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**CUSTOMS CONVENTION ON THE INTERNATIONAL TRANSPORT OF GOODS
UNDER COVER OF TIR CARNETS (TIR CONVENTION, 1975) ***

Revision of the Convention

Amendment proposals for the Convention

Note by the secretariat

I. BACKGROUND AND MANDATE

1. At its one-hundred-and-twelfth session, the Working Party considered the findings of the TIRExB concerning a number of amendment proposals of a technical nature, as laid down in document ECE/TRANS/WP.30/2006/2. With regard to Article 42bis, the Working Party took note of the considerations by the TIRExB and requested the secretariat to prepare proposals concerning the proper application of the Convention. The proposals should also include considerations concerning the non-application of the Convention by Contracting Parties and, as a result, possible sanctions in line with general UN rules and procedures (ECE/TRANS/WP.30/224, para.46).

* The UNECE Transport Division has submitted the present document after the official documentation deadline.

II. LEGAL PROVISIONS AND THEIR ANALYSIS

TIR Convention

2. The provisions of the TIR Convention, being a legal instrument, are binding for all Contracting Parties. The Convention establishes a mechanism of supervision and monitoring of the application of the TIR procedure by the Contracting Parties – a task which is performed by the TIR Administrative Committee and the TIR Executive Board, as stipulated, in particular, in the following provisions of the TIR Convention:

Article 42bis

The competent authorities, in close cooperation with the associations, shall take all necessary measures to ensure the proper use of TIR Carnets. To this effect they may take appropriate national and international control measures. National control measures taken in this context by the competent authorities shall be communicated immediately to the TIR Executive Board which will examine their conformity with the provisions of the Convention. International control measures shall be adopted by the Administrative Committee.

Annex 8, Article 1bis

1. ...

2. **The Committee shall monitor the application of the Convention and shall examine any measure taken by Contracting Parties, associations and international organizations under the Convention and their conformity therewith.**

3. **The Committee, through the TIR Executive Board, shall supervise and provide support in the application of the Convention at the national and international levels.¹**

3. From the above, it becomes clear that the TIR Convention does not provide for specific measures against a Contracting Party which does not abide by the provisions of the Convention. This is not exceptional, because, on a general note, it should be pointed out that in international public law it is seldom for an international legal instrument to include a direct procedure of sanctions in the event its provisions are violated by a Contracting Party.

4. The founders of the TIR Convention followed the same careful approach. This became evident when looking at Article 57 on the settlement of disputes, whose paragraphs 2 to 6 were made open for reservations. Obviously, that was done for good reasons, because many Contracting Parties have expressed that they do not consider themselves bound by these provisions.

5. In fact, the issue of observance of the TIR Convention by the Contracting Parties is closely linked to the issue of settlement of disputes: in a well-balanced mechanism, such as the TIR Convention, a breach of its provisions by a Contracting Party will inevitably affect other

¹ The detailed functions of the TIRExB are laid down in Annex 8, para.10.

players in the system (Contracting Parties, national associations, transport operators, etc.) and could be challenged in line with the appropriate procedures. For the sake of simplicity, this document mainly focuses on disputes between Contracting Parties.

6. The TIR Convention contains several references to the settlement of disputes:
 - Article 57, paragraph 1 stipulates that "any dispute between two or more Contracting Parties concerning the interpretation or application of this Convention shall, so far as possible be settled by negotiation between them or other means of settlement" (amicable settlement);
 - Article 57, paragraphs 2 to 6 sets up an arbitration mechanism which could be used in case the disputing Contracting Parties have not made relevant reservations;
 - According to Annex 8, Article 10 (e), the TIRExB shall "facilitate the settlement of disputes between Contracting Parties, associations, insurance companies and international organizations without prejudice to Article 57 on the settlement of disputes".

7. As the recent practice has shown, the majority of disputes between Contracting Parties are caused by national control measures introduced by some Contracting Parties. According to Article 42bis quoted of the Convention, if such situations arise, the TIRExB should not await a formal dispute between the countries concerned, but should directly intervene in the matter and give its opinion on the conformity of the underlying control measures with the provisions of the Convention. If these measures are deemed to be not in compliance with the Convention, the usual way to tackle this problem is to draw the attention of the respective Contracting Party to the breach committed and to convince it of rectifying the situation. The TIRExB's experiences in this regard have been rather positive: Contracting Parties which introduced controversial national control measures have eventually lifted them, though sometimes with noticeable delay. If a defaulting Contracting Party persists in applying such measures, other Contracting Parties may invoke the procedure for settlement of disputes laid down in Article 57, paragraph 1. Should this not work out, then the procedure set out in Article 57, paragraphs 2 to 6 may become applicable, unless the defaulting State has made a reservation regarding the application of these paragraphs. Eventually, the issue may be taken to the International Court of Justice.

UNECE Rules of Procedure

8. Rule 36 of the Rules of Procedure of the UNECE stipulates that no action in respect of any country shall be taken without the agreement of the Government of that country. As it is unlikely that any Government would accept sanctions against its own country, this Rule does not seem to play a role in ensuring the proper application of the TIR Convention.

Charter of the United Nations

9. Concluded in 1946, the Charter is the constituting document of the United Nations. It seems to be the only UN document which provides for the opportunity of imposing sanctions (called also 'measures' and 'preventive or enforcement actions') against a sovereign State. However, this right resides in the exclusive power of the UN Security Council in the field of international peace and security. In case of need, the Security Council may decide on the whole range of measures to be employed, such as complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, the severance of diplomatic relations, and the use of armed force.

Vienna Convention on the Law of Treaties (1969)

10. The UN Vienna Convention codifies the principles of international law on the subject of treaties, bilateral or multilateral, concluded between States. Article 4 of the Vienna Convention states that it applies only to treaties concluded after its entry into force, i.e. 27 January 1980. The TIR Convention, 1975 would thus fall outside the scope of application of the Vienna Convention. However, Article 3 of the Vienna Convention also states that the non-applicability of the Vienna Convention “to international agreements concluded between States and other subjects of international law ... shall not affect: ... (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention”, meaning that the already established principles and practices of international law also apply to earlier concluded treaties. In addition, the provisions of the Vienna Convention may provide guidance in a general sense.

11. The following provisions of the Convention are relevant for the discussion:

Article 26

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty...

Article 60

Termination or suspension of the operation of a treaty as a consequence of its breach

1. ...
2. **A material breach of a multilateral treaty by one of the parties entitles:**
 - (a) **the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:**
 - (i) **in the relations between themselves and the defaulting State, or**
 - (ii) **as between all the parties;**
 - (b) **a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;**
 - (c) **any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the**

treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

- 3. A material breach of a treaty, for the purposes of this article, consists in:
 - (a) a repudiation of the treaty not sanctioned by the present Convention; or**
 - (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.****
- 4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.**

...

12. Taking account of Article 3 of the Vienna Convention, it is worth analyzing how Article 60 of the Vienna Convention could apply in the context of the TIR Convention. A typical material breach of the TIR Convention by a Contracting Party would occur if this Contracting Party decided to implement national control measures which would be recognized by the TIRExB and, subsequently, by the TIR Administrative Committee, as not being in compliance with the TIR Convention. If that would be the case, other Contracting Parties could suspend the operation of the TIR Convention in relation to the defaulting State either on a unanimous (Article 60.2 (a) (i) of the Vienna Convention) or on a bilateral basis (Article 60.2 (b) and (c) of the Vienna Convention). As the latter option would totally disable the functioning of the TIR system, only the first option will further be considered. Thus, other Contracting Parties to the TIR Convention might take a unanimous decision to suspend the operation of the TIR Convention in the relations between themselves and the defaulting State. What would that mean in practice? In substance, the Customs authorities of other countries could refuse to accept TIR Carnets of transport operators from the defaulting State. In addition, the international organization, as referred to in Article 6 of the Convention, could be requested to stop distributing TIR Carnets to the national association of the defaulting State. Obviously, the TIR procedure would no longer be applicable on the territory of the defaulting State, and transport operators from other countries would have to use other transit procedures in this Contracting Party.

III. FURTHER CONSIDERATIONS

13. The scenario described in the previous paragraph, if introduced into the TIR Convention, could lead to grave consequences for the transport industry of the defaulting Contracting Party. Furthermore, the above sanctions could well endanger the functioning of the TIR Convention on a global scale and could even make the continuity of the TIR Convention doubtful. Therefore, the introduction and subsequent application of such measures should be considered with great care, taking account of the fact that sanctions, on the one hand, could contribute to ensuring the proper application of the TIR Convention by all Contracting Parties, but, on the other hand, would lead to repercussions which might endanger the sustainability of the TIR system.

14. The above considerations aim to indicate that:
- it is not usual for a treaty to contain a mechanism of sanctions;
 - containing such a mechanism could seriously endanger the viability and sustainability of any treaty;
 - in case a sanction mechanism were to be introduced of the TIR Convention, it would be difficult to implement, as the application of sanctions against one Contracting Party would have negative repercussions on all Contracting Parties.
