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5

LEGAL ISSUES AND REGULATORY DEVELOPMENTS

CHAPTER 5

This chapter provides information on some important legal issues and recent regulatory developments in the fields of transport and trade facilitation, together with information on the status of ratification of some of the main maritime conventions. Important developments include the entry into force, on 14 September 2011, of the International Convention on Arrest of Ships, which had been adopted at a joint United Nations/ International Maritime Organization (IMO) Diplomatic Conference, held in 1999, under the auspices of UNCTAD. Moreover, during 2010 and the first half of 2011, important discussions continued at IMO regarding the scope and content of a possible international regime to control greenhouse gas (GHG) emissions from international shipping. Finally, there were a number of recent regulatory developments in relation to maritime security and safety, as well as in respect of trade facilitation agreements at both the multilateral and regional levels.

A. IMPORTANT DEVELOPMENTS IN TRANSPORT LAW

This section highlights two significant legal developments that may be of interest to the parties engaged in international trade and to the shipping industry. First, an overview is provided about some of the key features of the International Convention on Arrest of Ships 1999, which recently entered into force and now represents the most modern international regulatory regime relating to ship arrest. Secondly, attention is drawn to the entry into force of the 2008 “e-CMR Protocol” to the Convention on the Contract for the International Carriage of Goods by Road, 1956 (as amended), which establishes the legal framework for the use of electronic means of recording and handling of consignment note data for such contracts.

1. Entry into force of the International Convention on Arrest of Ships 1999

Arrest of ships – a key mechanism to secure and enforce maritime claims – is an issue of considerable importance to the international shipping and trading community. While the interests of owners of ships and cargo lie in ensuring that legitimate trading is not interrupted by the unjustified arrest of a ship, the interests of claimants lie in being able to obtain security for their claims. The International Convention on Arrest of Ships 1999, like its predecessor, the Brussels Convention on the Arrest of Sea-Going Ships 1952, aims at striking a balance between these interests, bearing in mind the different approaches adopted by various domestic legal systems.¹

On 14 March 2011, Albania was the 10th State to accede to the 1999 Arrest Convention, following earlier accession by Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain and the Syrian Arab Republic. The latest accession triggered the entry into force of the Convention on 14 September 2011.²

The 1999 Arrest Convention refines and updates the principles of the 1952 Arrest Convention, regulating the circumstances under which ships may be arrested or released from arrest. It covers issues such as claims for which a ship may be arrested, ships that can be subject to arrest, release from arrest, right of re-arrest and multiple arrest, liability for wrongful arrest and jurisdiction on the merits of a claim. The new international rules on arrest apply to all ships within

the jurisdiction of a State Party, whether or not they are sea-going and whether or not they are flying the flag of a State Party; however, State Parties may enter a reservation in this respect when acceding to the Convention.

The 1999 Arrest Convention was adopted by consensus on 12 March 1999, at the Joint United Nations/IMO Diplomatic Conference, held in Geneva from 1 to 12 March 1999, under the auspices of UNCTAD.³ The preparatory work on a new international instrument on arrest of ships began following the adoption in 1993 of the International Convention on Maritime Liens and Mortgages (MLM Convention) by the United Nations/IMO Conference of Plenipotentiaries on Maritime Liens and Mortgages. Arrest of ships being a means of enforcing maritime liens and mortgages, it was considered necessary to revise the 1952 Convention on Arrest of Ships so as to closely align the two conventions and to ensure that all claims giving rise to a maritime lien under the 1993 MLM Convention would give rise to a right of arrest under the Arrest Convention. Furthermore, some of the provisions of the 1952 Convention had become out of date, requiring amendment, while others were considered ambiguous, giving rise to conflicting interpretations. An overview of the key features of the 1999 Arrest Convention will be provided below.⁴

As the 1999 Arrest Convention has now entered into force, Contracting States need to ensure effective national implementation of the new international legal regime. Contracting States to both the 1999 and 1952 Arrest Conventions⁵ would also need to denounce the 1952 Convention, so as to avoid undesirable overlap between the two international legal instruments.⁶ In view of the fact that the international regulatory landscape for ship arrest is to change soon, other States may too wish to consider the merits of accession more closely. In particular, Contracting States to the 1993 MLM Convention that are not parties to the 1999 Arrest Convention may wish to give the matter of accession particular consideration, with a view to strengthening the relevant legal regime for the enforcement of maritime liens and mortgages. The 1993 MLM Convention entered into force in 2004 and, as at 31 July 2011, had 16 Contracting States.⁷

It should be noted that, in some respects, the 1999 Arrest Convention may offer particular advantages from the perspective of developing countries. For instance, express reference in the list of maritime claims under the 1999 Arrest Convention to disputes

arising in relation to ownership or possession of a ship, or contracts of sale of a ship, as well as to claims regarding mortgages, hypothèques or charges of the same nature,⁸ may indirectly promote ship financing and purchase of second-hand ships – an important issue for developing countries. Moreover, in connection with a wide maritime lien of the highest priority under the 1993 MLM Convention in relation to crew claims,⁹ the possibility of arrest of ships for such claims under the 1999 Arrest Convention¹⁰ will be of particular interest to developing countries, from which the vast majority¹¹ of the maritime workforce originates.

Key features of the 1999 Arrest Convention

The 1999 Arrest Convention now represents the most modern international regime that regulates the circumstances under which ships may be arrested or released from arrest. Among the key features of the new Convention are a wider definition of arrest, a wider scope of application and an extended list of maritime claims, as compared with the existing international legal framework under the 1952 Arrest Convention. In addition, a range of other matters relating to arrest of ships has been clarified in the new Convention.

Wider definition of arrest: The definition of arrest in the 1999 Arrest Convention has been amended and is now wider, referring not only to the detention of a ship but also to the restriction on a ship's removal (article 1(2)). This means that other forms of pre-trial security, such as freezing orders, have been brought within the definition of arrest. This amendment aims to preclude the possibility of a claimant obtaining additional pre-trial security once a ship has been arrested.

Wider scope of application: The 1999 Arrest Convention applies to any ship within the jurisdiction of a Contracting State, whether or not that ship is flying the flag of a Contracting State. Also, in contrast to the 1952 Arrest Convention, the 1999 Convention is not limited to sea-going ships.¹² States may, however, reserve the right to exclude the application of the Convention to non-sea-going ships and/or ships not flying the flag of a Contracting State.¹³ Declarations may also be made in respect of treaties on navigation on inland waterways to the effect that they would prevail over the 1999 Arrest Convention (see articles 8 and 10).

Extended list of maritime claims: The 1999 Arrest Convention provides a closed list of maritime claims which give rise to the right of arrest, adopting a similar

approach to that of the 1952 Convention (article 1(1)). The list has been updated and expanded, however, and now extends to 22 types of claim,¹⁴ with completely new provisions in respect of (a) insurance premiums, including mutual insurance calls; (b) commissions, brokerage or agency fees; and (c) disputes arising out of a contract for the sale of the ship. "Bottomry" has been deleted, however, from the list of maritime claims.¹⁵ Given that the list is more extensive than that in the 1952 Convention, it is likely that, in practice, the number of claims giving rise to a right to arrest will significantly increase.

It is important to note that, during the Diplomatic Conference, there had been a strong divergence of opinion between certain delegations that preferred a closed list of claims, and other delegations that favoured an open-ended list of claims to ensure that no genuine maritime claims were excluded. After an extensive discussion, the Drafting Committee had succeeded in reaching a compromise solution where a closed list of claims giving rise to the right of arrest was adopted, while flexibility was allowed in respect of certain categories of claim. For example, in relation to environmental damage, various claims are identified along with the possibility of adding "damage, costs, or loss of a similar nature" to those already included in the provision (article 1(1)(d)). Such an approach reflects the fact that this specific area of law is still developing. Claims may also be made in respect of "a mortgage or a '*hypothèque*' or a charge of the same nature on the ship" (article 1(1)(u)). In contrast to the 1952 Convention, there is, however, no longer a requirement for such charges to be registered or registrable, as this condition was also removed as part of the compromise solution. As a consequence, arrest may be made for various forms of debt obligations.

Powers of arrest: The 1999 Convention clarifies that a ship may only be arrested or released from arrest under the authority of a court of the State Party in which the arrest is effected. Furthermore, it should be noted that arrest of a vessel is only possible for claims of a maritime nature, and vessels cannot be arrested for any other type of claim. The procedure relating to arrest and release from arrest is governed by the law of the forum of arrest, although the Convention makes clear that arrest may be used to obtain security for a claim which may be adjudicated or arbitrated in another jurisdiction. However, the exercise of the right of arrest, release from arrest and the right of re-arrest are governed by the Convention (see article 2).

Exercise of the right of arrest: Arrest of a ship is permissible following assertion of a maritime claim; there is no requirement to prove liability beforehand. However, a link between the person against whom the maritime claim is made and the ship to be arrested is generally required for the purposes of arrest. Accordingly, an arrest is only possible where the relevant person is the shipowner or demise charterer of the vessel at the time the claim arose and also at the time of arrest. Arrest of a ship for debts owed by a time charterer, for instance, is therefore excluded; an option which may have otherwise been available under the national law of some States (see article 3(1) (a) and (b)).

There are, however, a limited number of exceptions to this general rule, where arrest of a ship is permitted in other circumstances. These include cases where (a) the claim is based upon a mortgage or a *hypothèque* or a charge of the same nature on the ship;¹⁶ (b) it relates to the ownership or possession of the ship; or (c) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien available under the law of the State where the arrest is applied for. Accordingly, all maritime liens granted or arising under the law of the *forum arresti* are covered (see article 3(1)(c)-(e)).

Sister-ship arrest: The possibility of arresting other ships that are owned by the person or company against whom a maritime claim is brought (sister-ship arrest) is retained in the 1999 Arrest Convention, although the provision has been drafted more clearly (article 3(2)). There is, however, no definition of an “owner” or of what constitutes “ownership” in the 1999 Arrest Convention, an issue which was debated at length during the Diplomatic Conference.¹⁷

By way of background, certain delegations were concerned that the proliferation of single-ship companies since 1952 had typically precluded the possibility of sister-ship arrest, which meant that the only option available to claimants was to arrest the particular ship in respect of which a maritime claim arose. Several jurisdictions have attempted to combat this problem by allowing, under national law, for the corporate form to be disregarded where, for example, two companies are under the full control of the same person or persons, or in the case of fraud.¹⁸ This has come to be known as “lifting” or “piercing” the corporate veil. Even though most delegations considered that a problem did exist, they were of the opinion that it was a problem of a more general nature,

with implications for other areas of law. As such, certain delegations did not believe that the problem could be solved in the context of the Convention. By contrast, other delegations considered that the issue was of particular importance for the shipping industry, and should not be left to national law. A number of proposals to counter this problem were put forward at the Conference, but were rejected on various grounds. As a result, no uniformity has been achieved on the questions of whether and in which circumstances the corporate veil can be pierced and, consequently, whether ships owned by companies having a different corporate identity from that of the company against whom a maritime claim has been brought may be arrested.¹⁹ It should, however, be noted that the Convention does not prohibit piercing the corporate veil, and States will therefore need to refer to their national law in order to determine such questions.

Release from arrest: The provisions regarding release from arrest are based on those in the 1952 Arrest Convention. Release of a ship from arrest is mandatory when sufficient security has been provided in a satisfactory form. Where the parties cannot agree on the sufficiency and the form of the security, it will be left to the Court to determine its nature and the amount necessary, to a sum not exceeding the value of the arrested ship (see article 4).

Re-arrest and multiple arrest clarified: The circumstances that allow a ship to be re-arrested have been expressly clarified by the 1999 Arrest Convention. For example, a ship may be re-arrested where the initial security provided is inadequate, as long as the aggregate amount of security does not exceed the value of the ship. Also, a ship may be re-arrested if the insurer or person providing financial security is unlikely to fulfill his obligations, or, if the ship arrested or the security previously provided was released with the consent of the claimant or because the claimant could not prevent the release (see article 5(1)).

Furthermore, other ships which would be subject to arrest, i.e. sister-ships, may also be arrested to provide additional security to “top-up” the security already provided. Several arrests may be made to reach the amount of the maritime claim, so long as the additional security does not exceed the value of ship arrested (see article 5(2)).

Remedies of the shipowner: The 1999 Convention leaves at the discretion of the Court the question of whether the claimant must provide security for any

loss or damage that may be incurred by the shipowner (or demise charterer), as a consequence of the arrest having been wrongful or unjustified, or where excessive security has been demanded and provided. In such circumstances, the liability of the claimant, if any, will be determined by the courts of the State in which the arrest was effected, in accordance with the national law of that State (see article 6).

Jurisdiction and judgments: As a general rule, jurisdiction to determine the merits of the case is now granted only to the courts of the State in which the arrest was effected or security to obtain release of the ship was provided, unless there is a valid jurisdiction or arbitration clause. Such courts, however, may decline jurisdiction if permitted to do so by national law and a court of another State accepts jurisdiction. Regarding recognition of judgments, the courts of the State in which an arrest has been effected are required to recognize a final judgment of the courts of another State by releasing the security to the successful claimant. That is, so long as the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present his case, and such recognition is not against public policy (see article 7).

2. Entry into force of the e-CMR Protocol

The main international Convention governing liability arising from carriage of goods by road is the Convention on the Contract for the International Carriage of Goods by Road (CMR), 1956 (as amended in 1978²⁰), which, as at 31 July 2011, was in force in 55 States.²¹ The CMR standardizes conditions governing contracts for the international carriage of goods by road to or from a Contracting State, in particular by providing for mandatory minimum standards of carrier liability.²² Other issues, too, are regulated in the Convention, such as the obligation of a carrier to issue a consignment note in respect of the goods which complies with certain requirements and fulfils an important evidentiary function.

In order to better adapt the CMR Convention to the demands of modern transportation and to ensure the equivalent treatment of electronic alternatives to traditional paper-based transport documents, an amending Protocol was adopted on 20 February 2008, the so-called “e-CMR Protocol”. Following ratification of the e-CMR Protocol by Lithuania on 7 March 2011, the Protocol has now entered into force,

with effect from 5 June 2011, for those Contracting States to the CMR which have ratified or acceded to the new Protocol.²³

The e-CMR Protocol establishes the legal framework for the use of electronic means of recording and handling of consignment note data, allowing for the faster and more efficient transfer of information. As a consequence, the consignment note, along with any demand, declaration, instruction, request, reservation or other communication relating to the performance of a contract of carriage to which the CMR Convention applies, may be carried out by way of electronic communication. Electronic consignment notes that comply with the e-CMR Protocol are to be considered as equivalent to consignment notes referred to in the CMR Convention, having the same evidentiary value and producing the same effects.

By introducing electronic consignment note procedures, transport operators are likely to save time and money, and to benefit from streamlined procedures and secure data exchange. Widespread adoption of the e-CMR Protocol could, in the longer term, significantly facilitate transactions by reducing the scope of error in dealing with the identification and authentication of signatures.

B. REGULATORY DEVELOPMENTS RELATING TO THE REDUCTION OF GREENHOUSE GAS EMISSIONS FROM INTERNATIONAL SHIPPING

GHG emissions from international shipping – which carries over 80 per cent of world trade by volume and almost 60 per cent by value – are not regulated under the Kyoto Protocol.²⁴ Rather, IMO, at the request of parties to the United Nations Framework Convention on Climate Change (UNFCCC), 1992, is currently leading international efforts in developing a regulatory regime for the reduction of CO₂ emissions from international shipping, including the various technical aspects. While maritime transport compares favourably to other modes of transport, both in terms of fuel efficiency and GHG emissions (per unit/ton-kilometre), its global carbon footprint is likely to continue to grow in view of the heavy reliance of international shipping on oil for propulsion and the expected growth in world demand for shipping services, driven by expanding global population and trade. Recent IMO data shows

that international shipping emitted 870 million tons of CO₂ in 2007, or about 2.7 per cent of the global CO₂ emissions from fuel combustion.²⁵ In the absence of effective reduction measures, emissions from international shipping are expected to treble by 2050.²⁶

Against this background, ongoing efforts, in particular those under the auspices of IMO, aimed at reaching agreement on a package of measures to reduce GHG emissions from international shipping are of particular interest. Before providing a more detailed overview of the most recent developments under the auspices of IMO, it should be recalled, by way of background, that IMO's Marine Environment Protection Committee has been considering a range of measures aimed at reducing emissions of GHG from international shipping, including **technical, operational and market-based measures**.²⁷

The most important **technical** measure for the reduction of CO₂ emissions is the Energy Efficiency Design Index (EEDI), which establishes a minimum energy efficiency requirement for new ships depending on ship type and size. On the **operational** side, a mandatory management tool for energy efficient ship operation, the Ship Energy Efficiency Management Plan (SEEMP) has been developed to assist the international shipping industry in achieving cost-effective efficiency improvements in their operations, as well as the Energy Efficiency Operational Indicator (EEOI) as a monitoring tool and benchmark.²⁸

Discussions continue on a number of proposals for **market-based measures** to regulate emissions from international shipping, which had been submitted to the Marine Environment Protection Committee for consideration.²⁹ The different proposals under consideration were briefly described in chapter 6 of the *Review of Maritime Transport 2010*,³⁰ and an overview of deliberations over the past year is provided below. As the relevant deliberations are ongoing, they are subject to further development. However, it should be noted that there appears to be increasing controversy, with diverging views among IMO member States on whether there is a need for market-based measures at all and which, if any, of the proposals under consideration may be most suitable.

An important issue arising from the ongoing deliberations is an apparent divide in respect of the question of how any measures developed under the auspices of IMO, in particular any potential market-based measure that may be adopted, may reconcile the seemingly conflicting principles of UNFCCC and IMO.

While the UNFCCC regime is based on the principle of "Common but Differentiated Responsibilities and Respective Capabilities" (CBDR) of States, policies and measures adopted under the auspices of IMO are guided by its major principle of non-discrimination and equal treatment of ships (flag neutrality). All of the market-based proposals currently under consideration by IMO assume application to all ships. However, also under consideration is a proposal for a "Rebate Mechanism" tabled by the International Union for Conservation of Nature which aims to reconcile the different principals by compensating developing countries for the financial impact (incidence) of any market-based measure that may be adopted.

The sixty-first session of the Marine Environment Protection Committee was held from 27 September to 1 October 2010 in London. While the report of the meeting³¹ should be considered for further detail, a summary of the deliberations relevant to the reduction of GHG emissions from shipping is provided below.

1. Technical and operational measures on energy efficiency measures for ships

Speed reductions

The Committee noted that speed reduction was the most immediate single factor to increase energy efficiency and reduce emissions, and that slow steaming was widely deployed by some sections of the shipping industry to reduce fuel costs. Following consideration of whether speed reduction should be pursued as a regulatory option in its own right,³² the Committee agreed that speed considerations would be addressed indirectly through the EEDI and SEEMP, and any possible market-based measure, and thus further investigation of speed reductions as a separate regulatory path was not needed.

The use of correction factors in the EEDI

The Committee agreed to a proposal³³ in relation to the use of correction factors³⁴ in the EEDI, and decided that the matter should be further considered by the Working Group on Energy Efficiency Measures for Ships. The proposal suggested that correction factors should be used carefully to minimize the risk of creating loopholes in the EEDI requirements and proposed six criteria that must be met before any new correction factor is added to the EEDI equation.

Safety issues related to the EEDI

A proposal³⁵ was put forward by the International Association of Classification Societies (IACS), which aimed at ensuring that safety was not sacrificed, as a consequence of a ship being constructed to comply with the EEDI. In order to avoid any adverse affects on safety, such as under-powered ships, it was suggested that the necessary safeguard should be added to the draft EEDI guidelines. While the substance of the proposal attracted support from many delegations, others expressed the view that the guidelines needed to be developed before the Committee would be in a position to make a final decision. The IACS undertook to develop a first draft of the guidelines to be submitted at the next session of the Committee for further consideration.

EEDI and ships trading to LDCs and SIDS

Consideration was given by the Committee to a proposal³⁶ for alternative calculation or exemption of the EEDI, and the minimum efficiency thereby required, for ships whose trade was critical, either economically or materially, to support least developed countries (LDCs) and small island developing States (SIDS). Such countries may have less developed port facilities or limited infrastructure and thus require the support of vessels outfitted with self-loading and unloading appliances. The proposal therefore aimed to provide an exemption for vessels of such design, which might face a disadvantage if the current EEDI formulation is used as projected. The Committee agreed that the Working Group on Energy Efficiency Measures for Ships, if time allowed, should consider how the special needs and circumstances of remotely located States and SIDS might be accommodated. It was also agreed that thorough investigation of the implications of any exemptions from the EEDI framework was required before any action was taken, and delegations were invited to submit further proposals and input to future sessions.

CO₂ abatement technologies

The Committee discussed a proposal on CO₂ abatement technologies,³⁷ where it was suggested that a new provision to allow for alternative CO₂ reduction compliance methods, i.e. CO₂ abatement technologies, should be added to the draft EEDI regulations. It was also proposed that guidelines be developed for type approval of CO₂ abatement technologies and reduction factors for the EEDI and EEOI formulas. The Committee agreed to instruct

the Working Group on Energy Efficiency Measures for Ships to include provisions on CO₂ abatement technologies in the EEDI framework. It also noted that development of relevant guidelines was not at present an urgent matter and invited delegations to submit further input to future sessions.

Capacity-building

Regarding the assessment of the need for capacity-building related to mandatory EEDI and SEEMP, the Committee noted, inter alia, that to accurately assess the capacity-building implications, all aspects of the mandatory EEDI and SEEMP regimes would need to be finalized, including supporting guidelines, as they could influence the additional burden for maritime administrations; accordingly, the assessment needed to be kept alive. If the EEDI and SEEMP were to be made mandatory as proposed, the Integrated Technical Cooperation Programme of IMO for the 2012-2013 biennium should allocate the applicable funding for the training and capacity-building activities, and those activities should be implemented before entry into force of the amendments.³⁸

In this context, it should also be noted that on 21 April 2011, a Cooperation Agreement was signed between IMO and the Republic of Korea International Cooperation Agency, for implementation of a pioneering technical cooperation project on Building Capacities in East Asian countries to address GHG emissions from ships.³⁹ The Republic of Korea International Cooperation Agency will make available approximately \$700,000 to fund 10 activities to be implemented by IMO over a two-year period. The selected activities will focus on enhancing the capacities of developing countries in East Asia to develop and implement, at the national level, appropriate action on CO₂ emissions from shipping, in addition to promoting sustainable development.

Working Group on Energy Efficiency Measures for Ships

The Committee noted with approval the report⁴⁰ of the first intersessional meeting of the Working Group on Energy Efficiency Measures for Ships, which was held from 28 June to 2 July 2010, and decided to re-establish the Working Group, to finalize the draft regulatory text on EEDI and SEEMP with a view to approval by the Committee at the end of its current session. The Working Group was also asked to finalize the EEDI associated guidelines and to address other issues related to technical and operational measures.

A report of the Working Group⁴¹ was duly submitted to the Committee before the end of the session. In concluding its consideration of the report, The Committee agreed, among other things, to establish an Intersessional Correspondence Group on Energy Efficiency Measures for Ships which would submit its report to the sixty-second session of the Committee in July 2011. The Intersessional Correspondence Group was tasked, inter alia, to (a) finalize the draft guidelines on the method of calculation of the attained energy design index for ships; (b) further develop the guidelines for the SEEMP; and (c) develop a work plan with timetable for development of EEDI frameworks for ships not covered by the draft regulations.⁴²

No consensus was achieved, however, in respect of the fundamental question of the appropriate legal format in which draft regulations on energy efficiency for ships should be introduced, in particular whether this should be done by way of amendments to Annex VI⁴³ of the International Convention for the Prevention of Pollution from Ships (MARPOL), 1973/1978.⁴⁴ This question gave rise to considerable debate among delegates along with an intervention by the Secretary-General.⁴⁵ "A number of delegations supported the inclusion of the energy efficiency measures in MARPOL Annex VI as the appropriate legal instrument and in line with the decision made at the last session. However, a number of other delegations opposed this as they maintained the view that MARPOL Annex VI was not the appropriate legal instrument to regulate energy efficiency measures and that a new instrument would be needed".⁴⁶ In conclusion, the Committee noted that no consensus view on the issue could be reached.

In this respect, it is worth noting that, following the Committee's sixty-first session, two *IMO Circular Letters* were distributed, one of which made proposals for amendments to Annex VI of MARPOL 73/78⁴⁷ and another, prepared by a number of developing countries, expressed serious legal concerns about the proposed amendments.⁴⁸ A further document considering a number of potential legal issues arising out of the proposal to amend Annex VI of MARPOL 73/78 was subsequently submitted for consideration at the sixty-second meeting of the Committee.⁴⁹ Thus, at the time of writing, there is clearly no consensus among the IMO membership on the issue of adopting energy efficiency measures for ships by way of amendments to Annex VI of MARPOL 73/78.⁵⁰

It should be noted that, following completion of the Review of Maritime Transport 2011, important developments in respect of technical and operational measures took place at the sixty-second session of the Marine Environment Protection Committee in July 2011. As a result of a roll-call vote, the Committee adopted, by majority, amendments to MARPOL Annex VI, incorporating, within that Annex, a new chapter 4 regulating energy efficiency for ships. The amendments, as adopted by the Committee, are set out in resolution MEPC.203(62).⁵¹

2. UNFCCC matters

In respect of UNFCCC matters,⁵² the Marine Environment Protection Committee at its sixty-first session noted that there seemed to be general agreement among UNFCCC parties that IMO was the appropriate international organization to develop and enact regulations aimed at controlling GHG emissions from international shipping.⁵³ However, there were still three questions that needed to be resolved:

- (a) Should a reduction target be set for emissions from international shipping, and if so, what should the target be, how should it be articulated, and should it be set by UNFCCC or IMO?
- (b) Should a new legally binding agreement or a Conference of Parties decision state how revenues from a market-based instrument under IMO should be distributed and used (for climate change purposes in developing countries in general, for specific purposes only (e.g. adaptation) or in certain groups of developing countries (LDCs and SIDS))? and
- (c) How should the balance between the basic principles under the two Conventions be expressed in the new legally binding agreement text or the Conference of Parties' decision (UNFCCC and its fundamental principle of "Common but Differentiated Responsibilities and Respective Capabilities" and, on the other hand, the IMO constitutive Convention with its non-discriminatory approach)?⁵⁴

3. Market-based measures

(a) *Deliberations at the sixty-first session of the IMO Marine Environment Protection Committee*

At its sixty-first session, the Marine Environment Protection Committee, assisted by the report of the Expert Group on Feasibility Study and Impact Assessment of Possible Market-based Measures,⁵⁵ which had been completed in August 2010,⁵⁶ also held an extensive debate on how to progress the development of a market-based measure (MBM) for international shipping. The MBM proposals under review ranged from proposals envisaging a contribution or levy on all CO₂ emissions from all ships or only for those generated by ships not meeting the EEDI requirement, to emissions trading schemes and to schemes based on a ship's actual efficiency both by design (EEDI) and operation (EEOI).⁵⁷

The Committee exchanged views on which measure to build upon or the elements that should be included in such a measure. There was however no majority view on a particular MBM. It should be noted that a number of documents had been submitted for consideration, but, due to time constraints, they were not considered at the meeting.⁵⁸ These included submissions by some large developing countries' delegations, expressing concerns about the uncertainties associated with MBMs as well as the potential inherent in some of the proposals of placing developing countries at a competitive disadvantage, and their failure to reflect the principle of "Common but Differentiated Responsibilities and Respective Capabilities".⁵⁹

Following the discussions, the Committee agreed to hold an *Intersessional Working Group Meeting*, tasking it with providing an opinion on the compelling need and purpose of MBMs as a possible mechanism to reduce GHG emissions from international shipping. The *Intersessional Working Group Meeting* was also tasked to further evaluate the proposed MBMs considered by the Expert Group on Feasibility Study and Impact Assessment of Possible Market-based Measures, against the same criteria as used by the Expert Group, including (a) their impact on, among other things, international trade, the maritime sector of developing countries, as well as the corresponding environmental benefits; and (b) the principles and provisions of relevant conventions such as the UNFCCC and its Kyoto Protocol, as well as their compatibility with the World Trade Organization (WTO)

Rules and customary international law, as depicted in the United Nations Convention on the Law of the Sea (UNCLOS), 1982.⁶⁰ In addition to relevant terms of reference, the Committee also agreed on a list of nine criteria for use by the *Intersessional Working Group*.⁶¹

(b) *The third Intersessional Meeting of the Working Group on Greenhouse Gas Emissions from Ships*

The third *Intersessional Meeting* of the Working Group on Greenhouse Gas Emissions from Ships was held from 28 March to 1 April 2011 and was attended by more than 200 representatives from member Governments and observer organizations. The report of the meeting⁶² was published in April 2011, and submitted to the sixty-second session of the Marine Environment Protection Committee in July 2011, to enable the Committee to make further progress in accordance with its work plan. Given the importance of the substantive issues debated at the meeting, a brief summary of the deliberations is provided below.

Need and purpose of a MBM

In the context of an examination of the compelling need and purpose of a MBM as a possible mechanism to reduce GHG emissions from international shipping, a number of documents submitted by IMO members and observer organization were considered,⁶³ followed by an extensive debate on the matter.⁶⁴

Several delegations took a critical approach to the need for MBMs, stating a view⁶⁵ that MBMs could not achieve direct reduction of emissions, as they depended on a market mechanism to deliver reduction, and that technical and operational measures were the only means by which a vessel could achieve an immediate effect upon CO₂ emissions. Many also shared serious concerns⁶⁶ regarding the introduction of MBMs for international shipping on the no more favourable treatment basis of IMO, due to the disparity in economic and social development status between developed and developing countries. GHG reduction targets for international shipping under IMO should be in consonance with those being set by the UNFCCC;⁶⁷ otherwise, an MBM could negatively impact world trade and development, as it could disadvantage consumers and industries in developing countries and could further lead to an increase in the price of food, hampering food security in developing countries.

By contrast, a number of other delegations supported the view, expressed also in a joint submission,⁶⁸ that a global MBM for international shipping was needed to ensure that the international shipping community did its part to reduce the total amount of anthropogenic CO₂ emissions; although technical and operational measures could deliver CO₂ reductions for individual vessels, these measures were not sufficient and additional measures were needed to ensure that the shipping sector could deliver the requisite combined CO₂ reductions. Several delegations also expressed the view that there was a compelling need for an MBM for international shipping under IMO, which would provide the most cost effective emission reduction strategy for the sector, as well as an incentive to adopt new technology and make further efficiency gains. Some delegations also stated that there was a need to adopt an MBM sooner rather than later, otherwise the cost to society and developing countries in particular would be greater.

Thus, the debate revealed two groups of opinion: one which considered that a compelling need for an MBM under IMO had been clearly demonstrated with the purpose of reducing GHG emissions from international shipping; and another group which, by contrast, did not consider that a compelling need and purpose had been established.⁶⁹ The Intersessional Meeting agreed to put forward both opinions to the Committee; an extensive summary of supporting arguments, put forward by each group, is set out in the report of the meeting.⁷⁰

Review of the proposed MBMs

Based on a number of presentations⁷¹ and additional documents commenting on the different proposals,⁷² the Working Group on Greenhouse Gas Emissions from Ships proceeded to debate in some detail different aspects of the MBM Proposals. Some of the relevant submissions considered that, ultimately, a levy (GHG Fund) was considered preferable to an emissions trading scheme (ETS), in particular as it would provide price certainty and investors would respond to a price rather than an emissions cap⁷³ – a view which has since been formally endorsed by the global shipping industry association, the International Chamber of Shipping.⁷⁴ Others identified an ETS as a robust emission reduction mechanism.⁷⁵ In conclusion, it was noted that some delegations indicated a preference for certainty in emissions reductions, whereas other delegations opted for a certainty in price, with some delegations

considering the two as equally important and other delegations believing that certain MBM proposals had the potential to achieve both outcomes. In relation to the possible uses for revenues generated by MBMs, options identified include incentives for the shipping industry to achieve improved energy efficiency, offsetting, providing a rebate for developing countries, finance adaptation and mitigation activities in developing countries, finance improvement of maritime transport infrastructure in developing countries, research and development, and support for IMO's Integrated Technical Cooperation Programme. As part of the debate, the potential of MBMs to provide incentives for new technology and operational changes was also considered, as was the question of out-of-sector emissions reductions (offsetting).⁷⁶ By way of background, it should be noted that the different proposals for market-based measures under consideration have different ways of reducing GHG emissions; some focus on "in-sector" reductions and others also utilize reductions in other sectors. The extent of such reductions either within the sector (in-sector) or from outside the sector (out-of-sector) is detailed within the individual evaluation of each proposal in the report of the Expert Group on Feasibility Study and Impact Assessment of possible Market-based Measures,⁷⁷ which should be consulted for further information.

Grouping and evaluation of proposed MBMs

Following extensive debate on the desire and preferable approach to grouping the different proposals for MBMs, the Working Group on Greenhouse Gas Emissions from Ships agreed that the proposals should be grouped according to whether the mechanism delivers reductions in GHG emissions specifically within the sector, or also utilizes reductions in other sectors. Accordingly, the proposals were grouped in the following manner: (a) "focus on in-sector" and (b) "in-sector and out-of-sector"; strengths and weaknesses as understood by the proponents of the MBMs were identified and listed in a matrix, set out in the report of the meeting.⁷⁸ Other delegations which were not proponents of the MBMs were also invited to provide input and identified the following weaknesses of the proposals: (a) not compatible with UNFCCC principles and provisions; (b) not compatible with WTO Rules; (c) would adversely affect the export competitiveness of developing countries; (d) impose a financial burden on developing countries that are least responsible for global warming and consequent climate change;

(e) lack sufficient details for necessary evaluation; and
(f) do not take into account the needs and priorities of developing countries.⁷⁹

Relation to relevant conventions and rules

Following consideration of a number of documents⁸⁰ and extensive debate, the Working Group on Greenhouse Gas Emissions from Ships concurred with the findings of the Expert Group on Feasibility Study and Impact Assessment of Possible Market-based Measures that no incompatibilities existed between IMO establishing an MBM for international shipping, and customary international law as depicted by UNCLOS. As regards concerns about possible inconsistencies with WTO Rules,⁸¹ shared by a number of delegations, further submissions were invited for consideration at a future session. With respect to the relation of any potential MBM with UNFCCC, opinions were also divided, with some delegations reiterating their key concerns regarding a conflict between the UNFCCC principle of “Common but Differentiated Responsibilities and Respective Capabilities” and IMO’s approach of no more favourable treatment. No consensus view was reached on how to reconcile the two. In conclusion,⁸² it was agreed that further discussion was required on the relation to relevant conventions and rules and that focus on the goal, the reduction of GHG emissions from ships, should not be lost.

Impact evaluation

Due to lack of time, the Working Group on Greenhouse Gas Emissions from Ships did not further evaluate the impacts of the proposed MBMs on international trade and the maritime sectors of developing countries, LDCs and SIDS, and the corresponding environmental benefits.⁸³ It did, however, agree that a further impact study⁸⁴ was urgently needed, and that further studies would be more meaningful and comprehensive when proposals were more detailed and matured. Proponents were urged to fully develop their proposals in the shortest possible time. Certain delegations did not consider that it was appropriate to await the completion of further studies before making a decision on an MBM, noting that the resolution of the issue was a critical and urgent test of competency for IMO. A number of delegations expressed interest in the Rebate Mechanism proposal that had been initiated by International Union for Conservation of Nature and elaborated upon by World Wide Fund for Nature and supported its further development and consideration either as an integral or add-on element to a future MBM.

C. OTHER LEGAL AND REGULATORY DEVELOPMENTS AFFECTING TRANSPORTATION

This section touches upon some key issues in the field of maritime security and safety, which may be of particular interest to parties engaged in international trade and the shipping industry. These include notable developments relating to piracy and maritime and supply-chain security, as well as a new inspection regime adopted under the most recent amendment to the Paris Memorandum of Understanding on Port State Control and amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978.

1. Piracy

With pirate attacks at an all-time high, piracy at sea remains a fundamental international maritime security concern. In the first five months of 2011 alone, there were a total of 211 attacks worldwide, with 24 successful hijackings.⁸⁵ The majority of these events have been reported off the coast of Somalia, with 139 incidents in that area, 21 hijackings, 362 persons being taken hostage and 7 killed. According to the International Maritime Bureau’s Piracy Reporting Centre, 26 vessels and 522 hostages are currently being held by Somali pirates. In 2010, the number of actual or attempted acts of piracy and armed robbery against ships, which were reported to IMO, was 489, an increase of 83 (20.4 per cent) over the figure for 2009.⁸⁶ These reports mark 2010 as the fourth successive year that the number of reported incidents increased. The total number of actual or attempted incidents of piracy and armed robbery against ships, reported from 1984 to 2010, has risen to 5,716. The geographical reach of piracy has also expanded, as a consequence of the use of larger, so-called, “mother ships”. Even though the majority of incidents in 2010 occurred off East Africa, attacks in the Indian Ocean and the Arabian Sea also increased. Moreover, the number of attacks in the South China Sea increased significantly, along with a smaller rise in incidents in South America and the Caribbean.⁸⁷

Given the worsening situation, there has been a movement by the industry in favour of the use of private armed guards on board ships, as a means of protection against pirate attacks. In response to this movement,

the IMO Maritime Safety Committee (MSC), at its eighty-ninth session, in May 2011,⁸⁸ adopted various forms of guidance on the use of privately contracted armed security personnel,⁸⁹ building upon its previous work aimed at preventing and suppressing piracy and armed robbery against ships.⁹⁰ It is recommended, inter alia, that Flag States should have in place a policy on whether or not the use of private armed security personnel is authorized under national law and, if so, under which conditions. Consequently, such laws and regulations of the vessel's Flag State should be considered by shipowners before opting to use armed personnel, and the laws of Port and Coastal States should also be taken into account when entering their territorial waters.⁹¹ It is also noted that the use of armed guards should not be considered as an alternative to best management practices (BMP) and other protective measures.⁹²

The MSC also adopted Guidelines to Assist in the Investigation of the Crimes of Piracy and Armed Robbery Against Ships,⁹³ to be read in conjunction with the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships.⁹⁴ The Guidelines are intended to assist an investigator in collecting and recording evidence, with a view to assisting the capture, prosecution and sentencing of pirates and armed robbers. An Intersessional meeting of the "Working Group on Maritime Security including Piracy and Armed Robbery against Ships" was planned for September 2011, to develop further recommendations and review, as necessary, the Interim Guidance that has already been adopted.⁹⁵

Piracy has also been a key issue on the agenda of IMO's Legal Committee.⁹⁶ Following its ninety-eighth session in April 2011,⁹⁷ the Legal Committee requested the secretariat to issue IMO Circular Letter No. 3180, which includes a number of documents that the Committee agreed might be useful to States that are either developing national legislation or reviewing existing legislation on piracy.⁹⁸ The documents identify the key elements that may be included in national law to facilitate full implementation of international conventions applicable to piracy, in order to assist States in the uniform and consistent application of the provisions of these conventions. It should, however, be noted that the documents do not constitute definitive interpretations of the instruments referred to, nor do they limit, in any way, the possible interpretations by State Parties of the provisions of those instruments. Information had also been provided at the Committee meeting on the seventh session of Working Group 2 of

the Contact Group on Piracy off the Coast of Somalia, held in March 2011.⁹⁹ The Working Group had, in particular, focused on the report prepared by Mr. Jack Lang, special advisor of the United Nations Secretary-General on piracy, which dealt with the prosecution and imprisonment of persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia.¹⁰⁰

In addition, the United Nations Division for Ocean Affairs and the Law of the Sea (UNDOALOS), together with IMO and the United Nations Office on Drugs and Crime, has continued to collect information on national legislation relating to piracy, to serve as a resource for States. Such legislation has been included in the UNDOALOS database of national legislation.¹⁰¹

Efforts have also been made to combat piracy at the regional level. As reported in the *Review of Maritime Transport 2009*, the Code of conduct concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct) was adopted at a high-level meeting of States from the Western Indian Ocean, Gulf of Aden and Red Sea areas, which was convened by IMO in Djibouti in January 2009.¹⁰² Signatories to the Code of Conduct declare their intention to cooperate to the fullest possible extent, and in a manner consistent with international law, in the repression of piracy and armed robbery against ships. Following signature by the United Arab Emirates on 18 April 2011, the Code of Conduct had 18 signatories.¹⁰³ Furthermore, on 30 May 2011, a Memorandum of Understanding (MoU) was signed to allow IMO to fund the building of a regional training centre in Djibouti, to promote the implementation of the Code of Conduct.

For the shipping industry, an additional problem related to piracy is the potential repercussions that the capture and detention of vessels by pirates may have for various maritime contracts. Given that many standard form contracts are governed by English law and practice, certain recent decisions of the Courts of England and Wales are, in this context, particularly worth noting.

In relation to marine insurance, an important question that was recently examined is whether any depreciation in the value of a cargo, as a result of delay caused by detention by pirates, was covered by the insurance contract. The case referred, in particular, to the Institute Cargo Clauses and the Marine Insurance Act 1906. The Court of Appeal of England and Wales confirmed that capture by pirates does not render a

ship or cargo an actual total loss (ATL) for the purpose of a marine insurance policy.¹⁰⁴ The Court considered that such capture does not constitute an ATL, as there was no “irretrievable deprivation” of property, since the vessel and cargo were likely to be recovered following a payment of a comparatively small ransom.¹⁰⁵ Although not an issue on appeal, it was further stated by the Court that the facts of the case would not even support a claim for a constructive total loss (CTL), as it was doubtful that the test of “unlikelihood of recovery” would be satisfied. In the light of the decision, cargo owners who are concerned that they may suffer an economic loss as a result of prolonged detention of their cargo in connection with a piracy incident may therefore wish to obtain market alternatives in addition to standard insurance cover. A brief review of options that are currently available on the market suggests, however, that such specific cover is not at present widely available.¹⁰⁶

Another private law issue arising in the context of piracy incidents is the question of whether a vessel remains on-hire during the vessel’s detention by pirates, i.e. whether hire remains payable by the charterer. In a decision of the High Court of England and Wales,¹⁰⁷ it was held that the terms of a widely-used time charter-party, namely the 1946 version of the New York Produce Exchange (NYPE) Form, did not constitute an off-hire event and the charterers were obliged to pay outstanding hire to the shipowners. The High Court held that if parties wished to treat capture by pirates as an off-hire event under a time charter-party, they should agree to express provision in a “seizures” or “detention” clause that would clarify their intention to do so. In this regard, it is worth noting that BIMCO, an independent international shipping association, has developed various piracy clauses for incorporation into time and voyage charter-parties, in a bid to allocate responsibility between the parties in the unfortunate event of a pirate attack. BIMCO have also published Industry Guidelines on Private Maritime Security Contractors, Best Management Practices to deter piracy off the Coast of Somalia and in the Arabian Sea and other related documents that may serve as a useful resource for shipowners.¹⁰⁸

2. Maritime and supply-chain security

There have been a number of developments in relation to existing maritime and supply-chain security standards that had been adopted under the auspices

of various international organizations, such as the World Customs Organization (WCO), IMO and the International Organization for Standardization (ISO), as well as at the European Union (EU) level.

(a) WCO–SAFE Framework of Standards

As will be recalled from previous editions of the *Review of Maritime Transport*, WCO adopted, in 2005, the Framework of Standards to Secure and Facilitate Global Trade (the SAFE Framework),¹⁰⁹ with the objective of developing a global supply-chain framework. The SAFE Framework provides a set of standards and principles that must be adopted as a minimum threshold by national customs administrations. It has fast gained widespread international acceptance, and as of 1 March 2011, 164 WCO members had expressed their intention to implement the SAFE Framework.¹¹⁰

The SAFE Framework was developed on the basis of four core principles – advance electronic information, risk management, outbound inspection and business partnerships – and rests on two related twin pillars: (a) customs-to-customs network arrangements, and (b) customs-to-business partnerships. A key aspect of the SAFE Framework is the accreditation of Authorized Economic Operators (AEOs), who are essentially parties that have been approved by national customs administrations as complying with WCO or equivalent supply-chain security standards. Given that AEOs adhere to security and compliance criteria, customs administrations are able to focus on potentially risky trade flows and, as such, AEOs are typically rewarded by way of trade facilitation benefits. Over the course of recent years, a number of Mutual Recognition Agreements have been adopted between customs administrations, usually on a bilateral basis. In January 2011, a Mutual Recognition Agreement was concluded between Andorra and the EU and in May 2011, Japan and the Republic of Korea also concluded a Mutual Recognition Agreement. A number of other Mutual Recognition Agreements are currently being negotiated between, respectively, China-EU, China-Japan, China-the Republic of Korea, China-Singapore, EU-San Marino, EU-United States, Japan-Singapore, the Republic of Korea-New Zealand, New Zealand-Singapore, Norway-Switzerland, and Singapore-United States.¹¹¹

Recently, WCO has placed on its website the “SAFE package” i.e. a compilation of a number of instruments and guidelines, published in 2010, to further support

implementation of the SAFE Framework.¹¹² As part of the SAFE package, for example, guidance has been provided on how to implement an AEO programme, and a compendium of such programmes and Mutual Recognition Agreements has been created. Furthermore, in accordance with WCO AEO guidelines, national AEO programmes need to include a means of appeal against decisions by customs administrations regarding AEO authorization, including denial, suspension, revocation or withdrawal. In this context, Model AEO Appeal Procedures have been developed for consideration by members. WCO is currently in the process of updating the SAFE package, and a 2011 version will be adopted shortly, along with a 2011 edition of the AEO Compendium.

In April 2010, the Private Sector Consultative Group that had been established under the auspices of WCO issued a statement in respect of benefits being offered to accredited AEOs.¹¹³ The Group emphasized that it was imperative to establish a core set of internationally accepted trade facilitation benefits that could be offered to AEOs, and provided a list of example benefits as guidance to customs administrations implementing AEO programmes. The Group also believed that such benefits should be transparent and meaningful, should justify the additional costs sustained by economic operators in meeting prescribed AEO requirements, and should bring those operators real improvements and facilitation gains, above and beyond the normal procedures enjoyed by non-AEOs.

(b) European Union (EU)

At the regional level, the EU has continued to strengthen its measures to enhance maritime and supply-chain security. Given the particular importance for many developing countries of trade with the EU, certain developments in this context are worth noting here. Previous editions of the *Review of Maritime Transport* have provided information on the Security amendment to the Customs Code (Regulation 648/2005 and its implementing provisions), which aims to ensure an equivalent level of protection through customs controls for all goods brought into or out of the EU's customs territory. The amendment has introduced four major changes to the Customs Code, in respect of which there have been some developments over the past year.

First, a significant consequence of the amendment is the obligation on traders to provide customs authorities with advance safety and security data on goods prior to

import to or export from the EU customs territory. As reported in the *Review of Maritime Transport 2010*, the advance cargo data reporting requirements continued to be an option for traders for a transitional period from 1 July 2009 to 31 December 2010. It should be noted that, since 1 January 2011, this advance declaration has been an obligation for traders and is no longer optional. As a consequence, relevant security data must be sent before the arrival of the goods in the EU customs territory. If goods are not declared in advance, i.e. if safety and security data is not sent in advance, then the goods will need to be declared immediately on arrival at the border. This may delay the customs clearance of consignments pending the results of risk analysis for safety and security purposes.

In a second major change, the amendment introduced provisions regarding so-called Authorized Economic Operators (AEO), a status which reliable traders may be granted and which entails benefits in terms of trade facilitation measures. Further information on the AEO concept is provided in the *Review of Maritime Transport 2009*; however a number of relevant recent developments are worth noting. For instance, it has strongly been recommended that economic operators perform a self-assessment to be submitted together with the application for AEO status. A revised self-assessment questionnaire¹¹⁴ has been agreed between EU member States and the European Commission in order to guarantee a uniform approach throughout all member States in respect of AEOs. A transitional period was agreed in order to allow member States to adapt their internal procedure to the new self-assessment questionnaire. This transitional period ended on 31 December 2010, and the new self-assessment questionnaire should now be used. Furthermore, Regulation 197/2010¹¹⁵ has established new time limits for issuing the AEO certificate.

As regards customs procedures, the amendment introduced uniform risk-selection criteria for controls, supported by computerized systems for goods brought into, or out of, the EU customs territory. Guidelines on entry and summary declarations in the context of Regulation (EC) No 648/2005¹¹⁶ and Guidelines on export and exit in the context of Regulation (EC) No 648/2005¹¹⁷ have recently been developed.

As all economic operators established in the EU need to have an Economic Operators Registration and Identification (EORI) number, the final major change to the Customs Code introduced a Community

data base allowing the consultation of all national registration numbers.¹¹⁸ Guidelines¹¹⁹ have recently been established in respect of EORI implementation.

(c) International Maritime Organization (IMO)

One of the main tasks of the IMO Maritime Safety Committee is the consideration of measures to enhance maritime security. In this respect, certain developments at the most recent sessions of the Committee over the past year,¹²⁰ which relate to the International Convention for the Safety of Life at Sea (SOLAS), 1974, as amended, are worth noting. As will be recalled, Chapter XI-2 of SOLAS in particular provides special measures to enhance maritime security and includes the International Ship and Port Facilities Security (ISPS) Code. The ISPS Code represents the main international maritime security regime, which has been mandatory for all SOLAS member States since 1 July 2004. For ease of reference, the main obligations under the ISPS Code are briefly summarized in Box 5.1 below. Further information on the ISPS Code is also available in the *Review of Maritime Transport 2005*, as well as two UNCTAD Reports, which were published in 2004 and 2007 respectively.¹²¹

In accordance with SOLAS, Contracting States are obliged to communicate relevant security-related information to IMO. In this context, to improve the maritime security module of the Global Integrated Shipping Information System (GISIS), the Committee, at its eighty-eighth session, supported a proposal¹²² by the secretariat to add the following two fields in the section relating to port facilities: (a) the date of the most recent review or approval of the Port Facility Security Plan (PFSP) pursuant to SOLAS regulation XI-2/10.2; and (b) the date of the most recent Statement of Compliance of the Port Facility (SoCPF) issued, if applicable. Moreover, SOLAS Contracting States were urged by the Committee at its eighty-ninth session to meet their obligations under the provisions of SOLAS regulation XI-2/13 by reviewing the information which had been provided to the maritime security module of GISIS to ensure that it was complete and accurate, and to continue to update such information as and when changes occurred.¹²³

The Report¹²⁴ of the Correspondence Group on the Maritime Security Manual (the MSM Correspondence Group) was also submitted at the eighty-ninth session of the Committee. Among other tasks, the Group

had been required to (a) review the draft Maritime Security Manual – Guidance for port facilities, ports and ships¹²⁵ to ensure that all relevant material was reflected; to add explanatory text where required; (b) make recommendations on the development of any supplementary materials; and (c) make recommendations with respect to expansion or revocation of existing IMO material.¹²⁶ The purpose of the manual is to consolidate existing IMO maritime security-related material into an easily-read companion guide to SOLAS chapter XI-2 and the ISPS Code, intended both (a) to assist SOLAS Contracting Governments in the implementation, verification of compliance with, and enforcement of the provisions of SOLAS chapter XI-2 and the ISPS Code; and (b) to serve as an aid and reference for those engaged in delivering capacity-building activities in the field of maritime security.

In addition, at its eighty-ninth session, the Committee considered the necessity of periodical surveys of the Ship Security Alert System (SSAS).¹²⁷ It was agreed that the reliability of Alert System equipment was an important issue and two main questions needed to be resolved: namely, whether to make the surveys of such systems mandatory, and if so, by whom this should be done. Views were expressed by delegations on (a) the need for confidentiality; (b) the difficulty of introducing clear regulations; (c) whether a periodic testing regime mandated by the ISPS Code was an adequate substitute for an inspection; and (d) national regulation by the Flag State as opposed to global regulation. Consequently, the “Working Group on Maritime Security” was instructed by the Committee to further consider the issue and to provide recommendations on the need to conduct such periodical surveys, and, if appropriate, advise on how the issue should be taken forward.

Previously, at its eighty-fifth session in 2008, the Committee had approved the Non-mandatory Guidelines on security aspects of the operation of vessels which do not fall within the scope of SOLAS Chapter XI-2 and the ISPS Code.¹²⁸ In this regard, it was noted at the eighty-ninth session of the Committee that, on 24 January 2011, the United States had released its DHS Small Vessel Security Implementation Plan (SVS-IP), which was intended to reduce the risk of a small vessel being used by a terrorist for an attack on the maritime transportation system. The SVS-IP had been developed from the goals and objectives of the Small Vessel Security Strategy (SVSS) that had previously been released by the United States in 2008.

Box 5.1. The International Ship and Port Facilities Security Code

The ISPS Code imposes a wide range of responsibilities on governments, port facilities and ship-owning and operating companies. Since 1 July 2004, the ISPS Code applies mandatorily to all cargo ships of 500 gross tons or above, passenger vessels, mobile offshore drilling units and port facilities serving such ships engaged in international voyages. Part (A) of the Code establishes a list of mandatory requirements, and Part (B) provides recommendations on how to fulfil each of the requirements set out in Part (A).

Responsibilities of Contracting Governments

The principal responsibility of Contracting States under Part (A) of the ISPS Code is to determine and set security levels. Responsibilities also include, inter alia:

- The approval of Ship Security Plans;
- The issuance of International Ship Security Certificates (ISSCs) after verification;
- The carrying out and approval of Port Facility Security Assessments
- The approval of Port Facility Security Plans
- The determination of port facilities which need to designate a Port Facility Security Officer, and
- The exercise of control and compliance measures.

Governments may delegate certain responsibilities to Recognized Security Organizations (RSOs) outside Government.

Responsibilities of vessel-owning and/or operating companies

A number of responsibilities apply to vessel-owning and/or operating companies, whose principal obligation it is to ensure that each vessel they operate obtains an ISSC from the administration of a flag state or an appropriate RSO, such as a classification society. In order to obtain an ISSC, the following measures must be taken:

- Designation of a Company Security Officer (CSO);
- Carrying out Ship Security Assessments (SSA) and development of Ship Security Plans (SSP);
- Designation of a Ship Security Officer (SSO); and
- Training drills and exercises.

A number of special mandatory requirements in SOLAS chapters V, X-1 and X-2 are applicable to ships and create additional responsibilities for vessel-owning companies and for governments. These include in particular the following:

- Automatic Identification System (AIS);
- Ship Identification Number (SIN);
- Ship Security Alert System (SSAS); and
- Continuous Synopsis Record (CSR).

Responsibilities of port facilities

Depending on size, there may be, within the legal and administrative limits of any individual port, several or even a considerable number of port facilities for the purposes of the ISPS Code.

- Port Facility Security Plans (PFSP): based on the Port Facility Security Assessment carried out and – upon completion – approved by the relevant national government, a Port Facility Security Plan needs to be developed;
- Port Facility Security Officer (PFSO): For each port facility, a Security Officer must be designated;
- Training drills and exercises.

The Committee, at MSC 88, also considered further proposals in relation to SOLAS chapter XI-2 and the ISPS Code.¹²⁹ For instance, the Committee did not agree with the proposal of incorporating the provisions of the 2008 Code of Safety for Special Purpose Ships in SOLAS Chapter XI-2 and the ISPS Code, as it did not find that a compelling need to amend the instruments had been established.¹³⁰ In respect of the development of guidance on port facility security inspections in order to ensure the quality of implementation of SOLAS Chapter XI-2 and the ISPS Code, it was concluded that, in the absence of any feedback on the use of the existing self-assessment guidance,¹³¹ there was no merit in establishing a correspondence group on the matter. The Committee did, however, urge SOLAS Contracting Governments and international organizations to bring to the attention of the Committee the results of the experience gained from the use of the existing guidance, for consideration of action to be taken.

(d) International Organization for Standardization (ISO)

The development of the ISO 28000 series of standards, to specify the requirements for security management systems to ensure security in the supply-chain, has been reported in previous editions of the *Review of Maritime Transport*. Over the last year, revised standards have been published,¹³² and work has continued to progress in respect of new security-related standards.¹³³

Furthermore, following consultations with all of ISO's developing country members worldwide, the ISO Action Plan for developing countries 2011-2015 has been adopted,¹³⁴ with a view towards achievement of ISO's key objective that the capacity and participation of developing countries in international standardization is significantly enhanced. Under the Action Plan, ISO's stated goal is "to contribute to improving developing countries' economic growth and access to world markets, enhancement of the lives of citizens, fostering innovation and technical progress and achieving sustainable development when considered from each of the economic, environmental and societal perspectives." Accordingly, the stated purpose of the Action Plan is to "strengthen the national standardization infrastructure in developing countries in order to increase their involvement in the development, adoption and implementation of International Standards." The Action Plan sets out a range of activities which aim at:

- (a) Increasing participation of developing countries in ISO technical work;
- (b) Enhancing capacity-building efforts in standardization and related matters for ISO members and their stakeholders;
- (c) Raising awareness of the role and benefits of standardization and the need for involvement in standardization activities;
- (d) Strengthening ISO members in developing countries at the institutional level;
- (e) Encouraging better regional cooperation; and
- (f) Introducing the subject of standardization in educational curricula.

As reported in the *Review of Maritime Transport 2010*, during 2005-2009, ISO carried out more than 250 activities covering the five key objectives of its Action Plan for developing countries 2005-2010, and more than 12,000 participants from developing countries benefited.¹³⁵ The implementation of such activities will continue to be funded by donors and by ISO member contributors.

3. "New Inspection Regime" adopted under the Paris Memorandum of Understanding on Port State Control

Port State Control is an extremely important tool for the monitoring and enforcement of compliance with international conventions and codes on minimum standards for safety, pollution prevention and seafarers living and working conditions. Compliance with such standards is one of the main responsibilities of the shipowner or operator, and the Flag State of the vessel must ensure that the shipowner conforms to the applicable instrument. However, Port States may also inspect visiting foreign vessels that enter their territorial waters to ascertain whether the shipowner and Flag State have performed their respective obligations. Where necessary, the Port State can require defects to be corrected, and detain the ship for this purpose.

Following a major oil spill that resulted from the grounding of the Amoco Cadiz in 1978, political and public outcry in Europe for more stringent regulations with regard to ship safety led to the adoption of a new¹³⁶ Memorandum of Understanding on Port State Control among 14 European Countries, which entered into force on 1 July 1982. Since then, the Paris

Memorandum of Understanding (MoU) has been amended several times and the organization has expanded to 27 member States, including Canada and numerous European Coastal States.¹³⁷ The aim of the Paris MoU is to eliminate the operation of substandard ships through a harmonized system of Port State Control in the territorial waters of each member State.¹³⁸

In an effort to reward quality shipping and to focus Port State Control inspections, a New Inspection Regime has been adopted by the 32nd Amendment to the Paris MoU, which entered into force on 1 January 2011. The New Inspection Regime is aligned with the legislative requirements of EU Directive 2009/16/EC on Port State Control, and the national legislation of the Paris MoU member States. Foreign vessels entering the Paris MoU region will accordingly be inspected to ensure compliance with the standards laid down in the various instruments listed in the Memorandum.¹³⁹ It goes without saying that shipowners and operators visiting ports or anchorages in the Paris MoU region need to familiarize themselves with the New Inspection Regime, but more importantly, that each vessel complies with all of the legal instruments applicable to it. Ships may otherwise face multiple detentions and may ultimately be banned from entering the Paris MoU region, if infringements are not rectified.¹⁴⁰

Further information on the New Inspection Regime is provided in Box 5.2. Briefly, under the New Inspection Regime, every ship calling at a port or anchorage in a member State of the Paris MoU must be inspected. The type and frequency of each inspection will be determined by the classification awarded to each ship, in accordance with its "Ship Risk Profile". The classification of each ship will decide whether a ship must undergo an "initial", "more detailed" or "expanded" inspection, as well as how often such inspections must take place, unless an "overriding"¹⁴¹ or "unexpected"¹⁴² factor warrants an intermediate inspection. As mentioned above, ships that do not comply with the various standards laid down in the Paris MoU may be detained or refused access to the Paris MoU region. Furthermore, the requirement for arrival notifications has been extended, and member States are now required to report the actual time of arrival and departure of any ship calling at its ports or anchorages in the Paris MoU region.

4. 2010 Manila amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978

The safety of persons at sea and the protection of the marine environment are, to a considerable extent, dependent on the professionalism and competence of seafaring personnel. Against this background, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), adopted in 1978, establishes basic requirements on training, certification and watchkeeping for seafarers at the international level.¹⁴³ The STCW Convention entered into force on 28 April 1984 and, as at 31 July 2011, has 154 Contracting Parties, representing 99.15 per cent of world tonnage.¹⁴⁴

The STCW Convention was subjected to an extensive revision and updating process in 1995 to clarify the standards of competence required and to provide effective mechanisms for enforcement of its provisions. One major outcome of the 1995 revision was the development of the STCW Code, which contains various technical regulations that were previously listed in the Convention's technical annex. The STCW Code provides mandatory minimum standards of competence for seafarers along with recommended guidance for implementation of the Convention.

A number of significant amendments to the STCW Convention and Code were adopted at a Conference of Parties held in Manila, Philippines on 21–25 June 2010, under the auspices of IMO.¹⁴⁵ These amendments will enter into force on 1 January 2012 under the tacit acceptance procedure, and will provide enhanced standards of training for seafarers. The STCW Convention and Code have also been amended on several other occasions,¹⁴⁶ however, the 2010 amendments constitute the second major revision of the Convention. Some of the important changes include:

- (a) Improved measures to prevent fraudulent practices associated with certificates of competency and strengthen the evaluation process (monitoring of Parties' compliance with the Convention);
- (b) Revised requirements on hours of work and rest and new requirements for the prevention of drug and alcohol abuse, as well as updated standards relating to medical fitness of seafarers;

Box 5.2. The New Inspection Regime under the Paris Memorandum of Understanding on Port State Control (Paris MoU)

The 32nd Amendment to the Paris MoU, which introduced the New Inspection Regime, entered into force on 1 January 2011. An overview of the key features of the New Inspection Regime is provided below.

New target of full coverage: Under the New Inspection Regime, each member State commits to inspect every ship calling at its ports and anchorages in the Paris MoU region, in comparison with its previous target of inspecting 25 per cent of individual ships calling at each member State.

New “Ship Risk Profile”: All ships will be classified as “low-risk ships” (LRSs), “standard-risk ships” (SRSs) or “high-risk ships” (HRSs) on the basis of generic and historic parameters taken from inspections carried out in the Paris MoU area in the last three years. Each criterion has a weighting which reflects the relative influence of each parameter on the overall risk of the ship. Parameters include:

- Type and age of ship;
- Performance of the flag of the ship as reflected by the Black, Grey and White list for Flag State Performance adopted by the Paris MoU Committee;
- Development of a corrective action plan drawn up in accordance with the Framework and Procedures for the Voluntary IMO Member State Audit Scheme;
- Performance of recognized organizations, and performance of the company responsible for ISM management;
- Number of deficiencies and number of detentions.

The classification awarded to a ship will ultimately determine the type and frequency of inspection imposed upon a ship.

New inspection and selection scheme: The New Inspection Regime includes two categories of inspection: a “periodic inspection” which is determined by a set time window, and an “additional inspection”, which is triggered by overriding and unexpected factors depending on the severity of the occurrence. Ships become due for periodic inspection in the following time windows:

- HRS – between 5-6 months after the last inspection in the Paris MoU region;
- SRS – between 10-12 months after the last inspection in the Paris MoU region;
- LRS – between 24-36 months after the last inspection in the Paris MoU region.

Once a time window has passed or an overriding factor is apparent, a ship will become a “Priority I” and must be inspected. Alternatively, a ship will become a “Priority II” when the time window opens or an unexpected factor warrants inspection, and they may be inspected. Other ships will not have a priority status and member States are not obliged to perform an inspection, although they are at liberty to choose otherwise. The time span for the next periodic inspection re-starts after any inspection, as periodic and additional inspections have equal status.

Extended inspection to all ship types: Three types of inspection are provided by the New Inspection Regime – “initial”, “more detailed” and “expanded” – which will be imposed according to the Ship Risk Profile. “Initial” inspections will consist of a visit on board the ship in order to verify the numerous certificates that are listed in the Paris MoU, and to check the overall condition and hygiene of the ship. A “more detailed” inspection will be triggered where there are clear grounds for believing that the condition of the ship or of its equipment or crew does not substantially meet the relevant requirements of an applicable instrument. It will include an in-depth examination of areas where such clear grounds are established, areas relevant to any overriding or unexpected factors, and other areas at random from explicit risk areas detailed in the Paris MoU. An “expanded inspection” will require a check of the overall condition, including the human element where relevant, of a specific list of risk areas contained in the memorandum.

For periodic inspections, LRS and SRS will have to undergo an “initial” inspection unless clear grounds are established for a “more detailed” inspection. HRS, as well as chemical tankers, gas carriers, oil tankers, bulk carriers and passenger ships more than 12 years old, will be subject to an “expanded” inspection. Additional inspections are required to be “more detailed” inspections, except where the ship is a HRS or is one of the ship risk types mentioned above. In such cases, it is at the discretion of the Member State whether or not to perform an “expanded” inspection.

Widened refusal of access (banning): Multiple detentions will lead to ships being refused access to a port or anchorage within the region of the Paris MoU. In brief, ships that fly a blacklisted flag will be banned after more than 2 detentions in the last 36 months, and ships that fly a grey-listed flag will be banned after more than 2 detentions in the last 24 months. The time period that applies before bans may be lifted is as follows: 3 months after the first ban; 12 months after the second ban; 24 months after the third ban; followed by a permanent ban. Any subsequent detentions after the second banning will lead to refusal of access, regardless of the ship’s flag.

Widened requirement for arrival notifications: All HRS, as well as chemical tankers, gas carriers, oil tankers, bulk carriers and passenger ships more than 12 years old that are eligible for an “expanded” inspection are required to notify a port or anchorage in a member State 72 hours in advance, or earlier if required by national law, of its arrival (ETA72). In addition, all ships are required to provide a pre-arrival notification 24 hours in advance (ETA24). Furthermore, member States are now required to report the actual time of arrival (ATA) and the actual time of departure (ATD) of any ship calling at its ports or anchorages in the Paris MoU region.

- (c) New certification requirements for able seafarers;
- (d) New requirements relating to training in modern technology such as electronic chart display and information systems (ECDIS);
- (e) New requirements for marine environment awareness training and training in leadership and teamwork;
- (f) New training and certification requirements for electro-technical officers;
- (g) Updating of competence requirements for personnel serving on board all types of tankers, including new requirements for personnel serving on liquefied gas tankers;
- (h) New requirements for security training, as well as provisions to ensure that seafarers are properly trained to cope if their ship comes under attack by pirates;
- (i) Introduction of modern training methodology including distance learning and web-based learning;
- (j) New training guidance for personnel serving on board ships operating in polar waters; and
- (k) New training guidance for personnel operating Dynamic Positioning Systems.

It is worth noting that, once the amendments enter into force in 2012, several aspects of the Maritime Labour Convention, adopted by the International Labour Organization (ILO) in February 2006, will also become mandatory for Contracting States to the STCW Convention. As reported in previous issues of the *Review of Maritime Transport*,¹⁴⁷ the Maritime Labour Convention consolidates and updates over 68 international labour standards related to the Maritime sector that have been adopted by ILO over the last 80 years, including no fewer than 36 maritime Conventions and 1 Protocol.¹⁴⁸ It is hoped that the Maritime Labour Convention will represent the “fourth pillar” of the international maritime regulatory regime, alongside three other key IMO Conventions, namely, the International Convention for the Safety of Life at Sea (SOLAS), 1974; the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978; and the International Convention for the Prevention of Pollution from Ships (MARPOL), 1973, as amended by the Protocol of 1978 (73/78).

The Maritime Labour Convention 2006 has so far been ratified by 12 States representing approximately 48 per cent of world tonnage, although a further 18 ratifications are needed to satisfy its conditions for entry into force.¹⁴⁹ At the ninety-eighth session of the IMO Legal Committee in April 2011, several States indicated that they were working to ratify the Convention before the end of 2011, to enable it to enter into force at the same time as the 2010 Manila amendments to the STCW Convention and Code.¹⁵⁰ The Maritime Labour Convention requires widespread ratification in order for the enforcement and compliance system established under the Convention to be effective.

D. TRADE FACILITATION IN INTERNATIONAL AGREEMENTS

1. Towards the multilateral rules on trade facilitation at the WTO: different start, same finishing lines?

Through trade facilitation trading nations can achieve greater efficiency of processes and operations involved in international trade. With the aim to clarify and improve existing Articles V, VIII and X of the General Agreement on Tariffs and Trade 1994 (GATT)¹⁵¹ and develop multilateral trade facilitation rules, WTO members have been engaged in negotiations on trade facilitation under the Doha Development Agenda trade talks. Since their launch in 2004, the negotiations have made progress toward the draft text of a future WTO trade facilitation agreement. The draft text of the agreement currently comprises two parts.¹⁵²

The first part is devoted to commitments on substantive trade facilitation measures related to transparency in administration of trade rules, fees and formalities at the border and transit matters. The second part of the draft text addresses the provisions that deal with the principle of special and differential treatment providing developing countries, particularly least-developed countries, with flexibilities in implementing certain commitments.

In practice, implementing some trade facilitation measures can be complex and costly. For example, establishing a single window requires substantial financial resources and having certain preconditions

met such as legislative and regulatory reforms, strong political support, close collaboration among involved agencies, the prior analysis and simplification of trade control processes, the adoption of international standards on trade data elements and a sound information and communication infrastructure. Some developing country members have been reluctant to make such measures a WTO binding rule. The special and differential treatment provisions would provide flexibility for these countries to introduce such measures and thus could offer an incentive to implementing the commitments contained in the first part of the draft WTO trade facilitation agreement.

In the draft text of the WTO trade facilitation agreement, the special and differential treatment principle extends beyond the granting of traditional transition periods for the implementation of commitments.¹⁵³ The extent and time of entering into commitments of developing countries, particularly least developed countries, would depend on their acquired capacity to implement them. The agreement also contains provisions covering technical assistance, capacity-building, and financial support to these country members of WTO. Such assistance, it is hoped, will help overcome technical and financial obstacles to implement trade facilitation reforms, and will also support policy makers in their efforts to obtain the necessary political will for reform.

The capacity acquisition can be ensured with domestic resources and through the provision of technical assistance by the international community. The assistance provided by bilateral donors and international organizations can be expected to be channeled mostly to those trade facilitation commitments that are legally binding in the agreement (“shall” language). Where the trade facilitation agreement contains a “soft” provision in the form of best-endeavor language (“should”, “may”, “shall endeavor” or “shall to the extent possible”), developing countries will not be obliged to implement such a measure. In such case, the probability of receiving technical assistance and capacity-building support may be reduced.

Locking in trade facilitation reforms through mandatory commitments would allow WTO members to shelter from possible attempts from future governments to amend them. Binding WTO members to such reforms offers benefits to each country and significant advantages to the trading community with greater legal certainty for conducting international trade transactions.

2. Regionalism and trade facilitation

In parallel with trade facilitation negotiations at WTO, trade facilitation has also been agreed at a regional level. Many trade facilitation measures are easier to agree upon, and even to implement among the neighbouring or like-minded countries pursuing common economic, political or other interests. It would not, therefore, come as a surprise that trade facilitation measures have been increasingly included in regional trade agreements (RTAs).¹⁵⁴

By their nature, RTAs grant a more favourable treatment to the parties of such agreements than to other WTO members. Therefore, RTAs represent a departure from one of the core principles of the multilateral trading system: the most favoured nation (MFN) principle. The MFN principle establishes that a WTO member shall apply the same conditions on its trade of like products or services with other WTO members (i.e. prohibits discrimination among WTO members).¹⁵⁵ There are two sets of WTO provisions that allow for an exception from the MFN principle for the purposes of creating RTAs with regards to trade in goods:

- (a) Article XXIV of the GATT 1994 providing for preferential treatment through creating a customs union or a free trade area, which were an inherent part of the original GATT 1947, that built the basis of the multilateral trading system;
- (b) The decision on differential and more favorable treatment, reciprocity, and fuller participation of developing countries, known as “Enabling Clause”, which allows developed countries to grant a more favorable tariff treatment to products from developing country Members. Furthermore, it permits RTAs on trade in goods among developing countries.¹⁵⁶

By mid-2011, WTO had received 474 RTAs' notifications on goods and services, of which 351 RTAs were notified under Article XXIV of the GATT, and 31 under the Enabling Clause. Of all the notified RTAs, 283 agreements were in force.¹⁵⁷ Traditional RTAs concluded in early stages in the GATT era (before 1995) mainly aimed at creating free trade areas or customs unions through dismantling customs duties and non-tariff barriers to trade. The scope of RTAs has gradually expanded to further areas, such as services, intellectual property rights, investment, competition, government procurement and trade facilitation. Inclusion of separate chapters on trade facilitation and customs matters in RTAs reflects the growing importance attached to these issues in

national and regional development strategies. Trade facilitation aims to make movement of goods across the border easier and faster, therefore, its commitments are included in either in trade in goods chapters, or stand-alone chapters of RTAs.

Evolution of scope and depth of trade facilitation measures in RTAs

Between 2000 and 2010, the number of RTAs with trade facilitation provisions grew six-fold (see figure 5.1). About one third of all RTAs in force today contain some kind of trade facilitation measures. The scope of such measures has evolved significantly over the years. Initially, RTAs mainly included provisions narrowly focused on customs procedures. Nowadays, these provisions expand to other areas such as transparency measures, simplification and harmonization of trade documents by other border agencies than customs, and coordination among border agencies, as well as with the business community.

Provisions dealing with customs matters have also evolved by presenting a deeper content. Nowadays, these provisions cover a wide range of measures including risk management, right of appeal, advance rulings, periodic review, release of goods, temporary admission, and express shipment, among others.

Drivers for the scope expansion and depth of trade facilitation measures in RTAs

Several drivers can exist behind the expansion of the scope and the depth of trade facilitation measures in RTAs. These include: (a) specificities and common interests of trading partners; (b) harmonization with international standards; and (c) WTO negotiations on trade facilitation.

(a) Specificities and common interests of trading partners

An important factor that affects the nature of trade facilitation provisions contained in RTAs lies in the specificities and common interests of trading partners. These can include, for instance, economic development, the level of information technology maturity or geographical location. If an RTA involves a landlocked country, it usually includes transit-related provisions sometimes linked to provisions on development of transport infrastructure and logistics. Freedom of transit is of vital importance for landlocked developing countries trade with overseas markets

using land transport and seaports systems in coastal transit neighboring states. Some interesting examples of RTAs with detailed provisions on transit, transport policies and/or transport infrastructure development include the Common Market for Eastern and Southern African States (COMESA) and the Southern African Customs Union (SACU) treaties.

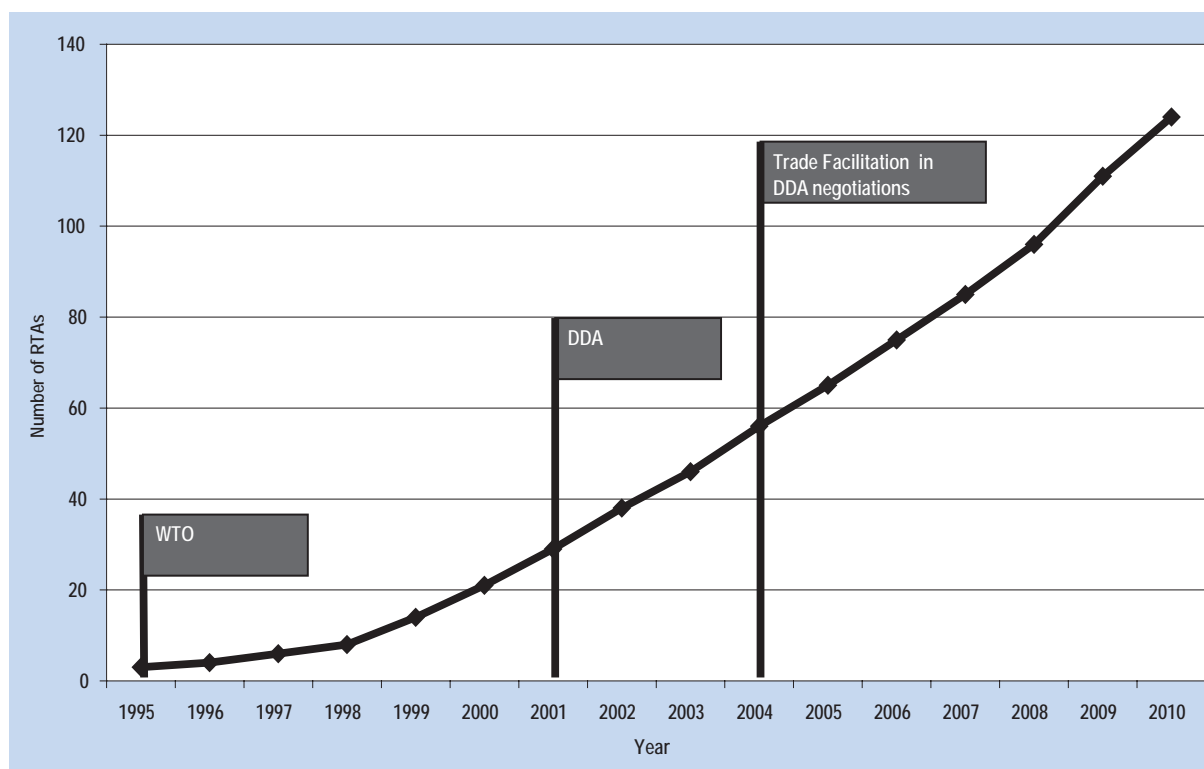
RTAs concluded between parties that are leading countries in development and use of information technology (IT) contain also provisions encouraging the use of IT solutions, such as paperless trading and electronic commerce transactions. Provisions on paperless trading as solution to facilitate trade through electronic filling and transfer of trade-related information and electronic versions of documents (e.g. such as bills of lading, invoices, letters of credit, and insurance certificates) can be found in RTAs in some bilateral RTAs by Japan (e.g. with the Philippines, Singapore and Thailand).

(b) Harmonization with international standards

Many RTAs refer to the international trade facilitation standards with the most cited ones including those developed by the World Customs Organization (WCO).¹⁵⁸ A significant number of RTAs refer to the WCO International Convention on the Simplification and Harmonization of Customs Procedures (the revised Kyoto Convention),¹⁵⁹ which provides a comprehensive set of rules and standards for efficient customs procedures and controls to comply with. It deals with key principles of simplified and harmonized customs procedures, such as predictability, transparency, due process, maximum use of information technology, and modern customs techniques, including risk management, pre-arrival information, and post-clearance audit, which are echoed in specific chapters on customs procedures and administration in a large number of RTAs. Thus, it may have influenced the way the provisions on customs procedures in those RTAs were crafted.

Adherence to such international standards would more likely ensure that the countries align their procedures and documents to the same internationally agreed benchmarks. The use of international instruments could provide for application of the same customs procedures and practices for all traders, not only for those under preferences. It could also contribute to convergence between potentially overlapping RTAs.

Figure 5.1. Increasing number of RTAs with trade facilitation measures (cumulative)



Source: UNCTAD secretariat.

(c) WTO negotiations on trade facilitation

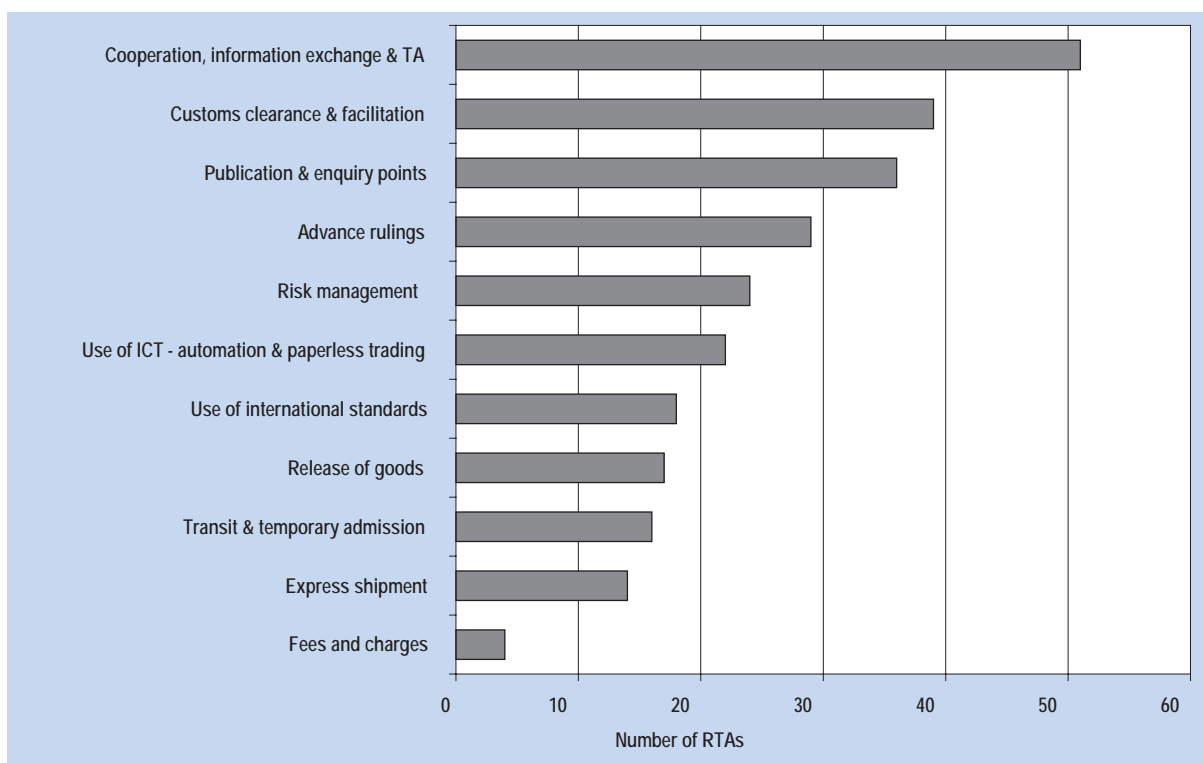
The majority of the RTAs concluded after the launch of the WTO negotiations on trade facilitation in July 2004 contain measures which are very similar or identical in their content to those considered at WTO – the so-called WTO-like trade facilitation measures. In this case, a parallel can be drawn between regional commitments and multilateral trade facilitation negotiations at WTO. It appears that, to some extent, trade facilitation commitments that are contained in existing RTAs have provided a basis to those currently negotiated at WTO, while on other occasions the draft WTO text may have served as basis for newly negotiated RTAs.¹⁶⁰ For example, a well-established pattern by the United States of including provisions on express shipment in RTAs is mirrored at WTO in the negotiating draft text agreement. Similar observations can be made in the case of the EU's interest in dealing with authorized traders. Provisions addressing this issue can be found in most of the Closer Economic Partnership Agreements by the EU and likewise advocated by the EU at WTO. Furthermore, a closer look at the Framework Agreement on Trade Facilitation

under the Asia-Pacific Trade Agreement (formerly known as the Bangkok Agreement) reveals that its trade facilitation measures are to a large extent similar to those negotiated at WTO. Figure 5.2 provides a breakdown of WTO-like trade facilitation measures contained in RTAs.

3. The interplay between trade facilitation commitments at the regional and multilateral level

Trade facilitation at the regional level can be beneficial also to trading partners outside the region that are not part of the RTAs. It has been argued that trade facilitation measures undertaken regionally rarely have a preferential effect against non-RTA parties, when implemented on the ground. Some trade facilitation measures under RTAs indeed appear to be applied to all the trading partners, not only to those under RTAs.¹⁶¹ Such measures, for instance, include some transparency provisions, such as public availability of trade-related laws, regulations and rulings, and the use of international instruments to simplify procedures

Figure 5.2. Overview of “WTO-like” trade facilitation measures under RTAs



Source: UNCTAD secretariat.

and documents. It is not only more efficient, but also more practical to introduce one Internet portal where all the necessary trade-related information is available in one place for all the trading partners, rather than publicizing information on a preferential basis. Another example might include creation of a paperless trading environment or a national single window under an RTA, both of which in practice are usually applied equally to trade flows from all trading partners and not only those under an RTA.

Are regional trade facilitation commitments always discriminatory?

On the other hand, due to the inherent nature of RTAs, many other trade facilitation provisions have shown to be applied on a preferential basis, i.e. solely among the parties to the RTA in question. This may potentially lead to discrimination against other trading partners. Such discrimination can be found in two forms:

- (a) The first type of potential discrimination lies in the nature of an agreed trade facilitation commitment that is exclusively agreed between members of an RTA. For example, this can include the provision of advance

rulings, harmonized customs procedures, fees and charges, or the application of regional standards. Trade facilitation measures discriminate against non-trading partners that are WTO members by lowering trade and non-trade barriers within their RTA partners;

- (b) The second type of discrimination could potentially be in the differentiated level of preferential trade facilitation measures, which vary across a maze of different RTAs. This means that individual countries or regional groupings are parties to two or even more RTAs that apply similar trade facilitation measures with a different scope, depth and language. Put differently, trade facilitation measures covered by different RTAs, which include the same countries, if not harmonized, might potentially discriminate among the different trading partners under different RTAs, and at the same time against the non-members of RTAs.

An interesting example of the second type of discrimination is the procedure and administration of advance rulings. Some remarkable differences and divergences were found in the scope, depth and

language across various RTAs, involving the same country and different trading partners. For example, the period of issuing the advance ruling in three different RTAs involving the same country, Australia, is 30 days in the Thailand-Australia RTA, 120 days in the United States–Australia RTA, and the Association of Southeast Asian Nations (ASEAN)–Australia–New Zealand RTA requires that an advance ruling be “issued to the applicant expeditiously, within the period specified in each Party’s domestic laws, regulations or administrative determinations”. The latter has a basis in a domestic regulation and diminishes any flavour of the potential discrimination, as it is equally applied to all trading partners.

As stated above, RTAs allow for preferential treatment among trading partners under RTAs against WTO members that are non-RTA countries. Then, instead of looking into whether trade facilitation measures under RTAs can discriminate under GATT Article XXIV against trading partners that are WTO members but not RTA members, a more relevant question is whether such application of differentiated trade facilitation measures would be permitted under the future WTO trade facilitation agreement. If, under the WTO trade facilitation agreement, developing countries commit to put in place a trade facilitation measure, which they already apply under an RTA but refuse to apply multilaterally, for example, due to the lack of capacity, this would be considered as a WTO plus in RTAs in relation to trade facilitation commitments. In such a case, as it happens with WTO plus obligations, those trade facilitation obligations would be considered as WTO discriminatory.

The commitment to facilitate trade

The primary objective of trade facilitation is to reduce the complexity and cost of formalities involved in international trade. The multiple RTAs concluded by a country or a regional grouping with other countries may lead to a new type of a “spaghetti bowl” of overlapping customs procedures and trade facilitation measures. Such phenomena could potentially arise, if a maze of different preferential customs procedures

and other trade facilitation measures is applied by one country or a regional grouping to different trading partners under different RTAs.

Independent of whether trade facilitation measures adopted under regional initiatives are applied differently to different trading partners, these should in practice be applied in such a manner that would minimize the potential discrimination and not contradict the primary objective of trade facilitation.

One possible solution to avoid such potential problems in the future is to apply as much preferential trade facilitation measures to all trading partners as possible. This “multilateralization” of regional trade facilitation measures can be done either through policymaking or national laws and regulations which would not differentiate among preferential and non-preferential trading partners. Another option is to use international conventions and standards, which provide the same internationally agreed basis to harmonize similar trade facilitation measures across different countries.

Since the majority of trade facilitation commitments under RTAs go deeper and broader than the current WTO provisions under GATT Articles V, VIII and X, they are probably WTO consistent. RTAs can serve as an experiment on how to reflect certain measures at the multilateral level. In particular, the WTO-like trade facilitation measures which are in the spirit of the measures negotiated at WTO could provide a useful basis for the implementation of the future multilateral agreement on trade facilitation. Adopting a coherent approach to the negotiation and implementation of the new or existing regional and multilateral trade facilitation commitments by countries is critical in this respect.

E. STATUS OF CONVENTIONS

There are a number of international conventions affecting the commercial and technical activities of maritime transport, prepared or adopted under the auspices of UNCTAD. Box 5.3 provides information on the status of ratification of each of these conventions, as at 31 July 2011.¹⁶²

Box 5.3. Contracting States parties to selected conventions on maritime transport, as at 31 July 2011

Title of Convention	Date of entry into force or conditions for entry into force	Contracting States
United Nations Convention on a Code of Conduct for Liner Conferences, 1974	Entered into force 6 October 1983	Algeria, Bangladesh, Barbados, Belgium, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chile, China, Congo, Costa Rica, Côte d'Ivoire, Cuba, Czech Republic, Democratic Republic of the Congo, Egypt, Ethiopia, Finland, France, Gabon, Gambia, Ghana, Guatemala, Guinea, Guyana, Honduras, India, Indonesia, Iraq, Italy, Jamaica, Jordan, Kenya, Kuwait, Lebanon, Liberia, Madagascar, Malaysia, Mali, Mauritania, Mauritius, Mexico, Montenegro, Morocco, Mozambique, Netherlands*, Niger, Nigeria, Norway, Pakistan, Peru, Philippines, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Serbia, Sierra Leone, Slovakia, Somalia, Spain, Sri Lanka, Sudan, Sweden, Togo, Trinidad and Tobago, Tunisia, Turkey, United Republic of Tanzania, Uruguay, Venezuela (Bolivarian Republic of), Zambia. (78)
United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)	Entered into force 1 November 1992	Albania, Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Dominican Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kazakhstan, Kenya, Lebanon, Lesotho, Liberia, Malawi, Morocco, Nigeria, Paraguay, Romania, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Syrian Arab Republic, Tunisia, Uganda, United Republic of Tanzania, Zambia. (34)
International Convention on Maritime Liens and Mortgages, 1993	Entered into force 5 September 2004	Albania, Benin, Ecuador, Estonia, Lithuania, Monaco, Nigeria, Peru, Russian Federation, Spain, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Syrian Arab Republic, Tunisia, Ukraine, Vanuatu. (16)
United Nations Convention on International Multimodal Transport of Goods, 1980	Not yet in force – requires 30 contracting parties	Burundi, Chile, Georgia, Lebanon, Liberia, Malawi, Mexico, Morocco, Rwanda, Senegal, Zambia. (11)
United Nations Convention on Conditions for Registration of Ships, 1986	Not yet in force – requires 40 contracting parties with at least 25 per cent of the world's tonnage as per annex III to the Convention	Albania, Bulgaria, Côte d'Ivoire, Egypt, Georgia, Ghana, Haiti, Hungary, Iraq, Liberia, Libyan Arab Jamahiriya, Mexico, Oman, Syrian Arab Republic. (14)
International Convention on Arrest of Ships, 1999	Entered into force 14 September 2011	Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain, Syrian Arab Republic. (10)
United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008	Not yet in force – requires 20 contracting parties	Spain (1)

Source: For official status information, see <http://www.un.org/law>.

*Following the modification in the structure of the Kingdom of the Netherlands, from 10 October 2010, the Kingdom will consist of four autonomous countries: the Netherlands (European part and Caribbean part, the latter comprising Bonaire, Sint Eustatius and Saba), Aruba, Curaçao and Sint Maarten.

ENDNOTES

- ¹ See further, Berlingieri F (2006). *Berlingieri on Arrest of Ships*. London: Informa, 4th ed.; Berlingieri F (2005). "The 1952 Arrest Convention revisited." L.M.C.L.Q., 3 August, 327-337; Gaskell N and Shaw R (1999), "The Arrest Convention." L.M.C.L.Q., 4 November, 470-490.
- ² The official text and status of the 1999 Arrest Convention can be found on the UNCTAD website at www.unctad.org/ttl/legal.
- ³ For further information on the Diplomatic Conference see <http://www.unctad.org/Templates/meeting.asp?intItemID=1942&lang=1&m=5674>.
- ⁴ See also the Report of the Chairman of the Main Committee, which highlights issues that had been the subject of considerable debate within the Committee, *Report of the United Nations/International Maritime Organization Diplomatic Conference on the Arrest of Ships (A/CONF.188/5)* at pp. 19-23, available on the UNCTAD website at www.unctad.org/ttl/legal.
- ⁵ As at 31 July 2011, the following States are Contracting Parties to both Arrest Conventions: Algeria, Benin, Latvia, Spain and the Syrian Arab Republic, although Spain has denounced the Convention with effect from 28/03/2012. For further status information on the 1952 Arrest Convention see <http://diplomatie.belgium.be/fr/>.
- ⁶ Denunciation of the 1952 Arrest Convention will take effect 12 months after its deposit with the Belgian Government. Contracting States to both Conventions will, therefore, for a transitional period at least, continue to be bound by the 1952 Convention after the 1999 Arrest Convention enters into force.
- ⁷ For the official text and current status of the 1993 MLM Convention, see www.unctad.org/ttl/legal.
- ⁸ See Articles 1(1)(s), 1(1)(u) and 1(1)(v), 1999 Arrest Convention.
- ⁹ In particular, "claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf", see Article 4, 1993 MLM Convention.
- ¹⁰ See Article 1(1)(o), 1999 Arrest Convention.
- ¹¹ For further information, see the *BIMCO/ISF Manpower 2010 Update*, available for a fee from www.bimco.org.
- ¹² Berlingieri debates the question of whether the 1952 Arrest Convention was limited to sea-going ships, as the only reference to such ships is in the title of the Convention, see Berlingieri F "The 1952 Arrest Convention revisited", at pp. 327-328.
- ¹³ Spain has reserved the right to exclude the application of the 1999 Arrest Convention in respect of ships not flying the flag of a Contracting State.
- ¹⁴ For the purposes of the 1999 Arrest Convention, "Maritime Claim" means a claim arising out of one or more of the following: (a) loss or damage caused by the operation of the ship; (b) loss of life or personal injury; (c) salvage operations; (d) environmental damage; (e) wreck removal; (f) any agreement relating to the use of hire of the ship; (g) carriage of goods or passengers; (h) carriage of goods, including luggage; (i) general average; (j) towage; (k) pilotage; (l) goods, materials, provisions, bunkers, equipment supplied or services rendered to the ship; (m) construction, reconstruction, repair, converting or equipping of the ship; (n) waterway dues and charges; (o) crews' wages; (p) disbursements; (q) insurance premiums; (r) any commissions, brokerages or agency fees payable in respect of the ship; (s) any dispute as to ownership or possession of the ship; (t) any dispute as to the employment or earnings of the ship; (u) a mortgage, hypothèque or a charge of the same nature on the ship; and (v) any dispute arising out of a contract for the sale of the ship (see Article 1).
- ¹⁵ "Bottomry" refers to a maritime contract (now almost obsolete) by which the owner of a ship borrows money for equipping or repairing the vessel and, for a definite term, pledges the ship as security – it being stipulated that if the ship be lost in the specified voyage or period, by any of the perils enumerated, the lender shall lose his money.
- ¹⁶ A significant deletion in this provision is the words "registered" or "registrable" in relation to mortgages or hypothèques. Their previous inclusion in the 1952 Arrest Convention was deemed to prevent the holder of an equitable mortgage from enforcing his security by arrest; an important type of security in container leasing and certain yacht financing agreements. It has been noted that a potential consequence of this change might be to allow a ship to be arrested for an unregistered mortgage or charge, even where that ship has been sold to a bona fide purchaser, as there is no link required between the person liable for the debt secured by a mortgage or charge and the owner at the time of arrest; see Gaskell N and Shaw R, at pp. 477-478.
- ¹⁷ See further the Report of the Chairman of the Main Committee contained in the *Report of the United Nations/International Maritime Organization Diplomatic Conference on the Arrest of Ships (A/CONF.188/5)* at pp. 19-23, available on the UNCTAD website at www.unctad.org/ttl/legal.
- ¹⁸ For further information and a brief overview of the position of selected jurisdictions on the matter, see Berlingieri on Arrest of Ships, Chapter 10.

- ¹⁹ *Berlingieri on Arrest of Ships*, at para. 99.130.
- ²⁰ On 5 July 1978, a Protocol to the Convention was adopted which establishes the Special Drawing Right (SDR) as the currency for the settlement of compensation rather than the gold franc used in the original CMR Convention. The Protocol entered into force on 28 December 1980 and as at 31 July 2011, had 41 Contracting Parties.
- ²¹ For the official text and ratification status of the CMR Convention and its Protocols, see <http://live.unece.org/trans/conventn/legalinst.html#25>.
- ²² For further information, see Clarke M (2008). *International Carriage of Goods by Road: CMR*. London: Informa, 5th ed.; and Clarke M and Yates D (2008). *Contracts of Carriage by Land and Air*, London: Informa, 2nd ed..
- ²³ Subsequently, as at 31 July 2011, the Czech Republic and Spain have also acceded to the e-CMR Protocol. Other Contracting States include Bulgaria, Latvia, the Netherlands and Switzerland.
- ²⁴ The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997. It came into force on 16 February 2005, and, as at 31 July 2011, had 192 Parties. It is an international agreement linked to the United Nations Framework Convention on Climate Change (UNFCCC), 1992, which provides the overall framework for international efforts to tackle climate change. While UNFCCC encourages developed countries to stabilize greenhouse gas (GHG) emissions, the Kyoto Protocol sets specific commitments, binding 37 developed countries to cut GHG emissions by about 5 per cent from 1990 levels over the five-year period from 2008 to 2012. The Protocol places a heavier burden on developed countries, as the largest contributors to GHG emissions over the years, under the principle of *Common but Differentiated Responsibilities and Respective Capabilities (CBDR)*. For more information, see the UNFCCC website at <http://www.unfccc.int>.
- ²⁵ Overall GHG emissions from international shipping are estimated at 2.7 per cent of global GHG emissions from fuel combustion in 2007, or more than double the GHG emissions from international air transport.
- ²⁶ See the Second IMO GHG Study 2009, available at http://www5.imo.org/SharePoint/blastDataHelper.asp/data_id%3D27795/GHGStudyFINAL.pdf.
- ²⁷ For an overview of the MEPC's work in recent years, see Chapter 6 of the 2008, 2009 and 2010 editions of the *Review of Maritime Transport*.
- ²⁸ For further information on the package of technical and operational reduction measures for ships that was agreed at MEPC 59, see <http://www.imo.org/OurWork/Environment/PollutionPrevention/AirPollution/Documents/Technical%20and%20operational%20reduction%20measures.pdf>.
- ²⁹ For an overview of a range of potential approaches to mitigation in maritime transport, see also the Summary of Proceedings from the *UNCTAD Multi-year Expert Meeting on Transport and Trade Facilitation: Maritime Transport and the Climate Change Challenge*, 16–18 February 2009, Geneva. UNCTAD/DTL/TLB/2009/1, at pp. 11-15, available on the UNCTAD website at www.unctad.org/ttl/legal.
- ³⁰ See the *Review of Maritime Transport 2010*, at pp. 118-123.
- ³¹ MEPC 61/24, *Report of the Marine Environment Protection Committee on its sixty-first session (secretariat)*.
- ³² See the submission by the Clean Shipping Coalition (CSC): MEPC 61/5/10, *Speed Reduction – the key to the fast and efficient reduction of greenhouse gas emissions from ships*.
- ³³ MEPC 61/5/17, *Decision criteria for establishing EEDI correction factors (United States)*.
- ³⁴ Correction factors, in this context, are mathematical components that may be used while calculating the EEDI of a ship. These factors will allow the calculation of the minimum energy efficiency requirement for ships to vary, where necessary, to take into account special characteristics of particular ships, e.g. ice-classed ships, or particular weather conditions, e.g. wave and wind factors.
- ³⁵ MEPC 61/5/32. *Consideration of the Energy Efficiency Design Index for New Ships – Minimum installed power to maintain safe navigation in adverse conditions (IACS)*.
- ³⁶ MEPC 61/5/12. *Consideration of a principle for alternate calculation or exemption of EEDI in ships with special circumstances (Vanuatu)*.
- ³⁷ MEPC 61/5/20. *Consideration of CO2 abatement technologies (Singapore)*.
- ³⁸ MEPC 61/5. *Preliminary assessment of capacity-building implications (Vice-Chairman)*.
- ³⁹ See further. <http://www.imo.org/MediaCentre/PressBriefings/Pages/Republic-of-Korea-to-assist-IMO-in-building-capacity-in-developing-countries-to-address-Greenhouse-Gas-Emissions-from-Ships.aspx>.
- ⁴⁰ MEPC 61/5/3, *Report of the outcome of the Intersessional Meeting of the Working Group on Energy Efficiency Measures for Ships*.
- ⁴¹ MEPC 61/WP.10.
- ⁴² See MEPC 61/24, at p. 41.
- ⁴³ Annex VI of MARPOL 73/78 deals with the prevention of air pollution from ships. Annex VI entered into force on 19 May 2005 and, as at 31 July 2011, has 65 Contracting States, representing 89.82 per cent of world tonnage.
- ⁴⁴ MARPOL 73/78 is the main international convention dealing with prevention of pollution of the marine environment
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by ships from operational or accidental causes. It includes six technical annexes that aim to prevent specific types of pollution including pollution caused by oil (Annex I), chemicals (Annex II), harmful substances in packaged form (Annex III), sewage (Annex IV), garbage (Annex V) and air pollution (Annex VI). The Convention, along with Annexes I and II, entered into force on 2 October 1983. As at 31 July 2011, it has 150 Contracting States, representing 99.14 per cent of world tonnage. The remaining Annexes have been ratified separately by States, with all Annexes having gained widespread acceptance. For the status of each Annex, see www.imo.org.

45 See further MEPC 61/24, at pp. 37-42.

46 See MEPC 61/24, at paras. 5.53-5.55.

47 IMO Circular Letter No.3128, dated 24 November 2010.

48 IMO Circular Letter No.3170, dated 1 March 2011.

49 MEPC 62/6/9, *Consideration and adoption of amendments to mandatory instruments (India)*.

50 In this context, it is interesting to note that the International Chamber of Commerce (ICC) issued recommendations for CO2 reduction for ships giving support to adoption of a package of measures by way of amendments to MARPOL Annex VI.

51 For further information, see MEPC 62/64, Report of the *Marine Environment Protection Committee on its sixty-second session (secretariat)*; and MEPC 62/24/Add.1. The outcome of the roll-call vote can be found at MEPC 62/24, at p. 57.

52 For further information, see MEPC 61/24, at pp. 42-44; MEPC 61/5/1, *Outcome of the United Nations Climate Change Talks held in Bonn, Germany in May/June 2010 (secretariat)*; MEPC 61/5/18 and MEPC 61/5/18/Rev.1, *High-Level Advisory Group of the United Nations Secretary-General on Climate Change Financing (secretariat)*.

53 In this context, the MEPC considered the outcome of the August 2010 session of the UNFCCC Ad Hoc Working Groups: *Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP)* 13 and *Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA)* 11. See further MEPC 61/5/1/Add.1.

54 MEPC 61/24, at p. 43.

55 A technical report by the UNCTAD secretariat, *Oil Prices and Maritime Freight Rates: An Empirical Investigation*, UNCTAD/DTL/TLB/2009/2, focusing on the effect of oil prices as a determinant of maritime freight rates, served to assist in the work of the *IMO Expert Group on Feasibility Study and Impact Assessment of Possible Market-based Measures*. The technical report is available on the UNCTAD website at www.unctad.org/ttl/legal.

56 MEPC 61/INF.2, *Full report of the work undertaken by the Expert Group on Feasibility Study and Impact Assessment of possible Market-based Measures (secretariat)*. For the Executive Summary, see MEPC 61/5/39 (Secretary-General). See also the *Review of Maritime Transport 2010*, at pp. 122-123, where the conclusions of the report are reproduced in full.

57 For a concise summary of the proposals, see Chapter 6 of the *Review of Maritime Transport 2010*.

58 Comments on the use of credits of the Clean Development Mechanism in market-based measures for international shipping (Republic of Korea); MEPC 61/5/19, *Market-Based Measures – inequitable burden on developing countries (India)*; MEPC 61/5/24, *Uncertainties and Problems in Market-based Measures (China and India)*.

59 See also MEPC 61/24/Annex 8, *Statements by the Delegations of India and China on the Report of the Expert Group on Market-based Measures to Reduce Green-house Gas Emissions from the Maritime Sector*.

60 See MEPC 61/24/Annex 7, *Terms of Reference for the Third Intersessional Meeting of the Working Group on GHG Emissions from Ships (GHG-WG 3)*.

61 See MEPC 61/24/Annex 7, Appendix, *Criteria agreed by MEPC 60 for use by the MBM-EG*.

62 MEPC 62/5/1.

63 GHG-WG 3/2, *Alternatives to Market-based Measures (Bahamas)*; GHG-WG 3/2/1, *International Greenhouse Gas Fund (Cyprus, Denmark, the Marshall Islands and Nigeria)*; MEPC 61/5/19, *Market-Based Measures – inequitable burden on developing countries (India)*.

64 The views expressed by individual delegations are reflected in MEPC 62/5/1, *Report of the third Intersessional Meeting of the working group on greenhouse gas emissions from ships (secretariat)*, at pp. 6-7. See also the separate statements of the delegations of Brazil, Australia, Greece and India, which are reproduced in Annex 1 of MEPC 62/5/1.

65 GHG-WG 3/2, *Alternatives to Market-based Measures (Bahamas)*.

66 MEPC 61/5/19, *Market-Based Measures – inequitable burden on developing countries (India)*.

67 See also the general statement by the delegation of Brazil which expresses the view that no measures should be imposed mandatorily on non-Annex 1 (of the Kyoto Protocol) countries, MEPC 62/5/1, Annex 1.

68 See GHG-WG 3/2/1, *International Greenhouse Gas Fund (Cyprus, Denmark, the Marshall Islands and Nigeria)*.

69 See MEPC 62/5/1, at para. 2.22.

70 For a summary of 12 supporting arguments put forward by each group, see further MEPC 62/5/1, at pp. 8-10.

- 71 Summaries of the proposals along with the presentations can be found in Annex 2 of MEPC 62/5/1.
- 72 GHG-WG 3/3/7 (Germany); GHG-WG 3/3/8 (United Kingdom); GHG-WG 3/INF.2 (the Netherlands); GHG-WG 3/INF.3 (European Commission); GHG-WG 3/3/1 (Republic of Korea); MEPC 61/5/19 (India); MEPC 61/5/21 (China and India); MEPC 61/5/28 (Republic of Korea).
- 73 GHG-WG 3/3 (Greece).
- 74 In a press release on 20 May 2011 by the newly merged International Chamber of Shipping (ICS) and the International Shipping Federation (IFS), the ICS gave express preference to a levy/compensation fund-based MBM rather than an emissions trading scheme. See <http://www.marisec.org/pressreleases.htm#20may11>.
- 75 GHG-WG 3/3/35 (Norway).
- 76 For further information on the various debates, see MEPC 62/5/1, at pp. 13-17.
- 77 MEPC 61/INF.2, *Full report of the work undertaken by the Expert Group on Feasibility Study and Impact Assessment of possible Market-based Measures (secretariat)*.
- 78 See further, MEPC 62/5/1, at pp. 16-17, and Annex 3.
- 79 The above mentioned weaknesses are noted in Annex 5 of MEPC 62/5/1.
- 80 For references to the documents consulted see MEPC 62/5/1, at pp. 18-21.
- 81 See only the statement of India, which is reproduced in Annex 1 of MEPC 62/5/1.
- 82 See MEPC 62/5/1 at para. 3.63.
- 83 Vivid Economics, an external consultant, had already provided detailed analysis on the economic impact on trade, for illustrative products and markets, due to the introduction of a MBM for reduction of GHG emissions from international shipping for the meeting of the Expert Group. The full report can be found at <http://www.imo.org/OurWork/Environment/PollutionPrevention/AirPollution/Documents/VividEconomicsIMOFinalReport.pdf>. A presentation on the outcome on its assessment was provided at the Intersessional Meeting of the Working Group, see GHG-WH 3/WP.4.
- 84 It is envisaged that a further impact study will build upon the earlier study of the *Expert Group on Feasibility Study and Impact Assessment of Possible Market-based Measures* (MEPC 61/INF.2).
- 85 Figures have been taken from the International Maritime Bureau's (IMB) Piracy Reporting Centre (PRC), <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures>. Figures are correct as of 23 May 2011. Quarterly and Annual Reports from the PRC are available free of charge, upon request at <http://www.icc-ccs.org/>. For further statistics on international piracy and armed robbery at sea, see the website of the United States Department of Transportation, Research and Innovative Technology Administration, Bureau of Transport Statistics, in particular, http://www.bts.gov/publications/special_reports_and_issue_briefs/special_report/2010_04_22/html/entire.html.
- 86 For the IMO 2010 Annual Report on acts of piracy and armed robbery against ships, see MSC.4/Circ.169, 1 April 2011. Information on all acts reported to have occurred or to have been attempted in 2010 can be found in the Annexes to the Circular along with a regional analysis of acts and a graphical presentation by area of reports received during 2010 alone, and of reports received between 1984 and 2010. Quarterly and Annual reports on piracy and armed robbery are available from the IMO at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/PirateReports.aspx>.
- 87 For further information on piracy prone areas, see <http://www.icc-ccs.org/piracy-reporting-centre/prone-areas-and-warnings>.
- 88 MSC 89/25, *Report of the Maritime Safety Committee on its eighty-ninth session (secretariat)*.
- 89 *Interim Guidance to shipowners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area (MSC.1/Circ.1405)*; and *Interim Recommendations for Flag States regarding the use of privately contracted armed security personnel on board ships in the High Risk Area (MSC.1/Circ.1406)*. The "High Risk Area" is an area defined by the Best Management Practices (BMP) unless otherwise defined by the Flag State. The latest edition of the BMP states that "the High Risk Area for piracy attacks defines itself by where the piracy attacks have taken place. For the purposes of the BMP, this is an area bounded by Suez to the North, 10°S and 78°E," see BMP3, at Section 2.
- 90 IMO has previously adopted *Recommendations to governments for preventing and suppressing piracy and armed robbery against ships (MSC.1/Circ.1333)*; *Guidance to shipowners and ship operators, shipmasters and crew on preventing and suppressing piracy and armed robbery against ships (MSC.1/Circ.1334)*; and *Piracy and armed robbery against ships in waters off the coast of Somalia: Best Management Practices to Deter Piracy off the Coast of Somalia and in the Arabian Sea Area developed by the industry (MSC.1/Circ.1337)*.
- 91 It should be noted in this respect that ships calling at South African Ports which do not have a license for any arms that are on board the vessel will risk arrest and detention by the South African Police Service. The 21-day rule for obtaining a permit is being strictly enforced by South African authorities, without exception. For further information see <http://www.skuld.com/News/News/South-Africa-Guns-and-ammunition-on-ships-calling-at-South-African-ports/?MyMode=print>.
- 92 The latest edition of BMP can be accessed at <http://www.icc-ccs.org/images/stories/pdfs/bmp3.pdf>.
- 93 See MSC.1/ Circ.1404.

- ⁹⁴ See Assembly resolution A.1025(26).
- ⁹⁵ See above, FN 89.
- ⁹⁶ For a discussion of the numerous issues that arise when considering a legal definition of sea piracy see Dubner B H (2011). On the Definition of the Crime of Sea Piracy Revisited: Customary vs. Treaty Law and the Jurisdictional Implications Thereof. *Journal of Maritime Law and Commerce*. Vol. 42, No. 1, January, and the references therein.
- ⁹⁷ See further the Report of the Legal Committee on the Work of its 98th Session, document LEG 98/14, at pp. 18-22. See also the Report of the Legal Committee on its 97th Session, document LEG 97/15, at pp. 19-23.
- ⁹⁸ The documents attached at annex to Circular Letter No.3180 include *Piracy: elements of national legislation pursuant to the United Nations Convention on the Law of the Sea, 1982* (documents LEG 98/8/1 and LEG 98/8/3, submitted by the United Nations Division for Ocean Affairs and the Law of the Sea); *Establishment of a legislative framework to allow for effective and efficient piracy prosecutions* (document LEG 98/8/2, submitted by the UN Office on Drugs and Crime); *Uniform and consistent application of the provisions of international conventions relating to piracy* (document LEG 98/8, submitted by the IMO secretariat); and *Establishment of a legislative framework to allow for effective and efficient piracy prosecutions* (document LEG 98/8/4, submitted by Ukraine).
- ⁹⁹ See further, LEG 98/14, at pp. 18-19.
- ¹⁰⁰ See Annex to the Letter dated 24 January 2011 from the Secretary-General to the President of the Security Council (S/2011/30), 25 January 2011.
- ¹⁰¹ Access to national legislation on piracy, as provided by Member States to the United Nations, is available at http://www.un.org/Depts/los/piracy/piracy_national_legislation.htm.
- ¹⁰² For further information on the Djibouti Code of Conduct, along with the full text and current signatories to the code, see <http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx>.
- ¹⁰³ As at 31 July 2011, signatories to the Djibouti Code of Conduct include Comoros, Djibouti, Egypt, Eritrea, Ethiopia, Jordan, Kenya, Madagascar, Maldives, Mauritius, Oman, Saudi Arabia, Seychelles, Somalia, Sudan, the United Arab Emirates, the United Republic of Tanzania and Yemen. There are now three countries that remain eligible to sign the Code, namely, France, Mozambique and South Africa.
- ¹⁰⁴ See *Masefield AG v Amlin Corporate Member Ltd.* [2011] EWCA Civ 24 (26 Jan 2011), on appeal from the decision of the High Court [2010] EWHC 280 (Comm) (18 Feb 2010).
- ¹⁰⁵ The Court of Appeal also confirmed that, under national law, the payment of a ransom is not illegal.
- ¹⁰⁶ It may be of interest to note that MARSH, a global insurance broker and risk adviser, has published a document titled *Piracy – the insurance implications*, intended to be used as a practical guide to shipping companies based on the situation in June 2011. The guide can be accessed at <http://documents.marsh.com/documents/piracywhitepaper07-11-11.pdf>.
- ¹⁰⁷ *Cosco Bulk Carrier Co. Ltd. V Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340 (Comm) (11 June 2010).
- ¹⁰⁸ For further information on BIMCO's piracy-related work, see <https://www.bimco.org>.
- ¹⁰⁹ For further information on the SAFE Framework, see http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Procedures%20and%20Facilitation/safe_package/safe_package_I.pdf.
- ¹¹⁰ For the list of WCO members who have expressed their intention to implement the SAFE Framework, see http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Enforcement/FOS_bil_05.pdf.
- ¹¹¹ According to information provided by the WCO secretariat.
- ¹¹² The current SAFE Package can be accessed at http://www.wcoomd.org/home_pfoverviewboxes_safepackage.htm.
- ¹¹³ For the PSCG Statement on AEO Benefits see http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Procedures%20and%20Facilitation/safe_package/safe_package_VI.pdf.
- ¹¹⁴ For the self-assessment questionnaire, see http://ec.europa.eu/taxation_customs/resources/documents/customs/policy_issues/customs_security/aeo_self_assessment_en.pdf. Explanatory notes are also available at http://ec.europa.eu/taxation_customs/resources/documents/customs/policy_issues/customs_security/aeo_self_assessment_explanatory_en.pdf.
- ¹¹⁵ Commission Regulation (EU) No 197/2010 of 9 March 2010 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code.
- ¹¹⁶ For the import/entry Guidelines, see http://ec.europa.eu/ecip/documents/procedures/import_entry_guidelines_en.pdf.
- ¹¹⁷ For the export/exit Guidelines, see http://ec.europa.eu/ecip/documents/procedures/export_exit_guidelines_en.pdf.
- ¹¹⁸ For access to the various databases in relation to the Taxation and Customs Union, see http://ec.europa.eu/ecip/information_resources/databases/index_en.htm.
- ¹¹⁹ See http://ec.europa.eu/ecip/documents/who_is/taxud1633_2008_rev2_en.pdf. For further information in respect of national implementation see http://ec.europa.eu/ecip/documents/who_is/eori_national_implementation_en.pdf.
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- 120 The 88th session of the MSC was held in November/December 2010, and the 89th session was held in May 2011.
- 121 For further information on maritime security, see the following reports of the UNCTAD secretariat, *Container Security: Major Initiatives and related International Developments* (UNCTAD/SDTE/TLB/2004/1), and *Maritime Security: ISPS Code Implementation, Costs and related Financing* (UNCTAD/SDTE/TLB/2007/1), available on the UNCTAD website at www.unctad.org/ttl/legal. See also Asariotis, R., 'Implementation of the ISPS Code: an overview of recent developments', J.I.M.L. 2005, 11(4), 266-287.
- 122 MSC 88/4, *Developments since MSC 87 (secretariat)*.
- 123 See further MSC 89/4, *Need for updating the information provided in the GISIS Maritime Security Module (secretariat)*, and MSC 88/26, at pp. 17-18.
- 124 MSC 89/4/1, *Report of the Correspondence Group on the Maritime Security Manual (Canada)*.
- 125 MSC 89/INF.13, *Maritime Security Manual – Guidance for port facilities, ports and ships (Canada)*.
- 126 The MSM Correspondence Group had been established at MSC 88. For its Terms of Reference see MSC 88/26, at paragraph 4.40.
- 127 Document MSC 89/4/2, *Consideration of periodical survey to Ship Security Alert System (SSAS)*, submitted by the Republic of Korea was also considered by the Committee.
- 128 MSC.1/Circ.1283, 22 December 2008.
- 129 See MSC 88/4/2, *Enhancements to the ISPS Code (Canada)*.
- 130 See further the *Interim scheme for the compliance of special purpose ships with the special measures to enhance maritime security* (MSC.1/Circ.1189).
- 131 See *Guidance on voluntary self-assessment by SOLAS Contracting Governments and by Port Facilities* (MSC.1/Circ.1192); *Guidance on voluntary self-assessment by administrations and for ship security* (MSC.1/Circ.1193); and *Effective implementation of SOLAS Chapter XI-2 and the ISPS Code* (MSC.1/Circ.1194).
- 132 See, for example, ISO/PAS 28002:2010: Security management systems for the supply chain – Development of resilience in the supply chain – Requirements with guidance for use; and ISO 28005-2:2011: Security management systems for the supply chain – Electronic port clearance (EPC) – Part 2: Core data elements. For further information, see www.iso.org.
- 133 In particular, work continues on ISO 28004 and ISO 28005.
- 134 The ISO Action Plan for developing countries 2011-2015 can be accessed at http://www.iso.org/iso/iso_strategy_and_policies. See also the ISO Strategic Plan 2011-2015.
- 135 See the *Review of Maritime Transport 2010*, at pp. 128-130. The ISO Action Plan for developing countries 2005-2010 can be accessed at http://www.iso.org/iso/actionplan_2005.pdf.
- 136 Prior to the oil spill, the "Hague Memorandum" had been agreed in 1978 between a number of maritime administrations in Western Europe, which dealt mainly with enforcement of shipboard living and working conditions as required by ILO Convention no. 147.
- 137 As at 31 July 2011, the 27 member States of the Paris MoU are Belgium, Bulgaria, Canada, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, Slovenia, Spain, Sweden and the United Kingdom. Further information on the Paris MoU, as well as the full text including the 32nd amendment can be found at <http://www.parismou.org/>.
- 138 For further information, see the Paris MoU Annual Reports, https://www.parismou.org/Publications/Annual_reports/.
- 139 The 15 international conventions listed in the Memorandum include the International Convention on Load Lines, 1966 and its 1988 Protocol; the International Convention for the Safety of Life at Sea, 1974 (SOLAS) and its Protocols of 1978 and 1988; the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978, and as further amended by the Protocol of 1997 (MARPOL); the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978; the Convention on the International Regulations for Preventing Collisions at Sea, 1972; the International Convention on Tonnage Measurement of Ships, 1969; the Merchant Shipping (Minimum Standards) Convention, 1976 and its 1996 Protocol; the International Convention on Civil Liability for Oil Pollution Damage, 1969; Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969; the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001; and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.
- 140 For a list of ships currently banned from the Paris MoU region see https://www.parismou.org/Inspection_efforts/Bannings/Banning_list/.
- 141 "Overriding factors" are considered sufficiently serious to trigger an additional inspection at Priority I and include, inter alia, ships involved in a collision, grounding or stranding; ships accused of violating the provisions on discharge of harmful substances or effluents; and ships which have been withdrawn or suspended from their Class for safety reasons.
- 142 "Unexpected factors" are those that may indicate a serious threat to the safety of the ship, crew or the environment, such as ships that do not comply with reporting obligations; ships reported with outstanding deficiencies or previously

- detained ships; ships operated in a manner to pose danger; or ships reported with problems concerning their cargo, in particular noxious or dangerous cargo. The need to undertake an additional inspection is, however, left to the discretion of the Member State.
- 143 Prior to the adoption of the STCW Convention, such standards were determined by national law irrespective of practices in other countries, which resulted in widespread differences in standards and procedures.
- 144 For the ratification status of the STCW Convention, see www.imo.org.
- 145 For further information, see a press release by IMO on the Conference <http://www.imo.org/MediaCentre/PressBriefings/Pages/STCW-revised-adopted.aspx>. The International Shipping Federation has produced new *Guidelines to the IMO STCW Convention* that take account of the recent amendments. See further <http://www.marisec.org/pressreleases.htm#22march>.
- 146 See further <http://www.imo.org/OurWork/HumanElement/TrainingCertification/Pages/STCW-Convention.aspx>.
- 147 See in particular, the *Review of Maritime Transport 2006*, at pp. 90-91, along with the applicable references to the *Maritime Labour Convention* in Chapter 6 of the subsequent editions of the *Review of Maritime Transport*.
- 148 For a list of the Conventions revised by the MLC 2006, see http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_150389/lang--en/index.htm.
- 149 For status information of the *Maritime Labour Convention 2006*, see <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C186>.
- 150 See document LEG 98/14, *Report of the Legal Committee of the work at its ninety-eighth session (secretariat)*, at paragraph 5.1.
- 151 The mandate of the trade facilitation negotiations at the WTO is “to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit”. GATT Articles V (freedom of transit), VIII (fees and formalities connected with importation and exportation) and X (publication and administration of trade regulations), are therefore the main focus of the ongoing negotiations and the substantive measures in the draft text of trade facilitation agreement are crafted along these three existing articles.
- 152 Draft consolidated negotiating Text, Negotiating Group on Trade Facilitation (TN/TF/W/165/Rev.8), of 21 April 2011.
- 153 UNCTAD (2011). *Reflections on a Future Trade Facilitation Agreement: Implementation of Future WTO Obligations, A comparison of Existing WTO Provisions*, <http://www.unctad.org/tlb20102.pdf>.
- 154 For purposes of this publication we will make reference to the term of Regional Trade Agreements as the document that creates free trade zones and/or customs union between countries and/or territories.
- 155 With respect to trade in goods, this principle is contained in Article I of GATT.
- 156 *Decision on differential and more favorable treatment reciprocity and fuller participation of developing countries*, 28 November 1979 (L/4903).
- 157 See http://www.wto.org/english/tratop_e/region_e/region_e.htm.
- 158 Such as SAFE Framework of Standards to Secure and Facilitate Global Trade, ATA and Temporary Admission Conventions, and the WCO Data Model.
- 159 The International Convention on the Simplification and Harmonization of Customs procedures (Kyoto Convention) entered into force in 1974 and was revised and updated to ensure that it meets the current demands of governments and international trade. The WCO Council adopted the revised Kyoto Convention in June 1999 as the blueprint for modern and efficient customs procedures in the 21st century. More information can be found at http://www.wcoomd.org/home_pfoverviewboxes_tools_and_instruments_pfrevisedkyotoconv.htm.
- 160 UNCTAD (2011). *Trade Facilitation Measures in Regional Trade Arrangements*. Working Paper presented at the Ad Hoc Expert Meeting on Trade Facilitation in Regional Trade Arrangements, 30-31 March 2011, Geneva.
- 161 Ibid.
- 162 Up-to-date and authoritative information on the status of international conventions is available from the relevant depository. For United Nations conventions, see the United Nations website at <http://www.un.org/law>. This site also provides links to a number of websites of other organizations, such as IMO (www.imo.org), ILO (www.ilo.org) and the United Nations Commission on International Trade Law (www.uncitral.org), containing information on conventions adopted under the auspices of each of them. Since the last reporting period, Albania and Ecuador acceded to the International Convention on Arrest of Ships, 1999. In addition, Spain was the first country to ratify the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”).