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Course Material

M.A.(MARITIME LAWS)

1.2.6. MARITIME DISPUTES RESOLUTION

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MARITIME BOUNDARY DISPUTES

Introduction

In 2010, Norway and Russia agreed on a maritime boundary in the Arctic, stretching from the Eurasian landmass almost all the way to the North Pole. The new 1750-km (1087-mile) boundary was ten times the length of the land border between the two countries and it was hailed as a sign of a new 'era' in Norway–Russia relations, as well as Arctic governance more broadly. Pundits were quick to argue that the primary reason for the maritime boundary agreement must have been the presence of oil and gas resources, not least as resource extraction figured prominently in the two countries' newly launched Arctic strategies.

However, it is unlikely that Norway and Russia would have been able to reach an arrangement today, a decade later. As the former Norwegian foreign minister highlighted explaining one of the factors behind the agreement: 'There must be trust between the negotiating partners'. The worsening in relations between the two countries after the Russian annexation of Ukraine in 2014 have made bilateral relations resemble those of the Cold War when the two countries were on opposing sides in the larger 'East West' dispute.

This speaks to the challenge of settling boundary disputes. Boundaries in the ocean are man-made constructs of importance to everything from oil and gas production, to fisheries and environmental protection. Presently, more than half of all maritime boundaries are still disputed, across all continents. As put by the Norwegian and Russian foreign ministers in 2010: 'unresolved maritime boundaries can be among the most difficult disputes for states to resolve'. Timing, in other words, is everything, when it comes to settling maritime boundaries.

This begs the question: What, in essence, is a maritime boundary, and why do states end up disputing them? Perhaps more important, how do states go about settling such disputes, and how can we better understand the development of the legal and political principles that frame such endeavours?

It is only recently – in an extended view of history – that states' ability to uphold sovereignty at sea has led to oceans becoming subject to explicit international jurisdiction. How states have viewed and utilised the sea – eventually attempting to control and develop a legal order for it – has varied and changed over the past millennium. From the 15th to the 19th centuries, the use of maritime space in exploration, dominance and industrialisation transformed the world.

When states legalised the maritime domain in the 20th century, with the Geneva Conventions on the Law of the Sea in 1958 and the UNCLOS regime in 1982, the relationship between states and ocean space changed. Since the turn of the millennium, certain global trends have further amplified the role of the oceans in international affairs. Technological developments, increased seaborne trade, growing demand for marine resources, and climate-change effects on the oceans and the location of those resources are all factors that have led to a renewed focus on maritime space, as well as states' rights and responsibilities within this domain. As Steinberg wrote already two decades ago: ‘we are now entering an era when […] human interactions with ocean-space are ever more intense and complex’.

The effects of climate change on the oceans – provoking sea level rise and in turn, coastal erosion – have also become increasingly apparent in recent decades. That in turn may influence the delineation of maritime space: with changes in the baselines from which boundaries are determined, or in the characteristics of islands and territory, states may find themselves faced with new challenges, or be forced to re-visit old and unresolved disputes. This could cause further tension, even conflict.

As this happens, more and more attention is paid to the question of ‘who owns what’ at sea. Writing about the Political Geography of Oceans in 1975, Victor Prescott argued that ‘[s]tates seek to use the oceans for precisely the same reasons as they use their territory: to provide security and the opportunity for development’. This simple fact has not changed. States have rights and duties regarding maritime space, and, as this space gains attention, the delineation of ownership and rights is already rising to the fore of domestic and international politics.

In turn, these trends require that we better examine the notion of boundary-making at sea, and why states engage in disputes over these more generally. This article does exactly that, by investigating the notion of maritime boundaries more generally, and how states go about managing and settling related disputes, before discussing the future of maritime boundary disputes. It draws on the fields of political science, international law, and political geography, as well as scholarly work that has dealt with maritime boundaries specifically, in order to outline what maritime boundaries are, and why they matter, at a time when questions of ocean governance are increasingly on the political agenda.

States and territory

As a consequence of European state formation and finite territorial space, the concepts of territorial sovereignty and boundaries have come to define the modern state. As states formed, developed, and expanded, the need to define and uphold territorial boundaries became increasingly relevant. As Kratochwil argues: ‘boundaries are points of contact as well as of separation between a social system and an environment’. According to Ruggie, ‘[t]he notion of firm boundary lines between the major territorial formations did not take hold until the thirteenth century; prior to that there were only ‘frontiers’, or large zones of transition’. Kratochwil in turn holds that the 1659 Treaty of the Pyrenees between France and Spain established the first modern state boundary.

When the emphasis was placed on delimitation of all territory (terrestrial) in the 19th and 20th centuries, ‘frontier’ regions became a source of inter-state friction, as they lacked clear demarcation. Disputes emerged as states sought to expand their territory and define their borders. Even today, related border disputes exist.

The concept of territoriality developed slowly in what has become the international system. Because of European state formation and the finite territorial space in this part of the world, the concept of territorial sovereignty and boundaries have come to define the modern state and its relations to other states across the globe. ‘The rise of the bounded state as a political unit necessitated a concern with the drawing and redrawing of political borders and the formalization of territorial arrangements’.

Scholars thus agree that boundaries and the integrity of territory constitute a pillar of the modern state-system. Tracing the development of the norm of ‘territorial integrity’ in recent centuries, Zacher shows how the norm has undergone three phases: emergence, acceptance, institutionalisation. Examining all territorial conflicts between 1946 and 2000, he finds that the norm has indeed been commonly accepted through efforts and statements from the 1970s onwards.

The link between territory, sovereignty and conflict has been extensively proven. Vasquez, for example, shows how at least 79% of all wars between 1648 and 1990 were fought over territory-related issues. Disputes emerged – and still emerge – as states seek to expand their territory and define their external boundaries. The classic territorial dispute involves two states that disagree on where a border should go, either because one state does not recognise another state's border derived from a previously signed treaty, or because no treaty exists at all. More complicated disputes concern situations where a state has occupied the territory of another state, where a state does not recognise the sovereignty of another state, or where a state does not recognise the independence and sovereignty of a seceding state.

Territory has been the primary source of conflict between states over the last millennium, as states grew into existence, developed and matured. Territory and where to draw related borders have also not lost their importance. According to Wiegand, territorial disputes concern 41% of all sovereign states today. Hensel holds that interstate rivalry is still twice as likely to escalate into war when territory is involved. As noted by Weber, it is the monopoly on the use of force in a given geographical area that has come to characterise the modern state. The notion of territoriality has come to define the very idea of statehood.

Maritime space and boundaries at sea

At sea, however, ‘territoriality’ and the rights of states take on a different form. Inherently a distinct domain altogether, the way in which society has viewed, legalised, and utilised the ocean has evolved through history. In the 15th century, as European powers pursued colonisation in waters outside Europe, a debate was sparked concerning the status of oceans and what rights nations could have at sea. Ideas of a natural law of nations were retrieved from antiquity and the Middle Ages and used by scholars to argue for various understandings. Grotius became a frequently cited proponent of the right to peaceful commerce and that passage at sea is natural to the 'need of all men to ensure their survival'. Grotius argued for the freedom of the seas in order to counter Portuguese and Spanish claims to trade monopolies in the world outside Europe, when they divided the non-Christian world between themselves with the 1494 Treaty of Tordesillas.

The principle of the oceans as global commons came to clash with the idea that nations had rights and sovereignty in nearby waters. For example, Norwegian kings around ad 1000 had claimed sovereignty in waters adjacent to Norway stretching all the way to the British shorelines. In the 15th century, a version of this position was advanced by Britain, in response to Dutch attempts at dominion of the North Sea. As Maier describes it:

The Dutch sent a fishing fleet of two thousand ships protected by an armed squadron to the North Sea waters off the east coast of Britain; and John Selden argued that the ocean's bounty of cod was no more a public good, replenished by nature, than the land, and like the land it could be assigned to particular owners.

Legal scholars like Hugo Grotius (*mare liberum* – freedom of the seas) and John Selden (*mare clausum* – closed seas) have become symbols for two opposing ways of grappling with questions of maritime ownership and rights. These conceptions of the ocean, which also hold varying degrees of relevance for different maritime spaces (open seas and/or coastal zones), came to dominate approaches to the sea in the subsequent centuries, until the international community began negotiating a legal framework for the oceans in the 20th century.

Already in the 18th century, the territorial waters of states were defined as being a 'cannon shot' from land, an idea developed by van Bynkershoek in 1703, and later defined as three nautical miles (n.m.) by Galiami. The League of Nations attempted to codify international law concerning the oceans in The Hague in 1930, but never managed to reach agreement.

Then, in 1945, US President Truman declared that the natural resources of the continental shelf were under the exclusive jurisdiction of the coastal state. This rapidly advanced discussions on what rights states have beyond a limited (3 n.m.) territorial sea. Central to the success of this declaration was not only the US position of strength after the Second World War, but also how the principle entitled every coastal state to similar rights, and the fact that these sovereign rights did not depend on occupation. This was later codified in the 1958 Geneva Convention on the Continental Shelf, which preserved the prospect of exclusive coastal state jurisdiction over offshore seabed resources.

At the same time, some states started expanding their territorial seas from three to twelve n.m., as negotiations of an international regime for the oceans were underway. This led to conflict around adjacent and overlapping maritime spaces. The first and second Law of the

Sea Conferences were held in 1956–1958 and 1960, without reaching final agreement on the extent of the territorial sea or the extension of State rights and jurisdiction extending further offshore, beyond the territorial sea. Then followed decades of negotiations aimed at developing a coherent international legal framework for the oceans; in 1982, most states agreed on a comprehensive legal regime: the United Nations Convention on the Law of the Sea – UNCLOS.

When it was agreed, UNCLOS provided the legal rationale for states to implement new maritime zones in addition to the 12-n.m. territorial sea, with a 200 n.m. 'resource' or 'fisheries' zone (what became termed the Exclusive Economic Zone – EEZ), driven largely by growing awareness of the possibilities for marine natural resource extraction (hydrocarbons, fisheries, minerals) and the desire of states to secure potential future gains.

Already in 1952, Peru, Chile and Ecuador had made claims of exclusive rights out to 200 n.m., seeking to reap benefits of an expansion in fisheries. These initial claims wetted the appetite of many coastal States and after a diversity of claims were put forward – because other states also claimed resource zones, including exclusive fishery zones in the 1950s, 60s and 70s – the international community agreed on the legal regime of the EEZ as defined under Part V of UNCLOS.

When states began expanding their maritime zones, the notion of straight baselines also came to the fore. This is the line drawn along the coast from which the seaward limits are measured. Instead of drawing the baseline of a country's maritime zone along its coast following all features, some states with indented coastlines or with multiple fringing islands started to draw straight lines along the coast, in essence claiming more maritime space (territorial sea) than a country with an even coastline. The UK took a case against Norway concerning this practice to the ICJ, which in 1951 endorsed the Norwegian approach regarding straight baselines with the Anglo-Norwegian fisheries case.

In consequence, states had in the span of a few decades gone from having control over a relatively limited (often just 3 n.m.) maritime domain, to having an international agreement on expanding the length of the territorial sea where states have full sovereignty to a maximum of 12 n.m., while also adding an EEZ where states have certain sovereign rights for an additional 188 n.m.

Moreover, with UNCLOS it was concluded that states have sovereign rights on the continental shelf up to 200 n.m., and, when relevant, beyond 200 n.m. where the shelf is a prolongation from the land mass of the coastal state by submitting this information on the limits to the Commission on the Limits of the Continental Shelf (CLCS). The limit of such claims was determined to be up to 350 n.m. from a country's baseline, or not exceeding 100 n.m. beyond the point where the seabed is at 2500-m depth (2500-m isobath).

With 168 ratifications as of 2020, UNCLOS has become part of the larger framework of international politics and law. Many of its provisions today reflect customary international law, which is universally binding on all states, and not limited to UNCLOS parties only. This legal-political regime that took decades to develop, has enabled states to reach a relative agreement on how to tackle issues that first arose centuries ago. As Keohane and Nye, put it in 1977: 'there is very little direct functional relationship between fishing rights of coastal and distant-water states and rules for access to deep-water minerals on the seabed; yet in conference diplomacy they were increasingly linked together as oceans policy issues'.

However, a central bone of contention that remained – and remains – is how and where to delineate maritime space and related rights to resources on the seabed and in the water column.

The process of drawing lines at sea

As states expanded their maritime zones, a number of maritime boundary disputes between neighbouring states emerged. Different states have developed different interpretations of how to draw boundary lines at sea. These relate to which map projection to use when drawing the boundary; whether or not to base the boundary on a median principle or a sector principle; the shape of the geographical attributes of the land from which the maritime boundary is derived – i.e. the direction of the coastal front and the weight given to islands and submarine features; and which portion of the coast is relevant to delimitation.

When states expanded their fisheries zones or EEZs to 200 n.m., existing maritime boundary disputes were enlarged as the disputed areas grew in size. Boundary disputes also arose or became more significant between the maritime zones of 'adjacent' or 'opposing' coastal states. Some of these boundary disputes were settled immediately, but a large number remain today. The map (Fig. 1) display how the EEZs of countries bundled together are contiguous and thus also need a clear boundary.

As maritime zones and state interest in them rose on political agendas in the middle of the 20th century and the need for their delimitation increased, the concept of 'equidistance' came to the fore. This guiding principle encountered another principle, namely that of equity. The balance between these two principles has shifted over the last half-century, and this tension is crucial in understanding how states settle their maritime boundary disputes (and the principles that guide such processes).

Equidistance entails a boundary that corresponds with the median line at an equal distance (equidistance) at every point from each state's shoreline. Some scholars have taken the position that this was codified under Article 6 (2) of the 1958 Geneva Convention on the Continental Shelf (Geneva Convention), which directs states to settle overlapping claims by reference to the equidistance principle. As St-Louis points out, with the Geneva Convention, states ‘intended to have equidistance applied as the basic principle, to be deviated from only in the case of special circumstances’.

Illustration I: The Exclusive Economic Zones in Oceania/the South Pacific

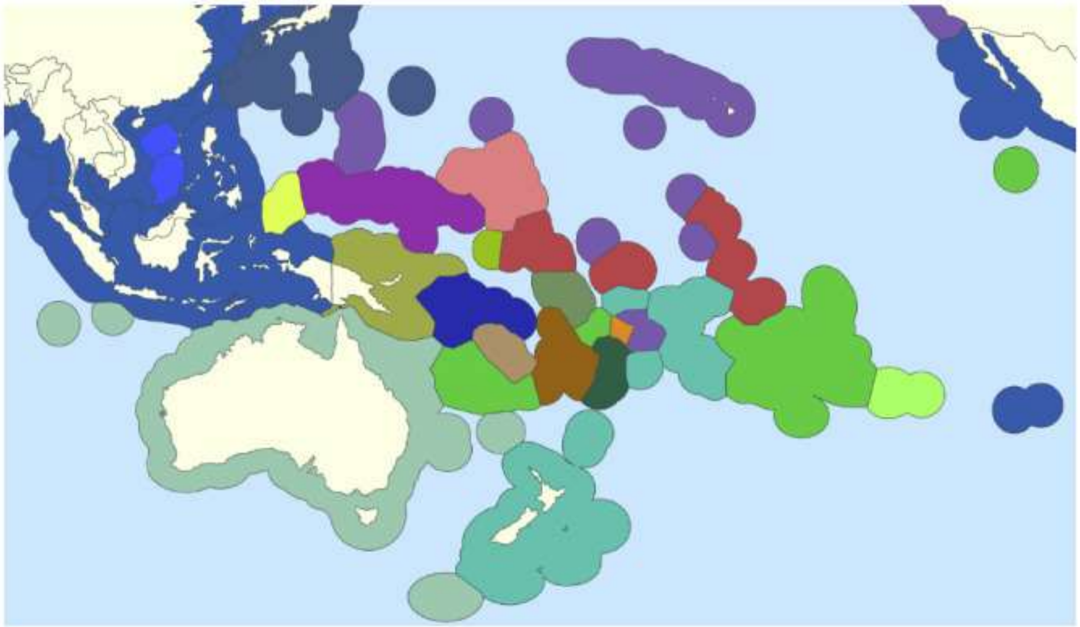

Fig. 1. Displaying the numerous EEZs in the South Pacific and how these are adjacent/overlapping and thus have been – at various times – in need of delimitation. Source: Wikimedia.

However, international law is not a static set of rules, but rather a process that evolves through time. The attention given to ‘relevant’ or ‘special’ circumstances led to varying interpretations among states. In addition to coastal length and other geographical variables, security interests and the location of natural resources have at times been accorded weight in a few international court rulings. This has been termed ‘equity’, as a principle distinct from ‘equidistance’.

Equity thus acquired importance in delimiting disputes the maritime domain. In particular, the North Sea Continental Shelf Cases between Denmark, West Germany and the Netherlands from 1969 pitted the principle of equity and equidistance against each other. Denmark and the Netherlands argued for the use of equidistance, whereas West Germany argued for a ‘just and equitable share’ of the disputed area. Outlining its approach to maritime boundary dispute settlement in general, the Court held that delimitation must be ‘effected in accordance with equitable principles … taking account of all the relevant circumstances’.

In addition, the Court introduced the concept of the 'natural prolongation' of the continental shelf – that also the geophysical attributes of the shelf in question matter for delineation between states. Although the ICJ specified that there was 'no legal limit' to the number of factors that were relevant to delimitation of the shelf, these were initially defined as geology, the desirability of maintaining unity of the natural resource deposits, and proportionality (the ratio between the water and shelf areas attributed to each state and the length of their coastline).

States were thus not deemed to be obliged to apply the equidistance principle: equity was seen as extending beyond mere equidistance. Robert Kolb argues that the ICJ's rulings in the 1960s and 1970s changed the jurisprudence from method (equidistance) to objective (equity). This entails that not equidistance, but fairness on its own was introduced as a guiding principle for maritime dispute resolution.

A case that exemplifies this came about in 1980, when Denmark extended its 200-mile fisheries zone northwards along the east coast of Greenland (Denmark being the colonial power operating on behalf of Greenaldn), creating an overlap with the Norwegian zone on the northwest side of the island of Jan Mayen. Denmark argued that it deserved a larger proportion of this disputed zone because Greenland's coast is longer than that of Jan Mayen, and because the population of Greenland deserved privileged access to fish stocks. Norway held firm to the equidistance principle; after years of unsuccessful negotiations, Denmark submitted the dispute to the ICJ in 1988.

The Court concluded that the longer length of the Greenland coast required a delimitation that tracked closer to Jan Mayen; and that the maritime boundary line should be shifted somewhat eastwards to allow Greenland equitable access to fish stocks. However, the Court rejected other arguments concerning population size and socio-economic conditions, declaring them irrelevant to the final determination of the boundary line.

Scholars have outlined how UNCLOS negotiations in the late 1970s concerning maritime boundary dispute resolution reached a compromise between two groups of states: those that wanted the equidistance principle enshrined, and those that wanted equity as the guiding principle without specifying any particular method. Equity as a principle was incorporated in 1982 UNCLOS article 74 (delimitation of the exclusive economic zone) and article 83 (delimitation of the continental shelf), with the wording: 'The delimitation of the exclusive economic zone/continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law … in order to achieve an equitable solution'. Kaye argues that 'The result was an acceptable (if fragile) compromise, but one that did little to clarify the method by which delimitation was to take place'. The UNCLOS regime consequently does not specify how states are to settle maritime boundary disputes – it merely calls for 'an equitable solution'.

As these cases and developments show, how states initially divided maritime space amongst themselves became questions where maritime law rested on the principles of both equity and equidistance. Thus, the process of settling a maritime boundary has not very straightforward As Finnemore and Toope put it in 2001:

If one considers the decisions of the International Court of Justice in boundary delimitation cases, for example, the results are clearly legal, influential, and effective in promoting compliance, but they are highly imprecise.

However, in rulings in recent decades, the ICJ has favoured a stricter interpretation of which relevant circumstances to include, placing emphasis on geographical factors in a three-stage approach in delineating maritime boundaries, as outlined in the Black Sea Case between Romania and Ukraine in 2009. First, a ‘provisional delimitation line’ between the disputing countries is established, based on equidistance. Second, consideration is given to of ‘relevant circumstances’ that might require an adjustment of this line to achieve an ‘equitable result’. This is where ‘equity’ is considered. Third, the Court evaluates whether the provisional line would entail any ‘marked disproportion’, taking the coastal lengths of the states into consideration.

Concerning the continental shelf vis-à-vis the EEZ, initially, the rules/process to settle the two kinds of boundaries were different. The emphasis on ‘natural prolongation’ and the scientific elements to prove it involved using a different approach for continental shelf delimitation. However, as state practice and court rulings developed after the 1969 North Sea Continental Shelf Cases, the principle of natural prolongation lost its hold. The main reason was the introduction of the 200-n.m. concept, where states, regardless of submarine features, immediately acquired rights over the seabed and water column out to 200 n.m. from shore. With the new rules in UNCLOS and the move away from ‘natural prolongation’ as a basis of entitlement to the continental shelf, courts have adopted a uniform approach to maritime boundary delimitation for both the water column and seabed.

This does not mean, however, that the idea of natural prolongation has become totally irrelevant. As Kaye argues, it has relevance if the submarine feature is ‘vast and significant’. Further, the notion of natural prolongation has remained the determining factor concerning ‘extended’ continental shelves, as states must use scientific data concerning the seabed in its submission to the CLCS as described in section 3. Then the geomorphology (and to a lesser extent, the geology) of the seabed and the ability of states to prove their natural extension come into play.

In summary: The concept of boundary-making at sea is in itself based on abstract lines on the map, and not borders that physically separate the maritime domains of two countries. States have leaned on – albeit often deviated from – legal principles set out in international Court rulings as well as UNCLOS as they attempt to agree on how to draw lines at sea.

Maritime boundary disputes today

The principles that guide the drawing of maritime boundaries are one thing, how states go about settling maritime boundary disputes is something rather different. Turning to how – practically – states manage to agree on boundary disputes, states may agree on a mutual solution after bilateral negotiations; or after having attempted to negotiate in good faith, they can submit the case for adjudication at the ICJ or another international Court like ITLOS (International Tribunal for the Law of the Sea); or they can use third-party arbitration like the Permanent Court of Arbitration (PCA).

However, because of the need to compromise, disputes are generally settled through bilateral negotiations without the use of international courts. The uncertainty as to outcome of international adjudication and arbitration does not inspire states to bring cases before courts and tribunals. Resolving a dispute bilaterally leaves states with the option of a creative resolution not confined by the international rules applied by courts and tribunals. Moreover, litigation is costly and in the maritime domain, the process often requires a great deal of scientific data, making it expensive for states to pursue delimitation actively.

Consequently, more than 90% of maritime boundaries have been settled through bilateral negotiations, where states are free to choose whichever approach they prefer when delineating maritime space. However, studies show that although states choose bilateral negotiations to avoid the shackles of international adjudication/arbitration, they still lean on, and mostly adhere to, the legal principles as set out by international court rulings.

Furthermore, if we compare with how the state emerged as geographical unit, in the maritime domain, as opposed to land, conflict over boundaries, sovereignty and jurisdiction have generally been resolved peacefully through negotiations and adjudication/arbitration. As outlined in the previous section, international law provides the framework for settling maritime disputes. The use of pure power in determining the limits of state jurisdiction at sea has in practice been ruled out in the post-World War II order, also because few states have the military and economic capacity for protracted conflict at sea (or see the benefit from such efforts).

This does not, however, mean that all disputes over maritime space and maritime resources are settled in an orderly way. Albeit central in guiding the process, as shown here international law does not always provide a clear pathway to settling maritime boundaries. As argued by Jagota: 'Maritime boundary, like territorial or land boundary, is a politically sensitive subject, because it affects the coastal State's jurisdiction concerning the fishery, petroleum and other resources of the sea as well as concerning the other uses of the sea'. As Weil further argues: 'Maritime boundaries, like land boundaries, are the fruit of the will of States or the decision of the international judge, and neither governments nor judges limit themselves simply to scientific fact.'

Historic resource conflicts and contemporary disputes around the world make clear the economic and political interests involved in maritime space. An unsettled maritime boundary can hinder economic exploitation of offshore resources. Similarly, it may complicate the management of transboundary fish stocks. At times, states engage in indirect conflict over such disputes, whether by arresting fishing vessels from the other party to the dispute, or by engaging with navy or coast guard vessels directly. Several disputes became entrenched, as states leaned on historical, legal and economic arguments to support their positions.

Therefore, today maritime boundary disputes exist on all continents. Settlement of outstanding disputes continues to take place, but many disputes remain, ranging from active and conflictual to dormant, or successfully managed. Prescott and Schofield highlight that 'out of 427 potential maritime boundaries, only about 168 (39%) have been formally agreed, and many of these only partially'. Other figures concerning the total number of maritime boundary disputes exist, with varying degrees of specificity. Some estimate that there are approximately 640 maritime boundary disputes, with around half resolved. Newman claims there are 512 maritime boundaries in total, again half of them resolved.

A dataset by Ásgeirsdóttir and Steinwand9 provides a more general overview of the total number of disputes (settled/not settled by 2008) per country and per continent. These figures give a rough idea of the global outreach of this phenomenon, not confined to one part of the world or a specific group of states. Unsurprisingly, large countries with more access to maritime space have a larger number of maritime boundaries. Russia, China, Canada, and Australia have long coasts, resulting in multiple neighbours and in turn multiple maritime boundaries. Also, areas like the Mediterranean and the Caribbean, where numerous small states are clustered together – such as Turkey, Italy, Greece, and Egypt; or Colombia, Venezuela, and Cuba – have a large number of maritime boundaries. Moreover, countries with overseas colonies and/or dependencies – such as France, the United Kingdom (UK), Spain and the USA – have multiple maritime boundaries, settled as well as unsettled.

This help to pinpoint exactly how common maritime disputes – settled as well as unsettled – are around the world. Most countries (157 to be exact) have had a maritime boundary in need of settlement at one point since 1950. In 2008, there were still 228 disputes (54.7%) that remained unsettled, out of a total of 417. If compared to borders on land, an interesting paradox emerges: Although the chance of outright conflict at sea over where to delineate boundaries is rather low, the political, economic and historic interests in the same boundaries have made it difficult for states to concede in bilateral negotiations. Consequently, more than half of all boundaries at sea are still disputed.

The future of maritime boundary disputes

Maritime boundary disputes are acquiring rising importance for states in the 21st century, as human interactions with ocean-space are becoming ever more intense and complex.

Exogenous and endogenous changes are underway in the maritime domain. Changes deriving from resource pressures, international commodity prices, and new technology are exogenous to the ocean, driven by economic developments.

Rising sea levels and other oceans changes resulting from climate change, and changing resource distributions, are endogenous to the maritime domain, with a specific geographic component. Disputes over maritime boundaries, access rights and interpretation of legal treaties or of UNCLOS have been left unresolved for decades. These are now being brought to the agenda by the mentioned trends, at times even leading to direct clashes at sea between the involved states.

For example, with shipping increasing in territorial waters across the globe, issues concerning access rights, status of sea-lanes, and environmental protection are at the forefront of international debates. Within and across EEZs, climate change and other environmental factors are causing variability in the spatial distribution of fish stocks, challenging established management regimes. The processes for determining the limits of continental shelves beyond 200 nautical miles are becoming increasingly relevant. And in the high seas, there are ongoing international negotiations to develop legal instruments for designating and managing MPAs beyond national jurisdiction. New political challenges are consequently emerging, as states hold differing views on access rights, marine environmental protection and how to exploit and manage marine resources.

Steinberg, in his The Social Construction of the Ocean, shows how the idea of maritime space has changed throughout history. There are many ways of thinking about the ocean: as a territorialised extension of land; as a domain where only limited control can be exercised; and as a great void. In particular, the role of oceans in international affairs changed with the introduction and adoption of UNCLOS. Steinberg argues that states have desired to keep the oceans free of conflict. Baker supports this, finding that states have become behaviourally conditioned by an international norm against the ‘forceful acquisition of maritime spaces and resources of other states’.

However, the way we see maritime space and the related boundary-making is not static. ‘The social construction of ocean-space, like that of land-space, is a process by which axes of hierarchy, identity, cooperation, and community are contested, establishing bases for both social domination and social opposition’. Steinberg conclude – in 2001 – by arguing that ocean space today is under pressure, as the various ways of conceiving it are clashing. Greater territorialisation (for exploitative purposes) clashes with the idea of oceans as free for all, as well as the increasingly prevalent ideas of ‘stewardship’.

From a purely functional perspective, maritime ‘territory’ has become more valuable for states. With the sea having emerged from being literally a great blue empty space to an institutionalised policy domain, the expansion of activities taking place at sea and the growing reliance on maritime activities have resulted not only in greater importance being placed on the outcome of maritime boundary disputes, but also in shifts in the political relevance and usage of the maritime domain. Today, oceans matter more than before for states in their power-relations vis-à-vis other states, as well as for political leaders seeking to sway domestic audiences.

Does that mean that maritime space has indeed come to take on the characteristics of traditional territory on land? It is essential to understand the difference between land and maritime space in the legal process of settling a maritime dispute. The concept of occupation – crucial in establishing title to land territory – does not hold the same relevance in the maritime domain. Occupation of the continental shelf itself could not separately lead to acquisition of the shelf, contrary to sovereignty over land territory. A marked separation between land and sea thus became apparent with UNCLOS, as rights to the latter derive from the former.

Consequently, what we are discussing with regard to states and maritime space are sovereign rights to resources in the water column or on the seabed, not exclusive rights to the entire maritime 'territory' in question, apart from their territorial sea. States cannot deny passage through their EEZs; they may only deny actors access to marine resources and apply environmental regulations in their maritime zones. For delimitation in the maritime domain, both states may have valid legal claims to a given area, in which case it becomes a matter of 'reasonable sacrifice such as would make possible a division of the area of overlap', or even joint sharing – as with oil and gas resources or a joint fisheries zone.

Still, states' and state leaders' preoccupation with marine resources as well as the general strategic value of extended maritime space, together with technological developments that enable greater control over the maritime domain (coast guard vessels, satellites, drones, subsea installations, etc.) will not render current disputes over the same space any less relevant. It could be reasonable to expect that as maritime space becomes increasingly relevant for states, related outstanding boundary disputes will be more difficult to settle.

Additionally, as maritime disputes become infused with intangible dimensions and issues concerning symbolism and engaged domestic audiences, the characteristics of dispute 'containment' at sea could be changing. Vasquez and Valeriano, describe a conflict as spiralling when it becomes infused with symbolic qualities. It might be assumed that maritime disputes – whether concerned with fishing rights or boundaries – would be a simple matter of delineating rights and ownership, given the tangible character of such disputes. Huth, for example, has argued that 'the political salience of the [maritime] dispute is generally limited, in contrast with the importance and attention often given to land-based disputes'.

However, when a maritime dispute reaches the political agenda, there are (domestic) actors who stand to benefit from infusing it with intangible dimensions like ‘national pride’ or ‘being cheated out of what is ours’. Contrary to popular belief, maritime disputes may assume some of the same characteristics as disputes on land. Although disputes over ocean space may initially be more concerned with tangible questions of resource delimitation and ‘who owns what’, they too can become infused with symbolism and intangible characteristics.

This concerns not only the economic interests of the actors involved, but also wider ideas of symbolism and identity. States (and their inhabitants) do care about their maritime disputes, even those of limited economic value, and increasingly so. Once a dispute has become politicised, any resolution of the dispute carries domestic political risk. Indeed, even undertaking negotiations may be risky, which explains why government officials sometimes refer to negotiations as ‘discussions’. As Kleinsteiber, has noted, regarding disputes in the South and East China Seas:

While these disputes have the potential to die down if they are ‘shelved’ in favour of pursuing more mutually beneficial goals, they can flare up at any time, especially when driven by nationalist sentiments. This has the potential to be the troubling future of maritime conflict, when conflicts in question may be impossible to separate from national identity.

In a study of a 2005-incident between the Norwegian Coast Guard and a Russian trawler, Fermann and Inderberg show the effect of the Norwegian media as they were quick to broadcast the event live on national television, in turn helping to spur politicians into action. The role of maritime space in domestic politics has arguably changed over the course of decades – from a functional space that inspired limited engagement, to that of a national space requiring ‘protection’ and defence. In conjunction with this, the function of ocean space itself has expanded, with more and more resources being harvested at sea, ranging from fisheries to hydrocarbons.

One the one hand, we therefore have the idea of the ocean and states' maritime space as a legalised, institutionalised and governed domain, where states tend to abide by the rules set forth by UNCLOS because it is in their common interest to do so. On the other hand, greater domestic engagement is also spurred by recognition of the ocean as a policy issue in need of common efforts to combat everything from sea-level rise to plastic pollution. As put by a Norwegian official from the 2010-rounds of negotiations with Russia: ‘A boundary itself is just one element. More important are those normative factors increasingly related, such as military interests, economy and larger security considerations’. Greater utilisation of oceans, or national maritime zones, in domestic politics is a trend likely to increase as maritime space continues to rise on the agenda.

The maritime domain has certain characteristics that nevertheless keeps it separate from the terrestrial domain. There are geographical barriers that hinder prolonged interaction between the actors concerned. Maritime boundaries are also a construct of international law: and (coastal) states seem to depend on the UNCLOS regime, and also desire to apply the regime to their own advantage. Also, as fisheries continue to grow in importance in terms of livelihoods and a source of protein, certain characteristics of fisheries and maritime boundaries might become more pronounced, spurring cooperation. As states fulfil their UNCLOS obligation to manage transboundary fish stocks, the continued development of management regimes might render the exact location of a maritime boundary less important for this specific purpose. Further, the use of complex resource-sharing mechanisms, or the increasing focus on developing adequate management solutions concerned with transboundary fish stocks, as well as the establishment of protected areas in tandem with greater environmental awareness over the state of the oceans, might make the exact location of the maritime boundary itself (if not the maritime domain) less important.

Establishing agreements on such mechanisms is still necessary, but perhaps with a slightly different focus than when settling maritime boundaries in the traditional sense. Managing the disputed maritime area might also, in some instance be an easier, and even preferred, solution, when tensions are low and relations stable. That being said, it does not seem likely that international ocean politics and related issues of resource management, sovereignty, and rights at sea are likely to become less relevant in years to come.

PROTRACTED MARITIME BOUNDARY DISPUTES AND MARITIME LAWS

Introduction

Maritime boundary dispute is an alarming issue all over the world. The countries are now becoming very much concerned about their marine resources because the world economy has turned into ocean-based resources termed as Blue Economy. So, every coastal state is aware of their maritime boundary for exploring and exploiting both its mineral and its food resources. According to the Law of the Sea Convention, the length of territorial sea is 12 nautical miles, contiguous zone is 24 nautical miles, and exclusive economic zone (EEZ) is 200 nautical miles from the baseline (UNCLOS 1982, Art. 3, 33, and 57). But practices show that larger limit of the different maritime zones is existing among the states. Every state claims jurisdiction to its own interest. As a result, maritime disputes are emerging among different coastal states. When the dispute gets serious, they try to settle it according to different methods of the settlement, but in most of the cases, the parties of the dispute fail to reach an agreement on settlement. Many bilateral or multilateral talks are held among them which delay the settlement. United Nations Convention on the Law of the Sea refers the peaceful method of the settlement of maritime dispute but states must be in consensus at first to accept the jurisdiction of this Convention. Otherwise, they will not be entitled to get any advantages of the Convention. Therefore, the purpose of this paper is to deal with the protracted maritime boundary dispute and maritime laws in terms of finding out appropriate means and measures as well as drawing attention to address some concepts which as act as guidelines for the countries that are in dispute due to share coastlines.

Maritime boundary

Generally, a maritime boundary is a theoretical division of the Earth's water surface areas using physiographic or geopolitical criteria. Thus, it usually bounds areas of exclusive national rights over marine resources, encompassing maritime features, limits, and zones. According to United Nations Convention on the Law of the Sea, maritime boundary represents the borders of a maritime nation which serve to identify the edge of international waters. Normally, a maritime boundary is demarcated at a particular distance from a jurisdiction's coastline.

Maritime boundaries exist in the context of territorial waters, contiguous zones, and EEZ; they do not cover lake or river boundaries that are considered in respect of land boundaries. Some maritime boundaries have remained indeterminate despite efforts to clarify them. This is explained by an array of factors, some of which involve regional problems. The delineation of maritime boundaries has strategic, economic, and environmental implications.

Maritime boundary dispute

Maritime boundary dispute is a dispute relating to demarcation of the different maritime zones between or among states. It is a common scenario all over the world. Of the World's 512 potential maritime boundaries, fewer than half have been agreed, creating uncertainty and room for disputes for the remainder (Newman, N.). In addition, maritime boundary disputes regularly occur over commercial, economic, and security interests and are a common but underrated investment risk in the energy sector (Newman, N.). Every coastal state is becoming very much concerned about the marine resources because the world economy is turning into the ocean-based resources which are being termed as Blue Economy. So, all the states claimed their different maritime zones according to their own interest. Maritime boundary dispute is occurs mostly due to the overlapping claims between adjacent or opposite states for 12 nautical miles territorial seas, 200 nautical miles EEZs, and continental shelves which may extend beyond 200 nautical miles and due to the contesting claim of sovereignty over the same island or the same area of mainland, e.g., Bakassi peninsula in ICJ Cameroon v. Nigeria (ICJ 1994). The maritime boundary disputes between Bangladesh, India, and Myanmar in the Bay of Bengal were long-standing disputes which have already been settled by the International Tribunal for the Law of the Sea (ITLOS) and Arbitral Tribunal peacefully under the Law of the Sea (LOS) Convention (ITLOS 2012; PCA 2014). The dispute between Bangladesh and Myanmar occurred due to the overlapping claim over their EEZ and continental shelf, and the dispute between Bangladesh and India occurred due to the overlapping claim over their EEZ and continental shelf and the contesting or controversial claim over South Talpatti/New Moore Island.

Protracted maritime boundary dispute

When a maritime dispute remains unresolved for a long time or when it takes a long time to be settled or when it cannot be settled within a reasonable period of time, it is considered as a protracted maritime dispute. Maritime boundary dispute settlement among states is an international phenomenon which is regulated by international laws. However, international law helps the parties to settle their dispute if they ask for advantage of it by their agreement. Otherwise, it is unable to do anything on a particular disputed issue spontenously. In case of maritime affairs, the United Nations Convention on the Law of the Sea (UNCLOS 1982) is the Specific codification which was promulgated in 1982 and came into force in 1994.

A dispute is delayed to be settled when the countries fail to reach a permanent solution due to various national and international obstacles. Sometimes, the governments of the coastal states give priority to other bilateral issues with the adjacent coastal states other than maritime disputes. They suffer from lack of confidence to win in the dispute. So, they delay to take necessary steps to settle the issue. The government is afraid of the people of the country because the people are the source of state power in a democratic country. So, the government does not give an opportunity to the opposition party making any issue by which they can position against the government with the people of the country. In the same way, the people do not pressurize the government to settle the dispute due to their ignorance about the sea and the sea resources. Another reason for delayed settlement of a maritime dispute is less expertise about the law of the sea. Due to these domestic obstacles, the maritime boundary dispute between or among states is protracted.

When a maritime dispute occurs between or among states, the first and foremost step to settle the dispute is negotiation between them. Mostly, the parties of the dispute fail to negotiate to arrive at a solution. In most of the cases, the maritime boundary dispute occurs due to the overlapping claims in different maritime zones and the contesting claims of sovereignty over the islands. It can be settled by their joint survey, but most of the time, the parties of the dispute fail to reach an agreement to do this. On the other hand, the international law has nothing to do until the parties make an agreement to take the advantage of an international instrument by signing and ratifying it.

Article 287 of the United Nations Convention on the Law of the Sea states that when signing, ratifying, acceding, 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 International Court of Justice (ICJ),

c) an arbitral tribunal constituted in accordance with Annex VII,
d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein (UNCLOS 1982).

So, after the failure of all the efforts between disputed coastal states when they agree to settle their dispute in accordance with the Convention, they create another problem with regard to the selection of abovementioned means for the settlement. In most cases, they do not agree to accept the jurisdiction of the same organ. This is a common cause to delay the settlement. In Bangladesh-Myanmar maritime boundary dispute in the Bay of Bengal, Bangladesh wanted to settle it by the ITLOS but Myanmar refused to accept the jurisdiction of the Tribunal. Later on, Myanmar agreed with Bangladesh and the 40 years long-standing maritime boundary dispute between these two nations was settled by the ITLOS (ITLOS 2012). In the same way, Bangladesh wanted to settle her maritime boundary dispute with India in the ITLOS but India wished to settle it in Arbitral Tribunal. Bangladesh accepted their claim and settled the dispute in 2014 by Arbitral Tribunal (PCA 2014). Another important reason for protracting maritime boundary dispute is the selection of the method of boundary delimitation. Almost in every case the coastal states fail to choose the method whether it be "equidistance or equitable principle." In the maritime boundary delimitation case between Bangladesh and Myanmar as well as Bangladesh and India it was the most important question before the Tribunal. Bangladesh claimed the equitable principle due to the special circumstances of her coast, but India and Myanmar always claimed the equidistance principle.

Codification of the maritime laws

The first conference concerning the Law of the Sea was held in 1930 in Hague and named "The Hague Conference for the Codification of International Law 1930." It was initiated by the League of Nations between 13 March and 12 April 1930 and was attended by 47 governments and an observer. The Conference was unable to adopt a convention concerning territorial waters as no agreement could be reached on the question of the breadth of territorial waters and the problem of the contiguous zone. There was, however, some measure of agreement regarding the legal status of territorial waters, the right of innocent passage, and the baseline for measuring the territorial waters.

The First UN Conference on the Law of the Sea was held in Geneva in 1958 in which 86 states participated. In this conference, the following four Conventions were adopted (UNCLOS I, 1958):

1. The Convention on the Territorial Sea and the Contiguous Zone,
2. The Convention on the Continental Shelf,
3. The Convention on the High Sea,

4. The Convention on Fishing and the Conservation of the Living Resources of the High Sea.

Through these Conventions, the Law of the Sea began to change from customary law in to codified international law and it mainly reflected the will of Western powers of the sea, ignoring the interests of the developing countries.

After that, the Second UN Conference on the Law of the Sea was held in Geneva in 1960. In this Conference, participants were trying to settle the question of the breadth of territorial sea, but failed because of the irreconcilable economic, political, and military conflicts among the states on the oceans.

So, this Conference failed to agree on the British 6 + 6 compromise (6 miles territorial sea + 6 miles contiguous zone) proposals.

Finally, the third UN Conference on the Law of the Sea was held from 1973 to 1982 in which 167 independent states and more than 50 independent territories participated; the Movement for the Liberation of National Liberation and international organizations were represented by observers. In this Conference, The United Nations Convention on the Law of the Sea was adopted by voting of 167 independent states. One hundred and thirty states voted in favor of this convention, four states (USA, Israel, Turkey, and Venezuela) were against this, and 17 states abstained.

The Convention provides the legal framework to be followed for the conduct of various maritime activities and it is the most important international legal instrument of the twentieth century following the Charter of the United Nations. To date, 167 countries and the European Community have joined in the Convention. However, it is now regarded as a codification of the customary international law on the issue.

Subject matter of maritime boundary disputes and maritime laws

Maritime boundary dispute mostly relates to the delineation of the baseline and delimitation of the territorial sea, the EEZ, and the continental shelf within or beyond 200 nm between or among the coastal states. Maritime boundary dispute is a result of overlapping claims over the abovementioned maritime zones by coastal states. The United Nations Convention on the Law of the Sea, 1982 is the core law of looking after the different maritime disputes. This instrument has few limitations in respect of implementation upon the states of the dispute. Unless and until the parties of the dispute seek solution under the Convention, the dispute cannot solved.

Baseline

The baseline is the line from which the outer limits of the territorial sea and other coastal zones are measured. So, it is the foundation for claiming subsequent maritime zones to the

Sea. Article 7 of the LOS Convention states two types of baseline, such as normal baseline and straight baseline. According to this article, the normal baseline for measuring the breadth of the territorial sea is the low-tide waterline along the coast and the method of demarcation of a normal baseline is comparatively easy. In this case, the determination of subsequent maritime zones from the baseline is also easier. The provisions on straight baselines contained in Article 4 of the 1958 Geneva Convention and, subsequently, Article 7 of UNCLOS were in large part motivated by the ruling of the ICJ in the Anglo-Norwegian Fisheries case (ICJ 1951). According to article 7 of LOS Convention, a straight baseline can be drawn in two circumstances: first situation is where the coastline is deeply indented or if there is a fringe of islands along the coast in its immediate vicinity; second is where because of the presence of a delta and other natural conditions, the coastline is highly unstable. In both cases, the appropriate points may be selected along the furthest seaward extent of the low waterline for the purpose of drawing the straight baseline. Demarcation of baseline is very important for delimitation of the subsequent maritime zones and the settlement of maritime boundary delimitation dispute with adjacent coastal states because according to the ruling of ICJ, “the delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act because of only the coastal State is competent to undertake it but the validity of the delimitation with regard to other States depends upon international law” (ICJ 1951).

In the Bay of Bengal, delineation of straight baseline following “depth method” by Bangladesh was opposed by India and Myanmar from the beginning although it was not inconsistent with the provision of Article 7 of LOS Convention. Article 7(2) of LOSC makes an exception from normal baseline (low watermark) where the coastline is highly unstable because of the presence of a delta and other natural conditions (UNCLOS 1982). So, Bangladesh’s claim was valid with this expression “other natural conditions” because the coastline of Bangladesh is highly unstable due to the cumulative effects of river floods, monsoon rainfall, cyclonic storms, and tidal surges which have contributed to a continuous process of erosion and shoaling (Platzoeder 1984). International Law also does not restrict delimitation of a sea area by taking into account the local requirements. But this rejection of India and Myanmar was the vital issue to delay the maritime boundary dispute settlement among Bangladesh, India, and Myanmar in the Bay of Bengal (ITLOS 2012; PCA 2014).

Territorial sea

Territorial sea, as defined by the United Nations Convention on the Law of the Sea (UNCLOS 1982), is a belt of coastal waters extending to almost 12 nautical miles from the baseline of a coastal state. Article 3 of the LOS Convention states the breadth of the territorial sea as a limit not exceeding 12 nm from the baseline. Article 15 of the Convention makes provision for the delimitation of the territorial sea. It specifies that where the coasts of the two states are opposite or adjacent to each other, neither of the two states is entitled to extend its territorial sea beyond the median line, every point of which is equidistant from the nearest points of the baseline of both the states. The second part of Article 15 allows the limit of the territorial sea beyond median line if it is necessary by reason of historic title or other special circumstances. Sometimes, this 12 nautical mile territorial sea faces the challenge of neighboring or adjacent coastal states because of establishing the claimed baseline as valid.

Exclusive economic zone and continental shelf

Generally, EEZ refers an area of coastal water and seabed within a certain distance of a country's coastline, to which the country claims exclusive rights for fishing, drilling, and other economic activities. An EEZ is a concept adopted at the Third United Nations Conference on the Law of the Sea (UNCLOS 1982), whereby a coastal state assumes jurisdiction over the exploration and exploitation of marine resources in its adjacent section of the continental shelf, taken to be a band extending 200 miles from the shore.

Continental shelf refers the area of seabed around a large landmass where the sea is relatively shallow compared with the open ocean and it is a geologically part of the continental crust. Article 74 of the LOS Convention provides mechanisms for the delimitation of the EEZ and Article 83 provides the procedure for the delimitation of the continental shelf. In both cases, the respective provisions use the same language, in that delimitation EEZ and continental shelf with opposite or adjacent states should be effected by agreement on the basis of international law in order to achieve an equitable solution.

Article 76 of the UNCLOS defines the continental shelf as follows:

> *"The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance". (UNCLOS 1982)*

According to the first part of paragraph 1, the natural prolongation of the land territory is the main criterion. In the second part of that paragraph, the distance of 200 nm is in certain circumstances the basis of the delimitation of the continental shelf. The criteria of natural prolongation have been endorsed by the ICJ and an arbitral tribunal in the Continental Shelf case (ICJ 1969), the Anglo-French case (ICJ 1977), and the Gulf of Maine case (ICJ 1984). However, in its landmark judgment in the Libya-Malta case, the ICJ decided to do away with geophysical arguments, at least in relation to those areas within 200 nm of the coast.

Settlement of the dispute under maritime laws

Article 33 of the UN Charter directs the parties of the dispute for the peaceful settlement by means of their own choice (UNCLOS 1982), and subject to Article 287 of UNCLOS, every state has the right to choose one or more means to settle their dispute concerning the interpretation and application of this Convention (UNCLOS 1982).

The Law of the Sea Convention is the key international instrument which regulates virtually all aspects of the law of the seas and sets rules to Baselines and Internal waters and all the maritime zones like territorial sea, the contiguous zone, the EEZ, the continental shelf within or beyond 200 nm, the high seas, and the deep seabed area.

Although the United Nations Convention on the Law of Sea regulates all the segments of the sea-based issue, the provisions regarding maritime boundary delimitation are not well defined and clear. The Convention provided for the process of delimitation of different maritime zones between states is affected by agreement on the basis of international law in order to achieve an equitable solution. This provision directs the parties of the dispute to take initiative between them and make an agreement equitably first. It does not provide any definite delimitation procedure to be followed. If the party of the dispute fails to reach an agreement, they can move toward the dispute settlement procedure under the Law of Sea Convention stated in part XV of the Convention.

There are two types of dispute settlement procedure in LOS Convention. Section 1 of Part XV states the non-compulsory procedures which are the negotiation, the mediation, and the conciliation and Section 2 of Part XV deals with compulsory settlement procedure which includes ITLOS under Annex VI, the ICJ and Arbitral Tribunal created under Annex VII, and the creation of a special Arbitral Tribunal formed as a panel of experts.

Negotiation

Negotiation is the most important and peaceful means to settle any bilateral or multilateral dispute. Maritime boundary delimitation is not an exception to it. In case of boundary delimitation, there are some advantages in pursuing negotiation. The parties of the dispute are free to shape the negotiations in accordance with their own needs and no party is forced to participate in a negotiation. The parties are free to accept or reject the outcome of negotiations and can withdraw at any point during the process. All through negotiation, there is no third party who interferes between the parties. So, it is easy to reach a decision on the maritime boundary delimitation dispute. One thing is that the litigation always carries risks for the parties before the judicial body, and legal rules available to the tribunal are more restricted than the opportunities open to the negotiators. In the judicial settlement, the parties are stuck within a specific legal frame before the tribunal and the court which is rigid and opposed to considering the interest of all the parties. Nevertheless, during negotiations, the parties follow a process of joint progress in the maritime zones and are able to concentrate on realistic actions to safe each party's core objective.

Statistics show that from 1994 to 2012, 16 negotiations took place, and some of them were successful, such as the 2003 Negotiation between Azerbaijan, Kazakhstan, and the Russian Federation; the 2004 Negotiation between Australia and New Zealand; the 2008 Mauritius-Seychelles EEZ Delimitation Treaty; etc. Unfortunately, the parties of the dispute failed to negotiate between them due to various domestic and international obstructions which delayed the settlement.

Mediation

Mediation is listed in Article 33 of the Charter of the United Nations (UN Charter, 1945) as alternative means of international dispute settlement. Although mediation is a highly successful method to settle international conflicts, in case of maritime boundary delimitation dispute, states rarely resort to mediation or good offices. For example, the 2015 OAS Mediation of Belize-Guatemala Border Dispute has not resolved the dispute and has led the parties to take the matter before the ICJ.

Conciliation

Conciliation is another non-judicial procedure for peaceful settlement of the maritime boundary delimitation which is stated in article 284 (Part XV) of LOS Convention and the procedure of conciliation is discussed in Annex 5. The rate of the conciliation in regard to maritime boundary dispute is very few. Most of the states are not interested to conciliate their dispute. As a result, conciliation is almost never used by states. The 1981 Iceland/Norway Continental Shelf Dispute Regarding Jay Mayen Island is one of a few conciliations till now (UN 1981).

In conciliation, the parties of the dispute have to give up their control over dispute to the third party and allow the third party for a formal decision which has the binding force upon the parties. So, the parties are afraid to settle their dispute through conciliation because nobody wants to lose in this process. Arbitration is more convenient for them to have grounds to set aside the award rather than lose conciliation and not have any legal basis to set the result aside.

Arbitration

Arbitration is the most popular and successful means to settle the maritime boundary dispute after the implementation of LOS Convention in 1994. The Arbitral Tribunal is composed of five arbitrators under Annex VII of the Law of the Sea Convention. Each party to the dispute appoints an arbitrator and both the parties jointly appoint the rest of the three. The President of IT LS acts as the appointing authority in this regard.

Arbitration is one of the compulsory methods of maritime boundary delimitation. When the parties of the dispute fail to resolve the dispute but need to solve it to explore marine resources, they then turn to compulsory dispute resolution. Through arbitration, many of coastal states settled their long-standing maritime boundary delimitation disputes. In 2014, Bangladesh and India resolved their 40 years of long-standing maritime boundary delimitation dispute which commenced in 1974 (PCA 2014). Some examples can be mentioned here which have been settled through arbitration.

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, 17 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. (Aceris Law 2015). Although the Arbitral Tribunal has resolved the majority of disputes than other means of settlement procedure, it has no power to call upon any party of the dispute unless both the parties accept its jurisdiction and make an agreement to solve their problem through it. It does not have the power also to make any party bound to follow its decision. So, these limitations are liable for protracting maritime boundary delimitation.

International Tribunal for the Law of the Sea

ITLOS is one of the notable creations for resolving different types of the maritime dispute under the Law of the Sea convention. The office of the Tribunal is situated in Hamburg, Germany. It may hear all kinds of cases regarding maritime disputes whether contentious or non-contentious.

The Tribunal has a set of 21 serving judges who are elected for 9 years by the state parties. Each state party can nominate up to two candidates. There is a process to ensure equitable distribution among the judges and the term of one-third of them expires every three years. ITLOS is entitled to hear “prompt release” cases taking place on an expedited basis when a coastal state has seized a foreign vessel and its crew in its maritime zones.

The Jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with the Convention. It has jurisdiction over all disputes concerning the interpretation or application of the convention, subject to the provisions of article 297 and to the declaration made in accordance with article 298 of the Convention. But article 297 and declaration under article 298 do not prevent parties from agreeing to submit to the tribunal a dispute otherwise excluded from the tribunal’s jurisdiction under these provisions (UNCLOS

1982). The tribunal is entitled to give an advisory opinion by its Seabed Dispute chamber on legal questions arising within the scope of the activities of the Assembly or Council of the International Seabed Authority (UNCLOS 1982). The Tribunal may also give an advisory opinion on a legal question if this is provided by an international agreement related to the purposes of the convention (Rules of ITLOS 1997, Art. 138).

There are 25 cases registered before the ITLOS till now; among them, most of them are "prompt release"–related cases. Only two 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 14 December 2009 and ended in 14 March 2012 and another one is Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Case no. 23, ITLOS) which began in 3 December 2014 and ended in 23 September 2017. So, in case of maritime boundary delimitation dispute, the position of ITLOS is not within expectation.

International Court of Justice

ICJ is the head judicial body of the United Nations and is an integral part of the United Nations. It is evident that the number one forum for states seeking judicial settlement regarding the Law of the Sea is the ICJ. It is the largest judicial organ in the world and is called the World Court. ICJ is not only limited to the Law of the Sea affairs but also may decide both maritime and sovereignty issues. 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 Article 288 (UNCLOS 1982). There are some judgments mentioned in the following relating to maritime boundary dispute mentioned here which have been declared by ICJ after 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.

Presently, the following maritime boundary delimitation cases are in the pending list before the ICJ.

1. Question of the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia) (Case no. 5, Pending case list, ICJ).
2. Maritime delimitation in the Caribbean Sea and the Pacific Ocean (Costarica v. Nicaragua) (Case no. 7, Pending case list, ICJ).

3. Maritime delimitation in the Indian Ocean (Somalia v. Kenya) (Case no. 8, Pending case list, ICJ).

Commission on the limits of the continental shelf (CLCS)

CLCS has been established under Annex 2 of the LOS Convention. The Commission consists of 21 members, experts in the field of geology and physics (UNCLOS 1982). 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 of 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 29 recommendations have been issued so far (UN, Division for Ocean Affairs and Law of the Sea).

Conclusion

Protracted maritime boundary dispute resolution has a vital negative impact in maintaining the international relation between or among states. Due to the dispute, countries suffer a lot since the commencement of the dispute in different sectors. The sovereignty of the disputed countries faces threat for a long time due to their conflicts. The marine environment becomes unstable from time to time. They experience difficulties to use their coast and become deprived of utilization of marine resources because of this unsettled boundary dispute for an indefinite period of time. As a result, the economy of those countries suffers a lot because a defined maritime boundary is almost a necessity for them. They need new sources of natural gas, oil, and other marine resources, but the undefined boundary blocks offshore exploration for them. The LOS Convention is called the constitution of the sea. It is the only international instrument which deals with all the legal issues relating to sea. It has some limitations in respect of its execution and applicability upon the states. The states which are not party or signatory to this Convention are not bound to follow this Convention and they are not also entitled to seek the advantages of this Convention. On the other hand, all the signatories of this convention are de jure bound to follow this convention in accordance with the principles of international law. They are entitled to get all the advantages of this convention as means of rights. Unfortunately, it does not have the de facto power of applicability upon the states that have signed and ratified it. As a result, the disputes emerged from maritime issues take a long time to be settled. Maritime boundary delimitation dispute is not an exception to it. At this moment, maritime boundary delimitation dispute between or among coastal states is a much-talked issue all over the world. Hundreds of disputes are pending in every corner of the world among which most of them are long-standing. The prevailing maritime laws or other international instruments have nothing to do unless and until the parties of the disputes seek its advantages. This is the limitation of maritime laws or international law as well. So, the state should be more aware of their sea resources and they should make an effort to find out their means and measure from the provisions of maritime law within a reasonable time. The parties of the dispute should settle their problems peacefully to live each other in harmony. This paper makes an effort to draw attention about protracted maritime dispute resolution with maritime laws briefly. So, a further study may be necessary to make a detailed account of the present topic.

MODULE-II

JUDICIAL SETTLEMENT OF INTERNATIONAL MARITIME DISPUTES

JUDICIAL SETTLEMENT OF INTERNATIONAL MARITIME DISPUTES — AN OVERVIEW OF THE CURRENT SYSTEM

INTRODUCTION

Until the end of the nineteenth century, war was a major means of settling disputes between states, hence the concept of "just war" in international law. Since the 1899[1] and 1907[2] Hague peace conferences, however, this concept has been undergoing a change toward peaceful settlements. War, aggression, and intimidation as means of settling international disputes are no longer the norm. Because of the unconventional and irregular ways in which wars are waged and fought today, even the term "war" is used much less frequently, having been replaced by the term "armed conflict."

The settlement of international maritime disputes is no exception to this new rule, as specified in the 1982 United Nations Convention on the Law of the Sea (the Convention),[3] which derives its authority from the Charter of the United Nations.[4] For the purpose of this paper, the relevant provision of the Convention relating to dispute settlement is:

> *Article 279. Obligation to Settle Disputes by Peaceful Means States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter*.

With this in mind, this paper presents a brief description of the current international judicial organs with general jurisdiction at the global, regional, and specialized levels, and the maritime dispute settlement mechanisms, particularly the International Court of Justice (the Court) and the International Tribunal for the Law of the Sea (the Tribunal).[5] Some notable functional differences between these two major international judicial organs are also briefly described as they specifically relate to the settlement of maritime disputes.

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[1] Convention for the Pacific Settlement of Disputes, July 29, 1899, 32 Stat. 1799; T.S. No. 536; 1 Bevans 230 (entered into force on Sept. 4, 1900).

[2] Convention for the Pacific Settlement of Disputes, October 18, 1907, 36 Stat. 2199; T.S. No. 536; 1 Bevans 577 (entered into force on Jan. 26, 1910, replacing the 1907 Convention).

[3] See U.N. CONFERENCE ON THE LAW OF THE SEA, U.N. CONVENTION ON THE LAW OF THE SEA, at 1, U.N. Doc. A/CONF.62/122, U.N. Sales No. E.83.V.5 (1983) [hereinafter U.N. CONVENTION ON THE LAW OF THE SEA].

[4] See id. art. 279. "Accordingly, our respective governments . . . have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations." U.N. CHARTER pmbl.

[5] See U.N. CHARTER, art. 7, ¶ 1. Article 7 provides that "[t]here are established as the principal organs of the United Nations: A General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat."

INTERNATIONAL JUDICIAL ORGANS

The International Court of Justice

The Court is one of the component bodies of the United Nations based in The Hague, The Netherlands. It is the major international judicial organ, with its fifteen members, commonly called judges, elected separately by the U.N. General Assembly and the Security Council for a term of nine years. Only states can bring contentious cases before it, either by special agreement between the parties to a dispute or by a unilateral application by either party. Some specified international organizations, including the United Nations itself, can seek what is called an "Advisory Opinion" from the Court. The Court has actually settled a number of maritime cases, the first being the North Sea Continental Shelf Cases of 1969 between former West Germany on one side and Denmark and the Netherlands on the other.

The International Tribunal for the Law of the Sea

Specifically for the settlement of maritime disputes and in compliance with the Convention, the International Tribunal for the Law of the Sea was established in October 1996 with its seat in Hamburg, Germany. At the Conference of the States Parties to the Convention held at the U.N. 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, as noted below. The Tribunal decided its first case in December 1997 and the second in March 1998, with the third to be decided 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. Although this case involves the same vessel, by practice in international litigation, it is handled as three separate cases, namely, the prompt release of the vessel and its crew, the prescription of provisional measures, and the merits of the case itself. 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. Besides these two universal judicial organs, there are two additional forums for settling maritime disputes open to the States parties to the Convention. Relevant provisions of Article 287 are:

> *Article 287. Choice of Procedure.*
>
> *1. When ratifying or acceding to this Convention 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 International Tribunal for the Law of the Sea established in accordance with Annex VI;

(b) the International Court of Justice;

(c) an arbitral tribunal constituted in accordance with Annex VII;

(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

As of December 1998, 128 States and one non-State entity (the European Union) ratified the Convention, 20 of which have specifically expressed their choices upon ratification. The others reserve their right to do so at any other time, as provided in the above Article.

OTHER COURTS AND TRIBUNALS AT THE UNIVERSAL LEVEL:

The Administrative Tribunals of the International Labor Organization and the United Nations both fit the definition of an international tribunal, because they settle disputes between the organizations and their staff members. In addition to the above-mentioned courts, the U.N. held a series of diplomatic conferences to establish an International Criminal Court (ICC) to deal with war crimes. At its final session in July 1998 in Rome, the U.N. decided to set up the ICC as the third permanent judicial organ at The Hague. The ICC would essentially perform the same duties as the post-war Nuremberg and Tokyo War Crimes Tribunals, and the current former-Yugoslavia and Rwanda Tribunals. Unlike these two tribunals currently trying those suspected of crimes they committed during civil disturbances in their own countries, the ICC would be a permanent tribunal with eighteen members. The expectation is that such standing arrangements would also have preventive effects on those who might otherwise commit similar crimes against humanity.

COURTS AND TRIBUNALS AT THE REGIONAL LEVEL:

Europe

In Europe, there are six international courts and tribunals in force, all of which have different functions. The Court of Justice of the European Communities is among the oldest of the regional judicial organs in the world, having begun its work in 1952 as the judicial arm of the European Coal and Steel Community. The European Court of Human Rights, established by the European Convention on Human Rights in 1959 is the tribunal that hears charges of convention breaches against a state. The tribunal that interprets the laws is the Court of Justice of the Benelux Economic Union, established in 1974. The fourth tribunal is the Benelux Arbitral College, also established in 1974, which is primarily an arbitrationtype dispute settlement forum. The European Nuclear Energy Tribunal, established under the terms of the Organization for Economic Cooperation and Development (OECD) of 1957, is a limited jurisdiction tribunal, dealing only with issues regarding nuclear energy. Finally, the

Western European Union Tribunal, when established, will be for "the protection of private interest against measures for the control of armaments." It should be pointed out, however, that not all these regional judicial organs have been active in their operations. For instance, the Benelux Arbitral College and the European Nuclear Energy Tribunal have yet to decide a case.

The Americas

In July 1978, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, patterned more or less on the European models, came into existence. The Arbitration Tribunal of the Central American Common Market was established to settle disputes between the Central American States. Unfortunately, tensions between these states make arbitration or settlement resolution unlikely. The countries of the Andean Pact of 1979 have decided to establish a Court of Justice for the purpose of resolving conflicts arising from the Pact itself.

Africa

The East African Common Market, comprised of Uganda, Tanzania, and Kenya, instituted a Tribunal in 1972 which resembled the early European court of justice. Like the Central American common market, hostilities among these countries make the purpose of the tribunal unlikely to succeed, and in all probability it will fail.

INSTITUTION OF PROCEEDINGS

As briefly noted above, for the settlement of a dispute, the parties can submit their case to a judicial organ either by a special agreement or by application. By special agreement, the parties agree to involve a third party — a court, a tribunal, or other similar means — while by application, either party applies unilaterally to a third party to settle the dispute. When either party institutes proceedings by unilateral application, the other party is notified by the party called on to adjudicate the case. In the case of a party's unilateral application to a judicial organ for proceedings, the other party can contest the jurisdiction of that organ. The decision on this preliminary objection, which is not seen in domestic-law proceedings, is a prerequisite to the final decision on the merits of the case.

SOME FUNCTIONAL DIFFERENCES BETWEEN THE COURT AND THE TRIBUNAL

In its structure and function, the Tribunal for the Law of the Sea is patterned basically on the International Court of Justice, but there are some significant differences between the two entities. Some of these differences pertain to the following: (a) the access to the judicial organs; (b) the prompt release of vessels and their crews; and (c) the effect of provisional measures.

In contentious cases, the access to the Tribunal is not confined to States, as provided in its Statute:

> *Article 20. Access to the Tribunal.*
>
> *1. The Tribunal shall be open to States Parties.*
>
> *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.*

Thus, the Tribunal is more accessible than the Court. Even a "fishing entity" could have access to the Tribunal under Article 1(3) of the 1995 Straddling Stocks Agreement.

The provisions of the Convention relating to the prompt release of vessels and their crews are a new concept in the international law of the sea. This rationale is based on the particular nature of shipping operation; a ship does not have to be under physical seizure in order to be dealt with legally. This is a procedural phase of a larger dispute to be ultimately settled by the court. As noted earlier, the Saiga case between St. Vincent and the Grenadines and Guinea first underwent this phase in December 1997.

Another procedural aspect of a dispute referred to a court or a tribunal is the provisional measures to be taken as a temporary in junction. The purpose is to protect the rights of the parties and to prevent possible damage to the environment, pending the final decision of the dispute. In the case of the Court, such provisional measures are "indicated," unlike in the case of the Tribunal, which "prescribe" such measures. In specific terms, the Convention provides that: "[T]he parties to the dispute shall comply promptly with any provisional measures prescribed under this article."

CONCLUDING REMARKS

The international maritime dispute settlement mechanism currently in force is by no means complete and effective. However, the Tribunal represents the first universal endeavor specifically for this purpose. Unlike in most other cases where a newly established international judicial organ had to wait for an extended period of time before a case was brought to it, the Tribunal was called on to deal with a dispute within a year of its inception, followed by a second, and a third, consecutively. This may be either an isolated instance or an indication of what is to follow in succession. In other words, the Tribunal has yet to stand the test of time and, more importantly, the test of its own performance.

In the case of many developing countries, the availability of domestic expertise and financial resources is an obstacle to access to the courts, because international litigation is an expensive undertaking. At the Court, for instance, the U.S.-Iran Hostages Case of 1979 took

177 days, and the El Salvador-Honduras Frontier Dispute of 1986 (with Nicaragua intervening) took 2101 days. In the U.S.- Canada Gulf of Maine Case of 1981, no less than thirty volumes (sixteen by the United States and fourteen by Canada) of documents annexed with more than 450 maps in different colors and sizes were presented to the Court, a record few other countries could match, if ever.

In the final analysis, there is a more fundamental point. As noted above, since World War II there has been a proliferation of international judicial organs. This does not mean that for the settlement of disputes, the community of nations is ready and willing to turn to them as a matter of course. The attitude toward litigation varies from culture to culture; in some cultures, it is indeed the last resort. Foremost among the countries most reluctant to court-going are those of East Asia and the former East Europe with the former Soviet Union in the lead. From the former region, only a single case was brought to the Court in its half-century history up to 1995, namely, the Cambodia-Thai Temple of Preah Vihear Case of 1959, and two more are reportedly under consideration in the late 1990s.

THE INTERNATIONAL COURT OF JUSTICE AND THE LAW OF THE SEA:

The purpose of this essay is to examine the contribution of the International Court of Justice to the development of the law of the sea. It is not intended to be an exhaustive overview of the Court's jurisprudence, but rather a *tour d'horizon* of the most important decisions related to law of the sea issues. The Court's judgments have undoubtedly played a crucial role in the process of codification and progressive development of certain fundamental rules and principles of the law of the sea, which are today mainly embodied in the 1982 *United Nations Convention on the Law of the Sea*. The Convention provides a comprehensive legal regime for the use of the world's largest resource, including regulation of use, assignment of maritime zones, and the provision of compulsory dispute settlement procedures. It is especially the modern law of maritime deli- mitation which has been forged to a large extent through a series of le- gal decisions —emanating not only from the International Court of Jus- tice, but also from a number of arbitral tribunals— beginning with the *North Sea Continental Shelf* cases, which contributed to the subsequent evolution of the continental shelf regime in international law.

Concerns that the proliferation of international tribunals might pro- duce substantial inconsistencies and fragmentation have not materialized. On the contrary, the decisions of the International Court of Jus- tice and the International Tribunal for the Law of the Sea (ITLOS) are serving the common goal of a mutually reinforcing corpus of international law in the settlement of international maritime disputes[6]. Over the past thirteen years, the ITLOS has

[6] The scopes of jurisdiction *ratione personae* and *ratione materiae* of the International Court of Justice and the ITLOS are differentiated:While only States can appear before the Court in contentious cases, the Tribunal is open to various non-state actors, the Seabed Chamber ha- ving an even broader range of potential parties. As regards jurisdiction *ratione materiae,* the ju- risdiction of the International Court of Justice is both wider and

regularly referred to the Judgments of the International Court of Justice with respect to questions of international law and procedure. The International Court of Justice, for its part, has been following the Tribunal's work closely, especially its well-developed jurisprudence on provisional measures.

In general, it can be noted that a greater range of international legal fora means that more disputes are submitted to international judicial settlement, to the benefit of all parties concerned. It must be borne in mind that the Court enjoys a more general and comprehensive jurisdiction than specialized judicial bodies. That explains why cases involving the law of sea thus continue to come before the International Court of Justice, but they are rarely concerned with purely maritime issues. Over the last decade, the International Court has decided several cases where the question of territorial title was anterior to the issue of mari- time delimitation, such as *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (2001) and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (2008).

In the last three years, the Court has also decided two cases concern- ing "pure" maritime delimitations: *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea* and *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*. In the Court's docket there is another "pure" delimitation case: the one concerning a maritime dispute between Peru and Chile. There is further a case on the Court's docket involving both territorial and maritime issues: *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* which is still pending on the merits, after the Court delivered its judgment on the preliminary objections raised by Colombia.

It is interesting to note that the very first cases heard by the Permanent Court of International Justice and the International Court of Jus- tice involved the law of the sea: the *S.S.Wimbledon* case in 1923 and the *Corfu Channel* case in 1947. In the *Wimbledon* case, the Permanent Court declared that an artificial waterway used for international navigation between two parts of the high seas should be assimilated to an international strait, where freedom of navigation exists even for warships of belligerent states[7].

The definition of an international strait, and the right of innocent passage through such straits, was also at issue in the *Corfu Channel* case, where the United Kingdom had asserted

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narrower than that of the Tri- bunal: on the one hand, the International Court of Justice is the only international body to possess general subject-matter jurisdiction; on the other hand, several categories of cases in the law of the sea can be brought to the Tribunal but not to the International Court of Jus- tice, such as the cases referred to in Article 187, paras. *(b)* to *(e)* UNCLOS (involving cases between States Parties and the Seabed Authority), which are intended to be resolved by the Seabed Disputes Chamber. Further, even in cases where the International Court of Justice could have jurisdiction *ratione materiae*, the drafters of UNCLOS expressed preference for the Tribunal to handle disputes over the prompt release of vessels or the indication of provisional measures pending the constitution of an arbitral tribunal in Articles 290 and 292.

[7] *P.C.I.J. Series A, 1923, No. I,* p. 28

its right of passage through international straits by sending a naval force through the Corfu Channel without complying with Albanian regulations requiring prior authorization. Albania claimed that its sovereignty had been violated by the passage, arguing that the Corfu Channel was not an international strait since it was used almost exclusively for local traffic and was only an alternative route between the Adriatic and the Aegean Seas.

The Court rejected this argument and held that "the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation".The Court established that, as a matter of customary law, warships —and hence, *a fortiori,* merchant ships— had a right of innocent passage through international straits, which could not be suspended by the coastal State.[8] This definition was subsequently incorporated into Article 16, para. 4, of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (which at the same time extended the right of innocent passage to straits connecting the high seas with the territorial sea of another State) and later in the relevant provisions of UN- CLOS relating to straits used for international navigation (*inter alia* Articles 37 and 45,[9] extending the concept to straits connecting the exclusive economic zones of two States).

In the *Corfu Channel* case, the Court further specified the criterion of "innocence"; it referred to the *manner* of passage as decisive element, holding that as long as the passage was conducted in a fashion which presented no threat to the coastal State it was to be regarded as innocent. This definition is reflected in Article 14, paragraph 4 of the Territorial Sea Convention, which provides that passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State, as well as in Article 19, paragraph 1 UNCLOS, which is couched in identical terms[10].

The right of innocent passage was dealt with by the Court in a number of more recent cases. In the *Nicaragua* case, the Court held that the extension of the right of innocent passage in the territorial sea to voyages to or from internal waters in order to access ports was established in customary law, as codified in Article 18 *(b)* UNCLOS.[11] The customary nature

[8] *I.C.J. Reports 1949,* p. 28: "It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace".

[9] Article 37 UNCLOS establishes the right of transit passage, which is broader than the right of innocent passage, on straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.The régime of innocent passage still applies to straits excluded from the application of the regime of transit passage or straits between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State (Article 45).

[10] Paragraph 2 of the same provision specifies the type of activities that are considered to be prejudicial to the peace, good order or security of the coastal State.

[11] *I.C.J. Reports 1986,* p.1 11, para. 2 13

of the right of innocent passage in the territorial sea was further confirmed in the Court's Judgment in the *Qatar* v. *Bahrain* case[12].

THE DELIMITATION OF MARITIME ZONES

It may well be that the most significant contribution of the International Court of Justice to the development of the law of the sea is the delimitation of maritime zones between opposite or adjacent States. The Court's case-law on maritime delimitation has had a major impact on the clarification of the principles and rules of delimitation, as well as on the unification of the rules concerning the delimitation of all the maritime zones.

In the Anglo-Norwegian Fisheries case (1951), the Court pronounced its famous dictum on the nature of maritime delimitation, emphasizing that delimitation of sea areas is always governed by international law:

> *The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law*.[13]

In the same case, the Court introduced an important innovation to the previously predominant rules for the establishment of the breadth of the territorial sea, by recognising the validity, in international law, of the drawing of straight baselines for coasts deeply indented or fringed with islands. The Court noted that such straight baselines become "independent of the low water mark, and can only be determined by means of a geometric construction".[14] This decision was widely regarded as a piece of "judicial legislation", which led to the incorporation of the sys- tem of straight baselines in the Territorial Sea Convention (Art. 4) and in the UNCLOS (Art. 7).

Although it upheld the validity of straight baselines in international law, the Court made it clear that the coastal State does not have an un- fettered discretion as to how it draws straight baselines; it laid down a number of conditions governing the drawing of such baselines. Notably, they shall "not depart to any appreciable extent from the general direction of the coast" and they must be drawn so that the "sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters".[15] These two conditions have been incorporated into Article 7, para. 3**,** UNCLOS, following *verbatim* the language of the Court's Judgment. The Convention further follows the Court's Judgment in providing that, in determining particular baselines, "account may be taken... of economic

[12] *I.C.J. Reports 2001*, para. 152 *(2) (b).*
[13] *I.C.J. Reports 1951*, p. 132
[14] *I.C.J. Reports 1951*, p. 129
[15] *I.C.J. Reports 1951*, p. 133

interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.[16] Obviously, fishing is usually the most important economic interest at issue.

The validity of the system of straight baselines has been affirmed by the Court in subsequent cases; at the same time, the Court has made it clear that the method of straight baselines is an exception to the nor- mal rules for the determination of baselines and must therefore be applied restrictively. In the *Qatar* v. *Bahrain* case, the Court concluded that Bahrain was not entitled to apply the method of straight baselines since certain maritime features off the coast could not be assimilated to fringe islands constituting a whole with the mainland.

MARITIME DELIMITATION: THE EQUITABLE SOLUTION APPROACH:

A further milestone in the development of the law of maritime delimitation was the Court's Judgment in the *North Sea Continental Shelf* cases in 1969. The North Sea delimitation cases, opposing the German Federal Republic to Denmark and the Netherlands, touched upon a phenomenon which until then had never been explored in international jurisprudence, namely the continental shelf. For that reason, the Court went beyond the particular delimitation it was considering and established what can be called a continental shelf doctrine; it dealt with the physical description of the continental shelf, with the way in which, as a matter of law, it attaches to a coastal State and with its legal structure. Due to its far-reaching scope, this decision has been a fertile source of subsequent jurisprudence.

Most importantly, the Court defined the continental shelf as the "natural prolongation" of the coastal State's land territory into and under the sea:

> [T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short there is here an inherent right.[17]

The idea that coastal States should enjoy certain rights over their continental shelves was generally accepted at that time, after a relatively short period of State practice following the famous Truman Proclamation in 1945. The 1958 Continental Shelf Convention provided that these rights should be "sovereign rights for the purpose of exploring and exploiting" the resources of the continental shelf (Art. 2). The Court recognized the customary character of the coastal States rights over their continental shelf (as codified in Articles 1 to 3 of the Continental Shelf Convention).[18] Although the law on the delimitation of the continental shelf has undergone a substantial evolution since the 1960's, the terms of the Court's

[16] Article 7, para. 5, UNCLOS; see also Article 4, para. 4, of theTerritorial Sea Convention
[17] *I.C.J. Reports 1969*, p. 22.
[18] I.C.J. Reports 1969, p. 39

definition can still be traced in Article 76 UN- CLOS. The said provision has introduced the criterion of distance to complement the geological element of the continental shelf; areas of the sea bed which lie beyond the physical continental margin are included, so long as they are within 200 miles off the coast.

The *North Sea Continental Shelf* cases were also of fundamental importance as they enunciated for the first time the Court's concept of equity in international law:

> Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the ap- plication of equitable principles". (*I.C.J. Reports 1969*, p. 48, para. 88.)

The Court was asked by the Parties to determine the principles and rules of international law applicable to the delimitation as between them of the areas of the continental shelf in the North Sea. It stated that such delimitation must be "effected in accordance with equitable principles... taking into account all the relevant circumstances.[19] The Court thus dismissed the argument that the equidistance/special circumstances rule set out in Article 6, para. 2, of the Continental Shelf Convention had to be applied and equally rejected Germany's claim to a "just and equitable share". In relation to equity, the Court stressed that it was concerned with equity *infra legem* and not exercising an autonomous equity or a judicial discretion *ex aequo et bono.* It demonstrated that equidistance did, in certain geographical conditions lead to inequity (such as concavity or convexity of the coasts, or convergence and overlap between several continental shelves). Finally, the Court emphasized that the method of delimitation was subordinated to the goal to be attained, which is to provide an equitable solution, and that it was not necessary to confine oneself to a single method if a combination of several methods was a better guarantee of an equitable solution.[20]

The Court's decision influenced the debates at the Third United Nations Conference on the Law of the Sea, concerning both delimitation of the continental shelf and the exclusive economic zone between adjacent or opposite States. The concept of equitable principles established by the Court found reflection in the deliberately ambiguous provisions of Articles 74 and 83 of UNCLOS. So far as the exclusive economic zone is concerned, Article 74 *(1)* provides that delimitation "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution". The same formula is employed in Article 83 *(1)* for the delimitation of the continental shelf.

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[19] I.C.J. Reports 1969, p. 53, para. 101

[20] I.C.J. Reports 1969, pp. 49-50, paras. 88-92

The Court's departure from the equidistance/special circumstances rule created a certain amount of legal uncertainty and unpredictability in the law of maritime delimitation. This development was intensified in a number of subsequent decisions, notably in the *Tunisia/Libya* case in 1982, where the Court interpreted equity in the process of maritime delimitation as requiring first and foremost an equitable result. It emphasized that the goal of reaching an equitable result had to determine the means for achieving it and thereby reduced the degree of normativity of applicable principles and rules to *a posteriori* reflection of equity depending on the facts of the particular case.[21] This reasoning was followed in the *Gulf of Maine* case, decided in 1984, where the Chamber held that "delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring... an equitable result".[22] The need for constant re-examination arose both from the complexity of geography and the specific features of each case. The evolution of the Court's jurisprudence on maritime delimitation thus reveals the difficult balancing of the polarity between normativity and predictability on the one hand and individualization of the law and equity of the particular case on the other.

In the 1985 *Libya/Malta* case, the previous approach, focusing exclusively on the equitable result, was abandoned in favour of a more balanced doctrine, characterized by the dual requirement of equitable principles and results, by equity anchored in law. The *Libya/Malta* case further contributed to the clarification of the legal concepts of the exclusive economic zone (EEZ) and the continental shelf: the Court found that the institution of the EEZ had become part of customary international law. In the light of the close interrelation between the legal regimes of the continental shelf and the EEZ, the Court moreover recognised that the distance criterion for the definition of the EEZ (200 nautical miles from the baselines used for the measurement of the territorial sea) equally applied to the continental shelf, the concepts of natural prolongation and distance being complementary.[23]

MARITIME DELIMITATION: THE EQUIDISTANCE/SPECIAL CIRCUMSTANCES RULE:

Since 2001, the Court has moved back to the application of the equidistance/special circumstances rule enshrined in Article 6 of the Continental Shelf Convention, in a series of cases including *Qatar* v. *Bahrain* (2001), *Cameroon* v. *Nigeria* (2002) and *Romania* v.

[21] I.C.J. Reports 1982, p. 59, para. 70: "The result of the application of equitable principles must be equitable...The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result".

[22] I.C.J. Reports 1984, p. 300, para. 112

[23] 18 I.C.J. Reports 1985, paras. 26-35, see particularly p. 33, para. 34: "This is not to suggest that the idea of natural prolongation is now superseded by that of distance.What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation, which in spite of its physical origins has throughout its history become more and more a complex and juridical concept, is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf...".

Ukraine (2009).Today, adjusted equidistance is thus firmly established in the Court's jurisprudence as the preferred method of delimitation for the EEZ and continental shelf as well as for territorial seas.

As regards the circumstances calling for an adjustment of the equidistance line in order to achieve an equitable result, no clear-cut criteria have been established in the Court's jurisprudence given that each case has its very specific characteristics. The Court has, on several occasions, decided not to take account of very small islands or not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the envisaged delimitation line. The Court has further consistently taken into consideration a marked disparity in the lengths of the coasts in order to avoid a disproportionate result.

Moreover, an important trend can be observed in the Court's recent jurisprudence towards the delimitation of a single maritime boundary involving all three maritime zones: the territorial sea, the continental shelf and the EEZ. Such a boundary is not provided for in UNCLOS or any other multilateral treaty; the Court is thus only empowered to draw such an all-purpose boundary when the Parties agree in requesting it - this occurred namely in the recent cases opposing Qatar and Bahrain (2001) and Nicaragua and Honduras (2007).

In the context of these cases, the Court seized the opportunity to contribute towards the unification of the rules of maritime delimitation by declaring the equidistance/special circumstances method to be applicable not only for purposes of continental shelf and EEZ delimitations but also for the delimitation of the territorial sea as set out in Article 15 UNCLOS.[24] In the *Qatar* v. *Bahrain* case, the Court confirmed the customary character of the "equidistance/special circumstances" rule embodied in the said provision (and Article 12, paragraph 1 of the Convention on the Territorial Sea and the Contiguous Zone), stating that the approach to be followed is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances constituted the most logical and widely practised approach (*I.C.J. Reports 2001*, p. 111, para. 230).

OTHER CONTRIBUTIONS

After this short overview of the Court's case-law in maritime delimitation, it is worth mentioning that the Court's jurisprudence has also contributed to the clarification of certain other questions of the law of the sea, such as the nationality of ships or the protection of the marine environment. To illustrate the point, the requirement of a "genuine link" for the

[24] Article 15 provides that the equidistance method should be used unless historic title or "special circumstances" apply.

ascription of nationality to ships in Article 5 of the High Seas convention[25] was strongly influenced by the Court's Judgment in the *Nottebohm* case delivered in 1955. In that decision, the Court held that where a State claimed to exercise diplomatic protection in respect of one of its nationals, nationality should be the legal reflection of a factual, a "genuine" link between the individual and the State. The transposition of the requirement of a "genuine link" to the nationality of ships has, regrettably, not been widely observed, as evidenced by the practice of so-called "flag of convenience" or "open registry" States. Nevertheless, the requirement of a "genuine link has bee incorporated into Article 91 UNCLOS.

In the field of environmental law, the Court has not been given, so far, the opportunity to decide specific questions related to the protection of the marine environment. It has, however, already in its early jurisprudence (namely in the *Corfu Channel* case), acknowledged the existence of "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" as a "well- recognised principle".[26] More recently, in its Advisory Opinion on the *Legality of Threat or Use of NuclearWeapons,* the Court affirmed "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national jurisdiction" as being "part of the *corpus* of international law relating to the environment".[27] This principle has been codified in Article 194, para. 2, UNCLOS.[28]

The Court's finding was reaffirmed in 1997 in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case[29] concerning a dispute between Hungary and Slovakia over the construction and operation of dams on the River Danube. In that decision, the Court further recognised the importance of the concept of sustainable development, involving the need to reconcile economic development with the protection of the environment; it also emphasized that States are under an obligation to give proper weight to recently developed standards and rules of environmental law, "not only when contemplating new activities but also when continuing with activities begun in the past".[30] These general obligations pronounced by the

[25] Article 5 reads as follows: "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag".

[26] I.C.J. Reports 1949, p. 22.

[27] I.C.J. Reports 1996, para. 29

[28] Article 194, para. 2, reads as follows: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention".

[29] I.C.J. Reports 1997, p. 41, para. 53

[30] *I.C.J. Reports 1997*, p. 78, para. 140: "The Court is mindful that, in the field of environ- mental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific

Court may become important in future cases related to the protection of the marine environment.

RECENT DEVELOPMENTS

It will be useful to pay special attention to the most recent judgments rendered by the Court in the area of maritime delimitation, covering the period since February 2006.

Nicaragua v. Honduras

The first one is the Judgment in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* issued in October 2007. Nicaragua asked the Court to determine the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras in the Caribbean Sea. While Nicaragua maintained that this maritime boundary had never been delimited, Honduras contended that there already existed a traditionally recognized *uti possidetis* boundary along the 15th parallel. Honduras argued in the alternative that the 15th parallel had been tacitly agreed between the parties to be their maritime boundary. During the oral proceedings, Nicaragua made a specific request that the Court pronounce on sovereignty over cays located in the disputed area to the north of the 15th parallel. Although the claim was formally a new one, the Court considered it to be admissible because it was inherent in the original claim. Since "the land dominates the sea", in order to plot the maritime boundary the Court would first have to determine which State has sovereignty over the islands and rocks in the disputed area.

Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".

In respect of sovereignty over the four cays, Honduras had relied on the principle of *uti possidetis juris* as the basis of sovereignty. The Court observed that *uti possidetis juris* may, in principle, apply to offshore possessions and maritime spaces *(Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992).* It concluded, however, that in the present case, the Parties had neither provided evidence clearly showing whether the islands were attributed by the Spanish Crown to the colonial provinces of Nicaragua or of Honduras prior to or upon independence nor persuaded the Court of the existence of colonial *effectivités.* The Court thus found that it had not been established that either Honduras or Nicaragua had title to these is- lands by virtue of *uti*

insights and to a growing awareness of the risks for mankind —for present and future generations— of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades.

possidetis. After examining the evidence, the Court concluded that Honduras had sovereignty over the four islands on the basis of post-colonial *effectivités*.

As for the delimitation of the maritime areas between the two States, the Court considered Honduras's alternative arguments of *uti possidetis juris* and tacit agreement. The Court rejected the *uti possidetis* argument, finding that the 1906 Arbitral Award, which indeed was based on the *uti possidetis juris* principle, did not deal with the maritime delimitation between Nicaragua and Honduras. As regards the existence of a tacit agreement, the Court carefully considered the evidence Honduras produced, including sworn statements by a number of fishermen attesting to their belief that the 15th parallel represented and continued to re- present the maritime boundary.

Having reviewed all of the practice placed before it, the Court concluded that there was no tacit agreement in effect between the Parties of a nature to establish a legally binding maritime boundary. Thus, the Court had to draw the boundary itself.

The Court was asked to draw a single maritime boundary between the areas of territorial sea, continental shelf and EEZ until it reaches the area where the rights of third States may be affected. Delimitation on the basis of the equidistance method proved to be difficult in the specific circumstances of the case. Cape Gracias a Dios —where the Nicaragua Honduras land boundary ends— is a sharply convex territorial projection with concave areas on both sides. This limited the choice of base points the Court could use, and any variation or error in situating those points would become disproportionately magnified in the resulting equidistance line.

Moreover, the mouth of the River Coco, which joins the sea at Cape Gracias a Dios, is constantly changing its shape, with unstable islands forming, moving and disappearing over time. Taking all of this into consideration, the Court could not follow the preferred practice of establishing an equidistance line. So far as the territorial sea was concerned, the Court found that it was faced with the "special circumstances" referred to in Article 15 of UNCLOS. The Court looked at the work that the ILC had undertaken during the drafting of the 1958 Convention on the Territorial Sea and the Contiguous Zone and found that it was indeed envisaged that a special configuration of the coast was a circumstance that might require a method of delimitation other than the equidistance method.

The Court therefore decided to construct a bisector line, finding that this method provided the delimitation line with greater stability as it was less affected by land movements of the area around Cape Gracias a Dios, and also significantly reduced the risk of error. The Court found that the Parties agreed "that the sediment carried to and deposited at sea by the River Coco have caused its delta... to exhibit a very active morphodynamism" (*I.C.J. Reports 2007*, p. 742, para. 277). The Court was thus unable to return to the equidistance method for the continental shelf and EEZ without there being a departure line from the coast based on that principle. Thus, the bisector method was used for the entire boundary. The line was then adjusted to take into account the territorial seas of the four cays. The use of the bisector method will be seen as a necessary exception to the now well-established equidistance method. And the Court made sure that it was absolutely clear from the text of the Judgment that the general principle of equidistance remains firmly in place.

One of the interesting sections of the Judgments concerns how to identify the relevant coasts for the drawing of the bisector line. Honduras suggested very narrow sectors of coast to the Court, whereas Nicaragua contended that the *entire* coasts of each State facing the Caribbean Sea should be used as the reference point. In the end, the Court selected coastal fronts that avoided the problem of "cutting off " Hondu ran territory and at the same time provided a façade of sufficient length to account properly for the coastal configuration in the disputed area.

Nicaragua v. Colombia

Two months later, in December 2007, the Court issued a Judgment on Preliminary Objections in another case submitted by Nicaragua: *Territorial and Maritime Dispute (Nicaragua* v. *Colombia).* The case concerns sovereignty over islands and cays in the western Caribbean and the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone.

There is no need in this essay to recount in detail the Court's reasoning on the very complex and technical questions related to the preliminary objections raised by Colombia. As regards the question of sovereignty over territory, namely the islands and other maritime features claimed by the Parties, it is important to note that the Court upheld Colombia's first preliminary objection, to the effect that the 1928 "Treaty concerning Territorial Questions at Issues between Colombia and Nicaragua" and its 1930 Protocol were valid and had already settled the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina named in that Treaty. This was a finding that the Court could make at the preliminary objections stage. However, various other questions before the Court —the scope and composition of the rest of the San Andrés Archipelago, sovereignty over certain cays, and the question of maritime delimitation— were held not to have been settled by the 1928 Treaty; the Court found that it had jurisdiction to decide them, but at the merits stage of proceedings. The Court is now moving ahead to the merits in this case.

Malaysia/Singapore

After this line of cases involving Latin American States, the Court issued a Judgment in May 2008 on the merits in a case between two Asian States: *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore*). This case was brought to the Court by special agreement between the Parties.The dispute once again involved sovereignty over maritime features: Pedra Branca/Pulau Batu Puteh (a granite island on which Horsburgh lighthouse stands), Middle Rocks (consisting of some rocks that are permanently above water) and South Ledge (a low tide elevation).

Malaysia contended that it had an original title to Pedra Branca/Pulau Batu Puteh (dating back from the time of its predecessor, the Sultanate of Johor) and that it continued to hold this title, while Singapore claimed that the island was *terra nullius* in the mid-1800's when the United Kingdom (its predecessor) took lawful possession of the island in order to construct a lighthouse.

After reviewing the evidence submitted by the Parties, the Court found that the territorial domain of the Sultanate of Johor did cover in principle all the islands and islets within the Straits of Singapore and did thus include Pedra Branca/Pulau Batu Puteh. This possession of the islands by the Sultanate was never challenged by any other Power in the region and therefore satisfied the condition of "continuous and peaceful display of territorial sovereignty". The Court thus concluded that the Sultanate of Johor had original title to Pedra Branca/Pulau Batu Puteh. This ancient title was confirmed by the nature and degree of the Sultan of Johor's authority exercised over the people who inhabited or visited the islands in the Straits of Singapore, including Pedra Branca/Pulau Batu Puteh and made this maritime area their habitat.

The Court then looked at whether this title was affected by certain developments in the period between 1824 and the 1840's and concluded that none of them brought any change to the original title.

The Court turned next to the legal status of Pedra Branca/Pulau Batu Puteh after the 1840's to determine whether Malaysia and its predecessor retained sovereignty over the island. In this regard, it examined the events surrounding the selection process of the site of the lighthouse, its construction, as well as the conduct of the Parties' predecessors between 1852 and 1952, but was unable to draw any conclusions for the purposes of the case.

The Court placed great emphasis on a letter written on 12 June 1953 to the British Adviser to the Sultan of Johor in which the Colonial Secretary of Singapore asked for information about the status of Pedra Branca/Pulau Batu Puteh in the context of determining the boundaries of the "Colony's territorial waters". In a letter dated 21 September 1953, the Acting State Secretary of Johor replied that the "Johore Government [did] not claim ownership" of the island. The Court found that the reply showed that as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh.

The Court finally examined the conduct of the Parties after 1953 with respect to the island. It found that certain acts, including the investigation of shipwrecks by Singapore within the island's territorial waters and the permission granted or not granted by Singapore to Malaysian officials to survey the waters surrounding the island, may be seen as conduct à *titre de souverain*. The Court concluded that by 1980 (when the dispute crystallized) sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore and still lay with Singapore.

As for Middle Rocks, the Court observed that the particular circumstances which led it to find that sovereignty over Pedra Branca/Pulau Batu Puteh stayed with Singapore did not apply to Middle Rocks. It therefore held that original title to Middle Rocks should remain with Malaysia as the successor to the Sultanate of Johor. As for South Ledge, the Court noted that this lowtide elevation fell within the overlapping territorial waters generated by Pedra Branca/Pulau Batu Puteh and by Middle Rocks. As the Court had not been asked by the Parties to draw the line of delimitation with respect to their territorial waters, the Court concluded that sovereignty over South Ledge belonged to the State in the territorial waters of which it is located.

Romania v. Ukraine

The most recent case of maritime delimitation was decided by the Court in February 2009: *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*. The dispute concerned the establishment of a single maritime boundary delimiting the continental shelf and exclusive economic zones between the two States in the Black Sea.

The Parties differed as to the exact scope of the Court's jurisdiction. The Court noted that it did not have jurisdiction to determine the Par- ties' territorial seas but that its jurisdiction to delimit the Parties' continental shelf and their exclusive economic zones could be exercised in such a way as to result in "a delimitation between, on the one hand, the exclusive economic zone and the continental shelf of one State, and, on the other hand, the territorial sea of the other State at its seaward end".

The Parties further disagreed as to whether there already existed an agreed maritime boundary around Serpents' Island, a maritime feature situated approximately 20 nautical miles to the east of Ukraine's mainland. They therefore also disagreed on the starting-point of the delimitation to be effected by the Court. The Court began "with the de- termination of the startingpoint of the delimitation as a function of the land boundary and territorial sea boundary as already determined by the Parties". After having carefully reviewed the evidence before it, the Court concluded that, in 1949, the Parties had agreed that the boundary between Romania and the USSR would, from a specified starting- point, follow the 12mile arc around Serpents' Island, but without any endpoint being specified. It added that pursuant to the 2003 State Border Régime Treaty "the endpoint of the State border between the Parties was fixed at the point of intersection where the territorial sea boundary of Romania meets that of Ukraine", a point referred to by the Court as "Point 1".

The Court next turned to the question of whether, as Romania claimed, a boundary delimiting the exclusive economic zones and continental shelf beyond Point 1, and extending around Serpents' Island, was established by a series of agreements concluded in 1949. It pointed out that paragraph 4 of Articles 74 and 83 of UNCLOS is relevant in this respect, since it provides that where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone and the continental shelf "shall be deter- mined in accordance with the provisions of that agreement". Having reviewed all the evidence placed before it, the Court concluded that there was no agreement in force between Romania and Ukraine delimiting between them the exclusive economic zone and the continental shelf.

The Court thus proceeded to draw the boundary itself. To this end, the Court first had to identify the relevant coasts and maritime areas. It recalled that, from a legal point of view, the relevant coasts can play two roles in relation to the delimitation of the continental shelf and the exclusive economic zone: First, it is necessary to identify the relevant coasts in order to determine what constitutes in the specific context of a case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line. In the present case, the Court excluded a segment of the Ukrainian coast, namely the coasts of Karkinits'ka Gulf since the coasts of this gulf face each other and their submarine extension cannot overlap with the extensions of Romania's coast.

As regards the delimitation methodology, the Court again followed the now well-established equidistance method. It began by drawing a provisional equidistance line between the adjacent coasts of Romania and Ukraine, which then continued as a median line between their opposite coasts. At the second stage, the Court considered whether there were factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result. At a third stage, it verified that the said line did not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line.

In respect of the selection of basepoints for the construction of the provisional equidistance line, it is interesting to note that the Court rejected the seaward end of the Sulina dyke used by Romania, a 7.5 km- long construction out to sea. It concluded that Sulina dyke could not be regarded as "permanent harbour works which form an integral part of the harbour system" within the meaning of Article 11 UNCLOS, which concerns the delimitation of the territorial sea, since no convincing evidence had been presented that this dyke serves any direct purpose in port activities.

The Court further observed that the text of Article 11 and the *travaux préparatoires* do not preclude the possibility of interpreting restrictively the concept of harbour works so as to avoid or mitigate the problem of excessive length of such works. The Court thus decided to use the landward end of the Sulina dyke as a basepoint, which had the advantage of "not giving greater importance to an installation than to the physical geography of the landmass".

The Court further considered it inappropriate to select any base points on Serpents' Island since the island does not form part of the general configuration of the coast.

As for the relevant circumstances calling for an adjustment of the provisional equidistance line, the Court concluded that the presence of Serpents' Island did not call for any adjustment, notably in the light of the specific geographical configuration, given that any continental shelf and exclusive economic zone entitlements possibly generated by Serpents' Island could not project further than the entitlements generated by Ukraine's mainland coasts. It concluded that Serpents' Island should have no effect on the delimitation in this case, other than that stemming from the 12 nautical-mile territorial sea which was attributed to it pursuant to previous agreements between the Parties.

Besides the presence of Serpents' Island in the area of delimitation, the Court considered five other factors as possible relevant circumstances: the possible disproportion between lengths of coasts, the enclosed nature of the Black Sea and the delimitations already effected in the region, the conduct of the Parties (oil and gas concessions, fishing activities and naval patrols), any cutting off effect and certain security considerations of the Parties. However, the Court did not see in these various factors any reason that would justify the adjustment of the provisional equidistance line.

The Court checked finally that the result arrived at, so far as the envisaged delimitation line was concerned, did not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue. Noting that the ratio of the respective coastal lengths for Romania and Ukraine, as it has measured them, was approximately 1:2.8 and the ratio of the relevant area between Romania and Ukraine is approximately 1:2.1, the Court was not of the view that the line it has constructed requires any alteration.

DISPUTE SETTLEMENT UNDER THE LAW OF THE SEA CONVENTION[31]:

The interpretation and application of international law are often apparent where there are shared expectations as to what behaviour is required to align with particular norms. We sometimes find that more than one norm has bearing in relation to a particular factual scenario and choices need to be made about whether those norms are being properly interpreted or applied in that context. Is one interpretation more valid than another? Is it a tomato or a tomahto? Are we actually making choices between two different things, or about the same thing but expressed differently? In making that choice, what are the justifications

[31] Natalie Klein, The Vicissitudes of Dispute Settlement under the Law of the Sea Convention, The international journal of marine and coastal law 32 (2017) 332-363

and what are the consequences? The arbitration relating to the South China Sea prompts these sorts of questions when contemplating the role of dispute settlement in the United Nations Convention on the Law of the Sea (LOSC or Convention).[32] This part examines how the LOSC dispute settlement regime has been interpreted and applied in recent decisions, most particularly in the South China Sea Arbitration,[33] and queries whether we should have just "call[ed] the whole thing off".

In doing so, the purpose of this article is to consider vicissitudes in the dispute settlement regime set out in Part XV of the LOSC. When we discuss the vicissitudes of life, there may be reference to a negative or unfortunate turn of events. Yet vicissitudes can simply indicate that there are changes and those alternations or contrasts are not necessarily positive or negative; what is important to recognize is that shifts are occurring. Judicial interpretations of provisions in Part XV are of fundamental importance in the operation of the dispute settlement regime under LOSC. It is in the actual decisions that the contours of the dispute settlement process may be discerned. Whether those provisions are interpreted restrictively or broadly will implicate how states choose to resolve maritime disputes in the future.

To frame our discussion, we must recall that Part XV of the LOSC consists of three sections. Section 1 sets out general obligations to settle disputes peacefully and anticipates that a variety of dispute settlement processes will be available to and used by States Parties. Section 2 provides for resort to compulsory procedures entailing binding decisions and indicates core aspects of the use of international arbitration or adjudication for resolution of LOSC disputes. Section 3 consists of two articles that are intended to reflect limitations on and exceptions to the resort to arbitration or adjudication.

Holding these three sections together is Article 286, which provides:

> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

This provision requires us to consider: what possible effect Section 1 might have; what are disputes concerning the interpretation or application of the Convention; and how do the exceptions and limitations of Section 3 apply. Each of these dimensions of Part XV were at play in the South China Sea Arbitration and we examine them in turn in the sections that

[32] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 UNTS 396 (hereinafter "LOSC").

[33] South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Award on Jurisdiction and Admissibility (29 October 2015), PCA Case No. 2013–19, available at http://www.pcacases.com/web/view/7 (hereinafter "South China Sea (Jurisdiction)"); South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Award (12 July 2016), PCA Case No. 2013–19, available at http://www.pcacases.com/web/view/7 (hereinafter "South China Sea (Final Award)").

follow. This article focuses on particular provisions of each of these Sections, highlighting where we can see the shifting approaches to LOSC dispute settlement. Notably from the South China Sea decision, we can discern a trend in favour of broadening the opportunities for a court or tribunal to exercise compulsory jurisdiction under the LOSC. Having examined the different interpretations of diverse provisions in Part XV of the LOSC, we conclude by considering the relevance of this approach for the broader dispute in the South China Sea.

Section 1 of Part XV

Article 281

The LOSC dispute settlement regime sits within our general requirements to settle disputes peacefully under international law. Section 1 of Part XV recognizes that states have a wide choice of means in determining how they will resolve disputes concerning the law of the sea. Section 1 therefore acknowledges the existence of other dispute settlement techniques that states may use, including the dispute settlement choices that may be enshrined in other treaties relating to the law of the sea. Under Section 1 of Part XV of the LOSC, these alternative means are acceptable as viable alternatives to adjudication or arbitration under Section 2 of Part XV.

One such provision allowing for alternative mechanisms is Article 281, entitled 'Procedure where no settlement has been reached by the parties'. Article 281(1) provides:

> If the States Parties which are parties to a dispute concerning the in- terpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

This article acknowledges the common situation of states accepting alterna- tive methods of dispute settlement over maritime issues in their bilateral and multilateral relations, and sets out the circumstances for where these methods should prevail over the compulsory procedures available in the LOSC. Some multilateral maritime agreements have referred disputes to the LOSC dispute settlement regime.[34] The most notable example in this regard is the 1995 Fish Stocks Agreement.[35] Regional fisheries agreements more commonly have their own dispute settlement regimes,[36] and bilateral agreements may include dispute settlement

[34] International Tribunal for the Law of the Sea, 'International agreements conferring jurisdiction on the Tribunal', available at https://www.itlos.org/jurisdiction/international- agreements-conferring-jurisdiction-on-the-tribunal/.

[35] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 December 1995, in force 11 December 2001) 2167 UNTS 3.

[36] See e.g. Convention for the Conservation of Southern Bluefin Tuna (Canberra, 10 May 1993, in force 20 May 1994) 1819 UNTS 359, at Art. 16; Agreement for the Establishment of the Indian Ocean Tuna Commission (Rome, 25 November 1993, in force 27 March 1996) 1927 UNTS 329, at Art. XXIII.

clauses intended to capture the parties ’preferred means of dispute settlement to resolve the law of the sea disputes arising under that treaty.

The parameters of Article 281 were tested in Southern Bluefin Tuna, where Australia and New Zealand instituted proceedings against Japan under the LOSC, challenging the legality of Japan’s experimental fishing program.[37] Although Australia, New Zealand and Japan were managing the southern blue- fin tuna fisheries under a trilateral agreement,[38] Australia and New Zealand claimed that Japan’s actions also violated provisions of the LOSC. The Arbitral Tribunal held that Australia and New Zealand were precluded from bringing claims against Japan because the trilateral agreement, the 1993 Convention for the Conservation of Southern Bluefin Tuna, had its own dispute settlement clause that fell within the terms of Article 281. It have previously argued—and maintain—that the decision in Southern Bluefin Tuna was correct.[39] However, the decision has been subjected to significant academic criticism.[40]

Commentators have suggested that Barbados/Trinidad and Tobago moved away from or limited the position espoused in Southern Bluefin Tuna,11 but the wording of the judgment relied on in this regard is far from decisive and does not clearly indicate that Article 281 will not prevail over the procedure otherwise available in Part XV of LOSC. The relevant passage from the judgment reads as follows:

> *Article 281 applies where Parties ‘have agreed ’to seek settlement of their dispute by a peaceful means of their own choice. [...] it would appear that Article 281 is intended primarily to cover the situation where the Parties have come to an ad hoc agreement as to the means to be adopted to settle the particular dispute which has arisen. Where they have done so, then their obligation to follow the procedures provided for in Part XV will arise where no settlement has been reached through recourse to the agreed means and where their agreement does not exclude any further procedure.*[41]

The reasoning of the Barbados/Trinidad and Tobago Tribunal to limit the operation of Article 281 to apply only to ad hoc agreements appears to run against the explicit wording of that provision. Moreover, it is unclear what a court or tribunal may consider to be an ‘ad hoc ’

[37] Australia and New Zealand initially sought provisional measures before the International Tribunal for the Law of the Sea (ITLOS). Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order (27 August 1999) 38 ILM 1624.
[38] Convention for the Conservation of Southern Bluefin Tuna (Canberra, 10 May 1993, in force 20 May 1994) 1819 UNTS 359.
[39] N Klein, Dispute Settlement in the UN Convention on the Law of the Sea (Cambridge University Press, Cambridge, 2005) 35–43.
[40] See e.g. IV Karaman, Dispute Resolution in the Law of the Sea (Brill, Leiden, 2012) 260 (and sources cited therein).
[41] Barbados/Trinidad and Tobago Arbitration, Award (11 April 2006) 45 ILM 800, at para. 200 (emphasis added).

dispute settlement agreement. Seemingly any bilateral agreement adopted to resolve a specific issue may be classed as 'ad hoc'.

These points of difficulty from Barbados/Trinidad and Tobago remain un- resolved for the moment. Instead, the focus from the decision on Article 281 in Southern Bluefin Tuna has been on whether there must be an explicit exclusion of other dispute settlement procedures within the alternative dispute settlement regime for Article 281 to apply. The Southern Bluefin Tuna Arbitral Tribunal determined that an implicit exclusion of other dispute settlement procedures is sufficient,[42] whereas commentators and the dissenting judgment of Judge Kenneth Keith in Southern Bluefin Tuna would require an explicit exclusion.[43]

In the South China Sea Arbitration, this issue arose because China had argued that the Philippines was required to negotiate the dispute existing between the parties, and this obligation arose from different bilateral and multilateral agreements. Rather than being bound potentially by any dispute settlement regime enshrined in a binding agreement between the Philippines and China, the Philippines urged the Tribunal to adopt the dissenting view of Judge Kenneth Keith and focus on explicit exclusions of the LOSC dispute settlement regime.[44] The Tribunal considered the majority approach of Southern Bluefin Tuna and the dissent of Judge Kenneth Keith, concluding that "the better view is that Article 281 requires some clear statement of exclusion of further procedures".[45] The Tribunal remarks that this "requires an 'opting out 'of Part XV procedures".[46] On this basis, seemingly any treaty relating to ocean matters adopted post 1982, or at least subsequent to the entry into force of the LOSC in 1994, must have an explicit exclusion of LOSC dispute settlement (an 'opt out') as part of its dispute settlement provisions. If it does not, the parties 'preferred choice of dispute settlement under that treaty will not be upheld as prevailing by a court or tribunal constituted under the LOSC. The consent to specific dispute settlement procedures in these other treaties thus runs the risk of being negated unless the negotiators had the foresight to exclude explicitly resort to the LOSC at the time of drafting. If states do not want to find their law of the sea disputes that arise under a bilateral or regional agreement being referred to compulsory procedures entailing binding decisions under the LOSC, there may now be a need for an additional agreement to clarify the exact preference for dispute settlement beyond what has already been included in a treaty's dispute settlement clause.

How did the Tribunal reach this conclusion, contrary to the finding in Southern Bluefin Tuna? The South China Sea Tribunal states that it "shares the views of ITLOS in its

[42] Southern Bluefin Tuna Cases (Australia v. Japan; New Zealand v. Japan), Award on Jurisdiction and Admissibility (4 August 2000) 39 ILM 1359, at para. 57.
[43] Ibid., at paras. 13 and 17–19 (Separate Opinion of Justice Keith).
[44] South China Sea (Jurisdiction) (n 3), at para. 210.
[45] Ibid., at para. 223.
[46] Ibid., at para. 224.

provisional measures orders in the Southern Bluefin Tuna and MOX Plant cases".[47] However, the International Tribunal for the Law of the Sea (ITLOS) did not mention Article 281 at all in its provisional measures order in MOX Plant, though two of the separate judgments did.[48] ITLOS made a pass- ing reference to Article 281 in listing one of Japan's arguments in its provisional measures order for Southern Bluefin Tuna,[49] but the Tribunal's Order does not otherwise set out any discussion of the meaning of Article 281. There do not appear to be any views to share with ITLOS in this regard, contrary to what was stated in South China Sea.

There are now two conflicting decisions on the interpretation of Article 281. The South China Sea Tribunal's judgment reflects an affirmation of the view that an explicit exclusion of further procedures, indeed perhaps an explicit exclusion of LOSC procedures, is necessary for Article 281 to prevent the exercise of jurisdiction. This decision has the effect of broadening the availability and scope of compulsory jurisdiction under the LOSC.

Further interpretation of Article 281 has been set out in a recent decision on jurisdiction and competence by a Conciliation Commission constituted under Annex V of the LOSC.[50] In 2016, Timor-Leste commenced compulsory conciliation proceedings against Australia in an attempt to resolve their maritime boundary dispute in the Timor Sea. The Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS Treaty) between Australia and Timor-Leste placed a moratorium on maritime boundary delimitation and in doing so, the parties agreed in Article 4:

> 4. Notwithstanding any other bilateral or multilateral agreement binding on the Parties, or any declaration made by either Party pursuant to any such agreement, neither Party shall commence or pursue any proceedings against the other Party before any court, tribunal or other dispute settlement mechanism that would raise or result in, either directly or in- directly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea.
>
> 5. Any court, tribunal or other dispute settlement body hearing proceedings involving the Parties shall not consider, make comment on, nor make findings that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime

[47] Ibid., at para. 223.
[48] MOX Plant Case (Ireland v. UK), Provisional Measures, Order (3 December 2001) (Separate Opinion of Vice-President Nelson and Separate Opinion of Judge Treves), available at https://www.itlos.org/en/cases/list-of-cases/case-no-10/.
[49] Southern Bluefin Tuna case, at para. 56.
[50] Timor-Leste v. Australia Conciliation, Decision on Australia's Objections to Competence (19 September 2016), available at https://pcacases.com/web/view/132 (hereinafter "Timor- Leste Conciliation").

> boundaries or delimitation in the Timor Sea. Any such comment or finding shall be of no effect, and shall not be relied upon, or cited, by the Parties at any time.[51]

For dispute settlement, Article 11 provides: “Any disputes about the interpretation or application of this Treaty shall be settled by consultation or negotiation”. The validity of the CMATS Treaty was contested between the parties.[52]

In the first phase of the conciliation process, the Commission considered if the CMATS Treaty constituted an agreement under Article 281 “to seek settlement of the dispute by a peaceful means of their own choice”.[53] The Commission characterized the CMATS Treaty as “an agreement not to seek settlement of the Parties ’dispute over maritime boundaries for the duration of the moratorium”.[54] As such, an agreement not to pursue dispute settlement for the stated period of time, according to the Commission, was not a dispute settlement means of the parties ’own choice. There is no explanation as to why a bilateral agreement choosing very explicitly to resolve the maritime boundary dispute at a later point in time was not a valid choice of dispute settlement for the purposes of Article 281. The curious outcome that resulted was that the engagement of the parties in the conciliation process under the LOSC placed them in violation of commitments under the CMATS Treaty. Instead, we have been presented with another scenario where Article 281 did not apply and the LOSC dispute settlement prevailed.

This approach to Article 281 runs the risk of denuding agreed dispute settlement provisions in many oceans-related treaties of proper effect. But it does allow scope for more cases to be resolved under the compulsory procedures available in the LOSC dispute settlement regime instead.

Article 283

Before states may institute arbitration or adjudication under the LOSC, Section 1 of Part XV also requires in Article 283 that states proceed to an ex- change of views when a dispute concerning the interpretation or application of the LOSC arises. More precisely, Article 283(1) reads:

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[51] Treaty on Certain Maritime Arrangements in the Timor Sea (Sydney, 12 January 2006, in force 23 February 2007) 2007 ATS 12.

[52] It may be noted that in a separate arbitration, Timor-Leste challenged the validity of the CMATS Treaty. See DK Anton, ‘The Timor Sea Treaty Arbitration: Timor- Leste challenges Australian espionage and seizure of documents ’ASIL Insights (26 February 2014), available at https://www.asil.org/insights/volume/18/issue/6/timor-sea-treaty-arbitration-timor-leste-challenges-australian-espionage. In the context of the conciliation proceedings, Timor-Leste subsequently withdrew from the CMATS Treaty and terminated the arbitrations against Australia. Ben Doherty, ‘Timor-Leste drops espionage claims against Australia in maritime border dispute’, The Guardian, 24 January 2017, available at https://www.theguardian.com/world/2017/jan/24/ timor-leste-drops-espionage-claims-against-australia-in-maritime-border-dispute.

[53] Timor-Leste Conciliation (n 21), at para. 61.

[54] Ibid., at para. 62

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

As Article 283 specifically references a dispute concerning the interpretation or application of the LOSC, an argument could be raised that the LOSC must be invoked during the exchange of views for this requirement to be satisfied.

The precise timing to invoke the LOSC had not been considered as relevant in earlier cases, although the arguments on this point have suggested that there was a threshold that required referencing LOSC provisions in the exchange of views.

Rather than focus on the subject matter of the dispute, the Chagos Archipelago Tribunal placed a different emphasis on the interpretation of Article 283. The Tribunal in that case reviewed the wording of Article 283 and concluded the obligation is one to exchange views regarding the means for resolving the dispute, not an obligation to negotiate the substance of the dispute.[55] This approach would not require the parties to specify what dispute concerning the interpretation or application of the LOSC was at issue but would entail discussion as to how the dispute was to be settled between the parties. No "undue formalism as to the manner and precision" of the exchange of views was required.[56]

The Arbitral Tribunal in Arctic Sunrise also followed this approach,[57] and the South China Sea Tribunal reaffirmed this interpretation.[58] The Arctic Sunrise Arbitral Tribunal further indicated that "Article 283(1) does not require the Parties to engage in negotiations regarding the subject matter of the dispute".[59]

The threshold established under Article 283 is low on any interpretation that we now have of the provision. States typically discuss how a dispute should be resolved in the context of negotiations or discussions over a point of controversy. As to when or whether specific provisions of LOSC provisions must be referenced, the reality of international practice is that the LOSC will often be cited in the context of affirming a state's legal position. It would normally be expected that states refer to the means of resolving disputes, as well as the substance of the dispute, when exchanging views on an issue that has arisen between them.[60] Our progressive understanding of Article 283 indicates that the requirement to exchange

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[55] Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award (18 March 2015), at para. 378, available at https://www.pcacases.com/web/view/11 (hereinafter "Chagos Archipelago").

[56] Ibid., at para. 382.

[57] Arctic Sunrise Arbitration (Netherlands v. Russia), Award on the Merits (14 August 2015), at paras. 149–156, available at http://www.pcacases.com/web/view/21.

[58] South China Sea (Jurisdiction) (n 3), at para. 333.

[59] Ibid., at para. 151.

[60] Ibid., at para. 332.

views will not usually prove too difficult for a state to establish once it reaches the point that it decides to institute arbitration or adjudication.[61]

In sum, the recent interpretations of provisions in Section 1 of Part XV would see a potential expansion of jurisdiction: opening the doors to disputes that may have otherwise been resolved by means or procedures other than those available under the LOSC. How we have understood provisions like Articles 281 and 283 has shifted in more recent decisions, with the swing in favour of allow- ing more disputes to be resolved under the compulsory procedures available in the LOSC.

Section 2, Article 288: Identifying and Characterising a Dispute

Establishing that a dispute falls within the subject matter jurisdiction of a court or tribunal constituted under the LOSC entails an assessment of whether the dispute concerns "the interpretation or application" of the LOSC, as well as whether it falls within an exception to the LOSC dispute settlement procedure. The characterization of the dispute will naturally depend on the particular aims of the states concerned. That is, does the government want the dispute resolved through arbitration or adjudication under the LOSC or not? The lawyers engaged in the dispute will then frame the case accordingly. As Boyle rightly noted: "[E]verything 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".[62] It necessarily falls to judges to make the determination as to whether there is a dispute concerning the interpretation or application of the Convention.[63]

The International Court of Justice (ICJ) has had cause to examine the subject matter of disputes before it in order to determine whether a dispute falls within its jurisdiction.[64] The ICJ summarized its approach from previous cases in its recent decision on the Obligation to Negotiate Access to the Pacific Ocean.[65] In that case, Chile had argued that the subject matter of Bolivia's claim was "territorial sovereignty and the character of Bolivia's access to the

[61] Talmon goes so far as to suggest that it seems 'highly unlikely 'that Article 283 will ever prevent recourse to compulsory dispute settlement procedures. See S Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the jurisdiction of UNCLOS Part XV courts and tribunals '(2016) 65(4) International and Comparative Law Quarterly 927–951.

[62] AE Boyle, 'Dispute settlement and the Law of the Sea Convention: Problems of fragmentation and jurisdiction '(1997) 46(1) International and Comparative Law Quarterly 37–54, at p. 38.

[63] LOSC, at Art. 288(4): "In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal".

[64] The Court's Statute and its Rules require applicants to specify the "precise nature of the claim" in the applications instituting proceedings. Statute of the International Court of Justice (San Francisco, 26 June 1945, in force 24 October 1945) 59 Stat. 1031, at Art. 40(1); Rules of the International Court of Justice (14 April 1978, in force 1 July 1978), at Art. 38(1), available at http://www.icj-cij.org/documents/index.php?p1=4&p2=3&

[65] Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment (24 September 2015), available at http://www.icj-cij.org/docket/files/153/18746. pdf.

Pacific Ocean". Chile considered that Bolivia's Application obfuscated the true subject matter of the claim. Bolivia contended that the case was a distinct matter concern- ing an obligation to negotiate sovereign access to the sea.[66]

In resolving these claims, the ICJ stated that it must determine the subject matter of the dispute on an objective basis, taking into account the positions and pleadings of both parties, in order to isolate the real issue in the case. Yet in doing so, there is an emphasis on how the applicant has formulated the dispute and what facts the applicant has identified as the basis of its claim. The ICJ stated:

> [...] while it may be assumed that sovereign access to the Pacific Ocean is, in the end, Bolivia's goal, a distinction must be drawn between that goal and the related but distinct dispute presented by the Application, name- ly, whether Chile has an obligation to negotiate Bolivia's sovereign access to the sea and, if such an obligation exists, whether Chile has breached it. The Application does not ask the Court to adjudge and declare that Bolivia has a right to sovereign access.[67]

The Court therefore was willing to proceed on the narrow and precise question presented by Bolivia irrespective of the wider implications of the dispute.

In the Chagos Archipelago, the Arbitral Tribunal had to determine the subject matter of the dispute in order to ensure that it was resolving a dispute concerning the interpretation or application of the LOSC. In an earlier paper,[68] we had considered the Chagos Archipelago case to be an unusual one for submission under the LOSC because central to the case was the question of whether the United Kingdom could be viewed as the relevant coastal state for establishing a Marine Protected Area.[69] The United Kingdom rightly criticised the approach by Mauritius, arguing the claim sought to contest the question of territorial sovereignty.

The Chagos Archipelago Tribunal acknowledged the earlier jurisprudence of the ICJ, but there was less emphasis on the view of the applicant in its approach.[70] Instead, the Tribunal stated:

> For the purpose of characterizing the Parties 'dispute, however, the Tribunal must evaluate where the relative weight of the dispute lies. Is the Parties 'dispute primarily a matter of the interpretation and application of the term 'coastal State', with the issue of sovereignty forming one aspect of a larger question? Or does the Parties 'dispute

[66] Ibid., at para. 28, 32, 30.
[67] Ibid, at para. 32.
[68] N Klein, 'The effectiveness of the UNCLOS dispute settlement regime: Reaching for the stars? '(2014) 108 Proceedings of the Annual Meeting (American Society of International Law) 359–364.
[69] P Prows, 'Mauritius brings UNCLOS arbitration against the United Kingdom over the Chagos Archipelago ' (5 April 2011) ASIL Insight, available at http://www.asil.org/insights/ volume/15/issue/8/mauritius-brings-UNCLOS-arbitration-against-united-kingdom- over-chagos.
[70] Chagos Archipelago, at para. 229.

> primarily concern sovereignty, with the United Kingdom's actions as a 'coastal State ' merely representing a manifestation of that dispute? In the Tribunal's view, this question all but answers itself.[71]

The Tribunal was quite clear in ascertaining that two of the submissions by Mauritius that queried whether the United Kingdom had acted lawfully as a "coastal State" went to a question of territorial sovereignty.

Having characterized the dispute as such, the Chagos Archipelago Tribunal then examined whether such a dispute fell within its jurisdiction as a dispute concerning the interpretation or application of the LOSC. The majority of the Tribunal concluded that such a determination necessarily concerned the ownership rights over the land generating the maritime zone and prima facie was outside the scope of the LOSC.[72] As a result, the dispute was not one concerning the interpretation or application of the LOSC and the Tribunal did not have jurisdiction to decide Mauritius 'claims on this point.

The minority in Chagos Archipelago disagreed on this argument relating to the characterization of the dispute, but instead took the position that the dispute could not be qualified as one about the sovereignty of the Chagos Archipelago.[73] Judges Kateka and Wolfrum adhered more closely to the ap- proach of the ICJ in this regard, and opted to focus on the wording used in the submission by Mauritius. On this basis, the minority judges concluded:

> The differing views on the coastal State are the dispute before the Tribu- nal and the issue of sovereignty over the Chagos Archipelago is merely an element in the reasoning of Mauritius and not to be decided by the Tribunal.[74]

Although the minority judges took the position that the sovereignty issue did not have to be decided, they nonetheless proceeded to assess whether the excision of the Chagos Archipelago at the time of Mauritian independence was lawful and concluded it was not.[75] To reach such a conclusion appears to cut against their initial characterization of the dispute, including that sovereignty did not have to be decided in the course of resolving Mauritian claims.

The question of whether the dispute concerned contested territorial sovereignty or was one concerning the interpretation or application of the LOSC was considered in the South China Sea Arbitration. China considered that the case submitted by the Philippines fundamentally concerned a question of territorial sovereignty and hence was outside the scope of LOSC

[71] Ibid., at para. 211.
[72] Ibid., at paras. 207–212 and 229–230.
[73] Ibid., at para. 9 (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum).
[74] Ibid., at para. 17 (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum).
[75] Ibid., at paras. 70–80 (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum).

dispute settlement entirely.[76] The Philippines instead focused one of the core aspects of its case on different provisions of the LOSC and followed an approach of seeking determinations of maritime entitlements to particular marine features, which can be done in the absence of knowledge of the ownership of those features. The Philippines dismissed the relevance of sovereignty to any consideration of what the maritime entitlement of some land might be. They did so on the basis that the status of a particular feature as a rock or island does not alter depending on which state might be sovereign over that feature but is instead an objective determination.[77]

I find that the arguments of the Philippines in this regard run against the fundamental nature of maritime space. We have long operated with the principle that land dominates the sea,[78] and the ICJ has recognised this proposition on a variety of occasions.[79] It may be suggested that the consequence of the land dominating the sea is that all that must be demonstrated is that there is land for there to be maritime entitlements. This approach appears to have been endorsed by the Philippines.

But what are the maritime entitlements? They are rights of sovereignty, of sovereign rights to the marine resources, and of jurisdiction over activities occurring in designated marine areas. These are distinct rights enshrined in Article 2 of the LOSC, which establishes the territorial sea, or in Article 56 of the LOSC, establishing the EEZ. We should also recall the important status of the continental shelf, which exists ipso facto and ab initio appertains to the coastal state. These entitlements belong to a state, a political entity, and have no relevance to an abstract physical land mass.

That maritime entitlements accrue to a state is an inexorable consequence of the nature of the entitlement. Indeed, each of the maritime entitlements in question is explicitly tied to the state. If we take the language of Article 2(1) of the LOSC:

> The sovereignty of a coastal State extends, beyond its land 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 clearly anticipates that sovereignty, as the maritime entitlement of a particular land mass, is that belonging to the coastal state.

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[76] People's Republic of China, 'Position paper of the Government of the People's Republic of China on the matter of jurisdiction in the South China Sea Arbitration initiated by the Republic of the Philippines '(7 December 2014), at paras. 4–29, available at http://www .fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml (hereinafter "China's Position Paper").
[77] South China Sea (Jurisdiction), at para. 144.
[78] See e.g. Grisbådarna (Norway v. Sweden), Award (23 October 1909) 11 RIAA 147.
[79] See e.g. North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep 3, pp. 51–52; Territorial and Maritime Dispute (Nicaragua v. Colombia) [2012] ICJ Rep 624, p. 674; Maritime Delimitation in the Black Sea (Romania v. Ukraine) [2009] ICJ Rep 61, p. 89.

The contiguous zone is inherently linked to a coastal state, as the powers granted to the coastal state therein reference 'a zone contiguous to its territorial sea'.[80] It is a zone to be measured from the same baselines used to draw the breadth of the territorial sea.[81] The entitlement to such a zone allows a coastal state to exercise rights to prevent and punish specific acts that are relevant to protecting aspects of the security of that state.

Article 55 defines the EEZ as an area adjacent to the territorial sea, and in which the coastal state and other states have specified rights and obligations. The "coastal State" has sovereign rights and jurisdiction in accordance with Article 56; hence the entitlements are directly linked to ownership of the land by a state. The definition of the continental shelf immediately identifies the "continental shelf of a coastal State". What is the point of an entitlement if we don't know who is entitled?

But the Philippines would have us focus on the interpretation and application of Article 121 regarding the regime of islands and Article 13 on low-tide elevations. Could these provisions be assessed in isolation and applied in relation to identified marine features? In relation to Article 121, we are provided with a basic definition of an island and then once classified as an island, "the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory". As already demonstrated, each entitlement to those maritime zones is linked to the existence of a coastal state; that is, a relevant political entity capable of exercising the rights and ob- ligations that flow from the maritime entitlements.

Article 121(3), which defines the negative entitlement of rocks (in that they are not entitled to a continental shelf or EEZ, but presumably still to a territorial sea), does not provide such a clear linkage between a coastal state and the maritime entitlements accruing to that state as may be seen in the other LOSC provisions discussed. Equally, Article 13 on low-tide elevations references such features being used as a basepoint for measuring a territorial sea, without explicitly linking that territorial sea to the coastal state in that specific provision. Yet it would be quite odd to suggest that a rock can be so classified or a low-tide elevation identified, and they are thereby deemed to be a land mass giving rise to sovereignty over maritime space without knowing which political entity is entitled to that sovereignty.

This emphasis on land is unremarkable when it is recalled that our conceptual framework in international law is usually territory-based. The very concept of sovereignty "protects the plenary jurisdiction of that sovereign State over its territory and the people on it".[82] Land is

[80] LOSC, at Art. 33(1)
[81] Ibid., at Art. 33(2)
[82] S Besson, 'Sovereignty 'in R Wolfrum (ed), Max Planck Encyclopedia of Public International Law (Oxford University Press, Oxford, 2011), available at http://opil.ouplaw.com/home/ epil. As Besson explains, sovereignty as a concept is multifaceted and contextual.

of prime value, because it is an area that people can inhabit and over which states can exert physical control. Land is the predicate for maritime rights—hence our distinction between coastal states, land-locked states and geographically disadvantaged states. If we did not assume that states were entitled to maritime space extending from their coasts, then very different legal regimes would have developed to better account for the rights of states that lack coasts and immediate access to the ocean. Certainly, this approach is one countenanced by the ICJ, which "has made clear that maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as 'the land dominates the sea" '.[83]

The South China Sea Tribunal considered that it had to ensure there were disputes in existence between the parties and that those disputes concerned the interpretation and application of the LOSC.[84] An objective approach was called for, even while acknowledging that the dispute was multifaceted and not all aspects of the dispute were before the Tribunal. The Tribunal "does not accept [...] that it follows from the existence of a dispute over sovereign- ty that sovereignty is also the appropriate characterisation of the claims the Philippines has submitted in these proceedings". The Tribunal appears to have been persuaded in the characterization of the dispute by the fact that its decisions did not require a determination of sovereignty as a prerequisite to the resolution of the Philippines 'claims nor did it consider that the Philippines was endeavouring to advance its own position in the sovereignty dispute. The South China Sea case could be distinguished from the Chagos Archipelago Arbitration as the latter case concerned implicit decisions on sovereignty whereas the Philippines in the former case was not even seeking such an implicit determination.

We would instead suggest that it is imperative for any court or tribunal in deciding whether it has jurisdiction under Article 288 not to examine provisions such as Article 121(3) or Article 13 of the LOSC in isolation but to recall that these provisions are very much tied in to a larger schema that divides maritime space into various zones as measured from terrestrial features, and accords rights and obligations to states by virtue of the state's ownership of the relevant land mass that generates those maritime zones. Interpretations as to whether a particular feature is a rock or an island, or a low-tide elevation attached to a continental shelf necessarily link to other provisions of the Convention. When these linkages are recognized, it is evident that the undetermined sovereignty is a critical issue and that maritime entitlements cannot (or should not) be articulated when there is uncertainty as to which state those entitlements accrue.

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[83] North Sea Continental Shelf (n 56), at p. 51, para. 96; Aegean Sea Continental Shelf (Greece v. Turkey) [1978] ICJ Rep 3, at p. 36, para. 86.
[84] South China Sea (Jurisdiction), at para. 148.

The dispute related to contested maritime features therefore does indeed go beyond any interpretation or application of the LOSC because of the undetermined sovereignty over these features. The LOSC does not contain provisions on unresolved questions of territorial sovereignty.[85] When the interpretations are placed in their complete contextual setting, the central dispute cannot be seen as one uniquely relating to the interpretation or application of the LOSC. A blinkered examination of provisions in dispute under the LOSC has the potential to expand what disputes are resolved within the compulsory procedures of the LOSC dispute settlement regime.

Section 3, Article 297

Fisheries Disputes

The limitations and exceptions in Section 3 of Part XV of the LOSC that are set out in Article 297 indicate the disputes that are excluded from arbitration or adjudication, as well as which disputes relating to sovereign rights are within jurisdiction for arbitration or adjudication. As discussed in Chagos Archipelago, Article 297 reaffirms the grant of jurisdiction in Article 288(1) of the LOSC but does carve out particular exceptions from compulsory procedures.[86]

One such exception concerns fishing in the EEZ. Article 297(3) provides for compulsory procedures entailing binding decisions to be available for disputes relating to fishing "except that 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". This provision prima facie denies the availability of adjudication or arbitration to challenge any actions of the coastal state in relation to fishing in its EEZ.

In the Chagos Archipelago case, the United Kingdom asserted that the Marine Protected Area (MPA) around the Chagos Archipelago was a measure concerning "sovereign rights with respect to living resources". The UK emphasized that the MPA "is properly characterized as a fisheries measure", and as such was to be excluded from jurisdiction under Article 297(3)(a). Mauritius considered that even if the MPA was so understood, the limitation from Article 297(3) would not apply because that provision insulated the coastal state's actions

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[85] With the exception of excluding the possibility of compulsory conciliation of maritime boundary delimitation disputes where a state has made a declaration excluding delimitation disputes from the procedures available in Section 2 of Part XV. LOSC, at Art. 298(1)(a), which excludes "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission".

[86] See Chagos Archipelago, at para. 316.

from compulsory dispute settlement procedures but would not exclude the consideration of the rights of other states in relation to fishing in the EEZ.

The Tribunal did not accept the British characterization of the MPA as "solely a measure relating to fisheries". There was considerable evidence before the Tribunal, including many government pronouncements, which demonstrated that the purposes of the MPA went well beyond fisheries management. Nonetheless, the Tribunal still had to consider whether a dispute about fish- ing rights, which was protected under an agreement known as the Lancaster House Undertakings, was justiciable in light of the exclusion in Article 297(3) (a). In this regard, the Tribunal rejected the submission by Mauritius that it was possible to consider a dispute relating to the fishing rights of other states within the EEZ as distinct from the rights of the coastal state in the EEZ, so that the former would fall within jurisdiction whereas a dispute on the latter would be excluded. The Tribunal remarked:

> In nearly any imaginable situation, a dispute will exist precisely because the coastal State's conception of its sovereign rights conflicts with the other party's understanding of its own rights. In short, the two are inter- twined, and a dispute regarding Mauritius 'claimed fishing rights in the exclusive economic zone cannot be separated from the exercise of the United Kingdom's sovereign rights with respect to living resources[87].

The approach of the Chagos Archipelago Tribunal would therefore maintain the strong position that any disputes relating to fishing activities occurring in the EEZ are excluded from arbitration or adjudication under the LOSC.

However, doubt seems to have been cast on the inter-connected nature of sovereign rights relating to fishing in the EEZ in the South China Sea Final Award. The Philippines challenged China's fishing activities in an area deter- mined in the Award to be part of the Philippines 'EEZ. Seemingly, a challenge to China's assertion of fishing rights against the fishing rights claimed by the Philippines would constitute a dispute relating to fishing in the EEZ. Yet, the Philippines argued that Article 297(3) did not apply because that provision only excluded disputes relating to the coastal state's actions. As China was not considered the coastal state, no examination of the coastal state's exercise of sovereign rights over fish was required.[88] It could be expected that if a third state has acted inconsistently with the fisheries requirements of a coastal state then the dispute may certainly concern the coastal state's decision-making over fisheries in the EEZ.

As with Chagos Archipelago, an argument could be raised that these issues are once again intertwined and thus fall within the exclusion of Article 297(3). Yet a difference appears to

[87] Ibid., at para. 297.
[88] South China Sea (Final Award), at para. 682.

exist between the two cases, albeit quite a subtle one. In Chagos Archipelago, Mauritius was complaining about the lack of due regard shown by the coastal state for other users. In South China Sea, the Tribunal noted that the Chagos Archipelago case therefore concerned a "reversed situation [to the one before the Tribunal] of the regard owed by the coastal State to the rights and duties of other States within its exclusive economic zone". The Tribunal considered that Article 297(3)(a) limited access to compulsory dispute settlement

> [...] where a claim is brought against a State's exercise of its sovereign rights in respect of living resources in its own exclusive economic zone. These provisions do not apply where a State is alleged to have violated the Convention in respect of the exclusive economic zone of another State.[89]

As a consequence of these decisions, coastal state rights over fisheries are not only firmly insulated from third-party review under Article 297(3), but they are further protected—if not empowered—by still allowing the coastal state recourse to arbitration and adjudication if necessary to challenge any unlawful fishing activity by a third state in its EEZ. In other words, coastal state authority over fishing in its EEZ is thus virtually unreviewable,[90] but review can be availed of by the coastal state if it wishes to challenge the fishing activities of other states within its EEZ. At the same time, the exception in Article 297(3), which seemed to exclude any and all disputes concerning fishing in the EEZ from arbitration or adjudication, has been narrowed in South China Sea.

Marine Environmental Disputes

Another provision in Article 297 that has recently been assessed by arbitral tribunals is paragraph (1)(c), which addresses disputes relating to the protection and preservation of the marine environment. This provision affirms the authority of courts or tribunals to examine such disputes but prompts questions as to what disputes concerning the marine environment may be outside the scope of compulsory dispute settlement under the LOSC.

In Chagos Archipelago, the United Kingdom sought to establish a restrictive reading of Article 297(1)(c) in the event the Tribunal did not accept its argument that the MPA in question constituted a fisheries measure excluded from compulsory jurisdiction under Article 297(3). Mauritius took the position that the MPA was an environmental measure, and as such it was undoubtedly within the jurisdiction of the Tribunal in accordance with Article 297(1)(c). According to this provision, the Tribunal may exercise jurisdiction:

[89] Ibid., at para. 695.
[90] Article 297 does allow for the possibility of conciliation but the factual predicate to allow for this process would be difficult to achieve. See Klein (n 9), at pp. 185–188. Note also that the Chagos Archipelago Tribunal would exclude from compulsory dispute settlement any disputes relating to straddling stocks or highly migratory species where the dispute concerns measures pertaining to those fish within the EEZ of a state. Chagos Archipelago, at para. 300.

> when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.[91]

The UK contended that this provision had to be understood in the context of navigational rights and should be viewed as a protection against coastal states misusing their powers to regulate marine pollution.[92]

The Tribunal assessed whether environmental disputes within compulsory procedures entailing binding decisions were limited to those addressing international rules and standards on marine pollution. The Tribunal considered that reference to rules and standards were not only those established by the LOSC but could also include the obligation to consult with or give due regard to the rights of other states. In this regard, the narrow British position was rejected. This interpretation was appropriate because of the important role that procedural obligations have in international environmental law, along with substantive standards. Similarly, in the South China Sea Arbitration, the Tribunal had no difficulty in considering that it had jurisdiction to resolve disputes concerning provisions relating to the protection and preservation of the marine environment.[93]

In rejecting a narrow interpretation of Article 297(1)(c), as well as accepting jurisdiction over disputes relating to Article 194, the Chagos Archipelago Tribunal and South China Sea Tribunal have affirmed the importance that the LOSC dispute settlement regime could serve in resolving a wide variety of marine environmental law disputes.

Section 3, Article 298

Maritime Boundary Disputes

In the South China Sea case, China consistently submitted that the dispute essentially concerned maritime boundary delimitation and was excluded from compulsory arbitration by virtue of its declaration under Article 298 of LOSC.[94] China argued in its Position Paper that the Philippines could not divide issues into discrete parts, given the integral process involved in maritime boundary delimitations. To do so, in China's view, would potentially denude Article 298 exceptions of any value in LOSC dispute settlement. China thus argued that determining whether a maritime feature was a rock or island to ascertain to what maritime zones that feature is entitled is an essential part of a sea boundary delimitation.

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[91] LOSC, at Art. 297(1)(c).
[92] Chagos Archipelago, at paras. 235 and 239.
[93] The only issue concerned the potential relevance of the military activities exception. South China Sea (Final Award), at para. 938. This argument is discussed further below in relation to that exception.
[94] China's Position Paper

In response, the Philippines submitted that a question of maritime delimitation could only arise once it is determined that there are overlapping maritime entitlements, but such a finding was not integral to the process.[95] The Philippines relied on the position that the entitlement could be determined and the result of such a determination may not lead to overlapping maritime zones (if, for example, the feature was a rock or a low-tide elevation), so no sea boundary delimitation would be necessitated. From the Philippines 'perspective, these steps should be viewed as discrete and distinct.

The Philippines further presented a strict interpretation of Article 298 to limit the scope of the exception. As such, the Philippines considered that Article 298(1)(a) was only relevant if the Tribunal was called on to interpret or apply one of the provisions expressly mentioned in that clause—namely, Articles 15, 74 and 83 on the delimitation of the territorial sea, EEZ and continental shelf, respectively. In the opinion of the Philippines, to look beyond the specific provisions listed would lead to an overly expansive exclusion of jurisdiction at the behest of one of the parties to the dispute.

The key point of distinction between the Philippines 'and China's positions thus centred on what is integral to maritime boundary delimitation and what is not. The Tribunal did note its agreement with China "that maritime boundary delimitation is an integral and systemic process". Nonetheless, the Tribunal was not willing to accept that a determination of maritime entitlements of features situated between states, and hence potentially creating states with opposite or adjacent coasts, would form part of that integral process. The Tribunal stated:

> In particular, the Tribunal considers that a dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap. While fixing the extent of parties 'entitlements and the area in which they overlap will commonly be one of the first matters to be addressed in the delimitation of a maritime boundary, it is nevertheless a distinct issue. A maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements.

A better view is that something that will "commonly be one of the first matters to be addressed in the delimitation of a maritime boundary" should be excluded from jurisdiction under Article 298. That should be the case because such matters are part of the delimitation of the territorial sea, EEZ and continental shelf, which fell outside the South China Sea Tribunal's jurisdiction. The Tribunal provides no reason for separating out the process as it has.

[95] South China Sea (Jurisdiction), at para. 146.

The interconnectedness of the delimitation process was evident in the Tribunal's initial decision on jurisdiction in South China Sea. The Tribunal considered that the resolution of certain Philippine submissions could be pre- vented at the merits stage if the Tribunal determined that China had an over- lapping entitlement in the area in question; it would only be in the absence of China's overlapping entitlement that the claims could otherwise be resolved. This recognition highlighted that the Tribunal was indeed conducting the first part of a maritime boundary delimitation and arguably the Tribunal should have been prevented from undertaking this task by virtue of Article 298(1)(a). The decision begs the question as to what other parts of the maritime delimitation process will be segregated in the same manner. Could we arrive at the point that the 'delimitation 'is considered to be the actual drawing of the line and a court or tribunal may otherwise undertake all steps leading up to that point, including the articulation of the principles to be utilized in the delimitation as occurred in the North Sea Continental Shelf cases?

Historic Title

Article 298(1)(a) also potentially excludes disputes relating to historic bays and title from the scope of compulsory dispute settlement under the LOSC. This provision was also at issue in the South China Sea Arbitration because one of the possible justifications for China's nine-dash line could be based on historic rights. The United States had undertaken an analysis of the possible legal bases for China's nine-dash line,[96] and assessed it: first, as a claim to sovereignty over the islands within the line; second, as a national boundary; and third, as based on historic rights.[97] The United States concluded that the nine-dash line could not be legally established on the basis of historic title or historic rights because it lacked the required notoriety.

The Philippines sought to separate out claims relating to historic rights to those specifically referenced in Article 298(1)(a), namely those "involving historic bays or titles". The Philippines argued that a dispute concerning historic rights lay outside of the LOSC, but that the connection to the LOSC still meant the dispute was one that concerned interpretation or application. Agreeing with this argument, the Tribunal noted:

> A dispute concerning the interaction of the Convention with another instrument or body of law, including the question of whether rights arising under another body of law were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention.

[96] United States Department of State, Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, 'China: Maritime claims in the South China Seas ' (2014) 143 Limits in the Seas 1–24, available at http://www.state.gov/ documents/organization/234936.pdf.

[97] In its paper, the United States asserted that the nine-dash line was illegal as a unilateral delimitation and further that it could not be considered as a lawful assertion of historic rights: ibid., at pp. 14–15, 15–22.

This statement could be read very broadly to allow the resolution of disputes concerning legal rights that touch on the LOSC to be settled within the LOSC dispute settlement regime. Yet it would seemingly be more reasonable to understand the statement as focused on resolving what is or is not covered by the Convention rather than also resolving any matter regulated by a body of law that interacts with the LOSC. Future decisions will need to have close regard to what properly falls within its jurisdiction in resolving a dispute.

A decision on the Philippines ’claim challenging China’s asserted historic rights could only be made at the merits stage, as the Tribunal reasoned it needed to determine the nature and validity of China’s historic rights before being able to conclude if such a decision would then fall within Article 298.

At the merits stage, the Philippines addressed the distinction between the “historic rights” claimed by China, and the concept of “historic bays or titles” as noted in Article 298 of the LOSC. Based on the evidence before the Tribunal, the Philippines drew three conclusions that supported the proposition that China’s claim of historic rights was distinct from historic bays or titles. The first was that China’s statements and actions demonstrated that its “historic rights” claim is not a claim to “historic bays or historic title”; the second was that China itself did not characterize its claim as one of “historic bays or historic title”; and the third was that China chose not to invoke the Article 298 exclusion of disputes concerning “historic bays or historic title” in its Position Paper, despite invoking the exception in respect to maritime delimitation.[98] Furthermore, the Philippines argued the importance of the distinction between the terms “historic rights” and “historic title” in Chinese, and submitted that “historic title” could only apply to waters directly appurtenant to the coast that lie with- in the limits of the territorial sea, and not beyond. Although there were difficulties in determining the nature of China’s claim as it did not participate in the arbitration or make submissions on the issue, the Philippines relied on the above points to demonstrate that China’s claim of historic rights was to be considered distinct from “historic bays or titles”.

The distinction drawn by the Philippines may not have been tenable be- cause once a dispute “involves” historic title, it falls within Article 298. Arguably, even a dispute as to whether a claim is based on historic rights or historic title still “involves” historic title and is excluded from jurisdiction. This latter view aligns with the common sense approach articulated in the Chagos Archipelago Arbitration in recognizing that states did not necessarily want key

[98] South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China), Transcript Day 1—Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility (24 November 2015), PCA Case No. 2013–19, at p. 44, available at http://www .pcacases.com/web/view/7.

sovereignty- related issues subjected to arbitration or adjudication.[99] However, this position was not adopted in the South China Sea Arbitration.

In its Final Award, the South China Sea Tribunal looked to the evolution of references to historic bays, titles and rights in the international law of the sea.[100] The various terms were differentiated as follows:

> The term 'historic rights 'is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. 'Historic title', in contrast, is used specifically to refer to historic sovereignty to land or maritime areas. 'Historic waters 'is simply a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea, although "general international law ... does not provide for a single 'régime 'for 'historic waters 'or 'historic bays', but only for a particular régime for each of the concrete, recognised cases of 'historic waters 'or 'historic bays" '. Finally, a 'historic bay 'is simply a bay in which a State claims historic waters.

On this basis, it appears the exception in Article 298(1)(a) covers only those disputes that involve historic sovereignty rather than broader, and lesser, claims of historic waters.[101] The elucidation of the substantive body of law should therefore clarify the scope of the exception in Article 298(1)(a), and has affirmed a narrow restriction to access compulsory arbitration or adjudication.

Law Enforcement

Under Article 298(1)(b), states further have the option of excluding disputes involving military activities and certain law enforcement activities from compulsory arbitration or adjudication. The law enforcement activities that may be excluded are those "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, paragraph 2 or 3". Article 297(2) addresses marine scientific research and Article 297(3) concerns fisheries.

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[99] Chagos Archipelago, at para. 217.

[100] South China Sea (Final Award), at para. 217.

[101] " The Tribunal is of the view that this usage was understood by the drafters of the Convention and that the reference to 'historic titles 'in Article 298(1)(a)(i) of the Convention is accordingly a reference to claims of sovereignty over maritime areas derived from historical circumstances". Ibid., at para. 227.

The scope of this exception was considered in the Arctic Sunrise, as the Netherlands challenged the legality of Russia's actions in arresting Greenpeace protestors who had staged a protest against an offshore oil platform in the Russian EEZ. Rather than adopt a broad reading of the exception so as to apply to any law enforcement activities undertaken by a coastal state, the Tribunal confirmed that the exception in Article 298(1)(b) only applies to law enforcement actions for fishing or marine scientific research in the EEZ.[102] Law enforcement in relation to artificial installations or in connection with the exploration and exploitation of continental shelf resources could be resolved under Section 2 of Part XV. The Arctic Sunrise Tribunal therefore affirmed the narrow scope of this exception.

The South China Sea Tribunal also examined the applicability of this exception under Article 298 in assessing the Philippines 'claims that China had violated the LOSC through its enforcement of its fisheries regulations in a disputed maritime area. In the course of its Final Award, the Tribunal determined that the maritime area in question would be part of the Philippines 'EEZ and thus assessed China's fishing regulation and enforcement in this context. Although on its face it would appear that China's actions constituted law enforcement actions over fisheries in the EEZ and would thus be excluded under Article 298(1)(b), the Tribunal accepted that this exception would not apply in relation to law enforcement activities undertaken by third states in a coastal state's EEZ; the exception only applies to exclude disputes concerning the coastal state's law enforcement activities in its EEZ from compulsory arbitration or adjudication. In doing so, the Tribunal determined it had jurisdiction to decide that China was in violation of the LOSC. This decision further narrows the in- stances where the law enforcement exception may be considered applicable, and thereby expands the scope of compulsory jurisdiction.

Military Activities

Article 298 does not specify what "military activities" might be excluded from the scope of compulsory procedures entailing binding decisions. There is thus considerable potential for judicial discretion in determining what may or may not constitute "military activities" for the purpose of this exception.

In the South China Sea Final Award, the Tribunal considered the exception in the context of its assessment of the legality of China's land reclamation activities, which the Philippines claimed were in violation of various provisions relating to the protection and preservation of the marine environment. Given the political controversy concerning China's activities and concerns as to whether the land reclamation activity has been for military purposes, the

[102] Arctic Sunrise Arbitration (Netherlands v. Russia), Award on Jurisdiction (26 November 2014), at para. 76, available at http://www.pcacases.com/web/view/21.

Tribunal considered briefly if the military activities exception would preclude examination of this conduct. In this regard, the Tribunal indicated that where a state disavows that its activities are military in nature then this characterization is of distinct relevance. Consequently, the exception could not apply in these circumstances.[103]

Whereas disavowing the military nature of certain conduct had implications in assessing the applicability of this exception, a state's failure to make a claim objecting to jurisdiction under the military activities exception did not prevent the exception from applying. This latter perspective was articulated in the South China Sea Final Award in response to the Philippines 'claims that China had unlawfully aggravated the dispute in its actions subsequent to the commencement of the arbitration.

Contrary to the view of the Philippines that the military activities exception did not apply because it had never been invoked by China, the Tribunal considered that such an explicit claim was not necessary. Instead, the Tribunal emphasized "the relevant question to be whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute". The facts before the Tribunal relating to the incidents at Second Thomas Shoal were deemed to be a "quintessentially military situation" and hence covered by Article 298(1)(b). No doubt disputes will arise in the future as to what is "quintessentially military" and what is not.

Conclusion

The situation in the South China Sea remains one of the critical flashpoints in international security. The competing territorial claims between neighbouring states over a variety of islands, rocks, low-tide elevations and other marine features and resulting maritime boundary disputes appear intractable in many respects. When one of the claimant states takes a particularly assertive stance against another claimant, concerns rightly arise that conflict might escalate and consume the region.

The enduring importance of the obligation to settle disputes by peaceful means, as enshrined in the UN Charter[104] and as part of customary international law,[105] is especially acute for the South China Sea. This obligation to settle disputes by peaceful means does not specify which peaceful means must be used, but at least has the effect of ruling out forceful means as a choice for dispute settlement.

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[103] South China Sea (Final Award), at paras. 893 and 934 ff. See further ibid., at paras. 1012 and 1028 in relation to Mischief Reef.

[104] Charter of the United Nations (San Francisco, 26 June 1945, in force 24 October 1945) 1945 ATS 1, at Art. 2(3).

[105] See e.g. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) [1986] ICJ Rep 14, para. 290.

Within the spectrum of settling disputes by peaceful means, states have an option, as articulated plainly in Article 33 of the UN Charter, to seek resolution by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice". This choice is reinforced in Article 279 of the LOSC for disputes that concern the law of the sea.

A corollary of states 'choice of means for dispute settlement is the principle of consent, particularly when it concerns referring disputes for binding resolution by third parties, or, in other words, for arbitration or adjudication.[106] The consent of states can be manifested in a variety of ways and the LOSC is a notable regime for the fact that states consent to compulsory procedures entailing binding decisions by dint of becoming parties to the LOSC. Yet it is important to discern carefully to what states have consented.

The LOSC dispute settlement regime is not comprehensive because not every law of the sea dispute that concerns the interpretation or application of the LOSC can be referred to compulsory procedures entailing binding decisions. As has been discussed in this article, within Section 1 of Part XV, states are given options for resolving their disputes through a variety of methods, including those procedures that have been previously agreed between the parties for different law of the sea disputes. The resort to arbitration or adjudication is further limited by Section 3 of Part XV, which explicitly excludes the availability of compulsory procedures for certain types of disputes as described in Article 297 and further provides states with the option of excluding categories of disputes in accordance with Article 298 of the LOSC. This system provides states with important flexibility in how disputes are settled and this flexibility should ensure the ongoing feasibility of the LOSC dispute settlement regime.

This feasibility may be cast into doubt depending on how the LOSC dispute settlement regime is interpreted and applied. The shifting scope of jurisdiction to resolve disputes under the LOSC may be considered the product of a living constitution; one that should be expected to evolve over time. The responsibility that falls to the arbitrators and judges within this dynamic is significant. De Mestral has described this situation in the following way:

> It is most unlikely that a dynamic court exercising its powers under the [UN Convention on the Law of the Sea] will have much difficulty both in finding that it possesses jurisdiction in a particular case, and in finding that the Convention contains rules appropriate for the resolution of virtually all disputes arising under it.[107]

[106] As discussed in R Beckman,'UNCLOS PartXV and the South China Sea' in S Jayakumar, T Koh and R Beckman (eds), The South China Sea Disputes and Law of the Sea (Edward Elgar, Cheltenham, 2014) 229–264, at p. 229.

[107] ALC de Mestral, 'Compulsory dispute settlement in the Third United Nations Convention on the Law of the Sea: A Canadian perspective 'in T Buergenthal (ed), Contemporary Issues in International Law: Essays in Honour of Louis B. Sohn (N.P. Engel, Kehl, 1984) 169– 188, at p. 171.

Part of the justification for such an argument lies in the "principle of effectiveness", which anticipates "allowing the tribunals to fulfill their judicial function".[108] Tempering such judicial enthusiasm has to be the principle of consent. This principle refers to the need for sovereign states to consent to be bound by the decisions of international courts and tribunals and ultimately underlines the foundation of jurisdiction for those courts and tribunals.[109]

Ensuring we have the correct balance between these two principles is critical for the actual and perceived success of any international dispute settlement regime.

For the judges in the South China Sea Arbitration, the broader consequences of the judgment relate to the politics of the dispute in the region and, from a legal perspective, the decision of the Arbitral Tribunal strictly only binds the Philippines and China. Yet it is undeniable that this Tribunal has addressed one of the most potentially volatile security issues in the world—millions of dollars in international trade and in resource exploitation are at stake, as well as an unfolding political and power dynamic that could influence world affairs for decades to come. Is this really what the LOSC dispute settlement regime was intended for? Given the key limitations with respect to the role of dispute settlement in the LOSC, it would seem that there are only narrow avenues to keep China's varied assertions in check this way. Is some resistance through the procedures available under the LOSC still better than none at all? Differences of opinion will clearly persist.

CONFLICTS BETWEEN THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA AND THE INTERNATIONAL COURT OF JUSTICE[110]:

Introduction:

The growth in number of international courts and tribunals, sometimes labeled with the slightly derogatory term "proliferation," raises questions of coordination and conflict between these various courts and tribunals and brings concepts to the attention of international lawyers whose interest was previously restricted to the domestic law of the jurisdiction of courts, such as the effect of is pendens and forum shopping.

[108] I Buga, 'Territorial sovereignty issues in maritime disputes: A jurisdictional dilemma for law of the sea tribunals '(2012) 27(1) International Journal of Marine and Coastal Law 59–95, at pp. 65–66, citing R Wolfrum, 'Statement to the informal meeting of legal advisers of Ministries of Foreign Affairs '(New York, 23 October 2006), available at https:// www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf.

[109] The principle has been emphasized in a variety of cases. It was articulated by the Permanent Court of International Justice as follows: "It is well established in international law that no State can, without its consent, be compelled to submit its dispute with other States either to mediation or to arbitration, or to any other kind of pacific settlement". Status of Eastern Carelia, Advisory Opinion [1923] PCIJ Series B, No. 5, 27. The ICJ stated: "One of the fundamental principles of the Court's Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction". East Timor (Portugal v. Australia) [1995] ICJ Rep 90, at para. 26.

[110] Tullio Treves, Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice, 31 N.Y.U. J. Int'l L. & Pol. 809 (1999)

These problems are made particularly acute because international courts and tribunals are growing in number within an international system that has no unified judiciary. The Appeals Chambers of the International Criminal Tribunal for the Former Yugoslavia (ICTY) remarked, "In international law, every tribunal is a self-contained system (unless otherwise provided)." Consequently, there are no general rules by which to sort questions of coordination and conflict These questions are to be solved within each "self-contained system"-in other words, within the context of the international court or tribunal to which the case has been brought. Sometimes these questions are addressed by the instruments regulating a specific court or tribunal. To quote again from the ICTY, these instruments sometimes "provide otherwise." When this is the case, the questions are solved by applying the applicable rules of the international court or tribunal in which a case has been brought When the international instruments regulating that court or tribunal do not envisage such problems directly, it will be a matter of interpretation. In the remarks that follow, I will explore some of these questions in regard to possible conflicts between the International Court of Justice (the Court) and the new International Tribunal for the Law of the Sea (the Tribunal)[111].

Two kinds of conflicts might develop: conflicts of jurisdiction and conflicts of jurisprudence. Many views have been expressed regarding the possibility that the jurisprudence of the Tribunal might diverge from that of the Court, either on questions concerning the law of the sea or on general problems of international law. These views range from concern over a looming risk of fragmentation in international law[112] to the idea that "the risk should not be exaggerated"[113] and that the co-existence of various-and not necessarily unanimous-judicial voices can improve the growth of international law and the settlement of disputes.[114] While we share the latter view,[115] we do not wish to enter into this discussion here. Leaving aside conflicts of jurisprudence, this part addresses conflicts of jurisdiction between the Court and the Tribunal.

In discussing such conflicts of juridiction, we will consider whether there are cases in which the same dispute falls within the jurisdiction of the Court and of the Tribunal and whether

[111] See United Nations Convention on the Law of the Sea of 10 December 1982, Annex VI: Statute of the Tribunal for the Law of the Sea, U.N. Doc. A/CONF.62/121 (1982), reprinted in 21 I.L.M. 1245, 1345-50 (1982) [hereinafter Convention on the Law of the Sea]. See generallyTullio Treves, Le Tribunal International du droit de la mer: Dibuts et perspectives, 1996 ANNUAiRE DU DROIT DE LA MER 27.

[112] See Shigeru Oda, Dispute Settlement Prospects in the Law of the Sea, 44 INT'L & CoMp. L.Q. 863 (1995); Shigeru Oda, The International Court off Justice Viewed from the Bench (1976-1993), 244 RECUEIL DES CouRS 9, 144-55 (1993); G. Guillaume, The Future of International JudiciaI lnstitutions, 44 IN-r'L &CONIe. L.Q. 848 (1995); E. LAUTERPAcHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONALJUSTICE 19-22 (1991).

[113] Stephen M. Schwebel, Address by the President of the International Court ofJustice to the General Assembly of the United Nations (Oct. 27, 1998)

[114] Bernard H. Oxman, The Rule of Law and the United Nations Convention on the Law of the Sea, 7 EUR.J. INT'L L. 353, 370 (1996).

[115] See Tullio Treves, New Trends in the Settlement ofInternationalDisputes, 1 BANCAJA EUROMEDITERRANEAN COURSES OF INTERNATIONAL LAw 395, 433-36 (1997).

these cases entail legal or practical problems for the parties and for the judicial body seized of a dispute.

CONFLICTS OF JURISDICTION BETWEEN THE COURT AND THE TRBUNAL IN GENERAL:

There is no doubt that the jurisdiction of both the Court and the Tribunal may encompass cases concerning the "interpretation or application" of the 1982 United Nations Convention on the Law of the Sea (the Convention).[116] The conflict is more theoretical than practical, however, as submission of the same case to the Court and to the Tribunal is not possible.

When a case is submitted by notification of a special agreement, the parties will inform either the Court or the Tribunal. The potential jurisdiction of the body to which the case has not been submitted becomes irrelevant. From the parties' perspectives, however, the choice between these two judicial bodies entitled to judge the case is relevant. In the negotiation leading to the special agreement, the problem of forum selection will take on a new dimension that goes beyond the usual dilemma of choosing between arbitration and the Court. This new dimension is the choice between two permanent judicial bodies with different characteristics: one is an old, well- established body with general jurisdiction, and the other is a new, specialized body.

When a case is submitted by application, one could imagine the possibility of "forum shopping," in the sense that the disputing party that takes the initiative has the advantage of choosing, as between the Court and the Tribunal, the forum that it prefers. This is not the case, however, in practice. Article 282 of the Convention is a mechanism that efficiently precludes forum shopping as well as questions of overlapping litis pendence-questions that might follow from conflicting choices made by the disputing parties. Article 282 states:

> If the states parties that are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.[117]

Article 282 favors any compulsory dispute settlement mechanism that is binding on the disputing parties, at the expense of both the Tribunal and other dispute settlement bodies with compulsory jurisdiction under Articles 286 and 287 of the Convention. If the disputing parties have agreed previously to confer jurisdiction on a given dispute settlement body, then

[116] Articles 279 and 286 of the Convention specify that the provisions on the settlement of disputes of the Convention refer to disputes concerning the interpretation and application of the Convention. Se Convention on the Law of the Sea, supra note 2, arts. 279 and 286, repintedin 21 I.LM. at 1322.
[117] Ibid, art.282

neither party can object to that body's jurisdiction on the grounds that jurisdiction belongs instead to the court or tribunal competent under Articles 286 and 287.

In the relationship between the Court and the Tribunal, the most interesting aspect of Article 282 is that the acceptance by all parties to a dispute of the Court's compulsory juris- diction, under Article 36, paragraph 2 of the Court's Statute, can be considered the "agreement" mentioned in Article 282. This may be disputed in formal terms, but the consensual aspect-which seems to be the fundamental requirement of Article 36, paragraph 2-undoubtedly exists,9 so that it is reason- able to conclude that the parties have agreed "otherwise." Thus, in light of Article 282, whenever both parties to a dispute have accepted the "optional clause," the Tribunal, if seized by an application, and so requested, should declare that it has no jurisdiction. Conversely, if the Court is so seized, it should reject the defendant's claim that, because the parties have chosen the Tribunal under Article 287, the Court lacks jurisdiction.

According to Article 282, the jurisdictional priority given to the Court over the Tribunal, as between states that have accepted the optional clause, applies to all cases of compulsory jurisdiction of the Tribunal "provided for" in Part XV of the Convention. Consequently, Article 282 does not seem to apply to the compulsory jurisdiction of the Seabed Disputes Chamber of the Tribunal because this jurisdiction is provided for in Article 187, which is in Part XI-not Part XV-of the Convention. The impact is relatively minor because it concerns only disputes between states. The other disputes under Article 187, which involve non-state parties, are outside the Court's jurisdiction ratione personae.

A real conflict, however, might arise. It is theoretically possible that, in a dispute concerning the interpretation of Part XI of the Convention, one state party would seize the Court under Article 36, paragraph 2, while the other state party would seize the Seabed Disputes Chamber under Article 187.

THE IMPACT OF RESERVATIONS TO THE ACCEPTANCE OF COMPULSORY JURISDICTION OF THE COURT:

The priority set out in Article 282 functions only if the dispute is encompassed by the compulsory jurisdiction agreement in force between the parties. When either party has excluded the dispute from their agreement, the priority cannot apply. Reservations to declarations accepting the compulsory jurisdiction of the Court are a means of obtaining such exclusion.

These reservations may have a general purport or may be specific to law of the sea matters. For example, general reservations may exclude disputes for which the compulsory jurisdiction of the Court was accepted by the other party less than twelve months prior to the filing of the application (such as the reservations of New Zealand,[118] the Philippines,[119] and the United Kingdom[120]) or disputes with states not recognized by the state making the reservation (such as the declaration of India.[121]). Reservations addressing the law of the sea may be very broad (such as those made by India and by Malta,[122] which exclude all disputes concerning maritime areas under their sovereignty and jurisdiction, including the delimitation of these areas) or may be focused on specific issues (such as those made by New Zealand[123] and the Philippines,[124] which concern only disputes regarding fisheries in the exclusive economic zone and, respectively, natural resources of the seabed of archipelagic waters and of the continental shelf).

It emerges clearly from these reservations that states have excluded disputes from compulsory jurisdiction of the Court that they cannot exclude from compulsory jurisdiction of a court or tribunal under the Convention. The recent fisheries case between Spain and Canada is an interesting example because, when the underlying events occurred, neither state was a party to the Convention.[125] The case concerned the boarding on the high seas of a Spanish fishing vessel (the Estai) by a Canadian patrol boat, in pursuance of the Canadian Coastal Fisheries Protection Act of the Northwest Atlantic Fisheries Organization (NAFO). Canada claimed that its acceptance of the compulsory jurisdiction of the Court did not apply to the case because the dispute was covered by a reservation excluding disputes "arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory area.., and the enforcement of such measures."[126] In its judgment of December 4, 1998, the Court relied on the Canadian reservation in finding that it had no jurisdiction. Had both Spain and Canada been parties to the Convention at the time the boarding occurred, the situation would have been quite different. No provision in the Convention excludes, or permits the exclusion of, conservation or management measures and their enforcement on the high seas from the compulsory jurisdiction of the courts and tribunals mentioned in Article 287. Article 297, paragraph 3, excludes from such compulsory jurisdiction disputes relating to the coastal state's sovereign rights with respect to living resources and makes it clear that these are resources in the exclusive economic zone.[127]

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[118] See Declarations Recognizing Jurisdiction: New, Zealand, para. 2, 1995-1996 Y.B. I..J. 106, 107.
[119] See Declarations Recognizing Jurisdiction: the Philippines. id. at 110, 111.
[120] See Declarations Recognizing Jurisdiction: the United Kingdom, id. at 120.
[121] See Declarations Recognizing Jurisdiction:India, para. 8, id. at 95, 96.
[122] See Declarations Recognizing Jurisdiction: Malta, id. at 102.
[123] See Declarations Recognizing Jurisdiction:New Zealand, id. at 106.
[124] See Declarations Recognizing Jurisdiction: the Philippines, id. at 110.
[125] See Fisheries Jurisdiction Case (Spain v. Can.), 1998 I.CJ. (Dec. 4), (visited July 6, 1999) <http://www.icj-cij.org/icjwww/idocket/iec/iecjudgment(s)/iec_ ijudgment_981204_frame.htm>. See generally A. Anna Zum-walt, StraddlingStock Spawn Fish War on the High Seas, 3 U.C. DAviSJ. Ir'L L. & POL'Y 35 (1997); Andrew Schaefer, Canada-SpainFishingDispute (The Turbot War), 8 GEO. INT'L ENVTL. L. REv. 437 (1996-1997).
[126] See Counter-Memorial of Canada (Jurisdiction) (Spain v. Can.), 1996 I.G.J. Pleadings (Fisheries Jurisdiction Case) (Feb. 29, 1996), (visited July 6, 1999) <http://ivwvwv.icj-ci.org/icjwwv/idocket/iec/iecpleadings/iec-iplead- ing860200_ countermemorialcanada.HTM>
[127] See Convention on the Law of the Sea, supra note 2, art. 297.

Article 298, paragraph 1 (b), which permits declarations excluding disputes concerning law enforcement activities from compulsory jurisdiction, specifies that these activities must be "in regard of the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraph 2 or 3"-that is to say, in the exclusive economic zone.

Once a reservation excludes a dispute from the compulsory jurisdiction of the Court, Article 282 cannot function, and the rules on compulsory jurisdiction of the Convention are to be applied.

THE RELEVANCE OF LIMITATIONS AND OPTIONAL EXCEPTIONS TO THE COMPULSORY JURISDICTION OF THE TRIBUNAL:

To determine which disputes can be brought to the Court and to the Tribunal unilaterally, it is insufficient to examine the impact of the reservations on the acceptance of the optional clause by the disputing parties. It is necessary to verify whether one or more of the limitations of, or optional exceptions to, the applicability of the rules on compulsory jurisdiction, set out in Articles 297 and 298 of the Convention, apply.

For instance, if one of the parties has accepted the optional clause with a reservation concerning disputes regarding the "determination and delimitation of its maritime boundaries," the ability to bring a case to a court or tribunal depends on whether one of the parties has made a declaration stating it does not accept the jurisdiction of such courts or tribunals under Article 298, paragraph 1(a). If such a declaration has been made, there would be no compulsory settlement clause in force between the parties, unless the requirements for "compulsory" conciliation under Article 298 are satisfied. If such a declaration under Article 298, paragraph 1(a), has not been made-as is the case for India and Malta, which have made the above-mentioned reservation to their acceptance of the optional clause-a party will be entitled to invoke the obligation under the Convention to submit the dispute to the jurisdiction of a court or tribunal.

Some aspects of a complex dispute may come under the jurisdiction of the Court, while others fall under the jurisdiction of the Tribunal or of another court or tribunal competent under the Convention. This can happen for several reasons: 1) the effect of reservations to acceptances of the optional clause of Article 36, paragraph 2; 2) the Statute of the Court; or 3) limitations and optional exceptions under Articles 297 and 298 of the Convention. In any such situation, each court would be competent to rule on different questions. While there would be no overlapping *litis pendence* strictly speaking, the connection between the questions submitted to the Court and to the Tribunal would make it impractical and risky that the Court and the Tribunal hear in parallel (or in sequence) the different connected questions.

The parties must be flexible and must try to concentrate the whole of their dispute before one court or tribunal. They should consider granting competence over the entire case to the one court or tribunal that has been seized. The parties may do this by their acquiescence, and by the forum prorogatum clauses included in the Rules of the Court and of the Tribunal.[128]

States also can prevent such a situation by drafting skillfully their declarations. An interesting example is the declaration of June 25, 1996, in which Norway modified its acceptance of the Court's compulsory jurisdiction. The declaration confirms such acceptance:

> provided, however, that the limitations and exceptions relating to the settlement of disputes pursuant to the provisions of, and the Norwegian declarations applicable at any given time to, the United Nations Convention on the Law of the Sea of 10 December 1982 ... shall apply to all disputes concerning the law of the sea.[129]

Through this declaration, Norway excludes all disputes that cannot fall under the compulsory jurisdiction of a court or tribunal according to the Convention, either because of the limitations set out in Article 297 or because of a declaration by Norway utilizing an optional exception set out in Article 298. In this way, with respect to disputes concerning the law of the sea, Norway accepts the jurisdiction of the Court, under Article 36, paragraph 2, of the Statute, with exactly the same scope as it has under the Convention's compulsory jurisdiction clauses-and their limitations and exceptions.

In light of this, it makes sense for states that have accepted the optional clause to make a declaration of preference for the Court under Article 287 with regard to disputes with states that also have made the declaration-not only when they have not accepted the optional clause, but also with regard to disputes with other states having accepted the clause. The Court’s jurisdiction, when excluded by reservations to the acceptance of the optional clause, may be "restored" on the basis of Articles 286 and 287. It also makes sense for states that have accepted the optional clause to prefer the Tribunal in their declarations under Article 287. The states that are in this category (Austria, Greece, Portugal, and Uruguay) will be under the compulsory jurisdiction of the Court for disputes with other states accepting the optional clause and under the jurisdiction of the Tribunal for disputes with other states preferring the Tribunal under Article 287. If reservations to the optional clause exclude the jurisdiction of the Court, in most cases, due to the low number of preferences for the Tribunal, arbitration will be the applicable procedure.

THE COURT, THE TRIBUNAL, AND DECLARATIONS MADE UNDER ARTICLE 287 OF THE LAW OF THE SEA CONVENTION:

It may be said that the Court and the Tribunal are in com- petition (not in conflict!) to attract declarations of preference under Article 287 by states parties to the Convention. It seems more important, however, to note that the Court and the Tribunal are in competition, together

[128] See Rules of Court, International Court of Justice, art. 38, par'a. 5; Rules of the Tribunal, Tribunal for the Law of the Sea, art. 54, para. 5.
[129] Declarations Recognizing Jurisdiction: Norway, 1995-1996 Y.B. I..J. 108, 109.

and not one against the other, with arbitration. Arbitration is the procedure that states parties can declare under Article 287, that they are presumed to prefer in the absence of a declaration, and that applies whenever two parties to a dispute have not expressed the same preference.

What has happened in practice? Out of 127 states parties, only twenty have expressed a preference under Article 287. These preferences are as follows:[130]

- ten for the Tribunal (Argentina, Austria, Cape Verde, Chile, Germany, Greece, Portugal, Tanzania, and Uruguay),
- six for the Court (Algeria, the Netherlands, Nor- way, Spain, Sweden, and the United Kingdom),
- four for the Tribunal and the Court without stat- ing a preference between the two (Belgium, Fin- land, Italy, and Oman), and
- one for arbitration (Egypt).

This data must be considered in light of acceptances of the optional clause of Article 36, paragraph 2, of the Statute of the Court, made by states parties to the Convention. There were forty-four (out of sixty-one) states at the beginning of 1998. Of these forty-four, thirty two have made no declaration under Article 287, while twelve have made one such declaration. These declarations demonstrate:

- five prefer the Court (the Netherlands, Norway, Spain, Sweden, and the United Kingdom),
- one prefers the Court and the Tribunal (Finland),
- four prefer the Tribunal (Austria, Greece, Portugal, and Uruguay),
- one prefers arbitration (Egypt), and
- one has declared that it rejects the jurisdiction of the Court for any dispute. (This is the position taken by Guinea-Bissau even though such a declaration is not, it would seem, within the terms of Article 287).

The states parties bound to the compulsory jurisdiction of the Court (either under the optional clause or under Articles 286 and 287) number forty-six, including Italy and Oman. Those bound by the compulsory jurisdiction of the Tribunal number thirteen, including Belgium, Finland, Italy, and Oman. The obligation of these states to submit to the jurisdiction of the

[130] See Division for Ocean Affairs and the Law of the Sea, U.N. Office of Legal Affairs, Settlement ofDisputes Mechanism: Choice ofProcedureby States Parties Under Article 287 of the Convention (last modified Feb. 17, 1999) <http:// www.un.org/Depts/los/los_sdml.htm>. Algeria accepts the jurisdiction of the Court only with a prior agreement between both parties concerned in the case.

Court or of the Tribunal only applies to disputes between states having accepted the jurisdiction of the Court or of the Tribunal. For all other disputes, arbitration remains competent according to Article 287.

An initial observation prompted by this data is that the overwhelming majority of states having expressed a preference have selected permanent judicial bodies. Only two states have expressed a preference for arbitration. It may be added that the policy of limiting the impact of the rules in Article 287 favoring arbitration can be pursued by declarations such as those made by Finland, Italy, and Oman-choosing the Court and the Tribunal without expressing a preference. This policy was dearly expressed by Italy in its declaration choosing the Court and the Tribunal:

> In making this declaration under Article 287 of the Convention on the Law of the Sea, the Government of Italy is reaffirming its confidence in the existing international judicial organs. In accordance with Article 287, paragraph 4, Italy considers that it has chosen "the same procedure" as any other state party that has chosen the International Tribunal for the Law of the Sea or the International Court of Justice. [131]

A second observation prompted by the data is that the great majority (approximately two-thirds) of states parties to the Convention have neither accepted the optional clause nor made a declaration under Article 287. In light of this observation, one may ask whether the states that have expressed no preference are satisfied with the "residual rule" of Article 287, paragraph 5, stating that "if the parties have not accepted the same procedure for the settlement of the dispute," compulsory jurisdiction under the Convention belongs to an arbitral tribunal. The answer may be affirmative in some cases, when the state in question has a deeply rooted attachment to arbitration or equally deeply rooted reasons for mistrust of the Court and the Tribunal. This might be the case for the United States, whose government, in transmitting the Convention to the Sen- ate for its advice and consent, made it clear that it intends to express a preference for special arbitration and, for disputes not covered by special arbitration, general arbitration.[132] This also should be the position of any states making the choice for arbitration, such as Egypt.

In most cases, however, the lack of declarations may well have explanations different from a preference for arbitration. One may think of bureaucratic passivity-the well-known trend of bureaucracies (including foreign affairs bureaucracies) not to make moves that are not strictly necessary or required. One may also think of the assumption, closely allied with bureaucratic

[131] Multilateral Treaties Deposited with 11te Secretao'-Geizn Status as of 31 December1997, at 812, U.N. Doc. ST/LEG/SERB/16 (1998). In the original French version of its declaration, Italy expresses its confidence in the “organes pernanents de justice interationale.”A better translation thus would have been "permanent" instead of "existing" international judicial organs.

[132] See Letter of Submittal of the Secretary of State to the President of the United States (Sept. 23, 1994), re printed in Special Supplement: Message from the President of the United States and Commentary Accompanying the United Nations Convention on theLaw of the Sea, 7 GEO. INT'LENvTL. L. REv. 77, 79 (1994); Comment ayon the 1982 United Nations Convention on the Law of the Sea, reprinted in id. at 87.

passivity-and in this case clearly wrong- that inaction has no consequences. It is also possible that inaction is a "wait-and-see" attitude derived from a lack of knowledge about the Tribunal.

CONCLUSION:

States parties to the Convention must consider seriously the issues surrounding declarations they are entitled to make under Article 287. More than the choice between the Court and the Tribunal, the important choice states must make is the one between permanent dispute settlement bodies and arbitral tribunals.

The M/V "Saiga" Case (No. 2) demonstrates why states should consider seriously the pros and cons of their choices under Article 287.[133] Neither party to the dispute, Saint Vin- cent and the Grenadines and Guinea, had made a declaration under Article 287. Consequently, when Saint Vincent and the Grenadines started proceedings on the merits, it requested the establishment of an arbitration tribunal, as arbitration was the only procedure competent to deal with the case under Article 287. At the same time, invoking Article 290, paragraph 5, Saint Vincent and the Grenadines also requested that the Tribunal prescribe provisional measures pending the constitution of the arbitration tribunal. When the parties discussed the organization of the case between themselves and with the President of the Tribunal, during the days preceding the hearings concerning the request for provisional measures, they agreed to transfer jurisdiction on the merits of the case from the yet- to-be-constituted arbitral tribunal to the Tribunal.- Even though the reasons were not publicized, it is reasonable to infer that this agreement may have been influenced significantly by the cost and organizational burdens that international arbitration imposes on the parties. In this case, two states that had made no declarations under Article 287 consequently found their situation uncomfortable when a dispute arose and an arbitration panel was to be constituted.

[133] See M/V "Saiga" (No. 2) Case, Order on Provisional Measures (St. Vincent v. Guinea), 37 I.L.M. 1202 (Int'l Trib. L. Sea, Mar. 11, 1998).

MODULE-III

ALTERNATE DISPUTE RESOLUTION IN MARITIME DISPUTES

ALTERNATIVE DISPUTE RESOLUTION METHODS IN MARITIME LAW

In the aftermath of the entry into force in 1994 of the 1982 Law of the Sea Convention (LOSC), dispute settlement methods flourished and the tide is still rising twenty years later. States mostly remain the featured players in these forms of dispute settlement methods but there are some avenues for private actors to engage in as their interests almost always lie behind the interests of State actors.

Negotiation

The detailed rules under the contemporary law of the sea, the increasing interest in exploiting resources and the threat of compulsory dispute settlement mechanisms encourage States to enter into negotiations. Identifying the fact that negotiations are going forward is difficult as States often keep them quiet. Studies have however reported 16 negotiations from 1994 to 2012, some of them were successful, such as the 2003 Negotiation between Azerbaijan, Kazakhstan and the Russian Federation, the 2004 Negotiation between Australia and New Zealand, the 2008 Mauritius-Seychelles EEZ Delimitation Treaty, etc.

Negotiations sometimes lead to the resolution of the dispute in the form of a treaty or to other forms of dispute resolution mechanisms. Negotiation is by far the method of dispute settlement preferred by States and other avenues are considered only when negotiations stall.

In the context of boundary delimitation, there are some real disadvantages in pursuing compulsory dispute mechanisms and considerable advantages in negotiating. During negotiations, the parties retain control over a series of very important issues including the precise result of the boundaries delimited, the way the line is being defined, the terms and the timing of the agreement and the way the agreement is presented publically. It is generally believed that litigation always carries risks for the parties and that the range of legal findings available to the tribunal is more restricted than the range of options open to the negotiators. Also, when appearing before a tribunal applying international law, the parties operate within a specific frame which lacks flexibility and leaves little room for creativity and tends to favor always one side while failing to consider the interests of all actors. However, during negotiations, the parties pursue a process of joint development in the maritime space and are able to set aside the legal dispute to focus on practical measures to secure each party's underlying objective, in particular when each party wishes to pursue different types of exploitation.

Conciliation

Conciliation is provided for in Part 15 of the Law of the Sea Convention but is almost never used by States. The 1981 Iceland/Norway Continental Shelf Dispute Regarding Jay Mayen Island is one of the few conciliation proceedings ever recorded. States are not inclined to use conciliation because once they decide to give up control over the dispute and allow for a formal decision by a third party body, States prefer to go all the way to an ultimately binding decision. There is not much to gain from a process which looks a lot like arbitration without the benefit of legal certainty flowing from the issuance of an arbitral award. Also, States would also prefer to lose an arbitration and have grounds to set aside the award rather than lose a conciliation and not have any legal basis to set the result aside.

Arbitration as a mode of dispute resolution in Maritime matters

Many contracts with which ship owners and their masters are concerned, such as bills of lading, charter-parties, salvage agreements, and marine insurance policies, nowadays provide for various litigious matters to be referred to arbitration. Some of the terms used in connection with this method of settling disputes, together with the main advantages and disadvantages of arbitration, the various methods of referring to arbitration, and so on, form the subject matter of this section. This part will present a comparative study amongst different countries with special focus on India.

Arbitration Clauses in contracts of Carriage by Sea

Bills of lading and charter-parties frequently contain clauses to that effect that the parties agree to refer to arbitration disputes arising under the contract. Such clauses are perfectly valid, but what constitutes a "dispute arising under the contract" is a matter deserving of some consideration. If, for instance, one party contends against the other that the contract has never been entered into at all, that is a dispute which cannot go to arbitration under the clause, for the party who denies that he entered into the contract is at the same time denying that he joined in the submission. On similar grounds, if a party alleges that the contract is void, that cannot be a matter for arbitration under the clause, for on the view that the whole contract is void the part (i.e., the submission) must be seen to be void as well.

An arbitration clause may provide that if the claimant fails to appoint an arbitrator within a stipulated time the claim shall be barred absolutely. Generally, this provision is effective, but there are some exceptions. For instance, by the Arbitration Act, 1950, the court may grant an extension of time if of the opinion that undue hardship would otherwise be caused.

No dispute arises within the meaning of the clause where a charterer admits a ship owner's claim for freight but fails to satisfy it. Where a ship owner claimed freight and the charterer, having admitted the claim, sought to- set off the amount due against his counter-claim the Court held that failure to appoint an arbitrator within the prescribed time barred the counter-claim but not the claim which was never in issue.

The question may arise as to whether an arbitration clause in a charter-party is imported into a bill of lading when the latter contains an incorporating clause such as "Freight and all other terms, conditions and exceptions, including the negligence clause, as per charter-party". It would seem that it is not, but as between a ship owner and a charterer who is also the shipper and who, in his capacity as shipper, has obtained a bill of lading, the arbitration clause in the charter-party remains effective even though the charter party contains a cesser clause, and even after the bill of lading has been assigned to a third party.

It appears that a merchant has no right to arrest a ship in respect of a dispute arising under a contract, which contains an arbitration clause.

International Arbitration

International arbitration is a means by which international disputes can be definitively resolved, pursuant to the parties' agreement, by independent, non-governmental decision-makers. There are almost as many other definitions of international arbitration as there are commentators on the subject. Commercial arbitration is common in both international and domestic contexts. Arbitration has several defining characteristics, they are as follows:

1. Arbitration is generally consensual in most cases, the parties must agree to arbitrate their differences.

2. Non-governmental decision-makers resolve arbitrations, arbitrators do not act as state judges or government agents, but are private persons ordinarily selected by the parties.

3. Arbitration produces a binding award, which is capable of enforcement through national courts, but not a mediator's or conciliators non-binding recommendation.

4. Arbitration is comparatively flexible, as contrasted to most court procedures.

In many circumstances, national law permits parties to agree upon the arbitral procedures that will govern the resolution of their dispute. As a consequence, the procedural conduct of arbitrations can vary dramatically across industrial sectors, arbitral institutions, geographic regions, and categories of disputes. In particular fields, or individual cases, parties may agree upon procedural rules that are tailor-made for their individual needs. Apart from specialized fields, commercial arbitration often bears broad resemblances to commercial litigation in national courts. Arbitration will frequently involve the submission of written pleadings and legal argument (often by lawyers), the presentation of documentary evidence and oral testimony, the application of "law" (in the form of judicial precedents and statutes), and the rendition of a reasoned, binding award. Nevertheless, in practice, arbitral procedures are usually less formal than litigation, particularly on issues such as pleadings and evidence. Arbitration often lacks various characteristics that are common in national court litigation, including broad discovery, summary disposition procedures, and appellate review. In smaller matters, domestic arbitrations are frequently conducted without the participation of legal advisers, before a lay-arbitrator, according to highly informal procedures.

International commercial arbitration is similar to domestic arbitration. As in domestic matters, international arbitration is a consensual means of dispute resolution, by a non-governmental decision-maker, that produces a legally binding and enforceable ruling. In addition, however, international arbitration has several characteristics that distinguish it from domestic arbitration. Most importantly, international arbitration is designed and accepted particularly to assure parties from different jurisdictions that their disputes will be resolved neutrally. Among other things, the parties usually seek an independent decision-maker, detached from the courts, governmental institutions, and cultural biases of either party. They also ordinarily contemplate the arbitrator's application of internationally neutral procedural rules, rather than a particular national legal regime.

In addition, international arbitration is frequently regarded as a means of mitigating the peculiar uncertainties of transnational litigation. These uncertainties can include protracted jurisdictional disputes, expensive parallel proceedings, and choice-of-law debates. International arbitration seeks to avoid these uncertainties by designating a single, exclusive dispute resolution mechanism for settling the parties' disagreements. Moreover, international arbitration awards are often more readily enforceable in jurisdictions other than their place of origin than national court judgments.

Although international arbitration is a consensual means of dispute resolution, it has binding effect only by virtue of a complex framework of national and international law. As we discuss below, international conventions, national arbitration legislation, and institutional arbitration rules provide a specialized legal regime for most international arbitrations. This legal regime enhances the enforceability of both arbitration agreements and arbitral awards, and seeks to insulate the arbitral process from interference by national courts or other governmental authorities.

On the most universal level, the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") has been ratified by more than 120 nations, including all significant trading states and most major developing states. The Convention obliges member states to recognize and enforce both international commercial arbitration agreements and awards, subject to limited exceptions. Other international conventions impose comparable obligations on member states with respect to particular categories of disputes or with respect to particular bilateral or regional relationships.

In addition, most developed trading states have enacted national arbitration legislation that provides for the enforcement of international arbitration agreements and awards, that limits judicial interference in the arbitration process, and that authorises specified judicial support for the arbitral process. National arbitration legislation typically affirms the capacity of parties to enter into valid and binding agreements to arbitrate future commercial disputes, provides mechanisms for the enforcement of such arbitration agreements (through orders to stay litigation or (less frequently) to compel arbitration), and requires the recognition and enforcement of arbitration awards. In addition, most modern arbitration legislation narrowly limits the power of national courts to interfere in the arbitration process, either when arbitral proceedings are pending or in reviewing ultimate arbitration awards. In many cases, national arbitration statutes also authorize limited judicial assistance to the arbitral process. This assistance can include selecting arbitrators or arbitral situses, enforcing a tribunal's orders with respect to evidence taking or discovery, and granting provisional relief in aid of arbitration.

In recent years, there have been a number of efforts to harmonise national laws relating to international arbitration. The UNCITRAL Model Law on International Commercial Arbitration is the leading example. About twenty nations expect the United States, have adopted the Model Law to date, and others are considering it. Similarly, national and international bar associations have produced rules or codes of conduct dealing with various arbitration-related subjects, such as evidence taking in arbitration, organizing arbitral proceedings, and the ethics of arbitrators.

International commercial arbitration frequently occurs pursuant to institutional arbitration rules, which are often incorporated by reference into parties' arbitration agreements. The leading international arbitration institutions include the International Chamber of Commerce, the London Court of International Arbitration, London Maritime Arbitrators Association and the American Arbitration Association, each of which has adopted its own set of rules governing the procedural aspects of arbitration. These institutions, as well as another several dozen or so less widely known bodies, supervise international arbitrations when parties agree to dispute resolution under their auspices. In addition, the UNCITRAL Commercial Arbitration Rules are widely used in so-called ad hoc (or non-institutional) arbitrations.

Advantages and Disadvantages of International Arbitration

The popularity of arbitration as a means for resolving international commercial disputes has grown tremendously over the past several decades. This popularity reflects important advantages provided by international arbitration as a means of resolving international commercial disputes. Despite these advantages, however, international arbitration also has significant disadvantages. These advantages and disadvantages can be summarised as follows:

1. International arbitration is often perceived as ensuring a genuinely neutral decision-maker in disputes between parties from different countries. International disputes inevitably involve the risk of litigation before a national court of one of the parties, which may be biased, parochial, or unattractive for some other reason. Moreover, outside an unfortunately limited number of industrialized nations, local court systems

simply lack the competence, experience, resources, and traditions of even-handedness satisfactorily to resolve many international commercial disputes.

International arbitration offers a theoretically competent decision-maker satisfactory to the parties, who are, in principle, independent of either party or any national or international governmental authority. On the other hand, private arbitrators can have financial, personal, or professional relations with one party (or its counsel). In the eyes of some observers, this poses the risk of even greater partiality than the favoritism or parochialism of local courts.

2. A carefully-drafted arbitration clause generally permits the resolution of disputes between the parties in a single forum pursuant to an agreement that most national courts are bound by international treaty to enforce. This mitigates the expense and uncertainty of multiple judicial proceedings in different national courts.

   On the other hand, incomplete or otherwise defective arbitration clauses can result in judicial and arbitral proceedings where the scope or enforceability of the provision, as well as the merits of the parties' dispute, must be litigated. Moreover, even well drafted arbitration agreements cannot entirely exclude the expense and delay of a litigant determined to confound the arbitral process.

3. Arbitration agreements and arbitral awards are generally (but not always) more easily and reliably enforced in foreign states than forum selection clauses or foreign court judgments. As described, some 120 nations have acceded to the New York Convention, which obliges contracting states to enforce arbitration agreements and awards (subject to specified, limited exceptions). In contrast, there are no worldwide treaties relating to either forum selection agreements or judicial judgments. The perceived ease of enforceability of arbitral awards has contributed to fairly substantial voluntary compliance with arbitral awards, although there is little empirical data comparing such compliance with that applicable to judicial judgments.

   In some developing and other countries, there has been a perception that international commercial arbitration was developed by, and was biased in favor of, Western commercial interests. As a consequence, national law in many countries was historically hostile towards international arbitration. In some states, this remains the case today. Hostile or simply archaic national law can therefore still pose significant obstacles to the effective enforcement of international arbitration agreements and awards. In general, this hostility has waned somewhat over the past decade, with many states acceding to the New York Convention and enacting "pro-arbitration" legislation.

4. Arbitration tends to be procedurally less formal and rigid than litigation in national courts. As a result, parties have greater freedom to agree on neutral and appropriate procedural rules, set realistic timetables, select technically expert and neutral decision-makers, involve corporate management in dispute-resolution, and the like. On the other hand, the lack of a detailed procedural code or decision-maker with

direct coercive authority may permit party misconduct or create opportunities for an even greater range of procedural disputes between the parties.

5. International arbitration typically involves less extensive discovery than is common in litigation in some national courts (particularly common law jurisdictions). This is generally attractive to international businesses because of the attendant reduction in expense, delay, and disclosure of business secrets.
6. Although sometimes advertised on grounds of economy, even its proponents rightly acknowledge that "international arbitration is an expensive process." Both private arbitrators (unlike judges) and arbitral institutions (unlike most courts) must be paid by the parties. And there is a perception that some institutional fees, charged for "administrative" services, are unnecessarily high. Nonetheless, these expenses generally will be less than the legal fees and other costs required for lengthy appellate proceedings or (in some jurisdictions) discovery. Given this background, it is not difficult to find enthusiastic proponents of the arbitral process:
7. In the realm of international commercial transactions, arbitration has become the preferred method of dispute resolution. Arbitration is preferred over judicial methods of dispute resolution because the parties have considerable freedom and flexibility with regard to choice of arbitrators, location of the arbitration, procedural rules for the arbitration, and the substantive law that will govern the relationship and rights of the parties.
8. Equally vigorous are some critics, including those who regard arbitration as "the slower, more expensive alternative," or conclude that "arbitration sometimes involves perils that even surpass the 'perils of the seas.'" In fact, the truth is less clear-cut, and lies somewhere between these extremes: "The more enthusiastic of sponsors have thought of arbitration as a universal panacea. We doubt whether it will cure corns or bring general beatitude. Few panaceas work as well as advertised." At bottom, if generalizations must be made, international arbitration is much like democracy; it is nowhere close to ideal, but it is generally better than the existing alternatives. To those who have experienced it, litigation of complex international disputes in national courts is often distinctly unappealing. Despite the daunting procedural complexities and other uncertainties, arbitration often offers the least ineffective way to finally settle the contentious disputes that arise when international transactions go awry.

Institutional and AD hoc Arbitration International Arbitration

International arbitration can be either "institutional" or "ad hoc." There are important differences between these alternatives. A number of international organisations and institutions, located in different countries, provide institutional arbitration services. The best-known international arbitration institutions are the International Chamber of Commerce ("ICC"), the American Arbitration Association ("AAA"), and the London Court of International Arbitration ("LCIA"), apart from this international organisations like the World

Intellectual Property Organisation ("WIPO"), International Center for Settlement of Disputes ("ICSID"), World Trade Organisation and like provide for international arbitration.

These arbitral institutions have promulgated sets of procedural rules that apply where parties have agreed to arbitration pursuant to such rules. Among other things, institutional rules set out the basic procedural framework and timetable for the arbitration process. Institutional rules also typically authorize the host arbitral institution to select arbitrators in particular disputes (that is, to serve as "appointing authority"), to resolve challenges to arbitrators, to designate the place of arbitration, to fix or influence the fees payable to the arbitrators, and to review the arbitrator's awards to reduce the risk of unenforceability on formal grounds. Each arbitral institution has a staff (with the size varying significantly from one institution to another) and a decision-making body. Of course, arbitral institutions charge an administrative fee, which can sometimes be substantial, for rendering these various services. This fee is in addition to compensation paid by the parties to the arbitrators.

It is fundamental that arbitral institutions do not themselves arbitrate the merits of the parties' dispute. This is the responsibility of the particular individuals selected as arbitrators. Arbitrators are virtually never employees of the arbitral institution, but instead are private persons selected by the parties. If parties cannot agree upon an arbitrator, most institutional rules provide that the host institution will act as an "appointing authority," which chooses the arbitrators in the absence of the parties' agreement.

Ad hoc arbitrations are not conducted under the auspices or supervision of an arbitral institution. Instead, parties simply agree to arbitrate, without designating any institution to administer their arbitration. Ad hoc arbitration agreements will often choose an arbitrator or arbitrators, who is to resolve the dispute without institutional supervision or assistance. The parties will sometimes also select a preexisting set of procedural rules designed to govern ad hoc arbitrations. For international commercial disputes, the United Nations Commission on International Trade Law ("UNCITRAL") has published a commonly used set of such rules. Where ad hoc arbitration is chosen, parties usually will designate an "appointing authority," that will select the arbitrators if the parties cannot agree. If the parties fail to select an appointing authority, then the national arbitration statutes of many nations permit national courts to appoint arbitrators.

Both institutional and ad hoc arbitration have their strengths as well as weaknesses. Institutional arbitration is conducted according to a standing set of procedural rules and supervised, to a greater or lesser extent, by a professional staff. This reduces the risks of procedural breakdowns, particularly at the beginning of the arbitral process, and of technical defects in the arbitral award. The institution's involvement can be particularly constructive on issues relating to the appointment of arbitrators, the resolution of challenges to arbitrators, and the arbitrators' fees. Less directly, the institution lends its standing to any award that is rendered, which may enhance the likelihood of voluntary compliance and judicial enforcement

On the other hand, ad hoc arbitration is typically more flexible, less expensive (since it avoids sometimes substantial institutional fees), and more confidential than institutional arbitration. Moreover, the growing size and sophistication of the international arbitration bar, and the efficacy of the international legal framework for commercial arbitration, have partially reduced the relative advantages of institutional arbitration. Nonetheless, many experienced international practitioners prefer the more structured, predictable character of institutional arbitration, at least in the absence of unusual circumstances arguing for an ad hoc approach.

RESOLUTION OF INTERNATIONAL DISPUTES: THE ROLE OF THE PERMANENT COURT OF ARBITRATION – REFLECTIONS ON THE CENTENARY OF THE 1907 CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES[134]

The year 2007 marked the hundredth anniversary of the Hague Peace Conference of 1907, a milestone in the development of international law and relations between states resulting in the conclusion of the 1907 Convention for the Pacific Settlement of International Disputes on 18 October 1907. Through this Conference, for the first time a global, coherent system emerged for the peaceful resolution of international disputes. The centenary of the 1907 Convention afforded the opportunity to reflect on the system of arbitration of the Permanent Court of Arbitration (PCA), which, more than a century on, remains an attractive dispute resolution mechanism for states and non-state entities alike. Whereas in 1907 a permanent arbitral forum where states could take disputes was an idealistic undertaking, and certainly ahead of its time, today states are accepting arbitral jurisdiction for their disputes at an unprecedented rate.

The purpose of this article is to present an overview of the achievements of the PCA in the light of these centennial reflections.

Against the background of a continuing growth in the number of interstate disputes, it is critical for governments in today's world to have ready access to reliable, efficient, and, above all, effective methods of dispute resolution. The delegates at the 1907 Hague Conference knew a world considerably less complex but no less dangerous than that of today, and world leaders attending the conference were determined to find a way to consolidate a system for interstate dispute resolution. It had been this rising concern among

[134] TJACO T. VAN DEN HOUT, Resolution of International Disputes: The Role of the Permanent Court of Arbitration – Reflections on the Centenary of the 1907 Convention for the Pacific Settlement of International Disputes; *Leiden Journal of International Law*, 21 (2008), pp. 643–661

world leaders to manage conflict that had led to the first Hague Peace Conference of 1899, at which the PCA was established. The purpose of establishing the Permanent Court of Arbitration was to provide a permanent and readily available organization to serve as the registry for international arbitrations and commissions of inquiry, and, later, conciliations.

While the 1899 Conference was responsible for the establishment of the PCA, it was the 1907 Conference that created the conditions for its further development, in terms of both membership and the use of its services in the field of international dispute resolution. Although the PCA's growth during its early period of greatest use, between 1900 and 1921, has been rivalled only by what has taken place during the twenty-first century, this latter period has seen continuing progress towards the realization of some of the most ambitious objectives of the drafters of the founding Conventions.

BACKGROUND

The 1907 Hague Peace Conference

It was of particular concern to the states represented at the 1907 Conference to consider the experience of the intervening period since 1899, including the 1899– 1902 Boer War, the Russo-Japanese War of 1904–5, and the related Dogger Bank Incident of 1904.[135] At the head of the programme for the Second Peace Conference, the circular addressed by Czar Nicolas II to the states parties on 3 April 1906 listed '[i]mprovements to be made in the provisions of the Convention for the pacific settlement of international disputes as regards the Court of Arbitration and international commissions of inquiry'. This task was carried out by the First Commission of the 1907 Conference, assisted by the work of two committees of examination.[136]

By 1907 the PCA had convened arbitrations on Pious Fund of the Californias,[137] Preferential Treatment of Blockading Powers against Venezuela,[138] Japanese House Tax,[139] and Muscat Dhows.[140] In addition, two international commissions of inquiry had been conducted by 1907 with regard to the Incident in the North Sea (Dogger Bank Case),[141] and 'Tauvigno',

[135] S. Rosenne, The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents (2001), xix.
[136] See Report to the Conference from the First Commission on the Revision of the Convention of 1899 for the Pacific Settlement of International Disputes (Annex D to the minutes of the Ninth Plenary Meeting) (hereinafter Annex D), reproduced in Rosenne, supra note 1, at 223 ff. Page numbers hereinafter refer to those in the original text.
[137] USA/Mexico, Arbitration Agreement dated 22 May 1902; Award dated 14 October 1902.
[138] Great Britain, Germany and Italy/Venezuela, Arbitration Agreement dated 7 May 1903; Award dated 22 February 1904.
[139] Germany, Great Britain and France/Japan, Arbitration Agreement dated 28 August 1902; Award dated 22 May 1905.
[140] France/Great Britain, Arbitration Agreement dated 13 October 1904; Award dated 8 August 1905.
[141] Great Britain and Russia, Inquiry Agreement dated 25 November 1904; Report dated 26 February 1905.

‘Camouna’, and ‘Gaulois’.[142] By the outbreak of war in 1914, awards had been rendered in a further nine arbitrations,[143] and proceedings had been initiated in Expropriated Religious Properties[144] and French Claims against Peru.[145]

The 1907 Convention for the Pacific Settlement of International Disputes is more detailed than the 1899 Convention, elaborating on its framework with further provisions identified as necessary for the proper functioning of the PCA and its arbitration mechanism. These provisions included improved rules for the establishment and operation of commissions of inquiry, clarification of the method for settlement of the compromis, the establishment of a system of arbitration by summary procedure, specification of the powers and duties of the arbitral tribunal, and other detailed rules regarding the conduct of proceedings and the exchange of pleadings and documents.

The 1907 Peace Conference also considered several detailed propositions relating to the principle of compulsory arbitration, as well as the possible establishment of a ‘Court of Arbitral Justice ’with a form of compulsory jurisdiction.[146] It was not possible to reach an agreement on these proposals at the 1907 Conference; however, it was noted from the outset that, with regard to certain subjects, obligatory resort to arbitration had already been adopted in international practice. The achievement of a standing court with an optional form of compulsory jurisdiction was not realized until the foundation by the League of Nations of the Permanent Court of International Justice (PCIJ).[147] Furthermore, it was not until 1929, after the entry into force of the General Treaty for the Renunciation of War as an Instrument of National Policy (the Kellogg-Briand Pact),[148] that acceptance of compulsory jurisdiction became a political reality.[149]

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[142] France and Italy, Inquiry Agreement dated 20 May 1912; Report dated 23 July 1912. See also the arbitration in ‘Tauvigno’, ‘Camouna’, and ‘Gaulois’, France/Italy, Arbitration Agreement of 8 November 1912. During the proceedings, the parties settled the matter by agreeing that compensation would be payable by the Italian government.
[143] Maritime Boundary Norway–Sweden (The Grisba rdana Case), Norway/Sweden, Award of 23 October 1909; North Atlantic Coast Fisheries, Great Britain/USA, Award of 7 September 1910; Orinoco Steamship Company, USA/Venezuela, Award of 25 October 1910; Arrest and Restoration of Savarkar, France/Great Britain, Award of 24 February 1911; Canevaro Claim, Italy/Peru, Award of 3 May 1912; Russian Claim for Indemnities, Russia/Turkey, Award of 11 November 1912; French Postal Vessel ‘Manouba’, France/Italy, Award of 6 May 1913; The ‘Carthage’, France/Italy, Award of 6 May 1913; Dutch–Portuguese Boundaries on the Island of Timor, The Netherlands/Portugal, Award of 25 June 1914.
[144] Spain, France and Great Britain/Portugal, Arbitration Agreement dated 31 July 1913; Award dated 2 and 4 September 1920.
[145] France/Peru, Arbitration Agreement dated 2 February 1914; Award dated 11 October 1921.
[146] See further Report of the Conference from the First Commission recommending the Creation of a Court of Arbitral Justice (Annex A to the minutes of the Ninth Plenary Meeting), reproduced in Rosenne, supra note 1, at 169 ff.
[147] See Statute of the Permanent Court of International Justice, Art. 36; Statute of the International Court of Justice, Art. 36(2).
[148] General Treaty for the Renunciation of War as an Instrument of National Policy 1928, 94 LNTS 57.
[149] S. Rosenne, The Law and Practice of the International Court (2006), II, 702.

Against this background, the affirmation of the need to maintain a permanent organization,[150] capable of administering the world's major arbitrations on a consensual basis, stands out as an enduring contribution of the 1907 Conference. The 1907 Convention formed the basis of a formalized arbitration mechanism, the demand for which, notwithstanding a period of relative inactivity resulting from the creation of international judicial bodies by the international community, has since grown in recognition and use.

International dispute settlement

Whereas it was the accepted position in international law in 1907 that recourse to war was a legitimate method for sovereign states of resolving their disputes, the following two decades saw the renunciation of war by treaty in the Kellogg-Briand Pact, which entered into force on 24 July 1929 and is still in effect,[151] and later the obligations set out in Article 2(3) of the UN Charter that

> [a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered

and in Article 2(4) that

> [a]ll Members shall refrain in their political relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

The wide range of mechanisms available to states for the settlement of their international disputes pursuant to this obligation is enumerated in Article 33(1) of the UN Charter, which provides,

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Although positioned between 'conciliation 'and 'judicial settlement', arbitration has more in common with judicial settlement than with any of the other dispute resolution mechanisms mentioned in Article 33 of the UN Charter. The most significant characteristic common to 'arbitration 'and 'judicial settlement 'is that decisions both of international arbitral tribunals and of international courts are final and binding on the parties to a dispute. The 1907 Convention, which provides that international arbitration 'has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for

[150] 1907 Convention, Art. 41.
[151] See, e.g., US State Department, Treaties in Force 2007, Section 2: Multilateral Agreements, at 158, available at http://www.state.gov/documents/organization/89668.pdf.

law',[152] adds that recourse to arbitration 'implies an engagement to submit in good faith to the award',[153] and, further, states that an award of an arbitral tribunal 'puts an end to the dispute definitely without appeal'.[154] Similarly, the Statute of the International Court of Justice (ICJ) provides that a judgment of that Court is 'final and without appeal'.[155]

The role of the PCA

Since its inception the PCA has been charged with administering various types of dispute resolution procedures, including conciliation and fact-finding. The parties to disputes in any of these types of procedure may be any combination of states, international organizations, and private entities. Although this has been a significant factor in the survival and recent growth of the PCA, allowing it by June 2008 to reach an all-time high of 28 pending cases, this latter feature was not expressly envisaged by the drafters of the 1907 Convention. Article 47 of the 1907 Convention, which reproduced Article 26 of the Convention of 1899 without amendment, provides,

> The International Bureau is authorized to place its premises and staff at the disposal of the signatory powers for the use of any special board of arbitration.
>
> The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-signatory Powers or between signatory Powers and non-signatory Powers, if the Parties are agreed to have recourse to this tribunal.

The PCA administered its first commercial arbitration between a corporation and a state in the 1935 case of Radio Corporation of America v. China,[156] which was submitted to a special board of arbitration constituted under paragraph 10 of the Traffic Agreement of 10 November 1928.[157] Sittings of the board were held at the Peace Palace in The Hague, 'the Bureau International de la Cour Permanente d'Arbitrage having kindly given the assistance of its organization for the functioning of this special jurisdiction of arbitration'. This precedent has since been followed in a number of international commercial arbitrations.[158]

[152] 1907 Convention, Art. 37, first paragraph.
[153] Ibid., Art. 37, second paragraph.
[154] Ibid., Art. 81. See also ibid., Art. 83, on requests for revision of the award.
[155] Statute of the International Court of Justice, Art. 59. See also Art. 61 on applications for revision of the judgment.
[156] Published in (1935) 3 Reports of International Arbitral Awards 1621, (1935) 81 ILR 26, (1936) AJIL 353, (1937) Reports of International Arbitral Awards 197.
[157] Award, (1935) 3 Reports of International Arbitral Awards 1621.
[158] See, e.g., information on pending PCA cases, available at http://www.pca-cpa.org. At the time of writing, the cases at the PCA include 17 investor-state arbitrations under bilateral or multilateral investment treaties, and seven arbitrations under contracts between private entities and states or state-controlled entities.

Today it has been noted that, '[g]iven the time and expense involved in conducting a major international commercial arbitration', such as the hiring of rooms and posibly also the appointment of a secretary, a registrar, translators, and stenographers, 'the PCA's facilities and the staff of the International Bureau have much to com- mend themselves to parties'.[159] In addition, the broad choice allowed to the parties to any dispute in terms of the procedural rule which will apply – from the rules of The Hague Conventions of 1899 or 1907, the PCA Optional Rules, or other appropriate rules, such as the UNCITRAL Arbitration or Conciliation Rules, or ad hoc rules tailored to the specific dispute ' –shows a great deal of modernity and forward thinking by the PCA'.

CASES IN THE PCA

The following consideration of the work of the PCA is set out according to the two principal ways in which states decide to submit disputes to arbitration, namely: first, through accession to treaties providing for arbitration as the means to settle future disputes arising out of that treaty or coming within its scope, with particular reference to arbitration under the United Nations Convention on the Law of the Sea (UNCLOS); and, second, through the conclusion of an agreement to submit an existing dispute to arbitration.

Arbitration pursuant to clauses in treaties, with particular reference to UNCLOS

A number of international treaties provide for arbitration under the auspices of the PCA, particularly in the field of the protection of international investments. Treaties relating to international investment increasingly refer to the PCA in relation to dispute resolution. Arbitration is generally selected as the means for resolving disputes arising under bilateral investment treaties, and frequently some assistance from the PCA is written into the arbitration procedure. For example, France and India have signed a bilateral investment treaty in which they agree to submit any dispute arising under the treaty between investors and a contracting party to a three-member arbitral tribunal. The treaty expressly states that if the appointment of an arbitrator is not made within the time limit provided, either party may request the Secretary-General of the PCA to make the appointment.[160] Similar provisions are also made in that treaty for disputes arising between the two contracting parties to the treaty.

The PCA is also referred to in the dispute settlement provisions of multilateral instruments such as the Energy Charter Treaty (ECT).[161] This treaty sets out principles for international trade, transit, and investment in energy resources, such as oil and gas, and has been signed, at the time of writing, by 51 states.[162] The ECT, which provides that disputes between

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[159] A. Redfern and M. Hunter (eds.), Law and Practice of International Commercial Arbitration (2004), 70.
[160] Accord sur l'encouragement et la protection re ciproques des investissements, 2 September 1997, Fr.-India, J.O., 6 May 1999,(2000)47Recueildestraite ́s6791,Art.9(3).
[161] Energy Charter Treaty of 17 December 1994, (1995) 34 ILM 360 (hereinafter ECT).
[162] See list of ratifications available at http://www.encharter.org/fileadmin/user_upload/document/Public_ratification_Treaty.pdf.

contracting parties may be referred to a three- member arbitral tribunal, goes on to state that, unless otherwise agreed by the parties, the tribunal shall sit in The Hague and use the premises and facilities of the PCA. The ECT also provides that the Secretary-General of the PCA may be requested to appoint an arbitrator to break a deadlock caused by failure by a respondent to appoint an arbitrator, or failure by the parties to agree on a third arbitrator.

The treaty which is of particular relevance in treaty-based arbitration under PCA auspices is UNCLOS, which provides, in effect, for a system of compulsory recourse to arbitration. UNCLOS was concluded to provide a regulatory framework for use of the world's seas and oceans, to ensure the conservation and equitable usage of re- sources and the marine environment, and to ensure the protection and conservation of the living resources of the sea. UNCLOS addresses matters such as sovereignty and rights of usage in maritime zones, navigational rights, and protection and pre- servation of the marine environment. From among the 115 original signatories, 105 states have ratified UNCLOS; a further 15 have acceded to it.[163]

Part XV(2) of UNCLOS lays down rules for the binding settlement of disputes arising out of its interpretation or application. When signing, ratifying, or acceding to UNCLOS, a state may make a declaration choosing one of the following means for settlement of disputes concerning the interpretation and application of the Convention:

1. the International Tribunal for the Law of the Sea (ITLOS) in Hamburg;
2. the International Court of Justice in The Hague;
3. ad hoc arbitration (in accordance with Annex VII of the Convention); or
4. a 'special arbitral tribunal 'constituted for certain categories of dispute (established under Annex VIII of the Convention).

If disputing states have declared preferences for different dispute resolution methods, according to Article 287(5) the default dispute settlement mechanism is arbitration under Annex VII, unless the states agree otherwise. According to Article 287(3), states that do not declare any preference are deemed to have accepted arbitration under Annex VII in any event. Few states have, as yet, invoked the optional exceptions under Article 298, although the right to make later use of this article has commonly been expressly reserved in declarations by ratifying states such as Iran, India, Morocco, and Nicaragua.[164]

Arbitration has a number of general and traditionally cited advantages over other methods of dispute resolution, which has made it an attractive choice as a default mechanism to the

[163] See Consolidated Table of Ratifications, Accessions, etc., published by the United Nations Division for Ocean Affairs and the Law of the Sea, available at http://www.un.org/Depts/los/reference_files/status2007.pdf.
[164] For this and the following information, see Table of Declarations and Statements published by the United Nations Division for Ocean Affairs and the Law of the Sea, as updated on 23 October 2007, available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

drafters of UNCLOS, notably the flexibility afforded to the parties in the choice as to the members of the arbitral tribunal.[165] Each party to an arbitration may usually appoint to its case an arbitrator with the knowledge and experience that the party considers appropriate, with each party appointing at least one arbitrator in most PCA-administered arbitrations. Even more autonomy is granted under UNCLOS, according to which parties to the dispute not only each nominate a party-appointed arbitrator, but also agree on the selection of three further tribunal members, including a president, provision being made for selection of tribunal members should the parties be unable to reach agreement. Direct involvement in the composition of the body that will decide the case is a confidence-building aspect of arbitration for most states, who may even appoint one of their own nationals pursuant to Annex VII.

The dispute settlement provisions found in Part XV of UNCLOS, providing for compulsory recourse to arbitration by unilateral application, are said to represent 'a major innovation in international litigation practice, namely, the compulsory recourse to arbitration by unilateral application'. Since the entry into force of the Convention in 1994, there have been no fewer than five instances of compulsory recourse to arbitration. It has been suggested that, given the 'unforeseen possibilities 'it entails, this innovation, coupled with a relative lack of interest in compulsory jurisdiction by states, indicates that the concept of the compulsory jurisdiction is in need of thorough review, and, significantly, that such review 'should be based on compulsory recourse either to the International Court (including the possibility of recourse to an ad hoc chamber) or to an ad hoc system of arbitration along the lines set out in Part XV of the Convention on the Law of the Sea'.

Although UNCLOS, unlike the ECT, does not provide for use of the premises and facilities of the PCA, in practice the PCA has shown itself to be ideally placed as an institutional forum for ad hoc arbitrations conducted under UNCLOS. It has now served as registry for four arbitral tribunals constituted under Annex VII of the Convention, three of which were recently concluded: Guyana/Suriname,[166] Barbados/Trinidad and Tobago,[167] the first Annex VII maritime delimitation, and Malaysia/Singapore,[168] a dispute concerning land reclamation, which was concluded by an award on agreed terms reflecting a settlement negotiated between the parties. The conduct of the proceedings in these cases has demonstrated that, in addition to the procedural advantages offered by arbitration, there are further benefits for parties who choose to conduct their arbitration under the auspices of the PCA. Although not a

[165] See S. Rosenne and L. B. Sohn (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary (1989), V, 42, n. 4, citing, e.g., the statements in the Plenary during the fourth session (1976) by representatives of France, 59th meeting, paras. 8–10, V Off. Rec. 14; and Madagascar, 61st meeting, para. 44, V Off. Rec. 34; N. Klein, Dispute Settlement in the UN Convention on the Law of the Sea (2005), 56.
[166] Guyana/Suriname (Award of 17 September 2007), available at http://www.pca-cpa.org.
[167] Barbados/Trinidad and Tobago (Award of 11 April 2006), (2006) 45 ILM 798, available at http://www.pca-cpa.org.
[168] Malaysia/Singapore (Award on Agreed Terms of 1 September 2005), available at http://www.pca-cpa.org.

court composed of judges holding a fixed term of office and with jurisdiction on a standing basis, but, rather, a permanent framework for arbitral tribunals established under its auspices, the PCA is able to offer administrative support that relieves the tribunal and the parties of many managerial and logistical tasks. Some examples will be considered below in relation to recent arbitrations conducted at the PCA.

A growing body of expertise

As a standing institution that provides a forum for dispute resolution on a consensual basis, the PCA has developed a body of expertise and relevant procedural precedent that will prove invaluable in future disputes submitted to arbitration under UNCLOS. Such precedent was utilized for example in the recent Guyana/Suriname arbitration, which concerned the delimitation by the drawing of a single maritime boundary of the common maritime boundary of Guyana and Suriname in the territorial sea, continental shelf, and exclusive economic zone. The case concerned, further, the alleged unlawful threat of use of force by Suriname in the expulsion of a Guyanese concession holder from the disputed area on 3 June 2000, and the failure of the parties to comply with their obligations under Articles 74(3) and 83(3) of UNCLOS to make every effort to enter into provisional arrangements of a practical nature and to refrain from taking action which might jeopardize the reaching of a final agreement pending delimitation of the continental shelf and exclusive economic zones. The tribunal unanimously rejected Suriname's jurisdictional objections and delimited the maritime boundary in the territorial sea in order to give effect to the special circumstance of a historical agreement between the parties that the delimitation should allow for Suriname to have navigational control of the approaches to the Corentyne River. The delimitation in the continental shelf and exclusive economic zone was carried out according to the method accepted in international jurisprudence and state practice of drawing a provisional equidistance line which fell to be adjusted according to any special circumstances, which the tribunal found did not exist in that case. The tribunal upheld Guyana's claim that Suriname had had unlawful recourse to the threat of use of force and held, further, that both parties had violated their respective obligations under Articles 74(3) and 83(3) of the Convention. In respect of these violations, the tribunal granted declaratory relief.

In carrying out the maritime delimitation, the tribunal in Guyana/Suriname had recourse not only to the jurisprudence of the ICJ cited extensively by the parties, but also to another recent maritime delimitation case conducted under PCA auspices, the Barbados/Trinidad & Tobago arbitration. This case, initiated in February 2004 by Barbados under the Law of the Sea Convention, concerned the delimitation of the exclusive economic zone and continental shelf in the Caribbean Sea region that separates the two island states. The tribunal's award in this case established the maritime boundary between Barbados and Trinidad and Tobago and required the parties to take steps to conserve fish stocks and ensure certain fishing rights of Barbadian fishermen who had traditionally fished in Trinidad and Tobago waters.

The decision in Barbados/Trinidad & Tobago brought an end to three decades of unsuccessful attempts to agree on the issues therein addressed. The proceedings were concluded by way of a unanimous final award in little more than two years; the final award was rendered within less than six months of the conclusion of the substantive hearings held in October 2005. This is an example of the efficiency that institutional arbitration can provide, particularly in that the parties and the tribunal relied extensively on the PCA for support, including the day-to-day administration of the case. Having the PCA perform various administrative tasks significantly alleviated the burdens on the tribunal and the parties, resulting in faster proceedings and reduction of costs. Furthermore, the tribunal's award in Barbados/Trinidad & Tobago has been described as a 'landmark 'development in the law of the sea.[169]

Expert assistance

The PCA provides assistance with the identification of experts to assist the tribunal with technical matters, such as the preparation of maps of maritime or land boundaries, which can be used to great effect depending on the issues which arise. This was demonstrated in the Guyana/Suriname arbitration, where the Tribunal, in addition to appointing a hydrographer in connection with the substantive issue of the maritime delimitation,[170] nominated an expert to provide assistance in the disclosure of documents following a disagreement between the parties on access to certain archive files.[171] The assistance thus provided in the resolution of the issue between the parties on the production and disclosure of documents prevented a dispute on a preliminary matter from impeding the resolution of the substantive issues.[172]

Administrative support and a channel of communication

Further, the PCA through its International Bureau provides a level of managerial and administrative support which is not available to other ad hoc tribunals. This can provide assistance in the resolution of disputes by means other than arbitration, the utility of which was demonstrated by the settlement reached in the Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia/Singapore). This case was initiated by Malaysia on 4 July 2003, pursuant to Annex VII of the 1982 Convention, concerning certain

[169] B. Kwiatkowska, 'The 2006 Barbados/Trinidad and Tobago Award: A Landmark in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation', (2007) 22 International Journal of Marine and Coastal Law 7. See also A. Blake and G. A. Campbell, 'Conflict over Flying Fish: The Dispute between Trinidad & Tobago and Barbados', (2007) 31(3) Marine Policy 327; B. Kwiatkowska, 'The 2006 UNCLOS Annex VII "Barbados/Trinidad and Tobago" Award: Landmark Progress in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation', (2007) 19 Hague Yearbook of International Law 33; B. Kwiatkowska, 'Barbados/Trinidad and Tobago: Award on Jurisdiction and Merits', (2007) 101 (1) AJIL 149; P. Weckel and A. Guillaume, 'Sentence du 11Mai2006,De limitationdelaZeeetduplateaucontinental(Barbadec.Trinite-et-Tobago)' (2006)3RGDIP 713.

[170] Guyana/Suriname, Order No. 2 of 18 July 2005.

[171] Guyana/Suriname, Order No. 1 of 18 July 2005; Order No. 3 of 12 October 2005; Order No. 4 of 12 October 2005; Order No. 5 of 16 February 2005.

[172] Guyana/Suriname, Award of the Tribunal, supra note 54, at paras. 16–99.

land reclamation activities carried out by Singapore that were said to infringe Malaysia's rights under the Convention in and around the Straits of Johor.

Malaysia's notification to Singapore was accompanied by a request to ITLOS for provisional measures under Article 290 UNCLOS. In October 2003 ITLOS issued an Order prescribing certain provisional measures, including the establishment of a group of independent experts to conduct a one-year study on the land reclamation activities and to recommend measures to deal with any adverse effects. Following issuance of the ITLOS Order, the arbitral tribunal and the group of independent experts (GOE) were duly constituted. The PCA served as registry for the tribunal. After the report of the GOE was submitted to the parties in November 2004, the parties transmitted this report to the tribunal and requested that a hearing be arranged at which the parties could apprise the tribunal of the progress of consultations that had taken place between them. At the hearing, which took place at The Hague on 10 January 2005, the tribunal was informed that the parties had agreed ad referendum on the text of a draft settlement agreement, signed on 26 April 2005, providing, with respect to the dispute submitted by Malaysia to the tribunal,

> 13. This Agreement is in full and definitive settlement of the dispute with respect to the land reclamation and all other issues related thereto. The Parties agree that the issue pertaining to the maritime boundaries be resolved through amicable negotiations, without prejudice to the existing rights of the Parties under international law to resort to other pacific means of settlement.
>
> 14. This Agreement accordingly terminates the Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore) upon the agreed terms.
>
> 15. The Parties shall forthwith jointly request that the Arbitral Tribunal in the Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore) adopt the terms of this Agreement in the form of an agreed Award which is final and binding upon the Parties.

Pursuant to the parties 'joint request, on 1 September 2005 the tribunal delivered a final award binding upon the parties in the terms set out in the settlement agreement, thereby terminating the proceedings.

The successful resolution of this dispute has been cited as an example of the utility of the institutional procedures under UNCLOS, 'in particular the availability of the GOE tasked to conduct an impartial fact-finding mission. . . . [I]t could be said that, in contrast, the absence of such institutional procedures unnecessarily aggravated the situation where, notably, both countries had already decided that some form of judicial or arbitral settlement would be suitable in the cases of the Pedra Branca/Pulau Batu Puteh and water disputes'.[173] It has also been cited as a possible precedent for other ongoing maritime disputes such as the need to develop appropriate means to handle the dispute between China and some south-east Asian countries over territorial claims to the Spratly Islands. The case has also been invoked in the context of the wider foreign-policy benefits of resort to pacific settlement of disputes. At the general level, the fact that countries in the region 'have even started to use international judicial organs to settle their maritime disputes 'has been hailed by an experienced commentator as a trend 'from the rule of power to rule of law 'in the marine legal order in east Asia.[174]

Assistance in drafting procedural rules

States have also called on the PCA to assist in drafting detailed procedural rules regarding matters such as evidence and confidentiality, the hearing of witnesses, the allocation and sharing of costs, and the publication of the award, particularly, for instance, in the MOX Plant case.[175] This case concerned a sensitive subject matter, namely, a decision made by the United Kingdom in 1993 to allow British Nuclear Fuels Limited, a UK corporation, to build a mixed oxide fuels (MOX) plant for the reprocessing of spent nuclear fuel on the coast of the Irish Sea. In October 2001 Ireland initiated arbitration proceedings pursuant to Part XV of Section 2 and in accordance with Annex VII UNCLOS, requesting that the arbitral tribunal find, inter alia, that the United Kingdom had failed (i) to take measures to prevent, reduce, and control pollution of the marine environment of the Irish Sea from discharges of radioactive materials; (ii) to put in place measures in the event of the release of radioactive materials as a result of accidents or terrorist acts; and (iii) correctly to assess the damage to the environment by taking into account relevant occurrences.

This dispute is also interesting from the point of view of the jurisdictional questions raised. The United Kingdom objected to the jurisdiction of an arbitral tribunal established under UNCLOS on the grounds that the parties 'dispute fell within the scope of European Community (EC) law. The United Kingdom argued that EC member states have, under the EC Treaty, conferred exclusive competence on the EC in the areas of, inter alia, the conservation and management of sea-fishing resources and some aspects of the prevention of

[173] C. Lim, 'The Uses of Pacific Settlement Techniques in Malaysia–Singapore Relations', (2005) 6 Melbourne Journal of International Law 313, at 332. The case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) was submitted to the ICJ on 24 July 2003 and the ICJ rendered its Judgment on 23 May 2008.

[174] Z. Keyuan, 'Implementing the United Nations Convention on the Law of the Sea in East Asia: Issues and Trends', (2005) 9 Singapore Yearbook of International Law, 37, 53. See further N. Schrijver, 'Practising International Law at the International Tribunal for the Law of the Sea: The Case Concerning Land Reclamation in and Around the Straits of Johor (Malaysia v. Singapore), Application for Provisional Measures', (2005) 6 (1) Griffin's View on International and Comparative Law 35; J. Leong, 'Singapore and Malaysia: Recent Bilateral Developments '(2004) 24 Singapore Law Review 1.

[175] Ireland/United Kingdom (MOX Plant Case) (Rules of Procedure of 25 October 2001), available at http://www.pca- cpa.org.

marine pollution; and that, under Article 292 of the EC Treaty, member states of the EC undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein. The European Commission, being also of the opinion that by instituting proceedings under UNCLOS, Ireland had failed to fulfil its obligations as a member of the EC,[176] brought the issue of jurisdiction before the European Court of Justice (ECJ) on 15 October 2003.[177] In view of the possible jurisdictional problems which could arise, in 2003 the arbitral tribunal stayed its own proceedings pending the determination of the question by the ECJ. In May 2006 the ECJ issued its judgment,[178] in which it found, essentially, that the questions of jurisdiction that had been raised concerned the internal operation of a separate legal order, namely the legal order of the EC, and that those issues had to be resolved within the institutional framework of the EC.

This case, now formally closed,[179] was a landmark in the development and history of UNCLOS, as its subject matter – dealing with protection and preservation of the marine environment, but also matters of competing jurisdiction – had never been brought before a tribunal constituted pursuant to the compulsory dispute settlement procedures of UNCLOS. Although the case was not heard on the merits, it has been the subject of extensive critical analysis[180] and will also be studied closely by future arbitral tribunals that are confronted with international treaties between EC member states relating to the protection of the environment.

[176] For the procedural background, see Case C-459/03, Judgment, Commission v. Ireland, 30 May 2006, paras. 49–57.

[177] Case C-459/03, Action brought on 30 October 2003 by the Commission of the European Communities against Ireland, Official Journal of the European Communities (2004/C 7/39).

[178] Case C-459/03, Judgment, Commission v. Ireland, 30 May 2006, paras. 168–183.

[179] See Order No. 6, 'Termination of Proceedings', 6 June 2008, available at www.pca-cpa.org.

[180] See J. Finke, 'Competing Jurisdiction of International Courts and Tribunals in Light of the MOX Plant Dispute', (2007) 49 German Yearbook of International Law 307; N. Lavranos, 'The MOX Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?', (2006) 19 (1) LJIL 223; M. B. Volbeda, 'The MOX Plant Case: The Question of "Supplemental Jurisdiction" for International Environmental Claims under UNCLOS', (2006) 42 (1) Texas International Law Journal 211; M. Tanaka, 'Lessons from the Protracted MOX Plant Dispute: A Proposed Protocol on Marine Environmental Impact Assessment to the United Nations Convention on the Law of the Sea', (2004) 25 (2) Michigan Journal of International Law 337; R. Churchill and J. Scott, 'The MOX Plant Litigation: The First Half-Life', (2004) 53 (3) ICLQ 643; V. Ro ben, 'The Order of the UNCLOS Annex VII Arbitral Tribunal to Suspend Proceedings in the Case of the MOX Plant at Sellafield: How Much Jurisdictional Subsidiarity?', (2004) 73 (2) Nordic Journal of International Law 223; Y. Shany, 'The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures', (2004) 17 (4) LJIL 815; B. Kwiatkowska, 'The Ireland v. United Kingdom (MOX Plant) Case: Applying the Doctrine of Treaty Parallelism', (2003) 18 (1) International Journal of Marine and Coastal Law 1; M. J. C. Forster, 'The MOX Plant Case: Provisional Measures in the International Tribunal for the Law of the Sea', (2003) 16 (3) LJIL 611; D. J. Devine, 'Provisional Measures Ordered by the International Tribunal for the Law of the Sea in the Area of Pollution: The MOX Plant Case', (2003) 28 South African Yearbook of International Law 263.

PCA initiatives

In addition to having provided services tailored to the actual requirements of parties in the cases described above, the PCA has taken initiatives to address the anticipated requirements of the parties to other disputes in this area, including the convening of a working group to draft specialized rules and make recommendations concerning environmental law disputes. Pursuant to Articles 8(3) and 27(5) of the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, adopted on 19 June 2001, the PCA maintains lists to which its member states have agreed to nominate one environmental law expert and one environmental science expert.[181] These lists are made available to assist the parties, the tribunal, and/or the appointing authority, depending on the circumstances of the case. Many of the experts on the current lists are experts on the law of the sea.

Arbitrations under ad hoc agreements

As outlined above, the PCA also deals with arbitrations between states that do not arise under a previously signed treaty or agreement, but where, instead, an agreement to arbitrate is reached after the dispute has arisen. Parties may, therefore, enter into agreements providing for arbitration at the PCA at any time.

Belgium/Netherlands: Iron Rhine arbitration

An interesting example of a case submitted in this way is the arbitration between Belgium and the Netherlands[182] concerning a historical railway built in 1879, known as the 'Iron Rhine', that runs from Belgium to Germany, via Dutch territory. The Iron Rhine railway traces its legal origins to a right of transit across Dutch territory that was conferred on Belgium and later elaborated through several treaties concluded in the nineteenth century. The railway was used intermittently for over a century, but had fallen into disuse by 1991. During the 1990s the Netherlands created several nature reserves on the path of the old railway. In 1998 Belgium sought to reactivate the railway on the basis of its treaty rights. However, the Netherlands was anxious to regulate any reactivation of the railway to ensure that the Dutch nature reserves would not suffer damage.

For a number of years the two states attempted to negotiate the terms of any reactivation project. They were unsuccessful, and, in 2003, agreed that the matter be submitted to arbitration at the PCA. The disagreement turned on two main points: first, the extent to which Belgium's right to reactivate the railway in Dutch territory was constrained by Netherlands environmental law; and, second, how the costs of any reactivation in Dutch territory were to

[181] See PCA Annual Report 2006, 11. See also Permanent Court of Arbitration, Peace Palace Papers Series, International Investments and the Protection of the Environment: The Role of Dispute Resolution Mechanisms (2001).

[182] Belgium/Netherlands (Iron Rhine Arbitration) (Award of 24 May 2005), in Permanent Court of Arbitration Award Series, The Iron Rhine (IJzeren Rijn) Arbitration (Belgium–Netherlands) Award of 2005 (2007). Full text of the Award available at http://www.pca-cpa.org.

be shared between the two states. The Netherlands submitted, among other things, that it had the right to impose the building of under- and overground tunnels along Dutch parts of the railway, at Belgium's expense.

The tribunal of five arbitrators (including one Dutch and one Belgian arbitrator) determined that Belgium's reactivation plans were restricted by Netherlands environmental law, but that such restrictions could not be so burdensome as to deny Belgium's right of transit nor render it unreasonably difficult. Accordingly, the Netherlands was entitled to impose a requirement to build under- and overground tunnels on sections of its territory, but the costs of this were to be shared between the two states.

The issues in dispute in this case were decided in large part by the identification of Belgium's rights under the nineteenth-century treaties, while upholding rights of the Netherlands that would not conflict with the treaty rights of Belgium. The tribunal's decision is an important example of the achievement of a balance between the rights of one state over the territory of another by virtue of a treaty, on the one hand, and the residual sovereignty of the other state, on the other. In the published view of the co-agent of the Netherlands in this case, 'in keeping with the work of art of the Iron Rhine tribunal . . . are the words which Sir Gerald Fitzmaurice wrote in 1951: "that in the last resort all interpretation must consist in the exercise of common sense by the judge, applied in good faith and with intelligence"'.[183] This arbitration was commenced in July 2003. In less than two years the case was concluded with a unanimous final award rendered in May 2005.

Eritrea/Yemen

The Eritrea–Yemen arbitration[184] involved a dispute between the two states with respect to sovereignty over a number of islands in the Red Sea and associated natural resources. In December 1995, when Eritrean naval patrols discovered a small Yemeni military presence on one of the islands, the dispute over the islands erupted in armed hostilities, which resulted in a stalemate, with Eritrean forces occupying one island and Yemeni forces occupying another. An agreement to arbitrate the dispute was concluded between the two states in 1996 and the PCA was invited by the arbitral tribunal to act as its registry. At the request of the two states, this arbitration was divided into two phases: the first-phase award concerning territorial

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[183] I. van Bladel, 'Iron Rhine Case and the Art of Treaty Interpretation', in N. Blokker, R. Lefeber, L. Lijnzaad, and I. van Bladel (eds.), The Netherlands in Court: Essays in Honour of Johan G. Lammers (2006), 1, at 17. See also V. Barral,'LasentenceduRhindeFer,unenouvellee tapedanslapriseencomptedudroita`l'environnement par la justice internationale', (2006) 3 RGDIP 647; I. van Bladel, 'The Iron Rhine Arbitration Case: On the Right Legal Track?: An Analysis of the Award and of its Relation to the Law of the European Community', (2006) 18 Hague Yearbook of International Law 3; Lavranos, supra note 71; P. Weckel, 'Sentences du 24 Mai 2005, Chemin de fer du Rhin (Belgique/Pays-Bas)', (2005) 3 RGDIP 715.
[184] Permanent Court of Arbitration Award Series, The Eritrea–Yemen Arbitration Awards of 1998 and 1999 (2005).

sovereignty was rendered in October 1998, and the second-phase award concerning maritime delimitation was rendered just over a year later in December 1999.

In the first phase, Eritrea contended that on gaining independence in 1993 it inherited title to the islands from Ethiopia, which had in turn on independence inherited title from Italy. Yemen argued that it had held title to the islands during the Middle Ages, before the Ottoman Empire controlled the area, and that after the collapse of the Ottoman Empire at the end of the First World War, title to the islands reverted to Yemen. Both parties supplied the tribunal with extensive evidence supporting their claims to sovereignty. In this regard, the parties relied, among other things, on displays of government authority over the islands, recognition by other states of their purported title, and a large number of maps, historical and modern, attributing the islands to either one state or the other. The tribunal ruled that Eritrea had sovereignty over two sets of islands that were within 12 miles of its coast, and that Yemen had sovereignty over a number of other islands over which it had frequently displayed authority in the years leading up to the arbitration.

In the second phase, each side proposed different median lines as the appropriate maritime boundary between the two states. The tribunal rejected the boundaries proposed by each party and determined, for the most part, that the appropriate maritime boundary was the equidistance line between the mainland coasts of the two states. In its analysis, the tribunal considered the relevance of petroleum agreements and concessions to the delimitation of the maritime boundary. The tribunal concluded that, while offshore petroleum contracts entered into by the two governments failed 'to establish or significantly strengthen the claims of either party to sovereignty over the disputed islands', they did, however, 'lend a measure of support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands, dividing the respective jurisdiction of the Parties'.[185]

During this second phase of the arbitration, a third state, Saudi Arabia, raised a concern with the Eritrea–Yemen tribunal, namely that the maritime jurisdictions of Yemen, Eritrea, and Saudi Arabia met at a point that had not been agreed upon by the three states. Saudi Arabia requested the tribunal to affirm in its award that its judgments would only bind Yemen and Eritrea and would in no way affect the rights and legal interests of Saudi Arabia. The tribunal accepted Saudi Arabia's request and stated in its award that it had neither the competence nor the authority to decide on any of the boundaries between either of the two parties and neighbouring states.

In requiring the parties to inform and consult one another regarding any oil and gas discovered straddling their shared maritime boundary, the tribunal provided a framework for the parties to share and/or jointly use such resources. The tribunal's decision in respect of

[185] Eritrea/Yemen (Award of the Tribunal in the Second Stage (Maritime Delimitation), 17 December 1999, ibid., paras. 77 and 78.

these petroleum contracts and concessions between the parties can be considered a valuable resource for international lawyers dealing with similar issues concerning resources straddling maritime boundaries. Furthermore, this case, 'one of the most significant international arbitrations of the end of the 20th century',[186] is expected to stand out in history as the arbitration that provided a solution to the problem of sovereignty over the southern islands of the Red Sea, which had been awaited 'since the end of the First World War'.

TheEritrea–Ethiopia Boundary Commission and Claims Commission

Two of the most complex and interesting cases that have been brought to the PCA in recent years arise from the war between Eritrea and Ethiopia from May 1998 to June 2000 relating to their shared border. This conflict resulted in extensive loss of life and the displacement of more than one million people. Pursuant to a peace agreement reached in December 2000 in Algiers, the parties 'boundary dispute was submitted to one arbitral tribunal, the Eritrea–Ethiopia Boundary Commission, and claims for violations of international law during the war were submitted to a second arbitral tribunal, the Eritrea–Ethiopia Claims Commission. The PCA serves as registry and provides administrative support to both commissions.

Prior to the establishment of the Claims Commission, it may be noted that there had been several historical instances of arbitration under PCA auspices of cases involving the laws of armed conflict, relating for example to the treatment of detainees, the laws of occupation, and the resort to force.[187] The Claims Commission has, to date, issued a total of 15 awards on the liability of each state for, among other things, the mistreatment of prisoners of war, the destruction and looting of property, and the injury and deaths of civilians during the armed conflict.[188] The Claims Commission is now seized with the damages phase of its work. The

[186] J.-P. Queneudec, 'The Eritrea–Yemen Arbitration: Its Contribution to International Law', in Permanent Court of Arbitration Award Series

[187] See, e.g., Deserters of Casablanca, France/Germany, Award of 22 May 1909; Arrest and Restoration of Savarkar, France/Great Britain, Award of 24 February 1911; French Postal Vessel 'Manouba', Award of 6 May 1913; Chevreau Claim, United Kingdom/France, Award of 9 June 1931.

[188] Eritrea–Ethiopia Claims Commission Partial Awards: Prisoners of War: Eritrea's Claim 17 (1 July 2003), (2003) 42 ILM 1083; Prisoners of War: Ethiopia's Claim 4 (1 July 2003), (2003) 42 ILM 1056; Central Front: Eritrea's Claims 2, 4, 6, 7, 8 & 22 (28 April 2004), (2004) 43 ILM 1249; Central Front: Ethiopia's Claim 2 (28 April 2004), (2004) 43 ILM 1275; Civilians Claims: Eritrea's Claims 15, 16, 23 & 27–32 (17 December 2004), (2005) 44 ILM 601; Ethiopia's Claim 5 (17 December 2004), (2005) 44 ILM 630; Western Front, Aerial Bombardment & Related Claims: Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26 (19 December 2005), (2006) 45 ILM 396; Western & Eastern Fronts: Ethiopia's Claims 1 & 3 (19 December 2005); Diplomatic Claim: Eritrea's Claim 20 (19 December 2005); Diplomatic Claim: Ethiopia's Claim 8 (19 December 2005), (2006) 45 ILM 621; Loss of Property in Ethiopia Owned by Non-residents: Eritrea's Claim 24 (19 December 2005); Economic Loss throughout Ethiopia: Ethiopia's Claim 7 (19 December 2005); Jus Ad Bellum: Ethiopia's Claims 1–8 (19 December 2005), (2006) 45 ILM 430. Final Awards: Pensions Claim: Eritrea's Claims 15, 19 & 23 (19 December 2005), (2006) 45 ILM 633; Ports Claim: Ethiopia's Claim 6 (19 December 2005). A full set of the Claims Commission's Awards is available at http://www.pca-cpa.org.

first round of hearings in the damages phase was held at the Peace Palace in April 2007; the second round was held there in May 2008.[189]

The Boundary Commission issued its Decision on Delimitation of the Border between Eritrea and Ethiopia (Delimitation Decision) on 13 April 2002,[190] and proceeded to the next phase of its mandate under the Algiers Agreement – demarcation of the border. However, after initial acceptance of the Delimitation Decision as final and binding by both parties, and involvement of both parties in the demarcation process, Ethiopia began insisting on changes that the Boundary Commission viewed as amounting to an attempt to reopen the substance of the Delimitation Decision. After several years of attempts by the Boundary Commission to complete demarcation, and against the background of several Security Council resolutions calling on both parties to co-operate with the Commission, the Commission met in November 2006 at the seat of the PCA in order to 'consider how best to advance the demarcation'.[191] On 27 November 2006 the Commission issued a statement[192] setting out 'its approach to demarcation in light of the obstacles the parties had placed in its way'.[193] The Commission identified 'the location of points for the emplacement of pillars as a physical manifestation of the boundary on the ground 'by means of precise co-ordinates.[194] The parties were given 12 months to reach agreement on the emplacement of pillars. If, by the end of 12 months, such agreement were not to have been reached nor sufficient progress made so as to enable the Commission to resume its activity, the Commission was to determine that 'the boundary [would] automatically stand as demarcated by the boundary points listed in the Annex [to the statement] and that the mandate of the Commission . . . be regarded as fulfilled'.[195]

Following a meeting with the parties at the PCA on 6 and 7 September 2007, the Boundary Commission concluded that no further progress could be made towards pillar emplacement on the ground. The parties were reminded that if before 30 November 2007 no progress were

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[189] For critical analysis see G. H. Aldrich, 'The Work of the Eritrea–Ethiopia Claims Commission', (2006) 6 Yearbook of International Humanitarian Law 435; C. Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps its Boundaries: A Partial Award?', (2006) 17 (4) EJIL 699; R. P. Barnidge, 'The Eritrea–Ethiopia Claims Commission: Partial Awards, Central Front', (2005) 6 (1) Griffin's View on International and Comparative Law 12; N. Klein, 'State Responsibility for International Humanitarian Law Violations and the Work of the Eritrea Ethiopia Claims Commission So Far', (2005) 47 German Yearbook of International Law 214; J. I. A. Lichtenberg, 'Eritrea Ethiopia Claims Commission', (2004) 12 (3) Tilburg Foreign Law Review 266.

[190] Decision on Delimitation of the Border between Eritrea and Ethiopia (13 April 2002), 41 ILM 1057 (2002); Eritrea–Ethiopia Boundary Commission, Observations, 42 ILM 1010 (2003) (hereinafter EEBC Observations). See http://www.pca-cpa.org for the full set of Decisions.

[191] See 22nd Report of the Eritrea–Ethiopia Boundary Commission, Annex II, UN Doc. S/2007/33, 22 January 2007, available at http://www.pca-cpa.org.

[192] Eritrea–Ethiopia Boundary Commission, Statement of 27 November 2006, available at http://www.pca-cpa.org (hereinafter EEBC Statement).

[193] See UN Doc. S/2006/992, 15 December 2006, available at http://www.pca-cpa.org.

[194] EEBC Statement, supra note 87, para. 20.

[195] Ibid,, para. 22. See also Eritrea–Ethiopia Boundary Commission Press Release of 30 November 2007, available at http://www.pca-cpa.org.

made with respect to the Commission's November 2006 statement, the Commission would formally promulgate a Decision establishing the line connecting the co-ordinates specified in the Commission's statement as the legally binding demarcated boundary between the two countries, thus fulfilling the mandate of the Boundary Commission to delimit and demarcate the boundary.[196]

CONCLUSIONS

Although the PCA has provided a standing venue for arbitration since 1899, there have been two distinct eras in which it has assumed a prominent role in the resolution of international disputes. In the first, which was the earlier part of the twentieth century, particularly following signature of the 1907 Convention, the PCA met an evident requirement for a readily available mechanism by which states could resolve disputes between themselves. In providing a standing forum for the resolution of disputes on a consensual basis, it facilitated the transition from the purely ad hoc arbitrations of previous centuries to the standing international tribunals that first came into existence with the Permanent Court of International Justice. It is only since the end of the last century, however, that, following a long period of relative inactivity, the advantages of PCA-administered arbitration have resulted in a large increase in the number of cases.

The second of these two eras, which commenced only at the end of the twentieth century, continues today. The international community increasingly recognizes the advantages of institutionally administered interstate and investor-state arbitration. The recent exponential growth in the number of cases administered by or under the auspices of the PCA clearly demonstrates this trend. At the time of writing, the PCA has a docket of 26 pending cases – a number unparalleled in its history – and, since the beginning of the year 2000, its membership has increased to 107 states. This increase in membership, of approximately 20 per cent in just the last seven years, reflects an evident need of the international community for such a standing forum and for a registry capable of administering disputes of the scale and complexity that arise between states, international organizations, and other international actors.

Today states have a variety of dispute resolution systems from which to choose. In this connection, it has even been argued that a 'market of sorts 'has emerged. There is also some truth in the contention that the international legal order, characterized as horizontal and

[196] See Eritrea–Ethiopia Boundary Commission, press release, 12 September 2007, available at http://www.pca-cpa.org. See further B. Simma and D.-E. Khan, 'Peaceful Settlement of Boundary Disputes under the Auspices of the Organisation of African Unity and the United Nations: The Case of the Frontier Dispute between Eritrea and Ethiopia', in N. Ando, E. McWhinney, and R. Wolfrum (eds.) Liber Amicorum Judge Shigeru Oda (2002), II, 1179; M. Kohen, 'The Decision on the Delimitation of the Eritrea/Ethiopia Boundary of 13 April 2002: A Singular Approach to International Law Applicable to Territorial Disputes', in M. Kohen (ed.), Liber Amicorum Lucius Caflisch (2007), 767; and M. Shaw, 'Title, Control, and Closure? The Experience of the Eritrea–Ethiopia Boundary Commission', (2007) 56 ICLQ 755.

decentralized, is currently in flux and that states have started to withdraw from certain dispute resolution systems. At a time when disputes are multiplying and becoming increasingly complex, the international community will be drawn to those mechanisms that can operate with a high degree of flexibility and are administered by experienced and highly responsive institutions. Such features seem to be increasingly important in today's ever-changing operating environment.

Maritime Arbitration in India:

Maritime arbitrations in India may be *ad hoc* or institutional arbitration with bodies such as the Indian Council of Arbitration (ICA). It is common for shipping contracts involving Indian government-owned companies to provide for arbitration in India to be administered by the ICA under its Maritime Arbitration Rules.

India has given effect to the UNCITRAL Model Law on International Commercial Arbitration through the Arbitration and Conciliation Act, 1996 (the Arbitration Act). The Arbitration Act was last amended in 2015, ushering in what is essentially a new arbitration regime following the amendment. The default court to move any application with respect to an international commercial arbitration (where one of the parties is a foreign party irrespective of whether the arbitration is taking place in India or not) would be a High Court. Indian High Courts are better equipped to deal with complex commercial disputes relating to international transactions, and the official language of High Courts in India is English. This brings an end to a rather notorious dilatory tactic adopted by certain litigants to initiate proceedings in courts in interior parts of India where the proceedings may be in a language other than English and the judge is ill-equipped to handle complex issues generally raised in international commercial disputes.

The Arbitration Act also empowers Indian courts to pass interim orders for security and other ancillary relief in support of arbitration taking place outside India. Another notable feature is allowing 'any person claiming through or under' a party who was a signatory of the original arbitration agreement to be party to the arbitration agreement. This has the effect of binding even an assignee or subrogatee within the ambit of the arbitration agreement contained in the underlying contract. The High Court of Gujarat has held that an endorsee of a bill of lading, which incorporates the terms of the charter party, including the law and arbitration clause, would be bound by such arbitration agreement.[197] The Supreme Court of India has held that a generic incorporation of a standard form contract in a particular industry (e.g., the GENCON, NYPE, Norwegian Sale Form, SUPPLYTIME in the shipping industry) is sufficient to incorporate the arbitration agreement contained in those forms into the underlying contract.[198] Recently, the Supreme Court has taken this proposition a step further by holding that a generic incorporation of a contract into another contract is sufficient to incorporate the

[197] MV Nicoloas A v. Indian Farmers Fertilizers Cooperative, 2017 SCC OnLine Guj 2149
[198] M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd. (2009) 7 SCC 696

arbitration clause (even if the contract that has been sought to be incorporated into the underlying contract is a bespoke contract, which is not common in the industry). [199]

The Arbitration Act requires an arbitrator to disclose in writing any circumstances relating to his or her impartiality and independence, and contains an exhaustive list[200] of grounds, including direct, indirect, past and present relationship with the subject matter or parties or counsel to the dispute, be it financial, business, professional, personal, and so on. Furthermore, there is a mandate imposed upon an arbitrator to dispose the reference within one year and in certain limited circumstances extend the reference by a further period of six months.

The Arbitration Act, following the amendment, has introduced fast-track arbitration, or document-only arbitration (with the consent of both parties), which, *inter alia*, entails that the tribunal would consist only of a sole arbitrator, the award being passed by the tribunal merely by reviewing documents without an oral hearing and the arbitrator being under obligation to pass and publish its award within six months of its reference.

Under the Arbitration Act, the fact that the award debtor has filed an application to challenge or set aside the award does not in itself amount to a stay on the execution of the award by the award holder.[201] In the event the arbitration proceeding seated in India is an 'international commercial arbitration' seated in India (i.e., when one of the parties to the arbitration is a foreign party), the scope of interference by Indian courts would be limited and similar to the context of deciding the award debtor's application to resist the enforcement of a foreign arbitral award in India whereby the Indian court is precluded from setting aside the Indian-seated arbitral award on the ground of 'patent illegality'.

To obtain a stay on execution, the award debtor would need to file a separate application for such a stay under Section 36(3) of the Arbitration Act. The Supreme Court of India has further clarified this position by holding that the amended Section 36 of the Arbitration Act has retrospective effect, and thereby the automatic stay as envisaged under the old Section 36 no longer applies to any pending application challenging the award under Section 34 of the Arbitration Act.[202] As a general rule, a court would pass an order staying the execution of the award, conditional on the party seeking the stay furnishing security for 50 per cent of the value of the award.

Indian courts would be bound to decline to exercise jurisdiction and to refer the parties to arbitration unless the Indian courts 'find that the said agreement is null and void, inoperative or incapable of being performed'.[203] The Supreme Court, in the case of *Chloro Controls India*

[199] Inox Wind Ltd. v. Thermocables Ltd., (2018) 2 SCC 519
[200] The Fifth and Seventh Schedules of the Arbitration Act
[201] Section 36(2) of the Arbitration Act.
[202] Board of Control for Cricket in India v. Kochi Cricket Private Limited & Ors., (2018) 6 SCC 287
[203] Section 45 of the Arbitration and Conciliation Act 1996

Private Ltd. v. Severn Trent Water Purification Inc.,[204] held that the court could have a fully-fledged trial (which includes leading oral or documentary evidence) to make a determination on whether an arbitration agreement exists before referring the parties to arbitration. The finding of the Indian courts on whether an arbitration agreement exists or not, is final and cannot be revisited by the arbitral tribunal. In other judgments, the Supreme Court has taken the view that the question of fraud leading to the conclusion of the underlying contract and arbitration agreement is an arbitral issue that ought to be decided by the tribunal.[205]

In an interesting judgment in 2017,[206] the Delhi High Court, in its interpretation of the *Chloro judgment*, followed the proposition of law laid down by the Singapore High Court in the case of *Aloe Vera of America, Inc. v. Asianic Food (S) Pte. Ltd*.[207] and held that the arbitral tribunal would, in principle, have jurisdiction to decide on issues regarding whether it should disregard the corporate and juridical personality of a company to hold a non-signatory to an arbitration agreement bound by the arbitration agreement. The Division Bench of the Delhi High Court, in its judgment of *Shakti Nath v. Alpha Tiger Cyprus Investment No. 3 Ltd.,*[208] upheld the findings of the court of first instance, which upheld the legal costs awarded by the arbitral tribunal in excess of US$1 million.

Under the Indian Stamp Act 1899 and legislation in every state of India regulating the payment of stamp duty such as the Maharashtra Stamp Act 1958 etc., legal instruments and contracts require the payment of stamp duty levied by the local state government for these documents to be enforceable in a court of law. Stamp duty is required to be paid, *inter alia*, on shipping contracts such as charter parties, bills of lading, indemnity bonds, delivery orders, protest of the master of ship, agreements creating a hypothecation or pledge over the goods, etc. In the case of an arbitration seated in India between two Indian parties a very recent judgment of the Supreme Court of India in *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.*[209] has created uncertainty over whether an Indian court can entertain an application for interim measures or security in aid of arbitration seated in India, between two Indian parties when the underlying contract had not been affixed with appropriate revenue stamps.

In an effort to promote institutional arbitration in India, the Indian government has, on 2 March 2019, promulgated the New Delhi International Arbitration Centre Ordinance, under which the New Delhi International Arbitration Centre (NDIAC) was established. The Ordinance seeks to establish an independent and autonomous regime for institutionalized arbitration in India through the NDIAC. The NDIAC has been declared to be an institute of

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[204] (2013) 1 SCC 641
[205] MSM Satellite v. World Sport Group, (2014) 1 SCC 58
[206] GMR Energy Limited v. Doosan Power Systems India Pvt. Ltd, 2017 SCC OnLine Del 11625
[207] 2006 SGHC 78
[208] 2017 (5) ArbLR 112 (Delhi)
[209] Civil Appeal No. 3631 of 2019 (Arising out of Special Leave Petition (Civil) No. 9213 of 2018)

national importance. India is rapidly moving towards a pro-alternative dispute resolution regime, and courts are not shying away from looking to institutions for assistance, including for appointment of arbitrators. In the first case of its kind, the Supreme Court of India has sought the assistance of the Mumbai Centre for International Arbitration to appoint an arbitrator for an arbitration between an Indian and a foreign company.[210]

The Supreme Court of India in SLP (Civil) no.17183/ 1999, the Owners & Parties Interested in *m.v "B.C" & Anr –vs- State Trading Corporation of India Ltd & Anr* has held that "On a careful consideration of the entire matter we are of the view that there is no good ground or acceptable reason why the intention of the parties to incorporate the arbitration clause in the Charter Party Agreement in the Bill of Lading should not be given effect to. The High Court was not right in rejecting the prayer of the appellants for stay of the suit…". A claim which is brought in the Admiralty Court by an action in rem is subject to an arbitration agreement so that if an action were commenced the court would stay the proceedings to arbitration upon the application of the defendant. Under the provision of English Law, under section 26 of The Civil Jurisdiction and Judgments Act, 1982, which is in force since November 1, 1984 provides that where the court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration the court may order that any property arrested or security given to prevent arrest or to obtain release from arrest shall be retained as security for satisfaction of the arbitration award or order that the stay be conditional upon the provision of equivalent security for the satisfaction of the arbitration award. The Court of Appeal has held in *The Bazias 3 & 4 [1993] 1 Lloyd's Rep. 101*, that the effect of section 26 is to assimilate arbitration claims with in rem proceedings in the Admiralty Court. Thus there is no longer a wider discretion when the claim is subject to an arbitration clause, and the ship arrested will ordinarily be released only if security is provided sufficient to cover the amount of the claim together with interest and costs, on the basis of the plaintiff's reasonably arguable best case.

In *Union of India v. Mc Donnell Douglas Corporation*, by a written agreement dated July 30, 1987 the plaintiffs contracted with the defendants for the latter to undertake services for the former in and about the launch of a space satellite. Art. 11 of the agreement provided that the agreement was to be governed by, interpreted and construed in accordance with the laws of India. The agreement also contained an arbitration clause (Art. 8) in the following terms: In the event of a dispute or difference arising out of or in connection with this Agreement, which cannot be resolved by amicable settlement, the same shall be referred to an Arbitration Tribunal consisting of three members. Either Party shall give notice to the other regarding its decision to refer the matter to arbitration. Within 30 days of such notice, one Arbitrator shall be nominated by each Party and the third Arbitrator shall be nominated by agreement between the Parties to this Agreement. If no such agreement is reached within 60 days of the

[210] Sun Pharmaceutical Industries Ltd. v. M/s Falma Organics Limited, Nigeria, Arbitration Case No. 33 of 2014 (SC)

mentioned notice, the President of the International Chamber of Commerce shall be requested to nominate the third Arbitrator. The third Arbitrator shall not be a citizen of the country of either Party to this Agreement. The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any reenactment or modification thereof. The arbitration shall be conducted in the English language.

The award of the Arbitrators shall be made by majority decision and shall be final and binding on the Parties hereto. The seat of the arbitration proceedings shall be London, United Kingdom. Each Party shall bear its own cost of preparing and presenting cases. The cost of arbitration including the fees payable to Arbitrators, shall be shared equally by the Parties to this Agreement.... The parties' dispute or difference has been referred to arbitration under the provisions of art. 8. The hearing before the arbitrators is presently fixed to begin in London on Jan. 11, 1993. The question before me is as to the law governing the arbitration proceedings. The parties are, as I understand it, agreed that this Court should decide this question, and should do so on the basis that there is no difference on this issue between English and Indian law.

In essence the plaintiffs contend that the words: "The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act 1940" make clear that the parties have chosen Indian law, or at least those parts of Indian law found in the 1940 Act, to govern any arbitration proceedings arising under Art. 8. The defendants, on the other hand, contend that by stipulating London as the "seat" of any arbitration proceedings under Art. 8, the parties have made clear not merely that any arbitration will take place in London, but that English law will govern the arbitration proceedings. An arbitration clause in a commercial contract like the present one is an agreement inside an agreement. The parties make their commercial bargain, i.e. exchange promises in relation to the subject matter of the transaction, but in addition agree on a private tribunal to resolve any issues that may arise between them.

The parties may make an express choice of the law to govern their commercial bargain and that choice may also be made of the law to govern their agreement to arbitrate. In the present case it is my view that by Art. 11 the parties have chosen the law of India not only to govern the rights and obligations arising out of their agreement to arbitrate. In legal terms, therefore, the proper law of both the commercial bargain and the arbitration agreement is the law of India. The fact that the law of India is the proper law of the arbitration agreement does not, however, necessarily entail that the law governing the arbitration proceedings themselves is also the law of India, unless there is in that agreement some effective express or implied term to that effect. In other words, it is, subject to one proviso, open to the parties to agree that their agreement to arbitrate disputes will be governed by one law, but that the procedures to be adopted in any arbitration under that agreement will be governed by another law.

India- Bangladesh Maritime Dispute:

Recently, the four decade-long dispute between India and Bangladesh ended when the UN tribunal on Tuesday awarded 19,467 square kilometers, four-fifth of the total disputed area of 25,602 sq km in the Bay of Bengal, to the latter.

The talks on resolution to the maritime dispute over territorial waters, which started from the formation of the country in 1971, first began in an official negotiation in 1974. But when bilateral efforts to solve the issue marked no progress for next 28 years, Bangladesh then moved to UN's International Tribunal for the Law of the Sea (ITLOS) in 2009. The issue went to the Permanent Court of Arbitration (PCA) at The Hague later in May 2011.

The conflict was largely over delimitation of the territorial sea. While India wanted the determination of the boundary on 'equidistance' method which means a nation's maritime boundaries should conform to a median line equidistant from the shores of neighboring nation-states, Bangladesh was pressing for equitable solution (a solution that led to equitable access to resources) to be reached by keeping in focus all relevant circumstances.

Bangladesh and India have welcomed the decision of the UN tribunal which was told to both the parties on Monday but kept under a 24-hour embargo before being made public on Tuesday. The verdict is binding on all parties and there is no option for appeal. Bangladesh had won a similar case against Myanmar in 2012 at the International Tribunal for the Law of Sea in Hamburg, Germany.

During India's external affairs minister Sushma Swaraj's visit to Dhaka in June this year, spokesperson of the ministry Syed Akbaruddin had said that both the countries would act in accordance with the verdict since they went to the court voluntarily. Once the judgement was out, the Indian official said, "We respect the verdict of the tribunal and are in the process of studying the award and its full implications…".

Bangladesh, which said it was satisfied with the decision, applauded India for its approach. Bangladeshi foreign minister Abul Hassan Mahmood Ali said in a news conference, "We commend India for its willingness to resolve this matter peacefully by legal means and for its acceptance of the tribunal's judgment."

When asked about how successful he thinks the country was in its battle, Bangladeshi foreign minister added, "A peaceful resolution to a dispute running for more than 40 years since independence has been achieved. Which success is larger than that?"

The dispute that had been going on for years is believed to have deterred companies from investing in the sea blocks in region. A statement by the Ministry of External Affairs said, "This paves the way for the economic development of this part of the Bay of Bengal, which will be beneficial to both countries."

The key issue of the dispute was over location of the land boundary terminus between the two countries and determination of the course of the maritime boundary in the territorial sea. While India was demanding determination of the boundary on 'equidistance' method, Bangladesh was pressing for 'equitable solution'.

Enforcement Of Arbitral Awards Under New York Convention Or Geneva Convention

Although the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention) has also been incorporated into the Arbitration Act, a foreign arbitral award can be enforced in India only if the government declares the country in which the award was passed to be a 'reciprocating territory' under Sections 44 or 53 of the Arbitration Act. A foreign award holder seeking to enforce an award in India would have to apply to the court, within whose jurisdiction the award debtor has its assets, to enforce the foreign award.[211] Presently, there is no requirement to convert the foreign award into a judgment of the Indian court by way of separate proceedings and the party seeking to enforce a foreign award can directly initiate execution proceedings to liquidate the assets of the award debtor.[212] Enforcement and execution proceedings can be initiated in India by placing on record the following documents before the Indian court:

a. the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

b. the original agreement for arbitration or a duly certified thereof; and

c. such evidence as may be necessary to prove that the award is a foreign award. In this regard, generally an affidavit from a lawyer from the country in which the foreign award was passed stating that the foreign award is final and binding as a matter of the laws in that jurisdiction and confirming that there is no appeal against the award pending in that jurisdiction suffices.

The award debtor can resist the enforcement of the foreign award on the grounds of objections enumerated in the New York Convention, which are reproduced under Section 48 of the Arbitration Act. One such commonly used ground was on the issue of public policy, where the award debtor would seek to reargue the underlying issues of the arbitration proceedings on merits, and there were a plethora of cases in which the courts considered the merits. However, there were two landmark judgments of the Supreme Court in 2015, in which[213]the scope of public policy was clarified. Subsequently, this was included as an amendment to Section 48 of the Arbitration Act to include an explanation that clarified that 'for the avoidance of doubt, the test as to whether there is a contravention with the

[211] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services (2012) 9 SCC 552
[212] Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. (2001) 6 SCC 356
[213] Oil and Natural Gas Corporation v. Western Geco International Ltd. (2014) 9 SCC 263 and Associate Builders v. Delhi Development Authority (2015) 3 SCC 49

fundamental policy of Indian Law shall not entail a review on the merits of the dispute'. Hence, the courts have been more restrictive in allowing the reopening of any issues on merits.

Indian courts are now prone to adopting a commercial approach in refusing to allow an Indian party to take advantage of its own wrong and avoid a contract, for example, in circumstances such as issuing guarantees for overseas companies that do not comply with Indian foreign exchange regulations.[214] The Bombay and Calcutta High Courts, in their judgments involving shipping disputes, held that a party is estopped from raising challenges to the foreign arbitral award at the time of its enforcement in India on the grounds of the existence of a valid and enforceable arbitration agreement, when they have chosen not to appeal against the award before the appropriate court in the country where the arbitration had been seated. [215]

Mediation In Maritime Disputes In India:

No matter what the complexity is, no one can understand the pain of the parties than the parties themselves. As both parties come forward and reach a successful settlement, only then does the settlement become enforceable on them, mediation makes more sense as it is comparatively cost effective. As per Dr. Dhananjaya Y. Chandrachud "Mediation at one level of perception is a means of avoiding the pitfalls of litigation." One of the reasons to opt for maritime mediation in India is the complexity of such disputes. Multijurisdictional cases can arise as a ship in the Indian waters can be subject to innumerable amount of contracts, domestically and internationally. A series of disputes can arise while travelling by the sea. The laws governing the Admiralty sector are complex and tend to cause a significant amount of uncertainty. This is because the ships can be governed by a variety of legislations during their movement through international waters and different ports around the world. Maritime cases are fit for mediation because as any other sector, the benefits which mediation provides easily weigh more than the benefits provided by any other dispute resolution mechanism. The parties are free to choose the mediator, negotiate, and the best feature is that the reputation and the relationship with the other party are mostly not hampered because it's settled amicably. Confidentiality of such matters helps in providing the companies.

Existing Framework With Respect To Maritime Mediation In India:

In India the terms 'mediation' and 'conciliation' are used synonymously; this was clarified in the judgment of the Supreme Court in its decision in *Afcons Infrastructure Ltd v M/s Cherian Varkey Construction*[216]. Hence adhering to this definition, it can be interpreted

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[214] Intesa Sanpaolo SPA v. Videocon Industries Ltd., 2014 SCC Online Bom. 1276
[215] Mitsui OSK Lines Ltd. (Japan) v. Orient Ship Agency Pvt. Ltd. (India), Arbitration Petition No. 842 of 2009 and Aurelia Reederei Eugen Friederich GmbH v. POL India Projects Limited, Arbitration Petition 12 of 2012; Sifandros Carrier Ltd. v. LMJ International Ltd., 2018 SCC OnLine Cal 7146
[216] [2010] (7) SCALE 293

mediation is encouraged by the judiciary. The judicial system has been encouraging litigants to look towards alternate dispute resolution (ADR) mechanisms, the recent arbitration and conciliation (amendment) bill 2018 also encourages for the same. One such method that is Civil Procedure Code was amended in 2002 in order to incorporate section 89 which includes mediation as a mechanism for ADR. The Rules framed by the Supreme Court and the 24 High Courts provide for reference by courts to mediation. In case of failure in mediation on court-referred mediation the matter shall go on in litigation.

In case the efforts of the mediator succeed in helping parties reach a settlement, a report is to be provided to the court by the mediator. In all, it can be said that mediation may take place in two stages, the first one being pre-litigation and the other stage being the court-referred mediation.8 When the parties by themselves enter into mediation instead of opting for litigation at the first place, it is known as pre-litigation mediation, also known as voluntary mediation. Court referred mediation works on the basis of section 89 of the CPC as mentioned in the above paragraph. During this research it was observed that recent court referred mediation in maritime disputes turned out to be successful in cases like *Startrek Shipyards Private Ltd v/s Chennai Port Trust*[217] and *M/S Chindambram Shipcare Pvt Ltd v/s Owners*[218] and parties, interested in the vessel M/V coastal, hence court referred mediation does exist in maritime disputes.

Part III of the Arbitration and conciliation Act is applicable to private mediation. Hence private mediation can also be practiced in maritime mediation disputes, Part III consists of provisions for the appointment and role of mediators, conduct of proceedings, communication and disclosure of information, status and effect and enforcement of settlement agreements, confidentiality, not resorting to arbitral or judicial proceedings during mediation (except when necessary to protect rights), costs, non-admissibility of evidence in other proceedings, etc. The Industrial Dispute Act sets up a conciliation framework to resolve disputes between workmen and their employers. As per Section 4 of the Act .The conciliation officers are appointed by the government.

<u>Time Frame – Mediation Compared To Other ADR Methods:</u>

In litigation, an adumbrate outlook given in a chapter on maritime law by the International Comparative Legal Guides on shipping law provides that, as far as the Indian courts are concerned, it depends upon where the court proceedings are being held. As far as the proceedings in the Bombay High Court are concerned it would take between 7 and 10 years to be heard and decided finally.

[217] Star Trek Shipyards vs Chennai Port Trust. Retrieved October 23, 2018, from Indian Kanoon: https://indiankanoon.org/doc/111960684/

[218] M/S ChindambramShipcare Pvt Ltd vs Owners and Parties Interested. Retrieved October 23, 2018, from Indian Kanoon: https://indiankanoon.org/doc/41513158/

In arbitration, as per section 29 A of the Arbitration and Conciliation (Amendment) Act, the arbitral tribunal is required to give its award within a period of 12 months of the formation of the tribunal. Hence it makes it mandatory that an award shall be passed in a particular matter within a period of 12 months off the arbitral tribunal entering upon the reference.

The biggest plus point of opting for mediation is the time frame. Mediation proceedings can be completed within a year or close to it .Thus the time frame can depend upon the negotiations and complexity of the case, as there is no set time frame ordered to them by law. The only perquisite is that in order to succeed the consent of all parties is mandatory.

Challenges Faced In Maritime Mediation:

The maritime sector, being a complex sector requires mediators to be highly skilled at maritime law and mediation skills, the people who are skilled at this are very hard to find as this combination of people are usually into arbitration because of better rules and existence of a proper framework.

Mediation in itself as an alternative dispute resolution mechanism has a long way to go. Lack of proper regulatory framework makes it a tough choice for implementation of in contracts involving huge sums of money as the question of its enforceability outside the purview of Section 89 of the Code of Civil Procedure, which only deals with court referred mediation still prevails.

As per the law commission of India there is also a need to modify section 89 off the CPC, the requirement that the court must formulate the terms of possible settlement places a significant burden on the court, even before referring the parties to the process of mediation. This leads to spending of considerable amount of time and effort in imploring the parties to settle their dispute and draw up the terms of a possible settlement.

Lack of clear distinction in laws relating to arbitration, mediation and conciliation also poses as a challenge and absence of a proper mediation culture. Practitioners of Alternative Dispute Resolution methods have noticed that the Mediation and Conciliation rules of 2004 are somewhat similar to the provisions that are covered in the Arbitration and Conciliation Act, 1996.

In terms of private mediation: A settlement agreement in a private mediation is not enforceable under Sections 73 and 74 of The Arbitration and Conciliation Act, 1996. This is evident as in the Delhi High Court case of *Shri Ravi Aggarwal vs Shri Anil Jagota* (EFA (OS) No. 19 of 2009). The Hon'ble High Court of Delhi refused to enforce a settlement agreement in a private mediation under Sections 73 and 74 of 1996 Act.

Mediation can only be successful in commercial cases relating to the maritime sector if a proper framework is brought into place and encouraged by all sectors of the society. Section

89 of the CPC can only help in increasing mediation up to a certain extent .Our country is becoming an economic hub as more and more countries are investing in India keeping in view its bright future.

Unless and until voluntary mediation is not encouraged by urging companies to enter into mediation clauses, by including new mediation clauses, Arb-Med-Arb or Med-Arb clauses in agreements, increasing pre mediation in India will pose as a basic challenge for all. Keeping this in view, as imports and exports in India are rising and most are usually done through the sea route, because of economic advantages.

With an increase in import-exports and shipping infrastructure in India there is a huge possibility of disputes to arise. Having a better regulatory framework in place will help corporate engage in maritime sector to tap the mediation processes more effectively, and hence increase the chances of reducing the burden of going through litigation or constraining their scope only to arbitration in order to settle a dispute.

MODULE-IV

INTERNATIONAL MARITIME TRADE AND DISPUTE SETTLEMENT MECHANISM

The WTO Agreement provides for the discipline applicable to all dispute settlement procedures is the "Understanding on Rules and Procedures Governing the Settlement of Disputes" or Dispute Settlement Understanding (DSU). The WTO dispute settlement mechanism also contains provisions for special or extra procedures under agreements such as Articles XXII and XXIII of GATS (General Agreement on Trade in Services) as well as the procedures and rules of the Appellate Body. The mechanism covers the procedures for mediation, conciliation, good offices and arbitration, and the core part of those procedures includes "consultation" and "panel procedures" and a series of other procedures relevant to them.

The WTO dispute settlement system, as it has been operating since 1 January 1995, did not fall out of the blue. It is not a novel system. On the contrary, this system is based on, and has absorbed, almost fifty years of experience with the resolution of trade disputes in the context of the GATT 1947. Article 3.1 of the DSU states:

> *"Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein."*

GATT DISPUTE SETTLEMENT (1948-1995)

GATT 1947

As explained above, the GATT 1947 was not conceived as an international organization for trade. The GATT 1947 therefore did not provide for an elaborate dispute settlement system. In fact, the GATT 1947 contained only two brief provisions relating to dispute settlement: Articles XXII and XXIII.

Under the GATT 1947, a dispute, which parties failed to resolve through consultations, was in the early years of the GATT "handled" by working parties set up pursuant to Article XXIII:2. These working parties consisted of representatives of all interested Contracting Parties, including the parties to the dispute, and made decisions on the basis of consensus. From the 1950s however, a dispute was usually first heard by a so-called "panel" of three to five independent experts from GATT Contracting Parties not involved in the dispute. This panel then reported to the GATT Council, consisting of all Contracting Parties, which would have to adopt by consensus the recommendations and rulings of the panel before they would become legally binding on the parties to the dispute. The dispute settlement procedures and practices, which were developed over the years in a pragmatic ad hoc manner, were progressively codified and supplemented by decisions and understandings on dispute settlement adopted by the Contracting Parties. In 1983, a GATT Legal Office was established within the GATT Secretariat, to help panels, often composed of trade diplomats without legal training, with the drafting of panel reports. As a result, the legal quality of panel reports improved and the confidence of the Contracting Parties in the panel system increased. During the 1980s, previous panel reports were increasingly used as a sort of "precedent" and the panels started using customary rules of interpretation of public international law.

Legalization

In view of these developments in the GATT dispute settlement system since the 50s, Bob Hudec speaks of the increasing "legalization" of the GATT's "diplomat's jurisprudence". The GATT dispute settlement system evolved from a power-based system of dispute settlement through diplomatic negotiations into a system that had many features of a rules-based system of dispute settlement through adjudication.

Success & Failure

While the GATT dispute settlement has generally been considered as quite successful in fully or partially resolving disputes to the satisfaction of the complaining party, the system had some serious shortcomings, which became ever more acute in the 1980s and the early 1990s. The most important shortcoming of the system was that the decision on the establishment of a panel, the decision on the adoption of the panel report and the decision to authorize the suspension of concessions, were to be taken by the GATT Council by consensus. The responding party could thus delay or block any of these decisions and thus paralyse or frustrate the operation of the dispute settlement system. In particular, the adoption of panel reports became a real problem from the late 1980s onwards. The fact that the losing party could prevent the adoption of the panel report meant that panels were often tempted to arrive at a conclusion that would be acceptable to all parties. Whether that conclusion was legally sound and convincing was not a prime concern. Furthermore, the Contracting Parties regarded the dispute settlement process as unable to handle many of the politically sensitive trade disputes since the assumption was that the respondent would refuse to agree to the establishment of a panel or the losing party would prevent the adoption of the panel report. As a result, some Contracting Parties, and, in particular, the United States, resorted increasingly to unilateral action against measures they considered in breach of GATT law.

THE WTO DISPUTE SETTLEMENT UNDERSTANDING

Uruguay Round

The improvement of the GATT dispute settlement system was high on the agenda of the Uruguay Round negotiations. The 1986 Punta del Este Ministerial Declaration on the Uruguay Round stated with regard to dispute settlement:

> *"In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines.*

> *Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations."*

Already in 1989, the negotiators were able to reach agreement on a number of improvements to the GATT dispute settlement system. These improvements included the recognition of the right to a panel and strict timeframes for panel proceedings. No agreement was reached, however, on the most difficult issue of the adoption of panel reports by consensus. This issue was only resolved in the final stages of the Round and was linked to the introduction of appellate review of panel reports.

DSU

The Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding or DSU, is attached to the WTO Agreement as Annex 2 and constitutes an integral part of that Agreement. The DSU provides for an elaborate dispute settlement system and is often referred to as one of the most important achievements of the Uruguay Round negotiations. The most significant innovations to the GATT dispute settlement system concern: (1) the quasi-automatic adoption of requests for the establishment of a panel, of dispute settlement reports and of requests for the authorization to suspend concessions; (2) the strict timeframes for various stages of the dispute settlement process; and (3) the possibility of appellate review of panel reports. The latter innovation is closely linked to the quasi-automatic adoption of panel reports and reflects the concern of Members to ensure high-quality panel reports.

WTO DISPUTE SETTLEMENT TO DATE

Use made of the System

The WTO dispute settlement system has been operational for almost eight years now and in that period it has arguably been the most prolific of all international dispute settlement systems. Since 1 January 1995, a total of 268 disputes have been brought to the WTO system for resolution. In more than one fifth of the disputes brought to the WTO system, the parties were able to reach a mutually agreed solution through consultations or the dispute was resolved otherwise without recourse to adjudication. In other disputes, parties have resorted to adjudication and, to date, such adjudication procedures have been completed in some 80 disputes. There are currently 19 disputes pending before panels and, very exceptionally, none before the Appellate Body. With different degrees of intensity, pre-adjudication consultations between parties to a dispute are currently being held in 209 disputes at the time of writing.

OBJECT AND PURPOSE OF THE WTO DISPUTE SETTLEMENT SYSTEM

Article 3.2 of the DSU states: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

Article 3.7 of the DSU states in relevant part: "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred."

WTO Members have explicitly recognized that the prompt settlement of disputes arising under the covered agreements "is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members." The declared object and purpose of the WTO dispute settlement system is to achieve "a satisfactory settlement" of disputes in accordance with the rights and obligations established by the covered agreements. Furthermore, the object and purpose of the dispute settlement system is for Members to seek redress for a violation of obligations or other nullification or impairment of benefits through the multilateral procedures of the DSU, rather than through unilateral action.

Article 23.1 of the DSU states: "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreement, they shall have recourse to, and abide by, the rules and procedures of this Understanding."

It should be recalled that concerns regarding unilateral actions by the United States against what it considered to be violations of GATT law, were one of the driving forces behind the negotiations of the DSU.

The DSU expresses a clear preference for solutions mutually acceptable to the parties reached through negotiations, rather than solutions resulting from adjudication. Article 3.7, quoted above, states in relevant part that a solution mutually acceptable to the parties to a dispute is "clearly to be preferred".

Accordingly, each dispute settlement proceeding must start with consultations between the parties to the dispute with a view to reaching a mutually agreed solution. To resolve disputes through consultations is obviously cheaper and more satisfactory for the long-term trade relations with the other party to the dispute than adjudication by a panel.

JURISDICTION

Scope of Jurisdiction

The WTO dispute settlement system has jurisdiction over any dispute between WTO Members arising under what are called the covered agreements. The covered agreements are the WTO agreements listed in Appendix 1 to the DSU, including the WTO Agreement, the GATT 1994 and all other Multilateral Agreements on Trade in Goods, the GATS, the TRIPS Agreement and the DSU. Article 1.1 of the DSU establishes "an integrated dispute settlement system" which applies to all of the covered agreements. The DSU provides for a single, coherent system of rules and procedures for dispute settlement applicable to disputes arising under any of the covered agreements.

However, some of the covered agreements provide for a few special and additional rules and procedures "designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement". Pursuant to Article 1.2 of the DSU, these special or additional rules and procedures prevail over the DSU rules and procedures to the extent that there is a "difference", i.e., a conflict, between the DSU rules and procedures and the special and additional rules and procedures.

Compulsory Jurisdiction

The jurisdiction of the WTO dispute settlement system is compulsory in nature. Pursuant to Article 23.1 of the DSU, quoted above, a complaining Member is obliged to bring any dispute arising under the covered agreements to the WTO dispute settlement system.

As a matter of law a responding Member, on the other hand, has no choice but to accept the jurisdiction of the WTO dispute settlement system. With regard to the latter, we note that Article 6.1 of the DSU states: "If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel."

Unlike in other international dispute settlement systems, there is no need for the parties to a dispute arising under the covered agreements to accept in a separate declaration or separate agreement the jurisdiction of the WTO dispute settlement system to adjudicate that dispute. Accession to the WTO constitutes consent to and acceptance of the compulsory jurisdiction of the WTO dispute settlement system. With regard the jurisdiction of the WTO dispute settlement system, it should also be noted that the system has only contentious, and no advisory, jurisdiction.

ACCESS TO WTO DISPUTE SETTLEMENT

Access to, that is, the use of, the WTO dispute settlement system is limited to Members of the WTO. The Appellate Body ruled in US – Shrimp: "It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a legal right to make submissions to, and have a legal right to have those submissions considered by, a panel."

The WTO dispute settlement system is a government-to-government dispute settlement system for disputes concerning rights and obligations of WTO Members.

Causes of Action

Each covered agreement contains one or more consultation and dispute settlement provisions. These provisions set out when a Member can have recourse to the WTO dispute settlement system. For the GATT 1994, the relevant provisions are Articles XXII and XXIII. Of particular importance is Article XXIII:1 of the GATT 1994, which states:

> *"If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of*
>
> *(a) the failure of another Member to carry out its obligations under this Agreement, or*
> *(b) the application by another Member of any measure, whether or not it conflicts with the provisions of this Agreement, or*
> (c) *the existence of any other situation, the Member may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other Member or Members which it considers to be concerned."*

In India – Quantitative Restrictions, the Appellate Body held:

> *"This dispute was brought pursuant to, inter alia, Article XXIII of the GATT 1994. According to Article XXIII, any Member which considers that a benefit accruing to it directly or indirectly under the GATT 1994 is being nullified or impaired as a result of the failure of another Member to carry out its obligations, may resort to the dispute settlement procedures of Article XXIII. The United States considers that a benefit*

accruing to it under the GATT 1994 was nullified or impaired as a result of India's alleged failure to carry out its obligations regarding balance-of-payments restrictions under Article XVIII:B of the GATT 1994. Therefore, the United States was entitled to have recourse to the dispute settlement procedures of Article XXIII with regard to this dispute."

The consultation and dispute settlement provisions of most other covered agreements incorporate by reference Articles XXII and XXIII of the GATT 1994. For example, Article 11.1 of the SPS Agreement, entitled "Consultations and Dispute Settlement", states: "The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein."

As was the case in India – Quantitative Restrictions, the nullification or impairment of a benefit or the impeding of the realization of an objective may, and most often will, be the result of a violation of an obligation prescribed by a covered agreement. Nullification or impairment or the impeding of the attainment of objectives may however, also be the result of "the application by another Member of any measure, whether or not it conflicts with the provisions" of a covered agreement. Nullification or impairment or the impeding of the attainment of objectives may equally be the result of "the existence of any other situation."

Unlike other international dispute settlement systems, the WTO system thus provides for three types of complaints: "violation" complaints, "non-violation" complaints and "situation" complaints. In the case of a "non-violation" complaint or a "situation" complaint, the complainant must demonstrate that there is nullification or impairment of a benefit or the achievement of an objective is impeded. With regard to a "violation" complaint, however, Article 3.8 of the DSU states:

"In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge."

Violation complaints are by far the most common type of complaints. To date, there have, in fact, been few non-violation complaints and no situation complaints. The difference between the WTO system and other international dispute settlement systems on this point may therefore, be "of little practical significance".

There is no explicit provision in the DSU requiring a Member to have a "legal interest" in order to have recourse to the WTO dispute settlement system. It has been held that such a requirement is not implied either in the DSU or any other provision of the WTO Agreement.109 In EC – Bananas III, the Appellate Body held:

> *"we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful"."*

The Appellate Body explicitly agreed with the statement of the Panel in EC – Bananas III that: with the increased interdependence of the global economy, Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly."

In EC – Bananas III, the Appellate Body considered in deciding whether the United States could bring a claim under the GATT 1994, the fact that the United States is a producer and a potential exporter of bananas, the effects of the EC banana regime on the United States internal market for bananas and the fact that the United States claims under the GATS and the GATT 1994 were inextricable interwoven. The Appellate Body subsequently concluded that "[t]aken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under the GATT 1994." The Appellate Body added, however, that "this does not mean though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case."

Involvement of Non-State Actors

As noted above, the WTO dispute settlement system is a government-togovernment dispute settlement system for disputes concerning rights and obligations of WTO Members. Individuals, companies, international organizations or non-governmental organizations, including environmental and human rights NGOs, labour unions and industry associations, have no access to the WTO dispute settlement system. They cannot bring claims of violation of WTO rights or obligations. Under the current rules, they do not have the right to be heard or the right to participate, in any way, in the proceedings. However, under Appellate Body case law, panels and the Appellate Body have the right to accept and consider written briefs submitted by individuals, companies or organisations. The acceptance by panels and the Appellate Body of these briefs, which are commonly referred to as amicus curiae briefs ("friend of the court" briefs), has been controversial and criticised by most WTO Members.

The WTO dispute settlement system provides for more than one dispute settlement method. The DSU allows for the settlement of disputes through consultations (Article 4 of the DSU); through good offices, conciliation and mediation (Article 5 of the DSU); through adjudication by ad hoc panels and the Appellate Body (Articles 6 to 20 of the DSU) or through arbitration (Article 25 of the DSU).

As discussed above, the DSU expresses a clear preference for solutions mutually acceptable to the parties to the dispute, rather than solutions resulting from adjudication. Therefore, resort to adjudication by a panel must be preceded by consultations between the complaining and responding parties to the dispute with a view to reaching a mutually agreed solution.

If consultations fail to resolve the dispute, the complaining party may resort to adjudication by a panel and, if either party to the dispute appeals the findings of the panel, the Appellate Body.

The dispute settlement methods set out in Articles 4 to 20 of the DSU (consultations and adjudication by panels and the Appellate Body) are by far the most frequently used methods. However, the WTO dispute settlement system provides for expeditious arbitration as an alternative means of dispute settlement. Pursuant to Article 25 of the DSU, parties to a dispute arising under a covered agreement may decide to resort to arbitration, rather than follow the procedure set out in Articles 4 to 20 of the DSU. In that case, the parties must clearly define the issues referred to arbitration and agree on the particular procedure to be followed. The parties must also agree to abide by the arbitration award. Pursuant to Article 3.5 of the DSU, the arbitration award must be consistent with the covered agreements. In the latter part of 2001, WTO Members used the Article 25 arbitration procedure for the first time.

The WTO dispute settlement system also provides, pursuant Article 5 of the DSU, for the possibility for the parties to a dispute — if they all agree to do so — to use good offices, conciliation or mediation to settle a dispute. To date, no use has been made of the dispute settlement methods provided for in Article 5 but in 2001 the Director-General reminded Members of his availability to help to settle disputes through good offices.

INSTITUTIONS OF WTO DISPUTE SETTLEMENT

Among the institutions involved in WTO dispute settlement, there is a distinction between the political institutions of the WTO and, in particular, the Dispute Settlement Body, and independent, judicial-type institutions such as ad-hoc dispute settlement panels and the standing Appellate Body. While the WTO has entrusted the adjudication of disputes to panels at the first instance level and the Appellate Body at the appellate level, the Dispute Settlement Body continues to play an active role in the WTO dispute settlement system. The Dispute Settlement Body, or DSB, is an alter ego of the General Council of the WTO. The General Council convenes as the DSB to administer the rules and procedures of the DSU.

Article 2.1 of the DSU states: "the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements."

Article 2.4 of the DSU stipulates that where the DSU provides for the DSB to take a decision, such a decision is always taken by consensus. It is important to note, however, that for most key decisions, such as the decision on the establishment of a panel, the adoption of panel and Appellate Body reports and the authorization of suspension of concessions and other obligations, the consensus requirement is in fact a "reverse" or "negative" consensus requirement. The "reverse" consensus requirement means that the DSB is deemed to take a decision unless there is a consensus among WTO Members not to take the decision. Since there will usually be at least one Member with a strong interest in that the DSB takes the decision to establish a panel, to adopt the panel and/or Appellate Body reports or to authorize the suspension of concessions, it is very unlikely that there will be a consensus not to adopt these decisions. As a result, decision-making by the DSB on these matters is, for all practical purposes, automatic. Furthermore, it should be noted that the DSU provides for strict "timeframes" within which decisions on these matters need to be taken.

The DSB meets as often as necessary to carry out these functions within the time frames provided in the DSU. In practice, the DSB has one regularly scheduled meeting per month and, in addition, a number of special meetings are convened when the need for a meeting arises.

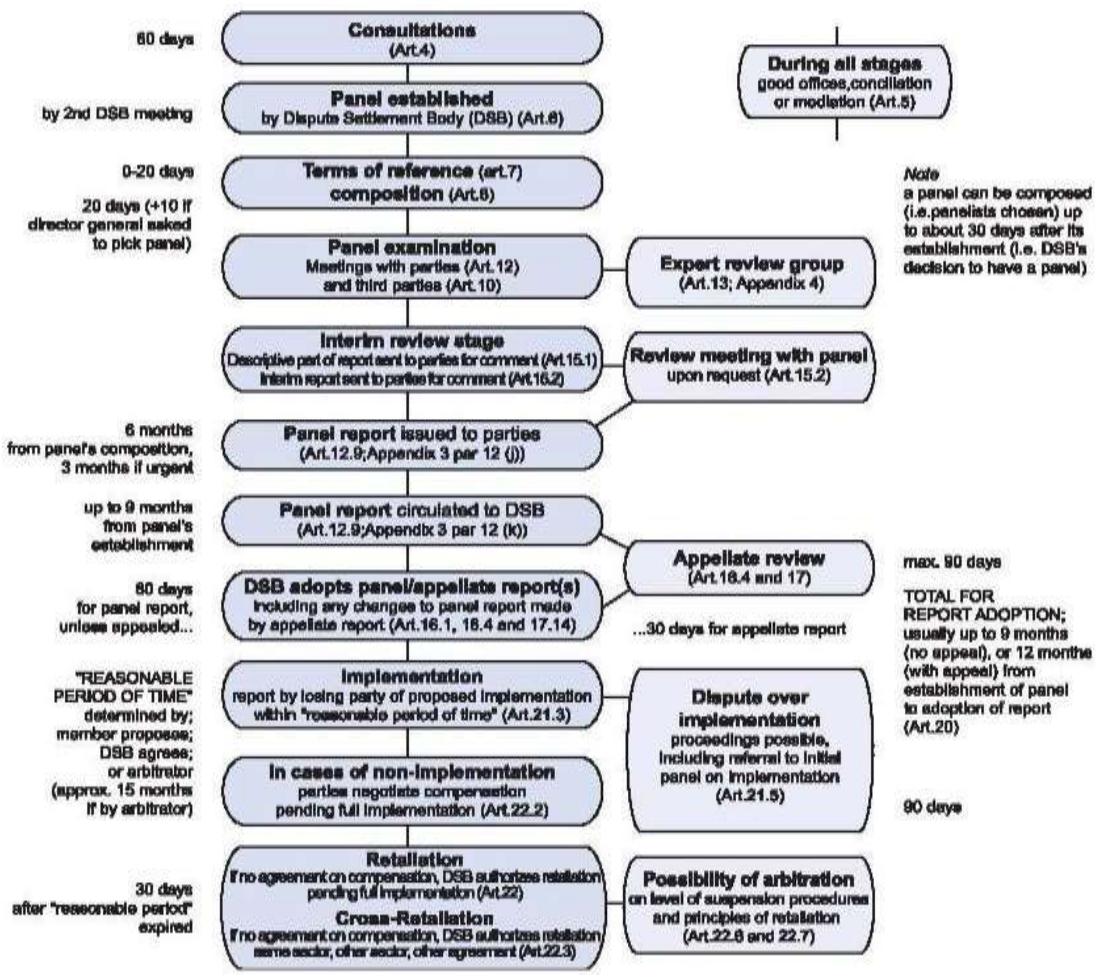
At the request of a complaining party, the DSB will establish a panel to hear and decide a dispute. The DSB will do so by reverse consensus. The establishment of a panel is therefore "automatic". As a rule, panels consist of three persons, who are not nationals of the Members involved in the dispute. These persons are often trade diplomats or government officials but also academics and practising lawyers regularly serve as panellists. The terms of reference of the panel are determined by the request for the establishment of a panel, which identifies the measure at issue and the provisions of the covered agreements allegedly breached. It is the task of panels to make an objective assessment of the matter, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

The Appellate Body hears appeals from the reports of dispute settlement panels. Unlike panels, the Appellate Body is a permanent, standing international tribunal. It is composed of seven persons, referred to as Members of the Appellate Body. Members of the Appellate Body are appointed by the DSB for a term of four years, once renewable. Only the complaining or responding party can initiate appellate review proceedings. Appeals are limited to issues of law covered in the panel report or legal interpretations developed by the panel. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel that were appealed.

Apart from the DSB, panels and the Appellate Body, there are a number of other institutions and persons involved in the WTO's efforts to resolve disputes between its Members. These institutions and persons include arbitrators under Articles 21.3, 22.6 or 25 of the DSU, the Textile Monitoring Body under the ATC, the Permanent Group of Experts under the SCM Agreement, Experts and Expert Review Groups under Article 13 of the DSU and Article 11.2 of the SPS Agreement, the Chairman of the DSB and the Director-General of the WTO. Furthermore, the WTO Secretariat and the Secretariat of the Appellate Body play important roles in providing administrative and legal support to panels and the Appellate Body respectively.

WTO DISPUTE SETTLEMENT PROCEEDINGS

The flow-chart below indicates the major steps in the WTO dispute settlement proceedings.



There are four stages in WTO dispute settlement proceedings: (1) consultations; (2) panel proceedings; (3) Appellate Body proceedings; and (4) implementation of the recommendations and rulings.

Consultations

Traditionally, GATT attached significant importance to bilateral consultation, and many disputes actually were settled in this manner. GATT provides for some special consultation and review procedures, such as the one mentioned in Article XIII at paragraph 2 (specifying that a contracting party shall, upon request by another contracting party regarding fees or charges connected with importation/exportation, review the operation of its laws and regulations), as well as in the "1960 GATT decision on arrangements for consultations on restrictive business practices" (specifying that a contracting party shall, upon request by another contracting party regarding the business practice by which international trade competitions would be limited, give sympathetic consideration and provide an adequate opportunity for consultation). However, paragraph 1 of Article XXII and paragraph 1 of Article XXIII of GATT play the central role in prescribing that "formal" consultation to take place prior to panel procedures.

1) *Consultation under Article XXII and Article XXIII, respectively*

Regarding the difference between the two provisions, consultation under Article XXII covers any matter affecting the operation of GATT, while the coverage of consultation under Article XXIII is limited to certain matters. Specifically, Article XXIII provides that a contracting party may make representations or proposals to another contracting party if the former party considers that any benefit accruing to it directly or indirectly under GATT is being nullified or impaired or that the attainment of any objective of GATT is being impeded as the result of:

(a) the failure of another contracting party to carry out its obligations under GATT, or
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of GATT, or
(c) the existence of any other situation.

Thus, disputes over "nullification or impairment of any benefit otherwise to accrue under GATT" may be brought to consultation under Article XXIII. Another point of difference between the two concepts of consultation is the participation of a third country; it is permitted only with respect to consultations under Article XXII. Similar differences can be seen in the relation between Article XXII and Article XXIII of GATS.

2) *Consultation under Article 4 of DSU*

The DSU specifies that it adheres to the principles of the management of disputes applied under Articles XXII and XXIII of GATT (paragraph 1, Article 3 of DSU). Article 4 of DSU provides for consultation procedures and rules and specifies that each party should give sympathetic consideration to any representations made by another party and should provide adequate opportunity for consultation. It provides that the parties which enter into consultations should attempt to obtain satisfactory adjustment of the matter concerned.

According to the DSU (paragraph 4, Article 4), a request for consultations shall be effective when such request is submitted in writing, gives reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint and is notified to the DSB (Dispute Settlement Body of WTO). It provides that the party to which a request is made shall reply within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution (paragraph 3, Article 4 of DSU).

WTO Members other than the consulting parties are to be informed in writing of requests for consultations, and any Member that has a substantial trade interest in consultations may request to join in the consultations as a third party. It is also provided that the party to which the request for consultations is addressed may reject the said third party's desire to join in the consultations when the party considers that "the claim of substantial trade interest is not well-founded" (paragraph 11, Article 4 of DSU).

Panel procedures

1) *Establishing a panel*

Paragraph 2, Article XXIII of GATT provides that if no satisfactory adjustment is effected through consultations between the contracting parties concerned, the dispute concerned may be referred to the DSB (Dispute Settlement Body, or "Contracting Parties" under the former GATT) with respect to alleged "nullification or impairment of any benefit otherwise to accrue under GATT" as mentioned above.

In the past, such disputes referred to the Contracting Parties were brought to a working group consisting of the disputing parties and neutral parties. The working group was supposed to confirm claims of the respective disputing parties and discuss them, but was not required to make a legal judgment. The function of the working groups was limited to the facilitation of negotiations and dispute settlement. Later, however, the "panel" procedure was introduced and has become the regular practice. A panel is composed of panelists (see Note) who do not represent a government or any organization, but are supposed to serve in their individual capacities. A panel is principally to make a legal judgment regarding the matters in dispute. Also, the WTO dispute settlement mechanism employs a two-tier appellate system, establishing the Appellate Body. GATT provides that consultations pursuant to paragraph 1 of its Article XXIII should precede the establishment of a panel in accordance with paragraph 2 of Article XXIII, but it was generally accepted that a panel could be established after consultations under Article XXII even if there had been no consultation under Article XXIII.

The WTO dispute settlement mechanism does not differentiate consultations under Article XXII from those under Article XXIII of GATT. If consultations fail to settle a dispute within 60 days after the date of receipt of a request for consultations, the complaining party may submit a written request to the DSB for the establishment of a panel (paragraph 7, Article 4 of DSU). It is provided that such written request should indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present clearly the problem of inconsistency with trade agreements in question (paragraph 2, Article 6 of DSU).

As a rule, decisions of the DSB are made by consensus, but the so-called “negative consensus method” is applied to the issues of “establishment of panels” (paragraph 1 of Article 6), “adoption of reports of a panel or Appellate Body” (paragraph 4 of Article 16 and paragraph 14 of Article 17) and “compensation and the suspension of concessions” (paragraph 6 of Article 22), the requested action is approved unless all participating Member countries present at the DSB meeting unanimously object. As far as the DSB’s establishment of a panel is concerned, paragraph 2, Article 6 of DSU specifies that “a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB’s agenda, unless at that meeting the DSB decides by consensus not to establish a panel.”

Parties other than the complaining party which requested the establishment of a panel are entitled to block the panel establishment but only once (paragraph 1, Article 6 of DSU). This veto is most frequently employed by the respondent. Therefore, in most cases, a panel is established at the second DSB meeting at which the request appears as an item on the DSB’s agenda. Any Member that desires to be joined in the panel procedure as a third party because of having a substantial interest in the matter concerned is required to express such desire at the time of the establishment of a panel or within 10 days after the date of the panel establishment.

2) Composition of Panels

Once a panel is established, the next step is to select panelists. Selection of panelists is conducted through proposals by the WTO Secretariat on panelists (paragraph 6, Article 8 of DSU). Generally, the Secretariat summons the disputing parties and hears their opinions concerning desirable criteria for selecting panelists, such as home country, work experience and expertise.

Then, the Secretariat prepares a list of nominees (generally six persons) providing their names and brief personal record, and show the list to both parties. It is provided that citizens of the disputing parties or third parties joined in the panel procedure may not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise (paragraph 3, Article 8 of DSU).

It is also provided that either disputing party "shall not oppose nominations except for compelling reasons" (paragraph 7, Article 8 of DSU). However, since the definition of a compelling reason is not very strict, frequently nominations made by the WTO Secretariat are not accepted by either party, and sometimes this happens several times. Also, it is provided that if there is no agreement on the panelists within 20 days after the date of the establishment of a panel, the Director-General, upon request of either party, shall determine the composition of the panel after consulting with the parties to the dispute (paragraph 7, Article 8 of DSU).

3) Making written submissions

After the composition of a panel is determined, the panel meets to determine the timetable for the panel process and the working procedures it will follow throughout the dispute. Then, after three to six weeks from the establishment of the panel, the complainant provides the panel a written submission containing all facts relating to the issue concerned and its claims. The respondent also provides a written submission to the panel in two to three weeks after the receipt of the complainant's written submission (paragraph 12 of Appendix 3 of DSU). Although there is no rule specifying the composition of a written submission, in many cases they are composed of five parts: 1) introduction; 2) facts behind the complaint; 3) procedural points at issue; 4) claims based on legal grounds; and 5) conclusion.

Regarding the disclosure of the written submissions, it is provided (in paragraph 3, Appendix 3 of DSU) that "deliberations of a panel and documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public." Thus, disputing parties may disclose their own written submissions to the public. Actually, the United States and EU disclose many of their written submissions to the public, and Japan also releases some of its written submissions to the public on websites.

4) Panel meeting

A panel generally meets two times. Meetings of a panel are held in the WTO building, instead of a special facility such as a court. Traditionally, a panel meets in closed session, just like other meetings of WTO. Generally, panel meetings last one to three days.

The first meeting of a panel is supposed to be held in one to two weeks after the receipt of the written submission submitted by the respondent (paragraph 12, Appendix 3 of DSU). This first substantive meeting is to begin with a briefing made by the chairman of the panel on how to proceed with the meeting. Then, the compalinant and the respondent, respectively, give oral statements regarding their own written submissions. This is followed by questioning by the panel and in some cases a question-and-answer session between the disputing parties. Next, a third party session is held, where oral statements and a question-and-answer session occurs. As a rule, the presence of third parties is permitted only at these third party sessions, and third parties may not be present at substantive meetings. The second substantive meeting of a panel is supposed to be held after two to three months since the first substantive meeting.

The second meeting focuses mainly on counter-arguments against claims of the other party made during the first substantive meeting. Unlike the first substantive meeting, third parties are not permitted to attend the second substantive meeting. Unless otherwise agreed between the disputing parties, third parties may not make written submissions or obtain written submissions submitted by the disputing parties.

5) *Interim report*

Following the second substantive meeting, the panel issues an interim report to the disputing parties. The interim report describes the findings and conclusions of the panel. An interim report provides the first opportunity for disputing parties to tell whether their arguments are supported by the panel or not. Disputing parties are entitled to submit comments or submit a request for the panel to review and correct technical aspects of the interim report for correction.

6) *Final panel report*

The DSU provides (in paragraph 9 of its Article 12) that the period in which the panel conducts its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the disputing parties, "shall not exceed six months as a general rule." When the panel considers that it cannot issue its report within six months, it is supposed to inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report (paragraph 9, Article 12 of DSU). The recent trend is that cases requiring an examination period exceeding six months are increasing because of the difficulty in confirming facts due to the existence of a highly technical matter or difficult interpretations of a legal matter at issue.

Generally, a final panel report is issued shortly after the disputing parties comment on the interim report, first to disputing parties and then to all Members in the three official languages of the WTO (English, French and Spanish).

A panel report contains, in its conclusion, the judgment reached by the panel as well as recommendations regarding correction of the measures in question. This conclusion is referred to the DSB, where the "negative consensus method" is applied for the adoption of the panel report. The DSB adopts the "recommendation and rulings", which are legally binding the parties concerned. Adoption of a panel report is supposed to be completed between 21 and 60 days after the date the report has been circulated to the Members (paragraphs 1 and 4 of Article 16 of DSU).

Appeal (review by the Appellate Body)

If there is an objection to a panel report, disputing parties may request the Appellate Body to examine the appropriateness of the legal interpretations employed by the panel (paragraph 4, Article 17 of DSU). The Appellate Body is a standing group composed of seven persons of recognized authority with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally; the Appellate Body membership is broadly representative of membership in the WTO. Three persons out of the seven Appellate Body members are to serve on any one case. Persons serving on the Appellate Body are selected by a consensus of all Members at the DSB and serve for a four-year term. Each person may be reappointed once (paragraph 2, Article 17 of DSU).

A Notice of Appeal should be filed no later than the DSB meeting at which a panel report is scheduled to be adopted. Since it is provided that the adoption of a panel report should be completed within 60 days after the date of circulation of the panel report to the Members, an appeal is supposed to be made within 60 days after the date of circulation (paragraph 4, Article 16 of DSU).

It is provided (in paragraph 6 of Article 17 of DSU) that an appeal should be limited to issues of law covered in the panel report and legal interpretations developed by the panel. In principle, factual findings of a panel may not be challenged. Regarding legal interpretations and findings, there is a precedent that mentions: "To determine whether a certain incident occurred at a certain place/time is a matter of fact typically. However, to determine whether a certain fact or a series of facts complies with any given rule of a certain convention is a matter of law and requires legal interpretation." (EC-Hormone-Treated Beef Case (DS26))

After the filing of a Notice of Appeal, the Appellate Body shows the timetable for set out in its working procedures. The three major steps in the procedures are: (1) filing of a written submission by the appellant; (2) filing of written submissions by the appellee and third participants, respectively; and (3) meeting of the Appellate Body with the parties (oral hearing). It is provided that the appellant's filing of its written submission ((1) above) should shall be made within 7 days after the filing of a Notice of Appeal, that the appellee's filing of its written submission ((2) above) should be made within 25 days after the date of the filing of a Notice of Appeal, and that the meeting of the Appellate Body (oral hearing) ((3) above) is supposed to be held between 35 and 45 days after the date of the filing of a Notice of Appeal (paragraphs 21, 22, 24 and 27 of Working Procedures for Appellate Review "WT/AB/WP/5" issued on January 4, 2005). It is also provided that the participation of a third party in appellate review procedures may be accepted only if such party was joined in the panel procedure (paragraph 4, Article 17 of DSU). Third party participants may file written submissions and also may be present at the meeting of the Appellate Body.

During a meeting of the Appellate Body (1) the appellant, (2) the appellee and (3) third participant(s), respectively, make oral arguments in the order mentioned. This is followed by questioning by the Appellate Body of the disputing parties as well as of third party participants; and each party is required to address the questions. The Appellate Body takes the initiative in questioning, and either disputing party is generally not allowed to ask a question to the other party. In general, following the question-and-answer session, disputing parties and third party participants are provided with the opportunity to make oral statements again at the end of the meeting.

Following the meeting, the Appellate Body is to circulate its report to the Members within 60 days after the date of filing of a Notice of Appeal. The proceedings should not exceed 90 days in any case (paragraph 5, Article 17 of DSU). Unlike panel procedures, there is no rule concerning an interim report for appellate review procedures.

Adoption of reports

A report prepared by the panel or the Appellate Body following the review process becomes the formal written recommendations of the DSB when adopted by the DSB. Regarding the adoption of panel reports, the DSU provides (in paragraph 1, Article 16) that "In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date on which they have been circulated to the Members." It is also provided (in paragraph 4, Article 16 of DSU) that "within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting." Regarding the adoption of reports of the Appellate Body, the DSU provides (in paragraph 14, Article 17) that "a report shall be adopted within 30 days after the date of circulation of the report to the Members." Together with a panel report, a report of the Appellate Body becomes the official written recommendations and rulings of the DSB once it is adopted at a DSB meeting.

Implementation of recommendations

The DSU provides that at a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member to which the recommendations are directed is supposed to express its intentions with respect to implementation of the recommendations mentioned in the report. If it is impracticable to comply immediately with the recommendations, the Member is given a reasonable period of time to do so. Such reasonable period of time may be decided by mutual agreement between the disputing parties concerned. However, in the absence of such mutual agreement, the parties may refer the decision to arbitration. In principle, an arbitrator usually is one of the three Appellate Body members who conducted the appellate review of the case concerned. The mandate of the arbitrator is to determine the "reasonable period of time" within 90 days after the date of the adoption of report. It is provided (in paragraph 3, Article 21 of DSU) that the reasonable period of time to implement the recommendations mentioned in a panel or Appellate Body report should, as a general rule, not exceed 15 months from the date of adoption of the report. It is also provided that the DSB should keep under surveillance the implementation of adopted recommendations and that the Member concerned should provide, after a certain period of time following the date of establishment of the reasonable period of time, the DSB with a status report in writing of its progress in the implementation of the recommendations until the issue of implementation is resolved (paragraph 6, Article 21 of DSU).

In general, a panel or the Appellate Body recommends that the Member concerned bring a measure determined to be inconsistent with a covered agreement into conformity with that agreement. It does not usually give any specific instruction on how to implement the recommendations. Therefore, it is not unusual that disagreement arises between disputing parties as to the existence or consistency with the WTO Agreement of measures taken to comply with the recommendations. In this respect, the DSU provides (in paragraph 5, Article 21) that "such disagreement as to the existence or consistency with a covered agreement of measures taken to comply with adopted recommendations or rulings" may be referred to a panel. Such panel established for the purpose of determining whether there has been implementation of adopted recommendations or rulings ("compliance panel") is supposed to be composed of those panelists who served on the original panel. The panel is required to issue a report within 90 days after the date when disagreement is referred to the panel. Unlike regular panel procedures, establishment of the compliance panel does not have to be preceded by consultations. Generally, such panels meet only once. When the complaining party doubts that there has been appropriate implementation of adopted recommendations or rulings, it may request review by a compliance panel repeatedly without limitation. In addition, there is a precedent that compliance panel decisions may be appealed to the Appellate Body for review, although DSU does not have any provision providing for such process.

Countermeasures

With the approval of the DSB, the complainant may take countermeasures, such as suspension of concessions, against the party who respondent's interests also in cases where it fails to implement the recommendations adopted by the DSB within a given reasonable period of time, provided that no agreement on compensation is reached between both parties. Specifically, it is provided that the complainant may request the DSB to suspend the application, to the Member concerned, of concessions or other obligations under covered agreements ("countermeasures") when such Member fails to bring the measures found to be inconsistent with a covered agreement into compliance therewith within the said "reasonable period of time" or that a panel or the Appellate Body confirms a failure of such member to fully implement adopted recommendations (paragraph 2, Article 22 of DSU).

There are rules as to the sectors and level of countermeasures to be taken. For instance, it is provided (by Article 22 of DSU) that the complainant, when taking countermeasures, should first seek to target sector(s) that are the same as that to which the dispute concerned is associated, and also that the level of countermeasures should be equivalent to the level of the "nullification or impairment" caused. If the complainant considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement (item (b), paragraph 3, Article 22 of DSU).

In addition, if that party considers that it is not practical or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement (item (c), paragraph 3, Article 22 of DSU). The latter practice is called "cross retaliation," and it can be represented by a case where retaliation for a violation of TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) involves the suspension of customs-related concessions under GATT. Such cross retaliation is one of the unique measures employed in the WTO dispute settlement mechanism, and was introduced as a result of the coverage of the WTO Agreement over not only goods but also services and intellectual property rights (However, GPA sets special provisions on prohibition of "cross retaliation." Paragraph 7, Article 22 stipulates that "any dispute arising under any Agreement …other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement.").

In the case that the respondent objects to the contents or level of the countermeasures for which the complainant requested authorization, the matter may be referred to arbitration (paragraph 6, Article 22 of DSU). When arbitration is conducted, the resulting decision is taken into consideration for the authorization of countermeasures. The negative consensus method is applied to finalize the authorization of the DSB (paragraph 7, Article 22 of DSU).

Time-frame for the Proceedings

One of the most striking features of the WTO dispute settlement system is the short time frames within which the proceedings of both panels and the Appellate Body must be completed. The period in which a panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. When a panel considers that it cannot issue its report within six months, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within with it shall issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months. Much shorter still is the time frame within which a panel has to rule on the WTO-consistency of measures taken to comply with the recommendations and rulings under Article 21.5 of the DSU. In such proceedings, the panel must circulate its report within 90 days after the date of referral of the matter to it.

With regard to the Appellate Body proceedings, the DSU provides that, as a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. When the Appellate Body believes that it cannot render its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

No other international court or tribunal operates under such severe time limits. These time limits, and in particular the time limits for the Appellate Body, have been criticized as excessively short and too demanding for both the parties to the dispute and the Appellate Body. As a result of these time limits, however, there is no backlog of cases either at the panel or appellate level. While panels frequently go beyond the time limits imposed on them by the DSU, the Appellate Body has thus far been able to complete all but four appeals within the maximum period of 90 days.

Confidentiality of the Proceedings

The WTO dispute settlement proceedings are also characterized by their confidentiality. Consultations, panel proceedings and appellate review proceedings are all confidential. Meetings of the DSB and panels and the oral hearing of the Appellate Body take place behind closed doors. All written submissions to a panel or to the Appellate Body by the parties and third parties to the dispute are confidential. Parties may make their own submissions available to the public. While a few Members do so in a systematic manner (e.g., the United States), most parties choose to keep their submissions confidential. The DSU provides that a party to a dispute must, upon request of any WTO Member, provide a non-confidential summary of the information contained in its submissions to the panel that could be disclosed to the public. However, this provision does not provide for a deadline by which such non-confidential summary must be made available and is, therefore, not very effective.

The interim report of the panel and the final panel report as long as it is only issued to the parties to the dispute are also confidential. The final panel report only becomes a public document when it is circulated to all WTO Members. In reality, however, the interim report and the final report issued to the parties do not remain confidential very long and are usually "leaked" to the media. Unlike panel reports, Appellate Body reports are not first issued to the parties and then, weeks later, circulated to all WTO Members. In principle they are issued to the parties and circulated to all WTO Members at the same time and are as of that moment a public document.

REMEDIES FOR BREACH OF WTO LAW

What can or should be done if a panel and/or the Appellate Body conclude that a measure is inconsistent with WTO law?

Article 3.7 of the DSU states: “In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure, which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.”

Article 19.1 of the DSU provides: “Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.”

Article 21.1 of the DSU adds to this: “Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.”

However, if it is impracticable to comply immediately with the recommendations and rulings of the DSB, the Member concerned shall have a reasonable period of time in which to do so. This reasonable period of time can either be agreed upon by the parties or be determined through binding arbitration. In those cases in which the reasonable period of time for implementation has been determined through arbitration, it has been set between six months and 15 months and one week.

With respect to compensation (for future damages) and retaliation in case of non-compliance, Article 22.1 states: “Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.” The DSU does not explicitly provide for the compensation of damage suffered.

DEVELOPING COUNTRY MEMBERS AND DISPUTE SETTLEMENT SYSTEM

Use Made of the Dispute Settlement System

The WTO dispute settlement system has been used intensively by the major trading powers, and, in particular, the United States and the European Communities. Developing country Members, however, have also had frequent recourse to the WTO dispute settlement system, both to challenge trade measures of major trading powers and to settle trade disputes with other developing countries. During the first six years of the WTO dispute settlement system (1995-2000) in 26 per cent of all cases brought to the WTO system for resolution developing countries were complainants and in 40 per cent they were respondents. In 2000 and 2001, developing countries brought more disputes to the WTO system than did developed countries. The most active users of the dispute settlement system among developing country Members are Brazil, India, Mexico, Thailand and Chile. To date, no least-developed country has ever brought a complaint to the WTO or has been a respondent in WTO dispute settlement proceedings.

Special and Differential Treatment

The DSU recognizes the special situation of developing and least-developed country Members. There are a number of DSU provisions that grant special rights to developing countries in the consultation and panel processes. Special rules for developing country Members are found in Article 3.12, Article 4.10, Article 8.10, Article 12.10, Article 12.11, Article 24 and Article 27 of the DSU. For the most part, these special rules and procedures have not been much used to date.

Legal Assistance

The WTO Secretariat assists all Members in respect of dispute settlement when they so request. However, the DSU recognizes that there may be a need to provide additional legal advice and assistance to developing country Members. To meet that additional need, Article 27.2 of the DSU requires the WTO Secretariat to make available qualified legal experts to help any developing country Member which so requests. The extent to which the Secretariat can assist developing country Members is, however, limited both by lack of manpower and by the requirement that the Secretariat's experts should give assistance in a manner "ensuring the continued impartiality of the Secretariat". The experts can thus not act on behalf of a developing country Member in a dispute with another Member and their assistance is necessarily limited to the preliminary phases of a dispute.

Effective legal assistance to developing country Members in dispute settlement proceedings is given by the newly established, Geneva-based Advisory Centre on WTO Law. At the occasion of the official opening of the Advisory Centre on WTO Law on 5 October 2001, Mr. Mike Moore, the then WTO Director-General, said that with the establishment of the

Advisory Centre for "the first time a true legal aid centre has been established within the international legal system, with a view to combating the unequal possibilities of access to international justice as between States". The Advisory Centre is an independent intergovernmental organization (fully independent from the WTO), which will function essentially as a law office specialized in WTO law, providing legal services and training exclusively to developing country and economy-in-transition Members of the Advisory Centre and all least-developed countries. The Centre will provide support at all stages of WTO dispute settlement proceedings at discounted rates for its developing country Members and all least-developed countries. The current 32 Members (nine developed countries, 22 developing countries and one economy-in-transition) have pledged in total US$ 9.8 million for the endowment fund and US$6 million for the multi-year contributions. In the summer of 2001, the Advisory Centre assisted for the first time a WTO developing country Member in a dispute settlement procedure when it assisted Pakistan in the Appellate Body proceedings in United States – Cotton Yarn.

NEGOTIATIONS ON THE DISPUTE SETTLEMENT SYSTEM

At the time of adoption of the WTO Agreement, it was agreed that the WTO Ministerial Conference would complete a full review of the DSU within four years after the entry into force of the WTO Agreement, and subsequently take a decision on whether to continue, modify or terminate the DSU. In the context of this review of the DSU, which took place in 1998 and 1999, Members made a large number of proposals and suggestions for further improvement of the dispute settlement system. In the run-up to and during the Seattle Session of the Ministerial Conference in December 1999, Members made a considerable but eventually unsuccessful effort to agree on modifications to be made to the DSU.

In 2000 and 2001, informal efforts outside the DSB to reach agreement on DSU amendments were continued. Also these efforts, intensified in the run-up to the Doha Session of the Ministerial Conference in November 2001, did not lead to an agreement. At the Doha Session of the Ministerial Conference, it was agreed, however, to open in January 2002 formal negotiations with the aim of concluding by May 2003 an agreement on changes to the DSU. The negotiations are based on the work done so far and on new proposals by Members. The Ministerial Declaration states that the negotiations on the Dispute Settlement Understanding will not be part of the single undertaking — i.e. that they will not be tied to the overall success or failure of the other negotiations mandated by the Ministerial Declaration.

Among the proposals for reform currently under negotiation, there is a proposal to introduce a system of permanent panelists, proposals regarding the composition and mandate of the Appellate Body, proposals concerning the transparency of the proceedings, proposals concerning the special and differential treatment for developing country Members and proposals to improve the WTO mechanism to ensure implementation of recommendations and rulings adopted by the DSB.

CASES ON MARITIME TRANSPORTATION UNDER WTO DSU

KOREA – COMMERCIAL VESSELS (DS273)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	*European Communities*	*ASCM Arts. 3.1(a),3.2, 4.7, 5(c) and 6.3(a)*	Establishment of Panel	*21 July 2003*
			Circulation of Panel Report	*7 March 2005*
Respondent	*Korea*		Circulation of AB Report	*NA*
			Adoption	*11 April 2005*

Measure and Industry at Issue

- Measure at issue: Korea's various measures relating to alleged subsidies to its shipbuilding industry.
- Industry at issue: Korean shipyard industry.

Summary of Key Panel Findings

ASCM Art. 3.1(a) and 3.2 (export subsidies)

- Measures as such: Having found that the KEXIM legal regime ("KLR"), APRG and PSL programmes did not "mandate" the conferral of a "benefit," the Panel rejected EC claims that these measures as such were inconsistent with Art. 3.1(a) and 3.2.
- Measures as applied: The Panel found that certain "KEXIM guarantees" under the APRG programme were prohibited export subsidies (specific subsidies contingent upon export performance) under Art. 3.1(a) and 3.2 and rejected Korea's argument that item (j) (i.e. export credit guarantee) of the Illustrated List could work as an affirmative defence, on the ground that item (j) does not fall within the scope of footnote 5 of ASCM. The Panel also found that certain "KEXIM loans" under the PSL programme were prohibited export subsidies and rejected Korea's defence under item (k) (export credit grants) since the PSLs (as credits to shipbuilders rather than foreign buyers) were not export credits.

ASCM Part III (actionable subsidies)

- Subsidies (debt restructurings): The Panel rejected the EC claims that the debt restructurings of Korean shipyards involved subsidization or that shipyards received subsidies through tax concessions, after having found: (i) that the European Communities had not demonstrated the existence of a benefit or subsidization in respect of the restructuring of DHI; (ii) that the European Communities had not demonstrated that either the decision to restructure or the terms were "commercially unreasonable" for Halla; (iii) that the European Communities had not argued that the determination that the going concern value for Daedong exceeded its liquidation was not proper; and (iv) in respect of Daewoo, as the assets were allocated at book value as part of the spin-off, there was no gain and thus no basis for any tax exemption.

- ASCM Arts. 5(c) and 6.3(c) (serious prejudice): The Panel rejected the EC claim that the subsidized APRG and PSL transactions at issue seriously prejudiced its interests by causing significant price depression within the meaning of Art. 6.3(c), finding that the evidence or arguments did not demonstrate that the subsidized transactions had such an aggregate effect.

ASCM Art 4.7 (recommendation)

- The Panel recommended that Korea withdraw the individual APRG and PSL subsidies within 90 days.

EC – COMMERCIAL VESSELS (DS301)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	*Korea*	*GATT Arts. III:4, I:1 and III:8(b)*	Establishment of Panel	*19 March 2004*
		DSU Art. 23.1	Circulation of Panel Report	*22 April 2005*
Respondent	*European Communities*	*ASCM Art. 32*	Circulation of AB Report	*NA*
			Adoption	*20 June 2005*

Measure and Product at Issue

- Measure at issue: The European Communities' Temporary Defensive Mechanism for Shipbuilding (the "TDM Regulation") of 2002, under which contract-related operating aid provided by EC member States for the building of certain ships were considered compatible with the common market.
- Product at issue: Container ships, product and chemical tankers as well as LNG carriers.

Summary of Key Panel Findings

- GATT Art. III:4 (national treatment - domestic laws and regulations) and III:8(b) (national treatment - subsidies exception): The Panel concluded that the state aid subject to the TDM Regulation was covered by GATT Art. III:8(b) because it provided for "the payment of subsidies exclusively to domestic producers", and therefore the TDM Regulation, the national TDM schemes (in this case, Denmark, France, Germany, the Netherlands and Spain) and the EC decisions authorizing the schemes were not inconsistent with GATT Art. III:4.

- GATT Arts. I:1 (most-favoured-nation treatment) and III:8(b) (national treatment - subsidies exception): Based on its conclusion that the TDM Regulation was covered by GATT Art. III:8(b) and that, as a result, the subsidies under the TDM Regulation were not covered by the expression "matters referred to in paras. 2 and 4 of Article III" in Art. I:1, the Panel concluded that the TDM Regulation and the national TDM schemes were not inconsistent with GATT Art. I:1.
- ASCM, Art. 32.1 (specific action against a subsidy): The Panel found that the TDM Regulation was a specific action because it had a strong correlation and inextricable link with the constituent elements of a subsidy but it was not taken against a subsidy of another member (Korea in this case) within the meaning of Art. 32.1. The Panel concluded that, in addition to the measure's (TDB Regulation in this case) impact on the conditions of competition, there must be some additional element for the measure to be considered an action "against" a subsidy: an element inherent in the "design and structure" of the measure that serves to dissuade, or encourage the termination of, the practice of subsidization. Therefore, the Regulation and the national TDM schemes mentioned above were found not to be in violation of Art. 32.1.

Other Issues

- Prohibition on unilateral determinations (DSU Art. 23.1): The Panel concluded that since "it is undisputed that the European Communities adopted the TDM Regulation without having recourse to the DSU," the European Communities acted inconsistently with DSU Art. 23.1. As a consequence, the national TDM schemes were also inconsistent with DSU Art. 23.1.

COLOMBIA – PORTS OF ENTRY (DS366)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	*Panama*	*GATT Arts. XI:1, XIII:1, V:2 V:6 and I:1* *CVA Arts. 1, 2, 3, 5, 6 and 7*	Establishment of Panel	*22 October 2007*
			Circulation of Panel Report	*27 April 2009*
Respondent	*Colombia*		Circulation of AB Report	*NA*
			Adoption	*20 May 2009*

Measure and Product at Issue

- Measure at issue: Colombian customs regulations establishing the use of indicative prices and restrictions on ports of entry.

- Product at issue: Certain textiles, apparel and footwear classifiable under HS Chapters 50-64 of Colombia's Tariff Schedule, which were re-exported and re exported from the Colon Free Zone ("CFZ") and Panama to Colombia.

Summary of Key Panel Findings

- CVA Arts. 1, 2, 3, 5, 6 and 7.2(b) and (f) (sequential use of valuation methods): The Panel found that Colombia's use of indicative prices constituted customs valuation and that the measures establishing indicative prices, by mandating their use for customs valuation purposes, were inconsistent as such with the obligation established in the CVA to apply, in a sequential manner, the methods of valuation provided in Arts. 1, 2, 3, 5 and 6 of the Agreement. The Panel further found that, by mandating the use of the higher of two values, or a minimum price as the customs value of subject goods, the measures were inconsistent as such with Art. 7.2(b) and (f).
- GATT Art. XI:1 (prohibition on quantitative restrictions): The Panel found that Colombia's prohibition of the importation of textiles, footwear and apparel from Panama or the CFZ except at the ports of Bogota and Barranquilla, was a prohibited restriction on importation within the meaning of Art. XI:1.
- GATT Art. I:1 (most-favoured-nation treatment): The Panel found that, by subjecting textile, apparel and footwear imports arriving from Panama and the CFZ to an advance import declaration requirement, which thereby requires payment of customs duties and sales tax in advance and prevents importers from inspecting goods on site upon arrival in order to verify the accuracy of the declaration, Colombia confered advantages to like products from all other WTO Members that were not extended immediately and unconditionally to textile, apparel and footwear imports from Panama and the CFZ in violation of Art. I.1.
- GATT Art. V:2 (freedom of transit): By requiring that goods undergo trans-shipment in order to proceed in international transit, the Panel found that Colombia failed to extend freedom of transit via the most convenient routes to goods arriving from Panama in international transit within the meaning of Art. V:2, first sentence, as informed by Art. V:1. The Panel also found that Colombia made distinctions based on the place of origin or departure of textiles, apparel and footwear arriving from Panama or the CFZ, in violation of Art. V:2, second sentence.
- GATT Art. XX(d) (exceptions - necessary to secure compliance with laws): The Panel found that Colombia failed to establish that the ports of entry measure was necessary to ensure compliance with Colombian customs laws and regulations under Art. XX(d).

MODULE-V

MARITIME DISPUTE SETTLEMENT IN INDIA

HISTORY AND ADMIRALTY JURISDICTION OF THE HIGH COURTS

For the first Admiralty jurisdiction came to be invested in the Recorder's Court at Bombay which was established by a Charter dated 20th February, 1798. The Recorders' Court, however, was substituted by the Supreme Court of Judicature at Bombay which was established by Letters Patent issued under the Charter of 1823. The Supreme Court of Judicature at Bombay was invested with the same jurisdiction on its Admiralty Side as the jurisdiction which was exercised by the High Court of Admiralty in England.

The Indian High Courts Act was passed by the British Parliament on the 6^{th} August, 1861 and was titled as an act for establishing high courts of judicature in India. This legislation contained only 19 sections only.

Its main function was to abolish the supreme courts and the Sadar Adalats in the three Presidencies and to establish the high courts in their place. The records and document of the various courts became the records and documents of the High Court concerned. It gave power authority in Her Majesty to issue letters patent under the great seal of the United Kingdom, to erect and establish High courts of judicature at Calcutta, Madras and Bombay.

Each High court was to consist of a chief justice and as many puisne judges not exceeding fifteen as her majesty might think fit to appoint. Each high court was to have and exercise all such civil and criminal admiralty and viceadmiralty, testamentary, intestate and matrimonial jurisdiction and original and appellate.

The High Court was to have superintendence over all courts subject to its appellate jurisdiction. It got power, authority to call for return, to transfer any suit or appeal from one court to another and to make and issue general rules for regulating the practice and proceedings of such courts.

The charter for the Calcutta High Court was issued on May 14, 1862 and was published in Calcutta on the 1st July 1862 establishing the high court from the next day. The charter for the High Courts of Bombay and Madras were issued on June 26, 1862 and these courts were inaugurated on the 14th and 15^{th} August 1862.

The Supreme Court of Judicature at Bombay which was established in 1823 as aforesaid was superseded by the High Court of Judicature at Bombay established by the Letters Patent of 1862. Clause 31 of the Letters Patent dealt with admiralty and Vice admiralty jurisdiction. The Letters Patent of 1862 were once again superseded by Letters Patent of 1865 and Clause 32 of these Letters Patent provided:

> "And we do further ordain that the High Court of Judicature at Bombay shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice Admiralty, and also such

jurisdiction for the trial and adjudication of prize clauses and other maritime questions arising in India as may now be exercised by the said High Court."

In the year 1890, Colonial Courts of Admiralty Act, 1890 was enacted. Section 2(1), section 3 and section 7 of the said Act read thus:--

"2. Colonial courts of Admiralty.---(1) Every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of its other Civil jurisdiction and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judicial authority the expression "Court of law" for the purposes of this section includes such Governor."

3. Power of Colonial legislature as to Admiralty jurisdiction.---The legislature of a British possession may by any Colonial law:---

(a) declare any Court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such Court of its jurisdiction under this Act, and limit territorially, or otherwise, the extent of such jurisdiction; and

(b) confer upon any inferior or subordinate Court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit;

Provided that any such Colonial law shall not confer any jurisdiction which is not by this Court conferred upon a Colonial Court of Admiralty.

7. Rules of Court.--

(1) Rules of Court for regulating the procedure and practice (including fees and costs) in a Court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees, and costs in the said Court in the exercise of its Ordinary Civil Jurisdiction respectively are made:

Provided that the rules under this section shall not, save as provided by this Act, extend to matters relating to the slave trade, and shall not (save as provided by this section) come into operation until they have been approved by Her Majesty in Council, but on coming into operation shall have full effect as if enacted in this Act, and any enactment inconsistent therewith shall, so far as it is so inconsistent, be repealed.

(2) It shall be lawful for Her Majesty in Counsel, in approving rules made under this section, to declare that the rules so made with respect to any matters which appear to Her Majesty to be matters of detail or of local concern may be revoked, varied, or added to without the approval required by this section.

(3) Such rules may provide for the exercise of any jurisdiction conferred by this Act by the full Court, or by any Judge or Judges thereof, and subject to any rules, where the Ordinary Civil Jurisdiction of the Court can in any case be exercised by a Single Judge, any jurisdiction conferred by this Act may in the like case be exercised by a Single Judge."

By Act No. 16 of 1891 i.e. Colonial Courts of Admiralty (India) Act, 1891, the High Court of Bombay along with the High Court of judicature at Fort William in Bengal and at Madras were declared to be Colonial Courts of Admiralty. The preamble of the said Act stated "Whereas it is provided by the Colonial Courts of Admiralty Act, 1890 that the Legislature of a British possession may by any colonial law declare any Court of unlimited civil jurisdiction in that possession to be a Colonial Court of Admiralty." The High Court of Bombay being the Court of record which had unlimited civil jurisdiction was also declared to be Colonial Court of Admiralty having the same jurisdiction in extent and quality as was vested in the High Court of England by virtue of any statute or custom.

The Colonial Court of Admiralty Act of 1890 equated the High Courts of Bombay, Calcutta and Madras to the High Courts of England with regard to admiralty jurisdiction. Admiralty jurisdiction in India was governed by Admiralty Courts Act 1861 applied by (English) Colonial Courts of Admiralty Act 1890 and adopted by Colonial Courts of Admiralty (India) Act 1891. This state of affairs continued due to legislative inaction. Further Section 3 of the 1890 Act empowered the Colonial Legislature to enact law to declare any Court of unlimited jurisdiction to be a Colonial Court of Admiralty. As per this provision the Indian Legislature enacted the Colonial Courts of Admiralty established under the 1890 Act at Calcutta, Bombay and Madras. Their powers and jurisdiction were continued in the 1915 and 1935 Government of India Acts. The Admiralty jurisdiction of the High Courts continued even after the promulgation of the Constitution by virtue of Art.372 which provided for the continuance of existing laws. Though the Admiralty jurisdiction was extended to a considerable extent in England, it continued to be the same in India as per the 1861 Act, today the Admiralty jurisdiction in India is governed by the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017.

Common law legal systems of the United States and Britain are in contrast to civil law legal systems which prevail in continental Europe and trace back to old Roman codified law. Even in England, however, admiralty courts were/are separate from common law courts, and generally follow civil law principles. Most of the common law countries (including Pakistan, Singapore, India, and many other Commonwealth of Nations countries) follow English statute and case law. India still follows many Victorian-era British statutes such as the Admiralty Court Act 1861 [24 Vict c 10]. Whilst Pakistan now has its own statute, the Admiralty Jurisdiction of High Courts Ordinance, 1980 (Ordinance XLII of 1980), it also follows English case law. One reason for this is that the 1980 Ordinance is partly modelled on old English admiralty law, namely the Administration of Justice Act 1956. The current statute dealing with the Admiralty jurisdiction of the England and Wales High Court is the Supreme Court Act 1981, ss. 20-24, 37. The provisions in those sections are, in turn, based on the International Arrest Convention 1952. Other countries which do not follow the English statute and case laws, such as Panama, also have established well-known maritime courts which decide international cases on a regular basis. Admiralty courts assume jurisdiction by virtue of the presence of the vessel in its territorial jurisdiction irrespective of whether the vessel is national or not and whether registered or not, and wherever the residence or domicile or their owners may be. A vessel is usually arrested by the court to retain jurisdiction. State-owned vessels are usually immune from arrest.

In M. V. Elisabeth and another v. Harwan Investment & Trading Co. and another, the question before the Apex Court was whether the High Court in India was invested with admiralty jurisdiction to order the arrest of the vessel in respect of a cause of action relating to outward cargo. While dealing with the said contention, the Apex Court referred to the history of the admiralty law and the various paragraphs, particularly 14, 17, 20, 25, 26, 30, 44, 48, 49, 56, 58, 59, 65, 66, 67, 68, 72, 75, 78, 80, 83, 85, 88, 89 and 101 throw immense light on the extent and power of admiralty jurisdiction possessed by the High Courts.

What is clearly laid down by the Apex Court in M.V. Elisabeth in respect of admiralty jurisdiction is that despite its peculiarity of original growth, it nevertheless is a part of the totality of jurisdiction vested in the High Court as the superior Court of record and is not a distinct and separate jurisdiction as was once the position in England before the unification of codes. The Colonial Courts of Admiralty Act, 1890 and Colonial Courts of Admiralty (India) Act, 1891 conferred admiralty jurisdiction on Indian High Courts by reason of their being courts of unlimited jurisdiction. The two Acts of 1890 and 1891 did not confer any separate or distinct jurisdiction but by passage of these acts equated the Indian High Courts to the position of English High Courts for the exercise of admiralty powers within their jurisdiction. The jurisdiction is not confined to the High Courts who were conferred power and jurisdiction under the Act of 1891 alone.

The State Reorganisation Act, 1956 was enacted to provide for the reorganisation of the States of India. The existing States were divided or expanded and the new States came to be formed from the appointed day i.e. 1st November 1956. Under section 8 of the Act of 1956 a new Part A State to be known as the State of Bombay came to be formed comprising the territories stated therein which inter alia included the territories of the existing State of Kutch. Part V of the Act of 1956 deals with High Courts. Section 49 provides that the High Courts exercising jurisdiction immediately before the appointed day shall be deemed to be High Courts of New States and accordingly High Court of Judicature at Bombay became empowered to exercise its jurisdiction in respect of new State of Bombay by virtue of section 52 of the Act of 1956. Sections 49 and 52 which are relevant for the present purposes read thus:--

> *49. (1) The High Courts exercising immediately before the appointed day jurisdiction to relation to existing States of Bombay, Madhya Pradesh and Punjab shall, as from the appointed day, be deemed to be the High Courts for the new States of Bombay, Madhya Pradesh and Punjab respectively.*
>
> *52. The High Court for a new State shall have, in respect of any part of the territories included in that new State, all such original, appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of that part of the said territories by any High Court or Judicial Commissioner's Court for an existing State.*

The State of Bombay which came to be formed in the year 1956 under the Act of 1956 was further reorganised under the Bombay Reorganisation Act, 1960 (Act of 1960). The appointed day of the said Act is 1st of May 1960. Under section 3 of the Act of 1960, State of Gujarat was formed comprising some of the territories of Bombay and the residuary State of Bombay was named the State of Maharashtra. The territories which form the State of Gujarat include Kutch district. Section 3 reads thus:

> 3. (1) As from the appointed day, there shall be formed a new State to be known as the State of Gujarat comprising the following territories of the State of Bombay, namely,:---
>
> > (a) Banaskantha, Mehsana, Sabarkantha, Ahmedabad, Kaira, PanchMahals, Baroda, Broach, Surat, Dangs, Amreli, Surendra nagar, Rajkot, Jamnagar, Junagadh, Bhavnagar and Kutch distircts; and
> >
> > (b) the villages in Umbergaon taluka of Thana district, the villages in Nawapur and Nandurbar talukas of West Khandesh district and the villages in Akkalkuwa and Taloda talukas of West Khandesh district, respectively specified in Parts I, II and III of the First Schedule; and thereupon, the said territories shall cease to form part of the State of Bombay, and the residuary State of Bombay shall be known as the State of Maharashtra.
>
> (2) The villages in Umbergaon taluka specified in Part I of the First Schedule shall form a separate taluka of the same name and be included in Surat district, and the

remaining villages in the said taluka shall be included in, and form part of, Dahanu taluka of Thana district; and the villages specified in Parts II and III of the First Schedule shall rspectively be included in, and form part of, Sangadh taluka of Surat district and Sagbara taluka of Broach distirct.".

The separate High Court for the State of Gujarat was established under section 28 of the Act of 1960 which also provide that High Court of Bombay shall become the High Court for the State of Maharashtra. The High Court of Gujarat, under section 30 of the said Act was conferred jurisdiction in respect of the territories included in the State of Gujarat having the same powers and the jurisdiction which the High Court of Bombay had in respect of the said territories immediately before the appointed date.

The historical development of admiralty jurisdiction and procedure is of practical as well as theoretical interest, since opinions in admiralty cases frequently refer to the historical background in reaching conclusions on the questions at issue. The special jurisdiction of admiralty has a maritime purpose, different from the common law. It is not exclusively rooted in the civil law system, although it includes substantial derivations there from. It has a strong international aspect, but may undergo independent changes in several countries. Certain universal features exist in all countries that have admiralty law and such international features are given serious consideration by admiralty courts. By the end of the seventeenth century the admiralty jurisdiction in England was restricted, it was not as extensive as compared to other European maritime countries due to a long standing controversy in which the common law courts with the aid of the Parliament had succeeded in limiting the jurisdiction of admiralty to the high seas and as such excluded admiralty jurisdiction from transactions arising on waters within the body of a country.

A suit against a foreign ship owned by a foreign company not having a place of residence or business in India is liable to be proceeded against on the admiralty side of the High Court by an action in rem in respect of the cause of action alleged to have arisen by reason of a tort or a breach of obligation arising from the carriage of goods from a port in India to a foreign port. Courts having admiralty jurisdiction is not limited to what was permitted by the Admiralty Court, 1861 and the Colonial Courts of Admiralty Act, 1890. Prior to the decision of m.v Elisabeth-v- Harwan Investment & Trading Pvt Ltd., Goa, the courts exercising Admiralty Jurisdiction statutorily in India were the three High Courts at Calcutta, Madras and Bombay. The High Courts of the other littoral states of India, viz. Gujarat, Karnataka, Kerala, Andhra Pradesh and Orissa, do not possess Admiralty jurisdiction, albeit there have been instances of the High Courts of Gujarat, Andhra Pradesh and Orissa having entertained Admiralty causes apparently on a perfunctory consideration of the various States Reorganisation Acts enacted by the Indian Parliament and presumably without the benefit of a full argument. However, after the decision of the Supreme Court in m.v Elisabeth-v- Harwan Investment & Trading Pvt Ltd) interpreting under A.225 the High Courts in India is superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers.

The Admiralty jurisdiction of the High Courts at Calcutta, Madras and Bombay were the same as the Admiralty jurisdiction of the High Court in England at the time of the enactment by the British Parliament of the Colonial Courts of Admiralty Act 1890 and is, under subsection (2) of the said Act, and subject to the provisions thereof, over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise and exercised in the like manner and to as full an extent as the High Court in England having the same regard as that court to international law and the comity of nations. The subsequent extension of the Admiralty jurisdiction of the High Court in England by statutes passed after that date by the British Parliament, the Administration of Justice Act 1920, re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925, is not shared by the said three High Courts. After India attained independence, the Indian Parliament has so far not exercised it powers to make laws with respect to Admiralty and thus the three Indian High Courts were to apply Admiralty laws as it was applied by the English Court of Admiralty as defined in the Admiralty Court Act, 1861. The scope and nature of the Admiralty jurisdiction exercised by the High Courts in India have been examined and ascertained in Kamlakar v. The Scindia Steam Navigation Co. Ltd; Rungta Sons Ltd. v. Owners and Master of Edison6; National Co. Ltd. v. M. S. Asia Mariner ; m.v Elisabeth-v- Harwan Investment & Trading Pvt Ltd., Goa.

The fact that the High Court continues to enjoy the same jurisdiction as it had immediately before the commencement of the Constitution, as stated in Art. 225, does not mean that a matter which is covered by the Admiralty Court Act, 1861 cannot be otherwise dealt with by the High Court, subject to its own Rules, in exercise of its manifold jurisdiction, which is unless barred, unlimited. To the extent not barred expressly or by necessary implication, the judicial sovereignty of this country is manifested in the jurisdiction vested in the High Courts as superior courts. It is true that the Colonial statutes continue to remain in force by reason of Art. 372 of the Constitution of India, but that do not stultify the growth of law or blinker its vision or fetter its arms. Legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of justice.

It was because of the unlimited civil jurisdiction that was already vested in these High Courts that they were declared to be Colonial Courts of Admiralty having the same jurisdiction in extent and quality as was vested in the High Court of England by virtue of any statute or custom. The High Courts were declared competent to regulate their procedure and practice in exercise of admiralty jurisdiction in accordance with the Rules made in that behalf. There is, therefore, neither reason nor logic in imposing a fetter on the jurisdiction of those High Courts by limiting it to the provisions of an imperial statute of 1861 and freezing any further growth of jurisdiction. This is even truer because the Admiralty Court Act, 1861 was in substance repealed in England a long time ago.

Assuming that the admiralty powers of the High Courts in India are limited to what had been derived from the Colonial Courts of Admiralty Act, 1890, that Act, having equated certain Indian High Courts to the High Court of England in regard to admiralty jurisdiction, must be considered to have conferred on the former all such powers which the latter enjoyed in 1890 and thereafter during the period preceding the Indian Independence Act, 1947. What the Act of 1890 did was not to incorporate any English statute into Indian law, but to equate the admiralty jurisdiction of the Indian High Courts over places, persons, matters and things to that of the English High Court. There is no reason to think that the jurisdiction of the Indian High Courts have stood frozen and atrophied on the date of the Colonial Courts of Admiralty Act, 1890.

Yet there appears no escape from it, notwithstanding its unpleasant echo in ears. The shock is still greater when it transpired that this state of affairs was and is due to lack of legislative exercise.

Viewed in the background of enactment of 1890 it would be too artificial to confine the exercise of power by the High Courts in Admiralty to what was contained in 1861 Act. Even otherwise for deciding the jurisdiction exercised by the High Court in India founded on jurisdiction exercised by the High Court of England it is not necessary to be governed by the decisions given by English Courts. Law is pragmatic in nature to problems arising under an Act and not by abdication or surrender, 1890 Act is an unusual piece of legislation expansive in scope, wider in outlook, opening out the wings of jurisdiction rather than closing in. The authority and power exercised by the High Court in England, the width of which was not confined to the statute but went deep into custom, practice, necessity and even exigency.

Law of 1890 apart, can the Indian High Courts after 1950 be denied jurisdiction to arrest a foreign ship to satisfy the claim of an owner of a bill of lading for cargo taken outside the country ? Without entering into any comparative study regarding the jurisdiction of the High Court of England and the High Courts in our country the one basic difference that exists today is that the English Courts derive their creation, constitution and jurisdiction from Administration of Justice Act or Supreme Court Act but the High Courts in our country are established under the Constitution. Under Art. 225 enlarged preserves the jurisdiction, including inherent jurisdiction, which existed on the date the Constitution came into force and Art. 226 enlarged it by making it not only a custodian of fundamental rights of a citizen but a repository of power to reach its arms to do justice. A citizen carrying on a particular business which is a fundamental right cannot be rendered helpless on the premise that the jurisdiction of the High Courts stands frozen either by the statute of England or any custom or practice prevailing there or the High Court of England cannot exercise the jurisdiction.

The jurisdiction of the High Court of Admiralty in England used to be exercised in rem in such matters as from their very nature would give rise to a maritime lien - e.g. collision, salvage, bottomry. The jurisdiction of the High Court of Admiralty in England was, however, extended to cover matters in respect of which there was no maritime lien, i.e., necessaries supplied to a foreign ship. In terms of Section 6 of the Admiralty Act, 1861, the High Court of Admiralty was empowered to assume jurisdiction over foreign ships in respect of claims to cargo carried into any port in England or Wales. By reason of Judicature Act of 1873, the jurisdiction of the High Court of Justice resulted in a fusion: of admiralty law, common law and equity. The limit of the jurisdiction of the Admiralty court in terms of Section 6 of the 1861 Act was discarded by the Administration of Justice Act, 1920 and the jurisdiction of the High Court thereby was extended to (a) any claim arising out of an agreement relating to the use or hire of a ship; (b) any claim relating to the carriage of goods in any ship; and (c) any claim in tort in respect of goods carried in any ship.

The admiralty jurisdiction of the High Court was further consolidated by the Supreme Court of Judicature (Consolidation) Act, 1925 so as to include various matters such as any claim "for damage done by a ship", and claim 'arising out of an agreement relating to the use or hire of a ship'; or 'relating to the carriage of goods in a ship'; or "in tort in respect of goods carried in a ship".

The admiralty jurisdiction of the High Court was further widened by the Administration of Justice Act, 1956 so as to include not only the claims specified under Section 1(i) of Part I but also any other jurisdiction which either was vested in the High Court of Admiralty immediately before the date of commencement of the Supreme Court of Judicature Act, 1873 (i.e. November 1, 1875) or is conferred by or under an Act which came into operation on or after that date on the High Court as being a court with admiralty jurisdiction and any other jurisdiction connected with ships vested in the High Court apart from this section which is for the time being assigned by rules of court to the Probate, Divorce and Admiralty Division.

Sub-section (4) of Section 1 removed the restriction based on the ownership of the ship. By reason of Clauses (d)(g) and (h) of the said Section the jurisdiction in regard to question or claims specified under Section 1(i) included any claim for loss of or damage to goods carried in a ship, any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.

In the course of time the jurisdiction of the High Courts of Calcutta, Bombay, Madras, Gujarat, Hyderabad, Telangana, Karnataka, Kerala and Orissa have entertained Admiralty actions.

The Admiralty jurisdiction exercised by the High Courts in Indian Republic is now governed by the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017, repealing the

English Admiralty Courts Act, 1861 applied by (English) Colonial Courts of Admiralty Act, 1890 and adopted by Colonial Courts of Admiralty (India) Act, 1891 (Act XVI of 1891).

The 1861 Act was discarded by the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 on August 9, 2017.

ADMIRALTY COURTS IN INDIA

The Indian Courts vested with Admiralty jurisdiction are the High Court's of Bombay, Calcutta, Madras, Odisha, Telangana, Hyderabad, Karnataka, Kerala and Gujarat. The Admiralty jurisdiction of each of these courts is concurrent and territorially extends over the coast line of India.

The jurisdiction in respect of all maritime claims is vested with the Indian Courts having Admiralty jurisdiction. The Admiralty jurisdiction of each of these courts is concurrent and territorially extends over the coast line of India and is exercisable over the waters up to and including the territorial waters of their respective state jurisdictions provided that the Central Government may, by notification, extend the jurisdiction of the High Court up to the limit as defined in section 2 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976).

SPECIFIC JURISDICTION AND JURISDICTION IN ADMIRALTY

The starting point for ship arrest in maritime law is the subject of admiralty jurisdiction. Admiralty jurisdiction is founded on the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017, section 3, provides: "subject to the provisions of sections 4 and 5, the jurisdiction in respect of all maritime claims under this Act shall vest in the respective High Courts and are the courts of specific jurisdiction and be exercisable over the waters up to and including the territorial waters of their respective jurisdictions in accordance with the provisions contained in this Act: ".

Admiralty jurisdiction is an essential aspect of judicial sovereignty which under the Constitution and the laws is exercised by the High Court as a superior court of record administering justice in relation to persons and things within its jurisdiction. Power to enforce claims against foreign ships is an essential attribute of admiralty jurisdiction and it is assumed over such ships while they are within the jurisdiction of the High Court by arresting and detaining them.

The Indian Courts possessing Admiralty jurisdiction have jurisdiction over the following claims herein under to hear and determine any questions with regard thereto the claims as set out in Section 4 (1) of the Act. The High Court may exercise jurisdiction to hear and determine any question on a maritime claim, against any vessel, arising out of any:

(a) dispute regarding the possession or ownership of a vessel or the ownership of any share therein;

(b) dispute between the co-owners of a vessel as to the employment or earnings of the vessel;

(c) mortgage or a charge of the same nature on a vessel;

(d) loss or damage caused by the operation of a vessel;

(e) loss of life or personal injury occurring whether on land or on water, in direct connection with the operation of a vessel;

(f) loss or damage to or in connection with any goods;

(g) agreement relating to the carriage of goods or passengers on board a vessel, whether contained in a charter party or otherwise;

(h) agreement relating to the use or hire of the vessel, whether contained in a charter party or otherwise;

(i) salvage services, including, if applicable, special compensation relating to salvage services in respect of a vessel which by itself or its cargo threatens damage to the environment;

(j) towage;

(k) pilotage;

(l) goods, materials, perishable or non-perishable provisions, bunker fuel, equipment (including containers), supplied or services rendered to the vessel for its operation, management, preservation or maintenance including any fee payable or leviable;

(m) construction, reconstruction, repair, converting or equipping of the vessel;

(n) dues in connection with any port, harbour, canal, dock or light tolls, other tolls, waterway or any charges of similar kind chargeable under any law for the time being in force;

(o) claim by a master or member of the crew of a vessel or their heirs and dependents for wages or any sum due out of wages or adjudged to be due which may be recoverable as wages or cost of repatriation or social insurance contribution payable on their behalf or any amount an employer is under an obligation to pay to a person as an employee, whether the obligation arose out of a contract of employment or by operation of a law (including operation of a law of any country) for the time being in force, and includes any claim arising under a manning and crew agreement relating to a vessel, notwithstanding anything contained in the provisions of sections 150 and 151 of the Merchant Shipping Act, 1958;

(p) disbursements incurred on behalf of the vessel or its owners;

(q) particular average or general average;

(r) dispute arising out of a contract for the sale of the vessel;

(s) insurance premium (including mutual insurance calls) in respect of the vessel, payable by or on behalf of the vessel owners or demise charterers;

(t) commission, brokerage or agency fees payable in respect of the vessel by or on behalf of the vessel owner or demise charterer;

(u) damage or threat of damage caused by the vessel to the environment, coastline or related interests; measures taken to prevent, minimise, or remove such damage; compensation for such damage; costs of reasonable measures for the restoration of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; or any other damage, costs, or loss of a similar nature to those identified in this clause;

(v) costs or expenses relating to raising, removal, recovery, destruction or the rendering harmless of a vessel which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such vessel, and costs or expenses relating to the preservation of an abandoned vessel and maintenance of its crew; and

(w) maritime lien.

The jurisdiction applies to every vessel, irrespective of the place of residence or domicile of the owner provided that the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 shall not apply to an inland vessel defined in clause (a) of sub-section (1) of section 2 of the Inland Vessels Act, 1917, or a vessel under construction that has not been launched unless it is notified by the Central Government to be a vessel for the purposes of the Act provided further that the Act shall not apply to a warship, naval auxiliary or other vessel owned or operated by the Central or a State Government and used for any non-commercial purpose, and, shall also not apply to a foreign vessel which is used for any non-commercial purpose as may be notified by the Central Government.

The jurisdiction applies in relation to all ships, whether Indian or not and whether registered or not and wherever the residence or domicile of their owners may be; in relation to all claims, wherever arising (including, in the case of cargo or wreck salvage, claims in respect of cargo or wreck found on land); and so far as they relate to mortgages and charges, to all mortgages or charges, whether registered or not and whether legal or equitable, including mortgages and charges created under foreign law.

A vessel would mean to include any ship, boat, sailing vessel or other description of vessel used or constructed for use in navigation by water, whether it is propelled or not, and includes a barge, lighter or other floating vessel, a hovercraft, an off-shore industry mobile unit, a vessel that has sunk or is stranded or abandoned and the remains of such a vessel but a vessel shall not be deemed to be a vessel, when it is broken up to such an extent that it cannot be put into use for navigation, as certified by a surveyor, filing of bill of entry of the vessel will have no relevance for this purpose.

EXERCISE OF THE ADMIRALTY JURISDICTION

Section 5 and 6 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 sets out the mode of exercise of the admiralty jurisdiction, which may take the form of action in rem or action in personam. Admiralty jurisdiction is statutory, with specific heads of subject matter. It entertains both claims *in rem* and claims *in personam*.

Ships are peripatetic and incur liabilities internationally, making, obtaining and enforcing security over them by their creditors. Merchant ships of different nationalities (including ship owned by Indian Company solvent or insolvent) travel from port to port carrying goods or passengers. They incur liabilities in the course of their voyage and they subject themselves to the jurisdiction of foreign States when they enter the waters of those States. They are liable to be arrested for the enforcement of maritime claims, or seized in execution or satisfaction of judgments in legal actions arising out of collisions; salvage, loss of life or personal injury, loss of or damage to goods and the like. The main purpose of arrest is to obtain security for satisfaction of judgment in the action in rem and it is necessary to arrest the ship in order to establish jurisdiction.

IN REM **AND** ***PERSONAM*** **ACTIONS**

Section 5 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 sets out action *in rem*

> 5. (1) The High Court may order arrest of any vessel which is within its jurisdiction for the purpose of providing security against a maritime claim which is the subject of an admiralty proceeding, where the court has reason to believe that—
>
> (a) the person who owned the vessel at the time when the maritime claim arose is liable for the claim and is the owner of the vessel when the arrest is effected; or
>
> (b) the demise charterer of the vessel at the time when the maritime claim arose is liable for the claim and is the demise charterer or the owner of the vessel when the arrest is effected; or
>
> (c) the claim is based on a mortgage or a charge of the similar nature on the vessel; or

(d) the claim relates to the ownership or possession of the vessel; or

(e) the claim is against the owner, demise charterer, manager or operator of the vessel and is secured by a maritime lien as provided in section 9.

(2) The High Court may also order arrest of any other vessel for the purpose of providing security against a maritime claim, in lieu of the vessel against which a maritime claim has been made under this Act, subject to the provisions of subsection (1):

Provided that no vessel shall be arrested under this sub-section in respect of a maritime claim under clause (a) of sub-section (1) of section 4.

Section 6 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 sets out action *in personam*

6. Subject to section 7, the High Court may exercise admiralty jurisdiction by action in personam in respect of any maritime claim referred to in clauses (a) to (w) of sub-section (1) of section 4.

Section 7 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 sets out the restrictions on actions *in personam* in certain cases.

7. (1) Where any maritime claim arising in respect of a damage or loss of life or personal injury arising out of any—

(i) collision between vessels,

(ii) the carrying out of or omission to carry out, a manoeuvre in the case of one or more vessels,

(iii) non-compliance, on the part of one or more vessels, with the collision regulations made in pursuance of section 285 of the Merchant Shipping Act, 1958, the High Court shall not entertain any action under this section against any defendant unless—

(a) the cause of action, wholly or in part, arises in India; or

(b) the defendant, at the time of commencement of the action by the High Court, actually and voluntarily resides or carries on business or personally works for gain in India:

Provided that an action may be entertained in a case, where there are more defendants than one and where one of the defendants who does not actually and voluntarily reside or carry on business or personally work for gain in India is made a party to such action either with the leave of the court, or each of the defendants acquiesces in such action.

(2) The High Court shall not entertain any action in personam to enforce a claim to which this section applies until any proceedings previously brought by the plaintiff in any court outside India against the same defendant in respect of the same incident or series of incidents have been discontinued or have otherwise come to an end.

(3) The provisions of sub-section (2) shall apply to counter-claims as they apply to actions except counter-claims in proceedings arising out of the same incident or series of incidents.

(4) A reference to the plaintiff and the defendant for the purpose of sub-section (3) shall be construed as reference to the plaintiff in the counter-claim and the defendant in the counter-claim respectively.

(5) The provisions of sub-sections (2) and (3) shall not apply to any action or counterclaim if the defendant submits or agrees to submit to the jurisdiction of the High Court.

(6) Subject to the provisions of sub-section (2), the High Court shall have jurisdiction to entertain an action in personam to enforce a claim to which this section applies whenever any of the conditions specified, in clauses (a) and (b) of sub-section (1) is satisfied and any law for the time being in force relating to the service of process outside the jurisdiction shall apply.

An action in rem is directed towards a ship rather than against a person (which is an in personam or personal action).

A personal action may be brought against the defendant if he is either present in the country or submits to the jurisdiction. If the foreign owner of an arrested ship appears before the court and deposits security as bail for the release of his ship against which proceedings in rem have been instituted, he submits himself to jurisdiction.

An action in rem is directed against the ship itself to satisfy the claim of the plaintiff out of the res. The ship is for this purpose treated as a person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be proceeded against by the plaintiff in personam. It is however, imperative in an action in rem that the ship should be within jurisdiction at the time the proceedings are started. A decree of the court in such an action binds not merely the parties to the writ but everybody in the world at large who might dispute the plaintiff's claim.

It is by means of an action in rem that the arrest of a particular ship is secured by the plaintiff. He does not sue the owner directly and by name; but the owner or any one interested in the proceedings may appear and defend. The writ is issued to the "owner and parties interested in the property proceeded against." A maritime lien is a privileged claim against the ship or a right to a part of the property in the ship, and it "travels" with the ship. Because the ship has to "pay for the wrong it has done", it can be compelled to do so by forced sale. In addition to maritime liens, a ship is liable to be arrested in enforcement of statutory rights in rem. If the owner does not submit to the jurisdiction and appear before the court to put in bail and release the ship, she is liable to be condemned and sold to satisfy the claims against her. If, however, the owner submits to jurisdiction and obtains the release of the ship by depositing security, he becomes personally liable to be proceeded against in personam in execution of the judgment if the amount decreed exceeds the amount of the bail. The arrest of the foreign ship by means of an action in rem is thus a means of assuming jurisdiction by the competent court.

The admiralty action in rem, is unknown to the civil law. In countries following the civil law, all proceedings are initiated by actions in personam. The Court having competence in the matter has the power to order an attachment of the ship if it is convinced that the plaintiff is likely to lose his security unless the ship is detained within the jurisdiction. Its hands are not fettered by the technicalities of an action in rem and the scopes of the proceedings are not limited to maritime liens or claims. According to the French law, arrest of a ship is allowed even in respect of non-maritime claims and whether or not the claimant is a secured or unsecured creditor. A vessel may be arrested either for the purpose of immobilising the vessel as security (Saisie Conservatoire) or in execution of judgment (Saisie Execution) whether or not the claim has any relation to the vessel. Arrest of the vessel has the advantage of forcing the owner to furnish security to guarantee satisfaction of any decree that may be passed against him. On furnishing sufficient security with the Court, he is usually allowed to secure the release of the vessel.

The real purpose of arrest is to obtain security as a guarantee for satisfaction of the decree, although arrest is the basis of assumption of jurisdiction, unless the owner has submitted to jurisdiction. In any event, once the arrest is made and the owner has entered his appearance, the proceedings continue in personam. All actions in the civil law- whether maritime or not-are in personam, and arrest of a vessel is permitted under the provision of the act, and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe a competent high court with admiralty jurisdiction over the owner in respect of any claim. Admiralty actions, whether in rem or in personam, are confined to well defined maritime liens or claims and directed against the res (ship, cargo and freight) which is the subject-matter of the dispute or any other ship in the same beneficial ownerships as the res in question.

Where statutes are silent and remedy has to be sought by recourse to basic principles, it is the duty of the court to devise procedural rules by analogy and expediency. Action in rem, as seen above, were resorted to by courts as a devise to overcome the difficulty of personal service on the defendant by compelling him to enter appearance and accept service of summons with a view to furnish security for the release of the res; or, in his absence, proceed against the res itself, by attributing to it a personality for the purpose of entering a decree and executing the same by sale of the res. This is a practical procedural device developed by the courts with a view to rendering justice in accordance with substantive law not only in cases of collision and salvage, but also in cases of other maritime liens and claims arising by reason of breach of contract for the hire of vessels or the carriage of goods or other maritime transactions, or tortious acts, such as conversion or negligence occurring in connection with the carriage of goods. Where substantive law demands justice for the party aggrieved, and the statute has not provided the remedy, it is the duty of the court to devise procedure by drawing analogy from other systems of law and practice. To the courts of the "civil law countries" in Europe and other places, like problems seldom arise, for all persons and things within their territories (including their waters) fall within their competence to deal with. They do not have to draw any distinction between an action in rem and an action in personam.

It is likewise within the competence of the appropriate Indian Courts to deal, in accordance with the general principles of maritime law and the applicability of provisions of statutory law, with all persons and things found within their jurisdiction. The power of the court is plenary and unlimited unless it is expressly or by necessary implication curtailed. In the absence of such curtailment of jurisdiction, all remedies, which are available to the courts to administer justice, are available to a claimant against a foreign ship and its owner found within the jurisdiction of the concerned High Court. This power of the court to render justice must necessarily include the power to make interlocutory orders for arrest and attachment before judgment.

The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of the Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own power.

A person who, maliciously and without reasonable and probable cause procures the arrest of a ship by Admiralty proceedings is liable to pay damages to the person aggrieved. A separate suit has to be filed for wrongful arrest proving malicious cause. Wrongful arrest may result in the condemnation of the claimant for damages only where the court is satisfied that the arrest was motivated by mala fides (bad faith) or crassa negligentia (gross negligence). Merely unjustified (i.e. erroneous) arrest would not normally entitle the defendant to claim damages, although he might then be able to recover costs.

The safeguarding of ownership/private property rights when ships are arrested in rem by the Admiralty Court are built into the rules of the High Court having admiralty jurisdiction for ship arrest. For example, a party wishing to prevent the arrest of property in an action in rem may, by filing a praecipe in the prescribed form, obtain the entry of a caveat against arrest in the caveat book kept in the Admiralty Registry/ Prothonotary & Senior Master of the High Court. Although the entry of the caveat does not prevent arrest of the res, the caveator, on a subsequent motion after arrest, may obtain the discharge of the arrest warrant and the condemnation of the arresting party in damages, if the latter is unable to show "good and sufficient reason" for having arrested.

Where a foreign ship registered in a port of a country having a consulate in jurisdiction of the High Court where arrest application is sought /is to be arrested in India in an action in rem for wages, prior notice of the arrest must be given to the consul concerned.

In the decision of the Supreme Court in Videsh Sanchar Nigam Limited -vsm.v. Kapitan Kud (1986) the court observed that the admiralty action is an action in rem and that there is strong triable case. The ship is a foreign ship and if it leaves the shores of Indian territorial waters it is difficult to get hold of it and it may not return to the jurisdiction of Indian courts. The claim thereby, even if successful, would remain unexecutable or land in trouble in private international law in its enforcement. Under these circumstances, we are of the firm opinion that the vessel may be released on the certain conditions..., viz., [i] the respondent shall deposit a sum of Rs.10 crores; [ii] the Ukrainian Government shall give an undertaking through its accredited authority, more particularly may be its Ambassador attached to its Embassy in India in writing duly undertaking that in the event of the suit being decreed they would comply with the decree without reference to the execution; [iv] the undertaking should be for balance amount of Rs.18 crores and towards costs and other expenses roughly put at Rs.25 crores. It would be open to them to comply with these directions at any time. We are not fixing any time limit because it would be open to them to comply with it at any time and until then the ship shall remain arrested and shall not leave the shores of the Indian territorial waters. On deposit of Rs.10 crores and on furnishing of undertakings to the satisfaction of the Division Bench of the High Court, as stated above, the High Court would give appropriate direction for releasing the vessel in accordance with law.

In m.v. Kapitan Kud the Supreme court also observed that whether the appellant (VSNL) has made out prima facie case. Rules on Admiralty Jurisdiction in Part III were framed by Bombay High Court to regulate the procedure and practice thereof on the original side of the Bombay High Court. Equally, Original Side Rule 941 is relevant in this regard which provides that party applying under this rule in a suit in rem for arrest of the property shall give an undertaking in writing or through advocate to pay such sum by way of damages as the court may award as compensation in the event of a party affected sustaining prejudice by such order. In Mahadeo Savlaram Shelke & Ors. v. Pune Municipal Corporation & Anr. [(1995) 3 SCC 33], even in case of civil court, exercising its power under order 39 Rule 1, this Court held that while granting interim injunction, the Civil Court or Appellate Court is enjoined to impose as a condition that in the event of the plaintiff failing to prove the case set up and if damages are caused to the defendant due to the injunction granted by the court, the court would first ascertain whether the plaintiff would adequately be compensated by damages if injunction is not granted. Equally the court should also impose condition for payment of damages caused to the defendant in the same proceeding without relegating the parties for a separate suit. The plaintiff should give such an undertaking as a part of the order itself. Rule 954 of Admiralty Rules provides that subject to the provisions of Rule 952 [caveat property not to be released unless notice is given to the caveator], property arrested under a warrant may be ordered to be released - [i] at the request of the plaintiff, before an appearance in person or a vakalatnama is filed by the defendant; or [ii] on the defendant paying into Court the amount claimed in the suit; or [iii] on the defendant giving such security for the amount claimed in the suit as the Court may direct; or [iv] on any other ground that the Court may deem just. Thus a ship arrested under warrant maybe released on fulfillment of any of the conditions mentioned hereinbefore. This could be done on the plaintiff showing prima facie best case.

Action in rem is an action against a thing, good or against certain property (ship or cargo) rather than a person. By proceeding against a res a plaintiff obtains security for his claim, the res may be arrested by the court and sold to satisfy a judgment in rem against it. An action may be brought in rem provided the property proceeded against (the res) is within the jurisdiction.

The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam.

An action in personam is an ordinary action as in common law courts.

In Halsbury's Laws of England, the nature of action in rem and the nature of action in personam at para 310 is stated to be as -Nature of actions in rem and actions in personam. - An action in rem is an action against the ship itself but the view that if the owners of the vessel do not enter an appearance in the suit in order to defend their property no personal liability can be established against them has recently been questioned. It has been stated that, if the defendant enters an appearance, an action in rem becomes, or continues also as, an action in personam; but the Admiralty jurisdiction of the High Court may now in all cases be invoked by an action in personam, although this is subject to certain restrictions in the case of collision and similar cases, except where the defendant submits or agrees to submit to the jurisdiction of the Court.

The foundation of an action in rem is the lien resulting from the personal liability of the owner of the res. Thus an action in rem cannot be brought to recover damages for injury caused to a ship by the malicious act of the master of the defendant's ship, or for damage done at a time when the ship was in the control of third parties by reason of compulsory requisition. On the other hand, in several cases, ships allowed by their owners to be in the possession and control of charterers have been successfully proceeded against to enforce liens which arose whilst the ships were in control of such third parties.

The defendant in an Admiralty action in personam is liable, as in other actions in the High Court, for the full amount of the plaintiff's proved claim. Equally in an action in rem a defendant who appears is now liable for the full amount of the judgment even though it exceeds the value of the res or of the bail provided. The right to recover damages may however be affected by the right of the defendant to the benefit of statutory provisions relating to limitation of liability."

CLAIMS RELATING TO CARGO OR PASSENGER ON BOARD AND CONTRACT OF AFFREIGHTMENT

The Admiralty jurisdiction of the High Court in respect of cargo claims, passenger on board and contracts of affreightment is statutory. Section 4 (1) (f) of the Admiralty Act (2017) deals with the above subject maritime claims, agreement relating to the carriage of goods or passengers on board a vessel, whether contained in a charter party or otherwise.

The High Court has Admiralty jurisdiction and jurisdiction in relation to the carriage of goods was first acquired by the Admiralty Court under the Admiralty Court Act, 1861. The Act of 1861 gave jurisdiction to the Court over claims by the owner, consignee or assignee of the bill of lading of any goods carried by a ship into any port in India for damage caused by negligence or for any breach of contract or breach of duty, unless at the institution of the cause the owner or part owner of the ship was domiciled in India. The jurisdiction which the Court now exercises has thus been extended. Under the Act of 1861 the right to bring an Admiralty action was limited to owners of cargo, but now there appears to be no reason why a ship-owner, provided that he is not domiciled in India, should not bring an Admiralty action against cargo owners, although the latter are domiciled in India; The only express limitation upon this exercise of jurisdiction in rem in claims relating to the carriage of goods is now the proviso that no owner or part owner of the ship shall on the institution of the suit be domiciled in India. The claim must be in respect of goods actually shipped on board the vessel which is made subject to proceedings in rem. Proceedings in rem can only be instituted against the ship in which such goods have actually been carried. Upon the same principle it would seem that a claim relating to the cargo or passenger on board or contract of affreightment is only capable of being enforced against the ship to which such agreement relates. The language of the section does not, however, expressly impose any such limitation, but leaves a plaintiff free to enforce in proceedings in rem a claim relating to an agreement for the hire of a ship, or carriage of goods in a ship, against a ship other than that to which the agreement relates or in which the goods were carried, belonging to the same owner.

A time or voyage charterer's involvement in cargo claims can arise in two different ways: either directly or indirectly. By directly we mean that the charterer incurs the liability directly to the cargo owner, receiver or insurer. By indirectly we mean that the charterer incurs liability to another party, often the shipowner, who has first incurred liability, under a separate contract, to the cargo owner, receiver or insurer. Just because the claim has not been made against the charterer in the first place does not necessarily mean that the time or voyage charterer will not face a claim. Nor does it mean that the charterer will be free from any or all ultimate liability.

The jurisdiction is, however, no longer confined to claims relating to goods "carried into any port in India in any ship", to include claims in respect of any breach of contract. The right to proceed is no longer confined to the owner, consignee or assignee of the bill of lading and therefore it would seem that the limitation of the jurisdiction to claims where actual damage to goods has been sustained, or a breach of contract taken place in relation to them

A claim in personam by cargo owners against the owners of the carrying ship who were domiciled in India are not within the jurisdiction of the Admiralty Court. Any action in personam may now be brought in the Admiralty Court. The jurisdiction in actions in rem has not, however, been affected in respect of cargo claims. There is, therefore, no jurisdiction to entertain an action in rem in which the owner of the ship, whether plaintiff or defendant, is domiciled in India. The remedy applies to foreign ships as well as to Indian ships, its objects being to give a practicable remedy, where formerly in the great majority of cases there was no available process in consequence of the shipowner being out of the jurisdiction. "Many foreign ships" "came into this country, and did not deliver the goods according to the bill of lading. The owners and consignees of cargo then suffered great loss, and had no practicable remedy; for though the shipowner, if in India, might have been sued for breach of contract, in the very great majority of cases that remedy was wholly unavailable. It appears, too, that in some cases, if not nearly in all, the owner of a Indian ship carrying cargo to a foreign country was liable to have his ship there seized for any breach of his contract as carrier.

As remedy depends upon the place where the owner of the ship is domiciled at the time of the institution of the suit, it is clear that it was not intended that a plaintiff having a claim under the section should have a maritime lien; for a maritime lien accrues from the instant of the circumstances creating it, and not from the date of the intervention of the Court. The claim of the plaintiff in cases of damage to cargo or breaches of contract therefore accrues only upon the institution of the suit, and is subject to claims subsisting on the ship at the time of the institution of the suit.

Limitation of liability

Carriers can limit their liability for cargo claims by way of 'package limitation' and 'kilo limitation' pursuant to the Indian COGSA and the Multimodal Transportation Act, 1993. A party seeking to limit liability under the LLMC Convention, 1976 can initiate limitation proceedings by filing an admiralty suit in the High Court.

Section 352(b) contained in Part XA of the MSA provides that 'the Convention on Limitation of Liability for Maritime Claims, 1976 as amended from time to time' has the force of law in India. The Merchant Shipping (Limitation of Liability for Maritime Claims) Amendment

Rules, 2015, which came into force on 16 February 2015, gives effect to the 1996 Protocol of the 1976 LLMC. Under the 2015 Rules, a different unit of account applies to 'Indian ships intended for navigation in or around the coast of India' than to foreign-going vessels. The Merchant Shipping (Limitation of Liability for Maritime Claims) Amendment Rules, 2017, which came into force on 21 February 2017, gave effect to the 2012 amendments to the 1976 LLMC. However, the 2017 Rules do not apply to coastal trade. This would imply Indian-flagged vessels having a licence only to trade along the coast of India would follow the 1996 Protocol to the 1976 LLMC, whereas seagoing vessels would follow the 2012 Amendments to the 1976 LLMC. The amended rates are applicable to incidents that take place subsequent to the amendment coming into force.

The High Court of Bombay held that a shipowner's right to limit liability under Part XA of the MSA is absolute and without reference to any proof of loss resulting from a personal act or omission of the shipowner.[219] This decision is therefore likely to make India a favourable jurisdiction for constituting a single worldwide limitation fund, without any prior claim being initiated. Interim limitation funds are not permissible under Indian law.

The CLC Convention, as amended from time to time, has been incorporated under Part XB of the MSA. A party seeking to limit liability can file an action in the admiralty court.[220] Security in the form of cash or bank guarantee is permissible.

India recently recast the law relating to specific performance of contracts from an equitable and discretionary remedy to be exercised in limited circumstances to a statutory remedy. Under the old regime, courts had discretion in granting the remedy of specific relief and could refuse to order such relief even if the party seeking specific relief satisfied all the criteria for it. This discretionary power of the court has now been done away with. Under the old regime, it was impossible to obtain an order directing specific performance of a contract, for the non-performance of which, compensation was an adequate relief. This is no longer the case under the present regime. Indian courts would not be able to pass an order of injunction if such an injunction would be likely to impede the completion of specific infrastructure projects, which, *inter alia*, include capital dredging of ports and other operations in ports, Shipyards (including a floating or land-based facility with the essential features of waterfront, turning basin, berthing and docking facility, slipways or ship lifts, and which is self-sufficient for carrying on shipbuilding, repair or breaking activities), inland waterways, oil pipelines, oil, gas or liquefied natural gas storage facilities (including strategic storage of crude oil), etc. Under the new regime, a court, even after granting specific performance, can additionally grant a certain amount of compensation.

[219] Murmansk Shipping Company v. Adanin Power Rajasthan Ltd. & Ors., Admiralty Suit No. 43 of 2012 (decided on 8 January 2016)

[220] For an Indian-registered ship, in the high court of the state in whose port the vessel is registered, or where the incident occurs. For foreign ships, at the port or place within the territorial waters of which the vessel is present.

Enforced Sale of the Ship

Under the Admiralty Rules of the three High courts, the sale of ship, whether pendente lite or after adjudication on the plaintiff's suit, has to be carried out by the marshal/sheriff, just like a sale of movable property in an ordinary civil suit. There is no provision for a reserve price and there is no provision for appraisement as in English Admiralty practice. Nevertheless, the courts, in order to prevent the ship being sold at a price a great deal less than its real value, from recent times have invariably ordered that the ship be appraised at its real value by a ship's valuer and sold at not less than the appraised value thereof unless the court, on the marshal's/sheriff's application, orders it to be sold for a lesser price when the bidding does not reach up to the appraised value.

The sale is normally by public auction after publication of the notice of sale in such newspapers as the court may direct. There have been no known instances of sales by private treaty, though there is nothing in the Rules preventing such a sale.

Claims payable in foreign currency:

In those cases where there are several claims payable in a foreign currency, usually United States dollars, the court may accede to a request in that behalf and order that the sale be restricted to persons who are able to bid for the ship in free foreign currency and that, in the event that there is no bid in free foreign currency equivalent to the appraised value, the ship be sold for Indian rupees. In order not to expose the claimants in foreign currencies to the hazards of fluctuations in the rate of exchange between the time from the filing of their suits and the payment out of their claims after adjudication, the court may be persuaded to direct that the sale proceeds in foreign currency, subject to prior approval of the Reserve Bank of India, be held by the registry in the same currency without conversion into Indian rupees. The Bombay High Court has so directed in the cases of The East Hampton,[221] The St. Nicolas,[222] and in both cases the Reserve Bank of India accorded approval to the sale proceeds, when received in the registry, being held in United States dollars without being converted into Indian rupees. The writer has mentioned the two cases within his experience which serve as precedents, as the Reserve Bank of India has not acted consistently in the matter of according such approval. In the cases of ships sold for Indian rupees, foreign claimants have experienced inexorable difficulty and delay in obtaining exchange control permission for repatriation out of India of the amounts recovered by them and wages claimants, especially, have had to suffer great hardship and privation.

[221] Sahida Ismail v. Petko R. Salvejkov, LXXIV B.L.R. 514 at 516
[222] Admiralty Suit No.74 of 1981

Conditions of sale:

Under the terms and conditions of the sale, the successful bidder is required to pay a percentage, usually 15 per cent, of the purchase price forthwith and the balance of the price within a period fixed in the conditions of sale, usually 15 days from the date of the sale. The payment is to be made by means of bankers’ draft or a certified cheque. Under the Rules, the sale is subject to sanction of the court. The sale is free and clear of all maritime or other liens and encumbrances.

Arrest and sale of ships:

Admiralty law in Indian has finally been codified as of 1 April 2018 with the coming into force of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (the Admiralty Act). The brief ramifications of the Admiralty Act are:

a. the Bombay and Calcutta High Courts would no longer exercise pan-India jurisdiction and each high court of a coastal state in India would only have jurisdiction over vessels within its own territorial waters;

b. Indian ships are amenable to orders of arrest, except vessels owned or operated by the government of India and vessels registered under the Inland Vessels Act, 1917;

c. a claimant can arrest a vessel to enforce a judgment or order;

d. an express stipulation of the limited cluster of claims that are classified as 'maritime liens' bring much-needed clarity to the rather nebulous notion of whether claims for supply of necessities to a vessel would give rise to a maritime lien;

e. express stipulations on the priority of claims or the hierarchy of various cluster of creditors over a vessel seeking to assert an *in rem* action against a vessel that includes an express stipulation of priorities of various creditors seeking to assert a maritime lien;

f. an expansive definition of a 'vessel' that can be subject to an order of arrest;

g. a plaintiff may arrest a vessel for any defined 'maritime claim' as listed in the 1999 Arrest Convention;

h. the right of a plaintiff to arrest a vessel other than a vessel against which a maritime claim has arisen, is subject to the fulfillment of certain conditions;

i. there is an express right of a plaintiff to initiate a pure action in personam for a 'maritime claim' beyond the scope of an action *in rem*;

j. the appointment of nautical assessors to assist the admiralty court to deal with technical or nautical matters;

k. an express provision authorising the admiralty court to sell the vessel by way of a judicial auction free of all encumbrances, liens, attachments, registered mortgages and charges;

l. a defined time period of one year after which maritime liens would expire, except for seafarers' wages, which expire after two years.

m. the courts have been empowered to impose on a claimant, either as a condition to obtain an arrest or to maintain the order of arrest, an obligation to provide an undertaking to pay damages or furnish security for damages, for any loss or damage to the shipowner as a result of a wrongful arrest or excessive security having been demanded;

n. express power to the Indian Central Government to publish rules under the Admiralty Act;

o. all pending applications in any admiralty court will be decided in accordance with the Admiralty Act; and

p. The Admiralty Act is silent on whether property other than ships, such as bunkers, cargo, freight, is amenable to an order of arrest without an underlying cause of action being made out against a vessel.

The Bombay High Court in the case of *Flag Mersinidi*[223]rejected the notion that a bunker supply contract could be given the recognition of a maritime lien, if the governing law of the bunker supply contract recognises a maritime lien for bunkers supplied to a vessel. The Court had refused to apply American law, which was the governing law of the bunker supply contract and applied Indian law as the lex fori.

The Supreme Court of India held that a claim for necessaries supplied to a vessel would constitute a maritime claim against a vessel and not a maritime lien.[224] The judgment further stated that 'arrest of a foreign ship for a maritime claim is permissible only if there is no change of ownership between the date of claim and date of arrest'.

Arrests can be moved *ex parte*, unless there is a caveat against arrest filed up to a reasonable contemplation of the claim with an undertaking to furnish security for the claim amount. India follows the English case of *The Moschanthy*[225], on the basis of which a claimant can sustain an order of arrest over a vessel merely by making out a reasonably 'best arguable'

[223] Notice of Motion No. 763 of 2013 in Admiralty Suit No. 8 of 2013
[224] Chrisomar Corporation v. MJR Steels Private Ltd., 2017 SCC OnLine SC 1104.*(Supra)*
[225] [1971] 1 Lloyd's Rep 37.

case.[226] The Division Bench of the Kerala High Court has clarified that even though an admiralty suit for damages can be filed for any amount the plaintiff desires, the owner of the ship cannot be asked to furnish excessive security for an unrealistic amount, having no proximity with the actual loss.[227]

A party seeking release of the vessel is required to furnish security either by way of a cash deposit or a bank guarantee.[228] Indian courts do not accept club letters of undertaking (LOUs) as security as a right, unless consented to by the plaintiff.[229]

In India, every company is a separate and independent legal entity; ownership of the assets vests with the company and not in its shareholders.[230] *Prima facie*, the registered owner of the vessel is deemed the beneficial owner, save in very exceptional cases.[231] Only in exceptional circumstances where questions of public policy, fraud or malice are involved, will the courts consider piercing the corporate veil. It must be noted that the party seeking to lift the corporate veil will be required to plead and particularise fraud or malice or public policy.[232]

The Admiralty Act does not expressly contain any provision allowing a party to arrest a vessel for simpliciter security in aid of judicial and arbitral proceedings taking place outside India. That said, a single judge of the Bombay High Court has recently held that it was permissible for a party to obtain security pending arbitration by way of an arrest in India, since the Admiralty Act is silent on this issue and does not expressly prohibit it. According to the Court, a party has a statutory right to initiate *in rem* proceedings under the Admiralty Act, which could not be denied if a party otherwise had a valid maritime claim.[233]

The Supreme Court of India has recognised that although a demise charterer may have absolute dominion and control over the vessel, this fact in itself would not allow a claimant to obtain an order of arrest against the vessel for an in personam claim against the demise charter relating to another vessel.[234] However, a single judge of the Bombay High Court on a bare reading of Section 5 of the Admiralty Act (which departs slightly in wording from Article 3 of the Arrest Convention 1999), came to a conclusion that even a vessel on bareboat charter could be arrested for an unrelated third-party claim against the bareboat

226 Videsh Sanchar Nigam Limited v. MV 'Kapitan Kud' (1996) 7 SCC 127
227 Sangita Das & Ors. v. MV Amber L and Ors. (2018) 1 KLT 836
228 Security can be deposited in US dollars in the Bombay High Court and Gujarat High Court
229 Stephen Commerce Pvt. Ltd. v. Owners and Parties in Vessel MT 'Zaima Navard', AIR 1999 Cal 64. However, the parties can agree to an LOU as security, which could be accepted by the courts.
230 Lufeng Shipping Company Ltd. v. MV 'Rainbow Ace', 2013 (4) ABR1412.
231 Universal Marine & Anr. v. MT 'Hartati', MANU/MH/0131/2014
232 Order VI Rule 4, Civil Procedure Code 1906
233 Siem Offshore Redri AS v. MV Altus Uber, 2018 (6) ABR 361. This judgment is under appeal to a higher bench of the Bombay High Court
234 Sunil B. Naik v. Geowave Commander, 2018 SCC OnLine SC 203 (Geowave Commander).

charterer.[235] Recent notable judgments in India involving ship arrest and sale have clarified the following matters:

a. In the event that bunkers are ordered by the owner (irrespective of whether the vessel is on time charter or not), the bunker supplier will be entitled to arrest a vessel at the *prima facie* evaluation stage.[236] By a recent judgment, the Appeal Court of the Bombay High Court has held [237] that an arrest granted at the *prima facie* stage cannot be vacated in the absence of a trial, on a rebuttable presumption of privity of contract between the actual physical supplier of bunkers and the shipowner, especially when supplies of necessities to a vessel such as bunkers have been made on faith and credit of the vessel. At the time of writing, a special leave petition (application for leave to appeal) against the Amoy Fortune judgment is pending before the Supreme Court of India.

b. While the earlier position was that a vessel could not be arrested for security pending arbitration in the admiralty jurisdiction of the court,[238] per the judgment of the single judge of the Bombay High Court this is now permissible if the suit is filed praying for a decree and determination on the merits of the underlying maritime claim.[239]

c. A claim for damages for wrongful arrest of a vessel is not a special law. Principles of mitigation will apply and the claim is subject to mitigation of losses arising from wrongful arrest of the vessel.[240]

d. The arrest of bunkers onboard a vessel is not subject to the admiralty jurisdiction of the courts in India.[241]

e. Freight alone cannot be arrested.[242]

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[235] Siem Offshore Redri AS v. MV Altus Uber, 2018 (6) ABR 361. This judgment is under appeal to a higher bench of the Bombay High Court on, *inter alia*, the ground that it is contrary to the findings of the Supreme Court in Geowave Commander.

[236] Gulf Petrochem Energy Pvt. Ltd. v. MT 'Valor' in Notice of Motion (L) No. 581 of 2015 in Admiralty Suit (L) No. 94 of 2015 and Drop Energy Services Ltd. v. MT 'Tradewind' in Notice of Motion No. 805 of 2015 in Admiralty Suit No. 240 of 2015. The former judgment is under appeal to a higher bench of the Bombay High Court.

[237] Socar Turkey Petrol Enerji v. M.V. Amoy Fortune, 2018 SCC Online Bom 1999. A petition for leave to appeal against this judgment has been filed before the Supreme Court of India and is currently pending

[238] Rushab Ship International LLC v. The Bunkers on board MV African Eagle, 2014(4) Bom CR 269

[239] Siem Offshore Redri AS v. Altus Uber, 2018 (6) ABR 361. This judgment is under appeal to a higher bench of the Bombay High Court, See footnote 33

[240] Lufeng Shipping Co Ltd v. MV 'Rainbow Ace' and Ors., Notice of Motion No. 1646 of 2013 in Admiralty Suit No. 29 of 2013.

[241] Peninsula Petroleum Ltd. v. Bunkers on board the vessel MV 'Geowave Commander', Notice of Motion No. 385 of 2014 in Admiralty Suit No. 85 of 2014

[242] Bulk Shipping Management SEA & Anr. v. The Bunkers on board MV 'African Eagle', 2013 (3) BomCR 380

f. The arrest of cargo without an underlying cause of action being made out against a vessel is not permitted by the Bombay High Court,[243] albeit certain other High Courts have allowed the same on occasions.

g. Institution of a prior legal proceeding against the concerned vessel or its owner cannot be said to be a precondition for maintainability of a suit for constitution of fund to limit the shipowner's liability under the LLMC Convention 1976 and the LLMC Protocol 1996.[244]

h. Proceedings for the sale of a vessel under arrest can be taken out on expiry of three days from the date of arrest if no security or bail has been furnished.[245]

i. 'Owner' means registered owner. The corporate veil can be lifted only in exceptional cases, such as fraud or public policy. The party seeking arrest on the basis of fraud must plead and *prima facie* establish that fraud is committed.[246]

j. In the Bombay High Court, once the order of arrest is vacated, the party that has suffered 'prejudice' can invoke the undertaking issued by the plaintiff to pay damages arising out of a wrongful arrest, and the test of malice or crassa neglentia does not apply.[247]

k. There is no right vested in a shipowner against a receiver or consignee, or the shipper or charterer (unless a vessel is a party) in personam in the admiralty jurisdiction of the court.[248]

l. The Bombay High Court in its interpretation of Section 5 of the Admiralty Act has held that multiple arrests of a number of vessels in the fleet of a shipowner is not permissible for a single claim even in circumstances wherein the sale proceeds of the vessel are sufficient to meet the claim of the plaintiff though these sale proceeds of the vessel may be insufficient to meet the claims of all creditors asserting a claim against the vessel (i.e., that even if the *pari passu* distribution of the sale proceeds of the vessel would be insufficient to fully satisfy the claim of the plaintiff, arrest of multiple vessels to satisfy the plaintiff's claim is impermissible).[249]

m. The Bombay High Court has clarified that only a claimant who has executed a warrant of arrest prior to the date of admission of winding-up petition (liquidation

[243] Global Integrated Bulkers Pte Ltd. v. Cargo of 14,072.337 MTS of Limestone (Judge's Order No. 253 of 2017 in Comm. Admiralty Suit (L) No. 665 of 2017
[244] See Footnote 18
[245] Coromandel International Limited v. MV 'Glory I' and Andromeda Ship Holdings Ltd., 2014 (3) ABR 365
[246] See Footnote 28
[247] Navbharat International Ltd v. Cargo on board MV 'Amtees', MANU/MH/0192/2014.
[248] M/s. Greenwich Meridian Logistics (India) Pvt. Ltd. v. M/s. Sapphire Kitchenware Pvt. Ltd., Admiralty Suit 31 of 2008 of Bombay High Court and MUR Shipping BV Amsterdam v. Al Gyas Exports Private Ltd.
[249] Praxis Energy Agents SA v. M.T. Prathibha Neera, 2018 (4) ABR 148.

application) would have a charge over the vessel and once the winding-up petition has been admitted, the claimant, in any case, would not be able to obtain decree against sister vessels or other assets of the company in liquidation.[250]

n. The Bombay High Court in its interpretation of Section 4(1)(n) and Section 9(1)(d) of the Admiralty Act held that port dues are in the nature of a maritime lien as well as a maritime claim against the vessel.[251]

o. A claim for interest on a principal amount towards supply of bunkers by a bunker supplier to a charterer would not be a 'maritime claim'.[252]

p. Arrest of a vessel is akin to the seizure of property and thus attracts Article 80 of the Indian Limitation Act 1963, which provides for a limitation period of one year from the date of seizure (the arrest of the vessel) to lodge a claim for damages or to lodge a counterclaim.[253]

q. The Court of Appeal of the Bombay High Court held that a claim involving a vessel operated by the Central Government will be outside the purview of the Admiralty Act in light of the proviso to Section 1(2) therein.[254]

Under Indian law, as a general rule of contractual construction, an attempt must be made to reconcile the relevant terms of a contract if possible and not treat any term as idle surplusage.[255] Indian courts have held that if a party seeks to invoke a termination clause in the contract, it is incumbent upon the party to strictly follow the procedural requirements stipulated in the contract to effect a valid termination.[256]

India allows 100 per cent foreign direct investment into shipbuilding in India. A shipbuilding contract providing for Indian law would be governed by the Indian Sale of Goods Act, 1930. This Act is based on and largely a reproduction of the English Sale of Goods Act, 1893 and the principles of the law of sale of goods in both the countries are the same.[257]

The shipbuilding industry is subject to goods and service tax (GST), which subsumes the earlier levy of VAT, central sales tax (CST), excise duty, octroi, service tax, etc. Customs duty, customs bonds, cost clearing and forwarding excise, foreign income tax, and taxes by

[250] Praxis Energy Agents SA v. M.T. Prathibha Neera, 2018 (4) ABR 148. See footnote 47
[251] State of Goa v. Sale Proceeds of vessel M.T. Pratibha Bheema and Ors., A.S. No. 72 of 2014 (decided on 7 June 2018)
[252] M.V. Kiveli v. Monjasa DMCC and Ors., 2018 (5) ALT 73
[253] M.V. Tongli Yantai and Ors. v. Great Pacific Navigation (Holdings) Corporation Ltd., NoM No. 2202 of 2015 in CC 19 of 2012 in AS. No. 3 of 2011 & NoM No. 1770 of 2015 in AS. No. 66 of 2015 (decided on 17.09.2018). This judgment is under appeal to a higher bench of the Bombay High Court.
[254] Joao Martin Fernandes v. The Union of India and Ors., Appeal No. 65 of 2017 (decided on 24 October 2018).
[255] Tiruvenibai v. Lilabai, AIR 1959 S.C. 620.
[256] Base International Holdings NV Hockenrode 6 v. Pallava Hotels Corporation Ltd., 1999 PTC (19) 252.
[257] Consolidated Coffee Ltd. v. Coffee Board, Bangalore (1980) 3 SCC 358

ancillary units and subcontractors are charged separately. GST at 5 per cent is applicable on all design and engineering services procured by the shipyards during the course of ship construction. It is important to ensure that any shipbuilding contract with an Indian counterparty to be governed by Indian law and jurisdiction has clear demarcations of the liability on each party, for the payment of taxes imposed by the Indian authorities.

Interest

Indian courts have the power to pass judgments in foreign currency.[258] As a general rule, for commercial transactions, courts award interest at the rate at which monies are lent or advanced by nationalised banks.[259] Indian arbitrators generally award interest at the rate of 18 per cent per annum.[260] The Appeal Court of the Bombay High Court has held that an Indian arbitral tribunal can award interest at the rate of 9 per cent per annum on a claim in US dollars.[261] However, a recent decision of the Supreme Court in *Vedanta Ltd. v. Shenzen Shandong Nuclear Power Construction Co. Ltd*.[262] has held that a high rate of interest on foreign currencies would be punitive in nature, and reduced the rate of interest awarded by the arbitrator to LIBOR plus 3 per cent.

In the case of *Forysthe Trading Services Ltd. v. MV Niizuru*,[263] the contract between the bunker supplier and the shipowner provided for interest of 20 per cent per annum for late payment. The Bombay High Court disregarded the interest rate stipulated in the bunker supply contract and awarded interest of only 8 per cent per annum. The Supreme Court held that a tribunal's award may be inclusive of interest and the sum of the principal amount plus interest may be directed to be paid by the tribunal for the pre-award period.[264]

The Enrica Lexie Case:

The Enrica Lexie Case is an ongoing international dispute concerning the killing of two Indian fishermen that were on board the Indian fishing boat St. Antony, allegedly committed by two Italian navy marines that were on board the Italian oil tanker Enrica Lexie. This incident occurred in the waters alongside the coasts of the Indian State of Kerala on 15 February 2012. Following the accusation of murder, the two Italian marines, Massimiliano Latorre and Salvatore Girone, were arrested by the Indian authorities and put into custody. The case gave rise to dangerous diplomatic tensions between Italy and India, since Italy claimed exclusive jurisdiction for the trial of the two officers, but India refused to release them and insisted on prosecuting the crime before its courts. Several issues appear to be at

[258] Forasol v. Oil & Natural Gas Commission, 1984 SCR (1) 526; and Forysthe Trading Services Ltd. v. MV 'Niizuru', 2004 (5) Bom CR 806.
[259] Section 34 of the Code of Civil Procedure, 1908.
[260] Section 31(7)(b) of the Indian Arbitration and Conciliation Act, 1996.
[261] Steel Authority of India Ltd. v. Pacific Gulf Shipping Co. Ltd., Appeal No. 391 of 2013
[262] (2018) SCCOnLine 1922
[263] 2004 (5) Bom CR 806. Refer to Footnote 56.
[264] Hyder Consulting Ltd. v. State of Orissa (2015) 2 SCC 189.

stake in this case from the international law standpoint. First of all, the rules of both customary and conventional international law governing state jurisdiction over the seas; second, the interpretation of several provisions of the United Nations Convention on the Law of the Sea (UNCLOS); finally, the applicability of the special provisions of the law of the sea for the fight against maritime terrorism, piracy and other similar crimes.

The incident:

The M/V Enrica Lexie is an Italian privately owned oil tanker. At the time of the incident, it was sailing from Singapore to Djibouti and had on board an Italian Vessel Protection Department (VPD)[265], since the International Maritime Organization (IMO) had declared the waters alongside Kerala a high-risk area for piracy. After the report of an armed attack and the killing of two fishermen that were on board the Indian fishing boat St. Antony, the Enrica Lexie was intercepted by the Indian Coast Guard at 36 nautical miles from the coast of Kerala and compelled to dock at the Kochi Port. There, two members of the VPD, Massimiliano Latorre and Salvatore Girone, were brought into custody and charged with homicide, receiving a First Information Report (F.I.R.) on 19 February 2012.

On 22 February, Italy filed a petition to the High Court of Kerala[266] for the quashing of the F.I.R. and all subsequent acts. At the same time, Italy asserted exclusive jurisdiction *over the Enrica Lexie* and started a criminal process against Latorre and Girone, who were charged with murder before the Tribunal of Rome. Nevertheless, the Kerala High Court dismissed the Italian petition by stating that Indian Courts were also entitled to exercise jurisdiction over the case, and started proceedings against the two marines for murder, attempt of murder and mischief. Consequently, Italy filed a second written petition, this time addressed to the Supreme Court of India, 'challenging the jurisdiction of the State of Kerala and the Circle Inspector of Police, Kollam District, Kerala, to register the F.I.R. and to conduct investigation on the basis thereof or to arrest the petitioner[s]'. With this second writ, Italy prayed 'for quashing of F.I.R.' since the same was 'without jurisdiction, contrary to law and null and void.

On January 18, 2013 the Supreme Court of the Union of India entered the fray of the Enrica Lexie incident by issuing a decision on the fate of the Italian military guards, Massimiliano Latorre and Slavatore Girone, who are accused of killing two Indian fishermen. The court, in clear terms, reaffirmed India's jurisdiction over the alleged crimes based both on

[265] Vessel Protection Detachment are privately hired military forces employed to protect non-military ships against possible piracy attacks. In Italy, they were authorized under art. 5 of Decreto Legge 12 Luglio 2011, n. 11. On this topic see, inter alia, G. M. FARNELLI, 'Vessel Protection Detachments and Maritime Security: An Evaluation of Four Years of Italian Practice', Maritime Safety and Security Law Journal, 1, 2015, pp.16 et ss.; J. J. PITNEY JR., J.-C. LEVIN, Private Anti-Piracy Navies: How Warships for Hire are Changing Maritime Security, Lexington Books, 2013; A. PETRING, 'The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates', International and Comparative Law Quarterly, 62, 2013, pp. 667 et ss.
[266] Massimiliano Latorre & others v. Union of India, Written Petition (civil) No.4542 of 2012.

international and national laws. The court also made certain pronouncements regarding internal divisions of jurisdiction within India. My comments here will be limited to the international legal aspects of the decisions.

Italy challenged the jurisdiction of the Indian court on several grounds. The main thrust was that the guards could not be tried before the Indian courts because their actions were taken as part of their official military duties and therefore covered by sovereign immunity. Italy also made arguments based on the United Nations Convention on the Law of the Sea (hereinafter UNCLOS), principally that the flag State has exclusive jurisdiction over the events that take place aboard a vessel on the high seas. Part of this second argument was an assertion that the Indian fishing boat was not "Indian" within the meaning of the convention and that article 97 gave exclusive jurisdiction to Italy.

Attorneys for India responded by making arguments primarily based on national provisions extending the penal code to the areas adjacent to the territorial sea such as the international water where the incident took place. The Union's international law arguments included a detailed analysis of UNCLOS. India argued that article 97 UNCLOS was limited to collision type events and had no bearing on jurisdiction in the Enrica Lexie case. This fact, along with the assimilation of ships to national territory and the objective territoriality principle, were sufficient to ground Indian jurisdiction. India also argued that the passive personality principle would grant jurisdiction in this case. On the issue of immunity, the Union pointed out that the State has a policy of not entering Status of Forces Agreements excluding national jurisdiction and that there was no basis for a sovereign immunity claim in a criminal case.

The actual decision of the court was issued in a two-page order. The motivation or reasoning of the decision came in two opinions, one by the Chief Justice. These two opinions are not completely consonant even though they agree in the result. We will turn first to the Chief Justice's views before analyzing those expressed in his fellow judge's concurrence.

The Chief Justice identified two issues that needed to be resolved in the case: one national and one international. The international problem was that of Indian jurisdiction based on applicable law, including UNCLOS, which India was bound to follow. The Chief Justice started by refuting the Italian argument based on article 97 of UNCLOS. After observing that there was no collision in this case the justice reasoned

The next question which arises is whether the incident of firing could be said to be an incident of navigation. The context in which the expression has been used in Article 97 of the Convention seems to indicate that the same refers to an accident occurring in the course of navigation, of which collision between two vessels is the principal incident. An incident of navigation as intended above, cannot, involve a criminal act in whatever circumstances. In what circumstances the incident occurred may be set up as a defence in a criminal action that may be taken, which legal position is accepted by both the countries which have initiated criminal proceedings against the two marines. Even the provisions of Article 100 of UNCLOS may be used for the same purpose. Whether the accused acted on the misunderstanding that the Indian fishing vessel was a pirate vessel which caused the accused to fire, is a matter of evidence, which can only be established during a trial. If the defence advanced on behalf of the Petitioner Nos. 2 and 3 is accepted, then only will the provisions of Article 100 of the Convention become applicable to the facts of the case.

Following the *Lotus* case, therefore, jurisdiction would be proper. Next, the justice observed that States only have limited jurisdiction outside of the territorial sea that are limited by UNCLOS. Unfortunately, this limit is not described and the Chief Justice asserts Indian jurisdiction over the incident based on this limited grant without further deliberation.

Judge Chelameswar issued an opinion agreeing with the judgment but on different grounds. His views were almost entirely based on internal law. The important international component was his assertion that jurisdiction itself is based on "the legitimate interests" of the State asserting its authority. He then used the passive personality and the objective territorial principles as evidence of this existing jurisdiction. Either of which would therefore be sufficient to ground jurisdiction in this case.

In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

Italy argued that the shooting was an "incident of navigation" and so wholly within her jurisdiction. Both opinions corrected concluded that article 97 was implemented with the limited scope of overturning the ruling in the *Lotus* case[267] when it came to collisions and similar events on the high seas. It was not designed to undo the general principles of State jurisdiction. The problem with the justices' analysis lies rather with the application of the passive personality principle.

[267] In 1927, the Lotus case, decided by the Permanent Court of International Justice (PCIJ), issued a landmark decision regarding jurisdiction over the seas. It involved a collision between a French steamship, the SS Lotus, and a Turkish steamer. As a result, eight Turkish nationals drowned in the seas north of Greece. When the Lotus reached the port of Istanbul, the French skipper was arrested and prosecuted for murder by the Turkish authorities. France and Turkey decided to settle the controversy through the PCIJ, asking whether Turkey had violated international law by arresting a French citizen for a crime committed on the high seas while on board a French vessel. France maintained that, for Turkey to be able to claim jurisdiction, it was necessary for Turkey to provide a specific provision within international law that granted them jurisdiction. Turkey, on the other hand, contended that a State can always exercise its sovereign powers unless a specific rule of international law prohibits it from doing so. In dealing with the issue, the Court made an important distinction between prescriptive and enforcement jurisdiction. The PCIJ clarified that, regarding prescriptive jurisdiction, 'all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction.

Article 92 of UNCLOS provides,

Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

This is enough to preclude the application of the passive personality principle. If the nationality of the victim were enough, India would have had jurisdiction over the events if they had occurred entirely on board the Lexie. Such a result would render article 92's provisions on exclusive jurisdiction without meaning. Such a reading should therefore be avoided. However, given the existence of other bases of jurisdiction, the justices' overstatement of the application of the passive personality principle is not fatal to the international validity of the judgment.

The most unfortunate part of the Supreme Court's judgment was its declining to fully address the issue of sovereign immunity for the Italian guards. The court rejected the argument but did so without an analysis of applicable international law. The court instead punted on the issue leaving it to be re-litigated based on the evidence in light of article 100 of UNCLOS. This last provision is nothing more than an obligation for the States party to co-operate in the fight against piracy. Presumably, this means that if the Italian guards were actually fighting piracy, article 100 UNCLOS would protect them from trial. This, however, would be a strange and unfortunate interpretation of a treaty provision that mentions neither jurisdiction nor immunity.

Most of the UNCLOS aspects of the *Enrica Lexie* incident appear to have been resolved by the Supreme Court of India. What remains now is a determination on the immunity of the guards and the facts of the case. If the guards are determined to have been "fighting piracy" they will in fact be innocent of the crimes with which they are accused. At the same time, under the court's probable reading of UNCLOS, this fact will grant them immunity. If they are instead found to have been acting outside of their mandate (for whatever reason) they will in fact be guilty of the crimes with which they are charged and not benefit from immunity. The Supreme Court would have done better to settle this issue once and for all and leave the trial to address the accusations alone.

ENFORCEMENT OF FOREIGN JUDGMENTS IN INDIA

In India we find the respect for foreign adjudication well established in the Civil Procedure Code 1908. The judgement of a foreign court is enforced on the principle that where a court of competent jurisdiction has adjudicated upon a claim, a legal obligation arises to satisfy that claim. The rules of private international law of each state must in the very nature of things differ, but by the comity of nations certain rules are recognised as commons to civilised jurisdictions. Through part of the judicial systems of each state these common rules have been adopted to adjudicate upon disputes involving a foreign element and to effectuate judgements of foreign courts in certain matters, or as a result of international conventions.

Sec 13 of the CPC lays down Indian law in this respect. Under section 13 of the code a foreign judgement is conclusive and will operate as res judicata between the parties thereto except in the cases mentioned therein. In other words, a foreign judgement is not conclusive as to any matter directly adjudicated upon, if one of the conditions specified in clauses (a) to (f) of sec 13 is satisfied and it will then be open to a collateral attack. As Dicey rightly states:

“A foreign judgement is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error either of fact or of law.”

Following are the six cases in which a foreign judgement shall not be conclusive.

1. Foreign judgement not by a competent court.
2. Foreign judgement not on merits.
3. Foreign judgement against international or Indian law.
4. Foreign judgement opposed to natural justice.
5. Foreign judgement obtained by fraud.
6. Foreign judgement founded on a breach of Indian law.

Further sec 14 talks about presumption as to foreign judgements. Sec 14 of the court declares that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgement, that such judgement was pronounced by a court of competent jurisdiction, unless the contrary appears on the record, or is proved. However, if for admissibility of such copying any further condition is required to be fulfilled, it can be admitted in evidence only if that condition is satisfied.

The scope of sec 13 of the CPC has been explained in extensor by the apex court in *Vishwanathan v. Abdul Wajid*[268] it was emphasised in this case that the foreign court must be a court of competent jurisdiction, that the matter adjudicated upon means the right claimed and that it must have been adjudicated upon directly between the same parties. The law relating to conclusiveness of the foreign judgement contained in clauses (a) to (f) of sec 13 creates substantive rights and is not merely procedural. The court’s ruling in this case establishes the following aspects of conclusiveness of a foreign judgment clearly: ‘conclusiveness’ in sec 13 refers to the final adjudication and not the reasons; the binding character of the judgement can be displaced only on the basis of the six grounds mentioned in the section: the question whether the principal of effectiveness form the basis of

[268] AIR 1963 SC1.

conclusiveness of the foreign judgement is debatable; conclusiveness referred to in sec 13 is different in its operation from the rule of res judicata envisaged in sec 11 as applicable to domestic judgements.

The *vishwanathan* further establishes the general rules restriction in matters of court's jurisdiction: 1) jurisdiction in *rem over res* beyond the limits of jurisdiction; 2) title to immovable property outside the jurisdiction; 3) courts will not exercise jurisdiction in enforcement in foreign penal and revenue laws. The rulings in this case also explain the basis of *action in personam* thus: a person who institutes a suit in a foreign court and claims a decree in personam cannot after the judgement is pronounced against him, say that the court have no jurisdiction which he invoked and the court exercised. The foreign court's competence in delivering the judgement in question under sec 13 is understood in the international sense and not merely by the law of the foreign state under which the court functions. Reciprocity on the part of the foreign country in the enforcing local judgements is not required as a condition for recognition of foreign judgements as in the United States and in the civil law countries.

Sir Gurdayal Singh v. Raja Of Faridkot[269] where it was held that in a personal action a decree pronounced in absentem by a foreign court to the jurisdiction of which the defendant has not in any way submitted himself is by international law an absolute nullity. But in *Lal Ji Rama v. Hans Raj Nathu Ram*[270] it was clarified that a decree passed by a foreign court to whose jurisdiction a judgement debtor had not submitted is an absolute nullity only if the local legislature had not conferred jurisdiction on the domestic courts over foreigners either generally or under specified circumstances.

It has been held in *Narappa v. Rangaswami*[271] that submission after the issue of the decree is of no effect. Similarily in another case i.e. *Ramkisan v. Harmukhari lal*[272], It was held by the Nagpur High Court that submission to jurisdiction, must be in the proceedings prior to the passing of the decree. But in *Veeraraghaviyer v. Muga sait*[273], ,court held that a submission to jurisdiction in order to save one's property is not voluntary submission, even if the defendant filed a statement on the merits as well.

Enforcement of Foreign Judgments

There are two ways of enforcing of foreign judgment in India:

(1) by instituting a suit on such foreign judgment

(2) by instituting execution proceeding

[269] 21 LA 171 PC.
[270] AIR 1971 SC 974.
[271] (1933) 64 MLJ 531.
[272] AIR1955Nag.103
[273] 27MLJ535

Suit on Foreign Judgment

A foreign judgment may be enforced by instituting a suit on such foreign judgment. The general principle of law is that any decision by a foreign court, tribunal or quasi-judicial authority is not enforceable in a country unless such decision is embodied in a decree of a court of that country. Court cannot go into the merits of original claim and it shall be conclusive as to any matter there by directly and adjudicated upon between the same parties and the period of limitation is 3 years from the date of judgment.

Execution Proceddings

Section 44-A of the code provides for the execution proceedings in certain specified cases. The section says that where a certified copy of a decree of a any superior court of any of the superior courts of any reciprocating territory a has been filed in a district court, the decree may be executed in India as if it has been passed by the district court. 'Reciprocating territory' means any country or territory outside India which the central government may, by notification in official gazette declared to be a reciprocating territory for the purposes of above mentioned section. A judgment-debtor is free to take all objections in case of any such execution proceedings under section 44-A which would have been open to him under section 13 if a suit had been filed on such judgment.

FOREIGN AWARDS:

Today we have the Arbitration and Conciliation Act 1996, which governs the law regarding the enforcement and recognition of foreign awards. The principal object of the act is to facilitate the resolution of disputes by arbitration, and to ensure that courts interfere as little as possible with the making of the awards, and as far as, possible, recognize and enforce them. Recognition of an award is different from enforcement of the award. Enforcement is a process whereby the successful party takes the steps to compel the other party to comply with the award. Recognition is a defensive process where the successful party uses the award as a shield to protect his rights.

There is a very important case on the new act. In *Bhatia International V. Bulk Trading SA*[274], court observed that even if an award does not fall under the conventions it is still enforceable under part I of the 1996 act. Though this observation was part of the obiter dicta and not the ratio decidendi, it still carries a lot of persuasive value and it is seen that lower courts generally follow such observations of the Supreme Court. If it happens that way then it becomes possible to enforce foreign non convention awards under the act. There is an interesting English case, *Dallal v. Bank Mellat*[275], where a suit was filed after the dismissal of the claim by the international tribunal, the person moved to the English court by filing a suit.

[274] AIR 2002 SC 1432.
[275] [1986] QB 441, [1986] 1 All ER 229.

The court by applying the principal of *abuse of process* struck off the suit at the very outset. The court explained the concept of abuse of process by observing that it is different from res judicata, though closely related. The former is a wider in scope so that a suit can be struck off at the outset for the abuse of process; whereas the issue of res judicata would be decided at the time of trial. Indian district courts can keep such decisions in mind while deciding the cases involving foreign arbitral awards.

Some principles developed by Indian courts over the years are mentioned below:

- Where the award is followed by a judgment in a proceeding which permits any objection being taken to its validity it is enforceable. A foreign award is enforced on the ground, it creates contractual obligation. AIR 1964 SC 538.

- A fraud played in obtaining an foreign award can be established to treat it as not binding. AIR 1975 SC105.

- The Indian courts do not enquire whether the conclusions reached by a foreign court correct or not. AIR 1963 SC 1

- The scope of enquiry in respect of a foreign award, under section 7 of the Foreign Awards Act 1961, is very limited. It is permissible to raise objections to the recognition or enforcement and arbitral award on the ground of the public policy or the principle law of the country. Sec 7(1) of the Arbitration (Protocol and Convention) Act of 1937 is also to the same effect. AIR 1994 SC 560.

Some Important Maritime Foreign Judgments Enforced in India

A foreign judgment can only be enforced in India as if it were a decree of an Indian court if it has been passed in a reciprocating territory declared by the Indian government. Foreign jurisdictions such as the United Arab Emirates and Australia are not 'reciprocating territories' and a party seeking enforcement of a judgment passed in a court in these territories would have to file a substantial lawsuit in India on the cause of action stemming out of the judgment passed by the foreign court in the non-reciprocating territory. Furthermore, only a foreign 'decree' (i.e., a final judgment on the underlying merits of the case) can be enforced in India and not an interim order. Courts in India have the right to examine whether a foreign judgment has been given on the merits.[276] In these circumstances, it would appear that interim or interlocutory orders of freezing or *Mareva* injunctions passed by foreign courts are not enforceable in India.

While the Gujarat High Court in the case of *MV Cape Climber v. Glory Wealth Shipping Pvt Ltd.*[277] has allowed the enforcement of a London arbitral award that has subsequently been

[276] International Woolen Mills v. Standard Wool, (UK) Ltd, AIR 2001 SC 2134
[277] Civil Application (OJ) No. 250 of 2015

converted into a judgment of an English High Court (as a decree of the English High Court), the Delhi High Court, in the case of *Marina World Shipping Corporation Ltd. v. Jindal Exports & Imports Private Ltd.,*[278] rejected this approach and held that a London arbitral award can only be enforced in India under the Arbitration Act and not as an English judgment under the Code of Civil Procedure, 1908 (CPC), even though the London arbitral award had been converted into a judgment of the English High Court. The Bombay High Court in the case of *Marine Geotechnic LLC v. Coastal Marine Construction & Engineering Ltd*.[279] held that a foreign judgment could in principle be directly enforced in India by way of bankruptcy or winding-up proceedings strictly subject to the decree holder establishing that the foreign decree satisfies the requirements of Section 13 of the CPC.

[278] 2007 (3) ARBLR 46 Delhi
[279] Company Petition No. 67 of 2013

MODULE-VI

INDIA AND MARITIME DISPUTES

INDIA’S MARITIME BOUNDARY DISPUTES WITH ITS NEIGHBOURS

It often comes as a surprise to many that India has maritime boundaries with a larger number of states than those with which it shares land borders. Whereas India’s maritime boundaries necessitate delimitation with seven states on adjacent and opposite coasts—Pakistan, Maldives, Sri Lanka, Indonesia, Thailand, Myanmar, and Bangladesh—its land borders are shared with six states (Pakistan, China, Nepal, Bhutan, Bangladesh, and Myanmar). The Indian coast line (including island territories) of 7,516.5 kms is the 15th longest in the world, with Canada (90,889 kms) and Indonesia (54,705 kms) possessing the first and second longest coasts. Due to considerable political and diplomatic efforts since the 1970s, virtually all of India’s maritime boundaries have been demarcated. The exceptions primarily remain those with Pakistan.

This module will cover various aspects of the maritime implications on India’s foreign policy and how the two interact and affect each other. India has had maritime boundary disputes with a number of countries and has successfully resolved some of them but the overall view in our neighbors remains one of mistrust of India’s growing military and economic power.

The 3rd UN convention on the laws of the Seas 1974 has laid down principles of demarcating sea boundaries of the maritime nations in specific terms but the task of resolving these issues takes a lot of effort on the part of the foreign ministries of various countries in our neighborhood. These issues become more contentious as they relate to specific economic activities the countries with maritime geography can undertake and which can be very beneficial and profitable for them.

Years of mistrust and apathy to develop more closely on the part of the countries of this region have been the result of the historical circumstances that have plagued the region for so long. It has to be accepted that politics has failed to resolve most of the contentious issues among these countries for example between India and Pakistan. Economics which is closely linked to maritime activities has a strong chance of reversing this trend if opportunities of cooperation and mutual coexistence are used effectively. This can lead to the development of a healthy regional cooperation and mutual trust giving boost to SAARC like organizations which has remained weak and ineffective whereas others like ASEAN have contributed so much to the development of their respective geographical areas. India‟s vast superiority in terms of scientific and technological resources can help her neighbouring countries in their development thereby dispelling many of the doubts and mistrust they have reared against her real intentions I themselves for so long.

Any analysis of such issues cannot obviously begin with any other country than Pakistan, with which India has had a very troubled past resulting in two major wars.

Maritime dispute between India and Pakistan

The Indo-Pak relations have been far from normal since partition. Kashmir has been the focal point of tension between the two countries. So much energy has been centered on this dispute that many other issues which could be resolved more easily have been relegated to the background. In fact resolution of such matters could prepare a solid basis on which other issues could be dealt with. One of such contentious issues is the Sir Creek issue. Even after so many years of independence, the two countries are yet to reach an agreement regarding the demarcation of the maritime boundaries.

It may sound ironical but the Maritime boundary dispute between India and Pakistan is primarily centred on Sir Creek, which is 96-KM of a water body, emptying out in to the Arabian Sea from the Rann of Kutch. The dispute is based on this swamp involving about 100-150 Sq. KMs which remains flooded through half of the year. Many experts opine that this is arguably the easiest dispute which could be resolved by the two countries if there is right political will displayed by the politicians of the two countries. What is probably hindering any progress on this issue is the Pakistani insistence on linking it with issues like Kashmir.

It is far more significant to determine the maritime boundary between India and Pakistan which remains undefined after 67 years of independence. The last point on the boundary of where the Creek at low tide hits the sea will be the beginning point of the maritime boundary and its orientation northwards or southwards could add or subtract several thousand square kilometres of the oceanic shelf, which is rumoured to be rich in oil and natural gas. The area is rich in fish resources. Every year hundreds of fishermen from both sides are detained by the forces of the two countries for poaching on what they claim is their territory which unnecessarily adds to the woes of these fishermen and their families. Due to intense rivalry between the two countries, the plight of these fishermen remains unknown for many years. They are treated as Prisoners of War and lack access to basic human rights in the absence of proper legal assistance.

The primary reason for the two countries not being able to sort out such issues Is the result of Pakistan‟s insistence to link every other issue with the resolution of the Kashmir problem.

The resolution of the cir Creek boundary issue has the potential to ameliorate the lives of the common man on both sides of the border. The issue is not only political and economic, but has other sides as well.

The Fisher folk of India and Pakistan are victims of defined and undefined borders in the sea as hundreds of them are arrested by the security agencies of the two countries for inadvertently crossing sea boundaries which are not well defined and an important contributing factor is the increasing conflicts over renewable resources. These coastal conflicts need to be understood from various overlapping but distinct perspectives. Low-intensity conflicts over environmental concerns are as serious as conventional war and simultaneously question the cartographic and border anxieties of the two countries.

“We‟re Prisoners of War”, Chacko said. “Our dreams have been doctored. We belong nowhere. We sail unanchored on troubled seas. We may never be allowed ashore. Our sorrows will never be sad enough. Our joys never happy enough. Our dreams never big enough. Our lives never important enough. To matter.” —The God of Small Things, Arundhati Roy.

While most of the studies about India Pakistan tensions have been centred around big and visible areas of conflitcs like Kashmir, Kargil, nuclear politics, various Indo-Pak wars and Hindu-Muslim tensions, there has been scant mention of the less spectacular and everyday conflicts taking place across the two countries. These conflicts are equally damaging affecting the lives of millions of people in the region and could be neglected at its own peril.

The question of peace and security must also be considered in the context of people, environment and resources. Conflict is directly connected in more than one ways to environmental degradation and struggle over natural resources. In the recent years, many social scientists have argued that renewable resource scarcity like land de- gradation, deforestation and fisheries depletion) is increasingly a factor that contributes to political conflict.

The governments of India and Pakistan have attempted to remould the recalcitrant clay of plural cultures and civilisations into lean, uniform, hypermasculine, and disciplined countries, where borders particularly have become sacrosanct. While in the case of land, they have been successful mostly in drawing clear- cut lines, there is great anxiety about the seas, where any line of demarcation is blurred. The close geographical location of the two countries, whereby they share the resources of the seas, has led to fisher people crossing sea borders since long, but they are increasingly perceived as causing grave instability to territorial boundaries, spilling into everyday tensions and conflicts. The fishermen of the two countries have been drawn into the ambit of intense rivalry and antagonism and are repeatedly paying a heavy price for it.

They are the victims of the intense nationalistic jingoism displayed by the two nations through which they have evolved a clearcut distinctions between insider and outsider, safety and danger, domestic and foreign, self and other. The concept of sea borders is difficult for the fishermen to comprehend as their livelyhoods have been intricately connected with sea for centuries. Yet they are often arrested and kept in jail for many years and are treated as prisoners of war in contravention to the provisions of international law. They are the poor lot often unable to afford legal assistance. They are thus denied basic human rights and languish in jails in the absence of proper basic amenities for years together.

Despite the process of globalisation which has brought nations closer to one another, and which seems to suggest that national boundaries have become irrelevant, it is ironical that nations have increasingly placed restrictions on the movement of and exchange between people of different nations. Passport and visa restrictions have only grown over the years and the problem is particularly 125eigh in the case of countries like India and Pakistan which have enjoyed a common past for centuries. Thus artificial division of nations and creations of new states have made matters complicated for the people of such countries.

Geographical and ecological factors have long played an important role in defining the natural boundaries of nations. For India mountains and sea have acted as natural borders for centuries. However, The seas surrounding India have been regarded especially vulnerable producing unstable borders and increased uncertainties. Border which delimit state boundaries which transform into national identity, are particularly fuzzy in the seas posing a threat to everything connected with the national identity.

According to K.M. Panikar, “It is necessary to emphasize that from that historic day when Vasco Da Gama with his fleet of warships arrived at Calicut, India has been under the relentless pressure of sea power, steady and unseen over long periods, but effectively controlling one’s economic life and political life. In fact, since 1498, India has been blockaded.” He further states, “The only practical remedy to this permanent geographical weakness of India is the strength of her own internal political and economic structure by a strong central government having full control of the resources of the nation.” At another place he states, “To other countries the Indian Ocean is only one of the important oceanic areas, to India it is a vital sea. Her lifelines are concentrated in that area, her freedom is dependent on the freedom of that coastal surface. No industrial development, no commercial growth, no stable political structure is possible for her unless her shores are protected.”

Various steps have thus been taken by India to organise a blue-water navy capable of securing India‟s long coastline and to define sea borders as accurately as possible. India and Pakistan share their maritime borders apart from that on land. India has a long coastline of about 7517 Kms With Gujarat alone having about 1663 KMS of it which is about 1/3 of the total coastline. Pakistan has a part of its coastline adjacent to that of Gujarat.

As has been mentioned above, the coastal dispute between the two countries is centred around the Cir Creek, a fluctuating tidal channel or an estuary, which is sixty-mileslong, situated in the marshes of the Rann of Kutch. The Rann lies on the border between the Indian state of Gujarat and the Pakistani province of Sindh The dispute over Sir Creek can be traced back to the preindependence period, to around 1908, when an argument ensued between the rulers of Kutch and Sind over a pile of firewood lying on the banks of a creek dividing the two principalities.

The dispute was taken up by the government of Bombay state, which had jurisdiction over the state of Sindh. It, resolved the dispute in 1914 supported by Map Number B44 and subsequently B74. Nothing significant happened in the next 40-50 years, and the dispute came alive again only in the 1960s. After armed clashes between India and Pakistan in 1965, Pakistan government claimed that the half of the Rann along the 24th parallel belonged to it. India countered that the boundary ran roughly along the northern edge of the Rann. The matter was referred for arbitration to an international tribunal, known as the Indo-Pakistani Western Boundary Case Tribunal. It announced its award on 19/02/1968, upheld 90% of India's claim to the entire Rann and conceded small portions to Pakistan.

The Sir Creek dispute originated after the Kutch tribunal award, wherein Both the parties had agreed to limit their larger dispute over the Rann to the boundary in the north. Well to the south lay an agreed boundary that began at the head of Sir Creek and ran a short distance eastward roughly along the 24th parallel. However, India's contention was that this line moved up sharply at a right angle to meet the northern boundary of the Rann. Pakistan sought to extend the line further eastward and claim half of the Rann along the 24th parallel. The sole issue, therefore, was whether the short agreed boundary from the head of Sir Creek went all the way east or rose at a right angle at its western end to reach the northern limit of the Rann. The tribunal accepted India's case that it did turn north and that almost the entire Rann was Indian. The dispute hinges on the demarcation of the boundary from "the mouth of Sir Creek to the top of Sir Creek" and from "the top of the Sir Creek eastwards to a point (on land) designated as the Western Terminus." The boundary thereafter has been fixed.

Unfortunately, the two states did not bring forth the issue of the westernmost part of the boundary of the Rann of Kutch, and the issue of the demarcation of the boundary between the top of Sir Creek to its mouth at the Arabian Sea. This lack of foresight gave rise to the Sir Creek dispute. Perhaps, at that point of time, neither nation thought that delimiting the river boundary was important.

The reason why the dispute has become important in recent times is because the river boundary delimitation will affect the determination of the maritime boundary, the EEZ (Exclusive Economic Zone), and the Continental Shelf. Studies have shown that this region is rich in petroleum, oil, and gas, minerals and plant life and therefore has potential for commercial exploitation. As of now, India asserts that the boundary lies in the middle of the Creek. Pakistan claims that the line lies on the Creek's eastern bank and, therefore, the entire Creek belongs to Pakistan.

Several rounds of diplomatic talks have taken place between the two nations, but no concrete solution has been reached. While Pakistan is willing to submit the dispute to a third party for settlement, India proposes an ad-hoc settlement where both countries should bilaterally delimit their maritime boundaries by commencing delimitation from the frontier of their respective EEZs and then moving inwards to a mutually acceptable point as per the provisions of the Technical Aspects of the Law of the Sea. Pakistan has not accepted this proposal, and the situation has remained in a gridlock ever since.

India wanted the Thalweg principle to be the basis of the settlement according to which the boundary should be defined where a river or a channel is at its deepest. Pakistan's contention is that the Thalweg principle cannot be applied in this case since the channel is non-navigable during most of the times in a year.

Pakistan's claim to the Sir Creek is based on the demarcation present in the 1914 resolution and the accompanying map which shows a green line present on the eastern boundary of the Sir Creek. Till the time of India‟s independence this position was not contested by either of the two states. Thus according to the principle of utipossidetis, Sir Creek belongs to Pakistan. Pakistan's position is further reinforced by the fact that all maps of the area indicate a green line on the eastern bank of Sir Creek.

According to a former Pakistani foreign secretary, "The adjudicators in 1968 did not discuss the Sir Creek because in the pre-partition documents the creek was clearly indicated as in Sind which is now in Pakistan." India refutes this claim vehemently. She has criticized Pakistan's claim by stating that the map published for the resolution in 1914 was a mere annexure and had no binding value. She has also stated that the 1914 resolution was implemented only in 1924 when pillars were already erected to demarcate the Sind-Kutch boundary. Although, no pillars were erected in the Creek itself, India maintained that The Thalweg principle must determine the boundary in Sir Creek between India and Pakistan.

The tribunal noted, "In view of the aforesaid agreement, the question concerning the Sir Creek part of the boundary is left out of consideration." It is this very Sir Creek part of the boundary that has become a bone of contention India and Pakistan have held a number of meetings to discuss the issue but no solution has been found so far. Incidents like the Cargil war, December2001 attack on Indian Parliament, 26/11 terrorist attack on Mumbai have also hampered any sustained discussions on various issues as Pakistan has been associated with almost all the terrorist activities in India.

It is very important for the two countries to resolve and demarcate their maritime boundries because under the UNCLOS if the dispute is not resolved within the time limit, some third party can theoretically step in to make its claim. Secondly, the resolution of the maritime dispute can create a healthy environment of mutual trust and cooperation which can lead to more meaningful engagement between the two countries.

As far as maritime strategy is concerned, as has been amply proven by the Indo-Pak war of 1971,Pakistan has to rely on the strategy of sea denial because of the large maritime boundary of India and also the superior size of her navy. Pakistan is situated on the route which is the main sea lane of communication for India‟s trade with the gulf countries, on which India mainly depends for her energy needs. Thus, in the event of war, Pakistan will definitely try to block the oil supplies to India by attacking Indian ships. Around the time of the 1971 war, much of India"s trade was carried out on board the foreign vessels which denied Pakistan the opportunity to attack Indian energy supplies.

However, the Pakistani Navy has also grown much stronger since, with the acquisition of a number of advanced submarines and armament from the western suppliers and with the responsibility of maintaining two naval fronts no longer at its hand, Pakistan can very successfully indulge in the sea denial strategy against India. This puts enormous pressure on India which has to maintain a strong naval force to face the challenges posed by Pakistan in coordination with China.

India has had a close relationship with Iran which will allow India to bypass limitations on India"s central Asia access through land. After the conclusion of the Iran Nuclear Deal in July 2015 one of the beneficiaries would be India. With American sanctions easing, India is racing to build the Chabahar port in Iran that will get around the fact that its land access to energy-rich former Soviet republics in Central Asia has been blocked by China and Pakistan. Closer Iran-India ties would allow New Delhi"s leaders to secure cheaper energy imports to bolster economic growth and reduce the influence of both China and Pakistan in the region.

The six nations that make up Central Asia hold at least 11 per cent of the world"s proven natural gas reserves, as well as substantial deposits of oil and coal, according to data compiled by BP. "Iran can offer us an alternative route to Central Asia," Indian Foreign Secretary S Jaishankar said in Singapore during his visit in July 2015. "The resolution of the nuclear dispute and lifting of sanctions will allow our agenda of energy and connectivity cooperation to unfold seriously."

India and Sri Lanka

Oceans occupy larger part of the earth. They have long been associated with the sustenance of human life. Since ancient times people have endeavored to explore other countries by crossing the oceans. As a result of these explorations, diplomatic and mercantile relations were formed between countries. There was a vigorous affair like this between India and Sri Lanka from very early times. According to 2500 years of well documented ancient history of Sri Lanka, India comprehended dominant role as a regional vigorous neighbor. As a result of it there was tenable adherence between the two states in political, economic, social and cultural spheres. In Sri Lankan foreign policy India gets incomparable importance in present as well as in past. Former Sri Lankan President Mahinda Rajapaksa describes the relationship thus "India is our relation and all others are our friends". Therefore in foreign policy India cannot be signified in poor manner.

India Sri Lanka relations suffered a lot during the LTTE era because of a number of problems connected with the terrorist activities of the organization. Thanks to the determined efforts of the Lankan government LTTE was finished leading to the dawn of a new peaceful era on the island. This is also good news for India as it has no longer to deal with the refugee problems on her shores. The domestic politics of the Tamil Nadu state has also more than often dominated the political thinking in New Delhi and the tensions were most visible during the era of coalition politics The maritime issues between India and Sri Lanka are not as serious as those between India and Pakistan.The maritime boundary between the two is more or less settled. It is the issue relating to fishing rights of the fishermen of the two countries which primarily causes friction in the relations between India and Sri Lanka.

Another thorn in the relations between the two countries is the growing Sri Lankan proximity to china both economically and militarily thus leading to tensions between India and Sri Lanka. This trend was most prominent during the rule of the former President MahindaRajapaksa"s regime, However, with the change in the guard in the island country, things have started turning around and there is hope of great improvement in mutual relations of the two countries. The maritime boundary between the two countries was settled by the agreements of 1974 and 1976. The 1974 agreement seeded the control of the Kachchatheevu island to Sri Lanka thereby India recognizing Sri Lankan sovereignty over the same.

India and Sri Lanka concluded a maritime boundary agreement which became effective from 8 July 1974. The agreement of 1974 was followed by an exchange of letters between the then Indian Foreign Secretary Kewal Singh and his Sri Lankan counterpart, WT Jayasinghe, and a supplementary agreement was signed in 1976. The maritime boundary between the two countries was delineated in the Gulf of Mannar from the south-western edge of the Bay of Bengal to a point further down in a south-western axis up to the point where the boundaries of India, Sri Lanka and Maldives met in the Indian Ocean. As per these international instruments, both countries enjoy sovereign rights over the waters, the islands, continental shelf and sub-soil of the maritime area on their respective side of the delineated boundary. Indian fishermen and pilgrims have also been permitted access to Kachhativu island which falls on the Sri Lankan side of the maritime boundary. The 1974 and 1976 agreements have not put an explicit embargo on fishing by Indian fishermen beyond the Indian maritime zone, though the sovereign rights of Sri Lanka in its part of the zone are unquestionable.

The strength of the Indian fishing trawlers is about 1900 which is more than double of that of the Sri Lankan boats and are much superior to them as well. Most of these Indian fishermen fish in the Palk Bay in the Indian maritime zone and some inadvertently cross over to the Sri Lankan side which causes serious friction with the Sri Lankan Navy as well as with the Lankan fishermen. This problem was most acute during the LTTE era when Indian boats were accused of helping the LTTE with weapons and supplies. During this period many Indian fishermen were brutally attacked, captured and killed by the SLN.

The Indians mostly fish at night for shrimp, with the trawlers originating from Rameshwaram, Mandapam, Kottaipattinam, Jagadipattinam, Kodikkarai and Nagapattinamin coastal Tamilnadu. Moreover, their use of gill nets and synthetic nets has caused severe damage to the ordinary nets of Sri Lankan fishermen. The Indians have not been fishing at long distances deep in the Indian Ocean away from the contentious Sri Lankan maritime zone because they do not possess multi-day fishing crafts.

Sri Lankan Tamil fishermen from the country"s northern province could not freely fish during the last three years of the Fourth Ealam War (2006-09) because the Sri Lankan Navy had imposed security restrictions, particularly on night fishing. It was during this period that the area of activities of the Indian fishermen is alleged to have increased. The capacity of Indian trawlers, use of synthetic nets and the extended area of their operations seem to have adversely affected the livelihood of nearly 30,000 fishermen families of Mannar, Kilinochchi, Mullaitivu and Jaffna districts of Sri Lanka"s northern province. While approximately 50,000 fishermen households primarily depend on the existing pattern of fishing for their daily earnings the dependence of Sri Lankan fishermen on fishing in their maritime zone area is significantly more acute because, the present overall economic conditions in that country`s northern province, is still quite adverse.

Similarly, Sri Lankan fishermen also venture out into Indian seas and also meet the same fate as their Indian counterpart, though Indian Navy has been less severe in terms of use of violent methods against the Sri Lankans. Thus this issue needs urgent attention. A resolution mutually acceptable to the fishermen of the two countries will benefit enormously the poor coastal population of India and Sri Lanka, the two countries which have had a history of close relations of more than 2500 years. In this context former President of India Shri APJ Abdul Kalaam once suggested that the Indian and Sri Lankan fishermen should be allowed to fish in the Palk Bay on alternate days thereby reducing chances of conflict.

Sri Lanka and India share a maritime border extending to more than 400 km. In the Palk Bay region, in which the island of Kachativu is located and which lies between the coastal regions of Nagapattinam, Thanjavur, Pudukottai and Ramanathapuram districts and Sri Lanka, firing, killing, detention and imprisonment of fishermen are a regular feature. In 1996, I.K. Gujral as External Affairs Minister informed Parliament that 11 fishermen had been killed in 20 incidents of shooting by the Sri Lankan Navy on their fishing vessels. The Sri Lankan Navy admitted to its involvement only in three of the reported incidents.

The Tamil Nadu Government, in its report on the situation up to 1991, said: "Since 1983, till the end of August 1991, there have been 236 incidents of attacks by the Sri Lankan Navy on Tamil Nadu fishermen. Three hundred and three boats have been attacked and 486 fishermen have been affected.

Sri Lanka's geographical location makes it a very important country in the Indian Ocean Region. It is situated in the center of Indian Ocean with potential for commercial utilization of its location on the important trade route. In order to meet this end, Sri Lanka has entered into deep economic, strategic and military engagement and cooperation with many countries, China in particular, with which India has had a troubled past. It's quite a herculean task for Sri Lanka to strike a right balance in her relationships with India on one hand and China on the other.

Sri Lanka was one of the first few countries to recognize China and very soon the two countries embarked upon closer ties in economic, military and strategic spheres. "We love this country", declared the Chinese Foreign Minister on a state visit to Sri Lanka in 1971. China was ready to give its fullest cooperation to speed up the socialist march of Ceylon. Since the first Rubber-Rice pact was signed in 1952, China-Sri Lankan relations have been a source of unity and continue on an upward trajectory today. Sometimes, it seems Sri Lanka is sandwiched between its relations with the two major powers of Asia i.e. India and China.

India has enjoyed anything but cordial relation with China. After the annexation of Tibet in 1950, China became India's immediate 134eighbour and the relations between the two have been in rough weather despite the fact that India was also one of the few countries to grant early recognition to her and Indian leaders specially Nehru tried his best to maintain harmonious and good neighborly relations with her. But despite India's peaceful posturing, there was a short but fierce war between the two countries in 1962 resulting in heavy defeat for Indian forces. With the latest trend of Chinese aggressive foreign policy and frequent skirmishes in Ladakh and Arunachal, India has been quite weary of Chinese intentions vis-à-vis India. India has been conscious of the Chinese designs of encircling India by building a string of pearls around her and this strategy seems to be extending to the maritime sphere. It is here that Sri Lankan relations with China come into conflict with the perceived Indian interests and anxieties.

As China's economic power has grown, it has used investing over cease as a tactics to extend its influence and bolster its national interests across the world. Its financial foreign policy rests on two strategies: "accumulating foreign currency reserves and sending money abroad in the form of FDI, aid, assistance, and loans" wrote US economic adviser Ken Miller in Foreign Affairs. Sri Lanka is a model of the latter part of this strategy. The statistics alone indicate amazing rise of China's financial stake in Sri Lanka. The finalization of China Sri Lanka Free Trade Agreement in 2014, which is to be signed in June 2015, is symbolic of the tight-knit relationship between the two countries.

Bilateral trade exceeded $3 billion for 2013 and China is Sri Lanka's second largest source of imports behind India. On the planned FTA dialogue, President Rajapaksa had said, "Our cooperation covers many sectors including industry, energy, technology, infrastructure and tourism." He said the FTA will boost the trade and investment ties as well as Sri Lanka's export to China, creating new momentum for the island nation's development. Chinese President Xi Jinping's visit to the island in September, the first by a Chinese head of state in 28 years, helped expand cooperation and cement the ties in trade and economy between the two countries.

During President Rajapaksa's state visit to China in May 2013, the two leaders agreed to elevate the bilateral relations to a "strategic cooperation partnership" by substantially expanding the mandate for engagement. Sri Lanka has a growing trade deficit with China that stood at approximately $2.4 billion in 2012. China is the destination for less than 2 percent of total Sri Lankan exports. However, concerns over trade deficits for South Asian nations like Sri Lanka are "outweighed by overall economic benefits and political support," wrote India's former Special Envoy to Southeast Asian countries on UN Security Council Reforms, Professor S D. Muni.

China is Sri Lanka‟s biggest source of foreign direct investment (FDI) as well as providing development loans for projects such as the $500 million new Colombo Port Terminal, Hambantota Port, Sri Lanka‟s first four-lane expressway, and a new National Theatre, among others. These lucrative benefits for Sri Lanka have played a pivotal role in building the current relationship. The recent commitment from Sri Lanka to join the Maritime Silk Road (MSR) indicates the proximity of the two states‟ strategic aspirations and is a reflection of the assimilation of national interests.

The Indian Ocean ports of Gwadar in Pakistan, Hambantota in Sri Lanka and Chittagong in Bangladesh have all benefited from Chinese investment and account for 30 percent of global trade, according to Indian Ocean Rim Association. The MSR is a vital strategic project for China in the Indian Ocean, and will increase China‟s presence in South Asian shipping routes. Sri Lanka can be seen as a gateway port up the western coast of India and further west to Iran, a vital exporter of oil to China. The brand new port of Hambantota, 85 percent of it paid for with a Chinese loan, is located on the south of the island, historically not a traditional shipping route. However, it is the perfect location to meet the strategic objectives of the MSR.

Hambantota is the main town of the Hambantota district of the southern province of Sri Lanka. This underdeveloped region was hit hard during the 2004 Indian Ocean Tsunami. It is currently undergoing a number of major developmental projects including the construction of a sea port and an international airport. These projects and others such as construction of the Hambantota Cricket Stadium are set to be a part of Sri Lankan government's plans to transform Hambantota into the second major urban hub away from Colombo.

China with its vast dollar reserves was able to step in and help Sri Lanka 136eighb its mission. But as long as this was strictly a non-military affair, it could not matter much. However, there have been reports appearing in media about possible build-up of a Chinese naval base in Hambantota. According to a Nov, 19 2014 report, PLA Navy of China is planning to build 18 bases in various regions over next 10 years including one in Sri Lankan Hambantota. The Namibian newspaper quoting Chinese media reports said Hambantota Port is among the three naval bases that will be established in the northern Indian Ocean.

However Sri Lanka"s defence ministry refuted reports that claimed China is planning to establish a naval base in Sri Lanka.

Then came the docking of Chinese naval submarines in the span of two months without any prior information. First it took place in Sept 2014 coinciding with Indian President Shri Pranab Mukherjee's visit to Vietnam. Acording to the Times of India report dated Nov 3 2014, the Chinese nuclear powered submarine Changzheng 2 along with warship Chang Xing Dao, again docked at the Colombo Port despite India's prior warning to Sri Lanka that the presence of Chinese submarines in Sri Lanka would be unacceptable to India.

The Chinese fleet of submarines, both diesel and nuclear-powered (of which three can fire ballistic missiles), represent some of Beijing's most offensive military capabilities and have been the focus of international media when one of them propelled through Indian Ocean waters for the first time in early 2014, making its way to the Persian Gulf. In a recent report, Wall Street Journal described the Chinese submarine fleet as Beijing's most significant military challenge in the region. And for them to surface at Lankan ports brings alive some of New Delhi's worst fears of China's expanding presence in India's neighborhood.

Sri Lanka's assurance — even from the highest level — that China has no military presence in the island nation does not inspire confidence, if we consider the following:

- Coinciding with the election of Mahinda Rajapaksa as president in 2005, assistance from China has grown manifold and in infrastructure.
- Of the totals assistance of $5.056 billion extended to Lanka by China from 1971 to 2012, around 94% or $4.761 billion came between 2005 and 2012. In the past two years (2012-2014), China has committed another $2.18 billion, mostly as loans with a high rate of interest.
- With its "no strings" overseas-aid policy, China has replaced Japan as the No. 1 donor to Sri Lanka.

India believes that the Chinese have been favoured despite the commercial and economic viability of their projects being suspect. Traffic generated at Hambantota port and Matara international airport, both built by China, are said to be far below expectations. India was angered because Sri Lankan permission to dock another Chinese sub came at a time when India had already conveyed its strong displeasure to Former defence Secretary Gotabaya Rajapaksa, brother of former President Mahinda Rajapaksa, about the Colombo docking on Sept 15. This Colombo stop for the sub in September came while President Pranab Mukherjee was touring Vietnam and when Indian and Chinese troops were locked in a face-off at Chumar in southeaster Ladakh. China later said the sub had docked in Colombo on its way to the Gulf of Aden.

This seriously raises questions about Sri Lanka's real intentions regarding India's strategic concerns in the Indian Ocean Region. According to strategic expert Brahma Chellaney

"India's weakened regional clout has emboldened Sri Lanka's hostile action to grant access to Chinese subs. But it is a grave miscalculation". With the slowing down of the Chinese economy, China has increasingly been adopting aggressive nationalistic posture and has sought to expand its claim into different international territories. In such a scenario, the Indian Ocean region will witness increasing Chinese presence in the coming years. Sri Lanka along with other South Asian countries other than India, very well fits the Chinese scheme of expanding its naval presence in the region. Sri Lanka would do well to strike a balance in its traditional and historical relations with India and the economic powerhouse of Asia namely China.

After the change of regime in Sri Lanka the new dispensation led by President Maithripala Sirisena has sought to improve relations with India. The signing of the nuclear cooperation agreement between India and Sri Lanka during the Sri Lankan President's visit to India in Jan 2015 is a major step in this direction. India has played the card well to win away Sri Lanka from the Chinese fold. But Sri Lanka cannot be expected to make a drastic brake from its foreign policy that has been continuing for a long time now. However, it would do well to pay attention to India's security concerns in the region and not to jeopardize its relations with its immediate 139eighbour India.

On the other hand, the Indian Government should also not allow the domestic political compulsions to creep into its foreign policy objectives. The coalition compulsions of the then UPA Government, which depended on the support of the DMK of Tamil Nadu, voted in favour of a US sponsored resolution in the UNHRC on March 22, 2012, censuring Sri Lanka for the shortcomings in investigations by Sri Lankan Government for possible violation of International Law and human rights during the final phase of the war with LTTE and a deficit of credible post-conflict reconciliation initiatives. China displayed its friendship by voting against the resolution, Which the Sri Lankan Government was very sensitive about and wanted it defeated.

By a calculus that was made with considerable frequency in the Indian media, the UNHRC vote was an own goal by India, needlessly antagonizing Sri Lanka and pushing it even more closely into the arms of China. Such situations do not augur well for India Sri Lanka relations.

India and the Maldives

The Republic of Maldives is an island nation in the Arabian sea situated south of the Minicoy island of Lakshadweep and Chagos Archipelago. The double chains of islands stand in the Laccadive Sea with the capital Male situated 600 km/370 mi south-west of India and 750 km/470 mi south-west of Sri Lanka.

It"s the smallest nation of Asia in terms of area and population. With an average ground level elevation of 1.5 metres (4 FT 11 in) above sea level, it is the planet"s lowest country. It is also the country with the lowest natural highest point in the world, at 2.4 metres (7 FT 10 in). [17] Future inundation of the Maldives due to rising sea levels is of great concern to its people, motivating the government to pledge becoming a carbon-neutral country by 2019.

The early settlers belonged to South India and people from Sri Lanka. Trade relations also existed between the countries. India enjoyed trouble-free relations with Maldives since its independence till dictaterGayum"s rule lasted. Since his overthrow, Maldives has been in the throes of political uncertainty. India has signed trilateral maritime security agreement with Sri Lanka and Maldives with a purpose of securing the SLOCs and to pool a data resource by building a partnership in the Arabian Sea part of the Indian Ocean region. Such a partnership can be very useful in tackling the menace of piracy, drug trafficking and terrorism on the high seas. To this end, a trilateral maritime agreement was signed between India, Sri Lanka and the Maldives in Sri Lankan capital Colombo on 9th July 2013.

India has been aiming to step up cooperation on security issues in general and on maritime security in particular with her island neighbours in the IOR and this agreement was part of this strategy. "On the one hand the agenda was to create a closer functional operative on maritime security and to assist in capacity build-up; at the unstated level it also sought to partially allay concerns about the growing strategic influence of the Chinese and Pakistanis on these islands."

The notion of cooperative security is very important that is based largely on regional systems and lays emphasis on cooperative approaches and the usage of modern technology. "This is significant in the vast oceanic spaces that are relatively unpoliced, giving rise to serious maritime challenges in the IOR. However, this approach calls for reorganization and prioritization of national objectives and harmonization of policies across territorial boundaries. Cooperation among regional organizations is therefore a force multiplier and is often most desirable."

India-Bangladesh Maritime boundary Settlement

Bangladesh won her independence from Pakistan in Dec 1971 after months of bloody struggle mainly due to the military support provided by India. However, the good neighbourly relations between the two countries came under strain soon after with the overthrow of the civilian regime by the Bangladesh Military. For over 40 years the nations have been engaged in a number of bitter disputes, one of them being related with the delimitation of maritime boundary between the two countries.

The first cession of the sea boundary discussions between India and Bangladesh took place in 1974. These discussion were held at the level of foreign secretaries of the two countries. No progress could be made due to disagreement regarding methods of delimitation. Therefore the talks were upgraded to the level of foreign ministers of India and Bangladesh but remained inconclusive. "It was reported that at the Commonwealth Summit in Jamaica in

May 1975, Bangladesh President Sheikh Mujibur Rahman proposed arbitration to resolve the issue to Prime Minister Indira Gandhi but India rejected it.

Although the sea boundary talks were renewed in 1978, 1982, 2008 (under the caretaker government), and in March 2009 under the Hasina government, it could not be resolved because of the differences over boundary delimitations. When the Hasina government found that the talks had stalled, it had no option but to look out for the involvement of a third party to resolve the dispute. Finally the Hasina government decided to lodge the dispute with the Court of Arbitration under Article 287 (the dispute machinery clause) of UNCLOS. India had ratified the UN Convention in 1995 and Bangladesh in 2001, and are both therefore bound by the provisions of the UNCLOS."

Thus, Bangladesh took the dispute to the UN Permanent Court of Arbitration (PCA) at Hague on 8th October, 2009. Submission of documents and oral hearings of the two countries was concluded in Dec. 2013 and the judgment was officially conveyed to the parties on 7th July, 2014. The judgment was final with no provisioning for appeal. It was a big victory for Bangladesh as according to the judgment, about 76% of the disputed sea territory translating into 19467 SQ. km was awarded to her, leaving 6135 SQ. km to India out of a total of 25602 SQ. km. Out of the 5 arbitrators only Indian arbitrator delivered a dissenting judgment. "India reportedly accepted the judgment by saying that the resolution of the boundary would lead to further good neighborly relations between the two nations and enhanced cooperation."

The judgment also allows a 200-mile Exclusive Economic Zone, continental Shelf beyond the EEZ and open access to sea, thus preventing it from turning into a 'sea-locked' country. This resolution meant a lot to Bangladesh because the 25602 SQ. km of disputed sea area in the Bay of Bengal constituted only a small fraction of the long Indian coastline whereas it is 100% for Bangladesh, its entire coastal territory and access to open sea. Now, Bangladesh's maritime boundary has been extended by 118,813 sq. comprising 12 nm of territorial sea and an EEZ extending up to 200 nm into the high seas. In addition, the ruling acknowledged Bangladesh's sovereign rights of undersea resources in the continental shelf extending as far as 345 nm in the high seas, taking Chittagong coast as the base line.

This resolution of the conflict is very significant given the geostrategic importance of greater Indian Ocean Region in general and of the South Asian region in particular. Apart from creating a goodwill between the two neighbors, the agreement would promote multilateral economic and strategic partnerships among the countries of the region. It would also have a positive impact on emerging multilateral forums like BIMSTEC. The resolution of the maritime dispute has also been a big factor for the two neighbors in reaching a historical land boundary settlement and also agreement regarding sharing of the Teesta river water. Indian Prime Minister ShriNarendraModi travelled to Bangladesh for this very treaty in June, 2015. The good neighbourly relations between India and Bangladesh are also expected to stem the tide of anti-India agenda of the radical Islamists in that country thereby reducing the scope of terrorism related activities from the Bangladeshi soil. The PCA award assumes strategic significance against the backdrop of China‟s close ties with Bangladesh and the Asian giant‟s growing interests and activities in the Bay region for which India is worried. Now the settlement of maritime disputes between India and Bangladesh may have a restraining influence on the expansionist designs of China.

The award has great economic significance for a small country like Bangladesh. The dispute has restrained many companies from undertaking hydrocarbon related activities in the Bay thereby denting these economic prospects. The area is rich in these resources and will result in great economic gains for the countries of the region. Bangladeshi government can now invite foreign companies to explore and tap huge reserves of natural gas in its maritime boundary. It has about 28 oil and gas blocks compared to India's 6. Indian companies like ONGC stand a good chance to win lucrative contracts in Bangladesh.

India is also happy with the ruling as it led to a diplomatic breakthrough with the cherished 143eighbour. Among other gains, the award recognized India's right over New Moore Islands and about 6000 SQ km of territory accrued to India. India discovered natural gas reserves in the year 2006 in the creek situated 50 KM south of the mouth of Hariabhanga river within the contested zone. The lingering maritime dispute stood in the way of exploration of hydrocarbons in the Bay region. Several petroleum companies had been reluctant to undertake exploration in the disputed area and a few of them even withdrew after making initial investments. Such as in December, 2013, Australian firm Santos withdrew from two sea-blocks citing security and maritime dispute with Bangladesh.

Now India's policy makers could chalk out a long-term strategy for the economic development of the Bay region. To realise its goals, New Delhi may forge bilateral or multilateral partnerships under the framework of sub-regional grouping like BIMSTEC. "The verdict is also good news for millions of fishermen in both the countries. The amicable settlement has opened up vast sea areas which were not available to them in the last four decades. Moreover, both the countries could enhance cooperation in the conservation of the rich biodiversity of the Sunderbans.

By clearly delineating the maritime boundary between the two nations, the verdict could help boosting coastal and maritime security in the region. Before the award, both India and Bangladesh could not undertake cooperative measures due to the vexed problem. The verdict has now cleared the hurdles of strengthening security in the maritime front. Furthermore, precise demarcation of maritime boundary would assist in preventing the cases of transgression by fishermen of both countries. The PCA award is really a "win-win" situation for both the countries, as described by the Bangladesh foreign minister, if they follow it up with concrete action."

The Prime ministers of India and Bangladesh signed the historical agreement on 6th June 2015 at Dhaka whereby 4000 km2500 mile boundary between the two was agreed upon and also understanding was reached on the fixing the identity of 52 living enclaves along the borders of the two countries more than 4 decades after Indian Prime Minister Indira Gandhi and Bangladeshi President Mujibur Rahman agreed upon it in 1974. However, after the assassination of Mujibur Rahman no agreement could be reached by successive governments. Under the deal, signed in the presence of Prime Minister Narendra Modi and his Bangladeshi counterpart Sheikh Hasina in Dhaka, the two countries will swap 200 tiny enclaves, most of them close to the official border. Their inhabitants have been deprived of public services and living in squalid conditions.

Established by a treaty between two former princely states, the 106 Indian enclaves in Bangladesh and 92 Bangladeshi enclaves in India are islands of foreign territory inside each country. Under the agreement, each country will take over most of the enclaves on its territory and residents will have the right to stay where they are or move to the other side of the border. Thus, the maritime dispute settlement had a positive impact in creating friendly relations between the two nations long connected to each other socially, economically and culturally.

India and Myanmar

Myanmar formerly known as Burma, is one of the closest Neighbour and ally with whom India has largely enjoyed a trouble-free and cordial relationship. A number of insurgent groups in our north-east are operating from Myanmar and there has been increased cooperation between the two countries in dealing with the menace. A recent example is the surgical strike by the Indian forces against the Naga Militants inside the Myanmar territory in retaliation to the killing of 18Indian soldiers on the 4th of June 2015.

Significant improvements in the relations were made since 1993 overcoming tensions related to drug trafficking, suppression of democracy and rule of military Junta. Myanmar shares about 1600 km land boundary with India and is situated south of the states of Mizoram, Manipur, Nagaland and Arunachal Pradesh in northeast India. Myanmar also acts as a buffer between India and China in the north east just as Tibet had been for centuries in the north and north west. According to some security analysts any possible “tibetisation” of Myanmar by China can have serious repercussions for Indian security.

India also shares a tryjunction point with Myanmar and Thailand in the Andaman Sea and a trilateral treaty was signed between the 3 countries India, Myanmar and Thailand on 27th August 1993. India has had long historical relationship with Myanmar since antiquity, cultural exchanges included Buddhism and the Burmese script, which was based off the Indian Grantha script. In particular, Theravada Buddhism has tremendously influenced

Burmese society and culture for millennia, with 90% continuing to follow the religion to this day.

Myanmar/Burma was made a British Indian province and again separated in 1937. India established relations with Myanmar in 1948 after the latter gained freedom from the British rule. For many years relations between the two countries remained strong due to cultural links, flourishing trade and common interest in regional affairs and the presence of a significant Indian community in Burma. India provided significant support when Myanmar struggled with regional insurgencies.

However, the overthrow of the democratic government by the Burmese military led to strains in ties with India along with most of the countries of the world condemning the action of the military. India condemned the suppression of democracy and human rights and Myanmar in turn ordered expulsion of the Burmese Indians from its territory. Myanmar mostly remained isolated with only China continuing to maintain close relations with the military regime of Myanmar. India continued to support pro-democracy movement led by Aung San SuuKyi.

China utilised the situation to its advantage establishing close economic and military relationship with the isolated military regime of Myanmar. A major breakthrough in indo-burmese relations was made in 1987 when Indian PM Rajiv Gandhi undertook a visit to that country. However, in 1988 the military regime used strong repression tactics against the prodemocracy movement which resulted in Burmese refugees influx to India, which again soured relations between the two. India strongly denounced the Bermese action and as a result Myanmar shifted more towards China.

Faced with pressure due to the suppression of the democratic movement the military regime of Myanmar moved to forge a closer military and economic relationship with communist China, which found itself in similar predicament following the Tiananmen massacre in 1989. China supplied arms to Myanmar which increased its military presence on Indo-Bermese border to a considerable extent. There were also reports about Chinese plans for a deep sea naval base for its submarines near the Hangyi Islands in Myanmar and a radar base near the Coco Islands in the Bay of Bengal which is only about 20 KM away from the Andamans. All this heightened India's naval concerns about a possible chinese presence in the Bay of Bengal resulting in security concerns for Andaman and Nicobar islands. Despite many denials by Myanmar and China, reports have been surfacing time and again about the presence of Chinese forces on the Coco Islands. According to a report published in Dainik Bhaskar daily in Feb. 2014, China is building a new runway and other infrastructure in the Cocos Islands.

A brief dispute over Coco Islands in the Andaman sea also caused problems between India and Myanmar in the past. However, after the conclusion of the trilateral treaty regarding the maritime boundary between India, Myanmar and Thailand in 1993, things have taken a positive turn in the mutual relations between the two nations. In recent years trade has increased and a number of Indian companies have started taking advantages of the economic opportunities and great natural resources in Myanmar. While China has long maintained a friendly relation with Myanmar, India's policy has undergone a major shift with the emphasis on building fruitful partnership by means of cooperation in various fields including economic, military and anti-terrorism related activities. The focus has thus shifted from using pressure tactics and forcing isolation to creative engagement.

It's getting increasingly important for India to engage Myanmar in its growing strategic calculus. First of all, India needs her to fight insurgencies in the northeast of its frontiers. Secondly, China has been pursuing the policy of economic, military and strategic engagement ever more aggressively in the Indian Ocean region by forging different types of alliances with countries like Pakistan, Sri Lanka, Bangladesh, Myanmar etc., thereby posing security challenges for India in her neighborhood. Indian would do well to forge strong ties with neighbors specially Myanmar Sri Lanka and Bangladesh with whom India enjoys comparatively better relationships vis-à-vis Pakistan.

India and Thailand

Diplomatic relations between India and Thailand were established in 1947, soon after India gained independence. India's Andaman and Nicobar Islands share a maritime border with Thailand along the Andaman Sea. The end of the Cold War led to a significant enhancement in the substance and pace of bilateral interactions. India's Look East policy from 1993 and Thailand‟s Look West policy since 1996 set the stage for a substantive consolidation of bilateral relations.

India and Thailand have over two millennia old religious, cultural and trade links. Buddhism has been one of the cultural pillars of relationship between the two. Like many other Southeast Asian countries Buddhism travelled to these countries from India through its Maurya and other rulers. An important event in the relations between two countries was the 1986 visit by Indian Prime Minister Shri Rajiv Gandhi to Thailand. During 1990‟s India's „look east‟ policy converged with Thailand's 'look west' policy to bolster cultural, economic, strategic and trade links between the two nations.

Since 2003, the relationship has blossomed to cover security and defence cooperation and negotiations are ongoing to ink a free trade area agreement. Some observers term the last two decades as the golden age of India-Thailand friendship. Both countries need to do more in order to iron out differences in signing FTA which is under Negotiation for last two decades. Delhi and Bangkok need to further strengthen their security and defence cooperation given their geo-strategic compulsions in the Indian Ocean region."

The leaders of the two countries have been paying reciprocal visits at the highest levels including the visits of the prime ministers and the foreign ministers of the two countries.

India and Thailand are located in the extended maritime boundary of each other and share maritime boundaries in the Andaman sea. "This proximity offers immense potential for increased connectivity, particularly between India's north-eastern states and Thailand. New Delhi hopes greater connectivity with ASEAN of its northeaster states would help decrease the development deficit in these states. Similarly, Thailand believes better connectivity could help increase the footprint of its businesses in foreign markets like India with the ASEAN expected to become the ASEAN Economic Community (AEC) by creating a single market in 2015."

India and Thailand have good connectivity in the civil aviation sector operating about 138 flights a week. India sees Thailand as an important bridge between South Asia and the Southeast Asian hinterland. "A trilateral project to construct a highway between India, Myanmar and Thailand is in the works and is likely to be completed by 2016." An India-Thailand Joint Working Group on Connectivity and Infrastructure had its first meeting in September 2012 to explore possibilities of cooperation with third countries, including cooperation on Dawei deep sea port and a special economic zone in Dawei, as also projects in Lao and Cambodia. Thailand is making efforts to develop ports on its western seashore in the Andaman Sea. A Thai private company is to develop Dawei port in Myanmar as a gateway to India, West Asia and Europe. It has sought Indian help to assist Myanmar to work towards better connectivity from the Indian border to Dawei port.

Bangkok and New Delhi have also made good progress in strengthening defence, security and juridical cooperation. The two have signed agreements on mutual legal assistance; transfer of sentenced persons, and close to signing an extradition treaty. The two claim good cooperation between their law enforcement agencies, particularly in counterterrorism and transnational crimes. An extradition treaty was finally signed between the two countries on 30th May 2013. It was signed by the foreign ministers of the two countries in the presence of the respective prime ministers. The treaty provides the legal framework for seeking extradition of fugitive offenders, including those involved in terrorism, transnational crimes and economic offences among others. This was a major Philip to the security relationship between the two countries.

"In defence, New Delhi and Bangkok have a broad-based engagement which comprises regular joint exercises/joint maritime patrols near the international maritime boundary to counter terrorism, piracy and smuggling; training of officers at each-others' Armed Forces Training institutions and exchange of visits at various levels." There was also a great leap in the trade which crossed $9 billion in 2012-13.

Thus, relations in various fields including trade and security cooperation have been strengthening between the two nations. Thailand is an important link In Indian strategic calculus forging maritime partnerships in the Indian Ocean region building closer ties with her neighbours. India and Thailand are also part of the BIMSTEC initiative.

India and Indonesia

India and Indonesia have had a socio Cultural and trade relationship that stretches back to more than 2000 years. India shares its maritime borders with her in the Andaman and Nicobar Islands along the Andaman Sea. Cordial relationship had existed between the two, with the leaders of the two countries cooperating with one another during their respective freedom struggle working towards the establishment of a free and independent Afro-Asian community. First president of Indonesia Sukarno called upon the peoples of the two countries to work towards strengthening the relationship that had existed for so long.

There is little doubt that seas have played an important role in this relationship. The Indian influence is evident in a great measure on the Indonesian culture. All the major religions of Indonesia Islamism, Hinduism and Buddhism travelled from India to Indonesia. India along with Egypt was one of the first countries to recognize Indonesian independence in 1949. The 3 were also among the foremost founders of the Non-aligned Movement (NAM) in 1961 preceded by the conference of Afro Asian community through the Bandung conference in 1955.

However, the relations between India and Indonesia began to worsen as Sukarno increasingly started shifting his weight towards communist countries specially China. Indonesia offered to help Pakistan during 1965 war by proposing to seize Andaman and Nicobar Islands so as to distract Indian attention from the Kashmir front by mobilising her submarines to help Pakistan. This news obviously disturbed India and increased her distrust of her maritime neighbour. A maritime boundary agreement between the two countries was signed on 14th January 1977.

Indonesia is a major ASEAN country and India’s relations with her have been growing after some problems like the one mentioned above. There was great enthusiasm in the beginning with Sukarno being friendly to India. But later with the establishment of an authoritarian regime under Suharto, relations between the two nations somewhat soured. But Indonesia is an important part of the ASEAN and India’s ties with ASEAN have been ever growing during last 10-15 years. At the same time with the victory of the democratic forces in Indonesia with the fall of Suharto in 1998, India’s relations with her are becoming ever stronger. Since the adoption of India’s ‘Look East Policy’ in 1991, there has been a rapid development of bilateral relations in political, security, defence, commercial and cultural fields.

The multi-faceted relationship got an added fillip with the signing of the „Joint Declaration on Establishing a Strategic Partnership‟ in 2005 during the State Visit of President Susilo Bambang Yudhoyono. The fact that more than 8 high-level visits have taken place since 2000, is an ample fact of the growing engagement between India and Indonesia in diverse fields including security and defence.

President Yudhoyono's visit to India in January 2011 as the Chief Guest on the occasion of India's Republic Day further deepened the strategic partnership. During the visit, 16 Inter-Governmental Agreements were signed including an Extradition Treaty, Mutual Legal Assistance Treaty, a MoU on Exchange of Financial Intelligence related to Money Laundering and Financing Terrorism.

Indonesia has emerged to become the second largest trading partner of India in the ASEAN region. India-Indonesia bilateral trade has increased from US$ 6.9 billion in 2007-08 to US$ 20.10 billion in 2012-13. India is the largest buyer of crude palm oil from Indonesia and imports coal, minerals, rubber, pulp and paper and hydrocarbons reserves. India exports refined petroleum products, maize, commercial vehicles, telecommunication equipment, oil seeds, animal feed, cotton, steel products and plastics to Indonesia. Furthermore, there is considerable scope and potential for expanding trade between the two countries in the areas of automotive components, automobiles, engineering products, IT, pharmaceuticals, biotechnology and healthcare sectors.

Both India and Indonesia are large democracies that emphasise pluralism. India is the largest democracy while Indonesia is the 3rd largest. The two countries are also home to the largest (Indonesia) and third largest (India) number of Muslims in the world. Both are members of important multilateral forums like the G-20 and East Asia Summit.

India and Indonesia are maritime neighbours. Given that Indonesia rules the major waterways between the Indian and Pacific Oceans—- waters through which more than half of all international maritime trade passes — the strategic significance of the relationship looms large. In fact India's 2009 maritime strategy document listed the Sunda and Lombok straits, both under Indonesian control, as major choke points with complicating potential for Indian interests. Cooperation with Indonesia is a prerequisite to enable the Indian Navy's operations in these waters. Joint coastal monitoring has been ongoing since 2010, but there is a need to step up this cooperation, including joint maritime exercises and training.

The relationship with Indonesia has also assumed greater importance in the context of China's rise and expanding regional reach. Both India and Indonesia have the potential to act as balancing powers and can aid each other in their mutual goals of engaging China to benefit from its economic might, while ensuring that Beijing's power is not untrammelled. Further there is ever increasing convergence of strategic thought process between the two specially in the field of maritime security.

The Ind-Indo Corpat is a biannual patrolling exercise between India and Indonesia, held in April and October every year in the Strait of Malacca. It involves a "patrol of the seas against piracy, armed robbery, poaching, illegal immigration, drug trafficking, and human trafficking". During India's MILAN2014 international naval exercises held in Feb 2014, Indonesia was also invited and its Naval commander of the submarine fleet expressed the desire to upgrade Corpat to the level of full scale joint naval exercises. Indonesia has showed interest in strengthening defence ties with India aiming cooperation in the Indian Ocean region.

Strategic partnership has thrived between India and Indonesia since 2005 and the two have resolved to work in the field of counter terrorism and maritime security. However, Indonesia also enjoys close strategic relationship with China, which is eager to expand its footprint in the Indian Ocean region. China is Indonesia's largest trading partner and there are sections in the Indonesian political dispensation, which are eager to expand this partnership. So far Indonesia has been able to balance her relationship with India and China, but it may pose future challenges to her strategic choices.

"As would be apparent, maritime cooperation between the two countries, even though modest, is the centerpiece of their bilateral relations. Recent developments in Indonesia's maritime strategy pose a challenge. President Jokowi has declared that Indonesia must become a "maritime fulcrum" and a "power between the two oceans". As a maritime country, he adds, "Indonesia should assert itself as the World Maritime Axis". It is the first time that an Indonesian leader has enunciated a maritime doctrine with such clarity, and this is to be welcomed.

In theory, this should create expanded opportunities for India to promote maritime cooperation with Indonesia and offer to play a part in helping build the latter's maritime capabilities. However, it is China that has emerged as the likely partner, subsuming Indonesian ambitions into its Maritime Silk Road (MSR) project."

But there are reasons for Indonesia and India to build a credible partnership in the maritime domain. "China's growing assertiveness in the region and, especially, in the South China Sea, the increasing importance of ASEAN, and the mounting challenges within the Indian Ocean Region have seen the two countries move closer to one another in recent times. Indonesia, by virtue of its size and influence in South-East Asia, is likely to become an important element of New Delhi's future foreign policy. Similarly, India's emergence as a possible great power and its strategic location at the heart of the Indian Ocean makes it an ideal partner for Jakarta, particularly as it aims to play a key role in developing a peaceful regional order. This will see the relationship enhanced in the twenty-first century, especially in the areas of diplomacy, security, defence, trade and people-to-people ties."

INDIA'S POSITION IN THE INDO-PACIFIC OCEAN

Each time a political administration coins a new word or diplomatic jargon in its official documents, the geopolitical strategic community excitedly searches to understand the meaning, causes, and implications. The past few years have seen the term Indo-Pacific gain new credence, originating in its use by several governments around the world and gaining momentum via the current US administration's embrace of the phrase. Although the term was introduced more than a decade ago, shifting geopolitical realities have given enough reasons for countries in the region to deliberate on it and formulate their foreign policies accordingly.

Interestingly, the term has brought attention to the maritime domain of Asia and related security perceptions. Since the end of the Second World War, Asian security concerns were linked to the land-based territorial construct and scant attention was paid to the security and foreign policy of the high seas or maritime waters. However, the burgeoning maritime trade among the regional and international countries over the past decades and the lack of an overarching institutional architecture for maritime governance at the regional level, exacerbated by an increase in traditional and nontraditional security threats in the high seas, provided compelling reasons for the littorals of the Indian Ocean and Pacific Ocean to cooperate.

India has remained a primary actor in the governance of the Indian Ocean, but it cannot work in isolation. Rather it needs cooperation with other important Indian Ocean littorals, many of whom also happen to share maritime domains with the Pacific, thereby connecting the economies of the two oceans. India's approach toward the Indo-Pacific, therefore, can be best seen working in tandem with the maritime policy considerations of other Indo-Pacific littorals. Hence, one must examine the defense and foreign policy white papers of the four large democracies— Australia, Japan, and the US, along with India—to understand their conception of the Indo-Pacific as a region and the threats facing that region and their interests.

A clearer picture of other countries' perceptions is likely to provide some answers as to how India intends to work with them for a regional-level maritime governance architecture. Additionally, this knowledge can be helpful for stakeholder countries in the Indo-Pacific in conceptualizing the term in ways that converge their interests and address the challenges that the region perceives in a collective manner.

The Indo-Pacific as a Geopolitical Construct

A country's foreign policy approach is based upon the geopolitical calculations of its threat perceptions, locating challenges and looking for opportunities. A white paper can be a definitive yet confounding political document to trace these elements—not only for domestic socio-military consumption but also for researchers, policy analysts, and decision makers from the rest of the world. These publications generate considerable interest both domestically and globally. Hence, allies and adversarial states read these documents closely, seeking to understand a country's threat perceptions and the tools they employ to deal with them. Additionally, white papers help other countries revise and refine their own foreign policy approaches accordingly toward the country publishing the document. In this context, a particular focus on any subject area is bound to raise the interest of the rest of the geopolitical community.

The term Indo-Pacific has recently found its place in white papers of four of the world's largest democracies: Australia, Japan, India, and the United States. This illustrates the importance of the region in the foreign policy pronouncements of these four countries in particular and for Asia in general. In 2017, the white papers of all these countries repeatedly mentioned the term Indo-Pacific and stressed the need to proactively secure this region for the peace, growth, and stability of Asia.

Therefore, it becomes pertinent to understand how each of these countries has defined the Indo-Pacific construct in their official documents. The "approach toward defining" a particular region can help provide clarity regarding each country's recognition of threat perceptions and opportunities.

Japan

First in line to initiate the use of the term Indo-Pacific in its official documents was Japan. As early as April 2017, Japan's Ministry of Foreign Affairs (MOFA) released its white paper in which it clearly promoted a "Free and Open Indo-Pacific Strategy" as a part of its foreign policy aimed at proactively "securing the peace, stability and prosperity of the international community." Promoting interconnectivity in the Indo-Pacific is one of the pillars in Japan's vision of "developing an environment for international peace, stability and sharing universal values."

This white paper recognizes the growing confidence of the Asian countries and their keenness to assume leadership and responsible roles in the several domains based on the rule of law, democracy, and market economy within East, South, and Southeast Asian countries. On the other hand, it views Africa as demographically vibrant and rich in natural resources, which makes that continent full of potential and a promising market. Japan sees a role in connecting these two continents via infrastructure development projects and improving business environments through necessary technological and similar investments that can lead to growth and prosperity throughout the region as a whole.

The Japanese construct of the Indo-Pacific is based on combining not just the two large oceans but also the two continents of Asia and Africa. Developing interconnectivity and infrastructure projects among the developing economies of these two large landmasses seems to form the heart of the Japanese concept of a Free and Open Indo-Pacific (FOIP). For the reasons of free flow of goods, capital, and knowledge in addition to human exchange, a robust and well-understood normative and institutional framework is needed as the firm ground upon which the structure can be constructed. The rules of law and complementary understanding of the global commons can be key deciding factors when enacting any formal or even informal working equation among so many countries.

For Japanese prime minister Shinzo Abe and his administration, freedom of navigation, as enshrined in United Nations Convention on the Law of the Seas, forms a central pillar in the FOIP, valuing "freedom, the rule of law, and the market economy, free from force or coercion, and making [Japan] prosperous." In other words, Japan's reflection of the Indo-Pacific is an external manifestation of its domestic vision, which is development oriented based upon respect for norms and rules. This aspiration was also reflected in its 2017 white paper clearly defining the Indo-Pacific as a key area for development.

Australia

With considerable strategic and commercial interests in the region, Australia regards itself as an Indian Ocean nation and has been involved in the Indian Ocean Rim Association regional institution since 1997 to foster economic cooperation. The country started its approach toward the Indo-Pacific as an extended neighborhood in its 2009 defense white paper. Titled Defending Australia in the Asia-Pacific Century: Force 2030, the document clearly identified that a stable and secure Southeast Asia is a vital strategic interest for Australia. The paper was visionary in predicting that the Indian Ocean and Pacific Ocean regions will converge as a crucial maritime region and global sea route for energy supplies and therefore see several major naval powers competing for strategic advantage in the region by the year 2030.

Apart from securing its immediate vicinity, the Australian defense white paper 2009 maintained the importance of its extended neighborhood. It highlighted the Asia-Pacific as the geopolitical construct that stretched from the eastern Indian Ocean, as a part of its larger strategic interests. For maintaining a global security order, the country drew its strength from the centrality of the United Nations charter's established "rules-based order." To secure its strategic interests, Australian defense policy is transparent about acting independently and being self-reliant in safeguarding its unique strategic interests. At the same time, Australia promotes a willingness to lead military coalitions and make tailored contributions to other military coalitions with countries having shared strategic interests in the region.

The Australian Defense White Paper 2013 became nuanced in its perception of the global changes and noted that "China's continued rise as a global power, the increasing economic and strategic weight of East Asia and the emergence over time of India as a global power are key trends influencing the Indian Ocean's development as an area of increasing strategic significance. In aggregate, these trends are shaping the emergence of the Indo-Pacific as a single strategic arc." Ensuring the safety and security of sea lanes in the Indo-Pacific became a vital strategic interest for Australian national defense and maritime policy. The document called for strengthening the regional security architecture by including countries like China, India, Japan, the Republic of Korea, and the United States as a community to discuss and cooperate on the political, economic, and security issues in the Indo-Pacific region.

The term Indo-Pacific was further shaped and concretized in the 2016 Defense White Paper and 2017 Foreign Policy White Paper, the former of which stated that “a stable rules-based regional order is critical to ensuring Australia’s access to an open, free and secure trading system and minimizing the risk of coercion and instability that would directly affect Australia’s interests,” representing Australia’s crucial strategic interests in the Indo-Pacific context. Australia’s maritime-based economy requires unfettered access to trading routes, secure communications, and transport to support its economic development in the long run. Hence, the focus of Australian foreign and defense policy is to build a “stable and prosperous” Indo-Pacific region.

India

The importance of the Indian Ocean and its evolution to Indo-Pacific as a strategy needs a more detailed focus in this study. The Indian Ocean derives its name not from the country but the entire Indian subcontinent, which comprises several neighboring littoral and territorial countries. The Indian Ocean surrounds India on three sides, making the country as maritime focused as the Himalayas and the country’s mass (2,973,193 sq. km, with more than 7,000 km of coastline, including its island territories in the Bay of Bengal and Arabian Sea) make it land-centric. The Indian Ocean connects India to near and extended neighborhoods in both eastern and western parts of Asia and to Africa and Oceania.

There is a significant body of respectable literature that has established the Indian subcontinent’s maritime trade back to third millennium BCE, beginning with the Indus Valley Civilization. Indian maritime heritage flourished until the seventeenth century, and Indian ports were visited by ships and traders from several countries from the Arab world and Europe, including the Portuguese, Dutch, and British, seeking to trade for Indian spices. However, in modern history, since the birth of India as an independent nation in 1947, the first few decades of maritime trade, commerce, and exchange remained limited due to the shortcomings of the country’s infrastructure and institutions. It was in the 1990s that the Indian government enunciated its approach toward its neighbors across the Indian Ocean under the policy of Look East—unveiled by Prime Minister P. V. Narasimha Rao in Singapore in 1992.

The new policy started as a trade and economy-based relationship between India and its ASEAN neighbors. However, for years there remained a glaring lack in application of this policy toward interconnectivity and infrastructure projects to integrate India and its eastern neighbors for the prospects of trade, market, and exchange of information. Realizing this shortcoming, Prime Minister Narendra Modi transformed the existing Look East policy into the more proactive “Act East” policy in 2015. The objective of Act East is to promote economic cooperation, forge cultural ties, and develop strategic relationships among ASEAN countries.

The policy, envisaged both at bilateral and regional levels, includes steady efforts toward developing and strengthening the interconnectivity of northeast India with the ASEAN region through trade, culture, interpersonal contacts, and physical infrastructure projects. In addition to land-based interconnectivity projects, the maritime component of the Look East policy has gradually expanded, and so has the realization of the importance of the security and strategic dimensions of maritime-related trade.

The current Indian leadership understands the growing strategic importance of the Indian Ocean not only for India but also for the entire region. The vast Indian Ocean region is composed of more than 40 states and represents nearly 40 percent of the world's population. One-half of world's container shipment, one-third of the bulk cargo traffic, and two-thirds of all oil shipment pass through Indian Ocean routes, though three-fourths of this traffic is destined for delivery in other regions of the world.

For India, 90 percent of its trade volume and 90 percent of its oil imports rely on Indian Ocean transport. India's current approach to the maritime domain can be described as two layered—regional and extra-regional. The recognition of the Indian Ocean as a common home to its neighboring states, its desire for regional peace, growth, and stability, and the need to protect itself from any threats led to Prime Minister Modi's commencement of his vision of "Security and Growth for All in the Region" (SAGAR) during his visit to Seychelles in 2015. Former Indian Foreign Secretary Subrahmanyam Jaishankar defines SAGAR as "doctrine that succinctly defines India's vision to collaborate with the region."

From the land-based conception of the Asia-Pacific, India's extended neighborhood now coherently encompasses the wider, maritime-based conception of the Indo-Pacific. Therefore, the second layer also considers the interconnectivity of the Indian Ocean and the Pacific Ocean. About 61 percent of the world's petroleum and other petrochemicals moved along maritime routes in 2015. The Strait of Hormuz and the Strait of Malacca are the world's most important strategic chokepoints by volume of oil transit, and the latter lies at the eastern end of the Indian Ocean.

In fact, the Malacca Strait is the primary chokepoint in East Asia, being just 2.7 km (1.7 miles) wide at its narrowest. It is an increasingly important waterway, with an estimated 16 million barrels per day (b/d) passing through in 2016, compared with 14.5 million b/d in 2011 (fig. 1-1). Crude oil generally comprises 85–90 percent of total oil flows per year, and petroleum products account for the remainder. Therefore, safety of these maritime trade routes is a matter of concern for all regional stakeholders, including India. This realization has now broadened India's conceptual understanding of the strategic domain to include Indo-Pacific economies from the previously land-based conception of the Asia Pacific. In

November 2017, a secretarial-level consultation between the officials of the Indian Ministry of External Affairs (MEA) and their counterparts from Australia, Japan and the United States focused on cooperation to ensure a free and open Indo-Pacific region for all, marking the first official diplomatic step toward realizing India's Indo-Pacific strategy.

Additionally, recent press releases from the MEA have stressed "India's centrality in the Indo-Pacific along with Japan." Therefore, for India, the Indo-Pacific is crucial for the security of trade and development within the Indian Ocean and for maritime connectivity to the Pacific economies as part of its Act East Policy.

United States

The United States has been long engaged with the Asian region as a whole. It has remained diplomatically, politically, economically, and, most importantly, militarily involved in West Asia (the Middle East in American diplomatic parlance), East Asia, and South Asia since the mid-twentieth century as a part of its Asia-Pacific strategy. Pres. Barack Obama brought a renewed focus to South and East Asia after America's long engagements with Russia and West Asia. This shift was widely recognized as a "Pivot to Asia." However, under Pres. Donald Trump, the US administration has focused even deeper on the maritime concept of the region, aligning its policies with the Indo-Pacific construct.

The National Security Strategy 2017 and National Defense Strategy 2018 documents—released in December and January—are the two white papers that used the term Indo-Pacific for the first time in American policy. Both documents repeatedly used the term and even placed it before other regions such as Europe and the Middle East, highlighting the salience of the region strategically.

However, the drivers of American strategic policy to shift toward the region as mentioned in the white papers are different from those of the other three countries previously discussed. The documents highlighted the rise of China and the perception of Russia as a threat to the region—labeling these powers as the "two revisionist powers"—reflecting the drivers for American engagement in the Indo-Pacific region. Since then, Secretary of Defense James Mattis and former US Secretary of State Rex Tillerson have used the term Indo-Pacific in their speeches.

This has been a departure from former President Obama's approach to the region, delineated a "Rebalance to Asia and the Pacific" since 2011 and focusing exclusively on the maritime threat of China's belligerent approach in the South China Sea (SCS), East China Sea, and Indian Ocean over the last several years. The Obama administration had engaged with the region through several institutional architectures such as ASEAN and the East Asia Summit and envisioned partnerships and alliances through the Trans-Pacific Partnership (TPP)—the latter of which was quickly scrapped by the Trump administration—as well as enhancement of defense posturing in the region.

The American strategic shift toward the Indo-Pacific region could be gauged by the fact that the US Pacific Command (USPACOM) was renamed as US Indo-Pacific Command (US INDOPACOM) in May 2018. However, it has been argued elsewhere that President Trump's approach toward the Indo-Pacific in the recent documents is inclined toward putting "America First" in domestic as well as global affairs rather than having a vision or a well-rounded foreign policy consideration for the Indo-Pacific.

The Trump administration, though it withdrew from the TPP, continues to view India as a major defense partner. However, the administration's policy pronouncements indicate a desire to form military and economic partnerships with Southeast Asian countries on a bilateral level. The American conceptualization of the Indo-Pacific construct still needs more deliberation to be seen as more than just a theater of conflict and competition—something that recent American documents and statements seem to convey. US policy toward the Indo-Pacific at the current stage is fragmented at best in terms of areas of engagement within the region and requires more collaborative work with regional stakeholders to develop a comprehensive security framework in the region.

Nonetheless, there are certain caveats one needs to bear in mind while considering the white papers. The objective of a defense or foreign white paper is to substantially define or redefine national strategy, embracing foreign policy and security objectives. Additionally, it explicates tools for foreign security and domestic security, through military and civilian means. It responds to risks emanating from states or nonstate actors; active, deliberate threats; and security implications of major disasters and catastrophes of a non-intentional nature. However, these official documents are to be read beyond their objectivity and require careful approach to not be taken at their face value. Countries can be expected to declare their security objectives without explicitly mentioning their threat perceptions or their strategy to deal with them.

Therefore, too much reading into the defense and foreign policy white papers can be misleading. Additionally, the fact that several countries, such as India, do not even publish defense white papers cannot be construed as a lack of any tools and strategies for ensuring their national security. In other words, white papers are a crucial political document of a country; however, it is not necessary that every political leadership produce one. Absence of one does not necessarily impede a country's capability to join regional or supra-regional regimes or mechanisms to ensure its peace and security.

Apart from white papers, official statements from the crucial government ministries and departments provide an insight into the government's stand on defense- and security-related issues. This paper too has based its conceptual understanding of the Indo-Pacific as mentioned in the various official documents and statements for the purpose of debating and postulating the future of the Indo-Pacific region and construct.

Evolution from Asia-Pacific to Indo-Pacific

In this section, the paper outlines persuasions that likely contributed to the aforementioned shifts toward the Indo-Pacific construct. Chinese belligerence in the South China Sea; the current range of North Korea's nuclear and missile program, encompassing several Indo-Pacific states; and China's Belt and Road Initiative (BRI)—all of which rely heavily upon the maritime construct of the region and impact the peace, growth, and stability of the overall region. Hence, besides the focus on territorial security in Asia, there is a renewed focus on securing the seas and oceans from impending threats and unilateral aggressions.

China's Aggressive Maritime Posture

The South China Sea, incorporating an area from the Karimata and Malacca Straits to the Strait of Taiwan, presents a peculiar challenge that the world is finding extremely difficult to overcome. It is among the world's most important maritime trade routes and is currently under dispute due to China's unilateral and excessive claims in the region. The SCS connects the Indian Ocean to the Pacific Ocean via the narrow straits—Malacca, Lombok, and Sunda—all lying to the west of it. The region is also important for the maritime trade flow and its abundant resources. Most the economies to the east of the SCS—like China, Japan, and Korea—are dependent upon the oil that comes from West Asia and Africa.

As discussed earlier, crude oil forms the largest part of the maritime trade passing through the Indo-Pacific, and the SCS route forms a crucial sea lane of communication (SLOC). The oil tankers and ships reaching East Asia travel the shortest route through these three straits. Overall, in 2016, maritime trade worth US $3.4 trillion passed through the waters of the SCS, making it one of the most significant maritime trade routes in the world. China has been legally claiming the landforms as well as the waters of the SCS on the basis of historic maps since 1951.

The maritime region lying to the south of Hainan extends to 3.5 million km2 and has been demarcated by Chinese authorities under U-shaped dashed lines to represent its claims, known as Nine-Dash Line (NDL). China has been aggressively countering rival claims by Vietnam and the Philippines on various occasions within this maritime region since the 1970s. The SCS region is surrounded by five countries in addition to China and Taiwan: Brunei, Indonesia, Malaysia, the Philippines, and Vietnam. All the countries claim overlapping exclusive economic zones (EEZ) and rights within the region. However, by claiming the entire region and the resources therein, China has unilaterally impinged the maritime rights of all the other SCS littorals. Since the 1970s, China and other littoral states have disputed over the landforms in the region that fall into their claimed jurisdictions. The most important ones are the Spratly and Paracel groups of islands that lie beyond China's 200 nautical EEZ—some parts fall into the maritime jurisdictions of Malaysia, Vietnam, and the Philippines.

However, the superior economic power and military strength that China possesses in comparison to these other states have afforded it the ability to project its power over several of the landforms since the 1970s. Malaysia, Vietnam, Taiwan, and the Philippines continue to hold several of the other landforms in the Spratly and Paracel groups. The Chinese historic rights over the NDL were "invalidated" in a legal battle between Beijing and Manila over the excessive claims at the Permanent Court of Arbitration in a landmark verdict in July 2016. However, recent reports and satellite images confirm that over the past few years China has constructed artificial islands and dual-use military establishments such as runways and infrastructure in the disputed areas. Beijing has been extensively demonstrating its growing and modernized military and naval fleet while hampering the use of open seas and overflight rights in the SCS by other countries. Such belligerent actions threaten the peace and security of the region in general.

North Korea's Nuclear and Missile Program

Kim Jong-un's authoritarian and autocratic regime in North Korea has used nuclear weapons and long-range missile systems as tools for blackmailing and negotiating with the United States rather than for conventional deterrence. The country has conducted more than 150 missile and nuclear tests since 1984—over half of these tests since 2011 when Kim took power. While his predecessors Kim Il-sung and Kim Jong-il focused on the testing of short- (up to 1,000 km) and mediumrange missiles (1,000–3,000 km), Kim Jong-un aimed his attention at perfecting the intermediate-range missile (3,000–5,000 km) and intercontinental missiles (greater than 5,500 km) that cover the entire Indo-Pacific region, touching the shores of Australia and all of South and Southeast Asia and reaching as far as Oman in the western Indian Ocean.

The totalitarian North Korean regime and its destabilizing behavior have created a sense of insecurity among its neighbors. The nuclear and missile tests have been a matter of concern since 2006. Though the success of earlier tests were contested, the 2016 tests indicated the country had attempted a thermonuclear or hydrogen bomb test yield estimated anywhere between 10–20 kilotons. By comparison, the Hiroshima bomb explosion in August 1945 yielded 15 kilotons. There are unconfirmed reports that Pyongyang is on its way to miniaturizing its nuclear weapons, which could then be mounted on the long-range missiles with the capability to reach Japan and Western parts of the United States—putting the entire Indo-Pacific region under constant nuclear threat.

The danger of nuclear weapons under an authoritarian ruler has contributed to regional insecurity. The United States has been a forerunner in ensuring global nuclear nonproliferation and arms race reduction and, therefore, views as imperative remaining engaged with the North Korean regime. The United States and its allies, notably Japan and Australia, are demanding North Korean submission to a nonproliferation regime as a precondition for any negotiation, and China's and Russia's calls for freeze on further North

Korean tests are supported by other states such as France, Germany, Japan, South Korea, and the United States. The larger geopolitical implications of North Korean nuclear weapons have brought together several regional and extra-regional countries to negotiate with Pyongyang's leadership.

Chinese Belt and Road Initiative

There have been many scholarly debates regarding the drivers and the larger geopolitical implications of Chinese president Xi Jinping's Belt and Road Initiative (BRI). China is aiming to stimulate a new approach to economic globalization— one in which Beijing plays a pivotal role in shaping the norms and institution building. First proposed by Xi in 2013, BRI is a much-touted \$1.3 trillion connectivity and infrastructure development project encompassing more than 60 countries in Eurasia and East Africa. Beijing promotes BRI as a development vehicle for the hardware of trade and investment. Additionally, it is also the foundation on which China views its role in future global leadership. The BRI has two primary components: the overland Silk Road Economic Belt (SREB) and the seabased twenty-first-century Maritime Silk Road (MSR)—thus, "belt and road."

The MSR is focused on developing key seaports that connect to land-based transportation routes across countries. The maritime trade route envisioned in this initiative starts from the South China Sea, connecting westward to the Indian Ocean and finally reaching Europe through the Red Sea and Mediterranean Sea. The success of the BRI and Chinese economy is dependent upon the SLOCs in this region. China has been systematically modernizing its army, airpower, and naval forces for several years.

The importance of SLOCs as envisioned in the BRI, has, therefore, incentivized China to build up its military and naval forces to protect its ships. However, the nature of forces being utilized by Beijing has become a matter of concern for the other regional and extra-regional countries involved in the region. Deployment of aircraft carriers, amphibious attack ships, submarines, and related craft points toward an offensive, warlike Chinese psyche rather than any intention to simply protect their maritime routes. Moreover, Chinese investment in building dual-use ports and airfields in Pakistan, Africa, and Sri Lanka and on the South China Sea islands raise questions about Beijing's objectives—in fact presenting China as a regional security threat.

These activities have reverberating impact on other countries that are trying to counter Chinese belligerence through internal (buying or building arms and strengthening militaries) or external (aligning with other powers) balancing, thereby making the region precarious. China is providing loans through its Asian Infrastructure Investment Bank (AIIB) to countries for the development of projects under the BRI. However, there are strong concerns about such "debt diplomacy," under which the recipient nations might have put collaterals against the loans gained from China.

For example, China's leasing of Sri Lanka's Hambantota port for 99 years against the unpaid $3.1 billion loan at a 6.3 percent interest rate is one such example. This is a deviation from the non-collateralized developmental funds given by the World Bank or International Monetary Fund. A recent 2018 study by the Washington-based Center for Global Development claimed that 23 of the 68 potential borrower countries under the BRI were already at a "quite high" risk of debt distress.

The threat of economic insecurity related to such a massive and interconnected project are intimidating. As China moves toward globalization and institution building following a blueprint that deviates from the Western-led order—maybe "with Chinese characteristics"—the norm and rule making under the BRI still remains a big question mark. The current developments in Asia demonstrate threat perceptions in the maritime domain. While the oceans serve the positive role of interconnecting countries economically, diplomatically, and culturally, they also serve to link the threats found in one area to the entire region. Therefore, none of the countries in the Indo-Pacific can formulate its maritime policies in isolation by excluding these common threat perceptions or being selective of the ones that affect it more than others. The next section is an overview of how the stakeholders are currently cooperating to address the concerns that affect the Indo-Pacific region.

India's Approach in the Indo-Pacific

India's geopolitical location, its capability and ambitions, and the various threat perceptions present in the Indo-Pacific will remain key determinants in shaping the nation's position in the region. India is a large country with a population second in size only to its neighbor, China. India also possesses one of the fastest growing economies in the world. Growing economic ambitions come with more responsibilities and an appetite to play a larger role in the regional geopolitics and security architecture. India, too, is looking forward to its role as a "net security provider" in the Indo-Pacific.

However, New Delhi still lacks clarity on how it can go about taking a leading role in the regional architecture and institutions. Prime Minister Modi has demonstrated his clarity and vision toward India's position and importance in the Indian Ocean. In a speech in February 2016 at the International Fleet Review held at Vishakhapatnam, Andhra Pradesh, Modi stressed India's centrality in the Indian Ocean and the shared opportunities and threats that the Indian Ocean presents to the regional economies.

More than 40 countries have shores on the Indian Ocean, and half of world's container traffic and close to one-third of world's cargo traffic passes through this region. India has 1,200 island territories and a huge EEZ of 2.4 million km2 in the Indian Ocean, establishing the importance of the region for the country—and vice versa. At the same time, the region shares threats of seaborne terror, piracy, natural disasters (like tsunamis and cyclones), and manmade problems such as oil spills and climate change, which continue to put at risk the stability of the maritime domain. The scale and complexity of these challenges toward international maritime stability cannot be the preserve of a single nation.

Hence, to ensure a peaceful and stable maritime environment, Modi explicated his vision of SAGAR, making the Indian Ocean region his foremost policy priority. The policy is conceptually based upon actively pursuing and promoting India's geopolitical, strategic, and economic interests on the seas, in particular the Indian Ocean. India has been involved similarly at the political, institutional level within the Indian Ocean states through the Indian Ocean Rim Association (IORA) since 1997. The organization celebrated its twentieth anniversary in 2017 and has "remained committed to building and expanding understanding and mutually beneficial cooperation through a consensus-based evolutionary and non-intrusive approach in the rapid changing environment faced by the region."

IORA is a dynamic organization of 21 member states and seven dialogue partners within the Indian Ocean. The organization has eight focus areas: maritime safety and security, trade and investment facilitation, fisheries management, disaster risk management, tourism and cultural exchange, blue economy, women's economic development, and academics, science, and technology.

On the other hand, the Indian Ocean Naval Symposium (IONS) forms the functional body, comprising 35 Indian Ocean littoral states that have been grouped into four sub-regions (South Asian, West Asian, East African, and Southeast Asian littorals including Australia). IONS formed in 2008, seeking to provide a regional forum through which the chiefs of navies (or equivalent maritime agency) of all the littoral states of the IORA can increase maritime security cooperation.

Over the past few years, one can observe a lack in attention in India's foreign policy approach focused on issues of immediate bilateral and multilateral importance. This adversely impacted India's relationship with the states at the long-term, strategic level. Now, however, India and the United States have restarted their institutionalized dialogues designed for deepening cooperation in the spheres of defense, technology, and counterterrorism. The two countries have operationalized agreements for allowing greater bilateral interoperability and technology transfer, including the Logistics Exchange Memorandum of Association (LEMOA).

Apart from the United States, the Indian navy regularly carries out naval exercises to increase interoperability in the maritime domain with several countries such as Singapore (SIMBEX), France (VARUNA), Australia (AUSINDEX), Oman (Sea Breeze), Japan (JIMEX), and Myanmar (MILAN and CORPAT). The scope of these exercises has remained limited to the Bay of Bengal and the Andaman Sea. With the above structures in place, it could be safely argued that India has a vision and strategy for the Indian Ocean. However, as India is extending its approach toward the Indo-Pacific as its extended maritime domain, it needs to ponder more deeply the institutional structures required to do so.

Considering the current trajectory of India's involvement in the region through bilateral and multilateral institutions related to several aspects of security (economic, military, political, and so forth), it could be argued that India is approaching the Indo-Pacific with a two-pronged approach—building multilateral alliances for socio-economic and political issues for development and keeping the security issues on a more bilateral level with the other regional powers rather than an overarching institutional proposition within the Indo-Pacific.

One of the key factors driving India toward its Indo-Pacific neighbors was the recognition of a lack of interconnectivity that includes the western region as India's immediate neighborhood in addition to its eastern neighbors. Expanding the area of interest and influence has come to be a foreign policy driver for New Delhi in recent years, and Prime Minister Modi's foreign visits are examples of the fact. There is a growing awareness among Indian leaders regarding the country's poor position in connecting with its neighboring states in terms of infrastructure building and capacity development due to the country's own internal structural problems.

However, India does share old historical and cultural ties with many of its neighbors, which several subsequent Indian leaderships are trying to revive as part of the nation's "Neighbourhood First" policy. India's approach toward Africa can be seen in this context. As a continent, Africa has huge human and resource potentials, but it lacks development and capacity building needed for its growth. Several Asian countries are taking initiatives to address structural issues that is keeping resource-rich African states from peace and prosperity.

Japan has been playing a major "complementary role" by providing developmental assistance to African states. At the same time, to bridge the supplyand-demand gap between the developing countries—like India and those in Africa—and developed Japan, the Asia Africa Growth Corridor (AAGC) has been proposed. AAGC, in its vision document of 2017, has been envisaged as a socioeconomic project to improve infrastructure, connectivity, and related development projects and increase people-to-people interaction between Asia and Africa. The project envisions that it "will have a strong influence on India's constructive role in shaping the global agenda for sustainable economic development and international cooperation based on the principles of solidarity, equity and sharing." In other words, there is a political willingness among nations and mutual acknowledgment of the opportunities presented by having an institutional structure in place.

On the strategic side, however, there is still a lack of any institutional structure in the Indo-Pacific region. The four large democracies of the region—Australia, India, Japan, and the United States—are in talks for renewing their Quadrilateral Security Dialogue, an informal body better known as the Quad, into a formal institutionalized relationship. The primary objective of the Quad is to maintain a rules-based order in the regional maritime security architecture. The first meeting of the Quad took place in May 2007 on the sidelines of the ASEAN Regional Forum meeting in the Philippines, and the second one was held in conjunction with the Shangri-La Dialogue in Singapore in June 2018.

In 2008, the cordial relations between the ruling Australian government and China temporarily led to Canberra quitting the group. Japan, India, and the United States went ahead with the Trilateral Strategic Dialogue, and the trio continued conducting joint naval exercises, known as the Malabar exercises in the Bay of Bengal near India and in the waters near the Okinawan coast of Japan. After the failure of the first iteration of the Quad, a revival occurred in 2017. Changing geopolitics in the region and China's belligerent maritime posture at the regional level and bilaterally with several countries of the neighborhood—including India, Japan, Vietnam, and the Philippines—had heightened the sense of threat perceptions in the intervening decade. Despite seeing China as a threat individually, the defense and security white papers of the four Quad nations do not reflect this perception at a collective level.

Except for the US paper, which repeatedly mentions China as the threat to American interests in the Indo-Pacific, the white papers from the other three members of the Quad have centered their focus on the growth and developmental aspect and maintenance of a rules-based order in the Indo-Pacific region. The lack of a common understanding of the Indo-Pacific region as a theater and the delimitation of its scope form the basis of the fault line for any organizational and operational structure to be developed among the four countries. India shares a long-disputed territorial border with China, and the two nations fought a brief but bloody war in 1962.

China and Japan too have a disputed maritime border in the East China Sea. Similarly, Australia and the United States share their maritime zones with China in the Pacific Ocean. Still, all the members of the Quad conceptualize the Indo-Pacific in their own manner based upon their maritime interests, rights, and threat perceptions, and these disparate conceptions are likely to have implications for any intra-regional legislation required for political and institutional building. The territorial/maritime proximity and economic interdependence with China can be seen as one of the major reasons for these countries to avoid increased hostility in the region.

Complications and a Way Forward

The term Indo-Pacific has gained currency in India since 2006, when the term was used as an academic and strategic concept. The regional geopolitics has come a long way since in defining the threats and opportunities for India and other littorals in the Indo-Pacific region. Japanese prime minister Abe's "Confluence of the Two Seas" speech in 2007 in the Indian parliament brought regional focus to the term by advancing cooperation and development. The United States and Australia, as the other stakeholders in the peace, security, and development in the Indo-Pacific region, joined the ranks recently to initiate a regional-level maritime dialogue. Nonetheless, the term still suffers handicaps from several angles, starting with the conceptualization of the term and further from a lack of finding common grounds to form a supra-regional institution to address security concerns.

That said, there are a few existing institutional mechanisms that can function as a platform for dialogue and deliberation among the regional stakeholders, reducing the need for establishing new institutions for maritime security in the IndoPacific. These include the East Asia Summit (EAS), the ASEAN Regional Forum (ARF), the ASEAN Defence Ministers Meeting Plus (ADMM Plus), and the IORA)—all of which deal with security issues within the region. These ASEAN sister organizations have seen some successful participation over the past years, with several high-ranking political and military officials from the member and observer countries attending each year.

However, the same cannot be said of the outcomes of such meetings, as the joint communiques or statements produced after these summits have reflected the inability to establish common grounds in terms of threat perceptions. Still, it brings the focus back to the centrality of ASEAN countries as the pillar for the establishment of an Asian security architecture. ASEAN countries have shown their willingness to develop an open and inclusive maritime security architecture but have shied away from any strategic-level, Quad-like arrangements. Just like several other neighbors, many ASEAN countries have complicated relations with China. On the one hand, there are disputed maritime boundary issues that some of these countries face individually with China, and on the other, they are dependent upon China economically—even more so now, as the BRI offers attractive land and maritime infrastructure and connectivity development opportunities to Southeast Asia.

ASEAN countries see these development-based projects as a boost to their economies. Additionally, land-oriented ASEAN countries such as Laos, Cambodia, Myanmar, and others share better bilateral relations with China than the maritime counterparts, which has reflected in their seeming inability to come up with a collective position in ASEAN with regard to China. The latter, too, plays an upper hand while negotiating with ASEAN at the multilateral level as seen in discussing maritime issues.

The Declaration on the Code of the Conduct on South China Sea (DoC 2002) that is yet to be concretized into a binding code of conduct, remains a point in case. China's precondition while discussing the DoC is to keep the maritime issues pertaining to SCS out of the agreement, which has kept the agreement from reaching fruition. The reinstituted Quad had an enthusiastic start with a joint secretary-level meeting among the countries; however, the initiative is facing issues with India repeatedly not accepting Australia in its Malabar naval exercises over the years. India did not provide its reasons for the exercises that were held in June 2018 near coast of Guam.

Moreover, Indian foreign policy is in a flux vis-a-vis its relations with China, and as the general elections are approaching in 2019, the current leadership appears reluctant to put India in a volatile situation. Nevertheless, the Indo-Pacific regional maritime framework is likely to see a joint effort from the four countries based upon a common agreement of being free, open, and inclusive, governed by a rule of law, and norms based upon the consent of all to ensure the peace and prosperity of the region. However, the same cannot be said about the establishment of the Quad in the current form of a purely military angle.

Several countries, including ASEAN nations, though agreeable with joint maritime and military exercises, have expressed their reservations regarding militarizing the region with warships. The countries in the region are seeking freedom of navigation and overflight rights as common for all and have denounced unilateral attempts by any country to claim territorial rights of sovereignty over these global commons. Additionally, these nations seek peaceful settlement of disputes and the formation of partnerships based upon shared values and interests rather than war fighting. In other words, the Quad states need to consider these aspirations of the regional stakeholders and ensure an overall security of the region beyond the military perspective.

Having stated that, as most of the littoral countries in the IORA are dependent upon maritime trade and have considerable stake in the security of the Indo-Pacific, such concerns need to reflect in regional policy making collectively and without ambiguity. This article establishes that India's position in the Indo-Pacific stems from its location and its interests in the region. The nation is keen to take a larger role in the regional security architecture—for which it needs to move beyond the Indian Ocean and take a proactive role in consensus building among the regional stakeholders.

At the same time, US foreign and security policy need to move beyond China's containment and seek to engage with American allies at a regional level beyond military or economic bilateral partnerships. India has a role to play beyond just being a major defense partner to the United States in ensuring a peaceful, free, and open Indo-Pacific. Along with Australia and Japan, India can deliberate on how New Delhi wishes to conceptualize the Indo-Pacific and then address the threat perceptions collectively. The Indo-Pacific is still evolving, and now is an opportune time for the Indo-Pacific littorals to cooperate on issues of concern to build a maritime security framework architecture and for India to take a prominent role in it.

MARITIME CO-OPERATION IN THE INDIAN OCEAN REGION

The Indian Ocean Region (IOR) has emerged as a vital geopolitical arena in the Asian Century. The primary coalescing factor is the systemic nature of the interconnected maritime context where global, regional, and national objectives come together. The strategic interests of multiple actors involved in the IOR overlap and converge at sea. Once a virtual strategic "backwater", the Indian Ocean is increasingly becoming an arena for strategic competition between the major powers, particularly India and China. All actors with IOR interests stand to benefit from ongoing peace and tranquillity. The IOR maritime domain is fundamental to global and regional economic and environmental well-being.

IOR freedom of navigation has to be protected because it is essential to world and regional trade, and critical to global energy security. The Indian Ocean marine environment impacted by climate change, pollution, and oceanic resource exploitation needs to be husbanded; it is vital to global environmental security and regional food security. Maritime territorial sovereignty is crucial to regional stability and nation-state integrity. Law and order at sea must be applied across the entire maritime expanse; criminal activities transcend national maritime boundaries and variously impact all states. Similarly, there are shared obligations for maritime and aeronautical search and rescue (SAR) and requirements for humanitarian assistance and disaster relief (HADR) across the Indian Ocean. Importantly, no single nation-state or other entity has the mandate or the wherewithal to ensure the integrity and security of the IOR maritime system. Cooperation between actors with interests in the Indian Ocean, both internal and external, is necessary into the future.

The Association of Southeast Asian Nations (ASEAN) occupies a central geostrategic position astride the confluence of the Indian and Pacific Oceans. Whether individual ASEAN states have Indian Ocean or Pacific Ocean littoral geography, a combination of the two, or are largely landlocked, their collective interests are profoundly affected by the inherently indivisible nature of the Indo-Pacific maritime context. For example, emerging tensions in the South China Sea that impact regional stability and could disrupt vital maritime trade routes are of significant concern to Indian Ocean trade, just as Somalian piracy in the Gulf of Aden impacted regional maritime trade. Notably, several ASEAN states committed maritime forces to assist international anti-piracy efforts in the Western Indian Ocean, operating under the banner of the voluntary multinational naval partnership, Combined Maritime Forces. Similarly, the operations at the eastern end of the IOR under the Malacca Strait Patrols (MSP) mechanism involving Malaysia, Singapore, Indonesia, and Thailand generate maritime trade security for all who use the Indian Ocean.

IOR MARITIME COOPERATIVE CONTEXT

The IOR geopolitical context presents major challenges to maritime cooperation. It is complex, diverse, dynamic, and fragmented; the IOR is difficult to deal with as an integrated entity. Geography, combined with historical, cultural, racial, ethnic, economic, political, and ideological factors, makes conceptualising the IOR as a coherent entity problematic. It is perceived to be a largely disaggregated oceanic and littoral region, more a collection of sub-regions than a single region. However, from a maritime perspective, there is a rising imperative for cooperation that spans the entire Indian Ocean and interconnects with the oceans to the east and west.

There are several regional cooperative entities in the Western Pacific that deal with aspects of maritime cooperation and maritime security, with ASEAN a central participant, and some Indian Ocean states involved. There is a relative dearth of IOR nation-state level arrangements or architectures in place specifically designed to facilitate maritime cooperation. The Indian Ocean Rim Association (IORA) is the only region-wide body designed to facilitate regional dialogue at the government-to-government level, although its membership does not include all IOR littoral states. ASEAN states that are members of IORA include Indonesia, Malaysia, Singapore, and Thailand. IORA has recently experienced resurgence after an extensive period where its effectiveness was doubtful and frequently criticised by member states. India, Australia, Indonesia, and other members have committed energy and resources to revitalise IORA in an effort to enhance its relevance and utility.

IORA's focus is primarily to promote economic cooperation, supported by human, social, environmental, and intellectual dialogue. Maritime cooperation features prominently among the six priority areas for IORA. Maritime Safety and Security is the first priority, followed by Fisheries Management at priority three. Disaster Risk Management (priority four) and Academic and Science and Technology Cooperation (priority five) also have some maritime aspects. Special IORA projects include the Maritime Transport Council (MTC), Fisheries Support Unit (FSU), and the IORA Centre of Excellence on Ocean Science and Environment. IORA is devoting significant attention to the "Blue Economy", with a core group tasked with "Promoting Fisheries and Aquaculture and Maritime Safety and Security Cooperation in the IOR". An IORA Indian Ocean Dialogue forum in Perth, Australia, in September 2015 identified several maritime cooperation focus areas for the future: combatting transnational crime, maritime security and defence cooperation, regional cooperation in SAR operations, the Blue Economy as a driver of economic growth, countering illegal fishing, and HADR.

The only IOR-wide entity charged specifically with maritime security collaboration is the Indian Ocean Naval Symposium (IONS). The focus of IONS is interaction between senior naval and maritime security officials, primarily to consider operational and technical matters. Modelled along the lines of the Western Pacific Naval Symposium (WPNS), IONS is an Indian-led initiative that first convened in 2008. IONS is at a relatively nascent stage of development and progress has been slow, in considerable part due to the disparate nature of strategic alignments in the IOR. There is no direct connection between IONS and IORA. ASEAN navies that are party to IONS include Indonesia, Myanmar, Singapore, and Thailand, while Malaysia has Observer status. IONS does not present an appropriate forum to consider international policy issues, which are the purview of heads of government and ministers.

Some maritime-related cooperative entities in the Indian Ocean come under United Nations auspices. These include the Indian Ocean Global Ocean Observing System (IOGOOS), primarily a marine scientific research project under the Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO); the Indian Ocean Memorandum of Understanding for Port State Control (IOMOU) that comes under the International Maritime Organization (IMO) and is intended to support enactment of the International Ship and Port Security (ISPS) Code in the IOR; and regional fisheries management organisations (RFMOs), including the Southwest Indian Ocean Fisheries Commission (SWIOFC), the Southern Indian Ocean Fisheries Agreement (SIOFA), plus the Indian Ocean Tuna Commission (IOTC).

Another area of IOR cooperation is in maritime and aviation SAR where adjacent Search and Rescue Regions (SRR) mostly have close cooperative arrangements, with instances of mutually beneficial SAR capacity-building programmes. The importance of international SAR cooperation has been highlighted by high-profile events like the March 2014 Malaysian Airlines MH370 tragedy in the Indian Ocean. Notably, from a regional and global SAR perspective, the engagement of ASEAN member states in international SAR treaties and arrangements is patchy. All ASEAN member states are parties to the Convention on International Civil Aviation, 1944, and most are parties to the International Convention for the Safety of Life at Sea (SOLAS), 1974. However, only Indonesia, Singapore, and Vietnam have so far ratified the International Convention on Maritime Search and Rescue (SAR), 1979.

There are numerous bilateral and sub-regional arrangements in the IOR that have varying, mostly limited, maritime cooperation relevance, with ASEAN as one of the more effective sub-regional cooperative entities that is also an Indian Ocean stakeholder. One arrangement with specific maritime application is the Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (DCoC), conceptually based upon the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP).

Overall, the lack of effective Indian Ocean regional maritime cooperative arrangements and mechanisms is likely to become critical, given emerging maritime security risks and vulnerabilities that will require collective and cooperative consideration and action. There is a strong case for enhanced IOR regionalism, with a focus on cooperation across the maritime domain. This presents perplexing challenges in the IOR strategic context: how to develop realistic and workable collective and cooperative security strategies?

OPPORTUNITIES FOR ASEAN MARITIME ENGAGEMENT IN IOR

The interests of ASEAN and other Indian Ocean stakeholders, both internal and external, converge at sea. ASEAN’s strategic location around the eastern end of the Indian Ocean sea lines of communication (SLOCs), part of the inherently interconnected globalised maritime system, demands that it play a constructive role. ASEAN should be integrally engaged in all aspects of IOR maritime cooperation. There are several areas where ASEAN is well placed to contribute and derive benefit; in some respects, ASEAN is uniquely positioned.

ASEAN represents an exemplar of regional cooperation that is demonstrably lacking and sorely needed in the IOR. Habits and mechanisms for cooperation between diverse ASEAN member states have been built over decades. ASEAN has provided a catalyst for economic, security, and other cooperative and collective endeavours, primarily in the Western Pacific. The ASEAN experience and lessons learned can be useful in informing cooperative approaches in the IOR.

ASEAN engagement in the IOR should go beyond that of the individual ASEAN states that have Indian Ocean littoral geography and are currently involved in specific arrangements. ASEAN may be well placed to moderate Indian and Chinese strategic competition in the IOR. ASEAN, as a separate entity, should consider applying to join IORA as a Dialogue Partner. This would enable mutually beneficial sharing of information, experience, and ideas and help place explicit emphasis on Indo-Pacific maritime congruence.

Similarly, ASEAN states could encourage cooperation and sharing of experience between the Western Pacific Naval Symposium (WPNS) and IONS, which could assist IONS to move forward. WPNS has been operating since 1988 and there are many mutual areas of operational and technical interest including, for example, law and order at sea, HADR, SAR, and promoting procedures for unalerted encounters between naval and coastguard forces.

A major area of mutual interest for ASEAN and the IOR that impacts all aspects of maritime cooperation is maritime domain awareness (MDA). High quality MDA is important for ensuring the safety and security of maritime trade flows, protecting the maritime commons, and imposing law and order at sea. While a level of cooperation is already happening, there is considerable room for improvement. For example, the Information Fusion Centre (IFC) hosted by Singapore as a regional maritime security information sharing centre represents regional best practice. Good liaison with several IOR states, including India and Australia, is already in place and this can be built upon and expanded across the Indian Ocean.

Finally, ASEAN should urge member states to ratify the 1979 Maritime SAR treaty and other IMO conventions and protocols that impact maritime safety, security, and marine environmental protection. Related domestic legislation and regulations should follow so that all ASEAN states effectively contribute to international maritime cooperative arrangements.

INDIAN OCEAN AND MARITIME DISPUTES

The Indian Ocean is the world's third-largest body of water and has become a growing area of competition between China and India. The two regional powers' moves to exert influence in the ocean include deep-water port development in littoral states and military patrols. Though experts say the probability of military conflict between China and India remains low, escalated activities (such as port development and military exercises) and rhetoric could endanger stability in a critical region for global trade flows. But the diverse nontraditional security challenges in the Indian Ocean Region (IOR) also offer areas of potential collaboration for China and India, as well as other regional actors.

What is the importance of the Indian Ocean?

The Indian Ocean covers at least one fifth of the world's total ocean area and is bounded by Africa and the Arabian Peninsula (known as the western Indian Ocean), India's coastal waters (the central Indian Ocean), and the Bay of Bengal near Myanmar and Indonesia (the eastern Indian Ocean). It provides critical sea trade routes that connect the Middle East, Africa, and South Asia with the broader Asian continent to the east and Europe to the west. A number of the world's most important strategic chokepoints, including the Straits of Hormuz and Malacca through which 32.2 millions of barrels of crude oil and petroleum are transported per day—more than 50 percent of the world's maritime oil trade—are found in the Indian Ocean Region, which itself is believed to be rich with energy reserves. Nearly 40 percent of the world's offshore petroleum is produced in the Indian Ocean, coastal beach sands and offshore waters host heavy mineral deposits, and fisheries are increasingly important for both exports and domestic consumption.

Why is the Indian Ocean a source of competition?

China and India are dependent on energy resources transported via the secure sealanes in the Indian Ocean to fuel their economies. India imports nearly 80 percent of its energy, mostly oil from the Middle East, and is due to overtake Japan as the world's third-largest energy consumer (behind China and the United States). According to a U.S. Department of Defense report, 84 percent of China's imported energy resources passed through Strait of Malacca from the Indian Ocean in 2012. As Beijing and New Delhi press to maintain economic growth, their dependency on the safe transport of resources will likely intensify. China's growing global influence and India's rapid economic rise have heightened the ocean's strategic value. Meanwhile, the United States' rebalance to Asia—shifting from a foreign policy dominated by the Middle East to one more centered on Asia—has also been a contributing factor elevating concern over Indian Ocean security. Diverse security challenges affect the region ranging from natural disasters to concerns over energy security, piracy, and military posturing.

How are China and India competing in the Indian Ocean?

Both countries have developed initiatives to bolster infrastructure and other connections in the region, which the World Bank describes as among the "least economically integrated." Competition between Beijing and New Delhi is not necessarily overt, but each country is seeking to strengthen ties with smaller regional states to secure their respective security and economic interests.

Beijing's regional vision, backed by $40 billion of pledged investment, outlines its One Belt, One Road plan—combining the revitalization of ancient land-based trade routes, the Silk Road Economic Belt, with a Maritime Silk Road. China's ties with regional states have deepened, including the influx of Chinese capital into construction projects in Bangladesh, Myanmar, Pakistan, and Sri Lanka. Since launching counterpiracy operations in 2009, Beijing has become increasingly active in the region. China has also undertaken efforts to modernize its military, particularly its naval deployment capabilities to protect overseas interests like personnel, property, and investments. Experts also argue that Beijing's forays into what is at times described as India's neighborhood are driven by China's excess capacity challenges—incentivizing Chinese firms out of domestic markets to compete in and open new markets abroad.

For its part, India sees itself as the natural preeminent regional power. Prime Minister Narendra Modi has doubled-down on fostering stronger diplomatic, economic, and security ties with IOR maritime states as a means to strengthen India's economy, establish its role a driver of regional growth , and simultaneously diminish China's growing appeal, writes CFR's Alyssa Ayres.

"It is India's neighbourhood that holds the key to its emergence as a regional and global power," writes former Indian foreign secretary Shyam Saran. Though Beijing deflects claims of hegemonic aspirations, it identifies security in the IOR as a primary concern for Chinese "core interests." In 2015, a white paper charting China's military strategy indicated a shift of People's Liberation Army Navy to focus on both offshore water defense and open seas protection. Chinese behavior suggests that Beijing seeks to establish a persistent regional maritime presence. It now boasts a semipermanent naval presence through its counterpiracy activities in the Indian Ocean and has more aggressively asserted itself in the Pacific with extensive patrols and land reclamation projects in disputed waters.

China's ambitions in the region have been described by many scholars by the "string of pearls" metaphor, which holds that China is taking on economic and investment projects with Indian Ocean states to secure ports or places where its military forces could set up naval facilities or at the very least, refueling and repair stations. Chinese experts dismiss this, claiming that China seeks access, not bases, for economic gain. C. Raja Mohan, director of Carnegie India, a regional center of the U.S.-based Carnegie Endowment think tank, argues that as rising powers, China and India's pursuit of partnerships with smaller regional states is inevitable. "Everyone is playing this game," he says. "Bases is going to be the name of the game in the Indian Ocean, and that game is going to be pretty attractive in the coming years."

Still, "maritime competition between China and India is still nascent and should not be overblown," cautions CFR's Daniel S. Markey in a Contingency Planning Memorandum. Still, he writes that a "tit-for-tat politico-military escalation" is possible in the larger Indo-Pacific, a region spanning both the Indian and Pacific oceans.

What fuels China-India tensions?

China-India relations are fraught, colored by historical disputes and the perceived threat to India of China's rise. Tensions have persisted despite overtures by Chinese President Xi Jinping and Indian Prime Minister Narendra Modi. Much of the friction stems from a longstanding dispute along a 2,400-mile border in India's Arunachal Pradesh and China's Tibet and the legacy of the 1962 Sino-Indian War along the Himalayan border.

The expansion of a Chinese presence in the Indian Ocean has heightened India's concerns. Beijing says its activities are commercially motivated and intended to better protect its interests and people abroad. However, Brahma Chellaney of the Center for Policy Research (CPR), an independent Indian think tank, argues a ramped up Chinese presence in the Indian Ocean and elsewhere is consistent with Xi Jinping's intention of making maritime power central to achieving Chinese dominance in Asia.

While China's aims are disputed, both sides continue to ramp up military capabilities in the ocean region. China continues to deploy greater numbers of naval forces to support counterpiracy operations in the western Indian Ocean, and invests and sells arms, including tanks, frigates, missiles, and radar, to India's neighbors. Beijing is currently restructuring its military: Xi Jinping announced in September 2015 that the People's Liberation Army would cut 300,000 of its troops to redistribute resources to sea and air capabilities. As China adapts its military force to meet its global ambitions, its posturing has grown bolder. In October 2015, China finalized the sale of eight submarines to Pakistan, and in recent years, Chinese submarines have docked at the Sri Lankan port of Colombo and the Pakistani port of Karachi. More still, Beijing's land reclamation efforts and assertive behavior in the Pacific could bleed into the region, suggest the U.S. Naval War College's Andrew Erickson and Kevin Bond.

India is also reinforcing its regional maritime presence. "Activating partnerships and expanding capabilities in the Indian Ocean has been central to our quest for security," said Indian Foreign Secretary Subrahmanyam Jaishankar at the launch of Carnegie India in April 2016. The country has vowed to spend billions to build up its navy, including anti-submarine capabilities, has sent vessels to visit the South China Sea, and called for freedom of navigation and the peaceful resolution of territorial disputes as part of its Act East policy. The construction of military bases, modernized equipment and fleets, new maritime assets, and the expansion of security ties are all part of New Delhi's push to assert itself as the region's leader. Modi initiated the first bilateral India-Australia exercises and India participated in multilateral naval games in the Bay of Bengal with the United States, Australia, and Japan. David Brewster of Australian National University says there is little doubt that despite India's traditional principle of nonalignment, outreach to the United States, Australia, and Japan are calculated moves that could play a significant role in counterbalancing China.

What other countries have strategic interests in the IOR?

Small regional states, such as Bangladesh, Maldives, Myanmar, Seychelles and Sri Lanka, are recipients of both Chinese and Indian aid and investment, primarily for transport and infrastructure development. The majority of their foreign policy ties are determined by what deals can be made to help them meet their national development goals, says Nilanthi Samaranayake of Virginia-based CNA, a nonprofit research and analysis organization.

Global powers from outside of the region also have an interest in maintaining the ocean's security. The United States operates a naval support facility—Diego Garcia—on UK-leased territory in the central Indian Ocean, while France maintains a presence in the region from Reunion, its Indian Ocean island outpost. Australia has a modern naval force operating in the ocean, and the IOR is increasingly featured in defense, national security, and maritime strategies developed in Canberra.

What are transnational concerns in the ocean?

Despite the rise in competition, multilateral cooperation involving China, India, and other states, takes place on issues including piracy, disaster relief, and drug smuggling. The following areas show potential for expanded cooperation:

- *Counterpiracy.* Piracy has been costly to ocean-faring traders but global and regional responses have shown success. Oceans Beyond Piracy, a Colorado-based non-profit, estimates that the economic cost of piracy off the Somali Coast amounted to $2.3 billion in 2014, a drop from the estimated $5.7–$6.1 billion loss two years prior.

Counterpiracy efforts near the Gulf of Aden have been the most successful manifestation of regional cooperation. More than eighty countries, organizations, and industry groups participate in operations in the IOR under the auspices of the ad hoc, voluntary Contact Group on Piracy off the Coast of Somalia (CGPCS), created in January 2009 in response to UN Security Council Resolution 1851 on Somali piracy and armed robbery at sea. Since military cooperation began, the volume of attacks has shrunk. Yet experts warn that pirates have turned to more sophisticated equipment and if naval pressure in the western Indian Ocean is reduced, pirate activity would rise again.

China and India carry out anti-piracy activities independently, deploying naval vessels to escort merchant ships, provide protection, conduct rescue operations, and confiscate contraband. In April, China dispatched its twentieth naval escort task force to the Gulf of Aden. Meanwhile, India has prevented forty piracy attempts and developed an online registration service for merchants to request Indian naval escorts.

- *Search and Rescue.* Another recent example of cooperation was the search effort for the Malaysia Airlines Flight 370, which disappeared en route from Kuala Lumpur to Beijing in March 2014. At the height of operations, twenty-six countries, including China and India, contributed to the search mission. Wreckage believed to be from the flight was discovered in July 2015.

- *Disaster Relief.* There is room for growth on humanitarian aid and disaster relief cooperation. After the 2004 Indian Ocean Tsunami, governments, including Australia, France, India, Japan, Malaysia, New Zealand, Pakistan, the UK, and the United States, participated in extensive relief and rehabilitation efforts . Separately, China disbursed more than $62.2 million in aid, shipped supplies, and dispatched medical and rescue teams. More than a decade later, the IOR's vulnerability to natural disasters and the subsequent effects of climate change could provide impetus for more extensive collaboration.

- *Fisheries*. Consumers in Indo-Pacific countries on average obtain 20 to 50 percent of their animal protein from fish, and industrial fishing is an important export for smaller countries in the IOR. Regional players identify overfishing and environmental degradation as serious risks to sustainable economic development and food security, but mechanisms to establish sustainable fisheries have not been effective. The Stimson Center's David Michel blames [PDF] challenges to cooperation on the region's existing security architecture: the majority of institutions, such as the Indian Ocean Tuna Commission, only operate at a sub-regional level or focus on specific species.

What are the prospects for improved regional governance?

Experts say there is a growing need for an effective regional security architecture, similar to extant mechanisms among major powers in the East and South China seas, to address the IOR's diverse challenges. Regional multilateral organizations, such as the Indian Ocean Naval Symposium (IONS), which facilitates the exchange of military views to enhance communication and transparency across the region's naval forces, do exist. However, experts say IOR members must undergo an extensive region-building project for countries to be willing to act together more effectively.

China and India have expressed eagerness to assume greater responsibility in policing maritime global commons and to be recognized as major powers. China's activities are likely to expand in conjunction with its One Belt, One Road initiative, but this does not have to come at India's expense, say some experts. "India is going to have to come to terms with

China's entry into the Indian Ocean," states CNA's Samaranayake. New Delhi could also benefit from partnering with Beijing to integrate the region. Broader initiatives like the BRICS Development Bank and the Asian Infrastructure Investment Bank (AIIB) are also pulling India into to a larger leadership role alongside China.

The biggest challenge to creating coordinated effective action across the Indian Ocean is the lack of institutions of governance that cover the whole space, says CFR's Alyssa Ayres. "It may sound mundane, but institutionalized organizations with a regular diplomatic calendar and senior officials meeting to work on an agenda drive processes of consultation and action."