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Transportation, Cooperation and Harmonization: GATS as a Gateway to Integrating the UN Seaborne Cargo Regimes into the WTO

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TRANSPORTATION, COOPERATION AND HARMONIZATION: GATS AS A GATEWAY TO INTEGRATING THE UN SEABORNE CARGO REGIMES INTO THE WTO

Lijun Zhao*

ABSTRACT

This paper seeks to analyze how the World Trade Organization (WTO) may cooperate with the United Nations (UN) to unify sea-borne cargo regimes. Beginning with the current dilemma of uniform maritime transport regime, the paper explores the relationship between the UN and the WTO. In light of the successful precedent of the incorporation of the UN intellectual property regime into the WTO, this paper probes into the feasibility that the UN and the WTO may interactively unify a maritime transport regime by reference to selected previous treaties, which include UN-administrated treaties. This paper argues the WTO-based sea transport negotiations do not start from a zero basis so that it can be traced backwards to negotiating the General Agreement on Trade in Services (GATS). Having scrutinized the progress and regress in the negotiations so far under the WTO framework, this paper stresses the potential role of an annex on sea transport to the GATS so as to address the issue of harmonization.

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I. INTRODUCTION

Maritime transport is a significant facilitator of world trade with approximately four-fifths of goods (by volume) being carried by sea and is an important service sector that makes significant contributions to some national Gross Domestic Products (GDP).¹ Concerning the harmonization of the maritime transport regime, the literature is unevenly focused on the United Nations (UN) and the world trading system (including the predecessor General Agreement on Tariffs and Trade (GATT)² system and the current World Trade Organization (WTO)³ system.⁴ Traditionally, the harmonization of the maritime transport regimes have been negotiated under the UN,

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¹ Special Session of the Council for Trade in Services, Communication from Australia, Canada, Chile, the People's Republic of China, Croatia, Cyprus, Czech Republic, Dominican Republic, Estonia, The European Communities and their Member States, Gambia, Georgia, Guatemala, Hong Kong, China, Iceland, India, Japan, The Republic of Korea, Kyrgyz Republic, Latvia, Lithuania, Malaysia, Malta, Mexico, New Zealand, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Peru, Poland, Romania, Singapore, Slovenia, Switzerland, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, TN/S/W/11, at 1 (March 3, 2003).

² General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm [hereinafter GATT]; *see generally* The GATT Years: From Havana to Marrakesh, WTO (2013), http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (GATT, which was replaced by the WTO in 1995, was a provisional agreement that entered into force in January 1948 and was designed to be terminated by the treaty creating the International Trade Organization (ITO). However, the ITO had not come into force, so the GATT was continued and integrated into the WTO in 1995).

³ *See generally* GATT, *supra* note 2 (The GATT system was incorporated into the WTO system in 1995. The GATT has two meanings: first it was a provisional agreement (GATT 1947) that entered into force in January 1948; second, the GATT was a predecessor (machinery) which was imparted into the WTO system in 1995).

⁴ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement], *available at* http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

but the UN framework has demonstrated shortcomings in fulfilling this task. Although the UN endeavors to foster a uniform regime by drafting the Rotterdam Rules,⁵ it will not easily replace the earlier effective conventions of The Hague,⁶ Visby,⁷ and Hamburg⁸ Rules to form a uniform regime worldwide.⁹ Moreover, the UN system of enforcement does not have the administrative framework at the international level to safeguard the application of these seaborne cargo conventions.¹⁰

Enormous emphasis has been placed on analyzing UN treaties;¹¹ little scholarship, however, has been devoted to the harmonization of the maritime transport regime under the WTO.¹² Moreover, there has been no literature looking at the WTO's capacity to address issues of harmonizing sea transport.

Due to wide participation and a center-administrated implementation system, the WTO can make up these two pitfalls of the current UN approach to harmonization – restricted scope of coverage and the lack of central administration in implementation. The aim of this paper is to refocus on the WTO. The paper will examine the feasibility of harmonizing international sea transport regimes through cooperation between the UN and the WTO in the following three sections:

Section II will briefly compare and contrast the UN system

⁵ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, G.A. Res. 63/122, U.N. Doc. A/RES/63/122 (Dec. 11, 2008) [hereinafter Rotterdam Rules].

⁶ Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155 [hereinafter Hague Rules].

⁷ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1412 U.N.T.S. 121 [hereinafter Visby Rules].

⁸ United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3 [hereinafter Hamburg Rules].

⁹ See, e.g., Anthony Diamond, *The Rotterdam Rules*, LLOYD'S MAR. AND COMMERCIAL LAW QUARTERLY 445, 535 (2009).

¹⁰ Pascal Lamy, *The Place of the WTO and its Law in the International Legal Order*, 17 EUR. J. INT'L L. 969, 982 (2006).

¹¹ See Comité Maritime International, *Bibliography on the Rotterdam Rules* (2013); e.g. Anthony Diamond, *The Rotterdam Rules*, Lloyd's Maritime and Commercial Law Quarterly 445–536 (2009).

¹² See generally Benjamin Parameswaran, *The Liberalization of Maritime Transport Services: With Special Reference to the WTO/GATS Framework* (2004); J. Michael Taylor, *Evaluating the Continuing GATS Negotiations Concerning International Maritime Transport Services*, 27 Tul. Mar. L. J. 129-95 (2002).

and the world trading system from the perspective of sea cargo transport.

Section III will demonstrate the feasibility of the harmonization of the sea transport regime under the WTO without prejudice to the UN's respective conventions. The WTO has successfully harmonized the intellectual property (IP) regime that is similar to sea transport law,¹³ as they have five aspects in common.¹⁴ Thus, a successful precedent from the "Trade-Related Aspects of Intellectual Property Agreement" (TRIPS)¹⁵ sheds light on the unification of sea transport law under the world trading system.¹⁶ Accordingly, an approach of selective reference, in which the WTO cooperates with the UN and unifies the IP regime, will fulfill the task of harmonizing maritime transport law.

With respect to the historical connection between the WTO and sea transport, Section IV will argue that the maritime transport negotiations at the WTO negotiating forum does not start from a zero basis. Section IV will further evaluate the history of WTO maritime transport related negotiations under the "General Agreement on Trade in Services" (GATS),¹⁷ produce progress upon which further negotiations can be built on, and identify setbacks that was problematic and that needed to be amended in further negotiations.¹⁸

¹³ Sea transport conventions and the intellectual property rights conventions are under the UN administration. *See, e.g.*, Visby Rules, *supra* note 7; *see also* TRIPS Agreement, *infra* note 15.

¹⁴ *See infra* Part III. IP in the section Cooperation between the WTO and the UN.

¹⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS], *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

¹⁶ *See infra* Part III.

¹⁷ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1 B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS], *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

¹⁸ *See infra* Part IV; *see also* Special Session of the Council for Trade in Services, Decision on Maritime Transport Services, S/L/94 at 1 (July 3, 1996) (providing the suspension and resumption of the negotiations on maritime transport services).

II. COMPARISON OF TWO APPROACHES TO UNIFY TRANSPORT LAW: THE WTO AND THE UN

A. Multi-Forums of Shipping Related Negotiations and the Need to Harmonize

Although they are two independent organizations, the WTO and the UN actively connect to each other. The emergence of the world trading system¹⁹ can be traced back to 1947.²⁰ In that year, the UN's Conference of Trade and Employment adopted the Havana Charter for the International Trade Organization (ITO)²¹ that aimed to establish a multilateral trade organization.²² Although the ITO never came into force, the Havana Charter was partially integrated into the WTO.²³

Furthermore, the cooperation between the two organizations is deeply rooted in the WTO agreements. In general, the legal basis of the WTO-UN relation is governed by the "Arrangements for Effective Cooperation with Other Intergovernmental Organizations-Relations between the WTO and the UN."²⁴ Additionally, the GATS and GATT, two cardinal components of the WTO Agreements, specify collaborative relationships with other international organizations,²⁵ which provide

¹⁹ For a summary of the function and history of the GATT, see John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* 15-35 (1998) (discussing the strengths and limitations of the WTO and how it will need to adapt to meet new demands from the perspectives of the constitutional structure and dispute settlement procedures); see also John H. Jackson, *The Jurisprudence of GATT & The WTO: Insights on Treaty Law and Economic Relations* 408-10 (2000).

²⁰ See United Nations Conference on Trade and Employment, Havana, Cuba, Nov. 21, 1947- Mar. 24, 1948, Final Act of the United Nations Conference on Trade and Employment, U.N. Doc. E/Conf.2/78 (1948) [hereinafter *Havana Charter*], available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

²¹ *Id.*

²² *Id.*

²³ Compare *id.* with GATT, *supra* note 2. (The chapter on Commercial Policy within the Havana Charter was integrated into the GATT (1948) system).

²⁴ Arrangements for Effective Cooperation with Other Intergovernmental Organizations-Relations between the WTO and the United Nations, available at http://www.wto.org/english/thewto_e/coher_e/wto_un_e.htm, (governing the WTO-UN relation, which was signed on 15 November 1995 in the same year as the WTO established).

²⁵ See GATS, *supra* note 17, art. XXVI (providing "The General Council

the legal basis for the cooperation with the UN and its specialized agencies on shipping.

In considering the multi-forum maritime transport, it is worthwhile to boost further cooperation. There are a number of UN specialized agencies handling shipping issues.²⁶ The United Nations Conference on Trade and Development (UNCTAD),²⁷ Organization for Economic Co-operation and Development (OECD),²⁸ and United Nations Economic and Social Council (ECOSOC)²⁹ have published statistical data on the shipping industry for years.³⁰ These are considerable resources of background information for further GATS-based maritime transport negotiations. For example, UNCTAD has published *"The Review of Maritime Transport"* yearly since 1968.³¹ Moreover, the International Labour Organization (ILO), the United Nations Commission on International Trade Law (UNCITRAL),³² and the International Maritime Organization

shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other inter-governmental organizations concerned with services."); *see also* GATT, *supra* note 2, art. XXXVI(7) (stating "There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries.").

²⁶ *See e.g.* United Nations Conference on Trade and Development, Geneva, Switz., Mar. 23-Jun. 16, 1964: Final Act and Report, U.N. Doc. E/CONF.46/141, Vol. I (1964) [hereinafter UNCTAD]; *see generally* Organization for Economic Cooperation and Development, *available at* <http://www.oecd.org>. (China is not an OECD country); United Nations, Econ. & Soc. Council, U.N. Doc. E/1849/Add.1 (1950) [hereinafter ECOSOC]. (These entities have different legal basis, governance structures, funding, mandates and scopes.).

²⁷ *See* UNCTAD, *supra* note 26.

²⁸ *See* OECD, *supra* note 26.

²⁹ *See* ECOSOC, *supra* note 26.

³⁰ *See, e.g.*, REVIEW OF MAR. TRANSPORT (SERIES) (2013), *available at* <http://unctad.org/en/Pages/Publications/Review-of-Maritime-Transport-%28Series%29.aspx> (UNCTAD has been publishing Maritime Transport Review since 1968. The maritime related statistical data are also published in the OECD website).

³¹ *Id.*

³² Establishment of the United Nations Commission on International Trade Law, G.A. Res. 2205 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6594 (Dec. 17, 1966) [hereinafter UNCITRAL]; International Transport of Goods, UNCITRAL, (2013), http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods.html.

(IMO)³³ deal with various aspects of shipping, for example, seamen,³⁴ the international sea cargo regime,³⁵ and international sale of goods.³⁶ Amongst these specialized agencies, the Working Group III (on transport law) of UNCITRAL mainly works on the harmonization of the sea cargo regime³⁷ with the assistance of a private international organization - the Committee Maritime International (CMI).³⁸

On the other hand, the WTO possesses two advantages over other forums on reinforcing harmonization of shipping regimes.³⁹ This study focuses on the sea cargo regime and UNCITRAL, but the proposed way of cooperation in this paper might be extended to other respective shipping areas. First, the nature of legal documents administered by UNCITRAL and by the WTO is dramatically distinct. Most WTO agreements (including the GATS and TRIPS) are multilateral and legally binding for all members,⁴⁰ but the UNCITRAL-administrated conventions can be regarded as plurilateral agreements.⁴¹ Unlike multilateral agreements, the category of plurilateral agreements is optionally applicable to UNCITRAL negotiating

³³ Convention on the International Maritime Organization, Geneva, Switz., Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 48 (1948) [hereinafter IMO].

³⁴ See *id.*

³⁵ See UNCITRAL, *supra* note 32; see Rotterdam Rules, *supra* note 5; see Hamburg Rules, *supra* note 8.

³⁶ See *International Sale of Goods (CISG) & Related Transactions*, UNCITRAL (2013), http://www.uncitral.org/uncitral/uncitral_texts/sale_goods.html.

³⁷ See *International Transport of Goods*, *supra* note 32.

³⁸ See *CMI History*, COMITÉ MARITIME INTERNATIONAL (2010), <http://www.comitemaritime.org/Home/0,271,1132,00.html> (stating that CMI was established in 1897 before the UN); F.L. Wiswall, *A Brief History*, COMITÉ MAR. INT'L, <http://www.comitemaritime.org/A-Brief-History/0,27139,113932,00.html> (2010) (The CMI drafted the Rotterdam Rules for the UNCITRAL Working Group III).

³⁹ This study focuses on the sea cargo regime and UNCITRAL, but the cooperation might be extended to other shipping areas.

⁴⁰ See John H. Jackson, *The World trading system - Law and Policy of International Economic Relations* 47-48 (MIT, 1997).

⁴¹ Jerome H. Reichman, *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement*, in *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT* 23, 29 & n.39 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2d ed. 2008) (discussing the difference between plurilateral and multilateral agreements. The term "plurilateral agreement" is used in the WTO. Unlike a multilateral agreement, a plurilateral agreement implies that WTO members would be given the choice to agree to new rules on a voluntary basis.).

countries on a voluntary basis, and is only binding for those members who ratify the treaties.⁴² Moreover, UNCITRAL has also adopted additional legislative techniques in modernizing and harmonizing the law of international trade.⁴³ Several different types of legislative texts are used on the basis of its mandate, including conventions, model laws, legislative guides and model provisions.⁴⁴ Among these legislative texts, only the conventions are binding.⁴⁵ As the maritime transport regimes, The Hague,⁴⁶ Visby,⁴⁷ Hamburg⁴⁸ and Rotterdam Rules⁴⁹ do not automatically apply to their negotiating countries, and their applications rely on ratifications.⁵⁰

In contrast, the second category of multilateral treaties consists of agreements that are compulsorily binding on all members, and WTO agreements mainly belong to this category.⁵¹ Thus, a WTO-based maritime transport regime is legally binding and likely to be applicable to all WTO Members.⁵² Due

⁴² *Id.*; see also United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008), UNCITRAL (2013), http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html (displaying the status and numbers of ratifications of the Rotterdam Rules.).

⁴³ See U.N. Secretary-General, *Question of Coordination: Direction of the Work of the Commission*, ¶¶ 99-122, U.N. Doc. A/CN.9/203 (May 13, 1981); see also U.N. Secretariat, *Alternative Methods for the Final Adoption of Conventions Emanating from the Work of the Commission*, Note by the Secretariat, U.N. Doc. A/CN.9/204 (May 21, 1981).

⁴⁴ See *A Guide to UNCITRAL*, UNCITRAL (2013), <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>.

⁴⁵ *Id.* at 13. (“To become a party to a convention, States are required formally to deposit a binding instrument of ratification or accession with the depositary (for conventions prepared by UNCITRAL, the Secretary - General of the United Nations)”).

⁴⁶ See MICHAEL F. STURLEY, *THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE TRAVAUX PRÉPARATOIRES OF THE HAGUE RULES* (1990) (discussing the adoption of the Hague Rules).

⁴⁷ See Allan I. Mendelsohn, *Why The U.S. Did Not Ratify The Visby Amendments*, 23 J. MAR. L. & COM. 29 (1992) (discussing the refusal of adoption of the Visby Rules).

⁴⁸ See Hamburg Rules, *supra* note 8.

⁴⁹ See Rotterdam Rules, *supra* note 5.

⁵⁰ See Rotterdam Rules, *supra* note 5; see Hague Rules, *supra* note 6; see Visby Rules, *supra* note 7, See Hamburg Rules, *supra* note 8.

⁵¹ Reichman, *supra* note 41, at 46.

⁵² See *Members and Observers*, WTO (Apr. 26, 2015),

to all WTO Agreements being a single package,⁵³ both substantive norms within the GATS and its procedural enforcement system will apply to all Members. The nature of a WTO-administrated maritime transport annex is if a uniform sea cargo regime is part of the annex, it is a multilateral agreement and is significantly different from The Hague, Visby, Hamburg, and Rotterdam Rules.⁵⁴

The WTO has built up the widest coverage of Members and application of scope.⁵⁵ Governing over 161 Members, the WTO engages in over 90 percent of all international trade in goods and services.⁵⁶ It is comprehensive in the composition of its membership, including all developed countries and almost all developing countries.⁵⁷ There are few other legal frameworks that are better at promoting the multilateral negotiations on the trade of goods and related maritime transport services. The WTO framework covers the broadest spectrum of Members and almost all stages of development of economic entities from developed nations to less developed countries.⁵⁸ Therefore, a WTO-based maritime transport agreement will likely become binding for all WTO Members globally.⁵⁹

Due to its minimal political image, the WTO has earned great prestige over the developing world.⁶⁰ In order to establish the WTO as a unified institution under the WTO Agreements, there were a variety of clearly unanswered issues after the conclusion of the Uruguay Round of negotiations.⁶¹ These issues entailed further negotiations on services⁶² and greater integra-

http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (Stating that there have been 161 WTO members).

⁵³ Jackson, *supra* note 40, at 47.

⁵⁴ See Rotterdam Rules, *supra* note 5; see Hague Rules, *supra* note 6; see Visby Rules, *supra* note 7; see Hamburg Rules, *supra* note 8.

⁵⁵ GATS - Fact and Fiction, WTO, at 2 (2001)

http://www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf.

⁵⁶ See *Members and Observers*, *supra* note 52.

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See JACKSON *supra* note 40; see Reichman *supra* note 41 (It is the nature of multilateral agreements.)

⁶⁰ J. Michael Taylor, *Evaluating the Continuing GATS Negotiations Concerning International Maritime Transport Services*, 27 TUL. MAR. L.J. 129, 180-81 (2002).

⁶¹ JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 40 (1998).

⁶² See *id.*

tion of developing countries,⁶³ as well as monitoring of the WTO rules to ensure fair treatment of these countries⁶⁴ the problem of integrating the “economies in transition” into the WTO system,⁶⁵ and facing up to the problem of “state trading” entities.⁶⁶

B. Harmonization: WTO's Liberalization and UN's Unification

Both the UN and the WTO aim at the harmonization of the maritime transport regime, but each does so with different focuses. The UN stresses the unification of the sea cargo regime.⁶⁷ As seen from the full name of the Hague Rules,⁶⁸ the UN harmonization is targeted at establishing and updating universal rules for a wide range of countries. The WTO emphasizes Members' deeper commitment in existing sectors to achieve further liberalization.⁶⁹ Meanwhile, the WTO does not intervene in its Members' regulatory autonomy over quality control of services supplied and the standardization of the service regulation worldwide.⁷⁰ Both the WTO and the UN try to adjust diverse levels of domestic regulations to universal levels set by them. The UN's unification and the WTO's harmonization are both targeted towards global application and the level of standardization affects whether the scope of application could become global or not.⁷¹ Therefore, the harmonization of

⁶³ See *id.* at 41.

⁶⁴ See *Who are the Developing Countries in the WTO?*, WTO (2013), http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm; see also Least-developed Countries, WTO (2013), http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (discussing developing countries and less developed countries in WTO; Contrasted with some other service sectors, the developed countries usually have less control on shipping sector than do the developed world.).

⁶⁵ See JACKSON, *supra* note 61 at 41.

⁶⁶ See *id.*

⁶⁷ From the full name of the Hamburg and Rotterdam Rules, which are negotiated under the UN.

⁶⁸ The “Hague Rules” stands for the “International Convention for the Unification of Certain Rules of Law relating to Bills of Lading”; see Hague Rules, *supra* note 6.

⁶⁹ See GATS *supra* note 17 pmbl.

⁷⁰ Marion Panizzon, Nicole Pohl and Pierre Sauvé, GATS and the Regulation of International Trade in Services: World Trade Forum, at 3, 5-6, (2008).

⁷¹ See Rotterdam Rules, *supra* note 5; see Hague Rules, *supra* note 6; see Visby Rules, *supra* note 7; see Hamburg Rules, *supra* note 8 (showing the status of the Hamburg and Rotterdam Rules, in comparison with the numbers of

the UN and of the WTO faces a question: which levels of the standardization should be imposed on the UN's unification and the WTO's liberalization? In general, the standard of unification on limiting freedom of contract should be relatively low; in contrast, the standard of the WTO's liberalization seems to be higher.⁷²

Nonetheless, the standardization is harmonized at different levels under unification and liberalization. The level of unification of the different cargo regimes is balanced between low and high levels and regards the scope of application and liability. Additionally, the level for liberalization sets the standard at a relatively high level requiring removing unnecessary regulations, but the high standards are achievable through progressive liberalization.⁷³ Moreover, both targets of liberalization and unification can be achieved under the WTO framework. According to GATS Preamble, the WTO's liberalization of shipping markets can be achieved without prejudice to UN's unification of the sea cargo regime.⁷⁴ In practice, TRIPS proves that the WTO is capable of unifying different domestic regulations and liberalizing markets in one go.

III. COOPERATION BETWEEN THE WTO AND THE UN: FROM INTELLECTUAL PROPERTY TO TRANSPORTATION

The WTO is setting a creative precedent to include IP regimes into the world trading system through TRIPS.⁷⁵ This precedent opens a door for individuals' private rights to be merged into the WTO system. Taking into account the four aspects that IP shares with maritime transport, it is feasible to include maritime transport in the TRIPS's counterpart GATS. First, TRIPS and the GATS are Annexes 1B and 1C at the same level of the pyramid of the WTO Agreements.⁷⁶ Second,

ratifications. It shows that the increasing number of articles tends to cause the decreasing number of ratifications.).

⁷² Alberto Bercovitz, *Copyright and Related Rights*, in *Intellectual Property and International Trade: The TRIPS Agreement* 125-145 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2nd ed. 2008).

⁷³ See GATS *supra* note 17, Part IV.

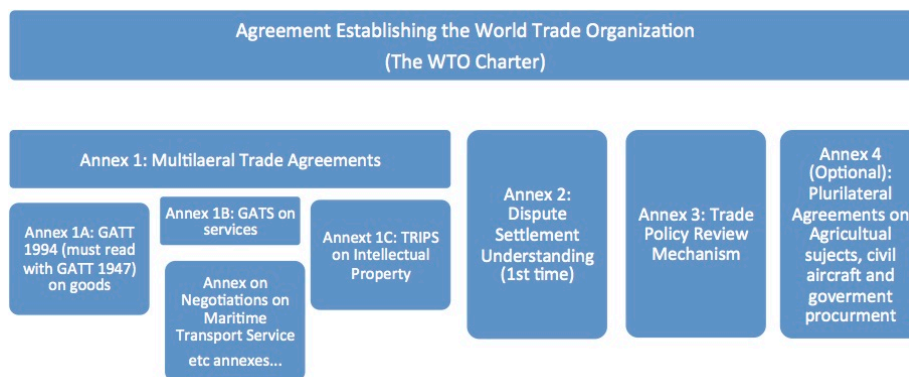
⁷⁴ See GATS *supra* note 17 pmbl.

⁷⁵ See WTO *supra* note 15.

⁷⁶ See WTO, *supra* note 15; see also *WTO Legal Texts*, *infra* note 82 (showing the relationship of these Agreements in the chart on Annex 1B and Annex 1C).

the implementation of TRIPS and the GATS are both safeguarded by the WTO's Dispute Settlement Understanding at an international level.⁷⁷ Third, both the IP and sea transport liability regimes are concerned with balancing rights and obligations between private entities, such as rights holders and late comers in IP,⁷⁸ and the hull and cargo interest individuals and companies in the sea transport.⁷⁹ Fourth, both regimes came into being before the establishment of the UN,⁸⁰ and there were respective international conventions prior to the UN conventions.⁸¹ Addressing the relationships between the pre-UN conventions and the UN-administrated conventions under TRIPS was an unavoidable task for IP harmonization. Likewise, the GATS will provide a vehicle for harmonizing the maritime transport regime, which entails addressing the relationships between previous conventions, including the UN-administrated conventions. On account of the four shared merits of IP and maritime transport, five successful aspects of IP's inclusion will be investigated in depth to shed light on maritime transport's inclusion into the WTO/GATS.

Figure 1: WTO Agreements



⁷⁷ See WTO *supra* note 15, Annex 2.

⁷⁸ See generally Reichman, *supra* note 41.

⁷⁹ See Diamond, *supra* note 9 at 535.

⁸⁰ See generally UN at a Glance, UN, <http://www.un.org/en/aboutun/> (last visited Sept. 30, 2013) (stating that the UN was established in 1945). See *infra* note 84 and note 85 (The IP conventions, such as the Paris Convention, were concluded in the 19th century); see *supra* note 6 and note 7 (The sea cargo conventions were negotiated in the beginning of the 20th century).

⁸¹ See e.g., Hague Rules, *supra* note 6.

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TRANSPORTATION, COOPERATION

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*Figure drawn up by the author.

The Figure above illustrates the umbrella-shape of the WTO and the single-package concept.⁸²

A. Cooperation between the UN agencies and the WTO: WIPO and Council for TRIPS; UNCITRAL and Council for Trade in Services

Patents and copyrights are two primary intellectual property regimes.⁸³ By the end of the nineteenth century the “Paris Convention for the Protection of Industrial Property” (the Paris Convention)⁸⁴ and the “Berne Convention for the Protection of Literal and Artistic Works” (the Berne Convention)⁸⁵ had been created to provide protection on the two categories of IP rights at the transnational level.⁸⁶ Both treaties and their revisions are administered by a United Nations special agency – the World Intellectual Property Organization (WIPO).⁸⁷ Although revised, these pre-GATT conventions on IP rights did not develop as quickly as did the advent of the digital age.⁸⁸ The new circumstance⁸⁹ entailed the emergence of an appropriate inter-

⁸² See the full texts of the Uruguay Rounds Agreements in WTO official website, http://www.wto.org/english/docs_e/legal_e/legal_e.htm, accessed 18 February 2013.

⁸³ Reichman, *supra* note 41, at 30, 44.

⁸⁴ See generally The Paris Convention on Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter the Paris Convention], available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html.

⁸⁵ See generally, Berne Convention on Literal and Artistic Works, September 9, 1896, 828 U.N.T.S. 221 [hereinafter the Berne Convention], available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

⁸⁶ Abdulqawi A. Yusuf, *TRIPS: Background, Principles and General Provisions*, in INTELLECTUAL PROP. AND INT’L TRADE: THE TRIPS AGREEMENT, 3, at 5. (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2008).

⁸⁷ *Id.*; see generally WIPO, <http://www.wipo.int/portal/index.html.en> (last visited February 8, 2013).

⁸⁸ See H. Kronstein & I. Till, *A Reevaluation of the Int’l Patent Convention*, 12 LAW & CONTEMP. PROBS. 765, 768 (1947) (citing the letter of invitation to the First International Congress for Consideration of Patent Protection held in Vienna in 1872, which stated, “We live no longer in the day of Industrial action . . . We lived at a time . . . today a magnitude a generation ago one could not have imagined. Under such altered relations the Patent granted for an invention . . . becomes in fact a restriction unprofitable and obstructive . . . Such and similar inconveniences can only be met by the common action of all civilized States, disposed to the maintenance of Patent protection”); see generally Yusuf, *supra* note 86, at 7-8.

⁸⁹ As to intellectual property at the digital age, the new circumstances re-

national instrument that satisfied the technology creators.⁹⁰

Although the discrepancies between the developed and developing world on IP rights-protection were aggravated,⁹¹ it was increasingly recognized as the justification for harmonizing the conflicts of international rules.⁹² Even though the United States (US) and the European Community (EC) proposed a draft agreement on measures to discourage the importation of counterfeit goods before the world trading system,⁹³ the proposal had not been adopted at the Tokyo Round;⁹⁴ however, the proposal triggered discussions for the adoption of TRIPS in the world trading system through the early 1980's and the Uruguay Round.⁹⁵ As a result, the WTO became another institution, besides the WIPO, administering the IP regime under TRIPS. Thus, subsectors of the IP regime, including the patents, copyrights and respective IP rights, have been integrated into TRIPS since the Uruguay Round.

In light of the WIPO-and-TRIPS case, this proves that an area that is traditionally administrated by the UN can be adjusted by the WTO system. It also proves that the WTO can collaboratively cope with pre-existing conventions, including the UN-administrated conventions. A WTO-based maritime transport regime can coexist with pre-UN treaties and deal with the harmonization of respective treaties together with the UN approach. The area of IP rights was traditionally administrated solely by the WIPO and maritime transport before the Uruguay Round negotiations was also administrated only by the UN agencies. Nevertheless, TRIPS has added some more ingredients to the IP negotiation forum and enforcement at the WTO under the Council of TRIPS, which justifies considering

fer to novel technologies and inventions.

⁹⁰ Yusuf, *supra* note 86, at 6-7.

⁹¹ See generally Jerome H. Reichman, *Intellectual Prop. in Int'l Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J OF TRANSNAT'L L. 747, 795-96 (1989); see also Yusuf, *supra* note 86, at 8.

⁹² See generally Kronstein & Till, *supra* note 88, at 768; Yusuf, *supra* note 86, at 7-8.

⁹³ Yusuf, *id.*, at 7.

⁹⁴ See GATT Secretariat, *Work Undertaken in GATT Concerning Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, MTN.GNG/NG/11/W/4 (May 6, 1987), available at http://www.wto.org/gatt_docs/English/SULPDF/92020093.pdf.

⁹⁵ Yusuf, *supra* note 86, at 7.

the possibility of maritime transport being governed by both systems. In addition, a GATS-based maritime transport annex will make the regime apply to all WTO members, which will make the maritime regime applicable worldwide as an IP regime under TRIPS.

B. The Conversion of UN-administrated Treaties into the WTO Agreements through Selective References: TRIPS and the GATS

The TRIPS Agreement permits the enforcement of existing instruments on IP rights, as long as such instruments were not a restriction on international trade in disguise.⁹⁶ The TRIPS approach is permissive but cautious towards IP regulatory measures hindering free trade and competition.⁹⁷ Thus, appropriate levels of regulation for example, the carrier's liability under the UN treaties⁹⁸ may be integrated into the GATS and applicable at the worldwide level as long as they contain no hindrance on liberalization and competition.

IP and sea transport conventions came into being before the establishment of the UN and the world trading system.⁹⁹ Under the TRIPS Agreement¹⁰⁰ and some pre-GATT,¹⁰¹ exist-

⁹⁶ See GATT, *supra* note 2 at Art. XX(d) (explaining, "General Exceptions" stipulates "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: [...] (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopoly operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices"); see Yusuf, *supra* note 86, at 8.

⁹⁷ See Reichman, *supra* note 91, at 795-96 (noting, an paradox of the GATT approach on regulations and free markets that the industrialized countries with free domestic markets hoped to impose a highly regulated market on intellectual goods on the rest of the world, and the developing countries with restrictive free market preferred a totally unregulated international intellectual property regime); see Yusuf, *supra* note 86, at 8.

⁹⁸ See, e.g., Hamburg Rules, *supra* note 8, at arts. 5, 6, and 8; Rotterdam Rules, *supra* note 5 arts. 17, 24, 59, 60 & 61.

⁹⁹ See generally Hague Rules, *supra* note 6; Visby Rules, *supra* note 7.

¹⁰⁰ See TRIPS Agreement, *supra* note 15.

¹⁰¹ The GATT system was founded in 1947 and replaced by the WTO in 1995 after the Uruguay Round negotiations; see *The GATT Years*, *supra* note 2.

ing IP conventions are creatively incorporated into the WTO framework by selective reference.¹⁰² These previous international regimes embrace the Paris Convention (1967 reversion),¹⁰³ Berne Convention (1971 reversion),¹⁰⁴ the “Washington Treaty on Intellectual Property in Respect of Integrated Circuits” (IPIC),¹⁰⁵ and the “Rome Convention for International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations” (Rome Convention).¹⁰⁶ However, a number of pre-existing IP conventions have not been incorporated into TRIPS. For instance the “International Convention for the Protection of New Varieties of Plants” (UPOV),¹⁰⁷ and WIPO “Copyright Treaty” (WCT),¹⁰⁸ the WIPO

¹⁰² See generally TRIPS Agreement, *supra* note 15, arts. 2, 9 & 35 (stating, “1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1-12 and 19 of the Paris Convention (1967). 2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits”. TRIPS Agreement Article 9, “*Relation to the Berne Convention*,” reads as, “1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6 of that Convention or of the rights derived there from. 2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”; TRIPS Agreement Article 35, “*Relation to the IPIC Treaty*,” reads as, “Members agree to provide protection to the layout-designs (topographies) of integrated circuits (referred to in this Agreement as “layout-designs”) in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits and, in addition, to comply with the following provisions.”).

¹⁰³ Paris Convention, *supra* note 84 (Its latest revision is under the WIPO administration but not WTO/TRIPS.).

¹⁰⁴ Berne Convention, *supra* note 85. (Its latest revision is under the WIPO administration but not WTO/TRIPS.).

¹⁰⁵ See Treaty on Intellectual Property in Respect of Integrated Circuits, May 26, 1989, 28 I.L.M. 1477 (1989), *available at* http://www.wipo.int/export/sites/www/treaties/en/ip/washington/pdf/trtdocs_w0011.pdf.

¹⁰⁶ See International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 44 (1961), *available at* http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html.

¹⁰⁷ International Convention for the Protection of New Varieties of Plants, Dec. 2, 1961, 33 U.S.T. 2703, 815 U.N.T.S. 109, *revised by* 33 U.S.T. 2703 (1978), *revised by* 815 U.N.T.S. 89 (1991) [hereinafter UPOV].

¹⁰⁸ See WIPO Copyright Treaty, Dec. 20, 1996,

“Performances and Phonograms Treaty” (WPPT).¹⁰⁹ In addition, only some articles of these aforementioned conventions and only some of these specific revised versions and not the latest revision, are incorporated into the WTO/TRIPS.¹¹⁰ It is not unusual for treaties of a technical character to be amended or revised often. But, the Paris and Berne Conventions have been revised several times.¹¹¹ TRIPS, however, does not refer to the latest version, but to a specific revision of them.¹¹²

The “selective referencing approach” has a backwards looking, threefold merits: a selective revised version, selected predecessor conventions, and selective articles within such a convention.¹¹³ In this way, parts of a number of earlier IP conventions, for example the Paris Convention (1967 version) and Berne Convention (1971 version), are made applicable through TRIPS to WTO Members, which might not adopt these conventions.¹¹⁴ Due to the broad coverage of the WTO membership,¹¹⁵ TRIPS indirectly extends the applicable coverage of

http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

¹⁰⁹ See WIPO Performances and Phonograms Treaty (WPPT), Dec. 20, 1996, http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

¹¹⁰ See TRIPS Agreement arts. 3.1, & 4(b). National treatment and the most-favoured-nation clauses apply only to those rights under the Rome Conventions that the TRIPS Agreement selectively provides, but not to rights generally flowing from that Convention.

¹¹¹ See Revisions and Contacting countries of Paris Convention and Berne Convention, WIPO,

http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html.

¹¹² See TRIPS Agreement, arts. 2, 9 and 35.

¹¹³ Cf. Jerome H. Reichman, *The Know-How Gap in the Gap in the TRIPS Agreement: Why Software Fared Badly, and What Are the Solutions*, 17 HASTINGS COMM. & ENT. L. J. 763, 765 (1995) (arguing both the strengths and weaknesses of the TRIPS Agreement stem from its essentially backwards-looking character: on one hand, the TRIPS traced back to the earlier conventions; on the other hand, it also leaves gaps and loopholes, especially in non-traditional objects of intellectual goods, such as computer programs and biotechnology). See also Reichman, *supra* note 41, at 43 (discussing the shortcomings of backwards looking character on computer programs and electronic information tools in information age).

¹¹⁴ Yusuf, *supra* note 86, at 20-21 (analysing the relationship between TRIPs and the Intellectual Property Conventions on the basis of these two articles, and he argues the twofold aims of the articles are first to incorporate the pre-existing conventions into the TRIPs Agreement and to express the intention of the WTO parties to TRIPS Agreement to maintain in force the obligations which member parties to related earlier conventions may have to each other under the provisions of these conventions).

¹¹⁵ There have been 161 WTO members by 26 April 2015; see *WTO Membership*, WTO,

these pre-GATT IP conventions.¹¹⁶

The selective referencing approach helps TRIPS avoid potential conflicts with former international treaties and with the UN to a large extent. TRIPS expresses an intention to maintain in force the obligations that WTO Members already have under the earlier conventions.¹¹⁷ Such a clear declaration is important in successive treaties governing the same subject matter, especially in the case that any two treaties are binding upon a different group of parties.¹¹⁸ This intention is to maintain the obligations already in force and to avoid the conflicting obligations for a WTO member, which already ratifies a pre-existing convention.¹¹⁹ Therefore, a Member to an earlier treaty and another Member that had contracted to both the treaty and TRIPS are subject to all the provisions of the treaty.

Concerning shipping regimes, the selective referencing approach will reduce conflict with the Members of earlier treaties and make a respective regime under the GATS feasible. There are two important effective conventions with respect to sea-borne cargo carriage: The Hague and Visby Rules. These were drafted before the 1970s,¹²⁰ but they must be updated to keep up with technological changes after their conclusion.¹²¹ Containers had been used in shipping by the end of the late 1950s,¹²² and they become widely used in the 1970s.¹²³ The sig-

http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, (last visited May 5, 2015).

¹¹⁶ TRIPS, as a multilateral agreement, make the referred conventions become part of the TRIPS Agreement itself and be applicable to all 161 WTO members. However, the number of countries, which ratified such a convention, is less than 161; see WIPO, *supra* note 111.

¹¹⁷ See TRIPS Agreement arts. 2.2 and 70. Article 2 entitled "*Intellectual Property Conventions*" states "2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits." Article 70.1 provides "This [TRIPS] Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question."

¹¹⁸ Yusuf, *supra* note 86, at 21.

¹¹⁹ TRIPS Agreement, *supra* note 15, art. 2.2.

¹²⁰ See generally Hague Rules, *supra* note 6; Visby Rules, *supra* note 7.

¹²¹ Edward Schmeltzer & Robert A. Peavy, *Prospects and Problems of the Container Revolution*, 1 J. MAR. L. & COM. 203, 210-11 (1970).

¹²² José Angelo Estrella Faria, Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules, 44 TEX. INT'L L.J.

nificant step toward modernized shipping was achieved by the emergence of the container.¹²⁴ However, these new situations have not been embodied in the Hague and Visby Rules.¹²⁵ Even though the UN has tried to update sea transport regimes with this trend through the Hamburg Rules and Rotterdam Rules since the 1970s,¹²⁶ these Rules have not been as widely adopted as their predecessors.¹²⁷ Even though they have been updated,¹²⁸ the Rotterdam Rules do not allow contracting countries to opt out of any chapter, which increases the difficulty in achieving wide spread adoption.¹²⁹ A possible way to make the best use of previous negotiations is to refer to Articles of these Conventions, no matter whether they are applicable or not to a WTO contracting Member, under a GATS annex, corresponding to the TRIPS precedent.

C. Theory of Balancing Rights: Intellectual Property and Maritime Transport

TRIPS negotiations have spawned a theory of balance, due to serving as a platform for bargaining and trade-off practice.¹³⁰ This theory will be enlightening for sea transport regimes, because both IP and sea cargo transport regimes face the same situation of conflicts between interest groups and respective

277, 290 (2009); Arthur Donovan, *Intermodal Transportation in Historical Perspective*, 27 *TRANSP. LJ.* 317, 318 (2000).

¹²³ Donovan, *supra* note 122.

¹²⁴ Gelina Harlaftis & Ioannis Theotokas, *Maritime Business During the Twentieth Century: Continuity and Change*, in *THE HANDBOOK OF MARITIME ECONOMICS AND BUSINESS* 3, 7 (Costas Th. Grammenos ed., 2d ed. 2010).

¹²⁵ See e.g. Schmeltzer & Peavy, *supra* note 121, at 223-25; Estrella Faria, *supra* note 122, at 292.

¹²⁶ See generally Hamburg Rules, *supra* note 8; Rotterdam Rules, *supra* note 5.

¹²⁷ See MICHAEL F. STURLEY, TOMOTAKA FUJITA, & GERTJAN VAN DER ZIEL, *THE ROTTERDAM RULES: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA* 125 (2010).

¹²⁸ *Id.*

¹²⁹ Rotterdam Rules, *supra* note 5, art. 90 (stating that no reservations to the Convention are permitted).

¹³⁰ See TRIPS Agreement, *supra* note 15, art. 7 (stipulating, "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."); see also Reichman, *supra* note 41, at 33-36, 60-62, 152, 171, 187, 421.

countries,¹³¹ and both try to harmonize the conflicts through treaties.¹³² As to the TRIPS precedent, the WTO balanced the interests between the IP rights holders and consumers,¹³³ and as between the developed world and latecomers of developing countries.¹³⁴ Likewise, a sea transport regime needs to achieve a balance between exempt rights holders (carriers)¹³⁵ and consumers (the cargo interests),¹³⁶ and between the traditional maritime powers from the developed world and latecomers to international trade (*i.e.* developing countries).¹³⁷ While developed countries were pursuing a high level of protection on their interests at the worldwide level, with numerous liability exemptions, an opposite trend was taking place in the developing world.¹³⁸ In the context of pre-1970s patent and copyright protections, developed countries sought to protect IP rights at high standards.¹³⁹ The United States started using the US Tariff Act¹⁴⁰ to combat the infringement of United States patents by foreign enterprises at the domestic level.¹⁴¹ It also introduced, together with the EU, a draft agreement on measures discouraging the importation of counterfeit goods into the Tokyo

¹³¹ TRIPS balanced between IP rights holds from developed countries and consumers from developing countries. The sea cargo transport regime deals with the carriers from traditional shipping powers from Europe, e.g. Great Britain, Greece, and Norway, and cargo export country outside Europe, such as China.

¹³² TRIPS Agreement, *supra* note 15, art. 7. The Rotterdam Rules state in Preamble that “*Reaffirming* their belief that international trade on the basis of equality and mutual benefit is an important element . . . , *Convinced* that the progressive harmonization and unification of international trade law . . . significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples . . . ”.

¹³³ *Id.*

¹³⁴ *Id.* Reichman, *supra* note 41, at 33-36, 60-62, 152, 171, 187, 421.

¹³⁵ Faria, *supra* note 122 (e.g., European shipping powers).

¹³⁶ *Id.* Review of Maritime Transport, *supra* note 30, at 70. There are a number of newly emerged shipping and cargo export countries, such as China, Singapore, the Republic of Korea and Saudi Arabia.

¹³⁷ *Id.*

¹³⁸ Reichman, *supra* note 41, at 24-25.

¹³⁹ Yusuf, *supra* note 86, at 6.

¹⁴⁰ 19 U.S.C. § 1337 (2004).

¹⁴¹ Yusuf, *supra* note 86, at 7. *See also* S. Sell, *Intellectual Property Protection and Antitrust in Developing World: Crisis, Coercion and Choice*, 49 INT'L ORG. 315, 315-49 (1995).

Round of multilateral negotiations.¹⁴² Conversely, developing countries sought to obtain the allowance of parallel imports, a greater scope for compulsory licensing, and less restrictive copyright protection¹⁴³ in order to benefit local social welfare and knowledge distribution.¹⁴⁴

In the 1970s, developing countries tried to obtain more flexibility in the IP rights regime.¹⁴⁵ For instance, the developing countries stimulated the revisions of the Paris Convention and the Berne Convention under the WIPO's administration.¹⁴⁶

Although there were divergent expectations about levels of regulation, views began to converge during the WTO and TRIPS negotiations. The GATT connection to IP was insisted upon first by the developed countries, not because of a belief that the strengthening of IP rights protection would further liberalize international trade, but as a bargaining chip for the access of developing countries' products to the markets of developed countries.¹⁴⁷

On the other hand, the developing countries themselves gradually perceived the GATT-based multilateral negotiations as a lesser evil than bilateral concessions, due to the fact that it led to trade-offs between the more greatly protected intellectual goods and market access of other goods from the developing world, such as agriculture, textiles and tropical products, to the industrial countries.¹⁴⁸

As a result, a group of fourteen developing countries submitted a detailed proposal on TRIPS, which consisted of their views on the content and level of the standards on IP protec-

¹⁴² See Agreement on Measures to Discourage the Importation of Counterfeit Goods, GATT Doc. L/4817 (July 31, 1979); Yusuf, *supra* note 86, at 7 (noting that this proposed agreement on counterfeit goods had not been adopted by the Tokyo Rounds, but it triggered the discussions in the GATT through the earlier 1980s and until the Uruguay Round for the adoption of the TRIPS).

¹⁴³ Yusuf, *supra* note 86, at 5 (in the way of permit relatively speedy reprinting and translation of books related to educational and scientific development).

¹⁴⁴ *Id.* at 5.

¹⁴⁵ *Id.* at 4-6. Reichman, *supra* note 41, at 23.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 9; Agreement on Measures to Discourage the Importation of Counterfeit Goods, GATT Doc. L/4817 (July 31, 1979).

¹⁴⁸ Yusuf, *supra* note 86, at 9; Reichman, *supra* note 41, at 25; David Hartridge & Arvind Subramanian, *Intellectual Property Rights: The Issues in GATT*, 22 VAND. J. TRANSNAT'L L. 893, 895-96 (1989).

tion.¹⁴⁹ The submission of this proposal heralded the acceptance of a GATT-based standard-setting approach in IP protection by the developing world.¹⁵⁰ Thus, the WIPO administers IP negotiations in a way that focuses on the countries' arguments for or against the higher level of protection of IP rights. Unlike the UN's WIPO approach, the trade-off bargaining happened to the TRIPS-based multilateral negotiations within the overall WTO framework. Therefore, the WTO is capable of engaging both the developed and developing world, allowing them to bargain with each other.

Moreover, interest groups can have access to negotiations¹⁵¹ and derive profits from harmonization of IP and of sea transport, respectively, within the WTO system.¹⁵² The access to negotiations is a way for developing countries to take part in the rule making process, while developed countries can derive profits from TRIPS. TRIPS successfully imposes levels of protection, through imposing minimum standards on patents, especially on the criteria of eligibility and duration.¹⁵³ These protections have not been addressed under the Paris Convention.

Meanwhile, developing countries can gain bargaining chips in the sector of goods, services and IP.¹⁵⁴ For example, they

¹⁴⁹ See Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Pakistan, Peru, Tanzania, Uruguay and Zimbabwe, Applicability of the Basic Principles of the GATT and of Relevant International Intellectual Property Conventions, MTN.GNG/NG11/W/71 (May 14, 1990); Decision of the General Council of 30 August 2003, WT/L/540 and Corr.1 (Sept. 1, 2003). Yusuf, *supra* note 86, at 9.

¹⁵⁰ See e.g. Yusuf, *supra* note 86, at 9; Reichman, *supra* note 41, at 25.

¹⁵¹ Henry Gao, *Evaluating Alternative Approaches to GATS Negotiations: Sectoral, Formulae, and Others*, in GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 183 (Marion Panizzon, Nicole Pohl, & Pierre Sauvé eds., 2008).

¹⁵² See IP, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: TRIPS AGREEMENT (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2d ed. 2008). See Pierre Sauvé, *Been There, Not Yet Done That: Lessons and Challenges in Services Trade*, in GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 599, 603-607 (Marion Panizzon, Nicole Pohl, & Pierre Sauvé eds., 2008).

¹⁵³ TRIPS Agreement, *supra* note 15, arts. 14, 27(1) and 28(1); Cf. Paris Convention for the Protection of Industrial Property art. 5A, Mar. 20, 1883, as revised at Stockholm on July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305. See Reichman, *supra* note 41, at 30-31, 48, 49 (discussing the elevation of Paris-Convention, Berne-Convention and Rome Convention standards to the TRIPS standard).

¹⁵⁴ BENJAMIN PARAMESWARAN, THE LIBERALIZATION OF MARITIME

used IP protection as a bargaining chip in exchange for better negotiating positions in other areas, such as trade in goods under GATT¹⁵⁵ or trade in services under the GATS. In this way, developed countries maintain certain high standards, but the developing countries successfully were also spared some limitations, such as compulsory licensing, and parallel importing.¹⁵⁶ The incorporated Berne Convention (1971) and its appendix of preferential measures puts limits on the rights holders from the developed world by enabling nationals of the developing countries to secure non-exclusive compulsory licenses on favorable terms.¹⁵⁷ It is a compromise and the limitation is also qualified. For example, TRIPS addresses the scope of copyright protection by echoing the Berne Convention (1971),¹⁵⁸ confining the limitation or exceptions.¹⁵⁹

In light of TRIPS, the WTO provides a bigger negotiating forum with trade-off practices to foster harmonization on sea transport. TRIPS allows IP to be connected to other WTO covered areas of trade under the GATT or GATS such as, agriculture, textiles and tropical products.¹⁶⁰ Therefore, the negotiations of a higher standard of IP protection supported by industrialized countries gave the developing countries bargaining chips in such areas as agriculture, textiles, and tropical products.¹⁶¹ Similarly, the GATS provides maritime transport with a range of bargaining opportunities under other areas covered by the GATS, GATT and TRIPS between different in-

TRANSPORT SERVICES: WITH SPECIAL REFERENCE TO THE WTO/GATS FRAMEWORK 252-53 (2004) (describing different bargaining chips available to developing countries under GATT, TRIPS and other service sectors under the GATS).

¹⁵⁵ GATT, *supra* note 2; *see also* WTO Legal Texts, *supra* note 82.

¹⁵⁶ Reichman, *supra* note 41, at 33-36 (discussing limits of the Patentee's exclusive rights with specific analysis on compulsory licenses and public interest exception).

¹⁵⁷ *See* Berne Convention, *supra* note 85, art. 21 and app. arts. I – VI; *see* Reichman, *supra* note 41, at 44.

¹⁵⁸ TRIPS Agreement, *supra* note 15, art. 9.2.

¹⁵⁹ *See* TRIPS Agreement, *supra* note 15, art. 13; *see* Reichman, *supra* note 41, at 63 (analyzing the constraints of licensing which limit the developing countries).

¹⁶⁰ Yusuf, *supra* note 86, at 9; PARAMESWARAN, *supra* note 154 (describing the trade-off problem in maritime negotiations).

¹⁶¹ PARAMESWARAN, *supra* note 154; *see also* Marrakesh Agreement, *supra* note 4; GATT, *supra* note 2.

terest groups and respective countries.¹⁶²

Similar conflicting groups compete under TRIPS and in maritime transport negotiations.¹⁶³ The majority of maritime powers are Western developed countries¹⁶⁴ who have established exempt rights for carriers through earlier treaties.¹⁶⁵ In contrast, developing countries accommodate a great number of shippers and cargo interest groups, but they are latecomers to international trade and transport.¹⁶⁶ As latecomers, the developing countries had to abide by previous sea transport conventions¹⁶⁷ and were unable to amend the established rules¹⁶⁸ that were unfriendly to them.¹⁶⁹ Facing these conflicts, the WTO enables the GATS to balance rights and interests between developed and developing worlds, between traditional shipping powers and new born hull-interest representative countries from the otherwise developed and developing world, and between the hull and the cargo interest groups.¹⁷⁰ Therefore, if the WTO initiates special negotiations on maritime transport, the TRIPS balancing theory and trade-off practices may apply to shipping areas and promote its harmonization.

D. Universal Regulation on Minimum Standards: From IP Protection to the Levels of Carrier's Liability

The level of regulations, which are seen in the form of minimum standards,¹⁷¹ result from balancing rights through negotiations.¹⁷² The absorption of pre-GATT IP regimes into the world trading system entails the introduction of universal min-

¹⁶² See *Marrakesh Agreement*, *supra* note 4; GATT, *supra* note 2.

¹⁶³ Reichman, *supra* note 41, at 23-78 (Conflicting groups in IP negotiations); see also PARAMESWARAN, *supra* note 154, at 185-312 (Conflicting groups in maritime transport negotiations).

¹⁶⁴ Faria, *supra* note 122, at 289.

¹⁶⁵ See the Hague Rules, *supra* note 6; see also the Visby Rules, *supra* note 7 (describing the protection on carriers in terms of exempt rights and limits of litigation on cargo damages).

¹⁶⁶ Faria, *supra* note 122, at 278-92.

¹⁶⁷ The Hague Rules, *supra* note 6; see also the Visby Rules, *supra* note 7.

¹⁶⁸ The Hamburg Rules, *supra* note 8 (These rules are not widely ratified).

¹⁶⁹ Faria, *supra* note 122, at 278-92.

¹⁷⁰ See Panizzon, Pohl & Sauve, *supra* note 152.

¹⁷¹ Reichman, *supra* note 41, at 23-78.

¹⁷² TRIPS Agreement, *supra* note 15, arts. 7 & 21.

imum standards on IP protection into TRIPS.¹⁷³ The levels are explored through balancing the relations between innovators and latecomers in an integrated world market.¹⁷⁴ Based on the principles of national treatment¹⁷⁵ and the most-favoured-nation provision,¹⁷⁶ WTO Members must accord to the nationals of other Members. These international minimum standards of IP protection are comprised within the treatment provided for in TRIPS agreement.¹⁷⁷ One component of these TRIPS na-

¹⁷³ For a detailed analysis on conditions nurturing the growth of universal legal standards, see generally Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L., 529, 543-50 (1993) (emphasizing the important role of multilateral forums in the creation and shaping of contemporary international law and the ability of these forums to move the solutions substantially towards acquiring the status of international law); see also, Mohamed Omar Gad, *TRIPS Dispute Settlement and Developing Country Interest*, in INTELLECTUAL PROP. AND INT'L TRADE: THE TRIPS AGREEMENT, 321, 321-83 (Carlos M. Correa and Abdulqawi A. Yusuf, eds., 2nd ed., 2008).

¹⁷⁴ See *supra* Section on balancing theory; Reichman, *supra* note 41, at 21; Andres Moncayo von Hase, *The Application and Interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights*, in INTELLECTUAL PROP. AND INT'L TRADE: THE TRIPS AGREEMENT at 83-124 (Carlos M. Correa and Abdulqawi A. Yusuf, eds., 2nd ed., 2008) (stating that the TRIPS regime is a treaty that establishes a public international law regime on the protection of private rights through the establishment of minimum standards and enforcement mechanisms).

¹⁷⁵ The WTO national-treatment obligation requires non-discrimination against foreign rights holders. See TRIPS Agreement, *supra* note 15, art. 3.1 "National Treatment" (stating,

"1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection³ of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only apply in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS").

¹⁷⁶ The WTO Most-Favoured-Nation-Treatment obligation requires the equal treatment under the domestic laws; see TRIPS Agreement, *supra* note 15, art. 4 "Most-Favoured-Nation Treatment" (providing "With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation is any advantage, favour, privilege or immunity accorded by a Member . . .").

¹⁷⁷ TRIPS Agreement, *supra* note 15, art. 1.3 and Part II (entitled Standards Concerning the Availability, Scope and Use of Intellectual Property

tional and equal treatments constitutes the selective parts of the Paris Convention (1967), Berne Conventions (1971) and of the IPIC Treaty.¹⁷⁸ The other component consists of minimum standards that the TRIPS agreement creates irrespective of earlier instruments. Either way, the relevant standards are binding on all Members.¹⁷⁹

The developed countries achieved their goals¹⁸⁰ in TRIPS to elevate and harmonize minimum standards in several areas that had been established previously.¹⁸¹ With regard to patent protection, the Paris Convention strengthened the IP protection (1967).¹⁸² A WTO member has to respect a previous convention referred and abide by the universal minimum standards within the convention, even if it has not ratified the earlier convention.¹⁸³ The only possibility for deviation from the universal standards of patent protection is that a WTO Member is in a transition period, being either a developing country or a least-developed country.¹⁸⁴ The notion of transition gains wider acceptance for the WTO particularly from the developing nations.¹⁸⁵ Also, TRIPS augments the minimum standards of protection for other areas of IP, including the trademark and

Rights); Reichman, *supra* note 41, at 26-30.

¹⁷⁸ TRIPS Agreement, *supra* note 15, art. 1.3 (providing "general provisions and basic principles").

¹⁷⁹ *Id.* art. 9.1 (describing standards and "relations to the Berne Convention"); Reichman, *supra* note 41, at 29, n.39 and 46 (distinguishing TRIPs as a multilateral trade agreement binding on all members from a plurilateral trade agreement, which is binding only for members which have accepted them). Most but not all the minimum standards, set out by the Paris Convention and the Berne Convention are made applicable to all WTO member countries because of the TRIPS reference, no matter whether the Member is contacted to those conventions or not).

¹⁸⁰ TRIPS Agreement, *supra* note 15, art. 16 (explaining well-known trademarks) and 22-24 (showing geographical Indications).

¹⁸¹ *Id.* arts. 2.2 and 70.

¹⁸² Reichman, *supra* note 41, at 30, 43 (claiming that intellectual property protection is strengthened).

¹⁸³ See WTO Membership, *supra* note 115. (All WTO Members have to implement the TRIPS and GATS unless in transitional period); see also TRIPS Agreement *supra* note 15, arts. 65-67. (describing requirements of transitional periods).

¹⁸⁴ Reichman, *supra* note 41, at 31; see TRIPS Agreement *supra* note 15, arts. 65 & 66.

¹⁸⁵ TRIPS Agreement, *supra* note 15, arts. 65-67 (providing privileges for developed countries).

geographical indication of origin.¹⁸⁶ As to copyright protection under the Berne Convention, TRIPS incorporates most but not all of the minimum standards set out in this earlier convention,¹⁸⁷ adding certain additional standards of its own¹⁸⁸ and begins the task of harmonizing the protection of neighboring rights.¹⁸⁹ Nonetheless, TRIPS qualified the scope of areas subject to minimum standards. For instance, TRIPS excludes the compulsory license provisions of the IPIC Treaty from the list of mandatory international minimum standards.¹⁹⁰

TRIPS practices regarding minimum standards shed light on the WTO efforts to establish minimum standards on transport services under GATS. Both IP and services are invisible outputs, which are qualitatively different from physical goods.¹⁹¹ In order to ensure information symmetry on the quality of services, it is necessary to establish certain instruments through government actions.¹⁹² Especially in the case of liner shipping and engagements of small shippers, legal instruments on the levels of carriers' minimum liability will protect the consumers from relatively bigger carriers' abuse of standard contracts and immunity clauses.¹⁹³ Within the WTO system, the maritime transport as a service sector falls within the scope of the GATS, which is a parallel counterpart of GATT and TRIPS.¹⁹⁴

¹⁸⁶ Reichman, *supra* note 41, at 41-44.

¹⁸⁷ *Id.*

¹⁸⁸ Correa & Yusuf, *supra* note 152, at 125-382 (discussing new standards for IP protection in TRIPS).

¹⁸⁹ Reichman, *supra* note 41, at 45.

¹⁹⁰ TRIPS Agreement, *supra* note 15, arts. 35-38.

¹⁹¹ Michael Fritsch, Thomas Wein & Hans-Jürgen Ewers, MARKTVERSAGEN UND WIRTSCHAFTSPOLITIK: MIKROÖKONOMISCHE GRUNDLAGEN STAATLICHEN HANDELNS [MARKET FAILURE AND ECONOMIC POLICY: MICROECONOMIC FOUNDATIONS OF GOVERNMENT ACTION, at 272-94 (4th ed. 2001).

¹⁹² *Id.*

¹⁹³ Hans-Bernd Schäfer and Claus Ott, *Freedom of Contract, Contract Law and the Fully Specified Contract*, in *The Economic Analysis of Civil Law*, at 273-295 (Edward Elgar ed., 2004), (arguing freedom of contract is "the basis upon which a properly functioning competitive economy that directs resources to the highest value use is grounded", but the market failure entails government action to restrict the abuse of this freedom. The bills of lading are the standard contracts of carriage of goods by sea that are widely used in liner shipping).

¹⁹⁴ See Marrakesh Agreement, *supra* note 4; see generally Jackson, *supra* note 40; Reichman, *supra* note 41.

Moreover, the WTO principles¹⁹⁵ do not conflict with TRIPS and the GATS creating minimum standards. The objective of the GATS is to liberalize trade-in services rather than to deregulate services.¹⁹⁶ The liberalization of markets entails the removal of the regulations that causes harm in such a free and competitive market.¹⁹⁷ However, a service sector can benefit from certain regulations.¹⁹⁸ GATS Article VI specifically provides qualification requirements and procedures, technical standards and licensing requirements recognizing “the right of Members to regulate and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives.”¹⁹⁹ In fact, this Article does not set standards for a service sector, nor does it provide for the review of national standards. It instead aims to increase transparency, which means access to being informed of regulations, standards and procedures for licensing or obtaining qualifications.²⁰⁰ However, the GATS has not set any standard for service quality so far.²⁰¹ Additionally, the GATS does not require a WTO Member to submit any national instruments for review by other Members.²⁰² What the GATS requires is that its Member be able to demonstrate that a given measure is not more trade-restrictive than necessary in the event of a dispute with another Member.²⁰³ Therefore, the GATS may follow the TRIPS levels of IP protection²⁰⁴ to establish levels for sea transport ser-

¹⁹⁵ *Principles of the Trading System*, WTO (2013)

http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm. (These fundamental principles of the multilateral trading system of the WTO are trade without discrimination, freer trade (gradually, through negotiations), predictability (through binding and transparency), promoting fair competition, and encouraging development and economic reforms).

¹⁹⁶ GATS - Fact and Fiction, *supra* note 55, at 11 (stating that many services sectors are closely regulated for very good reasons).

¹⁹⁷ *Principles of the Trading System*, *supra* note 195 (describing free trade and promoting fair competition).

¹⁹⁸ Fritsch, Wein and Ewers, *supra* note 191.

¹⁹⁹ GATS, *supra* note 17, art. VI; *see also* GATS — Fact and Fiction, *supra* note 55, at 11.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ TRIPS Agreement, *supra* note 15, arts. 9-40 (Standards Concerning the Availability, Scope and Use of Intellectual Property Rights).

vices, for example, the level of carriers' minimum liability.²⁰⁵

E. Enforcement and Dispute Settlement Mechanism: the TRIPS, GATS and DSU

Traditionally, international trade rules are enforced under either decentralized or centralized paradigms.²⁰⁶ The pre-WTO IP regimes (the Berne Convention²⁰⁷ and Paris Convention²⁰⁸) seemed to take both approaches. They allow disputes to be brought before both national courts and the International Court of Justice.²⁰⁹ However, the disputes brought before the International Court of Justice are only theoretically possible.²¹⁰ Thus, the central approach to file cases before the World Court became a problem in practice.²¹¹ There was no invoked litigation against the deviation from the agreed minimum standards, because it seemed like an unfriendly act.²¹² The sea transport regimes merely apply in a decentralized way in which contracting countries ratify a convention and incorporate it into national legal system.²¹³

²⁰⁵ *E.g.* Rotterdam Rules art. 17 *Basis of Liability [of the Carrier]*, art. 59 *Limits of Liability [of the Carrier]*, and art. 60 *Period of Time for Suit*. The GATS may selectively refer to part of the Rotterdam Rules, the Hague, Visby or Hamburg Rules, to impose minimum liability on the carrier so as to guarantee the minimum level of quality of transport services.

²⁰⁶ Jonathan T. Fried, *Two Paradigms for the Rule of International Trade Law*, 20 CAN.U.S. L.J. 39 (1994) (contrasting centralized model of European Union which rely on supranational enforcement of European Court of Justice with the decentralized model of the North American Free Trade Agreement that depends on the judicial systems of Members); *see also* Jerome H. Reichman, *supra* note 41, at 63.

²⁰⁷ Paris Convention, *supra* note 84, at art. 28

²⁰⁸ Berne Convention, *supra* note 85, at art. 33

²⁰⁹ These conventions allow the contracting countries to deal with disputes at national judicial systems, and disputes can also be brought before the International Court of Justice.

²¹⁰ *See* Paris Convention, *supra* note 84 at article 28; Berne Convention, *supra* note 85, at art. 33. The International Court of Justice works as a world court, but it deals with relations between public rights instead of intellectual property rights and contract issues of maritime shipment; *see also*, International Court of Justice, *Cases*, <http://www.icj-cij.org/homepage/index.php>, last accessed 19 February 2013.

²¹¹ Gail E. Evans, *Intellectual Property as a Trade Issue*, 18 WORLD COMPETITION 137, 147-48 (1994); *see also* Jerome H. Reichman, *supra* note 41, at 64.

²¹² Evans, *supra* note 211, at 147-48

²¹³ *See* status of the Hamburg Rules, *supra* note 8; Rotterdam Rules, *supra* note 5. Thus, the sea cargo regimes are implemented through the ratifi-

In contrast, the dispute settlement mechanism (DSM)²¹⁴ guarantees WTO agreements to be effectively enforced at a central level.²¹⁵ In this way, the TRIPS agreement fills the two gaps of pre-existing regimes and implements both approaches.²¹⁶ TRIPS is guarded by the Council of TRIPS and centrally enforced under the Dispute Settlement Understanding (DSU),²¹⁷ which was practically lacking under the UN WIPO forum.²¹⁸ The enforcement of the TRIPS component of the WTO Agreement primarily depends on the Member's domestic judicial system, which must meet the minimum standards governing the substantive IP rights, such as patents and copyrights.²¹⁹ Within TRIPS, Part III of the DSU provides detailed enforcement procedures, backed up by a centralized dispute settlement apparatus for all Members; thus agreed minimum standards within Part II of the DSU can be further maintained in the long run.²²⁰ In this sense, the TRIPS provisions on enforcement complement and reinforce the strengthened universal regulatory framework for international IP relations, which emerged during the Uruguay Round. Likewise, the Council for Trade in Services and DSM will safeguard a possible sea transport annex.

cation of conventions, and then they are guarded by national judicial systems.

²¹⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes art.1, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 ["hereinafter DSU"].

²¹⁵ DSU, *id.*, at art. 1.2.

²¹⁶ See WTO, *Overview: The TRIPS Agreement*, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited 10 November 2013); see also Jonathan T. Fried, *supra* note 206, at 39; Jerome H. Reichman, *supra* note 41, at 63-64.

²¹⁷ DSU, *supra* note 214 at art. 1. On the one hand, the WTO Members incorporate the GATT, TRIPS, and GATS articles into their domestic laws; on the other hand, the disputes on the implementation of these WTO agreements can be brought before the WTO dispute settlement bodies in accordance with DSU.

²¹⁸ Abdulqawi A. Yusuf, *supra* note 86, at 9.

²¹⁹ TRIPS Part II provides the substantive rights and minimum standards, and Part III prescribes the enforcement of the Part II. This set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights; See *Overview: The TRIPS Agreement*, *supra* note 216.

²²⁰ *Id.*

IV. TRANSPORTATION AND THE WTO/GATS: LESSONS LEARNT FROM PROGRESSION AND REGRESSION

The harmonization of liberalizing maritime transport services and unifying maritime transport related regulations can be jointly negotiated under the WTO. To begin with, the WTO has successfully assumed the twin tasks under TRIPS.²²¹ Moreover, the liberalization does not prevent the GATS from harmonizing the seaborne cargo regime of regulations. The past sea transport negotiations under the GATS mainly targeted harmonizing the levels of liberalization of shipping markets.²²² The international regulations which are not competition distorting do not contradict liberalization.²²³ Thus, the GATS does not forbid harmonizing the different international regulations. Last but not least, the harmonizing of liberalization and of sea cargo regime/regulation engaged the same negotiating groups of countries (or territories).²²⁴ The tendency of liberalization in the international maritime transport area is also to produce a pattern of balancing and harmonizing countries with different transport interests.²²⁵ Whilst developed countries with renowned merchant fleets were pursuing the high level of liberalization worldwide,²²⁶ an opposite trend took

²²¹ See *supra* Sec. III (D).

²²² See GATS, *supra* note 17, at Preamble, ¶ 3-4 (providing “Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives; Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right.”).

²²³ Regina Asariotis, *UNCITRAL (Draft) Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea: Mandatory Rules and Freedom of Contract*, in *COMPETITION AND REGULATION IN SHIPPING AND SHIPPING RELATED INDUSTRIES* at 350–65 (Antonis Antapassis, Lia Athanassiou, & Erik Rosaeg eds., 2009).

²²⁴ Council for Trade and Services, *Maritime Transport Services: Background Note by the Secretariat*, S/C/W/315 (Jun. 7, 2010). The maritime countries or territories are divided into three categories: the hull dominated countries, the cargo-interest dominated countries, and the hybrid interests countries. A great number of countries belong to the third category.

²²⁵ *Id.* at ¶27.

²²⁶ *Id.* at ¶¶21-27.

place in the developing world with a prosperous export trade in goods but an infant shipping industry.²²⁷ Harmonization becomes more complex in comparison with other industries due to a distinct interest group of third-country transport.²²⁸ Hence, the WTO will be a feasible negotiating forum to further harmonize liberalization and sea-cargo regulations.

Sea transport has gained a prominent role in the WTO negotiating agenda under the GATS, along with IP under TRIPS, and maritime related service is an area on which WTO negotiations were scheduled under the GATS.²²⁹ Since the Uruguay Round Negotiations, the international trade-in services have been included in the WTO negotiations along with IP.²³⁰ The relationship between sea transport and the WTO can be traced back from the Uruguay Round till the current Doha Round.²³¹ As Sturley commented, history is already repeating itself and there are lessons to be learnt from it; thus, many of today's arguments stem three decades or more.²³² The lessons to be learned from past maritime transport negotiations on liberalization are not only enlightening for the WTO, but for as broad as all the treaties concerning maritime transport (including UN treaties),²³³ because of same negotiating countries and same respective interest groups these countries represent. In light of progress and regress, experience in this part sheds light on the harmonizing of entire maritime transport treaties.

²²⁷ *Id.*

²²⁸ *Id.* at ¶27 (discussing cargo geology and third-party shipments, viz. carriers are neither the producing nor recipient country).

²²⁹ Negotiating Group on Maritime Transport Services, *Note on the Meeting of 4 June 1996*, S/NGMTS/13, (Jun. 11, 1996), ¶2.

²³⁰ See Marrakesh Agreement, *supra* note 4.

²³¹ E.g. Council for Trade in Services, Decision on Maritime Transport Services- on 28 June 1996, S/L/24, (Jul.3, 1996), ¶1 (providing the suspension and resumption of the negotiations on maritime transport services); *see infra* Sec. III.

²³² Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. & COM., 1, 3 (1991).

²³³ *See, e.g.*, the Hague Rules, *supra* note 6; *see also* the Visby Rules, *supra* note 7; *see also* the Hamburg Rules, *supra* note 8; *see also* the Rotterdam Rules in *supra* note 5.

A. Negotiations on Maritime Transport Service in the Uruguay Round Negotiations (1986-1994): the WTO, GATS and Maritime Transport Service

Trade in services was one of the novel issues in comparison with trade in goods under the world trading system.²³⁴ The service issues were introduced into the world trading system (now the WTO) by the United States over the strenuous objections from both the developing and developed world.²³⁵ Services sectors were officially included in the multilateral negotiations of world trading system for the first time during the Uruguay Round negotiations.²³⁶ The negotiations on services²³⁷ were also separately structured from that on goods.²³⁸ This clear division highlights the importance of services and reduces the trade-offs risks between goods and services. It is worth noting that the negotiations on trade in services²³⁹ were accommodated in an independent multilateral discussion forum on the trade of goods.²⁴⁰

The maritime transport negotiations need to address the trade-off problems amongst services sectors. In the Uruguay

²³⁴ GATT, Ministerial Declaration on the Uruguay Round, GATT/1396, (25 September 1986) (clearly distinguishing the trade in goods and trade in services in its Part I and Part II). The intellectual property rights (TRIPS) and trade-related investment measures (TRIMS) are also new issues besides the trade of goods under GATT.

²³⁵ Raymond J. Krommenacker, *Multilateral Services Negotiations*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS, 455-73, at 456, (Ernst-Ulrich Petersmann and Meinhard Hilf eds., 1988).

²³⁶ GATT, *supra* note 234.

²³⁷ *Id.* Part II of the Ministerial Declaration on Uruguay Round of September 1986 as to negotiations on trade in services says, "Ministers also agree, as part of Multilateral Trade Negotiations, to launch negotiations on trade in services. Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing counts. [...] GATT procedures and practice shall apply to these negotiations.

²³⁸ *Id.*

²³⁹ *Id.* at 100 (stating in Part II that "[m]inisters, also decided, as part of the Multilateral Trade Negotiations, to launch negotiations on trade in services").

²⁴⁰ *Id.* at 101 (stating that "[A] Group on Negotiations on Services is established to deal with these matters").

Round, the shipping industry strongly resisted the world trading system covering transport services.²⁴¹ For instance, US shipping interests asserted that the inclusion of maritime transport services into the world trading system would be more harm than benefit.²⁴² In contrast, a majority of countries supported a broad coverage in the negotiations of services, including maritime transport services.²⁴³ Additionally, the exclusion of maritime transport would cause domino effects through excessive claims from an increasing number of sectors requesting exclusion from the coverage.²⁴⁴ The debate came to an end with the invention of a dual approach to maritime transport negotiations.²⁴⁵

The first progress in maritime transport negotiations is the introduction of the dual-approach. The dual approach was introduced by a "Group for Negotiations on Services" (GNS) meeting in 1990.²⁴⁶ Under this approach, sea transport negotiations were held at dual levels: being discussed in a general negotiation forum with all other service sectors at the one level, and a specific sectoral/sectional maritime transport negotiation forum at the other level.²⁴⁷ This approach had earned support

²⁴¹ Uruguay Round - Group of Negotiations on Services, *Report to the Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988*, MTN.GNS/21, (Nov.25, 1988), (announcing the substantial negotiations were begun in December 1988).

²⁴² PARAMESWARAN, *supra* note 154, at 252-53 (describing US domestic shipping industry's resistance). Cf. OECD, Doc. No. DSTI/SI/MTC(94)9 (Mar.8, 1994), at 2-3 (claiming the gains might offset the lost).

²⁴³ See Uruguay Round Negotiations- Trade Negotiations Committee, *Mid-term Meeting*, MTN.TNC/11, Part II, (Apr.21, 1989) (stating a majority of member parities supported a universal approach which kept any particular services sector from being excluded from GATS coverage).

²⁴⁴ See OECD, *supra* note 242, at 2-3.

²⁴⁵ On Sep.25,1990, Chairman Waldemar Hoffmann of the Working Group on Maritime Transport Services reported to a GNS meeting, which generally concluded that a special sectoral/sectional maritime transport annex addressing this very special service sector was necessary, even though there had no consensus as to the exact contents of such an annex; see more in The Uruguay Round, *Working Group on Maritime Transport Services*, MTN.GNS/TRANS/6 (Nov. 30, 1990), at 1-2; WTO, Uruguay Round Doc. No. CC-TRAN2, Working Group on Maritime Transport Services-Reports of the Chairman, (Oct.19, 1990), at 1 (stating that there were different opinions on the very contents or formats of an annex on maritime transport regime).

²⁴⁶ *Id.*

²⁴⁷ GATT Secretariat, *Multilateral Trade Negotiations the Uruguay Round - Group of Negotiations on Goods (GATT) Negotiating Group on Dis-*

from many participating nations.²⁴⁸ These countries agreed to follow the dual approach to accommodate the need of a particular annex on maritime transport regime, where a specific sector would be regulated under the world trading system.²⁴⁹ As a result of the dual approach, the maritime transport became one of exclusively negotiated sectors²⁵⁰ and an avid trade-off negotiating problem.²⁵¹ Sea transport was negotiated under the transport-specific sectoral/sectional negotiations with air, road and inland waterways.²⁵² The other specific sectors were financial services²⁵³ and telecommunications,²⁵⁴ which were also related to sea-borne cargo trade. Therefore, this dual approach has beneficiary effects of expanding the participation of maritime negotiations and shrinking the trade-off problem.

Another progress is the supplementary mechanisms to solve disagreements. On the one hand, the bilateral negotiation was introduced to supplement the on-going of multilateral negotiations. Although the GNS tried to promote consensuses on a multilateral basis,²⁵⁵ the European Community and the United States had dramatic bilateral conflicts.²⁵⁶ As a result, the majority of the initial commitments submitted to the conference contained little or far from sufficient consideration of the interests of the maritime transport sector.²⁵⁷ Consequently, the

pute Settlement, Meeting of 20 July 1989: MTN.GNG/NG13/15, (Jul.26, 1989).

²⁴⁸ Uruguay Round MTN.GNS/TRANS/6, *supra* note 245.

²⁴⁹ *Id.*

²⁵⁰ Uruguay Round Negotiation, *Trade in Transport Services- Note by the Secretariat*, MTN.GNS/W/60, (Jul.4, 1989), (addressing air, maritime, multi-modal and other transport services).

²⁵¹ See PARAMESWARAN, *supra* note 154, at 254-56.

²⁵² *Id.*

²⁵³ Uruguay Round Negotiation, *Communication from the Chairman of the Group of Negotiations on Services to the Chairman of the Trade Negotiations Committee*, MTN.GNS/W/117, (Jun.26, 1991), at 5 (addressing the need of annexes on telecommunications and financial services).

²⁵⁴ *Id.*

²⁵⁵ Uruguay Round Negotiations, *Report to the Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988*, MTN.GNS/21, (Nov.25, 1988).

²⁵⁶ For instance, the disagreement involved in the subsidiary system under the auspices of the European Community Common Agricultural Policy related services.

²⁵⁷ See e.g. Uruguay Round Negotiations, *Conditional Offer of the United States of America Concerning Initial Commitments*, MTN.TNC/W/112, (Nov.13, 1990); *Conditional Offer of Japan Concerning Initial Commitments*, MTN.GNS/W/113, (Nov.29, 1990); *Conditional Offer of Australia Concerning*

multilateral negotiations broke down because of conflicts between the two gigantic economic entities.²⁵⁸ The multilateral negotiations on services were not officially resumed until the United States and the European Community had agreed to enter into bilateral negotiations.²⁵⁹ On the other hand, a procedural mechanism was designed to assist substantial negotiations. For example, the GNS adopted "Procedural Guidelines" for substantial negotiations to solve the substantial disagreements.²⁶⁰ Consequently, the results of the negotiations successfully covered twelve service sectors and their subsectors, including transport service and its subsector maritime transport.²⁶¹ It seems that a future agreement on maritime transport must be rooted in a consensus between the US and European countries.

The additional advance made by the Uruguay Round negotiations to maritime transport was the creation of a model scheduled approach.²⁶² These modes were drawn up by the European Community in an "Ideal Quad Schedule on International Shipping"²⁶³ which was endorsed by three trade giants, the

Initial Commitments, MTN.TNC/W/51, (Dec.4, 1990); *Conditional Offer of Hong Kong Concerning Initial Commitments*, MTN.TNC/W/54, (4 December 1990). Cf. GATT Secretariat, *Draft Final Act Embodying the Uruguay Round of Multilateral Trade Negotiations* MTN.TNC/W/35 (Nov.26, 1990); PARAMESWARAN, *supra* note 154, at 328, 364-65 (addressing the issues on GATS Annex on Maritime Transport Services).

²⁵⁸ PARAMESWARAN, *supra* note 154, at 211-12, 266-68 (describing developments of the multilateral negotiations as to service from mid-term review in Montreal in Dec. 1988 to the Ministerial-level Trade Negotiations Committee Meeting in Brussels in 1990).

²⁵⁹ WTO, Press Release GW/11, at 10.

²⁶⁰ Uruguay Round Negotiations, *Communication from the Chairman of the Group of Negotiations on Services to the Chairman of the Trade Negotiations Committee*, MTN.GNS/W/117, (Jun.24,1991), (addressing the need of annexes on telecommunications and financial services), at 3, ¶ 4 (mentioning substantive and procedural guidelines); Uruguay Round Negotiations, *Procedural Guidelines for Negotiations on Initial Commitments*, MTN.GNS/W/119, (Jul.2, 1991), ¶ 3.

²⁶¹ See Uruguay Round Negotiations, *Communication from the Chairman of the Group of Negotiations on Services to the Chairman of the Trade of Negotiations Committee*, MTN.GNS/W/117, (addressing the need of annexes on telecommunications and financial services), at 3.

²⁶² See GATS, *supra* note 17, at art. I.2 (prescribing that the four modes of maritime transport services according to the supply of a services).

²⁶³ WTO, Negotiating Group on Maritime Transport Services, *Note of the Meeting of 5 May 1994*, TS/NGMTS/1, (Jun.10, 1994), at 2 (mentioning EC's draft schedule of late 1992). EC, Quad Ideal Draft Schedule on International

United States, Canada and Japan.²⁶⁴ According to the forms of supply, maritime transport services were divided into four modes:²⁶⁵ Mode 1 cross-border supply (e.g. international freights and passengers shipping);²⁶⁶ Mode 2 consumption abroad, (e.g. vessel repair);²⁶⁷ Mode 3 overseas commercial presence;²⁶⁸ and Mode 4 the supply of transport related services through the presence of natural persons.²⁶⁹ The classification of modes makes the participants' offers clearly comparable and saves negotiating time when there are disagreements on the levels of harmonization.

Although the inclusion of maritime transport into the world trading system was agreed upon after the introduction of the dual-level approach, one area where there is a lack of progress is the Uruguay Round. The draft "Annex on Maritime Transport Services" did not pass in order to become binding on Members.²⁷⁰ The difficulty in the passing of this maritime Annex was the bilateral disagreement between the United States and the European Community within the multilateral negotiations.²⁷¹ For instance, they disagreed on the scope which service sectors covered and whether special agreements should be presented in the form of annexes to a general agreement on services.²⁷²

Maritime transport services were covered by a draft annex, which included air, road and inland waterway transport.²⁷³

Shipping, Inside US Trade, Jul.20, 1993, Special Report, at 2-4.

²⁶⁴ *Id.*

²⁶⁵ See GATS, *supra* note 17 at art. I.2

²⁶⁶ See *id.*, at art. I.2(a). (a) states "from the territory of one Member into the territory of any other Member." This paper aims to unify the freight transport laws regarding Mode 1 in the context of overall harmonization of shipping regimes.

²⁶⁷ GATS, *supra* note 17 at art. I.2(b). It states: "in the territory of one Member to the service consumer of any other Member".

²⁶⁸ GATS *supra* note 17 at art. I.2 (c) : "by a service supplier of one Member, through commercial presence in the territory of any other Member".

²⁶⁹ GATS, *supra* note 17 at art. I.2 (d) provides: "by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member", e.g. Maritime cargo handling, storage and warehouse in ports, customs clearances, container station and depot; see also Parameswaran, *supra* notes 154, 306 footnotes 1437-40.

²⁷⁰ Uruguay Round Negotiations, *supra* note 245.

²⁷¹ PARAMESWARAN, *supra* note 154, at 214.

²⁷² *Id.*

²⁷³ Uruguay Round Negotiations-Trade Negotiations Committee, *Draft*

However, maritime transport became the unique sector that was drafted in an annex but not adopted, due to the lack of the general admitted levels of harmonization in Members' commitments.²⁷⁴ Nevertheless, the United States and the European Community had not given up maritime transport negotiations and agreed to settle their disputes by launching bilateral negotiations on controversial service sectors after the conclusion of the Uruguay Round.²⁷⁵ In terms of the coverage of incorporated transport service, the European Community drafted a maritime sectoral/sectional annex applying to all international maritime cargo transport services, including bulk cargo shipping and liner shipping.²⁷⁶ Their plan was too comprehensive to gain general support at the beginning stages of negotiations,²⁷⁷ and the broad spectrum would possibly encounter more difficulties.²⁷⁸ Therefore, the task of harmonization should be started from a small area, such as liner shipping.²⁷⁹

The Final Act Embodying the Results of Uruguay Round of Multilateral Trade Negotiations was officially signed, and the GATS became an indispensable component of the WTO, in Marrakesh on April 15, 1994.²⁸⁰ The GATS disciplines generally apply to all service sectors²⁸¹ with various degrees of unifica-

Final Act Embodying the Result of Uruguay Round of Multilateral Trade Negotiations – Revision, MTN.TNC/W/35/Rev.1, (Dec.3, 1990), (drafting the annexes on maritime inland waterway, road, air transport, financial services, telecommunications, and audio-visual services).

²⁷⁴ WTO, GATS and its annex, *supra* note 15. As to financial services, a protocol (Second Protocol to the GATS) was adopted on 21 July 1995, and entered into force on 1 September 1996. Subsequently another protocol (Fifth Protocol to the GATS) as to financial services was adopted on 14 November 1997, and entered into force on 1 March 1999. Others protocols concerning the movement of nature persons (Third Protocol to the GATS) and as to telecommunications (Fourth Protocol to the GATS) have also been adopted and entered into force.

²⁷⁵ PARAMESWARAN, *supra* note 154, at 214.

²⁷⁶ See Uruguay Round Negotiations-Group of Negotiations on Services, *Draft: General Agreement on Trade in Services*, MTN.GNS/W/105, (Jun.18, 1990), (a proposal from the European Community).

²⁷⁷ Uruguay Round Negotiations, *supra* notes 260 and 261.

²⁷⁸ *Id.*

²⁷⁹ The consumers of liner shipping are not economic equals with the transport service provider, in order to protect them from abusing of liner carriers, it is necessary to establish international regulations. In bulk shipping sector, the problem is not as severe as liner shipping.

²⁸⁰ See Marrakesh Agreement, *supra* note 4.

²⁸¹ GATS *supra* note 17 at Preamble ¶ 3; GATS Article XIX (conveying

tion from sector to sector.²⁸² The inclusion of maritime transport services into the GATS is officially confirmed in the form of a GATS Annex entitled “*Negotiations on Maritime Transport Services*”.²⁸³ Therefore, further negotiations of harmonization may be situated under the Annex.

B. Progress in the NGMTS Negotiations (1994-1997): Bilateral or Multilateral?

The maritime transport negotiations occurred in the era of specific sectoral/sectional negotiations after the Uruguay Round Negotiations.²⁸⁴ According to *Ministerial Decision on Negotiations on Maritime Transport Services*²⁸⁵ and GATS “*Annex on Negotiation on Maritime Transport*,”²⁸⁶ the WTO provided the mandate for specific sectoral/sectional negotiations on maritime transport to be commenced no later than May 16, 1994 and closed by June 1996.²⁸⁷

The first advancement was that the design of dual-level negotiations which was maintained as a specific sectoral discussion forum under the “Negotiating Group on Maritime Transport Services” (NGMTS).²⁸⁸ This group was established for the exclusive handling of the maritime transport regime.²⁸⁹ Thus, the sectoral/sectional negotiations reduced the trade-off

that successive rounds of multilateral negotiations in the GATT tradition as foreseen in the GATS will broaden and deepen in maritime transport services).

²⁸² The application to a specific service sector was highly influenced by the related negotiations and the concrete commitments. For example, the area of maritime transport services was suspended after the Uruguay Negotiations until 1994. See WTO, *Services: Post-Negotiations - Post-Uruguay Round Negotiation (1994-97)*, http://www.wto.org/english/tratop_e/serv_e/s_negs_posturuguay_e.htm, accessed 3 July 2012.

²⁸³ See GATS, *supra* note 17, at annexes.

²⁸⁴ See Marrakesh Agreement, *supra* note 4.

²⁸⁵ *Id.*

²⁸⁶ See GATS, *supra* note 17 at annexes.

²⁸⁷ *Id.* at ¶ 4 states: “The NGMTS shall hold its first negotiating session no later than 16 May 1994. It shall conclude these negotiations and make a final report no later than June 1996. The final report of the NGMTS shall include a date for the implementation of results of these negotiations”.

²⁸⁸ Negotiating Group on Maritime Transport Services, *Negotiations on Maritime Transport Services-Note by the Secretariat*, TS/NGMTS/W/1, (2 May 1994), at 1.

²⁸⁹ *Id.*

risks between service sectors and reduced the opposition from the shipping industry.

During the post-Uruguay Round Negotiations, the second advancement was that the NGMTS had integrated the UN agencies²⁹⁰ and elaborately worked together in depth for the first time.²⁹¹ By the end of 1996, there were fifty-six members,²⁹² as well as sixteen observers,²⁹³ in the NGMTS negotiations. These participants substantially engaged in the NGMTS negotiations through sixteen formal meetings at Marrakesh.²⁹⁴ However, only international organizations obtained the right of observership. Some of the international organizations included were the OECD, UNCTAD and World Bank.²⁹⁵

The third advancement is the method by which the NGMTS exclusively based substantial negotiations on primary data. The NGMTS had its Secretariat prepare a questionnaire to collect primary information in 1994.²⁹⁶ The finalized ques-

²⁹⁰ See *infra* notes 291 and 292 for inter-government organizations, such as UNCTAD and the World Bank.

²⁹¹ See *Note by the Secretariat, supra* note 288; see also PARAMESWARAN, *supra* note 154, at 287-91.

²⁹² See Negotiating Group on Maritime Transport Services, *Note of the Meeting of 13 July 1994*, S/NGMTS/2, (4 Aug., 1994), ¶ 1-3 (claiming that there had been forty seven participating members if counting the European Community countries separately by August 1994); *Note of the Meeting of 9-10 February*, S/NGMTS/4, (9 Mar., 1995), at 1; *Note of the Meeting of 17-19 July*, S/NGMTS/6, (3 Aug., 1995), at 1; *Note of the Meeting of 30 October-1 November 1995*, S/NGMTS/7, (Nov.16, 1995), at 1.

²⁹³ Negotiating Group on Maritime Transport Services, *Report of the Negotiating Group on Maritime Services*, S/NGMTS/16 (3 July 1996), ¶3; WTO Doc. No. S/NGMTS/2 (4 Aug., 1994) (notifying that two intergovernmental organization -the UNCTAD and the OECD – become observers); *Note of the Meeting of 17 October*, S/NGMTS/3, (31 Oct., 1994), at 1 (announcing that the World Bank also became another observer, but the American Institute of Merchant Shipping did not). Cf. WTO Doc. No. S/NGMTS/2, (4 Aug., 1994), at 1 (stating that the Council and European and Japanese Shipowners' Associations applied to attend the meeting as an observer); *Note on the Meeting of 9-10 February 1995*, S/NGMTS/4, (Mar. 9, 1995), at 1 (declining to grant observer status to two private-sector organizations-the Council of European and Japanese National Shipowners Associations and the American Institute of Merchant Shipping- on the basis of an expressed preference on the part of several delegations for limiting observership to inter-governmental organizations).

²⁹⁴ See *Note by the Secretariat, supra* note 288 at 1; see also PARAMESWARAN, *supra* note 154, at 287-91.

²⁹⁵ *Id.*

²⁹⁶ Negotiating Group on Maritime Transport Services, *Questionnaire on Maritime Transport Services S/NGMTS/W/2*, (Oct.21, 1994), at 2-10 (publish-

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tionnaire was very comprehensive, consisting of two parts.²⁹⁷ The questionnaire covered matters beyond liberalization and regulation issues, such as the economic structure, including trade flows and regulatory structures applying to liner and tramp shipping.²⁹⁸ Part I of the questionnaire covered economic structure and statistics on international shipping markets.²⁹⁹ Part II of the questionnaire dealt with the regulatory structures applicable for maritime transport in each Member.³⁰⁰ A wide range of participants committed themselves to responding.³⁰¹ Almost all NGMTS members and observers responded to

ing the schemes of the questionnaire and stating that the questionnaire serves the purpose of establishing factual background but not extends to issues such as competition law and shipping conferences, as well on the institutional arrangements).

²⁹⁷ Negotiating Group on Maritime Transport Services, *Note on the Meeting of 4 August 1994*, S/NGMTS/2 (Oct. 21, 1994) at ¶ 6; WTO, Questionnaire on Maritime Transport Services, S/NGMTS/W/2 (Oct.21, 1994), at 3-10.

²⁹⁸ Negotiating Group on Maritime Transport Services, *Note on the Meeting of 13 July 1994*, S/NGMTS/2 (Aug.4, 1994) ¶11 (mentioning that the questionnaire would be produced by the Secretariat on the economic structure, including trade flows and on regulatory structures); S/NGMTS/W/2, (Oct.21, 1994), at 1 (stating that the questionnaire has been prepared for circulation to all participants and observers of the NGMTS on Jul.13, 1994).

²⁹⁹ See *Questionnaire on Maritime Transport Services*, *supra* note 296 at 2 (stating in Introductory Comments, that the questions were designed to capture, as fully as possible, the information on participants' market and regulatory structures applying to the maritime transport services sector, including both cargo and passenger transportation where relevant); WTO, *Note of the Meeting of 17 October 1994*, S/NGMTS/3, (Oct. 31, 1994), at 2, ¶ 6 (restating the purpose of the questionnaire is to establish factual background and did not imply a broadening of the scope of the negotiations).

³⁰⁰ *Id.*

³⁰¹ See WTO – Negotiating Group on Maritime Transport Services, *Note on the Meeting of 13 July 1994*, S/NGMTS/2, (Aug.4, 1994). WTO, *Questionnaire and Response to the Questionnaire on Maritime Transport Services*, S/NGMTS/W/2/Add.-- (1994-1995) (covering 34 countries). WTO, *Communication from Australia-Response to Questionnaire on Maritime Transport Services*, S/NGMTS/W/2/Add.4, (Feb.24, 1995), ¶ 8; WTO-NGMTS, *Communication from the United States of America-Response to Questionnaire on Maritime Transport Services*, S/NGMTS/W/2/Add.11, (Jan. 31, 1995), ¶¶ 3-4; WTO, *Communication from the European Community and Their Member States-Response to Questionnaire on Maritime Transport Services*, S/NGMTS/W/2/Add.12, (Feb. 17, 1995), at 37, 43; WTO, *Communication from Hong Kong-Response to Questionnaire on Maritime Transport Services*, S/NGMTS/W/2/Add.15f, (Feb. 10, 1995), at 4; WTO, NGMTS, *Communication from Malaysia-Response to Questionnaire on Maritime Transport Services*, S/NGMTS/W/2/Add.19, (Mar. 13, 1995), ¶ 4; WTO, *Communication from Ghana-Response to Questionnaire on Maritime Transport Services*, S/NGMTS/W/2/Add.21, (Apr. 3, 1995), ¶ 3; WTO, *Communication from Ar-*

it,³⁰² so that the information collected became comprehensive and worked as the factual background for the further negotiations.³⁰³

Additionally, progress has been achieved in two other areas as well. First, a majority of participants recognized the need to increase transparency on various domestic shipping regulations and the value of legal certainty.³⁰⁴ Furthermore, the importance of multimodal transport turned out to be further highlighted at the WTO.³⁰⁵ For example, the United States delegation stressed the inclusion of the door-to-door supply of transport services within GATS framework in its informal statement on multimodal transport.³⁰⁶

However, it is necessary to address the area of multimodal transport after the achievement in sea transport. As to inland transport by truck, members impose various domestic instruments, which make the harmonization of multimodal transport very difficult.³⁰⁷ Subsequently, the joint negotiations on all transport modes would make the sea transport negotiations more difficult. Owing to the absence of joint negotiations on air,

gentina-Response to Questionnaire on Maritime Transport Services, S/NGMTS/W/2/Add.22, (Apr. 4, 1995), ¶ 2; WTO, Communication from Turkey-Response to Questionnaire on Maritime Transport Services, S/NGMTS/W/2/Add.23, (Apr. 6, 1995), ¶ 5; WTO, *Communication from Philippines - Response to Questionnaire on Maritime Transport Services*, S/NGMTS/W/2/Add.24, (Apr. 5, 1995), ¶ 6.

³⁰² See generally WTO, *infra* note 394.

³⁰³ Negotiating Group on Maritime Transport Services, *Note of the Meeting of 17-19 July 1995*, Doc. No. S/NGMTS/6, (Aug. 3, 1995), ¶ 1 (encouraging every participant and observer alike to submit their replay in order for the Group to engage in a new phase of negotiations from as large an information base as possible). See also Council for Trade in Services, *Maritime Transport Services*, Doc. No. S/C/W/62 (Nov. 16, 1998), ¶¶ 1-2.

³⁰⁴ These issues were initiated by a circulated EC Model Schedule, which was informally circulated among delegations shortly before the conclusion of the Uruguay Round among the participants. See WTO, *Note on the Meeting of 6-7 April 1995*, S/NGMTS/5, (Apr. 24, 1995), at 7; See also Negotiating Group on Maritime Transport Services, *Note of the Meeting of 17-19 July 1995* Doc. No. S/NGMTS/6, (Aug. 3, 1995), ¶ 4; Negotiating Group on Maritime Transport Services, *Note on the Meeting of 13 and 16 February 1996*, S/NGMTS/9, (Mar. 8, 1996), ¶ 5.

³⁰⁵ Cf. the Rotterdam Rules *supra* note 5 (reflecting the emphasis of multimodal transport under the UN system).

³⁰⁶ OECD, *World Trade Organization - Recent Developments in NGMTS*, DSTI/SI/MTC(96)8, (Mar. 7, 1996), at 3-4; see also Parameswaran, *supra* note 154, at 343-46.

³⁰⁷ See generally WTO, *infra* note 394.

sea and inland transport in the Uruguay Round and NGMTS,³⁰⁸ international multimodal transport arrangements should not be negotiated before addressing harmonization of sea and inland legs, as well as certain degrees of cabotage³⁰⁹ on inland waterways, respectively.

Even so, negotiations encountered a tug of war, which saliently happened between the United States and other participants.³¹⁰ Also, a majority of participants had not rendered substantive offers for maritime transport.³¹¹ In particular, the US delegation failed to submit a timely and substantial offer.³¹² As a result, most other participants swiftly shifted backwards to their Uruguay-Round propositions.³¹³ A number of negotiating representatives claimed that there was a need for a substantial offer from the world's major trading entities first.³¹⁴ Subsequently, their feedback was far from the United States' expectation on substantial rules on maritime transport under the GATS.³¹⁵ It seemed as though many participants were waiting for the United States' to submit their substantial offer first, but the U.S. was waiting for everyone else. Therefore, this historical period demonstrated the difficulty of addressing the tug of war in the multilateral negotiations.

So far, accomplishing a multilateral agreement on maritime transport under GATS is still far from being attained.³¹⁶ The lack of a substantial US offer on maritime transport ser-

³⁰⁸ Uruguay Round Negotiations, *supra* note 260 and note 261 (addressing air, maritime, multimodal and other transport services).

³⁰⁹ See generally WTO, *infra* note 394 (referencing that cabotage is subject to national instruments instead of international instruments).

³¹⁰ Council for Trade in Services, *Decision on Maritime Transport Services: Adopted by Council for Trade in Services on 28 June 1996*, S/L/24, (Jul. 3, 1996) ¶¶ 23-30 (enclosing a list of documents of NGMTS negotiations on maritime transport); see PARAMESWARAN, *supra* note 154, at 214.

³¹¹ *Id.*

³¹² OECD, *Developments in Negotiating Group on Maritime Transport Services*, DSTI/SI/MTC(95)34, (Oct. 4, 1995), at 3-4 (stating that the US violated paragraph 7 of the 1994 Ministerial Decision on Maritime Transport Service in the form of domestic legislation to improve its negotiating position. The issue was argued at every the NGMTS meeting during Jul. 1995 to May 1996.

³¹³ Council for Trade in Services, *supra* note 310, at ¶ 23.

³¹⁴ Negotiating Group on Maritime Transport Services, *Note on the Meeting of 13 and 16 February 1996*, S/NGMTS/9, (Mar. 8, 1996), at 2.

³¹⁵ Council for Trade in Services, *supra* note 310, at ¶ 23.

³¹⁶ *Id.*

vices has tremendous negative effects in other countries, particularly in developing countries, on the inclusion of this sector into the world trading system.³¹⁷ On the one hand, the European Community proposed to promote a mere standstill agreement, taking the view that “the challenge in maritime [transport service] was not so much to liberalize as to bind the existing openness of most trade regimes.”³¹⁸ In contrast, the United States ardently appealed for an agreement, which in fact liberalized the shipping sector.³¹⁹ The United States claimed that an agreement standstill was not sufficient,³²⁰ and emphasized that a sea-transport agreement should be promoting the level of liberalization rather than merely reflecting the current level.³²¹ This was in spite of a last-minute unification effort by twenty-four participants³²² that proposed a package of draft offers “conditional on a matching, comprehensive offer from the United States” in June 1996.³²³ The package constituted several substantial improvements on all three pillars of maritime transport services, as well as on multimodal transport.³²⁴ Nevertheless, the United States ultimately deemed it as merely reinforcing the *status quo* and repackaging the previous offers that were far from being sufficient.³²⁵ When

³¹⁷ See also, PARAMESWARAN, *supra* note 154, at 343-46.

³¹⁸ Negotiating Group on Maritime Transport Services, *Note on Meeting of 8 May 1996*, S/NGMTS/11 (May 14, 1996), at 2; see also Negotiating Group on Maritime Transport Services, *Note on Meeting of 13 & 16 February 1996*, S/NGMTS/9 (Mar. 8, 1996), ¶ 6.

³¹⁹ See also Negotiating Group on Maritime Transport Services, *Note on Meeting of 13 & 16 February 1996*, S/NGMTS/9 (Mar. 8, 1996), ¶ 5.

³²⁰ *Id.*

³²¹ Negotiating Group on Maritime Transport Services, *Note on Meeting of 16 & 19 March 1996*, S/NGMTS/10 (Apr. 11, 1996), ¶ 3.

³²² The European Community members count as one entity.

³²³ Negotiating Group on Maritime Transport Services, *Note on the Meeting of 4 June 1996*, S/NGMTS/13 (Jun. 11, 1996), ¶ 2. The participants included Argentina, Australia, Brazil, Canada, Colombia, the European Community, the Dominican Republic, Hong Kong, Iceland, Japan, Mexico, Morocco, New Zealand, Nigeria, Norway, the Philippines, Poland, the Republic of Korea, Romania, Singapore, South Africa and Switzerland. WTO, Doc. (unregistered): Conditional Aggregate Package of Offers on Maritime Transport Services, (Jun. 1996), at 1.

³²⁴ *Id.*

³²⁵ Negotiating Group on Maritime Transport Services, *Note on the Meeting of 13 and 16 February*, S/NGMTS/9 (Mar. 8, 1996), at 1, ¶ 5 (stating that the US would not put forward either an offer or a request because it did not consider the existing offers satisfactory); See also WTO, *Note on the Meeting*

the NGMTS was ended mandatorily, the improved offer submitted by twenty-four countries was rejected because of the US's resistance.³²⁶ Consequently, it was widely recognized that the NGMTS negotiations should not be continued at that moment,³²⁷ and the NGMTS negotiations between 1994 and 1996 fell into a stalemate at the end of June 1996.³²⁸ In order to address the tug of war in future negotiations, bilateral negotiations and multilateral negotiations might be undertaken.

History usually repeats itself. When the Uruguay Round was nearing its end, some participating members tried to make a last-minute effort to achieve maritime transport liberalization by offering varying degrees of liberalized offers,³²⁹ but these

of 17 June 1996, Doc. No. S/NGMTS/14 (Jun. 24, 1996), at 1; Negotiating Group on Maritime Transport Services, *Note on the Meeting of 25 June 1996*, S/NGMTS/15, (Jun. 27, 1996), at 1; Negotiating Group on Maritime Transport Services, *Note on the Meeting of 26 and 29 March 1996*, S/NGMTS/10 (Apr. 11, 1996), at 1 (The United States stressed that the existing offers merely reflected the current situation rather than promoting the commitments).

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ See WTO, *Post-Uruguay Round Negotiations (1994-97)*

http://www.wto.org/english/tratop_e/serv_e/s_negs_posturuguay_e.htm, (last visited Jul. 27, 2012).

³²⁹ Participating members offered different degrees of liberalization on maritime transport, and a comprehensive substantive commitment on all pillars of maritime transport and on multimodal transport were scarce. *e.g.* Uruguay Round, *Australia-Schedule of Specific Commitments*, GATS/SC/6, (Apr. 15, 1994) (excluding the port service from the its negotiating schedule); Japan, Uruguay Round Doc. No. GATS/SC/46, (Apr. 15, 1994) (excluding the international shipping sector). Some countries offered rather protectionist commitments, *e.g.* Uruguay Round, *Egypt-Schedule of Specific Commitments*, GATS/SC/30, (Apr. 15, 1994); Uruguay Round Doc. No. GATS/EL/13 (Apr. 14, 1994); Ghana, Uruguay Round Doc. No. GATS/SC/11 (Apr. 15, 1994), Uruguay Round Doc. No. GATS/SC/35 (Apr. 15, 1994) (stating protectionist commitments on international shipping); WTO, *Communication from the European Community and their Member States: Conditional Offer on Maritime Transport Services*, S/NGMTS/W/3, (Jun. 30, 1995), at 1, ¶¶ 2-3 (setting no limitation on the mode 1, *e.g.* international shipping, and freight forwarding services); See also WTO, *Communication from Norway- Maritime Transport Services*, S/L/33, (Sep. 12, 1996); WTO, *Communication from Malaysia- Maritime Transport Services*, S/L/32 (Sep. 12, 1996); Brazil, Uruguay Round Doc No. GATS/EL/13 (Apr. 15, 1994). Cf. WTO, *Communication from Iceland- Conditional Offer on Maritime Transport Services*, S/NGMTS/W/27, (Jun. 24, 1996) (mentioning Iceland's highly liberalized offer covering all three maritime pillars and multimodal transport); Korea-Schedule of Specific Commitments (Apr. 15, 1994) and General Agreement on Trade in Services, *Thailand-Schedule of Specific Commitments*, GATS/SC/85, (Apr. 15, 1994).

meaningful offers were withdrawn before the mandatory close of negotiations, due to the absence of a US offer.³³⁰ Other significant maritime powers either entirely withdrew (e.g. the European countries)³³¹ or significantly diminished substantive offers (e.g. Canada,³³² Japan³³³ and India³³⁴). Again, the absence of a US substantial offer led the NGMTS negotiations between 1994 and 1996 to a deadlock. Although the US delegation claimed that the US regime for maritime transport services was almost the most liberal in the world, many NGMTS participants felt that there were some ulterior motives associated with the US reluctance to make a substantive concession on its domestic restrictive measures, for instance US unilateral cargo reservation for its domestic carriers and a conservative policy for its cabotage trade.³³⁵ As Parameswaran noted, the NGMTS seemed to encounter a tug-of-war between the United States and other participating negotiators:³³⁶ the United States was waiting for other negotiators to submit a set of comprehensive and adequate offers; nonetheless a considerable number of participating countries would not actively and voluntarily do so unless the US handed in a substantial offer as a premise.³³⁷

At first glance at the failures in negotiations, the history of NGMTS negotiations has established that it is difficult to

³³⁰ See, e.g., Negotiating Group on Maritime Transport Services, *Communication from the European Community and their Member States*, S/NGMTS/W/5 (Jul. 17, 1995), ¶ 3 (protesting the US unilateral measures affecting the multilateral negotiations on the liberalization of maritime transport); Parameswaran, *supra* note 154, at 300.

³³¹ See Negotiating Group on Maritime Transport Services, *supra* note 330, ¶ 3.

³³² Negotiating Group on Maritime Transport Services, *Communications from Canada: Conditional Offer on Maritime Transport*, S/NGMTS/W/8, (Jul. 18, 1995).

³³³ WTO, *Communications from Japan: Conditional Offer on Maritime Transport*, S/NGMTS/W/5, (Jul. 18, 1995).

³³⁴ *Id.*; e.g., Negotiating Group on Maritime Transport Services, *Communication from India: Conditional Offer on Maritime Transport Services*, S/NGMTS/W/29 (Jul. 8, 1996).

³³⁵ PARAMESWARAN, *supra* note 154, at 297-99 (illustrating the insufficiency of the maritime transport offers by shedding lights on developing countries of Asia and South America, such as India and Brazil).

³³⁶ *Id.* Traditional European maritime powers concerned that inclusion of maritime transport into GATS framework would downgrade the degree of liberty of shipping industry.

³³⁷ *Id.* at 299.

achieve a worldwide enforceable maritime transport regime without a meaningful participation from the United States. The previous negotiation practices teach us that a successful conclusion of an extended negotiation of Uruguay Round negotiation on the GATS is not achievable without the participation of the US. As further maritime transport negotiations developed, it became obvious that a substantial involvement of the United States was the precondition for the breakdown of the paralyzed maritime negotiations.

Further scrutiny of the United States' practice shows a bilateral approach may break the deadlock in multilateral negotiations. First of all, the absence of a US substantial offer is because there are two conflicting voices as to shipping within this country. It is the United States government who pioneered the inclusion of services sectors into WTO;³³⁸ meanwhile its domestic shipping industry tried to exclude shipping from being included.³³⁹ The shipping industry's resistance originated from the shipowners who feared that their interests granted by national instruments would vanish after maritime transport services were integrated at the world trading system.³⁴⁰ Moreover, conflicts within influential parties had not been properly addressed before the multilateral negotiations at the WTO level. For instance, the confrontation between the United States and the Europe was once very tough.³⁴¹ The success of the US-EC bilateral agreement proves that the tough issues can be addressed by moving from a bilateral approach to extended multi-

³³⁸ US Congress, *Office of Technology Assessment, Trade in Services: Exports and Foreign Revenue - Special Report*, OTA-ITE-316 (1986), at 7 (citing document prepared at the request of the US Senate Committee on Governmental Affairs as a "separate publication of OTA's estimates of the impacts of services trade on the Nation's balance of payments." By 1982, US policymakers had decided "to place a high priority on services in the next round [of multilateral trade negotiations]. Later on, the US augmented international preparations of the multilateral negotiations in service for the Uruguay Round).

³³⁹ William DiBenedetto, *Hills Asks Congress to Table GATT Maritime Resolutions*, 4 J.L. COM., 3B (1989); see also PARAMESWARAN, *supra* note 154, at 254.

³⁴⁰ *Id.*

³⁴¹ See the US and EC's disagreement on agriculture caused temporary suspension of GATS negotiations in PARAMESWARAN, *supra* note 154, at 211-12; 266-68 (describing developments of the multilateral negotiations as to service from mid-term review in Montreal in December 1988 to the Ministerial-level Trade Negotiations Committee Meeting in Brussels in 1990 because of a compromise between the EC and the US); Uruguay Round Negotiations, MTN.GNS/W/60, *supra* note 250 at ¶49-94 on maritime transport.

lateral negotiations.³⁴² Further, in recent maritime negotiations, bilateral agreements are highly helpful between important trade regions, such as those concluded between the European Union and China,³⁴³ and the United States and China.³⁴⁴ Therefore, bilateral negotiations will help the multilateral trading negotiations remove difficulties.

C. Regression in Doha Round Negotiations (2000): Trade-off Problem and the Necessity of an Annex

On January 1, 2000, GATS negotiations were officially launched as scheduled.³⁴⁵ This new trade round was initiated at a Declaration during the Fourth WTO Ministerial Conference in Doha, Qatar in November 2001 (Doha Round).³⁴⁶ Currently, maritime transport services are included in this Round under GATS negotiations along with all other service sectors.³⁴⁷

In an early phase of the Doha Round, the developed and the developing countries expressed their common interest in maritime transport services.³⁴⁸ In October 2000, the European Community prompted a joint statement specifically dealing

³⁴² Negotiating Group on Maritime Transport Services, *Note on the Meeting of 6-7 April 1995*, S/NGMTS/5, at 8, ¶ 36 (the Chairman of the NGMTS pointing out the process could be plurilateral, multilateral or bilateral in character to enhance greater transparency and legal certainty; *Note on the Meeting of 30 October-1 November 1995*, S/NGMTS/7, at 2, ¶ 8. The inclusion of GATS under the WTO framework started from the successful bilateral negotiations between the EC and US; *See also, Note on the Meeting of 5 and 8 December 1995*, S/NGMTS/8, (Jan. 5, 1996), at 1-2, ¶ 6 (the Chairman of the NGMTS placed great emphasis on the need for the participants to intensify the bilateral negotiations accompanying the multilateral negotiations; *Note on the Meeting of 13 and 16 February 1996*, S/NGMTS/9, (Mar. 8, 1996), at 1, ¶ 5 (considering the bilateral negotiations as useful and candid by the US delegation).

³⁴³ Council for Trade In Services, *Maritime Transport Services Background Note by Secretariat*, S/C/W/315, (Jun. 7, 2010) at 36, ¶ 126.

³⁴⁴ Negotiating Group on Maritime Transport Services, *Note on the Meeting of 26 and 29 March 1996*, S/NGMTS/10, (Apr. 11, 1996), at 1 (mentioning the NGMTS negotiations that the combination of bilateral and multilateral negotiations).

³⁴⁵ *See* GATS, *supra* note 17, at 19.

³⁴⁶ World Trade Organization, *Ministerial Declaration of 14 November 2001*, WT/MIN(01)/DEC/W/1 (2001).

³⁴⁷ WTO, *Service Negotiations*, (Jul. 12, 2012), http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm.

³⁴⁸ WTO, *infra* notes 349 and 350.

with maritime transport.³⁴⁹ Later, Japan, Norway, the Republic of Korea, Chile, Australia and Colombia submitted respective negotiation proposals as well.³⁵⁰ As we have seen, the Doha Round inherits a request-offer approach from previous negotiations.³⁵¹ In light of the previous offers, they aimed to reduce, or even to further eliminate, impediments to the shipping industry and to cultivate a free and fair competitive shipping market with merely a minimum level of regulation on reducing shipping tariffs thus benefiting consumers from all WTO member parties.³⁵²

The principles of trade in services are contained in the GATS, including maritime transport service sectors.³⁵³ The specific regime for maritime transport services in the negotiations is defined by decision.³⁵⁴ The “Guidelines and Procedures for the Negotiations on Trade in Services” at paragraph 11 claims that “Liberalization shall be advanced through bilateral, plurilateral or multilateral negotiations [...]”.³⁵⁵ After the Hong Kong 2005 Ministerial Conference, the rigidity of harmonization on maritime transport services is amended with certain flexibilities with regard to countries at different stage of devel-

³⁴⁹ Council For Trade in Services, *Joint Statement from the European Community and their Member States, Hong Kong, Japan, Republic of Korea, Norway and Singapore: The Negotiations on Maritime Transport Services*, S/CSS/W/8, (Oct. 6, 2006), ¶¶ 3-5, (announcing their ambition for real and meaningful liberalization in shipping).

³⁵⁰ See Council For Trade in Services, *Communication from the European Communities and Their Member States: GATS 2000: Transport Services*, S/CSS/W/41, (Dec.22, 2000), at 8; *Communication from Japan: The Negotiations on Trade in Services*, S/CSS/W/42, (Dec. 22, 2000), at 10-11; *Communication from Norway: The Negotiations on Trade in Services*, S/CSS/W/59, (Mar. 21, 2001), at 6; *Communication from Republic of Korea: Negotiating Proposal for Maritime Transport Services*, S/CSS/W/87, (May 11, 2001), at 1; *Communication from Chile: The Negotiations on Trade in Services*, S/CSS/W/88, (May 14, 2001), at 3; *Communication from Australia: Negotiating Proposal for Maritime Transport Services*, S/CSS/W/111, (Oct. 1, 2001), at 1; *Communication from Colombia - Negotiating Proposal for Maritime Transport Services*, S/CSS/W/123, (Nov. 27, 2001), at 1.

³⁵¹ Uruguay Round and NGMTS Negotiations in Section IV.A-B; See, e.g., *supra* notes 323, 325, 330-33.

³⁵² Council for Trade in Services, *supra* notes 349-50.

³⁵³ WTO, *supra* note 347.

³⁵⁴ Council For Trade in Services, *Decisions on Maritime Transport Services*, S/L/24, (Jul. 3, 1996).

³⁵⁵ Special Session of the Council for Trade in Services, *Guidelines and Procedures for the Negotiations on Trade in Services*, S/L/93, (Mar. 29, 2003).

opment.³⁵⁶

A substantial advance in the Doha Round negotiations is that absence of a US offer on the maritime transport sector has not frozen the multilateral negotiations. Until 2003, the United States had not included any specific commitment on maritime transport service³⁵⁷ because the inclusion of the maritime transport into GATS/WTO negotiations under the Doha Round would reduce US flexibility on whether to undertake counteract.³⁵⁸ The inclusion means that the breach of WTO maritime transport will be a subject under the dispute settlement apparatus, instead of by any unilateral retaliatory measure, in addition that the US would be subject to the WTO dispute settlement system concerning maritime transport issues.³⁵⁹ Moreover, the US's hesitation caused negative reactions from other countries, particularly developing countries, such as India and Brazil towards handing in any comprehensive and substantial offers in the sector.³⁶⁰ Even so, developing countries have learnt not to rely heavily on the US attitude. There are an increasing number of developing countries that have made substantial commitments on maritime transport, including India and Brazil.³⁶¹ As a result, the Doha Round has been developed without heavy reliance on the US offers like the NGMTS negotiations (1994-1996).

Unlike the NGMTS specific forum, the Doha Round is problematic owing to lack of a specialized maritime transport negotiation platform. Although the Korean delegation hinted

³⁵⁶ World Trade Organization, *Ministerial Declaration of 18 December 2005: Doha Work Programme*, WT/MIN(05)/DEC, Annex C, at C-2, ¶ 3, 5 (on the more forms of negotiations and more flexibility for less developed countries); see also Marion Panizzon, Nicole Pohl and Pierre Sauvé, *supra* note 70, at 153.

³⁵⁷ Special Session of the Council for Trade in Services, *Communication from the US: Initial Offer*, TN/S/O/USA, (Apr.9, 2003), at 93.

³⁵⁸ See PARAMESWARAN, *supra* note 154, at 320-21, n.1508 (The Chairman of the US Federal Maritime Commission expressed concerns that "the Commission's authority to move unilaterally to counteract the laws and actions of foreign government is unique. [...] this is an important authority and the Commission is judicious in its use. Had the US agreed to include maritime services in the World Trade Organization, the Commission would have lost this authority and not been able to take these actions").

³⁵⁹ DSU Article 2.

³⁶⁰ WTO, *Members and Observers*, *supra* note 52.

³⁶¹ PARAMESWARAN, *supra* note 154, at 339-41.

that it was necessary to found the NGMTS-like negotiation forum, a specialized negotiation forum on merely maritime transport has not been established.³⁶² The General Council of Services decided to undertake maritime transport negotiations along with all other services sectors.³⁶³ Firstly, it is unlikely for negotiators to be equipped with adequate knowledge in this sector due to the perplexing nature of sea transport.

Moreover, the mixed negotiations mean the sea transport sector encounters trade-off risks from other sectors. The cross sectoral/sectional trade-off bargaining practices existed in the previous WTO negotiations. This practice was widely manipulated by negotiators in their bargaining procedure in the transformation from the GATT system to the WTO system.³⁶⁴ From the perspective of a governmental negotiator, the overall service trade of the country gained an upper hand over domestic shipping industry only.³⁶⁵ Due to the lesser economic and political importance of the shipping industry compared with a country's overall services economy, the maritime transport sector faced a challenge from the trade-off process.³⁶⁶ Despite the acknowledgement of the essential importance achieved through GATT as to trade of goods, shipowners' associations in different countries might fear that the inclusion of maritime services negotiations in this framework is paralleled with all other sectoral/sectional services bears the risk of cross-sectoral/sectional trade-off problem.³⁶⁷ The problem will remain outstanding unless the maritime transport is negotiated separately as a specific service sector; the agreements achieved in the independent negotiations will form a GATS annex.

Additionally, a request-offer approach used in the Doha

³⁶² Special Session of the Council for Trade in Services, *Korea Delegation's Proposal*, S/CSS/W/87, (May 11, 2001), at ¶5.

³⁶³ *Id.*

³⁶⁴ See Jackson, *supra* note 40, at 48.

³⁶⁵ PARAMESWARAN, *supra* note 154, at 252-53, 346-48.

³⁶⁶ *Id.*

³⁶⁷ See CENSA, *GATT Rules for Sea Transport: CENSA Position Paper* (May 1984), at 2; BIAC, BIAC Statement to the OECD Maritime Transport Committee Regarding Maritime Services and the GATT (Jun.23, 1989; International Chamber of Commerce, *Liberalization of Services Under the GATT Uruguay Round*, 321/360 (1989), at 2; OECD DAF/FE/MTC/87.11(2nd Rev.) (October 1987), at 7; OECD, Results of the Uruguay Round of Multilateral Trade Negotiations on Maritime Transport, DSTI/SI/MTC(94)9, (Mar.1994), at 2.

Round bears a risk of creating a negotiation vacuum in WTO Member's offers. During 2003, WTO Members submitted a number of initial offers on all service sectors.³⁶⁸ Among them, some offers contained meaningfully substantial commitments on all three pillars of maritime transport,³⁶⁹ multimodal transport (referred to sometimes as the fourth pillar), and even on certain extents of cabotage domestic transport.³⁷⁰ Take the European Community offer as an example. The European Community mainly restates its 1996 NGMTS-negotiation offer with a high extent of liberalization on international shipping and on cabotage shipping as well.³⁷¹ So do the offers of New Zealand,³⁷² Australia,³⁷³ Canada,³⁷⁴ Japan, all of whom are maritime powers.³⁷⁵ Nevertheless, others omitted the shipping sector in their service GATS commitments entirely. A salient example was the US offer, which did not include any specific commitment to the shipping sector.³⁷⁶

Last but not least, it is necessary to unify the system of classification before the next negotiations. The participants follow various classifications of maritime transport sub-categories, so that it is very difficult to precisely identify common and conflicting areas for further negotiations.³⁷⁷ So far, the diversity of national commitments combine three commonly used forms of classification systems, mixing the Central Product Classification (CPC) system and services sectoral/sectional

³⁶⁸ See *infra* notes 360, 376 and 377.

³⁶⁹ WTO, *Notes to the Section on International Maritime Transport Services*, TN/S/O/EEC (Jun.10, 2003).

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² Council for Trade in Services Special Session, *New Zealand: Initial Conditioning Offer*, TN/S/O/NZL (Mar. 31, 2003).

³⁷³ Council for Trade in Services Special Session, *Australia: Initial Conditioning Offer*, TN/S/O/AUS (Apr. 2, 2003).

³⁷⁴ Council for Trade in Services Special Session, *Canada: Initial Conditioning Offer*, TN/S/O/CAN (Apr. 4, 2003).

³⁷⁵ Council for Trade in Services Special Session, *Japan: Initial Conditioning Offer*, TN/S/O/JPN (Apr. 7, 2003).

³⁷⁶ See Council for Trade in Services Special Session, *United States: Initial Offer*, TN/S/O/USA, (Apr. 9, 2003) at 93; *Chile: Initial Offer*, TN/S/O/CHL, (Jul. 16, 2003) at 35-36; *Turkey: Initial Offer*, TN/S/O/TUR, (Sep. 3, 2003) at 34-35. The US offer on maritime transport sector was absent.

³⁷⁷ See Council for Trade in Services, *Maritime Transport Services Background Note by Secretariat*, S/C/W/315, (Jun. 7, 2010).

Classification List, as well as the Maritime Model Schedule (MMS).³⁷⁸ The diversity is further perplexed by the fact that some Members added their own *sui generis* definitions.³⁷⁹

As of November 2005, WTO members collectively identified their sectoral/sectional and modal objectives for maritime transport negotiations.³⁸⁰ Unfortunately, many of the details of maritime negotiations contained in maritime transport negotiations remain restricted and unavailable for researchers.

The key objective of this new round of maritime negotiations probably puts greater emphasis on developing countries, which is reflected in many articles in the 2001 Doha Ministerial Declaration.³⁸¹ Active participation of China in the WTO negotiations and in the Rotterdam Rules' negotiations offer various chances for maritime transport service providers from all over the world to embody the Chinese maritime regime in a uniform regime under the WTO, in particular the GATS, framework.

It is worth noting that, within the WTO framework, a multilateral trading and negotiating system, there are a few non-reciprocal elements, albeit they usually erode the unification of an international transport regime. These exceptions originate from the progressive notion.³⁸² According to some, these exceptions benefit less developed countries from a fully uniform GATS transport regime offered by developed member parties without requiring that the former groups adhere to the uniform standards at exactly the same degree as that of the later groups. In fact, it is reasonable to allow this non-reciprocity, because these LDCs are usually negotiating underdogs.³⁸³ Owing to their minor economic importance and unfamiliarity with the WTO rules of play, they cannot act as rule makers.³⁸⁴

³⁷⁸ Council for Trade in Services, Maritime Transport Services Background Notes by Secretariat, MTN/GNS/W/120, (Jun. 7, 2010).

³⁷⁹ See Council for Trade in Services, *supra* note 378, at 36, ¶136.

³⁸⁰ See WTO,

<http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/tn/s/23.doc>, accessed Jan. 26, 2013.

³⁸¹ World Trade Organization, Ministerial Decision of 14 November 2001, WT/MIN(01)/DEC/1 (Nov. 20, 2001), at ¶¶ 2, 3, 9, 15 and 16.

³⁸² GATS, *supra* note 17, at Part IV "Progressive Liberalization"

³⁸³ PARAMESWARAN, *supra* note 154, at 252-53, 346-48.

³⁸⁴ See WTO, *Less-Developed Countries*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm, accessed Sep. 30, 2013.

This merit distinguishes the WTO from other international organizations, contributing to the active engagement of the developing world. Thus, while it is important to strive for substantial unification in all major maritime powers from both the industrialized and developing world, the absence of GATS offers on all three pillars of sea transport sectors and multimodal transport from some will not inevitably result in the overall failure of GATS maritime negotiations. If the unification is achieved through a progressive process, the developing countries can tender substantial offers, which meet high standards but will be realized through progressive phrases. On balance, the aim of the developed world, for instance the U.S., cannot be achieved without considerations on the reluctance of the developing world.

D. Reopening of Maritime Transport Negotiations under the WTO Framework

Based on the historical and doctrinal analyses of maritime transport negotiations within the WTO framework, the thesis argues that it is feasible to reopen the maritime transport related negotiations within the WTO framework now. The legal setting today is different from it was, and the WTO has been much developed since 1995.³⁸⁵ In particular, the TRIPS model of unifying intellectual property rights has become full-fledged after approximately 20 years' development. The TRIPS model has proved that the WTO is able to unify a fragmented area of law,³⁸⁶ and this will reduce the concerns of negotiators against opening of maritime transport negotiations. In addition, the nature of unifying intellectual property right regimes and unifying seaborne cargo regimes are almost the same. Thus, the success of the WTO in the TRIPS model provides the international community a feasible way to unify seaborne cargo rules. Moreover, the interest parties have recognized the increasing importance of maritime transport negotiations, such as in the US and other developing countries.³⁸⁷ Chapter Seven will ad-

³⁸⁵ See *supra* Sec. IV (A) and (B).

³⁸⁶ See *supra* Sec. III: Cooperation between the WTO and the UN

³⁸⁷ See *supra* Sec. IV (B) and (C). For further details in how to remove barriers to maritime transport negotiations in Lijun Zhao, *Soft or Hard law: Effective Implementation of Uniform Sea Transport Rules through the World Trade Organization Framework*, INT'L ORG. L. R., 172-227 (2014).

dress how to remove possible barriers to negotiations and the implementation of uniform maritime transport rules.

V. CONCLUSION

Traditionally, sea transport law is governed by conventions. Its harmonization has been negotiated under the UN framework; most notably in the Hamburg Rules and recently in the Rotterdam Rules since the 1970s. Unfortunately, these two UN conventions have had difficulties in achieving worldwide ratification in so far so as to form a uniform sea transport regime. Owing to the successful incorporation of another private-right area of intellectual property into its framework, the WTO is likely to cooperate with the UN to foster a uniform sea transport regime and to address the issues on unification and liberalization in one go under the WTO's GATS annex. Furthermore, the WTO is an influential worldwide organization built upon comprehensive documents and complete legal framework.

The unification of seaborne transport is feasible under the GATS, since the WTO has successfully created a uniform IP regime under TRIPS. On the whole, the WTO possesses at least five advantages in boosting the pace of unification of the sea transport regime. First, it has the successful precedent of cooperation with the UN's WIPO in IP regime which can be followed in the sea transport regime. Second, the WTO's unique way under TRIPS of dealing with the WTO agreements and pre-existing international treaties on IP will shed light on the potential reference to previous sea cargo conventions, including the UN Hamburg and Rotterdam Rules to the GATS and its annex. Third, the WTO has developed a theory of balancing rights for the conflicting interest groups from TRIPS and will apply it to the maritime transport uniform law negotiations. Fourth, the WTO can establish minimum standards under its GATS to maintain the criteria of unification for sea transport as does TRIPS. Fifth, the WTO institution is effectively implemented under an enforcement procedure under a dispute settlement system. Based on these five merits, the endeavours to unify sea transport law will be increasingly accelerated with WTO and UN cooperation.

The relationship between the WTO and maritime transport regime can be traced backwards to GATS negotia-

tions which contained maritime transport negotiations. In light of the history of the GATS-based maritime transport negotiations from the 1980s to today, there has been demonstrated a trend subject to both progression and regression. Since the Uruguay Round, maritime transport services have been integrated into the WTO negotiations for the first time. The necessity of its inclusion had been challenged and confirmed in the NGMTS negotiations from 1994 to 1996. The progress achieved during this period includes the formation of the specific negotiation forum and a statistical approach based on a wide range of questionnaires. Also, it explores a pre-bilateral approach combined with multilateral negotiations to address the problem of absence of substantial offers from importance entities, such as the US. In order to continue the NGMTS achievements, a significant drawback in the current Doha Round, namely the lack of a special negotiation platform for maritime transport services, should be removed. This is because seaborne transport bears trade-off risks, which require an independent negotiations forum and a special annex.

On the whole, the maritime negotiations within the world trading system are divided into three stages in Section V: the Uruguay Round (1986-1994), the NGMTS (1994-1997) and Doha Round (2000-). From the progress and regress within the three-stage negotiations, there are primarily three lessons learned which shed lights to future uniformity of maritime transport regimes. The first lesson is that the dual approach introduced within the Uruguay Round, has the beneficiary effects of expanding the participation of maritime negotiations, and of shrinking the trade-off problem. This dual approach was continued in the NGMTS negotiations; however, the Doha Round negotiations have not maintained it. Future maritime negotiations should maintain this dual approach in designing negotiating forums and concluding the negotiating results in an independent instrument (e.g. an annex) exclusively for maritime transport sector.

The second lesson regards the ways to engage a number of private participants in the shipping industry. In light of the NGMTS negotiations, in order to foster communications between the shipping industry and rule makers, future negotiations should consult non-government entities (e.g. shipowners' council and shippers' alliances). In future negotiations, the

form of their participation is not restricted to the role of observers. For instance, the WTO can hold workshops similar to those the OECD currently holds and allow respective private parties to hear and speak out there.³⁸⁸

The third lesson is on the merits of conducting empirical research on maritime transport.³⁸⁹ The questionnaire conducted by the NGMTS on the maritime transport is a worthwhile endeavor due to the general lack of worldwide statistical data³⁹⁰ concerning the seaborne transport service sector today. Even though the questionnaire was conducted in 1994,³⁹¹ and some information is obsolete,³⁹² a number of results are still worthy of attention in today's harmonized system.³⁹³ Cabotage is generally excluded from sea transport negotiations.³⁹⁴ That indicates that negotiators are very conservative on transportation within their Member's territories. Similarly, the multimodal transport might be a tough issue because of its inland transport legs. Thus, further GATS negotiations may discuss cabotage and multimodal transport issues but cannot harmonize them at the beginning stages of maritime negotiations. Moreover, the unification of sea cargo regulation under the GATS already had been initiated by a WTO member's response concerning the minimum standardization of transport service and conditions of carriage.³⁹⁵ Accordingly, it is also worthwhile

³⁸⁸ E.g. OECD, Workshop: Measuring the potential of green growth in Chile (Santiago, Chile), <http://www.oecd.org/chile/lowcarbonworkshopchile.htm>, accessed Feb. 25, 2013 (the OECD engages individuals, intergovernmental and non-government organizations in its workshops).

³⁸⁹ See *supra* Sec. IV (B).

³⁹⁰ Council for Trade in Services, *Background Note By Secretariat*, S/C/W/62 (Nov. 16, 1998), at 1-2. The United States triggers the endeavor for collecting statistical information in a worldwide spectrum and unique unprecedented as to world registered tonnage and ownership to be the factual basis of further shipping negotiations.

³⁹¹ Negotiating Group on Maritime Transport Services, *supra* note 296.

³⁹² See also WTO, *infra* note 392. E.g. Question 9 of the questionnaire on the information collected on the United Nations Code of Conduct for liner Conferences.

³⁹³ *Questionnaire on Maritime Transport Services*, *supra* note 296, at 1.

³⁹⁴ See WTO, *supra* note 301; e.g. WTO, *Communication from Cyprus-Response to Questionnaire on Maritime Transport Services*, S/NGMTS/W/2/Add.8, (Feb. 6, 1995), at 3.

³⁹⁵ Negotiating Group on Maritime Transport Services, *Communication from Australia-Response to Questionnaire on Maritime Transport Services*, S/NGMTS/W/2/Add.4, (Jan. 24, 1995), at 8 and 12-13; Negotiating Group on

of conducting a similar questionnaire in the further to obtain more first-hand information.³⁹⁶

The last lesson is the introduction of the supplementary mechanisms, designed in the Uruguay Round and NGMTS negotiations, may avoid tugs of war in negotiations. The two supplementary mechanisms, used in the NGMTS and Doha Round negotiations, for multilateral negotiations are helpful to solve disagreements, namely procedural rules of negotiations and bilateral negotiations. In order to avoid the deadlock of tugs of war in the next negotiations, it might be necessary to impose deadlines for all participants to submit offers.

Therefore, having been an important part of the negotiating agenda in the Uruguay Round, the NGMTS, and the Doha Round, maritime transport may be concluded within an annex to the GATS with reference to selected pre-existing conventions. Besides unification, the WTO will also need to tackle some shipping-related issues, because they are all components of the GATS-based annex on maritime transport.

Maritime Transport Services, *Communication from Canada-Supplementary Information on the Canadian Response to Questionnaire on Maritime Transport Services*, S/NGMTS/W/2/Add.5/Suppl1, (Feb.24,1995), at 2 (mentioning standards to health in transport).

³⁹⁶ *Background Note By Secretariat*, *supra* note 390. The problem of the statistical data vacuum on shipping has been recognized since the Uruguay Round.