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INTERNATIONALEN EISENBAHNVERKEHR

INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL
CARRIAGE BY RAIL

**DIPLOMATIC CONFERENCE TO ADOPT A
RAIL PROTOCOL TO THE CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE
EQUIPMENT**

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COMMENTS ON THE DRAFT RAIL PROTOCOL

(presented by the Government of the United States of America)

The United States supports the efforts of the many States, organizations and railroad interests that have joined in this project under UNIDROIT and OTIF auspices to enhance global finance of rail equipment as part of the Cape Town Convention system. We have set out the following comments on issues that we wanted to identify at the outset. We expect to submit additional comments on other matters as the discussions progress, including the structure of the Supervisory Authority. We also may have additional suggestions with regard to drafting and/or clarification of provisions.

At the outset we would note that we support generally the concepts of the proposed Supervisory Authority and the Registry system to be established. At the same time, it is highly important to draft provisions on the Supervisory Authority, the Registry and related matters such as identification of rolling stock for purposes of registration so as to recognize already well-functioning regional or subregional rail systems which have established methods of identification and recordation. The Protocol's Registry system will need to establish accepted methods of interface. These methods should be established on the basis of mutual agreement between the Supervisory Authority and each regional system recognized by declaration under Protocol Article V. This approach can achieve reasonable accommodation and also facilitate adoption of the Protocol.

We would also note as a general matter that where provisions have similar import in this Protocol to provisions in the existing aircraft finance Protocol, similar language should be maintained to the maximum extent possible so as to promote harmonization of interpretation, unless a different result is intended.

Our other preliminary comments are as follows:

Article IV (Representative capacities): this Article should apply to debtors as well as creditors so as to reflect actual financing practices.

Article V (Identification of railway rolling stock): as a general matter, the paragraphs of this key provision will need to be reviewed and clarified as to their effect. In particular, (a) a reference to Protocol Article XIX should be added to the reference to Convention Article 7 in paragraph (1); (b) paragraph (1) should be reviewed to ensure that it does not preclude the use of acceptable methods of identification currently used in transaction documents; (c) the last sentence of paragraph (3) should be changed to read “Such a national or regional identification system shall, to the extent and in the manner provided by agreement between such national or regional system and the Supervisory Authority, ensure ...”; (d) Comment No. 3 to Article V, which explains the effect of Article V(5), should clarify that the Supervisory Authority’s capacity to “give advice” does not include the capacity to compel changes in a national or regional identification system without the system’s agreement, and (e) clarify whether the last sentence of paragraph (7) applies only to matters in that paragraph or to other paragraphs of that Article.

Article IX (Remedies on insolvency): we have serious concern that adding another option to this provision, now effectively amounting to four options, will result in loss of harmonization of a critical provision and could result in more States choosing an economically unproductive path.

Article X (Insolvency assistance): substitute “unless precluded by” for “in accordance with” in paragraph 2. Few States have positive law on this matter; thus, adopting the latter formulation is effectively writing the provision out of most cases. Since States do not apply this provision unless they opt-in, there is no good policy reason not to permit those States that wish to upgrade the efficiency of cross-border matters to do so.

Article XIII *et seq.* (Registry provisions): additional comments will be submitted taking into account discussions on this overall structure and proposals that may be made.

Article XVI (Designated entry points): (a) insert “by declaration” after the term “designate” in the first line so as to assure transparency and notice, and (b) delete “but shall not compel” in the penultimate sentence. As was done with respect to the Aircraft Protocol, it may be necessary or desirable for particular countries to have the option of providing a single coordinated entry point to facilitate interface with the Registry system.

Article XVII (Additional modifications): Close paragraph (4) with the words “to be appropriate”, and delete “having regard to”. The Protocol should not set in stone the factors to be considered, since they clearly change as changes take place in insurance capacity, risks, costs to the Registry, and other factors, and may need to be adjusted as a result by the Supervisory Authority.

Article XVIII (International Registry fees): it will be necessary for States parties, the Supervisory Authority, the Registry and the Secretariat to constrain services and costs to the maximum extent so as to limit as far as possible additional cost burdens on railway systems. The purpose of the Convention and this Protocol is to boost availability of key infrastructure equipment at lower costs by introducing asset-based financing concepts.

By relying on a modern electronic registry and “notice-filing” concepts, administrative costs also can be markedly reduced. This should not be compromised by adding back in avoidable system costs. The first sentence of paragraph (2) should be worded so as not to preclude assumption of any portion of the costs of a registry by a host state or others. In addition, the reference to the Supervisory Authority should be deleted. Ratifying States should absorb the cost, if any, of participation by their representatives in functions of the Supervisory Authority. This will parallel the operation of the Supervisory Authority under the Aircraft Protocol.

Article XX (Relationship with other Conventions): this section includes a number of instruments not covered by the Cape Town Convention or the aircraft Protocol. We believe that unless specific conflicts are identified and are also of substantial importance in actual practice for transactions or regulation, such references should be deleted. Thus, references in (a) to (d) and (f) should be reexamined and unless shown to be clearly necessary should be deleted. Paragraphs (e) and (g) appear to be useful to resolve overlap issues. Paragraph (h) refers to a draft convention that has been set aside, which was replaced by the recent Hague Convention on Choice of Court Agreements, which can be examined to ascertain whether reference to it is necessary. We have no opinion on the reference in paragraph (i).

Article XXIII (Entry into force): we recommend substituting six months in place of three, based on experience with the time needed to conclude arrangements for the Registry under the Aircraft Protocol. We also recommend that more than three instruments of ratification be required before the Protocol comes into force (the aircraft Protocol requires eight), in order to amplify the likelihood that there will be a sufficient volume of transactions covered and filings in the Registry so as to amortize costs.

Article XXV (Public service rolling stock): We understand that a revised draft may be presented at the Conference and would welcome discussion on it. It is critical to constrain the reach of such an article so that it does not result in a broad path for excluding enforcement of secured financing rights upon default. Since most rail functions involve either passenger or freight, broadly placing one or both in a protected category can eliminate the benefits otherwise achieved by promoting lower costs for acquisition of rolling stock. In particular, the reference in the current draft to “determined by a competent authority” should be deleted, since under that formulation that can occur after the fact, or in any case in a manner not transparent ex ante, which would eliminate transparency, prior notice, and reliance on that notice, that are key to the financing concepts underlying the draft Protocol.

We appreciate the opportunity to make our concerns available, and look forward to a full exchange of views between participating states, organizations and the representatives of the rail industry. In closing, we would like to recognize and welcome the process initiated by UNIDROIT of bringing together at the concept and drafting tables government interests and industry and commercial sector interests. It is a path that has produced significant achievements over the past decades in the field of international private law.

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