

# Energy Transit under GATT Article V and Energy Trade Dispute Resolution in the WTO

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# ENERGY TRANSIT UNDER GATT ARTICLE V AND ENERGY TRADE DISPUTE RESOLUTION IN THE WTO\*

**Michail Skouzes\*\***

## ABSTRACT

This paper analyses Article V of the General Agreement on Tariffs and Trade (GATT) and its application to transit of energy related goods via fixed infrastructure with certain capacity, such as pipelines and power grids. Modern economy requires the passing of goods through the territory of more than two countries in order to reach their destination. This also applies to goods in the energy sector, since oil and natural gas producing countries are not their majority consumers. There is a nexus of pipelines, both on land and below the sea, that transport oil and natural gas through vast distances of land crossing several countries to connect producing and consuming countries. Transfer via pipelines is not the only mode of transportation in the energy sector. Sea carriage via specially designed ships, such as oil tankers or LNG carriers, is another common way of transporting energy commodities. Electric power can be internationally transported through power grids connecting neighboring countries. In an era, in which energy plays a strategic role, the transportation of energy related goods is essential to the welfare of countries. In the absence of a multilateral International Treaty regulating international trade in the energy sector, bilateral treaties proliferate in this sector. It is evident that the creators of the GATT did not intend to regulate energy matters. However, as will be discussed in this article, the World Trade Organization (WTO), with its Dispute Settlement System, can be a forum suitable to adjudicate disputes in the energy sector, concerning eg the transportation of natural gas, oil and

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electric power. Article V of the GATT ensures freedom of transit, with some limitations, from the territory of each contracting party for goods, vessels and other means of transportation. Should this Article be applied to the energy sector and it being interpreted so as to also provide for capacity establishment rights, it has the potential to liberalize the energy market for WTO Members and reshape the world economy.

## **I. Introduction**

It is considered that the original currency in today's world is energy and natural energy resources and not traditional fiat currencies such as the dollar or the euro.<sup>1</sup> Although energy from renewable energy sources has risen exponentially during the last decade it is still far from being used universally. The consumption of traditional fossil fuels accounted for 84% of the world's primary energy consumption in 2019 and the global demand for hydrocarbons is expected to continue to grow until about 2040, albeit at a slower pace. Yet, natural gas together with renewable energy are the fastest growing sources of energy.<sup>2</sup> The most commonly used ways to transport natural gas are either via pipelines, usually in gaseous form, or via sea carriage in liquid form (Liquefied Natural Gas). Sea carriage is primarily regulated by the United Nations Convention on the Law of the Seas (UNCLOS), which guarantees for ships of all states the rights of innocent passage through the territorial sea (UNCLOS Article 17) and transit passage through straits used for international navigation (UNCLOS Article 38), and will not be examined in this paper. The only way to transport electricity is through power grids. Given that major fossil fuel reserves are situated far from their major consumers, they must be transported across thousands of kilometers crossing the borders of multiple states. Therefore, a state could take advantage of its location and hinder its transportation for its own purposes. In this context, the present paper will examine how GATT Article V could ensure the freedom of transit of energy resources, with a focus on fixed infrastructure. It will examine the issues that may arise from the ownership status of infrastructure and whether third parties have a right to access the infrastructure. Then, it will present the dispute settlement system of the WTO and elaborate on the

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<sup>1</sup> Randy Udall, 'Energy Challenges, Energy Opportunities' (2009) 29 *J Land Resources & Envtl L* 27, 33;

<sup>2</sup> Yuryi Leonidovich Zhukovskiy and others, 'Fossil Energy in the Framework of Sustainable Development: Analysis of Prospects and Development of Forecast Scenarios' (2021) 14 *Energies* 5268, 2;

reasons it is a suitable forum to adjudicate disputes arising from trade in the energy sector.

## II. Freedom of Transit in the GATT

### II.1. GATT Article V

GATT Article V is a complex provision comprised of seven paragraphs designed to ensure the freedom of transit for goods through the territory of WTO Members (Members). This Article has not been invoked in many disputes and relevant jurisprudence is provided by Panel Reports in only two cases: *Colombia – Ports of Entry*<sup>3</sup> and *Russia – Traffic In Transit*.<sup>4</sup> According to GATT Article V:1, goods, vessels or other means of transport are in transit when the passage across the territory of a Member is only a portion of a complete journey beginning and ending beyond the frontier of the Member whose territory the traffic passes. This traffic is termed in Article V as “traffic in transit”.

Traffic in transit destined to or originating from another Member shall be guaranteed freedom of transit via the routes most convenient for international transit. The use of the term ‘or’ in the first sentence of Article V:2 shall be construed as creating two separate obligations for each Member. A Member has an obligation to ensure transit through its territory to traffic entered from any other Member or is exited to any other Member.<sup>5</sup> Considering the ordinary meaning of the word freedom is the unrestricted use of something, a Member may not, in principle, restrict the passage of traffic in transit. GATT Article V:2 first sentence limits this freedom to the routes most convenient for international transit.<sup>6</sup> However, there is no further elaboration either by the GATT or by a Panel on what constitutes a ‘route most convenient for international transit’.

Article V:2 second sentence establishes a non-discrimination obligation stating that no distinction shall be made based on circumstances relating to the ownership of the goods or modes of transport, the point of entry or exit, the destination and origin of the goods

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<sup>3</sup> Panel Report, Colombia — Indicative Prices and Restrictions on Ports of Entry, WT/DS366/R, adopted on 20 May 2009;

<sup>4</sup> Panel Report, Russia — Measures Concerning Traffic in Transit, WT/DS512/R, adopted on 26 April 2019;

<sup>5</sup> *ibid* 62-63;

<sup>6</sup> Panel Report, Colombia —Ports of Entry (n 3), 174-175;

or on the flag of the vessels carrying the goods. Therefore, as noted by the Panel in *Colombia – Ports of Entry*, goods from all Members shall enjoy the same level of access and equal conditions when in international transit.<sup>7</sup>

Article V:3 stipulates that a Member has the right to require that traffic in transit through its territory be entered at the proper customs house. However, it cannot be subject to unnecessary delays or restrictions. Furthermore, Article 11.6 of the Agreement on Trade Facilitation (TFA) provides that formalities, documentation requirements and customs control shall not be more burdensome than necessary in order to: (a) identify the goods; and (b) ensure fulfilment of transit requirements. Traffic in transit is also exempt from all charges imposed in relation to the transit. Charges may only be imposed for transportation, to cover administrative expenses or the cost of services rendered. Charges and regulations imposed by Members shall be reasonable, having regard to the conditions of the traffic. Article V:5 contains a Most Favoured Nation (MFN) treatment obligation with respect to all charges, regulations and formalities on connection with transit. The Ad note to this Article provides that MFN treatment regarding transportation charges refers to like products being transported on the same route under the same conditions.<sup>8</sup> MFN treatment, which is entailed in GATT Article I, prohibits discrimination among like products originating in or destined for different countries.<sup>9</sup> The fundamental purpose of the MFN treatment obligation is to ensure the equality of competitive opportunities for like products from all Members.<sup>10</sup> Whether two products are ‘like’ has to be examined *in concreto*. In *Japan – Alcoholic Beverages II*, the Appellate Body took the following four elements into consideration: the product's end-uses in a given market, consumers' tastes and habits, the product's properties, nature and quality and their tariff classification on the basis of the Harmonized System established under the World Customs Organization (WCO).<sup>11</sup>

Article V:6 requires Members to accord MFN treatment to products which have been in transit through the territory of any other Member. The issue raised from this

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<sup>7</sup> *ibid*, 175;

<sup>8</sup> Panel Report, *Colombia – Ports of Entry* (n 3), 190;

<sup>9</sup> Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R adopted on 19 June 2000, 27;

<sup>10</sup> Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R adopted on 18 June 2014, 120;

<sup>11</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R adopted on 1 November 2006, 20;

paragraph is whether it creates obligations for the Member whose territory a product passes or the Member whose territory is the ultimate destination of a product. The Panel in *Colombia – Ports of Entry* found that the obligations of Article V:6 apply to Members whose territory is the final destination for goods in transit.<sup>12</sup>

Article V:7 explicitly limits the scope of Article V to not cover aircraft in transit. However, Article V applies to the air transit of goods.

In summary, Article V contains two basic principles of international economic law: the principle of non-discrimination and the MFN treatment obligation. It provides for the equal treatment of traffic in transit regardless of its origin, destination or the ownership and origin of the goods. It exempts traffic in transit from all duties imposed in respect of transit and only allows the imposition of certain reasonable charges and regulations with regard to the conditions of traffic and it creates an obligation for Members to avoid causing unnecessary delays or restrictions to traffic in transit.

## **II.2. The issues in GATT Article V:2**

### **II.2.A. The routes most convenient for international transit**

Article V:2 limits the freedom of transit to ‘the routes most convenient for international transit’. However, it does not elaborate on what constitutes a convenient route or what are the criteria which determine convenience. In order to resolve this issue, one must first define the term route and, more specifically, whether or not it covers both fixed infrastructure, such as a pipeline, or just a land, sea and air corridor. It is supported that, by its ordinary meaning, the term route is broad enough to cover fixed infrastructure as well as land, sea or air corridors.<sup>13</sup> In addition, this view is supported by the fact that the wording of GATT Article V:1 refers generally to ‘means of transport’ without excluding any mode, except for aircrafts in transit.<sup>14</sup> Plain access to the territory of another is, also, considered a route.<sup>15</sup>

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<sup>12</sup> Panel Report, *Colombia – Ports of Entry* (n 3), 186-192;

<sup>13</sup> Vitaliy Pogoretsky, *Freedom of Transit and Access to Gas Pipeline Networks under WTO Law* (Cambridge University Press 2017), 133;

<sup>14</sup> Mireille Cossy ‘Energy Trade and WTO Rules: Reflexions on Sovereignty over Natural Resources’ in Christoph Herrmann and Joerg Philipp Terhechte, *European Yearbook of International Economic Law 2012* (Springer 2012), 297;

<sup>15</sup> Arnoud R. Willems & Qing Li, ‘Using WTO Rules to Enforce Energy Transit and Influence the Transit Fee’ (2014) 4 *EEJ* 34, 37;

On the issue of convenience, the answer is not simple and may not be uniform for all cases. It has been maintained that the text of GATT Article V:2 provides that convenience is linked to the “international transit” as opposed to a ‘party’.<sup>16</sup> The wording of GATT Article V:2 (“via the routes most convenient for international transit”) supports this opinion. However, little to no explanation is given as to what and who determines convenience. In view of the principle of territorial sovereignty, it is the position of this Article that the transit state shall determine which route is convenient. This position is, also, supported by the fact that the transit state is better situated to determine convenience.<sup>17</sup> However, it cannot do so arbitrarily.

In order for a transit state to not violate its obligations under GATT Article V:2, it must take into account several criteria. Indeed, convenience is greatly dependent on the geographical position of the consumer and the producer.<sup>18</sup> The shortest route entails less costs. However, when determining convenience, the transit state shall, also, take into account the interests of the international community in general; a route that passes through a protected and fragile ecosystem is not convenient on the sole basis that it is the fastest route. Therefore, environmental aspects shall be considered as well. Furthermore, the transit state should consider the economic feasibility this particular route has for the entity that intends to use it. It should, also, be taken into account whether the suggested route might be prejudicial to the peace, good order, or security of the transit state. It is evident, that there one Member shall consider a plethora of criteria to ensure it does not violate its obligations under GATT Article V:2. Thus, the optimal way to ensure compliance is via bilateral (or plurilateral) negotiations with the interested parties.

In a scenario, where negotiations are not successful and an agreement is not reached, the transit state shall weigh all the aforementioned criteria and, most likely, even more. However, it is the position of this article that, in light of the general principles of good faith and the prohibition of abuse of rights, a transit state shall not be found to be obstructing freedom of transit when it has taken all the possible considerations into

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<sup>16</sup> Ibid, 38;

<sup>17</sup> Pogoretsky (n 13), 135;

<sup>18</sup> Danae Azaria, ‘Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade’ (2009) *J Energy & Nat Resources* L 559, 572;

account, but has decided to give more importance to some of them when determining convenience, to the extent this decision is reasonable and justified by the available data.

### **II.2.B. Capacity establishment rights**

When a fixed infrastructure with a certain capacity, such as a pipeline or a power grid is concerned, the issue of convenience becomes more complex. A pipeline may become convenient on the sole basis of its existence, but then congestion problems may arise rendering its utilization not feasible in a technical aspect. Therefore, an alternative solution must be found: either the construction of a new pipeline or the expansion of the existing one or the use of another pipeline. Constructing a new or expanding an existing pipeline or power grid and, thus, creating new capacity is defined as capacity establishment<sup>19</sup>.

GATT Article V:2 does not impose an obligation to Members to construct or permit the construction of new routes.<sup>20</sup> Article 11.5 of the Agreement on Trade Facilitation (TFA) stipulates that Members are encouraged to make available, where practicable, physically separate infrastructure (such as lanes, berths and similar) for traffic in transit. One cannot convincingly argue that TFA Article 11.5 imposes an obligation for capacity establishment. This is based on the wording of the Article, which states “encouraged” instead of legally binding treaty language such as “shall”. It is the position of this article that, when read in conjunction with TFA Article 11.5, and in accordance with the principles of good faith and the prohibition of abuse of rights, a Member may not arbitrarily hinder the construction of new or the expansion of existing fixed infrastructure. Instead, the transit state shall have an obligation to conduct negotiations with the interested parties to address this matter. This obligation should not be construed as an obligation to achieve a certain result (e.g., construct a new pipeline), rather as a behavioral obligation to hold negotiations in good faith to examine whether it is possible for the parties to reach an agreement.

It should be noted that there are other international treaties, that certain Members have signed, which specifically provide for capacity establishment. Namely, the United Nations Convention on the Law of the Sea (UNCLOS) and the Energy Charter Treaty

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<sup>19</sup> Pogoretsky (n 13), 54;

<sup>20</sup> Danae Azaria, ‘Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade’ (n 18), 572;



(ECT). The former stipulates in Article 125 that land-locked States, in order to exercise the rights provided for in the UNCLOS, shall enjoy freedom of transit through the territory of transit States by all means of transport. In the context of UNCLOS, 'all means of transport' does not entail transport pipelines and gas lines, unless land-locked States and transit States agree otherwise. ECT Article 7(4) stipulates that, if transit of energy materials and products cannot be achieved by means of energy transport facilities, then the contracting parties shall not, in principle, place obstacles in the way of new capacity being established. In addition, it is supported that in an instance, where the transport capacity is limited, the transport company may be required to reduce the capacity it has allocated to every user, in order to fulfill the requirements of non-discriminatory treatment. This reduction will, most likely, either be not possible or the transport company will be obliged to pay an excessive amount of damages to the users. Thus, ECT Articles 7(1) and 7(3) may indirectly compel it to expand its pipeline capacity.<sup>21</sup> In addition to these treaties, there are other soft law documents, such as the UN GA Resolution 63/2010, which welcomes international cooperation in developing transportation systems and pipelines and recognizes the need for extensive international cooperation in determining ways of ensuring the reliable transportation of energy to international markets through pipelines and other transportation systems.

The fact, that other international treaties, whether addressing specifically energy matters (in the case of the ECT) or create more general provisions for transit (in the case of UNCLOS) may provide for capacity establishment rights or simply encourage cooperation to ensure the reliable transportation of energy (such as the UN GA Resolution 63/2010) is of little to no significance in the context of obligations assumed under the GATT. However, when these treaties are read in conjunction with TFA Article 11, they constitute a convincing argument that the denial of a Member to establish new capacity will be done in bad faith and will constitute an abuse of right, provided of course that the Member is a contracting Party to the other treaties (or one of them). Therefore, a Member will be in breach of its obligation under Article V:2 to provide freedom of transit through its territory.

One has to consider the systemic implications to which such an interpretation of the Law might lead to. Could this argument, also, be applied to impose an obligation to the

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<sup>21</sup> Rainer Liesen, 'Transit under the 1994 Energy Charter Treaty' (1999) 17 J Energy & Nat Resources L 56, 64-65;

transit state to construct other infrastructure, eg a railroad, a highway, or even a new port? This argument is not uniform. It has to be examined on a case-by-case basis, taking into account the circumstances and the obligations a Member has assumed under other international treaties or soft law documents.

### **II.2.C. The issues of ownership and third-party access**

The obligation, under GATT Article V:2, for a Member to provide the same level of access and equal conditions to goods from all Members when in international transit can be problematic, when an infrastructure with limited capacity, such as a pipeline or a power grid, is concerned. There are two main issues arising in such a scenario. The first one concerns the ownership of the infrastructure. It is not uncommon for a private entity to be the owner of a pipeline. Second, should the same level of access to a pipeline/power grid be given to all Members, then congestion issues would arise and the infrastructure might not be able to handle the volume of all goods passing through.

Should the owner of the infrastructure be a private entity, then it will not be bound by WTO rules and obligations. The WTO is an international organization comprised of states and three separate customs territories that possess full autonomy in the conduct of their external commercial relations.<sup>22</sup> It should be noted that all the agreements under the WTO are integral parts of one agreement: the WTO Agreement.<sup>23</sup> Therefore, the WTO Agreements should be regarded as an international treaty between subjects of international law.<sup>24</sup> A third state has an obligation from an international treaty only if it consents to it in writing.<sup>25</sup> The WTO Agreements do not concern, in principle, private entities, for they only apply to Members. It is possible, in certain instances, for a private entity to be deemed as a 'public body' and, therefore, be subject to WTO law. A 'public body' is an entity that is vested with governmental authority and exercises governmental functions.<sup>26</sup>

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<sup>22</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3<sup>rd</sup> Edition, Cambridge University Press, 2013), 105;

<sup>23</sup> Appellate Body Report, Brazil — Measures Affecting Desiccated Coconut, WT/DS22/AB/R adopted on 20 March 1997, 18;

<sup>24</sup> Willems and Li (n 15) 39;

<sup>25</sup> Aristoteles Konstantinidis 'The Law of International Treaties' in Konstantinos Antonopoulos and Konstantinos Magkliveras (eds.), *The Law of the International Society* (2<sup>nd</sup> Edition, Nomiki Bibliothiki, 2011), 387;

<sup>26</sup> Appellate Body Report, United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted on 25 March 2011, 122-123;

It is maintained that the provisions of GATT Article V:2 establish an obligation to achieve a certain result and, thus, Members incur responsibility when this result is not achieved.<sup>27</sup> It should be noted, that the actions of a private entity will be attributable to a Member if said Member directs in any formal way a private entity to act inconsistently with WTO Law or if the private entity acts on behalf of the government of the Member.<sup>28</sup> In a scenario where infrastructure is owned by a private entity, freedom of transit could be reduced to inutility as Members would have the ability to circumvent their obligations by allowing private entities to be the sole owners or operators of their infrastructure. It would be inconsistent for GATT Article V:2 to impose an obligation to the Members, only for them to circumvent this obligation by allowing a private entity to operate the infrastructure. Consequently, Members must enact binding measures in their national legislation to regulate the practices of private entities in order to be in conformity with their obligations under the WTO regime.<sup>29</sup>

A second issue regarding freedom of transit via fixed infrastructure concerns the limited capacity such an infrastructure has. A pipeline or a power grid can transport a finite volume of goods, before congestion problems arise. In order to ensure identical level of access to every interested party the infrastructure's owner should grant access to every party that requests it. This essentially constitutes an obligation to allow third-party access. However, it is supported that Article V does not provide a legal basis for third-party access.<sup>30</sup> Were it the case, the obligation to allocate capacity to a third-party could lead to energy security problems and demand would be less fulfilled, since each party would be allocated less capacity for its goods. This would lead in a restricted energy market rather than a liberalized one and jeopardize the energy security of States. A valid argument against the compulsory third-party access obligation is that in certain States, the pipelines were financed, built and operated by private investors for their private use. A mandatory third-party access obligation would infringe on the property rights of these investors.<sup>31</sup> This could be considered as expropriation and the transit

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<sup>27</sup> Danae Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* (Cambridge University Press, 2015), 65;

<sup>28</sup> Pogoretsky (n 13), 236-237;

<sup>29</sup> Willems and Li (n 15), 40-41;

<sup>30</sup> Azaria, 'Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade' (n 18), 572;

<sup>31</sup> Pogoretsky (n 13), 234;

State may be found liable to pay damages to the investors. Therefore, a mandatory allocation of capacity to third-parties would not be practically feasible.

As mentioned above, GATT Article V:2 does not by itself create an obligation for a Member to construct or permit the construction of new infrastructure. In order to reject the establishment of new capacity, the transit state's rejection should be in accordance with the principles of good faith and the prohibition of abuse of rights. Therefore, the only way to guarantee an identical level of access in infrastructure with limited capacity is to set up a mechanism by which they regulate capacity allocation between exports, imports, transit, and domestic transport in a non-discriminatory manner.<sup>32</sup> This can be done through the establishment of a fixed set of procedures, in accordance with the principles of non-discrimination and national treatment, to allow interested parties to negotiate access to the infrastructure on the same basis through transparent procedures. This will provide equal opportunities to access the infrastructure and protect the interests of all interested parties. Consequently, in the case of infrastructure with limited capacity, such as power grids and pipelines, the obligation to provide the same level of access, set by the Panel in *Colombia – Ports of Entry*<sup>33</sup>, shall be interpreted to mean the provision of same opportunities to access the infrastructure through transparent procedures.

### **III. Dispute Resolution**

#### **III.1. The WTO as a forum to adjudicate disputes**

The WTO has three institutions to adjudicate trade disputes. First, there is the Dispute Settlement Body (DSB), which is established according to Article 2.1 of the DSU. The DSB has the authority to establish Panels, adopt Panel and Appellate Body reports, supervise the adoption of these reports and authorize suspension of concessions under the covered agreements. Pursuant to DSU Article 20, the period between the establishment of a panel until the date the DSB considers the Panel or Appellate Body report for adoption shall not exceed nine months where the panel report is not appealed or twelve months where the report is appealed. The DSB informs the relevant WTO Councils and Committees of developments in disputes regarding the respective WTO agreements.

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<sup>32</sup> Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* (n 27), 65;

<sup>33</sup> Panel Report, *Colombia – Ports of Entry* (n 3), 175;

DSU Article 17 provides that a standing Appellate Body is established by the DSB. The Appellate Body has the competence to hear appeals from panel cases. It is composed by seven members, three of whom serve on any one case. The members have a four-year term and each person may be reappointed only once. Its members shall have a demonstrated experience in the fields of law and international trade. The proceedings, from the day a party to a dispute formally notifies its decision to appeal to the date the Appellate Body report is circulated, shall not in any case last more than 90 days. A panel report may be appealed only by parties to the dispute and the appeal must be limited to legal issues covered in the panel report and legal interpretations developed by the panel.

The Panels established by the DSB are the third institution competent to adjudicate disputes concerning the WTO Agreements. The Panels are comprised of three (or five if the parties to a dispute agree so within ten days from the establishment of the panel) well qualified governmental and/or non-governmental individuals. These individuals may have served or presented a case to a panel in the past, served as a representative of a Member, or in the Secretariat, taught or published on international trade law or policy. They are selected with a view on ensuring the independence of the members and they may not be a citizen of a Member who is a party to the dispute the panel adjudicates. A panel is established, if a complaining party requests it, at the latest DSB meeting which follows the one in which the request first appeared as an item to its agenda. The DSB retains the authority to decide by consensus to not establish a Panel. Panel members serve in their individual capacity and not as representatives of a government or of any organization.

The DSB is competent to adjudicate any dispute arising from any of the WTO Agreements. The DSU sets the rules and procedures by which the dispute will be resolved. The aim of the dispute settlement system is to provide security and predictability to the multilateral trading system. Hence, the DSB may not add to or diminish the rights and obligations provided in the WTO Agreements. The Panels and the Appellate Body when interpreting a covered agreement are guided by the customary rules of interpretation of public international law. However, their interpretation is not definitive as the Ministerial Conference and the General Council have the authority to

adopt definitive interpretations.<sup>34</sup> The adopted (by the DSB) Panel and Appellate Body reports are binding on the parties to the dispute, but not to Members which are a third party to the dispute.

Should the DSB adopt a report that concludes a Member has violated its obligations under the WTO regime, the dispute enters its final stage. According to DSU Article 21, the Member concerned shall inform the DSB whether it intends to implement the recommendations. This shall be done in a DSB meeting held within 30 days from the date of the adoption of the panel or Appellate Body Report. In cases, where it is impracticable for a Member to comply immediately, it shall be given a reasonable period of time. This reasonable time period is often agreed by the parties to the dispute.<sup>35</sup> If an Agreement is not reached within 45 days after the adoption of the recommendations and rulings, the original complainant may refer the matter to arbitration under DSU Article 21:3 (c). The parties must agree to an arbitrator within ten days. Otherwise, the Director-General of the WTO, at the request of either party, may appoint an arbitrator after consultations with all parties.<sup>36</sup>

DSU Article 21:8 provides that during this reasonable period of time, the DSB is monitoring whether the adopted rulings and recommendations are implemented. In order to implement the rulings and recommendations, a Member must withdraw or modify the inconsistent measure with a new measure. This results, in the existence of two distinct measures, one of which is the original measure that gave rise to the dispute and the other the measure adopted to implement the rulings and recommendations.<sup>37</sup> Any Member may raise the issue of implementation at the DSB at any time following the adoption of the recommendations and rulings. Six months after the reasonable period of time is established the issue of implementation is an item on the agenda of each DSB meeting, until it is resolved.<sup>38</sup>

If a disagreement on the implementation of the rulings and recommendations arises, DSU Article 21:5 stipulates that it should be decided through recourse to the procedures

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<sup>34</sup> Mitsuo Matsushita and others, *The World Trade Organization Law, Practice and Policy* (3<sup>rd</sup> Edition, The Oxford International Law Library, 2015), 87;

<sup>35</sup> Van den Bossche and Zdouc, (n 22), 195;

<sup>36</sup> *ibid*, 291-292;

<sup>37</sup> Appellate Body Report, Canada — Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/RW, adopted on 4 August 2000, 11;

<sup>38</sup> Van den Bossche and Zdouc, (n 22), 292;

of DSU Articles 4 to 20, including resort to the original panel if this is possible.<sup>39</sup> During recourse to DSU Article 21:5, new claims, arguments and factual circumstances may be raised by the complainant, for an adopted measure may be inconsistent in ways different from the original measure. In the opposite scenario, a Panel's ability to resolve the dispute would be limited and it would not be able to properly carry out its mandate.<sup>40</sup> DSU Article 21:5 panel and Appellate Body reports are binding on the parties to the dispute after their adoption by the DSB. However, the complainant can request authorization from the DSB to suspend the application of concessions or other obligations to the respondent immediately, without the respondent be given a reasonable period of time to implement the rulings and recommendations of these reports.<sup>41</sup>

### **III.2 Energy disputes in the WTO**

Regulating trade in the energy sector was not an intended target for the GATT. At the time it was negotiated, major energy producers were not contracting parties to the GATT, eg the Russian Federation (member since 22 August 2012), Saudi Arabia (member since 11 December 2005) and Kazakhstan (member since 30 November 2015). There are opinions that GATT Article V does not apply to transit of energy resources through fixed infrastructure, for the WTO is not suited to regulate trade in energy and at the time Article V was negotiated not a great many goods was transported by fixed infrastructure.<sup>42</sup>

It is true that there are other International Treaties specially designed to regulate energy matters. Namely, the Energy Charter Treaty (ECT). However, the ECT is ratified by 52 Contracting Parties, including the European Union and Euratom. Belarus has not ratified the ECT, but applies it provisionally. Norway has not ratified the ECT, albeit it being a Contracting Party.<sup>43</sup> Most ECT Contracting Parties are located in the Europe

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<sup>39</sup> Ibid, 293;

<sup>40</sup> Appellate Body Report, European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India, WT/DS141/AB/RW, adopted on 24 April 2003, 27;

<sup>41</sup> Van den Bossche and Zdouc, (n 22), 295;

<sup>42</sup> See Zhong Lei, 'The Applicability of GATT Rules to Gas Transit against the Backdrop of the Belt and Road Initiative: China's Pipeline Transit Transport' (2020) 15 Asian J WTO & Int'l Health L & Pol'y 259, 269;

<sup>43</sup> Information taken from the ECT Website <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/> accessed on 15 October 2022;

and Central Asia. Therefore, the ECT can be considered by some as a regional agreement.

Although, Members did not originally intend for the GATT to regulate energy matters, the very preamble of the WTO Agreement states that the Parties agree to the expansion of the production and trade in goods and services. Thus, one cannot convincingly argue that the regulation of energy goods falls outside the scope of application of the GATT. The wording of the preamble allows the interpretation of terms found in the GATT in light of the contemporary needs and issues of the Members.<sup>44</sup> It is logical, after all, that the law and interpretation of the law should pay due regard to the advancements of technology and the evolution of society. In an era that energy security is of utmost important for states and the unrestricted flow of energy related goods is imperative, it would be unreasonable, in the absence of another forum, for the World Trade Organization to not have the authority to adjudicate energy trade related disputes.

## **VI. Conclusion**

When GATT Article V was negotiated, transit via pipelines could hardly had been envisioned by its creators. However, the law and its interpretation should not remain stagnant throughout the years, but it should follow the advancements in technology and society. In this context, GATT Article V, when interpreted in light of the principle of good faith could provide the legal basis for the construction and the improvement of fixed infrastructure, necessary to transport energy related goods. Each Member should set transparent procedures in order for the interested parties to access its fixed infrastructure, thus fulfilling its obligation to provide identical level of access to interested parties. The WTO as a universal Organization has a set of rules and procedures established in the DSU, in order to adjudicate disputes arising by any of the Multilateral Agreements that are listed in Appendix 1 of the DSU, including the GATT. Therefore, since traditional energy resources are considered goods and electricity is treated in international practice as a good, the WTO is a forum competent to resolve disputes in the energy sector. What makes the WTO a forum suitable to adjudicate energy disputes is the composition of the various Panels and the Appellate Body by individuals, who are experts in the field of international trade law. The WTO has the

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<sup>44</sup> Vladyslav Darahan, 'Obstacles to Free International Trade: Pressing Challenges of the Freedom of Transit' (2018) 13 Lex Portus 46, 53;



potential to completely liberalize trade in the energy sector and promote energy security, should Members be willing to apply its provision to this sector and not resort to the isolationism of the past years.