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Draft Convention on the Facilitation of Border Crossing Procedures for Passengers, Luggage and Load-Luggage carried in International Traffic by Rail

Draft Convention on the Facilitation of Border Crossing Procedures for Passengers, Luggage and Load-Luggage carried in International Traffic by Rail

Note by the secretariat

I. Background and mandate

1. At its previous session (October 2018), the Working Party continued its discussions on the draft convention on the Facilitation of Border Crossing Procedures for Passengers, Luggage and Load-Luggage carried in International Traffic by Rail on the basis of document ECE/TRANS/WP.30/2018/6/Rev.1, containing its full text in English, French and Russian. After extensive discussions (see paragraph 4 for details), the Working Party requested the secretariat to prepare an update of the draft, for discussion at its present session. Considering the progress achieved and in line with the request by the Inland Transport Committee (ITC) to finalize considerations in 2018, with the aim that the draft text of the new convention could be transmitted to the Committee for consideration and possible endorsement at its eighty-first session and subsequent transmittal to the depositary, the document should also be tabled for adoption by ITC at its February 2019 session (see ECE/TRANS/WP.30/300, paras. 34–37).

2. In accordance with Part III of United Nations Secretary-General's bulletin ST/SGB/2001/7¹ "all draft treaties and international agreements deposited with the Secretary-General of the United Nations shall be submitted by the relevant department, office or regional commission to the Office of Legal Affairs for review and comment prior to

¹ For the full text, see treaties.un.org/doc/source/publications/st_sgb_2001_7_e.pdf



finalization. Draft final clauses of such treaties and international agreements shall be submitted to the Treaty Section for review and comment prior to finalization.”

II. Past considerations by the Working Party

3. The Working Party may wish to recall that it had discussed preliminary comments from the Office of Legal Affairs – Treaty Section (OLA-TS) on the final clauses at its 146th session (June 2017; see ECE/TRANS/WP.30/292, para.44). At its 148th session (February 2018), the Working Party considered documents ECE/TRANS/WP.30/2018/6 containing the final text of the draft convention, in combination with document ECE/TRANS/WP.30/2018/6/Corr. 2, containing the following two corrections to the text of Article 27, further to a review by OLA-TS: (a) to change the deadline for an amendment to enter into force from thirty days to three months, in order to achieve alignment with the entry into force of the convention for newly acceding States, as stipulated by Article 22, paragraph 2; (b) to invert, for reasons of logic, the order of paragraphs 3 and 4, which should then be renumbered accordingly. In the context of its discussions, the Working Party took also note of document ECE/TRANS/WP.30/2018/7, containing a set of final clauses, as prepared by the secretariat in close consultation with OLA-TS. At the 149th session (June 2018), the delegation of Turkey expressed its support for the draft convention, while pointing out that document ECE/TRANS/WP.30/2018/19, contained, *inter alia*, alternative proposals for Article 27, introducing a distinction between contracting parties having accepted amendments and those that considered themselves not being bound by them. The delegation of the Russian Federation stated that, at a first glance, a number of proposals seemed of an editorial nature or were already covered by other provisions of the draft convention. The proposals for Article 27 merited further study in order to come to a mutually satisfactory wording (see ECE/TRANS/WP.30/298, para. 40). At its 150th session (October 2018), the Working Party continued its discussions of the draft convention on the basis of document ECE/TRANS/WP.30/2018/6/Rev.1, containing its full text in English, French and Russian, with the assistance of document ECE/TRANS/WP.30/2018/26 by the Government of Turkey, elaborating its proposals to the draft. The delegation of the European Union stated that it had taken seriously the repeated requests to agree on the text and that it was now in a position to take a decision at this meeting. However, it would not be in favour of the text would a clause about the participation of regional economic integration organizations (REIO) as contracting party to the new Convention not be inserted. The delegation of the Russian Federation could agree to such request, on the condition that a similar wording to that of Article 52 of the TIR Convention would be used rather than the proposal, drafted by the secretariat in consultation with OLA-TS, as contained in document ECE/TRANS/WP.30/2018/7. The delegation of the Russian Federation further informed the Working Party that it could also accept the Turkish proposals to amend articles 1 (m), 4 and 25, paragraph 1 of the text. However, in the opinion of the delegation of the Russian Federation, the proposals to amend Article 27, as proposed by Turkey, would significantly complicate the legal structure and the framework function of the new Convention. The delegation of the Russian Federation proposed, as a compromise, to amend Article 27, paragraph 1, introducing consensus as a principle to adopt amendments rather than the figured two-thirds majority (see ECE/TRANS/WP.30/300, paras. 34 and 35).

4. In view of the possible adoption of the draft convention at the present session, the secretariat requested OLA-TS to conduct a final review of the text, in particular the alternative proposals for Article 27².

III. Comments by the Office of Legal Affairs – Treaty Section

5. First of all, OLA-TS states to limit its comments to the changes made to the text after its initial review in 2017 (see Informal document WP.30 (2017) No. 11 (English only)). Furthermore, its comments only concern the final clauses.

6. With regard to new paragraph 3 of Article 21, containing a clause related to the participation of regional economic integration organization, OLA-TS would have preferred a clearer wording, but can accept that this is the preferred formulation of the parties.

7. The changes to the settlement clause of Article 25 meets with the agreement of OLA-TS.

8. When it comes to the original proposal for Article 27, OLA-TS has already provided its provisional agreement (see para. 4 above). This leaves the Russian and Turkish proposal for assessment. These provide two different choices in both process and outcome. In the Turkish proposal, only those States accepting an amendment would be bound by it, which has the effect of creating different regimes under the Convention. Under the Russian proposal, an amendment would come into force for all parties once a threshold is reached, ensuring uniformity of obligations among all parties.

9. In the opinion of OLA-TS, the Russian proposal presents no legal issues and is clear and coherent. The use of the term consensus in the last line of paragraph 1 of the Russian proposal has precedents in other final clauses regarding amendments and would be interpreted in light of the applicable rules of procedure governing the conference of the parties. The Russian proposal deals clearly with the issue of entry into force of amendments by stating, in its paragraph 2, that an amendment shall enter into force for all parties three months after the number of instruments of ratification, acceptance or approval deposited reaches two-thirds of the number of States parties at the date of the adoption of the amendment. Paragraph 3 is clear in that it stipulates that any instrument of ratification, acceptance of approval or accession, deposited after an amendment has been accepted, but before it enters into force, shall be deemed to apply to the convention as amended on the date when the amendment enters into force.

10. On the other hand, OLA-TS identified a number of issues from a technical treaty law perspective with the Turkish proposal. First, it is not clear when the two-thirds of States parties, referenced in paragraph 2, is counted. Furthermore, the formulation in paragraph 4 regarding a State which becomes a party to the convention after the entry into force of an amendment contradicts paragraph 3. According to paragraph 3, States parties must ratify or accede to amendments in order to be bound by them. However, when it comes to States which become party to the Convention after the entry into force of an amendment as stipulated by paragraph 4, they are considered to be party to the Convention as amended, in the absence of an expression of a different intention. In other words: while paragraphs 2 and 3 require a positive action to bind a State to an amendment, in paragraph 4 new parties to the Convention are bound absent an expression of a different intention by that State. Finally, paragraph 5 is confusing in that it is not clear why any State, at the moment it becomes party to this

² For ease of reference, the three alternative texts of Article 27, as attached as Annex II to the report of the 150th session of the Working Party (ECE/TRANS/WP.30/300, Annex II) are reproduced in Annex for ease of reference.

Convention would not wish to be bound by an amendment which has been accepted but not yet entered into force.

IV. Considerations by the Working Party

11. The Working Party is invited to take note of the comments by OLA-TS before deciding how to further proceed with finalizing the text of the draft Convention.

Annex

Draft Convention on the Facilitation of Border Crossing Procedures for Passengers, Luggage and Load-Luggage carried in International Traffic by Rail³

Article 27

1. Any Party may propose an amendment to the present Convention and submit it to the secretariat of the Convention. The secretariat of the Convention shall communicate any proposed amendments to the Parties with a request to be notified whether they favour a conference of Parties for the purpose of considering and deciding upon the proposals. If within four months from the date of such communication at least one third of the Parties favour such a conference, the secretariat of the Convention shall convene the conference under the auspices of the United Nations Economic Commission for Europe. Any amendment adopted by a majority of two thirds of the Parties present and voting shall be communicated by the Depositary to Parties for their acceptance.
2. An amendment adopted in accordance with paragraph 1 of this Article shall enter into force for all Parties three months after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment.
3. Any instrument of ratification, acceptance, approval or accession deposited after an amendment has been accepted in accordance with the procedure in this article, but before it has entered into force, shall be deemed to apply to the Convention as amended on the date when the amendment enters into force.
4. Any such instrument deposited after the entry into force of an amendment to this Convention shall be deemed to apply to the Convention as amended.

Alternative proposal Article 27 by the Government of Turkey⁴

Article 27

1. Any Party may propose an amendment to the present Convention and submit it to the secretariat of the Convention. The secretariat of the Convention shall communicate any proposed amendments to the Parties with a request to be notified whether they favour a conference of Parties for the purpose of considering and deciding upon the proposals. If within four months from the date of such communication at least one third of the Parties favour such a conference, the secretariat of the Convention shall convene the conference under the auspices of the United Nations Economic Commission for Europe. Any amendment adopted by a majority of two thirds of the Parties present and voting shall be communicated by the Depositary to Parties for their acceptance.
2. Amendments to this Convention shall enter into force for the States Parties ratifying or acceding to them three months after the deposit of the instruments of ratification or accession by two thirds of the States Parties. Such amendments shall not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

³ See document ECE/TRANS/WP.30/2018/6/Rev.1

⁴ See document ECE/TRANS/WP.30/2018/26

3. For each State Party ratifying or acceding to an amendment referred to in paragraph 2 after the deposit of the required number of instruments of ratification or accession, the amendment shall enter into force three months after the deposit of its instrument of ratification or accession.
4. A State which becomes a Party to this Convention after the entry into force of an amendment in accordance with paragraph 2 shall, failing an expression of a different intention by that State:
 - (a) be considered as a Party to this Convention as amended; and
 - (b) be considered as a Party to the Convention as not amended, in relation to any State Party not bound by the amendment.
5. A State which becomes a Party to this Convention after an amendment has been accepted in accordance with the procedure in paragraph 2, but before it has entered into force, shall be deemed to apply to the Convention as not amended.

Alternative proposal Article 27 by the Government of the Russian Federation at the 150th session of the Working Party⁵
Article 27

1. Any Party may propose an amendment to the present Convention and submit it to the secretariat of the Convention. The secretariat of the Convention shall communicate any proposed amendments to the Parties with a request to be notified whether they favour a conference of Parties for the purpose of considering and deciding upon the proposals. If within four months from the date of such communication at least one third of the Parties favour such a conference, the secretariat of the Convention shall convene the conference under the auspices of the United Nations Economic Commission for Europe. Any amendment adopted by consensus of the Parties shall be communicated to the Parties.
2. An amendment adopted in accordance with paragraph 1 of this Article shall enter into force for all Parties three months after the number of instruments of ratification, acceptance or approval deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment.
3. Any instrument of ratification, acceptance, approval or accession deposited after an amendment has been accepted in accordance with the procedure in this article, but before it has entered into force, shall be deemed to apply to the Convention as amended on the date when the amendment enters into force.
4. Any such instrument deposited after the entry into force of an amendment to this Convention shall be deemed to apply to the Convention as amended.

⁵ See report ECE/TRANS/WP.30/300, Annex II