

## CHAPTER 11 FREEDOM OF TRANSIT

### Freedom of transit: Article 11

Goods usually cross multiple border crossings before reaching their destination. The cost of transporting cargo containers and following various procedures and requirements of multiple customs administrations is a major share of the value of goods. In spite of Members' obligation in terms of Article V of GATT (1994, Freedom of Transit), transit procedures can still be trade-restrictive.

For landlocked countries and regions, transit across other states' territories to access international markets and transport services is an essential condition for their connection to global and regional supply chains.

However, freedom of transit is limited by the sovereign right of countries over transit across their territories. In fact, the transit state can set specific requirements for granting access or transit rights which regulate the terms and modalities of transit and are subject to bilateral or multilateral negotiations.<sup>18</sup>

Building on the obligations under Article V of GATT, Article 11 of the TFA addresses the regulations and formalities imposed by Members on traffic in transit to ensure that they are not applied in a trade-restrictive manner.

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*Members must not condition the traffic in transit upon the collection of fees or charges and must not maintain voluntary restrictions on transit.*

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### The measure

ARTICLE 11	FREEDOM OF TRANSIT
1.	Any regulations or formalities in connection with traffic in transit imposed by a Member shall not be: <ul style="list-style-type: none"><li>(a) maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a reasonably available, less trade restrictive manner;</li><li>(b) applied in a manner that would constitute a disguised restriction on traffic in transit.</li></ul>
2.	Traffic in transit shall not be conditioned upon collection of any fees or charges imposed in respect of transit, except the charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.
3.	Members shall not seek, take, or maintain any voluntary restraints or any other similar measures on traffic in transit. This is without prejudice to existing and future national regulations, bilateral or multilateral arrangements related to regulating transport, consistent with WTO rules.
4.	Each Member shall accord to products which will be in transit through the territory of any other Member treatment no less favorable than that which would be accorded to such products if they were being transported from their place of origin to their destination without going through the territory of such other Member.

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<sup>18</sup> UNCTAD Trust Fund for Trade Facilitation Negotiations. Technical Note 8 [http://unctad.org/en/Docs/TN08\\_FreedomofTransit.pdf](http://unctad.org/en/Docs/TN08_FreedomofTransit.pdf)

5. Members are encouraged to make available, where practicable, physically separate infrastructure (such as lanes, berths and similar) for traffic in transit.

6. Formalities, documentation requirements, and customs controls in connection with traffic in transit shall not be more burdensome than necessary to:

- (a) identify the goods; and
- (b) ensure fulfilment of transit requirements.

7. Once goods have been put under a transit procedure and have been authorized to proceed from the point of origination in a Member's territory, they will not be subject to any customs charges nor unnecessary delays or restrictions until they conclude their transit at the point of destination within the Member's territory.

8. Members shall not apply technical regulations and conformity assessment procedures within the meaning of the Agreement on Technical Barriers to Trade to goods in transit.

9. Members shall allow and provide for advance filing and processing of transit documentation and data prior to the arrival of goods.

10. Once traffic in transit has reached the customs office where it exits the territory of a Member, that office shall promptly terminate the transit operation if transit requirements have been met.

11. Where a Member requires a guarantee in the form of a surety, deposit or other appropriate monetary or non-monetary instrument for traffic in transit, such guarantee shall be limited to ensuring that requirements arising from such traffic in transit are fulfilled.

12. Once the Member has determined that its transit requirements have been satisfied, the guarantee shall be discharged without delay.

13. Each Member shall, in a manner consistent with its laws and regulations, allow comprehensive guarantees which include multiple transactions for same operators or renewal of guarantees without discharge for subsequent consignments.

14. Each Member shall make publicly available the relevant information it uses to set the guarantee, including single transaction and, where applicable, multiple transaction guarantee.

15. Each Member may require the use of customs convoys or customs escorts for traffic in transit only in circumstances presenting high risks or when compliance with customs laws and regulations cannot be ensured through the use of guarantees. General rules applicable to customs convoys or customs escorts shall be published in accordance with Article 1.

16. Members shall endeavor to cooperate and coordinate with one another with a view to enhancing freedom of transit. Such cooperation and coordination may include, but is not limited to, an understanding on:

- (a) charges;
- (b) formalities and legal requirements; and
- (c) the practical operation of transit regimes.

17. Each Member shall endeavor to appoint a national transit coordinator to which all enquiries and proposals by other Members relating to the good functioning of transit operations can be addressed.

## Understanding the measure

### *What is covered?*

#### *Scope*

Freedom of transit was already disciplined in Article V of the GATT (1994) which outlined a set of fundamental principles related to freedom of traffic in transit. However, Article 11 goes much further by setting forth the establishment of physically separate infrastructure for traffic in transit, the limitation of formalities, documentation, customs controls and guarantee requirements, and stronger cooperation and coordination among WTO Members.

#### *Core obligation*

This measure aims to ensure movement of traffic in transit through the application of rules, regulations and processes in a non trade-restrictive manner, eliminating all unnecessary regulations and formalities, prohibiting any voluntary restraints to traffic in transit and securing a non-discriminatory treatment of goods in transit.

#### *Trade-restrictive regulations*

Paragraph 1 requires Members to examine their traffic in transit formalities and regulations to determine if they have out-lived their purpose or if less trade-restrictive alternatives are available, and if so, the Member shall not maintain the formalities. Nor should the regulations be applied in a manner that would constitute a disguised restriction on traffic in transit.

#### *Cost of transit*

Paragraph 2 mandates governments not to condition traffic in transit upon collection of fees or charges, except for transportation charges or those charges imposed for administrative expenses, commensurate to the cost of the service rendered.

#### *Restraints and barriers*

Members must not apply any voluntary restraints or barriers to traffic in transit. Members must also accord the same treatment to the goods in transit as if these were not passing through a third country while moving from the country of origin to the country of destination.

It is also provided that the goods in transit in one Member's territory will not be subjected to any customs charges or unnecessary processes that may delay the movement of the goods. Moreover, this Article specifies that the goods in transit will not be subjected to the requirements of the Agreement on Technical Barriers to Trade.

As soon as the goods in transit reach the point of exit of a Member's territory, customs must not delay their exit if transit requirements have been complied with, by promptly completing necessary procedures to conclude the transit operation.

#### *Documentation and formalities requirements*

Members are required not to apply cumbersome requirements for submission of documents other than those which are sufficient to identify the goods in transit and to ensure fulfilment of transit process requirements. Members must also allow and provide for advance submission and processing of documents for goods in transit, ahead of the arrival of goods.

#### *Guarantees and customs convoys*

The TFA does not prohibit Members to seek guarantees for transit. However, when a guarantee is sought, Article 11 states that this instrument must be limited to ensure that the requirements arising from the traffic

in transit are fulfilled. Moreover, once the transit requirements have been fulfilled, the guarantee must be immediately discharged without any delay by the transit country authorities.

Article 11 also requires Members to allow the submission of comprehensive guarantees covering multiple transactions for the same operator, or renewal of guarantees without discharge for subsequent consignments. However, the use of qualifying language 'in a manner consistent with its laws and regulations' means that if the guarantee is not consistent or not provided for in national legislation, the obligation to implement this TFA provision would not be required. To ensure transparency and predictability, the TFA obliges Members to publish relevant information regarding requirements and processes for setting and discharging guarantees.

Paragraph 15 provides for the use of customs convoys or escorts only in specific circumstances. Members can only demand the use of customs convoys or escorts for high risk traffic in transit or when guarantees provided are not sufficient to ensure compliance with customs laws and regulations. Members have a binding obligation to publish general rules applicable to custom convoys or escorts in accordance with Article 1 of the TFA, which sets forth the principle of access to information and transparency.

### *Physical infrastructure*

Paragraph 5 encourages WTO Members to set up separate physical infrastructure – including separate berths, lanes and corridors – to facilitate traffic in transit 'where practicable'. Members are not obliged to enforce this specific provision but are encouraged to do so if there is national capacity and resources.

### *Coordination and cooperation among Members*

The last requirements of Article 11 call WTO Members to attempt to cooperate with each other to enhance traffic in transit. This could be achieved by strengthening reciprocal understanding of the charges that apply to traffic in transit, formalities and legal requirements, and practical aspects of transit management. The legal language 'shall endeavour to' means that Members are not bound to mutual cooperation but have to demonstrate that they have at least made some effort to reach an understanding.

The closing provision states that Members must 'endeavour' to appoint a focal point for transit coordination to whom all queries and information regarding traffic in transit may be directed. Again, this is not mandatory.

### **Benefits and opportunities for stakeholders**

The implementation of this measure will reduce the time and cost of transit operations and enhance volumes of transit due to simplification of transit procedures and formalities.

Use of comprehensive guarantee schemes will accelerate movement of goods, remove bottlenecks at ports of entry and reduce the risk to businesses. Advance submission and processing of trade documents will also help reduce delays in the clearance of goods and will enable smoother document transmission between countries and agencies.

The publication of information on transit procedures (guarantees, customs convoys) will ensure transparency and predictability for businesses. Not least, improved understanding of government procedures will improve traders' confidence and compliance.

Inter-agency cooperation among countries will lead to mutual learning and knowledge exchange to find innovative solutions to common problems faced by traders.

### **Implementation**

#### *Implementation checklist*

The following checklist may be used to estimate the level of compliance with the measure:

- Procedures, regulations and formalities for transit are no less favourable than those for import or export.

- Restrictions affecting transit are not higher than necessary and they are withdrawn by justifiable changes in circumstances and/or objectives.
- Transit is exempt from customs and other duties except for reasonable charges for transportation and administrative expenses.
- Goods in transit are not subject to quality control or control of compliance with technical standards.
- Once the goods have been authorized to proceed from the point of origin, they are not subject to further charges, formalities and customs inspections until they conclude their transit at their point of destination within the country.
- Where goods in transit exit the country, the customs office promptly concludes the transit operation, if transit requirements are met.
- Guarantees for goods in transit are allowed and promptly discharged.
- A national transit coordinator has been appointed.

### Preparing a national implementation plan

The following template may be used as the basis for a national implementation plan:

<b>Implementation sequence</b>	<b>Actions suggested</b>
	<b>Preparatory phase</b>
	If needed, take legal or administrative measures to reduce restrictions to traffic in transit and support free transit trade.
	Nominate a transit coordinator as a focal point.
	Conduct business process analysis of existing procedures and documentation to ensure the implementation of the measure.
	<b>Set-up phase</b>
	Put in place a protocol of coordination with all relevant agencies so that documents and data may be shared.
	Assign sufficient trained staff.
	Where possible, implement processes with ICT-enabled solutions.
	Undertake a robust public awareness campaign. Specific requirements related to transit are published.
	<b>Management and follow-up phase</b>
	Set up a monitoring mechanism to ensure compliance of the measure.
	Perform reasonable and regular reviews of formalities, business processes and documentation requirements to ensure compliance with laws and procedures.
	Encourage users to give feedback and evaluation on the procedures.
<b>Average time for implementation</b>	Between two to three years.
<b>Leading implementation agency</b>	Customs is most commonly chosen as the leading implementation agency with the ministry of trade or the NTFC.

### Key challenges

There may be no existing procedures for streamlining traffic in transit and institutionalizing new processes can be challenging. The financial sector in some countries may not be able to provide guarantees and other appropriate financial instruments to reduce risk of transit trade. Moreover, SMEs may not be able to provide sufficient financial instruments to cover the risks.

A lack of trust and a culture of not sharing information can hamper genuine inter-agency cooperation as agencies may not want to work together, share data or harmonize their information requirements.

### **Key factors for success**

Harmonious coordination between relevant national agencies is a key factor for success. It is recommended that all agencies work together to map existing documentation, procedures, operations and infrastructure, with the private sector to gather their perspectives in identifying bottlenecks and key problem areas.

Setting up a monitoring system of regular review that ensures governments do not introduce voluntary restrictions to traffic in transit or burdensome new documentation and formalities will successfully contribute to implementation.