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A Faustian Bargain: Creating A Successful Agreement In The WTO Negotiations On Trade In Maritime Services

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A FAUSTIAN BARGAIN:
CREATING A SUCCESSFUL AGREEMENT
IN THE WTO NEGOTIATIONS
ON TRADE IN MARITIME TRANSPORT SERVICES

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INTRODUCTION

On October 25, 2008 the last liner shipping conference in the European Union closed its doors in compliance with regulations of the EU which withdrew an exemption to anti-trust laws for such conferences. The closing of the liner conference system ended a method of ocean shipping regulation which had existed since the first conference, the Calcutta Steam Traffic Conference, was set up by British cargo lines in 1875 to regulate trade between India and the United Kingdom. While there were more than 150 liner conferences worldwide, the change in EU regulations required closing of 28 of them. Further, the end of the conference system in the EU will affect the status of current world trade negotiations on maritime services, and will require sixteen Member States of the EU which are signatories to the UNCTAD Code of Conduct for Liner Conferences to withdraw their ratification.

Since over sixty percent of world trade is carried by containerships operating in liner conferences, the end of the liner conference system is bound to have repercussions both in the United States and throughout the rest of the world. In addition it may signal an end to the World Trade Organization's negotiations concerning marine transport services. The UNCTAD Code had been ratified by over 81 nations, including the “new locomotives” of world trade, China, India, Russia, and Brazil, and a number of those countries had included accession to the cargo
allocation scheme in the UNCTAD Code as part of their conditional offers to the maritime trade negotiations. Withdrawal of 16 of the signatories may end the effectiveness of the UNCTAD Code, or may result in retaliation from nations which are signatories to the Code against European carriers. A trade war in maritime services would be a set-back to the goals of the WTO to seek liberalization of world trade through multi-lateral negotiations.

This article will examine the three sides to the WTO negotiations on marine transport services, explore the issues of protectionism in maritime trade, and finally will propose a Faustian solution to the bargain—a system which recognizes and tolerates a limited amount of protectionism in exchange for progressive liberalization of trade in ocean shipping and related services.

I: Bringing the GATS up to Sea Speed

The maritime sector of the General Agreement on Trade in Services has been seeking to establish freer trade in ocean shipping, and primarily in liner trade by containership but so far the talks have failed to produce a multi-lateral agreement. Though the Negotiating Group on Maritime Transport Services met on numerous occasions, progress is virtually at a standstill. Several participants blame the United States for causing the collapse of negotiations by not submitting an opening offer, and for walking out of the initial round of talks with a month remaining for discussions. However, the United States raised legitimate concerns that the position of the Organization for Economic Co-operation and Development (OECD) member nations and the position of the developing nations, supported by the United Nations Conference on Trade and Development (UNCTAD), could not be reconciled. OECD member nations generally sought elimination of the liner conference system while developing nations saw
continuation of the system, along with cargo allocation to national flag carriers, to be the only means by which they could claim any share of world maritime commerce. Finally, the United States had an unexpressed interest which was not shared by either the other participants. It needed to have access to containerships and ro-ro vessels\(^8\) which would provide sealift\(^9\) for its military. The actions of the United States seems to have arisen from the conclusion that these three interests could never be reconciled.

Conditions have changed since the last talks took place, and before new talks can begin, participating nations will have to consider the effects of the global economic recession on world trade, the effect of the expansion of the Panama Canal, and global transportation's effect upon climate change.

**A. The Global Economic Recession and Maritime Trade**

World shipping has also been dramatically affected by a global recession. In the Spring, Summer and Fall of 2008 the U.S. sub-prime lending crises hit world stock markets hard. On October 3\(^{rd}\), Congress approved the Troubled Assets Relief Program which would spend $700 billion in a bailout of financial institutions. In November, Democrats took control of both the Presidency and both houses of Congress, and by November 22\(^{nd}\), the Dow Jones Industrial Average had lost 43% of its value from its October 2007 high\(^{10}\). In December 2008 the U.S. announced that it was in an economic recession.

The world is now in a global recession. Freight rates for shipments from the Far East to Europe has fallen to as low as $350 per TEU\(^{11}\), a rate offered just to keep ships full of cargo, regardless of the losses incurred. The economic difficulties posed by a global recession is likely to lead many nation to retrench from free trade and set up non-tariff barriers to the free flow of
trade in services. With the increased role that services play in the world economy, such a retrenchment could lead to the type of protectionism that caused the stock market crash of October 1929 to become the Great Depression. Fear of retrenchment could pave the way for renewed talks on liberalizing trade in ocean shipping.

Maritime transportation is the most common method of transporting goods in international commerce, carrying four-fifths of world trade\textsuperscript{12}, and far exceeding the totals of goods shipped by air, rail, truck, and pipeline\textsuperscript{13}. Sixty percent of world trade by value is carried on liner vessels and twenty percent is carried on bulk carrier. There is little that the WTO can do to improve trade in ocean bulk shipping because the market is substantially free\textsuperscript{14}. The fittest survive, the weakest do not. However, in liner shipping, substantial efficiencies can be realized through liberalizing trade in liner services.

Low cost transportation of goods by sea contributes to overall world trade. The increase in the size of ships has caused freight rates to decline over the past few decades and in developed countries the cost of freight only makes up about 5\% of the overall cost of goods. In developing countries that rate is higher, but it is still only 8\%. Countries in the Caribbean and Africa pay even higher freight costs at 12-15\% of the cost of goods\textsuperscript{15}.

The end of the liner conference system in the EU, along with the global recession are expected to have a dampening effect on world freight rates, lowering the cost of goods exported from the EU. The Far East continues to operate under a liner conference system, but one must wonder whether the global recession and the EU decision will force it to follow suit and end liner conferences as well.

B. The Expansion of the Panama Canal (2015)

The newest positive development in maritime trade is the expansion of the Panama Canal
which began work on September 3, 2007. The new set of locks are expected to be completed in 2015 at a cost of over $5.25 billion\textsuperscript{16}. The most important effect that the new locks will have will be the increased cargo capacity of the ships that will be able to transit through the Canal from the Far East and China to the United States East Coast.

Currently, the largest containerships which can pass through the Canal, known as Panamax ships, can carry up to 5000 TEU’s or 2500 forty foot containers. The new Canal will permit ships with a carrying capacity of 12000 TEU’s or 6000 forty foot containers to pass through, more than doubling the number of containers which can be carried on a single ship. A single train carrying an equivalent number of containers would have to extend over 50 miles in length without locomotives, to carry the same amount of cargo.\textsuperscript{17}

Currently most containerships passing through the Canal make their voyages to the United States with containers full of cargo, and carry empty containers back. That fact reflects the decline in the U.S. manufacturing of goods, but is also caused by a protectionist trade measure which has been in effect since 1920. It was called the Merchant Marine Act of 1920 and goes by the popular name “the Jones Act.”\textsuperscript{18} The opening of the new, expanded Panama Canal will only serve to highlight the inefficiencies caused by protectionism which prevents foreign flag ships from carrying cargo between the U.S. East and West Coasts through the Canal.

C. The Effect of Transportation by Sea on Global Warming and Climate Change

When the marine transport negotiations of the General Agreement on Trade in Services talks were begun in 1995 the topic of climate change and global warming was still in its infancy. In the past two decades the world has come to recognize the burning of fossil fuels threatens to raise global temperatures worldwide. The public has failed to become alarmed because the
prospects of a rise in sea level have seemed remote and at present just theoretical. However, the less theoretical, and more immediate effect of global warming is that an increase in temperature of even one degree Fahrenheit will cause electrical demand for air conditioning to rise dramatically. As the demand for electricity increases, global warming will accelerate, eventually to the point where it cannot be stopped.

Global transportation of cargo plays an important role in climate change because currently merchant ships must operate on either heavy fuel or diesel fuel, both of which are petroleum products which produce nineteen pounds of carbon dioxide per gallon of fuel burned. While liquified natural gas carriers may operate on natural gas, which produces half the carbon dioxide that diesel fuel does, nuclear ships have only been developed for the U.S. and Russian navies and on a prototype basis for the merchant marine. All other ships must use fossil fuel to move cargo and passengers from place to place. Consequently, merchant shipping will continue to contribute to global warming for the foreseeable future.

The only progress which can really be made in reducing the contribution of transportation to global warming is to increase the size of ships, reduce the length of transportation provided by motor common carrier and rail carrier, and increase the efficient use of cargo space. In containership operation, increasing the efficient use of cargo space means carrying more containers filled with cargo, and fewer empty containers. Cabotage, the restriction of cargo between ports in a single country to national vessels, contributes to inefficiency and hence to global warming.

D. General Agreement on Trade in Services and Maritime Transportation of Goods

These two recent developments, the global economic recession and the end of the EU
liner conferences, and the two coming developments, the expanded Panama Canal and the growing problem of global warming, create new incentives for parties to negotiate for freer trade in maritime services to address the needs of the changing world economy. This is where the General Agreement on Trade in Services (GATS) comes in.

When the GATS entered into force on January 1, 1995, it became the first legally enforceable international agreement whose goal was to remove national barriers to international trade in a vast number of service activities. Those services included insurance, banking, telecommunications, travel, tourism, recreation, education, franchising, engineering, construction, health care, hospitalization, sanitation, refuse, and finally transportation. Just as the General Agreement on Tariffs and Trade (GATT) had removed tariffs and non-tariff barriers to international trade in goods, the goal of the GATS was to increase international trade in services by lowering barriers which prevented services from being freely traded across national boundaries.

The GATS has three basic principles. First, it is intended to cover all services except those provided in the exercise of government authority. Second the GATS seeks the elimination of discrimination in favor of national providers. This is known as “the national treatment principle.” Third, it seeks the elimination of discrimination among members of the agreement. This is known as the “the most-favored-nation (MFN) principle.”

One would have thought that marine transportation, and particularly world shipping, would have been one of the easiest services to open up to free trade. Ships had always operated in multiple jurisdictions. The International Maritime Organization has experienced success for a number of decades in harmonizing safety and transportation regulations for vessels, a non-tariff barrier to international trade which was lowered with the passage of the Safety of Life at Sea
Convention. However, while air transportation, rail transportation, over-the-road transportation, pipelines, and even space transport have been brought within the GATS framework of rules, the marine transport sector stubbornly remains on the outside looking in. Consequently, while marine transportation is formally within the GATS framework of negotiations, the reduction in trade barriers has been virtually non-existent.

E. The Status of the Negotiations

After negotiations on opening up maritime trade failed during the Uruguay Round which preceded the adoption of GATS, a special Negotiating Group on Maritime Transport Services (NGMTS) was established which held a series of 17 post-Uruguay meetings between May of 1994 and June of 1996.

The failure of the United States to submit a conditional offer to commence negotiations frustrated many members of the Negotiating Group. The official notes of the meetings diplomatically stated that "disappointment was again widely expressed with the absence of an offer from one major participant [the United States]."23 The Republic of Korea took the position that "the absence of offers from some countries [i.e. the United States] made it difficult to overcome domestic resistance to making further improvements in its already comprehensive offer.24

In response, at the meeting held on June 3, 1996 the United States effectively withdrew from the negotiations, even though there was over a month of negotiations left. It took the position that it would not submit a written negotiating position because "the results achieved so far fell woefully short of the objectives of the negotiations"25 which were open markets and non-discriminatory treatment for ocean carriers and their supporting operations.
The negotiating interests fell into three groups: the thirty high and upper middle income members of the Organization for Economic Cooperation and Development (OECD), the developing nations whose positions were often put forward by the United Nations Council on Trade and Development, and the United States. The U.S. found that among conditional offers submitted by OECD nations "the only participants with acceptable offers....were OECD countries with no shipping industries to defend." Further, among the developing nations, the U.S. position was that their conditional offers "enshrined [cargo] preferences in the United Nations Liner Code [the UNCTAD Code of Conduct for Liner Conferences] and contained MFN exemptions."

It is not too harsh to call the U.S. position, and its virtual withdrawal from the negotiations disingenuous. Conditional offers are the starting point for negotiating, not the end point. OECD nations could hardly be blamed for submitting negotiating positions which favored their domestic shipping industries when the United States had just a small merchant marine, and had offered no negotiating position at all. Finally, in 1996 the UNCTAD Code of Conduct for Liner Conferences was still a viable means for developing countries to gain a share of international shipping even if they lacked a domestic merchant marine. The basic formula of the UNCTAD Code was to allocate cargo to national lines with up to 40% going to lines of the importing nation, up to 40% to lines of the exporting nation, and at least 20% to cross-traders. "Enshrining" the terms of that international agreement in their conditional offers to the Negotiating Group represented a reasonable opening offer, even if it was one with which the U.S. disagreed.

Most major maritime nations in the world have submitted negotiating positions
indicating a willingness to bargain back and forth on freeing up trade restrictions on maritime services. However, after all these years, the United States still declines to do so. Frustration over the approach of the United States lead China and Japan, among others to “call on Members [i.e. the United States] to express their views on the matter for the coming second phase of negotiations”. South Korea said that “all Members [including the United States] should participate in the negotiations on maritime transport services.... their full participation is crucial to achieving a meaningful liberalization of maritime transport services.”

Representing some South American interests, Columbia concluded that “the results of the WTO Negotiating Group on Maritime Transport Services (NGMTS) proved unsatisfactory since a critical mass of market access commitments was not achieved [in part because the United States did not offer a market access commitment].” Finally, Australia, Canada, Chile, The People's Republic of China, The European Economic Communities, Japan and thirty-four other nations said “we call for the active participation of all Members [including the United States] in the on-going negotiations.”

Nevertheless, the United States has refused to participate.

At the WTO's negotiations in 1996 to open up maritime trade in services, the United States had been the proverbial "bad boy" in the group of nations. It refused to make an initial offer in the negotiations, known as a conditional offer, leaving the other participants with little to discuss. If the world's largest economy didn't have an offer on the table, there was little to talk about. Then, with over a month of talks remaining, the U.S. had virtually stormed out claiming to be the only pure free trader, and asserting that the developed nations of the OECD nations had not been willing to compromise on free trade, and that the developing countries of UNCTAD were trying to establish a cargo allocation system reserving to themselves a portion of
world shipping business.\textsuperscript{33}

At a press briefing in Geneva on July 29, 2005, United States Trade Representative Rob Portman was asked by a reporter “will there be a U.S. offer on maritime transport? You [the United States] are the only major player without an offer on the table at the moment.” Portman, who clearly didn't want to answer the question responded “I don't know with regard to maritime transport, but Ambassador Allgeier will answer that question.”\textsuperscript{34} At the time, Peter F. Allgeier was the Deputy United States Trade Representative. However, three months later he would be appointed by President Bush to be the U.S. Ambassador and Permanent Representative to the WTO.\textsuperscript{35} Allgeier tried to put the best possible face on the question\textsuperscript{36}, but it was clear that no substantial change had taken place in the position of the United States on negotiating an agreement on free trade in maritime services.

U.S. intransigence caused many of it trading partners, including Canada and the European Union, to be very critical stating “it was unprecedented to withdraw from negotiations when more than a month remained before the deadline.” The European Union and Norway went so far as to accuse the United States of timing "its announcement to preempt efforts to create a package that it would have found difficult to reject." The ten ASEAN nations (Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Cambodia, Laos, Myanmar, and Vietnam) stated that "the United States was demanding a higher degree of liberalization in maritime transport services than had been achieved in any other service sector....[and that]...it was ironical that the U.S., who had insisted on negotiating services in the Uruguay Round [was now] preventing the achievement of a fully multilateral outcome."\textsuperscript{37} Chile said that "the position the United States had taken compromised the ability of the WTO to deal with an
ambitious trade agenda." Finally, both Canada and Hong Kong pressed the Negotiating Group to reach an agreement without the participation of the United States. However, it was not to be. Without the participation of the world's largest economy, other countries were unwilling to negotiate further liberalization of world maritime trade.

At conclusion of those negotiations the WTO Council for Services adopted the Decision on Maritime Transport Services, which could more accurately have been named the "Non-Decision" on Maritime Transport Services. It incorporated the maritime commitments and the MFN exemptions of those nations which had voluntarily made a written commitment to reduce barriers to trade in maritime transport, which were insignificant, but suspended the negotiations among non-volunteers until the commencement of the next comprehensive negotiations on services.

The next comprehensive round of negotiations continued through 2008 under the name the "Doha Development Round." The negotiations began in Doha, Qatar in 2001. They continued in locations such as Cancún, Mexico (2003), Hong Kong (2005), Geneva, Switzerland, where the WTO has its headquarters (2004, 2006, 2008), Paris, France (2005), and Potsdam, Germany (2007). In July of 2008 in Geneva the talks collapsed over agricultural issues unrelated to maritime transport.

F. Why the First Round of Negotiations Ended Without an Agreement

Any negotiations on liberalizing trade in maritime services will have to meet at least three distinct needs or desires: the desire of developed countries for open markets and low freight rates, the desire of lesser developed countries to develop and enhance nascent domestic maritime industries, and the need of the U.S. for maritime sealift capability. With any difficult
negotiation, a successful agreement is one where each of the parties leaves the negotiating table feeling unsatisfied that the result was not all it could have been, but that at least a conclusion has been reached. Meeting all of these needs may require a Faustian bargain--a deal which incorporates some level of protectionism in order to realize progressive liberalization of trade in maritime services.

In this case, the prior round of negotiations were unsuccessful for a number of reasons. However, it is unquestionable that the notes of the Negotiating Committee place most of the responsibility for failure on the United States. The first complaint of the committed is that the United States failed to submit a "conditional offer"---an initial negotiating position from which each party seeks to gain concessions from the others. Secondly, the United States is blamed for leaving, or some might say "storming out of" the negotiations prematurely with over a month of scheduled meetings remaining. Today, the United States still doesn't have a public conditional offer on trade in maritime transport services.

From the United States perspective, there are a number of problems which prevented its participation in the negotiations. First, protection of the United States merchant marine is ingrained in national legislation supported by powerful constituencies including maritime labor unions, shipping companies which provide cabotage services, and the longshoreman's union to name a few. Supporting free trade in maritime services is a less vocal collection of shippers and exporters, and the people of Puerto Rico, Hawaii, and Guam who pay higher freight costs due to protectionism. When asked about the prospects for lowering protectionist barriers in the Senate, John McCain, who is chairman of the Committee on Commerce, Science, and Transportation, said that he doubted he could round up a dozen votes to do away with the Jones Act, the U.S.'s principal cargo protection legislation.
Many participants in the GATS blame the United States for the lack of progress, and not without some cause. However, in an historical perspective, the U.S. opposition to a system of freer trade in services is somewhat of an aberration. After all, it was the U.S.'s opposition to the practices of cargo allocation, loyalty agreements, and other anti-competitive provisions of the United Nations Conference on Trade and Development's (UNCTAD) Code of Conduct for Liner Conferences which largely resulted in its failure. The United State's opposition to regulated maritime transportation and its opposition to freer maritime transportation in its opposition to GATS strike many as being inconsistent.

However, the United States merchant marine has been on life-support for decades. Nixon attempted to rescue it in the 1970's with both construction subsidies to benefit shipyards, and operating subsidies to benefit shipping lines\textsuperscript{41}, but the subsidies eventually became too expensive and were eliminated. With the demise of subsidies, the U.S. developed its own sealift capacity supported by moth-balled ships which remained un-crewed and at anchor except in time of war and ready reserve ships which remained crewed but stationary and on call pending a time of war. However, the first Gulf War in 1991 proved that the combination of reserve and ready-reserve ships were unable to sustain a major military action. Further, crews were unavailable to rapidly respond in a time of military crisis. Having tried subsidies and reserve fleets, and having found that one is expensive and the other is unreliable, a new way of providing for the country's sealift capacity, one that can survive on its own for decades without cost to the taxpayer, should become a primary goal of the United States.

Any system of cargo allocation which reserves a portion of cargo shipments for national flag carriers is inherently protectionist, and is anathema to the principles which the United States espouses, and the WTO GTS seeks to promote. However, just as Faust sold his soul, it may be
necessary for the United States and the OECD countries to accept some protectionism in order to achieve the goal of progressive liberalization of maritime trade.

II: The Storms Challenging Free Trade in Maritime Services

A. U.S. Policy

The Jones Act requires that merchandise being transported by water between U.S. points must travel in U.S.-built and U.S.-citizen owned vessels that are documented by the U.S. Coast Guard for such carriage. The Jones Act was enacted in 1920 to grant preference to U.S. flag vessels in operating between ports in the United States, and ports in its territories. It has the support of President Obama. However, in modern trade, the Jones Act is both economically and environmentally inefficient. Jones Act shipping includes shipping between the West, Gulf and East Coasts (intercoastal shipping), coastwise shipping within the United States, and shipping from the United States’ mainland to and from Puerto Rico, Hawaii, and Guam.

U.S. transportation of cargo is now more expensive and less efficient than it would be if the United States had freer trade or, to use an oxymoron, “regulated free trade.” The U.S. has virtually no domestic deep sea merchant fleet and hence it carries virtually none of the primarily containerized liner cargo which comes into the country each day. The U.S. dominates transportation by sea from the mainland to Puerto Rico and Hawaii, but only because of cabotage laws which prohibit foreign competition, but in general, U.S. maritime policy has been a continuous effort to keep the industry from disappearing entirely. Any attempts to actually increase the size and strength of the maritime industry, as Nixon attempt in the 1970's, has been expensive and therefore short-lived. It may seem harsh, but it is not unfair to say that U.S.
maritime policy has been a string of failures for over half a century.

Over the past sixty years, the U.S. policy of protectionism of the domestic maritime industry has been a failure, and at times an expensive one. It is time that the U.S. reexamined its own interests, and its commitment to free trade, in developing a new policy towards marine transportation.

B Cabotage: The Puerto Rican/Dominican Republic Trade Route

A good example of the inefficiency of protectionism is provided by the current system of maritime regulations in the United States with regards to the U.S. East Coast to Eastern Caribbean trade. Cargo flows primarily from Florida to the Eastern Caribbean islands of Haiti, Dominican Republic, Puerto Rico and the Virgin Islands. However, because of cargo preference laws, known as cabotage laws, trade between the United States and Puerto Rico can only be transported on U.S. flag vessels. The Act which establishes cabotage is the Jones Act.

U.S. flag tug and barge operators carry containers loaded with cargoes of manufactured and agricultural goods from Florida to Puerto Rico on a daily basis, passing by Haiti and the Dominican Republic on the way, but picking up and delivering no cargo there. The Dominican Republic port of Puerto Plata, which is on the Dominican Republic's northern coast, serves the capital of Santiago, a center for clothing assembly and cigar manufacturing. On a daily basis foreign flag ships depart from Puerto Plata bound for Florida carrying Dominican exports of clothing such as assembled men's sports jackets, coats, shirts, underwear, shoes and fine Dominican cigars.

Because Puerto Rico has virtually no exports, the U.S. flag carriers bring full shipping containers to Puerto Rico and returning to the United States with empty shipping containers.
Along the same trade route, foreign flag carriers transport empty shipping containers from the United States to the Dominican Republic where they are filled with clothing and cigars, and transported to Florida. In the process, foreign flag ships filled with empty shipping containers go Southbound to the Dominican Republic while U.S. flag tugs and barges carry empty shipping containers Northbound from Puerto Rico to Florida. This has been going on for decades.

A more logical approach to this trade route, and one that would exist in the absence of protectionism, would be for carriers to bring loaded containers to Puerto Rico, carry empty containers the short distance from Puerto Rico to the Dominican Republic, and then carry full containers from the Dominican Republic back to Florida. The additional cost of using U.S. flag carriers exclusively in trade with Puerto Rico costs a staggering amount of money each year, and burns a staggering amount of fuel needlessly. The estimated freights between the United States and Puerto Rico are $830 million per year. A comparison of Puerto Rican freight rates of about $2400 per TEU (February 2008, Eastbound, Miami to San Juan), and the EU rate of $1400 per TEU (October 2007, Westbound, Far East to EU) shows the disparity caused by cabotage. With rates between the Far East and the EU being further depressed to $350 per TEU in 2009 due to the world recession, the inefficiencies of cabotage become even more apparent.

Defenders of cabotage laws, which includes the maritime labor unions, would say that the cargo preference laws preserve U.S. jobs. However, the U.S. flag tugboats used on this route are only manned by a six-man crew (Captain, Chief Mate, Second Mate, Chief Engineer, and two deckhands), and the same number of longshoremen would be needed to load and unload the ships, the same number of checkers and clerks to manage the flow of cargo, and the same number of truck drivers to truck the shipments inland regardless of whether the ships used are U.S. or foreign flag vessels.
The Navy would say that the preservation of a United States Merchant Marine preserves the country's sealift capability in times of war, but the two invasions of Iraq as well as the incursion into Afghanistan show that tugs and barges are not a significant component of U.S. sealift ability. In short, no significant national interests are preserved by reserving this cargo to solely U.S. flag vessels, yet it costs lots of money, over $830 million per year.

However, even in this market there are allegations of price fixing. On April 17, 2008 the United States Department of Justice Antitrust Division performed simultaneous raids on the offices of three of the carriers in the Puerto Rican trade, Horizon Lines, Crowley, and Sea Star Lines. Following the raids, on April 29, 2008 five class action suits were filed against the companies, three in the Southern District of Florida, one in the Middle District of Florida and one in the District of Puerto Rico alleging “that defendants conspired to fix prices of cabotage services to and from Puerto Rico in violation of the Sherman Antitrust Act.” The suit alleges that meetings to fix prices have been held since at least 2002.

Puerto Rico has long opposed cabotage laws. "Cabotage laws are an impediment to our free trade, and even to the success of a future transshipment port. Why should international companies with goods headed for the U.S. unload their cargo in U.S. flag vessels that are costlier than their own ships?..Ideally, we are looking for the derogation of the Jones Act over Puerto Rico" said Puerto Rican Senator Ortiz at a 2001 meeting of the Council of State Governments' Eastern Regional Conference. "Cabotage laws represent protective measures that are not practical for a global economy," said Roberto Prats, a candidate for resident commissioner in Puerto Rico in 2004.

Prats is correct. Cabotage is a relic of the 1920s, preserved to the present, long after it
C. Cabotage: Intercoastal Trade---China to U.S. East Coast Trade Route

With the large volume of imports which the United States receives from China, a substantial amount of cargo travels on containerships from China, through the Panama Canal, to Jacksonville, Savannah, Norfolk, and Newark on the United States East Coast. Because of the relatively small amount of exports from the United States to China, the same containerships travel westbound from the U.S. East Coast, through the Panama Canal, and back to China with mostly empty containers. On the way back to China, these ships pass up the opportunity to transport cargo to Long Beach, Oakland, and even Hawaii because the Jones Act prohibits such trade. At the same time, U.S. ships depart from the U.S. West Coast to carry cargo to Hawaii while empty ships on the way to China pass Hawaii by because they are prohibited by the Jones Act from carrying cargo to Hawaii from the United States. This inefficiency raises the prices of goods on Hawaii, particularly of beef and other agricultural commodities.

A more efficient means of handling cargo would be for the ships to discharge on the U.S. East Coast, and load cargo bound for the U.S. West Coast. On the West Coast the same ships could carry cargo from the West Coast to Hawaii. The increased efficiency that would be achieved would reduce prices in Hawaii, and increase the overall efficiency of vessels operating on the trade route.

D. Cabotage as an Environmental Issue

International shipping was one of the only greenhouse gas emitting sectors which was not covered by the Kyoto Protocol primarily due to "lack of reliable emission data and lack of an agreed approach for defining responsibility by country." An ongoing study by the
International Maritime Organization on greenhouse gas emissions from ships has estimated the total carbon dioxide emissions from international shipping to be 847 million tons in 2007, constituting about 3.5% of a global man-made carbon dioxide emissions, which is twice the amount emitted by the airline industry. However, the estimate eliminated coastwise, intercoastal, short shipping and other categories of marine transportation and it is likely that the actual contribution is much higher. According to the Intergovernmental Panel on Climate Change (IPCC), around 90% of global merchandise is transported by sea. The United Nations Framework Convention on Climate Change has reported that international maritime emissions from developed countries rose by 7% between 1990 and 2005.

It is infrequently that the environmental cost of the Jones Act is discussed, but with increased concern in the world community about global warming and the effect that burning fossil fuels has on the environment, shipping lines have enacted plans to reduce the amount of fuel burned. However, one of the most effective things that the United States could do to reduce greenhouse gases from ocean shipping is to repeal the Jones Act.

Prior to the advent of containerships, the goal of every Chief Mate and booking agent was to make certain that a ships made its voyages "full and down" meaning full of cargo and down to its "marks." The reason is because it takes substantially the same amount of fuel to transport a full ship as it does an empty ship in international trade. The same is true of containers.

Ocean shipping containers are the functional equivalent of the hold of a vessel. If they are transported empty the ship earns no freight, but burns substantially the same amount of fuel as it would if the containers were full. Consequently the most efficient use of container space,
and hence the most efficient use of fuel is attained when a ship travels with full containers all the time. Empty containers are a waste of space and fuel.

E. The Federal Maritime Commission vs. Japan on maritime port services

In 1996 the Federal Maritime Commission took retaliatory trade action against Japan for having restrictions on port labor. The Foreign Shipping Practices Act of 1988 authorizes the FMC to investigate and prosecute "any practices of foreign carriers or other persons providing maritime or maritime-related services in a foreign country result in the existence of conditions that adversely affect the operations of United States carriers in United States ocean borne trade." The Commission is authorized to impose "limitations on sailings to and from United States ports," suspension of tariffs, and fines up to $1 million per voyage.

The action arose out of complaints by U.S. flag carriers Sea-Land Services (currently Maersk Line of Copenhagen, Denmark) and APL (formerly American President Lines, APL is now a wholly owned subsidiary of Singapore-based Neptune Orient Lines) which had extended back about 15 years. The two U.S. flag carriers asserted that two non-tariff barriers to trade, namely the denial licenses to operate their own terminals in Japanese ports and a system used by the Japan Harbor Transportation Association called the "prior consultation system" prevented them from operating on the same basis as Japan's three largest container carriers, NYK Line, Mitsui OSK Lines and Kawasaki Kaisha Kisen (K-Line) did. U.S. carriers were being assessed fees by a "harbor fund" in Japan that according to FMC Chairman "was extracting payments from carriers with no attendant benefits."

In September of 1996 sanctions of $4 million per month were assessed by the FMC
against the big three Japanese containership operators, NYK Line, Mitsui OSK Lines and K-Line. Upon instructions from the Japanese government, on October 16th the lines refused to pay the fines and in reaction to that decision, the FMC told the Coast Guard to bar most Japanese cargo ships from American ports, and to detain any Japanese ships currently in port. 

After the imposition of sanctions, reforms were promised by Japan's Ministry of Transport (MOT) which resulted in an agreement between the US and Japan in November 1997. As part of the agreement, the action was suspended and the fines were reduced to $1.5 million per month.

While the specific dispute which resolved the FMC action has been resolved, the animosity which is created between the United States and Japan has not. The sanctions were imposed against three Japanese companies but resulted from the actions of Japanese labor unions which were unrelated to the companies fined. The Japanese government eventually paid the fines, but governmental authorization of the anti-competitive acts was indirect and evidence of governmental support was circumstantial. The FMC concluded that "by preventing foreign lines from providing terminal services for themselves and by blocking new entrants from the market, the Government of Japan virtually guarantees that JHTA's monopoly over harbor operations will continue unabated." However, that actions of the licensing authority seem to have been controlled by the labor unions and not by the government itself.

Participation by the United States in a multilateral agreement on trade in services should include a repeal of Section 19 of the Merchant Marine Act of 1920, which authorizes countervailing measures to be imposed by the Federal Maritime Commission. It should be
replaced by an agreement to submit international disputes concerning maritime transport services to a neutral international body, such as the Dispute Settlement Body envisioned by Article XXIII of the WTO's General Agreement on Trade in Services.

F. The Maritime Security Program

Since the close of the last round of negotiations the United States has embarked on an expensive plan of containership and roll-on roll-off ship subsidization known as the Maritime Security Program or “MSP.” Congress passed the Maritime Security Act, on October 8, 1996. The program, which subsidizes the operation of 60 containerships and ro-ro ships at an annual cost of $173 million, is meant to assure that in case of war or national emergency, commercial containerships will be available to launch a military action, and support that action once it is in place. These ships are operated by U.S. subsidiaries of foreign ocean carriers, primarily Maersk Line Ltd. and APL Marine Services, out of Copenhagen and Singapore respectively, with American crews. The MSP supplements the Military Sealift Command's 27 sealift ships, plus 44 more ships of the U.S. Maritime Administration’s Ready Reserve Force. In addition there are 54 other ships that are kept in reduced operating status, which are ready to be activated if needed. These government-owned ships offset the shortage of militarily useful cargo ships in the U.S. commercial sector. The combined cost of these programs is estimated to be $3.2 billion per year. The program was supported by President Obama during his campaign.

There have been problems in the past, for instance during the 1991 Gulf War, with foreign crews being unwilling to transport U.S. military cargo to Kuwait. More recently in Somalia, foreign crews have been sometimes unwilling to transit the Indian Ocean for fear of
pirates. U.S. crews do not pose similar problems. This problem could be solved with mixed crews of U.S. officers with foreign seamen.

The goal is to have a commercially operated fleet capable of hauling U.S. military cargoes in time of war, while operating profitably, and without subsidies in time of peace. The economic turmoil which erupted in 2008 will eventually, if not immediately lead to the need to reduce the cost of the program or eliminate it altogether. Hence a less expensive means for supplying U.S. sealift needs to be ascertained. It is an area where the United States and the less developed countries have a common interest---assuring a small but functioning merchant marine for national security purposes.

G. The Liner Conference System and EU Policy

To understand the effect of the end of the liner conference system in the EU, it would help to look at the development of the liner conference system, and the benefits and burdens which it places on international free trade in maritime services. No matter how much one believes in Adam Smith's "invisible hand" and a free market's ability to create wealth and ration resources, the fact is that in maritime transportation, and particularly in liner trades, experience has shown that completely free trade does not work well. Ship's and maritime trade bring with them emotions concerning national pride, national security, and national survival which inevitably lead to protectionism or subsidization. It is that way today and it was that way in the times of the Greeks and Romans. With over two thousand years of experience to rely upon, there is no reason to suspect that it will change in the 21st Century.

Liner shipping has been provided by shipping lines operating in "liner conferences" for over a hundred years. During the late 1800's shipping companies operating on the same trade
routes would band together to form cartels which they called “conferences.” Conferences set joint rates and assigned market shares to their members, creating revenue-pooling or cargo-pooling arrangements to “spread the wealth.”73

The effects of the conference system were not all bad. Liner conferences had the beneficial effect of self-regulating the shipping industry by providing regular services at stable, if somewhat higher freight rates than would result from unrestrained free trade. Importers and exporters were encouraged to support the liner conference system through a “carrot and stick” system of rewards and penalties. By entering into customer loyalty arrangements such as dual rate systems, with a lower rate for preferred shippers, or deferred rebate agreements, where regular shippers would get a freight rebate based upon their volume of cargo, shippers were given a “carrot” for loyalty. The “stick” was that shippers who shipped their cargo with non-conference or so-called “independent carriers” could lose their preferential rates or even their accrued rebates.

Liner conferences were not complete monopolies however. The existence of non-conference lines and independent carriers along the same routes kept freight rates in check. When liner conference freight rates rose too much even regular shippers could be induced to forfeit their privileges and accrued rebates and ship with them. The practical result of this system of checks and balances on totally free trade was that smaller, less frequent shippers tended to use the less expensive and less reliable independents, while large and frequent shippers of cargo stayed loyal to the conference lines.74

When independents threatened the existence of the conference members by gaining a substantial hold on the market, examples of what might be called extreme anti-competitive practices were sometimes brought into force. The conference had two choice in dealing with
independents which gained too much of the market share—either invite them into the conference or drive them from the trade route.

Driving an independent shipping line from a particular trade route was an expensive process of the conference members. If that remedy were chosen, one or more conference ships would be assigned to be “fighting ships” designed to operate at a loss until the independent operator was driven from the market. The fighting ships would arrive and depart from port on the same schedules as the independent non-conference ship and offer reduced freight rates. Sooner or later, the independent would lose so much money that it was forced off the route and the fighting ships would begin charging the regular conference rates again. The limited monopoly of the conference would thereby be reestablished.75

By the mid-1970's there were over 360 liner conferences operating worldwide and serving every major trade route in the world with little government intervention. European governments adopted a laissez-faire position based upon the belief that ocean shipping, as an international activity, was not subject to national regulation of the extraterritorial application of domestic laws. The United States position has always been different.76

H. The Liner Conference System and U.S. Policy

The United States pride's itself as being a maritime nation, but for long periods of its history, and particularly in the past hundred years, this has not really been so. In the early 1900's the domestic merchant marine was small and from the 1890's to the early 1900's the conference system was seen as inhibiting the development of a domestic merchant marine. Further, most conference practices violated U.S. antitrust laws. Patronage and loyalty contracts, agreements allocating ports or sailings, combinations of competitors which regulated conference membership,
cargo pooling and revenue sharing were all anathema to the U.S. commitment to free and unfettered commerce. The Federal Trade Commission and the Department of Justice favored application of traditional antitrust enforcement methods to combat liner conferences, but to do so threatened diplomatic relations with our European trading partners who considered conferences to be an economic necessity. A compromise was in order, and it was enacted into law as the Shipping Act of 1916.77

The Shipping Act of 1916 provided for the application of U.S. antitrust laws to liner conferences with certain exemptions, which could be granted by the Federal Maritime Commission. Conference membership had to be open to all carriers on equal terms and conditions, deferred rebate loyalty contracts could not be employed and where dual rate contracts were used, the maximum rate differential between the general freight rate offered to the public and the preferential contract rate could not be greater than 15%.

The FMC enforced the Shipping Act and could direct U.S. Customs to refuse entry into port of any ships owned or operated by an offending carrier who was in violation of the Act. Further, fines of up to $1000 per bill of lading could be imposed. Conferences were unhappy with the Act, and FMC approval could be expensive and time-consuming. The system, which was now one of restrained competition, seemed to work well in assuring reliable and relatively low cost maritime services. However, the cost of administrative compliance and the delays in obtaining FMC approval, which could sometimes take years, made the U.S. system of liner conference regulation a barrier to entry of new carriers into the system. As third world nations sought to develop their own merchant marines and to gain a share of the maritime trade, they found the liner conference system to be a non-tariff barrier to entry into the marketplace.78
Hence, the push came for the development of what came to be known as the UNCTAD Code.

I. UNCTAD Policy and the UNCTAD Code of Conduct for Liner Conferences

The United Nations Conference on Trade and Development (UNCTAD) was created in 1962 and was destined to become the forum by which the world's less developed countries (LDCs) sought to realign their economic relationships with the developed countries. That realignment process brought UNCTAD into direct opposition with U.S. policy on most economic issues. However, in the matter of maritime trade and the regulation of liner conferences it appeared at first that the LDC's and the United States had some common interests.79

The U.S. had a relatively small merchant marine, was distrustful of conference practices, and had sought to regulate and control them since 1916. The major conference shipping lines were operated by European nationals and the U.S. spent substantial sums of money through subsidies in an attempt to preserve its merchant marine from decimation by foreign competition. The LDC's complained that the conferences were predominantly controlled by the developed nations, that restrictions on membership, rates, and practices impeded the efforts of smaller nations to develop their own maritime industries, and that the developed primarily European countries could not or would not remedy conference wrongs.80 It seemed like the common interests of the United States and the LDC's could have created a rare alliance between them, but such was not the case.

The process which led to the creation of the UNCTAD Liner Code began in 1972 when the United Nations General Assembly adopted a resolution requesting that UNCTAD consider and adopt a multilateral treaty on liner conferences.81 As part of UNCTAD's Second Development Decade economic program it set a goal for LDC carriage of world trade of 10% by
In May of 1972 at its third meeting in Santiago, Chile UNCTAD laid the groundwork for the Liner Code negotiating process. The actual negotiations began in November 1973 with 79 nations present and they proceeded through two sessions until the final document emerged in the early hours of April 6, 1974.

When negotiations on the UNCTAD Code of Conduct for Liner Conferences were completed in 1974, it was clear that a multilateral program of worldwide cargo-sharing had wide support among the third world community. However, the Code's emphasis on cargo allocation, known as the 40-40-20 split, along with loyalty agreements and other anti-free trade devices was diametrically opposed to the stated U.S. policy of free competition and ever-freer trade. Policymakers in the United States and the 24 members of the Organization for Economic-Cooperation and Development (OECD) held the belief that abandonment of unrestricted free trade in world shipping would result in higher freight rates, reduced services, and eventually in reductions in overall global trade.

With insufficient support to bring about its ratification, the UNCTAD Code remained stalled until 1980 when the European Economic Community (EEC) altered its position and announced that its member states had reached a compromise agreement where it could accept what would come to be known as a “Codist Regime.” In the nine years between 1974 and 1983 the process of ratification and implementation of the Code through national legislation took place. The compromise became known as the “Brussels Package” and EEC support for the Code caused it to come into effect without the approval or participation of the United States in October of 1983.
J. Cargo Allocation Under the UNCTAD Code

The essential feature of UNCTAD was a cargo allocation agreement which split cargo with 40% being carried by ships belonging to a national shipping line of the exporting nation, 40% being carried by ships of the importing nation, and 20% being carried by cross-traders.88

The Code would establish a cargo pooling system in which the national shipping lines would share equally and substantially in both freight earned and volume of cargo shipped, known as a dual quota system, which third party shipping lines, the cross-traders, in any, would have the right to acquire “a significant,” such as 20% of the trade. While there is no strict 40-40-20 division under the Code, the mention of a 20% allocation as being “significant” has led to that formula becoming a short-hand way for describing the Code system.89

Most preference cargoes, that being cargo generated through government purchases, like the P.L. 480, also known as the “Food for Peace Program,” contributions of grain by the United States to ease world hunger are shipped on chartered vessels, once called “tramps,” and therefore would not fall under the Code. Hence those cargoes could continue to be subject to cargo preference legislation. Government financed cargoes through the EXIM bank and government purchases would become part of the pool, but could be allocated to national lines to comply with cargo preference legislation. Military cargo, specifically designated as “military equipment for national defense purposes” would be excepted from inclusion in the cargo pool.90

The Code divided conference members into two classes: national shipping lines and third country lines known as “cross-traders.” National shipping lines were defined as vessel operating common carriers (VOCC’s) which had their head offices in the country they sought to represent and which were recognized under the laws of that country. The flag flown by the ship was not
one of the factors used to determine if a ship belonged to a “national shipping line” so ship operators could continue to flag their ships under flags of convenience and secure the taxation and regulatory benefits which come flagging a ship in, for example, Liberia or Panama. Further, since many shipping companies have multinational ownership, a country could nominate a carrier as a “national shipping line” in either public or private interests had a substantial share of the company's ownership.91

Cross-traders were carriers from countries which were not from the importing or exporting countries in a liner conference who had the desirable effect of keeping freight rates in check. If the rates charged by the national shipping lines of either the importing or exporting nations got too high, cross traders would gather a larger share of the cargo in the trade.

Another check on freight rates was to possibility of other non-conference carriers as long as they “adhere to the principle of fair competition on a commercial basis.”92 If they did, “non-conference lines should not be prevented from operating”93 and the use of fighting ships to drive non-conference vessels out of the trade was specifically prohibited.94

K. Checks and Balances On Freight Rates in Cargo Allocation

With all these competitive checks and balances in place, to some the UNCTAD Code seemed to be a compromise designed to address the anti-competitive concerns raised by the United States95. However, further protections were also put in place. As a further check on high freight rates caused by liner conference’s regulated monopolies the Code sanctioned the formation of “shipper's council” to represent cargo owners in direct negotiation with the liner conferences. The shipper's councils had direct input into decisions concerning admission of third-country lines to the conference, the form and terms of loyalty arrangements, increases in freight rates,
surcharges, currency and exchange rate changes, and the adequacy of service.96

The shipper’s council also has the right to question the necessity of general freight rate increases and the power to demand audits from independent accountants on the costs and revenues of the conference members to determine if those increases are justified.97 The applicable standard is that “freight rates shall be fixed at as low a level as is feasible from a commercial point of view and shall permit a reasonable profit for shipowner.” In order to give shippers stability in prices and the ability to forecast their freight costs in advance, once set the rates would remain in effect for at least fifteen months, although in cases of extraordinary increases in costs, such as an unexpected spike in fuel prices, a temporary surcharge could be added.98

Under the Code, if disputes arise between the shipper's council and the conference the parties can be compelled into mediation and subsequently into international compulsory conciliation99 before a panel of three conciliators from the International Panel of Conciliators list maintained by the Registrar in the United Nations office in Geneva.100 If disputes between shipper and conference members cannot be resolved through mediation or conciliation, then the parties could result to suits under national law, whose courts would apply the law having the most significant contacts to the dispute.

L. Criticism of the UNCTAD Code

The primary criticism of the UNCTAD Code came from the United States. Adherents classical economics and to Adam Smith's “invisible hand” approach argued correctly that economic development occurs most beneficially in ways not foreseeable or capable of planning, and that transportation is merely a means to facilitate the expansion of world trade and not an end
in itself. However, the world in 2008 is considering financing economic activity whose sole purpose is to create jobs and jump start a faltering world economy. Adhering to classical economics and the belief in creative destruction in this economic environment lacks the same appeal that it has in less urgent economic situations.

The next criticism is that the UNCTAD Code was anti-competitive because it resembled in many ways a closed conference, a practice which had been abandoned in the United States in 1916. However, while open conferences were the norm in the United States and its foreign trades, they were not in most other trades. What the United States had gained was inexpensive freight rates which made foreign goods less expensive in the United States, as free trade is intended to do. What it had lost was a domestic merchant marine. In a vacuum, the absence of a merchant marine would be no more or less important that the absence of the telegraph—other means of communication will suffice, but in the United States, the military could not do without a merchant marine. To substitute for the lack of a commercial merchant marine, the military had developed a fleet of Military Sealift Command vessels and terminals at taxpayer expense. Most of the ships in the fleet sat idle most of the time, and the number of ships in the fleet was inadequate to mobilize the military quickly, a lesson learned in both Iraq wars. It became apparent that the lack of sealift capacity was the United State's Achilles heel. If one could prevent a long, slow build up of U.S. forces, one could render its military forces ineffective.

Hence, there were trade offs for free trade. Completely free trade with open conferences meant that the U.S. would have no operating commercial merchant fleet for use in time of war, and that a shadow fleet of vessel, which sat idle most of the time, would have to be maintained at taxpayer expense to provide even a semblance of ability to move U.S. forces to places they might be needed in the world. To some it seemed a high price to pay for low freight rates.
Critics also charged that under the Code, since shipowners were guaranteed a reasonable profit, there was no incentive to reduce costs or upgrade equipment. However, the presence of cross-traders and other national shipping lines would appear to address those concerns. This is not a system with no competition, only with regulated competition.

Other technical objections were raised—that fifteen months was too long a period to hold rates steady, that the dispute resolution procedures were too weak and ineffective. These concerns could all be worked out in a revision to the Code.

III Re-Powering U.S. Policy on Trade in Maritime Services

A. Transparency as a Hindrance to Negotiations

In the United States cabotage and subsidies are “hot button” political issues and as U.S. Ambassador to the WTO Allgeiers has attempted to point out to the WTO, it is a “very sensitive subject in the United States.”101 Some commentators have noted that “the WTO discussions have become the forum for criticism of the United States by the European Union, Japan, Nordic countries, Canada, Mexico and others.”102 However, much of that criticism has been due to the fact that a transparent system of negotiation on free trade in maritime services can lead to direct and immediate opposition from entrenched American interests.

Perhaps in future rounds of negotiation less transparency may lead to more progress in the negotiations103. While the United States prides itself on open government, it is frequently forgotten and both The Declaration of Independence and United States Constitution were negotiated in secret before being opened to the public free debate. A lesson from history might be that openness in these trade negotiations hamstrings the opportunity for U.S. representatives to
reach compromises.

B. Cabotage:

Cabotage has been the practice in trade with Puerto Rico and Hawaii since the 1920s. There has been a general agreement among the nations participating to leave cabotage out of the negotiations. “The United States jealously guards its legislation (the Jones Act), which restricts U.S. domestic deep-sea, Great Lakes and inland shipping to vessels owned, built, flagged and crewed in the U.S. It can be expected therefore that any discussion about the further opening up of the maritime sector will meet strong United States opposition.”

However, it is time for the United States to rethink its position on cabotage, and to consider offering competition in its trade between the U.S. mainland and Puerto Rico, Hawaii, and Guam, in exchange for trade concessions in other maritime sectors, or in exchange for a guaranteed share of liner cargo.

C. Cargo Allocation

The UNCTAD Code was essentially an agreement whereby 81 nations agreed to split cargo among vessels based upon nationality. The split agreed to by most of the world, was 40-40-20—40% being carried by shipping lines which are of the exporting country, 40% being carried by shipping lines of the importing country, and 20% being carried by shipping lines from other countries, known as cross-traders. While the Code has now fallen apart with the withdrawal of the EU and the closing of EU liner conferences, it shows that a cargo allocation system can gain wide acceptance.

The United States should consider agreeing to the demands of the developing world, and establishing a system of cargo allocation which provides U.S. flag carriers with a sufficient
enough share of world cargo to permit elimination of the Marine Security Program (MSP) and a large portion of the Military Sealift Command. The goal should be to reduce the current 115 vessel fleet of government owned or available ships to 22 ready reserve ships supplemented by a domestic commercial fleet which is subsidized through a system of cargo allocation.

While such a plan is anathema to existing U.S. policy, it recognizes that in a global economic recession, it cannot continue to spend $3.2 billion per year on sealift capability. The majority of the developing world wants the opportunity to participate in maritime trade with national flag carriers. While the 40-40-20 formula may have been too much of an allocation to national flag carriers, a 10-10-80 formula, where 80% of trade is allotted to cross-traders, may be sufficient to give every country the opportunity to develop its merchant fleet to preserve its national security, without overburdening world trade with measures which are non-competitive.

Is it a Faustian bargain? Of course it is. However, the current system doesn't work well, and a Faustian bargain is better than no bargain, and continued subsidization of the U.S. merchant marine by American taxpayers. Before even taking office President Obama was proposing "the largest public works construction project since the inception of the interstate highway system....to resuscitate the reeling economy." The problem with such a large public works project is that it can only come to fruition by raising taxes and increasing deficits. The advantage of reviving the American merchant marine by reviving the UNCTAD Code, in a modified form, is that it reduces the burden on taxpayers.

CONCLUSION

Cargo allocation introduces a protectionist element into trade negotiations which are designed to eliminate protectionism. However, progress in the trade negotiations in the field of maritime transport must involve a Faustian bargain--the need to accept a limited number of
protectionist measures, the very traits that the WTO negotiations seek to eliminate, in order to achieve progressive liberalization in the trade in maritime services.

With all of these changes, an historic opportunity may exist to alter the way in which world maritime trade is conducted. Many call for protectionist measures, a call which runs directly counter to the principals behind the World Trade Organization's General Agreement on Trade in Services. However, in one area of international trade, cooperation with other nations in establishing a new method of conducting trade could in effect revitalize a flagging American industry, create thousands of jobs, and be entirely self-financing. That area is in trade in maritime services.

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3. EU Regulation 4056/86, which had permitted the operation of the liner conferences went into effect in 1987. The Regulation was abolished on 25 September 2006, effective 18 October 2006. However, existing conferences were given a two-year reprieve within which to wind up their business. EU regulation 4056/86 abolished by: Council Regulation 1419/2006, 2006 O.J. (L 269) 1 (EU). All documents relevant to the EU decision to end liner conferences can be found at http://europa.eu.int/comm/competition/antitrust/legislation/maritime/ (last visited Dec. 31, 2008).

4. The WTO has developed four categories of trade in services: “cross-border supply” which includes, for example, international phone calls and the supply of electric power, all of which is designated in “WTO-Speak as “Mode 1 trade.” Maritime transportation of goods falls primarily within the definition of Mode 1 trade. Other categories of trade in services include “consumption abroad,” including travel and tourism designated as Mode-2 trade. Cruise ships and other vessels, like casino boats, which carry passengers fall primarily with the definition of Mode-2 Trade. “Commercial presence” is where companies like banks set up overseas branches, known as “Mode-3 trade.” The failed “Dubai Ports Deal” would have fallen within the definition of Mode-3 trade.
The “movement of natural persons” including fashion models and other specialists who travel abroad to provide services in another country, known as “Mode-4 trade.” Technical specialist who provide ship repair, electronic installations, and other support for vessels in transit would fall within the definition of Mode-4 trade.
5. Ocean shipping of cargo can be broadly defined into two categories, liner trade and tramp trade. Liner vessels are ships operating as common carriers of merchandise for hire on fixed routes with fixed schedules. Today, most liner services are provided by containerships or ro-ro vessels. *Hellenic Lines, Ltd. v. Dir. gen. of the India Supply Mission ex rel. India*, 319 F. Supp. 821 (S.D.N.Y. 1970).

Tramp shipping consists primarily of vessels carrying bulk commodities, or heavy lift cargoes pursuant to private contracts of carriage called charters, along variable routes for a single or multiple voyages. The operation of tankers carrying crude oil, tankers carrying refined petroleum products (gasoline and aviation gas), dry bulk ships carrying iron ore for steel production, bauxite for aluminum production, cement for concrete production, and grain ships carrying sugar, wheat, and corn are all examples of tramp shipping.

World trade in bulkers is already highly competitive and free from regulation. These private carriers already operate on razor thin margins in freight rates through a global system of internet offers and acceptances. Few free trade gains can be made in that arena because the industry is already substantially free.

6. The majority of the world's manufactured or refined products are carried in ocean shipping containers. The standard measurement of an ocean shipping container is the TEU, or trailer equivalent unit. One TEU is a container twenty feet long, eight feet wide, and eight high. Most containers are forty feet long, making the average container two TEU's. BusinessDictionary.com, Twenty-foot Equivalent Unit (TEU), http://www.businessdictionary.com/definition/twenty-foot-equivalent-unit-TEU.html (last visited Dec. 31, 2008).

Containers are carried aboard containerships without chassis, and hence in order to transport containerized cargoes, chassis must be provided at both the loading and discharge ports, and large sophisticated container cranes must be available to load and discharge the containers.

7. Hereinafter the World Trade Organization will be referred to simply as the "WTO", the General Agreement on Trade in Services will be referred to as the "GATS", and the Negotiating Group on Maritime Transport Services will be referred to as the "NGMTS."

8. The term ro-ro vessel refers to a roll-on roll-off vessel. Ro-ro vessels are fitted with ramps so that containers on chassis, or other wheeled or tracked cargo, such as earth moving equipment, tractors, tanks, Humvees, and fuel carriers can be driven on and off the vessel without the need for either container cranes or chassis at the discharge ports. *Flynn v. American Auto Carriers, Inc.*, 2000 AMC 986, 987 (E.D.N.Y. 2000).

9. “Sealift” refers to the ability to move military cargo and equipment in time of conflict or war. Since the United States is separated from the remainder of the world by oceans on its East and West Coasts, it is geographically, and geopolitically required to have sealift capability in order for its military to be able to respond to both humanitarian and military missions around the world. The U.S. military requires both containerships and ro-ro vessels to support its military capabilities, since recent history has shown that many humanitarian crises and military conflicts arise in places where port facilities are either inadequate or unavailable. Military Sealift Command, MSC Overview, http://www.msc.navy.mil/N00P/overview.asp (last visited
Dec. 31, 2008).


14. The WTO has long recognized that in the spot and future market rates for ocean bulk shipping "contracts are allocated on an extremely competitive basis; business is won on the basis of freight rates a few cents per ton lower than the competition." For that reason, trade in bulk shipping services has only tangentially been part of the talks to date. WTO, Council for Trade in Services, *Background Note by the Secretariat: Maritime Transport Services*, S/C/W/62 (Nov. 16, 1998).


17. Rail-bridge services in the United States carry containers on trailers (chassis), which are then loaded on rail flatcars. This service is known as Trailer-on-Flatcar or "TOFC" service. The standard rail flatcar is 89 feet in length and can carry two forty foot containers. 2 Scott R. Thompson, Great Northern Equipment Color Pictorial: Freight Cars (Four Ways West Publ'ns 1996).

When comparing the carriage of containers from Long Beach, California to Jacksonville, Florida, a route which is substantially parallel to Interstate 10, one can see the advantage that doubling the size of containerships transiting the new Panama Canal will have in comparison to transporting a similar amount of cargo by rail. It takes the same number of crewmembers, and less fuel per container to transport cargo on a 12,000 TEU vessel when compared to transporting 5000 TEU's on current Panamax (the largest ships that can passed through the existing Canal) vessels. Rail transportation will be at a considerable disadvantage when the new Canal is opened.


21. Cabotage is "trade or navigation in coastal waters, or, the exclusive right of a country to operate the air traffic within its territory." American Heritage Dictionary of the English Language (4th ed. 2000). In the United States, cabotage laws also apply to transportation between the mainland of the United States and Puerto Rico, Hawaii, Alaska, and Guam.


24. Note of the Meeting, supra at note 23.


26. Note of the Meeting, supra at note 25.

27. Id.


29. Joint Statement from the European Communities and their member states; Hong Kong, China, Japan, Republic of Korea, Norway, and Singapore to the Council for Trade in Services, WTO document #00-4099 (Oct. 6, 2000).


32. Communication from Australia, Canada, Chile, The People’s Republic of China, The European Economic Communities and Their Member States, Japan [and 34 other countries and customs territories] to the Council for Trade in Services, WTO document #03-1228 (March 3, 2003).


36. Allgeier responded to the question stating “I was just drawing boats here on the napkin. Actually, I mean we do have certain maritime services in our services schedule. The principal thing that we do not have is the intra-costal maritime services and that of course is a very sensitive subject in the United States.” By intra-coastal services, he was referring to trade between the United States’ East and West Coasts. However, the services schedule also did not contain a substantial position on international trade, trade with Puerto Rico and Hawaii, or intra-coastal trade.

37. WTO Negotiating Group on Maritime Transport Services, Note of the Meeting, S/NGMTS/12 (June 3, 1996).


40. Jones Act, Flag-of-convenience Shipping Become Topics during Senate Hearing on Tankers, OPA ’90, American Maritime Officer, Volume 38, number 9.

41. The subsidies were actually called Construction Differential Subsidies and Operating Differential Subsidies and were designed to make up the difference between foreign labor costs and U.S. labor costs. Merchant Marine Act, 46 U.S.C. §1171 (1936). Merchant Marine Act, 46 U.S.C. §1151 (1936).

42. The Jones Act is named for U.S. Senator Wesley L. Jones (1863-1932), a Republican from Yakima, Washington who served as Chairman of Commerce Committee from 1919 to 1930. The Act was rammed through Congress without debate on June 5, 1920. If its two most controversial provisions had been fully implemented it would have effectively denied foreign carriers access to U.S. cargoes. as envisioned by Senator Jones, the Act would have granted preferential rail rates to cargoes imported or exported on U.S. vessels, and would have charged higher customs duties on cargo arriving on foreign flag vessels. Rene De La Pedraja, A Historical Dictionary of the U.S. Merchant Marine and Shipping Industry (Greenwood Publ’g Group 1994).
Another Jones, William Atkinson Jones (D., Va.), Chairman of the Committee on Insular Affairs of the House of Representatives, was as vocal advocate a opponent of subsidies for the U.S. merchant marine as Senator Wesley L. Jones was an advocate. Said Congressman William Jones about subsidies:

No one would fail to distinguish between ship subsidies paid in direct bounties out of the public Treasury in aid of purely private enterprise and payments out of our postal funds for services actually rendered in carrying our ocean mails in American vessels. I am as heartily in favor of the latter [carriage of government impelled cargo on U.S. ships]...as I am opposed to the former [subsidization of U.S. flag ships].


44. Specifically Section 883 of the Act provides that "...No merchandise...shall be transported by water....on penalty of forfeiture of the merchandise...between points in the United States, including Districts, Territories, and possessions....in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States"  Section 866 of the Act provides for "...preference in the sale or assignment of vessels for operation on such steamship lines shall be given to persons who are citizens of the United States..." 46 U.S.C. App § 866.

45. Obama's position on the continued vitality of the Jones Act during his campaign for the Presidency was as follows: “The Jones Act is a vital part of our national defense and supports American workers. As President, I would fully enforce it. The Jones Act should be waived only under rare circumstances. I spoke out when the Bush Administration ignored the Passenger Vessel Services Act, which applies Jones Act requirements to cruise, ferry and excursion vessels, and contracted Carnival Cruise Lines, a foreign owned company, to house evacuees from hurricane Katrina. Not only did they earn a higher-than-normal profit, but they violated Federal law in doing so. As is required by law, I will only waive the Jones Act when necessitated by national security. Furthermore, maintaining the American merchant marine fleet is vital to our economy and national security. I would oppose any move to undermine this Act." (2008).

46. Substantially less cargo originates from Puerto Rico or Hawaii to be transported to the mainland of the United States compared to the amount destined from the U.S. mainland to those islands. Puerto Rico exports about $18 billion in medical equipment and rum the mainland, but in general ships departing from Puerto Rico leave with empty containers. http://www.census.gov/prod/www/abs/ft8952007annual.pdf (last viewed Dec. 31, 2008). Ships returning from Hawaii carry about $560 million a year (2007 in pineapples, houseplants, sugar, and macadamia nuts, but these commodities fail to fill up the containers returning to the United
States mainland. See Foreign Trade Statistics, U.S. Census Bureau (2007) at
<www.census.gov/foreign-trade>; <http://www.census.gov/prod/www/abs/ft8952007annual.pdf>; and National Agricultural
47. It is estimated that the freight paid for ocean marine transportation between the United
States and Puerto Rico is $830 million per year. See Yoly Industrial Supply v. Horizon
Lines, Crowley Maritime Corporation, Sea Star Lines, and Trailer Bridge, Inc., Case
No. 3:08-434 (USDC Middle, Florida 2008).
48. The Jones Act of 1920, formally known as the Merchant Marine Act of 1920, §19 and §27, 46
App. U.S.C. §876 and §883 et seq. In addition to cabotage, the Jones Act which first
provided seamen with the right to sue their employers for negligence if they were
injured on the job. It is worth noting that Senator Jones, the author of the legislation,
ever lived on the ocean or a navigable river, and that while he was a lawyer, his
practice never included maritime law.
49. Average Far East to EU rates can be found in Bruce Barnard, End of an era for liner
<http://www.joc.com/articles/news.asp?section=OCEAN&sid=46712> (last viewed
January 2, 2009). Because of resistance of U.S. to Puerto Rican carriers to providing
rate quotes to non-customers, the rate from Miami to Puerto Rico was estimated from
shipment records of two forty foot containers obtained by the author from a current
customer. The source cannot be disclosed for fear of retaliation.
13, 2008).
51. Marialba Martinez, Puerto Rico Senate To Investigate Jones Act Repeal, Puerto Rico Herald,
52. Henriette Westhrin, Norwegian State Secretary (October 4, 2007), "No reason for
international aviation and maritime transport to be excluded from a new climate
regime," Norwegian Ministry of the Environment,
<http://www.regjeringen.no/en/dep/md/About-the-Ministry/Other-political-staff/Tidligere-statssekretarer-og-radgivere/
(accessed December 28, 2008).
53. Stefano Ambrogi, Ship CO2 emissions at 3.5 pct of global total: IMO, Reuters
February 13, 2008.
54. IMO Report Calculates CO2 Emissions from Shipping 3x Higher Than Previously Believed,
Green Car Congress,
<http://www.greencarcongress.com/2008/02/imo-report-calc.html> (last viewed
January 2, 2009).
55. One of the companies which benefits from the Jones Act is Horizon Lines, which operates
ships between the United States mainland and Puerto Rico. Horizon Lines Chairman and
CEO Chuck Raymond was quoted in the August 2008 issues of the Masters, Mates & Pilot's
publication "Marine Log" that "we were able to effectively mitigate the impact of steep fuel
cost increases in the [second quarter of 2008] through a combination of conservation, strict
vessel scheduling and fuel cost recovery measures" The company also introduced "Horizon
Green," a program which included vessel management controls and audits, ballast water
management, waste stream analysis, usage of low sulfur diesel fuel and marine terminal
pollution mitigation plans. “Energy and sustainability are the two most critical issues confronting the shipping market today,” Horizon Lines John Keenan was quoted as saying.

58. Section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b) ("Section 19")


65. On September 24, 1996, the United States Senate joined the House of Representatives in passing H.R. 1350. President Clinton signed Public Law 104-239, the Maritime Security Act, into law on October 8, 1996.

66. The final rule implementing the Maritime Security Act of 2003 is published at 70 Federal Register 55581-55597 (September 22, 2005).

67. A complete list of MSP participants is on the MARAD web site at <http://marad.dot.gov/documents/MSP_Participants_10_1_08.pdf> (last viewed January 2, 2009).


69. President Obama stated during his campaign for the presidency: “The Maritime Security Program helps ensure US-flag vessels are ready to meet our needs during times of war or national emergency and I support fully funding it. I support funding the Maritime Security Program so that it serves our nation’s national security needs. If the GAO [General Accountability Office] or another independent body finds that the MSP program needs to be expanded, I will support expanding it to the size necessary.” (2008).

70. Damas Kanyabwowa, Somali pirates threaten fuel supply to Tanzania, The Citizen, December 27, 2008.


72. Lionel Casson, The Ancient Mariners: Seafarers and Sea Fighters of the Mediterranean in Ancient Times, Princeton University Press, (2nd Edition 1991). In the time of Augustus the Rome to Alexandria grain run was so important to the survival of the Roman Empire that the merchant fleets of grain clippers were subsidized and controlled by the government. The ships, although owned by Rome, were manned by Greeks, Phoenicians, or Syrians. The cargoes were mostly free, supplied in the payment of taxes, and the shipping routes were controlled by the Minister of Supply, the praefectus annonae, as he was called. See also Lionel Casson, Ships and Seamanship in the Ancient World, Princeton University Press, (1971).


79. These common interests were acknowledged in statements by Franklin K. Willis, Esq., who was the Deputy Secretary of Transportation for Policy and International Affairs during the early 1980's when issues regarding the UNCTAD Code and its worldwide adoption were coming to a head. Mr. Willis also served in the Legal Advisor's Office of the Department of State during the period when the UNCTAD Code was being considered. He was part of the U.S. negotiating team on the Code.


81. UNCTAD Code, note 6 *supra*, at 913.

82. *The Outlook for Shipping, supra*, note 4.

83. UNCTAD Code, note 6 *supra*, at 913.

85. For a complete statement of the position of the United States, see Note to the Governments of Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, the Republic of Ireland, Italy, Japan, the Netherlands, Norway, Sweden, the United Kingdom and the European Economic Community, UNITED STATES DEPARTMENT OF STATE (November 10, 1982) [hereinafter cited as Note of Nov. 10, 1982].


88. Id. Page 31.

89. Id. Page 86.

90. Id. Page 57.

91. Id. Page 32.

92. UNCTAD Code, Annex II: Art. 2(2).

93. UNCTAD Code, Annex II: Art. 2(3).

94. UNCTAD Code, Art. 18.


96. UNCTAD Code, Articles 1(5); 7(1); 14(2); 16(3) and 17(2).

97. UNCTAD Code, Art. 14(3).

98. UNCTAD Code, Articles 12, 14(9), and 23.


100. Each nation participating in the Code could nominate 12 conciliators to the list. However, no two conciliators on a three person panel could be from the same nation. UNCTAD Code, Art. 53 and 30.