



Transit of energy via cross-border pipelines: A study on the limits of GATT article V

Fazil Jamal

Centre for International Legal Studies, School of International Studies, Jawaharlal Nehru University, New Delhi, India

Abstract

The freedom of transit in international trade law originally involved the movement of goods across borders without any arbitrary or unnecessary hindrance. In this era of network-bound energy systems requiring the permanent establishment of fixed installations such as gas pipelines and high voltage power transmission grids to facilitate access to energy across borders, and especially in the absence of an international legal regime specifically addressing the question of such transit of energy goods, the scope and ambit of the freedom of transit in international trade law is under critical scrutiny. While some scholars state that the freedom of transit includes the construction and maintenance of cross-border pipelines, this paper argues that such an interpretation of the existing GATT Article V on international transit of goods might be inaccurate, ‘stretching’ the legal provisions too imaginatively, rather than reflecting what it actually says. This paper reviews the textual language of Article V and also the interpretation of the Article as emerging from the WTO/ DSB case law. It is argued that the specificity of the network-bound infrastructure systems involved in energy transit are not yet addressed by the international trade law framework and that in the absence of special disciplines at WTO, only incremental practice can provide guidance on transit of energy goods via cross-border pipelines.

Keywords: GATT, article V, freedom of transit, pipelines, energy transit, WTO panel report

Introduction

Contemporary international trading regime is constituted by the institutional framework of the World Trade Organization (WTO) ^[1] The scope and scale of the WTO Agreements straddle the vast terrain of cross-border transactions ranging from goods, services, intellectual property rights, trade, finance and the environment ^[2] The GATT/WTO framework essentially seeks to reduce and eliminate various unfair barriers to, and discriminatory treatment in, international trade so as to enable nations to truly benefit from comparative advantage and open competition. One of the distinguishing features of the WTO is the presence of a dispute settlement body (DSB) that provides enforceable remedy for violations of its ‘covered agreements’ ^[3].

Until the establishment of the WTO at the end of the Uruguay Round of international trade negotiations in 1994, the global trade regime was based on the 1947 GATT framework. It is important to remember in this context that soon after the GATT 1947 was signed as a temporary arrangement in a post-war international economic reconstruction effort. The creation of a comprehensive international trade organization –originally floated at the 1944 Bretton Woods’ Conference- was envisaged by the 1948 Havana Charter ^[4]. While the international trade organization envisaged did not materialise for decades altogether; from diplomacy and consensus-based *ad hoc* decision-making among the contracting parties of GATT 1947, the world trading system graduated to a rules-based order, with GATT 1994/WTO. The GATT 1994 ^[5] included many changes from the 1947 framework, yet it retained the foundational philosophy of the trading regime: the principles of most-favoured-nation ^[6] and of non-discrimination.

The present study seeks to identify and understand the text and context of GATT Article V pertaining to freedom of transit, especially as it relates to the transit of network-bound energy in our times. International energy pipelines and grid-based power transmission cables across borders are a significant part of the modern landscape. Hence, an examination of the scope and extent of the freedom of transit of good across borders is a matter of profound practical relevance. The structure of the paper is as follows: Part B explains the textual language and meaning of GATT Article V on ‘freedom of transit’. Part C examines the interpretation of the Article V as laid down by the WTO/DSB in two important cases in the last decade or so. Part D surveys the new question of transit of network- bound energy via pipelines and power grids, and its policy relevance for many land-locked states in particular. Part E concludes with some observations on the state of the law on freedom of transit and its likely trajectory.

GATT Article V: Freedom of Transit

Historically, the GATT framework recognized the vital role and significance of freedom of transit for international trade among the ‘contracting parties’. It incorporated a provision in this regard at the very beginning of the Agreement- right along with the disciplines on MFN and National Treatment. Article V,

entitled “freedom of transit”, addresses issues related to the international transit of goods by prescribing disciplines on the charges, regulations and procedures that a GATT contracting party may impose vis-a-vis traffic in transit through its territory by another party to a foreign destination. The disciplines are also in relation to a member’s treatment of goods that have been in transit through another member. The Article provides normative guidelines for a State in the exercise of regulatory authority on foreign goods transported through its territory. The primary purpose is to facilitate transit through the territory of each member to or from the territory of other members. To ensure freedom of transit, Article V deploys two kinds of disciplines: First, by asking States not to impose unnecessary delays, restrictions or charges on transit. Secondly, by asking States not to discriminate among the States in the transit chain, including transit-related vessels and other means of transport [7].

Like the GATT 1947, the Havana Charter also included a provision on freedom of transit, albeit with some additions- reflecting the need for progressive development of norms for the protection of the transit rights of land-locked states [8]. Hence, the Havana Charter envisaged the proposed organization to “undertake studies, make recommendations and promote international agreement relating to the simplification of customs regulations concerning traffic in transit, the equitable use of facilities required for such transit and other measures designed to promote the effectiveness of this Article [9].” As legal scholars note, the Havana Charter did point to the directions for a progressive evolution of the freedom of transit in international law by providing for a way to build upon the GATT 1947 framework. Hence, the consensus of international opinion reflected in the Havana Charter is certainly important in the interpretation of GATT Article V [10]. Be that as it may, when we look closely at the GATT 1947 transit framework, it is clear that in many ways, Article V essentially follows the 1921 Barcelona Convention and Statute on Freedom of Transit [11]. However, there are some differences in the approach of the two treaties. While the Barcelona Convention envisaged the transit of goods and persons, Article V only deals with the transit of goods. The GATT framework does not deal with the movement of persons in transit as it is the domain of immigration laws.

Article V (1) defines goods as ‘traffic in transit’ [12]. The definition envisages that goods may originate in one country, transit through another State, and finally reach a third State as the final destination of the goods. While the GATT’s transit norms are primarily meant to support international trade, the same norms can also facilitate internal trade within one country with geographical peculiarities [13]. Hence, ‘traffic in transit’ includes a movement between two points in the same country passing through another country due to geographical reasons. It is noted that the provisions of GATT Article V apply so long as the transit State and the state of origin and/or destination of the goods are WTO Members [14].

The legal norms seek to ensure protection for the goods in transit from unnecessary restrictions, including unreasonable charges or delays, and the extension of MFN treatment to goods which are “traffic in transit” or “have been in transit”. Paragraph 1 of the Article essentially indicates as to when goods qualify as being “in transit across the territory of a contracting party.” The paragraphs 2-5 of this Article cover the treatment to be given by a member country to products in transit through its territory between any other member country and any third country, and paragraph 6 covers the treatment to be given by a member country to products cleared from customs within [15].

GATT Article V (2) declares “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.” Further, the provision does not brook any discrimination on the basis of “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.” The provision entails two major legal obligations on contracting Parties [16]. First, the States agree to provide freedom of transit to the goods entering and then subsequently departing from the Member’s territory- the goods that are ‘traffic in transit’. Secondly, the contracting States agree to provide non-discriminatory treatment to the goods in transit. National origin, type and means of transport, ownership of the goods, etc. should not be advanced as reasons to prevent or restrict or unfairly treat the traffic in transit. The provision does not prohibit bilateral agreements among neighbouring countries on issues of transit provided such agreements do not prejudice the interests of other members, nor limit the freedom of transit for other Members.

Under Article V (3), a State may require traffic in transit to enter through designated customs house, and it may charge administrative expenses, transportation charges and other admissible costs entailed by the services rendered by handling of the goods in transit. However, transit states cannot convert the facility to raise exorbitant charges. Moreover, such traffic should not be subjected to unnecessary delays or other forms of restrictions [17].

Article V (4) envisages that the charges and regulatory measures to be ‘reasonable’ [18]. Article V (5) expects the transit regulations and charges to be completely non-discriminatory in similar circumstances [19]. Article V (6) provides added protection against discriminatory or disadvantageous treatment of goods in transit from other member States [20]. Article V (7) provides that while the transit of air cargo, including baggage, is covered under the present rules; the operation of aircraft in transit is not- an exception to the general rule [21]. The Article makes it clear that freedom of transit applies to transit of goods by aircraft.

WTO/DSB: Interpreting Article V

‘Article V has never before been interpreted by the Appellate Body or a GATT/WTO panel. The Panel’s task is therefore arduous since it will be necessary to interpret Article V of the GATT 1994 without any meaningful guidance [22].’

The aforesaid observation was made by a WTO Panel in April 2009, in a dispute between Colombia and Panama^[23]. Although most areas of transit trade in goods fall within the scope of Article V, disputes between States on the interpretation and application of the legal provision have rarely found their way into the WTO^[24]. Even after more than two decades of functional existence and jurisprudence, the WTO Dispute Settlement Body rarely dealt with the question of freedom of transit. Where differences of interpretation or application of the provision arose between states in the past, such matters were settled among the states concerned through diplomatic negotiations and bilateral processes. This was the legal scenario vis-a-vis the transit provisions, until that Panel Report in 2009.

Ten years later, in April 2019, the WTO once again dealt with a transit dispute involving Ukraine and Russia. The case has wider systemic ramifications as it also pertains to the interpretation and application of the national security exception vis-a-vis the obligation to respect transit freedoms^[25]. We shall presently explore the two cases- one after the other, respectively- so as to understand their contribution to the meaning and content of the principle of free transit under the WTO framework.

a. Columbia- Ports of Entry Case^[26]

The dispute concerns certain Colombian customs measures that required compliance with restrictions on ports of entry available to subject textiles, apparel and footwear arriving from Panama. The new measures under challenge required that all goods undergo transshipment as a pre-requisite to proceeding in international transit, at Bogota airport or Barranquilla seaport. Whereas the Colombian restrictions targeted the goods in transit through Panama, no such restrictions were imposed on these products when transported from their country of origin to Colombia without going through Panama^[27]. Panama argued that the restrictions on ports of entry and the requirement to trans-ship goods violate the obligation to guarantee freedom of transit via the most convenient routes for all goods that are traffic in international transit under GATT Articles V(2)^[28] and V(6)^[29]. Although Colombia sought to justify the measures under GATT Article XX(d)^[30], the Panel found that the ports of entry measure violated GATT Article V(2), as well as V(6).

Examining in detail the substantive obligations in Article V(2), the Panel Report makes some important points. 'Freedom of transit' is not defined in the Article V, or in any other provision of the GATT 1994. However, the obligations entailed could be deduced from the linguistic analysis of the text of the Article. Based on its assessment, the Panel notes:

1. "Article V:2, first sentence requires extending unrestricted access via the most convenient routes for the passage of goods in international transit whether or not the goods have been trans-shipped, warehoused, break-bulked, or have changed modes of transport. Accordingly, goods in international transit from any Member must be allowed entry whenever destined for the territory of a third country^[31]."
2. While a Member is not required to guarantee transport on any or all routes in its territory, transit must be provided on those routes "most convenient" for transport through its territory^[32].
3. Whereas Article V:2, first sentence addresses freedom of transit for goods in international transit; Article V:2, second sentence is a complement to this protection. It essentially "prohibits Members from making distinctions in the treatment of goods, based on their origin or trajectory prior to arriving in their territory, based on their ownership, or based on the transport or vessel of the goods^[33]."
4. Article V: 2, second sentence "requires that goods from all Members must be ensured an identical level of access and equal conditions when proceeding in international transit^[34]."

1. The meaning and scope of Article V (6)

The Panel noted the absence of prior interpretations of the provision in the following words: "As was the case with Article V: 2, neither the Appellate Body nor a GATT/WTO panel has ever interpreted Article V:6. Accordingly, the Panel will again analyse Panama's claim under Article V: 6 in accordance with the principles of treaty interpretation..."^[35] On the one hand, Columbia marshalled arguments in favour of the position that the MFN obligation only extends to Members whose territory a good passes through intermediately in route to a final destination elsewhere. On the other hand, Panama's argument was that Article V (6) extends MFN obligations to Members whose territory is the ultimate destination of the goods in transit. Based on its analysis of the text and context of the legal provisions- including the diplomatic negotiations and drafting history of the norms, the Panel Report explained the scope and ambit of Article V(6). According to the Panel, the obligations in Article V (6) "apply to Members whose territory is the final destination for goods in international transit^[36]." In other words, the MFN obligation not only covers products passing through a party's territory after having already passed through another country, but it also extends to products, which, having passed through a country, enter another party's territory to remain there as their final destination.

Explaining the substantive obligation in Article V (6) first sentence, the Panel noted:

all treatment extended to goods that were transported from their place of origin to their destination without going through the territory of other contracting party, must be extended to goods that have been transported from their place of origin, and passed through the territories of such other contracting countries as "traffic in transit" prior to reaching their final destination. Such "treatment" must strictly be "no less favourable^[37]."

The Panel found that Columbia through its ports of entry measure failed to extend "treatment no less favourable" to goods arriving from Panama in comparison to the same goods had they been transported from their place of

origin to Colombia without circulating through Panama. Accordingly, the measure was declared “inconsistent” with the first sentence of Article V (6) of the GATT 1994.

b. Russia- Measures Concerning Traffic in Transit ^[38]

In the last decade, even before the outbreak of the full scale war between them in the last few months, Russia-Ukraine relations deteriorated drastically, especially after the impeachment of the pro-Russian Ukrainian President in February 2014, and the subsequent Russian intervention and illegal annexation of the Crimean peninsula in March 2014. The military engagements by the Russian forces in the conflict in eastern Ukraine and the consequent political strife in the region created an extraordinary situation both bilaterally and internationally, with the European Union as well as the United States imposing sanctions on Russia in support of the Ukrainian resistance against Russian ‘expansionism’. While the international community, including the UNGA and the UNSC, took note of the challenges posed by the recent Russian moves to the territorial integrity of Ukraine ^[39], Ukraine has been mounting one legal challenge after another against the Russian measures in various international judicial institutions under the multilateral treaty frameworks. The legal proceedings instituted by Ukraine under the law of the sea framework, as well as the ICJ proceedings on violations of multilateral treaty obligations are notable in this context. In so many ways, the present legal scrutiny on freedom of transit goods under the multilateral trading framework parallels these “lawfare” by Ukraine against Russia.

Against the backdrop of deteriorating bilateral relations, Russia imposed a series of administrative measures targeting the Ukrainian transit trade. Following the failure of formal consultations with Russia over its dispute concerning ‘various measures imposed by Russia on transit by road and rail through the territory of Russia, as well as the publication and administration of those measures’, Ukraine approached the WTO Dispute Settlement Body (DSB), in February 2017 ^[40]. These measures pertained to ‘bans and restrictions on traffic in transit by road and rail, from Ukraine, across Russia and destined for Kazakhstan and the Kyrgyz Republic. It was also alleged that the *de facto* restrictions imposed by Russia targets the Ukrainian goods in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan.

In its formal submissions to the DSB, Ukraine argued that the ‘measures at issue are inconsistent with Russia's obligations under the first sentence of Article V: 2, the second sentence of Article V:2, Article V:3, Article V:4 and Article V:5 of the GATT 1994’, and other legal provisions, including Article X ^[41] as well as Russia's Accession Protocol ^[42]. On the other hand, Russia claimed that the measures were instituted to safeguard its essential security interests at a time of emergency in bilateral relations covered by Article XXI (b) (iii) of the GATT 1994, and requested the Panel to declare its lack of jurisdiction to evaluate the merits of Ukraine's claims as the dispute, it claimed, pertains to measures falling within the ‘security exceptions’ under the WTO framework ^[43]. Russia seeks to defend its anti-transit measures by claiming that these measures fall within the rubric of ‘essential security interests’- an exception to the general law in the times of an ‘emergency in international relations’- a context of non-justiciability of rights against States that are alleged to be in violation of their regular obligations under the trade regime, including on transit freedom.

In the present case, the Panel Report agreed that Russia's ‘transit ban’ measures that prohibited ‘traffic in transit from entering Russia from Ukraine’ took place in times of an “emergency in international relations” and that if those measures were in normal times, they would have been inconsistent with its obligations under GATT Article V(2) ^[44]. While the Report could be analyzed from a number of vantage points involving different legal provisions discussed within- including ‘national security’; the present study is confined to tease out its relevance for our understanding of the GATT Article on freedom of transit.

In its discussion of the legal content of Article V, the Panel Report explains the scope of Article V (2). The first sentence of Article V (2) reads: “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].” According to the Panel, there are two obligations that emanate from this first sentence of Article V (2): Every Member is duty bound to secure freedom of transit “through its territory for any traffic in transit entering from any other Member.” Likewise, they are to guarantee freedom of transit ‘through its territory for traffic in transit to exit to any other Member ^[45].’

The second sentence of Article V(2) reads: “No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or any circumstances relating to the ownership of goods, of vessels or of other means of transport.” Hence, the Panel notes that any impermissible distinction on the basis of prohibited grounds- the place of “origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or other means of transport” would be inconsistent with the second sentence of Article V (2). Considering that the Panel has already declared that the Russian transit-ban measures in normal circumstances would be inconsistent with its legal obligations under the trade regime- “findings of inconsistency with either the first or second sentence of Article V(2), or both”; the Panel Report did not examine Ukraine's claims under Articles V(3), V(4) and V(5) in the present case, as the Panel felt that addressing these claims were deemed unnecessary in the circumstances of the case ^[46].

The Question of Pipeline Energy Transit

Beyond the traditional issues of international transit of goods contemplated in the legal arrangements, new issues of transit and transport are emerging in our times, and they point to the need for creative thinking and progressive development of the law to meet the requirements of transnational cooperation in our times. One

significant question in this context is the need for regulatory clarity for the development of international transit pipeline networks for the transportation of oil and gas and petroleum products from producing countries to the markets abroad. While much of the international trade in oil, natural gas and other petroleum products is taking place through maritime shipping/ sea-borne trade; transit pipelines are the principal means of transport to deliver petroleum resources from the centres of production in land-locked countries to consumer markets abroad.

Energy specialists point out that international pipelines provide a cost-effective means of transport for both oil and natural gas from land-locked States to energy markets in the regional neighbourhood. Since oil and natural gas is required in all regions of the world, the unimpeded transit of such petroleum resources from land-locked states through pipeline networks is often critical for energy security in many countries, including in the advanced economies. However, the construction and operation of such pipelines would require substantial investments as well as close cooperation and coordination among the States concerned, reflecting the interests of the parties on the most cost-effective routes, including the question of Transit ^[47].

Transit infrastructure such as pipeline networks are inextricable intertwined with international trade in energy. However, competing economic interests and political considerations usually find their way into pipeline projects at different levels. The demands of transit rights are generally contentious, and often a vexed political issue, among the States concerned ^[48]. Given the foundational premises of State sovereignty in international law, it is generally for the transit state to decide whether to grant the transit being sought by other States ^[49]. Even after the establishment of pipeline networks, disputes may escalate among the parties, including on transit issues and the disputes could impact relations between the countries concerned, as was witnessed in the episode of energy transit problems between Russia and Ukraine in the last decade.

The question of energy trade under the WTO framework has gained topical importance in recent years ^[50]. Some scholars argue that for long petroleum trade was treated as a distinct and special discipline disconnected to the general trade regime. However, it needs to be noted that while the GATT negotiations were taking shape, the world already has had experience of cross-border pipelines in several regions, including the Middle East and South America. In fact, in 1941, the Convention on the Construction of Oil Pipelines, Montevideo was signed at the Regional Conference of the Countries of the River Plate. It is, however, unclear whether the negotiating states took account of the existence of such infrastructure in shaping the framework on transit freedom. Unlike most goods in the international market under the GATT framework, petroleum never faces trade barriers such as restrictions on market access or other related concerns. The WTO agreements are applicable to all international trade in goods, in general, and no specific exemption is crafted for energy trade. Even if the multilateral framework of trade rules did not specifically include or exclude petroleum from the domain, energy remains within the scope of GATT. Issues concerning petroleum industry and its commercial practices, so long as they implicate specific rules of the GATT/WTO framework, are liable to be examined by the DSB when cases are brought before it. Indeed, many of the covered agreements have a direct bearing on energy products and trade practices. Questions relating to energy trade had been addressed in the past by both the GATT Panel as well as by the Appellate Body of the WTO ^[51].

The debates on energy security and sustainable development, as well as the quest for transition to a low carbon economy point to a complex landscape of global governance. In an era of growing concern over global warming and climate change, the nations are called upon to reduce their carbon footprints and to reorient their energy policies so as to promote renewable resources over hydrocarbons. Hence, the techno-politics of energy transformation has profound implications for the future of petroleum trade. At the same time, the renewable energy subsidy patterns are also under scrutiny- as the policies have implications for the interpretation and application of global trade rules. Hence, contrary to widespread misconception, the normative architecture of the WTO has implications for the energy sector, and the DSB offers an effective platform to shape trade rules and policies in the quest for a low-carbon future ^[52].

Conclusion

Freedom of transit is an issue of foundational importance in the world of energy trade. Without the vital linkage that pipelines provide, energy producing countries, especially the landlocked ones among them, will find it difficult to access energy markets in the region. In facilitating international trade in oil, natural gas and other petroleum products, the role of transit pipelines cannot be overstated. Considering that petroleum resources are naturally distributed across the world- with some countries abundantly endowed and others less so- the interdependence of consuming and producing countries is very pronounced in global petroleum trade. While maritime trade and transportation of oil and gas is taking place around the world, linking coastal States with petroleum producers; the question of land-locked geographies are also a reality. In many cases, especially in Central Asia, the energy producers require transit transportation arrangements for facilitating their energy trade. Hence, the significance of transit arrangements for natural gas transmission is widely commented upon.

International trade in natural gas, unlike most other goods in the market, requires fixed infrastructure support-transmission pipelines and liquefied natural gas terminals. While the world's natural gas reserves are located in certain countries- Russia, Qatar, Iran, Turkmenistan, Australia, United States, etc.; the consuming markets in the regions around them can only be accessed through the construction or expansion of gas pipelines, especially for land-locked countries. The international pipelines may also have implications for the freedom of transit. With increased trade in natural gas, it is assumed that more transit options are necessary. The capital intensive and long-term nature of the investments in pipeline construction necessitate a stable and fixed legal regime from the

perspective of both importers and exporters., long-term energy infrastructure planning required for making investment decisions would call for clarity on the applicable transit framework ^[53]. Today, the international community recognizes the significance of establishing “stable, reliable and efficient energy transportation ^[54].”

One of the most crucial issues in the transit of natural gas is whether GATT Article V covers transportation through pipeline networks. While Article V applies to all transit goods, vessels and other “means of transport”, the provision, however, does not explicitly refer to fixed infrastructures such as gas pipelines or power grids as ‘means of transport ^[55].’ Legal scholars have expressed conflicting opinions on the scope of the provision with regard to freedom of energy transit through fixed infrastructure such as gas lines and electricity grids. Some have argued that Article V refers exclusively to “moving” means of transport, and as such pipelines and grids with their fixed nature cannot be contemplated in the category of “traffic in transit ^[56].” In defence, other scholars point out that Article V does not provide an exhaustive list of means of transport; nor does the Article distinguish between goods and ‘means of transport’ as ‘traffic in transit ^[57]’.

There is much ambiguity concerning the validity of energy transit via fixed infrastructure under GATT Article V. If we categorize gas pipelines as a ‘means of transport’ for the purposes of GATT Article V, this would have several implications. First, GATT Article V does not oblige a transit state to allow the construction of fixed infrastructure. It only covers the use of existing infrastructure ^[58]. If gas pipelines are declared ‘traffic in transit’ without providing detailed rules based on consensus on all associated issues, it will raise difficult questions of appropriate implementation on commercial feasibility, third party access, capacity expansion, new constructions, etc ^[59].

Extending the regular standards of international transit of moving goods to the energy transit context requires engagement with its specificity ^[60]. Considering the current state of ambivalence or vagueness attached to the question of transit of energy goods via pipelines under the WTO framework, legal scholars have been appealing for a comprehensive solution for a period now ^[61]. In the absence of such a WTO agreement on energy, one can only agree that the rules will “likely develop incrementally through negotiations in order to address energy trade more comprehensively. Case-law may also contribute to the clarification of existing disciplines ^[62].”

References

1. Signed at Marrakesh, Morocco, 15 April 1994; the WTO formally came into existence on 01 January 1995.
2. Important agreements that constitute the pillars of the WTO include the 1994 GATT, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), etc.
3. Agreements listed in Appendix 1 (of the Understanding on Rules and Procedures Governing the Settlement of Disputes)
4. See generally, Havana Charter for an International Trade Organization, United Nations Conference on Trade and Employment, Final Act and Related Documents, UN Doc E/Conf. 2/78 (1947-48), available at URL: <https://bit.ly/3pRloYC> (accessed on 07 April 2022).
5. See GATT, 1994, at <https://bit.ly/3oeDX8J> (accessed on 30 March 2022).
6. Article I:1 of the GATT 1994 contains the Most Favoured Nation (MFN) principle: ‘any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties’.
7. See Valles, “Article V: Freedom of Transit,” in Rüdiger Wolfrum, Peter-Tobias Stoll and Holger P. Hestermeyer (eds.), *WTO—Trade in Goods*, Leiden, the Netherlands: Brill, 2011:183-194.
8. See Article 33 of the Havana Charter.
9. Ibid: specifically, Article 33.6 of the Havana Charter. However, the Havana Charter was not eventually adopted.
10. See for this point, Valles, “Article V: Freedom of Transit,” in Rüdiger Wolfrum, Peter-Tobias Stoll and Holger P. Hestermeyer (eds.), *WTO—Trade in Goods*, Leiden, the Netherlands: Brill Nijhoff, 2011:183-194.
11. See Martha M Roggenkamp. “Transit of Network-bound Energy: A New Phenomenon?-Transit Examined from the Barcelona Transit Convention to the Energy Charter Treaty,” *World Competition*, 1995:(19:2):119-146. See also Azaria, Danae. “Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade,” *Journal of Energy & Natural Resources Law*, November, 2009:(27:4):559-596.
12. Article V (1) reads: ‘Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without transshipment, 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 contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article “traffic in transit”’.
13. See Valles (2011), note 10.
14. See Valles (2011), note 10.
15. See the Report of the Technical Subcommittee of the Preparatory Committee of the International Conference on Trade and Employment, 1946. UN doc. E/PC/T/C.II/54/Rev.1.
16. These legal provisions essentially followed and indeed built upon the 1921 Barcelona Convention and Statute on Freedom of Transit. See also UNCTAD, “Freedom of Transit and Regional Transit Arrangements,” Trust Fund for Trade Facilitation Negotiations, Technical Note No. 8, January 2011.

17. See WTO Secretariat, “Article V of GATT 1994 – Scope and Application”, TN/TF/W/2; UNCTAD, (2009). See also Caiado JGM and Baetens F. (2014), *Frontiers of International Economic Law : Legal Tools to Confront Interdisciplinary Challenges*. Brill: Nijhoff; Danae Azaria (2009), “Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade,” *Journal of Energy and Natural Resources Law*, 2005:(27:4):559-596.
18. Article V (4) of GATT 1994 reads: ‘All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic’.
19. Article V (5) of GATT 1994 reads: ‘With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country’. In a note attached to this provision it is clarified that non-discriminatory charges are applicable to like products using same routes.
20. Article V (6) of GATT 1994 reads: ‘Each contracting party shall accord to products which have been in transit through the territory of any other contracting party 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 contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party’s prescribed method of valuation for duty purposes’.
21. Article V (7) of GATT 1994 reads: “The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).” The report of the Technical Subcommittee of the Preparatory Committee of the International Conference on Trade and Employment" dated 28 November 1946 states a revealing consensus even before the GATT 1947: “In the discussion dealing with the Freedom of Traffic in Transit, it was generally felt that air traffic should be exempted as a matter which is being dealt with by the Provisional International Civil Air Organization.” See UN Doc. E/PC/T/C.II/54/Rev.1. As is widely known, the International Civil Aviation Organization deals with freedoms of the air today.
22. Panel Report, Colombia -- Indicative Prices and Restrictions on Ports of Entry, WT/DS366/R, 2009, 1-254.
23. There were a number of WTO proceedings involving Article V even before the present case. However, these WTO consultation requests either did not reach the stage of Panel Report or when reached, did not lead to any findings under Article V. For a list of five such cases, see Rüdiger Wolfrum, Peter-Tobias Stoll and Holger P. Hestermeyer, *WTO—Trade in Goods*, Leiden, the Netherlands: Brill, (2010), 183-194.
24. A chronological listing of the cases can be found at the WTO official website, available at URL: <https://bit.ly/3iklyoL> (accessed on 07 January 2022).
25. Panel Report, Russia-Measures Concerning Traffic in Transit, WT/DS512/R adopted, 2019, 1-137.
26. Panel Report, Colombia -- Indicative Prices and Restrictions on Ports of Entry, WT/DS366/R, 2009, 1-254.
27. It is instructive to note that Article V(2) extends MFN obligations on goods in international transit and prohibits Members from making distinctions on freedom of transit based on place of origin or departure, or on any circumstances relating to ownership of the goods.
28. Article V (2) reads: “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.”
29. Article V(6) reads: “Each contracting party shall accord to products which have been in transit through the territory of any other contracting party 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 contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party’s prescribed method of valuation for duty purposes.”
30. The 1994 GATT Article XX (d) reads: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a)...(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.”
31. See Note No. 69; (Paragraph 7.401):195.
32. *Ibid.*

33. Ibid.
34. Ibid, 195
35. Ibid, 204.
36. Ibid, 212.
37. Ibid, 212
38. Ukraine v. Russia, WT/DS512/R |05 April 2019, available at URL: <https://bit.ly/3ddg39r> (Accessed on 07 March 2022).
39. See UNGA Resolution 68/262 (27 March 2014), entitled "Territorial integrity of Ukraine",
40. Ibid, 21.
41. Article X of the GATT 1994 relates to publication and administration of trade regulations.
42. See note 64, 21-22. To view the Protocol on the Accession of the Russian Federation, see WTO, WT/MIN(11)/24, WT/L/839, 17 December 2011, available at URL: <https://bit.ly/2Lvshjf> (visited on 28 April 2022).
43. Article XXI(b)(iii) of the GATT 1994 states: "Nothing in this Agreement shall be construed... (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests... (iii) taken in time of war or other emergency in international relations."
44. Among the listed measures are the following regulations that impose 'transit bans': the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods; the 2016 Belarus Transit Requirements; the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. See Panel Report, Russia-Measures Concerning Traffic in Transit, WT/DS512/R adopted.,2019:65:1-137.
45. Ibid, 63.
46. Ibid, 69-70.
47. Roggenkamp, Martha M. "Transit of Network Bound Energy: A New Phenomenon? Transit examined from the Barcelona Transit Convention to the Energy Charter Treaty," *World Competition*,1995:(19:2):119-46.
48. As Judge MC Chagla noted, "prima facie a State enjoying territorial sovereignty has the right to allow or to prohibit a right of passage or transit under such terms and conditions as it thinks proper." See *Portugal v. India: Right of Passage Case: Preliminary Objections. Dissenting Opinion of Judge Chagla*,1957:166-180:174.
49. Ibid.
50. Abdallah KL. "The Changing Structure of the International Oil Industry: Implications for OPEC", *Energy Policy*,1995:23(10):871-877; Botchway, Francis N., "International Trade Regime and Energy Trade", *Syracuse Journal of International Law and Commerce*,2001:28:1-17; Desta, MG, "The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements", *Journal of World Trade* 2003:37(3):523-551; Desta, M.G., "The GATT/ WTO System and International Trade in Petroleum: An Overview," *Journal of Energy and Natural Resource Law*,2003:(21:4):385-398. Arghyrios A Fatouros, *An International Legal Framework for Energy*, *Recueil des Cours: Collected Courses of the Hague Academy of International Law*,2007:332:355-446.
51. See GATT Panel on United States – Taxes on Petroleum and Certain Imported Substances, Report of the Panel adopted on 17 June 1987 (L/6175-34S/136); Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996; Appellate Body Report, Canada — Certain Measures Affecting the Renewable Energy Generation Sector, WTO Doc. WT/DS412/AB/R, WT/DS426/AB/R, adopted 24 May 2013.
52. According to the United Nations, 'energy is the dominant contributor to climate change, accounting for around 60 per cent of total global greenhouse gas emissions'. See UN Sustainable Development Goals Site, available at URL: <https://bit.ly/3sJLkai> (Accessed on 07 March 2022).
53. Zarilli, Simonetta, "The Doha Work Programme: Possible Impact on Energy Trade and on Domestic Policies in Energy Producing Developing Countries," *Journal of Energy and Natural Resource Law*,2003(21:4):399-412; Council for Trade in Goods, Article V of the GATT 1994—Scope and Application; Note by the Secretariat, G/C/W/408, 10 September 2002; Doha Work Programme: Decision Adopted by the General Council on 1 August 2004, Annex D "Modalities for Negotiations on Trade Facilitation", WT/L/579, 2 August 2004.
54. See UNGA Res. A/RES/67/263: Reliable and stable transit of energy and its role in ensuring sustainable development and international cooperation, 17 May 2013.
55. Article V (1) reads: 'Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party 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 contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit."'
56. See Mireille Cossy, "Energy Trade and WTO Rules: Reflections on Sovereignty over Natural Resource, Export Restrictions and Freedom of Transit," *European Yearbook of International Economic Law*,2012:3:281-306.
57. GATT Article V (1) states that 'Goods..., and also vessels and other means of transport shall be deemed to be in transit'.

58. Legal scholars Ehring and Selivanova notes: 'There is nothing explicit in Article V of GATT 1994 obliging WTO Members to expand existing transit capacity or to allow infrastructure construction, for instance, where constraints exist'. Ehring L, Selivanova Y. "Energy Transit" in: Selivanova, Y. (ed.), *Regulations of Energy in International Trade Law: WTO, NAFTA and Energy Charter*, USA: Kluwer Law International, 2011:70:49-107.
59. AA Konoplyanik. "Gas Transit in Eurasia: Transit Issues Between Russian and the European Union and the Role of the Energy Charter," (27:3), *Journal of Energy & Natural Resources Law*, 2009, 445-486.
60. GATT Article V (2) requires goods from all Members to be given an identical level of access and equal conditions when proceeding in international transit.
61. Distinguished energy law expert Thomas Waelde proposed to develop an "Energy Transit Reference Paper" modelled on the WTO Telecom Reference Paper to complement the disciplines contained in GATT Article V. See Thomas Waelde and A. Gunst, "International Energy Trade and Access to Energy Networks," *Journal of World Trade*, 2002:(36:2):191-218.
62. Mireille Cossy. "Energy Transport and Transit in the WTO", *Global Challenges at the Intersection of Trade, Energy and the Environment: Conference Draft*, 2009.