



Organisation intergouvernementale pour les transports internationaux ferroviaires  
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**Groupe de travail «Modification de la  
procédure de révision de la COTIF»  
Arbeitsgruppe „Änderung  
Revisionsverfahren COTIF“  
Working group to amend the  
procedure for revising COTIF**

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## **WORKING GROUP TO AMEND THE PROCEDURE FOR REVISING COTIF**

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Feasibility of amending the procedure for revising COTIF

Document from the Secretariat of OTIF

Two revision systems apply to amendments to COTIF and its Appendices:

- a revision system which is “classic” in international public law for the amendment of the basic provisions which fall within the competence of the General Assembly: these have to be approved by the Member States which, in most cases, takes the form of ratification;
- a revision system for more technical provisions which fall within the competence of the Revision Committee and which, in the States, come more within the domain of regulatory authority.

The national procedures thus take more or less time; experience shows that they usually take around 6 years.

However, entry into force of the amendments adopted by the 12<sup>th</sup> General Assembly within reasonable deadlines corresponding to the requirements of the sector would enable the provisions of COTIF and its Appendices to be aligned as soon as possible with the amendments already adopted by the 25<sup>th</sup> session of the Revision Committee, which have been in force since 1 July 2015.

This is why the work programme for 2016 – 2017 adopted by the Administrative Committee at its 124<sup>th</sup> session (Berne, 29/30 January 2016) says that: “With a view to the consistent and rapid implementation of amendments to COTIF and its Appendices, the legal department will carry out a study on the feasibility of adapting Article 34 of COTIF to enable amendments adopted at the General Assembly to be applied by a fixed deadline.”.

This document reflects this analysis and is arranged in three parts:

- An analysis of the procedure for revising COTIF that falls within the competence of the General Assembly and of the simplifications already introduced during the last two revisions (1).
- A preliminary analysis of the national approval procedures (2).
- Preliminary areas for consideration in terms of adapting the revision procedure (3).

It was initially submitted to the Administrative Committee, which noted it at its 126<sup>th</sup> session (Berne, 6 and 7 December 2016). The Committee also noted that a working group set up by the Secretary General would be convened at the beginning of 2017.

This is a very complex subject, so it demands a high level of expertise in international law. For this reason, the Secretariat of OTIF, with the agreement of the Administrative Committee, has decided to rely on an expert recognised in the field of law concerning international organisations.

Following a call for tenders, the task of preparing a legal opinion on the procedure for revising COTIF and possible solutions to change it was entrusted to Mrs Catherine Brölmann, an associate professor of international law at the University of Amsterdam’s Department of international and European public law.

This legal opinion has been submitted to the Secretary General’s working group to examine the feasibility of amending the procedure for revising COTIF, which falls within the competence of the General Assembly.

Nevertheless, this note is still topical, not just because the legal opinion refers to it several times, but also because it contains some additional information.

## 1. PROCEDURE FOR REVISING COTIF

Efforts to simplify the revision system date from the 3<sup>rd</sup> Revision Conference (1923/1924). It was at this Revision Conference that annex 1 to the Convention, i.e. RID, was made subject to a simplified revision procedure.

### a) Under the regime of COTIF 1980

The procedure relating to amendments that fell within the competence of the General Assembly was based on Article 20 of COTIF 1980.

It was considerably more formal, because:

- amendments decided upon by the General Assembly had to be recorded in a Protocol. Two Protocols were adopted under this regime: the Protocol of 20 December 1990 and the Protocol of 3 June 1999 (Vilnius Protocol);
- the Protocol had to be signed by the representatives of the Member States. It also included final provisions relating to its “signature, ratification, acceptance or approval”, its “entry into force”, “accession” to the Protocol and its “relationship to the COTIF in force”;
- the Protocol was then subject to ratification, acceptance or approval by the Member States;
- instruments of ratification, acceptance or approval had to be deposited with the Depositary Government, which was Switzerland for the 1990 Protocol, then with the Provisional Depositary (OTIF) for the 1999 Protocol (Article 2 of the 1999 Protocol);
- amendments entered into force automatically when a specified period had expired after they had been ratified, accepted or approved by more than two thirds of the Member States.

Despite the simplification achieved with the entry into force of COTIF 1980, experience showed that an increasing amount of time was needed before amendments adopted by the General Assembly could enter into force, i.e. five years for the entry into force of the COTIF of 8 May 1980<sup>1</sup> and six years for the entry into force of the Protocol of 20 December 1990<sup>2</sup>. The time necessary for the entry into force of the Vilnius Protocol of 3 June 1999<sup>3</sup> merely confirmed this experience, as the amendments only entered into force seven years after they were adopted.

### b) Under the regime of COTIF 1999

The procedure that applies under the regime of COTIF 1999 is simpler than the procedure prescribed in COTIF 1980, in the sense that:

- amendments adopted by the General Assembly no longer have to be recorded in a protocol signed by the Member States and subjected to mandatory ratification, acceptance or approval;
- however, amendments adopted by the General Assembly still have to be **approved by the Member States**, and the **arrangements** for providing this approval are **determined by the constitutional law** of each Member State;

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1 Entry into force on 1 May 1985

2 Entry into force on 1 November 1996

3 Entry into force on 1 July 2006

- as in the case of declarations that they do not approve these amendments, the Member States' approval of amendments must be **notified to the Secretary General**; the **approval** of amendments by a Member State or the **declaration** that they do not approve them must therefore be **explicit**;
- amendments to the Appendices (approval by half the Member States) may enter into force sooner than amendments to the Convention itself (approval by two thirds of the Member States);
- modifications **enter into force for all Member States** twelve months after their approval, **with the exception of** those which, **before the entry into force**, have made a **declaration** in terms that they do not approve such modifications. The Member States do not therefore have to accept an amendment they do not want, but they must make this known explicitly before the amendment in question enters into force;
- as soon as the decisions enter into force, application of the Appendix or Appendices concerned is suspended with and between the Member States that have declared within the specified deadline that they do not approve the amendments. This system ensures that international transport law is uniform by avoiding the simultaneous application of several versions of the Uniform Rules between different Member States.

### c) **The 1999 revision: the constitutional constraints**

The revision of 1999 suggested the following simplification:

- no longer to have to submit the General Assembly's decisions to a procedure of ratification, acceptance or approval;
- to lock in entry into force within a fixed time limit of one year.

The arguments raised against this simplification at that time can be summarised as follows:

- important amendments or amendments dealing with provisions of civil law, particularly principles in matters of liability, are matters which, in certain Member States, have to be dealt with by being adopted by the parliament, such as provisions concerning the scope of application, the basis of liability or the burden of proof. It is not possible to adopt a law transposing these provisions into national law within one year;
- a period of time that is too short might constrain a Member State either to accept an amendment that it does not want, or to oppose an amendment because of imperatives imposed by constitutional law, or to withdraw from OTIF;
- amendments to a Convention which has been subject to ratification require another ratification;
- a Member State's approval of amendments should always be explicit and it should not be possible to interpret its silence as agreement.

## **2. PRELIMINARY ANALYSIS OF THE NATIONAL APPROVAL PROCEDURES**

In order to accompany the entry into force of the amendments adopted by the 12<sup>th</sup> General Assembly in all the OTIF Member States, the Secretariat of OTIF carried out a preliminary survey of national approval procedures in an admittedly small number of States, but which represent different legal cultures and traditions, in order to get a clearer idea of these national procedures. The States surveyed were Germany, Spain, France, the United Kingdom and Switzerland. The Secretariat also received information directly from one Member State, the Netherlands.

In its survey, the Secretariat asked the States surveyed if they would provide information on whether, in accordance with their constitutional law, the amendments adopted by the 12<sup>th</sup> General Assembly were part of the legislative field and required the parliament to adopt an act or if, on the other hand, these amendments were part of the regulatory field and had to be approved by the government.

To this end, the Secretariat of OTIF prepared a table setting out each of the amendments adopted by the 12<sup>th</sup> General Assembly so that the States concerned could specify the national approval procedure necessary for each amendment, depending on the nature of the amendment, and the ministries involved, and lastly, how long the procedure was likely to take.

The responses to the survey can be summarised as follows:

- Each Member State applies the same national approval procedure for each amendment adopted by the 12<sup>th</sup> General Assembly. In other words, the national approval procedure does not vary depending on the nature of the amendments approved by the 12<sup>th</sup> General Assembly.

Therefore, to quote one example, the editorial amendment to replace “European Communities” by “European Union” in Article 3 § 2 of COTIF is subject to the same national approval procedure as the amendment to the provision of CUV (Article 9) concerning liability for agents and other persons, the purpose of which is to take account of the implementation of the function of entities in charge of maintenance in OTIF law.

- Only two Member States gave a view on how long the procedure was likely to take. The Netherlands thought the procedure could take 9 to 12 months and France thought it would take 2 months from the time the Ministry of Foreign Affairs is officially seized by the Ministry responsible for transport and official publication of the decree in the Official Journal.
- In Germany and the Netherlands, the amendments come under the legislative area (ratification law), whereas in Switzerland, Spain, the United Kingdom and France, they come under the regulatory area.
- The number of ministries involved also varies greatly from one State to another, as all ministries may be involved or just one.

Table 1: Result of the survey on 17/10/2016

<b>State</b>	<b>National approval procedure</b>	<b>Ministries involved</b>
Germany	Ratification law	All
Spain	Article 36 § 2 b) of law 25/2014 of 27 November on treaties and other international agreements. Council of Ministers	Ministry of Development Ministry of Foreign Affairs and Cooperation
France	Decree by the Minister of Foreign Affairs	Ministry of Foreign Affairs Ministry of Transport
Netherlands	Decision by the full Council of Ministers (decision of the Council of Ministers and Council of State). Parliamentary approval. Following approval by the Parliament and in accordance with a Dutch law on referendums, the public has the opportunity (for 4 to 6 weeks) to request a referendum on the amendments to COTIF.	Ministry of Infrastructure and the Environment and Ministry of Foreign Affairs

<b>State</b>	<b>National approval procedure</b>	<b>Ministries involved</b>
United Kingdom	Approval by the Minister of Transport, with ministerial signature	Ministry of Transport
Switzerland	Approved by the Federal Council on 15 September 2015. No other approval procedure provided for	Federal Department of Foreign Affairs

The number of Member States that have notified the Secretary General of their approval of the amendments, more than a year after they were adopted by the 12<sup>th</sup> General Assembly, is small. There are therefore serious concerns that it will take several years for these amendments to enter into force and that the simplification of the revision procedures decided in 1999 will not really shorten the period for their entry into force.

### **3. PRELIMINARY AREAS FOR CONSIDERATION IN TERMS OF ADAPTING THE REVISION PROCEDURE**

Once again, the Secretariat of OTIF is convinced that a further step will have to be taken towards simplifying the revision procedure, fundamentally for two reasons.

It does seem reasonable to be able to align amendments to the provisions of COTIF and its Appendices that fall within the competence of the General Assembly more quickly with those that fall within the competence of the Revision Committee.

The last round of revisions does in fact show that the same amendment to the APTU and ATMF UR, i.e. the deletion of the references to “other railway material”, entered into force one year after the 25<sup>th</sup> session of the Revision Committee for the provisions that fall within the latter’s competence, whereas the date of entry into force for the provisions that fall within the competence of the General Assembly is still not certain.

First and foremost though, it is becoming increasingly essential to be able rapidly to adapt the relevant provisions of COTIF and its Appendices to a legal environment that is constantly developing ever more quickly.

The sector is often criticised for its lack of adaptability and inability to react. It would be disadvantageous if the entry into force of amendments that are necessary were delayed by another four to six years before becoming applicable, as they have often been negotiated over several years, then discussed at the Revision Committee and then approved a year later at the highest level by the General Assembly.

#### **a) A constantly changing legal environment**

During its approximately twenty years in force (1985 to 2006), COTIF 1980 was only amended four times: partly as a result of decisions adopted by the Revision Committee in 1989 and 1990, and partly as decided by the General Assembly in the 1990 Protocol and the Vilnius Protocol of 1999.

Since it entered into force in 2006, COTIF 1999 has already been amended three times, firstly by the Revision Committee in 2009 and 2014 and then by the General Assembly in 2015. Another round of revisions is planned in 2017 (Revision Committee) and in 2018 (General Assembly). The rhythm of revisions is therefore increasing and becoming more regular and closer together than in the past.

Similarly, the legal environment is constantly changing at an increasing rate, which means that both the Secretariat and the OTIF Member States have to become more responsive.

Since COTIF 1999 entered into force, the European Union has adopted Regulation No 1371/2007 of 23 October 2007 on rail passengers' rights and obligations, the annex to which includes a large extract from the CIV UR. This Regulation entered into force on 4 December 2009, only 24 months after it was published. A study on revising it is currently being carried out. This might have implications for the provisions of the CIV UR that are currently in force and might mean they have to be revised. If it turns out that such an alignment is necessary, it would certainly be preferable if this could be done simultaneously so as to avoid two different versions of the CIV UR being in force in the OTIF Member States during a period of time which is currently impossible to predict.

SMGS is revised every year. The version that entered into force on 1 July 2015, which also drew on the provisions of the CIM UR in force, shows a clear bringing together of the provisions of SMGS and the CIM UR. In the Secretariat's view, the differences between these two legal regimes will increasingly disappear and it can no longer be ruled out that in future, the revised provisions of SMGS could prompt a revision of the CIM UR.

For the entry into force of future amendments, Article 69 § 3 of the draft new OSJD convention also stipulates that:

"3. Amendments and additions to this Convention shall be adopted at a session and shall enter into force upon expiry of three months, if no other period of time has been specified in a session's decision. The amendments and additions adopted to this Convention shall not require ratification. [...]"

Experience will show whether three months is realistic or whether it will systematically be extended.

However, it is at the very least surprising that amendments to two legal regimes of the same nature can be subject to procedures and entry into force periods that are as different as those of COTIF and the future OSJD Convention, even though these two legal regimes are becoming increasingly harmonised, to the benefit of the rail sector overall.

Article 25 of the Vienna Convention on the Law of Treaties provides for the provisional application of treaties:

*"1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:*

*(a) The treaty itself so provides; or*

*(b) The negotiating States have in some other manner so agreed.*

*2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty."*

States apply a treaty or part of a treaty on a provisional basis in order to speed up the application of its provisions. The treaty can therefore be applied without awaiting conclusion and the effects of the entry into force formalities.

Provisional application is used both for original treaties and for amendments thereto. For example, Article 30 of the Constitution of the Universal Postal Union (UPU) says that:

*"1. To be adopted, proposals submitted to Congress and relating to this Constitution must be approved by at least two thirds of the member countries of the Union having the right to vote.*

*2. Amendments adopted by a Congress shall form the subject of an additional protocol and, unless that Congress decides otherwise, shall enter into force at the same time as the Acts renewed in the course of the same Congress. They shall be ratified as soon as possible by member countries and the*

*instruments of such ratification shall be dealt with in accordance with the procedure laid down in article 26."*

Consequently, amendments to the UPU Constitution enter into force on specific, predetermined dates. The UPU Member States are bound by these amendments, even if they have not yet ratified them at national level.

For its part, the Secretariat of OTIF, and more specifically its technical department, has started drafting a new appendix to develop interoperability beyond the EU. The idea is to create a set of basic provisions setting out aims, principles, requirements and responsibilities that would apply to any railway system, irrespective of its gauge. These generic rules could then be supplemented by specific provisions for each particular gauge.

Rapid application of this new appendix and the amendments it would entail for the basic Convention would make it possible to give the Member States the harmonised provisions they need equally quickly in order to organise international traffic in the manner they prefer.

All these reasons argue in favour of shorter timescales for the entry into force of amendments adopted by the General Assembly, or even their provisional application.

#### **b) An adaptation that takes account of the realities of this legal environment**

There are various solutions that could be considered in order to adapt the procedure for revising the Appendices to COTIF.

In the document submitted to the Administrative Committee at the end of 2016, the Secretariat of OTIF envisaged the following solutions:

**1. The first solution** to accelerate the entry into force of amendments could be to examine the possibility of applying amendments provisionally, pending their entry into force, and hence provide for an amendment to Article 34 § 3.

In this case, amendments to the COTIF Appendices would apply provisionally from a predetermined date, pending their formal approval. The provisional application of amendments would accelerate their application and might encourage the Member States to approve them in due time.

**2. A second solution** could be to examine whether more of the provisions in the Appendices could benefit from the simplified revision system (Article 35 of COTIF), and hence provide for an amendment to Article 33 of COTIF.

In addition, following the example of RID, the competence for amending the APTU and ATMF UR could also be transferred from the Revision Committee to the Committee of Technical Experts, which would require an amendment to both Article 33 and Article 35 of COTIF.

The advantage of this solution would be that amendments to these provisions would enter into force on the first day of the twelfth month following that in which the Secretary General notifies them to the Member States.

**3. A third solution** could be to amend Article 34 § 3 of COTIF and to prescribe a fixed period of two years, for example, for the entry into force of amendments to the Appendices that fall within the competence of the General Assembly.

Thus the Member States would no longer have to approve the amendments and notify them to the Secretary General. On the other hand, if a State decided not to approve them, it would then have to notify the Secretary General accordingly. The consequence of this declaration, which is currently provided for in Article 34 § 7 of COTIF, would stand.



The advantage of this solution is that it would fix with certainty the date of entry into force of amendments to the Appendices adopted by the General Assembly, while leaving the Member States sufficient time to complete their national approval procedures before this period expired.

Moreover, it could also be followed for amendments to the Convention itself, with the exception of Articles 9 and 27 §§ 2 to 4 of COTIF, which will continue to fall within the competence of the Revision Committee.

The second solution dispossesses the General Assembly of some of its competences. From the Secretariat's point of view, a study of the first or third solution could result in a balanced solution without calling the Member States' prerogatives into question.

Preliminary discussions took place at the Administrative Committee in December 2016.

It is not the aim of the OTIF Secretariat's document to eliminate or prefer a particular solution, but to present the initial avenues for consideration on how to adapt the revision procedure.

The legal opinion contains additional recommendations and specific text proposals moving in the direction of further simplification of the revision procedure.

The OTIF Secretariat proposes that there should first be a discussion of substance on these recommendations and proposals in the working group set up by the Secretary General, with a view to preparing a proposal for the Revision Committee, which should meet at the beginning of 2018.

## **Annex:**

Provisions of COTIF and its Appendices that fall within the competence of the General Assembly

## ANNEX

### Provisions of COTIF and its Appendices that fall within the competence of the General Assembly

All Articles except Article 9 (Unit of account) and Article 27 §§ 2 to 5 (Auditing of accounts)

#### CIV

##### **Title 1            General Provisions**

Article 1            Scope

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Article 5            Mandatory law

##### **Title II            Conclusion and performance of the contract of carriage**

Article 6            Contract of carriage

##### **Title III           Luggage**

Article 16           Consignment of registered luggage

##### **Title IV           Liability of the Carrier**

##### **Chapter I        Liability in case of Death of, or Personal Injury to, Passengers**

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Article 27           Damages in case of death

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Article 29           Compensation for other bodily harm

Article 30           Form and amount of damages in case of death and personal injury

Article 31           Other modes of transport

##### **Chapter II        Liability in case of Failure to Keep to the Timetable**

Article 32           Liability in case of cancellation, late running of trains or missed connections

##### **Chapter III      Liability in respect of Hand Luggage, Animals, Registered Luggage and Vehicles**

##### **Section 1        Hand luggage and animals**

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Article 35           Exclusion of liability

##### **Section 2        Registered luggage**

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Article 37	Burden of proof
Article 38	Successive carriers
Article 39	Substitute carrier
Article 41	Compensation for loss
Article 42	Compensation for damage
Article 43	Compensation for delay in delivery
<b>Section 3</b>	<b>Vehicles</b>
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Article 45	Compensation for loss
Article 46	Liability in respect of other articles
Article 47	Applicable law
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Article 48	Loss of right to invoke the limits of liability
Article 49	Conversion and interest
Article 50	Liability in case of nuclear incidents
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Article 57	Forum
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Article 59	Extinction of right of action arising from carriage of luggage
Article 60	Limitation of actions

**CIM****Title 1       General Provisions**

Article 1       Scope

Article 5       Mandatory law

**Title II       Conclusion and performance of the contract of carriage**

Article 6       Contract of carriage (§§ 1 and 2)

§ 1: the carrier shall undertake to carry the goods for reward to the place of destination and to deliver them there to the consignee.

§ 2: The contract shall be confirmed by a consignment note. The absence, irregularity or loss of the consignment note shall not affect the existence or validity of the contract.

Article 8       Responsibility for particulars entered on the consignment note

Article 12      Evidential value of the consignment note

Article 13      Loading and unloading of the goods (§ 2)

§ 2: The consignor shall be liable for all the consequences of defective loading carried out by him.

Article 14      Packing

Article 15      Completion of administrative formalities (§§ 2 and 3)

§ 2: The consignor shall be liable to the carrier for any loss or damage resulting from the absence or insufficiency of, or any irregularity in, such documents and information [that required by customs or other administrative authorities].

§ 3: The carrier shall be liable for any consequences arising from the loss or misuse of the documents referred to in the consignment note.

Article 19      Exercise of the right to dispose of the goods (§§ 6 and 7)

§ 6: In the case of fault of the carrier he shall be liable for the consequences of failure to carry out an order or failure to carry it out properly.

§ 7: If the carrier implements the consignor's subsequent modifications without requiring the production of the duplicate of the consignment note, the carrier shall be liable.

**Title III       Liability**

Article 23      Basis of liability

Article 24      Liability in case of carriage of railway vehicles as goods

Article 25      Burden of proof

Article 26      Successive carriers

Article 27	Substitute carrier
Article 30	Compensation for loss
Article 31	Liability for wastage in transit
Article 32	Compensation for damage
Article 33	Compensation for exceeding the transit period
Article 36	Loss of right to invoke the limits of liability
Article 37	Conversion and interest
Article 38	Liability in respect of rail-sea traffic
Article 39	Liability in case of nuclear incidents
Article 40	Persons for whom the carrier is liable
Article 41	Other actions

#### **Title IV      Assertion of Rights**

Article 44	Persons who may bring an action against the carrier
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Article 5	Loss of right to invoke the limits of liability
Article 7	Liability for loss or damage caused by a vehicle
Article 8	Subrogation
Article 9	Liability for servants and other persons
Article 10	Other actions
Article 11	Forum
Article 12	Limitation of actions

#### **CUI**

**Title 1           General Provisions**

Article 1        Scope

Article 2        Declaration concerning liability in case of bodily loss or damage

Article 4        Mandatory law

**Title III         Liability**

Article 8        Liability of the manager

Article 9        Liability of the carrier

Article 10       Concomitant causes

Article 11       Damages in case of death

Article 12       Damages in case of personal injury

Article 13       Compensation for other bodily harm

Article 14       Form and amount of damages in case of death and personal injury

Article 15       Loss of right to invoke the limits of liability

Article 17       Liability in case of nuclear incidents

Article 18       Liability for auxiliaries

Article 19       Other actions

**Title IV         Actions by Auxiliaries**

Article 21       Actions against the manager or against the carrier

**Title V         Assertion of Rights**

Article 23       Recourse

Article 24       Forum

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**APTU**

Article 1	Scope
Article 3	Aim
Article 9	Declarations
Article 10	Abrogation of Technical Unity
Article 11	Precedence of the UTP

**ATMF**

Article 1	Scope
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Article 9	Operation prescriptions