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Administrative Committee for the TIR Convention, 1975

Sixty-third session

Geneva, 10–11 February 2016

Item 7 (e) of the provisional agenda

Revision of the Convention:

Proposals transmitted by the Government of the Russian Federation

Article 38 of the Convention

Note by the secretariat

I. Background and mandate

1. At its previous session, the Committee discussed a proposal by the Russian Federation to amend Article 38 so as to unequivocally entitle Contracting Parties to assess whether a customs offence is serious enough to constitute grounds for exclusion. The Committee was of the general view that such an entitlement exists in the current wording of the provision. While the Committee was generally not opposed to the addition of the phrase “or repeated” to Article 38, some delegations questioned the necessity for the remaining part of the proposed amendment, as it was generally understood that such competence exists for Contracting Parties under the current text of Article 38. The delegation of the Russian Federation clarified that, in order to ensure that there is no interpretative ambiguity in as far as mandate is concerned in the national law-making processes of the Russian Federation, it would be necessary to include such a reference in the text of Article 38. As an alternative proposal, the delegation of the European Union suggested that a comment or Explanatory Note, clarifying the rights of Contracting Parties under Article 38, would provide sufficient interpretative guidance. The Committee was not ready to decide on this proposal and decided, due to a lack of time, to revert to this issue at its next session. The Committee requested the secretariat to make prior considerations by the Committee and TIRExB available for its next session (ECE/TRANS/WP.30/AC.2/127, para. 34 (e)).

2. In Annex 1, the secretariat reproduces excerpts from TIRExB reports and reports from the Committee as well as the Working Party on Customs Questions affecting Transport (WP.30) on the issues at stake. Annex 2 contains related background documents.

II. Preliminary assessment by the secretariat

3. As can be seen from the information in Annexes 1 and 2, the issue of clarifying the scope of the term “serious offence against customs laws or regulations” was raised several times before in the past, lastly in 2005. In that year, TIRExB established that “due to considerable differences in national legislations, it would be quite difficult to come to a common understanding of “serious offence against customs laws or regulations”, as it has not even been feasible in the European Union whose member States have reached a very high degree of harmonization of national legislations. The Board felt that the gravity of an infringement should be determined according to the national law of the country where this infringement has been committed (TRANS/WP.30/AC.2/2005/19, para. 20; see also TRANS/WP.30/AC.2/2006/1, para. 24).”

4. In order to provide guidance to Contracting Parties on how to apply the provisions of Article 38, TIRExB, in 2006, developed an example of best practice, as can be found in the Annex to document (ECE/TRANS/WP.30/2006/17–ECE/TRANS/WP.30/AC.2/2006/17). The example was updated in 2012 (see also Chapter 5.8 of the TIR Handbook).

III. Considerations by the Committee

5. The Committee is invited to take note of previous considerations by the various TIR governing bodies on the term “serious offence against customs laws or regulations” and provide guidance to the secretariat how it wishes to proceed in the current discussion of the Russian proposal to amend the wording with Article 38, para. 1 with the words “or repeated” or to amend it with the sentence: “The conditions in which the offence against the customs laws or regulations is considered to be serious shall be decided by the Contracting Party.”

Annex I

I. Excerpts from TIRExB reports

A. Sixth session (December 2000)

16. At its sixth session (December 2000), the Board took note that the reason for the exclusion of a person from the TIR regime in accordance with Article 38.1, e.g. guiltiness of a serious offence against the customs laws or regulations applicable to the international transport of goods, could have quite different interpretations in various Contracting Parties. Therefore, the TIRExB was of the view that such an exclusion in one Contracting Party should not be automatically extended to other Contracting Parties, in particular to the country where this person is resident or established.

17. Nevertheless, during the authorization procedure in line with Annex 9, Part II of the Convention, the competent authorities of the Contracting Party where the person concerned is resident or established should take into due account any information on serious or repeated offences against customs or tax legislation to be provided by another Contracting Party in accordance with Article 38.2. The authorization for the person to utilize TIR Carnets could be revoked temporarily or permanently, if the competent authorities of the first country consider evidences to be sufficient in terms of their national law.

18. It was stressed that the notification of an exclusion in accordance with Article 38.2 should contain not only the name of the excluded person but also detailed reasons for that, including relevant alpha-numerical numbers of TIR Carnets (ten symbols), in order to allow for efficient consideration of the case by the Contracting Party where the person concerned is resident or established. While a possible withdrawal of the authorization is under consideration by the competent authorities, the excluded person should be given a possibility of presenting explanations, documents and witnesses for the defence.

19. Taking account of the above considerations, the TIRExB felt that full implementation of the amended Article 38, paragraphs 1 and 2 would need some comments by the TIR Administrative Committee on such notions as "a person guilty", "a serious offence against the customs laws or regulations applicable to the international transport of goods" as well as on a procedure of cooperation between the customs authorities while implementing Article 38 of the Convention. The TIR Secretary was requested to prepare relevant proposals for the next sessions of the TIRExB and Administrative Committee.

20. The TIRExB was also of the opinion that, before such comments were adopted, it would be premature to disseminate any data on excluded persons ("blacklists") which are also reported to the Board in accordance with Article 38.2 of the Convention. Distribution of this information should be restricted to the organizations which are already referred to in the amended Article 38 of the Convention.

21. The Board also noted that, at present, the competent authorities of a Contracting Party could use the provisions of both Article 38, paragraph 1 and Annex 9, Part II, paragraph 1 (d) to exclude from the TIR regime a national transport operator guilty of a serious offence against the Customs laws committed on the territory of that country. The TIRExB felt that the provisions of Annex 9, Part II, paragraph 1 (d) would be preferable for that purpose while the first option might lead to the situation where a transport operator excluded from the TIR procedure in its own country might still carry out TIR operations elsewhere as its authorization to utilize TIR Carnets has not been revoked. The TIR Secretary was requested to prepare necessary recommendations for Contracting Parties (TRANS/WP.30/AC.2/2001/1, paras. 16–21).

B. Twenty-fifth session (January 2005)

19. At its twenty-fifth session (January 2005), the Board, at the request of Turkey, discussed document TRANS/WP.30/2005/9 on a harmonized application of Article 38 of the TIR Convention. The Board felt that this issue should be split in two separate items:

- legal interpretation/definition of "serious offence against customs laws or regulations"(Article 38.1);
- exchange of information regarding an exclusion of a transport operator from the TIR procedure (Article 38.2).

20. With regard to the first item, the TIRExB was of the view that, due to considerable differences in national legislations, it would be quite difficult to come to a common understanding of "serious offence against customs laws or regulations", as it has not even been feasible in the European Union whose Member States have reached a very high degree of harmonization of national legislations. The Board felt that the gravity of an infringement should be determined according to the national law of the country where this infringement has been committed.

21. Concerning the second item, the TIRExB shared the concern of Turkey that more transparency on practical procedures in case of exclusions should be provided. To this end, a recommendation or example of best practice should be prepared, addressing such issues as:

- notification to the transport operator being excluded;
- a minimum number of details which communications regarding the exclusion should contain, like its motivation, details of the infringement, if the exclusion is temporary or permanent, etc.;
- means of appeal.

The secretariat was requested to prepare relevant proposals for consideration at one of the future sessions of the TIRExB (TRANS/WP.30/AC.2/2005/19, paras. 19–21).

C. Twenty-sixth session (May 2005)

23. At its twenty-sixth session (May 2005), The TIRExB considered at length Informal document No.10 (2005) drafted by the secretariat, containing an example of best practices regarding the application of Article 38 of the Convention. The Board delivered a number of remarks concerning the form and content of the example and requested the secretariat to modify the draft accordingly. In particular, the TIRExB felt that a standard notification form should be developed to inform the person being excluded from the TIR procedure.

24. Mr. R. Şen (Turkey) stated that, although such an example would be desirable, it would not solve in full the problem of harmonized application of Article 38 and, thus, other aspects of the issue should be addressed as well. In this context, the Board recalled that the issue of harmonized application of Article 38 could be split into two separate items:

- legal interpretation/definition of "serious offence against Customs laws or regulations" (Article 38.1);
- exchange of information regarding an exclusion of a transport operator from the TIR procedure (Article 38.2).

The TIRExB reiterated that, due to considerable differences in national legislations, it seemed unrealistic to reach a consensus on the first item. Therefore, only the second item

should be pursued for the time being with a view to preparing an example of best practice for the inclusion into the TIR Handbook. With regard to the first item, the Board felt that this issue should better be considered in WP.30 (ECE/TRANS/WP.30/AC.2/2006/1, paras. 23–24).

D. Twenty–seventh session (October 2005)

12. At its twenty–seventh session (October 2005), the TIRExB considered Informal document No. 20 (2005), containing an updated example of best practice for the application of Article 38 of the Convention. The Board generally agreed to the example, but made few additional changes to the document. A modified example of best practice is contained in Annex 2 to the present report. The TIRExB also invited its members to transmit written comments on the issue, if any.

13. Mr. R. Şen (Turkey) was of the view that the exclusion of a person from the TIR regime should not come into force as long as appeal procedures against the initial decision of the competent authorities to exclude the person had not been completed. The initial decision to exclude a person from the TIR regime, if followed by a suspension or cancellation of this decision as a result of the appeal procedures, could cause unjustified damages for the transport operators and their reputation and could eventually lead to their bankruptcy. In order to avoid such negative consequences, in the course of the appeal procedures the customs authorities should only apply transitional control measures, such as physical inspection of the cargo at the border and/or customs escorts. Therefore, Mr. R. Şen (Turkey) felt that the underlying example of best practice should be modified with the aim to reflecting such transitional measures ECE/TRANS/WP.30/AC.2/2006/5, paras. 12–13).

II. Excerpts from AC.2 reports

A. Twenty–ninth session (October 2000)

17. At its twenty–ninth session (October 2000), the Administrative Committee noted that the TIRExB, at its sixth and seventh sessions, had considered the underlying reasons for the exclusion of persons from the TIR procedure, in accordance with Article 38, paragraph 1 of the Convention, and had noted that they were quite different in the Contracting Parties to the Convention. This was mainly due to different interpretations given by the Contracting Parties to the conditions for such exclusion as provided in the Convention stating that such persons should be “guilty of a serious offence against the customs laws or regulations applicable to the international transport of goods”.

18. On the basis of a document prepared by the TIR Secretary and with a view to clarifying this notion and allowing for improved international cooperation in this field, the Administrative Committee considered the proposed comments to Article 38 and to Annex 9, Part II contained therein (TRANS/WP.30/AC.2/2000/14) and decided, following a preliminary exchange of views, to invite the UNECE Working Party on Customs Questions affecting Transport (WP.30) to review these proposals and report back to the Administrative Committee (TRANS/WP.30/AC.2/59, paras. 17–18).

B. Thirty–third session (October 2002)

57. At its thirty–third session (October 2002) the Administrative Committee adopted the proposal made by the UNECE Working Party (WP.30) and supported by the TIRExB to delete Explanatory Note 0.38.1 [“A business enterprise should not be excluded from the

TIR system because of offences committed by one of its drivers without the knowledge of the management”] of Annex 6 relating to Article 38, paragraph 1 of the Convention with a view to facilitating the application of national legislation in this field (TRANS/WP.30/AC.2/67, para. 57).

C. Forty-second session (September 2006)

18. At its forty-second session (September 2006), The Committee considered document ECE/TRANS/WP.30/AC.2/2006/17, prepared by the secretariat, containing a proposal for an example of a best practice developed by TIRExB with regard to the application of Article 38 of the Convention. The Committee took note of the decision of the Working Party to generally endorse the document and to provide some minor amendments to both the text and the appendix. The Committee decided to follow the request of the Working Party that the secretariat prepare a revised version of the document, taking account of the proposed amendments, which will be submitted to the forthcoming session of the Committee for consideration and adoption (TRANS/WP.30/AC.2/85, para. 18).

III. Excerpts from reports of the Working Party

A. Ninety-seventh session (February 2001)

74. At its ninety-seventh session (February 2001), the Working Party was informed that the TIR Administrative Committee, at its twenty-ninth session, had considered the underlying reasons for the exclusion of persons from the TIR procedure in accordance with Article 38, paragraph 1 of the Convention and had noted that they were quite different in the Contracting Parties to the Convention. This was mainly due to different national interpretations of the conditions for such exclusion as stipulated in Article 38; i.e. “guilty of a serious offence”. With a view to clarifying, to the extent possible, this notion, the TIR Secretary had prepared comments to Article 38 and Annex 9, Part II of the Convention (TRANS/WP.30/AC.2/14 and Corr. 1). Following a brief discussion on these proposals, the TIR Administrative Committee had invited the Working Party to review the proposals of the TIR Secretary and to report back to the Administrative Committee (TRANS/WP.30/AC.2/59, paras. 17 and 18).

75. The Working Party took note of the proposals on harmonized application of Article 38 of the Convention as contained in document TRANS/WP.30/AC.2/2000/14 and Corr.1. Supporting in principle the approach taken, the Working Party pointed out that this matter was closely linked to differences in national legislations of Contracting Parties and thus would need to be considered in more detail with a view to arriving at common interpretations of legal reasons for and consequences of the exclusion of a person from the TIR procedure in accordance with Article 38, paragraph 1.

76. The Working Party briefly exchanged views on the issue and decided to review the question at its next session (TRANS/WP.30/194, paras 74–76).

B. Ninety-eighth session (June 2001)

73. At its ninety-eighth session (June 2001) the Working Party recalled that, at the invitation of the TIR Administrative Committee, the Working Party, at its ninety-seventh session, had considered the underlying reasons for the exclusion of persons from the TIR procedure in accordance with Article 38, paragraph 1 of the Convention. The Working Party may wish to recall that the TIR Administrative Committee had noted that the reasons

for exclusions were quite different in the Contracting Parties to the Convention. This was mainly due to different national interpretations of the conditions for such exclusion as stipulated in Article 38; i.e. "guilty of a serious offence" (TRANS/WP.30/194, para. 74).

74. The Working Party had at its previous session taken note of the proposals prepared by the TIR Secretary on the harmonized application of Article 38 and Annex 9, Part II of the Convention as contained in document TRANS/WP.30/AC.2/14 and Corr.1.

75. Following the recommendation of the TIRExB the Working Party agreed, as a first step, to facilitate the application of national legislation with regard to Article 38 and, for this purpose, decided to consider the deletion of the Explanatory Note 0.38.1 to Article 38, paragraph 1 of the Convention.

76. The Working Party also considered to add the following comment to Article 38, paragraph 2 of the Convention based on the proposal contained in TRANS/WP.30/AC.2/2001/14.

“Cooperation between competent authorities

With regard to authorization of a person to utilize TIR Carnets in line with Annex 9, Part II of the Convention the competent authorities of the Contracting Party where the person concerned is resident or established should take into due account any information notified by another Contracting Party in accordance with Article 38, paragraph 2 on serious or repeated offences against Customs legislation committed by that person. Thus, in order to allow for efficient consideration of the case by the Contracting Party where the person concerned is resident or established, such notification should contain as many details as possible.”

77. The Working Party also considered to add a new comment to Article 38, paragraph 1 based on a revised text of the proposal contained in TRANS/WP.30/AC.2/2001/14, that reads as follows:

“Exclusion of a domestic transport operator from the TIR procedure

In order to exclude from the TIR regime a national transport operator guilty of a serious offence against the Customs laws committed on the territory of the country where he is resident or established, the Customs authorities are recommended to use also the provisions of Article 6, paragraph 4 and Annex 9, Part II, paragraph 1 (d) and not only the provisions of Article 38, paragraph 1.“

78. The same comment should also be added to Annex 9, Part II, “Procedure”.

79. The Working Party considered that the new comments proposed in TRANS/WP.30/AC.2/2000/14 relating to Article 38, paragraph 1 concerning “A person guilty of a serious offence against the Customs laws or regulations ...” and “Seriousness of an offence against the Customs laws or regulations applicable to the international transport of goods...” should not be considered further for the time being (TRANS/WP.30/198, paras. 73–79).

C. Ninety–ninth session (October 2001)

92. At its ninety–ninth session (October 2001) the Working Party recalled that, at the invitation of the TIR Administrative Committee, the Working Party, at its ninety–seventh session, had considered the underlying reasons for the exclusion of persons from the TIR procedure in accordance with Article 38, paragraph 1 of the Convention. The TIR Administrative Committee had noted that the reasons for exclusion were quite different in

the Contracting Parties to the Convention. This was mainly due to different national interpretations of the conditions for such exclusion as stipulated in Article 38, i.e. "guilty of a serious offence" (TRANS/WP.30/194, para. 74).

93. The Working Party had, at its previous session, taken note of the proposals prepared by the TIR Secretary on the harmonized application of Article 38 and Annex 9, Part II of the Convention as contained in document TRANS/WP.30/AC.2/2000/14 and Corr.1. At its ninety-eighth session, the Working Party had agreed, as a first step, to facilitate the application of national legislation with regard to Article 38 and, for this purpose, at the recommendation of the TIRExB, had decided to consider the deletion of Explanatory Note 0.38.1 to Article 38, paragraph 1 of the Convention (TRANS/WP.30/196, para. 75).

94. The Working Party, following an in-depth discussion of the issues addressed in secretariat document TRANS/WP.30/AC.2/2000/14 and Corr.1, decided to revert to this issue at its next session. Nevertheless, the Working Party took note that Explanatory Note 0.38.1 to Article 38 seemed not to be in line with the philosophy of the TIR Convention, which was based on the notion that as much competence as possible should be left to national legislation, particularly with regard to irregularities contained in Articles 36 and 38 of the Convention (TRANS/WP.30/198, paras. 92–94).

D. One-hundredth session (February 2002)

66. At its one-hundredth session (February 2002), the Working Party recalled that, at the invitation of the TIR Administrative Committee, the Working Party, at its ninety-seventh session, had considered the underlying reasons for the exclusion of persons from the TIR procedure in accordance with Article 38, paragraph 1 of the Convention. The TIR Administrative Committee had noted that the reasons for exclusion were quite different in the Contracting Parties to the Convention. This was mainly due to different national interpretations of the conditions for such exclusion as stipulated in Article 38, i.e. "guilty of a serious offence" (TRANS/WP.30/194, para. 74).

67. The Working Party, following an in-depth discussion of the issues addressed in secretariat document TRANS/WP.30/AC.2/2000/14 and Corr.1 felt that it was necessary to delete Explanatory Note 0.38.1 to Article 38 of the Convention and decided to submit this proposal at the next session of the TIR Administrative Committee in October 2002.

68. The Working Party also decided to adopt the following two comments and transmit them to the next session of the TIR Administrative Committee in October 2002 for endorsement:

(i) Comment to Article 38

Add a new comment to Article 38, paragraph 1 to read as follows:

“Exclusion of a domestic transport operator from the TIR procedure

In order to exclude from the TIR regime a national transport operator guilty of a serious offence against the Customs laws committed on the territory of the country where he is resident or established, the Customs authorities are recommended to use the provisions of Article 6, paragraph 4 and Annex 9, Part II, paragraph 1 (d) rather than the provisions of Article 38, paragraph 1.” {TRANS/WP.30/200, para. 68}

Add the same comment to Annex 9, Part II, “Procedure”.

Comment to Article 38

Add a new comment to Article 38, paragraph 2 to read as follows:

“Cooperation between competent authorities

With regard to the procedure of authorization of a person to utilize TIR Carnets in line with Annex 9, Part II of the Convention the competent authorities of the Contracting Party where the person concerned is resident or established should take into due account any information notified by another Contracting Party in accordance with Article 38, paragraph 2 on serious or repeated offences against Customs legislation committed by that person. Thus, in order to allow for efficient consideration of the case by the Contracting Party where the person concerned is resident or established, such notification should contain as many details as possible.”

Add the same comment to Annex 9, Part II, “Procedure” (TRANS/WP.30/200, paras. 66–68).

Annex II

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ECONOMIC COMMISSION FOR EUROPE

Administrative Committee for the TIR Convention, 1975
(Twenty-ninth session, 19 and 20 October 2000,
agenda item 3 (a) (i))

ACTIVITIES AND ADMINISTRATION OF THE TIR EXECUTIVE BOARD (TIRExB)

Activities of the TIRExB

Report by the Chairman of the TIRExB

Implementation of Article 38 of the TIR Convention

Note by the TIR Secretary

1. Controlled access of natural and legal persons to the TIR procedure is considered to be one of the main pillars of the whole TIR system (see 1999 TIR Handbook, page 8). This fundamental principle may be fully implemented by the competent authorities of Contracting Parties by means of the provisions of Article 6, paragraph 4 and Annex 9, part II as well as partially by means of the provisions of Article 38, paragraphs 1 and 2 of the TIR Convention.

2. The TIR Executive Board (TIRExB), at its sixth session (23-25 May 2000), studied the correlation between the two above groups of provisions and some practical aspects of their application. Below the TIR Secretary reproduces the relevant deliberations of the session and, following the request of the TIRExB, has prepared new proposals on the implementation of Article 38 of the TIR Convention.

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3. The TIRExB focused its attention on the issue as to what legal consequences the exclusion of a person from the TIR procedure in accordance with Article 38, paragraph 1 in one Contracting Party should have for other Contracting Parties, in particular for the country where this person is established or resident. The TIRExB noted that the reason for the exclusion of a person from the TIR regime in accordance with the said article, e.g. guiltiness of a serious offence against the Customs laws or regulations applicable to the international transport of goods, could have quite different interpretations in various Contracting Parties. Therefore, the TIRExB was of the view that such an exclusion in one Contracting Party should not be automatically extended to other Contracting Parties, in particular to the country where this person is resident or established.

4. Nevertheless, during the authorization procedure in line with Annex 9, Part II of the Convention the competent authorities of the Contracting Party where the person concerned is resident or established should take into due account any information on serious or repeated offences against Customs or tax legislation to be provided by other Contracting Parties in accordance with Article 38, paragraph 2. The authorization for a person to utilize TIR Carnets could be revoked temporarily or permanently, if the competent authorities consider such evidences to be sufficiently in line with national legislation.

5. The TIRExB stressed that notification of an exclusion in accordance with Article 38, paragraph 2 should contain not only the name of the excluded person, but also detailed reasons for such an exclusion, in order to allow for efficient consideration of the case by the Contracting Party where the person concerned is resident or established. While a possible withdrawal of the authorization is under consideration by the competent authorities, the excluded person should be given the possibility of presenting explanations, documents and witnesses for the defence.

6. Taking account of the above considerations, the TIRExB felt that full implementation of the amended Article 38, paragraphs 1 and 2 would need some comments by the TIR Administrative Committee on such notions as "a person guilty", "a serious offence against the Customs laws or regulations applicable to the international transport of goods" as well as on a procedure of co-operation between the Customs authorities while implementing Article 38 of the Convention. The TIR Secretary was requested to prepare relevant proposals for the next sessions of the TIRExB and Administrative Committee.

7. The TIRExB was also of the opinion that, before such comments were adopted, it would be premature to disseminate any data on excluded persons (so-called "black lists") which are also reported to the Board in accordance with Article 38, paragraph 2 of the Convention. Distribution of this information should be restricted to the organizations which are already referred to in the amended Article 38 of the Convention.

8. In line with the aforementioned request, the TIR Secretary proposes the following draft comments to Article 38, paragraphs 1 and 2 of the TIR Convention:

Comments to Article 38

Add a new comment to Article 38, paragraph 1 to read as follows:

“A person guilty of a serious offence against the Customs laws or regulations

A person should be considered guilty of a serious offence against the Customs laws or regulations applicable to the international transport of goods, if the competent authorities of a Contracting Party (Customs authorities, competent courts, etc. in line with national legislation) have brought in a verdict of guilty resulting in liability of that person for payment of a Customs debt, administrative fines and/or other pecuniary sanctions. This verdict should be deemed true unless it is revoked or suspended by the authorities having taken the decision, other competent authorities or by other bodies of appeal in accordance with national legislation.”

Add a new comment to Article 38, paragraph 1 to read as follows:

“Seriousness of an offence against the Customs laws or regulations applicable to the international transport of goods

In general, the seriousness of an offence is determined in line with national legislation of the Contracting Party where the offence has been committed or detected, in accordance with Article 37 of the Convention. However, in order to harmonize the application of Article 38 of the Convention, the Customs authorities are recommended to consider the cases listed below as serious offences:

- smuggling or attempted smuggling of goods into/from the Customs territory of a Contracting Party;
- non-payment of a Customs debt in connection with the international transport of goods amounting to or more than the maximum sum per TIR Carnet established by the Contracting Party in line with Article 8, paragraph 3 of the Convention.”

Add a new comment to Article 38, paragraph 2 to read as follows:

“Cooperation between competent authorities

During the procedure of authorization of a person to utilize TIR Carnets in line with Annex 9, Part II of the Convention the competent authorities of the Contracting Party where the person

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concerned is resident or established should take into due account any information notified by another Contracting Party in accordance with Article 38, paragraph 2 on serious or repeated offences against Customs legislation committed by that person. Thus, in order to allow for efficient consideration of the case by the Contracting Party where the person concerned is resident or established, such notification should contain as many details as possible.”

Add the same comment to Annex 9, Part II, “Procedure”.

9. The TIRExB also noted that the competent authorities of a Contracting Party could use the provisions of both Article 38, paragraph 1 and Annex 9, Part II, paragraph 1 (d) to exclude from the TIR regime a national transport operator guilty of a serious offence against the Customs laws committed on the territory of that country. The TIRExB felt that the provisions of Annex 9, Part II, paragraph 1 (d) should preferably be used for that purpose since the first option might lead to a situation where a transport operator excluded from the TIR procedure in its own country may still carry out TIR operations elsewhere as its authorization to utilize TIR Carnets has not been revoked. In this regard the following new comment is proposed:

Comment to Article 38

Add a new comment to Article 38, paragraph 1 to read as follows:

“Exclusion of a domestic transport operator from the TIR procedure

In order to exclude from the TIR regime a national transport operator guilty of a serious offence against the Customs laws committed on the territory of the country where he is resident or established, the Customs authorities are recommended to use the provisions of Article 6, paragraph 4 and Annex 9, Part II, paragraph 1 (d) rather than the provisions of Article 38, paragraph 1. The latter option might lead to a situation where a transport operator excluded from the TIR procedure in its own country may still carry out TIR operations elsewhere as its authorization to utilize TIR Carnets has not been revoked.”

Add the same comment to Annex 9, Part II, “Procedure”.

10. The TIR Administrative Committee may wish to consider the above draft comments with a view to their adoption or transmission to the UN/ECE Working Party on Customs Questions affecting Transport for further deliberations.

UNITED
NATIONS

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ECONOMIC COMMISSION FOR EUROPE

INLAND TRANSPORT COMMITTEE

Working Party on Customs Questions Affecting Transport

One-hundred-and-fourteenth session
Geneva, 25-29 September 2006
Agenda item 9 (b) (ii)

Administrative Committee for the TIR Convention, 1975

Forty-second session
Geneva, 28 September 2006
Agenda item 3 (a) (i)

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

Application of Article 38 of the Convention

Note by the secretariat*

1. At its one-hundred-and-eighth session, the Working Party, at a request of the delegation of Turkey, undertook an in-depth discussion of the application of Article 38 and, in particular, the recent deletion of Explanatory Note 0.38.1. The Working Party recognized that it could be useful to elaborate some guidelines concerning the application of Article 38 with a view to aligning the application of the article at national level. In this context, the Working Party took

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

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note of a study of the TIRExB concerning the application of Annex 9 to the Convention. In this context, the TIRExB had decided to deal with the issue of exclusions according to both Annex 9 and Article 38 and to develop some guidelines for a harmonized approach in relation to exclusions. In this context, the Turkish delegation was invited to submit its observations for consideration by the TIRExB as well as by the Working Party (TRANS/WP.30/216, paras.28-32).

2. At its one-hundred-and-ninth session, the Working Party took note of the position of the TIRExB on this matter, that (1) Article 38 plays an important role for the sustainability of the Convention as a counterbalance to the rules of access to the Convention, (2) with regard to the reasons for exclusions according to Article 38, this is a matter of national competency according to national legislation and (3) with regard to the procedural aspects of exclusions according to Article 38 there seems to be some room for improvement with a view to creating transparency concerning the decisions for exclusions as well as establishing a harmonized approach to the communication procedures for exclusions. In relation to the latter, the Working Party was of the view that issues such as a detailed reasoning for exclusions, the permanent or temporary nature of exclusions as well as appeal possibilities should be included in the communication from Customs authorities. The Working Party recommended that the TIRExB continue its work on this issue with a view to developing a set of guidelines for the communication of exclusions according to Article 38 (TRANS/WP.30/218, paras.27-29).

3. At its one-hundred-and-tenth session, the Working Party was informed by Mrs. N. Rybkina, Chairperson of the TIRExB, TIRExB had considered the issue and confirmed the view of the Working Party that the question concerning reasons for exclusions according to Article 38 is a matter of national competency and that the TIRExB was in the process of developing a best practice for communicating exclusions according to Article 38. Once the best practice has been finalized by the TIRExB, it will be transmitted to the Working Party for consideration (TRANS/WP.30/220, para.28).

4. In January 2006, the TIRExB finalized the underlying example of best practice which is reproduced in the annex. The Working Party may wish to comment on the example with a view to submitting it to the TIR Administrative Committee for adoption.

Annex

EXAMPLE OF BEST PRACTICE
WITH REGARD TO THE APPLICATION OF ARTICLE 38

A. INTRODUCTORY REMARKS

1. Chapter IV "Irregularities" of the TIR Convention contains references to national legislation of the Contracting Parties. In particular, in accordance with Article 36, *"any breach of the provisions of this Convention shall render the offender liable, in the country where the offence was committed, to the penalties prescribed by the law of that country"*. Article 38 constitutes in itself a framework provision which also relies on national legislation for practical implementation. For example, national law determines:

- gravity of an infringement ("serious offence against Customs laws or regulations applicable to the international transport of goods");
- date when the exclusion according to Article 38 comes into force;
- appeal procedures and possible suspension of the exclusion in the course of appeal.

2. In general, Article 38 should be considered as a tool to protect and prevent the TIR procedure from abuses, rather than as an automatic mechanism of sanction in any circumstances. The application of Article 38 should be justified according to the gravity of the infringement.

3. Article 38 is closely linked to the provisions of Article 6 and of Annex 9, part II which govern the procedure of access of physical and legal persons to the TIR procedure. This relation is highlighted by two comments to Article 38 "Cooperation between competent authorities" and "Exclusion of a domestic transport operator from the TIR procedure".

4. Apart from the person being excluded, the following actors are mentioned in Article 38:
- the competent authorities of the Contracting Party where the offence has been committed and where Article 38.1 is implemented;
 - the competent authorities of the Contracting Party on whose territory the excluded person is established or resident;
 - the association(s) in the country where the offence has been committed;
 - the TIR Executive Board.

In addition, the national association of the Contracting Party where the excluded person is established or resident is involved in the implementation of Article 38, although not mentioned explicitly in the text.

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5. Because of the involvement of various actors, the close cooperation between them is indispensable for the smooth application of Article 38. Such cooperation should be based on two major elements:

- duly fulfilment by the actors involved of their respective functions;
- a fast and transparent exchange of information.

An example of best practices in this respect is given below¹.

B. EXAMPLE OF BEST PRACTICE

6. The competent authorities of the Contracting Party where an infringement of the TIR Convention was committed should consider, in line with national legislation, whether this infringement constitutes "a serious offence against Customs laws or regulations applicable to the international transport of goods" and whether the TIR Carnet holder should be excluded from the TIR procedure according to Article 38.1.

7. If a decision is taken to implement Article 38.1, the person being excluded should be informed without delay. Such information should be made in any of the three official languages of the TIR Convention (English, French or Russian) and should contain at least the following particulars²:

- Date and place of issuance of the document;
- Name and official address of the competent authority;
- Name, address, country and ID-number of the person being excluded;
- TIR Carnet reference number;
- Registration No(s) of road vehicle(s) (if applicable);
- Identification No(s) of container(s) (if applicable);
- Description of the goods;
- Date and place of the infringement;
- Detailed description of the infringement;
- Reasons for the application of Article 38.1;
- Type of the exclusion (temporary or permanent) and the date of its entry into force;
- Duration of the exclusion (for temporary exclusions only);

¹ According to the comment "Exclusion of a domestic transport operator from the TIR procedure", the Customs authorities are recommended to use the provisions of Article 38.1 against foreign transport operators guilty of a serious offence of the Customs laws. The proposed example of best practice addresses such a situation.

² A specimen of information is given in the appendix.

- Information on possible appeal procedures (deadline, appeal bodies, possible suspension of the exclusion in case of appeal, etc.).

Where possible, a copy of the TIR Carnet should be attached.

8. The information should be transmitted to the excluded person by the fastest available means of communication (fax, electronic mail, etc.). Within one week, this information should also be forwarded by registered mail to the person being excluded or should be handed over to his legal representative against signature on receipt.
9. Within one week, the same information should also be transmitted by the fastest available means of communication (fax, electronic mail, etc.) to the competent authorities of the Contracting Party on whose territory the person concerned is established or resident, to the association(s) in the country or Customs territory where the offence has been committed, to the TIR Executive Board and, as far as possible, to the association of the Contracting Party where the excluded person is established or resident (issuing association).
10. In case of any changes in the status of the original exclusion (e.g., cancellation or suspension, etc.), the competent authorities, which have excluded the person, should keep the addressees mentioned in paras. 9 and 10 above informed of these changes.
11. The competent authorities of the Contracting Party on whose territory the excluded person is established or resident should consider whether the committed infringement can affect the minimum conditions and criteria set out in Annex 9, part II, that persons have to meet in order to have access to the TIR procedure. If the person concerned no longer fulfils these requirements, his authorization should be withdrawn. Such a withdrawal should be reported within one week to the TIR Executive Board. It is also recommended to inform the competent authorities which have issued the exclusion.
12. Irrespective of the possible decision on withdrawal of authorization by the competent authorities of the Contracting Party on whose territory the person concerned is established or resident, the issuing association should assess the reliability of the holder and may impose on him some sanctions in compliance with the association's internal rules, for example, suspend the issuance of TIR Carnets.

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APPENDIX

INFORMATION OF EXCLUSION FROM THE TIR PROCEDURE (in accordance with Article 38, para.1 of the TIR Convention)		
To:		
(name, address, country and ID-number of the person being excluded)		
This is to notify that you have been excluded from the TIR procedure on the territory of _____ (name of the country)		
This exclusion comes into force on _____ (date)		
and is <input type="checkbox"/> permanent <input type="checkbox"/> temporary until _____ (date)		
Appeal against the exclusion can be launched with _____ (name of appeal body)		
before _____ (deadline for appeal, if any) possibly, by registered mail		
The exclusion has been a result of the TIR infringement whose details are given below:		
TIR Carnet reference number		
Registration No(s) of road vehicle(s) (if applicable)		
Identification No(s) of container(s) (if applicable)		
Description of goods		
Date and place of the infringement		
Description of the infringement:		
Reasons for the application of Article 38.1:		
Attachments (if any)		
Name and official address of the competent authority:		
Date and place	Signature	Stamp (if applicable)