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Maritime Transport, the WTO, and Regional Trade Agreements: Too Many Cooks?

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Abstract

Shipping is the most international of all industries, as well as being one of the oldest — and it is also one of the most complicated. This chapter examines, through historical, legal and economic lenses, whether and how RTAs (and PTAs) may facilitate international trade and enhance liberalisation of maritime transport service along with the GATS under the WTO framework. The relationship between the WTO and maritime transport regime can be traced back to the GATS and related maritime transport service negotiations. Even though shipping has been on the negotiating agenda since the 1980s, the GATS related negotiations on this sector turned out extremely frustrating. After exploring the status quo of the maritime transport services and their liberalisation under the GATS and RTAs, this chapter argues that the future liberalisation of maritime transport sector relies on efforts from both the WTO and RTAs. From an economic point of view, today's trade relies on shipping to carry the goods around the world, because the trade is globalised, shipping needs such a global, multilateral framework which the WTO empowers. At the same time, shipping also needs regional, bilateral and local forums – RTAs (including PTAs) – through which Members share a high degree of commonality.

1 Introduction

As average consumers today, we have been accustomed to driving cars assembled thousands of miles away from our home and purchasing cheap cloth and groceries, as well as inexpensive household appliances and smartphones which are indispensable by many of us. However, few of us pause to think about the significant logistical effort involved in maritime transport which bestows us this level of comfort and prosperity in our lives. The truth is that many of these goods in our everyday lives are shipped long distances via sea routes.

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* Thanks to Richard Scott and reviewers who provided assistance/support. All errors remain mine. In this chapter, 'shipping' and 'maritime transport' are used interchangeably. All data used in this chapter are collected up to 1 January 2019. All internet-based resources being used in this chapter are last accessed on 1 December 2019.

Maritime transport is a significant facilitator of international trade. UNCTAD estimates that roughly four-fifths of goods (by volume) are carried by sea nowadays.¹ In the breakdown of the purchase price at which consumers pay for, the freight rates only account for a very small percentage compared with the production costs of goods.² Maritime transport is also an essential service sector which makes gigantic contributions to the value of services trade for some countries, such as the UK, Norway, Korea and Japan.³

This chapter aims to assess whether services agreements on maritime transport tend to be coherent or divergent, especially in light of the today's proliferation of preferential trade agreements (PTAs) and regional trade agreements (RTAs). Because these two terms – PTA and RTA – are used interchangeably in many literature and official documents,⁴ so RTAs in this chapter refer both bilateral and regional agreements; however, it should be noted by readers that these two terms are different in other contexts. Furthermore, readers should bear in mind that PTA in goods trade relates to 'unilateral treatment', but PTA in services trade usually observe the 'doctrine of reciprocity'.⁵

Through examining maritime transport services and the related commitments in bilateral, plurilateral and regional frameworks under the WTO (the World Trade Organization) framework and in RTAs, as well as applied measures in services and services statistics, this chapter probes into whether and how RTAs may facilitate international trade and enhance the liberalisation of the shipping sector – maritime transport services – in the context of preferential liberalisation. In this chapter, 'shipping' and 'maritime transport' are used interchangeably. Some relevant questions have been considered as follows:

- Has the WTO's multilateral approach under the GATS properly addressed the uniqueness of the shipping sector?
- If not, to what extent, the further liberalisation of maritime transport services calls for different instruments and approaches?
- Which approach is better in liberalising the maritime transport services, through multilateral or bilateral/regional agreements? What roles will the WTO and RTAs play in the future liberalisation of the shipping sector?

2 Methodology

This study bears a multi-disciplinary nature. The analysis in this chapter is conducted from three perspectives – legal, economic and historical. History usually repeats itself, thus lessons can be learnt from history.⁶ Many of the arguments made today go back three decades or more. In light of progress and regress in the existing negotiations which the WTO facilitated, experience in this part sheds light on the harmonising of all transport modes, owing to the rise of containerisation and door-to-door transport.

Moreover, law and economics interact with each other – good laws facilitate trade, but bad ones are impediments to economy.⁷ Services trade liberalisation aims to improve market conditions and promote competitions, thus this chapter adopts economic analysis to examine the shipping industry in order to evaluate relevant law and trade agreements.

¹ UNCTAD (2018), Review of Maritime Transport, pp1-15. WTO (2001), Doc. S/CSS/W/59.

² UNCTAD (2018), Review of Maritime Transport, pp1-15.

³ WTO (2001), Doc. S/CSS/W/59.

⁴ E.g WTO I-TIP databases.

⁵ See details in Section 6.1.

⁶ Sturley (1991), p. 3

⁷ Sturley (1991), pp. 3-15.

As for the scope of the negotiating documents and achieves being covered in this research, the current author has employed the WTO, UNCTAD and the World Bank public datasets and databases; some documents dated in 2013 are still confidential, so the analysis in the chapter only considered the documents which have been published by 1 January 2019.

This author employs the WTO documents databases⁸ and searched all documents regarding maritime transport dated after 1 January 2010 which have not been sufficiently studied by existing literature.⁹ There are totally relevant 35 documents achieved in the database, among which two documents dated in 2013 are of particular relevant but still restricts public access.

In short, this chapter employs two main methods:

- Doctrinal approach through focusing on the legal authorities, such as the WTO legal texts and those of RTAs trade agreements; and
- Empirical approach. This author uses ‘The Integrated Trade Intelligence Portal’ (I-TIP),¹⁰ supported by the WTO and the World Bank, which is the only database providing a comprehensive scope of information on trade in services.

I-TIP Databases cover several useful databases providing first-hand information on Members’ commitments which they made under the WTO framework and are associated to the General Agreement on Trade in Services (GATS), and services commitments made under preferential, bilateral and regional trade agreements (all of which are collectively referred as ‘RTAs’ in I-TIP, so this chapter also follows the database to use the term RTAs in a broad, comprehensive sense). In addition, two databases of I-TIP are particularly useful for this research:

- TIP GATS Database: this covers all GATS specific commitments and exemptions to the obligation of most-favoured-nation treatment (MFN) undertaken by WTO Members under the GATS, and
- TIP RTAs Database: this allows researchers and the public to access and search information on Members’ commitments under RTAs which the WTO is notified under Article V of the GATS.

3 Selection Criteria of RTAs to be Studied in this Research

This chapter studies maritime transport and its relevant commitments under multilateral, bilateral, plurilateral and regional frameworks (namely, commitments under the WTO’s GATS and in RTAs), as well as applied measures in services and services statistics available from the WTO, the World Bank and UNCTAD.

Under the GATS, apart from Members’ horizontal commitments, the current author has identified 62 sectoral commitments specifically made to the maritime transport sector, which are achieved in the I-TIP database. Furthermore, the I-TIP database has covered the majority of RTAs related to services trade, and this chapter is based on researching of a number of existing RTAs.¹¹

⁸ WTO (no date), <https://docsonline.wto.org/>

⁹ Parameswaran (2010); Zhao (2014); Zhao (2015).

¹⁰ WTO and World Bank, Services Databases “I-TIP-Services Portal” <http://i-tip.wto.org/services/default.aspx>. See “Users Guide” at https://www.wto.org/english/tratop_e/serv_e/itip_user_guide_e.htm

¹¹ ASEAN - China; Australia - Chile; Canada - Chile; Canada - Colombia; Canada - Honduras; Canada - Panama; Canada - Peru; Chile - China; Chile - Colombia; Chile - Costa Rica (Chile - Central America); Chile - El Salvador (Chile - Central America); Chile - Guatemala (Chile - Central America); Chile -

Based on the current author's calculation, there are roughly 86 relevant RTAs¹² addressing shipping as of 1 January 2019. It should be noted that, due to the existence of a large number of identified commitments (under the GATS and RTAs) and the time restraint, it is not feasible to scrutinise all commitments. There are too many PTAs and RTAs including maritime transport commitments, so this chapter selected some important RTAs to conduct cases studies.

The standard of selection is the involvement of any of the top 5 merchant fleet owning countries (namely, Greece, Japan, China, Germany and Singapore, as shown in Figure 1),¹³ and some world-leading open registry countries. Thus, the current author decided to narrow up the scope of research through selecting some commitments (under both the GATS and RTAs) which involve these aforementioned representative countries.

This chapter reviews the relevant RTAs governing maritime transport services. Again, not all RTAs are studied, and this chapter focuses on those involving countries meeting either of the three criteria as mentioned above. Through searching 'services databases I-TIP' created jointly by the WTO and the World Bank, this author identified all relevant PTAs which govern maritime transport services.

In summary, the selection criteria for this research are:

- Influential trading countries, such as the USA, though it is not a shipping power which provides maritime transport services in today's international shipping market
- Countries with Open registries,¹⁴ such as Panama and Norway.
- Shipping powers. According to UNCTAD, the world top five ship owner countries, as shown in Figure 1, are Greece, Japan, China, Germany and Singapore, which collectively account for one half of the shipping market.¹⁵

Figure 1: Top 5 Merchant Fleet Owning Countries – 2014 and 2017

Honduras (Chile - Central America); Chile - Japan; Chile - Mexico; Chile - Nicaragua (Chile - Central America); China - Costa Rica; China - New Zealand; China - Rep. of Korea; China - Singapore; Colombia - Mexico; Colombia - Northern Triangle (El Salvador, Guatemala, Honduras); Costa Rica - Peru; Costa Rica - Singapore; Dominican Republic - Central America - United States Free Trade Agreement (CAFTA-DR); East African Community (EAC); EFTA - Chile; EFTA - Colombia; EFTA - Hong Kong, China; EFTA - Korea, Republic of; EFTA - Singapore; EFTA - Ukraine; El Salvador- Honduras - Chinese Taipei; Guatemala - the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Hong Kong, China - Chile; Hong Kong, China - New Zealand; Iceland - China; India - Japan; India - Malaysia; India - Singapore; Japan - Australia; Japan - Mexico; Japan - Mongolia; Japan - Peru; Japan - Philippines; Japan - Switzerland; Jordan - Singapore; Korea, Republic of - Australia; Korea, Republic of - Chile; Korea, Republic of - Singapore; Korea, Republic of - US; Korea, Republic of - Viet Nam; Mexico - Central America; New Zealand - Chinese Taipei; New Zealand - Malaysia; Nicaragua and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; North American Free Trade Agreement (NAFTA); Pakistan - China; Panama - Chile; Panama - Costa Rica (Panama - Central America); Panama - El Salvador (Panama - Central America); Panama - Guatemala (Panama - Central America); Panama - Honduras (Panama - Central America); Panama - Peru; Panama - Singapore; Panama and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Peru - Chile; Peru - China; Peru - Korea, Republic of; Peru - Mexico; Peru - Singapore; Singapore - Australia; Singapore - Chinese Taipei; Switzerland - China; Trans-Pacific Strategic Economic Partnership; Ukraine - Montenegro; US - Australia; US - Bahrain; US - Chile; US - Colombia; US - Jordan; US - Morocco; US - Oman; US - Panama; US - Peru; US - Singapore

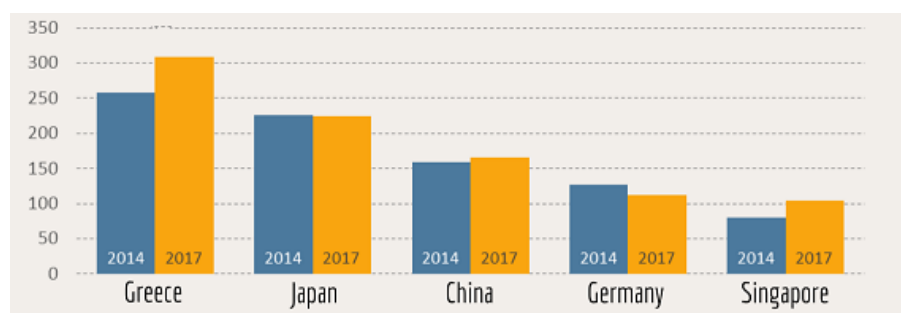
¹² A full list of covered RTAs under I-TIP database (up to September 2016) can be found at http://i-tip.wto.org/services/Services_RTAs_covered.pdf

¹³ UNCTAD (2018). <http://stats.unctad.org/merchantfleet>, <http://stats.unctad.org/fleetownership>

¹⁴ See details on flagging out and open registry in Section 6.2.3.

¹⁵ UNCTAD (2018). <http://stats.unctad.org/merchantfleet>, <http://stats.unctad.org/fleetownership>

Source: UNCTAD (2018). Unit in the figure: millions of deadweight tons.



After calculation, the author found that the shipping sector (i.e. maritime transport services) has been covered by 86 of RTAs. Thus, an enormous amount of information on maritime transport under these the RTAs has been identified; however, they are not of equal importance, taking into account of the scale of services trade. Hence, this author selected some out of the identified RTAs to conduct further analysis; the selection criteria is that a RTA involves at least one influential country in the shipping industry.

4 Uniqueness and Liberalisation of Shipping: Multilateralism or Reciprocity?

4.1 Dual Nature Shared by Both Shipping and the WTO

Both the shipping sector and the WTO bear a dual nature connecting goods and services. Shipping is a globalised business with a dual nature¹⁶ that joins trade in goods and trade in maritime transport services into one transaction. This dual nature is mirrored by the structure of WTO. Likewise, the WTO also represents a dual nature connecting goods and service. Maritime transport has gained a prominent role in the WTO negotiating agenda under the GATS,¹⁷ along with trade in goods under the GATT (General Agreement on Tariffs and Trade). Maritime related service is an area on which WTO negotiations were scheduled under the GATS.¹⁸ Since the Uruguay Round negotiations in the 1980s, trade in services was part of international trade negotiations, along with trade in goods.¹⁹ The connectivity between shipping and the WTO can be traced back to the Uruguay Round, as well as the recent Doha Round, negotiations.²⁰

The connectivity between maritime transport service and the global trading system – the WTO – originated from GATS related negotiations. Several annexes were negotiated along with the GATS, each representing “an integral part” of this Agreement.²¹ Paralleling with all listed annexes to the GATS, it is the “Annex on Negotiations on Maritime Transport” that is of particular relevance to be discussed here in this chapter.

4.2 Liberalisation of Maritime Transport: a Broadly, Internationalised, Liberalised and Competitive Sector

¹⁶ UNCTADSTAT (no date). <https://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx>

¹⁷ See Section 4.3

¹⁸ WTO (1996). Doc.S/NGMTS/13, para 2.

¹⁹ WTO (1994). *Marrakesh Agreement Establishing the World Trade Organization*.

²⁰ E.g. Zhao (2015); WTO (1996b), p. 1, para 1.

²¹ GATS Article XXIX.

Maritime transport services are largely internationalised and highly liberalised in reality. Through the World Bank's Database on 'Service Trade Restrictiveness Index (STRI)'²² the author checked the STRI for many countries by several service sectors, and found that the restrictiveness index for transportation is lower than the majority of other services sectors, such as banking, insurance, professional, telecommunications, and retail.

It should be noted that, even though the World Bank's Database does not provide the breakdown restrictiveness index figures as for air, road and maritime transports, the restrictiveness index of the maritime transport services is lower than those of other modes of transport. This is because maritime transport has been one of the most internationally integrated services and functioned beyond national boundaries.

“[A]ny one ship may involve members of different nations – in its ownership, registration, builder, supply of engines, officers and crew, financing, insurance and chartering.”²³

Therefore, the shipping sector and its maritime services are largely internationalised and liberalised crossing countries' boundaries, and the liberalisation of maritime transport services relates to all the four modes²⁴ of services. This *status quo* is probably because of its importance to international trade in goods. Hence, the liberalisation of maritime transport has historically been a focus of the international community.

4.3 The WTO, The GATS and Shipping

Even though the shipping sector has been largely internationalised and liberalised, compared with many other service sectors, the international community was and is still attempting to liberalise this sector through the multilateral trading system. The existing effort was part of the GATS negotiations during the 1980s-1990s and finalised as the GATS 'Annex on Negotiations on Maritime Transport'.²⁵ The GATS consists of 29 articles and eight annexes which represent integral parts of the GATS and address special rules for separately identified matters or service sectors. Moreover, each member country may undertake specific commitments listed in its 'Schedules of Specific Commitments' and also list MFN exemptions in its List of Article II exemptions.²⁶

This GATS Annex on maritime transport is very brief, including mere 155 words and representing three sections. Section 1 of this Annex regarding negotiations delays the applications of the MFN obligations to the maritime transport sector and stipulates requirements to list MFN exemptions, to “international shipping, auxiliary services and access to and use of port facilities” beyond the effective date of the GATS, namely 1 January 1995. As seen, there have been no concrete substantive provisions under the GATS and its Annex so far.

With regard to the *status quo* of GATS Schedules on maritime transport, through searching the GATS Commitments Database, the current author has found that apart from members' horizontal commitments, 62 WTO members included maritime

²² World Bank (2019), Service Trade Restrictiveness Index Database <http://iresearch.worldbank.org/servicetrade/default.htm#>

²³ Degenhardt and Day (1985), p.41. Mukherjee (2013).

²⁴ See GATS Article II.

²⁵ Zhao (2015), pp. 60-118.

²⁶ Consolidated GATS Schedules of Commitments and MFN exemptions (by country and sector) can be viewed and downloaded at Services Database <http://i-tip.wto.org/services/Search.aspx>

transport services (Code11.A)²⁷ into their Schedules of Commitment and made specific commitments, and 60 WTO members included services auxiliary to all modes of transport (Code11.H)²⁸ in their Schedules of Commitment and made specific commitments.²⁹ That is to say, though the Uruguay round negotiations during the 1980s and 1990s did not progress much on this sector, many countries have voluntarily made commitments on maritime transport under the GATS.

Even so, the WTO-related negotiations on maritime transport have been stalled. To some extent, the multilateral framework and the WTO failed in further liberalising the shipping sector.³⁰ However, the existing negotiations and informal discussions of the maritime transport sector were not nought since some headway was made and became the basis serving the following negotiations in this sector under RTAs.³¹

The multilateral negotiations specifically laid down two cornerstones for future negotiations regardless of their approach: Firstly, the four modes of services supply³² were followed and adapted to the maritime transport sector. Secondly, the Uruguay Round negotiations agreed that the scope of national specific commitment on maritime transport services would address ‘four pillars’³³ of the maritime sector.

4.4 Four Modes of Services: created by the WTO, followed by RTAs

There is a wide range of maritime services. Here is a non-exhaustive list:³⁴

- Commercial shipping services, including transporting bulk cargoes, manufactured goods and passengers on regular services, or as individually negotiated shipments – ship-owning, and commercial or operational management;
- Ports Loading and unloading cargoes at the intersection of land (rail, road) and maritime transport, distribution and multimodal role (logistics);
- Shipbuilding, repairing and scrapping (also known as recycling), including constructing new ships (hull, engines and equipment), servicing or repairing existing ships, and demolishing (recycling) old ships
- Shipping ancillary services, such as shipbroking, ship’s agency, marine insurance, P&I clubs, shipping consultancy and market analysis;
- Offshore oil and gas exploration and exploitation;
- Other categories, including cruise shipping (leisure market), maritime tourism (leisure), fishing and aquaculture.

The GATS applies to services trade when the activities fall within one of the four modes of supply referred to Article I:2 of the GATS. When applying the four modes of supply³⁵ to shipping, maritime services can be divided into four modes:

²⁷ WTO (no date), GATT (1001), Classification List, https://www.wto.org/english/tratop_e/serv_e/serv_sectors_e.htm.

²⁸ GATT (1001), Classification List.

²⁹ I-Tip database (2019).

³⁰ See details in Section 5.

³¹ Zhao (2014), pp. 172-227.

³² See details in Section 4.4.

³³ See details in Sections 5.3-5.6. This categorising has been used by the WTO/GATT negotiations since the 1980s, see WTO (2013) doc. JOB/SERV/137.

³⁴ List created by the current author. Source: Stopford M, Maritime Economics (London, 2009), 49.

³⁵ Zhao (2014), pp. 172-227.

- Mode 1: e.g. international freights (cargo shipping), passengers shipping, etc.; cabotage shipping is usually reserved for national carriers instead of foreign counterparts, e.g. the USA and India;³⁶
- Mode 2: e.g. vessel repair, etc.;
- Mode 3: e.g. Flagging out a vessel to a country adopts open registry,³⁷ etc. and
- Mode 4: e.g. Seafarers; Maritime cargo handling, Storage and warehouse in ports; Customs clearances; Container station and depot; etc.³⁸

These four modes have a significant impact on maritime transport, regardless of their association with the WTO (the GATS) or with RTAs. Under the WTO framework, National Treatment regarding maritime transport sector is listed in a Member country's Schedule of Specific Commitments by stating restrictions and applied measures on the above four modes. Likewise, it is worth noting that, the negotiations and outcomes of commitments on maritime transport services in RTAs followed the four modes which were created under the GATS.

4.5 Defects of WTO Multilateral Approach in Handling Maritime Transport Services: MFN, National Treatment Obligations and Free-rider Problem under the GATS

Even though shipping is one of the most internationalised and liberalised industries in the world,³⁹ negotiations in the maritime sector turned out extremely frustrating.⁴⁰ Arguably, the difficulties in enhancing existing liberalisation in this sector largely are created by the existing multilateral liberalisation efforts themselves. Thus, this section examines the relevant negotiations and identifies lessons which can be learned from progression and also regression during the negotiating process.

The GATS-related maritime transport negotiations can be divided mainly into three phases; details of the negotiating history and documents can be found in existing literature,⁴¹ this chapter does not repeat these works. The focus here is lessons extracted from these existing negotiations and possible interactions with other RTAs on maritime transport.

The Most-favoured-Nation (MFN) and National Treatment (NT) principles work as cornerstones of the WTO which employs a multilateral approach, instead of reciprocity. Albeit in slightly different ways, MFN and NT apply to trade in goods under the General GATT,⁴² as well as to trade in services under the GATS. Under the GATT, both principles create general obligations.

MFN and national treatment also apply to the GATS. Unlike their counterpart provisions governing trade in goods under the GATT, two specialities are worth noting that:

Firstly, MFN is a general obligation applicable to all services sectors with some exceptions; many of the exceptions shadow their corresponding articles under the GATT, but one of them is unique.⁴³ The MFN principle, under Article II of the GATS, requires a country accords unconditional and most favoured treatment among the service

³⁶ See details in Section 5.3.

³⁷ See details in Section 6.2.3.

³⁸ See also Parameswaran (2010), p. 306, footnotes 1437-1440. See the four modes in GATS Article I.2.

³⁹ See Section 4.2.

⁴⁰ Zhao (2015), pp. 60-118.

⁴¹ Zhao (2015), pp. 60-118. Parameswaran (2010).

⁴² GATT Articles I and III.

⁴³ GATS Article II.

suppliers of all Member state of the WTO. However, the MFN obligation can be exempted provided conditions listed in the GATS ‘Annex on Article II Exemptions’ are met. In addition, the ‘Annex on Maritime Transport Negotiations’ includes a proviso to MFN and prevents MFN from applying to the maritime transport sector due to two reasons. The first reason was in the negotiating practice regarding maritime transport negotiations under the GATS framework, too many Members expressed the willingness to use MFN exemptions, so a special arrangement was created under this Annex and save the efforts from the Members to include maritime transport sector into their individual Schedules. Another reason is that the multilateral approach would lead to a ‘free-rider problem’⁴⁴ in the liberalisation process of maritime transport and no consensus was achieved on this service sector.⁴⁵

Secondly, the national treatment obligations of the GATS are unique and different from its counterpart article under the GATT. It is not a general principle under the GATS.⁴⁶ Instead, it works as a *specific*⁴⁷ obligation only if a Member country includes a sector into its GATS Schedule of Commitment. Moreover, Members can unilaterally restrict the market access and national treatment of a service sector, through listing any limitations in its GATS schedule of commitment (including horizontal and sectoral commitments).

4.6 The Impact of Positive/Negative List on Maritime Transport Services

The two important issues whether and how the maritime transport sector is covered by the GATS and an RTA relies on whether a ‘positive list’ or ‘negative list’ method is utilised. The National Treatment principle, under Article XVII of GATS, utilises a ‘positive list’ approach⁴⁸ which means that a member assumes the national treatment obligation provided a sector is being listed in its Schedule of Commitments. Namely, it is a member country’s choice to make the national treatment be applicable to a sector through including the sector in its Schedule of Commitments.

It should be noted that the ‘negative list’ approach is being used by some RTAs, for instance, NAFTA addresses maritime transport and relevant investment (such as port infrastructures). This distinction between the MFN and National treatment principles leads to no consensus in the GATS multilateral negotiations on maritime transport sector. This explains why maritime transport services are liberalised through RTAs after the multilateral negotiations did not progress much after the WTO’s Uruguay Round negotiations.

5 Recent Liberalisation of Maritime Transport Services under the GATS and RTAs: Coherence or Divergence?

In this section, this author examines the *status quo* of liberalisation of maritime transport services, with special reference to both the GATS and RTAs (especially some important RTAs involving influential trade and shipping countries as mentioned in Section 3). It starts with overviews of maritime transport services under the WTO (namely under the GATS) and under RTAs. Next, because the GATS negotiations used to categorise maritime transport services into four kinds (i.e. ‘pillars’),⁴⁹ this chapter follows this

⁴⁴ See Section 6.1.

⁴⁵ See Section 4.5.

⁴⁶ GATS Article XVII.

⁴⁷ Emphases by this author.

⁴⁸ See Section 4.6; Mattoo and others (2018).

⁴⁹ WTO (2013), doc. JOB/SERV/137.

tradition and examines the status of the liberalisation in each of the four pillars of maritime transport under the GATS and RTAs.

As stated in Section 2 Methodology, this author used 'I-TIP Services portal' Databases and searched 'Maritime Transport' commitments made in relation to GATS and RTAs. Apart from Members' horizontal commitments which are applicable to the maritime transport services, it is found that there have been 62 sectoral commitments to GATS specifically made to the maritime transport sector. In addition, there are approximately 86 RTAs⁵⁰ being covered in the I-TIP Database. A large number of RTAs are identified in the database in which all of the Commitments/Reservations regarding maritime transport services and relevant investment are studied here.⁵¹ Due to the reasons stated in Section 2 on methodology, the author chose some sample GATS and RTA commitments for further analysis in depth.

On the whole, based on researching the 62 GATS commitments related to maritime transport, it is worth mentioning some recent updates. Firstly, the recent liberalisation through the GATS multilateral forum is mainly fulfilled by new members' accession to the WTO, for instance, Afghanistan, Cambodia, China, Kazakhstan, Liberia, and Viet Nam. Secondly, the USA has not made any special commitment on this sector, thus unless stated in its horizontal commitment, maritime services are not bound.⁵² In fact, the US submitted MFN Exemptions on maritime services to the WTO and stated the intended duration is to be indefinite. Thirdly, unlike the attitude of the USA, some shipping powers – the EU (representing Greece, Germany and others) and Japan, who decided not to submit any commitments between 1986 to 1996 because of the absence of a commitment from the USA,⁵³ have changed their points of view and submitted their GATS Commitment on maritime services.

More importantly, in terms of MFN Exemptions, this current author found that the EU, China and Singapore have chosen to utilise this exemption to allow themselves certain flexibility in RTAs and bilateral agreements. Surprisingly, Japan has not sought to use this exemption which means that the Japanese commitments on maritime transport services are consistent with MFN obligations and largely open its domestic market to foreign services and providers without requesting a Member country's also do the same under reciprocity principle – an approach used usually for trade in services.⁵⁴ This is possible because Japanese shipping service is highly competitive in the global market, at least in Pillar One.

5.1 The WTO and GATS: Service Schedules on Maritime Transport

In detail, maritime transport services have been further liberalised under the GATS, because of a significant expansion of WTO membership and globalisation. Many restrictive maritime policies have disappeared or ceased to work. Up to date, many countries have made GATS Specific Commitment, and there have been 62 such GATS Schedules dealing with maritime transport.⁵⁵

It is worth noting that, after 2000, further liberalisation of maritime transport mainly benefited from the WTO accession process. When new WTO members joined the WTO,

⁵⁰ WTO and World Bank (2016), http://i-tip.wto.org/services/Services_RTAs_covered.pdf

⁵¹ Zhao (2019), <http://i-tip.wto.org/services/SearchResultRTA.aspx>.

⁵² I-Tip database on GATS, (2019).

⁵³ Zhao (2015).

⁵⁴ See section 6.1.

⁵⁵ I-Tip database on GATS (2019).

many of them made GATS commitments covering maritime transport services. Since 2000, many important trading countries and blocks have joined the WTO as new members, such as China and many south-east Asian countries. For instance, all ASEAN member countries joined the WTO and made GATS commitments on maritime transport. Active participation of these new WTO members has further brought about liberalisation to maritime sectors. It is noted by the current author that these ‘new’ members have included sectoral commitments regarding maritime transport along with their accessions to the WTO.

5.2 WTO-Plus Liberalisation of Maritime Transport through RTAs

The plurilateral approach is not new and should not be ruled out as a legitimate and effective approach to deepening commitments within a group of countries instead of all WTO members. The plurilateral trade agreements through RTAs can soften the rigidity of the WTO’s multilateral approach and can help to overcome the defects of the GATS.⁵⁶

Furthermore, the WTO itself commenced plurilateral negotiations in 2006.⁵⁷ Annex C of the Doha Work Programme states: “In addition to bilateral negotiations, [WTO members] agree that the request-offer negotiations should also be pursued on a plurilateral basis”.⁵⁸ The wording of the plurilateral approach shifts the negotiations from a legally binding, mandatory mandate of the bilateral negotiations to act in favour of greater flexibility.⁵⁹ Similar with RTAs, some of the plurilateral negotiations under the WTO framework were sector-focused, with members acting in so-called ‘friends’ groups’,⁶⁰ which are informal, sectoral or modal groups of like-minded members. Friends’ groups allow members to benefit from an intense and close working relationship in relation to a particular sector or a mode of service. In 2006, there were approximately 14 friends’ groups.⁶¹

It has been found that RTAs and the plurilateral approach considerably reduce the need to negotiate at the member-to-member level, and also help to avoid the free-rider problem associated with the WTO and GATS.⁶² In addition, the plurilateral approach has already been used for negotiations in relation to the maritime transport sector, as well as in relation to air transport and logistics.⁶³ Thus, future maritime-related negotiations may continue using the plurilateral approach, including friends’ groups.

Moreover, maritime transport is a global business, and its shipping routes include global, international, regional and local networks. Not all networks need to be addressed internationally or globally. Namely, regional and local networks of the shipping sector are effectively governed by RTAs rather than by the WTO framework. The RTAs could function as ‘WTO-plus’ agreements that complement the WTO and provide rules in areas in which the WTO could not reach.

5.3 First Pillar of Maritime Transport – International Shipping and Cabotage (Coastal Shipping) under GATS and RTAs

⁵⁶ See Section 4.5.

⁵⁷ WTO (2005), Doc.WT/MIN(05)/DEC, page C-3, paragraph 9. Türk (2008), pp. 150-162.

⁵⁸ WTO (2005), Doc.WT/MIN(05)/DEC, Annex C, page C-3, paras. 7, 11.

⁵⁹ Türk (2008), pp. 151-153, 155.

⁶⁰ “Friends’ groups” focus on specific sectors, such as air transport, maritime transport, but are not strictly plurilateral negotiating groups. Türk (2008), pp. 148, 159-161, 163.

⁶¹ Türk (2008), pp. 148, 159-160.

⁶² Türk (2008), pp. 158-159.

⁶³ Türk (2008), p. 163.

Since the time of GATS negotiations, international shipping has been regarded as the first pillar of maritime transport services. This subsector of international maritime transport has been highly liberalised in commitments under both the GATS and RTAs. This section examines the current commitments on this subsector of shipping being made under the GATS and RTAs. Compared to international shipping, coastal shipping (ie. cabotage transport) has been usually reversed for a country's own nationals since the 1890s, so this section also explains updates on this area of maritime transport.

5.3.1 Freight Transport and Passenger Transport

International maritime transport consists of freight and passenger shipping, but they are treated differently with regard to liberalisation. Freight transport (cargo shipping) is highly liberalised and bound. In contrast, the attitudes on the liberalisation of passengers' transport vary among countries. Still, international maritime transport of passengers is frequently excluded from a country's commitments. For instance, China includes both cargo and passenger shipping in its GATS schedule; which means that China liberalised both cargo and passenger shipping; in contrast, Japan chose to exclude passenger transport from its GATS schedule, which means the Japanese passenger maritime transport services are not liberalised.⁶⁴

With regard to freight and passenger transport, salvage (which means to save goods or passengers from a ship that has sunk or been damaged or a building that has been damaged) is sometimes mentioned in commitments under the GATS and/or any RTAs. Because ship accidents are associated with freight transport and passenger shipping, a country usually stipulates whether salvage is included in its commitments under the GATS or RTAs. Currently, the author found that salvage is usually excluded from the liberalisation commitments under the GATS and RTAs by a country.

Furthermore, it is time to take a close look at some influential RTAs. One of the RTAs which deserves attention is the North American Free Trade Agreement (NAFTA).⁶⁵ It includes commitments on transport, and in its sector-specific reservations, but 'fisheries, maritime matters (including salvage)' are excluded from being bound by the MFN and NT obligations. It is noted that NAFTA does not use the terminologies or classifications of transport services which are widely used.

Turning to another important trading block the EU. This current author found that the EU has not entered any RTAs on maritime transport, at least not in the RTAs covered by I-TIP Databases.⁶⁶ In addition, this author checked the EU's GATS Schedule, in which the EU only states that the 'rental services with operators and with crew (CPC 7213, 7223)' are unbound and chartering of all ships is subject to notification.

5.3.2 Cabotage Transport Service and the Impact of US Harter Act of 1893 on Today's Shipping

Open registry (flagging out) has been a widely adopted practice in the shipping industry which cut the management cost.⁶⁷ One case in which flagging out can lead to market restrictions is in the area of cabotage.

⁶⁴ WTO and World Bank (no date), I-Tip database.

⁶⁵ USTR (no date), NAFTA, <https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>.

⁶⁶ I-Tip database on RTAs (2019)

⁶⁷ Murkerhjee (2013).

Cabotage, or coastal trade, refers to the trade or navigation in coastal waters between two points within a country. Cabotage also refers to the right to engage in trade and navigation in coastal waters and to the restriction of that right to domestic carriers. The term in essence denotes the discriminatory practice of keeping foreign flags out of coastal waters and thus often constitutes an element of a government's maritime policy as a category of flag preference. The idea behind cabotage restrictions is to promote the development of national merchant fleets.⁶⁸

Cabotage restrictive service dates back to the US Harter Act of 1893⁶⁹ which is still effective today. It should be noted that this Act is an example of restrictive legislation on shipping liberalisation and still being used by the USA even today. The US Harter Act was enacted in 1893 governing all sea carriage to and from the US.⁷⁰ It should be noted that by the late 19th century, the rise of the USA as a power equal to Europe increased the influence of US domestic law in international shipping, and this Act was introduced to protect its national shipping interests, requiring that coastal shipping must be carried out by vessels flying the US flag with US crews.

The US Harter Act had a long-lasting impact on shipping and is well known for its restrictive arrangement on cabotage.⁷¹ Although this Act was partially superseded by the US Carriage of Goods by Sea Act of 1936, it is still effective. This aggressive⁷² legislation has been followed by several countries through unilaterally enacting domestic Harter-style legislation, such as India. The Harter-style legislation generally excludes cabotage from sea transport negotiations under both the GATS and RTAs.⁷³ Even today, many countries are very conservative on transportation within their territories, reserving cabotage for their own national vessels and crew.

Moreover, cabotage is usually excluded from a country's commitments under many RTAs. For example, cabotage is excluded from being liberalised under Japan's GATS schedule, Japan-Austria RTA, and ASEAN-China RTA.⁷⁴

However, an eye-catching change is that cabotage service has been gradually further liberalised than it was in the past. Under an important recent RTA between the EU and Canada, the Comprehensive Economic and Trade Agreement (CETA), European firms will have more opportunities to provide services, including specialised maritime services, for instance, dredging, moving empty containers, and shipping certain cargo within Canada.⁷⁵ This RTA arrangement between the EU and Canada on cabotage is unprecedented for cabotage service which foreigners have been excluded from running this service since the US Harter Act of 1893 until nowadays.

⁶⁸ Petrovena (1998), pp1039-1040.

⁶⁹ United States, the Harter Act 1893, 27 Stat. 445 (1983). The Harter Act is currently codified at 46 U.S.C. app. §§ 190-196 (1998).

⁷⁰ See also Sturley (1991), pp. 11-14.

⁷¹ Sweeney (1993), p. 1.

⁷² See Sturley (1991), p.4.

⁷³ E.g. WTO (1995), Doc.S/NGMTS/W/2/Add.8, p. 3. WTO (1995), Doc.S/NGMTS/W/2/Add.4, p. 8. WTO (1995), Doc.S/NGMTS/W/2/Add.21, p. 3. WTO (1995), Doc. S/NGMTS/W/2/Add.12, pp.37-43. WTO (1995), Doc.S/NGMTS/W/2/Add.15, p. 4. WTO (1995), Doc.S/NGMTS/W/2/Add.22, p.2. WTO (1995), Doc.S/NGMTS/W/2/Add.24, p. 6. WTO (1995), Doc.S/NGMTS/W/2/Add.23, p. 5. WTO & NGMTS (1995), Doc.S/NGMTS/W/2/Add.11, pp.3-4. WTO & NGMTS (1995), Doc.S/NGMTS/W/2/Add.19, p. 4.

⁷⁴ I-Tip database on GATS and RTAs (2019).

⁷⁵ European Commission (no date), https://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm.

5.4 Second Pillar of Maritime Transport - Maritime Auxiliary Services under GATS and RTAs

There are no clear definitions on this subsector of maritime transport services. However, there seems to be a coherent understanding among countries, because a list of maritime services, such as the exemplary list provided below, is commonly used by many countries in their service commitments. This current author found that commitments in maritime auxiliary services which have been stated in a large number of countries in their GATS and RTAs commitments look more or less the same.

There are usually nine kinds of maritime transport services are regarded as the Second Pillar – ‘maritime auxiliary services’, comprising:

- Pilotage
- Towing and tug assistance
- Provisioning, fuelling and watering
- Garbage collecting and ballast waste disposal
- Port Captain’s services
- Navigation aids
- Shore-based operational services essential to ship operations, including communications, water and electrical supplies
- Emergency repair facilities
- Anchorage, berth and berthing services.

These nine kinds of maritime auxiliary services listed above are largely liberalised nowadays. The commitments on their liberalisation can be found in the GATS Commitments made by many influential trade and shipping countries, for instance, China, Japan and Singapore.⁷⁶

Attitudes towards the liberalisation of pilotage services vary among countries under the RATs and the GATS. In shipping practice, pilotage is usually an optional service for vessels calling at a port, but sometimes this service is compulsory for foreign-flagged vessels. Therefore, the extent of liberalisation pilotage service varies among countries. This statement is still true, reaffirmed by searching GATS and RATS databases on pilotage services.

5.5 Third Pillar of Maritime Transport under GATS and RTAs – Access to and Use of Port Facilities

Regarding ‘maritime auxiliary services’ (Pillar 2) and ‘access to and use of port facilities’ (Pillar 3), the recent GATS and RTAs Commitments usually address these two pillars together, just as the means in the previous GATS negotiation documents. This is probably because the two categories of sub-sectors are interchangeable and mingled together in the commercial and shipping reality. Unlike other subsectors, the commitments concerning the third pillar stress ‘the services at port are made available to international maritime transport suppliers on reasonable and non-discriminatory terms and conditions’.⁷⁷ For instance, China, Japan and Singapore have committed themselves in maritime transport services, covering Pillar 3, but the EU chose not to bound.⁷⁸

⁷⁶ I-Tip database on GATS (2019)

⁷⁷ China’s GATS Commitment; Japan’s GATS Commitment.

⁷⁸ I-TIP database on GATS and RTAs (2019).

5.6 Fourth Pillar of Maritime Transport under GATS and RTAs – Multimodal Transport Services and Land-based Facility and Services Sectors

Since the Uruguay Round negotiations on the GATS date back to the 1980s-1990s, multimodal transport has been addressed during the negotiations of maritime transport and was regarded as its ‘fourth pillar’.⁷⁹ Progress has been achieved on two domains on the basic points. Firstly, a majority of participants recognised the need to increase transparency on various domestic shipping regulations and the value of legal certainty.⁸⁰ Secondly, the importance of multimodal transport turned out to be further highlighted at the WTO.⁸¹ In late October 1995, the US delegation stressed the inclusion of the door-to-door supply of transport services within the GATS framework in its informal statement on multimodal transport.⁸²

It is necessary to address the four pillar of maritime transport services, but the joint negotiations, together with the other three pillars of maritime transport, would make the negotiations more perplexing. Take one key element in multimodal transport – inland transport by truck and its liberalisation – as an example to illustration the complexity which would trigger; members impose various domestic instruments of the inland part of transport, which make the harmonisation of multimodal transport very difficult.⁸³ Owing to the absence of joint negotiations on air, sea and inland transports in the negotiations at Uruguay Round and later NGMTS (Negotiating Group on Maritime Transport Services),⁸⁴ international multimodal transport arrangements should not be negotiated until agreements have been achieved regarding sea leg of multimodal transport, as well as cabotage⁸⁵ and inland waterways.

Since the huge economic interest and a large number of players involved in multimodal and door-to-door transport, shore-based services are ardently guarded by various interest groups and countries. Hence, land-related services are more contentious areas than the other three pillars, in the GATS and RTAs negotiations. That is to say, the fourth pillar is important but also the most difficult area as for future negotiations and further liberalisation.

6 Potential Roles for both the GATS and RTAs in the Future Liberalisation of Maritime Transport: Legal and Economic Analyses

6.1 Multilateralism vs Reciprocity: Both Approaches are Needed for Shipping

Traditionally, countries adopt the reciprocity approach to liberalising this sector instead of the multilateral approach that is employed under the GATS. Though the shipping sector has been highly liberalised,⁸⁶ when a country seeks to gain access to another country’s services markets, they both open up the domestic markets to each other in a reciprocal way. Simply speaking, reciprocity means that when your ‘backyard’ is open

⁷⁹ Parameswaran (2010).

⁸⁰ 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 (1995), doc.S/NGMTS/W/2, p.7.

WTO (1996),doc.S/L/27, p. 1, para 5.

⁸¹ Cf. the Rotterdam Rules.

⁸² OECD & WTO (1996), Doc.DSTI/SI/MTC(96)8, pp. 3-4. See also Parameswaran (2010), pp. 343-346.

⁸³ E.g. WTO (1995), Doc.S/NGMTS/W/2/.

⁸⁴ Uruguay Round (1991), Doc.MTN.GNS/W/60.

⁸⁵ WTO (1995). Doc.S/NGMTS/W/2/.

⁸⁶ See Section 4.2.

to aliens, their home country's backyard is open to you; and this approach is adopted by RTAs.

As seen from the existing services trade agreements which govern the maritime transport sector, the reciprocity can be achieved through RTAs (or equivalents). More specifically, there are three means:

- Bilateral agreements, such as Pakistan-China RTA, China-Singapore RTA, US-Australia RTA, Chile-Japan RTA, India-Japan RTA, India-Singapore RTA
- Regional trade agreements. This is probably because the commonality shared among the countries in the same geographical region, e.g. ASEAN Service Trade Agreement, and NAFTA
- A group of countries which bears commonality, for instance, geographical proximity (e.g. ASEAN-China), or similar level of economic development between two countries with some distance (e.g. EFTA-Hong Kong RTA).

However, the reciprocity is difficult to be achieved through multilateral approaches due to the 'free-rider problem'.⁸⁷ Because the GATS uses positive approach and national treatment is a specific obligation, not all countries choose to make commitments on maritime transport. Suppose if a country includes the sector in its schedule, MFN as a general obligation will require the country to open up its maritime transport sector to some members which have also opened up this sector, and to other members which have not committed to open their domestic markets. Namely, for the latter group of countries, they are 'free riders' of the liberalisation process, but their backyard is still closed to others. Thus, reciprocity is frustrated under these circumstances, and the free-rider effect discouraged many members to include the shipping sector and maritime transport services into their GATS schedules. Until today, out of 164 WTO members, there have only been 62 sectoral commitments in maritime transport; that is to say, the majority of countries, including the USA, have not made commitments on maritime transport services yet.⁸⁸ For instance, China, the EU (Greece and Germany included), Malta, Norway, Panama and Japan have made GATS commitments on maritime transport.⁸⁹ However, the USA while always taking part in relevant negotiations, has not made any commitments which are legally binding on the shipping sector.⁹⁰

6.2 The Necessity of the WTO regarding Shipping

6.2.1 Polycentric Governance: Multi-Forums of Shipping Related Negotiations and the Necessity of Coordination among the Forums by the WTO

There have been approximately 30 inter-governmental organisations governing shipping, many of which are the UN agencies. There are a number of UN specialised agencies handling shipping issues.⁹¹ The United Nations Conference on Trade and Development (UNCTAD),⁹² the Organization for Economic Co-operation and Development (OECD),⁹³ and the United Nations Economic and Social Council (ECOSOC)⁹⁴ have published statistical data on the shipping industry for years.

⁸⁷ See Section 4.5

⁸⁸ See Section 5 for details.

⁸⁹ I-Tip database.

⁹⁰ Zhao (2015).

⁹¹ These entities have different legal basis, governance structures, funding, mandates and scopes.

⁹² UNCTAD, <http://unctad.org/en/Pages/Home.aspx>.

⁹³ OECD, http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1,00.html. China is not an OECD country.

⁹⁴ United States Economic and Social Council (ECOSOC), <http://www.un.org/en/ecosoc/>.

Moreover, the International Labour Organization (ILO), the United Nations Commission on International Trade Law (UNCITRAL),⁹⁵ and the International Maritime Organization (IMO)⁹⁶ deal with various aspects of shipping, *e.g.* seamen, the international sea cargo regime, and international sale of goods. Considering the multi-forum maritime transport, it is worthwhile to boost further cooperation.

The current author argues that the WTO possesses advantages over other forums on reinforcing the liberalisation for the shipping sector in the global scale,⁹⁷ because: firstly, the WTO is an international organization with 164 members and shipping is the most internationalised industry; secondly, as explained in Section 4.1, both the WTO and shipping demonstrate a dual nature that connects both trade in goods and trade in services.

6.2.3 Open Registry: A Popular Shipping Practice Contradicted with Cabotage Transport

The WTO needs to strike a balance between cabotage restrictiveness and flagging out through open registry. This is a problem unique to the shipping industry, but not for other service sectors. To fly a flag the same as the shipowner or to flag out in an open registry country is a key question.

This is because the nationality of vessels affects their rights to access port services and facilities and inland logistics network. Under maritime law and in practice, the expressions “nationality”, “flag” and “registration” are usually used interchangeably.⁹⁸ The nationality of a vessel depends on its registration which is a key element of a particular ship operation because there are certain fiscal and other advantages or disadvantages attached to the registration regime and corresponding legal standards on safety and security on the operation of a ship. That is to say, nationality and registration of ships affect the provision of maritime transport service and the standards on the service quality.

Furthermore, open registry (illustrated in the Table in Appendix 2) is a kind of regulatory competition between flag states, eroding safety standards and creating harmful deregulations which allow shipowner to avoid high-safety standard in one country through flagging out in an open registry. The US shipowners pioneered the open-registry system in the 1930s and after the Second World War, so the harsh commercial climate led many shipowners from many traditional maritime states (usually high-cost countries for the ship operators/owners) and others to seek to operate under foreign flags which give them possibilities of operating at lower costs.⁹⁹

Open registry sometimes undermines the quality of maritime transport services. In practice, open registry has created the phenomenon of ‘bigger ships and smaller crews’ which led to many shipping grounding accidents and disasters. The GATS allows regulation and international standards and this problem unique to shipping services influence the whole world need to address by the WTO multilateral framework, and particularly by the GATS.

6.2.2 Containerisation and Increasing Multimodal Transport and Door-to-Door Transport

⁹⁵ UNCITRAL, <http://www.uncitral.org/uncitral/en/index.html>.

⁹⁶ International Maritime Organization (IMO), <http://www.imo.org/Pages/home.aspx>.

⁹⁷ Zhao (2015).

⁹⁸ Murkherjee (2013), p. 199.

⁹⁹ Murkherjee (2013).

Nowadays, multimodal transport has become increasingly significant due to the wide use of door-to-door transport and e-commerce (see Figure 3). Containerisation significantly boosted the further development of liner carriers.¹⁰⁰ According to UNCTAD (see Figure 3), goods have been increasingly carried within containers since the 1970s.¹⁰¹ The increasing tendency in maritime trade boosts the multimodal transport. According, the fourth pillar of maritime transport – multimodal transport – becomes more important for the liberalisation of the entire shipping industry.

Figure 2: International Seaborne Trade for Selected decades (tonnes and percentage of tonnage)¹⁰²

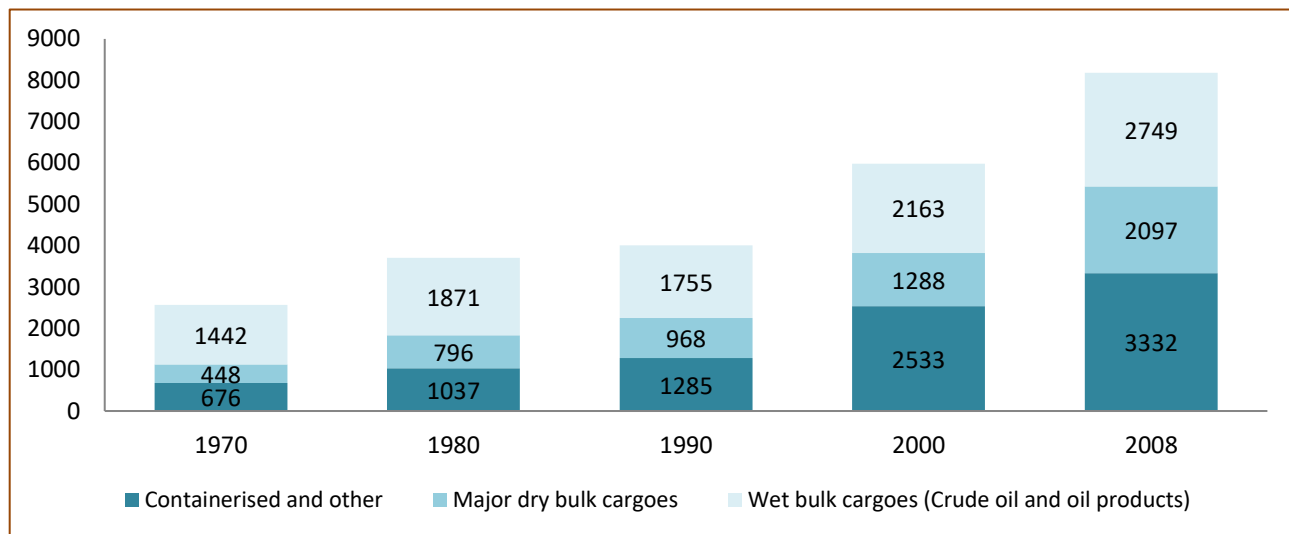


Figure is drawn up by the author. Source: UNCTAD (2018).

However, when searching the concluded negotiating outcomes on the liberalisation of multimodal transport, this author has not found any commitments concerning multimodal and door-to-door transport under the GATS and RTAs. As mentioned in Section 5.6, the multimodal transport is a tough issue, because of its connectivity with inland transport legs which occurs purely within a country's territory – which the country has exclusive authority to regulate its domestic waterways, cabotage transport and coastal territory seas. That is to say, multimodal transport (with a sea leg), as a subsector of maritime transport services, is the most difficult area in the current and future liberalisation of maritime transport, even compared with cabotage transport – a less restrictive area.

The future maritime transport sector needs to address the connectivity with other modes of transport on land beyond ports areas. This is a common task facing all countries and regions around the world. As a result, the WTO which has a wide membership is justified to work on this area and coordinates with other co-existing international bodies governing shipping.

¹⁰⁰ Levinson (2010), pp. 1,15, 58.

¹⁰¹ Harlaftis and Theotokas (2015), pp. 8-12.

¹⁰² See data and chart of 2008 in Hoffmann and Kumar (2010), p. 39. Source: Hoffmann and Kumar, based on data from the UNCTAD (2009). See data and charts of 2008 in Hoffmann and Kumar (2010).

6.3 Shipping: a Network Industry Needs both the WTO and RTAs

Shipping is a network industry, connecting two ports around the globe. The networks which shipping creates could be international, regional, or just local. As shown in Figure 4, in practice, some shipping service connects two ports internationally, and some shipping just serves local or regional feeder ports.

Figure 3: Shipping – A Network Industry involving Global, Regional and Local Networks

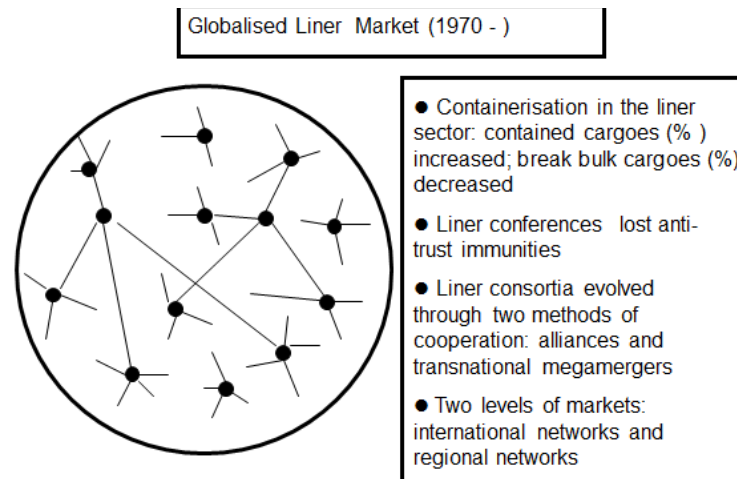


Figure drawn up by the current author. Source: Zhao (2016)

At the loading and unloading ports, as well as *en route* ports, ships require extensive shore-based support for cargo storage and handling. As stated by Gilmore and Black:
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Ships require a vast and bewilderingly various amount of supply and repair. An outgoing ship will normally have taken on some stores and fuel for her voyage at the port of lading. She will have run up a wharfage bill, and incurred various port fees. She will have been loaded by stevedores. She will probably be taken out by a pilot, and assisted at the start of her voyage by tugs. From time to time she will have to be repainted and repaired. A host of special callings and industries has arisen to furnish these and a hundred other supplies and services.

The WTO and RTAs meet the need of the liberalisation of maritime transport under different circumstances. On the one hand, when the shipping network is globalised and international, the WTO which bears a wide global memberships can facilitate the negotiations of this kind of maritime and logistical services. On the other hand, when the shipping network is bilateral among two regions/countries or just local, it is appropriate that RTAs which are negotiated among relevant countries and/or regions to handle the negotiations and further liberalisation of relevant maritime and even multimodal transport services.

¹⁰³ Gilmore and Black (1975), p. 16.

7 Concluding Remarks and Proposals for Future Liberalisation of Maritime Transport Services

Maritime transport is a globalised business with a dual nature that joins trade in goods and trade in maritime transport services into one transaction. This dual nature is mirrored by the structure of WTO. Compared with other organisations that handle maritime transport matters, the WTO multilateral trading system is broader in its scope and membership,¹⁰⁴ more precise in its application, and more binding in its effect. These are the features that the global shipping routes and corresponding maritime transport requires. The WTO would, therefore, excel as a negotiation and implementation forum for promoting the future liberalisation of maritime transport services.

Nevertheless, the future liberalisation in the maritime transport sector relies on both the WTO and RTAs (including PTAs). Shipping is one of the most internationalised and liberalised industries in the world, but negotiations on the maritime transport services turned out to be extremely frustrating. Arguably, the difficulties in enhancing existing liberalisation in this sector largely are created by the existing multilateral liberalisation efforts themselves. Many lessons can be extracted from the input of the effects to the multilateral negotiations from 1986 till today. From the legal and historical perspectives, the relationship between the WTO and maritime transport can be traced back to GATS and related maritime transport service negotiations. From an economic point of view, today's trade relies on shipping to carry the goods around the world, since the trade is globalised, shipping also needs such a global multilateral framework.

At the same time, shipping also needs regional and bilateral fora in which members share a high degree of commonality. For instance, ASEAN countries form a regional bloc for their culture, economies and transport networks. Since transport is a network industry, relaying port and some logistical infrastructure (e.g. road, railway, and inland waterway connected with seaports), regional transport services only need to be liberalised among the involved countries within this region (e.g. NAFTA, ASEAN, and the EU, China-Korea RTA, EU-Canada RTA). As shown in the economic analysis,¹⁰⁵ the shipping industry consists of both global and regional networks. The feeder ports work as a connector between hub ports and local regions. RTAs among the countries sharing commonality can better facilitate the negotiations and liberalisation of maritime transport, and remove legal obstacles in the future liberalisation of multimodal transport.¹⁰⁶

Moreover, because of the polycentric governance of today's maritime services, there are over 30 international bodies and agencies governing the shipping industry, that is why the current author claims that there are "too many cooks". However, the WTO and RTAs play different roles in the future liberalisation of maritime transport services. It is necessary to involve the WTO to coordinate the existing bodies governing shipping, especially matters which have global and international impact, such as open registry and cabotage,¹⁰⁷ and containerisation and door-to-door transport, etc. Meanwhile, regarding regional and bilateral transport logistical networks, RTAs among relevant countries and regions can deal with maritime transport and relevant service sectors. Therefore, both the WTO and RTAs are two indispensable 'cooks' who can complement their others' tasks in the field of shipping.

¹⁰⁴ E.g. GATT, TRIPS Agreement, GATS, and the DSU.

¹⁰⁵ See Sections 6.2-6.3.

¹⁰⁶ See Section 5.6.

¹⁰⁷ See Sections 4 and 5.

As the Bible says “Render to Caesar the things that are Caesar’s; and to God the things that are God’s”, the shipping industry is a network industry, so it needs both the WTO and RTAs which involve global and regional/bilateral/local members. Therefore, it is justified that the WTO handles maritime transport services which involve countries around the world, and the RTAs deal with these maritime transport with regional or bilateral characterises and share a high degree of commonality (in culture, geographical features and other aspects).

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Appendix 1: Services Sectoral Classification List regarding Transport Services (which include maritime transport services)

Sectors: Reports - Commitments - Member x Sector (GATS)

11 TRANSPORT SERVICES

- 11.A Maritime Transport Services
- 11.B Internal Waterways Transport
- 11.C Air Transport Services
- 11.D Space Transport
- 11.E Rail Transport Services
- 11.F Road Transport Services
- 11.G Pipeline Transport
- 11.H Services auxiliary to all modes of transport
- 11.I Other Transport Services
- HC Horizontal Commitments

Source: the WTO

The above classifications was first used in 1991 during the preparatory negotiations for GATS. The existing Member countries' services Schedule of Commitment have utilised the above classifications, and up to date there have been 63 GATS Schedules of Commitments addressing maritime transport sector. Moreover, this classification has also been utilised by critical majority of RTAs and PTAs.

Appendix 2: Table on Open Registry (also known as 'Flag of Convenience')

Open registry	The shipping company	The host country
Exemplars	<ul style="list-style-type: none"> • Shipowners who choose to flag out in open registry countries • Ship operators who runs bareboat chartered vessels and choose to flag out in open registry countries 	<ul style="list-style-type: none"> • The first states to open their registers were those over which the US had considerable influence. Initially, they were few, the best known being Liberia, Panama and Honduras. • Today, world top 10 open registries are: Panama, Liberia, Marshall Islands, Hong Kong (China), the Bahamas, Singapore, Malta and Cyprus. Roughly 70 % of the world fleet are flagged with open registries.

Proponents	<ul style="list-style-type: none"> • Reduce tax liability • Lower registration fee • Lower crewing costs, because manning of ships by non-nationals is freely permitted and, thus a ship owner/operators can employ lower-cost (probably foreign) crews • Flexibility in certain aspects of the corporate structure (e.g. anonymity, through permitting greater use of bearer shares whereby the identity of the ultimate owner of the ship may be hidden) 	<ul style="list-style-type: none"> • a new area of business activity for its national economy • A new, relatively modest, revenue source (e.g. registration fee and tax)
Opponents	<ul style="list-style-type: none"> • decline in the need for crews from the states whose flags the ships had previously flown. • Lowered the shipping safety standards for the international community and the port state, because the shipowner/operator try to reduce the operation cost 	<ul style="list-style-type: none"> • Bigger ships, smaller crew: a formula for disasters.

Table compiled by the current author. Source: Fathering (2013), pp 205-206.

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