UNCITRAL's Proposed Instrument on the International Marine Carriage of Goods[1]

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I. INTRODUCTION

"Ships are but boards, sailors but men: there be land-rats and water-rats, water-thieves and land-thieves," said William Shakespeare in *The Merchant of Venice*. But no, ships and the seas upon which they travel are far more than that. Indeed, our world turns on them. Homer forced Odysseus to spend years afloat, while Noah had a short drift. Hemingway found it interesting, while a seagull named Jonathan Livingston knew no better. The reality is, humanity has always written, sung, and dreamed about the sea. Whether it is the unknown horizon or the setting fog, its deep mystery has forever appealed to our romanticist imagination. Yet that mystery is also enlightenment. Before the internet, before the Wright Brothers, before transatlantic cables and satellites, it was boats that connected us from afar and brought us to new places.

From the time of Athens and before, till today and henceforth, we have and do rely on ships. From the hallowed history of Magellan to the British Empire of yore, such water-faring craft have changed our world in every way. That is, be it the Santa Maria or the Peerless, the world we

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1. *Draft Instrument on the Carriage of Goods [wholly or partly] [by Sea]*, U.N. Comm'n on Int'l Trade Law, 12th Sess., U.N. Doc. A/CN.9/WG.III/WP.32 (2003) [hereinafter *Draft Instrument*], *available at* http://www.uncitral.org/english/workinggroups/wg_3/WP32-FINAL%20REVISION%203%20Sept.pdf.

know is a creation of boats. Cars, chairs, the mythical widget and Smith's "silent hand" all conspire to force nations out, and let others in. Ships bring about the wealth of nations; ships are elemental to commerce. Every sea voyage, however, is fraught with danger, be it Poseidon or kamikaze winds. To maintain the commerce – and save merchants pounds of flesh – a doctrine has developed over time to deal with Cassandra's prophecies. With increased globalization and the rise of liberal economic theory, countries have increasingly found themselves needing to interact with their trading partners overseas. For such reasons, the global community has chosen to develop standards and protocols for such carriages of goods.

II. History

The modern United States statutory maritime carriage law, Carriage of Goods by Sea Act, is currently based on the Hague Rules, and was developed at a 1924 meeting in the Netherlands.[2] In 1969, the international community amended the Hague Rules, now the Hague-Visby Rules, to increase liability limits.[3] The United States, however, never adopted the Hague-Visby Rules.[4] In 1978, the international political community adopted a new set of rules, the Hamburg Rules.[5] The Hamburg Rules abolished the defense of "nautical-fault," and again increased liability.[6] Again, however, the United States never adopted the Hamburg Rules.[7] In short, no convention on the marine carriage of goods has been widely accepted, particularly by key nations.[8] The general consensus has

2. R.G. Edmonson, *Making Headway: With COGSA Reform Stalled, Attention is Focused on Working Group's Draft of a New International Cargo-Liability Regime*, J. of Com., 16, 16 (July 16, 2001).

3. *Id.*

4. *Id.*

5. Edmonson, *supra* note 2, at 16.

6. *Id.*

7. *Id.*

8. The Adoption of the Various International Conventions

1. Hague 1924:
   a) The United States adopted COGSA 1936 on April 16, 1936, and the Hague Rules were approved by the United States Senate on May 6, 1937, signed by President Franklin Roosevelt, and ratified by the United States Senate on June 29, 1937.
   b) A few colonies and small entities are still party to the Hague Rules
2. Hague-Visby 1968/1979: Over seventy nations, including almost all of the world's major shipping nations (with the exception of the United States), are party to or have Hague-Visby in their national laws or have ratified it.
3. Hamburg 1978: Adopted by twenty-nine nations (only a few major shipping nations).
4. Multimodal Convention, 1980: Ratified by ten nations. However, thirty ratifications are required to bring it into force.

William Tetley, Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA '99, 28 Tul. Mar. L.J. 1, 6 (2003) (citations omitted).

been that "[w]ith the development of shipping industry, the mandatory regimes adopted by the Hague Rules are somewhat out of date, and the Hamburg Rules are not advisable either."[9] In 1996, the United Nations Commission on International Trade Law ("UNCITRAL") deliberated over a proposal to review the current practices in the arena of international trade law, particularly the international carriage of goods by sea.[10] Specifically, the proposal intended to form "uniform rules in the areas where no such rules existed and with a view to achieving greater uniformity of laws than [had] so far been achieved."[11] Commission members appeared to be specifically concerned regarding an absence of law relating to bills of lading and seaway bills.[12] However, many were concerned about the limits of UNCITRAL's time.[13] Others argued that adding another document to the already existing documents was likely to concern existed as to the limits of UNCITRAL's time, the issue was not put on the agenda.[14] Clearly, however, these concerns were substantial – UNCITRAL did direct its Secretariat to gather "information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems."[15]

By 1998, UNCITRAL had become more receptive to the idea. UNCITRAL was informed that the Secretariat and the Committee Maritime International ("CMI") had begun to work together to pursue the Secretariat's mandate from 1996.[16] In 1997 it became clear that the concerned industries were very interested in the proposal.[17] The UNCITRAL members responded, showing strong interest themselves.[18] By 2000, the CMI and UNCITRAL Secretariat had organized a transport law colloquium,

9. *Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by Sea] - Proposal by China*, U.N. Comm'n on Int'l Trade Law, 13th Sess., annex, at para. 1, U.N. Doc. A/CN.9/WGIII/WP.37 (2004), *available at* http://www.uncitral.org/english/workinggroups/wg_3-/wp.37-e.pdf.

10. *Official Records of the UNCITRAL General Assembly,* U.N. Comm'n on Int'l Trade Law, 51st Sess., Supp. No. 17, at para. 210, U.N. Doc. A/51/17 (1996) [hereinafter *51st Session of UNCITRAL General Assembly*], *available at* http://www.uncitral.org/english/sessions/unc/unc-29/a51-17.htm.

11. *Id.*

12. *Id.*

13. *Id.* at para. 212.

14. *Id.* at paras. 212, 215.

15. *Id.* at para. 215.

16. *Official Records of the UNCITRAL General Assembly*, U.N. Comm'n on Int'l Trade Law, 53rd Sess., Supp. No. 17, at paras. 264-66, U.N. Doc. A/53/17 (1998), *available at* http://www.uncitral.org/en-glish/sessions/unc/unc-31/a-53-17.htm.

17. *Issues of Transport Law*, COMITE MARITIME INT'L (CMI) Y.B., 132 (1999); *Official records of the General Assembly*, U.N. Comm'n on Int'l Trade Law, 54th Sess., Supp. No. 17, at para. 413, U.N. Doc. A/54/17 (1999), *available at* http://www.uncitral.org/english/sessions/unc/unc-32/a-54-17.pdf.

18. *Id.* at para. 417.

to "gather ideas and expert opinions on problems that arose in the international carriage of goods, in particular the carriage of goods by sea," looking towards concerns that might be remedied.[19] The colloquium confirmed what had been argued before: "with the changes wrought by the development of multimodalism and the use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts."[20]

The surveying and analysis performed by CMI culminated in a report, "Possible Future Work on Transport Law," from the Secretary-General to UNCITRAL.[21] This report ("SG Report") categorized and identified problems with the then current state of international maritime transport law. This comment first looks to the most major problems identified by the Secretary-General, and then looks to the most recent complete version of the proposed document: "The Draft Instrument on the Carriage of Goods [wholly or partly] [by sea]" ("Draft Instrument").[22] By considering each item side-by-side, the effectiveness and curative powers of the Draft Instrument are easily considered. This Comment will then move on to look at a specific provision of the Draft Instrument: the port-to-port regime.

III. Curative Actions

The largest problem facing companies whose business concerned with the carriage of maritime involved a simple, but esoteric, requirement: knowledge. In order for companies to calculate the cost of doing business, to understand the meaning and requirements of contracts into which they are considering, companies must be able to predict the legal environment around them.

The United States is not the only country that is either reluctant or otherwise unable to amend their rules – the Hamburg Rules were never generally accepted by the international community.[23] United States companies, and others, have thus been not only unable to predict the outcome of disputes, but even what law would control any dispute.[24] The

19. *Official records of the UNCITRAL General Assembly,* U.N. Comm'n on Intl. Trade Law, 56th Sess., Supp. No.17, at 64-65, para. 333, U.N. Doc. A/56/17 (2001), *available at* http://www.uncitral.org/en-glish/sessions/unc/unc-34/A-56-17e.pdf.

20. *Id.* at para 334.

21. *Id.* at para. 335; *Report of the Secretary-General, Possible Future Work on Transportation Law*, U.N. Comm'n on Int'l Trade Law, 34th Sess., at para. 20, U.N. Doc. A/CN.9/497 (2001) [hereinafter *Secretary-General Report*], *available at* http://www.uncitral.org/english/sessions/unc/unc-34/acn9-497-e.pdf.

22. *Draft Instrument*, *supra* note 1.

23. *CMI Plans to Replace the 80-year-old Hague Rules*, New Straits Times, Feb. 26, 2001, at 27.

24. *Cf.* Edmonson, *supra* note 2, at 16.

recent history of international maritime carriage law, particularly the interspersed acceptance of the various treaties, prohibited companies from operating in a transparent environment.[25]

The developers of the Draft Instrument have recognized this issue. The very beginning proposal, the first impetus, stated that review should be undertaken "with a view to establishing the need for uniform rules in the areas where no such rules existed and with a view to achieving greater uniformity of laws."[26]

The potential power, then, of the Draft Instrument, to clean this muddled sea of treaties and laws is clear. With one uniform, well-drafted, code, at least the sources of authority will be known to all transacting business. The Draft Instrument, in this regard, does not fully complete its purpose, however. The so-called "network exception" may reduce its efficiency in this matter, discussed *infra*.

Essential today in any type of commercial agreement, of course, is the written instrument. The Secretary-General found in his report to UNCITRAL that several problems existed with the requirements of written documents, or bills of lading, as the former laws applied to it. The Secretary-General pointed out that the document requirements of the various conventions were incomplete: while some requirements were listed and spelled out accurately (for example, a requirement of description of goods), other logical and practical necessities were not mandated (for example, dates).[27] This particular issue, dates, the Draft Instrument has done well and explicitly cured, in Article 34(1)(f).[28] Stepping back, not to miss the ocean for the waves, Articles 34 and 35 efficiently and effectively address the normal contractual requirements. Description, identification, weight, quantity, dates, condition, and signatures are among the statutory requirements to be.[29] Of course, merchants are expected to occasionally overlook some requirements. Article 36 serves to save the document from itself, providing instructions to resolve ambiguities.[30]

"Most troublesome," the Secretary-General noted, "[is] the carrier's ability to limit its liability for descriptions in the transport document that it has failed to verify."[31] The authors of the Draft Instrument seem to have directly followed the Secretary-General's concerns: Article 37 addresses this scenario. Article 37 gives a procedure whereby a carrier, act-

25. *Id.*
26. *51st Session of UNCITRAL General Assembly*, *supra* note 10, at para. 210.
27. *Secretary-General Report*, *supra* note 21, at para. 34.
28. *Draft Instrument*, *supra* note 1, at 39-40, art. 34.
29. *Id.* at 39-41, arts. 34, 35.
30. *Id.* at 41-42, art. 36.
31. *Secretary-General Report*, *supra* note 21, at para. 37.

ing in good faith, may limit its liability.[32] Clearly, in this regard, the Draft Instrument achieves what it originally intended to do.

Also missing, notes the Secretary-General, is any articulation of obligations of the shipper.[33] In keeping with tradition, the Draft Instrument rectifies this oversight. Indeed, the chapter has been entitled "Obligations of the shipper."[34] Articles 25 – 32, the articles which Chapter 7 encompasses, clearly and without question describe the duties that the shipper statutorily undertakes.[35]

This analysis can continue, but the pattern is clear. The Draft Instrument takes on and satisfies the elements that the Secretary-General found lacking.

In some ways the Draft Instrument did better than it had to, when judged by the Secretary-General's "what's missing" criteria. The most insightful section is Chapter 8, entitled "Transport Document and *Electronic Records*."[36] Article 33, in particular, shows forethought and proactive intent not only to rectify an issue that has been noted but also a desire to create an instrument that justifies its 21st-Century inception.[37]

IV. Port-to-Port Analysis

Perhaps the most interesting and potentially important element of the Draft Instrument is found in its definitions. Article 1(a) states that "contract of carriage" means "a contract under which a carrier, against payment of freight, undertakes to carry goods *wholly or partly* by sea from one place to another."[38]

Initially, observers expected the Draft Instrument to use the "port-to-port" criteria rather than the "tackle-to-tackle" tradition, meaning that the "carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge," rather than simply "starting from the time of loading of the goods onto the ship until the time the goods are discharged therefrom."[39] It was quickly decided, though, to consider going beyond "port-to-port" coverage in favor of "door-to-door" coverage.[40] Ultimately, this decision manifested in the definition of "contract of carriage." As the writers understood, the words "wholly or partly" re-

32. *Draft Instrument*, *supra* note 1, at 42-43, art. 37.
33. *Id.* at para. 33.
34. *Draft Instrument*, *supra* note 1, at 35, ch. 7.
35. *See id.* at 35-38.
36. *Id.* at 39, ch. 8 (emphasis added).
37. *See id.* at 39, art. 33.
38. *Draft Instrument*, *supra* note 1, at 8, art. 1.
39. Xia Chen, *Chinese Law on Carriage of Goods by Sea Under Bills of Lading*, 8 Currents: Int'l Trade L.J. 89, 95 (1999).
40. Michael F. Sturley, *The United Nation's Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress*, 39 Tex. Int'l L.J. 65, 73 (2003).

sults in the application of the Draft Instrument to overland portions of a shipment that at some point experiences international maritime transport. That is, if a shipment of Hondas from Japan arrived in Seattle, was then transported by truck to Boise, but experienced delay or damage along the way, the Draft Instrument would govern any subsequent legal processes.

A door-to-door regime was preferred for several reasons. First, a door-to-door regime would provide a 'smooth and seamless' movement of containers from one place to another.[41] Simply put, companies prefer to do business with one company rather than many companies, when all other factors are equal.[42] Dealing with only one other company is easier for companies because there are fewer people with whom that company must maintain communication. Furthermore, a door-to-door system also promotes efficiency and predictability in cost, if for no other reason than the development of one contractual relationship rather than many.[43] At other points, a door-to-door arrangement would act to 'plug the holes' in previous multimodal and unimodal agreements.[44]

Because "[t]he principal difficulty in achieving door-to-door coverage with a new international convention is the prior existence of potentially conflicting national laws and international conventions that already govern various segments of the door-to-door carriage," an exception was needed to give way to those pre-existent rules.[45] The "network exception" permits parties who are subject to another *binding* international treaty, i.e. a regional agreement, to subject themselves to that agreement rather than the Draft Instrument.[46] One proposed formulation of the network exception provides for both binding international treaties and national laws to permit exceptions from the otherwise multimodal nature of the Draft Instrument.[47]

This, of course, destroys uniformity. There are states that have these systems in force, usually economic unions. Whether this limited destruction is warranted – and it probably is – is another issue. Nevertheless, the law affecting parties will be clearer, though extensive research may be necessary at times to determine how the law affects any given state.

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41. *Preparation of a Draft Instrument on the Carriage of Goods [by Sea] – General Remarks on the Sphere of Application of the Draft Instrument*, U.N. Comm'n on Int'l Trade Law, 11th Sess., at 28, para. 111, U.N. Doc. A/CN.9/WGIII/WP.29 (2003) [hereinafter *General Remarks on the Draft Instrument*], *available at* http://www.uncitral.org/english/workinggroups/wg_3/WP-29-e.pdf.

42. *Id.*

43. *Id.*

44. *Id.* at 28, para. 112.

45. *General Remarks on the Draft Instrument*, *supra* note 41, at 14, para. 43.

46. *Draft Instrument*, *supra* note 1, at art. 8(1).

47. *Id.*

The door-to-door provision interacts in an interesting way with the network exception clause. If shipment were to have a sea leg from State A to State B, and then the goods were transported over land to State C (possibly a landlocked country, or one that lacks access to an appropriate coast), and a binding agreement exists between States A and B regarding the overland transportation of goods, the treaty would come into force because of the land leg and would immediately be nullified because of the network exception. Countries like the Democratic Republic of the Congo, the Czech Republic, and Mongolia might be able to sign the treaty without any effect. At the same time, however, these states might greatly benefit from the door-to-door provision of the Draft Instrument. If the Czech Republic were to buy more goods from Britain and fewer goods from Germany, then the Czech Republic could force Germany (et. al) to treat its imports in a specific manner. This would be a great advantage to any country that is presented with a Hobson's Choice, regarding another country with biased transportation laws.

Professor Tetley has pointed out that the predecessor to the current door-to-door clause in a previous version of the Draft Instrument might have allowed a nation to defeat the door-to-door provision using domestic law.[48] Even now, the door-to-door clause presently includes a new bracketed provision (neither adopted nor rejected) expanding the limited network exception from simply binding international conventions to binding national laws.[49] Such a provision would allow a country wishing to avoid any or all pre-carriage or on-carriage Draft Instrument clauses effectively modify the Draft Instrument into a port-to-port convention simply by enacting a binding national law. Such is not the theory of *inter*national agreements. Footnote 42 of the current Draft Instrument explains that the Draft Instrument's "[or national law]" rider was placed in the section for "further reflection in the future."[50] The same footnote points out that the "[or national law]" proposal had strong support.[51]

Another problem with the network system is that the various networks have varying liability limits.[52] This problem seems to be particularly noteworthy when it is considered that the greatest disparities exist between modes.[53] For non-maritime conventions, the limits are significantly greater – at one point nearly nine times that of the maritime liability limits: "the CMR limit is 8.33 SDRs per kilogramme, the COTIF-CIM

48. Tetley, *supra* note 8, at 10 (Professor Tetley was analyzing the previous version of the Draft Instrument, A/CN.9/WG.III/WP.21. The current version is A/CN.9/WG.III/WP.32).

49. *Draft Instrument*, *supra* note 1, at art. 8(1)(b).

50. *Draft Instrument*, *supra* note 1, at n.42.

51. *Id.*

52. *General Remarks on the Draft Instrument*, *supra* note 41, at 29, para. 117.

53. *Id.*

limit is 17 SDRs per kilogramme, [like] the Montreal and Warsaw Conventions . . . the Hague-Visby limit is . . . 2 SDRs per kilogramme or 666.67 SDRs per package, and the Hamburg limit is 2.5 SDRs per kilogramme or 835 SDRs per package."[54] This problem leads into another: the application of a maritime convention to non-maritime activities.[55] Some of the clauses built into the Draft Instrument simply do not make sense in non-maritime modes.[56] For example, the Draft Instrument's "perils of the sea" defense is clearly illogical on a truck.[57]

Other modal differences are elemental to their respective regimes.

> The Draft Instrument requires due diligence to make the ship seaworthy . . . barely one level higher than that of reasonable care. In contrast, the CMR level of duty with respect to the vehicle is one of the utmost diligence, while the Montreal Convention holds the air carrier to a strict duty . . . .[58]

Therefore, if the Draft Instrument were to be applied to non-maritime problems, it might apply a different duty of care other than that to which the road, rail, or air carrier would otherwise be subject. The network exception might not apply here because Article 8(1)(b)(ii) limits the importation of other conventions' doctrines to "provisions for carrier's liability, limitation of liability, or time for suit."[59] It seems, therefore, that if "provisions for carrier's liability" is read to include the carrier's duty of care, then this issue might be moot. On the other hand, if "provisions for carrier's liability" is read so as not to include duty, then it will become much more difficult for plaintiffs to prove their case. Plaintiffs would be injured because the duty of care of any of their shippers will drop, at times from strict liability to due diligence.[60]

Many nations, intergovernmental organizations and non-governmental organizations have given input regarding their position on the port-to-port/door-to-door debate. "The United States," for example, "supports a door-to-door regime on a uniform liability basis as between the contracting parties, subject to a limited network exception."[61] The United States, though supporting the network exception, desires to keep the network exception "as narrow as possible" to "provide the maximum degree

54. *Id.*

55. *Id.* at 30, para. 119.

56. *Id.* at 30, para. 121.

57. *Id.*

58. *Id.* at 30, para. 122.

59. *Draft Instrument*, *supra* note 1, at art. 8(1)(b)(ii).

60. *General Remarks on the Draft Instrument*, *supra* note 41, at 30, para. 122.

61. *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea] - Proposal by the United States of America*, U.N. Comm'n on Int'l Trade Law, 12th Sess., at 3, para. 5, U.N. Doc. A/CN.9/WG.III/WP.34 (2003), *available at* http://www.uncitral.org/english/workinggroups/wg_3/wp-34-e.pdf.

of uniformity possible."[62] The United States is not, however, being as multilateral as it might initially seem. The United States stated that, while it has no problem with the Draft Instrument applying to pre-carriage or on-carriage situations, it did object to the Draft Instrument applying to pre-carriage or on-carriage actors.[63] Hence, the only pre-carriage or on-carriage activity covered by the Draft Instrument would be that activity undertaken by an already "performing party" or shipper.[64] The United States, therefore, while supporting subject-matter jurisdiction over pre-carriage and on-carriage activities, opposes personal jurisdiction over the most typical pre-carriage and on-carriage actors.[65]

The Netherlands, conversely, embraces door-to-door coverage. The Netherlands first notes that most modern contracts of maritime carriage are door-to-door rather than port-to-port.[66] Hence, the Netherlands reasons, a port-to-port instrument would "just add another maritime convention to the existing ones."[67] In order to have some meaningful purpose, therefore, only a door-to-door instrument would be useful.[68] Problematically, however, a door-to-door instrument would violate other international conventions dealing with unimodal forms of transport.[69] For that reason, the network exceptions embodied in Article 8 are necessary.[70] Furthermore, the Netherlands expressly endorsed the "regardless of national law" provision of Article 8(3), stating that "Article 8 applies regardless of the national law otherwise applicable to the contract of carriage."[71]

The Italian comments echo the first of the Netherlands' comments that a port-to-port instrument would be of little value in a contractual door-to-door world.[72] Italy argued that

> certain sections of the industry (e.g. shipowners . . . insurers) might be prepared to leave the safe grounds of a well tested, albeit old fashioned, sys-

62. *Id.*

63. *Id.* at 7, para. 23.

64. *See id.*

65. *See id.*

66. *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea] - Proposal by the Netherlands on the Application Door-to-Door of the Instrument*, U.N. Comm'n on Int'l Trade Law, 12th Sess., at 3, para. 3(5), U.N. Doc. A/CN.9/WG.III/WP.33 (2003), *available at* http://www.unc-itral.org/english/workinggroups/wg_3/wp-33-e.pdf.

67. *Id.* at annex 1, para. 1(a).

68. *Id.*

69. *Id.* at annex 1, para.1(c).

70. *Id.* at annex 1, para. 1(d).

71. *Draft Instrument*, *supra* note 1, at 19, art. 8(3).

72. *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea] - Proposal by Italy*, U.N. Comm'n on Int'l Trade Law, 11th Sess., at annex, para. 1, U.N. Doc. A/CN.9/WG.III/WP.25 (2003), *available at* http://www.uncitral.org/english/workinggroups/wg_3/WP-25-e.pdf.

> tem . . . only if the new instrument would really constitute an answer to the reality of modern transportation. And the reality is door-to-door container transportation.[73]

Italy is correct: in the United States, for example, at least 75 – 80% of container trade is conducted on door-to-door contracts.[74] Moreover, in the absence of an international agreement that provides for and articulates rules for dealing with door-to-door arrangements, "it is not surprising that the transport industry has developed its own pragmatic solutions."[75]

Canada has come forth with three potential solutions to these problems. Canada's first option has the committee continuing to work on the document, but permits a reservation that "would enable contracting States to decide whether or not to implement this Article and the relevant rules governing the carriage of goods preceding or subsequent to the carriage by sea."[76] It is unclear how a state would do this outside of reservations, as articulated in Canada's Option 3.

Canada's second option appears to have been the option chosen by the drafters. Canada suggests that the drafters insert "or national law" after "international convention," allowing a country to legislate its way out of the agreement; the country would vote for the Draft Instrument before it votes against it.[77] This, however, significantly increases the difficulty of determining the state of the law in any given country.[78] Whereas signatory reservations are nearly always included with the list of signatories of any document, each country's opposition to the "door" elements would be found in their own code. Signatory reservations are easily obtainable; many country's codes are not. Other difficulties, like language, legal system, and precedent would undoubtedly increase such difficulties.

Canada's third option splits the truly operative parts of the instrument into half: a door-to-door scheme is articulated in the first half while a port-to-port scheme is created in the second half.[79] Countries would be permitted to add reservations, either opposing the first or second half.[80] When a country opposes the second half, it implicitly endorses the port-

73. *Id.*

74. *General Remarks on the Draft Instrument, supra* note 41, at 7, para. 18.

75. *Id.* at 13, para. 41.

76. *Transport Law: Preliminary Draft Instrument on the Carriage of Goods [by Sea] - Proposal by Canada*, U.N. Comm'n on Int'l Trade Law, 10th Sess., at annex, para. 8, U.N. Doc. A/CN.9/WG.III/WP.23 (2002), *available at* http://www.uncitral.org/english/workinggroups/wg_3/WP-23-e.pdf.

77. *Id.* at annex, para. 9.

78. *Id.* at annex, para. 9(a).

79. *Id.* at annex, para. 10.

80. *Id.*

to-port clause.[81] Conversely, if a country files a reservation against the second half, it signs onto the Draft Article's door—to-door provision.[82] This option is the standard diplomatic method for obtaining signatures and ratifications on and of treaties without offending the sovereignty of a signatory or party state. The reservation simply allows countries to state that they agree to the document, except section X.

Both Peru and Malaysia have expressed concern that the Draft Instrument's door-to-door provision may be too ambitious, thereby precluding its acceptance.[83] In Peru's words, "a consensus is almost an utopia."[84] These observations are likely what everyone knows, but nobody says. This issue has not been decided upon, and it is sure to be a point of extensive discussion.[85] Given various governments' concern in the past few years over the potentially binding nature of treaties and their impacts on sovereignty, this might dissuade some of the world's largest economic powers from signing or ratifying any final instrument. That is not to say, however, that the door-to-door coverage should be eliminated. Though it is important to, and, with some supereconomic powers, vital, to gain their approval and acquiescence, the argument can easily be made to show the door-to-door coverage as a good thing – if for no other reason than the uniformity.[86]

V. Conclusion

The Draft Instrument is well on its way to becoming a controlling and useful operator of maritime commerce. The Draft Instrument fulfills several deficiencies in the current regulatory scheme, creates uniformity, and pushes the nations towards a generally consistent theory and method of resolving disputes. The Draft Instrument has several hurdles to jump, however, before it can come to fruition. Most importantly, the scope of the Draft Instrument must be determined – will it be port-to-port or door-to-door? This determination should either enlarge or restrict the remaining requirements of the Draft Instrument. If the drafters choose to continue with a door-to-door regime, the instrument should be expanded to deal with the separate necessities of the additional modalities. If the drafters, however, choose to do away with the door-to-door regime in

81. *Id.*

82. *Id.*

83. *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea] - Compilation of Replies to a Questionnaire on Door-to-Door Transport and Additional Comments by States and International Organizations on the Scope of the Draft Instrument*, U.N. Comm'n on Int'l Trade Law, 11th Sess., at 24, U.N. Doc. A/CN.9/WGIII/WP.28 (2003), *available at* http://www.uncitral.org/english/-workinggroups/wg_3/WP-28-e.pdf.

84. *Id.*

85. *Draft Instrument*, *supra* note 1, at n.3.

86. Yet one must bear in mind the "network exceptions."

favor of a port-to-port, tackle-to-tackle, or depot-to-depot regime, then the instrument needs to articulate how it will interact with its corollaries.

Whatever form it takes, the Draft Instrument will find use. The current muddle of regimes and doctrines in use today make it more difficult than it need be to transact business overseas over seas. With any simplification, transaction costs should decrease. When transaction costs decrease, more trade will likely occur, leading to an increase in the Wealth of Nations.[87] Though we no longer rely on ships for news of Europe and spices from the East, we now rely on them for national defense, economic security, and, ultimately, political stability. Every effort made to create a regime like the Draft Instrument is a step forward onto steady ground.

87. *See generally* ADAM SMITH, WEALTH OF NATIONS (Prometheus Books 1991) (1776); *cf.* Mu Erref Yetim, *Governing International Rivers of the Middle East*, WORLD AFFS., Sept. 22, 2003, at 81; *Eastern Europe: Trade and Integration in Transition Countries*, EBRD TRANSITION REP., Dec. 31, 2003, at 73.