Frank Stuart Dethridge Memorial Address 2001
Globalisation – Pressures and Challenges

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The Dethridge annual address developed from a lifetime engagement and fascination with maritime law on the part of Frank Dethridge. He is remembered and admired with affection and respect for having the vision which led to the founding of this association in May 1975 and for his outstanding service to the law and the maritime community. These addresses provide an opportunity on a continuing basis to address major developments touching on matters maritime. The topic of my address today is "Globalisation – Pressures and Challenges".

"Globalisation" is like a hologram. Every time you look at it from a different angle or under a new light it assumes a different colour and dimension. In this address, I want to present an overview of some of its implications with respect to developments which impinge upon the law.

The more seamless the linking of global operations of national enterprises the greater the potential for actions in one nation to have repercussions in other states or regions.

Over the past month, the world has witnessed the consequences of a globally orchestrated terrorist campaign. The September attacks were organised, financed and implemented from bases in many countries. The attacks have had a worldwide impact on international financial markets, labour markets, the insurance industry, airline businesses and tourism, not to mention their effect on confidence in the ability of nations to protect their citizens against global terrorist tactics. Witness also the cancellation of the CHOGM Conference.

The developing response has necessarily been organised on a global basis. To date, there has been a degree of international co-operation on a scale never before seen in tracing the perpetrators and their supporters and acting to stamp out terrorism. Not only have the investigations disclosed a global strategy of disruption but they have also uncovered a collateral proposal to profit on global markets from the consequent collapse of confidence. Although the weapons used to commandeer the planes were primitive in the extreme, the overall planning behind the attacks was highly sophisticated and co-ordinated, exploiting the latest communications and technology. While the

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consequences of the attacks are still developing, their effects thus far demonstrate the extreme vulnerability of globally integrated societies. There have been numerous flow-on effects. To take one example, Fuji Film in Japan is facing a financial crisis because of the downturn in world tourism.

What is Globalisation?

A convenient description of "globalisation" for present purposes is that it:

> ... encompasses a host of interwoven processes. 'These include, amongst other things: increasing transnational movement of capital, goods, and people; closer ties via new communications technologies; a more complex international division of labour as a result of the dispersal of the production of goods and services to a number of different locations; a rapid turnover of ideas, of images, and of patterns and objects of consumption; a growing awareness of risks and dangers that threaten the world as a whole; a quantitative increase in, and growth in importance of, transnational institutions and globally interlinked political movements. What is involved is thus the interpenetration of these processes both horizontally and vertically, and at national, subnational, and transnational levels.'[1]

> 'Globalization' is ... a complex multidimensional process of, on the one hand, de-bordering and de-spatialization, and, on the other, compaction and interlinkage. ...[2]

The emphasis in this description is on the integration of national interests arising from the movement of goods, services and information across and through national boundaries. In a recent statement, Charles O'Hanlon, Austrade's Executive General Manager, pointed out that:

> Under globalisation, the paradigm is changing. International business is no longer about putting boxes on ships, or selling your technology and getting royalties or a licence fee. It is now about enmeshing yourself in the markets of industrialised countries it is all about finding global opportunities for Australian businesses and helping them benefit from internationalisation by helping them source capital, skills and new technologies as well as export opportunities.

One consequence of this enmeshing is illustrated by the attempted General Electric ("GE")-Honeywell merger. Earlier this year GE and Honeywell negotiated a merger by which GE would acquire Honeywell at a figure in the order of US$42 billion. The US authorities approved the merger on conditions. The European Commission ("EC") shortly afterwards refused consent to the merger. Notwithstanding that the merger was a commercial transaction between two US corporations, approved in the US by US authorities, by reason of the corporations' globalised operations it was impractical for the merger to proceed and the EC decision therefore blocked that merger. This interaction between merger legal regimes is novel in relation to such mergers. The significance of the EC approach is that global businesses primarily based in one national territory must now take into account, in merger negotiations, the need to meet policy objectives of other world regions and nations which claim to be impacted when they are considering how best to restructure their commercial operations. In this instance, there

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[1] Randeria, S, "Globalisierung und Geschlechtsfrage: Zur Einführung" in Ruth Klingebiel and Shalini Randeria (eds), *Globalisierung aus Frauensicht: Bilanzen und Visionen*, EINE Welt-Texte der Stiftung Entwicklung und Frieden: Bonn, 1998, 16-33 at 16. An interesting look at the phenomenon of globalisation is taken by Thomas Friedman, of the New York Times, in his book "The Lexus and the Olive Tree", 1999, Harper-Collins.

[2] Tetzlaff, R, "World Cultures Under the Pressure of Globalisation: Experiences and Responses from the Different Continents", Hamburger Bildungsserver, 21 October 1998, available at http://lbs.hh.schule.de/welcome.phtml?unten=/global//allgemein/tetzlaff-121.html.

was a sharp difference between perceived EC interests and the best interests of the US shareholders and management as perceived by US governmental authorities.

Nevertheless, as Mario Monti, the European Commissioner for Competition, who blocked the merger, points out, it is important not to be unduly pessimistic at this impasse. During the last decade, there has been developed a bilateral co-operative arrangement between the US Department of Justice and the EC with respect to anti-competitive activities, directed to achieve co-ordination and co-operation in the enforcement of competition laws. The proposed GE-Honeywell merger was only the first instance in which the EC prohibited a merger between two US entities which the US authorities allowed. Since the establishment of merger control in Europe, the EC has considered 394 mergers involving at least one US party but only one other merger between US companies has been blocked by the EC and that was a case where the merger was also prohibited by the US.[3]

Another interesting example of enmeshing is the *Gutnick* case. In August this year, the Victorian Supreme Court was faced, in *Gutnick v Dow Jones Inc*,[4] with the question whether it had jurisdiction in a defamation action brought by Gutnick in relation to publication of material downloaded in Victoria from an Internet website in New Jersey. The argument for Dow Jones was that the publication occurred in New Jersey where the material was made available and that the courts in that State had exclusive jurisdiction and US law applied. Hedigan J decided that the material was published in Victoria, Victorian law applied and Victoria had jurisdiction. His Honour, after having the web communication process carefully explained in expert evidence, did not consider that globalisation called for the development of any novel principles of law and held that the question could be resolved by the application of well-settled legal principle.

Globalisation processes, however, do call for a supra-national perspective on the part of the courts. The need for courts to adopt a broader perspective in international transactions has not escaped the notice of the courts in maritime matters. In New Zealand, four years ago, Williams J, in the case of *Turners and Growers Exporters Pty Limited v The Ship "Cornelis Verolme"*,[5] when deciding whether to release a vessel from arrest and surrender it to the custody of a Belgian trustee administering a world-wide bankruptcy, observed that:

> The third factor in this balancing exercise is the international. When fortunes cross international boundaries at the click of a mouse, when the scale of international transactions – and the consequent scale of international bankruptcies – is as vast and instantaneous as it is and when the Courts and litigants in one country can have confidence that their rights and obligations will be properly acknowledged by Courts and litigants in other countries, in this Court's view it is appropriate that solutions to the legal problems created by international transactions, and by cross-border insolvencies in particular, should reflect modern international commercial practice and not be ... encumbered by dictates from another age derived from different circumstances.[6]

Williams J was there concerned to cater for the interests of the Master and Crew of the vessel, claiming in New Zealand, to preserve the vessel in order to secure their

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[3] See the speech by Mario Monti, the European Commissioner for Competition Matters, "The Future for Competition Policy in the European Union", Merchant Taylor's Hall, London, 9 July 2001, extracts available at http://europa.eu.int/rapid/start/...t&doc=SPEECH/01/340/0/RAPID&lg=EN.

[4] (2001) VSC 305 at 59-79. The decision contains a useful summary of the technology.

[5] (1997) 2 NZLR 110.

[6] Ibid at 26.

claims and to balance this interest against the ability to quickly arrange substitute security using modern communications so the vessel could be released from arrest.

The concept of "globalisation" has, of course, polarised interest groups.[7] Demonstrators over the past three years have decried the move to globalisation as an invasive force which must be arrested in order to preserve national identity and protect poorer nations from exploitation and cultural and economic domination by developed nations. Advocates of globalisation laud its beneficial economic results in the form of enhanced opportunities for employment and prosperity in poorer nations. Whether perceived as beneficial or detrimental, globalisation, like Everest, is here, and it is essential to confront the many complex problems it poses. These problems largely develop from the resistance to loss of national identity and values in the surge to global conformity.

Globalisation is really a new label for an established process. It has developed over decades. Global trade figures tell part of the story. If one takes the year 1990 as a benchmark, over the ensuing nine years there has been an increase of 74 per cent in the volume of world merchandise exports according to recent figures from the World Trade Organisation ("the WTO"). In the period from 1950 through to 1999, the value of world merchandise exports increased 80 times and the volume of merchandise exports increased 19 times. There was a 60 per cent increase in the value of merchandise exports worldwide during the years 1990 to 1999. From 1948 to 1999, the value of merchandise exports increased from US$58 billion to US$5.47 trillion. Although Australasia's share of world merchandise trade has declined from 3.7 per cent to 1.3 per cent, it can be seen that the overall value and volume of world trade have dramatically increased.[8] Of special importance in this process, is the continuous reduction of trade barriers to allow for the freer flow of world trade which, notwithstanding the current slump, will result in accelerating expansion in the value and volume of international trade. As an example, it is estimated that if the US and Australia enter into the free trade agreement currently being canvassed, both economies could be boosted by a figure in the order of US$2 billion annually.[9]

This acceleration of merchandise trade will increase over the next two decades as a consequence of the multilateral 1995 Uruguay Round Agreements which founded the WTO. We will see the entry of new members to the WTO, whose membership presently numbers 141 countries. One major factor in expansion in Asia will be the admission to the WTO early next year of China with its 1.2 billion population. Other substantial trading nations such as Taiwan, Russia, Vietnam, Cambodia and the independent Central Asian Republics are moving towards membership.[10] The legal systems of some of these countries are undergoing extensive restructuring as they convert to market

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[7] Demonstrations in Genoa, Gothenberg, Washington and Seattle emphasise this division. See the discussion in the comprehensive Supplement to "The Economist", September 29, 2001 "Globalisation and its Critities".

[8] World Trade Organisation, *International Trade Statistics 2000* (WTO Publications: Geneva, 2000) at 28, available at http://www.wto.org/english/res_e/statis_e/stats2000_e.pdf. As at August 2001, the membership of the WTO was 142 nations with 32 observer governments, including China, the Russian Federation, a number of former Central Asian Soviet Republics, Vietnam, Laos and Cambodia. The merchandise figures exclude services and construction. The pace of increase is demonstrated in the following figures. Over the past decade, world trade has grown 2-3 times as fast as world GDP compared with only 1.4 times in the previous two decades. "A Global Game of Dominoes", *The Economist*, 25-31 August 2001 at 23-25.

[9] Pollard, I., and Pollard, J, *Australian Economic Trends*, No 421, The Lumley Group, August 2001, available at http://www.lumley-holdings.co.uk/home.htm.

[10] As observer governments, these nations must decide in the near future whether to join the WTO as full members.

economies. This increase and diversification in trading patterns will inevitably result in new pressures being exerted on those engaged in international shipping. Increased trade contracts will require the maritime community to engage, to a much greater extent, with nations having legal systems different to the common and civil law systems.

Two impacts on present international maritime regimes can be anticipated from this expansion. The first is that, as a result of the increased incidence of contacts, there will be a greater number of disputes and therefore increased involvement with the courts and legal regimes of new WTO members, with the consequent uncertainty this will engender. The second is that there will be an urgent need for the adjustment of maritime law, both private and public, to harmonise it with the legal systems of these trading nations experiencing sudden growth. Newly important centres of trade will emerge over the next decade and this will call for the adaptation of existing international shipping controls to cater for this development.

It is instructive, by way of example, to consider the rise of Shanghai as a financial centre and trading hub. In the May 2001 edition of the publication *Hong Kong Business*, there is an examination of the anticipated trade figures for Shanghai and Hong Kong projected over the next twenty years.[11] Shanghai has rapidly emerged as a major trading port. One quarter of China's foreign trade presently flows through Shanghai and it is now the seventh busiest port in the world. Its foreign trade has expanded by over 20 per cent per year from 1990 to 1999.[12] This expansion of Shanghai as a trading centre operating under a different legal regime to that in Hong Kong, where there is a well-settled body of trade and shipping jurisprudence, will require adjustments by China and its trading partners to ensure co-operation and co-ordination with respect to maritime and trade disputes. This will create new demands for the modification of maritime law. It will be necessary to persuade China to make adjustments to ensure that procedures are in place so that those dealing through Chinese ports can have confidence in a timely and impartial resolution of trade and shipping disputes.

While China, with its foreshadowed entry into the WTO, is the most striking example, there are smaller nations which are expected to experience increased trade in the next decade, such as Vietnam.[13] As a consequence of liberalised trade with the US, Vietnam's trade figures with the US increased from US$935m in 1996 to US$1.16bn in 2000. Between 1994 and 2000, total trade between Vietnam and the US increased by 420 per cent.[14] With a population of over 80 million people, Vietnam's legal system is presently undergoing a transition from being heavily influenced by a Soviet system based on the socialist concept of a centralised socialist economy to becoming a legal system existing alongside an economy more sensitive and attuned to outside influences. Inevitably, the Vietnamese legal system must undergo significant changes in the areas of shipping and commercial law. However, although some modest changes have been made in the areas of bankruptcy and corporate law to date, it may be many years before its legal system accords with the standards currently achieved by the international mercantile community. The objective of the maritime community must be to preserve the harmony and certainty which has been so painstakingly developed thus far and to involve developing countries in the harmonisation process. It is essential to persuade

[11] "Shanghai's Challenge to Hong Kong" (Excerpts from Hong Kong Trade Development Council, *The Two Cities: Shanghai – Hong Kong*, March 2001), *Hong Kong Business*, May 2001, 35-39 at 35.
[12] Ibid at 35-37.
[13] In 1999, Australia ranked third in Vietnam's export markets. Australia ranks fourteenth in Vietnam's Import Source. It can be seen that Australia has an important trading relationship with Vietnam.
[14] US Congress, *US Congressional Report on Trade with Vietnam*, Washington, 23 July 2001 at 107-154.

developing countries that it is in their best interests to cooperate with the international trading community and to actively participate in the formulation of international conventions and standards which accommodate their special needs.

Increase in Convention, Treaties and Model Laws

The maritime community has, of course, successfully directed its efforts towards achieving international co-operation and harmonisation among nations. Some commentators see the regulation of international maritime commerce as providing a prototype for the legal regime which needs to be developed to control the Internet and cyberspace.[15] Of all bodies of law, maritime law is one of the oldest and most international of legal regimes. From earliest times to the present, transport, by sea, has been the way in which most international trade is carried out. Courts which have administered admiralty and maritime law have been pressured by the mercantile community to follow the customs and practice of international merchants in the regulation of their dealings.

International conventions, rules and codes currently in force are concerned with all aspects of admiralty and maritime law. Many of them are outlined by Professor Tetley[16] in a recent article and include numerous conventions, protocols and agreements involving such matters as:

- the carriage of goods and passengers,
- collision,
- limitation of liability,
- salvage,
- maritime liens and mortgages,
- arrest of vessels,
- safety at sea,
- port safety control,
- marine pollution and the environment,
- seafarers,
- the law of the sea, and
- arbitration and procedure

The need to review and harmonise conventions and agreements, model rules and standard documents to cover new developments in maritime transactions has accelerated dramatically over the past twenty years, in response to the commercial pressures underlying the globalisation process.[17] In that brief period there have been over sixty international instruments promulgated or modified. In contrast, by the latter half of the nineteenth century, there were a handful of widespread international arrangements in force in relation to maritime matters. The diversity and complexity of issues to be addressed today require parties to be more resilient to cope with new technology and the global integration of commerce. There must now be even more intense focus on transnational or supranational regulation.

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[15] Ban, K, "Does the Internet Warrant a Twenty-Seventh Amendment to the United States Constitution?" (Spring 1998), 23,3, *The Journal of Corporation Law* 521 at 533-537. A similar comparison was also referred to in "The Internet's New Borders", *The Economist*, 11-17 August 2001 at 9-10.

[16] See Tetley, W, "Uniformity of International Private Maritime Law – the Pros and Cons and Alternatives to International Conventions", (2000) 34 *Tul Mar LJ* 775.

[17] McCormack, H, "Uniformity of Maritime Law History and Perspective from the US Point of View", (1999) 73 *Tul L Rev* 1481.

Maritime Organisations – Education and Guidance

In the past century, international organisations have played the central role in recognising and meeting the need for regulation in maritime law. They have initiated and co-ordinated the move to a uniform body of commercial and maritime law. An outstanding example is UNCITRAL, with its Convention on the International Sale of Goods, Model Laws, Commercial Arbitration, and Electronic Commerce. Similarly, valuable contributions to international commercial transactions have been made by UNIDROIT. We are all familiar with the work sponsored by CMI, UNCTAD and the IMO. The expertise and experience provided under the auspices of these bodies in their specialised areas has been invaluable to the development of international maritime law.

These organisations have achieved realistic and practical solutions. Their work represents the patient co-operation and reconciliation of diverse interests over decades in forging consensus on wide-ranging issues. They are essentially co-operative, advisory and promotional. They cannot serve in any sense as a supra-national legislature imposing controls from above but they achieve results at the horizontal level by formulating new rules and by persuasion and co-operation directed to their adoption. Their output reflects compromises of diverse national and international interests. The challenge which now confronts these organisations is that, with the acceleration of globalisation, more novel problems will arise with greater urgency and complexity and this will demand faster response times and the input of specialised expertise. To meet these demands, procedures need to be streamlined. Lengthy periods of deliberation, as in the past, will be a luxury no longer available.

If we stand back and look at the current state of maritime controls we can readily imagine the uncertainty in maritime transactions if it were not for the work of these bodies. Of course, they have not been entirely successful. There remain large areas of uncertainty which require resolutions. Overall, the organisations have dealt with particular specialised aspects of problems, as they emerge, with expertise and resilience. We may now have reached a stage where the work of these bodies needs to be consolidated and co-ordinated with an aspiration to arriving at a comprehensive and readily accessible body of principles to control maritime and related transactions to which nations are prepared to commit.

Conventions, agreements, rules and model laws formulated under the guidance of these bodies now effectively codify many of the principles of court and merchant made maritime law, just as modern legislation has come to take over the law-making process within nations. Courts in most common law countries are now not equipped and cannot make "the law" in the same sense as they did a century ago. The principles of "equity" are perhaps an exception. Regulatory law on a comprehensive basis is now made by legislatures adopting solutions presented by international bodies. The courts now "develop" the law and direct their efforts towards resolving and complementing legislative anomalies and omissions as they arise in particular circumstances. Within that limited sense, courts can be seen to develop the law. The principles of maritime law are now largely "codified" in the sense that they provide detailed controls in respect of specific matters of concern to international maritime commerce.

Conventions, agreements and model laws will achieve nothing unless State parties are prepared to implement them and this will often involve surrender of sovereignty or national self-interest in the broader interest of achieving uniform and comprehensive international rules. Just as nations have been prepared to assume obligations with respect to refugees, the environment, safety and labour conditions, there is the need for a similar response in relation to the regulation of maritime commerce.

The transition to greater participation by less developed countries in the established maritime community will be difficult and must be encouraged by a free exchange of ideas and guidance and by pro-active measures on the part of members of the established maritime community. Measures must be taken to assist these nations to participate in the cooperative international legal regimes which have been achieved by many decades of adjustment, examination and experience. This will not be an easy task because most developing countries have previously been isolated and inwardly focused, with almost no acquaintance with the international conventions, trade agreements, model laws and approaches to maritime problems which have been embraced by the more developed members of the international community. In an age where national barriers to trade are being dismantled, as a consequence of globalisation, inward focus is a luxury no nation can afford. Engagement in and commitment to the international community is unavoidable. The challenge is how best to encourage this commitment and engagement. The Internet can play a vital role in the educational process, which requires education, guidance and training to develop understanding and involvement in the international maritime community.[18]

A developing nation must see tangible advantages before it is likely to be convinced to assume obligations under the present international maritime regime and surrender its sovereignty. It is the responsibility of the established maritime community to assist developing nations to participate in and contribute to the present regimes. This is a necessity. Excellent work is being carried out under the auspices of the maritime community through the World Maritime University at Malmo, Sweden (founded 1983); the IMO International Maritime Law Institute in Malta (founded 1988) and the International Maritime Academy in Trieste, Italy (founded 1988). These institutions were founded in the last eighteen years. The great universities which specialise in maritime law, such as McGill, Tulane, and Southhampton, also play a most important role.

The immediate need, however, is for a body specifically focused on the provision of practical continuing training and guidance for emerging participants in world trade. It is essential to build on the educational and training experience of existing bodies to establish a systematic and comprehensive learning process to be undertaken by representatives from the developing countries. The goal should be to ensure that maritime law is understood and caters for the needs of these nations and preserves and enhances the uniformity and harmonisation of international maritime law. Given the complexity and diversity of maritime legal regimes, the task will be challenging. However, such a facility is essential.

Technology

Technology, along with social change, drives legal development to a large extent. Generally, legal development lags well behind technology. In the past, legal regimes have had the luxury of time within which to adjust to technological change. What distinguishes this era is the rapidity of technological change and the urgency for legal reform to accommodate its consequences.

At the forefront of the new technology are modern communication systems which draw together a vast amount of information and which enhance the speed and ease with

[18] See the speech of James Wolfensohn, President of the World Bank, "Globalisation and the Poverty Challenge", *The Australian Financial Review*, 3 August 2001 at 72-73, where he refers, at 73, to a "Virtual Colombo Plan" based on education using the Internet.

which such information can be accessed. The world-wide-web and related inter-active technology such as e-mail, chat rooms, bulletin boards and news groups are the primary influences. Communications using these facilities display information in multi-media formats so that photographs, audio and moving images can accompany text.

There is a synergy between the enhancement of communications and the accessibility and development of technology. This is because with the improvement of the technology of communication, there is immediate dissemination of data, ideas and techniques which in turn promotes the development and enhancement of further technology. This has a compounding effect. The better the communications technology, the more quickly people will learn of improvements and it will then be possible to make further enhancements which will again accelerate and reinforce this process. Without modern technology, for example, the human genome project would have been delayed many years.

Information – State of Knowledge

The new communications technology will impact on the standard of care or the state of knowledge by which the existence and breach of legal duties frequently fall to be determined by the courts. One consequence of the Internet is that there is now an abundance of information immediately available in real time as to the latest developments. As soon as material goes onto the Internet, it is immediately accessible by more than 200 million people. This instantaneous universal dissemination of knowledge will impact on issues such as what constitutes breach of duty in actions for negligence or breach of sea worthiness obligations, for example. Central to both those duties is the concept of "state of the art" or knowledge actual or constructive at any particular time.[19]

To take an everyday example, a question may arise in relation to an injured seaman as to whether working conditions were sufficiently safe or whether modifications should have been made to working conditions as a result of current knowledge and information as to possible problems and dangers. In deciding this issue, the state of information available is relevant to the state of an employer's knowledge as to risks. Difficult questions can arise as to constructive knowledge in relation to work risks and the precautions which might have been taken to prevent accidents or as to the adequacy of precautionary procedures.

Another area where state of knowledge could be important is in relation to matters of ship design. Questions as to awareness of dangers in the carriage of hazardous goods may arise in determining the question whether, in particular circumstances, responsibility can be attributed to employers and carriers where material is available on the Internet. The existence and availability of such information will impose an increasingly onerous duty on shipowners and carriers to ensure that conditions are safe for cargo, crew, the environment and the public at large. This, in turn, will entail the examination of questions such as what efforts ought reasonably have been made to become aware of such information.

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[19] The general principle was stated by Rees J in *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* (1971) 1 QB 88 at 109 in relation to an explosion of hazardous chemicals. When speaking of foreseeability, his Honour stated: *"I am satisfied that BDH failed to comply with their duty in two respects: first they failed to provide and maintain a system for carrying out an adequate research into scientific literature to ascertain known hazards; secondly, by Mr Hill and Dr Muir, they failed to carry out an adequate research into the scientific literature available to them in order to discover the industrial hazards of a new or little known chemical."*

Issues can be foreseen in relation to navigation and weather information available on the Internet. There will be circumstances, for example, where it would be negligent not to have obtained the most current information available on the Internet as to wind, weather, and sea conditions, where such information could have been readily obtained. Likewise, in relation to collisions, the availability of accurate current information and technology, if not availed of, may constitute negligence. In a similar vein, failure to have regular regard to communications, such as e-mails, which result in avoidable loss or damage, may constitute a breach of duty. New procedures will need to be implemented to take account of and enable regular access to the ever compounding mass of information. The concept of being aware, having knowledge, or being on notice will assume greater importance as greater amounts of information become available. The duty will be to remain reasonably up to date. The failure to have facilities to enable parties to obtain and analyse and act on relevant information may amount to negligence so that not only the failure to access the information but also the failure to have effective means and procedures in place to obtain the knowledge to make informed decisions may result in legal liability.

Again, it can be envisaged that there may be exposure to liability on the part of bodies and organisations which furnish up to date information as to weather, location, pollution, navigation, shipping traffic and other hazards, in the event that such information is inaccurate. Potential exposure to liability for inaccurate information is greater now, when it is simultaneously broadcast world-wide to reach hundreds of millions of recipients, than when it is broadcast over a geographically limited area to relatively few recipients. These observations apply, of course, not only in the area of shipping law but also to any misleading or fraudulent misstatement. Added exposure to these potential liabilities in turn may lead to restrictions on the availability of information. This would be a backward step.

Novel vulnerability to breaches of information security will arise as the maritime industry becomes more dependent on electronic communication. The most obvious is the risk of loss or disruption which can be caused by "hackers" able to access data banks, records and systems, and either delete or modify the systems, data and programs so that the information is rendered unusable. Privacy can be invaded. Funds can be diverted. This is not fanciful. Destructive viruses can be spread. You will all recollect a few months ago the story of the hacker who generated the so-called "love bug" virus which brought down large sophisticated networks in the US for several days. No-one is immune from this danger. Even Bill Gates had his records invaded while he was at the Davos meeting in Switzerland this year. The liabilities which arise from this exposure and the question of who ultimately bears the risk will raise novel questions as to liability and the measure of damages. It is true that analogous issues concerning the destruction or modification of records, or failure to meet the "state of the art" requirement, have always been with us. However, the scale, speed and unpredictable range of adverse consequences arising from use of new technology make the problems acute. This is because of the seamless inter-weaving of business systems on a global basis involving numerous parties in an electronic age. Where so much is done by pre-programmed automatic electronic response without human monitoring, the potential for massive loss is great. This is especially so in the maritime area where there are usually many parties to a series of integrated transactions.

Another instance of the operation of the Internet arises in the context of discovery of documents. In legal proceedings, pre-action discovery may be sought in order to decide whether to commence proceedings. This can raise an issue of whether "all reasonable

inquiries have been made" before such an application is made. The resolution of this question, in turn, may involve consideration of what was available on the Internet.[20]

The Intersection of Salvage Law and Intellectual Property

The new technology has thrown up some novel legal questions relating to salvage, particularly in relation to "historic" wrecks. This is illustrated by the spate of litigation concerning "the Titanic" in which the prospect of a new form of salvage right was raised by the Federal District Court in the US. The question raised was whether a salvor could exclude third parties from visiting and photographing "the Titanic" wreck site, thereby exercising a right analogous in some respects to a right of intellectual property.

Technology enables entrepreneurs to locate and salvage shipwrecks further offshore and at greater depths than ever before. The new technology includes sophisticated underwater infra-red cameras' magnetometers' sonar scanning of the seabed enabling the mapping of profiles of the deepest sea-beds, diving apparatus, and remotely operated vehicles. Some of this technology was shown in the movie *Titanic*. As a consequence of enhanced capacities to carry out salvage operations, questions which did not arise when salvage laws were developed have now been posed for the courts. In the first case in "the Titanic" litigation, a claim was made by a salvor that it had the exclusive right to photograph and film the shipwreck and exploit those rights. The Titanic was located in 1985 in the Atlantic Ocean, 560 miles off the coast of Newfoundland, at a depth of 2.5 miles. In the Federal Court in Virginia, the salvor contended that it had the right to exclude a competitor salvor from photographing the wreck. At first instance, in 1996, the Federal District Court Judge equated the right to take and market photographs with the right to market artefacts taken from a salvage operation. In relation to the right of the salvor under an earlier order, the Judge said that:

> The Court is of the opinion that the order ... while it did not specifically forbid photographing the wreck or the wreck site by other than [the Salvor] it did express in specific terms the need for [the Salvor] to have jurisdiction over the wreck site. This would include determining who could enter the site for any purpose and who could photograph the ship and the locale.

The Judge also observed:

> Video sales, film documentaries and television broadcasts [are inventive marketing ideas] that [the Salvor] must resort to since it is not selling the artefacts ... it is clear that the presence of another in the market place would diminish the rights the Court has granted [the Salvor] ... allowing another "Salvor" to take photographs of the wreck and wreck site is akin to allowing another Salvor to physically invade the wreck and take artefacts themselves ... Since photographs can be marketed like any other physical artefacts the right to images, photographs, videos and the like belong to the Salvor.[21]

This reasoning proceeds on the basis that in the case of some "historic" wrecks, the only way a salvor may be recompensed could be by the sale of the rights to visit or photograph the wreck. In other cases of wrecks, such as treasure laden Spanish galleons, this is not a problem.

In the second "Titanic" case, in 1998, a similar question arose. The issue there was whether the salvor had the right to exclude from the shipwreck site a deep sea diving company which proposed to take private tourists to the ocean floor in order to view the

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[20] The Federal Court Rules, O 15A r 6(b) provides for preliminary discovery in order to enable a decision to be made as to whether to commence a proceeding after "all reasonable inquiries have been made" prior to making the application.

[21] 9F Supp 2d 624, 1998, 627.

wreck and take photographs. The Judge in that case confirmed the earlier opinion that the taking of photographs was properly to be treated as part of the rights of salvage.[22] On appeal from the 1998 decision, the Circuit Court, taking a more "orthodox" approach, accepted that the right of salvage included the right to exclude others from visiting the wreck but only insofar as such visits could interfere with the salvage operation. The Circuit Court rejected the notion that a right of exclusion could be expanded to include an exclusive right to photograph or record images of the wreck for the purpose of compensating the salvor. The Circuit Court also doubted whether the law of salvage extended to confer on a salvor an exclusive right to record images of property which had not yet been saved.

These questions could not have arisen thirty years ago because the technology for locating, filming or conducting shipwreck tourism to deep seabed sites, such as "the Titanic" site, was simply not available. Although firmly rejected by the Circuit Court, the decision simply shows how a novel question as to the development of the law can be posed. As technological change accelerates, these issues will no doubt be revisited by other courts and may eventually find favour. The "adventurous" view espoused by the trial Judge has already found favour with some academic writers.[23]

Another area impacted by technology concerns electronic data banks and electronic record-keeping. United Nations statistics estimate that about 7 per cent of the value of each consignment in international trade arises from the need to issue, administer and process paper shipping documentation.[24] Increased use of electronic shipping records can result in considerable savings and it has been canvassed extensively over the last fifteen years. Traders and financiers use electronic technology extensively and it is inevitable that, in due course, there will be a total conversion from hard copy documents. The sophisticated technology to do this has only recently become widely available. Although a great deal of work has been done in this area, no satisfactory solution has yet been reached. By "satisfactory", I mean a solution which is acceptable on a wide basis in international maritime trade.

The proposals have many advantages. These are instantaneous communications and carry less likelihood of mutilation, loss or destruction. Use can be made of automatic recording and response techniques to receive information and act on it instantaneously so that changes in ownership and interests in vessels and cargo can be speedily recorded. A number of enterprises already offer the facility of electronic documents. In order to attract widespread usage of electronic bills of lading, the commercial community will need to be assured of their legality and enforceability. At present, there is some scepticism but the position will be assisted by the implementation of model rules or law providing for the use of electronic bills.

One difficulty in relation to the use of electronic documentation in maritime transactions is the number and diversity of commercial interests and contracts involved in a single shipping transaction. There will be contracts of sale, contracts of carriage, financing arrangements with banks from different countries, insurance, carriers and

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[22] 171 F 3d 943, 4th Cir, 24 March 1999, 969-970.

[23] See the comment by Rachel Lin, "Salvage Rights and Intellectual Property: are Copyright and Trademark Rights Included in the Salvage Rights to the R.M.S. Titanic?" (Spring 1999), 23(2) *Tul Mar LJ* 483; Justin S Stern "Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks", (2000), 68 *Fordham L Rev* 2489.

[24] Caplehorn, R, "bolero.net – the Global Electronic Commerce Solution" (November 1999) *Journal of International Banking and Financial Law*, available at http://www.boleroltd.com/news/inthenews/inthenews1999/blank_law.php3.

forwarders contracts, and port and customs authorities requirements, all of which have documentary requirements which need to be coordinated and accurately recorded and assessed.

It makes sense that the electronic transfer of assets should take place in relation to a shipping transaction where electronic transfers can be used to transmit security documents which underlie the transaction. That is why there have been strong efforts made to adopt and enact uniform rules such as the Bolero net project which has entered into an arrangement with "K LINE" and "Cosco" to set up an electronic document system using what is known as the Core Messaging Platform. This is based on users being issued with a private and secure key.

Central Data Banks

Electronic technology opens increased possibilities for centralised, up-to-date record keeping bodies which could give real time information as to the ownership of and interests in vessels and cargo in transit. Such a registry might be established in the near future, on an indicative pilot basis at first, as an aid which could be used to provide an avenue of inquiry as to title and interests in vessels which become the subject of litigation.

Counter Pressures – Values – Environment & Conservation

Countervailing pressures of global values, which demand recognition, act as counters to economic and financial globalisation. A glance at the names of the conventions and draft conventions impacting on maritime activities over the past fifty years identifies some of these values. They concern issues such as liability for oil pollution, dumping of wastes, the prevention of pollution generally, protection against hazardous cargo damage and the welfare and labour conditions of seafarers. These values operate to restrain the economic, corporate and financial pressures driving the elimination of national borders. Their expression has gathered momentum as nations have become aware of global problems such as climate change, transnational pollution of air and water, dumping and the transfer of hazardous waste (including nuclear waste) and the devastation of oil pollution, global terrorism and exploitation of labour in poorer countries. The "value" conventions have also had an effect on the way in which maritime operations are conducted. Most nations are vitally affected by these problems. They transcend national boundaries and their solutions require co-operation.

There are now vociferous international interest groups and organisations, both "official", non-governmental bodies and unofficial groups which demand recognition of their values. They want a say in the making of decisions which, up to now, in their view, have been based primarily on considerations of finance, economic efficiency and the interests of the wealthier nations. The growing impact of these non-economic values is seen in the way in which they have been reflected in decisions of the world-wide organisations principally identified with globalisation. In the maritime area, in particular, it is instructive to look at examples of the ways in which these values have found expression.

(i) Environment

It has become evident from recent decisions of the WTO Dispute Settlement Body that the WTO, in making determinations on trade disputes, is prepared to take account of factors which extend beyond economic imperatives.

An example of a recent WTO decision applying this approach concerned a requirement of the US that fish could not be exported to the US unless the fishing was carried out in a way that took account of the need to protect endangered sea turtles. The US required that fish be caught using a particular device known as a turtle excluder device ("TED"). Several fish exporting nations, including Thailand, contended that the US was not entitled to impose such a condition on importation. The WTO decision accepted that while it was proper to take account of the need to protect endangered sea turtles, the US requirements as to the form of the particular device stipulated was too specific. What is important about the decision is that the WTO took account of conservation considerations in resolving a trade dispute. This case, in principle, was a marked victory for the US conservationists.

The sea turtle case is an interesting example of the way in which one country can "export" its conservationist values to bring about changes in the way fishing is carried out. As a consequence of the US stance, fishermen in Thailand were required to modify fishing practices to conform with the objectives of the US policy.

By parity of reasoning, one can anticipate recognition, in principle, of controls aimed at prohibiting imports of artefacts produced by the exploitation of child labour, or unsafe practices, or products involving the destruction of endangered species or timber logged from virgin rain forest. The value conflict is stark. The exporting interests say there should be no trade barriers because they are economically inefficient and discourage investment. The conservationists say that conservation, environmental and labour values must be recognised and protected. The dilemma is, as always, where to draw the line. One significant outcome over the past five years is that, even within the WTO, seen in some areas as a prime mover in the globalisation process, recognition is given to values other than pure economic efficiency.

(ii) Cultural heritage

Salvage operations in recent years have raised important questions relating to the preservation of the world-wide cultural value of shipwrecks. There is now widespread recognition of the need to protect wrecks as part of the world's cultural heritage. In the July edition of *National Geographic*, there was a map showing the nature and extent of many historical wrecks throughout the world.

As a consequence of these conservation values, UNESCO formulated, in 1998, a draft Convention on the Protection of the Underwater Cultural Heritage. This is directed particularly at historic wrecks which lie in both national and international waters. The expression "Underwater Cultural Heritage" refers to all traces of human existence which has been underwater for at least 100 years.

The draft Convention acknowledges the need to preserve these heritage items as part of the history of nations and expresses the need to conform to principles of sound maritime archaeology. The preamble refers to the increasing commercialisation of efforts to recover these items and to the availability of advanced technologies to locate, view and access wrecks. The draft is concerned with the need for protection against unsupervised excavation and the destruction of the environment surrounding the sites, with the consequential loss of historic and scientific value. It requires States to regulate activities affecting sites in their internal waters, their territorial seas, and other areas over which they have jurisdiction. States must require the notification of discoveries of such sites in their exclusive economic zone or on their continental shelf. They must not allow the use of their territory in support of any activity adversely affecting sites and they must ensure nationals and vessels flying their flags do not adversely affect sites in

the high seas. Parties are obliged to impose sanctions including seizure and criminal prosecution on the importation of items from such sites where the sites have been excavated or items retrieved in a manner not in conformity with the requirements of the Convention.

The draft Convention has given rise to considerable controversy. Notwithstanding this controversy, the important consideration is that the value of these sites and the dangers of uncontrolled exploitation have been recognised as requiring global protection. It is significant that progress has been made to a stage where there is now a concrete proposal formulated by a leading international body which focuses on and potentially gives effect to these values. The draft is an example of a situation where areas in the high seas, outside the control of any individual state, must be controlled in the interests of implementing widely held values of conservation.

Comity – The Need For Consultation

Recent litigation concerning Yahoo Inc. in the French and Californian courts illustrates the acute conflict that can arise from the borderless nature of Internet technology. Greatly simplifying the matter, a French Court, on 20 November 2000, at the request of a French Jewish student group, ordered Yahoo Inc. to prevent any visit through its Internet site to auction sales which offered Nazi insignia and memorabilia. The Court assumed jurisdiction on the simple basis that the page could be accessed in France. Yahoo Inc contended that it was not possible to prevent visits to the site on the basis of national frontiers. Yahoo Inc operates in the US. Cyberspace, it argued, is borderless. It said that the French Court had no jurisdiction and that the order was contrary to the guarantee of free speech in the US Constitution. Nevertheless, the French Court, after considering expert evidence, rejected those submissions, made the order and required it be implemented within three months. Failure to comply attracts a fine of US$13,000 per day. Yahoo Inc, in mid-December 2000, commenced litigation in California and pressed the submission that the French orders to prevent publication in the US were not enforceable as a consequence of the First Amendment guarantee of free speech. The Californian case has not yet been decided. This conflict raised in the Californian Court illustrates the need for urgent international regulation in the interests of commercial certainty in the novel situation presented by use of the Internet. The clash of national values raised in this case, namely the extent to which free speech should be protected as against racial hatred, is one of a myriad of legal problems generated by use of the world-wide web. Numerous other problems involving issues of jurisdiction, choice of law, misrepresentation, fraud, defamation and contract continue to come before the national courts. A proper resolution of these issues requires a global approach.[25]

The determination of complex transnational questions by each nation attempting to protect communications within its own territory is unsatisfactory. The use of the world-wide-web impacts on the different values of many nations. Confrontations such as that manifested in Yahoo Inc undermine confidence in the courts. There is an immediate need for a comprehensive regulation of cyberspace. Courts have only begun to touch on these problems but, increasingly, they will be called upon to adopt a more international perspective.

Some courts have shown admirable vision in having regard to the importance of looking beyond national interests in reaching a decision. Earlier, I referred to the New

[25] See the note by Ryszard Piotrowicz, "Yahoo! – But No Hooray! for the International Online Community" (July 2001) 75 *ALJ* 411.

Zealand decision in the *"Cornelis Verolme"* where Williams J took account, in his decision to release a vessel from arrest, of the administrative complications in an international insolvency. Another instance, again in the same Court, of the adoption of an international perspective, is the decision in *Attorney General v Mobil NZ Ltd*, a decision of Heron J.[26] In that case, his Honour, contrary to the submissions of the New Zealand Government, granted a stay of proceedings in favour of Mobil. The effect of the stay was that the dispute was referred, in accordance with the agreement between the parties, to arbitration by the International Centre for Settlement of Investment Disputes ("ICSID") in Washington. Strong concern was expressed by the Crown that competition issues arising under New Zealand legislation should not be determined or could not be determined by foreign arbitration. While his Honour described as formidable the objections to the Washington Centre assuming jurisdiction, he nevertheless granted the stay. In so doing, his Honour quoted the US Supreme Court in *Scherk v Alberto-Culver Co*,[27] where it said that:

> A contractual provision specifying in advance the forum in which a dispute shall be litigated and the law to be applied is ... an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

His Honour then continued:

> Such expressions are of course expressions of United States judicial policy towards international investments and contracts. I think such principles are appropriate even in this small country as international trade and commercial relationships are of critical importance. In holding the Crown to its agreement I see no reason for departing from those principles of international commercial comity, and in my view they accurately reflect the attitude that New Zealand Courts should take notice of international arbitration provisions of this kind. [28]

This judgment, like that in the *"Cornelis Verolme"*, reflects a court attuned to the need of the international community to have uniform administration, determinations, and certainty of outcome. The decision in *Mobil* is particularly significant because the Court decision was exercised against the submissions of the New Zealand Government in relation to an agreement which was of major concern to the Government.

The principles of comity between courts in different countries will assume greater importance in this twenty-first century. That principle is an old one and has been succinctly expressed by the US Supreme Court in *Hilton v Guyot*, as follows:

> ... recognition which one nation allows within its territory to the legislative executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[29]

Comity is sometimes referred to as passive or active. Passive comity is where a court in one country pays regard to the impact of its decision within another country as in the *Hilton* case. Active comity is where one court or body takes a pro-active role and seeks to obtain assistance from the other body, as in the case, for example, of s 29 of the *Australian Bankruptcy Act* 1966 (Cth) which provides for requests to be made for assistance between countries to assist in the exercise of bankruptcy administration.[30]

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[26] (1989) 2 NZLR 649.
[27] 417 US 506 (1974), 516.
[28] (1989) 2 NZLR at 668.
[29] 159 US 113 (1895).
[30] See the discussion in *Re Lyons* (2000) 104 FCR 486.

If we are to avoid the sterile transnational conflicts between courts that we see reflected in many anti-suit injunction proceedings, then this principle will need to be given more weight and applied more often than it has been in the past. It will come into sharper focus in a world moving towards greater integration where courts must, necessarily in the absence of any supra-national law, be prepared to co-operate in reconciling competing interests.

Another example of outward focus is the judgment of Samuels JA in *J Gadsden Pty Ltd v Australian Coastal Shipping Commission*,[31] where his Honour had to consider what was meant by the expression "the ship" in Article III Rule 6 of the Hague Rules. His Honour said:

> The reason for the use of the words 'carrier' and 'ship' in the various collocations to which I have referred was no doubt to make it clear that the various immunities were available not only in an action in personam against the carrier, but also in an action in rem against the ship. This construction accommodates the characteristics of the action in rem in English and American jurisprudence, and those elements of continental systems, e.g. of France, Germany, Italy, The Netherlands and Sweden, which permit the arrest of a ship in order to provide security for a claim against the owner.
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> I think it impossible, therefore, to extend the meaning of the word 'ship' in Art. III, r. 6 to include those interested in the vessel, and entitled to come in and defend an action in rem. The more restricted meaning fits the terms of that rule, and the intention to be inferred from the general subject matter and language of the rules as a whole. ...[32]

I have referred to these judgments because they illustrate the way in which courts have focused on consequences beyond national borders in a world where transactions are integrated as a consequence of the dynamics of trade and technology.

Courts Harnessing Technology

There is pressure on the courts to adapt to modern technology and this process is under way. But there is still much to be done in the area of record management and the integration of electronic resources.

In the Federal Court, for more than six years now, directions hearings and trials have been heard using video-conferencing. This technique has been used in relation to appeals. The technology has been extensively used in circumstances where Judges, witnesses and counsel are in different parts of Australia or where overseas witnesses, or witnesses in ill-health, are required to give evidence. Extensive cross-examinations have been conducted using this facility. Over the year ended 30 June 2000, video hearings across the Court have occupied approximately 152 hours on 146 occasions.[33] The latest figures for several months of the current year indicate an increase in the rate of usage. The facility has been particularly useful in shipping cases where often the sums involved cannot justify the expense necessary to have witnesses brought to Australia or to have Judges and lawyers take evidence on commission overseas.

Another initiative which the Federal Court has recently introduced is a system of electronic filing whereby the initiating process and interlocutory motions can be filed,

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[31] (1977) 1 NSWLR 575.

[32] Ibid at 585-6.

[33] These figures represent a great saving in time, expense and convenience. Without this technology, evidence in some cases, for example, where witnesses are ill, aged or infirm, could not have been satisfactorily presented to the Court or tested.

signed and authenticated electronically. This facility is especially useful for country practitioners and their clients. It will reduce the expense involved in attending court and lodging documents. The system has a high standard of security and is presently under trial. This facility can be accessed via the Federal Court home page.

A recent facility, which is at the pilot stage in the Federal Court, is the e-Court forum which uses Internet technology, via the Court's web site, to handle directions hearings. E-Court has been used to resolve interlocutory disputes concerning pleadings, particulars, notices to admit, discovery, privilege claims and the like. This facility avoids the necessity to attend court on routine matters and can be accessed at any time by the parties or their advisers. It is suitable for the resolution of disputes where there are no contested questions of fact. It is intended that, subject to questions of privilege and confidentiality, all the exchanges using the e-Court forum will be available to the public just as if the procedures had taken place in open court. Submissions can be made in the form of attachments to e-mails and directions can be given by return e-mail. The advantages of this virtual court include the ability of litigants and the Court to access the Court at any time and the creation of a comprehensive electronic record of the progress of the matter. For example, a Judge sitting in Western Australia can make directions involving parties in Sydney without the necessity of having a video conference, a telephone hook-up or attending court. The protocol which applies to the e-Court forum is that the parties are to proceed as if they were in a physical court room.

One further proposal which the Federal Court is presently pursuing is the publication via the Courts Internet web site of a list of caveats lodged with the Court in relation to the arrest and release of vessels. Although at this stage it will be indicative only, this proposal will provide an opportunity for practitioners and clients to access at any time the site to check the existence of caveats. In due course, it is anticipated that the Register itself will be available electronically for lodgement, recording and inspection. This will be especially useful for those wishing to access the Register outside normal court hours.

The measures outlined above are consequences of new technology and requirements imposed by the electronic age where the "tyranny of distance" is truly removed and communications in the court room context can take place in the same way as they occur in modern commercial practice.

Conclusion

The forces driving globalisation cannot be stopped. They may to some extent be channelled and tempered by factors other than commercial and economic considerations and they must be. International consensus has been reached in many areas and this has impacted on the harsh reality of economic globalisation. Considerable vigilance is required in reconciling global values with pure economic interests. Difficult questions arise as to how conflicting interests can be accommodated. The maritime community, in particular, because of the acceleration of trade, will need to address the problems immediately. It is of fundamental importance to educate, induce and persuade newly active trading nations to participate and assist in the development of international maritime law designed to meet these emerging issues. Inevitably, the courts of all nations which apply maritime law will be forced to adopt a more international perspective.