

GATT and its Effects on Shipping and Ports¹

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Introduction

The title of this paper is more ambitious than what its contents justify. The agreement signed in Marrakesh in April 1994 consists of twenty thousand pages that, at a rate of twenty pages per night, could make interesting bed time reading for many of us, for 1001 (Arabian) nights. Although this paper tries to speculate on the effects on shipping and ports of the most important GATT principles, such as those of *Most Favoured Nation*, *National Treatment*, *Market Access* and *Subsidies and Anti-dumping*, it does not touch the equally important issues of *Trade Related Investment Measures (TRIMs)*, *Rules of Origin*, *Pre-shipment Inspection (PSI)*, *Customs Unions* and *Free Trade Areas*.

Peter Sutherland, Secretary General of GATT, described the conclusion of the Uruguay Round as a *defining moment in modern history*. This may indeed be so but GATT was not signed because people were convinced of its positive effects but because they were rather brainwashed about the "disastrous" consequences of not reaching an agreement. Ironically, the reasons for excluding Maritime Transport from the agreement on trade in services were rather the opposite. The sector was not excluded because people failed to see the advantages but because they feared the potential disadvantages that could result from clauses favouring protectionism.

Against popular belief, the philosophy of GATT is not about trade liberalisation but about non-discrimination. The two things are not necessarily the same and the one does not necessarily lead to the other. GATT allows for protectionism - through tariffs or otherwise - provided that Parties are not treated differently and, on the other hand, the commitment of countries to reduce or eliminate their trade barriers does not exclude their ability to discriminate through a myriad of ways that they have at their disposal.

Europe's role in these discussions has been rather ambivalent. With more than thirty million people structurally unemployed (a situation reaching the limits of a social crisis in countries like Finland, Sweden and Spain) and with its infamous welfare systems at shambles, policies of "day by day survival" are becoming the norm and Europe's pursuit of the holly grail of a "level playing field" assumes surrealistic dimensions.

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The General Agreement on Tariffs and Trade

The GATT System operates in three ways:

- as a set of multilaterally-agreed rules governing the trade behaviour of countries providing, in essence, the “rules of the road” for trade;
- as a forum for trade negotiations in which the trade environment is liberalized and made more predictable either through the opening of national markets or through the reinforcement and extension of the rules themselves;
- as an international "court" in which governments can resolve disputes with other GATT members.

The basis of the GATT has always been its rules and procedures: the most basic commitment is not to liberalise trade, but to maintain equal treatment of trading partners, "*Most Favoured Nation*" (MFN) treatment for all fellow members, and to avoid disruptive changes in policies affecting trade, most notably by the "binding" of tariffs.

GATT does not prohibit protection for domestic industries. However, a second basic principle is that where such protection is given, it should be extended essentially through tariffs and not through other commercial measures. Among other things, the aim of this rule is to make the extent of protection clear and to minimize the trade distortion caused.

The method of GATT negotiations has embodied a mercantilist approach to trade, offering reductions in trade barriers as a "concession" rather than viewing them as a gain to those making them, combined with the requirement that all such concessions be extended to all other members. A *concession* is defined as a reduction in restrictions on imports whereby concessions from other countries are won at the "cost" of relaxations in one's own import regime.

GATT comprises a set of trading rules that apply generally across commodities and contracting parties. There are exceptions both for countries (developing countries in particular) and commodities (e.g. agricultural products). One of the main exceptions to the general GATT rules against quantitative restrictions concerns cases of balance-of-payments difficulties (article XII). Even then, restrictions must not be applied beyond the extent necessary to protect the balance-of-payments and must be progressively reduced and eliminated when they are no longer required. This exception is broadened for developing countries, by the recognition (article XVIII) that they may impose quantitative restrictions to prevent an excessive drain on their foreign exchange reserves caused by the demand for imports generated by development, or because they are establishing or extending their domestic production. Where quantitative restrictions are allowed, they should be applied without discrimination (Article XIII).

There are also "waiver" procedures (article XXV) under which a country may, when its economic or trade circumstances so warrant, seek a derogation from particular GATT obligations. *Customs Unions* and *Free Trade Agreements* (FTA) are allowed (article XXIV) as an exception to the general MFN rule, provided that certain conditions are met. In a nutshell,

article XXIV requires that (a) all trade within the "Area" be liberalized and (b) tariffs applicable to countries outside the "Area" should not be more restrictive than those in existence before the creation of the FTA.

GATT's two principal pillars are non-discrimination and reciprocity. Non-discrimination has two dimensions: the Most Favoured Nation clause requires that, subject to identified exceptions, imports from all sources should face identical barriers, while *National Treatment*, (NT), requires that, once through customs, foreign goods are not subject to taxes or regulations more onerous than those on equivalent domestic goods. On the other hand, "reciprocity" was never defined in detail. The means to achieve it were developed informally and have changed over time, but its centrality has never been -nor could ever be- challenged in the context of voluntary agreements between sovereign nations. An obvious tension, however, exists between "reciprocity" and MFN, making the combination of bilateral reciprocity and MFN rather difficult to manage due to the resulting "free-rider" problem (see below).

Services in the GATT Negotiations

In 1982, the United States submitted a document to the GATT that placed great emphasis on the importance of services to the world economy and on the GATT as a "solid basis" for a framework for *trade in services*. In all previous Rounds, the major issues were tariffs; agriculture was excluded and the major bargains were among the industrial countries. Four main regional clusters became apparent in the period just preceding the *Punta del Este* meeting:

1. the United States and some OECD countries that favoured the original proposal;
2. the European Union, some OECD members and some developing countries that were working towards an overall compromise;
3. the G10 group of ten developing countries, led by Brazil and India, which strongly opposed the U.S. initiative;
4. a group of twenty developing countries (G20) that were prepared to accept the U.S. proposal depending on the terms.

Negotiations on trade in services were launched through part II of the *Punta del Este* declaration of September 1986. Following the adoption of the *Punta del Este* declaration, the *Group of Negotiations on Services* (GNS) was established, with a program for the initial phase of the negotiations that, in broad terms, aimed at addressing underlying issues that were not resolved in the ministerial declaration while, at the same time, shedding some light on how to satisfy the guidelines and objectives agreed upon in *Punta del Este*. The work program of the GNS that was agreed in February 1987 consisted of five agenda items:

- definitions and statistics;
- concepts;
- sectoral coverage;
- existing sectoral arrangements and disciplines (the GNS extended invitations to participate in the relevant GNS discussions to, among others, UNCTAD);

- measures and practices contributing to or limiting the expansion of trade in services.

Services were included in the Uruguay Round in a rather semi-formal way that resulted in questions as to whether they were part of the GATT system or not. For many services, particularly transport and finance, there were already international agreements or regulatory frameworks in existence, so that the principle of international intervention was not the issue. However, such agreements were normally collections of bilateral arrangements or unilateral concessions, with no provision for MFN-type extension to all participants. The reasons for bringing them under the GATT included the taking of advantage of their enforcement mechanisms and the use of multilateral frameworks both to accelerate negotiations, which otherwise had to be country by country, and to permit the striking of deals across services and merchandise trade.

The General Agreement on Trade in Services (GATS)

The concept of *Market Access* played a central role in the discussions on services, reflecting the interests of export-oriented multinational service industries and government agencies seeking liberalisation and/or deregulation of domestic service markets. Services (particularly direct ones) differ from merchandise goods in that international transactions frequently require consumers and suppliers to be at the same place at the same time (something, however, that is changing fast with the advances in telecommunications). As a result, market access restrictions for services may involve not only barriers to the cross-border exchange of services, but also policies affecting the physical entry of service producers into markets where consumers are located.

The final draft of the General Agreement on Trade in Services (GATS) was presented on December 20, 1991. Article I distinguishes four *modes of supply* to which the Agreement applies. These are (a) the cross-border supply of a service (i.e. not requiring the physical movement of supplier or consumer); (b) the provision implying movement of the consumer to the location of the supplier; (c) services sold in the territory of a Party by (legal) entities that have established a *commercial presence* there but originate in the territory of another Party; and (d) the provision of services requiring the *temporary* movement of *natural* persons (service suppliers or persons employed by them who are nationals of a country that is Party to the Agreement).

A core general obligation of the GATS is the *unconditional* MFN treatment. Other general obligations deal with transparency; economic integration; recognition of licenses and certification; domestic regulation; behaviour of public monopolies and behaviour of private operators.

National Treatment is defined as treatment no less favourable than that accorded to "like" domestic services and service providers. However, such treatment may or may not be identical to that applying to domestic firms, in recognition of the fact that identical treatment may actually worsen the conditions of competition for foreign-based firms (e.g. a requirement for insurance firms that reserves be held locally). Although quite similar in wording to GATT's NT provision, it implies significantly different obligations in an operational sense, given that NT is not a general obligation in GATS: Once access to a market has been achieved through one or more of the *modes of supply*, the NT commitments of the relevant party specify the conditions

under which the foreign service providers can compete in the domestic market for each of the modes concerned.

Although, conceptually, the distinction made in GATS between *Market Access* and *National Treatment* is relatively clear, the distinction may be difficult to draw in practice. This is because market access restrictions in the form of limitations or conditions on *modes of supply* are likely to violate NT for these modes as well. The articles are not integrated, because the market access obligation also pertains to quantitative limitations that are applied on a non-discriminatory basis. An example of such a non-discriminatory quantitative restriction is a requirement that only a given number of firms -whether of foreign or domestic origin- may provide a specific service. Such policies are in principle prohibited under article XVI. Any such measures that countries might desire to maintain for services that are included in their *Schedules* must be listed. While the use of separate *Market Access* and *National Treatment* provisions partly reflects a desire to maintain the GATT distinction between measures that are applied at the border (market access restrictions) and measures that are applied inside the border (national treatment), it also reflects one of the distinguishing characteristics of service markets: the fact that the contestability of such markets is frequently restricted by non-discriminatory regulations.

The Principles of GATT

Most Favoured Nation (MFN)

Non-discrimination in the GATT is expressed in the *Most Favoured Nation* concept in its unconditional form. Article I of the GATT provides:

...with respect to customs duties and charges of any kind imposed on ... importation or exportation ... any advantage, favour, privilege, or immunity granted by any contracting party to any product originating in or destined for any country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

There are exceptions to this rule relating to customs unions and free trade areas that were part of the GATT from its inception, and preferences for developing countries that were added later.

The requirement of article I that a *concession* given to one has to be given to all could actually discourage negotiations on the reduction of barriers. Each country could drag its feet in negotiations knowing that it would get the benefit from reductions in other countries' barriers whether it reduced any of its own or not: it could "free-ride" on the negotiations of others. Free-riding has been curtailed in the successive rounds of GATT talks by negotiating concessions between principal suppliers on narrowly defined products while at the same time covering a wide range of products in the negotiations as a whole. During the Tokyo Round, a *formula reduction* in barriers (with exceptions) was adopted, and this also helped to curtail the problem of "free-riding".

It appears, however, that unconditional MFN is being eroded in the trade of goods, as many countries focus more on the bilateral rather than on the multilateral and systematic aspects of trade policies. In recent years, the main players in GATT have shown considerable reluctance to extend the benefits of the new Agreements to all members, even when these Agreements had been interpretations of the GATT articles. Many signatories have extended the benefits only to the co-signatories of the particular Agreement. With such attitudes prevalent, there might be little chance that the benefits of the Agreements on services would be extended to any, except the signatories to the relevant Agreements.

By its very nature, MFN is weighted in favour of the developed countries and it may hamper the development process of LDCs and their efforts to achieve growth through trade. In a global economic climate which remains ever more uneven and lopsided, it is unrealistic to assume absolute equality among Contracting Parties. In recognition of the inequity occasioned by the MFN-principle, the GATT Part IV on Trade and Development (Art. XXXVI-XXXVIII) introduced the *Differential and More Favourable Treatment* for LDCs, which provides the recognition of tariff and non-tariff preferential treatment in their favour as a permanent legal feature of the global trading system.

National Treatment

National Treatment is to be distinguished from MFN; it refers to the treatment of foreign products (or suppliers) not with respect to each other but with respect to national products (or suppliers). Article III of the GATT requires that internal taxes, regulations and the like should not be applied to imported or domestic products so as to afford protection to domestic production. It has sometimes been implied that, for some services, NT means equality of treatment of foreigners and nationals.

In certain cases, GATT may authorize or legitimize certain forms of discrimination against goods produced by foreigners. The generally authorized form of discrimination according to source is an import tariff, although in some circumstances quantitative restrictions on imports are also permitted. NT then implies that once the authorized form of discrimination has been imposed on a product, there should be no further discrimination according to national source. When one views *national treatment* in this manner, the way in which it could be extended to services is readily apparent. A general agreement on services could include a provision for specifying particular means of discrimination against foreign-produced services. Sector-specific agreements could then identify the particular form or forms of authorized discrimination for the services in that sector, and particular levels of these forms of discrimination could be bound among the parties to that agreement. *National treatment* would then imply that in all other respects domestic and foreign producers should be treated equally.

Dumping and Safeguard

Dumping is traditionally defined as selling at a lower price in one national market than in another. Accordingly, Viner, in his classic study of dumping, concluded that dumping should be confined to "price discrimination between national markets". The classic dumping case is that in which a country sells goods abroad at a price lower than the price prevailing in its home market. The *rationale* for dumping products in a foreign market is analogous to that for price

discrimination within a domestic market: the discriminating firm can maximize its profits by charging different customers different prices for essentially the same products.

Abuse is central to the negotiations on anti-dumping. These actions are meant to protect domestic producers against predatorily priced imports, but they may now have become a preferred protective instrument in some countries. For example, since 1980, the four leading users of anti-dumping measures (Australia, Canada, the EC, and the United States) have initiated over 1,000 investigations, of which some 50 percent have led to action. As a result, the countries that are often subject to such actions -led by Japan and other Asian exporters- want clear rules to prevent unpredictability; they suggest an agreed methodology for calculating dumping margins and strict limits for the period between initiation and definitive findings of anti-dumping actions. On the other side, the EC and the United States want the rules to cover circumvention (e.g. assembly of dumped inputs in the domestic or third markets). However, the framing of rules to determine "intent" in investment decisions is difficult in the face of the internationalization of production that can make exporting via third countries, or moving assembly operations into markets, an economically sensible undertaking.

The definition of dumping, as described in GATT and elsewhere, is often expressed as the sale of products for exports at a price less than *normal value*, where the latter is roughly defined as the price for which those same products are sold in the "home" or exporting market. The difference is called the "margin of dumping". It is often very difficult to determine the correct prices which have to be compared in order to determine whether dumping is present or not. Things become even more complicated in cases of countries where a "home" price does not exist due to barter trading arrangements (former Soviet Block) or when the inconvertibility of national currencies makes price comparisons meaningless.

The opportunities for profits from dumping will depend upon the interaction of three variables:

- (1) *the demand for the dumping firm's product in its own country and abroad*: the firm will be more likely to profit from dumping if the home demand for the dumped goods is inelastic while the foreign demand for the same goods shows a high price elasticity.
- (2) *the barriers to re-entry into the exporting market*: a condition for a successful dumping scheme is, therefore, the effective insulation of the home market from the world market for dumped goods.
- (3) *the nature of the firm's cost structure*: in general, a firm will not dump unless the marginal revenue that it derives from abroad is substantially greater than its marginal costs of production for dumped goods. Generally, this can be achieved at a lower foreign price only when the cost curve is descending at the margin, i.e. when there is a declining cost industry involving economies of scale.

Given the long history of national and international concern on dumping, it is not surprising that when the GATT was negotiated in 1947, special attention was given to such cases. Article VI of GATT allows Contracting Parties to utilize anti-dumping duties in order to offset the margin of dumping, provided that it can be shown that such dumping is causing or threatens to cause "material injury" to competing domestic industries.

As time passed, however, some countries in GATT began to feel that other countries were applying their anti-dumping laws in such a way as to raise new barriers to trade. Thus, during the Kennedy Round of GATT trade negotiations (1962-1967), the GATT contracting parties negotiated an "Anti-Dumping" (AD) Code, which set forth a series of procedural and substantive rules regarding the application of anti-dumping duties, partly due to the desire to limit anti-dumping duty practices and procedures of governments which were damaging international trade. During the Tokyo Round (in 1973), a new anti-dumping code was negotiated whose official title was "Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade". The code came into effect in 1979. Although GATT reports that as many as twelve countries have used anti-dumping laws from time to time, it is commonly understood that four traders are the principal users of anti-dumping laws, sometimes allegedly in order to inhibit imports: the United States, the EU, Canada, and Australia.

The original GATT (Article VI) called for the *material injury* test in anti-dumping and subsidy cases, and the language of this test has been carried over in the three codes concerning anti-dumping and countervailing duties, namely the two anti-dumping codes (1967 and 1979) and the subsidies countervailing code of 1979. Not surprisingly, the US law concerning the *material injury* test for both the anti-dumping and the countervailing duty cases has not always been completely consistent with the GATT rules. Since these laws preceded GATT, the United States benefited from *grandfather* rights with respect to injury test matters.

In order to find "dumping", the rules compare the export price with some "fair" benchmark. At some time this was essentially a price discrimination test - a comparison of the price for export with the price in the home (exporting) market. However, there was always allowance for the case where the "home" price was not comparable, either because there were no home market sales, or for other reasons. The traditional approach in such cases has been to turn to comparisons with sales to third markets, or to a "constructed cost" method of arriving at a "fair" home price. During recent decades, however, more attention has been focused on the "cost" of goods produced abroad and there has been a shift from exploring potential "price discrimination" to a determination of whether the exported goods have been sold at a price which is "below cost".

Both anti-dumping and countervailing duties require, under international rules, fulfilment of the "material injury" test. The basic idea is that in the case of imported dumped or subsidized goods, the importing country is not authorized to respond with anti-dumping or countervailing duties (as an exception to other obligations in GATT), unless it can be established that the imported goods have caused "material injury" to the competing industry of the "like" product in the importing country. Further, in GATT 1994, no complaints are investigated unless they are lodged by at least the 25% of those adversely affected; when the price movement represents less than 2%; and/or when the change in the volume of imports is less than 3%. Exporters threatened with an anti-dumping investigation can either negotiate an *Export Restrain Agreement*, aimed at reducing the volume of imports, or relocate production to the country threatening with anti-dumping action.

The potential for proliferation of anti-dumping measures has increased considerably as many developing countries are combining the liberalization of their import regimes with the adoption of national legislation incorporating anti-dumping measures. With the objective of reducing the possible abuse of anti-dumping measures, efforts were undertaken in the Uruguay

Round to establish more precise and stringent multilateral disciplines aimed at introducing more predictability and reducing arbitrariness in the application of anti-dumping duties. The revised draft Agreement on Implementation of Article VI of the GATT (Anti-dumping Code) was one of the major components of the rule-making area.

Compared to the Tokyo Round, the Agreement contains more details on the "determination of dumping" and the "determination of injury"; something that could be generally considered as a positive outcome for those countries that are subject to anti-dumping investigations. In particular, the new specifications aim at making the determination of dumping less arbitrary for exporters. New provisions concerning a) the examination of additional factors (other than dumped imports) for ascertaining causality between dumping and injury and b) the more precise factors pertaining to the determination of *threat of material injury*, could be also considered as improvements to the Tokyo Round Code. For the first time in any GATT anti-dumping code, this Agreement also specifies that any definitive anti-dumping duty is to be terminated on a date not later than five years from its imposition (or from the date of latest review), unless the authorities determine otherwise, in a new review initiated before that date.

GATT and the Developing Countries

The share of developing countries in total trade has increased from 21% in 1973, the beginning of the Tokyo Round, to 26% in 1986 when the Uruguay Round opened. As many of them are now significant markets for the exports of most industrial countries, access to their markets and regulation of their trade policies have become the objectives of the traditional participants of the Round. It could be argued that, in the period since 1973, developed countries have increased their protection while developing countries, by choice and because of pressure from the international financial organizations, have liberalised their trade. Interestingly, for the first time in economic history, the impetus to trade liberalisation is not coming from industrial countries which profess to accept liberal norms, but rather from countries whose past tradition has been to reject them. A comprehensive passage in the *Montreal Declaration*, titled "*Increasing Participation of Developing Countries*", could be of special relevance here. It directly linked greater participation in world trade in services and expanded services' exports by developing countries to the strengthening of the capacity, efficiency, and competitiveness of the domestic services' sectors of their economies.

In the Uruguay Round of GATT trade negotiations, changes in policy towards, and by, developing countries have been central objectives and concerns for both industrial and developing countries. In the July 1991 review of progress (GATT, 1991b), the spokesman of the developing countries (the Brazilian ambassador, Rubens Ricupero) pointed out that *...without awaiting the conclusion of the Round, we have opened our markets, we have given away our non-tariff measures, our exceptions for balance-of-payment-protection...having put aside our weapons, having placed our faith in the system, we cannot afford to wait any longer. We cannot allow the Round to drag on indefinitely...*

Although developing countries had not played an important part in previous Rounds, demands on, and by, them had always been on the table, in all the major "negotiating groups" into which the discussions were divided. The reasons for this include:

- the increasing economic importance of developing countries;
- the attempts to extend the role of GATT into new areas, in some of which developing countries have a crucial role to play;
- the significant changes in the nature of trade policy on both sides.

Exceptions for Developing Countries

A constant stream of developing countries is seeking accession to GATT. As a consequence, in 1965, a new chapter -Part IV- was added to the General Agreement. Industrial countries also accepted that they would not expect reciprocity for commitments they made to reduce or remove tariffs and other barriers to trade. The only agreed exception to non-discriminatory treatment, introduced in 1971 by amendment to the original treaty of 1948, was for developing countries: they may receive special preferences, for example the Generalised System of Preferences (GSP), or they may introduce "exceptional" import controls. In practice, however, and in the past, developing countries were allowed further special treatment, through indefinite postponement of their obligation to bind tariffs. At the same time, developed countries also enjoyed special privileges, which worked against developing countries: GSP preferences were not "bound" or contractual, and the agricultural, textiles and clothing sectors were largely outside the normal GATT rules.

GATT and Maritime Transport

As it has been mentioned above, the aim of GATT is to liberalize world trade and place it on a secure basis. With the reduction of tariff and non-tariff barriers achieved in various rounds of negotiations, GATT is expected to increase substantially the volume of international trade which in turn should increase the demand for maritime transport services.

Quantifying the overall effect of GATT 1994 on both world trade and world GDP is hard because many of the most significant gains will come from outside the traditional areas of merchandise trade. Despite this, a number of studies have made the attempt. The studies carried out by the OECD, the World Bank and the GATT broadly agree that the boost to world GDP will be between \$213bn and \$274bn after ten years, or roughly 1.0-1.2% of world GDP as a step-gain. The joint World Bank/OECD study, with the lower estimate, does not include non-tariff barriers on industrial products, while the follow-up OECD study does [EIU 1994]. If this increased volume of trade is realised, together with the other dynamic effects of trade liberalisation, it could generate the equivalent amount of sea transport demand which could help the shipping industry exit from its current structural depression.

GATT could affect shipping and ports in another way, namely in the furtherance of liberalization of the maritime transport sector and its inclusion in the GATS framework. As the Uruguay Round concluded without adopting an agreed position for maritime transport (shipping is loosely included within a wider GATT framework but excluded from the specific round settlement), the prospects of the industry, with regard to further liberalization, become somewhat vague. However, a strong appeal for further liberalization in shipping comes from both traditional maritime nations and developing countries, though the understanding of *liberalization in shipping* remains different.

Notwithstanding shipping's exclusion from GATT 1994, it is believed in this paper that the discussion is still open and relevant, on issues such as the applicability of the various GATS principles in the shipping industry, the possible effects of GATS on shipping and ports, the principles on which the liberalization of shipping should be based and the way in which the GATS principles should be implemented in the maritime transport sector.

Objectives of Further Liberalisation in Shipping

Based on the liberal spirit of GATS and the present situation in the shipping industry, the following objectives could be considered as relevant within the context of a GATS framework for the liberalization of the industry.

- *The immediate or gradual removal of all restrictive measures.* This may mean that each country would now have the possibility to participate, on a competitive basis, in international seaborne trade. There should be no discriminatory treatment in any areas such as ports, agency operations and freight forwarding. All arrangements with regard to cargo reservation, preference and cargo sharing should be immediately or gradually removed. Governmental financial and non-financial incentives towards the domestic shipping and shipbuilding industries should be immediately or gradually abandoned.
- *The achievement of a more competitive environment in shipping markets.* As free competition has been hampered by various commercial and institutional arrangements, further liberalization in shipping, by being included in the GATS framework, should aim to remove the obstacles which prevent free competition. In this sense, the conference system, consortia and stabilization agreements should be re-examined under a 'different' light.
- *Liberalization in maritime transport should aim at a closer cooperation between the Traditional Maritime Nations (TMN) and LDCs.* The cooperation areas are wide, ranging from technical cooperation, training of crews and management staff and policy consultation, to commercial cooperation and even joint venture. Cooperation between TMNs and LDCs can promote the development of international trade and the industrialization of the developing countries while it could also contribute to further liberalization in the sense that LDCs might give up their cargo reservation and sharing systems, in exchange for a higher participation in shipping. This cooperation could extend to environmental protection and to a better implementation of international safety regulations.

Possible Effects of GATS on Shipping and Ports

The issue immediately arising with respect to the MFN principle is that of *cargo sharing* through bilateral and multilateral agreements. Unconditional application of the MFN clause in maritime transport could mean that all countries who exercise cargo sharing should immediately or gradually phase out all or some of their practices, or otherwise extend cargo reservation and/or sharing privileges to other Parties. The following effects might result from the implementation of this clause:

- Insufficient demand for the LDCs' fleets caused by the removal of cargo reservation practices, which may shrink their maritime industries.
- If MFN is binding, LDC governments may seek other protectionist measures, in order to establish and develop their national fleets. These measures may include governmental financial assistance or other forms of cargo reservation such as *government cargoes*.
- As the UN Code of Conduct for Liner Conferences appears not to be in conformity with the MFN clause, the strict implementation of this clause may mean the end of the Code. Since the Code is expected to prevent unilateral cargo reservation by LDCs, its end, or withdrawal from it, may cause new or greater cargo reservation.
- Since the loss to LDCs from a strict implementation of MFN to shipping could be rather heavy, LDCs may seek the partial or complete non-application of the MFN clause. As MFN is the most important clause in the GATS framework, if LDCs can successfully derogate from this commitment and, without standstill and roll-back provisions, they could be encouraged to continue, or introduce new, restrictive cargo reservation measures. If so, the inclusion of maritime transport into GATS will have very little effect on the promotion of liberalization in the shipping industry.
- If all kinds of cargo reservation are phased out immediately, it will be difficult, if not impossible, for LDCs to participate in maritime transport. This is contrary to the principle of *increasing participation of developing countries*. A compromise may be the gradual phasing out of cargo reservation, i.e. LDCs may demand a time-limited derogation from MFN. During this period of derogation, LDC governments can strengthen their national fleets by promoting improvements in management know-how and by seeking technical and commercial cooperation from developed countries while at the same time diminishing the extent of their dependence on cargo reservation or other restrictive measures.

As far as the EU and some OECD countries are concerned, the 1992 Regulation on the implementation of Regulation (EU) 4055/86 has shown that there still exist some bilateral agreements concerning cargo sharing cases which have not yet been phased out or adjusted. However, examples of cargo reservation arrangements between EU Member States are not so often seen as in the case of the developing world. Since there are only *some* cargo sharing practices with third countries under the UN Liner Code, the MFN clause would have only limited effect on EU shipping. EU countries may benefit from the implementation of this clause in the following aspects:

- The immediate or gradual phasing out of cargo reservation and cargo sharing will increase the total cargo tonnages available to them in the sense that they can provide high quality services, compared with those of LDCs. This tonnage increase, however, will depend on the comparative advantage of their fleet and, of course, on the extent to which restrictive measures will be relaxed.
- If the phasing out of cargo reservation and cargo sharing arrangements could adequately increase the cargo volumes available to EU fleets, this might also help them to walk out of the current depression. In this case, and with freight rates returning to normal levels,

governments may consider reducing some of their various assistance schemes, which are both a burden to them and a target for LDCs.

National Treatment and Maritime Transport

NT, if binding, can be the most important principle applicable to maritime transport. As the GATS states, ...*Parties shall accord to other Parties no less than that accorded to domestic services or domestic service providers...* Equality of treatment between foreigners and nationals imply that protectionist measures, such as cargo reservation and preference for national shipping, discriminatory taxes and charges towards foreign flag ships etc., are contrary to this principle.

Cargo reservation may be arranged by national legislation. For example, in Ecuador, the Export Facilitation Law still stipulates that all exported oil products, which along with their derivatives account for approximately 52 per cent of total Ecuadorian exports, have to be transported by national ships. In South Korea, the cargo reservation law which confined the carriage of many bulk imports to the country's ships is now to be relaxed. In mid-1992, the Nigerian National Maritime Authority announced its intention to bring into force legislation, dating from 1987, requiring shippers to notify it of intended cargoes, in order to allow it to allocate them to domestic conference lines.

In the United States, cargo reservation is exercised through the various definitions of *government cargoes* such as government-financed cargoes, foreign aid cargoes, surplus agricultural commodities and relief aid, itemised or designated cargoes, energy transport, defence and security transportation, government supplies etc.

The implementation of the *National Treatment* clause may bring about at least the following effects.

- Under a strict implementation of NT, any restrictive measures in favour of domestic shipping should either be removed or extended to foreign shipping companies. For LDCs, this would mean a further reduction of the demand for their national fleets, if they are not competitive enough. Concerning US shipping, the effects would be similar but less destructive.
- The implementation of *National Treatment* would also mean the removal of any discriminatory charges and taxes levied against foreign flag ships by, mainly, LDCs. In Nigerian ports for example, national carriers are allowed to pay charges in Naira (the local currency), while foreign lines must pay in U.S. dollars. A similar situation exists in China where foreign lines are asked to pay in US dollars, according to a particular tariff, while domestic shipping companies are allowed to pay in RMB (the local currency). Thus, although the effects could be negative for many LDCs, TMNs would benefit as they are the victims of discriminatory charges and taxes.
- Although the above restrictive measures provide less effective protectionism than cargo reservation and similar arrangements, their removal may reduce national tax income, the income of stevedoring and other companies and the income of the Port Authority. Port conditions in LDCs are inferior to those of TMNs and port charges constitute an

important source of foreign currency, which is a commodity in scarce supply in these countries. The reduction of port income might reduce investment in port infrastructure and maintenance and the implementation of NT may cause further deterioration of port conditions in LDCs. Of course, the extent of the deterioration will depend on the level of discrimination that individual ports exercise. The alternative may be that LDCs increase the tax and charges levied on domestic carriers to the same level as that of foreign flags. China is now in a process of making domestic shipping companies pay the same amount as the foreign ones. This will increase the revenue of the ports which in turn could improve the port facilities. Obviously, all ships calling at the port would benefit but the national fleet would now be less protected than before.

- The implementation of *National Treatment* (and *Market Access*) may also mean the entitlement of foreign ships to access and use the port infrastructure and facilities. These may include the physical port infrastructure, like anchorage, berths, lightering, garbage collection etc. as well as services related to navigation and cargo handling, like pilotage, towing and tug assistance, stevedoring and terminal services and communications. It may also include customs, maritime agency, freight forwarding and so on. With respect to all these facilities or services, foreign ships should be treated in the same way as domestic ones and the priority of the latter in using port facilities should be lifted. In cases of port congestion, domestic ships could suffer more than before. On the other hand, for ports with under-utilised facilities (and low marginal costs), increased market access could mean higher port revenues, operational improvements, lower turnaround times and transport costs, and an increase in overall consumer welfare.
- Another implication of this article may relate to the ability of foreign companies to own and operate the port infrastructure and installations, i.e. to allow shipping companies or other organizations to establish and run terminals and related installations in other countries. In many developed countries port investment is treated as investment in any other sector and foreign companies are allowed to invest in port and related infrastructure without too many restrictions. In LDCs, however, there are still some legal procedures that prevent this kind of investments, mainly due to considerations of sovereignty and the perceived importance of transport infrastructure in international trade. Port facilities built by foreign companies can be either exclusive or public. If they are meant for public use, the benefits accrued to LDCs would be substantial, especially in those countries that lack port facilities or money to invest in port improvements. But if these facilities are for private use only, they may not directly contribute to LDC shipping. However, they may generate taxes and other contributions, such as employment and increased consumption of domestic goods and services. The P&O Group investments in terminals in two Chinese ports (Shekou and Zhangjiagang) are expected to contribute both to the improvement of port capacity, especially the container handling capacity, and to employment, tax revenue and management know-how.
- The last important effect of the implementation of NT to shipping and ports concerns cabotage restrictions. The lifting of cabotage is an important step towards the integration of coastal and international shipping and the efficiency of multimodal transport. The opening of this area to outsiders, even conditionally, i.e. only when coastal shipping is an extension of international transport, might affect significantly the industry as whole, particularly in developing countries. The real effect will depend on the competitiveness

of the domestic shipping companies which, due to the near-monopolistic structures prevailing in cabotage arrangements, appears to be doubtful in many cases.

Market Access

Together with MFN and NT, *Market Access* (MA) is the third most important clause for implementing the principle of non-discrimination. MA implies that Parties shall grant treatment to services and service providers of other Parties no less favourable than that provided for under the terms of their *Schedule*. Where access to more than one *mode of supply* is provided for in a Party's *Schedule*, other Parties shall be free to choose the preferred mode.

Two issues immediately arise with regard to MA: the establishment of *commercial presence* in foreign countries and the right to provide services.

Regarding the establishment of commercial presence, the effect could differ considerably among different countries. Commercial presence could take various forms and could be in charge of different activities. These activities may be the marketing and sale of maritime transport services; the purchase and use of any transport and related services; transport documentation; customs and other activities; provision of business information and agency services and related activities.

- In LDCs, these activities are mostly performed by local companies in a relatively rather inefficient way. The establishment of *commercial presences* may cause severe competition between local and foreign firms. In certain cases this may mean -at least in the beginning- the complete loss of business for local companies (or agencies) since they lack extensive international business networks and experience, and they operate less efficiently. Understandably, therefore, the allowance of foreign shipping companies to set up various commercial presences in the domestic markets of LDCs might at least harm the business of ship agency and forwarding which are a part of the shipping industry. A further consideration, which is more critical to domestic shipping, has to do with the fact that commercial presences may compete for national cargoes on behalf of the shipping companies they represent.
- In the above context, inland transport can also be an objective of further liberalization. As international transport becomes more integrated, and considering the advantages of multimodal transport, many shipping companies, or their subsidiaries, are trying to start their business in inland transport, particularly in trucking. As a first step, the possibility of freely contracting with any local transport service providers should be granted to foreign shipping companies, especially those in liner shipping. This free choice of local transport suppliers will surely increase the competitiveness of the local transport market. Secondly, foreign shipping companies may wish to provide local transport services themselves, i.e. to provide origin and/or destination related port and associated services. In many countries, the trucking services of foreign shipping companies are confined within port regions. However, it seems possible that, in the future, trucking services could be extended beyond the port, as foreign shipping companies may wish to provide door-to-door services to their customers. In China, Sea-Land cooperates with the local trucking companies (Guangdong Sinotrans) in order to start its trucking services between HongKong and the Guangdong province.

It has been mentioned already that the provisions of *National Treatment* and *Market Access* are binding only in so far as Parties' Schedules specify. If they are strictly implemented, LDC shipping may suffer significantly, provided all protectionist measures are abolished completely. This is not in conformity with the other articles of the GATS framework, notably with the principle of *increasing participation of developing countries*. A *standstill* commitment which would prevent the introduction of new restrictive measures, within a given period of time, may be the acceptable compromise. During that time LDC shipping will have to strength itself and adjust in order to be able to compete with others under terms of free and fair competition.

The Impact of Articles Favouring Protectionism

Although the aim of the inclusion of MTS into the GATS framework is to liberalize international shipping and to remove or restrict business practices which hinder its development, some articles and/or provisions give countries who exercise such measures the tacit consent to continue or even introduce additional ones or leave some "loopholes" through which they may continue their protectionism and interventionism.

Increasing Participation of Developing Countries

Article IV of the GATS is specially created for developing countries. As stated, the GATS is to

... facilitate developing countries to strengthen domestic services, improve access to distribution channels and information networks and liberalize market access in areas of export of interest to them by providing information on their respective markets...

This article effectively recognizes the *infant industry* principle and the right of developing countries not only to participate in maritime transport, but also to have the privilege of getting help from developed countries, in order to strengthen their maritime transport industries, and to get access to the shipping markets of the developed world without much obligation or commitment for reciprocation.

Understandably, this is one of the most criticised principles of GATT. Whilst recognising the aspirations of developing countries to develop and increase the size of their fleets and their share in world shipping under competitive conditions, OECD countries have not accepted that a less developed status confers a right to promote increasing participation in maritime transport services via discriminatory flag measures. This argument sounds very reasonable notwithstanding the fact that the LDC fleet is still relatively small compared with their increasing share in world trade.

Domestic Regulation and Transparency

Domestic regulation affords Parties the right to require, from foreign shipowners and operators, the adherence to domestic regulations, standards or qualifications, in conformity

with *national policy objectives*. Some countries, LDCs in particular, may use this loophole to implement their policy of protecting their domestic fleets. As OECD argues, this article may be used by individual signatories to either disguise restrictions on international trade or to exclude the whole MTS sector. Some governments may even use it in order to retain the right of refusing the establishment of commercial presences and it might be used even in the absence of *national policy objectives*, which need to be clearly defined. Ambiguity and lack of *transparency* with regard to national and local laws, regulations, prices, fees and their alteration etc. may also have similar effects.

Restrictions to Safeguard the Balance of Payments and Public Procurement

Concerning exemptions aiming to safeguard the balance of payments, the relevant articles acknowledge that *a Party in the process of economic development is more vulnerable to difficulties and that it may need to ensure the maintenance of a level of external financial reserves for the implementation of its programme of economic development*. Developing countries have often used these provisions in order to withdraw MFN rights in cases of a balance of payments crisis. A number of them, however, including Brazil and Korea, have waived their right to appeal to these provisions. As developing countries are by definition in a process of economic development and as shipping is considered by most of them as a prime foreign exchange earner, the balance of payments considerations of GATT can constitute a very strong argument for the continuation of protectionist practices.

With respect to Government and Public Procurement, the relevant article implies that, within two years after the entry into force of the Agreement, multilateral negotiations may still be used and in the meantime Market Access and National Treatment shall not apply. This article provides another loophole with which some Parties may enjoy the advantage of sharing cargoes through multilateral negotiations without being obliged to commit themselves to the Market Access and National Treatment clauses. OECD argues that the allowance of a blanket non-application of MFN, National Treatment and Market Access to such procurement would restrict Parties' access to cargoes in a number of countries. In order to reduce government protectionism to the minimum, it should be clearly stated what kind of public and government procurement may be allowed and in what sense the MFN, NT and MA clauses may not be applied. The EU argues that cargo reservation and preference for government cargoes or for public procurement, except for military goods, is not in conformity with the Agreement.

Subsidies and Anti-dumping

One way or the other, a number of governments today afford their domestic shipping and shipbuilding industries some of the following subsidies or other financial support: operational subsidies; construction subsidies; modernization subsidies; actual depreciation subsidies; loan and interest subsidies; investment allowances and grants; investment guarantees and deferred credits; tax benefits; construction deposits; customs exemptions; compensatory subsidies; inflation and insurance subsidies; seamen's welfare benefits and ship research grants.

For example in South Korea since 1962, the government has used considerable public funds for the expansion of the major ports of Incheon and Pusan and the construction of

industrial ports, container and bulk terminals. According to Korean experts, this investment in infrastructure has indirectly stimulated the growth of Korean shipping. In Africa, Zaire and Nigeria, among others, give financial incentives, such as rebates, tax credits, low interest rates and waivers of import duties to their domestic shipping industries. In its 1993 budget, Malaysia decided to establish a M\$800 million shipping fund. Of the total, M\$500 million were planned to be allocated to new investments, to encourage entrepreneurs into shipping, and M\$300 million was earmarked as help to existing owners to fund new building and second-hand ship acquisitions.

Various types of financial aid are used in the developed countries too. In the United States, a certain amount of tonnage is required to be built under the Jones Act. *Counter-measures* are accepted only in case these limits are surpassed. The Home Credit Scheme of Japan is considered by other countries as indirect assistance to domestic shipbuilding. Restructuring aid is considered to be in compliance with EU rules provided it does not involve an increase in shipbuilding capacity.

The article on subsidies stresses their distortive effects and the need for the establishment of disciplines to eliminate them. However, a special provision is made which recognizes the role of subsidies in developing countries, in relation to their development programmes. This article is very favourable to LDCs, as it recognises that the LDC shipping industry is an infant one and special assistance from governments may help to develop its potential efficiency. Subsidies are simply an effective way to protect the domestic fleet and if their aim is primarily promotional, i.e. to develop merchant marines in developing countries, then direct government subsidies are more efficient.

As far as the liberalization of shipping is concerned, the implementation of this Article may increase the extent of protectionism in the industry. Since subsidies to shipping may result in unfair pricing, many countries, especially TMNs, have suggested that criteria and procedures for dealing with unfair pricing should be established on a coordinated basis and the rights of Parties to introduce or apply legislation aimed at dealing with unfair pricing should be retained. To this effect, the United States have reinstated their "famous" "Super 301" clause of their Trade Law which permits unilateral action against unfair traders [EIU 1994].

The only anti-dumping case known in shipping is the judgement against the Korean Hyundai Merchant Marine (HMM), after a complaint by the European Conference carriers (plus the Belgian independent ABC Container Line). The European liner operators claimed that the South Korean service was charging uneconomic and unfair freight rates on the southbound trip from North Europe to Australia. HMM, however, argued that their route was a lot slower, consisted of a different cargo mix and it called at different ports than those of the complainants. This case has helped to stress how difficult and thorny the anti-dumping issues can be, particularly in the case of (intangible) services, and how elusive and subjective is the definition of a *fair price* or *normal value*.

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