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REVIEW OF THE COTIF AMENDMENT PROCEDURE: ASSESSMENT OF THE PUBLIC INTERNATIONAL LAW DIMENSION

It is becoming increasingly essential to be able rapidly to adapt the relevant provisions of COTIF and its Appendices to a legal environment that is constantly developing. Considerations regarding a possible revision should take into account public international law and in particular state practice under other relevant treaties.¹

Current legal framework of COTIF

In accordance with the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Modification Protocol of 3 June 1999, two principal amendment procedures are applicable.

The General Assembly decides on proposed amendments to COTIF unless the Convention attributes such competence to specific committees, in particular the Revision Committee². The enactment of modifications adopted by the General Assembly requires 'approval' by COTIF's Member States in accordance with their domestic law. Modifications to COTIF decided by the General Assembly enter into force twelve months after they have been approved by a specified number of Member States. It is noteworthy that the procedure applies equally to all amendments relating to a designated provision, whether it amounts to a simple change in wording or to a substantive adjustment.

Entry into force of modifications according to the above-mentioned provisions does not apply to those Member States which, before the entry into force, have submitted a declaration explaining that the state does not accept the modification(s). When decisions on modifications take effect, the relevant Appendix or Appendices are suspended with and between the Member States that have declared their non-approval of the amendment within the

deadline. Member States do not therefore have to accept an amendment by which they do not wish to be bound. Moreover, Article 42 § 1 gives Member States the right to declare at all times that they will not apply a particular Appendix in its entirety.

The envisaged 'approval' by states of a modification decided upon by the General Assembly must be explicit. It requires an individual legal act to finalise enactment of the modification. The procedure set out in Article 34 COTIF does not stipulate a time period or time limit for approval by individual states. The establishment of such approval is contingent upon the constitutional requirements of the domestic legal systems and may also be influenced by political circumstances. It is at this point that the process of the entry into force of modifications may become considerably lengthy, unforeseeable time-wise, and varied throughout the Member States.

At present, those amendments to the base Convention and its Appendices that come under the competence of the COTIF General Assembly take on average six years to enter into force.

Adverse effects of the current procedure

The international environment of COTIF develops rapidly, both in terms of law and in terms of the market. COTIF operates in a relatively complex legal context:

- In the first twenty years of its existence, COTIF 1980 was amended four times. Since COTIF 1999 entered into force in 2006, it has been amended three times. The speed of revisions is thus increasing, which is unsurprising in view of the intensification of international relations.
- An added factor is the dimension of EU law, where for the EU region EU transport law partly covers the same subject matter as COTIF, with EU legislative processes following their own – shorter - time frame.
- As for the market, there is an increase and an intensification of trade and transport across the globe; these require an ever more speedy response to the commercial environment;
- In this regard it is worth noting that in the draft constitutive text of the OSJD currently under discussion, the Organization is considering speeding up its revision procedure.

The lengthy revision procedure of COTIF has several adverse effects, both legal and non-legal in nature:

- The extended time period that passes before important modifications to the Convention actually enter into force can have a negative impact on the further amendments needed, as the latter may be linked to the amendments whose entry into force is still pending.
- The fact that COTIF envisages two different procedures for modification of the Convention and its Appendices may give rise to inconsistencies

¹ This article relies in part on the external legal report written for COTIF, LAW-17034-WGREVCOTIF 3-01 - 03.04.2017.

² Modifications to COTIF decided upon by the Revision Committee enter into force *automatically* for all Member States on the first day of the twelfth month following that during which the Secretary General has given notice of them to the Member States. Therefore, this "simplified" amendment procedure will not be considered further in this article.

between Appendices or even within one single Appendix.

- Long time periods before the entry into force of COTIF amendments have a direct effect on the railway market of the Member States. The regulatory framework will not meet the market's needs for speed and adaptability – ultimately this may have a negative impact on the Member States' market share in rail transport.
- What is said about the length of time before entry into force of COTIF amendments and its effect on the market can also be said about the unpredictability of the precise period of time until entry into force. Domestic approval is dependent on legal and sometimes political aspects of the various national legal orders of the Member States.
- Because of the parallel development of national and regional (notably EU, but also EEA) law, inconsistencies with and discrepancies in COTIF regulations may arise. As a consequence, Member States may feel obliged to make a declaration of non-application of certain COTIF Appendices.

Intersection between international and national legal regimes

On account of the field of operation of COTIF and its Appendices, and the fact that these contain both public and private law provisions, effectuation of the provisions of the Appendices very much depends on, and ties in with, the domestic legal order in the Member States.

International and regional law are created bottom-up, emanating from sovereign states, and states are free to decide how they arrange their domestic legal order within the outer boundaries of the rules of public international law to which they are bound. If and when states become a party to a treaty, they

are free to decide how they implement their treaty obligations at a domestic level, provided the international obligations are met.

At the level of international law, on the other hand, it is a longstanding principle that states cannot rely on their national law to justify non-performance of their international (treaty) obligations. The Permanent Court of International Justice (PCIJ) has already famously held that “[f]rom the standpoint of international law [...] municipal laws are merely facts which express the will and constitute the activities of states”.³ Today, this principle is reflected in Articles 27 (Performance) and 46 (Validity of consent to be bound) of the 1969 Vienna Convention on the law of treaties.

General considerations of public international law on the enactment of treaty amendments

In the decentralised system of international law, obligations are traditionally construed as directly grounded in the consent of states (to leave aside other subjects of international law) – which accounts for the prominence of the treaty instrument and of the law of treaties in international legal relations. It follows that in principle, amendments to treaty obligations are subject to the same requirement of consent by parties. This said, it is not uncommon in international law for states to give their consent *ex ante*. Thus, sovereign states may choose to delegate certain competences to a treaty organ or an intergovernmental organisation. Such delegation constitutes a general consensual basis, from which an international body may proceed to take decisions – for example on the adaptation of rules – without going back to the Member States for each individual case to obtain consent.

International practice shows a range of such possible mechanisms. Unsurprisingly, these mechanisms have emerged in the context of international organisations, which – themselves consent-based treaty regimes – have after all been created precisely to provide a somewhat centralised infrastructure in order to facilitate international cooperation. Intergovernmental organisations' regulatory activity runs from preparing or revising treaties in a classic process on the one hand, to 'majority rule making' on the other, in which the international body takes a definitive decision on the basis of previously given consent, while also operating in a non-plenary composition and/or taking decisions by majority rather than unanimity. As to the legal instrument at issue, technically the intergovernmental organisations may create a new provision, or they may modify an existing treaty or its Annexes/Appendices.

The consensual foundation is not prejudiced by the fact that at some point on the spectrum of regulatory activity by the organisation, international law may move out of the contractual (law of treaties) perspective into an institutional perspective, in which 'treaty parties' become 'Member States'.

There has been discussion in scholarship on whether and when regulatory acts by IGOs should be considered under the rubric of 'treaty practice', as obligations deriving from the constituent treaty for the IGO Member States, or, on the other hand, as 'legislative' acts by an IGO binding its Member States⁴. The former was, for example, the approach of the International Court of Justice when it dealt with the conflict between the 1971 Montreal Convention and Security Council Resolution 748 – originating in the UN Charter – as a traditional case of conflicting treaties.⁵

In the context of the present article it

³ *Certain German Interests in Polish Upper Silesia case*, PCIJ, 1926, p 19.

⁴ M. Fitzmaurice, who adheres to the first view (at 316-317), and, contrariwise, C. Alexandrowicz (at 152), on the regulatory acts of Specialized Agencies: “this is no doubt an extra-treaty process”.

⁵ Case concerning Questions on Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Provisional Measures), 14 April 1992, ICJ Rep. 1992, at 126.

is relevant to note that in either view there is agreement that the binding character of these intergovernmental organisations' regulatory acts can, in international law, be soundly explained on the basis of an advance expression of consent on the part of states.

International organisations and treaty regimes

International legal practice shows a variety of mechanisms employed in international organisations and treaty regimes for the enactment of new rules or the amendment of existing ones, while at the same time safeguarding state consent as a legal basis. These range from definite state consent given in advance, with the organisation or organ proceeding without further consultation of the Member States, to the states (re)confirming their explicit consent for each individual decision. This will depend on the organisation or treaty regime, and on the nature of the rule or amendment to be enacted. In some cases rules and their modifications may be enacted by the decision of an organisation or treaty organ only. In most instances, however, formal approval on the part of the Member States per decision – be it explicit or implicit – is required.

Approval may be required in an explicit form (as is currently the case for Convention revisions decided upon by the OTIF General Assembly). Alternatively, for procedural optimisation, it may be arranged for states to become bound after they have not objected within a specified period of time. This mechanism is sometimes construed as 'tacit approval' (or 'tacit consent'), and sometimes as 'opting-out' (or 'contracting out', or 'negative ratification'). There is some conceptual difference between the two: in the

case of tacit approval, states become bound at some point by tacitly demonstrating their legal assent, possibly in combination with provisional application; in the case of an opting-out procedure, states become bound from the adoption of an act onwards, unless they free themselves from the obligations by objecting within a specified period of time. This said, in practice the mechanisms work out the same way. In the light of present day demands on the flexibility of treaty regimes and the effectiveness of process management by international organisations and treaty bodies, tacit approval and opting-out are widely used in international practice. In this respect, moreover, "it has become common practice to separate basic treaty provisions from regulations or standards of a technical, scientific, or administrative nature."⁶

Another mechanism applied is provisional application. In accordance with Article 25 of the 1969 Vienna Convention on the law of treaties this is possible if "(a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed."

A variety of regulatory activity is first of all found in organisations with a specialised or technical field of operation; the following non-exhaustive overview provides some examples.

International Civil Aviation Organization (ICAO)

The ICAO constitution provides for an 'opting-out' mechanism or 'negative ratification' for international civil aviation standards that may be annexed to the constitution. When the period for contracting out has passed, the members that have failed to respond are legally bound by the provisions in question. This does not necessarily

mean that they apply the decisions. Almost half of the members did not indicate whether or not they applied the international standards and recommended practices adopted by the Organization.

International Labour Organization (ILO)

The ILO stands out for its strong executive secretariat and a constitutional mandate to prepare and adopt conventions in its plenary organ by a two-thirds majority. Ratification of conventions is then considered essential for the Organization. Not only do Member States have to submit conventions to their competent authorities and to report on the result within 18 months, but, as long as they have not yet ratified, they must also periodically report on the position of their laws and practices with regard to the matters dealt with in the convention. These reports are examined by the ILO Committee of Experts on the Application of Conventions and Recommendations, which in turn provides information to the general congress of the Organization, which again discusses the reports.⁷

International Maritime Organization (IMO)

IMO Conventions enter into force within an average of five years after adoption.⁸ It is crucial that they remain up to date by periodically amending the text or the Annexes. However, the original amendments procedure in IMO proved very slow. A newly devised amendment procedure was used for conventions as of 1972; it envisages (in the terminology of IMO) 'tacit acceptance'⁹ or (in the terminology of Schermers & Blokker) 'negative acceptance'¹⁰ of amendments by states. For example, in the

⁶ D. König, 'Tacit Consent/Opting Out Procedure', *Max Planck EPIL*, para 4.

⁷ HG Schermers & NM Blokker, *International Institutional Law: Unity Within Diversity* (5th ed), Martinus Nijhoff Publishers, 2011, §1284.

⁸ *ibid*, §1281.

⁹ <http://www.imo.org/en/About/Conventions/Pages/Home.aspx>

¹⁰ Schermers & Blokker, §1266.

case of the 1974 SOLAS Convention, an amendment to most of the Annexes is 'deemed to have been accepted at the end of two years from the date on which it is communicated to Contracting Governments...' unless the amendment is objected to by more than one third of Contracting Governments, or Contracting Governments owning not less than 50 per cent of the world's gross merchant tonnage.¹¹ The 'tacit acceptance' procedure has greatly speeded up the amendment process. Amendments generally enter into force within 18 to 24 months. With regard to this procedure the IMO has concluded that 'without tacit acceptance, IMO's ability to set safety and environmental standards for world shipping would have been seriously weakened'¹².

United Nations Educational, Scientific and Cultural Organization (UNESCO)

Members can be required to report periodically on any action taken on the basis of conventions submitted by the general Congress. Members can be obliged to submit conventions to their competent authorities within one year of the close of the session at which they are adopted. The degree of compliance within UNESCO does not seem impressive (an indicative figure of 10 per cent has been given).¹³

World Health Organization (WHO)

Amendments to the WHO Constitution come into force for all Members in accordance with their respective constitutional processes. The Health Assembly (plenary body has the regulatory function, in contrast to e.g. the ICAO Council) has the authority to adopt regulations in some specified fields. The WHO provides for a negative ratification procedure of these regulations. Not only are the members of the WHO bound to submit conventions to their national authorities (within 18 months)

and to report on the result, they are also obliged to provide an explanation for any failure to ratify. Subsequent international publicity undoubtedly creates further pressure to ratify.

Universal Postal Union (UPU)

UPU deserves special mention for its complex institutional set-up and its variety of legal instruments, i.a. with provisions setting out rules of private law in the same way as some of the COTIF Appendices. The UPU works with different legal instruments (the 'Acts' of the Union): the Constitution, the General Regulations, the Rules of Procedure, the Convention (comprising two 'manuals'), the (optional) Agreement, and the Regulations (which bring the Convention and, where applicable, the Agreement, into operation).

The common rules applicable to the international postal service and the provisions concerning the letter-post and parcel-post services are given in the Convention and its Regulations, which are binding on all Member States. Member States are to "ensure that their designated operators fulfil the obligations" arising therefrom. The 1999 Congress saw a transfer of authority of amendment from Congress to the Postal Operations Council (POC).¹⁴ The ensuing change in legal status of the Regulations was accompanied by the decision that ratification or approval on the part of the Member States would no longer be required. Since then, the Regulations of the Convention are agreements concluded by the member countries elected by the Congress to the POC. Proposals for amendments to the Parcel Post and Letter Post Regulations are to be submitted to the POC directly. Adopted amendments are communicated to the member countries.

The UPU Regulations are comparable to the COTIF Appendices to the extent that they contain operational and

commercial rules to be applied by the postal services, including rules on contractual liability. The Regulations then contain all provisions with rules that do not have the states as normative addressee, hence are not of an 'inter-governmental' nature, but rather are addressed to private parties, such as postal services and customers. Such rules may thus be said to have a private law character.

The newly specific character of the Regulations as containing rules of a private law character were then considered to mean that no ratification or approval of the Regulations was necessary. It also led to the conclusion "that it was no longer justified to formally submit to Congress proposals for amending the Regulations." It is noteworthy that in the renewed UPU system one decisive factor in the decision to put in place the 'simplified procedure' for enactment of (amendments to) the Regulations appears to have been precisely that the rules concerned were not of an 'intergovernmental' nature. This indicates that the possible interaction of the Regulations with private law provisions in respective national legal orders was not perceived as a problem by the Member States.

Another notable feature of UPU legal practice is the prominent role of the mechanism of provisional application. The Constitution does not mention provisional application, but the Commentary on Article 33 provides that in accordance with the practice followed by the Union since its foundation, Congress fixes the date on which the Acts (i.e. the instruments mentioned above, including the Convention and Regulations) enter into force, irrespective of the number and dates of the ratifications or notifications of approval deposited by the signatory states. This procedure differs from the traditional practice (still used, but less frequently than before), in which treaties enter into force after a certain number of ratifications.

¹¹ <http://www.imo.org/en/About/Conventions/Pages/Home.aspx>.

¹² Schermers & Blokker, §1291.

¹³ *ibid*, §1286.

¹⁴ Commentary on Article 29 (29.3) UPU Constitution.

Despite delays in ratification and approval, it appears that the Acts of the Union have been consistently applied – in most cases ‘provisionally’ - by all member countries from the date of their entry into force. The result is that the Convention is stable and can function as the instrument in force between Congresses, regardless of how many countries have ratified or approved it. According to Schermers & Blokker, UPU is the organization that makes most frequent use of provisional application in order to ensure speedy application of its Acts. The book reports that ‘as a general rule’ the UPU (amended) Convention enters into force on a predetermined date, usually 12-20 months after its adoption.¹⁵

Provisional application

Provisional application is used more often – for example the Organisation for Economic Co-operation and Development (OECD) aims partly to solve the problem of ‘watchful waiting’ (states only ratifying social conventions if their competitors accept the same limitations, as the acceptance of these conventions may have negative economic consequences) by allowing members to apply the rules provisionally as long as other members have not ratified them.¹⁶ For the European Union the possibility of provisional application of international agreements with third countries is explicitly envisaged in Article 218(5) TFEU; and this possibility is often used by the European Union. The 2016 Report on Provisional Application in the work of the International Law Commission (ILC)¹⁷ contains an addendum with i.a. examples of recent European Union practice on provisional application, amongst others in the con-

text of mixed agreements. These frequently specify in the text which parts of the agreement may apply provisionally; this is related to the fact that said parts are generally linked to the competence of the European Union, while the provisions that fall within the competence of the Member States, and are subject to national ratification, are not normally eligible for provisional application.¹⁸

Other treaty regimes

Certain treaty regimes that present centralised structures to some degree, without perhaps qualifying as traditional international organisations, show a similar practice. An opting-out mechanism is used for example in CITES¹⁹ and the International Whaling Convention²⁰. While the 1985 Vienna Convention for the Protection of the Ozone Layer envisages a procedure for amendments much like that of the ILO system, the procedure laid down in the 1987 Montreal Protocol on Substances which Deplete the Ozone Layer for the enactment of ‘adjustments’ to the original standards with regard to controlled substances, amounts to genuine ‘legislation’ within treaty regimes: such ‘adjustments’, failing consensus, are adopted by a two thirds majority; they do not offer the states the possibility to opt out and they are, contrary to e.g. ICAO standards, explicitly said to be binding on all parties.²¹

The treaty practice in the Council of Europe showed a growing interest in ‘streamlined’ or ‘simplified’ procedures as early as the 1980s and the 1990s. A commentator in this regard concisely expresses the principle of freedom of contract when confirming that the

rules of international treaty law concerning amendments are flexible and that states have the freedom to adapt these rules to new circumstances, “as long as some basic principles of *jus cogens* are not violated.”²²

Possible amendments to COTIF

Adjustment and streamlining of the COTIF revision procedure could take different forms. A working group to amend the procedure for revising COTIF was held in Berne on 3 May 2017. It considered different proposals aimed at increasing both the speed and the predictability of the revision procedure, while safeguarding (in a streamlined manner) the consent of Member States in relation to a particular amendment. However, the discussions highlighted the difficulties Member States encounter in their national procedures.

Bearing in mind the complexity of the issue, the working group agreed to give the Member States a further period of time to enable them to carry out their internal consultations and examine the issue in more depth. It was also agreed at the working group that the Secretariat would send the Member States a questionnaire to make their internal consultations easier.

The Revision Committee will meet from 27 February to 1 March 2018. The document that will be submitted to the Revision Committee concerning the feasibility of amending the revision procedure will take into account the positions and comments from the Member States and their replies to the questionnaire.

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¹⁵ Schermers en Blokker, § 1295.

¹⁶ *ibid.*, §1289.

¹⁷ UN Doc. A/CN.4/699/Add.1.

¹⁸ *Statement on behalf of the European Union* at the General Assembly Sixth Committee, United Nations New York, 1 November 2016.

¹⁹ 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, UNTS, Vol. 993, 243.

²⁰ 1946 *International Convention for the Regulation of Whaling*, UNTS Vol. 161, 72.

²¹ Article 2(9) d of the Montreal Protocol stipulates that decisions (possibly taken by majority) are binding on all parties and enter into force 6 months after notification by the Secretariat. An analysis of the procedural aspects of the 1985 Ozone Convention (1513 UNTS 3) and the 1987 Montreal Protocol (1522 UNTS 3), in M Fitzmaurice, ‘Modifications to the Principles of Consent in Relation to Certain Treaty Obligations’, *ARIEL* 1997, 275-317.

²² See the helpful overview in J Polakiewicz, *Treaty-Making In The Council Of Europe*, Council of Europe Publications 1999, pp 161-172, quotation at p 169.