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Strategic questions of a modal and thematic nature:

Rail transport

Towards unified railway law in the pan-European region and along Euro-Asian transport: Identification of an appropriate management system for unified railway law*

Note by the secretariat

Summary

This note outlines the main principles of an appropriate management system for the unified railway law.

In accordance with the strategy outlined in the Joint Declaration signed during the Ministerial session of the seventy-fifth Inland Transport Committee, an appropriate management system for unified railway law should be identified using the experience of international organizations in the field of the railway transport (Intergovernmental Organization for International Carriage by Rail (OTIF), Organization for Cooperation between Railways (OSJD) and others) as well as of international organizations of other modes of transport (ECE/TRANS/2013/2, para. 2 (d)).

It is recalled that, as specified in the Joint Declaration, discussions on an appropriate management system should await consensus among experts on the material (substantive) provisions and mechanisms of a unified international regime for the international carriage of goods by rail.

* The present document is being issued without formal editing.

I. Depository of the new rail regime

1. Based on the Vienna Convention on the Law of Treaties of 23 May 1969 the designation of the depository of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depository may be one or more States, an international organization or the chief administrative officer of the organization. The functions of the depository of a treaty are international in character and the depository is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depository with regard to the performance of the latter's functions shall not affect that obligation.

2. The functions of a depository, unless otherwise provided in the treaty or agreed by the Contracting States, comprise in particular:

(a) keeping custody of the original text of the treaty and of any full powers delivered to the depository;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) Performing the functions specified in other provisions of the Convention.

3. In the event of any difference appearing between a State and the depository as to the performance of the latter's functions, the depository shall bring the question to the attention of the signatory States and the Contracting States or, where appropriate, of the competent organ of the international organization concerned.

4. Considering that this new rail regime is based on two existing rail regimes – COTIF Convention and SMGS Agreement – as well as the fact that the main objective was to create an international legal regime which would increase railways competitiveness it is suggested that the best solution for a depository of this new legal instrument would be the Secretary-General of United Nations.

II. Administrative Committee

5. It is common practice with international agreements that there is a designated intergovernmental body – customarily composed of Contracting Parties – which is authorized, under the Treaty, to make decisions relating to implementation and/or amendments to part or whole of the agreement. In most cases this body is regarded as an

independent Treaty body, which is nonetheless hosted by the organization holding the responsibility for administering the Agreement, and which also offers Secretariat services.

6. There are, however, examples where the Agreement is integrally linked with an organization because the treaty body in question may be in fact an intergovernmental subsidiary body of the organization itself. Such examples are the European Agreement on Important International Combined Transport Lines (AGTC) and the European Agreement on Main International Railway Lines (AGC), both administered by UNECE. In these two cases, the Working Party on Intermodal Transport and Logistics (WP.24) and the Working Party on Rail Transport (SC.2) respectively, are the responsible Treaty bodies for all matters and this is clearly stated in both Agreements.

A. The cases of SMGS and CIM

7. The Management of the SMGS Agreement is entrusted to the OSJD Committee (OSJD Commission on Transport Law). The Commission shall hold its meetings and shall be composed of delegations from the Parties to SMGS Agreement. Proposals on modifications and amendments to be made in the SMGS Agreement shall be submitted to OSJD Committee and to all the Parties to the SMGS Agreement at the same time or not later than two months before a meeting of the Commission on Transport Law. The Commissions' activity in relation to amendments and modifications to be made in SMGS Agreement shall be carried out by experts and it includes two phases: – consideration of proposals on amendments and modifications to be made in SMGS at expert meetings; – consideration of proposals on amendments and modifications to be made in SMGS at the meetings of OSJD Commission on Transport Law.

8. The date of entry into force of amendments and modifications in SMGS and Manual for SMGS, adopted upon the expiry of not less than five years dating from the latest date of their entry into force, and the date of entry into force of amendments and modifications in Annex II, adopted upon the expiry of not less than two years dating from the latest date of their entry into force, shall be established by the OSJD Committee. As to individual, critical issues requiring modification of SMGS and Manual for SMGS, on which one cannot adhere to the five-year term, the adopted amendments shall enter into force on the first of July of the year to follow, if within two months following their transmission to all the railways which are Parties to SMGS, no objections are submitted by any railways which are Parties to SMGS.

9. The Management of CIM is entrusted to the Secretary-General of OTIF. All the submitted proposals on amendments to be made in CIM shall be considered by the Revision Committee. Where necessary, experts shall be involved or working groups shall be established. The Secretary-General submits proposals on modifications of CIM to the members of the Revision Committee and Observers not later than two months before the meeting is convened. The Revision Committee shall take decisions on modifications in CIM Uniform Rules or shall draft papers for making decision at the General Assembly.

10. Amendments in CIM Uniform Rules, adopted by the General Assembly, shall enter into force twelve months after their approval by at least half of member States which have not declared that they will not apply fully the CIM Uniform Rules, for all member States except those which made such a declaration before the date of entry into force, according to which they did not approve the amendments, and those which declared that they would not apply fully the CIM Uniform Rules. For all member States, CIM Uniform Rules amendments adopted by the Revision Committee shall enter into force on the first day of the twelfth month dating from the month of the notification on the amendments, sent by the Secretary-General to member States. Member States may submit their objections no later than four months from the time of notification. In case of objections received from at least

one-fourth of member States, the amendment shall not enter into force. Member States which have submitted their objections against the decision within the established period of time shall suspend the full application of the respective Annex for communication with member States or between them from the moment of the decision's entry into force.

B. Examples of administrative structures in UNECE administered legal instruments

11. The TIR Administrative Committee, composed of all Contracting Parties to the TIR Convention, is the highest entity under the TIR Convention. It usually meets twice a year in spring and autumn under the auspices of the UNECE in Geneva to approve amendments to the TIR Convention and to give all countries, competent authorities and concerned international organizations an opportunity to exchange views on the functioning of the system. To date, thirty-one amendments to the TIR Convention have been adopted and numerous resolutions, recommendations and comments have been approved by the Committee. The TIR Executive Board (TIRExB) was established by the Contracting Parties to the TIR Convention in 1999. Its objective is to enhance international cooperation among Customs authorities in the application of the TIR Convention and to supervise and provide support in the application of the TIR system and the international guarantee system. The TIRExB is composed of 9 members who are elected in their personal capacity by the Governments which are Contracting Parties to the TIR Convention for two-year terms of office. The TIRExB is inter alia mandated to supervise the centralized printing and distribution of TIR Carnets, to oversee the operation of the international guarantee and insurance system and to coordinate and foster exchange of intelligence among Customs and other Governmental authorities. The decisions of the TIRExB are executed by the TIR secretary who is assisted by the TIR secretariat. The TIR secretary is a member of the UNECE secretariat. The operation of the TIRExB is financed, for the time being, through an amount on each TIR Carnet issued.

12. The work of the TIR Administrative Committee is supported by the UNECE Working Party on Customs Questions affecting Transport (WP.30) which holds between two and three sessions a year in Geneva, usually in conjunction with the sessions of the TIR Administrative Committee. Participation in the Working Party is open to all member States of the United Nations and to interested international organizations. The Working Party also regularly adopts comments on certain provisions of the Convention. These comments are not legally binding for the Contracting Parties to the Convention, such as are the Articles and the Explanatory Notes of the Convention. However, they are important for the interpretation, harmonization and application of the TIR Convention because they reflect a consensus opinion of the Working Party in which the majority of the Contracting Parties and the major users of the TIR system are represented (comments adopted by the Working Party are usually transmitted to the TIR Administrative Committee for consideration and endorsement).

13. A body established under an international agreement carries particular weight and decision-making power, which is why its most stable and effective form is to stand independently from a subsidiary intergovernmental body – however interlinked with it by channels of communication and cooperation.

14. When it comes to Treaty bodies, there are three main structures:

- The first is the case where the Treaty itself specifies that the United Nations will provide secretariat services under the responsibility of the Secretary-General. In a subclass of those cases, a specific United Nations entity is tasked with this responsibility (e.g. TIR Convention (1975), Annex 8, Article 2 – obligation of the

United Nations to provide secretariat services, Article 4 – obligation to convene the Committee at UNECE and Article 12 – obligation to appoint a regular staff member of UNECE as secretary of the Committee). In other cases there is only a generic reference (e.g. The Secretary-General shall provide the Committee with secretariat services).

- The second case is when the Treaty establishes a Treaty body (Administrative Committee), but does not stipulate an obligation for the United Nations secretariat to service this body. In this second case, since there is no obligation stipulated by the legal instrument, it is within the rights of the General Assembly not to consider that body as being serviced by the United Nations regular budget.
- The third structure is that whereby the Parties to a Treaty agree to finance the secretariat of the Treaty body and host it at the United Nations or elsewhere.

15. Based on good practices implemented in UNECE conventions and agreements regarding the formulation of an administrative committee the following text could be suggested for the new rail legal regime on how to formulate its administrative committee.

Administrative Committee

An Administrative Committee composed of all the Contracting Parties shall be established.

Article 1

- (i) The Contracting Parties shall be members of the Administrative Committee.
- (ii) The Committee may decide that the competent administrations of States which are not Contracting Parties or representatives of international organizations may, for questions which interest them, attend the sessions of the Committee as observers.

Article 2

1. The Committee shall consider any proposed amendment to the Convention in accordance with Article
2. The Committee shall monitor the application of the Convention and shall examine any measure taken by Contracting Parties, associations and international organizations under the Convention and their conformity therewith.
3. The Committee shall supervise and provide support in the application of the Convention at the national and international levels.

Article 3

The Secretary-General of the United Nations shall provide the Committee with secretariat services.

Article 4

The Committee shall, at its first session each year, elect a Chair and a Vice-Chair.

Article 5

The Secretary-General of the United Nations shall convene under the auspices of the Economic Commission for Europe the Committee annually and also at the request of the competent administrations of at least five States which are Contracting Parties.

Procedure for amending this Convention

Article 1

This Convention, including its Annexes, may be amended upon the proposal of a Contracting Party by the procedure specified in this Article.

Article 2

Any proposed amendment to this Convention shall be considered by the Administrative Committee composed of all the Contracting Parties in accordance with the rules of procedure set out above. Any such amendment considered or prepared during the meeting of the Administrative Committee and adopted by it by a two-thirds majority of the members present and voting shall be communicated by the Secretary-General of the United Nations to the Contracting Parties for their acceptance.

Article 3

Any proposed amendment communicated in accordance with the preceding paragraph shall come into force with respect to all Contracting Parties three months after the expiry of a period of twelve months following the date of communication of the proposed amendment unless, at least one-third of the Contracting Parties, or five of them if one-third exceeds that figure, have given the Secretary-General written notification of their objection to the proposed amendment.

Article 4

If at least one-third of the Contracting Parties, or five of them if one-third exceeds that figure, have given the Secretary-General written notification of their objection to the proposed amendment in accordance with paragraph 3 of this Article, the amendment shall be deemed not to have been accepted and shall have no effect whatsoever.

III. Voting Rights

A. General United Nations principles on participation and voting

16. When talking about the United Nations, the starting point is always the Charter. The Charter is the constituent instrument of the United Nations, and consequently, the primary source and highest authority of United Nations law. According to Article 103 of the Charter:

In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

17. As concerns membership, Articles 3 and 4 of the United Nations Charter unequivocally specify that members of the United Nations are none other than States. Further to this, Article 18 of the United Nations Charter establishes the fundamental principle that each member has one (1) vote in the decision-making processes. The main conclusion, thus, is that:

United Nations member = State, and;

1 member (State) = 1 vote

B. SMGS and COTIF

18. As it concerns SMGS agreement's voting rights the OSJD Commission's meeting is valid, if there are not less than two-thirds of Parties to SMGS present at the meeting. The expert meeting is valid, if there is not less than one-third of Parties to SMGS present at the meeting. At all the phases of the drafting process and further during the adoption of final decisions, the unanimity principle shall be applied.

19. Regarding COTIF Convention the General Assembly shall be valid, if the majority of member States are present at the Assembly. The Revision Committee is composed of representatives from member States. The meeting of the Committee is valid, if the majority of its members are present at the meeting. The decisions of the General Assembly shall be adopted by the majority of votes of member States present at the Assembly. The decisions of the Revision Committee shall be adopted by the majority of votes of the member States present provided that not less than one-third of members of the Committee which are present at the time of voting are in favour.

C. Proposal by the secretariat

20. For the new railway legal regime the following text is proposed based on the good practices implemented in UNECE regarding voting rights.

Article 1

Proposals shall be put to the vote. Each State which is a Contracting Party represented at the session shall have one vote. Proposals other than amendments to this Convention shall be adopted by the Committee by a majority of those present and voting. Amendments to this Convention and the decisions referred to in Articles ... and ... (optional) of this Convention shall be adopted by a two-thirds majority of those present and voting.

Article 2

A quorum consisting of not less than one-third of the States which are Contracting Parties is required for the purposes of taking decisions.

Article 3

Before the closure of its session, the Committee shall adopt its report.

Article 4

In the absence of relevant provisions in these rules, the Rules of Procedure of the Economic Commission for Europe shall be applicable unless the Committee decides otherwise.

IV. The special case of Regional Economic Integration Organizations as Contracting Parties

21. A Regional Economic Integration Organization (REIO) is defined in law as an organization that is constituted by, and composed of, States, and on which such States have conferred sovereign authority to make decisions that are binding on them, and that are directly applicable to and binding on persons within these (member) States. This is accomplished via a constituent Treaty/international agreement between the (founding)

member States. A REIO could be a Free Trade Area, a Customs Union, a Common Market, or a complete unification of monetary, fiscal, social, and counter-cyclical policies, depending on the level of integration achieved.

22. REIOs participate in the work of UNECE and have a major role to play in terms of setting or influencing policy directions, providing input on technical matters and participating actively in capacity-building projects in the field of work of UNECE. It is often the case that REIOs provide experts or other “in-kind” resources or even financial support to UNECE activities.

23. Chapter X of the United Nations Charter on the Economic and Social Council (ECOSOC) reiterates in its Article 67, the “one member equals one vote” principle. It also specifies in Article 70 that specialized agencies participate without voting rights. This in itself is of no consequence since REIOs are not specialized agencies within the meaning of the United Nations Charter (see Articles 57 and 63 of the United Nations Charter), however, the ECOSOC Rules of Procedure (see document E/5715/Rev.2 Rule 79) specify that International Governmental Organizations (IGOs), the definition of which includes REIOs, may participate without voting rights. Consequently, UNECE, along with all United Nations Regional Commissions that are subsidiary to ECOSOC are subject to the United Nations Charter and ECOSOC Rules of Procedure, despite the fact that some functional autonomy is granted to them.

24. From a Public International Law perspective, the rule is quite straightforward: If a REIO has international legal personality i.e. is an entity independent of its member States, the rule of one vote per Contracting Party should apply. In fact most conventions include the clause:

For the purposes of taking decisions, each Contracting Party shall have one vote.

25. That would ordinarily mean one vote for the REIO and one vote for each of its member States that are also Contracting Parties. However, this simple logic hardly ever applies.

26. Some Treaties only allow REIOs to accede to a Treaty if or after all of its member States have ratified it (e.g. TIR Convention, Article 52 para. 3). Some Treaties do not allow non-State entities to accede to them at all, leaving member States to act, in a coordinated manner, on behalf of the interests of the REIO (e.g. AETR Agreement). Some Treaties allow the REIO to cast as many votes as the number of its member States (e.g. 1958 Vehicle Agreement, UNECE), or one vote on behalf of itself and its member-States (e.g. Harmonization Convention, 1982). In other cases, the matters on which a REIO can vote and its member States can vote are divided by means of a declaration of competence (1954 CPD Convention).

27. Participation of the EU, as a REIO, in an agreement is warranted in certain situations, namely, when competence is exclusive, when competence is shared if the European Union (EU) has already exercised competence, and when the agreement covers areas that partly fall within exclusive competence of the EU. When competence is exclusive, the EU ideally concludes the agreement alone. In the latter cases, both the EU and its member States would most likely ratify the agreement, resulting in a mixed agreement.

28. In situations where the EU has competence, but the Treaty does not allow it to become a Contracting Party (e.g. when the Treaty is only open for States), EU competence may be exercised through the member States acting jointly in the interest of the EU.

29. The position of the European Commission on this issue can be found in the annex of this document.

Annex

Position of the European Commission

1. This Convention, deposited with the Secretary-General of the United Nations, shall be open to the participation of all States and of regional integration organizations constituted by sovereign States which have competence to negotiate, conclude and apply international agreements on matters covered by the Convention.
2. The regional integration organizations referred to in paragraph 1 may, in matters within their competence, exercise on their behalf the rights and fulfil the responsibilities which this Convention otherwise confers on their member States which are Contracting Parties to this Convention including the right to vote with a number of votes equal to the number of their member States that are Parties to this Convention whether they are present in the vote or not. Such an organization shall not exercise its right to vote if any of its member States exercises its right and vice versa.
3. States and the regional integration organizations referred to above may become Contracting Parties to this Convention:
 - (a) By depositing an instrument of ratification, acceptance or approval after signing it, or
 - (b) By depositing an instrument of accession.
4. This Convention shall be open from ... until ... inclusive for signature at the Office of the United Nations at Geneva by all States and the regional integration organizations referred to in paragraph 1.
5. From ... it shall also be open for their accession.
6. Any reference to a “Contracting State” or “State” in this Convention shall apply equally to a regional integration organization that is a Party to it, where appropriate.
7. Regional integration organizations shall, on a case-by-case basis, inform the other Parties to the Convention of the cases where, with regard to the various items on the agendas of the [body at UNECE level] and other deliberating bodies, it will exercise the voting rights provided for in paragraph 2. That obligation shall also apply when decisions are taken by correspondence. That information is to be provided early enough to the [Secretary-General] in order to allow its circulation together with meeting documents or a decision to be taken by correspondence.
8. The scope of the competence of the Regional integration organizations shall be indicated in general terms in a written declaration made by the Regional integration organizations at the time of their ratification, acceptance, approval or accession of this Agreement. That declaration may be modified as appropriate by notification from the regional integration organizations to []. It shall not replace or in any way limit the matters that may be covered by the notifications of Regional integration organizations competence to be made prior to decision-making by means of formal voting or otherwise.