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# Maritime Transport Services in the Law of the Sea and the World Trade Organization

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# 1 Introduction

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Prior to the advent of the United Nations Convention on the Law of the Sea in 1982 (the LOS Convention), the focus of the law of the sea was on navigation and shipping. With the coming of the LOS Convention, the utility of the sea, in particular the continental shelf and exclusive economic zone, has been greatly expanded. This is also the case with the regulation of marine natural resources, which were brought under more uniform, strict and transparent disciplines on an international scale and had exerted crucial influences on maritime transport and trade. On the one hand, with more demanding requirements imposed on maritime transport, relating to, for example, seaworthiness, due diligence, tort, privity, and maritime liens, the safety of maritime transport and the more reliable and efficient operation of international trade have therefore been noticeably assured. On the other hand, some relevant rules and regulations may at the same time constitute technical barriers to trade and restrict access to free trade and market. Such regulations are mainly based on the conditions for the right of passage in certain maritime zones, shipping safety, prevention and control of pollution, and the right of access of land-locked states.

Before the establishment of the WTO in 1995, the GATT 1947 was a relatively self-contained legal regime which was limited to disciplines on goods. With the expansion of trade rules to services and intellectual property under the new WTO framework, and foremost the reinforcement of dispute settlement mechanism, the WTO has been integrated as a part of international law which can no longer be isolated. This has been mainly experienced in the field of trade and environment, where rules sometimes are mutually supportive and sometimes cause considerable tensions<sup>1</sup>. The

1 The relationship between trade and environment in the WTO is mainly worked out in two ways: the Committee on Trade and Environment, and the Environment-Related Provisions in WTO Agreements. For further read-

case law of the WTO has made considerable progress in interfacing the two areas, yet the matter is far from being solved and settled<sup>2</sup>.

This work explores another issue critical to international trade – the impact of the interface relationship of the WTO trade law and the law of the sea on maritime transport services. The inclusion of services in the WTO system under the GATS has broadened the relevance of the WTO law for maritime transport and navigation, which have essentially come under the umbrella of the trading system, albeit still operating under basic exemptions for maritime transport services at this stage. Theoretically, the rules under the GATT 1994 in respect of goods already fully apply to maritime transport, and the principles of the WTO law in respect of securing market access rights and non-discrimination have been of increasing relevance to this field. Although no substantive agreement was reached on this issue in the Uruguay Round, there are ongoing discussions on achieving a more open shipping market and further liberalization of maritime transport services.

The hypothesis of this work is based on the feasibility of mutual integration of these two international systems and the potential for commonalities. These systems to date have still operated in different and independent regimes with different constituencies, and suffer from lack of co-ordination and interaction. Through analysis of certain issues that are likely to overlap and create tensions in both forums, the research offers an insight into how the two systems may

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ing: Gary P. Sampson & W. Bradnee Chambers: *Trade, Environment, and the Millennium*, UN University Press, Tokyo, 1999; Horst Siebert: *Economics of the Environment Theory and Policy*, Springer-Verlag, Heidelberg, 1998 (5<sup>th</sup> edition); Caroline London, Michael Llamas: *EC Law on Protection of the Environment and the Free Movement of goods*, Butterworths, 1995.

- 2 Cases in the WTO dealing with fisheries and the protection of marine environment include: US-Shrimp Case, the Tuna-dolphin Cases, and the Shrimp-Turtles Case; for further readings on the Shrimp Case, see Dukgeun Ahn: “Environmental Disputes in the GATT/WTO: before and after US-SHRIMP Case”, Michigan Journal of International Law, Vol. 20. No. 4, 1999; Rebecca DeWinter: “Issues of Fairness in the Tuna-Dolphin Cases”, available at the website of International Economics Study Centre: <http://internationalecon.com> revisited in February 2006.

achieve further harmonization and mutual integration. It also examines the issue of international organizations and international dispute settlement, including the improvement of the WTO case law, the overlapping jurisdictions between panels and the Appellate Body of the WTO and other pertinent international courts/tribunals such as the ICJ and the ITLOS. The research will be of interest in respect of further study on the relationship of public international law and the WTO trade law.

This work assesses the convergence and divergence of maritime transport services in respect of the law of the sea and the WTO in some of their most important aspects. Particular emphasis is laid on the substantive integration of the law of the sea regulations with disciplines under the WTO. After a brief exploration of the evolving process of maritime transport in the law of the sea and the WTO, the study shifts to the analysis of selected related issues. Three areas that may constitute non-tariff barriers to trade in maritime transport services are examined: the right of access to port, maritime cabotage and international liner shipping. Corresponding discussion is then undertaken, especially in respect of the possibility of integrating these issues into the framework of international regulatory regimes, in particular that of the WTO. The study concludes with a systematic analysis of relevant dispute settlement forums under the LOS Convention and the WTO. Recommendations are then made in respect of assessing jurisdiction and the choice of forum, including an analogy to private international law.

To the present, the WTO regulatory system has dealt with a number of issues relating to the law of the sea, focusing essentially on fisheries and the protection of the marine environment. These cases, however, addressed either anti-dumping, subsidies or environment-related issues, rather than the law of the sea as such. Moreover, there has been considerable discussion on the relationship of fishing subsidies and the environment, as a case of whether further the WTO disciplines may bring about improvements in the conservation of marine resources. However, there has been little further systematic research on the interface between these two major areas of international law, which have to date been

developing separately as two succinct systems and operating in different forums.

This work provides an innovative discussion of the complex subject of maritime transport services. However, significant challenges are imposed on research in this area because of the sensitivity of the topics in political and international trade terms, together with the depth and breadth of the field. This situation also partially explains why negotiations on maritime transport services within the WTO have encountered serious controversy over the years, and failed to produce the anticipated breakthrough despite the efforts of the member countries.

In addressing these issues, the study is divided into four parts.

Part I makes a survey of maritime transport services in the law of the sea and the WTO. Part II turns to selected issues. It discusses port access both in the law of the sea and the WTO law. It deals with the problem of coastal shipping (cabotage) and with access to cargo in international liner shipping. Part III turns to issue of jurisdiction and dispute settlement under the law of the sea and WTO law. The work concludes with brief reflection and policy recommendations in Part IV.

Part I: Chapter 1 provides a snapshot of the state of research, dissertation objects and summary of the work. Chapter 2 explores the evolution of the issues and points out that while the law of the sea has been serving international trade over centuries, it has been entrusted with new meanings and new fulfillments in today's new era. Although maritime transport is still at the heart of major law of the sea conventions such as the LOS Convention, it is no longer the sole focus of the law of the sea. The key task is to achieve a "co-regulation" of maritime transport between the LOS Convention and other international organizations (in particular the WTO), that have different, but sometimes overlapping jurisdictions. This situation is made more complex by the fact that, with the transforming of the self-contained legal regime of the GATT to the comprehensive WTO law, maritime transport has been essentially

included under the umbrella of the international trading system. Many of the WTO disciplines fully apply to this area of service, but at the same time, there is no clear delineation of the jurisdictional relationships between international institutions.

Chapter 3 explores the relevance of the WTO principles to the operation of maritime transport services. It starts with a brief introduction to the GATT/GATS and the related liberalization of trade in services, it then discusses some important issues and principles as well as the main impediments on maritime transport services. The discussion ends up by putting forward the recommendation that instead of the three-pillar approach, an integrated model schedule may help to facilitate the WTO negotiations in this field.

Part II: Chapter 4 introduces port access issue in the law of the sea, which includes the port state's jurisdiction over its ports in customary international law, key international conventions and treaties on this issue, as well as relevant work under international organizations. It then studies principles concerning port access and use of port facilities in the GATT/GATS provisions and agreements. GATT Article V is the main provision for the study. The Chapter addresses the question of whether this provision implies a right to port. The conclusion it draws is that Article V does not imply such a right although it does contribute to the facilitation of transit for international trade. The proposals of this Chapter include options to further strengthen the WTO principles in order to facilitate the access to port. Besides enhancing transparency in the relevant procedures and requirements for port access, it also makes recommendation on the strengthening of bilateral and regional consultation and cooperation on this issue. Furthermore, the work recommends that GATT Article VIII on fees and formalities should also be clarified in order to make it more operational. GATT Articles XX and XXI could be used by port states to hinder the access right of other countries' vessels under the guise of safety or security considerations. Countries should be cautious when interpreting these articles and try to distinguish between justified protection and disguised protectionism.

Coastal shipping is one of the most controversial areas in maritime transport where no consensus has been reached as to whether or not it shall be deregulated. Chapter 5 discusses the economic issues and legal framework for cabotage. It then studies the current regulatory mechanisms on cabotage under both international institutions and domestic legislations. The cabotage policy of a number of countries is discussed, from which the work identifies little evidence that the deregulation initiatives in countries such as New Zealand have adversely affected the domestic economy or national defence. This work recommends that cabotage protection should be phased out, but on a gradual basis due to its complex nature. At the same time, more domestic and international cooperation and consultation should be conducted for the benefit for international trade.

Moreover, this work suggests that the WTO principles on security exceptions should be clarified. These are reflected in GATT Article XXI, GATS Article XIVbis, Article 2.2 of TBT Agreement, and Article XXII of the Government Procurement Agreement.

There have been substantial debates over a long period of time as to whether or not the anti-competition exemption system for liner shipping should be repealed. Chapter 6 argues that under current global market circumstances it is still premature to replace the present regulatory instrument with some sort of new system. Instead, this work takes the position that regulation of liner shipping in different countries and regions should be brought into a more harmonized monitoring mechanism under a WTO framework. Against a background of the existing GATS provisions on restrictive business practices being merely for information exchange and consultation, this work puts forward suggestions on ways to establish pro-competitive principles and strengthen the enforcement capability of developing countries.

Part III: Chapter 7 deals with jurisdiction and dispute settlement. Based on earlier discussions, this Part examines the convergence and divergence among the various jurisdictions of international institutions. It introduces the dispute settlement systems under the WTO and the LOS Convention, on basis of which it assesses the

jurisdictional similarities and differences among the WTO, the International Court of Justice and the International Tribunal for the Law of the Sea.

This work then draws an analogy to private international law in assisting the determination of jurisdiction and the choice of legal forums. The EU-Chilean Swordfish case, in which the dispute settlement mechanisms of both the WTO and the LOS Convention was invoked, illustrates how disputes may end up in two jurisdictional forums coming to contradictory or at least incompatible decisions. This case is discussed as an example of how to determine the most substantive links in a dispute.

Part IV: This part summarizes the whole work and elaborates on a number of recommendations on the three selected issues in Part II.