



**Addis Ababa University**  
**The School of Graduate Studies**  
**Faculty of Law and Governance**

**The Compatibility of Ethiopian Shipping Sector Regime with GATS  
Obligations**

**BY: Asfaw Siyum**

**ADDIS ABABA UNIVERSITY  
SCHOOL OF GRADUATE STUDIES  
FACULTY OF LAW**

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**By: Asfaw Siyum**

**Advisor: Fikremarkos Merso (PHD)**

**A Thesis submitted to Addis Ababa University, the School of Graduate  
Studies, Faculty of Law in Partial fulfillment of the Requirements for  
The Degree of Master of Laws (LL.M) in Public International Law**

**September, 2021**

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Declaration

I, the undersigned, declare that this thesis titled "The Compatibility of Ethiopian Shipping Sector Regime with GATS obligations." is my own work, and that it has not been submitted before a program in any other university, and that all the sources I have used have been indicated and acknowledged

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**Confirmation**

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Date 22 Sept 2021

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## **Abbreviations and Acronyms**

<b>DWT</b>	<b>Dead Weight Tons</b>
<b>CSAs</b>	<b>Cargo Sharing Agreements</b>
<b>E.C.</b>	<b>Ethiopian calendar</b>
<b>EU</b>	<b>European Union</b>
<b>ECOSOC</b>	<b>United Nations Economic and Social Council</b>
<b>EFY</b>	<b>Ethiopia Fiscal year</b>
<b>ESLSE</b>	<b>Ethiopian Shipping and Logistics Service Enterprise</b>
<b>FOB</b>	<b>Free On Board</b>
<b>GATS:</b>	<b>General Agreement on Trade in Services</b>
<b>IMO</b>	<b>International maritime organization</b>
<b>CMI</b>	<b>International Maritime Committee</b>
<b>LC</b>	<b>Letter of credit</b>
<b>MTN</b>	<b>Multilateral trade negotiation</b>
<b>MFN</b>	<b>Most-Favoured-Nation Treatment</b>
<b>NT</b>	<b>National Treatment</b>
<b>NGMTS</b>	<b>Negotiations on Maritime Transport Services</b>
<b>OECD</b>	<b>Organization for Economic Co-operation and Development</b>
<b>UN</b>	<b>United Nations</b>
<b>UNCITRAL</b>	<b>United Nations Commission on International Trade Law</b>
<b>UNCTAD</b>	<b>United Nations Conference on Trade and Development</b>
<b>UNCLOS</b>	<b>United Nations Convention on the Law of the Sea</b>
<b>WTO</b>	<b>World Trade organization</b>
<b>SSS</b>	<b>Shipping Service Sector</b>

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## **Abstract**

The role of shipping transport in the development of international trade and the economy is critical, as evidenced by the binding of international trade. This is because, globally, states are not self-sufficient in meeting all of their society's interests, forcing the state to interact in various trade activities. Maritime transport is the world's biggest bulk transport with low cost when compared to other transport modalities with high financial value.

The world is moving toward globalization to eliminate trade barriers for free flow of goods and service among countries. The major driving forces for globalization are plans for the government's living standard of their people, modernizing and privatizing public enterprise and the contemporary stiff competition and market search persisting in the world. But this effort is facing different challenges from various political, economic, social and technological crises.

There is a continuous negotiation under GATT to remove different trade barriers among the states. Among such negotiations, the Uruguay round is the largest Multilateral Trade Negotiation which resulted in the establishment of the WTO on January 1, 1995, and the incorporation of trade in service (GATS) under the Multilateral Trade agreement. The Maritime transport Negotiations Originally scheduled to end in June 1996, but participants failed to agree on a package of commitments. As a result, it did not yet come in effect.

Currently, Ethiopia is in the process of accession to the WTO and as part of its accession process, its legal regime on maritime transport shall be the subject of inquiry in line with GATS obligation. International maritime transport is one of the sophisticated legal regimes which has been unsuccessful till now. The thesis will first look at how the general and specific legal obligations of GATS are enforced on the international shipping service, as well as the efforts made so far to implement Multilateral Law on Maritime Service. Secondly, it examines the compatibility of Ethiopian shipping service laws with that of GATS. Thirdly, it briefly discusses the gaps in Ethiopia's shipping service sector laws and ways of negotiation to keep up the sectors of strategic importance for the country.

Finally, it will identify the potential areas of interest that negotiating parties might tend to limit in line with Ethiopian policy and suggest terms of negotiation in the shipping service sector. The study concluded that from a legal point of view, Ethiopian shipping sector law is compatible with GATS obligation subjected to specific obligation the country is undertaking and enactment of the clear licensing directive. It advises negotiators to maintain the sector's existing preferential treatment.

## Chapter One

### 1.1. Background of the study

The maritime sector is an important service sector that contributes the lion's share in the growth of the nation's economy. It is a significant facilitator of world trade with approximately four-fifths of goods (by volume) being carried by sea.<sup>1</sup>

Ethiopia has been in the process of accession to the World Trade Organization (WTO) since January 2003.<sup>2</sup> While the country has long reserved certain service sectors such as banks, insurance companies, and telecommunications to domestic investors, it has recently expressed its intention to liberalize through the enactment of the new Investment Regulation.<sup>3</sup> According to this regulation, tertiary health care article 4 (3), grade one construction article 4 (8), hotel service designated with a star article 4 (9), and freight transport with a capacity of more than 25 tons are not reserved for domestic or joint investment, and thus fall under article 6 residual for foreign investment. Ethiopia on the fourth meeting of the working party on its accession has expressed its clear intention to open about ten service sectors as an initial point.<sup>4</sup> The accession to the WTO in services indicates members states interest towards a particular sector which means the country has right to negotiate on certain service sector such as primary Education ,Health ,Tourism, Aviation Etc. and reserve the other sectors or put a limitation if not interested. In other words, a

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<sup>1</sup> Lijun Zhao, 'Transportation, Cooperation and Harmonization GATS as a Gateway to Integrating the UN Seaborne Cargo Regimes into the WTO', *Pace International Law Review* 27 Rev. 60 [2015].

<sup>2</sup> A working party was established by the General Council to examine its application on 10 February 2003, Ethiopia's Memorandum on its Foreign Trade Regime was circulated in January 2007. <[https://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_ethiopia\\_e.htm](https://www.wto.org/english/thewto_e/acc_e/a1_ethiopia_e.htm)> accessed on November 13, 2020.

<sup>3</sup> Council of Ministers Investment Regulation no 474/2020, *Fed. Neg. Gaz.*, Year 26, No.78.

<sup>4</sup> Mr Mamo Mihretu, Chief Trade Negotiator for the Federal Democratic Republic of Ethiopia 'Working Party on the Accession of Ethiopia' <<https://twitter.com/wto/status/1222900075086536709>> accessed on December 12/2020. Even if the Ethiopian trade negotiator agreed to open ten service sectors, I was unable to identify what those ten service sectors were because the documents related to the negotiations are secret and restricted to access. Telecom, tertiary health care, grade one construction, hotel service with a star, and freight transport with a capacity of more than 25 tons are expected to be presented for negotiation, based on current government policy and the Investment regulation.

country has the right to negotiate one sector while closing another, to determine the mode of delivery, and to impose limitations and conditions as long as the negotiations satisfy the working party and are approved by the General Council/Ministerial Conference.<sup>5</sup>

The International Negotiations on Maritime Transport are challenging. So far, little progress has been made in various rounds of multilateral trade negotiations (MTN). Among these rounds of MTN, the Uruguay Round of negotiation is the largest trade negotiations for goods and services, and did not cover maritime transport in the success list.<sup>6</sup> This round of negotiations used the WTO Secretariat Services Sectorial Classification list contained in document MTN.GNS/W/120 and commonly known as the W/120 classification.<sup>7</sup> Liberalization in Maritime Transport Services was a central concern of it, but at the end of the process, only a few countries were willing to offer commitments, most with significant limitations.<sup>8</sup>

Next to Uruguay, the Doha Round of MTN, which is the latest round of trade negotiations among the WTO membership<sup>9</sup>, Maritime transport services were stressed in joint statements and negotiating proposals were tabled by a number of WTO Members, at the Council for Trade in Services in Special Session<sup>10</sup> WTO members with a strong interest in securing meaningful liberalization in this sector have exerted their efforts to achieve such an outcome within a dedicated informal working group, called the Friends of Maritime Transport Group.<sup>11</sup>

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<sup>5</sup> UNCTAD report, Negotiations on transport and logistics services /SDTE/TLB/2005/3 UNCTAD Geneva 2006 <<https://unctad.org/system/files/official-document/sdtetlb20053en.pdf> > accessed on April 18, 2021.

<sup>6</sup> Ibid 6

<sup>7</sup> It is a comprehensive list of services sectors and sub-sectors covered under the GATS. It was compiled by the WTO in July 1991 and its purpose was to facilitate the Uruguay Round negotiations, ensuring cross-country comparability and consistency of the commitments undertaken < [http://tsdb.wto.org/Includes/docs/W120\\_E.doc](http://tsdb.wto.org/Includes/docs/W120_E.doc) > accessed on February 10, 2021.

<sup>8</sup> Bernard Hoekman, Aaditya Mattoo, and Philip English (eds), 'Development, Trade, and the WTO' [June 2002] ISBN 0-8213-4997-X.

<sup>9</sup> <[https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm)> Accessed on December 10/2020.

<sup>10</sup> Ibid (n5) 10.

<sup>11</sup> Ibid

Even though the negotiation for unification and minimization of trade restrictions on maritime transport has a long history, it did not achieve its objective. Formal negotiations started in 1924 under UN supervision.<sup>12</sup> This lack of success is largely because of negotiating member state's diverse interests, in regulation of the maritime sector by different bilateral agreements, rather than making multilateral trade agreements within the WTO framework.<sup>13</sup>

As indicated above, Ethiopia has embarked on the liberalization of some of its service sectors. So far, the Shipping Service Sector (SSS) is under the full monopoly of the Government. Due to this, the sector has never experienced external as well as internal competition and marketing activity is less developed.<sup>14</sup> Besides, the government protects the sector through the FOB (Free On Board) <sup>15</sup> directive, a cargo reservation policy, which obliges all importers, whether governmental bodies or private entities who received LC (Letter Of Credit) from Commercial Banks in Ethiopia or foreign loans to use ESLSE (Ethiopian Shipping and Logistics Service Enterprise)'s Service to transport the imported cargo.<sup>16</sup> Even if the direct objective of this directive is to control the external flow of hard currency to be paid for sea transport freight payment, the rule has the effect of protection by way of cargo reservation for the national shipping line. Specifically, to protect ESLSE's from foreign competition.

The market access obligations, under article XVI GATS (General Agreement on Trade and service) cover six types of restrictions that must not be maintained in the absence of limitations.<sup>17</sup>

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<sup>12</sup> International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules), (Brussels, 25 August 1924). It represented the first attempt by the international community to find a workable and uniform way to address the problem of ship-owners regularly excluding themselves from all liability for loss or damage to cargo

<sup>13</sup> Ibid (n8).

<sup>14</sup> Because of full control of the market, the price of service is not determined based on market competition rather than by tariffs which always keep the profit margin of the ES LSE.

<sup>15</sup>FOB is an INCOTERM that allows the buyer to choose the marine transporter, and the seller's obligation ends when the goods are loaded onto the ship chosen by the buyer.

<sup>16</sup>Federal Democratic Republic of Ethiopia Ministry of Finance and Economic ref.no ፲/ኢ/ል/ሚ/1/53/41 date 29/07/2003. Available at ESLSE.

<sup>17</sup>See Article 16 of GATS.

The Market access obligation under GATS, like the national treatment obligation, does not apply unconditionally. It applies only to services sectors that are inscribed in the Members Schedules of specific commitments and subject to the terms, limitations and conditions set out therein.<sup>18</sup> The Market access obligation under GATS is negatively defined in that; it prohibits several types of restrictions that obstruct the supply of services in a given market. All GATS substantive obligations aim to achieve meaningful access to domestic services markets. Granting national treatment or MFN (Most-Favoured-Nation) treatment, abiding by the GATS transparency obligations and other GATS obligations should ultimately lead to improved conditions of entry into and operation within the Member's markets. Hence, the restriction under article XVI (2) (a) does not seem to conform with Ethiopia's current Maritime Sector protection policy if Ethiopia will make a Market Access Commitment.<sup>19</sup> Article XVI (2) (a) of GATS Prohibits any limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test. The current FOB directive grants ESLSE a monopoly on carrying and transporting all imported cargoes to Ethiopia. Therefore, ESLSE is the sole sea freight transport operator according to the FOB directives.<sup>20</sup> Further, the existing Ethiopian Maritime laws do not allow or clearly ban Foreign Service suppliers to establish their branch or head office to provide the international shipping service in Ethiopia.<sup>21</sup>

From the above discussion, we can infer that the domestic law of Ethiopia only allows the national shipping line to transport imported goods. While GATS market access commitment prohibits monopoly of service suppliers once market access commitment has been undertaken.

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<sup>18</sup> Committee on Specific Commitments, Additional Commitments Under Article XVIII of the GATS, Note by the Secretariats/CSC/W/34,16July2002Para.3<[https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gats\\_art18\\_jur.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art18_jur.pdf)> accessed on April 18, 2021.

<sup>19</sup> There are specific requests in the maritime transport sector negotiations to make commitments on international freight transport by eliminating limitations on cargo reservation (Mode1) restrictions on foreign equity participation under Mode 3; nationality requirements of board members under Mode 3.

<sup>20</sup> Tilahun Esmael Kassahun, 'Trade Facilitation in Ethiopia: The Role of WTO Accession in Domestic Reform' [2014] Vol. 8 Mizan Law Review 167.

<sup>21</sup> See Article 1(2) (c) of GATS. Existing law lacks clarity practically only flag state shipping lines are operating with a monopoly.

The Ethiopian negotiation on the maritime sector is narrow in scope because the majority of maritime services are not provided by Ethiopia as a result of being a landlocked state. Except for service rendered under the first pillar<sup>22</sup> there may not be big deals regarding other two pillars for Ethiopia.<sup>23</sup> The core interest of WTO members with regards to Maritime Negotiation in Ethiopia is feasibly associated with market access to cargo destined for Ethiopia. It will be tough to negotiate for Ethiopia without making specific commitment in market access.

Ethiopia, being a land locked state, is not expected to negotiate on port and auxiliary service. Most probably, the only area of negotiation is the service of transportation of goods by sea, because we don't supply such a service.

Non-discrimination is one of the fundamental principles of the WTO.<sup>24</sup> The national treatment under GATS aims to avoid discrimination between domestic and foreign services and service suppliers.<sup>25</sup> GATS national treatment does not apply automatically to all service sectors, but only applies to scheduled sectors and/or sub-sectors that a Member specifically lists in its commitments.<sup>26</sup> According to GATS Article XVII, an importing country must treat foreign services and service suppliers of any other member as less favored than its own "like" services

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<sup>22</sup>Ms. Selvi Ganesh, 'Transportation Services and the World Trade Organization: A Legal Study' (Doctor of Philosophy thesis submitted to Jawaharlal Nehru University in 2009). According to MTN.GNS/W/120 and the Nordic proposal, the first pillar includes a) passenger transportation, b) freight transportation, and c) rentals of vessels with crew. <<http://hdl.handle.net/10603/14814> > accessed in September 2020.

<sup>23</sup> Ibid152-53. The second pillar includes: cargo handling (loading and unloading warehousing customs clearance, freight forwarding, container station and depot service, maritime agency services, repair services; customs agencies services. Port services (third pillar) include: towing and tug assistance, pilot age, anchorage and berthing services; lightering and water taxi provisioning, fueling collection and ballast waste port; and several other services provided to the ship calling its port by the port authorities of host states.

<sup>24</sup> See preamble paragraph 3 of Agreement Establishing the WTO 1994.

<sup>25</sup> See GATS agreement, article XVI I, which states that if a country has scheduled maritime transport services, this article prohibits regulators from treating foreign maritime suppliers less favorably than domestic shipping, except as specifically noted in the Schedule.

<sup>26</sup> The national treatment is inapplicable to the service sectors not covered by a Member's service schedule, so one Member of the WTO may take discriminatory measures against services and service suppliers of any other Member in those reserved sectors without violation of the national treatment rule embodied in GATS article XVII.

and service suppliers.<sup>27</sup> In line with this principle, Article 13 (1) of Maritime Sector Administration Proclamation<sup>28</sup> exempts ESLSE from payment of income tax on income derived from the operation of owned vessels engaged in international shipping services. If Ethiopia makes NT obligations in the maritime sector, how can Ethiopia limit its NT obligations in order to continue providing preferential treatment to ESLSE? National treatment is not necessarily or fully applicable because national treatment may be limited by any conditions and qualifications set out in the Member's service schedule.<sup>29</sup> Thus, Ethiopian negotiations on the maritime sector have to find a way out within the GATS context to keep the current national strategic importance.

## **1.2 Statement of the Problem**

The great majority of the world's trade in goods is moved by sea. A truly competitive maritime transport service is crucial to global economic wellbeing. In many respects, international shipping markets are not strictly regulated by government regulations. Nevertheless, there are remaining practices and market barriers in the trade of maritime services that need to be addressed.<sup>30</sup>

GATS rules are more flexible than GATT, in that the former allows member states to open certain service sectors only and also can put a restriction on the accepted schedule as long as it does not contradict GATS general and specific commitments undertaken by member states' schedule. This allows a new member state to regulate internal interests or policy matters within

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<sup>27</sup> The intangibility nature of services makes it difficult to draw a line between product and production. The existence of four modes of supply, the combined reference to like services and like service suppliers, and the lack of a detailed nomenclature create difficulty in establishing likeness in services trade.

<sup>28</sup> See article 13(1) of the Maritime Sector Administration Proclamation no 549/2007, *Fed.Neg.Gaz* 13<sup>th</sup> Year No,60.

<sup>29</sup> Wei Wang, 'On the Relationship between Market Access and National Treatment under the GATS', [2012] (46 Int'l L 1045) <<https://scholar.smu.edu/til/vol46/iss4/7>> accessed on April 20, 2021.

<sup>30</sup> UNCTAD Report, 'Review Maritime Transport' 2011 by Secretariat < [https://unctad.org/system/files/official-document/rmt2011\\_en.pdf](https://unctad.org/system/files/official-document/rmt2011_en.pdf)>Accessed on April 20, 2021.

the GATS framework. The GATS agreement also aims to gradually liberalize trade in services through successive multilateral negotiations that protect the interests of all members.<sup>31</sup>

Currently, the maritime transport sector in Ethiopia has the two most important legal protections. The first one is the FOB directive<sup>32</sup> with its amendment that obliges all importers to transport their imported goods by flag state's shipping line.<sup>33</sup> If Ethiopia subscribes to market access obligation under Maritime negotiation, its current Maritime sector protection policy will not conform to Article XVI (2) (a) of GATS, because the national shipping is operating with a monopoly of the market.<sup>34</sup> This might require amendment of rules on monopoly or putting limitations and conditions in order to protect our national interest in this service sector.

The second one is Article 13 (1) of the proclamation which exempts ESLSE from payment of income tax derived from the operation of owned vessels that are engaged in international shipping service.<sup>35</sup> If Ethiopia subscribes to the NT obligation under the Maritime sector negotiation, subject to any conditions and qualifications set forth in GATS, the NT obligation requires Ethiopia to accord to services and service suppliers of any other Member treatment no less favorable than that accorded to its own like services and service suppliers in terms of tax measures.

Therefore, the research will in general examine how Ethiopia can negotiate on the maritime transport sector without compromising its national interest. Specifically deals with whether there is a possibility to keep up existing preferential treatment and keep the status quo it serves as a strategic importance for the national interest.

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<sup>31</sup> See GATS Paragraph 3.

<sup>32</sup> Federal Democratic Republic of Ethiopia Office of The Prime Minister Directive ref/80.ሐ.3/01/01 dated 23/05/2000 (commonly known as FOB directive).

<sup>33</sup> Federal Democratic Republic of Ethiopia Ministry of Finance and Economic Development date 27/07/2003 E.C. ref.no ፲/አ/ል/ሚ/1/53/41.

<sup>34</sup> Ibid 2

<sup>35</sup> Ibid (n 28)

### **1.3 The objective of the study**

The general objective of this research is to assess the compatibility of the existing Ethiopian legal framework concerning the international shipping service sector with GATS obligation on maritime transport.

Within this general objective, the research has the following specific objectives:

- Examine the advantages and disadvantages of liberalizing the marine service sector;
- Discuss legal and policy implications of reforming existing laws on the marine service sector;
- Analyze the GATS Agreement on the international shipping service sector; and
- Recommend terms of negotiation on Maritime transport negotiation.

### **1.4 Research Question**

The research paper mainly aimed at responding to the following questions:

1. Is the current Ethiopian Marine sector legal framework compatible with GATS obligations?
2. What are the arguments in favor of and against opening up the SSS?
4. How can Ethiopia join the WTO without compromising the current strategic importance of shipping transport to the national economy?
5. What could be the benefits and challenges of reforming the existing laws on the Ethiopian Marine Service Sector?
5. What should be the important terms of negotiation for Ethiopia in the SSS?

### **1.5 Research Methodology**

For the proper implementation of the research, primary and secondary sources will be used. As such, relevant legal literature, books, articles, online journals, WTO reports, and negotiations on

maritime service and journals will be used. Analysis and explanation of the legal regime governing International Maritime transport protection are made by exploring several international and national laws that have a direct or indirect impact on the international shipping service sector.

An empirical method will also be employed to identify the practical impediment, related market access, and share of ESLSE, customer's preference to use ESLSE service, readiness of the maritime sector for external competition.

In addition, the major sources used to determine the role and value of the protection regime will be an interview with one deputy CEO and three operational managers at ES LSE, five clients from various sectors, and financial data.

### **1.6 Limitation of the Study**

The author believes that the following constraints may reduce the quality of the research;

- ✓ Financial and time constraints to go through the study,
- ✓ Lack of adequate relevant data on the sector in our country.
- ✓ Inadequacy of time because of the workload i have.
- ✓ Absences of prior research works in the area which limit the scope of the study.

### **1.7 Significance of the Study**

The research has the following significance

1. It can be used a reference source for policymakers, industry associations and academicians working in the area.
2. It may give an insight to the negotiating terms in this area.

### **1.8 Scope of the study**

The research only sees “the international shipping service sector” particularly the transportation of goods by sea.

## Chapter Two

### The GATS Agreement and International Maritime Transport Services

#### 2.1 Introduction.

The maritime transport service is one of the few genuinely global services serving all continents, and it is difficult to think of a service sector with more possibilities of international involvement than shipping.<sup>36</sup> Maritime transport is the backbone of the increasingly globalized economy and the international trade system.<sup>37</sup>

The Maritime Transport Services are classified into six basic sub sectors.1<sup>st</sup> Passenger transportation, 2<sup>nd</sup> Freight transportation, 3<sup>rd</sup> Rental of vessels with crew, 4<sup>th</sup> Maintenance and repair of vessels, 5<sup>th</sup> Pushing and towing services and 6<sup>th</sup> Supporting services for maritime transport.<sup>38</sup>

*"But this classification reflected in the sectorial classification list MTN.GNS/W/120<sup>39</sup> does not reflect the maritime transport services market structure and its condition. As a result, the Nordic countries<sup>40</sup> proposed classifying the maritime transport services sector into three pillars<sup>41</sup> namely, international shipping service (first pillar), auxiliary services (second pillar), access to*

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<sup>36</sup> Benjamin Parameswaran, *The Liberalization of Maritime Transport Services With Special Reference to the WTO/GATS Framework* (Springer-Verlag Berlin Heidelberg New York April 2004) <<https://bok.africa/book/2260862/f1e1d3> > accessed on September 1/2020.

<sup>37</sup> Ibid 25-26.

<sup>38</sup> Ibid (n7; ibid (n23)

<sup>39</sup>Ibid (n7)

<sup>40</sup> The Nordic countries make up a region in Northern Europe and the North Atlantic which consists of Denmark, Finland, Iceland, Norway and Sweden and their associated territories, the Faroe Islands, Greenland, Svalbard and Aland. <<http://www.nobelux.se/countries-data/nordic-countries> >Accessed on December 10, 2020.

<sup>41</sup>< [https://shodhganga.inflibnet.ac.in/bitstream/10603/14814/9/09\\_chapter% 203.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/14814/9/09_chapter%203.pdf) > accessed on September 0/2020.

*and use of port infrastructure (third pillar), and now multi-modal transport (fourth pillar)."*<sup>42</sup>  
This thesis focuses on the first pillar, mainly on freight transportation.

The maritime service transport sector is known and characterized by its low freight rates, which can boost trade in volume, which, in turn, leads to the growth of national economies. In spite of the expected benefits of liberalizing trade in maritime services, the sector continues to witness significant barriers, such as reservation of cargoes for ships of specific flags, restrictions on Foreign Maritime Service suppliers from having access to and operating in a market, national preference, discriminatory access to port facilities, etc.<sup>43</sup>

However, the GATS Agreement under the WTO has tried to create possibilities for liberalizing trade in maritime transport services under a multilateral framework of rules and discipline in different rounds of negotiations by putting different limitations such as NT (National Treatment), MFN and market access obligation through multilateral agreements.

## **2.2 The Development of Maritime Transport Services.**

The history of the maritime includes fishing, international maritime law, naval history, the history of ships, ship design, shipbuilding, the history of navigation, the history of the various maritime-related sciences (oceanography, cartography, hydrography, etc.), sea exploration, maritime economics and trade, resorts, the history of lighthouses and navigation aids.<sup>44</sup>

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<sup>42</sup> Ibid

<sup>43</sup> Selvi( n 22 ) 120.

<sup>44</sup> Dr Uday Dokras Ph D, 'Maritime History of Ancient Hindu Traders' Journal of the Indo Nordic Author's collective<[https://www.researchgate.net/profile/Uday-Dokras-2/publication/344443150\\_Maritime\\_History\\_of\\_Ancient\\_Hindu\\_Traders/links/5f760037a6fdcc00864e2963/Maritime-History-of-Ancient-Hindu-Traders.pdf](https://www.researchgate.net/profile/Uday-Dokras-2/publication/344443150_Maritime_History_of_Ancient_Hindu_Traders/links/5f760037a6fdcc00864e2963/Maritime-History-of-Ancient-Hindu-Traders.pdf)> accessed on May 12, 2021.

Because there are no other ways to move large amounts of cargo over long distances at a low cost, maritime transportation dominates.<sup>45</sup>

Crete and Phoenicia were considered as the earliest maritime powers, but modern scholars contest this claim, and they assert that India and Egypt were the earliest maritime powers.<sup>46</sup>

Egyptians on their coastal and rivers sailed ships around 3,200 BC. By 1,200 BC, Egyptian ships traded as far as Sumatra, representing one of the longest maritime routes of that time.<sup>47</sup> By the 10th century, Chinese merchants frequented the South China Sea and the Indian Ocean, establishing regional trade networks. In the early 15th century, Admiral Zheng led a large fleet of more than 300 vessels manned by a crew of 28,000 to conduct seven major expeditions, one of which reached the East African coast.<sup>48</sup> However, China's attempt to assert regional maritime dominance was short-lived. Such expeditions were not permitted to continue, mainly because China perceived itself as a continental power with maritime trade of limited interest.<sup>49</sup>

*"After the decline of the Greeks in the 3rd Century B.C., the Romans became supreme, and the Mediterranean Sea became a Roman Lake for all purposes. The period of Roman maritime supremacy saw the codification of maritime law, a process which started with the Greeks. The code was based on the ancient laws and customs of the sea formulated by the inhabitants of the Islands of Rhodes. The Roman law established seamen's wages, merchants' rights, shipowners' responsibilities for passengers and cargo, and punishment for offenses ranging from piracy to negligence, among other things."*<sup>50</sup>

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<sup>45</sup> Jean-Paul Rodrigue, with Claude Comtois and Brian Slack, *The Geography of transport system* (ISBN 978-0-367-36463-2 3<sup>rd</sup>edn, Routledge Taylor and Francis Group London and New York 2013) <<https://transportgeography.org/contents/chapter5/maritime-transportation/>> accessed on January 1/2021.

<sup>46</sup> Selvi, (n 22) 140.

<sup>47</sup> Ibid

<sup>48</sup> Ibid

<sup>49</sup> <[https://transportgeography.org/?page\\_id=1762](https://transportgeography.org/?page_id=1762)> Accessed on December 03, 2020.

<sup>50</sup> Bekiashev K.A. Serebriakov V.V, *International Marine Organizations Essays on Structure and Activities* (Springer, Dordrecht [1981]) < [https://doi.org/10.1007/978-94-009-8261-1\\_9](https://doi.org/10.1007/978-94-009-8261-1_9)> accessed on January 20/2021

Following the inauguration of the Suez Canal in 1869,<sup>51</sup> the success of seaborne trade led to a significant increase in the tonnage of European Maritime countries, resulting in uncontrolled competition for cargo. There was also a demand for stable freight rates. The response came in the form of co-operation among the shipowners in establishing the Liner Conference System<sup>52</sup> to provide scheduled services between ports. This system came to govern shipping operations throughout the world.<sup>53</sup>

The complex<sup>54</sup> international aspect of maritime transactions, on the one hand, and the fact that maritime law is national (rather than international), on the other, present different problems. The difference in domestic maritime legislation may, for example, make the outcome of the international transaction unpredictable for participants. Furthermore, issues of jurisdiction, choice of law, and forum non-convenient would be present.<sup>55</sup>

The effort to develop uniform maritime law started in 1897, when the International Maritime Committee (CMI)<sup>56</sup> initiated uniformity among national maritime legislation of member countries.<sup>57</sup> Among the conventions drafted by CMI were The Hague Rules and the Visby Amendments (amending The Hague Rules). Many of CMI's functions have been taken over by the United Nations' International Maritime Organization (IMO) since 1958.<sup>58</sup> This organization

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<sup>51</sup> The Suez Canal is a man-made waterway that runs from north to south across Egypt's Isthmus of Suez. One of the world's most important shipping lanes, the Suez Canal connects the Mediterranean Sea and the Red Sea. <<https://www.britannica.com/topic/Suez-Canal>> accessed on April 23, 2021.

<sup>52</sup> Liner conferences are organizations of vessel operators who serve similar markets. They form cartels to both regulate (some say, eliminate) competition among themselves and protect their market from outsiders. <[https://link.springer.com/chapter/10.1007/978-1-4615-2085-6\\_6](https://link.springer.com/chapter/10.1007/978-1-4615-2085-6_6)> accessed on April 23, 2021.

<sup>53</sup> Selvi (n 22) 60.

<sup>54</sup> Wide coverage of the sector and involvement of different parties from different parts of the world with different legal systems makes the relationship or the transaction sophisticated.

<sup>55</sup> <<https://www.abysinnialaw.com/study-on-line/item/1072-historical-development-of-maritime-law>> accessed on April 24/2021.

<sup>56</sup> It is a non-governmental international organization established in Antwerp in 1897, with the object of unification of maritime law in all its aspects. <<https://comitemaritime.org/about-us/>> accessed on April 24, 2021.

<sup>57</sup> Ibid (n51)

<sup>58</sup> the Organization Established under the United Nation Convention on the International Maritime Organization, Geneva, Switz., Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 48 (1948) [hereinafter IMO] is the United Nations

has also continued the move towards uniform maritime laws. Many states followed these laws, either by incorporating the provisions into domestic laws or through treaty implications.<sup>59</sup> Thus, now, we can speak of the relative uniformity of national maritime laws of different shipping states which may not be matched by the degree of uniformity attained in some other areas of law.<sup>60</sup> The degree of harmonization so far attained is not, however, satisfactory so far as some areas are concerned. In order to remove barriers to trade, GATS comes up with more liberalized and accommodating rules which allow the Member states to choose which sectors are to be progressively liberalized, which mode of supply would apply to a particular sector and to what extent that liberalization will occur over a given period of time and provides a mechanism for resolving disputes between member countries.

Currently, the World Maritime activities and shipbuilding transactions have developed in number as well as holding capacity. In early 2019, the total world fleet stood at 95,402 ships, accounting for 1.97 billion dead-weight tons (DWT) of capacity.<sup>61</sup> The bulk carriers and oil tankers maintained the largest market shares of vessels in the world fleet (DWT), at 42.6 percent and 28.7 percent, respectively.<sup>62</sup> As of January, 1 2019, the top five ship-owning economies were Greece, Japan, China, Singapore, and Hong Kong China, accounting for more than 50 percent of the world's tonnage.<sup>63</sup> The role of such a big owner of the shipping market is important in the negotiation of GATS under maritime transport.

### **2.3 Basic Policy Objectives on the International Shipping Service Sector.**

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specialized agency with responsibility for the safety and security of shipping and the prevention of marine and atmospheric pollution by ships. Its objective is to create a level playing field so that ship operators cannot address their financial issues by simply cutting corners and compromising on safety, security and environmental performance.<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XII-1&chapter=12&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-1&chapter=12&clang=en)>accessed on May 12, 2021.

<sup>59</sup> <<https://www.abysinnialaw.com/study-on-line/item/1072-historical-development-of-maritime-law>> accessed on April, 24/2021.

<sup>60</sup> Ibid

<sup>61</sup> Review of Maritime Transport 2019, by UNCTAD Sales No. E.19.II.D.20 31 Geneva, p 29 <[https://unctad.org/system/files/official-document/rmt2019\\_en.pdf](https://unctad.org/system/files/official-document/rmt2019_en.pdf)> accessed on February 8/2012.

<sup>62</sup> Ibid

<sup>63</sup> Ibid

Developed maritime industries invest time and resources to frame comprehensive shipping policy and strategies. But, this policy is different from country to country as well as from region to region based on the economic capacity of the state. The term shipping policy can be interpreted in a wide sense to cover the entire maritime sector or in a narrow sense to cover trade and service-related shipping policies. Shipping policies have to also take into account policies being developed in ports, infrastructure and ancillary services, road and rail transport, and related industry sectors.<sup>64</sup> It is therefore important that the government decides at the outset, the scope of the policies to be formulated from the range of topics that would be covered in a comprehensive maritime policy.

A comprehensive policy incorporates port infrastructure, ancillary Maritime Services, competitive shipping services for trade, development of national shipping capabilities, safety of life and protection of the marine environment, and a human resource development plan.<sup>65</sup> A clearly articulated set of policies would bring certainty and stability to the shipping scene and can motivate the public sector and the private sector to work together to achieve the objectives of the governments.<sup>66</sup>

As part of its national Logistics Strategy, Ethiopia has enacted six key strategies to address logistics issues over the next decade. This includes strengthening logistics sector policy and legal framework, establishing an efficient and reliable customs and transit system, developing the role of logistics facilitator by establishing a reliable business and financial system, construction of logistics infrastructure and institutional capacity of regulatory agencies, capacity building of human resources and effective organization.<sup>67</sup> Generally, the policy seems to incorporate important elements in the industry of shipping based on the resources and countries' current setup.

## **2.4 The Relationships between UN and WTO on Maritime Transport Service.**

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<sup>64</sup> J. Steele et al, eds, 'Encyclopedia of Marine Science, Academic Press', 2001, pp. 2768-76.

<sup>65</sup> Ibid

<sup>66</sup> < [https://www.unescap.org/sites/default/files/Pub\\_1988\\_Ch3.pdf](https://www.unescap.org/sites/default/files/Pub_1988_Ch3.pdf)> accessed on December 05/2020.

<sup>67</sup> Ethiopian Shipping and Logistics Service Enterprise Ten Years (2013-2022) strategic plan June 2012.

Traditionally, the harmonization of the maritime transport regimes has been negotiated under the UN, but the UN framework has demonstrated shortcomings in fulfilling this task.

#### **2.4.1 The UN Legal Frameworks on International Carriages of Goods by Sea.**

##### **A. The Hague Rules<sup>68</sup> and Hague Visby Rules<sup>69</sup>**

For decades, sea carriers, taking advantage of their superior bargaining power, insisted on the inclusion of clauses into the contract of carriages that exempt them even from their basic common law liability.<sup>70</sup> Prior to 1924, there were different maritime laws in each country and these divergent laws resulted in different terms of bill of lading which exempted the carrier from liability. The rights and responsibilities of the carrier and cargo owner were different in each country.<sup>71</sup> One of the main objectives of The Hague rules and its amendment was to attempt to regulate and unify rules regulating carriage of goods by sea under the bill of lading contract.

The Hague and Hague-Visby rules require the carrier to exercise due diligence to make the ship seaworthy before it commences its journey.<sup>72</sup> Under these rules, the carrier must take good care to look after the cargo from the time it is entrusted to him until the time that it is delivered to the receiver. To achieve this objective, there should be

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<sup>68</sup> Ibid (n12)

<sup>69</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, (1968), 1412 U.N.T.S.121 [hereinafter Visby Rules]

<sup>70</sup>In common law countries, carriers are liable for any damage or loss to goods in their possession as carriers, unless they can demonstrate that the damage or loss is due to certain excepted causes. The excepted causes of common law include acts of God, acts of enemies of the crown, fault of the shipper, inherent vices of the goods, and fraud of the shipper < <https://www.britannica.com/topic/carriage-of-goods/Liability-for-safety-of-the-goods> >accessed on April 25, 2021.

<sup>71</sup>T.K.Thommen, 'Carriage of Goods by Sea; The Hague rules and Hamburg rules' (1990) V 32 Journal of the Indian Institute < <https://www.jstor.org/stable/43952305?seq=1> >accessed on April 25, 2021.

<sup>72</sup>See Article 2 and 3 of the Hague and Visby Rules respectively.

common international laws which govern the relationship of parties involved in different states.

### **B. Hamburg Rules**<sup>73</sup>

The Hamburg Rules constitute a new Convention on Maritime transport agreed under the auspices of the United Nations at a conference. The rules were devised with the intention that they should supersede the 1924 Hague Rules together with the 1968 Visby amendments.<sup>74</sup> The Hamburg Rules have been strongly opposed by ship owning interests, fearing that it would tend to increase the carrier's liability.<sup>75</sup> They have been equally and strongly supported by shipper interests who believe they set a fairer balance between the responsibilities of carrier and shipper. As of March 2021, the convention had been ratified by 35 countries.<sup>76</sup> The Hamburg Rules came into force internationally on 1st November 1992 as per article 30 (1) of the convention.<sup>77</sup> But, the influence of the convention is lower because it is not ratified by the powerful ship-owning states.

### **C. Rotterdam Rules**<sup>78</sup>

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<sup>73</sup> United Nation Convention on the Carriage of Goods by Sea, March 31, 1978, 1695 U.N.T.S. 3 (hereinafter Hamburg Rules).

<sup>74</sup> Ms Anomi Wanigasekera ,Comparison of Hague-Visby and Hamburg rules, Attorney-at-Law, <<http://www.juliusandcreasy.com/images/pdf/comparison-of-hague-and-hamburg-AW.pdf>> accessed on April 20/2021.

<sup>75</sup> Liability limits for loss or damaged goods under the Hague Visby Rules are 666.67 SDRs per package or 2 SDRs per kilogram, whichever is greater (article 4 (5) (a)), whereas the Hamburg Rules are 835 SDRs per package or 2.5 SDRs per kilogram, whichever is greater.(article 6(1)(a).

<sup>76</sup> The powerful and strong ship owning states (Greek, USA English, China, India etc.) have not yet ratified this convention. Because of this, the convention was unable to achieve its purpose<<http://www.jus.uio.no/lm/un.sea.carriage.hamburg.rules.1978/doc.html>> accessed on December 10/2020.

<sup>77</sup>< <https://www.gard.no/web/updates/content/52406/hamburg-rules-come-into-force-in-egypt> > accessed on April 25, 2021.

<sup>78</sup> United Nation Convention on Contracts for the International Carriage of Goods wholly or partly by sea, G.A. Res. 63/122, U.N. Doc. A/RES/63/122 (Dec.11,2008) [hereinafter Rotterdam Rules].

This new Convention, to be known as the Rotterdam Rules, provides mandatory standards of liability for loss or damage arising from the international carriage of goods by sea and is intended to provide a modern successor to earlier international conventions in the field, namely the so-called Hague Rules 1924, the Hague-Visby Rules, 1968 and the Hamburg Rules 1978. In contrast to these conventions currently in force, however, the Rotterdam Rules also apply to multimodal transport involving an international sea-leg and deal with a range of issues not presently subject to mandatory international law.<sup>79</sup>

The current legal regime governing the international carriage of goods by sea is characterized by complexity and a lack of uniformity. Currently, three separate international treaties govern international maritime transport.<sup>80</sup>

Taking into account these and other concerns and obstacles, the maritime industry and the governments decided to make new efforts in order to achieve international legal harmonization.<sup>81</sup> But the Rotterdam treaty has been signed by 25 countries, and so far only 4 countries (Cameroon, Congo, Spain and Togo) have subsequently ratified the treaty.<sup>82</sup>

Even though the UN endeavors to foster a uniform legal regime by drafting the above maritime laws, until now the efforts to create uniform maritime laws applicable throughout the world have not been realized. Because of this, the negotiation of maritime transport under the GATS has become important.

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<sup>79</sup> < <https://unctad.org/topic/transport-and-trade-logistics/policy-and-legislation/rotterdam-rules> > accessed on May 14, 2021

<sup>80</sup> Marin Jasenko, Dr. Sc, 'The Rotterdam rules an Overview of their key provisions' Associate Professor, University of Zagreb Faculty of Law. Hague Rules, The Hague-Visby Rules, and The Hamburg Rules are applicable with different coverage.

<sup>81</sup> UNCITRAL decided to commence work on this project and, in 2001, established a Working Group on Transport Law to carry out this task. And come up with Rotterdam's rule.

<sup>82</sup> Until now, the convention did not enter into force as per article 94 (1) of the convention.

<[https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam\\_rules/status](https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status) > accessed on May 12, 2021

Moreover, unlike the WTO, which has a Dispute Settlement Body, the UN system of enforcement does not have the administrative framework at the international level to safeguard the application of these seaborne cargo conventions.<sup>83</sup>

The UNCTAD and IMO are UN Specialized agencies handling shipping issues. These agencies have published statistical data on the shipping industry for years and these are important sources of information for further GATS based Maritime transport negotiations. For example, UNCTAD has published "The Review of Maritime Transport" yearly since 1968.<sup>84</sup> The IMO deals with various aspects of shipping. For example, seamen, the international sea cargo regime, and international sale of goods are basic ones. Because of this, the WTO possesses an advantage over other forums in reinforcing harmonization of shipping regimes. Most WTO agreements (including the GATS) are multilateral and legally binding for all members.<sup>85</sup> However, UNCITRAL administered conventions can be considered plurilateral agreements because they are optionally applicable to UNCITRAL negotiating countries on a voluntary basis and are only binding for those members who ratify the treaties.<sup>86</sup> Thus, a WTO based maritime transport regime is legally binding and likely to be applicable to all WTO Members. Due to this nature, all WTO agreements being a single package, both substantive norms within the GATS and its procedural enforcement system will apply to all members.<sup>87</sup>

Both the UN and the WTO aim at the harmonization of the maritime transport regime, but each does so with different focuses. The UN stresses the unification of the carriage of

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<sup>83</sup> Pascal Lamy, 'The Place of the WTO and its Law in the International Legal Order' (2006) European Journal of International Law, Volume 17, Issue 5 <<https://academic.oup.com/ejil/article/17/5/969/2756295>> accessed on December 9/2020.

<sup>84</sup> Ibid (n 1) 66

<sup>85</sup> John H. Jackson, 'The World trading system Law and Policy of International Economic Relations' (1990) Volume 14, Issue 1 Fordham International Law Journal p 47-48). <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1269&context=ilj> accessed May 12, 2021.

<sup>86</sup> It is a treaty between a limited numbers of states with a particular interest in the subject of the treaty. The primary difference between a plurilateral treaty and other multilateral treaties is that the availability of reservations is more limited under a plurilateral treaty.

<sup>87</sup> Ibid (n 1) 71.

sea cargo regime.<sup>88</sup> While the WTO emphasizes members' deeper commitment to existing sectors to achieve further liberalization. Meanwhile, the WTO does not intervene in its members' regulatory autonomy over quality control of services supplied and the standardization of service regulation worldwide.<sup>89</sup> Both the WTO and the UN try to adjust diverse levels of domestic regulations to universal levels set by them.<sup>90</sup> The UN's unification and the WTO's harmonization are both targeted towards global application and the level of standardization affects whether the scope of application could become global or not. Therefore, the harmonization of the UN and of the WTO faces a question of which levels of standardization should be imposed on the UN's unification and the WTO's liberalization.<sup>91</sup>

## **2.4.2 The Inclusion of Maritime Transport Services into the WTO Agreement.**

### **A. Maritime Services Negotiation under the Uruguay Round MTN**

The Services sectors were officially included in the multilateral negotiations of the world trading system for the first time during the Uruguay Round negotiations.<sup>92</sup> At the Uruguay Round, the shipping industry strongly resisted the world trading system covering transport services. For instance, US shipping interests asserted that the inclusion of maritime transport services into the world trading system would be more harmful than beneficial.<sup>93</sup>

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<sup>88</sup> For example, under UN law, The Hague Rules, as the name implies, aim at the Unification of Certain Rules of Law Relating to Bills of Lading.

<sup>89</sup> Marion Panizzon, Nicole Pohl and Pierre Sauvé, 'GATS and the Regulation of International Trade in Services' Cambridge University Press; 1st edition (2008) <<https://www.cambridge.org/core/books/gats-and-the-regulation-of-international-trade-in-services/9C64C5DE80A37A34EA241B805C606E3C> > Accessed on December 12/2020.

<sup>90</sup> Ibid

<sup>91</sup> Lamy (n83)

<sup>92</sup> Bernard Ascher, Multilateral Negotiations on Trade in Services: Concepts, Goals, Issues(1989), Georgian Journal of international law and comparative law 392.<<https://digitalcommons.law.uga.edu/gjicl/vol19/iss2/20>> accessed on May 13, 2021.

<sup>93</sup> Parameswaran (n36) 271.

The first progress in maritime transport negotiations is the introduction of the dual approach. This approach was introduced by a Group for Negotiations on Services (GNS) meeting in 1990. Under this approach, sea transport negotiations were held at dual levels, being discussed in a general negotiation forum with all other service sectors at one level, and a specific sectoral/sectional maritime transport negotiation forum at another level.<sup>94</sup> According to the forms of supply, maritime transport services are divided into four modes.<sup>95</sup> This classification helps participants to give their comparable offer, and it also assists in saving the negotiating time. Although the inclusion of maritime transport into the world trading system was agreed upon after the introduction of the dual level approach, one area where there is a lack of progress under the Uruguay Round.<sup>96</sup> The draft Annex on Maritime Transport Services was not accepted in order to become binding on members.<sup>97</sup> However, maritime transport became the unique sector that was drafted in an annex but not adopted, due to the lack of the generally admitted levels of harmonization in members' commitments.<sup>98</sup> In particular, both the United States and the European Union withdrew their offers in the end.<sup>99</sup>

Conversely, the United States and the European Community had not given up maritime transport negotiations, rather agreed to settle their differences by launching bilateral negotiations on controversial service sectors after the conclusion of the Uruguay Round.<sup>100</sup>

## **B. Maritime Transport Service Negotiation under Doha Round of MTN**

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<sup>94</sup> Ibid

<sup>95</sup> See GATS article (2) Mode 1: cross-border supply (e.g., international freight and passenger shipping), Mode 2: broad consumption (e.g., vessel repair), Mode 3: overseas commercial presence, and Mode 4: supply of transportation-related services through natural persons' presence.

<sup>96</sup> Zhao (n1) 97

<sup>97</sup> See GATS Annex on Negotiations on Maritime Transport Services article 3.

<sup>98</sup> Uruguay Round Negotiations Trade Negotiations Committee, Draft Final Act Embodying the Result of Uruguay Round of MTN Revision, MTN.TNC/W/35/Rev.1, (Dec.3, 1990), <[https://www.wto.org/gatt\\_docs/English/SULPDF/92130093.pdf](https://www.wto.org/gatt_docs/English/SULPDF/92130093.pdf)> accessed on April 26, 2021.

<sup>99</sup> Zhao (n1) 98.

<sup>100</sup> Zhao (n1) 98.

After the Uruguay round of negotiation, a new trade round was finally agreed upon during the Fourth WTO Ministerial held in Doha, Qatar, in November 2001 and the Ministerial Declaration adopted on 14 November 2001 Doha Declaration.<sup>101</sup>

*"In October 2000, the EC and their Member States, Hong Kong, Japan, Korea, Norway, and Singapore circulated a joint statement which was the first formal document in the new service negotiations dealing specifically with maritime transport. It called for solutions that would offer meaningful progress for multilateral liberalization in the maritime transport sector, and announced the willingness of its sponsoring countries to real and meaningful liberalization and commitments in shipping during the course of the negotiations."*<sup>102</sup>

Despite the fact that the maritime transport sector is comparatively liberal, there are still significant barriers to trade and investment in maritime transport services in the economies of many Member States, including, inter alia, various restrictions on the commercial presence and access to international maritime transport services.<sup>103</sup> The proposals also coincide in that the aim of the negotiations shall be to eliminate or reduce these impediments and to work towards a maritime transport system based essentially on the principle of free and fair competition between shipping companies of all member States with only minimal governmental interference and regulation to reduce inefficiencies, expand business opportunities in international maritime transport and benefit consumers of shipping services through lower transport costs.<sup>104</sup>

The Doha round of maritime negotiation has attained some important achievements. Among others, EC offered its initial requests for improved market access in services to 109 other WTO Members in early July 2002, including free access to cargoes, free choice among shippers and providers, and non-discriminatory practices for use of and access to

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<sup>101</sup> Parameswaran (n36) 315.

<sup>102</sup> Ibid 315

<sup>103</sup> Ibid 28

<sup>104</sup> Ibid 312

scarce infrastructures.<sup>105</sup> But the USA is refusing to bind itself to make any specific commitments in the maritime sector.<sup>106</sup>

## **2.5 Scope of Maritime Transport Services and Modes of supply.**

GATS Article I (3) (b) leaves no doubt that the scope of the agreement is very wide covering any service in any sector except services supplied in the exercise of governmental authority.<sup>107</sup>

The GATS define trade in services as the supply of services through four different modes which include;

### **2.5.1 Cross-Border Supply (Mode 1)**

It refers to transactions where only the service itself crosses the border without the movement of the service receiver or of factors of production. The transaction is executed without the physical proximity of service provider and receiver. Examples of across-the-border service apply to this sector because the ship is servicing the import and export cargo without crossing the border. An Ethiopian ship carries export cargo from Ethiopia to any place of world part, but the ships did not cross the border of importing state rather up to the border.

### **2.5.2 Consumption Abroad (Mode 2)**

It is the supply of a service in the territory of one Member to the service consumer of any other Member. A good example would be the repair of a vessel in a foreign port, Dry

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<sup>105</sup> Ibid 317

<sup>106</sup> < [https://www.everysreport.com/reports/RL33085.html#\\_Toc287544634](https://www.everysreport.com/reports/RL33085.html#_Toc287544634)> accessed on May 14, 2021.

<sup>107</sup> See GATS article I (3) (c) which clarifies that a service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers. Classic examples would be central banking or social security.

dock<sup>108</sup> service for the ships. In such a case, the ships cross to the border of another state, usually the shipyard state or holder of the dry dock.

### **2.5.3 Commercial presences (Mode3)**

It is the supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member. Since the requirement of physical proximity between the service provider and consumer is essential for many services, this mode of supply is of great significance for the efficiency of the GATS in many sectors but is at the same time highly complex as it involves sensitive domestic policy instruments, such as subsidies, technical standards, and the like generally implies competition for local companies.

Ship owning companies are not really interested in establishing their company abroad because they have the option of registering the ships in another country, in order to cut costs and increase profits. The shipping companies are only interested in picking up cargo and not establishing their shipping company in another country. Whichever tramp ship is quoting less freight gets the cargo to be transported.<sup>109</sup>

### **2.5.4 Presence of Natural Persons (Mode 4)**

It refers to transactions where nationals of one country go to another member country to provide their services there, either as in connection with Mode 3 as a staff member of a foreign supplier's office or as such, where the service supplier temporarily travels to the country of the consumer, for instance in the case of consultants. It could be applied to the ship's crew. Ships' crews are natural people who serve the ship and its cargo in various capacities such as Captain, Manager, technicians, stevedore, and so on. The flag of the ship for which the crew is serving could be construed as the country where the crew has

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<sup>108</sup> Dry dock is an area from which the water can be removed in order for ships to be built or repaired or it is an area where, the whole ship is brought to a dry land so that the submerged portions of the hull can be cleaned or inspected. <<https://dictionary.cambridge.org/dictionary/english/dry-dock> > accessed on February 10/2020

<sup>109</sup> Selvi (n21) 162

gone to supply their services. The crews also provide services to the cargo on behalf of the ship.

## 2.6 The Major Trade Barriers to International Shipping Services.

The maritime transport sector has traditionally been one of the most liberal of all service sectors.<sup>110</sup> The international law of the sea and particularly, the regime of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) ensure that merchant vessels are generally free to navigate through the majority of maritime zones as has been described in UNCLOS Article 87 (1). The freedom of navigation is the oldest and traditionally assumes the highest significance with regard to merchant shipping services and international trade.<sup>111</sup>

The freedom of navigation primarily implies freedom of movement of vessels on the high seas. It means that everyone is entitled to enter the oceans and to pass there unhindered by efforts of other states or entities to prohibit that use or to subject it to regulations unsupported by a general consensus among states. Freedom of navigation is the right to free access to and from the oceans and no one is authorized to exclude anyone else from shared enjoyment.<sup>112</sup> No state may make and apply the law to the ships of other states.<sup>113</sup>

Every ship sails there with the unquestionable right to pursue her own lawful business without interruption, but, whatever may be that business is, she is bound to pursue it in such a manner as not to violate the rights of others. According to this broader economic interpretation, freedom of the seas includes a general right to enter foreign ports without

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<sup>110</sup> OECD workshop on maritime transport EU views on international maritime relations Paper submitted by the European Commission DG TREN Paris, 8-9 January 2003 DSTI/DOT/MTC(2003)12 <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/DOT/MTC\(2003\)12&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/DOT/MTC(2003)12&docLanguage=En)> Accessed on January 25/2021.

<sup>111</sup> Parameswaran (n36) 82

<sup>112</sup> See Article 125 and 127 of the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>113</sup> Naval War College (U.S.), 'The role of international law and Evolving Ocean' (1980) (Richard B. Lillich, John Norton Moore ( editor)) Naval War College Press, 1980.

restriction or hindrance, as well as a right to engage in free trade in maritime transport services on an equitable basis, free of interference in commercial operations by others, particularly foreign governments.<sup>114</sup> Despite this international principle, there are some major restrictive practices that include.

### **2.6.1 Cargo Sharing Arrangements**

Cargo sharing agreements <sup>115</sup> are used by a number of states as a protectionist mechanism to promote, protect, and defend their national merchant marines by ensuring an automatic supply of cargoes, thereby creating demand for domestic flag carriers. These activities clearly contradict the GATS specific obligation for member states and significantly restrict free trade in maritime transport services through different means;

#### **A. Bilateral and Regional Cargo Sharing Arrangements**

It plays an important role in the trade activities among countries, and it is the means by which a state restricts free maritime trade activities. Bilateral agreements restrict the supply of shipping services and the allocation of cargo and seek to divide the shipping market between two countries on some agreed basis. In the event of a split between the national lines of the bilateral partners that does not give any entitlement to a portion of the trade to carriers of other nations (so-called cross traders), the latter is completely excluded from the trade between the contracting states.<sup>116</sup>

Cargo Sharing Agreements (CSAs) are a very particular form of preference that are granted in transport, and especially in international shipping. These agreements establish a system of cargo reservation between two partners based on shares of bilateral or

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<sup>114</sup> Selvi(22) 170.

<sup>115</sup> It includes activities such as restricted access to government and strategic cargo, restricted Cabot age markets, cargo reservation schemes, mandated CIF/FOB contracts, and various forms of government support such as subsidies, loans or guarantees.

<sup>116</sup> Parameswaran (n36) 83.

international trade transported by sea. CSAs are a purely protectionist measure that excludes third countries from the market and contradicts the GATS MFN principle.<sup>117</sup>

## **B. The UN Code of Conduct for Liner Conferences<sup>118</sup>**

Under Article 2 of the Liner Code, the national lines of the two bilaterally trading states involved are granted the right to specify the amount of conference cargo that can be carried by shipping lines of the state of origin, the state of destination, and third-country shipping lines, the most common though not mandated ratio being 40/40/20. Because the Code only applies to conference cargo and not to liner cargo in general, it is unlikely to exclude all participation, but it can certainly limit market access and cargo access, particularly if carriers are refused entry to conferences that operate on routes where the Code is in effect.<sup>119</sup>

### **2.6.2 National Preferences**

There are various forms of national preferences that favor the domestic fleet to the detriment of foreign service providers and equally aim at maintaining the structure, size, and status of the respective country's national merchant fleet or at expanding it to the size and structure desired or required by the needs of the national economy.

#### **A. Restrictive Access to Government and/or Strategic Cargoes**

It has become common for governments around the world to rigorously restrict the carriage of so-called government and/or strategic cargoes to their own fleets as a means

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<sup>117</sup> Fabien Bertho, 'Preferential Agreements in Maritime Transport the current and the outdated Working Paper' June 2010 < [https://ecipe.org/wp-content/uploads/2014/12/Bertho\\_PrefAinMaritime.pdf](https://ecipe.org/wp-content/uploads/2014/12/Bertho_PrefAinMaritime.pdf)> accessed on May 23, 2021.

<sup>118</sup> UN Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, Held at Geneva from November 12 to December 15 1973 (first part) and from 11 March to 6 April 1974 (second part).IBID 52

<sup>119</sup> Parameswaran (n36) 59.

of strengthening national security and maintaining the transport capability and capacity of their fleet.<sup>120</sup>

But what constitutes a government and strategic cargo rises to high questions and disagreement. However, it primarily refers to military and defense equipment. However, the majority of governments define government and strategic very broadly, including not only household items and peacetime food supplies for armed forces, but any cargo that is somehow related to national security.

### **B. Cabot age<sup>121</sup>**

Almost every country with a coastline has legislation that either completely prohibits or severely restricts foreign participation in what is known as the maritime cabot age.<sup>122</sup> Thus, cabotage restrictions effectively bar foreigners from entering that market and represent discriminatory protectionist practices based on nationality that favor domestic maritime service providers over foreign maritime service providers. This will disturb shipping transport and free competition in the market.<sup>123</sup>

### **C. Cargo Reservation**

States around the world have applied cargo reservation schemes, i.e. legislation attributing a certain (often significant) fraction of the maritime trade of a state to that state's national fleet, for many decades as a means of promoting and developing their national fleet.

Where cargo reservation laws exist, they generally do not entirely exclude market access by foreign maritime transport service providers.<sup>124</sup> However, they have the potential to

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<sup>120</sup> Ibid

<sup>121</sup> A restriction of the operation of sea, air, or other transport services within or into a particular country to that country's own transport services.<<https://www.merriam-webster.com/dictionary/cabotage>> accessed on February 15/2020.

<sup>122</sup> Parameswaran (n36) 60.

<sup>123</sup><<https://www.aopa.org/travel/international-travel/cabotage>> accessed on April 26, 2021.

<sup>124</sup> Parameswaran (n36)62.

lock up sometimes significant proportions of the trade of a country create substantial operational obstacles and can be very disruptive. Because of a lack of transportation capacity in many developing countries, reserved cargoes are simply sold to the highest bidder, which is just as disruptive and incurs inefficiencies and significant costs.<sup>125</sup>

### 2.6.3 Limitations on Local Presence and Investment.

The majority of international sea transport services can be provided across-the border without the necessity of establishing a commercial presence. However, today's globalized trading reality, the increasing complexity of supply chains, and the increasing importance of multimodal transport (i.e. services involving more than one mode of transport), which frequently necessitates the establishment of local offices to control both water and land-based activities, have increased the importance of foreign transport operators' ability to establish local subsidiaries.<sup>126</sup>

However, the legislation of the majority of countries makes it difficult for foreign transport operators to establish a local presence. These restrictions are generally horizontal and apply to all foreign participation, regardless of the economic sector, and often take the form of administrative hurdles of varying complexity which ultimately lead foreign service providers to abandon the establishment of a subsidiary and use local operators instead.<sup>127</sup>

### 7.2.4 Other Impediments.

Governments around the world support their maritime transport service providers through a large variety of practices, ranging from cash subsidies and direct loans and covering of losses that may give these fleets a competitive advantage vis-a-vis foreign operators.<sup>128</sup>

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<sup>125</sup> <<https://www.financialexpress.com/archive/govt-rules-out-policy-for-cargo-reservation/446136/>> accessed on April 26, 2021.

<sup>126</sup> Parameswaran (n36)62.

<sup>127</sup> Ibid

<sup>128</sup> Hans Jürgen Peters, 'Sea trade, Logistics, and Transport' (Policy & research series; 6) ISBN 0-8213-1364-9 <<https://documents1.worldbank.org/curated/en/642271468739550200/pdf/multi-page.pdf>> accessed on May 23, 2021.

Most maritime nations let their national fleet operators benefit from various forms of preferential tax treatment, which range from exempting income derived from international activities from taxes and social contributions to the granting of partial or total exemptions on the income of investors in national flag vessels.<sup>129</sup>

Discriminatory treatment of foreign maritime service providers with respect to maritime auxiliary<sup>130</sup> and port services may significantly reduce their efficiency and their competitiveness in the market

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<sup>129</sup> Parameswaran (n36)62.

<sup>130</sup> Maritime Cargo Handling Services, Customs Clearance Services, Container Station and Depot Services, Maritime Agency Service Maritime Freight Forwarding Services etc. On Alternative Classifications of Maritime Transport Services: WTO RSTRICED S/C/W/6216 November 1998 (98-4578)

## Chapter Three

### Ethiopian Legal Regime on International Maritime Transport Services and GATS Agreement

#### 3.1 Introduction

A maritime transport service plays a crucial role in the development of the Ethiopian economy. The national import data shows that the cargo imported to the country is increasing from time to time, both in volume and value. The share of cargo transported by sea, for instance, increased from 6,264,168 tons in 2004 Ethiopian Fiscal Year (EFY) to 16,057,400 tons in 2012 EFY which is five folds as compared to that of 2004 EFY.<sup>131</sup> Similarly, Ethiopia's seaborne export cargo volume increased slightly from 1,205,502 tons in 2004 EFY to 1,348,699 tons in 2012 EFY. However, the volume of export cargo transported by ESLSE has decreased to 374 tons in 2012 EFY from 492 tons in 2004 EFY which shows that ESLSE's share is still insignificant.<sup>132</sup> This is due to the fact that export customers are not required to employ national shipping, and export products are sold CIF, meaning the buyer arranges and selects the carrier.

Generally, the importance of the shipping and logistics sector to the national economy and the development of other sectors is indisputable and in some cases indispensable.

Ethiopia is a landlocked country that shares borders with Eritrea to the north, Somalia to the east, Kenya to the south, South Sudan to the west, and Sudan to the north. For the past three decades, Ethiopian foreign trades have principally used Djibouti's port. Ethiopia's location in the Horn of Africa has direct implications for the safety of all Red Sea seaports as well as the national security of the Arabian Gulf, and it must be viewed as a test balloon for the regional and

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<sup>131</sup> Ethiopian Shipping and Logistics Service Enterprise statics bulletin 2012Bulletin, (Ethiopian FISCAL Year Series, 2012 E.C).

<sup>132</sup>Ibid 11-12

international power struggle.<sup>133</sup> The East African region is economically important since it is the source of the Nile and a gateway to the Red Sea and the Gulf of Aden.<sup>134</sup>

Ethiopia, on the other hand, with a population of over 112 million people (2019)<sup>135</sup>, is Africa's second most populous country after Nigeria and is strongly reliant on imported commodities, therefore it requires other port paths to defend its residents' interests.<sup>136</sup> Ethiopia is scheduled to resume utilizing the Eritrean ports of Asseb for its international trade as a result of such interest and the end of hostilities with Eritrea.<sup>137</sup> Ethiopia currently has 11 merchant shipping fleets. Two of the ships are tankers.<sup>138</sup> The national shipping line (ESLSE) offers a variety of services in addition to international shipping, includes cargo handling, shore handling, freight forwarding, dry port service, customs clearance, and maritime personnel training at Babugaya Maritime Institute.<sup>139</sup>

Despite the fact that the national marine transport sector has existed for more than half a century, the international market's development and ability for competition is still in its infancy. The sector benefits from many government initiatives, including the FOB mandate, which requires all

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<sup>133</sup>Khattar Abou Diab, 'The strategic importance of the Horn of Africa contrasts sharply with its tragic economic conditions' *The Arab weekly* (London, August 5/2018) < <https://theArabweekly.com/strategic-turning-point-horn-africa> > accessed on 27April 2021.

<sup>134</sup> Abou Diab(n 133) 7.

<sup>135</sup> The World Bank in Ethiopia < <https://www.worldbank.org/en/country/ethiopia/overview> >accessed on 27April 2021.

<sup>136</sup> Ibid (n 131) 10. Ethiopian Import Goods, Petroleum products, industrial equipment and machinery, agricultural and industrial chemicals, hybrid seeds, fertilizers, durable and semi-durable consumer goods, and so on are all included.

<sup>137</sup> Ethiopian News Agency<<http://www.madote.com/2018/07/ethiopia-will-soon-start-using-eritreas.html>> accessed on 26 April 2021.

<sup>138</sup> Ethiopian Shipping and Logistics Service Enterprise Technical Department data on April 26, 2021.(Nine multipurpose ships: M/V shebele, Gibe,Assosa, Harer,Finfine Gambela Jijiga Mekelle,Semera with total DWT of 246,185 and Two Tanker M/VBahirdar and Hawassa with total DWT 83,000).

<sup>139</sup> See Article 5(1) of Ethiopian Shipping and Logistics Services Establishment Council of Ministers Regulation No 255/2011 Fed. Neg. Gaz 18<sup>th</sup> Year No 3.

imported goods to be delivered by a national shipping line and income tax exemptions. Ethiopia is the only African country with its own national carrier owing to the government's policy.<sup>140</sup>

In this chapter, I will examine the existing national laws on shipping sectors, their compatibility with GATS agreement, and the possibilities and implications of liberalizing the shipping service sector, as Ethiopia is currently negotiating for WTO accession and the shipping sector has been under the full monopoly of the government.

### **3.2 The Ethiopian Marine Sector Legal Framework and GATS obligation**

#### **3.2.1 The Federal Democratic Republic of Ethiopia (FDRE) Constitution.**

The Constitution is the supreme law of the land, according to Article 9 (1) of the FDRE Constitution.<sup>141</sup> Any statute, customary practice, or decision of a governmental organ or public authority that is in violation of this Constitution is null and void. Furthermore, all foreign agreements ratified by Ethiopia are part of the law of the land, pursuant to article 9 (4).

Furthermore, Ethiopian foreign relations must be based on the safeguarding of national interests and respect for the country's sovereignty, mutual interests and equality of states, as well as international accords, according to Article 86 of the constitution. As a result, our shipping service sector's negotiations must take these fundamental principles of the constitution into account.

#### **3.2.2 The Maritime Administration Proclamation**

The Ethiopian Maritime Affairs Authority now regulates the maritime sector.<sup>142</sup> The authority is in charge of overseeing all elements of maritime transportation. It basically ensures that the country's transportation operations and movement of goods for import and export are cost-effective; it plans, coordinates, and enforces such operations; it reduces the transit time of goods import and export; it promotes and develops multimodal transportation; and it ensures the

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<sup>140</sup> Ethiopian shipping and logistics service enterprise Newsletter vol.4 no74 April 2021.

<sup>141</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Fed.Neg.Gaz 1<sup>th</sup> Year No.1.

<sup>142</sup>ibid (n28)

availability of a continuous resource of skilled manpower in the maritime sector for the country.<sup>143</sup>

The Maritime Sector Administration Proclamation<sup>144</sup> addresses two critical challenges in international maritime transportation. To begin with, according to article 14, "No person shall operate a multimodal or marine transport service, or purchase, sell, import, export, or use a marine transport service vessel, or be employed as a seafarer on board any marine transport vessel, unless he has obtained an authorization granted by the Authority"<sup>145</sup> This article prohibits the operation of a maritime transport service without first obtaining a permit or license from the authorities. There is no problem with the licensee's needs; the problem is that the Authority has not issued specific requirements for the licensee until the Transport Minister issues the Multimodal Transport operators Commercial Licensing and competency Certification Directive No 802/2021 on June 2021<sup>146</sup>, and so far, only ESLSE has been granted a license to work on international maritime transport services by the authority.<sup>147</sup> Because there was no clear requirement to operate a shipping service, until enactment of the licensing directive the sector was ambiguous and the government had entire monopoly. This could be due to a lack of attention given to the sector or a misunderstanding of the importance of the shipping service industry in the country's overall activities. As a result, the government must pay attention to and resolve current financial, legal, and other issues in order to enhance the sector's capacity, welcome the private sector, and concentrate on regulatory requirements rather than commercial operations.<sup>148</sup> The Licensing Directive, which does not specify whether non-nationals are permitted to participate in international multimodal transportation.<sup>149</sup> It seems only allow joint investment article 1(6).The licensing directive did not take into consideration the new investment

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<sup>143</sup> *ibid* article 5.

<sup>144</sup> *Ibid* (n28)

<sup>145</sup> *ibid* article 14.

<sup>146</sup> Multimodal Transport operators Commercial Licensing and competency Certification Directive No802/2021.herein after called licensing directives.

<sup>147</sup> Ethiopian Maritime Authority records on March 10/2021

<sup>148</sup> Interview with Mr. Dawit Tedela, General Manager ‘Dolphin Transit and Shipping Pvt. Company (Addis Ababa May 6, 2021).

<sup>149</sup>See Article 2(1) of Multi Modal transport of Goods Proclamation No 548/2007 Fed. Neg. Gaz. 13<sup>th</sup>Year NO.59.

rule, which allows foreigners to participate without need to form joint investment. The Authority has to assess the licensing required in compliance with the new investment regulation.<sup>150</sup>

The monopoly service renders the ESLSE service devoid of flexibility and capacity to tackle problems out of the box.<sup>151</sup> Therefore, according to the new investment regulation if the Maritime authority enacted a license law which liberalizes the industry at least for domestic investor will generate flexibility, competition, the best price, and avoid bureaucracy of getting waiver from ESLSE. Other shipping lines aid their customers beyond the conveyance of products in the event that issues such as bill amendments, marketing efforts, and so on emerge after shipment.<sup>152</sup> Because such services are not wisely offered in ESLSE, that the enactment of the new licensing directive which allow the private sector to participate have an important role in strengthening the shipping service sector.<sup>153</sup>

Article III of the GATS contains a general obligation on each Member to publish all relevant general-application measures that pertain to or affect the GATS' operation as soon as possible. Members must notify the Council for Trade in Services promptly, or at least once a year, of any new or changed laws, regulations, or administrative guidelines that have a major impact on trade in services covered by the Agreement's specific commitments. Ethiopian SSS laws in this respect are not clearly specified in order for the member states to appreciate the limitations in the sector. In this way, Ethiopia must seek to guarantee that all of its maritime regulations are clearly disclosed or publicly accessible in order to accept pre-requests to participate in international maritime transportation.

Furthermore, the Maritime Code's nationality and head office requirements are substantial uncertain blocks.<sup>154</sup> This provision forbids the provision of services under Mode 3, which

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<sup>150</sup> Ibid (n4)

<sup>151</sup> Interview with, Mr.Mitiku Amanuel, Marine and Aviation Insurance Officer' Ethiopian insurance Corporation' (Addis Ababa May 29, 2021).

<sup>152</sup> Interview with Mr. Daniel Girmaiy General Manager, Ashenda Import export (Addis Ababa May 6, 2021)

<sup>153</sup> Ibid ;Ibid 146

<sup>154</sup> See Article 6 (1,2) of the Licensing Directive; The Maritime Code proclamation, 1960 (hereinafter referred to as the Code) The Maritime Code under article 4 Nationality of Ethiopian ships is only granted to Ethiopian subjects,

necessitates the establishment of commercial foreign fleets.<sup>155</sup> GATS recognizes that service providers often need to create a commercial presence abroad in order to maintain closer touch with customers at various phases of manufacturing, distribution, marketing, sale, and delivery, as well as after-sales service.<sup>156</sup> The Ethiopian Maritime code and Multimodal Transport of Goods Proclamation<sup>157</sup> does not allow establishment of office with commercial presence for the operation of shipping activities. As a result, Ethiopia must either change its existing shipping legislation to comply with the GATS requirement of commercial presence, or limit commercial presence while negotiating on the maritime sector. Any requirements for private and foreign investors to participate in the industry must also be clearly established.

The other issues addressed by the proclamation is , “Any income that accrues to the Ethiopian Shipping Lines due to its ownership of vessels engaged in international, marine transport services is exempt from any tax,” according to Article 13(1) of the proclamation. The mere fact that the income is generated from the operation of own vessels qualifies ESLSE for tax exemption under these rules. If Ethiopia takes a national treatment commitment under the GATS Maritime Negotiation, such privileges for the country's national carrier will not conform with GATS national treatment obligations. One of the core concepts of the GATS is the national treatment obligation, which states that international competitors must be treated equally to nationals in terms of trade treatment. However, it is difficult to analyze and comment on the impact of commitment on these specific tax exemption laws at this time because there is no package of commitments annexed to the GATS agreement made by member countries with regard to maritime transport in general, and the Ethiopian interest has not been expressed. Ethiopia, on the other hand, has the option of limiting its obligations in order to retain the

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bodies corporate established under, and subject to, Ethiopian laws, having the principal place of business in Ethiopia, foreigners domiciled in Ethiopia, and Ethiopian nationals.

<sup>155</sup> Article 1(2)(b) of GATS provision of service by a service supplier of one Member, through commercial presence in the territory of any other Member. If Ethiopia negotiate on maritime sector the existing laws has to clearly indicate what is allowed and not.

<sup>156</sup> Ibid

<sup>157</sup> Multimodal Transport of Goods Proclamation no 548/2007, Fed.Neg.Gaz 13<sup>th</sup> Year No,59.

capacity to implement measures that are incompatible with full market access<sup>158</sup> and/or national treatment.<sup>159</sup>

The GATS notions of MFN (Most Favored Nation) treatment and NT (National Treatment) are particularly important since they imply non-discrimination based on origin, not just of services but also of service providers. Foreign Direct Investment<sup>160</sup> that entails a commercial presence for the supply of services is covered under the GATS. To the extent that WTO members have made NT commitments in their schedules, these commitments apply to tax measures, including tax incentives, unless they are aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other members, as defined in Article XIV of GATS.<sup>161</sup> This implies that direct tax measures would generally be covered by Article XVII. However, according to Article XXII, a Member may not invoke the NT obligation if a measure of another Member falls within the scope of a treaty relating to the avoidance of double taxation. As a result of Articles II, XIV, XVII and XXII, it is generally conceded that direct taxation has, to a considerable extent, been excluded from the GATS disciplines particularly, if there is a double taxation agreement between the Members.<sup>162</sup> Direct tax incentives, particularly profit tax exemptions or reductions, tend to be the most essential kinds of export support in the case of services. Furthermore, members must provide tax incentives to both international and domestic service providers if they have made NT promises in their GATS

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<sup>158</sup>No limitation on the number of service suppliers, the value of service transactions or assets the number of operations or quantity of output, the number of natural persons supplying a service, the type of legal entity or joint venture and on the participation of foreign capital.

<sup>159</sup> National treatment (Article XVII) implies the absence of all discriminatory measures that may modify the conditions of competition to the detriment of foreign services or service suppliers. Again, limitations may be listed to provide cover for inconsistent measures, such as discriminatory subsidies and tax measures, residency requirements, etc.

<sup>160</sup> Ibid (n 3) See Article 6 a negative listing approach employs the opening of all economic sectors to FDI except those that are expressly reserved/restricted by law.

<sup>161</sup> Zena, Abera Tesema 'The Tax Implications of Ethiopian Accession to WTO legal and policy analysis'(Degree of Master of Laws (LL.M.) in Business and Corporate Law Program at the School of Law, Bahir Dar University June 2017).

<sup>162</sup> Ibid 27

schedules.<sup>163</sup> If Ethiopia wants to fulfill its national treatment requirement in this area, it must either change the present tax exemption statute or grant similar treatment, unless it limits its national treatment commitment.

It is important to consider how taxation can be an issue in all of the four modes of supply under the GATS. In mode I (cross border supply of services), as there is no Permanent Establishment and no physical presence, there is no sufficient connection by which countries can impose tax on the non-resident service suppliers. In mode II (consumption abroad), except for indirect taxes, it is also unlikely that there will be any tax-trade issue, as both the Service and the service provider are from one state. In mode III (Commercial presence), where a non-resident service providers set up a Permanent establishment in another WTO member, both MFN and NT with respect to taxation applies. For example concerning MFN, if Ethiopia offers a no-tax treatment to China, a WTO member, it has to offer it to all WTO members as well. With regard to NT, if in sector specific commitment has been undertaken, WTO members have to give the same treatment to other members unless, there is a tax treaty between concerned member states treat indifferent way. Lastly, in mode IV (presence of natural presence), the principles apply contextually which means the Member state cannot discriminate between foraging service supplier and domestic supplier for the sector national treatment has been undertaken.

The tax exemption provided by the above-mentioned proclamation has a substantial impact on ESLSE's performance in the shipping service industry in Ethiopia. Tax relief is one type of assistance given to a sector. As a result, before offering any treatment or altering existing tax privileges, Ethiopian Negotiations on Specific Commitment of NT must take into account the tax benefit given for national carrier's role. The performance of the sectors during the last four years is shown in Table 1.

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<sup>163</sup> Ibid 27-28.

Table 1 *ESLSE, SSS Owen vessel Revenue, Cost & expense from 2008 to 2011 E.C*

<i>Ethiopian Budget Year</i>	<i>Cargo operation income birr(A)</i>	<i>Operational costs in birr and other expense(B)</i>	<i>Net Income/Loss before Tax in birr (c)</i>
2008	1,889,385,565.34	2,217,843,552.38	(328,457,987.04)
2009	1,540,302,452.95	2,150,106,003.47	(609,803,550.52)
2010	1,438,041,687.03	1,957,707,995.26	(519,666,308.23)
2011	1,890,322,435.52	2,367,057,581.53	(476,735,146.01)
<i>Total income/loss</i>			<i>(1,934,662,991.80)</i>

Source ESLSE. <sup>164</sup> Note that this table doesn't show total ESLSE's performance.

As shown in the table above, the financial performance of own vessels on the 2008 E.C reveals that operational and administrative expenses are more than cargo operational income by birr 328,457,987.04, resulting in a deficit for the fiscal year. In 2009, 2010, and 2011 E.C., the loss increased to birr 609,803,550.52, birr 519,666,308.23, and birr 476,735,146.01, respectively. This clearly shows, let alone being profitable and paying tax, the sector exists at the expense of slot service income, freight forwarding, port and terminal service sector performance. This is primarily due to the fact that ESLSE did not have cargo when returning from Djibouti to other ports because our export cargo is limited, and even most of the existing export cargo is not transported by ESLSE. In each of the past four fiscal years, operational expenditures have exceeded revenue.<sup>165</sup> As a result of this, the vessels return with ballast water.<sup>166</sup> Therefore, ESLSE had been compelled to offset its loss by income generated by import operations to cover

<sup>164</sup> Email from Mekuria Ansa Finance and Account Department Director on 20/04/2021.

<sup>165</sup> Interview with Mr. Yared Endale ,Ship Planning Division Manager, Ethiopian Shipping and Logistics Service Enterprise ,(Addis Ababa April 29/2021) the researcher has learned that Ethiopian ships get import cargo only. The ships have fixed cost on both way to Djibouti and from Djibouti to other ports but incomes are earned only on Import cargo. This is because of Ethiopia and horn of Africa doesn't have strong export market.

<sup>166</sup>Ballast water is fresh or saltwater held in the ballast tanks and cargo holds of ships. It is used to provide stability and maneuverability during a voyage when ships are not carrying cargo, not carrying heavy enough cargo, or when more stability is required due to rough seas.< <https://www.invasivespeciesinfo.gov/subject/ballast-water>> accessed on April 28, 2021.

all costs. Secondly, unlike Liner shipping services, ESLSE vessels do not have a fixed time route.<sup>167</sup> For one thing, ships are limited in number and size, making it difficult to provide them in the time required in various ports. Consequently, the existing small export cargo will not wait for a long time until ESLSE's ships are returned. It was shipped by another vessel which arrived first. Thirdly, the fact that ships are small in size is an important factor. Although the operating costs of small ships and those of large ships are nearly identical, their role in generating income differs due to their different carrying capacity.<sup>168</sup> Fourthly, the inefficiency of port service at Djibouti and the untrained work culture of port employees, the type of our vessels which require a long time to discharge and the unavailability of skilled technicians at Djibouti will increase our operational cost.<sup>169</sup> Finally, the way of management of existing capacity also has its own adverse impact on the profitability of the sector, because if ESLSE works strongly to find cargo through different marketing activities and cross trade work, it will increase the profit of the sector.<sup>170</sup>

In general, it is too difficult for the shipping sector to compete with those giant shipping companies due to this and other factors. As a result, with these limitations and indicated financial performance and negotiation on this particular sector, the above-mentioned factors and their effect on the sector must be considered wisely and internally.

### **3.2.3 Ethiopian Investment laws and Shipping Service Sector.**

Over the past few years, substantive issues which call for the revision of the Ethiopian investment legal regime have been identified.<sup>171</sup> The need to modernize the investment regulatory and administrative framework, revisit investment areas open to both domestic and

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<sup>167</sup> Liner shipping is a service that operates within a schedule and has a fixed port rotation with published dates of calls at the advertised ports. A liner service generally fulfills the schedule unless in cases where a call at one of the ports has been unduly delayed due to natural or man-made causes. <<https://www.shippingandfreightresource.com/liner-and-tramp-service/>> Accessed on April 28, 2021.

<sup>168</sup> Ibid (n 161)

<sup>169</sup> Interview with Mr. Zenebe Asefa , Technical Department Director and currently working as Safety Director and Teshale Nuguse , Supper Cargo Officer, Ethiopian Shipping and Logistics Enterprise (Addis Ababa May 6, 2021).

<sup>170</sup> Ibid

<sup>171</sup> <<http://www.unido.or.jp/files/Ethiopia-Investment-Policies-and-Incentives-and-Opportunities.pdf> > accessed on 13/04/2021.

foreign investors, consolidate protracted investment rules, and adapt a transparent investor grievance handling mechanism are among the major factors driving the revision of the investment law.<sup>172</sup> Investments areas open to foreigners are classified as residual list under Article 6 of this regulation.

A foreign investment, according to the new investment law, is any capital expenditure by a foreign investor for the purpose of starting a new firm, or acquiring, expanding, or upgrading an existing one, in any qualified investment region.<sup>173</sup>

The Regulation now provides for a negative list comprising the following three investment areas which are reserved for (i) joint investment with the Government of Ethiopia, (ii) joint investment with domestic investors and (iii) domestic investors only.<sup>174</sup> All sectors and activities not mentioned in the list (other than the prospecting, exploration and development of minerals and petroleum)<sup>175</sup>, which are the subject of specific mining and petroleum legislation) are open to foreign investors.<sup>176</sup>

The regulation under article 4(14) (d) (e) freight transport<sup>177</sup> having more than 25 tones are excluded from domestic investment reservation. Therefore, it can be argued freight transport more than 25 tones are left under the residual article 6 which is open to foreigner. But, this article is ambiguous and it does not clarify which types of transport is it and why<sup>178</sup> the limit of 25 ton is prescribed. The structure of the regulation indicates any investor can engaged in the freight

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<sup>172</sup> See Ibid (n3)

<sup>173</sup> See the Preambles of Ethiopian Investment Proclamation no. 1180/2020, Fed.Neg.Gaz 26<sup>th</sup> Year No. 28.

<sup>174</sup> ibid (n3)See article 3, 4, 5.

<sup>175</sup> ibid (n 173) See article 3.

<sup>176</sup> Anthony Giustini, Nadezhda Varbanov, Tadesse Kiros, Habtamu Hailemeskel |Client Briefing Ethiopia Investment-Regulation1(2021)<<http://www.tadessekiros.com/wp-content/uploads/Client-Briefing-Ethiopia-Investment-Regulation>> accessed on April 14, 2021.

<sup>177</sup>Freight transport is the physical process of transporting commodities and merchandise cargo. It is the transportation of cargo by land, rail, water or air and carriers specialize in one mode, the term shipping originally referred to transport by sea, but is extended in American English to refer to transport by land or air as well. < <https://www.definitions.net/definition/freight+transport> > accessed on April 14, 2021.

<sup>178</sup>The different types of transportation are Road, Railway, Water and Air transport. < <https://www.airtract.com/question/what-are-the-types-of-transportation> > accessed on April 14, 2021

transportation more than 25 tones including sea transport. But, according FDRE Transport Minister Ms Dagmawit Moges Interview with reporter <sup>179</sup> clearly indicates currently the shipping sectors are not profitable due to the number and capacity of our country's fleets and the involvement giant ships with large number of fleet in the world market. The Minster explains that even if the sector is not profitable because of the above mentioned factors the government has decided to keep the sector as it exists for sake of people's interest and sovereign security. Despite this stand of the government official, since the investment law clearly allows foreigners to participate in SSS, there is no problem with regard to existing laws for our negotiations on maritime transport.

Generally, the change in the investment laws is a good shift, but we still need directives which will support the implantation of the regulations. Therefore, the Maritime Authorities have to enact a directive which is compatible with investment regulation.

### **3.2.4The FOB<sup>180</sup> Directive**

The FOB directive is another legal issue in the shipping service.<sup>181</sup> The directive requires all importers, whether government owned or private entities who received LC from commercial banks in Ethiopia or from foreign loans to use the national shipping lines (ESLSE) for import of cargo, unless ESLSE is unable to give the service required and give permit using foreign vessels.<sup>182</sup>

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<sup>179</sup> *Reporter News pepper*, 'Preparing Policy by its Self is not a Goal' (Addis Ababa October 11/2020) 21-23.

<sup>180</sup> FOB is an INCOTERM which empowers the buyer to nominate the marine transporter and the obligation of the seller ends at the time when he places the goods on board the ship nominated by the buyer. If the terms include FOB destination, freight prepaid, the seller retains ownership until delivery, provided there are no insurance claims. In this scenario, the seller is responsible for the freight charges. FOB origin or FOB shipping point, on the other hand, indicates that the buyer takes ownership as soon as the vendor ships the goods. <<https://www.investopedia.com/terms/f/fob.asp>> accessed on April 7/2020.

<sup>181</sup> *Ibid* (n 32)

<sup>182</sup> If an Ethiopian importer uses C&I or CIF for the purchase of goods from a foreign country, the seller determines which carrier or shipping company to transport the good as well as the insurance company which insures the goods.

It is common for countries to use FOB term for import and CIF for export. What distinguishes our case is that the directive requires the selling contract to be FOB Incoterms and the goods to be transported by ESLSE.<sup>183</sup> In addition to the Prime Minister's Office directive, the Ministry of Finance and Economic Development issued a directive explaining that, in addition to the sector's contribution to the country's economy, the national airline and shipping line convey the country's flag, which has a high advertisement value for the country; thus, all importers must act in accordance with FOB directives.<sup>184</sup>

Though, the direct objectives of the directive look to save the hard currency of the country from being paid to foreign shipping companies as freight for imported goods, in effect, it protects ESLSE from international competition. According to the directive, importers must obtain a waiver permit from ESLSE in order to use foreign shipping lines where ESLSE cannot transport due to the reasons specified in the waiver directive.<sup>185</sup> In such a situation, ESLSE informs the banks which give import permits using foreign shipping. All importers who have secured a letter of credit from a commercial bank must use national shipping lines and trade on FOB terms, according to the rule. The country's monopolistic policy has aided ESLSE in gaining market access and resisting external competition.<sup>186</sup> The market share of ESLSE is shown in table 2 below.

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<sup>183</sup> Interview with Mr. Siraj Abedulah, Depute CEO of the Freight Forwarding Service Sector, Ethiopian Shipping and Logistics Enterprise (Addis Ababa April 29 2021).

<sup>184</sup> Ibid (n32);Ibid(n33).There is also a big debate on the Authority of the office of prime minister to issue such directive. As there is no clear legislation which empowers the PM office to enact laws under the FDRE constitution of Ethiopia.

<sup>185</sup> ESLSE has enacted waiver directive no  $\varphi$ ሥክ/003/2005 based on the FOB directive issued by the PM office. Article 3 of the directive lists the main grounds on which ESLSE can grant a waiver permit, including ports that ESLSE or chartered vessels do not access, if the imported goods are less than one 20-foot container, while the existing ships are container carriers, and the request is for break bulk, irregular cargo, goods imported with loans or aid, and a turnkey project for which ESLSE has no schedule. Furthermore, under Article 4, ESLSE can grant a waiver without requiring evidence when the exporter's country's regulations require the sale to be done by C & F or CIF and the good was purchased by Franco valuated and cash against document.

<sup>186</sup> Ibid (n140)

Table (2) the volume of Import Cargo (in'000 Tons) by Sea and ESLSE Share.

<i>EFY</i>	<i>2007</i>	<i>2008</i>	<i>2009</i>	<i>2010</i>	<i>2011</i>	<i>2012</i>
<i>Total Import cargo by sea</i>	<i>10012.408</i>	<i>14093.6</i>	<i>11770.672</i>	<i>12071.661</i>	<i>11216.392</i>	<i>11572.745</i>
<i>Import by ESLSE</i>	<i>3690.335</i>	<i>4966.265</i>	<i>4538.722</i>	<i>4065.569</i>	<i>4,338.44</i>	<i>6689.181</i>
<i>ESLSE Share in %</i>	<i>36.9</i>	<i>35.2</i>	<i>38.6</i>	<i>33.7</i>	<i>38.7</i>	<i>57.8</i>

Source ESLSE<sup>187</sup>

Table 2 shows that from 2007 to 2012 EFY, ESLSE transported only 40.2 percent of all imported commodities by sea on average. International shipping companies handle the remaining 59.2 percent of cargo delivered by sea. Despite the FOB directive's protection, ESLSE does not transport the majority of imported goods. This is owing to ESLSE's inaccessibility on all major commerce routes throughout the world, as well as the fleet's modest capacity in comparison to the countries' required transportation demand for imported commodities.<sup>188</sup>

Even if the major motivation for establishing FOB directive was to save hard currency that would otherwise be paid to foreign shipping companies for the transport of imported cargo by foreign vessels, knowing the proper values of goods acquired for tax purposes is also advantageous.<sup>189</sup>

The government must examine the benefits of preserving hard currency by monopolizing shipping services, on one hand, and its effect on the country's overall business activity on the other hand. I believe that it is preferable to open the shipping business to the private sector in order to increase competition and potentially keep our hard currency. Despite this, some argue the FOB policy of the country, on the other hand, provides significant advantages for the country's insurance market and employment opportunities.<sup>190</sup>

Table 3(Total Imported Cargoes transported by own and slot carries (in'000'tons)

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<sup>187</sup> Ibid (n131)15.

<sup>188</sup> Ibid (n165)

<sup>189</sup> Ibid (n140) 3.

<sup>190</sup> Ibid (n149)

<i>EFY</i>	<i>2007</i>	<i>2008</i>	<i>2009</i>	<i>2010</i>	<i>2011</i>	<i>2012</i>
<i>Total Import by ESSE</i>	<i>3690.34</i>	<i>4966.26</i>	<i>4538.72</i>	<i>4065.56</i>	<i>4338.44</i>	<i>6689.80</i>
<i>Own Vessel</i>	<i>1,315</i>	<i>953</i>	<i>603</i>	<i>643</i>	<i>889</i>	<i>1,028</i>
<i>Slot Carriers</i>	<i>3,374</i>	<i>4,014</i>	<i>3,935</i>	<i>3,423</i>	<i>3,450</i>	<i>5,661</i>
<i>Own Share in %</i>	<i>36</i>	<i>19</i>	<i>13</i>	<i>16</i>	<i>20</i>	<i>15</i>

Source ESLSE<sup>191</sup>

As we observed on table two above, out of total goods imported to Ethiopia by sea transport, only 36.9%, 35.2%, 38.6%, 33.7%, 38.7% and 57.8% were transported by ESLSE(own vessel and slot carriers) from 2007-2012 E.C respectively. When we closely observe table 3, out of total goods imported through ESLSE (which is on average 40.2% of total goods imported by sea) the share of goods transported by own vessel from 2007-2012 EFY on average is only 24.33%. This shows the remaining 75.67% of imported goods transported by ESLSE were transported by ESLSE slot carrier's arrangement.<sup>192</sup> ESLSE collects data on the projected volume of commodities to be imported each year based on the previous year's performance to execute slot carriage.<sup>193</sup> Then, to benefit from the Scale of Economy, negotiate an agreement based on auction with ships that have a set route to Djibouti on a mass amount or bulk basis. This agreement has given an advantage for both ESLSE to get a discount freight rate and also to slot carriers to secure market in a given route and time while allotting its vessels. The discount

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<sup>191</sup> Ibid (n131)15.

<sup>192</sup> Chartering is a common activity within the shipping industry. A Slot Charterer is an actual shipping line who belongs to a consortium or service but may not be operating a vessel on that service. Instead, the shipping line chooses to buy a certain amount of slots (space on board a ship) from the principal vessel operators on every vessel. It is an independent shipping line and uses their own equipment and bill of lading and have their own account with the port and the port invoices them directly for their charges.<  
<https://www.shippingandfreightresource.com/difference-between-slot-charterer-and-nvocc-operator/>>accessed on April 29, 2021

<sup>193</sup> Ibid (n165) The researcher has learned that the when a negotiation is done through ESLSE on mass basis the customer could get an advantage because the ship my not enter in one port to collect one or two container that each individual has, but while ESLSE negotiate on behalf of each customer on huge number of container it will help it to get discount.

acquired by ESLSE is usually less than the spot market price at times of making contracts with customers.<sup>194</sup>

Nevertheless, in line with the main objective of the directive, which is saving hard currency, ESLSE has been paying huge amounts of hard currency for slot carriers. *Table 4 ESLSE- SSS slot and charter vessel Operational Revenue, Cost & Administration 2008 to 2011 in Birr*

<i>Budget Year</i>	<i>Slot and charter vessel Income(A)</i>	<i>Operational costs(payment for slot carriers)(B)</i>	<i>Net Income/Loss before Tax(C)</i>
2008	5,935,957,408.32	4,961,776,083.19	974,181,325.13
2009	4,752,663,267.84	3,180,066,348.75	1,572,596,919.09
2010	4,654,549,851.25	4,093,386,132.99	561,163,718.26
2011	5,561,973,674.63	4,102,936,756.61	1,459,036,918.02
		<i>Total income/loss</i>	<u>4,566,978,880.50</u>

Source ESLSE<sup>195</sup>

Table 4 column B illustrates the payment paid by ESLSE in regard to slot transportation arrangements from 2008 to 2011 E.C, indicating that Ethiopia continues to pay foreign vessels in hard currency. This means that, according to the FOB instruction, the fact that imported items are transported by ESLSE has not saved the country's hard currency. This is primarily due to a limitation of transportation capacity; ESLSE does not transport reserved cargoes, and foreign carriers take full advantage of this privilege, causing delays, inefficiencies, and high expenses. Even though ESLSE pays for slot carriers, there is still an argument to be made. Its advocates say that it keeps the administrative costs and profit margins that would otherwise be paid to foreigners because of economies of scale.<sup>196</sup> Second, the directive will save 3-4 percent in hard currency that would otherwise be spent on Marine Insurance coverage that would be kept within the country, as well as domestic banks from paying insurance premiums in hard currency.<sup>197</sup>

<sup>194</sup> Ibid

<sup>195</sup> Ibid (n164)

<sup>196</sup> Ibid ;ibid (n183).

<sup>197</sup> Interview with Mr. Chrent Ayalew, Swift Correspondent Banking Coordinator Manger, Development Bank of Ethiopia (Addis Ababa May 26, 2021).

Table 1 column C shows the performance loss of ESLSE's own vessels in each year, whereas table 4 column C shows ESLSE has made a profit in slot arrangements by collecting the difference between what is collected from customers and what is paid by slot carriers, demonstrating the benefit of the FOB directive to SSS. This gives the shipping industry a significant advantage in terms of performance and continuity. The effect of cargo reservation policy seems more important in this regard than the saving of hard currency of the country. Table 2 & 3 shows that out of total import cargo by sea, 59.2 % of cargo is transported by foreign shipping company, which is not totally monitored by ESLSE. Out of the remaining 40.2% of cargo transported by ESLSE our own vessels' share is only 24.33%. This segment designates small significance of the FOB directive on hard currency saving.

Despite the fact that the policy's role in hard currency savings is minor, four out of five interviewed customers understand and accept the importance of the FOB policy, especially with certain changes in shipping service, such as opening the sector to private competition, which will benefit both the country in terms of hard currency savings and the development of the service sector.<sup>198</sup>

To sum up, this policy of the country does not comply with GATS article XVI (a), if a specific commitment on market access is undertaken. Because it creates discrimination for cargo access between national shipping and foreign shipping service suppliers, GATS mode 1 (cross border trade) requires all WTO members who have taken a specific commitment schedule are required to give Market Access under XVI and National Treatment Article XVII unless there is a limitation. The current policy, which effectively monopolizes cross-border commerce in shipping services for national carriers, needs to be changed in order to attract domestic and foreign investors to the sector, which will help the country's WTO negotiations in the shipping sector.

The policy's role in developing internal capacity is undeniable, but we must work together to address the drawbacks associated with monopoly; otherwise, the policy's continuity will not yield a better result, and will also have an impact on future GATS negotiations.

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<sup>198</sup> Ibid; ibid (n147); ibid(n149);ibid (n152).

### **3.3 The Important Preparation for Negotiation in the Shipping Service Sector.**

We've looked at tax immunity, the role of the FOB directive, investment regulation, and the sector's performance, as mentioned in the previous section. Ethiopia must take certain critical measures in order to negotiate on the SSS.

#### **3.3.1 Increasing the capital of the shipping service sector.**

The government must add additional ships and expand capacity to make the sector competitive and profitable. However, at the moment, its current and future competition has been hampered by a lack of resources to build a large and new ship that serves the interests of countries. The value of the worldwide maritime products' transportation business is in the trillions of dollars, and it is steadily expanding.<sup>199</sup> Despite the fact that the shipping industry has experienced its fair share of ups and downs due to economic crises and financial instability, worldwide demand appears to be growing at a healthy pace.<sup>200</sup> As a result, in order to prepare the industry for the future, the government must invest substantial capital in the sector using the countries' available resources.

#### **3.3.2 Increasing the country's export performance and establishing a suitable climate for exporters to use flag state shipping lines.**

The investment in the shipping service sector is mainly based on the capacity of the export goods and port facilities the country has.<sup>201</sup> If we don't have sufficient export cargo to be transported to different parts of the world, investors and other shipowners are not interested in participating in the sector because there is no enough market to export. Export facilitates international trade while also stimulating domestic economic activity by providing jobs, production, and foreign currency revenues. When the volume of our exported goods rises, shipping companies gain a competitive market advantage. For example, exports from China surged 32.3 percent year-on-year to USD 263.92 billion in April 2021, accelerating from a 30.6 percent rise in March and

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<sup>199</sup> <<https://www.marineinsight.com/know-more/list-of-major-shipbuilding-companies-around-the-globe/>> accessed on May 07/2021.

<sup>200</sup> Ibid

<sup>201</sup> Ibid

easily beating the market consensus of a 24.1 percent growth<sup>202</sup> On the contrary, in 2019, Ethiopia's trade deficit amounted to around 11.79 billion U.S. dollars.<sup>203</sup>

Therefore, before presenting for negotiation or amendment of existing laws that may affect Ethiopia in general and ESLSE in particular, Ethiopia's negotiations on the shipping service sector must take into account the major factors discussed above.

### **3.4 Negotiation Terms and Strategy for Ethiopia in the Shipping Service Sector.**

Ethiopia's plan for liberalizing trade in shipping services must be evaluated in light of other nations' capabilities to compete in the global maritime sector, the expected economic benefits of the liberalization process, and the willingness of major trading partners to liberalize the sector. Currently, Ethiopia does not have a comparative advantage in maritime transport services and her export possibilities in this sector are quite limited and needs huge investment on the sector to make the level of competition fair and fruit full. As it has been discussed in chapter one<sup>204</sup> the negotiation of Ethiopia focus on International shipping service sector.

#### **3.4.1 International shipping services.**

Ethiopia has a closed registration system, which means that no foreign ships can register in Ethiopia and fly the Ethiopian flag. To put it another way, no foreign vessels are now permitted to compete in this country. The national carrier's entire monopoly on all imported commodities on a FOB basis is one of the most noticeable barriers to market access in cross-border supply. Ethiopia's policy allows the country to have more control over shipping service sector. The policy has its own advantage <sup>205</sup>and dis advantage as discussed in previous sections.

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<sup>202</sup> <<https://tradingeconomics.com/china/exports> > accessed on May 8, 2021.

<sup>203</sup> Trade balance is the value of exported goods minus the value of imported goods. A positive trade balance signifies a trade surplus, while a negative value signifies a trade deficit. <

<https://www.statista.com/statistics/455183/trade-balance-of-ethiopia/>> accessed on May 8, 2021.

<sup>204</sup> Ibid 21

<sup>205</sup> It is apparent that ESLSE's 11shps, with a total capacity of DWT 329,185, are insufficient to meet the country's needs and manage all outflows of foreign currency. However, if this policy had not been in place, the organization might not have been able to cover the hard currency required to carry out its everyday operations. Because of the

As a result, the relative negotiating power of the trading nations will determine the outcome of the SSS negotiations to reserve the FOB policy (a cargo reservation policy). In the event that such cargo support is removed, Ethiopia should only do so if other nations agree to do the same, and it should endeavor to reserve at least a government strategic cargo for its own ships. Foreign ships can only participate in the import of cargo destined for Ethiopia when ESLSE ships are unavailable.

States have shown a lack of commitment in the GATS maritime sector negotiations. Until the most recent round of talks, the United States had made no commitments on maritime transport services, while Japan, Canada, and the European Union had made no promises on international shipping services trade.<sup>206</sup> It would be extremely difficult for Ethiopia to commit to market access in the absence of any commitments from these countries. Many powerful maritime nations set aside a portion of international cargo for domestic shipping companies. For example, US aid and defense cargo is only carried by US flagged ships.<sup>207</sup> As a result, Ethiopian ships will be unable to transport such cargo. As a result, Ethiopia can aggressively negotiate to keep its cargo reservation policy under the FOB guideline, allowing it to maintain its small and secure national fleet.

The other topic of discussion for Ethiopian negotiators in the shipping service sector is whether to keep the tax exemption privilege granted to ESLSE vessels, despite the GATS concept of national treatment. Because, according to the negotiations and the Secretariat's background note on maritime transport services, only five<sup>208</sup> of the 29 WTO members with commitments in international shipping services are willing to take on the national treatment obligation. The remaining members don't make any commitments at all or do not accept NT obligation.<sup>209</sup> The

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worldwide character of the service, investments in maritime transport require a considerable value of hard currency, and it will be impossible to operate such a business while waiting for LC from banks.

<sup>206</sup> The classification adopted in the model draft schedule on maritime transport services of 15 April 1996 as well as on the services sectorial classification of document MTN.GNS/W/120.WTO Maritime Transport Services Background Note by the Secretariat S/C/W/62 16 November 1998.

<sup>207</sup> < <https://www.acquisition.gov/far/52.247-64> > accessed on April 28/2021.

<sup>208</sup> Ibid (n171) 16 (Jamaica ,Malaysia ,Nigeria, Philippines, Singapore).

<sup>209</sup> Ibid

substantial portion of the world's shipping capacity is now in the hand of shipowners belonging to developed countries, and it is extremely difficult for developing countries, such as Ethiopia, to compete with these powerful shipping lines without subsidization of their shipping service.

Therefore, before making any specific commitments under GATS, Ethiopian negotiators must thoroughly understand the other members' approaches to international shipping. Ethiopia has to correct licensing laws, which are incompatible with GATS general obligations such as transparency, domestic regulation, and so on.

### **3.4.2 Auxiliary services and Access to and use of port facilities.**

*“Auxiliary services are services that are provided in addition to shipping services. Cargo handling (loading and unloading), warehousing, customs clearance, freight forwarding, container station and depot service, maritime agency services, repair services, customs agency services, and all other logistic services are examples of shore-based operational services that are essential to ship operations.”*<sup>210</sup> Ethiopia is currently a landlocked country, hence auxiliary services are primarily provided by the Djibouti Port Authority. Even some formerly available services have been withdrawn, and rights have been secured through a bilateral arrangement with Djibouti.<sup>211</sup> As a consequence, our interest and negotiation capacity in these areas are determined by Djibouti's and other east African port-owning states' participation in GATS negotiations. To strengthen the Common Market for Eastern and Southern Africa (COMESA) and ensure port usage rights, Ethiopia must work on various diplomatic connections with surrounding countries). Because one of COMESA's goals is to establish a full free trade zone that ensures the free flow of products and services generated by COMESA members.<sup>212</sup>

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<sup>210</sup> Selvi (22) 152.

<sup>211</sup> Agreement on Port Utilization and the Transit of Goods towards Ethiopia, signed in April 2002. The Agreement cover major issue related to port utilization.

<sup>212</sup> Article 164 of Treaty Establishing the Common Market for Eastern and Southern Africa Volume 20 No.1.

## Chapter four

### 4.1. Conclusions and Recommendations

Most WTO members have unilaterally liberalized their maritime transport services with certain restrictions and controls in place, and this was the only service sector in which multilateral discussions failed during the Uruguay Round. Given that sea transport accounts for a significant portion of global trade volume, failure to liberalize this sector has significant implications for global trade growth. However, the second round of GATS negotiations, led by the Negotiating Group on Maritime Transport Services, is expected to play a key role in lowering trade barriers in maritime transport services. The success of Maritime Negotiations is contingent on WTO members, particularly those with significant power in the sector, agreeing to open up their Maritime sector by making a genuine and practical commitment.

The Ethiopian maritime service sector plays a minor impact in the worldwide market. Lack of capital for modernization and expansion, low productivity, managerial inefficiency, absence of competition that keeps the sector stagnant, local financial regulatory limits, and other issues have rendered the sector incompetent in the worldwide market. Despite this, Ethiopia has to open the sector to at least for two or three domestic, investors who are interested in investing in shipping transportation services under specific oversight and regulation, in order to remove existing impediments.

This thesis clearly suggests that complete and unrestricted deregulation will extinguish Ethiopia's shipping service sector at this point. So, the primary problem that needs clarification is whether Ethiopia, as a land locked country with more than a hundred million inhabitants, and greatly dependent on imports, ought to have its own national carrier or not. This is a critical issue that must be addressed. Having our own national carrier for a country like Ethiopia, undeniably beneficial, in my opinion. For non-coastal states like Ethiopia, total reliance on foreign ships for sea transportation is dangerous. Because without our own national shipping line, we will be unable to manage the escalating freight prices of competition with huge foreign shipping corporations owing to monopoly, and we will be left with few options, resulting in a severe

problem in the country. As a result, comprehensive liberalization without addressing the sector's difficulties will not help the country.

Furthermore, due to the unfavorable political environment in the Horn of Africa, other states may no longer be interested or ready to carry our commodities for numerous security concerns. The country's Grand Renaissance Dam, for example, has sparked political debates among a variety of interested parties and countries. In such a circumstance, our national line will play an important role as a shipping line. We may need to charter a ship as a shipping firm operator to preserve our interests, even if our national fleets' capacity is limited and insufficient.

The sector's existence contributes to the sector's ability to retain human power and expertise, which is more important than anything else. It can also advise the government on policy matters. Ethiopia's naval force, for example, was destroyed when the country became landlocked, which may have contributed in the development of a new naval force. Which require Ethiopia to invest and expand a huge amount of money to compensate for lost navy force.

In addition to the general comment already made, the following specific recommendations for the shipping service sector are made:-

- The FOB policy does not comply with GATS article XVI if Ethiopia makes an explicit reservation from commitment of market access requirement. Because it restricts access to cargo for international shipping service companies. I suggest that the FOB policy be maintained, but not in the manner in which it is now implemented with a single service provider (ESLSE); rather, the shipping service should be made available to private investors as well. The FOB strategy is a significant policy in other countries as well; therefore it is necessary to improve Ethiopians' ability in shipping services while also saving the country's hard money.
- If NT commitments are made, the tax exemption under art 13 of the Maritime Administration Proclamation will not conform to the GATS agreement. It will be tough to take away the present tax advantage, as we saw in Chapter 3 with the sector's financial performance. The negotiator must maintain the national carrier's preferred tax benefit, especially if our negotiations involve a mode 3 commercial presence. The tax issue must

be highlighted since it creates discrimination between national carriers and international service providers.

- The WTO and GATS Agreements are mainly aimed at globalizing the world economy and increasing economic interdependence among nations. The criteria and methods for assuming commitments are well defined in the WTO and GATS Agreements. The negotiators must ensure that any commitment made in the sector is based on the perspectives of professionals or experts on the sector's benefits and drawbacks.
- Ethiopian investment regulation number 474/2020 treats maritime transport as a by-product for international companies. This suggests that the government intends to enable Foreign Service providers to invest in the sector. As a result, the government's shipping economic policy must be reviewed, with a focus on developing the sector through a variety of modalities, such as facilitating long-term loans, subsidies, and bilateral negotiations with neighboring countries, in order to maintain or protect the sector's competitive advantage in the international market.
- Finally, because global maritime trade is not completely free, and major ship-owning countries have been hesitant to accept NT and Market access obligations until now, Ethiopian maritime negotiations on specific commitments must impose restrictions in order to preserve existing market privileges on imported goods for domestic investors in the sector.

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## Appendix

1. FOB directive and its amendment
2. Wavier directive
3. Email data
4. Interview Guide Questions