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UNIVERSITI TEKNOLOGI MARA (UiTM)

An Introduction

Universiti Teknologi MARA (formerly known as MARA Institute of Technology) is Malaysia's largest institution of higher learning. It had its beginnings in 1956 as Dewan Latihan RIDA, a training centre under the supervision of the Rural Industrial Development Authority (RIDA).

Nine years later Majlis Amanah Rakyat (MARA) Act, 1965 provided for a change of name from Dewan Latihan RIDA to Maktab MARA (MARA College). The Act also defined a new role for the MARA College -- to train Bumiputras (literally it means "the sons of the soil" - ie the indigenous people) to be professionals and semi-professionals in order to enable them to become equal partners with other ethnic groups (ie the former migrants, especially the Chinese and Indians) in the commercial and industrial enterprises of the nation.

In 1967 Maktab MARA was renamed Institut Teknologi MARA (ITM) (or MARA Institute of Technology). In August 1999, the Institute was upgraded to university status and named Universiti Teknologi MARA (UiTM).

As part of the government's affirmative action policies, UiTM provides education and training in a wide range of sciences, technology, business management and professional courses to 56,408 full-time students in 2000. Another 3,156 have enrolled for off-campus courses. In addition, there are 7,725 students in distance-learning and flexible-learning programmes.

The main campus stands on a 150-hectare piece of land on a picturesque hilly area of Shah Alam, the state capital of Selangor Darul Ehsan, about 24 kilometres from the city of Kuala Lumpur.

The Universiti has also established branch campuses in the various states of the Federation: Sabah (1973), Sarawak (1973), Perlis (1974), Terengganu (1975), Johor (1984), Melaka (1984), Pahang (1985), Perak (1985), Kelantan (1985), Penang (1996), Kedah (1997) and Negeri Sembilan (1999).

The Universiti currently offers 184 programmes conducted by 18 Faculties. These programmes range from post-graduate to pre-diploma or certificate levels. More than half of these are undergraduate and post-graduate programmes, while diploma programmes account for an additional 39%. Some of the post-graduate programmes are undertaken in the form of twinning programmes, through collaboration with universities based overseas.

The following 18 Faculties currently run programmes in the University:

Accountancy; Administration and Law; Applied Science; Architecture Planning & Surveying; Art & Design; Business & Management; Civil Engineering; Education; Electrical Engineering; Hotel & Tourism Management; Information Technology & Quantitative Science; Mass Communication; Mechanical Engineering; Office Management & Technology; Performing Arts; Science; Sport Science & Recreation.

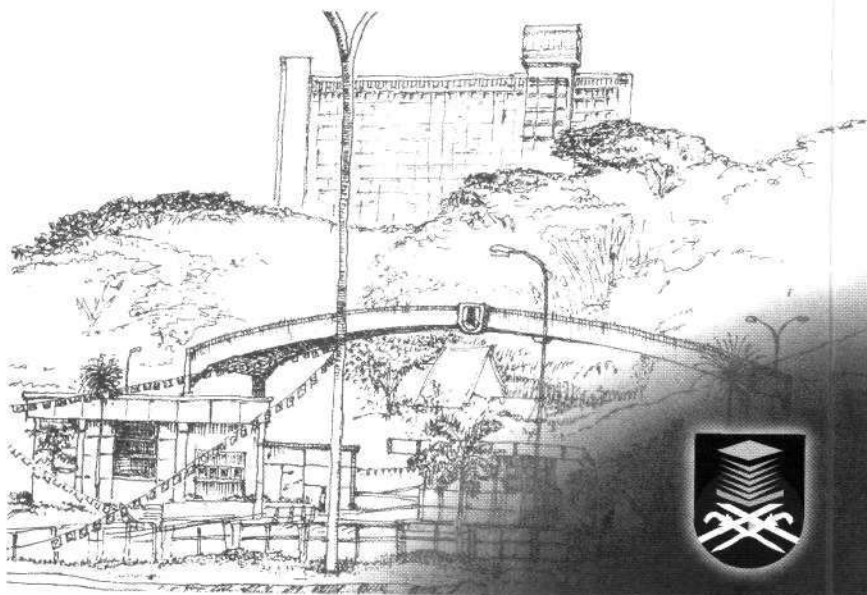
In addition to faculties there are 17 'academic centres' to cater various academic, business, technological and religious needs of the campus community. They are Extension Education Centre (PPL); Language Centre; Centre for Preparatory Education; Resource Centre for Teaching and Learning; Total Quality in UiTM (CTQE); Department of Academic Quality Assurance & Evaluation; Computer Aided Design Engineering Manufacturing (CADEM); Malaysian Centre for Transport Studies (MACTRANS); Text Preparation Bureau; Bureau of Research & Consultancy; Malaysian Entrepreneurship Development Centre (MEDEC); Islamic Education Centre; Centre for Integrated Islamic Services; Business & Technology Transfer Centre.

THE FACULTY OF ADMINISTRATION AND LAW, UiTM

The Faculty of Administration and Law (formerly known as the School of Administration and Law) was founded in 1968. It began as a centre offering British external programmes, the LLB (London - External) and the Chartered Institute of Secretaries (now Institute of Chartered Secretaries and Administrators). The only internal programme offered then was the Diploma in Public Administration and Local Government (DPALG). In 1978 the LLB (London - External) programme was terminated and replaced by the current internal LLB programme. The LLB is a three-year academic degree course based on the structure of the undergraduate law programmes normally offered in the British universities. Unlike most of the British LLB programmes, however, the LLB at the Faculty is conducted on a semester system. In 1982 the Faculty introduced a one-year LLB (Hons) programme towards which graduates of the LLB could advance their studies. The LLB (Hons) is a professional and practice-oriented programme that provides training to students for their career in the legal practice as Advocates and Solicitors. The delivery of the curriculum for this course adopts the method and strategy of simulated or experiential learning. Because of the unique experience it provides to students in their legal training this course has acquired wide recognition and acceptance among the Malaysian public.

The Faculty of Administration and Law enjoys strong connections with the legal profession, particularly the Malaysian Bar, and the industry. It takes pride in continually developing pioneering options in its degree programmes, both at the academic and professional levels. In 1995 the Faculty introduced the degree of Bachelor in Corporate Administration (Hons) to train young and bright Malaysians to hold office as Company Secretaries. In the pipe-line are some new courses - Bachelor of Law and Management (Hons), Bachelor of Administrative Science (Hons), Masters of Law and Executive Masters in Administrative Science.

The Faculty currently comprises some 70 academic staff from both the disciplines of law and administration. It has about 600 students reading for the LLB and LLB (Hons) and 500 students reading for the Diploma in Public Administration and Bachelor in Corporate Administration (Hons). The Faculty admits about 200 students each year.



Main Entrance to Shah Alam Campus

EDITORIAL NOTES

This law journal had a long period of gestation in the Faculty. There were several attempts in the past, by individuals or the faculty collectively, to bring about its parturition. It is no easy task to initiate an academic journal, regardless of the discipline it represents. It demands a high degree of commitment in time, energy and attention. It calls for an intense love of labour for scholarship among a critical mass of the faculty members, either in the editorial board or as article contributors. But, at long last, this journal has arrived.

Many factors led to this successful launch. The recent elevation of this institution to university status created its own impetus. Our strong law programme and its capable teachers demanded, and will benefit from, this specialist forum for academic debate and analysis. There is support within the legal profession and among our many distinguished alumni for such a journal, too. We are delighted by the synergy and collaborative goodwill the notion of a journal has evoked. So, we were able to marshal much expertise and experience to bring out this inaugural issue of the Journal.

Academic faculty at UiTM are part of the worldwide network of academia. We must participate in discussions and debates over issues that are not only of direct academic and professional concern but also of importance to the general public. A journal such as this facilitates reflective and disciplined participation. In doing so, it helps the Faculty, and the University, to undertake its noble role in serving the general community.

A learned journal is one of the major measures by which the weight and prestige of an institution are judged. It reflects the institution's maturity and ability to manage and conduct its specialist discipline. It reflects a confidence among its faculty to offer themselves to be evaluated in the open market place of ideas, and it serves notice of the faculty's readiness to serve the community at large. This Journal, in no small measure, marks the coming of age of the Faculty.

The Journal functions also as a meeting point for law teachers and practitioners who share a common interest in various areas of law. It provides them a source of information on the current and topical issues in their specialised areas. It creates a forum for the exchange of ideas and for engaging in discourse over sometimes intricate and often vexed legal issues. Much is gained by the legal fraternity, as well as the legal system, through such engagements and encounters.

Law teachers, as members of the broader academic community, are aware that it is no longer tenable for them to function solely within their traditional ivory towers, isolated from the reality of the world outside. For career and professional advancement, and for taking their rightful role in the community, no academic can confine

herself to her classroom or departmental audience. She must reach for a wider audience. The recognition (or lack of it) that she gains from her peers, both within and without the discipline, will speak for her standing and credibility in the community, both scholarly and otherwise. This Journal will serve as one channel for the Faculty members to reach that wider audience.

There are relatively few academic legal journals in this country. Most existing legal publications cater for the professional needs of legal practitioners. One ramification of this is that there are few discourses on theoretical and abstract legal issues. Yet these issues are important for the fuller appreciation and development of the law and the legal system, by the legislature, the reform bodies and the courts. This Journal will try to answer this need and stimulate discussions on issues that are of interest and relevance to the academic and broader communities.

The labour and skill required for this Journal to thrive will challenge the staff of the institution and the supporters of this initiative among the profession and the wider community. We hope the Journal sails well in fair winds.

Our wish is that Malaysia's legal profession, its legal academic circle and the many students and practitioners of law in this country and elsewhere will benefit from this forum for analysis and reform. We hope this Journal makes an important contribution to debate on vital legal matters in our society. We hope, too, that our quest for self-expression and critical reflection among the members of the legal academia will be assisted by this Journal. It is with great pleasure and some satisfaction at the completion of this worthy task that we complete this inaugural Editorial.

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THE TRANSIT PASSAGE REGIME UNDER INTERNATIONAL LAW AND ITS IMPACT ON THE STRAITS STATES POWERS: A CASE STUDY ON THE STRAITS OF MALACCA¹

by DR. MUSRIFAH SAPARDI RUSTAM*

Introduction

Significant questions of control over navigation by foreign shipping only arise in those straits used for international navigation which cannot be traversed without entering the territorial waters of straits States, as in the case of the Straits of Malacca.² The law relating to straits used for international navigation therefore became more important as States increasingly claimed 12 miles territorial seas.³ The Third United Nations on the Law of the Sea Convention (1982 LOSC) introduced the new regime

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1 The Straits of Malacca lie between the south-eastern part of the Andaman Sea and south-western part of the South China Sea, creating a link between the Indian Ocean and Pacific Ocean. To be more precise, the Straits run for 520 nm down the western side of Peninsula Malaysia, around and just beyond Singapore, ending in the South China Sea. The Straits are officially bordered by Malaysia and Indonesia, although a small portion falls under the Singaporean jurisdiction, see "Joint Statement by the Governments of Malaysia, Indonesia and Singapore in the Straits of Malacca and Singapore", 16 November 1971. In the Straits of Malacca, problems of navigational safety and marine pollution from ships are getting serious. These concerns have become more urgent in modern times because of the need to protect and preserve the marine environment, particularly against the increasing dangers posed by the types of cargo being transported by sea and the ever increasing high traffic density in the Straits of Malacca. In addition, the pollution from ships has resulted in physical damage to marine habitats and organisms. It also affects human health, social activities and economic welfare. Discharges of harmful substances by commercial vessels are particularly serious in an enclosed sea, such as the Straits of Malacca, which are relatively narrow and shallow.

2 Malaysia claimed 12 nm territorial sea in 1969, see s 3(1) of Malaysian Territorial Waters Emergency (Essential Powers) Ordinance, No 7, 1969. Indonesia claimed 12 nm territorial sea in 1960, see Article 1(2) of Indonesian Territorial Sea Ordinance, No 4, 1960. As a result of both coastal States bordering the Straits of Malacca having a 12 nm territorial zone, the narrowest portion of the Straits fall entirely under the Malaysian and Indonesian territorial jurisdiction. See discussion in Lewis M Alexander, "Geographical Perspectives on International Navigation", in J M V Dyke, et al. (ed), *International Navigation: Rocks and Shoals Ahead?* (Law of the Sea Institute Univ. of Hawaii Honolulu 1988) 73.

3 Article 3 of the 1982 LOSC, see *UN Doc. A/CONF.62/122* (1982); 21 *International Legal Materials* (1982) 1261. This claim now represents a clear majority of States' practice and has now been made uniform for the Parties to the 1982 LOSC. As of 30 December 1998, more than 70 countries are parties to the 1982 LOSC. They include, inter alia, Malaysia, Singapore, Indonesia, and the United Kingdom. Malaysia ratified the 1982 LOSC on 2 October 1996, Indonesia ratified on 3 February 1986, Singapore ratified on 17 November 1994, and the UK acceded on 25 July 1997. The 1982 LOSC came into force on 16 November 1994.

of transit passage to govern navigation through straits that fall within territorial sea which would previously have been governed by the rules of innocent passage.⁴

Transit passage may be described as a compromise between innocent passage⁵ and freedom of navigation⁶. It is restricted to "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone".⁷ If the strait is formed by an island of a State bordering the strait and its mainland, "transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics".⁸ Within the Straits of Malacca, this excludes the Strait of Johore which is used only by local traffic.⁹ The principle of transit passage does not affect the sovereignty or jurisdiction of the coastal States in other respects.¹⁰

Malaysia was initially reluctant to accept any change from a regime of innocent passage, because it was concerned that the transit passage regime would significantly reduce its power to protect itself, inter alia, against marine pollution from vessels.¹¹ In the light of this concern and continuing calls for special treatment to be accorded to the Straits of Malacca,¹² it is appropriate here to consider briefly the extent of relevant changes introduced by the transit passage regime and whether Malaysia's concern were justified. In addition, it is appropriate to outline the general principles

4 Part III (Straits Used for International Navigation: Articles 38-45) of the 1982 LOSC. See J I Charney, "Entry into force of the 1982 Convention on the Law of the Sea" 35 *Virginia Journal of International Law* (Winter 1995) 383.

5 Article 14(4) of the 1958 TSC. Cf. Article 38 of the 1982 LOSC.

6 *UN Doc. A/AC.138/SC.II/SR.66*, p. 2. See discussion in E D Brown, *The International Law of the Sea*, vol. 1, Introductory Manual, (Dartmouth 1994) p 86.

7 Article 37 of the 1982 LOSC.

8 Article 38(1) of the 1982 LOSC.

9 The Strait of Johore is separated by a causeway of only 3,465 feet (0.656 miles) between Malaysia and Singapore, see *Malaysia in Brief*, 1994, p 1.

10 Article 34(1) of the 1982 LOSC. "The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil".

11 Indonesia is another strait State which was initially reluctant to accept any change from innocent passage, see D P O'Connell, *The International Law of the Sea* Vol 1 (Clarendon Press Oxford) 319. See also detailed discussion in para. 1.3, on the development and concept of the transit passage regime, 9-16, and the impact of transit passage regime on straits States powers in para. 1.5, below at 21-24.

12 The Malaysian government is concerned about problems of navigational safety and marine pollution from commercial vessels, both with respect to its legal powers and the cost of enforcement and the provision of navigational facilities as discussed in above n 1 at 1. These concerns are stressed in the "Keynote Address by the former Malaysian Minister of Foreign Affairs", YB Datuk Abdullah Ahmad Badawi, at the international Conference on the Straits of Malacca: Meeting the Challenges of the 21st Century, (14 June 1994), Kuala Lumpur, 1-9. See also "Opening Speech by the Malaysian Minister of Science, Technology and Environment", Datuk Dr Law Hing Ding, at the International Conference on Malaysia Seeks New Maritime Role, *Lloyds Ship Manager*, (September 1994: Supplement), 5-9. The said Minister also calls for "a new Convention relating to the Straits of Malacca", in an interview after the First Session of the Second Informal Association of the Southeast Asian Nations (ASEAN) Ministerial Meeting on the Environment, see H Kaur, "Malaysia Needs for New Pact on Straits", *The Star*, (13 September 1995), 8.

that govern the relationship between strait States powers to regulate foreign shipping and freedom of navigation.

A brief summary of the main elements of innocent passage will now be given before examining the development of the concept of transit passage in more detail. The rules governing transit passage will then be discussed, followed by an analysis of the extent to which the change from innocent passage to transit passage has affected straits States' powers over commercial shipping.

The Regime of Innocent Passage

Innocent passage is defined in the 1982 LOSC:

Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.¹³

Under the equivalent provision of the 1958 Geneva Convention on Territorial Sea (1958 TSC), this rather general test did not require the commission of any particular act, only that the passage was not, for whatever reason, prejudicial to the peace, good order or security of the coastal State.¹⁴ The exception that proved the rule, as Churchill and Lowe point out, was that the mere act of fishing where prohibited would render passage non-innocent.¹⁵

The 1982 LOSC adopts a different approach and provides a detailed list of activities which will render passage non-innocent.¹⁶ The relevant activities are:

- (i) any exercise or practice with weapons of any kind,¹⁷
- (ii) the launching, landing or taking on board of any aircraft,¹⁸
- (iii) the launching, landing or taking on board of any military device,¹⁹
- (iv) any act of willful and serious pollution contrary to this Convention,²⁰

13 Article 19(1) of the 1982 LOSC.

14 Article 14(4) of the 1958 TSC. It provides "[P]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law".

15 Article 14(5) of the 1958 TSC. See R R Churchill and A V Lowe, *Law of the Sea*, (Manchester University Press Manchester 1988) 72.

16 Articles 19(2)(a) to (f) of the 1982 LOSC. Other activities are, (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State; (d) any act of propaganda aimed at affecting the defence or security of the coastal State and (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State. See also D R Rothwell, "Navigational Rights and Freedoms in the Asia Pacific Following Entry into Force of the Law of the Sea Convention" , (Spring 1995), 35 *Virginia Journal of International Law*, 592.

17 Article 19(2)(b) of the 1982 LOSC.

18 Article 19(2)(e) of the 1982 LOSC.

19 Article 19(2)(f) of the 1982 LOSC.

20 Article 19(2)(h) of the 1982 LOSC.

- (v) any fishing activities,²¹
- (vi) the carrying out of research or survey activities,²²
- (vii) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State,²³
- (viii) any other activity not having direct bearing on passage.²⁴

These detailed provisions were made in order to produce a more comprehensive and objective definition of innocent passage. The result is that the coastal States are allowed less scope for interpretation and therefore less opportunity to abuse their powers by preventing innocent passage in the territorial sea.²⁵ The mere presence or passage of ships in the territorial sea of a coastal State, cannot now be characterised as an act prejudicial to the coastal State unless the ships are engaged in one or more of the listed activities. There is, apparently, no need to show that such activities are actually prejudicial to the peace, good order or security of the coastal State. Churchill and Lowe suggest that the right of innocent passage has been widened to the advantage of foreign ships, because they can only lose the right of passage if they positively commit one of the listed acts.²⁶

On the other hand, the listing of activities also narrows down the right of innocent passage. Any act that falls within the list will automatically render the passage non-innocent, whereas under Article 14(4) of 1958 TSC, it would have been necessary to show that such activities actually prejudiced the peace, good order or security of the coastal States.²⁷

In addition, the list of activities has been made very broad by the insertion of Article 19(2)(l) of 1982 LOSC, which includes as a non-innocent activity, "any activity not having a direct bearing on passage". On this point, O'Connell suggests that:

The Draft Convention (1980), by linking innocence explicitly with the list of subject matters within coastal State competence, could have the effect of reversing the presumption of innocence. If passage is innocent until the commission of a prejudicial act, the burden of proving non-innocence could logically rest on the coastal State, which should be required to establish the fact and its prejudicial implications. But if no overt act need be committed for passage to be non-innocent then logically the burden of proving innocence would tend to shift the ship.²⁸

21 Article 19(2)(i) of the 1982 LOSC.

22 Article 19(2)(j) of the 1982 LOSC.

23 Article 19(2)(k) of the 1982 LOSC.

24 Article 19(2)(l) of the 1982 LOSC.

25 Churchill and Lowe, above n 15 at 72.

26 Ibid.

27 Ibid.

28 O'Connell, above n 11 at 273.

Thus, coastal States lost a degree of discretion under the 1982 LOSC provisions on innocent passage but, arguably, this discretion was ill-defined and difficult to apply clearly. Under the 1982 LOSC, there is probably a greater advantage given to coastal States with regard to innocent passage in that their burden of proof is a great deal less and, if O'Connell is correct, could even shift from the coastal States altogether. In this light, Malaysia's reluctance to accept a move to the more restrictive regime of transit passage away from innocent passage is even more understandable, since it would probably have gained greater powers of control over foreign shipping than before once the 1982 LOSC came into effect.²⁹ However, the key issue, in the sense of its practical importance for protecting the Straits of Malacca from marine pollution, is not so much the question of what constitutes innocent passage as such, but the power of the coastal States to regulate the conduct of the passage.

In this regard, the 1985 TSC provided merely that:

Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these Articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation.

However, this provision was open to interpretation and there was considerable uncertainty as to the precise powers of coastal States, not least in the area of environmental protection.³⁰ Article 21(1) of the 1982 LOSC, in contrast, contains much more detailed provisions and specifies the following relevant areas in which coastal States may exercise control:³¹

- (i) the safety of the navigation and the regulation of maritime traffic.³²
- (ii) the protection of navigational aids and facilities or installations.³³
- (ii) the protection of cables and pipelines.³⁴
- (iv) the conservation of the living resources of the sea.³⁵
- (v) the prevention of infringement of the fisheries laws and regulations of the coastal State.³⁶

29 The 1982 LOSC has entered into force on 19 November 1994. See discussion in Charney, above n 3 at 381-404. See also further discussion in paras. 1.3. and 1.5, below at 9-16 and 21-24, respectively.

30 See P W Birnie and A E Boyle, *International Law and the Environment*, (Oxford University Press Oxford 1992) 274-275.

31 Except para (h) with respect to the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State which is not involving control on navigational safety or marine pollution from vessels by coastal States.

32 Article 21(1)(a) of the 1982 LOSC. Through the IMO's supervision, coastal States may implement various means to control navigation by way of international conventions and agreements, including the development of Vessels Traffic Services (VTS). The IMO Guidelines for VTS defines VTS as "any service implemented by a competent authority, designed to improve safety and efficiency of traffic and the protection of the environment", see "IMO Guidelines for Vessel Traffic Services", IMO Resolution A.578(14), 20 November 1985. See also G Plant, "International Legal Aspects of Vessel Traffic Services", 14 *Marine Policy* (1990), 73.

33 Article 21(1)(b) of the 1982 LOSC.

34 Article 21(1)(c) of the 1982 LOSC.

35 Article 21(1)(d) of the 1982 LOSC.

36 Article 21(1)(e) of the 1982 LOSC.

- (vi) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof.³⁷
- (vii) marine scientific research and hydrographic surveys.³⁸

Foreign vessels exercising the right of innocent passage are required to comply with all such laws and regulations.³⁹ The explicit grant of these powers is to be welcomed by coastal States, but is subject to certain very important limitations.

First, the laws may not apply to the design, construction, manning or equipment of foreign ships, unless they are giving effect to generally accepted international rules or standards.⁴⁰ Secondly, coastal States must give due publicity to all such laws and regulations to foreign vessels, passing through their territorial sea.⁴¹ Thirdly, coastal States must not hamper the innocent passage of foreign vessels, except in accordance with the 1982 LOSC, nor impose requirements that have the practical effect of denying or impairing the exercise of innocent passage.⁴² Fourthly, coastal States may only exercise very limited criminal jurisdiction on board a foreign ship.⁴³ Apart from the first limitation, all of these are derived from the provisions of the 1958 TSC and the previous State practice and represent no significant change. On the other hand, the listing of legislative competence represents a clarification and, arguably, an extended interpretation of the coastal States' powers with regard to environmental protection and control of marine pollution. Again, the improvement of the innocent passage provisions in favour of coastal States may help to justify Malaysia's reluctance to move away from innocent passage towards an acceptance of transit passage.⁴⁴

In addition to the power of coastal States to regulate the conduct of innocent passage, the 1958 TSC gave them the power to suspend innocent passage under the following conditions, namely, that the suspension was temporary, affected only specified areas of their territorial sea, was not discriminatory and was essential for the protection of their security.⁴⁵ Such suspension could take effect only after having been duly published.⁴⁶ This power to suspend has been retained unchanged by the 1982 LOSC.⁴⁷

37 Article 21(1)(f) of the 1982 LOSC.

38 Article 21(1)(g) of the 1982 LOSC.

39 Article 21(4) of the 1982 LOSC; Article 17 of the 1958 TSC.

40 Article 21(2) of the 1982 LOSC.

41 Article 21(3) of the 1982 LOSC.

42 Article 24(1) of the 1982 LOSC; Cf. Article 15(1) of the 1958 TSC. See also Jose A De Yturriaga, *Straits Used for International Navigation: A Spanish Perspective*, (Martinus Nijhoff Dordrecht: London 1991) 251.

43 Article 27 of the 1982 LOSC; Article 19(1) of the 1958 TSC. The exceptions to this rule are provided in Articles 21(1)(a) to (d) of the 1982 LOSC and Articles 19(1)(a) to (d) of the 1958 TSC.

44 Straits States do have legislative competence under transit passage, but it is not expressed in such wide terms as discussed in para. 1.4.2. on rights and duties of straits States, below at 18-21.

45 Article 16(3) of the 1958 TSC.

46 Ibid.

47 Article 25(3) of the 1982 LOSC.

With regard to international straits, the power to suspend under the 1958 TSC was specifically withheld in straits used for international navigation.⁴⁸ In the case of the 1982 LOSC, the issue has been subsumed by the introduction of the transit passage regime which has the same effect by giving no power to suspend.⁴⁹ In this respect at least, the strait States have not lost any previously held power to control foreign shipping.

Another rule that has remain unchanged under the 1982 LOSC is that coastal States must not levy charges upon foreign ships by reason only of passage through the territorial sea,⁵⁰ except for specific services rendered to the ships.⁵¹ It is not clear, however, whether this prevents coastal States from charging foreign ships for infrastructure costs or for services rendered generally to all shipping, such as navigational aids or communication systems.

Development of the Concept of Transit Passage Regime

The evolution of the law on straits used for international navigation and its relationship with territorial sea rules under the 1982 LOSC is important as an aid to interpreting relevant provisions. Unlike several Parts of the 1982 LOSC, the wording of Part III, which contains the rules and regulations for straits used for international navigation, is not based upon any of the Conventions on the Law of the Sea adopted by the First United Nations Conference in Geneva 1958.⁵² However, this does not mean that the provisions in Part III of 1982 LOSC do not have any antecedents. A concept similar to transit passage has been discussed for a long time and the debate over navigational rights in straits used for international navigation, in general, goes back as far as the 17th century when Grotius and Selden wrote about the claim of freedom of the seas versus the closed sea and the extent of coastal States' jurisdiction.⁵³

The first attempts to codify the rules on straits were made by the Institut de Droit International between 1894 to 1912⁵⁴ the International Law Association at Brussels

48 Article 16(4) of the 1958 TSC. See O'Connell, above n 11 at 314-317.

49 Article 38(1) of the 1982 LOSC.

50 Article 26(1) of the 1982 LOSC; Article 18(1) of the 1958 TSC.

51 See United Nations Conference on the Law of the Sea, Geneva, 24 February 27 April 1958 *Official Records, vol. I-VII, United Nations Doc.A/Conf. 13/37-43*. The four Conventions are as follows:

(a) Geneva Convention on the Territorial Sea and Contiguous Zone.

(b) Geneva Convention on High Seas.

(c) Geneva Convention on the Continental Shelf.

(d) Geneva Convention on Fishing and Conservation of the living Resources on the High Seas.

53 H Grotius, *Mare Liberum*, *The Free Sea*, 1609, English translation by R.V.D. Magoffin and J.B. Scott, (eds), (Oxford University Press, American Branch New York 1916) 37-46; J Selden, *Mare Clausum*, *The Closed Sea*, Lugdani Batavorum, 1635, Lib. 1, Chapter XX. See also discussion in Rothwell, above n 16 at 594; D L Larson, *Security Issues and the Law of the Sea*, (University Press of America 1994) 81-83.

54 O'Connell was of the view that "the Institut decided to create a special category of straits in which territorial rights and rights of passage would coincide. This followed from the definition of straits as being those which did not exceed double the territorial sea in width. The waters of such straits would be territorial waters, but precisely in order to avoid interruption of passage, it was proclaimed that transit was to be free", see O'Connell, above n 11 at 301.

between 1895 to 1910⁵⁵ and the Hague Peace Conference in 1907⁵⁶ in their proposed rules relating to territorial waters. They went no further than suggesting that ships should have the right of innocent passage through straits.⁵⁷ World War I interrupted the work of Institut de Droit International respecting the legal status of straits, but the issue was debated again at the International Law Association.⁵⁸ This Conference marked another attempt to formulate treaty provisions. When the Hague Codification Conference met, the question of passage through straits was dealt with in the context of the right of passage of warships in the territorial sea.⁵⁹ The Hague Codification Conference considered the question of territorial sea, including straits used for international navigation, in its Second Sub-Committee Meeting, which decided:

Under no pretext whatsoever, may the passage even of warships through straits used for international navigation between the parts of the high seas be interfered with ... It is essential to ensure in all circumstances the passage of merchant vessels and warships through straits between the parts of the high seas and forming ordinary routes of international navigation.⁶⁰

However, no treaty was agreed at the Conference. The issue of the law of straits used for international navigation was fully reviewed in a learned treatise written by Erik Bruel in 1930 and was later published in English in 1947.⁶¹ This treatise was the first comprehensive study of matters pertaining to international straits. Bruel argued that the regime governing straits used for international navigation should be separated from that of innocent passage through territorial seas, and should give greater emphasis to the freedom of navigation.⁶²

In 1949, the law on straits used for international navigation was discussed and clarified by the International Court of Justice (ICJ) in the *Corfu Channel Case*.⁶³ The Court held:

States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal State, provided the passage is innocent.

55 Ibid at 302.

56 Ibid at 302-303.

57 Ibid at 301-302. See also S N Nandan and D H Anderson, "Straits used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982", *British Yearbook of International Law*, (Frowde London 1989) 159-204.

58 O'Connell, above n 11 at 303.

59 Ibid at 304-305.

60 Conference on the Progressive Codification of International Law, *Publications of the League of Nations V: Legal Questions*, (1930), Supplement: Official Documents, 234-253.

61 E Bruel, *International Straits: A Treatise to International Law*, vol. I (The General Legal Position of International Straits) and vol. II (Straits Comprised by Positive Regulations), (Sweet & Maxwell London 1947).

62 Ibid at 38-40.

63 *ICJ Reports*, (1949) 28.

Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.

This case was clearly focused on the question of whether warships were entitled to the right of innocent passage, and it deals with the issue of passage through international straits by reference to "innocence". It may be interpreted as meaning that the Court believed that only a right of innocent passage applied to international straits. However, their evident concern to safeguard warship passage might suggest that, had they been asked a more general question, in other words, what precise rights pertained to shipping in international straits, they would have supported a right of navigation which was stronger than mere innocent passage. At the very least, this interpretation is not excluded by the Court's judgment.

The 1958 TSC treated international straits as subject to the regime of innocent passage by making no specific reference to them, except that the normal right of a coastal State to suspend innocent passage could not be exercised in territorial sea falling within international straits.⁶⁴ In this respect, the 1958 TSC does not differ significantly from the draft Articles proposed by the International Law Commission (ILC).⁶⁵

From the above discussion, it is clear that there had been a long standing preference amongst States towards protecting freedom of navigation through international straits to a greater degree than would normally occur under the regime of innocent passage in ordinary territorial sea. This pressure had been quite consistent and, despite reservations by straits States such as Malaysia, apparently irresistible.⁶⁶ It

64 Article 16(4) of 1958 TSC as previously discussed in para. 3.2. above at 48. See also discussion by J N Moore, "The Regime of Straits and the Third United Nations Conference on the Law of the Sea", 74 *American Journal of International Law*, (1980) 90. Moore observes that "one of the shortcomings of the 1958 TSC is that with the exception of a single clause providing for 'no suspension' of innocent passage in the straits, it fails to differentiate meaningfully between passage of ships through the territorial sea in general and transit through straits". A further exception to the rules of innocent passage is demonstrated through State practice. The 1958 TSC required submarines to navigate on the surface and show their flags when passing through territorial seas and in the absence of an express exception, this should be interpreted to include straits used for international navigation, see Article 14(6) of 1958 TSC. However, State practice appears to support the right of submarines to subnavigate through international straits. This point is discussed by Churchill and Lowe where the State practice "is consistent with the *travaux préparatoires*" of the 1982 LOSC: "it underlines the importance of transit passage for submarines, which must normally pass through the territorial sea on the surface", see Churchill and Lowe, above n 13 at 93. See also J B R I Langdon, "The Extent of Transit Passage: Some Practical Anomalies", *Marine Policy*, vol. 14, No. 2, (March 1990) 132-136. This right for submarines to subnavigate now appears to be included under the transit passage regime. See further discussion in para. 3.4.1, below at 17.

65 See Draft Article 17(4) of the ILC in the Report of the International Law Commission to the General Assembly, Doc.A/3159: Report of the ILC covering the work of its eighth session, 23 April-4 July 1956 in *Yearbook of the International Law Commission*, vol. II, 1956, United Nations, New York, 1957, 273. Draft Article 17(4) provides that "there must be no suspension of the innocent passage of foreign ships through straits normally used for international navigation between two parts of the high seas".

66 After the Malaysian claim of 12 nm territorial sea in 1969, Malaysia asserted that the Straits of Malacca should not be classified as an international strait, but at the same time, that they were subject to the regime of innocent passage, see Clause 5 of the 1971 Joint Statement of the Governments of Malaysia, Indonesia and Singapore, 16 November 1971. It provides that, "[T]he Governments of the Republic of Indonesia and Malaysia

was probably inevitable, therefore, that a protecting regime governing passage through international straits would be called for in the Third United Nations Conference on Law of the Sea. However, it was always likely to be a contentious issue.

In particular, coastal States had been increasingly concerned over the passage of ships in international straits in the light of increasing traffic density and the environmental risks posed by their cargoes. Since there are 118 international straits, the issue affected a great number of coastal States. It also affected the major maritime States, whose interests in promoting freedom of navigation tended to conflict with the interests of the straits States and which were threatened by the intended extension of territorial sea rights to 12 miles.⁶⁷ These tensions were particularly strong where the straits were of special strategic importance but the coastal States were not major maritime powers, such as the Straits of Malacca between Malaysia and Indonesia.⁶⁸ Hence it was clear that proper provision needed to be made for the governance of international straits, but that any regime agreed would need to accommodate the differing objectives of straits States and user States.

During the negotiations at the Third United Nations Law of the Sea Conference, Malaysia and seven other straits States, namely, Cyprus, Greece, Indonesia, Morocco, the Philippines, Spain and Yemen, urged that international straits that fell within the territorial sea should be treated in the same way as ordinary territorial

agreed that the Straits of Malacca and Singapore are not international straits, while fully recognising their use for international shipping in accordance with the principle of innocent passage ...". However, Singapore was silent on this point, merely taking note of the position of the other two nations. In response to this statement, many countries including the United Kingdom, the USSR (now Russia), Australia and Japan addressed Notes to both Malaysia and Indonesia insisting that the straits were an international waterway in which shipping was free to navigate. The Notes of Protest were made in March 1972, see O'Connell, above n 110 at 319 and Yaacov Vertzberger, "The Malacca-Singapore Straits: The Suez of South-East Asia", *Conflict Studies*, 1988, 5. Strictly speaking, this statement appears to mean that Malaysia would respect for freedom of navigation, but the Malaysian government intended to retain their power to suspend shipping and deny passage to submerged submarines. However, it is not clear from the governmental statement of the time was in fact what Malaysia was intended. According to O'Connell, "both governments assured foreign missions (embassies) that they had no intention to impede innocent passage of foreign ships, and their intention was only to regulate navigation so that the danger to the coastal States bordering the Straits of Malacca can be minimised", see O'Connell, above n 11 at 319. This desire to control navigation was demonstrated in 1992, when Malaysia and Singapore strongly and successfully resisted the proposed passage of Japanese ships carrying plutonium passing through the Straits of Malacca. On this occasion, it was considered that the risk would be too great for the straits States to bear if a collision were to occur. See also Reuters, 8 November 1992; M. Kusumaatmaatja, "Overcoming Navigational Hazards and Marine Pollution in the Straits of Malacca and Singapore: The Exercise of Rights and Duties of Littoral States", Paper presented at the International Conference on the Straits of Malacca: Meeting the Challenges of the 21st Century, (14-15 June 1994) 1-39; J M V Dyke, "Legal and Practical Problems Governing International Straits", Paper presented at the Kuala Lumpur Workshop on the Straits of Malacca, (24-25 January 1995) 36.

67 Rothwell, above n 16 at 594. See also Larson, above n 54 at 81-83.

68 Other examples include the Straits of Hormuz between Iran and Oman; the Straits of Gibraltar between Morocco and Spain and, Bab el Mandeb which is bordered by the State of Yemen, Republic of Djibouti and Ethiopia. See M Leifer, *Malacca, Singapore and Indonesia*, (Sijthoff & Noordhoff Alphen aan den Rijn 1978) R K Ramazani, *The Persian Gulf and Straits of Hormuz*, (Sijthoff & Noordhoff Alphen aan den Rijn 1979) S C Truver, *The Straits of Gibraltar and The Mediterranean*, (Sijthoff & Noordhoff Alphen aan den Rijn 1980) *New Directions in the Law of the Sea, Documents*, vol. II, compiled and edited by R R Churchill, M Nordquist and S Houston Lay, (Oceana Publications Dobbs Ferry New York 1973) 887.

sea.⁶⁹ For example, Mr. Ruiz Morales from Spain argued during a debate in 1973 as follows:

Straits used for international navigation are an integral part of the territorial sea in so far as they lay within territorial waters. Any attempt to set up separate regimes for the territorial sea and for straits would clearly violate the fundamental principle of the sovereignty of the coastal State over its territorial sea.⁷⁰

Malaysia joined other straits States in proposing that the regime for straits should remain essentially unchanged, which would include having no right to suspend innocent passage with respect to the Straits of Malacca.⁷¹ This argument however, was opposed by Mr. John Norton Moore, the representative from the United States. Mr. Moore pointed out that "the community interest at stake in international straits is far more vital than simply the right of innocent passage in the territorial sea".⁷² Thus, the position of straits States was that they should retain as much control as possible over navigation which would be protected by continuing with the innocent passage regime, whereas the major maritime powers sought greater freedom of navigation on the basis of the strategic and commercial importance of international straits. In the end, the regime that was developed was that of transit passage, which was designed to give greater protection to freedom of navigation than innocent passage.⁷³ It is notable that the transit passage regime was proposed by the United Kingdom, which is both a strait and a major maritime State.⁷⁴

This apparent victory for the user States was not entirely accepted by strait States, however, and some made reservations when signing the 1982 LOSC.⁷⁵ Nevertheless,

69 See UN Doc. A/AC.138/SC. II/L.18 (27 March 1973). See also Moore, above n 66 at 93; R W Smith and J A Roach, "Navigational Rights and Responsibilities in International Straits: A Focus on the Straits of Malacca", Paper presented at the International Conference on the Straits of Malacca: Meeting the Challenges of the 21st Century, (14-15 June 1994) 5.

70 Statement by Mr Ruiz Morales from Spain, UN Doc. A/AC.138/SC. II/SR.60 (1973) 188.

71 UNCLOS III, Official Records, vol. III, 1973, p. 194. See also O'Connell, above n 11 at 320.

72 Statement by Mr John Norton Moore, the United States Representative to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, 2 April 1973, see *US Press Release No. 32 (73)*, 3 April 1973, 2. The United States has taken a particular interest in the international straits regime, see W M Reisman, "The Regime of Straits and National Security: An Appraisal of International Law Making", 74 *American Journal of International Law*, (1980) 48.

73 The rules on transit passage is discussed in para. 3.4. below at 16-20. These rules are contained in Part III of 1982 LOSC which deals with straits used for international navigation, and the specific provisions on the transit passage regime are contained in s 2 (Articles 37-44 of 1982 LOSC). Rules on territorial sea and contiguous zone are contained in Part II of 1982 LOSC, with provisions on the innocent passage in s 3 (Articles 17 to 26 of 1982 LOSC). See also Rothwell, above n 16 at 588; Nandan and Anderson, above n 59 at 159; S Rosenne and Louis B Sohn, *United Nations Convention on the Law of the Sea 1982, A Commentary*, vol. V, (Nijhoff Dordrecht 1982) R P Anand, "Transit Passage and Overflight in International Straits", 26 *Indian Journal of International Law*, (1986) 72-105.

74 See UN Doc. for UK proposal on transit passage regime at the Law of the Sea Conference, in Draft Articles on the Territorial Sea and Straits, (3 July 1974), submitted to Committee II by the UK, 3 Official Records, UNCLOS 183, UN Doc. A/CONF. 62/C.2/L.3, 1974.

75 For example, the Statement made by Iran accompanying its signature to the 1982 LOSC on 10 December 1982 and Yemen Declaration of 10 December 1982, in the *U.N. Status of the United Nations Convention on the Law of the Sea*, 18 and 29.

Malaysia accepted the transit passage regime when it signed the 1982 LOSC on 10 December 1982⁷⁶ and ratified on 2 October 1996, although it did assert that the Straits of Malacca should be considered as a special case for some purposes.⁷⁷

Transit passage is now the predominant regime governing international straits and has been accepted by many parties to the 1982 LOSC, such as the newly acceded United Kingdom.⁷⁸

What follows is an analysis of the particular rules or law governing transit passage.

76 Upon signing the 1982 LOSC, the Malaysian representative, H E Tan Sri Ghazali Shafie stated: "[T]he Constitution (Convention) incorporates ... a new concept in relation to straits used for international navigation, namely the concept of transit passage. Lying as we do, on one side of the narrow and shallow Straits of Malacca, which is one of the most important and busiest international waterways in the world ... Malaysia particularly welcomes those provisions in the Convention which seek to ensure the safety of navigation as well as the protection of the marine environment. In this respect, together with Indonesia and Singapore, our neighbours sharing the Straits of Malacca, we have reached a common understanding with major user States of the Straits on measures that coastal States may adopt in accordance with the relevant provisions of the Convention", see the *Third UNCLOS, Official Records, vol. XVII, Plenary Meetings Documents*, 192nd Meeting, 9 December 1982, 117-118.

77 See, the Malaysian Declaration Upon Ratification of the Convention of Law of the Sea 1982 on 2 October 1996. It is to be noted that the signature and ratification of the 1982 LOSC by Malaysia were subject to requiring some special exceptions to be applied to the Straits of Malacca, see the Letter dated 28th April from the Representative of Malaysia to the President of the Conference (29 April 1982), *Third UNCLOS, Official Records, vol. XVI, Summary Records of Meetings*, 11 Session, New York, 8 March-30 April 1982, pp. 250-251 and the Declaration 5 of the Malaysian Declaration Upon Ratification of the Convention of Law of the Sea 1982. Malaysia made two relevant declarations when ratifying the 1982 LOSC. First, Malaysia declared that "[I]n view of the inherent danger entailed in the passage of nuclear-powered vessels or vessels carrying nuclear material or other material of a similar nature and in view of the provision of Article 22, paragraph 2 of the Convention on the Law of the Sea concerning the right of the coastal State to confine the passage of such vessels to sea lanes designated by the State within its territorial sea, as well as that of Article 23 of the Convention, which requires such vessels to carry documents and observe special precautionary measures as specified by international agreements, the Malaysian Government, with all of the above in mind, requires the aforesaid vessels to obtain prior authorisation of passage before entering the territorial sea of Malaysia until such time as the international agreements referred to in Article 23 are concluded and Malaysia becomes a party thereto. Under all circumstances, the flag State of such vessels shall assume all responsibility for any loss or damage resulting from the passage of such vessels within the territorial sea of Malaysia", see Declaration 4 of the Malaysian Declaration Upon Ratification of the Convention of Law of the Sea 1982, 2 October 1996. Secondly, Malaysia's requirement that special considerations should apply to the question of underkeel clearance (UKC) in the light of the peculiar geographic and traffic conditions of the Straits of Malacca. Declaration 5 reiterating a statement made April 1982 from the Representative of Malaysia to the President of the Conference (29 April 1982). This requirement was acknowledged as being possibly inconsistent with Article 233 of the 1982 LOSC, see Declaration 5 of the Malaysian Declaration Upon Ratification of the Convention of the Law of the Sea and Letter dated 28 April from the Malaysian Representative in *Third UNCLOS, Official Records, vol. XVI, Summary Records of Meetings*, 11th Session, New York, 8 March-30 April 1982, pp. 250-251. However, the special UKC has now been adopted under the auspices of the IMO.

77 The UK government has acceded the 1982 LOSC on 25 July 1997.

77 For an overview of the provisions in Part III (Straits used for international Navigation) of the 1982 LOSC, see V D Bordenov, "The Right of Transit Passage Under the 1982 Convention", 12 *Marine Policy*, (1988) 219; Nandan and Anderson, above n 59 at 159, previously during the negotiations at the Third United Nations Law of the Sea Conferences, in a Letter dated 28 April 1982 from the Representative of Malaysia to the President of the Conference (29 April 1982). This requirement was acknowledged as being possibly inconsistent with Article 233 of the 1982 LOSC, see Declaration 5 of the Malaysian Declaration Upon Ratification of the Convention of the Law of the Sea and Letter dated 28 April from the Malaysian Representative in *Third UNCLOS, Official Records, vol. XVI, Summary Records of Meetings*, 11th Session, New York, 8 March-30 April 1982, 250-251. However, the special UKC has now been adopted under the auspices of the IMO.

78 The UK government has acceded the 1982 LOSC on 25 July 1997.

The Law Relating to Transit Passage Regime

The transit passage regime in the 1982 LOSC lays down the rights and responsibilities of both straits States and user States.⁷⁹ It applies to all ships and aircraft, thus encompassing merchant ships and warships, including submarines, as well as overflight for both civil and military purposes. In this article, attention will focus on ships as representing the most important actors in questions of navigational safety and marine pollution.⁸⁰

The rights and duties of user States and straits States will now be looked at in more detail.

Rights and duties of user States

The rights and duties of foreign ships passing through straits used for international navigation under the new legal regime enunciated in 1982 LOSC are as follows:

Foreign ships are entitled to exercise the freedom of navigation which must not be impeded through international straits.⁸¹ They enjoy the freedom of navigation solely for the purpose of continuous and expeditious transit.⁸² While doing so, they must proceed without delay through or over the strait.⁸³ This right of transit passage applies to submarines because their "common practice"⁸⁴ of transiting through international straits while submerged satisfies the requirement that passing vessels refrain from activities other than those "incident to their normal modes of continuous and expeditious transit".⁸⁵

Although there is no requirement of "innocence", ships exercising the right to transit passage are subject to certain restrictions.⁸⁶ They must refrain from any threat or use of force against the sovereignty of the straits States⁸⁷ and activities other than those incidental to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or distress.⁸⁸ If ships do not so

79 For an overview of the provisions in Part III (Straits used for international Navigation) of the 1982 LOSC, see V D Bordinov, "The Right of Transit Passage Under the 1982 Convention", 12 *Marine Policy*, (1988) 219; Nandan and Anderson, above n 59 at 159.

80 The provisions on warships and other government ships will not be analysed in this article since the discussion and analysis on types of ships are limited and concentrated on commercial vessels, see Introduction, above n 1 at 1.

81 Article 38 (1) of the 1982 LOSC.

82 Article 38(2) of the 1982 LOSC.

83 Article 39 (1)(a) of the 1982 LOSC.

84 See Churchill and Lowe, above n 15 at 93. See also H Caminos, "The Legal Regime of Straits" in *United Nations Convention on the Law of the Sea*, 1982 (Martinus Nijhoff Dordrecht 1989) Jia Bing Bing, *A Study on the Regime of International Straits*, (unpublished Ph.D thesis), 1995, and W V Dunlap, *Transit Passage in the Russian Arctic Straits*.

85 Article 39(1)(c) of the 1982 LOSC.

86 Articles 39(1)(b), (c) and (d) of the 1982 LOSC.

87 Article 39(1)(b) of the 1982 LOSC.

88 Article 39(1)(c) of the 1982 LOSC.

refrain, they lose the right of transit passage and fall under the general regime of innocent passage.⁸⁹ In the former case, i.e. the threat or use of force, the right to innocent passage would almost certainly be lost.⁹⁰ In the latter case, the right of innocent passage would probably be lost because the right is based on "passage" as well as "innocence".⁹¹

More specifically, foreign ships, while in transit, must comply with generally accepted international regulations, procedures and practices for safety at sea including the International Convention on Collision Regulations (COLREG 1972).⁹² In addition, all ships in transit shall comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.⁹³ These international regulations, procedures and practices are generally taken to be those international conventions implemented under the auspices of the IMO.⁹⁴ It should be noted that this duty to comply with international safety and pollution standards is independent from States' national legislation.

Rights and duties of straits States

Rights and duties of States bordering straits used for international navigation contained in the 1982 LOSC are as follows:

Straits States have no right to impede transit passage of foreign ships passing through straits used for international navigation.⁹⁵ The right of transit passage cannot be hampered, denied or suspended.⁹⁶ Any danger to navigation must

89 Article 38(3) of the 1982 LOSC. The Article provides that "any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention". See also Churchill and Lowe, above n 15 at 91.

90 Article 19(2)(a) of the 1982 LOSC.

91 It will fall under Article 19(2)(1) of the 1982 LOSC which includes in the list of prejudicial activities, "any other activity not having a direct bearing on passage". See previous discussion in para. 1.2, where the 1982 LOSC adopts a different approach and provides a detailed lists of activities which will render passage non-innocent, above at 3-9. See also Churchill and Lowe, above n 15 at 91 and detailed discussion in para. 1.5, on the impact of transit passage regime on straits States powers, below at 21-24.

92 Article 39(2)(a) of the 1982 LOSC.

93 Article 39(2)(a) and (b) of the 1982 LOSC.

94 This is not entirely uncontroversial. It is because the question of whether the IMO rules and standards are generally accepted ones was discussed in the "Report of the 67th Conference by the Committee on Coastal State Jurisdiction relating to Marine Pollution", held at Helsinki, 12-17 August 1996. In this Report, it is acknowledged that there is some disagreement on whether the IMO Conventions should automatically be considered to be the relevant international rules and standards, but the more common view appears to be that they should be so considered, see *International Law Association Yearbook*, Report of the 67th Conference by the Committee on the Coastal State Jurisdiction relating to Marine Pollution, held at Helsinki, 12-17 August, 166 and 170. It is stated that the common ground for these references was the attempt to harmonise national laws with generally accepted international rules. This approach can be accepted and, in this article, it will be assumed that they are. It is also to be noted that Article 39(2) (a) of the 1982 LOSC refers specifically to COLREG 1972. In addition, vessels must refrain from research and survey activities during passage unless prior authorisation is obtained from the States bordering the straits (Article 40 of the 1982 LOSC).

95 Article 38(1) of the 1982 LOSC.

96 Article 42(2) and 44 of the 1982 LOSC.

be notified publicly.⁹⁷ However, the straits States have the right to adopt laws and regulations relating to transit passage through straits in relation to safety of navigation and the regulation of maritime traffic by establishing sea lanes and traffic separation schemes.⁹⁸ They may also adopt laws and regulation relating to prevention, reduction and control of marine pollution by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the straits.⁹⁹ These laws must not have the practical effect of denying, hampering or impairing transit passage nor must they be discriminatory.¹⁰⁰ As noted above, the duty of foreign shipping to comply with international safety and pollution standards arises independently from any coastal State national legislation.¹⁰¹ However, it is also to the advantage of straits States to implement international rules and standards in their national legislation so that they become directly enforceable by the coastal State authorities. Otherwise, violations could only be pursued through diplomatic channels.¹⁰²

In order to promote safe passage of ships passing through international straits, the straits States may designate sea lanes and traffic separation schemes.¹⁰³ However, there are certain restrictions on this power. The sea lanes and traffic separation schemes must conform with generally accepted international regulations and adopted under the auspices of the IMO.¹⁰⁴ Straits States must indicate all sea lanes and traffic separation schemes designated or prescribed by them clearly on charts, and ensure that those charts are made publicly available.¹⁰⁵

In addition, straits States may adopt laws and regulations with respect to the prevention of fishing including the stowage of fishing gear.¹⁰⁶ In these matters, there is no reference to the application of international standard, but national legal requirements must not discriminate foreign ships exercising their rights of transit passage nor may they have the practical effect of impairing the right of transit passage.

Beside the rights given to straits States under international law, they also have considerable responsibilities towards foreign vessels passing through straits used for international navigation. There is a general duty to publicise any dangers to

97 Article 44 of the 1982 LOSC.

98 Article 42(1)(a) of the 1982 LOSC.

99 Articles 42(1)(a) and (b) of the 1982 LOSC.

100 Article 42(2) of the 1982 LOSC.

101 See Churchill and Lowe, above n 15 at 92.

102 Ibid.

103 Article 41(1) of the 1982 LOSC.

104 Articles 41(3) and 41(4) of the 1982 LOSC.

105 Article 41(6) of the 1982 LOSC.

106 Article 42(1)(c) of the 1982 LOSC.

navigation and a number of specific services that straits States are expected to provide. However, Article 43 of the 1982 LOSC provides that both straits and user States must co-operate on establishing and maintaining navigational safety aids and other improvements in aid of international navigation in international straits.¹⁰⁷ In addition, they must co-operate for the prevention, reduction and control of marine pollution from ships.¹⁰⁸ Article 43 is capable of being interpreted more widely than merely the provision of technical consultations, and may include other matters such as technical assistance and funding.¹⁰⁹ There is no specific provision relating to the levying of charges against foreign ships transiting through straits used for international navigation. Article 26 of the 1982 LOSC, which provides that charges cannot be levied for passage through territorial sea save for services rendered, applies to innocent passage, but it must also apply *mutatis mutandis* to transit passage. This is especially so since the provision is phrased negatively against the coastal State and freedom of navigation is more protected by transit passage than by innocent passage and in any case is reflected in State practice, such as that of Malaysia and the United Kingdom.

The Impact of the Transit Passage Regime on Straits States Powers

From the above discussion, it can be seen that the transit passage regime is largely similar to that of innocent passage, save that it provides a greater degree of freedom of navigation.¹¹⁰ Under the 1982 LOSC provisions, coastal States have fewer powers to control and restrict ships passing through straits used for international navigation. The question remains, however, how significant these changes are in practice.

Rules on qualifying ships

On the face of it, transit passage gives greater allowance to foreign shipping than innocent passage because it does not impose a test of innocence in order to qualify for the right.¹¹¹ However, the new formulation of innocence in the 1982 LOSC appears to give coastal States less power to designate passage as non-innocent than before since a particular act must be committed.¹¹² This is qualified by the inclusion of "any other activity not having a direct bearing on passage"¹¹³ although

107 Article 43(a) of the 1982 LOSC.

108 Article 43(b) of the 1982 LOSC.

109 See United Nations Conference on Economic Development (UNCED) Working Group proposing IMO as medium to carry the responsibility as discussed in MEPC 37/10, 18 January 1995.

110 See discussion in ED Brown, above n 6 at 93, TTB Koh, "Transit Passage through Straits used for International Navigation the need for co-operation between straits States and user States", Paper presented at the International Conference on the Straits of Malacca: meeting the challenges of the 21st century, (14-15 June 1994) 6.

111 Article 38(1) of 1982 LOSC.

112 See Churchill and A V Lowe, above n 15 at 91, TTB Koh, above n 110 at 1.

113 Article 19(2)(i) of the 1982 LOSC.

it would seem that such activity would still have to be shown to be prejudicial to the peace, good order or security of the coastal States.¹¹⁴ In transit passage, on the other hand, there is no such qualification and loss of right to transit appears to occur automatically if the ship does anything that is not "solely for the purpose of continuous and expeditious transit".¹¹⁵ It is questionable, therefore, whether in this respect at least, there is any significant reduction in the coastal States' powers.

Rules on non-suspension of passage

All foreign ships enjoy the right of transit passage,¹¹⁶ without having to satisfy a general test of innocence. As in innocent passage through international straits,¹¹⁷ transit passage cannot be suspended for any reason by the straits States.¹¹⁸ Straits States can only act to exclude ships from transit passage if they threaten or use force, or act in a way not pertaining to passage.¹¹⁹ However, in practice, this is probably not so different from the regime of innocent passage and, in any case, loss of the right to transit passage means that a ship would automatically become subject to the rules of innocent passage.¹²⁰

Rules on legislative competence

Scope

Under the transit passage regime, straits States are permitted to make and adopt laws for purposes of navigational safety and or for the prevention of marine pollution, subject to the proviso that they must not discriminate or have the effect of denying, impairing or hampering transit passage.¹²¹ This is similar to the legislative powers given to coastal States regarding innocent passage, but is expressed in a less detailed fashion.¹²² Under the innocent passage regime, coastal States have the legislative competence to adopt laws and regulations with reference to the navigational safety and regulatory of shipping, the preservation of the environment of the coastal States, and the prevention, reduction and control of pollution.¹²³ Under the transit passage regime, straits States may establish traffic

114 Article 19(2) of the 1982 LOSC.

115 Article 38(2) of the 1982 LOSC.

116 Article 38(1) of the 1982 LOSC. See previous discussion on rights and duties of user States above at 16-18.

117 Article 25(3) of the 1982 LOSC.

118 Article 44 of the 1982 LOSC. See previous discussion on rules governing innocent passage, above at 3-9.

119 Article 39(1)(b) of the 1982 LOSC. See previous discussion on the law relating to transit passage, above at 16-20.

120 Article 38(3) of the 1982 LOSC. See also Churchill and Lowe, above n 15 at 91.

121 Article 42(2) of the 1982 LOSC. It is notable that these provisions were the subject of considerable debate during the negotiation of UNCLOS, as States such as Malaysia and Indonesia were particularly concerned over the impact the provisions would have on their ability to implement certain navigational requirements for the Straits of Malacca and Singapore, see Leifer, above n 70 at 113-121.

122 Article 24(1) of the 1982 LOSC. Nevertheless, in both cases, foreign shipping are under a duty to comply with coastal States legislation, see Articles 21(4) and 42(4) of the 1982 LOSC.

123 Article 21(f) of the 1982 LOSC.

separation schemes and sea lanes in the case of navigational safety,¹²⁴ and relate discharges of oil or other noxious substances in the case of marine pollution.¹²⁵ However, in practice, it is not clear that this more limited formulation would have much significance and particularly in the light of the detailed provisions laid down in the IMO Conventions.¹²⁶

Rules on prohibiting regulation of design, construction and equipment

Coastal States, under the rules of innocent passage, are expressly prohibited from regulating on the basis of design, construction, and manning of equipment, unless conforming with international rules or standards.¹²⁷ The Convention is silent on the point with regard to transit passage, and the list of regulatory competence contained in Article 42(1) appears to be exhaustive.¹²⁸ Nonetheless, it would be extraordinary in the context of the 1982 LOSC as a regulatory framework if straits States were prevented from legislating on the basis of international rules and standards as they can in other parts of their territorial sea. Again, therefore, there appears to be no significant change in the powers of coastal States.

Rules on the designation of traffic separation schemes

Before designating the traffic separation schemes or prescribing the sea lanes, strait States must refer their proposals to the IMO for approval. This means that the straits States can only have the power to make recommendations and can only implement those which are sanctioned by the IMO, in accordance with generally accepted international standards.¹²⁹ This is stricter than the rules governing innocent passage, where coastal States need only take into account the recommendations of the competent international organisation, i.e. the IMO, when designating sea lanes and traffic separation schemes.¹³⁰ On the other hand, it promotes greater compliance

¹²⁴ Article 42(1)(a) of the 1982 LOSC.

¹²⁵ Article 42(1)(b) of the 1982 LOSC.

¹²⁶ Detailed international rules and standards relating to navigational safety and prevention of marine pollution from vessels are discussed, inter alia, in the Convention on the International Regulations for Preventing Collision at Sea 1972 (COLREG 1972), the International Convention on Safety of Life at Sea 1974 (SOLAS 1974), the International Convention on Load Lines 1966 (Load Lines 1966), and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW 1978). In addition, with specific reference to marine pollution control, the IMO has set down rules and regulations for vessel-source pollution in the International Convention on Prevention of Pollution from Ships (MARPOL 1973/78).

¹²⁷ Article 21(2) of the 1982 LOSC.

¹²⁸ See Churchill and Lowe, above n 15 at 92.

¹²⁹ Article 41(4) of the 1982 LOSC.

¹³⁰ Article 22(3)(a) of the 1982 LOSC.

because all straits traffic separation schemes will have been accepted multilaterally.¹³¹

Rules on levying charges

It is clearly provided by the 1982 LOSC that charges may only be levied for services rendered to ships exercising the right of innocent passage.¹³² The law is silent as far as transit passage is concerned, but this principle would appear to apply also to ships in transit.¹³³ The ambiguity contained in this provision as to what kind of services can be charged for and the level at which charges can be set is, however, of particular importance to transit passage because of the greater need for navigational facilities in international straits, such as the Straits of Malacca.

Conclusion

The question to be asked is whether Malaysia should be concerned about the change from innocent to transit passage in the Straits of Malacca. The key issue, in the sense of its practical importance for the Straits of Malacca, is not so much the question of what constitutes innocent passage or transit passage as such, but whether the change in regime affects the power of straits States to regulate the conduct of passage. It appears from the above discussion that, in the context of commercial shipping, there have been some changes in form but no significant changes of substance as far as navigational safety and marine pollution are concerned.

The 1982 LOSC contains the general principles relating to innocent passage and transit passage and gives very little detail on the extent to which such passage may be regulated.¹³⁴ However, the Convention has an arguably more important function as the international legal umbrella under which a variety of new regulatory measures

131 An example of this is the need for regulation of under keel clearance regulations in the TSS in the Straits of Malacca, in particular with the development of supertankers and the potential for grounding. The Malaysian government was able to obtain agreement from a number of major users of the Straits to an interpretative statement issued in 1982 which recognised the strait State's power to enact laws and regulations dealing with traffic separation schemes and determining underkeel clearance. The insertion of Article 233 of 1982 LOSC, recognising the rights of straits States to take certain action to intervene when vessels engaged in transit passage are causing or threatening major damage to the marine environment, represents a further worry, see Letter dated 28th April to the President of the Conference, 11th Session, *U.N. Doc. A/CONF.62/L. 145*. But, as a result of these initiatives, the strait States bordering the Straits of Malacca won some specific concessions for their concerns. See also K. L. Koh, *Straits in International Navigation: Contemporary Issues*, (Oceana Publications Dobbs Ferry N.Y. 1981) 158-160.

132 Article 26 of the 1982 LOSC.

133 See previous discussion on rights and duties of user States, above at 18-21.

134 For example, there is very little international law that actually regulates vessels carrying hazardous cargoes. The 1982 LOSC contains some specific provisions, namely, Articles 19, 21 and 24, but these are not comprehensive and, only refer back to existing international standards. Article 23 of the 1982 LOSC provides that "foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances, shall when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements. However, this provision does not authorise the coastal State to prohibit passage by vessels carrying certain inherently dangerous cargoes if they meet the standards of existing international agreements". See discussion in Rothwell, above n 15 at 614.

certainly the procedure as well as the decision making process, and it is ineffective in the enforcement of the legal rulings. These shortcomings have, for a long time, been a constant source of concern in international relations.²

Fundamentally, as this article attempts to show, these shortcomings stem from the difficulties encountered in designing an effective mechanism for the dispute settlement itself. Designing such a mechanism at the international level often involves difficult and intricate issues. In the first place, trade agreements, which are multilateral in nature, involve a complex interplay of domestic interests and conflicting interests between trading nations. This is compounded by the fact that these agreements often involve vague and ambiguous procedures. Thus, so far, no international mechanism of disputes settlement has fully satisfied the needs and requirements of the competing interests between states.

The next difficult task of designing an effective dispute settlement mechanism is the formulation of the mechanism itself. Although, at present, abundant literature can be found on the general subject of dispute settlement mechanism concerning international trade, literature on designing the criteria for an effective dispute settlement mechanism in international trade remains yet to be developed. As such, until today there is no generally established rule and principle that can be accepted as a practical and workable guideline in formulating an effective dispute settlement mechanism, other than the dispute settlement systems established by WTO, NAFTA and CUSFTA.

General theories and concepts of dispute settlement in international trade

The viability of international rules is constantly being questioned, and for several reasons. First, international rules lack enforcement. This is especially so where the rules are vague and ambiguous. Second, international rules do not operate in the same way as national rules, where in the latter's case, the courts have the jurisdiction and liberty to apply various techniques of interpretation or construction. The doctrine of judicial creativity, for instance, provides for judges in the common law jurisdiction to be creative in law making especially in situations where there appears to be a gap in the law or legislative inactivity. This may not be the case at the international plane, as different legal systems and other multilateral characteristics require careful consideration, as the decision would have political implications. Thus the perception of a rule as an ethical goal differs substantially in the two contexts. Third, at the international plane differences in language, culture, religion and political philosophy and ideology necessitate greater care in constructing any effective rule. This is not

2 R Hudec, "Transcending the Ostensible: Some Reflections on the Nature of Litigation Between Governments" 72, Minn. L.R. (1987) 211-226.

the case in national laws where domestic complications in promulgating rules are less intense.

Further, even if rules are being provided for at international level, there is no guarantee that the rules will be complied with fully. On the contrary, there is a tendency that the rules will be breached. Thus GATT, for instance, despite its many years of experience as an institution of international trade was criticised for its inability to maintain compliance with its rules. As Professor Jackson has rightly pointed out rules must be set in a framework of an effective legal system. The system must provide for application of the rules to particular facts, objective methods of determining those facts and trusted interpretations of the rules and methods by which these actions are kept consistent and reasonably predictable.³ Admittedly, however, although such a system is much anticipated there are numerous hindrances to its full realisation.

Common law versus Civil law

It has been the long-term goals of every international agreement, first, to achieve a reasonable degree of compliance with the obligations it embodies, and secondly, to resolve any dispute arising therefrom in such a manner where the integrity of the agreement is preserved. However, both of these goals are contentious because of the underpinning differences in the approaches between the common law and the civil law countries. The common law countries view international trade agreement like GATT as "creating binding obligations". The civil law countries, on the contrary, prefer a more flexible approach, where reliance is placed upon negotiations and consensus, which is premised on the principle that members should retain legal sovereignty and undiminished policy making authority. The United States and European Community's different approaches to GATT law respectively reflect the common law and the civil law countries' positions.

In regard the international legal system, it does not subscribe to the common law principle that calls for the judiciary to operate on the doctrine of binding judicial precedent or *stare decisis*. This draws it closer to the civil law system which equally excludes the doctrine. Thus, originally, a GATT panel report is not considered a binding precedent, although there is certainly a tendency for subsequent GATT panel reports to follow their predecessors.⁴ When this happens antecedent panel reports have been cited as the reason in support of the finding. For example, the panel report on *Japan – Trade in Semi Conductors*⁵ noted that the Contracting

3 John H Jackson, "The Jurisprudence of International trade: the DISC case in GATT" 72 Am. J. Intr. L (1978) 747.

4 John H Jackson, "The Uruguay Round and the Launch of the WTO: Significance and Challenges" in TP Steward, *The WTO: Multilateral Trade Framework For the Twenty-first Century and US Implementing legislation*, (American Bar Association, 1996) 5-28.

5 BISD 35s/116

Parties had decided in a previous case of *EEC – Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables*⁶ that import regulation allowing the import of a product not below a minimum level, in principle, constituted a restriction within the meaning of Article XI.1 of GATT. The panel then considered that the principle applied in the case was equally applicable to restrictions on exports below certain prices. The recent 1996 report of the Appellate Body of the WTO on *Japan – Taxes on Alcoholic Beverages* constitutes a high water-point on the use of precedent in world trade disputes settlement.⁷

Sovereignty in international trade

The traditional concept of sovereignty views the states as the only sovereign entity in the international order, thereby denying the very existence of international law as law. This classical view of international law, founded on the principle of the sovereign equality where states could assert exclusive jurisdiction over activities within their territory, was based on the old concept of protecting the state from invasion. Accordingly, any framework for peaceful co-operation created among states is, from such a position, but an anathema and a sham.

Unlike the classical international law, international economic law, on the contrary, finds its foundation not on the concept of state sovereignty, but the notion of economic interdependence. As such the classical view of international is no longer accurate to reflect the current reality, at least in the area of global and regional trade. Greater economic integration and interaction at international level are now altering the notion of sovereignty. In fact, state's obligations under economic integration arrangements have undermined much of states' ability to control activities within their territory. This rapid progress has also penetrated state borders thus making states vulnerable entities. Today even private citizens within states are becoming involved and directly affected by the economic forces beyond their country's boundaries.⁸ This rapid expansion in international trade calls for the comprehensive international framework of rules and order to enhance the management of international trade. The establishment of such a framework will provide a degree of order and certainty. Indirectly it reduces conflicts caused by

6 BISD s5s/68

7 See the discussion in R S J Martha, "Precedent in World Trade", NILR (1997) 346-377.

8 The rise of private participation is now becoming more prominent in international law. There is a common trend in international law to regard individuals and business entities as subject of international law. In the human rights filed, international organisation provide direct access for individuals who claim human rights violations. The protection of foreign investment is also a field where private party participation plays an important role. See the Convention on the Settlement of Investment Dispute between States and Nationals of Other States, done at Washington, 18 March 1965, entered into force 14 October 1966. The rise of private participation in new areas such as competition policy for instance is a field that largely governs private conduct. See Martin Lukas, "The Role of Private Parties in the Enforcement of the Uruguay Round Agreements" J.W.T. 29 No.5 (1995) 181-206; see also M Bronkers, "Private Participation in the Enforcement of the WTO Law: The New EC Trade Barrier Regulation" 33 C. M. L. Rev. (1996) 299-318.

different application of regulations among states.⁹ Through the regional mechanism of disputes settlement, such as ASEAN, member countries can agree in enforcing uniform rules applicable to all member countries.

Alternative to the above notion of sovereignty is one that arises from the different application of the dualist and monist paradigms. This concept provides that a state is neither wholly subordinated nor supreme to a distinct and co-existing international legal order. Nonetheless even such an idea of sovereignty, it will be later argued, is no longer appropriate within the present context and structure of international economic law. The dualist paradigm operates on the basis that national and international law co-exist as two separate and distinct entities. While international law is universally accepted as a valid and binding norm, it is at the same time restricted from transgressing state's sovereignty unless the law is transformed into domestic legal system through the legislative process of the state. Monism, on the other hand, presupposes the existence of a single system of international law norms binding upon states and an individual is the ultimate subject of international law. Hence, international law will be automatically incorporated and available as a domestic legal instrument. In terms of international economic law, both of these paradigms, however, are no longer relevant as countries are full-fledged participants in international economic activities. In other words, dividing the notion of sovereignty into two separate theories does not bear any significance in the eyes of international economic law.

Yet another new challenge to state's sovereignty emerges from international treaties that regulate the various aspects of trade in services and intellectual property. Thus the General Agreement on Trade in Services (GATS) and Trade Related Intellectual Property (TRIP) require the surrender of a certain degree of sovereignty by states to the international system and its institutions.

Rule of law in international trade

International trade perceives the "rule of law" as a necessity rather than an aspiration. It is a tool of modern diplomacy, particularly in international economic relations and matters. However, for the rules to work there must be a framework of an effective legal system, a system that provides for application of rules to particular facts, objective methods of determining those facts, trusted interpretations of the rules, consistency and predictability.¹⁰ As to extent the rule of law should govern international trade, however, there have been extensive debates between the protagonists of two schools of thought, the legalists and the pragmatists.

9 See Susan Hainsworth, "Sovereignty, Economic Integration and the World Trade Organisation" 33 No. 3 Osgoode H. L. J. (1995) 583-614.

10 J H Jackson, "The Jurisprudence of International trade: The DISC case in GATT" 72 A.J.I.L. (1978) 74.

For the legalists, the non-legalist approach lacks the element of predictability because it reserves too great a role for negotiations of disputes with the prospect of diplomatic interaction and political compromise.¹¹ For the pragmatists, on the other hand, they attribute the GATT's success largely to the non-legalistic approach it adopts in the application of rules. To them the principal value of GATT is that it provides a process through which trade problems are negotiated and compromises reached within a broad framework of rules. But such negotiations and compromises may not always be technically in accordance with strict law, as a court would apply it.

The Post Uruguay Round of multilateral trade negotiations saw the increase in the demand for rule of law in the organisation of world trade. The multilateral agreement contains provisions which are more precise than the GATT of 1947 and the Tokyo Round.

However, it is generally conceded that even a rule-bound system in international trade relations does not necessarily demand that disputes must be settled only by means of adjudication. The consultation approach can still play an important role as it is the "natural" initial attempt to settle any dispute between states and it can be the cheapest, most confidential and the least adversarial form of disputes settlement.¹² Similarly, maintaining rule of law is no guarantee that no trading nations would ever breach the rule.

International trade governance

The development of the world trading system is based on two incompatible theories: the economic free trade theory and the classic international relations theory of realism. Economic free trade theory basically emphasises real economic welfare based on the doctrine of comparative advantage. Global wealth increases if each state specializes in producing and exporting those goods and services that it is most efficient at producing.

The international relations theory of realism, on the other hand, explains how states actually behave in their relations. Essentially, realism views states as the main actors in world affairs and they are autonomous, self-interested and animated by the single-minded pursuit of power. This interstate competition for power, in turn, creates anarchy. In such an anarchic situation, international law is "but a collection of evanescent maxims or a 'repository of legal rationalisations' and international co-operation arrangements have an unstable existence."

11 P R Trimble, "International trade and the 'Rule of Law'" 83 Mich. L. Rev. (1985) 1018.

12 See R Ostrihansky, "Settlement of Interstate Trade Disputes—The Role of Law and Legal Procedures", 22 N.Y.L.J. (1991) 163-214.

Hence while the economic free trade theory stressed global trade usefulness in providing jobs, wealth and economic stability for most states, especially those states that were falling behind in the race for international power, the realist approach, instead, saw states as being exposed to economic and security threats even when they co-operated to adopt such measures as lowering trade and other protective barriers. The early development of dispute settlement in GATT saw the predominance of the realism despite the differences between the realists and the free traders over its use of diplomatic working parties rather than adjudicatory tribunals to settle disputes.

Even though GATT system had become more procedurally complex and adjudicatory, it nonetheless still maintained the realist characteristic by empowering its defendants to veto dispute resolution panel decisions when they came to the GATT council for approval.

The criteria of an effective dispute settlement mechanism (DSM) in international trade

This article argues that in establishing the criteria of an effective dispute settlement mechanism in international trade three broad aspects would need to be addressed: *the paradigm of disputes settlement mechanism, the characteristics requirement of the mechanism, and the structural imperative requirement of the mechanism.*

Paradigm of dispute settlement mechanism

Gathering from the literature on the subject of the paradigm of dispute settlement, it can be discerned that the paradigm for any peaceful settlement of disputes can be looked at from several perspectives namely, the technique-based, the process-based, and the objective-based.

(a) The technique based approach

The technique-based approach refers to the various techniques suggested for disputing states to adopt in the peaceful settlement of the dispute. The techniques can be categorised into three types: diplomatic means of dispute settlement, legal or judicial means of dispute settlement and, dispute settlement procedures among member states of international organisations¹³.

(b) The process-based approach

The process-based approach emphasises on the processes of dispute settlement. It has three variants - a power-based approach, a right-based approach and, an interest-

13 P Malanczuk, *Akehurst's Modern Introduction to International Law*, (Routledge London 1997) 273. Shaw divided these techniques into two broad categories: diplomatic procedure and adjudication. See M N Shaw, *International Law* (Cambridge University Press Cambridge 1997) 717.

based approach.¹⁴ These approaches were widely adopted in dispute settlement systems of the United Nations, which covered a wide range of disputes where the main objective was the avoidance of war. The three approaches are, however, often related, and in the process of resolving a dispute the focus may shift from one approach to another. As the United Nations was created with the main aim of curbing the excesses of power, the lesson learned from the devastating catastrophes of the two World Wars, the processes adopted by the body in dispute settlement were primarily based on a combination of rights- and power-based approaches.

The power-based approach refers to the process where disputing parties would attempt to determine who is the most powerful through a power contest. War is the most obvious and extreme version of the power-based approach, though other less intense forms are also common. The Security Council of the UN, which was established as the organ primarily responsible for the maintenance of international peace and security, was given virtually unlimited powers to ensure "collective security" (the term that embraces the concept wherein all Member States will protect each Member State from external threat).

The right-based approach, on the other hand, refers to a dispute settlement process where the parties try to determine who is "right" according to certain common standards under international law, such as treaties, conventions or accepted customs. It operates on the notion that throughout history, human communities have created rules, customs and laws to serve as a standard of conduct for their members for the maintenance of peaceful relations and avoidance of conflicts. However, where the rights themselves become the subject of a dispute the process may lie somewhere between the two approaches. And although an adversarial nature of a rights contest will inevitably strain relationship between the parties, its consequences are less serious than that in a power contest. The International Court of Justice (ICJ) plays an important role in a right-based approach of dispute settlement. However, from its inception in April 1946 until August 1994, the ICJ dealt with only 72 contentious cases and 21 advisory cases. The Court's ability to act as an effective dispute settlement mechanism is limited by Article 36 of the Statute of International Court of Justice which makes its jurisdiction optional. There are currently 3 ways for states to submit to the court's jurisdiction. The first is through the "optional clause", which is set in Article 36(2) of the Statute. The Article allows Member States to declare that they recognise the compulsory jurisdiction of the court but they can also exempt certain areas from jurisdiction.¹⁵ The second is through the consent of a state to take a given dispute to the Court as part of a special agreement or

14 Connie Peck, *The United Nations as a Dispute Settlement System: Improving Mechanisms for the Prevention and Resolution of Conflict* (Kluwer The Hague 1996) 10.

15 By August 1995, only 61 of the 185 Member States of the UN, less than 1/3 have agreed to the Court's compulsory jurisdiction under the optional clause and many of these have limited its jurisdiction by making exception. Only 1 of the 5 Permanent Members of the Security Council (the UK) has currently endorsed the optional clause for compulsory jurisdiction.

compromis, as provided under Article 36(1). The third is through compromising clauses in treaty agreements which stipulate that any dispute arising therefrom must be referred to the Court.

It has been pointed out that the right-based approach in many ways resembles the rule-oriented approach mentioned earlier. First, both approaches emphasise on the importance of legal rules in dispute settlement mechanism operating at the international plane. Secondly, both approaches will apply international law principles as the common standard of determining the "right" and the "wrong" of parties in a dispute. Thirdly, both approaches suffer the same consequence of inevitable result in the strained relationship between disputing parties. In respect of the practical significance of both the approaches at the international plane, the rule-oriented approach seems to be more prominent as compared with the right-approach. This is evidenced by the fact that currently a rule-oriented approach is gaining ground in most dispute settlement mechanisms of international trade. This is true in the cases of the WTO, NAFTA and the ASEAN Protocol of Dispute Settlement Mechanism. It is perhaps here that a convergence can be found in the approaches taken by both the UN system and the system of international trade of GATT/WTO. Thus, for instance, consultation prior to a panel ruling is still an important element in any trade disputes settlement. In most of the institutions, the mechanism of dispute settlement makes provisions for the institutions or any other body to offer good office and conciliation before proceeding to panel rulings.

In contrast to the above approaches, an interest-based approach requires parties to attempt at reconciling their underlying interests by opting for solutions that will bridge their different needs, aspirations, fears or concerns in a manner that is satisfactory to both sides.

(c) Objective-based approach

The third perspective of the paradigm for dispute settlement is the objective-based approach. This approach lays stress on the objectives and goals of a dispute settlement paradigm and is found suitable in dispute settlement involving international trade.

In terms of the cost-effectiveness of these approaches, the power-based approach tends to be the most costly of the three. Power contest consumes enormous amount of time, energy and money and when it escalates it often leads to enormous destruction of resources. Additionally, the approach relies on the factor of satisfaction with outcome. Hence, when the parties are satisfied with the outcome, future conflict is less likely to arise. On the other hand, unmet grievances and dissatisfaction can result in the recurrence of the conflict. The use of coercive or adversarial power-based tactics may also damage or destroy the relationship between the parties and thereby making resolution of the conflict more difficult. Interest-based approach tends to be the most cost effective since it attempts to address and

meet the parties' underlying interests and to achieve a satisfactory outcome for all concerned, and it is unlikely to lead to the destruction of resources.

An effective international dispute resolution system should offer a *step-wise* process, where low-cost procedures are deployed as early as possible in a dispute, and resort to other more costly ones is undertaken only when they fail.¹⁶ In the case of the UN, for instance, since the interest-based methods are the least costly, they should be first employed. Only if they fail then the other methods, such as low-cost rights- or power-based approaches, can be used as a backup. When these also fail, progressively higher-cost approaches can subsequently be deployed.

It has been suggested that a functional system of dispute settlement should be structured to provide a full range of dispute settlement approaches. Such a system would attempt to apply low cost approaches as early as possible, in order to find a resolution before the dispute becomes costly to the disputants and to the system. Any systems that are not structured in a step-wise fashion with an early attention to dispute resolution often become "distressed". Distressed systems are those that allow disputes to go unresolved and, therefore, to be recycled over and over again. Typically, a distressed system waits until the dispute has turned into a full-fledged conflict, and then it employs power-based procedures to impose a solution. But since the solution is not based on the parties' interests, one or both parties may remain dissatisfied and will either not comply with the outcome or will re-instigate the dispute in another form at a later time.

Although in theory the Charter of the UN provides a range of dispute settlement procedures, in practice the body has never been able to fully develop into an effective dispute settlement system. The UN thus has resembled a distressed system, since many international disputes have gone unresolved and others have only been addressed when it was too late to stop their escalation into full-blown conflicts.

Working paradigms of dispute settlement in international trade

Broadly, the working paradigms of dispute settlement in international trade can be divided into two main categories. The first category (which is referred to as "objective paradigm") emphasises the goals or objectives of dispute settlement process, and the second category emphasises on the content of the trade agreements. The former demarcates firstly, the different approaches to dispute settlement mechanism between the rule-oriented approach and the power-oriented approach, and secondly, the different standpoints adopted by legalism and pragmatism on the subject matter. The latter category (which will be called the "content approach") outlines the strengths and weaknesses of soft law and hard law, and the various ways in which the norms of obligation and norms of aspiration are applied in trade

16 Connect Peck, above n 18 at 13.

agreements. The discussion that follows will elaborate, firstly, on the two categories of dispute settlement paradigms in international trade by taking the historical overview of their evolution in GATT/WTO, and secondly, on their practical application in the GATT/WTO dispute settlement procedures since its inception in 1947.

The "objective paradigm": Rule-Oriented and Power Oriented¹⁷

Professor Jackson has raised an important and fundamental question that needs to be addressed prior to any construction and evaluation of dispute settlement system at the international level.¹⁸ This fundamental question relates to the goal of the system: Whether the system should primarily be designed to adjudicate disputes or to mediate them. If adjudication is the goal, then the system must be able to apply the relevant rules consistently and ensure that the decisions it produces are implemented. On the other hand, if mediation is the goal, then a dispute settlement system must emphasize methods designed to encourage the parties in dispute to negotiate a solution to their dispute.¹⁹

This proposition has created a long history of legal and philosophical debates among academics and practitioners of international trade. From his numerous writing on the subject,²⁰ Professor Jackson has innovated two main techniques for the peaceful settlement of international disputes, namely the rule-oriented and power-oriented diplomacy. A rule-oriented system is one based upon a legally binding constitution setting out clear and precise rules and obligations enforced by an effective and impartial adjudication mechanism that aims to foster and establish a stable and consistent international legal order.²¹ The system is designed to ensure the highest possible degree of adherence and conformity to a set of rules. The power-oriented system, on the other hand, focuses on a dispute settlement system that facilitates states interaction characterized by negotiation, conciliation and compromise.²² Underlying the system is the conviction that the purpose of dispute settlement

17 Terminology coined by Jackson.

18 John H Jackson, W J Davey, and A Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text on The National and International Regulations of Transnational Economic Relations* (St. Paul Minn. West Pub 1995) 328.

19 Ibid at 327-328.

20 For some of his writings see: J H Jackson, "Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States" 82 Mich L R. (1984) 1570; Jackson, "The Crumbling Institutions of the Liberal Trade System" 12 J.W.T.L. (1978) 93; Jackson, "Dispute Settlement techniques Between Nations Concerning Economic Relations-With Special Emphasis on GATT in Resolving Transnational Disputes Through International Arbitration", Thomas, C., (ed.) Charlottesville University Press of Virginia at 39-72; Jackson, "Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT" 13 J.W.T.L. (1979) 1; Jackson, "The Jurisprudence of International Trade: The DISC Case in GATT", 72 Am. J. Int'l L. (1978) 747; Jackson, "The Uruguay Round and the Launch of the WTO: Significance and Challenges" in *The World Trade Organisation: Multilateral Trade Framework For the 21st Century and U.S. Implementing legislation*, T P Steward, T.P. (ed.) (A.B.A. 1996) 5-28.

21 Above n 9 at 590.

22 Ibid at 590.

procedures in international economic organisation is not so much to decide who is right and who is wrong, or to determine a state's responsibility or culpability in the matter. Instead, the aim is to proceed with the dispute in such a way so that even serious violations can be terminated as quickly as possible. Thus while the main objective of a dispute settlement is for a rigorous application of law, adjustment of divergences between states must be allowed to enable them to find equitable solutions.

Critics of the rule-oriented approach have argued that the system will encourage conflicts and contentiousness in an international organization that seeks to promote negotiated solutions to achieve its goal. As such the rule-oriented system is viewed as counter-productive because it poisons the atmosphere in which negotiations are possible. Three reasons were given as to how this can happen. First, the publicity that it attracts, second, the act of filing the complaint which constitutes a contentious act, and third, more cases will result in more unresolved disputes. Professor Jackson, however, is not convinced by these reasons, as they are not compelling enough to displace the arguments in favour of the rule-oriented approach. In turn he counter-argues that the emphasis on negotiation is likely to lead to some countries to use their relative political and economic strength to take advantage of the weaker countries. In contrast, the rule-oriented system stresses on rules, and rules tend to treat everyone in the same fashion. Negotiated settlements, instead, tend to favour the party with the best negotiating position, which often will turn out to be the more powerful party. For this reason, therefore, the smaller countries find favour in the rule-oriented system, as they perceive they will be treated fairly under such a system.²³

Another strong objection to the rule-oriented system is, however, made on the ground that the system will result in "wrong" cases being brought into the system. Such instances can arise into three situations: firstly, when the government unavoidably violates a rule of international trade policy itself; secondly, when the matter involves old outmoded rules; and finally, where governments use the panel procedure for reasons that are more political than legal.

In the light of the above controversies, it may be said that, perhaps the most appealing reason for diplomatic or negotiation approach lies in the fact that it leads to an equitable arrangement which is satisfactory to both the parties to the dispute and to the institution itself. The smooth functioning of the institution is always the main concern of the organ responsible for settling disputes. Judicial approach, on the contrary, is not always able to safeguard the spirit of the understanding and collaboration required in an institution.

Notwithstanding the above criticisms against the rule-oriented approach, there are at least two situations where it prevails over the power-oriented approach; the first

23 Ibid at 330

relates to private individuals right, and the second concerns reforms in the dispute settlement system.

As the world becomes more economically interdependent, private individuals will ultimately become directly affected, either in terms of their jobs, business or daily life, by the forces outside and beyond the national boundaries. A rule-oriented approach thus allows private individuals in the future a better opportunity to plan their action and pursue legal suits on a more predictable and credible dispute settlement system.

The extensive reforms, which took place resulting from the Uruguay Round, which led to the formation of WTO and DSU seem to suggest that the rule-oriented and adjudicatory paradigm have clearly found favours among members of the international community. Additionally, the appellate review of panel decisions by a permanent appellate body where appeals are limited to issues concerning law indicates the significant role played by the appellate body in bringing consistency and uniformity to the interpretation of the international norms enshrined in the WTO constitutional base. In this way it is opined that the dispute settlement system of the WTO will create an authoritative body of jurisprudence on question of law concerning covered agreements.²⁴

Legalism and Pragmatism

Another controversial point in regard the dispute settlement system in international trade arises from the contrasting position that the legalists and the pragmatists have taken in the way the system should operate. Like rule-oriented and power-oriented paradigms debate, the legalist-pragmatist dichotomy has permeated the GATT history since its inception.

Kenneth Dam has used the term legalism as to refer

*... to an approach to the drafting of international agreements under which draftsman attempt to foresee all of the problems that may arise in a particular area ... and to write down highly detailed rules in order to eliminate to the greatest extent possible any disputes, or even doubts, about the rights and obligations of each agreeing party under all future circumstances.*²⁵

Dam is generally critical of the detailed code approach taken in the drafting of the General Agreement. He charges that a certain type of "legalism" dominated the drafting of the General Agreement. And this legalism rested on a "naïve" notion of law for it tended to view law as substantive rules. Instead, he points out,

24 Above n 9 at 617-618.

25 For the arguments and benefits of the legalistic system, see J H Jackson, "Perspectives of International Trade: Costs and Benefits of Legal Procedure in the United States" 82 Mich L R (1984) 1570-1583. See also R E Hudec, "GATT or GABB? The Future Design of the GATT" 80 No. 7 Yale L.J.(1971) 1299.

... law is not solely, or even primarily, a set of substantive rules. It is also a set of procedures, adapted to the subject-matter and designed to resolve disputes that cannot be foreseen at the moment when those procedures are established. Perhaps more important than settling disputes, law viewed as procedures and process serves to identify the common interest in complex situations and to formulate short-term policies for the achievement of long-term objectives...

Dam, on the other hand, uses the term pragmatism to refer to an approach to rule making where "emphasis is placed on mutual agreement on objectives, and rules concerning rights and obligations are considered formalities to be avoided whenever possible."

Against this view, the legalists believe that the pragmatic approach fails to achieve the necessary predictability because it emphasizes so much on negotiation in settling disputes with the aid of diplomatic intervention and political compromise. The GATT system requires stability and predictability and, therefore, rules must be clear and the best way of ensuring this is through a system of impartial adjudication.

Also in support of a legalistic system is the argument that the system promotes compliance with rules better than a negotiated system. In relation to GATT/WTO the legalists claim that such a system would promote the compliance with its rules in two ways. First, at least in theory, the system would discourage the infringement of the rules. Infringement is here perceived as costly in relation to states' future negotiations over trade issues and benefits, and in terms of their reputation for being labeled as a rule violator. By contrast, in a negotiated system, the cost is considered inconsequential as, at most, it may only create an unpleasant diplomatic exchange. Secondly, adjudicative approach produces more panel decisions. In this way compliance with GATT/WTO rules will improve since panel decisions tend to be implemented, if not sooner, then later. In practice, compliance with the dispute settlement decisions that the Council has adopted is encouraging. Hence, as the number of decisions increases, the obligations of GATT/WTO members will become clearer and better defined.

Although the appeals to legalism may seem compelling, there are nonetheless practical limitations to the strict application of substantive rules in dispute settlement. In reality, hence, not all rules can be applied strictly and fully in dispute settlement cases. Admittedly in the face of such hard reality many of GATT/WTO obligations still remain general and vague. Strict application of rules can inhibit successful negotiations, whereas political and diplomatic compromise can achieve a better outcome. Similarly, too much emphasis on legal rules can undermine the credibility of the very mechanism for the dispute settlement. The DISC case, for instance, offers a good illustration on the point.

"Content approach": norms of aspiration and norms of obligation

According to Professor Jackson, one of the features in international organisation that tends to complicate the issues relating to the rule of law in international trade

is the confusion and ambiguity created along two separate normative paradigms namely, the "norms of obligation" and the "norms of aspiration". "Norms of obligation" designate those norms toward which a person or a country should feel obliged to follow. This feeling of obligation may stem from an idea of moral duty or a pragmatic recognition of consequences that might follow if the norms are broken. From this point of view the terms in an agreement are more than just a mere "statement of purpose or objective". "Norms of aspiration", on the other hand, involve a mode of conduct that everyone thinks is desirable, but toward which there is no feeling of obligation.

In practice, the main weakness of the "content approach" paradigm lies in its tendency to commingle both normative categories in the same instrument. And this can render the interpretation of the instrument difficult and contentious, as some countries will consider a particular phrase to be a "norm of obligation" while others will treat the same phrase to be a "norm of aspiration". This can certainly add tensions and disputes in international affairs.

The application of both normative approaches can be seen in GATT. They discernibly cut across many of its provisions. The most-favoured-nation treatment obligation, the obligation of national treatment on internal taxation and regulation, and the prohibition of quantitative restrictions are clear examples of the norms of obligation. On the other hand, the rules introduced in 1966 in favour of the developing countries, which are embodied in Part IV of GATT, constitute the norms of aspiration. As pointed out earlier, one obvious weakness that this approach has given rise to in GATT is that the boundaries between the two normative categories are often blurred and this causes different legal interpretations as to the actual meaning of the norm.

Hard Law and soft Law

Generally, all laws, domestic or international, possess three important elements namely, a normative statement of what is prohibited or encouraged, a self-characterization of legitimacy or authority, and a manifestation of the lawmaker's intent to make the norm effective. Hard law, as the name suggests, requires the commitment of parties to make legal statements effective; possesses the authority to make binding agreements with other states; and embodies the intention of the lawmakers to make the agreement effective. In sum, hard law denotes a binding agreement enforceable by law, be it domestic or international.

The term "soft law"²⁶ is normally applied to international norms that contain a mixture of ethical and political values or economic claims in a form not traditionally

26 For detailed explanation of Soft Law see, O Elias and C Lim, "General Principles of Law: 'Soft' law and the Identification of International law" XXVIII N.Y.I.L. 3-49 (1997); C M Chin Kin, "The Challenge of Soft Law: Development and Change in International Law" 38 ICLQ (1989) 850; J Carlson, "Hunger, Agricultural Trade Liberalisation, and Soft International Law: Addressing the Legal dimension of a Political Problem", 70 No. 5 Iowa L.R. (1985) 1200.

regarded as a source of international law. The term is also applied to international instruments that do not purport to be binding on the nations accepting them. Soft law is thus rather inchoate in nature. It embraces international norms that reflect principles or values, but do not create legal obligations. Sir Joseph Gold describes the essential ingredient of soft law as "... an expectation that the states accepting these instruments will take their content seriously and will give them some measure of respect ..."²⁷ He also postulates three other elements of soft law, namely, "its legitimacy" as promulgated "is not challenged"; its "quality as law" is not destroyed because failure to observe is not a breach of obligation; and "conduct that respects soft law cannot be deemed invalid".²⁸ Two attributes of soft law norms thus lend themselves some semblance of a legal character: firstly, the international consent to the norms, which gives them an authoritative base; and secondly, an international expectation that the norms will be taken seriously, which communicates an intention that nations will adhere to the behavioral values expressed in the norms.

In the current situation of mounting political and economic pressures, international trading system is showing a greater preference for a flexible and soft rule to replace the rigid rule that tend to undermine international co-operation in international trade. Unlike hard rules, soft and flexible rules permit or accommodate temporary and limited deviations from the important norms, while at the same time assuring that the basic norms retain their force.

Generally, therefore, the obligations to enforce international agreements are intended to be vague and ambiguous. The soft law language, as opposed to that of the hard law, is often chosen to designate the norms as "guidelines" or "declarations of principles" such that compliance with the norms is "voluntary", or that the nature and degree of adherence to the norm is a matter of national discretion.

Further, even where the norms are being supported by an expectation that the states accepting them will take their content seriously and will give them some measure of support, they can still be considered "soft law" in either of two circumstances. First, the norms are soft when the obligation they impose is so vague in its intention that it is impossible to determine with certainty what behavior is expected or required. Secondly, the norms are soft if, notwithstanding their clearly stated normative standard, there is only a weak command for national compliance with the standard. Hence, "soft law" may include any international norm that is characterized by an unclear policy content or a weak command for national compliance with the international policies expressed in the norm.

27 Gold, "Strengthening the Soft International Law of Exchange Arrangements" 77 Am. J. Int'l L (1983) 443.

28 See *ibid* for Gold's analysis on soft law in relation to exchange arrangements and exchange rates in the international monetary system and some of the consequences of the softness of that law found in Article IV of the Articles of the Agreement of the International Monetary Fund.

Soft law has been found to be most useful in situations where the inability of states to reach an agreement on the general principles of international relations threatens to block negotiations on the practical details. The purpose of adopting a soft law in such a case is thus to create a norm that would deflect any discussion or debate on the disputed issue of principle thereby creating a space for states to proceed to addressing and reaching agreement on the practical issues raised in their negotiations. For instance, when states disagree on issues involving territorial sovereignty they may keep themselves deliberately ambiguous to avoid resolving the conflicting territorial claims while still reaching agreement on how the claimed sovereignty is to be exercised. Deliberate ambiguity through soft law may, therefore, serve the laudable function of permitting nations to reach binding agreements on appropriate international behavior without forcing them to bind themselves to any particular interpretation of the broader legal principles applicable to the subject matter at issue. It is a matter of practice in international affairs that states seldom agree on firm rules governing the practical details of their relations. Instead, agreements are reached on vague or ambiguous general principles neither specifying how those principles are to be achieved nor stating a clear command for adherence to those principles. In trade and economic relations particularly, soft law functions to avoid large issues of principle so that an agreement on matters of details can be reached.

Criticisms have, however, been raised against such a use of soft law in international relations. While at first brush it may appear to reconcile disputes in a principled manner, what it in fact does is simply postpones a solution, legal or otherwise. In that regard soft law may only create an illusion of progress toward resolving international problems. Again, although soft law depends on an "implicit" common intent, there may be no clear "common understanding of a soft norm". As a consequence the "common intent" may be misunderstood. In such a case it would fail to guide states to conform to an internationally acceptable behavior, and may instead be used to defend behaviour or behaviours that undermine the very framework of which it is a part.

It is also pointed out that soft law's qualities - an unclear content or a weak command - are not of a nature that suggests they will effectively influence national decision-making or contribute to national compliance with international policy goals. First, an international judgement declaring that a national conduct violates a norm will not be clearly and emphatically made if the norm is itself unclear in content or weak in command. The lack of clarity may *ipso facto* imply that the international community does not view the norm as representing a particularly important principle. Second, a soft norm's ambiguity or vagueness may permit individual nations to legitimize their non-compliance with the norm by offering justifications that partially avoid or blunt international criticism. A clearer rule would often make it obvious that such justifications are illegitimate. Third, ambiguity and vagueness in a norm may create non-reciprocity in its underlying legal obligation. This can hinder a national willingness to comply with the norm as well as the international willingness to condemn its violations.

From a practical viewpoint, soft law is perceptibly not in a position to attract the same degree of support from the domestic forces, as would a firmer rule. Difficulties in interpreting the ambiguous rules and the ability to offer justifications for ignoring soft law's weak commands would undermine the force of arguments that those domestic interests might offer in support of such rules.

To summarise the preceding discussion the following points can thus be made:

First, any trade agreement should provide some guidelines relating to the mechanism of dispute settlement. Whether the dispute settlement system favours negotiation or rules depends upon the objective/s the system seeks to achieve.

Second, while power-oriented, soft law, pragmatic and anti-legalist approaches have the tendency to achieve a settlement of disputes through the negotiation process, rule-oriented, hard law and legalistic approaches tend to bring it about through judicial process.

Third, it is not possible to have an entirely rule-based system in an international mechanism of dispute settlement, as there are situations where power-based approach still dominates. On the other hand, it is also not practical to have an entirely power-based system without rules system.

Fourth, all the working paradigms can be applied in any dispute settlement mechanism, although not in their entirety.

Characteristics requirement for an effective dispute settlement mechanism

The characteristic requirement for an effective dispute settlement mechanism is derived from the notion that there is a natural tendency among states to treat international legal instruments as though they operate in the same way that domestic legal institutions would: there will be a plaintiff and a defendant; a legal claim, a tribunal and a legal ruling at the end of the trial.²⁹ Thus, in its ideal situation, the characteristics of an effective dispute settlement mechanism should include the following:³⁰

- i. A formal mechanism.
- ii A prospective orientation.
- iii A compulsory jurisdiction.
- iv A sovereignty-impinging quality.
- v An effective compliance.

29 Above n 2; see also Peter Stein, *Legal Institutions: The Development of Dispute Settlement* (Butterworth London 1984).

30 The discussion in this part draws a few of D S Sullivan's observations on effective dispute settlement mechanism and its correlation with the liberal democracy, see D S Sullivan, "Effective International Dispute Settlement Mechanism and the Necessary Condition of Liberal Democracy" 81 G. L. J. (1993) 2369-2412.

The five characteristics invariably resemble and share the qualities, functions and legitimacy of those of domestic judicial bodies, and are generally in tandem with the general notion of how a truly effective adjudicatory tribunal,³¹ either at domestic or international levels, is supposed to operate. It follows, therefore, that first, both international and domestic judicial bodies are established by governments for future disputes settlement process. Secondly, parties to disputes governed by both types of tribunal do not have the option of refusing to accept their jurisdiction. Finally, decisions from such judicial bodies are generally obeyed.³²

Thus said, it must be pointed out that while all the above features fulfil the requirement of a domestic legal institution for an effective dispute settlement mechanism, they may not, however, be well accepted by states at the international level. The sovereignty-impinging and effective compliance characteristics, for instance, are frequently disputed and subjected to criticisms both in international law generally and in international tribunals. In themselves, both of these characteristics are ineffective and, in many ways, a sham. The reluctance and unwillingness of state parties to submit themselves by conforming to these characteristics can be justified on several grounds.³³ Firstly, states are unwilling to take the chance of losing, particularly when the dispute involves important or vital national interest. Secondly, a judicial settlement is essentially a win-or-lose, zero-sum game, thus explaining why many disputes are resolved through negotiations. Thirdly, there is a general reluctance, and for good reasons, for parties to entrust a third party with an important decision. In light of these shortcomings, it is understandable that so far only a few international institutions that deal with dispute settlement mechanism have fulfilled the entire characteristics requirement. The following discussion will outline how this requirement is generally treated in states' dealings.

Formal Mechanism

This characteristic requires states to initially establish some form of formal agreement. This is not a difficult task to undertake since most international institutions, which establish trade agreements, will also institute a formal mechanism of dispute settlement. Viewing the matter from the perspective of international trade paradigms as discussed earlier, whenever a formal agreement requires observation and adherence to rules, then it is imperative that the characteristic fulfils the requirement of the rule-oriented approach. Whereas, if the formal agreement contains rules where the obligation to comply with the agreement is vague and ambiguous, the characteristic will fall into the category of soft law.

31 C W Jenks, *The Prospects of International Adjudication* (Stevens, London 1964) 13.

32 For a discussion on adjudication generally, see Lon L. Fuller, "The Forms and Limits of Adjudication" 92 Harv. L. R. (1978) 353-409.

33 For a discussion on limitations of adjudication, see R B Bilder, "Some Limitations of Adjudication as an International Dispute Settlement Technique" 23:1 Vir. J. Inter. Law (1982) 1-12.

Prospective orientation

Prospective orientation means that the main function and purpose of a DSM established by the parties to the agreement must be to adjudicate and settle disputes that might arise in the future, that is, after and not before the formation of the DSM. This characteristic confirms the general rule regarding a treaty application where, unless a different intention appears from the text or otherwise established, it is not retrospective and will not bind a party in respect of any act or fact which took place before the treaty entered into force.³⁴

Compulsory jurisdiction

This characteristic requires that the parties be subjected to the compulsory jurisdiction of a DSM. It essentially refers to the capacity of the mechanism to govern the parties involved in the agreement. Admittedly, as highlighted earlier, one of the difficult challenges of international institutions is to convince members to agree in submitting their sovereignty to a higher structure. As such, even in the case of the International Court of Justice, for instance, member states are given the option to choose whether or not to accept the compulsory jurisdiction of the Court. While at the national level compulsory jurisdiction is privileged to operate well through a legislative process, there is no similar process at the international level.

Notwithstanding the above limitation, however, the requirement of compulsory jurisdiction is seemingly met by the European Court of Justice (ECJ). There are at least three instances to support this observation. First, in several provisions of the Treaty of Rome it is stated that the ECJ "... shall have the jurisdiction ..." (Articles 173, 178-82). Second, Article 177 requires all domestic courts to refrain from making an appeal to request for preliminary rulings from the ECJ. Third, through its decisions and judgements, the Court itself, not the Treaty of Rome or other Community law, has determined that the Community law takes precedence where it conflicts with the laws of any member state.

Sovereign-impinging quality

Sovereign-impinging quality or nature of a DSM means that a tribunal is given the jurisdiction and mandate to make rulings on matters that have traditionally and exclusively been made within the sovereign realm of a state. Specifically, it means a tribunal or a panel has the mandate to rule upon the legality of states' laws as well as the validity of states' application of their own laws if those laws violate a relevant international agreement.

The ECJ fulfils this characteristic requirement in the sense that the Court has the mandate to rule upon the legitimacy of a state's domestic laws and to render them

34 Article 28 of the Vienna Convention on the Law of Treaties.

incompatible with international obligations. The two most important decisions of the Court in establishing the supremacy of the Community law over other laws can be found in *Case 26/62, Van Gend en Loos v. Nederlandse Belastinga Administratie*³⁵ and *Case 106/77, Amministrazione della Finanze dello Stato v. Simmenthal S.p.A.*³⁶

Effective compliance

Effective compliance would require all contracting parties to trade agreements to strictly observe the rules stated therein.³⁷ Non-compliance will result in punishment, which, in all probability, will be in the form of compensation.

However, the vexed question that arises in relation to this characteristic requirement is How can the effectiveness of the mechanism be measured? One way in which this can be done is by analysing what would have happened in the absence of such a system.³⁸ This may lead one to observe how the contracting parties in an international agreement comply with the system. However, the general observance of the rules cannot be a definitive proof that the rules have been effective. This is because there is still a possibility that even in the absence of the rules, states would not have behaved differently. Similarly, a departure from the rules does not have any bearing on non-compliance either, for the simple reason that there is no way of comparing empirically the instances of compliance with those of non-compliance. Such an empirical limitation unavoidably leads to the conclusion that "a critical question for any study of compliance is what presumption to adopt."³⁹ From this perspective, the question of whether states really comply with their international obligations depends on the strength of the arguments put forward in support of one presumption or the other. Hence, on the basis of such considerations the presumption adopted is that contracting parties normally comply with international rules/norms. First, an international treaty is binding upon the contracting parties on the principle of *pacta sunt servanda*, which is codified in Article 26 of the Vienna Convention on the Law of the Treaties. Apart from this maxim, a general principle of law common to all the legal systems would require a state to comply with any international agreement or treaty. Second, the strongest evidence for this sense of obligation is the care that states take in negotiating and entering into the treaties. Third, as in GATT, rules observance is perceived to be in the national interest, while non-observance is considered "cost" in terms of reduced national welfare and additional political costs. Finally, the basic principle of classical international law stipulating that states cannot be legally bound except with their own consent

35 (1963) E.C.R. I, 1963 C.M. L.R. (1963) 105.

36 (1978) E.C.R. 629: 3 C.M.L.R. (1978) 263.

37 For a discussion on compliance at international law, see S M Schwebel, "The Compliance Process and the Future of International Law" in Schwebel, *Justice in International Law* (Cambridge 1994) 598.

38 For the notion of effectiveness, see Pieter Van Dijk, "Normative Force and Effectiveness of International Norms" 30 G. Y.B. I. L. (1987) 9.

39 The rationale behind this argumentation has been borrowed from M M Mora, "A GATT With Teeth: Law Wins Over Politics in Resolution of International Trade Disputes" 31 Colum. J. Transl. L., Vol.31 (1993) 103-180.

and accord tends to make the rules they are obligated to carry out reflective of their interests.

Notwithstanding the above complexities, however, the ECJ has fulfilled the effective compliance criterion. Article 171 of the Treaty of Rome provides that when the Court determines that a member state has failed to fulfil its treaty obligations, the state is required to take the necessary measures to comply with the judgement of the Court. In addressing enforcement issues, the Court has issued a general ruling of non-compliance as well as detailed specifications of what a member state must do to be in compliance with an ECJ judgement.

Contrariwise, the International Court of Justice (ICJ), as an international DSM, apparently does not meet the criterion of an effective DSM. Essentially, many members of the ICJ have declined to accept the compulsory jurisdiction of the Court. And in the recent years, whenever ICJ issued decisions on certain disputes, particularly those which were political in nature, parties had been reluctant to abide by such decisions.

In light of the foregoing elaboration, the practical significance of the characteristics requirement as a component of the general criteria requirement of a dispute settlement mechanism in international trade can be viewed from two different aspects. Firstly, the characteristics requirement can operate as an indicator to determine whether the mechanism of a dispute settlement is correctly formulated based on the five factors or qualities just mentioned. Although it has not been possible for most states to adopt the sovereign impinging and compliance factors in trade agreements that require the formation of dispute settlement mechanism, it is still imperative that they realise that those factors are complied with for a mechanism to operate effectively. Secondly, as a practical alternative, even where it is not possible for the dispute settlement mechanism to fulfil all the characteristics requirements, the three factors (formal mechanism, prospective orientation and compulsory jurisdiction) can still be useful as a general guideline for designing an effective dispute settlement mechanism.

Structural imperative requirement of an effective dispute settlement mechanism

The structural imperative requirement criterion for an effective dispute settlement mechanism in international trade is based on the notion that such a criterion would allow a better designing of the mechanism. To this end, Reisman and Weidman are of the view that the mechanism designing process should be informed by the following considerations:

1. DSM is imperative for all parties in trade agreements. This is without regard as to whether they are a weaker or a stronger party to the agreement.
2. The deeper the mutual economic interdependence, the greater the intensity of this imperative.

3. The features and the political setting of the actual agreement dictate the design of the dispute settlement mechanism. This includes the following:
 - i. The scope (either ambitious or comprehensive) of the economic exchanges called for in the agreement;
 - ii. Their durability through time;
 - iii. The number of participants;
 - iv. The degree, intensity and effectiveness of the internal support for and the opposition to the agreement in each party; and
 - v. The degree of resulting economic integration between the parties.⁴⁰
4. Trade agreements generate their own dynamic through their operation.

Underlying the above considerations is, primarily, the contention that, in international relations where the situation is such that parties are on equal footing and mutually dependent, they will normally share a common interest in having a compulsory, neutral, third party and non-disruptive dispute settlement mechanism as an effective means of settling disputes. This is because, as interdependence increases, any disruption of the economic relationship may hurt both parties, economically and politically.⁴¹

Notwithstanding this, it is generally assumed that in a situation where parties are not on a "level playing ground", which is often the case in international dealings, the stronger party will have an interest to evade a neutral, third party dispute settlement mechanism. And indeed in a situation where a formal mechanism is absent, it will fully advantage the stronger party as it will be able to exploit its dominant position. Hence, on the basis of such assumptions, the stronger states, whether in a multilateral or a bilateral agreement, should resist or decline the inclusion of a meaningful dispute settlement mechanism. However, this intuitive assumption is of doubtful general validity. And it is still less convincing and credible in terms of comprehensive trade agreements between states where their aim is for a high degree of economic integration and mutual dependence.

The above proposition also takes cognizance of the internal and external political factors that can influence the designing of an effective dispute settlement mechanism. The more comprehensive the scope and participation the agreement commands and the greater the interdependence it generates, the more urgent will be the requirement for the designing of a centralized, neutral and binding decision-making mechanism. Conversely, the more limited its scope, participation, duration, and integrative consequence, the weaker will be the incentive to create such a mechanism. Furthermore, there is in such a circumstance a room for the stronger parties to dictate the direction of the mechanism.

40 M Reisman and M Weidman, "Contextual Imperatives of Dispute Resolution Mechanisms: Some Hypotheses and their Applications in the Uruguay Round and NAFTA" 29 J. W. T. 5 (1995) 10.

41 Ibid at 9.

Underlying the proposition above is also the notion that every trade agreement will have positive and negative impacts on the participating states. Once an agreement begins to operate, the dynamic that expands the positive impact should come into play. Invariably, free trade agreements should have a growing and positive impact because ambitious trade agreements are supposed to make national economy more robust and productive. Effective dispute settlement mechanism is, therefore, a critical factor in the operation of these free trade agreements, and the more comprehensive and effective the agreements, the greater will be the demand for the mechanism. However, the optimistic view of free trade agreements is subject to potential threats by other non-participating states on the ground of comparative advantage or competitive position. But a compromise in this situation may be found in the soft law approach.⁴³

Summary

Instead of a conclusion, this article proposes to make a summary of the above discussion. What have been covered are two important issues in the area of dispute settlement. The first relates to the importance of the general working paradigms of dispute settlement systems. It is a fundamental principle in any dispute settlement system that parties must first agree on what type of approach they should adopt in the event of a dispute arising between them. Should they agree on rule system or co-operate and negotiate? Thus it is imperative that in designing a mechanism of dispute settlement, the objective of the process be made clear. Equally important is to emphasize on the content of the agreement. Will the parties agree on a rule based principle or a compromise on a soft law approach? Both approaches, as discussed, have their strengths and weaknesses.

The second issue focuses on the designing of an effective mechanism of dispute settlement specifically in international trade agreements. To this end several criteria have been proposed. They comprise three broad components namely, the working paradigms, which form the main thrust of the criteria, the characteristics requirement and the structural imperatives, which would enhance the effectiveness of a dispute settlement mechanism. These three components are highlighted as they are representative of the current thinking on the subject of dispute settlement system in international trade.

43 Ibid at 14; see also Gbenga Bamodu, "Legal mechanism of Transnational Economic Co-operation: International and European Dimension" in C Harding and C Lim (eds.), *Westphalia Revisited: A New Model of European International Law* (Kluwer Law International The Hague 1999) 240-241.