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Working Party on Customs Questions affecting Transport

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Item 8 of the provisional agenda

Terms of Reference and Rules of Procedure of the Working Party

Status of non-ECE Contracting Parties in ITC Working Parties

Note by the secretariat

I. Mandate

1. In 2013, Mongolia requested to become a member of the Inland Transport Committee (ITC). This request is linked, inter alia, to the guidelines (ECE/EX/1) approved by the Executive Committee (EXCOM) at its fourth session in July 2006 concerning the status and rights of non-UNECE¹ Contracting Parties. Various non-UNECE countries have expressed their interest to become full members to Working Parties which deal with legal instruments to which they are Contracting Parties.

2. The meeting of the Chairs of the Inland Transport Committee's subsidiary bodies during the seventy-sixth session of the Committee was dedicated to discussing the participation of non-UNECE countries that are also Contracting Parties to the UNECE transport conventions and agreements in the related Working Parties and other intergovernmental bodies of UNECE. The Committee decided, among others, to request the secretariat to transmit the issues at stake to the Working Parties for discussion and to collect and consolidate their views and current practices for the consideration of the ITC at its seventy-seventh session.

3. Pursuant to this request, the secretariat prepared the present document containing background information, reflecting the views expressed so far within the ITC and the Working Party on Customs Questions Affecting Transport (WP.30) and drawing parallels to the questions currently under discussion at WP.30.

¹ United Nations Economic Commission for Europe

II. Background

4. UNECE is the custodian organization of 58 legal instruments in transport (simply referred to as transport conventions hereafter), 49 of which are in force. Non-ECE member States are Contracting Parties to 29 transport conventions. This means that about 60 per cent of United Nations transport conventions serviced by UNECE and in force have a geographical coverage beyond the UNECE territory. Some of these Conventions provide for treaty bodies (Administrative Committees), which are serviced by UNECE and grant full powers and voting rights to all Contracting States irrespective of whether they are UNECE member States or not.

5. Fourteen Administrative Committees have been set up by the different transport conventions serviced by UNECE. In other words out of the 58 legal instruments 14 have an Administrative Committee. Even in these cases, however, a lot of preparatory work is carried out by the concerned Working Party. In case of no provisions in the legal instrument for setting up an administrative committee, the ITC Working Party dealing with the same topics has assumed the functions for preparing amendments. In such cases, the decision-making process and the formal rights of participation in the Working Party can become an issue.

6. Since not all Conventions stipulate the establishment of administrative committees and even if such committees exist and meet regularly a large proportion of the work is carried out within the Working Party, non-UNECE Contracting Parties actively involved in the activities to update and modify it, have raised concerns about the status of their participation in the Working Party and eventually in the ITC. Participation in different UNECE Working Parties and their subsidiary bodies by non-UNECE countries has, in practice, taken different forms:

(a) Full members: non-UNECE member States in some working parties participate as full members, subject to further agreement by the parent Sectoral Committee (i.e. ITC).

(b) Observers: non-UNECE countries participate in Working Parties as observers (i.e. in a consultative capacity) on any item of particular concern to them, in line with para. 11 of the UNECE Terms of Reference.

(c) Hybrid observers: non-UNECE countries participate as observers in the corresponding Working Parties on any matter of particular concern to them, but acquire full member rights during discussions on matters relating to the legal instruments to which they are Contracting Parties.

7. As part of the first review of the ECE reform adopted in December 2005, the Economic Commission for Europe (ECE) requested the Sectoral Committees and their subsidiary bodies to review their Terms of Reference and programmes of work which should be prepared in line with a new template. Against this background, WP.30 launched the process towards adopting revised Terms of Reference (ToR) and Rules of Procedure (RoP). During this process, the delegation of Iran (Islamic Republic of) expressed the view that, due to the global nature of some Conventions adopted under the auspices of WP.30, Contracting Parties which are not UNECE member States should be given an opportunity to participate in the Working Party in a full capacity, rather than in a mere consultative capacity, as is the case per the UNECE Rules of Procedure. Furthermore, the Iranian delegation submitted proposals for the modification of the draft ToR, with the objective of distinguishing between the competencies of the Working Party and those of the various Administrative Committees, mentioned under item 1 (n) of the proposed ToR. Over the course of several sessions, the issues raised by Iran (Islamic Republic of) have not been resolved and the Working Party has not reached a mutually agreed decision.

III. United Nations Economic Commission for Europe Terms of Reference and Rules of Procedure

8. The Commission's ToR as well as its RoP contain provisions relevant to the case in point. According to paragraph 11 of the Commission's ToR:

“The Commission shall invite any member of the United Nations not a member of the Commission to participate in a consultative capacity in its consideration of any matter of particular concern to that non-member”.

9. This privilege can be extended and become applicable also to subsidiary bodies. However, this particular provision specifically refers to consultative capacity only, and only to consideration of matters that may affect that country. There is no reference to general participation. Such reference is made in paragraph 8 of the ToR pursuant to which only “European nations not members of the United Nations” can be admitted in a consultative capacity and – subject to the Commission's approval – endowed with voting rights. This paragraph now appears to be obsolete. As a result, paragraph 11 of the UNECE ToR is considered the only relevant reference.

10. In practical terms, consultative capacity means that these non-UNECE countries can raise their flag and state their position on matters of concern; they may participate in discussions and their views are taken into consideration by full members, in the spirit of cooperation. At the time of decision, while only UNECE member countries vote or take a decision by consensus, the points of view of non-UNECE countries are duly taken into account in the decision making process.

11. In the UNECE Rules of Procedure, Chapter VI on Subsidiary bodies also contains the following relevant references:

- Rule 18 (last sentence) stipulates that “subsidiary bodies shall be given as much autonomy as may be necessary for the effective discharge of the technical responsibilities laid upon them”.
- Rule 20 reads “subsidiary bodies shall adopt their own Rules of Procedure unless otherwise decided by the Commission”.

12. It is arguable that the Commission, in its RoP, allows for a degree of functional autonomy for its subsidiary bodies. At first glance it would appear that this autonomy is granted only with regard to the RoP. There does not appear to be scope for any significant deviation from the Commission's ToR which outline the aims and objectives of the Commission and, by extension, its subsidiary bodies, within a designated geographic scope.

A. Process for admission of new members to the United Nations Economic Commission for Europe and/or to its subsidiary bodies

13. The Economic and Social Council (ECOSOC), a primary organ of the United Nations established under the United Nations Charter², is the parent body of all United Nations regional commissions, including UNECE, as well as of other United Nations bodies dealing with issues in the social and economic sphere. As such, and in accordance with the ECOSOC rules of procedure, any country that wishes to be admitted to UNECE as a full member, should address that request to ECOSOC for consideration. The ECOSOC rules of procedure more specifically read as follows:

² See Charter of the United Nations, Chapter X.

- Rule 24: The Council may establish and define the composition and terms of reference of regional commissions.
- Rule 25: Unless the Council decides otherwise, the members of any body or organ of limited membership, other than those subsidiary to a regional commission, shall be elected by the Council.

14. ECOSOC is the only body that may amend the UNECE ToR and decide which countries may be members for it. Any country that is admitted to UNECE by ECOSOC automatically acquires all rights and responsibilities of a full member at all levels. According to consultations with the Office of Legal Affairs at United Nations Headquarters, the exception under rule 25 is that regional commissions, contrary to all other ECOSOC bodies, may establish their own subsidiary bodies without requesting the approval of ECOSOC. This freedom is granted under the assumption that regional commissions are acting within their mandate as reflected in their own ToRs.

15. As to the possibility of admitting new members, it appears that non-UNECE countries have to demonstrate legitimate economic interests and activity in the region applied for. However, judging from the examples of the United States of America and Canada, geographical proximity does not appear to be a mandatory requirement. An example of the membership admission procedure is that of Israel, by means of ECOSOC Resolution 1991/72, reproduced below:

"26 July 1991

32nd plenary meeting

Membership of Israel in the Economic Commission for Europe

The Economic and Social Council,

Considering the wide range of economic relations that exist between Israel and the States members of the Economic Commission for Europe,

Considering also that Israel has expressed its readiness to contribute to the work of the Commission by accepting the responsibilities inherent in full membership,

Considering further that, at its forty-sixth session, the Commission took note of the renewal of the application of Israel to the Council for temporary admission as a member of the Commission and looked forward to a decision by the Council on the admission of Israel in accordance with its application,

Decides to amend paragraph 7 of the terms of reference of the Economic Commission for Europe by adding Israel to the list of members of the Commission in accordance with its request for temporary admission as a member of the Commission, as contained in the letter dated 16 April 1991 from the Permanent Representative of Israel to the United Nations addressed to the President of the Economic and Social Council."

B. EXCOM Guidelines and Instructions

16. EXCOM document ECE/EX/1 of 9 October 2006 sets out the Guidelines for the establishment and operation of Working Parties within UNECE. This document supplements the UNECE ToR and RoP, and contains specific reference to non-UNECE countries in its paragraph 2:

"Working Parties are open for participation by all UNECE member-States. Non-UNECE member States can participate as observers or, if agreed by the parent Sectoral Committee, as full members. In addition, relevant international organizations and NGOs can also be invited as observers, in compliance with the UN rules and practices in this respect".

17. The terms of this guideline clearly allow non-UNECE countries to be given full member status within Working Parties. However, this status must be approved by the relevant Sectoral Committee, in this case, the Inland Transport Committee. Furthermore, it may reasonably be assumed that the Working Party's RoPs should be amended accordingly to allow for such participation.

18. If the Working Parties of UNECE may elect to admit non-UNECE countries as full members, it is assumed that such full membership is granted for the purposes of the mandate of that Working Party only. The countries in question would have no standing in the Sectoral Committee (of ITC), other Working Parties, or the Commission.

19. With specific reference to WP.30 – and equivalently for all working parties – when international agreements that do not have Administrative Committees are discussed, it is only Contracting Parties to those agreements that can participate in decisions on amendments to them. This applies to both UNECE and non-UNECE countries. Put simply, UNECE member States and any other participating State cannot intervene in a decision pertaining to an agreement that they are not party to regardless of their working party membership status. It is only that, in lack of an Administrative Committee, the relevant issues are discussed in the forum provided by the Working Party.

C. Reform Review Outcome document

20. As the outcome of the review of the 2005 reform of ECE, the UNECE approved harmonizing procedures and practices and requested EXCOM to ensure that all subsidiary bodies as well as the secretariat apply the Guidelines on Procedures and Practices as contained in Annex III to document E/ECE/1468³ of 2013. Article 2 of these Guidelines stipulates that:

“All Sectoral Committees and other subsidiary bodies may adopt their own Rules of Procedure on the basis of UNECE Rules of Procedure and, where applicable, Rules of Procedure of ECOSOC, taking into account these guidelines. Otherwise it will be presumed that they are governed by the Rules of Procedure of the Commission and, where applicable, Rules of Procedure of ECOSOC and taking into account these guidelines *mutatis mutandis*”.

IV. Considerations for the Working Party

21. There appears to be a discrepancy between the UNECE ToR and RoP and the EXCOM guidelines. According to the UNECE ToR, non-UNECE countries can be granted only consultative status by the Commission in order to be able to participate in the Commission and its subsidiary bodies, and exclusively for matters affecting the countries in question. However, the EXCOM guidelines allow the participation of a non-UNECE country as a full member in working parties irrespective of its status within the Commission itself. EXCOM, as the executive body of the Commission, has the authority to decide on the operational guidelines for the Commission's subsidiary bodies, upon instruction of and with the approval of the Commission. Furthermore, despite the *prima facie* inconsistency between the UNECE ToR and the EXCOM guidelines, the New York Office of Legal Affairs has advised that these guidelines reflect established practice and that, consequently, it is possible for non-UNECE countries to become full members in working parties.

³ www.unece.org/fileadmin/DAM/commission/2013/E_ECE_1468-EN.pdf

22. The Working Party is invited to consider the above information and express its views for the consideration of the Inland Transport Committee at its next session, as well as take stock of this discussion in its decision to amend and/or adopt its revised ToR and rules of procedure.
