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Item 9 (b) (i) of the provisional agenda
Issues that need consideration and require decisions by the Committee:
Road Transport – European Agreement concerning the Work of Crews of Vehicles Engaged in International road transport (AETR)

European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport (AETR) discussion paper (Roadmap)

Prepared by the secretariat

Revising certain provisions in the AETR

(i) Article 14 AETR to allow accession of Regional Economic Integration Organizations into the Agreement.

(ii) Article 22*bis* to modify the decision-making process for technical amendments in Appendix 1B.

I. Mandate

1. The Inland Transport Committee at its seventy-third session (Geneva, 1-3 March 2011), discussed the urgency and importance of addressing some key issues of the European Agreement Concerning the Work of Crews of Vehicles engaged in International Road Transport (AETR). As a result, the Committee decided to transform the existing informal AETR expert group, set up by decision of the 105th session of the Working Party on Road Transport (SC.1), to a formal Group of Experts for all Contracting Parties of AETR and the European Union (EU).

2. The Executive Committee, on 19 September 2011, approved the establishment of the Group of Experts on AETR and its Terms of Reference. The Group of Experts is expected to develop amendment proposals for the AETR Agreement, in particular on Article 22bis (which stipulates procedure for the amendment of Appendix 1B), including the creation of a new institutional arrangement such as an administrative committee. It will also examine and develop proposals to modify the relationship between the AETR and the corresponding EU legislation pertaining to road transport/social rules.

II. Introduction

3. The European legislative framework for driving and rest times for professional drivers, as well as the corresponding measures for the tachograph (initially analogue, now digital), is two-fold and is currently reflected in the AETR as well as in a series of regulations developed within the EU legal order. The two systems have been developing side by side since the late 1960's and have been a recurrent cause of concern for AETR Contracting Parties and the EU, as they seem to overlap and conflict in particular areas. There is also an unconventional mechanism for introducing technical modifications to the digital tachograph, whereby the AETR agreement allows a non-contracting party, in this case the EU, to legislate on the matter at the EU level and transpose the said decisions into the AETR Agreement without involvement of non-EU AETR Contracting Parties (art.22bis).

4. The present document aims to outline and analyse the current situation of the AETR and its relationship to the EU regime. It also aims to clarify some of the questions that arise in this particular context. The main objective, is to present a set of proposals designed to bridge the gap between the two systems—to be tabled and discussed at the first session of the Group of Experts on AETR. This will be accomplished through a set of amendments to the Agreement, following suggestions made by Contracting Parties, the EU and other affected stakeholders. These amendments would allow the EU to participate in the AETR framework as a Contracting Party. At the same time, the Group of Experts will also discuss the modalities of setting up a Treaty body based in Geneva, that would involve all AETR contracting parties in the process of updating and modifying the digital tachograph, and which would replace the current provisions of article 22bis.

5. The present paper also addresses practical matters on the above process such as the procedural and practical steps to be taken, implications to be expected as well as model examples of how to proceed with the amendments in the agreement. The document also demonstrates that a "Business as Usual" approach may significantly jeopardize the successful outcome of this endeavor. The operation of article 22bis may have to be

suspended for the duration of this complex proposed process.[1] Introducing new modifications to the digital tachograph, while efforts are underway to resolve this long standing conflict in a holistic manner, should strongly be discouraged.

III. The relationship between the AETR and the EU framework

A. Historical and legal background

6. The AETR regulates the employment conditions of international road transport of goods and passengers. It has at present 50 Contracting Parties, including all 27 European Union (EU) member States.

7. The first AETR Agreement was negotiated and signed under the auspices of the United Nations Economic Commission for Europe (UNECE) in 1962 by 5 out 6 member States of the European Economic Community (EEC) and a number of other European States. [2] It did not enter into force due to an insufficient number of ratifications. Negotiations among States for a new AETR Agreement were resumed in 1967. The purpose of the new negotiations was not to draw up an entirely new Agreement, but to amend the 1962 Agreement in such a way that would enable all the Contracting Parties to ratify it.

8. Parallel work undertaken at the EEC level resulted in the adoption of Council regulation 543/69 of 25 March 1969, which standardized the driving and rest periods for professional drivers and covered the areas of the "failed" 1962 Agreement. A year after the adoption of this regulation, the member States involved in the ongoing AETR negotiations concluded the new AETR Agreement (1970), with other non-EEC States. The European Commission in 1971 brought an action before the European Court of Justice (ECJ) for the annulment of all legal consequences of the proceedings that had led to the adoption of the AETR Agreement, [3] on the grounds that the adoption of regulation 543/69 transferred the competence for a common transport policy to the Community and consequently the Community was empowered to negotiate and conclude the Agreement in question. The Council of Ministers of the European Union (EEC at the time), which represented the position of the EEC member States, argued that there was no express conferral of powers by the Treaty to the Community and as such the competence would, at best, be shared between the Community and the member States.

9. The ECJ examined the question of who was empowered to negotiate and conclude the Agreement, but ultimately did not annul the legal consequences of its conclusion. This was based, in part, on the grounds that the 1970 Agreement was a revised version of the 1962 Agreement hence, the process had begun before the Community had legislated in the field, and thus at a time when power to conclude such an agreement was vested in EEC member States.[4] In addition the Court found that the interests of the Community were in essence safeguarded by means of the common position adopted by the negotiating States.[5] The Court however did establish the doctrine of implied external powers, also known in legal circles as the "AETR principle". In areas in which the Community has adopted

[1] Suspension of an agreement or part thereof is provided for in article 57 of the Vienna Convention on the Law of Treaties (1969) and requires agreement by all Contracting Parties.

[2] The signatories of the first AETR agreement were Belgium, France, Germany, Luxemburg, the Netherlands, Poland, Sweden and the United Kingdom of Great Britain and Northern Ireland.

[3] Judgment of the Court of Justice, AETR, Case 22/70 (31 March 1971).

[4] Judgment of the Court of Justice, AETR, Case 22/70 (31 March 1971), paragraphs 81-84.

[5] As above, paragraphs 90-91.

Community rules within the framework of a common policy (in this case transport), even where the Community Treaties do not explicitly provide for such powers, the member States are not allowed, individually or collectively, to enter into Agreements with third States in the areas affected by those rules.[6]

10. The 1970 AETR Agreement came into force on 5 January 1976, and the EEC never became party to it in its own right. Council regulation 2829/77 of 12 December 1977 instructed EEC Contracting Parties to ratify the Agreement individually, **acting on behalf of and in the interest of the Community.**[7] The Community (now EU) maintained internally the competence to develop and enact legislation on the subject matter of the AETR Agreement, which member States were required to follow. At the same time EEC member States were also bound to respect their international obligations under the AETR Agreement, even if those conflicted with their internal EEC legislation **(Principle of safeguarding the rights of third parties who have entered into Treaty commitments with EEC member States,** See Questions and Answers table)

11. It follows that the manner in which this situation developed created ample room for inconsistencies between the two regimes, which could in effect place EEC member States in a very difficult situation.

12. The same Council regulation (2829/77) required the ratifying (and later acceding) EEC member States to enter a reservation excluding the application of the Convention in its entirety as between EEC Member States: "Transport operations between member States of the EEC shall be regarded as national transport operations within the meaning of the AETR {…}." [8] Furthermore it should be noted that at present, EU member States that had become Parties to the AETR prior to their joining the EU have been unable to enter the reservation in question (e.g. Poland).[9]

Timeline:

Year	*Legislative Act or other instrument*	*Actor*
1962	Signing of the first AETR Agreement	States
1967	Negotiations for second AETR Agreement	States
1969	Council regulation 543/69 of 25 March 1969 on the harmonization of certain social legislation relating to road transport[10]	EEC
1970	Signing of the second AETR Agreement	States
1971	AETR Case 22/70, European Court of Justice	Commission v. Council, EEC
1976	Entry into force of the (second) AETR	States

[6] As above, paragraphs 12-22.

[7] Council Regulation (EEC) No. 2829/77 of 12 December 1977, Article 2, para.1. See also ref. Council recommendation of 23 September 1974.

[8] Council Regulation (EEC) No. 2829/77 of 12 December 1977, Article 2, para. 2.

[9] See article 19 of the Vienna Convention on the Law of Treaties (1969): A reservation may be made at the time of signature, ratification, approval, acceptance or accession to a Treaty. It follows that countries that were already parties to the AETR at the time they joined the EU, would be unable to submit the reservation in point.

[10] Regulation 543/69 was followed (and amended) by regulations (EEC) No 3821/85 and (EC) No. 2135/98 and repealing Council Regulation (EEC) No 3820/85.

Year	*Legislative Act or other instrument*	*Actor*
	Agreement	
1977	Council regulation 2829/77 of 12 December 1977 on the bringing into force of the AETR Agreement	EEC
2006	Regulation 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonization of certain social legislation relating to road transport[11]	EC/EU

Questions and Answers

What does the European Court's Judgement mean in practice for EC/EU AETR Contracting Parties?
Internally, within the EU legal order, member States are bound to give prevalence to Community rules over their national legislation (supremacy doctrine).[12] **Externally,** member States are bound to give prevalence to the AETR Agreement, by respecting their obligations toward third States parties to the Agreement even in the event of conflict with EC law. However, this applies only to the obligations of member States towards third parties, meaning that they are only allowed to derogate from EU rules in order to respect their external obligations but not in order to exercise any rights they may have under the AETR Agreement. (Principle of safeguarding the interests of third Parties who have entered into Treaty commitments with member States).[13] From an international law perspective, member States cannot invoke EC law or any internal law provision as grounds for failure to perform a Treaty.[14]
What does it mean for the EU legal order that the EC/EU is not part to the AETR?
The AETR Agreement does not have a status in EU law that would make it part of the EU legal order. Notwithstanding the circumstance that the AETR Agreement relates to matters that are in large measure covered by EU law, the Community is not bound by the Agreement nor does the

[11] Regulation 561/2006 amended Council Regulations (EEC) No 3821/85 and (EC) No 2135/98

[12] The principles of direct effect and supremacy of EU law guide the implementation of ECJ rulings and the legal framework within which it acts. These joint principles give the ECJ a large amount of judicial power within member states. Supremacy allows the ECJ to establish primacy for European laws while direct effect means that these laws then apply to people as well as to states - making them more like domestic laws than international acts. The principles were first established by the ECJ with cases 6/64 of 15 July 1964, Flaminio Costa v. ENEL (Supremacy) and in Van Gend en Loos v. Nederlandse Administratie der Belastingen, case Case 26/62 of 1963 (direct effect).

[13] See article 351 of the Treaty on the Functioning of the European Union.

[14] See articles 26 and 27 of the Vienna Convention on the Law of Treaties (1969).

validity of EU legislation depend on its compatibility with AETR. This places its member States in a conflicting and difficult position – given that they cannot derogate from EU obligations in view of enforcement measures (such as fines), as opposed to the Agreement which provides no enforcement mechanism. The above situation creates conflicting obligations for member States, to the detriment, ultimately, of the AETR Agreement.

B. The issue of the digital tachograph and article 22*bis*

13. The state of affairs, above described has, over the years, created significant hurdles for the uniform implementation of the AETR Agreement, particularly as regards the question of the prevailing legal instrument and the applicable law in combined routes passing through the territory of non-Contracting Parties, EU Contracting Parties and non-EU Contracting Parties to the Agreement. The difficulties are not only practical, but also create legal tensions both "downwards" in relation to the member States and "upwards" in relation to the international regime.

14. The EU often duplicates already existing international rules and standards in its internal legal order. It also sometimes reinforces those rules by adding elements to them or proceeds with early implementation of international rules that have not yet entered into force. **All these circumstances are applicable in this case as, firstly, the 1969 Council regulation 543/69 was in large measure based on the "failed" 1962 AETR Agreement and secondly, the regulation was enforced within the EEC before the new AETR Agreement came into force.**

This was also the case with the introduction of the mandatory use of the digital tachograph in the EU in 2006 on the basis of Council Regulation (EC) 2135/98 that amended Council Regulation (EEC) 3821/85 and Council Directive 88/599/EEC. Commission Regulation (EC) 1360/2002 introduced all technical requirements for the digital tachograph and tachograph cards. In the non-EU AETR countries, an additional transitional period was negotiated by Contracting Parties in Geneva at the United Nations Economic Commission for Europe. The date of entry into force of the digital tachograph amendment was later, in 2010. Furthermore, as per article 22*bis* AETR, all amendments to technical specifications or requirements for the digital tachograph that are introduced at the EU level via revisions to **Council Regulation 3821/85** are automatically transposed into the AETR Agreement, without formal consultation with non-EU Contracting Parties. **This contradicts the principle of safeguarding the interests of third countries who have entered into Treaty commitments with EU member States.**

C. Commentary

15. The EU legislation in the field of transport is treated (intra-EU), much the same as any national legislation by a single State. Yet the EU is not a State, and its international activities are legally and politically guided by a number of considerations which follow from its very particular constitutional nature that lies somewhere between that of a State and that of a traditional intergovernmental organization. Despite its unique features, however, the EU remains, in the eyes of international law, an intergovernmental organization and its member States are prohibited, under the Vienna Convention on the Law of Treaties and customary international law, from invoking internal rules as grounds for failure to adhere to the terms of a Treaty that has been entered into in good faith.

16. In the field of transport in particular, the EU has shared competence alongside its member States, as reflected in article 4 of the Treaty on the Functioning of the European Union (TFEU). Also known as the Lisbon Treaty, the TFEU also assigned unified legal personality to the European Union with its entry into force.[15] This means that the European Union is a subject of international law and as such is bound by any obligations incumbent upon it under international law, under its constituent instrument and under international Agreements to which it is party.

17. The attribution of responsibility for breach of international obligations is joint for both the organization and its member States in cases of shared competence and in cases of mixed Agreements. With regard to transport and the common transport policy, the Lisbon Treaty lays down a new set of provisions as well as codifies the Court awarded doctrine of implied powers[16] Under the Lisbon Treaty, the EU has implied external powers in cases where "common rules are affected and their scope altered."[17]

18. The AETR Agreement is at present open only to States and not to other legal entities. However, since all member States are Parties to the Agreement and the subject matter of the Agreement falls in part within the realm of (shared) competences of the EU one may justifiably argue that the EU may consider itself bound by the AETR Agreement insofar as its member States have ratified the Agreement acting on behalf and in the interest of the Community. This argument is soundly grounded in law and practice by virtue of numerous examples such as those of the GATT and the UN Charter to which the EU is not a contracting party but by whose principles it is nonetheless bound. It is also supported by the European Court's jurisprudence. In the Libor Cipra case,[18] the ECJ concluded that on the basis of Council Regulation 2829/77 that brought the AETR agreement into force (on behalf and in the interest of the Community) and as per article 2(2) of Council Regulation 3820/85 on certain specified matters in the AETR Agreement, "*it must be held that the* AETR Agreement forms part of Community law and that the Court has jurisdiction to interpret it."[19]

As the European Court of Justice ruled in the Kadi case[20] *"The EU must respect international law in the exercise of its powers and a measure adopted by virtue of those powers must be interpreted, and its scope limited in the light of the relevant rules of international law."*

[15] The Lisbon Treaty abolishes the EC and the pillar structure and amends the Treaty on European Union (TEU; also known as the Maastricht Treaty) and the Treaty establishing the European Community (TEC; also known as the Treaty of Rome). In this process, the Rome Treaty was renamed to the Treaty on the Functioning of the European Union (TFEU). The EC is succeeded by the EU and legal personality is expressly conferred upon the EU.

[16] The principle of implied external powers evolved further in a series of subsequent cases. See for example Cases 3,4 and 6/76, Cornelis Kramer and others (1976), Opinion 1/76 on the European Laying up fund for Inland Waterway Vessels (1977), the "Open Skies" judgments and Opinion 1/2003.

[17] See article 3 of the Treaty on the Functioning of the European Union.

[18] Case C-439/01, Libor Cipra and Vlastimil Kvasnicka v. Bezirkshauptmannschaft Mistelbach (2003).

[19] As above, paras. 23-24.

[20] Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, Summary of the Judgment, para.6.

IV. Analysis and reflections on the modification process envisaged

19. Against the above background, the EU has put forward a proposal (Brussels, 19/07/2011, Digital Tachograph: Roadmap for future activities)[21] to revise the AETR Agreement so as to allow the EU to accede to the AETR. It has also proposed that article 22bis is revised and replaced by a set of articles that sets out the conditions and terms of operation of a new decision-making body for amendments to appendix 1B in which all AETR Contracting Parties would participate in equal standing. This body would function under the operational and governing structure of the UNECE, based in Geneva. While in principle this proposal, if accepted, would address many of the issues discussed above, other important practical and legal questions remain to be addressed.

A. Accession of the European Union to the AETR Agreement

20. This step would require several actions on the part of AETR Contracting Parties and the EU. Most importantly, article 14 of the AETR would need to be modified so as to allow accession by the EU. This may be done by following the procedures set out in the AETR Agreement itself. However, given the magnitude of the changes to be introduced in the Agreement, the question arises as to whether the proposed changes will be made by applying article 21 AETR on amendments or article 20 AETR on convening a review conference.

Step 1: Modification of article 14 AETR
Option 1: Amendment (article 21 AETR) ⇒ the modification would be considered as a single amendment and the procedure would be faster. **Option 2:** Revision Conference (article 20 AETR) ⇒ This would essentially be a re-negotiation of the Agreement. The modification would be part of revising the entire Agreement, and the amendment would be considered in tandem with any other changes to the Agreement. The procedure would be significantly more complex and time consuming.
Step 2: Initiation of internal EU accession procedures
Accession of the EU to an international Agreement requires, under Article 218 of the Lisbon Treaty (TFEU) and related provisions (article 207 and Title VI Part Three): (i) a recommendation from the Commission for a negotiation mandate; (ii) a unanimous Council decision to open accession negotiations; (iii) the consent of the European Parliament to the accession Agreement; and

[21] See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, Brussels 19.7.2011, COM(2011) 454 final.

(iv) In some cases ratification of the accession Agreement in all 27 EU member States is also required. The non-EU AETR contracting Parties would also have to agree to the terms of the accession Agreement. It can therefore be expected that the accession process may take years.
Step 3: Deposit of the accession Agreement
The accession Agreement is in essence the instrument of accession, which includes any declarations/reservations and in the case of organizations also **includes a declaration of competence.** The procedure is as follows: (i) The EU initiates its internal procedure (step 2); (ii) The Council of Ministers of the EU issues a decision stating its intent to accede to the Agreement; (iii) The instrument of accession, **once agreed upon,** is deposited with the Secretary-General of the United Nations; (iv) The Agreement enters into force within the time-frame specified in the Agreement (180 days for the AETR).
The Declaration of Competence: It specifies the areas of the Agreement that fall within the EU's competence and within the competence of its member States. Simply put, the organization and its member States will decide and declare their respective responsibilities for the performance of their obligations under the Agreement. This is usual practice when the EU accedes to an Agreement (e.g. Montreal Convention, 1999).

21. With accession, the EU would become a Contracting Party to the AETR. This would automatically create significant changes within the EU legal order. As a Contracting Party, the EU will be bound by the provisions of the AETR Agreement. The European Court of Justice will be bound to examine any internal legislative measure in light of the AETR Agreement and therefore EU legislation would have to be aligned with the provisions of the Agreement.[22] As a result, any existing conflicts or disagreements as to the hierarchy of norms will be eliminated, allowing for uniform application of the Agreement by all AETR Contracting Parties.

22. As per the examples of the European Convention of Human Rights and Fundamental Freedoms (ECHR), the WTO Agreement and the Montreal Convention (1999) among others, accession of the EU to the AETR could potentially not alter the position of EU member States under the Agreement. The 27 EU member States and the EU, as AETR Contracting Parties, could have individual and equal standing in the processes of the

[22] See article 27(2) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO) (1986): "An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty."

Agreement which for all intents and purposes could take the character of a mixed agreement.

The EU is party to more than 130 mixed agreements to which both the EU and its member States are Contracting Parties in their own right, therefore such an arrangement is legally feasible.

23. It should also be taken into account that the 27 EU member States have been Contracting Parties to the Agreement either prior to their accession to the EU and/or prior to the EU's accession to the AETR. The Agreement was negotiated and concluded by States and not the EU, therefore the procedure followed will be that of a clear-cut accession, not that of new Conventions negotiated ab initio[23] at the EU level in areas of exclusive EU competence. Given this circumstance, therefore, it stands to reason that a mixed agreement would best serve the objectives of all parties involved.

24. As a result, voting rights in the decision-making mechanisms of the AETR Agreement would have to be determined clearly in the declaration of competence. The EU would not vote on behalf of its member States, unless this is expressly agreed upon in the declaration of competence. Should there be agreement on a different voting procedure, it is paramount that the necessary provisions would be put in place to safeguard the rights of non-EU Contracting Parties.

25. For example, a development whereby EU member States would not exercise their right to vote (in favor of the European Commission voting on their behalf), would effectively have a multitude of unfavorable consequences, as their membership would in essence be rendered null and void insofar as participation of their national delegations in the AETR processes is concerned. Furthermore, such a voting arrangement could be considered unfair as it would not ensure a clear and representative majority in the decision-making processes of the Agreement, considering the current number of Contracting Parties, as well as the average number of Contracting Parties present at relevant meetings, as can be extrapolated on the basis of participation at SC.1 sessions and ad hoc AETR meetings.

26. It should, of course, be noted that the specific nature of the voting process cannot at this stage be foreseen. It will depend on the agreement reached between AETR Contracting Parties and the EU at the time of accession. Therefore, and to avoid speculation, this paper merely stipulates that all potential outcomes ought to be considered carefully.

27. To counteract such adverse effects, it could be possible to customize a voting formula that would take into account the interests of all parties involved. For instance, decisions could be passed following a procedure that could aim for– to the extent possible– consensus of those present and voting. If consensus is not reached, then a second tier process might be triggered, which would require either a very high threshold of acceptance or a relatively low number of objections. This would offer the necessary safeguards for non-EU Contracting Parties, and at the same time ensure transparency and stability of the Agreement and the decision-making process. It would also effectively change the current situation with article 22bis.

Three-tier decision-making procedure:
Tier 1 ⇒ Amendments go to a vote in Geneva (UNECE) ⇒ Contracting Parties present and voting will aim to reach a consensus decision.
Tier 2 ⇒ If those present and voting in Geneva (UNECE) cannot reach consensus, then the decision will

[23] i.e. from the beginning.

be taken by a high three-quarter (¾) (for example) majority vote in favour.

Tier 3 ⇒ The proposed amendment is communicated by the Depositary to all Contracting Parties to the AETR and if less than one-fifth (1/5) of all Contracting Parties. notify their objection to the proposed amendment within a specified period of time (e.g. 6 months), the amendment is considered adopted and becomes effective for all Contracting Parties.

B. Further considerations with regard to amending article 14 AETR

28. It may be worth noting at this point, that article 14 AETR as it stands today, allows accession only to UNECE member States, and to States having consultative status with UNECE. The contemplation of amending the article so as to allow organizations to accede may present an additional opportunity to amend it so that all States members of the United Nations may be able to become Contracting Parties to the Agreement.[24] This would expand the geographical scope of the Agreement. Should this be considered positively by the AETR Contracting Parties, the procedure to be followed will be the same as discussed above and will necessarily have to be done simultaneously with the other amendments.

C. Revision of Article 22*bis* and establishment of a new decision-making intergovernmental body

29. 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.

30. 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 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.[25]

31. Such an arrangement may suit the needs of these very technical agreements, where participation of non-governmental actors and industry representatives may present benefits for the Agreement. However it may be considered a risky approach as any changes to the structure of the organization (this case UNECE) may have adverse effects for the functionality of the body and the implementation of the Agreements in question. In particular, it should be noted that in the case of the AGC Agreement, all SC.2 members,

[24] For examples of agreements open to all States, see article 37 of the Vienna Convention on Road Signs and Signals and article 52 of the TIR Convention.

[25] AGTC articles 14, 15, 16 and AGC articles 10, 11, 12.

including non-Contracting Parties and non-governmental actors have the right to vote on amendments and decisions. However, the result is conditional upon a majority of those voting being Contracting Parties: "If it is {a proposed amendment} adopted by the majority of the members present and voting and if this majority includes the majority of the Contracting Parties present and voting, the amendment shall be communicated by the Secretary-General to the competent administrations of the Contracting Parties directly concerned."[26]

32. In the case of AETR there is currently no single treaty body fulfilling these functions. The practice for amendments and decisions relating to the main part of agreement is that of Depositary notification, which States Parties may accept or object to.[27] Discussions on these matters take place within the framework of UNECE's Working Party on Road Transport (SC.1) however this is not stipulated in the AETR Agreement itself. Rather, it is mandated by the Working Party's Terms of Reference.[28]

"The Working Party on Road Transport (hereinafter referred to as SC.1), acting within the framework of the policies of the United Nations and the Economic Commission for Europe (hereinafter ECE) and subject to the general supervision of the Inland Transport Committee shall, provided such actions are in conformity with the Terms of Reference of the ECE (document E/ECE/778/Rev.3) and consistent with the legal instruments listed in the annex: {…}

(c) Draw up, apply and update appropriate legal instruments;

(d) Encourage the accession of new countries to the Conventions and Agreements listed in the annex;"

33. However, the situation is different as regards amendments to Appendices 1 and 2 of the Annex to the Agreement. In this case the procedure followed is exactly the same as that for the AGC Agreement. Article 22 stipulates that SC.1 will discuss and vote on proposed amendments, by majority of all members present – qualified by majority of present Contracting Parties.

"Art.22:

2. At the request of a Contracting Party, any amendments proposed to appendices 1 and 2 to the annex to this Agreement shall be considered by the Principal Working Party on Road Transport of the Economic Commission for Europe.

3. If it is adopted by the majority of the members present and voting, and if this majority includes the majority of the Contracting Parties present and voting, the amendment shall be communicated by the Secretary-General to the competent administrations of all the Contracting Parties for acceptance."

34. Yet the procedure becomes different again with regard to Appendix 1B of the Annex. As has been mentioned, the procedure with regard to amendments to the technical specifications of the digital tachograph device is significantly different. As per article 22bis, such amendments are initiated at the EU level and transposed into the AETR Agreement, where they become binding for all Contracting Parties.

35. Therefore the AETR has three distinct amendment procedures for different parts of the Agreement, as well as a mechanism for other decisions regarding the AETR, involving SC.1. The proposal as formulated as presently formulated, refers to **a new decision-making**

[26] Art.11 AGC, identical in arts.10 and 12.
[27] See article 21, AETR.
[28] TRANS/SC.1/377/Add.1.

body for amendments to Appendix 1B only (as has been proposed by the European Commission in its "Non-paper concerning the decision-making in appendix 1B of the AETR", of 3 June 2011). This body would take the form of an Administrative Committee, composed of all Contracting Parties to AETR. As per the terms of the AETR Agreement, this would be made possible by amending the existing art.22*bis* and replacing it with a new set of provisions. However, it is worth raising the question of whether Contracting Parties would consider the possibility that the new body may take on all amendment and decision processes for the Agreement, so as to simplify the procedure which at present appears to be overly fragmented and complicated.

36. The relationship of this committee and its procedures to the Working Party on Road Transport (SC.1) should also be clarified. It is evident from numerous examples within the UN system that the involvement of a Working Party is most usually that of the first discussion platform, where potential proposed amendments are discussed and negotiated. Once a proposed amendment is fine-tuned and agreed upon informally at Working Party level, it is passed on to the Administrative Committee for final decision and approval.

37. As a matter of practice, this has proven to be fruitful and effective. It also ensures that only amendments that are well supported and well thought through reach the Administrative Committee. At the same time it is worth underlining that the role of SC.1 may but need not be specifically mentioned in the AETR Agreement itself, as this is already covered by the Terms of Reference of the Working Party. On the other hand Contracting Parties are invited to consider – in light of the provided information – the exact nature of the Treaty body they would like to establish, its relationship to SC.1 and the tasks it will be charged with.

V. Conclusions

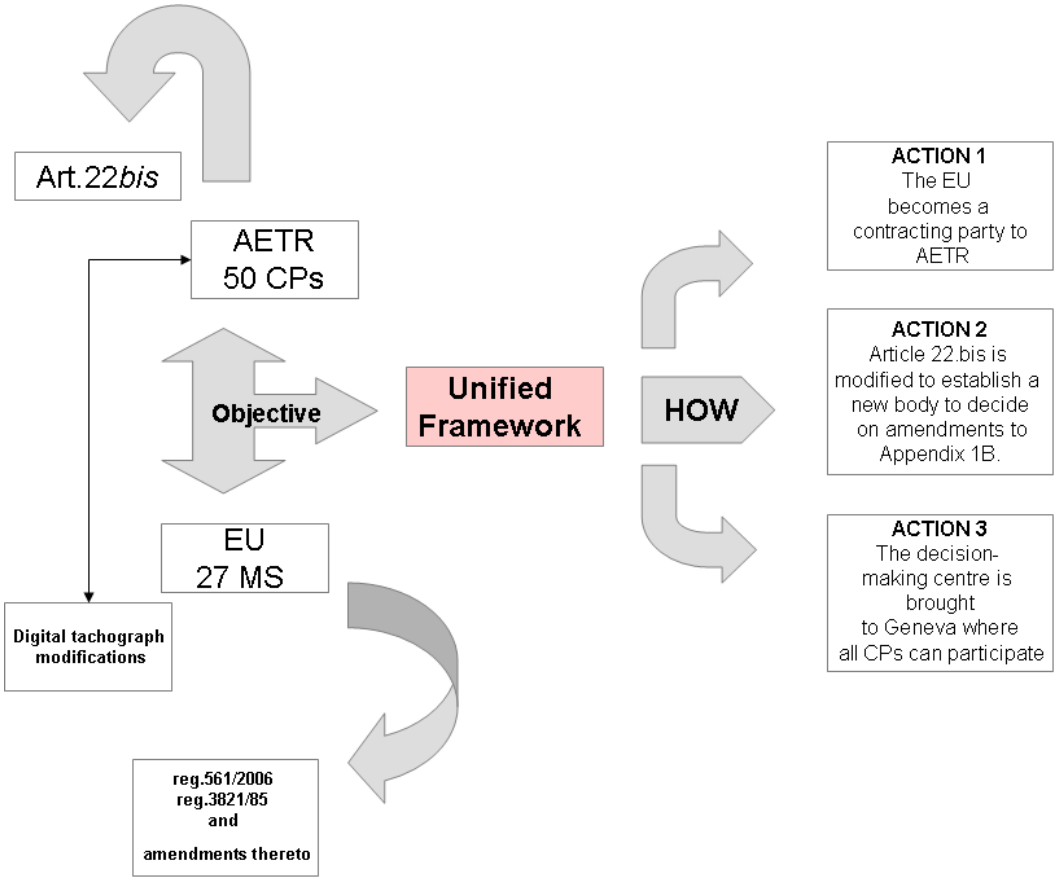
38. The AETR Contracting Parties and the EU are invited to reflect on all the available information – much of which is provided in the present document—and to consult multilaterally within the AETR Expert Group.

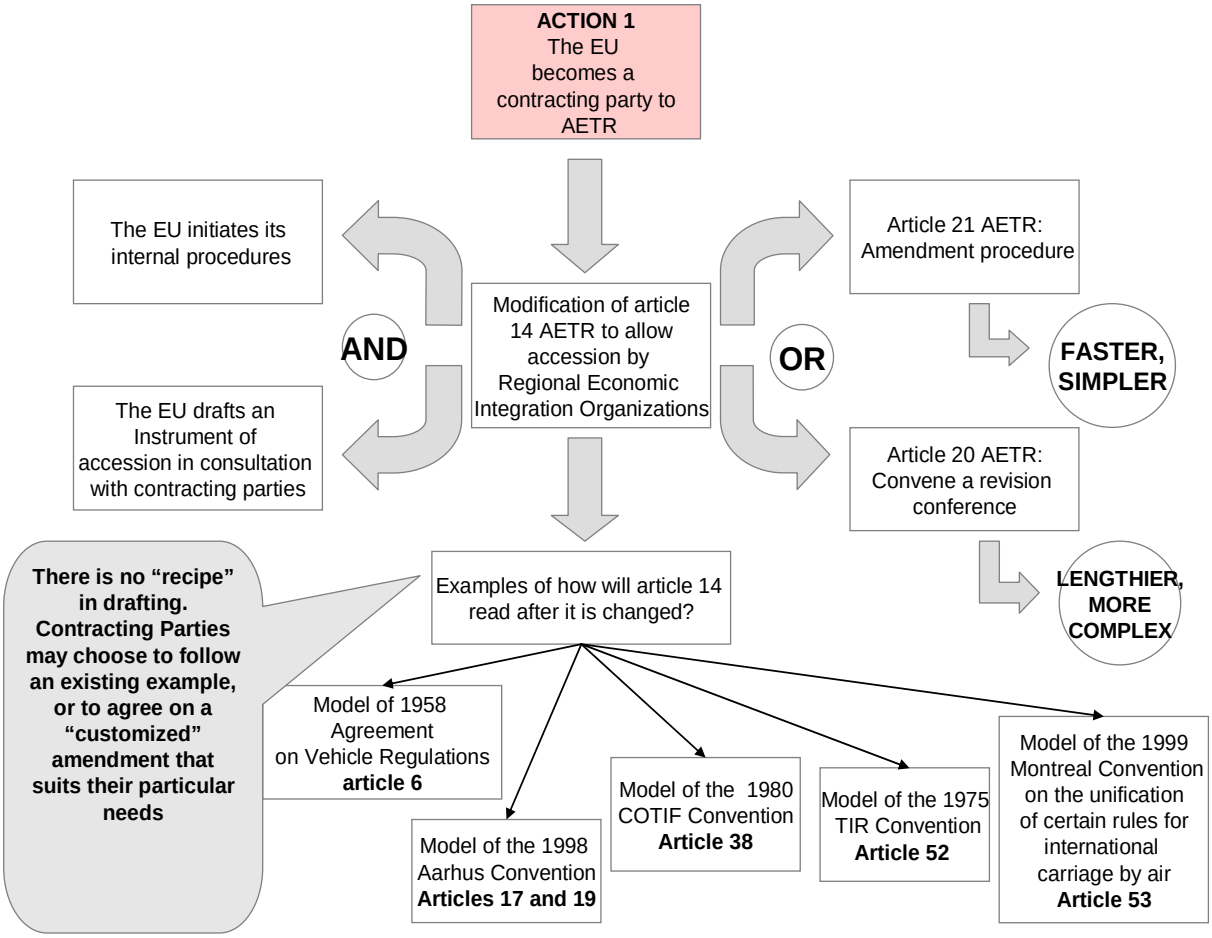
39. Bridging the differences between the two regimes, calls for significant changes, not only to the Agreement, but to the overall approach of Contracting Parties and the EU. It would clearly be beneficial for all involved parties to move forward in a dynamic and pro-active way, without jeopardizing the objectives and overarching goals of the AETR concept as a whole.

40. To this end, it is proposed that all required modifications to the agreement are agreed upon in a "package" manner. The Group of Experts may wish to proceed with preparing a package proposal reflecting all relevant considerations, for further discussion and agreement of the Contracting Parties.

Annex

Roadmap, Schematic representation of possible next steps and options




ACTION 1
The EU becomes a contracting party to AETR
The EU initiates its internal procedures
AND
The EU drafts an Instrument of accession in consultation with contracting parties
Modification of article 14 AETR to allow accession by Regional Economic Integration Organizations
OR
Article 21 AETR: Amendment procedure
FASTER, SIMPLER
Article 20 AETR: Convene a revision conference
LENGTHIER, MORE COMPLEX
There is no "recipe" in drafting. Contracting Parties may choose to follow an existing example, or to agree on a "customized" amendment that suits their particular needs
Examples of how will article 14 read after it is changed?
Model of 1958 Agreement on Vehicle Regulations **article 6**
Model of the 1998 Aarhus Convention **Articles 17 and 19**
Model of the 1980 COTIF Convention **Article 38**
Model of the 1975 TIR Convention **Article 52**
Model of the 1999 Montreal Convention on the unification of certain rules for international carriage by air **Article 53**

Accession Clause examples:[29]

Model of 1958 Agreement on Vehicle Regulations, article 6
1. Countries members of the Economic Commission for Europe, countries admitted to the Commission in a consultative capacity in accordance with paragraph 8 of the Commission's Terms of Reference, and regional economic integration organizations set up by countries members of the Economic Commission for Europe to which their member States have transferred powers in the fields covered by this Agreement, including the power to make binding decisions on their member States, may become Contracting Parties to this Agreement. 2. Countries Members of the United Nations may participate in certain activities of the Economic Commission for Europe in accordance with Paragraph 11 of the Commission's Terms of Reference and regional economic integration organizations of such countries to which their Member States have transferred powers in the fields covered by this Agreement including power to make binding decisions on their member States may become Contracting Parties to this Agreement. For the determination of the number of votes referred to in Article 1, paragraph 2 and in Article 12, paragraph 2, regional economic integration organizations vote with the number of votes of their member States being Members of the United Nations. 3. Accession to the amended Agreement by new Contracting Parties which are not Parties to the 1958 Agreement shall be effected by the deposit of an instrument with the Secretary-General, after the entry into force of the amended Agreement.
Model of 1980 COTIF Convention, article 38
1. Accession to the Convention shall be open to regional economic integration organizations which have competence to adopt their own legislation binding on their member States, in respect of the matters covered by this Convention and of which one or more member States are members. The conditions of that accession shall be defined in an agreement concluded between the Organization and the regional organization

[29] Only most relevant excerpts have been included in the examples. Where there is the symbol {…}, part of the text or article has been excluded. For further information please refer to the original texts of the agreements referred to.

2. The regional organization may exercise the rights enjoyed by its members by virtue of the Convention to the extent that they cover matters for which it is competent. This applies also to the obligations imposed on the member States pursuant to the Convention, with the exception of the financial obligations referred to in Article 26.

3. For the purposes of the exercise of the right to vote and the right to object provided for in Article 35 §§ 2 and 4, the regional organization shall enjoy the number of votes equal to those of its members which are also member States of the Organization. The latter may only exercise their rights, in particular their right to vote, to the extent allowed by § 2. The regional organization shall not enjoy the right to vote in respect of Title IV.

4. Article 41 shall apply mutatis mutandis to the termination of the accession.

Model of 1975 TIR Convention, article 52

1. All States Members of the United Nations or members of any of the specialized agencies or of the International Atomic Energy Agency or Parties to the Statute of the International Court of Justice, and any other State invited by the General Assembly of the United Nations, may become Contracting Parties to this Convention:

(a) by signing it without reservation of ratification, acceptance or approval;

(b) by depositing an instrument of ratification, acceptance or approval after signing it subject to ratification, acceptance or approval; or

(c) by depositing an instrument of accession.

{…}

3. Customs or economic unions may, together with all their member States or at any time after all their member States have become Contracting Parties to this Convention, also become Contracting Parties to this Convention in accordance with the provisions of paragraphs 1 and 2 of this Article. However, these unions shall not have the right to vote.

4. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations.

Model of 1999 Montreal Convention article 53

28 May 1999 by States participating in the International Conference on Air Law held at Montreal from 10 to 28 May 1999. After 28 May 1999, the Convention shall be open to all States for signature at the headquarters of the International Civil Aviation Organization in Montreal until it enters into force in accordance with paragraph 6 of this Article.

2. This Convention shall similarly be open for signature by Regional Economic Integration Organizations. For the purpose of this Convention, a "Regional Economic Integration Organization" means any organization which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to this Convention. A reference to a "State Party" or "States Parties" in this Convention, otherwise than in paragraph 2 of Article 1, paragraph 1(b) of Article 3, paragraph (b) of Article 5, Articles 23, 33, 46 and paragraph (b) of Article 57, applies equally to a Regional Economic Integration Organization. For the purpose of Article 24, the references to "a majority of the States Parties" and "one-third of the States Parties" shall not apply to a Regional Economic Integration Organization.

3. This Convention shall be subject to ratification by States and by Regional Economic Integration Organizations which have signed it.

{…}

Model of the 1998 Aarhus Convention

Article 17

Signature

This Convention shall be open for signature at Aarhus (Denmark) on 25 June 1998, and thereafter at United Nations Headquarters in New York until 21 December 1998, by States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.

Model of the 1998 Aarhus Convention

Article 19

Ratification, acceptance, approval and accession

1. This Convention shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.

2. This Convention shall be open for accession as from 22 December 1998 by the States and regional economic integration organizations referred to in article 17.

3. Any other State, not referred to in paragraph 2 above, that is a member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.

4. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization's member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

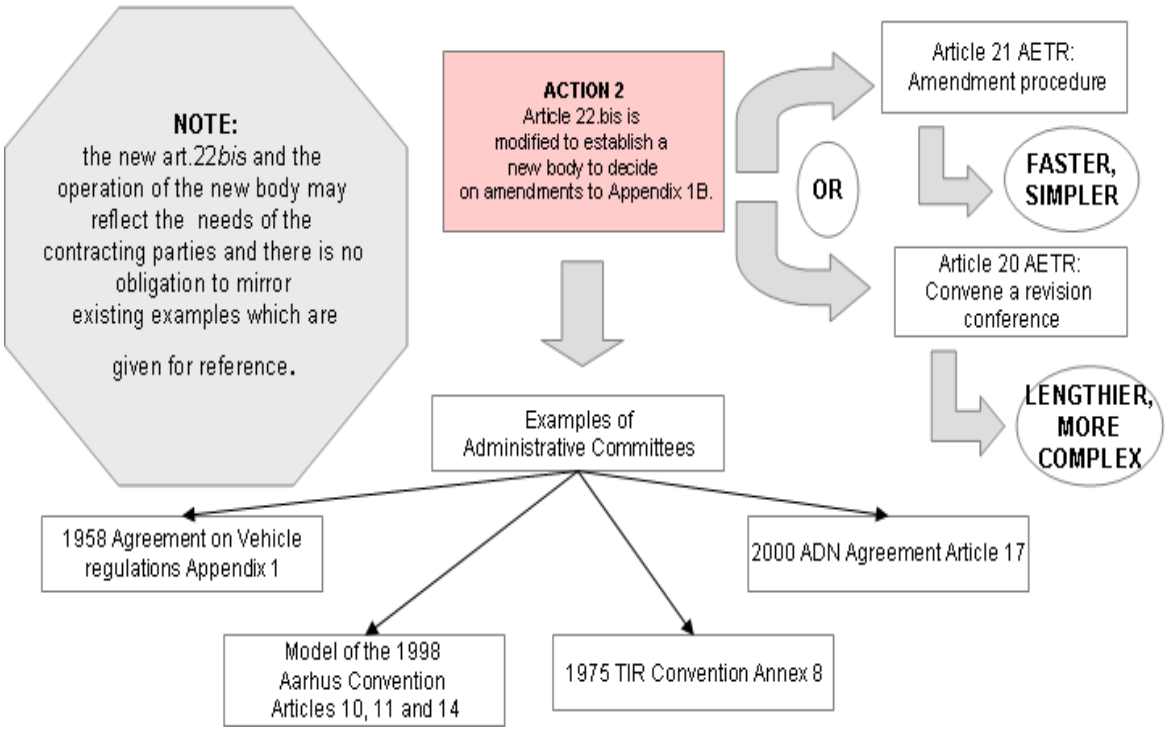
Customized Example [30]

1. The present Convention shall be open for signature by Regional Economic Integration Organizations. For the purpose of this Convention, a 'Regional Economic Integration Organization means any organization which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by the present Convention and has been duly authorized to accede to or ratify the present Convention.

2. An organization within the meaning of paragraph 1 which has acceded to the present Convention shall inform the Secretary-General of the United Nations that it has competence with respect to the matters governed by the present Convention. The organization and its Member States may, without in any way derogating from their obligations under the present Convention, determine their respective responsibilities for the fulfilment of their obligations under the present Convention.

3. A regional economic integration organization and its member States which have determined their responsibilities under paragraph 2 above, shall duly inform all other Parties of any such proposed distribution of responsibilities in their instrument of accession. {…}

[30] Examples are cited in order to provide information about different options that may serve the purposes of AETR Contracting Parties. The secretariat is not proposing verbatim wording or stipulating any particular course of action. These examples are for explanatory and informative purposes only.


NOTE:
the new art.22bis and the operation of the new body may reflect the needs of the contracting parties and there is no obligation to mirror existing examples which are
given for reference.
ACTION 2
Article 22.bis is modified to establish a new body to decide on amendments to Appendix 1B.
OR
Article 21 AETR: Amendment procedure
FASTER, SIMPLER
Article 20 AETR: Convene a revision conference
LENGTHIER, MORE COMPLEX
Examples of Administrative Committees
1958 Agreement on Vehicle regulations Appendix 1
2000 ADN Agreement Article 17
Model of the 1998 Aarhus Convention Articles 10, 11 and 14
1975 TIR Convention Annex 8

Examples of Administrative Committees:[31]

Model of 1958 Agreement on Vehicle Regulations, Appendix 1
1. The members of the Administrative Committee shall be composed of all the Contracting Parties to the amended Agreement. 2. The Executive Secretary of the United Nations Economic Commission for Europe shall provide the Committee with secretariat services. 3. The Committee shall, at its first session each year, elect a chair and vice-chair. 4. The Secretary-General of the United Nations shall convene the Committee under the auspices of the Economic Commission for Europe whenever a new Regulation or an amendment to a Regulation is required to be established. 5. Proposed new Regulations shall be put to the vote. Each country, Contracting Party to the Agreement shall have one vote. A quorum consisting of not less than half of the Contracting Parties is required for the purposes of taking decisions. For the determination of the quorum regional economic integration organizations, being Contracting Parties to the Agreement, vote with the number of votes of their member States. The representative of a regional economic integration organization may deliver the votes of its constituent sovereign countries. New Draft Regulations shall be established by a two-thirds majority of those present and voting. 6. Proposed amendments to Regulations shall be put to the vote. Each country, Contracting Party to the Agreement applying the Regulation shall have one vote. A quorum of not less than half of the Contracting Parties applying the Regulation is required for the purposes of taking decisions. For the determination of the quorum, regional economic integration organizations, being Contracting Parties to the Agreement, vote with the number of votes of their member States. The representative of a regional economic integration organization may deliver the votes of those of its constituent sovereign countries which apply the Regulation. Draft Amendments to Regulations shall be established by a two-thirds majority of those present and voting.

[31] Only most relevant excerpts have been included in the examples. Where there is the symbol {…}, part of the text or article has been excluded. For further information please refer to the original texts of the agreements referred to.

Model of 1975 TIR Convention, Annex 8

Article 1

(i) The Contracting Parties shall be members of the Administrative Committee.

(ii) The Committee may decide that the competent administrations of States referred to in Article 52, paragraph 1 of this Convention which are not Contracting Parties or representatives of international Organizationss may, for questions which interest them, attend the sessions of the Committee as observers.

Article 1*bis*

1. The Committee shall consider any proposed amendment to the Convention in accordance with Article 59, paragraphs 1 and 2.

2. The Committee shall monitor the application of the Convention and shall examine any measure taken by Contracting Parties, associations and international Organizations under the Convention and their conformity therewith.

3. The Committee, through the TIR Executive Board, shall supervise and provide support in the application of the Convention at the national and international levels.

Article 3

The Committee shall, at its first session each year, elect a chair and a vice-chair.

Article 4

The Secretary-General of the United Nations shall convene under the auspices of the Economic Commission for Europe the Committee annually and also at the request of the competent administrations of at least five States which are Contracting Parties.

Article 5

Proposals shall be put to the vote. Each State which is a Contracting Party represented at the session shall have one vote. Proposals other than amendments to this Convention shall be adopted by the Committee by a majority of those present and voting. Amendments to this Convention and the decisions referred to in Articles 59 and 60 of this Convention shall be adopted by a two-thirds majority of those present and voting.

Article 6

A quorum consisting of not less than one-third of the States which are Contracting Parties is required for the purposes of taking decisions.

{…}Article 8

In the absence of relevant provisions in this Annex, the Rules of Procedure of the Economic Commission for Europe shall be applicable unless the Committee decides otherwise.

Model of 2000 ADN Agreement, Article 17[32]

1. An Administrative Committee shall be established to consider the implementation of this Agreement, to consider any amendments proposed thereto and to consider measures to secure uniformity in the interpretation and application thereof.

2. The Contracting Parties shall be members of the Administrative Committee. The Committee may decide that the States referred to in Article 10, paragraph 1 of this Agreement which are not Contracting Parties, any other Member State of the Economic Commission for Europe or of the United Nations or representatives of international intergovernmental or nongovernmental organizations may, for questions which interest them, attend the sessions of the Committee as observers.

3. The Secretary-General of the United Nations and the Secretary-General of the Central Commission for the Navigation of the Rhine shall provide the Administrative Committee with secretariat services.

4. The Administrative Committee shall, at the first session of the year, elect a Chair and a Vice-Chair.

5. The Executive Secretary of the Economic Commission for Europe shall convene the Administrative Committee annually, or at other intervals decided on by the Committee, and also at the request of at least five Contracting Parties.

6. A quorum consisting of not less than one-half of the Contracting Parties shall be required for the purpose of taking decisions.

7. Proposals shall be put to the vote. Each Contracting Party represented at the session shall have one vote **{…}**

(d) Any proposal or decision {..} shall be adopted by a majority of the Administrative Committee members present and voting.

Model of 2000 ADN Agreement, Article 17[33]

8. The Administrative Committee may set up such working groups as it may deem necessary to assist it in carrying out its duties.

[32] The European Union is not party to the ADN Agreement. However, the text offers an interesting example of the structure and operation of a Treaty body/ Administrative Committee.

[33] The European Union is not party to the ADN Agreement. However, the text offers an interesting example as to the structure and operation of a Treaty body/ Administrative Committee.

9. In the absence of relevant provisions in this Agreement, the Rules of Procedure of the Economic Commission for Europe shall be applicable unless the Administrative Committee decides otherwise.

Model of 1998 Aarhus Convention

Article 10

Meeting Of The Parties (fulfilling the role of an AC)

1. {...} An ordinary meeting of the Parties shall be held at least once every two years, unless otherwise decided by the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to all Parties by the Executive Secretary of the Economic Commission for Europe, the said request is supported by at least on-third of the Parties.

2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties {...}.

3. The Meeting of the Parties may, as necessary, consider establishing financial arrangements on a consensus basis.

4. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State or regional economic integration organization entitled under article 17 to sign this Convention but which is not a Party to this Convention, and any intergovernmental organization qualified in the fields to which this Convention relates, shall be entitled to participate as observers in the meetings of the Parties.

Article 11

Right To Vote

Except as provided for in paragraph 2 below, each Party to this Convention shall have one vote.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

Article 14

Amendments to the Convention

1. Any Party may propose amendments to this Convention.

2. The text of any proposed amendment to this Convention shall be submitted in writing to the Executive Secretary of the Economic Commission for Europe, who shall communicate it to all Parties at least ninety days before the meeting of the Parties at which it is proposed for adoption.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

4. Amendments to this Convention adopted in accordance with paragraph 3 above shall be communicated by the Depositary to all Parties for ratification, approval or acceptance. Amendments to this Convention other than those to an annex shall enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Thereafter they shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.

5. Any Party that is unable to approve an amendment to an annex to this Convention shall so notify the Depositary in writing within twelve months from the date of the communication of the adoption. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for its previous notification and, upon deposit of an instrument of acceptance with the Depositary, the amendments to such an annex shall become effective for that Party.

Customized Example

Article 1

(a) There shall be an Administrative Committee that shall be responsible for deciding on amendments to Appendix 1B of the present Convention. based in Geneva.

(b) The members of the Administrative Committee shall be composed of all the Contracting Parties to the Agreement

Article 2

The Administrative Committee shall be based in Geneva. Its sessions will normally be held in Geneva. The Committee may decide to holds sessions in other locations.

Article 3

The Executive Secretary of the United Nations Economic Commission for Europe shall provide the Committee with appropriate secretariat services.

Special Consideration: The Secretariat and the Contracting Parties ought to consider and make provision for the additional cost in human and financial resources for providing services for this body, as well as the requirement for sufficient secretariat expertise in such matters.

Article 4

The Committee shall elect a chairperson and vice-chairperson every two years

Article 5

The Secretary-General of the United Nations shall convene the Administrative Committee under the auspices of the United Nations Economic Commission for Europe at least once a year or at such other intervals as may be decided by the Administrative Committee, or at the request of a minimum of five Contracting Parties.

Article 6

A quorum of not less than one half of the Contracting Parties shall be required to be present for the Administrative Committee to be able to adopt decisions.

Article 7

Any Party may propose amendments to Appendix 1B of the present Convention. The text of any proposed amendment shall be submitted in writing to the Executive Secretary of the Economic Commission for Europe, who shall communicate it to all Parties at least ninety days before the meeting of the Administrative Committee at which it is proposed for adoption.

Article 8

(a) The Contracting Parties shall endeavor to adopt decisions of the Administrative Committee by consensus

(b) If all efforts at consensus have been exhausted, and no agreement reached, any Contracting Party may request that a vote be taken. The amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

(c) Amendments to Appendix 1B of the present Convention, adopted in accordance with paragraph (a) or (b) above shall be communicated by the Depositary to all Parties for ratification, approval or acceptance. Such amendment shall become effective if, within 6 months of communication, the number of Contracting Parties to object shall be less than one fifth of all Contracting Parties to the Agreement.

Article 9

(a) For the purpose of taking decisions, each Contracting Party shall have one vote

(b) Regional economic integration organizations that are Contracting Parties to the present Convention shall have one vote. Their constituent member States that are Contracting Parties to the present Convention shall vote in accordance with paragraph (a) above.

or,

Regional economic integration organizations shall, for matters within their competence, exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Agreement. **Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.**