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Legal status of the eTIR Reference Model and amendment procedure

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Note by the secretariat

I. Mandate

1. At its first session, the Group of Experts on Legal Aspects of Computerization of the TIR Procedure (GE.2) was of the view that the eTIR Reference Model, because of its technical nature, would warrant a separate amendment procedure as well as a technical body that would develop these amendments, but the exact modalities of this remain to be clarified. As such, the secretariat was requested to prepare a document for the next session, presenting options on how to give a legally binding status to the eTIR Reference Model, which parts of the eTIR Reference Model might have to be included in the Protocol as well as possible amendment procedures (see ECE/TRANS/WP.30/GE.2/3 para. 8(e)). In line with this request, the secretariat has prepared the present document.

II. Legal status of technical documents in international treaties

2. Treaties that include technical elements or establish technical procedures have become exceptionally common in the last two decades. Since the Law of Treaties did not foresee or provide any concrete guidance on how to assign binding force to technical documents that are attached to or related to a treaty, various practices have evolved, each of which has been selected to suit the particular needs of each legal instrument and its Contracting Parties.

3. Some examples would be the European Agreement Concerning the Work of Crews of Vehicles engaged in International Traffic (AETR), the Agreement concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles (henceforth the 1998 Agreement), as well as the International Convention for the Prevention of Pollution from Ships (MARPOL). The latter is administered by the International Maritime Organization (IMO), but has been selected as an example due to its subject-matter relevance (transport), and extensive technical elements. In each of the above-mentioned cases, the technical details pertaining to the substantive obligations under these Conventions have been given legal validity in different ways, all of which, however, include a reference in the main body of the legal text.

4. The AETR Agreement establishes, in its Appendix 1B, the requirements for construction, testing, installation, and inspection of the digital control device used in road transport (digital tachograph). Although named as Appendix B to Annex 1, this technical document of approximately 300 pages, is maintained separately from the rest of the agreement and is given legal validity by means of reference in Article 10 of the main body of AETR Agreement, which stipulates that the control device shall be governed by the rules laid down in the Annex and its appendices.

5. The 1998 Agreement on technical regulations for vehicles establishes, in its main body, a separate document called a “global registry” of technical regulations. Therefore, the regulations adopted and maintained in this document are considered binding under the 1998 Agreement, as indicated in its article 6, paragraph 1.

6. Finally, the MARPOL Agreement includes all its technical elements in its Annexes (which are optional) and its Protocols (which are mandatory), to which a legally binding status is given by means of a single provision in the main body of the Convention, namely: Article 1, paragraph 2 whereby the Annexes and Protocols to MARPOL are considered an integral part of the Convention.

7. Based on the above examples, the eTIR Reference Model can be made a binding technical document by reference, i.e. by including a provision in the eTIR legal framework that expressly states that the technical and functional specifications of eTIR as contained in the eTIR Reference Model are binding. It will not make a difference, legally, whether the Reference Model becomes an Appendix to an Annex, or an Annex to a Protocol, or is called a separate technical document that is an integral part of the eTIR legal framework (whatever format that may have). The element of crucial importance would be to make it clear, in the instrument outlining the substantive legal obligations of Contracting Parties that implementing this technical document is a legal obligation for implementing the eTIR procedure. In that sense, it does not seem to be necessary to include parts of the Reference Model in the main body of the eTIR legal framework, as the eTIR Reference Model will be an integral part of the legal framework.

III. Amendment procedures: Tacit and consent-based

8. Traditionally, formal amendment procedures in international agreements and conventions would involve a strictly consent-based process. This translated to a procedure of depositary notifications via the Secretary-General, and an active written response by Contracting Parties, expressly accepting the proposed amendment. Put simply, in the old-fashioned traditional treaty processes, it would be required for a majority (simple or qualified) of Contracting Parties to notify their acceptance to the Depositary in writing, in order for an amendment to enter into force. For example, amendments to the United Nations Framework Convention on Climate Change (UNFCCC) are adopted by a meeting

of the Conference of the Parties, normally by consensus but, as a last resort, by a three-quarters majority of those present and voting. However, these amendments will not enter into force unless three-quarters of the 194 parties to the Convention have accepted them in writing to the Depositary, during a specified period.

9. With the significant increase of international agreements and multilateral cooperation, modern treaty practices have evolved and now establish less formal and more expedient procedures, such as that of tacit acceptance; that is to say that unless there are objections, a proposal is considered accepted without having to formally state such an acceptance. The TIR Convention itself is an example of this practice, as Article 59 clearly stipulates that an amendment shall enter into force, three months after the expiry of the period during which a Contracting Party could object. There is no requirement for declaring acceptance. The process is similar in the case of the Annexes to the TIR Convention, although Article 60 requires a higher number of objections for the amendment not to come into force.

IV. The special case of amending technical documents in international treaties

10. A way to adapt treaties to changing technological circumstances is to establish mechanisms allowing for less formal amendment procedures. In order to facilitate flexibility, it is not uncommon to distinguish between amendments which create new obligations, and amendments which do not create new obligations but are, instead, merely technical or executive. The procedure for approving such amendments may be less strenuous than the procedure involving new obligations, for example requiring the support of a simple majority instead of a higher threshold. Second, provisions relating to the entry into force may be more relaxed: often amendments that do not involve new obligations enter into force upon adoption, or at a date set on an ad hoc basis by the parties.

11. Particularly in the case of treaties where technical annexes or other technical documents exist, a variety of examples of different practices can be found. The secretariat has selected a few transport related examples for the consideration of GE.2.

12. The AETR Agreement has established what can only be described as a kind of automatic amendment procedure for Appendix 1B on the requirements for construction, testing, installation, and inspection of the digital control device used in road transport (digital tachograph). The relevant UNECE Working Party may adopt an amendment to Appendix 1B by majority vote; the amendment enters into force three months after the notification to all Contracting Parties, and there is no possibility to object.

13. The 1998 Agreement on technical regulations for vehicles stipulates that amending any regulation in the Global Registry shall be subject to the formal amendment procedure of the Convention. This entails consensus adoption by the Executive Committee of the Convention (consensus of those present and voting), and subsequently no objection during the depositary notification period. This is an example of a very rigid and lengthy technical amendment process.

14. Finally, the MARPOL Convention contains several optional technical annexes. These can be amended by the technical bodies, established in particular to address technical amendments in each annex, and by following a simplified procedure of tacit acceptance. The period for objection is flexible and set by the technical body at the time of adoption of the amendment.

V. Possibilities to be considered for the eTIR Reference Model

15. In the case of the eTIR Reference Model, and specifically those technical chapters that are relevant for the functioning of the eTIR international system, an amendment procedure that is somewhere between the most flexible and the most strenuous could be envisaged. For example, technical amendments could be adopted by a technical body established for this purpose, and communicated upon adoption by the technical body to all Contracting Parties to the eTIR legal framework. Contracting Parties would then have a short period of three months to object. In this case, the blocking threshold could be set quite high, similarly to Article 60 of the TIR Convention. The technical experts that developed the eTIR Reference Model could, conceivably, even identify types of technical amendments that are of such little operational or legal significance that no objection would be permitted, as is the case with the AETR Agreement. However, having several classifications of technical amendments may entail administrative burden and hamper a harmonized approach. The eTIR Reference Model is certainly too technical and complex a document for WP.30 or AC.2 to continually review and update, therefore the establishment of a body for technical amendments could probably not be avoided.

VI. Considerations by the Group of Experts

16. GE.2 is invited to take the provided examples into consideration during its discussions on assigning legal status to the eTIR Reference Model and identifying a suitable amendment procedure.