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Freedom of Transit and Access to Pipeline Networks under WTO Law

By Vitaliy Pogoretskyy

Cambridge: Cambridge University Press, 2017

In *Freedom of Transit and Access to Pipeline Networks under WTO Law*, the author appropriately introduces the topic by stating that energy is featuring increasingly prominently as a topic in international trade law. Indeed, while being a dormant issue in the World Trade Organization (“WTO” forum for decades, the importance of energy in the multilateral trading system can no longer be denied today. The reasons for its growing importance can, inter alia, be attributed to the changing nature of energy generation and global trade in energy, as well as the large number of accessions of major energy producing, exporting and transporting countries to the WTO over the past fifteen years. An example of how the importance of the WTO for energy can no longer be ignored is, for instance, the fact that beyond disputes regarding renewable energy, a case concerning the European Union’s Energy Package and Russia’s access to the EU gas market is currently pending at the WTO (DS476, *EU – Energy Package*). It may well be that this unprecedented case becomes a turning point for the WTO as a forum for resolving energy trade disputes. Unintentionally, the WTO may be *de facto* taking over this role from institutions such as the Energy Charter Secretariat.

This is precisely why Pogoretskyy’s study on the treatment of natural gas transit and access to pipelines under WTO law is such a relevant and timely contribution. While other books have appeared in recent years dealing with gas transit in public international law (notably Azaria’s volume), this is the first book that genuinely puts the emphasis on international trade law.¹ The goal of the book is, according to the author, to investigate to what extent WTO law can positively contribute to the development of a competitive international gas market. This is an important line of enquiry, as several key obstacles in international gas trade, including pertaining to transit, can undermine the notion of ‘free trade’ as promoted by the WTO. Such obstacles are, for instance, political considerations that can hamper the establishment of a trade connection between suppliers and consumers located in different WTO Members or the fact that gas trade and transit is network-dependent. In an accessible, clearly articulated manner, the author makes several compelling arguments on how WTO law can play a constructive role in mitigating such hurdles. The key to achieving this result, writes Pogoretskyy, is the adequate international regulation of two essential matters in cross-border gas trade, namely ‘third-party access’ (the right of a third party, such as a gas seller, to access a pipeline network) and ‘capacity establishment rights’ (the rights of different stakeholders to create new pipeline capacity through its construction or expansion). The central question, then, is whether the existing WTO disciplines can, at least to some extent, facilitate the strengthening of these rights.

The starting point is to investigate whether various WTO agreements (notably the GATT and the GATS) apply to trade in natural gas and if so, to what extent their relevant provisions apply to its transit. The author answers the first question in the affirmative, finding that natural gas in its gaseous state is classified as a good under the Harmonized System

¹ D Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* (Oxford, Oxford University Press 2015)

convention, which can be used to interpret the meaning of ‘goods’ under the GATT. Building on this analysis, he draws the sensible inference that GATT Article V (freedom of transit) applies to the transit of natural gas via pipelines, as a ‘good’ in transit (a contested issue among WTO Members). Subsequently, the author unpacks the elements of GATT Article V to shed light on the various dimensions of the transit of gas. As regards the GATS, the author rightly remarks that the current services classification system does not reflect the commercial reality of the energy industry. Nevertheless, the GATS is relevant to services in the energy sector, and the rules of the GATS are – at least partially, according to the author – applicable to services relevant to trade in gas. Can there be a conflict between the GATT and GATS when both apply to gas transit? Not necessarily, writes Pogoretskyy. Although both agreements apply concurrently, a clash can be avoided because, as the author shows throughout the volume, all issues are amenable to a harmonious interpretation and application of both agreements. As the Appellate Body clarified in *EC – Bananas III*, the GATT and the GATS are not mutually exclusive. The two agreements can consequently apply to the same measure simultaneously, but covering different aspects. In the case of natural gas, the GATS thus protects the suppliers or gas transportation services (and not the suppliers of goods). The GATT, on the other hand, protects the actual suppliers of the good.

Turning to the fundamental issue in the study, Pogoretskyy proceeds to examine to what extent the relevant WTO agreements help to entrench ‘third party access’ and ‘capacity establishment rights’ for WTO Members. In his opinion, these rights are ultimately ancillary to the provisions relevant for transit, as either right is neither expressly mentioned nor expressly excluded. Therefore, a case is to be made that certain provisions support the argument that such rights are enshrined in WTO law. Looking for interpretations in public international law, the author finds backing for his argument in the principles of effective or integrated rights and economic cooperation, the obligation to negotiate in good faith, and the prohibition of *abus de droit*. His overall finding is that WTO law ‘contains broad rules regulating transit, which may in principle encompass ancillary rights integrally related to the obligation to provide freedom of transit, or to accord non-discriminatory treatment under GATT Article V, such as third-party access and capacity establishment rights’.² Nonetheless, the study concludes that the transit State cannot be required to provide compulsory third-party access right to a foreign gas shipper, especially in the absence of pipeline capacity. Moreover, as the study argues, based on current law, a transit State is not obliged to allow the entry of foreign investment on its territory to build a gas pipeline.

Apart from the in-depth discussion on how WTO law is relevant for the transit of natural gas, the most valuable and innovative contribution of the volume is, in my opinion, the discussion of how the WTO can develop the regulation of these aspects of the international trade in gas (‘third-party access’ and ‘capacity establishment rights’) more effectively. Pogoretskyy sets out two scenarios on how the WTO could play a role in this endeavour: (i) through dispute settlement proceedings, as nothing in the law prevents a WTO Member from challenging in WTO dispute settlement measures that infringe on these rights, and (ii) by means of providing a diplomatic platform for the development and further improvement of the international regulation of ‘third-party access’ and ‘capacity

² V Pogoretskyy, *Freedom of Transit and Access to Gas Pipeline Networks under WTO Law* (CUP: Cambridge 2016) p. 120.

establishment rights'. Regarding the latter, one could go about it in two ways, by either codifying already existing principles of general public international law in the WTO legal system, or through the progressive development of WTO law through negotiations on additional commitments under the GATS relevant to gas transit.

Two remarks are in place here. First, given the gridlock the WTO is faced with regarding any progress on multilateral negotiations, and given that a dispute relevant for some of these issues is currently pending (*EU – Energy Package*), the most realistic scenario is, at present, development through dispute settlement. Second, regarding the diplomatic platform suggested as a means to develop disciplines relevant for these issues, it could be added that cooperative avenues among the WTO and the Energy Charter Secretariat (ECS) could be explored. The ECS has valuable experience and expertise in this area, and a duplication, overlap and competition between the WTO and the ECS on the same issues is a lost opportunity. Rather, these two treaty regimes, their respective Membership and secretariats should attempt to cooperate. One could think of a diplomatic, bottom-up WTO-ECS working group on particular issues of energy trade and transit, for instance.

Overall, the strength of the book is that, while the emphasis is on international trade law, the author always places the topic in the broader context of not only public international law and other relevant agreements, but also of the historical, political and market realities of international gas trade. These elements combine to make the book a compelling read. That being said, it would have been helpful if the volume would have more elaborately explained the different gas market models that exist around the world in a comparative manner, including their specificities and varying contract arrangements. The book would have also benefited from the inclusion of some actual in-depth gas transit case studies. However, this deficiency cannot be attributed to the author, as the difficulty therein is that most of it would remain purely hypothetical, as we still await a decision on the first WTO dispute relevant to these matters.

More generally, the problem remains that, while WTO law may clarify legal issues pertaining to trade between its Members, it will not be able to solve the political undertone and disagreements between its Members that may and do exist in the field of cross-border gas trade. Striving for an optimally competitive international gas market in which the equilibrium between gas supply and demand would be struck by market forces is without a doubt a noble goal and one that should be pursued. The bigger question is though to what extent this can be attained, taking into account its inevitable political dimensions and the uneven distribution of exhaustible natural resources such as natural gas. This may change as cleaner energy becomes more competitive and natural gas loses market share globally. But until that time, natural gas will remain a sought-after resource, and producing and exporting countries will make use of their dominant export and transit positions. Nevertheless, natural gas, though arguably the cleanest fossil fuel, will hopefully ultimately prove to be a transition fuel.

This does not make Pogoretsky's contribution obsolete. Quite to the contrary, in fact. Many important conclusions can be drawn from his study, not only for the regulation of international trade in natural gas, but also for other areas of network bound trade, such as electricity.

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