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Administrative Committee for the TIR Convention, 1975
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PROPOSALS FOR AMENDMENTS TO THE CONVENTION *

Amendment(s) to the Convention with regard to the financing
of the operation of the TIRExB and the TIR secretariat

Note by the secretariat

I. MANDATE

1. At its fortieth session, the Administrative Committee considered Informal document No. 2 (2006), prepared by the secretariat, containing inter alia a proposal for solving the inconsistency which exists between, on the one hand, the legal provision for the collection of the levy contained in Annex 8, Article 13 of the Convention and, on the other hand, the transfer and collection by the IRU of the amounts required for covering the operation of the TIRExB and the TIR secretariat. The Committee requested the secretariat to prepare a document for the session containing proposals, including the proposal mentioned in Informal document No. 2 (2006), aimed at resolving the inconsistency mentioned above. The Committee pointed out that the proposals should be developed in consultation with the UN Auditors, the UN Office of Legal Affairs (OLA) and other relevant regulations in the UN. Bearing this in mind, the Committee recognized that the secretariat should have sufficient flexibility with regard to the preparation of the proposals (ECE/TRANS/WP.30/AC.2/81, para. 30).

2. In the present document, the secretariat provides the Committee with a range of considerations and possible solutions to address the existing inconsistency.

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

II. BACKGROUND REGARDING ESTABLISHMENT OF ANNEX 8, ARTICLE 13

3. In 1996, when preparing Phase I of the revision of the TIR Convention, the Working Party on Customs Questions affecting Transport (WP.30), at its eighty-third session, felt that the idea of financing the functioning of the TIRExB through a small levy on each TIR Carnet was interesting and should be further pursued (TRANS/WP.30/R.166, para. 70). The original concept was to organize this financing through a levy on each TIR Carnet issued by authorized associations (see, *inter alia*, TRANS/WP.30/R.170, page 20 and TRANS/WP.30/AC.2/43, para. 13). The levy was, at times, also referred to as “service charge” (TRANS/WP.30/R.179). In 1997, at its eighty-eighth session, the Working Party decided to change the wording “a levy on each TIR Carnet issued by authorized associations” to “a levy on each TIR Carnet distributed by the international organization as referred to in Article 6”. This was done after discussion of a note by the secretariat, contained in document TRANS/WP.30/R.190. This change in wording was adopted by the Administrative Committee, at its twenty-third session (TRANS/WP.30/AC.2/47).

4. In the aforementioned note, the secretariat, based on advice given by OLA, provided the information that the basic principle of financing the TIRExB and its secretariat by means of a levy on TIR Carnets, is not novel, with a reference to the United Nations Convention on the Law of the Sea and the Patent Cooperation Treaty, which provide for similar mechanisms. With regard to the transfer of the funds, the note proposed, for the sake of administrative simplicity and in order to facilitate control by the TIRExB, not to request this from the national associations (in which case the written agreement between associations and Customs authorities would need to contain provisions to this effect), but from the international organization as one of the prerequisites for the authorization of the international organization(s) (TRANS/WP.30/R.190, paras 15-17).

III. THE PROVISIONS OF ANNEX 8, ARTICLE 13

5. Since the entry into force of Phase I of the TIR Revision process on 17 February 1999, Annex 8, Article 13 stipulates as follows:

“Article 13

1. The operation of the TIR Executive Board and the TIR Secretariat shall be financed, until such time as alternative sources of funding are obtained, through a levy on each TIR Carnet distributed by the international organization as referred to in Article 6.

Explanatory Notes to Article 13, paragraph 1

8.13.1-1 Financial arrangements

Following an initial period of two years, the Contracting Parties to the Convention envisage the operation of the TIR Executive Board and the TIR secretariat to be financed through the Regular Budget of the United Nations. This does not preclude a prolongation of the initial financing arrangement should financing from the United Nations or alternative sources not be forthcoming.

8.13.1-2 Operation of the TIR Executive Board

The work of the members of the TIR Executive Board will be financed by their respective Governments.

2. The amount of the levy and the procedure for its collection shall be determined by the Administrative Committee following consultations with the international organization as referred to in Article 6. Any proposed changes to the levy shall be authorized by the Administrative Committee.”

IV. ISSUES RAISED SINCE THE ENTRY INTO FORCE OF ANNEX 8, ARTICLE 13

6. Since the entry into force of Phase I of the TIR Revision process on 19 February 1999, considerations by the Administrative Committee in relation to the application of Annex 8, Article 13, have been limited to the use of the term “levy”. At its thirty-fifth session in September 2003, the Administrative Committee took note of observations of the Chairman of the WP.30 concerning the use of the term “levy”. At its thirty-sixth session in February 2004, the Administrative Committee considered document TRANS/WP.30/AC.2/2004/4, prepared by the secretariat on the basis of a proposal submitted by the Chairman of the Working Party. The Chairman of the WP.30 considered that the word “levy” used in Annex 8, Article 13, could be ambiguous, as it was very often used in relation to tax measures, whereas the collection of funds, as referred in Annex 8, Article 13, should be regarded as a compensation for costs incurred by the TIRExB and the TIR secretariat. Some delegations expressed their doubt as to whether a change in words would take away the possible ambiguity of the term and proposed to the Committee to consider the possibility of introducing a comment, which would clearly define the scope of the term “levy”. The Committee requested the secretariat to obtain the opinion of the Legal Office of the United Nations (OLA) before continuing its discussion of the issue. Russian speaking as well as French speaking delegations expressed the view that the corresponding term for “levy” as used in the Russian and French text of the Convention, was appropriate and requested that any change in terminology be limited to the English text only (TRANS/WP.30/AC.2/73, para. 44).

A. Comments provided by OLA

7. In line with the request by the Administrative Committee, the secretariat submitted the following three questions to OLA for advice:

- (a) Could the English term “levy” be considered as being ambiguous, with the possible effect that it could be interpreted as a tax measure?
- (b) If yes, could OLA provide alternative wording, which would accurately reflect the fact that the amount paid on every TIR Carnet to finance the operation of the TIRExB and the TIR secretariat should be regarded as a mere compensation of costs incurred?
- (c) If the word “droit” in French and “сѡоп” in Russian reflect the English term “levy” and if they, depending on the outcome of question (a), could also be considered as being ambiguous. If yes, OLA was encouraged to provide alternative wordings.

8. With regard to question (a), OLA, having reviewed routinely negotiated agreements and the principal agreements of the United Nations, and having consulted other international organizations (WCO and EU) and a number of English-language law dictionaries, considered that “it would appear that the English noun “levy” is capable of being understood to connote a tax”.

9. With regard to question (b), OLA, having consulted the provisions of a number of treaties and international agreements that provide for charges on items or services which do not represent a tax, was not able to identify a single term or a single expression which clearly and unambiguously expresses the idea that the term used represents the recovery of the costs involved in providing a service or item, but, nevertheless, suggested to give consideration to the use of the expression “service charge”.

10. With regard to question (c), OLA referred to the French and Russian Translation Services of the UN, which advised that the word “droit” is ambiguous in its signification. According to OLA, “it may connote a fee which is paid in return for a particular service; but it may also connote a tax. They note that a synonym of “droit” is “redevance”, but that it is no less ambiguous than the term “droit”. (...). The word “сѡоп” is very close to the term “tax” and can easily be understood in that sense. (...). There is not any other term in Russian that can be used instead of it in order simply to convey the idea that a charge is not a tax, but a charge to cover the costs of issuing an item or providing a service.”

11. In conclusion, OLA considered that “the word “levy” as it appears in Article 13 of Annex 8, cannot be read in isolation. Rather it must be read in the light of, and together with, the text of the TIR Convention as a whole, including its preamble and all of its annexes. When read in this way, it may turn out that the word “levy”, as it is used in Article 13 of Annex 8 of the Convention, bears a meaning that is different from the sense in which it would be understood if it were read in isolation or as it is used in common parlance.”

B. Comments provided by the UN Board of Auditors

12. In January 2005, the UN Board of Auditors, started an audit of the UNECE, including the agreement between UNECE and the IRU concerning the annual transfer of funds for financing the operation of the TIRExB and the TIR secretariat. In May 2005, the Auditors issued a Management Letter, containing a number of recommendations related to this agreement, including some recommendations aimed at providing closer monitoring in the implementation of the TIR Convention. When analyzing the Management Letter and its recommendations, the funding mechanism of the TIRExB and the TIR secretariat through a levy on each TIR Carnet distributed and the collection and transfer of the funds required for the operation of the TIRExB and the TIR secretariat, as described in the UNECE-IRU agreement, appears to be the major source of concern to the Board of Auditors. The IRU informed the UNECE secretariat that the consultation of specialized lawyers in various countries had demonstrated the impossibility, by law, for the IRU and national associations to collect the “levy” mentioned in Article 13 of Annex 8 to the TIR Convention and in the IRU-UNECE agreement. According to the IRU, the funding of the TIRExB and the TIR secretariat through the collection, by the IRU, of a levy (tax) on each TIR Carnet distributed is the main source of the problem.

C. Considerations by the UNECE secretariat

13. As elaborated above, the discussion with regard to Annex 8, Article 13, has, so far, focused on the term “levy” and its potentially contentious nature. However, in the view of the secretariat, when analyzing all relevant documentation, in particular with regard to the establishment of the text of the said Article, it becomes clear that, in order to fully understand its scope, the complete text of the Article must be taken into account before any judgment on its legality can be made. Bearing in mind the relevant documentation, it becomes doubtful whether the arguments put forward, so far, to challenge the validity of Annex 8, Article 13, are valid. First of all, because Contracting Parties, from the outset of the discussion, have regarded the levy as a service charge for the costs incurred by the TIRExB and the TIR secretariat. And secondly, because, in accordance with the provisions of the Convention, the levy is not applicable at the national level but at the international level. This explains why there was no reason for Contracting Parties, when preparing for the adoption of the amendments of Phase I of the TIR revision process at the national level, to apply procedures required for the introduction of tax legislation. Bearing in mind the above, it seems that the decision by the international organization whether or how to charge their national associations with the costs incurred for the operation of the TIRExB and the TIR secretariat, is an internal commercial decision which does not concern Contracting Parties.

V. POSSIBLE STEPS FORWARD

14. In view of the considerations above, the secretariat considers that the following issues should be addressed:

- (1) The meaning of the word “levy”, the basis upon which the amount of the levy needs to be calculated and from whom it is collected (Annex 8, Article 13, paragraph 1);

- (2) The apparent divergence between the amount of the levy per TIR Carnet, as decided by the Administrative Committee in accordance with Annex 8, Article 13, paragraph 2, based on a forecast by the IRU of the number of TIR Carnets to be distributed the following year, and the actual funds transferred by the IRU each year before 15 November;
- (3) The need for instructions for the collection of the levy, which should be determined by the Administrative Committee in accordance with Annex 8, Article 13, paragraph 2 as well as the lack of clear reporting requirements in relation to the collection;
- (4) The need for alignment of the text of the UNECE/IRU agreement with the text of Annex 8, Article 13.

15. In order to address the above issues, the secretariat below provides various alternatives which the Committee may wish to consider. These alternatives have been elaborated after informal consultations with representatives from some Contracting Parties. For reasons of clarity, the alternatives follow the structure of the current text of Annex 8, Article 13. These alternatives are provided, without prejudice to the Administrative Committee's final objective to have the cost of the TIR secretariat included in the regular budget of the UNECE (See, *inter alia*, TRANS/WP.30/AC.2/75, paras. 29-30).

ALTERNATIVE 1

16. Contracting Parties may wish to establish that Annex 8, Article 13, paragraph 1 is in itself clear and does not need to be amended, but may wish to decide that the introduction of a comment is appropriate (see also TRANS/WP.30/AC.2/73, para. 44), to read as follows:

“Comment to Article 13, paragraph 1

Within the context of this Article, the term “levy” shall mean a service charge for each TIR Carnet distributed by the international organization as referred to in Article 6 to finance the operation of the TIRExB and the TIR secretariat.”

17. As alternatives it could be considered to put the above text as Explanatory Note to Annex 8, Article 13, paragraph 1 (alternative 1 A) or add the definition of the term “levy” to Article 1 of the TIR Convention (alternative 1 B), although the latter option would require the amendment procedure of Article 59 of the Convention. Adoption of alternative I would leave the text of Annex 8, Article 13, paragraph 2 unchanged.

ALTERNATIVE 2

18. Contracting Parties may wish to establish that the possible ambiguous character of the term “levy” within the context of the TIR Convention and when translated into the national languages of Contracting Parties may, in the future, lead to complications in the application of Annex 8, Article 13 and, therefore, decide to replace the term “levy” by “TIRExB fee” (see document TRANS/WP.30/2004/4) or “service charge” (as suggested by OLA) or any other

appropriate term. Adoption of this alternative would imply an amendment of Annex 8, Article 13, paragraph 2 in relation to the word “levy”.

ALTERNATIVE 3

19. As requested by the Administrative Committee at its fortieth session (ECE/TRANS/WP.30/AC.2/81, para. 30), Contracting Parties may wish to consider the alternative that the operation of the TIRExB and the TIR secretariat shall be financed by the international organization referred to in Article 6 through the payment of a lump sum covering the budget of these bodies, as determined by the Administrative Committee. Adoption of this alternative would require the amendment of the texts of paragraphs 1 and 2, for example as follows:

Annex 8, Article 13:

“1. The operation of the TIR Executive Board and the TIR secretariat shall be financed, until such time as alternative sources of funding are obtained, by the international organization, authorized by the Administrative Committee [to centrally print and distribute TIR Carnets in accordance with Annex 8, Article 10 (b) and ¹] to take on responsibility for the effective organization and functioning of an international guarantee system, in accordance with Article 6.2bis** of the Convention.**

(text Explanatory Notes remains unchanged)

2. The budget for the operation of the TIR Executive Board and the TIR secretariat shall be determined by the Administrative Committee. Any proposed changes in the budget shall be authorized by the Administrative Committee.”

VI. CONSIDERATIONS REGARDING THE IMPLEMENTATION OF THE PROPOSED ALTERNATIVES

20. In accordance with the text of Annex 8, Article 13, para. 2, it is the task of the Administrative Committee to determine the procedure for the collection of the levy. This should be done following consultations with the international organization as referred to in Article 6. However, the provision does not stipulate anything with regard to the collection procedure itself nor the nature or extent of these consultations.

21. Without prejudice to the outcome of the discussion above, the Administrative Committee may wish to confirm that it is the prerogative of the Administrative Committee to decide on the procedure for the collection of the levy as well as on the consultation of the international organization in accordance with Annex 8, Article 13, paragraph 2. Therefore, with regard to the

¹ A reference to the authorization stipulated in Annex 8, Article 10 (b) is not necessarily required, in view of the entry into force of Explanatory Note 8.10 (b) on 12 August 2006 (ECE/TRANS/WP.30/AC.2/79, Annex 2).

consultation of the international organization, the Administrative Committee may wish to clarify that its only aim is to obtain information on the number of the TIR Carnets the international organization forecasts to distribute in the following year. Alternatively, the Committee may wish to discuss whether the reference to the consultation of the international organization should be maintained.

22. With regard to the collection itself, the TIR Administrative Committee, considering the fact that, in accordance with general UN procedures, the financing of the TIRExB and TIR secretariat for a given year should be secured before 15 November of the preceding year, may wish to instruct the UNECE to negotiate with the international organization as referred to in Article 6.2**bis** an agreement, which should ensure:

- a) The prefinancing of the TIRExB and the TIR secretariat by means of a transfer of funds by the international organization authorized in accordance with Article 6.2**bis** covering the budget for the operation of the TIRExB and the TIR secretariat for the forthcoming year;
- b) The collection by the abovementioned international organization of the levy determined by the Administrative Committee, calculated on the basis of the budget for the TIRExB and the TIR secretariat for the forthcoming year and the number of TIR Carnets forecasted to be distributed by the international organization as referred to in Article 6.2**bis**;
- c) A system for final assessment of the funds collected by the international organization at the end of the forthcoming year, based on the submission of data, audited in accordance with UN approved standards, on the total number of TIR Carnets distributed, in combination with a well-defined procedure dealing with any deficit/surplus with regard to the funds already transferred under (a);

23. In view of the purely procedural and financial nature of the above issue, the Administrative Committee may wish to also consider if the only object of the agreement with the international organization should be the transfer, collection and final assessment of the sums required to cover the costs incurred by the TIRExB and the TIR secretariat to the UNECE. With such instruction, the Administrative Committee would seem to provide adequate follow-up to Recommendation No. 1 of the UN Board of External Auditors, recommending the UNECE to review the long-term perspectives for the UNECE/IRU Agreement.

VII. FINAL CONSIDERATIONS

24. The Administrative Committee may wish to discuss and, possibly, decide which alternative best meets its request to ensure the uninterrupted financing of the operation of the TIRExB and the TIR secretariat, until alternative sources of funding are obtained. Within the context of its discussion, the Administrative Committee may also wish to consider how to best ensure a strict and transparent procedure for the collection and transfer of the funds.

25. In view of the financial implications, linked to the authorization of the international organization to take on responsibility for the effective organization and functioning of an

international guarantee system, in accordance with Article 6.2bis of the Convention, the Administrative Committee may wish to have a first discussion with a view to assessing to what extent the existing procedure of granting the authorization meets the general requirements of good and transparent governance.

26. As instructed by the Administrative Committee, the secretariat has requested the UN Auditors, the UN Office of Legal Affairs and other relevant UN bodies to provide their comments to the issues raised in this document.
