

4 Road transport restrictions, freedom of transit and the Trade Facilitation Agreement: The case of Turkey

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Abstract

This chapter argues that restrictions, including quotas and stringent permit systems, employed by some EU member states on road transport and transit run by Turkish road operators, are important barriers to Turkish exporters. Mindful of the parties' failure to overcome this major obstacle despite the customs union which has existed between them since 1995, this chapter seeks to shed light on how trade can be significantly hampered by such restrictions, and explores the ways in which WTO legal instruments, in particular Article V ("Freedom of Transit") of the General Agreement on Tariffs and Trade (GATT) and recently Article 11 ("Freedom of Transit") of the Trade Facilitation Agreement can come into play to liberalize trade.

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4.1 Introduction

The European Union remains Turkey's most important trading partner, with 44 per cent of Turkish exports in 2014 destined for EU markets, even though the European Union's share of Turkey's exports has fallen in recent years, and now accounts for 37 per cent of Turkish imports.¹ The trade that is carried by road transport between Turkey and the European Union is governed mainly by a set of bilateral and multilateral agreements that restrict quantity and capacity by limiting the number of permits available for a truck to make a journey. Turkish exports in manufactured products towards the European Union are subject to technical barriers (Pastori et al., 2014).

Turkey is the biggest economy to be in a customs union (CU) arrangement with the European Union compared to the European Union's other CU partners, i.e. Andorra, Monaco and San Marino. Under normal circumstances, Article XXIV ("Territorial Application – Frontier Traffic – Customs Unions and Free-trade Areas") of the General Agreement on Tariffs and Trade (GATT) requires that internal trade should be liberalized within a CU, which would imply that neither EU countries nor Turkey should impose trade quotas on each other's exports. EU member states, which are all party to the CU that is the European Union, do not impose any such quotas on each other, since these would be in breach of the Treaty on the Functioning of the European Union (TFEU).² Bilateral road transport agreements, including quota negotiation, remain within the exclusive competence of individual EU member states, and several EU member states apply road transport quotas to Turkish truck operators.³ As such, Turkey is the only customs union member country on which a road transport quota is applied.

"Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union", which is based on EU customs union norms and principles, provides that the parties cannot transpose and implement regulations and practices that lead to additional and avoidable costs for the import or export operations as they can be considered to be charges having equivalent effects to customs duties.⁴ According to World Bank (2014),⁵ restrictive road transport permits, especially for transit, that create obstacles to the free movement of goods hinder the full operation of the CU. Arguably, to the extent that the amount of trade volume that is being operated through road transport falls within the scope of the "substantially all trade" requirement as stipulated in Article XXIV:8 of the GATT 1994, the restrictions and quotas imposed on that volume could lead to a breach of internal trade liberalization requirement to be met by customs unions under that Article.

On the other hand, it might be argued that the issue lies within the sovereign decision-making mechanism of the European Union's member states and thus a union-wide application cannot be secured. In the absence of a concrete solution toward settling the conflict between parties, this chapter explores the ways in which the existing WTO rules, in particular Article V ("Freedom of Transit") of the GATT and Article 11 ("Freedom of Transit") of the WTO's Trade Facilitation Agreement (TFA) could serve as tools to reduce trade costs and boost trade for WTO members.

In this context, the objectives of this chapter are twofold. First, the obstacles to trade liberalization within the CU of Turkey and the European Union under Article XXIV of the GATT 1994, consisting of road transport quotas and transit permits, are outlined. Second, the chapter discusses how other existing WTO legal texts could be instrumental to overcome such obstacles.

The first section examines the bilateral trade framework between Turkey and the European Union. It highlights the road transport regime that is in force within the European Union and its implications for Turkish road transport operators, who are subject to quotas and transit permits in their exports to EU countries. Data from several studies are used, including a thorough study by the World Bank that was completed in 2014.

With a view to demonstrating the inconsistency of the existing restrictions with other WTO rules and disciplines, the second section turns to the assessment of the WTO legal texts related to transit traffic and freedom of transit, in particular Article V of the GATT 1994 and Article 11 of the TFA.

The third section suggests that Article V of the GATT 1994 and Article 11 of the TFA could serve as useful tools, provided that they are empowered with effective interpretation through Dispute Settlement organs when tested in a case.

4.2 Turkey-EU customs union and restrictions on road transportation

Turkey's preferential trading relationship with the European Union dates from 1963, when the parties agreed to establish a framework for the free movement of goods, services, labour and capital. The relationship was deepened in 1973 with the Additional Protocol and in 1995 with the conclusion of "Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union", which provided mainly for the free movement of

goods and related issues and did not foresee the free movement of persons or of services, freedom of establishment, or capital movements.

By concluding Decision 1/95 with the European Economic Community, Turkey agreed to adopt legislation, to conclude agreements, and to apply treaty articles equivalent to provisions adopted by the European Economic Community. To ensure the free movement of goods, both parties had to abolish tariffs, quotas and equivalent measures,⁶ and also to adopt subsidiary provisions on discriminatory taxation and intellectual property law – all of which mirror primary or secondary EC law. To implement the CU, the parties undertook the commitment to implement identical customs legislation and commercial policy. In order to avoid market distortions, they agreed on common competition and state aid disciplines and related functioning mechanisms. Finally, to avoid distortions resulting from divergent amendments to legislation or from divergent judicial interpretation, they had to develop an institutional structure to monitor continued legal integration.

Despite this advanced level of market integration between the parties, there was a substantial problem related to the restrictions applied by several EU member states in the field of road transportation, including quotas and transit permits. The EU-Turkey CU is now 20 years old and has become outdated in view of the more ambitious free trade agreements that the EU has concluded or is negotiating with other key economic partners. Consequently, the parties have undertaken to modernize the existing trade framework and improve the deficient parts.

Several studies on this modernization process have been and are currently being undertaken by various institutions, including a landmark report entitled “Evaluation of the EU-Turkey Customs Union Report”,⁷ which was drafted by the World Bank at the request of the European Commission. Among the key findings of the report are the positive economic and trade benefits that both parties derive from the partnership.⁸ The changing dynamics of the world economy, the shortcomings of the existing CU to deal with those changes, and the ongoing negotiations between the European Union and the United States in the context of the Transatlantic Trade and Investment Partnership (TTIP), are cited among the factors that might necessitate a revision of the arrangement. It suggests that “Increased trade necessitates the movement of increasing volumes and values of goods. Road transport permits, especially for transit, that limit the free circulation of those goods covered by the CU are therefore a key source of concern. Within the context of the CU, road transport quotas and transit permits should be liberalized – at least on consignments of those products covered by the CU - as they hinder the free circulation of goods.”⁹

European attempts to liberalize the road transport market started already with the Treaty of Rome in 1957. Despite several amendments to it, some restrictions still remain. The freedom to supply international inland transport services was provided for in Title IV of Article 79 of the Treaty of Rome, even though full liberalization was not achieved until the establishment of the Single European Market.¹⁰

It should be noted that the liberalization that was reached, was conceived within the framework of the free movement of services through the *acquis communautaire* (i.e. the accumulated legislation, legal acts, and court decisions of EU law) related to Transport Policy and was not really regulated through the principle of free movement of goods.¹¹ Moreover, although significant progress has been achieved, cabotage (which allows for the national carriage of goods by transport operators based in the other country)¹² is still solely enjoyed by EU road transport operators, where operators from non-EU countries can have market access only if they have bilateral agreements with the EU member states. In this context, Switzerland remains the sole exception where there is a comprehensive Land Transport Agreement in force between the European Union and Switzerland. Since the bilateral agreements concluded between the EU member states and Turkey regulate road transportation, the imposition of quota and permit arrangements on hauliers from both sides, in particular from the European Union's side, create impediments to intra-CU trade. Although there is certainly room for the parties to improve their respective overall customs operations, practices and procedures towards trade facilitation, road quota and transit permit issues still stand out as significant trade barriers, to the extent that they appear as quasi customs control issues.

As for Turkey and its road transportation capacity, World Bank (2014) shows that almost 40 per cent of Turkish foreign trade is run by its international road transport sector operators.¹³ Mindful of its capacity and global competitiveness, Turkey has undertaken a major reform of its road transport sector in the last decade by introducing criteria for access to the profession, roadworthiness tests for vehicles, social legislation, professional training requirements for drivers and a licensing system. One of the principal reasons for Turkey's reform of the road transport industry was its participation in the TIR¹⁴ System, to which only professional and trustworthy transport operators have access, as well as in the ECMT (European Conference of Ministers of Transport) Multilateral Quota, which introduces qualitative criteria for vehicles and professionals. As a natural outcome of these efforts, Turkey has become the largest user of TIR carnets¹⁵ in the world in the last 15 years. Some of the reforms have also been the result of Turkey's efforts to accede to the European Union and its alignment with the European Union's *acquis communautaire*. Consequently, road transport has become one of Turkey's most competitive and successful sectors, especially for international operations.

According to the World Bank study, almost 40 per cent of Turkish foreign trade is carried by its international road transport sector of around 1,300 firms and fleet of 45,000 vehicles.¹⁶ Although Turkey's share in external trade capacity is substantial, its share has actually shrunk, as it was at 64 per cent in 1995, even though Turkish operators have increased export operations towards their customs union partners, i.e. EU countries.¹⁷ Within the EU, Turkey's main competitors in the road transport industry are Bulgaria, Poland and Romania, along with Moldova – a non-EU country which has been expanding its capacity towards the EU in recent years.

In order for the EU Commission to negotiate transport agreements with third-party countries, a mandate provided by the member states is needed, regardless of the agreement being air or road transport-related. As a matter of fact, any agreement to be concluded between the European Union and non-EU states is subject to the exclusive competence of the member states and thus must be handled through bilateral negotiations. Therefore, road transport services operating between the European Union and Turkey are regulated by bilateral agreements with individual EU members. Turkey currently has a bilateral road transport agreement with all the EU members except Cyprus, Ireland and Malta (see Table 4.1). These bilateral agreements set the number and nature of the permits that are required to perform a transport operation between an EU member and Turkey.¹⁸

However, significant differences and variations exist between the agreements signed by the EU member states with Turkey, and present a number of complications for both operators and regulators. Some of the agreements may regulate and render different classes of permit towards transit trade and bilateral trade, whereas other agreements do otherwise. Permits may also be specific to a certain vehicle type and are thus not valid for other vehicles. In some instances, Turkish operators are obliged to buy a special permit for a haulier in transit, whereas other third-country operators are not subject to the same requirement. Specifically, there are four types of permissions that the countries grant to each other's operators:

“Bilateral transport, or direct traffic, allows transport operators of the two parties to carry goods in trade between them. Transit transport rights allow trade to be transported through countries (without any loading/unloading) while triangular, or third-country traffic, allows goods to be loaded on a truck registered in one country from the other country and carried to a third country. Cabotage allows the national carriage of goods by transport operators based in the other country.”¹⁹

Although the share of road and rail transportation in relation to freight traded internationally remains small and limited in comparison with maritime shipping,

Table 4.1 EU member states with which Turkey has concluded bilateral road transport agreements

EU member state	Agreement concluded	Date of conclusion	Post-accession modifications
Austria	✓	21 January 1971	21 February 1978
Belgium	✓	10 January 1970	26 October 1977
Bulgaria	✓	16 April 1977	29 July 1979 and 27 January 2007
Croatia	✓	9 January 1998	-
Cyprus		No agreement concluded	
Czech Republic	✓	30 June 1981	-
Denmark	✓	14 July 1977	22 February 2007
Estonia	✓	9 October 1995	-
Finland	✓	3 August 1977	-
France	✓	14 November 1969	10 November 1976
Germany	✓	21 December 1977	-
Greece	✓	4 April 1970	-
Hungary	✓	14 September 1969	21 August 1978
Ireland		No agreement concluded	
Italy	✓	30 June 1971	21 February 1978
Latvia	✓	21 January 1996	-
Lithuania	✓	10 February 1994	-
Luxembourg	✓	25 May 1988	-
Malta		No agreement concluded	
Netherlands	✓	6 December 1971	21 February 1978 and 24 April 2003
Poland	✓	14 May 1978	15 April 2003
Portugal	✓	9 May 2005	-
Romania	✓	30 April 1977	-
Slovakia	✓	14 March 1982	-
Slovenia	✓	20 October 2001	-
Spain	✓	3 March 1998	-
Sweden	✓	14 May 1978	-
United Kingdom	✓	14 May 1978	20 May 2009

Source: Pastori et al. (2014).

because road transportation has advantages related to cost per transit time as opposed to water and air transport, the demand for road transportation remains stable and is subject to increase.²⁰

One of the significant impediments for the efficiency of the road transportation for countries and their operators are quotas and transit permits. Various studies undertaken on the implications of the road transport quotas for Turkish foreign

trade performance towards the European Union show that Turkey's road transportation is significantly and negatively affected by the quotas applied by EU member states.²¹ Under normal circumstances, Turkish operators have transit through Greece or Bulgaria to carry goods in Europe by road. Bilateral quota arrangements are in place between Turkey and several EU member states, which occasionally give rise to problems.²² In the case of Greece, no major hurdles are reported with regard to transit quotas, but the number of exports made through road transportation is limited in a number of countries due to the imposition of road transport quotas.^{23,24} In this context, the findings in World Bank (2014) show that, since road transport quotas hinder free circulation, impose burdens on Turkish trade and prevent Turkish carriers from efficiently using their trucks, they should be eliminated both on bilateral and transit transportation, at least for those goods covered by the CU.²⁵

Similarly, road transport quotas impose additional costs, both financial and administrative, on Turkey's trade since when permits are exhausted in several EU member states, trade undertaken by Turkish road transport operators is effectively closed.²⁶ Apart from the economic consequences, the existing arrangements also have social implications for the operators, since the extended times that the truck drivers are asked to wait at the borders before they are eventually given right to access or transit may cause stress and fatigue and thus negatively affect road safety. Research undertaken by several national and international organizations²⁷ estimates that the EU quota system has deprived Turkey of export opportunities to the EU of 1.66 billion tons of goods worth US\$ 5.56 billion.

Studying the precise effect of road quotas on Turkey's export performance through the analysis of textile sector, the findings of Kabak et al. (2014) show that:

"One of the important industries suffering from road transport quotas is the textile sector. As road transportation is faster than rail and sea as well as cheaper than air, trucking is the most preferred means of transport for goods in which customer demand can be fickle and efficient response time required. Turkey is chosen as one of the largest suppliers of the European apparel companies particularly for its ability to provide short response time and low costs. The country's competitive advantage in the textile sector lies in the use of trucks, for short transportation time. Therefore, quotas on road transportation are expected to primarily affect Turkish textile exports to European countries."²⁸

It should be noted that more or less all candidate countries to the European Union were presented with road quota limitations.²⁹ As a matter of fact, similar situations faced by other candidate countries (some of them now are full members) serve as precedents that can be effectively used as benchmarks in identifying a possible solution to ease access of Turkish road transport operators to EU markets. Part of the solution is, without doubt, increased coherence among EU countries regarding their quota systems as this would ease some of the problems faced by Turkish hauliers and move towards compliance of EU-Turkey CU obligations. Moreover, deviations of direct transport to the destination may also be qualified as not in keeping with WTO members' obligations under GATT Article V and Article 11 of the WTO's TFA.

In a scenario where Turkey and the European Union would try to overcome the trade restrictive effect of road transport quotas and transit permit requirements, hence easing the market access conditions in their existing preferential trade agreement, the following actions could be considered: a) goods currently entering the European Union under an EU Free Trade Agreement would be liable for duty in Turkey, b) goods currently entering the CU in the European Union and paying tariffs to EU customs, but which are insufficiently transformed within the European Union to qualify as EU originating goods, would be required to pay an external tariff upon entering Turkey as well as rules-of-origin compliance costs to be paid in Turkey. The latter would include the cost of adapting the production process and sourcing in order to fulfil rules of origin requirements and the cost of demonstrating compliance, including the administrative procedures to obtain a certificate or an approved exporter status from customs.

Road transport operators argue that if an agreement abolishing trade restrictions could be reached with the European Union, this would have an extremely positive impact on trade, output and employment for both parties.³⁰ The main benefit would essentially derive from removal of transit permits as opposed to the removal of bilateral transit permit arrangements having a smaller effect. The studies undertaken in the field³¹ suggest that in case of full liberalization, trade between the parties could be enhanced by more than €3 billion per year. The benefits that would accrue to Turkey in case of liberalization of road-freighted exports are clearly more consequential than those from which the European Union would be likely to benefit.³² Although Turkish hauliers might benefit from bilateral arrangements, the positive impact of those arrangements would be limited and only secondary when compared with the advantages of an overall liberalization that would be achieved at an EU-wide scale. As such, the total removal of time and resource consuming quotas and transit permitting arrangements, including the transit permits required from Turkish hauliers when passing through several EU member states, would liberalize and boost trade.

Once the obstacles are removed, the benefits of trade liberalization will be shared by both parties to the CU. In case the quota system is withdrawn, completely or partly, both parties' exports to each other's markets will increase substantially compared to a business-as-usual scenario. Turkey's exports towards the European Union are expected to increase more quickly than imports from the European Union, while EU consumers are likely benefit from lower prices for Turkish goods due to regulatory costs being removed from the supply chain.³⁹ Full liberalization for both parties can be realized in a scenario where transport quotas are removed and adjustment of bilateral permits is regulated with a view to trade liberalization. If the currently cumbersome procedures related to the issuance of transit permits could be improved by way of identifying the amount of permits that would be needed for the corresponding number of estimated trips, it would greatly ease transport operators' tasks. However even in this scenario, since they will still need to get hold of a transit permits and to actually have them on board trucks, the time savings can effectively take place only if full and complete liberalization is achieved.

Having dealt with the problems arising out of the limitations that bilateral and regional arrangements may and do have in relation to the liberalization of trade effectuated through road transportation, we will now turn to the analysis of the relevance and advantages of solutions offered by multilateral rules, such as GATT and the Trade Facilitation Agreement.

4.3 Assessment of the road transport quotas and transit permits in view of the “freedom of transit”

In principle, freedom of transit is regulated by international agreements, be they bilateral, regional or multilateral. The concept of transit, as distinct from transit procedure, may be roughly defined as the action of one country's goods passing through or across another country. Freedom of transit, i.e., right of transit, is a right adopted under international law.

The liberalization and facilitation of transit passes via the territory of each contracting party and the routes conducive to international transit, were stipulated by the League of Nations Agreement and the Barcelona Convention and Statute on Freedom of Transit Law of 20 April 1921, as well as by the other agreements adopted in the international arena. Article V of GATT is the most detailed legal piece among these documents. Article V:2 of the GATT stipulates that international trade should transit via the most convenient route in the contracting countries in international trade and legitimizes freedom of transit for vehicles moving on this route, notwithstanding the departure and arrival points, mode of transport, origin

and flag of vessels. Freedom of transit is also governed in detail in Article 11 of the TFA.

Article V of the GATT determines the concept of traffic in transit and lays down the conditions a member may impose on goods transported through its territory by another party to a foreign destination. Accordingly, the main purpose of the provision is to provide for the freedom of transit through the territory of each member for transport to or from the territory of other members. In order to ensure that this freedom is effectively present and enjoyed, Article V stipulates two essential requirements, i.e. not to hinder traffic in transit by imposing unnecessary delays or restrictions or by imposing unreasonable charges (Article V:3) and to accord most-favoured-nation (MFN) treatment to transiting goods of all members (Article V:5).

Although Article V is entitled “Freedom of Transit”, Article V:1 clarifies the term “transit” and the “traffic in transit”, whereas Article V:2 lays down the principle of the “freedom of transit”. In negotiating Article V, the contracting parties considered the Barcelona Convention and Statute on Freedom of Transit of 20 April 1921, regulating the conditions a member could apply to goods of another member passing through its territory to a third destination. Parts of Article V (i.e. Article V:1 and the last sentence of Article V:2) were drawn from corresponding provisions of the Barcelona Convention. An even higher degree of correspondence can be found with respect to the draft Havana Charter for an International Trade Organization, Article 33 of which is a nearly verbatim copy of GATT Article V.³⁴

GATT Article V has been subject to interpretation in some disputes, notably in Colombia – Ports of Entry. As a matter of fact, the Colombia – Ports of Entry case is the first WTO case where GATT Article V on the freedom of transit was tested. The Panel dealt first with Article V:2:

“There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.”

According to the Panel in this case,

“Article V:2, first sentence, provides that there shall be freedom of transit through the territory of each Member, via the routes most convenient for international transit, for traffic in transit to or from the territory of other

Members. In turn 'traffic in transit' is defined as the transit across the territory of a Member when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the Member across whose territory the traffic passes. [...] Article V:2, second sentence provides that no distinction shall be made based on, inter alia, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport. [...] Article V:6 of GATT 1994 provides that products which have been in transit through the territory of any other Member shall be accorded treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other Member." ³⁵

In other words, the Panel in this case clarified whether freedom of transit applies to all goods in transit or only those that are transhipped.

The Panel opined that freedom of transit, as a concept, extends to all traffic in transit in accordance with the definition given in Article V:1. Consequently, this freedom ought to be guaranteed without conditions linked to trans-shipment, warehousing, breaking bulk or changes in the mode of transport.³⁶ Moreover, and again in accordance with Article V, the panel stated that transit should be permitted and provided via the most convenient route for the passage through its territory for specified routes. Accordingly, the fact that the goods had to be transhipped in order to be recognized and proceed as traffic in transit was found in the *Colombia – Ports of Entry* case to be a breach of Article V.2.

Article V of the GATT 1994 also establishes rules concerning transit. Although this Article has sometimes been invoked during consultations, in particular in connection with pipelines, it had never been subject to a detailed interpretation by a panel until the *Colombia – Ports of Entry* case.³⁷ Road freight transport lies at the heart of the trade facilitation work that was undertaken as part of the Doha Development Agenda. Article V itself has been under review in the negotiations, in line with the mandate contained in Annex D of the "July package", i.e. the text of the WTO General Council's decision on the Doha Agenda work programme, agreed on 1 August 2004. Pursuant to Annex D, the Negotiating Group on Trade Facilitation was tasked to "clarify and improve relevant aspects of Article V". As a result of this mandate, members submitted a number of legal proposals, which were contained within a draft consolidated negotiating text.

However, even though traffic ought to be permitted to transit freely via any available route in accordance with GATT Article V, the reality is different and that many operators do face restrictions in their road transportation.³⁸

4.4 The Trade Facilitation Agreement and its Article 11

The Trade Facilitation Agreement was launched during the WTO Trade Facilitation negotiations of the Doha Round and the text was agreed on 7 December 2013 at the Bali Ministerial Conference. It contains provisions for advancing efficiency in customs procedures by way of ensuring effective cooperation between customs and other authorities on trade facilitation and customs compliance issues. The text was adopted by the General Council of the WTO on 27 November 2014. However the Agreement's entry into force is pending, awaiting formal acceptance by two-thirds of the WTO membership.

Several Articles of the TFA are directly relevant for dealing with the issues discussed in this chapter. The TFA calls for improved collaboration between parties; its Article 11, and several other provisions that touch upon transit, are targeted towards facilitating transit trade. In fact, among the benefits expected from the TFA implementation are improved regional transport markets, the mutual recognition of licences and certificates, and larger infrastructure investments. That said, the ways in which the TFA will apply to the sector in practice will need to be further clarified and tested once it enters into force. Even though transportation is typically perceived as a services sector, the relevance and applicability of the TFA and in particular its Article 11 that are naturally intended to regulate trade in goods, will be employed to address the problems emanating from transport measures to the extent they are trade in goods-related and not services.

The TFA provides for the elimination or reduction of regulations or formalities related to traffic in transit, in particular if they are not necessary or if a less trade-restrictive alternative can be employed. As for the fees or charges, WTO members can have recourse to them if they are strictly related to transit for transportation or if they are used to meet administrative expenses generated by transit or the cost of services rendered. The TFA contains various provisions and related measures geared towards facilitating transit procedures, including the pre-arrival declaration, and prohibits restrictive measures and practices related to customs charges, formalities and inspections, apart from those handled at the offices of departure and destination. It also provides for guarantees where applicable.

In accordance with its Preamble, the TFA desires to "clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994". To that end, the TFA was built

on GATT provisions related to transit, fees and formalities concerning importation and exportation, trade rule publication and administration, among others. The TFA's Article 11 clarifies and improves GATT Article V on freedom of transit. Accordingly, the article associated with the freedom of transit stipulates that WTO members shall not impose non-transport-related fees or seek voluntary restraints on traffic in transit through a binding commitment. It includes various disciplines on inspection and guarantee schemes as mostly binding commitments. The TFA's Article 11 also forbids a disguised restriction on traffic in transit.

Trade facilitation becomes even more important tool as far as developing countries are concerned. In relation to the interaction between trade facilitation and regional integration, it is argued that those countries with more capacities, higher trade volumes and financial resources, are in a better position to invest in reforms that make trade faster, easier and more transparent.³⁹ Accordingly, provided that developing countries work towards modernizing customs administrations and trade procedures, they will benefit from more trade that will lead to more revenue and economic development. Consequently, it will be easier for these countries that enjoy the opportunity to trade more as well as attract financial resources to invest in trade facilitation, as larger trade volumes help to achieve a higher rate of return on trade-related investments, which will consequently help their trade to grow further.⁴⁰

Other studies (Government of Mongolia et al, 2007)) further point out the importance of trade facilitation, with particular emphasis on the implications of transport quotas for landlocked developing countries: "Freight distribution quotas are applied in certain road transit corridors with a view to ensuring that transporters from both landlocked and transit countries share the gains and benefits. Usually, two thirds of the transit freight at a port is allocated to carriers from a landlocked country and one third to those from a transit country. Although these quotas were established with development objectives in mind, such as to help develop the transport sector of landlocked countries, their strict application can give rise to efficiency issues and may have unintended results. In particular, transport quotas may cause transport capacity bottlenecks and increase transport costs, if the supply, capacity and quality of vehicles are not the same in the landlocked country as they are in a transit country. Therefore, the quota system may economically be disadvantageous to landlocked countries if the effects of the increase in transport costs outweigh the benefits generated in the transport sector."⁴¹ Since the transshipment of cargo at a border and an empty return voyage are costly in cases where market restrictions do not allow transport companies to pick up cargo in both directions, regional collaboration and coordination are needed in order for transit to become more efficient through improved transport infrastructure that will take into account cross-border trade flows and vehicle standards. Consequently,

the mutual recognition of permits, insurances and drivers' licences would be necessary to ensure the efficiency as well as the trade gains that are sought after by the landlocked developing countries.

When compared with the efficiency of a multilateral framework, the trade facilitation related rules and disciplines provided in regional integration arrangements that are essentially geared towards trade liberalization between the parties do not necessarily serve as an essential feature. It has been put forward that those measures can only play an essential role in regional trade agreements (RTAs) provided that:

“First [...] RTA provisions are binding and enforceable via the RTA's dispute settlement mechanism. Secondly, RTAs serve as a training ground: they can provide a head-start for the members to absorb and implement the multilateral customs and trade-facilitation instruments. Thirdly, given that customs procedure and trade-facilitation disciplines are relatively similar across RTAs, RTAs can facilitate and accelerate convergence in these disciplines around the world. Fourthly, to the extent that RTAs streamline customs procedures and facilitate trade, they are inherently good for the multilateral trading system: the resulting lowered trade costs boost trade with all trade partners”.⁴²

As a matter of fact, it could also be argued that on the basis of the internal trade liberalization requirement that is laid down in Article XXIV of GATT 1994, regulations or formalities in connection with traffic in transit should be eliminated or reduced if they are no longer required, or a less trade restrictive solution becomes available between the RTA parties. In order to meet the conditions laid down for CUs, the RTA parties must internally eliminate duties and other trade restrictions on “substantially all the trade” between their members in originating products under Article XXIV: 8(a)(i).⁴³ As for the fees or charges related to the transit, arguably they may be imposed on transit only for transportation or if commensurate with administrative expenses entailed by transit or with the cost of services rendered.⁴⁴

The new TFA disciplines and rules relative to transit on the basis of the principles laid down in Article V of the GATT represent a significant improvement. Article V frames a series of fundamental freedom-of-transit principles, such as the definition of goods in transit, non-discrimination and national treatment, freedom from unnecessary delays or restrictions, exemption from customs duties and other duties (except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered) and reasonable transit duties and regulations. Similarly, and in a way that complements Article V of the GATT, Article 11 of the TFA on freedom of transit

embodies some 17 provisions that can be grouped under charges, regulations, and formalities; strengthened non-discrimination; transit procedures and controls; guarantees; and cooperation and coordination on transit issues. The obligations that are spelled out in Article 11 (see Table 4.2) improve upon and go beyond GATT Article V insofar as transit procedures, guarantees and cooperation are concerned, and thus aim to clarify further international legal disciplines applicable to transit operations via operational guidelines that are geared towards securing freedom of transit and that include both mandatory and best-endeavour obligations.

In view of the international agreements, including the TFA, discussed above, where does the problem related to road transport quota and transit permits between Turkey and the European Union stand? Turkey has been active alongside other countries requesting further liberalization of global road transport markets. Within the framework of the UN system, Turkey has actively contributed to the work undertaken by countries towards the liberalization and enforcement of road transportation within the Working Party on Road Transport at the United Nations Economic Commission for Europe (UNECE)⁴⁵ by advocating for negotiations to be conducted on a multilateral agreement whereby UNECE member countries would amend their bilateral agreements in order to comply with the provisions of the three major multilateral legal instruments of direct relevance to international road transit.⁴⁶

As for the TFA, Turkey, along with the rest of the WTO membership, actively participated in its negotiation and submitted various proposals and opinions leading up to the Ninth WTO Ministerial Conference of 2013. Turkey's efforts arguably concentrated on transit rules, where it was involved with other WTO members in proposing and drafting paragraph 3 of Article 11 stating: "*Members shall not seek, take or maintain any voluntary restraints or any other similar measures on traffic in transit*". On this point, it should be noted that the second sentence of paragraph 3, which reads: "*This is without prejudice to existing and future national regulations, bilateral or multilateral arrangements related to regulating transport, consistent with WTO rules*" may be interpreted to fall short of expectations, since quota-imposing members arguably remain free to keep their already existing arrangements and regulations that restrict freedom of transit and thus the effectiveness of the provision may be lessened. The only part of the provision that may still be used and invoked by any WTO member which may face road transport quotas is the conditionality expressed by "*consistent with WTO rules*", through which members may attempt to challenge their trading partners' existing arrangements and regulations if and when tested through WTO dispute settlement.

Table 4.2 Obligations under TFA Article 11

Items	Article	Mandatory obligation	Necessity test	Best endeavour
Less restrictive regulations or formalities	11-1		X	
Avoidance of disguised restrictions	11-1	X		
Prohibition of traffic in transit to be conditioned upon the collection of fees except transportation costs, administrative expenses, or cost of services	11-2	X		
Prohibition of voluntary restraints or similar measures	11-3	X		
No less favourable treatment than goods directly transported from origin to destination for goods in transit	11-4	X		
Physically separate infrastructure for traffic in transit	11-5			X
Formalities, documentation requirements, and customs control not more burdensome than necessary	11-6		X	
Prohibition of customs charges and unnecessary delays or restrictions until transit is concluded at exit point	11-7	X		
Prohibition of the application of technical regulations and conformity assessment procedures	11-8	X		
Provision of advance filing and processing of transit documentation and data prior to the arrival of goods	11-9	X		
Prompt termination of transit operations	11-10	X		
Guarantees:				
- Shall be limited to ensuring that transit requirements are fulfilled	11-11.1	X		
- Shall be discharged without delay once transit requirements have been satisfied	11-11.2	X		
- Can be comprehensive in a manner consistent with the Member's laws and regulations	11-11.3			X
Publication of relevant information used to set the guarantee	11-11.4	X		
Prohibition of customs convoy or escorts when circumstances are not high-risk or guarantees ensure compliance	11-11.5	X		
International cooperation and coordination for transit	11-12			X
Appointing a national transit coordinator	11-13			X

Source: Hamanaka (2014).

Similarly to the issue on road transport quotas, Turkey reportedly also took part in drafting paragraph 2 of the TFA's Article 11, which stipulates that "*traffic in transit shall not be conditioned upon collections 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*". This involvement in the drafting process may well be due to the fees that Turkish road operators have been paying in order to obtain transit permits when operating within Europe, hence the importance of multilateral negotiations to address issues that may not always have been solved on a regional or bilateral level. In terms of adoption of their commitments and the legal texts, Turkey notified the WTO of its Category A commitments under the TFA in July 2014. It has designated all of the provisions contained in Section I of the Agreement under Category A for full implementation upon the TFA's entry into force, except for Article 7.9 relating to perishable goods. It also deposited its instrument of accession and notified its acceptance of the TFA in March 2016. As for the European Union, it completed its ratification procedure in October 2015. Therefore, both Turkey and the European Union remain ready and committed to honour their obligations under the TFA.

Will the TFA solve Turkey's ongoing struggle with the EU member states' road transport quotas and transit permits? While this multilateral agreement is certainly a positive step towards trade liberalization in the long run, more flexible arrangements with the respective EU member states, i.e. bilateral agreements, also remain necessary. Since, as it stands, the authority to conclude road transportation agreements lies with the EU member states, the mandate and empowerment to be given to the European Commission by EU member states in order to conduct the road transport negotiations on their behalf could boost trade liberalization among the CU partners.⁴⁷

4.5 Concluding remarks

The Decision 1/95 establishing a CU between the EU and Turkey provided mainly for the free movement of goods and related issues and did not foresee the free movement of persons or of services, establishment, or capital movements. The principle of liberalization of trade in goods has been in effect since the initiation of the CU in 1995. However, in practice, this principle has had a few exceptions and has also faced some major obstacles. Among them are road quotas, and notably transit permits, which form impediments to the free movement of goods as well as to transit traffic and thus they remain to be a stumbling block on the way to the full operation of the CU. The World Bank's high-level analysis (World Bank, 2014) highlighted the impact of the gradual liberalization of access to the market for road

freight services operated between the European Union and Turkey. This study suggests that the liberalization of the quota system between Turkey and the EU member states would facilitate trade and enable Turkish carriers to effectively use their export capacity through road transport. A careful study of various liberalization scenarios between the European Union and Turkey reveals that major improvement would likely be linked to the removal of transit quotas.

Despite the benefits of the removal of the obstacles related to road transport quotas and transit permits, the essential question is how this removal can effectively take place. Road quotas and transit permits are often subject to bilateral agreements. However, those arrangements fall short of bringing an effective solution to the problem, since most transit operations require the involvement of various countries and thus necessitate a series of bilateral agreements on transit traffic rights. In order to provide for a solution on a larger scale, a number of international agreements have been concluded as to stipulate the principle of the freedom of transit. Article V of the GATT 1994 and the revised Consolidated Resolution on the Facilitation of International Road Transport, which was adopted by UNECE in 2004, were the pioneer legal texts in the field until recently.

To complement and further clarify what was achieved through these texts, the WTO Trade Facilitation Agreement could well serve as an effective tool although the relevant provisions of Article 11 of the TFA contain some limitations. In any event, a multilateral forum to eliminate barriers to the transit as well as the transport of goods by laying down multilateral principles and disciplines is surely the best scenario where the interests and concerns of both developed and developing countries can be addressed.

We argue that the WTO legal texts that are related to the transit traffic and the freedom of transit, in particular Article V of the GATT 1994 and Article 11 of the Trade Facilitation Agreement, could serve as useful tools in particular if they are clarified and tested following an effective interpretation by the WTO adjudicating bodies when invoked in a case. Article V of the GATT 1994 has been interpreted in WTO dispute settlement in essentially one case so far and yet a substantial clarification was brought to the way in which the Article should be understood and operate. By analogy and if the need arises, the mandate that was given to the Trade Negotiations Committee through the Doha Development Agenda towards the clarification and improvement of the disciplines related to the freedom of transit under Article V of the GATT 1994 which led to the enactment of Article 11 of the TFA, could effectively be complemented through a dispute where the WTO adjudicating bodies could pronounce on the interpretation and application of the rules applicable to the freedom of transit and thus make a substantial contribution to legal heritage of the WTO multilateral trading system.

Endnotes

1. See WTO (2016), paragraph 2.24.
2. E.g. Article 34 of the TFEU reads: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."
3. The Court of Justice of the European Union opined in Case C-265/95 (Commission of the European Communities v. French Republic) that obstacles to road transportation, even in cases not caused by the member state measures, may become obstacles to the free movement of goods and thus be attributed to the state in question.
4. Article 4 of the Decision 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC) provides as follows: "Import or export customs duties and charges having equivalent effect shall be wholly abolished between the Community and Turkey on the date of entry into force of this Decision. The Community and Turkey shall refrain from introducing any new customs duties on imports or exports or any charges having equivalent effect from that date. These provisions shall also apply to customs duties of a fiscal nature." Similarly, Article 5 provides that: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Parties."
5. E.g. World Bank Report (2014), paragraph 56.
6. Article 5 of the Decision 1/95 of The EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC) provides that: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Parties."
7. World Bank (2014) - see its paragraph 20. The report was officially launched in Istanbul on 8 April 2014 and in Brussels on 10 April 2014.
8. Executive Summary, World Bank Report (2014).
9. World Bank (2014), paragraph 8.
10. Article 79.1 of the original version of the Treaty of Rome reads as follows: "1. In the case of transport within the Community, discrimination which takes the form of carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on grounds of the country of origin or of destination of the goods in question, shall be abolished, at the latest, before the end of the second stage."
11. Article 61 of the original version of the Treaty of Rome reads as follows: "1. Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport." Along the same line, see World Bank (2014), paragraph 102.
12. World Bank (2014), paragraph 105.
13. *Ibid*, paragraph 99.
14. "TIR" stands for Transports Internationaux Routiers (International Road Transport) and is an international harmonized system of customs control that facilitates trade and transport whilst effectively protecting the revenue of each country through which goods are carried.
15. An international transport document that allows the transport of goods from the customs

office of departure to the customs office of destination under the TIR procedure, defined by the TIR Convention.

16. World Bank Report (2014), paragraph 99.
17. Ibid.
18. Pastori et al. (2014).
19. World Bank Report (2014), paragraph 105.
20. OECD (2010).
21. Kabak (2014).
22. World Bank (2014), paragraph 102: "By limiting the number of Turkish-registered vehicles that can carry goods in their territory, EU member states set limits on Turkish goods that can be transported to the EU by Turkish road transport operators (although they can still be carried by EU road transport operators). This raises costs if the most efficient transport operator can no longer be used."
23. See, for example, World Bank (2014), Box 14, p. 54 and Pastori et al. (2014), p. 89.
24. Kabak (2014).
25. See World Bank (2014), paragraph 110 and Government of Mongolia et al. (2007), pp. 62-63.
26. See World Bank (2014), Box 14, p. 54.
27. See UNECE (2008); Kabak (2014); World Bank (2014), paragraph 110.
28. Kabak et al. (2014). See along the same lines Pastori et al. (2014), p. 47, table 8.7.
29. World Bank (2014), paragraph 111.
30. See remarks by Çetin Nuhoğlu, President of the Turkish International Transportation Association (UND) Board of Directors on 29 April 2014: http://oldweb.ikv.org.tr/icerik_en.asp?konu=haberler&id=682&baslik=UND%20DELEGATION%20VISITED%20IKV
31. See Pastori et al. (2014), Executive Summary, page i.
32. See Pastori et al. (2014).
33. Ibid, p.47.
34. WTO (2005).
35. WTO (2009), paragraphs 4.35, 4.37 and 4.38.
36. See WTO (2009), paragraph 7.396.
37. Ibid.
38. World Bank Report (2014), paragraph 111.
39. See UNCTAD Transport and Trade Facilitation Newsletter N°69, First quarter of 2106, available at: http://unctad.org/en/PublicationsLibrary/webdtltlb2016d1_en.pdf

40. Ibid.
41. "Trade, Trade Facilitation and Transit Transport Issues for Landlocked Developing Countries", Government of Mongolia, United Nations Office of the High Representative for Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLS), United Nations Development Programme (UNDP), United Nations Conference on Trade and Development (UNCTAD) and Mission of Paraguay in Geneva (2007). Available at: <http://unohrls.org/UserFiles/File/Elle%20Wang%20Uploads/LLDCs%20Publication.pdf>
42. Estevadeordal, Suominen and Teh (2009), page 148.
43. For the legal test to be applied under Article XXIV of the GATT 1994, see WTO (1999a) and WTO (1999b).
44. Cousin and Duval (2014).
45. World Bank Report (2014), paragraph 112.
46. The three major multilateral legal instruments are: "United Nations Convention on the Law of the Sea (Montego Bay Convention) of 10 December 1982 (Articles 3.1b and c to liberalize transit transport); the United Nations Convention on Transit Trade of Landlocked States (New York Convention) of 8 July 1965 (Articles 2.2d and e which foresee the liberalization of transit transport) and the Article V of the General Agreement on Tariffs and Trade (freedom of transit)." World Bank Report (2014), footnote 59.
47. World Bank Report, 2014, p. 55 paragraph 113.

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