

FREEDOM OF TRANSIT AND ACCESS TO GAS PIPELINE NETWORKS UNDER WTO LAW

Gas transit is network-dependent and it cannot be established without the existence of pipeline infrastructure in the territory of a transit state or the ability to access this infrastructure. Nevertheless, at an inter-regional level, there are no sufficient pipeline networks allowing gas to travel freely from a supplier to the most lucrative markets. The existing networks are often operated by either private or state-controlled vertically integrated monopolies who are often reluctant to release unused pipeline capacity to their potential competitors. These obstacles to gas transit can diminish the gains from trade for states endowed with natural gas resources, including developing land-locked countries, as well as undermine WTO Members' energy security and their attempts at sustainable development.

This book explains how the WTO could play a more prominent role in the international regulation of gas transit and promote the development of an international gas market.

VITALIY POGORETSKYY works as Counsel at the Advisory Centre on WTO Law (ACWL), where he assists developing-country Members of the ACWL and the least-developed countries in the WTO dispute settlement proceedings, and provides to these countries legal advice and training on WTO law. He has also worked at the Rules Division of the WTO Secretariat, FratiniVergano – European Lawyers, and as a civil servant of the Government of Ukraine.

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To my wife and best friend, Charlene, my parents
and my grandfather, Victor

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FOREWORD

I gladly comply with Vitaliy Pogoretskyy's request to write a foreword by way of introduction to his book, which I previously read in the form of a PhD thesis as an external examiner. This book addresses the very contentious subject of the freedom of gas transit and access to gas pipeline networks, which is not sufficiently explored, and, at first glance, may seem exceedingly technical and complex. Dr Pogoretskyy's presentation of this subject, however, is both interesting and highly thought-provoking, addressing many issues relevant to regulatory authorities, WTO lawyers, energy analysts and generalists in the field of public international law. Energy security, sustainable development, the right of access to the sea for land-locked countries and the risk of the fragmentation of international law are among the topical issues discussed.

Only a handful of WTO rules directly regulates the issue of access to energy networks, including for purposes of gas transit. These rules are not located in the multilateral agreements on trade in goods. They can be found mainly in the positive commitments on trade in services, or in the accession commitments of a few individual WTO Members. Does this mean that the issue of gas transit, which is highly network-dependent, is of little concern to the WTO? Does this issue fall within the realm of WTO provisions regulating trade in goods, services or both? Similar questions can be asked with regard to other areas of network-dependent trade. Dr Pogoretskyy's book examines these questions by providing a comprehensive and original analysis of all major WTO provisions directly and indirectly relevant to the subject of gas transit.

This book makes a particularly useful contribution to the existing literature by placing the discussion of WTO provisions regulating gas transit within the broader context of public international law. As is well known, the interaction between WTO law and public international law has been an important and challenging topic in the academic literature. This book presents a thorough review of many non-WTO legal sources relevant to WTO transit obligations. These sources are then used to

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interpret WTO law by applying, among others, the principle of systemic integration. In his book, Dr Pogoretsky demonstrates his in-depth understanding of the methods of treaty interpretation, WTO jurisprudence, public international law and the relevant regulatory context.

Offering an interesting perspective on the relationship between WTO law and public international law, this book in a timely manner fills a very important gap in the literature. I have no doubts it will be a valuable reference source for the on-going discussions on the place of energy in the WTO, as well as for a broader debate on the role of public international law in the WTO legal system.

Prof Dr Peter Van den Bossche

Member, Appellate Body, World Trade Organization, Geneva

Director of Studies, World Trade Institute, Bern

Geneva, July 2016

PREFACE, ACKNOWLEDGEMENTS AND DISCLAIMER

This monograph is based on more than five years of PhD research, inspired by my general interest in energy and the theme of the fragmentation of international law, which, after the landmark rulings in *US – Gasoline*, *US – Shrimp*, *Korea – Procurement* and *EC – Approval and Marketing of Biotech Products*, has got its second wind in the WTO case law and is vividly discussed in the academic literature. This monograph explores whether the problem of the fragmentation of international law is also pertinent in the context of the WTO's regulation of energy trade, in particular gas transit. I set out my preliminary ideas on this subject in an article: Vitaliy Pogoretsky, 'Freedom of Transit and the Principles of Effective Right and Economic Cooperation: Can Systemic Interpretation of GATT Article V Promote Energy Security and the Development of an International Gas Market?', 16(2) *Journal of International Economic Law* (2013) 313, which were further developed into a PhD thesis, defended at the Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP, the University of Dundee), and, subsequently, into this monograph.

During the period of my research, I spent two and a half years as a full-time PhD researcher at the CEPMLP, and three years working in the WTO Secretariat, Rules Division and the Advisory Centre on WTO Law (ACWL). In all of these places, I found an intellectually stimulating environment for completing this monograph. I also met many great personalities and competent experts in various fields: international lawyers, energy economists, political scientists, energy industry professionals, who, in one way or another, shaped the outcome of this study. Their contributions took different forms, including a thorough and critical review of particular chapters of this monograph, offering valuable and creative advice or sharing professional experience and knowledge while supervising my professional activities, which I subsequently applied to my research. This monograph has greatly benefited from all of these contributions and I would like to thank all of my colleagues and friends for their help and support. I am also profoundly grateful to the

CEPMLP for its PhD Research Scholarship, without which this research would not be feasible.

Among the individuals whom I would like to thank are my PhD supervisors, Professor Melaku Geboye Desta and Professor Joost Pauwelyn. They were excellent mentors and their comprehensive reviews of my PhD chapters were truly priceless. I would also like to thank Professor Peter Van den Bossche, Dr Jacques Hartmann and Dr Sarah Hendry for challenging my ideas during the examination of my PhD thesis and providing critical comments. I am deeply grateful to Professor Van den Bossche for agreeing to write the foreword for this monograph.

At the CEPMLP, I greatly benefited from intellectual discussions with Dr Abba Kolo, Professor Kaj Hobér, Professor Jonathan Stern, Stephen Dow and Dr Sergei Vinogradov, as well as many of my research fellows, including my good friends Dr Daniel Behn and Dr Ana Maria Daza-Clark. Among my former colleagues at the WTO Secretariat, I would like to thank Mark Koulen and Professor Gabrielle Marceau for providing valuable comments on the draft of my article mentioned earlier and Mireille Cossy, Dr Nora Neufeld, Graham Cook and Pierre Latrille for insightful comments on various aspects of my research. I would like to thank my colleagues at the ACWL for their understanding and support throughout the first year and a half of my tenure, during which I had to combine my professional responsibilities with completing my research, and for sharing their profound knowledge and expertise in WTO law that I applied to this study.

Many other friends and colleagues contributed to this research. I am grateful to Dr Yulia Selivanova and Graham Coop for facilitating my access to the negotiating history of the Energy Charter Treaty, and Dr Daniel Behn, Sergii Melnyk, Tetyana Payosova, and Alexander Volkov for reviewing some parts of my study. I would like to thank Dr Carol Ní Ghiollarnáth for her help in editing different versions of this monograph.

Last but not least, my warmest thanks go to my wife, Charlene, my parents, my brother Nikolay, and my grandparents. Without their love and support throughout more than five years of my research, this monograph would not have seen the light of day.

By way of a disclaimer, all errors in this monograph are mine alone and the views expressed in this study should not be attributed to the organisations with which I have been affiliated.

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ACRONYMS AND ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
BIT	Bilateral investment treaty
CIS	Commonwealth of Independent States
COMESA	Common Market for Eastern and Southern Africa
CPC	United Nations Provisional Central Product Classification
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EAC	East African Community
ECOWAS	Economic Community of West African States
ECT	Energy Charter Treaty
EEZ	Exclusive economic zone
EPS	Electronic payment services
EU	European Union
GA	United Nations General Assembly
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ICJ	International Court of Justice
IEA	International Energy Agency
ILC	International Law Commission
ITA	Information Technology Agreement
ITO	International Trade Organization
LNG	Liquefied natural gas
LOSC	The Law of the Sea Convention
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	Most-favoured-nation obligation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
SADC	Southern African Development Community
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SCP	South Caucasus Pipeline
STE	State trading enterprise
TBT	Technical barriers to trade

LIST OF ACRONYMS AND ABBREVIATIONS XXXV

TELECOM	Telecommunications
TRIMS Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCLOS	United Nations Conference on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WWI	World War I
WWII	World War II