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Sixth session

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Report of the Group of Experts towards Unified Railway Law on its sixth session

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I. Attendance

1. The Group of Experts towards Unified Railway Law held its sixth session on 2 and 3 December 2013 in Geneva.
2. The session was attended by experts from the following countries: Azerbaijan, Finland, France, Germany, Kazakhstan, Lithuania, Poland, Russian Federation, Netherlands and Turkey. Representatives of China also attended under Article 11 of the Terms of Reference of UNECE. An expert of the European Union (DG MOVE) also attended.
3. Experts from the following intergovernmental organizations participated: Organization for Cooperation between Railways (OSJD), Eurasian Economic Commission (EEC) and Intergovernmental Organisation for International Carriage by Rail (OTIF). Experts from the following non-governmental organizations participated: Coordinating Council on Trans-Siberian Transportation (CCTT), International Rail Transport Committee (CIT) and International Union of Railways (UIC).
4. At the invitation of the secretariat, experts from the following organizations and an industry group participated: CMS Cameron McKenna, Deutsche Bahn (DB) and Plaske JSC.

II. Adoption of the agenda (agenda item 1)

Documentation: ECE/TRANS/SC.2/GEURL/2013/7

5. The expert from the Russian Federation suggested replacing in paragraph fourteen, sentence four the “further details” by “other issues”. The Group of Experts adopted the provisional agenda prepared by the secretariat as amended (ECE/TRANS/SC.2/GEURL/2013/7).

III. Establishment of a unified set of transparent and predictable provisions and legal rules for Euro-Asian rail transport operations (agenda item 2)

Documentation: ECE/TRANS/SC.2/GEURL/2013/9

6. The Group of Experts recalled that the Joint Declaration outlined the strategy (rail map) to establish legal conditions for rail transport from the Atlantic to the Pacific equivalent with those existing for competing modes, such as those for road, air and maritime transport that included the following elements:
 - (a) Establishment of a unified set of transparent and predictable provisions and legal rules for Euro-Asian rail transport operations in all countries concerned that would facilitate border crossing procedures, particularly for transit traffic;
 - (b) Analysis of existing international modal transport conventions (rail, road, air, inland water and maritime transport) and related agreements in order to identify provisions and procedures important for the establishment of unified railway law;
 - (c) Unification of international railway law with the objective to allow rail carriage under a single legal regime from the Atlantic to the Pacific;
 - (d) On the basis of a material consensus on unified railway law, identification of an appropriate management system for unified railway law using the experience of

international organizations in the field of railway transport (OSJD, OTIF and others) as well as of international organizations of other modes of transport;

(e) Support for the widest possible use of electronic document workflow and intelligent transport systems.

7. These five elements constitute the objectives of the work of the Group of Experts and should constitute the main issues for consideration.

8. The Group of Experts also recalled that, during its fifth session, it had considered and discussed the main problems and issues to be addressed by a unified set of provisions and legal rules for Euro-Asian rail transport operations. It had also agreed to prepare the legal provisions covering international carriage of goods by rail focusing on the contract of carriage, in particular, on rights and obligations of the parties to the contract of carriage, documentation, liability, assertion of claims and relationship among carriers. It was understood that other issues, such as technical specifications, rail infrastructure, rolling stock as well as security and safety should be decided upon the basis of the analysis of COTIF/CIM and SMGS to be prepared by the UNECE secretariat.

9. It was understood that border crossing facilitation, customs issues, the international transport of specific cargoes or loading units as well as access to rail markets was either addressed by other international legal instruments or subject to national or regional rules and regulations and, thus, outside the scope of its work.

10. The geographical scope of unified rail transport rules should encompass primarily the UNECE region as well as interested countries, such as China and Mongolia. Therefore, the involvement of these countries as well as that of the UNESCAP secretariat in the legal work of the Group of Experts was highly desirable and should be facilitated by the secretariat.

11. The Group of Experts welcomed the delegation from China which were participating for the first time at its sessions and invited them to continue to do so in the future. Furthermore, the Group of Experts requested the secretariat to enquire about possibilities to facilitate the participation and efficient contributions of experts from China by possibly providing for the translation of documents and for simultaneous interpretation into Chinese.

IV. Analysis of existing international modal transport conventions (rail, road, air, inland water and maritime transport) and related agreements (agenda item 3)

Documentation: ECE/TRANS/SC.2/GEURL/2013/4

12. The Group of Experts recalled that, at its previous session, it reviewed existing international arrangements and legal instruments covering all modes of transport on the basis of an outline provided by the secretariat with a view to identifying elements and mechanisms as well as best practices that could be of relevance for the establishment of a unified railway regime (ECE/TRANS/SC.2/GEURL/2013/4).

13. The Group of Experts noted that none of the experts had transmitted to the secretariat comments on the correctness and completeness of the information provided in the secretariat document as had been requested at the previous session.

14. The expert from Germany noted that references to “Hague Rules” should be corrected as “The Hague-Visby Rules”.

15. If experts will make available their comments before the next session; the secretariat would consolidate this information in the form of a background document for further review by the Group of Experts.

16. The Group of Experts agreed that if no comments are received by the experts by its next session then the document will be considered accurate and complete.

V. Unification of international railway law with the objective to allow rail carriage under a single legal regime (agenda item 4)

Documentation: ECE/TRANS/SC.2/GEURL/2013/9, ECE/TRANS/SC.2/GEURL/2013/10, ECE/TRANS/SC.2/GEURL/2013/11

17. The Group of Experts recalled that, at its previous session, it had an exchange of views on possible key elements and regulations to be included or addressed in a unified international legal regime for rail freight transport operations that would provide legal transparency and certainty for Euro-Asian rail freight transport.

18. On the basis of ECE/TRANS/SC.2/GEURL/2013/9 prepared by the secretariat and taking note of ECE/TRANS/SC.2/GEURL/2013/10 transmitted by the OTIF secretariat and ECE/TRANS/SC.2/GEURL/2013/11 prepared by the OSJD secretariat, the Group of Experts reviewed a comparison of relevant legal provisions in COTIF/CIM and in SMGS in the following seven fields (listed without prioritization):

- (a) Scope of application;
- (b) Contract of carriage (conclusion and performance);
- (c) Liability;
- (d) Assertion of claims;
- (e) Relationship between rail carriers;
- (f) Recourse of action (infrastructure, rolling stock, technical specifications, safety and security, etc.);
- (g) Other relevant provisions (electronic data interchange, reservations, disputes, entry into force, transition period, etc.).

19. Document ECE/TRANS/SC.2/GEURL/2013/9 provided a comparison of provisions in COTIF/CIM (column 1) and in SMGS (column 2). These legal provisions are briefly evaluated in the context of other international legal documents, such as CMR and the Montreal Convention (column 3). Finally first elements and a possible wording of some specific legal provisions (column 4) that could be included into a legal instrument for Euro-Asian rail freight transport were provided, as appropriate and mandated.

20. There seems to be consensus among experts that the establishment of an overall (third) layer of international railway law, in addition to COTIF/CIM and SMGS, should be avoided, not least to avoid conflict of conventions. Similarly, the creation of a new international railway regime replacing COTIF/CIM and SMGS in their entirety would be complex and would require considerable time due to long transition periods for entry into force and for denunciation of COTIF/CIM and SMGS.

21. The secretariat presented an alternative concept for an international legal railway regime that, while leaving the present two regimes untouched, would fill the gap left by COTIF/CIM and SMGS for use of a single rail transport contract, a single consignment

note and a single liability system for Euro-Asian rail transport. This regime would allow rail transport from the Atlantic to the Pacific on the same legal basis as is today only possible for road and air transport.

22. Such a new international railway regime would be based on relevant provisions of COTIF/CIM and on the latest draft of the new SMGS, including appropriate EDI procedures. Such an approach, using familiar and well-proven legal provisions, standards and procedures, should ensure smooth and effective implementation of the new legal railway regime in acceding countries.

23. This concept for a new legal railway regime would be based on the following main features:

(a) The new legal railway regime would be applicable only for international rail transport of goods that extend beyond the scope of application of the present COTIF/CIM or SMGS regime. For instance:

(i) International rail transport between China and the Russian Federation would continue to be governed by the SMGS regime. Also rail transport of goods between Germany and Turkey would remain under the COTIF/CIM regime;

(ii) Rail transport of goods between China or the Russian Federation and Germany could also continue to use, as of today, a mix of national, COTIF/CIM and SMGS laws under the condition that two separate contracts of carriage would be concluded: One relating to the carriage of goods within the States parties to SMGS, another one relating to the carriage of goods within the States parties to COTIF/CIM. This will, however entail, re-consignment procedures at the borders between the COTIF/CIM and SMGS regimes;

(iii) The new legal railway regime could facilitate international rail transport of goods and containers between China or the Russian Federation and Germany without any re-consignment at the borders of the COTIF/CIM and SMGS regimes on the basis of a single contract of carriage. Similarly, rail transport between Europe and Turkey to the Middle East or to Pakistan and India could, in the future, be carried out with the new legal railway regime.

(b) The new legal railway regime would only apply if the parties to the rail transport contract, i.e. the consignor and the railway enterprise concluding the contract of carriage so decide and agree that the new legal railway regime should apply (opting-in). Thus, application of the new legal railway regime by the rail industry would be voluntary. However, once the parties to the transport contract agree to apply the new railway regime and mark this in the transport contract, its provisions become mandatory.

When using a single contract of carriage railway, enterprises and consignors would thus be free to decide whether they would want to continue to apply for Euro-Asian rail transport and beyond a specific national law or whether they would wish to apply the uniform and transparent facilities of the new international railway regime.

24. The experts from the Russian Federation and OSJD mentioned that the Group of Experts should work towards developing a new law which would replace the two existing regimes. This new law should cover all the issues that are currently covered by the two existing regimes. The expert from the OSJD pointed out that their organization is currently revising the SMGS Agreement. He pointed out that the revised SMGS Agreement will be closer to the provisions of the COTIF Convention and should be finalized and approved by OSJD member States in the summer of 2014. He suggested that the revised provisions of the SMGS Agreement should form the basis for consideration of a new legal instrument.

25. The expert from the OTIF secretariat pointed out that the idea of creating a law that overarches the two legal regimes COTIF/CIM and SMGS might appear, at first sight, to be attractive, but it would be counter to the desired aim, in that it would in fact be tantamount to creating a supplementary legal regime, a sort of third law, with all the risks of clashing with the two existing legal regimes that this would involve. He mentioned that a possible second approach might be to create autonomous law for the transport of goods by rail in Eurasia. However, in the view of OTIF, this approach would constrain States not only to enter into a lengthy cycle of negotiations, whose success would not be certain, but also to denounce COTIF/CIM and SMGS. If this approach were taken, the States that are Parties to the CIM Uniform Rules should first of all declare that they will not apply this Appendix to COTIF in its entirety. In a subsequent step, COTIF should be amended to enable denunciation of the CIM Uniform Rules, which is a long process requiring ratification by the States. The third solution, which is the preferred approach of OTIF, would be to put in place a legal system that would rapidly become operational by developing interface law between the two legal regimes which currently coexist, COTIF/CIM and SMGS.

26. The expert from OTIF further stressed their appreciation for the progress resulting from the constant efforts of OSJD, CIT and OTIF, in bringing together the legal provisions of COTIF/CIM and SMGS: such as the rapprochement of the provisions concerning the presumption of damage in case of re-consignment and the legal harmonisation of the carriage of goods by rail in Eurasia, particularly, with the creation of the CIM/SMGS consignment note, the model wagon and container list form and the uniform CIM/SMGS report model. The interface law based on the approach of OTIF could either be applied to certain high-performance corridors or quite simply, if the parties to the contract of carriage so decide, when goods traffic passes from the area of application of COTIF/CIM to that of SMGS.

28. Taking due account of this information and proposals and referring to the relevant provisions of COTIF/CIM and SMGS, the Group of Experts undertook a first review of columns 3 and 4 of ECE/TRANS/SC.2/GEURL/2013/9 in order to arrive at a common understanding of the concepts and explanatory legal provisions to be enshrined into a new international legal railway regime. This exchange of views was performed article by article starting with newly proposed Article A and up to article I.

29. Scope of Application

There was agreement that the scope of application of the new railway regime should be redrafted as to clearly state that this legal regime should apply only to international and not to national rail transport (...taking place in the territories of at least two contracting parties...). Several experts agreed with the proposal made by OTIF that a new railway regime should cover intermodal transport operations, including road and inland waterway transport.

30. Mandatory Law

The Group of Experts noted that the new international legal instrument will overrule national law. The expert from the European Commission supported this article since it similar provisions are contained in COTIF/CIM and in SMGS. The expert from Germany pointed out that that the establishment of a new general layer of international railway law, in addition to COTIF/CIM and SMGS should be avoided, not least to avoid conflict of conventions.

31. Prescriptions of Public Law

The expert from Germany pointed out that it is very important to clarify what is meant by public law and whether the consignment note could be used for public law issues. The Chair mentioned that the SMGS consignment note is accepted as a

customs document. Therefore, relevant provisions should be added to this article. The expert from the European Commission mentioned that for the transport of dangerous goods, the relevant provisions of RID should apply. The expert from OSJD mentioned that, in principle, he agrees with the articles and that in the revised SMGS agreement this article will include more details.

32. Consignment Note

The expert from CIT mentioned that the title of this provision should be changed to read “contract of carriage”. OSJD agreed with this proposal. All experts agreed that paragraph 2 of this article should be deleted. The experts from OSJD further suggested that the common /CIM/SMGS consignment note should be annexed to the new legal regime. The expert from OTIF mentioned that experts should first decide if a standard consignment note is going to be used and then if it is going to be annex to the new legal instrument or not. The Chair and the expert from CIT pointed out that the issue of an electronic consignment note should also be addressed. The expert from Germany felt that in paragraph 4 of this provision, relevant provisions of the Additional Protocol to the CMR Convention concerning the electronic consignment note, initially prepared by UNIDROIT, should be reviewed in this context. The expert from the Russian Federation agreed in principle, with the provisions of this article and suggested that the Russian text might need to be revised and corrected. The expert from CIT mentioned that the relevant provisions in COTIF/CIM are currently revised and further information would be provided at the next session.

33. Wording of the Consignment Note

The expert from OSJD mentioned that in the revised SMGS Agreement the wording of the consignment note contains seventeen (17) particulars whereas there are only fourteen (14) in the proposed article. Thus, the list should be revised. The Chair suggested that the new legal instrument should address the issue of the wording provided by the consignment note.

34. Responsibility for particulars entered on the Consignment Note

The Chair mentioned that in addition to the consignment note, other documents may be required. The secretariat mentioned that such issues are covered by the provisions of article K. In principle, the provisions of such an article seemed to be acceptable to the Group of Experts.

35. Payment of Costs

The expert from Germany pointed out that, within the European Union and many other countries, tariffs are agreed upon by the parties and are not regulated by Governments or State authorities. The expert from OSJD informed the Group that in those countries where the SMGS Agreement is applicable, tariffs are calculated based on the day in which carriage was undertaken and that the application of tariffs is mandatory. The expert from the Russia Federation stressed that, in its present form, the example provisions of the proposed article G are not acceptable. The Chair mentioned that in SMGS countries, not all tariffs are regulated and a compromise might be found if more details are added to this article. The principles of the proposed article might then be acceptable.

36. Examination

The expert from OSJD mentioned that this issue is addressed by article 20 of the revised SMGS Agreement. The expert from CIT mentioned the importance for discussing the evidential value of the consignment note. The Chair pointed out that

in the SMGS Agreement, the procedures of examination are clearly established and that the experts should consider how the examination procedures should be organized and referred to in relevant articles.

37. Evidential Value of the Consignment Note

The expert from the Russian Federation and the Chair felt that, in principle, the provisions of this article are correct. However its translation into Russian is not correct. The expert from Germany questioned the meaning of the “duly authorized” mentioned in the second sentence of this article.

38. Following this first review of the conceptual and legal basis of a new international railway regime, the Group of Experts decided that for its next session:

- (i) Document ECE/TRANS/SC.2/GEURL/2013/9 should be revised based on the discussions of this session;
- (ii) Further possible wording for articles J to FF should be prepared by the secretariat as part of column 4 of ECE/TRANS/SC.2/GEURL/2013/9.

39. The representatives of CIT informed the Group of Experts about the latest developments on the preparation of GTC EurAsia and the work done by CIT secretariat. The group of experts appreciated the work done and thanked the CIT secretariat for their efforts.

VI. Identification of an appropriate management system for unified railway law using the experience of international organizations in the field of the railway transport (agenda item 5)

40. The Group of Experts recalled that, at its previous session, it had requested the secretariat to prepare, a preliminary analysis of pertinent management issues enshrined in other transport conventions/agreements addressing at least the following issues:

- (a) Depository functions (custody, certified copies, notifications, etc.);
- (b) Administrative functions (amendments, interpretation, monitoring, etc.);
- (c) Secretariat support functions.

41. The secretariat introduced document ECE/TRANS/SC.2/GEURL/2013/12 which took account of more detailed information transmitted by OSJD and OTIF as contained in Informal documents Nos. 2 and 3 respectively. Due to lack of time, the Group of Expert did not consider these documents.

VII. Other Business (agenda item 6)

42. There were no proposals under this agenda item.

VIII. Date of next session(s) (agenda item 7)

43. The next session of the Group of Experts is scheduled to be held at the Palais des Nations in Geneva on 3 and 4 April 2014.

IX. Summary of decisions (agenda item 8)

44. The Group of Experts agreed that the secretariat would prepare a short report on the outcome of the session.
