

Distr.
GENERAL

UNCTAD/SDTE/TLB/2003/1
13 January 2003

ENGLISH ONLY

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**MULTIMODAL TRANSPORT:
THE FEASIBILITY OF AN INTERNATIONAL LEGAL INSTRUMENT**

Report by the UNCTAD secretariat

TABLE OF CONTENTS

	<u>Paragraphs</u>
A. INTRODUCTION AND BACKGROUND	1-4
B. INTERNATIONAL MULTIMODAL TRANSPORT AND CURRENT LEGAL FRAMEWORK	5-17
C. QUESTIONNAIRE.....	18-116
I. Initial assessment of status quo	19-20
1. Satisfaction with current legal framework and cost-effectiveness	21
2. Reasons why the 1980 MT Convention did not attract sufficient ratifications to enter into force	22-26
3. Desirability of new international instrument.....	27-29
II. Possible ways forward.....	30-39
4. Type of approach.....	30-37
5. Support in principle for the development of a new international instrument.....	38-39

	<u>Paragraphs</u>
III. Substantive features and key elements of any instrument governing multimodal transport	40-88
6. Delay	41-43
7. 'Uniform', 'network', or 'modified' liability system	44-59
8. Types of provisions varying if network or modified system	60-62
9. Basis of liability: fault-based liability or strict liability	63-67
10. Limitation of liability	68-77
11. Mandatory or non-mandatory?.....	78-82
12. Responsibility of the contracting carrier/MTO during all stages of the transaction	83-88
IV. Overview and discussion of responses.....	89-109
1. Assessment of status quo and desirability of international instrument.....	90-91
2. Suitability of different approaches	92-94
3. Important features and key-elements of any possible international instrument.....	95-109
3.1 Delay	96
3.2 'Uniform', 'network' or 'modified' liability system	97-99
3.3 Limitation of liability	100-103
3.4 Basis of liability	104
3.5 Mandatory or non-mandatory?.....	105-106
3.6 Contracting carrier's responsibility throughout the multimodal transaction.....	107-109
V. Issues arising for further consideration	110-116

LIST OF FIGURES AND TABLES

	<u>Pages</u>
Figure 1: World Port Container Throughput TEU's (millions)	5
Figure 2: Forecast World Port Container Throughput TEU's (millions).....	5
Figure 3: Container Hubs.....	6
Figure 4: Value of Manufactured Goods Exported (trillion US\$ f.o.b.)	6
Table 1: International Multimodal Transportation Under One Transport Document:-simplified framework for determination of applicable liability rules in cases of loss or damage	8
Table 2: Simplified overview over limits of liability according to mode of Transport under international unimodal conventions in force	21
Table 3: Breakdown of responses to UNCTAD questionnaire on Multimodal Transport Regulation.....	26
Annex: UNCTAD questionnaire on Multimodal Transport Regulation	

A. INTRODUCTION AND BACKGROUND

1. The current work of UNCTAD on multimodal transport arises from the Plan of Action (TD/386) adopted by UNCTAD X, held in Bangkok in February 2000. Following the preparation of a study of the implementation of the laws and regulations applicable to multimodal transport by the secretariat (UNCTAD/SDTE/TLB/2 and Add.1), an Ad Hoc Expert Meeting on Multimodal Transport was convened which reviewed the existing situation with regard to the regulation of multimodal transport. In view of the great diversity of regulation at the international level, the Meeting recommended that the UNCTAD secretariat study the feasibility of a new international instrument, taking into account the views of all interested parties, both public and private.

2. To this end the UNCTAD secretariat circulated a questionnaire to all Governments and industry as well as to interested intergovernmental and non-governmental organisations and a number of experts on the subject. The secretariat received 109 replies to the questionnaire, including 60 from the Governments of both developed and developing countries, and 49 from industry representatives and others. The replies received from industry representatives reflect the views of virtually all interested parties. They include the views of operators of transport services (maritime, road and rail), freight forwarders, providers of logistics services and terminal operators, liability insurers, cargo insurers as well as shippers and users of transport services.

3. This report presents the results of the secretariat's study. It is mainly based on the views and opinions expressed in the questionnaire, which are detailed in part C of this report. **A complete copy of the questionnaire is annexed and a breakdown of the responses received is presented in Table 3¹.**

4. The secretariat wishes to express its deep appreciation to all those who took time to reply to the questionnaire. Many of the respondents provided additional comments and information that has been extremely valuable to the secretariat in the preparation of this report. Every effort has been made to reflect all the comments received and, where appropriate, representative and noteworthy comments have been reproduced verbatim.

¹ Page 26. The table reproduces the questions in abbreviated form. Percentage values have been rounded to the nearest full unit.

B. INTERNATIONAL MULTIMODAL TRANSPORT AND CURRENT LEGAL FRAMEWORK

5. The world of transport has changed considerably over the last few decades. International transportation of goods is increasingly carried out on a door-to-door basis, involving more than one mode of transportation. While there is little information on the overall proportion of cargo transported by multiple modes, data on the development of containerized traffic provide some highly significant indications, as containers are designed for transportation by different modes.

6. Since the advent of the container in the mid-1960s, there has been an exponential increase in containerized transport, which is forecast to continue well into the future:

World port container throughput, i.e. the number of movements taking place in ports, has grown from zero in 1965 to 225.3 million moves in 2000 (Figure 1). Container traffic is forecast to more than double until 2010 to almost 500 million moves; this represents an annual growth rate of 9% (Figure 2). While globally the major container flows are between Asia, Europe and North America (Figure 3), there are significant flows within all regions.

World seaborne trade in containerized cargo is estimated to more than double from 1997 to 2006 to around 1 billion tons². Most of this containerized cargo will involve transportation by more than one mode before reaching its final destination. In particular the first and the last leg of any door-to-door transaction will usually involve transportation by another mode, such as road or, to a lesser extent, rail.

There has been significant growth in trade in manufactured goods, as a result of globalisation, leading to foreign direct investment in factories and assembly plants in regions with lower labour costs and good access to trade routes. In 2000, the **value of manufactured goods exported globally** (f.o.b.) had risen to 75% of all goods exported (~ 4.7 trillion US\$ out of a total of ~ 6.2 trillion US\$³, see Figure 4). The majority of manufactured goods moving by sea will be transported in containers.

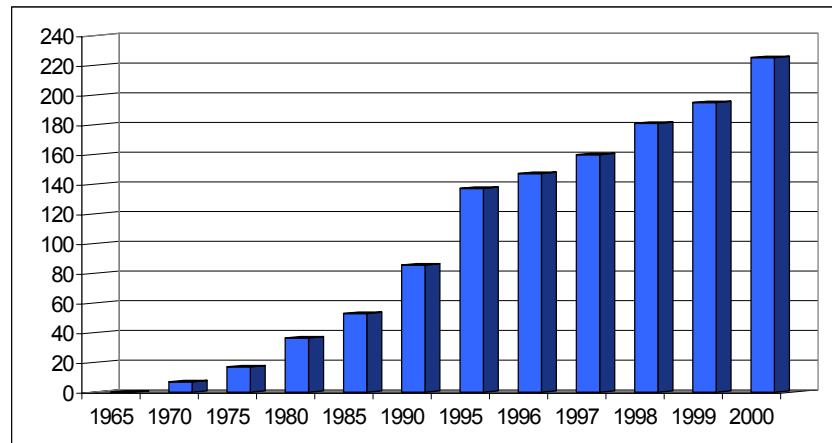
7. The growth of containerized transportation, together with technological developments improving the systems for transferring cargo between different modes has considerably affected modern transport patterns and practices.

8. Shippers and consignees are often interested in dealing with one party (Multimodal Transport Operator, MTO), who arranges for the transportation of goods from door to door and assumes contractual responsibility throughout, irrespective of whether this is also the party who actually carries out the different stages of the transport. For many transport users, delay in delivery has come to be of increasing importance in connection with efficient supply chain management.

² UNCTAD *Review of Maritime Transport*, 1997, 13.

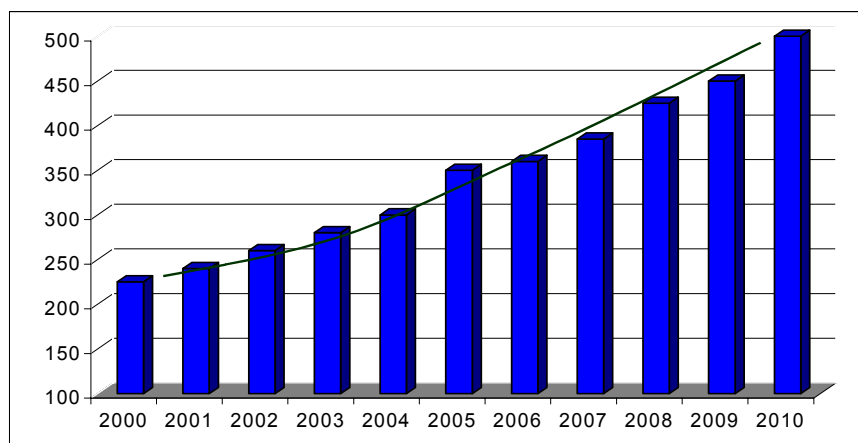
³ UNCTAD *Handbook of Statistics* 2002.

**Fig. 1: World Port Container Throughput
TEU's (millions)**



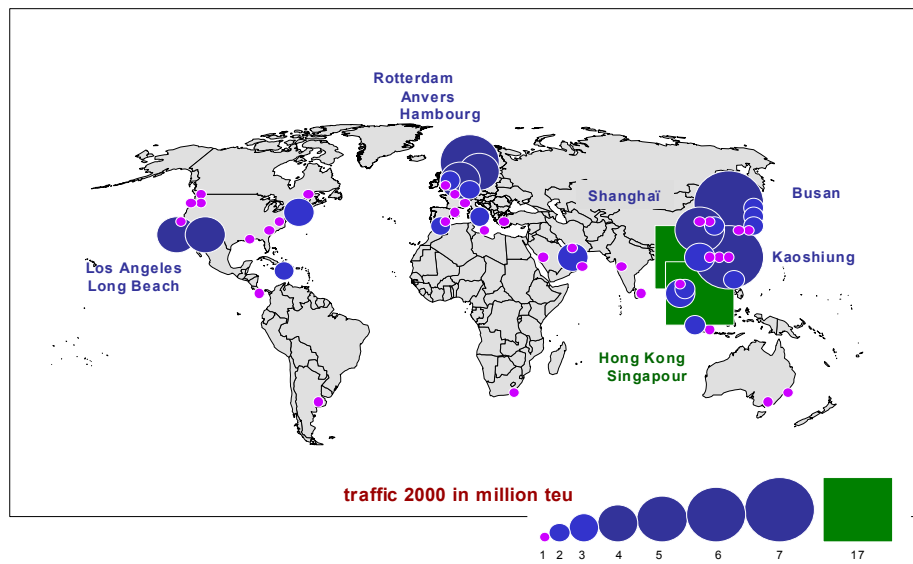
Source: Containerisation International Yearbooks

**Fig. 2: Forecast World Port Container Throughput
TEU's (millions)**



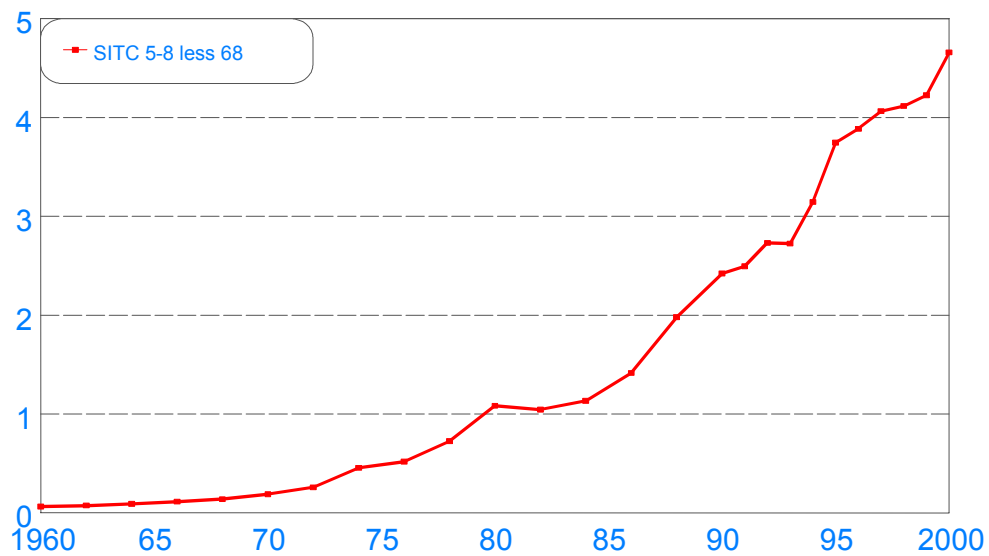
Source: ISL Bremen

Fig. 3: Container Traffic Hubs



Source: Containerisation International

**Fig. 4: Value of Manufactured Goods Exported
(trillion US\$ f.o.b.)**



Source: UNCTAD Handbooks of Trade Statistics

9. At the global level, the main providers of multimodal transport services appear to be freight forwarders, who often do not themselves own or operate any means of transport, but arrange for the performance of individual modal stages of transport by traditional unimodal carriers. Increasingly, big liner shipping companies, some of which dominate the ocean trade involving container shipments⁴, are also expanding their services to offer transportation from door-to-door by engaging other carriers to perform different modal stages of a multimodal transaction.

10. Where goods are carried in sealed containers, it is often difficult to identify the stage/mode of transport where a loss, damage or delay in delivery occurs. Under the present regulatory framework, however, both the incidence and the extent of a carrier's liability may depend crucially:

- (a) on whether a loss can be attributed to a particular stage and mode of transport;
- (b) on which of a considerable number of potentially applicable rules and/or regulations is considered to be relevant by a court or arbitral tribunal in a given forum.

11. The current liability framework does not reflect developments that have taken place in terms of transport patterns, technology and markets. No international uniform regime is in force to govern liability for loss, damage or delay arising from multimodal transport. Instead, the present legal framework consists of a complex array of international conventions designed to regulate unimodal carriage, diverse regional/subregional agreements, national laws and standard term contracts. As a consequence, both the applicable liability rules and the degree and extent of a carrier's liability vary greatly from case to case and are unpredictable.⁵ The complexity of the situation is illustrated in Table 1, which provides in broad outline an overview over the framework for the determination of applicable liability rules in cases of loss and damage.

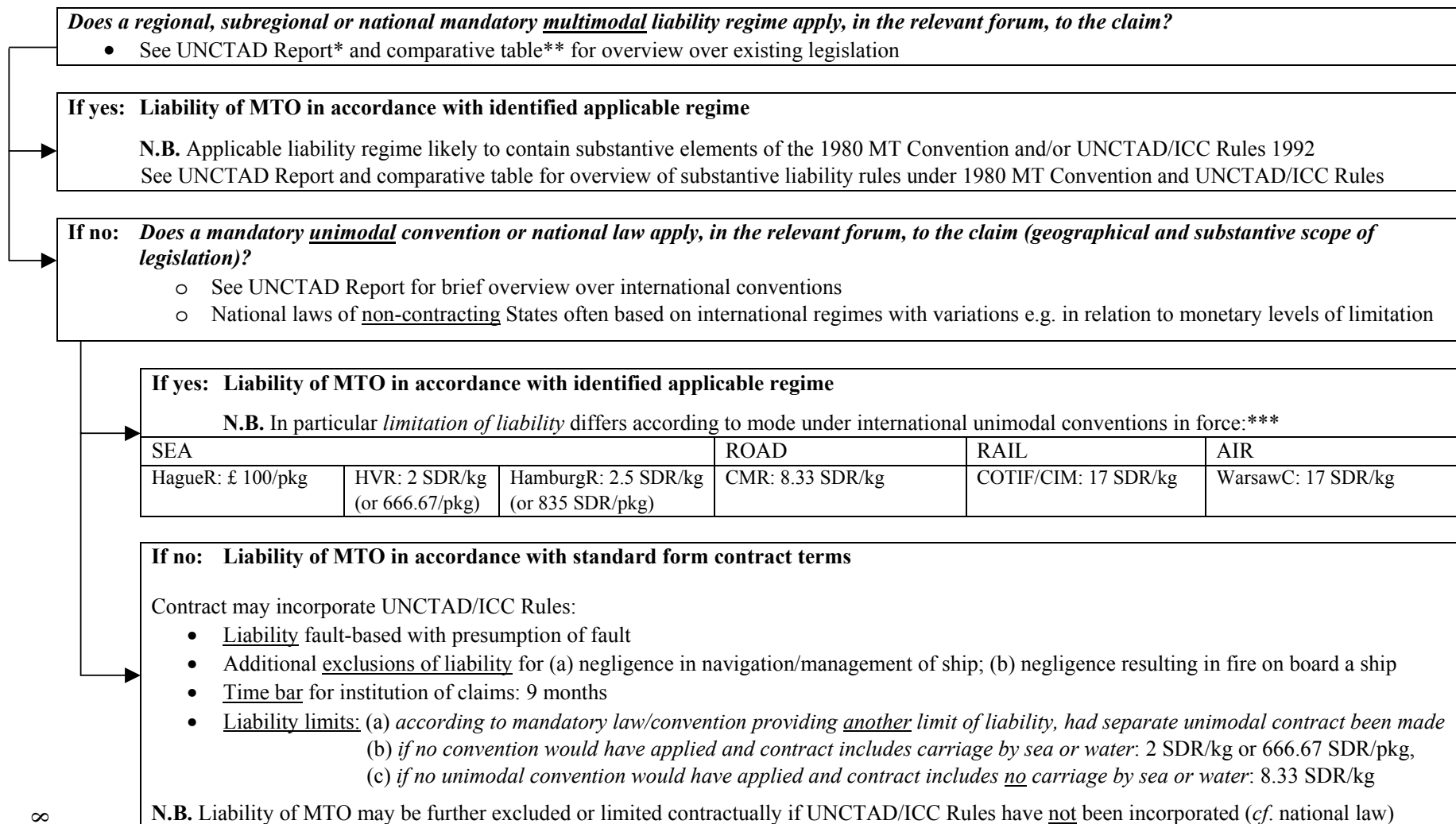
12. While there have, over the years, been several attempts at drafting a set of rules to regulate liability arising from multimodal transportation, none of these has brought about international uniformity. In 1980, the *United Nations Convention on International Multimodal Transport of Goods* (hereafter *1980 MT Convention*) was adopted, but it did not attract the necessary number of ratifications and has not entered into force. In the early 1990's, a set of standard contractual terms was prepared for incorporation into commercial contracts (*UNCTAD/ICC Rules for Multimodal Transport Documents 1992*, hereafter *UNCTAD/ICC Rules*). However, as these rules are contractual in nature, they are by definition subject to any applicable mandatory law and are thus not an effective means of achieving international uniformity.

⁴ In 2001, the leading 10 container service operators (in terms of number of ships and container carrying capacity), accounted for more than 40% of global capacity and the top 20 operators accounted for almost 60%. *UNCTAD Review of Maritime Transport 2002*, Table 34.

⁵ Further detail about the complex international liability framework is provided in the UNCTAD Report *Implementation of Multimodal Transport Rules* and the accompanying comparative table, which presents in overview the content of existing regional, subregional and national multimodal liability regimes; UNCTAD/SDTE/TLB/2 and Add.1, available on the www.unctad.org website.

Table 1: INTERNATIONAL MULTIMODAL TRANSPORTATION UNDER ONE TRANSPORT DOCUMENT:
- simplified framework for determination of applicable liability rules in cases of loss or damage

Scenario 1: Loss can be localized to a particular modal stage of the transport



Scenario 2: Loss cannot be localized to a particular modal stage of the transport

Does a regional, subregional or national mandatory multimodal liability regime apply, in the relevant forum, to the claim?

- See UNCTAD Report and comparative table for overview over existing legislation

If yes: Liability of MTO in accordance with identified applicable regime

N.B. Applicable liability regime likely to contain substantive elements of the 1980 MT Convention and/or UNCTAD/ICC Rules 1992
See UNCTAD Report and comparative table for overview of substantive liability rules under 1980 MT Convention and UNCTAD/ICC Rules

If no: Liability of MTO in accordance with standard form contract terms

Contract may incorporate UNCTAD/ICC Rules:

- Liability fault-based with presumption of fault
- Time bar for institution of claims: 9 months
- Liability limits (for non-localized loss): (a) *if contract includes carriage by sea or water: 2 SDR/kg or 666.67 SDR/pkg*
(b) *if contract includes no carriage by sea or water: 8.33 SDR/kg*

N.B. Liability of MTO may be further excluded or limited contractually if UNCTAD/ICC Rules have not been incorporated (*cf.* relevant national law)

* UNCTAD Report: *Implementation of Multimodal Transport Rules*, UNCTAD/SDTE/TLB/2

** UNCTAD comparative table: *Implementation of Multimodal Transport Rules*, UNCTAD/SDTE/TLB/2/Add.1

*** Abbreviations used here refer to *Hague Rules 1924*; *Hague-Visby Rules 1968*, as amended in 1979; *Hamburg Rules 1978*; *CMR 1956*, as amended by Geneva Protocol 1978; *COTIF/CIM 1980*; *Warsaw Convention 1929*, as amended by Montreal Protocols 1975

13. More than 20 years have passed since the adoption of the 1980 MT Convention. During this time, globalisation, together with significant developments in technology and communication and resulting changes in demand, has led to increased emphasis on multimodal transportation. In response to these developments, and in view of the absence of international uniform regulation of liability, there has, at the same time, been a proliferation of diverse national, regional and subregional laws, often based on the 1980 MT Convention or the UNCTAD/ICC Rules, but creating a trend of further "disunification" at the international level⁶. Recently, an UNCITRAL Working Group has started consideration of a *Draft Instrument on Transport Law*⁷ (hereafter *Draft Instrument*) and of whether the Draft Instrument, primarily designed to govern sea-carriage, should also apply to all multimodal contracts which include a sea-leg.

14. The current legal framework governing multimodal transport, it is suggested, gives rise to concern. A fragmented and complex legal framework creates uncertainty, which in turn creates transaction costs as it gives rise to legal and evidentiary enquiries, costly litigation and rising insurance costs. For developing countries, and for small and medium-size transport users, particularly, the concern is considerable. Without a predictable legal framework, equitable access to markets and participation in international trade is much harder for small or medium players.

15. Moreover, it needs to be borne in mind that multimodal transport is typically conducted on the basis of standard term contracts, issued unilaterally by the carrier and, as a result, often favourable to the carrier. While big shippers/consignors can negotiate their terms of contract with the carrier, this is not the case for small or medium-size parties. Standard term contracts, which are not subject to negotiation, are obviously prone to abuse by the issuing party and as such, they raise public policy considerations in a field where normally freedom of contract reigns. Over the past century, mandatory minimum standards of liability were gradually introduced in the form of international conventions governing unimodal transport conducted on standard terms. In the field of multimodal transport, however, no such agreed international minimum standards are in force.

16. Against this background and particularly in view of the continuing growth of international multimodal transportation, fresh consideration of the need for an effective international instrument to govern multimodal transport may be appropriate.

17. The responses to the UNCTAD questionnaire, which were submitted by a large number of public and private interested parties and are reflected in part C of this report, provide a representative snapshot of currently held views and opinions. As such, they will, hopefully, be of assistance in any further constructive consideration of appropriate international regulation of multimodal transport.

⁶ See UNCTAD Report *Implementation of Multimodal Transport Rules* and accompanying comparative table; UNCTAD/SDTE/TLB/2 and Add.1

⁷ UNCITRAL document A/CN.9/WG.III/WP.21 available on the www.uncitral.org website. A detailed commentary on most individual provisions of the Draft Instrument has been prepared by the UNCTAD secretariat and is contained, together with some comments by the UNECE secretariat, in UNCITRAL document A/CN.9/WG.III/WP.21/Add.1. The same commentary (hereafter *UNCTAD commentary*), but with the text of the Draft Instrument integrated for ease of reference, is available in English, on the www.unctad.org website (UNCTAD/SDTE/TLB/4).

C. QUESTIONNAIRE

18. In this part, the responses to the UNCTAD questionnaire on Multimodal Transport Regulation received are presented and discussed. Overall, the UNCTAD secretariat received 109 replies, including 60 from Governments of both developed and developing countries and 49 from industry representatives and others.

I. Initial assessment of status quo

19. The starting point for any debate on a possible new international instrument to govern multimodal transport must be an assessment of the status quo. As has been pointed out under B, above, the current legal framework is unquestionably fragmented and complex. Given that the main aim of any change would be to facilitate the future development of international trade and transport, it is crucial to establish how both stakeholders on the supply and demand side of the industry as well as Governments perceive the status quo. Moreover, it is important to establish why past attempts at achieving uniformity of international regulation have failed to produce the desired result, in particular why the 1980 Convention on International Multimodal Transport of Goods, which has clearly informed and influenced various regional, subregional and national laws and regulations, has never entered into force internationally.

20. The questionnaire thus asked whether the current legal framework was considered satisfactory and cost-effective. It also asked respondents to express their views on the reasons why the 1980 MT Convention had not succeeded in attracting a sufficient number of ratifications to enter into force. Also, the question was posed whether an international instrument to govern liability arising from multimodal transportation would be considered desirable.

1. Satisfaction with current legal framework and cost-effectiveness

21. The great majority of all respondents (83%) do not consider the existing legal framework for multimodal transportation to be satisfactory. Most respondents (76%) also do not consider the existing legal framework to be cost-effective, citing in particular additional costs in relation to insurance, claims and legal advice as relevant factors increasing overall transport costs. One respondent expressed the concern that while the status quo was imperfect, *"any attempt to tinker with the existing legal framework"* might create the opportunity for more powerful and influential parties to upset the balance to the detriment of the weaker parties. Several of the replies received from Governments suggest that legal and economic studies in the field as well as a review of the 1980 MT Convention would be desirable.

2. Reasons why the MT Convention did not attract sufficient ratifications to enter into force

22. Views expressed on the reasons why the Convention had not attracted sufficient ratifications to enter into force fall into two broad categories:

(a) *lack of support or commitment, adverse lobbying*

23. A considerable number of respondents indicated that *lack of information and/or awareness particularly on the part of shippers/consignees* and their representatives, as well as *uncertainty about the benefits of the liability regime* were crucial in generating only limited support for ratification of the Convention. A small number of respondents also considered the Convention to be *too complicated or not sufficiently transparent*. Most respondents emphasized that the Convention met with *resistance from the transport and particularly the maritime industry* and was subject to much adverse lobbying. Some respondents attributed lacking support for the Convention to *inadequate consultation with both public and private parties*. Attention was also drawn by several respondents to the fact that the 1980 MT Convention required a particularly large number of ratifications (30) for its entry into force.

24. Some Governments of developed countries indicated that the *lack of interest by other leading maritime nations* was a crucial factor in their decision not to ratify the Convention or that the Convention did not reflect the *"interests and views of the relevant industries"*. Some Governments of developing countries pointed to the combination of *hesitation on the part of industrialised nations, opposition of major shipping interests and lack of motivation on the part of Least Developed Countries* to ratify the Convention.

(b) *underlying reasons*

25. As regards the underlying reasons for the identified lack of support/resistance, several respondents emphasized the fact that the Convention was *closely associated with the Hamburg Rules* (UN Convention on Carriage of Goods by Sea), which had been adopted in 1978, but failed to gain much support among the main shipping nations. In particular, three factors were highlighted as giving rise to concern among the carrier interests about increased liability: (i) *the basis of liability*, which was modelled after the Hamburg Rules, rather than the Hague-Visby Rules⁸; (ii) the *monetary limitation of liability*, which was by some considered as too high; (iii) the *principle of uniform liability* which was considered by some as giving rise to concerns (a) in relation to recourse actions by an MTO against a sub-contracting unimodal carrier and (b) as introducing mandatory liability levels in relation to transports otherwise not subject to mandatory law (e.g. road and rail transport not covered by the CMR⁹ or CIM/COTIF¹⁰). Others emphasized that 20 years ago the *market share of multimodal transportation was much less significant* than nowadays and that the timing of the 1980 MT Convention may have been unfortunate. Some respondents pointed also to the *inclusion of customs provisions* in the Convention as an inappropriate *"complicating factor"*.

26. Some further comments provided include the following:

- *"Lack of commitment by Governments";*
- *"The liaison with unimodal transport";*

⁸ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (Hague Rules), as amended by the Visby Protocol of 1968 and the SDR Protocol of 1979.

⁹ Convention on the Contract for the International Carriage of Goods by Road, 1956, as amended by the Geneva Protocol of 1980 (CMR);

¹⁰ Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM), Appendix B to the Convention Concerning International Carriage by Rail (COTIF), 1980.

- *"Carriers and freight forwarders do not want to face their responsibility";*
- *"The adoption of network system with regard to limitation amounts";*
- *"There are probably too many varied interests in the form of national laws, etc. and reconciling these varied interests into one convention has so far proved very difficult";*
- *"Shipowners and container shipping lines probably did not want to be deemed 'Multimodal Transport Operators' by virtue of activities, and become subject to the high door-to-door liability limitation and other rules in the MT Convention";*
- *"The main problem is to find one limitation that is acceptable to both on shore and at sea";*
- *"The main reasons why the Convention failed are because it is largely based on the Hamburg Rules and it follows the principle of uniform liability. Any new Convention containing these elements would not be supported by the shipping industry";*
- *"The major part of the Convention was very good. Only some provisions, like the deletion of the exemption of carrier's liability for error in navigation or management of the ship, were not acceptable to shipping interests twenty years ago".*

3. Desirability of new international instrument

27. The great majority of respondents representing both Governments and non-governmental stakeholders (92% of all respondents) considered an international instrument governing liability arising from multimodal transportation desirable.

28. Some of the respondents provided further comments, which indicate that it *"would be of great assistance to the industry as a whole to have an international convention applicable to door-to-door carriage"*, while an important factor remained whether this would be achievable in practice. Several respondents referred to the growing demand for uniform international rules on multimodal transport as a result of recent developments and the fact that some recent unimodal transport conventions had extended their application to cover door-to-door or multimodal transportation. It was therefore considered that - to avoid a conflict of conventions and in the interest of legal certainty - a single international framework on multimodal transport would be preferable.

29. Some respondents emphasized the desirability of a regime establishing uniform liability rules applicable throughout the entire multimodal transaction. It was stressed that any new instrument on multimodal transport should cover all modes of transport and should not be restricted to multimodal transport involving a sea leg. Several respondents expressed their support for a reconsideration of the 1980 MT Convention while others pointed out that a fresh approach was required to develop an instrument which would govern transport contracts, rather than focus on *unimodal* or *multimodal* carriage.

II. Possible ways forward

4. Type of approach

30. One of the initial and central issues for decision in the debate on a possible international multimodal liability regime would be how best to approach the matter. In particular, whether an altogether new dedicated instrument or a solution building on (revision of) the 1980 MT Convention would be most appropriate. Alternatively, whether a multimodal liability regime should be linked to a primarily unimodal instrument, i.e. by extending an international sea-carriage regime to all multimodal contracts involving a sea-leg or by extending an international road-carriage regime to all multimodal contracts involving a

road-leg. The issue is of particular topical relevance, as the UNCITRAL Working Group Transport Law has begun considering a Draft Instrument on Transport Law, designed to cover sea-carriage, but drafted, so as to cover all multimodal contracts involving a sea-leg¹¹.

31. When asked which of a number of approaches appeared to be the most appropriate, respondents expressed a preference as follows:

32. Of all respondents, **39%** (35% of Governments and 43% of others providing a response) considered a new international instrument to govern multimodal transport to be the most appropriate. There was some support for a new international instrument to govern "generic" transport, irrespective of mode (i.e. unimodal and multimodal transport) and some broader support for the preparation of an instrument based on rules which are currently used in commercial contracts, namely the UNCTAD/ICC Rules for Multimodal Transport Documents.

33. Of all respondents, **26%** (27% of Governments and 25% of others providing a response) expressed support for a revision of the 1980 MT Convention, with some expressing support for the 1980 MT Convention as originally adopted. It was also pointed out that the basic principles of the MT Convention 1980 were still valid and should therefore be studied to determine if a Protocol to the Convention would provide an appropriate solution. In this context it was proposed that the focus should be on articles 16-21 dealing with liability of the MTO and particularly article 19 concerning the issue of localized damage.

34. Only **13%** of all respondents (14% of Governments and 13% of others providing a response), but in particular some representative of the maritime transport industry, considered the approach of extending an international sea-carriage regime to all contracts for multimodal transport involving a sea-leg to be most appropriate. It thus appears that the approach currently proposed in the Draft Instrument has very limited support across the spectrum of all interested parties. One respondent expressed a preference for the extension of an international sea-carriage regime to multimodal contracts involving a sea-leg, provided the regime was based on both the Hamburg Rules and the 1980 MT Convention. A small number of respondents expressly supported the approach adopted in the Draft Instrument.

35. Of all respondents, **13%** (20% of Governments and 5% of others providing a response) expressed a preference for the extension of an international road-carriage regime to all contracts for multimodal transport involving a road-leg.

36. Some respondents supported a totally new approach. In their view, the use of a unimodal convention as a point of departure was not considered appropriate for the regulation of multimodal transport in an era of transport logistics. Others emphasized that unimodal and multimodal transport should be regulated separately. For instance, a respondent from the insurance sector pointed out that the extension of any unimodal regime to multimodal transport was not a satisfactory solution. Instead, the best approach would be the preparation

¹¹ UNCITRAL document A/CN.9/WG.III/WP.21. Under the Draft Instrument, as currently proposed, the substantively maritime liability regime would be applicable to a wide range of claims arising from contracts for multimodal transportation involving a sea-leg, in particular (a) in cases where loss cannot be localized; (b) in cases where loss was attributable to a land or air leg of transport but no international unimodal convention applied. See Articles 1.5 and 4.2.1 Draft Instrument. See also UNCTAD commentary, footnote 7, above.

of a new instrument to govern the liability for sea carriage to replace the Hague, Hague/Visby and the Hamburg Rules and another new instrument to govern multimodal transportation¹².

37. Additional comments provided include the following:

- *"The MT Convention is not bad at all. Why invent the wheel a second time";*
- *"The MT Convention does not need to be revised. Revision would make all of us realize how good it is";*
- *"Rewrite the Hamburg Rules 1978 and the MT Convention 1980 into one single convention for both sea carriage and multimodal transport";*
- *"The most appropriate would be a new international convention to govern multimodal transport, one that would be based on commercially accepted contracts in use today (UNCTAD/ICC Rules 1992). Not an extension of an international sea carriage regime, as the sea carriage conventions are unique to sea carriage, with their long established traditions and jurisprudence that should continue to govern only sea carriage. Not an extension of an international road carriage liability regime. The so-called "international" road carriage regime is actually a regional European regime governing mostly a small geographical area over States with similar laws and regulations, standards and culture. It cannot be generally extended overseas to areas of vast geography with different infrastructures, diverse laws, customs and practices. What works in Europe may not necessarily work in other parts of the world";*
- *"A new multimodal transport law convention should be based on a broadly accepted international unimodal convention, preferably the CMR, but should as well take into consideration the special needs of a multimodal transport";*
- *"Multimodal transport should be seen all-inclusive, such as road, rail, sea, air, inland water, etc. It should not be limited to sea and road only";*
- *"A new international instrument to govern transport unconnected to any unimodal or multimodal regime ("generic" transport). Focus on the promise of transport from point to point and not on the actual mode of performance";*
- *"In most cases of international containerised trade, road and sea are two essential components. Increasingly, rail and air are also becoming a part of the multimodal transport chain. There is, therefore, a need for an international instrument which would cover all elements of the transportation chain. The liability regime will undoubtedly constitute the most important factor governing the acceptability of the proposed instrument";*
- *"A large part of the containerised transport of goods is concluded on a door-to-door basis. If a new international instrument is developed, it should govern liability for both multimodal movements involving a sea-leg and tackle-to-tackle shipments";*
- *"As a first step the existing unimodal conventions could be examined and possibly amended to extend their application to door-to-door transport, thereafter as a second approach the need for a separate multimodal convention has to be examined";*
- *"Revision of the old convention would not give the expected result because of the development in transport sector during the last 20 years, therefore a fresh approach is needed";*
- *"At present, UNCTAD/ICC Rules for MT Documents are the most acceptable instrument in practice; the new regime should be based on them";*
- *"Unimodal conventions should not be combined with multimodal one. Therefore, the sea carriage should be governed by a new convention which would cover port-to-port shipments. Door-to-door or multimodal transport should be governed by a separate instrument".*

¹² 9% of respondents did not express a preference for either of the substantive options set out in question 4, but ticked the box "other". Any views expressed by these respondents are also reflected in the text.

5. Support in principle for the development of a new international instrument

38. Given that past efforts at achieving an international multimodal transport liability regime have not been successful, the questionnaire also sought to ascertain the level of support that might be expected if a fresh concerted effort towards a new international instrument was made.

39. Virtually all respondents (98%) indicated that they would support any concerted efforts towards the development of a new international instrument. Notably, there was no significant difference between responses by Governments and by others in relation to this question. However, a small number of respondents provided further comments, noting that in practice the level of support would depend on the content of any possible new instrument.

III. Substantive features and key elements of any instrument governing multimodal transport

40. Several questions were aimed at identifying which substantive features and key elements any possible new instrument governing liability for multimodal transportation should have.

6. Delay

41. In the modern global environment, delay in delivery is becoming of increasing concern in connection with effective supply chain management. With the exception of the Hague and Hague-Visby Rules in the field of sea-carriage, all unimodal transport conventions for the carriage of goods by land, sea, air and inland waterways, as well as the 1980 MT Convention contain rules to regulate liability for delay in delivery.

42. A clear majority of all respondents (90%) stated that any possible new instrument should govern liability for delay.

43. Additional comments supplied indicate that some respondents believe liability should only arise where delivery by a specific date was expressly agreed in a transport document. One respondent pointed out that any liability for delay should be on the part of any actual or performing carrier as well as on the part of the contracting carrier, in order to allow for effective recourse actions by an MTO against a sub-contracting party responsible for any delay. Several respondents indicated that any limitation of liability for delay should be tied to the freight or a multiple thereof.

7. 'Uniform', 'network', or 'modified' liability system

44. One of the key questions and possibly the single most important issue for debate is which type of liability system should be adopted in any possible international instrument to govern multimodal transport. Essentially three options exist, namely uniform, network and modified liability system. For a better understanding, the three options are presented in overview.

45. (a) In a **uniform liability system**, the same rules apply irrespective of the unimodal stage of transport during which loss, damage or delay (hereafter "loss") occurs. There is no difference between cases where loss can or cannot be localized.

46. The clear advantage of this type of liability system is its simplicity and transparency, as the applicable liability rules are predictable from the outset and do not depend on identifying the modal stage where a loss occurs. This is of particular benefit from the point of view of the transport user (consignor/consignee), as a carrier's liability vis-à-vis a cargo claimant would be uniform throughout a multimodal transaction and would not vary depending on (a) whether a loss can be attributed to a particular mode of transport and (b) the rules considered applicable to that mode in a given forum.

47. However, in view of the continued existence of diverse unimodal liability regimes with different rules on incidence and extent of a carrier's liability, two main concerns may arise from the point of view of a carrier (MTO). First, there is a concern that a carrier's liability exposure would increase in comparison with the current situation. If uniform rules applied irrespective of the modal stage of transport during which a loss occurs, a carrier would no longer be able to take advantage of potentially less onerous liability rules, which may otherwise apply to the particular mode of transport during which a loss occurs. Secondly, there is a concern arising from the commercial practice of sub-contracting with unimodal carriers for parts of the performance of a multimodal transport contract. A contracting carrier (MTO) would be liable to the cargo claimant under uniform rules, but would wish to seek recourse against any responsible unimodal sub-contracting actual or performing carrier. In any such recourse action, a unimodal carrier would continue to be able to rely on any applicable unimodal liability rules, which, in some cases, may be less onerous.

48. The uniform liability system, therefore, while potentially best suited to the needs of the transport user tends to meet with the resistance of the transport industry. Any debate considering the adoption of a uniform liability system would need to seek to address potentially conflicting interests by formulating mutually acceptable rules on liability and limitation of liability.

49. (b) In a **network liability system**, different rules apply depending on the unimodal stage of transport during which loss, damage or delay (hereafter "loss") occurs. There is an "alternative" or fall-back" set of rules for cases where loss cannot be localized.

50. To a large extent, the present international legal framework governing multimodal transport contracts can be characterized as a network system by default: due to the absence of an applicable international instrument on multimodal transport, liability varies according to the stage of transport to which a particular loss can be attributed and any relevant international or national mandatory unimodal liability rules; for cases where a loss cannot be localized, standard form contracts typically provide "fall-back" rules on terms which tend to be favourable to the carrier. Increasingly, subregional, regional or national mandatory laws relating to multimodal transportation may also be relevant; typically, these regimes provide for a modified system, based on the 1980 MT Convention and/or the UNCTAD/ICC Rules (see below).

51. As in a network system, a carrier's liability is primarily governed by rules applicable to the mode during which a loss occurs, concerns in relation to recourse actions, as set out above, do not arise for the contracting carrier (MTO). However, the disadvantage of this approach, particularly for transport users, is that applicable liability rules, as well as incidence and extent of a carrier's liability are not predictable, but vary from case to case, thus placing an extra burden on cargo-claimants in the form of increased insurance premiums and

ultimately higher costs of claims recovery/administration. Any debate considering the adoption of a network system of liability would need to particularly focus on universally acceptable "fall-back" provisions on liability and limitation of liability for cases where loss cannot be localized.

52. (c) In a **modified liability system**, some rules apply irrespective of the unimodal stage of transport during which loss, damage or delay (hereafter "loss") occurs, but the application of other rules depends on the unimodal stage of transport during which loss, damage or delay occurs.

53. A modified system essentially seeks to provide a compromise or middle-way between a uniform and a network system. Various arrangements are possible, making a system more uniform or more network-like. The potential advantage of this approach is that it may effectively provide a workable consensus, taking into account conflicting views and interests. The potential disadvantage of a modified system, however is that application of its provisions may be complex and that it may fail to appeal widely, as it provides neither the full benefits of a uniform system, nor fully alleviates the concerns of those who favour a network-system.

54. Both the 1980 MT Convention and the UNCTAD/ICC Rules operate a modified system under which in cases of localized loss only the *monetary limits of liability* may be determined by reference to mandatory unimodal regimes. Both regimes have clearly influenced regional, subregional and national laws, which have been adopted over recent years. The 1980 MT Convention is not in force internationally, but the UNCTAD/ICC Rules have been relatively successful and have been incorporated by BIMCO and FIATA into their standard form documents (Multidoc 95 and FBL 92).

55. Under the 1980 MT Convention, the liability of the MTO is uniform for both localized and non-localized loss, but, in cases of localized loss the *limits of liability are determined by reference to any applicable international Convention or mandatory national law which provides a higher limit of liability than that of the 1980 MT Convention* (Art. 19). The limits of liability set out in the 1980 MT Convention are 2.75 SDR per kg or 920 SDR per package, but for contracts, which do not include carriage of good by sea or inland waterway, the CMR limit of liability of 8.33 per kg has been adopted.

56. Under the UNCTAD/ICC Rules, the *limits of liability* are, in cases of localized loss, *determined by reference to any applicable international Convention or mandatory national law, which would have provided another limit of liability, had a contract been made separately for that particular stage of transport* (Rule 6.4). The limits of liability set out in the UNCTAD/ICC Rules correspond to those in the Hague-Visby Rules (as amended in 1979), 2 SDR per kg or 666.67 SDR per package, but for contracts, which do not include carriage of good by sea or inland waterway, the CMR limit of 8.33 per kg has been adopted. In relation to contracts, which include carriage of goods by sea or inland waterway, the carrier is also entitled to rely on certain exceptions to liability in cases of negligence, which have been modelled after the Hague-Visby Rules¹³.

¹³ In particular, under Rule 5.4, the MTO is not liable for "loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by: - act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or management of the ship; - fire, unless caused by the actual fault or privity of the carrier". These defence, however, are made subject to an overriding requirement that whenever loss, damage or delay resulted from the

57. When asked whether a uniform, a network or a modified liability system would be considered most appropriate in any instrument governing multimodal transport, **48%** of all respondents (50% of Governments and 45% of others providing a response) expressed a preference for a uniform system. **28%** of all respondents (24% of Governments and 34% of others providing a response) stated they would prefer a network system. Among industry representatives in favour of the network system approach, different views appear to be held as regards the fall-back or default provisions to apply in cases where loss remains non-localized. For instance, the view was expressed by representatives of the freight forwarding industry that *"where the loss or damage cannot be localized, the default rule should be that the transport segment with the highest limitation is applicable"*. **24%** of all respondents (26% of Governments and 21% of others providing a response) stated they would prefer a modified system.

58. This result indicates that there is a broad divide of opinions among respondents, with roughly equal support being expressed for (a) a uniform liability system and (b) a system adopting a network or modified approach. Clearly, there is a close link between views on the best type of liability system and on appropriate levels of limitation. Both issues therefore need to be considered in context.

59. Some of the additional comments illustrate the differences in opinion:

- *"The uniform system of liability is more likely to make the convention clearer, less prone to ambiguity and therefore easier to apply";*
- *"The network system, has repeatedly been criticized by practitioners for being too complicated. Therefore efforts should be made to get rid of the network system and to create a simple system, as far as legally possible";*
- *"A uniform system ensures reliability and tends to avoid conflicts between parties";*
- *"The uniform system has the advantage to simplify the liability regime, while offering a better protection to the shipper";*
- *"A network or modified network system of liability is complicated and not easy to comprehend and apply in practice";*
- *"It is not correct to say that in container carriage the place of loss often cannot be reasonably localized. One cannot argue that the risk at one segment is the same as at another and that the liability limitation should be uniform throughout. A uniform system would create disharmony in an otherwise harmonious patchwork or regimes and would create difficulties in indemnity actions the contracting carrier needs to take against the responsible segmental carrier or depot, that are governed by different liability regimes. The "network system" is the predominant commercial regime and it has been working well in judicial systems around the world. There is no need to tinker with the existing dynamics. Where the loss or damage cannot be localized, the default rule should be that the transport segment with the highest limitation is applicable";*
- *"Although cases where loss or damage that ultimately cannot be localized are infrequent, the investigation of the location of damage increases the overall costs of the claims settling process, and requires the involvement of more numerous parties. Although a uniform system would reduce costs of claims as between claimants and multimodal carriers, the totality of costs of transport claims settlement includes recourse claims by multimodal carriers against actual carriers. The savings in total costs cannot really be determined and so are a matter of*

unseaworthiness of the vessel, the MTO must prove that due diligence was exercised to make the ship seaworthy at the beginning of the voyage.

speculation. It is strongly arguable that there would be increased costs as all parties adjust to the new regime. For this reason, a uniform regime system is not clearly an advantage";

- *"The liability of the MTO should be based, in the case where the responsible carrier is not identified, on the alternative/fall-back regime, which should be based on the one applicable to land transport (liability principles applying for road and rail transport are practically the same. Only the limitation of liability is twice higher for rail transport than for road transport)";*
- *"From the economic point, there is little doubt that a uniform liability system would be much more attractive for shippers and simpler to handle for both parties to the multimodal contract of carriage".*

8. Types of provisions varying if network or modified system

60. Both the network and the modified system envisage, to a greater or lesser extent, that in cases of localized loss (certain) provisions contained in unimodal liability regimes shall be applicable. In this context, an important further question to be addressed is, which types of provisions should vary depending on the modal stage of transport during which loss, damage or delay occur.

61. Overall, **59%** of respondents indicated that only provisions on limitation of liability should vary, with a particularly strong majority of Governments in favour of this option (79%). **41%** of respondents suggested that other types of provisions, too, should vary. Of non-governmental respondents, 60% favoured this option.

62. The further comments provided include the following:

- *"MTO's liability system, including basis of liability and limitation of liability";*
- *"Not only provisions on limitation of liability, but also provisions governing the basis of liability itself should vary depending on the unimodal stage where loss/damage occurred. Provisions for carrier liability, limitation of liability and time for suit should vary. There may be other provisions, which should vary also, and this should be subject to further consideration";*
- *"In addition to limitations of liability, I consider that the basis of and exemptions from the carrier's liability should vary according to the unimodal stage where the loss, damage or delay occurred. However, to avoid substantial variation, it is desirable for any transport convention to avoid a catalogue of exemptions and instead adopt a general principle of liability that provides guidance to courts for the determination of those exceptional circumstances where the multimodal carrier should not be liable";*
- *"Only the provisions on limitation of liability and when legally necessary under existing conventions";*
- *"All provisions which mandatorily apply to the relevant mode of transport";*
- *"The provisions of the instrument that govern the last leg in the transport chain should govern the delivery of the goods, time-bar and other matters connected to the delivery of the goods".*

9. Basis of liability: fault-based liability or strict liability

63. A further central question in any debate about a possible international instrument governing multimodal transport is whether liability of the carrier (MTO) should, in principle, only arise in cases of fault or should be strict, i.e. arise irrespective of fault.

64. Of all respondents, **53%** (51% of Governments and 54% of others providing a response) stated that liability should be fault-based and **47%** (49% of Governments and 46% of others providing a response) stated that liability should be strict.

65. This result indicates that views are, at the present time, broadly divided on the issue. However, a very clear majority of respondents across the board (**85%**) stated that in any event, liability should be subject to certain exceptions. In this context, *force majeure* was mentioned.

66. Further comments by respondents indicate that those in favour of fault-based liability consider that the carrier should be presumed to be at fault. This corresponds to the approach taken in existing transport law conventions.

67. Several respondents provided suggestions to the effect that a general clause should be included, rather than provisions listing specific exemptions from liability. Representatives of the freight forwarding industry expressed the view that the defence for "*negligence in the navigation and management of the ship*" on which a carrier may currently rely under the Hague Rules and Hague-Visby Rules should be eliminated in any possible future instrument.

10. Limitation of liability

68. One of the potentially most contentious issues is that of limitation of liability, and, more particularly, the level at which any monetary limit of liability may or should be set in any international multimodal liability regime. All transport law conventions currently in force provide for monetary limitation of liability, but the relevant levels vary considerably. For a better appreciation of the issue, an overview over the relevant amounts is provided in Table 2¹⁴.

SEA			ROAD	RAIL	AIR
HagueR:	HVR:	HamburgR:	CMR:	COTIF/CIM:	WarsawC:
£ 100/pkg	2 SDR/kg or 666.67/pkg	2.5 SDR/kg or 835 SDR/pkg	8.33 SDR/kg	17 SDR/kg	17 SDR/kg

Table 2: Simplified overview over limits of liability according to mode of transport under international unimodal conventions in force.

69. Respondents were asked to express any views on limitation of liability in the context of any international instrument governing multimodal transport. As would be expected, the responses reflect a considerable variety of views.

70. Among those in favour of limitation of liability, there were differences in opinion on the level at which liability should be set. Some respondents representing the maritime

¹⁴ Abbreviations used here refer to *Hague Rules 1924*; *Hague-Visby Rules 1968*, as amended in 1979; *Hamburg Rules 1978*; *CMR 1956*, as amended by Geneva Protocol 1978; *COTIF/CIM 1980*; *Warsaw Convention 1929*, as amended by Montreal Protocols 1975.

transport and freight forwarding industry advocated the Hague-Visby Rules limits of 666.67 SDR per package or 2 SDR per kilo (whichever is higher) as appropriate.

71. Other industry representatives who favoured a network or modified liability system thought a distinction should be made between contracts involving a sea-leg and other contracts. They suggested, similar to the approach in the UNCTAD/ICC Rules, that the Hague-Visby Rules limit was appropriate for non-localized loss in cases where sea-carriage was involved, but that in other cases a limit of 8.33 SDR per kilo (cf. CMR) should apply. Several respondents suggested that the network-approach to limitation of the UNCTAD/ICC Rules should be adopted, but that in cases of non-localized loss limitation should be at the *highest* level applicable under any of the modes employed by the carrier to perform the contract.

72. Some respondents supported the limits established in the 1980 MT Convention, whereas some others indicated specific amounts ranging from 2 SDR per kilo to 8 or 17 SDR per kilo. A maximum limitation of 40 SDR per kilo was also mentioned. Overall, it appeared that those concerned with or representing the interests of sea carriers tended to advocate lower limitation amounts than other respondents.

73. A considerable number of respondents, mainly those representing shippers' interests as well as some Governments, questioned the need for limitation of liability and advocated a system whereby the cargo claimant would be compensated in full for loss or damage to goods. Some emphasized that this would be acceptable if the liability regime did not apply mandatorily and could be contracted out of. It was argued that a non-mandatory regime, providing full compensation for loss or damage would be an attractive proposition both for shippers and for carriers who wanted to provide this service to their customers.

74. Others expressed the view that transport should be compatible with the law of international sale and the example of the 1980 Vienna Convention on the International Sale of Goods (Articles 74 and 79) should be followed, albeit only if the regime was non-mandatory, allowing parties to agree on exceptions and monetary limits. One respondent pointed out that monetary compensation was "*also a sales argument for some means of transport, e.g. railways*", which compensated their customers to a higher level than road or sea carriers. This, it was said, explained the "*resistance of the maritime industry*".

75. In respect of delay in delivery, those who expressed a view thought appropriate limitation should be tied to the freight or a multiple thereof.

76. The variety of views outlined above shows that limitation of liability is a contentious key issue, which would need to be debated in detail. It is important to bear in mind, however, that an important factor affecting any views on limitation is what the substantive rules of any potential regime as a whole offer to the stakeholders representing different interests. Moreover, the debate on limitation of liability would be considerably influenced by the nature of any substantive regime, (i.e. mandatory or non-mandatory) and the relevant type of liability system (uniform, network, modified) under consideration.

77. Some representative and noteworthy comments are reproduced here:

- "*Monetary limitation should ideally relate to the value of goods (at the point of dispatch or the point of receipt?), costs incurred by the shipper and the loss of trade goodwill. However,*

if there is no wilful negligence or criminal intent liability could be confined to the monetary value of goods. It would help if the value of goods is declared by the shipper and forms part of the Multimodal Transport Document issued by an MTO";

- *"Monetary limitation stipulated in the MT Convention 1980 needs to be reviewed to reflect costs / inflation";*
- *"The MTO's limits of liability under the MT Convention 1980 would be acceptable and reasonable basis today";*
- *"At present, we can be guided by limitations established by Hague-Visby Rules increasing them by 15-20% (depending on when new rules may be established). A new Convention will obviously contain rules for facilitated review of monetary limitation of liability";*
- *"Monetary limits should follow the UNCTAD/ICC Rules for Multimodal Transport Documents 1992";*
- *"No limits in case of fraud and severe fault";*
- *"I question the whole system of limitation. I can not see the good arguments for deviating from general rules on liability for loss, damage or delay in general contract law";*
- *"Limitation should be the real value of the goods transported";*
- *"The relevant monetary limitations under a network system should be those applicable to the mode of transport where the loss or damaged occurred. The monetary limitation unique to an MTO's liability applies only in cases of non-localized damage. This monetary limitation should be set at the highest limitation amount applicable under any of the modes of transport employed by the MTO to perform its undertaking under the multimodal contract";*
- *"It is our understanding that the Hague-Visby limits continue to provide adequate compensation in the majority of instances. When considering limits, claims experience must be taken into account and [we] would be opposed to any proposal based solely on deterioration of monetary values. Many other factors are involved, such as the type and value of commodities, and improvements in packaging and transport generally".*
- *"The issue depends on the regime as a whole. It should therefore be studied further. The limits should reflect the real value of the goods transported today and tomorrow".*

11. Mandatory or non-mandatory?

78. Respondents were asked to indicate their views on the question of whether any possible international instrument should apply mandatorily or non-mandatorily¹⁵.

79. A majority, **58%** of respondents, expressed the view that any instrument should be in the form of a convention, which applies on a mandatory basis and provides mandatory liability rules. **35%** of respondents indicated that any instrument should be in the form of a non-mandatory convention, which could be contracted into or out of, but which provided mandatory liability rules in all cases where it applied to a given contract. There was no significant difference between responses received from Governments and from other stakeholders.

80. Those in favour of a mandatorily applicable instrument emphasized that this would be most likely to provide international uniformity of regulation. Those in favour of a non-mandatory solution pointed out that non-mandatory rules would be easier to agree and could lead to international uniformity as a result of market forces; a simple and predictable liability

¹⁵ 7% of respondents did not express a preference for either of the two substantive options set out in question 11, but ticked the box "other". Any views expressed by these respondents are also reflected in the text.

regime which applied by agreement only, but would provide legal certainty due to its statutory force would become widely adopted as a matter of commercial decision-making.

81. Some more detailed suggestions for possible approaches were made and a number of additional comments supplied. A suggestion made by the Government of a developed country was for a mandatory convention, which allowed the opting out into a mandatory unimodal convention, which would have applied to parts of the transport.

82. Additional views expressed included the following:

- *"Mandatory international convention on multimodal transport is realistically not feasible although desirable in principle";*
- *"Uniformity of law on multimodal transport can only be achieved by implementation of a mandatory convention";*
- *"At the present market condition a two sided mandatory liability regime for all modes is preferred";*
- *"The convention should contain both mandatory and non-mandatory rules. The rules on liability and its limitation should be of mandatory character";*
- *[We are] basically in favour of a mandatory convention with mandatory rules on liability, which override conflicting contractual terms. However, we believe that the proposed instrument should allow the parties a degree of contractual freedom, while at the same time safeguarding the interests of third parties";*
- *"There should be a convention that applies mandatorily, with no opting out by States and no opting out nor contracting out of liability by parties to the contract. It is difficult to envisage how a non-mandatory convention could maintain the integrity of mandatory rules on liability if parties can contract in or out of it. The essence of a convention, after all, is about the universality of the rules of liability";*
- *"A non-mandatory convention is preferred. If users of transport prefer multimodal transport rather than integrated modal transport, this market demand will result in transport contractors agreeing with users to have the convention apply, so that the rules of the convention become the content of a private contract. This state of affairs now exists in conjunction with the UNCTAD/ICC Rules, which are non-mandatory but commonly accepted by both users and carriers as the basis of a transport contract";*
- *"The best solution is probably a convention which generally applies on a mandatory basis but may be contracted out of if (1) the carrier informs the customer of the main features of the liability provisions of the convention before the contract is concluded and (2) the customer confirms it has been informed and its acceptance not to apply the convention in writing (or by equivalent electronic communication). The convention will thus apply as mandatory law unless the customer gives an informed consent to waive its application in a manner which ensures that this can be proven afterwards thereby limiting the risk of disputes about the facts".*

12. Responsibility of the contracting carrier/MTO during all stages of the transaction

83. Under existing regional, subregional and national laws and regulations on multimodal transport, as well as under the 1980 MT Convention and the UNCTAD/ICC Rules, the contracting carrier/MTO is responsible throughout the entire transport even if the performance of some or all parts of the transport has been sub-contracted to others. This ensures that while substantive liability may vary, there is always one party responsible to cargo interests throughout, irrespective of the stage of transport where a loss occurs.

84. Respondents were asked whether any international instrument governing multimodal transport should (a) adopt the same approach or (b) *"allow the contracting carrier/MTO to contract out of certain parts of the transport or out of certain functions related to the performance of the contract by including a clause to this effect in the transport document (or electronic equivalent)"*.

85. The question has been posed due to its particular relevance in connection with the use of standard term contracts in multimodal transport. Where standard form contracts are used, it is possible for the issuing party to unilaterally include a term in the contract to limit the scope of the contract and thus its contractual liability. The question of whether this should be admissible is also of relevance to discussions on the Draft Instrument on Transport Law. Arguably, the Draft Instrument, as currently proposed, would allow a carrier to adopt the approach set out in (b) above¹⁶.

86. A clear majority of **76%** of all respondents (74% of Governments and 78% of others providing a response) expressed the view that any international instrument should adopt the same approach as existing laws and regulations on multimodal transport; i.e. ensure the contracting carrier's responsibility throughout the entire transport. Only **24%** of all respondents took the view that the approach set out in (b) above should be adopted.

87. While representatives of the shipping industry emphasized that *"through transport contracts and FIO(S) clauses are legitimate commercial arrangements which any new instrument should respect"*, several respondents cautioned against the admissibility of standard clauses contained in a transport document. One Government representing a developed country stated that the approach set out in (b) should be possible, but *"not by including generic clauses in the contract of carriage, but in specified cases"*. Similarly, a respondent from the insurance sector stressed that allowing the contracting carrier/MTO to escape his liability by including a back clause that a shipper did not expect and approve was not a good solution. In another comment, representatives of the freight forwarding sector state:

"It does not make sense to enter into a contract of carriage from Point A to Point B to C and charge for a through freight from A to C but be responsible only from A to B. If it is the intention of the contracting carrier not to be responsible for the segment from B to C, then he should simply limit the scope of this contract of carriage from A to B. In other words, a contract of agency should not be mixed in with a contract of carriage. They are two distinctly separate contracts of undertaking and putting them on the same transport document is confusing, especially so in an electronic environment where there are no documents issued".

88. The responses suggest that there is considerable concern about any solution which would permit a carrier to contract out of responsibility by way of a clause contained in the transport document (or electronic equivalent). It thus appears that the relevant provisions of the Draft Instrument - as currently proposed - are controversial, at least in respect of any possible application of the Draft Instrument to multimodal transport. It is submitted that their careful consideration by the UNCITRAL Working Group should be a priority.

¹⁶ Articles 5.2.2 and 4.3, together with Art. 6.1.3 Draft Instrument; see UNCTAD commentary, footnote 7, above.

Table 3: Breakdown of responses to UNCTAD questionnaire on Multimodal Transport Regulation

1. (a) Do you think that the existing legal framework is satisfactory? (b) Do you think that it is cost-effective?	Yes 17% 24%	No 83% 76%
2. What in your view, are the reasons why the 1980 MT Convention did not attract sufficient ratifications to enter into force?	N/A	
3. Do you think that an international instrument governing liability arising from multimodal transportation would be desirable?	Yes 92%	No 8%
4. If so, which of the following approaches do you consider the most appropriate? (a) New international instrument to govern multimodal transport; (b) Revision of the 1980 MT Convention; (c) Extension of a sea-carriage liability regime to all MT contracts involving a sea-leg; (d) Extension of a road-carriage liability regime to all MT contracts involving a road-leg; (e) Other.	(a) 39% (b) 26% (c) 13% (d) 13% (e) 9%	
5. If concerted efforts were made towards the development of a new international instrument, would you support these efforts?	Yes 98%	No 2%
6. Should any possible instrument governing multimodal transportation cover liability for delay?	Yes 90%	No 10%
7. Which of the following liability systems would you think is most appropriate in any instrument governing MT: (a) Uniform system (b) Network system (c) Modified system	(a) 48% (b) 28% (c) 24%	
8. If you have expressed a preference for 7(b) or (c), which types of provisions should vary: (a) Only the provisions on limitation of liability; (b) Other types of provisions.	(a) 59% (b) 41%	
9. Should liability for loss, damage or delay under any international instrument be: (a) (i) Fault-based: liability only in case of fault (ii) Strict: liability irrespective of fault. (b) In any event, liability should be subject to certain exceptions.	(i) 53% (ii) 47%	
	Yes 85%	No 15%
10. Please express any views you may have on the question of monetary limitation of carrier's/MTO's liability.	N/A	
11. Should any international instrument governing MT be in the form of: (a) A convention which applies on a mandatory basis and provides mandatory rules on liability; (b) A convention which applies on a non-mandatory basis, but provides mandatory rules on liability; (c) Other.	(a) 58% (b) 35% (c) 7%	
12. Under existing laws and regulations on MT the contracting carrier/MTO is responsible throughout the entire transport. Should any international instrument governing multimodal transport: (a) Adopt the same approach; (b) Allow the contracting carrier/MTO to contract out of certain parts of the transport or out of certain functions related to the performance of the contract by including a clause to this effect in the transport document (or electronic equivalent).	(a) 76% (b) 24%	
13. Which international convention(s) governing liability in the field of carriage of goods by sea, land and air have been ratified or acceded to by your country?	N/A	

IV. Overview and discussion of responses

89. In this part, the main results of the questionnaire, detailed in III above, are summarized and discussed.

1. Assessment of status quo and desirability of international instrument

90. A large majority of respondents, both among Governments and non-governmental and industry representatives, consider the present legal framework unsatisfactory, with a clear majority considering the present system not to be cost-effective. The vast majority of respondents across the board consider an international instrument to govern liability arising from multimodal transport to be desirable and virtually all indicated they would support any concerted efforts made in this direction.

91. In practice, it is clear that the level of support would depend on the content and features of any possible new instrument. However, the general assessment of the status quo suggests that there is both a demand for a more detailed debate and willingness to further engage in an exchange of views.

2. Suitability of different approaches

92. As regards the most suitable approach, which might be adopted, views are, to a certain extent, divided. However, around two thirds of respondents from both Governments and non-governmental quarters appear to prefer a new international instrument to govern multimodal transport or a revision of the 1980 MT Convention. In further discussions considering this approach, the views expressed on why the 1980 MT Convention did not attract sufficient ratifications to enter into force should be of some interest. Several central issues have emerged from the responses, in particular that the 1980 MT Convention, at least at the time, may not have appeared attractive enough to shippers interests while at the same time containing elements which carrier interests found not acceptable. A number of respondents expressed their support for a new legally binding instrument based on rules which are currently used in commercial contracts, namely the UNCTAD/ICC Rules.

93. A minority of respondents, representative mainly of parts of the maritime transport industry, appeared to favour the extension of an international sea-carriage regime to all contracts for multimodal transport involving a sea-leg and some respondents expressly stated their support for the proposed Draft Instrument on Transport Law, which adopts this approach¹⁷. Another minority of respondents, representative mainly of parts of the road transport industry, considered the extension of an international road-carriage regime to all contracts for multimodal transport involving a road-leg to be the most appropriate approach.

94. Overall, the responses indicate that - with the important exception of the maritime transport industry - there appears to be only limited support for the approach adopted in the Draft Instrument on Transport Law. Accordingly, there is significant scope for the exploration of other options in consultation with all interested parties in transport.

¹⁷ See footnote 11, above.

3. Important features and key-elements of any possible international instrument

95. The following picture emerges from the responses:

3.1 Delay

96. The vast majority of respondents think any instrument governing multimodal transport should address the issue of delayed delivery, albeit some believe that liability for delay should only arise in certain circumstances and should be limited at a level equivalent to the freight or a multiple thereof.

3.2 'Uniform, 'network' or 'modified' liability system

97. As regards the type of liability system, which may be most appropriate, views are, as may be expected, divided, with just under half of all respondents expressing support for a uniform liability system and, among the remainder of respondents, broadly equal numbers expressing support for a network liability system or for a modified liability system.

98. Among those favouring a network or a modified liability system, a majority believes only the limitation provisions should vary depending on the unimodal stage where loss, damage or delay occurs. This view appears to be particularly prevalent among respondents representing Governments. Others, particularly among non-governmental respondents, believe that matters like basis of liability or exceptions to liability and time for suit should vary.

99. Early agreement on the most appropriate type of liability system, including the extent to which liability rules should be uniform, would clearly be central to the prospect of success of any discussions on a new international instrument.

3.3 Limitation of liability

100. Closely linked to the question of the appropriate type of liability system is the issue of limitation of liability on which, again, views are at this stage divided.

101. Overall, a majority of respondents provided comments supportive of or accepting the need for limitation of liability. However, the responses reflect a broad variety of views on the issue. A considerable number, both among Governmental and industry respondents, question the whole idea of limitation of liability whereas others, particularly those representing the maritime and freight-forwarding industry, emphasize the desirability of limitation of liability in line with unimodal conventions, in particular due to the continued relevance of unimodal conventions in the context of recourse actions by multimodal carriers against unimodal sub-contracting carriers.

102. In relation to the various possible monetary levels of limitation mentioned, it is noticeable that those concerned with or representing the interests of sea carriers tend to advocate lower limitation amounts than most other respondents.

103. Limitation of liability is clearly a central issue, as views on limitation appear to both affect and be influenced by views on the nature and type of liability system. Although in negotiations for any international convention the issue of limitation of liability traditionally

arises at a relatively late stage in the proceedings - once agreement on substantive rules has been achieved - it may be that some earlier principled discussions on possible levels of limitation would benefit constructive debate on other central issues.

3.4 Basis of liability

104. Both among Governments and among other respondents, broadly equal numbers expressed support for (a) a fault-based liability system and (b) a strict liability system. However, a clear majority across the board considered that certain exceptions to liability should apply in any event.

3.5 Mandatory or non-mandatory?

105. Overall, a majority of all respondents considered that any international instrument should be in the form of a convention, which applies on a mandatory basis and provides mandatory liability rules.

106. However, a sizeable minority considered that a non-mandatory convention, which could be contracted into or out of but provided mandatory liability rules overriding any conflicting contractual terms would be appropriate. This suggests that it may be worthwhile to explore in more detail the advantages and disadvantages of possible non-mandatory options for an international instrument.

3.6 Contracting carrier's responsibility throughout the multimodal transaction

107. A clear majority of respondents from all quarters considered that any international instrument governing multimodal transportation should adopt the same approach as existing statutory and contractual multimodal liability regimes by providing for continuing responsibility of the contracting carrier/MTO throughout the entire transport.

108. In particular, the responses indicate that the use of standard clauses in a transport document (or electronic equivalent) to limit the scope of contract and thus the contracting carrier's responsibility and liability is generally not considered to be acceptable.

109. In this respect, the responses may be of particular relevance to any further consideration of provisions in the Draft Instrument on Transport Law under the auspices of UNCITRAL. As has been pointed out by UNCTAD in its commentary¹⁸, Articles 5.2.2 and 4.3 of the Draft Instrument, as proposed, would arguably allow a contracting carrier to disclaim liability arising out of (a) certain functions (e.g. stowage, loading, discharge) and (b) certain parts (stages) of the contract performed by another party. In its current form, the Draft Instrument does not preclude the use of standard terms to this effect in the transport document (or electronic equivalent) and thus does not safeguard against abusive practice. As a result, a shipper might engage a carrier to transport its goods from door-to-door against the payment of freight and find that the carrier, under terms of contract issued in standard form by the carrier, was not responsible throughout all stages of the transport and/or for all aspects of the transportation. This situation would not conform to the legitimate expectations of transport users, who in many cases arrange with one party for the transportation of goods from door-to-door so as to ensure that one party will be responsible throughout all stages of

¹⁸ See footnote 7, above.

the transaction. Responses to the UNCTAD questionnaire suggest strong opposition across the board to any change in approach along the lines currently proposed in the Draft Instrument.

V. Issues arising for further consideration

110. The main aim of the UNCTAD questionnaire was to take a step towards establishing the feasibility of a new international multimodal liability regime, in particular, the desirability in principle of international regulation, the acceptability of potential solutions and approaches and the willingness of all interested parties, both public and private, to pursue this matter further.

111. The large number of responses to the questionnaire and the detail, in many cases, of the comments provided by public and private parties across a broad spectrum suggests that there is a general willingness to engage in an exchange of views on future regulation of liability for multimodal transport. This is encouraging, given the continuous growth of multimodal transportation against a background of an increasingly fragmented and complex legal framework at the international level. Both users and providers of transport services as well as Governments and other interested parties clearly recognize that the existing legal framework is not satisfactory and that, in principle, an international instrument would be desirable. However, views on how the aim of achieving uniform international regulation may be accomplished are divided, partly as a result of conflicting interests, partly due to the perceived difficulty in agreeing a workable compromise, which would provide clear benefits as compared with the existing legal framework.

112. The apparently broad divide in opinion on closely linked key issues, such as type of liability system (uniform, network or modified), basis of liability (strict or fault-based) and, importantly, limitation of liability may be seen as an obstacle to the development of a successful international instrument. However, it may equally be seen as a reflection of the fact that - despite the expansion of multimodal transportation and a proliferation of national multimodal liability regimes - there has, in recent times, been little focused debate, involving all interested parties at the global level.

113. The need for increased dialogue on controversial matters as well as on potential ways forward is illustrated by the fact that some possible options, which have tentatively been suggested by a number of respondents have yet to be explored in any international forum.

114. For instance, several respondents indicated support for the development of a binding international liability regime based on commercially accepted contractual solutions, i.e. the UNCTAD/ICC Rules. The UNCTAD/ICC Rules share significant characteristics with the 1980 MT Convention in that both operate a modified liability system, which (entirely or to an extent) retains the network-approach in relation to limitation of liability. However, while the 1980 MT Convention has not generated much support within the transport industry, the UNCTAD/ICC Rules have clearly been quite successful and have been adopted by FIATA in their FBL 92 and by BIMCO in Multidoc 95. As proposals for a legally binding international instrument building on the UNCTAD/ICC Rules as a basis for negotiations have not yet been considered in any international forum, their further exploration may be worthwhile.

115. An altogether different approach to liability regulation for international multimodal transport, lies in proposals for the development of a non-mandatory regime, which provides

uniform and high levels of liability. Proponents of this approach argue that such a non-mandatory regime would, as a matter of commercial decision-making, appear an attractive proposition to both shippers who are interested in a simple and cost-effective regime and to carriers who wish to offer such a regime as part of their service. A non-mandatory solution of this kind has not yet been considered in any international forum¹⁹ and may also be worth investigating.

116. Although it would be presumptuous to try to foreshadow the substance and development of any further detailed discussions involving all interested parties, it appears that there is significant interest in further constructive debate. In order to facilitate and support this process, it would seem that the convening of an informal international forum under the auspices of UNCTAD, together with other interested UN organizations, such as UNCITRAL and UNECE, would be both appropriate and timely. The forum would enable frank discussion of controversial key issues highlighted in this report and serve as a platform at which priorities and potentially attractive ways forward may be explored more fully by all interested public and private parties. While, clearly, there is at present much controversy regarding the best approach that might be pursued in relation to several key issues, certain areas of consensus have also emerged. These, it is hoped, will serve as a basis for constructive and fruitful discussion of possible regulation of multimodal transportation.

¹⁹ For a European study discussing this approach, see *Intermodal Transportation and Carrier Liability*, Luxembourg, Office for Official Publications of the European Communities, 1999.

ANNEX

TDN 932(2) SITE

Questionnaire on Multimodal Transport Regulation

1. Given the continuing growth of multimodal transport

(a) Do you think that the existing legal framework is satisfactory?

Yes	No
☐	☐

(b) Do you think that it is cost-effective?

Yes	No
☐	☐

Further comments, if any:

.....

.....

.....

.....

.....

2. The 1980 Convention on Multimodal Transportation of Goods has never entered into force, although a significant number of its provisions have been enacted in various regional, subregional and national laws and regulations.

What, in your view, are the reasons why the Convention did not attract sufficient ratifications to enter into force?

.....

.....

.....

.....

.....

3. Do you think that an international instrument governing liability arising from multimodal transportation would be desirable?

Yes	No
☐	☐

4. If so, which of the following approaches do you consider the most appropriate?

- (a) A new international instrument to govern multimodal transport; ☐
- (b) A revision of the 1980 MT Convention; ☐
- (c) The extension of an international sea-carriage liability regime to all contracts for multimodal transport involving a sea-leg; ☐
- (d) The extension of an international road-carriage liability regime to all contracts for multimodal transport involving a road-leg; ☐
- (e) Other. ☐

Further comments, if any:

.....

.....

.....

.....

.....

5. If concerted efforts were made towards the development of a new international instrument, would you support these efforts?

Yes	No
☐	☐

6. Should any possible instrument governing multimodal transportation cover liability for delay?

Yes	No
☐	☐

7. Which of the following liability systems would you think is most appropriate in any instrument governing multimodal transport:

(a) Uniform system: The same rules apply irrespective of the unimodal stage of transport during which loss, damage or delay occurs. There is no difference between cases where loss can or cannot be localized.

☐

(b) Network system: Different rules apply depending on the unimodal stage of transport during which loss, damage or delay occurs. There is an "alternative" or "fall-back" set of rules for cases where loss, damage or delay cannot be localized.

☐

- (c) Modified system: Some rules apply irrespective of the unimodal stage of transport during which loss, damage or delay occurs, but the application of other rules depends on the unimodal stage of transport during which loss, damage or delay occurs. ☐

Further comments, if any:

.....
.....
.....
.....
.....
.....

8. If you have expressed a preference for 7(b) or (c), which types of provisions should vary depending on the unimodal stage to which loss, damage or delay may be attributed:

- (a) Only the provisions on limitation of liability; ☐

- (b) Other types of provisions. Please provide further indications. ☐

.....
.....
.....
.....
.....
.....

9. Should liability for loss, damage or delay under any international instrument governing multimodal transport be:

- (a) (i) Fault-based: liability only in case of fault; ☐

- (ii) Strict: liability irrespective of fault. ☐

- (b) In any event, liability should be subject to certain exceptions. ☐ ☐

Yes No
☐ ☐

10. Please express any views you may have on the question of monetary limitation of a carrier's/MTO's liability for loss, damage or delay:

.....
.....
.....
.....
.....

11. Should any international instrument governing multimodal transport be in the form of:

(a) A convention, which applies on a mandatory basis (application may not be excluded by contract) and provides mandatory rules on liability which override conflicting contractual terms; ☐

(b) A convention which applies on a non-mandatory basis (may be contracted into or out of), but provides mandatory rules on liability which override conflicting contractual terms; ☐

(c) Other. ☐

Further comments, if any:

.....
.....
.....
.....
.....

12. Under existing regional, subregional and national laws and regulations on multimodal transport the contracting carrier/MTO is responsible throughout the entire transport even if the performance of some or all parts of the transport has been sub-contracted to others. In your view, should any international instrument governing multimodal transport:

(a) Adopt the same approach; ☐

(b) Allow the contracting carrier/MTO to contract out of certain parts of the transport or out of certain functions related to the performance of the contract by including a clause to this effect in the transport document (or electronic equivalent). ☐

13. Which international convention(s) governing liability in the field of carriage of goods by sea, land and air have been ratified or acceded to by your country?

.....
.....
.....
.....
.....

14. Additional comments (Please attach additional sheets if necessary):

.....
.....
.....
.....
.....
.....
.....

Completed questionnaire should be returned no later than 15 October 2002 to:

UNCTAD secretariat
Ms. Mahin Faghfour
Chief, Legal Section, SITE
Palais des Nations
CH-1211, Geneva 10