

UNCTAD Trust Fund for Trade Facilitation Negotiations Technical Note 8

Freedom of Transit

The measure in the WTO context

Article V of GATT

Article V of the GATT 1994 provides for the freedom of transit of goods, vessels and other means of transport across the territory of another WTO via the routes most convenient for international transit.

It stipulates the following principles of freedom of transit:

- (i) equal treatment independent of flag of vessel, origin, departure, entry, exit, destination or ownership of the goods, vessels,;
- (ii) prohibition to make traffic in transit subject to unnecessary delays or restrictions;
- (iii) prohibition to levy customs duties, transit duties and other transit related charges (except for charges for transportation or those commensurate with administrative expenses entailed by transit, or with the cost of services rendered);
- (iv) level of charges levied should be reasonable to the conditions of traffic);
- (v) Most favoured nation treatment with regards to charges, regulations and formalities.

In the current negotiations on trade facilitation, several proposals have been made regarding GATT Art. V. The WTO reference document for this topic is TN/TF/W/437Rev. (see latest revisions).

Definition of transit

In the WTO context, goods are defined to be in transit when the crossing of the territory of another WTO Member constitutes only part of the journey between departure and final destination country, whether or not transshipment, warehousing, breaking of bulk or change in transport mode are involved. GATT Article V therefore only refers to so-called through-transit, i.e. transit in the GATT context, normally involves at least three states. It should be noted that in the context of Customs transit regimes (see UNCTAD Technical Note on Customs Transit), other parts of a journey are also defined as constituting transit, notably inward transit (from a Customs office of entry to an inland Customs office), outward transit (from the inland Customs office to the Customs office of exit) and interior transit (from one inland Customs office to another in the same country).

Background

International trade often requires the crossing of goods across and through territory of other States. For landlocked countries and regions, the transit across other States' territories to access international markets and transport services is an essential condition for their integration in the international economy. Therefore, the right to pass through other countries, the use of simplified and harmonised procedures, including provisions for financial Customs guarantees in transit countries, and application of efficient and rapid administrative

procedures on traffic in transit, including the use of ITC are particularly important for the economic development of landlocked developing countries.

Freedom of transit as a principle in international law is derived from the access to the Sea for landlocked countries. Goods, means of transports, and persons, should enjoy freedom of transit in order to access to the Sea. Access to and from the Sea and passage rights across the territories of states have been the subject of various international conferences and several international conventions which form the basis for the principle of freedom of transit; commencing with the Barcelona Statute on freedom of transit (1921), Article V of the GATT 1947, the New York Convention on Transit Trade of Landlocked Countries (1965), and the United Nations Convention on the Law of the Sea (UNCLOS III) (1982).

However, the ability to enjoy freedom of transit is limited by the sovereignty of states over their territory and because of this, the question of the right to transit and the duty of the transit state to allow transit across its territory remains a contentious issue in international law. As such, the texts of the New York Convention and UNCLOS III stipulate that the exercise of the right of free and unrestricted access to the Sea shall in no way infringe the legitimate interests of the transit state. Consequently, it is understood, that whilst enjoying freedom of transit, there is also a right for the transit state to set requirements for granting access or transit rights. Such access and transit rights regulate the terms and modalities of the exercise of this freedom and are in general subject to bi-or multilateral negotiations.

Implementation Issues

Traffic and access rights

Generally speaking transit traffic rights regulate access to a territory. They are subject to negotiations between states and form part of bi, regional, or multilateral agreement on transit or cross-border transport. Such agreements define the terms and modalities of the transit traffic rights, including quotas and permits, and other technical aspects related to transit operations.

From an operational perspective, a transit operation involves goods, services, operations, vehicles or other means of transport and infrastructure. Transit must therefore comply with various national regulations, including traffic and transport laws, licenses requirements, vehicle safety, environmental laws, immigration of person etc..

Bilateral, regional and plurilateral agreements

Numerous bilateral transit and transport agreements have been signed. They generally make reference to existing international practice and rules and contain provisions determining the scope of application of the freedom of transit (e.g. including or not the persons), designating transit routes (limited to certain routes or not), regulating permits/quotas, procedures and documents, visas, driving licences, cross-border cooperation, dispute settlement, technical specifications of vehicles and technical certifications, motor vehicle third-party insurance, customs transit issues, etc.

There is a recent trend in bilateral agreements to include provisions on road safety and security with a view to mitigate the risks of accidents, nuisance to population, and secure financial liability in case of accidents.

In parallel to the bilateral agreements, the trend in the recent years point towards more comprehensive solutions at the regional level with a view to establishing or enhancing integrated and harmonized transit and transport systems in view of supporting regional economic integration. These regional agreements cover some elements such as regional

harmonization of Customs transit procedures and documents, regional cooperation between authorities in particular at border posts and regional Customs transit guarantee systems.

Examples of regional agreements include the ASEAN Framework Agreement on the Facilitation of Goods in Transit; the ECO Transit Transport Framework Agreement, the SADC transport protocol and SACU Memorandum of Understanding on Road transportation.

Transit corridor arrangements

A complementary approach to transit which has evolved during recent years is transit corridor and cluster arrangements. Although limited to a certain geographical area, they tend to be inclusive and across-the-board approaches which allow for the development of a good physical infrastructure and harmonized and simple procedures along a transit corridor between several countries, including all stake holders, public and private. The Walvis Bay corridor and the Maputo Corridor are examples of existing cross-border corridor arrangements aiming at increasing cooperation amongst corridor users and service providers.

General restrictions of freedom of transit

It is recognised that based on existing international law, freedom of transit and the freedom of access to the sea can not be absolutely restricted by the transit state. Absolute restrictions are only considered lawful if they are applied on a temporary and exceptional basis - justified by war, civil unrest.

Furthermore, it is possible to restrict access for certain categories of goods on the ground of protection of public health and security (Barcelona Statute) and public moral, plant and animal diseases (New York Convention). Such restrictions on goods in transit may include traffic in weapons, and drugs.

Freedom of transit also covers means of transport. Whilst some conventions and legal texts exhaustively list means of transport others, such as GATT Article V don't. It is therefore understood that states can include in the respective bilateral or regional agreements, restrictions on the means of transport enjoying freedom of transit; such as excluding inland waterways. Implicitly, this also means that transit in the GATT context, also extends to modes such as pipelines, gas lines and electricity grids

References and tools available

Almaty Programme of Action

The first UN General Assembly endorsed programme for landlocked developing countries which identifies specific actions in five priorities: fundamental transit policy issues, infrastructure development and maintenance, international trade and trade facilitation, international support measures, and implementation and review. www.un.org/ohrlls.

World Bank

The World Bank published a comprehensive study on the theoretical and operational aspects of freedom of transit in international law. World Bank, 2006: The transit regime for landlocked States, Law, Justice and Development Series.

UNCTAD

Various reports are available via <http://r0.unctad.org/ttl>. See in particular the document "Regional cooperation in transit transport: Solutions for landlocked and transit developing

countries”, 2007, (TD/B/COM.3/EM.30/2). In order to subscribe to UNCTAD’s Transport Newsletter please visit <http://extranet.unctad.org/TransportNews>.

Further UNCTAD Technical Notes

Further Technical Notes are available via <http://r0.unctad.org/ttl/technical-notes.htm>. See in particular:

- Technical Note No. 14 (Border Agency Coordination/Cooperation)
- Technical Note No. 17 (Bonded Customs Regimes)

The *Technical Notes* have been produced by technical experts contracted by UNCTAD within the Trust Fund project “Capacity building in developing countries and least developed countries to support their effective participation in the WTO Negotiations Process on trade facilitation”, financed by the Governments of Sweden and Spain. Their purpose is to assist Geneva- and capital-based negotiators to better understand the scope and implications of the various trade facilitation measures being proposed in the context of multilateral negotiations on trade facilitation. The Technical Notes have not been edited, and the opinions expressed may not necessarily coincide with those of the organization or the donors of the Trust Fund. For comments and enquiries please contact trade.logistics@unctad.org. All Technical Notes are available via <http://r0.unctad.org/ttl/technical-notes.htm>
