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Execution of the Mandate of the Group

Different options for converting Unified Railway Law into a legally binding instrument including the corresponding management systems

Note by the secretariat

I. Mandate

This document is submitted in line with Cluster 4: Rail transport and Trans-European Railway (TER) Project, para 4.2. of the work programme of the transport subprogramme for 2018-2019 (ECE/TRANS/2018/21/Add.1) as adopted by the Inland Transport Committee on 23 February 2018 (ECE/TRANS/274, para. 123) and the Terms of Reference (ECE/TRANS/2018/13/Rev.1) of the UNECE Group of Experts towards Unified Railway Law as adopted by the Inland Transport Committee on 23 February 2018 (ECE/TRANS/274, para. 69) and by the Executive Committee of ECE.

II. Different options for converting Unified Railway Law into a legally binding instrument

A. United Nations legally binding instruments

1. Terms

(a) Multilateral treaties

1. A multilateral treaty is an international agreement concluded between three or more subjects of international law, each possessing treaty-making capacity.

2. Treaty is a generic term embracing all instruments binding under international law, regardless of their formal designation, concluded between two or more international juridical persons. Thus, treaties may be concluded between:

(a) States;

(b) International organizations with treaty- making capacity and States; or

(c) International organizations with treaty- making capacity.

3. The application of the term treaty, in the generic sense, signifies that the parties intend to create rights and obligations enforceable under international law. Based on the Vienna Convention on the Law of Treaties “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (article 2(1)(a)).

4. Accordingly, conventions, agreements, protocols, and exchange of letters or notes may all constitute treaties. A treaty must be governed by international law and is normally in written form. Although the Vienna Convention 1969 does not apply to non-written agreements, its definition of a treaty states that the absence of writing does not affect the legal force of international agreements. No international rules exist as to when an international instrument should be entitled a treaty. However, usually the term treaty is employed for instruments of some gravity and solemnity.

5. The term “convention” is generally used for formal multilateral treaties with a broad number of parties. Conventions are normally open for participation by the international community as a whole, or by a large number of States. Usually instruments negotiated under the auspices of an international organization are referred to as conventions. The same holds true for instruments adopted by an organ of an international organization.

6. A protocol, in the context of treaty law and practice, has the same legal characteristics as a treaty. The term protocol is often used to describe agreements of a less formal nature than those entitled treaty or convention. Generally, a protocol amends, supplements or clarifies a multilateral treaty. A protocol is normally open to participation by the parties to the parent agreement. However, in recent times States have negotiated a number of protocols that do not follow this principle. The advantage of a protocol is that, while it is linked to the parent agreement, it can focus on a specific aspect of that agreement in greater detail.

(b) Bilateral treaties

7. The majority of treaties registered pursuant to Article 102 of the Charter of the United Nations are bilateral treaties. A bilateral treaty is an international agreement

concluded between two subjects of international law, each possessing treaty-making capacity. In some situations, several States or organizations may join together to form one party. There is no standard form for a bilateral treaty. An essential element of a bilateral treaty is that both parties have reached agreement on its content. Accordingly, reservations and declarations are generally inapplicable to bilateral agreements. However, where the parties to a bilateral treaty have made reservations or declarations, or agreed on some other interpretative document, such instrument must be registered together with the treaty submitted for registration under Article 102 of the Charter of the United Nations.

(c) Unilateral Declarations

8. Unilateral declarations that constitute interpretative, optional or mandatory declarations may be registered with the secretariat by virtue of their relation to a previously or simultaneously registered treaty or international agreement. Unlike interpretative, optional and mandatory declarations, some unilateral declarations may be regarded as having the character of international agreements in their own right and are registered as such. An example is a unilateral declaration made under Article 36 (2) of the Statute of the International Court of Justice, recognizing as compulsory the jurisdiction of the International Court of Justice. These declarations are registered ex officio when deposited with the Secretary-General.

9. Interpretative declaration: An interpretative declaration is a declaration by a State as to its understanding of some matter covered by a treaty or its interpretation of a particular provision. Unlike reservations, declarations merely clarify a State's position and do not purport to exclude or modify the legal effect of a treaty.

10. Mandatory declaration: A mandatory declaration is a declaration specifically required by the treaty itself. Unlike an interpretative declaration, a mandatory declaration is binding on the State making it.

11. Optional declaration: An optional declaration is a declaration that a treaty specifically provides for but does not require. Unlike an interpretative declaration, an optional declaration is binding on the State making it.

(d) Subsequent actions, modifications and agreements

12. Subsequent actions effecting a change in the parties to, or the terms, scope or application of, a treaty or international agreement previously registered must be registered with the secretariat. For example, such actions may involve ratifications, accessions, prolongations, extensions to territories, or denunciations. In the case of bilateral treaties, it is generally the party responsible for the subsequent action that registers it with the secretariat. However, any other party to such agreement may assume this role. In the case of a multilateral treaty or agreement, the depositary usually effects registration of such actions. Where a new instrument modifies the scope or application of a parent agreement, such new instrument must also be registered with the secretariat. It is clear that for the subsequent treaty or international agreement to be registered, the prior treaty or international agreement to which it relates must first be registered. To maintain organizational continuity, the registration number that has been assigned for the registration of the parent treaty or international agreement is also assigned to the subsequent treaty or international agreement.

2. Management — Administrative Committee

13. It is common practice with international agreements that there is a designated intergovernmental body (customarily composed of Contracting Parties) which is authorized, under the treaty, to make decisions relating to implementation and/or

amendments to part or whole of the agreement. In most cases, this body is regarded as an independent treaty body, which is nonetheless hosted by the organization holding the responsibility for administering the Agreement, and which also offers secretariat services.

14. There are, however, examples where the Agreement is integrally linked with an organization because the treaty body in question may be in fact an intergovernmental subsidiary body of the organization itself. Such examples are the European Agreement on Important International Combined Transport Lines (AGTC) and the European Agreement on Main International Railway Lines (AGC), both administered by the United Nations Economic Commission for Europe (UNECE). In these two cases, the Working Party on Intermodal Transport and Logistics (WP.24) and the Working Party on Rail Transport (SC.2) respectively, are the responsible treaty bodies for all matters and this is clearly stated in both Agreements.

15. When it comes to treaty bodies, there are three main structures:

- The first is the case where the treaty itself specifies that the United Nations will provide secretariat services under the responsibility of the Secretary-General. In a subclass of those cases, a specific United Nations entity is tasked with this responsibility (e.g. TIR Convention (1975), Annex 8, Article 2 – obligation of the United Nations to provide secretariat services, Article 4 – obligation to convene the Committee at UNECE and Article 12 – obligation to appoint a regular staff member of UNECE as secretary of the Committee). In other cases, there is only a generic reference (e.g. The Secretary-General shall provide the Committee with secretariat services).
- The second case is when the treaty establishes a treaty body (Administrative Committee) but does not stipulate an obligation for the United Nations secretariat to service this body. In this second case, since there is no obligation stipulated by the legal instrument, it is within the rights of the General Assembly not to consider that body as being serviced by the United Nations regular budget.
- The third structure is that whereby the Parties to a treaty agree to finance the secretariat of the treaty body and host it at the United Nations or elsewhere.

3. Participation in multilateral treaties

16. Treaties generally specify in their final clauses the categories of States, organizations or other entities that may become a party thereto. For instance, the United Nations Convention on the Law of the Sea, 1982, lists in article 305 the entities that may become parties to the Convention and contains an annex concerning participation by international organizations.

(a) The “all States formula”

17. Treaties may be open to participation by “all States” or “any State”. The “all States formula” has been used often in multilateral treaties that seek universal participation (see those treaties relating to disarmament, human rights, penal matters and environment).

(b) The “Vienna formula”

18. The “Vienna formula” was developed to overcome the uncertainties of the “all States formula”. The “Vienna formula” attempts to identify in detail the entities eligible to participate in a treaty. The “Vienna formula” permits participation in a treaty by Member States of the United Nations, Parties to the Statute of the International Court of Justice and States Members of specialized agencies or, in certain cases, by any other State invited by the General Assembly to become a party.

(c) International Organizations

19. The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986 (hereinafter the "Vienna Convention, 1986") codified the practice of international organizations participation in treaties. Such participation primarily depends, as for States, upon the relevant provisions of the treaty. Certain treaties cannot be implemented by international organizations by reason of their nature and the absence of competence in respect of the subject matter of those treaties. Accordingly, negotiating parties have taken the view that such treaties would not be open to international organizations. For instance, the human rights conventions.

(d) Regional economic integration organizations

20. Certain treaties, in particular, those covering trade, commodities, the seas and the environment are increasingly open to participation by international organizations. Negotiating parties have specifically identified regional economic integration organizations with full or shared competencies in the subject matter covered by those treaties as capable of participation.

21. The definition of a regional economic integration organization encompasses two key elements: the grouping of States in a certain region for the realization of common purposes and the transfer of competencies relating to those common purposes from the members of the regional economic integration organization to the organization. The term regional economic integration organization mainly refers to the European Communities.[1]

(e) Limitations on the ability of international organizations to participate in treaties

22. Some treaties provide that an organization may become party to a treaty only if its constituent member States are already parties to the treaty. A key concern is to avoid the parties to a regional economic integration organization being given additional votes in an international organization through the participation of the regional economic integration organizations.

(f) Exclusive competence of international organizations

23. Certain treaties prohibit member States of international organizations from becoming parties to the treaty in their own right, in cases where that international organization has competence over all the matters governed by the treaty.

(g) Participation by entities other than States or international organizations

24. In principle, non- metropolitan and other non-independent territories do not have the power to conclude treaties. However, the parent State may authorize such a territory to enter into treaty relations either ad hoc or in certain fields. Based on such delegated authority, some treaties authorize participation by entities other than independent States or international organizations. However, this is exceptional.

(h) Regional agreements

25. Certain regional treaties adopted within the framework of the United Nations regional commissions provide that they are open, not only to the States members of the

[1] There are three European Communities: the European Coal and Steel Community (ECSC); the European Community (EC), which was originally called the European Economic Community (EEC); and the European Atomic Energy Community (Euratom).

Commission and to regional economic integration organizations but also to States having consultative status with the Commission and other entities specified.

4. Provisional application of a treaty

(a) Provisional application of a treaty before its entry into force

26. Provisional application of a treaty may occur when a State unilaterally decides to give legal effect to the obligations under a treaty on a provisional and voluntary basis. This provisional application may end at any time. A treaty or part of it is applied provisionally pending its entry into force if either the treaty itself so provides or the negotiating States, in some other manner, have so agreed (Article 25 (1) of the Vienna Convention, 1969).

(b) Provisional application of a treaty after its entry into force

27. Provisional application is possible even after the entry into force of a treaty. This option is open to a State that may wish to give effect to the treaty without incurring the legal commitments under it. It may also wish to cease applying the treaty without complying with the termination provisions.

B. Case Studies

1. TIR Convention

28. The TIR Convention, 1975, is one of the most modern and up-to-date international Customs Conventions. It is working efficiently with only a limited number of incidences of litigation, resulting from unclear and vague provisions and different interpretations.

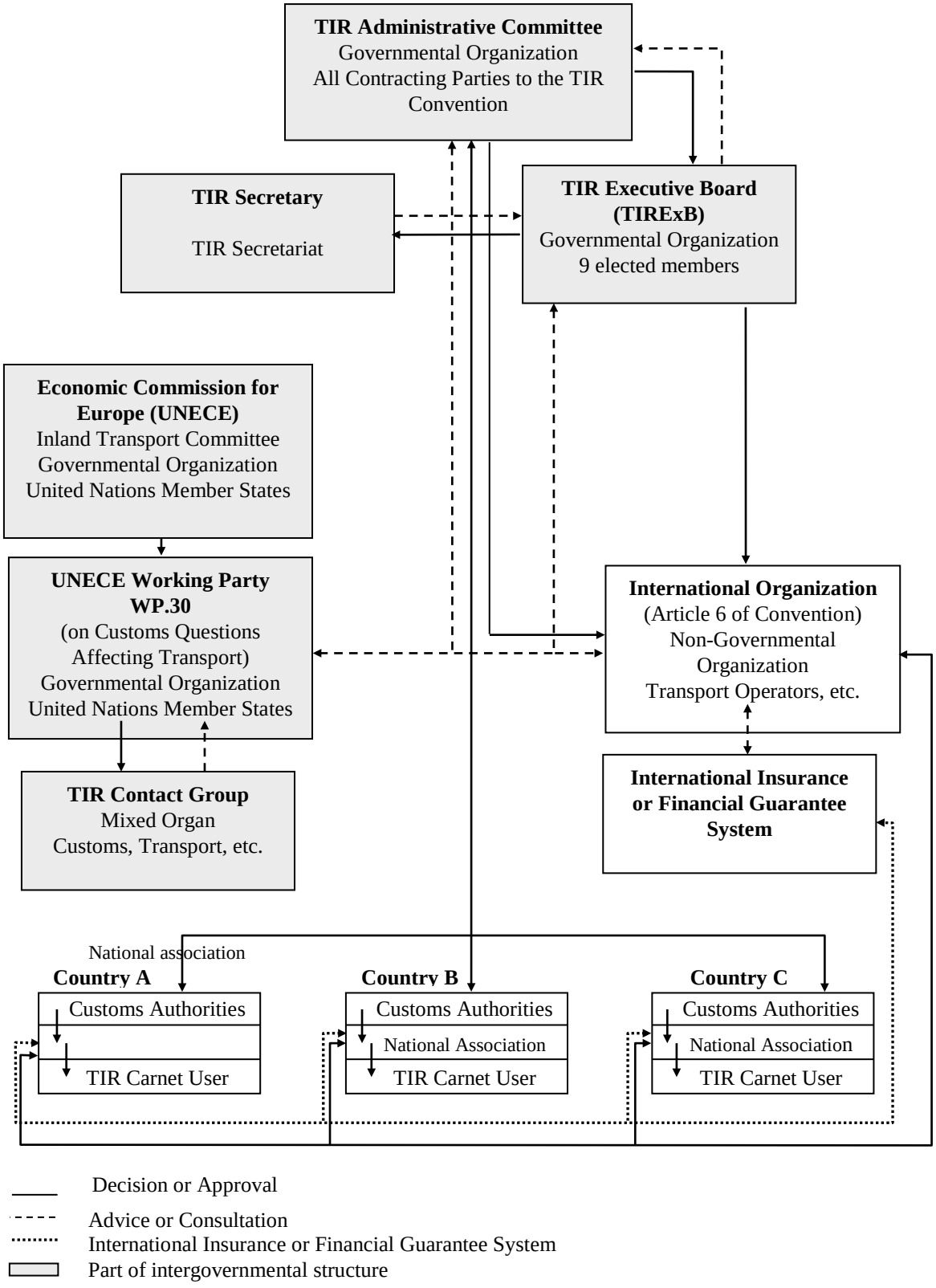
29. Several reasons for the smooth functioning of the Convention exist, one of which is the interest of all Parties concerned, be it transport operators or Customs authorities, to keep the system in operation as it saves time and money for all concerned. Another reason lies in the fact that the authors of the TIR Convention have already provided some interpretation of the legal text through the introduction of Explanatory Notes into the Convention. These Explanatory Notes, contained in Annex 6 of the Convention, form an integral part of the Convention. They interpret certain provisions of the Convention and its Annexes and describe recommended practices for the everyday functioning of the TIR system. These Explanatory Notes do not modify the provisions of the Convention, but make their contents, meaning and scope more precise.

30. Technological changes occur very rapidly today, and what was "state of the art" in 1975 when the Convention was created, is not necessarily valid today. This affects not only Customs techniques, but also vehicle and container manufacturing and smuggling techniques. In addition, as smuggled goods, particularly drugs, become more and more expensive, profits for smugglers soar, with the result that more and more elaborate smuggling techniques evolve.

31. In view of these developments, the TIR system, and the TIR Convention as its legal base, have to be constantly kept up-to-date. This task has been entrusted to the TIR Administrative Committee, the TIR Executive Board (TIRExB) and to UNECE in Geneva.

32. An overview of the administrative structure of the TIR Convention is provided in the following figure.

Administrative Structure of the TIR System



(a) The TIR Administrative Committee

33. The Administrative Committee, composed of all Contracting Parties to the Convention, is the highest organ under the Convention. It usually meets twice a year in spring and autumn under the auspices of the UNECE in Geneva to approve amendments to the Convention and to give all countries, competent authorities and concerned international organizations an opportunity to exchange views on the functioning of the system. Until today more than twenty amendments to the TIR Convention have been adopted and numerous resolutions, recommendations and comments have been approved by the Committee.

(b) The TIR Executive Board (TIRExB)

34. The TIR Executive Board (TIRExB) was established by the Contracting Parties to the Convention in 1999. Its objective is to enhance international cooperation among Customs authorities in the application of the TIR Convention and to supervise and to provide support in the application of the TIR system and the international guarantee system. The TIRExB is composed of 9 members who are elected in their personal capacity by the Governments which are Contracting Parties to the Convention for two-year terms of office.

35. The TIRExB is inter alia mandated to supervise the centralized printing and distribution of TIR Carnets, to oversee the operation of the international guarantee and insurance system and to coordinate and foster exchange of intelligence among Customs and other Governmental authorities.

36. The decisions of the TIRExB are executed by the TIR Secretary who is assisted by the TIR secretariat. The TIR Secretary shall be a member of the ECE secretariat. The operation of the TIRExB is financed, for the time being, through an amount on each TIR Carnet issued.

(c) The UNECE Working Party on Customs Questions affecting Transport (WP.30)

37. The work of the TIR Administrative Committee is supported by the UNECE Working Party on Customs Questions affecting Transport (WP.30) which holds between two and three sessions a year in Geneva, usually in conjunction with the sessions of the TIR Administrative Committee. Participation in the Working Party is open to all member States of the United Nations and to interested international organizations.

38. The Working Party also regularly adopts comments on certain provisions of the Convention. These comments are not legally binding for the Contracting Parties to the Convention, such as are the Articles and the Explanatory Notes of the Convention. However, they are important for the interpretation, harmonization and application of the TIR Convention because they reflect a consensus opinion of the Working Party in which the majority of the Contracting Parties and the major users of the TIR system are represented (comments adopted by the Working Party are usually transmitted to the TIR Administrative Committee for consideration and endorsement).

(d) Bodies of the transport industry

39. The functioning of the TIR Convention would be impossible without public-private partnership. The International Road Transport Union (IRU) and its member associations, supported by insurance companies, provide the necessary guarantees to Customs authorities. Apart from this most important function, they also issue TIR Carnets to transport operators and monitor their performance, in close cooperation with Customs. In case of need, unreliable operators can be deprived of TIR Carnets and even excluded from the TIR system.

2. European Agreement concerning the International Carriage of Dangerous Goods by Road

40. The European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) was done at Geneva on 30 September 1957 under the auspices of the United Nations Economic Commission for Europe, and it entered into force on 29 January 1968. The Agreement itself was amended by the Protocol amending article 14 (3) done at New York on 21 August 1975, which entered into force on 19 April 1985.

41. The Agreement itself is short and simple. The key article is the second, which say that apart from some excessively dangerous goods, other dangerous goods may be carried internationally in road vehicles subject to compliance with:

(a) the conditions laid down in Annex A for the goods in question, in particular, their packaging and labelling; and

(b) the conditions laid down in Annex B, in particular as regards the construction, equipment and operation of the vehicle carrying the goods in question.

42. Annexes A and B have been regularly amended and updated since the entry into force of ADR. Consequently, to the amendments that entered into force on 1 January 2017, a revised consolidated version has been published as document ECE/TRANS/257, Vol. I and II ("ADR 2017").

43. The structure is consistent with that of the United Nations Recommendations on the Transport of Dangerous Goods, Model Regulations, the International Maritime Dangerous Goods Code (of the International Maritime Organization), the Technical Instructions for the Safe Transport of Dangerous Goods by Air (of the International Civil Aviation Organization) and the Regulations concerning the International Carriage of Dangerous Goods by Rail (of the Intergovernmental Organization for International Carriage by Rail).

44. Amendments to ADR and International Carriage of Dangerous Goods by Inland Waterways (ADN) requiring or calling for harmonization with provisions relating to the transport of dangerous goods by rail shall be prepared by the Joint Meeting of the RID Committee of Experts for the Carriage of Dangerous Goods of the Intergovernmental Organization for International Carriage by Rail (OTIF) and WP.15 (RID/ADR/ADN Joint Meeting) (WP.15/AC.1).

45. Amendments to the Regulations annexed to ADN shall be prepared by the Joint Meeting of Experts on the Regulations annexed to the European Agreement concerning ADN, in partnership with the Central Commission for the Navigation of the Rhine (CCNR) and ECE at special sessions of WP.15 (WP.15/AC.2). It is understood that, pursuant to the resolution adopted on 25 May 2000 by the Diplomatic Conference for the Adoption of a European Agreement concerning ADN, cooperation in organizing this joint meeting of experts could be extended to the Danube Commission.

3. The cases of SMGS and CIM

46. The Management of the Agreement on International Goods Transport by Rail (SMGS) is entrusted to the OSJD Committee (OSJD Commission on Transport Law). The Commission shall hold its meetings and shall be composed of delegations from the Parties to SMGS. Proposals on modifications and amendments to be made in the SMGS shall be submitted to OSJD Committee and to all the Parties to the SMGS at the same time or not later than two months before a meeting of the Commission on Transport Law. The Commissions' activity in relation to amendments and modifications to be made in SMGS shall be carried out by experts and it includes two phases: consideration of proposals on amendments and modifications to be made in SMGS at expert meetings; and consideration

of proposals on amendments and modifications to be made in SMGS at the meetings of OSJD Commission on Transport Law.

47. The date of entry into force of amendments and modifications in SMGS and Manual for SMGS, adopted upon the expiry of not less than five years dating from the latest date of their entry into force, and the date of entry into force of amendments and modifications in Annex II, adopted upon the expiry of not less than two years dating from the latest date of their entry into force, shall be established by the OSJD Committee. As to individual, critical issues requiring modification of SMGS and Manual for SMGS, on which one cannot adhere to the five-year term, the adopted amendments shall enter into force on the first of July of the year to follow, if within two months following their transmission to all the railways which are Parties to SMGS, no objections are submitted by any railways which are Parties to SMGS.

48. The Management of Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) is entrusted to the Secretary-General of OTIF. All the submitted proposals on amendments to be made in CIM shall be considered by the Revision Committee. Where necessary, experts shall be involved or working groups shall be established. The Secretary-General submits proposals on modifications of CIM to the members of the Revision Committee and Observers not later than two months before the meeting is convened. The Revision Committee shall take decisions on modifications in CIM Uniform Rules or shall draft papers for making decision at the General Assembly.

49. Amendments in CIM Uniform Rules, adopted by the General Assembly, shall enter into force twelve months after their approval by at least half of member States which have not declared that they will not apply fully the CIM Uniform Rules, for all member States except those which made such a declaration before the date of entry into force, according to which they did not approve the amendments, and those which declared that they would not apply fully the CIM Uniform Rules. For all member States, CIM Uniform Rules amendments adopted by the Revision Committee shall enter into force on the first day of the twelfth month dating from the month of the notification on the amendments, sent by the Secretary-General to member States. Member States may submit their objections no later than four months from the time of notification. In case of objections received from at least one-fourth of member States, the amendment shall not enter into force. Member States which have submitted their objections against the decision within the established period of time shall suspend the full application of the respective Annex for communication with member States or between them from the moment of the decision’s entry into force.