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Item 5 of the provisional agenda

International Convention to Facilitate the Crossing of Frontiers for Passengers and Baggage carried by Rail, of 10 January 1952

Amendment procedure

Note by the secretariat

I. Mandate and background

1. At its previous session, the secretariat briefed the Working Party on Customs Questions affecting Transport (WP.30) on progress made towards the formal acceptance of a Protocol to the International Convention to Facilitate the Crossing of Frontiers for Passengers and Baggage Carried by Rail, 1952, which would introduce amendment clauses to the said Convention. The Working Party recalled that, at its 127th session, it had agreed on a text, which could count on the consent of the Contracting Parties to the 1952 Rail Convention participating in its work (some European Union countries, Norway and Switzerland). The secretariat informed WP.30 that the text of the protocol had now been transmitted to the Ministers of Foreign Affairs of all ten Contracting Parties to the 1952 Rail Convention, asking for their tentative approval of the text by 31 July 2011 (Informal document No.6 (2011)). Having received a sufficient number of positive replies, the Secretary-General of the United Nations would then be requested to issue a Depositary Notification, formally announcing the adoption of the Protocol and asking Contracting Parties for their acceptance. The text of the Protocol in English, French and Russian, as agreed upon by WP.30, can be found in document ECE/TRANS/WP.30/2010/10 and ECE/TRANS/WP.30/254, para.17 and corrigendum 1 thereto (French only).

2. This document contains a summary of the replies received by the UNECE secretariat by 31 July 2011.

II. Reaction from Belgium

3. In its letter of 28 July 2011, the Permanent Mission of Belgium to the United Nations Office and Specialized Agencies in Geneva informs the Executive Secretary of the United Nations Economic Commission for Europe (UNECE) that Belgium cannot agree to an amendment to the 1952 Rail Convention by means of simple agreement to a Protocol. In the absence of any procedure foreseen by the 1952 Rail Convention to amend its provisions, any amendment is considered as a new treaty, requiring parliamentary ratification. Thus, Belgium recommends amending the text of the Protocol to the extent that it reflects this formal legal requirement.¹

III. Reaction from Italy

4. In his note of 25 July 2011, the Permanent Representative of Italy to International Organizations in Geneva informs the Executive Secretary of UNECE that the Italian competent authorities have no objection to the text of the additional Protocol to the 1952, Rail Convention. However, the Italian authorities point at a discrepancy between the English and French text of the Protocol (which has been corrected by means of document ECE/TRANS/WP.30/254/Corr.1 (French only)).

IV. Reaction from France

5. In an e-mail of 26 July 2011, the Permanent Mission of France to the United Nations in Geneva, informs that France does not wish to negatively impact the decision making process with regard to the acceptance of the Protocol, but points out that, in any case, the French text will have to be corrected (see paragraph 4).

V. Reaction from the Netherlands

6. In its letter of 30 June 2011, the Dutch Ministry of Foreign Affairs informs the Executive Secretary of UNECE that the Netherlands is not, in principle, opposed to the proposed Protocol. However, the Netherlands considers that the normal and formal treaty procedure should be followed for such fundamental amendment, that is to say signature and subsequent ratification. With regard to the substance of the amendment clauses, the Netherlands considers the deadlines of six months to raise objections and of nine months for proposed amendments to enter into force, too short. Concerning the proposed entry into force of the Protocol itself, the Netherlands considers the time frame of six months too short and proposes a minimum time frame of eighteen months. Finally, provisions for signature and ratification should be included in the text of the draft Protocol.

VI. Reaction from Portugal

7. In its letter of 29 July 2011, transmitting comments by the Portuguese authorities, the Permanent Mission of Portugal to the United Nations and other International

¹ Confusingly, the Belgian Federal Governmental Authority for Mobility and Transport sent a letter to the Executive Secretary of UNECE, dated 25 July 2011 (in Dutch), informing that, in conformity with a coordinated position at the level of member States of the European Union, Belgium could agree to the text of the draft Protocol.

Organizations in Geneva informs that the Portuguese Republic does not have any opposition to an amendment to the Convention by means of a Protocol. However, the Portuguese Republic considers that for such fundamental amendment, the usual and formal treaty amendment procedure should be followed as provided for in the Vienna Convention, which requires the State agreement and the deposit of instruments of approval, ratification or accession, since, for the Portuguese Republic, the consent to be bound to a Convention or to an amendment thereto requires the internal approval of the final text by the national competent organs. Thus, as far as the substance of the proposed Protocol is concerned, a system that does not require, in each case, an international act such as acceptance, approval, accession or ratification, whereby a State establishes on the international plane its consent to be bound, is unacceptable for the Portuguese Republic.

VII. Reaction from Switzerland

8. In its letter of 25 July 2011, the Federal Transport Office of the Swiss Confederation expresses the view that it considers it preferable, and feasible, to proceed to materially modernize the Convention and to introduce amendment provisions at the same time, rather than taking the rather fastidious approach of first adopting a separate Protocol, introducing amendment provisions and, then, proceeding to modernize the 1952 Rail convention itself. With regard to the substance of the Protocol, the Swiss Confederation is of the view that the text of Article 3 gives the impression that any amendment proposal would be circulated by the Secretary-General of the United Nations without prior discussions between Contracting Parties to the 1952 Rail Convention. With regard to the 'opt-out' clause, stipulated by Article 4 of the said Protocol, the Swiss Confederation considers that it is rather unusual to apply such clause for other than purely technical amendments to a treaty. In any case, the deadline of six months to raise objections is too short for Contracting Parties to finalize their internal approval procedures. The same applies to the deadlines stipulated by Article 2 of the Protocol. Finally, the Swiss Confederation wonders what happens to an amendment proposal in case a country, which has first raised an objection thereto, leading to the rejection of the amendment, later decides to deposit an instrument of acceptance of such amendment in accordance with Article 1, paragraph 5 of the Protocol.

9. In conclusion, the Swiss Confederation cannot accept the text of the Protocol, certainly not in its current wording.

VIII. Ratification, acceptance and approval

10. According the United Nations Treaty Handbook,² ratification, acceptance and approval all refer to the act undertaken on the international plane, whereby a State establishes its consent to be bound by a treaty. Ratification, acceptance and approval all require two steps:

- (a) the execution of an instrument of ratification, acceptance or approval by the Head of State, Head of Government or Minister of Foreign Affairs, expressing their intent to be bound by the relevant treaty; and
- (b) for multilateral treaties, the deposit of an instrument with the depositary; and for bilateral treaties, the exchange of instruments between parties.

² ISBN 92-1-133645-7

11. Ratification, acceptance or approval at the international level indicates to the international community a State's commitment to undertake the obligations under a treaty. This should not be confused with the act of ratification at the national level, which a State may be required to undertake in accordance with its own constitutional provisions, before its consent to be bound at the international level.

IX. Conclusion and possible next steps

12. Although not all ten Contracting Parties to the 1952 Rail Convention have provided their preliminary opinion on the adoption of the Protocol, it seems reasonable to already conclude now that the Protocol in its current wording would not be accepted by Contracting Parties, if the Secretary-General of the United Nations officially notified all Parties of the text of the Protocol, pursuant to its Article 2, paragraph 1. With regard to the future, the Working Party may wish to consider the following options:

- (1) to reword the current draft of the Protocol, following the formal treaty amendment procedure as provided for in the Vienna Convention (including the deposit of instruments of ratification, acceptance or approval), to reconsider the opt-out clause and to introduce more extensive deadlines for objections and entry into force.
 - (2) to postpone the introduction of amendment clauses to a later stage, when such proposals can be submitted, following the formal treaty procedure as provided for in the Vienna Convention, in combination with substantial proposals to modernize the text of the 1952 Rail Convention itself.
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