Trade facilitation potential of Asian transit agreements in the context of the WTO negotiations

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TRADE FACILITATION POTENTIAL OF ASIAN TRANSIT AGREEMENTS IN THE CONTEXT OF THE WTO NEGOTIATIONS

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Abstract: This paper examines how freedom of transit and transit facilitation are addressed in trade, transport as well as transit specific agreements in the ESCAP region, with a view to identifying good practices and the extent to which existing agreements meet the transit facilitation provisions set out in the draft text of the WTO trade facilitation agreement (TFA). Following an overview of the provisions on transit found in 153 preferential trade agreements involving ESCAP countries, the study provides a more detailed analysis of a sample of 19 international transport and transit agreements in Asia in terms of their trade facilitation potential. Although some useful provisions for transit facilitation considered during the WTO negotiations did not find their way into the final TFA, the text agreed in Bali strengthens the basis for implementation of freedom of transit in the Asia-Pacific region. At the same time, the analysis highlights the complexity of the existing legal environment for transit and suggests a need for further enhancing inter-agency coordination and strengthening of multilateral rules in this area, building on the “good practices” found in the many existing bilateral, regional and multilateral instruments.
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Introduction

Freedom of transit is an issue particularly relevant to the ESCAP region, host of 12 of the world’s 31 landlocked developing countries, among which 4 least developed countries (Afghanistan, Bhutan, Lao People’s Democratic Republic, Nepal).\(^1\) Due in large part to their lack of direct access to the sea, these countries face higher costs of trade (see figure 1), making it more difficult for them to maintain competitiveness in terms of both trade and investment. Freedom of transit is fundamental to landlocked countries’ integration to international economy and economic development and their ability to move from landlocked to “land-linked”.\(^2\)

Figure 1: Trade costs (excluding tariffs) of Asian Landlocked Countries and their main transit countries with the United States of America

Recognizing that transit issues are of the utmost importance to the many landlocked countries, ESCAP Member States on their 67\(^{th}\) annual commission session endorsed the recommendation that transit facilitation should be addressed as part of an inte-

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\(^1\) [www.unescap.org/media-centre/impact-story/new-vision-landlocked-development-countries](http://www.unescap.org/media-centre/impact-story/new-vision-landlocked-development-countries)

\(^2\) Economic development in the Asian region raised awareness from landlocked countries about the potential benefits for a country to support international transit through its own territory by increasing the efficiency of transit services to their neighbors. This created a subsequent demand from landlocked countries to be seen as “land-linked” countries, enhancing their strategic position and contribution to the development of international trade in Asia. See for example, Economic and Social Commission for Asia and the Pacific (ESCAP), ”Landlocked Developing Countries Series, No. 1: Transit Transport Issues in Landlocked and Transit Developing Countries”, New York, 2003.
grated approach to trade facilitation. In ESCAP Resolution 68/3 on Enabling paperless trade for inclusive and sustainable intraregional trade facilitation, ESCAP Member States also mandated the Secretariat to, inter alia, “continue and further strengthen [its] support for capacity-building activities related to trade facilitation […], including transit facilitation, particularly with regards to least developed and landlocked developing countries […].”

In line with these mandates, this paper examines how freedom of transit and transit facilitation are addressed in trade, transport as well as transit specific agreements in the ESCAP region, with a view to identify good practices and the extent to which existing agreements meet the transit facilitation provisions set out in the draft text of the WTO trade facilitation agreement as of July 2013.

The paper is structured as follows: the next section provides an introduction to the concept of Freedom of Transit and how it has been addressed through various types of agreements, in particular preferential trade agreements. An analysis of the trade facilitation potential of selected international transport and transit agreements involving Asian landlocked developing countries is then presented, followed by conclusion and implications.

**Freedom of Transit as a Key Component of Trade Facilitation**

Trade Facilitation is a notion of flexible and evolving scope, adaptable to the diversity of situations to which it is applied. The definition developed by the World Trade Organization (WTO) recognizes freedom of transit (Article V of the General Agreement on Tariffs and Trade (GATT) – see Box 1 below) as an integral component of Trade Facilitation, in addition to the disciplines on fees and formalities connected with importation and exportation (GATT art. VIII) and to the transparency requirements (GATT art. X).

The definition of transit in GATT art. V is limited to so-called through transit, involving at least three countries: traffic is qualified as being “in transit when the passage across [the] territory [of a State] is only a portion of a complete journey beginning and terminating beyond the frontier” of this State. However, this definition, along with the concepts of Trade Facilitation and Freedom of Transit at the WTO, are prone to evolution since WTO Members have been negotiating in order to “clarify and improve” related GATT provisions.

Freedom of transit is currently dealt with under Article 11 of the Draft Consolidated Negotiating Text (DCNT) (see Box 2 below). Freedom of transit is a development of

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3 While Trade Facilitation is understood as broadly as “the simplification, standardization and harmonization of procedures and associated information flows required to move goods from seller to buyer and to make payments” by UN/CEFACT, a narrower definition was developed in the WTO context.

4 “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).” UNCTAD Trust Fund for Trade Facilitation Negotiations, Technical Note 8: “Freedom of Transit”, Rev2, February 2009.
the original landlocked countries’ right to access to the sea. Although numerous international conventions grant freedom of transit – especially for landlocked States, they also protect the rights and “legitimate interests” of the transit country: freedom of transit is thus balanced with national sovereignty. International treaties on transit aim to solve this tension, allowing the transit State to set the conditions under which the other Member State’s traffic will be allowed to cross its territory.\(^5\) In this paper, the term “freedom of transit” combines both GATT art. V and DCNT art. 11.

**Box 1: GATT Article V**

Article V of the GATT 1994 grants freedom of transit to 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:

(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 favored nation treatment in terms of charges, regulations and formalities.


1. **GATT/WTO transit obligations shall apply to**:\(^6\)
   - Goods moved via a fixed infrastructure, such as energy products carried by pipelines or electrical power lines, and
   - State enterprises (e.g., state-owned railroad) or private enterprises that have monopoly position or special privileges (e.g., transit pipeline owners/operators).

Members shall not be required to build or permit others to build infrastructure of any kind (e.g., railroads, roads, pipelines) to facilitate transit, and shall not be required to provide access to such infrastructure unless it is open to general use by third parties.

2. **Charges, regulations or formalities on transit shall not be more restrictive than necessary**, and shall be eliminated or reduced if no longer required or a less trade-restrictive solution becomes available.

Charges may be imposed on transit only for transit administrative procedures entailed or transit services provided, and shall be limited in amount to the expense of such procedures or cost of such services.

Members must periodically review any charges imposed on transit traffic for possible reductions, and must regularly notify the WTO Committee of the reasons and duration of any such charges, regulations or formalities.

Members shall not seek, impose or maintain voluntary restraints or similar measures on traffic in transit.

3. **Non-discrimination**

*Non-discrimination*: A Member shall not discriminate against goods in transit or transport means of other Members except as permitted by other WTO agreements and for justified reasons.

*National Treatment*: A Member’s regulations and formalities affecting traffic shall not treat transit movements less favourably than domestic traffic or export or import movements.

*Treatment Preceding Transit*: A Member shall not treat goods that will pass in transit through another Member’s territory to the final destination less favourably than if the goods were shipped to the destination without passing through that other Member’s territory.

4. **In processing and control of transit movements, a Member**:\(^6\)
   - shall allow pre-arrival declaration.

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\(^6\) Some of the provisions featured in the DCNT, such as those clarifying the scope and coverage of freedom of transit, are not included in the final WTO trade facilitation agreement text agreed in Bali in December 2013.
- shall not apply formalities, documentation requirements or controls other than those necessary to identify the goods and ensure compliance with transit requirements.

- shall not apply customs charges, formalities or inspections other than at the offices of departure and destination (and not en-route).

- shall promptly terminate the transit operation once goods reach the office of exit, if all requirements are met.

Members are encouraged to make separate lanes or similar infrastructure for transit in traffic.

5. Any guarantee that Customs requires for a transit movement:

- shall not exceed in amount the potential duty and charges; 

- shall be discharged by Customs without delay once the transit is completed; and 

- may be renewed by the trader thereafter. Customs may require a convoy to accompany goods only if the goods are high risk and so specified in the Member’s laws and regulations.


Transit facilitation: a complex system of legal instruments

Freedom of transit is addressed through a wide range of international legal instruments. These instruments vary in type as well as geographical scope. For example, transit is sometimes covered by international trade agreements, but also often by road transport agreements or even specific transit agreements. In addition, if global legal instruments (such as the GATT) provide – usually broad – principles related to transit, these are usually coupled with – more specific – (sub) regional and bilateral treaties.

Kunaka et al. (2013) found several reasons explaining this tendency for States to negotiate and conclude such a diversity of agreements addressing transit. The first is political in nature: formally expressing through one –or more- treaty their will to cooperate and improve their relations makes it easier to implement reform. Other stem from economic considerations and include needs to set the conditions under which transit can be performed across respective territories in an equitable manner; to detail bilaterally the implementation of broader commitments, such as the ones contained in multilateral treaties; or to send a positive signal to markets.

This diversity of instruments raises a number of issues, which can have positive or negative impacts in terms of trade facilitation. On the one hand, the ability for countries to negotiate and conclude various bilateral transit-related treaties can constitute

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a quicker and more flexible way for cooperation than multilateral instruments, thanks to a smaller number of individual interests to conciliate. Initiation and gradual improvement of varied transit mechanisms on a smaller scale may also facilitate the emergence of best-practice models to be transposed at a multilateral level. Inclusion of transit facilitation provisions in both trade agreements and transport agreements may also in principle provide for a more broad-based support for implementation of freedom of transit.

On the other hand, there is no guarantee that provisions related to transit are consistent across the different agreements signed by a given country, in particular since the line ministries in charge of negotiating often differ according to the type of agreement being signed. The multiplicity of bilateral instruments also inherently creates a legal environment difficult to apprehend and analyze comprehensively. This is particularly true in relation to transit facilitation: apart from the Vienna Convention article 80\(^8\) – which is very partially implemented – and the WTO transparency mechanism for regional trade agreements (RTAs),\(^9\) States are not committed to publish their international transit-related treaties. Importantly, bilateral agreements tend to reflect the relative bargaining power of the negotiating partner, leading to transit-related provisions and agreements that provide for differential amounts of freedom of transit and transit facilitation – which might ultimately conflict with multilateral commitments.

Transit provisions in preferential trade agreements

Freedom of transit is an important component of the WTO trade facilitation agreement. However, analysis of bilateral and regional trade agreements in the ESCAP region suggests that only few such agreements include provisions on transit facilitation.\(^10\)

In a first attempt to understand the extent to which preferential trade agreements (PTAs) entered into by ESCAP countries may facilitate transit, we searched for transit-related provisions in PTAs involving countries of the Asia-Pacific region.\(^11\) International transit was found to be only marginally addressed in PTAs, with only a minority of these agreements covering international transit directly (i.e., by specifying their own rules on transit) or indirectly (i.e., by referring to another agreement, e.g., GATT art. V).

Out of 153 agreements, 66 grant freedom of transit for all contracting parties. Among those, 32 refer explicitly to GATT art. V. Although the number of PTAs covering transit has continued to grow in absolute terms, such agreements have become proportionally less prevalent (see figure 2).

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8 Vienna Convention on the Law of the Treaties, 1969, art. 80(1): “Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.”

9 GATT art. XXIV (7).


11 Source: Asia-Pacific Trade and Investment Agreement Database (APTIAD).
In the agreements where it is mentioned, freedom of transit is essentially considered from a broader trade facilitation viewpoint. It is generally granted, but its technical aspects related to implementation are not covered. A detailed review of the 66 agreements with transit-related provisions show that none of them mention anything about key underlying transit facilitation measures such as those related to recognition of customs seals, escort fees or transit guarantees. Two representative examples of transit provisions found in PTAs are provided in Box 3.

**Box 3: Transit Facilitation in PTAs: Examples from the Japan-Philippines and Armenia-Kazakhstan Agreements**

The two trade agreements quoted below are among the most comprehensive found in terms of transit facilitation. They are representative of the two different approaches identified: (1) a simple reference to the WTO agreements and GATT art V.; or (2) one specific article on freedom of transit and its different aspects. The second approach is typical of agreements where not all parties are members of the WTO.

**Japan-Philippines**

**Article 11**

**Relation to Other Agreements**

1. The Parties reaffirm their rights and obligations under the WTO Agreement or any other agreements to which both Parties are parties.
2. In the event of any inconsistency between this Agreement and the WTO Agreement, the WTO Agreement shall prevail to the extent of the inconsistency.

(...) 

Article 52

Transparency

1. Each Party shall ensure that all relevant information of general application pertaining to its customs laws is readily available to any interested person.

2. When information that has been made available must be amended due to changes in its customs laws, each Party shall, wherever possible, continue to make the revised information publicly available prior to the entry into force of the changes.

3. At the request of the interested person, each Party shall provide, as quickly and as accurately as possible, information relating to the specific matters raised by the interested person and pertaining to its customs laws. Each Party shall supply not only the information specifically requested but also any other pertinent information which it considers the interested person should be made aware of.

Each Party shall endeavor to provide such information in language mutually understandable within its available resources.

Article 54

Goods in Transit

Each Party shall continue to facilitate customs clearance of goods in transit from or to the other Party in accordance with paragraph 3 of Article V of the GATT 1994.

Armenia – Kazakhstan

Article 10

Each Party shall provide free transit over the territory of its country for goods originated within the customs territory of the other Party or having originated in third countries and destined for the customs territory of the other Party or any third country, and shall supply the exporters, importers, and shipping companies involved in such transit operations with all the available resources and services required for the execution of these transit operations on terms (including financial) that are not worse than the terms for providing the same resources and services to exporters, importers, and national shipping companies of any other third country.

Each Party guarantees waiving any customs duties and transit fees on trans-shipment of goods originated within the customs territory of the other Party, and this shall be formalized by a separate agreement.

Rates on trans-shipment by any means of transportation, including the rates for loading and unloading operations, shall be economically justified and shall not exceed normal operating expenses, including reasonable profit rates.
No PTA was identified which featured transit provisions that clearly exceeded those of GATT art. V – or the WTO trade facilitation agreement. To the extent that they specify that WTO rules prevail in the case of inconsistencies between the PTA and the WTO agreement, as in the case of the Japan-Philippines agreement (art. 11), PTAs covering transit may have at best a potential to facilitate transit similar to that of the WTO trade facilitation agreement.

**Trade Facilitation Potential of Selected Transport and Transit Agreements**

**Sample and analytical template**

The methodology followed in this analysis is inspired by the Quantitative Analysis of Road Transport Agreements (QuARTA) approach of Kunaja et al. (2013), including selection of a sample of agreements and development of an analytical template. A sample of 19 international transport and transit agreements is selected with a view to ensuring adequate representation across ESCAP sub-regions (figure 3). Given the importance of international transit for landlocked countries, priority is given to agreements to which at least one landlocked State is a member – all 12 ESCAP landlocked States are represented at least once. The sample is also representative of the diversity in the types of agreements: bilateral and multilateral, “transit” and “road transport” agreements, and “water transit” agreements. Table 2 provides a detailed list of agreements selected.

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12 Unlike for trade agreements, existing databases on transit-related agreements are few and far from exhaustive. Collection by ESCAP Trade and Investment Division of texts of international transport and transit agreements through the United Nations Treaties website and other relevant online sources as well as through collaboration with the WTO Secretariat resulted in an initial database of 116 bilateral agreements involving States from the ESCAP region - many more agreements exist but their text could not be located.
Since our analysis aims at determining the potential trade-facilitating effect of Asian transit agreements by comparing the requirements of the selected agreements with those provided in WTO rules and DCNT art. 11, the QuARTA analytical template is both simplified as well as completed with transit-related requirements specified in GATT art. V and the DCNT text. Our template generally follows the structure provided for in DCNT art. 11 as detailed in the WTO Trade Facilitation Negotiations Self-Assessment Guide: (a) scope and coverage, (b) charges, regulations and formalities, (c) non-discrimination principle, (d) transit procedures and controls, (e) guarantees-related provisions, and (f) cooperation and coordination. In each case, we tried to determine whether the transit agreement provisions are generally consistent with, more restrictive than, or more facilitative than the DCNT requirements.

It is worth noting that the DCNT of July 2013 is arguably more facilitating than the final WTO TFA text agreed at the Bali Ministerial, as a lot of the bracketed text in the draft art. 11 of the DCNT was ultimately deleted, including for example two of the three provisions on strengthening non-discrimination (see Annex 1).

Table 1: List of agreements selected for analysis

<table>
<thead>
<tr>
<th>Agreement's short name</th>
<th>Agreement's title</th>
<th>ESCAP contracting parties</th>
<th>Date of signature</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Afghanistan - Pakistan</td>
<td>Afghanistan - Pakistan Transit Trade Agreement</td>
<td>Afghanistan, Pakistan</td>
<td>2010</td>
</tr>
<tr>
<td>3. Bangladesh - India</td>
<td>Trade Agreement Between the Government of the Republic of Bangladesh and the Government of the Republic of India - Protocol on Inland Water Transit and Trade</td>
<td>Bangladesh, India</td>
<td></td>
</tr>
<tr>
<td>5. ECO TTFA</td>
<td>ECO Transit transport framework agreement</td>
<td>Afghanistan, Turkmenistan, Tajikistan, Pakistan, Iran, Turkey, Kazakhstan, Kyrgyzstan</td>
<td></td>
</tr>
<tr>
<td>6. GMS - CBTA</td>
<td>Agreement between and among the governments of the Lao's People Democratic Republic, the Kingdom of Thailand, and the Socialist Republic of Viet Nam for facilitation of cross-border transport of goods and people</td>
<td>Cambodia, China, Lao, Myanmar, Thailand, Viet Nam</td>
<td>1999</td>
</tr>
<tr>
<td>7. India-Bhutan</td>
<td>Agreement on Trade, Commerce and Transit between the Government of the Republic of India and the Royal Government of India</td>
<td>Bhutan, India</td>
<td>2006</td>
</tr>
<tr>
<td>8. Iran - Turkey</td>
<td>Transit Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Iran</td>
<td>Iran, Turkey</td>
<td>1968</td>
</tr>
<tr>
<td>9. Iran - Turkey</td>
<td>International Road Transport Agreement Between the Government of the Republic of Turkey and the Government of the Islamic Republic of Iran</td>
<td>Iran, Turkey</td>
<td>1980</td>
</tr>
<tr>
<td>10. Vordecez - Uzbekistan</td>
<td>International Road Transport Agreement Between the Government of the Republic of Uzbekistan and the Government of the Islamic Republic of Iran</td>
<td>Iran, Uzbekistan</td>
<td></td>
</tr>
<tr>
<td>12. Kazakhstan - Kyrgyz Republic</td>
<td>Agreement Between the Government of the Republic of Kazakhstan and the Kyrgyz Republic on International Road Transport</td>
<td>Kazakhstan, Kyrgyz Republic</td>
<td></td>
</tr>
<tr>
<td>19. TRACECA</td>
<td>Basic Multilateral Agreement on International Transport for Development of the Europe - the Caucasus - Asia corridor</td>
<td>Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkey, Uzbekistan</td>
<td>1999</td>
</tr>
</tbody>
</table>
Findings and discussion

It is important to remember at the outset that our analysis provides an analysis of the scope and potential facilitation effect of agreements – and specific provisions within them - from a legal point of view, and does not reflect the actual environment for goods in transit. Indeed, depending on practical constraints faced during implementation of the agreements and the willingness and intent of the parties, even identical provisions in two different agreements can lead to different level of facilitation on the ground.

The findings are summarized in table 3. This comparative table shows the scope of each of the 19 agreements in our sample and the extent to which they feature various transit facilitating provisions. The provisions reviewed are introduced and discussed in turn below, in light of WTO rules and the DCNT text and with a view to identifying good practices.

a. Scope

As mentioned earlier, WTO rules\textsuperscript{15} provide that contracting parties shall grant freedom of transit through their territories to “[g]oods (including baggage) and also vessels and other means of transport […] via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties”. Traffic in transit includes passage across a territory “with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport”.

Definitions of “international transit”

Definitions of “international transit” were found in 14 agreements of our sample. The form of transit covered then is systematically through transit, i.e. “when the passage through [the] territory [of a Contracting Party] is only a portion of a complete journey starting and ending beyond the frontiers of a Contracting Party across whose territory the traffic passes”.\textsuperscript{16} However, a certain disparity appears in several respects. Two agreements provide additional geographical restrictions, mainly in relation to the goals and purposes of the agreements: Bangladesh-India limits its definition of transit to the “passage of goods between two places in one country through the territory of the other”\textsuperscript{17} contracting party – thereby excluding transit to a third country. Kazakhstan-Turkmenistan\textsuperscript{18} on the contrary excludes transit between two places of the same territory, specifying that traffic in transit must reach a third country.

Disparity is also observable in the transport operations encompassed under the definition of transit. Most of the agreements are less extensive than WTO rules, sometimes not evoking such operations (e.g., Iran-Uzbekistan) or only some of them (e.g., Afghanistan-Pakistan includes the passage of goods “with or without transshipment, or change in the mode of transport”\textsuperscript{19} but does not refer to warehousing nor breaking

\textsuperscript{15} GATT art. V:1 and :2.
\textsuperscript{16} GMS-CBTA art. 3(u).
\textsuperscript{17} Protocol on inland water transit and trade, Préambule.
\textsuperscript{18} Art. 2(8).
\textsuperscript{19} Art. 2.
bulk). Two of them seem actually more extensive than GATT art. V in this regard: “the assembly, disassembly or reassembly of machinery and bulky goods” is included under the Nepal-Bangladesh and Nepal-India agreements\(^{20}\) definition of transit.

**Freedom of Transit**

All the agreements selected cover transit of goods. Furthermore, a majority of them go beyond GATT requirements (limited to goods), encompassing passengers in their scope (e.g. Kazakhstan-Kyrgyz Republic: freedom of transit for passengers\(^{21}\)).

Freedom of transit is also almost always granted to the vessels, in accordance with GATT art. V. Yet, additional restrictions seem to be generally imposed in this regard: a large number of agreements require that the vessels be registered in one of the contracting parties to benefit from freedom of transit. Only a few marginal exceptions to that requirement can be found. For example, Kazakhstan-Tajikistan agreement\(^{22}\) provides that while motor vehicles in transit have to be registered in a contracting party, trailers may be registered in a third country.

**Modes of Transport and Trade routes**

Although GATT art. V suggests that traffic should be allowed to transit freely via any available route, agreements selected show that traffic in transit can face different conditions according to the mode of transport or route used.

Firstly, most agreements apply to some specific modes of transport only. Eight of the 19 agreements in our sample only cover one mode of transport (i.e., one inland water transit and 7 international road transport agreements). As for the other 11 agreements, while all of them deal with road transport, only some of them also provide freedom of transit for rail transport (7), inland water transport (4), maritime transport (6), and air transport (4). With regards to the goods “moved via fixed infrastructures” mentioned in the WTO DCNT, only the TRACECA agreement refers to pipelines.

Secondly, it appears that agreements covering different modes of transport institute different treatments among them. For instance, the Afghanistan-Pakistan agreement (covering road, railway and sea) institutes two different types of permits: “permit A” for the goods imported or exported by sea, valid for 15 days; “permit B” for the goods not imported or exported by sea, valid for 30 days.\(^{23}\) In that particular case, this differentiated treatment is more favorable to the goods transiting by road and railway than to the ones transiting by sea.

Thirdly, an obvious limitation to the Freedom of Transit principle is prescription of designated trade routes and/or of designated exit and entry points. Although such measures may be contradictory to GATT art. V, they were found in a majority of treaties from our sample. Such a limitation could fall under some exceptions listed in the GATT agreement, such as security exceptions (GATT art. XXI). However, these exceptions are specific to certain circumstances and require justifications (e.g. “protec-

\(^{20}\) Art. 2.
\(^{21}\) Art. 1.
\(^{22}\) Art. 6(2).
\(^{23}\) Protocol 1 art. 25(2).
tion of its essential security interests”). From our sample, it appears that only one agreement specifies the criteria used to determine these routes (Kazakhstan-China: prescribed routes for oversized and overweighed vehicles, and transport of dangerous goods).

b. Charges, regulations and formalities

**Exemption from charges and reasonableness principles**

The WTO law\(^{25}\) states that traffic in transit “shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.” Moreover, all charges imposed on traffic in transit “shall be reasonable.”

From the sample studied, it appears that the general exemption of traffic in transit from customs duties, fees and charges principle is generally granted. Likewise, the reasonableness principle is present in a majority of agreements – although a significant number of them do not stipulate anything in this respect.

**Transit Traffic Quotas**

According to WTO DCNT, this reasonableness principle applies also to regulations: “regulations or formalities in connection with traffic in transit […] shall not be more restrictive on traffic in transit than necessary and shall not be applied in a manner that would constitute a disguised restriction on transit traffic.”\(^{26}\)

If quotas are not expressly mentioned in this provision, such restrictions to international transport can safely be qualified as a regulation “in connection with traffic in transit”. Consequently, a very facilitative agreement would ideally prohibit the use of quotas. When such restrictions are considered as being necessary, an international agreement authorizing quotas should preferably explicitly limit their use to the circumstances justifying their allowance, so as to prevent unnecessary or disguised restrictions to traffic in transit.

Quotas are mentioned in ten agreements in our sample. Half of them prohibit the use of quotas, allowing transit in an open-ended manner. Among the five other agreements authorizing transport quotas, two different situations can be found:

- Agreements justifying quotas or restricting the use of quotas to specific situations. Two agreements of our sample fall under this category. The Afghanistan-Pakistan agreement stipulates that the parties may agree to set up a quota system for the issuance of transit permits “to respect a fair share of traffic between the two Contracting Parties”. In like manner, Bangladesh and India agreed to respect “as far as practicable” an equitable share of transit cargo on an equal tonnage basis.

\(^{24}\) Art. 7(1).
\(^{25}\) GATT art. V:3 and :4.
\(^{26}\) DCNT art. 11(3).
- Agreements allowing quotas without justification or limits: the Iran-Turkey agreement for instance simply states that the carriage of goods in transit "shall be subject to prior permit based on quota".

**Periodical review**

In order to further trade and transit facilitation, the DCNT institutes a requirement for the States to "periodically review [their] charges on traffic in transit with a view to reducing them".\(^27\)

It appears from our sample that such commitment is rarely present in international transit agreements. It is also worth noting that the few agreements providing an obligation of periodical review systematically apply it more broadly to "all documents and procedures" prescribed for transit.\(^28\)

**Transparency**

DCNT also provides new rules in terms of transparency, stating that "[e]ach member shall notify the Committee on the objective and duration of all charges, regulations or formalities in connection with traffic in transit on a regular basis."\(^29\)

It appears from the sample selected that transparency requirements are mentioned in only a minority of agreements, and that the related obligations can be very variable from one agreement to another. In some instances, this obligation is worded in broader and more flexible terms than the WTO provision: the Kazakhstan-Kyrgyz Republic agreement’s\(^30\) transparency requirement consists in an obligation to exchange information about the changes of national laws that affect the implementation of the agreement, without explicitly clarifying the kinds of regulations covered under this statement.

Some of the other agreements’ obligations are however more extensive. For example, while DCNT art. 11 requires periodical notification (which can be whether a priori or a posteriori) without imposing explicit timeframes,\(^31\) the TTFA stipulates that the parties “shall give due advance notice […] of any additional requirement or modification in prescribed documentation and procedures to be introduced in regard to traffic in transit”.\(^32\) This allows in principle those agencies and operators to anticipate the upcoming modifications in transit regulations and procedures.

In some instances, States also commit themselves to providing transport operators with additional and operational tools designed to facilitate transit operations. These include among others the publication of transit regulations and procedures in Eng-

\(^{27}\) *Idem.*

\(^{28}\) Although it is not expressly mentioned, the context in which these provisions were found suggests that the term "procedures" implicitly integrates transit charges.

\(^{29}\) DCNT art. 11(3bis).

\(^{30}\) Art. 17(1).

\(^{31}\) The text of the WTO trade facilitation agreement (art. 2) adopted in Bali in December 2013 does require consultation and advance notification of changes “in laws and regulations of general application related to the movement, release and clearance of goods, including goods in transit”.

\(^{32}\) TTFA art. 31.
lish and the establishment of enquiry points where transporters can acquire information on relevant measures.

**c. Non-discrimination**

The principle of non-discrimination is a key aspect of general WTO law. The DCNT transposes this principle to traffic in transit. In this context, non-discrimination principle encompasses three different aspects (see box 4 below): non-discrimination per se, national treatment and treatment preceding transit.

**Box 4: DCNT’s requirements on non-discrimination.**

| Non-discrimination: | A Member shall not discriminate against goods in transit or transport means of other Members except as permitted by other WTO agreements and for justified reasons. |
| National Treatment: | A Member’s regulations and formalities affecting traffic shall not treat transit movements less favourably than domestic traffic or export or import movements. |
| Treatment Preceding Transit: | A Member shall not treat goods that will pass in transit through another Member’s territory to the final destination less favourably than if the goods were shipped to the destination without passing through that other Member’s territory. |


The general idea of non-discrimination with regards to traffic in transit was found in a majority of agreements. However, only two of them actually cover the three aspects of non-discrimination as generally provided by WTO law. The non-discrimination sub-principle is the most usually referred to, with 10 agreements granting it, followed by treatment preceding transit (5 agreements) and national treatment (4 agreements).

**d. Transit procedures and controls**

DCNT completes GATT art. V with a new set of requirements designed to simplify transit procedures and controls applied to traffic in transit. Interestingly, these requirements find few, if any, direct equivalence in the treaties from our sample. Thus, the analysis here proposes to group the different requirements under broader topics.

_Preferential facilitation measures for the goods_

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33 GMS-CBTA art. 1.
34 Afghanistan-Pakistan art. 29(b).
35 Art. 11(4), (5) and (6).
36 In contrast to the DCNT which contained such provisions in bracketed text, the unedited final text of the trade facilitation agreement adopted as part of the Bali package on 8 December 2013 does not include specific provisions on non-discrimination or national treatment under the Freedom of Transit Article. [https://mc9.wto.org/system/files/documents/w8_0.pdf](https://mc9.wto.org/system/files/documents/w8_0.pdf)
Several DCNT provisions fall under this category. First, DCNT art. 11(8) states that “[f]ormalities, 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 that transit requirements are have been met.”

Second, DCNT art. 11(9) requires that goods in transit that have been authorized at the border be exempted from “further customs charges, formalities or customs inspections until they conclude their transit”, such as en-route controls. Third, DCNT art. 11(10) prohibits “quality controls or controls of compliance with technical standards on goods in transit.” Forth, DCNT art. 11(11) provides an obligation of “advance filing and processing of transit documentation and data prior to the arrival of goods”.

A small minority of selected treaties provides such facilitative measures (8 out of 19). Moreover, requirements provided can be very different from one treaty to another, and few match DCNT requirements: international treaties deal with these issues whether in a broader way, or through other obligations having a facilitative effect on the transit procedures.

Some treaties provide specific provisions affecting procedures and customs controls. These include provisions on (i) simplification of customs formalities, (ii) exemption from physical inspections, (iii) exemption from *en route* inspections, and on (iv) advance clearance of goods. While such provisions individually contribute to the general preferential facilitation measures for goods in transit, they must be cumulated to reach the level of facilitation envisaged in the DCNT.

Obligation to exempt traffic in transit from physical customs inspections is the most commonly specified. The Mongolia-Russia agreement is a pertinent illustration:

“*The cargo and means of transport of the State lacking access to the sea shall as a rule be subject only to external customs inspection unless, for reasons of *ordre public* and, in particular, public security, morals and health, or with a view to protecting the environment, cultural heritage or industrial, commercial and intellectual property, it is necessary to conduct a full or partial internal inspection.*”

Even though the definition of “*ordre public*” provides a large interpretation margin to the Russian administration, this article seems to cover obligations from both DCNT art. 11(8) and 11(10): external inspection is a particularly non-burdensome customs control (DCNT art. 11(8)), and quality controls or controls of compliance with technical standards don’t seem to fall under the “reasons of *ordre public*” allowing internal inspection (DCNT art. 11(10)). However, this obligation doesn’t provide for simplification of formalities and document requirements (DCNT art. 11(8)), or exemption from en-route controls (DCNT art. 11(9)).

In the same way, prohibition to impose formalities, procedures and controls “*more burdensome than necessary*” is addressed in some of the agreements through the broader obligation of periodical review of formalities mentioned earlier. For example, the GMS-CBTA provides an obligation to “*review periodically the need for and use-*

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37 Mongolia-Russia art. 7(2).
fulness of all documents and procedures required for cross border traffic" 38 and to "reduce to the extent possible, procedures and formalities required for cross-border traffic" 39

It is noteworthy that the only one non-binding provision on advance clearance of goods in transit in the sample was found in GMS-CBTA. 40 With regards to the other three requirements, they are punctually evoked in several treaties – but none of the agreements studied covers them all.

However, some agreements provide facilitation measures that arguably go beyond the DCNT’s requirements, such as single-window inspection, single-stop inspection, or establishment of a Customs Transit System 41. In this regard, the GMS-CBTA clearly represents a best-practice example as it not only cumulates most DCNT requirements, but also provide for single-window inspection and single-stop inspection measures (see Box 5).

Box 5: A “best practice” example: the GMS-CBTA Preferential facilitation measures for the goods

<table>
<thead>
<tr>
<th>Simplification of customs formalities:</th>
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<tr>
<td>“The Contracting Parties […] undertake to:</td>
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<tr>
<td>(i) limit the number of documents and reduce to the extent possible, procedures and formalities required for cross border traffic; […]</td>
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<tr>
<td>(vi) eliminate any documents and formal requirements that are superfluous or do not serve any particular purpose; […]”</td>
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<tr>
<td>Article 35(b)</td>
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</tbody>
</table>

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<tr>
<th>Exemption from physical en route inspections:</th>
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<tbody>
<tr>
<td>“[…] the cargoes carried cross border […] shall as a general rule be exempted from routine physical customs inspection en route […]”</td>
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<td>Annex 6 art. 2(a)</td>
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<thead>
<tr>
<th>Single-window inspection</th>
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<tr>
<td>“Single-window inspection: The different inspections and controls of people […], vehicles […], and goods […] shall be carried out jointly and simultaneously by the respective Competent Authorities involved (e.g., customs, police, immigration, trade, agriculture, health department).”</td>
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</tbody>
</table>

38 Art. 35(b)(v).
39 Art. 35(b)(i).
40 Art. 4(d).
41 A Customs Transit System is established in the Afghanistan-Pakistan agreement. However this measure would need to be clarified so as to be able to assess its legal – and facilitative - effects.
Article 4(a)

**Single-stop inspection**

“Single-stop inspection: The officials of the country pairs shall assist one another to the extent possible in the performance of their duties. The two adjacent national authorities will carry out their inspections jointly and simultaneously.”

Article 4(b)

**Immigration formalities**

Immigration formalities aren’t specifically covered by WTO rules. However, some – mainly multilateral – agreements in the sample do include provisions to facilitate delivery of visas to the drivers and persons engaged in international transit operations.

The modalities vary from one agreement to another, but some common features include: a multiple-entry visa for a minimum validity period ranging from six months (Afghanistan-Pakistan) to one year (ECO, TTFA). Requirements in terms of length of stay can be flexible (GMS-CBTA: "multiple entry/exit visa for a minimum validity period of one year") or more specific (ECO-TTFA: “multiple entry and transit visas valid for a period of one year with a right of staying on the territory of each Contracting Party for 15 days in transit for each trip and for up to 5 more days in place of loading and discharge”).

**Customs seals**

Customs sealing is another aspect not evoked in WTO texts but found in several bilateral or multilateral agreements on transit. Customs sealing regulations can be grouped under two different categories: mutual recognition of customs seals, and unilateral recognition of customs seals.

Mutual recognition means that customs authorities of each country will recognize seals apposed by the other country’s customs authorities. This potentially greatly facilitates transit, by exempting sealed cargoes from physical inspections and double-checks.

From our sample, mutual recognition of customs seals seems to typically belong to multilateral agreements (ECO-TTFA and GMS-CBTA agreements), but some bilateral treaties also provide such provisions: “If the lead seals affixed by the customs authorities of one of the Contracting Parties […] are found intact […], vehicles will be inspected by the customs authorities of the other Contracting Party externally; be sealed off and be permitted to enter and leave the country.” (Iraq-Turkey).

In contrast, unilateral recognition is found exclusively in bilateral agreements. In some instances, one party has exclusivity on the recognition of Customs seals (Ne-
pal-Bangladesh\textsuperscript{47}). For example, in Nepal-Bangladesh, the coastal state (Bangladesh) unilaterally grants a right of transit to the state lacking access to the sea (Nepal). Generally, mutual recognition is agreed on when both countries believe they have a clear reciprocal interest in facilitated transit through the other’s territory.

e. Guarantees and escorts

Guarantees (limitations of)

DCNT adds new requirements to WTO rules regarding transit guarantees: guarantees imposed by the customs “shall not exceed the full amount of the duties or charges which may be incurred”,\textsuperscript{48} “shall be discharged without delay” when the transit operation is done\textsuperscript{49} and “be renewed for subsequent consignments once a previous one is proved to have reached its destination”\textsuperscript{50}.

Few of these requirements were found in our sample as guarantees are rarely evoked. Only three treaties provide a limit on the maximum amount of guarantees. The limit in two of the agreements are expressed in absolute terms (GMS-CBTA: “The amount of security to be provided […] shall be a maximum of SDR 70,000”,\textsuperscript{51} Iraq-Turkey: “Enterprises and companies of transport […] will, as custom guarantee, deposit a sum equivalent to $12,000 in local currency which can be either in cash or in letter of credit\textsuperscript{52}”), and in one of the agreements in relative terms (Nepal-India: goods “shall be covered by an insurance company or a bank guarantee, at the option of the importer, for an amount equal to the Indian customs duties on such goods\textsuperscript{53}”).

The rules on guarantees also can differ within the same treaty according to the means of transportation. For example, in Nepal-India, a distinction is made between goods moving by rail and goods moving by road in trucks belonging to listed companies on the one hand, and goods moving by road in trucks of other companies on the other hand\textsuperscript{54}.

None of the treaties analyzed provide a time limit on discharge of guarantee. In addition, the possibility of renewable guarantees was found only once, in the Afghanistan-Pakistan treaty: “Persons who regularly carry out Customs transit operations shall be entitled to lodge a revolving guarantee, acceptable to customs, valid for at least one year”.\textsuperscript{55}

\textsuperscript{47} Protocol art. 3.
\textsuperscript{48} DCNT art. 11(13).
\textsuperscript{49} DCNT art. 11(14).
\textsuperscript{50} DCNT art. 11(15).
\textsuperscript{51} Annex 6 art. 11(c).
\textsuperscript{52} Exchange of letters I, a.
\textsuperscript{53} Memorandum, Import procedure par. 9(b).
\textsuperscript{54} Memorandum, Import procedure par. 9.
\textsuperscript{55} Afghanistan-Pakistan Protocol 3 art. 9(3) and (4).
Based on the DCNT, future international trade law may also limit escorts: “Members shall not require the use of customs convoys for traffic in transit, except for circumstances presenting high risks”\textsuperscript{56}

The issue of Escorts is actually addressed only by a small minority of treaties. A few are consistent with DCNT, limiting mandatory escorts on traffic in transit to some exceptional circumstances (Afghanistan-Pakistan: escorts required “in very exceptional cases, where goods are precious and highly susceptible to diversion en route”\textsuperscript{57}) or on some specific routes. One treaty, GMS-CBTA,\textsuperscript{58} goes further than the DCNT by exempting all traffic in transit from mandatory escorts.

f. Cooperation and coordination

DCNT provides additional facilitative measures through cooperation between the parties. This includes a general obligation to “cooperate and coordinate with one another with a view to enhance freedom of transit”,\textsuperscript{59} and an incentive to “appoint a national transit coordinator”.\textsuperscript{60}

Cooperation measures are provided by a large number of treaties, mainly through an obligation to exchange information related to transit. In most cases, they consist in a transposition of GATT art. X, with an obligation of transparency on procedures and regulations (ASEAN Framework Agreement: “The Contracting Parties shall ensure transparency of its respective laws, regulations and administrative procedures which affect the facilitation of transit transport of goods under this Agreement. […] Parties shall deposit with the ASEAN Secretariat [their] laws, regulations and procedures”\textsuperscript{61}). However, they also include an obligation to exchange operational information designed to improve enforcement of national transit regulations: “The Customs authorities [shall] communicate to each other as promptly as possible: (a) Information relating to Goods declarations, completed and accepted in their territory which are suspected to be false; (b) Information to enable the authenticity of seals claimed to have been affixed in their territory to be verified”,\textsuperscript{62} and “any serious inaccuracy in a Goods declaration or of any other serious irregularities discovered”\textsuperscript{63} (ECO-TTFA).

Obligation to designate a “national transit coordinator”, although rarely evoked, was found in two treaties: ASEAN Framework Agreement\textsuperscript{64} and GMS-CBTA.\textsuperscript{65} This can be seen as an encouraging sign from a WTO prospective.

\begin{footnotesize}
\begin{enumerate}
\item DCNT art. 11(16).
\item Protocol 3 art. 16(a).
\item Art. 7(a).
\item DCNT art. 11(17).
\item DCNT art. 11(18).
\item Art. 27(1)&(2).
\item ECO TTFA Annex 7 Section 2 art. 10.
\item ECO TTFA Annex 7 Section 2 art. 11.
\item Art. 29.
\item Art. 28.
\end{enumerate}
\end{footnotesize}
## Table 2: Scope and Provisions of Selected Asian Transport and Transit Agreements for Trade Facilitation

<table>
<thead>
<tr>
<th>Scope</th>
<th>Afghanistan - Pakistan</th>
<th>Nepal - India</th>
<th>Irak - Turkey</th>
<th>GMS - CBTA</th>
<th>ECO TTFA</th>
<th>TRACECA</th>
<th>Nepal - Bangladesh</th>
<th>Iran - Uzbekistan</th>
<th>Iran - Turkey</th>
<th>Mongolia - Russia</th>
<th>Bangladesh - India</th>
<th>Kazakhstan - Kyrgyz Republic</th>
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*If routes prescribed, criteria used for route specification are indicated*
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<tr>
<th>Charges, regulations and formalities</th>
<th>Afghanistan - Pakistan</th>
<th>Nepal - India</th>
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Conclusion and Implications

The importance of transit facilitation for the development of landlocked developing countries cannot be overstated: effective participation of these countries in global trade is likely to remain elusive without freedom of transit. The negotiations on trade facilitation at the WTO identified transit as a key component of the trade facilitation agenda and provided a unique opportunity to clarify and strengthen the rules in this area.

The analysis of selected Asian transit-related agreements presented in this paper suggests that little attention has generally been given to transit facilitation matters in preferential trade agreements, with many countries dealing with these matters through a variety of other bilateral and regional instruments, notably international transport or transit specific agreements. In fact, it appears that PTAs and international transit agreements do not play the same role with regards to transit facilitation. The first ones tend to provide general political support for freedom of transit without providing extensive implementation tools. The second ones do also have political implications, but often go far deeper into concrete implementation aspects. As such, the use of the two types of instruments may be seen as complementary.

At the same time, our analysis highlighted some of the challenges arising from addressing transit issues through a variety of separate trade, transport, and/or transit specific treaties and instruments – rather than through a more integrated approach. Such an approach indeed can lead to legal contradictions and inconsistencies, possibly best illustrated by the fact that WTO rules grant freedom of transit through the most convenient routes while a large number of bilateral transport and transit specific agreements reviewed prescribe specific trade routes for traffic in transit, some of which may or may not be most convenient. Addressing such legal inconsistencies would be important in ensuring the continuing credibility of the multilateral trading system.

As illustrated in figure 4, with the notable exception of the Afghanistan-Pakistan transit trade agreement, “good practices” and innovative transit facilitating measures were found in multilateral rather than bilateral agreements, confirming the general superiority of such instruments over bilateral ones for achieving more balanced outcome and inclusive growth. In bilateral agreements, international transit is addressed through each party’s interest and a balanced outcome may be particularly difficult to achieve when the treaty is being negotiated between a landlocked and a coastal country. On the contrary, multilateral agreements may reflect a common interest at a regional or global level. An integrated approach, granting freedom of transit as a regional common interest would thus allow transit facilitation to be considered as part of an overall regional development strategy – as it was considered, in the context of the WTO negotiations, as part of a global development agenda.
Referring to figure 4, the DCNT – as of July 2013 – included particularly ambitious and innovative measures not or rarely found in the bilateral or regional transport or transit agreements reviewed in this paper. Some of these measures included, for example, advance clearance of goods in transit (found in 1 treaty only), renewal of guarantees (1 treaty) and designation of national coordinators (3 treaties). At the same time, however, some measures widely found in bilateral and multilateral treaties were found to be absent from WTO rules and the DCNT, e.g., mutual recognition of customs seals (5 treaties), simplified immigration formalities for the drivers (5 treaties) and freedom of transit for passengers (10 agreements). Such positive practices at a regional level could be transposed at a global level; possibly in a future update to art. 11 of the WTO Trade Facilitation Agreement (TFA).

Generally, the differences found in the transit facilitation measures included in trade agreements and those included in international transport and transit specific agreements suggest a need for closer collaboration and coordination between the agencies responsible for trade (who lead trade negotiations), those responsible for transport (who lead transport agreement negotiations), as well as the various control agencies and private sector operators at the relevant border crossings and along transit corridors. Closer – and earlier – collaboration would contribute not only to a more transparent and less conflicting rules on transit but also increase the chance that transit facilitation measures will be effectively applied and implemented on the ground. The WTO TFA is promising in this regard, as it mandates the establishment of national transit coordinators in addition to requiring Members to “establish and/or
maintain a national committee on trade facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of provisions of this Agreement.66

The DCNT text of July 2013, used as the benchmark for the trade facilitation potential analysis of bilateral and regional transit agreements in this paper, looked particularly promising for transit countries, as art. 11 on Freedom of Transit then contained (albeit in brackets) many very specific provisions, in particular broadening the scope of GATT art. V and strengthening non-discrimination. A number of these provisions did not find their way into the final text of art. 11 agreed by WTO members in Bali on 8 December 2013 (see Annex for a comparison of the July DCNT text and the final text). Nonetheless, as reflected in Figure 4, the Bali text clearly enhances the freedom of transit of WTO members, with specific provisions on guarantees and institutional aspects having been agreed upon.67 This should be welcome news for WTO landlocked developing economies in particular, which may have a unique opportunity to further advance Freedom of Transit through the new WTO Committee on Trade Facilitation, established to afford “Members the opportunity to […] consult on any matters related to the operation of this Agreement or the furtherance of its objectives”.68

It may be worth reminding once again that the analysis presented here only provided a preliminary assessment of the trade facilitation “potential” of various transit related agreements based on legal provisions they contained. However, it remains to be established whether the agreements with the highest “potential” do lead to the highest level of transit facilitation in practice. For example, while the Afghanistan-Pakistan transit agreement was found to have the highest legal potential among other bilateral agreements reviewed, informal discussions with officials from both countries suggest that implementation has been very challenging. Similarly, discussions with cross-border logistics service providers in the Greater Mekong subregion suggest that the GMS CBTA, while featuring leading edge transit facilitation measures, may not as yet have facilitated transit more than some of the much simpler bilateral transit treaties among GMS countries.

Another issue that may deserve some further attention is the relationship between the multilateral trade and transport instruments and how to enhance linkages between them. Indeed, instruments such as The Convention on International Transport of Goods Under Cover of TIR Carnets (TIR Convention),69 while not mentioned in the WTO TFA, provide for very concrete and detailed mechanisms for transit facilitation.70 As the WTO TFA implementation begins, incorporating these existing instruments into implementation plans may be an effective way to further the objectives of the new WTO agreement.71

66 WTO TFA, art.13.2.
67 Using our analytical template, the GATT+WTO TFA gets a trade facilitation potential score only four points lower than the GATT+DCNT, i.e., a much higher score than most bilateral and regional transit agreements reviewed.
68 WTO TFA, art.13.1.
69 As of May 2013, there were 68 parties to the Convention, including 67 states and the European Union. See http://www.unece.org/tir/welcome.html.
70 See also ESCAP (2007), Towards a Harmonized Legal Regime on Transport Facilitation in the ESCAP Region, ST/ESCAP/2489, for a list of other relevant transport instruments and useful guidelines on legal frameworks for transport facilitation.
71 Exploring the links between the transit facilitation objectives of the WTO TFA and transportation services covered in the General Agreement on Trade in Services may also be useful in that context.
ARTICLE 11: FREEDOM OF TRANSIT

[1. Goods subject to the provisions on Freedom of Transit of GATT 1994 and of this Agreement include those moved via fixed infrastructure, inter alia pipelines and electricity grids.

1bis For greater certainty, nothing in Article V of the GATT 1994 or this Agreement shall be construed to require a Member:

(a) to build infrastructure of any kind in its territory, or to permit the building of infrastructure by others, in order to facilitate the transit of goods;

(b) to provide access to any infrastructure for transit unless such infrastructure is open to general use by third parties. For the purpose of this Agreement, the term "general use by third parties" does not include access to infrastructure granted on a contractual basis.

2. Each Member undertakes that if it establishes or maintains a State enterprise or if an enterprise has, formally or in effect, exclusive or special privileges, such enterprise shall, in its regulations, formalities and charges – including transportation charges –, on or in connection with traffic in transit, comply with the provisions on traffic in transit of this Agreement.

1. Any [charges,] regulations or formalities in connection with traffic in transit imposed by a Member [in accordance with Article V of GATT 1994] shall not:

[a. be more restrictive on traffic in transit than necessary [to fulfil a legitimate objective.]

a. be 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,

b. be applied in a manner that would constitute a disguised restriction on traffic in transit.

[Except as otherwise provided in Article V of GATT 1994, no Member shall impose charges for reasons of any kind, including for allowing transit through its territory. Any charge imposed by a Member consistently with Article V of GATT 1994, shall:

(a) Only be imposed for the administrative procedures entailed or transit services provided in connection with the transit movement in question;

(b) Not exceed the approximate administrative expenses entailed or cost of the
transit service rendered; and

(c) Not be calculated on ad valorem basis.

Each Member shall periodically review its charges on traffic in transit with a view to reducing them, where practicable.

3bis Each Member shall notify the Committee on the objective and duration of all charges, regulations or formalities in connection with traffic in transit on a regular basis.

Members may draw the Committee’s attention to examine any measure that under their judgement should have been notified by another Member.

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. Members shall not apply discriminatory measures to goods in transit, or to vessels or other means of transport of other Members, for reasons of any kind. This does not exclude the right to resort to the exceptions already laid down in WTO Agreements, for valid reasons and provided that the measure concerned does not constitute a disguised restriction on international trade.

5. With respect to all regulations and formalities imposed on or in connection with traffic in transit, including charges for transportation, traffic regulations, safety regulations and environmental regulations, Members shall accord to traffic in transit treatment no less favourable than that accorded to export or import traffic/domestic traffic/traffic which is not in transit. This principle refers to like products being transported on the same route under like conditions.

4. Each Member shall accord to products which will be in transit through the territory of any other Member treatment no less favourable 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.

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 fulfillment 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, formalities or customs inspections 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 on 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 the Member, that office shall promptly terminate the transit operation if transit requirements have been met.

11.1. 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 reasonable and shall not be applied in a manner that would constitute a disguised restriction on traffic in transit limited to ensuring that requirements arising from such traffic in transit are fulfilled.

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

11.3 Each Member shall, where practicable, 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 once a previous one is proved to have concluded its transit at the point of exit or destination within the Member’s territory.

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

11.5 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.

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

   i. charges;

   ii. formalities and legal requirements; and

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13 Nothing in this provision shall preclude a Member from maintaining existing procedures whereby the mean of transport can be used as a guarantee for traffic in transit.
iii. the practical operation of transit regimes.

13. Each Member shall endeavour 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.
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