THE PROPOSED ROTTERDAM RULES AND THE OBJECTIONS CONTAINED IN THE "DECLARATION OF MONTEVIDEO".

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Recently an important group of South American experts from the private sector signed the Declaration of Montevideo and **recommend the governments of our countries NOT TO ADOPT the Rotterdam Rules**.

The most important rejection is contained in point 15, which reads as follows: (free translation of a lay-man)

15. The limitation of liability of carriers is harmful to transport-users, involves a transfer of costs for the benefit of maritime carriers and affects the balance of payments of countries using maritime transport-services. We note that in the legislation of many countries in this region it is not allowed to limit responsibility (such as Brazil and Uruguay), and that the limits adopted by Argentina and other countries that have ratified the Hague Rules, are substantially higher.

If this in fact the main reason to make such a very serious recommendation, I believe that **prompt action should be taken to provoke a very ample debate.** Such a debate might prove that the recommendations of the **Montevideo Declaration** are based on wrong assumptions and if in fact this would be the outcome of the open debate, new recommendations could be made and serious damage to our Foreign Trade could so be avoided. And this debate should not be restricted to lawyers alone, as is done so far, but people from all sectors that have an interest in Foreign Commerce should take their time and give their input. I myself am a layman, but with 50 years experience in the port- and maritime sector in the region. Since 1970, when the "container" was practically unknown here, I became involved in questions surrounding its use and have read many papers which usually are only read by lawyers. I have tried to pass this experience on to as many people as possible and in the website you can find the full text of a book I wrote in Spanish (Contenedores, Buques y Puertos, partes de un Sistema de Transporte)-(Containers, Ships and Ports, parts of a Transport-system). Therefore I invite you to read my humble opinion of what should be debated:

WHY IS IT SO IMPORTANT TO CREATE A LEGAL SYSTEM FOR MULTIMODAL TRANSPORT?

No one can dispute that a good legal system for Multimodal Transport can provide great benefits to Foreign Commerce of all countries. Since the seventies, thousands of meetings and discussions on the national, regional and global level have taken place, probably the most important one was in Geneva, where a committee of the United Nations (UNCTAD) worked from 1972 to 1980 to finally approve a

Multimodal Transport Convention. The same day of its adoption, 8 countries warned that the selected modified Uniform System, instead of a Network-system, would be impractical, which finally proved to be correct. In Argentina the Chamber of Deputies is trying to make an adaptation of the Multimodal Transport Act 21429 of 1992, which after 18 years could not be enforced. At the international level there are discussions whether or not to ratify the Rotterdam Rules, a convention adopted by the General Assembly of the United Nations in December 2008, which was opened for ratification by member countries in September last year. This is mainly a maritime convention, but would apply to multimodal transport if there is a "leg" using sea-transport, which would cover 80% of all international multimodal transport. In both cases (the Argentine and international), there are still many obstacles and unfortunately there are reasons to doubt that we can expect good results in the short term. Many people all over the world, **who are convinced that good general rules for multimodal transport will benefit all,** ask the following question: **What can be the reason that for more than 30 years globally applicable rules are discussed, and yet only progress has been made for its application in the industrialized countries**? Studies have clearly demonstrated the great benefits to those countries, which have definitely lowered their transport- and transaction costs. This situation is unsatisfactory for everyone, because the absence of progress in emerging countries restrict these benefits to trade between the “industrialized “ countries, which is only a part of world trade. The next question is: **Why was there so little progress in "emerging" countries?** To address this issue in detail, you can write entire books, but let's see if we can give in this paper an explanation of one of the main issues, **the one on which the Montevideo Declaration is based: the issue of limitation of liability of the carrier**. Studies in the United States and the European Union indicate, that the blame why so little progress has been made, must be sought in the global lack of knowledge (both in developed and developing countries) **to distinguish a Multimodal Transport from an Intermodal Transport.**

Let's start with the first explanation: The term Intermodal Transport (I.T.) was invented in the United States, when the widespread use of containers started and an efficient integration of a transport chain with the use of different modes, became possible and the so called "seamless transportation chains" were created.

I.T. primarily has to do with the operation.

The term Multimodal Transport (M.T) came into use in 1972 in Geneva at UNCTAD meetings. **M.T. has to do with the operator engaging the multimodal transport (M.T.O), his responsibilities and with the transport document that is used (M.T.D.).** We all know

how the massive use of containers totally changed the face of transport operations throughout the world since the 80's. This development began in the industrialized countries and gradually extended to developing countries, which could not do so quickly because of the huge investments they had to make to change their infrastructures. But little by little they managed to adapt to the new demands and now the container is present in all corners of the world. With the widespread use of containers, Intermodal Transportation was created worldwide and transportation costs and logistics costs began to decline. Finally this decline in transport-costs became so substantial that it was cheaper to move the factories of Europe and America to Asia with cheaper labor costs. This was the begin of the famous globalization and now it is common in the assembly of a car that parts are used from several countries. Because of its proven cost reduction, intermodal transport is now applied (to a greater or lesser degree) throughout the whole world and **all countries**, both the "developed" as well as the "emerging" countries have benefited from reduced transport costs. For all of them the "economic distance" separating the production areas from consumption areas, has narrowed. However there is a big difference between achievements in the two groups: In the "developed" countries it was constantly studied how they could lower the total costs of transport, not only the direct costs, but also those related with commercial transactions and logistics costs. On the other hand in emerging countries "dogmatic approaches" prevailed: most did not want to discuss certain legal aspects. The advancement of Intermodal Transportation lowered costs, but at the same brought changes in the way contracts are made from origin to destination, and these changes led to difficulties in the application of rules of liability of the carrier in the different transport modes that are successively used. (usually each mode has its own rules, according to historical trends). The industrialized countries realized that **changes in transportation contracts required adjustments to their laws** and started making fargoing studies. In general we can say that emerging countries did not follow these examples and for example in Argentina transport still is governed mainly by the Commercial Code of the end of the 19th century and still speaks of horses and carts. Europe, where most countries also had laws of the 19th century, started to develop in 1956 Regional Conventions for different modes of transport, which also were joined by several countries outside Europe. (CMR, CIM-COTIF and CMNI). Finally several European countries changed their laws and outmoded business models and adapted new laws based on those modern conventions. One of the best examples is the Trade Act of Germany based on the CMR Convention. I think our legislators should discuss such examples in detail: The industrialized countries have tried to adapt their legal systems so as to **take utmost advantage** of the

new operating systems and studied how to reduce not only the direct operational costs, but also those related to commercial transactions and especially the rules that have to do with loss and damage and the administrative costs related therewith, the so called **friction-costs**. **Several countries have shown with proven figures that they have been successful with their legal adaptations to the new transport-systems,** especially in the U.S.. (See www.antonioz.com.ar Multimodal Transport). Meanwhile in many emerging countries certain legal issues are addressed as **a dogma in a religion, something about which one cannot argue**. One of the best examples is the difficulty to agree on the rules that have to do with the liability of carriers and compensation in cases of damage to the goods. There are several international studies that identified the problems and here we can name three:

1) 1998 Ministry of Transport of the U.S.A. (DOT study of Cargo liability regimes).

2) 2001 Study of the European Union (The Economic Impact of carrier liability on intermodal freight transport)

3) 2001 Study of the OECD (Cargo Liability Regimes / carrier liability regimes). In these 3 studies various effects have been examined of costs of insurance on the final costs of trade and transport. (friction costs). Shippers usually take insurance on their goods and carriers do so to cover their risk against claims, when damages occur.

What rules apply in Argentina? To Road transport mainly the Commercial Code (1889 repeat 1889), which has no limit of liability of the carrier (with few exceptions). But also another law applies: The Motor Transport Act 24,653 of 1996. This law requires the cargo owner to take out insurance on his cargo, with a clause that the insurance company cannot take recourse against the carrier.

Transport by train is also mainly regulated by the Commercial Code and by the Law of Railways. In the port also the Commercial Code applies, except in special cases when a special clause in the bill of lading (the Himalaya-clause) can be used by the terminal operator. Water transport is ruled by the Navigation Act. Then there is also a multimodal transport law 24921, which so far cannot be applied in practice. But throughout the chain the Civil Code is applicable. The result is that in the case of inland transport and terminal operations in Argentina, claims can be for the value of the damaged goods plus profits and sometimes several other items: **the final value of a claim is unpredictable.** This causes some problems for carriers when taking liability insurance. They probably find the same complication in many other "developing" countries. In the 3 studies we mentioned above you can read that there is a lack of understanding how the limitation of carrier's liability works out in the total costs. In all three it was concluded that the final costs are lower if the carrier has the possibility

to limit his liability, unless the shipper declares the value of their merchandise and eventually agrees to pay a higher freight. This was already ascertained in the United States in 1935, when an amendment was made to the Carmack Act, which originally did not allow the limitation of liability for land transport. The "Amendment" established that if the carrier offered a discount on its published rate ("released rate") he could agree with the owner of the cargo to limit the carrier´s liability. This same concept applies in modern European and Regional Conventions. The C.M.R. Convention is high-lighted in the 3 studies as a good example for road transport. As already mentioned, in 1998 Germany built it in in their national commercial laws and it is considered that the CMR is the most successful case of legal unification of liability regimes in history. (See DOT study page 45 and Uniform Law Review, 1996, page 429). In these studies we can read that **the system of limiting the liability of the carrier in C.M.R., counts with the satisfaction of both parties: shippers and carriers.** In this regard we read verbatim in D.O.T. page 25: **It is not fair to charge shippers of common cargoes with costs of damages or other losses of cargoes that have a value that is higher than usual**. And in D.O.T.page 30: **An efficient legal system is one in which the cost of loss and damage, and transportation costs will be as low as possible.**

Emerging countries also must find a legal system that offers the lowest overall cost to all involved. The important thing is to fix the value of the limitation of the liability of the carrier, in such a way that it covers a very large percentage of the value of the cargoes that normally are transported and use a **monetary unit that over a considerable period can offset the devaluation: the Special Drawing Right** which is used in regional agreements in Europe. People should observe the figures of the European study 2001 which can be found in the box at the end of this note: The limitation of liability of C.M.R. is 8.33 S.D.R. per kilo of the damaged goods, which covers a very wide range of cargoes transported in Europe and is higher than average values for most emerging countries. Those that offer higher valued cargoes, may agree on higher carrier's liability limit, reporting the value of the merchandise and eventually pay a higher freight. Many people ignore these facts, as was found in a Virtual Forum of Aladi of 2007 about the rules for Multimodal Transport in the region. Several rejected the idea of limiting liability, which they considered (as said above) like **a dogma** in a religion! **Something that cannot be considered!** But almost none had any idea of the relationship of the various conventions that set limits, between the average value of the cargoes carried by each mode and the value of the limitation. Neither did they know the fact that there is always a possibility of agreeing a higher limit. I think the 3 studies mentioned above, should be part of the discussions on the ratification

of the Rules of Rotterdam, which the "Group of Montevideo" reject mainly on the issue of limitation of liability of the carrier. The Navigation Act of the U.S. (COGSA) has a limitation of liability of only $ 500, - per package, however the U.S. has proven to be the country which has studied the issue very seriously. Since 1965 the USA has regularly enacted new laws to adapt them to the requirements of modern transport and trade. Major studies (of ENO TRANSPORTATION FOUNDATION) have shown with figures how the benefits have been to U.S.economy .

I hope many people will realize that they should voice their opinions and that everybody should become aware of the importance of internationally accepted rules. As a layman, I repeat a layman, I am convinced that it is better to start with a convention which is not clear enough for many, but if after an ample debate it is considered to be clear enough to give it a start then let us do so.
Then certainly in 4 or 5 years enough jurisprudence be formed.

The other option seems to be, that we start all over again and discuss another 30 years to try to put a perfect Convention together, which will probably prove to be an impossible task.

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Valores medidos por Kilo de carga				
Modo	Valor en Euros	Regimen Responsabilidad	Limite SDR/DEG	Valor Limite en Euros (*)
Tr. aereo	E$ 44.65	Warsaw Conv	17.00	23.12
Tr. carretero	E$ 1.62	CMR	8.33	11.40
Tr. ferroviario	E$ 0.93	CIM	16.33	22.20
Tr. nav. interior	E$ 0.90	CMNI	2.00	2.72
Nav. mar. cabotaje	E$ 0.88	H.V (B/L)	Ver abajo	2.72

(*) Valor de la limitacion de responsabilidad por kilo en Euros

H.V = Hague Visby Limitacion de responsabilidad SDR 667 por bulto o 2.00 por kilo, lo que resulte mayor

H.V.Hague Visby is SDR 667 per package or 2 SDR per kilo, whichvever is highest.

Notes: Average values of cargo per kilo and values of limitation.
E$ stands for Euros. As shown, only the limitation on air transport is much lower than the average value of the cargo, but receives few objections.

Value of C.M.N.I. is for the general cargo. Bulk-values (mainly coal and minerals, reportedly are only Euros 0.10 per kilo)