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Item 8 (c) (iii) of the provisional agenda

Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention, 1975):

Application of the Convention – Application of the TIR Convention in the Customs Union of Belarus, Kazakhstan and the Russian Federation

Application of the TIR Convention in a Customs Union

Note by the secretariat

I. Mandate

1. At the 133rd session of the Working Party on Customs Questions affecting Transport (WP.30), the Eurasian Economic Commission (EEC) informed the Working Party about the progress in preparing an intergovernmental agreement on the functioning of the TIR procedure in the Customs Union of Belarus, Kazakhstan and the Russian Federation, in particular, about the efforts to reach a common position on the issue of whether or not the TIR procedure can apply to internal transports of foreign goods under Customs control between two offices located in different member States without crossing the territory of third countries.

2. The secretariat introduced Informal document No. 5 (2013) which analysed several key provisions of the TIR Convention in the context of international law and came to the conclusion that their current wording does not seem to allow for a clear-cut interpretation in case of Customs Unions with no internal Customs borders. To give new Customs Unions the necessary flexibility to adapt the use of the TIR procedure to their economic and political needs, the secretariat proposed several options on how to amend Article 2.

3. The Working Party welcomed the efforts by the secretariat and decided to consider these proposals in detail at the next session. In the interim, the secretariat was requested to issue Informal document No. 5 (2013) as an official document in all working languages and include an option, to apply provisionally, a selected amendment pending its entry into force. The present document is the revised version of Informal document No. 5 (2013)

submitted at the 133rd session. The secretariat has prepared it with a view to providing the necessary background information that would allow WP.30 and Contracting Parties to make a consensus decision on how to proceed in this matter. While Contracting Parties are, in principle, free to make mutually agreed arrangements, this should not in any case impede or jeopardize the functioning of the TIR Convention or the rights and obligations of third parties to the TIR Convention or related international legal instruments. In this regard, WP.30 is also invited to recall document ECE/TRANS/WP.30/2010/6, prepared by the secretariat on the application of the TIR Convention in a Customs Union with a single Customs territory.

II. Background

4. Since the 132nd session of WP.30, the secretariat has been made aware of the following relevant developments:

(a) A member of the European Parliament questioned the European Commission on reinstating the use of the TIR transit system for goods transport under Customs control within the EU. The Commissioner for Taxation and the Customs Union, Mr. Šemeta, replied that the absence of internal borders excludes the possibility of using TIR Carnets for EU internal transports.

The EU Customs code in article 91b allows the use of a TIR Carnet for transports which:

- begin or terminate outside the Community; or
- relate to consignments of goods which must be unloaded in the Customs territory of the Community and which are conveyed with goods to be unloaded in a third country; or

(b) are effected between two points in the Community through the territory of a third country; the Republic of Kazakhstan submitted a study which indicated that for the Customs Union of Belarus, Kazakhstan and the Russian Federation, the TIR system is the most effective and practical means of financial security for Customs transit. This study concluded also that according to Article 48 and 49 of the TIR Convention, TIR operations can be performed for internal transports within a Customs Union (Informal document No. 1 (2013)).

(c) At the 133rd session of the Working Party, the international guarantee chain expressed its readiness to cover operations, already today, both for TIR transports inside the Customs Union as well as even within a single country. This information was duly noted by the Working Party for its consideration in its future decision on the matter.

(d) The Eurasian Economic Commission expressed its regret that, by the 133rd session, the Working Party had not been in a position to reach consensus on the underlying issue and pointed out that the member States of the Customs Union may take their own decision before WP.30 considerations are finalized.

III. Interpretation of the term “frontier” in Article 2 and the relevance of Articles 48 and 49

5. The term “frontier” on its own is not commonly used in international Customs conventions. In the “Glossary of International Customs terms” (WCO, October 2011) only the term “Customs frontier” which means “the boundary of a Customs territory” is mentioned.

6. Customs transit is defined in the Revised Kyoto Convention, 1999 (RKC) managed by the World Customs Organization (WCO), as a “Customs procedure under which goods are transported under Customs control from one Customs office to another”. The WCO definition of Customs transit thus covers both national and international Customs transit.

7. For the purpose of defining the term “frontier” in the TIR Convention, the principles of interpretation as stipulated in the 1969 Vienna Convention on the Law of Treaties (VCLT) may be a useful place to start. According to Article 31 (1) of the VCLT *“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.”* The context includes, in addition to the treaty text itself, the preamble and the annexes as well as other agreements and documents which are considered by the parties as being instruments related to the treaty (Article 31 (2)). Furthermore, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation has to be taken into account, too. Finally, there are supplementary means of interpretation as, for instance, the preparatory work of the treaty (so called “travaux préparatoires”) and the circumstances of its conclusion (Article 32).

8. Against this background, and in accordance with the universally accepted provisions on interpretation as contained in the law of Treaties, the term “frontier” from Article 2 could be understood as “Customs frontier” where the necessary Customs clearance of TIR Carnets takes place, insofar as the object and purpose of the TIR Convention is that of Customs transit. As a Customs union with a single Customs territory does not have internal Customs frontiers, the above interpretation could lead to a conclusion that “the TIR procedure can only be used for a transit movement which begins or ends outside the single Customs territory, or is effected between two points in the Customs territory through the territory of a third country”. The TIR Convention, thus, would not reasonably be applicable to national transit operations which, in this case would be comparable to transit within the Customs union.

9. Furthermore, reference should be made to the relevance of Article 48 of the TIR Convention which reads:

“Nothing in this Convention shall prevent Contracting Parties which form a Customs or Economic Union from enacting special provisions in respect of transport operations commencing or terminating or passing through, their territories, provided that such provisions do not attenuate the facilities provided for by this Convention”.

10. In the first instance, the drafting of the article does not seem to imply that the conditions of “commencing”, “terminating” and “passing through” are applied simultaneously. The lack of the qualifying “and/or”, and, by contrast, the use of only the word “or” means that only one of these conditions should apply, not all together. If read in conjunction with Article 2, Article 48 does not seem to unequivocally provide the freedom to use the TIR procedure within a Customs Union. At the same time, the ambiguity of the drafting does not explicitly prohibit it either. As a result, the rules of Treaty interpretation and established practices would be the best way to qualify the intended meaning of this article.

11. Finally, Article 49 of the TIR Convention refers to the freedom of Contracting Parties to provide greater facilities than those guaranteed under the Convention or other legal instruments, regional or domestic, insofar as those facilities do not intervene with or disrupt the application of the TIR Convention. The article thus refers to greater facilities, i.e. greater benefits. It is not clear how this provision would necessarily be relevant to the issue at hand, unless it is the case that use of the TIR procedure within a Customs Union is considered a greater benefit for users than not having to use it. Another consideration would be the risk management benefits it provides to Customs authorities and relevant

administrations, but this is not a facility that is granted by a Contracting Party to the users or to other Contracting Parties. Article 49 is presumably only relevant to the extent that the formation of a Customs Union in itself is a greater facility provided for the members of the Customs Union. Consequently, reference to or amendment of article 49 is not, in the view of the Secretariat, a necessity.

IV. Other Considerations

12. Customs Unions should be established in conformity with international norms as included in article XXIV (8) of the GATT 1994, that is to say that the GATT 1994 sets the defining requirements for a Customs Union. More specifically Article XXIV (8) (a) (i) and (ii) read as follows:

“(a) A Customs Union shall be understood to mean the substitution of a single Customs territory for two or more Customs territories, so that:

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the Union or at least with respect to substantially all the trade in products originating in such territories, and

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the Union.”

13. Against this background there are two issues that need to be taken into consideration by WP.30 and Contracting Parties:

(a) Use of the TIR procedure within a Customs Union establishing a single Customs territory with no internal borders, for the transport of domestic goods could potentially be problematic with regards to certain provisions of the TIR Convention and – possibly – in relation to the provisions of the GATT 1994.¹ In addition, it could be contended that the removal of customs controls that follow from the formation of a single customs territory dispenses with the need for a guarantee for domestic goods in transit. On the other hand it is possible that implementing the TIR procedure for goods originating outside the Customs Union and intended for consumption in one of the countries of the Customs Union may present valid concerns and reasons to continue to use the TIR procedure. However, such use would require certain adjustments to the TIR Convention.

(b) An issue of discriminatory practice could possibly be raised with regard to routes within the Customs Union where the TIR procedure and the TIR guarantee can presumably be used (e.g. St. Petersburg to Minsk, with crossing of the internal Belarusian-Russian border) and routes where the TIR procedure and the TIR guarantee cannot be used under any circumstances (e.g. St. Petersburg to Moscow entirely within the Russian territory). A possible discrimination between these two cases would be in contradiction with the basic principles of existence of a Customs Union with a single Customs territory

¹ A former Judge of the WTO Appellate body has noted that “an important task for the members of the WTO is to ensure that WTO disciplines are effectively applied to prevent customs unions and regional free trade agreements from being too exclusive and discriminatory in relation to outside parties”. It is not determined if this statement could apply to the use of the TIR procedure for foreign goods across geographical country borders within a Customs Union as opposed to those foreign goods requiring use of the TIR procedure only upon entry and exit from the entire territory of the Customs Union.

without internal Customs borders, because transport operations would still be treated as either international or domestic, depending on the route selected.

V. Amendment proposal

14. In order to facilitate considerations of the Working Party, and in accordance with the request of the Working Party at the 133rd session, the secretariat has drafted a set of proposals that would either amend Article 2 itself or, alternatively, introduce a new Explanatory Note to this Article. An additional draft amendment is proposed for article 48, as well as an option of provisional application of a selected amendment pending its entry into force. The proposed modifications to the current text of Convention are marked in **bold** and ~~strikethrough~~ for new and deleted text.

Amendment proposal for Article 2:

- “1. This Convention shall apply to the transport of goods without intermediate reloading, in road vehicles, combinations of vehicles or in containers, across one or more **[Customs]** frontiers between a Customs office of departure of one Customs territory Contracting Party and a Customs office of destination of another or of the same Contracting Party, provided that some portion of the journey between the beginning and the end of the TIR transport is made by road.
- 2. The provisions of paragraph 1 of this Article shall not prevent the Contracting Parties [in particular those which form a Customs or Economic Union], from unilaterally, bilaterally or multilaterally enacting legislation that would allow the application of the TIR Convention solely in their Customs territory without the crossing of a Customs frontier.”**

Proposal for a new Explanatory Note 0.2-3 to Article 2:

“0.2-3 The provisions of this Article do not prevent Contracting Parties that form a Customs or Economic Union from, upon mutual agreement, implementing the TIR procedure for transport operations within their territory of goods not originating in their territory, as long as the conditions of such operations are specified and do not otherwise contradict the [object and purpose][spirit and text] of the TIR Convention.”

Amendment proposal for Article 48:

“ Nothing in this Convention shall prevent Contracting Parties which form a Customs or Economic Union from enacting special provisions in respect of transport operations commencing **and/or** terminating **and/or** passing through, their territories, provided that such provisions do not attenuate the facilities provided for by this Convention.”

Note on the application of an amendment prior to its entry into force:

“By decision of the Administrative Committee, if Contracting Parties agree to proceed with one of the above amendments or other amendment of their choosing, Contracting Parties – and specifically the member of the Customs Union at issue – may provisionally apply the amendment, in good faith, prior to its entry into force but no earlier than the time of notification of the amendment to the Secretary-General.”

VI. Considerations by the Working Party

15. The Working Party is invited to consider the above proposals and provide guidance to the secretariat as to which option should be pursued.