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Joseph C. Sweeney

Abstract

This Article summarizes the history of international trade agreements from the time of Columbus to the present.

FROM COLUMBUS TO COOPERATION— TRADE AND SHIPPING POLICIES FROM 1492 TO 1992†

*Joseph C. Sweeney**

I. COLUMBUS AT THE BEGINNING OF THE AGE OF EMPIRES

We are preparing to celebrate the passage of 500 years since the people of Western Europe began to carry the good and the evil of their civilization across the mighty ocean to the Americas. 1992 will also see the potential of the Treaty of Rome¹ realized as the economic merger of the Member States of the European community creates a new type of economic unit, although it will not yet become a unitary state. Trade and shipping barriers among the members are to disappear, leaving common tariffs to the outside world, and a perceived threat to the United States and other developed economies.

The centennial,² bicentennial,³ and tricentennial⁴ of Columbus' first voyage passed without notice or ceremony but

† This Article was originally prepared and delivered as a paper at Convegno Colombiano, a conference, at Palazzo Rondinini in Rome on September 22, 1988. The conference was organized by the International Association of Jurists: Italy-USA, Comitato Internazionale Cristoforo Colombo and Fondazione Cristoforo Colombo. The proceedings are entitled *I Problemi della Liberta dei Traffici e La Funzione della Banca nei Commerci Internazionali a 500 Anni del Viaggio di Cristoforo Colombo*.

* Professor of Law, Fordham University School of Law. The views expressed herein are those of the author and not the government of the United States nor any international organization to which he has been accredited.

1. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

2. In 1592, the centennial of Columbus' first voyage, the Spanish Crown (King Philip II) suffered the catastrophic destruction of the Great Armada by England. The destruction took place in 1588, in the last years of Queen Elizabeth's forty-five year reign. See G. MATTINGLY, *THE ARMADA* (1959). The dynamic Pope Sixtus V, builder of Baroque Rome, died in 1590 and was succeeded by three short-lived popes. Venice had defeated the Turks at Lepanto in 1571, but was pursuing a cautious policy of retreat while Genoa, home of the discoverers, was clearly in decline. See J. NORWICH, *A HISTORY OF VENICE* (1982).

In the Americas, the subjugation of Mexico (New Spain) and Peru was complete. Spanish colonies were being developed in Buenos Aires and the Rio de la Plata as well as New Granada (Venezuela and Colombia), while the Portuguese were developing Brazil. See H. HERRING, *A HISTORY OF LATIN AMERICA* (3d. ed. 1968). Spain established a colony in Florida at Saint Augustine in 1565 while the first English colony

the quadricentennial produced the Columbian Exposition at the Chicago World's Fair of 1893⁵ and extensive celebrations in Italy and in the Spanish Empire.⁶

was planted, unsuccessfully, in Virginia from 1584 to 1591. See S. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* (1965).

3. By the bicentennial, Spain's preeminence in European affairs had come to an end during the age of Louis XIV of France (1643-1715) and the end of the Hapsburg line in Spain at the death of Charles II (1665-1700). See J. WOLF, *LOUIS XIV* (1968). Italy was at the mercy of foreigners: Austrians, French, and Spaniards. See D. SMITH, *ITALY: A MODERN HISTORY* (1959).

In the Americas, Spain moved north into New Mexico (1696). France moved into New France (Canada) on a permanent basis with establishments at Quebec (1608) and Montreal (1642) and had explored the Mississippi (1689). See S. MORISON, *supra* note 2.

English colonies were founded rapidly in the seventeenth century: Jamestown (1607) in Virginia; Plymouth (1620) and Boston (1630) in Massachusetts; Hartford (1636) and New Haven (1638) in Connecticut; Maryland (1633); Pennsylvania (1681) and the Carolinas (1669). Colonies of the Dutch at New York (1626) and the Swedes on the Delaware (1638) were conquered subsequently by the English (1664). *Id.*

4. The tricentennial year was the first year of the French Republic made possible on September 20, 1792 by the first success of the revolutionary armies under Kellerman against the Prussians at Valmy. At Paris, on September 21, 1792, the monarchy was abolished and the new calendar of liberty was subsequently decreed to be in effect from September 22, 1792. The execution of Louis XVI (January 21, 1793) and the Reign of Terror (March 1793-July 27, 1794) inevitably followed. Europe went to war in 1792 with the French fighting Austria and Prussia, and in 1793 the war expanded with the entry of Great Britain, Spain and Holland. See S. SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* (1989). These wars were to last until the defeat of Napoleon at Waterloo on June 18, 1815, by which time Russia, Sweden, Italy, Spain, Portugal, Egypt, the German states, and even the United States (1812-1815) had been brought into the general conflagration.

Under the U.S. Constitution of 1787, President George Washington was elected for the second time in 1792, the year in which political parties, detested by Washington, began to act nationwide in the wake of the intra-cabinet feud between Alexander Hamilton (Federalist Party) and Thomas Jefferson (Democratic-Republican Party). Differing reactions to the French Revolution exacerbated the domestic feud and produced the first contested presidential election in 1796. See J. FLEXNER, *GEORGE WASHINGTON: GEORGE WASHINGTON AND THE NEW NATION (1783-1793)* (1969); J. FLEXNER, *GEORGE WASHINGTON: ANGUISH AND FAREWELL (1793-1799)* (1969).

5. The World's Columbian Exposition at Chicago in 1893 cost US\$20 million and contained 150 buildings sponsored by 46 nations and most states of the United States. More than 27 million people viewed the exhibition which contained a replica of the flagship Santa Maria II. See *CONCISE DICTIONARY OF AMERICAN HISTORY* 1123 (1983). Governments in Italy and Spain also commissioned research and development of Columbian studies.

6. The celebrations in the Spanish Empire (King Alfonso XIII) occurred just before the Empire itself disappeared. The Treaty of Paris of December 10, 1898, terminated the short and ugly war between Spain and the United States with the cession of the Philippine Islands to the United States for a payment of US\$20 million, while Puerto Rico and Guam were ceded outright as indemnification for the cost of the war to the victor. The problem that caused the war was Spanish colonial rule in

In our day, the cinquecentennial comes at the time the trading nations of the General Agreement on Tariffs and Trade ("GATT")⁷ are seeking new trading relationships in the Uruguay Round⁸ and the members of the United Nations through the International Maritime Organization ("IMO"),⁹ the UN Conference on Trade and Development

Cuba, which was resolved by Spain's abandonment of all claims to Cuba while assuming Cuban debts, estimated at US\$400 million.

Anti-imperialists in the U.S. Congress were suspicious of the intentions of the McKinley Administration (1897-1901) to substitute U.S. colonial rule for Spanish rule in Cuba. Accordingly, attached to the Joint Congressional Resolution of Ultimatum on Spain of April 20, 1898 was the Teller Amendment, by which the eventual independence of Cuba was pledged. The U.S. military government continued during the organization of the Cuban Republic in 1901 and a protectorate was established under which there were numerous interventions in Cuban affairs by the United States in 1906-1908, 1913-1917, 1920-1923, and 1933-1934. See H. THOMAS, *CUBA, THE PURSUIT OF FREEDOM* (1971).

The Spanish-American War began on April 21, 1898, and terminated with an armistice on August 12, 1898, a little less than four months later. Key elements in the war were the destruction of the Spanish Pacific Squadron by Admiral Dewey at the Battle of Manila Bay on May 1, 1898, and the destruction of the Spanish Atlantic Fleet by Admiral Sampson at the Battle of Santiago, Cuba on July 3, 1898. It was estimated that 379 U.S. soldiers were killed in battle, and 5462 died mostly of tropical diseases. See generally F. FREIDEL, *THE SPLENDID LITTLE WAR* (1958). Of this war Samuel Eliot Morison has written, "America rushed into this war 'to free Cuba,' more nearly unanimous than in any war in her history. The few who cried out against the childish jingoism, the unjust blackening of Spain's noble history, and, above all, the needlessness of the war, were dismissed as cranks or old fogies." See S. MORISON, *supra* note 2, at 802. The brief Spanish-American War gave the militarists in Europe the wrong impression, leading them to think the war of 1914 would be over in the same four months instead of the horrible four years and five months during which more than ten million people were killed and twenty million were wounded.

By 1892, the system of alliances and balance of power was at its zenith as France and Russia contemplated an alliance in view of the continued renewals of the Triple Alliance of Germany, Austria-Hungary and Italy. The European powers had finished the division of Africa and vast expenditures on armies and navies were to follow. See generally P. KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000* (1987).

7. The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5 and 6, T.I.A.S. 1700, 55 U.N.T.S. 308 [hereinafter GATT]. GATT is in force among contracting parties through the Protocol of Provisional Application. There are more than 80 protocols to the original agreement.

8. See *infra* note 132. The Uruguay Round of multilateral trade negotiations treats not only the movement of goods and the barriers to such movement by way of tariffs or non-tariff barriers, such as quotas, but also treats problems concerning service industries such as insurance, banking, and shipping, and the question of subsidies to agriculture.

9. See U.N. Doc. E/1064 of Aug. 31, 1948 for ECOSOC approval of the IMCO draft convention. General Assembly approval came on November 18, 1948. See 1949 U.N.Y.B. 969-70; 1950 U.N.Y.B. 1007-08; see also *infra* note 139.

("UNCTAD")¹⁰ and the UN Commission on International Trade Law ("UNCITRAL")¹¹ are fulfilling the mandate of the UN Charter¹² for the progressive harmonization and unification of international trade law regarding the vital shipping industry.

Columbus was a real man, not a legend.¹³ He brought Eu-

10. UNCTAD's creation by the General Assembly in 1964 was a direct reflection of the increased presence of the newly independent states in Africa and Asia and a demonstration of the political power of the non-aligned states, organized initially as the "Group of 77" consisting of developing states of Africa, Asia, and Latin America. Ghana's independence in 1957 began the decolonization process of Great Britain's African empire just as Tunisian and Moroccan independence in 1956 foreshadowed the end of the French African empire. The removal of Belgium from the Congo (now Zaire) in 1960 furthered the formal independence of Africa. Economic independence and development for those states will be more difficult to achieve, thus the purpose of UNCTAD is to use trade and aid to assist Third World states to become as developed as states with market and centrally-planned economies. See *infra* notes 40 & 156 and accompanying text.

11. UNCITRAL was established in 1966 at the urging of Hungary to provide a vehicle for East-West trade discussions. Like all organs of the General Assembly it has been responsive to the demands for the creation of a "New International Economic Order" since 1974. The initial resolution of the General Assembly establishing UNCITRAL is A/Res. 2205 (XXI) of Dec. 17, 1966. See *infra* notes 41 & 168 and accompanying text.

12. U.N. CHARTER, art. 1, ¶¶ 3-4.

13. The life of Christopher Columbus (Cristoforo Colombo in Italian, Cristobal Colon in Spanish, and Christovao Colom in Portuguese) has been researched and analyzed by generations of scholars. There are some unanswered questions about his life prior to his four voyages of exploration, but scholars seem to agree that he was born in 1451 in Genoa into a family of weavers. His nautical apprenticeship involved voyages to the Aegean Sea (1470) and to Portugal (1476). He may also have voyaged to Iceland and Ireland (possibly in 1477), but he certainly sailed to Madeira (1478) and to the Gold Coast (1482). Columbus' "Enterprise of the Indies" was commissioned by the Court of Spain in April 1492. Three ships with eighty-eight men made the first voyage.

Much is known about Columbus' first voyage to the Americas; leaving Palos, Spain for the Canary Islands on August 3, 1492, then leaving Gomera in the Canaries on September 6, 1492 on an essentially westward course for thirty-three days, covering 3000 miles and making landfall at the island he named San Salvador on Friday, October 12, 1492.

The present identity of Columbus' San Salvador—whether Watling Island (renamed San Salvador in 1926) or Samana Cay—is uncertain. The Harvard-Columbus Expedition of 1939, led by Professor Samuel Eliot Morison (1887-1976), agreed with the choice of Watling Island. In 1986, the National Geographic Society reconstruction of the Columbus track, however, disagreed with the choice of Watling Island and supported the choice of Samana Cay, which is sixty-five miles from Watling Island. The reconstruction took place with computer assistance from Control Data Corporation, under Joseph Judge, Senior Associate Editor, and Luis and Ethel Marden. Others of the Bahama Islands have been suggested as the point of Columbus' initial landing: Egg, Cat, Conception, Plana Cays, Mayaguana, Grand Turk, and

rope to America and his four voyages blazed a trail to opportunity and riches for the oppressed and the daring. Great empires¹⁴ followed Columbus to the Americas bringing the best

East Caicos Islands. The search for the exact identity of San Salvador has not slowed down other aspects of Columbian studies.

The voyage then continued through the Bahamas and the northern shores of Cuba and Hispaniola and returned to Palos, Spain by March 15, 1493.

See generally S. MORISON, *THE EUROPEAN DISCOVERY OF AMERICA: THE SOUTHERN VOYAGES 1492-1616* (1974); J. MANZANO, *CRISTOBAL COLON, SIETE ANOS DECISIVOS DE SUA VIDA 1485-1492* (1964); S. MORISON & M. OBREGON, *THE CARIBBEAN AS COLUMBUS SAW IT* (1964); *JOURNALS AND OTHER DOCUMENTS ON THE LIFE AND VOYAGES OF CHRISTOPHER COLUMBUS* (S. Morison ed. 1963); S. MORISON, *ADMIRAL OF THE OCEAN SEA: A LIFE OF CHRISTOPHER COLUMBUS* (1942); P. TAVIANI, *CRISTOFORO COLOMBO, LA GENESI DELLA GRANDE SCOPERTA* (1974); see also Judge & Stanfield, *Our Search for the True Columbus Landfall*, 170 *NAT'L GEOGRAPHIC MAG.* 566 (Nov. 1986). Marden, *Tracking Columbus Across the Atlantic*, 170 *NAT'L GEOGRAPHIC MAG.* 572 (Nov. 1986); Scofield, *Christopher Columbus and The New World He Found*, 148 *NAT'L GEOGRAPHIC MAG.* 584 (Nov. 1975).

14. The initial impact of Columbus' voyages was to create a problem of overseas competition in power politics between Spain and Portugal. The solution came in the form of the Papal Letter of May 4, 1493 by Pope Alexander VI, a Spaniard of the Borgia Family, fixing the claim of Spain west of a line drawn 100 leagues west of the Azores.

In 1492, Spain was a recently unified nation-state formed by the marriage in 1469 of the ancient royal house of Leon and Castile (Queen Isabella) to the equally ancient royal house of Navarre, Aragon and Catalonia (King Ferdinand II). The Portuguese consistently resisted takeover efforts by Castile, having organized an independent kingdom in 1143 under which great voyages of exploration set out to discover a route to the East, creeping southward along the west coast of Africa until the great voyage of Vasco da Gama reached India (1497-1498). Da Gama's voyage marked the beginning of Portugal's imperial adventures, which continued until 1974 when the collapse of the right-wing dictatorship led to the abandonment of the Empire in Africa and Asia. Another Portuguese captain, Pedro Alvares Cabral, in the course of a voyage to India, discovered Brazil in 1500. Portugal's independence of Spain continued until 1580 when the two nations were joined temporarily under one king until 1640.

During the period of Portuguese independence, the Papal Letter of 1493 declared that the Spanish were to have exclusive possession of all lands not held by a Christian prince as of Christmas Day, 1492. Spain and Portugal, to forestall clashes between them, agreed to another line of demarcation, further west than the Papal line in the Treaty of Tordesillas of June 7, 1494, by which Portugal was to have exclusive rights in lands to the east of a line drawn 270 leagues further west than the Papal line. See S. MORISON, *supra* note 13, at 297-98. Under the Treaty, Spain secured the Indies and Portugal secured the African route to India and, accidentally, Brazil. The location of the key points in the Azores and Cape Verde Islands was then very inexact, as scientific methods for determining longitude did not exist.

The Papal Letter of 1493 did not deter the English and French from exploring the West. Atlantic fisheries probably drew these countries across the ocean. Bristol merchants were familiar with navigation of the Western Ocean, probably at least as far as Iceland and possibly even Greenland before the Norse settlements there were forgotten. Icelanders settled Greenland after 1000 A.D. Communications between

of the old world: enlightenment and faith; and the worst: greed and slavery.¹⁵ The successors of Columbus may have contributed something to the liberation of the human spirit. Through technological advances, the successors of Columbus may be able to liberate other societies from the mindless and grinding toil of past ages, but due to grave economic, social, and environmental problems, the lands revealed to Western Europeans by his voyages do not provide the same opportunities for all who reach their shores.

Columbus lived when the peoples of the Mediterranean were just beginning to navigate the deep ocean, out of sight of land. Seafaring on the Mediterranean, before Columbus, was largely coastal navigation, always in sight of land.¹⁶

Greenland, Norway, and Iceland continued until the 15th Century when voyages became infrequent and finally ceased altogether. When the Danes returned to Greenland in the 18th Century, there was no trace of Norse settlers.

Formal English exploration took place under an Italian, John Cabot of Genoa, who may have been born in the same year (1451) as Columbus. John Cabot's first voyage to the North American continent reached Newfoundland on June 24, 1497. Even before the Reformation Act of Supremacy in 1534, the English ignored the Papal Letter of 1493 since it dealt with Spanish-Portuguese politics rather than religion. Official French voyages to the Americas began under another Italian, Giovanni de Verazzano, born in Greve in Chianti in 1485. His voyage to North America in 1524 may have made him the first European to enter New York Harbor on April 17, 1524. See generally S. MORISON, *THE EUROPEAN DISCOVERY OF AMERICA: THE NORTHERN VOYAGES 500-1600* (1971).

15. Columbus' first voyage (1492-1493) was followed by an enormous expedition of seventeen vessels with 1500 men. The second voyage, September 25, 1493 to June 11, 1496, began farther south in latitude, leading to the discovery of the islands of Dominica and the Lesser Antilles, the Virgin Islands, Puerto Rico and the south coasts of Hispaniola, Jamaica; and Cuba. Columbus' brother, Bartholomew, and a group of colonists remained on Hispaniola where the city of Santo Domingo was founded in 1496.

During the third voyage from May 30, 1498 to November 25, 1500 Columbus went even farther to the south and landed at Trinidad. He then proceeded to the mouth of the Orinoco River in Venezuela before sailing northward to Hispaniola, where the troubles which were to lead to his temporary imprisonment and eventual disgrace began.

Nevertheless, his fourth voyage, from May 11, 1502 to November 7, 1504, explored Central America from Honduras, heading easterly to Nicaragua, Costa Rica, and Panama, then to Jamaica. In his last days, Columbus experienced the "gratitude" of princes and he died, forgotten by the court, at Valladolid on May 20, 1506 at the age of fifty-five, predeceased by his patroness, Queen Isabella of Spain in 1504. It is likely that Christopher Columbus and his son Diego were reburied in the Cathedral of Santo Domingo in 1541. See S. MORISON, *supra* note 14; S. MORISON, *supra* note 13.

16. F. BRAUDEL, *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II* (2d ed. 1966).

In the age of the European Empires which followed Columbus,¹⁷ trade problems were solved by war and shipping problems were solved by piracy, theft, and fraud.¹⁸ The waste of five hundred years of slaughter and destruction have caused the descendants of Western European civilization to try to resolve trade and shipping disputes by cooperative efforts.

II. THE COLLAPSE OF THE EUROPEAN EMPIRES AND THE DECLINE OF MERCANTILIST POLICIES

The Empires that followed Columbus produced the classic Mercantilist Economy which has in our day been replaced by forms of international cooperation. Mercantilism¹⁹ was the

17. The First British Empire (1497-1783) (which ended with the Peace Treaty with the United States) was followed by a Second British Empire in Australia, India, New Zealand, and Africa (1788-1931) when the self-governing dominions and the mother country entered into the British Commonwealth of Nations, now known simply as the Commonwealth. The First British Empire drove the French out of North America and India, but France resumed its colonial adventures in Africa after 1830 and extended from North Africa to West and Central Africa, Indochina, and the South Pacific until 1960. The German colonial empire was short-lived (1870-1918) as was Italy's (1911-1941), and Belgium's (1885-1960). The Netherlands East Indies became independent in 1949 and the Japanese East Asian empire (1905-1945) also collapsed in the Second World War. See *supra* note 6 (Spain); *supra* note 14 (Portugal).

18. Trading posts were also fortresses, but the perils of the sea were such that most people who were not professional mariners were unwilling to undertake them more than was absolutely necessary. As a consequence, colonization by families became the standard practice in English and Spanish colonies instead of the gold rush atmosphere, accompanied by the inebriation and violence of all-male societies, as in French Canada.

The Spanish did not find native Americans amenable to slavery and theft of their property. Hispaniola was already the scene of violence with the native Caribs in Columbus' own time. By 1519, the Spanish had founded the city of Havana, from which the expedition of Hernan Cortes set out for Mexico. Spanish conquest of the Aztecs of Central Mexico took place in 1526. The conquest of the Mayas of Yucatan followed, lasting until 1546. Conquest of Northern Mexico continued through the end of the century. Francisco Pizarro's incredible conquest of Peru by the murder of the Inca emperor took place in 1532 and was complete by 1536. Although the Portuguese discovered Brazil in 1500, settlement and colonization did not take place until 1549. See generally P. KENNEDY, *supra* note 6; J. PARRY, *THE SPANISH SEABORNE EMPIRE* (1966); C. BOXER, *THE PORTUGUESE SEABORNE EMPIRE* (1969); C. HARING, *THE SPANISH EMPIRE IN AMERICA* (1963); R. DAVIS, *ENGLISH OVERSEAS TRADE 1500-1700* (1973); J. PARRY, *TRADE AND DOMINION: THE EUROPEAN OVERSEAS EMPIRE IN THE EIGHTEENTH CENTURY* (1971); L. TECLAFF, *ECONOMIC ROOTS OF OPPRESSION* (1984); C. REYNOLDS, *COMMAND OF THE SEA* (1974); C. BOXER, *THE DUTCH SEABORNE EMPIRE: 1600-1800* (1965).

19. Mercantilism, in its classic form, asserted that the economic welfare of a nation-state required the accumulation of wealth in gold or silver through increased

state policy by which an imperial nation maintained the balance of trade in its favor by artificial means such as: high protective tariffs against manufacturers of its trading partners; subsidies to its inefficient industries; and monopolies and price-fixing in its domestic economy. A colony in such an empire existed to increase the wealth of the imperial nation by furnishing raw materials at controlled prices to the advantage of the imperial nation.

In his significant 1987 book,²⁰ Professor Kennedy showed the connection between mercantilism and the collapse of the European empires:

wealth is needed to underpin military power, and military power is needed to acquire and protect wealth. If, however, too large a proportion of the state's resources is diverted from wealth creation and allocated instead to military purposes then that is likely to lead to a weakening of national power over the longer term.²¹

Thus, all the great empires have collapsed for economic reasons in the 500 years of Professor Kennedy's study: Spain, France, Holland, Germany, Austria-Hungary, Russia and Great Britain. Our future as an imperial power is none too bright.

III. *DEVELOPMENT OF MECHANISMS FOR INTERNATIONAL COOPERATION*

A. *The Multilateral Treaty*

By the mid-19th century, the most significant development in the growth of international cooperation had occurred: the multilateral treaty as a type of international legislation. In maritime matters this began with the Declaration of Paris of 1856,²² an aftermath of the Crimean War, in which the belligerents agreed that: privateering would be abolished; a vessel's neutral flag would protect enemy cargoes against seizure

foreign trade. The accumulation was to take place by creating a trade balance in favor of the exporting country, to the detriment of importing countries. See W. CUNNINGHAM, *THE GROWTH OF ENGLISH INDUSTRY AND COMMERCE*, pt. 2 (6th ed. 1925).

20. See P. KENNEDY, *supra* note 6.

21. *Id.* The collapse of great empires has been a frequent subject of academic discussion. See, e.g., A. TOYNBEE, *A STUDY OF HISTORY*, vols. 1-6 abridgment (1947); O. SPENGLER, *THE DECLINE OF THE WEST* (abridgment) (1962).

22. See C. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 457-63 (6th ed. 1967).

(except for contraband); neutral cargoes carried on enemy vessels would also be protected against seizure (except for contraband); and that blockades must be effective in order to be binding (and that such effectiveness required a force sufficient to prevent access by sea to an enemy's coasts).²³

One of the earliest multilateral treaties, signed by twenty-six nations in Paris in 1884, was the International Convention for the Protection of Submarine Cables which dealt with important questions of international communication and vessel operations.²⁴

In 1889, the Washington Conference on Safety at Sea²⁵ dealt with a number of difficult questions: depths to which vessels may be safely loaded (load lines); rules to determine the seaworthiness of vessels; compulsory sea lanes to follow in frequented waters; and guidelines to minimize ice problems in North Atlantic navigation. The Washington Conference also developed uniform systems of buoys; methods to report wrecks; and qualifications for merchant marine officers. Furthermore, it discussed the creation of a permanent international maritime committee, a predecessor of the IMO of today. The most useful product of the Conference was the Rules of the Road,²⁶ a draft uniform law to be enacted by all maritime states. This early attempt at cooperation through a uniform law did not achieve global uniformity because few nations adopted the Rules, although the nations which adopted them were leading maritime nations.²⁷ Thus, at an early stage of in-

23. *Id.*

24. Convention for Protection of Submarine Cables, Paris, Mar. 14, 1884, 24 Stat. 989, T.S. No. 380. The 1884 Convention is restated in the 1919 Treaty of Versailles, June 28, 1919, art. 282, 2 MAJOR PEACE TREATIES OF MODERN HISTORY 1265-1533 (A. Toynbee ed.), and in the Geneva Convention on the High Seas, Apr. 29, 1958, art. 26, *entered into force* Sept. 30, 1962, 13 U.S.T. 2312 (pt. 2), T.I.A.S. No. 5200, 430 U.N.T.S. 82. The 1884 Convention is still in effect with respect to forty signatories.

25. Final Acts and Protocols of Proceedings of the International Maritime Conference, Oct. 16 - Dec. 31, 1889, 51st Cong., 1st Sess., S. Ex. Doc. No. 53 (1890).

26. Act to Adopt Regulations for Prevention of Collisions at Sea, 26 Stat. 320, ch. 802 (1890).

27. Uniformity in the vital question of the navigation rules can be traced to the Treaty of 1863 between the United Kingdom and France whereby the French government accepted the invitation extended by the British Parliament in 1862 for other states to adopt the navigation rules already legislated (from 1846 to 1858) and reembodyed in Board of Trade Regulations of 1863. The United States adopted these rules in 1864 for inland waters as well as the high seas. The U.S. Congress enacted

ternational cooperation it was discovered that the treaty process would be essential for the progressive harmonization and unification of trade and shipping law.²⁸

Problems invariably arise in the interpretation of multilateral treaties due to the conflicts of meaning that develop when a treaty is expressed in several different languages because each version is equally authentic. Historically, diplomats used Latin as the sole diplomatic language until the seventeenth century when Latin was gradually replaced by French.²⁹ Later, international organizations such as the League of Nations used both French and English.³⁰ Today, treaties developed by diplomatic conferences under the auspices of the United Nations use six official languages and all are equally authentic.³¹

The next problem in interpreting multilateral treaties derives from the fact that even when translation is not a problem, words in a treaty acquire a narrow meaning of their own and this meaning becomes difficult to change without a new treaty.³² It is customary today to include hortatory language in

the 1889 Rules of the Road in 1890 and the leading maritime nations, including the United Kingdom, separately enacted the same or similar rules so that the 1889 Rules were to be effective in maritime nations from July 1, 1897. See Presidential Proclamation No. 18, 29 Stat. 885. See generally Owen, *The Origins and Development of Marine Collision Law*, 51 TUL. L. REV. 759, 782-790 (1977).

28. The spirit of international unification of maritime law extended beyond the realm of trading and shipping. The Second Hague Peace Conference of 1907, for example, treated the subject of naval warfare. The conference dealt with neutral vessels and rules of naval warfare and there was a follow-up conference at London in 1909 on the Rules of Naval Warfare. See 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 732-35 (8th ed. 1955) (discussing Hague Conference).

29. See generally S. DE GRAMONT, *THE FRENCH, PORTRAIT OF A PEOPLE* 259-60 (1969) (outlining French linguistic history and development).

30. See F. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* (1967).

31. U.N. CHARTER, art. 111, ¶ 1. The U.N. Charter provides for the equal authenticity of the Chinese, French, Russian, English, and Spanish texts of the Charter, and Rule 51 of the Rules of Procedure of the General Assembly reflect this. Arabic has subsequently been added to these official languages. Under the Statute of the International Court of Justice, annexed to the U.N. Charter, the official languages of the court are English and French. Specialized agencies also follow this practice.

32. A classic example of this problem can be found in the difficulties for maritime lawyers in interpreting the words "per package or unit" in the 1924 Hague Rules. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, Aug. 25, 1924, entered into force June 2, 1931, for the U.S. Dec. 29, 1937, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155 [hereinafter 1924 Hague Rules]. After years of controversy as to whether a steel and aluminum container measuring (40' x 8' x 8') was a package, a refinement of the 1924 treaty language was effectuated in Article II of the Visby Amendments of 1968. Protocol to Amend the

a treaty which urges strongly that a treaty be interpreted uniformly.³³ Given the social and economic differences that are papered over by imprecise words in a multilateral treaty, uniform interpretation rarely is possible. Thus, the lawyer's search for treaty meaning becomes increasingly difficult. Guidance may be drawn from the Vienna Treaty on Treaties,³⁴ adopted in 1969; the clear import of the treaty language controls unless such use of words effects a result inconsistent with the purpose of the treaty.³⁵

B. *The League of Nations, 1920*

The creation of the League of Nations in 1920 was an im-

1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, U.K.T.S. 83 (Cmd. 6944) (1977) [hereinafter 1968 Visby Amendments] amending 1924 Hague Rules. The 1968 Visby Amendments made the decision of whether or not a container is a package (for limitation of carrier liability purposes) to depend on whether the packages within the container were enumerated in the bill of lading. *But see* 46 U.S.C. § 1304(5) (1936) (Congress provided a different statutory formula for the resolution of similar legal issues in the United States, "per package . . . or in case of goods not shipped in packages, per customary freight unit . . ."); *Binladen BSB Landscaping v. M.V. "Nedlloyd Rotterdam"*, 759 F.2d 1006 (2d Cir. 1985); *Mitsui & Co. v. American Export Lines, Inc.*, 636 F.2d 807 (2d Cir. 1981).

33. *Cf.* U.N. Convention on the Carriage of Goods by Sea, Mar. 31, 1978, art. 3, 17 I.L.M. 608, 610 (1978), U.N. Doc. A/CONF. 89/5 (1978) [hereinafter Hamburg Rules]. ("In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.").

A more complicated formulation was used by UNCITRAL in the 1980 Convention on Contracts for the International Sale of Goods (the "CISG"), which provides:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, art. 7, 19 I.L.M. 671, U.N. Doc. A/CONF. 97/19 *entered into force for the United States* Jan. 1, 1988, Sen. Treaty Doc. No. 98-9; 52 Fed. Reg. 40, 6262-6280 (1987).

34. International Convention on the Law of Treaties, Vienna, May 22, 1969, arts. 31-33, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *see* Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970). The Convention entered into force in 1980. President Nixon referred the treaty to the Senate in 1971, but the Senate has not yet given advice and consent to ratification.

35. Vienna Convention, *supra* note 34, arts. 31-33.

portant step on the road to international legislation by the treaty process. The Covenant of the League of Nations,³⁶ adopted after the First World War, provides a classic example of a multilateral treaty that also serves as international legislation for very limited purposes. In its initial efforts to improve the quality of life, especially in public health and communication, the League of Nations demonstrated the feasibility of international cooperation,³⁷ but its system of collective security failed to keep the peace.³⁸

C. *The United Nations, 1945*

The United Nations Charter, in addition to emphasizing the importance of international cooperation in economic and social activities, required it.³⁹ Pursuant to this requirement, part of this cooperation takes place through the General Assembly and its organs, such as the U.N. Conference on Trade and Development ("UNCTAD")⁴⁰ and the U.N. Commission on International Trade Law ("UNCITRAL").⁴¹ Much of the work of international cooperation, however, is done through the specialized agencies connected to the United Nations.⁴²

36. The League of Nations was created (and perhaps doomed) by the 1919 Treaty of Versailles. See F. WALTERS, *supra* note 30. The Treaty was enforced by the victorious allies in the First World War against the German Empire (Second Reich) and its allies. The Weimar Republic was the victim of the treaty. The Covenant of the League is Part One of the Treaty of Versailles between the allied powers and Germany. *Id.* at 43-65.

37. *Id.* at 175-94, 745-62.

38. A. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 252-56 (1958); W. Friedmann, *General Course in Public International Law* 65-75 II *Recueil Des Cours, Academie de Droit International* (1969).

39. Article 55 provides that: "the United Nations shall promote:

a. higher standards of living, full employment and conditions of economic and social progress and development,

b. solutions of international economic, social, health and related problems . . ."

U.N. CHARTER, art. 55. See generally Fleischauer, *United Nations and the Progressive Development and Codification of International Law*, 25 *INDIAN J. INT'L L.* 1 (1985).

40. G.A. Res. 1995, 19 U.N. GAOR Supp. (No. 15) at 1, U.N. Doc. A/5815 (establishing the U.N. Conference on Trade and Development (UNCTAD), Dec. 30, 1964).

41. G.A. Res. 2205, 21 U.N. GAOR Supp. (No. 16) at 99, U.N. Doc. A/6316 (establishing the U.N. Commission on International Trade Law (UNCITRAL), Dec. 17, 1966).

42. U.N. CHARTER, art. 57. Article 57 provides: "[t]he various specialized agencies, established by intergovernmental agreement and having wide international responsibilities . . . in economic, social, cultural, educational, health and related fields,

Specialized agencies are different because they are set up under their own treaty instruments with their own administrations and, more importantly, their own budgets, which are financed independently of the general U.N. budget and, in varying degree, such agencies are free of the politics of the General Assembly.

The political difficulties of the bloc-voting systems in the General Assembly have made it necessary to eliminate formal voting; thus, many U.N. organs, including the General Assembly, follow the practice observed in UNCITRAL since 1971 of making decisions by consensus without formal votes.⁴³

IV. DEVELOPMENT OF PROCEDURES FOR POLICY- MAKING IN THE INTERNATIONAL COMMUNITY

The initial development of procedure for policy-making by treaty in the international community, before the creation of the U.N. system, first came from non-governmental organizations, and later from governmental organizations.

shall be brought into relationship with the United Nations" *Id.*; see WILLIAMS, *THE SPECIALIZED AGENCIES AND THE UNITED NATIONS: THE SYSTEM IN CRISIS* 14 (1987).

43. Consensus became a necessary device in the General Assembly following the decision of the Soviet Union and France not to pay for the support of the peace-keeping forces in the Belgian Congo (now Zaire). Since strict construction of the Charter language provided that those states in arrears in their assessed contributions would lose the vote in the General Assembly, *see* U.N. CHARTER, art. 19, it was necessary to devise a formula to avoid formal votes, beginning in 1965. The International Court of Justice had held the Congo expenses to be expenses of the organization in an advisory opinion. 1962-63 I.C.J.Y.B. 77-83. Attempted enforcement of article 19 against two permanent members of the Security Council would have been disruptive, if not fatal.

With the numerical voting superiority of the "Group of 77," comprised of developing nations, those nations with the largest populations and greatest monetary contributions to the organization were consistently outvoted in formal voting. Thereafter, formal voting was seen as unnecessarily confrontational and potentially disruptive. For example, the U.S. Ambassador to the U.N. is required to keep track of countries voting differently from the United States for the President and Congress so those countries may somehow be penalized. With decisions taken only by consensus and no formal voting, keeping score of "victories" and "defeats" in the General Assembly has become largely meaningless.

Under the system of formal voting, China (pop. 1 billion), United States (pop. 250 million), and U.S.S.R. (pop. 300 million) could be outvoted by Tonga, Tuvalu, Kiribati and Vanuatu — four South Pacific island nations with a combined population of less than one million.

A. *The Comité Maritime International*

The origins of the Comité Maritime International (the "CMI"), a non-governmental international organization founded in 1897, may be traced to an earlier organization, the International Law Association (the "ILA") founded in 1873 during the aftermath of the Civil War in the United States and the Franco-Prussian War in Europe.⁴⁴ One of the first products of the ILA was a set of rules to adjust the maritime disputes between owners and insurers of vessels and owners and insurers of cargo, a system of law known as General Average.⁴⁵

Subsequently, the ILA developed the York-Antwerp Rules of 1877, which also contained a series of accommodations between the legal systems of France and Great Britain.⁴⁶ Because of dissatisfaction with the slow progress of other maritime law issues before the ILA, the CMI was established in 1897 by the Belgian, Louis Franck, with the cooperation of Sir Leslie Scott in the United Kingdom and the Berlingieris in It-

44. See E. GOLD, *MARITIME TRANSPORT: THE EVOLUTION OF INTERNATIONAL MARINE POLICY AND SHIPPING LAW* 128 (1981). The CMI today is made up of 48 national member associations of maritime law. Its President, since 1976, is Francesco Berlingieri of Genoa, grandson of one of the founders of CMI and its Executive Secretary is Professor Jan Ramberg of Stockholm. Its administrative headquarters is in Antwerp. The organization meets at conferences held in different parts of the world at regular intervals. *Id.* at 130. The principal work is undertaken by Committees and Sub-committees commissioned by the President to undertake studies and prepare reports on a variety of maritime law topics of a commercial nature.

The International Law Association was founded in Brussels in October, 1873. Olmstead, *The International Law Association: A Worldwide Organization for Development and Promotion of International Law*, in *THE PRESENT STATE OF INTERNATIONAL LAW* 1 (M. Bos., ed. 1973). The ILA conducts studies and makes reports at its biennial conferences on all aspects of public and private international law. See *id.*

45. *Id.* at 7. General Average originated before the corporate form of vessel ownership and the introduction of the present system of insurances for the vessel's hull and liabilities to third parties (commonly known as "P & I") and the insurance on cargo, yet its continued presence is presupposed in the setting of insurance premiums. A general average is a loss to the cargo or to the vessel whereby the entire venture is at peril so that the losses should be equitably apportioned among those who benefit. See L. BUGLASS, *MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES: AN AVERAGE ADJUSTER'S VIEWPOINT* 185-87 (1981).

46. See BUGLASS, *supra* note 45, at 180. These Rules are incorporated into all maritime documents. The current version was adopted by CMI at the Hamburg Plenary in 1974. *Id.* at 184; see York-Antwerp Rules, May 1974, 6 *BENEDICT ON ADMIRALTY*, Doc. No. 4-6 (7th ed. 1990). See generally R. LOWNDES & G. RUDOLF, *THE LAW OF GENERAL AVERAGE AND THE YORK-ANTWERP RULES* 239-53 (discussing development of York-Antwerp Rules through the adoption of the York-Antwerp Rules in 1974).

aly.⁴⁷ Subsequently, groups of maritime lawyers, newly-organized into national associations of maritime law in Western European countries and the United States, could consolidate their efforts in this new international, non-governmental organization.

The CMI method of unifying international maritime law was proven to be successful in the years from 1897 to 1968. First, a questionnaire about a subject proposed for unification was submitted to each of the national maritime law associations. The answers were then circulated to all associations, and a committee was appointed to deal with the subject generally, as well as to compile the answers to the questionnaire received from member associations. Thereafter, discussion in informal meetings proceeded until the issues and their resolution in a "commercial" manner seemed to be ready for international legislation. After preparation of the final committee report and a draft convention, a plenary meeting of CMI would approve the draft convention with possible amendments, followed by a request to the Belgian government to convene an international diplomatic conference of plenipotentiaries. This method continued until 1979 when the Belgian government sponsored the thirteenth and last of those conferences.⁴⁸ The final acts of these diplomatic conferences then were sent to signatory governments for ratification and to all other states for

47. The early work of the CMI, which followed the ILA, also accommodated the civil law system of France and the common law systems of England and the United States. See Sweeney, *Proportional Fault in Both to Blame Collisions*, in *STUDI IN ONORE DI GIORGIO BERLINGIERI*, 549 (Sp. ed. Il Diritto Marittimo 1964) (tying the development of CMI itself to the high-seas collision problem). This led to the 1910 Collision Convention. See International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, 1910, 6 *BENEDICT ON ADMIRALTY*, Doc. No. 3-2 (7th ed. 1990). The United States is not a party to the Convention. See *id.* The Convention, as ratified in the United Kingdom, is in *The Maritime Conventions Act of 1911*, 1 & 2 *Geo. 5*, ch. 57 § 1.

48. The thirteenth and last diplomatic conference to be convened by Belgium for CMI developed the protocol to amend the 1968 Visby Amendments to the 1924 Hague Rules at Brussels in December 1979. The 1979 protocol substituted the Special Drawing Right of the International Monetary Fund (S.D.R. Protocol) for the gold (or Poincaré) franc in the limitation of carrier liability. The author represented the United States at the sessions. See 6 *BENEDICT ON ADMIRALTY*, Doc. No. 1-2A (7th ed. 1990). The protocol entered into force in 1984. The United States is not a signatory to the 1968 Visby Amendments or the 1979 S.D.R. Protocol. See A. LILAR & C. VAN DEN BOSCH, *LE COMITÉ MARITIME INTERNATIONAL* (1972).

accession. Lastly, Belgium acted as the depository government for ratifications (and denunciations) of the CMI's conventions.

The CMI successfully shepherded six international conventions through the international legislative process prior to the Second World War: Collision (1910);⁴⁹ Salvage (1910);⁵⁰ Limitation of Shipowner's Liability (1924);⁵¹ Bills of Lading (1924);⁵² Maritime Liens and Mortgages (1926);⁵³ and Immunity of State-Owned Ships (1926).⁵⁴

With the end of the Second World War, the completion of reconstruction efforts in Western Europe and the disposition of the U.S. publicly-owned Second World War merchant fleet, the maritime industry in the non-Communist world returned to private ownership. Accordingly, the CMI resumed its tradi-

49. See 1910 Collision Convention, *supra* note 47; 1989-1990 C.M.I. Y.B. 80.

50. Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658, T.S. No. 576. A new convention was prepared in 1989. See 20 J. MAR. L. & COM. 589-602 (1989); 1989-1990 C.M.I. Y.B. 83.

51. Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-Going Vessels, Brussels, Aug. 25, 1924, 6 BENEDICT ON ADMIRALTY, Doc. No. 5-1 (7th ed. 1990). There have been two subsequent conventions on the same subject, in 1957, International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, Brussels, Oct. 10, 1957, 6 BENEDICT ON ADMIRALTY, Doc. No. 5-2 (7th ed. 1990) and in 1979, Protocol Amending the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, Brussels, Dec. 21, 1979, 6 BENEDICT ON ADMIRALTY, Doc. No. 5-3 (7th ed. 1990). The previous conventions were replaced by the International Convention on Limitation of Liability for Maritime Claims, London, November 19, 1976, 6 BENEDICT ON ADMIRALTY, Doc. No. 5-4 (7th ed. 1990) and in 1979, Misc. 15 (1980) (Cmd. 7926). The new convention entered into force on December 1, 1986. See 1989-1990 C.M.I. Y.B. 116, 146.

52. 1924 Hague Rules, *supra* note 32, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155. U.S. ratification of this convention in 1937 is subject to reservations, or "understandings" previously enacted in the 1936 Carriage of Goods by Sea Act ("COGSA"). See 46 U.S.C. §§ 1300-34 (1986). See *infra* note 64; 1989-1990 C.M.I. Y.B. 88.

53. International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, Brussels, Apr. 10, 1926, 120 L.N.T.S. 189. A subsequent convention was prepared in 1967, International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, May 27, 1967, 1 TRANSPORT LAWS OF THE WORLD, Doc. I/E/13 (1977) (not in force). A new convention is being prepared by UNCTAD and IMO, with the assistance of CMI. The United States is not a party to these conventions. See 1989-1990 C.M.I. Y.B. 98.

54. International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships, Brussels, Apr. 10, 1926, 1 TRANSPORT LAWS OF THE WORLD, Doc. I/E/6 (1989). The United States is not a party. See 1989-1990 C.M.I. Y.B. 100.

tional role and made further efforts at legal harmonization in the period from 1952 to 1968, which produced new CMI conventions on Civil Jurisdiction in Matters of Collision (1952);⁵⁵ Penal Jurisdiction in Matters of Collision (1952);⁵⁶ Arrest of Sea Going Ships (1952);⁵⁷ Limitation of Liability of Shipowners (1957);⁵⁸ Stowaways (1957);⁵⁹ Carriage of Passengers (1961);⁶⁰ Liability of Operators of Nuclear Ships (1962);⁶¹ Vessels under Construction (1967);⁶² Passenger Luggage (1967);⁶³ Protocol Amending the 1924 Convention of Bills of Lading

55. International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction in Matters of Collision, May 10, 1952, 439 U.N.T.S. 217, 6 BENE-DICT ON ADMIRALTY, Doc. No. 3-1 (7th ed. 1990); see 1989-1990 C.M.I. Y.B. 102. This Convention will be replaced by a new convention prepared by CMI in 1977, Jurisdiction, Choice of Law and Recognition and Enforcement of Judgments in Collision Cases."

56. International Convention for the Unification of Certain Rules Concerning Penal Jurisdiction in Matters of Collision, May 10, 1952.

This Convention was suggested by a decision of the Permanent Court of International Justice. The *Lotus Case* (Fra. v. Turk.), P.C.I.J. (ser. A), No. 10 (1923), 2 HUDSON, WORLD COURT REPORTS 20 (1929) (superseded by the Geneva Convention on the High Seas, *supra* note 51). Both conventions remain in force, but there are 63 accessions or ratifications to the Penal Jurisdiction Convention, while there are 58 to the High Seas Convention.

57. International Convention Relating to the Arrest of Sea-Going Vessels, Brussels, May 10, 1952, 439 U.N.T.S. 193, 1 TRANSPORT LAWS OF THE WORLD, Doc. I/E/7 (1989). The United States is not a party. See Ripert, *Les Conventions de Bruxelles du 10 Mai 1952 sur l'Unification du Droit Maritime*, [1952] DROIT MARITIME FRANCAIS 343; 1989-1990 C.M.I. Y.B. 112.

58. See *supra* note 51.

59. International Convention Relating to Stowaways, Oct. 10, 1957, 8 BRITISH SHIPPING LAWS 1064 (1963).

60. International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea, Brussels, Apr. 29, 1961, 1 TRANSPORT LAWS OF THE WORLD, Doc. I/E/10 (1989). This Convention and the Passenger Luggage Convention of 1967, International Convention for the Unification of Certain Rules Relating to Carriage of Passenger Luggage by Sea, Brussels, May 27, 1967, 1 TRANSPORT LAWS OF THE WORLD, Doc. I/E/12 (1989), were replaced by the Convention Relating to the Carriage of Passengers and Their Luggage by Sea, Athens, Dec. 13, 1974, 14 I.L.M. 945. See BENE-DICT ON ADMIRALTY, Doc. No. 2-2 (7th ed. 1990). The United States is not a party to any of these conventions.

61. International Convention Relating to the Liability of Operators of Nuclear Ships, Brussels, May 25, 1962, 6 BENE-DICT ON ADMIRALTY, Doc. No. 5-5 (7th ed. 1990). While this convention is not in force, the Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Brussels, Dec. 17, 1971, entered into force 1975, 974 U.N.T.S. 255, entered into force on July 15, 1975.

62. Convention Relating to Registration of Rights in Respect of Vessels under Construction, Brussels, May 27, 1967, 1 TRANSPORT LAWS OF THE WORLD, Doc. No. I/E/14 (1977) (not in force).

63. See *supra* note 60.

(1968);⁶⁴ and a new Convention on Maritime Liens and Mortgages (1967).⁶⁵

By 1968, however, international governmental organizations had posted large numbers of maritime subjects on their agendas, without waiting for CMI consideration. Thus, there was a serious danger that CMI viewpoints would be ignored in the future and the reason for its existence might disappear. Reorganizing to meet the new challenges in 1968, the CMI offered its services to the Intergovernmental Maritime Consultative Organization ("IMCO")⁶⁶ in connection with the preliminary work on the Oil Pollution Civil Liability Convention of 1969⁶⁷ and that kind of cooperation continues.⁶⁸ By 1974, the leaders of the CMI clearly saw that the older CMI method of changing public law through the cooperative efforts of industry members, private lawyers, and the Belgian government would no longer suffice, because governments demanded to participate in the international legislative process from the very beginning. This also may account for the fact that there have been few ratifications of the treaties negotiated after 1957 with the result that the Conventions on Stowaways (1957), Nuclear Ships (1962), Vessels Under Construction (1967), Passenger Luggage (1967), and Maritime Liens and Ship Mortgages (1967) have never come into force and the Brussels Protocol to the Hague Rules (the "Visby Amendments") did not become effective for ten years.⁶⁹

The reorganized CMI now sees that its future lies in the preparation of commercial solutions to commercial problems which do *not* require the intervention of governments or inter-

64. Protocol to Amend the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, Feb. 23, 1968, 2 U.N. REGISTER OF TEXTS, ch. 2, p. 180, 1 TRANSPORT LAWS OF THE WORLD, Doc. I/E/15 (1989). It entered into force on June 23, 1977. A 1979 Protocol amending the Protocol entered into force on February 14, 1984. See 1989-1990 C.M.I. Y.B. 88, 95, 97.

65. See *supra* note 53 and accompanying text.

66. See *infra* note 140 and accompanying text (discussing the troubled history of IMCO).

67. International Convention on Civil Liability for Oil Pollution Damage [hereinafter CLC], Nov. 29, 1969, 973 U.N.T.S. 3, 9 I.L.M. 45; see *infra* note 149.

68. In addition to the subject of maritime liens and mortgages, see *supra* note 53, CMI has been involved in studies dealing with sea waybills, electronic bills of lading, maritime fraud, salvage, carriage of hazardous and noxious substances, multimodal transport, and carriage of passengers.

69. See *supra* note 48.

national treaties to become effective. Projects have included Rules on Conflicts of Law and Jurisdiction in Collision Cases, Rules on Damages in Collision Cases, a study of charterparty terminology, a comparative study of ship-building contracts (with model clauses), rules for international maritime arbitrations, rules for the status of hovercraft and off-shore mobile craft such as drilling rigs and rules on electronic bills of lading, seaway bills, and other forms of documentation in cargo carriage. These ambitious proposals illustrate that the CMI has found a new vocation, which will harmonize with the commercial concerns of the international community in maritime subjects.

The problem with the older CMI was not the method but the nature of the member national associations. In some national associations, only the shipowners and their insurers have any voice, while in other national associations governments have effective control. Shippers and maritime labor usually are not represented. In the past, CMI members frequently stated that their drafts need not accommodate the views of the United States because of the few U.S. ratifications of CMI conventions, but those failures of ratification occurred because provisions in many CMI conventions were hostile to U.S. interests, especially where the carriage of passengers and cargo were concerned. Article 3 of the CMI's 1981 Constitution now urges a balancing of national interests.

B. *The International Labour Organization*

The International Labour Organization (the "ILO") was founded in 1919 under the League of Nations at Geneva as an autonomous inter-governmental organization. It survived the Second World War to become a specialized agency under the U.N. Charter in 1946.⁷⁰ The purposes of this organization are: (1) to improve labor conditions; (2) to raise living standards of

70. See 1 & 2 THE ORIGINS OF THE INTERNATIONAL LABOUR ORGANIZATION (J. Shotwell ed. 1934); D. MORSE, THE ORIGIN AND EVOLUTION OF THE I.L.O. AND ITS ROLE IN THE WORLD COMMUNITY (1969). The organization is also known by its French name, Bureau International du Travail ("B.I.T."); see Constitution of the International Labour Organisation, Oct. 9, 1946, art. 3, 62 Stat. 3485, 15 U.N.T.S. 35 [hereinafter ILO Const.]. There was a three year hiatus on U.S. membership (1977-1980) for political reasons.

workers; and (3) to increase productive employment and to counter unemployment in developing nations.

There are presently 145 member states. The member states of the ILO presuppose a free, mobile labor force with organized trade unions which undoubtedly exist in the developed economies of Western Europe, the Americas, Japan and Australia but which have not been an effective force in centrally planned economies and those developing states still dependent on agriculture.⁷¹

The ILO's work products, which won for it the Nobel Peace Prize in 1969, include: (1) conventions open for the signature of members and non-members⁷² (the ILO boasts more than 150 Conventions in seventy years and more than 5000 ratifications beginning in 1919 with Number One, the Convention on Hours of Work (Industry)),⁷³ and (2) recommendations for uniform legislation by member states where the treaty process is either unnecessary or rendered impossible by constitutional problems in federal nations.⁷⁴

There have been conventions dealing with maritime labor since 1919 to provide bare minimum standards for the industry. Some examples include: the Minimum Age of Seafarers in 1920⁷⁵, 1936⁷⁶, 1946, and 1973⁷⁷ the Minimum Standards for Seamen's Articles of Agreement in 1926,⁷⁸ the Minimum Stan-

71. A notable feature of the ILO is the tripartite character of delegations from member states; delegations represent employers, employees, and government. See Jenks, *The Significance for International Law of the Tripartite Character of the International Labour Organisation*, 22 *TRANSACTIONS OF THE GROTIUS SOC'Y* 45, 46 (1962).

72. ILO Const., *supra* note 70, art. 19, 62 Stat. 3485, T.I.A.S. 1868, 15 U.N.T.S. 68. A convention adopted by two-thirds of the delegates present is forwarded to member states for ratification within one year, although not effective until the number of ratifications required has been achieved. The convention in force binds only the ratifying states.

73. See Hours of Work (Industry) Convention (ILO No. 1) *opened for signature* Nov. 28, 1919, 38 U.N.T.S. 17.

74. See ILO Const., *supra* note 70, art. 19, 62 Stat. 3485, T.I.A.S. 1868, 15 U.N.T.S. 68; 1 L. OPPENHEIM, *INTERNATIONAL LAW* 725-26 (8th ed. 1955).

75. Minimum Age (Sea) Convention (ILO No. 7), *opened for signature* July 9, 1920, 38 U.N.T.S. 109.

76. Convention Fixing the Minimum Age for the Admission of Children to Employment at Sea (ILO No. 58)(revised 1936), Geneva, Oct. 24, 1936 *entered into force* April 11, 1939, *for the United States* Oct. 29, 1939, 54 Stat. 1705, T.S. 952, 40 U.N.T.S. 205 (still in force).

77. Minimum Age Convention (ILO No. 138), June 26, 1973.

78. Seaman's Articles of Agreement Convention (ILO No. 22), June 24, 1926, 38 U.N.T.S. 295.

dards of the Accommodations of the Crew in 1949⁷⁹ and 1970,⁸⁰ and Shipowner Liability for Injuries in 1936.⁸¹

Cooperation between the ILO and the International Maritime Organization continues to be essential as these international organizations confront the problems of the efficient and safe manning levels of vessels and the competency and training required for officers and crew.⁸²

C. Maritime Safety Conventions Before IMCO

Today, safety and pollution problems are under the supervision of the IMO, but there was much international legislation prior to the effective date of the IMCO charter in 1958.⁸³

The predominance of British shipping interests throughout the world during the years from 1890 to 1914 and the central position of London in international financial transactions of all kinds ensured that decisions taken in conferences summoned by Great Britain would be attended by the principal maritime powers and that any solution adopted there would automatically cover a large amount of world maritime traffic.⁸⁴ Thus the world-wide outcry that followed the sinking of the

79. Accommodation of Crews Convention (revised) (ILO No. 92), *opened for signature* June 18, 1949, 160 U.N.T.S. 223 *replacing* 1946 Accommodation of Crews Convention (ILO No. 75). Bulgaria is the only remaining party to ILO No. 75, which never entered into force and is no longer open to acceptance.

80. Accommodation of Crews (Supplementary Provisions) Convention (ILO No. 133), Oct. 30, 1970 (requiring improved standards). In addition to the conventions, there are recommendations concerning bedding, mess utensils, air conditioning, and harmful noises.

81. Convention Concerning the Liability of the Shipowner in Case of Sickness, Injury or Death of Seamen (ILO No. 55), Geneva, Oct. 24, 1936, 54 Stat. 1693, T.S. No. 951, 40 U.N.T.S. 169.

82. ILO interest and cooperation were apparent in the IMO's International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, London, July 7, 1978, which was transmitted to the Senate for advice and consent August 20, 1979. Sen. Treaty Doc. No. 96-1, Executive EE; 6A BENEDICT ON ADMIRALTY, Doc. No. 9-38 (7th ed. 1990).

83. Convention on the Intergovernmental Maritime Consultative Organization, March 6, 1948, 9 U.S.T. 621, T.I.A.S. No. 4044, 289 U.N.T.S. 3, *entered into force for the United States* Mar. 17, 1958. There have been amendments in 1964, 18 U.S.T. 1299, T.I.A.S. No. 6285, 607 U.N.T.S. 276; 1965, 19 U.S.T. 4855, T.I.A.S. No. 6490, 649 U.N.T.S. 334; 1974, 28 U.S.T. 4607, T.I.A.S. No. 8606; 1975, T.I.A.S. No. 10374; and unnumbered agreements dated November 17, 1977 and November 15, 1979. See *infra* note 140 and accompanying text (explaining ten-year delay in enactment).

84. The size of the British flag merchant fleet in 1900 was estimated to be 52% of world shipping. D. HOWARTH, *SOVEREIGN OF THE SEAS* 332 (1974).

R.M.S. Titanic on April 15, 1912 with the loss of 1,500 lives,⁸⁵ led to a resumption of international maritime cooperation, begun with the Washington Conference of 1889 but in abeyance during the ferocious maritime and naval competition between the powers in the early years of the twentieth century. Great Britain assumed the initiative and invited the powers to the 1913 London Conference on Safety of Life at Sea. As a result of that two-month conference, the London Convention of 1914 was prepared dealing with rules for water-tight integrity in the construction of vessels, lifesaving appliances, fire protection, safety certificates, use of radiotelegraphy on merchant vessels, and a North Atlantic Ice Patrol.⁸⁶

The outbreak of the First World War meant that all international maritime cooperation would be suspended at least until the end of the war, but in fact, this important international work was not resumed until 1929 when a six-week conference was held at London to revise and amend the unratified 1914 convention. The meeting produced a new convention dealing with the subjects of the 1914 convention and including International Rules of the Road.⁸⁷ The subject of load lines (Plimsoll Marks) was removed from the 1929 Safety of Life at Sea Convention ("S.O.L.A.S.") and dealt with at the London International Load Line Conference in 1930.⁸⁸

During its twenty years of existence, the League of Nations Communication and Transit Organization took up some

85. See "Loss of the Steamship Titanic," S. Doc. No. 933 S. 6179, 62d Cong. (1912). There are many popular treatments of the disaster. See W. LORD, *A NIGHT TO REMEMBER* (1955). The tragedy was reexamined in M. DAVIE, *TITANIC* (1987). In 1985, Robert Ballard and experts from the Woods Hole Oceanographic Institution, with French cooperation, located and explored the wreck at an ocean depth of approximately 2.5 miles at a distance of 350 miles southeast of Newfoundland. A French expedition in 1987 brought up artifacts of the ship. See generally Ballard, *How We Found Titanic*, 168 *NAT'L GEOGRAPHIC MAG.* 696 (Dec. 1985); Ballard, *A Long Last Look at Titanic*, 170 *NAT'L GEOGRAPHIC MAG.* 698 (Dec. 1986).

86. See *INTERNATIONAL CONFERENCE ON SAFETY OF LIFE AT SEA*, S. DOC. NO. 463 (1914).

87. *International Convention on Safety of Life at Sea*, May 31, 1929, 50 Stat. 1121, T.S. 910, 136 L.N.T.S. 81.

88. The load-lines, or Plimsoll marks, are engraved on the vessel's sides, midships, to indicate the depth to which the vessel may be safely loaded in various seasons and waters. See *International Load Line Convention*, July 5, 1930, 47 Stat. 2228, T.S. 858, 135 L.N.T.S. 301. This convention was replaced in 1966. *International Convention on Load Lines*, London, Apr. 5, 1966, 18 U.S.T. 1857, T.I.A.S. 6331, 640 U.N.T.S. 133.

maritime subjects and was able to achieve some success with respect to uniform systems of maritime signals and buoys⁸⁹ but was less successful with the subject of oil pollution of the oceans, which could not be completed by the League of Nations before the Second World War brought an end to these efforts in 1939.⁹⁰

Although the subject of oil pollution regulation would certainly be within the broad scope of the activities of IMCO, the U.K. government was finally persuaded that the subject matter was too important to postpone until IMCO should have been established. The U.K. government, therefore, called an international conference in 1954 to consider oil pollution of the oceans. The London Conference of May 1954 was concerned with deliberate discharges of oil and oily mixtures from vessels operating within zones of the high seas in which such discharges would be prohibited.⁹¹ The convention went into effect four years later on July 26, 1958.

The 1954 Convention did not deal with civil liabilities, but rather with penal or quasi-penal proceedings by the flag state against the vessel, the shipowner, and her master. Dissatisfaction with that regulatory aspect of the convention—only by the flag state—soon led to demands for amendments even before the convention became effective and a reconsideration of issues involving *port* states took place in the LOS III negotiations.⁹² The entire subject is now within the IMO.⁹³

89. International Convention on Maritime Signals, Manned Lightships not on their Stations, and Lighthouse Characteristics and Radio Beacons, Oct. 10, 1930, 125 L.N.T.S. 95, and International Convention for a Unified System of Maritime Buoyage, May 13, 1936, 8 BRITISH SHIPPING LAWS, Doc. 13-32 (1963).

90. See L.N. Rep. No. C/449/M/235 - 1935 - VIII, Oct. 26, 1935; S. PRITCHARD, *THE INTERNATIONAL POLITICS OF OIL POLLUTION CONTROL, 1920-1962* (1979).

91. International Convention for the Prevention of Pollution of the Sea by Oil, London, May 12, 1954, 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3, *entered into force* July 26, 1958. Amendments to the basic convention were made on April 11, 1962, 17 U.S.T. 1523, T.I.A.S. 6109, 600 U.N.T.S. 332, on October 21, 1969, 28 U.S.T. 1205, T.I.A.S. 8505. In 1973 an entirely new convention was prepared by the IMO. See *infra* notes 148 & 149.

92. "L.O.S. III" describes the negotiation of the public law treaty, U.N. Convention on the Law of the Sea, Montego Bay, Dec. 10, 1982, 21 I.L.M. 1261 (1983). It is not yet in force.

93. See *infra* notes 135-53 and accompanying text.

D. *The International Institute for the Unification of Private Law (UNIDROIT)*

The International Institute for the Unification of Private Law ("UNIDROIT"), founded by the League of Nations and preserved by the Italian government and its constituent member states since the end of the Second World War,⁹⁴ is an organization devoted to the science of comparative law. UNIDROIT now works in conjunction with organs of the United Nations in the preparation of draft texts harmonizing significant aspects of international commercial law, such as its work on relations between principals and agents, international commercial contracts, franchising, and carriage of dangerous goods. The work on financial leasing and factoring is now complete.⁹⁵ UNCITRAL is now preparing an international agreement on the subject of the liability of terminal operators as the result of a study and draft text prepared by UNIDROIT.⁹⁶

V. *POLICY-MAKING UNDER THE UNITED NATIONS AND ITS SPECIALIZED AGENCIES*

In addition to GATT, IMO, UNCTAD, and UNCITRAL, there are other specialized international organizations, such as the Food and Agricultural Organization ("FAO"),⁹⁷ the International Civil Aviation Organization ("ICAO"),⁹⁸ the World

94. UNIDROIT, the International Institute for the Unification of Private Law, was established in 1926 by its intergovernmental agreement, the Statute of UNIDROIT and is headquartered in Rome. As of 1989 there were fifty-three states party to the Statute.

95. Draft Conventions on International Financial Leasing and on International Factoring were prepared by UNIDROIT and submitted to a diplomatic conference convened by Canada at Ottawa in May, 1988. The Financial Leasing Convention deals with rules for equipment leasing in the triangular relation of lessor, lessee and financial institution. The Factoring Convention deals with the business arrangements of receivables furnished by a supplier to debtors (or customers) where the factor finances, maintains accounts, collects and protects against defaults. See *Financial Times*, May 25, 1989, at 17.

96. See *infra* note 180.

97. Constitution of the United Nations Food and Agriculture Organization, Quebec, Oct. 16, 1945, 12 U.S.T. 980, T.I.A.S. No. 4803. The headquarters of this organization is in Rome.

98. Convention on International Civil Aviation, Chicago, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (establishing the International Civil Aviation Organization (the "ICAO")). The headquarters of the ICAO is in Montreal.

Health Organization ("WHO"),⁹⁹ the World Intellectual Property Organization ("WIPO"),¹⁰⁰ and the International Atomic Energy Agency ("IAEA"),¹⁰¹ whose actions concern, and even govern, commercial activities. Those specialized agencies and the IMO have been established by separate multilateral treaties under article 57 of the U.N. Charter. In the U.N. scheme, the Economic and Social Council (the "ECOSOC") is supposed to work out conflicts of jurisdiction between U.N. agencies through "coordination" of work.¹⁰² Each U.N. specialized agency or U.N. General Assembly organ jealously guards its territory lest the reasons for its existence disappear, and the usual result of the turf battles is duplication of effort and multiplication of personnel.

A. *The Failure of the International Trade Organization*

When discussing trade problems, it is necessary to begin with the fact that the International Trade Organization (the "I.T.O."), designed as the specialized agency for trade problems, never came into existence. The United States was the principal force behind the I.T.O. and U.S. failure to ratify the treaty establishing this organization doomed it.¹⁰³

United States efforts on behalf of the trade organization were so strong because the United States recognized the part that trade disputes may have had in the Second World War. The United States may have goaded Japan into further aggres-

99. Constitution of the World Health Organization (the "WHO"), July 22, 1946, 62 Stat. 2679, T.I.A.S. No. 1808, 14 U.N.T.S. 185, amended by T.I.A.S. Nos. 8086, 8534 and unnumbered agreement dated May 17, 1976. See 18 U.S.T. 3003, T.I.A.S. No. 6393 (nomenclature regulations). The headquarters of WHO is Geneva.

100. Constitution of the World Intellectual Property Organization ("WIPO"), July 14, 1967, 21 U.S.T. 1749, T.I.A.S. No. 6932, 828 U.N.T.S. 3 entered into force for the United States Aug. 25, 1970. WIPO is headquartered in Geneva.

101. International Atomic Energy Agency ("IAEA"), Oct. 26, 1956, 8 U.S.T. 1093, T.I.A.S. No. 3873, 276 U.N.T.S. 3, amended by T.I.A.S. Nos. 5284, 7668. The headquarters of the organization is in Vienna.

102. "Coordination" is a euphemism used in turf battles between organizations. ECOSOC's "coordinating" function is authorized by the U.N. Charter, which states: "The Organization shall make recommendations for the coordinating of the policies and activities of the specialized agencies." U.N. CHARTER, arts. 58, 63(2).

103. For the struggle to establish the International Trade Organization, see generally, J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969); see also W. DIEBOLD, *THE END OF THE I.T.O.* 16 (ESSAYS IN INTERNATIONAL FINANCE), Princeton (1952); BRONZ, *The International Trade Organization Charter*, 62 HARV. L. REV. 1089 (1949); U.S. DEP'T OF STATE, "HAVANA CHARTER FOR AN I.T.O." Pub. No. 3206 (Sept. 1948).

sion by its export controls on fuels and mineral resources in the 1930s, initially in response to Japanese aggression in China. Also, the Great Depression of the late 1920s and 1930s caused a 50% fall in world trade.¹⁰⁴ The United States felt an international organization was needed to assist long-range growth in world trade. Europeans, however, were not convinced of the need for such international action and became suspicious of U.S. motives even as the Marshall Plan restored their shattered economies. Fear of international controls of national restrictive trade practices played the same part in the demise of I.T.O. which would delay the creation of IMCO for ten years.¹⁰⁵

Work on the I.T.O. began with a draft charter prepared in 1946 in the ECOSOC. Congress insisted on international cooperation in the area of trade policy as a condition to the post-war loans.¹⁰⁶ Further discussions at the United Nations led to a preliminary conference in Geneva in which the first round of tariff reduction discussions took place simultaneously under the auspices of a "temporary" organ created by the GATT.¹⁰⁷ The peculiar situation of GATT as a bare-minimum organization with a lack of dispute-resolution mechanisms and executive powers must be explained as due to the I.T.O.'s spectacular failure in an effort to produce a world-wide organization for free trade.

In the early spring of 1948, the founding conference of the I.T.O. met in Havana. It was expected that the temporary GATT would be replaced by a permanent I.T.O. Thus, today's GATT was a temporary expedient, not expected to last. The U.S. Secretary of State planned to negotiate the I.T.O. Convention under authority of the 1934 Trade Agreements Act and its 1945 extension.¹⁰⁸

104. See W. BROWN, *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE* (1950) (discussing pre-war trade problems).

105. See *infra* note 137 and accompanying text.

106. See R. GARDNER, *STERLING-DOLLAR DIPLOMACY* 191-99 (1980).

107. The General Agreement on Tariffs and Trade ("GATT"), Geneva, October 30, 1947, 61 Stat. (5), and (6), T.I.A.S. 1700, 55 U.N.T.S. 308. The GATT agreement is in force among contracting parties through the Protocol of Provisional Application. There are more than 80 protocols to the original agreement.

108. The Reciprocal Trade Agreements Act of 1935, 48 Stat. 943 (1934) *amending* the Tariff Act of 1930, 19 U.S.C. § 1337 (1982), initiated the process whereby the record-high duties of the 1930 Smoot-Hawley Tariff Act could be reduced through

In June, 1950, the Cold War became hot with hostilities in Korea that lasted until 1953. A consequence of the Korean War and disillusionment with the "bitter peace" was that President Truman withdrew the I.T.O. treaty from the U.S. Senate because it was doubtful that two-thirds of the Senate would have given its advice and consent as required under the U.S. Constitution.¹⁰⁹ Consequently, the I.T.O. treaty died because it was never ratified. President Truman finally announced U.S. adherence to GATT as an executive agreement and not as a treaty.¹¹⁰ Failure of U.S. ratification meant that no major trading nation would ratify I.T.O. The only remnant of the I.T.O. effort was the temporary organization, GATT.

B. *The General Agreement on Tariffs and Trade (GATT), 1947*

GATT might be called a non-organization because of the circumstances surrounding its birth. As such, GATT has kept a very low profile as an international organization. The GATT Agreement does not provide for administration. Presumably, only annual sessions of all the contracting parties may make policy and execute it.¹¹¹ But, there is a "temporary" secretariat with a Director General (now Arthur Dunkel),¹¹² a council

bilateral negotiation and extension of most-favored nation privileges. The Smoot-Hawley Tariff Act of 1930 was enacted during the Depression with very high tariffs, and has been amended in some part at every session of Congress in the past 60 years. It has not been repealed *in toto* and remains the underlying statutory basis for duties unless such duties have been reduced by bilateral agreement (1934 to 1947) or a multilateral agreement (GATT).

The Reciprocal Trade Agreements Act permitted the President to negotiate bilaterally for the reduction of tariffs up to fifty percent in exchange for reciprocal reductions. Up to that time Congress had jealously guarded its prerogatives in setting the tariff, and was often responsive to lobbying and deals to the detriment of international trade. The negotiating authority of the President was continued in subsequent legislation. See 57 Stat. 125; Joint Resolution to Extend the Authority of the President under section 350 of the Tariff Act of 1930, as amended June 7, 1934, H.J. Res. 111, Pub. L. No. 66, 59 Stat. 410. An Act to Extend the Authority of the President under section 350 of the Tariff Act of 1930, as amended, and for other purposes, July 5, 1945.

109. U.S. President John F. Kennedy used the term "bitter peace" to describe the post-World War II era in his inaugural address on January 20, 1961. See U.S. CONST. art. II, § 2 (advise and consent clause); J. JACKSON, *supra* note 103, § 2.5 (discussing President Truman's action in December, 1950).

110. See Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 259 (1967).

111. See J. JACKSON, *supra* note 103, at 128.

112. *Id.* at 157-60.

provided "temporarily" in 1960,¹¹³ and a steering committee provided "temporarily" in 1975.¹¹⁴

The admission to GATT membership is difficult today, much more complicated than U.N. admission. Each admission to GATT has to be negotiated separately to determine that the applicant has made all the tariff concessions that the other contracting parties already have accomplished.¹¹⁵ Customarily, applicants are first admitted to observer status, followed by provisional accession as the concessions are worked out.

Originally, GATT consisted of only twenty-three member states, but today there are ninety-seven members, plus thirty-one additional nations that apply GATT articles to trade negotiations.¹¹⁶ GATT may already cover as much as 90% of world trade.¹¹⁷

Of "centrally planned economies," Cuba, Czechoslovakia, Hungary, Poland, Romania, and Yugoslavia are already members of GATT. The USSR and other Eastern European states are not now members. The People's Republic of China ("PRC") has observer status, although the Kuomintang regime was a full member before the creation of the PRC in 1949. Despite the membership of some Eastern European nations, views have been expressed in the United States that GATT agreements will only work in capitalist-industrialized societies, where the means of production, that is decision-making on exports and imports, are in private hands and not the responsibility of the government, essentially a free market economy. Centrally-planned economies usually have preferred the political atmosphere of UNCTAD for trade problems. The Soviet Union, however, has expressed an interest in GATT membership and has recently been granted observer status. Certainly, in the days before Perestroika and Glasnost, trade decision-making was centralized in the Ministry of Foreign Trade in Moscow. Now, however, that department has been eliminated and it is asserted that the number of decision-makers in foreign

113. *Id.* at 154; see GATT Doc. SR 16/11, 160.

114. This group is known as the Consultative Group. See GATT Press Release 1163 (July 11, 1975).

115. GATT, *supra* note 107, art. XXXIII, 61 Stat. A75, 55 U.N.T.S. 284 (1947).

116. *Special Report On GATT*, Journal of Commerce, Jun. 6, 1990.

117. *Id.*

trade in the U.S.S.R. will increase dramatically.¹¹⁸

GATT functions by using four basic principles. First, trade is on the basis of non-discrimination among the member states.¹¹⁹ Second, protection is by means of tariff only and not by the use of quotas or other non-tariff barriers.¹²⁰ Third, compensation must be offered under prescribed procedures if GATT commitments have been altered.¹²¹ Fourth, consultations among the contracting parties must be used to settle trade disputes.¹²²

Thus, GATT is an international body where nations can negotiate, bargain, cajole, and persuade each other. The goal of GATT is the possible "freer" trade, not the impossible "free" trade, but it is not yet an organization where disputes can be resolved easily by international law.

The goals of GATT are accomplished through: (1) the use of the most-favored nation clause regarding tariff concessions,¹²³ and (2) the prohibition of new non-tariff barriers.¹²⁴ The general most-favored nation clause requires that tariff concessions granted by a nation to one of its trading partners must be applied to all other trade partners. Thus, GATT makes multilateral any tariff condition already granted by members in bilateral negotiations. GATT also prohibits all non-tariff barriers, where not inconsistent with existing legislation as of 1947 (the "Grandfather Clause").

118. See Wall St. J., June 21, 1990 at A1 (describing Soviet trade liberalization efforts).

119. GATT, *supra* note 107, art. 1, 61 Stat. at A1, T.I.A.S. No. 1700, 55 U.N.T.S. at 196 as amended reprinted in J. JACKSON, *supra* note 103, at 802, app. A.

120. GATT, *supra* note 107, arts. XIII, XIV, XX, 61 Stat. at AHO-A43, A43-A48, A60-A63, T.I.A.S. No. 1700, 55 U.N.T.S. 235-50.

121. *Id.* art. XXIII, 61 Stat. at A64-65, T.I.A.S. No. 1700, 55 U.N.T.S. at 266.

122. *Id.* arts. XXII, XXVIII, 61 Stat. at A64, A71-A72, T.I.A.S. No. 1700, 55 U.N.T.S. at 266, 276.

123. Most favored-nation treatment is guaranteed by article I of GATT, which says that "any advantage, favour, privilege or immunity granted by any contracting party to any product . . . shall be accorded immediately and unconditionally to the like product . . . of all other contracting parties." *Id.* art. I, ¶ 1, 61 Stat. at A12, T.I.A.S. No. 1700, 55 U.N.T.S. at 196.

124. The "grandfathering" of existing barriers is found in GATT. *Id.* art. III, § (3), 61 Stat. at A18-A19, T.I.A.S. No. 1700, 55 U.N.T.S. at 287; see Jackson, *supra* note 110, at 294.

1. Negotiating Rounds

Negotiations involving GATT members have taken place during eight rounds of meetings. The first five sets of negotiations were on the basis of product-by-product bargaining but since then have been on an across-the-board basis with non-tariff barriers taking up much of the discussion.¹²⁵ The sixth or Kennedy Round of negotiations took place in Geneva from 1962 to 1967 and involved some forty-eight countries as well as US\$40 billion in trade.¹²⁶ These negotiations were required because of the birth of the European Economic Community (the "EEC") in 1957.¹²⁷ These negotiations accomplished 4,000 pages of tariff concessions and an international anti-dumping code, but other goals such as a world grain agreement and a special chemical agreement could not be carried out.¹²⁸

The seventh or Tokyo Round took place in Geneva from 1973 to 1978 and involved some 100 nations.¹²⁹ This round of negotiations was made necessary by the expansion of the EEC beyond its original six members.¹³⁰ The principal concerns were non-tariff barriers, government procurement, government subsidies to exporters, and the special treatment to be accorded to developing countries known as the General System of Preferences (the "GSP").¹³¹

The most recent negotiations, the eighth or Uruguay

125. The early rounds of GATT negotiations were: Geneva, 1947; Annecy, 1948; Torquay, 1950; Geneva, 1956; and Geneva, 1960. See J. JACKSON, *supra* note 103, at 59-85.

126. *Id.*; see GATT Press Release No. 992 (1967); K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 69 (1970) (discussing Kennedy Round).

127. An economic community (a Zollverein in European history) eliminates tariff barriers among the members and erects a high tariff barrier against non-members.

128. K. DAM, *supra* note 126.

129. See GATT PUBLICATION, *REPORT BY THE DIRECTOR GENERAL, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS* (1979); J. JACKSON, J.V. LOUIS & M. MATSUSHITA, *IMPLEMENTING THE TOKYO ROUND* (1984); J. TWIGGS, *THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS* (1987).

130. K. DAM, *supra* note 126, at 73-76.

131. The General System of Preferences (the "GSP") was devised at the first UNCTAD Conference in 1964, although it was considered part of the ITO in 1948, and implemented by GATT in 1971 by a system of waivers whereby developed countries would extend more favorable treatment to developing-country products than to similar products from developed countries. See *supra* note 102 and accompanying text (discussing ITO and GSP).

Round, have been in progress since 1986.¹³² The U.S. goal is the elimination of non-tariff barriers in service industries, such as banking, insurance, transportation, and data processing.¹³³ The dangerous subject of agricultural subsidies has also been addressed, thus far without success. At present, fourteen negotiation sub-groups have been established to deal with all the agenda items, and it is anticipated that the negotiations can be completed by 1991.¹³⁴

2. Dispute Settlement

While the principal enforcement-type machinery of the 1947 agreement was to be article XXIII, entitled "Nullification or Impairment,"¹³⁵ in practice that article has proven to be very cumbersome. It is also dangerous in that it may force member states out of the organization.¹³⁶

Instead, article XXVIII has been constructed into a method of dispute resolution through the reports of groups of experts in a negotiation that is part arbitration and part conciliation.¹³⁷ The title of article XXVIII is "Modification of Schedules" and its purpose is to keep the parties talking as the experts attempt to devise withdrawals of equivalent concessions

132. The Uruguay Round of tariff negotiations began in September, 1986 at Punta del Este, Uruguay. See *General Agreements on Tariffs and Trade: Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations*, 25 I.L.M. 1623 (1986); see also J. JACKSON, *THE WORLD TRADING SYSTEM; LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989).

133. See BNA Daily Report For Executives, Jan. 17, 1990, at 5-6.

134. See *General Agreements on Tariff and Trade: Decisions on Negotiating Structure and Plans for the Uruguay Round*, 26 I.L.M. 850 (1987) (Organization of the Negotiations and GATT Focus, No. 43).

135. GATT, art. XXIII, *supra* note 107, 61 Stat. at A64-A65, T.I.A.S. No. 1700, 55 U.N.T.S. at 266-68; see generally J. JACKSON, *GATT AS AN INSTRUMENT FOR THE SETTLEMENT OF TRADE DISPUTES*, PROCEEDINGS OF THE AMERICAN SOCIETY FOR INTERNATIONAL LAW 144-46 (1967).

136. The Netherlands employed article XXIII against the United States in 1950 concerning U.S. agricultural quota restrictions on cheese and was ignored. Netherlands Measures of Suspension of Obligations to the United States, Determination of Nov. 8, 1952, GATT: B.I.S.D., 32-33 (Supp. I 1953).

137. Walker, *Dispute Settlement: The Chicken War*, 58 AM. J. INT'L L. 671 (1964) (discussing use of GATT, article XXVIII, "Modification of Schedules" with the influence of the Group of Experts). Arbitrations, like judicial proceedings, resolve existing disputes between parties; whereas conciliation looks to past and future conduct to reconcile the parties without proposing a specific resolution to any particular dispute.

in retaliation for actual or perceived losses of exports.¹³⁸

C. Shipping

In 1948, the conference to draft the multilateral convention to establish the IMCO was held in Geneva. Negotiations with the United Nations were concluded in that year, and the draft agreements were approved by the Economic and Social Council and the General Assembly at that time.¹³⁹ However, because of political disputes and economic differences concerning restrictive business practices and the international status of flag of convenience shipping, IMCO was not actually established until 1958 with the entry into force of its multilateral convention.¹⁴⁰

The promotion of safety at sea was an obvious IMCO purpose, but another treaty purpose was to abolish discriminatory and restrictive practices (such as the conference system and

138. For example, the Chicken War (U.S.-EEC), 1961-1981, see Lowenfeld, "Doing Unto Others." —*The Chicken War Ten Years After*, 4 J. MAR. L. & COMM. 599 (1973), the Pasta War (U.S.-EEC), 1982-1988, see Barcero, *Trade Laws, GATT and The Management of Trade Disputes Between the U.S. and EEC*, 5 Y.E.L. (1985), and GATT's ruling that U.S. Customs user fees were an impermissible surcharge. 5 Int'l Trade Rep. (BNA) 168 (1988).

139. See U.N. Doc. E/1064 of Aug. 31, 1948 (ECOSOC approval of draft convention). General Assembly approval came on November 18, 1948. See 1949 U.N.Y.B. 969-70; 1950 U.N.Y.B. 1007-08; see also Convention on the International Maritime Consultative Organization, Mar. 6, 1948, 9 U.S.T. 621, T.I.A.S. No. 4044, 298 U.N.T.S. 48 (1948 IMCO Charter).

140. IMCO was intended to succeed two wartime cooperative agencies, the United Maritime Authority (1942-1946) and the United Maritime Consultative Council (1946-1948). Thirty nations attended the founding conference of IMCO in February and March of 1948. Under article 60 of the IMCO Convention, it would come into force upon the completed ratifications of twenty-one states, seven of which would have in excess of 1,000,000 gross tons of shipping. The first five ratifications were quickly achieved (Canada, Greece, Netherlands, United Kingdom, and United States) but it required ten years to achieve the required "tonnage" ratifications (Germany and Japan remained under wartime controls in 1948).

During the abeyance of an international maritime organization, the four Law of the Sea Conventions were prepared by the International Law Commission, and the 1958 Geneva Conference on the Law of the Sea was held. In addition, the 1889 Rules were revised by the Convention on the Safety of Life at Sea, London, 1948, 65 Stat. 406-19 (1951) and the International Convention for the Prevention of Pollution of the Sea by Oil, see *supra* note 91, was prepared.

Prior to the major changes of 1982, the charter was amended in 1964, see 18 U.S.T. 1299, T.I.A.S. No. 6285, in 1965, see T.I.A.S. No. 6490, in 1974, see 28 U.S.T. 4607, T.I.A.S. No. 8606, in 1975, see T.I.A.S. No. 10374, and by unnumbered agreements dated November 17, 1977 and November 15, 1979.

preference laws) which were in widespread use. U.S. goals would include major changes in the conference system, such as open admission, while European goals would include the elimination of U.S. cargo preference laws. While the 1948 IMCO treaty required ratification by twenty-one countries, including seven with fleets of one million gross tons each, the requisite tonnage was not available until IMCO organizers figuratively took the pledge not to intervene in restrictive trade practices. The final necessary ratifications took place in 1958 and the organization was established in London in 1959, where it continues with 134 member states, although its present effectiveness has been crippled by financial stresses because of non-payment of assessments by member states.¹⁴¹

The early troubles of the organization can be demonstrated by its former name, the Intergovernmental Maritime Consultative Organization (or IMCO) which was clearly designed as a restriction on its activities. The organizers used "intergovernmental" rather than international because of its intended limited membership to a few states concerned with shipping, and the use of "consultative" denoted an advisory rather than a legislative role.

In a manner similar to the ILO, the IMO produces conventions (or treaties) requiring ratification and recommendations (or codes) permitting uniform legislation, which, supposedly, can be made effective in less time than the time for treaty ratification by maritime powers. An unusual feature of the IMO conventions is the implicit amendment which takes effect upon acceptance by two-thirds of the Members;¹⁴² the alternative for states disapproving the amendment is denunciation of the entire convention under Article 58.

On May 22, 1982, by amendment of its 1948 constituent agreement, a new constitutional treaty became effective,¹⁴³ expanding activities of the IMCO into pollution and other legal

141. In large measure, this is due to U.S. actions against the Noriega government in Panama. See Sweeney, 6 LLOYDS MAR. L. NEWSLETTER, No. 20 (1989). The largest maritime fleet is that of Liberia, now racked by civil war.

142. Implicit amendment occurs under the provisions of article 51 of the IMO Charter, as amended, which provides that "[t]welve months after its acceptance by two-thirds of the Members of the organization . . . each amendment shall come into force for all members." See IMO Charter, *supra* note 139, art. 51.

143. IMO Charter, Amendments of Nov. 14, 1975, *effective* May 22, 1982, T.I.A.S. No. 10374.

matters and giving it a new name, the International Maritime Organization or the IMO, as well as a new role in policy-making.¹⁴⁴ The IMO (and its predecessor) has been responsible for twenty-eight international maritime conventions of which twenty-three are currently in force. These conventions include: SOLAS;¹⁴⁵ Rules of the Road;¹⁴⁶ Load Lines;¹⁴⁷ Maritime Pollution—deliberate spills;¹⁴⁸ Civil Liability for Accidental Oil Pollution;¹⁴⁹ Passengers;¹⁵⁰ Tanker Safety, 1978;¹⁵¹

144. The IMCO Convention, *supra* note 139, 9 U.S.T. 621, T.I.A.S. No. 4044, 289 U.N.T.S. 48, (IMO Charter Revisions 1982), deleted former article 2 of the IMO Charter: "The functions of the Organization shall be consultative and advisory." New organs of the Organization under article 12 include the Legal Committee, the Marine Environment Protection Committee, and the Technical Cooperation Committee. *Id.* art. 12.

145. International Convention for Safety of Life at Sea, June 17, 1960, 16 U.S.T. 185, T.I.A.S. No. 5780, 536 U.N.T.S. 28 [hereinafter 1974 SOLAS Convention], *replaced and abrogated as between contracting governments by* 32 U.S.T. 47, T.I.A.S. No. 9700.

146. International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, T.I.A.S. No. 8587.

147. International Convention on Load Lines, Apr. 5, 1966, 18 U.S.T. 1857, T.I.A.S. No. 6331, *amended by* 20 U.S.T. 17, T.I.A.S. No. 6629; 20 U.S.T. 2577, T.I.A.S. No. 6720.

148. Intervention on the High Seas in Cases of Pollution by Substances Other Than Oil ("MARPOL"), Nov. 2, 1973, *entered into force for the United States* Mar. 30, 1983, T.I.A.S. No. 10561.

149. *See supra* note 67. The United States is not a party to the CLC despite the efforts of three administrations, although the United States is a party to the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties ("Intervention Convention"), Nov. 29, 1969, 26 U.S.T. 765, T.I.A.S. No. 8068.

The 1969 CLC is supplemented by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution (Dec. 18, 1971, 11 I.L.M. 284); *see* Leich, *U.S. Practice*, 80 AM. J. INT'L L. 947 (1986) (Department of State opinion on oil pollution conventions).

Both conventions were amended in 1984 to increase the limits of liability: Draft Protocol to the International Convention on Civil Liability for Oil Pollution Damage, Sept. 7, 1984, 23 I.L.M. 177 (1984), 15 J. MAR. L. & COMM. 613 (1984); Draft Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 23 I.L.M. 195 (1984). President Bush signed federal oil spill legislation into law on August 18, 1990, but criticized Congress for not enacting the international treaty, which would have provided access up to US\$ 260 million per spill. *See* Locke, *Oil Spill Bill Signed*, BUS. INS., at 18 (Aug. 27, 1990). The approved legislation sets limits of liability in excess of the international agreements at 1200 per gross for ocean-going tankers without a maximum liability limit.

150. *See supra* note 60 and accompanying text.

151. The IMCO Tanker Safety Conference of 1978 produced Protocols to the 1973 MARPOL Convention, 17 I.L.M. 546; *supra* note 148, and to the 1974 SOLAS Convention, *supra* note 145.

Standards of Training and Certification for Watchkeepers, 1978;¹⁵² Maritime Terrorism, 1988;¹⁵³ and Salvage, 1989.¹⁵⁴ In the wings are new conventions in the areas of a global distress and safety system, revision of the Athens 1974 Passenger Convention, and another effort to resolve the question of liability in the case of carriage of hazardous and polluting substances.¹⁵⁵ The IMO, however, cannot solve shipping's economic problem of too many ships and not enough cargoes.

VI. UN ACTIVITIES UNDER THE GENERAL ASSEMBLY

A. *The UN Conference on Trade and Development (UNCTAD)*

In 1964, the United Nations began the UNCTAD in Geneva.¹⁵⁶ This organization consists of all member states and has a large bureaucracy in Geneva. UNCTAD holds conferences at four-year intervals: Geneva,¹⁵⁷ New Delhi,¹⁵⁸ Santiago,¹⁵⁹ Nairobi,¹⁶⁰ Belgrade,¹⁶¹ Manila,¹⁶² and Geneva.¹⁶³ The meetings have a heavy political flavor unpalatable to developed nations like the United States and the north/south confrontation has become a hallmark of the organization.

UNCTAD work products with respect to shipping include:

152. Standards of Training and Certification of Watchkeepers (1978). *See supra* note 82 and accompanying text. This was an IMO treaty, heavily influenced by U.S. Coast Guard drafts. The treaty came into force in 1984. There are presently 72 signatories. IMO Doc. Circ. 71, Apr. 10, 1989. Despite U.S. sponsorship of the treaty, the Senate has not yet given advice and consent because of objections by domestic industry concerning the effect of this treaty with its higher standards and the increased admeasurement tonnage of vessels which industry leaders argue would lead to increased costs of operation.

153. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *done*, Mar. 10, 1988, 27 I.L.M. 672 (the "Achille Lauro Convention").

154. International Convention on Salvage, Apr. 20, 1989, IMO Doc. LEG 60/12; *see* 20 J. MAR. L. & COMM. 589-602 (1989).

155. The IMO Conference on this subject in 1984 failed to produce agreement of two-thirds of the member states and a new conference will be necessary.

156. UNCTAD, *see supra* note 40 and accompanying text.

157. *See* 1964 U.N.Y.B. at 195.

158. *See* 1968 U.N.Y.B. at 367.

159. *See* 1972 U.N.Y.B. at 272.

160. *See* 1976 U.N.Y.B. at 392.

161. *See* 1979 U.N.Y.B. at 538.

162. *See* 1983 U.N.Y.B. at 558.

163. *See* Financial Times, June 28, 1988 at 17.

(1) the Code of Conduct on Liner Conferences, 1974;¹⁶⁴ (2) Convention on Multimodal Transport, 1980;¹⁶⁵ and, (3) Convention on Open Registry Fleets, 1986.¹⁶⁶

UNCTAD operates under a rigid bloc voting system that consists of Group B—Western Europe and others including the United States, Canada, Japan, Australia, and New Zealand; Group D—the USSR and other centrally-planned economies, except the PRC; and the Group of 77—developing states made up of Latin American, African, and Asian states. Consensus should be essential to the work of UNCTAD.¹⁶⁷ In the future UNCTAD will deal with maritime liens and mortgages (in cooperation with the IMO), charter parties, marine insurance, maritime fraud and shipping agents. Further confrontation with the shipping industry is inevitable as real economic disputes come before the political arena of UNCTAD.

B. *U.N. Commission on International Trade Law (UNCITRAL)*

UNCITRAL was created in 1966.¹⁶⁸ It is now a thirty-six member-state commission elected by the General Assembly on a geographic basis.¹⁶⁹ For fourteen years, the secretariat oper-

164. Code of Conduct for Liner Conferences, *opened for signature* Apr. 6, 1974, 13 I.L.M. 912 (1974). See L. JUDA, *THE UNCTAD LINER CODE: UNITED STATES MARITIME POLICY AT THE CROSSROADS* (1983). The United States is not a party to the UNCTAD Liner Code. The convention entered into force on October 6, 1983.

165. International Convention on International Multimodal Transport of Goods, May 24, 1980, U.N. Doc. TD/MT/CONF/16 (not in force); see Driscoll & Larsen, *The Convention on the International Multimodal Transport of Goods*, 57 TUL. L. REV. 193 (1982).

166. United Nations Convention on Conditions for Registration of Ships, *opened for signature* Feb. 7, 1986, U.N. Doc. TD/RS/CONF/23, 26 I.L.M. 1229 (not in force). Ratification by 40 states representing 25 percent of gross registered tonnage will be necessary to bring the convention into force.

167. UNCTAD's operations under the rigid bloc system have resulted in wasted resources, at least in the shipping area. It proved to be impossible to organize an entire scheduled meeting on the Multimodal Convention because of a dispute on the election of a chairman. The review conference on the Code of Conduct for Liner Conferences could not be organized because of a dispute as to whether signatory status was necessary to participate in voting.

168. UNCITRAL was established in 1966 at the urging of Hungary to provide a vehicle for East-West trade discussions. Like all organs of the General Assembly it was responsive to the demands for the creation of a "New International Economic Order" in 1974. See G.A. Res. 2205 (XXI) of Dec. 17, 1966, 21 U.N. GAOR Supp., (No. 16), UN Doc. A/6316, at 68, *reprinted in* 1 UNCITRAL Y.B. 65.

169. Initially, the Commission was composed of 29 member states, but in 1973 membership was increased to 36, the membership to be representative of geographic

ated out of New York; since 1980 the secretariat has had its headquarters in Vienna. Annual plenary sessions and Working Group meetings now alternate between New York and Vienna. The meetings do not involve political questions but rather provide a forum in which to discuss the science of comparative law as applied to trade problems. UNCITRAL has had an impressive work product since 1966: Voluntary Arbitration and Conciliation Rules, 1976;¹⁷⁰ Convention on the International Sale of Goods (the "CISG");¹⁷¹ International Negotiable Instruments;¹⁷² Guide to Contracts for Large Industrial Works (Turnkey Guide);¹⁷³ and the Hamburg Rules of 1978,¹⁷⁴ by which a new allocation of risks between shippers and shipowners was negotiated.

While the CISG, completed in 1980, came into force in 1988, the Hamburg Rules, completed in 1978, are not yet in force and that requires some explanation. Respecting carrier liability for cargo damage, the existing international regime for the allocation of risks was developed by CMI in a 1924 Convention (known as Hague Rules)¹⁷⁵ modeled, as to its com-

regions and economic and legal systems. Member states are elected for six-year terms. J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 50 n.5 (1987).

170. UNCITRAL Arbitration Rules, 1976; UNCITRAL Conciliation Rules, 6 Y.B. COMMERCIAL ARB. at 168-90 (1976-1981).

171. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, 52 Fed. Reg. 40,6264 (1987), 19 I.L.M. 668 (1980). See J. HONNOLD, *supra* note 169. The convention entered into force on January 1, 1988.

172. Convention on International Bills of Exchange and International Promissory Notes *opened for signature until* June 30, 1990, U.N. Doc. St/Leg/Ser. E/7. An unusual method of final preparation of this convention was utilized, in large part because of the financial crisis of the United Nations. After preparation by UNCITRAL Working Groups over twenty years and final approval by UNCITRAL's Plenary Sessions in 1986 and 1987, the Sixth (Legal) Committee of the General Assembly approved the draft convention itself and the General Assembly by Resolution 43/165 adopted the convention. General Assembly adoption, thus, stands in lieu of a diplomatic conference.

173. Report of the U.N. Commission on International Trade Law, U.N. Doc. A/42/836.

174. United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, U.N. Doc. A/CONF./89/5 (1978), 17 I.L.M. 608 (1978).

175. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the "Hague Rules"), *opened for signature* Aug. 25, 1924, T.S. No. 931, 51 Stat. 233; 120 L.N.T.S. 155. The Hague Rules were developed for voluntary adoption in the industry (similar to the York-Antwerp Rules) in 1921 by ILA at the

promises, on the U.S. Harter Act, a statute enacted in 1893.¹⁷⁶ The 1924 convention has two protocols making "cosmetic" changes, the 1968 Visby Amendments¹⁷⁷ and the 1979 protocol changing from gold to S.D.R. for limitation of liability purposes.¹⁷⁸ (The United States has not adopted these amendments.) In 1971, UNCITRAL took over the subject of Carriage of Goods from UNCTAD. A 1970 UNCTAD report¹⁷⁹ was very confrontational as it reflected the view of developing countries that the existing regime was flawed because of an obvious tilt in favor of shipowners from developed states, which led to double insurance of goods to the detriment of developing country trade.

UNCITRAL worked on this complex subject for over six years. In March, 1978, the Hamburg Conference consisting of some seventy-eight nations produced a new convention.¹⁸⁰ The results were not dictated by shipowners or any group and the text is full of compromises between the economic interests of shipowners (and their insurers) and cargo owners (and their insurers). A "package deal" was at the heart of the Hamburg negotiations, which were lengthy and difficult between nations whose shipping interests largely determined government policy (e.g., the United Kingdom, the Netherlands, Greece, Japan, and the USSR) and the nations where cargo interests have some effect on government policy (e.g., Australia, Canada, France, and the United States) with the cooperation as to some issues of an important carrier nation, Norway, and developing

Hague. The diplomatic conference for mandatory application followed three years later.

176. 46 U.S.C. §§ 190-93 (1982).

177. See *supra* note 32 (discussing the Visby Amendments to the Hague Rules).

178. Protocol Amending the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, U.N. Doc. St/Leg/Ser. E/7.

179. Report of the UNCTAD Working Group on International Legislation on Shipping, U.N. Doc. TD/B/C.4/86.

180. United Nations Convention on the Carriage of Goods by Sea (the "Hamburg Rules"), Mar. 31, 1978, U.N. Doc. A/CONF. 89/5, 17 I.L.M. 608 (the Author was U.S. Representative and Chairman of Delegation at the Conference, having been present at the Working Group Sessions and the UNCITRAL Plenary reviews as well as the consideration of the project by UNCTAD). The Author reviewed the development of the UNCITRAL Draft Convention in a five-part article, 7 J. MAR. L. & COMM. 69-125 (1975); 7 J. MAR. L. & COMM. 327-350 (1976); 7 J. MAR. L. & COMM. 487-503 (1976); 7 J. MAR. L. & COMM. 615-670 (1976); and 8 J. MAR. L. & COMM. 167-194 (1977).

states such as Mexico, Brazil, Argentina, Egypt, Nigeria, and India. Pro-shipowner provisions in the Hague Rules of 1924 include the nature of shipowner defenses, the period of shipowner responsibility, the amount of liability and the breakability of the limitation amount. The shipowner group admits no reason to abandon the system of the 1924 Hague Rules in favor of the changes in the Hamburg Rules.¹⁸¹ Cargo insurers, but not the shippers themselves, agree with the shipowners.

While only twenty signatories are needed for ratification, only seventeen countries have adopted the Hamburg Rules after twelve years (the United States not yet being one of these countries),¹⁸² although twenty-seven nations signed the convention in the year it was opened for signature.¹⁸³

While UNCTAD, rather than UNCITRAL, prepared the 1980 Convention on Multimodal Transport¹⁸⁴ covering goods shipped in the charge of a multimodal operator, and other specialized agencies such as ICAO and IMO and the European Rail Organization ("COTIF")¹⁸⁵ have dealt with aspects of the individual modes of transport, UNCITRAL is now involved with the interfaces between modes of transportation when goods are in the charge of a terminal operator in international trade.¹⁸⁶ UNCITRAL may have a further vocation in dealing

181. Hamburg Rules, *supra* note 178, arts. 5 (basis of liability); 4 (period of responsibility); 6 (unit limitation of liability); 7 & 8 (breakability).

182. Barbados, Botswana, Burkina Faso, Chile, Egypt, Hungary, Kenya, Lebanon, Lesotho, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Tanzania, Tunisia, and Uganda have ratified or acceded to the Hamburg Rules.

183. Signatories which have not yet ratified are Austria, Brazil, Czechoslovakia, Denmark, Ecuador, Finland, France, Federal Republic of Germany, Ghana, Holy See, Madagascar, Mexico, Norway, Pakistan, Panama, Philippines, Portugal, Singapore, Sweden, United States, Venezuela, and Zaire.

184. *See supra* notes 165 & 167.

185. Intergovernmental Organization for International Carriage of Goods by Rail (the "OTIF"). The OTIF is responsible for the 1966 Rail Transport Convention (C.I.M.), Berne, May 1, 1961, 2 *TRANSPORT LAWS OF THE WORLD*, Doc. I/B/1 (1988), and the 1985 replacement Convention concerning International Transport by Rail (COTIF), May 9, 1980, 2 *TRANSPORT LAWS OF THE WORLD*, Doc. I/B/8 (1988).

186. Draft United Nations Convention on Liability of Operators of Transport Terminals in International Trade, Jan. 29, 1988, U.N. Doc. A/Conf. 1545, 6 *BENEDICT ON ADMIRALTY* Doc. 1-7 (approved by the UNCITRAL Plenary on June 2, 1989); *see* U.N. Doc. A/Conf. 152/5. The draft text was reviewed by the Sixth (Legal) Committee of the General Assembly in October 1989 and the General Assembly, by Resolution 44/33 of Dec. 4, 1989, convened a diplomatic conference to meet at Vienna, beginning April 2, 1991. *See* Larsen, Sweeney & Falvey, *The Uniform Rules on the Liabil-*

with other aspects of the interfaces between modes of transport.

UNIDROIT prepared a draft convention which addressed the basic idea of responsibility for the safe-keeping of goods,¹⁸⁷ having drawn heavily on its Hotel-keepers Convention.¹⁸⁸ Today, however, safe-keeping is only a small part of the activities of a terminal operator with respect to goods covered by an international treaty.¹⁸⁹ Accordingly, following substantial studies of the industry, a new convention dealing with the liability of terminal operators in international trade has now been prepared.¹⁹⁰ In the future, UNCITRAL will be dealing with government procurement contracts, countertrade (an organized form of barter), contracts for the construction of industrial works, stand-by letters of credit and electronic funds transfers.

VII. *THE EUROPEAN COMMUNITY AND 1992*

The significance of 1992 is the projected integration of the economies of the European Community members through the elimination of customs and immigration formalities at the old national borders to produce the free movement of people, capital, and goods among the member states. The 1985 commitment of EEC heads of state to remove internal trade barriers by December 31, 1992 was finally realized in the Single European Act,¹⁹¹ providing for a gradual disappearance of Euro-

ity of Operators of Transport Terminals, 20 J. MAR. L. & COMM. 21 (1989) (discussing development of the treaty in the UNCITRAL working group, 1983-1988). Developments at the UNCITRAL Plenary and the General Assembly will be discussed by the same authors in an article to be published in October, 1990. 22 J. MAR. L. & COMM. — (1990). The idea for the terminal operator project developed from the need to fill gaps between various modes of transportation for the period when the goods are in charge of a non-carrier (*i.e.*, the operator of a transportation terminal or warehouse).

187. UNIDROIT's preliminary draft convention was considered by the Working Group at its 1984 Session in Vienna. See U.N. Doc. A/CN.9 260, Jan. 3, 1985. UNIDROIT's work on the subject began in 1976 with a Report by the late Professor D.J. Hall.

188. The draft Hotel-keepers Convention is in process of review by a Committee of Government Experts. See UNIDROIT 1989 Report, 1988 C.D. 68 Doc. 2.

189. OTT Working Group Report on Liability of Operators of Transport Terminals, U.N. Doc. A/CN.9 298, Feb. 8, 1988.

190. Draft Convention on the Liability of Operators of Transport Terminals in International Trade, *supra* note 186.

191. The Single European Act, 2 E.C. BULL. No. 11 (Supp. Feb. 1986), *reprinted* in 10 *FORDHAM INT'L L. J.* 471-502 (1987).

pean frontier barriers over a five and one-half year period after which persons, goods, services, and finance will move freely without the restrictions imposed by the old national borders. How this can ever be achieved without a common currency and a community central bank remains a mystery at this time, but the goal of creating the largest trading bloc in the world has such impetus now that planning of full market integration is proceeding even without this key element.

As far as shipping is concerned, instead of 1992 the important date for future developments may turn out to be 1993 when the English Channel Tunnel (the "Chunnel") is scheduled for completion, enabling passengers and freight to proceed by road or rail from the continental heart of the community to Northern Scotland.

While community policy has not previously required common action with respect to the liability regime in international shipping, the community did finally develop a unified policy with community ratification¹⁹² of the UNCTAD Code of Conduct for Liner Conferences.¹⁹³ This ratification with its conditions and reservations has essentially modified the code in ways not initially contemplated by its authors.¹⁹⁴

The future Common Shipping Policy will have to deal with almost as many contentious issues between carrier member nations and shipper member nations as the Common Agricultural Policy must deal with between farming communities and manufacturing communities. It can be expected that there will have to be segments of the policy added in gradual stages. Thus, in 1986, regulations were adopted to eliminate unilateral cargo reservations for national flag lines (cargo preference) by 1993; to eliminate cargo sharing arrangements of a discriminatory nature with non-members of the Community by 1993; and to authorize joint action by the members to combat the protectionist policy of non-members.¹⁹⁵ The more difficult second stage must address the question of various forms of subsidy—ranging from direct grant to indirect forms such as mortgage guarantees—paid to national flag shipping lines.

192. Council Regulation No. 954/79 (May 15, 1979), reprinted in L. JUDA, *supra* note 164.

193. See Code of Conduct for Liner Conferences, *supra* note 162.

194. See L. JUDA, *supra* note 164, at 145-51.

195. See Financial Times, Apr. 29, 1982, at 10.

Tied into these policies is the question of the cabotage laws of coastal states¹⁹⁶ which appear in one view to be simply a method of guaranteeing year round access to the mainland for island dwellers in the Aegean, Ionian, Ligurian, Tyrrhenian and North Seas of Europe, but in summer tourist season can be viewed as anti-competitive activity to protect national flag ships. Entry of foreign flag vessels into the hitherto protected waters of Denmark, Greece, Italy, and the United Kingdom may produce old-fashioned liner conferences complete with predatory strategies to preserve the status quo.

Concerning competition between the national fleets of Greece, Netherlands, Belgium, Germany, and the United Kingdom as third country carriers, it may be necessary to test the new powers of the Commission of the European Communities to block large "dominant position" mergers under the anti-trust articles of the Treaty of Rome.¹⁹⁷

The shipping industry, as an employer of unionized labor, has already witnessed flights from the national flag to off-shore registries or open registries (flags of convenience) in order to escape labor unions, taxes and regulatory supervision. A community Shipping Register would seem to be an easy answer to the disparate standards of the "bargain" flags provided by these new ship registers.

Union-busting activity in shipping will surely have its counterpart in land-based industries which will emulate the American example by moving labor-intensive activities, for example, from high-wage Germany to low-wage Portugal. Fear of this has already led to a demand for a community Social Charter to reduce differences in labor costs. Minimum standards can be expected to emerge from a Socialist-dominated European Parliament to regulate such things as: minimum working age, minimum hourly wage, annual paid vacations, number of holidays, length of the work-day or work-week, overtime pay, workers' compensation coverage and pension guarantees. Threatened removals to force down wages would

196. Cabotage refers to the right to engage in coastal trading from port to port within a single country. Foreigners are usually forbidden to engage in this trade and it is often applied to the aviation industry as well.

197. Treaty of Rome, *supra* note 1, arts. 85-87, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) at 32-33, 298 U.N.T.S. 11, 47-49; *see also supra* notes 70-82 (citing various ILO conventions dealing with maritime issues).

become uneconomical in a community with that kind of Social Charter which would greatly exceed the benefits available to mariners under the bare minimum standards of the International Labour Organization.¹⁹⁸

CONCLUSION

The purpose of the long lists of conventions is obvious, to show that international cooperation to solve trade and shipping problems is thriving five hundred years after Columbus' first voyage. International cooperation manifested through the public and private organizations described here brings acceptable solutions to common problems of societies with widely differing economic, social and cultural backgrounds while the necessity to achieve consensus, aided by the science of comparative law, makes it possible to cut through the stale politics of the past.

It has been the author's privilege and honor to represent the United States at meetings of UNCTAD and UNCITRAL since 1971, and to observe meetings of IMO and CMI. In these organizations, international legal agreements to resolve disputes in international trade have been carefully nurtured. The goal must always be to ensure that a commercial dispute between private parties does not turn into a dispute between governments. Thus, international agreements must be designed to resolve disputes between parties on the basis of the effective words in a treaty rather than on the basis of economic or military power.

198. *See supra* notes 76-80 and accompanying text (discussing maritime labor conventions).