<table>
<thead>
<tr>
<th>Law making</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Treaty law making</td>
</tr>
<tr>
<td>• Focus on IMO</td>
</tr>
<tr>
<td>• Lecture not dealing with</td>
</tr>
<tr>
<td>• European Union legislation</td>
</tr>
<tr>
<td>• Soft law</td>
</tr>
</tbody>
</table>
Law making by the United Nations itself

- UN Security Council
- UN General Assembly
  - Human Rights Convention
  - Rotterdam Rules

Normal procedures for adoption of treaties

- Diplomatic Conferences
- Governing bodies of intergovernmental organisations
Procedures in various organisations

- IMO
- Other UN Specialised Agencies, eg. ICAO
- UNCITRAL
- UNCTAD
- OECD (adoption by Council)
- Council of Europe (adoption by Council of Ministers)

Legal framework for adoption of treaties

- In force 1980
- Ratified by over 90 States (exceptions e.g. United States, France)
Vienna Convention on the Law of Treaties

- Large number of articles codification of customary international law
- Some provisions progressive development of international law
- Deals only with treaties between States
- Does not deal with
  - treaties between States and organisations, or between organisations
  - States succession
  - effects of war on treaties
- No retroactive effect

National legislative procedure

- Initiative by
  - government/ministers/civil servants
  - members of parliament/political parties/parliamentary committees
  - pressure groups, professional organisations, trade unions
  - media

- Draft legislation prepared by
  - government/civil servants
  - special government committees
  - parliamentary committees

- Draft legislation open for comments (white paper, hearings)

- Bill to parliament

- Legal and political scrutiny in parliament; political negotiations and compromises

- Bill adopted by parliament

- Publication of legislation in the Official Gazette and entry into force
International procedure for adoption of treaties

• Initiative by
  • governments
  • intergovernmental organisations
  • non-governmental organisations

• Draft treaty prepared by
  • government/group of governments
  • Secretariat of the organisation
  • Committee within the organisation

• Draft treaty debated by competent body of the organisation

• Political negotiation and compromises

• Draft treaty approved by the competent body

International procedure for adoption of treaties (continued)

• Governing body approves convening of Diplomatic Conference

• Diplomatic Conference convened by the organisation

• Draft treaty sent to governments and non-governmental organisations for comments

• Comments compiled and circulated

• Secretariat prepares draft Rules of Procedure and draft Final Clauses
Diplomatic Conference

- Meeting of Heads of Delegations
- Plenary session
  - Adoption of Rules of Procedure
  - Election of officers
  - Setting up subsidiary bodies
    - Committee of the Whole
    - Credentials Committee
    - Drafting Committee

Diplomatic Conference (continued); Committee of the Whole

- Chairman of Committee of the Whole crucial
- General discussion
- Discussion of controversial issues
- Groups set up by the Chairman
- Voting by show of hands or by roll call (simple majority required)
- Package proposal by Chairman
- Committee of the Whole approves the draft treaty text
Diplomatic Conference (continued)

- Committee of the Whole’s text to Drafting Committee
- Drafting Committee tidies up the text
  - only drafting issues, not issues of substance
  - several languages
- Drafting Committee’s text to Plenary

Diplomatic Conference; final plenary session

- Plenary considers text
- Voting on individual provisions
- Voting on the treaty as a whole
- 2/3 majority of those present and voting required
- Signature of final act
- Signature of the treaty
Procedures for States to be bound by the treaty

- Signature subject to ratification
  - Only obligation is to refrain from acts which would defeat the object and purpose of the treaty
- States bound by
  - Signature not subject to ratification
  - Ratification by States having signed the treaty subject to ratification,
  - Accession, acceptance or approval by States not having signed the treaty
- Double meaning of the term ratification
  - Internal national procedure
  - Deposit of ratification instrument with the organisation

Reservations

- Unilateral statement (however phrased or named) made by a State when signing or ratifying a treaty whereby the State purports to exclude or modify the legal effects of certain provisions of the treaty
- May be made except when
  - Reservations are expressly prohibited
  - The treaty provides that only certain reservations are allowed
  - The reservation is incompatible with the object and purpose of the treaty
Procedure for amendments to treaties

Adoption by

• Diplomatic Conference, followed by ratification by States, or
• Special body (e.g. MSC, MEPC), normally under tacit acceptance procedure

Application/interpretation of international treaties in several languages

• Authentic texts
• Official translations
• If authentic texts diverge: the meaning that best reconciles the texts having regard to its object and purpose
• Problems for countries whose national language is not one of the treaty languages
Application of treaties by/in States parties

- Legal and political problems
  - Conventions not correctly implemented in national law
  - Courts ignore the Conventions and apply national law

Implementation and application of international treaties

- Implementation of treaties into national law
  - Monistic system
  - Dualistic system

- Application of treaties
  - Public authorities
  - National Courts
  - International bodies and tribunals
Quality of treaties

Quality of international legislation
- Treaties rushed through
- Political expediency
- Lack of proper consultations
- Lack of respect for international law
  - Example of legislation of doubtful quality: EU Directive on Criminal Sanctions for Oil Pollution

Implementation and application of international treaties by States

- Do States implement treaties correctly and respect their treaty obligations?
- Vienna Convention on the Law of Treaties
  - Treaties must be performed by the parties in good faith
- Defective implementing legislation
- Failure to respect treaties because of political pressures
  - Pacific Adventurer
  - Geroi Sevastopolya
- Criminal sanctions in pollution cases vs UNCLOS art 230
  - Fair treatment of seafarers
Application/interpretation of international treaties by national courts

• Do national courts interpret and apply treaty provisions correctly?

• Vienna Convention on the Law of Treaties (art. 31): treaties to be interpreted
  • in good faith
  • in accordance with the ordinary meaning to be given to the terms of the treaty in their context
  • and in the light of its object and purpose

  taking into account
  • agreement between the States parties regarding interpretation or application
  • subsequent practice regarding interpretation or application

  • Supplementary means of interpretation (art.32), e.g.
    • the preparatory work
    • circumstances of its conclusion

• Rotterdam Rules (art.2):
  • In the interpretation of this Convention, regard is to be had to its international character
    and to the need to promote uniformity in its application and the observance of good faith in
    international trade.

Application/interpretation of international treaties by national courts

• Problems
  • Judges human beings
  • Legal traditions
  • Lack of knowledge and experience of treaties
  • Legal concepts may differ
  • Inaccurate translation into national language
  • Incorrect implementation into national law
  • National law in adjacent fields at variance with treaty applied
  • Disregard for the international context
  • Political considerations
Application/interpretation of international treaties by national courts (continued)

- Examples of courts not respecting provisions in international treaties: the 1992 Civil Liability Convention
  - Claims for pollution damage against master allowed in spite of clear provisions barring such claims
  - Time bar provisions in the Civil Liability Convention not respected
  - Failure to respect increase in limitation amount under 1992 Civil Liability Convention
  - Claims for non-economic environmental damage accepted

Possible ways of ensuring/promoting correct application/interpretation of international treaties

- Review by international courts and tribunals (e.g. International Court of Justice, International Tribunal for the Law of the Sea, European Court of Human Rights, European Court of Justice)
  - INTERTANKO case in the European Court of Justice
- Supervision by international bodies (e.g. IOPC Funds’ governing bodies, IMO Audit Scheme)
- Technical assistance to developing countries
### Normal disputes in public international law

- Disputes between States or entities having international personality
- Resolved in international fora
- Parties to a potential dispute identifiable prior to emergence of dispute
- Disputes normally between a few parties

### Pursuing compensation claims under 1992 Conventions

- Rights of compensation based on private law
- Legal actions to recover from shipowner and insurer normal private law actions
- Legal actions to recover from IOPC Funds are brought against an intergovernmental organisation created by an international treaty
- Legal actions under these Conventions heard by national courts
Disputes under 1992 Conventions

- Every victim may take legal action against shipowner, insurer and IOPC Funds, including:
  - companies and other private legal persons
  - private individuals
  - States
  - local authorities
- Actions are taken in the national courts of the State(s) where the pollution damage was sustained
- Procedures are those followed by the national court seized
- Decisions of the national court to be recognised and enforced in all States parties

Drawbacks with this system

- National courts may have difficulty in handling large numbers of claims
- Could result in delay in claims settlements
- National courts in various States may not interpret and apply the Conventions uniformly
Uniform Application of the 1992 Conventions and Supplementary Fund Protocol

• Essential for the functioning of the regime
• Equal treatment of claimants
• Development of international law
• UNCLOS Article 235

Uniform Application of the 1992 Conventions

• Lack of uniformity in application may undermine the international regime
• Experience of national courts not applying the 1992 conventions in a uniform manner
  • admissibility of claims for pure economic loss
  • requirement that clean-up measures should be objectively reasonable
  • definition of ship
  • channelling of liability
  • time bar
  • environmental damage
Alternative dispute resolutions

• Arbitration
• Mediation and conciliation
• International tribunal

Arbitration in cases involving IOPC Funds

• Litigation mostly in incidents involving many compensation claims
• Litigation should resolve individual cases but also ensure equal treatment of all claimants
• Equal treatment crucial if the total amount of accepted claims exceeds the compensation amount available
• Arbitration award is only binding between the parties to the arbitration agreement
• Award may be challenged by other claimants
• Arbitration agreement would have to be concluded after the oil spill
Arbitration in cases involving IOPC Funds

• The Funds could only accept arbitration if arbitrators are bound to apply the Conventions as interpreted by the Funds
• The Funds may not accept arbitration on the interpretation of the Convention on a point where the Funds’ governing bodies have taken a position
• Arbitration must involve also shipowner and insurer
• Costs of arbitration
• Many claimants may not accept arbitration

Mediation and conciliation in cases involving IOPC Funds

• Funds already use some of the techniques of mediation and conciliation
  • use of independent experts
  • dialogue with claimants
  • establishment of local claims offices
• Unlikely in most cases that formal mediation or conciliation procedures would succeed
• Mediation and conciliation not frequently used in many jurisdictions
• Sea Empress incident mediation
Adjudication before an International Tribunal in IOPC Funds cases

• Competence
  • individual compensation claims, or
  • matters of principle relating to
    – interpretation of Conventions
    – application of Conventions by national courts
    – Implementation of Conventions into national legal systems

• Jurisdiction
  • claims against Funds
  • claims against shipowner and insurer

Adjudication before an International Tribunal in IOPC Funds cases

• Claims to be referred to Tribunal by
  • Individual claimants
  • States
  • National court seized
  • IOPC Funds

• Costs

• Right of intervention by other claimants

• Binding effect of Tribunal’s decisions
Adjudication before an International Tribunal in IOPC Funds cases

- Special Oil Pollution Liability Tribunal
  - not realistic
- International Tribunal for the Law of the Sea (Sea-Bed Disputes Chamber)
  - UNCLOS Article 187 makes it possible
- Other existing International Tribunals (?)

Scope for alternatives to litigation before national courts in IOPC Funds cases

- Very limited scope for arbitration
- Very limited scope for mediation
- Formal conciliation procedures unlikely to succeed
- International Tribunal
  - Only way to ensure uniform interpretation of Conventions
  - Special Tribunal not practical
  - Use of an existing Tribunal, e.g. ITLOS
  - Would necessitate major amendments to the Conventions
  - Significant problems if not all States parties ratify amendments
- Is there the political will to make use of an International Tribunal?
Haven incident, Italy, 1991