

## Freedom of Transit: A right for transit traffic to move across borders?

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### **Abstract**

*The world has become a global village, and various efforts have been made to facilitate trade, including transit traffic. In international trade, transit involves the movement of goods to the destination through third-party countries. Landlocked countries experience challenges in that they access trade with the rest of the world through seaports belonging to other territories. The freedom to transit through third party countries is therefore an important avenue that has gained traction in facilitating global trade. The freedom to transit is a concept that has evolved and improved over the years. This paper examines the efforts taken by international treaties to facilitate the movement of goods in transit: starting with the Barcelona Convention and Statute on Freedom of Transit of 1921, then the General Agreement on Tariffs and Trade, and lately, the Trade Facilitation Agreement of the World Trade Organisation. The paper analyses the progressive liberalisation of the transit regime over a century and brings out the impact that has been contributed to international trade. The study established that the Barcelona Convention on Transit provided the foundation, while Article V of GATT 1994 built upon that foundation. The Trade Facilitation Agreement represents the latest effort to facilitate traffic in transit.*

**Keywords:** *Article V of GATT 1994; Barcelona Convention on Transit; freedom of transit; Trade Facilitation Agreement; transit*

### **Introduction**

Transit is a unique regime in the movement of goods in international trade. The practical picture of transit traffic portrays a buyer and seller, together with the transporter, seeking authority for their goods to pass through foreign territory where they have neither control nor rights. The movement of goods in transit is exposed to additional costs, not only at the borders, but also in the countries through which the goods pass. Article V of GATT 1994 (hereafter Article V) explains that transit occurs when the passage of goods through another territory 'is only a portion of a complete journey beginning and terminating beyond the frontier of the Member across whose territory the traffic passes' (GATT 1994, art. V:1). This definition has an international approach in that it views transit from the perspective of goods crossing international borders. The Protocol of Amendment to the International Convention on the Simplification and Harmonisation of Customs Procedures (hereinafter, Revised Kyoto Convention or RKC) of the World Customs Organisation (WCO) offers a customs-oriented definition which interprets transit as the movement of goods, under Customs control, from one Customs office to the other (Specific Annex E, Chapter 1). Both definitions, though derived from different standpoints, are correct. Essentially, the transit regime of goods in international trade is subject to Customs control. Article V depicts transit from the World

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## *2 Freedom of Transit: A right for transit traffic to move across borders?*

Trade Organisation (WTO) perspective of goods crossing international boundaries, whereas the Customs definition considers it from an enforcement point of monitoring the movement of goods between Customs control points. The principal point is that a country allows goods destined to another territory to pass through unhindered.

Transit involves many stakeholders such as Customs, transport authorities, financial services, and shipping agents. Traffic in transit also undergoes various and at times different regulatory measures in each of the countries that the goods pass through. Furthermore, the transitory countries, within the scope of their own laws, are obliged to balance the trade facilitation role against the enforcement function in respect of cargo passing through their territories.

This paper examines how the concept of freedom of transit, and the legal framework to support it, have evolved from the Barcelona Convention and Statute on Freedom of Transit of 1921 (hereafter, Barcelona Convention on Transit) till the WTO's Trade Facilitation Agreement of 2013 (hereafter, TFA). It is also a comparative analysis of the relevant legal provisions that were developed to ease the flow of traffic in transit and in particular, Article V of GATT 1994 and Article 11 of the TFA. Both Article V of GATT 1994 and Article 11 of the TFA are in force and have the same functionality, aiming to facilitate the expeditious movement of traffic in transit at lower costs. Essentially, the paper explores the relationships between earlier laws and new laws and discusses the similarities or differences, and the reasons for these similarities or differences. The paper, therefore, attempts to determine the gaps between the three sets of laws, all of which are recognised in international law, and each of them having made an epic contribution to the subject matter. This study was a qualitative analysis that involved a review of existing literature. The comparative analysis will result in a better understanding of the legal developments to liberalise transit traffic at a global level for close to a century. The analysis will motivate further debate on transit among stakeholders such as trade experts, trade lawyers, customs administrations, and academia.

This paper is relevant in that it brings out key issues regarding the freedom of transit, and how these have progressively been developed, first for the benefit of landlocked countries and now, for any country that handles transit traffic. International law has provisions that are of importance to the countries through which the goods pass. It therefore follows that transit issues are no longer just for the benefit of landlocked nations. Given the increasing importance of facilitating transit in global trade, this study will benefit academia and those involved in international trade by giving an appreciation of how trade law on transit has evolved.

The paper is divided into four broad discussion areas. It first discusses the concept of freedom of transit, whose background can be traced to the Barcelona Convention on Transit and the peculiar situation of landlocked countries whose trade with the outside world relied on moving goods through third party territories. The study then proceeds to analyse Article V, which built upon Barcelona Convention on Transit and lays the fundamental principles anchoring modern-day issues affecting transit. This is followed by a review of Article V by the WTO's Trade Facilitation Agreement (TFA). Finally, the study draws conclusions from the analysis.



## The Principle of Freedom of Transit

The significance of transit becomes evident when it is considered that 44 countries in the world, of which 16 are from Africa, are landlocked and have no direct access to the sea. This gives the continent the highest number of landlocked countries in the world (World Population Review, 2024). Goods from these landlocked countries, therefore, get access to international markets through foreign ports, which results in the landed costs of such commodities being higher and, consequently, less competitive. The United Nations Trade and Development (2022) has done some analysis and referred to studies by the World Bank on the impact of costs and delays from international transit in Central Africa. The studies showed that landlockedness and the associated transport costs represent 35% of the value of exports, and more than 45% of the value of imports. This demonstrates the negative impact of a country's competitiveness on the global market.

The debate on freedom of transit arose from the land-locked countries that considered there must be unhindered access to the open seas and oceans through other countries, whereas the transit states argued that as sovereign nations, it was within their sovereign rights to allow or disallow transit traffic through their territories (Malik, 2019). The Barcelona Convention on Transit is premised on the fundamental principle of mitigating the situation of landlocked states by providing them equal access to the seas and not hindering the passage of goods through third party territories. The concept 'Freedom of Transit' has therefore become an important subject in the liberalisation of international trade and market access. The Barcelona Convention on Transit reaffirmed the principles in the Statute on Freedom of Transit whose focus was to ensure freedom of transit for goods across borders and which had been drafted under the auspices of the League of Nations (1921, art. 1). The scope was focused on transit by rail or internal navigable waterways. Although this may be a narrow scope, it fulfilled the aspirations of the founding countries. The eight introductory Articles of the Barcelona Convention on Transit are presented as preamble texts to the Statute on Freedom of Transit. They introduce and incorporate the Statute on Freedom of Transit, previously adopted by the Barcelona Conference on 14 April 1921 as an annexure and fundamental part of the convention (1921, art. 1).

Despite breaking the ground and setting the tone on freedom to transit, the Barcelona Convention on Transit, which would later form the basis for Article V, refers several times and guardedly to the issue of 'sovereignty'. As an example, Article 1 of the Barcelona Convention on Transit reads:

Persons, baggage and goods, and also vessels.... and other means of transport, shall be deemed to be in transit across territory under the sovereignty or authority of one of the Contracting States, when the passage across such territory, .... is only a portion of a complete journey....

While recognising that governments can make transit arrangements within their territories, Articles 2 and 4 of the Barcelona Convention on Transit require its Contracting Parties to allow and facilitate transit traffic within their territories. The convention has space for governments to grant even greater freedoms of transit than were stipulated (1921, art. 8 and 11). Therefore, it provides a means of enforcing the right of free transit without prejudice to

the rights of sovereignty of transit states over the routes. This paves the way for traffic in transit to move freely. In international law, freedom of transit, therefore, amounts to a right for goods to be permitted to transit through the territory of a third party (Teh et al., Eds., 2016, p. 124). The principle of freedom of transit can face threats from a number of national regulatory requirements. These conditions include compliance with transport requirements such as road quotas and permits, interest from the security sector regarding foreign goods moving through their territory, concern from the business sector on possible threats if goods destined outside are offloaded into their markets, and Customs as the overall agency responsible for facilitating or enforcing trade. On the other hand, the seller and buyer of goods are interested in having the commodities delivered without unnecessary controls and delays.

Despite its scope being limited to rail or navigable waterways only, the Barcelona Convention on Transit laid a foundation for liberalisation of transit traffic. Scholars have commented that the Barcelona Statute on Freedom of Transit provides an important framework in facilitating transit of goods, (Uprety, 2008, pp. 203-208). Modern day global trade needs to acknowledge that the current freedom of transit, that is guaranteed under the WTO and in a number of free trade agreements, has a historical tracing to the Barcelona Convention on Transit. The legal instruments that followed were therefore to build upon these founding principles.

### **Article V on Freedom of Transit**

The scope of the Barcelona Convention on Transit covers rail and navigable waterways and does not cover other modes of transport. This was a limitation that obviously needed attention. Two decades later, GATT 1947 came with a modern regime of that time. GATT 1947 developed its Article V as a comprehensive provision that broadened the coverage from the Barcelona Convention on Transit and came up with more recognitions to further ease the movement of goods in transit. Article V maintained the heading ‘Freedom of Transit’ as formulated earlier by the Barcelona Convention on Transit. It introduced new provisions such as:

‘Goods (including baggage), and also vessels and other means of transport...’  
(GATT 1947, art. V:1)

and, it added

‘No distinction.... relating to the ownership of goods, of vessels or of other means of transport’ (GATT 1947, art. V:2).

In the context of Article V, the meaning of “freedom of transit” broadened to meet the demands of trade. The goods and other means of transport were also granted the freedom to pass through any territory when they moved from point of dispatch to destination. Unlike the Barcelona Convention on Transit, which focuses on seacoast, Article V also encompasses even those transit goods moving from one inland country to another. From this perspective, transit issues would not just involve those countries that want access to the sea. Transit issues affect any country either as a supplier or destination of goods, or as a transitory country.

Without excluding any means of transport, Article V, addresses transit-related concerns and mandates that members permit freedom of transit in order to facilitate trade among themselves (GATT 1994, art. V:2). The tone of Article V was to further relax the movement



of goods and to ensure that WTO Members adopt measures that would facilitate the movement of goods in transit. One of the objectives of the Barcelona Convention on Transit was to enforce the freedom of transit without prejudicing the sovereign rights of transit States over the routes available for transit (GATT 1994, art. V:2). Unlike the Barcelona Convention on Transit that calls for freedom of transit while emphasizing issues of sovereignty, all seven paragraphs of Article V make no mention of 'sovereignty'. This shows that the theme of Article V was to ease restrictions on the movement of goods and to ensure that Members adopt measures that would facilitate the movement of goods in transit.

Article V deals with the liberalisation of goods in transit by ensuring that the processes, systems, and controls are liberalised with obligations shared between the transit countries and stakeholders involved in traffic in transit (Grosdidier de Matons, 2004, p.17). It further establishes a framework to eliminate unnecessary delays or administrative bottlenecks regarding goods in transit, thereby expediting the movement of goods across borders. WTO members are required not to discriminate against or obstruct the movement of such goods by imposing exorbitant service fees and complex procedures (GATT 1994, art. V:4). The establishment of the WTO saw the translation of GATT 1947 to GATT 1994. Article V remained intact, and the change made involved the legal parlance of redesignating the term 'Contracting Party' as 'Member' (WTO Agreement, Annex 1A).

It must, however, be noted that Article V considerably reviewed the provisions found in the Barcelona Convention on Transit. Some of the new areas brought about by Article V, and as a means to liberalise the freedom of transit are as follows:

### **3.1 Freedom of transit ...in the route most convenient'**

As already noted, the Barcelona Convention on Transit (1921, art. 5) laid the foundation for transit matters in landlocked countries, based on the principle that transit regimes utilising rail, water and networks must not be sources of control or abuse. Article V:2 stipulates that WTO members must grant goods freedom of transit through their territories on condition that the traffic in transit uses the most convenient routes. The freedom has a condition governing it, and thus gives room for the transitional government to deny this right in the event of any deviation from this requirement. WTO jurisprudence does not have many cases involving freedom of transit. A number of disputes involving Article V have been settled by mutual consent (Sengupta, 2007, p. 136). In one of the few cases *Colombia – Indicative Prices and Restrictions on Ports of Entry*, the Report of the Panel reiterated the position and ruled that:

In light of the ordinary meaning of freedom and the text of Article V:2, the Panel concludes that the provision of "freedom of transit" pursuant to Article V:2, first sentence, requires extending unrestricted access via the most convenient routes for the passage of goods in international transit, whether or not the goods have been trans-shipped, warehoused, break-bulked, or have changed modes of transport. Accordingly, goods in international transit from any Member must be allowed entry whenever destined for the territory of a third country. Reasonably, in the Panel's view, a Member is not required to guarantee transport on necessarily any or all routes in its territory, but only on the ones "most convenient" for transport through its territory....

This ruling emphasizes the breadth of the interpretation of freedom of transit, which is neither governed by the mode of transport used nor how the goods are packed. As long as the goods are in transit and using the most convenient route, they must be granted the freedom to transit. The practicalities might not be convenient for regulatory authorities including Customs and transport, as they involve extra administrative control measures. Such administrative measures arise when traffic in transit changes the mode of traffic or requires resources and facilities for transshipments or warehousing in the transit country. It will therefore be incumbent upon the regulatory authorities to put in place procedures to monitor and control such goods. Article V:4 provides for the levying of reasonable service fees. This is further clarified in Article 11:2 of the TFA. Obviously, lack of such monitoring facilities would not be a sufficient reason to deny such goods the right to transit, and that would amount to a non-tariff barrier (NTB) to international trade.

### **3.2 No unnecessary delays for traffic that complies**

Article V:3 requires that traffic in transit must be facilitated and not hindered once all the required laws have been complied with. The facilitation is conditional on the transit traffic complying with the established requirements tied to this condition. This stipulation requires authorities in the transitory countries to put in place facilities that will ensure that transit is not delayed.

Article V:4 however has a rider that the fees, procedures laid by the WTO members for purposes of controlling traffic in transit must be reasonable, and it states:

All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

The term ‘reasonable’ is not defined and is therefore left to interpretation. Such open-ended clauses are elastic and can accommodate various interpretations. Such a scenario creates different understandings or misinterpretations, leading to NTBs and disputes.

### **3.3 Charges, Formalities and regulations imposed by Members**

Paragraphs 4,5 and 6 of Article V cover a wide spectrum and provide guidelines for members in respect of charges, formalities and regulations for traffic in transit. WTO members are required not to discriminate against or obstruct the movement of such goods through the imposition of exorbitant service fees and cumbersome procedures (GATT 1994, art. V:4). In line with Article VIII of GATT 1994, Members may raise service fees, but these must be reasonable. Further, these should be non-discriminatory and consistent with the MFN principle. Members are similarly required to extend to each other MFN treatment when it comes to implementation of regulations and formalities (GATT 1994, art. V:5). The stipulations require reasonableness while taking into account the conditions of the traffic.

There have been cases of dispute pertaining to procedures and regulations, but these never reached the panel stage, and the parties resolved them mutually. In 1989/90, Austria issued an announcement to limit night movements of certain heavy trucks of all nationalities on some of its roads, and Germany responded by banning the movement of specified Austrian vans in Germany during the night (WTO, 2005). Both parties considered the measures a violation of Article V, and the matter was resolved by mutual consent.



In another case, the European Communities (EC) objected when Chilean authorities prohibited the unloading of swordfish at Chilean ports for transit after warehousing or transshipment to other means of transport (WTO, 2005). This amounted to denying freedom of transit through Chile and forcing the EC vessels to divert their cargo to ports of other countries. This was also discrimination, and it could be argued that it was unreasonable. This was a violation of Article V. Chile and the EC did not pursue the WTO Dispute Settlement avenue.

Article V not only expanded the meaning of freedom of transit, but it introduced wide provisions to ensure that the freedom is enjoyed without unnecessary restrictions. Whereas the Barcelona Convention on Transit introduced restricted freedom, Article V brought the real freedom, and liberalised a number of issues, for example most-favoured-nation (MFN) treatment to goods in transit and the elimination of unnecessary delays. In an effort to monitor transit traffic through their territories and to ensure compliance, some countries have tended to introduce restrictions. These restrictions have resulted in traders claiming their rights resulting in Members resorting for dispute settlement at the WTO.

### **Doha Round: Review of Articles V, VIII and X of GATT 1994**

The provisions of GATT 1947 were incorporated as GATT 1994. During the negotiations for GATT 1947, the term ‘trade facilitation’ was not common. Practically, prior to 2017, the principal instruments of the WTO on trade facilitation were Articles V, VIII and X. One of the agenda items under the WTO Doha Round of negotiations was trade facilitation, particularly Articles V, VIII and X of GATT 1994. During the launch of the negotiations, The Doha Ministerial Declaration underscored this and stated:

Recognising the case for further expediting the movement, release and clearance of goods, including goods in transit, we agree that negotiations will take place on the basis of a decision, to be taken by explicit consensus at that session, on the modalities of negotiations after the Fifth Session of the Ministerial Conference. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 ... (WTO, 2001).

Accordingly, issues regarding trade facilitation were given due prominence during the Doha Round (WTO, n.d.-a). The Trade Negotiating Committee of the WTO established the Negotiating Group on Trade Facilitation (NGTF) in October 2004 (WTO, n.d.-b). Following over nine years of negotiations, the Ministerial Conference concluded the TFA in December 2013, which later entered into force on 22 February 2017 (WTO, n.d. -c). The preamble to the TFA recalls the Doha Ministerial Declaration and the need to review trade facilitation, including aspects of Article V. It states:

***Having regard*** to the negotiations launched under the Doha Ministerial Declaration;

***Recalling and reaffirming*** the mandate and principles contained in paragraph 27 of the Doha Ministerial Declaration ...

**Desiring** to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit...

A preamble is a key component of an international agreement, as it underlines the background and strategic objective of the treaty. A major objective of the TFA was to ‘clarify and improve’ Articles V, VIII and X in order to further expedite the movement, release and clearance of goods in international trade (TFA, preamble). The review did not seek to repeal the provisions in GATT 1994, but desired to improve upon what already existed and make it clearer in order to facilitate trade. After referring to Article V, which is about transit, the preamble to the TFA emphasizes, through the words “including goods in transit...” (TFA, preamble). This shows the importance that the TFA gives to transit, and this is further demonstrated by the fact that its Article 11 introduced 16 additional paragraphs that, in essence, built upon Article V.

It can be argued that the six decades of experience in implementing Article V together with the dispute cases encountered had an influence in the negotiations of the TFA. The period witnessed growth in trade together with an expansion of the Membership of the WTO.

### **Provisions on Transit in the TFA**

The TFA comprises 24 legal Articles, 12 of which deal with trade facilitation measures. Article 11 of the TFA responded to the call of the Doha Ministerial Declaration by reviewing or clarifying Article V on transit. The TFA uses the same heading ‘Freedom of Transit’ as is used in Article V. Despite repeating the same heading, Article 11 of the TFA avoided duplicating what is in Article V, for example, defining the term transit. Article 11 of the TFA goes straight into clarifying and improving the old provisions in GATT 1994. Article 11 of the TFA has 17 paragraphs, and the question is the extent to which it has improved, explained and clarified Article V, and whether it has added any value at all, and thus achieved its mandate and objectives. This paper selects six areas it considers key and demonstrates that the TFA was indeed a major improvement to Article V by identifying new horizons not covered before. The areas identified from Article 11 of the TFA together with the relevant paragraphs are as follows:

#### **5.1 Separate infrastructure to handle traffic in transit (Paragraph 5)**

The provision is new in WTO law. It is not a mandatory provision, but it encourages Members to develop separate infrastructure such as lanes and berths in order to expedite traffic in transit. This has been demonstrated at Beitbridge Border Post, which is Zimbabwe’s border with South Africa, and is considered Southern Africa’s busiest border, handling transit traffic for the Democratic Republic of Congo, Malawi, South Africa, Tanzania, and Zambia (Muleya, 2020). A survey conducted with some of the transporters and shipping agents who use the border post revealed that the facility has improved the flow of traffic and has greatly reduced delays at the border. Not only has the separation of transit traffic expedited its movement, but it has also improved the flow of other non-transit traffic passing through the border. The separation of traffic at Zimbabwe’s busiest border, Beitbridge, was part of a major modernisation program, which included automation and led to a better flow of traffic, enhanced revenue collections, and trade facilitation (Muleya, 2024).





It must be noted that the establishment of separate infrastructure or lanes in respect of transit traffic is effective at busy border posts where it is necessary to ensure that goods that are merely transiting through a territory are not delayed by those that have already reached the country of destination. The separation would then result in fast movement of either a specified high-volume or low-volume regime of goods. This separation must be viewed in the context of freedom of transit and reducing border delays in respect of goods in transit.

## **5.2 Application of Technical Barriers to Trade (Paragraph 8)**

This provision recognizes that countries have different technical standards on goods due to differences in culture, tastes, level of development or other legitimate orientations. This stipulation obliges Members not to apply technical regulations and conformity assessments that act as barriers beyond those permitted by the WTO's Agreement on Technical Barriers to Trade. The practical effect of this is that such regulatory measures must be left to the destination country of the goods. While it is common sense that concern over issues related to technical barriers to trade must be left to the destination country, it should be noted that the country of transit is justified in ensuring that such goods leave its territory, as any illegal disposal in the transitory country might be in contravention of its own TBT regulatory measures.

## **5.3 Preclearance of Goods in Transit (Paragraph 9)**

Advance processing of Customs documents before the arrival of goods is a measure provided for under Article 7:1 of the TFA as a way of expediting the release of goods upon arrival. Preclearance allows processing of documentation before the goods arrive at the border, and it is a strategic method of facilitating trade. It is included in Chapter 3 of the General Annex of the RKC, which states that:

National legislation shall make provision for the lodging and registering or checking of the Goods declaration and supporting documents prior to the arrival of the goods. (RKC, Standard 3.25).

Article 11 of the TFA therefore highlighted traffic in transit can also enjoy this facility. Notably, similar attention is given in respect of goods in transit. It can, however, be argued that with or without this provision in the TFA, it was natural that goods in transit could be precleared. There is, however, a difference in impact in that RKC binds those countries who have acceded to it whereas the TFA applies to the members of the WTO (WCO, n.d. and WTO, 2024). What has happened is that a mandatory provision of the RKC has been extended to incorporate WTO members, making it an obligation. This shows the relationship and partnership between the WTO and the WCO.

## **5.4 Guarantee on duties for Goods in transit (Paragraphs 11 to 14)**

The TFA has introduced the issue regarding transit guarantees and this is covered in Article 11, starting from paragraph 11.11 to 11.14. Although transit traffic has the freedom of transit, Customs authorities will require a guarantee to cover the potential loss to customs duties and other obligations that may arise while the goods are transiting, for example, if the goods disappear in the transitory territory. Transit traffic moves high revenue risk, and any diversion of such goods in the country of transit amounts to fraud and has revenue implications. Corfmat and Goorman (2003, p. 113) noted that the European Union estimates that such

diversions into its domestic market amounts to revenue losses of about US\$4 billion per year. The products involved in this form of smuggling include tobacco products, motor vehicle and alcoholic beverages. The guarantee, therefore, serves to assure Customs authorities that the customs duties on goods moving under a transit procedure are secured until the goods have left the transit country. The WCO noted that the guarantee system is a prerequisite for an efficient transit system (WCO 2017 p. 39). The guarantee would usually involve an agreement between Customs, the owner of the goods, or their agent, and the guarantor, who would usually be a financial institution. The guarantee can be in the form of cash deposit, surety, or any other instrument deemed necessary.

Article V does not cover the issue of guarantees. Customs administrations have insisted on the guarantees and due to the absence of a harmonised template, various approaches have been employed. In Europe and Asia, for example, some countries use the United Nations TIR system, while in Africa some countries use a scheme developed by the Common Market for Eastern and Southern Africa (WCO, 2017 pp.47-48). The provisions in the TFA call upon members to ensure that their processes are not cumbersome and that the relevant information regarding guarantees is available as much as possible in the public domain. The guarantee must be to ensure that the transit requirements are complied with and must be discharged expeditiously. The provisions in Article 11 of the TFA are relevant in that they attempt to streamline and harmonize practices and ensure that they are aligned with international best practices.

### **5.5 Use of Customs convoys to control goods in transit (Paragraph 15)**

Article V provides a broad legal framework that allows the freedom of transit and fair application of laws and procedures to goods in transit. It is liberal and does not prescribe control measures. In implementing Article V, various control measures to ensure that goods in transit leave the transitory country have been developed and these are mainly Customs measures. The most unsophisticated method to monitor traffic in transit is the use of convoys, which is essentially the physical accompaniment of goods in transit and confirms their departure point. The TFA has put a cap on the use of convoys, and it states that:

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

While not being overly prescriptive, it will be noted that the provisions lack the strong force of law and are couched in diplomatic language, suggesting that convoys are not desirable. Where they are used as a control measure, such actions must be publicized for the public to know as per the terms of Article 1 of the TFA.

Related to this, there are other traditional means, which, though not involving convoys, are designed to ensure compliance with the laws governing transit. These involve measures such as highway patrols, use of designated routes, time limits governing the movement of goods between certain check points, or for the removal of goods from the transitory country. To monitor the movement of cargo without physical presence through escorts or convoys, some members introduced the use of seals. These seals range from simple designs, which ensure



that the cargo is not tampered with, to electronic seals monitored through radio frequencies, used to track cargo movement. The tracking system using the radio frequency identification system, based on global positioning system (GPS), has become a very popular means to facilitate and monitor goods in transit, without expending physical presence of persons along the highways. This system has proved to be effective in facilitating transit traffic and in controlling the movement of goods in many countries like Jordan (Alfitiani, 2010).

### **5.6 Appointment of National Transit Coordinator (Paragraph 17)**

To highlight the importance of transit, and to enable effective communication between members, the TFA come up with a new provision that calls for members, where possible, to appoint a transit coordinator at national level. This is not mandatory. Elsewhere in the TFA, the appointment of contact points with specific assignments, requires that the respective details of such offices be notified to the Committee on Trade Facilitation. This enables dissemination of details to other members and thus facilitates implementation. The provision under the paragraph does not request such notification. Unless such information is publicized, implementation would be challenging since other members would not have access to details of the designated focal point.

### **5.7 Other issues under Article 11 of the TFA**

The selected examples illustrate the impact of the TFA on previous efforts to facilitate transit traffic. It must, however, be noted that in addition to the aforementioned cases, Article 11 has additional paragraphs hitherto not included in previous international instruments on transit. The provisions are meant to further liberalise the movement of goods in transit. The movement of goods in transit is not conditioned upon payment of any transit fees (TFA, art. 2). The charging of fees, for the specific reason that the goods are in transit, would amount to a punitive measure that defeats the principle of freedom of transit. This provision is therefore a re-emphasis on a liberalized transit regime.

### **5.8 Shortcomings of TFA**

The provisions of the TFA are new and have more specific commitments compared with Article V, which is general. Some specific measures address issues regarding TBTs and preclearance. The TFA, however, has some aspects that are considered best endeavours, such as issues related to separate infrastructure and the appointment of a national coordinator. Despite these positive additions by the WTO, the TFA still has areas that need improvement under its Article 11.

While it is understandable that GATT 1994 makes no mention of automation in Article V, it is, however, a serious omission that none of the 17 paragraphs of Article 11 of the TFA, all developed during the era of modern technology, mention aspects related to automation, interconnectivity, and data exchange. These are key pillars in managing and facilitating the movement of goods in transit. Timely information flow and exchange, along the entire chain through which goods pass, are important ingredients of a transit system and facilitate goods. The TFA, as an international agreement, refers to pre-clearances and electronic processing of documents elsewhere, but fails to make specific reference to electronic processes and interconnectivity under paragraph 11.

Arvis (2011 p.283) observed that transit is a transport operation under customs control. This interpretation is credible, when considered that the transporter is at the centre of the the movement of goods, and in fact must be held responsible should the goods be illegally disposed in the transit country. The TFA does not bring up the transport issues, but it concentrates on the customs procedures. The physical control of the goods is essentially under the control of the transporter while the clearing agent and the transporter might have little or no control at all in respect of such goods. Further, it must be observed that the customs procedures make no mention of a single transit document, which would be an appropriate manner of processing transits, especially along trade or transport corridors. These observations indicates that there is room to improve Freedom of Transit.

## Conclusion

The freedom for goods to transit through third-party territories is an important measure when facilitating international trade. This paper has explored the attention that has been given to transit at the international level for nearly a century. Freedom of transit helps contain transit costs and delays. The League of Nations took the lead through the Barcelona Convention on Transit when this freedom was granted to rail and inland waterways. This was followed by Article V which was comprehensive and expanded the scope of the freedom by incorporating all means of transport. Accordingly, Article V has a broader and deeper scope and is not just associated with access to the sea or being a landlocked country.

The TFA brought a new era as it improved and clarified a number of aspects under Article V. It did not repeal Article V, but it achieved its mandate and objectives by clarifying the provisions in GATT 1994 and making them easier to implement. It added value by introducing new and practical measures that supplemented Article V. While observing that there are certain limitations under the TFA, the paper has shown the significant effort undertaken by the League of Nations, followed by the GATT, and more recently, the TFA to ensure traffic in transit is liberalised and facilitated. What started as a request to access the sea has been improved upon and it now encompasses other concessions for transit goods such as demand for separate lanes or infrastructures, stipulation that transit countries have reasonable laws and special treatment when dealing with goods in transit. This study has therefore illustrated how the concept regarding the freedom of transit has progressively improved, from a simple text to the current comprehensive international agreement that offers wide and deep positions on easing the flow of goods that pass through third party countries.

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14 *Freedom of Transit: A right for transit traffic to move across borders?*

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