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REMARKS ON THE PROVISIONAL AGENDA OF THE SECOND LATIN AMERICAN
REGIONAL PREPARATORY MEETING ON THE INTERNATIONAL
CONVENTION ON MULTIMODAL TRANSPORT

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SECOND LATIN AMERICAN REGIONAL PREPARATORY MEETING ON THE
INTERNATIONAL CONVENTION ON MULTIMODAL TRANSPORT

Buenos Aires, 13-17 December 1976

PROVISIONAL AGENDA

- I Organization of work: election of officers, adoption of the agenda, constitution of commissions.
- II Current situation and prospects of the negotiations in Geneva:
 - (a) Analysis of the progress and results of IPG meetings;
 - (b) Study of the prospects, in time and scope, of the draft convention on international multimodal transport.
- III The Latin American position: definition of a common Latin American position on the following points, particularly with respect to the inclusion of clauses of public law:
 - (a) Scope of the convention;
 - (b) The multimodal transport contract and the document which evidences it;
 - (c) Insurance and liability;
 - (d) Customs aspects;
 - (e) Licensing of the Multimodal Transport Operator;
 - (f) Adaptation of the terms of shipment to multimodal transport;
 - (g) Relations between the convention and the technological aspects of the unitization of cargo and maritime transport.
- IV Strategy to be followed.

I. Introduction

1. The Inter-Governmental Preparatory Group (IPG) set up by the UNCTAD Trade and Development Board to prepare a draft convention on international multimodal transport was obliged to interrupt its third session on 4 March 1976, due to circumstances beyond its control, and asked the Board to reconvene the Group to continue its session at the beginning of 1977. The meeting has now been fixed for January 1977.
2. At the end of the first part of the third session, the Chairman of the IPG invited all the groups of countries to take advantage of the interval to "go more deeply into the documentation and consider their position in the light of the work carried out so far".
3. The Latin American countries, recognizing that it was necessary and opportune to make a further analysis of the present state of the negotiations on a convention on international multimodal transport, will meet in Buenos Aires between 13 and 17 December 1976, convened by the Permanent Secretariat of the Latin American Economic System (SELA), at the request of the Latin American Group in Geneva (GRULA) to study the background material on which the Latin American position can be defined and make a constructive contribution to the progress of the discussions at the international level.
4. The position of the Latin American countries has been developing in the course of the meetings held at the subregional, regional and world levels. (See CEPAL, Evolution of the Latin American position regarding the negotiations for a Convention on International Multimodal Transport, E/CEPAL/L.141.) The present note indicates their current position as it appears from the conclusions reached and statements made at those meetings, and its purpose is to serve as a working document for the Second Latin American Regional Preparatory Meeting on the International Convention on Multimodal Transport.

5. To facilitate access to the sources of information used, at the end of each paragraph or section, mention has been made of the corresponding reference to the report of the meeting or other basic documents, as follows:

III IPG: for the first part of the third session of the Inter-Governmental Preparatory Group on a Convention on International Multimodal Transport (Geneva, 16 February-4 March 1976); document TD/B/AC.15/18, 18 May 1976;

II IPG: for the second session of the IPG (Geneva, 11-29 November 1974); document TD/B/AC.15/11, 31 December 1974;

Mar del Plata: for the First Latin American Regional Preparatory Meeting on the International Convention on Multimodal Transport (Mar del Plata, 21-30 October 1974); document GRULA INTERMODAL/G/Rev.1, 30 October 1974;

Lima: for the Second Meeting of the Consejo de Integración Física de la Junta del Acuerdo de Cartagena (Lima, 7-11 October 1974); document C-IF/II Informe final/Rev.1, 12 October 1974.

II.A. Definition of international multimodal transport

6. The Latin American countries, like the other regional groups, were in agreement to accept the following as a working definition:
- "The carriage of a consignment of goods from one country to another, by more than one mode of transport, on the basis of a single contract (the multimodal transport document or contract) issued by the person or enterprise that organizes such service (the multimodal transport operator (MTO)). The MTO acts as a principal and not as an agent or on behalf of the shipper or of the carriers participating in the multimodal operations and assumes responsibility for the execution of the contract." (III IPG, para. 14.)

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7. During the 1971 discussions on the TCM Convention in the IMCO/ECE joint meetings, there was a proposal to define multimodal transport as the "carriage of goods under at least two different legal régimes governing transportation", but since in Europe there are international conventions for each individual means of transport, it was a matter of indifference which approach was used and it was preferred to choose the definition of "by at least two different modes of transport" in which the multimodal convention is seen as a legal instrument to link up in a suitable way the existing unimodal rules. On the other hand, the situation is different in Latin America since there are no international conventions on road or rail transport which harmonize the regulations of countries in those fields, so that international transport carried out by a single means of transport is subject to different legal régimes in each country. Furthermore, the modal approach has the disadvantage of emphasizing the physical aspect, thus obscuring the inherently institutional nature of multimodal transport.

II.B. Study of the prospects, in time and scope, for the draft convention on international multimodal transport

8. In 1974, at the Mar del Plata meeting, the Latin American countries reached the conclusion that in view of the progress in new transport techniques, measures should be adopted "towards:

(a) assuring control by the governments of the region over the new processes of multimodal transport and adequate participation by the Latin American countries in this transport;

(b) promote the establishment and strengthening of national operators of multimodal transport in their own countries".

(Mar del Plata, A para. 2.)

9. The Latin American countries also decided to participate actively in the preparation of a convention on the grounds that if such a convention were not adopted "the expansion of multimodal transport will impose, at any rate, new legal norms and commercial practices" and that they should not run the risk "of the adoption of an international convention ... based on criteria which have hitherto been sustained by the industrialized countries".

10. More recently, in Geneva, through the Group of 77 to which they belong, the Latin American countries reasserted what was said at the second session of the IPG to the effect that the future convention should satisfy the following conditions:

- (a) the future convention should be elaborated within the context of the establishment of a new international economic order in conformity with General Assembly resolutions 3201 (S-VI) and 3202 (S-VI);
- (b) the convention should safeguard and promote the economic and social development of developing countries, especially the least developed among them;
- (c) it should be compatible with relevant bilateral agreements and national legislation concerning cargo sharing;
- (d) it should also be compatible with the Convention on a Code of Conduct for Linear Conferences and to this effect should contain provisions with regard to linear conferences and other carriers in their relations to shippers, MTOs and other interested parties, and the provisions of the Convention on a Code of Conduct should prevail in the case of conflict between these two Conventions, in order to safeguard the achievements of developing countries in international forums. (III IPG, para. 7.)

11. In view of the involuntary interruption of the IPG's third session there will inevitably be a delay in the preparation of the text of the draft convention. If the Trade and Development Board convenes the fourth session of the Group in October/November 1977 (III IPG, para. 105) the Conference of Plenipotentiaries would not be held earlier than 1978.

III.A. Scope of the convention

(i) Means of transport and types of cargo

12. These two highly important questions have not yet been studied in depth. In Geneva all the groups were in agreement that it was necessary to proceed with caution on the question of whether the convention should also apply to a multimodal transport which included carriage by air, and also to the question of the types of goods to which the convention should apply. More specifically, doubts still exist about the inclusion or non-inclusion of break-bulk cargoes.

(III IPG, para. 58.)

13. In 1974 it was agreed that the convention should apply to all means of transport and that the clauses of private law of the convention "should be applied above all to international multimodal transport of unitized cargo. Bulk cargo (solid, liquid, and gaseous) shall be excluded from the convention". (Mar del Plata, A, paras. 8 and 9.)

Two points in the Mar del Plata declaration are worth reconsidering:

• preferential application to the transport of unitized cargo.

This position deserves greater study since a convention restricted to unitized cargo could unduly encourage the introduction of technology which does not take into account the interests of the developing countries and would deprive some exporters of the region of the potential advantages of being able to operate under a single multimodal transport contract when it was not suitable to unitize their cargo.

• the exclusion of bulk cargo. In as much as the application of the convention would facilitate trade, it may be questioned whether it is desirable to exclude from such benefits other forms of cargo whose volume is important within Latin American international trade.

(ii) Geographic scope or territorial links

14. This is one of the key aspects of any convention on international transport, since a sound definition avoids or reduces to a minimum the uncertainty about the substantive law which shall apply to the transactions in question.

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15. However, this question - together with arbitration and conflicts of laws - was not studied at Mar del Plata nor at the second session of the IPG, while awaiting the results of the work of the United Nations Commission on International Trade Law (UNCITRAL) (Mar del Plata, H, para. 1 and II IPG, para. 98.)

16. In Geneva, the Group of 77 declared that the "territorial link of the convention to a Contracting State should be defined by reference to three criteria:

- (a) the place at which the goods were taken into charge by the MTO was located in a Contracting State;
- (b) the place designated for delivery of the goods by the MTO was located in a Contracting State, and
- (c) the place where the MT document was issued was located in a Contracting State".

17. These connecting factors should be cumulative. Subsequently, however, the representatives of some developing countries expressed the view that the convention should apply even if only the first two conditions were satisfied. (III IPG, para. 57.)

Since some developed countries have suggested that any one of the three conditions should be sufficient to provide a territorial link, it would be desirable to study carefully the disadvantages which might accrue to the developing countries from the acceptance of criterion (c) as territorial link if it is not further conditioned by an effective link with the transport journey. (See UNCTAD, Study on the scope of application of the rules on international multimodal transport, TD/B/AC.15/7/Add.5, para. 34.)

18. With regard to the situation of the land-locked countries, the Andean Pact countries were in agreement that "adherence or non-adherence to the convention by the transit countries shall not affect the facilities which are granted or may be granted to the land-locked countries, nor those envisaged in their bilateral agreements on free transit". (Lima, para. 4.)

/(iii) Issuance

(iii) Issuance of the multimodal transport document

19. There was consensus at Mar del Plata that the issuance of the multimodal transport document "constitutes adequate proof that a specific operation will be regulated by the clauses of the convention and that the issuance of this document is obligatory for the MTO, when the user requests it". (Mar del Plata, D, para. 2.)

In this respect, it would be advisable to make the issuance of the MT document obligatory as of the time the parties agree on multimodal transport and not to make it subject to being requested by the user, and also to establish a provision similar to the one in article 5.(2) of the Warsaw Convention so that the convention mandatorily apply to multimodal transport operations regardless of the existence of the transport document (see CEPAL, Contents of the international multimodal transport document, E/CEPAL/L.142.)

(iv) Temporal scope

20. With regard to this aspect, it was agreed that it should be "from the moment the goods were delivered to the MTO until he delivered in turn to the consignee". (III IPG, para. 58.)

However it would seem necessary to add a provision in respect of delivery "in good order" and also to stipulate the time-limits within which the consignee can make claims for concealed damage or other factors.

(v) Stipulation which depart from the convention

21. It has been included that - in the opinion of the Group of 77 - "once [the shipper] had decided to use multimodal transport and an MT document had been issued, the convention should be mandatory".

(III IPG, para. 57.)

It should however be borne in mind that the foregoing does not allow the carrier to increase his liability or obligations in favour of the user, although this possibility is explicitly envisaged in the UNCITRAL draft convention on maritime transport.

(vi) Choice between segmented transport and multimodal transport

22. The right of the shipper to choose between segmented and multimodal transport has been widely recognized (III IPG, paras. 11 and 57.)

III.B. The multimodal transport contract and the document which evidences it

(i) Definition of the multimodal transport document

23. "It is the legal evidence of the contract between the user and the MTO, by means of which the MTO assumes the obligation to transport or to see to the transport of the cargo, between two countries and by at least two modes of transport, from the place where he receives the cargo to the place agreed upon for the delivery". (Mar del Plata, D, para. 1).

The definition of the document is one of the items which will be discussed in the second part of the third session of the IPG (III IPG, para. 96), but although the Group of 77 declared that the document "evidenced the MT contract", it would seem to derive from the working definition of the concept of international multimodal transport which was adopted at IPG III: "carriage ... on the basis of a single contract (the multimodal transport document or contract)", so that for the IPG the contract and the document are one and the same thing. (III IPG, paras. 15 and 14). It would thus be advisable to establish clearly the distinction between the contract itself and the document which evidences it.

(ii) Enforcement of the norms of public law

24. It has been established that the convention should contain norms of public law which would be mandatory both for the MTO and for the users. (Mar del Plata, A, para. 6).

It would have to be decided, however, whether it would be advisable to include some of these norms in the multimodal transport document or whether it should be left entirely to national legislation to enforce the aspects of public law.

/(iii) Negotiability

(iii) Negotiability of the document

25. It has been agreed that it should be left to the option of the user (or shipper) to decide on the negotiability of the document at the time of issuance by the MTO. (III IPG, para. 15.)

(iv) Contents of the document and the functions it would fulfill

26. In the opinion of the Group of 77, the MT document "should contain as much information as possible in order to safeguard the interests of the parties concerned and to enable it to perform its functions in world trade". It was thus considered essential to include a much greater amount of information than that agreed on in Mar del Plata (D, para. 3).

For a more detailed consideration of the contents of the multimodal transport document, reference may be made to the document Contents of the International Multimodal Transport Document, November 1976 (E/CEPAL/L.142). It could also be useful to follow the draft outline proposed by the Chairman of the Working Group of IPG III which is reproduced in Annex I.

III.C. Insurance and liability

27. The Latin American countries have expressed their concern that the insurance and liability régime included in the convention should duly safeguard both the interests of the users and the participation of the Latin American insurance industry.

28. On this second aspect resolution 42 (III) of UNCTAD has indicated that the insurance of cargo in multimodal operations should be covered "as far as is technically feasible" in the markets of developing countries.

29. Furthermore, resolution 9 (VII) of the UNCTAD Committee on Invisibles and Financing Related to Trade endorsed the conclusions of the study made by the UNCTAD Secretariat, Marine cargo insurance (TD/B/C.3/120), to the effect that it is considered advisable to maintain the present system of the coexistence of cargo insurance and

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coverage of the carrier's liability and that "any radical shift in risk allocation from cargo insurance to carrier's liability would be particularly detrimental to the interests of developing countries".

30. During the first part of the third session of the IPG a Latin American Insurance Group was set up; it analysed this subject in detail and its conclusions appear in Annex II of document E/CEPAL/L.141, already mentioned.

It would be advisable, in addition to analysing and ratifying the agreements of the Latin American Insurance Group, to establish the Latin American position on the exemptions from the liability of the MTO considered acceptable for inclusion in the future convention. This aspect, which is considered basic, has not yet been discussed in any Latin American forum, or in Geneva.

Jurisdiction

31. The Latin American countries had agreed that the convention should establish that the plaintiff should have "the following options, among others, as regards jurisdiction:

- (1) the place where the defendant has his domicile, his principal place of business, or is ordinarily resident;
- (2) the place where he has the branch or agency through which the contract of carriage was made;
- (3) the place where the loss of damage occurred;
- (4) the place of origin or of destination of the cargo movement."

(Mar del Plata, E).

III.D. Customs aspects

32. The Latin American Customs Group, set up during the third session of the IPG, considered that the following general guidelines were advisable for the treatment of customs questions in the convention on multimodal transport:

/Customs transit

Customs transit régime:

- (a) the customs transit régime is the most suitable for multimodal transport.

Single document:

- (b) the possibility of using a single customs transit document, which would be accompanied by others which the legislation of each country deems necessary;

Customs controls and guarantees:

- (c) Taking into account the interests of the developing countries, it is necessary to leave to national legislations all that concerns customs controls arising from multimodal transport operations and the systems of surety or guarantee of fiscal interest. (GRULA-Customs and III IPG, paras. 53 to 55.)

Although the legislations of each country ensure that national interests are safeguarded in all that concerns customs controls and the systems of surety and guarantees, it is important to establish common norms outside the world convention to expedite the transit of merchandise and facilitate international transport in the region. For these purposes, it is worth bearing in mind the draft common norms on customs transit recently approved at the ninth meeting of LAFTA National Customs Directors, (Montevideo, August 1976).

III.E. Licensing of the Multimodal Transport Operator

(i) Definition of the MTO

33. For the purposes of the convention, agreement was reached at Mar del Plata on the following definition:

"It is that legal or natural person, public or private, with the necessary technical, commercial and financial capacity, who assumes the responsibility for the organization and execution of international multimodal transport, in conformity with the legislation of the country in which he operates and with the norms of the proposed convention"

(Mar del Plata, B, para. 1).

34. In the first part of the third session of IPG, as part of the definition of multimodal transport, the following was agreed on: "The MTO acts as a principal and not as an agent or on behalf of the shipper or of the carriers participating in the multimodal operations and assumes responsibility for the execution of the contract". (III IPG, para. 14).

(ii) Regulation of the operations of the MTO in the convention

35. As the representative of the Secretary General of UNCTAD pointed out when summing up the conclusions of the studies on multimodal transport prepared by the Intergovernmental Preparatory Group, in order to protect the interests of the developing countries the "future Convention should ... regulate, on a broad basis, the duties and responsibilities of MTOs vis-à-vis the shippers and other interested parties in the countries where they operated". He also indicated that, among the suggestions contained in its studies, the Secretariat recommended that the developing countries should establish "a licensing system for MTOs", and also measures aimed at the "promotion of regional economic co-operation and the establishment of multinational transport enterprises among developing countries". (III IPG, paras. 12, and 10.)

36. The Latin American countries have already said that the "States reserve the right to regulate and authorize the establishment of multimodal transport operators in their territories" (Mar del Plata, A, para. 7 and B, para. 2), but that the convention must "establish the minimum requirements which the MTO should fulfill". (Mar del Plata, B, para. 3). Within the norms of public law, the Convention should contain "a provision allowing Contracting States to supervise and regulate in detail the activities of MTOs in their respective territories" (II IPG, para. 98).

The Latin American countries have stressed this aspect in various forums but have not proposed a specific text which could be submitted for consideration by the Group of 77. Taking into account the degree of progress made in the negotiations it

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seems essential that the Second Latin American Regional Preparatory Meeting on the International Convention on Multimodal Transport should make a start on drafting clauses of public law which would satisfy the requirements in this respect.

III.F. Adaptation of the terms of shipment to multimodal transport

37. If international trade is to operate efficiently there needs to be perfect communication between the seller and the buyer in respect of the obligations and rights of each party. An important aspect of every trade transaction is the selection and engagement of the means of transport to transfer the merchandise from the seller to the buyer. In order to help ensure that the liability in this respect remains completely clear, the International Chamber of Commerce has defined in great detail a series of options for the terms of shipment which avoid the possibility of misunderstandings when the seller and buyer choose one of these options. This series of options, known as INCOTERMS, was developed at a time when almost all international transport was carried out in segmented form, and the sender or consignee of the merchandise contracted each carrier in his own name.
38. With the introduction of multimodal transport, the MTO hires the carriers, and it would probably be desirable to revise the definitions of the INCOTERMS so that the seller (under terms of shipment of "franco place of destination") or the buyer (under terms of shipment "ex works") does not lose the right he currently has to choose the flag of the ship and the route to be taken by the merchandise.
39. Furthermore, one of the concerns of the Latin American countries has been the possible diversion of maritime transport cargo towards foreign flags through the sale of multimodal service "packets" even in cases where there is national legislation reserving certain cargoes for national flags. In this respect,

some Latin American countries have indicated that it would be feasible to include in the convention a clause of public law which would transfer to the MTO, who contracts the maritime services in his own name, the same obligations and responsibilities that have been laid down for shippers or importers.

III.G. Relation between the Convention and the technological aspects of the unitization of cargo and maritime transport

40. Although the IPG had the studies requested from the UNCTAD Secretariat for the consideration of this theme, it was not able to get on to it because of lack of time. However at the close of the first part of the third session the Group of 77 indicated its intention of proposing that when the session resumed "the item ... should be dealt with thoroughly before the Preparatory Group moved on to other more specific items". (III IPG, para. 76).

41. It is interesting to note, however that the Secretariat of UNCTAD, in preparing these studies, recognized "the interdependence between modern transport technologies, which were a matter of physical transport capacities, and multimodal transport operations, which were, rather, of an institutional nature", and also the need for "consultations among MTOS, shippers and other interested parties with the participation of governments", particularly so as to prevent damage to the interests of the "existing transport enterprises". (III IPG, paras. 9 and 11.)

42. The developing countries have expressed their concern to acquire sufficient knowledge of the technical implications of multimodal transport for the developing countries, and their wish to have "in-depth technical, economic studies of the implications of international multimodal transport operations for the various developing regions of the world, including the determination of the alternative costs of these operations". (II IPG, annex II, para. 12).

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43. In response to this concern of the Group of 77, the Secretariat of UNCTAD, and also the United Nations Economic Commission for Latin America (CEPAL), have prepared various studies on this subject. (See bibliography annexed to document E/CEPAL/L.141 already mentioned.)

To supplement these studies, CEPAL has recently prepared the reference document Technical aspects of the unitization of cargo and the new maritime transport modes (E/CEPAL/L.143, November 1976), which provides technical information to facilitate the evaluation of the various options which exist.

Annex I */

OUTLINE OF DISCUSSION ON DOCUMENTATION PROPOSED BY
THE CHAIRMAN OF THE WORKING GROUP

1. Functions of the MT document:
 - (a) Evidence of the MT contract.
 - (b) Evidence of receipt of identified goods.
 - (c) To act as negotiable document of title or a non-negotiable document of control.
2. Issuance of the MT document:
 - (a) To cover entire multimodal journey.
 - (b) Optionality of issuance.
 - (c) Date and place of issue.
 - (d) By whom issued/validity signature agent.
3. Does the issuance of the MT document preclude the issuance of other documents in accordance with applicable international conventions or national law?
4. Position in case of less than full container loads?
5. Rules of negotiable/non-negotiable MT documents:
 - (a) Presumption of the negotiable character of the document.
 - (b) Choice between negotiable/non-negotiable document; who will determine?
 - (c) Order/bearer.
 - (d) Transfer and endorsement.
 - (e) Delivery of goods against document.
6. Special problems of bankability of MT document arising in light of commercial credits:
 - (a) Journey.

*/ Source: UNCTAD, Report of the Intergovernmental Preparatory Group on a Convention on International Intermodal Transport on the first part of its third session (TD/E/602, May 1976).

- (b) On-deck shipment.
 - (c) Name of a carrying vessel.
 - (d) Reservations (see also point 10 below).
7. Contents of MT document:
- (a) When negotiable.
 - (b) When non-negotiable.
8. Does the irregularity or loss of the MT document affect the existence or validity of the MT contract?
9. Evidentiary effect:
- (a) Prima facie evidence.
 - (b) Proof to the contrary.
10. Reservations:
- (a) As to quantity and description of the goods.
 - (b) As to the condition of the goods.
11. Format for an MT document.
12. Should there be a sample MT document as an integral part of the convention?
13. Definition of MT document.