CONCLUSIONS AND SUGGESTIONS

Transportation is, both a traded services in its own right as well as pre-requisite for trade in goods and services. Transport is an integral part of the production process and therefore has a direct bearing on a country’s economy and development. The very survival of a nation depends fundamentally on the movement of goods it produces and receives in exchange from other nations. It is a life line of international trade. Effective and efficient transportation brings about enhanced international trade, increased foreign exchange, and hence the GDP of a country which brings about overall development of the economy.

Transportation services are included in chapter 11 of GATS classification. They are further classified into: maritime transportation services, internal waterways transport, air transport services, space transport, rail transport services, road transport services, pipeline transport, and services auxiliary to all modes of transportation. Though eight sectors are included under the GATS, only maritime transportation service is the main focus of the negotiations. Maritime transportation is just one mode of transport which picks up cargo from one port in a country to a port in another country. From the port the cargo needs to be carried to the inland destination either through road, rail, inland waterways or through air ways or combination of these unimodal transport system to make the transaction complete. With the advancement in transport technology, containerisation came into being. Containerisation simply means the transport of goods in a standard unified box, from point of origin to point of destination without break over the entire range of transport system involved that is through sea, road, rail, air, to reach the final destination. The rapid expansion of multimodal transport operations brings domestic and international transport closer to each other by linking them together.

Transport industry operates under the regulatory regime of different jurisdictions. Every aspect of transportation sector is governed by different legal norms under different institutional mechanisms. Legal rules—at national and international levels—developed on strictly separated lines with respect to the various modes of transportation: railway law is different from road laws, road law is different from air law, and air law is different from maritime law. Even the law of inland navigation, where this mode of transport is of
economic importance, varies from maritime as well as from land transport laws. Activities affiliated with transport of goods such as: warehousing, handling, loading, and discharging on the one hand and forwarding on the other, are subject to principles and rules of their own. For carriage of goods within a national boundary—national carriage of goods—national laws apply, which differ from country to country.

Considering the complexities of international transport services, particularly concerning its already well established and wide-ranging regulatory regimes, the negotiations within WTO framework failed to make substantial progress. The maritime services sector is heterogeneous; the commitments made by few countries in this sector are even more heterogeneous. Maritime transport provides the basic infrastructure for world trade, in which international shipping is one of the most globalised industries in terms of markets, technology, capital, and employment. A proper solution for this important service could not be found in the negotiations so far. In view of its importance, a binding substantive liberalization of the maritime transport service sector is crucial, for ensuring an overall success of this current Doha Round of trade negotiations. For that the countries should, firstly identify the nature of the barriers that exist in the transportation services sector, which is hampering the market access for trade in transportation services, and once the barrier is identified, then the modalities to remove/eliminate that barrier or minimise its effects should be considered and adopted in the negotiations.

In order to identify the nature of barriers, it is essential to understand the maritime industry and the legal norms currently governing it because many aspects of maritime transport process have their roots in history and the legal superstructure exists as a result of early state conduct which created rights and duties of the subject of international law.

The maritime legal norms are said to have originated during the Greeks; after the decline of Greeks, the period of Roman maritime supremacy saw codification of maritime law, a process which started with the Greeks. These laws survived the Roman Empire and were incorporated in the laws of Oleron, in the 1100 A.D., which was to become the foundation of modern maritime law. Those were the times of sailing ships. The substitution of sail by steam and wood by iron and steel brought about yet another revolution in the history of shipping. The Industrial Revolution in the UK, the
development of the New World (the America), and the opening of Suez Canal contributed to an increase in the volume of international trade. The risks involved and the time taken for the voyage started to decline due to further developments in the maritime technology and organisation.

Until the Second World War, the operation and organization of cargo transport trade progressed at a very slow pace; multi-deck vessels were used and teams of stevedores stowed general cargo in the ship’s hold which was a slow and labour intensive process. With the growth of volume of trade in the post war era and the rapidly rising cost of manual labour, the system became overstretched. As a result, cargo liners spent two-third of their time in ports, and cargo handling costs had escalated to more than one-quarter of the total shipping costs. The shipping industries' response to this problem was the ‘unitization’ of general cargo—individual items were packed into standard units, which could be handled quickly and economically. Thus, containerisation came into being. The first deep sea container was introduced in 1966 and the containers came to dominate the transport of general cargo.

Political supremacy along with the technological developments in this sector called for evolution of legal norms. The maritime liability regime evolved from ‘absolute liability’ to ‘strict liability’ to ‘no liability’ during the British supremacy to preserve the interest of their ship-owners (at that point in history Britain was the largest ship owning country). When the US emerged as maritime superpower it sought to alter the British Common Law regime through the Harter Act, which gave way for the unification of maritime law through the Hague Rules.

In the subsequent decades, the international political and economic scenario changed. The post War period of 1947-67 witnessed the birth of score of new States after prolonged struggle for independence. Majority of these new nations had no fleet of their own and their international trade depended on foreign ships. Some developing countries had very few national fleets and were struggling to expand their national merchant marine. Their dependency on foreign vessels brought about adverse effect on their balance of payment position. They watched with deep concern the decline of the terms of trade, which being further aggravated by serious impact of rising freight rates and the
inadequacy associated with the existing institutional mechanism of shipping. Their shipping problems ranged from complete dependence on foreign flag ships for the sea transport of their international trade, to those countries partly dependent and struggling to expand their national merchant marine. Thus, the maritime norms set by the maritime super-powers were inimical to the newly independent countries' maritime trade. Hence, they organized themselves under the auspices of the UNCTAD to press for change in the maritime norm arguing that the existing maritime laws and customary norms are tilted towards the advantage of maritime powers and the ship-owning countries.

The volume of general cargo grew steadily during the 1950s and the 1960s; and the whole system started to become unmanageable in administrative, physical, and financial terms, which called for the introduction of containers and multi-modal transport system into the liner shipping system. Containersation however, requires huge capital outlay, not only in building and operating container ships but also in equipping the ports, and providing the necessary inland transportation facilities. The containerization also required advancement in the port infrastructure and container terminals designed for handling large number of containers. The terminals are equipped with specially designed giant cranes and other lifting and moving equipment to permit the carrier to move the containers within their own terminals, and to load stow and discharge the same into and from their container-ships. This involved a major investment in completely new ships, shore based handling facilities and, of course, the containers themselves, it also called for installation of computers to keep track of the movement of the containers. The overseas trade of developing countries, including India, is still carried on by conventional ships. There are no fully containerized ships in developing countries but there are however quite a few ships, that can carry a limited number of containers, including refrigerated containers.

The advent of containerization has facilitated the development of international inter-modal transport. At present, each form of transport is governed by separate international conventions. The Hague Rules and Hamburg Rules govern the bills of lading pertaining to carriage of goods by sea. The Geneva Convention, 1956 (CMR) governs the international transport document for the carriage of goods by road; the Berne Convention 1952 (CIM) governs the transport document for the carriage of goods by rail;
and the Warsaw Convention 1929, as modified by the Hague Protocol of 1955 governs the transport document for the carriage of goods by air. Every aspect of international transportation is governed by different regime, for instance, the contract for carriage of cargo (bill of lading) governed by the Hague Regime, the Hamburg Regime and the COGSA in various countries (the new UNCITRAL 2008 Convention seeks to replace the Hague, Hamburg and the COGSA regime); the seafarers wages, safety and working conditions are governed by ILO regime; technical qualifications of seafarers, ships safety measures, technical standards etc., are governed by the IMO regime. The ship itself is governed by provisions of the UN Law of the Sea Conventions and registration rules of every country; the multimodal transport (which includes auxiliary services and multimodal transport operators) is governed by the ICC, UNCTAD and UNCITRAL model laws; the aspect of Trade Facilitation (the procedures and controls governing the movement of goods across national borders i.e. exchange of information and documentation to take care of the loss and damage in transit, insurance and other formalities) is being simultaneously sought to be governed by the IMO, UNCTAD and the NGFT within WTO (refer chapter IV).

It emerges from this study that there are certain constraints in the transportation services negotiations at the WTO. The negotiations must focus on overcoming these constraints, in order to move ahead and to conclude a framework for transportation services sector. These constraints can be briefly identified:

The modalities or the methodology adopted by the GATS for the liberalisation of transportation services sector is the tabulation method. Against the four modes of supply of services, the countries are asked to write either the word 'none' or 'unbound' or any condition they would like to put in the market access and national treatment column. The method of tabulation of commitment by inscribing words 'none' or 'unbound' and the like in the limitation to market access and national treatment columns could be made applicable to other services sector, but not to transportation sector because this sector is very peculiar.

Imagine a situation where all the countries inscribe the word ‘none’ in the market access column and national treatment column, in their schedule of commitment, in all the
modes of supply of service against maritime, multimodal, auxiliary and port services; will this bring about liberalization in this sector? Could the maritime, multimodal and logistic service providers be pulled out of legal uncertainties that they are currently facing? Maritime industry is so complexly organized with several complicated and uncertain legal norms that it is posing as a grave barrier to international trade. Unlike trade in goods the barriers to trade in services are non-tariff regulatory legal measures, which are not easily identifiable and quantifiable. This creates difficulties for enhancement of both international trade in goods and services. The tabulation method of negotiation is not going to bring about any difference at the ground level. The exporters and importers continue to struggle with contradictory liability regime, varied operational and customs regulations, insufficient infrastructure facility for the smooth functioning of the trade; which will continue to remain even after the ‘tabulation’ is completed perfectly, with no limitations in the market access and national treatment columns of the schedule of commitment. Under the scheduling method, the precise effects of the obligations of the countries are indefinite and unclear. Hence, there is reluctance on the part of members for scheduling commitment.

The limitation inscribed in the national schedule of commitments simply reflects the requirement of local laws in those countries. For example countries have mentioned in their schedule of commitment that market access is subject to their Business Act or Maritime Laws etc. In order to assess the effect of such commitments, knowledge of those countries local laws are essential. The negotiators, therefore, must sit and identify barriers to cargo transport services and then each barrier thus identified be deliberated upon, so that a conclusion can be arrived at, so as to devise means to overcome that particular barrier to market access and national treatment. The negotiators must consider first, how to overcome regulatory barrier and second, to overcome infrastructure and technological barriers.

Regulatory barriers could be overcome through harmonizing and linking international legal regimes. The limitation prescribed in the national schedule of commitments shows that, the market access is subject to their local law. Law per se may not be a barrier but the market entry at each country is subject to different rules and
regulations. If those regulations in each country are sought to be harmonised, certain amount of predictability could be achieved.

For the purpose of harmonization various kinds of such linkages of regimes are discussed in this study. Every aspect of transportation services (services rendered by carriers, port authorities, multimodal transport operators etc.) are not merely conceived to be linked but as intrinsically part of the subject of same area, and hence must be addressed in any set of meaningful trade negotiations because they are inseparable in the process of seamless international transportation. In other words issues within an issue must be linked through substantial negotiations. Regime linkage may not differ significantly from issue area linkage, with regard to the substantive claim that issues should be linked, but it poses different institutional questions because it is an era of multilateralism, for instance, in the transportation sector itself there exist several multilateral agreements. These numerous multilateral regimes are with sometime overlapping and sometimes conflicting mandates. In the multilateral context, means of linkage are more complex—"Nothing is agreed until everything is agreed." Regime amalgamation is possible, but in the international context the obstacles are especially formidable, except perhaps when some conglomerate structure already exists. The Uruguay Round demonstrated a tendency toward regime expansion and the development of "conglomerate" regime. The conglomerate regime can be regarded as the formalised version of nesting regime. These are regimes that remain separate, in terms of norms and institutional structures, within an overarching regime. If such a 'conglomerate' regime could be worked out one could be optimistic that such a 'conglomerate' regime is possible for international transportation service as well.

The international cargo, and the carrier moving through different jurisdictions is subject to arbitrary and unpredictable actions in various jurisdictions. The main function of WTO is to bring about predictability and level playing field through "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations" (preamble) and it shall provide the 'common institutional framework' for the conduct of trade relations among members (Art.II of WTO) and it shall engage in
“successive rounds of negotiation with the view to promoting the interest of all participants on mutually advantageous basis” (GATS XIX: 1). By establishing a commitment to negotiate and the machinery to enforce the results, the WTO is to facilitate the removal of barriers to the free movement of goods and services. Thus, the primary aim of WTO is to bring about ‘predictability and level playing field’ in international trade. It is a large mandate; whether to shrink the given mandate or to expand it, is in the hands of its member countries, and the parties who sit there and negotiate. The members can get into any exercise, as long as it brings about predictability and level playing field to international trade.

The GATS prescribe ‘progressive liberalization of trade in services through elimination of restriction to trade.’ How could a restriction be eliminated unless restrictions are identified? Only after identifying restriction, the means and methods of elimination of such restriction could be considered. Restrictions cannot be eliminated simply by tabulating the words ‘none’ or ‘unbound.’ The rigid negotiating modalities adopted by the parties do not allow the WTO mandate to be fulfilled. It should also be noted that several countries have mentioned that their commitment is subject to their domestic Business Acts or Shipping Laws, bilateral treaties etc. The GATS does not prejudice members’ right to regulate; regulation per se is not a barrier to trade but it is the divergence in the regulations in different countries that forms the barrier. Unless those laws relating to market access are unified and harmonised there is no hope that this sector would ever be liberalized.

Range of linkage methods such as: horizontal linkage, substantive linkage, regime borrowing, nesting of regime etc., are formulated by various scholars. Depending upon the nature of problem at hand to be addressed, any one or a combination of such linkages could be considered. The form and content of harmonisation would emerge from the negotiation for each sector or sub-sectors. For example, the discussion that is happening with respect to ‘trade facilitation’ and the maritime discussion with respect to ‘auxiliary services’ could be ‘nested,’ using the modalities for ‘nested regime.’ Thus for every sub-sector activity, suitable linkage formulation could be adopted, depending upon what emerges out of the harmonisation negotiation. Hence the optimum solution to this problem is not deregulation but harmonization of legal regime. Regulations can be
designed, implemented, or enforced in a way that it would benefit all the parties concerned.

The negotiators at Geneva are constrained as they were mostly from trade ministries or commerce ministries, and not from shipping or transport ministries. Based on the interviews and interactions conducted with the negotiators, during the field trip to Geneva (in April 2008), it was found that the negotiators did not have the required expertise to deal with matters relating to shipping and maritime industry. Moreover, they are simultaneously negotiating all the 160 plus sub-sectors of services along with maritime services. It is not possible to know the intricacies of all sectors being negotiated. The transportation sector cannot be treated like any other services sector because it is very unique and different from other services sectors. The current confusion in the legal realm of transportation sector can only be sorted out by experts in the respective field and respective ministries, who could be assisted by trade ministers. Nevertheless, the trade ministry personnel alone cannot handle all the sectors simultaneously, and by doing so they are not treating individual services sectors with fairness. If they continue to do so, then the negotiation might go on for several decades without any constructive results.

First of all it is necessary to identify the difficulties and concerns of the developing countries. There are two basic constraints for the developing countries in this sector, one is legal and the other is technological.

The legal problem is that, prior to 1970s, the laws that were governing the maritime services were created by the maritime super powers, which were imposed upon the developing countries that had no role in the creation of those laws and were brought out by the imperialistic countries. The developing countries attempted to alter the regime so as to make it more balanced and equitable regime—through the UN and its specialized agencies but they could not succeed.

The structure of international shipping is dictated largely by political decisions embodied in multilateral, bilateral, and unilateral rules and regulations. Protectionism and conflicting government policies are now major factors in the international market for maritime transport services impeding the market. Thus a more liberal, more economically efficient, and less conflict-riddled environment for international trade in maritime transport services requires a fundamental reorientation of present trends. The regulation
of maritime sectors came before various forums—the labour forum (ILO), the technical forum (IMO), the economic forum (UNCTAD)—in the past, but the developing countries aspirations could not be embodied in the legal regime, and even if they were embodied that were rejected by the developed countries. Thus those conventions and treaties did not come into force. The developing countries only aspire to have their say in the formulation of maritime law, which could address their problems and aspirations. A total of 84.4 percent of the tonnage of the world fleet in terms of registration is held by the EU and the open registry countries,\(^1\) and the ship-ownership in the open registry country is almost entirely possessed by ship-owners from developed countries.\(^2\)

The second constraint faced by the developing countries is the technological constraint or lack of infrastructure and latest transport technology. New technological developments always raise important issues and the legal framework required, to establish the rights and liabilities of the various actors involved in the use of that new technology. Some of the technological developments such as containerization of general cargo and electronic commerce led to the introduction of multimodal transport and logistic services, which calls for negotiations in multimodal transport services.

The maritime transport sub-sector services and activities should be bifurcated to see which sector is most sensitive, that makes countries reluctant to come forth and undertake liberalisation and which one is less problematic for liberalisation commitment, and then the negotiations should be commenced on the less problematic one first and other should be kept for ‘progressive liberalisation’ in the future.

The port services ‘third pillar’ provided by the governmental authorities neither on commercial basis nor in competition with other suppliers and therefore it should be kept out of negotiations. The current modalities adopted for making commitment, as additional commitment on reasonable and non-discriminatory basis, be abandoned for two reasons: a) The non-discriminatory access to ports is already governed by other international conventions. Hence there is no need for duplicating the work done by other international organisations. b) Port services are very sensitive because of security, marine

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\(^2\) 46.6 percent by the EU and 73.8 percent by the open registry countries. WTO doc. S/C/W/62 dated 16 November 1998.
environmental, and safety reasons, and moreover the provision of ports services is both an expensive and non-profitable activity.

The international shipping services ‘first pillar’ is governed by national laws of member countries and international laws such as: UNCLOS, the Hague rules, the Hamburg rules, the UN Liner Code, the UN Multimodal Convention, and the OTT convention etc. The method adopted in the GNS/GATS is neither suitable nor appropriate to deal with the issues in question. The GATS in the present form and the negotiating modalities in the present form only add to the legal chaos that is prevailing in this sector. Thus these services could be liberalised only through harmonisation of national and international legal regimes, which cannot be achieved overnight, but an initiation nonetheless in that direction could be commenced at the earliest.

The rules that are being evolved under GATS should be in harmony with the needs of modern trade. There are uncertainties in the multi-modal transportation trade because of lack of international rules relating to multi-modal transport document and MTOs. The auxiliary services ‘second pillar’ poses not so much a problem for liberalisation. Maersks Line—an shipping company that provides auxiliary and multi-modal transport services has its presence in 164 countries.³ It has registered in each country as local entity by which it is entitled to ‘national treatment’ because the company is considered as local company and thus gets all the benefits that a local company gets. Auxiliary services, especially, the custom house agent services, clearing and forwarding services are also part of the ‘Trade Facilitation’ discussions at the WTO and other UN organisations. Three different bodies are working on the same issue separately. Hence some kind of linkages—discussed in chapter IV—could be created between these three bodies.

Thus, it is suggested that the port services be kept out of the negotiation (port infrastructure development could fall under ‘construction and engineering services’ and not under port services connected to transportation services). With respect to the first pillar—international shipping—harmonisation of legal regime be initiated. And in second pillar—auxiliary services—a full blown liberalisation be initiated through a sui generis method, and the remaining sectors be left to ‘progressive liberalisation.’

³ www.maerskline.com
Lastly, the Indian position regarding maritime transportation services within GATS needs consideration: International shipping services—"first pillar", is already open to foreign ships because India is not having enough number of ships to carry even the 40% reserved, under UN Liner Code, thus, India continue to depend on foreign ships. Moreover, Indian shipping companies are de-flagging and going to Singapore and flying its flag. If this trend continues India will be continuously dependent on foreign flag for its external trade thus losing precious foreign exchange. In port services pilotage is one of the main services rendered to the ships arriving at the port by the port captain or the marine pilot. In every country, this function is provided by local persons or the citizens of that country, but in India, even pilotage is proposed to be privatized. It is ironic to note that India is pressing for opening 'mode 4' in foreign countries for Indian citizens but the Indian jobs in the maritime sector are thrown open to foreign nationals.

There are several criticisms that the Commerce Ministry has not adhered to the fundamental concept of a federal democracy. India’s offers/commitment must be debated in the Parliament and the State Legislative Assemblies, failure to do this will lead to serious conflict with the mandate of state governments under the Indian Constitution. The importance of making taking commitments based on comprehensive understanding of the transport sectors and their complex inter-linkages cannot be over emphasised. Hence the Commerce Ministry ought to study the maritime and multimodal sector carefully, get into a mode of 'sector testing' at the national level, engage in consultation with DG shipping, Shipping Ministry, ports authorities and port associations, shippers council, ship-owners' associations, trade unions of the maritime industry; and have a proper assessment on the impact that it would have on the industry, keeping in mind the national interest, before making any final commitment in the GATS’ negotiations.