

# Recent Cases in International Transport Law

Law in Action, Recent Cases in International Transport Law,  
Seminar Clé de Berne, 16 October 2017

Nando Stauffer von May

Attorney-at-law, Notary of the Canton of Bern

gbf


recht@muri

# Law in Action – Rail Transport

gbf



# Law in Action?

 LANDESVERWALTUNG FÜRSTENTUM LIECHTENSTEIN					<b>Firmenindex</b> Handelsregister Amt für Justiz (AJU)
Firmennummer	Rechtsnatur	Eintragung	Löschung	Übertrag 1069036 von: FL-0002.024.642-3/a auf:	
FL-0002.024.642-3	Aktiengesellschaft.	05.10.2000			

Bestellungen

EI	Lö	Firma	Ref	Sitz
1		SBB Insurance AG	1	Vaduz

Ref	Adresse der Firma
1	c/o PRÄSIDENTIAL-ANSTALT Äulestrasse 38 9490 Vaduz
2	c/o AON INSURANCE MANAGERS LIECHTENSTEIN AG Pflugstrasse 7 9490 Vaduz
8	c/o AON INSURANCE MANAGERS (LIECHTENSTEIN) AG Erlenweg 3 9495 Triesen

- Captive Insurance Company
- Passporting rights in the European Economic Area

# Law in Action ?



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**UNDERWRITER**

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News

## Overcapacity leads to premium rate reductions of as much as 30% in some markets: Willis

July 16, 2014 by Canadian Underwriter



# Law in Action – Ocean Freight

**DELIYERIANAN SHIPPING COMPANY S.A.**  
 11, rue de la Bourse 1050 BRUXELLES  
 Tel. 02 512 00 300 Fax 02 512 00 301  
 Telex 320000 DELIYER

**BILL OF LADING NON-NEGOTIABLE COPY**  
 NO. OF ORIGINAL BILLS 1/THREE  
 NO. OF OTHER COPIES 2/THREE

**SHIPPER:**  
 SINOPEC  
 CHINA NESTLE  
 SWI 202400

**CONSIGNEE:**  
 TO COME (CUSTOMER)  
 INC 00011488184

**SHIPPER'S REFERENCE:**  
 P.O. BOX 6025  
 30116 CA 9014

**CONSIGNEE'S REFERENCE:**  
 TO COME (CUSTOMER)  
 INC 00011488184

**VESSEL:** A VOYAGE TO THE GULF OF ADEN  
**DATE OF DEPARTURE:** 2012.12.24  
**DATE OF ARRIVAL:** 2013.01.04

**PORT OF DEPARTURE:** SHANGHAI  
**PORT OF DESTINATION:** ROTTERDAM

**MARKS AND NUMBERS:** 25 TANK CONTAINERS - NOT DECKED BY SHIPPER - CASKS ARE NOT RE-STACKABLE

Container No.	Description of Goods	Quantity	Unit	Weight
MSCU6421143	14000 CONTAINERS RATE TO COMPANY: 4 DUCKS COMMITTEE 226 NOT SUBJECT TO TMS-CODE H.C. CODE: 2309.5000	4	CONTAINERS	13712.200 KG
MSCU6421144	22 PUBLIC DRUGS CONTAINER 72 NOT SUBJECT TO TMS-CODE 3 CB 1800 - 5000 PA 211 H.C. CODE: 3309.5000	22	CONTAINERS	1256.000 KG
TOTAL 26 CONTAINERS				14968.200 KG
MSCU6421145	14000 CONTAINERS RATE TO COMPANY: 24 STOCKS COMMITTEE 207, CONTAINER 226 NOT SUBJECT TO TMS-CODE H.C. CODE: 3309.5000	24	CONTAINERS	33720.200 KG
TOTAL 50 CONTAINERS				50.000 CBM

**SHIPPER'S DECLARATION:**  
 I hereby certify that the above is a true and correct copy of the original bill of lading and that the goods are in conformity with the description and marks thereon.

**DATE:** 01/01/2013  
**BY:** [Signature]

FREIGHT PREPAID

# Law in Action?

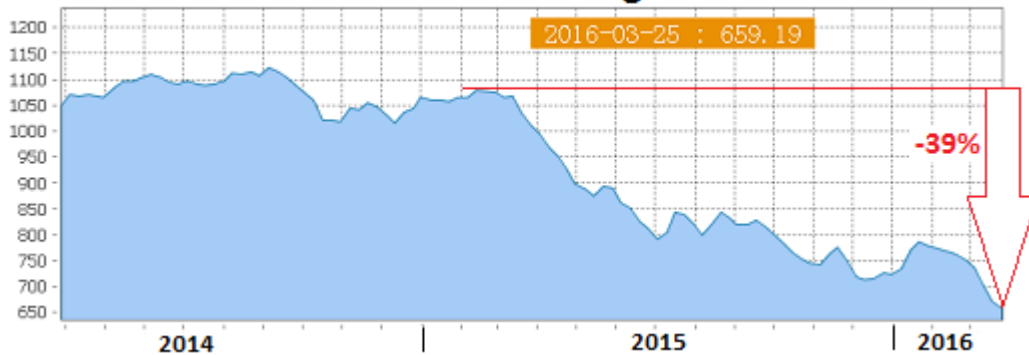
## FREIGHT NOT PAID

### First Ocean Freight Rates Collapse to “Zero,” China Freight Index Plunges to Record Low, Bailouts Loom

by Wolf Richter • Mar 28, 2016



China Containerized Freight Index



# Law in Action – Ocean Freight

Transport of



from San José



to Rotterdam





# Law in Action – Ocean Freight

**Producer**, Costa Rica, booked the transport of pineapples on a FREIGHT COLLECT basis

**Carrier**, France, carried out the transport

**Fruit Company**, Canton of Zug, asked the carrier's local agency to release the containers

**Agency**, Basel, arranged for release of the goods

**Logistics Company** (Freight Forwarder), Netherlands, received the goods and arranged for transport to end buyer/receiver

# Law in Action – Ocean Freight

Agency invoiced the Fruit Company for the freight costs.



Fruit Company alleged:

- that it would be up to the logistics company as Consignee to pay for the costs based on FREIGHT COLLECT
- that the Agency is not entitled to claim freight costs
- that it had not booked the transport, i.e. that it is not a contractual party and does, therefore, not owe the freight costs

# Law in Action – Ocean Freight

## Kantonsgericht Zug

The **applicable law** to the claim for freight is basically French law (art. 117 para 3 lit. c of Swiss Act on International Private Law – domicile of the carrier), whereas the contractual relationship between Agency and Fruit Company is a mandate according to art. 394 et seqq. Swiss Code of Obligations.



# Law in Action – Ocean Freight

## **Allegation 1:**

It would be up to the logistics company as Consignee to pay for the costs based on FREIGHT COLLECT.

## **Kantonsgericht Zug:**

Fruit Company requested (by e-mail) the Agency to arrange for release of the goods to its «handling agent».

-> The logistics company was Fruit Companies' handling agent, and thus only an auxiliary person. It was never the parties' intention that it should pay the freight costs.



# Law in Action – Ocean Freight

## **Allegation 2:**

The Agency is not entitled to claim freight costs.

## **Kantonsgericht Zug:**

Agency has not proved that it had to pay the freight costs which it now claims from the principal (Fruit Company) as expenses (based on art. 402 CO).

But Agency presented the assignment of the claim for freight cost (assignment from Carrier to Agency).



# Law in Action – Ocean Freight

## **Allegation 3:**

The Defendant (Fruit Company) had not booked the transport, i.e. it is not a contractual party and does, therefore, not owe the freight costs.

## **Kantonsgericht Zug:**

Defendant asked the Agency for release of the goods and thus accepted to become a party to the contract of carriage by novation (according to French law).

-> Defendant had to pay...



# Law in Action – Ocean Freight

... but had no money



# Law in Action

## Inland Water Transport

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# Inland Water Transport Parties involved

- Ship owner + hull insurer (Claimant)
- Charterer
- Terminal operator + liability insurer
- Crane service provider + liability insurer
- 2 employees of the crane service provider (Defendants)
- Owner of the goods + transport insurer



# Inland Water Transport

## Expertise / Survey reports:

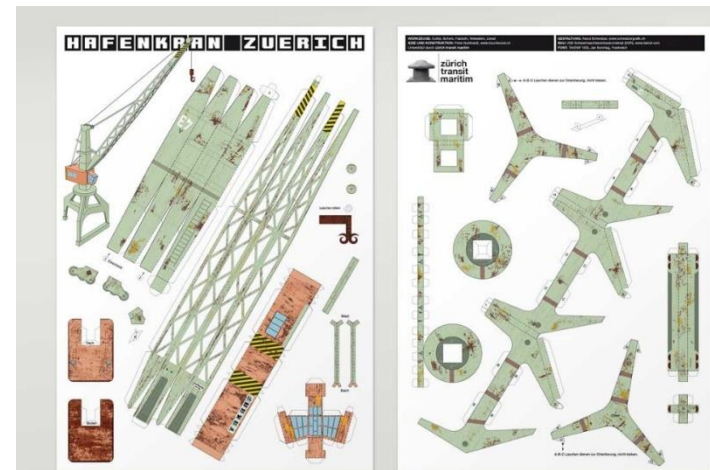
- Hull insurer
- Terminal operator (liability insurer) + owner of the goods (transport insurer)
- Crane service provider (liability insurer)
- EMPA (Swiss Federal Laboratories for Materials Testing and Research) expertise and further expertise (without involvement of the Defendants)



# Inland Water Transport

## Possible causes:

- Mistake of the crane drivers
- Wrongful load distribution
- Wrong indication of weight
- Failure of the steering
- **Mechanical failure of the brake unit due to wrongful configuration of the bolt of the brake**
- Wrongful configuration of the adjustment block



# Inland Water Transport

## Procedure:

- February 2012: Occurance of the damage
- 2 years: Survey reports/expertises, correspondence, request for precautionary taking of evidence
- April 2014: Statement of claim (hull insurer)
- January 2015: Statement of Defense (2 employees of the crane service provider)
- May 2015: Replication
- Oktober 2015: Rejoinder
- February 2016: Instruction hearing



## Law in Action? Inland Water Transport

### Result:

- Amount in dispute is around CHF 70'000
- Duration around 4 years
- Expenses for survey reports, lawyers and for the court
- Court asked for the advancement of CHF 60'000 for an independant expertise to be ordered by the court.



# Road Haulage (CMR)

## Refugees on the trailer



# Convention on the Contract for the International Carriage of Goods by Road (CMR), 1956

- Seller, Switzerland
- Freight Forwarder, Switzerland
- Road Carrier, Austria + its liability insurer (Claimant)
- Road Carrier, Latvia (Defendant) + its liability insurer
- Executing Road Carrier, Latvia
- Buyer, UK

## INCOTERMS® 2010 - DDP



# CMR

**Claimant alleged, based on a survey report that it ordered:**

- Refugees have been on the trailer during transit from France to UK
- Chocolate has been on the trailer
- Goods got wet and dirty from excrements and dirt
- Packaging has been damaged
- Chocolate no longer consumable
- Total loss of the goods

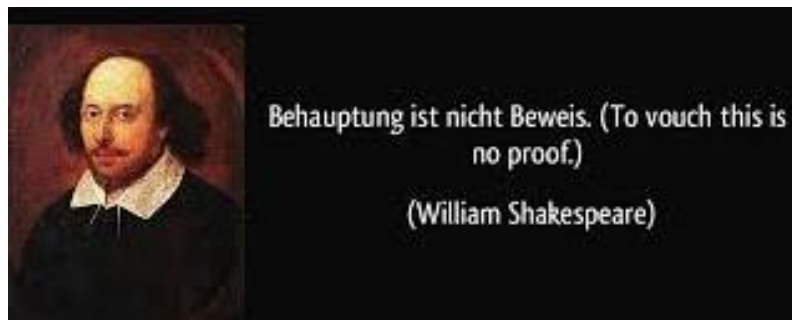


# CMR – Law in Action

## Civil Procedure Code

The private survey report is a party's allegation only („blosse Parteibehauptung“).

Allegations must be made in the statement of claim itself  
- private reports can not be declared as an integral part of the statement of claim.



# Judgment of the Commercial Court of the Canton of Argovia



- Claimant failed to sufficiently allege that all goods have been damaged and that it would be in line with the industry standard to destroy all goods.
- Causation between contamination and total loss has not been sufficiently alleged and proved.
- Pending before Federal Supreme Court.



# Law in Action Rail Transport (CIM)



# Rail Transport - CIM

- Deutsche Bahn ordered new railway tracks from a steel company with manufacturing sites in Spain and Poland.

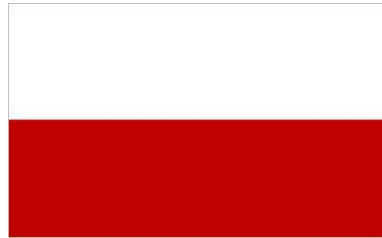


- Steel Company needed to transport 30m railway tracks to German and Austrian welding factories.



# Rail Transport - CIM

- From Spain to Poland by Ocean Freight
- From Poland to Austria/Germany by rail transport



-> Crossborder transport

- Multimodal transport?
- Steel Company mandated a Freight Forwarder (Defendant)
- Freight Forwarder mandated a rail carrier (Claimant) for the transport starting from the seaport in Poland to the train station nearest to the welding factory

# Rail Transport - CIM

For the **final transport** from the public train station to the welding factory a special diesel locomotive was required. As the freight forwarder (Defendant) did not organise for such transport, Claimant hired itself the necessary specialists.

-> Costs in total: EUR 424'858



# Rail Transport - CIM

For unloading of the steel, parties agreed – depending on the destination – on a duration of 24h or 48 h. For additional laytime („Überliegezeit“) of the rail waggons the parties agreed on the usual compensation (so-called demurrage / «liquidated damages») for the carrier (Claimant).

-> Laydays: 12`354

at a rate of EUR 31.72 per day

= EUR 470`242



# Rail Transport - CIM

- Transports started in January 2009
- Statement of claim filed on 18 June 2010

Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM)

## Article 48 - Limitation of actions

§ 1 The period of limitation for an action arising from the contract of carriage shall be **one year**. [...]





# Rail Transport - CIM

## Article 48 - Limitation of actions

§ 1 The period of limitation for an action **arising from the contract of carriage** shall be one year. [...]

There must be a objective close connection between the contract of carriage and the claim.



# Rail Transport - CIM

## Demurrage

Claimant: Payment for laytime is only due after the carriage has been terminated and, therefore, is not close connected to the carriage.

Oberster Gerichtshof, Wien:

Decision of 6 April 2016, 7 Ob 146/15v, published in TranspR 2016, p. 479 et seqq.

Payment for demurrage is usual practice and has been agreed in the contract of carriage. Art. 48 § 1 CIM is applicable. Limitation period must be examined for each claim for demurrage.



# Rail Transport - CIM

## Final Transport

Oberster Gerichtshof, Wien

Decision of 6 April 2016, 7 Ob 146/15v, published in TranspR 2016, p. 479 et seqq.

The final transport has not been contractually agreed at all and thus has not been included in the contract of carriage. The carrier (Claimant) performed an action without due authority in connection with the affairs of the Defendant ("Geschäftsführung ohne Auftrag"). CIM is not applicable. According to national Austrian law such claim has not yet been time-barred.

CIM is not applicable to forwarding contracts.

The Bern Key - The Bern Convention 1886  
OCTI (Central Office for International Carriage by  
Rail) -> OTIF (Intergovernmental Organisation  
for International Carriage by Rail ), Bern  
COTIF - **CIM**

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# Swiss Federal Act on Carriage of Goods



## Art. 21 Beförderungsvertrag

- <sup>1</sup> Mit dem Beförderungsvertrag verpflichtet sich das Unternehmen, ein Gut gegen Entgelt zum Bestimmungsort zu transportieren und es dort dem Empfänger oder der Empfängerin abzuliefern.
- <sup>2</sup> Der Beförderungsvertrag bedarf zu seiner Gültigkeit keiner besonderen Form.
- <sup>3</sup> Im Übrigen gilt für den Beförderungsvertrag im nationalen und im internationalen Verkehr Anhang B (Einheitliche Rechtsvorschriften für den Vertrag über die internationale Eisenbahnbeförderung von Gütern - **CIM**) zum COTIF.
- <sup>4</sup> Der Bundesrat kann für den nationalen Verkehr abweichende Vorschriften erlassen.  
->Gütertransportverordnung

## Art. 21 Contrat de Transport

- <sup>1</sup> Par le contrat de transport, l'entreprise s'engage, contre rémunération, à transporter une marchandise à destination et à l'y remettre au destinataire.
- <sup>2</sup> Le contrat de transport ne nécessite aucune forme particulière pour être valable.
- <sup>3</sup> Dans le cadre du transport national comme du transport international, le contrat de transport est régi pour le reste par l'appendice B (règles uniformes concernant le contrat de transport international ferroviaire des marchandises - **CIM**) de la COTIF dans sa teneur du Protocole de modification du 3 juin 1999.
- <sup>4</sup> Le Conseil fédéral peut édicter des dispositions dérogatoires pour le transport national.  
-> Ordonnance sur le transport de marchandises

Swiss national law refers to CIM  
for the (inland) transport of goods  
by **Train**

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Swiss national law refers to CIM  
for the transport of goods by  
**Cable Car**



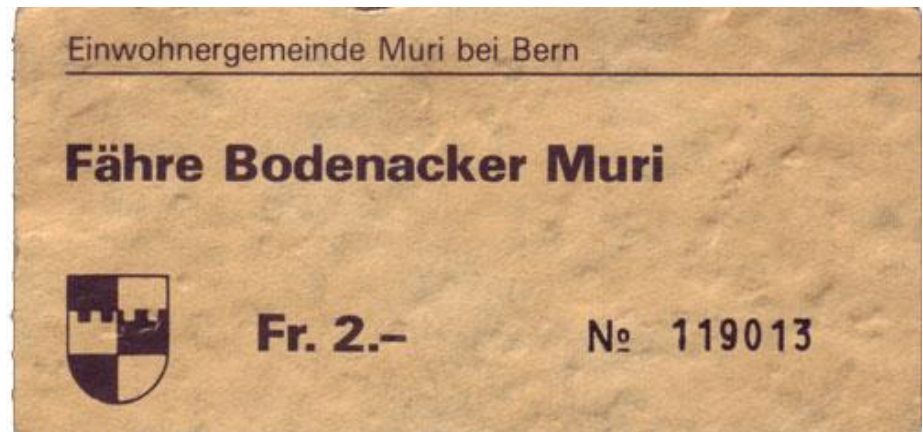
# Swiss national law refers to CIM for the transport of goods by **Tram and Rack Railway**





Swiss national law refers to CIM  
for the transport of goods by  
**Rubber Boat, Canoe etc.**

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# Marzili-Bahn

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## **Nando Stauffer von May**

Attorney-at-law, Notary of the Canton of Bern

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Muri bei Bern

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Berne  
16.10.2017

# «Canton of Berne: a Central Swiss Region with Great Potential Outcome»

MP Christian Wasserfallen  
National Councillor, FDP.The Liberals

# Einleitung

Technik & Politik & Bildung



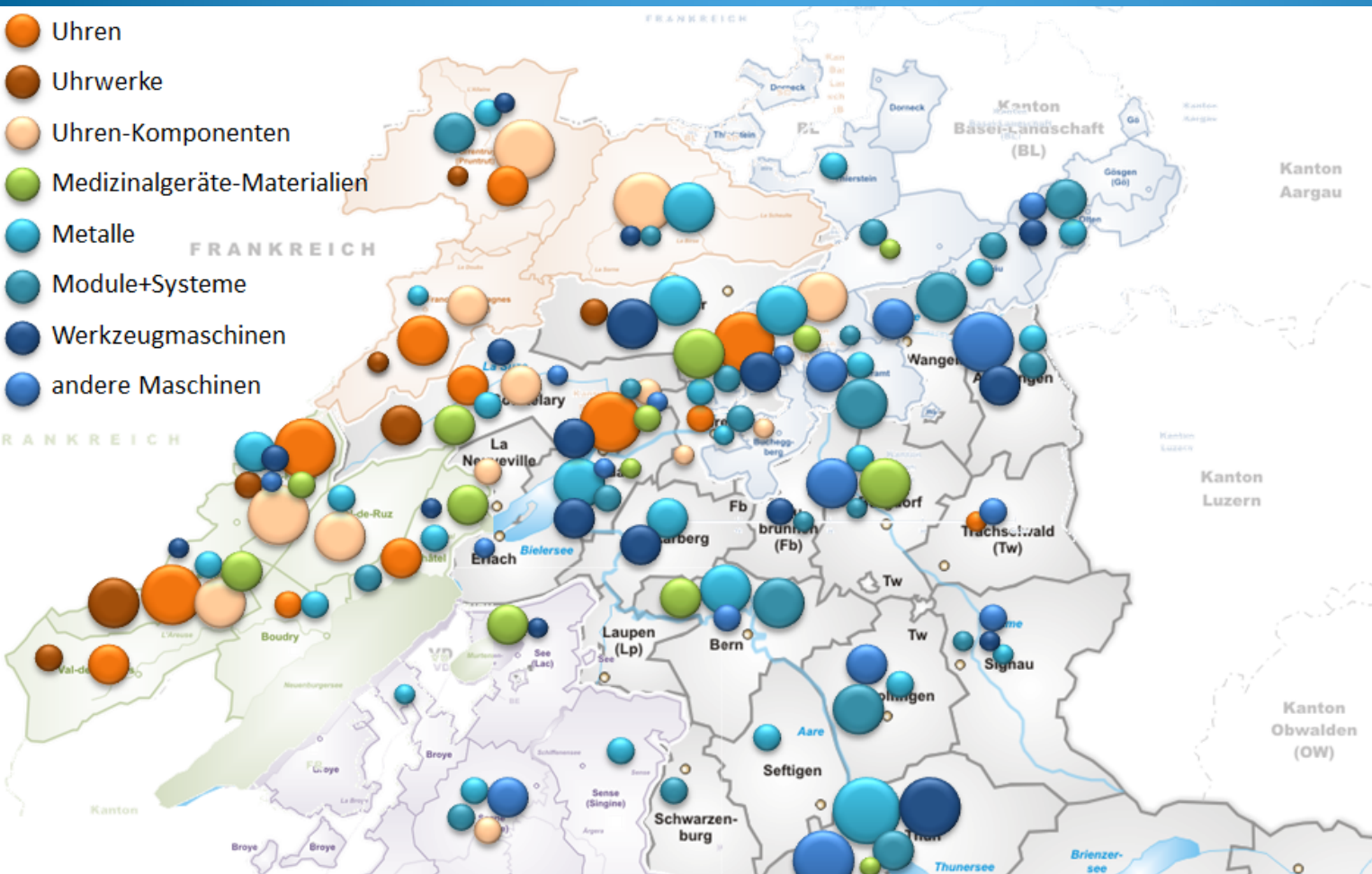
2

MP Christian Wasserfallen  
Berne, 16.10.2017

@cwasi   
[www.cewe.ch](http://www.cewe.ch)



# MEM-Branchen: Keine zufällige Anordnung



# Produktionsketten im Maschinenbau

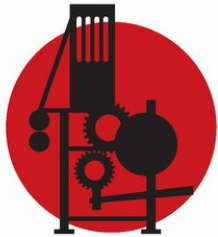


# Industrie 1.0 bis 4.0

Industrie 4.0 ist eine intelligente Organisation und Steuerung der gesamten Wertschöpfungskette über den Lebenszyklus von Produkten unter konsequenter Anwendung von ICT mit dem Zweck neue Geschäftsmodelle zu erschliessen.

## DIE VIERTE REVOLUTION

Erster mechanischer  
Webstuhl | 1784



### ERSTE INDUSTRIELLE REVOLUTION

Mechanische Produktionsanlagen, angetrieben durch Wasserkraft und Dampfmaschinen

ENDE 18. JHD.  
(Mechanisierung)

Erstes Fließband, Schlachthöfe  
von Cincinnati | 1870

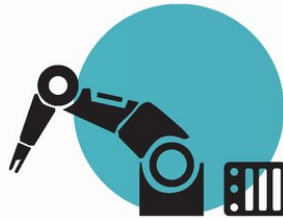


### ZWEITE INDUSTRIELLE REVOLUTION

Transportbänder zur schnelleren Fertigung, Strom ermöglicht arbeitsteilige Massenproduktion

BEGINN 20. JHD.  
(Elektrifizierung)

Erste speicherprogram-  
mierbare Steuerung | 1969



### DRITTE INDUSTRIELLE REVOLUTION

Dank Elektronik und IT übernehmen Maschinen ganze Arbeitsschritte der Produktion

BEGINN 70ER-JAHRE | 20. JHD.  
(Automatisierung)

Industrie 4.0



### VIERTE INDUSTRIELLE REVOLUTION

„Intelligente Fabrik“: Mensch, Maschine und Objekt tauschen Informationen aus. Das Produkt steuert seinen eigenen Fertigungsprozess

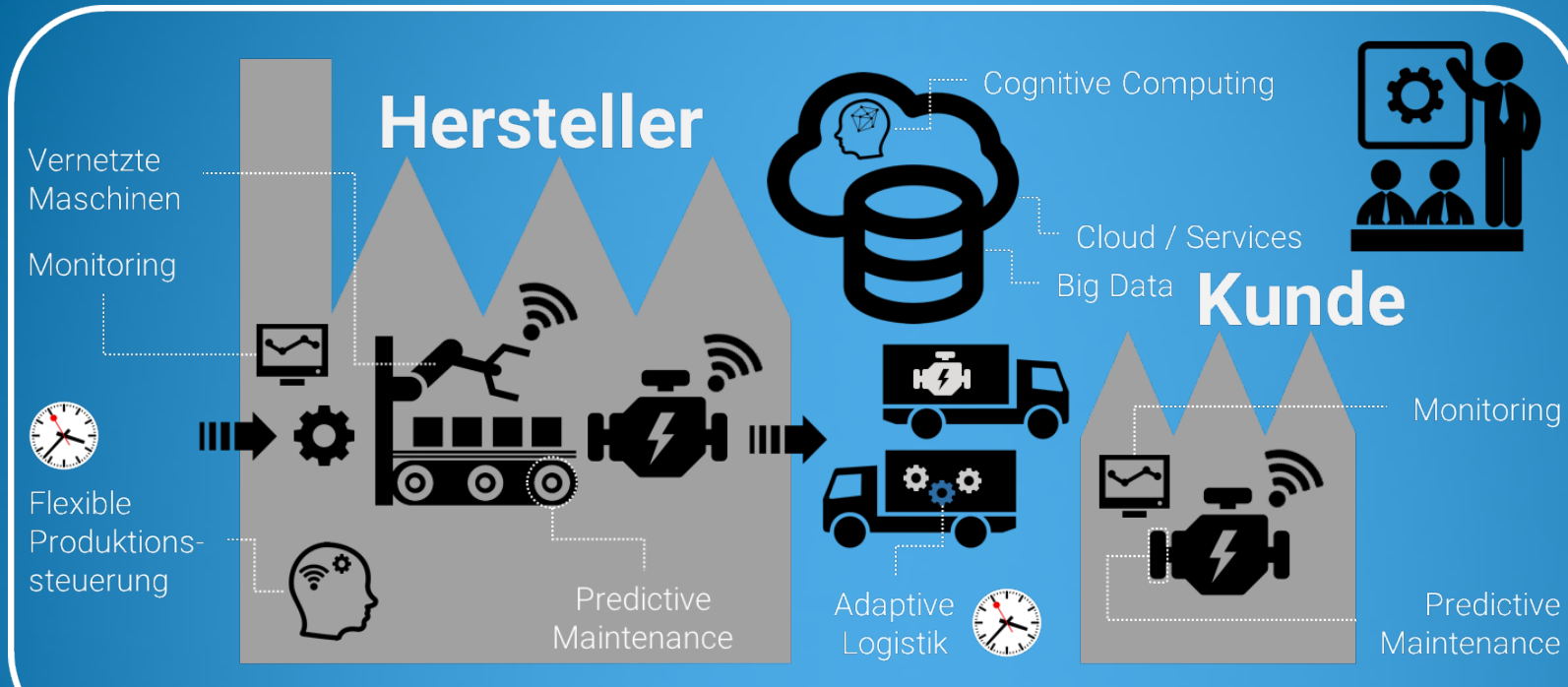
HEUTE  
(Vernetzung)

«Die Maschinen sind auf die Digitalisierung vorbereitet – die Unternehmen auch?»





# Industrie 4.0



## Smart Products

Produkt steht nach Verkauf beim Kunden mit dem Hersteller in Kontakt

## Smart Factory

Intelligenter Produktionsprozess mit Verwendung von Sensoren & Aktoren

## Smart Operations

Smart Factory ermöglicht flexible Produktionsplanung mit optimaler Logistik

## Data-driven Services

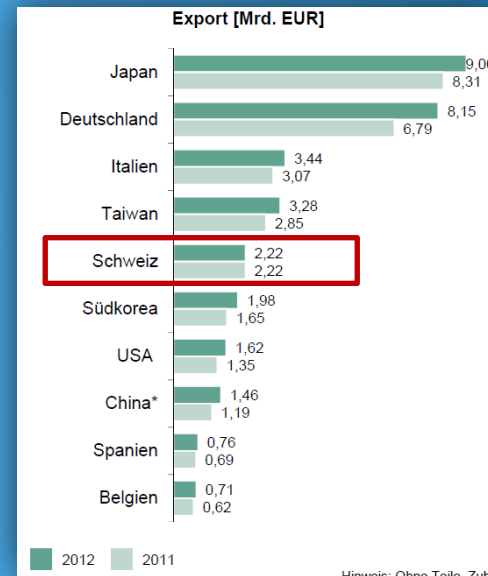
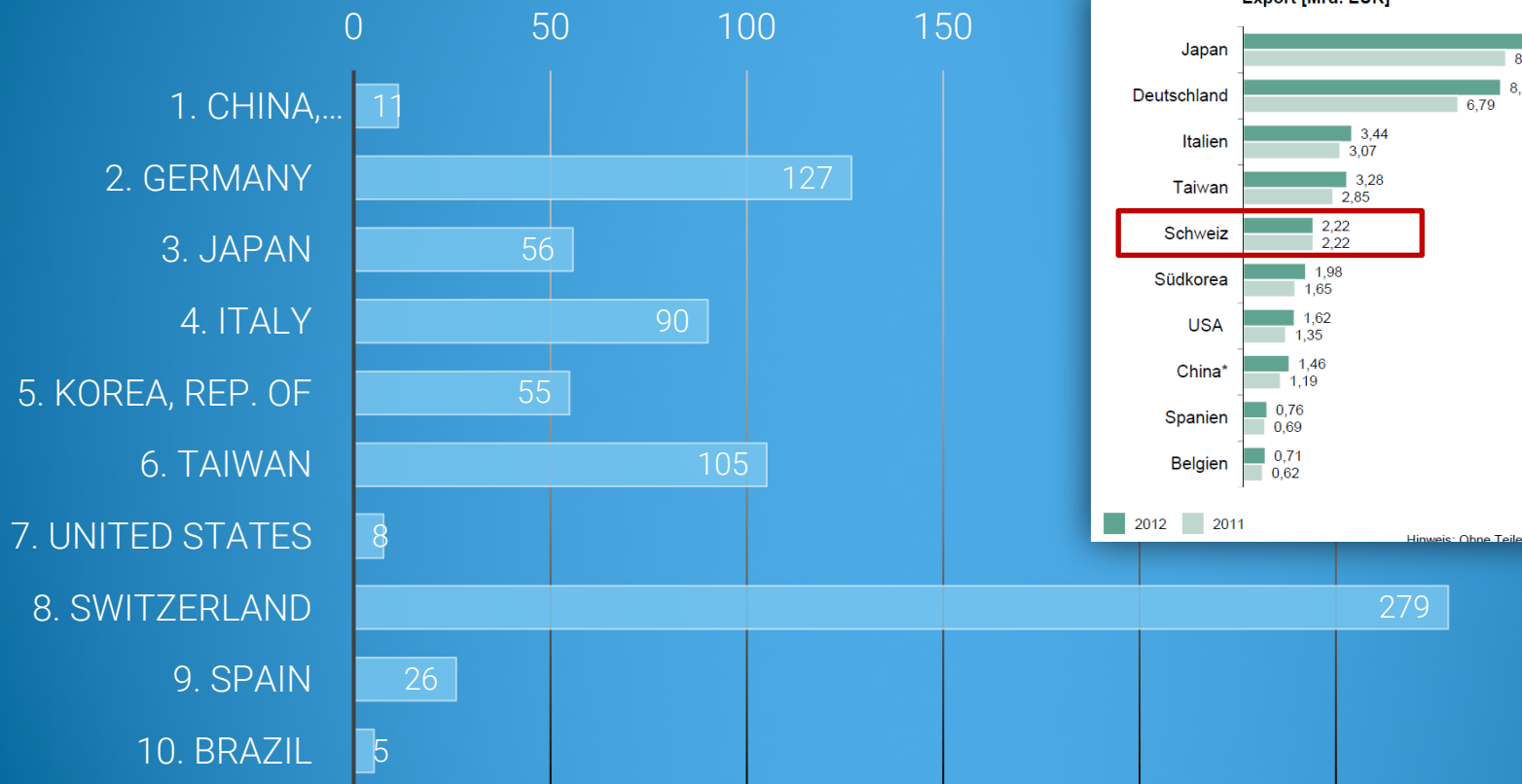
Vernetzung von Produkt, Hersteller und Kunde in Echtzeit

Quellen: Forschungsunion Wirtschaft & Wissenschaft / Impuls-Stiftung VDMA



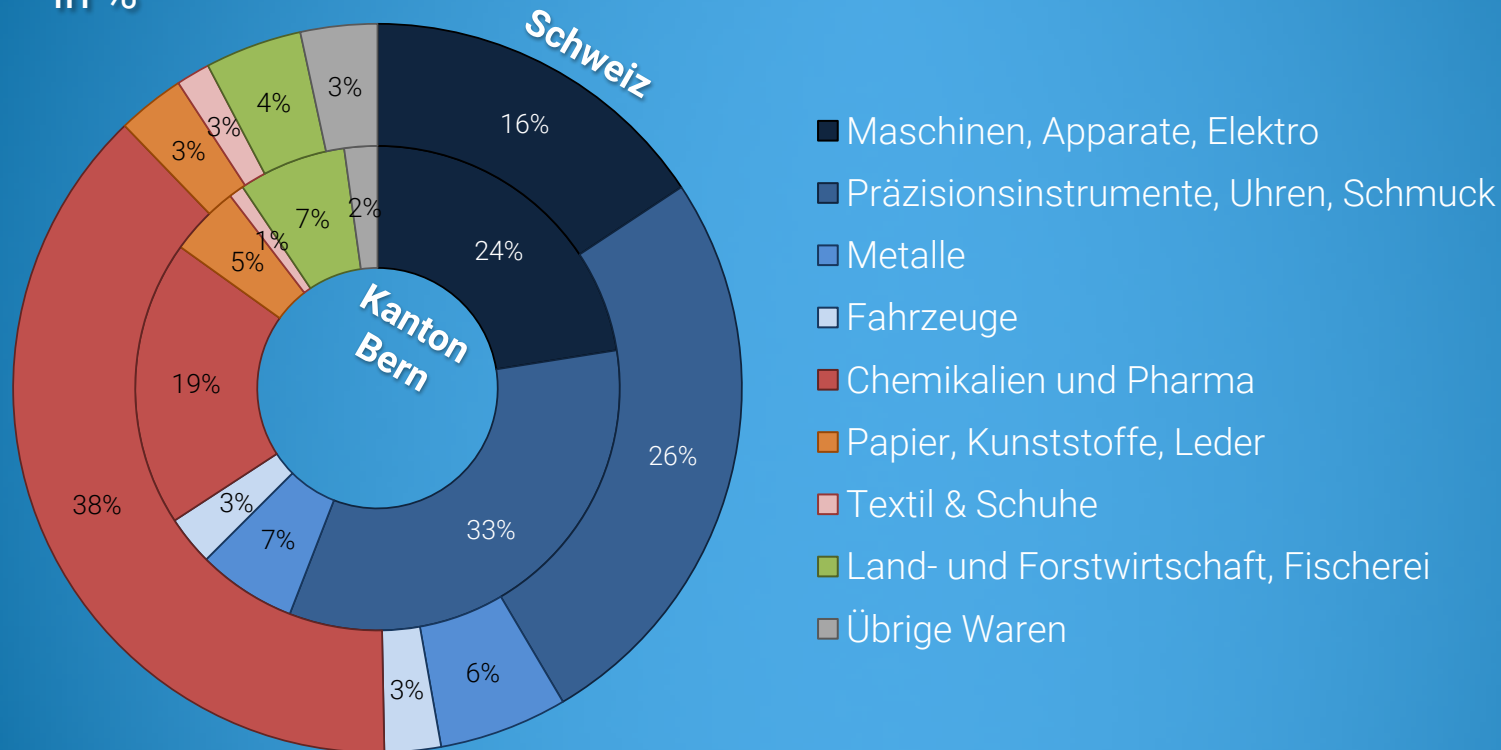
# Beispiel: Top-Position bei Umsatz Werkzeugmaschinen

## WZM-Umsatz pro Einwohner 2009 [\$/Person]



# Werkplatz ist international und damit Export orientiert

Exporte 2013 nach Warengruppen  
in %

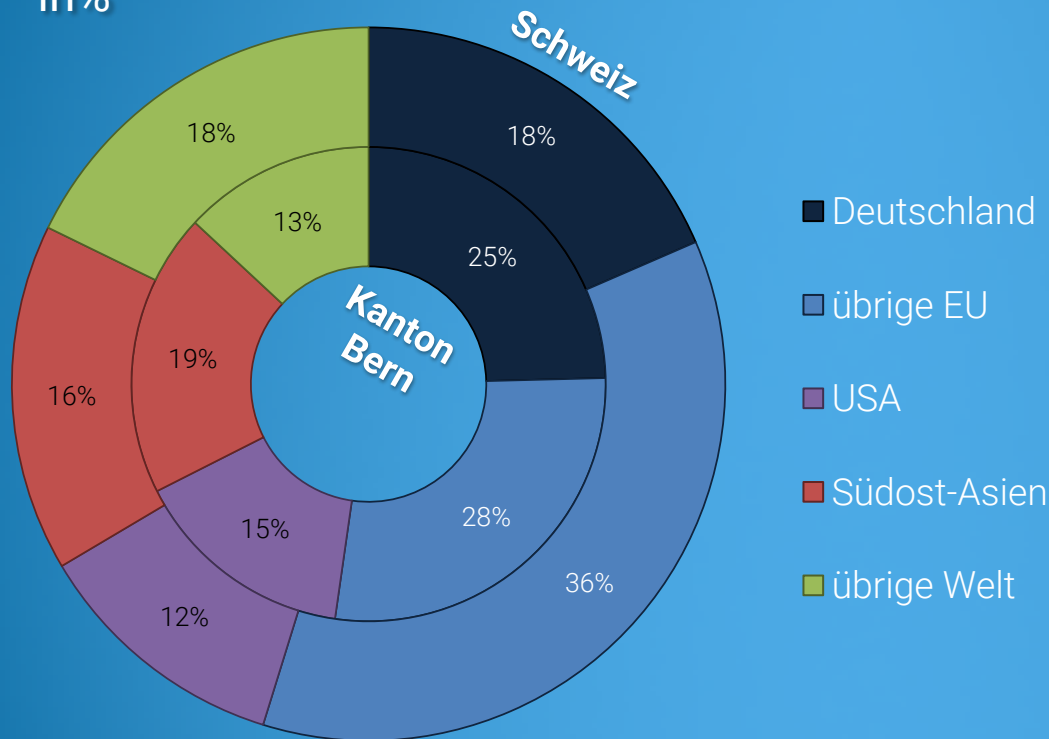


Quelle: Eidgenössische Zollverwaltung (EZV)  
Aussenhandelsstatistik



# Werkplatz ist international und damit Export orientiert

Exporte nach Ländergruppen  
in%



Quelle: Eidgenössische Zollverwaltung (EZV)  
Aussenhandelsstatistik

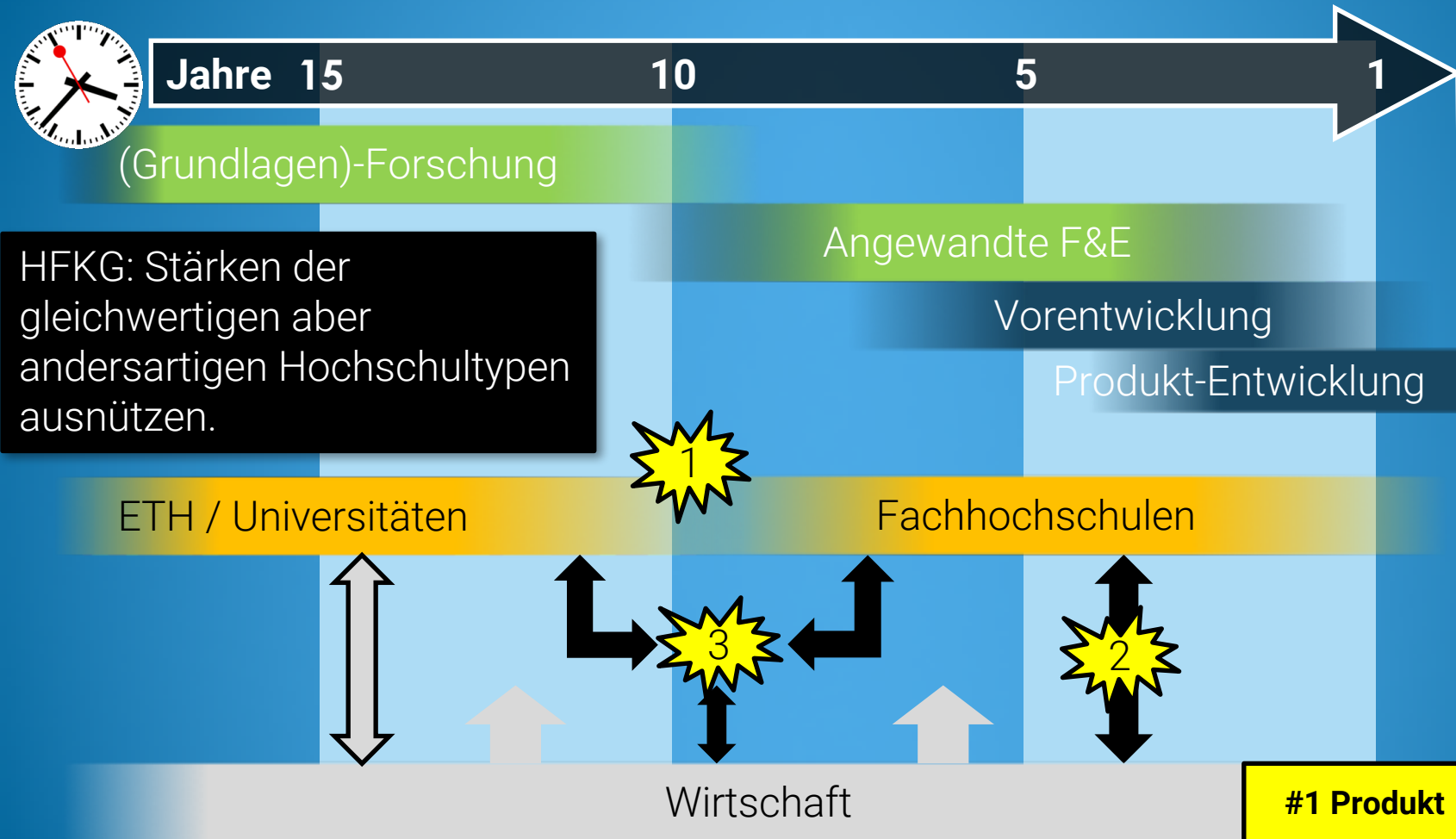


# Beste Fachkräfte mit bestem Bildungssystem

- Duale Berufslehre mit viel Praxis als Startpunkt für vielfältige Berufskarriere
- Durchlässigkeit: alle Wege stehen offen
- Matur muss für erfolgreiches Hochschulstudium vorbereiten

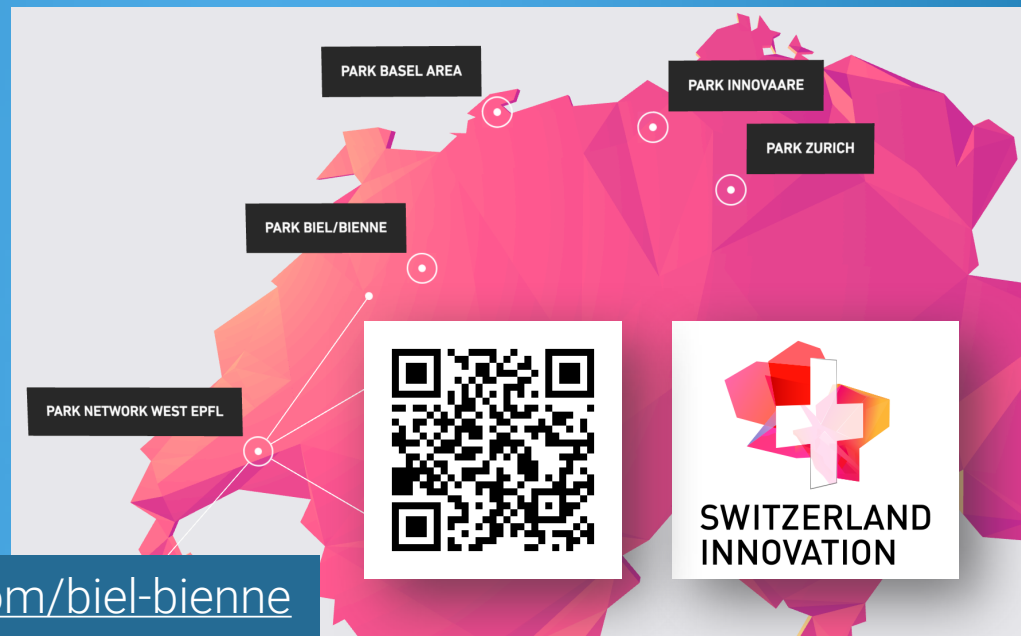
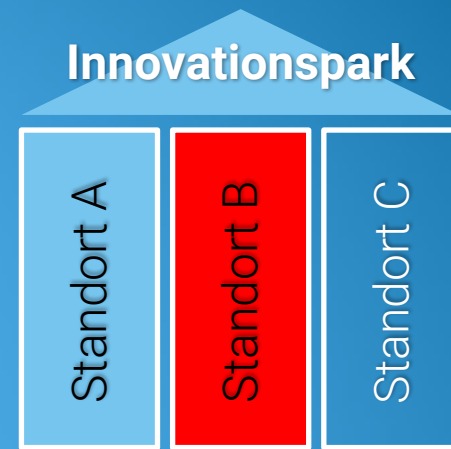


# Wissens- und Technologietransfer stärken



# Schweizerischer Innovationspark

- Industrie muss Treiber sein
- Kein Geld vom Bund
- Hochschulen wirtschaftsnahe integrieren
- Start am 18.01.2016
- Hub-Standorte  
Lausanne & Zürich
- Netzwerkstandort  
des SIP Biel



[www.switzerland-innovation.com/biel-bienne](http://www.switzerland-innovation.com/biel-bienne)

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# Schweiz top in Forschung & Innovation

- Was zählt?  
 Infrastruktur, Arbeitsmarktflexibilität,  
 F&E-Ausgaben, Patente, innovative Produkte, ...

Abb. 1: Voraussetzungen

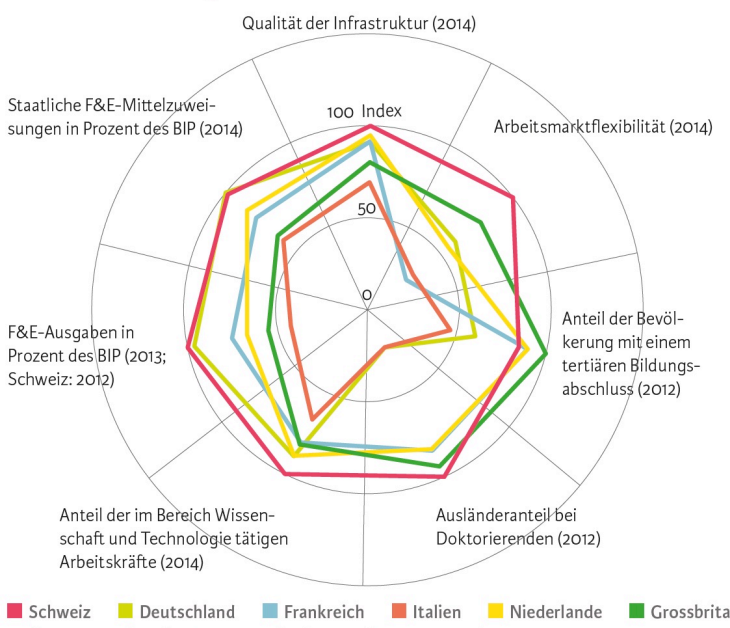
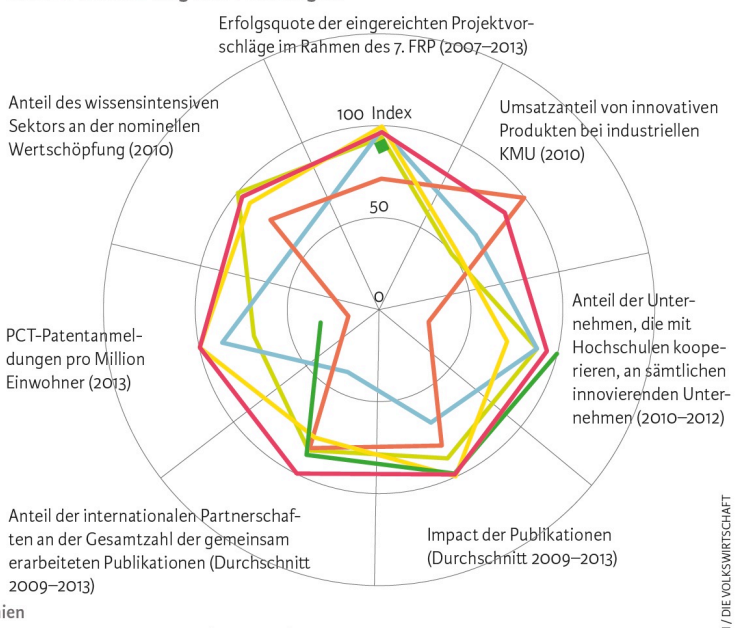


Abb. 2: Vernetzung und Leistungen



Index: 100 = höchster Wert der betrachteten Länder; PCT: Patent Cooperation Treaty; FRP: EU-Forschungsrahmenprogramm

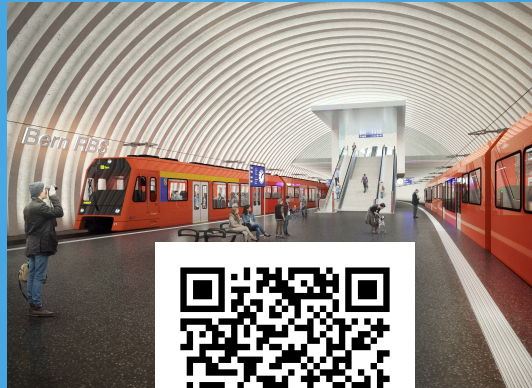
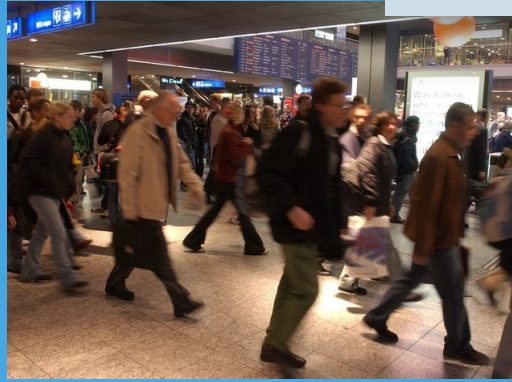
SBFI/DIE VOLKSWIRTSCHAFT





# Infrastruktur Bahn

- „Clé de Berne“ war 1886
- 2017: Heute geht es so richtig zur Sache ca. 300'000 PAX/Tag
- Zukunft Bahnhof Bern 1. Schritt RBS-Schmalspur & Publikumsanlagen bis ins 2025
- Rund 1.1 Mrd. CHF



RBS: 16'000 PAX  
geplant, heute  
60'000 PAX



[#zukunftbahnhofbern](#)

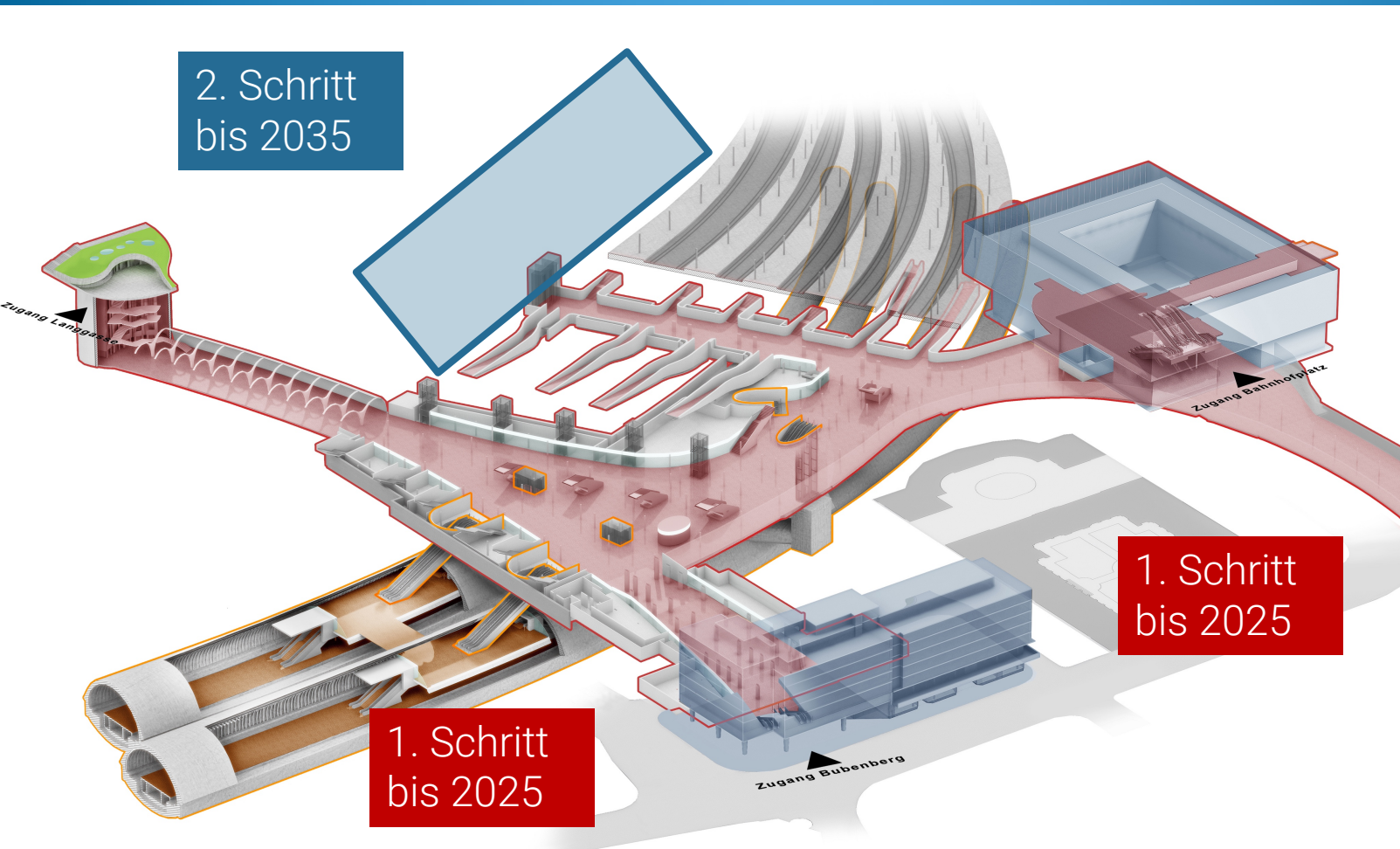


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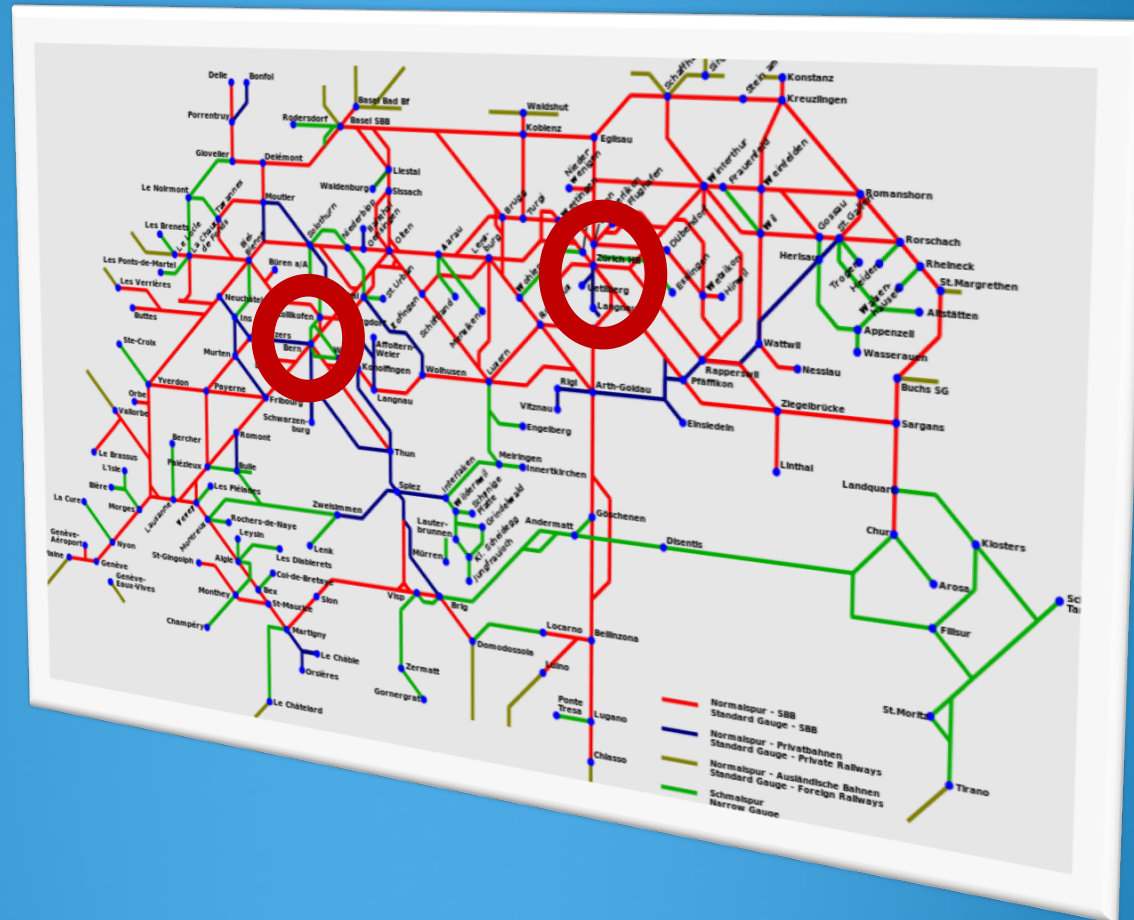
# Infrastruktur Bahn

## 2. Schritt ZBB folgt bei SBB-Normalspur bis 2035



# Bern als Bahnknoten

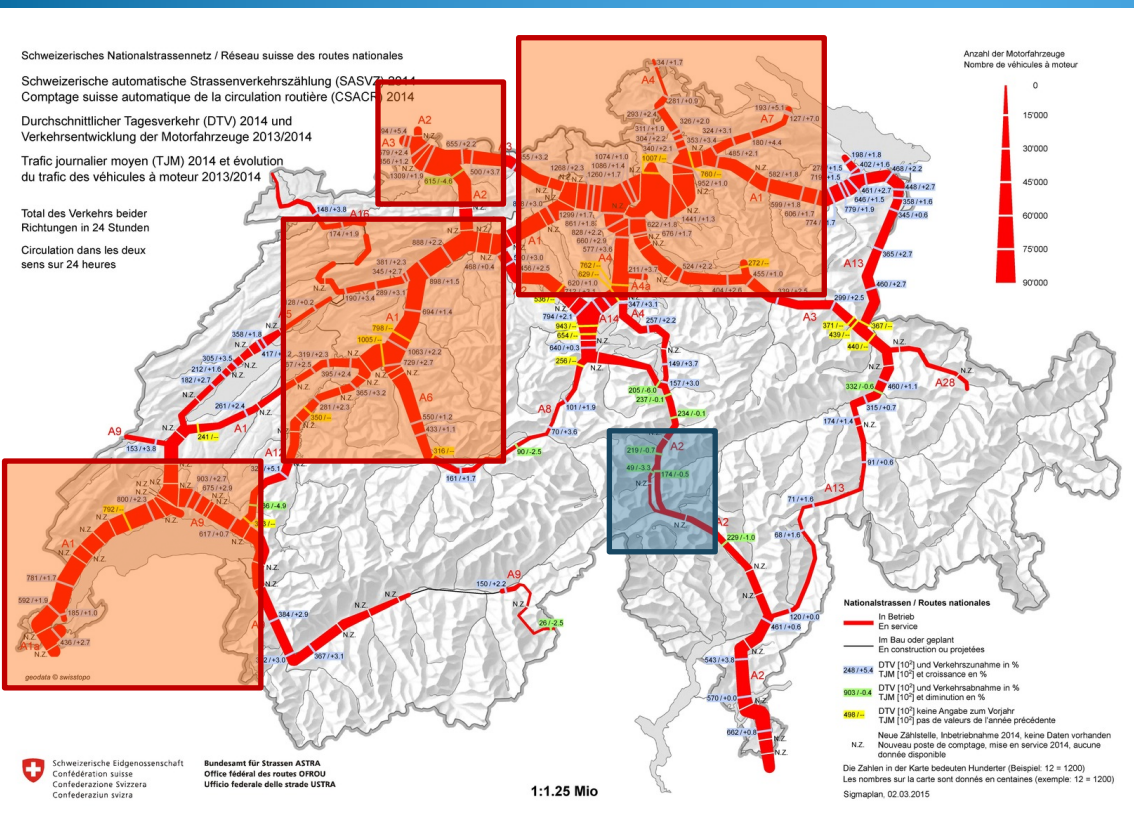
- 270'000 Reisenden pro Tag
- zweitgrösster Bahnhof der Schweiz nach Zürich
- Bern – Zürich in 1 Stunde
- Nahverkehr mit S-Bahn



# Bern an der Hauptachse des Strassen-Verkehrs

- Funktionale Räume sind klar sichtbar
- Zürich, Basel, Bern, Genf - Lausanne
- Starke Belastung in Region Zürich
- Gotthard ist nur Bottleneck

15



# Flughafen Bern mit dichtem Linien- & Charterverkehr

- 20 Minuten Check-In Zeit
- 200 m vom Parkplatz
- Interlining: BRN –AMS - ??



[www.flughafenbern.ch](http://www.flughafenbern.ch)





www.cewe.ch



 download PPP



Berne  
16.10.2017

**«Will die Schweiz im internationalen Wettbewerb bestehen, müssen wir immer 10% besser als Deutschland und 10 Jahre früher als China sein.»**

MP Christian Wasserfallen  
National Councillor, FDP.The Liberals

# European and International Rail Transport Law (Eur&Int RTL)

## The legal history of the railways

# The legal history of the railways: Clé de Berne

*\* Technical interoperability 1886*

> The key of Bern?

> ... or the Bernese space?



# (1) The legal history of the railways

- > The diplomatic conference in Bern 1878 and the follow up
- > The opening of the Gotthard tunnel (1882)
- > From voluntary agreements to intergovernmental convention
- > Intergovernmental conference on unified law for international rail transport (Bern, 14 October 1890)
- > *Nine* continental states: Austro-Hungary, Belgium, France, Germany, Italy, Luxemburg, the Netherlands, Russia and Switzerland
- > Continental powers *versus* the maritime power of the Britain Empire
  - *“The Trans-Siberian railroad will become one of the greatest trade routes in human history. It is destined to undermine the British sea-borne trade...”*, Archibald R. Colquhoun, British administrator and economist, 1900
  - 1435mm *versus* 1520mm
- > Establishing of the *Central Office* in Bern (OCTI, 1893)
- > The creation of the International Rail Transport Committee in Bern (CIT, 1902)
- > The role of the unified international rail law before the First World War

## (2) The legal history of the railways

- > The First World War and the peace treaties from Versailles, St. Germain, Trianon, Lausanne and Neuilly
- > The time between the wars: the League of Nations (1919)
- > The economic conferences from Genoa, Rapallo and Portorosa (1921)
- > The revision conference from Rom (1934)
- > Non application of the international rail transport law by Soviet Union
- > Bilateral agreements with the neighbouring countries
- > The Second World War
- > Separation of the unified international rail transport law (1951-1956)
- > The creation of the dual legal system: CIM/CIV *versus* SMGS/SMPS
- > The accession of the Russian Federation to COTIF on 1 February 2010
- > The legal challenge for the future: *Single Eurasian Rail Transport Law*

### (3) The single legal instruments

- > *International Convention* concerning the carriage of *goods* by rail (Bern Agreement – come in to effect on 1 January 1893)
- > *Agreement* on the international carriage of *goods* by rail (AIM – 1 July 1907)
- > *Agreement* on the international carriage of *passengers* and *luggage* by rail (AIV – 1 October 1928)
- > *International Convention* concerning the carriage of *goods* by rail (CIM – 7 February 1970)
- > *International Convention* concerning the carriage of *passengers* and *luggage* by rail (CIV – 7 February 1970)
- > Convention concerning international carriage by rail of 9 May 1980 – **COTIF 1980**
- > Protocol of 3 June 1999 for the *modification* of the Convention concerning international carriage by rail – **COTIF 1999** (Vilnius protocol)

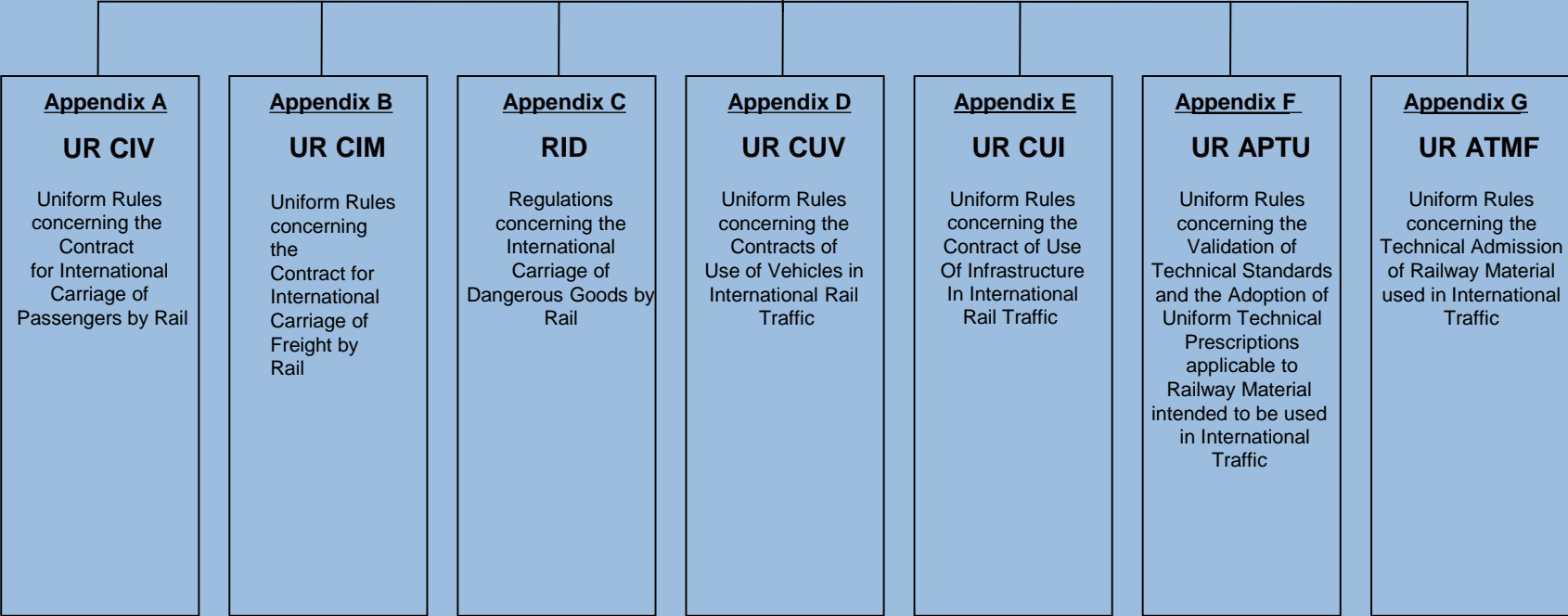
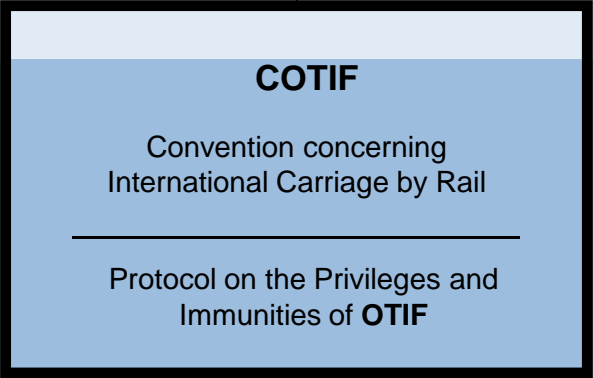
## (4) The legal history of the railways

- > COTIF 1980 – applicable from 1 May 1985
  - 2 Appendixes for international carriage of *passengers* and *luggage* (Appendix A: CIV) and *goods* (Appendix B: CIM)
    - Regulations concerning the international carriage of *dangerous goods* by rail (RID – Annex I of Appendix B to COTIF 1980)
    - Regulations concerning the international haulage of *private owners' wagons* by rail (RIP – Annex II of Appendix B to COTIF 1980)
    - Regulations for the reciprocal use of carriage of *containers* by rail (RiCo – Annex III of Appendix B to COTIF 1980)
    - Regulations concerning the international carriage of *express parcels* by rail (RIEx – Annex IV of Appendix B to COTIF 1980)
  
- > Regulation on the reciprocal use of wagons in international traffic (RIV, 1922)
- > Regulation for the reciprocal use of carriages and brake vans in international traffic (RIC, 1922)
  
- > SMGS – Convention concerning international *goods* traffic by rail (1951)
- > SMPS – Convention concerning international *passenger* traffic by rail (1951)

## (5.1) COTIF 1999 scope of application

- > Creation of International Organisation (OTIF), article 1 § 1 COTIF
- > Headquarters and Secretariat of OTIF in Bern
- > Aim of OTIF (Article 2 paragraph 1 COTIF):
  - establishing a system of uniform law for the contract of international carriage of *passengers and goods* by rail
  - carriage of *dangerous goods* in international rail traffic
  - including complementary carriage by other modes of transport subject to a *single contract*
  - contracts of *use of wagons* as means of transport in international rail traffic
  - contract of *use of infrastructure* in international rail traffic
- > *Organisational clause* for the international cooperation of the OTIF member states – Article 3 paragraph 1 COTIF
- > The *disconnection clause* in Article 3 paragraph 2 COTIF
- > Uniform rules – Article 6 paragraph 1 COTIF

# Vilnius Protocol 1999



## (5.2) COTIF 1999 content and legal architecture

- > COTIF 1999 – applicable starting from 1 July 2006
  - Basic agreement
  - 7 Appendixes governs the international rail traffic and admission of railway material (article 6 § 1 COTIF)
    - **CIV** (Appendix A): *Uniform rules* concerning the *Contract* of international carriage of *passengers* by rail
    - **CIM** (Appendix B): *Uniform rules* concerning the *Contract* of international carriage of *goods* by rail
    - **RID** (Appendix C): *Regulation* concerning the International carriage of *dangerous goods* by rail
    - **CUV** (Appendix D): *Uniform rules* concerning *Contracts* of *use of vehicles* in international rail traffic
    - **CUI** (Appendix E): *Uniform rules* concerning the *Contract of use infrastructure* in international rail traffic
    - **APTU** (Appendix F): *Uniform rules* concerning the *Validation* of technical standards and the *Adoption* of uniform technical prescriptions applicable to railway material intended to be used in international traffic
    - **ATMF** (Appendix G): *Uniform rules* concerning *Technical Admission* of railway material used in international traffic

## (6.3) Accession of States to COTIF/OTIF and OSJD

- > Legal base, Article 37 COTIF:
- > § 1 “Accession to the Convention shall be open any State on the territory of which railway *infrastructure* is operated”
- > § 2 “A State wishing to accede to the Convention shall address an application to the Depositary. The Depositary shall notify it to the States”
- > Associate member – Article 39 COTIF (Jordan)
- > Example: Participating to the SMGS Agreement
  - *Railways* in member states, Article 40 SMGS
  - Ministry or Central administration responsible for the railways, Article 41 SMGS
  - *Mixed* legal structure of the OSJD



## (8.1) The legal history of the railways

- > The law in action: two examples of railway leading cases
- > *Advisory Opinion* of the Permanent Court of International Justice of the League of Nations (CPJI Sér. B Nm 15, 1928)
- > The Danzig railways servant agreement (Beamtenabkommen)
- > Pecuniary claims of the *railway employees* against the *Polish Railways Administration*
- > The question of the competent *national court (lex fori)*
- > Elaboration through the PCIJ of the fundamental principal of *self executing and binding power* of some rules in the *international treaty law*. Decisive *elements* in this prospect are:
  - the *intention* of the parties of the agreement (according to the *content*) and
  - the *practical application* of the agreement (*precisely part* of the single international contract of service of the railway employees)
  - executed by the national authority and tribunals (Polish Railways Administration and Danzig tribunals)

## (8.2) The legal history of the railways

- > United States v. Terminal Railroad Association of St. Louis (224 U.S. 383 1912)
- > Elaboration of the *essential facility doctrine* through the US Supreme Court
- > Group monopoly in the sense of *concentration* (Terminal Railroad Association of St. Louis)
- > Bottlenecks agreement (Merchants' bridge over Mississippi river)
- > The prohibition of the group monopoly (Wiggins Ferry Company & Merchants' bridge Company (Eads Bridge) = tunnel + bridge + ferry)
- > Limits of the unilateral refusal to deal under the Sherman Anti-Trust Act
- > *Conditions* for the *essential facility doctrine*:
  - Facility *controlled* by a company with a monopoly or at least dominant market position;
  - *Non duplication* of the facility which is indispensable for the operation of the competitor;
  - *Ability* of the company with a monopoly position to *provide access* to the facility to the competitor;
  - *No objective justification* for the *unilateral refusal* to access or seek to access to the facility;
  - Illegal *intent* to restrain the interstate commerce and **freedom of competition** – through out controlled or unified transport facilities (terminals).



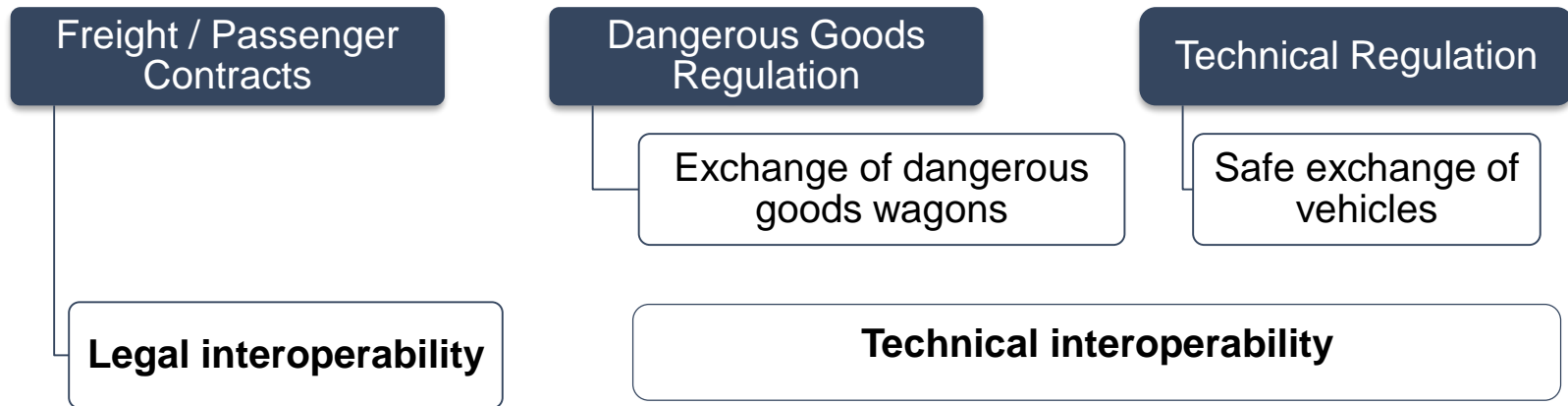
COTIF

unified railway law to connect Europe, Asia and Africa

F. DAVENNE  
Bern – October 2017

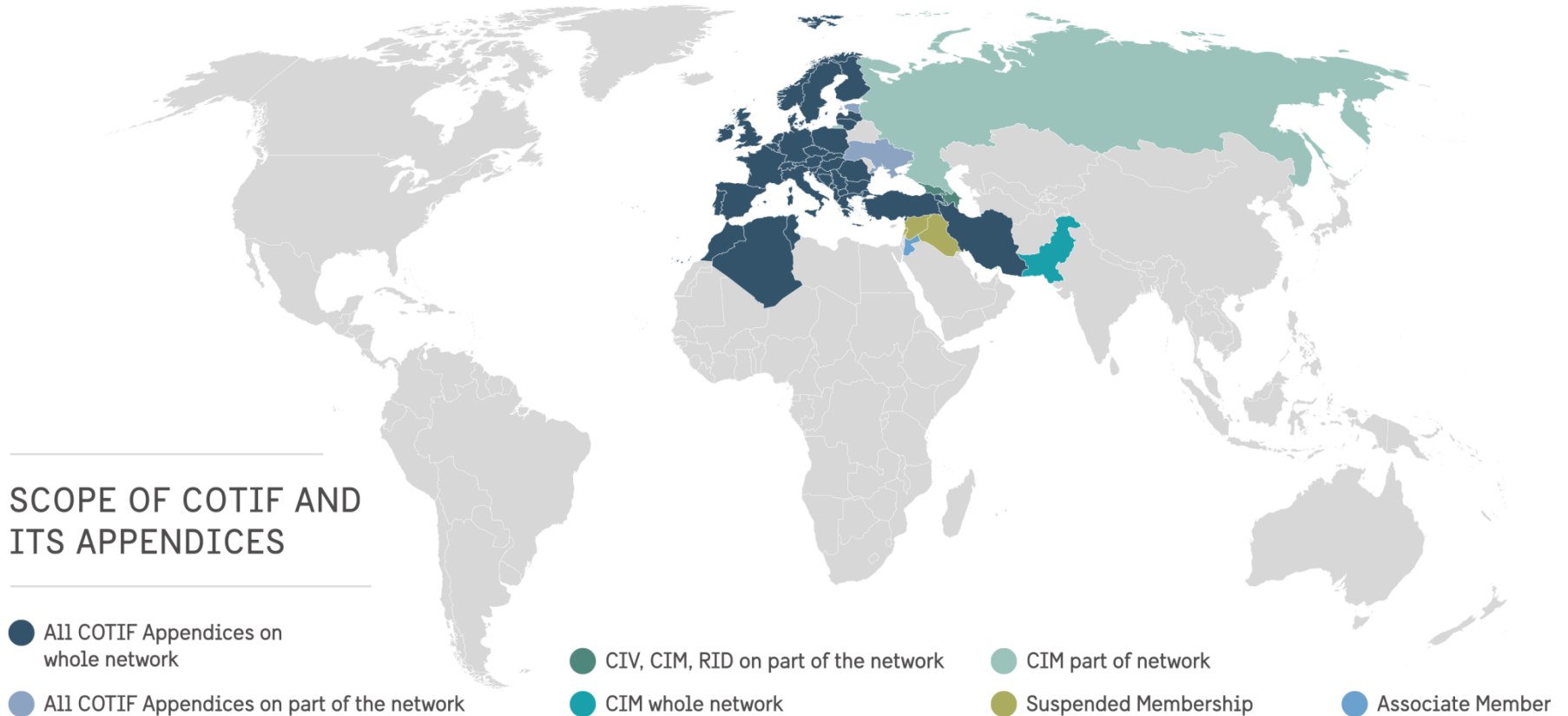
## COTIF – uniform railway law to connect Europe, Asia and Africa

- 1893 - first international Convention regarding international freight traffic by rail
- Currently - base Convention with seven Appendices covering various aspects of international traffic by rail
- Is international law
- Member States can make declarations not to apply selected parts of COTIF



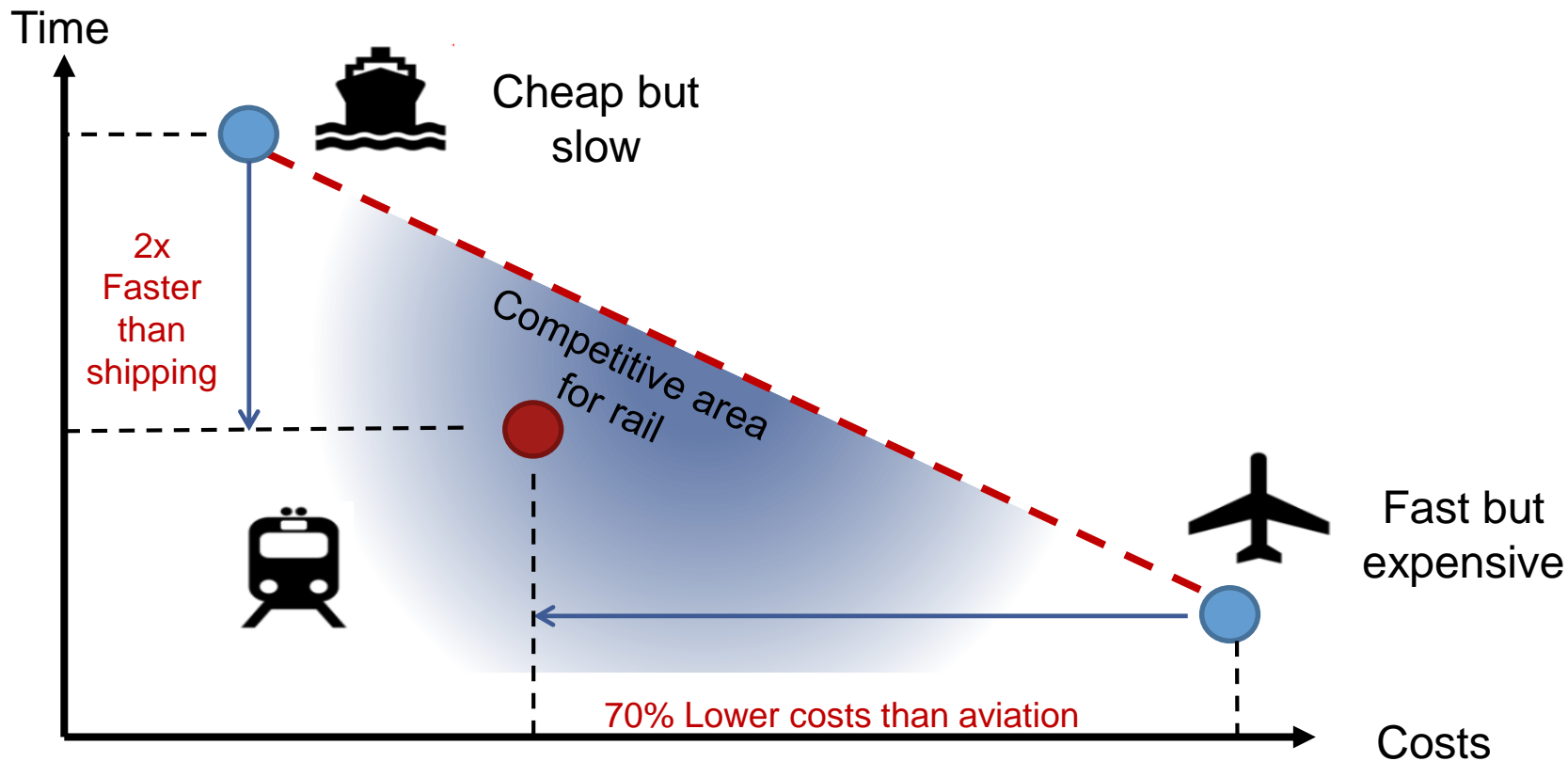
# Intergovernmental Organisation for International Carriage by Rail (OTIF)

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# The case for intercontinental rail freight

China  $\leftrightarrow$  Europe



---

What is missing

Single contracts for Euro-Asian backbone

---

A common understanding of interoperability, possibly backed by law

---

Access conditions to the rail networks

---

What should be questioned

Abolishing regional regulation or developing legal and technical interfaces?

---

Who should determine the operational rules?

---

Path to multimodality: legal interoperability or single regulation?

---

## The four levels of international railway regulation

4

### *Access conditions*

The conditions under which States provide access for foreign railway undertakings to operate trains on their networks.

3

### *Interoperability: the cross-border operation of trains*

Safety framework concerning the international operation of complete trains  
Contractual relations between IM and RU (CUI) : GCU for train path

2

### *exchange of vehicles*

Contractual relations between vehicle keepers and railway undertakings (CUV)  
construction, approval, use and maintenance of vehicles (APTU / ATMF)

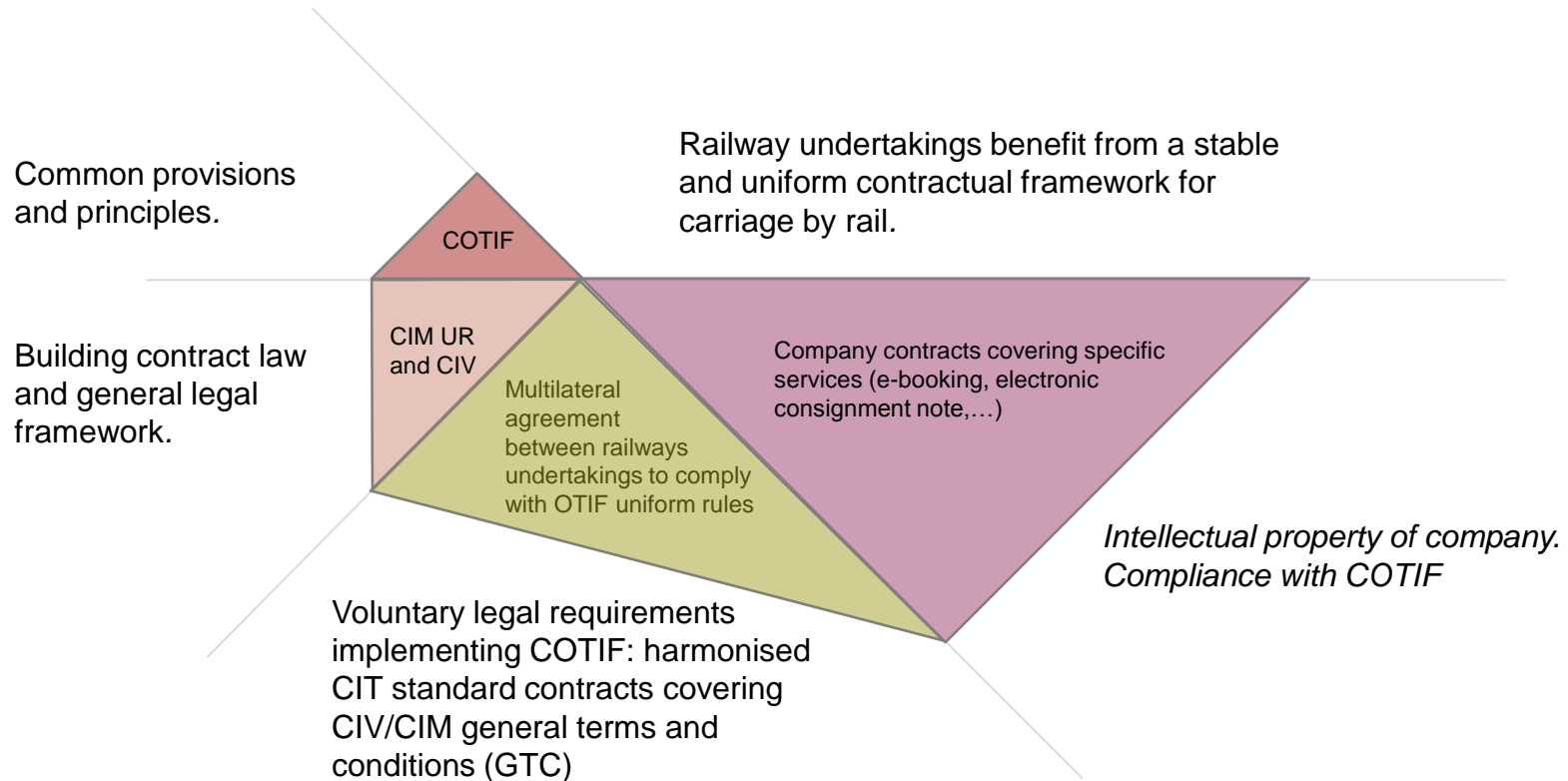
1

### *Contract of transport and transport of dangerous goods*

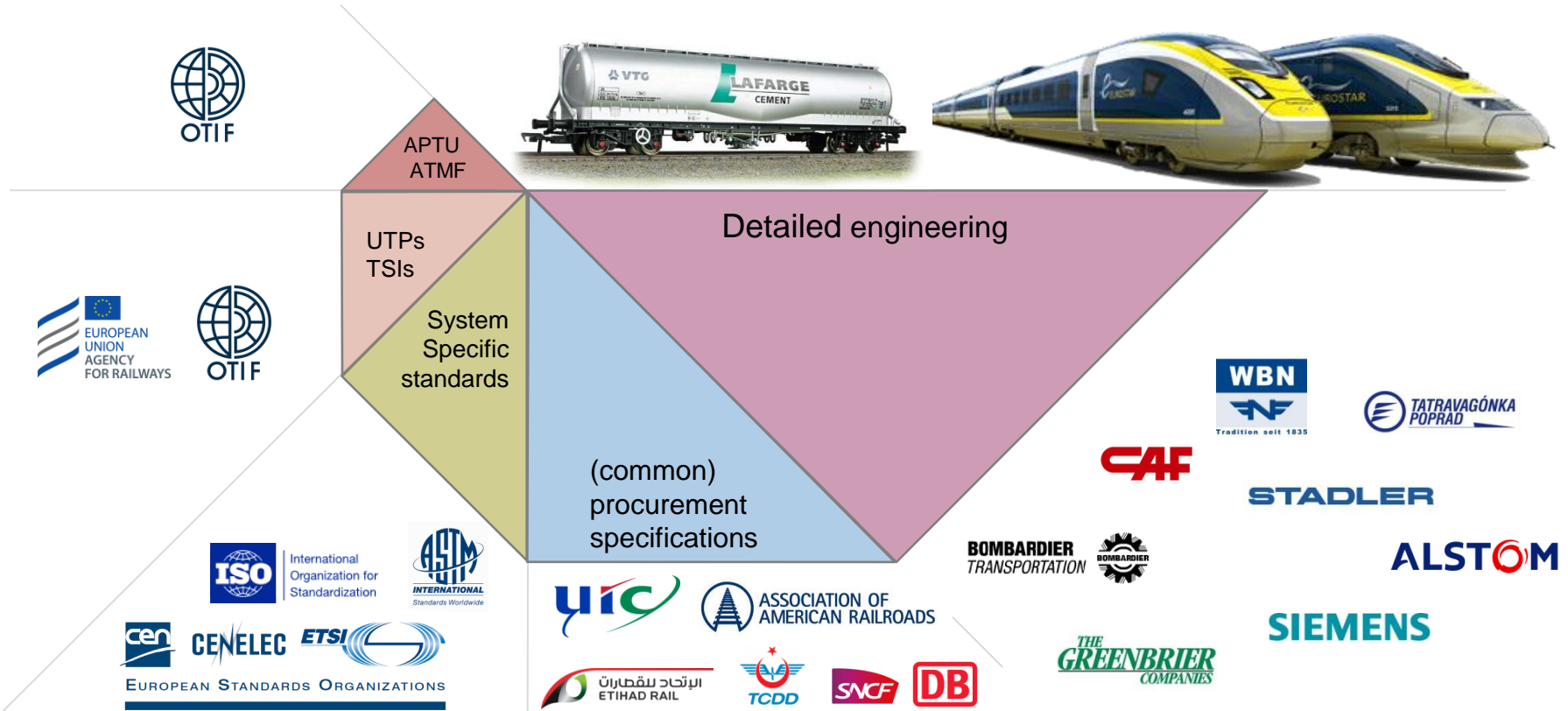
Contractual relations between railways and their customers (CIM / CIV)  
Provisions for the safe transport of dangerous goods by rail (RID)



# Implementation of international rail services : contract law



# Implementation of international rail services : technical aspects



## Challenges for the authorities – what can we do?

### Challenges for the future of rail freight transport

To be competitive with other modes and get maximum return on investment:

- States should stimulate the **operation of complete trains across borders** (instead of handing over vehicles to the neighbouring RU)
- Consistent international legal framework for train path allocation and transit procedures
- Therefore **States should open their international railway routes** to international railway undertakings

Key elements to be agreed multilaterally:

- Ensure that traffic is covered by a single legal regime for transport contracts
- Developing a rail transit framework in collaboration with DGTAXUD, WCO and UNECE
- Harmonised approval of vehicles, so that these vehicles can be used across borders
- Standardise interfaces between infrastructure and vehicles, in particular international corridors should be equipped with a uniform signalling system
- International safety certification of railway undertakings to safely operate international trains under a harmonised safety framework
- Network access conditions

# OTIF's strategic objectives

## OTIF AS A FORUM FOR UNIFORM RAILWAY LAW

**1** Maintain and share a common knowledge base with OTIF's stakeholders

**2** Encourage the involvement of experts from our Member States in ERA and OSJD activities on the basis of common positions

**3** Make railway law consistent in partnership with other organisations in the sector

## EXTEND AND DEVELOP THE APPLICATION OF COTIF

**4** Foster working relationships with UNESCAP

**5** Extend the application of COTIF in Europe, Asia and Africa

## PROMOTE SAFE TECHNICAL AND LEGAL INTEROPERABILITY

**6** Continue the development of technical and legal regulations for safe interoperability beyond the EU

**7** Cooperate with the EU and OSJD with a view to harmonising the regulations more closely

## PROMOTE THE SAFE TRANSPORT OF DANGEROUS GOODS

**8** Keep the dangerous goods regulations up to date, taking into account technical progress

**9** Improve the compatibility of the RID provisions with the technical approach of the UTPs as regards issues of interoperability

Thank you for your attention

11



Organisation intergouvernementale pour les transports internationaux ferroviaires  
Zwischenstaatliche Organisation für den internationalen Eisenbahnverkehr  
Intergovernmental Organisation for International Carriage by Rail

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# **Cross-border Multimodal Transport: The (Fragmentary) Legal Framework**

**Seminar: Clé de Berne**

16th of October 2017, University of Berne

**Dr. iur. Juana Vasella**

# Overview

- Introduction
- Limits of the Current Legal Framework
- Approaches to Overcome these Limits
- Conclusion



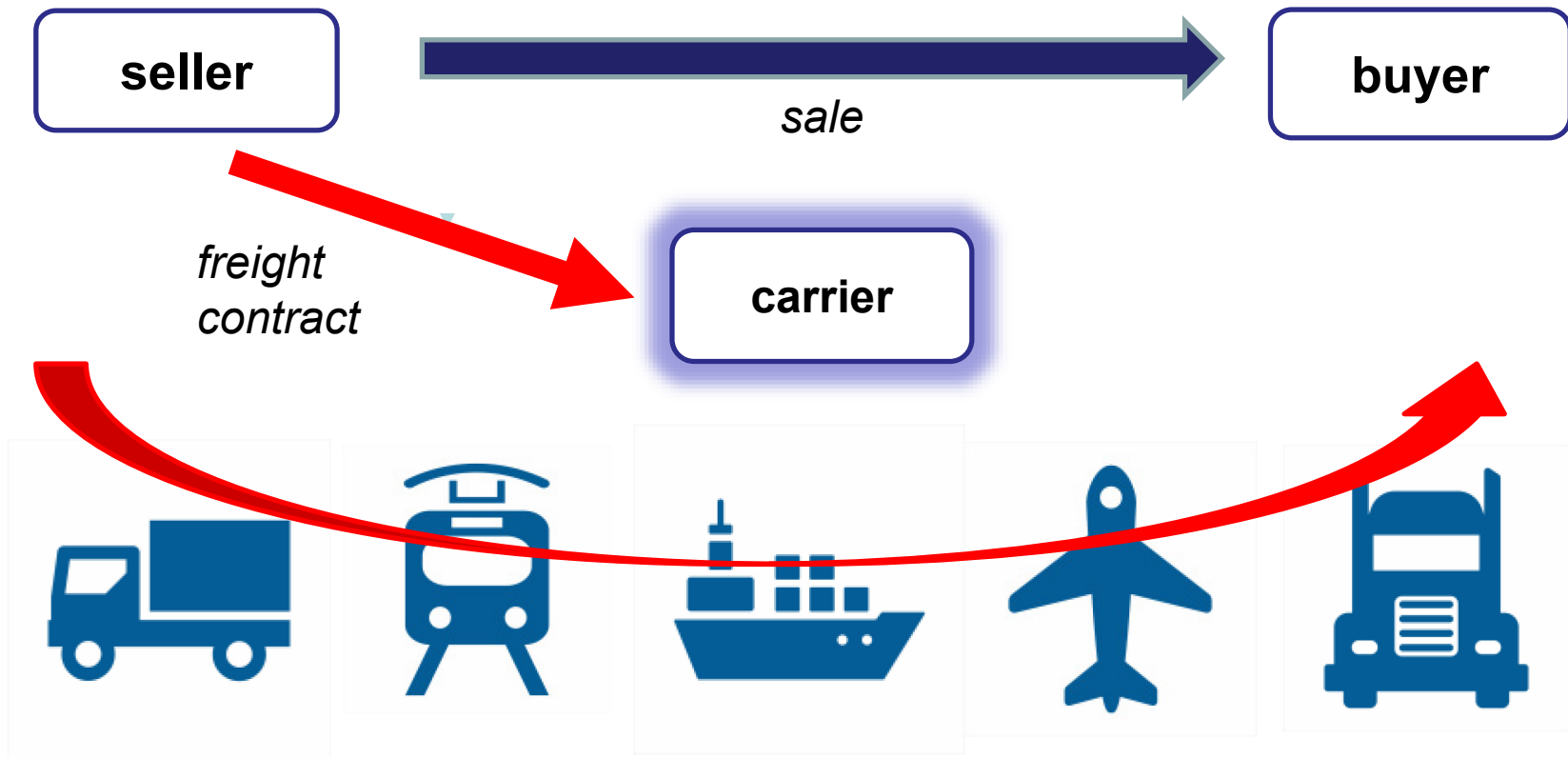
# Overview

- **Introduction**
  - Concept of Multimodal or Combined Transport
  - Recent Developments in International Transport
- **Limits of the Current Legal Framework**
  - Special Convention or National Provisions on Cross-border Multimodal Transport?
  - Applicability of Unimodal Conventions on Cross-border Multimodal Transport?

# Overview

- **Approaches to Overcome these Limits**
  - Network Liability Systems:  
pure network system / modified network system
  - Uniform Liability System:  
system of conflict rules / new specific convention
- **Conclusion**
  - In Practice
  - Check Schema

# Concept of Multimodal Transport



Carriage of goods consisting in a number of unimodal stages of transport and involving various modes of transport under one single contract

# Developments in International Transport



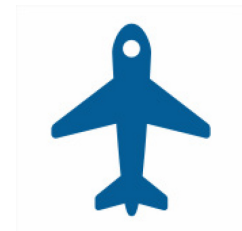
Growing system of cross-border transport with standardized containers

# Developments in International Transport



## Special Convention or National Provisions?

- **United Nations Convention on International Multimodal Transport of Goods**: not in force
- **Continental and regional agreements**: ALADI (Asociación Latinoamericana de Integración), CAN (Andean Community), MERCOSUR (Mercado Común del Sur)
- **Statutory national provisions**: only in some jurisdictions (e.g. Germany, the Netherlands)



## Applicability of Unimodal Conventions?

- **Art. 1 (1) CMR:** “*This Convention shall apply to every contract for the carriage of goods by **road** in vehicles...*”
- **Art. 2 (1) CMR:** “*Where the vehicle containing the goods is carried over part of the journey by **sea, rail, inland waterways or air**, and [...] the **goods are not unloaded** from the vehicle, this Convention shall nevertheless apply to the whole of the carriage.*”



# Applicability of Unimodal Conventions?

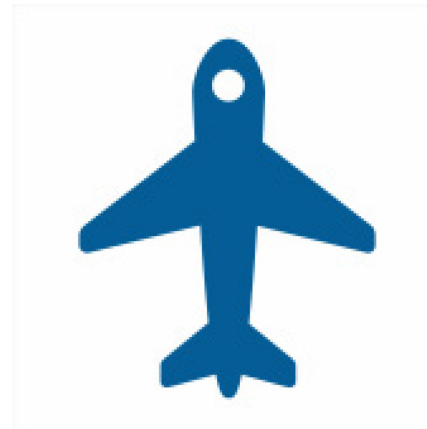
- **Art. 1 § 1 CIM:** “*These Uniform Rules shall apply to every contract of carriage of goods by **rail** for reward...*”
- **Art. 1 §§ 3 and 4 CIM:** “*CIM shall apply when the international carriage by rail is **supplemented***
  - *by a **national carriage by road** or **inland waterway** in a Member State;*
  - *by **carriage by sea** or **international carriage by inland waterway** performed on services mentioned in specific list of services.”*





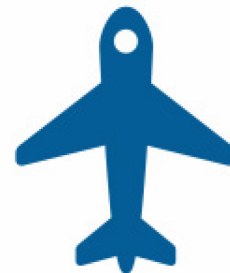
# Applicability of Unimodal Conventions?

- **Art. 1 (1) Montreal Convention:** “*This Convention applies to all international carriage of persons, baggage or cargo performed by **aircraft** for reward...*”
- **Art. 18 (3, 4) and 38 Montreal Convention:**
  - *regulates the **period** during which the carrier is in charge of the air cargo*



# Applicability of Unimodal Conventions?

- **Art. 18 (3, 4) and 38 Montreal Convention:**
  - does *not* extend to any carriage by *land, sea or inland waterway* performed *outside an airport*, unless it was performed for the purpose of loading, delivery or transshipment (and no proof of damage during air freight)
  - regulates any carriage whereby the carrier *substitutes, without the consent* of the consignor, the carriage by air by *another mode* of transport (whole or part)
  - in case of *combined* carriage performed partly by air and partly by *any other mode* of carriage, this Convention shall apply *only* to the carriage by *air*



## Applicability of Unimodal Conventions?

- **Art. 1 lit. b Hague-Visby-Rules:** *“Contract of carriage’ applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by **sea**, ...”*
- **Art. 1 No. 1 Rotterdam Rules** (United Nations Convention on Contracts for the International Carriage of Goods **Wholly or Partly by Sea**; not in force): *“The contract shall provide for carriage by sea and may provide for carriage by **other modes** of transport **in addition** to the sea carriage.”*



# Network Liability Systems

- the liability of the carrier shall be determined by the law which would be applicable to a contract **relating to this leg of carriage**
- e.g.: Germany (art. 452<sup>bis</sup> HGB)

→ *the place where damage occurred **can be localized***



## Uniform Liability System

- the liability of the carrier shall be determined by the (national) **general transport law**
- e.g.: Switzerland (art. 422 seq. OR, GüTG);  
Germany (art. 452 HGB)

→ *the place where damage occurred is unknown*

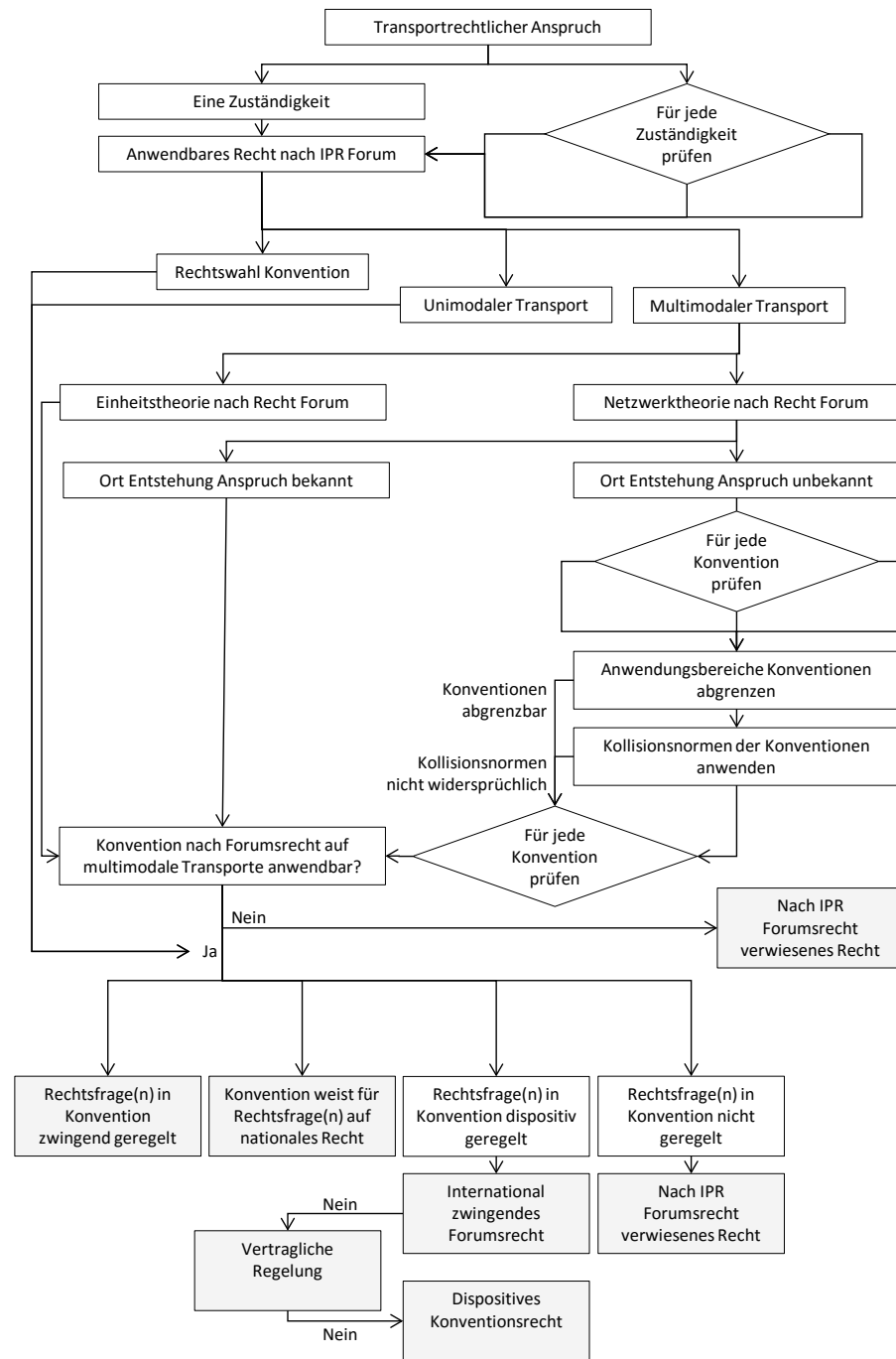


## In Practice

- in general, **freedom of contract**
  - but depends on the law applicable under the network system
  - possibility to chose the general transport law
- special **transport documents**
  - BIMCO Bill of Lading (Multidoc95)
  - FIATA Multimodal Transport Bill of Lading (FBL)
  - UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication no. 481)

# Check Schema

Please see the handout of this scheme in a larger format



IPR Vorprüfung

Erste Ebene: Konventionskonflikte

Zweite Ebene: Einbindung nationales Recht

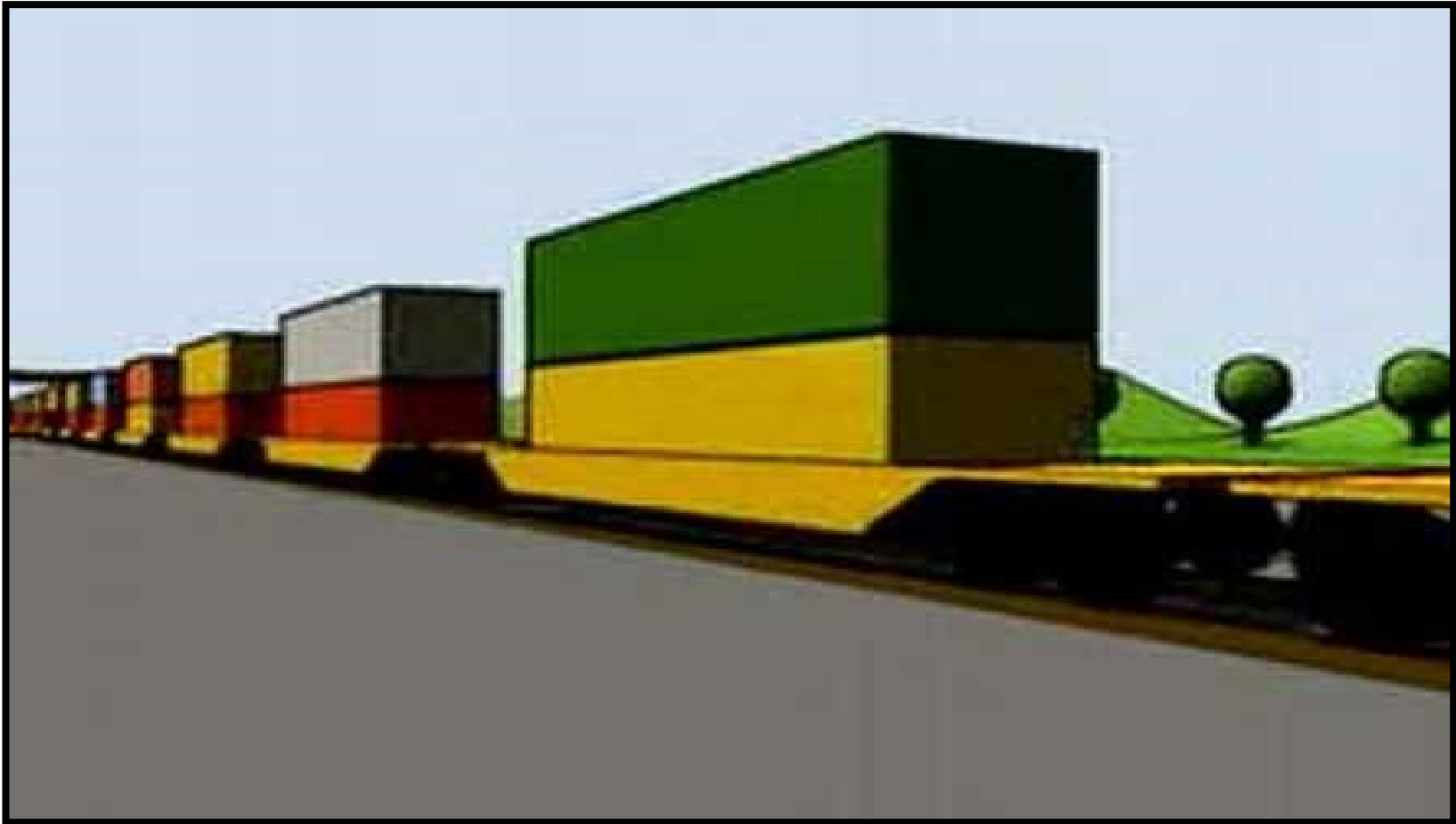
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# Multimodal Transport in a Nutshell



Source: **Youtube 2006** (movie done within Blender and compiled in iMovie)



# Many thanks!

**Dr. iur. Juana Vasella**

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