



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

OTIF



ORGANISATION INTERGOUVERNEMENTALE POUR LES
TRANSPORTS INTERNATIONAUX FERROVIAIRES

ZWISCHENSTAATLICHE ORGANISATION FÜR DEN
INTERNATIONALEN EISENBAHNVERKEHR

INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL
CARRIAGE BY RAIL

COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE
PREPARATION OF A DRAFT PROTOCOL TO THE
CONVENTION ON INTERNATIONAL INTERESTS IN
MOBILE EQUIPMENT ON MATTERS SPECIFIC TO
RAILWAY ROLLING STOCK

UNIDROIT 2005
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RAIL REGISTRY TASK FORCE

FOURTH MEETING

(Rome, 22 – 24 February 2005)

SUMMARY REPORT

(prepared by the UNIDROIT Secretariat)

I. INTRODUCTION

The Fourth Meeting of the Rail Registry Task Force was held in Rome from 22-24 February 2005. The Task Force was established by the Committee of governmental experts at its Second Joint Session, in order to consider issues relating to the establishment of an International Rail Registry under the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (*the preliminary draft Rail Protocol*). The terms of reference for the Task Force are set out in Appendix I and the agenda of the session is set out in Appendix II.

The participants in the meeting are listed in Appendix III. The meeting was co-chaired by Mr Henrik Kjellin (Sweden) and Mr Peter Bloch (United States of America).

II. ISSUES AND DISCUSSIONS

Tax status of the Registrar

Following an introduction by the representative of OTIF on problems of legal personality and immunity, the Task Force discussed how the preliminary draft Rail Protocol should deal with the tax status of the proposed Rail Registrar. The views, comments and observations made during this discussion included the following:

- (a) The Convention on International Interests in Mobile Equipment (*the Convention*) did not anticipate that the Registrar would enjoy immunities from liability, because it was regarded as essential to the credibility of the registration system that the Registrar be susceptible to suit;
- (b) It might be possible for select immunities (for example, immunity from taxation) to be conferred on the Registrar by way of a provision in the headquarters agreement with the host State, rather than by including a provision in the Protocol;
- (c) If the Registrar were immune from taxes this could reduce its costs and the fees it was required to charge for using registry services. However, this would not necessarily be the case (for example, if the Registrar operated other, non-tax-exempt businesses, there might be a high administrative cost in administering the tax-free status);
- (d) From the perspective of the costs of the Registry and fees charged to users, it would be preferable if services provided by the Registry were exempt from tax, and that the Registry itself be exempt from taxes or have an entitlement to recover taxes paid;
- (e) Comparisons with the tax status of the Aircraft Registry might not be relevant, as it was possible that European legislation included special provisions for the aircraft and shipping industries which were not available for the rail industry;
- (f) It would be desirable for there to be maximum flexibility to enable the appropriate solution to be implemented, and for this reason it would be preferable to deal with the issue of tax exemption in the headquarters agreement between the Registry and the host State rather than in the Protocol.

The Task Force agreed that it would be preferable for the Registrar to be made subject to whichever tax status would enable it to minimise its costs and to minimise the fees charged to users, and that it would be preferable for this issue to be dealt with in the headquarters agreement with the host State rather than in the Protocol. The representative of OTIF indicated that the future discussion on this issue would exclude reference to the tax status of the Registry until that issue had been progressed and resolved.

Legal status of the Supervisory Authority

The representative of OTIF provided an overview of the issue of the legal status of the Supervisory Authority. During the Task Force discussions it was questioned whether the reference to the Supervisory Authority being a Council was appropriate. The question was forwarded to the Drafting Committee.

Legal status of the Secretariat

The representative of OTIF provided an overview of the issue of the legal status of the Secretariat as presented in the meeting paper entitled "The Supervisory Authority and the Registrar – Capacity, immunity and domicile" attached as Appendix IV. During the Task Force discussions it was noted that it would be a question of timing whether the OTIF General Assembly would be able to decide, in advance of the Diplomatic Conference, whether to accept the role of

Secretariat to the Supervisory Authority. At the September 2005 OTIF General Assembly it would be recommended that OTIF accept the role of Secretariat on condition that all costs and charges be covered by Registry revenues, and that it would be prudent to wait until after that meeting to decide if it was necessary to include a provision in the preliminary draft Rail Protocol providing for the possibility of OTIF not accepting the role of Secretariat.

Immunities of the Secretariat and its employees

The representative of OTIF provided an overview of the issue of the immunities of the Secretariat and its employees as presented in the meeting paper attached as Appendix IV, and of the recommendation that the Secretariat and its employees enjoy the immunities identified in Article 27(3) and (4) of the Convention. During the Task Force discussions it was noted that OTIF is only granted immunities in relation to its functions under the OTIF Convention. It was agreed that the Drafting Committee should consider amendments to Article XIII of the preliminary draft Rail Protocol to ensure that the Secretariat and its employees would enjoy the same exemptions and immunities as would be enjoyed by the Supervisory Authority under Article 27(3) of the Convention and by the International Registry under Article 27(4) of the Convention.

Liability and insurance

The representative of OTIF provided an overview of the issue of the liability and insurance as presented in the meeting paper attached as Appendix IV, and the Co-Chairman noted that the issue of insurance would be an important issue for users of the Registry system. The views, comments and observations made during this discussion included the following:

- (a) The value of the insurance to be required could be expressed by reference to the amount of the liability to be covered, by reference to the amount of the premium to be paid, or by some other criteria (such as an amount to be determined within the discretion of the Supervisory Authority);
- (b) Although the Convention provided for the Supervisory Authority to determine the extent to which insurance shall cover the liability of the Registrar, the liability of the Registrar is itself set out in the Convention and would not be able to be amended. Further, any recommendation that the Supervisory Authority be authorised to limit the liability of the Registrar could raise constitutional difficulties for some Contracting States;
- (c) The insurance market had changed since the Diplomatic Conference in 2001 which adopted the text of the Convention, and it was possible that it would continue to change and evolve. It was therefore possible that new insurance products would emerge to address the types of risks associated with the Convention. For this reason, it would be preferable for the Protocol to avoid being overly prescriptive;
- (d) It would be necessary to ensure that the Registrar was not exposed to unlimited liability with limited insurance, whilst also ensuring that the insurance coverage obtained was commensurate with the likely risks. Accordingly it would be preferable for the Supervisory Authority to have the maximum possible flexibility in determining the appropriate level of insurance coverage;
- (e) The Registry system was likely to be very sophisticated and to carry very little risk of error, but it would nevertheless be useful for there to be a study, in advance of the Diplomatic Conference, of the risks of the Registrar being exposed to liability, and of the cost of insurance available in the insurance market. It would also be useful to study the Aircraft Registry once it is in operation.

The Task Force concluded that strict liability covered by insurance was very important in relation to the general confidence of the users, but that this may have serious financial consequences and that the issue merited further study, especially as regards the development relating to the Aircraft Registry. As this question may require amendments of the preliminary draft Rail Protocol, States were invited to present proposals to the Diplomatic Conference.

Fee structure of the Registry

The Co-Chairman introduced the meeting paper “Factors to be taken in to consideration in the establishment of the International Rail Registry’s fee structure” (see Appendix V).

In relation to the proposal to amend the preliminary draft Rail Protocol to clarify that there would be no payments to State Parties for their participation in the Supervisory Authority, the Task Force referred to the Drafting Committee the question whether this could be achieved by an amendment to Article XVIII(2) of the preliminary draft Protocol to remove the phrase “of the Supervisory Authority and its” and to replace it with the phrase “of the Supervisory Authority’s Secretariat”.

In relation to the operating costs of the Secretariat, the views, comments and observations made during this discussion included the following:

- (a) The Secretariat’s costs would be greatly reduced if it were to work only in English, but this would require the agreement of all Contracting Parties;
- (b) Although it would possibly not be difficult to secure agreement that the operations of the Secretariat be in English, it might be more difficult to secure agreement that all official documents be produced only in English;
- (c) The costs of the Secretariat might include room hire for meetings (in UNIDROIT’s case, meetings not able to be held at UNIDROIT Headquarters incur costs of € 12.000 per week in room hire fees);
- (d) OTIF Member States might not agree to bear the costs of the Secretariat, although there may be some flexibility in relation to the start-up costs during the establishment phase of the Secretariat;
- (e) It would be useful to prepare some preliminary estimates of the Secretariat’s costs, with alternative versions based on the use of one or three languages;
- (f) Article XX(3) of the Aircraft Protocol refers to the “reasonable” costs of the Registrar being recoverable, and a similar formulation should be used in the preliminary draft Rail Protocol;
- (g) The amortisation of start-up costs should be a question to be determined by the Supervisory Authority having regard to the proposals submitted by those bidding to operate the Registry; therefore this would not need to be specified in the preliminary draft Rail Protocol,.

It was agreed that the Drafting Committee should consider amendments to the preliminary draft Rail Protocol so that it would refer to the “reasonable” costs of the Registrar being recoverable, and that a preliminary estimate of the Secretariat’s costs should be prepared.

In relation to possible transactional savings, the Co-Chairman noted that an industry trade group study, which was referenced in the meeting paper attached as Appendix V, concluded that there would be no transactional savings for users of the existing North American registries. The views, comments and observations made during this discussion included the following:

- (a) Estimates derived from an industry trade group study of the revenue and costs structure of the North American registries showed that set-up costs would be between US \$ 500.000 and US \$ 1.000.000 with ongoing maintenance costs of between US\$1.000.000

and US \$ 2.000.000, that operating the registry (excluding the help desk) in different languages would not add significantly to the costs, and that based on a US \$ 30 filing fee such a registry would require 1.2 million or more transactions to recoup its costs;

- (b) The costings for the Aircraft Registry, which will provide a help-desk in English, French and Spanish, would be significantly lower;
- (c) Users of the North American registries might have difficulty understanding what added value they would receive from registration of their interests with the proposed Rail Registry. One possible benefit would be to cover situations where railway rolling stock travelled outside jurisdictions covered by the North American registries (for example, into South America), although this occurred very infrequently at present;
- (d) The Drafting Committee should give consideration to an amendment of Article XVIII(1) of the preliminary draft Rail Protocol to expand the categories of items for which fees may be paid to include “other services that may be provided”.

In relation to possible role of the Supervisory Authority in setting and changing fees, the views, comments and observations made during this discussion included the following:

- (a) It would be desirable to require the Supervisory Authority to be advised of all proposed fee changes;
- (b) If it is expected that fee changes may be justified by currency fluctuations, it would be expected that fees might decrease as well as increase;
- (c) It would be desirable for the Supervisory Authority and the Registrar to be able to agree between themselves on the process for approval of fee increases, and the preliminary draft Rail Protocol should not impede this.

It was agreed that the Drafting Committee should examine the relationship between Articles XVIII (1) and (3) of the preliminary draft Rail Protocol.

In relation to the question of how registration fees should be calculated, the Co-Chairman indicated that the meeting paper attached as Appendix V set out a number of options for discussion. The views, comments and observations made during this discussion included the following:

- (a) Some of the options would require human input for processing, and this would increase the Registry’s operating costs;
- (b) The proposed fee structure for the Aircraft Registry, which will provide discounts for group registrations of registered users, should be examined;
- (c) The fee structure should take into account the relatively low volume of transactions in Europe;
- (d) Consideration of fees, or discounts on fees, for bulk transactions will need to take account of the fact that all registrations will have to be verified against individual assets, although for large transactions it would be desirable if it were possible to submit information specific to all of the individual assets in a single schedule;
- (e) It would not be possible for a single registration to cover multiple assets, because it would be necessary to enable the discharge of a registration over a single asset;
- (f) The fee structure should take account of the possibility of transfers of title being registered;
- (g) If the Registry help desk is to be operated in English only, it might be possible for user guides and FAQ guides to be made available on-line in multiple languages. It is possible that the help desk might not need to operate 24 hours per day, as rail financing transactions would typically be less time-sensitive than aircraft financing transactions.

It was concluded that an economically viable fee structure is key to the success of the whole project and that, even if the fee structure would be established subsequently to the Diplomatic Conference, more detailed predictions of the fees would be very useful for the Conference.

Registrar Regulations and the Supervisory Authority Rules of Procedure

In relation to the Registrar Regulations and the Supervisory Authority Rules of Procedure, the representative of OTIF noted that the drafts had been revised following the meeting in Brussels in 2004. The views, comments and observations made during this discussion included the comment that it would be necessary to give further consideration to the question of categories of authorised users of the Registry. Unless the same entity operated the Rail Registry as operated the Aircraft Registry (in which case it might be possible to use the same registry system), it would be possible to design a different system for the Rail Registry.

It was noted that both the regulations and the rules of procedure would be adopted after the Diplomatic Conference, but also that both drafts texts would be very important as a basis for the discussions at the Conference.

Identification of railway rolling stock, Article V

The discussion was opened in relation to Article V and the following points were made:

- (a) In relation to the types of declarations to be made under Article V(2), there might be difficulties in specifying the required nexus between the Contracting State making the declaration and the rolling stock in question. Different jurisdictions use different methods for identifying and registering rolling stock, and not all systems record the nationality of the rolling stock. Some identification systems (for example, the European system) are still under development and may not be finalised for some time;
- (b) In relation to Article V(6) and the question of possible sanctions for a failure to provide the identification number information referred to in that article, such a failure should not invalidate the registration itself, but the consequences of the failure should be specified in the article. One appropriate sanction for a failure by a creditor might be subordination;
- (c) It would be important for Article V to set out identification criteria in order to satisfy the requirements of Article 7(c) of the Convention, although it would be possible for the regulations to specify additional identification criteria.

It was agreed that the Drafting Committee would give further consideration to Article V in light of the Task Force's discussion.

Drafting Committee

On the basis of the proposals made by the Rail Registry Task Force, a Sub-Committee of the Drafting Committee met on 23 February 2005. It recommended a number of amendments to the preliminary draft Rail Protocol. The Rail Registry Task Force then met to re-examine the text and the following amendments were agreed:

- (a) Adding a new introductory paragraph to Article V to specify the identification requirements for railway rolling stock for the purposes of Article 7 of the Convention;
- (b) Adding a new sentence at the beginning of Article V(2);
- (c) Amending Article V(2) (to be renumbered as Article V(3)) to include a factor to connect the Contracting State making the declaration with the item of railway rolling stock;

- (d) Amending Article V(6) (to be renumbered as Article V(7)) to clarify that failure to comply with the requirements of that article would not invalidate a registration;
- (e) Amending Article XIII(1) to replace “council of representatives, one representative” with “a body consisting of representatives”;
- (f) Inserting new Article XIII(3) to provide for privileges and immunities of the Secretariat,
- (g) Amending Article XVII(4) to provide that the amount of insurance or financial guarantee shall be not less than the amount determined by the Supervisory Authority to be appropriate, although the factors for the Supervisory Authority to take into account are yet to be determined;
- (h) Amending Article XVIII(1) to reflect the requirement of the Convention that fees be set by the Supervisory Authority, and that fees might be required to be paid in connection with other services provided by the Registry;
- (i) Amending Article XVIII(2) to add “reasonable” before “costs of establishing and implementing” and to refer to the “reasonable costs of the Supervisory Authority’s Secretariat”;
- (j) Deleting Article XVIII(3), in light of the amendment to Article XVIII(1); and
- (k) Inserting footnotes to indicate issues that will require further consideration.

The text of the amended Articles of the preliminary draft Rail Protocol are set out in document UNIDROIT 2005 Study LXXIIH – Doc. 18 / OTIF/JGR/14. As these amendments have not been agreed by the Joint UNIDROIT/OTIF Committee of governmental experts, these amendments will be submitted to the Diplomatic Conference as a proposal from the States members of the Rail Registry Task Force.

Diplomatic Conference

The Task Force discussed progress in relation to arrangements for identifying a State to host the Diplomatic Conference. A host State has not yet been identified. The possibility of approaching the European Union for assistance for the Diplomatic Conference to be hosted in an Eastern European State was mentioned. The possibilities of acquiring similar funds for a Conference in a developing African State was also discussed. The UNIDROIT Secretariat has prepared a provisional estimate of resources required for the holding of the Diplomatic Conference, which could assist some potential host States in their consideration of the issue.

Conclusion of the meeting

The co-Chairmen concluded that it had been a very successful meeting and that most problems on the table had been solved. In relation to the problems not solved, procedures had been developed to solve them. The conclusion was thus that there was probably no need for a subsequent meeting of the Task Force before the Diplomatic Conference, but should such need arise the co-Chairman would co-ordinate with the two organisations on the issue. Otherwise the further preparations would continue via e-mails.

APPENDIX I

UNIDROIT/OTIF RAIL REGISTRY TASK FORCE:

TERMS OF REFERENCE

(as adopted by the UNIDROIT/OTIF Joint Committee of governmental experts
at its third session held in Berne from 5 to 13 May 2003)

1. In relation to Article V:
 - (a) solicit, receive and summarize comments from stakeholders, including manufactures, operators and lenders, on the operability of the system, and (SWEDEN, US & RWG)
 - (b) propose any additional measures to the system, including any regulation provisions, with a view of implementing its objectives. (SWEDEN, US & RWG)
2. In relation to Article XI (now Article XIII):
 - (a) assess, develop and propose any amendments to the draft Protocol to address issues identified in footnotes to the Article, (CANADA, SWITZERLAND & OTIF)
 - (b) develop appropriate regulation provisions for the Registrar and the Supervisory authority with a view of implementing the Article, and (CANADA, SWITZERLAND & OTIF)
 - (c) solicit States or other entities interested in hosting the Registry. (GERMANY & UNIDROIT)
3. In respect of Article XVI (now Article XVIII), assess and determine factors to be taken into consideration in the establishment of the fee structure, taking into account transactional savings realised by virtue of the international system in relation to national ones. (US, FINLAND & HUNGARY)
4. Assess, develop and propose any amendments necessary with regard to the liability of the Registrar and insurance for it, and also in relation to any tax obligations of the Registrar (RWG & CANADA)
5. Review the trends in modern railway rolling stock manufacturing and financing, especially in Europe (RWG)
6. Develop a description of the envisaged international registry system (CANADA & UNIDROIT)
7. To develop and propose additional regulation provisions (CANADA, SWITZERLAND & OTIF)

In performing these tasks, the Registry Task Force shall in particular take into account the work done by the Preparatory Commission to implement the Aircraft Protocol and, if appropriate, convene a meeting of the Registry Task Force.

APPENDIX II

AGENDA

Tuesday, February 22

10 a.m. - 1 p.m.

- Opening of the meeting
- Update on developments on the aircraft Registry
- Presentation of item 5 of the Terms of Reference (trends in rail manufacturing and financing) by RWG and discussion of that item
- Discussion of item 3 of the Terms of Reference (factors to be taken into consideration in the establishment of the fee structure)

1 p.m. - 2:30 p.m.

Lunch

2:30 p.m. - 5:30 p.m.

- Continued discussion of item 3 (fee structure)

Wednesday, February 23

10 a.m. - 1 p.m.

- Continued discussion of item 3 (fee structure)

1 p.m. - 2:30 p.m.

Lunch

2:30 p.m. - 5:30 p.m.

- Discussion of item 2a (capacity, immunity and domicile issues re: Supervisory Authority and Registrar)

Thursday, February 24

10 a.m. - 1 p.m.

- Discussion of item 4 (liability and insurance)
- Discussion of item 1b
- Discussion of item 2b (Registrar Regulations and Supervisory Authority Rules of Procedure)

1 p.m. - 2:30 p.m.

Lunch

2:30 p.m. - 5:30 p.m.

- Continued Discussion of item 2b
- Discussion of item 2c (States or entities interested in hosting the International Registry)
- Discussion of possible hosts for the Diplomatic Conference

APPENDIX III

LIST OF PARTICIPANTS

CANADA	Richard SHAW Director-General, Corporate Directorate Industry Canada
FINLAND	Mika MÄKILÄ Coordinator in European Affairs VR-Group Ltd Finnish Railways
GERMANY	Inke WOLFF Federal Ministry of Justice
MEXICO	Jorge SÁNCHEZ CORDERO DÁVILA Centro Mexicano de Derecho Uniforme
SLOVAKIA	Zuzana ŠTRBÍKOVÁ Lawyer – Headquarters – Department of Strategy Železničná Spoločnosť, a.s.
SWEDEN	Henrik KJELLIN, <i>Co-Chairman of the RRTF</i> Counsellor – Internal Market – Justice and Home Affairs Permanent Representation of Sweden to the European Union
SWITZERLAND	Laurent NOËL Conservateur du registre des aéronefs Office fédéral de l'aviation civile Vincent RUSCA Office fédéral des transports
UNITED KINGDOM	Kevin HOULTON Strategic Rail Authority European Affairs Manager Sir Roy GOODE , <i>member of the Drafting Committee of the Committee of governmental experts and Chairman of the Drafting Committee of the RRTF</i>

UKRAINE**Victoria GUKASYAN**

Chief Specialist International Organizations Division
State Aviation Administration of Ukraine

Anatolij TOFANCHUK

Deputy Chief of State Property Department
State Aviation Administration of Ukraine

Anna MAZUR

Head of International Agreements
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Irina SHVETZ

Head of protocol Sector
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UNITED STATES OF AMERICA**Peter BLOCH** *Co-Chairman of the RRTF*

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UNIDROIT

Herbert KRONKE
Secretary General

John ATWOOD
Research Officer

Alison McMILLAN
Research Officer

Marina SCHNEIDER
Research Officer

APPENDIX IV

THE SUPERVISORY AUTHORITY AND THE REGISTRAR CAPACITY, IMMUNITY AND DOMICILE

Document prepared by Mr Gerfried MUTZ, OTIF,
for the 3rd meeting of the Rail Registry Task Force
Brussels, September 2004, and revised after that meeting

OCTI/GMU (December 2004)

Terms of Reference

With respect to Article XIII of the Rail Protocol, item 2(a) of the Terms of Reference of the Rail Registry Task Force suggests that Canada, Switzerland and OTIF:

“assess, develop and propose any amendments to the draft Protocol to address issues identified in footnotes to the Article, (CANADA, SWITZERLAND & OTIF)”.

Article XIII(1) reads: *“The Supervisory Authority shall be a council of representatives,⁶ one representative to be appointed by each State Party.”*

Footnote 6 reads: *“Issues of immunity, capacity and domicile of the council as a subject of international law will have to be addressed. Likewise, Authority for internal rules of procedures may have to be provided for in the Protocol.”*

Article XIII of the Rail Protocol

Article XIII of the Rail Protocol prescribes that the Supervisory Authority is a council made up of representatives appointed by each State Party to the Protocol. This Supervisory Authority shall have international legal personality. The Supervisory Authority and its officers and employees shall enjoy, in accordance with Article 27 of the Convention, “such immunity from legal or administrative process as is specified in the Protocol”, as well as exemption from taxes and such other privileges as may be provided for in the headquarters agreement with the host State. At this stage, the Protocol does not regulate the question of the Supervisory Authority's privileges and immunities.

The creation of the Council of representatives leads the RRTF to query whether the Council is a separate body from the Supervisory Authority. This doubt explains the questions identified in footnote No. 6. To the RRTF, it would be simpler and probably more appropriate to state that the Supervisory Authority shall consist of a representative of each State Party. Such an approach would achieve the intent and would leave intact the relevant provisions of the Convention, including those governing the questions identified in footnote No. 6.

The RRTF recommends that the text of Article XIII(1) be modified to read:
“The Supervisory Authority shall consist of a representative of each State Party.”

Neither the Convention, nor the Protocol, provides expressly the competence of the Supervisory Authority to conclude a headquarters agreement on privileges and immunities with the State in which it will be situated.

Legal status of the Secretariat

Article XIII § 2 of the Rail Protocol reads:

“The Intergovernmental Organisation for International Carriage by Rail shall be the Secretariat of the Supervisory Authority and shall assist the Supervisory Authority in the performance of its functions.”⁸

Footnote 8 reads:

“The Protocol could state that the General Assembly of the Intergovernmental Organisation for International Carriage by Rail (OTIF) must approve that OTIF becomes the Secretariat of the Supervisory Authority. To the extent that OTIF will be acting as the Secretariat, issues of immunity, capacity and domicile will have to be addressed. The financing of the activities of OTIF for the purpose of the Protocol should be provided for under the Protocol.”

From a strict legal approach to the RRTF there appears to be no requirement to the effect that the Protocol mention that the General Assembly of OTIF should approve this organisation becoming the Secretariat of the Supervisory Authority. In its opinion, such approval could be required if the Protocol required OTIF, when acting as Secretariat of the Supervisory Authority, to perform a task contradicting the spirit or the intent of the constituting agreements. In the present case, the role contemplated by the Protocol is one that does not contradict the aims of OTIF and that can be seen as a complement to the existing one.

According to Article 4 § 1 of COTIF 1999, “Taking on and transfer of attributions” however, “the Organisation shall be authorised [by a decision of the General Assembly] to take on, within the framework of its aim as defined in Article 2, the attributions, resources and obligations which may be transferred to it by other intergovernmental organisations by virtue of agreements concluded with those organisations.”

The RRTF **recommends** that the wording of Article XIII § 2 of the Railway Protocol be modified for this provision to read:

“The Secretariat of the Supervisory Authority shall be the Intergovernmental Organisation for International Carriage by Rail.

Option 1: *The Secretariat shall assist the Supervisory Authority in the performance of its functions. In the event of the Organisation for International Carriage by Rail refusing to act as Secretariat, the Supervisory Authority may appoint a person or body to perform the duties of its Secretariat.”*

Option 2: *“In the event of the Organisation for International Carriage by Rail not being able or willing to act as the Secretariat of the Supervisory Authority, a Conference of Signatory and Contracting States shall be convened by the Depositary to designate another Secretariat by a majority vote of the Members represented at the time of the vote.”*

Practically speaking, it appears unlikely that the General Assembly of OTIF will reject this organisation becoming the Secretariat. At its autumn session 2003 the Administrative Committee of OTIF noted and agreed a document (CA 100/4) concerning possible assumption of tasks relating to the “Rail Protocol” (Secretariat of the Supervisory Authority) and supported unanimously the Secretariat's efforts in connection with the Rail Protocol.

The Rail Protocol does not lay down the legal status of the Secretariat of the Supervisory Authority. The Protocol only mentions that OTIF “shall be the Secretariat of the Supervisory Authority”.

Quite obviously, the Secretariat of the Supervisory Authority must be distinguished from the staff appointed to keep the Registry (Registrar, officers and employees), so that the employees of the Secretariat could not be assigned to certain tasks concerning the Registry.

On the question of immunity, one can appreciate that immunity is granted to OTIF only as far as it is necessary to discharge the duties of OTIF under its Convention, COTIF. It is doubtful that this provision gives OTIF immunity for the purpose of the Rail Protocol. For this reason, the Rail Protocol should establish that the Secretariat enjoys immunity for the purpose of the Protocol.

The RRTF therefore **recommends** that the following provision be added to Article XIII of the Protocol:

"The Secretariat shall have legal personality where not already possessing such personality. The Secretariat and its employees shall enjoy the immunities identified in Article 27(3) and (4) of the Convention."

As mentioned above, the International Rail Registry must be distinguished from the Secretariat of the Supervisory Authority. According to the Cape Town Convention, the "International Register" has no separate legal personality under international law. Only the Supervisory Authority has international legal personality and enjoys immunities. This is the view held by Professor Goode in his official commentary (p. 86, items 3 and 4), by the Draft Regulations Working Group for the Aircraft Protocol in preparing the Aircraft Register (Report on the second meeting, Montreal, 12 to 14 November 2002) and by the RRTF.

The Convention prescribes that the property, documents, databanks and archives belonging to the International Registry are inviolable and that the Supervisory Authority can remove this inviolability, or define the criteria for consulting the Registry.

Legal personality of the Registrar

Pursuant to Article 17 § 5 of the Convention the Registrar shall ensure the efficient operation of the Registry.

The Registrar may be a physical person or a legal personality under both public and private law. Relevant issues, such as the jurisdiction of the court under Article 44 of the Cape Town Convention and taxation relating to the Registry, should be resolved between the Supervisory Authority and the State where the Registrar has its domicile.

Privileges and immunities

Neither the Cape Town Convention, nor the Rail Protocol state that the Registrar enjoys privileges and immunities.

Nevertheless the Registrar enjoys certain privileges and immunities: Article 44 of the Convention says that no court may make orders or give judgments or rulings against or purporting to bind the Registrar, except in cases of a request for damages and compensation arising from an error or omission of the Registrar and its officers and employees or from a malfunction of the international registry pursuant to Article 28 of the Convention. The Registrar therefore enjoys

sovereign immunity for all the acts he performs in a private or professional capacity, with the exception of the case referred to above concerning claims for damages and compensation. Thus, in the hypothesis where the Registrar might have misappropriated Registry property to his profit without it having caused any loss for the Registry users, he could not be charged unless his

immunity has been removed. Similarly, the Registrar would enjoy absolute sovereign immunity for all acts performed in a private capacity, including for example in the case of a serious infringement of the road traffic regulations where material or physical injury was caused.

The Registrar operates the International Registry under the control and instructions of the Supervisory Authority. The fact that neither the Cape Town Convention, nor the Rail Protocol state that the Registrar enjoys privileges and immunities could lead to fees higher than they should be. Therefore the RRTF recommends that the following provisions should be added as paragraph 5 of Article XI (now XIII) to the Rail Protocol:

Option 1: “[For greater certainty,] the Registrar shall enjoy immunities and exemptions referred to in Article 27(2) and 27(3) of the Convention.”

Option 2: “[For greater certainty,] Articles 27(2) and 27(3) of the Convention apply to the Registrar.”

Option 3: “[For greater certainty,] the Registrar is deemed an agent of the Supervisory Authority and Articles 27(2) and 27(3) of the Convention apply to the Registrar.”

Whichever option is selected, the following would have to be added to address the situation experienced in the context of the Aircraft Protocol:

“For the purposes of Article 27(3) of the Convention, in the event that the Supervisory Authority and the Registrar are situated in different States, “host State” also means the State in which the Registrar is situated.”

Liability

The Registrar is personally liable under civil law, in accordance with Article 28 of the Convention, for compensatory damages due when the loss has occurred as a result of an error or omission of the Registrar and its employees (mismanagement of the Registry). According to this wording, the Registrar has to cover damages with his personal property, subject to insurance being taken out which could cover this type of risk. Such insurance having been taken out by the Registrar "*ad personam*", the insurance might be turned against him (and his personal property) in the event of the Registrar or his employees being at fault. Nowhere is it provided that the Registrar's liability is limited to the insurance cover or to the property of the Registry respectively (to the extent that the Supervisory Authority decides to remove the inviolability of this property).

Since 11 September 2001 insurance markets have changed. Nowadays it might not be possible to find adequate insurance cover at all for an unlimited liability. In any case, insurance costs will increase the operating costs of the Register.

The RRTF therefore **recommends** the following paragraph to Article XV (now XVII) of the Protocol:

The Supervisory Authority may limit the liability of the Registrar under Article 28 of the Convention to the amount of the insurance or financial guarantee procured by the Registrar for the purpose of Article 28(4) of the Convention.

APPENDIX V

FACTORS TO BE TAKEN INTO CONSIDERATION IN THE ESTABLISHMENT OF THE INTERNATIONAL RAIL REGISTRY'S FEE STRUCTURE

(prepared by Mr Peter BLOCH, Co-Chairman of the Rail Registry Task Force)

Under item 3 of the Terms of Reference adopted by the third intergovernmental meeting on the Rail Protocol, the RRTF is to assess and determine factors to be taken into consideration in the establishment of the fee structure, taking into account transactional savings realized by virtue of the international system in relation to national ones. This paper is intended to raise issues to discuss at the RRTF meeting and to propose some solutions.

The fee structure for the International Rail Registry is critical to the success of the Rail Protocol. In the Preparatory Commission's work on the Aviation Registry, this was the subject of much discussion and the fee structure ultimately agreed upon reflects the need to keep the fees charged to users at an absolute minimum. This sensitivity to cost will be especially true for rail, where the most expensive piece of rolling stock, a locomotive, is less costly than the lowest cost commercial jet aircraft. It will also be true because the registration fees in at least some of the current registration systems are extremely modest. A number of States may need to know in advance what is the fee structure, as it will likely play a significant role in their ratification decisions.

The Supervisory Authority and Secretariat. The fee structure will in large measure be a function of the costs involved in setting up, running and supervising the Registry. In the current draft of the Rail Protocol, Article XVIII (2) provides that the reasonable costs of the Supervisory Authority and its Secretariat will be funded from the fees collected. Article XIII (1) provides that the "Supervisory Authority shall be a council of representatives, one representative to be appointed by each State Party," (The RRTF, as discussed in the Capacity, Immunity and Domicile paper proposes deleting the notion of a council) Article XIII (2) also provides that OTIF "shall be the Secretariat of the Supervisory Authority." Thus, unlike aviation, which, under the current plan, rolls these two functions into one entity (ICAO), there are two entities to be provided for here.

With respect to the Supervisory Authority, there is a strong case to be made for amending the draft Rail Protocol to make clear that there is no compensation or reimbursement for a State party or its representatives. If a State is a Party, it or its nationals are receiving or are in the position to receive benefits under the Convention. This should be more than a sufficient *quid pro quo* for paying for their own expenses. Beyond this, the actual costs that a State incurs in carrying out this role should not be burdensome because there will be very little work for this body to do. There may be periodic meetings to attend and decisions to make (which might well be done through videoconferences and electronic voting), but little else; after all, their sole responsibility is supervising a highly- electronic, notice-based registry system.

With respect to the Secretariat, the draft Rail Protocol presently provides that its reasonable costs will be covered. While that is fair, it is also important that these costs be controlled so to keep the fees as low as possible. Therefore, it should be made explicit that the Supervisory Authority will be the final decision maker as to what are the Secretariat's reasonable costs. To this end, the Secretariat should prepare and submit to the Supervisory Authority a budget in

advance setting out its detailed explanation of its anticipated costs. Furthermore, the Supervisory Authority should have the discretion, in the event that fees are temporarily not covering the costs of the Registry, to defer compensating the Secretariat for a period to be determined by the Supervisory Authority.

Another drafting suggestion is to add the word "reasonable" before "costs" in the second line of paragraph 2 of Article XVIII: users of the system should not have to pay for unreasonable or frivolous items purchased by the Registrar, for improperly allocated overhead expenses etc.

Thus, putting these points together yields a revised paragraph 2 of Article XVIII that would read:

"The fees referred to in the preceding paragraph shall be set so as to recover the reasonable costs of establishing and implementing (amortized over 10 years) and operating the International Registry. The reasonable costs of the Secretariat of the Supervisory Authority shall also be reimbursed out of such fees, at the time and in the amount as determined by the Supervisory Authority."

Transactional savings. With respect to possible transactional savings (for those now using a national registry) from the implementation of an international registry, the Association of American Railroads has looked into this issue and concluded that there may be no such savings for the users of existing North American registries. While there may be savings realized by parties no longer having to file in national registries, these savings, according to the AAR, may be more than offset by possible increases in fees for the remaining services that these national registries will need to continue performing. The AAR also concluded that there may be no savings with respect to searches and legal opinions because prudent investors may still feel compelled to check the national registries even after the international registry is in place.

Services. With respect to the services for which fees are to be charged, the present draft Rail Protocol lists those as "registrations, filings and searches". Art. XVIII(1).

As seen with the fee schedule that has been worked out on the aviation side, there are additional services that the Registry will perform. Thus, to cover these services, and thereby reducing the fees charged for registrations, paragraph 1 of Article XVIII could be amended so that after the word "searches" at the end of that paragraph, the words "and other services it may provide" are added.

Start-up costs. With respect to the funding of start-up costs, separate from the on-going costs of the Registry, consideration should be given to any possible assistance that may be provided by the host country. In this regard, it should be noted that on the aviation side, there was always an assumption that the host country would help defray the expenses of setting up the Registry, and in fact that is now the case with Aviareto, receiving assistance from the government of Ireland. Thus, while we do not know if the entity chosen as Registrar will receive such assistance, the Rail Protocol should allow for it. To that end, we may wish to propose that the language in the beginning of Article XVIII(2), with respect to establishment and implementation costs, be made more permissive. For example, it might read: "The fees referred to in the preceding paragraph shall be set so to recover the reasonable costs of operating the International Registry and, if necessary, the reasonable costs of establishing and implementing (amortized over 10 years) the International Registry."

Supervisory Authority's role in changing fees. Another matter for consideration is whether there is a need to clarify the role of the Supervisory Authority in changing the fees. Paragraph 1 of Article XVIII seems to say the Supervisory Authority has discretion to get involved in changing the fees and paragraph 3 says that it must get involved when fees would increase more than 10%. Given the interest in keeping fees low, should the Supervisory Authority need to approve any changes in the fee structure?

How fees are set. A significant factor to consider is how registration fees should be calculated. The simplest method would be to charge a set dollar amount for each item of rolling stock that is registered. A variation on this approach would be to charge a set flat fee by general category of rolling stock. Thus, there could be a fee for flatbed or basic freight cars, another for more sophisticated cars such as refrigerated vehicles and another for locomotives.

Another approach to fees would be to charge a flat fee per transaction. Unlike aviation, rail financings are typically done for hundreds of vehicles at a time. Thus, charging by transaction would be more consistent with existing financing practices. However, such an approach would not likely produce significant revenue.

A final alternative would be to charge a fee based on the dollar value of the transaction. In some ways, this might be the fairest approach. However, in transactions that involve thousands of cars, which do take place sometimes in North America, it could produce extremely high fees. This could be dealt with by imposing a maximum fee per transaction. A more significant problem with this approach, however, is that the dollar value of transactions may not be a matter of public record in all countries. If this were the case, this would not be a feasible approach.

The fee structure for searches, amendments etc must also be determined. Arguably, the method chosen for registrations would also be used for other services provided by the Registrar. However, if a more complex method is used for registrations, there may be a desire to use a simpler approach for the other Registrar services.

Cap the rate of return for a private Registrar. Another issue to consider is whether, if the Registrar is a private entity, a cap should be placed on the rate of return it can realize. The notion here is that if fees far exceed expectations, the Registrar should not, at least on a longer-term basis, realize a windfall. However, this issue may adequately be dealt with through the Supervisory Authority's supervision of the fee structure.

Help desk. Also to be considered is the type of help desk to be provided. On the aviation side, there will be a 24/7 help desk with English, French and Spanish available. This is seen as one of the more expensive items in the Aviation Registry's budget. Unfortunately, it is hard to see how to get around this type of help desk. Transactions can be done virtually anywhere in the world, so it is hard to see what part of a day not to make the help desk available. Savings could be realized by having fewer languages, but that could significantly undermine the rationale for, and reduce the utility of, a help desk

Insurance. A final issue relates to insurance. As seen in the aviation context, this can be a very significant part of the Registry's expenses. In the aftermath of September 11, the insurance market remains skittish and the available underwriting pools limited. It would therefore seem prudent to give the Supervisory Authority the maximum discretion in deciding what insurance to obtain. Therefore, we might recommend that paragraph 4 of Article XVII be amended to read:

“The amount of insurance or financial guarantee referred to in Article 28(4) of the Convention shall be determined by the Supervisory Authority.”

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