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Working Party on Customs Questions affecting Transport

Ad hoc Expert Group on Phase III of the TIR Revision
(30 and 31 August 2004, agenda item 5)

PRELIMINARY EVALUATION OF AMENDMENT PROPOSALS[*/]

Note by the secretariat

A. BACKGROUND

1. At its one hundred-and-seventh meeting (15-18 June 2004), the Working Party, after an in-depth discussion, mandated the secretariat to convene an Ad hoc Expert Group with a view to dealing with the other amendment proposals that had been transmitted by Contracting Parties as well as, possibly, other proposals for amendments of the Convention, in particular in relation to the guarantee system. The Working Party was of the view that the Ad hoc Expert Group should be established with an open-ended mandate and be open to participation by all Contracting Parties and relevant organizations. As a first priority, it should consider the amendment proposals before it with a view to separating these into (a) questions of a more technical nature, which the Working Party or the TIRExB could deal with and (b) questions of a more strategic nature, which the Ad hoc Expert Group should consider how best to deal with. In this context, it was proposed that it could be considered to launch a strategic review of the future of the Convention through a meeting of a TIR Contact Group, as it had been done in connection with Phase I of the TIR revision process.

[*/] The UNECE Transport Division has submitted the present document after the official documentation deadline due to resource constraints.

Contracting Parties were invited to inform the secretariat whether they were interested in hosting such a TIR Contact Group meeting. The topics to be dealt with by the TIR Contact Group could be decided by the Ad hoc Expert Group. The Working Party decided to convene the Ad hoc Expert Group on 30 and 31 August 2004 in Geneva as proposed by the secretariat (TRANS/WP.30/214, para. 42).

B. INTRODUCTION

2. The secretariat provides below its preliminary observations which the Ad hoc Group may wish to take into consideration in the course of its discussion. For the sake of simplicity, the observations are given in the order of the provisions contained in the TIR Convention.

C. PRELIMINARY OBSERVATIONS BY THE SECRETARIAT

Article 4

Documentation: TRANS/WP.30/2004/14.

3. The TIR Convention aims to facilitate the carriage of goods and to simplify and harmonize administrative formalities in the field of international transport, in particular at frontiers (see preamble). At present, the scope of the Convention is not to address issues relating to procedures at Customs offices at departure and/or destination unless they relate, to the extent possible, to the simplification and harmonization of the related transport. Therefore, the prohibition to subject goods carried under the TIR procedure to the payment or deposit of import or export duties and taxes is limited to the Customs offices en route only and leaves the issue aside, as to whether or not Customs offices of departure or destination have the right to request payment or deposit of import or export duties and taxes.

4. This provision, although in a slightly different wording, can already be found in the TIR Convention, 1959. Before the TIR Convention came into force, it was customary that at each border crossing, Customs authorities en route would request either the deposit or payment of duties and taxes regarding the goods in transit. That was no longer required once the internationally valid TIR guarantee became available. Article 4 contains the codification of this simplification by means of the interdiction to subject goods to the payment or deposit of import or export duties and taxes at Customs offices en route as long as they are carried under the TIR procedure. Although the scope or application of the provision may have been questioned in recent times, the importance of the principle behind it remains as evident as ever.

5. On the other hand, if understood literally, Article 4 does not prohibit the payment or deposit of duties and taxes for the goods carried under the TIR procedure, provided that this payment or deposit takes place at the Customs office of departure or destination or at any other Customs office which is not a Customs office en route. For example, the Customs authorities of the country of destination may wish to request the advance payment of duties and taxes, to be effected at the Customs office of destination before the TIR goods have entered the territory of that country. It is evident that such a request would be contrary to the principles of the TIR Convention and, thus, should not be allowed. In other words, as long as the goods are carried under the TIR procedure, they should not be subjected to the payment or deposit of import or export duties and taxes at any Customs office. However, before the TIR procedure has started or after it has finished, the payment or deposit of duties and taxes may be required with regard to the same goods.

6. One more consideration should be taken into account. Apart from depositing the duties and taxes at stake, there exist other forms of security (guarantee) applicable to the goods in transit: banking guarantee, surety, etc. It goes without saying that any form of additional security is not in line with at least the spirit of the TIR Convention.

7. In view of the above, the Ad hoc Group may wish to consider the following amendment proposals:

(i) Modify Article 4 to read as follows:

"Goods carried under the TIR procedure shall not be subjected to the payment or security of import or export duties and taxes."

(ii) Introduce a new Explanatory Note underlying that Article 4 applies as long as the goods are carried under the TIR procedure. Before or after the TIR transport, the same goods may be subjected to the payment or security of duties and taxes, as applicable.

Title Chapter II

Documentation: TRANS/WP.30/2004/14; Informal document No. 2 (2004).

8. The TIR Convention deals, inter alia, with the issue of liability of the national guaranteeing association. The liability of persons directly liable is left to provisions of national legislation. Bearing this in mind, the title of Chapter II seems to be correct to the extent that it refers to the liability of guaranteeing associations only.

9. It is, however, true that, since 1999, Chapter II has been amended with Article 6.2. bis which deals with the effective organization and functioning of an international guarantee system by an international organization. This additional provision is not covered by the title of Chapter II, which refers only to activities of the national associations.

10. Therefore, the Ad hoc Group may wish to consider whether or not a title of a Chapter should fully reflect all issues covered in it or whether it is sufficient if the main subject(s) is/are covered.

Article 6.2. bis

Documentation: TRANS/WP.30/2003/11; TRANS/WP.30/2003/22; TRANS/WP.30/2004/11; TRANS/WP.30/2004/14; TRANS/WP.30/214.

11. The purpose of the various proposals is to ensure that the international organization, when it is granted the authorization to take on responsibility for the effective organization and functioning of an international guarantee system, formally accepts this responsibility. In addition, some proposals wish to have reflected (in the text of the provision or as an Explanatory Note) that the international organization, in accepting the authorization, confirms that it will respect the competencies of the Contracting Parties and will comply with the decisions of the TIR Administrative Committee (and requests by the TIRExB).

12. In view of their importance, the Ad hoc Group may wish to discuss the various proposals and provide guidance to the Working Party or to the TIR Contact Group, which will consider the issue again at their forthcoming sessions in 2004.

Article 8.5 (and 31)

Documentation: TRANS/WP.30/2004/14.

13. Under this proposal, the Ad hoc Group may wish to consider that, so far, the TIR Convention does not deal with the responsibility of the TIR Carnet holder, because this is considered to be a matter of national law. From this perspective, it seems inappropriate to introduce this issue either generally into an amended Annex 9, Part II or specifically into any provision, such as Article 8.5.

Article 8.7

Documentation: TRANS/WP.30/2003/22; TRANS/WP.30/2004/14.

14. The Ad hoc Group may wish to carefully consider the background and structure of Article 8 in its integrity before taking any decision on changing the order or amending the text of the provision. Article 8 constitutes the liability of the guaranteeing association and provides criteria with regard to the application of such liability. Article 8 does not provide guidance with regard to the treatment of the person(s) directly liable, because this is considered to be a matter of national competence. Article 8.7 requests a Contracting Party to undertake, so far as possible, its legal possibilities to request payment from the person(s) directly liable, before applying the provisions provided by the TIR Convention to address the guaranteeing association. As such, it does not constitute the liability of the person(s) directly liable. Introducing such concept would fundamentally change the scope of the TIR Convention.

15. The difficulties in the application of Article 8.7 may stem from the fact that the wording "as far as possible" could be understood in two slightly different ways, as shown by dictionary entries below:

(i) **as far as possible**

Also, **so far as possible**. To the greatest extent, degree, or amount that is attainable.

Source: The American Heritage® Dictionary of Idioms by Christine Ammer.
Copyright © 1997 by The Christine Ammer 1992 Trust. Published by Houghton Mifflin Company.

(ii) **as far as possible**

adv: to a feasible extent [syn.: as much as possible]

Source: WordNet ® 1.6, © 1997 Princeton University.

It seems that these differences relate not only to English, but also to French and Russian.

16. In case the Ad hoc Group feels that an amendment of the wording of Article 8.7 would be preferable, it may wish to weigh the pros and cons of the current wording "as far as possible" against any other wording, such as "shall make every effort to ensure". The current wording instructs Contracting Parties to go to great lengths to seek payment from the person(s) directly liable, but

leaves room for judging the proportionality of any action to be undertaken in order to obtain payment. Alternative, stricter, wordings may complicate the application of the Convention considerably, because of the impossibility to assess when the criteria of such provision have been fulfilled and who is authorized to make that assessment.

Article 11

Documentation: TRANS/WP.30/2003/11; TRANS/WP.30/2004/11; TRANS/WP.30/2004/14.

17. Article 11 stipulates the procedure to be followed by Contracting Parties in order to claim or obtain payment from their guaranteeing association. Considering the crucial nature of this Article within the application of the TIR Convention and the impact is has on the sustainability of the system, the Ad hoc Group may consider it prudent to first identify the principles of the guarantee system, before addressing the wording of the individual paragraphs of this provision. In this respect, the following issues would need to be discussed (in the logical order):

- the basic legal principles of the TIR guarantee, as laid down in the current TIR Convention, namely that the guarantee of the national association covers the liabilities incurred in connection with all TIR Carnets used in that country issued by itself or by any foreign association (Article 6.2) and that the association is liable, jointly and severally, with the persons directly liable (Article 8.1). For instance, during Phase I of the TIR revision process in 1995-1996 some considerations were given to the proposal of establishing a decentralized guarantee system where every issuing association would be responsible only for TIR Carnets issued by itself;

- once the basic legal principles of the TIR guarantee, as referred above, are approved, the Contracting Parties should decide whether a detailed mechanism of functioning of the guarantee system (for example, the relations between different players in the guarantee chain) should be described in the text of the TIR Convention, which is not the case for the present Convention. In this regard, the Ad hoc Group may wish to be informed of the organization and functioning of the present TIR guarantee system managed by the IRU;

- in case a decision is taken to incorporate a detailed mechanism of functioning of the guarantee system into the TIR Convention, relevant proposals should be further discussed.

Article 28

Documentation: TRANS/WP.30/2004/14.

18. The Ad hoc Group may wish to consider if it seems correct to attribute any irregularity directly to the guaranteeing association itself. Such inclusion would disregard the fundamental principle of the TIR system, that, because of its joint and several nature, any liability of the guaranteeing association presupposes liability of the TIR Carnet holder. On top of that, an irregularity as such (not the liability for payment of Customs duties and taxes) can only be attributed to the person who has committed it and not to any third person(s).

Article 40

Documentation: TRANS/WP.30/2004/14.

19. Within the context of this Article, the Ad hoc Group may wish to reconsider the fact that any liability of the guaranteeing association presupposes liability of the TIR Carnet holder. Therefore, it seems unnecessary to include references to the guaranteeing association in provisions dealing with the responsibility (or not) of the TIR Carnet holder.

Article 41

Documentation: TRANS/WP.30/2004/14.

20. The Ad hoc Group may wish to provide guidance with regard to the question as to whether or not the apparent absence of a reference to “goods which are irretrievably lost or missing” has, so far, caused any problem in the application of the said Article.

Article 42 bis

Documentation: TRANS/WP.30/2004/14.

21. When reviewing the proposal, the Ad hoc Group may wish to consider that there is a difference between “the proper use of TIR Carnets”, being a task to be fulfilled by competent authorities, in close cooperation with the associations, and the “proper application of the Convention” being an obligation Contracting Parties have to ensure independently from any cooperation with associations as a direct consequence of their accession to the TIR Convention.

22. In its discussion on the issue, the Ad hoc Group may wish to take note of the Rules of Procedure of the UNECE, in particular Rule 36, which stipulates that no action in respect of any country shall be taken without the agreement of the Government of that country.

Annex 8, Article 13

Documentation: TRANS/WP.30/2004/4; Informal document No. 3 (2003).

23. When considering this proposal, the Ad hoc Group may wish to take note of the fact that the secretariat, at the request of the TIR Administrative Committee has sought the opinion of the Office of Legal Affairs of the United Nations (OLA) (TRANS/WP.30/AC.2.73, para. 44), which states (1) that the term "levy" may be used to denote either a contribution or a tax, (2) that the French term "droit" may connote both fee and tax and (3) that the Russian term "сбор" is very close to the term "tax" and can easily be understood in that sense. OLA has not been able to identify a single term or a simple expression which clearly and unambiguously denotes charges on items or services which do not represent a tax, but represent rather the recovery of the costs involved in providing that service or item. Having consulted the provisions of a number of treaties and international agreements, OLA suggests considering the use of the expression "service charge", indicating, however, that the use of that expression on its own is not unambiguous either.

D. FINAL CONSIDERATIONS

24. When discussing the various proposals for amendment of the TIR Convention, the Ad hoc Group may wish to keep in mind the provisions of the Vienna Convention on the Law of Treaties, in particular Articles 31 to 33, which deal with the interpretation of international Conventions and which stipulate that the terms of international treaties should not be read in isolation, but in the context and in the light of the treaty's object and purpose.

Annex

Excerpt from the Vienna Convention on the Law on Treaties (1980)

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.
