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Bulletin

OTIF
Organisation intergouvernementale pour les transports internationaux ferroviaires
Zwischenstaatliche Organisation für den internationalen Eisenbahnverkehr
Intergovernmental Organisation for International Carriage by Rail

Unified railway law to connect Europe, Asia and Africa

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2017

Bulletin of International Carriage by Rail

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The focus of this Bulletin is OTIF's partnerships. For an institution such as OTIF, they are essential, as the success of international rail transport depends on smooth border crossings and the creation of a level playing field over a sufficiently broad area.

I should therefore like to highlight how important it is for the Secretariat to have signed a memorandum of understanding with the World Customs Organization (WCO). Historically, border crossing has been easy for rail traffic because of the railway undertakings' proximity to their respective states. In the light of new developments in transport, it is important to maintain this advantage in a world that is becoming more globalised and competitive. In this respect, the question of transit, which is essential for the WCO, is also fundamental to the success of rail transport between Europe and Asia. In the longer term, if Africa wishes to acquire a rail system, this question will have to be resolved effectively.

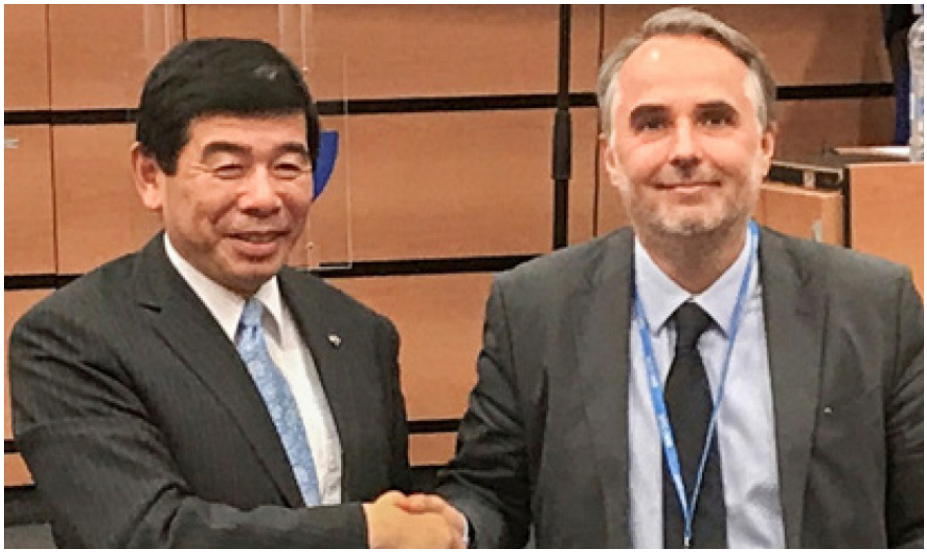
At another level, the participation of OTIF's teams in the GCC meeting of experts in Abu Dhabi is a sign of the strength of OTIF's partnership with the Gulf. The decision to opt for solutions developed by the OTIF Secretariat for the future network is evidence of COTIF's vitality. Representatives of GCC and a delegation from the National Administration of Chinese Railways thus took part in the latest session of the Committee of Technical Experts.

All these developments are only possible thanks to the commitment shown by various experts from our Member States, who, on a daily basis, create the conditions for the emergence of law that can be shared and adapted to the sector's requirements. I should like to take this opportunity to thank them for their efforts.

François Davenne

MEMORANDUM OF UNDERSTANDING WITH THE WORLD CUSTOMS ORGANIZATION

On the first day of the Global transit conference in Brussels on Monday, 10 July, the Secretary General of the World Customs Organization (WCO), Mr Kunio Mikuriya, and the Secretary General of OTIF, Mr François Davenne, signed a memorandum of understanding (MoU). The Secretary General of OTIF took this opportunity to give a speech as part of the session on "challenges and solutions for efficient transit".



For some months, WCO and OTIF have wished to strengthen their discussions, particularly with regard to the removal of obstacles to border crossing for international traffic. This MoU establishes a framework for dialogue and cooperation so as to achieve a balance between safety and the facilitation of trade.

It is in the rail sector's interest to ensure that it has a globalised goods transit system. In order for rail freight between Europe and Asia to be successful, it is essential to establish a link between national customs systems and international transit regulations, along the lines of the TIR Convention.

Subject to the cause of these obstacles falling within the competence of states, WCO and OTIF have agreed to define and organise consultations, communicate documents and provide mutual assistance. For example, WCO and OTIF will be able to send representatives to each other's meetings, when they are relevant, in order to discuss how customs questions can be better linked to rail transport.

The Secretariat of OTIF welcomes the signing of this MoU and is looking forward to working productively with WCO.

RECEPTION FOR THE CTE

The Committee of Technical Experts (CTE) held its annual meeting in Berne on 13 and 14 June 2017. To celebrate this 10th session of the CTE, the Secretariat organised a reception at the Organisation's headquarters on the evening of Tuesday, 13 June.

The occasion provided the opportunity to pay tribute to Mr Roland Bacher, who represents Switzerland and who has chaired the Committee outstandingly at the last eight sessions.

Against the background of the memoranda of understanding signed with the Gulf Cooperation Council (GCC) and China's National Railway Administration (NRA), this pleasant occasion also provided the opportunity to become more acquainted with the representatives of the GCC's transport department, the representatives of the NRA and those of the Ministry of Transport of Qatar.

AMENDMENTS TO COTIF, STATUS OF MEMBER STATE APPROVALS

OTIF's 12th General Assembly (GA) held in Berne on 29 and 30 September 2015 adopted some amendments to the base Convention and to Appendices D (CUV), F (APTU) and G (ATMF).

With regard to Appendix D (CUV), the amendments adopted by the 12th GA are essentially of two types: they affirm that the CUV Uniform Rules do not affect the rules of public law and they make clear that the keeper assumes his obligations in respect of the maintenance of the wagon under the contract of use in international traffic by having recourse to an entity in charge of maintenance (ECM), which is his servant. Introduction of the ECM function has been implemented in OTIF law through Annex A to the ATMF UR.

The amendments to Appendices F (APTU) and G (ATMF) adopted by the 12th General Assembly are to delete the term "other railway material" in the provisions that fall within the GA's competence. This term seemed to be of no practical use and had no equivalent in European Union law and would therefore have become a potential source of incompatibility constituting an obstacle to international railway traffic.

Lastly, the purpose of the amendments to the base Convention is to respond to a recommendation made on several occasions by the auditor concerning, in particular, the periodicity of the budget and accounts. These amendments also implement a proposal from the Committee of Technical Experts (CTE) to enable it to amend the Uniform Technical Prescriptions.

All these amendments adopted in 2015 are important, particularly for the rail sector, which has to remain flexible and be able to adapt continuously.

However, in order to enter into force, Article 34 § 2 of COTIF states that the amendments to the base Convention must first be approved by two thirds of the Member States in accordance with their national law (this would currently mean 31 states). Secondly, once the adoption by two thirds has been notified, a period of twelve months starts to run, at the end of which entry into force takes effect. With regard to the amendments to the COTIF Appendices, Article 34 § 3 of COTIF requires that they be approved by half the Member States (i.e. 21 states), rather than by two thirds. In all cases, the OTIF Secretariat's experience is that amendments can enter into force between four and six years after they have been adopted. This might seem too long a period of time, given that some of the amendments are crucial for the development of international rail traffic.

Since the 12th General Assembly, six Member States have deposited instruments notifying their approval of these amendments with the Secretary General of OTIF, the depositary for COTIF. Belgium, France, Germany, Serbia and Slovenia, among others, have initiated their national approval procedures. An up-to-date status report of approvals will be published in the next Bulletin (4/2017).

Iris Gries

Instruments deposited as at 20 September 2017:

Member State	Instrument	Date
1. Switzerland	Approval	21 October 2016
2. Sweden	Approval	16 March 2017
3. Finland	Acceptance	10 April 2017
4. Netherlands	Acceptance	1 May 2017
5. Hungary	Ratification	1 June 2017
6. Spain	Acceptance	24 August 2017

These instruments were not accompanied by any declarations.

APPLICATION OF RID 2017

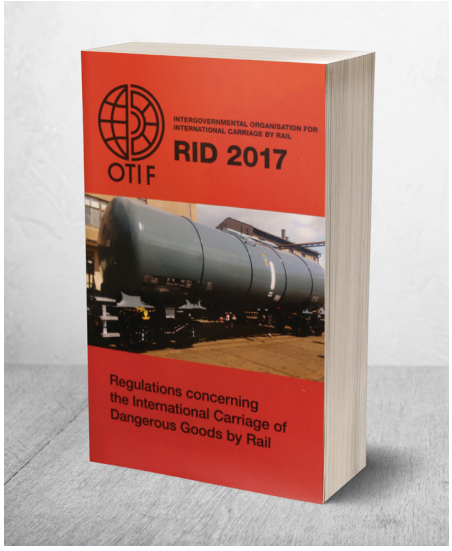
The 2017 edition of the Regulations concerning the International Carriage of Dangerous Goods by Rail (RID) entered into force on 1 January 2017.

As for every publication of a new edition of RID, users were allowed a six month transitional period during which either the old or the new version could be applied.

This transitional period ended on 30 June 2017, so from 1 July 2017, only the 2017 edition applies.

The principal new features of the 2017 edition are the new UN numbers for polymerizing substances and vehicle engines, new marks and danger labels for lithium cells and batteries, the use of flexible bulk containers for certain dangerous goods and extending the requirement to appoint a safety adviser to undertakings that pack dangerous goods or fill tanks with dangerous goods.

RID is available in the three working languages of the Intergovernmental Organisation for International Carriage by Rail (French, German and English) on its website (www.otif.org).



GOVERNANCE, TRANSPORT AND GOOD PRACTICE

Mr François Davenne, the Secretary General of OTIF, gave his first speech to the annual International Transport Forum (ITF) in Leipzig, which took place from 31 May to 2 June 2017 under the chairmanship of Mexico.

The ITF is administratively part of the Organisation for Economic Co-operation and Development (OECD), but is politically autonomous. It is an intergovernmental organisation with 59 Member States. The ITF acts as a think tank focusing on transport policy and organises the annual summit of transport ministers. The ITF is the only global organisation that covers all modes of transport.

This year, the main theme of ITF's annual summit was the governance of transport.

Mr François Davenne took part in the panel discussion on 1 June on the governance of gateways and corridors – exploring good practice. His talk focused on highlighting the need to establish common rules, particularly in order to manage and optimise the new Euro-Asian routes.

The panel brought together Nagy A. Amin, Acting Director of the Communications and IT Department, Suez Canal Authority, Egypt, Baolin Shi, President of the China Academy of Transportation Sciences, Ministry of Transport, China; Michael B. Christides, Secretary General of the Organization of the Black Sea Economic Co-operation (BSEC); Mathieu Grosch, European Coordinator for the TEN-T Orient-East Med Corridor, European Commission; and Joshua Posaner, a reporter for POLITICO Europe.

The panel discussed the development of international seamless traffic, which is a condition sine qua non for assuring the success of the international freight corridors. There are several avenues of development and the Secretary General of OTIF supported

the idea of an interface-based approach aimed at achieving consistency between railway contract law, dangerous goods regulations and technical interoperability. The panel discussion is available as a video HERE.

In the evening, the Secretary General had the pleasure of attending the International Transport Forum's gala dinner and of handing out OTIF's new brochure, particularly to Mr Anis Ghedira, Tunisia's Minister of Transport.

The Secretary General of OTIF would like to offer the International Transport Forum's teams his warmest thanks.

STRENGTHENING COOPERATION: OTIF'S PARTICIPATION IN THE GCC'S GROUP OF TECHNICAL EXPERTS IN ABU DHABI

The signing of the 2014 memorandum of understanding with the Gulf Cooperation Council (GCC) has enabled the Organisation to become a preferred partner in the development of this new network and to share the values of COTIF.

For the GCC, linking all the countries on the Arabian Peninsula by means of a modern, completely interoperable freight and passenger transport network is a multifaceted challenge:

- Particular technical adaptations will be necessary to take account of the extreme desert climate.
- A complete set of regulations will have to be developed at GCC level to implement the principle of free access to the network.
- The will to achieve interoperability on the peninsula is no obstacle to a strategic vision in which the network being built could also act as a hub for traffic with Europe, Asia and North Africa.

I should therefore like to thank the teams in charge of this project at GCC, particularly Mr Khalid Al-Olayan and Mr Ramiz Al-Assar, for having invited OTIF's experts to this high level working group: Mr Bas Leermakers for the technical issues and Mr Aleksandr Kuzmenko for the legal aspects. The General Secretary of the CIT, Mr Cesare Brand, was also involved.

Through this group, we were able to meet the main architects of this major project in the Gulf States, both governmental and those representing the existing national networks. It is not possible in this brief article to summarise the very productive discussions we had during the two days of the working group.

However, it should be pointed out that the questions that arise now on the eve of the start of operational services are in line with the answers that COTIF can provide:

- How can an international contract of carriage regime be defined?
- How can interoperability and innovative solutions be reconciled?
- How can wagons complying with the North American standard be used without abandoning interoperability on a scale that is broader than the Gulf network?

The very specific questions that the GCC working group now has concerning access to the network and the recognition of safety certificates or driver licences are also questions the Organisation is trying to resolve in the context of the project on interoperability beyond the European Union, which will be discussed at the next Revision Committee.

Following our participation in the Abu Dhabi meeting, I believe that it is clear to our partners in the Gulf that OTIF is the right forum in which to develop a seamless network and find effective solutions, now that the crucial point of bringing the network into operation is approaching. This endorses the OTIF Secretariat's view that the peninsula's accession will in due course enable us to make progress and be inspired to come up with innovative solutions.

François Davenne

CTE 10 - SUMMARY OF MAIN CONCLUSIONS

What has already been decided with respect to the provisions concerning technical interoperability in the scope of COTIF and what is still to be agreed? On Tuesday 13 June and Wednesday 14 June 2017, the Committee of Technical Experts (CTE) met for its 10th anniversary session in Bern.

Two of the main subjects for this session were the adoption of new Uniform Technical Prescriptions concerning telematic applications for freight (UTP TAF) and the development of a new Appendix H to COTIF concerning the safe operation of trains in international traffic.

UTP TAF

On the basis of a study presented to CTE 8 and further discussed at CTE 9, it was agreed in 2016 that the TAF TSI should be transposed into a UTP.

The OTIF Secretariat prepared a proposal in close cooperation with, in particular, ERA, CIT and the European Commission and in coordination with the standing working group technology (WG TECH).

The UTP TAF will contain requirements for the international exchange of information for international freight services. It will lay down requirements for the communication process between railway undertakings and infrastructure managers, databases intended to be used to track trains and wagon movements and the information to be delivered to freight customers.

The UTP TAF makes reference to the appendices that are published and regularly updated on ERA's website, including the data and message model in XML files. This way, the legal provisions will become embedded in COTIF, but the IT provisions will be managed by ERA. This ensures that the IT provisions are always identical between the EU TSI and the UTP. Arrangements should be agreed so that the non-EU Member States of OTIF can be involved in the development of these IT provisions.

Implementation of the UTP TAF will not be forced upon non-EU Member States; in other words, there will be no deadline to complete implementation of the UTP TAF. Nevertheless, Contracting States will have to ensure that if IT investments and developments in the scope of the UTP TAF are made, they are done in a harmonised and compatible way, in compliance with the UTP, so as to facilitate international rail traffic.

When drafting the UTP TAF the OTIF Secretariat proposed, in close cooperation with CIT, small deviations from the EU TAF TSI to ensure consistency with CIM.

Within COTIF, the CIM Uniform Rules govern the rights and obligations of the parties to the contract (the carrier and the consignor) of international carriage of goods by rail.

The TAF TSI sets out provisions concerning the exchange of information for rail freight services. Although it is not the purpose of the TAF TSI to regulate contractual relations, it does refer to obligations in a limited number of clauses. In particular:

- 2.3.2 "...Under contractual agreement the LRU shall provide information to the Customer in particular..."
- 4.2.1.1 "The Consignment Note has to be sent by the Customer to the Lead RU...".

These requirements can lead to ambiguities in relation to CIM. CIM governs the rights and obligations between carriers and consignors. In terms of CIM, the carrier means the contractual carrier with whom the consignor has concluded the contract of carriage in accordance with CIM. It is not necessarily a railway undertaking as defined in the TAF TSI. The consignor can be the same entity as the customer of the LRU in the TAF TSI, but the customer of the LRU in the TAF TSI can also be, for example, the contractual carrier.

29 of the 42 Contracting States were present or represented, which was more than half of the Contracting States and which meant that there was a quorum. The European Union and the European Union Agency for Railways were also represented.

In addition to Contracting States, representatives of China and the Gulf Cooperation Council and Qatar also attended in an advisory capacity at the invitation of the Secretary General. The fact that they were present as the CTE is starting to create a concept of interoperability that is valid outside the European Union is evidence of the operational nature of the cooperation agreements the Secretariat signed with China and the GCC in 2014 and 2016 respectively.

The following organisations and associations were also represented: CER, UNIFE and NB-Rail.

The Committee elected Switzerland, in the shape of Roland Bacher, to chair this session. Switzerland has thus chaired all ten sessions of the CTE.

The deviations were reviewed in detail by the WG TECH before being accepted by CTE. The representative of the European Union announced that it would amend the EU TAF TSI in order to bring it into line with the UTP.

The UTP TAF was unanimously adopted.

Modifications to UTP GEN-A, GEN-B and GEN-C

UTP GEN-A defines the essential requirements for the rail system.

UTP GEN-B lists and describes the subsystems which constitute the rail system.

UTP GEN-C lays down requirements concerning the technical file referred to in ATMF.

All three UTPs have been amended to ensure continued equivalence of the provisions of COTIF and the provisions applicable in the EU, taking into account the changes brought about by the adoption of the fourth Railway Package in the European Union. The changes are mainly editorial. In addition to the purely editorial modifications, the essential requirements will be made clearer in terms of passenger information and passenger safety when boarding and alighting from trains. With regard to the definition of subsystems, the reference to "other railway material" will be deleted, as such references have also been deleted from APTU and ATMF. The required content of the technical file will be clarified.

The amendments to all three UTPs were agreed unanimously.

Next steps until the entry into force of the UTPs following the CTE's decisions

- Following the CTE's decision to adopt or modify the UTPs, the Secretary General will notify the decisions to the Member States in accordance with Article 35 § 1 COTIF. This is done by means of a circular letter.
- Unless one quarter of the CSs object, a modification enters into force on the first day of the sixth month following the notification. The entry into force will also be announced by a circular letter.
- The UTPs will be published on the Organisation's website at least one month before they enter into force.

All COTIF rules are public and are available on the OTIF website. For the technical provisions, see **http://otif.org/en/?page_id=194**.

Draft new Appendix H to COTIF

The draft new Appendix H discussed by the CTE sets out provisions which would regulate the safe operation of trains in international traffic. This new appendix would be an important element to achieve interoperability. The concept of the draft new appendix is that state authorities would issue Safety Certificates for railway undertakings based on harmonised criteria, as proof that the railway undertakings are able to operate trains safely in the state concerned.

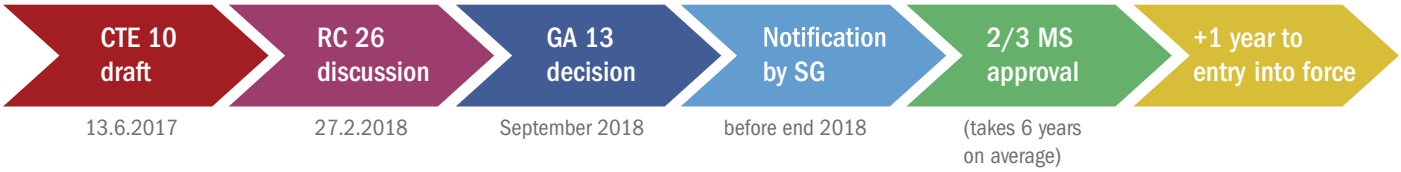
- Interoperability in the context of COTIF is the ability of different national rail systems to allow the safe and uninterrupted movement of trains which attain the required levels of performance.
- Interoperability therefore implies the cross-border operation of complete trains, meaning that the infrastructure would be used by different railway undertakings, both national and from other countries.
- Interoperability has the potential to make railways much more efficient, but also requires additional harmonisation of, for example, operational rules, safety responsibilities and the licensing of railway undertakings.

The Committee discussed several aspects of the draft proposal in detail and expressed support for the development in general. As a result of the discussions the draft new Appendix H should be modified to:

- Clarify that a Safety Certificate would provide evidence that a railway undertaking has established its safety management system and that it is able to operate safely in the state in which the certificate is valid.
- State that although the railway undertaking and the infrastructure manager must control the risks associated with the operation of trains in international traffic, this should be without prejudice to other entities having a potential impact on the safety of the railway system.
- Ensure that Certification Authorities will accept the results of assessments made by authorities from other states, provided they are based on equivalent procedures and provisions.
- Ensure that the annexes to the new appendix, which will be developed as a second step, will include in particular the elements of the safety management system and the Common Safety Methods on conformity assessment, monitoring and supervision.

The CTE does not have any decision-making competence on this subject, but can use its expertise to advise the Revision Committee of its opinion. The Revision Committee is scheduled to meet in February 2018 and after its discussions, will advise the General Assembly, which is the

organ with the competence to take a decision.



Modifications to APTU and ATMF

It is important for international traffic that the provisions applicable in the EU and COTIF are harmonised. Following the adoption of the fourth railway package, the EU changed several provisions and informed the CTE and WG TECH about these changes. On the basis of an analysis by the EU Commission, the Secretariat and the WG TECH prepared modifications to APTU and ATMF to ensure continued harmonisation with EU law.

The modifications were necessary in order to harmonise some terminology with the new EU provisions and to take account of some procedural changes in the EU, in particular the fact that the EU Agency for Railways will be competent to issue vehicle authorisations. The basic concepts of APTU and ATMF were not the subject of the proposed changes.

The CTE did not identify any critical issues and generally supported the proposed changes. The CTE does not have any decision-making competence on these subjects, but can use its expertise to advise the Revision Committee of its opinion.

Explanatory document concerning UTP GEN-G on a common safety method for risk evaluation and assessment

The OTIF Secretariat drafted the explanatory document for this agenda item.

The aim of the explanatory document was to help clarify the rules for people not familiar with them. In particular, it explained when the CSM should be applied and summarised the roles and tasks of the proposer and the assessment body.

After agreeing some small modifications, CTE endorsed the explanatory document, which will be published on the OTIF website.

Results of the RID-ATMF working group

In 2015 the EU Commission's DG MOVE and the OTIF Secretariat set up a working group to study possible inconsistencies between RID and the general railway legislation. The group had a well-balanced composition of experts in both fields of law. The RID-ATMF working group met four times and concluded its work in February 2017.

It agreed that better coordination of the process of developing the two sets of law was required, starting with a certain number of defined topics. Among these topics, the working group agreed that it was necessary to discuss the vehicle aspects in both RID and the TSIs/UTPs as a priority. With regard to this, the group was of the view that an improved coordination process should enable the "protective aims" of vehicle-related requirements to be maintained in RID, whereas technical specifications should be formulated in TSIs/UTPs. A specific process was developed for this purpose, which will be managed by a "Joint Coordinating Group of Experts".

The conclusions of the RID-ATMF working group will be presented in 2017 to the four committees involved (at OTIF level the CTE and the RID Committee of Experts and at EU level RISC and TDG).

The CTE endorsed the conclusions without comment.

Accreditation and monitoring of Notified Bodies in the European Union and relevance to COTIF

The OTIF Secretariat described in a document the various initiatives taken in the European Union in order to ensure that the conformity assessment of subsystems, such as vehicles, is carried out properly and consistently. The document also analysed how these initiatives might be significant for OTIF.

The Secretariat proposed a course of action which can be summarised as follows:

1. To establish a link between NB-Rail and the non-EU assessing entities.
2. To publish and promote the existing accreditation scheme for Notified Bodies among non-EU Competent Authorities as an example of best practice.
3. To follow closely the development of the monitoring scheme for Notified Bodies and to keep WG TECH updated on the results.
4. Once the work is finished at EU level, to make available to non-EU Competent Authorities the experience and best practices concern-

ing implementation of the monitoring scheme at EU level.
5. To discuss whether and how coordinated monitoring of assessing entities should be established within the framework of COTIF.
6. To consider the need for changes to the UTP GEN-E on assessing entities.

The CTE discussed the document and endorsed the course of action it described.

CTE work programme 2017/18

The Secretariat prepared a document setting out the Secretariat's proposals. The most important activities for the coming period would include:

- Preparation of amendments to APTU and ATMF for the Revision Committee, on the basis of the documents reviewed in the CTE.
- Development of a draft proposal for a new Appendix H to COTIF concerning the safe operation of trains in international traffic, first for the Revision Committee and then for the General Assembly.
- Facilitating the exchange of (passenger) vehicles in international traffic, by preparing the transposition of the new EU provisions as soon as they become available.

The Secretariat will continue to follow developments in the EU and, where relevant, provide input to represent the non-EU MSs, particularly in the following areas:

- WP on possible extension of the scope of ECM; WAG TSI developments – also with regard to derailment detection devices (DDD).
- LOC&PAS TSI developments.
- European Vehicle Register (EVR).
- Vehicle authorisation processes.
- Accreditation and monitoring of NoBos/assessing entities.

The CTE endorsed the Secretariat's proposals and asked that contact continue to be fostered with states and organisations which are not (yet) members of the Organisation. In this context, the presence of China, the Gulf Cooperation Council and Qatar at the CTE was welcomed.

Next session

CTE 11: 12-13 June 2018 in Bern.

Bas Leermakers

USING INTERCHANGEABLE PASSENGER COACHES IN INTERNATIONAL TRANSPORT

The development of provisions concerning interchangeable passenger coaches has been on the agenda of OTIF and ERA meetings since 2014. These provisions are now nearing completion. What has been done so far and what are the final hurdles to be overcome?

In 2014, we reported in Bulletin 3/2014 on the "interchangeable passenger coaches" project. The report notes that on 10 September 2014, the working group TECH discussed this issue, together with the associated letter from CER. The result of the discussion was that there is a need for technically interchangeable passenger coaches and regulations to succeed the RIC and RIV should be drafted.

The use of railway vehicles in international passenger traffic was previously governed by the "*Regolamento Internazionale delle Carrozze*" (RIC) and international freight traffic was governed by the *"Regolamento Internazionale Veicoli"* (RIV), but these criteria are no longer recognised by the authorities.

In subsequent working group TECH meetings, it was quickly agreed that freight transport is well covered by the optional "Appendix C to the UTP/TSI Freight Wagons" and the General Contract of Use for Wagons (GCU).

However, there were no such provisions for passenger transport.

The task was therefore to specify requirements for the construction of passenger coaches so that they can be used, coupled and operated unrestrictedly in international transport.

The first major concept between the EU and OTIF to date is that the EU deals with the compatibility of a whole train, whereas OTIF focuses its attention on individual coaches.

It was therefore agreed that the focus should be on the coupling capability and deployment of individual passenger coaches with each other.

Appendix C to the UTP/TSI Freight Wagons was looked at in more detail. This Appendix consists of a series of detailed provisions, conditions and technical solutions that have been optimised for the free exchange of freight wagons. Reference is also made to the operating requirements that have to be complied with and the maintenance concept of the railway

undertakings responsible.

If an applicant decides to apply this Appendix C, all the conditions must be met and must be assessed by a notified body.

The carrying undertaking is ultimately responsible for the safe operation of trains and particularly for establishing the conditions under which a particular freight wagon may be operated.

As there are no such requirements for passenger coaches – as has already been mentioned – the Secretariat of OTIF, together with the European Union Agency for Railways (ERA), has drafted some preliminary requirements. These requirements will first appear in the revised version of the TSI LOCPAS. It is planned to publish this revised TSI in 2018. ERA's corresponding recommendation on this was already drafted at the end of 2015, together with the OTIF Secretariat. As the fourth railway package has since entered into force and some amendments had to be incorporated, publication has been delayed.

However, the revised version of the TSI LOCPAS is now at a stage where it can be adopted at the RISC meeting to be held at the beginning of 2018. If it is adopted then, the Secretariat of OTIF and the European Commission will endeavour to publish the revised UTP and the revised TSI LOCPAS at the same time.

The new version will include a chapter "6.2.7a", which can be applied on a voluntary basis, as is the case for the TSI Freight Wagons.

Therefore, if the requirements of this new chapter have already been taken into account in the design of passenger coaches, they can be operated in so-called "general operation". For the time being, these requirements only apply to new vehicles. At present, there is no uniform mechanical and electrical coupling capability between existing and new vehicles. The question therefore arises of the extent to which older vehicles (existing vehicles) should be adapted to the level of new vehicles.

It should also remain clear that, as at present, it is the operator or the carrying railway undertaking that is ultimately responsible for the deployment of passenger coaches.

Irrespective of this, there should be an incentive to be able to continue using existing vehicles internationally with newly built passenger coaches, or even to define so-called "standard coaches" in this age of digitalisation and automatic couplings.

Margarethe Koschmider

REVIEW OF THE COTIF AMENDMENT PROCEDURE: ASSESSMENT OF THE PUBLIC INTERNATIONAL LAW DIMENSION

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. Considerations regarding a possible revision should take into account public international law and in particular state practice under other relevant treaties.[1]

Current legal framework of COTIF

In accordance with the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Modification Protocol of 3 June 1999, two principal amendment procedures are applicable.

The General Assembly decides on proposed amendments to COTIF unless the Convention attributes such competence to specific committees, in particular the Revision Committee[2]. The enactment of modifications adopted by the General Assembly requires 'approval' by OTIF's Member States in accordance with their domestic law. Modifications to COTIF decided by the General Assembly enter into force twelve months after they have been approved by a specified number of Member States. It is noteworthy that the procedure applies equally to all amendments relating to a designated provision, whether it amounts to a simple change in wording or to a substantive adjustment.

Entry into force of modifications according to the above-mentioned provisions does not apply to those Member States which, before the entry into force, have submitted a declaration explaining that the state does not accept the modification(s). When decisions on modifications take effect, the relevant Appendix or Appendices are suspended with and between the Member States that have declared their non-approval of the amendment within the deadline. Member States do not therefore have to accept an amendment by which they do not wish to be bound. Moreover, Article 42 § 1 gives Member States the right to declare at all times that they will not apply a particular Appendix in its entirety.

The envisaged 'approval' by states of a modification decided upon by the General Assembly must be explicit. It requires an individual legal act to finalise enactment of the modification. The procedure set out in Article 34 COTIF does not stipulate a time period or time limit for approval by individual states. The establishment of such approval is contingent upon the constitutional requirements of the domestic legal systems and may also be influenced by political circumstances. It is at this point that the process of the entry into force of modifications may become considerably lengthy, unforeseeable time-wise, and varied throughout the Member States.

At present, those amendments to the base Convention and its Appendices that come under the competence of the OTIF General Assembly take on average six years to enter into force.

Adverse effects of the current procedure

The international environment of OTIF develops rapidly, both in terms of law and in terms of the market. COTIF operates in a relatively complex legal context:

- In the first twenty years of its existence, COTIF 1980 was amended four times. Since COTIF 1999 entered into force in 2006, it has been amended three times. The speed of revisions is thus increasing, which is unsurprising in view of the intensification of international relations.
- An added factor is the dimension of EU law, where for the EU region EU transport law partly covers the same subject matter as OTIF, with EU legislative processes following their own – shorter - time frame.
- As for the market, there is an increase and an intensification of trade and transport across the globe; these require an ever more speedy response to the commercial environment;
- In this regard it is worth noting that in the draft constitutive text of the OSJD currently under discussion, the Organization is considering speeding up its revision procedure.

The lengthy revision procedure of COTIF has several adverse effects, both legal and non-legal in nature:

- The extended time period that passes before important modifications to the Convention actually enter into force can have a negative impact on the further amendments needed, as the latter may be linked to the amendments whose entry into force is still pending.
- The fact that COTIF envisages two different procedures for modification of the Convention and its Appendices may give rise to inconsistencies

1 This article relies in part on the external legal report written for OTIF, LAW-17034-WGREVCOTIF 3-01 - 03.04.2017.

2 Modifications to COTIF decided upon by the Revision Committee enter into force *automatically* for all Member States on the first day of the twelfth month following that during which the Secretary General has given notice of them to the Member States. Therefore, this "simplified" amendment procedure will not be considered further in this article.

between Appendices or even within one single Appendix.

- Long time periods before the entry into force of COTIF amendments have a direct effect on the railway market of the Member States. The regulatory framework will not meet the market's needs for speed and adaptability – ultimately this may have a negative impact on the Member States' market share in rail transport.
- What is said about the length of time before entry into force of COTIF amendments and its effect on the market can also be said about the unpredictability of the precise period of time until entry into force. Domestic approval is dependent on legal and sometimes political aspects of the various national legal orders of the Member States.
- Because of the parallel development of national and regional (notably EU, but also EEA) law, inconsistencies with and discrepancies in COTIF regulations may arise. As a consequence, Member States may feel obliged to make a declaration of non-application of certain COTIF Appendices.

Intersection between international and national legal regimes

On account of the field of operation of COTIF and its Appendices, and the fact that these contain both public and private law provisions, effectuation of the provisions of the Appendices very much depends on, and ties in with, the domestic legal order in the Member States.

International and regional law are created bottom-up, emanating from sovereign states, and states are free to decide how they arrange their domestic legal order within the outer boundaries of the rules of public international law to which they are bound. If and when states become a party to a treaty, they are free to decide how they implement their treaty obligations at a domestic level, provided the international obligations are met.

At the level of international law, on the other hand, it is a longstanding principle that states cannot rely on their national law to justify non-performance of their international (treaty) obligations. The Permanent Court of International Justice (PCIJ) has already famously held that "[f]rom the standpoint of international law [...] municipal laws are merely facts which express the will and constitute the activities of states".[3] Today, this principle is reflected in Articles 27 (Performance) and 46 (Validity of consent to be bound) of the 1969 Vienna Convention on the law of treaties.

General considerations of public international law on the enactment of treaty amendments

In the decentralised system of international law, obligations are traditionally construed as directly grounded in the consent of states (to leave aside other subjects of international law) – which accounts for the prominence of the treaty instrument and of the law of treaties in international legal relations. It follows that in principle, amendments to treaty obligations are subject to the same requirement of consent by parties. This said, it is not uncommon in international law for states to give their consent ex ante. Thus, sovereign states may choose to delegate certain competences to a treaty organ or an intergovernmental organisation. Such delegation constitutes a general consensual basis, from which an international body may proceed to take decisions – for example on the adaptation of rules – without going back to the Member States for each individual case to obtain consent.

International practice shows a range of such possible mechanisms. Unsurprisingly, these mechanisms have emerged in the context of international organisations, which – themselves consent-based treaty regimes – have after all been created precisely to provide a somewhat centralised infrastructure in order to facilitate international cooperation. Intergovernmental organisations' regulatory activity runs from preparing or revising treaties in a classic process on the one hand, to 'majority rule making' on the other, in which the international body takes a definitive decision on the basis of previously given consent, while also operating in a non-plenary composition and/or taking decisions by majority rather than unanimity. As to the legal instrument at issue, technically the intergovernmental organisations may create a new provision, or they may modify an existing treaty or its Annexes/Appendices.

The consensual foundation is not prejudiced by the fact that at some point on the spectrum of regulatory activity by the organisation, international law may move out of the contractual (law of treaties) perspective into an institutional perspective, in which 'treaty parties' become 'Member States'.

There has been discussion in scholarship on whether and when regulatory acts by IGOs should be considered under the rubric of 'treaty practice', as obligations deriving from the constituent treaty for the IGO Member States, or, on the other hand, as 'legislative' acts by an IGO binding its Member States[4]. The former was, for example, the approach of the International Court of Justice when it dealt with the conflict between the 1971 Montreal Convention and Security Council Resolution 748 – originating in the UN Charter – as a traditional case of conflicting treaties.[5]

In the context of the present article it

3 *Certain German Interests in Polish Upper Silesia case*, PCIJ, 1926, p 19.

4 M. Fitzmaurice, who adheres to the first view (at 316-317), and, contrariwise, C. Alexandrowicz (at 152), on the regulatory acts of Specialized Agencies: "this is no doubt an extra-treaty process".

5 Case concerning Questions on Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Provisional Measures), 14 April 1992, ICJ Rep. 1992, at 126.

is relevant to note that in either view there is agreement that the binding character of these intergovernmental organisations' regulatory acts can, in international law, be soundly explained on the basis of an advance expression of consent on the part of states.

International organisations and treaty regimes

International legal practice shows a variety of mechanisms employed in international organisations and treaty regimes for the enactment of new rules or the amendment of existing ones, while at the same time safeguarding state consent as a legal basis. These range from definite state consent given in advance, with the organisation or organ proceeding without further consultation of the Member States, to the states (re)confirming their explicit consent for each individual decision. This will depend on the organisation or treaty regime, and on the nature of the rule or amendment to be enacted. In some cases rules and their modifications may be enacted by the decision of an organisation or treaty organ only. In most instances, however, formal approval on the part of the Member States per decision – be it explicit or implicit – is required.

Approval may be required in an explicit form (as is currently the case for Convention revisions decided upon by the OTIF General Assembly). Alternatively, for procedural optimisation, it may be arranged for states to become bound after they have not objected within a specified period of time. This mechanism is sometimes construed as 'tacit approval' (or 'tacit consent'), and sometimes as 'opting-out' (or 'contracting out', or 'negative ratification'). There is some conceptual difference between the two: in the case of tacit approval, states become bound at some point by tacitly demonstrating their legal assent, possibly in combination with provisional application; in the case of an opting-out procedure, states become bound from the adoption of an act onwards, unless they free themselves from the obligations by objecting within a specified period of time. This said, in practice the mechanisms work out the same way. In the light of present day demands on the flexibility of treaty regimes and the effectiveness of process management by international organisations and treaty bodies, tacit approval and opting-out are widely used in international practice. In this respect, moreover, "it has become common practice to separate basic treaty provisions from regulations or standards of a technical, scientific, or administrative nature."[6]

Another mechanism applied is provisional application. In accordance with Article 25 of the 1969 Vienna Convention on the law of treaties this is possible if "(a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed."

A variety of regulatory activity is first of all found in organisations with a specialised or technical field of operation; the following non-exhaustive overview provides some examples.

International Civil Aviation Organization (ICAO)

The ICAO constitution provides for an 'opting-out' mechanism or 'negative ratification' for international civil aviation standards that may be annexed to the constitution. When the period for contracting out has passed, the members that have failed to respond are legally bound by the provisions in question. This does not necessarily mean that they apply the decisions. Almost half of the members did not indicate whether or not they applied the international standards and recommended practices adopted by the Organization.

International Labour Organization (ILO)

The ILO stands out for its strong executive secretariat and a constitutional mandate to prepare and adopt conventions in its plenary organ by a two-thirds majority. Ratification of conventions is then considered essential for the Organization. Not only do Member States have to submit conventions to their competent authorities and to report on the result within 18 months, but, as long as they have not yet ratified, they must also periodically report on the position of their laws and practices with regard to the matters dealt with in the convention. These reports are examined by the ILO Committee of Experts on the Application of Conventions and Recommendations, which in turn provides information to the general congress of the Organization, which again discusses the reports.[7]

International Maritime Organization (IMO)

IMO Conventions enter into force within an average of five years after adoption.[8] It is crucial that they remain up to date by periodically amending the text or the Annexes. However, the original amendments procedure in IMO proved very slow. A newly devised amendment procedure was used for conventions as of 1972; it envisages (in the terminology of IMO) 'tacit acceptance'[9] or (in the terminology of Schermers & Blokker) 'negative acceptance'[10] of amendments by states. For example, in the

6 D. König, 'Tacit Consent/Opting Out Procedure', *Max Planck EPIL,* para 4.

7 HG Schermers & NM Blokker, International Institutional Law: Unity Within Diversity (5th ed), Martinus Nijhoff Publishers, 2011, §1284.

8 ibid, §1281.

9 http://www.imo.org/en/About/Conventions/Pages/Home.aspx

10 Schermers & Blokker, §1266.

case of the 1974 SOLAS Convention, an amendment to most of the Annexes is `deemed to have been accepted at the end of two years from the date on which it is communicated to Contracting Governments...' unless the amendment is objected to by more than one third of Contracting Governments, or Contracting Governments owning not less than 50 per cent of the world's gross merchant tonnage.[11] The 'tacit acceptance' procedure has greatly speeded up the amendment process. Amendments generally enter into force within 18 to 24 months. With regard to this procedure the IMO has concluded that 'without tacit acceptance, IMO's ability to set safety and environmental standards for world shipping would have been seriously weakened'[12].

United Nations Educational, Scientific and Cultural Organization (UNESCO)

Members can be required to report periodically on any action taken on the basis of conventions submitted by the general Congress. Members can be obliged to submit conventions to their competent authorities within one year of the close of the session at which they are adopted. The degree of compliance within UNESCO does not seem impressive (an indicative figure of 10 per cent has been given).[13]

World Health Organization (WHO)

Amendments to the WHO Constitution come into force for all Members in accordance with their respective constitutional processes. The Health Assembly (plenary body has the regulatory function, in contrast to e.g. the ICAO Council) has the authority to adopt regulations in some specified fields. The WHO provides for a negative ratification procedure of these regulations. Not only are the members of the WHO bound to submit conventions to their national authorities (within 18 months) and to report on the result, they are also obliged to provide an explanation for any failure to ratify. Subsequent international publicity undoubtedly creates further pressure to ratify.

Universal Postal Union (UPU)

UPU deserves special mention for its complex institutional set-up and its variety of legal instruments, i.a. with provisions setting out rules of private law in the same way as some of the COTIF Appendices. The UPU works with different legal instruments (the 'Acts' of the Union): the Constitution, the General Regulations, the Rules of Procedure, the Convention (comprising two 'manuals'), the (optional) Agreement, and the Regulations (which bring the Convention and, where applicable, the Agreement, into operation).

The common rules applicable to the international postal service and the provisions concerning the letter-post and parcel-post services are given in the Convention and its Regulations, which are binding on all Member States. Member States are to "ensure that their designated operators fulfil the obligations" arising therefrom. The 1999 Congress saw a transfer of authority of amendment from Congress to the Postal Operations Council (POC).[14] The ensuing change in legal status of the Regulations was accompanied by the decision that ratification or approval on the part of the Member States would no longer be required. Since then, the Regulations of the Convention are agreements concluded by the member countries elected by the Congress to the POC. Proposals for amendments to the Parcel Post and Letter Post Regulations are to be submitted to the POC directly. Adopted amendments are communicated to the member countries.

The UPU Regulations are comparable to the COTIF Appendices to the extent that they contain operational and commercial rules to be applied by the postal services, including rules on contractual liability. The Regulations then contain all provisions with rules that do not have the states as normative addressee, hence are not of an 'intergovernmental' nature, but rather are addressed to private parties, such as postal services and customers. Such rules may thus be said to have a private law character.

The newly specific character of the Regulations as containing rules of a private law character were then considered to mean that no ratification or approval of the Regulations was necessary. It also led to the conclusion "that it was no longer justified to formally submit to Congress proposals for amending the Regulations." It is noteworthy that in the renewed UPU system one decisive factor in the decision to put in place the 'simplified procedure' for enactment of (amendments to) the Regulations appears to have been precisely that the rules concerned were not of an 'intergovernmental' nature. This indicates that the possible interaction of the Regulations with private law provisions in respective national legal orders was not perceived as a problem by the Member States.

Another notable feature of UPU legal practice is the prominent role of the mechanism of provisional application. The Constitution does not mention provisional application, but the Commentary on Article 33 provides that in accordance with the practice followed by the Union since its foundation, Congress fixes the date on which the Acts (i.e. the instruments mentioned above, including the Convention and Regulations) enter into force, irrespective of the number and dates of the ratifications or notifications of approval deposited by the signatory states. This procedure differs from the traditional practice (still used, but less frequently than before), in which treaties enter into force after a certain number of ratifications.

11 http://www.imo.org/en/About/Conventions/Pages/Home.aspx.

12 Schermers & Blokker, §1291.

13 ibid, §1286.

14 Commentary on Article 29 (29.3) UPU Constitution.

Despite delays in ratification and approval, it appears that the Acts of the Union have been consistently applied – in most cases 'provisionally' - by all member countries from the date of their entry into force. The result is that the Convention is stable and can function as the instrument in force between Congresses, regardless of how many countries have ratified or approved it. According to Schermers & Blokker, UPU is the organization that makes most frequent use of provisional application in order to ensure speedy application of its Acts. The book reports that 'as a general rule' the UPU (amended) Convention enters into force on a predetermined date, usually 12-20 months after its adoption.[15]

Provisional application

Provisional application is used more often – for example the Organisation for Economic Co-operation and Development (OECD) aims partly to solve the problem of 'watchful waiting' (states only ratifying social conventions if their competitors accept the same limitations, as the acceptance of these conventions may have negative economic consequences) by allowing members to apply the rules provisionally as long as other members have not ratified them.[16] For the European Union the possibility of provisional application of international agreements with third countries is explicitly envisaged in Article 218(5) TFEU; and this possibility is often used by the European Union. The 2016 Report on Provisional Application in the work of the International Law Commission (ILC)[17] contains an addendum with i.a. examples of recent European Union practice on provisional application, amongst others in the context of mixed agreements. These frequently specify in the text which parts of the agreement may apply provisionally; this is related to the fact that said parts are generally linked to the competence of the European Union, while the provisions that fall within the competence of the Member States, and are subject to national ratification, are not normally eligible for provisional application.[18]

Other treaty regimes

Certain treaty regimes that present centralised structures to some degree, without perhaps qualifying as traditional international organisations, show a similar practice. An opting-out mechanism is used for example in CITES[19] and the International Whaling Convention[20]. While the 1985 Vienna Convention for the Protection of the Ozone Layer envisages a procedure for amendments much like that of the ILO system, the procedure laid down in the 1987 Montreal Protocol on Substances which Deplete the Ozone Layer for the enactment of 'adjustments' to the original standards with regard to controlled substances, amounts to genuine 'legislation' within treaty regimes: such 'adjustments', failing consensus, are adopted by a two thirds majority; they do not offer the states the possibility to opt out and they are, contrary to e.g. ICAO standards, explicitly said to be binding on all parties.[21]

The treaty practice in the Council of Europe showed a growing interest in 'streamlined' or 'simplified' procedures as early as the 1980s and the 1990s. A commentator in this regard concisely expresses the principle of freedom of contract when confirming that the rules of international treaty law concerning amendments are flexible and that states have the freedom to adapt these rules to new circumstances, "as long as some basic principles of *jus cogens* are not violated."[22]

Possible amendments to COTIF

Adjustment and streamlining of the COTIF revision procedure could take different forms. A working group to amend the procedure for revising COTIF was held in Berne on 3 May 2017. It considered different proposals aimed at increasing both the speed and the predictability of the revision procedure, while safeguarding (in a streamlined manner) the consent of Member States in relation to a particular amendment. However, the discussions highlighted the difficulties Member States encounter in their national procedures.

Bearing in mind the complexity of the issue, the working group agreed to give the Member States a further period of time to enable them to carry out their internal consultations and examine the issue in more depth. It was also agreed at the working group that the Secretariat would send the Member States a questionnaire to make their internal consultations easier.

The Revision Committee will meet from 27 February to 1 March 2018. The document that will be submitted to the Revision Committee concerning the feasibility of amending the revision procedure will take into account the positions and comments from the Member States and their replies to the questionnaire.

Catherine Brölmann
Aleksandr Kuzmenko

15 Schermers en Blokker, § 1295.

16 ibid, §1289.

17 UN Doc. A/CN.4/699/Add.1.

18 *Statement on behalf of the European Union* at the General Assembly Sixth Committee, United Nations New York, 1 November 2016.

19 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora,* UNTS, Vol. 993, 243.

20 1946 *International Convention for the Regulation of Whaling,* UNTS Vol. 161, 72.

21 Article 2(9) d of the Montreal Protocol stipulates that decisions (possibly taken by majority) are binding on all parties and enter into force 6 months after notification by the Secretariat. An analysis of the procedural aspects of the 1985 Ozone Convention (1513 UNTS 3) and the 1987 Montreal Protocol (1522 UNTS 3), in M Fitzmaurice, 'Modifications to the Principles of Consent in Relation to Certain Treaty Obligations', ARIEL 1997, 275-317.

22 See the helpful overview in J Polakiewicz, Treaty-Making In The Council Of Europe, Council of Europe Publications 1999, pp 161-172, quotation at p 169.

CALENDAR OF OTIF'S MEETINGS IN 2017

DATE	EVENT	LOCATION
19 - 29 September	RID/ADR/ADN Joint Meeting	Geneva - Switzerland
20 - 24 November	8th session of the RID Committee of Experts' standing working group	Utrecht - Netherlands
5 - 6 December	33rd session of the standing working group WG TECH	Berne - Switzerland
5 - 6 December	128th session of the Administrative Committee	Berne - Switzerland

EVENTS WITH OTIF PARTICIPATION IN 2017

DATE	EVENT	ORG	LOCATION
19 September	Meeting with National Railways Administration (NRA)	NRA	Peking - China
20 - 21 September	XXVI Plenary meeting of the Coordinating Council on Trans-Siberian Transportation (CCTT)	CCTT	Peking - China
27 - 28 September	Vehicle authorisation workshop under the 4th railway package	European Union Agency for Railways	Valenciennes - France
28 September	Kick-off meeting of the LOC&PAS and WAG TSI limited revisions	European Union Agency for Railways	Lille - France
3 - 4 October	Railway PRO Investment Summit 2017	Communication platform "Railway Pro", Club Feroviar, Romanian Railway Industry Association (AIF)	Bucharest - Romania
4 October	CUI Committee	CIT	Berne - Switzerland
10 - 13 October	Working Party on Customs Questions affecting Transport (WP.30)	UNECE	Geneva - Switzerland
17 - 19 October	OSJD Commission for Transport Law in the field of provisions for the carriage of dangerous goods	OSJD	Warsaw - Poland
18 October	Kick-off meeting for the NOI TSI revision	European Union Agency for Railways	Valenciennes - France
24 - 26 October	OSJD Commission on Infrastructure and Rolling Stock	OSJD	Warsaw - Poland

EVENTS WITH OTIF PARTICIPATION IN 2017

DATE	EVENT	ORG	LOCATION
25 - 26 October	2nd session of the Working Party for revision of ECM requirements	European Union Agency for Railways	Lille - France
1 - 3 November	16th session of the Group of Experts towards Unified Railway Law (SC.2/GEURL)	UNECE	Geneva - Switzerland
6 - 10 November	103rd session of the Working Party on the Transport of Dangerous Goods (WP.15)	UNECE	Geneva - Switzerland
14 - 15 November	UIC Group of Experts on the Carriage of Dangerous Goods	UIC	Brig - Switzerland
14 - 16 November	Railway Interoperability and Safety Committee (RISC)	European Commission	Brussels - Belgium
16 November	General Assembly	CIT	Berne - Switzerland
17 - 18 November	New Horizons 2017 – VI International Symposium of transport and communication	University of East Sarajevo, Faculty of Transport and Traffic Engineering in Doboj and co-organisers	Doboj - Bosnia and Herzegovina
17 November	Multimodality Committee	CIT	Berne - Switzerland
27 - 29 November	71st session of the Working Party on Rail Transport (SC.2)	UNECE	Geneva - Switzerland
27 November - 6 December	52nd session of the UN Sub-Committee of Experts on the Transport of Dangerous Goods	United Nations	Geneva - Switzerland
29 - 30 November	CIM Working group	CIT	Berne - Switzerland

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