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Soft or Hard Law

Effective Implementation of Uniform Sea Transport Rules through the World Trade Organization Framework

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Abstract

Historically, international regimes regulating maritime transport have aimed to develop uniform rules. However, these rules are relatively static and have been implemented differently based on different national understandings in a de-centralised, State-based manner. This article argues that greater global uniformity in maritime transport rules could be achieved through the framework of the World Trade Organization ('WTO'). The WTO could update these rules dynamically, and could also enforce them. A WTO-based negotiating forum could generate substantive, uniform seaborne cargo rules in two ways. Through a selective referral approach, it could incorporate the existing rules — including the UN-administered rules — within the WTO framework. It could also develop new uniform rules. The WTO also provides international communities with a quasi-judicial procedure — the WTO dispute settlement mechanism ('DSM') — which could also be used to protect and promote the global uniformity of seaborne cargo rules. Such an approach could further reduce divergent interpretations of uniform transport rules by providing a centralised system for the implementation of those rules.

Keywords

uniform transport rules – World Trade Organization – GATS – dispute settlement mechanism

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> "[The World Trade Organization] is a permanent negotiating forum between sovereign states and is therefore a cooperation organization akin to international conferences established under traditional law. It also comprises a sophisticated dispute settlement mechanism which makes it an integration organization, rooted in contemporary international law."[1]
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> PASCAL LAMY, Former Director-General, World Trade Organization

1 Introduction

Today's average consumers are accustomed to driving cars assembled thousands of miles away from their homes and buying cheap household appliances and electronic goods that have been shipped long distances on sea routes. Nevertheless, we rarely pause to think about the gigantic logistical effort involved in maritime transport, which is indispensable in ensuring this level of comfort and prosperity. Even further from our thoughts is the idea that promoting uniformity in maritime transport laws may facilitate the worldwide movement of goods more easily and cheaply.

Maritime transport is a global, higher-value and indeed perplexing service sector. It allows a significant number of countries to benefit from the trade in goods and in sea carriage (or 'seaborne cargo') services in one combined process. Two primary reasons contribute to the huge importance of maritime transport services. First, maritime transport is a prerequisite for the international trade in goods. By volume and weight, around 90–95 per cent[2] of today's international trade in goods is shipped by sea.[3] Secondly, maritime transport — itself a service sector — has become an engine of growth for many members of the World Trade Organization ('WTO'). According to the

1 Pascal Lamy, 'The Place of the WTO and Its Law in the International Legal Order' (2006) 17 *European Journal of International Law* p. 969, at p. 970.

2 International Trade Centre, *UNCTAD & GATT: Maritime Transportation Guidelines for Importers* (1991), pp. 3–4. *See also* Lawrence J. White, *International Trade in Ocean Shipping Services: The United States and the World* (Ballinger Publishing Company, 1988) p. 1.

3 WTO Council for Trade in Services, 'Joint Statement on the Negotiation on Maritime Transport Services', Doc.TN/S/W/11 (3 March 2003), including Communications from Australia, Canada, Chile, the People's Republic of China, Croatia, Cyprus, Czech Republic on Maritime Transport Services, p.1, para. 2.

International Monetary Fund ('IMF')[4] and the WTO,[5] the added valued of services as a share of gross domestic product ('GDP') has reached approximately ten per cent of international trade in the services sector, and it has enjoyed an average annual growth rate of approximately three per cent over the last decade.[6] Uniform laws regulating seaborne cargo services would better facilitate global trade and allow average consumers to access a greater variety of goods more cheaply. However, the four conventions that have attempted to unify maritime transport rules worldwide have largely become indigenous, 'soft law' rules.[7]

In order to promote greater legal uniformity through the effective implementation of international maritime transport rules, this paper explores how these existing rules might become 'hard law' rules, from both a substantive and a procedural perspective, within the WTO framework.[8] Unlike other transnational organizations, the WTO is a special organization which has three attributes that make it feasible to unify maritime transport rules within its framework. First, the WTO has 159 members:[9] matching the breadth of the globalised maritime transport business, it potentially enjoys global reach in relation to the governance of the international trade in goods and maritime transport services.[10] The WTO therefore has the capacity to develop maritime transport rules of global application, unlike other transnational frameworks,

4 Rechard Senti, *Welthandels Organisation (WTO)*, (Dike Verlag AG, Zürich, 2009) p. 598.

5 WTO, 'International Trade Statics 2012', available at: <www.wto.org/english/res_e/statis_e/its2012_e/its12_ toc_e.htm>, last visited 21 January 2013, pp. 146–152 (including data on III Trade in Commercial Services, and pinpointing the transportation services' development in 2011 in the importance in the last decade).

6 Institut für Seeverkehrswirtschaft und Logistik (Institute of Shipping Economics), *Shipping Statistics Yearbook* (*Institute of Shipping Economics 1992*), p. 113; Dietrich Barth, *The Prospects of International Trade in Services* (Friedrich Ebert Foundation, 1999) p. 84.

7 See Section 2 on the Hague, Visby, Hamburg, and Rotterdam Rules. There is no international delegation which enforces uniform understandings and interpretations of seaborne cargo obligations under these conventions of uniform rules.

8 Within the legal academy, hard and soft law generally refers to whether legal obligations of a formally binding or not. *See e.g.* Gregory C Shaffer and Mark A Pollack, 'How Hard and Soft Law Interact in International Regulatory Governance: Alternatives, Complements and Antagonists' [2008] *Online Proceedings the Society of International Economic Law* p. 1.

9 *See* WTO, 'Memberships', available at <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>, last visited 8 January 2014, stating that the WTO has 159 Members.

10 Most WTO Agreements are multilateral agreements and applicable to all WTO members, such as GATT, TRIPS, and GATS. The Dispute Settlement Understanding ('DSU') applies to all of them.

which provide either a more limited regional coverage,[11] or which deal with global but non-trade issues.[12] Secondly, the WTO agreements consist of both substantive and procedural rules that govern established agreements, and are accompanied by dynamic 'permanent' negotiation and implementation machinery;[13] and all of these agreements and mechanisms are embodied in 'a single package' in which they complement one another.[14] Finally, not only does the WTO not have the power to enforce these agreements, but the organization can also act as a vehicle to update these established, static agreements in the light of shifting international contexts through the WTO's 'permanent negotiating forums' and its sophisticated 'dispute settlement mechanism' ('DSM').[15] For example, in the Doha Round of WTO negotiations, the WTO has been seeking ways to fulfil its mandate of progressive liberalisation of the *1994 General Agreement on Trade in Services* ('GATS').[16] WTO members have also agreed to pursue the liberalisation of service sectors through domestic regulations and by way of the standardisation of these regulations.[17] However, the chief characteristic of the current WTO framework is its shift from the traditional, de-centralised (that is, national or State-based) implementation of transport rules towards the utilisation of centralised and global administration machinery, in particular the DSM.[18]

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11 *E.g.* the European Union ('EU').

12 *E.g.* the United Nations Security Council.

13 Lamy, supra note 1, p. 970.

14 *See further* John Howard Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press, Cambridge, 2000) pp. 400–404 (stating that the tiny Charter is devoted to the institutional and procedural structure to enhance effective implementation of the substantive rules under the Uruguay Round auspices). The result of the Uruguay Round was crystallised by the *1994 Marrakesh Agreement Establishing the World Trade Organization*, adopted 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995) ('Marrakesh Agreement'), which is informally known as the 'WTO Charter', but which is actually it is only the first eleven pages of what is approximately a 26,000-page document. All of these documents are regarded as indispensable being components of the single package of 'WTO Agreements'.

15 Lamy, supra note 1, p. 970.

16 Marrakesh Agreement, Annex 1 B: General Agreement on Trade in Services ('GATS').

17 Marion Panizzon and Nicole Pohl, 'Testing Regulatory Autonomy, Disciplining Trade Relief and Regulating Variable Peripheries: Can a Cosmopolitan GATS do it All?' in M. Panizzon, N. Pohl, and P. Sauve (eds.), *GATS and the Regulation of International Trade in Services: World Trade Forum* (Cambridge University Press, Cambridge, 2008) pp. 3, 12–13, and 677.

18 Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995–2012: A Statistical Analysis' (2013) 16 *Journal of International Economic Law* p. 257, at p. 262 (illuminating in

The place of maritime transport rules within the WTO framework has been insufficiently studied by scholars and practitioners.[19] In one of only two references to these rules in the whole of the literature, Parameswaran has discussed barriers to the liberalisation of trade in maritime transport services in the WTO framework.[20] In order to avoid duplicating these arguments, this paper will look at barriers to the harmonisation of uniform seaborne cargo rules within the WTO framework, and in doing so it will deal only with seaborne cargo rules and will not consider maritime passenger transport rules.

This paper examines the overall scheme of incorporation of the uniform seaborne cargo regimes by GATS into the WTO framework in three main sections. Sections 2 and 3 will scrutinise the uniformity of seaborne cargo rules from two perspectives: respectively, the making of rules and the implementation of rules. The focus in Section 2 will be on the existing barriers to the negotiation process in rule making, and how to remove these barriers to create more efficient negotiating forums in order to generate substantive uniform seaborne cargo rules. On the basis of the lessons learnt from progress and setbacks in previous WTO maritime-transport negotiations, this section will look at how to promote the effectiveness of GATS in negotiating approaches towards establishing further uniformity in sea-transportation rules. This section will also suggest how a number of substantive rules within United Nations-administrated seaborne cargo conventions can be selectively incorporated into the WTO/GATS framework.

Section 3 will then turn to consider the removal of barriers to implementing maritime transportation rules through the introduction of an effective procedural mechanism (the Dispute Settlement Mechanism or 'DSM') to ensure the effective implementation of United Nations-referred and WTO-generated uniform sea transportation rules. This section will catalogue the overall record

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Table 5 that there have been 21 cases of the breakdown of the GATS Agreement invoked over the 1995–2012 period, and 31 cases related to TRIPS). According to the WTO website, as at 1 January 2014 there have been 23 GATS claims: *see* 'Disputes by Agreements', available at: <www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A8# selected_agreement>.

19 There is only a limited amount of literature, such as J. Michael Taylor, 'Evaluating the Continuing GATS Negotiations Concerning International Maritime Transport Services' (2002) 27 *Tulane Maritime Law Journal* p. 129; and Panizzon, Pohl and Sauve (eds.), *supra* note 17.

20 Benjamin Parameswaran, *The Liberalization of Maritime Transport Services: With Special Reference to the WTO/GATS Framework* (Springer, Berlin, 2004). Chapter V of this text discusses barriers of maritime transport services in the WTO as objections from domestic vested interest groups owing to trade-off problems.

and outcomes of WTO/GATS dispute settlement cases,[21] and the picture presented by this analysis of existing litigation will provide an impression of what potential sea transport litigation under the WTO/GATS framework might look like.

Finally, the concluding Section 4 will introduce two supplementary suggestions that relate to the WTO and the United Nations: one concerns the role of public-private partnerships (that phrase being understood in its most general sense) used in WTO negotiation and dispute-settlement mechanisms, and the other the possibility of establishing a DSM-like institution within the United Nations structure.

2 Barriers to Negotiation and the Establishment Uniform Rules

2.1 *Negotiations Concerning the Formation of Substantive Rules*

2.1.1 GATS Negotiating Forum: A Specific Annex on Maritime Transport Service Sectors?

GATS is one of the multilateral WTO agreements.[22] It is the first (and a unique) set of rules developed in the attempt to draft transportation rules with a broad, multilateral scope.[23] It covers all sectors involving trade in services, including maritime transportation, other modes of transport, and communications.[24] GATS is a feasible negotiating forum in which to negotiate a number of important outcomes in relation to maritime transport rules, including the uniformity, harmonisation, and standardisation of those rules.[25]

21 As at 1 January 2014, according to the WTO's 'Index of Dispute Issues', which is available at <www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#selected_subject>. Many cases were against China, thus China is an important factor in this study on litigation on enforcement.

22 WTO, 'GATS: Fact and Fiction', p. 1, available at: <http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm>, last visited 1 August 2014.

23 *Ibid.*, p. 1 and 4. It consists of two components: a framework agreement on general rules and disciplines, and national schedules from individual members on their specific commitments regarding domestic market access for foreign services suppliers.

24 *Ibid.*, p. 1 and 4. The two exceptions are "services provided to the public in the exercise of governmental authority, and, in the air transport sector, traffic rights and all services directly related to the exercise of traffic rights". The GATS covers all international trade in services, with two categories of exceptions being those under Article XIV ('General Exceptions') and under Article XIV *bis* ('Security Exceptions').

25 Li-jun Zhao, 'Transportation, Cooperation, and Harmonization: GATS as a Gateway to Integrating the UN's Seaborne Cargo Regimes in the WTO' (2013) 26 *Pace International Law Review* (forthcoming).

The WTO not only works on matters involving trade liberalisation and economic growth, but also defines its tasks as "achieving greater coherence in global economic policymaking" and "promoting human welfare" in the broadest sense.[26] These tasks demonstrate that the WTO intends to interact actively with both the developed and the developing worlds. However, there is fragmentation among and between the current uniform transportation regimes. The discrepancy between reality and the aims of uniform regimes creates both a need and an opportunity for the WTO to promote greater coherence between, and to resolve conflicts among, the various 'hull' and the 'cargo' interests (that is, the ship owners and the freight/cargo owners, respectively), and their respective representative countries.

This paper proposes that the WTO should introduce GATS-based, uniform seaborne cargo rules. Developing a 'GATS Annex on Maritime Transport Services', for example, would have at least four benefits.[27] To begin with, the introduction of such a follow-up annex to the existing GATS 'Annex on Negotiations on Maritime Transport Services' would involve fewer challenges than amending the existing GATS provisions. This is because the WTO Charter requires a unanimous consensus in order to change a GATS provision.[28] A follow-up annex would reduce the difficulty in achieving the consensus necessary to make a change to GATS. In order to further develop the *1947 General Agreement on Tariffs and Trade* ('GATT'),[29] the Uruguay Round negotiations concluded with a follow-up agreement to establish the WTO, rather than amending the existing GATT articles, because the process of passing amendments is harder than the promulgation of new articles.[30] In this way, the GATT has been maintained as part of the WTO agreements, and aspects of the WTO's machinery utilize provisions contained within GATT. In a similar way, the WTO

26 WTO, 'Uruguay Round Agreements — Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking', available at: <www.wto.org/english/docs_e/legal_e/32-dchor_e.htm>, last visited 1 January 2014.

27 *Ibid.*, discussing the feasibility of unifying seaborne cargo rules through GATS.

28 See John Howard Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Royal Institute of International Affairs, 1998) pp. 150–189 (discussing requirements on amending GATT and other WTO agreements).

29 Opened for signature 30 October 1947, 55 UNTS p. 194 (entered into force 1 January 1948). The GATT, ultimately replaced by the WTO in 1995, was a provisional agreement that was designed to be terminated by a treaty creating the International Trade Organization ('ITO'). However, the ITO had not come into force, so the GATT was continued and integrated into the WTO in 1995.

30 See Jackson, *supra* note 28.

could maintain the existing GATS articles and introduce follow-up uniform seaborne cargo rules as an annex to GATS.

Secondly, the transport service sector needs regulations on minimum standards of quality such as those prescribed by the *1994 Agreement on Trade Related Aspects of Intellectual Property Rights* ('TRIPS').[31] Both services and intellectual property are 'invisibles', and this requires an approach that is different from that taken with respect to 'visible' goods. Service sectors, including transport services, rely on minimum standards that are stricter than those for goods under GATT.[32] These minimum standards, such as compulsory liabilities, help to maintain the competitiveness of markets for transport services. However, GATS has not yet followed TRIPS by introducing minimum standards. Therefore, minimum standards should be incorporated as an indispensable part of any GATS maritime transport rules.

Thirdly, the maritime transport sector deserves a GATS Annex on Maritime Transport Services, because other modes of transport already have such annexes.[33] For instance, annexes on air, maritime, and inland waterway transport, as well as one on telecommunications, were drafted during the Uruguay Round negotiations.[34] Subsequently, a formal GATS Annex on Air Transport Services was established.[35] However, maritime transport services, which carry

31 Marrakesh Agreement, Annex 1 C: Agreement on Trade Related Aspects of Intellectual Property Rights, ('TRIPS'), which is a WTO agreement on intellectual property rights. *See* TRIPS, Article 1.1 on minimum standards and Part II on standards.

32 See Michael Fritsch, Thomas Wein, and Hans-Jürgen Ewers, *Marktversagen und Wirtschaftspolitik: Mikroökonomische Grundlagen staatlichen Handelns* (*Market Failure and Economic Policy: Microeconomic Foundations of Government Action*) (6th ed.) (Verlag Vahlen, 2005), pp. 272–294. The adverse selection of the market results in the imbalance of information from the perspective of purchasers of services (e.g. shippers).

33 WTO, Draft Final Act Embodying the Result of Uruguay Round of Multilateral Trade Negotiations, Uruguay Round Doc. MTN.TNC/W/Rev.1 (3 December 1990), pp. 364–375 (drafting the annexes on maritime inland waterway, road, air transport, financial services, telecommunications, and audio-visual services).

34 Uruguay Round Doc. MTN.TNC/W/Rev.1, pp. 364–375. *See also e.g.* Uruguay Round, Conditional Offer of the United States of America Concerning Initial Commitments, Doc. MTN.TNC/W/112, (13 November 1990); Conditional Offer of Japan Concerning Initial Commitments, Doc. MTN.TNC/W/113, (29 November 1990); Conditional Offer of Australia Concerning Initial Commitments, Doc. MTN.TNC/W/51, (4 December 1990); and Conditional Offer of Hong Kong Concerning Initial Commitments, Doc. MTN.TNC/W/54, (4 December 1990). *Cf.* GATT Secretariat, Uruguay Round Doc. MTN.TNC/W/35 (26 November 1990), pp. 328, 364–365 (addressing a General Agreement on Trade in Services and an Annex on Maritime Transport Services).

35 See GATS Annex on Air Transport, which appears together with the text of GATS, *supra* note 16.

a greater volume of goods every year than air transport services, had only a draft GATS annex, which ultimately failed to become an official and effective annex.

Finally, owing to dual-level[36] negotiation forums, specific sectoral negotiations and an annex that is limited to maritime transport. In such a manner, public actor negotiators have to consider the commercial interests of maritime transport separately from other service sectors. Therefore, the maritime sectoral negotiations would reduce the objections to covering the maritime transport sector by diminishing the trade-off problem of industry interests between this sector and other service sectors.

2.1.2 Promoting Negotiations on Rules by Establishing Public-Private Partnerships

There are three categories of stakeholders that are involved in transportation rule negotiations, and any individual delegate might fall into one or more of these categories. The first category of primary stakeholders is that of public sector actors (politicians and bureaucrats) representing sovereign territories or international organizations. These are the traditional stakeholders in international organizations, including the WTO. The second group of stakeholders is represented by a number of legal scholars working on maritime law issues, but only if they have been appointed as delegates by their governments and interact with the public sector actors. The third group of possible stakeholders might be the increasing numbers of private sector actors working in the shipping business. This third category of emerging stakeholders, whose commercial rights, obligations, and liabilities are governed by transportation rules, should have access to the forums in which those rules are made. They represent either the cargo or the hull interests whose rights, obligations and liabilities are negotiated and regulated through maritime transport conventions. These private sector participants might be individuals, shipping companies, or regional non-governmental organizations such as national shipping councils, and they are able to examine the compatibility between shipping laws and shipping practice.

2.1.2(a) *Private Sector Actors*

It is important to encourage public-private partnerships — which term is used in this paper to refer to any formal or informal relationship between any public and private actors with related or overlapping sectoral interests — to engage directly or indirectly in or with delegations to international negotiations

36 'Dual-level' means the maritime transport negotiations take place at two levels: the first level is the GATS negotiating forum for all service sectors, and the second is a specific negotiating forum solely for the maritime transport service sector.

related to the shipping industry. This is because the three categories of negotiators listed above think respectively in political, legal, and commercial terms; and also because the concluded legal rules will directly influence those private actors and their shipping commerce. There are four specific reasons justifying the important introduction of private actors into deliberations conducted by sovereign governments.

First and foremost, the structure of the international shipping industry is of extraordinary complexity, and private sector actors are familiar with this structure. Shipping negotiations cover a number of widely differing shipping sectors, such as the international carriage of goods by sea, and also auxiliary and port services (e.g. loading, uploading and demurrage charges).[37] Sectoral and technical issues become much more challenging when it comes to addressing increasing volumes of multimodal transport that also involve land or air stages, because those other modes of transport are governed by various mandatory international conventions with different standards and liability exposures. Thus, maritime negotiations should be built upon the foundations of commercial feasibility and the actual practices of the shipping industry, rather than on theories or assumptions.

Secondly, private sector actors have first-hand information concerning shipping markets, market failures, and the extent of the imbalance between cargo and hull interests. Market failures in the shipping sector occur for several different reasons, including: information asymmetry with respect to markets and law; the presence of oligopolies and monopolies in the established logistics network; externalities, such as the protection of the environment and mass litigation; and universal service provision.[38] Private actors can provide commercial and economic perspectives that contribute to the evaluation of the equity, efficiency and efficacy of uniform seaborne cargo regimes. Thus, they are invaluable participants in empirical research on the *status quo* of the international shipping industrial and legal regimes, providing a sound basis for further negotiations.

37 *See e.g.* WTO Doc. S/NGMTS/W/2 (4 August 1994) p.4, which states that the auxiliary services defined in the draft model schedule include container station and depot services, maritime agency services, maritime freight forwarding services, maritime cargo handling services, storage and warehousing services, customs clearance services and maintenance and repair of vessels.

38 Pierre Sauve, 'Lessons and Challenges in Services Trade', in Panizzon, Pohl & Sauve, *supra* note 17, p. 604 (enumerating the diverse sources of market failure in service sectors and arguing that market failure runs the gamut in service sectors.) The present author considers that all the listed sources play roles in maritime transport services in their respective sub-sectors.

Thirdly, private sector actors base their commercial actions on their understanding of current and actual technical conditions, and on technical terms used in practice, rather than on abstract conceptions. The shipping industry is plagued with a significant number of commercial terms regarding technology and practices, such as 'bills of lading', 'letters of indemnity', and 'documentation and liabilities in multimodal transport'. In addition, Electronic Data Interchange ('EDI')[39] technology is immature for electronic maritime commerce. Therefore, private sector actors are a reliable barometer that can be consulted in the assessment of the technical complexity of shipping laws.

Finally, private sector actors are likely to defend commercial, private interests, rather than trade-off political interests, during negotiations. It is worth engaging private sector actors when negotiating a private-sector related convention on shipping, and drafting the convention in language that is understandable by the private sector actors, rather than using political and diplomatic wording to reach compromise positions. Therefore, private actors from the shipping industry are indispensable in designing appropriate standards in relation to any restrictions on freedom of contract in uniform transportation rules to adjust for market failures.

2.1.2(b) *Professional Legal Actors*

Moreover, the regulatory character of GATS negotiations, and the wide range of legal issues involved, call for heavily reliance on legal professionals with knowledge of maritime and WTO law. Lawyers respect the law and think in legal terminology, but they are less prone to question the efficiency of the rules relating to market failures than are entrepreneurs.[40] A legal approach might lessen the scope for bargaining in the area of negotiations and eliminate sectoral trade barriers.[41] Furthermore, public actors (political and bureaucratic actors from international organizations and governments) and private actors (shipping practitioners) think in different terms and values: by contrast, legal professionals are, owing to their professional training, capable of transforming ambiguous policy statements into clear legal drafting.[42] Therefore, legal professionals

39 The EDI systems work by using electronic 'documents'. In such a document, there is an 'electronic signature' which is a generic term applied to any combination of electronic numbers or letters used to authenticate an electronic message (e.g. the use of PIN numbers and public key cryptography procedures). See more in John Furness Wilson, *Carriage of Goods by Sea* (7th ed.) (Pearson/Longman, 2010) pp. 165–171.

40 Sauve, supra note 38, p. 603.

41 *Ibid.*

42 *Ibid.*

might help to bridge the gap between the public and private actors in any forthcoming negotiations.

2.1.3 Clarifying Terminology and Unifying Classifications

Political, commercial, and legal negotiators do not always think in, or use, the same terms when analysing or describing the shipping industry. Moreover, the complex sub-classification of shipping sectors makes WTO members' commitments hard to compare and contrast. Consequently, it is important that negotiators with political, commercial or legal proficiency must "not compare[e] apples with oranges when making specific commitments".[43] In particular, they first need to introduce a common terminology to be used by all negotiators. In this way, they can undertake forthcoming negotiations and focus their negotiations on areas of disagreement. Hence, unifying definitions and classifications, and creating consistent terminology that is equally understood by all negotiators, are important steps in seeking to facilitate potential future negotiations.

In the post-Uruguay Round negotiations, the WTO conceptualised transportation negotiations into four modes of services rather than into sub-sectors. GATS specifies four ways in which a service can be traded, which are known as four 'modes of supply'. These are:[44]

- Mode 1 — 'cross-border supply';
- Mode 2 — 'consumption abroad';
- Mode 3 — 'commercial presence/ overseas establishments'; and
- Mode 4 — 'movement of natural persons'.

The shipping industry includes bulk shipping and liner shipping sectors for cargo and passenger transport respectively[45] (although passenger transport is not covered in this paper). Within their sub-sectors, issues concerning technical matters cover international shipping, auxiliary services, access to and use

43 Henry Gao, 'Alternative Approaches to GATS Negotiations', in Marion Panizzon *et al* (eds), *GATS and the Regulation of International Trade in Services* (Cambridge University Press, 2008) p. 193.

44 GATS Article I, 'Scope and Definition' elaborately prescribes four modes of supply of a service.

45 See Zhao, *supra* note 25, on the history of WTO negotiations. *See* WTO, 'Uruguay Round — Services Sectoral Classification List', Doc. MTN.GNS/W/120 (24 May 1991) pp. 7–8 (the secretariat indicated in its informal note containing the draft classification list of service sectors that it would prepare a revised version based on comments from participants, including enumerating the classification of the sea transport sector and other modes of transport).

of port facilities, and multimodal transport services.[46] In each sub-sector there are technical differences. As noted above in relation to the Uruguay Round and later negotiations,[47] WTO members were using widely differing classifications of sub-sectors in relation to the shipping industry. Thus, the sub-sectoral shipping markets were abstracted into four modes in the GATS negotiations.

Even so, these heterogeneous classifications still exist and make mutual understanding difficult among WTO members. Recent WTO negotiating documents (e.g. commitments) of various members combine three commonly-used forms of classification systems, and mix the Central Product Classification ('CPC') system,[48] the Services Sectoral Classification List ('SSCL') and the Maritime Model Schedule ('MMS').[49] In Mode 3, commitments have been written in accordance with various classifications.[50] Commitments on Mode 4 also reflect the significant extent of sectoral specificity and the heterogeneity of its components.[51] The status of a ship's crew and other forms of commercial presence (such as shore-based undertakings by shipowners) are incompatible with any classification system. Moreover, the diversity in classification has been made more perplexing due to the fact that some members have added their own *sui generis* definitions.[52] This explains why attempts at harmonisation in such a highly globalised sector of transportation have been undertaken for over fifty years without yet achieving a successful conclusion under GATS.

As can be seen from the discussion above, these preliminary classifications are not sufficiently uniform, and this has impeded progress towards achieving mutually understandable agreements in future negotiations. Similar comprehension difficulties also arose in negotiations in relation to the UNCITRAL Rotterdam Rules.[53] In contrast, homogeneous classifications would make a member's attitude to each sub-classified sub-sector comprehensible and clear

46 Gao, *supra* note 43, p.193.

47 See *supra* section 2.1.1, 'GATS Negotiating Forum'.

48 WTO Doc. TN/S/23, (28 November 2005), pp. 12, 17, 18.

49 WTO Doc. MTN/GNS/W/120 (services sectoral classification list).

50 WTO Doc. S/C/W/315, p. 39, para. 145.

51 WTO Doc. S/C/W/315, p. 40, para. 149.

52 WTO Doc. S/C/W/315, p. 36, para. 136.

53 *See* Meltem Deniz Güner-Özbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the 'Rotterdam Rules'* (Springer, 2011). *See also* the *travaux préparatoires* to the Rotterdam Rules, which are available from the UNCITRAL website at: www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_travaux.html, last visited 1 August 2014; and the text of the Rotterdam Rules themselves, which is available from the UNCTAD website at: <unctad.org/en/Pages/DTL/TTL/Legal/Rotterdam-Rules.aspx>, last visited 1 August 2014.

for all other members, and thus in negotiations the parties could clearly identify areas of shared opinion and focus on areas of disagreement. In order to avoid misunderstandings, the WTO machinery needs to unify classification of the sub-sectors of transportation and its ancillary service sectors, and clarify technical or commercial terms relevant to the shipping industry in drafting applicable transport rules. It is crucial to build a solid, shared conceptual foundation because mutual understanding will lead to better decisions being made in negotiations.

2.1.4 The Limitations of Request-Offer Negotiations

2.1.4(a) *Different Bases for Request-Offer Negotiations*

The request-offer approach is the primary method of undertaking GATS negotiations when basic changes are needed to its terms.[54] In the Uruguay Round negotiations, the request-offer approach ensured that services negotiations were mainly held on a bilateral basis. While the requests and offers were submitted by two members, the results of such bilateral negotiations were extended, through the operation of the 'most-favoured-treatment' principle, to other members so as to create a multi-lateral basis of agreement.[55] At the same time, in order to avoid the 'free-rider' problem, the post-Uruguay Round negotiations on maritime transport already started using model schedules and target formulas.[56] Maritime transport services were categorised into one of the four modes of service outlined above, and WTO members were required to submit their offers on those four modes as applicable. However, bilateral negotiations cannot on their own produce a consensus, due to the disparity between the unsatisfactory quality of offers made by different members, and the rigid standard of quality required.[57] For example, while the United States aimed at a high level of liberalisation, other countries made relatively low-level offers.[58]

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54 GATS Article XIX, 'Negotiation of Specific Commitments', para. 4; WTO Doc. WT/MIN(05)/DEC, Annex C, p. C-3, para. 6. *See also* Elisabeth Türk, 'Services Post-Hong Kong: Experiences with Plurilaterals', in Panizzon, Pohl & Sauve, *supra* note 17, pp. 148–149 (classifying the negotiating methods and initiatives as friends' groups, bilateral request-offer ('R-O') negotiations, formulas, model schedules, sectoral services negotiations, plurilateral agreements in the WTO, and plurilateral services negotiations in the Doha Work Programme).

55 Türk, *supra* note 54, pp. 145–149, 163. Contents of requests are confidential and communication is only with the receiving Members.

56 *Ibid.*, pp. 148, 153. Members' offers need to meet the quantitative and qualitative criteria of formulas.

57 Parameswaran, *supra* note 20, p. 245.

58 *Ibid.*

A plurilateral approach can soften the rigidness of the bilateral request-offer approach and can help to overcome the deficiencies of the bilateral approach. WTO members commenced plurilateral negotiations in 2006.[59] 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".[60] The wording of the plurilateral approach shifts the negotiation from a legally binding, mandatory mandate of the bilateral negotiations to act in favour of greater flexibility.[61] This approach considerably reduces the need to negotiate at the member-to-member level, and also helps to avoid the free-rider problem which the formula approach seeks to address.[62] Similarly, some of the earlier plurilateral negotiations were sector-focused, with members acting in so-called 'friends' groups',[63] 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.[64] 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.[65] Thus, future maritime-related negotiations may continue using the plurilateral approach, including friends' groups.

2.1.4(b) *Vehicles that Facilitate Greater Interaction*

Vehicles that may be used to engage private stakeholders can be either formal or informal. Some public actors, such as the World Intellectual Property Organization ('WIPO') and the Organization for Economic Cooperation and Development ('OECD'), organise workshops or training programmes that are open to both public and private actors.[66] Other public actors, such as the WTO

59 WTO Doc. WT/MIN(05)/DEC, p. C-3, para. 9. *See also* Türk, *supra* note 54, pp. 150, 162 (examining the experiences with plurilateral approach, and claiming that the approach has changed, shifting from a legally binding, mandatory mandate to best endeavour formulation, rendering more GATS flexibility to less-developed countries and enhancing the level of specific commitments for other Members).

60 WTO Doc. WT/MIN(05)/DEC, Annex C, p. C-3, para. 7.

61 Türk, *supra* note 54, pp. 151–153, 155.

62 *Ibid*., pp. 158–159.

63 "Friends' groups" focus on specific sectors, such as air transport, maritime transport, but are not strictly plurilateral negotiating groups: *Ibid*., pp. 148, 159–161, 163.

64 *Ibid*., pp. 148, 159–160 (discussing "friends' groups").

65 *Ibid*., p. 163.

66 *See e.g.* Jean-Paul Rourigue, *Maritime Transportation: Drivers for the Shipping and Port Industries* (OECD, 2010), which is available from the website of the International Transport

Council for Trade in Services, primarily grant observer status; but WTO observer status is exclusively granted to international organizations rather than commercial, non-government organizations — let alone individual shipping companies or practitioners.[67] Future negotiators developing transportation rules should consider attempting to open at least one of these vehicles to engaging with public-private partnerships, so as to allow the voices of commercial shipping practitioners to be heard by public actors and other rule makers.

2.1.4(c) *Observer Status for Related International Organizations*

In any WTO maritime transport negotiations, it will be necessary to engage the cargo interests, carriers and United Nations agencies. A very small number of private actors from the maritime industry have lobbied the United States, and this has resulted in the United Nations' reluctance to include the shipping sector in the multilateral framework (that is, in GATS).[68] The exclusion of private actors from the negotiating process has made both the negotiations and rules negotiated remote and opaque to practitioners and existing institutions. However, sharing negotiating information might reduce such interest groups' concerns and opposition to WTO maritime transport negotiations.

Moreover, the current suspension of maritime negotiations under GATS probably results from concerns regarding the potential risk of the replacement of the United Nations by the WTO. In fact, the successful lesson of the WIPO and TRIPS strongly suggests that the United Nations and the WTO could work together on the same areas of private rights, such as rights and obligations with respect to the carriage of goods by sea. Thus, these interest groups should be eligible to apply to become observers at transport services negotiations. Observer status has been granted by the WTO Negotiation Group of Maritime Transport Services ('NGMTS') to the United Nations Conference on Trade and Development ('UNCTAD'), the OECD and the World Bank.[69] Therefore, the WTO/GATS maritime negotiations framework should allow the United Nations agencies to participate.

Forum at: <http://www.internationaltransportforum.org/pub/pdf/10FP02.pdf>. See also WTO Council for Trade in Services, 'Maritime Transport Services: Background Note by the Secretariat' (2001), Doc. S/CSS/W/106.

67 WTO Council for Trade in Services, 'Report of the Meeting held on 3–6 March 2003: Note by the Secretariat' (2003), Doc. TN/S/M/6. The WTO organised a workshop engaging public actors from governments and from other international organizations.

68 *See* Parameswaran, *supra* note 20, p. 365.

69 *See* WTO Doc. S/NGMTS/2, (4 August 1994) p. 1, para. 4 (granting observer status to UNCTAD to the WTO-based NGMTS maritime transport services negotiations). *See further* Zhao, *supra* note 25.

2.1.4(d) *Workshops to Enhance Information Exchange*

WTO observer status is granted only to inter-governmental organizations:[70] currently, the WTO excludes private actors, such as national shipping associations, from obtaining observer status at negotiations.[71] To overcome this dilemma, the OECD's practice sheds light on the way in which private parties could be permitted to join GATS negotiations. The OECD holds joint workshops at which government and industry work together effectively.[72] Practitioners' opinions on maritime transport could likewise be heard in maritime transport negotiations through the use of joint workshops, which would help adjust GATS to the reality of the shipping sector, thus producing a better outcome for many countries. Therefore, holding a joint workshop comprising WTO members, inter-governmental organizations, non-governmental organizations and private shipping actors would probably be able to reduce the level of criticism with respect to the potential risks arising from proposed changes to GATS.

2.2 *Harmonising the Multiplicity of Shipping Forums: Selective Referral and Public-Private Partnerships*

The existence of multiple negotiating forums does not necessarily result in a full coverage by them of all maritime transport issues, and there are a number of vacuums or overlapping areas among these forums. Moreover, the international organizations that currently administer maritime transportation rules have not provided legally binding regimes with enforcement machinery to guarantee the effective implementation of those rules.[73] In order to make up for these two shortcomings, future maritime transport rule negotiations should occur within the framework of the WTO. The WTO has at least four unique

70 WTO Doc. S/NGMTS/2, p. 1, para. 4 (stating that the Council of European and Japanese National Shipowners' Associations ('CENSA'), as the only private-sector organization, had not been granted observer status).

71 WTO Doc. S/NGMTS/2, p. 1.

72 *See e.g.* OECD, 'Measuring the Potential of Green Growth in Chile', a paper issued in conjunction with a workshop held in Santiago, Chile, a copy of which is available from the OECD's website at: <www.oecd.org/chile/lowcarbonworkshopchile.htm>, last visited 1 August 2014 (on engaging private and public organizations into this workshop). See also WTO, 'Public Forum', a paper issued in conjunction with an annual event held by the WTO which regularly attracts over 1,500 representatives from civil society, academia, business, the media, governments, parliamentarians and inter-governmental organizations, a copy of which is available from the WTO's website at: <www.wto.org/english/forums_e/public_forum_e/public_forum_e.htm>, last visited 1 August 2014.

73 *Cf.* International Chamber of Commerce ('ICC'), 'Note on Informal Meeting at GATT' (6 July 1989) Doc. 321/INT.188, p. 2.

advantages as a competent negotiating forum that would benefit the further unification of maritime transport regimes.

The first advantage is that the WTO seeks to cooperate with other international organizations and forums.[74] Even though the International Chamber of Commerce ('ICC') has expressed its concern that adding another international organization to an already long list would give rise to further confusion, due to the need to coordinate the negotiation of such issues with negotiations occurring in other forums.[75] Nevertheless, the WTO is experienced in such international-organizational cooperation and in the harmonisation of legal rules.

The second advantage is based on the WTO's structure and practice. Besides its wide membership (159 members), the WTO has an effective implementation system — the DSM[76] — through which it can ensure that the rules that it administers are applicable to, and binding on, all of its members. The WTO also has successful experience in working in the same area of law as the United Nations through a referral approach, such as in relation to TRIPS[77] and other pre-existing United Nations' conventions on intellectual property rights. By means of such a referral approach, the existing seaborne cargo rules could obtain wider application among all WTO members, and also obtain binding force through the DSM.

Third, WTO negotiations on transport rules do not start from scratch. Maritime transport was a crucial topic of discussion in the Uruguay Round negotiations, in the NGMTS and its practical survey, and in the Doha Round negotiations.[78] Re-launching maritime transport negotiations within the WTO's negotiation forums would therefore benefit from the efforts and comprehensive negotiations undertaken under the WTO framework to date. The WTO's experience in regulating international trade through both the goods and the services regimes makes the organization particularly suitable for the inclusion of maritime transport services, along with trade in goods, into the WTO/GATS framework. Moreover, in the recent Doha Round negotiations, a majority of WTO members agreed that it was unnecessary to start maritime

74 GATS Article XXVI, on Relationships with Other International Organizations, states: "The General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services."

75 ICC Doc. No. 321/360 (1989), p. 2.

76 *See* Section 3 below in relation to the WTO DSM.

77 *See* the following section 2.2.1 'The TRIPS Precedent and Selective Referral Approach'.

78 *See further* Zhao, *supra* note 25.

transport negotiations from the starting line along with other service sectors.[79] Indeed, current maritime transport negotiations continue to build upon previous work, whether on the basis of previous WTO/GATS negotiations or of other United Nations negotiating forums. Such past achievements and negotiating experience should not be foregone.

The fourth advantage is the existence of a similar duality in both the maritime transport rules and within the WTO framework. More than a purely service sector, maritime transport is an important facilitator of the worldwide trade in goods.[80] Similarly, the WTO contains negotiating forums for both trade in goods and trade in services (including transport).[81] As a result, the duality of maritime transport rules with respect to trade and services could comfortably be addressed in the relevant WTO negotiating forums on trade in goods and in services.

In summary, for reasons including the four primary rationales identified above, the WTO is an excellent potential negotiating forum that is capable of unifying current seaborne cargo regimes. When it comes to formulating uniform and global seaborne cargo rules, the essential reasons that make the WTO an appropriate forum are its primary significance and comprehensive competence in governing world trade, its extremely wide sectoral and geographical coverage and broad membership structure, its single-package framework,[82] the unique selective-referral approach available to it in dealing with relationships with the United Nations and pre-existing conventions, its capacity to set up legally binding and worldwide enforceable obligations for all 159 of its members through the DSM, and in particular the WTO/GATS historical relationship with maritime transport services and its close relationship with the global trade in goods.

The following section will discuss four potential questions that might arise in any WTO/GATS negotiations regarding maritime transport rules.

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79 WTO, 'Communication from Japan: The Negotiations on Trade in Services' (22 December 2000), Doc. S/CSS/W/42, pp. 10–11; WTO, 'Communication from Norway: The Negotiations on Trade in Services (21 March 2001) , Doc. S/CSS/W/59, p. 6; WTO, 'Communication from Republic of Korea: Negotiating Proposal for Maritime Transport Services' (11 May 2001), Doc. S/CSS/W/87, p. 2; WTO, 'Communication from Australia: Negotiating Proposal for Maritime Transport Services' (1 October 2001), Doc. S/CSS/W/111, p. 1.

80 WTO, Doc. TN/S/W/11 (3 March 2003), p. 1, para. 2.

81 *See* GATT on trade in goods, GATS on trade in services, TRIPS on intellectual property matters, and so on.

82 The texts of all of the relevant agreements are conveniently available from 'Legal Texts' page on the website of the WTO, which is available at: <www.wto.org/english/docs_e/legal_e/final_e.htm>, last visited 1 August 2014.

2.2.1 The TRIPS Precedent and Selective Referral Approach: The Establishment of Uniform Sea Cargo Rules through Special Reference to the Hague, Visby, Hamburg and Rotterdam Rules

Not all articles within GATS' proposed maritime rules would need to be drafted at the WTO negotiating forum. In order to make effective use of previous drafting efforts within any influential WTO forum, the WTO should allow other international organizations, such as United Nations special agencies, to attend any relevant negotiations as observers. The WTO and other organizations are fully capable of a harmonious association within a cooperative network, similar to that which currently exists between the United Nations' WIPO and WTO TRIPS regimes in relation to intellectual property rights.[83]

Following the example of the selective referral approach of TRIPS, in addition to constituting a form of cooperation with and between other international organizations, the GATS Annex on Maritime Transport proposed by this paper should refer to existing rules.[84] The number of referred articles might not be large in the initial stages of harmonising sea transport rules. Subsequently, the dynamics of the referral approach would be anticipated to work as a 'dynamic funnel' (see Figure 1 below). At the top end of the 'funnel', the WTO machinery might continue incorporating articles of existing international instruments. Meanwhile, from the bottom end of the funnel, a referred article which has been determined not to be feasible or desirable should be removed from the negotiation process.

In terms of international seaborne cargo regimes, the existing conventions are the Hague,[85] Visby,[86] Hamburg[87] and Rotterdam Rules.[88] The present

83 See TRIPS on incorporating existing, non-WTO conventions in 'Intellectual Property Conventions': Article 3 'National Treatment'; Article 9 'Relation to the Berne Convention'; Article 10 'Computer Programs and Compilations of Data'; and Article 16 'Rights Conferred'.

84 The WTO has the tradition of accepting international organizations as observers of negotiations; it has also set the precedent of referencing previous conventions on intellectual property under WTO/TRIPS.

85 *1924 Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, opened for signature 25 August 1924, 120 LNTS p. 155, entered into force 2 June 1931 ('Hague Rules').

86 *First and Second Protocols to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, opened for signature on 23 February 1968 and 21 December 1979 respectively, and entered into force on 23 June 1997 and 24 February 1982 respectively, 1412 UNTS p. 127 (the 'Visby Rules').

87 *1978 United Nations Convention on the Carriage of Goods by Sea*, opened for signature 31 March 1978, 1695 UNTS p. 3, entered into force 1 November 1992 (the 'Hamburg Rules').

88 *2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, opened for signature 11 December 2008, UN Doc. C.N.790.2009, not yet in force (the 'Rotterdam Rules').

author leaves the analysis of the technical aspects of the existing sea cargo conventions to the world's leading maritime scholars, experts and practitioners, and established authors.[89] However, in order to ensure that the dynamics affecting the technical analysis and drafting of such conventions is complete, this paper suggests that any well-drafted substantive articles, including from these sources, should be incorporated into the WTO/GATS framework though the selective referral approach.[90]

With respect to the two United Nations sea cargo conventions — the Hamburg[91] and Rotterdam Rules — some articles can be referred into the proposed GATS Annex on Maritime Transport. Multimodal transport, however, is a controversial issue, so it would be too soon to refer or consider rules in this area in the initial stages of harmonisation. The following section will explain the reasons for this approach.

2.2.2 Non-Incorporation of Multimodal Transport Issues into Uniform Transport Rules, so as to Avoid Negotiation Deadlock

The term 'multimodal transport' refers to the carriage of goods by two or more different modes of transport by a multimodal transport operator, usually on the basis of a single contract that covers the transport from a point of collection to a point of delivery.[92] Since the development of containerized transport in the 1970s, there has been an increasing volume of multimodal, door-to-door transport.[93] Because of containerization, traditional maritime transport services are increasingly being replaced by integrated transnational transport services, in which the sea leg is only one of many transport legs operated by a large number of different carriers.[94] According to the OECD, 74 per cent of containers arriving at European ports by sea continue their journeys via other modes.[95] This sector is so important that it has been considered to be the fourth pillar of maritime transport.[96]

89 See the works of authors including Anthony Diamond, Francesco Berlingieri, Michael Sturley, and John Jackson.

90 *Cf. e.g.* TRIPS Arts. 2 and 10.

91 The author had an informal discussion with Professor Rhidian Thomas, from Swansea University, in November 2013 at Bangor, UK. Professor Thomas supported the period of liability of carriers under the Hamburg Rules (known as 'port-to-port' period) as representing an appropriate period in today's commercial reality.

92 *See* OECD Doc. DSTI/DOT/MTC(99)18 (12 October 1999), p. 5.

93 *See* WTO Doc. TN/S/W/11, p. 1, para. 2.

94 *See* OECD Doc. DSTI/DOT/MTC(2001)3 (11 January 2001), p. 4; WTO Doc. TN/S/W/11, p. 1, para. 2 (stating that "[s]eaborne trade is continuing to expand at some 9% for containerized cargoes annually").

95 *See* OECD Doc. DSTI/DOT/MTC(2001)3 (11 January 2001), pp. 4–9.

96 *See* OECD Doc. DSTI/DOT/MTC(99)18 (12 October 1999), p. 5.

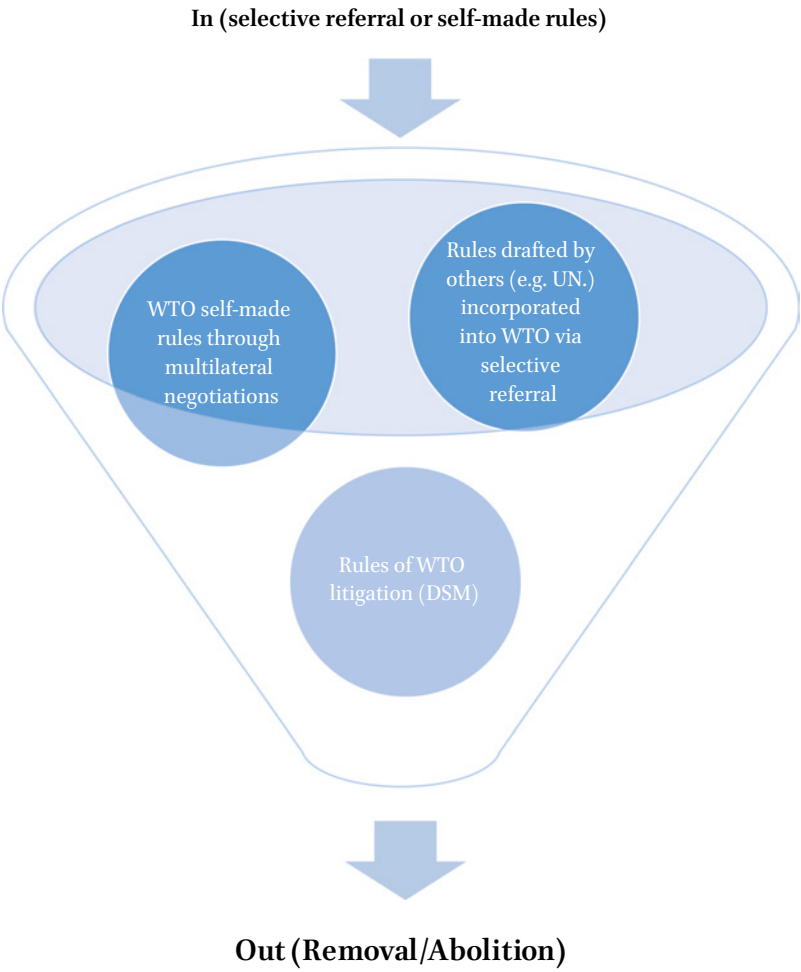

FIGURE 1 *Dynamic funnel of the WTO selective referral approach*

In multimodal transport, maritime carriers usually participate in worldwide transport logistics networks at sea, in ports and, increasingly, inland.[97] More and more shippers today rely on multimodal carriers who offer door-to-door transport services from a port or an inland location (such as a factory) under the continuous supervision and responsibility of a single multimodal transport operator for all legs of the journey, resulting in improved quality and efficiency in the control of goods, at lower total

97 *See* WTO, Uruguay Round Doc. No.MTN.GNS/W/60 (July 1989), p. 29.

cost.[98] However, the United Nations' attempts at regulating multimodal transport have not been workable, and have received a great amount of criticism.[99]

The attention paid to multimodal transport within the WTO can be traced back to a questionnaire designed by the NGMTS negotiators under GATS.[100] Based on this questionnaire, WTO delegates exchanged opinions and organised their discussion programme around a broad-ranging coverage of the three main pillars of maritime transport service — international maritime transport, maritime auxiliary services, and access to and use of port services — as well as on related matters, such as inland transport legs and cabotage.[101] However, multimodal transport is a sector that has resulted in such conflicting national arrangements that no international agreements have yet been reached. Thus, this sector should not be considered in the initial stages of the establishment of a GATS Annex on Maritime Transport Services.

2.2.3 Non-Incorporation of Marine Safety and Environment-Related Issues at the Present Time

Many WTO members favour including maritime security, environmental policy and international labour standards in the WTO's negotiation agenda.[102] These issues would certainly have impacts on maritime transport service sectors and on the management of the shipping industry. Nevertheless, there are a number of specialist organizations dealing with these areas whose approach has proved fruitful. For instance, the United Nations has dealt with these issues through its special agencies such as International Maritime Organization ('IMO'), the International Labour Organization ('ILO')[103] and the United

98 *See* OECD Doc. DSTI/DOT/MTC(99)18 (12 October 1999), p. 4; OECD Doc. DSTI/DOT/MTC(2001)3 (11 January 2001) pp. 5–6.

99 See the Rotterdam Rules and related articles on multimodal transport.

100 WTO Doc. S/NGMTS/W/2 (4 August 1994), pp. 7–8 (collecting statistical data on multimodal transport, such as regulations on inland legs by truck); OECD Doc. CCNM/EMEF/MTC(99)4 (30 September 1999), p. 6.

101 *See* WTO Doc. S/NGMTS/W/2, pp. 7–8 (describing the access and use of port facilities include pilotage, towing and tug assistance, provisioning, fuelling and watering, garbage collecting and ballast waste disposal, navigation aids, shore-based operational services essential to ship operations, including communications, water and electronic supplies, emergency repair facilities, anchorage, and berth and berthing services).

102 *Cf.* Parmeswaran, *supra* note 20, p. 358.

103 The ILO has adopted the *2006 Maritime Labour Convention*, adopted 23 February 2006, entered into force 20 August 2013, which consolidates the maritime social standards. A copy of the convention is available from the website of the ILO at: <http://www.ilo.org/

Nations Commission on International Trade Law ('UNCITRAL').[104] These are issues of considerable complexity.[105] Therefore, the WTO might not wish to address these issues until it has first resolved the problems associated with the fragmentation of seaborne cargo rules. Further cooperation between the United Nations and the WTO might in the future be extended to marine safety and environmental issues.

2.2.4 Competition Policy and Antitrust Law

Both GATS and a United Nations convention have attempted to deal with competition areas. The United Nations' *1974 Convention on a Code of Conduct for Liner Conferences* ('Liner Code') provided maritime transport carriers with anti-trust immunities.[106] During previous GATS negotiations on a specific annex relating to maritime transport services, a draft prepared by the then European Community ('EC') stated that the proposed GATS Annex on Maritime Transport Services should be exempted from trade measures in conformity with the provisions of the Liner Code.[107] Nevertheless, this Liner Code has not actually worked in practice.[108] More recently, the EU has abolished maritime carriers' anti-trust clauses in their national laws (and the United States might also do so).[109] Therefore, the uniform seaborne cargo regimes and GATS should leave marine competition policy to future UN or national laws.

2.3 *Standardisation and Harmonisation: Universal Minimum Standards on Levels of Liability*

2.3.1 Mandatory Transport Rules Establishing International Standardisation

The WTO respects both international and national standards. The WTO hopes to become integrated into the contemporary international legal order,[110] and

global/standards/maritime-labour-convention/lang--it/index.htm>, last visited 1 August 2014.

104 Rotterdam Rules, Arts. 15, 17.3(n), and 32.

105 *Cf.* Parmeswaran, *supra* note 20, pp. 358–359 (rejecting the inclusion of these issues into the WTO framework).

106 Opened for signature 1 July 1974, 1334 UNTS p. 15, entered into force 6 October 1983.

107 Parmeswaran, *supra* note 20, pp. 263–264 (mentioning the EC Draft Maritime Annex, Art. 8).

108 *See* WTO Doc. S/C/W315, pp. 23–24, paras. 76 and 78.

109 *See* EC Regulation 4056/86. *See also* US Federal Maritime Commission, 'The Impact of The Ocean Shipping Reform Act 1998' (September 2001), available at: <http://www.fmc.gov/assets/1/Page/OSRA_Study.pdf>, last visited 1 August 2014.

110 Lamy, *supra* note 1, p. 980.

respects the legal value of existing international standards or norms which are set up through other negotiating forums. The WTO also allows members to set up their national regulations and standards. For example, the WTO Appellate Body supported an application of standards established by an EC regulation in a dispute:[111] the WTO referred to regional/national standards rather than international standards. In another example, the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures ('SPS Agreement')[112] provides that members' domestic regulations based on external standards developed in the Codex Alimentations,[113] the International Office of Epizootics ('OIE')[114] and the *1951 International Plant Protection Convention* ('IPPC')[115] are assumed to be compatible with their WTO obligations.[116] The SPS Agreement demonstrates that the WTO tries to lead members' national regulations towards achieving conformity with international standards.[117] The WTO encourages its members, therefore, to negotiate norms in other forums which they will then implement coherently within the context of the WTO.[118] Likewise, the mandatory uniform standards within the UNCITRAL transport rules would be compatible within the WTO framework and could be incorporated into the GATS.

The mandatory, uniform rules within existing sea cargo regimes do not conflict with WTO principles and provisions.[119] First and foremost, both TRIPS and the WTO's Agreement on Technical Barriers to Trade ('TBT Agreement')[120] are

111 The dispute was between Canada and the European Community over French standards on imported material: *ibid.*, p. 980.

112 The SPS Agreement formed part of the agreement establishing the WTO.

113 The Codex Alimentarius Commission, established by the FAO and WHO in 1963, develops harmonised international food standards, guidelines and codes of practice to protect the health of the consumers and ensure fair practices in the food trade. See: <http://www.codexalimentarius.org/>.

114 The OIE (or World Organization for Animal Health) is an intergovernmental organization initially established by an International Agreement of 25 January 1924. In 2013, the OIE totalled 178 Member Countries See: <http://www.oie.int/>.

115 Opened for signature 6 December 1951, 150 UNTS p. 67, entered into force 3 April 1952.

116 Lamy, *supra* note 1, p. 980.

117 *Ibid.*

118 *Ibid.*

119 GATS Art. 1.1. *See also* WTO, 'What are the Basic Obligations under the GATS?', which is available at: <www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm#7>, last visited 1 August 2014 (claiming there are only two general obligations: most-favoured-nation treatment, and transparency. Additional specific commitments include market access and national treatment.)

120 *See e.g.* Arts. 2.4, 2.5 and 10. The revised TBT Agreement, which revised a previous version incorporated within the 1947 GATT, formed part of the agreement establishing the WTO.

precedents that incorporate international minimum standards. As their parallel counterpart, GATS is justified in introducing such mandatory rules as minimum standards on transport services without infringing any WTO principles and provisions. Secondly, standards help GATS to establish a framework of rules in order to ensure that service regulations are administered in a reasonable, objective and impartial manner, and do not become unnecessary barriers to trade.[121] For instance, Brazil and other developing countries proposed a general obligation under GATS Article VI.5(b), which refers to international standards — 'Disciplines on Domestic Regulation' — in determining whether a member's national regulations are in accordance with the international 'disciplines'.[122] Likewise, mandatory transport rules set up through existing transport conventions might also be treated as international standards for the purposes of evaluating whether national laws meet them. If the national laws of another government do not meet the standards, and the legal position of an overseas private actor is adversely affected, the overseas private actor might petition its national government to raise WTO/GATS litigation against the other country's national law and government.[123]

Unlike GATT, GATS obligations apply jointly with annexes and WTO members' specific commitments. The obligations with respect to maritime transport would therefore depend on such specific commitments together with any potential GATS Annex on Maritime Transport Services that might be negotiated.[124] National regulations of WTO members are laid down in their individual specific schedule in relation to sectoral requirements, which constitute a

121 WTO, 'Does the GATS affect a Member's Ability to Pursue National Policy and Objections and Priorities?', which is available at: <www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm#7>, last visited 1 August 2014 (stating that the GATS does not seek to influence these objectives).

122 Markus Krajewski, 'Recognition, Standardisation and Harmonisation', in Panizzon, Pohl & Sauve, *supra* note 17, pp. 426–427 (discussing international standardisation upon domestic regulations in accountancy disciplines). See also WTO Working Party on Domestic Regulations, 'Communication from Brazil, Colombia, Dominican Republic, Peru and the Philippines, Elements for Draft Disciplines on Domestic Regulation, Room Documents' (26 April 2005) Doc. S/WPDR/W/32, para. 3(f).

123 WTO/GATS litigation will be discussed further in section 3 below.

124 A specific commitment in a services schedule is an undertaking to provide market access and national treatment for the service activity in question on the terms and conditions specified in the schedule. See WTO, 'Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II ('MFN') Exemptions', available at: <www.wto.org/english/tratop_e/serv_e/guide1_e.htm>, last visited 1 August 2014.

binding and minimum standard, so members are prevented from introducing regulations which do not meet minimum standards.[125]

2.3.2 Harmonising Seaborne Cargo Rules by Establishing Minimum Standards

Most WTO agreements (except TRIPS) have not established detailed substantive standards for members.[126] However, there is a nucleus of harmonisation available in relation to the international sea cargo regimes under GATS. The harmonisation of seaborne cargo rules entails the establishment of minimum standards for all WTO members, which will require WTO members' national laws and regulations to comply with WTO minimum standards.

There is a misunderstanding that the trade liberalisation objective pursued by the WTO is purely intended to deregulate services and reduce standards.[127] However, the international standards established for the seaborne transport of goods, according to GATS Article VI.5, determine the level of necessity for national regulations to comply with such standards.[128] Therefore, by requiring WTO members to abide by international standards, this approach introduces a GATS-based harmonisation approach that continues to maintain standards, but which reduces national regulatory autonomy to some extent.[129]

In the WTO, TRIPS and GATS are two basic agreements at the same level of the WTO structure. While TRIPS has already introduced minimum standards within it, GATS does not contain any provision of standards. Moreover, the WTO principles do not contradict establishing standards in GATS — TRIPS' counterpart — to imposing minimum standards as TRIPS. Namely, although GATS does not yet impose minimum standards for national regulations,[130] the

125 Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press, 2003) p. 25. To date, US private actors have already petitioned the United State Trade Representative ('USTR') to address WTO litigation on food and drug standards.

126 Krajewski, *supra* note 122, pp. 426–427.

127 WTO, *GATS-Fact and Fiction* (WTO Publications, Geneva, 2001) p. 11 (claiming that the objective of GATS is to liberalize services trade instead of to deregulate services, because many service sectors are closely regulated for very good reasons). For example, some regulations defeat anticompetitive practices and benefit a healthy market.

128 Krajewski, *supra* note 122, p. 427.

129 *Ibid.*

130 The concluding document of the Uruguay Round was a lengthy 26,000-page single package with extensive annexes.

WTO's fundamental principles would not prevent GATS from doing so in the future.[131] These principles are:

- trade without discrimination;
- the promotion of freer trade through negotiation;
- improving the predictability and legal certainty of trade transactions through binding and transparent legal institutions;
- promoting fair competition; and
- encouraging development and economic reform.[132]

These principles function as guidelines for further GATS harmonisation work by introducing minimum standards for WTO members.

The harmonisation of seaborne cargo rules through the imposition of minimum standards is beneficial for both developed and developing countries. First, both maritime and non-maritime countries may benefit from uniform minimum standards. If all WTO members follow the same rules and adjust their domestic laws to meet the minimum requirements established by the transnational GATS regime, the motivation for forum shopping in international litigation will be considerably reduced among WTO members. This is because litigation that follows the same minimum standards should always produce the same, or at least similar, legal rulings. Consequently, the elimination of forum shopping would cut the cost of overseas legal consultancy fees for both shipowners and cargo owners, and thus would further reduce the transaction costs[133] of shipping services and establish a more competitive and healthy maritime transport service market. Additionally, the reduction of freight rates may boost the production of goods among nations. Since transport costs in today's international trade have a greater impact on international trade than do member states' tariffs,[134] products from all over the world could be turned out in any maritime or non-maritime country at lower cost and be shipped to any corner of the world.[135] As a consequence of the reduction of

131 WTO, 'Understanding the WTO: Principles of the Trading System', available at: <www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm>, last visited 1 August 2014.

132 *Ibid*.

133 Transaction costs are different from price, according to the Coase Theorem: transaction costs include the cost of obtaining information, and the costs of litigation.

134 *See e.g.* Jeffrey H Bergstrand and Scott L Baier, 'The Growth of World Trade: Tariffs, Transport Costs, and Income Similarity' (2001) 53 *Journal of International Economics* 1; *see also* J. Korinek and P. Sourdin, 'Clarifying Trade Costs: Maritime Transport and Its Effect on Agricultural Trade' (2010) 32 *Applied Economic Perspectives and Policy* pp. 417–435.

135 *See* OECD Doc. DSTI/DOT/MTC(99)7 (17 May 1999), p. 5.

maritime transport transaction costs, the service regime would enable maritime and non-maritime nations to take a more active role in world trade.

Secondly, there is a need to establish worldwide minimum levels of carriers' liability within the seaborne cargo regime. Instead of removing or reducing national regulations on the trade in goods under GATT, GATS is able to establish global minimum standards on carriers' liability to guarantee the quality of transport services provided in the international shipping sector.

It seems paradoxical that establishing a universal minimum standard on carriers' liability under GATS could have a positive relationship with liberalisation of marine freight markets. But the precedent of the minimum level of standards under TRIPS illustrates the reality behind this apparent paradox. In order to counteract the adverse effects of absolute freedom of contract on service trades, it is necessary for worldwide legal regimes to create and maintain minimum levels of carrier's liability to offset market failures in the international freight shipping sector. From the economic perspective, if there were no such minimum standard, there could be adverse selection of carriers potentially resulting in high-quality carriers being forced out of shipping markets. Even though it is unfortunate that to date the current GATS framework still mostly imitates GATT provisions without prescribing regulations, the content of GATT and GATS should still develop even where relevant interests differ in the on-going Doha Round.[136]

GATS specifically states that negotiations "shall take place with a view to promoting the interests of all participants on a mutually advantageous basis" and "with due respect for national policy objectives and the level of development of individual Members".[137] GATS allows WTO members to determine the levels of obligations they would like to assume, with a certain amount of flexibility.[138] Hence, the extent of the adherence to the relevant international standards depends on the members' state of development.

For these reasons, a GATS Annex on Maritime Transport Services containing minimum standards in relation to service quality should be a primary goal in any future rounds of maritime transport negotiations.[139] This is because such standards would create legal certainty within this regime. They would guarantee increased competition and thereby improve the quality of transport

136 In January 2000, WTO Members started the latest round (the 'Doha Round') of negotiations to promote the progressive liberalisation of trade in services.

137 WTO, 'GATS: Fact and Fiction', p. 2, available at: <http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm>, last visited 1 August 2014.

138 *Ibid.*, pp. 4–5.

139 *Cf.* the preliminary goal in GATS Preamble.

services at a reasonable and lower cost for cargo interests; and this would ultimately bring benefits not only for individuals but also for the world economy as a whole. The standards would also take the interests of developing countries' shippers and carriers into consideration.

3 Barriers to the Implementation of Uniform Rules, and the Potential for Enforcement through WTO Litigation

Shaffer has described a typology of 'hard' and 'soft' international law rules based on three criteria:

- the stringency of the legal 'obligation' the rule imposes;
- the 'precision' of the detail used in the rule; and
- whether there is 'delegation' to an enforcing authority to ensure compliance with the rule.[140]

Even though seaborne cargo conventions cover the 'obligation' and 'precision' criteria, and in this respect would qualify as 'hard law', "there is no legal authority above the state capable of enforcing" uniform transport rules,[141] with the result that in relation to the 'delegation' criterion maritime transport conventions appear to be more in the nature of 'soft law' rules: the uniformity of maritime transport rules is significantly undermined by the varying understandings and interpretations of these rules by different national tribunals.

However, the WTO could provide an international legal authority to enforce these rules worldwide in a uniform way. The WTO law comprises rules that establish a centralised mechanism of enforcement — the Dispute Settlement Mechanism or 'DSM' — which adopts judicial judgements that, if not complied with, trigger 'sanctions'.[142] Shaffer notes:[143]

140 Shaffer, *supra* note 125, p. 4; Shaffer and Pollack, *supra* note 8, pp. 707–708.

141 Max Weber, *The Theory of Social and Economic Organization*, Talcott Parsons (ed.) and Alexander Morell Henderson (trans.) (The Free Press, 1964) p. 128.

142 *See* Shaffer, *supra* note 125, p. 2; *see also* Sherzod Shadikhodjaev, *Retaliation in the WTO Dispute Settlement System* (Kluwer Law International, 2009) pp. 11–47.

143 *See* Shaffer, *supra* note 125, pp. 2–3. WTO texts do not use the term 'sanctions', but affected WTO Members, commentators, and legal practitioners commonly refer to them as such. *See also* WTO, 'EC - Regime for the Importation, Sale and Distribution of Bananas' ('EC Bananas Case'), WT.DS27.R (22 May 1997); and WTO, 'EC - Measures Affecting Meat and Meat Products' ('EC Meat Hormones Case'), WT.DS26/R/USA (18 August 1997).

> Although the WTO lacks police power, its judicial panels [and the appellate body] are empowered to authorise the withdrawal of trade concessions. All states, even the most powerful ones, have responded to WTO judgements by modifying domestic regulations and practices, or in the few cases where domestic politics [have] blocked modification, have accepted the resulting sanctions.

The blurring of the public and the private in international economic issues spurs the growth of international (economic) law. "WTO law, while formally a domain of public actors [i.e. nations and customs territories], profits and prejudices private actors",[144] such as entrepreneurs and lawyers. Through WTO litigation and judgements, international economic relations have become litigable at the international level. This litigation in turn yields a vehicle in which private actors exercise influence on domestic law and regulations. WTO law, through the centralised DSM, thereby becomes 'harder' law which is binding and enforceable at the international level.

The WTO attempts to "facilitate the implementation, administration and operation of … multilateral trade agreements," including GATS.[145] The DSM, generally governed by the 'Understanding on Rules and Procedures Governing the Settlement of Disputes' ('Dispute Settlement Understanding' or 'DSU'), was modified when GATT was incorporated as a component of the new WTO framework.[146] The precursor dispute settlement mechanism under GATT has likewise been incorporated into the WTO DSM (but unless otherwise indicated, the following discussion relates only to the WTO DSM).

The DSM is entrusted with the implementation of multilateral agreements, including GATT, TRIPS and GATS: the DSU is applicable to GATS, either through the establishment of panels, or through a member's request for consultations.[147] In this way, the DSM ensures that GATS exists as a binding and effectively applicable international treaty on matters relating to service sectors. Consequently, any component of GATS that incorporates rules for maritime

144 Shaffer, *supra* note 125, p.3.

145 Agreement Establishing the World Trade Organization, Article III.1 'Functions of the WTO'.

146 Agreement Establishing the World Trade Organization, Annex 2 'Understanding on Rules and Procedures Governing the Settlement of Disputes' ('DSU').

147 Mohamed Omar Gad, 'Chapter 12: TRIPS Dispute Settlement and Developing Countries Interests', in Carlos M. Correa and Abdulqawi A. Yusuf (eds.), *Intellectual Property and International Trade: TRIPS Agreement* (2nd ed.) (Kluwer Law International, 2008) pp. 331–383, at p. 341.

transport (or seaborne cargo rules) would be binding and applicable as 'hard law' through the DSM.

3.1 *Meetings of the Council for Trade in Services for Maritime Transport Rules*

The evolution of the GATS-based transportation rules can be viewed from two perspectives. First, the Council for Trade in Services is obliged to review periodically developments in a service sector and in the relevant GATS annex. For example, Article 5 of the Annex on Air Transport Services provides:

> The Council for Trade in Services shall review periodically, and at least every five years, developments in the air transport sector and operation of this Annex with a view to considering the possible further application of the Agreement in this sector.

The air transport sector is a prime example of this approach, as air transport has long been a compelling constituent of the maritime transport sector.[148] Following this precedent, it would be expected that an official GATS Annex on Maritime Transport Services would be reviewed periodically and updated with further developments in this sector. The practice of undertaking a periodical update as a routine process reduces the problem of international agreements lagging behind commercial developments in the relevant sector.

3.2 *The DSM: A Practical Precedent for a WTO Evolutionary Mechanism to Update Uniform Seaborne Cargo Rules*

3.2.1 The WTO DSM

Another fundamental but evolving institution within the GATS-based transport rules is litigation over GATS through the DSM. The static texts of WTO agreements cannot be expected to be perfect. Thus, periodic re-negotiations and the DSM are designed to clarify the texts.

In the Uruguay Round negotiations, the DSU was developed to promote the effective implementation of the WTO agreements at the international level over national jurisdictions. The DSU corrected the initial problems of the previous GATT dispute settlement mechanism and introduced those improvements into the DSM.[149] It is fair to say that the DSM is

148 For instance, high-valued and light cargoes: *see further* UNCTAD, *Maritime Transport Review* (2011).

149 The GATT itself scarcely contains an institutional framework: it makes no provision for a secretariat, and it was drafted as temporary, transmittable preparation for the

unique:[150] for the first time, the Uruguay Round legal text established a single, unified dispute settlement procedure for all components of the Uruguay Round agreements (including GATS),[151] accompanied by a legal text to implement these procedures, instead of relying on customary practice.[152] Moreover, a new 'appellate procedure' was also formed for the first time within the DSM.[153] Due to the troublesome defects of its precursor GATT dispute settlement mechanism, the DSM is far from being fully-fledged, and remains flawed when implementing TRIPS and GATS. However, the DSM has substantially corrected the problems that weakened its predecessor, and it is considered to work better than might have been expected.[154] Jackson even rates it highly, and considers that it functions better than many other international dispute procedures such as the World Court.[155]

First, the DSM helps WTO law to evolve on a case-by-case basis, and this helps to solve problems associated with the need to update laws and clarify ambiguous rules. Since international dispute resolution institutions are usually less elaborate and comprehensive than their national counterparts (domestic judicial systems), a number of hurdles may be encountered by such international institutions. For example, difficulties in updating conventions

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International Trade Organization ('ITO'), which failed to materialize because it did not receive US domestic ratification. There are other defects, such as (in the old dispute settlement procedure) the right of the losing party to block an adopted panel report; the legal structure of the GATT; a focus on tariffs and non-tariff barriers only; and difficulty in amending its rules.

150 Jackson, *supra* note 28, p. 5.

151 The DSM applies to GATT, as well as to GATS and TRIPS.

152 Jackson, *supra* note 28, p. 5.

153 *Ibid.* A panel report will be regarded as adopted by the WTO dispute settlement body ('DSB'), unless it is appealed against by one of the disputant parties. If appealed against, the dispute will go to an appellate body, and the ruling of the appellate body will then be provided to the DSB again and be deemed adopted unless there is a consensus against adoption (see further below in relation to 'negative' or 'reverse' consensus). Additionally, the right of a losing disputant party to block adoption of the DSB report under GATT is no longer available under the WTO; thus, the ultimate result of the appellate report automatically comes into force in virtually almost all cases.

154 Jackson, *supra* note 28, pp. 15–22, 71 (describing the troubled beginnings of the GATT with special historical reference to its initial defects, and listing seven main flaws of the GATT process in detail).

155 *Ibid. Cf.* Leo Gross (ed.), *The Future of the International Court of Justice* (Dobbs Ferry, Oceana, New York, 1976); and Daniel G. Partan, 'Increasing the Effectiveness of the International Court', (1977) 18 *Harvard International Law Journal* p. 559.

may cause them to lag behind changes in commercial practices, and it may be necessary to bridge gaps between ambiguous texts that are embedded in treaties which were drafted in negotiations conducted between many States. The texts of international cargo conventions, including the Hague, Visby, Hamburg, and Rotterdam Rules also have similar problems. However, if a pre-existing sea cargo convention were to be incorporated into GATS through a selective referral approach, the convention would be safeguarded via the DSM and would be uniformly applicable among WTO members.

Secondly, the 'automatic' nature of the resolution of cases following the issuance of a WTO body's report in the DSM represents a significant change from the GATT dispute settlement mechanism. Early GATT reports merely *recommended*[156] that a member party bring its practice into consistency with its legal obligation under GATT. However, practice showed that the contracting parties of GATT tended to treat the final result of an *adopted* panel report as legally binding, whereas a non-adopted report was not seen as being legally binding. Unlike the GATT dispute settlement mechanism, the process for the adoption of a report under the DSM follows the rule of 'reverse consensus'.[157] This means that a report on a dispute that is prepared by the relevant DSM panel will be adopted by the WTO membership unless there is a unanimous consensus *against* its adoption. The 'winning' party can therefore always support the adoption of the report, and there is no opportunity for the 'losing' party to block the adoption of the report: therefore, the adoption of the report is effectively automatic. Hudec's study on the predecessor GATT dispute settlement mechanism had already shown that the settlement mechanism successfully addressed 90 per cent of legal valid claims.[158] The WTO decisions considered by Busch and Reinhard confirm similarly high success

156 Emphasis added.

157 This special decision-making procedure is commonly referred to as 'negative' or 'reverse' consensus. At the three mentioned important stages of the dispute settlement process (establishment, adoption and retaliation), the DSB must automatically decide to take the action ahead, unless there is a consensus not to do so. This means that one sole Member can always prevent this reverse consensus, i.e. it can avoid the blocking of the decision (being taken). To do so that Member merely needs to insist on the decision to be approved.

158 *See* Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers, Salem, 1993). *See also* Tom Ginsburg and Gregory Shaffer, 'How Does International Law Work', in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research*, (Oxford University Press, Oxford, 2012) pp. 756–780, 776–778.

rates under the DSM system, which amends and improves upon its predecessor.[159]

Thirdly, the DSM generates more predictable and efficient litigation results in international disputes than traditional political and diplomatic processes. The DSM adopts a checks-and-balance principle, which prevents the dispute settlement body and panels from abusing their powers when delivering decisions.[160] Even though the WTO covers new areas of trade, such as intellectual property and services, negotiators have in the past worried about the danger that conferring too much power on the new institution might lead to misuse and corruption.[161] For this reason, this evolving machinery has been subject to the imposition of certain checks and balances.[162] On the one hand, the structure of the DSM is designed with a view to allocating functions between first-instance panels and appellate bodies: the first-instance decision is subject to review by the appellate panel; and the appellant panel's review is itself restricted to making a review decision within the scope of the substantive provisions considered by the first-instance panel's decision, without extension.[163] On the other hand, the panel decisions are made in a rule-orientated way[164] which apply WTO provisions with certain deference to the diplomatic, political and economic influences of disputant WTO members.[165]

159 M. Busch, E. Reinhardt and G. Shaffer, 'Does Legal Capacity Matter? A Survey of WTO Members' (2009) 8(4) *World Trade Review* pp. 559–577. See also Ginsburg and Shaffer, *supra* note 158, pp. 756–780, 776–778.

160 Jackson, *supra* note 28, pp. 15–22.

161 *Ibid.*, pp. 57–58 (arguing that the negotiators in the Uruguay Round built checks and balances into the evolving system for the WTO).

162 *Ibid.*

163 DSU Art. 17.6.

164 Roughly two viewpoints were adopted in relation to this question: some supported a rule-oriented approach, indicating that the dispute settlement procedures should simply assist members' negotiators to resolve differences through negotiations, diplomacy and compromise, in which the procedure should not be juridical or legalistic; others advocated the rule-of-law or rule-based approach, requiring that the dispute settlement procedures work as a juridical process by which an impartial panel makes objective rulings about whether a member's performance fulfils the GATT obligations or not. *See further* Jackson, *supra* note 28, p. 60.

165 'Rule orientation' is used here by contrast with phrases such as 'rule of law' and 'rule-based system', and implies a less rigid adherence to rules and offers some fluidity in rule approaches in order to accord with reality. *See e.g.* Jackson, *supra* note 14, pp. 8–9, 121–122 (stating that rule-oriented approach, by contrasting it with power-oriented/diplomacy approach, has many policy merits, focusing disputant parties' attention on the rules, and in turn, enhancing certainty and predictability in future cases).

It is arguable as to which approach — the rule-oriented or the quasi-judicial — is more justifiable. At a first glance, the text of the DSU appears to highlight the rule-oriented approach. If one reads through relevant clauses in the DSU carefully, in particular clause 3.2,[166] it is not difficult to draw the conclusion that the DSU seeks to take a rule-oriented approach.[167] However, the DSM appears to have developed a tendency to emphasise the judicial approach. On the basis of the treaty language of the GATT and the WTO, the DSB panels and the appellant body have evolved a case-by-case approach to implementing WTO agreements. In addition, the establishment of a panel and its corresponding appeal mechanism pave the way for the WTO DSM to be an international trade court on economic disputes. The inclusion of an appellate body, absent in the GATT dispute settlement mechanism, means that the WTO is moving towards incorporating fully-fledged dispute settlement machinery within its framework.[168] Therefore, disputes concerning the application of a future GATS Annex on Maritime Transport Services under the DSM might follow a judicial approach in any future WTO litigation, and may therefore more closely resemble at the international level the manner in which disputes concerning the international sea cargo regimes are currently resolved at the national level.

Another noteworthy, quasi-judicial feature of the DSB bodies is the 'collegiality principle',[169] in accordance with which panels and the appellate body act as a single entity, not as individuals. This feature promotes the establishment of 'precedents' for future litigation.[170] Take Article XXIII of GATT as an example. Although the sketchy wording of this Article mentions 'nullification or impairment', this does not necessarily imply a condition that requires an 'actual' breach of GATT rules. However, the practice in the GATT dispute

166 *See e.g.* DSU Art. 3.2, which prescribes that "The dispute settlement mechanism of the WTO is a central element in providing security and predictability to the multilateral trading system." This point had been supported by the speech of King Hassan II for the host government of the April 1994 Marrakesh ministerial meeting to conclude the Uruguay Round, in which his Excellency said that "[b]y bringing into being the World Trade Organization today, we are enshrining the rule of law in international economic and trade relations, thus setting universal rules and disciplines over temptations of unilateralism and the law of the jungle."

167 Jackson, *supra* note 28, pp. 74, 123 (note 48).

168 *Ibid.*, p. 62.

169 *Ibid.*, p. 80.

170 *Ibid.*, p. 127 (arguing that there is obviously a *de facto stare decisis* effect, even though this is not strictly provided for). *Cf.* Art. 59 of the *Statute of the International Court of Justice*, which states that judgements of the International Court of Justice "has no binding force except between the parties and in respect of that particular case".

settlement mechanism deviated from the language of this Article and required actual breach. In 1962, a panel made the crucial decision that a breach of GATT obligation would *prima facie* be deemed to be a 'nullification or impairment'.[171] Subsequently, this precedent was followed by a number of later panels and the appellate body.[172]

Moreover, 'collegiality principle' helps the appellate body to consider its existing reports. In terms of the WTO DSM process, only three out of the seven persons who comprise the appellate body sit on a particular appeal, and detailed decision making has deliberately been kept secret. Nevertheless, the other four members will be continuously kept informed, receive the relevant documents, and gather together in Geneva at some point during proceedings to discuss each case. In this way, all members of the appellate body are informed of all precedents. Therefore, the collegiality principle, the quasi-judicial nature and the sense of continuity and consistency of dispute settlement rulings act as foundations for legal certainty in potential future cases between disputant WTO Members.[173] These foundations also help to clarify the legal rights and responsibilities for future similar cases of obligations between other non-disputant WTO Members.

It is worth noting that there are some cases in which the WTO panels and the appellate body have departed from their previous rulings, and the DSM seems to treat itself as being empowered and entitled to deviate from precedents.[174] This practice supports Brownlie's opinion that the DSM and its tribunal opinions do not have an absolute *stare decisis* effect.[175] But Jackson refutes the idea that there is no precedential effect at all by referring to subsequent cases between the same Members, in which later cases have followed

171 GATT, 'Uruguayan Recourse to Article XXIII', GATT Doc.L/1923, Basic Instruments and Selected Documents, 11th Supplement, pp. 95, 100 (panel report adopted 16 November 1962).

172 *E.g.* GATT, 'United States — Taxes on Petroleum and Certain Imported Substances', GATT Doc. L/6175, Basic Instruments and Selected Documents, 34th Supplement, pp. 136, 155–159 (panel report adopted 17 June 1987).

173 *Cf.* Ian Brownlie, *Principles of Public International Law* (4th ed.) (Oxford University Press, 1990), p. 20 (explaining that the WTO dispute settlement procedures or its tribunal opinions, decisions, or recommendations, even though carried out by disputant Contracting Parties, do not bear precedential effect).

174 *E.g.* the ruling of the WTO DSB in the 'Shrimp-Turtle Case' mentioned that this ruling did not establish a precedent: see WTO, 'United States — Import Prohibition of Certain Shrimp and Shrimp Products, WTO Case Nos. 58 (and 61) (ruling adopted on 6 November 1998).

175 Brownlie, *supra* note 173, p. 21.

precedents established by the earlier cases.[176] Therefore, panels and the appellate body tend to operate on a quasi-judicial basis, but their practice shows that it is not a very strict and rigid basis. This would also be the case in the resolution of any future GATS-based maritime transport services disputes, if they were to be included within the DSM framework.

3.2.2 DSMs in Other Transnational Governance Structures

Maritime transport is a global business, but most transnational authorities (or 'delegations', to use the soft / hard law terminology)[177] provide for either non-trade implementation or trade implementation on a bilateral or regional basis.[178] Even so, other transnational practices with respect to implementation also shed light on the potential future implementation of maritime transport rules. In particular, dispute settlement mechanisms are incorporated into many bilateral investment treaties ('BITs') and free trade agreements ('FTAs').

Unlike the DSM, a peculiar feature of dispute settlement procedures in BITs is that not only state-to-state disputes but also investor-to-state disputes are dealt with.[179] This permits disputes in which private actors (investors) can challenge states (host-country governments) before international arbitral panels established by or under the BIT. An arbitral award, which usually grants monetary compensation or restitution, is generally final and binding on the parties.[180]

Moreover, dispute settlement procedures are also provided for in FTAs. For instance, the North American Free Trade Agreement ('NAFTA'), the European Union ('EU') and the Association of Southeast Asian Nations ('ASEAN') "stipulate consultation among the parties, referral to a panel, an award which is binding, and that the losing party rectify wrongs, and/or compensate."[181] These FTAs are 'WTO-plus' agreements that provide rules in areas in which the WTO

176 Jackson, *supra* note 28, p. 127.

177 Shaffer and Pollack, *supra* note 8, pp. 707–708.

178 Yasuhei Taniguchi, Alan Yanovich, and Jan Bohanes (eds.), *The WTO in the Twenty-first Century: Dispute Settlement Negotiations and Regionalism in Asia* (Cambridge University Press, 2007) pp. 409–483.

179 Mitsuo Matsushita and Yong-Shik Lee, 'Free Trade Agreements: WTO Disciplines and Development Perspectives', in Yong-Shik Lee et al (eds.), *Law and Development Perspective International Trade Law* (Cambridge University Press, 2011) pp. 269–272.

180 The *1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, adopted 18 March 1965, 575 UNTS p. 159, entered into force 14 October 1966 ('ICSID Convention') provides for a review and repeal of an arbitral award under certain conditions.

181 Matsushita and Lee, *supra* note 179, p. 270.

has failed.[182] Thus, non-global aspects of maritime transport rules could potentially be effectively governed by FTAs rather than by the WTO framework.

3.3 *Establishing Self-Contained Provisions on Transport Dispute Settlement*

Both TRIPS and GATS cases are governed by the DSU; and there are also a number of self-contained dispute settlement provisions within TRIPS.[183] However, as yet GATS has no self-contained DSM provisions.[184] The provisions regarding dispute settlement are provided in the GATS Articles XXII[185] and XXIII:[186] they prescribe that if a WTO member considers that any other member "fails to carry out its obligations or specific commitments" or that "any benefit it could reasonably have expected to accrue to it under a specific commitment of another member … is being nullified or impaired", it may resort to the DSM. It is suggested that future maritime transport negotiations should introduce a

182 *Ibid.*, pp. 258, 269–272.

183 TRIPS Arts. 41–61.

184 Andrew W. Shoyer, 'GATS Case Law: A First Assessment, Lessons Learned from Litigating GATS Disputes', in Panizzon, Pohl and Sauve, *supra* note 17, pp. 233–324.

185 GATS Art. XXII 'Consultation' states: "1. Each Member shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by any other Member with respect to any matter affecting the operation of this Agreement. The Dispute Settlement Understanding (DSU) shall apply to such consultations. 2. The Council for Trade in Services or the Dispute Settlement Body (DSB) may, at the request of a Member, consult with any Member or Members in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1."

186 GATS Art. XXIII 'Dispute Settlement and Enforcement' states: "1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU. 2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU. 3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 ['Compensation and the Suspension of Concessions'] of the DSU shall apply."

number of DSM measures into GATS itself (or a relevant Annex) for transportation-rule cases in addition to those general provisions that are set out in the DSU.

Maritime transport-related dispute settlement provisions also need to include provisions dealing with interim measures to address any loss or damage arising during the procedural period of a dispute but in advance of the final determination. It is possible that an offending nation may act cynically in promising to obey the final decision of a dispute process, knowing that during the delay between commencement of the dispute and the final determination, a significant amount of financial damage may be incurred by a private business located in the disputant member's country, bringing financial pressures on the disputant party to settle on terms relatively favourable to the offending party. TRIPS provides for provisional measures[187] and interim measures,[188] whereas the current GATS lacks similar provisions on interim measures. The TRIPS interim measures provisions are only available for TRIPS litigation, and not for litigation under other WTO agreements.

3.4 *DSM Cases from 1995 to 8 January 2014: An Appraisal*

From its establishment in 1 January 1995 until 8 January 2014 there have been 471 disputes heard through the DSM process.[189] Of these cases, a total of 106 disputes were filed by the United States, accounting for approximately 22 per cent; and the European Community (now the European Union) had filed 89 disputes, 19 per cent of the total.[190] This data demonstrates that the USA, closely followed by the EU, is the heaviest user of the DSM.[191] Overall, there have been 23 disputes invoking GATS.[192] As regards 'new' areas of WTO agreements, such as services and intellectual property, the number of disputes is still small. The table below (Table 1) shows that GATS has been invoked considerably less frequently under the DSM than was the case under the previous GATT regime for disputes.[193]

187 TRIPS Arts. 42, 44, 48 and 50 ('Provisional Measures').

188 *See* TRIPS Arts. 42, 44 and 48 on 'Interim Measures'.

189 WTO, 'Find Disputes Cases', available from the WTO website at: <www.wto.org/english/tratop_e/dispu_e/find_dispu_documents_e.htm>, search conducted on 12 May 2013 (search results amount to 984 cases).

190 *Cf.* Leitner and Lester, *supra* note 18, p. 221.

191 *Cf. ibid.*, pp. 221 and 258.

192 WTO, 'Index of Disputes Issues', available from the WTO website at: <www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#selected_subject>, last visited 6 April 2013.

193 Leitner and Lester, *supra* note 18, p. 260.

TABLE 1 *WTO agreements invoked in WTO disputes — 1 January 1995 to 8 January 2014*[194]

Agreement	No. of claims invoking a specific WTO agreement	Percentage %
Agreement Establishing the World Trade Organization	51	10.83
Agriculture	74	15.71
Anti-dumping (Article VI of GATT 1994)	100	20.23
Civil Aircraft	0	0
Customs valuation (Article VII of GATT 1994)	15	3.18
Dispute Settlement Understanding	15	3.18
GATT 1947	1	0.21
GATT 1994	379	80.47
Government Procurement	4	0.85
Intellectual Property (TRIPS)	34	7.22
Pre-shipment Inspection	2	0.42
Rules of Origin	7	1.49
Safeguards	43	9.13
Sanitary and Phytosanitary Measures (SPS)	40	8.49
Services (GATS)	23	4.88
Subsidies and Countervailing Measures	100	21.23
Technical Barriers to Trade (TBT)	49	10.40
Textiles and Clothing	16	3.40
Trade-Related Investment Measures (TRIMS)	38	8.07
Protocol of Accession	26	5.52
Total Disputes	**471***	

Table compiled by the author. See also the pie chart showing percentages in the Appendix, Figure 3.

194 Source: WTO, 'Disputes by Agreement', available on the WTO website at: <www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm>, last visited 8 January 2014. *Cf.* Leitner and Lester, *supra* note 18, p. 262, Table 5.

A dispute arises when a member government considers that another member government is violating a WTO agreement. The complaining WTO member must submit a 'request for consultations', identifying the agreements it believes are being violated. A dispute can be, and often is, brought under more than one agreement. The list above shows the agreements cited in these requests for consultations. The total number of claims in this table —1017 — adds up to more than the total number of discrete complaints — 471 — dealt with under the DSM, because a number of claims may be cited in a single request for consultations, which may invoke more than one WTO agreement.

At least two reasons account for the dramatic difference between the numbers of disputes under GATT and GATS. First, the current GATS lacks well-developed substantive rules more than GATT.[195] However, GATS-related maritime transport disputes would only be filed after more substantive rules are negotiated and incorporated. Secondly, the frequent invocation of GATT also arises because GATT consists of general provisions. Consequently, "many complaints refer to the provisions of other, more specific substantive agreements, as well as to the more general provisions of GATT".[196]

When this data is examined more closely, most of these disputes can be seen to have resulted from growing interactions between public officials and private enterprises and their lawyers. The private entrepreneurs collaborate with their governmental bureaucracy to challenge foreign laws before the WTO panels and the appellate body.[197] The increasing number of public-private partnerships using the DSM reflects a tendency away from solely inter-governmental decision-making towards the pursuit of "varying, but complementary, goals" between public and private actors at national and international levels.[198] Shaffer asserted that the DSM is the most legalised among all international institutions.[199] Therefore, the DSM possibly provides a unique legalised tribunal, which could accommodate litigation invoking maritime transport conventions at the international level rather than simply at the national level.

Another merit of the DSM for potential future maritime cases is that the whole process is time-saving. From the start of proceedings until the date of reckoning by concrete action against an offending party, Jackson has estimated that the whole process takes two to three years, which, even when compared

195 *Ibid.*, p. 260.
196 *Ibid.*, p. 260.
197 Shaffer, *supra* note 125, p. 5.
198 *Ibid.*, p. 4.
199 *Ibid.*, p. 8–9.

with many national domestic court procedures, seems speedy and efficient.[200] This estimated length of time is true for the GATS cases mentioned above.

In relation to maritime-transport litigation, the key issues are: by whom, and under what circumstances, can such cases be filed through the DSM? The answer relies on a case-by-case consideration.[201] This is because the genuinely international nature of shipping, and the potentially large number of countries involved in any such maritime transport transactions, make it impossible to be clear which member should file such a dispute. For example, if a shipowner[202] has the nationality of member State A, a vessel is registered in member State B, that vessel is chartered to a transnational company based in member State C, and the relevant goods are carried from member State D to member State E — which member should be eligible to invoke GATS provisions through the DSM? Unfortunately, to date there has been no answer to this issue under GATS. It is therefore necessary to formulate a specific GATS Annex on Maritime Transport Services and include specific provisions governing disputes concerning the maritime transport sector.

Of the 23 disputes to date invoking GATS, there has not yet been any dispute regarding transport services.[203] On the one hand, of the 471 WTO disputes only three have involved disputes concerning ships.[204] On the other hand, there have been 34 TRIPS disputes, which shows that cases at the international level (centralised enforcement) invoking international agreements with respect to private rights are being filed under the DSM.[205] Thus, future GATS cases on the centralised enforcement of maritime transport treaties on private rights would seem to be litigable in a comparable way.

Owing to the absence of a specific GATS annex on maritime transport rules, or disputes on GATS-based maritime transport services, the following sections will analyse the overall characteristics of GATS disputes brought between 1 January 1995 and 8 January 2014. These GATS disputes will present a picture of what the dispute process for a future GATS Annex on Maritime Transport

200 Jackson, *supra* note 14, p. 97 (stating that in his private conversations with practitioners, some participants in these procedures suggested that the WTO procedure is superior to some national procedures).

201 See cases listed in the WTO's 'Index of Disputes Issues', *supra* note 192.

202 A shipowner can be a natural person or a legal entity (such as a shipping company).

203 See the WTO's 'Index of Disputes Issues', *supra* note 192.

204 WTO, disputes DS273, DS301 and DS307 on the subject of ships.

205 For example, in the WTO dispute DS362, the Agreement cited was TRIPS (Articles 3.1, 9.1, 14, 41.1, 46, 59, 61; as cited in the US request for consultations) regarding whether China's domestic law was compatible with its WTO minimum standards, which were referred from existing UN administrated conventions to the WTO agreements.

Services would look like. The process includes all the various stages through which a dispute can pass in the DSM.[206]

3.4.1 Requests for Consultation

GATS Article XXII.2 states that the Council for Trade in Services or the relevant dispute settlement body ('DSB') may consult with a member at the request of another member if consultations under Article XXII.1 have not led to a satisfactory solution. There have been 13 GATS cases that have not resulted in a panel report.[207] Of these, as at 8 January 2014, four cases are still at the consultation stage.[208] By requiring formal consultations as the first stage of any dispute, Article 3.7 of the DSU provides a framework in which the parties to a dispute must always at least attempt to negotiate a settlement. Accordingly, nine cases have been settled or terminated through consultations, and have not proceeded to the establishment of a panel.[209] The GATS cases that have concluded through consultations, and not led to panel reports (rulings), including the *US – Helms Burton case* (DS38), were "fairly mundane cases".[210] This means that any future WTO maritime transport cases need not only experience a purely legal process for the resolution of any disputes.

Another characteristic of these cases is that several other WTO agreements besides GATS were invoked even where GATS was applicable. In most instances, the non-GATS issues involved in the claim were more significant than the GATS issues.[211] This indicates that future maritime transport cases may engage other WTO agreements as well as GATS.

3.4.2 Cases Involving WTO Bodies (Panels or the Appellate Body)

There have been eight GATS-related cases leading to the establishment of a panel. Among them, there is one case (DS188) in which a panel has been established but not yet composed;[212] one case (DS38) in which a panel was

206 See the flow chart of the WTO dispute settlement process which is set out in WTO, 'The Process — Stages in a Typical WTO Dispute Settlement Case', which is available from the WTO website at: <www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm>, last visited 10 January 2014.

207 *See* WTO, 'Disputes by Agreement', *supra* note 194. The case (DS38) is included (its panel was suspended, and the case terminated).

208 The WTO disputes in consultation on 8 January 2014 were DS80, DS117, DS182 and DS201.

209 WTO cases that have been settled or terminated (withdrawn, mutually agreed solution) up to 8 January 2014 are DS16, DS27, DS38, DS105, DS237, DS309, DS372, DS373, and DS378.

210 Leitner and Lester, *supra* note 18, p. 260.

211 The cases only invoking GATS are DS80, DS117, DS204, DS258 and DS413.

212 WTO dispute DS188.

established but suspended because the case was terminated and withdrawn following further consultations; and six cases in which panels generated reports that were adopted.[213] Therefore, at least some GATS-related cases have been processed by the relevant DSB as international, rule-orientated tribunals. A dispute settlement panel and the appellate body in the WTO could therefore also act as a quasi-judicial tribunal for future maritime-transport cases at the international level. The use of this centralised implementing system would promote uniformity of implementation for uniform substantive seaborne cargo rules.

Technical, factual issues require that a panel hearing disputes shall have the necessary expertise relevant to the specific sectoral services in disputes. For example, in the GATS sector of finance, the GATS Annex on Financial Services requires that panels shall have the necessary expertise relevant to the sector in dispute.[214] The maritime transport sector is as complex as the finance sector, and can be too complicated for a panel without the requisite technical background. In the UK, a maritime court judge is probably capable of handling civil and business cases, but judges with civil and business backgrounds cannot handle maritime issues, because maritime law is more specific and complex than general business and civil law.[215] Additionally, the Decision on Certain Dispute Settlement Procedures for GATS provides for a special roster of panellists with sectoral expertise.[216] It also prescribes that "panels for disputes regarding sectoral matters shall have the necessary expertise relevant to the specific service sectors which the dispute concerns."[217] Accordingly, in hearing any future maritime transport-related cases,

213 WTO decisions implementing WTO agreements through notifying respondent are: DS319 (implementation notified by respondent), 142, 204, 363; DS285 (authorisation to retaliate granted); 413 (reports adopted, with recommendation to bring measures into conformity).

214 GATS Annex on Finance.

215 Liangyi Yang, an experienced Hong Kong international shipping disputes arbitrator, mentioned this point in his maritime lectures in November 2004 in Yantai, China.

216 WTO Doc. S/L/2, (4 April 1995), (adopted by the Council for Trade in Services on 1 March 1995). See also WTO, WT/DSB/33 & Add. 1-6, (6 March 2003–26 July 2006) (providing the current Indicative List of potential panellists with indications as to whether they have GATT, GATS and/or TRIPS experiences).

217 WTO Doc.S/L/2. *See also* William J. Davey, 'Specificities of WTO Dispute Settlement in Services Case', in Panizzon, Pohl and Sauve (eds.), *supra* note 17, p. 279, note 5 (suggesting that the specialised roster of panellists under GATS should be incorporated into the Indicative List and with additional annotation of any service sectoral expertise of persons on the list).

panels and the appellate body would need to achieve a similar competence in that sector.

3.4.3 Arbitration

Arbitration and litigation are widely used nowadays to handle maritime cargo-claim disputes. Article 25 of the DSU provides a general article for arbitration. However, arbitration was used only once prior to 8 January 2014, in the very peculiar context of retaliation arbitration (Article 22.4 of the DSU).[218] There was no appeal for such retaliation arbitration.[219] Arbitration *per se* — instead of a panel process — has never been used in the DSM. Nevertheless, the WTO arbitration mechanism could be further used for future maritime-cases involving private parties. By this means, the relevant DSB might appoint arbitrators to act in maritime disputes as well.

No agreed rules of procedures exist for the arbitration provided for in Article 25 of the DSU. WTO members have nothing to refer to as a basis for such arbitration, because they have never agreed to use arbitration instead of the panel procedure. There are three possible reasons for this situation. The key reason why arbitration *per se* has never been used is probably because WTO members know the panel process very well, and have developed a good understanding of panel procedures. With arbitration, however, WTO members in dispute would need to develop the applicable procedural rules and stages for such an arbitration. Moreover, and more importantly, there would be no possibility of an appeal to the DSM appellate body when parties chose arbitration, and no parties appear to be willing to give up this possibility. Thirdly, as noted above, the DSM is merely quasi-, rather than 'purely', judicial. Under Articles 3.7, 4 and 5 of the DSU, disputant parties are provided with alternative processes — like conciliations, or mediation — to reach a settlement during all stages of the DSM.[220]

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218 Davey, *supra* note 217, p. 265 (the arbitration occurred in DS 160, the US Copyright dispute).

219 See also a similar dispute related to GATT issues in WTO, 'DS27: EC — Bananas III'.

220 WTO, 'Consultations', available from the WTO website at: <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm>, accessed 20 February 2014. *See also* WTO, 'The Process — Stages in a Typical WTO Dispute Settlement Case', available from the WTO website at: <www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm>, accessed 10 January 2014. *See further* M. Busch and E Reinhardt, 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes' (2000) 24 *Fordham International Law Journal* pp. 158–172 (investigating the impact of the consultation stage of WTO disputes after a claim is filed by a complaining Member and before a ruling is delivered, and finding that the complainants usually reach consensuses to settle a dispute before a final judgement is reached).

3.5 *Other Suggestions*

3.5.1 Involving Private Actors: The Possibilities for Public-Private Partnerships

Traditionally, States were almost exclusively the only actors in inter-governmental organizations and under international law, and international procedures were available only to nations, or sometimes to international organizations.[221] This is still generally true, because today's international legal institutions for dispute settlement, such as the International Court of Justice, are still only open to states and international organizations.[222] Nonetheless, a developing practice has allowed private actors to petition their governments to challenge foreign trade matters and laws: and for example the US[223] and the EC (now EU)[224] have enacted this practice. If these private actors have a complaint against a foreign country, they must resort to the traditional approach by

221 John Howard Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Vol. 2) (MIT Press, 1997) p. 127.

222 *Ibid.* Jackson uses the term 'World Court' when referring to the International Court of Justice.

223 *US Trade Act of 1974*, §301, 19 US Code §2411 (1998). Section 301 constitutes a specific legal provision for private solicitation of public assistance on trade-related litigation including private-right related matters such as intellectual property protections and standards. See Shaffer, *supra* note 125, pp. 20–22 (observing that Section 301 of this US Act allows private actors to petition the US government to challenge foreign trade barriers in service sectors and intellectual property protection). The precursor to Section 301 was Section 252 of the *US Trade Expansions Act of 1962*, Pub. L. 87-794, 75 Stat, 879, which explicitly granted the US President authority to take retaliatory actions against foreign governments if the offending country has harmed the trade interests of US companies in trade in services and in products. *See further* Bart S. Fisher and Ralph G Steinhardt III, 'Section 301 and the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services, and Capital' (1982) 14 *Law and Policy in International Business* p. 569 (discussing moving the authority from the US President to the US Trade Representative under the President's nearly automatic or mandatory direction; thus US firms and citizens can file petitions before the US government in any case concerning trade or commerce for government aid to redress foreign-nation action which is considered a violation of the rights of the US, and which denies the US benefits under any trade agreement, and which is unjustifiable, unreasonable or discriminatory and burdens or restricts the US commerce).

224 EC Council Regulation, No. 3286/94 of 22 December 1994 (stipulating that European Community procedures can be initiated by a community industry, by an individual company or a Member State on the common commercial policy so as to ensure the exercise of the EC's rights under international trade rules, in particular those established under the auspices of the WTO (OJ No L 349, 31.12.1994, 71). Jackson, *supra* note 221, pp. 128–133.

petitioning their governments to file the issue for the attention of the offending country or before an international tribunal.[225]

The US and the EU practice raises the issue whether there is a trend towards establishing more formalised procedures that are available to private actors in connection with the application and enforcement of the international trade rules, at least under WTO law. The DSM itself was conceived as an inter-governmental forum, and claims cannot be initiated by private parties. However, as indicated above there seems to be a significant tendency in the WTO for the DSM to take a more judicial approach. As Jackson notes, an increasing number of member governments are taking up complaints on behalf of their domestic private parties (private economic operators), and generally involve external lawyers in bringing a case before the dispute settlement panel.[226] Jackson goes further, and predicts that the DSM will further evolve towards adopting a legalised approach.[227] As matters stand, governments are not obliged to initiate international procedures on behalf of private actors.[228] It should also be noted that a desire to preserve its good relations with a more powerful State — although this may not be a problem for the EU and the US — may dissuade a small country from supporting the complaints of its citizens against another offending country.[229] This makes private complaints from small countries less likely to be filed as international cases than those from the US and the EU.

Public-private collaboration in the US and the EU is linked to, and conducted in the shadow of, WTO law. Private actors (citizens and companies) could petition a public authority to initiate "a process of public-private collaboration in fact-gathering [investigation], strategizing, negotiating, and potential litigating over foreign trade" legislation and regulatory behaviours.[230] On the basis of empirical research in the EU and the US, Shaffer has noted that

225 *See* Brownlie, *supra* note 173, pp. 21–23 (discussing diplomatic protection of the nation-states for citizens, although governments do not have to a duty to exercise it). *See also* Jackson, *supra* note 221, p. 128. *Cf.* Edmond McGovern, 'Dispute Settlement in the GATT: Adjudication or Negotiations?' in Meinhard Hilf, Francis Jacobs, and Ernst-Ulrich Petersmann (eds.), *The European Community and the GATT* (Kluwer, Deventer, 1986) pp.73–84, 78–79.

226 Jackson, *supra* note 28, p. 62.

227 *Ibid.*

228 Brownlie, *supra* note 173, pp. 21–23. *See also* Jackson, *supra* note 221, p. 128 (predicting that the national policy that preserves its relations with an offending but more powerful nation may lead a small nation to refrain from aggravating a powerful state by supporting the complaints of its citizens).

229 Jackson, *supra* note 221, p. 128.

230 Shaffer, *supra* note 125, p. 30.

US[231] and EU[232] law already provides specific legal provisions for the private solicitation of public assistance to challenge foreign trade-related laws and matters through the DSM, such as intellectual property and service sectors.[233] Private actors and public authorities do so "by deploying and operating in the shadow of public international trade law".[234] If those private actors successfully challenge foreign countries' legislation and regulations, they must rely on public authorities to represent their interests and bring WTO claims. For instance, a US company must work through the Section 301 process with the US Trade Representative as a partner in order to challenge foreign laws.[235] In summary, private actors deploy their right to petition their government for WTO litigation as leverage points (threatened use) against foreign governments.

At some point in the future, increasing indirect[236] participation by private actors in cross-nation dispute settlements will possibly spawn the ability of private actors to gain direct access to international dispute settlement procedures. Perhaps the private actors' direct right to sue should be restricted by an international filter stage, preventing unnecessary litigation. Jackson *et al.* make the following prediction:

> There are some interesting potentials in these precedents for the GATT [now the WTO] and the international economic system .... [G]overnments and business firms do desire greater predictability of national government economic action in an increasingly interdependent world, and do desire greater balance and equality in actual implementation of negotiated international rules on economic matters [including intellectual property and service sectors]. Those factors could lead governments to be willing to accept some sort of a mechanism by which individual citizens

231 *See also US Trade Act of 1974*, 19 US Code §2242, §2420, and §3106; Shaffer, *supra* note 125, p. 29.

232 The EU Trade Barriers Regulation (3286/94) (adopted 22 December 1994), Arts. 2 and 4. *EEC Treaty*, Part Three: Community policies - Title IX: Common commercial policy, Art. 133, O J C 325, 24/12/2002 P. 0090 - 0091. Shaffer, *supra* note 125, pp. 74–79, 85.

233 *See* Shaffer, *supra* note 125, pp. 1–5, 21, 23, 25, 75 (examining the growing interaction between private enterprises and public officials to initiate disputes before the WTO dispute bodies).

234 *Ibid.*, pp. 27–28.

235 *Ibid.*, p. 31. US private actors could steadily increase pressure on foreign countries to change their legislation and regulatory behaviour.

236 *See* WTO, 'Note on the Meeting of 9–10 February 1995', Doc. S/NGMTS/4 (9 March 1995) pp. 1–2 (the US delegation said that US law permitted third-parties to seek action by the Federal Maritime Commission to address cross-border shipping issues).

> or firms could appeal directly to an international body like the GATT [now the WTO] to determine whether a [offending] government obligated under [the other WTO agreements] has taken an action that is inconsistent with its international obligations .... Clearly, the typical governmental reluctance to relinquish any power or to constrain its field of discretion would discourage a move in the direction ... [but] there are some advantages for governments in such a procedure.... [I]f it were carefully designed and became reliable, governments might well find that the [DSM] procedure would tend to deemphasize and depoliticize many relative minor trade or economic complaints that now exist between nations.[237]

3.5.2 Enhancing Communication between the WTO and Members' National Courts

Unlike the EU's judicial system,[238] the DSM does not provide for any formal communication to occur between WTO panels (or the Appellate Body) and members' national courts. Thus, a communication link between the DSM and national judicial systems is lost, and this might be a key factor in members' reluctance to resort to the DSM on GATS issues.[239] As shown from successful experiences with a similar format of communication between the European Court of Justice ('ECJ') and EU members' national courts, [240] such communication enhances the ECJ's understanding of provisions that are applicable in and by national courts.

In a similar way, this kind of inter-level dialogue could work to promote mutual understanding on GATS-based uniform seaborne cargo rules between the WTO and its members. Introducing communication provisions into the DSM would develop the national courts' authority in fact identification and the

237 John H. Jackson, Jean-Victor Louis, and Mitsuo Matsuchita, *Implementing the Tokyo Round*, (University of Michigan Press, Ann Arbor, 1984) pp. 208–209. Jackson, *supra* note 221, pp. 135–136.

238 The procedure is based on Art. 267 of the *Treaty on the Functioning of the European Union* ('TFEU') (former Art. 234 of the *Treaty establishing the European Community* ('TEC')) under which national courts refer to the European Court of Justice ('ECJ') questions regarding the interpretation of EU law. The judgment given by the ECJ is called a preliminary ruling.

239 Krajewski, *supra* note 122, p. 102. *See further* Meinhard Hilf, 'The Role of National Courts in International Trade Relations' (1997) 18(2) *Michigan Journal of International Law* pp. 321–356.

240 TFEU Art. 267 (former Art. 234 TEC).

WTO's authority in the uniform understanding of a GATS provision. This kind of dialogue would be well-suited to achieving a uniform understanding of WTO agreements at both the international, WTO level and also at the WTO members' national level, including in relation to any potential future GATS-based uniform seaborne cargo rules.

4 Concluding Observation and Proposals

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 organizations handling maritime transport issues, the WTO system is broader in its scope and membership,[241] more precise in its application, and more binding in its effect. These are the features that a uniform maritime transport law requires. The WTO would therefore excel as a negotiation and implementation forum for promoting the future uniformity of maritime transport rules.

This paper has looked at issues relating to the rule-making stage and the implementation process that would apply to uniform maritime transport rules within the framework of the WTO. In relation to the rule-making stage, it has argued that there are two sources of uniform seaborne cargo rules that may be brought within the WTO framework. Four international seaborne cargo conventions currently govern private actors in the sector by apportioning their duties and responsibilities, namely the Hague and Visby Rules, as well as the United Nations' Hamburg and Rotterdam Rules. First, the WTO could introduce existing rules into the WTO framework through the selective referral process. This cooperative approach works through WTO multilateral negotiations and the United Nations framework could unify and implement all areas that need to be covered by the rules in one process, and might be feasible for unifying other shipping areas. However, regulations on maritime safety, the environment, labour standards and market liberalisation should left to future United Nations conventions or national laws, and should not be incorporated within the WTO framework at the early stages of negotiations. Secondly, the WTO could itself provide a forum for the negotiation of new uniform rules for seaborne cargo. Using this approach, the WTO would work as permanent negotiating forum in which problems presented by the existing seaborne cargo conventions could be addressed in a dynamic way and updated.

241 *E.g.* GATT, TRIPS, GATS, and the DSU.

With respect to the implementation stage, this paper has suggested that the WTO could provide a uniform framework for promoting a better understanding, and a more effective enforcement, of maritime transport rules. Through the centralised implementation system achieved by the DSM, multilateral agreements such as GATS have effectively become legally binding and enforceable on all 159 of the WTO members. Within this context, countries and international organizations as public actors are still dominant, but are no longer the only actors in such fora. Private actors, such as commercial entrepreneurs and private lawyers, have attempted to advance their influence at the international level by using the WTO's legal machinery,[242] and in so doing have contributed towards WTO law becoming 'harder' law.[243] Therefore, including maritime transport rules as part of WTO law would allow those rules to benefit from this greater degree of binding force and uniform implementation.

4.1 *Public-Private Partnerships in WTO Negotiations and Dispute Settlement Cases*

Based on this understanding of these two key features of the WTO, negotiation and implementation, this paper has contended that public-private partnerships should be included in both the rule-making stage and through the implementation process. Private, commercial actors from the shipping industry are both service providers (carriers, the vessel or hull interests) and buyers (the cargo interests). In both the rule-making stage and through the implementation process, private actors with maritime law or shipping practice expertise can contribute constructively to a number of aspects needed to create uniformity of seaborne cargo rules. They can bring their expert knowledge to contribute to the rule-making process in negotiations. They can also play an important role in maritime-related WTO cases in the DSM process, both by assisting to articulate relevant claims and by sitting as panel members in considering them and issuing reports. Moreover, they can also advise what kinds of interim measures would urgently need to be incorporated in any GATS-based maritime transport annex and any corresponding specific dispute resolution provisions.

On balance, the current WTO/GATS negotiations look promising with respect to establishing uniform sea transport rules — and potentially a new GATS Annex on Maritime Transport Services — in spite of some legal uncertainties.[244] Should any trading power decide to stay outside the GATS negotiations

242 Shaffer, *supra* note 125, pp. 2–3.

243 *Ibid.*

244 See section 2.2.1 above.

on the shipping industry,[245] this would not be fatal for the outcome of the maritime negotiations, especially as the majority of trading nations have been actively involved in relevant rounds.[246] Many powerful maritime industry associations that put enormous pressure on their governments in previous negotiations have shifted to adopt more positive attitudes on the inclusion of the maritime transport sector into GATS.[247] They will probably be more encouraging in the future, if they get closely involved in the WTO talks through workshops. More and more governments and institutes have recognised that failure to reach a maritime agreement again will stimulate pure bilateralism and regionalism at a cost to less powerful economic players,[248] and this would do severe harm to the WTO multilateral framework. Additionally, the continuation of a situation in which the rules for maritime transport services are chaotic would increase the risk of incurring high litigation costs due to legal uncertainty, imposing tremendous costs on the whole global economy.[249]

4.2 *Learning from Each Other: The Establishment of a DSM-like Institution under the United Nations*

While the WTO is a unique international organization, the WTO's successful innovations may also offer some insights for the future evolution of maritime transport rules within the United Nations framework. As mentioned above, it is feasible (and would be ideal) if the WTO could incorporate and implement existing substantive maritime transport rules — including those within United Nations seaborne cargo conventions — through the selective referral (cross-reference) approach within the WTO framework. However, if this proposed solution is not realised in the near future, relevant United Nations agencies could potentially seek to establish mechanisms drawn from precedents provided by the WTO. UNCITRAL, for example, has already started learning from the WTO's experience and has made a contribution to "case law on UNCITRAL texts" (known as 'CLOUT').[250] The CLOUT system was established for the

245 *E.g.* the US and Britain.

246 Parameswaran, *supra* note 20, pp. 287–291.

247 *Ibid.*

248 WTO, 'Korea Delegation's Proposal', Doc. S/CSS/W/87 (11 May 2001) p. 2.

249 *Cf.* WTO Doc. TN/S/W/11, pp. 1–2, paras. 1–4 (admitting that the global reliable binding regulations of the maritime transport services under the GATS framework will benefits all countries, ensuring lower freight rates, greater choices for shippers, and fast and efficient delivery of goods).

250 *See* UN, 'Case Law On UNCITRAL Texts —User Guide', UN Doc. A/CN.9/SER.C/GUIDE/1/Rev.2.CLOUT, available at: <www.uncitral.org/uncitral/en/case_law.html>, last visited 25 October 2013.

purpose of "collecting and disseminating information on court decisions and arbitral awards relating to the Conventions and Model Laws which have emanated from UNCITRAL texts".[251] Through this system, UNCITRAL has attempted to facilitate a uniform interpretation and application of UNCITRAL legal texts. (The CLOUT system covers the Hamburg Rules but not the Rotterdam Rules, possibly because the latter have not yet come into effect.) If the United Nations were to attempt to establish effective case law repositories or central judicial bodies to implement uniform maritime transport rules, such as at the UNCITRAL and UNCTAD forums, the author suggest that the WTO should participate in this process by allowing its DSM panellists, arbitrators and specialists to cooperate, share case databases,[252] and hold interactive workshops to engage with private actors form the shipping industry.

251 *Ibid.*

252 *See* the WTO's 'Index of Disputes Issues', *supra* note 192.

Appendix

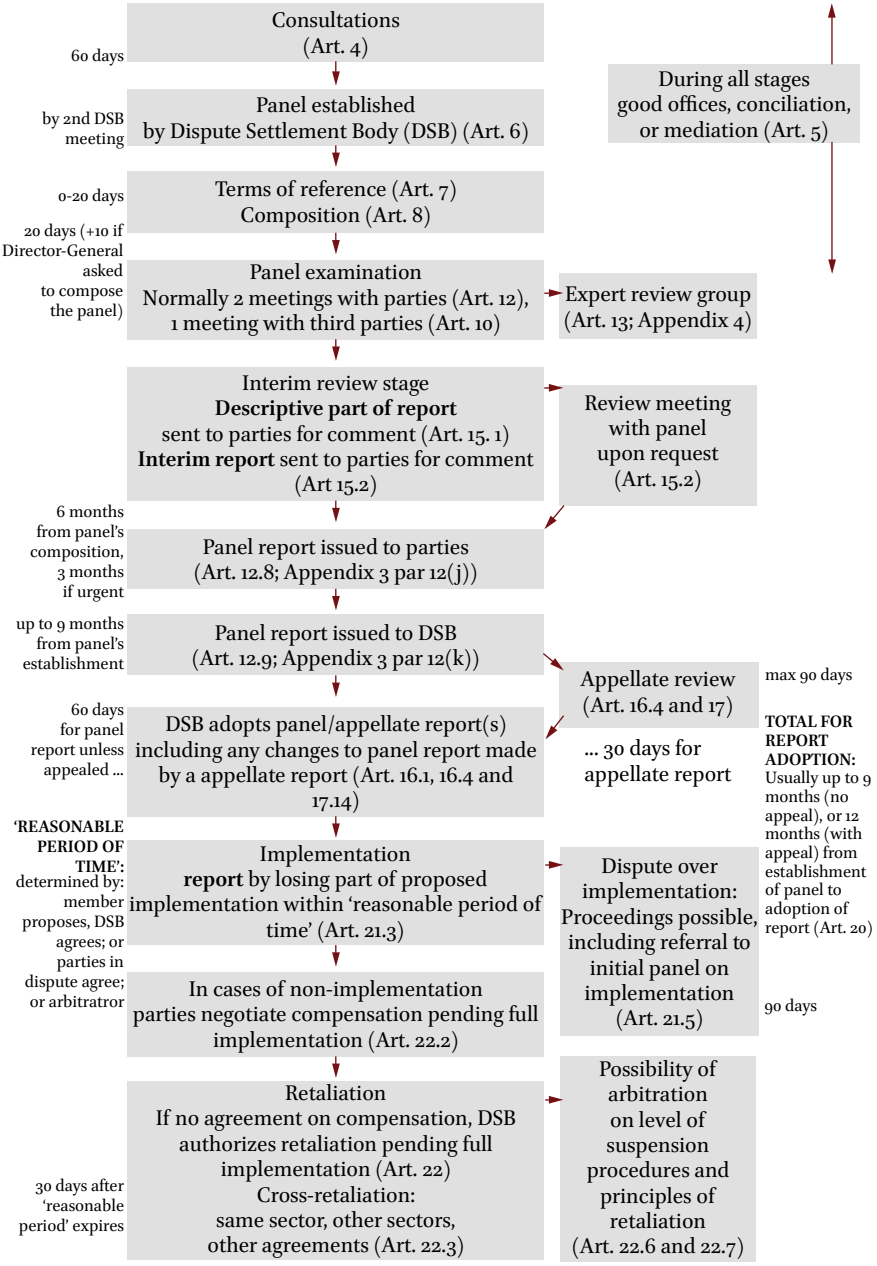

FIGURE 2 *The process — stages in a typical WTO dispute settlement case*
SOURCE: WTO, 'THE PROCESS — STAGES IN A TYPICAL WTO DISPUTE SETTLEMENT CASE', AVAILABLE FROM THE WTO WEBSITE A<WWW.WTO.ORG/ENGLISH/TRATOP_E/DISPU_E/DISP_SETTLEMENT_CBT_E/C6S1P1_E.HTM>, LAST VISITED 1 AUGUST 2014.

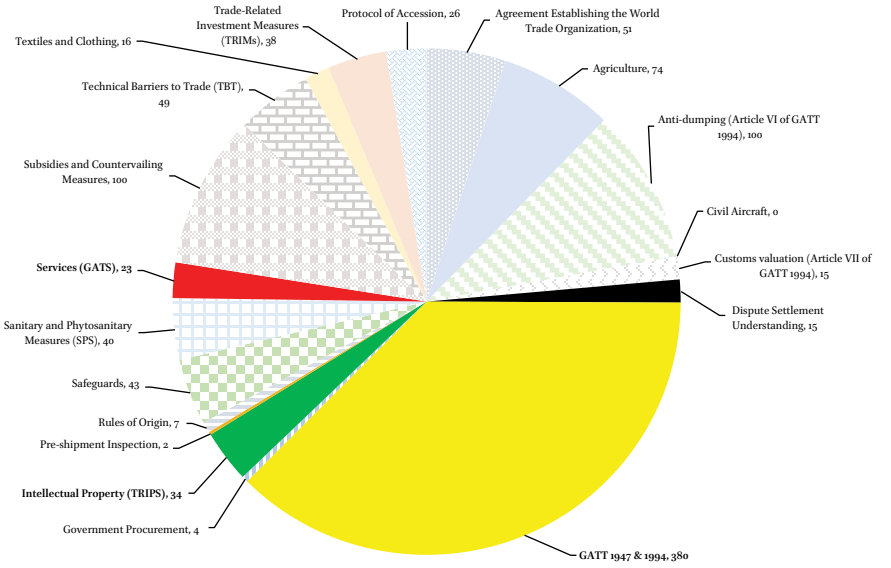

FIGURE 3 *WTO litigation and potential litigation under GATS (total cases: 471)*