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**OTIF**



**ORGANISATION INTERGOUVERNEMENTALE  
POUR LES TRANSPORTS INTERNATIONAUX  
FERROVIAIRES**

**ZWISCHENSTAATLICHE ORGANISATION FÜR  
DEN INTERNATIONALEN EISENBAHNVERKEHR**

**INTERGOVERNMENTAL ORGANISATION FOR  
INTERNATIONAL CARRIAGE BY RAIL**



**INTERNATIONAL INSTITUTE FOR THE  
UNIFICATION OF PRIVATE LAW**

**INSTITUT INTERNATIONAL POUR L'UNIFICATION  
DU DROIT PRIVE**

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

**Third Joint Session**

**(Berne, 5 - 13 May 2003)**

**REPORT**

(prepared by the Secretariats of OTIF and UNIDROIT)

Berne, June 2003

Rome, June 2003

## **OPENING**

The third session of the Joint OTIF/UNIDROIT Committee of governmental experts (hereinafter referred to as the “Joint 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 was attended by 41 delegates, representing 25 States, and by four Organisations<sup>1</sup> (see Attachment A for the list of participants).

The session was opened on 5 May 2003 by the Director General, Mr. Hans Rudolf Isliker, on behalf of OTIF, and by Prof. Herbert Kronke, Secretary-General, on behalf of UNIDROIT.

Ms Inès M. Weinberg de Roca (Argentina) chaired the first week of the third session of the Joint Committee of governmental experts and Mr Antti T. Leinonen (Finland), Deputy Chairman, chaired the meeting on 12 and 13 May 2003. The *Rapporteur* was Sir Roy Goode (United Kingdom) and the Chairman of the Drafting Committee was Mr. Karl F. Kreuzer (Germany). The Rail Registry Task Force was co-chaired by Mr. Peter Bloch (USA) and Mr. Henrik Kjellin (Sweden), who was elected at this meeting.

The representatives of the Joint Secretariat emphasised the importance as a secure basis for the private funding of railway rolling stock of the Convention on International Interests in Mobile Equipment (Cape Town Convention, hereinafter referred to as “the Convention”), which was signed on 16 November 2001, and of the Rail Protocol, the preliminary draft of which was to be discussed at this meeting. They reported on further developments since the second session of the Joint Committee of governmental experts (Rome, 17 – 19 June 2002) and referred in particular to the Convention having been signed by more States and to preparations for ratification in some States. They also mentioned publication of the official commentary on the Convention and the Protocol on Matters Specific to Aircraft Equipment (hereinafter referred to as “the Aircraft Protocol”) written by Sir Roy Goode. They noted that States from almost every continent were signatories to the Convention.

The representatives of the Joint Secretariat also informed the meeting about the outcome of the 2<sup>nd</sup> session of the Drafting Committee (Rome, 23 – 25 October 2002) and the 2<sup>nd</sup> session of the Rail Registry Task Force (Washington, 19 – 20 March 2003). They expressed regret that participation at the meeting in Washington had not been sufficiently representative.

## **BASIC WORKING DOCUMENTS**

The main working document for the third session of the Joint Committee of governmental experts was the preliminary draft Protocol on Matters specific to Railway Rolling Stock OTIF/JGR/6 – UNIDROIT 2002 Study LXXIIH - Doc. 8, November 2002 (hereinafter referred to as “the preliminary draft Rail Protocol, Doc. 8”). This document sets out the result of the second session of the Joint Committee of governmental experts as revised by the Drafting Committee.

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<sup>1</sup> The European Community, represented by the European Commission, the Association of American Railroads (AAR), the Rail Working Group and the International Rail Transport Committee (CIT).

The following documents were also on the table at the Joint Committee of governmental experts:

- OTIF/JGR/7 – UNIDROIT 2003 Study LXXIIH - Doc. 9 – Changes proposed by the Rail Working Group, March 2003 (hereinafter referred to as “Document 9”)
- OTIF/JGR/8 – UNIDROIT 2003 Study LXXIIH - Doc. 10 – Report of the Rail Registry Task Force meeting held in Washington on 19/20.3.2003, April 2003 (hereinafter referred to as “Document 10”)
- OTIF/JGR/9 – UNIDROIT 2003 Study LXXIIH - Doc. 11 – Observations presented by the Austrian Federal Ministry of Justice, April 2003 (hereinafter referred to as “Document 11”).

At the end of the session, the version of the preliminary draft Rail Protocol resulting from this session, to which the Drafting Committee subsequently made some minor amendments, was made available to participating delegations (see document OTIF/JGR/12 UNIDROIT 2003 Study LXXIIH – Doc. 14, hereinafter referred to as “the preliminary draft Rail Protocol, Doc. 14”).

**AGENDA ITEM 1: ADOPTION OF THE AGENDA**

The Joint Committee of governmental experts adopted the provisional agenda dated 31 January 2003 (see Attachment B).

**AGENDA ITEM 2: FURTHER EXAMINATION OF THE PRELIMINARY DRAFT PROTOCOL ON MATTERS SPECIFIC TO RAILWAY ROLLING STOCK**

**General remarks**

The *Rapporteur* reminded the meeting of some of the features of the system adopted by the Diplomatic Conference in Cape Town for facilitating the funding of high value, mobile equipment. The aim of the system was basically to ensure the creation of international interests in the simplest form possible, and to enable matters to proceed as quickly as possibly in the event of insolvency measures being taken. He pointed out that

- the Convention enters into force subject to the terms of each of the Protocols in relation to the objects covered by the Protocols, and
- in several places, the Convention and the Rail Protocol provide for declarations, which give the Contracting States the opportunity of making a choice (opt in/opt out). This applies, among other things, to the creditor’s rights in the event of insolvency. For this important point, Contracting States could choose between three variations.

The *Chairman of the Drafting Committee* mentioned some provisions that had already been revised to which further thought would have to be given. In addition to those concerning insolvency measures, the provisions in question were, among others, those relating to the problem of the unique identification criteria, short term leasing and public service railway rolling stock. He also referred to the introductory remarks on the preliminary draft Rail Protocol, Doc. 8 (item 8). He also noted that the proposals in Documents 9 and 10 had not been incorporated as they had not been available to the Drafting Committee at its second session.

## **CHAPTER I – GENERAL PROVISIONS**

### **Article I(2) – Defined terms**

The Joint Committee of governmental experts first decided to defer discussion on **(a)** (“autonomous registry authority”) until a decision of principle had been taken on the registration system.

Following adoption of a new proposal from the Rail Registry Task Force concerning Article XIII, the definition of “autonomous registry authority” was no longer needed.

Under **(b)** (“identification criteria”), the question was first discussed as to whether the identification criteria should be set down directly in a definition or whether this should be left up to the Supervisory Authority.

The *Chairman of the Drafting Committee* reminded the meeting that the definition in the preliminary draft Rail Protocol, Doc. 8 was a decision of the second session of the Joint Committee of governmental experts, according to which the then subparagraph (iii) under (k) (“such identification criteria as are prescribed or approved by the Supervisory Authority...”) was the most important element of the definition. The Joint Committee of governmental experts was however aware that this definition also depended on the final decisions concerning the registration system.

The *Rail Working Group Coordinator* pointed out firstly the close connection between this definition and Article V and secondly the proposals for amendments drafted by the Rail Registry Task Force at the meeting in Washington (see Attachments C and D to Doc. 10).

In the ensuing discussion between four of the delegations, the Rapporteur and an observer, the following views were expressed:

- it would have to be made clear that the main purpose of this provision was more to make possible the identification of and search for objects within the International Register than to enable them to be physically identified, although covering both these aims in a regulation was not ruled out. But in any case, there would have to be a link between each of the national identification numbers and the identification criterion in the International Register;

- it must be borne in mind that introducing a criterion that derogated from each national system of identification had cost implications;
- it was not absolutely necessary that the number allocated from the international registration system be shown on the vehicle, as the purpose of this number was simply to make it possible to search the Register and find international interests registered in it quickly;
- the identification criteria could either be set out in a definition or in Article V.

The Joint Committee of governmental experts upheld the principle that it was incumbent upon the Supervisory Authority to establish identification criteria; however, care must be taken to ensure that the national or regional identification systems used at present could also be used as the unique identification for the purposes of the International Register.

Following adoption of the newly worded Article V, in which this principle was given expression, the definition of “identification criteria” was deleted.

In the discussion on (c) (“designated entity”), the Chairman pointed out that the Rail Registry Task Force had proposed to delete this definition (see Doc. 10).

The *Rail Working Group Coordinator* explained that this proposal was related to the majority of the Rail Registry Task Force having declared themselves in favour of the option of a self-governing regional register (see Attachment C to Doc. 10).

The *Rapporteur* and one delegation thought this provision could be considered separately from the political question of the relationship between the Supervisory Authority and the regional registry authority. It had no effect on the position of the regional registry authority.

The Joint Committee of governmental experts shared this view and maintained this provision for the time being. The Committee came back to this in the discussion on Chapter III and decided in the end to delete this definition.

After the *Rapporteur* had, in conjunction with Article IX, clarified (d) (“insolvency-related event”, new (c)) and (f) (“primary insolvency jurisdiction”, new (d)), these provisions were retained without amendment.

(e) (“local personal property register”) was first deferred and in the end – following adoption of the provisions concerning the Registry (Articles XIII and XIII<sub>bis</sub>) – was deleted.

(g) (“public service rolling stock”, new (e)) was deferred until Article XXII was discussed.

In the discussion on Article XXII<sub>bis</sub>, one delegation pointed out that the definition was too far-reaching. It was true that in addition to maintaining scheduled public passenger transport, other public interests had to be taken into account, e.g. military transport operations or those involving radioactive material. However, the railway rolling stock used for these purposes was not to be relieved from applying the Convention indefinitely, but only for the

period during which it was being used for these special purposes. These other purposes could be taken into account in Article XXII<sup>bis</sup>, while the definition should be limited to those vehicles used for scheduled public passenger transport.

Another delegation supported the proposal to tighten up the wording of the definition and to limit it only to railway rolling stock used in scheduled passenger transport. The Joint Committee of governmental experts adopted this proposal.

With regard to (h) (“railway vehicle”, new (f)), the *Rapporteur* and the *Rail Working Group Coordinator* referred to Document 9, where it was proposed firstly to make the definition more precise by prescribing a minimum weight and secondly to entitle the Supervisory Authority to exclude railway rolling stock not being used for commercial purposes.

A representative of the Joint Secretariat and one delegation did not consider the proposed clarification necessary.

Another delegation instead proposed an editorial simplification (deletion of the words “or confined to movement”).

The Joint Committee of governmental experts referred the simplified wording to the Drafting Committee and forwent the clarification.

(i) (“railway rolling stock”) was maintained without amendment, apart from a minor editorial correction.

Because of the connection with the registration system, the wording of (j) (“self-contained rail network area”) was referred to the Rail Registry Task Force. As a result of the newly worded Registry provisions (Articles XIII and XIII<sup>bis</sup>), (j) was then deleted.

Following a decision on Article VII, paragraph 4, two new definitions, **new (a)** (“guarantee contract”) and **new (b)** (“guarantor”) proved to be necessary.

## **Article II – Application of Convention as regards railway rolling stock**

The wording was maintained without amendment.

## **Article III – Derogation**

After a brief discussion, the proposal in Document 11 was modified in so far as Austria no longer wished Article VI to be made a mandatory provision. The *Rapporteur* made clear that on the one hand Contracting States were free to make a declaration in accordance with Article VI, paragraph 1, or not, and on the other, if a Contracting State had made such a declaration, the Contracting Parties were free to agree on the law to be applied (Art. VI, paragraph 2).

The Joint Committee of governmental experts followed Austria's proposal in as much as it designated Article VII, paras. 2<sup>2</sup> and 3<sup>3</sup> as provisions the Contracting Parties could not derogate from.

#### **Article IV – Representative capacities**

In reply to the questions posed by three delegations, the *Rapporteur* explained the purpose of this provision: it would make it possible for such persons who were not creditors, but who represented creditors, to register international interests and also, if necessary, to file an action. He confirmed that this provision did in fact relate not only to the registration of international interests in accordance with Chapter III, but also to the assertion of rights that were regulated in Chapter II. This invalidated the proposal contained in footnote 10 of the preliminary draft Rail Protocol, Doc. 8 (move to Chapter III). The discussion revealed that the provision needed editorial adjustments to avoid misunderstandings. Two delegations wanted it to be clarified to the effect that conclusion of a contract and registration or assertion of rights are performed on behalf of the creditor; in addition, this should all be covered in a single sentence, as the beginning of the second sentence ("In such case") could be misunderstood.

The Joint Committee of governmental experts adopted the Article with the amendments proposed.

#### **Article V – Identification and description of railway rolling stock**

The *Rapporteur* explained the provision and in so doing drew attention to some unresolved questions, e.g. whether railway rolling stock could be altered and its description changed with or without the creditor's agreement, and the problem that no penalty was prescribed in the event of a change of location (railway rolling stock moving out of a self-contained rail network area) and the corresponding identification criterion for the new location not being communicated.

A representative of the Joint Secretariat, the *Chairman* and the *Rail Working Group Coordinator* noted that this provision regulates two main problems which could be discussed separately: identification of railway rolling stock on the one hand and the priority of the interest in the event of the railway rolling stock moving out of a self-contained rail network area on the other. In addition, paragraph 4 referred to modification of the railway rolling stock itself (refurbishment or alteration).

With regard to the question raised by the *Rapporteur*, the *Rail Working Group Coordinator* pointed out that modifications to railway rolling stock (e.g. installation of safety devices) could be imposed by means of a legal act; they could then also be undertaken without the creditor's agreement.

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<sup>2</sup> Subsequently deleted.

<sup>3</sup> Became paragraph 2.

The *Rapporteur* added that this could also lead to problems if a wagon which was the subject of two interests moved between two systems where a different marking was used, e.g. within the European Community, where a uniform vehicle identification was shortly to be introduced, and outside the Community area. It was stressed that the creditor's rights must not be prejudiced in the event of a new identification number being allocated for physical identification. It therefore seemed sensible in such case to create a link to the original number.

The interrupted discussion on Article I, paragraph 2 (b) (old) concerning the identification criteria was taken up again. The Chairman summarised the position thus far: the Joint Committee of governmental experts had agreed that the Supervisory Authority would be responsible for determining the identification criteria. But account would have to be taken of the approach used by States who already had systems for registering interests in railway rolling stock that were up and running and that were based on other criteria, such as the USA, Canada and Mexico. One delegation pointed out that there were also identification marks of a public law nature for other purposes.

An observer informed the meeting that a final decision had not yet been taken within the European Community on uniform vehicle identification. He presented the results of a recently concluded study on this subject. The identification of railway rolling stock had to satisfy different requirements. As it was hardly conceivable that the various requirements could be taken into account by allocating just one number, two numbers could be allocated: a serial number which the manufacturer could affix to the wagon at the outset and which could not be changed, and an operational number allocated when the wagon entered into service and which could, if necessary, be changed, e.g. in the event of re-entering into service following a change of location, or refurbishment. For the purpose of international interests, it would be better to use the first, permanent number.

One delegation shared the view that the Supervisory Authority should use this permanent number as the basis for identifying the railway rolling stock in the Registry. Another delegation proposed having a rule which would prohibit the Supervisory Authority from issuing a new identification criterion for railway rolling stock that already had a fixed number. Another delegation had doubts as to whether this would be enforceable and considered that it would be sufficient if the genealogy of the numbers allocated could be established by consulting the Registry.

With regard to Article V, paragraph 4, the *Rapporteur* made clear that fitting a vehicle with separately funded components for which interests existed should not result in a diminution of the creditor's rights. However, he raised the question of whether a separate provision to cover this was necessary in the Rail Protocol - in contrast to the Aircraft Protocol – especially as Article 29, paragraph 7 of the Convention provided such protection.

The *Rail Working Group Coordinator* also had doubts concerning this separate rule. In future, it was to be expected that the separate funding of components, e.g. engines, could also arise in the case of railway rolling stock, as had been usual in the aviation sector for a long time.

One delegation wondered whether the wording of Article V, paragraph 4 should at least begin with the words "Subject to Article 29, paragraph 7 of the Convention".

In addition, it was noted that there was a link with the registry system (Chapter III) and further discussion of this Article was deferred until this question was dealt with.

In the context of its mandate concerning the registry system, the Rail Registry Task Force drafted a new proposal for the text of Article V. The Task Force's newly elected Co-Chairman outlined the most important elements of this proposal:

- the identification criteria should serve the purpose of identification in the Registry as well as physical identification (para. 1);
- at the time of ratification or accession, each Contracting State may by a declaration state the system of national or regional identification numbers it will use, which will also serve as identification in the International Registry (paras. 2 and 3);
- the Supervisory Authority must ensure that the national and regional identification numbers comply with the requirements of the Convention by reviewing them and by giving the States concerned advice on the measures to be taken (para. 4);
- the Registrar must ensure that all the entries for a particular object can be found under the same identification number and that a link is established between the national/regional identification number and the number allocated in the International Registry (paras. 5 and 6).

One delegation welcomed this proposal as a balanced compromise solution which took account both of the interest in having a unique identification in the International Registry and of the approach of those States with differing national or regional registry systems.

The meeting discussed whether it would be appropriate to refer to the identification "at a certain point in time" in order to make it possible for numbers to be reused, e.g. after a wagon had been taken out of service or transferred to another State.

In reply to a remark from one delegation, the *Co-Chairman of the Rail Registry Task Force* explained why in paragraph 6 of the proposed text, only the debtor was obliged to notify all national or regional identification numbers to the International Registry. The creditor may also notify these numbers to the International Registry, but he was not obliged to do so. In order to make things clear, this could be precisely specified in the wording.

Another delegation considered it particularly important for the functioning of the system that all changes to the identification numbers must be notified to the Registrar, who must enter them in the International Registry. After a brief discussion, three delegations proposed a clarifying addition to paragraph 6.

The question of the consequence of the failure to comply with these duties was also discussed, but no decision was taken in this respect (see preliminary draft Rail Protocol, Doc. 14, footnote 15 of the marked up version or footnote 2 of the clean version).

One delegation advised against using the term "item" in the English version of Article V in another sense (object) than in the Convention (component or accessory). The Drafting Committee examined this suggestion but did not in the end take it into account.

The Joint Committee of governmental experts adopted the new wording of Article V.

## **Article VI – Choice of law**

In reply to a question raised by an observer concerning the relationship with Article XVIII and the priority of the law chosen by the Contracting Parties over the 1980 Rome Convention, the *Rapporteur* confirmed that the law chosen by the parties had to take priority over the Rome Convention, provided that the State concerned or an organisation of the regional economic community has made an opt-in declaration in accordance with Article VI, paragraph 1.

The Joint Committee of governmental experts adopted this Article without amendment.

# **CHAPTER II – DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS**

## **Article VII – Modification of default remedies provisions**

### **Paragraph 1**

Paragraph 1 in square brackets was the subject of a discussion of principle between seven delegations, two observers, the Rapporteur and two representatives of the Joint Secretariat. In response to the question of the aim of and necessity for this provision, for which there was no equivalent in the Aircraft Protocol, it was argued that the transfer/return of objects for which interests exist were not subject to the same difficulties in aviation as they were in the rail sector: railway rolling stock might also travel on another network's railway infrastructure and in so doing, this might affect the rights of third parties. For this reason, the Joint Committee of governmental experts had argued in favour of allowing the transfer of railway rolling stock only on the basis of a court order.

In the discussion on this, the words “where the creditor can move it without the need of traction [or other services or facilities] to be provided by the defaulting debtor ...” were called into question. In addition, the meeting considered whether restrictions should be introduced where, e.g., transfer would only be provided for between neighbouring regions. It was pointed out by an observer that the rule concerning the place of jurisdiction contained in paragraph 1 would be counter to European Community law.

It was concluded from the discussion that paragraph 1, if needed at all, should be worded more generally and the rule concerning the place of jurisdiction should be dispensed with. An informal working group was set up under the chairmanship of Sweden to review the need for this provision in the light of the existing provisions in the Convention concerning default remedies and to draft a new version if necessary.

After the working group had met, its Chairman set out the most important elements of the new wording:

- court order in accordance with Chapter III of the Convention as the basis for the measures to be taken, irrespective of whether a State has chosen the option in accordance with Article VIII, paragraph 1;
- the creditor is authorised to take possession, custody or control of the object.

There was repeated discussion on the question as to whether the new wording should refer to Chapter III as a whole, to Article 8 only or to other provisions of the Convention if need be. In particular, the reference to Article 13, which covers relief pending final determination, was called into doubt. Moving this provision to Article VIII was mentioned, but the discussion revealed that the matter was not just one of systematic sequence.

The Joint Committee of governmental experts therefore preferred to leave the working group's newly worded provision, including the contentious reference in Article VII (see preliminary draft Rail Protocol, Doc. 14, footnote 17 of the marked up version or footnote 3 of the clean version).

## **Paragraph 2**

The *Rapporteur* raised the question of whether the newly worded paragraph 1 would have any bearing on paragraph 2.

Two delegations noted that paragraph 1 did not now regulate any particular default remedy, it merely made it possible to take existing measures more efficiently. In the view of the first delegation, paragraph 1 would therefore have to be adapted. The second delegation's view was that paragraph 2 was henceforth redundant. In its decision, the court would in any case have to take into account any existing priority rights of third parties.

The Joint Committee of governmental experts decided to delete paragraph 2.

## **Paragraph 4**

With regard to paragraph 4, the Joint Committee of governmental experts decided to align the wording with the Aircraft Protocol, i.e. to retain the words "or a guarantor" without the square brackets. This decision resulted in the inclusion of the definitions of "guarantee contract" and "guarantor" in new Article I (a) and (b) (see p. 5).

## **Article VIII – Modification of provisions regarding relief pending final determination**

### **Paragraph 1 (new paragraph 2)**

The *Rapporteur* and the *Chairman of the Drafting Committee* raised the matters still to be resolved, including especially the question as to whether and in respect of which paragraphs of this Article an opt-out declaration should be permitted.

In a discussion between four delegations, the Rapporteur and an observer, it was explained that this provision, which derogates from the Aircraft Protocol, was aimed at strengthening the creditor's position; this was in contrast to numerous national laws which tended more to provide protection for the debtor. Although one delegation expressed doubts, no amendment was proposed and the paragraph was left unchanged.

### **Paragraph 2**

Two delegations pointed out that the "normal maintenance" referred to specifically in paragraph 2 came from Article 13, paragraph 1(a) of the Convention ("preservation of the object and its value") and was therefore unnecessary.

The Joint Committee of governmental experts decided to delete this paragraph.

### **Paragraph 3**

One delegation observed that setting a period of 60 calendar days for the courts to come to a decision would create constitutional difficulties. The delegation proposed to take a lead from Article X, paragraph 2 of the Aircraft Protocol; this would mean that this period would be set out in a declaration of the individual Contracting State. Another delegation supported this proposal.

With respect to a remark made by one observer, who emphasised the need for rapid judicial relief for the creditor, a delegation replied that it would be counterproductive to set down a standard period in the Rail Protocol while paragraph 7 made an opt-out declaration possible. Relief for the creditor would be weakened if a lot of States were to make use of this possibility.

Two delegations underlined that it was right to state the period in calendar days rather than work days, in contrast to the Aircraft Protocol. They also proposed a compromise solution according to which the period should be 60 calendar days or a period of time to be specified in the relevant State's declaration.

After the Joint Committee of governmental experts had followed the Aircraft Protocol with regard to the following paragraphs (opt-in instead of opt-out), it also followed the Aircraft Protocol in respect of paragraph 3, in so far as the period should be given in the relevant State's declaration. In contrast to the Aircraft Protocol though, this period must be specified in calendar days.

### **Paragraphs 4 and 5**

Two delegations recalled the difficult discussion in respect of the Aircraft Protocol on the question of whether sale should be allowed as relief "pending final determination". As a result of strong opposition from some delegations, an opt-in possibility had proved necessary. The two delegations proposed taking this solution as a basis.

The Joint Committee of governmental experts followed this proposal and decided to make provision for an opt-in declaration for the whole of Article VIII in a new paragraph 1 which would be based on the model of the Aircraft Protocol.

#### **Paragraph 6**

In reply to a question raised by an observer, the *Rapporteur* made clear that this paragraph, which was also the subject of the possibility of an opt-in declaration, in no way called into question application of the European Community's instruments concerning the insolvency procedure.

The Joint Committee of governmental experts retained the paragraph without amendment.

#### **Paragraph 7**

Paragraph 7, which provided the possibility of an opt-out, had to be deleted in accordance with the decision already taken concerning an opt-in declaration (new paragraph 1).

### **Article IX – Remedies on insolvency**

The *Rapporteur* presented the three Alternatives A, B and C, and summarised the reasons that had led at the second session of the Joint Committee of governmental experts to the inclusion of a new Alternative C as a "middle way" in addition to the "hard" Alternative A and the "soft" Alternative B, in contrast to the Aircraft Protocol. The *Rail Working Group Coordinator* added that the aim of this last alternative was to balance the interests of the creditor and the debtor.

One delegation emphasised that it was also a matter of taking account of the public interest through the State obtaining the relevant information before the railway rolling stock was sold. Only Alternative C ensured that this would happen.

One observer also considered that Alternative C was the only acceptable solution. Two other delegations supported this view.

The *Chairman* therefore asked whether Alternative A could be dispensed with.

Three delegations warned against restricting the flexibility offered. Alternative A had to be retained in the interest of the industry.

The Joint Committee of governmental experts stood by this view and maintained the concept of the three alternatives with the possibility of an opt-in. The *Rapporteur* stressed that in each case, only one full alternative could be selected.

One delegation raised the question of the application of this Article in the event that the State having the primary insolvency jurisdiction chose a different alternative to the State in which the railway rolling stock was located. The *Rapporteur* explained that in such a case, only the alternative chosen by the State having the primary insolvency jurisdiction was to be applied. Any measures on the territory of another State were dependent upon the courts co-operating in accordance with Article X. He later also referred to the new Article XXIII-*bis*, paragraph 3, according to which the State has to declare which types of insolvency proceedings it will apply each alternative to. A brief discussion revealed that even taking this new Article into account, the effects of such a combination could not be considered completely to clarify the legal situation of railway rolling stock (see preliminary draft Rail Protocol, Doc. 14, footnote 22 of the marked up version or footnote 4 of the clean version).

### **Alternative A**

To answer a question raised by one delegation, the *Rapporteur* confirmed that the period in accordance with paragraph 2 could either be specified in an agreement between the Contracting Parties or in general law, depending on the circumstances of the case.

Three delegations supported the Drafting Committee's proposal to delete paragraph 4 (see preliminary draft Rail Protocol, Doc. 8, footnote 22). The Joint Committee of governmental experts adopted this proposal and retained the wording of this alternative.

### **Alternative B**

The wording of this Alternative was retained without amendment.

### **Alternative C**

Apart from an editorial improvement (alignment with the wording of Alternatives A and B), paragraphs 2 and 3 were maintained.

New wording based on Article VIII, paragraph 3 was adopted for paragraph 4.

The remaining paragraphs up to paragraph 12 were maintained, although the wording of paragraph 7 was brought into line with paragraph 2 by making reference to the related transaction documents in addition to the agreement.

Four delegations took part in a discussion on paragraph 13 which covered firstly the subsidiary rule concerning the duration of the cure period and secondly the systematic categorisation of this provision as a definition. The Drafting Committee reviewed the suggestions that arose from this discussion. Following adoption of the new Article XXII~~bis~~, the second sentence of paragraph 13 was deleted, as the State which has chosen Alternative C must specify the duration of the cure period in its declaration; a subsidiary rule therefore became superfluous. The Joint Committee of governmental experts endorsed the Drafting Committee's decision to leave the definition of the cure period here, as the term was only used once and then only in this Article (see preliminary draft Rail Protocol, Doc. 14, footnote 30 of the marked up version or footnote 5 of the clean version).

## **Article X – Insolvency assistance**

In the outcome of a discussion between five delegations and an observer, the decision on this Article taken at the second session of the Joint Committee of governmental experts to declare a willingness to co-operate without making provision for an opt-in possibility was called into question. Such a derogation from the Aircraft Protocol was not considered proper.

One delegation maintained that Article X only applied if the State concerned had chosen one of the options in accordance with Article IX; but it did not apply if the State concerned had not made a declaration in accordance with Article IX, paragraph 1, i.e. if the State had not chosen any of the Alternatives A, B or C. This must be made clear in the wording.

The Joint Committee of governmental experts adopted the suitably amended wording.

## **Article Xbis – Modification of assignment provisions**

Following the *Rapporteur's* explanations, this Article was maintained without amendment.

## **Article Xter – Debtor provisions**

The wording of paragraphs 1 and 4 taken from the Aircraft Protocol was uncontentious, but the discussion was focussed on paragraphs 2 and 3 in square brackets. The *Rail Working Group Coordinator* said these paragraphs were necessary because railway rolling stock was continuously moving across borders and short term leasing contracts were common practice. This meant there was a need to protect the short term lessee who is not in default. In sub-leasing for example, the situation could arise where the main leasing contract expired earlier than the short term leasing contract under which the lessee has passed the vehicle on to a sub-lessee. In such cases, the sub-lessee's claim to quiet possession and use of the railway rolling stock – in respect of the creditor in accordance with the main contract – should be ensured for a certain period of time. In the Railway Working Group's view, a period of 60 days was suitable for this. According to the *Rail Working Group Coordinator*, the purpose of paragraphs 2 and 3 was to protect a person who, according to the Convention, would have no protection.

Some delegations were of the view that the wording of paragraphs 2 and 3 did not express this purpose quite clearly enough. Also, it was not clear whether only bilateral arrangements or multilateral contract chains should be covered. One delegation was even of the view that such a rule set a false priority and proposed that both paragraphs be deleted.

The Joint Committee of governmental experts decided to delete paragraphs 2 and 3.

## CHAPTER III – RAILWAY ROLLING STOCK REGISTRY PROVISIONS

The *Co-Chairman of the Rail Registry Task Force* introduced his report of the meeting in Washington (see Doc. 10) and dealt with the individual points of the terms of reference the Rail Registry Task Force was given at the second session of the Joint Committee of governmental experts. Particular attention had been paid to the identification criteria and the question of the relationship between a regional registry and the (international) Supervisory Authority. Appropriate texts had been proposed for the options of a regional registry independent of the Supervisory Authority on the one hand and a regional registry dependent upon the Supervisory Authority on the other (see Doc. 10, Attachments C and D), although the majority of the members of the Rail Registry Task Force present in Washington had supported the first option.

Before the Joint Committee of governmental experts took up the discussion on the individual provisions of Chapter III, the Rail Registry Task Force met. The Joint Committee of governmental experts noted with satisfaction that in contrast to the meeting in Washington, additional States from various continents had taken part in the Task Force's meeting. The newly elected Co-Chairman of the Rail Registry Task Force announced that the participants had agreed on two principles in respect of the Registry: it should be universal and asset-based.

### Article XI – The Supervisory Authority and the Registrar

#### Paragraphs 1 to 3

It was recalled that the most important problems surrounding this Article had not been dealt with satisfactorily at the second session of the Joint Committee of governmental experts. Two delegations took up the question of how an organisation of only regional significance, such as OTIF, could perform the function of Supervisory Authority.

A representative of the Joint Secretariat explained that the predecessor organisation of OTIF in the 19<sup>th</sup> century had originally been conceived as global, in the same way as the Universal Postal Union and the Telecommunications Union which were founded at the same time, but it had later developed into a regional organisation, principally in Europe, with additional Member States in North Africa and the Near East. Adoption of the Protocol of 3 June 1999 for the Modification of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 and of the new version of COTIF (COTIF 1999), meant that OTIF's field of activity had been broadened such that it could deal with matters of world-wide interest affecting rail transport, along the lines of the IMO and ICAO models.

In reply to a question raised by one delegation, the representative of the Joint Secretariat explained that the Administrative Committee of OTIF was updated on a continuous basis about the work on the preliminary draft Rail Protocol. However, assuming a new task such as that of Supervisory Authority would in any case require approval by the General Assembly.

There was no dispute that, at present, OTIF was the only competent governmental organisation in the rail sector. The representative of the Joint Secretariat explained that as an international governmental organisation, OTIF enjoyed the usual privileges and immunities. These were regulated in the COTIF Convention and in the Organisation's Headquarters Agreement with Switzerland. In his view, assuming additional tasks should not meet with any difficulties with regard to the immunity necessary in this respect.

Three delegations expressed doubt as to how the interests of those Contracting States that were not Member States of OTIF could be safeguarded if the Supervisory Authority's decisions were made through the organs of OTIF using their internal rules. In their view, another decision-making mechanism would have to be found. Another delegation stressed that it was out of the question for OTIF to assume a supervisory function in relation to States that were not members. Several delegations from the OTIF Member States sympathised with this position.

A representative of the Joint Secretariat agreed with these arguments to the extent that OTIF's assuming this task meant that the exertion of influence by all the Contracting States had to be ensured. Another representative of the Joint Secretariat explained that COTIF 1999 provided for Associate Members. He did however concede that this was not a satisfactory legal solution for Contracting States that were not members of OTIF, since Associate Members would only be able to participate in the organs of OTIF in an advisory capacity.

One delegation emphasised that there had to be a distinction between the decision-making powers on the one hand and supporting Governments in implementing the Supervisory Authority's decisions on the other. For the latter function, only OTIF was suitable. The *Rapporteur* added that for the former function, a new decision-making body with additional members would have to be set up in parallel with the existing organs of OTIF.

In contrast to the Rail Working Group's proposal to form a Council and a Committee of Experts to support the Supervisory Authority (see preliminary draft Rail Protocol, Doc. 8, footnote 29), one delegation thought OTIF could act not as the Supervisory Authority, but as its Secretariat. The Supervisory Authority itself should be formed from a group of the Contracting States.

Some delegations stated that the decision on the Supervisory Authority should be the responsibility of the Diplomatic Conference.

In a discussion, it became clear that supporting the Supervisory Authority by means of a Commission of Experts, which could be set up in accordance with paragraph 3, comprising representatives from a range proposed by the Signatory and Contracting States, was not sufficient. For the time being, it was determined that paragraph 3 should lapse and be replaced by new wording from paragraph 1. The Rail Registry Task Force took on the task of drafting a new text for this provision and for other provisions connected with it, particularly Article V.

After two meetings of the Rail Registry Task Force, its Co-Chairman presented the result. A proposal from the Rail Registry Task Force for a newly worded Article XI, paragraphs 1 to 3 was distributed. It was based on the proposal considered in the general discussion, according to which the function of Supervisory Authority should be performed by

a Council made up of representatives of the Contracting States and OTIF should act as the Secretariat to this Supervisory Authority. The solution that emerged did depart from the Aircraft Protocol, but in the opinion of the Rail Registry Task Force, it made it possible for all the Contracting States to have confidence in the Supervisory Authority. Matters that still have to be resolved, such as the immunity, the headquarters and the Rules of Procedure of the Council, and the funding of OTIF's activities in relation to the Rail Protocol, are referred to in footnotes (see preliminary draft Rail Protocol, Doc. 14, footnotes 33-35 of the marked up version or footnotes 7-9 of the clean version).

The Joint Committee welcomed this proposal and adopted it, although it did not rule out the possibility that the text could be improved from an editorial point of view.

#### **Paragraph 4**

The *Rapporteur* underlined that the difference between alternatives A and B was not just in relation to the duration of the Registrar's mandate (5 or 10 years). The alternatives also differed in their formulation. Alternative A referred to the operation of the Registry which began with the entry into force of the Rail Protocol. In contrast, Alternative B only mentioned the period for which the Registrar was to be appointed. The appointment could be made at the Diplomatic Conference, i.e. before the Protocol entered into force. It should be borne in mind that the Registrar would have to start work even before the Registry came into operation.

Following these explanations, four delegations supported Alternative B.

In contrast to the Aircraft Protocol, upon which Alternative A was modelled, the Joint Committee of governmental experts decided in favour of Alternative B.

#### **Article XII – First Regulations**

Following some explanatory remarks by the *Rapporteur*, this provision was adopted without amendment.

#### **Article XIII – Access to Registry**

##### **Paragraph 1**

Paragraph 1, which is required because of the time difference between the continents, was uncontentious. The focus of the discussion was paragraphs 2 to 5.

##### **Paragraphs 2 to 5**

One delegation reminded the meeting of the Rail Registry Task Force's proposal to delete these paragraphs (see Doc. 10, Attachment C). The *Chairman of the Drafting Committee* drew attention to the fact that this proposal formed part of the proposals for amendment drafted by the Rail Registry Task Force at its meeting in Washington, which had to be discussed in its entirety.

In a discussion on paragraph 2, it was explained that the problem of national or regional entry points and the problem of regional registry systems should be kept separate. The *Chairman of the Drafting Committee* furthermore proposed that in regulating national or local entry points, which could, incidentally, exist independently of a national or regional registry system, Article XIX of the Aircraft Protocol should be taken as a guide.

In view of the task assigned to the Rail Registry Task Force in connection with Article XI, the Joint Committee of governmental experts decided that Article XIII should be revised in a meeting of the Rail Registry Task Force to be held separately from the plenary, as was the case for Articles V and XI.

After this had been done, the Co-Chairman of the Rail Registry Task Force presented the outcome. The new proposal was also based on the assumption that only paragraph 1 was to be retained and paragraphs 2 to 5 were to be deleted.

This proposal was welcomed by an observer, especially as paragraphs 2 to 5 would relate to other regulatory subjects that paragraph 1; in so far as these needed to be regulated, they should be covered in another provision.

The Joint Committee of governmental experts decided to cover only the time aspect of access to the Registry (24 hours every day) in Article XIII. The entry points designated by the Contracting States should in contrast be covered in a new Article XIII-*bis*. |

### **Article XIII***bis*** – Designated entry points**

The Rail Registry Task Force first introduced a proposed text with the heading “Local Access to Registry” which retained some elements of the former Article XIII (paragraph 3 (b)). However, after a brief discussion, the Task Force circulated a simplified version based largely on Article XIX of the Aircraft Protocol.

The Joint Committee of governmental experts adopted this second proposal.

### **Article XIV – Autonomous Transnational Registries**

The Joint Committee of governmental experts decided to delete this provision in accordance with the new compromise proposal from the Rail Registry Task Force concerning Articles V and XI.

### **Article XV – Additional Modifications to Registry provisions**

#### **Paragraph 1**

The Co-Chairman of the Rail Registry Task Force explained that paragraph 1 was superfluous as a result of the new wording of Article V. One delegation doubted whether the

lexicon showing the different descriptions prescribed in paragraph 1 could be dispensed with, and asked which other sources there were from which the equivalent descriptions could be ascertained. In a discussion, it was made clear that this was not a matter concerning the creditor, but rather concerning a third person interested in such information. The doubts about deleting paragraph 1 could be eliminated by referring to Article V, paragraph 6: this provision ensured that all the national or regional identification numbers are specified when an entry is made, where a Contracting States uses a system of national or regional identification numbers for the purposes of the International Register in accordance with a declaration.

The Joint Committee of governmental experts decided to delete paragraph 1.

## **Paragraphs 2 to 4**

One delegation suggested a clarification with regard to the search criteria in paragraph 2. It should be made clear that the Supervisory Authority was to establish the search criteria in the Registry Regulations. In addition, paragraph 2 and paragraphs 3 and 4 were retained without amendment.

## **Paragraph 5**

The *Rapporteur* and two delegations queried the rule in paragraph 5 concerning the liability of the Registrar and considered the rule in Article 28, paragraph 1 of the Convention to be sufficient. They pointed out that the term “consequential loss” was interpreted differently in various legal systems and could lead to disputes.

Another delegation noted that the Convention did not prescribe any liability for an error made by a designated point. The *Rapporteur* confirmed this and added that the national law in each case was authoritative. As the national entry points did not form a component of the international registration system, there was no need to regulate them either in the Convention or in the Protocol.

The Joint Committee of governmental experts decided to delete paragraph 5.

## **Paragraphs 6 and 7**

There was a discussion on the question of whether it was correct to follow the Aircraft Protocol (Art. XX, paragraph 5) in the wording of paragraph 6, and to limit the amount of insurance to the maximum value of one object only. While it was rather unlikely in the aviation sector that more than one aircraft objects could be affected by an incident, it was conceivable in the rail sector that, for example, an entire train composition could be affected by incorrect entries.

The Joint Committee of governmental experts noted that more consideration would need to be given to this point. The words “of an item” were therefore put in square brackets. Paragraphs 6 and 7 were adopted without amendment.

## **Article XVI – International Registry fees**

The discussion initiated by the *Rapporteur* showed that in some respects, the current wording was unclear and – apart from the consequences of deleting Article XIV – needed some adapting.

### **Paragraph 1**

Two delegations proposed to merge (a) and (b) in paragraph 1 and to delete (c). They shared the Rapporteur's view that the annual fees for operating and administering the International Register were unnecessary, since the fees to be levied against users served the same purpose.

The Joint Committee of governmental experts followed these proposals and adopted the amended wording of paragraph 1.

### **Paragraph 2**

The Chairman summarised the uncontentious amendments needed in paragraph 2 as a consequence of the decisions on paragraph 1 and the deletion of Article XIV. With regard to the effects of the new wording of Article XI, it was clear that the Secretariat of the Supervisory Authority would have to be mentioned in connection with the fees.

### **Paragraph 3**

In paragraph 3, the second and third sentences were deleted following a suggestion from the *Rapporteur* which was endorsed by a delegation.

## **CHAPTER IV – JURISDICTION**

## **Article XVII – Waivers of sovereign immunity**

There was no discussion on this provision, which was adopted without amendment.

## **CHAPTER V – RELATIONSHIP WITH OTHER CONVENTIONS**

## **Article XVIII – Relationship with other Conventions**

A representative of the Joint Secretariat pointed out that this provision already needed to be updated and it might need to be adapted again before the Diplomatic Conference. One observer added that developments were underway in those European Union's instruments referred to in this provision concerning insolvency proceedings and the competence of the courts and the recognition and enforcement of decisions in civil and commercial matters.

Another representative of the Joint Secretariat explained why it had to be stipulated that the Cape Town Convention and the Rail Protocol take precedence over COTIF: COTIF still contained a provision (Art. 12 § 5 of COTIF 1999) prohibiting railway vehicles from being seized in a State other than that in which the keeper has its registered office. This prohibition could stand in the way of the measures prescribed in the Cape Town Convention and the Rail Protocol.

The Joint Committee of governmental experts adopted the updated version of this provision (deletion of the 2001 UNCITRAL Convention on assignment of receivables in international trade) with minor editorial amendments. Conventions to which amendments were beginning to become known and which will have to be taken into account later were placed in square brackets.

## **CHAPTER VI – FINAL PROVISIONS**

On a suggestion from the *Rapporteur*, the title of the Chapter was modified by deleting the word “other”.

### **Article XIX – Signature, ratification, acceptance, approval or accession**

There was no discussion on this provision and it was retained without amendment.

### **Article XX – Regional Economic Integration Organisations**

The *Rapporteur* pointed out that it corresponded word for word to Article 28 of the Convention. It was nevertheless a good idea to keep it in the Protocol. Several delegations, including those of States that were not members of the European Community, agreed. The Joint Committee of governmental experts kept this provision.

### **Article XXI – Entry into force**

There was a discussion on the question of how many ratifications were required for entry into force. The figure of three ratifications currently included in the preliminary draft Rail Protocol, Doc. 8, was queried to a certain extent. The following views were expressed in this regard:

- eight ratifications were required for the Aircraft Protocol to enter into force. However, it was not necessary to follow this example, as railway rolling stock, in contrast to aircraft equipment, tended only to move over a geographically limited area;

- keeping the number of ratifications required as low as possible would enable those States that had ratified the Convention and the Protocol to benefit from the secure funding of railway rolling stock rapidly;

- in setting the number of ratifications required, the idea that it can prove useful to divide the burden of the Registry between several States should also be included in the considerations;

- the number did not have to be set yet; the final decision should be up to the Diplomatic Conference.

- However, it would be a good idea to establish a number as a guide, even though the final decision should lay with the Diplomatic Conference.

The Joint Committee of governmental experts decided to maintain the existing text, with the word “third” placed in square brackets.

## **Article XXII – Territorial units**

As a consequence of the earlier decisions, there was no disagreement that there could no longer be any reference to a local personal property register or to an autonomous transnational registry authority. The relevant parts of the text in paragraph 5 (c) were therefore deleted. The remainder of the provision was kept without amendment following the *Rapporteur’s* explanations concerning its consequences and the connection with Article 3 of the Convention.

## **Article XXIIbis – Public service rolling stock**

The discussion on this Article centred on weighing up the interest in protecting the creditor on the one hand and the interest in the ability of public service transport to function on the other.

One delegation emphasised that excluding railway rolling stock from the scope of certain of the creditor’s rights must remain an exception. If the debtor did not fulfil his duties, the creditor had to be in a position to exercise his rights.

The Joint Committee of governmental experts agreed that the Contracting States should be given the opportunity to provide special protection for public service rolling stock; however, the definition of public service rolling stock should not go too far (see Article I, paragraph 2(g)). If a large part of railway rolling stock were given special protection, the value of the Rail Protocol would be diminished.

One observer expressed concern that a declaration in accordance with Article XXII-*bis* could prejudice existing rights (e.g. automatic cancellation of a leasing contract in the event of default). The *Rapporteur* conceded that in the case of public service rolling stock, this could not be ruled out, since public law took precedence over private law. Two representatives of

the Joint Secretariat added that in certain cases, e.g. in the event of confiscation as a result of a court ruling, it was difficult to distinguish clearly between private law and public law.

One delegation was of the view that this provision was superfluous as the State could in any case intervene in matters of private law. Three delegations disagreed. One observer added that in some States, confiscation was unconstitutional.

One delegation stressed that this provision was about railway rolling stock used for two different purposes, the first of which was scheduled passenger services and the second, other transport operations of public importance (military, atomic waste etc.). This should be expressed more clearly.

There was a discussion on the question of which of the creditor's rights the declaration prescribed in this Article should relate to. One observer thought it was sufficient to prevent repossession of the object by the creditor by means of such a declaration; in contrast, ending the leasing contract should not be covered. Some delegations thought it was appropriate to refer to Chapter III of the Convention as a whole. One delegation explained further that in addition, not only must the rights in accordance with Article IX be mentioned, but all the rights set out in Articles VII to X of the Protocol.

In connection with this, consideration was given to whether it would be appropriate to include a general protecting clause for the creditor. The question also arose as to the extent of the possibility for opting in.

Following a discussion in a small informal working group, a delegation circulated a new proposed text and outlined the new elements it contained:

- the opportunity of only partial application of this special provision was expressly provided for, so that States had sufficient room for manoeuvre;
- a clear distinction was made between public scheduled services on the one hand and other public services on the other ((a) and (b));
- a general provision for protecting the creditor was included ((c)).

Four delegations, one observer and the *Rapporteur* welcomed the proposal which in point of fact took account of the comments made in discussion and brought the different approaches into line.

In reply to a question from an observer, the delegation making the proposal explained that in contrast to the original text, the provision as drafted in no way weakened the position of the creditor. On the contrary, it enabled the prohibition on confiscating railway rolling stock that existed in some national laws to be mitigated, for example.

The Joint Committee of governmental experts adopted this proposal with a minor editorial amendment.

## Article XXIII – Transitional provisions

The *Rapporteur* explained that Article 60 of the Convention lays down the principle that pre-existing rights are not affected. Paragraph 3 of Article 60 nonetheless enables the Contracting States to declare that the Convention and the Protocol will become applicable to pre-existing rights from a specific date (not earlier than three years after the date on which the declaration becomes effective). In contrast, Article XXIII of the preliminary draft Rail Protocol, Doc. 8, provides that the Protocol will automatically become applicable to pre-existing rights after expiry of a certain period following its entry into force. The problem of maintaining priority had still to be dealt with.

Three delegations said they were against applying the Protocol automatically to pre-existing rights after a certain period. This would be a derogation from the usual rule in private law. The question arose as to whether this provision could be dispensed with. One observer pointed out the normally long period during which railway rolling stock was in operation; during the long period of validity of an agreement between the debtor and the creditor, it would therefore be desirable to enter all international interests in the Registry by a fixed date, thereby putting an end to the uncertainty present during the transitional period.

Two delegations were of the view that a special rule in the Rail Protocol should not be dispensed with, particularly as Article 60 of the Convention was not worded very clearly and could lead to problems of interpretation. One of these delegations proposed replacing the current text of Article XXIII with a new text clarifying and modifying Article 60 of the Convention (paragraph 2(a) and paragraph 3) in order to take account of the problem of the order of precedence of conflicting rights, conflicting assignments and conflicting assignees.

The Joint Committee of governmental experts adopted this proposal.

## Article XXIIIfis – Declaration relating to certain provisions

In the discussion on Articles VI, VIII, IX and X, it was established that these provisions should be subject to an opt-in. For the time being, no appropriate Article had been drafted (see preliminary draft Rail Protocol, doc. 8, footnote 15). It was also established that Article XXX of the Aircraft Protocol could serve as the basis for such an Article. After the entire text of the Rail Protocol had been discussed, the *Chairman of the Drafting Committee* submitted a proposed text for this Article. The *Rapporteur* explained each paragraph it contained, pointing out the difference between paragraphs 1 and 2: in contrast to Articles VI and X (paragraph 1): a Contracting State may declare in relation to Article VIII that it will apply this Article in whole or in part; in addition the State must notify the period prescribed therein (paragraph 2).

An observer raised the question of the relationship with Article XXV, where Articles VI and VIII were also referred to. This was left open to be looked at later. In view of the parallel with Article XXX of the Aircraft Protocol, there were no concerns in relation to the Article with the wording proposed, which the Joint Committee of governmental experts adopted.

## **Article XXIV – Reservations and declarations**

This Article was adopted without discussion. The Drafting Committee modified the Articles referred to, in the light of the new provisions adopted (see preliminary draft Rail Protocol, Doc. 14).

## **Article XXV – Declarations modifying the Convention or certain provisions thereof**

The *Rapporteur* explained Articles 8 and 13 of the Convention referred to in the first sentence, and their effect. One delegation proposed deleting the first sentence, for which there was no equivalent in the Aircraft Protocol. One observer suggested supplementing the list of Articles in the second sentence of Article 55 of the Convention, according to which declarations are permitted, thereby aligning the text with the Aircraft Protocol. In so doing, he referred to the mandate given to the European Commission concerning the negotiations on the Rail Protocol: it must be ensured that there was a parallel with the Aircraft Protocol.

The Joint Committee of governmental experts adopted both proposals.

## **Articles XXVI to XXX**

These Articles were adopted without discussion.

## **AGENDA ITEM 3: FUTURE WORK**

Several delegations expressed their satisfaction with the good outcome of this meeting. Three representatives of the Joint Secretariat endorsed the view that considerable progress had been made at this meeting.

A representative of the Joint Secretariat nonetheless pointed out that the related work would still take some time. In addition, a certain amount of time would be needed to arouse more interest of States and international organisations and associations in the Rail Protocol. In a range of Contracting States, there was an obvious lack of political pressure to do so. It might therefore be of some benefit to convene another, perhaps shorter Joint Session of governmental experts before the Diplomatic Conference in order to draw in more States. As far as OTIF was concerned, some matters still needed to be resolved in the meantime, e.g. the agreement of the General Assembly to assuming the new task as Secretariat of the Supervisory Authority, the question of immunity in relation to this new task and rules concerning its funding, etc.

Another representative of the Joint Secretariat described this third Joint Session as the most important and productive. At the same time, he thought there was still a lot of work to do.

Regional seminars were to be organised in areas where the most benefit could be obtained from the Convention in relation to railway rolling stock. He reported on seminars that had already been held concerning the Aircraft Protocol in Singapore, Nairobi and Uruguay, which had met with great approval on the part of Governments and the private sector alike.

The Rail Registry Task Force should continue with its activities in order to clarify various points of detail concerning the registry system, e.g. the fee structure.

An economic evaluation of the benefit of this system would have to be carried out as had been done for the aviation sector. This would then help convince those Governments that were hesitating of the merits of the system.

However, it was not appropriate to wait too long before convening a Diplomatic Conference once consensus had been reached. The text of the Rail Protocol had first to be submitted to UNIDROIT's Governing Council and then transmitted to the Diplomatic Conference. This should not be held later than the second half of 2005. The Conference venue was not yet set as no country had yet declared an interest in assuming the role of host country for the Diplomatic Conference.

Eight delegations gave their views on the way forward as outlined by the representatives of the Joint Secretariat. There was no doubt of the need to promote political awareness of the Convention and the Rail Protocol or of the need for the Rail Registry Task Force to continue its work.

Consideration was given as to how to foster the interest of other States that had not yet participated in the meetings. One delegation had noted for example, that up to now, very few States from Central and Eastern Europe had attended. In their view, these States, as well as States in other parts of the world could perhaps be mobilised at a further Joint Meeting of governmental experts if it were held after the regional seminars.

One delegation thought it would be sensible to spare the effort involved in organising a fourth Joint Meeting of governmental experts and to use the resources to achieve the desired acceptance of the Rail Protocol in another way. In addition, this delegation was concerned that what had been achieved could be called into question if there were a further meeting of this sort.

A representative of the Joint Secretariat explained that the next General Assembly of OTIF, which a lot of Central and East European States were expected to attend, could provide a good platform for promoting the Rail Protocol.

One delegation reminded the meeting that despite the good outcome of this meeting, some matters requiring further consideration and on which no final decision had been taken were still outstanding. This delegation was of the view that it would be better to resolve these matters at another Joint Session of governmental experts before a Diplomatic Conference was convened.

In contrast, the majority of delegations who expressed a view thought most of the outstanding matters could be resolved by the Rail Registry Task Force in the meantime, as these matters were more of a technical nature. All the important political questions had been clarified. It would even be possible to deal with some outstanding political questions at a Diplomatic Conference, as the example of the Diplomatic Conference in Cape Town had shown. Nevertheless, most of these delegations were flexible and did not entirely rule out a short additional Joint Session of governmental experts should it prove necessary.

An informal working group summarised in written terms of reference the outstanding questions and tasks the Rail Registry Task Force would have to look at. The Co-Chairman of the Rail Registry Task Force thanked those delegations that had worked on this, and presented the various points of the terms of reference, particularly in respect of Articles V, XI and XVI. After a brief discussion on item 4 concerning any additional regulation provisions, the Joint Committee of governmental experts approved these terms of reference (see Attachment C).

Various States said they were willing to make a contribution to carrying out the tasks listed in the terms of reference, together with the Secretariats:

- Item 1 – Sweden, USA
- Item 2
  - (a) – USA
  - (b) – Canada, OTIF
  - (c) – Germany, UNIDROIT
- Item 3 – Hungary, USA
- Item 4 – Switzerland, OTIF

The Chairman concluded from the views expressed in the discussion that at present, a fourth Joint Session of governmental experts did not seem absolutely necessary. The Diplomatic Conference could therefore already be held next year or in 2005.

One observer appealed in the industry's interest for a Diplomatic Conference to be convened as soon as possible. Bearing in mind the fact that the ratification procedures in the Contracting States would also take up a considerable amount of time, a date in 2004 would be preferable to a later date.

A representative of the Joint Secretariat pointed out that OTIF's assuming the role of Secretariat of the Supervisory Authority was subject to the entry into force of COTIF 1999. At present, the required number of ratifications for it to enter into force was still awaited. The first half of 2005 therefore seemed a more realistic date.

One delegation replied that it was not essential that OTIF satisfy all the formal requirements before the Diplomatic Conference. At the Diplomatic Conference in Cape Town, it had also been uncertain as to whether ICAO would be able to assume the task of Supervisory Authority for the Aircraft Protocol. The Conference had therefore only adopted a resolution containing an offer to ICAO. A similar procedure could be envisaged for the Rail Protocol.

The Joint Committee of governmental experts invited the Secretariats of UNIDROIT and OTIF, working closely together with all interested States and with other interested

organisations to undertake all the necessary preparations for a successful Diplomatic Conference to be held not later than May 2005.

The Secretariats were authorised to make editorial adjustments to the three language versions of the text adopted at this meeting. It was assumed that the Rail Registry Task Force will fulfil its terms of reference in co-operation with the Secretariats.

On the basis of the outcome of this third Joint Session of governmental experts and the further work of the Rail Registry Task Force, the Secretariats will prepare for the Diplomatic Conference the views received up to then from States, organisations and associations.

The Secretariats will check which State will offer to host the Diplomatic Conference.

#### **AGENDA ITEM 4 - ANY OTHER BUSINESS**

The Chairman thanked all the participants for their active co-operation in the work of this meeting and expressed his hope that they could also be counted on in future.

One delegation associated itself with the thanks accorded by another delegation to the Chairman in the first week of the meeting for her exceptionally skilful and prudent handling of the negotiations and thanked the Chairman, who had led the discussions on the last two days of the meeting very efficiently, for his work.

Two representatives of the Joint Secretariat commended the spirit of initiative of the delegations present and congratulated them on the result achieved. They particularly thanked delegations for their readiness to compromise. The excellent work of both Chairmen, the Rail Registry Task Force, the Drafting Committee and the informal working groups set up spontaneously during the meeting had made it possible to achieve rapid progress in the work and the matter in hand. They also thanked the interpreters for their excellent work.

**ATTACHMENT A  
ANNEXE A**

**LIST OF PARTICIPANTS**  
**LISTE DES PARTICIPANTS**

THIRD JOINT SESSION OF THE COMMITTEE OF GOVERNMENTAL EXPERTS – RAIL PROTOCOL /  
TROISIÈME SESSION CONJOINTE DU COMITÉ D’EXPERTS GOUVERNEMENTAUX –  
PROTOCOLE FERROVIAIRE  
(Berne, 5 to 13 May 2003 / Berne, 5 au 13 mai 2003)

**States / Etats**

**Argentina / Argentine**

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Judge, Professor of Private International Law  
University of Buenos Aires; Judge, Court of  
Appeals Administrative Matters  
Buenos Aires  
**Chairperson of the Committee / Présidente  
du Comité**

**Austria / Autriche**

MS BIRGIT WINKLER

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**Director for Civil Law and Legislation**  
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*Vice-Chairperson of the Committee / Vice-  
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## **ATTACHMENT B**

### **AGENDA**

#### **of the third Joint Session of the Committee of governmental experts – Rail Protocol**

(Berne 5 - 13 May 2003)

1. Adoption of the draft agenda
2. Consideration of the preliminary draft Protocol on Matters specific to Railway Rolling Stock (continuation)
3. Future work
4. Any other business.

**ATTACHMENT C**

**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 summarise comments from stakeholders, including manufacturers, operators and lenders, on the operability of the system, and
  - (b) propose any additional measures to the system, including any regulation provisions, with a view of implementing its objectives.
2. In relation to Article XIII:
  - (a) assess, develop and propose any amendments to the draft Article to address issues identified in footnotes to the Article,
  - (b) develop appropriate regulation provisions with a view of implementing the Article, and
  - (c) solicit States or other entities interested in being appointed as the Registrar.
3. In respect of Article XVIII, assess and determine factors to be taken into consideration in the establishment of the fee structure.
4. To develop and propose additional regulation provisions and any other appropriate material necessary for further deliberations.

In performing the tasks set out in 1 to 4 above, the Rail 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 Rail Registry Task Force.