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Joint ECMT/UNECE Working Party/Group on Intermodal Transport and Logistics
(24 and 25 March 2004)

Working Party on Intermodal Transport and Logistics
(Forty-first session, 25 March 2004,
agenda item 5)

**DEVELOPMENT OF COMBINED AND INTERMODAL TRANSPORT
AT THE PAN-EUROPEAN LEVEL**

**Legal opinion on the inclusion of “Model” Action Plans or Partnership Agreements
in the AGTC Agreement**

Note by the secretariat

Note: The secretariat reproduces below an exchange of interoffice memoranda between the UNECE secretariat and the Treaty Section, Office of Legal Affairs (OLA) of the United Nations.¹

¹ The legal opinion provided by the Office of Legal Affairs (OLA) has been translated into French by the UNECE secretariat (informal translation).

Interoffice memorandum of 6 January 2004 (UNECE to OLA)

Subject: European Agreement on Important International Combined Transport Lines and Related Installations (AGTC) done at Geneva on 1 February 1991
- ECE/TRANS/88/Rev.1

The above Agreement, with its 26 Contracting Parties, has the objective to make international combined transport (road/rail/inland water) in Europe more efficient and attractive to customers by establishing a legal framework that lays down a plan for the development of combined transport services and their infrastructure based on internationally agreed performance parameters and standards.

While it can be said that the services and infrastructure standards set in the AGTC Agreement, together with their permanent monitoring by a UNECE Group of Governmental experts (WP.24), have contributed to the development of combined transport in Europe, it has become apparent that, in addition to the general standards already stipulated in the AGTC Agreement, further mechanisms and procedures need to be developed and agreed upon internationally to provide a framework in this field for better inter-governmental cooperation and interaction with the private sector in the UNECE region – the latter is becoming increasingly important as a result of privatization of European railways.

To this end, a UNECE expert group, with the assistance of private sector interests, is developing at present so-called “Model” Action Plans or Framework Agreements to foster cooperation at the Governmental level as well as so-called “Model” Partnership Agreements to facilitate, in the framework of such inter-governmental agreements, cooperation with and among private actors concerned (railway and combined transport companies, freight forwarders, terminal operators, etc.).

The objectives of these “Model” agreements is to provide a solid basis for cooperation among interested Governments and the private sector along certain transport corridors in order to make combined transport more efficient and competitive. In order to ensure that such sub-regional or corridor-based cooperation can be established and measured on the basis of a common minimum consensus among Governments and private sector interests at the pan-European level, it is planned to insert such “Models” - together with performance indicators (benchmarks) to measure impact and compliance – into the above AGTC Agreement, possibly by means of a new Article 4 bis and a new Annex V.

We feel that the insertion of such “Models” would be fully in line with the objectives of the AGTC Agreement and would, in fact, provide a much needed value-added to the present, and by its very nature, rather general (consensus) provisions of the AGTC Agreement. We are however not sure whether, in legal terms, such “Model” provisions would fit into such an Agreement “as a treaty concluded between States and governed by international law”.

As we understand these “Models” to be included into the AGTC Agreement, they are not meant to be literally binding to all Contracting Parties and to the private actors. They will contain very specific and concrete measures that may not always be required and acceptable. These “Models” should rather provide the common Pan-European frame (elements or “tool box”) that could facilitate negotiations among interested countries and the private sector in this field and would allow them to agree rapidly on the required actions and mechanisms relating to specific transport lines – only if needed, at agreed times and in line with the specific requirements of involved Governments and business interests. Thus, no strict obligation to engage into such negotiations, on the basis of the “Models” in the AGTC Agreement, should be construed for Contracting Parties.

Against this background, I should be grateful if you could provide me with your advice on the above issues based on your experience with possibly similar treaties, particularly on the advisability for the inclusion of such “Models” into a treaty. If this approach is acceptable from a legal point of view, I should also appreciate your guidance on possible wordings for insertion into the AGTC Agreement that would allow for the above-mentioned flexibility in the application of the above-mentioned “Model” provisions.

I am aware that such “Models” could, alternatively, also be inserted into a Resolution or a Recommendation to be adopted by an appropriate UNECE or other Governmental organ, but it is felt that the AGTC Agreement with its many Contracting Parties could provide a stronger and more visible signal on the importance that UNECE Governments attach to such concrete measures towards promotion of combined transport.

For your information, I attach document TRANS/WP.24/2003/6 that provides you with more details on the possible content of the above-mentioned “Model” Action Plans and Partnership Agreements.

Following the present review by UNECE Governments of these draft “Models” contained in the attached document, the UNECE Working Party on Intermodal Transport and Logistics (WP.24) is expected to consider these “Models” as well as their possible insertion into the AGTC Agreement at its forthcoming session on 25 March 2004. I should therefore be grateful to have your advice and guidance well before this date.

Interoffice memorandum of 2 February 2004 (OLA to UNECE)

I refer to your memorandum of 6 January 2004 by which you seek the comments of the Treaty Section on whether it would be legally correct to include Model Action Plans or Framework Agreements as well as Model Partnership Agreements in the AGTC Agreement, possibly by insertion of a new article 4 bis and a new annex V. You further request our advice on the possible wording of the new article to reflect the exact nature of these Model Agreements.

You mention that such mechanisms and procedures need to be agreed upon internationally to provide a framework in the field of international combined transport (road/rail/inland water) for better inter-governmental cooperation and interaction with the private sector in the UNECE region.

We have also reviewed the document TRANS/WP.24/2003/6 of 22 July 2003 attached to your memorandum.

In principle, there is no reason why mechanisms or procedures such as model or framework agreements cannot be incorporated into a treaty if so decided by the parties thereto. We note that normally such mechanisms or procedures, once incorporated into the treaty, would be binding for the parties to that treaty. However, it is possible to incorporate the Models using general recommendatory provisions to achieve the objective of creating a framework that facilitates the standardization of procedures in keeping with your objective.

However, you also state in your memorandum that you “are not sure whether such “Model” provisions would fit into such an Agreement [the AGTC Agreement] as a treaty concluded between States and governed by international law”. You further state that “[a]s we understand these “Models” to be included in the AGTC Agreement, they are not meant to be literally binding to all Contracting Parties”. Accordingly, if your wish is not to incorporate the Models into the treaty but to leave them outside the treaty, such concerns could also be accommodated with appropriately drafted provisions, e.g., through an “opt in” declaration to be deposited with the Secretary-General.

As you propose these Models could alternatively be part of a Resolution or a Recommendation adopted by the appropriate UNECE or other governmental organ.

We also note that the International Trade Law Branch of the United Nations Office of Legal Affairs provides secretariat services to the United Nations Commission on International Trade Law (UNCITRAL) and assists United Nations organs, bodies and conferences in matters relating to international trade law, including the area of transport. UNCITRAL prepares international legislative texts for use by states in modernizing commercial law and non-legislative texts for use by

commercial parties in negotiating transactions. It promotes the use of legislative and non-legislative instruments in a number of key areas of commercial law that represent internationally agreed standards and solutions acceptable to different legal systems. These documents include Model Laws, Rules, Notes and Legal Guides that could provide you a precedent to develop cooperation and facilitate the use of uniform and standard procedures in the field of combined transport.
