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Course Material

P.G. DIPLOMA (ADVANCED MARITIME LAWS)

1.1.2. International Maritime Laws

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INTRODUCTION TO INTERNATIONAL LAW

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Definition, Nature, Scope and Development Of International Law: Why Module on International Law? In this modern age the world has greatly shrunk as a result of scientific and technological developments drastically. As a consequence events in one part of the world have an immediate impact on the rest of the world. Similarly there are other issues such as maintenance of peace, security and sovereignty of states, Environment degradation, Terrorism, Piracy, Air and Space law, Law of seas, Airplane Hijacking, International trade and commerce and disputes related thereto, Economic-Social and Cultural developments of states, promotion, protection of Human Rights and International trade and business etc. These issues are global in nature and cannot be confined to and solved within territorial or political boundaries. Therefore, States maintain regular relations with other states because a modern State cannot lead an isolated life in the present context of world affairs. The more a State is civilized and perfect in its organization, the greater and more familiar shall be its intercourse with other States. This leads to that a Government of a State must not only conduct its internal affairs but also regulate its conduct towards the Governments and citizens of other States.

Just as men could not live together in a society without laws and customs to regulate their actions, so States could not have mutual intercourse without usages and conventions to regulate their conduct. International Law impinges on state sovereignty by creating new structures for regulating relations across international boundaries. International Law and International Norms limits the state sovereignty in another way. They create principles for governing international relations that compete with the core realist principles of sovereignty and anarchy. International Law derives not from actions of any legislative branch or other central authority, but from traditions and agreements signed by states. It also differs in the difficulty of enforcement, which depends not on the power and authority of central government but on reciprocity, collective action and international norms. Without International laws and customs, it is impossible for states to maintain relations on the basis of peace, harmony and mutual co-operation. Rather, then the rule 'might is right' will prevail that would be destructive for the global peace and humanity.

International law has emerged & grown to fulfill the essential needs of men organized in separate communities & national entities bound together by common bonds of geography & civilization. The political order of the world is divided into three kinds of nations/ states according to their political, social, economic & cultural backgrounds as to: The western or the capitalist countries are known as First World Countries; The Communist or Socialist countries of East Europe, Latin America & China are known as Second World Countries; The developing or under-developed countries of Asia & Africa are coined as Third World countries. International Law is to be found in the history of ancient & medieval as well as modern times of each kind of political communities.

International law governs relations between states. It provides the basis for peace and stability and aims to protect and ensure the well-being of humankind. Globalisation has not only increased the importance of international law but also the complexity of international legal issues. Transportation is one of the important fields of international law. International treaties are essential for ensuring the safety of international air and rail travel. International Air Law being a part of Contemporary International Law has many branches including the relevant principles and rules of international law, the International Human Rights Law, International Humanitarian and Refugee Law, International Trade Law, International Intellectual Property Law, International Environmental Law, International Space Law, etc. that affect the use of air space and aeronautics.

What is International Law (IL)? International Law also called other names likes Law of Nations, Public International Law Inter-State Law and Trans-national Law, etc. It is generally viewed that International Law regulates the relations between or among states or International Law is Body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as international actors. International also called Law of nations because it regulates the behavior of nation-states. The expression 'International Law' and 'Law of Nations' is synonymous and is equivalent terms. Jermy Bentham introduced the former in 1789. Prior to that International Law was known by the name 'Law of Nations'. International law also called Public International Law because there is a private international law or Conflict of Laws. Public International law is commonly divided into the law of war and the law of peace. Hugo Grotius, "considered to be father of international law" called his great work as *De Jure Bella ac pacid* or the Law of War and Peace. Oppenheim divides his treatise into one volume on peace and the other on war.

The conventional view is that public international law is made up of two separate and distinct branches, with the law of war being necessary to regulate the rights and obligations of belligerents and neutrals when the law of peace is no longer applicable. Private International law or Conflict of laws is different which regulate the behaviors of two or more individuals of different countries. International law also called as Inter-state law, which provides a system of rules governing the conduct of inter-state relations. Judge Philip Jessup called international law as Trans-national law because it regulates the actions or events that transcend national frontiers. International law also equated other terminology like Common Law of Mankind, World Order and World Law.

DEFINITIONS

Traditional Definitions of International Law:

Oppenheim: International Law is "the name for the body of customary and treaty rules which are considered legally binding by civilized states in their inter course with each other." There are three main elements present in this definition: Body of rules governing the relation between the states, States regard them binding in their relation with each other and Rules are derived from customs and Treaties. *J.L.Brierly:* International Law may be defined as "the body of rules and the principles of actions, which are binding upon civilized states in their relation with the one another. Hackworth: "International Law consists body of rules governing the relation between states." According to Bentham, international law is a collection of rules governing relations between states. *Queen Vs. Keyn: Lord Coleridge C.J.* defined "the law of Nations is that collection of usages which civilized states have agreed to observe in their dealings with one another"

Modern definitions of International Law

Charles G. Fenwick: International Law may be defined as "the body of general principles and scientific rules which are binding upon members of the International Community in their mutual relations." Whiteman: International law is "the standard of conduct at as given time for states and other entities subject there to." *J.G.Starke:* International Law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also: The rules of law relating to the functioning of international institutions or organizations, their relations with each other, and their relations with states and individuals; and Certain rules of relating to individuals and non-states entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community. *Schwarzenberger* "International Law as the body of legal rules which apply between sovereign states and such other entities as have been granted international personality." Whiteman defined International Law as**--** The standard of conduct at a given time, for states and other entities subject thereto.

On the basis of above definition we may conclude that international law is a body of rules and principles which regulate the conduct and relations of the members of international community. The contention that states alone are the subject matter of international law is not only inconsistent with the changing nature of international law but has become completely obsolete and inadequate. Individualistic character of international law is being replaced by the law of social inter-dependence. International law has been remarked as a "living and expanding code". In view of some changing character and expanding scope of international law today, international institutions, some non-state entities and individuals have also become the legitimate subjects of international law. Thus, international law is constantly evolving body of norms that are commonly observed by the members of international community in their relation with one another. These norms confer rights and impose obligations upon state and to a lesser extent, upon international organizations and individuals. Moreover, International law has effects on, and effected by the international relations, political thought and communications, as well as by the awareness of women and men in every state that they are part of those addressed by the United Nations as being " we the people of the United Nations".

Nature of International Law: The status of international law is the most controversial and debated topic among the jurist all over the world. The important to be debated is whether international law is really a law or not? Or is it just a code of rules of conduct of moral force only?In order to understand the real nature of international law it is important to take into consideration how the various theorists have defined the tern *"law".*

International Law is not true Law. The initial reaction of law students and laymen alike, when they are first told about international law, is usually highly skeptical. They believe that states have little respect for international law, and have no incentive to obey it in the absence of a supranational system of sanctions capable of being enforced against the law-breaker. In short, the popular belief is that international law is not really law. In fact, however, states do accept that international law is law and what is more, they usually obey it. It is true that international law is sometimes broken with impunity, but the same could be said of any legal system. The supporter of the positivists school like *Hobbes*, *Bentham* and *Pufendrof* are of the view that international law is not a true law as it is not binding on the states. Many other prominent jurists took the similar view.

The most prominent amongst them is the British jurist Austin who believed that law is the command of the sovereign attended by sanction in case of violation of the command. In other words law should be limited to the rules of conduct enacted by a determinate legislative authority and enforced by physical sanction. The definition of law as given by Austin basically has two parts: Any rule which is not enacted by sovereign or superior cannot be regarded as law; and Command must be enforced by the sovereign authority. According to him existence of both is necessary for any law to be called as “Proper Law” and other senses of law are “improper law”. International law is law improperly so called because it has neither sovereign authority to enact laws nor there is adequate sanction behind it. Since the international law governs the relation of the states inter se and there is sovereign political authority of the state inter se, there is no supreme executive government to execute these laws nor there is any judicial organization with compulsory jurisdiction, it cannot be said to be law.

Criticism: *Austin’s* view has been vehemently criticized by mane jurist. According to *Sir Henry Maine* and *Savigny* Austin has not taken into consideration certain important facts which are necessary as to: 1) He completely ignores the customary or unwritten laws and only treats laws enacted by the sovereign legislative authority as law. 2) Laws are not only obeyed because of the fear of sanction behind them, they are also observed because of habit of mind and practice of communities. *Oppenheim:* Another famous jurist Oppenheim defines law as a body of rules for human conduct within a community which by a common consent of the community shall be enforced by external power. Thus this definition of Oppenheim has three main parts: There must be a community; there shall be a body of rules to govern the community; and there shall be a common consent of the community that the rules be enforced by external power.

Comparison with the contemporary international law: When we look at the definition of Law as given Oppenheim and compare it with the present concept of international law, the international law satisfies all the requirement of law. There is an international community present at the international level which is the community of nation. Customs and the treaties have in them set rules which govern the conduct of the members of the international community. The international communities do accept that these set rules are binding on them and are governed by them. There have been many treaties concluded between and among the states and though there are few breaches too but it cannot refute the existence of the international law.

International law as weak law: International law is a law in the true sense of the term which is in turn affirmed by the state practice as well as the practices of the international judicial institutions. International law is observed by all the state and the international level because it is crucial for the peaceful relations and cooperation. Never the less it has to be conceded as a weak law. There are many reasons behind saying so which can be summarized as: 1) International law is not as efficient and as effective as the state legislative machinery as wide options are given to the state parties through customs and treaties. 2) Courts at the international level act with the consent of the state and don't have jurisdiction to decide the disputes of al the states. 3) Under International law the enforcement measures are not effective as courts do have real power to enforce its decisions. 4) Rules as laid down at the international level are frequently violated by the states.

International law is a weak law on the institutional side as there is no legislature, the court though present is not strong enough and has no real powers to enforce its decisions. There is an urgent need to develop formal institutions which will be responsible for law creation and enforcement. There shall be a strong enforcement mechanism and for which the state cooperation is the need of the hour. According to *Austin*, International Law is not true law but positive International morality only. *Holland* remarked that International Law is the vanishing point of jurisprudence. According to him, rules of International law cannot be kept into the category of law because they lack sanction, which is an essential element of municipal law. He further said there is no judge or arbiter to decide international disputes and that the rules of international law are followed by states by courtesy.

- Austin Definition of Law: Law is the command of sovereign political authority given by political superior to inferiors.
- In International Law, no political superior, no physical force and no enforcing authority. So international law is not a law. Rules of international law.
- The rules of international law are positive morality: Holland Bentham, Brown etc., is denied the legal character of international law.

International law is not law because: No agency for international legislation. International Law is a limitation imposed by sovereign state upon itself. Auto limitation is no limitation; therefore international law is not a law, No organised force, No a determinate impartial arbitrato, Though we have the International Court of Justice, but has no compulsory jurisdiction. Some writers called international law as a quasi-law. Starke: International law is a weak law *In Queen vs. Keyn* case the court said International law is not an exactly law.

International Law is a Law: *Oppenhiem, Brierly, Starke, H.L.A.Hart, Pollock, etc.* States obey International law far more often than most people suppose. Fear of sanctions has very little to do with this obedience. There are other factors inherent in the very nature of international law and of international society which induce states to obey international law. These factors more than compensate for the weakness of sanctions, but few people are aware of them, because they have no counterpart in international system of law.

In international law the absence of a legislature means that states very largely create law for themselves, and it is unlikely that they will create law which is not in their interests or which they will be tempted to break. Interdependence is the order of the day. In today's world states are interdependent in many ways, and international law facilitates international cooperation. For example states have a common interest in preventing pollution of the sea, but prevention of pollution requires detailed rules about such things as the discharge of oil from ships, and a treaty or some other legal instrument is the obvious way of laying down the necessary rules. Similarly, when a particular problem is constantly arising (for example, do aircraft from one state have a right to fly through the air space above another state?), it is everyone's interests to have an agreed rule to deal with all such cases, instead of leaving every individual case to be decided by a trial of strength between the particular states concerned. Even when the relevant rule of international law is imprecise, it still performs a useful function; it may not eliminate the area of disagreement between states, but at least it reduces that area, and thus makes it easier for disputes to be settled without frictions.

Sanctions of observance of International Law: A controversial question is the extent to which sanctions, including sanctions by way of external force, are available under international law, to secure observance of its rules. At one extreme there is the view that international law is a system without sanctions. However, it is not quite true that there are no forcible means of compelling a state to comply with international law. The United Nations Security Council may, pursuant to Chapter VII of the United Nations Charter of 26 June 1945, in the event of a threat to the peace, breach of the peace, or act of aggression, institute enforcement action against a particular state to maintain or restore international peace and security, and to the extent that the state concerned is in breach of international law. For example, economic sanctions proclaimed in 1966 against Rhodesia or military in the Korean War 1950 or both in 1990 against Iraq. Also, under article 94, paragraph 2 of the Charter, if any state, party to a case before the International Court of Justice, fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the Security Council may upon application by the other state, party to the same case, make recommendations or decide upon measures to be taken to give effect to the judgment.

Public opinion can also be an effective sanction. The role of reciprocity in international law observance should not be minimized. The international legal system is intrinsically different from municipal law. The principal participants of the international legal system states are all treated as equally sovereign. The international community is composed not of a homogeneous grouping of states, but rather a heterogeneous group of some nearly 200 states, which differ politically, economically, culturally and ideologically. States need to co-exist. International law was conceived and born out of such a need, and thus is designed to promote international peace and harmonization. The international legal system is a young, immature system, which is constantly evolving and developing. It is not simply lawyer's law. Politics play an influential role. (See Rebecca, p.4) International law is primarily formulated by international agreements, which create rules binding upon the signatories, and customary rules ,which are basically state practices recognized by the community at large as laying down patterns of conduct that have to be complied with.

Contrary to popular belief states do observe international law, and violations are comparatively rare. However, such violations are well publicized and strike at the hear of the system, the creation and preservation of international peace and justice. But just as incidents of murder robbery and rape do occur within national legal orders without bringing down the whole edifice or stimulating citizens to deny that law exists, so analogously assaults upon international legal rules point up the weaknesses of the system without denigrating their validity or their necessity. In support of the above argument *Professor Louis Henkin*, observed, "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"

Scope of International Law: The scope of international law has expanded due to the inclusion of new subjects; establishment of International Organizations; the emergence of new states; and the emergence of new problems like nuclear weapons, expansion of international trade and trade related problems, development of transport and communications, etc., International law has expanded both in terms of its subjects and its content. Major problems of international law concern have been tackled collectively by states. This has proved, for example, more resource effective than attempting individual state action. The consequence has been a proliferation in the number of international organizations in the years since 1945. Modern technology has brought states and their populations into close and more frequent contact with each other, and rules have evolved to regulate such contact.

The subject matter of international law has correspondingly expanded. For example boundaries of nations on land or at sea, international servitudes, succession of states and governments, ports and inland waters, international rivers and lakes, territorial waters, contiguous zones, continental shelf, exclusive economic zones, international canals and straits, rights and duties of states on the high seas, fisheries, whaling and sealing, air navigation, polar regions, outer space, nationality and statelessness, rights of aliens, asylum, extradition, international communications, protection of minorities, human rights ,governmental and state immunities, status and immunities of international organizations and their personnel, status of armed forces on foreign territory, limits of criminal jurisdiction ,limits of anti-trust jurisdiction, enforcement of foreign judgments and commercial arbitral awards, validity of international treaties and agreements, interpretation and application and termination of treaties and agreements, validity and interpretation of international arbitral awards, pacific blockade, reprisals, indirect aggression and subversion, rights of neutrals, relations between belligerents and neutrals, violations of the laws of war, terrorism and hijacking and overlying all of these , the limits of countermeasures and retaliatory measures designed to protect existing primary rules of international law and so on…

International law is a dynamic law. It has been changing since its inception. However, in the four decades changes have been so radical and tremendous that was not witnessed in the last four centuries. The process of change has resulted in reconstruction and development of international law and at the same time has created many faceted problems because of the demand of further changes. The most significant change that has taken place is the emergence of a number of new states, which hitherto were colonies, into independent states. However, international law still favors their power rather than the number.

International Law has been expanding its frontiers not only in terms of its subject matter but also in terms of its content and orientation. In addition to such new areas as international constitutional law, law of international institutions, international economic law, international communications and air law, law of outer space, human rights law and international humanitarian law, there have also emerged new sources of the law and of the ways by which new laws are made by means of declarations, resolutions and the use of consensus at the UN Security Council and the General Assembly. Either because or in spite of this expansion of its frontiers, traditional notions and attitudes are beginning to show a certain resilience and adaptability: the rigid assertion that only sovereign states are the subjects of international law is giving place to the idea that other entities, notably certain international organizations like the United Nations itself, as well as individuals are now also subjects of international law for most practical purposes.

One such entity has successfully litigated a case before the International Court of Justice in Certain Expenses case (1949) stated that the U.N was a subject of international law and could enforce its rights by bringing international claims. While in the Fasla Case, certain rights of the individual were recognized, albeit by way of appeal from the UN Administrative Tribunal. Indeed, the European Commission and the European Court of Human Rights have both been entertaining cases brought before them by individual citizens of the States of the Council of Europe. There also exists established machinery, although limited, for the implementation of the fundamental rights of the individual through state action. All these are recent developments in contemporary international law, which could not have taken place before 1945. The Euro centric character of international law has been greatly weakened in the last six decades and opinions; hopes and needs of other cultures and civilizations are beginning to play an increasing role in the evolution of world juridical system. Third World's concern for the recognition of sovereignty of states is complemented by their support of the U.N and its charter and supplement of their desire for economic self-determination or Right of permanent sovereignty over natural resources.

This expansion of international law into the field of economics is a major development of the 20th century and is evident by the creation of GATT, UNCATD and establishment of IMF and World Bank. The scope of international law today is immense. From the regulation of space explorations to the question of the division of ocean floor, and from the protection of human rights to the management of the international financial system, its involvement has spread out from the primacy concern with the preservation of peace to embrace all the interests of contemporary international life. The scope of international law today is immense from the regulation of space expeditions to the question of division of the ocean floor, and from the protection of human rights to the management of the international financial system, its involvement has spread out from the primary concern with the preservation of peace to all the interests of contemporary international life. The determining factor of international law lies in its composition consisting of needs and characteristics of the international political system.

International organizations have now been accepted as possessing rights and duties of their own and are distinctive legal personalities. The international court of justice in 1949 delivered an advisory opinion that United Nations was a subject of international law and could enforce its rights by bringing international claims. Such a ruling can be applied to other international institutions like the ILO and the FAO which have a judicial character of their own. They have been joined by other non state entities whose importance is likely to grow in the near future. The growth of regional organizations should also be noted at the same time in this stage. Many of those were created for reasons of military security, for example, NATO and the opposing Warsaw Pact Organizations, others as an expression of regional and cultural identity, such as the OAU and OAS.

DEVELOPMENT OF INTERNATIONAL LAW

There are two views on the development of international law. One view says that International Law is essentially a product of Christian civilization – middle Ages – Oppenheim. Another view opinioned that International Law is a product of ancient times: Ramayana & Mahabharata – S.S.Dhawan Development of International Law in ancient period (from ancient times to 10th century) Jews practiced international law in their relations with other nations. Inviolability of diplomatic agents was recognized and maintained. They recognised humanitarian rules of warfare. They entered treaties with other countries and sanctity was attached to treaties. Hindus: In ancient India international law was practiced. It operated in the Vedic age from 4000 B.C. to 100 B.C. between tribal heads known as Rajahs. The basis of international law in ancient India was religious teachings like Manu's Dharam Shatras and Kautiliys's Arthsgastra. International law then had more sanctity because it was based on the concept of Dharma, which was sacrosanct for all Indian states. Then India was divided into many kingdoms having the same religion. They conducted their foreign relations through rajdoots who are known today as ambassadors.

Manusmriti prescribes qualifications of a good envoy and his functions. It also provided that an ambassador must be well versed in all branches of knowledge. He should be of noble lineage, of pure character, efficient and able to read minds through gestures and postures. Kautiliya expected the envoy to be endowed with power of persuasion, well trained in arts and with foresight, memory and enthusiasm and industry in addition to being in the enjoyment of good physique. According to Manu, inheritance, recovery form usurper and conquest as a result of enforcing of some right or settlement of dispute or could acquire territory by occupation of territory which was unoccupied. Cession of territory by dana (gift) to avoid war or as a token of matrimonial settlement was also prevalent. Foreigners were allowed entry by royal warrant—which we term as visa today—and they had to report at points of entry. There was practice of grant of asylum to political refugees who sought protection. The practice of *Pacta Sunt Servanda* was not to Hindu international law. Kautiliya required faith and honesty in carrying out international obligations. War was resorted to as the last step when everything else failed. Wars were divided into two categories: just war which was termed as *Dharma Yudha*, and unjust war – *Adharna Yudha*.

Ancient Greeks also practiced international law. It was during Greek period that the rule of international law requiring prior declaration of war was developed. The dead were given a decent burial even during the fury of war and prisoners of war could be exchanged. International law was followed on the basis of religion. City state relations were common at that time. Greeks were considered as superior race and non-Greeks were treated as barbarians. It is said that Aristotle studied 158 city state constitutions at that time. Romans have contributed a fair amount to the rules of the international law as they exist today. *Jus Gentium*—International law—was the Roman device to deal with foreigners. This law consisted of commonly accepted rules among states based on law of nature. The rule of acquiring territory through means of occupation has been borrowed form Roman law. Romans has drafted elaborate rules of warfare and the doctrine of postilminium as we know toddy is based on *Jus Postliminii*.

Development of I.L in middle Ages (from 11th century to 16th century) The supremacy of church and the universality of its laws; Feudalism; Sea Trade and the growth of Maritime Law; Renaissance and Reformation etc. have helped the growth of international law at that time.

Development of Modern I.L (from 17th century to 20th centuries) the age Discovery in the sixteenth and seventeenth centuries necessitated the evolution of rules governing the acquisition of territory. At the same time, the principle of freedom of the seas was articulated. International law grew out of necessity in response to the need of states to co-exist. During this period international law was developed by various jurists, international treaties and conferences and judicial and arbitral tribunals also helped.

1648 Westphalia peace treaty; Members of Holy Roman Empire attained sovereignty; International peace treaties started; French was common language; Alabama claims Award 1872; Maritime law convention of 1856 – Sea welfare rules were framed; the Hague conference of 1899 and 1907 – established the permanent court of arbitration; Development of International Law in 20th century was Before the World War I; Between World War I & II; After World War II and the establishment of the United Nations. Otherwise development of International law before the league of Nation, under the league of nation and under the United Nations and its specialized agencies.

Basis of International Law or Theories of International Law

Natural Law Theory: According to this school, the Law of Nations is only part of the law of Nature. Previously, it is related to religion, Divine Law. From Greeks, Romans to 18th century this school dominated. States relations are regulated by higher law "the law of Nature". Pufendrof and Vattel are the chief exponents of this school. Traces of the natural law theories survive today, albeit in a much less dogmatic form. Kelsen has said: The theory of natural law, which was dominant throughout the 17th and 18th centuries, after relapsing during the 19th has again in the 20th re-entered the foreground of social and legal philosophy, in company with religious and metaphysical speculation.

Positivist theory: Positivism begins from certain premises, that the state is a metaphysical reality with a value and significance of its own, and that endowed with such reality the state may also be regarded as having a will. This psychological notion of a state-will is derived from the great German philosopher, Hegel. To the state-will, the positivists attribute complete sovereignty and authority. The positivists base their views on the actual practices of states. Growth of International law to treaties and customs rather than human nature: Law is will of states. Chief Exponents of this school are Bynkershoek and Anzilotti.

Grotiu's Theory: This theory propounded by Grotius – He is the father of International law. His principal work, *De Jure Belli ac Pacis*, was continually relied upon as a work of reference and authority in the decisions of courts, and in the textbooks of later writers of standing. His contribution to development of International law.

a. According to Wheaton that "Grotius seems to have been the first to lay down rules of Justice would be binding on men living in a social state.
b. Grotius tried to establish that law governed the totality of relations between states.
c. He secularized the concept of law of Nature
d. Grotius further recognized that the individuals and the state composed of the individual were essential identical.
e. Grotius maintained a fine distinction between Just and Unjust Wars.
f. Grotius developed the qualified Neutrality.
g. Grotius emphasized the binding force of promises and agreements in international sphere.

h. He supported peaceful settlements between states.
i. Grotius recognized Fundamental Rights Freedom of the individuals.
j. Grotius rejection of the reason of state.

Theory of consent: Supporters of this theory says consents of states in the basis for International Law. States observe International Law because they have given their consent for it. Chief exponent of this school – Anzilotti, Tripele, Oppenheim. This theory supported to the positivism. *Auto Limitation Theory:* According to this theory, international law is binding upon states because they have restricted their power through the process of auto – limitations. Each state has a will, which is completely independent and free from external influence. But process of limitation they can restrict their powers and follow the international law. Jellinck is the chief exponent of this theory. *Pacta Sunt Servanda:* According to Anzilotti the binding force of international law is based on the supreme fundamental norm or principle. Is known as Pacta Sunt Servanda. This means that the agreements entered into by states will be respect and followed by them in good faith. *Theory of fundamental rights*: this theory is based on Naturalist. According to this, prior to the existence of state, man lived in natural state; in that state he possessed some fundamental rights such as independence, equality, right of self-preservation. Like man state has possessed their rights because there was no world institution above the state.

Perspectives on International Law or Contribution of First, Second and Third World Countries to IL

Contribution of the first world countries: The foundation of International Law as it is understood today lie firmly in the development of western countries & political organizations. Ancient Greece & Rome were divided into small city-states & the mutual relation or these states are governed by some definite rules & principles. They deserved the credit of developing the laws of- War & peace; Resolving the dispute through Arbitration; Prior declaration before the commencement of the war. The modern International Law is ordinarily regarded as dating from sixteenth & seventeenth centuries, the medieval period, for its special character has been determined by that of the modern European National States system. Meanwhile, there were certain counter-factors leading to inmate & constant relations of the states with another as states could never be accepted as the final & perfect form or human association, so it would be necessary to recognize the existence of a wider unity - the rise of International Law was the recognition of this truth. The seventeenth & eighteenth (modern period) centuries are given birth to three different schools if International Law, namely –

The naturalists; The Positivists; & the Grotians: There were factors led to the development of International Law in the nineteenth & twentieth centuries. The twentieth century witnessed two World Wars & the aftermath was the transformation of European International Law into Law of Nations or Universal International Law. As a result of this, the states & their mutual contracts had greatly increased during this periods, for e.g.-

a) Hague Conferences of 1899 & 1907: It was the establishment of Permanent Court of Arbitration. It also emphasized the settlement of International disputes through peaceful means, formation of many rules of International Law relating to land & naval welfare.

b) Treaty of Versailles 1919: The League of Nations was established under this.
c) Geneva Convention 1929: It laid down rules relating reprisal of prisoners of wars.
d) United Nations: The U.Ns was established in 1945 to ensure the maintenance of international peace & security.

Contribution of the second world countries: Classical Marxist theory described Law & politics as the means by which the ruling class maintained their domination of society. International Law as a method of exploitation would also be criticized by socialist states. Soviets theorists expressed the view that International Law was an inter-class law within two antagonistic class systems (Capitalism & Socialism) would also seek accommodation until the victory of socialist system. International Law was not a form of temporary compromise between capitalist states & U.S.S.R but rather a means of conducting the class war. The new approach in late 1930s was reflected in Russia's successful attempt to join League of Nations. But U.S.S.R was bound only by those rules of which accorded with its purposes. The years that followed the Second World War saw a tightening up the Soviet doctrine as the Cold War gathered pace and the law of transition and state was replaced by International Law of peaceful co-existence. Peaceful co-existence itself rested upon the certain basic concepts, e.g.- Non-intervention in the internal affairs of the others states; The sovereignty of states; Good neighborhood; International co-operation; The observance in good faith of international obligation. The concept was an attempt to reiterate the basic concepts of International Law in a way that was taken to reflect an ideological trend. But it must be emphasized that the principles themselves have long accepted by the international community.

With the decline of the Cold War & the dissolution of the Soviet Union a process of re-evolution in the field of international legal theory took place. Global inter-dependence & the necessity for international co-operation were emphasized. The essence of new Soviet thinking was started to lie in the priority of universal human values & the solution of global problems, which is directly linked to the growing importance of International Law in the world community.

Contribution of the third world countries: The old civilization like in Egypt & India had significant contribution in the history of International Law. The duties of the states in administrative & external matters; The privileges & immunities enjoyed by the diplomatic agents during war – are their contribution in the field of International Law. In the evolution of international affairs since Second World War one of the most decisive had been the disintegration of colonial empires & the birth of new states, in the so-called Third World. The new nations have eagerly embraced the ideas of sovereignty & equality of the states & the principles of non-aggression & non-intervention.

The Soviet emphasized on the territorial integrity & sovereignty proved a great attraction to the developing nations of the Third World anxious to established their own national identities & counteract western financial & cultural influences. The new internationalization of International Law that has destroyed the European based homogeneity & emphasized in universalistic scope, e.g., the Declaration on the Granting of Inter-dependence to colonial countries & Peoples of 1960 enshrined the rights of colonies to obtain their sovereignty with least possible delay for recognition of the principles of self-determination. Their concern for the recognition of the sovereignty of the states complemented by the support of the U.N & its character & supplemented by their desire for economic self-determination. The interests the new states of Third World are often in conflict with these of industrialized nations, but contrary to many fears expressed in the early years of Decolonization saga, International Law has not been discarded & altered beyond recognition. The end of Cold War & rapid development of Russian-American co-operation lead to the development of Globalization in the sense of inter-dependence of High order of individuals, groups & corporation. Both public & private, across national boundaries & might be seen the triumph of one special particularism which had sometimes been used as a justification for Human Rights abuses free from international supervision or criticism

Differences between Public & Private International Law: Public International Law deals with states: private International Law deals with individuals. Private International Law is a part of Municipal Law. But Public International Law is not. Public International Law has Uniformity of rules: But private International Law is different. Private International Law determines as to which law will apply in a case having foreign element. No such provision in public International Law. Private International Law also determines the count which will have jurisdiction to decide the issue. It is not in Public International law. Breach of public International Law is possible. But not in Private International Law

Basic Principles of Modern International Law: In Municipal Legal systems we have well-established rules, organizations to regulate and control human behaviors, whereas in international law not so well developed rules, institutions to regulate or control the behavior of states. In the absence of the above system the international community had experienced tow world wars and their effects. The United Nations was established in 1945 to prevent third world war and maintain peace and security in the world. In spite of the Charter Principles, international community suffered from two shortcoming, firstly, the principles won't apply states who are outside the UN system and secondly, emergence of new states. So to get reaffirmation from the international community the socialist and developing countries initiated process of revision of the UN Charter—the process was stated in 1950s but it reached its climax in 1962, special committee was set up. Its work lasted several years and in 1970 a Declaration on Friendly Relations was adopted unaninasmusly. Sovereign Equality of States; Good faith Principle; Peaceful Settlement of Disputes; Prohibition of force; International Cooperation; Non-intervention; Equal Rights and Self-determination.

New trends regarding basis of obligation in international law: Since the beginning of modern international law, consent has been the basis of obligation under international law. Consent played a predominance role that it was even extended to explain the basis of customary rules of international law. The positivists tried to establish that international customs were based on "tacit-agreements" between states. The unanimity rule was the prevailing rule for every conference and treaty was bound by it. The United Nation charter introduced majority rules in all of its organs and which is having a binding force.(like General assembly. Security Council etc.). A unique feature of new international law is that it is found not only in law making conferences but also in law creating conferences such as UNCTAZ, GATT, IBRD, IMD, OECD, OPEC etc.

One of the most important change is that has taken place is that many a decisions at international conferences and General assembly of the UN are being adopted by 'consensus'. Though the unanimity rule has not been completely defeated, the basis of obligation in international law is changing from sovereignty oriented consent to community oriented consensus. The international court of justice has also lent its support to the above mentioned change i.e. from sovereignty oriented consent to community oriented consensus. This undoubtedly is a clear triumph of community oriented consensus over sovereignty oriented consent. But the battle has not been finally won and the struggle is likely to a prolonged one. As a matter of fact, consent will continue to be a basis of obligation and there should be no objection to it, but in view of even widening scope of international law it has become necessary to recognize the importance and utility of 'consensus' as a basis of obligation in international law. It is therefore, necessary to enunciate a dynamic and comprehensive theory of basis of obligation so that it may take into account the interest and inspirations of international community as a whole.

SOURCES OF INTERNATIONAL LAW

The words 'Sources of Law' (*i.e.'source de droit'*) has a variety of interpretations. In technological sense, the term 'sources' relates to the law making process. The most important source of International law for centuries was Customary Law, evolving from the practice of states. The recent attempt to codify international law and the conclusion of multinational treaties in many important areas, such as diplomatic and consular relations, the law of war or the law of the sea, have sought to clarify the law and to establish universally accepted norms. It has to be noted that, the changes in international society since 1945 have led to basic disputes on the sources of International law and it must be noted at the outset that they have become an area of considerable theoretical controversy. In particular, the two main traditional elements, customs and treaties, are now often difficult to distinguish clearly.

The question of how these sources are derived brings us to **Article 38 of the Statute of the International Court of Justice**. It provides that:

(1) The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) International Conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) International Custom, as evidence of a general practice accepted as law;

(c) The General Principles of Law recognized by Civilized Nations;

(d) Subject to the provisions of Article 59, **judicial decisions** and **the teachings of the most highly qualified publicists** of the various nations, as a subsidiary means for determination of rules of law.

(2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree.

Types of Sources: Now we come to the various types of sources. Sources are divided into: **Formal Sources ('law creating')** and **Material Sources ('law identifying')** also known as **Primary Sources** and **Secondary Sources.** A Formal or Primary Source of law, is a process by which a legal rule comes into existence i.e. it is law creating. Hence in International Law, Conventions, Customs and the General Principles of Law are considered formal sources (as they are law creating processes). Material Sources 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.

1. International Conventions (Treaties) [1] **:** International Conventions or Treaties are considered the most important source of law, primarily because, it reflects the understanding of states, i.e. they are the only way states can consciously create law. Treaties are known by a variety of differing names such as Conventions, International Agreements, Pacts, General Acts, Charters, through to Statutes, Declarations and Covenants. According to Article 2 of Vienna Convention on Law of Treaties, 1969, " A treaty is an agreement whereby two or more states establish or seek to establish relationship between them governed by international law."

Prof. Schwarzenberger defines it as follows: "Treaties are agreements between subjects of international law creating a binding obligation in international law." Prof. Oppenheim states that, "International treaties are agreements of a contractual character entered into between states or organization of states creating legal right and obligation."All the above definitions show how the rights and duties of parties to a treaty are in the first instance, determined by an agreement between them. McNair gives the most appropriate definition[2]. He says, "Treaty means a written agreement by which two or more states or international organizations create or intending to create relationship between them, operating within the sphere of international law."

We can divide International Treaties into 2 types: (A) Law- making Treaties (B) Treaty Contracts.

(A) Law-making Treaties: Law making treaties are those treaties, entered into by a large number of States; they are the multilateral treaties that lay down rules of universal or general application. Hence, the provisions of a 'law-making' treaty are a direct source of international law. Law-making treaties can be divided into two: (a) Treaties enunciating rules of universal international law- The best example for such a treaty is the United Nations Charter, to which 192 States are members. (b) International treaties that lay down general principles- These are multilateral treaties entered into by a large number of countries. E.g.: Vienna Convention on the Law of Treaties, 1969, Vienna Convention on Diplomatic Relations, 1961. In order to understand treaty as a source of law, we need to look into the Principles Governing a Treaty: (i) Treaties are voluntary i.e., a treaty can bind no state, without the state having given its consent to be bound by one of the methods recognized as

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[1] Article 38(1) (a)

[2] McNair on Law of Treaties

effective in international law for this purpose (i.e. signature, ratification, accession etc.). There is an exception to this general rule, as there are certain treaties, which contain rules available against the whole world known as *erga omnes*. This concept is being dealt with towards the end. (ii) Treaties require consent, once a state has signified its consent to a treaty, and then it is bound by the terms of the treaty. Here, I would like to explain the two types of consent:Express Consent – those states that are parties, are bound by the treaty, as the treaty has been formed as a result of their express agreement,

Tacit Consent – sometimes, if state practice develops along the lines of the treaty code, the result could be that new rules of custom, similar to those found in the treaty, come into being. When such a thing happens, the new customary law will bind non-parties- here the non-parties give their tacit consent to the treaty. E.g. the 1982, United Nations Convention on Law Of the Sea, crystallized the concept of Exclusive Economic Zone (EEZ). According to the ICJ in the *North Sea Continental Shelf Cases*[3], for a treaty provision to give rise to a general customary law principle, it 'should be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'.

(B) Treaty Contracts: 'these are 'particular' treaties entered into between two or more sovereign states'. They are like contracts in national law, and hence are not directly a 'source' of international law, as they are not binding on states that are not parties to it. But treaty contracts may help in the development of a new customary rule as it indicates state practice. E.g. are Bilateral Treaties between states.

2. International Customs[4]: The essence of custom according to Article 38 is that, it should constitute 'evidence of a general practice accepted as law'. Before looking into what constitutes a custom, we need to have a general understanding of what a custom is. International Custom is the oldest and the original source of international law. Though it is said that, the role of international custom as a source of international law has diminished, it is undeniable that it still has, a significant role to play, as a dynamic source, in the development of new rules of international law.

Now, the terms 'custom' and 'usage' are often used interchangeably; but there is a clear distinction between the two. 'Usage' represents the initial stage of custom. It is an international habit of action that has not yet received, full legal attestation[5]. Hence, when the states in their international relations start behaving in a particular way, in certain circumstances, that behaviour is called usage. When this usage receives the general acceptance or recognition of the states, in their relations, the usage becomes a custom. A Custom is a usage that has obtained the full force of law. When a usage crystallizes (i.e. becomes clear and definite) it becomes a custom. Hence, custom begins where usage becomes general[6]. But an international customary rule emerges only when there is satisfactory evidence that the rule has been accepted generally by states. Hence, it is possible to detect 2 basic elements in the making of a Custom: (A) The Material Fact, i.e. the actual behaviour of States or State Practice and (B) The Psychological or Subjective belief that such

[3] 1969

[4] Article 38(1) (b)

[5] I.A. Shearer, Starke's INTERNATIONAL LAW, 11th ed. (2007), p. 31

[6] *Supra* at n.6

behaviour is law, i.e., *opinio juris*. This has been pointed out in *Libya/Malta* case[7], where it was held that the substance of customary law must be ‘looked for primarily in the actual practice and opinio juris of states’.

(1) The Material Fact/ State Practice- Customary rules crystallize from usages or practices of States that evolve usually from three sets of circumstances: a) Diplomatic Relations Between States- Evidence of usages followed by states is found in acts or declarations by representatives of states, opinions of legal advisors to State Governments, bilateral treaties and press releases or official statements by governments. b) Practice Of International Organs- The practice of international organs, by conduct or declarations, may lead to the development of customary rules of international law concerning their status, or their powers and responsibilities. c) State Laws, Decisions Of State Courts, And State’s Parliamentary Or Administrative Practices- This can be found by looking into statutes i.e. State’s municipal laws, official books and documents or the internal regulations of a state’s diplomatic and consular services.

There are certain points that ought to be considered in order to ascertain State Practice: (1) Duration of Practice – In municipal systems, there is a recognized time-scale for acceptance of a practice as customary law. For e.g. in British legal system it is time- immemorial, while in some continental countries it is thirty to forty years. But in international law, there is no such rigid time element. The ICJ also does not give any clear guideline as to what will the time required be for the formation of customary law. This is because it depends from case to case, as to how a custom evolves. In certain cases the progress is slow, but in certain fields, the need for rules to develop quickly becomes necessary. In such cases, ‘instant’ customary law is possible. This is often known as ‘Custom on Demand’. For e.g. the principle of state sovereignty in Air Law and the principle of non-sovereignty in Space Law are examples of Instant Custom. Hence, the duration is not very important in constituting state practice.

(2) Uniformity and Consistency of Practice- This is one of the most important factors in determining State Practice. The basic rule regarding this was laid down in the *Asylum Case* [8] where the Court held that a customary rule must be ‘*in accordance with a constant and uniform usage practiced by the States in question.*’ The facts of the case are as follows:

Haya de la Torre, a Peruvian was sought after by his government after an unsuccessful revolt. He was granted asylum by Columbia’s embassy in Lima, but Peru refused to grant safe passage for Haya de la Torre to leave the country. Columbia brought the matter before ICJ and stated that it wanted the right to try Torre in its country. The Columbian government stated that the practice of granting asylum existed in the Latin-American countries and that it was a regional custom. But the ICJ held that, what needs to be proved is an existing ‘constant and uniform usage’ or practice, by the states in question. Hence, Columbia’s plea was rejected due to lack of ‘uniformity and consistency’. Thus we can see that ICJ emphasizes on

[7] ICJ (1985)
[8] *Columbia* v. *Peru*, (1950) ICJ

a certain degree of uniformity amongst state practices as essential before a custom could come into existence.[9]

(3) Generality of Practice – Though universality of practice is not required, ICJ requires that the practice should have been generally observed or repeated by numerous states, i.e. there should be a certain degree of continuity and also the practice must be common to a significant number of states. As an exception to generality of practice is the *Lotus Case*[10] the facts says there was a collision on the high seas between The Lotus, French ship and The Boz – Kourt, Turkish ship. 8 crew- members of the Turkish ship died. Turkey alleged negligence and arrested the captain of the French ship, De Mones, when he arrived on the Turkish territory. The French government challenged the Turkish government stating that the jurisdiction to try the accused lies with the French government and hence, they should not be barred from trying him. The French State argued that there existed a custom of abstaining criminal proceedings by which states in similar situations and hence that practice ought to be given regard. The PCIJ rejected this argument and held that, abstention will form international customary rule 'only if such abstention were based on the states being conscious of a duty to abstain. Hence, this case shows how protests and acquiescence, as such will not form customary law. But, if there is a conscious abstention by states in general, then a particular rule may become customary law.

(B) The Psychological Element/ Opinio Juris- '*opinio juris sive necessitates*' is the factor that differentiates legal custom from mere social usage. It is the belief by a state, which behaved in a certain way that it was under a legal obligation to act that way. *The North Sea Continental Shelf Cases*[11] can explain the concept of opinio juris. The case is concerning the dispute between delimitation of continental shelf between Germany, Denmark and Netherlands. In this case, the ICJ laid down the two conditions for the existence of opinio juris. Not only should: 1) The act amount to a settled practice 2) The act must also be carried out in such a way, as to give evidence of a belief that a practice is obligatory by the existence of a rule of law. Hence, state practice along with opinio juris leads to the emergence of a customary rule of international law.

3. General Principles of Law[12]**:** According to clause 1 (c) of Article 38, the Court recognizes general principles of law, recognized by civilized nations, as a third source of international law. There are many opinions as to what constitutes 'general principles of law'. Generally, when the court finds that a principle has received general recognition, the court may apply it as a principle of international law. Some jurists believe that Article 38 (1) (c) incorporates natural law doctrines, and that they have a pre-existing legal validity, irrespective of whether they are contained in a treaty or custom. Then there are those principles and rules, common to all municipal legal systems. Given are important case- laws that have recognized the following rules as general principles:

[9] *Anglo- Norwegian Fisheries Case* (1951) ICJ
[10] *France* v. *Turkey*, (1927) PCIJ
[11] *Germany* v. *Denmark*, (1969) ICJ
[12] Article 38(1) (c)

(i) *Chorzow Factory Case*[13] where the PCIJ applied the principle of *res judicata* and also held that one who violates a rule is liable to make reparation. (ii) *Mavrommatis Palestine Concessions Case*[14] in this case the court applied the general principle of Subrogation. (iii) *Case Concerning the Temple of Preach Vihar*[15] ICJ in this case recognized and applied the principle of estoppel. (iv) *Barcelona Traction Case*[16] here also the principle of estoppel was applied by the ICJ

Other than these general principles that have gained their importance through application in the municipal sphere, there are other principles, which have gained international significance also. They are: Principle of *pacta sunt servanda*: The whole idea of binding international agreements rests upon this. This doctrine is also the basis of law of treaties[17]. Also mentioned in Article 2(2) of UN Charter are obligations resulting from international law, including treaties. Principle of Equity: 'Principles of equity have long been considered to constitute a part of international law and as such have often been applied by international tribunals.'[18] Here, what needs to be understood is that usage of equitable principles in deciding cases is different from deciding a case under Article 38(2), i.e. deciding *ex aequo et bono* (according to fairness and good faith). Hence, while applying the Principle of Equity in the *Case of Rann of Kutch Arbitration*[19], the Court emphasized that equity is not an abstract concept, but denotes the application of substantive rules of international law. Hence, it can be said that general principles help in validating certain important rules through them being applied in the process of deciding cases by various international courts and tribunals.

4. Judicial Decisions: Though described as a 'subsidiary' means[20]for the determination of law, judicial decisions can be of immense importance. This is because, in spite of Article 59, which states that ' the decision of the Court has no binding force, except between the parties and in respect of that particular case', the ICJ is more involved with the process of law creation. The best example is the *Anglo- Norwegian Fisheries* case, where the baselines from which to measure territorial waters were laid down. This was later incorporated in the Geneva Convention on Territorial Sea and Continguous Zone, 1958. Hence, what is to be noted is that, while deciding cases these international courts may actually form a new treaty rule or provide evidence for the existence of a customary rule. In addition to the decisions and opinions given by the Permanent Court of International Justice and the International Court of Justice, 'judicial decisions' include International Arbitral awards and the rulings of national courts also. International Arbitral Tribunals, like the Permanent Court of Arbitration and Claims Tribunals like The Iran-US Claims Tribunal, are all significant in the development of international law.

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[13] (1928) PCIJ
[14] (1925) PCIJ
[15] (1962) ICJ
[16] *Belgium* v. *Spain*, (1970) ICJ
[17] Vienna Convention on Law of Treaties, 1969.
[18] *The River Meuse Case*, *Netherlands* v. *Belgium*, (1937) PCIJ
[19] *India* v. *Pakistan*, (1968) ICJ
[20] Article 38(1) (d)

5. Writers: Article 38 includes as a subsidiary means for the determination of rules of law, 'the teachings of the most highly qualified publicists of the various nations'.[21] Historically, the influence of academic writers on the development of international law was immense. Classic writers like Hugo Grotius and Gentili have contributed to help in determining the scope, form and content of international law. Similarly, writers like McNair on Law of Treaties and Jenks on Space Law, have all helped in the process of evolution of rules of law. But it is to be noted that 'juristic works cannot be treated as an independent source of law'. They can only assist in the development of law in emerging areas. For example, jurists played a very significant role in the development of Air Law and also Law relating to Outer Space since its evolution. Other than the sources explicitly mentioned in Article 38 of the Statute of ICJ, there are a few other sources the existence and importance of which cannot be denied in the development of international law.

Decisions or Determinations of the Organs of International Institutions: In this come the resolutions and declarations of the General Assembly of the United Nations. The General Assembly has produced a large number of highly important resolutions and declarations, and hence, it is inevitable that they should have some impact on the development of modern international law. The biggest drawback is that General Assembly Resolutions are not binding, even if they are adopted unanimously, by voting of all states. But the importance of General Assembly Resolutions lies in the fact that, these resolutions may give evidence of state practice, which in turn may lead to the creation of a new customary rule in international law. An example for such a declaration is the Declaration on the Legal Principles Governing Activities of States in the Exploration and Use of Outer space (1963), where unanimous votes led to evidence of state practice and that in turn led to the formation a binding rule of customary law[22]. Similarly, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States also led to emergence of requisite opinio juris. Hence, General Assembly Resolutions, though not binding, may have normative value, and provide evidence important for establishing opinio juris. It is because of its non- binding nature that they are termed as 'Soft Law'.

Soft Law is per se, not law. But it has a great influence in the development of treaties or laws in certain areas. The Helsinki Final Act, 1975 is an example of this. Though it is not a binding agreement, it is from this that the concept of International Human Rights Law has evolved. Similarly, in the area of International Economic Law and International Environmental Law, there are many such guidelines and recommendations which are though non-binding instruments play an important role in the development of legally binding rules. Also bodies like the International Law Commission (ILC), The United Nations Commission on International Trade Law (UNCITRAL), The United Nations Conference on Trade and Development (UNCTAD), The International Labour Organisation (ILO), United Nations Educational, Scientific and Cultural Organisation (UNESCO) etc. are all specialized bodies playing a significant role in the development of international law by working from within their respective spheres.

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[21] *Ibid.*

[22] This later crystallized into The Outer Space Treaty, 1967

Hence, though the rules made by these bodies are termed 'Soft Law', it is undeniable that there these organizations are instrumental and influential in creating legal norms.

Newly Emerging Concepts: Lastly, there are two more emerging concepts that give way to creating sources, which are slowly gaining significance. They are:

Jus Cogens and *Erga Omnes* Obligations: The concepts of *jus cogens* and *erga omnes* obligations, which are now at the heart of the concern for "serious beaches of obligations arising from a peremptory norm under general international law", are important new elements in the structure of international law. They are an attempt to signify that international law is, going beyond the bilateral and State centric interaction, becoming more and more responsive to the needs of more globalize international relations and the demands of increasingly integrated international community interests.[23]

The concept of *Jus Cogens* was introduced in Article 53 of the Vienna Convention of Law of Treaties, 1969 which states that *jus cogens* is a peremptory norm of general international law, i.e. it is a norm accepted and recognized by the international community of States as a whole[24]. Hence, a treaty is void, if at the time of its conclusion, it conflicts with a norm of such a nature. *Jus Cogens* is a norm from which no derogation is possible. Also, it can be modified only by a subsequent norm of general international law having the same nature. Examples of *jus cogens* norms are fundamental rules of humanitarian nature (like prohibition of genocide, slavery and racial discrimination), rules of sovereignty of States, the concept of Common Heritage of Mankind (in High Seas, Outer Space).

Next, is the concept of *Erga Omnes*. The ICJ laid down the concept of *erga omnes* obligation, in the *Barcelona Traction* case[25]. It explained that, *erga omnes* is an obligation a State owes to the international community as a whole. This obligation, gives locus standi for any State to invoke the responsibility of a State, even if it is not directly injured by the wrongful conduct. Examples are obligations to outlaw genocide, protection from slavery etc. are issues that can be raised by any State, on behalf of the international community. Violation of these obligations is considered as a 'serious breach' of peremptory norms in international law[26].

SUBJECTS OF INTERNATIONAL LAW

Theories relating to subjects of International Law: "A subject of rules is a being upon which the rules confer rights and capacity and imposes duties and responsibility; whereas an object enjoys and is burdened by no such competence. The law commands its subjects but it merely regulates the use and disposition of the objects." Subjects of law are those upon

[23] Pemmarajulu Sreenivasa Rao, "The Indian Position on Some General Principles of International Law", Bimal N. Patel (ed.), INDIA AND INTERNATIONAL LAW, 2n ed. 2001, p. 33

[24] Article 53 of Vienna Convention on Law of Treaties, 1969: " A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only a subsequent norm of general international law having the same character."

[25] *Belgium* v. *Spain* (1970) ICJ

[26] ILC Draft Articles on State Responsibility, 2001

whom law bestows a capacity to act. Capacity implies personality. Legal personality indicates that the entity may be capable of possessing international rights and duties. During the classical era of international law, the positivists were of the view that the only legitimate legal person on the international plane is the "state". While states remained the most important subject of international law, one feature of development since 1945 has been recognition of other legal persons. In principle it is for international law to determine firstly whether an entity has legal personality and secondly the scope of that personality. The other subjects of international law are International Organizations and certain non-state entities like NGOs, MNCs etc. and now even the individuals are also included in the realm of international law.

Following are the three main theories prevalent in regard to the subjects of international law:

- States alone are the subject of international law.
- Individuals alone are the subject of international law.
- States are the main subject of international law, but to a lesser extent individuals and certain non-state entities have certain rights and duties under international law.

State as a Subject of International Law

As we all know International Law is also called as ‘Law of the Nations’. The term itself suggests that it is the law which operates amongst various states. States are traditional subject of international community; in the sense that they have been ‘dramatis personae’ (character of the play) on the international scene since its inception. The position could not have been expressed more clearly than by Oppenheim who observed in 1912: ‘since the law of the nations is based on the common consent of the individual human beings, states solely and exclusively are the subjects of the international law’. Therefore with this background the paper will cover following points which are provided in the form of questions: What kind of states are the subjects of international law? Definition of state, traditional and modern concept of international law. Why are the states important in the international law? Role played by the states in the scenario of international law. How is the international law operating between states? Fundamental rights and duties of the states as a subject of international law. Admission case.

Definition of State: Many jurists have attempted the definition of STATE but no definition can be called as a complete one. Still some of them are optimized to cover characteristics of ‘state’. According to Salmond ‘State is a society of men established for the maintenance of order and justice within a given territory by way of force’. According to Oppenheim: ‘the existence of state is possible only when people of the state have settled under highest government authority and habitually follow its order’. According to Kantarowicz ‘a state as a jurist person endowed with the right to impose its will on the inhabitant of a given territory, of which right it cannot by law be deprived without its own consent ’.

From above definitions we can define state – A group of society within defined geographical area united to ensure their mutual welfare and security. Today it is generally accepted that the legal criteria for statehood are those set in Art.1 of the Montevideo Convention on the Rights and Duties of the States (1933) which reads: The state as a person of the international law should possess the following qualifications –(a) a permanent population (b) defined territory (c) a government and (d) Capacity to enter into relations with other states. All the above criteria set out are flexible. Statehood is recognized in the international law though they do not fulfill some of the criteria. These states may be condominium, federal states, protected states etc. From the outset the states has been at the centre of the international society. States are so important because State can only seek membership of the United Nations; State can only participate in litigation before the International Court; Only state commands the permanently organized armed forces; It is normally only state that can mobilize the large resources needed to relieve suffering and afford humanitarian relief.

As the subject of international law state are imposed with certain rights, duties and powers. In broad terms they may be expressed as: the doctrine of the equality of states; the principle of non-interference; the principle of independence of state; and The principle of self-preservation or self-defense. To some extent, these principles overlap and are but consequence of each other however in the interests of clarity it is sensible to segregate them.

These may be discussing in brief: The United Nation Charter (1945) Art.2 (1) expressly asserts that: 'The organization is based on the principles of sovereign equality of all its members'. In particular, sovereign equality includes the following elements: States are juridically equal; Each state enjoys the rights inherent in full sovereignty; Each state has duty to respect the personality of the other states; Each state has a right freely to choose and develop its political, social, economic and cultural systems; The territorial integrity and political independence of the other state; Each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states. It would be seem that the concept of equality indicates that the each state will be answerable in international law for its conduct. Independence is nothing but consequences of sovereignty. To an extent it is clear that sovereignty implies independence and independence implies jurisdiction.

Peaceful Co-Existence: The doctrine has been reworked to meet anxieties of cold war and nuclear age. It obtained legal recognition in Art.13 of the Charter of the Organization of the American States, Charter of the Organization of The African Unity (1963), and Declaration of the Principles of International Law (1970). The preamble in effect states seven principles which may be summarized as: State shall refrain in international relations from the threat or use of force. States shall settle their international disputes by peacefully means. States recognize a duty not to intervene matters within the jurisdiction of another state. State recognizes a duty to cooperate with one another in accordance with the United Nations Charter. States recognize the principle of equal rights and self determination of peoples. States recognize the principle of sovereign equality. States agree to fulfill in good faith the obligations assumed under the charter.

Admission Case [(1948) ICJ 61]: In the early years after 1945 cold war rivalry caused the Security Council to be reluctant to admit new States. In consequence, the General Assembly sought an Advisory Opinion from the ICJ on the criteria for admission; and the criteria that a State should have in mind when casting a vote for admission. In the Advisory Opinion on conditions of membership in United Nations the ICJ held by a majority that there were 5 conditions mainly that the applicant had to be A State; Peace loving**;** Accept the obligations of the charter**;** Be able to carry our these obligations; Be willing to do so. Secondly, the Court ruled that when casting a vote for admission a State should have these criteria in mind and no others. Nevertheless, the situation became less tense on admission after December1955, when a ‘Package Deal’ was negotiated to enable 16 new States to become members.

In the International Law, States remain the principle subject. It is the only permanent entity which is broadly accepted as having legal rights and duties in the International scenario.

International Organisations as Subjects of International Law

One of the most important developments of the 20th century has been the establishment of numerous international Organisations for inter-state relations. International organisations are also generally counted among the subjects of International law together with states, individuals, and perhaps, some other entities like International corporations, national corporations, and national liberation movements as well. In accordance with the standard definition of ‘subjects’, they are deemed capable of independently bearing rights and obligations under International law. The question as to whether International Organisations could be regarded as subjects of International Law reverberated well into the second half of twentieth century. It is pertinent to note that even before the establishment of League of Nations, the problem of assuming international legal personality was in vogue. There is a long history of non- sovereign organisations performing acts in international law.

Classifications of International Organisations: The international organisations may be classified on various grounds such as the on the basis of functions they perform, the membership and their scope of jurisdiction. But they are mainly divided into two main categories: *Inter governmental Organisations* and *Non-governmental organisations*. Inter governmental Organisations have national governments as their members. Hundreds of IGO’s operate in all parts of the world. The United Nations and its agencies are IGO’s. They are again classified on the basis of the area of their operation. They are divided into **international** and **regional**. SAARC, OPEC, G8, Arab League and the African Union are the best examples of IGOs operating at regional level.

Importance of International Organisations: The main objective of all the international organizations has been welfare improvement of member countries. International organizations, such as International Trade Centre and World Trade Organization, assist member countries in promoting fair trade with each other. The World Bank and Institute of International Finance are international organizations that provide monetary help to member countries and to enhance sustainable economic development in the world. And they are facing the challenges of enhancement of international reforms and integrating developing countries on various measures.

International organisations play as necessary instruments for organising the growing relation of states ***per se***. They are the institutions which represent that process and play significant roles in the contemporary world. International organisations have become indispensable instruments to deal with international problems confronted by international society.

International Organisations as a Subject: It was in the case of Reparations for injuries suffered in the services of United Nations **(**I.C.J Reports, 1949p.174), the international court of Justice held that the United Nations is a subject of international law and capable of possessing international rights and duties, and it has capacity to maintain its rights by bringing international claims. Hence the subjectivity of international organisations is cleared with the help of three indicators. They are, Whether the organisation possesses the right to enter into international agreements? Whether they have the right to send and receive legations? Whether they can bring and receive international claims? These are not strict requirements as such. At best they can be viewed as indicators; to the extent that proposed subjects of International Law on any of these indicators, they can be deemed to be subjects of international law. And it was also held that the organisation was intended to exercise and enjoy the functions and rights which can only be explained on the basis of the possession a large measure of international personality and the capacity to operate upon the international plane. Therefore, we can say that the idea of considering International organisations as subjects of international law emerged from the decision of the ICJ in this case where it pronounced that UN was not the same as a state, let alone a super state.

Position of International Organisations in Municipal Law: It is usually explicitly provided for in the constituent treaty of the organisation. Article 104 of the United Nations charter provides in this context that ‘The organisation shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and fulfilment of its purposes.’ And the ICJ has also stated that the organisation should be regarded as possessing the powers which even if they are not expressly stated in the charter are conferred upon the organisation as being essential to the discharge of its functions.

Contribution of United Nations in International Law: The United Nations is an international organization founded in 1945 after the Second World War by 51 countries committed to maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights. Due to its unique international character, and the powers vested in its founding Charter, the Organization can take action on a wide range of issues, and provide a forum for its 192 Member States to express their views, through the General Assembly, the Security Council, the Economic and Social Council and other bodies and committees. The work of the United Nations reaches every corner of the globe. Although best known for peacekeeping, peace building, conflict prevention and humanitarian assistance, there are many other ways the United Nations and its System (specialized agencies, funds and programmes) affect our lives and make the world a better place. The Organization works on a broad range of fundamental issues, from sustainable development, environment and refugees protection, disaster relief, counter terrorism, disarmament and non-proliferation, to promoting democracy, human rights, governance, economic and social development and international health, clearing landmines, expanding food production, and more, in order to achieve its goals and coordinate efforts for a safer world for this and future generations.

The Changes Happening in the International Scenario: It may however, be noted that the Brettonwoods conference held in 1944, was the beginning point in the direction of a new International Economic Order. The establishment of WTO has marked the emergence of a new era of economic order of the world. As a result of Uruguay round of GATT negotiations for about 7 years, as many as 125 states including India formed by consensus, the world trade organisation which came into force on January 1, 1995. The WTO is playing an active role in setting up the trade policy agenda, working on consensus and basing itself on the fundamental principles of non- discrimination. WTO has become the world body to oversee a comprehensive set of rules and disciplines covering every aspect of world commerce including trade in services and intellectual property protection. Thus World trade organisation is the main organ for implementation of Multi lateral trade Agreements. It has become the negotiating forum for the member states. It is been regarded as the third economic pillar of world trade and commerce dimensions along with the International Monetary Fund and the International Bank for reconstruction and Development or World bank.

The paradigm of subjectivity of International law differs from subject to subject and even between various subjects of same category. It is because the scope of International law keeps on widening, thus making the corporations, individuals, and movements come into the ambit of subject of international law. There is a radical transformation from UNO to WTO in controlling the international trade and administration of Multi-lateral Trade Agreements and also of the plurilateral Trade agreements.

Individual as Subjects of International Law: Subject of any law means an entity capable of possessing rights and duties. Similarly a subject is said to possess international personality if the entity is capable of possessing international rights and duties .Thus subject of international law owes responsibility to international community and enjoys rights that may be claimed and if denied may be enforced via legal procedure: that means the particular entity will have *procedural capacity*. To be recognized as a subject of international law is not a choice that an individual in his capacity as an individual has an option of subscribing to, unlike in the municipal legal arena where it is forcibly thrust upon an individual that he has to be the subject weather to his liking or not. Thus one may find in this particular field not lot of changes have taken place, at least in the theoretical concepts of traditional international law. The states themselves afford the status of subjects of international law to individuals, as every thing in international law is dependent on consent even if this does not concern the state but only individuals are affected by them. Even today though lot of inroads are made in traditional view point put forward by older jurists there still remains some hope and scope of improvement in different arenas where international law operates.

Scope on International Law and Changing Concepts of Subjects: In order to understand individual as a subject of international law one must understand the changing structure of scope of international law. The scope of international law have developed and expanded, so new entities have been admitted as subjects, but *the personality enjoyed by such subjects varies considerably*. In order to understand the evolution of the scope of international law one must look into the definition of international law given by various jurists. There were two schools of thought regarding the scope of international law one was the *traditionalistic* school of thought and the other was the *modernistic* school of thought.

The traditionalistic scholars believed *state as the exclusive subjects of international law***.**

Oppenheim was the most prominent exponent and as pointed by him **"**Since law of nations is based on the common consent of the individual states and not of the individual human being states solely and exclusively are the subjects of international law." *Starke* was the most important exponent of modernistic theory and according to him**,** "international law may be defined as that body of law which is composed for its greater part of the principles and rules that state feel themselves bound to observe and therefore do commonly observe in their relation with each other and which include also the rules of law relating to the functioning of international institutions, their relations with each other and their relation with state and individual and certain rules relating to individuals and non-state entities are the common concern of international community**.** Today states are the primary subjects of international but hey are no longer the only subjects, international organizations, non-state entities and individuals are also considered as subjects of international law."The scope of international law has widened as a result of greater international awareness of human rights, proliferation of international organization. "State possess international personality as inherent attribute of their statehood, all others do so only to the extent that their states allow i.e. their personality is derived from states. Thus, *personality of states may be characterized as original and that of the other entities as derivative.*

Individual as Subjects: Individual in general have very limited personality but contemporary international law recognizes that individual may possess international rights and duties. *Why is this so?* One of the reasons may be the greater awareness of human rights for individual through both international and regional regulation. As a consequence of this it is being recognized that individuals may be responsible for certain conduct – earlier it was believed that states are exclusively the perpetrators of breach of international law but now this belief if not shattered but definitely dented, some of the examples are piracy-has been recognized under customary international law as international crime. Pirates are considered as hostis humani generis i.e. common enemies of mankind any state that apprehends then can punish them under international law. War crimes and crimes against humanity are recognized as international crimes and individuals may be held liable under the ICC. Nuremburg trail- Judge Jackson made an opening statement "Crimes against international law are committed by men and not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international be established."

Convention on the prevention and punishment of the crime of genocide – article 4 – "*Genocide is punishable as crime irrespective of whether they are committed by A) Constitutionally responsible rulers B) Public officials and C) Private individuals.* As a natural corollary of this individuals are under obligation to refrain from such conduct. Individuals thus have limited right and duties in international scene. There are also other acts that an individual may be personally be held responsible these are hijacking, sabotage, terrorism, drug trafficking and acts upon diplomats.

One point to be noted here is that individual responsibility derives from international law and is independent of law of the state for they may be responsible in municipal law also but the exception is that the responsibility is founded in international law.

Drawback: The most important drawback is that for individual exercising international personality is the lack of procedural capacity which is denied to them because of reluctance of states to grant them such capacity. Some instances though where international law affords procedural capacity are 1) Permanent court in Danzing railway official's case recognized-

"*Those exceptional treaties could create rights for individuals and in certain cases these rights could be enforced in municipal courts*.

Vangenden Hoos V. Nederlandse Tarief Commissioner (1963) **-** where article 12 or the European community treaty was interpreted to read- "*The very object of international agreement, according to the intention of the contracting parties may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by international courts"* Central American Court Of Justice – where for the recourse was made available to an individual for violation of international law (human rights)-1908- it was novel in the aspect that court had jurisdiction to deal with dispute between individual and states and individual "court had jurisdiction to hear dispute between private individual of any of the five contracting parties and any of the other contracting parties. Treaty Of Versailles –provided for claims by individuals against government and nationals of defeated state. Tribunal Established under Upper Silesian Convention**-**it was competent to hear cases brought by nationals of state against their own.

In modern international law individual definitely can be considered as a subject of international law there can be no arguments against this fact simply because it is a fact and not a myth. Any student of international law should know better than argue that individual is not a subject of international law, but to what extent is deficiently a arguable issue not just for students of international law but also for any human being. The status of individual as a subject of international law is pointed towards an upward incline which is a relief for all human beings as evident from the case of Astronauts – they are considered as friends of mankind in general in respect of the. Asylum- every individual has a right to claim asylum in any other country and other states may or may not consider them but if they do there is no practice of questing that particular states decision. Extradition- there is also a duty upon every state subject to the bilateral treaty between them to extradite criminals found in their territory wanted in other states. Slavery And Slave Trade**-** work they do for the development of humans hence there is a duty upon every state to actually render help and return any astronaut to their respective states upon entry into the earth from any mission. There is also a duty upon every individual and state to desist from slave trade and practicing slavery and every person has a right against slavery. Diplomats –diplomats as individuals have the variety of rights enumerated in Vienna convention on diplomatic agents (1961) and a person may be held liable for the crimes committed against them.

Non-State Entities as Subjects: All the legal persons in the international law apart from State are termed as non-state entities. In the 19th Century States were the only legal persons in International Law. But the position has changed in the last century, and international organisations, individuals and companies also acquired some degree of international legal personality. The problem of including new actors in the international legal system is reflected in very concept of legal personality, the central issue of which has been:- Capacity to bring claims arising from the violation of International law. To conclude valid international agreements. To enjoy privileges and immunities from national jurisdiction.Thus, International Court of Justice has noted that, 'the subject of law in any legal system is not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. The non-state entities can be categorised under following heads namely:- International Organisations, Non-governmental Organisations, Multi-national

Organisations, Insurgents and National Liberation Movements, Ethnic minorities, Indigenous people under International Law.

Non-Governmental Organisations: Non-governmental Organisations are those organisations which are not established by a government or by an agreement between states but, its members are private citizens or body corporate. International NGOs have proliferated considerably in past decades and are engaged in a broad variety of different areas, ranging from politics, the legal and judicial field, the social and economic domain, human rights and humanitarian relief, education, women, to the environment and sports. The role of NGOs in International Law is primarily of informal character. They have some effect on International law-making in certain areas by adding additional expertise and making procedures more transparent. They are essentially providers of information, lobbyists or pressure groups, and as such may properly be regarded as so-called non-state actors. From formal point of view, on global level there are no international legal standards governing the establishment and status of NGOs. The relevant law is that of the State where an NGO is based. This may cause problems in the case of international activities because national laws are different. Inter-governmental organisations may agree to grant NGOs a certain consultative or observer status (such as the exceptional case of the observer status granted by the UN General Assembly to the International Committee of Red Cross in1991) and thereby a limited international status, but this does not make them a subject of international law. Since the beginning of this century, efforts have been made by the bodies such as the Institute of International Law (itself being an NGO) to improve the international legal standing of NGOs, but such efforts have remained fruitless in view of the doctrine of sovereignty. On the regional level, however, within the framework of the Council of Europe a common status for NGOs has been recently laid down in the European Convention on the Recognition of Legal Personality of International Governmental Organisations. The State which has ratified it attributes legal personality in any one of the state parties.

The problem as regards NGOs is that they are based in industrial part of the world. Therefore it is concentrated in few home countries like U.K., France, Belgium, Switzerland and U.S. As a resultant, it creates geographical imbalance. Although these countries are democracies, guaranteeing freedom of association, NGOs are sometimes misused by governments in their international dealings. Now the question which raised is- Is it really advisable that these non-territorial entities should seek to obtain a formal international status on the universal level? Owing to its work in the field of human rights, they are now generally acknowledged. But in regard to international law-making in general, it is unlikely that NGOs will be included in formal process in near future. As is said by one recent author, " As NGOs are not democratically authorised to realise common good, they often neglect the common good in pursuance of their specific interests."

Multi-National Corporations: MNCs are those corporations and associations that operate transnationally in the finance, transportation, communication and other areas of economic life. Because they operate across many state boundaries, they serve as a global vehicle to transfer and esseminate capital, skill and technology. They are profit oriented and hence are commonly treated as distinct from NGOs. The larger transnational corporations negotiate directly with nation-state representatives in a new form of democracy. Agreements with these corporate giants may surpass treaties between states in terms of values affected and the prescribing effect engendered. They have contributed greatly to the internationalization of production, finance, and ownership and to the growing integration of national economies into world economy. Though they are labelled multi-national, trans-national, or international, MNCs owe their creation to national laws. Their success in operation however, depends greatly on trans-national recognition of such national laws.

MNCs are incorporated under domestic law of State of incorporation. But conflicting national laws are inadequate to deal with manifold problems of MNCs. Profit-oriented by nature, multinational corporations have come to be perceived variously as exploiters of the labour and physical resources of the developing countries, environmental polluters, manipulators of currencies and commodities, tax dodgers, practitioners of corrupt business practices, supporters of reactionary regimes, and instruments of their national governments. They have recently gained particular notoriety due to the exposure of the widespread business practice of bribery- corruption and conspiring with power elites to the detriment of democratic values and the masses of the population. As their operations expand in geographical reach and in magnitude of impact and grow in complexity, it has become increasingly apparent that conflicting national laws are inadequate to deal with manifold problems having to do with multinational corporations. So in 1972 Economic and Social Council called together a group of eminent experts to study the role and impact of MNCs and to recommend measures towards international accountability.

In 1974 they established two permanent bodies to deal with problems of MNCs - Inter-governmental Commission on Transnational Corporation, consisting of 48 members. U.N. Centre on Transnational Corporations. The commission made it a top priority to develop code of conduct for activities of transnational corporations. This are because MNCs basically are also seen as a threat to nation-states because they possess more resources than most of these nation states. Hence the nation-states fear that there power would be undermined over their own nationals.

Insurgents and Non-Liberation Movements: Insurgents in civil war have long been recognised in international law as subjects having certain rights and duties because they control some territory and might become the effective new government of the state. This is also reflected in Articles 14 and 15 of the United Nations international Law commissions draft articles on state responsibility, according to which the whole old government is still in power, a wrongful act of an insurrectional movement established in the territory of the state shall not be considered as an act of that state under international law (involving responsibility to other states for it).

New problems emerged in the process of de-colonisation concerning the international legal status of liberation movements of ‘peoples under colonial, alien or racist domination’ having a representative organisation (such as SWAPO, the ANC or the PLO). With regard to such national liberation movements there have been conflicting positions of states on this issue in the past, which has now lost most of its former relevance.

Ethnic Minorities and Indigenous People: With the rise of ethno-national in many parts of the world, not only in the Balkans and in the former Soviet Union, the status of Ethnic Minorities and other groups in International Law has again become a central issue. This is witnessed in various recent efforts on the global and regional level to improve their legal protection. The question of international legal personality of minorities is more complicated than the issue of international legal personality of individuals or corporations. The problem of minorities has quite different political and legal dimensions. Indigenous people are not subjects of international law in any meaning full sense of the term and have not (yet achieved an international legal status any higher than that of individuals).

RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

International Law, in the present context, is considered as one of the most significant concepts, which has been gaining momentum at a fast pace in the world community. There has been several occasions, since the evolution of human civilization, where efforts have been put by mankind throughout the world in order to legitimise the concept of International Law in a broader perspective, with the sole objective of maintain universal brotherhood and keeping international war and conflicts at bay. Since the formation of the world community, especially after the Second World War (1939-44), inferences of International Law can be found quite frequently. The presence of International Law has increased by leaps and bounds which is quite evident from the fact that almost all the sovereign nations of the world, irrespective of their political, social, economic, religious or geographical background, have voluntarily accepted the authority of International Law.

With the due passage of time, the role of International Law has also widened accordingly and the concept of International Law is no more restricted only to the maintenance of international tranquility. The ambit of International Law has been growing expansively and hence, it becomes very essential to analyse what could be the possible aspects of international community, where the seeds of International Law can be sown. One can easily chalk out the significance of International Law with the presence of several agencies or sources of International Law, such as, International Organisations, Non-Governmental Organisations (NGOs), International Treaties and Conventions, Multi-National Corporations (MNCs), etc., which have been exhaustively assisting in the growth and development of International Law, with the establishment of the first inter – governmental organization in the year 1864, viz., the "International Telegraphic Union." It is also essential to note that there has been a significant contribution on the part of the internal organs of the sovereign States, such as, the Legislature, the Executive, the Judiciary, etc. who have been making a valiant effort to uphold the principles of International Law in their own territory for achieving the ultimate goal, i.e., 'international peace and security.'

The practice of States regarding the relationship of International Law and Municipal Law is divergent. Application of International Law depends largely upon the Legislature as well as the Judiciary of a State. They are expected to take cognizance and endeavour to honor the international obligations of the State. It has to be realized by them that neither Municipal Law nor International Law is supreme, but they are concordant to each other. They both have been made to solve the problems of human beings in different areas. If they refuse to accept the rules of International Law, relations between the States would obviously become tense and the high ideals of 'maintaining international peace and security' will be at peril.

Theories as to the Relation between International Law and Municipal Law: The proper understanding of the concept of International Law is possible only when its relation with Municipal Law is analysed in a comprehensive manner. Even though International Law regulates the conduct of international subjects, the question arises whether International Law has any impact on domestic legal systems or on subjects within those systems. The framework under which a domestic legal system relates to and applies international law is very important as it is this aspect that gives an effect to the domestic implementation of International Law in the domestic circuit.

There are two major models for this relationship: dualism and monism.[27] In a dualist approach, the domestic and international legal systems are kept separate because they operate in different spheres. Monism, on the other hand, holds that the domestic and international legal systems are simply two connected areas of a single legal dimension. The two principal theories can be elaborately discussed as under:

Monism: Kelsen (1881-1973) is one of the chief protagonists of this theory. Besides Kelsen, the other supporters of monism are Lauterpacht, Fitzmaurice and Starke. According to monism, International Law and State Law are similar aspects of the same system, i.e., law in general. Monism considers that all law as a single unity is composed of binding legal rules, whether those rules are obligatory on States, on individuals or on entities other than States. Monists opine that the science of law is a unified field of knowledge and the decisive question that needs attention is whether or not International Law is true law. Once it is accepted that International Law is a system of rules that are of a true legal nature, it was impossible to deny that the two systems constitute part of that unity corresponding to the unity of legal science. Both Municipal Law and International Law are part of the same universal body of legal rules binding all human beings collectively or individually. It is the individual who lies at the root of the unity of all. Thus, any construction other than monism is bound to amount to a denial of the true legal character of International Law.

Dualism: In the 19th and 20th centuries, there developed a strong view towards the dualist view. The chief exponents of dualism have been the positivist writers Triepel and Anzilotti. For the positivists, with their consensual conception of International Law, it was natural to regard state law as a distinct system. Dualists state that International Law consists of principally of customary and treaty rules whereas, Municipal Law consists of in most part the legislative enactments and judicial legislation. The difference between International Law and Municipal Law is depicted by the dualists as under: Source: Under International Law, customs grown up among States and Law making treaties are the main sources, whereas, under Municipal Law, customs developed within the territory of the State and Statutes enacted by law-giving authority are the main sources. Operation: International Law operates between Relation of States, whereas, Municipal Law operates between the relations of individuals within the sway of the State. Substance: International Law is a weak law as it operates between the States and is not above them, whereas, Municipal Law is the supreme law where the law is the sovereign and operates over individuals. Subjects: States are considered as the subjects of International Law, whereas, Individuals are considered as the subjects of Municipal Law.

[27] Supra n. 24.

The question of primacy, i.e., whether International Law or Municipal Law is superior and in case of a conflict which should be given primacy. On the question of primacy, the monists are divided. Some of them give primacy to International Law. Kelsen has made structural analysis of International Law and Municipal Law. For this, he has applied his 'hierarchical' doctrine or 'grund norm'. On this basis, he asserts that each rule is conditioned by a superior rule for its validity, and thus, in turn, it derives validity from the fundamental rule, i.e., the grund norm. This grund norm is not exclusive in International Law and it may pertain either to International Law or Municipal Law. The primacy of Municipal Law is perfectly legitimate because the choice between either system could not be decided scientifically. As dualism attaches importance to the sovereignty of 'State Will', they give primacy to Municipal Law over International Law.

Transformation and Specific Adoption Theories: The application of International Law within the municipal sphere would be incomplete without referring to certain theories. On one hand, the positivists have put forward the view that the rules of International Law cannot directly be applied within the municipal sphere by state Courts or otherwise. In order to be so applied, such rules must undergo a process of specific adoption by Municipal Law. As according to positivists, International Law and Municipal Law constitute two distinct and structurally different systems, the former cannot be applied upon state law unless the latter allows its constitutional machinery to be used for that purpose. In the case of treaty rules, it is claimed that there must be a transformation of the treaty into state law, which is not merely a formal but a substantive requirement. The transformation theory is based on an alleged difference between treaties on one hand, and state laws or regulations on the other.

Delegation Theory: According to the exponents of this theory, there is delegated to each state Constitution by constitutional rules of International Law, the right to determine when the provisions of a treaty or convention are to come into force and the manner in which they are to be embodied into state law. The procedure and methods to be adopted for this purpose by the state are a continuation of the process begun with the conclusion of the treaty or convention. There is neither any transformation nor any fresh creation of rules or Municipal Law, but merely a prolongation of a single act of creation. Whatever are the ultimate merits of this theoretical controversy over the alleged necessity for a transformation or specific adoption of International Law by Municipal Law, the actual practice of states concerning the application of International Law within the sphere of Municipal Law must remain of critical importance. It is therefore essential to pass to a consideration of such state practice, and then to derive there from any necessary conclusions with regard to the matter.

Pre Independence Implementation of International Law in British India: Before the adoption of the Constitution, the British 'Doctrine of Incorporation' with certain qualifications as prevailing in Britain was followed in India. It is the part of the public policy that the Courts should in principle give effect to clearly established rules of international law. When a Municipal Court in England has decided as a preliminary issue that a rule of Customary or Treaty law is applicable to a case before it, the rule is applied as though it is a rule of the law of the forum.[28] In the sphere of customary international law, the doctrine of incorporation has become the main British approach.

[28] Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 5th ed. 1998, p. 42.

Conditions for Implementation of Customary International Law in British Practice:[29] Consistency: Such rules should not be inconsistent with the British statutes, no matter whether the statute is earlier or later in date than the particular customary rule concerned..2 Supremacy of the Court: If the scope of such customary rules has been determined by the final authority of the British courts, all British courts are thereafter bound by that determination, notwithstanding a divergent customary rule of international law developing later on.

'Doctrine of Incorporation': The British model of interpretation of the 'Doctrine of Incorporation' can be discussed as follows: In **Triquet** v. **Bath**,[30] the 'Doctrine of Incorporation' was quoted as "the Law of Nations, in its full extent was a part of the law of England." This view was in practice for a subsequent period of time. But a departure in this practice of British Courts was noticed in the latter part of the 19th century. The majority of the Court refused to apply the 'Doctrine of Incorporation' and said that English Courts had no jurisdiction over crimes committed by foreigners within the maritime belt extending to three miles from the British coast, although such right existed under customary international law in Franconia case (**R.** v. **Keyn**).[31] The Court held that a rule of customary international law does not apply in England on its own force, but needs preliminary legislation. However, this decision of the Court was reversed by the territorial Waters Jurisdiction Act, 1878 of the British Parliament.

In **West Rand Central Gold Mining Co**. v. **R.**,[32] the Court observed that whatever has received the common consent of civilised nations must have received the assent of the country, which may properly be called 'International Law' and as such will be acknowledged and applied by the municipal tribunals of England. This was a partial return to the 'Doctrine of Incorporation'.

In **Chung Chi Cheung** v. **R**.,[33] Lord Atkin declared that the Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by the Statutes or finally declared by their tribunals. It is a recognized prerequisite of the adoption in the Municipal Law of the British, a doctrine of Public International Law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions. The Privy Council further observed that the Courts acknowledge the existence of that body of rules which are accepted by the nations themselves. Any international rule can be incorporated into the domestic law, so far as it is not inconsistent with rule enacted by Statutes or finally declared by the English tribunals. To conclude, it can be clearly observed that the English Courts did not apply any rule of customary international law if it is in conflict with the existing Parliamentary legislation or

[29] I. A. Shearer, STARKE'S INTERNATIONAL LAW,11th ed. 2007, p.68.

[30] (1764) 3 Burr 1478 KB.
[31] (1876) 2 Ex D 63.
[32] (1905) 2 KB 391.
[33] 1939 AC 160.

any clear judicial precedent. The same practice was also equally exercised in the pre independence implementation of the principles of international law in the Indian context as well.

Post-Independence Implementation of International Law in Independent India

The Constitution of India does not include any clear direction on treaties as found in the United States and French Constitutions. It, however, follows the British approach, namely, that treaties are not the part of internal law unless specifically adopted. But unlike Britain, India has a written Constitution and it contains several provisions which have the bearing on treaty making and treaty implementation in India, but at the same time, there is no provision making treaties as the supreme law of the land. The relevant provisions are Articles 37, 51, 53, 73, 77, 246 read along with Entries 10, 13 and particularly 14 of List I of the Seventh Schedule (The Union List), as well as Article 253, 372(1). In accordance with these provisions, the Union Parliament has the exclusive power to legislate in the realm of treaties, i.e., for the making of treaties and their implementation. But Parliament has not yet legislated; it is instructive, therefore, to refer to the Indian practice, as reflected in the constitutional provisions and the judicial precedents.

Article 37, which provides that the provisions contained in Part IV shall not be enforceable by any Court, also states that the principles laid therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Article 51 strengthens the common law principle that International Law is a part of Indian Law which reads as follows: "Promotion of International Peace and Security – The State shall endeavour to – (a) International Peace and Security (b) Maintain just and honourable relations between nations (c) Foster respect for International Law and treaty obligations in the dealings of organised people with one another (d) Encourage settlement of international disputes through arbitration" Article 51 does not give any clear guidance regarding the position of International Law in India as it since it is included in Part IV of the Constitution of India which is unenforceable by the Indian Courts. However, it would be wrong to contend that Article 51 is of no relevance and provides no guidance at all.

Article 73(1) states that "Subject to the provisions of this Constitution, the executive power of the Union shall extend: (a) To the matters with respect to which Parliament has power to make laws and (b) To the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any agreement or treaty".

Article 246 empowers the Parliament to legislate on Entry 14 (of the Union List), which it has not done yet, and until it does so, the President's treaty making power remains unfettered by any internal constitutional restrictions. Hence, the Executive will be very much within its power to bind India internationally under a valid treaty, without referring to the Parliament, or require legislation sanctioning money expenditure, or require a change in existing laws for implementation of the treaty obligations of the Union.

Article 253 of the Constitution of India confers exclusive power upon the Parliament to make law for giving effect to any treaty, agreement or convention with any other country or countries or any decision or any decision made at any international conference. Article 253 of the Constitution provides that "Notwithstanding in the foregoing provisions of Chapter XI of Part XI, the Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at an international conference, association or other body."

Article 372(1) provides that "Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, shall continue in force therein before until altered or repealed or amended by a competent Legislature or any competent authority." This Article contemplates the fact that before the adoption of the Constitution of India, the British practice was prevalent in India which has been continued even after the adoption of the Constitution by virtue of the provisions of Article 372.

Indian Judiciary and International Law: Before independence, the Common Law Principles of the British, which practised customary rules of International Law as part of the land, applied in India as well. Prior to the Constitution of 1950, Indian Courts were following the British practice of enforcing International Law in the domestic circle. The Constitution of India contains a specific provision in Article 51 (which is stated under Part IV of the Constitution of India, i.e., the Directive Principles of State Policy) a direction to the State, which shows that the intention of the founding fathers towards International Law.

The British practice of the 'Doctrine of Incorporation' continues still in India by virtue of Article 372(1) of the Constitution as was held in *T.K. Varred v. State of Travancore-Cochin.*[34]

In the case of *A.M.S.S.V.M. & Co. v. The State of Madras,*[35] the question was whether the State was entitled to abolish private right in the exploitation of chank fish in Palk Bay. The Madras High Court, in its judgment relied on principles of English Common Law and corresponding rules of International Law relating to fisheries, maritime belt, harbours and estuaries, particularly the historic title based on prescription. It held that chank fish cannot be treated as fisheries proper, since they do not move away from the seabed. The rulers of the State adjacent to the sea had acquired the right from the time immemorial to exploit chank fish in the bay. The Court held that particular part of the seabed, though outside the three-mile limit, vested in the Crown and thus, the Government had the right to abolish private right to exploitation of the chank fish in the Bay.

In *Birma v. State of Rajasthan,*[36] the Court held that the Courts that are part of International Law do not form part of the law of the land unless expressly made so by the legislative

[34] AIR 1956 SC 142.
[35] MLJ (2-1957) 587.
[36] AIR 1951 Raj. 127.

authority. In *Motilal v. U.P. Government,*[37] it was held that any obligations or arising out of international treaties do not have the force in India and they can be enforced in the territory of India only through proper legislations.In *Keshavananda Bharati v. State of Kerala*,[38] it was opined that in view of Article 51 of the Directive Principles, the Court must interpret language of the Constitution, if not intractable, which is after all a Municipal Law, in the light of the United Nations Charter and the solemn declaration subscribed to by India.

In *Shri Krishna Sharma v. State of West Bengal,*[39] the Calcutta High Court held that the Indian Courts would apply rules of internal law which includes The Constitution of India, the Statute enacted by the Parliament of India and the Statutes enacted by the State Legislatures. The Court held: "If the Indian Statutes are in conflict with any principle of International Law, the Indian Courts will have to obey the laws enacted by the legislature of that country to which they owe their allegiance. In interpreting and applying Municipal Law, the Courts will try to adopt such a construction as will not being into conflict with the rights and obligations deductible from the rules of internal law. If such rule or rights and obligations are inconsistent with the positive regulation of Municipal Law, the Courts override the latter. It is futile in such circumstances to seek to reconcile, by strained construction which are really irreconcilable."

In *Maharaja Vikram Kishore of Tripura v. Province of Assam,*[40] the Court held similarly as the above case and stated that it is a well established rule of construction that a statute will not be construed as overriding International Law unless the words of the statute compel the Court to put such a construction upon it. In *A.D.M. Jabalpur v. Shivakant Shukla*,[41] popularly known as the "Habeas Corpus case", one of the questions for consideration of the Supreme Court was whether the Universal Declaration of Human Rights, 1948 and the two International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, 1966 were part of Indian Municipal Law. By majority, the Supreme Court held that they were not part of Indian Municipal Law. In his dissenting opinion, however, H.R. Khanna, J. held that if there was a conflict between the provisions of a International Treaty and the Municipal Law, it is the latter that will prevail. But if two constructions of the Municipal Law is possible, the Court should give that construction as might bring about harmony between Municipal Law and International Law or Treaty. In his view, the constitutional provision should be construed in such a way as to avoid conflict with the Universal Declaration of Human Rights, 1948, which seems to be more rational and better.

In *Gramophone Co. of India v. Birendra Bahadur Pandey*,[42] the Supreme Court accepted the binding force of international Law with certain limitations. The Court's observation in this regard is relevant: "There can be no question that nations must march with the international community and Municipal Law must respect rules of International Law. The Comity of Nations requires that rules of International Law may be sanction with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the

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[37] AIR 1951 All. 257.
[38] (1973) 4 SCC 225: AIR 1973 SC 1461.
[39] AIR 1954 Cal 591.
[40] (1948) 15 ILR 64.
[41] AIR 1976 SC 1207: (1976) 2 SCC 521.
[42] AIR 1984 SC 667: (1984) 2 SCC 534.

supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of International Law are incorporated into national law and considered to be part of national law, unless they are in conflict with an Act of Parliament. Comity of Nation or no, Municipal Law must prevail in case of conflict. National Courts cannot say 'yes' if Parliament has said 'no' to a principle of International Law. National Courts will endorse International Law but not if it conflicts with Municipal Law. National Courts being organs of the State and not organs of International Law must per force apply national law if International Law conflicts with it."

In *People's Union for Civil Liberties (PUCL) v. Union of India*,[43] the Supreme Court of India held that it is almost an accepted proposition of law that the rules of customary International Law which are not contrary to the Municipal Law shall be deemed to be incorporated in Municipal Law. In *Daya Singh Lahoria v. Union of India*,[44] the Apex Court has observed that there is no rule of International Law which imposes any duty on a state to surrender a fugitive in the absence of an Extradition Treaty. This question is decided by national courts on the basis of international commitments as well as rules of International Law relating to the subject. In *State of Madras v. G.G. Menon*,[45] the question before the Apex Court was whether any legislative enactment which was prevalent in pre Independence period is applicable to the post-independence era by the reason of the provisions of Article 372 of the Constitution of India, without any alteration or repeal or amendment of the pre Independence legislative enactment by a competent Legislature or any other competent authority. In this case, the Supreme Court held that such a legislative enactment cannot be enforced in the Indian territory notwithstanding Article 372. In *Shiv Kumar Sharma and Others v. The Union of India and Others*,[46] the Delhi High Court held that in India, treaties do not have the force of law and consequently obligations arising there from will not be enforceable in Municipal Courts unless backed by legislation. Settlement of dispute as to boundary arises no such obligation requiring implementation in Municipal Courts. Cases may arise where a domestic law is in express terms extended to a named city and that city as a result of treaty settling a dispute like the present, has to be handed over to another country. In that case, legislation may be necessary.

In *Maghanbhai Ishwarbhai Patel and Others v. Union of India*,[47] the Supreme Court opined that international treaties are enforceable in India by the Municipal Courts only when there is a legislation with that regard as treaties do not have the force of law. In *Civil Rights Vigilance Committee, Bangalore v. Union of India*,[48] the Karnataka High Court observed that if the Parliament does not enact any law for implementing the obligations under a treaty entered in to by the Government of India with foreign countries, Courts cannot compel Parliament to make such law. In the absence of such law, Court cannot also enforce obedience of the Government of India to its treaty obligations with foreign countries. In this case, the question was as to whether Geoff Boycott and Geoff Cook, the two cricket players

[43] (1997) 1 SCC 301.
[44] (2001) 4 SCC 516.
[45] AIR 1964 SC 517.
[46] AIR (1968) Del. 64.
[47] AIR 1969 SC 783.
[48] AIR (1983) Kar. 85.

shall be allowed to visit India and to play cricket matches as members of the English cricket team against India in view of their links with South Africa which was practicing the policy of apartheid. Here, the Petitioner contended that the action of the Government of India in permitting these two cricket players to enter into India and to play cricket in India was in breach of its obligations under the Gleneagles Accord and obligations attached to its membership to the United Nations. The Court held that the Government of India's obligations under the Gleneagles Accord and obligations attached to its membership to the United Nations, cannot be enforced, at the instance of citizens of this country, or associations of such citizens, by Courts in India, unless such obligations are made part of the law of this country by means of appropriate legislation.

In *Vineet Narain v. Union of India*,[49] the Supreme Court held that it is the duty of the Executive to fill the vacuum by executive orders because its field is conterminous with that of the Legislature and where there is inaction even by the Executive, for whatever reason, the Judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time as the Legislature acts to perform its role by enacting proper legislation to cover the field. In *Jolly George Varghese v. Bank of Cochin*,[50] the question was in case of a conflict between a provision of an International Treaty (such as Article 11 of the International Covenant on Civil and Political Rights) to which India is a party and a provision of a State Statute (such as Section 51 of the Code of Civil Procedure), it is the latter which shall prevail if the International Treaty in the question has neither been specifically adopted in the domestic field nor has gone under transformation.

In *Union of India v. Association for Democratic Reforms*,[51] the Supreme Court held that the foundation of a healthy democracy is to have well informed citizen voters. The reason to have right to information with regard to the antecedents of the candidate is that voter can judge & decide in whose favour he should cast his vote, which is considered as an important aspect of International Law which promotes fair and free elections. In *Sunil Batra v. Delhi Administration*,[52] it was observed by the Court that as a police officer is vested with power to restrain a person by handcuffing him, there is simultaneous restraint by the law on the police officer as to the exercise of the power. The handcuffs should not be used in routine manner. The minimum freedom of movement which even an under trial prisoner is entitled to under Article 19 of the Constitution, cannot be cut down cruelly by application of handcuffs or other hoops. This is in accordance with Universal Declaration on Human Rights, 1948.

In *Prem Shankar Shukla v. Delhi Administration*,[53] the Supreme Court emphasised that handcuffs should be used in the "rarest of the rare cases" and only when the person is 'desperate', 'rowdy' or one who was involved in a non-bailable offence. Krishna Iyer J., speaking for the Court held that 'to manacle man is more than to mortify him. It is to dehumanise him and, therefore, to violate his very personhood; too often using mask of dangerousness and security. The Supreme Court also opined that involvement of the prisoner in a score of criminal cases is no ground for handcuffing. Nor can a person be handcuffed

[49] AIR 1998 SC 889.
[50] AIR 1980 SC 470.
[51] (2002) 5 SCC 294: AIR 2002 SC 2112.
[52] AIR 1978 SC 1675.
[53] AIR 1980 SC 1535.

only because he is charged with a grave offence. It cannot be used only for the convenience of the escort party. The rules, regulations and manuals of various states authorising the police to use handcuffs have been struck down as violative of Article 14 of the Constitution of India. This opinion of the Supreme Court is in accordance with the Universal Declaration on Human Rights, 1948.

In *Sheela Barse v. Secretary, Children's Aid Society*,[54] the Supreme Court stressed on the role played by the International Instruments and highlight the fact that these Instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under an obligation to see that the message of the International Instruments is not allowed to be drowned. This Court and Counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effects to the principles contained in those International Instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law. The President can validly exercise his treaty-making power without an authorising legislation of the Parliament. This was clearly stated in *Union of India v. Manmull Jain*,[55] where the validity of the treaty relating to the transfer of the Chandannagore, a former French possession, without the prior parliamentary legislation was questioned. The Court observed that "Making a treaty is an executive act and not a legislative act. Legislation may be and is often required to give effect to the terms of a treaty.

In *Rai Sahib Ram Jawaya Kapur v. State of Punjab*,[56] the Supreme Court laid down that for the exercise of the executive power (of which treaty making is one), under Article 73, the Union legislation is not a pre-requisite. In *Jayanti Lal v. Rana*,[57] the above decision was taken into consideration by the Supreme Court. In *Nirmal Bose v. Union of India*,[58] emphasis was laid on Article 253 of the Constitution of India which talks about the Parliamentary power to implement in the whole or any part of the Indian territory, any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. In *Union of India v. Sukumar Sengupta*,[59] the Government of India leased in perpetuity "Teen Bigha" connecting Bangladesh enclaves of Dahagram and Angerpota, surrounded by Indian Territory, with Panbari Manza of Bangladesh in accordance with 1974 and 1982 agreements between India and Bangladesh, so as to enable Bangladesh to exercise her sovereignty over those enclaves. The Court held that the implementation of these agreements, as far as "Teen Bigha" was concerned, did not amount to cession of the said territory or transfer of sovereignty in respect of the same and did not require any constitutional amendment.

Legislations in connotation to International Law: International Treaties are enforceable in India when they are incorporated into domestic law by Parliamentary legislations, which can be seen in a number of legislations, such as:

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[54] AIR 1987 SC 656.
[55] AIR 1954 Cal. 615.
[56] AIR 1955 SC 549.
[57] AIR 1964 SC 648.
[58] AIR (1959) Cal. 606.
[59] AIR 1990 SC 1692.

- The Diplomatic Relations (Vienna Convention) Act, 1972.
- The SAARC Convention (Suppression of Terrorism) Act, 1993.
- The Territorial Water, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976.
- The Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981.
- The Chemical Weapons Convention Act, 2000.

Domestic Implementation of International Air Law in India: Globally, civil aviation is undergoing technological advances in several areas which have impact on agreements. A major supporting development for the aviation industry in most parts of the world has been the globalization and liberalization of economies and an increasingly active role for the private sector in the economic development of the countries. These economic changes brought about structural changes in civil aviation throughout the world and also in the approach towards bilateral agreements and open skies. In 1944, the international aviation community and representatives of various States organised a major international conference in Chicago to consider regulation of international air transport with a view to developing and ensuring safe secure, efficient, and economical international air transport services and to avoid arbitrary action of the States which could hinder such development. This conference culminated in signing of three major agreements, which may be described as follows:

(a) Convention on International Civil Aviation (The Chicago Convention):
The first agreement was the Chicago Convention to which presently 189 States, including India are signatories. This Convention established the International Civil Aviation Organisation (ICAO) and the primary basis for the regulation and development of international airports. The provisions of the Convention are binding on all the Contracting States. The ICAO has a General Assembly which meets at least every three years. It has also a permanent governing Council with 36 members of which India is a member.
(b) International Air Services Transit Agreement: This agreement provided for multilateral exchange of first two rights of freedom, namely, Overflight, i.e., the right to fly across the territory of other contracting States without landing. And Non traffic stop for scheduled air services among its contracting States, i.e., the right to land for non-traffic purposes.
As many as 122 States have ratified this agreement, including India.
(c) International Air Transport Agreement:
This agreement was intended to for grant of the right to five freedoms of air. This agreement was to have a far reaching effect in liberalising international air transport operation and grant of traffic rights. However, only 19 States could ratify this agreement, thus, this agreement is of no proper use in the international air transport regime. India is not a signatory to this agreement. Had this agreement been ratified by the States, the shape of international air transport would have been different from what it is today, as there would been no need of any bilateral or regional agreements. India today has a large civil aviation network. There are 122 airports in the country today, out of which 11 are international airports, which are maintained by the International Airport Authority of India, established in 1986.

There are a number of legislations that have come into practice on the pipeline of international air law norms, such as, the Airship Act, 1911, a pre-independence Act which in itself is a unique feature in the world, the Air Corporations (Transfer of Undertakings and

Repeal) Act, 1994 which came into existence after the repeal of the previous Airport Corporation Act, 1953, the Airport Authority Act, 1994, w.e.f. 1995, the Aircraft Rules, 1937, the Airport Infrastructure Policy, 1997, the Aviation Policy, 2000, to name a few. At the normative level, the Aircraft Act, 1934 created the fundamental legislative framework for manufacture, possession, use, operation, sale, import and export of aircraft in India while the Carriage By Air Act, 1972 implemented the Warsaw Convention, 1929 in India. These legislations have been supplemented by host of statutory rules and notifications covering different aspects of aircraft operations and several security related enactments like the Tokyo Convention Act, 1975 and the Anti Hijacking Act, 1982.

MODULE-II

INTERNATIONAL MARITIME LAW AND LAW OF THE SEA CONVENTION

MODULE-II - INTERNATIONAL MARITIME LAW AND LAW OF THE SEA CONVENTION

The adoption of the LOS Convention on 30 April 1982 marked a milestone in the development of the law of the sea. For the first time, there was a single, all-inclusive treaty governing all uses of the seas and oceans. Moreover, the Convention represented a revolution in the manner in which international law is made.

This chapter seeks to outline the way in which the law of the sea has developed over the past century. It focuses on law-making techniques, rather than substantive rules, tracing the shift from customary international law to the codification and progressive development of international law by international conferences. Finally, it will outline the procedures and processes utilized at UNCLOS III, identifying the significant characteristics of the Conference which distinguish it from more traditional law-making techniques. The trends of law-making in the law of the sea reflect wider changes in the international legal system itself and moves towards an increasing institutionalization of law-making techniques. However, the subject finds its origins in the practice of individual states which contributed to the gradual formation of customary international law through a process of claim and counter-claim.

The Origins of the Law of the Sea: The law of the sea as a discipline is not new, although its distinct and independent existence could be set at the first half of the XXth century, as the result of the different international efforts to codify it and to reach consensus on the basic rules that had emerged throughout the practice of states in the precedent five centuries, and rooted in the very beginning of human civilization. Avoiding the long journey of tracing back the very first expressions of regulatory norms for the conduct of human activities at sea, it is enough to state that the more important that the interaction with the sea became for an empire or human agglomeration, the more common the attempts to regulate the latter became, and those regulations went from simple assignment of competences to officers, to claim large areas of the sea under the exclusive control of that reign. Nevertheless, it is important to highlight some of those events as they contributed in one way or the other to the current status of development of the law of the sea.

From the Romans to the Colonial Empires : Although there are earlier examples of sea-related regulations made by various human groups predating the Roman Empire1 , most of them were more of the maritime law kind, regulating the relations of cargo owners with ship owners, offences committed onboard, compensation, liability, etc. Some others related to judicial decision and precedents that through the usages and customs of merchants rose as a branch of the Lex Mercatoria: the Lex Maritima. Leaving such expressions behind, scholars have discussed the value of the many references in the roman texts about the regime of the Mare Nostrum, however it must be reminded that such a semi-enclosed basin, was under the exclusive control of the Roman Empire, which meant that it was the sole user of the waters and resources, leaving aside any consideration of an international regime.

The real first instances where the regime of the seas came into discussion were the claims made by some realms, like Venice over the Adriatic Sea, or Genoa on the Ligurian Sea. That phenomenon spread around in Medieval Europe, as the situation in the Baltic Sea, Northern Sea, Irish Seas and other spaces which were claimed by the Swedish, Danish, English, etc. These claims usually were sustained in the ruler's commercial and military power, and demanded from third parties tolls and taxes by the mere transit through those waters. But once the small City-States declined in power and the larger empires arose, claims also grew in extension and complexity. The most famous example of the aforementioned is the Treaty of Tordesillas (1494), concluded between the sovereigns of Spain and Portugal, to modify the Pope's Bull Inter Cætera II (1493), which itself modified a previous treaty concluded by the former under the name of Alcáçovas-Toledo in 1479. By that Treaty and the previous agreements, both kingdoms literally divided the world in two, including the oceans and navigation routes. From that division, monopoly over the commerce and navigation to and from their subsequent colonies sprung, as well as the fierce reply from other nations by means of supporting buccaneers and pirates, or issuing letters of marque, as well as making a wide use of the institution of the privateer and the maritime prize.

Mare Liberum, Mare Clausum and the Territorial Sea
As a result of one incident involving the monopoly over the commerce around Johor exercised by the Portuguese, the vessel Santa Catarina was captured and brought back as prize by the Captain Jakob van Heemskerck to Dutch port. Before it was cleared as prize by court, a young lawyer by the name of Hugo Grotius was asked to deliver his opinion over the morality of the prize. As a product of that request he wrote a whole book under the title De Rebus Indicis, which was not published by him, but by an editor until 1868 by the title De Iure Prædare Commentarius.

However, chapter XII of such book was published under the title Mare Libervm Sive De Iure Qvod Batavis Competit Ad Indicana Commercia Dissertatio in 1608. Nowadays that short chapter is regarded as the beginnings of the Law of the Sea. A clear exercise of advocacy, Grotius argued in favor of the liberty of the seas and oceans based on principles and writings of famous authors that stretch from biblical texts to the very founders of international law like Francisco de Vitoria. That freedom covered the whole of the oceans, with a few very narrow exceptions: inlets, gulfs, inner seas, straits and what he defined as "…all the expanse of sea which is visible from the shore". Later on such phrase will be regarded as the predecessor of the Territorial Sea17. Unexpectedly, the most forceful replies came from the British, specifically from two authors: John Selden with his book Mare Clausum Seu De Dominio Maris Libri Duo18, which was published in 1618, and William Welwod in chapter XXVIII of his book An Abridgment of All Sea-Lawes (1613) and later on with the book De dominio maris juribusque ad dominium precipuè spectantibus assertio brevis ac methodica (1615). In any case, replies came from all over Europe, being the best crafted the one of the Portuguese Fray Serafín de Freitas De Justo Imperio Lusitanorum Asiatico, which earned the following description: "L'ouvrage est remarquable; l'auteur défend avec un rare talent une mauvaise cause".

The controversy that captured the mind of scholars centers in the opposing doctrines of Grotius and Selden and it is until now the most celebrated and quoted as giving birth to the adversarial forces that shaped modern Law of the Sea into a balance between the freedom of the seas and the power of coastal states. States (any form thereof) decided over that extension of sea that was under their control that Grotius had recognized as an exception to the freedom of the seas. The original dimension referred by Sassoferrato was two days of navigation, distance that amounts to a hundred miles (1478 meters), opinion that Gentili supported. Grotius, on the other hand, expounded in Mare Liberum, a choice for the reach of the human eye, capacity that according to what the practice evidences, was different from nation to nation, as it was calculated and claimed 21, 14 or 15 miles (England and France, Scotland, and The Netherlands correspondingly). However, the criterion that emerged triumphant was expressed by Grotius, in his most celebrated work De Iure Belli Ac Pacis, where he propounds that the width of that strip of sea should be restricted to the capacity of the coastal state to exercise an effective control over it. As a maxim, Grotius rule needed to be translated into practical terms, and it was finally made by another Dutch writer, Cornelius van Bynkershoek who, in his book De Dominio Maris Dissertatio (1703) states that such control necessarily depends on the effective range of the weapons of the kingdom: "…Terræ potestas finitur ubi finitur armorum vis". Although it is contested, most scholars attribute the determination of the range of the cannon shot in those times to the Italian Ferdinand Galiani, who measured it at three nautical miles or a league (although the Scandinavian Countries used a league of 4 miles or "German league"). States quickly established a practice on their maritime claims based on the "cannon shot rule" or similar. Treaties were concluded between powers paying due regard to it and as such it survived until the XXth Century.

Inevitably, claims were not uniform and sooner rather than later States found different reasons to justify different widths to claim as i.e. protection zones, neutrality zones, customs zones, fishing zones, and the list goes on. Many authors identify the foundations of the modern law of the sea in seventeenth century Europe. An early milestone for the subject was undoubtedly the publication in 1609 of *Mare Liberum*, the seminal thesis on the law of the sea by the Dutch jurist Hugo Grotius. Grotius famously argued that the seas are not susceptible to appropriation, thereby setting the foundations for the principle of the freedom of the seas. His thesis prompted other scholarly contributions advocating competing theories on the general principles of the law of the sea.

Although largely written by academics, these texts often provided support for the position of a particular state. Nevertheless, many of these seventeenth century scholars found much of their inspiration in natural law theories or principles of Roman law. From the beginning of the eighteenth century and the onset of the enlightenment period, natural law began to lose favor amongst European scholars. At this time, positivism became the dominant theory of international law. According to positivist theory, states could only be bound on the basis of their consent. A classic exposition of this theory is found in **The S. S. Lotus**, where the PCIJ held that, "the rules of law binding upon States … emanate from their own free will as expressed in conventions or by usages generally accepted as law."

Customary International Law of the Sea: How do these principles of customary international law apply in the case of the law of the sea? Can the LOS Convention be seen as codifying, crystallizing or creating new customary international law? What evidence of state practice and *opinio juris* would support such a conclusion? It is not intended to consider in detail which parts of the Convention are actually declaratory of customary international law;

this issue has been dealt with adequately in other works. The principal issue is how this process has taken place.
One argument is that the Convention cannot influence customary international law because it was adopted as a package deal. Advancing this view, Caminos and Molitor say that "if one assumes that the package deal was solidified at the time that the Convention was formally adopted, then those of its provisions that had not attained customary status by that date may have been precluded from ever doing so." They cite numerous declarations and statements made by participants at UNCLOS III to support their argument. On closer inspection, this approach does not seem to be satisfactory. Firstly, it does not explain how one identifies what the customary law of the sea is. Vasciannie notes that "it would … require States to deny the independent status of custom as a source of obligations in matters falling within the purview of the LOS Convention: as this requirement has no basis in law, it cannot be supported." More importantly, it is not an argument that has been accepted by states or by international courts and tribunals. Indeed, it may be this argument that a chamber of the ICJ had in mind when it said that certain provisions of the LOS Convention, "even if they in some respects bear the mark of compromise surrounding their adoption may nevertheless be regarded as consonant at present with general international law on the question."

Nor can it simply be claimed that the whole LOS Convention has become customary international law because it was adopted as a package deal. This argument ignores the subtleties of the customary law-making process and it comes too close to advocating the Convention as a form of international legislation. It should not be surprising that an instrument the length and complexity of the LOS Convention is not susceptible to a simple analysis in terms of its impact on customary international law. The preamble of the LOS Convention itself indicates that it is a "progressive development and codification of the law of the sea", although it makes no attempt to distinguish between which provisions are covered by these two processes.

Many states have noted the codifying effect of certain provisions on the Convention. The United Kingdom, for instance, stated at the closing session of UNCLOS III that "many of the Convention's provisions are a restatement or codification of existing conventional or customary international law and state practice." It is true that several parts of the Convention incorporate provisions found in the 1958 Conventions on the Law of the Sea without substantial change. Nevertheless, it is questionable whether the Convention is a codification in the traditional sense of the word. Any provisions that are found in previous instruments were incorporated because they continued to be politically acceptable, rather than because they reflected state practice. As noted by Cameroon in its final speech to UNCLOS III, "this Convention represents for the first time a truly universal law and must be seen as such. Any of its features that bear resemblance in content or form to any custom or agreements or treaties recognized by any region or sub-region or among maritime nations sharing common interests must be viewed as purely coincidental." Moreover, as noted above, the codification of a treaty can only be treated as a presumption which should be confirmed by an analysis of subsequent state practice and *opinio juris*.

Many other provisions in the Convention are without precedent in previous law or practice. Of these new norms, some have undoubtedly inspired subsequent state practice which has

contributed to their transition into customary international law. Indeed, state practice began to coalesce around certain rules before the whole regime had been finally agreed. At the same time, state practice in other areas is in fact quite diverse. An analysis of national legislation does not necessarily point to a consistent trend of state practice. Even those states which are formally bound by the Convention have been criticized for apparent divergences from the text of the treaty.
Several authors have concluded from this state of affairs that parts of the Convention have not made the transition into customary international law. For instance, Orrego Vicna says "while the basic elements of the regime of the territorial sea, including the twelve mile limit, can be considered to have been transformed into customary law, … not every detail of the Convention will have followed the same path."

In the context of the EEZ, Churchill and Lowe conclude that "it would seem that what is part of customary international law are the broad rights of coastal and other States enumerated in Articles 56 and 58 of the Convention. It is much more doubtful whether the detailed obligations in the articles relating to the exercise of coastal State jurisdiction over fisheries, pollution and research have passed or are likely quickly to pass into customary international law, partly because of a lack of claims embodying duties in the Convention, partly because there is some divergence between States practice and the Convention, and partly because some of the Conventional rules would not seem to have the 'fundamentally norm-creating character' necessary for the creation of a rule of customary international law." The logical conclusion of these arguments is that there are two distinct and substantively different regimes for the law of the sea, depending on whether a state is a party to the Convention or not.

An alternative view is that the Convention has in large part succeeded in crystallizing the law of the sea through the negotiating process at UNCLOS III. Discussing customary international law of the sea in the wake of the LOS Convention, Moore says "no description of … the customary international law-making process as applied to oceans law would be complete without noting that for the last seventeen years the UNCLOS process and patterns of practices have been a central feature in the customary international law-forming process." Sohn takes a similar view in saying "the interesting thing that happened in the Law of the Sea Conference was that a consensus emerged not only that those rules were necessary but that those rules have been accepted by states … if states generally agree that it has emerged, this is sufficient, for the practice of states is the main of source of international law." This approach implicitly asserts that the international community set out to create a universal regime at UNCLOS III. Is there sufficient evidence of opinio juris to this effect?

The universal application of the rules is supported in part by the text of the Convention itself. Most of the treaty is directed to "States" or "all States". It would have been perfectly possible for participants to indicate their intention to create a treaty regime by drafting the Convention in terms of "States Parties". Indeed, this approach was taken in relation to Parts XI, XV and XVII of the Convention. This differentiation in terminology may be important for the purposes of determining customary international law.

It is also relevant that large parts of the Convention are supported by a consensus of the international community. An analysis of what states say they consider to be the law indicates widespread support for most parts of the Convention as customary international law. The opinion of the United States, as a major maritime state and a nonparty to the Convention, is of particular significance. At the closing session of the Conference, the US asserted that "those parts of the Convention dealing with navigation and overflight and most other provisions of the Convention serve the interests of the international community. These texts reflect prevailing international practice. They also demonstrate that the Conference believed that it was articulating rules in most areas that reflect existing state of affairs – a state of affairs that we wished to preserve by enshrining these beneficial and desirable principles in treaty language." This statement on the status of the Convention was confirmed by subsequent declarations in 1983. Following his decision not to sign the Convention, President Reagan nevertheless proclaimed that "the United States is prepared to accept and act in accordance with the balance of interests relating to the traditional uses of the oceans – such as navigation and overflight.

In this respect, the United States will recognize the rights of other states in waters off their coasts, as reflected in the Convention, so long as rights and freedoms of the United States and others under international law are recognized by such coastal states." It would be reasonable to conclude from these statements that the US accepts the whole Convention framework on the navigational and related uses of the seas and oceans as a reflection of customary international law on the subject. Nor was the US alone in recognizing the substantial normative impact of the Convention. Records of UNCLOS III reveal concurring opinions of several states. Further support for the customary status of the Convention is found in the resolutions and declarations of other international institutions and conferences. Although formally non-binding, as noted in the previous section, these instruments may provide important means of identifying further state practice and *opinio juris communis*.

Of particular importance is the General Assembly which, through its annual resolutions on the law of the sea, asserts a substantial and formative influence in this area. It stands out from other international institutions because it was the organ which originally convened UNCLOS III. Furthermore, it is one of the few international institutions to include all states. The General Assembly has adopted a number of resolutions which support the Convention as a source of customary international law. For instance, the preamble of General Assembly Resolution 49/28, adopted in 1994, recognizes "the universal character of the Convention and the establishment through it of a legal order for the seas and oceans." Since then, the General Assembly has regularly proclaimed that "the Convention sets out the legal framework within which all activities in the oceans and the seas must be carried out." Year after year, the General Assembly call on states to harmonize their legislation with the provisions of the Convention. These statements are clear support for the idea that the LOS Convention creates universal law.

Also important are the activities of other international institutions working in the field of the law of the sea which have, at least implicitly, been operating within the framework of the LOS Convention since its conclusion. General Assembly Resolution 40/63, adopted on 10 December 1985, recognized that "all related activities within the United Nations system need to be implemented in a manner consistent with it." True to this statement, many of the UN organs and specialized agencies treat the LOS Convention as the starting point for all law of the sea issues, regardless of the fact that not all states are party to the Convention. For instance, the 2001 Anti-Fouling Convention and the 2004 Ballast Water Convention, both adopted under the auspices of the IMO, refer to the LOS Convention as customary international law.

How have courts and tribunals approached the customary international law of the sea since the conclusion of the LOS Convention? A number of judicial decisions on the law of the sea appear to attribute weight to the consensus underlying the Convention in the formation of customary international law. The most explicit reference to the negotiating techniques employed at UNCLOS III is found in the **Gulf of Maine Case**, where a Chamber of the Court confirmed that the fact that the LOS Convention had not entered into force "in no way detracts from the consensus reached on large portions of the instrument and, above all, cannot invalidate the observation that certain provisions of the Convention, concerning the continental shelf and the exclusive economic zone, which may, in fact, be relevant to the present case, were adopted without any objections." The Court thus considers that consensus is a critical factor in determining the impact of the Convention on customary international law.

At the same time, courts and tribunals have continued to pay lip-service to the practice of states in relation to the LOS Convention. Thus, in the **Continental Shelf Case between Libya Arab Jamahiriya and Malta**, after attributing weight to the adoption of the Convention by "an overwhelming majority of states", the Court held that the institution of the EEZ is also shown, "by the practice of states", to be part of customary international law. As noted above, it is true that many states had in fact proclaimed an EEZ whilst the negotiations at UNCLOS III were ongoing. Yet, as one author has said, "the most striking element in this reasoning is not that provisions of an international agreement are qualified as customary international law but that this was done without embarking upon any empirical research as to whether the respective rules were recognised as law and reflected in State practice."

In many contexts, state practice on the law of the sea is mixed, falling a long way short of being "widespread and virtually uniform". However, it is submitted that any inconsistent state practice must be assessed in light of the general acceptance of the Convention. Following the approach of the ICJ in **Nicaragua**, it is suggested that any contrary state practice is not supported by *opinio juris* in favor of rules which diverge from those found in the Convention. Oxman notes that "there is a fundamental difficulty in attempting to prove the continuing validity of rules of law that are directly at variance with those in the Convention." He continues, "it would be difficult to find sufficient uniform state practice and *opinio juris* today to demonstrate convincingly that there is some other generally accepted positive restraint of customary law substantially more restrictive than, or inconsistent with, the Conventional rule of restraint." That is not to say that customary international law was frozen at the time that the LOS Convention was concluded. The law can continue to evolve through consistent trends of state practice, either unilaterally or equally through institutional processes. However, such practice must also be supported by an indication that states are intending to create new rules of customary international law. At present, most of the Convention continues to be supported by the international community as the material source of the international law of the sea.

It is possible to conclude that the process of negotiating the LOS Convention had a substantial impact on the customary international law of the sea by forging and crystallizing a consensus on the general rules and principles that apply to most uses of the oceans. Although practice is not in rigorous conformity with the substance of the Convention, there is nevertheless clear evidence that states believe the Convention provides a repository of the prevailing rules and principles. The negotiation of the Convention has therefore succeeded in promoting a degree of certainty in the applicable law of the sea, mitigating the confusion and ambiguity that was prevalent at the time of the **Fisheries Jurisdiction Cases**.

It does not follow that all parts of the Convention have become customary international law. From the records of UNCLOS III, it is clear that the provisions on deep seabed mining were not supported by consensus and there was not sufficient *opinio juris* for their translation into customary international law. Applying the words of the ICJ from a different context, these provisions were the subject of "long continued hesitations". The industrialized states consistently raised objections to the regime for deep seabed mining both before and after the conclusion of the Convention. The objections were not to the principle of the deep seabed as the common heritage of mankind. States had managed to reach a consensus over this issue in 1970 and it is arguable that these broad principles have become custom. The same, however, is not true for the details of the institutional regime and the conditions attached to deep seabed mining which led the industrialized states to reject Part XI of the Convention. The verbal protests of the industrialized states presented at the Conference itself were further supplemented by state practice which conflicted with the detail of the treaty text. Several states, including the US, the UK, the Soviet Union, Germany, France and Italy, passed unilateral legislation permitting their nationals to undertake mining. Further to these unilateral acts, Germany, France, the US and the US entered into an Agreement concerning Interim Arrangements relating to Polymetallic Nodules of the Deep Seabed in 1982. The objections and contrary state practice of these important states were fatal for the future of Part XI out-with the treaty framework.

These objections to the deep seabed mining regime were overcome through the negotiation of the Part XI Agreement. Yet, there are other problems for the transition of Part XI into customary international law. In order to have this effect, a provision must be of a "fundamentally norm creating character." As Jennings explains, "a treaty is not capable of becoming a general rule of custom in a form which belongs essentially to the particular treaty context. This is without prejudice to whether that rule, in abstracto or in another context, would be capable of becoming a rule of general law." The provisions on deep seabed mining, however, are specifically directed at States Parties to the Convention. In addition, Part XI is largely concerned with creating and maintaining an international institution which can only occur through the conclusion of a treaty. These considerations also apply to the provisions on dispute settlement. Many provisions in Part XV are also addressed to States Parties and they are similarly concerned with the creation of institutional procedures.

These important provisions can therefore only be invoked as treaty provisions. Ultimately, the substantial influence of the LOS Convention on customary international law does not completely mitigate the need for states to consent to be bound by the Convention if it is to be fully effective. This explains why the General Assembly continues to call on all states that have not done so to become a party to the LOS Convention.

Furthermore, the traditional conception of customary international law is based on consistent trends of state practice and it was to such practice that courts, tribunals and other decision-makers had to turn in order to determine the substance of the law. At this time, few international courts and tribunals existed and maritime cases were chiefly dealt with by national admiralty courts. Although they were national institutions, the law applied by these courts was largely of an international character. Sir Charles Hedges, a seventeenth century Judge of the English High Court of Admiralty, made this clear when he said, "the Court of Admiralty is a Court of Justice, and the judge who is sworn to administer it is as much obliged to observe the laws of nations as the Judges of the Courts of Westminster are bound to proceed according to the statutes and the common law." The admiralty courts drew on a variety of sources, including ancient codes of maritime law, as well as the contemporary practices of states in order to determine customary international law.

For instance, in **The Paquete Habana**, the US Supreme Court traced the history of prize jurisdiction from 1403 onwards, examining several international treaties, the work of scholars, and prize court decisions of various countries. The task of courts in determining the content of the customary international law of the sea was by no means straightforward. Judges were faced with a mass of evidence, often contradictory, as to what the prevailing customs were. Needless to say, the reliance on the claims and counter-claims of states left much to be desired in terms of the precise formulation of rules.

The Paquete Habana again provides a good example. In that case, the US Supreme Court was faced with the question whether there was a rule of international law prohibiting small coastal fishing vessels which were flying the flag of an enemy state from being captured as prize. Although the justices seemingly agreed on the material sources which contribute to the formation of customary international law, they profoundly disagreed on their assessments of the prevailing state practice. The majority of the Court concluded that the available evidence supported the existence of an exemption for small coastal fishing vessels. A minority of the Court, led by Chief Justice Fuller, dissented, arguing that the practice was inconclusive and "in truth, the exemption of fishing craft is essentially an act of grace, and not a matter of right and it is extended or denied as the exigency is believed to demand."

A similar division over the conclusions to be drawn from state practice can be seen in **The S.S. Lotus**. In a decision adopted by the casting vote of the President, the majority of the Court denied the existence of a principle of international law prohibiting Turkey from prosecuting the Master of a French vessel which had collided with a Turkish ship on the high seas. The majority reasoned that the applicable rules of customary international law "must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear." Yet, the evidence of state practice was itself ambiguous and there were precedents pointing in both directions. In the words of Judge Weiss, the record of the case demonstrates "controversial doctrine and contradictory judicial decisions…invoked by both parties." The actual result of the case largely turns on the assumption made by the majority that states may exercise jurisdiction unless there is a positive rule which prohibits such action. As France was not able to adduce sufficient evidence of such a rule, its arguments failed. The traditional techniques of deducing customary international law also accorded a significant role to powerful maritime states.

In **The Scotia**, decided by the US Supreme Court in 1871, it was said that "many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of a single state, which were first of limited effect, but which, when generally accepted, became universal obligations." The Court described how the Merchant Shipping Regulations promulgated by the British Government in January 1863 became generally accepted and applied by all the major maritime states of the world and therefore formed part of the international law of the sea.

It can be seen from these few illustrations that traditional conceptions of customary international law, as a means of regulating the activities of a large number of states, suffer from a number of weaknesses. Firstly, divergences in state practice mean that it is often difficult to identify the applicable law at any one time. The more states there are, the more difficult the process. Perhaps one of the greatest weaknesses of custom as a method of law-making is the uncertainty which accompanies the promulgation of new norms. Any evolution in an existing rule requires a breach of that rule. Therefore, until a stable pattern of state practice has emerged, it is impossible to predict the legality of a state's actions.

It has also been suggested that customary international law is unsuitable for the promulgation of detailed rules or regulations in technical fields. Thus, Oxman says that "because it is so difficult to prove a level of state practice and *opinio juris* beyond generalities sometimes barely distinguishable from mere labels, customary international law is a much blunter instrument than written law." However, cases such as **The Scotia** would suggest that this assumption is not always valid. What this case demonstrates is the way in which written texts can inspire and influence the formation of customary international law. This fact has major implications for modern law-making techniques. It can be expected that a number of matters or concepts will be argued to be customary law by various states.

Among the concepts that are important in connection with custom are:

1. The maximum geographical extent of the territorial sea and the scope of coastal authority within;
2. The principles governing the delimitation of the territorial sea from baselines;
3. The specific principles relevant for delimiting archipelagic baselines;
4. The law governing the creation of historic waters;
5. The principles applicable to archipelagic waters, including those benefiting neighboring states;
6. Resource rights in the EEZ and the scope of authority over foreign activities in the EEZ; and

7. The limits of the continental shelf and the scope of authority over the shelf.

The Continental Shelf: Despite the disclaimers by some delegates against the effect upon them of the 1958 Law of the Sea Conventions entered into before they became independent, there seems to be general acceptance of the provisions contained in at least one of these-the 1958 Convention on the Continental Shelf. As of January 1, 1976 this convention had been ratified by 15 countries that in 1958 were under colonial rule.' Furthermore, the International Court of Justice has by dictum accepted certain basic rules laid down in the Convention as declaratory of existing customary law.

The revised single negotiating text (RSNT) embodies much of the Continental Shelf Convention. It fixes the outer boundary of the Continental Shelf at 200 nautical miles from the baseline used to measure the territorial sea plus an area beyond "to the outer edge of the continental margin." (Part II, Art. 64-74) Views differ as to the method of drawing the line between States facing one another at a distance of less than 200 miles, also as to lateral boundaries between neighbors.
There seems to be general acquiescence in a shelf 200 miles wide but there is opposition, particularly by the landlocked and so-called geographically disadvantaged (e.g. shelf-locked) States, to inclusion of the area beyond that limit. To accommodate the opponents among the lesser developed States, the RSNT calls for distribution amongst them of contributions to be made "in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles" (Part II, Art. 70, par. 1).

One may conclude that there is general recognition that under emerging customary law coastal states now have an exclusive right to control exploitation of the mineral resources of the seabed adjacent to their coasts seaward at least 200 nautical miles from the baseline for measuring their territorial seas and beyond to the 200 meter isopath in cases of exceptionally shallow shelves.

Territorial Sea: The First and Second LOS Conferences held in 1958 and 1960 failed to agree on the width of the territorial sea but did agree on regulations to govern the area. 8 As of January 1, 1976, 44 countries had ratified the Convention on the Territorial Sea and Contiguous Zone. Of these, 13 were under colonial rule in 1958 and 1960. There is widespread acceptance of the SNT on the width of the territorial sea. This reads: Article 2 - Breadth of the territorial sea: Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines in accordance with the present Convention.

Some States have asserted a right to a broader territorial sea but this has not been generally recognized. With the general acceptance of 12 miles as the maximum, the resistance heretofore posed against recognition of a wider territorial sea will doubtless continue and probably stiffen. Those countries that have declared for a wider territorial sea will as a matter of pride probably not back down but they also will probably not enforce restrictions that go beyond those permitted on the high seas beyond the twelve mile boundary.

Contiguous Zone: The 1958 Convention on the Territorial Sea and Contiguous Zone provided for a zone "not to extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured" for enforcement of “customs, fiscal, immigration or sanitary regulations within its territory or territorial sea” (Article 24). This was carried over into the RSNT but widened to 24 miles (Part II, Article 32). It is unlikely that any State will contest the exercise by a coastal State of control in the widened area for enforcement of its laws.

Free Transit through Straits: It has already been mentioned that the importance the delegations of the United States and other maritime countries attached to the continued right to free transit through straits under the three-mile territorial sea rule has encountered opposition by some countries themselves the beneficiaries of open straits. It was also suggested that this opposition might have been tactical in order to bargain for concessions on other issues.

The leading maritime states will now most likely refuse to recognize any extension of the territorial seas where the effect would be to close international straits now open to free transit by ships and overflight by aircraft. Other countries will probably support this position tacitly if not expressly. Yet, some strait States, Spain and Algeria, for instance, may refuse to back down from the position in opposition taken by these delegations. A confrontation may, however, be avoided by scrupulous observance by ships in transit of rules set out in, or regulations issued in accordance with, RSNT, Part II. While under the text "States bordering straits may not hamper transit passage," they may make laws regarding safety of navigation, the regulation of marine traffic, and the prevention (a) of pollution by enforcing international regulations, (b) of fishing, and (c) of loading or unloading goods or passengers in contravention of their customs and immigration laws (Part II, Arts. 40 and 42). It seems most unlikely that when reality replaces rhetoric many States would regard their own self-interest as calling for opposition to a position supported by strong arguments of law and policy advanced by the leading maritime States.

Economic Zone: The 1945 Proclamation by President Truman asserting the right of the United States to exploit the mineral resources of the continental shelf beyond the territorial sea led to comparable assertions by other states of a right to exploit not only the mineral seabed resources but the living resources off their shores. A significant number of States have claimed the right to regulate exploitation of living and non-living resources as far seaward as 200 miles.The United States and other countries have, until recently, resisted such claims. They are now faced with the argument that if the importance to a coastal State of the natural resources of the adjacent seabed mineral resources conferred the right to preclude others from exploiting them, the importance to another coastal State of the living resources in the super-adjacent waters confers a comparable right.

The differences remained irreconcilable so long as the assertion of such a right was confused with an extension of the territorial sea beyond a twelve-mile limit. While some States continue to assert a territorial sea right beyond twelve miles, the differences between most of the coastal States have been reconciled by acceptance of the concept of a 200-mile zone of exclusive economic rights but not exclusive navigational or overflight rights. There remains an unreconciled doctrinal difference over the so-called residual rights. Put simply, the position of the United States and most maritime and landlocked countries is that the coastal State will have only those economic rights spelled out in the convention; all States will continue to enjoy the high seas rights not expressly limited. The other group contends that the coastal States shall have all rights not expressly limited by the Convention. Without a Convention the extent of the rights in the economic zone must be left to the traditional process of assertion and response on which customary international law grows. There is, however, already a general consensus as to a 200-mile width of the economic zone and the right of the coastal State to regulate fishing of certain species in that zone. Coastal State regulation of fishing as to certain species remains to be resolved.

The High Seas: The sharpest differences between the delegations were over the high seas character of the area in the Economic Zone just discussed and over the freedom to explore and exploit the non-living as well as the living resources of the high seas. A group of 77 developing States (calling itself the Group of 77), now grown to over 100 States, many of which were under colonial rule in 1958, have united behind spokesmen who assert that the non-living resources of the high seas seabed (deep seabed) may be exploited only after, and in accordance with, a convention acceptable to that Group.

As late as last September, in the closing debate of the fifth session of the LOS Conference, spokesmen for the Group of 77 declared they were not bound by the 1958 Convention on the High Seas or the customary law then existing and would not accept a convention that recognized the freedom to explore and exploit the mineral resources of the high seas. Spokesmen for leading nations not members of the Group of 77 made clear that they would not accept a convention that took away that freedom. For the foreseeable future this means that exploration and exploitation must be conducted under the principles of customary law and, for the parties to the High Seas Convention, the rules of conventional law it contains.

Whatever rights States and their nationals have to exploit the resources of the high seas and deep seabed, it is clear that each in the exercise of its rights must respect the equal rights of others. It is also clear, though not universally conceded, that under customary law as understood in 1958 the right to explore and exploit the mineral resources of the deep seabed was one of the so-called freedoms of the seas. The Reports of the International Law Commission state this unequivocally.

What was not clear in 1958 and remains debatable today is whether the right to exploit along with others having the same right would be followed up with a right by reason of occupation or long usage to exclude others. There had in 1958 been insufficient activity in exploiting the resources of the seabed to give rise to regulations covering the exercise of that right. This explains why the 1956 Report of the International Law Commission declares that the right to explore and exploit the resources was not listed in what became Article 2 of the High Seas Convention. It was, however, clearly taken into account in the phrase "inter alia" which precedes the listing in Article 2 of the Convention expression that the four freedoms comprised in the Freedom of the seas.

Among those members of the Group of 77 that were under colonial rule in 1958 and have not since adhered to the 1958 Convention on the Law of the Sea, some have contended that customary international law which developed before they became independent is not binding upon them. Whatever merit this has as to their rights and duties it has little bearing on the rights and duties of others as between themselves. Exploration and exploitation of the seabed beyond coastal-state jurisdiction has, of course, been practiced for centuries. Currently, the deep seabed is being explored and nodules are being reduced to possession by nationals of many countries.

Right of innocent and transit passage: In general, no one disputes that innocent passage is provided for by customary international law in the territorial sea. This has been the concept that bridges the gap between coastal state sovereignty within the territorial sea and the notion that freedom of navigation pertains to the ocean beyond. The right to use the territorial sea for passage is accepted so long as it is innocent. A coastal state may protect its overall interests by preventing non-innocent passage and regulating innocent passage. The difficulty with this orderly picture of accepted custom is in determining how to regulate innocent passage without hampering or impeding it. The recently adopted strong emphasis and concern over the protection of the marine environment especially raises a question about how coastal states can achieve realistic protection by regulation of passage in its territorial sea.

The increased traffic in movement of hazardous materials is perceived by some states to justify special measures to avoid potential harm. Can the coastal state, in addition to requiring the use of special sea lanes, also require notice and posting of bond by such vessels? This problem has not yet been played out but it seems clear that further clarification of coastal and navigation interests is definitely required.

Attempts at Codification of the Law of the Sea: From the beginning of the twentieth century, there was an increasing interest in the idea of codifying international law. It was widely believed at the time that the codification of international law on major topics would contribute to the maintenance of international peace and security. It was thought that the reduction of rules to writing would promote clarity and certainty in the applicable law. The Second Hague Peace Conference had adopted a resolution which called for the codification of topics which were "ripe for embodiment in international regulation", but the outbreak of the First World War had prevented this initiative from being further pursued. Nevertheless, Rosenne suggests "that recommendation is the seed which was ultimately to burgeon forth, first as the Committee of Experts for the Progressive Codification of International Law, and later as the International Law Commission of the United Nations."

Amongst the first topics considered suitable and necessary to codify was the law of the sea. Specific aspects of the law of the sea had already been the subject of treaty negotiations. The 1856 Declaration of Paris sought to establish international rules on naval warfare, neutrality, blockades and privateering. This aspect of the law of the sea was further developed by several treaties adopted at the two Hague Peace Conferences in 1899 and 1907 and subsequently at the International Naval Conference held in London in 1909. Non-military aspects of the law of the sea, however, were neglected until after the First World War. The 1920s saw several codes on the law of the sea produced by private institutions and individuals, including the International Law Association, the Institut de Droit International, the American Institute of International Law, the German Society for International Law, the Japanese Society for International Law, and Harvard Law School. These private initiatives were swiftly followed by governmental attempts at codification.

In 1924 the Council of the League of Nations initiated a process for the codification of international law. To reflect the international character of the project, it was to be carried out by “a body representing the main forms of civilization and the principal legal systems of the world.” The Council duly established a Committee of Experts for the Progressive Codification of International Law. Participation in the Committee was not restricted to individuals from member states of the League of Nations. This Committee was charged with investigating which topics or fields of law were suitable for codification. The initial list of topics for potential codification considered by the Committee included the status of territorial waters, the status of government ships engaged in commerce, the suppression of piracy, and the exploitation of the products of the sea. Following a series of debates, the Committee of Experts narrowed down the list to those topics of international law which it considered were “sufficiently ripe” for codification by a general international conference. Of the above topics, only the subject of territorial waters was considered to meet this criterion.

In response to this recommendation, the League convened the 1930 Hague Codification Conference, which was attended by delegates from forty-seven governments, including states which were not members of the League. The issue of territorial waters was considered by the Second Committee of the Conference. Despite prolonged discussions, delegates failed to agree a treaty on territorial waters, although they did produce a set of draft articles that were subsequently circulated to governments. This text itself did not create legal obligations. Nevertheless, one commentary explains that it “later exerted influence to the extent that Governments accepted them as a statement of existing international law.” The draft articles once again demonstrate the influence that a written text can have on the formation of customary international law. The 1930 Codification Conference was to be the only major multilateral attempt to codify international law during the lifetime of the League whose attention was consumed with more fundamental political crises during the 1930s. Although the Conference had failed to produce substantial results, many lessons were learned which would subsequently influence future attempts at codification.

The United Nations: A New Era of Codification: The codification of international law was to become a much more prominent and permanent feature of the international system following the Second World War. The International Law Commission was established by the UN General Assembly in 1947 for the purposes of advancing the codification and progressive development of international law. The ILC is composed of thirty-four independent experts on international law appointed by the General Assembly. At its first meeting in 1949, the Commission identified a provisional list of fourteen topics as suitable for codification. This list included the regime of high seas and the regime of territorial seas. It decided to prioritize the codification of the regime of the high seas and J.P.A. François was appointed as special rapporteur on the subject. Following a recommendation from the General Assembly, the Commission started work on the regime of the territorial sea at the third session of the Commission in 1951 and François was appointed as special rapporteur on this topic as well. The Commission proceeded with these two topics simultaneously, albeit continuing to treat them as separate subjects on its work programme. In furtherance of its work on the high seas, the Commission submitted draft articles on the continental shelf and fisheries to the General Assembly in 1953. The Commission recommended that the General Assembly adopt the articles on the continental shelf in the form of a resolution. In addition, the Commission proposed that the articles on fisheries should be forwarded to the FAO for adoption.

The General Assembly, however, refused. Citing “the physical, as well as the juridical, linking of the problems related to the high seas, territorial waters, contiguous zones, the continental shelf and the superjacent waters”, the General Assembly resolved that “it would not deal with any aspect of the regime of the high seas or of the regime of territorial waters until all problems involved has been studied by the Commission and reported by it to the General Assembly.” In this way, the General Assembly made it clear that it preferred a comprehensive and coherent approach to codifying the law of the sea. Following this recommendation, the ILC duly submitted a single set of draft articles on the law of the sea to the General Assembly in 1956 along with a detailed set of commentaries.

The draft articles formed the basis for discussions at UNCLOS I which was convened by the General Assembly in order to “examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments that the conference may deem appropriate.” The mandate of the conference is important in a number of respects. Firstly, the General Assembly recognized that the law of the sea raised issues of a political or technical nature, as well as pure questions of law. Secondly, the General Assembly, in a significant u-turn, also abandoned its determination to treat the law of the sea as a coherent whole. The mandate foresaw the adoption of more than one international convention on the subject. Indeed, the General Assembly left open the question of whether the outcome of the Conference would be legally binding at all by indicating that the Conference could adopt other such instruments that it deemed appropriate. UNCLOS I took place in Geneva in 1958. In accordance with Resolution 1105 (XI), an invitation was sent to all Members of the United Nations.

The final list of participants included eighty-six states as well as observers from seven specialized agencies. Like the previous attempt at codification through the League of Nations, it was recognized that the rules of the law of the sea should be developed with the involvement of as many states as possible. Four principal treaties were negotiated, dealing with the territorial sea and the contiguous zone, the continental shelf, the high seas and fishing. The Conference also adopted an optional protocol on dispute settlement. All substantive decisions of the Conference were subject to a vote of a two-thirds majority. Although the draft articles had been prepared by the ILC as a single and coherent text, the four substantive treaties were not linked in any way, so that a state could choose which instruments it would accept. Thus, the balance of rights and obligations crafted by the Commission was weakened at UNCLOS I. As O’Connell notes “that opened up the possibility for States to adhere to parts only of what was intended to be an over-all scheme, and so distortions and exaggerations became inevitable.” Only those states bound by all four Conventions are subject to the package as it was intended to apply.

Even then, states could make reservations to many of the articles upon ratification. Nevertheless, UNCLOS I had taken a significant step forward. Where there had been previously only customary rules, there were now four substantive treaties on the law of the sea. The success of UNCLOS I was marred by the failure to solve some small, yet highly significant issues, in particular the width of the territorial sea and the important question of fishing rights. A resolution was adopted requesting the General Assembly to study the advisability of convening a second international conference, which it did in 1960. The mandate of UNCLOS II was to fill in the gaps in the legal framework left by the first conference. It was not intended to consider new issues or reconsider issues that had been concluded at UNCLOS I. However, the eighty-eight states which attended UNCLOS II were not able to agree on an acceptable formula. The Conference was only able to conclude that "the development of international law affecting fishing may lead to changes in practices and requirements of many states." Thus the issues were left to the vagaries and uncertainties of customary international law.

The Conferences of the XXth Century

The Hague Conference of 1930: By the 1920's the League of Nations identified that the lack of uniformity and the growing claims related to maritime territories presented huge risks to peace and stability. Following the premise that codification of International Law would help avoid conflict, preparatory works commenced around 1924 and called for a conference for the progressive codification of international law in 1930, in The Hague. Together with subjects like problems of nationality and State responsibility, the issue of territorial waters was taken into account and finally dealt by the second commission of the conference. Due to the strong fragmentation of the 48 participating States' position, no agreement was reached with regards to the width of the territorial sea. Nevertheless, the above evidenced that the so-called "three mile rule" was not a uniform rule at all. It is under these conditions that the world entered the II World War.

Truman's Effect The 28th of September 1945, President Truman published Presidential Proclaims 2667 & 2668, the first one dealing with the Continental Shelf and the second one with offshore fishing resources. The effect of the combined interpretation of both proclaims by other states possibly was the main thrust for the change that the Law of the Sea experienced in the next decade. Through the first one of the proclaims, President Truman made a claim over the offshore subsoil mineral resources beyond the three nautical miles that the United States of America traditionally claimed as Territorial Sea. This was seen as a sovereignty claim over the whole of the continental shelf itself (and not the resources) by, especially, the Latin American countries and led to a wave of claims which were inaugurated by Mexico (1945) and followed by Argentina & Panama (1946) Costa Rica (1948), Honduras & Brazil (1950), Nicaragua (1961) and Uruguay (1969), all based on the US assertion.

It is also worth highlighting the claims made by the South Pacific countries in 1947, namely the Chilean and Peruvian claims, which reached the 200 nautical miles expressly and by 1952 gave way to the first treaty around that number, the South Pacific Permanent Commission (or CPPS), being the main precedent to the Exclusive Economic Zone figure that arose in the United Nations Convention on the Law of the Sea (UNCLOS) in 1982. Several other national claims were subsequently made, again, concentrating in Latin America. A number of important regional conferences dealt with the issues of the different maritime claims regarding the Territorial Sea and the Continental Shelf, as well as the emerging "Epicontinental Sea" or "patrimonial sea."

The 1958 United Nations Conference After the failed attempt of the Hague Conference of 1930 to regulate the "territorial waters" question, and the failure of the League of Nations itself, it was to the United Nations to pick up the unfinished business of its predecessor, particularly in the view of the massive number of uneven claims that arose after 1945. In compliance with Article 13 of the United Nations Charter, the International Law Commission (ILC) was set up in 1947 and by 1949 a list of issues to be dealt with was in place. Without delay, the issues of the Territorial Sea and the High Seas were identified to be priorities and as such work was done; this concluded in 1956, when a draft containing 73 articles with corresponding comments was released. A diplomatic conference was convened and gathered from the 24th of February to the 27th of April 1958 in Geneva, to discuss the draft articles prepared by the ILC.

The result of that meeting were four conventions on: a) the Territorial Sea and Contiguous Zone, b) the Continental Shelf, c) the High Seas, d) fishing and conservation of the living resources of the High Seas, and the Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes. Most of the contents of the four conventions were a mere codification of the current evolution of the Law of the Sea so far. Despite the success in bringing uniformity in many aspects of the law (which has outlasted the conventions themselves) no agreement was reached in the important issue of the breadth of the Territorial Sea. Another major failure that has been attributed to the Conference was its fractioned approach by concluding separate conventions instead of a single holistic instrument as envisaged by the ILC. That situation allowed states to benefit of acceding only to one or more of the Geneva Conventions and exclude those that were against their interest, the settlement of disputes being the most compromised section. However, the Optional Protocol did enter into force in 1962 and has 38 parties. It provides compulsory jurisdiction to the International Court of Justice with regards to any of the four Geneva Conventions (with exception to Articles 4-8 of the Convention on Fishing and Conservation of the Living Resources of the High Seas, to which Articles 9-12 are applicable). The protocol also provides for the option of resorting to Arbitration (Article III) or Conciliation (IV) within the period of two months after the notification of the existence of a dispute to the other party.

Success or Failure? The Impact of the 1958 Conventions: The overall reception of the 1958 Conventions was underwhelming. The High Seas Convention, with 62 ratifications, was the most widely accepted of the four treaties. The Fisheries Convention, on the other hand, only managed to attract 37 contracting parties. However, it is certainly not true that they had no normative impact. Many of the rules in the 1958 Conventions would be reproduced in some form in the 1982 LOS Convention. Moreover, some of the proposals on which states could not come to an agreement would have an impact on the formation of customary international law. At the same time, some of the more controversial provisions of the 1958 Conventions would be the catalyst for a more wide-ranging reformulation of the law of the sea in the following decades. During the 1960s, the process of decolonization saw the creation of several new states, many at lower levels of development. Some of these newly independent states were demanding changes in the law to take into account their special interests. As O'Connell notes, some states, "inspired more by emotion than legal analysis, purported to find their hands tied by the Convention in the interests of the great powers, and were disposed to overthrow the whole Geneva system as having been contrived without their consent and against their interests."

In this way, the law of the sea became caught up with more general demands for a New International Economic Order which was being promoted by developing countries within the United Nations at that time. Although the 1958 Conventions did contain amendment clauses, no attempts were made to invoke these procedures in order to make changes to the legal regime. The relatively low number of contracting parties to these instruments may have contributed to the failure to pursue this option. Moreover, many states had in mind a more revolutionary change to the legal regime, rather than tinkering with what was already there. In the meantime, the widely perceived weaknesses of the 1958 regime led to a return to unilateralism as a means of asserting legal claims.

State practice continued to develop to the degree that the ICJ held in the **Fisheries Jurisdiction Cases** that coastal states could claim a twelve mile exclusive fisheries zone, a "*tertium genus* between the territorial sea and the high seas", as well as preferential fishing rights on the high seas, despite the principle of freedom of fishing as found in the 1958 High Seas Convention. By the time the judgment was rendered in the Fisheries Jurisdiction Cases, negotiations at UNCLOS III were already underway. Indeed, the Court took note of these multilateral law-making activities. The Court recognized that it could not render judgment sub specie *legis ferendae* and it clearly acknowledged the advantages of negotiated outcomes at the international level.

The 1960 United Nations Conference : United Nations convened a new diplomatic conference on the Law of the Sea, again in Geneva, from 17th of March to the 26 of April 1960, which worked with no preparatory background and in a single committee. Being its main goal to find consensus with regards to the breadth of the Territorial Sea and now the Fisheries claims, the Conference was again a failure, although the proposal of adopting a 6 mile Territorial Sea plus a 6 mile Fishing Zone ended up just one vote away of being approved.

The Third United Nations Conference on the Law of the Sea: The Conference was convened for a first session in 1973 in New York. The work begun on the basis of a preliminary list of subjects prepared by the preparatory commission, rendering the exercise a creative one, and not one of discussion and approval of a previously arranged draft, as was the case of the 1958 Conference. The Conference worked on four commissions that dealt separately with all issues now included in the UNCLOS.

The fourth of those commissions was the one dealing with the settlement of disputes provisions. The mechanism to take decisions was agreed on a three tier process: firstly, consensus, secondly, a period of reflection, and thirdly, a qualified majority vote. Only once there was a need to recur to vote and it was on the final approval of the Convention itself. The Conference met from 1973 until 1982 and most of the years it met twice, making the conference the longest diplomatic effort to conclude an international instrument. Finally, the Conference adopted a text composed by 320 articles divided in 17 Parts, complemented by 9 Annexes (88 Articles) and 4 Resolutions all which form an integral part of the Convention, without the general possibility to make reservations, as the text was devised as a "package deal" due to the serious exercise of balance of compromises made by the different negotiating states.

United Nations Convention on Law of the Seas, III: In 1967, the Maltese ambassador Arvid Pardo addressed the First Committee of the General Assembly, demanding urgent action to ensure the peaceful development of the law of the sea and in particular the legal regime relating to the deep seabed. In response to this speech, the General Assembly created the Committee on the Peaceful Uses of the Seabed whose initial mandate was to prepare a survey of state practice on the deep sea-bed and the ocean floor, an account of the scientific, technical, economic, legal and other aspects of the issue, and an indication of practical means of promoting international co-operation in the exploration, conservation and exploitation of the ocean floor. The work of the Committee led to the adoption by the General Assembly of the 1970 Declaration of Deep Seabed Principles.

In the words of one author, these principles "obviously filled a void created by the rampant technological revolution in this rampant area." The promulgation of the Declaration differed drastically from the process of codification because the Committee was faced with completely new issues where there was no settled state practice. Formally, the Declaration was nonbinding, although the principles therein were to have a significant influence on the future LOS Convention and international law generally. Indeed, the Declaration was not an end in itself and it foresaw the establishment of an international regime to implement the principles in a more concrete form.

In 1970, the General Assembly also decided to convene another conference on the law of the sea. The mandate of the Conference was not limited to the deep seabed. UNCLOS III was instructed to "adopt a convention dealing with all matters relating to the law of the sea." Thereby, the General Assembly sanctioned the reform of the whole law of the sea in order to address the concerns of states over the 1958 Conventions. According to one author, "nothing was now to be taken for granted; everything was to be looked at again in the light of new political, economic and technological realities." UNCLOS III was described by one of its participants as "the most comprehensive political and legislative work undertaken by the United Nations in its 38 years of existence." Clearly there was a lot at stake for all states concerned and UNCLOS III was "as much a daring venture of international politics and international relations as an exercise in international law." The politically charged atmosphere also affected the methods of law-making to be adopted by UNCLOS III. From the start, it was a drastically different process from previous attempts at codifying the law of the sea. The politicization of the law of the sea is partially reflected in the preparatory process of UNCLOS III.

In contrast to UNCLOS I, the task of preparing for the conference was not delegated to the International Law Commission. It was thought the balancing of competing state interests could not be undertaken by a body of independent legal experts. As one commentator says, "states were simply unwilling to leave the promotion of their vital interests to the International Law Commission because they reasoned that only governmental representatives could effectively formulate solutions." In particular, developing countries doubted the representativeness of the Commission and they had serious reservations about its conservative approach to codification. Instead, the preparatory work for the Conference was entrusted to the Seabed Committee, whose membership was increased in size to ninety-one members for this purpose.

General Assembly Resolution 2750 (XXV) mandated the Committee to prepare draft treaty articles embodying the international regime for the deep seabed area and resources of the seabed beyond the limits of national jurisdiction as well as a comprehensive list of subjects and issues relating to the law of the sea to be dealt with by the Conference, including draft articles on such subjects and issues. The Seabed Committee met for six sessions between 1971 and 1973. Its final report consisted of six volumes of proposals and counter-proposals submitted by states, as well as a number of studies prepared by the UN Secretariat at the behest of the Committee. Crucially, it failed to produce a draft treaty text. A further reflection of the political character of UNCLOS III was the fact that oversight of the Conference was undertaken by the First (Political) Committee of the UN General Assembly, rather than the Sixth (Legal) Committee. Many commentators have stressed the enormity of the task with which UNCLOS III was charged.

It is true that the scope of the issues had grown since the first serious attempt at codification through the International Law Commission. Deep seabed mining, the marine environment and the transfer of marine technology were now key issues in the discussions. More significantly, perhaps, the number of states involved in the negotiations had dramatically increased. Whereas 86 states had attended the 1958 Conference, over 160 states participated at various stages of UNCLOS III. Resolution 3067 (XXVIII) explicitly called for universality of participation at the Conference and it mandated the UN Secretary General to invite all Members States of the United Nations or its specialized agencies, members of the International Atomic Energy Agency, contracting parties to the ICJ Statute, as well as Guinea-Bissau and North Viet-Nam, who at the time were not yet members of the United Nations. In addition, invitations were sent to certain inter-governmental and non-governmental organizations and the UN Council for Namibia. In other words, this was intended to be an attempt at law-making by the international community as a whole. The negotiations at UNCLOS III were politically charged. Traditional groupings, such as the G77 or the geographical groups inherited from the UN system, did play a role in the negotiations.

More importantly, several interest groups spontaneously emerged from the negotiating process such as the coastal states, the strait states, the archipelagic states, and the landlocked and geographically disadvantaged states. The conflict between the developing countries and industrialized states was one of the most striking dynamics at the Conference. The chief area of controversy between these two factions was the somewhat unusual topic of deep seabed mining, an issue that would ultimately cause the failure of the Conference to agree a text by consensus. However, political alliances and divisions often varied depending on the issues under discussion. Whilst the industrialized states were largely unified on the issue of deep seabed mining, divisions arose over questions of maritime pollution depending on whether a state identified itself as a coastal state or a maritime state. The challenge for the Conference was to balance all of these diverse interests.

The Limits of the LOS Convention as a Treaty Instrument : From the outset, the object of UNCLOS III was to conclude a treaty covering all aspects of the law of the sea. At its final session in 1982, the Conference fulfilled this aim by adopting the LOS Convention which was subsequently opened for signature on 10 December 1982. The LOS Convention aspires to universal participation. It is open to formal acceptance by all states, as well as a range of non-state actors which had attended the Conference. The target of universal participation has been endorsed by the General Assembly which regularly urges states that have not done so to become parties to the Convention.

States can consent to be bound by the Convention through ratification or accession. The LOS Convention required sixty ratifications or accessions in order to come into force. It finally did so on 16 November 1994. States accepting the Convention following its entry into force will become bound thirty days after indicating their acceptance. As of May 2007, the number of States Parties was 155. Whilst this includes a significant proportion of the international community, it still falls short of the 192 states who are currently members of the United Nations.
According to the fundamental doctrine of pacta tertiis nec nocent prosunt, a treaty only creates legal obligations for states which have consented to be bound. The International Law Commission describes this doctrine as “one of the bulwarks of the independence and equality of States”, whilst McNair says that “both legal principle and common sense are in favor of the rule … because as regards States which are not parties … a treaty is res inter alios acta.”

The limitations of treaties as instruments for the creation of universal law are thus plain. From the strict perspective of the law of treaties, it is necessary for all states to become party to the Convention in order for it to successfully create a universal framework for the law of the sea. Given these inherent limitations, it may seem strange that states continue to use treaties as a way of developing international law. The answer may be a lack of any viable alternative. As McNair noted as long ago as 1930, the treaty is “the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out multifarious transactions.” Little has changed since that time. More than sixty years later, another author similarly concludes, “law-making by treaty is the only organized procedure for the conscious, rational positing of legal rules, at least at the universal level.”
International legislation has occasionally been mooted, but the idea of an instrument capable of binding all states ipso facto without their consent is not yet generally accepted. Danilenko, for one, says "there is no evidence that by entering into negotiations leading to treaty norms expressing general interests, members of the international community endorse legislative techniques based on majority lawmaking.”

One possible exception is the power of the UN Security Council to impose obligations on Members of the United Nations. Whilst most Security Council resolutions deal with specific threats to international peace and security involving a small number of states, some are drafted in general terms. These resolutions come close to legislation. Nor is the Security Council alone in possessing the ability to bind states by its decisions. Some other institutions have powers to create and amend standards which are binding on states without the need for their further consent. However, it should be remembered that all of these law-making powers are conferred by treaty in the first place. Moreover, they can only be exercised within strict limits. Such powers are better understood as delegated law-making than legislation per se.

It is inappropriate to describe the LOS Convention as a legislative act. Yet, there may be other ways to account for the transition of the Convention from treaty instrument to universal law. The first stage of the analysis is to look to the law of treaties for any exceptions to the *pacta tertiis* principle which would allow the application of the LOS Convention to third states without them being a party. Secondly, it is necessary to inquire whether the conclusion of a treaty such as the LOS Convention can influence the creation of customary international law.

Treaty Rights and Obligations for Third States: The first question is to what extent states can have rights or obligations under a treaty without being a party. The general principle is that treaties are only binding on states that have consented to be bound. One exception to this principle is that a treaty can confer rights on third states, sometimes referred to as "stipulation pour autrui". In the **Free Zones Case**, the PCIJ confirmed that third states could enjoy rights under a treaty without becoming a party to the treaty itself. The Court emphasized the importance of the intention of the contracting parties to this effect, as well as the consent of the third state. On the evidence, the Court held that the parties to the 1815 Treaty of Paris and associated instruments had intended to extend to Switzerland a right to the withdrawal of the French customs barrier behind the political frontier and that Switzerland could rely on that right in the proceedings against France.

The rules relating to the rights of third states under treaties are now found in the 1969 Vienna Convention on the Law of Treaties. Article 36 provides in part, "a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto." According to this provision, there are two conditions which must be satisfied before a right is conferred on a third state. Firstly, the parties to the treaty must have intended to confer a right on a third state. Secondly, the third state itself must consent to the conferral of the right. The consent of third parties to accept a right under a treaty to which it is not a party shall however be "presumed so long as the contrary is not indicated."

As well as conferring rights, a treaty can also create obligations for third states without those states actually becoming party to the whole treaty. This situation is covered by Article 35 of the Vienna Convention on the Law of Treaties. Article 35 again stresses the importance of the intention of the parties to the treaty to create an obligation for a third State and the consent of the third state to that obligation. The principal difference between the treatment of rights and obligations in this context is the form of consent. According to Article 35, a third party must accept an obligation under a treaty in writing. The ILC commentary confirms that such obligations are not strictly speaking based upon the treaty itself but on a second collateral agreement between the parties to the treaty and the third state. The intention of the contracting parties to confer a right or obligation is central to these provisions. In these circumstances, the parties to the treaty may be characterized as offering a right to a third state or inviting a third state to undertake an obligation. How one identifies the intentions of the parties is an important issue. The standard of proof is a high one – in the words of the PCIJ, "it cannot be lightly presumed that stipulations favorable to a third State have been adopted with the object of creating an actual right in its favor."

The principal means of identifying intention should be the text of the treaty itself and the normal rules of treaty interpretation apply. A third state which is afforded rights or obligations under a treaty need not be specifically named; a treaty may direct itself to all states or to a specific class of states belonging to an identifiable category. Further evidence of intention may also be found in *travaux préparatoires*. Such evidence, however, should not be used to infer an intention that cannot be supported by the text of the treaty.

In the case of the UNCLOS, there are no express stipulations which clearly and unambiguously confer rights or obligations on third states. It is true that many provisions in the Convention refer to "States" or to "all States" as opposed specifically to "States Parties". For example, Article 2(1) says that "the sovereignty of a coastal State extends, beyond its land and territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea." This provision seemingly refers to coastal States in general rather than coastal States Parties. Similar phrasing is found throughout the Convention with the exception of Parts XI, XV, and XVII which are largely addressed to States Parties alone.

Does this generic terminology demonstrate the intention of the drafters to grant rights to third states? St Skourtos asserts that "with regard to the comprehensive objective, the universal aim and the system applied by the Convention concerning the conferment of rights and the imposition of obligations … it cannot be lightly presumed that this differentiation of terms is to be regarded as meaningless." However, it is not obvious that this conclusion is supported by other evidence. Lee argues that "the intent may most appropriately be ascertained from official statements made by representatives of states participating in [UNCLOS III]." A survey of the *travaux préparatoires* of the LOS Convention reveals strong disagreement amongst states over the precise impact of the Convention on third states with many delegates arguing that the Convention is a package deal which cannot be selectively applied by states.

The issue of interconnecting rights and obligations was stressed, for instance, by Deputy Foreign Minister Gouzhenko of the Soviet Union, who said at the closing session of the Conference that "the Convention is not a basket of fruit from which one can pick only those one fancies. As is well known, the new comprehensive Convention has been elaborated as a single and indivisible instrument, as a package of closely interrelated compromise decisions." It is the interconnection of the LOS Convention that causes problems for the application of Articles 35 and 36 of the Vienna Convention. These provisions allow third states to selectively choose individual rights and obligations under a treaty. Yet, this possibility would appear to have been against the wishes of many states at UNCLOS III. Further support for this view can be found if one considers the wider context of the Convention. Article 309 of the Convention prohibits reservations which are not expressly permitted. Allowing third states to selectively claim rights and obligations under the LOS Convention would undermine this provision.

Indeed, the differential treatment of rights and obligations could be problematic for many multilateral treaties. In his analysis, Sinclair notes that most treaties confer rights and obligations simultaneously and the two can often be intertwined. Moreover, although Article 36(2) allows conditions to be attached to rights conferred on third states, Chinkin notes that "onerous conditions could, in the opinion of a third party, transform such a right into an obligation." These issues are not satisfactorily resolved by the Vienna Convention.

There is a further question of whether the provisions on third states are applicable to general multilateral treaties such as the LOS Convention. Third state is defined by the Vienna Convention as "a State not party to a treaty". This is a very broad definition and it makes no distinction between those states which can become a party and those states which cannot. Nevertheless, the underlying policy of these provisions suggests that they should have a limited application. It is submitted that the concept of stipulation pour autrui, literally "for other persons", only applies where a state is not able to become a party to the treaty by signature, ratification or accession.

This argument finds some support in the fifth report on the law of treaties by Fitzmaurice where he suggests that the presumption that a treaty has no effects for third states is "enhanced, and may become absolute, in the case of these treaties which contain specific provision for the participation of third states, either by leaving the treaty open for signature or subsequent ratification by states other than the original signatories, or by the inclusion of an accession clause or its equivalent." Fitzmaurice admits there is no authority for this position, but he asserts that it is correct as a matter of principle. He explains, "it seems clear that when a treaty itself makes provision for the admission of third states, then the correct method of procedure, if those third States wish to benefit from, or to enjoy the rights provided by the treaty or if they are prepared to assume obligations, is for them to avail themselves of the faculty of becoming parties."

These comments raise questions over when the provisions on third states apply? The concept of stipulation pour autrui is aimed at the situation where a group of states concludes a treaty which has ramifications for other states who are not able to become a party to the treaty. Examples are the 1815 Treaty of Paris and the 1919 Treaty of Versailles, which were considered by the PCIJ in the **Free Zones Case**. These instruments were both peace treaties concluded by a small number of powerful states following the cessation of international conflicts. Despite the limited number of parties to the negotiations, the outcome nevertheless had the character of an international settlement that affected numerous third states who had not been involved in the negotiations and who could not become a full party to the treaty. It was therefore necessary to invoke the rules on third states in order to give full effect to the treaty.

Many modern multilateral treaties, on the other hand, are negotiated in very different circumstances. As Tunkin pointed out during the ILC discussions on this issue, "if a state had a legitimate interest in the subject-matter of a treaty, it should be invited to the Conference formulating the treaty or at least consulted during its formulation." All states and many other interested actors were involved in the drafting of the LOS Convention. Moreover, any state, whether or not it attended UNCLOS III, is free to become a party to the Convention. It is submitted that the participation of all states in the drafting of most modern multilateral treaties negates the need for invoking the principles on third party rights and obligations. Similar observations were made by several members of the ILC in their discussion on Articles 35 and 36. The special rapporteur himself noted that "it was unlikely that the parties to a general multilateral treaty would resort to devices of the kind envisaged…" Thus, on the basis of these arguments, the application of the provisions on third states to general multilateral treaties such as the LOS Convention is not appropriate.

The UNCLOS as an Objective Regime: Another doctrine supporting the application of a treaty to non-parties is that of objective regimes. Support for the doctrine is found in the judgment of the PCIJ in the **Case of the S.S. Wimbledon** where the Court considered the implementation of Part XII, Section VI of the 1919 Treaty of Versailles which sets up a treaty regime for the Kiel Canal. The S.S. Wimbledon was a ship flying the flag of the United Kingdom. It had been chartered by a French company to carry munitions to the port of Danzig at the time when Poland was at war with Russia. The ship was stopped from passing through the Kiel Canal by the German authorities because Germany claimed that it was bound by its status as a neutral state not to allow the transit of weapons to a warring party.

The UK, France, Italy and Japan brought a claim before the PCIJ claiming that Germany was under a duty to guarantee free access through the Kiel Canal under the terms of the Treaty of Versailles. The Court held that the terms of Article 380 created an international waterway "intended to provide easier access to the Baltic for the benefit of all nations of the world." It is clear from this decision that Part XII, Section VI of the Treaty of Versailles creates a set of rights that are invocable by all states, whether or not they are party to the treaty. Nor was it a matter of a single right being conferred on these states; the Court treated Part XII, Section VI of the Treaty as an inseparable whole.

The doctrine of objective regimes was considered by the International Law Commission in its codification of the law of treaties, although ultimately the Commission decided not to include it in the draft articles because it was deemed unlikely to meet with the general acceptance of states. Nevertheless, Sinclair insists that "it must not be assumed that the deliberate decision of the Commission and the Conference not to make special provision for treaties creating 'objective regimes' in the series of articles on treaties and third states in the Vienna Convention on the Law of Treaties constitutes a denial of the existence of this category of treaty." Indeed, the doctrine can still find support in the writings of many commentators. Aust writes that certain treaties have been held to create a status or regime valid erga omnes, including demilitarisation treaties, waterway regimes or a regime for a special area, for example Antarctica.

Although the draft articles on objective regimes prepared by the special rapporteur were not ultimately submitted to the Vienna Conference on the Law of Treaties, this work nevertheless provides a useful account of the scope of the doctrine. Waldock, as special rapporteur on the law of treaties, describes a treaty as creating an objective regime "when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided that the parties include among their number any State having territorial competence with reference to the subject matter of the treaty, or that any such State has consented to the provision in question." Waldock's draft article on objective regimes required states to expressly or impliedly accept the objective regime. Failure to oppose the treaty within a certain time limit amounts to tacit acceptance.

It can be seen from this short analysis that the concept of objective regimes shares many similarities with third state rights and obligations under Articles 35 and 36 of the Vienna Convention on the Law of Treaties. The creation of an objective regime must be clear from the intention of the parties to the treaty. Consent also plays a central role in Waldock's conception of objective regimes. Yet, there are several aspects of the doctrine of objective regimes which differentiate it from Articles 35 and 36 of the Vienna Convention. Firstly, as noted above, it applies to a whole regime as opposed to individual treaty articles. Furthermore, the doctrine of objective regimes as proposed by Waldock would only appear to be applicable to certain types of territorial regimes. Can this doctrine be invoked to support the universal application of the LOS Convention? Unlike Article 35 and 36, it cannot be argued that the doctrine of objective regimes undermines the package deal achieved at UNCLOS III. Indeed, this doctrine emphasizes the interconnection of certain treaty articles.

Notwithstanding the controversial question of the intention of states attending UNCLOS III, it is not clear that Waldock considered the doctrine was applicable to treaties such as the LOS Convention. In his commentary, he makes clear that his conception of objective regimes would not apply to general law-making treaties, a category into which the LOS Convention arguably falls. Waldock explains, "it excludes from the article cases where the parties have a general treaty-making competence with respect to the subject-matter of the treaty but no greater competence than any other state; in other words, it excludes law-making treaties concerned with general international law or with areas not subject to the exclusive jurisdiction of any state." Therefore, this doctrine, like the provisions on third states generally, are not intended to be applied to general multilateral treaties to which any state can become a party through ratification or accession.

It follows that the law of treaties cannot account for the application of a general multilateral treaty such as the LOS Convention to non-parties. Therefore, it is necessary to look beyond the law of treaties in order to account for any law-making impact that they might have.

Beyond the Law of the Sea Convention: UNCLOS III successfully managed to settle many of the outstanding controversies that had precipitated the collapse of previous attempts to codify the law of the sea. As a consequence, the LOS Convention is hailed as a milestone in the international legal order. It has been described by one author as "a shining example of international cooperation, diplomacy and the role of international law in the regulation of international affairs and is considered to be one of the most complex and ultimately successful international diplomatic negotiations that took place in the twentieth century."Whilst the LOS Convention has had huge success in stabilizing state claims to jurisdiction over the oceans, it is also true that "the law needs to be flexible and able to change to reflect new circumstances whether it be increased national sovereignty, greater environmental protection, or enhanced global security."The LOS Convention cannot be seen as a fait accompli. The law of the sea, like all international law, must be able to balance the need for stability with the desire for change.

How the LOS Convention evolves in light of the ever-changing challenges facing the international community will be considered in the following chapters. In doing so, it will be necessary to take into account the interplay of written instruments and custom, as well as the role of international institutions in the law-making process. The fact that the Convention reflects a consensus of the international community may pose challenges to the future development of the law of the sea. As Treves notes, "the impact of the Convention on customary international law, on whose crystallization and development it exercises a powerful influence, makes the Convention, as well as the main substantive questions it addresses, a matter of interest for all states even beyond the circle of States Parties." It is in this context that questions of participation, decision-making procedures and other aspects of legitimacy are relevant.

What is clear from this chapter is that international institutions are a vital aspect of modern law-making techniques and they will form a central part of the analysis of the ways in which the law of the sea evolves. There are many institutions which have an interest in maritime affairs. Their characteristics vary from general political organizations such as the UN General Assembly to technical organizations such as the International Maritime Organization. Moreover, some institutions are created by the LOS Convention itself. The role that these types of institutions play will be considered over the following chapters. Many of the issues that have been addressed in this chapter will be further considered in the context of these other institutions. What role does consensus play in law-making by international institutions? How do written instruments influence the development of universal international law? The analysis will also demonstrate to what extent the law-making techniques utilized at UNCLOS III have survived or been further developed by other institutions in order to maintain the balance of interests in the law of the sea.

MODULE-III

UN, IMO AND INTERNATIONAL MARITIME LAW

MODULE-III- UN, IMO AND INTERNATIONAL MARITIME LAW

UNITED NATIONS AND INTERNATIONAL MARITIME LAW

Life itself arose from the oceans. The ocean is vast, covering 140 million square miles, some 72 per cent of the earth's surface. Not only has the oceans always been a prime source of nourishment for the life it helped generate, but from earliest recorded history it has served for trade and commerce, adventure and discovery. It has kept people apart and brought them together.

Even now, when the continents have been mapped and their interiors made accessible by road, river and air, most of the world's people live no more than 200 miles from the sea and relate closely to it.

Freedom of the Seas

The oceans had long been subject to the freedom of-the-seas doctrine - a principle put forth in the 17th century, essentially limiting national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation's coastline. The remainder of the seas was proclaimed to be free to all and belonging to none. While this situation prevailed into the twentieth century, by mid-century there was an impetus to extend national claims over offshore resources.

There was growing concern over the toll taken on coastal fish stocks by long-distance fishing fleets and over the threat of pollution and wastes from transport ships and oil tankers carrying noxious cargoes that plied sea routes across the globe. The hazard of pollution was ever present, threatening coastal resorts and all forms of ocean life. The navies of the maritime powers were competing to maintain a presence across the globe on the surface waters and even under the sea.

United Nations Law of the Sea Convention (UNCLOS)

The United Nations has long been at the forefront of efforts to ensure the peaceful, cooperative, legally defined uses of the seas and oceans for the individual and common benefit of humankind. Urgent calls for an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction set in motion a process that spanned 15 years and saw the creation of the United Nations Seabed Committee, the signing of a treaty banning nuclear weapons on the seabed, the adoption of the declaration by the General Assembly that all resources of the seabed beyond the limits of national jurisdiction are the common heritage of mankind and the convening of the Stockholm Conference on the Human Environment.

The UN’s groundbreaking work in adopting the 1982 Law of the Sea Convention stands as a defining moment in the extension of international law to the vast, shared water resources of our planet. The convention has resolved a number of important issues related to ocean usage and sovereignity, such as:

- Established freedom-of-navigation rights

- Set territorial sea boundaries 12 miles offshore
- Set exclusive economic zones up to 200 miles offshore
- Set rules for extending continental shelf rights up to 350 miles offshore
- Created the International Seabed Authority
- Created other conflict-resolution mechanisms (e.g., the UN Commission on the Limits of the Continental Shelf)

Protection of marine environment and biodiversity

The United Nations Environment Programme (UN Environment), particularly through its Regional Seas Programme, acts to protect oceans and seas and promote the environmentally sound use of marine resources. The Regional Seas Conventions and Action Plans is the world's only legal framework for protecting the oceans and seas at the regional level. UNEP also created The Global Programme of Action for the Protection of the Marine Environment from Land-based Activities. It is the only global intergovernmental mechanism directly addressing the connectivity between terrestrial, freshwater, coastal and marine ecosystems.

The United Nations Educational, Scientific and Cultural Organization (UNESCO), through its Intergovernmental Oceanographic Commission, coordinates programmes in marine research, observation systems, hazard mitigation and better managing ocean and coastal areas.

The International Maritime Organization (IMO) is the key United Nations institution for the development of international maritime law. Its main role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented.

Marine shipping and pollution

To ensure that shipping is cleaner and greener, IMO has adopted regulations to address the emission of air pollutants from ships and has adopted mandatory energy-efficiency measures to reduce emissions of greenhouse gases from international shipping. These include the landmark International Convention for the Prevention of Pollution from Ships of 1973, as modified by a 1978 Protocol (MARPOL), and the 1954 International Convention for the Prevention of Pollution of the Sea by Oil.

Polar Code

In 2014, important regulatory developments in the field of transport and trade facilitation included the adoption of the International Code for Ships Operating in Polar Waters (Polar Code), as well as a range of regulatory developments relating to maritime and supply chain security and environmental issues.

Piracy

In recent years there has been asurge in the piracy off the coast of Somalia and in the Gulf of Guinea. Acts of piracy threaten maritime security by endangering, in particular, the welfare of seafarers and the security of navigation and commerce. These criminal acts may result in the loss of life, physical harm or hostage-taking of seafarers, significant disruptions to commerce and navigation, financial losses to shipowners, increased insurance premiums and security costs, increased costs to consumers and producers, and damage to the marine environment.

Pirate attacks can have widespread ramifications, including preventing humanitarian assistance and increasing the costs of future shipments to the affected areas. The IMO and UN have adopted additional resolutions to complement the rules in the Law of the Sea Convention for dealing with piracy.

SPECIALIZED BODIES ESTABLISHED BY UNCLOS

1. International Seabed Authority

The International Seabed Authority is an autonomous international organization established under the 1982 United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.

The International Seabed Authority (ISA) is an intergovernmental body based in Kingston, Jamaica, that was established to organize, regulate and control all mineral-related activities in the international seabed area beyond the limits of national jurisdiction, an area underlying most of the world's oceans. It is an organization established by the United Nations Convention on the Law of the Sea.

The Mandate of the International Seabed Authority

Under the 1982 United Nations Convention on the Law of the Sea (the Convention), the International Seabed Authority (ISA) is the organization through which States Parties to the Convention shall, in accordance with Part XI of the Convention, organize and control activities in the "Area", that is, the area of the seabed beyond national jurisdiction. -his is to be done in accordance with the regime established by Part XI of the Convention and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (the 1994 Implementation Agreement), which was adopted on 28 July 1994 by the United Nations General Assembly. The magnitude of the task is not to be underestimated. The ocean floor beyond national jurisdiction covers some 50 per cent of the world's surface.

The phrase "activities in the Area" is a term of art, defined in the Convention, and refers chiefly to the exploration for and subsequent mining of deposits of minerals. These mineral deposits, which include polymetallic nodule deposits or sulphides on the ocean floor or minerals embedded in cobalt rich crusts on the tops and flanks of seamounts, are of potential economic interest because they are rich in cobalt, copper, nickel and manganese, as well as containing traces of gold, silver and other rare metals. There are formidable economic and technical barriers to commercial mining of the deep seabed. Nevertheless, when it does take place, it can be expected that mining would occur in depths of up to 6,000 metres on the abyssal plain, but also in biologically rich ocean areas, such as seamounts and mid-ocean ridges where hydrothermal vents are found. For this reason, the legal mandate of the ISA is drawn sufficiently broadly to, and indeed requires, the ISA to take steps to monitor, control and prevent serious harm to the marine environment as a result of mining activities.

Thus, whilst the ISA aims to encourage the development of seabed mineral resources, it also works to ensure that biodiversity within the marine environment is sustained. A key factor for the ISA is that, although a significant amount of basic and applied research has been done in the past or is still in progress, it is broadly accepted that the current level of knowledge and understanding of deep sea ecology is not yet sufficient to allow conclusive risk assessment of the effects of large-scale commercial seabed mining. Effective administration of the Area requires knowledge of the Area. In order to be able in future to manage the impacts from mineral development in the Area in such a way as to prevent serious harm to the marine environment, it will be essential for the ISA to have better knowledge of the state and vulnerability of the marine environment in mineral-bearing provinces.

This includes, inter alia, knowledge of baseline conditions in these areas, the natural variability of these baseline conditions and the relationship with impacts related to exploration and mining. For this reason, all exploration contracts issued by the ISA require contractors to organize and provide training programmes for personnel from developing countries. However, the ISA's responsibilities go wider still. Under Articles 143 and 145 of the Convention, in addition to its core function of encouraging the development of seabed mineral resources, the ISA also has a general responsibility to promote and encourage the conduct of marine scientific research in the Area for the benefit of mankind as a whole and to disseminate the results of such research. This implies that research and scientific knowledge should be shared widely amongst the international science community so scientists around the world can benefit from the findings. Furthermore, scientific study in the international seabed area should include scientists and researchers from both developing and developed countries.

Unfortunately, the financial costs of conducting research in the deep seabed often prohibit the involvement of developing nations' scientists and other personnel. Lack of technology and expertise in a field that remains on the cutting edge of science may also contribute to fewer researchers from developing countries being involved in deep sea research initiatives. In reality, therefore, pending the start of commercial mining of the seabed, the most immediate and practical way in which the ISA can carry out its responsibilities under the Convention is to try to make the benefits of scientific research more widely accessible to developing States which would otherwise be unable to participate in such efforts.

2. Commission on the Limits of the Continental Shelf

The Commission on the Limits of the Continental Shelf was established to facilitate the implementation of UNCLOS in respect of the establishment of the outer limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The responsibilities of the Commission are set forth in Annex II of UNCLOS.

The Establishment of the Commission on the Limits of the Continental Shelf and Its Functions

The entry into force of the United Nations Convention on the Law of the Sea (UNCLOS) is a milestone in the development of the law of the sea. For the first time in history, the UNCLOS lays down the rights and obligations that every State has in territorial sea, contiguous zone, exclusive economic zone, high seas, continental shelf, international seabed area and other regions, and becomes a comprehensive code governing the relationship of rights and obligations that each State has in ocean space. More importantly, the UNCLOS specifies the legal status of each part of the seas and seabed and plays a role in settling disputes between States over ocean sovereignty. Entitlements to all water areas shall be claimed according to the rules of the UNCLOS, including territorial sea which a State has sovereignty over, exclusive economic zone that a State has sovereign rights in, or the international seabed area that is common heritage of mankind. The UNCLOS also stretches out the last shred of hope for ocean enclosure movement to the coastal States. In line with Article 76 of the UNCLOS, the coastal State may establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, and also extend its entitlement up to 350 nautical miles from the baselines on some conditions. Quite different from the coastal State that has inherent entitlement to the continental shelf within 200 nautical miles, the State with a broad continental shelf should submit its application in accordance with the provisions of the UNCLOS and obtain the entitlement with approval.

Hence, Article 76 of the UNCLOS and Annex II provide the establishment of the Commission on the Limits of the Continental Shelf (hereinafter "the Commission"), and confer upon the Commission the power over affairs concerning the extended continental shelf. During June 16-20, 1997, the 21 elected members of the Commission held the first session of the Commission, and elected Mr. Yuri Borisovitch Kazmin (Russian Federation) by acclamation as its Chairman. Since then, the Commission officially came into operation and performed its important duties conferred by the UNCLOS. According to Article 3, Annex II of the UNCLOS, the Commission has two functions: first, to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea; second, to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data said above. These two functions work as an organic whole and neither of them can be underestimated.

The first function represents the substantive work of the Commission as it directly concerns whether the entitlement claimed by the coastal State to the outer continental shelf can be realized and, on the other hand, also decides whether benefits enjoyed by the international community can be effectively guaranteed. The second function, to a certain extent, can be regarded as the obligations borne by the Commission to the State Parties. The scientific and technical advice not only is assistance to relevant coastal States, but also reflects the legal status of the Commission from a side view.

Considering the importance of its status and functions, the birth of the Commission attracted great attention and expectation in the international community. At the same time, the legal regime on which it was established is brand-new and the scientific and technical difficulties that it is confronted with are very complicated. Both the Commission itself and the work on outer continental shelf that it deals with will continuously develop and reform in practices.

Status of the Commission in International Law

1. The Commission Is Not an International Organization

After World War II, international organizations became an important player in international communities and produced profound influence on the development of international law and the construction of international order. The status of international organizations has become a more complicated issue along with changes in international situation and diversification of multilateral cooperation among countries. Scholars and international institutions, however, both particularly emphasize that independent legal personality is the fundamental attribute of an international organization. Professor Schermers believes that, "international organizations are defined as forms of cooperation founded on an international agreement, having at least one organ with a will of its own and established under international law." During the ongoing preparation of the Draft Articles on the Responsibility of International Organizations, the International Law Commission also points out that "international organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality."

In this view, the Commission, though established by a treaty and governed under international laws, cannot be regarded as an international organization due to the lack of independent legal personality. This is not only to pinpoint the definition, but also to place emphasis on how to regard the power and authority the Commission may have. An international organization may have the implicit power necessary to perform functions specified in its charter, and interpret the charter serving as its cornerstone more purposefully. Therefore, the Commission, because it is not an international organization, lacks freedom and flexibility since it must conduct its work strictly in accordance with the clear authorization of the UNCLOS.

2. The Commission Is a Treaty Body Established by the UNCLOS

The Commission is established pursuant to Article 76 of the UNCLOS and has the function to supervise the implementation of Article 76(8). While the Commission has no independent legal personality, it has a will of its own. It urges State Parties to implement relevant provisions of the UNCLOS through recommendations as its own working methods. Similar to other treaty bodies, the Commission does not have its own secretariat and separate financial source, and largely relies on the UN's Secretariat and financial allotments. Generally speaking, either the charter of some international organization or the organ under an international organization establishes a treaty body. The Commission is obviously an exception.

The Commission was established by the General Assembly of the State Parties of the UNCLOS and an organ with the assistance from UN Secretariat and particularly the Division of Ocean Affairs and the Law of the Sea. Different from the other two organs (International Tribunal for the Law of the Sea and the International Seabed Authority) established by the UNCLOS at the same time, the Commission is more like a steadfast guardian of the UNCLOS instead of a positive practitioner. This is partly because the other two organs are international organizations with independent legal personality having more sufficient resources and higher initiative in their work, and partly because provisions of the UNCLOS in the charge of the Commission are voluntarily introduced by interested State Parties and the Commission merely plays a role of judgment and supervision from the perspective of the UNCLOS. Again, this proves that the Commission need not and should not voluntarily involve itself in the process of implementation of the UNCLOS by State Parties. Instead, it should comment and supervise in strict accordance with the authorization of the UNCLOS.

3. The Commission Is an Expert Organization Established by the UNCLOS

There are generally two types of treaty bodies: the first type includes those consisting of governmental officials of State Parties, represented by the general assembly of multilateral environmental agreements, for example, the United Nations Framework Convention on Climate Change; the second type includes those consisting of experts from fields concerned, represented by the treaty body of international human rights, for example, the Committee on the Elimination of Racial Discrimination. Comparatively speaking, the Commission is the second type because its members are experts with independent identities and do not speak for any governments.

The first type of treaty bodies reflects to a greater extent intergovernmental wills as its members are from governments of State Parties. It is a form of intergovernmental, international, and multilateral cooperation in a broad sense. Their task is usually to elaborate on the basic framework established by a multilateral treaty and carry out the principled consensus previously reached by State Parties via regular meetings. As a result, this type of organization can more easily and directly reflect the wills of State Parties in view of its staff composition, thus facilitating the formation of new consensus. On the other hand, their tasks also require them to continue efforts to achieve goals provided in the treaty. As an expert organization, the Commission has more independence. While broad representativeness is considered to the greatest extent during the selection of the Commission's members, all members of the Commission hold their positions individually. They neither represent any government nor receive instructions from any government. They express their opinions with their expertise and review whether the act of a State Party claiming outer continental shelf is consistent with the Convention.

Actual Force of the Commission's Recommendations

After the analysis from theoretical perspective, we should now examine the actual force of the Commission's recommendations with reference to specific provisions of the UNCLOS and the practices of the Commission. First, the Convention does not directly define the force of the Commission's recommendations. Instead, it states that “the limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.” This provision does not explain the force of the recommendations, but says the limits of shelf established with the adoption of these recommendations by a coastal State shall be binding. Presumably, the targets "bound" hereby include not only coastal States but also other State Parties.

In other words, a delimitation decision made according to the Commission's recommendations should be recognized and respected by other State Parties. This shows that the Commission's recommendations are critical as to whether the international community can recognize the delimitation of a coastal State. We should also note that the UNCLOS does not require coastal States to delimitate completely in accordance with the Commission's recommendations, and merely requires coastal States to delimitate on the basis of these recommendations. Herein lies the problem about how to understand the phrase "on the basis of these recommendations." In the Beef Hormone Dispute (the United States and Canada v. European Communities) lodged to the WTO dispute settlement system, the appellate body disagreed with the Panel's interpretation that "based on" meant the same thing as "conform to," explaining that the animal and plant inspection and quarantine measures which are based on a given international standards do not require the achievement of the same level of sanitary protection for two parties. Similarly, the UNCLOS does not require coastal States to use the Commission's recommendations as their delimitation standards and allows coastal States to exercise discretion.

Additionally, no other people other than State applicants and the Secretary-General of the United Nations know about the specific content of the Commission's recommendations. They don't know if the recommendations contain clear-cut delimitation methods or propose improvements in principles. If the Commission's recommendations provide some factors that a coastal State should consider in revising its submissions, as the Secretary-General said in the report of Oceans and the Law of the Sea, these recommendations accordingly cannot be the delimitation submission. On the basis of the preceding analysis, we believe that the UNCLOS confers quite high authority upon the Commission's recommendations, making them the basis that coastal States use to establish binding outer limits of the continental shelf beyond 200 nautical miles. Meanwhile, the UNCLOS doesn't completely deprive the coastal States of their right to make final decisions based on the Commission's recommendations. Second, judging by the rules of procedure of submission to the Commission, the Rules of Procedure of the Commission, the Commission always has effective supervision over whether or not a coastal State has adopted its recommendations, making these recommendations too important to be ignored. When a coastal State makes a submission, the Commission would usually give recommendations for revision to the coastal State unless the Commission totally agrees with the submission. The coastal State, whether or not it expresses its intention to adopt the recommendations, must make a revised or new submission to the Commission and then go through the consideration of the Commission again. In the case that the Commission approves the revised or new submission, the coastal State may establish outer limits thereunder.

The Commission will make further recommendations for revision if it thinks the revised or new submission does not completely adopt previous recommendations. For this sake, the Commission actually has the final power to judge if a coastal State has accepted its recommendations. We can say that the Commission uses its power of giving recommendations to continuously increase the de facto binding force of its recommendations. Third, judging by the considerations of the Commission on the submission of the Russian

Federation, the Commission's recommendations have an actual impact on the success of a coastal State's delimitation. At present, the Commission completed only the first consideration of the first submission it received and gave recommendations. According to the summary of recommendations disclosed by the UN Secretary-General in his report, we can see that the Commission required the Russian Federation to submit additional information on certain elements of its submission and consider the examination results mentioned in the Commission's recommendations. Put simply, the first submission of the Russian Federation did not obtain the final approval of the Commission and needed to be further improved and revised.

In fact, Russia seriously took the Commission's recommendations after receiving them and submitted to the Commission its comments and requested advice through governmental channels. The Commission's preliminary practices show that the coastal States give due respect and attention to the Commission's recommendations and make amendments to their submissions with reference to these recommendations. We must wait until Russia makes a new submission or the Commission makes further recommendations to see to what extent Russia has accepted the Commission's recommendations.

In conclusion, the Commission's recommendations are the indispensable reference to determine whether the submission of a coastal State is final and binding, though they are not the final judgment on whether the submission is appropriate.

HISTORY OF IMO

The importance of international co-operation in shipping has been recognized for centuries, and has long been manifested in maritime traditions such as ships taking refuge in foreign ports in the event of bad weather and going to the aid of others in distress, irrespective of their nationality.

In 1889 an international maritime conference in Washington, DC, United States discussed a proposal to set up a permanent international body to cater for the needs of shipping. This followed the establishment of a number of other international organization, such as the International Telegraph (now Telecommunications) Union (established 1865); the International (now World) Meteorological Organization (1873); and the Universal Postal Union (1874).

But the plan for a shipping body was rejected. The Conference announced: "for the present the establishment of a permanent international maritime commission is not considered expedient". The reason - although not stated explicitly - was that the shipping industry was suspicious of any attempt to control its activities and restrict its commercial freedom.

In 1945, the United Nations was established and, in the same decade, a number of international organizations were formed, each dealing with a different subject. The International Civil Aviation Organization (ICAO) was founded in 1944, the Food and Agriculture Organization (FAO) was created in 1945, the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1945 and the World Heath Organization (WHO) in 1947. All were members of the United Nations system.

In 1948, a Conference was held to establish a similar body for shipping.

The Geneva conference 1948

The Geneva conference opened in February 1948 and on 6 March 1948 the Convention establishing the Inter-Governmental Maritime Consultative Organization (IMCO) was adopted. (The name was changed in 1982 to International Maritime Organization (IMO).)

In the 1948 convention text, there was no reference to marine pollution or the environment, now among IMO's greatest concerns. Maritime safety was only referred to briefly, at the end of paragraph (a). The emphasis was on economic action to promote "freedom" and end "discrimination". Paragraphs (b) and (c) were of concern to a number of Governments who regarded promises to create "a world without discrimination" and to take action against "unfair restrictive practices", as dangerous interference in the practice of free enterprise.

In Part II of the Convention, dealing with the Organization's functions, Article 2 stated: "The functions of the Organization shall be consultative and advisory."

Article 3 (b) said that, in order to achieve the purposes set out in Article 1, IMO should "provide for the drafting of conventions, agreements, or other suitable instruments, and to recommend these to Governments and to intergovernmental organizations, and to convene such conferences as may be necessary". IMO was not given the authority itself to adopt treaties. Article 3 (c) said that IMO should "provide machinery for consultation among Members and the exchange of information among Governments".

It was expected in 1948 that Article 1 (b) in particular would prove controversial, because Article 4 stated: "When, in the opinion of the Organization, any matter concerning unfair restrictive practices by shipping concerns is incapable of settlement through the normal processes of international shipping business, or has in fact so proved, and provided it shall first have been the subject of direct negotiations between the Members concerned, the Organization shall, at the request of those Members, consider the matter."

The Convention provided for three main organs: the Assembly, the Council and the Maritime Safety Committee (MSC).

The Assembly was to consist of all Member States and to meet once every two years, with provision for extraordinary sessions if necessary. Its main tasks were to vote on the budget and decide financial arrangements, to determine the general policy of the Organization to achieve the purposes of Article 1 and to adopt resolutions submitted to it by the Council and the MSC.

The Council originally consisted of 16 Member States (now 40 – see below) elected by the Assembly, of which, according to Article 17:

(a) six shall be governments of the nations with the largest interest in providing international shipping services;
(b) six shall be governments of other nations with the largest interest in international seaborne trade;
(c) two shall be elected by the Assembly from among the Governments of nations having a substantial interest in providing international shipping services, and

(d) two shall be elected by the Assembly from among the governments of nations having substantial interest in international seaborne trade.

The main functions of the Council were to receive recommendations and reports of the MSC and transmit them to the Assembly; to appoint the Secretary-General, with the approval of Assembly; to submit budget estimates and, between sessions of the Assembly, to perform other functions of the Organization.

The MSC was also an elected body consisting of 14 Members elected by the Assembly (later expanded to include all Members – see below). Eight were to be the largest shipowning nations and the remainder were to be elected "so as to ensure adequate representation of other Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas". Members were to be elected every four years and were to be eligible for re-election.

The duties of the MSC (Article 29) were to consider "aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, log-books and navigational records, marine casualty investigation, salvage and rescue and any other matters directly affecting maritime safety".

The Convention then went on to deal with the Secretariat, finances, voting (each Member was to have one vote), the headquarters (it was to be in London) and various other matters. Article 59 stated that the Convention "would enter into force on the date when 21 States, of which seven shall each have a total tonnage of not less than 1,000,000 gross tons of shipping, have become parties to the Convention..." The question of funding was left to the IMO Assembly to decide. Article 41 of the Convention stated that the Assembly "should apportion the expenses among the Members in accordance with a scale to be fixed by it after consideration of the proposals of the Council thereon".

Long process to entry into force

It was hoped that the Convention would enter into force relatively quickly. The Geneva conference established a preparatory committee to deal with such matters as rules of procedure, draft financial regulations and a provisional agenda. It also resolved that a conference to revise the International Convention for the Safety of Life at Sea (SOLAS), due to be held in London later in 1948, should draft provisions taking into account the duties and functions which had been accorded to IMO, the intention being to delegate future responsibilities for the Convention to IMO.

However, to some countries, much of Article 1 was unacceptable. Some were afraid that the treaty would lead to interference with their own national shipping industries and laws. Others felt that the IMO Convention was written by and for the benefit of the handful of countries which dominated shipping at that time.

By the mid-1950s the delay in ratifying the IMO convention was causing concern. The 1948 SOLAS Convention was already in need of revision. New maritime problems were also beginning to emerge, among them oil pollution. In 1954 a conference in London adopted the

International Convention for Prevention of Pollution by Oil and agreed that it would become the responsibility of IMO once the new organization was established.

Gradually the number of Parties to the Convention increased. But many of them registered declarations or reservations which had the effect of greatly restricting the Organization's area of activities. Several used identical wording stating "it is in the field of technical and nautical matters that the Organization can make its contribution towards the development of shipping and seaborne trade throughout the world. If the Organization were to extend its activities to matters of a purely commercial or economic nature, a situation might arise where the Government (of the country concerned) would have to consider resorting to the provisions regarding withdrawal".

Entry into force 1958

The convention provided for entry into force "on the date when 21 States, of which seven shall each have a total tonnage of not less than 1,000,000 gross tons of shipping, have become Parties to the Convention".

On 17 March, 1958, the acceptance of the IMO Convention by Egypt and Japan brought the number of Parties to 21, and the Convention finally entered into force. But by the time the new Organization met for the first time in January 1959, so many reservations had been submitted that it was clear that it would not be able to engage in any activities that might be regarded as economic or commercial. It would have to confine itself to mainly technical issues, especially those involving safety as defined in Article 29.

The first Assembly met in January 1959 and much of its work concerned administrative arrangements, one of the most important being the apportionment of expenses among Member States. Resolution A.20(I) agreed that each Member should pay a basic assessment to be determined by the percentage of its contribution to the United Nations. Countries paying less than 2% would have to pay $US 2,000, while those paying 10% or more would have to pay $US10,000.

Each Member would additionally pay an additional assessment determined by the gross registered tonnage of its merchant marine, as shown in the latest edition of Lloyd's Register of Shipping, on the basis of one share for every 1,000 tons. In practice, therefore, contributions to the IMO budget are based primarily on shipping tonnage rather than national wealth. This system is unique in the United Nations system.

The 1964 amendments – entry into force 1967

The 1960s saw the emergence of new nations, many of which had an interest in maritime affairs. Membership of IMO was growing and in September 1964, at the 2nd Extraordinary Session of the Assembly, IMO adopted an amendment to the IMO Convention that increased the size of the Council to 18. The main shipowning and trading nations continued to have six seats each, but a third group (c) was added consisting of six Member States "which have special interests in maritime transport or navigation and whose election to the Council will ensure the representation of all major geographic areas of the world".

The 1965 amendments – entry into force 1968

The 4th regular session of the Assembly in 1965 adopted an amendment to Article 28 increasing membership of the Maritime Safety Committee to 16. Of these, eight were to be elected from among the ten largest shipowning States and four to be elected in such a way as to ensure that Africa, the Americas, Asia and Oceania and Europe were all represented. The other four seats "shall be elected from among States not otherwise represented on the Committee".

The 1964 and 1965 amendments were important because they acknowledged the fact that the membership of IMO was not only growing but was changing. The dominance of the traditional maritime countries was coming to an end as more and more developing nations joined the Organization.

The 1974 amendments – entry into force 1978

At the 5th Extraordinary Session in October 1974, Council membership was increased to 24 Member States. This was done by enlarging Group (c) to 12 Member States. More significantly, Article 28 was amended. The existing text was replaced by one line stating: "The Maritime Safety Committee shall consist of all Members".

These amendments did much to counter the criticism that IMO was still dominated by traditional shipowning nations. The change in membership was underlined by the adoption of resolution A.316 (ES.V) which noted that "a high number of the members of the Organization is constituted by developing countries and that such fact has not so far been reflected in the composition of the governing bodies of the Organization".

The resolution stated that the amendments were adopted "as a recognition of the need of wider and more equitable representation in the Council and all sectors interested in the work of the Organization, having regard to the increased membership of the Organization and the need to improve the representation of developing countries in the Council".

The 1975 amendments – entry into force 1982

In 1967, the **Torrey Canyon** oil spill illustrated the immense environmental damage that could result from an accident involving a large oil tanker. The protection of the marine environment became a major issue, but the Torrey Canyon spill also revealed a number of deficiencies in the international system for assessing liability and compensation for oil spill damage. IMO established a Legal Committee to deal with the latter and a new sub-committee of the MSC to handle environmental issues.

By the mid-1970s both subjects were recognized as being important enough to become a permanent part of the IMO work programme. In 1975, the 9th Assembly adopted resolution A.358(IX) which formed a new Marine Environment Protection Committee (MEPC) and raised it and the Legal Committee to the same status as the MSC.

Article 1 of the Convention was changed by adding to the list of purposes "the prevention and control of marine pollution from ships; and to deal with legal matters related to the purposes set out in this Article."

Also, the name of the Organization was changed to the International Maritime Organization. It was felt that the original name was confusing, especially the inclusion of the word "Consultative", which gave the impression that IMO could only talk, rather than take decisions and act.

The 1977 amendments – entry into force 1984

IMO's 10th assembly adopted amendments to Article I parts (a) and (d) to accommodate the Organization's growing involvement in environmental, administrative and legal issues. Article 2, which then limited IMO's role to being consultative and advisory, was deleted and subsequent articles renumbered.

The Technical Co-operation Committee (which had been established in 1969) was raised to the same status as the MSC, Legal Committee and MEPC.

The 1979 amendments – entry into force 1984

The Council was increased in size to 32, with 16 places for Group (c).

The 1991 amendments – entry into force 2008

The amendments raise the Facilitation Committee to the same status as the other Committees. The Committee seeks to standardize the documentary procedures involved in international maritime trade and to remove unnecessary "red tape".

The 1993 amendments – entry into force 2002

The amendments increased the size of the Council to 40, with Groups (a) and (b) increased to ten and Group (c) to 20 Member States. The adoption of the amendments followed concern over elections to the Council held during the 17th session of the Assembly, when several time-consuming votes had to be held to decide membership of Group (a) because so many Members were seeking election.

IMO's mission statement:

"The mission of the International Maritime Organization (IMO) as a United Nations specialized agency is to promote safe, secure, environmentally sound, efficient and sustainable shipping through cooperation. This will be accomplished by adopting the highest practicable standards of maritime safety and security, efficiency of navigation and prevention and control of pollution from ships, as well as through consideration of the related legal matters and effective implementation of IMO's instruments with a view to their universal and uniform application."

Convention on the International Maritime Organization Articles of the Convention – Summary

Part 1 – Purposes of the Organization

Part II – Functions

Part III – Membership

Articles 4-10 – give procedures for becoming a Member (or Associate Member) of IMO, by becoming Party to the IMO Convention.

Part IV – Organs

Article 11 – states the Organization consists of an Assembly, Council, Maritime Safety Committee, Legal Committee, Marine Environment Protection Committee (MEPC), Technical Co-operation Committee Facilitation Committee and "such subsidiary organs as the Organization may at any time consider necessary"; and a Secretariat.

Part V- The Assembly

Articles 12-15 – give constitution (all Members) and functions of the Assembly.

Part VI – The Council

Articles 16-26 – relate to composition, election procedures and functions of the Council.

Part VII – Maritime Safety Committee

Articles 27-31 – give constitution (all Members) and functions/work of the Committee.

Part VIII – Legal Committee

Articles 32-36 – give constitution (all Members) and functions/work of the Committee.

Part IX – Marine Environment Protection Committee

Articles 37-41 – give constitution (all Members) and functions/work of the Committee.

Part X – Technical Co-operation Committee

Articles 42-46 – give constitution (all Members) and functions/work of the Committee.

Part XI – Facilitation Committee

Articles 47-51 – give constitution (all Members) and functions/work of the Committee.

Part XII - The Secretariat

Articles 52-57 - give functions and duties of the Secretariat.

Part XII I– Finances

Articles 58-61 – give financial obligations of the Member States

Part XIV – Voting

Article 62 – Each Member has one vote, decisions shall be by a majority vote.

Part XV – Headquarters of the Organization

Article 63 – The headquarters is established in London; the Assembly may by two-thirds majority vote change the site if necessary; sessions may be held in any place other than Headquarters if Council deems it necessary.

Part XVI – Relationship with the United Nations and other organizations

Article 64 – relate to relationships and co-operation with the United Nations, intergovernmental organizations and non-governmental organizations.

Part XVII – Legal capacity, privileges and immunities

Articles 69-70 – refers to the General Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations and refers to Appendix II of the IMO Convention which gives provisions on legal capacity, privileges and immunities which should be applied by Members and by the Organization.

Part XVIII – Amendments

Articles 71-73– Amendments to the IMO Convention must be adopted by two-third majority vote of the Assembly and enter into force 12 months after acceptance by two-thirds of Member States.

Part XIX – Interpretation

Articles 74-75 – questions or disputes over interpretation or application of the Convention shall be referred to the Assembly; if they cannot be settles, they must be referred to the International Court of justice for an advisory opinion.

Part XX – Miscellaneous Provisions

Articles 76-78 – cover signature and acceptance; territories; withdrawal.

Part XXI – Entry into force

Articles 79-82– entry into force provisions for the Convention.

PURPOSE AND FUNCTIONS OF IMO

Purpose of IMO

Article 1 – states the purposes of the organization are:

(a) To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article.

(b) To encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade;

(c) To provide for the consideration by the Organization of matters concerning unfair restrictive practices by shipping concerns in accordance with Part II;

(d) To provide for the consideration by the Organization of any matters concerning shipping that may be referred to it by any organ or specialized agency of the United Nations;

(e) To provide for the exchange of information among Governments on matters under consideration by the Organization.

Functions of IMO

Article 2 – states that IMO provides for the drafting of conventions, agreements or other suitable instruments; provides machinery for consultation among Members and exchange of information; facilitates technical co-operation.

Article 3 – states that for matters "capable of settlement through the normal processes of international shipping business", the IMO should recommend their resolution in that manner.

he Role and the Functions Performed by the International Maritime Organization

There are various functions and vital roles that the International Maritime Organisation plays as an organization as well as an International leader in the maritime department. The roles and the functions of the International Maritime Organisation are mentioned below.

Strategic Development and the high-level action plans

This means that the International Maritime Organisation always focusses on the highest possible standards in the maritime department and ensures the safety, security, efficiency and the ability to work in the maritime development. Apart from this it makes sure that the various mishappenings that take place in the sea waters or the international waters such as that of the pirates looting the ships and the ship's sinking in the sea or the oceans due to the natural as well as the non natural factors, does not happen because any loss of life or property is a loss of a country or a continent in trade that the International Maritime Organisation is supervising or has the jurisdiction over.

In the year 2003, in order for the organization to effectively address those strategic objectives, a high-level action plan was also adopted by the International Maritime Organisation Assembly to identify the actions required to achieve its mission objectives and to provide for the linkage between the Organisation's strategy and the work of its committees. The International Maritime Organisational Assembly, at its 25th session held in the year 2007 in November, reviewed the plans that the various countries had for trade through the International waters and adopted the Strategic Plan for the Organisation and a high-level action Plan for the Organisation and priorities for the 2008-2009 Biennium.

Safety of Passenger Ships

Safety of passenger ships means that the International Maritime Organisation has the responsibility and the function of ensuring the safety of the ships in the international waters. The safety of the ship does not only mean protecting from factors such as pirates and other things, it also includes other factors which have been mentioned below:-

- Designing of the ships and the alternative designing and arrangements related to the danger thereto,
- To mention the safe areas and the essential systems to be maintained while the ship proceeds to the port after a casualty, which will require redundancy of the propulsion and other essential things that the ship needs to carry while on the sail.
- Onboard safety centers, from where the safety systems can be controlled, operated and monitored.
- Fixed wire detection and the alarm systems in the ships including requirements for fire detector and manually operated call points to be capable of being remotely and individually identified.
- Fire prevention, including amendments aimed at enhancing the fire safety of atriums, the means of escape in case of fire and the ventilation systems and
- The time for orderly evacuation and abandonment, including requirements for the essential systems that must remain operational in case any one main vertical zone is unserviceable due to fire.

Goal-Based New Ship Construction Standards

This means that the International Maritime Organisations also have to set standards for the new ships before the making based on the loopholes in the previous ships and the renovation of the same. IMO also plans to determine the new hull construction standards for the new ships which are currently largely under the responsibility of the classification societies. The standards, once finalized, are intended to ensure that full standards developed by the classifications societies and other recognized organizations conform to the safety goals and the functional requirements established by the International Maritime Organisations. Therefore, it is an important role or a function that is performed by the organization.

Formal Safety Assessment

The safety assessment that the IMO does is according to the safety standards laid down by the same. In 2002, the MSC and the Marine environment Protection committee introduced a new methodology called Formal Safety Assessment, for its rulemaking process to incorporate risk assessment techniques that have been successfully used in several other industries such as the nuclear and the offshore industries.

FSA guidelines were approved by the MSC in 2002 and the guidelines have been routinely amended so as to catch up with the latest trends and the knowledge in the international market on the subject. The above committees are utilizing FSA process in the evaluation of the proposed new measures with a view to achieving a balance between the technical and operational issues, including the human element and between costs and benefits. Since 2002, FSA's has been used in several cases by MSC. there were several guidelines which were added to them in the year 2006 but at present the MSC having received several new FSC studies submitted by the IMO member governments, agreed, in principle, to establish a group of experts to review these FSA studies for use in future rule-makings.

Human Element

International Maritime Organization also keeps into account the human element and maintains standards for the same and it does ensure that there is a human element in the working of the organization and the people who are engaged in the working of the ship, be it sailing or other operational issues are not faced with issues risking their lives. The International Maritime Organisation in this way maintains high standards of safety and environmental protection for the purpose of significantly reducing the maritime casualties.

Improving Maritime Technology Standards

There are certain standards which the International Maritime Organization as a part of its function have to perform, and improving the technological standards of the maritime. The technical standards of the SOLAS conventions with a view to keeping them updated with the latest marine technologies in the ship design. As such, the MSC routinely adopts numerous codes and guidelines to support matters related to fire safety, life-saving, marine equipment, stability and the carriage of dangerous goods and hazardous cargoes. Most merchant ships today are covered by the 1966 Load Lines Convention to establish international rules with respect to the limits to which ships may be loaded. In 1988, in order to facilitate the adoption of amendments related to the 1966 Load Lines Convention, IMO adopted the 1988 LL protocol, which harmonized the convention's survey and certification requirement with those contained in SOLAS and MARPOL 73/78. IMO has developed in 1993, the Code on Intact Stability (IS Code) for all types of ships covered by IMO instruments and the MSC is currently revising the IS code to incorporate states of art knowledge, such as dynamic stability and the performance-based criteria. The regulations were made to bring in changes to the new ships and technology in force. The new regulations came into force in January 2009.

Investigation of the Maritime Casualties and Incidents

This means that the International Maritime Organization will have to check and investigate the casualties and the accidents happening in the midwaters or the international waters and also to ensure and facilitate the conduct of the investigations, analysis and reporting the accidents in accordance with the globally recognised best practices, with a view to maintaining an efficient and comprehensive knowledge-based mechanism to support the identification of trends and the International Maritime Organization rulemaking process. With this aim and within the framework of article 94.7 of the United Nations Convention on the Law of the Sea (UNCLOS), and relevant provisions contained in the IMO conventions. They have developed a new code of International Standards and Recommended Practices for a safety investigation into the marine casualty or marine incident (Casualty Investigation

Code), which is now under consideration for becoming mandatory under the SOLAS convention.

Piracy and Armed Robbery Against Ships

IMO also prevents attacks of piracy and armed robbery, to combat piracy and armed robbery at sea by adopting measures, including those relating to assistance with capacity-building through training of seafarers, port staff and enforcement personnel in the prevention, reporting and investigation of the incidents; bringing the alleged perpetrators to justice, in accordance with the international law; and by adopting national legislation as well as providing enforcement vessels and the equipment and guarding against fraudulent ship registration.

ADMISSION AND MEMBERSHIP TO IMO

Member States

IMO currently has 174 Member States and three Associate Members.

Non-Governmental Organizations (NGOs)

Non-governmental international organizations that have the capability to make a substantial contribution to the work of IMO may be granted consultative status by the Council with the approval of the Assembly.

Any organization seeking consultative status with IMO has to demonstrate considerable expertise as well as the capacity to contribute, within its field of competence, to the work of IMO. It must also show that it has no means of access to the work of IMO through other organizations already in consultative status and that it is "truly international" in its membership, namely that it has a range of members covering a broad geographical scope and, usually, more than one region.

The application procedure is initiated by sending, by post or e-mail, a formal letter addressed by the Executive Head of the NGO (or the person in charge) to the Secretary-General of IMO, informing him of the wish of the NGO to obtain consultative status with IMO. Applications, together with a completed questionnaire and other relevant documentation, should be sent to the following address:

The IMO Council considers applications for consultative status by non-governmental international organizations once a year, at its first session, which is usually held in the summer. Applications, including the letter, the questionnaire and any additional relevant documentation must have reached the IMO Secretariat by 31 March in order to be submitted to the summer Council session held that year; applications received after that date will be considered the following year.

Intergovernmental organizations (IGOs)

IMO may enter into agreements of cooperation with other intergovernmental organizations on matters of common interest with a view to ensuring maximum coordination in respect of such matters.

INSTRUMENTS OF IMO

One of the main aims of IMO is to ensure co-operation among maritime governments of the world. It also uses a number of instruments to implement and maintain the highest standards in areas of maritime safety, prevention of marine pollution, and shipping navigation and trade.

The 5 important instruments of IMO are:

(a) Conventions
(b) Protocols
(c) Amendments
(d) Recommendations, codes, and guidelines
(e) Resolutions

Conventions

A convention is a written agreement with several parts. Conventions form a major part of maritime affairs governed by the IMO. Some of the major conventions by IMO are Safety of Life at Sea (SOLAS) 1974 convention and International convention for prevention of pollution from Ships (MARPOL).

It is to note that conventions generally have several sub-parts, which would describe in details various aspects of the subject defined by that particular convention. For e.g. MARPOL convention has six parts which are known as annexes. Each of this annexe deals with different aspect of marine pollution.

It is also possible that details given within a convention are put under an associated code, which provides further technical details of that aspect; for e.g. the Life saving appliances (LSA) code gives details for minimum requirements for safety equipment used on board ships.

Each member state must accept the details mentioned in conventions put forth by the IMO and agree to international supervision required under such conventions.

Thus, conventions act as a treaty between the IMO and member states. It is imperative that every member state abides by the rules and regulations put forth by the IMO.

Protocols

Protocol is an important instrument used by the IMO to introduce changes to conventions, which are already adopted but not yet entered into force.

For e.g. SOLAS convention 1973 was amended twice using protocols – by 1978 SOLAS protocol which entered into force in 1st May 1981 and by 1988 SOLAS protocol which entered into force on 3rd Feb 2000. Both the protocols are now known as SOLAS 74/78 and SOLAS 74/88.

Amendments

As mentioned above, amendments are major changes that are brought into action using protocols. Amendments are the reforms that are needed in a convention and are backed by the protocols.

For e.g. Because of several accidents at sea, there was an urgent need to change the MARPOL 1973 convention in 1970s. These changes or amendments were brought into action by the combined convention-protocol instrument called MARPOL 73/78 on 2nd October 1983.

Recommendations, codes, and guidelines

Recommendations are mainly guidelines which are not legally accepted. They are not formal documents like convention or protocol but are a list of recommended practices that are closely linked to conventions. For e.g. timber deck cargo code

Recommendations can also be guidelines which are waiting to be accepted by the IMO.

However, it is to note that though recommendations are not legally binding, some governments might apply them in whole or in part.

Codes and guidelines can be both mandatory and non mandatory. Codes such as ISM and IBC codes are mandatory and are a part of a parent convention or protocol.

Resolutions

Resolutions are the finalized documents which are accepted by the IMO or any of the main body under IMO. They generally result from an agreement on a recommendation or amendment.

Resolution passed by the assembly is denoted in a peculiar manner.

For e.g. Resolution A. 586 (XIV)

Where, A = assembly; 586 = serial number of resolution; and XIV = Made by the 14th session of the assembly

E.g. 2: MEPC. 54 (32)

Where, MEPC = Marine environment protection committee; 54 = serial number; 32 = 32nd session of the committee

ORGANIZATIONAL STRUCTURE OF IMO

The International Maritime Organization consists of an assembly, a council and five main committees, which are as follows:-

1. The maritime safety committee
2. The Marine Environment Protection Committee
3. The legal committee
4. The technical cooperation committee
5. The facilitation committee

Apart from the main committees, there are certain subcommittees as well to assist the main five committees as mentioned above.

Assembly

This is the highest governing body of the organization. IT consists of all the member states and it meets once every two years in regular sessions, but may also meet in an extraordinary session if necessary. The assembly is responsible for approving the work programme, voting the budget and determining the financial arrangements of the organization. The assembly also elects the council.

Council

The council is a prestigious institution to be a part of. It is elected by the assembly for the two-year terms beginning after each regular session of the assembly. The council is executive organ of the International Maritime Organisation and is responsible, under the assembly for supervising the work of the organization. Between sessions of the assembly, the council performs all the functions of the assembly, except the function of making the recommendations to the governments on the maritime safety and pollution prevention which is reserved for the assembly by Article 15(j) of the convention.

Maritime Safety Committee (MSC)

The Maritime Safety Committee is the highest technical body of the organization. It consists of all the member states. The functions of the Maritime Safety Committee are to consider any matter within the scope of the organization concerned with the aids to navigation, construction and equipment of vessels, manning form a safety standpoint the rules for the prevention of the collisions, handling of the dangerous cargoes, maritime safety procedures and requirements that directly affect the maritime security.

The Marine Environment Protection Committee (MEPC)

The Marine Environment Protection committee consists of all the member states of the international maritime organization, is empowered to take any decision with respect to the scope of the organization concerned with prevention and control of pollution from ships.In particular, it is concerned with the adoption and amendment of conventions and other regulations and measures to ensure their enforcement.The Marine Environment Protection

Committee was established as a subsidiary body of the assembly but later on, in 1985 it was raised to the full constitutional status.

Sub-Committees

There are certain subcommittees that are made in the process. These subcommittees are also open to all the member states. These committees are as follows:-

- Sub-Committee on Human Element, Training, and Watchkeeping (HTW);
- Sub-Committee on Implementation of IMO Instruments (III);
- Sub-Committee on Navigation, Communications and Search and Rescue (NCSR);
- Sub-Committee on Pollution Prevention and Response (PPR);
- Sub-Committee on Ship Design and Construction (SDC);
- Sub-Committee on Ship Systems and Equipment (SSE); and
- Sub-Committee on Carriage of Cargoes and Containers (CCC).

Legal Committee

The legal committee is always important as far as the efficient working of the organization is concerned. The legal committee is empowered to deal with the legal matters of the organization and helps in deciding the right way even out of the wrong way. The Committee consists of all Member States of IMO. The committee works together for the administration as well as the organization of the International Maritime Organization. The Legal Committee is also empowered to perform any duties within its scope which may be assigned by or under any other international instrument and accepted by the Organization.

Technical Cooperation Committee

The technical cooperation committee is required to consider any matter within the scope of the organization concerned with the implementation of the technical cooperation projects for which the organization acts as the executing or cooperating agency and any other matters related to the organization's activities in the technical cooperation field. It also consists of all the member states of the international maritime cooperation, and was established in 1969 as a subsidiary body of the council and was institutionalized by means of an amendment to the International Marie Organisation Convention which entered into force in 1984.

Facilitation Committee

The facilitation committee was established as a subsidiary body of the Council in May 1972 and became fully institutionalized in December 2008 as the result of an amendment of the International Maritime organization at their own convention. It consists of all the member states of the organization and deals with International Maritime Organization's work in eliminating unnecessary formalities and the red tape in international shipping by implementing all the aspects of the convention on facilitation of the International Maritime Traffic 1965 and any matter within the scope of the IMO and international maritime traffic. To be specific the work of this committee has been to ensure the right balance between the maritime security and the facilitation of the international maritime trade.

Secretariat

Who does not want to be a part of the Secretariat of the International Maritime Organisation, and especially when there are career opportunities open in this institution, why cannot we target it. For now, let us know the current number of members of the secretariat. The Secretariat IMO consists of the Secretary-General and some 300 international personnel based at the headquarters of the Organization in London. The Secretary-General of the Organization is Mr. Kitack Lim (Republic of Korea) who was appointed to the position with effect from 1 January 2016, for an initial four-year term.

CHIEF ACTIVITIES OF IMO

In order to achieve its objectives, IMO has, in the last 35 years, promoted the adoption of some 40 conventions and protocols and adopted well over 700 codes and recommendations concerning maritime safety, the prevention of pollution and related matters.

The initial work on a convention is normally done by a committee or sub-committee; a draft instrument is then produced which is submitted to a conference to which delegations from all States within the United Nations system – including States which may not be IMO Members -are invited. The conference adopts a final text, which is submitted to Governments for ratification.

An instrument so adopted comes into force after fulfilling certain requirements, which always include ratification by a specified number of countries. Generally speaking, the more important the convention the more stringent is the requirements for entry into force. Implementation of the requirements of a convention is mandatory on countries, which are parties to it. Codes and recommendations, which are adopted by the IMO Assembly, are not binding on Governments; however, their contents can be just as important, and in most cases, they are implemented by Governments through incorporation into domestic legislation.

Below are the major categories which are implemented by IMO:

1. Safety – SOLAS
2. Preventing pollution – providing compensation
3. MARPOL
4. IMO’s codes & recommendations

In addition to conventions and other formal treaty instruments, IMO has adopted several hundred recommendations dealing with a wide range of subjects.

Some of these constitute codes, guidelines or recommended practices on important matters not considered suitable for regulation by formal treaty instruments. Although recommendations -whether in the form of codes or otherwise – are not usually binding on Governments, they provide guidance in framing national regulations and requirements. Many Governments do in fact apply the provisions of the recommendations by incorporating them, in whole or in part, into national legislation or regulations. In some cases, important codes have been made mandatory by including appropriate references in a convention.

These recommendations are generally intended to supplement or assist the implementation of the relevant provisions of the conventions and, in some cases, the principal codes, guidelines, etc.

In appropriate cases, the recommendations may incorporate further requirements, which have been found to be useful or necessary in the light of experience gained in the application of the previous provisions. In other cases, the recommendations clarify various questions, which arise in connection with specific measures and thereby ensure their uniform interpretation and application in all countries.

Examples of the principal recommendations, codes, etc., adopted over the years are:

- International Maritime Dangerous Goods Code (IMDG Code) (first adopted in 1965);
- Code of Safe Practice for Solid Bulk Cargoes (1965);
- International Code of Signals (IMO took over responsibility for the Code in 1965);
- Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (1971);
- Code of Safe Practice for Ships Carrying Timber Deck Cargoes (1973);
- Code of Safety for Fishermen and Fishing Vessels (1974);
- Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (1975); Code of Safety for Dynamically Supported Craft (1977);
- Code for the Construction and Equipment of Mobile Offshore Drilling Units (1979);
- Code on Noise Levels on Board Ships (1981);
- Code of Safety for Nuclear Merchant Ships (1981);
- Code of Safety for Special Purpose Ships (1983);
- International Gas Carrier Code (1983);
- International Bulk Chemicals Code (1983);
- Code of Safety for Diving Systems (1983);
- International Code for the Safe Carriage of Grain in Bulk (1991);
- International Safety Management Code (1993);
- International Code of Safety for High-Speed Craft (1994).

Other important recommendations have dealt with such matters as traffic separation schemes (which separate ships moving in opposite directions by creating a central prohibited area); the adoption of technical manuals such as the Standard Marine Navigational Vocabulary, the IMO Search and Rescue Manual and the IMO Manual on Oil Pollution; crew training; performance standards for shipborne equipment; and many other matters. There are also guidelines to help the implementation of particular conventions and instruments.

The provisions of recommendations are sometimes incorporated into amendments to the relevant conventions. Recommendations enable provisions or requirements to be suggested relatively quickly to Governments for consideration and action. It is also easier for Governments to act on such matters than in respect of provisions in formal treaty instruments, which involve international legal obligations.

Dumping at sea

In addition to other aspects of marine pollution prevention, IMO also carries out Secretariat functions in connection with the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. This Convention, now called the London Convention, was adopted in 1972 at a conference held under the auspices of the United Kingdom. It entered into force in 1975.

The Convention controls and regulates on a global level the disposal at sea of wastes and other material of any kind (including ships and platforms). The disposal of certain substances which from the environmental point of view are known to be particularly harmful (such as organ halogen compounds, mercury, cadmium, plastics, mineral oils and radioactive wastes) is prohibited.

The Convention also contains specific regulations concerning the dumping of several other materials, which may present a risk to the marine environment and human health. In addition, it bans the incineration of wastes on board ships.

How does it work?

The International Maritime Organisation works through a number of specialist committees and sub-committees. All these bodies are composed of representatives of Member States who discharge their functions with the assistance and advice of appropriate bodies of the United Nations or the specialised agencies, as well as international governmental and non-governmental organisations with which formal relationships have been established.

Formal arrangements for co-operation have been established with more than 30 intergovernmental organisations, while nearly 50 non-governmental, international organisations have been granted consultative status to participate in the work of various bodies in an observer capacity. These organisations represent a wide spectrum of maritime, legal and environmental interests and they contribute to the work of the various organs and committees through the provision of information, documentation and expert advice. However, none of these organisations has a vote.

How does IMO implement legislation?

The Organization itself has no powers to enforce conventions. Therefore, IMO does not implement any Conventions. The enforcement of IMO convention depends upon the Governments of Member Parties. Contracting Governments enforce the provisions of the IMO conventions as far as their own ships are concerned and also set the penalties for infringements, where these are applicable. They may also have certain limited powers in respect of the ships of other Governments.

In some conventions, certificates are required to be carried onboard ship to show that they have been inspected and have met required standards. These certificates are normally accepted as a proof by authorities from other States. When an offence occurs in international waters, the responsibility for imposing a penalty rests with the flag State. Should an offence occur within the jurisdiction of another State, however, that State can either cause proceedings to be taken in accordance with its own law or give details of the offence to the flag State so that the latter can take appropriate action.

Under the terms of the 1969 Convention Relating to Intervention on the High Seas, Contracting States are empowered to act against ships of other countries that have been involved in an accident or have been damaged on the high seas if there is a grave risk of oil pollution occurring as a result that would reach their waters.

The way in which these powers may be used arc very carefully defined, and in most conventions the flag State is primarily responsible for enforcing conventions as far as its own ships and their personnel are concerned.

Actors in the IMO Law-Making Process

The IMO Convention of 1948 created room for three types of entities to participate in the IMO law-making process. These are member states (including associate members), inter-governmental organisations as observer organisations, and international non-governmental organisations as organisations with consultative status.

Member States

Presently, IMO has 170 Member States and three Associate Members representing all regions of the world. Subject to the relevant provision of the IMO Convention 1948, all States are eligible to become Members of the organisation. United Nations members are allowed to become members of the organisation by joining as a party to the IMO Convention 1948. There is an elaborate mechanism for gaining membership for the countries which are not members of the United Nations. Any Territory or group within a Member State may be an associate member if it is a territory to which the Convention has been made applicable under Article 72, by the Member having responsibility for its international relations or by the United Nations. Member States of the IMO may be divided into different groups depending on their interest in the organisation.

Port, Coastal and Flag States

The first dynamic of IMO members' interests is the conflict between the interest of port or coastal and flag States. However, this type of binary division is practically impossible because a country may be a port state while simultaneously being a coastal or flag state. Nevertheless, a State may consider one of these roles more important than the other due to its economic, geographical and environmental interests. For example, a State with a huge merchant fleet may largely represent the interests of its shipping companies because revenue from this sector is a major source for national income. This is particularly true for 'flag of convenience' (FOC) countries. As of 2011, around 69.7 % of the total global merchant fleet operates under FOCs. FOC has been defined as the "flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels". Under international law, an owner has full liberty to choose the flag for his or her ship. Consequently, every State has the right to set its own regulation and standards for registration of ships. Both the 1958 Geneva Convention on High Seas and UNCLOS (articles 91 and 94) impose a condition of 'genuine link' between the ship and the flag State, without precisely defining the term. This seems to be an incomplete provision which creates more problems than it solves. Its ambiguity has led scholars to interpret the term in a variety of different ways with divergent results. Most scholars come to the conclusion that a mere administrative act such as registration is sufficient to fulfil the condition of "genuine link".

Moreover, there is strong support for the opinion that lack of a 'genuine link' is not sufficient to refuse nationality of a ship. As observed by the International Tribunal for the Law of Sea (ITLOS) in the *M/V "SAIGA" (No. 2) Case* :

…there is nothing in article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the flag of the flag State. …… The conclusion of the Tribunal is that the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.

All these shortcomings open up the profitable business of FOC at the cost of environmental protection and safety. FOC countries may consider environmental protection is not an important issue for them.

In contrast, a country may consider its role as a coastal state is very vital. Australia is a good example. With its large pristine marine areas, such as the Great Barrier Reef, Australia considers its role as a coastal State as vital. Indeed, Australia has advocated for more robust international regulation for the protection of the marine environment from vessel-source pollution, having submitted a proposal in 1990 urging MEPC to establish the Great Barrier Reef Particularly Sensitive Sea Area (PSSA) for the introduction of a system of pilotage and mandatory ship reporting. The Great Barrier Reef PSSA is the first PSSA approved by IMO.

Developed, Developing and Least Developed States

Like other international organisations IMO Member States are also deeply divided into developed, developing and least developed States; a division which has existed from the very beginning of the organisation. There is an assertion that "the developed-developing state dynamics underlying much of international discourse in the 1970s have largely dissipated. The more relevant tussle at IMO today is one between coastal and port states seeking greater control over foreign ships and maritime states seeking to uphold the freedom navigation". In fact the north–south divide is still a dominating factor in the IMO discourses. The presence of issues like the implementation of the principle of Common but Differentiated Responsibilities (CBDR) is more apparent than ever in current IMO discourses. Dealing with the issue of shipbreaking industry and reduction of emissions of greenhouses gases from international shipping, there is a serious divide and ongoing conflict between developed and developing States. This debate is playing a catalyst in profoundly resurfacing relatively older north–south debates, like the issue of technology transfer and assistance. Recent negotiations in MEPC, particularly in the context of climate change, show developed and developing countries are debating with each other as groups. That is a clear sign of serious north–south divide, like in other areas of international law-making. However, despite serious interest involved particularly in the areas of climate change and shipbreaking, least developed countries are not playing an active role in the debate as a group. For example, the 48 nations comprising the Least Developed Countries group work together in the intergovernmental negotiations under the UN Framework Convention on Climate Change (UNFCCC). However, they do not work together in the IMO negotiations relating to climate change and international shipping. This may be due to their divergent interests regarding the maritime sector.

Nevertheless, IMO is still mainly dominated by developed countries despite the scope for equal participation in most of the IMO organs. As will be discussed later in this chapter, there is a role of non-governmental actors behind this domination.

United Nations and Other Intergovernmental Organisations

IMO is a specialised agency of the United Nations in the fields of shipping and the effect of shipping on the marine environment. The IMO Convention 1948 provides that IMO shall cooperate with any specialised agency of the United Nations on matters of common concern. The IMO Convention 1948 also provides that IMO may cooperate with other intergovernmental organisations whose interests and activities are related to the purpose of the organisation. In accordance with these provisions IMO has signed agreements of cooperation with 63 intergovernmental organisations. Some of these organisations are specialised organisations from the maritime sector or regional organisations active in maritime sectors. These organisations, particularly some regional organisations, may have and exert serious influence on the Member States' opinions regarding marine environmental issues under IMO 's consideration. For example, the European Commission as the executive body of the European Union is an observer organisation in IMO. The European Union has serious influence on other Members because a regulation adopted by the European Union may be binding for the Member States. Therefore, Member States of the European Union may try to impart the European Union's view on the IMO negotiation process. There is even a discussion on whether the European Union should take full membership of IMO, although this is in fact impossible without amending the IMO Convention 1948.

IMO works cooperatively with other organisations and programs in the United Nations system for matters related to marine environment. One such example is IMO's interaction with United Nations Environment Program.

International Non-governmental Organisations with Consultative Status

International non-governmental organisations (INGOs) play a significant a role in the IMO law-making process despite not having any voting rights in IMO organs. IMO Convention 1948 empowers IMO to make suitable arrangements after consultation and cooperation with non-governmental international organisations on matters within the scope of IMO. In 1961, in accordance with a provision, the IMO Assembly approved the *Rules for Consultative Status of Non-Governmental International Organizations with the International Maritime Organization*. IMO Council developed Guidelines in this regard in 1978. The Rules and Guidelines were amended several times. According to these the IMO Council, with the approval of the IMO Assembly, may grant consultative status to an INGO if that organisation is able to make a substantial contribution to the work of IMO. Seventy-seven INGOs have been granted consultative status in IMO. INGOs represent a variety of interests in the IMO marine environmental discourses, including different types of shipping interests (for example ship-owners and operators), cargo interests (for example cargo owners and charters), seafarers and other labour organisations, environmental organisations, research organisations, training organisations, classification societies, organisations representing marine-related industries, protection and indemnity insurance clubs and other marine insurers.

Among these organisations, those representing ship-owners and operators appear to be the most powerful. They even have the capacity to influence the Member States with vested shipping interests. Another very vocal group is cargo owners and charters, particularly big oil companies. Classification societies, protection and indemnity insurance clubs and other marine insurers are also active participants in the IMO marine environmental law-making process. Environmental NGOs also actively participate in the MEPC meetings and make regular submissions.

Non-governmental organisations do not just influence the law-making process merely by their submissions and participation in the meetings of MEPC and other IMO organs. Their main influence comes via IMO Member States who also share similar interests. The presence of FOC countries in the leading position of IMO created a further avenue for shipping companies to exert influence on the IMO law-making process, as they virtually have a client–service–provider relationship with those countries. The participation of non-governmental organisations in IMO is more apparent than many other similar international organisations. These issues will be elaborated further in subsequent chapters with practical examples.

IMO'S CONTRIBUTUION TO INTERNATIONAL MARITIME LAW

Maritime Security and international regulations in maritime transportation of CBRN materials

IMO measures do not explicitly focus on "preventing terrorists from acquiring weapons of mass destruction" but rather on maintaining the security of the ship at all times to prevent use of the ship for a terrorist purpose.

Maritime security is an integral part of IMO's responsibilities. A comprehensive mandatory security regime for international shipping entered into force on 1 July 2004 and included a number of amendments to the 1974 Safety of Life at Sea Convention (SOLAS), the most far-reaching of which enshrined the International Ship and Port Facility Security Code (ISPS Code), which contains detailed security-related requirements for Governments, port authorities and shipping companies in a mandatory section (Part A), together with a series of guidelines about how to meet these requirements in a second, non-mandatory section (Part B).

The purpose of these maritime security measures is to establish an international framework involving co-operation between Contracting Governments, Government agencies, local administrations and the shipping and port industries to detect/assess security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade; to establish the respective roles and responsibilities of all parties concerned, at the national and international level, for ensuring maritime security; to ensure the early and efficient collation and exchange of security-related information; to provide a methodology for security assessments so as to have in place plans and procedures to react to changing security levels; and to ensure confidence that adequate and proportionate maritime security measures are in place. The objectives are to be achieved by the designation of appropriate officers/personnel on each ship, in each port facility and in each shipping company to prepare and to put into effect the security plans.

Under SOLAS Chapter XI-2 and the ISPS Code, ship security plans must address measures designed to prevent weapons, dangerous substances and devices intended for use against persons, ships or ports and the carriage of which is not authorized from being taken on board the ship. Ship security plans should have established procedures at all security levels to establish, maintain and update an inventory of any dangerous goods or hazardous substances carried on board, including their location, and make provision for restricted areas and access, including to spaces containing dangerous goods or hazardous substances.

Port facility security plans must also address measures designed to prevent weapons or any other dangerous substances and devices intended for use against persons, ships or ports, and the carriage of which is not authorized, from being introduced into the port facility or on board a ship. Those responsible for ship and port facility security are expected to have, as a competency, knowledge of recognition and detection of weapons, dangerous substances, dangerous goods and devices, and an awareness of the damage they can cause. Procedures and actions should be in accordance with the principles established by the maritime security measures and the relevant provisions of the International Maritime Dangerous Goods (IMDG) Code.

The IMO maritime security measures also require Governments to determine when a Declaration of Security (DOS)—which is an agreement between a port or port facility and a ship or between a ship and another ship that confirms the security responsibilities of each party during a ship/port interface or a ship-to-ship activity—is required. It is the responsibility of the respective security officers of the ship and port/port facility to assess the risk that the ship/port interface or ship-to-ship activity poses to persons, property or the environment. These circumstances are usually specified by the Designated Authority or Administration for inclusion in port, port facility and ship security plans, which are then implemented in circumstances such as when the port facility/ship interface involves a cruise ship, a ship carrying dangerous goods or the loading or transfer of dangerous goods.

Many maritime countries have taken steps to regulate the carriage of dangerous goods by sea, based on the safety considerations set out in parts A and A-1 of Chapter VII of the 1974 SOLAS Convention, as amended. More recently, as marine pollution has become a serious concern, countries have taken further steps to regulate the carriage of marine pollutants, as described in Annex III of MARPOL.

The IMDG Code, which was first published in 1965, amplifies the requirements of both conventions and has become the standard guide to all aspects of handling dangerous goods and marine pollutants in sea transport. The Code as originally amended was recommended to governments as the basis for national regulations by which the requirements of SOLAS 1974 and MARPOL Annex III were effected, but as amended by Amendments 32, 33, 34 and 35 is now mandatory. The Code lays down basic principles: detailed recommendations for individual substances, materials and articles, and a number of recommendations for good operational practice, including advice on terminology, packing, labelling, stowage, segregation and handling, and emergency response action.

Wider initiative to counter terrorism

The maritime security provisions of SOLAS chapter XI-2 and the ISPS Code are part of a wider initiative to counter terrorism, including action by the Counter Terrorist Committee of the UN Security Council through resolution 1373; co-ordination with other UN agencies and Interpol through the UN Counter-terrorism implementation task force; co-operation with the World Customs Organization (WCO) on container security; and joint initiatives with the International Labour Organization (ILO) on port security and identification documents.

IMO's Maritime Safety Committee and its subsidiary bodies are continuously working on additional elements of and guidance for the mandatory requirements, e.g. Ship Security Alert Systems (SSAS), long-range identification and tracking (LRIT) of ships, control and compliance measures, training and certification of security officers, etc.

2005 Protocol to the SUA Convention

Among the unlawful acts covered by the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (the SUA Convention) in Article 3 are the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.

The 2005 Protocol to the SUA Convention, which entered into force 28 July 2010, adds a new Article 3bis which states that a person commits an offence within the meaning of the Convention if that person unlawfully and intentionally:

- When the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from any act:
    - uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN (biological, chemical, nuclear) weapon in a manner that causes or is likely to cause death or serious injury or damage;
    - discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
    - uses a ship in a manner that causes death or serious injury or damage;
- Transports on board a ship:
    - any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, death or serious injury or damage for the purpose of intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act;
    - any BCN weapon, knowing it to be a BCN weapon;
    - any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear

explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; and
- any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

The transportation of nuclear material is not considered an offence if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non Proliferation of Nuclear Weapons (Subject to conditions).

The 2005 Protocol establishes procedures to board ships suspected of transporting WMD and related goods under certain circumstances. A new Article 8bis covers co-operation and procedures to be followed if a State Party desires to board a ship flying the flag of a State Party when the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the Convention. The authorization and co-operation of the flag State is required before such a boarding. A State Party may notify the IMO Secretary-General that it would allow authorization to board and search a ship flying its flag, its cargo and persons on board if there is no response from the flag State within four hours. A State Party can also notify that it authorizes a requesting Party to board and search the ship, its cargo and persons on board, and to question the persons on board to determine if an offence has been, or is about to be, committed. At time of writing, 20 Contracting States had ratified SUA 2005, representing approximately 30% of world tonnage.

In addition to the development of legal instruments and associated training and guidance material, IMO has focussed on assisting Governments to implement the provisions of SOLAS chapter XI-2 and the ISPS Code and other instruments through its technical cooperation programme. Such activities have included conducting training courses, needs assessment missions, seminars and workshops on a regional and national basis.

Marine Environment

Shipping – which transports about 90% of global trade – is, statistically, the least environmentally damaging mode of transport, when its productive value is taken into consideration. For example, the vast quantity of grain required to make the world's daily bread could not be transported any other way than by ship. Moreover, set against land-based industry, shipping is, overall, a comparatively minor contributor to marine pollution from human activities.

IMO's original mandate was principally concerned with maritime safety. However, as the custodian of the 1954 International Convention for the prevention of pollution of the sea by oil (OILPOL Convention), the Organization, soon after it began functioning in 1959, assumed responsibility for pollution issues and subsequently has, over many years, adopted a wide range of measures to prevent and control pollution caused by ships and to mitigate the effects of any damage that may occur as a result of maritime operations and accidents.

These measures have been shown to be successful in reducing ship-sourced pollution and illustrate the commitment of the Organization and the shipping industry towards protecting the environment. Of the 51 treaty instruments for the regulation of international shipping IMO has adopted so far, 21 are directly environment-related.

The work of the Marine Environment Division is, in the main, directed by the Marine Environment Protection Committee, the MEPC in short, which is IMO's senior technical body on marine pollution related matters. It is aided in its work by a number of IMO's Sub-Committees, in particular the Sub-Committee on Pollution Prevention and Response (PPR).

The original focus of its work was the prevention of marine pollution by oil, resulting in the adoption of the first ever comprehensive antipollution convention, the International Convention for the Prevention of Pollution from Ships (MARPOL) in 1973. This has changed over the last few decades to include a much wider range of measures to prevent marine pollution, and the original MARPOL Convention was amended many times to also include requirements addressing pollution from chemicals, other harmful substances, garbage, sewage and, under an Annex VI adopted in 1997, air pollution and emissions from ships.

Other international instruments in the remit of the Division regulate oil pollution preparedness, response and co-operation (OPRC Convention and its 2000 OPRC-HNS Protocol), control of harmful anti-fouling systems on ships (AFS Convention), prevention of the potentially devastating effects of the spread of invasive harmful aquatic organisms carried by ships’ ballast water (BWM Convention), safe and environmentally sound recycling of ships (Hong Kong Convention), to name just a few.

IMO also carries out Secretariat functions in connection with the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the London Convention as well as its 1996 Protocol. Its objective is to promote the effective control of all sources of marine pollution and to take all practicable steps to prevent pollution of the sea by dumping of wastes and other matter.

Many developing countries cannot yet give full and complete effect to these instruments, for various reasons. IMO has established an Integrated Technical Co-operation Programme (ITCP), with the sole purpose of assisting countries in building up their human and institutional capacities for uniform and effective compliance with the Organization’s regulatory framework. Assisting these countries in working towards sustainable socio-economic development and enhancement of marine environment protection will ultimately result in cleaner waters and coasts, increased tourism, greater access to protein through improved and uncontaminated fish catches and integrated coastal zone management.

Pollution Prevention

In 1973, IMO adopted the International Convention for the Prevention of Pollution from Ships, now known universally as MARPOL, which has been amended by the Protocols of 1978 and 1997 and kept updated with relevant amendments. The MARPOL Convention addresses pollution from ships by oil; by noxious liquid substances carried in bulk; harmful substances carried by sea in packaged form; sewage, garbage; and the prevention of air pollution from ships. MARPOL has greatly contributed to a significant decrease in pollution from international shipping and applies to 99% of the world’s merchant tonnage.

Other treaties address anti-fouling systems used on ships, the transfer of alien species by ships' ballast water and the environmentally sound recycling of ships. Reductions of pollution generated by ships have been achieved by addressing technical, operational and human element issues and are all the more noteworthy when compared with the significant growth in the world's shipping industry – both in the size of the world fleet and the distances that it travels. IMO is continuously pursuing a pro-active approach to enhance implementation and enforcement, both by flag and port States, including a pro-active action plan to ensure that shore-based reception facilities for ship generated waste keep up with international regulatory requirements.

Oil Pollution

Oil tankers transport some 2,900 million tonnes of crude oil and oil products every year around the world by sea. Most of the time, oil is transported quietly and safely...

Measures introduced by IMO have helped ensure that the majority of oil tankers are safely built and operated and are constructed to reduce the amount of oil spilled in the event of an accident. Operational pollution, such as from routine tank cleaning operations, has also been cut.

The operational and construction regulations introduced by MARPOL, which entered into force in 1983, have been a success, with statistics from reputable industry and independent bodies showing that these regulations, along with other safety-related regulations such as the introduction of mandatory traffic separation schemes and international standards for seafarer training, have been instrumental in the continuous decline of accidental oil pollution that has taken place over the last 30 years.

The MARPOL convention, in 1983, introduced a number of radical new concepts, such as a requirement for new oil tankers to be fitted with segregated ballast tanks, so as to obviate the need to carry ballast water in cargo tanks. This was superseded by the requirement for oil tankers delivered from 1996 onwards to be fitted with a double hull. The protection of the marine environment was thus greatly enhanced.

As far as operational oil pollution is concerned, the many innovations introduced by MARPOL on allowable discharges of bilge water through the oily water separator (with the well-known 15ppm standard), or oily waters from the cargo tanks, through the oil discharge and monitoring system, have contributed greatly to a noticeable decrease in the pollution of the world's seas, though it is fair to recognise that a greater effort to impose compliance must be carried out.

Chemical Pollution

Regulations governing the carriage of chemicals by ship are contained in the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention for the Prevention of Marine Pollution from Ships, as modified by the Protocol of 1978 relating thereto (MARPOL).

Chemicals carried in bulk

Carriage of chemicals in bulk is covered by regulations in SOLAS Chapter VII - Carriage of dangerous goods and MARPOL Annex II - Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk.

Both Conventions require chemical tankers built after 1 July 1986 to comply with the International Bulk Chemical Code (IBC Code), which sets out the international standards for the safe carriage, in bulk by sea, of dangerous chemicals and noxious liquid substances. The Code prescribes the design and a construction standard of ships involved in the transport of bulk liquid chemicals and identifies the equipment to be carried to minimize the risks to the ship, its crew and to the environment, with regard to the nature of the products carried.

The IBC Code sets out a list chemicals and their hazards, and identifies both the ship type required to carry that product and the environmental hazard rating.

Chemical tankers constructed before 1 July 1986 should comply with the requirements of the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (BCH Code) – the predecessor of the IBC Code.

MARPOL Annex II - Carriage of noxious liquid substances in bulk

MARPOL Annex II Regulations for the control of pollution by noxious liquid substances in bulk sets out a pollution categorization system for noxious and liquid substances. The four categories are:

- Category X: Noxious Liquid Substances which, if discharged into the sea from tank cleaning or deballasting operations, are deemed to present a major hazard to either marine resources or human health and, therefore, justify the prohibition of the discharge into the marine environment;

- Category Y: Noxious Liquid Substances which, if discharged into the sea from tank cleaning or deballasting operations, are deemed to present a hazard to either marine resources or human health or cause harm to amenities or other legitimate uses of the sea and therefore justify a limitation on the quality and quantity of the discharge into the marine environment;

- Category Z: Noxious Liquid Substances which, if discharged into the sea from tank cleaning or deballasting operations, are deemed to present a minor hazard to either marine resources or human health and therefore justify less stringent restrictions on the quality and quantity of the discharge into the marine environment; and

- Other Substances: substances which have been evaluated and found to fall outside Category X, Y or Z because they are considered to present no harm to marine resources, human health, amenities or other legitimate uses of the sea when discharged into the sea from tank cleaning of deballasting operations. The discharge of bilge or ballast water or other residues or mixtures containing these substances are not subject to any requirements of MARPOL Annex II.

The annex also includes a number of other requirements reflecting modern stripping techniques, which specify discharge levels for products which have been incorporated into Annex II. For ships constructed on or after 1 January 2007 the maximum permitted residue in the tank and its associated piping left after discharge is set at a maximum of 75 litres for products in categories X, Y and Z (compared with previous limits which set a maximum of 100 or 300 litres, depending on the product category).

MARPOL Annex III - Chemicals carried in packaged form

Chemicals which are carried in packaged form, in solid form or in bulk are regulated by Part A of SOLAS Chapter VII - Carriage of dangerous goods, which includes provisions for the classification, packing, marking, labelling and placarding, documentation and stowage of dangerous goods.

MARPOL Annex III also sets out regulations for the prevention of pollution by harmful substances in packaged form and includes general requirements for the issuing of detailed standards on packing, marking, labelling, documentation, stowage, quantity limitations, exceptions and notifications for preventing pollution by harmful substances. For the purpose of Annex III, “harmful substances” are those identified as “marine pollutants” in the IMDG Code.

Both SOLAS and MARPOL refer to the International Maritime Dangerous Goods (IMDG) Code, which was developed by IMO as a uniform international code for the transport of dangerous goods by sea.

Preparedness, Response and Liability and Compensation for Chemical Pollution Incidents

Issues related to the preparedness for and response to incidents of chemical pollution is covered by the OPRC-HNS Protocol 2000. Liability and compensation for incidents involving chemical pollution incidents are covered by the HNS Convention 2010, which has yet to enter into force.

Sewage

Regulations for the prevention of pollution by sewage are contained in MARPOL Annex IV.

Sewage – the problem

The discharge of raw sewage into the sea can create a health hazard. Sewage can also lead to oxygen depletion and can be an obvious visual pollution in coastal areas - a major problem for countries with tourist industries.

The main sources of human-produced sewage are land-based - such as municipal sewers or treatment plants. However, the discharge of sewage into the sea from ships also contributes to marine pollution.

Annex IV of MARPOL

Annex IV contains a set of regulations regarding the discharge of sewage into the sea from ships, including regulations regarding the ships' equipment and systems for the control of sewage discharge, the provision of port reception facilities for sewage, and requirements for survey and certification.

It is generally considered that on the high seas, the oceans are capable of assimilating and dealing with raw sewage through natural bacterial action. Therefore, the regulations in Annex IV of MARPOL prohibit the discharge of sewage into the sea within a specified distance from the nearest land, unless otherwise provided.

Governments are required to ensure the provision of adequate reception facilities at ports and terminals for the reception of sewage, without causing delay to ships.

The Annex entered into force on 27 September 2003. A revised Annex IV was adopted on 1 April 2004 and entered into force on 1 August 2005.

The revised Annex applies to ships, engaged in international voyages, of 400 gross tonnage and above or which are certified to carry more than 15 persons. The Annex requires ships to be equipped with either an approved sewage treatment plant or an approved sewage comminuting and disinfecting system or a sewage holding tank.

The discharge of sewage into the sea is prohibited, except when the ship has in operation an approved sewage treatment plant or when the ship is discharging comminuted and disinfected sewage using an approved system at a distance of more than three nautical miles from the nearest land. Sewage which is not comminuted or disinfected may be discharged at a distance of more than 12 nautical miles from the nearest land when the ship is en route and proceeding at not less than 4 knots, and the rate of discharge of untreated sewage shall be approved by the Administration (see resolution MEPC.157(55))

The MEPC also adopted the *Recommendation on standards for the rate of discharge of untreated sewage from ships* (resolution MEPC.157(55)).

Special Areas

In July 2011, MEPC 62 adopted, by resolution MEPC.200(62), the most recent amendment to MARPOL Annex IV, which entered into force on 1 January 2013. The amendment introduced, inter alia, a definition for Special Area as well as relevant requirements for the discharge of sewage from passenger ships in Special Areas and for port reception facilities.

The discharge of sewage from passenger ships within a Special Area is generally be prohibited under the new regulations, except when the ship has in operation an approved sewage treatment plant which has been certified by the Administration (see resolution MEPC.227(64)). The sewage treatment plant installed on a passenger ship intending to discharge sewage effluent in Special Areas should additionally meet the nitrogen and phosphorus removal standard when tested for its Certificate of Type Approval by the Administration (resolution MEPC.227(64), section 4.2).

Currently, the Baltic Sea area is the only Special Area under Annex IV. In accordance with resolution MEPC.275(69), the discharge requirements for Special Areas in regulation 11.3 of MARPOL Annex IV for the Baltic Sea Special Area shall take effect:

1. on 1 June 2019, for new passenger ships[1];
2. on 1 June 2021, for existing passenger ships[1] other than those specified in .3; and
3. on 1 June 2023, for existing passenger ships en route directly to or from a port located outside the special area and to or from a port located east of longitude 28˚10' E within the special area that do not make any other port calls within the special area.

Garbage

Regulations for the prevention of pollution by garbage from ships are contained in Annex V of MARPOL.

Background of MARPOL Annex V

Garbage from ships can be just as deadly to marine life as oil or chemicals.

The greatest danger comes from plastic, which can float for years. Fish and marine mammals can in some cases mistake plastics for food and they can also become trapped in plastic ropes, nets, bags and other items - even such innocuous items as the plastic rings used to hold cans of beer and drinks together.

It is clear that a good deal of the garbage washed up on beaches comes from people on shore - holiday-makers who leave their rubbish on the beach, fishermen who simply throw unwanted refuse over the side - or from towns and cities that dump rubbish into rivers or the sea. But in some areas most of the rubbish found comes from passing ships which find it convenient to throw rubbish overboard rather than dispose of it in ports.

For a long while, many people believed that the oceans could absorb anything that was thrown into them, but this attitude has changed along with greater awareness of the environment. Many items can be degraded by the seas - but this process can take months or years.

Persuading people not to use the oceans as a rubbish tip is a matter of education - the old idea that the sea can cope with anything still prevails to some extent but it also involves much more vigorous enforcement of regulations such as MARPOL Annex V.

MARPOL Annex V

MARPOL Annex V seeks to eliminate and reduce the amount of garbage being discharged into the sea from ships. Unless expressly provided otherwise, Annex V applies to all ships, which means all ships of any type whatsoever operating in the marine environment, from merchant ships to fixed or floating platforms to non-commercial ships like pleasure crafts and yachts.

Although the Annex is optional[1], it did receive a sufficient number of ratifications to enable entry into force on 31 December 1988. Today, more than 150 Countries have signed up to MARPOL Annex V.

MARPOL Annex V generally prohibits the discharge of all garbage into the sea, except as provided otherwise in regulations 4, 5, and 6 of the Annex, which are related to food waste, cargo residues, cleaning agents and additives and animal carcasses. Exceptions with respect to the safety of a ship and those on board and accidental loss are contained in regulation 7 of Annex V

Under MARPOL Annex V, garbage includes all kinds of food, domestic and operational waste, all plastics, cargo residues, incinerator ashes, cooking oil, fishing gear, and animal carcasses generated during the normal operation of the ship and liable to be disposed of continuously or periodically. Garbage does not include fresh fish and parts thereof generated as a result of fishing activities undertaken during the voyage, or as a result of aquaculture activities.

To assist Governments, ships and port operators in implementing relevant requirements under MAPROL Annex V, MEPC has developed and adopted the Guidelines for the implementation of MARPOL Annex V, known as a living document, the latest of which is resolution MEPC.295(71).

Port reception facilities

The effectiveness of ships to comply with the discharge requirements of MARPOL depends largely upon the availability of adequate port reception facilities, especially within special areas. Hence, MARPOL Annex V also obliges Governments to ensure the provision of adequate reception facilities at ports and terminals for the reception of garbage without causing undue delay to ships, and according to the needs of the ships using them.

As provided in regulation 8.3, Small Island Developing States (SIDS) could satisfy the requirements for providing adequate port reception facilities through regional arrangements when, because of those States' unique circumstances, such arrangements are the only practical means to satisfy these requirements. Parties participating in a regional arrangement must develop a Regional Reception Facility Plan, taking into account the guidelines developed by IMO[2].

Special areas

The special areas established under Annex V are:

- the Mediterranean Sea area
- the Baltic Sea area
- the Black Sea area
- the Red Sea area
- the Gulfs area
- the North Sea area
- the Wider Caribbean Region and
- the Antarctic area.

These are sea areas where for recognized technical reasons relating to their oceanographic and ecological condition and the particular character of traffic, such as heavy maritime traffic, low water exchange, extreme ice states, endangered marine species, etc., the adoption of special mandatory methods for the prevention of marine pollution by garbage is required.

Port State control

Provisions to extend port State control to cover operational requirements as regards prevention of marine pollution were adopted in 1994 and entered into force on 3 March 1996. Like similar amendments to the other MARPOL Annexes, regulation 9 of Annex V makes it clear that port State control officers can inspect a foreign-flagged ship at a port or an offshore terminal of its State "where there are clear grounds for believing that the master or crew are not familiar with essential shipboard procedures relating to the prevention of pollution by garbage".

Placard

Regulation 10.1 also requires every ship of 12 metres in length or over and every fixed or floating platform to display placards notifying passengers and crew of the disposal requirements of the Annex; these placards should be written in the working language of the ship's crew and also in English, French or Spanish for ships travelling to other States' ports or offshore terminals.

Garbage management plan

All ships of 100 gross tonnage and above, every ship certified to carry 15 persons or more, and every fixed or floating platform must carry a garbage management plan on board, which includes written procedures for minimizing, collecting, storing, processing and disposing of garbage, including the use of the equipment on board (regulation 10.2). The garbage management plan must designate the person responsible for the plan and be written in the working language of the crew. Resolution MEPC.220(63) provides the *2012 Guidelines for the development of garbage* management *plans*.

Garbage Record Book

Implementation and enforcement is also the focus of regulation 10.3, which requires all ships of 400 gross tonnage and above and every ship which is certified to carry 15 persons or more engaged in voyages to ports and offshore terminals under the jurisdiction of another Party to the Convention and every fixed or floating platform to provide a Garbage Record Book and to record all disposal and incineration operations.

The date, time, position of the ship, description of the garbage and the estimated amount incinerated or discharged must be logged and signed. The Garbage Record Book must be kept for a period of two years after the date of the last entry. This regulation does not in itself impose stricter requirements - but it makes it easier to check that the regulations on garbage are being adhered to as it means ship personnel must keep track of the garbage and what happens to it. It could also prove an advantage to a ship when local officials are checking the origin of discharged garbage - if ship personnel can adequately account for all their garbage, they are unlikely to be wrongly penalised for discharging garbage when they have not done so. Appendix 2 of MARPOL Annex V provides a standard form for a Garbage Record Book.

Cargo residues

Cargo residues are defined as the remnants of any cargo which are not covered by other Annexes to the present Convention and which remain on deck or in holds following loading or unloading. They include loading and unloading excess or spillage, whether in wet or dry condition or entrained in wash water, but do not include cargo dust remaining on deck after sweeping or dust on the external surfaces of the ship (regulation 1.2 of Annex V). In addition to this definition, MARPOL Annex V also stipulates that only those cargo residues that cannot be recovered using commonly available methods for unloading could be considered for discharge.

A simplified overview of the regulations regarding the discharge of cargo residues under MARPOL Annex V. As a general rule, cargo residues which contain substances classified as harmful to the marine environment (HME) must not be discharged at sea, but have to be taken to port reception facilities. Regarding the discharge of cargo residues which do not contain any HME substances, the Annex establishes different requirements depending on whether they are contained in wash water or not.

Solid bulk cargoes must be classified and declared by the shipper as to whether or not they are harmful to the marine environment, in accordance with the criteria set out in appendix 1 of MARPOL Annex V.

Shipboard incinerator

The Standard Specification for Shipboard Incinerators (resolution MEPC.244(66)) covers the design, manufacture, performance, operation and testing of incinerators designed to incinerate garbage and other shipboard waste.

Verification of compliance

Chapter 2 of MARPOL Annex V provides that Parties must use the provisions of the Code for Implementation in execution of their obligations and responsibilities, and be subject to the IMO Member State Audit Scheme (IMSAS) in accordance with the audit standard to verify compliance with and implementation of the Annex. The mandatory IMSAS commenced from 1 January 2016,

Polar Regions

Chapter 3 of MARPOL Annex V makes use of the environment-related provisions of the Polar Code mandatory, and requires that ships trading the Polar Regions must comply with strict environmental provisions specific to the harsh conditions in Polar waters – the Arctic waters and the Antarctic area.

Air Pollution and GHG Emissions

Air Pollution

In 1997, a new annex was added to the International Convention for the Prevention of Pollution from Ships (MARPOL). The regulations for the Prevention of Air Pollution from Ships (Annex VI) seek to minimize airborne emissions from ships (SOx, NOx, ODS, VOC shipboard incineration) and their contribution to local and global ai r pollution and environmental problems. Annex VI entered into force on 19 May 2005 and a revised Annex VI with significantly tightened emissions limits was adopted in October 2008 which entered into force on 1 July 2010.

Energy Efficiency

In 2011, IMO adopted mandatory technical and operational energy efficiency measures which are expected to significantly reduce the amount of CO_2 emissions from international shipping. These mandatory measures (EEDI/SEEMP) entered into force on 1 January 2013.

IMO has adopted important guidelines aimed at supporting implementation of the mandatory measures to increase energy efficiency and reduce GHG emissions from international shipping, paving the way for the regulations on EEDI and SEEMP to be smoothly implemented by Administrations and industry.

The expected growth of world trade represents a challenge to meeting a future target for emissions required to achieve stabilization in global temperatures and so IMO has begun consideration of further technical and operational measures to enhance the energy efficiency of ships.

Data Collection System

Amendments to MARPOL Annex VI on Data collection system for fuel oil consumption of ships entered into force on 1 March 2018.

Under the amendments, ships of 5,000 gross tonnage and above are required to collect consumption data for each type of fuel oil they use, as well as other, additional, specified data including proxies for transport work. The aggregated data is reported to the flag State after the end of each calendar year and the flag State, having determined that the data has been reported in accordance with the requirements, issues a Statement of Compliance to the ship. Flag States are required to subsequently transfer this data to an IMO Ship Fuel Oil Consumption Database. IMO will be required to produce an annual report to MEPC, summarizing the data collected.

Technical Co-operation

IMO adopted a resolution on Promotion of Technical Co-operation and Transfer of Technology relating to the Improvement of Energy Efficiency of Ships and is focusing its efforts on technical co-operation and capacity building to ensure smooth and effective implementation and enforcement of the new regulations worldwide. To that effect, IMO has been undertaking a series of workshops in all regions of the world on implementation of the measures to address GHG emissions from international shipping.

Reduction of GHG Emissions from Ships

In 2012, international shipping was estimated to have contributed about 2.2% to the global emissions of carbon dioxide (CO_2). Although international shipping is the most energy efficient mode of mass transport and only a modest contributor to overall CO_2 emissions, a global approach to further improve its energy efficiency and effective emission control is needed as sea transport will continue growing apace with world trade.

As already acknowledged by the Kyoto Protocol, CO2 emissions from international shipping cannot be attributed to any particular national economy due to its global nature and complex operation. Therefore, IMO has been energetically pursuing the limitation and reduction of greenhouse gas (GHG) emissions from international shipping, in recognition of the magnitude of the climate change challenge and the intense focus on this topic.

MODULE-IV

OTHER INTERNATIONAL MARITIME ORGANIZATIONS

MODULE-IV - OTHER INTERNATIONAL MARITIME ORGANIZATIONS

There are two types of international maritime organizations: intergovernmental and non-governmental organizations. The intergovernmental maritime entities are composed only of Member States, although some private organizations may be invited to participate as observers in working groups depending on the agenda. But, to contribute to the progressive development and uniformity of maritime rules, focus should not be placed on a monopoly of the inter-State organizations. There are also a significant number of private international organizations that deal with maritime legal problems. Their supranational nature is a consequence of the different nationality of its members. Private national associations related to specific topics of maritime business set up an international association or federation to promote the same goals at international level.

The list of international bodies that have contributed to produce sources of maritime law, unification of the rules, and guidelines and criteria to avoid problems of interpretation is so prolific that its mere enumeration would be excessive. Therefore, mention is made below of the most relevant, both intergovernmental and private, international maritime organizations.

INTERGOVERNMENTAL MARITIME ORGANIZATIONS

The International Maritime Organization

Kindly refer the previous Module.

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 195 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.

The United Nations Conference on Trade and Development (UNCTAD) Committee on Shipping was established by resolution of 29 April 1965, with regard to the importance of shipping to the trade and the balance of payment of developing countries and to further the desirability of having high-level representation with special knowledge in shipping and related activities. Its role of protecting developing countries seeking a fair balance in shipping trade has been reasonably well achieved. Indeed, most of the international maritime conventions have been adopted under its auspices: the Code of Conduct for Liner Conferences, 1974; the Maritime Liens and Mortgages, 1967; the Hamburg Rules, 1978; the Multimodal Transport, 1980; the Conditions for Registration of Ships, 1986; the Arrest of Ships, 1999; and the Rotterdam Rules, 2010. In recent years, its activities have been more oriented towards drafting reports, organizing seminars and workshops on topics of maritime trade, insurance and shipping legislation, and development. Since 1968, with the aim of fostering the transparency of maritime markets and analysing relevant developments, there a recurrent publication has been prepared by the UNCTAD Secretariat, the Review of Maritime Transport.

The future of UNCTAD in ruling uniform shipping laws is a challenge, taking into account the important role of the World Trade Organization (WTO) in helping producers of goods and services, exporters, and importers to conduct their business by the promotion of the progressive harmonization and unification of the law of international trade.

UNCITRAL

In an increasingly economically interdependent world, the importance of an improved legal framework for the facilitation of international trade and investment is widely acknowledged. The United Nations Commission on International Trade Law (UNCITRAL), established by the United Nations General Assembly by resolution 2205 (XXI) of 17 December 1966 (see annex I), plays an important role in developing that framework in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law. Those areas include dispute resolution, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement and sale of goods. These instruments are negotiated through an international process involving a variety of participants, including member States of UNCITRAL, non-member States, and invited intergovernmental and non-governmental organizations. As a result of this inclusive process, these texts are widely accepted as offering solutions appropriate to different legal traditions and to countries at different stages of economic development. 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.

UNCITRAL gives effect to its mandate by:

(a) Coordinating the work of organizations active in this field and encouraging cooperation among them;
(b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;
(c) 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 practices, in collaboration, where appropriate, with the organizations operating in this field;
(d) 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;
(e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;
(f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;
(g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade; and
(h) Taking any other action it may deem useful to fulfil its functions.

UNCITRAL has consequently achieved a relevant role, jointly with UNCTAD and CMI, in drafting significant numbers of international maritime conventions. By resolution of 1 April 1971, the UNCITRAL Working Group on Maritime Legislation was set up with the purpose of achieving the unification of the rules governing bills of lading and in particular a new balance between carriers and cargo owners. The Hamburg Rules, 1978, were its main achievement in this field. Also under its auspices was the approval of the UN Convention on Liability of Operators of Transport Terminals in International Trade, 1991, although it has not yet entered into force. The working group has been very active too in drafting model legislation for developing countries and reports on several maritime topics (i.e. marine insurance and charterparties). In recent years, UNCITRAL, like UNCTAD, is losing its influence in this area of unification rules due to the major prominence of IMO and WTO.

ILO-JMC

The International Labour Organization, Joint Maritime Commission (ILO-JMC) was set up by the ILO Antwerp Resolution of 1920. The Joint Maritime Commission (JMC) is a bipartite standing body that provides advice to the Governing Body on maritime questions including standard setting for the shipping industry. It is composed as follows: Chairman of the Governing Body; two Governing Body members (one Worker, one Employer); twenty regular shipowner members; twenty regular seafarer members; four deputy shipowner members; and four deputy seafarer members. The Standing Orders of the JMC provide guidance on how to deal with the various procedural questions that may arise in the course of the Commission's work.

Among the Joint Maritime Commission's (JMC) specific attributes is the updating of the minimum basic wage figure for able seamen in accordance with the Seafarers' Wages, Hours of Work and Manning of Ships Recommendation, 1996 (No. 187). This is the only statutory international wage fixing mechanism. The Joint Maritime Commission's Subcommittee on Wages of Seafarers has been established to regularly update this wage figure.

ILO’s first conference, which was entirely devoted to maritime questions, took placed in Genoa, Italy, at the beginning of the twentieth century. According to the minutes of the resolution, ‘A joint commission of 12 members should be appointed, consisting of five ship-owners and five seamen chosen by the Genoa Conference and two members chosen by the Governing Body. The Commission will assist the technical maritime service of ILO and will be consulted on questions of maritime labour.’

Since that time, the ILO-JMC has been intensive in its action to improve the labour conditions of seamen but it is outside the scope of this Chapter to list the large number of conventions, recommendations, guidelines, reports, seminars, workshops, books, pamphlets, etc., produced. It is fair to note that the vast majority of nations have introduced into domestic legislation either the minimum standards approved by ILO or likely to improve such standards.

Seamen’s working conditions, such as finding employment, minimum age for admission of children, compulsory medical examination, repatriation, hours of work and manning, paid vacations, accommodation of crew, national identity documents, wages, inspection of working and living conditions, continuity of employment, recruitment and placement, and certificates of capacity, and seamen welfare and social security are the topics regulated by ILO Conventions.

IMSO

The International Maritime Satellite Organization was created by the UN Convention and Operating Agreement on the International Maritime Satellite Organization (Inmarsat), done in London on 3 September 1976, as amended in 1989, 1994, and 1998—in force since July 1979.

The purpose of the Organization is to make provision for the space segment necessary for improving maritime communications, thereby assisting in improving distress and safety of life at sea communications, efficiency and management of ships, maritime public correspondence services, and radio communication capabilities. Taking into account that a very high proportion of world trade is dependent upon ships, maritime communications are the key words of Inmarsat. The twenty-seven founding States have today become a group of over 100 Member States and several agreements on traffic and legislation on maritime communications have been the two aspects of the Organization in favour of international unification.

The establishment of the Organization was based on two international public law instruments developed under the auspices of the International Maritime Organization (IMO). These are:

1. Convention on the International Maritime Satellite Organization (Inmarsat) between States Parties to the Convention; and

2. Operating Agreement between telecommunications entities public or private (one per Party) called "Signatories" designated by a State.

Both instruments entered into force on 16 July 1979.

The purpose of Inmarsat was to make provision for the space segment necessary for improved maritime communications and, in particular, for improved safety of life at sea communications and the Global Maritime Distress and Safety System (GMDSS). This purpose was later extended through amendments to the Convention and Operating Agreement to provide the space segment for land mobile and aeronautical communications, and the name of the organization was changed to the International Mobile Satellite Organization to reflect the amended purpose.

Inmarsat was structured with three principal organs:

1. the Assembly of Parties (one State, one vote), which dealt with general policy matters and the long term objectives of the Organization;

2. the Council, composed of 22 Signatories, or groups of Signatories. It decided on all financial, operational, technical and administrative matters, and made provision for the space segment for carrying out the purposes of the Organization. Signatories' voting rights were linked to their utilization of the system via investment shares;

3. the Directorate which was the executive body of the Organization headed by a Director General who was the Chief Executive Officer and legal representative of the Organization.

After twenty years of successful operation, Member States and Signatories of the intergovernmental organization Inmarsat decided to challenge rapidly growing competition from private providers of satellite communications services and pioneered the first ever privatization of all assets and business carried on by the intergovernmental organization while adhering to the continuous provision of the public service obligations and governmental oversight as a pre-requisite of the privatization.

At its Twelfth Session in April 1998, the Inmarsat Assembly adopted amendments to the Inmarsat Convention and Operating Agreement which were intended to transform the Organization's business into a privatised corporate structure, while retaining intergovernmental oversight of certain public service obligations and, in particular, the Global Maritime Distress and Safety System (GMDSS). The Assembly and Council of Inmarsat subsequently decided to implement the amendments as from 15 April 1999, pending their formal entry into force. In doing so, it was recognised that early implementation of the new structure was needed to maintain the commercial viability of the system in a rapidly changing satellite communications environment, and thereby ensure continuity of GMDSS services and other public service obligations, namely: peaceful uses of the system, non-discrimination, service to all geographical regions and fair competition.

The restructuring amendments entered into force on 31 July 2001 and became binding upon all Parties, including those which had not accepted them, and the Operating Agreement terminated on the same date.

The restructuring of Inmarsat involved the incorporation of holding and operating companies, located in England and registered under British law on 15 April 1999, as planned. On the same day, the Headquarters Agreement between the UK Government and the IMSO was signed. A Public Services Agreement between IMSO and the privatised Inmarsat was also executed with immediate effect. The Operating Agreement was terminated and the Signatories received ordinary shares in the privatised Inmarsat in exchange for their investment shares. Capital requirements are met from existing shareholders, strategic investors and public investment through a listing of the shares on a stock exchange (IPO). The Inmarsat satellites and all other assets of the former intergovernmental organization have been transferred to the privatised operating Company which continues to manage the global mobile satellite communications system, including maritime distress and safety services for GMDSS at either no cost or at a special rate.

IHO

The International Hydrographic Organization is an intergovernmental organization that works to ensure all the world's seas, oceans and navigable waters are surveyed and charted. Established in 1921, it coordinates the activities of national hydrographic offices and promotes uniformity in nautical charts and documents. It issues survey best practices, provides guidelines to maximize the use of hydrographic survey data and develops hydrographic capabilities in Member States.

The marine environment is constantly changing, whether due to climate change, extreme events, or simply the movement of tides and currents. Hydrography helps States monitor such changes and adapt their activities. For most ships for example, 30cm extra depth shown on a chart allows at least 2000 tons more cargo to be carried. The economic benefits of having an up-to-date knowledge of the marine environment can be considerable.

And yet, we know the surface of the Moon and Mars better that we know the seabed. States are represented within the IHO by the national authority responsible for the provision of hydrographic and nautical charting services in each Member State. A Secretary General and two Directors are elected by Member States and administer the work of the Organization.

The IHO has currently 93 Member States. The IHO Secretariat has been hosted by the Principality of Monaco since the creation of the organization in 1921.

The basic documents of the IHO compose a constitutional framework, consisting of a set of general regulations for the operations of the organs of the organization, namely the Assembly, the Council and the Finance Committee. Together with agreements made with the Government of H.S.H. the Prince of Monaco and diplomatic notes exchanged between France and Monaco concerning the privileges and immunities of the IHO, all these documents are consolidated in the IHO Publication M-1.

This set of basic documents is supplemented by the compilation of all IHO Resolutions in force as IHO Publication M-3 and can be downloaded from the "Publications" section, category "Miscellaneous Publications".

The Assembly as the main organ of the Organization is formed by the representatives of the Member States. It meets every three years to provide general guidance on the functioning and work of the Organization, as well as taking decisions of technical and administrative nature.

During the inter-Assembly period the Council coordinates the activities of the Organization within the framework of the strategy, work programme and financial arrangements, prepares proposals concerning the overall strategy and the work programme, considers the financial statements and budget estimates, review proposals submitted to it by subsidiary organs, proposes the establishment of subsidiary organs, reviews draft agreements between the Organization and other organizations.

The Council meets one a year and submits its reports, obervations, recommendations, and draft decisions to the Assembly and the IHO Member States for approval.

The IHO runs a 3-yearly budgetary cycle. Each budget cycle is based on forward forecast approved by the Member States at the previous Assembly. Each yearly forecast is reviewed in the preceding year and any changes approved by the Member States. The approved budget supports an annual work programme that is also approved by the Member States.

The CB Work Programme (CBWP), which includes all the activities scheduled for the Sub-Committee for a determined period, including Seminars, Workshops, Technical Visits and any other action directed to development purposes and is inserted in the overall IHO Work Programme.

The Capacity Building Management Plan is the compilation of specific proposals and inputs submitted by the Regional Hydrographic Commissions.

INTERNATIONAL NON-GOVERNMENTAL MARITIME ORGANIZATIONS

It must be noted that not only intergovernmental maritime organizations are committed to the promotion of uniformity of maritime law but there are also an important number of non-governmental international maritime organizations that contribute, with different approaches and methods, to produce either the so-called voluntary sources of shipping law or useful documents in that field.

CMI

Comité Maritime International (CMI) is a non-governmental not-for-profit international organization established in Antwerp in 1897, the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. To this end it shall promote the establishment of national associations of maritime law and shall co-operate with other international organizations.

The Comite Maritime International is incorporated in Belgium as an Association Internationale sans but lucratif (AISBL) Internationale Vereniging zonder Winstoogmerk (IVZW) under the Belgian Act of 27 June 1921 as later amended. It has been granted juridical personality by Royal Decree of 9 November 2003. Its statutory seat is at Ernest Van Dijckkaai 8, 2000 Antwerpen. Its statutory seat maybe changed within Belgium by decision of the Executive Council.

The CMI was formally established in 1897 and is the oldest international nongovernmental organization concerned exclusively with maritime law. Its administrative headquarters are in Antwerp, Belgium, the place of its birth. Undoubtedly, from the late nineteenth century to the present day changes have occurred that explain the present structure of the CMI. The 1955 CMI Madrid Conference adopted a constitution that began the transition of the CMI. The General Assembly and the Executive Council, the President, the Vice-Presidents, the Secretary-General, the Treasurer, and the Administrator are responsible for carrying out the duties of the CMI. Members of the CMI are national maritime law associations and individual titular members. Also, other international organizations are consultative members.

The scope of the CMI is to promote the unification of maritime law although the CMI methods to achieve uniform rules have changed over the years. As it is not an intergovernmental organization, the CMI does not have the prerogative to call for a diplomatic conference at which a new convention could be adopted. Therefore, historically, between 1910 and 1979, the CMI prepared the text of the different so-called Brussels Maritime Conventions and the Belgian Government was the sponsor and host of the diplomatic conferences where the said conventions were formally adopted.

On the other hand, the new intergovernmental maritime organizations—such as IMO, UNCITRAL, and UNCTAD—have, since the 1980s, taken on the role of preparing draft conventions and calling an international conference at which the new maritime conventions have been adopted. The CMI's new role is to advise and also draft the text of the conventions approved by these intergovernmental organizations.

In addition to cooperation in the preparation of international conventions, the CMI is very active in drafting rules, codes of practice, model laws, and reports on both private and public aspects of maritime law. Finally, the CMI's sponsorship of conferences, symposiums, colloquiums, seminars, workshops, and conferences in maritime legal matters should be underlined.

Baltic Exchange

The Baltic Exchange is the world's largest shipping exchange, and its origins date back to the first half of the seventeenth century when shipowners met in London coffee houses. Today, all transactions in this shipbroking marketplace are made electronically, which assures neutral freight prices data in real time. The Baltic Exchange self-regulating market is open to shipowners, charterers, and shipbrokers around the world.

The reliable independent source of maritime market information for the merchandising and settlement of physical and derivative contracts, of the shipping world; can easily be pinpointed as The Baltic Exchange. The international community of the Baltic Exchange is said to be comprised of more than 550 members, currently and proficiently covers the majority of world shipping interests. It is also said to consecrate to a business conduct code, with the Baltic supervising it.

The company, as per historical records, is known to be founded around the midway of the 18th century. The name of the company, Baltic Exchange, was first officially used at the Virginia and Baltic Coffee House located in the Threadneedle Street in 1744. In 1990, it went on to be listed as a private limited company, holding shares. In present times, the member companies have the ownership of the exchange and there is no public dealing on a stock exchange.

A Board of Directors governs it, and the members of the board are chosen through the process of election. Currently, it incorporates 20 employees and is situated at 38 St Mary Axe, in central London.

The members of the Exchange were the sole owners of it, with an estimate of 600 companies and 2,000 individuals, as it happened earlier in 2010.The company supported a huge member base, and the membership has also included financial experts, lawyers, and representatives of the insurance industry; while those from the shipping business formed the principal part of it.

United Kingdom or continental Europe saw the maximum number of corporate members, though nationality confinements on membership did not exist. The members are required to strictly work in accordance with the Baltic Exchange "code of business", which should be agreed to, beforehand, in order to gain the membership. The code maintains certain rules for carrying out business with shippers. The membership contract can be cancelled if a reckless member violates the code.

The responsibility of a large proportion of all dry cargo and tanker fixtures, are undertaken by the members of the Baltic Exchange. It monitors the monetary transactions, regarding the sale and purchase of merchant vessels and .

The Baltic Exchange actively provides daily Baltic freight market prices, and maritime shipping cost indices that are used to settle freight futures (known as Forward Freight

Agreements or FFAs). Transactions, regarding the members of the Exchange, are carried out exclusively over the telephone.

The exchange publishes six daily indices:

- Baltic Dry Index (BDI)
- Baltic Panamax Index (BPI)
- Baltic Capesize Index (BCI)
- Baltic Supramax Index (BSI)
- Baltic Handysize Index (BHSI)
- Baltic Dirty Tanker Index (BDTI)
- Baltic Clean Tanker Index (BCTI)

The exchange also provides forward curves, dry cargo fixture list, daily news and settlement data.

Essentially a London-based organization, the Baltic Exchange is chiefly constituted of shipbrokers, ship owners, and Baltic freight charterers, which fulfil the task of supplying daily information and data, based on the affairs of the maritime market. The Exchange supervises matters concerning international shipping operations and price fluctuations. This in turn, majorly helps shippers and investors to purchase freight futures, to decide on financial arrangements, and to finalise the terms of the derivative contracts.

The Baltic Exchange also serves as a platform for the trading of futures. It can also be considered as serving as a resource, for the proper guidance for maritime investors across the world. It is an administrative arrangement for the shippers to have a profound influence on the modern transactions of the Exchange.

The Baltic Exchange diligently observes the publication of daily exponents on various issues, concerning the shipping industry, This also adds up the registering of detailed statistics , assures updation, by constant addition of " up-to-minute data", dealing with various freights and shipping futures, which guides the investors and shippers, while to negotiating contracts.

The readings, printed by the Baltic Exchange, also determine the decisions taken by the dealers of maritime cargo and freight; like in the case of the Chicago Merchantile Exchange, which happens to be a U.S. based company. It facilitates an internationally renowned dispute resolution forum for contract and other disputes, and maintains a database of those members as expert witnesses in maritime law trials.

BIMCO

The Baltic and International Maritime Council was founded in 1905 and is a Danish international shipping organization that provides a range of services to its shipping members. Its aim is to facilitate commercial operations by means of drafting standard contracts and clauses and providing information, education, and training for any activity in shipping.

BIMCO is the world's largest direct-membership organisation for shipowners, charterers, shipbrokers and agents. In total, around 60% of the world's merchant fleet is a BIMCO member, measured by tonnage (weight of the unloaded ships).

The organisation has NGO status and is based in Copenhagen, Denmark, with offices in Athens, Singapore and Shanghai. With around 1900 member companies across 120 countries – from the largest shipowners in the world to small local port agents and law firms, BIMCO represents a wide range of maritime companies and organisations.

BIMCO's goal is to secure a level playing field for the global shipping industry. BIMCO therefore works to promote and secure global standards and regulations for the maritime sector. The organisation's century long effort into creating standard contracts and clauses is an expression of that aim.

Furthermore, BIMCO wants workable and realistic regulations that – among other things – drive the industry towards the target of reducing CO_2 emission by 50% by 2050. Ultimately, the goal is a zero-emissions industry in this century.

To achieve its goals, BIMCO organises and funds committees to discuss and deliver new or revised standard contracts and clauses. The documents are used within the entire shipping industry, including containers, dry bulk, tankers, financing, offshore and shipbuilding. Through working groups, BIMCO also develops suggestions for new regulation or industry standards – such as the international standard for underwater hull cleaning.

Our aim is to produce flexible commercial agreements that are fair to both parties. We work with industry experts to produce modern contracts tailored to specific trades and activities. BIMCO's contracts are recognised around the world and widely used.

On a political level, BIMCO participates as an NGO at the International Maritime Organization (IMO), where BIMCO advises the member-states - on behalf of the industry - on the consequences of proposed regulation and suggests solutions to making regulation effective and practicable. The direction is set by BIMCO's Board of Directors.

As a BIMCO member, you become part of an organisation that brings shipping people together to work for shared goals. Members receive news and access to exclusive hands-on guides and a helpdesk for contractual issues. The BIMCO website contains a broad range of information dealing with the day-to-day operation of a shipping company, such as contracts and contractual issues, port information, a cargo database, maritime security updates and much more.

Members furthermore receive discounts on several BIMCO products including:

- SmartCon
- Shipping KPI
- Training
- Publications, such as the Ship Master's Security Manual

The organisation's foundation stretches back to 1905, where BIMCO began as a grain shipping cartel under the name "The Baltic and White Sea Conference". Within a couple of years, the cartel was scrapped, but the collaboration on standard contracts remained. Since then, BIMCO has become more involved in the regulatory side of shipping and is now a leading voice in shipping.

IACS

The International Association of Classification Societies represents the world's major classification societies. Founded in London in 1988 its purpose is to promote the highest standard of ship safety and prevention of marine pollution. The members like American Bureau of Shipping, Bureau Veritas, China Classification Society, Det Norske Veritas, Germanischer Lloyds, Korean Register of Shipping, Lloyd's Register, Registro Navale Italiano, etc. are among the most qualified and issue safety certificates in compliance with IMO Conventions and recommendations on safety. All ships of the IMO Member States are required such safety certificates to operate legally in the international trade and navigation. Likely the Member State has a representative at IACS to ensure the implementation of the mandatory required conditions of safety.

The International Association of Classification Societies (IACS) is a collective of ten of the more than 50 organisations worldwide that provide classification of ships. These ten societies, together with an additional associate society, class around 94% of the entire commercial fleet involved in international trade worldwide. With a mantra of "dedicated to safe ships and clean seas", IACS makes a unique contribution to maritime safety and regulation through technical support, ensuring standard compliance, research and development.

IACS, along with other classification societies outside of this group, establish and apply technical requirements for the design, construction and survey of marine-related facilities, most often ships and offshore structures. These requirements are then published as classification rules. Importantly, IACS stresses that classification societies are not "guarantors of safety of life or property at sea or the seaworthiness of a vessel" because classification societies have no control over how a vessel is operated and maintained in between surveys.

It is often easier to explain the role of classification by explaining what a classification society does not do, as there are many misconceptions about the role of class. Put simply, a classification society does not design, build, own, operate, manage, maintain, repair, finance, insure or charter ships and as an independent, self-regulating, externally audited, body, a classification society has no commercial interests related to ship design, ship building, ship ownership, ship operation, ship management, ship maintenance or repairs, insurance, or chartering.

The Contribution

With its extensive knowledge of the industry and fleet, IACS provides a massive contribution to international shipping and regulations, depending obviously on the input from the members. Although it is a non-governmental organisation, it holds a consultative status with the IMO and regularly participates in the capacity of an observer as well as an adviser to the IMO and the member states. This includes participation in the Maritime Safety Committee

(MSC), Maritime Environment Protection Committee (MEPC), International Safety Management (ISM) as well as any other sub-committees and such.

IACS had a vital role in the implementation of ISM, a mainstay in the shipping industry today, wherein the IACS developed guidelines and provided interpretations of the ISM Code. Having the majority of the world's fleet under its purview and the extensive knowledge associated with it, IACS also enables cooperation with the Port State Control (PSC) to ensure high quality in the maritime field.

In the ever increasing world of regulations paperwork, IACS members support and comply with the regulatory demands. With rising demands and a focus on skilled workers and the expertise of the human element, IACS' role keeps on becoming more and more vital.

Enhance Survey Programs

The ESP was introduced for oil tankers and bulk carriers by the IACS in 1993. Included in SOLAS Chapter 9, it came into full effect in 1996.

The ESP requires full planning of the in advance of the periodical classification surveys and associated minimum requirements with increasing stringency and maintenance of onboard documents. While it might seem cumbersome for this, in turn, may increase the efficiency of merchant shipping and reduces risks associated therein with regard to the same. Its motto of safe ships and clean seas is indeed adhered to with the enforcement of such standards.

Transfer of Class

This agreement to be able to prevent transfer the class was enforced in 1995. In this, the objective was to prevent the transfer of a ship from one class with one IACS member to another to avoid unnecessary surveys and repairs. Under this agreement, the transfer can happen only if the pending classification surveys and associated documentation have been completed. All such transfers are promulgated to PSC organisations and other parties of interest.

IACS Activities

Ship Classification Services

Classification is essential to the structural and engineering design, construction and operation of ships and affects shipbuilding, maintenance and repair, shipbroking, chartering, insurance etc. The certificate issued is an imperative document which confirms that the ship has been built as per the classification society's standards and that she adheres to the level of the quality associated with such society. To maintain its class while in service, a ship must be surveyed annually, with a major survey every 5 years. These surveys get stricter as the ship gets older. Failure to adhere to the quality standards of the classification societies renders the certificate liable to be invalid.

Ensuring High Standards

To ensure highest standards as the norm for IACS members, IACS introduced the QSCS (Quality System Certification Scheme) in 1991. This scheme embraces management systems with respect to ship classification and statutory work carried out by members. QSCS sets monitors standards to create uniformity in the operations of the members. The members play a vital role in strengthening the QSCS. Compliance with the requirements of the QSCS is mandatory for membership into the IACS. The certificate of conformity to the QSCS is valid for 3 years subject to review as per surveys and monitoring.

Publications

IACS has publications provide guidelines to members. This area provides access to technical resolutions produced by IACS. The IACS Green Book contains IACS Resolutions and Recommendations in force a The Green Book is updated when an IACS new or revised Resolution or Recommendation is uploaded. The IACS Green Book is revised at the end of each working day. The annexe to the Green Book contains all adopted IACS Resolutions and their future entry into force dates. The IACS Blue Book contains the IACS Green Book as well as previous revisions of IACS publications and historical data. The IACS Blue Book is updated and published once a year only.

INTERCARGO

The International Association of Dry Cargo Shipowners (INTERCARGO) is representing the interests of quality dry cargo shipowners. INTERCARGO convened for the first time in 1980 in London and has been participating with consultative status at the International Maritime Organization (IMO) since 1993.

INTERCARGO provides the forum where dry bulk shipowners, managers and operators are informed about, discuss and share concerns on key topics and regulatory challenges, especially in relation to safety, the environment and operational excellence. The Association takes forward its Members' positions to the IMO, as well as to other shipping and international industry fora, having free and fair competition as a principle.

ICS

The International Chamber of Shipping (ICS) is the principal international trade association for the shipping industry, representing shipowners and operators in all sectors and trades. ICS membership comprises national shipowners' associations in Asia, Europe and the Americas whose member shipping companies operate over 80% of the world's merchant tonnage.

Established in 1921, ICS is concerned with all technical, legal, employment affairs and policy issues that may affect international shipping. ICS represents shipowners with the various intergovernmental regulatory bodies that impact on shipping, including the International Maritime Organization. ICS also develops best practices and guidance, including a wide range of publications and free resources that are used by ship operators globally.

The aim of ICS is to promote the interests of shipowners and operators in all matters of shipping policy and ship operations.

To that end ICS will:

- Encourage high standards of operation and the provision of high quality and efficient shipping services.
- Strive for a regulatory environment which supports safe shipping operations, protection of the environment and adherence to internationally adopted standards and procedures.
- Promote properly considered international regulation of shipping and oppose unilateral and regional action by governments.
- Press for recognition of the commercial realities of shipping and the need for quality to be rewarded by a proper commercial return.
- Remain committed to the promotion of industry guidance on best operating practices.
- Co-operate with other organisations, both intergovernmental and nongovernmental, in the pursuit of these objectives.
- Anticipate whenever possible and respond whenever appropriate to policies and actions which conflict with the above.

Intertanko

The International Association of Independent Tankers Owners (Intertanko) is domiciled in Oslo, Norway, and represents the tanker industry and tanker owners and operators of maritime transport of chemicals. Its aim is to manage a safe and reliable tanker industry worldwide. INTERTANKO is a Member-run, direct entry organisation that works hard to ensure the voices of its Members are heard. It represents the interests of Members at national, regional and international levels, guided by the people and groups listed below.

Chairman

The Chairman is a member of INTERTANKO's Council and elected by Members for a two-year period. He is the figurehead of independent tankers owners, representing INTERTANKO's Membership at the highest level; he also chairs meetings of the Council, the Executive and Management Committees.

Council

Our Council of Members is the Association's main governing body. The Council's role is to set and agree policy, to elect members of the Executive Committee and to determine annual Membership fees. Input from the council also helps to shape INTERTANKO's Strategic Workplan. The Council meets twice each year.

Regional Panels

The five Regional Panels ensure that important regional issues and perspectives are captured and brought to bear in the Association's work, in order to inform and enrich INTERTANKO's global view of key industry issues. Most regional panels meet twice yearly under an elected chairperson supported by a member of the Secretariat who also serves as a regional manager and first contact for Members.

Executive Committee

The Executive Committee guides the Secretariat in the implementation of directions given by Council. It also assists the Managing Director and Secretariat in conducting the Association's affairs. The ExCom meets three times each year.

Secretariat

The Secretariat is made up of industry professionals and support staff with complementary skills and experience, dedicated to assist Members and organise Association activities. With representation in London, Oslo, Singapore, Washington and Athens, the Secretariat manages and coordinates the workings of 14 technical and three governance committees, as well as five regional panels.

Membership

Through the Committees, INTERTANKO harnesses the collective knowledge and expertise of its Membership in order to best provide information, advice and representation across key issues.

Member Committees

INTERTANKO's Committees and Sub-Committees meet on a regular basis to harness the collective knowledge of the Membership and address issues of importance to Members. The Committees help to promote Members' interests with governmental and non-governmental bodies and other stakeholders including environmental groups and the general public. Each Committee works to specific terms of reference, vetted and approved by Council and meets twice yearly under an elected chair person, supported by the Secretariat.

Mission

Provide leadership to the Tanker Industry in serving the world with the safe, environmentally sound and efficient seaborne transportation of oil, gas and chemical products.

Vision for the Tanker Industry

A responsible, sustainable and respected Tanker Industry, committed to continuous improvement and constructively influencing its future.

INTERTANKO and Its Members' Goals

(a) Be the representative forum of choice for all quality tanker owners and managers.
(b) Enhance public and political awareness of the importance and positive performance of the tanker industry.
(c) Promote balanced terms of trade and a competitive, transparent and sustainable tanker industry.
(d) Lead the development, acceptance and implementation of uniform, worldwide international tanker standards.

(e) Lead in establishing and maintaining partnerships, cooperation and open and constructive dialogue with the relevant maritime authorities, organisations, associations and special interest groups.

INTERTANKO Members will:

(a) Lead the continuous improvement of the Tanker Industry's performance in striving to achieve the goals of:
    a. Zero fatalities
    b. Zero pollution
    c. Zero detentions
(b) Deliver the highest quality services to meet the expectations of their stakeholders.
(c) Promote the availability and utilisation of personnel with the highest quality marine skills and competencies

INTERTANKO's Four Strategic Objectives

(a) To develop and promote best practices in all sectors of the tanker industry, with owners and operators setting the example.
(b) To be a positive and proactive influence with key stakeholders, developing policies and positions, harmonising a united industry voice, and engaging with policy and decision makers.
(c) To profile and promote the tanker industry, communicating its role, strategic importance and social value.
(d) To provide key services to Members, with customised advice, assistance and access to information, and enabling contact and communication between Members and with other stakeholders.

FIATA

International Federation of Freight Forwarders Associations is a nongovernmental, membership-based organization representing freight forwarders in some 150 countries. FIATA's membership is composed of 108 Associations Members and more than 5,800 Individual Members, overall representing an industry of 40,000 freight forwarding and logistics firms worldwide.

FIATA is a reference source on international policies and regulations governing the freight forwarding and logistics industry. FIATA works at the international level to represent service providers who operate in trade logistics and supply chain management. Through its FIATA documents and forms, congress, training and publications, it promotes trade facilitation and best practices among the freight forwarding community. FIATA is committed to representing the interest of its members by actively engaging with the World Trade Organization, United Nations agencies and other international organizations, transport organizations, global partners and governments to promote and protect the interest of the industry.

Founded in Vienna, Austria, on 1926, FIATA owes its name to its French acronym (Fédération Internationale des Associations de Transitaires et Assimilés) and is known as 'the global voice of freight logistics'. FIATA is headquartered in Geneva, Switzerland.

FIATA's objectives are fivefold:

- to unite the freight forwarding industry worldwide;
- to represent, promote and protect the interests of the industry by participating as advisors or experts in meetings of international bodies dealing with transportation;
- to familiarize trade and industry and the public at large with the services rendered by freight forwarders through the dissemination of information, distribution of publications, etc.;
- to standardize and improve the quality of services rendered by freight forwarders by developing and promoting uniform forwarding documents, standard trading conditions, etc.;
- to assist with vocational training for freight forwarders, liability insurance problems, tools for electronic commerce including electronic data interchange (EDI) and barcode.

The FIATA General Meeting is the governing body of the federation. The general meeting passes resolutions that set the course for the organization’s work and monitors progress on their achievement. They meet once a year to hold elections of leadership and members; validate the annual report, budget and financial statements; and approve business conditions and regulations.

FIATA is constituted of a presidency, responsible of the executive management of the organization; an extended board, who plays an advisory role to the presidency; and the head office who – under the direction of the presidency – determines and implements the strategic plan for FIATA to achieve its objectives. FIATA relies on its institutes, advisory bodies, working group and regions to provide advice on technical and policy issues concerning land-, sea-, air- and multimodal transport; logistics and customs; trade concessions; information technology, and more. FIATA members are spread across four regions: Africa and Middle East, Americas, Asia-Pacific and Europe.

IMIF

The International Maritime Industries Forum (IMIF) is a forum where almost all members of the shipping community meet to discuss and improve the relationships among them, even those having opposite interests in the business. Shipowners, P&I Clubs, maritime bankers, shipbuilders, tanker owners, and maritime brokers and agents state their opinions about different aspects of the field of shipping, such as ship financing, ship insurance, and security and safety.

History

1975, following a series of meetings between independent tanker owners, bankers, shipbuilders and oil companies who were concerned about the widespread effect of surplus tanker capacity. Reorganized 1979. Ceased to exist 2018.

Aims

Re-establish and subsequently maintain a healthy commercial and financial climate for all sectors of maritime industry; further a coherent international policy of increased scrapping of surplus tonnage and orderly reduction of over-capacity in *shipbuilding*, together with a commercially sound approach to new building and ship financing in the future; promote improvement, strengthening and widening of port state control as a means of eliminating substandard *ships*.

Structure

Forum has no formal constitution: day-to-day affairs organized by Steering Committee (comprising very senior representatives of 9 banks, 2 oil companies, 6 shipowners, 4 shipbuilders and 3 insurance companies), Ship Finance Committee, Membership Committee and Secretariat.

INTERMANAGER

It started with just one vision from five competing ship management companies to improve industry standards – and after many highs and lows over the last 25 years, InterManager is now regarded as one of shipping's most influential trade associations that has helped shape the industry.

The first steps in the creation of what is now known as InterManager began back in 1988 when five leading ship management companies – Barber International, Columbia Shipmanagement, Denholm Ship Management, Hanseatic Shipping Company and Wescol International Marine – met to discuss the possibility of improving standards within the shipmanagement sector and the shipping industry in general.

InterManager was founded originally under the name ISMA (International Ship Managers' Association) in 1991. ISMA was originally formed to improve standards and achieve a safer, more environmentally conscious, reliable and controllable ship management industry. This continues to be the aim of InterManager today.

The example of the ISMA Code triggered a continuing quality movement of as yet unknown proportions, with classification societies introducing their own codes, shipowners adapting codes designed for the production industry, and IMO adopting the ISMA Code for mandatory implementation by flag states as Chapter IX of the SOLAS Convention. The ISMA Code of Ship Management Standards, the foundation stone of the Association, reflected the highest standards of ship management practice. It was drafted by practical ship managers, and based on the experience gained through their involvement in day to day ship management.

Today the entry ticket to InterManager membership is a commitment to work towards ISO 9001:2000 compliance. In 2005 ISMA relaunched as InterManager and relaxed its criteria for new members, the association was struggling to meet the success of other similar associations. The newly-named InterManager's aim was to become a trade association for managers and shipping-related entities, which it continues to be to this day. The serving Secretary-General at the time Stephen Chapman told Lloyds List that the launch of InterManager was 'evolution,' not 'revolution.'

Since the late 1980s, ship management has been an important industry in its own right. It was this which drove the need for an association to represent ship managers and to provide a forum for the global ship management industry to ensure best practice procedures and sustainability. Today InterManager represents ship and crew managers, as well as associated organisations, from around the world. It’s unrivalled presence within the wider maritime industry has allowed the association to be at the forefront of a number of initiatives, including:

- Enclose Space Deaths
- On board Alarms
- Shipping KPIs
- Seafarer fatigue
- The single window system
- Paperless shipping

Representing over 5,000 vessels and over 250,000 seafarers, InterManager has a respected global representation. In its bid too ensure sustainability and quality, full members must establish, implement and maintain a quality management system in accordance with the requirements of ISO 9001:2000 for all activities undertaken by the organisation.

The work of the Association is performed by its President, Secretary-General, IMO Representative and the Executive Committee. Members are invited to participate in the activities of the various committees:

- Criminalisation of the Seafarers
- Piracy
- Key Performance Indicators
- EU/ IMO
- ICT

InterManager supports and is involved in a number of projects, all related to either management, technical or welfare. These have included studies into fatigue, information sharing, ballast water, shipping KPI’s and communication facilities for seafarers.

We also run an ‘adopt a ship’ program, building on groundwork by the Cyprus Chamber of Shipping and Cyprus Maritime Environmental Protection Association, bringing together schools, colleges and orphanages in Cyprus, Poland, the Philippines, India and Greece to interact with seafarers on board ships. The program aims to develop awareness of shipping, seafaring and the maritime industry, particularly among the younger generation. In 2019, at least 40,000 children around the world are expected to participate in this program.

Mission Statement

- To federate and serve the needs of all companies an organisations involved in the management and crewing of ships
- To encourage the highest standards of ship operations, through innovation, creativity and the sharing of knowledge
- To provide a platform for discussion on matters of common interest
- To be the common voice of ship managers in the international forums and with international regulators
- To advocate efficiency, quality and ethics in ship management

- To promote a career of seafaring

ISF

The International Shipping Federation (ISF) is the name used by the International Chamber of Shipping when representing maritime employers globally on labour affairs and training issues. ISF/ICS members include national shipowners' associations from 36 countries. ISF represented employers throughout the discussion at IMO which led to the adoption of the STCW amendments.

In 2011, ISF published comprehensive Guidelines on the IMO STCW Convention including the 2010 'Manila Amendments' available from maritime booksellers or Marisec Publications.

To assist shipping companies to comply with the new requirements to records of individual seafarers' rest hour records, ISF has developed its Watchkeeper 3 Computer Programme.

The International Shipping Federation (ISF) meets in London and its members are the national shipowners' associations. Their agenda covers all aspects of the shipping trade and recently it had focused on maritime labour conditions, security, State control, piracy, and robbery at sea.

MODULE-V

INTERNATIONAL MARITIME LAW AND INTERNATIONAL TREATIES

MODULE-V- INTERNATIONAL MARITIME LAW AND INTERNATIONAL TREATIES

INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA (SOLAS), 1974

The SOLAS Convention in its successive forms is generally regarded as the most important of all international treaties concerning the safety of merchant ships. The first version was adopted in 1914, in response to the Titanic disaster, the second in 1929, the third in 1948, and the fourth in 1960. The 1974 version includes the tacit acceptance procedure - which provides that an amendment shall enter into force on a specified date unless, before that date, objections to the amendment are received from an agreed number of Parties.

As a result the 1974 Convention has been updated and amended on numerous occasions. The Convention in force today is sometimes referred to as SOLAS, 1974, as amended.

Technical provisions

The main objective of the SOLAS Convention is to specify minimum standards for the construction, equipment and operation of ships, compatible with their safety. Flag States are responsible for ensuring that ships under their flag comply with its requirements, and a number of certificates are prescribed in the Convention as proof that this has been done. Control provisions also allow Contracting Governments to inspect ships of other Contracting States if there are clear grounds for believing that the ship and its equipment do not substantially comply with the requirements of the Convention - this procedure is known as port State control. The current SOLAS Convention includes Articles setting out general obligations, amendment procedure and so on, followed by an Annex divided into 14 Chapters.

Chapter I - General Provisions

Includes regulations concerning the survey of the various types of ships and the issuing of documents signifying that the ship meets the requirements of the Convention. The Chapter also includes provisions for the control of ships in ports of other Contracting Governments.

Chapter II-1 - Construction - Subdivision and stability, machinery and electrical installations

The subdivision of passenger ships into watertight compartments must be such that after assumed damage to the ship's hull the vessel will remain afloat and stable. Requirements for watertight integrity and bilge pumping arrangements for passenger ships are also laid down as well as stability requirements for both passenger and cargo ships.

The degree of subdivision - measured by the maximum permissible distance between two adjacent bulkheads - varies with ship's length and the service in which it is engaged. The highest degree of subdivision applies to passenger ships.

Requirements covering machinery and electrical installations are designed to ensure that services which are essential for the safety of the ship, passengers and crew are maintained under various emergency conditions.

"Goal-based standards" for oil tankers and bulk carriers were adopted in 2010, requiring new ships to be designed and constructed for a specified design life and to be safe and environmentally friendly, in intact and specified damage conditions, throughout their life. Under the regulation, ships should have adequate strength, integrity and stability to minimize the risk of loss of the ship or pollution to the marine environment due to structural failure, including collapse, resulting in flooding or loss of watertight integrity.

Chapter II-2 - Fire protection, fire detection and fire extinction

Includes detailed fire safety provisions for all ships and specific measures for passenger ships, cargo ships and tankers.

They include the following principles: division of the ship into main and vertical zones by thermal and structural boundaries; separation of accommodation spaces from the remainder of the ship by thermal and structural boundaries; restricted use of combustible materials; detection of any fire in the zone of origin; containment and extinction of any fire in the space of origin; protection of the means of escape or of access for fire-fighting purposes; ready availability of fire-extinguishing appliances; minimization of the possibility of ignition of flammable cargo vapour.

Chapter III - Life-saving appliances and arrangements

The Chapter includes requirements for life-saving appliances and arrangements, including requirements for life boats, rescue boats and life jackets according to type of ship. The International Life-Saving Appliance (LSA) Code gives specific technical requirements for LSAs and is mandatory under Regulation 34, which states that all life-saving appliances and arrangements shall comply with the applicable requirements of the LSA Code.

Chapter IV – Radio-communications

The Chapter incorporates the Global Maritime Distress and Safety System (GMDSS). All passenger ships and all cargo ships of 300 gross tonnage and upwards on international voyages are required to carry equipment designed to improve the chances of rescue following an accident, including satellite emergency position indicating radio beacons (EPIRBs) and search and rescue transponders (SARTs) for the location of the ship or survival craft.

Regulations in Chapter IV cover undertakings by contracting governments to provide radiocommunication services as well as ship requirements for carriage of radiocommunications equipment. The Chapter is closely linked to the Radio Regulations of the International Telecommunication Union.

Chapter V - Safety of navigation

Chapter V identifies certain navigation safety services which should be provided by Contracting Governments and sets forth provisions of an operational nature applicable in general to all ships on all voyages. This is in contrast to the Convention as a whole, which only applies to certain classes of ship engaged on international voyages.

The subjects covered include the maintenance of meteorological services for ships; the ice patrol service; routeing of ships; and the maintenance of search and rescue services.

This Chapter also includes a general obligation for masters to proceed to the assistance of those in distresses and for Contracting Governments to ensure that all ships shall be sufficiently and efficiently manned from a safety point of view.

The chapter makes mandatory the carriage of voyage data recorders (VDRs) and automatic ship identification systems (AIS).

Chapter VI - Carriage of Cargoes

The Chapter covers all types of cargo (except liquids and gases in bulk) "which, owing to their particular hazards to ships or persons on board, may require special precautions". The regulations include requirements for stowage and securing of cargo or cargo units (such as containers). The Chapter requires cargo ships carrying grain to comply with the International Grain Code.

Chapter VII - Carriage of dangerous goods

The regulations are contained in three parts:

Part A - Carriage of dangerous goods in packaged form - includes provisions for the classification, packing, marking, labelling and placarding, documentation and stowage of dangerous goods. Contracting Governments are required to issue instructions at the national level and the Chapter makes mandatory the International Maritime Dangerous Goods (IMDG) Code, developed by IMO, which is constantly updated to accommodate new dangerous goods and to supplement or revise existing provisions.

Part A-1 - Carriage of dangerous goods in solid form in bulk - covers the documentation, stowage and segregation requirements for these goods and requires reporting of incidents involving such goods.

Part B covers Construction and equipment of ships carrying dangerous liquid chemicals in bulk and requires chemical tankers to comply with the International Bulk Chemical Code (IBC Code).

Part C covers Construction and equipment of ships carrying liquefied gases in bulk and gas carriers to comply with the requirements of the International Gas Carrier Code (IGC Code).

Part D includes special requirements for the carriage of packaged irradiated nuclear fuel, plutonium and high-level radioactive wastes on board ships and requires ships carrying such products to comply with the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code).

The chapter requires carriage of dangerous goods to be in compliance with the relevant provisions of the International Maritime Dangerous Goods Code (IMDG Code).

Chapter VIII - Nuclear ships

Gives basic requirements for nuclear-powered ships and is particularly concerned with radiation hazards. It refers to detailed and comprehensive Code of Safety for Nuclear Merchant Ships which was adopted by the IMO Assembly in 1981.

Chapter IX - Management for the Safe Operation of Ships

The Chapter makes mandatory the International Safety Management (ISM) Code, which requires a safety management system to be established by the shipowner or any person who has assumed responsibility for the ship (the "Company").

Chapter X - Safety measures for high-speed craft

The Chapter makes mandatory the International Code of Safety for High-Speed Craft (HSC Code).

Chapter XI-1 - Special measures to enhance maritime safety

The Chapter clarifies requirements relating to authorization of recognized organizations (responsible for carrying out surveys and inspections on Administrations' behalves); enhanced surveys; ship identification number scheme; and port State control on operational requirements.

Chapter XI-2 - Special measures to enhance maritime security

Regulation XI-2/3 of the chapter enshrines the International Ship and Port Facilities Security Code (ISPS Code). Part A of the Code is mandatory and part B contains guidance as to how best to comply with the mandatory requirements. Regulation XI-2/8 confirms the role of the Master in exercising his professional judgement over decisions necessary to maintain the security of the ship. It says he shall not be constrained by the Company, the charterer or any other person in this respect.

Regulation XI-2/5 requires all ships to be provided with a ship security alert system. ,Regulation XI-2/6 covers requirements for port facilities, providing among other things for Contracting Governments to ensure that port facility security assessments are carried out and that port facility security plans are developed, implemented and reviewed in accordance with the ISPS Code. Other regulations in this chapter cover the provision of information to IMO, the control of ships in port, (including measures such as the delay, detention, restriction of operations including movement within the port, or expulsion of a ship from port), and the specific responsibility of Companies.

Chapter XII - Additional safety measures for bulk carriers

The Chapter includes structural requirements for bulk carriers over 150 metres in length.

Chapter XIII - Verification of compliance

Makes mandatory from 1 January 2016 the IMO Member State Audit Scheme.

Chapter XIV - Safety measures for ships operating in polar waters

The chapter makes mandatory, from 1 January 2017, the Introduction and part I-A of the International Code for Ships Operating in Polar Waters (the Polar Code).

INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS (MARPOL)

The International Convention for the Prevention of Pollution from Ships (MARPOL) is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes.

The MARPOL Convention was adopted on 2 November 1973 at IMO. The Protocol of 1978 was adopted in response to a spate of tanker accidents in 1976-1977. As the 1973 MARPOL Convention had not yet entered into force, the 1978 MARPOL Protocol absorbed the parent Convention. The combined instrument entered into force on 2 October 1983. In 1997, a Protocol was adopted to amend the Convention and a new Annex VI was added which entered into force on 19 May 2005. MARPOL has been updated by amendments through the years.

The Convention includes regulations aimed at preventing and minimizing pollution from ships - both accidental pollution and that from routine operations - and currently includes six technical Annexes. Special Areas with strict controls on operational discharges are included in most Annexes.

Annex I Regulations for the Prevention of Pollution by Oil (entered into force 2 October 1983)

Covers prevention of pollution by oil from operational measures as well as from accidental discharges; the 1992 amendments to Annex I made it mandatory for new oil tankers to have double hulls and brought in a phase-in schedule for existing tankers to fit double hulls, which was subsequently revised in 2001 and 2003.

Annex II Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk (entered into force 2 October 1983)

Details the discharge criteria and measures for the control of pollution by noxious liquid substances carried in bulk; some 250 substances were evaluated and included in the list appended to the Convention; the discharge of their residues is allowed only to reception facilities until certain concentrations and conditions (which vary with the category of substances) are complied with.

In any case, no discharge of residues containing noxious substances is permitted within 12 miles of the nearest land.

Annex III Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form (entered into force 1 July 1992)

Contains general requirements for the issuing of detailed standards on packing, marking, labelling, documentation, stowage, quantity limitations, exceptions and notifications.

For the purpose of this Annex, "harmful substances" are those substances which are identified as marine pollutants in the International Maritime Dangerous Goods Code (IMDG Code) or which meet the criteria in the Appendix of Annex III.

Annex IV Prevention of Pollution by Sewage from Ships (entered into force 27 September 2003)

Contains requirements to control pollution of the sea by sewage; the discharge of sewage into the sea is prohibited, except when the ship has in operation an approved sewage treatment plant or when the ship is discharging comminuted and disinfected sewage using an approved system at a distance of more than three nautical miles from the nearest land; sewage which is not comminuted or disinfected has to be discharged at a distance of more than 12 nautical miles from the nearest land.

Annex V Prevention of Pollution by Garbage from Ships (entered into force 31 December 1988)

Deals with different types of garbage and specifies the distances from land and the manner in which they may be disposed of; the most important feature of the Annex is the complete ban imposed on the disposal into the sea of all forms of plastics.

Annex VI Prevention of Air Pollution from Ships (entered into force 19 May 2005)

Sets limits on sulphur oxide and nitrogen oxide emissions from ship exhausts and prohibits deliberate emissions of ozone depleting substances; designated emission control areas set more stringent standards for SOx, NOx and particulate matter. A chapter adopted in 2011 covers mandatory technical and operational energy efficiency measures aimed at reducing greenhouse gas emissions from ships.

INTERNATIONAL CONVENTION ON STANDARDS OF TRAINING, CERTIFICATION AND WATCHKEEPING FOR SEAFARERS (STCW)

The 1978 STCW Convention was the first to establish basic requirements on training, certification and watchkeeping for seafarers on an international level. Previously the standards of training, certification and watchkeeping of officers and ratings were established by individual governments, usually without reference to practices in other countries. As a result standards and procedures varied widely, even though shipping is the most international of all industries.

The Convention prescribes minimum standards relating to training, certification and watchkeeping for seafarers which countries are obliged to meet or exceed.

The **1995 amendments**, adopted by a Conference, represented a major revision of the Convention, in response to a recognized need to bring the Convention up to date and to respond to critics who pointed out the many vague phrases, such as "to the satisfaction of the Administration", which resulted in different interpretations being made.

The 1995 amendments entered into force on 1 February 1997. One of the major features of the revision was the division of the technical annex into regulations, divided into Chapters as before, and a new STCW Code, to which many technical regulations were transferred. Part A of the Code is mandatory while Part B is recommended.

Dividing the regulations up in this way makes administration easier and it also makes the task of revising and updating them more simple: for procedural and legal reasons there is no need to call a full conference to make changes to Codes.

Another major change was the requirement for Parties to the Convention are required to provide detailed information to IMO concerning administrative measures taken to ensure compliance with the Convention. This represented the first time that IMO had been called upon to act in relation to compliance and implementation - generally, implementation is down to the flag States, while port State control also acts to ensure compliance. Under Chapter I, regulation I/7 of the revised Convention, Parties are required to provide detailed information to IMO concerning administrative measures taken to ensure compliance with the Convention, education and training courses, certification procedures and other factors relevant to implementation.The information is reviewed by panels of competent persons, nominated by Parties to the STCW Convention, who report on their findings to the IMO Secretary-General, who, in turn, reports to the Maritime Safety Committee (MSC) on the Parties which fully comply. The MSC then produces a list of "confirmed Parties" in compliance with the STCW Convention.

STCW Convention chapters

Chapter I: General provisions

Chapter II: Master and deck department

Chapter III: Engine department

Chapter IV: Radiocommunication and radio personnel

Chapter V: Special training requirements for personnel on certain types of ships

Chapter VI: Emergency, occupational safety, medical care and survival functions

Chapter VII: Alternative certification

Chapter VIII: Watchkeeping

The STCW Code

The regulations contained in the Convention are supported by sections in the STCW Code. Generally speaking, the Convention contains basic requirements which are then enlarged upon and explained in the Code.Part A of the Code is mandatory. The minimum standards of competence required for seagoing personnel are given in detail in a series of tables. Part B of the Code contains recommended guidance which is intended to help Parties implement the Convention. The measures suggested are not mandatory and the examples given are only intended to illustrate how certain Convention requirements may be complied with. However, the recommendations in general represent an approach that has been harmonized by discussions within IMO and consultation with other international organizations.

The **Manila amendments to the STCW Convention and Code** were adopted on 25 June 2010, marking a major revision of the STCW Convention and Code. The 2010 amendments entered into force on 1 January 2012 under the tacit acceptance procedure and are aimed at bringing the Convention and Code up to date with developments since they were initially adopted and to enable them to address issues that are anticipated to emerge in the foreseeable future.

Amongst the amendments adopted, there are a number of important changes to each chapter of the Convention and Code, including:

- Improved measures to prevent fraudulent practices associated with certificates of competency and strengthen the evaluation process (monitoring of Parties' compliance with the Convention);
- Revised requirements on hours of work and rest and new requirements for the prevention of drug and alcohol abuse, as well as updated standards relating to medical fitness standards for seafarers;
- New certification requirements for able seafarers;
- New requirements relating to training in modern technology such as electronic charts and information systems (ECDIS);
- New requirements for marine environment awareness training and training in leadership and teamwork;
- New training and certification requirements for electro-technical officers;
- Updating of competence requirements for personnel serving on board all types of tankers, including new requirements for personnel serving on liquefied gas tankers;
- New requirements for security training, as well as provisions to ensure that seafarers are properly trained to cope if their ship comes under attack by pirates;
- Introduction of modern training methodology including distance learning and web-based learning;
- New training guidance for personnel serving on board ships operating in polar waters; and
- New training guidance for personnel operating Dynamic Positioning Systems.

CONVENTION ON THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972 (COLREGS)

The 1972 Convention was designed to update and replace the Collision Regulations of 1960 which were adopted at the same time as the 1960 SOLAS Convention.

One of the most important innovations in the 1972 COLREGs was the recognition given to traffic separation schemes - Rule 10 gives guidance in determining safe speed, the risk of collision and the conduct of vessels operating in or near traffic separation schemes.

The first such traffic separation scheme was established in the Dover Strait in 1967. It was operated on a voluntary basis at first but in 1971 the IMO Assembly adopted a resolution stating that that observance of all traffic separation schemes be made mandatory - and the COLREGs make this obligation clear.

Technical provisions

The COLREGs include 41 rules divided into six sections: Part A - General; Part B - Steering and Sailing; Part C - Lights and Shapes; Part D - Sound and Light signals; Part E - Exemptions; and Part F - Verification of compliance with the provisions of the Convention. There are also four Annexes containing technical requirements concerning lights and shapes and their positioning; sound signalling appliances; additional signals for fishing vessels when operating in close proximity, and international distress signals.

Part A - General (Rules 1-3)

Rule 1 states that the rules apply to all vessels upon the high seas and all waters connected to the high seas and navigable by seagoing vessels.

Rule 2 covers the responsibility of the master, owner and crew to comply with the rules.

Rule 3 includes definitions.

Part B- Steering and Sailing (Rules 4-19)

Section 1 - Conduct of vessels in any condition of visibility (Rules 4-10)

Rule 4 says the section applies in any condition of visibility.

Rule 5 requires that "every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

Rule 6 deals with safe speed. It requires that: "Every vessel shall at all times proceed at a safe speed...". The Rule describes the factors which should be taken into account in determining safe speed. Several of these refer specifically to vessels equipped with radar.The importance of using "all available means" is further stressed in

Rule 7 covering risk of collision, which warns that "assumptions shall not be made on the basis of scanty information, especially scanty radar information"

Rule 8 covers action to be taken to avoid collision.

In Rule 9 a vessel proceeding along the course of a narrow channel or fairway is obliged to keep "as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable." The same Rule obliges a vessel of less than 20 metres in length or a sailing vessel not to impede the passage of a vessel "which can safely navigate only within a narrow channel or fairway."

The Rule also forbids ships to cross a narrow channel or fairway "if such crossing impedes the passage of a vessel which can safely navigate only within such channel or fairway." The meaning "not to impede" was classified by an amendment to Rule 8 in 1987. A new paragraph (f) was added, stressing that a vessel which was required not to impede the passage of another vessel should take early action to allow sufficient sea room for the safe passage of the other vessel. Such vessel was obliged to fulfil this obligation also when taking avoiding action in accordance with the steering and sailing rules when risk of collision exists.

Rule 10 of the Collision Regulations deals with the behaviour of vessels in or near traffic separation schemes adopted by the Organization. By regulation 8 of Chapter V (Safety of Navigation) of SOLAS, IMO is recognized as being the only organization competent to deal with international measures concerning the routeing of ships.

The effectiveness of traffic separation schemes can be judged from a study made by the International Association of Institutes of Navigation (IAIN) in 1981. This showed that between 1956 and 1960 there were 60 collisions in the Strait of Dover; twenty years later, following the introduction of traffic separation schemes, this total was cut to only 16.

In other areas where such schemes did not exist the number of collisions rose sharply. New traffic separation schemes are introduced regularly and existing ones are amended when necessary to respond to changed traffic conditions. To enable this to be done as quickly as possible the MSC has been authorized to adopt and amend traffic separation schemes on behalf of the Organization.

Rule 10 states that ships crossing traffic lanes are required to do so "as nearly as practicable at right angles to the general direction of traffic flow." This reduces confusion to other ships as to the crossing vessel's intentions and course and at the same time enables that vessel to cross the lane as quickly as possible.

Fishing vessels "shall not impede the passage of any vessel following a traffic lane" but are not banned from fishing. This is in line with Rule 9 which states that "a vessel engaged in fishing shall not impede the passage of any other vessel navigating within a narrow channel or fairway."In 1981 the regulations were amended. Two new paragraphs were added to Rule 10 to exempt vessels which are restricted in their ability to manoeuvre "when engaged in an operation for the safety of navigation in a traffic separation scheme" or when engaged in cable laying.

In 1987 the regulations were again amended. It was stressed that Rule 10 applies to traffic separation schemes adopted by the Organization (IMO) and does not relieve any vessel of her obligation under any other rule. It was also to clarify that if a vessel is obliged to cross traffic lanes it should do so as nearly as practicable at right angles to the general direction of the traffic flow. In 1989 Regulation 10 was further amended to clarify the vessels which may use the "inshore traffic zone."

Section II - Conduct of vessels in sight of one another (Rules 11-18)

Rule 11 says the section applies to vessels in sight of one another.

Rule 12 states action to be taken when two sailing vessels are approaching one another.

Rule 13covers overtaking - the overtaking vessel should keep out of the way of the vessel being overtaken.
Rule 14 deals with head-on situations. Crossing situations are covered by Rule 15 and action to be taken by the give-way vessel is laid down in Rule 16.

Rule 17 deals with the action of the stand-on vessel, including the provision that the stand-on vessel may "take action to avoid collision by her manoeuvre alone as soon as it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action.

Rule 18 deals with responsibilities between vessels and includes requirements for vessels which shall keep out of the way of others.

Section III - conduct of vessels in restricted visibility (Rule 19)

Rule 19 states every vessel should proceed at a safe speed adapted to prevailing circumstances and restricted visibility. A vessel detecting by radar another vessel should determine if there is risk of collision and if so take avoiding action. A vessel hearing fog signal of another vessel should reduce speed to a minimum.

Part C Lights and Shapes (Rules 20-31)

Rule 20 states rules concerning lights apply from sunset to sunrise.Rule 21 gives definitions.

Rule 22 covers visibility of lights - indicating that lights should be visible at minimum ranges (in nautical miles) determined according to the type of vessel.

Rule 23 covers lights to be carried by power-driven vessels underway.

Rule 24 covers lights for vessels towing and pushing.

Rule 25 covers light requirements for sailing vessels underway and vessels under oars.

Rule 26 covers light requirements for fishing vessels.

Rule 27 covers light requirements for vessels not under command or restricted in their ability to manoeuvre.

Rule 28 covers light requirements for vessels constrained by their draught.

Rule 29 covers light requirements for pilot vessels.

Rule 30 covers light requirements for vessels anchored and aground.Rule 31 covers light requirements for seaplanes

Part D - Sound and Light Signals (Rules 32-37)

Rule 32 gives definitions of whistle, short blast, and prolonged blast.

Rule 33 says vessels 12 metres or more in length should carry a whistle and a bell and vessels 100 metres or more in length should carry in addition a gong.

Rule 34 covers manoeuvring and warning signals, using whistle or lights.

Rule 35 covers sound signals to be used in restricted visibility.

Rule 36 covers signals to be used to attract attention.

Rule 37 covers distress signals.

Part E - Exemptions (Rule 38)

Rule 38 says ships which comply with the 1960 Collision Regulations and were built or already under construction when the 1972 Collision Regulations entered into force may be exempted from some requirements for light and sound signals for specified periods.

Part F - Verification of compliance with the provisions of the Convention

The Rules, adopted in 2013, bring in the requirements for compulsory audit of Parties to the Convention.

Rule 39 provides definitions.

Rule 40 says that Contracting Parties shall use the provisions of the Code for Implementation in the execution of their obligations and responsibilities contained in the present Convention.

Rule 41 on Verification of compliance says that every Contracting Party is subject to periodic audits by IMO.

Annexes
The COLREGs include four annexes:

Annex I - Positioning and technical details of lights and shapes

Annex II - Additional signals for fishing vessels fishing in close proximity

Annex III - Technical details of sounds signal appliances

Annex IV - Distress signals, which lists the signals indicating distress and need of assistance.

CONVENTION ON FACILITATION OF INTERNATIONAL MARITIME TRAFFIC (FAL)

The Convention's main objectives are to prevent unnecessary delays in maritime traffic, to aid co-operation between Governments, and to secure the highest practicable degree of uniformity in formalities and other procedures. In particular, the Convention reduces the number of declarations which can be required by public authorities.

Most human activities are regulated, either by precedent, convention or regulation. Most regulations are essential - but sometimes they come to be regarded not only as unnecessary but also as a significant burden on the activities they are supposed to control. Few activities have been more subject to over-regulation than international maritime transport.

This is partly because of the international nature of shipping: countries developed customs, immigration and other standards independently of each other and a ship visiting several countries during the course of a voyage could expect to be presented with numerous forms to fill in, often asking for exactly the same information but in a slightly different way.

As shipping and trade developed and grew in the early part of the twentieth century, so did the paperwork involved. By the 1950s it was being regarded not simply as an inconvenience but as a threat. The actual number of separate documents required varied from port to port; yet the information on cargoes and persons carried that was sought was often identical. The number of copies required of some of these documents could often become excessive. To the variety of forms and the number of copies required could be added other burdens such as local language translations, consular visa requirements, variations in document size and paper stock used and the necessity for authentication by the shipmaster of the information submitted.

By the early 1960s the maritime nations had decided that the situation could not be allowed to deteriorate further. International action was called for and to achieve it Governments turned to IMO, which had held its first meeting in 1959.

In 1961 the 2nd IMO Assembly adopted resolution A.29 (II) which recommended that IMO take up the matter. An Expert Group was convened which recommended that an international convention be adopted to assist the facilitation of international maritime traffic.

In October 1963 the 3rd IMO Assembly adopted resolution A.63 (III) which approved the report of Expert Group and in particular recommended that a convention be drafted which would be considered for adoption at a conference to be held under IMO auspices in the spring of 1965. The conference duly took place and the Convention on Facilitation of International Maritime Traffic (FAL), 1965 was adopted on 9 April.

Standards and recommended practices

In its Annex, the Convention contains "Standards" and "Recommended Practices" on formalities, documentary requirements and procedures which should be applied on arrival, stay and departure to the ship itself, and to its crew, passengers, baggage and cargo.

The Convention defines standards as internationally-agreed measures which are "necessary and practicable in order to facilitate international maritime traffic" and recommended practices as measures the application of which is "desirable".

The Convention provides that any Contracting Government which finds it impracticable to comply with any international standard, or deems it necessary to adopt differing regulations, must inform the Secretary-General of IMO of the "differences" between its own practices and the standards in question. The same procedure applies to new or amended standards.

In the case of recommended practices, Contracting Governments are urged to adjust their laws accordingly but are only required to notify the Secretary-General when they have brought their own formalities, documentary requirements and procedures into full accord.

This flexible concept of standards and recommended practices, coupled with the other provisions, allows continuing progress to be made towards the formulation and adoption of uniform measures in the facilitation of international maritime traffic.

The IMO Standardized Forms (FAL 1-7)

Standard 2.1 lists the documents which public authorities can demand of a ship and recommends the maximum information and number of copies which should be required. IMO has developed Standardized Forms for seven of these documents. They are the:

- IMO General Declaration
- Cargo Declaration
- Ship's Stores Declaration
- Crew's Effects Declaration
- Crew List· Passenger List
- Dangerous Goods

Two other documents are required under the Universal Postal Convention and the International Health Regulations.

The general declaration, cargo declaration, crew list and passenger list constitute the maximum information necessary. The ship's stores declaration and crew's effects declaration incorporate the agreed essential minimum information requirements.

Important amendments include:

The 2002 amendments

Adoption: 10 January 2002; Entry into force: 1 May 2003

The amendments add new standards and recommended practices for dealing with stowaways. Another amendment relates to the Dangerous Goods Manifest (FAL Form 7), which becomes the basic document providing public authorities with the information regarding dangerous goods on board ships.

The 2005 amendments

Adoption: 7 July 2005; Entry into force: 1 November 2006

The amendments are intended to modernize the Convention in order to enhance the facilitation of international maritime traffic, including a Recommended Practice for public authorities to develop the necessary procedures in order to use pre-arrival and pre-departure information to facilitate the processing of information, and thus expedite release and clearance of cargo and persons; a Recommended Practice that all information should be submitted to a single point to avoid duplication; encouragement of electronic transmission of information; and the addition of references to the International Ship and Port Facility Security (ISPS) Code and SOLAS chapter XI-2 in the Standards and Recommended Practices which mention security measures; and amendments to the IMO Standardized FAL Forms (1 to 7).

A further amendment relates to persons rescued at sea. A standard in Section 2 - Arrival, stay and departure of the ship, in section H Special measures of facilitation for ships calling at ports in order to put ashore sick or injured crew members, passengers, persons rescued at sea or other persons for emergency medical treatment. The amendment requires public authorities to facilitate the arrival and departure of ships engaged in the rescue of persons in distress at sea in order to provide a place of safety for such persons.

The 2009 amendments

Adoption: 16 January 2009; **Entry into force: 15 May 2010**

The amendments are related to sections concerning contents and purpose of documents; arrival and departure requirements and procedures; measures to facilitate clearance of passengers, crew and baggage; and facilitation for ships engaged on cruises and for cruises passengers. The amendments introduced the text of “voyage number”, and new IMO FAL Forms were approved.

The 2016 amendments

Adoption: 8 April 2016; **Entry into force: 01 January 2018**

These amendments introduce new definitions for Cargo Transport Unit (CTU), clearance, freight container, the International Ship and Port Facility Security (ISPS) Code, master, ship agent, shipper and single window. Electronic exchange of information will be mandatory from 9 April 2019 with a transition period of no less than 12 months. The text now refers to the use of “Single Window” systems and has been revised in a gender-neutral format. Three additional documents have been introduced for ship’s clearance that may be required by the shore authorities, i.e. security-related information as required under SOLAS regulation XI-2/9.2.2, Advance electronic cargo information for customs risk assessment purposes, and Advanced Notification Form for Waste Delivery to Port Reception Facilities. Additional guarantees have been included relating to the shore leave of crew members. All IMO FAL forms, with the exception of Ship's Stores Declaration (IMO FAL Form 3), have been revised.

INTERNATIONAL CONVENTION ON MARITIME SEARCH AND RESCUE (SAR)

The 1979 Convention, adopted at a Conference in Hamburg, was aimed at developing an international SAR plan, so that, no matter where an accident occurs, the rescue of persons in distress at sea will be co-ordinated by a SAR organization and, when necessary, by co-operation between neighbouring SAR organizations.

Although the obligation of ships to go to the assistance of vessels in distress was enshrined both in tradition and in international treaties (such as the International Convention for the Safety of Life at Sea (SOLAS), 1974), there was, until the adoption of the SAR Convention, no international system covering search and rescue operations. In some areas there was a well-established organization able to provide assistance promptly and efficiently, in others there was nothing at all.

The technical requirements of the SAR Convention are contained in an Annex, which was divided into five Chapters. Parties to the Convention are required to ensure that arrangements are made for the provision of adequate SAR services in their coastal waters.Parties are encouraged to enter into SAR agreements with neighbouring States involving the establishment of SAR regions, the pooling of facilities, establishment of common procedures, training and liaison visits. The Convention states that Parties should take measures to expedite entry into its territorial waters of rescue units from other Parties.

The Convention then goes on to establish preparatory measures which should be taken, including the establishment of rescue co-ordination centres and subcentres. It outlines operating procedures to be followed in the event of emergencies or alerts and during SAR operations. This includes the designation of an on-scene commander and his duties.

IMO search and rescue areas

Following the adoption of the 1979 SAR Convention, IMO's Maritime Safety Committee divided the world's oceans into 13 search and rescue areas, in each of which the countries concerned have delimited search and rescue regions for which they are responsible.

Provisional search and rescue plans for all of these areas were completed when plans for the Indian Ocean were finalized at a conference held in Fremantle, Western Australia in September 1998.

Revision of SAR Convention

The 1979 SAR Convention imposed considerable obligations on Parties - such as setting up the shore installations required - and as a result the Convention was not being ratified by as many countries as some other treaties. Equally important, many of the world's coastal States had not accepted the Convention and the obligations it imposed.It was generally agreed that one reason for the small number of acceptances and the slow pace of implementation was due to problems with the SAR Convention itself and that these could best be overcome by amending the Convention.

A revised Annex to the SAR Covnention was adopted in May 1998 and entered ito force in January 2000.

The revised technical Annex of the SAR Convention clarifies the responsibilities of Governments and puts greater emphasis on the regional approach and co-ordination between maritime and aeronautical SAR operations.

The revised Annex includes five Chapters:

Chapter 1 - Terms and Definitions

This Chapter updates the original Chapter 1 of the same name.

Chapter 2 - Organization and Co-ordination

The Chapter makes clear the responsibilities of Governments. It requires Parties, either individually or in co-operation with other States, to establish basic elements of a search and rescue service, to include:

- legal framework;
- assignment of a responsible authority;
- organization of available resources;
- communication facilities;
- co-ordination and operational functions; and
- processes to improve the service including planning, domestic and international co-operative relationships and training.

Parties should establish search and rescue regions within each sea area - with the agreement of the Parties concerned. Parties then accept responsibility for providing search and rescue services for a specified area.

The Chapter also describes how SAR services should be arranged and national capabilities be developed. Parties are required to establish rescue co-ordination centres and to operate them on a 24-hour basis with trained staff who have a working knowledge of English.

Parties are also required to "ensure the closest practicable co-ordination between maritime and aeronautical services".

Chapter 3 - Co-operation between States

Requires Parties to co-ordinate search and rescue organizations, and, where necessary, search and rescue operations with those of neighbouring States. The Chapter states that unless otherwise agreed between the States concerned, a Party should authorize, subject to applicable national laws, rules and regulations, immediate entry into or over its territorial sea or territory for rescue units of other Parties solely for the purpose of search and rescue.

Chapter 4 - Operating Procedures

The Chapter says that each RCC (Rescue Co-ordination Centre) and RSC (Rescue Sub-Centre) should have up-to-date information on search and rescue facilities and communications in the area and should have detailed plans for conduct of search and rescue operations. Parties - individually or in co-operation with others should be capable of receiving distress alerts on a 24-hour basis. The regulations include procedures to be followed during an emergency and state that search and rescue activities should be co-ordinated on scene for the most effective results. The Chapter says that "Search and rescue operations shall continue, when practicable, until all reasonable hope of rescuing survivors has passed".

Chapter 5 - Ship reporting systems

Includes recommendations on establishing ship reporting systems for search and rescue purposes, noting that existing ship reporting systems could provide adequate information for search and rescue purposes in a given area.

IAMSAR Manual

Concurrently with the revision of the SAR Convention, the IMO and the International Civil Aviation Organization (ICAO) jointly develop and publish the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual, published in three volumes covering Organization and Management; Mission Co-ordination; and Mobile Facilities.

2004 amendments - persons in distress at sea

Adoption: May 2004; Entry into force: 1 July 2006

The amendments to the Annex to the Convention include:

- addition of a new paragraph in chapter 2 (Organization and co-ordination) relating to definition of persons in distress;
- new paragraphs in chapter 3 (Co-operation between States) relating to assistance to the master in delivering persons rescued at sea to a place of safety; and
- a new paragraph in chapter 4 (Operating procedures) relating to rescue co- ordination centres initiating the process of identifying the most appropriate places for disembarking persons found in distress at sea.

CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION, PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF FIXED PLATFORMS LOCATED ON THE CONTINENTAL SHELF

Concern about unlawful acts which threaten the safety of ships and the security of their passengers and crews grew during the 1980s, with reports of crews being kidnapped, ships being hi-jacked, deliberately run aground or blown up by explosives. Passengers were threatened and sometimes killed.

In November 1985 the problem was considered by IMO's 14th Assembly and a proposal by the United States that measures to prevent such unlawful acts should be developed by IMO was supported.

The Assembly adopted resolution A.584(14) *Measures to prevent unlawful acts which threaten the safety of ships and the security of their passengers and crew,* then in 1986 the Maritime Safety Committee (MSC) issued a Circular (MSC/Circ.443) on *Measures to prevent unlawful acts against passengers and crews on board ships.*

In November 1986 the Governments of Austria, Egypt and Italy proposed that IMO prepare a convention on the subject of unlawful acts against the safety of maritime navigation 'to provide for a comprehensive suppression of unlawful acts committed against the safety of maritime navigation which endanger innocent human lives, jeopardize the safety of persons and property, seriously affect the operation of maritime services and thus are of grave concern to the international community as a whole."

In March 1988 a conference in Rome adopted the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.The main purpose of the Convention is to ensure that appropriate action is taken against persons committing unlawful acts against ships. These include the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.

The Convention obliges Contracting Governments either to extradite or prosecute alleged offenders.

Important amendments to the 1988 Convention and its related Protocol, were adopted by the Diplomatic Conference on the Revision of the SUA Treaties held from 10 to 14 October 2005. The amendments were adopted in the form of Protocols to the SUA treaties (the 2005 Protocols).

2005 Protocol to the SUA Convention

Among the unlawful acts covered by the SUA Convention in Article 3 are the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.

The 2005 Protocol to the SUA Convention adds a new Article 3bis which states that a person commits an offence within the meaning of the Convention if that person unlawfully and intentionally:

- when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from any act:
    - uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN (biological, chemical, nuclear) weapon in a manner that causes or is likely to cause death or serious injury or damage;

    - discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
    - uses a ship in a manner that causes death or serious injury or damage;
- transports on board a ship any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, death or serious injury or damage for the purpose of intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act;
- transports on board a ship any BCN weapon, knowing it to be a BCN weapon;
- any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; and
- transports on board a ship any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

The transportation of nuclear material is not considered an offence if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non Proliferation of Nuclear Weapons (Subject to conditions).

Under the new instrument, a person commits an offence within the meaning of the Convention if that person unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence under the SUA Convention or an offence set forth in any treaty listed in the Annex. The Annex lists nine such treaties.

The new instrument also makes it an offence to unlawfully and intentionally injure or kill any person in connection with the commission of any of the offences in the Convention; to attempt to commit an offence; to participate as an accomplice; to organize or direct others to commit an offence; or to contribute to the commissioning of an offence.

A new Article requires Parties to take necessary measures to enable a legal entity (this could be a company or organization, for example) to be made liable and to face sanctions when a person responsible for management of control of that legal entity has, that capacity, committed an offence under the Convention.

Boarding provisions

Article 8 of the SUA Convention covers the responsibilities and roles of the master of the ship, flag State and receiving State in delivering to the authorities of any State Party any person believed to have committed an offence under the Convention, including the furnishing of evidence pertaining to the alleged offence.

A new Article 8bis in the 2005 Protocol covers co-operation and procedures to be followed if a State Party desires to board a ship flying the flag of a State Party when the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the Convention.

The authorization and co-operation of the flag State is required before such a boarding. A State Party may notify the IMO Secretary-General that it would allow authorization to board and search a ship flying its flag, its cargo and persons on board if there is no response from the flag State within four hours. A State Party can also notify that it authorizes a requesting Party to board and search the ship, its cargo and persons on board, and to question the persons on board to determine if an offence has been, or is about to be, committed.

The use of force is to be avoided except when necessary to ensure the safety of officials and persons on board, or where the officials are obstructed to the execution of authorized actions.

Article 8bis includes important safeguards when a State Party takes measures against a ship, including boarding. The safeguards include: not endangering the safety of life at sea; ensuring that all persons on board are treated in a manner which preserves human dignity and in keeping with human rights law; taking due account of safety and security of the ship and its cargo; ensuring that measures taken are environmentally sound; and taking reasonable efforts to avoid a ship being unduly detained or delayed.

Extradition

Article 11 covers extradition procedures. A new Article 11bis states that none of the offences should be considered for the purposes of extradition as a political offence. New article 11ter states that the obligation to extradite or afford mutual legal assistance need not apply if the request for extradition is believed to have been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Article 12 of the Convention requires States Parties to afford one another assistance in connection with criminal proceedings brought in respect of the offences. A new Article 12bis cover the conditions under which a person who is being detained or is serving a sentence in the territory of one State Party may be transferred to another State Party for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences.

Amendment procedure

Amendments to the Articles in the Convention require acceptance by a requisite number of States. However, the Annex, which lists the treaties under which offences can be considered for the purpose of the SUA Convention, has a special amendment procedure.

The treaties listed are:

- Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973
- International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979
- Convention on the Physical Protection of Nuclear Material, done at Vienna on 26 October 1979
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988
- International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997
- International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

2005 Protocol to the 1988 SUA Protocol

The amendments to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf reflect those in the 2005 Protocol to the SUA Convention.

New article 2bis broadens the range of offences included in the Protocol. A person commits an offence if that person unlawfully and intentionally, when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act, uses against or on a fixed platform or discharges from a fixed platform any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or discharges from a fixed platform, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration, that it causes or is likely to cause death or serious injury or damage; or threatens, with or without a condition, as is provided for under national law, to commit an offence.

New article 2ter includes the offences of unlawfully and intentionally injuring or killing any person in connection with the commission of any of the offences; attempting to commit an offence; participating as an accomplice; organizing or directing others to commit an offence.

INTERNATIONAL CONVENTION FOR SAFE CONTAINERS (CSC)

In the 1960s, there was a rapid increase in the use of freight containers for the consignment of goods by sea and the development of specialized container ships. In 1967, IMO undertook to study the safety of containerization in marine transport. The container itself emerged as the most important aspect to be considered.

IMO, in co-operation with the Economic Commission for Europe, developed a draft convention and in 1972 the finalized Convention was adopted at a conference jointly convened by the United Nations and IMO.

The 1972 Convention for Safe Containers has two goals.

One is to maintain a high level of safety of human life in the transport and handling of containers by providing generally acceptable test procedures and related strength requirements.

The other is to facilitate the international transport of containers by providing uniform international safety regulations, equally applicable to all modes of surface transport. In this way, proliferation of divergent national safety regulations can be avoided.

The requirements of the Convention apply to the great majority of freight containers used internationally, except those designed specially for carriage by air. As it was not intended that all containers or reusable packing boxes should be affected, the scope of the Convention is limited to containers of a prescribed minimum size having corner fittings - devices which permit handling, securing or stacking.

Technical annexes

The Convention includes two Annexes:

Annex I includes Regulations for the testing, inspection, approval and maintenance of containers

Annex II covers structural safety requirements and tests, including details of test procedures.

Annex I sets out procedures whereby containers used in international transport must be safety-approved by an Administration of a Contracting State or by an organization acting on its behalf.

The Administration or its authorized representative will authorize the manufacturer to affix to approved containers a safety approval plate containing the relevant technical data.

The approval, evidenced by the safety approval plate granted by one Contracting State, should be recognized by other Contracting States. This principle of reciprocal acceptance of safety-approved containers is the cornerstone of the Convention; and once approved and plated it is expected that containers will move in international transport with the minimum of safety control formalities.

The subsequent maintenance of a safety-approved container is the responsibility of the owner, who is required to have the container periodically examined.

The Convention specifically requires that the container be subjected to various tests which represent a combination of safety requirements of both the inland and maritime modes of transport.

Flexibility is incorporated in the Convention by the provision of a simplified amendment procedures (tacit amendment procedure) which makes it possible to speedily adapt the test procedures to the requirements of international container traffic.

INTERNATIONAL CONVENTION RELATING TO INTERVENTION ON THE HIGH SEAS IN CASES OF OIL POLLUTION CASUALTIES, 1969

The Convention affirms the right of a coastal State to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate danger to its coastline or related interests from pollution by oil or the threat thereof, following upon a maritime casualty.

The coastal State is, however, empowered to take only such action as is necessary, and after due consultations with appropriate interests including, in particular, the flag State or States of the ship or ships involved, the owners of the ships or cargoes in question and, where circumstances permit, independent experts appointed for this purpose.

A coastal State which takes measures beyond those permitted under the Convention is liable to pay compensation for any damage caused by such measures. Provision is made for the settlement of disputes arising in connection with the application of the Convention.

The Convention applies to all seagoing vessels except warships or other vessels owned or operated by a State and used on Government non-commercial service.

The 1969 Intervention Convention applied to casualties involving pollution by oil. In view of the increasing quantity of other substances, mainly chemical, carried by ships, some of which would, if released, cause serious hazard to the marine environment, the 1969 Brussels Conference recognized the need to extend the Convention to cover substances other than oil.

The 1973 London Conference on Marine Pollution therefore adopted the Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil. This extended the regime of the 1969 Intervention Convention to substances which are either listed in the Annex to the Protocol or which have characteristics substantially similar to those substances.

The 1973 Protocol entered into force in 1983 and has been amended subsequently to update the list of substances attached to it.

CONVENTION ON THE PREVENTION OF MARINE POLLUTION BY DUMPING OF WASTES AND OTHER MATTER

The Inter-Governmental Conference on the Convention on the Dumping of Wastes at Sea, which met in London in November 1972 at the invitation of the United Kingdom, adopted this instrument, generally known as the London Convention. The London Convention, one of the first international conventions for the protection of the marine environment from human activities, came into force on 30 August 1975. Since 1977, it has been administered by IMO.

The London Convention contributes to the international control and prevention of marine pollution by prohibiting the dumping of certain hazardous materials. In addition, a special permit is required prior to dumping of a number of other identified materials and a general permit for other wastes or matter.

"Dumping" has been defined as the deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures, as well as the deliberate disposal of these vessels or platforms themselves. Annexes list wastes which cannot be dumped and others for which a special dumping permit is required.

Amendments adopted in 1993 (which entered into force in 1994) banned the dumping into sea of low-level radioactive wastes. In addition, the amendments phased out the dumping of industrial wastes by 31 December 1995 and banned the incineration at sea of industrial wastes.

In 1996, Parties adopted a Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (known as the **London Protocol**) which entered into force in 2006. The Protocol, which is meant to eventually replace the 1972 Convention, represents a major change of approach to the question of how to regulate the use of the sea as a depository for waste materials. Rather than stating which materials may not be dumped, it prohibits all dumping, except for possibly acceptable wastes on the so-called "reverse list", contained in an annex to the Protocol.

The London Protocol stresses the "precautionary approach", which requires that "appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects". It also states that "the polluter should, in principle, bear the cost of pollution" and emphasizes that Contracting Parties should ensure that the Protocol should not simply result in pollution being transferred from one part of the environment to another.

The Contracting Parties to the London Convention and Protocol have recently taken steps to mitigate the impacts of increasing concentrations of CO2 in the atmosphere (and consequently in the marine environment) and to ensure that new technologies that aim to engineer the climate, and have the potential to cause harm to the marine environment, are effectively controlled and regulated. The instruments have, so far, been the most advanced international regulatory instruments addressing carbon capture and sequestration in sub-sea geological formations and marine climate engineering such as ocean fertilization.

The 1996 Protocol restricts **all** dumping except for a permitted list (which still require permits).

Article 4 states that Contracting Parties "shall prohibit the dumping of any wastes or other matter with the exception of those listed in Annex 1."

The permitted substances are:

1. Dredged material
2. Sewage sludge
3. Fish waste, or material resulting from industrial fish processing operations
4. Vessels and platforms or other man-made structures at sea
5. Inert, inorganic geological material
6. Organic material of natural origin
7. Bulky items primarily comprising iron, steel, concrete and similar unharmful materials for which the concern is physical impact and limited to those circumstances, where such wastes are generated at locations, such as small islands with isolated communities, having no practicable access to disposal options other than dumping
8. CO2 streams from CO2 capture processes.

INTERNATIONAL CONVENTION ON OIL POLLUTION PREPAREDNESS, RESPONSE AND CO-OPERATION (OPRC)

In July 1989, a conference of leading industrial nations in Paris called upon IMO to develop further measures to prevent pollution from ships. This call was endorsed by the IMO Assembly in November of the same year and work began on a draft convention aimed at providing a global framework for international co-operation in combating major incidents or threats of marine pollution.

Parties to the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) are required to establish measures for dealing with pollution incidents, either nationally or in co-operation with other countries.

Ships are required to carry a shipboard oil pollution emergency plan. Operators of offshore units under the jurisdiction of Parties are also required to have oil pollution emergency plans or similar arrangements which must be co-ordinated with national systems for responding promptly and effectively to oil pollution incidents.

Ships are required to report incidents of pollution to coastal authorities and the convention details the actions that are then to be taken. The Convention calls for the establishment of stockpiles of oil spill combating equipment, the holding of oil spill combating exercises and the development of detailed plans for dealing with pollution incidents.

Parties to the convention are required to provide assistance to others in the event of a pollution emergency and provision is made for the reimbursement of any assistance provided.

The Convention provides for IMO to play an important co-ordinating role. A Protocol to the OPRC relating to hazardous and noxious substances (OPRC-HNS Protocol) was adopted in 2000.

INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE (CLC)

The Civil Liability Convention was adopted to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships.

The Convention places the liability for such damage on the owner of the ship from which the polluting oil escaped or was discharged.

Subject to a number of specific exceptions, this liability is strict; it is the duty of the owner to prove in each case that any of the exceptions should in fact operate. However, except where the owner has been guilty of actual fault, they may limit liability in respect of any one incident.

The Convention requires ships covered by it to maintain insurance or other financial security in sums equivalent to the owner's total liability for one incident.

The Convention applies to all seagoing vessels actually carrying oil in bulk as cargo, but only ships carrying more than 2,000 tons of oil are required to maintain insurance in respect of oil pollution damage.

This does not apply to warships or other vessels owned or operated by a State and used for the time being for Government non-commercial service. The Convention, however, applies in respect of the liability and jurisdiction provisions, to ships owned by a State and used for commercial purposes. The only exception as regards such ships is that they are not required to carry insurance. Instead they must carry a certificate issued by the appropriate authority of the State of their registry stating that the ship's liability under the Convention is covered.

The Convention covers pollution damage resulting from spills of persistent oils suffered in the territory (including the territorial sea) of a State Party to the Convention. It is applicable to ships which actually carry oil in bulk as cargo, i.e. generally laden tankers. Spills from tankers in ballast or bunker spills from ships other than other than tankers are not covered, nor is it possible to recover costs when preventive measures are so successful that no actual spill occurs. The shipowner cannot limit liability if the incident occurred as a result of the owner's personal fault.

The Protocol of 1976, which entered into force in 1981, provided for the aplicable unit of account used under the convention to be based on the Special Drawing Rights (SDR) as used by the International Monetary Fund (IMF), replacing the the "Poincaré franc", based on the "official" value of gold, as the applicable unit of account.

The Protocol of 1984 set increased limits of liability but was superseded by the 1992 Protocol.

The Protocol of 1992 changed the entry into force requirements by reducing from six to four the number of large tanker-owning countries that were needed for entry into force.

The compensation limits were set as follows:

- For a ship not exceeding 5,000 gross tonnage, liability is limited to 3 million SDR
- For a ship 5,000 to 140,000 gross tonnage: liability is limited to 3 million SDR plus 420 SDR for each additional unit of tonnage
- For a ship over 140,000 gross tonnage: liability is limited to 59.7 million SDR.

The 1992 protocol also widened the scope of the Convention to cover pollution damage caused in the exclusive economic zone (EEZ) or equivalent area of a State Party. The Protocol covers pollution damage as before but environmental damage compensation is limited to costs incurred for reasonable measures to reinstate the contaminated environment. It also allows expenses incurred for preventive measures to be recovered even when no spill of oil occurs, provided there was grave and imminent threat of pollution damage.

The Protocol also extended the Convention to cover spills from sea-going vessels constructed or adapted to carry oil in bulk as cargo so that it applies apply to both laden and unladen tankers, including spills of bunker oil from such ships.

Under the 1992 Protocol, a shipowner cannot limit liability if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

From 16 May 1998, Parties to the 1992 Protocol ceased to be Parties to the 1969 CLC due to a mechanism for compulsory denunciation of the "old" regime established in the 1992 Protocol. However, there are a number of States which are Party to the 1969 CLC and have not yet ratified the 1992 regime - which is intended to eventually replace the 1969 CLC.

The 1992 Protocol allows for States Party to the 1992 Protocol to issue certificates to ships registered in States which are not Party to the 1992 Protocol, so that a shipowner can obtain certificates to both the 1969 and 1992 CLC, even when the ship is registered in a country which has not yet ratified the 1992 Protocol. This is important because a ship which has only a 1969 CLC may find it difficult to trade to a country which has ratified the 1992 Protocol, since it establishes higher limits of liability.

The 2000 Amendments

Adoption: 18 October 2000; Entry into force: 1 November 2003

The amendments raised the compensation limits by 50 percent compared to the limits set in the 1992 Protocol, as follows:

- For a ship not exceeding 5,000 gross tonnage, liability is limited to 4.51 million SDR (US$5.78 million)
- For a ship 5,000 to 140,000 gross tonnage: liability is limited to 4.51 million SDR plus 631 SDR for each additional gross tonne over 5,000
- For a ship over 140,000 gross tonnage: liability is limited to 89.77 million SDR

ATHENS CONVENTION RELATING TO THE CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA (PAL)

The Convention was adopted at a Conference, convened in Athens in 1974 and was designed to consolidate and harmonize two earlier Brussels conventions dealing with passengers and luggage and adopted in 1961 and 1967 respectively.

The Convention establishes a regime of liability for damage suffered by passengers carried on a seagoing vessel. It declares a carrier liable for damage or loss suffered by a passenger if the incident causing the damage occurred in the course of the carriage and was due to the fault or neglect of the carrier.

However, unless the carrier acted with intent to cause such damage, or recklessly and with knowledge that such damage would probably result, he can limit his liability. For the death of, or personal injury to, a passenger, this limit of liability is set at 46,666 Special Drawing Rights (SDR) per carriage. The 2002 Protocol, when it enters into force, will introduce compulsory insurance to cover passengers on ships and substantially raise those limits to 250,000 SDR per passenger on each distinct occasion. .

As far as loss of or damage to luggage is concerned, the carrier's limit of liability varies, depending on whether the loss or damage occurred in respect of cabin luggage, of a vehicle and/or luggage carried in or on it, or in respect of other luggage.

The 1976 Protocol made the unit of account the Special Drawing Right (SDR), replacing the "Poincaré franc", based on the "official" value of gold, as the applicable unit of account.

The 1990 Protocol was intended to raise the limits set out in the convention but it did not enter into force and was superseded by the 2002 Protocol.

The 2002 Protocol

Adoption: 1 November 2002; Entry into force: 12 months after being accepted by 10 States

The Protocol introduces compulsory insurance to cover passengers on ships and raises the limits of liability. It also introduces other mechanisms to assist passengers in obtaining compensation, based on well-accepted principles applied in existing liability and compensation regimes dealing with environmental pollution. These include replacing the fault-based liability system with a strict liability system for shipping related incidents, backed by the requirement that the carrier take out compulsory insurance to cover these potential claims.

The limits contained in the Protocol set a maximum limit, empowering - but not obliging - national courts to compensate for death, injury or damage up to these limits.

The Protocol also includes an "opt-out" clause, enabling State Parties to retain or introduce higher limits of liability (or unlimited liability) in the case of carriers who are subject to the jurisdiction of their courts.

Compulsory insurance

A new Article 4bis of the Convention requires carriers to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the limits for strict liability under the Convention in respect of the death of and personal injury to passengers.

The limit of the compulsory insurance or other financial security shall not be less than 250,000 Special Drawing Rights (SDR) per passenger on each distinct occasion. Ships are to be issued with a certificate attesting that insurance or other financial security is in force and a model certificate is attached to the Protocol in an Annex.

Limits of liability

The limits of liability have been raised significantly under the Protocol, to reflect present day conditions and the mechanism for raising limits in the future has been made easier.

The liability of the carrier for the death of or personal injury to a passenger is limited to 250,000 SDR per passenger on each distinct occasion.

The carrier is liable, unless the carrier proves that the incident resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or was wholly caused by an act or omission done with the intent to cause the incident by a third party.

If the loss exceeds the limit, the carrier is further liable - up to a limit of 400,000 SDR per passenger on each distinct occasion - unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

Death of or personal injury to a passenger

For the loss suffered as a result of the death of or personal injury to a passenger not caused by a shipping incident, the carrier is liable if the incident which caused the loss was due to the fault or neglect of the carrier. The burden of proving fault or neglect lies with the claimant.

The liability of the carrier only includes loss arising from incidents that occurred in the course of the carriage. The burden of proving that the incident which caused the loss occurred in the course of the carriage, and the extent of the loss, lies with the claimant.

"Opt-out" Clause

The Protocol allows a State Party to regulate by specific provisions of national law the limit of liability for personal injury and death, provided that the national limit of liability, if any, is not lower than that prescribed in the Protocol. A State Party, which makes use of this option is obliged to inform the IMO Secretary-General of the limit of liability adopted or of the fact that there is none.

Loss of or damage to luggage and vehicles

- The liability of the carrier for the loss of or damage to cabin luggage is limited to 2,250 SDR per passenger, per carriage.
- liability of the carrier for the loss of or damage to vehicles including all luggage carried in or on the vehicle is limited to12,700 SDR per vehicle, per carriage.
- liability of the carrier for the loss of or damage to other luggage is limited to 3,375 SDR per passenger, per carriage.

The carrier and the passenger may agree that the liability of the carrier shall be subject to a deductible not exceeding 330 SDR in the case of damage to a vehicle and not exceeding 149 SDR per passenger in the case of loss of or damage to other luggage, such sum to be deducted from the loss or damage.

Amendment of limits

The 2002 Protocol introduces a new procedure for amending the limits of liability under the Convention, so that any future raises in limits can be achieved more readily. Under the 1974 Convention, limits can only be raised by adopting amendments to the Convention which require a specified number of States' acceptances to bring the amendments into force. This has meant, for example, that the 1990 Protocol, which was intended to raise the limits, has not yet entered into force and indeed is being superseded by the 2002 Protocol.

The 2002 Protocol therefore introduces a tacit acceptance procedure for raising the limits of liability. A proposal to amend the limits, as requested by at least one-half of the Parties to the Protocol, would be circulated to all IMO Member States and al States Parties and would then be discussed in the IMO Legal Committee. Amendments would be adopted by a two-thirds majority of the States Parties to the Convention as amended by the Protocol present and voting in the Legal Committee, and amendments would enter into force 18 months after its deemed acceptance date. The deemed acceptance date would be 18 months after adoption, unless within that period not less than one fourth of the States that were States Parties at the time of the adoption of the amendment have communicated to the IMO Secretary-General that they do not accept the amendment.

Regional Economic Integration Organizations

For the first time in an IMO Convention, a regional economic integration organization may sign up to the Protocol. An article in the Protocol states that a Regional Economic Integration Organization, which is constituted by sovereign States that have transferred competence over certain matters governed by this Protocol to that Organization, may sign, ratify, accept, approve or accede to the Protocol. A Regional Economic Integration Organization which is a Party to this Protocol shall have the rights and obligations of a State Party, to the extent that the Regional Economic Integration Organization has competence over matters governed by this Protocol.

Title of Convention

The Protocol states that Articles 1 to 22 of the Convention, as revised by the Protocol, together with Articles 17 to 25 of the Protocol and the Annex thereto, shall constitute and be called the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002.

States who ratify the 2002 Protocol are required to denounce the 1974 Convention and its 1976 and 1990 Protocols, if they are Party to the 1974 Convention and those Protocols.

2006 "reservation"

The Legal Committee at its 92nd session in October 2006 adopted the text of a reservation, intended for use as a standard reservation, to the 2002 Protocol and adopted *Guidelines for the implementation of the Athens Convention, to allow limitation of liability in respect of claims relating to war or terrorism*.

The aim is to put States in a position to ratify the 2002 Protocol and thereby afford passengers better cover.

The text of the agreed reservation states that the Government concerned reserves the right to and undertakes to limit liability to 250,000 units of account in respect of each passenger on each distinct occasion; or 340 million units of account overall per ship on each distinct occasion. This relates in particular to war insurance which, under the guidelines, shall cover liability, if any, for loss suffered as a result of death or personal injury to a passenger caused by:

- war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power;
- capture, seizure, arrest, restraint or detainment, and the consequences thereof or any attempt thereat; derelict mines, torpedoes, bombs or other derelict weapons of war;
- act of any terrorist or any person acting maliciously or from a political motive and any action taken to prevent or counter any such risk;
- confiscation and expropriation.

CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS (LLMC)

The Convention replaced the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, which was signed in Brussels in 1957, and came into force in 1968.

Under the 1976 Convention, the limit of liability for claims covered is raised considerably, in some cases up to 250-300 per cent. Limits are specified for two types of claims - claims for loss of life or personal injury, and property claims (such as damage to other ships, property or harbour works).

The limits under the 1976 Convention were set at 333,000 SDR for personal claims for ships not exceeding 500 tons plus an additional amount based on tonnage. For other claims, the limit of liability was fixed under the 1976 Convention at 167,000 SDR plus additional amounts based on tonnage on ships exceeding 500 tons.

The Convention provides for a virtually unbreakable system of limiting liability. Shipowners and salvors may limit their liability, except if "it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result".

Protocol of 1996

Adoption: 2 May 1996; Entry into force: 13 May 2004

Under the Protocol the amount of compensation payable in the event of an incident being substantially increased and also introduces a "tacit acceptance" procedure for updating these amounts.

The limit of liability for claims for **loss of life or personal injury** on ships not exceeding 2,000 gross tonnage is 2 million SDR.

For larger ships, the following additional amounts are used in calculating the limitation amount:

- For each ton from 2,001 to 30,000 tons, 800 SDR
- For each ton from 30,001 to 70,000 tons, 600 SDR
- For each ton in excess of 70,000, 400 SDR (US$634).

The limit of liability for **property claims** for ships not exceeding 2,000 gross tonnage is 1 million SDR.

For larger ships, the following additional amounts are used in calculating the limitation amount:

- For each ton from 2,001 to 30,000 tons, 400 SDR
- For each ton from 30,001 to 70,000 tons, 300 SDR

- For each ton in excess of 70,000, 200 SDR

Amendments to 1996 Protocol

Adoption: 19 April 2012; Entry into force: 8 June 2015

Under the amendments to the 1996 Protocol, the limits are raised as follows:

The limit of liability for claims for **loss of life or personal injury** on ships not exceeding 2,000 gross tonnage is 3.02 million SDR (up from 2 million SDR).

For larger ships, the following additional amounts are used in calculating the limitation amount:

- For each ton from 2,001 to 30,000 tons, 1,208 SDR (up from 800 SDR)
- For each ton from 30,001 to 70,000 tons, 906 SDR (up from 600 SDR)
- For each ton in excess of 70,000, 604 SDR (up from 400 SDR).

The limit of liability for **property claims** for ships not exceeding 2,000 gross tonnage is 1.51 million SDR (up from 1 million SDR).

For larger ships, the following additional amounts are used in calculating the limitation amount:

- For each ton from 2,001 to 30,000 tons, 604 SDR (up from 400 SDR)
- For each ton from 30,001 to 70,000 tons, 453 SDR (up from 300 SDR)
- For each ton in excess of 70,000 tons, 302 SDR (up from 200 SDR).

INTERNATIONAL CONVENTION ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA (HNS)

The HNS Convention was adopted by an international conference in 1996 and is based on the highly successful model of the Civil Liability and Fund Conventions which cover pollution damage caused by spills of persistent oil from tankers. As with the original oil pollution compensation regime, the HNS Convention will establish a two-tier system for compensation to be paid in the event of accidents at sea, in this case, involving hazardous and noxious substances such as chemicals. However, it goes further in that it covers not only pollution damage but also the risks of fire and explosion, including loss of life or personal injury as well as loss of or damage to property.

Tier one will be covered by compulsory insurance taken out by shipowners, who would be able to limit their liability. In those cases where the insurance does not cover an incident, or is insufficient to satisfy the claim, a second tier of compensation will be paid from a fund, made up of contributions from the receivers of HNS. Contributions will be calculated according to the amount of HNS received in each Party in the preceding calendar year.

HNS are defined by reference to lists of substances included in various IMO Conventions and Codes. These include oils; other liquid substances defined as noxious or dangerous; liquefied gases; liquid substances with a flashpoint not exceeding 60°C; dangerous, hazardous and harmful materials and substances carried in packaged form; and solid bulk materials defined as possessing chemical hazards. The Convention also covers residues left by the previous carriage of HNS, other than those carried in packaged form.

The Convention defines damage as including loss of life or personal injury; loss of or damage to property outside the ship; loss or damage by contamination of the environment; the costs of preventative measures and further loss or damage caused by them.

The Convention introduces strict liability for the shipowner and a system of compulsory insurance and insurance certificates.

By 2009, the 1996 HNS convention had still not entered into force, due to an insufficient number of ratifications. A second international conference, held in April 2010, adopted a Protocol to the HNS convention (2010 HNS Protocol) that was designed to address practical problems that had prevented many States from ratifying the original Convention.

States are being urged to ratify the 2010 Protocol. Together with the IOPC Funds and ITOPF, IMO has produced a six-page brochure that explains to States the purpose and benefit of the HNS Convention and encourages IMO Member States to take the next steps to ratify or accede to the Convention.

Once the 2010 HNS Protocol enters into force, the 1996 Convention, as amended by the 2010 Protocol, will be called "the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010.

Limits of liability under the 2010 Protocol

Under the 2010 Protocol, if damage is caused by bulk HNS, compensation would first be sought from the shipowner, up to a maximum limit of 100 million Special Drawing Rights (SDR).

Where damage is caused by packaged HNS, or by both bulk HNS and packaged HNS, the maximum liability for the shipowner is 115 million SDR.

Once this limit is reached, compensation would be paid from the second tier, the HNS Fund, up to a maximum of 250 million SDR (including compensation paid under the first tier).

The Fund will have an Assembly, consisting of all States Parties to the Convention and Protocol, and a dedicated secretariat. The Assembly will normally meet once a year.

Entry into force criteria for the Protocol

The 2010 Protocol will enter into force eighteen months after the date on which the following conditions are fulfilled:

- (a) at least twelve States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it; and
- (b) the Secretary-General has received information in accordance with article 20, paragraphs 4 and 6, that those persons in such States who would be liable to contribute pursuant to article 18, paragraphs 1(a) and (c), of the Convention, as amended by this Protocol, have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account.

HNS Fund

It has generally been agreed that it would not be possible to provide sufficient cover by the shipowner liability alone for the damage that could be caused in connection with the carriage of HNS cargo. This liability, which creates a first tier of the Convention, is therefore supplemented by the second tier, the HNS Fund, financed by cargo interests. The Fund will become involved:

- because no liability for the damage arises for the shipowner. This could occur, for example, if the shipowner was not informed that a shipment contained HNS or if the accident resulted from an act of war;
- because the owner is financially incapable of meeting the obligations under this Convention in full and any financial security that may be provided does not cover or is insufficient to satisfy the claims for compensation for damage, or
- because the damage exceeds the owner's liability limits established in the Convention.

Contributions to the second tier will be levied on persons in the Contracting Parties who receive a certain minimum quantity of HNS cargo during a calendar year. The tier will consist of one general account and three separate accounts for oil, liquefied natural gas (LNG) and liquefied petroleum gas (LPG). The system with separate accounts has been seen as a way to avoid cross-subsidization between different HNS substances.

The Fund will have an Assembly consisting of all States which are Parties and a Secretariat headed by a Director. The Assembly will normally meet once a year.

HNS and the CLC/Fund Conventions

The HNS Convention excludes pollution damage as defined in the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, to avoid an overlap with these Conventions.

However, HNS covers other damage (including death or personal injury) as well as damage caused by fire and/or explosion when oils are carried.

INTERNATIONAL CONVENTION ON TONNAGE MEASUREMENT OF SHIPS

The Convention, adopted by IMO in 1969, was the first successful attempt to introduce a universal tonnage measurement system.

Previously, various systems were used to calculate the tonnage of merchant ships. Although all went back to the method devised by George Moorsom of the British Board of Trade in 1854, there were considerable differences between them and it was recognized that there was a great need for one single international system.

The Convention provides for gross and net tonnages, both of which are calculated independently.

The rules apply to all ships built on or after 18 July 1982 - the date of entry into force - while ships built before that date were allowed to retain their existing tonnage for 12 years after entry into force, or until 18 July 1994.

This phase-in period was intended to ensure that ships were given reasonable economic safeguards, since port and other dues are charged according to ship tonnage. At the same time, and as far as possible, the Convention was drafted to ensure that gross and net tonnages calculated under the new system did not differ too greatly from those calculated under previous methods.

Gross tonnage and net tonnage

The Convention meant a transition from the traditionally used terms gross register tons (grt) and net register tons (nrt) to gross tonnage(GT) and net tonnage (NT).

Gross tonnage forms the basis for manning regulations, safety rules and registration fees. Both gross and net tonnages are used to calculate port dues.

The gross tonnage is a function of the moulded volume of all enclosed spaces of the ship. The net tonnage is produced by a formula which is a function of the moulded volume of all cargo spaces of the ship. The net tonnage shall not be taken as less than 30 per cent of the gross tonnage.

INTERNATIONAL CONVENTION ON SALVAGE

The Convention replaced a convention on the law of salvage adopted in Brussels in 1910 which incorporated the '"no cure, no pay" principle under which a salvor is only rewarded for services if the operation is successful.

Although this basic philosophy worked well in most cases, it did not take pollution into account. A salvor who prevented a major pollution incident (for example, by towing a damaged tanker away from an environmentally sensitive area) but did not manage to save the ship or the cargo got nothing. There was therefore little incentive to a salvor to undertake an operation which has only a slim chance of success.

The 1989 Convention seeks to remedy this deficiency by making provision for an enhanced salvage award taking into account the skill and efforts of the salvors in preventing or minimizing damage to the environment.

Special compensation

The 1989 Convention introduced a "special compensation" to be paid to salvors who have failed to earn a reward in the normal way (i.e. by salving the ship and cargo).

Damage to the environment is defined as "substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents."

The compensation consists of the salvor's expenses, plus up to 30% of these expenses if, thanks to the efforts of the salvor, environmental damage has been minimized or prevented. The salvor's expenses are defined as "out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used".

The tribunal or arbitrator assessing the reward may increase the amount of compensation to a maximum of 100% of the salvor's expenses, "if it deems it fair and just to do so".

If, on the other hand, the salvor is negligent and has consequently failed to prevent or minimize environmental damage, special compensation may be denied or reduced. Payment of the reward is to be made by the vessel and other property interests in proportion to their respective salved values.

MODULE-VI

SETTLEMENT OF MARITIME DISPUTES

MODULE-VI- SETTLEMENT OF MARITIME DISPUTES

The United Nations Convention on the Law of the Sea (UNCLOS), which came into effect in 1994, is the most comprehensive and most influential international maritime relationship adjusting convention. It is recognized as a milestone for establishing a new international maritime order. The dispute settlement system is established under Part XV (Settlement of Disputes), other relevant provisions in the main text and Annexes V (Conciliation), VI (Statute of the International Tribunal for the Law of the Sea), VII (Arbitration) and VIII (Special Arbitration), which constitute the core part of the UNCLOS. The International Tribunal for the Law of the Sea (ITLOS), established under the UNCLOS, has been performing its duties ever since the first set of judges was elected on 1 August 1996.

The ITLOS has made remarkable achievements in procedural disputes in relation to requests for "provisional measures" and "prompt release of vessels and crews;" Annex VII (Arbitration) has become a bridge between the UNCLOS and the PCA; the settlement of substantial issues in maritime disputes has become the "Achilles Heel"; and the Seabed Disputes Chamber (hereinafter "the Chamber") demonstrates great potential for resolving seabed disputes.

I. The Settlement of Disputes Mechanism in the Law of the Sea Convention

A. Development of the settlement of disputes in the law of the sea

It is important to note that the rules and principles for the settlement of disputes in the law of the sea are an inalienable part of the process of codification and progressive development of the law of the sea. The League of Nations convened in 1930 the Hague Conference for codifying the law of the sea in which, for the first time, 48 countries examined legal question of the territorial sea, the contiguous zone and related issues. With regard to the settlement of disputes, according to Gerard J. Tanja, although the topic of the delimitation of territorial sea was hardly addressed, it seemed that the preference for the adoption of a median line rule was obvious.

After the failure of the 1930 Hague Conference, the political environment of the world was not conducive for the countries to continue their attempts to form the rules governing the ocean and sea issues. After World War H, demand for natural resources was high and the ocean was perceived to be amenable to a widening range of human activity from platforms made feasible by new technology. The discovery of offshore hydrocarbons in the seabed and subsoil and the means to exploit these resources led to increasing claims to exclusive control over ever wider areas of seas adjacent to coastal states.

In this context, the First UNCLOS was held in 1958 under the auspices of the United Nations to codify the law of the sea. As a result of the Conference, four Conventions on the law of the Sea and an Optional Protocol on the Settlement of Disputes were adopted.

These legal instruments served as a legal framework governing the uses of the seas and oceans and related issues. The Geneva Conventions on the law of the sea had contributed significantly to the settlement of disputes through establishing rules and principles applicable to the delimitation of territorial sea and the continental shelf. Douglas M. Johnson and Mark J. Valencia have commented on the several important elements that the First UNCLOS contributed to the ocean boundary delimitation practices in the 1960s. They include: (i) recognition of a coastal State's jurisdiction to the continental shelf and its resources, which consequently leads to the delimitation of the continental shelf between the States concerned; and (ii) establishment of criteria for the delimitation of the territorial sea and continental shelf between opposite and adjacent States.

However, the Geneva Conventions on the law of the sea also contained many uncertainties, such as the breadth of the territorial sea and the definition of the continental shelf. The easily abused definition of the continental shelf had created confusion in States' practices and had encouraged States to take advantage of the vague language of the Convention to claim their continental shelf to the fullest possible extent. In 1960, UNCLOS II failed to solve the issues left unresolved at the First UNCLOS.

Furthermore, by the mid-1960s, the need for a new legal order for the oceans was well understood by both the great powers and the coastal States, and the four Geneva Conventions on the Law of the sea were being rapidly overtaken by State practice. Additionally, the newly independent nations that were born as a result of the decolonization movement in the 1960s also sought to reform those parts of international law in whose formation they did not participate, which they perceived to be detrimental to their distant water fishing fleets. Coastal States became very anxious to protect these resources and developing States wished to use their geographical advantages to achieve economic development.

Moreover, on 1 November 1967, Malta's Ambassador to the United Nations, Arvid Pardo, delivered an historic speech before the United Nations General Assembly in which he called for 'an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction' and advocated that the seabed and ocean floor outside the limits of national jurisdictions be recognized as the 'common heritage of mankind'. The General Assembly adopted Pardo's proposal and allocated it to the agenda of the United Nations First Committee. The First Committee supported the establishment of the Ad hoc Seabed Committee whose task was to study the peaceful uses of the seabed and ocean floor beyond national jurisdictions. At the suggestion of the Seabed Committee, in 1970, the General Assembly adopted the Declaration of Principles governing the Deep Ocean Floor and a Resolution on convening the Third Law of the Sea Conference.

The LOS Convention was the result of the tremendous efforts to achieve a new and generally acceptable convention on the law of the sea made by the States participating in the Third United Nations Conference on the Law of the Sea. Comprising 320 Articles and 9 annexes, the LOS Convention has a quite comprehensive objective: to establish a legal order for the seas and oceans, including the deep seabed and subsoil thereof.'" Such a legal order, as explained by Wolfrum, 'is meant to promote the peaceful uses of the seas and oceans by providing the balance between the different forms of usages and by coordinating the various rights and interests of States parties'. The LOS Convention, indeed, does provide a broad legal framework for determining the legal status of all ocean spaces and for governing the legal regime of all major uses of the sea and their natural resources.

Turning now to the dispute resolution aspects, it has been considered the most important development in the settlement of international disputes since the adoption of the United Nations Charter and the Statute of the International Court of Justice. It has been constructed to safeguard the agreed package of compromises against destruction through unilateral and conflicting interpretation and is aimed at contributing to international peace and security through dispute resolution by peaceful means.

B. The content of the settlement of disputes mechanism in the Law of the Sea Convention

With more than a hundred Articles, the LOS Convention devotes a large part of its provisions to settlement disputes regarding the law of the sea. The inclusion of so many provisions in the main body of the convention makes it quite different from the 1958 Conventions, where an optional protocol for the settlement of disputes was prepared in parallel but separately. Although these four 1958 Conventions became effective between 1962 and 1964, the optional protocol received only a few ratifications and has never been applied in the last twenty years.

The settlement of disputes mechanism in the LOS Convention is recognized as complex and can be grouped into the following categories:

From the structural perspective: The settlement of disputes provisions in Part XV can be divided into three parts. The first part deals with voluntary procedures; the second with compulsory procedures entailing a binding decision; and the third part sets out the limitations and optional exceptions to the compulsory procedures. Besides that, the provisions for the settlement of deep seabed mining disputes are found in the Part XI of the

LOS Convention while the provisions for the delimitation of maritime areas can be found in Parts II, V and VI, Articles 15, 74 and 83.

From the subject-matter jurisdiction perspective: The mechanism can be categorized into disputes pertaining to the delimitation of maritime boundaries; disputes concerning the exercise of rights and duties of coastal States and other international actors in maritime zones of national jurisdiction; and disputes relating to the activities in the Area.

From the rationae-materiae jurisdiction perspective: The settlement of disputes mechanism can be classified into disputes arising between and among States themselves and disputes involving the participation of international organizations, corporations and individuals. Another way to classify disputes in the LOS Convention is into disputes that may be brought to the compulsory third party dispute settlement and disputes that may be excluded or exempted from this mechanism.

The system of dispute settlement in the LOS Convention was built on the fundamental principle that the parties would be able freely to select by agreement any dispute settlement procedure they desired. The principle of free choice of means for the resolution of disputes was a manifestation of the principle of equality of States under international law so that all States, regardless of their geographical size, population, military power, economic strength, development stage or socio-political regime, are free from pressure from other States to choose the method for the settlement of their disputes under the LOS Convention.

Such settlement must, however, be peaceful. Article 279 of the LOS Convention states:

“States parties shall settle any dispute between them concerning the interpretation and application of this convention by peaceful means in accordance with Article 2, para.3 of the Charter of the United Nations.”

As provided in Article 33 of the Charter of the United Nations, international disputes are typically settled through either negotiation (informal bilateral process) or through recourse to a third party (formal) procedure. The third party procedures produce different results, ranging from binding to non binding decisions, depending on the type of third party mechanism chosen. Traditionally, third party procedures can be classified into adjudicative and non-adjudicative procedures. The adjudicative procedures always lead to binding results and take the form of arbitration and tribunals. On the other hand, the non-adjudicative procedures' results are not necessarily binding and may take the form of good offices, mediation, enquiry, fact-finding or conciliation. Under the LOS Convention, both informal and formal procedures are available to States parties.

Article 279 of the LOS Convention, however, may have a broader scope as well.

According to J.G Merrills, it also requires that it extend the obligation contained in the Charter to non-member States of the United Nations if they become parties to the LOS Convention and, secondly, that it confirms that LOS Convention disputes must be settled in accordance with justice. Under Article 279, the States parties may agree 'at any time' to solve their dispute by 'any peaceful means of their own choice'. This possibility allows States parties to become the 'complete master' of how their disputes are settled. When the States parties have chosen the dispute settlement methods or procedures that they prefer, their choice will prevail over the procedures provided in the Convention. This emphasis on the parties' autonomy is, of course, consistent with general practice and is not controversial.

The LOS Convention also imposed upon States parties in a dispute the obligation to exchange views. Under Article 283, the States parties are required to proceed expeditiously to exchange views regarding settlement. The obligation also applies in cases where no settlement of dispute is reached or the circumstances require consultation regarding the manner of implementing the settlement. Although the LOS Convention grants a place to informal mechanisms in the settlement of disputes, ‘compulsory procedures entailing binding decisions’ are a main characteristic of the settlement of disputes system. It is a new development as many treaties relating to the international law of the sea have not provided for an obligatory, binding third party dispute settlement procedure.

Under this scheme, any dispute concerning the interpretation and application of the LOS Convention shall, where no settlement has been reached by recourse to negotiation or other mechanisms contemplated in section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section. This meant that by becoming a party to the Convention, a State becomes bound by the compulsory procedure laid down in Part XV and cannot 'escape' from the legal obligation to have its dispute resolved by a third party, subject to the conditions provided for in the LOS Convention.

Under Part XV of the UNCLOS, (articles 279 to 299) explains the Mechanism for "Settlement of Disputes" in three sections.

This convention encourages parties to freely negotiate with the spirit of mutual understanding and co-operation including usage of diplomatic and all other peaceful means to resolve their disputes regarding sea and ocean spaces.

In any case, if the party states fail to achieve an agreement or fail to accept common terms or disagree to continue mutual discussion then Article 284 allows them to proceed to a conciliation process or Article 287 shows further four alternative ways for dispute resolution, Among them any one or few or all methods may be used by mutual consent, as mandatory upon those party states involved in that Maritime dispute.

Article 284 of UNCLOS, 1982, provides for the procedure for formation of commission etc. Conciliation as a method of dispute resolution is explained in Annex V of the convention.

With regard to the choice of procedures for compulsory settlement under Part XV, when signing, ratifying or acceding to the LOS Convention, or at any time thereafter, a State party may declare its choice of one or more of the following:

(i) the International Tribunal for the Law of the Sea (ITLOS);

(ii) the International Court of Justice (ICJ);

(iii) an arbitral tribunal; or

(iv) a special arbitral tribunal.

A written declaration indicating their preferred choice of compulsory mechanism can be made by States parties at any time and revoked or modified on three month's notice. If a State fails to declare its preference, or if the State party instituting a proceeding and the respondent State party have not chosen the same forum, arbitration is mandated. A State's failure to appoint an arbitrator will not prevent the constitution of an arbitral tribunal and a State's non-appearance before the tribunal will not prevent the tribunal from reaching a decision.

The compulsory jurisdiction scheme in the 1982 Convention was seen as a success of UNCLOS III because it was the first time not only the developed countries, but also the developing countries and the countries of Eastern Europe and Russia, were able to codify a dispute settlement mechanism. The wide acceptance of this mechanism of compulsory settlement was due to the fact that 'many negotiators at UNCLOS III thought that compulsory dispute settlement mechanisms could help cement the compromises embodied in the Law of the Sea Convention. During the course of negotiation at UNCLOS III, the views on the settlement of disputes in the LOS Convention were very divergent. Many developing States and a few States (such as France) would not accept the International Court of Justice, but some would accept a differently constituted specialist tribunal for the law of the sea, while the Soviet block continued to oppose any form of judicial settlement but would accept arbitration. Finally, to break the deadlock, the so-called "Montreux formula", proposed by Professor Willem Riphagen of Netherlands was adopted and embodied in Article 287.

However, there are also some limitations and exceptions which are governed by section 3 of Part XV, ‘limitations and exceptions to the applicability of section 2’, that preclude State parties from applying the compulsory procedure in the LOS Convention. The exclusion of these disputes from the compulsory procedure was a prerequisite condition for the acceptance of the provision for the settlement of disputes in the LOS Convention by the participants at UNCLOS II.

Under section 3 of Part XV, there are two categorizes of exception to compulsory jurisdiction, namely automatic and exceptional. The automatic exception is governed by Article 297 while the latter is regulated by Article 298. Under Article 297, certain disputes may be excluded from the compulsory procedures and these disputes include rights of navigation, overflying, laying submarine cable, the protection and preservation of the marine environment, etc. This means that with respect to these disputes State parties to the LOS Convention are not bound by the compulsory procedures. On the other hand, under Article 298, if a State party to the LOS Convention declares at any time that it does not accept any one or more of the compulsory procedures with respect to certain disputes, the other party to the dispute cannot use the compulsory procedure against them. According to J.G. Merrills, Article 297 reflects the view of coastal States that certain decisions relating to the exercise of sovereign rights or jurisdiction, especially those concerning the exercise of discretion, should not be subject to any form of adjudication.

In short, the dispute settlement system in the LOS Convention is a positive development in the settlement of international disputes. It requires disputes arising thereunder (to some extent) to be resolved by international institutions in conformity with international law and justice through compulsory procedures. On the other hand, rights to control and retain full autonomy over the process of dispute settlement of some "sensitive" disputes are also recognized and guaranteed.

If both the parties engaged in a Maritime dispute fails to agree upon choosing all or any one method prescribed in Article 287, then what shall turn to be the default Mechanism?

Except in cases of those dispute resolution activities in progress under section 5 of Part XI , for all other cases an arbitral tribunal constituted in accordance with Annex VII of the convention shall become the default mechanism , i.e. it shall be deemed that both parties have consented to accept the jurisdiction of such tribunal under Annex VII of UNCLOS.

It may be mentioned that, in case of a dispute regarding Marine Fisheries, Marine Eco Systems, Conservancy, Scientific Research at Seas, which are considered as special matters and hence such dispute could be resolved through a special tribunal constituted in accordance with Annex VIII of UNCLOS.

Does a party remains bound to accept entire judgment while a dispute resolution is underway in accordance with Part XV of the convention?

It may be said after analyzing the history of maritime dispute resolution that , a party would declare in advance which all matters to be kept aside or she would not be bound to accept in a particular case. Or else in the process of ratification or accession to the convention the party involved may make her declaration.

How will a state party assess the appropriateness of any dispute resolution method?

As the state parties involved in a maritime dispute are free and sovereign, they are not bound to submit any case to ICJ or ITLOS, except where they have consented to do so. The ICJ or ITLOS only have jurisdiction to decide cases that states consent to submit to ICJ or ITLOS for decision.

In the above context continuous prolong discussions, Negotiations; Mediations including Diplomatic efforts are the best means to achieve peaceful & fruitful understanding in the long term. Unfortunately in case both parties disagree to continue the discussion, then one first attempt may be made for conciliation in accordance with Annex V of the convention. In case maritime dispute is of a special matter like Fisheries, Navigation, Pollution, Scientific Research etc, then a special arbitration tribunal in accordance with Annex VIII of the convention may be appropriate dispute resolution mechanism.

While choosing dispute resolution procedure, Article 287 of the convention also provides that a state party which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII of the convention, And if the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to an Arbitration Tribunal constituted in accordance with Annex VIII , unless the parties otherwise agree . Such an Arbitration Tribunal (in accordance with Annex VIII) may continue to work for long, for protection of the greater National interest prolong discussions and negotiations are necessary, while simultaneously mediation , litigation and diplomatic efforts are to be made.

However while an Arbitration Tribunal (in accordance with Annex VII) is in progress, in case of national need or an emergency situation application may be made for provisional measure (Article 290) or Prompt release (Article 292) by mutual agreement to the Arbitration tribunal or ITLOS or ICJ. But a long term and greater interest of the nation should not be attempt to resolve at ITLOS or ICJ in a quick fix without having tried very patience and prolong discussions, Negotiations, Mediation, Conciliation, and Arbitration including diplomatic efforts.

Such un-researched quick attempt may bring harmful & disastrous results for the nation.

It must be remembered that, even though the judges of ITLOS or ICJ are experts in their field, they are nominated by the Governments. Political influence of those nominating authority could not be ignored.

II. Choice Of Forum: Does It Make A Difference?

This is not an easy question to answer because it very much depends on the case. What we can say is that with the exception of special arbitration under UNCLOS Annex VIII, of which there is to date no known example, all the other dispute settlement options listed in Part XV have been relatively well used by states. To that extent the rationale behind allowing a choice of compulsory dispute settlement fora has been borne out - it has facilitated dispute settlement and encouraged participation in the convention.

Up until January 2015 ITLOS had listed 23 cases, but nine are prompt release applications, six are provisional measures applications, two are advisory opinions, and one case has settled without a hearing. Only four cases have been heard on the merits: three of these involve arrest of ships and one is a maritime boundary case.

This is not a notably impressive record for a permanent court fast approaching its twentieth anniversary, but the Bangladesh/Myanmar Case and the Advisory Opinion on Seabed Activities are by any standard important cases.

Strictly speaking the ICJ has so far heard no cases brought before it under Part XV. But it has heard few cases dealing with law of the sea since 1996.[60] The Court is clearly still in business for law of the sea disputes. The most recent is a maritime boundary case filed by Somalia against Kenya.[61] Somalia relies on the parties' ICJ optional clause declarations as the basis of jurisdiction, but it also notes that "the jurisdiction of the Court under Article 36, paragraph 2, of its Statute is underscored by Article 282 of UNCLOS". What this illustrates is that Part XV is a default mechanism: the parties to an UNCLOS dispute do not have to operate within the jurisdictional and procedural confines of Part XV if they have already agreed to take their disputes elsewhere under some other treaty.

This point is emphasized by the other ICJ cases, six of which have been brought under the Pact of Bogota,[62] and one under a bilateral treaty (**Black Sea case**), rather that under Part XV. What they all show is that when considering litigation care must be taken to determine (a) whether the claim falls within Part XV compulsory jurisdiction and (b) whether it would nevertheless be better to bring it under some alternative jurisdictional basis (ICJ Statute, Pact of Bogota etc.) ? The latter will often be broader than Part XV.

In four of the ICJ cases UNCLOS constitutes the applicable law,[63] even though not the basis of jurisdiction. The remainder all involve a non-party to UNCLOS, or a land and maritime boundary dispute which may not fall within compulsory jurisdiction under Part XV. We might say that the ICJ is the forum of choice for mixed disputes of this kind - or we might just say it is the forum of choice for Nicaragua, which is the applicant in most of them.

Nicaragua v. Colombia has proved to be the most controversial of these decisions, prompting a withdrawal by Colombia from the Pact of Bogota, but also generating a second

[60] ICJ, Maritime Delimitation in the Indian Ocean Case (Somalia v. Kenya); ICJ, Maritime Delimitation in the Caribbean Sea and the Pacific Ocean Case (Costa Rica v. Nicaragua); ICJ, Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast Case (Nicaragua v. Colombia); ICJ, Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea Case (Nicaragua v. Colombia).

[61] ICJ, Somalia, Application, Dispute concerning Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), 28 August 2014.

[62] American Treaty of Pacific Settlement, 30 April 1948, 30 United Nations Treaty Series 55.

[63] ICJ, Maritime Delimitation in the Back Sea Case (Romania v. Ukraine), ICJ Reports, 2009, p. 61; ICJ, Territorial and Maritime Dispute in the Caribbean Case (Nicaragua v. Honduras), ICJ Reports, 2007, p. 659; ICJ, Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua); ICJ, Maritime Delimitation in the Indian Ocean (Somalia v. Kenya).

case to delimit the maritime boundary beyond 200 miles. It is not obvious that the Court decided the first case wrongly, notwithstanding Colombia's response.

Annex VII arbitration remains the default option for most parties, and (if we ignore prompt release and provisional measures cases) that is where UNCLOS disputes are most likely to be started. From a total of 15 cases, only three had been decided on the merits by the end of 2014,[64] one less than the ICJ and ITLOS have each decided over the same period. Three others were quickly transferred to ITLOS,[65] three were settled without a hearing,[66] and two were dismissed for lack of jurisdiction.[67] Three cases remained pending.[68]

We thus have only three maritime boundary awards on which to judge Annex VII, and two jurisdictional decisions, one of which (**Southern Bluefin Tuna**) is the most controversial so far given by an UNCLOS tribunal. But judgments in the **Chagos MPA** and **South China Sea Cases** will be important and interesting - whether or not the arbitrators ultimately accept jurisdiction.

Only one UNCLOS related arbitration has been heard outside the framework of Annex VII (Croatia v. Slovenia – based on an ad hoc agreement between the two countries). But Annex VII arbitration has drawbacks. In particular, the idea that the parties choose the arbitrators may well be illusory.

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[64] PCA, Maritime Boundary Arbitration (Barbados v. Trinidad and Tobago), Decision of 11 April 2006, (2008) XXVII RIAA 147; PCA, Maritime Delimitation Arbitration (Guyana v. Suriname), Award of 17 September 2007, (2012) XXX RIAA 1; PCA, Bay of Bengal Arbitration (Bangladesh v. India), Award of 7 July 2014, available at www.pca-cpa.org/showpage.asp ?pag_id = 1376 (last visited 30 May 2019).

[65] WTO, Measures affecting the transit and importation of swordfish (European Communities v. Chile) (WT/DS193), 2002 WTO Annual Report 109 (reporting on the suspension of the Panel constitution); ITLOS, Dispute concerning delimitation of the maritime boundary (Bangladesh/Myanmar) (No. 16), Special Agreement (Notification submitted by Bangladesh), available at www.itlos.org/fileadmin/itlos/documents/cases/case-no_16/NotificationBangladesh_14.12.09.pdf (last visited 30 May 2019); ITLOS, Dispute Concerning Delimitation of the Maritime Boundary (Ghana! C6te d'Ivoire) (No. 23), Order of 12 January 2015, available at www.itlos.org/en/cases/list-of cases/case-no-23/ (last visited 30 May 2019).

[66] PCA, Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Decision of 1 September 2005, (2008) XXVII RIAA 133; PCA, ARA Libertad Arbitration (Argentina v. Ghana), Termination Order of 11 November 2013, available at www.pca-cpa.org/showpage.asp ?pagid = 1526 (last visited 15 February 2015); PCA, Atlanto-Scandian Herring Arbitration (Denmark in respect of the Faroe Islands v. European Union), Termination Order of 23 September 2014, available at www.pca-cpa.org/showpage.asp ?pag-id= 1554 (last visited 30 May 2019).

[67] Southern Bluefin Tuna Arbitration (New Zealand v. Japan, Australia v. Japan), Decision of 4 August 2000, (2006) XXIII RIAA 1; PCA, The MOX Plant Case (Ireland v. United Kingdom), Order of 6 June 2008 - Termination of Proceedings, available at www.pca-cpa.org/showpage.asp ?pagid= 1148 (last visited 30 May 2019; ITLOS, Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 2011 ITLOS Reports 10.

[68] PCA, Chagos MPA Arbitration (Mauritius v. United Kingdom), available at www.pca-cpa.org/showpage.asp ?pagid = 1429; PCA, South China Sea Case (Philippines v. China), available at www.pca-cpa.org/showpage.asp ?pagid = 1529; PCA, Duzgit Integrity Arbitration (Malta v. Sao Tome and Principe), available at www.pca-cpa.org/showpage.asp ?pag_id= 1583; PCA, Arctic Sunrise (Netherlands v. Russia), available at www.pca cpa.org/showpage.asp ?pag_id= 1556 (all last visited 30 May 2019).

In most of the recent UNCLOS cases the parties have either been unable to agree arbitrators or have refused to nominate any except their own initial appointee. This was the situation in the **Chagos MPA Case**, in the **South China Sea Case**, and in the **Bangladesh/India Case**, and in default of appearance by Russia it is also now the case in the **Arctic Sunrise Case**. It then falls to the President of ITLOS to nominate the other three or four arbitrators. He (or she) will normally consult the parties about potential candidates, who must be drawn from a list maintained for this purpose. No doubt their views will be listened to but, if they still cannot agree, it is the President's choice, not the parties. The outcome in practice will usually be that ITLOS judges, or former judges, are nominated by the President. That may work out well, or it may not. Much depends on the fairness and judgment of the president. But what all these arbitrations have tended to produce is essentially a chamber of ITLOS with one ad hoc judge appointed by each party. The logic of this system would suggest an ad hoc chamber of ITLOS as the preferred forum, not arbitration. ITLOS is free to use; arbitrators and the Permanent Court of Arbitration (PCA) are expensive. If the same people will decide the case it makes no sense to choose Annex VII arbitration rather than a chamber of ITLOS.

This method of selecting arbitrators is not necessarily a good one, and there is a risk that it may disadvantage some respondent states. To take one example: in the **Chagos MPA Case** Mauritius chose to ignore the UK's declared preference for the ICJ or ITLOS; it must have thought that Annex VII arbitration would be more advantageous to its own case despite the added expense. Mauritius also challenged the independence of the UK's nominated arbitrator (Judge Greenwood): had it been successful the choice of party-appointed arbitrator would have been constrained by rules normally applied to commercial arbitration rather than inter-state litigation. But it did not succeed, and it is now established that the requirements of independence and impartiality for annex VII arbitrators are comparable to those applicable to judges of ITLOS and the ICJ. However, the parties (or the arbitrators) may want to set a higher standard than is strictly required: in the **South China Sea Case** an arbitrator with a Filippino spouse decided to recuse himself.

In contrast to ad hoc arbitration, the parties know who the judges of the ITLOS are, there are rather more of them, and, collectively, they are possibly a more predictable commodity. In 2009 Bangladesh persuaded Myanmar to transfer the first **Bay of Bengal case** to the full Tribunal and both states were pleased with the result. Why did the parties do so?

First, they wanted a judicial tribunal with more authority to rule on novel questions of law of general importance. They did not regard an ad hoc arbitration as the right forum for the job in hand and the case was indeed a landmark because of the way it dealt with the delimitation of the outer continental shelf, the relationship with the Commission on the Limits of the Continental Shelf (CLCS), and the continued relevance of coastal concavity as a relevant circumstance for delimitation purposes.

Secondly, the ITLOS was able to hear the case quickly, and it duly gave judgment in 2012, a mere three years after the case started. This is remarkable. But it was also important: the judgment could then be relied on when pleading the Bangladesh-India Case; three of the arbitrators were ITLOS judges who sat in the earlier case, and of course they were likely to follow their own judgment when the arbitral case was heard in late 2013. From Bangladesh's perspective this was a successful strategy. The actual outcome of the Annex VII arbitration shows the value of getting the first judgment from a standing court with an authority that few arbitral tribunals can match.

Compared to arbitrators, courts have an institutional commitment to being perceived by other states as doing a good job. Their decisions may come back to haunt them. Taking the easy way out is not usually an option, whereas arbitrators need only decide the case before them. The **Southern Bluefin Tuna Arbitration** might well have gone the other way in a judicial forum. This was a case that required a coherent vision of how UNCLOS relates to regional agreements and to the dispute settlement provisions (or lack of them) in those agreements. Neither ITLOS nor the ICJ could easily have evaded that question in the way the arbitrators chose to evade it.

Judge Lauterpacht's observations on the drawbacks of arbitration are still relevant:

"There was no assurance that the decisions of the arbitrators chosen from the panel of the Court of Arbitration would serve a purpose other than that of disposing of the dispute between the parties. They could not invariably be relied upon to develop and clarify international law."[69]

He gave this as one of the principal reasons for creating the PCIJ in 1920, and he saw development and clarification of the law as one of the main tasks of international courts. That is still true today.

III. Arbitration versus Judicial Settlement

A. ARBITRATION

Literally, arbitration means Settlement of a dispute between parties to a contract by a neutral third party without resorting to court action. It is usually voluntary but sometimes required by law. If both sides agree to be bound by the arbitrator's decision it becomes a binding arbitration.

The Arbitration is one of the four means for the settlement of maritime boundary disputes concerning the interpretation or application as stated in article 287 of the Convention. The Arbitration under Annex VII is used for the settlement of disputes between parties that have not made a declaration of choosing procedure or for parties that have not accepted the same procedure for settlement of the dispute. So, it is a default procedure to settle the maritime dispute.

Any party to the dispute may bring their case before Arbitration by written notification addressed to the other party with the statement of the claim and the ground on which it is based'. The Arbitration is composed of five members preferably chosen from the list of arbitrators which shall be drawn up and maintained by the Secretary General of the United Nations. The party who institute the proceeding before the Arbitral tribunal shall appoints

[69] Hersch Lauterpacht, The Development of International Law by the International Court, 2nd ed., London, Stevens, 1958, p. 6.

one member to be chosen preferably from the list of arbitrators, who may be its national. The other party, against which the proceeding is brought, also appoints one member among its nationals in the list within 30 days of getting of the notification addressed by the party that brings the case. The rest of the three members shall be appointed jointly by the parties according to their agreement from the nationals of the third States unless the parties otherwise agree. One member out of these three will be appointed as the president of arbitral tribunal. If the party against which the case is made fail to do so within above-mentioned time or the parties are not able to reach an agreement on the appointment of arbitrator, the President of the International Tribunal for Law of the Sea (ITLOS), upon request and in consultation with the parties, shall make the necessary appointment. According to article 5 of Annex VII of the LOS Convention, the arbitral tribunal decides its own procedure, ensuring full opportunity to be heard and to present the case to each party. The decisions of the arbitral tribunal depend on a majority vote of its members. In case of an equality of vote the President has a casting vote.

The award mentions the subject matter of the dispute and states the reasons on which it is based, and the name of the members who have participated. The award shall be final without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure and it will be binding upon the parties.

Through arbitration, many of coastal states settled their longstanding maritime boundary delimitation disputes. In 2014, Bangladesh and India resolved their 40 years longstanding maritime boundary delimitation dispute which commenced in 1974.

Some examples of the settlement of maritime boundary disputes can be mentioned here which have been settled through arbitration. They are:

Australia and New Zealand v. Japan (Southern Bluefin Tuna Arbitration, 4 August, 2000); Ireland v. UK (Mox Plant Arbitration, 6 June, 2008); Malaysia v. Singapore (Land Reclamation Arbitration, 1 September, 2005); Barbados v. Trinidad and Tobago (Maritime Delimitation Arbitration, 11 April, 2006); Guyana v. Suriname (Maritime Delimitation Arbitration, September, 2007); Bangladesh v. India (Bay of Bengal Maritime Boundary Arbitration, 7 July, 2014); Mauritius v. UK (Chagos Archipelago Arbitration, 18 march, 2015); Argentine v. Ghana (ARA Libertad Arbitration, 11 November, 2013); Philippines v. China (South China/West Philippines Sea Arbitration, 12 July, 2016); Denmark in respect of the Faroe Islands v. European Union (Atlanto-Scandian Herring Arbitration, 23 September, 2014) etc.

Advantages of Arbitration

Arbitration is more flexible than the procedure followed by the ICJ or Judicial process. Statute and Rules of ICJ or ITLOS are defined in advance and are applied in the same manner to all cases brought before it. In the case of arbitration, particularly if a case is brought before the arbitral court on the basis of a special agreement, the parties have more freedom of movement and option.

All the proceedings of arbitration are generally confidential because it remains completely in the hands of the disputing parties. This confidentiality is useful in the case of maritime boundary disputes where, if the parties to such a dispute still have outstanding differences with other States over their maritime boundaries, they do not want that the arguments that they use in the dispute settlement proceedings to be made public because this may disadvantage their position in negotiating over their other unresolved maritime boundaries. From appointment of the arbitrators to the decision about procedures and rules of arbitration are remained under the control of the disputing parties.

However, in the extreme condition of discord between the disputing parties as to the appointment of three other members, the President of the ITLOS is au- thorized to appoint these members". These three members constitute the majority, thus the basic logic that the disputing parties have some control in the constitution of the arbitral tribunal stands little bit compromised. However, it also acts as impetus for the disputing parties to promptly agree on the remaining three members.

In arbitration there is no third party intervention in any dispute like the proceedings before any standing courts and tribunals. Without the wishes of disputing parties no third state can intervene in the proceeding to take any benefit.

Thus, it provides flexibility and space to States to settle their dispute peacefully.

It also gives chances that similar kinds of disputes can be settled using different principles with different States. The arbitration proceedings under Annex VII are time bound and the traditional excuses of delays are not available under this process.

Disadvantages of Arbitration

Extra expenditure for the appointments of arbitrator according to Annex VII of the convention is one of disadvantages of arbitration. Each disputing party appoints one member to the tribunal and the rest three are appointed jointly by the disputing parties". So, States have to incur extra expenditures for their services.

Arbitration tribunals involve high costs and high fees paid to arbitrators and court registrars, together with rental expenses of premises in which proceedings are carried on, secretarial and interpreting services, are well known for the adverse effect they have on public opinion whereas all costs of the ICJ are borne by the UN.

Another possible disadvantage of arbitration is delay appointment of arbitrators and ill motive to get the appointment by the president of ITLOS in case the

President belongs to the nationality of one of the disputing parties. This arbitration procedure, being default in the situation of discord as to the choice of respective means under Article 287(1), can be invoked by any State party in diversified circumstances. In some circumstances, this option for the appointment by the President of ITLOS may be exploited with some ulterior motives.

B. JUDICIAL SETTLEMENT

The Judicial process of maritime boundary dispute settlement consists of the following three institutions:

1) International Court of Justice (ICJ).

2) International Tribunal for the Law of the Sea (ITLOS).

3) Commission on the Limits of the Continental Shelf (CLCS).

International Court of Justice (ICJ) is an essential part of the United Nations and the largest judicial body of United Nations which is also called the World court. International Tribunal for the Law of the Sea (ITLOS) is the latest international judicial body which deals with the maritime dispute affairs under the Law of the Sea Convention. Commission on the Limits of the Continental Shelf is also a body that deals with the overlapping claim of extended continental shelf among states.

The International Court of Justice

The International Court of Justice is one of the integral parts of the United Nations based in The Hague, The Netherlands. It is the major international judicial organ which has fifteen members or judges, elected separately by the U.N. General Assembly and the Security Council for a term of nine years. Only states can bring controversial cases before it, either by special agreement between the parties to a dispute or by a unilateral application by either party.

Some particular international organizations, including the United Nations itself, can seek the "Advisory Opinion" from the Court. The Court has actually settled a number of maritime boundary dispute, the first being the North Sea Continental Shelf Cases (1969) between former West Germany on one side and Denmark and the Netherlands on the other hand. ICJ is entitled to exercise its jurisdiction over any dispute concerning the interpretation or application of LOS convention which is submitted to it under Article 287 and 288. There are some Judgments relating to maritime boundary dispute is mentioned here which have been declared by ICJ after the enforcement of LOS Convention in 1994. Fisheries Jurisdiction (Spain v. Canada) 2001; Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), 1998; Land and Maritime Boundary (Cameroon v. Nigeria: Equatorial Guinea intervening), 2002; Territorial and Maritime Dispute in the Caribbean Sea (Nicaragua v. Honduras), 2007; Territorial and Maritime Dispute (Nicaragua v. Colombia), 2012; Maritime Delimitation in the Black Sea (Romania v. Ukraine), 2009; Maritime Dispute (Peru v. Chile), 2014; Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), 2014.

The International Tribunal for the Law of the Sea

Particularly for the settlement of maritime disputes, the International Tribunal for the Law of the Sea is one of the notable creations established in October 1996 with its seat in Hamburg, Germany. At the Conference of the States Parties to the Convention held at the United Nations headquarters in New York in August 1996, the twenty-one judges of the Tribunal were each elected for a nine-year tenure (staggered to three, six and nine years for each group of seven in the first election). The jurisdiction of this Tribunal is not exclusive to the extent that the parties to a dispute may choose it as one of the four judicial means open to them.

The Tribunal decided its first case in December 1997 and the second in March 1998, with the third in June 1999. All three cases involve a St. Vincent and the Grenadines oil tanker, the

Saiga, which was seized by Guinea in the offshore waters of Guinea in October 1997, allegedly for smuggling.

There are 25 cases registered before the ITLOS till now among them most of are “prompt release” related case. Only 2 cases were about maritime boundary delimitation; one is "Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal" (Case no. 16, ITLOS) case which began in December 14, 2009, and ended in March 14, 2012 another one is “Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Cote d’Ivoire in the Atlantic Ocean” (Case no. 23, ITLOS) which began in December 3, 2014, and ended in September 23, 2017.

Unlike the Court, the Tribunal can give Advisory Opinions only with respect to specific seabed disputes referred to it by the Jamaican-based International Seabed Authority, which was also established by the Convention.

Commission on the Limits of the Continental Shelf (CLCS)

Commission on the limits of the continental shelf has been established under Annex 2 of the LOS Convention. The Commission consists of 21 members, experts in the field of geology and physics. Generally, every state claims Continental shelf up to 200 nm but sometimes they claim their continental shelf beyond 200 nm which creates boundary dispute between coastal states. In this regard, the LOS convention has created the commission of continental shelf to hear the arguments of the parties to the dispute in favor of their claim. The decision or recommendation of this commission is binding for all the parties to the Law of the Sea convention. Seventy-seven States have already filed their submissions to seek recommendations before the Commission and twenty nine Recommendations have been issued so far.

Advantages of Judicial Settlement

Throughout special agreement under Article 36(1) of the Statute to submit the dispute to the ICJ has the advantage of the dispute being concisely defined in the special agreement. Basically, contesting parties may agree through the special agreement and in advance on the exact extent and content of their dispute, avoiding thereby subsequent submission of preliminary exceptions by the defendant, as can happen and has often taken place in cases of unilateral applications.

During bilateral talks for special agreement, both litigants may agree to refer only part of their dispute to the Court, leaving final settlement to their own discretion. In judicial settlement there is less opportunity for abusing of the process. In this process the parties to the dispute are compelled to attend the proceeding. Because of institutionalized process it allows safeguards for the parties.

The decision declared by the court or tribunal is binding for the disputed parties. Through this process legal precedent may be established for the upcoming or future maritime dispute settlement.

In Judicial settlement, no extra expenditure for the appointments of judges of court or tribunal is necessary like arbitration. Judicial process does not involve high expenses and high fees paid to the Judges and court registrars, together with rental expenses of premises in which proceedings are carried on; all costs of the ICJ are borne by the UN. In this process there is no scope of making delay regarding appointment of Judges or member of court or tribunal like arbitration because the court or tribunal is established institution.

Disadvantages of Judicial Settlement

In some extent, the procedure followed by the judicial settlement is more rigid than arbitration. Statute and Rules of ICJ or ITLOS are defined in advance and are applied in the same manner to all cases brought before it but in arbitration the parties to the dispute get freedom of choice of procedure based on their agreement. Judicial settlement consumes more times than arbitration because the rules of judicial process is defined and strictly followed. Its involvement with other categories of disputes generally may delay the legal process relating to the law of the sea disputes. It is not always possible to get prompt and effective remedy from the ICJ.

In case of judicial settlement, the parties to the dispute are not in control of the process or decision of court or tribunal like arbitration so that the outcome is in uncertainty. It is a public process; that is why, everything is expressly declared.

So, it is not confidential like arbitration. The judicial settlement is regulated by the statutes. So, sometimes it has a limited remedy which depends on evidentiary documents. In Judicial process, the parties to the dispute are not authorized to keep any role for the appointment of members or judges of the court or tribunal like arbitration. So, the disputing parties in most cases are unable to compromise their dispute promptly. Judicial settlement process is an expensive undertaking of maritime dispute settlement than that of arbitration.

As a result, most of the developing countries have not preferred judicial process as the first means of settlement rather they have treated it as secondary priority.

C. Similarities and Differences between the Two Processes

Arbitration and Judicial process are the most accepted means for maritime boundary disputes settlement till now. Most of the disputes have been settled through these processes. With some similarities, a number of differences are obvious between the two existences regarding their compositions and proceedings.

Both of the procedures are contained in section 2 of part XV of the United Nations Convention on the law of the Sea as compulsory means of settlement".

Similarities:

- Compulsory settlement process.
- Contained in same section of same part of LOS Convention.
- Acceptance of jurisdiction in both of the processes depends on the wishes of the parties.
- Third party is always involved in both of the processes.
- More successful than other mechanism of maritime boundary dispute settlement.

- Arbitrators and Judges usually use the principles of international law as the basis for their decisions.
- The legality of Arbitration and Judicial Settlement generates international reputation costs.

Differences:

- Number of Judges and Arbitrators are different.
- Members of the Arbitral tribunal are appointed **by** the parties but judges have already been appointed in Courts or Tribunals.
- The parties have to spend extra expenditure for arbitrators but in judicial process United Nations bears all the expenditures.
- The decision of Arbitration may be advisory or binding but the decisions of the Court are always binding.
- The proceeding of Arbitration is run **by** the agreement between the parties. On the other hand, proceeding of the court is controlled **by** the well established rules of the court or tribunal.
- Judicial settlement consumes more times than Arbitration.
- Arbitration is a confidential and more flexible process but judicial settlement is a public and rigid process.

IV. Provisional Measures and Prompt Release of Vessels and Crews

A. The ITLOS Has Compulsory Jurisdiction over Requests for Provisional Measures and Prompt Release of Vessels and Crews

The ITLOS has decided at least 10 cases in regard to requests for provisional measures and prompt release of vessels and crews, while the PCA and the ICJ have not received any such cases. Therefore, the ITLOS is obviously advantageous in this connection, because it has compulsory jurisdiction over cases requesting provisional measures and prompt release of vessels and crews under the UNCLOS, unlike the PCA, which lacks jurisdiction over these areas, and the ICJ, which lacks explicit provisions on jurisdiction over requests for prompt release of vessels and crews, and has not exercised jurisdiction over provisional measures since the establishment of the ITLOS due to its prudent attitude toward this issue, despite its even greater authority in this area.

1. Provisional Measures

"Provisional Measures" (as referred to in the Statute of the International Tribunal for the Law of the Sea), also known as Provisional Protection (as referred to in the Statute of the International Court of Justice), means the parties to a dispute may file an application for or the court itself may on its own initiate the protection of property or rights and interests in urgent situations when such rights and interests are being damaged or threatened before or after litigation or arbitration procedures are initiated. According to the provisions in Article 290 of the UNCLOS, the ITLOS is entitled to prescribe such provisional measures. Pending the constitution of an arbitral tribunal to which a dispute is being submitted, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the ITLOS or, with respect to the activities in the Area, the Chamber, may prescribe provisional measures in accordance with the provisions under the UNCLOS; once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures.

2. Prompt Release of Vessels and Crews

Where the authorities of a State Party have detained a vessel flying the flag of another State Party, it may cause adverse effects on the normal operations of the detained vessel and personal harm to the crew. Therefore, Article 292 of the UNCLOS provides that the ITLOS shall be entitled to prescribe prompt release of vessels and crews. Upon the posting of a reasonable bond or other financial security, the flag State Party of the detained vessel, failing to reach an agreement on the question of release from detention with the detaining State within 10 days from the time of detention, may directly file an application with the ITLOS for release, without being bound by the selection of court or tribunal in accordance with Article 287 of the UNCLOS.

3. Distinction between Compulsory Jurisdiction and Compulsory Dispute Settlement Procedures

Compulsory procedures entailing binding decisions, as discussed earlier, are not the same as compulsory jurisdiction. For compulsory procedures, the parties are to choose among the bodies listed in Article 287 of the Convention.

The Montreux Formula does not operate when there is compulsory jurisdiction on a certain entity because, in such cases, the Convention itself identifies the proper court or body that can resolve an issue in dispute.

The Tribunal has compulsory jurisdiction for cases for provisional measures where the relief sought is either to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment.

Another application for the Tribunal's compulsory jurisdiction is in cases for prompt release of crews and vessels; here, the Tribunal shall deal only with the question of release and without prejudice to the merits of the case. The Tribunal also has jurisdiction over disputes involving the activities in the International Sea-Bed Area. However, the Tribunal, as a whole, does not assume that function; rather, it is the Sea-Bed Disputes Chamber of the Tribunal which has exclusive jurisdiction over disputes concerning the Area.

Compulsory jurisdiction can also be extended to the Tribunal when a separate agreement related to the purposes of the Convention confers jurisdiction upon it. This permitted practice is reflected in Article 21 of the Statute of the Tribunal, which states that the jurisdiction of the Tribunal “comprises all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”

B. The PCA Does Not Have Jurisdiction over Requests for Provisional Measures or Prompt Release of Vessels and Crews

Like ordinary arbitration institutions, the PCA shall not be entitled to prescribe provisional measures in the cases submitted to it or deal with requests for prompt release of vessels and crews. The applicant can only apply to a competent court for provisional measures or a competent tribunal for prompt release of vessels and crews when the circumstances require so. For example, in the **MOX Plant Case (Ireland v. U.K.)** heard by the PCA, Ireland applied to the ITLOS for provisional measures, which was finally realized on December 3, 2001.

C. The ICJ Has Been Holding a Prudent Attitude in Prescribing Provisional Measures and a Vacancy in Terms of Explicit Provisions on Its Jurisdiction over Prompt Release of Vessels and Crews

According to the Rules of the ICJ, it may at any time prescribe provisional measures on one or both parties to a dispute on its own initiative, as the case may be, which means the ICJ is competent to adopt provisional measures even before litigation procedures are initiated, going even further than the ITLOS which is supposed to only do so upon application by the applicant during the litigation or arbitration process. However, prudent as it is in this regard, the ICJ has never really prescribed provisional measures in maritime dispute-related cases ever since the establishment of the ITLOS. Furthermore, the ICJ has also never dealt with any request for prompt release of vessels and crews, considering the vacancy of explicit provisions on its jurisdiction over such matters.

V. Annex VII of the UNCLOS: A Bridge between the UNCLOS and the PCA

According to Article 287 of the UNCLOS, arbitration provided for in Annex VII may act as a standby and shall be based on when the parties to a dispute submit maritime disputes to the PCA for arbitration. Obviously, it has become a bridge between the UNCLOS and the PCA.

A. "Standby Applicability" of Annex VII of the UNCLOS

According to Article 287 of the UNCLOS (Choice of Procedure), arbitration provided for in Annex VII shall have "standby applicability." As provided for in Paragraph 1, when signing, ratifying or acceding to the UNCLOS or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the ITLOS established in accordance with Annex VI; (b) the ICJ, (c) an arbitral tribunal constituted in accordance with Annex VII, and (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein. Paragraph 3 provides that a State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII. According to the provisions in Paragraph 4, if the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree. And as stipulated in Paragraph 5, if the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.

Therefore, in case of any contradiction between State Parties in choosing the manners of dispute settlement, or should one party have a choice while the other has not, or neither party choose one of the four options given in Article 287(1), the arbitration provided for in Annex VII shall automatically apply.

B. Submission to the PCA in Accordance with Annex VII of the UNCLOS

Although provided for in Annex VII, the arbitration procedure has never been practiced or publicized since the UNCLOS became effective. However, all PCA cases concerning maritime disputes were decided based on Annex VII of the UNCLOS. Take the **MOX Plant Case** (Ireland v. U.K.) as an example. Ireland first filed a request for provisional measures with the ITLOS, which were adopted on December 3, 2001, and then it submitted the case to the PCA in accordance with Annex VII. In such a way, an organic link between Annex VII and the PCA can be seen, as the arbitration provided for in the former becomes a bridge between the UNCLOS and the PCA.

The authors find there are three reasons entailing a submission of arbitration to the PCA in accordance with Annex VII of the UNCLOS, rather than to an arbitral tribunal constituted in accordance with Annex VII.

Firstly, it is still inadequate to initiate the arbitration procedures provided for in Annex VII. As revealed by an analysis of the ITLOS cases, 11 cases concerned provisional measures or prompt release of vessels and crews, which are all procedural matters under its compulsory jurisdiction; only 2 cases concerned substantial disputes, which, based on the settlement method selected by the parties thereto, are also inadequate to initiate the arbitration procedure provided for in Annex VII.

Secondly, it is not provided under the UNCLOS that other international juridical or arbitration institutions shall not accept submission of disputes beyond compulsory jurisdiction. The ITLOS having compulsory jurisdiction over provisional measures and prompt release of vessels and crews does not exclude other competent international juridical or arbitration institutions to accept submission of maritime disputes, creating the conditions for submission of maritime delimitation and environment disputes to the PCA.

Thirdly, the reputation and characteristics of the PCA regarding arbitration are also contributive. Some sovereign States prefer the PCA arbitration as it enjoys a good reputation for international arbitration - especially inter-State arbitration.

Furthermore, it fully respects the autonomy of the parties to the case and allows them to choose or determine the arbitration procedure by agreement. Therefore, it is no surprise that the parties to a maritime dispute submitted to the PCA choose the arbitration procedures in Annex VII of the UNCLOS.

VI. Non-Appearance of Parties

While the Convention provides for a comprehensive dispute settlement system, it does not prevent parties from not appearing, in practice. The arbitration between the **Philippines and China**[70] is an example, while another is the **Arctic Sunrise case**[71] before the International Tribunal for the Law of the Sea.

The Convention gives a State Party a choice on the adjudicatory body it wishes to have the jurisdiction to settle the dispute concerning the interpretation of the Convention, or the interpretation or application of an international agreement related to the purposes of the Convention. The rules on or treatment of default would depend on the rules of that adjudicatory body. The bodies enumerated in Article 287 are the Tribunal, the ICJ, the Annex VII Tribunal, and the Annex VIII Tribunal.

A. The ITLOS

Article 28 of the Statute of the Tribunal states the following for default procedures:

"When one of the parties does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and make its decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its decision, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law."

The Arctic Sunrise case: The first case for the Tribunal where a party was in default is the Arlic Sunrise case. The Arctic Sunrise case is a request for provisional measures in accordance with the fifth paragraph of Article 290 of the Convention. The Arctic Sunrise is a vessel registered in the Netherlands. According to the Netherlands, Russian authorities boarded the vessel on September 19, 2013 while it was in the EEZ of Russia. The vessel was later detained along with the 30 persons on board. Among the reliefs requested by the Netherlands to the Tribunal was for Russia to re-supply the Arctic Sunrise, allow the vessel to leave from its place of detention, release the crew members of the Arctic Sunrise and permit them to leave Russian territory.

Russia manifested to the Registry of the Tribunal its non-acceptance to the arbitral procedure under Annex VII and its intention not to participate in the proceedings of the Tribunal for the prescription of provisional measures as requested by the Netherlands. Russia based its refusal to participate in the proceedings from the declaration it made in its instrument of ratification done on March 12, 1997, where it manifested its non-acceptance of compulsory procedures entailing binding decisions to disputes concerning law-enforcement activities with regard to the exercise of sovereign rights or jurisdiction.

In dealing with Russia's lack of participation in the proceedings, the Tribunal declared that the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings and does not preclude the Tribunal from prescribing provisional measures,

[70] Republic of the Philippines v. People's Republic of China, PCA Case No. 2013-19 (Perm. Ct. Arb.), available at http://www.pca-cpa.org/showpage.asp?pag-id= 1529.

[71] Arctic Sunrise (Neth. v. Russ.), ITLOS Case No. 22, available at http://www.itlos.org/index.php?id=264.

provided that the parties have been given an opportunity of presenting their observations on the subject.

Although the Order did not address directly the application of Article 28 of the Statute of the Tribunal, thorough discussions were supplied by several judges of the Tribunal in their separate opinions.

Judges Wolfrum and Kelly explained in their joint separate opinion that the requisite in Article 28 of the Statute of the Tribunal-that the Tribunal must satisfy itself that the “claim is well founded in fact and in law” covers all proceedings before the Tribunal, including provisional measures. They noted that while provisional measures as provided in Article 290 of the Convention only requires the Tribunal to establish prima fade jurisdiction, Article 28 of the Statute of the Tribunal requires that the claim must be well founded in fact and in law. They harmonized the two articles by interpreting the phrase "well founded in fact and in law" in Article 28 to apply in accordance with the standards for a particular dispute. In other words, if a provisional measures proceeding only requires prima fade jurisdiction for the Tribunal to acquire jurisdiction, then the requisite that the claim must be well founded in fact and in law must likewise be satisfied under prima fade standards only.

Further, Judges Wolfrum and Kelly emphasized that the existence of default provisions in the Statute does not grant a party the right not to appear in the proceedings.

Judge Paik shared the same view as Judges Wolfrum and Kelly on the applicability of Article 28 of the Statute for cases on the merits and for provisional measures. He likewise interpreted the term "claim" in the Article 28 to cover both a claim on the merits and one for provisional measures.

B. The International Court of Justice

Article 53 of the ICJ's Statute has the following provision in cases of default:

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

The ICJ has had several occasions to apply Article 53. Below are brief summaries of these cases, with emphasis on how the ICJ tackled the issue of defaulting parties.

Corfu Channel Case: This case was instituted by the Government of the United Kingdom against the Government of Albania on a dispute arising from the incidents in the Corfu Strait, where two British destroyers struck mines in Albanian waters, damaging two British vessels and resulting in the loss of life of the members of its navy.

Albania was not a member of the United Nations during the time of the incident. When the dispute was referred to the Security Council, Albania was invited by the body to participate in the discussions, which it did. The Security Council adopted a resolution recommending the referral of the dispute to the ICJ.

The United Kingdom then submitted an Application to the ICJ. Albania opposed this action through a letter dated July 2, 1947, contending that the Application was not in conformity with the Security Council recommendation as it was done through unilateral application. Nevertheless, it expressed in the same letter its preparedness to appear before the ICJ.

The ICJ interpreted the letter as a voluntary acceptance of its jurisdiction. Subsequent to this ruling, the parties concluded a Special Agreement for the ICJ to judge, among others, the questions of whether Albania was responsible for the explosions and, assuming that it was, if there was a duty to pay compensation.

The Judgment of April 9, 1949 held that Albania was responsible for the explosions.

Albania actively defended itself in the case until the ICJ rendered a judgment on the merits. It was only during the third phase of the case (the assessment of amount of compensation) 99 when Albania did not defend its case in the proceedings. Albania was of the view that it was beyond the terms of the Special Agreement for the ICJ to determine the amount of compensation due.

The ICJ said that this issue was resolved in its Judgment of April 9, 1949 and the matter was, therefore, *res judicata*. The ICJ proceeded with the case following Article 53 of its Statute, which obliges it to determine whether the claims of the Applicant are well founded in fact and in law. In determining the soundness of the claims, the ICJ said that it was not compelled to examine the accuracy of all the details in the submissions as it was "sufficient for the Court to convince itself by such methods as it considered suitable that the submissions were well founded."

Dr. Ecer (Judge ad hoc designated by Albania) was of a different view. For him, the standard of lesser degree of accuracy for the details in applying Article 53 should not be implemented in a case such as the Corfu Channel when the non-appearing State had appeared and presented its case in the earlier stages of the court proceedings. These kinds of cases should not be treated as pure default, according to him.

Anglo-Iranian Oil Company Case: In 1933, the Imperial

Government of Iran had an agreement with the Anglo-Iranian Oil Co., Ltd. (“Oil Company”), a company incorporated in the United Kingdom. In 1951, Iran nationalized the oil industry that eventually led to a dispute between the Oil Company and Iran.

Adopting the cause of the oil company, the United Kingdom instituted proceedings before the ICJ against Iran on May 26, 1951. Both the United Kingdom and Iran made Declarations accepting the jurisdiction of the ICJ in accordance with the second paragraph of Article 36 of the ICJ Statute. The United Kingdom asked for the restitution of the oil company or for compensation for its expropriation by Iran.

On June 22, 1951, the United Kingdom requested for provisional measures pending the resolution of the dispute. Iran objected to the request for provisional measures, contending that the ICJ had no jurisdiction in the case.

Iran did not appear during the hearing of the case.

The ICJ subsequently made an Order issuing certain provisional measures. 104 While the Order mentioned that Iran did not participate during the hearing of the case, it did not discuss the repercussions or the implications of Iran's non-appearance.

During the deliberation on the merits of the case, Iran submitted, in lieu of a counter-memorial, a document declaring its refusal to recognize the jurisdiction of the ICJ. Despite this, it was able to amply present its position by means of its submissions before the ICJ.

The ICJ ultimately found that it did not have jurisdiction over the case.

Nottebohm Case: The Government of the Principality of Liechtenstein filed an Application before the ICJ against the Republic of Guatemala. Both Liechtenstein and Guatemala made prior declarations accepting the compulsory jurisdiction of the ICJ. Liechtenstein alleged that Mr. Nottebohm was its national and that Guatemala acted contrary to international law and is therefore liable for unjustly detaining and expelling Mr. Nottebohm from Guatemala and from sequestering and confiscating his property.

Instead of a counter-memorial, Guatemala sent a communication to the ICJ. Guatemala presented its position to the ICJ by means of this communication. One of the contentions of Guatemala was that its declaration accepting the compulsory jurisdiction of the ICJ was only for a period of five years which already expired when Liechtenstein filed its Application.

Guatemala did not send a representation during the hearing of the case.

In deciding that it had jurisdiction, the ICJ said that it had the right to decide its own jurisdiction and had the power to interpret for this purpose the instruments which governed that jurisdiction.

Guatemala eventually participated in the case on the merits.

Trial of Pakistani Prisoners of War: Pakistan instituted proceedings against India before the ICJ over a dispute on the charges of genocide committed against 195 Pakistani prisoners of war or civilian internees while in Indian custody. India did not consent to the jurisdiction of the ICJ and did not appear during the hearing for provisional measures. Since Pakistan was expecting to negotiate with India on matters including the reliefs sought in the interim measures, it requested the ICJ to postpone its request for provisional measures to facilitate the negotiations. The ICJ issued an Order setting the dates of submissions of both parties and did not discuss India's non-appearance.

The case was later discontinued upon the request of Pakistan because the Parties resolved the dispute through negotiations.

Fisheries Jurisdiction Cases (Federal Republic of Germany v. Iceland and United Kingdom v. Iceland): This dispute concerned the proposed extension of the fisheries jurisdiction of the Government of Iceland.

The United Kingdom, as Applicant, cited the first paragraph of Article 36 of the ICJ Statute and the Exchange of Notes' dated March 11, 1961 between the Parties.

During the jurisdiction phase of the case, Iceland informed the ICJ by letter that it did not grant jurisdiction to the ICJ and will not appoint an Agent for the proceedings. The United Kingdom maintained that the Exchange of Notes was either a treaty or a convention in force which gave the ICJ the jurisdiction to resolve disputes, including Iceland's claim for an extended fisheries jurisdiction. Iceland did not submit any pleadings, was not represented in the hearings, and did not give any submissions. On the issue of Iceland's non-participation in the case, the ICJ said that it regretted Iceland's failure to plead in the case. Nevertheless, it had to examine its jurisdiction proprio motu in accordance with jurisprudence and further by Article 53 of the ICJ Statute. The Court also noted that Iceland failed to follow the second paragraph of Article 62 of the Rules of Court which requires a party to set out the facts and law on which its objection is based.

Iceland acted in the same manner during the merits phase of the case but sent a letter expressing its non-acquiescence to any of the allegations or contentions of law made by the United Kingdom. The ICJ once again relied on Article 53 of the ICJ Statute in proceeding with the resolution of the case on the merits despite Iceland's non-participation. In applying the principles of international law in this case, the ICJ considered upon its own initiative all rules of international law which might have been relevant to the settlement of the dispute. It expressly did not impose upon the parties the burden of establishing or proving rules of international law.

In evaluating the case, it took into consideration the legal arguments of the United Kingdom and the various communications sent by Iceland.

According to the ICJ, it acted with circumspection and had taken special care, considering that respondent State was absent.

The fisheries case between the Federal Republic of Germany and Iceland was likewise revolved on the same issue and Iceland's non-participation was treated in the same manner as in its Fisheries case with the United Kingdom.

Nuclear Tests Cases (Australia v. France and New Zealand v. France): The issue for the two cases was the legality of the atmospheric nuclear tests conducted by France in the South Pacific. The respective. Applications of New Zealand and Australia invoked the first paragraph of Article 36 and Article 37 of the ICJ Statute and the General Act for the Pacific Settlement of International Disputes or, in the alternative, the second and fifth paragraphs of Article 36 of the ICJ Statute. In both cases, France did not submit any pleading, was not represented during the hearings, and made no formal submissions before the ICJ. It, however, submitted a letter (dated May 16, 1973) manifesting its refusal to accept the ICJ's jurisdiction and requesting for the withdrawal of the case from the ICJ's roster.

The ICJ treated the non-appearance and non-participation of France in the two cases in a very similar fashion. It stated that while it regretted France's failure to present its arguments, it had to proceed with the case. In reaching its conclusion, the ICJ gave due regard to the evidence and arguments presented and raised by the applicant States and also to any relevant evidence. From these considerations, it assessed the existence of its jurisdiction and determined that the applications were well-founded in fact and in law. The ICJ's Judgment did not make a decision because it took notice of the statements from France, through various official sources, manifesting its intention to cease the conduct of atmospheric nuclear tests. The ICJ did not issue a decision because it interpreted France's statements as having the effect of ending the dispute among the Parties.

Aegean Sea Continental Shelf Case: Greece submitted an Application to the ICJ requesting for a judicial declaration of Greece's entitlement to a continental shelf and for the determination of the boundary of the continental shelves between Greece and Turkey. Although Turkey neither appeared in the hearings nor presented any submissions, it conveyed its observations to the ICJ by means of a letter. The ICJ examined the question of its jurisdiction proprio motu according to the terms of Article 53 of the ICJ Statute. Greece based the ICJ's jurisdiction on Article 17 of the General Act for the Pacific Settlement of International Disputes in conjunction with Article 36 and 37 of the ICJ Statute and the Brussels Joint Communique made by Greece and Turkey.

The ICJ took note of the reservations made by Greece in the General Act where it excluded disputes relating to the territorial status of Greece from the procedures of the General Act . It treated the present dispute as relating to the territorial status of Greece within the meaning of the reservations made by Greece. With respect to the Brussels Joint Communique, it did not see the Communique as a commitment to accept submission of the dispute to the ICJ by unilateral application.

The Court did not find that it had jurisdiction in the dispute.

United States Diplomatic and Consular Staff in Tehran: The United States of America instituted proceedings against the Islamic Republic of Iran concerning the dispute over the seizure and holding as hostages members of the diplomatic corps and consular staff of the United States as well as other United States nationals.

Iran did not file any pleading before the ICJ. It was not represented during the hearings and did not file any submissions. However, it sent letters to the ICJ conveying its position. In dealing with Iran's absence, the ICJ reiterated its statement in the Corfu Channel case, to quote:

“While Article 53 thus obliges the Court to consider the submissions of the party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded.”

The ICJ had to rely on the above-mentioned principle because of its limited access to official documents. The United States could not access its diplomatic and consular premises, personnel and archives in Iran to establish its factual allegations. Most of the evidence considered by the ICJ was sourced from newspaper, radio and television reports, including statements from Iranian officials.

Military and Paramilitary Activities in and against Nicaragua:

The Government of Nicaragua instituted proceedings before the ICJ against the United States for the dispute on the responsibility for the military and paramilitary activities in and against

Nicaragua. The United States participated in the proceedings for the request for provisional measures and the proceedings for the determination of the ICJ's jurisdiction and the admissibility of the case.

In its Judgment dated November 26, 1984 on the ICJ's jurisdiction and the admissibility of the case, the ICJ found that it had jurisdiction on the basis of Article 36 of the ICJ Statute and the Treaty of Friendship, Commerce and Navigation between the disputing countries.

After the ICJ issued the November 26, 1984 Judgment, the United States reiterated to the Court, by a letter, its view that the ICJ had no jurisdiction in the case and that the ICJ's Judgment was erroneous. It manifested through the same letter its intention not to participate further in the proceedings relating to the case.

Because of the United States' non-participation in the merits stage of the proceedings, the ICJ had to resort to Article 53 of the ICJ Statute. The ICJ expounded its discussion on default proceedings unlike its previous treatment of this behavior. It clarified the legal repercussions of default proceedings, to wit:

1. A case will continue without the participation of the non-appearing State;

2. The non-appearing State will be bound by the eventual judgment in accordance with Article 59 of the Statute;

3. The Court "must attain some degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence;

4. The Court is not solely dependent on the arguments of the parties before it with respect to the applicable law in deciding whether the claim is well founded in law;

5. The Court is not bound to the material submitted by the parties in examining the facts of the case but its own enquiries cannot make up for the absence of one of the parties.

6. The absent party forfeits the opportunity to counter the factual allegations of its opponent;

7. While the appearing party has to prove the allegations it makes, the Court is not compelled to examine the accuracy of the submissions “in all their details.”

C. The Arbitral Body Constituted under Annex VII and Annex VIII of the Convention

The arbitral body constituted under Annex VII determines its own procedure, as long as the procedure shall assure that each party shall have the opportunity to be heard and to present its case. In instances of default, Annex VII specifies the standards that have to be met by the constituted arbitral body in this manner:

Article 9 - Default of Appearance.

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

The special arbitral tribunal constituted in accordance with Annex VIII of the Convention follows the same guidelines as provided in Annex VII of the Convention, both in terms of the drafting of its own rules of procedure and the standards to be complied with in cases of default.

The Republic of Philippines vs. The People's Republic of China: The arbitral body constituted for the dispute between the Philippines and China is in accordance with Annex VII of the Convention. On January 22, 2013, the Philippines served China with a Notification and Statement of Claim.

China rejected the Philippines' notification through a Note Ierbale dated February 19, 2013. On August 1, 2013, China addressed a Note Verbale to the Permanent Court of Arbitration reiterating its position that it was not accepting the arbitration initiated by the Philippines and that it was not participating in the proceedings.

In addition to Article 9 of Annex VII of the Convention, the rules of procedure 136 of the arbitral tribunal for this dispute provides the following:

In the event that a party does not appear before the Arbitral Tribunal or fails to defend its case, the Arbitral Tribunal shall invite written arguments from the appearing party on, or pose questions regarding, specific issues which the Arbitral Tribunal considers to have not been canvassed, or have been inadequately canvassed, in the pleadings submitted by the appearing party. The appearing party shall make a supplemental written submission in relation to the matters identified by the Arbitral Tribunal within three months of the Arbitral Tribunal's invitation. The supplemental submission of the appearing party shall be communicated to the non-appearing party for its comments which shall be submitted within three months of the communication of the supplemental submission. The Arbitral Tribunal may take whatever other steps it may consider necessary, within the scope of its powers under the Convention, its Annex VII, and these Rules, to afford to each of the Parties a full opportunity to present its case.

Observations

Default proceedings open concerns, both in terms of procedure and the merits of the case, distinct from cases where both parties actively participate.

While it may not appear as adversarial as when both parties actively participate in the resolution of a case, it has its own issues that may not always be addressed by the rules. Moreover, default proceedings, in most cases, lead to judgments that are, to say the least, a challenge to comply with.

Despite the prevalence of the kompetenz-kompetenz rule in most international courts including the bodies created pursuant to the Convention, the basis for non-appearance in the cases previously discussed is the allegation of lack of jurisdiction of the court or tribunal.

The rules for default under the rules of the Tribunal, the ICJ and Annex VII all provide that the body can proceed to grant the relief prayed for provided that it has jurisdiction and the claim is well founded in fact and law. These rules reflect the guiding principle for all default proceedings of *audi alteram partem,* whereby a court is required to listen to the arguments and evaluate the evidence presented by the parties before it gives a decision in a contentious case. It is enough that both parties are given an equal opportunity to present their case before the court or tribunal. If one of the parties does not or refuses to participate in the proceedings, the court can still proceed with its judgment.

There are certainly advantages for the appearing party in default proceedings. The non-appearing party cannot counter the factual allegations of the other and the court or body will not compel itself to examine the accuracy in all the details of a party's submission. The effects of default as set out in the Nicaragua case appear to be fair and reasonable for both parties.

The details of its actual application, however, subject the applicant to hurdles that otherwise would not have been there had the respondent cooperated and appeared before the tribunal or the court. These difficulties are brought about by the necessity for the adjudicatory body to arrive at a conclusion in an objective manner. In the experience of some practitioners, these hurdles actually work in favor of the respondent. To quote Sir Fitzmaurice, "the injustice to the Plaintiff State arises precisely from the Court's determination not to be unfair to the Defendant State by penalizing it for its nonappearance in the proceedings." What follows are some of the reasons for this position.

When a State respondent does not appear before an international court or tribunal, it does not mean that any of its statements outside the court will be refused evaluation in order for the court to arrive at its decision. In practice, States Parties, although vehemently refusing to participate in the proceedings, would submit, before the adjudicatory body, a statement that is not technically considered a pleading. In the Separate Opinion of Fitzmaurice in the Fisheries Case, he expressed his view of the inequity that results from the act of a non-appearing State of not formally providing the court with submissions and yet providing it with letters and telegrams that had gone into the merits of the case.

According to Fitzmaurice, this gives the impression that the action was intended for Iceland to present its position as if it actually appeared before the Court while allowing her to retain the position of non-recognition on the proceedings and its outcome.

Another mode for a respondent to informally convey its position is by means of press releases. These materials may consciously or unconsciously influence the evaluation of the case. As these can come from different sources, the applicant could be forced to have a shotgun approach to address all the informal statements made by the respondent outside of the court proceedings.

There are risks for the applicant in taking this route. These statements may have come from unverified sources and subsequently denied by the respondent, or these statements may be inconsistent or contradictory, thus making a comprehensive reply to these statements not possible.

This predicament was experienced by the Tribunal as expressed by Judge Ad Hoc Anderson, where he stated in his Declaration for the Arctic Sunrise case that the Tribunal had to resort to diplomatic communications, legislation and court decisions from the Russian Federation which were "both incomplete and in places inconsistent."

Still in the Arctic Sunrise case, the Order of the Tribunal itself admitted its difficulty in evaluating the nature and scope of the respective rights of the parties that could have been easier done had Russia provided it with more information, both in facts and in law.

The arbitral tribunal in the dispute between the Republic of the Philippines and China1anticipated this difficulty and provided in its rules that the tribunal can pose questions regarding specific issues which it considers to have not been canvassed or inadequately canvassed by the appearing party.

Nevertheless, there are still questions that only the absent respondent is competent to address.

It has also been observed that the effect of the failure to object seems to be graver when both parties participate in the proceedings, treating the said non-action as acquiescence from the part of opponent. Meanwhile, when a party does not appear, its failure to object can be given varying interpretations.

Non-appearing States Parties may also have the view that they are not bound by the decision of the court or tribunal since they did not appear in the proceedings, seeing the proceedings as res *inter alios acta* and the judgment a mere "academic expression of opinion." One of the justifications for this action is the notion that the court or tribunal has no jurisdiction in the proceedings against the non-appearing State.

The adjudicatory body, in general has this tendency to give more allowances to a non-appearing party, because it does not have the mechanism to coerce a State to participate in the proceedings. While a State may have the obligation to go through compulsory dispute settlement as a party to the Convention, it might still decide not to participate in the proceedings and get away with it.

Thirlway observes that respondent States seem to enjoy a privilege in non-appearance, as succinctly put in the report on the legislative intention of Article 53 of the ICJ Statute:

The essential condition for the exercise of jurisdiction in such a case is and must be that the plaintiff, although proceeding ex parte, should present its case as fully as if the defendant were present, and that the court be especially mindful of the interests of the absent defendant.

This does not mean that the court shall take sides. It does mean, however, that the court, without espousing the cause of the defendant, shall, nevertheless, act as its counsel. There is an apt French phrase to the effect that "the absent are always wrong". The court must go on the assumption that the absent party is right, not wrong until the plaintiff has proven him to be wrong. There is no alternative except to refuse jurisdiction, if the defendant does not appear, or to compel the presence of the defendant. The world is not ripe for this.

The disadvantages of actions in default do not end with the proceedings. When a respondent refuses to appear in the proceedings, chances are, it will also not comply with the judgment.

VII. Dealing with Substantial Issues in Maritime Disputes

The settlement of substantial issues in cases concerning maritime disputes has become the most obvious gap for the ITLOS, and the main reason is that the compulsory nature of jurisdiction by the ITLOS is impaired by statutory and agreed exceptions under the UNCLOS. By contrast, most PCA and ICJ maritime cases arise from maritime delimitation disputes, falling into the category of matters that may be excluded by agreement under the UNCLOS.

A. Compulsory Jurisdiction Exceptions of the ITLOS

1. Statutory Exceptions

Statutory exceptions refer to matters explicitly excluded from compulsory jurisdiction under the UNCLOS, including:

a. Disputes concerning Marine Scientific Research

According to the provisions in Article 297(2)(a) of the UNCLOS, the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out *of:* (i) the exercise by the coastal State of a right or discretion in accordance with Article 246 (Marine scientific research in the exclusive economic zone and on the continental shelf); or (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with Article 253 (Suspension or cessation of marine scientific research activities).

b. Fishery Disputes

As provided in Article 297(3)(a) of the UNCLOS, the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

2. Optional Exceptions

What is meant by optional exceptions is that a State Party may exclude certain disputes from jurisdiction by means of a written declaration. According to the provisions of Article 298 of the UNCLOS, a State Party may declare that it does not accept compulsory jurisdiction over the following three categories of disputes:

a. Sea Boundary Disputes

Disputes concerning the interpretation or application of Articles 15 (Delimitation of the territorial sea between States with opposite or adjacent coasts), 74 (Delimitation of the exclusive economic zone between States with opposite or adjacent coasts) and 83

(Delimitation of the continental shelf between States with opposite or adjacent coasts) relating to sea boundary delimitations, or those involving historic bays or titles.

b. Military Activities

Military activities include disputes concerning military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297(2)-(3).

c. Activities of the Security Council of the United Nations

Disputes arise when the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.

B. The PCA's and the ICJ's Unrestricted Maritime Dispute Jurisdiction

Based on the PCA arbitration procedure rules, the Statute and Rules of the ICJ, the restrictions stipulated on the ITLOS do not apply to the PCA and the ICJ, which indicates that the PCA and the ICJ have the right to handle the cases which can be excluded from the jurisdiction of the ITLOS, overcoming the deficiency of the ITLOS. In fact, the cases concerning maritime disputes heard by the PCA and the ICJ mainly arise from delimitation disputes and environment disputes that fall into the category of optional exceptions stipulated in the UNCLOS.

VIII. Settlement of Seabed Disputes

Part XI of the UNCLOS provides the exploration and exploitation activities of resources in the Area. According to Article 1 (Use of terms and scope) of the UNCLOS, the "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, and "activities in the Area" means all activities of exploration for, and exploitation of, the resources of the Area. Since the resources in the Area are still under exploration and large-scale substantial exploitation activities have not been initiated, few of seabed disputes have occurred, leading to a vacancy in submitting such disputes to the Chamber. However, more and more seabed disputes have arisen as resource exploitation activities in the Area increase in both depth and scope, which is an opportunity for realizing the advantages of the Chamber in terms of compulsory jurisdiction, parties, and applicable laws.

A. Why Has the Chamber Not Accepted Any Such Cases?

As revealed by an analysis of the actual operations of the UNCLOS dispute settlement system, the Chamber has not heard any cases concerning seabed disputes in the Area, which is closely related to the seabed resource exploitation practices in the Area. The principle of common heritage of mankind and parallel system of seabed resource exploitation, and institutions such as the International Seabed Authority and the Enterprise, etc. are established under the UNCLOS in order to guarantee orderly resource exploitation activities in the Area. So far, the Authority has developed the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and concluded a 15-year exploitation contract with pioneer investors. It is now ready to develop regulations on prospecting and exploration for polymetallic sulphides, cobalt-rich crust, and other resources so as to promote a new round of competition in deep-sea resource exploration and exploitation.

According to statistics, by the end of 2004, the Authority had awarded six contracts to pioneer investors for polymetallic nodule resource exploration in the Area, and an additional contract will be awarded in the near future.0 However, resources in the Area are still under exploration, large-scale substantial exploitation has not been initiated, and so there have been few seabed disputes at this stage. Therefore, it is understandable why the Chamber has not yet received any cases concerning seabed disputes.

B. The Chamber Has Huge Potential for Settling Seabed Disputes

As demand for seabed resources rises, new technologies and enhanced exploitation capabilities will lead to an increase in both the scale and frequency of seabed resource exploitation, which in turn will lead to more seabed disputes.

Therefore, the huge potential of the Chamber for settling seabed disputes, which is mainly embodied in its compulsory jurisdiction, parties to a case, and applicable law, will be gradually demonstrated by settling more and more relevant cases.

1. Compulsory Jurisdiction

As stipulated under the UNCLOS, the Chamber shall have compulsory jurisdiction over seabed disputes. As provided in Article 287(2) of the UNCLOS, "a declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, Section 5. Therefore, the Chamber shall have compulsory jurisdiction over seabed disputes in the Area. According to Article 187 of the UNCLOS, the disputes with respect to activities in the Area include the following:

(1) disputes between States Parties concerning the interpretation or application of this Part and the Annexes in relation thereto;

(2) disputes between a State Party and the Authority concerning: (i) acts or omissions of the Authority or a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith, or (ii) acts of the Authority alleged to be in excess of jurisdiction or a misuse of power;

(3) disputes between parties to a contract, being State Parties, the Authority or the Enterprise, State enterprises and natural or juridical persons, concerning: (i) the interpretation or application of a relevant contract or a plan of work; or (ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests;

(4) disputes between the Authority and a protective contractor concerning the refusal of a contract or a legal issue arising in the negotiation of the contract;

(5) disputes between the Authority and a State Party, a State enterprise or a natural or juridical person sponsored by a State Party, where it is alleged that the Authority has incurred liability; and

(6) any other disputes for which the jurisdiction of the Chamber is specifically provided in this Convention.

Compared with the ITLOS, the compulsory jurisdiction of the ITLOS, flexible as it may be, is subject to statutory and optional exceptions and should more appropriately be referred to as "quasi-compulsory jurisdiction," while the compulsory jurisdiction of the Chamber is rigid and spared from such exceptions.

Compared with the ICJ, it shall obtain consent by the sovereign State prior to exercising jurisdiction. This important international rule was determined by the Permanent Court of International Justice (PCIJ) as early as 1923. In the Status of Eastern Karelia case, the PCIJ declared that "no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." This is also a principle that the ICJ has been following in exercising its jurisdiction.

2. Parties to a Case

Article 37 of the Statute of the ITLOS provides that the Chamber shall be open to the State Parties, the Authority and the other entities referred to in Part XI, section 5. And according to the provisions of Article 20 (Access to the Tribunal) thereunder, (1) the Tribunal shall be open to State Parties, and (2) the Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case. Therefore, parties to a case before the Chamber may include:

a. State

The State Parties to the UNCLOS may be parties in cases.

b. Self-governing Associated States or self-governing Territories

According to Article 305(1) (c)-(e) of the UNCLOS, self-governing associated States and territories which enjoy full internal self-government may be parties in cases before the ITLOS.

c. Intergovernmental International Organizations Referred to in Annex IX of the UNCLOS

According to the provisions in Article 305 of the UNCLOS, it shall be open for signature by international organizations in accordance with Annex IX, which provides that an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by the UNCLOS, including the competence to enter into treaties in respect of those matters. An international organization may sign the UNCLOS if majority of its member States are signatories of the UNCLOS. At the time of signature an international organization shall make a declaration specifying the matters governed by the UNCLOS in respect of which competence has been transferred to that organization by its member States which are signatories, and the nature and extent of that competence. The European Community is such intergovernmental organization, and juridical practices may be tracked back to 2001 in the Case concerning the Conservation and Sustainable Exploration of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Union).

d. Authority and Enterprise

The International Seabed Authority and the Enterprise, which are executing institutions established in accordance with the provisions under the UNCLOS, shall be competent to be parties in cases.

e. State Enterprise

The rights and obligations of State enterprises under the international law may be exercised and performed by the State that owns such enterprises.

f. State Sponsoring a Natural or Juridical Person as a Party to the Dispute

In order to avoid inequality between the parties to a dispute in proceedings arising from the fact that a natural or juridical person is a party to the dispute, Article 190 of the UNCLOS provides for the system of "participation and appearance of sponsoring State Parties in proceedings":

(i) If a natural or juridical person is a party to a dispute, the sponsoring State shall be given notice thereof and shall have the right to participate in the proceeding by submitting written or oral statements, and

(ii) If an action is brought against a State Party by a natural or juridical person sponsored by another State Party in a dispute, the respondent State may request the State sponsoring that person to appear in the proceedings on behalf of that person. Failing such appearance, the respondent State may arrange to be represented by a juridical person of its nationality.

By contrast, Article 34(1) of the Statute of the ICJ provides that only States may be parties in cases before the Court.

3. Applicable Law

According to the provisions of Article 38 (Applicable Law) of the Statute of the ITLOS, in addition to the provisions of Article 293, the Chamber shall apply (i) the rules, regulations and procedures of the Authority adopted in accordance with this Convention and (ii) the terms of contracts concerning activities in the Area in matters relating to those contracts. As provided in Article 293 (Applicable Law) of the UNCLOS,

"1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree."

Therefore, the Chamber shall apply; (a) the UNCLOS; (b) other rules of international law not incompatible with the UNCLOS, (c) principle of ex aequo et bono; (d) rules, regulations and procedures of the Authority adopted in accordance with the UNCLOS; and (e) terms of contracts.

Different from the Statute of the ITLOS, Article 38 of the Statute of the ICJ provides that (1) the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) subject to the provisions of Article 59 of the ICJ Statute, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(2) This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

It indicates that the ICJ shall only apply international law.

IX. Effectiveness of the UNCLOS dispute settlement regime

It is important to consider how Part XV has instead been used. It should be asked, what have been the unexpected uses of the UNCLOS dispute settlement regime, and how do those reflect on the effectiveness of Part XV to the law of the sea? It is worth considering in this regard: (1) What were the cases that have been submitted under Part XV, contrary to expectations? (2) Which were the cases that went elsewhere when they could have been submitted under UNCLOS? and (3) Which cases never made it to resolution under UNCLOS even when a peaceful dispute settlement process may well have been desirable?

Among the unexpected cases to be submitted under the UNCLOS dispute settlement regime is **Mauritius v. United Kingdom** concerning the Chagos Archipelago, as well as **Philippines v. China,** which challenges China's assertion of rights in the South China Sea. The **Chagos Archipelago case** should be considered to be an unusual one for submission under UNCLOS because central to the case is whether the United Kingdom is indeed the relevant coastal state for establishing a Marine Protected Area. Such a determination necessarily concerns the ownership rights over the land generating the maritime zone, and prima facie is outside the scope of UNCLOS. It would be a considerable challenge to untangle the law of the sea issues from other issues of self-determination and questions of territorial sovereignty for a decision to be properly reached on the interpretation and application of UNCLOS. It is important to recall that not all disputes to do with maritime interests and concerns necessarily implicate the interpretation and application of UNCLOS.

Furthermore, the decisions of the International Tribunal for the Law of the Sea (ITLOS) in prompt release cases arising under Article 292 are redolent with concern for safeguarding the interests of flag states in freedom of navigation against potential over-zealous enforcement of fisheries laws by coastal states. The difficulty that has emerged is that the strong desire of ITLOS to protect flag state interests pursuant to the perceived purpose of Article 292 is that such protection has come by sacrificing cooperative fishing regimes that are trying to better conserve and manage diminishing fish resources.

The decision in **Hoshinmaru** does point slightly in the opposite direction in referencing the importance of accurate reporting to coastal states.

Other examples of the protection of flag state interests against those of coastal states emerge from the provisional measures orders of ITLOS in the case brought by Argentina against Ghana for the detention in port of its warship, the ARA Libertad, and in the case brought by the Netherlands against Russia for the detention of the Arctic Sunrise and arrest of Greenpeace protestors for interference with one of Russia's oil rigs. Argentina successfully secured a unanimous order that the ARA Libertad was to be released pending arbitration over the merits of Argentina's claims. Similarly, the Netherlands, in a near-unanimous decision, secured an order for Russia to release the Arctic Sunrise and all detained persons upon payment of a financial bond.

In relation to the UNCLOS dispute settlement regime being needed to flesh out general obligations included within the Convention, there are fewer examples to bear out this view.

The **Southern Bluefin Tuna arbitration** underlines that a tribunal does not have a role in elaborating on obligations of cooperation in high seas fisheries where states have already proceeded to do so under their own agreement, which includes its own preferred dispute settlement regime. There was potentially an opportunity for an arbitral tribunal to elaborate on the broad environmental norms included in UNCLOS for the protection and preservation of the marine environment in the MOX Plant case brought by Ireland against the United Kingdom. 13 However, with the cessation of the arbitration, no such elaboration could occur. The advisory opinion of the Seabed Disputes Chamber did, however, provide important details on the requirements of due diligence, including what constitutes best environmental practices, and whether developing countries could be held to any different standard.

Philippines v. China reflects another case that was unexpectedly filed under UNCLOS. The surprising aspect in this regard is that the Philippines is essentially seeking to challenge China's unilateral delimitation of the South China Sea with its U-shaped, nine dotted line, even though China has excluded maritime boundary delimitations as the subject of compulsory procedures entailing binding decisions under Article 298 of UNCLOS. As with the Chagos case, the Philippines will need to argue skillfully to have disagreements relating to baselines or the status of rocks, islands, and other marine features resolved without a tribunal dealing with the purported boundary itself or disputes as to ownership over the islands, rocks, and other features. As Professor Boyle rightly noted some years ago:

“Everything turns in practice not on what each case involves but on how the issues are formulated. Formulate them wrongly and the case falls outside compulsory jurisdiction. Formulate the same case differently and it falls inside.”[72]

[72] Alan E. Boyle, Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction, 46 Int’l & Comp. L.Q. 37, 44-45 (1997).

Perhaps the characterization of these disputes will be the ultimate determination for the parties and the judges in resolving these cases. It may be the case that the resolution of specific legal disputes may facilitate resolution of the broader political dispute between the parties concerned. For the purposes of deciding those legal disputes under UNCLOS, the critical questions are whether the dispute concerns the interpretation and application of the Convention and whether any of the exceptions and limitations applies.

As another unexpected case, one would include in this list the **Bangladesh v. Myanmar** maritime boundary delimitation to the extent that it entailed delimitation of the outer continental shelf. It may well have been assumed that this responsibility would have solely rested with the Commission on the Limits of the Continental Shelf. Yet ITLOS, in resolving this dispute, considered that its jurisdiction to delimit the continental shelf extended to the continental shelf in its entirety. It will now be for the International Court of Justice to determine its scope of jurisdiction to delimit the outer continental shelf in one of Nicaragua's most recent cases against Colombia.

There has been law of the sea cases decided outside the mechanisms available under UNCLOS. The International Court of Justice has maintained an active docket of maritime boundary cases.[73] In some instances these cases have been coupled with territorial sovereignty disputes, which would fall outside the jurisdiction of the UNCLOS procedures.

Bolivia's case for access to sea from Chile has been instituted at the ICJ on the basis of the Pact of Bogota, rather than UNCLOS, given its concerns over the interpretation of treaties and claims that extend far beyond obligations owed to landlocked states under UNCLOS. This practice is consistent with the freedom of choice accorded to states parties under Section 1 of Part XV to seek a range of avenues for the peaceful resolution of their disputes. It further reflects the jurisdictional limits that exist under UNCLOS and that do not constrain the parties in a similar way before the International Court of Justice.

A notable law of the sea case decided outside the UNCLOS framework is the **Whaling in the Antarctic case** that Australia filed against Japan, with New Zealand intervening. As all of these states had accepted the compulsory jurisdiction of the International Court of Justice, the Court provided an obvious forum for resolving the critical dispute concerning the interpretation and application of Article VIII of the Whaling Convention. The case could have been instituted under UNCLOS.

Finally, it should be noted that there are a number of instances in which the UNCLOS dispute settlement mechanism could have been used but was not resorted to by the states concerned. Singapore threatened to institute proceedings against Australia for the imposition of a compulsory pilotage regime in the Torres Strait, alleging it was a violation of the provisions relating to transit passage. This case would reflect the need for the dispute settlement mechanism in providing a safeguard for the inclusive interests of flag states against greater claims to exclusivity by coastal states. Other maritime activities that may have been challenged include potential cases by Japan against the flag states of Sea Shepherd's

[73] Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) (Judgment), [20071 ICJ REP. 659; Maritime Delimitation in the Black Sea (Romania v. Ukraine) (Judgment), [2009] ICJ REP. 61.

vessels following their violent interactions in the Southern Ocean, assuming Japan would have clean hands in launching such proceedings.

Some of the most controversial issues arising in the law of the sea in recent years cannot be resolved under UNCLOS. These disputes include China's and Japan's hostile exchanges because of disputed ownership of the Senkaku/Diaoyu islands in the East China Sea. Similarly to **Philippines v. China**, the root of the problem lies in a question of territorial sovereignty. Arguably, the precise incidents concerning actions against fishing vessels and declaration of an air defense identification zone could form the subject matter of a case under UNCLOS concerning the various rights and obligations enshrined in UNCLOS that are at stake. However, it would be difficult to characterize the dispute so as to avoid the territorial sovereignty question.

Intelligence-gathering in foreign exclusive economic zones remains an unsettled legal issue. However, because one of the main protagonists on this issue, the United States, is not a party to UNCLOS, this matter will no doubt remain a source of controversy among the states concerned and will not become the subject of legal proceedings. The status of non-parties to UNCLOS also meant that Israel's and Turkey's dispute over the legality of Israeli forces boarding of the Turkish MV Mavi Marmara could not be resolved under UNCLOS.

Hence, the cases that may have been expected because of controversial interactions or disputes that have occurred at sea have not arisen, even if there was a need to clarify the legal rights and duties of the states concerned. The cases have not been submitted because of the political preferences of the states concerned, the linkage of the issues to matters that do not fall within the jurisdiction of Part XV dispute settlement, and/or because the states involved are not parties to UNCLOS. The jurisdictional limits of UNCLOS have been an important reason for states to refer law of the sea cases to other judicial mechanisms (or not). As such, the occasions for not using UNCLOS dispute settlement do not necessarily reflect negatively on its effectiveness. They do reflect on the modest case load, as compared with some other international courts and tribunals.

In conclusion, Part XV of UNCLOS undoubtedly reached for the stars and managed to get off the ground by including a compulsory dispute settlement procedure in such an important constitutive instrument. The need for Part XV arbitration or adjudication has not arisen as frequently as may have been anticipated. Possible reasons for this are the lower number of expected challenges to the balance of interests contained in the Convention; that UNCLOS itself has worked well; and that the Convention has worked well in partnership with other agreements, regimes, and organizations for resolving matters that have arisen between states parties. It is the unexpected cases that may pose the greatest risks to the credibility and effectiveness of the dispute settlement regime, particularly if the tribunals concerned overreach the confines of Part XV.