

**UNIVERSITY OF PRETORIA
FACULTY OF LAW
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**Rethinking the limitations in the enforceability of freedom of transit
in the context of the Mozambican gas industry under Article V of
the General Agreement on Tariffs and Trade**

A research paper submitted in partial fulfilment of the requirement for the degree of Master of Laws in International Trade and Investment Law in Africa at the University of Pretoria

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I Karrit

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Acronyms

DSU	Dispute Settlement Understanding
EIEMD	European Internal Energy Market Directives
EU	European Union
FLNG	Floating Liquefied Natural Gas
GATT	General Agreement on Tariffs and Trade
GSA	Gas Sales Agreement
GTA	Gas Transport Agreement
IEA	International Energy Agency
ILC	International Law Commission
IMF	International Monetary Fund
JOA	Joint Operating Agreement
LNG	Liquefied Natural Gas
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
PPA	Petroleum Production Agreement
PA	Pipeline Agreement
PPP	Public-Private Partnerships
RTA	Regional Trade Agreements
SADC	Southern African Development Community
TAFTA	Transatlantic Free Trade Area
UNCLOS	United Nations Conference on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

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CHAPTER ONE

INTRODUCTION

1.1 Introduction of the research subject matter

In 2010, Anadarko Petroleum Corporation, an American company engaged in the exploration, development, production and marketing of natural gas, oil and natural gas liquids,¹ made its first discovery of more than 75 trillion cubic feet of natural gas in the offshore Area 1 of the deep-water Rovuma Basin in Mozambique, triggering one of the most high profile natural gas discoveries in the last two decades.² It is stated that this discovery is propelling the country into the top three African countries for gas reserves, along with Nigeria and Algeria.³ The production and exploration companies have further projected that should the gas resources found in the Rovuma Basin begin to be developed, Mozambique could become the third largest exporter of liquefied natural gas (LNG) in the world within the next ten years.⁴ Over and above servicing the gas market at the domestic level, the country seeks to export most of its natural gas, mainly to Asia and Europe via the sea.

This discovery has attracted foreign investment into the gas sector in the form of two multinational companies, namely Anadarko Petroleum Corporation and ENI S.P.A. ENI, an Italian company, is a major integrated energy company, committed to growth in the activities of locating, producing, transporting, transforming and marketing oil and gas.⁵ These two multinationals have put in place huge infrastructural plans to build a \$40 billion LNG export

¹Available at: <http://www.reuters.com/finance/stocks/companyProfile?symbol=APC.N#Fe0Z0AzwtIBRWX57.97> (accessed 29 November 2015).

² Available at: <http://www.anadarko.com/Operations/Upstream/Africa/Mozambique/> (accessed 29 November 2015).

³ Frost & Sullivan 'Mozambican gas sector: Major opportunities across multiple industries, Mozambique's potential to become the Qatar of Africa' 2015.

⁴ As above.

⁵Available at: http://www.eni.com/en_IT/company/company-profile/company-profile.shtml (accessed 29 November 2015).

facility in the north of Mozambique, with the aim of transporting the natural gas to Europe and Asia, subsequently enabling the country to become a global player in the gas industry.⁶

However, political tension between the two major political parties, Frelimo and Renamo, has played a massive role in delaying a final investment decision on the development of the onshore LNG export facility. One of the opposition's key demands and sticking points is that it be granted a more equitable share of the country's natural resources, although it is yet to specify the manner in which this is to be achieved.⁷ Hence, dialogue between the two parties has stalled and no progress has been made on the issue. Other major factors contributing to the delay in the final investment decision include the steep drop in oil prices and the global oversupply of LNG. Consequently, this has resulted in a substantial reduction of Mozambique's revenue that it derives from exporting this energy commodity. Moreover, the Mozambican currency's 40% decline against the dollar has made the Metical the world's third-worst performing currency in 2015.⁸

To compound the issues further, the World Bank has decided to suspend direct financial aid to Mozambique after it came to the Bank's attention that the country had loaned out more than \$1 billion without disclosing such loans to the Bank.⁹ The Bank's decision came after the International Monetary Fund (IMF) stated that it had placed a halt on a \$55 million loan and suspended its lending to Mozambique due to the country having violated its contractual terms by failing to disclose the \$1 billion in loans.¹⁰ With the IMF and the World Bank being Mozambique's short and long-term aid sources respectively, the country finds itself in a very precarious position going forward, given that it is heavily reliant on foreign donors that contribute for medication, food and schooling.¹¹ Consequently, a downgrade of the country's

⁶See Frost & Sullivan (n 3 above).

⁷Gwinyayi A, Dzinesa & Motsamai D 'Renamo's war talk and Mozambique's peace prospects' ISS Policy Brief 50 (2013) 2.

⁸ F Scala 'Mozambique to curb use of credit cards abroad to stem outflows' (2015) Available at: <http://furtherafrica.com/2015/11/30/mozambique-to-curb-use-of-credit-cards-abroad-to-stem-outflows/> (accessed 1 December 2015).

⁹ J Wernau & W Matthieu 'World bank is suspending direct financial aid to Mozambique' (2016) Available at: <http://www.wsj.com/articles/world-bank-is-suspending-direct-financial-aid-to-mozambique-1461775025> (accessed 10 May 2016).

¹⁰ As above.

¹¹As above.

debt risk by the World Bank would result in an overall reduction of the total aid provided to the Mozambican government. Moreover, the absence of IMF support will lead to liquidity issues as the country will experience difficulties in raising money from both donors and investors alike.

The positive news however is that a final investment decision on the development of the onshore LNG facility is expected to be reached in 2016.¹² To the extent that the successful completion of the LNG projects merely serves as an initial step to commercializing the gas, the focus must now shift to identifying the most reliable and cost effective means of exporting the energy commodity to the international market. The ability to establish the necessary capacity in this regard is crucial for the creation of a global reaching Mozambican gas-based industry. Hence, upon completion of the LNG and floating liquefied natural gas projects (FLNG), the main question becomes which measures Mozambique needs to undertake to enable the country to export its natural gas in the safest and most cost efficient manner to the international market? Does the transportation of the gas via the sea offer Mozambique with the most reliable and cost effective solution in the long term?

The short answer is through the construction of pipelines, which although expensive to build, provide a more cost-effective option than a series of LNG facilities along the various Mozambican ports.¹³ With the recent announcement of the African Renaissance Pipeline's construction, to be carried out by China, evidence that pipelines provide the solution has been reiterated.¹⁴ If successfully built, the pipeline will transport gas from the Rovuma Basin in the north of Mozambique to the Gauteng province in South Africa, with the pipeline branching out to other Southern African Development Community (SADC) States, making it a cross border gas pipeline.¹⁵ A tentative date for the completion of the pipeline is set at 2020; however, to the extent that the approval is dependent on the finalization of the financing details, the date could find itself being stretched.

¹²See Frost & Sullivan (n 3 above).

¹³ICF International 'National Gas Master Plan for Mozambique: Draft report executive summary' 26 August 2012.

¹⁴F Scala 'Experts warned it was too risky: The \$6 billion gas pipeline China hopes to build in Mozambique' (2016) Available at: <https://furtherafrica.com/2016/04/13/experts-warned-it-was-too-risky-the-6b-gas-pipeline-china-hopes-to-build-in-mozambique/> (accessed 16 April 2016).

¹⁵As above.

The project to construct the pipeline inevitably gives rise to the issues relating to third-party access to existing infrastructure and capacity establishment in the absence of such infrastructure, issues that are yet to be addressed at the World Trade Organization (WTO) level. Resultantly, issues related to the cross border transit of gas via pipelines are still widely regulated by bilateral and regional investment agreements under Engineering, Procurement, Construction and Commissioning Contracts (EPCC's). The current practice involves regulating third-party access and capacity establishment rights and obligations contractually, where the parties set out all the specifics related to the infrastructural project's practical implementation. However, the legal basis for this relationship is actually grounded in the bilateral or regional investment treaty concluded by the respective States, subsequently disregarding all other parties that do not form part of this relationship.

Presently, there is only one existing 865 km transmission pipeline linking Sasol's natural gas fields in northern Mozambique to South Africa.¹⁶ The Southern Africa Regional Gas Project, as it was named, comprised of two individual but fully integrated sub-projects.¹⁷ The second project, being the most relevant one for purposes of this discussion, involved constructing the pipeline to transport the natural gas from the north of Mozambique to Sasol's petrochemical Secunda Plant in Mpumalanga, South Africa.¹⁸ The contractual agreement to have this pipeline built was concluded between the Government of Mozambique, the South African Government, the Mozambique National Oil Company (ENH) and the Mozambique Oil Company (CMH), which is a subsidiary of ENH and SASOL.¹⁹

Given the fact that such infrastructural projects fall under sensitive sectors of high geo-political interest to governments, they are partially publicly owned. However, given the excessive costs involved in their construction and maintenance, these projects are controlled, managed and financed by private entities under public-private partnership (PPP) regimes. As has already been mentioned, the details of these infrastructural projects are regulated under specific contractual

¹⁶See Frost & Sullivan (n 3 above).

¹⁷ Available at: http://endeavor-energy.com/case_studies/pande-gas-pipeline-mozambique/ (accessed 30 May 2016).

¹⁸ As above.

¹⁹Southern Africa Regional Gas Project Design and Context Available at: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/07/04/000442464_20140704091153/Render/INDEX/863740ICR0P0820IC0disclosed07010140.txt (accessed 30 May 2016).

agreements. In the context of the Southern Africa Regional Gas Project, these implementation contracts included the Petroleum Production Agreement (PPA) and the Pipeline Agreement (PA) which were signed on 26 October 2000 as well as the Joint Operating Agreement (JOA), the Gas Sales Agreement (GSA) and the Gas Transport Agreement (GTA) which were signed two years later.²⁰

Interestingly, the issues related to third-party access and capacity establishment rights have only been raised in the European context in light of the 2009 gas crisis involving Russia, Ukraine and the European Union (EU). This paves the way for an analysis and discussion of third-party access and capacity establishment rights within the African context, with the achievement of energy security,²¹ free trade in gas and economic prosperity as the desired long term objectives for the region.

1.2 Research problem

In lieu of the fact that third-party access and capacity establishment rights and obligations are presently regulated contractually under EPCC agreements, subject to the respective bilateral or regional investment treaty, the research problem lies in the unenforceability of the freedom of transit provision under Article V of the WTO's General Agreement on Tariffs and Trade (GATT). Article V expressly guarantees every WTO Member a freedom of transit right, but nevertheless fails to achieve its effective implementation in circumstances where an importing or exporting WTO Member State lacks the necessary transit infrastructure.

The provision is vague in that it makes no mention of third-party access to existing pipelines and capacity establishment in the absence of pipeline infrastructure. Resultantly, the *lacunae* in Article V translates to a situation where a WTO Member State that lacks the required pipelines to

²⁰ As above.

²¹Energy security relates to a country's ability to diversify its sources of supply and subsequently become less dependent on merely one or a couple of suppliers when it comes to purchasing the specific energy commodity. V 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?' (2013) 16(2) *Journal of International Economic Law* 315.

import or export its energy commodity is, in essence, the subject of a right which it cannot effectively enforce, to the extent that such Member State is not party to the respective bilateral or regional investment treaty regulating third-party access and capacity establishment rights.

1.3 Research questions

With regard to third-party access, the main research question in this study is, for purposes of importing or exporting natural gas, how can WTO Member States that do not possess the necessary pipeline infrastructure effectively invoke Article V of the GATT to enable them to access other cross border pipelines in the region, merely for their energy commodity to transit to or from their respective territories to that of other WTO Member States?

With regard to capacity establishment, the main research question in this study is, for purposes of importing or exporting natural gas, how can WTO Member States that lack the required infrastructure capacity effectively invoke Article V of the GATT to enable such States to construct or expand pipelines on the territories of other Member States, merely for their energy commodity to transit to or from their respective territories to that of other WTO Members?

To provide a response to these questions, the following sub questions will be answered:

- a) What are the rights and obligations contained under Article V of the GATT and how do the concepts of third-party access and capacity establishment fit into this provision?
- b) Are third-party access and capacity establishment rights implicitly inherent in the freedom of transit principle under Article V of the GATT?

1.4 Thesis statement

In light of energy security concerns, this study argues that there is great need to explore the potential availability of legal avenues under Article V of the GATT, in what concerns third-party access rights to existing pipeline infrastructure and capacity establishment in the absence of such

infrastructure. The research explores whether Article V of the GATT does in fact guarantee third-party access and capacity establishment rights to WTO Member States that do not possess the necessary infrastructure to import or export energy commodities. The research seeks to illustrate the applicability of Article V of the GATT to the Mozambican gas market, to the extent that clear rules on third-party access and capacity establishment are formulated at the multilateral level. The discussion highlights the need on the part of the WTO to extend or elaborate on the provision to cover the current issues related to the liberalization of gas trade and energy security in general, namely by providing for third-party access and capacity establishment rights and obligations under Article V of the GATT.

In this context, the writer submits that the absence of these rules at the multilateral level has been one of the contributing factors which have led to the creation of monopolistic pipeline owners. In the absence of regulatory oversight, these monopolies have consistently blocked access to their pipelines, effectively utilizing the infrastructure as a leverage tool in the achievement of disguised political objectives. Moreover, it is argued that blocking third-party access to pipeline infrastructure negatively impacts on competition and subsequently gives rise to all forms of economic problems brought about by disequilibrium in the market.

Hence, for Mozambique, whose economy is presently undergoing a slump, the lack of efficiency brought about by disequilibrium in the market, in essence, translates to a failure to maximize its gas producing capacity. Ultimately, like many African States that have been blessed with an abundance of natural resources, Mozambique will have failed to translate this endowment into socio-economic development, subsequently resulting in increased poverty for its people brought about by the failure to achieve much desired economic prosperity.

The reluctance on the part of the WTO to formulate third-party access and capacity establishment rights and obligations under Article V of the GATT will, in the long term, most certainly result in a huge gas crisis within the region, such as the one experienced between Russia, Ukraine and the European Union (EU) in 2009, as these monopolies may unilaterally take the decision of cutting off the supply of the energy commodity in exchange for the granting of certain concessions. Therefore, the enactment of clear, coherent and implementable rules

regulating third-party access and capacity establishment at the multilateral level will go a long way in liberalizing the global energy market, albeit beginning at the sub-regional and ultimately the regional level.

1.5 Main contribution and significance of the study

Presently, the drop in global oil prices and the oversupply of LNG has negatively impacted the Mozambican economy with the local currency having dropped 40% against the dollar, reducing it to the world's third-worst performing currency in 2015.²² Moreover, the economic situation has been worsened with the IMF having cut off lending to the Mozambican government along with the World Bank's suspension of direct financial aid to the country.²³ Hence, this study will enable Mozambique to make full use of its gas producing capacity, subsequently allowing it to establish a solid presence and compete efficiently on the international gas market.

The study will also contribute significantly to addressing two of the greatest challenges facing Mozambique and many parts of the world in this present day, namely those of poverty and energy security. With regard to tackling poverty, it is submitted that an outreaching and prosperous Mozambican gas industry will have the effect of creating more jobs, subsequently improving the populations' living standards and resulting in the creation of improved socio-economic outcomes. Equally, the achievement of sub-regional and ultimately regional energy security for the African continent is also a priority that the research aims to address and ultimately attempt to tackle.

The reality though, is that many important energy exporting gas dependent and transit states have acceded to the WTO, making this an issue attributable to every WTO Member State that lacks the necessary pipeline infrastructure to import or export energy commodities. Hence, the research's extra territorial relevance and contribution cannot be overstressed. Over and above benefiting Mozambique and the African continent, the successful argument and invocation of these rights under Article V of the GATT will go a long way in stimulating numerous gas

²²See Scala (n 8 above).

²³See Wernau & Matthieu (n 9 above).

dependent economies as well as contributing significantly to the achievement of international energy security and the global liberalization of energy trade.

In the last few years, natural gas has grown quite considerably in importance, as evidenced by the International Energy Agency's (IEA) special report, where it is predicted that the use of the energy commodity will increase by 50% and it will account for a quarter of the global energy demand by 2035.²⁴ In its special report, the IEA actually refers to this period as the energy commodity's 'Golden Age'.²⁵ Hence, as gas grows in importance, the fixed infrastructure responsible for the transport of this energy good will most certainly follow in the same direction.

And finally, the research is particularly significant because it will contribute to the growing debate on whether third-party access and capacity establishment rights can be read into Article V of the GATT. The subject is timely because the argument on whether these rights can be read into the provision has seldom been approached in a manner that employs general international law principles to interpret treaty clauses.

1.6 Literature review

The overall assessment of the literature is based on an analysis of the books, journal articles, reports, international treaties and foreign case law as referenced below. However, the cited sources do not exhaustively cover the relevant literature available on the subject matter nor do they intend to constitute an exhaustive view on the topic. An investigation of the literature review has revealed contradictory views from various well renowned authors who have written quite extensively on whether third-party access and capacity establishment rights are inherent in Article V of the GATT. Hence, a carefully weighted analysis and evaluation of all these sources is crucial prior to the arrival at an informed conclusion.

Roggenkamp²⁶ argues that by making use of the terms 'routes most convenient', the wording

²⁴IEA Special Report 'Are we entering a golden age of gas?' (2011) 9.

²⁵ As above.

²⁶ M Roggenkamp 'Implications of GATT and EEC on networkbound energy trade in Europe' as cited in V Pogoretsky *Freedom of transit and the principles of effective right and economic cooperation: Can systemic*

under Article V(2) of the GATT, implicitly, reflects a ‘deeper’ commitment when compared to the words ‘routes in use’ employed in the Barcelona Convention on Freedom of Transit.²⁷ Hence, she is of the opinion that the wording under the GATT provision ‘can’ be interpreted to incorporate the right to establish pipelines in the absence of capacity.²⁸

With regard to third-party access, Ehring and Selivanova²⁹ argue that, should a WTO Member State be burdened by infrastructural deficiencies, the freedom of transit and non-discrimination principles under Article V of the GATT do incorporate a third-party access right.³⁰ However, despite agreeing with the argument that third-party access rights are implicit under Article V of the GATT, Ehring and Selivanova argue that a capacity establishment right is not inherent in the provision.³¹

Grewlich³² is of the opinion that the freedom of transit principle does in fact incorporate a third-party access right in the event where a WTO Member State is burdened by capacity constraints. On the other hand, Azaria,³³ Cossy,³⁴ Konoplyanik,³⁵ and Rakhmanin,³⁶ are all opposed to the argument that Article V implicitly regulates capacity establishment and third-party access rights.

According to Walde and Gunst,³⁷ for Article V of the GATT to be effective, a logical step

interpretation of GATT Article V promote the energy security and the development of an international gas market? (2013).

²⁷ See Roggenkamp as cited in Pogoretsky (n 26 above) 318 fn 22.

²⁸ As above.

²⁹ L Ehring & Y Selivanova ‘Energy transit’ in Selivanova, Y (ed) *Regulation of energy in international trade law: WTO, NAFTA and Energy Charter* (2011).

³⁰ See Ehring & Selivanova (n 29 above) 70-71.

³¹ As above.

³² KW Grewlich ‘International regulatory governance of the Caspian Pipeline policy game’ as cited in Pogoretsky (n 21 above) 318 fn 22.

³³ D Azaria ‘Energy transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade’ (2009) 27 *Journal of Energy and Natural Resources Law* 559.

³⁴ M Cossy ‘Energy trade and WTO rules: Reflexions on sovereignty over natural resources, export restrictions and freedom of transit’ in Herrmann, C & Terhechte, JP (eds) *European Year Book of International Economic Law* (2012).

³⁵ AA Konoplyanik ‘Russia-EU Summit: WTO, the Energy Charter Treaty and the issue of energy transit’ (2005) 2 *International Energy Law & Taxation Review* 30.

³⁶ V Rakhmanin ‘Transportation and transit of energy and multilateral trade rules: WTO and Energy Charter’ in Pauwelyn, J (ed) *Global challenges at the intersection of trade, energy and the environment* (2010).

³⁷ TW Walde & AJ Gunst ‘International energy trade and access to energy networks’ (2002) 36(2) *Journal of World Trade* 191.

involves introducing a third-party access regime against energy transport monopolies.³⁸ By stating that the introduction of a third-party access regime is one way of ensuring the effectiveness of Article V, it can be assumed that these authors implicitly accept third-party access rights under this GATT provision.

Kurmanov³⁹ argues that where a WTO Member State refuses to grant third-party access to existing infrastructure, such State has acted in contravention of Article V of the GATT and can be sued at the WTO.⁴⁰ He argues that despite the fact that Article V fails to clearly specify under which conditions third-party access can be granted, the provision establishes ‘a general substantive obligation’ for WTO Member States to grant access to available transport infrastructure.⁴¹ He further argues that in the event where the construction of a new pipeline is required for energy to transit, unwillingness on a WTO Member State to permit the building of such infrastructure could be a ground upon which a legal claim can be brought under Article V, to the extent that such refusal is unreasonable.⁴² Kurmanov believes that Article V permits claiming a capacity establishment right if a WTO transit state, unwilling to construct new infrastructure, refuses to allow the construction of such infrastructure on its territory, on the basis that it prevents the transit dependent state from exercising its freedom of transit right.⁴³

Pogoretskyy argues that due to the fact that gas resources are unevenly distributed across the globe and to the extent that net gas exporting countries are located far apart from the gas importing States, constructing and expanding gas pipelines has provided the safest and most cost effective means of linking the supply and demand for the product.⁴⁴ Recognizing that transit is unavoidable in such a situation, Pogoretskyy is of the view that the right to access a transit state’s existing pipeline infrastructure or the right to build and/or expand such infrastructure is required to achieve the provision’s effective implementation.⁴⁵ Pogoretskyy’s argument is backed by

³⁸ See Walde & Gunst (n 37 above) 212.

³⁹ B Kurmanov ‘Transit of energy resources under GATT Article V’ (2013) Available at: <http://group-global.org/ru/node/4884> (accessed 23 May 2016).

⁴⁰ See Kurmanov (n 39 above) 24.

⁴¹ See Kurmanov (n 39 above) 29.

⁴² See Kurmanov (n 39 above) 28.

⁴³ As above.

⁴⁴ See Pogoretskyy (n 21 above) 314.

⁴⁵ See Pogoretskyy (n 21 above) 313.

Pauwelyn,⁴⁶ who states that should there be different interpretations of a particular treaty provision; the Vienna Convention on the Law of Treaties requires that the interpretation allowing for the treaty to be effective be adopted.⁴⁷

Furthermore, Pogoretskyy convincingly argues, that to the extent that the general principles of public international law are interpreted separately from Article V(2) of the GATT, the provision on its own does not directly regulate third-party access and capacity establishment rights and obligations.⁴⁸ In this regard, he mentions the existence of two general international law principles, which indirectly affect third-party access and capacity establishment rights and which may play a significant role in the interpretation and enforcement of the freedom of transit provision, namely the principles of effective right and economic cooperation.⁴⁹

As observed, it becomes clear that the different well renowned authors on the subject matter share contradictory views on whether third-party access and capacity establishment rights are in fact implicitly regulated under Article V of the GATT. However, over the years, the arguments on this issue have been approached from a rather similar angle leading to deadlock and a subsequent unwillingness to argue the matter further. In lieu of this, the approach employed by Pogoretskyy in his argument on the topic is quite fascinating and unique in its own right. The writer submits that such an innovative and equally creative approach to tackling this legal conundrum is what in fact inspired this research. If not for authors like Pogoretskyy, issues like these would continue being debated along the same lines with very little end product to show for.

1.7 Research methodology

The approach adopted in this research in collecting information will primarily involve desktop, library and on-line database search. The research will involve a qualitative review of primary sources in the form of the WTO rules and other international treaties and secondary sources that include, *inter alia*, books, journal articles, foreign case law and internet websites as well as

⁴⁶ J Pauwelyn *Conflict of norms in public international law: How WTO law relates to other rules of international law* as cited in Pogoretskyy (n 21 above).

⁴⁷ See Pauwelyn as cited in Pogoretskyy (n 46 above) 319 fn 28.

⁴⁸ See Pogoretskyy (n 21 above) 319.

⁴⁹ See Pogoretskyy (n 21 above) 328.

working papers and reports by companies and non-governmental organizations alike.

The research will adopt a prescriptive and analytical approach. A prescriptive approach will be used to introduce Article V of the GATT and the concepts of third-party access and capacity establishment. An analytical approach will be employed to explore whether and how third-party access and capacity establishment rights may be read into Article V of the GATT. Lastly, for the purposes of forming recommendations, the research will employ a prescriptive approach.

1.8 Outline of chapters

Chapter one will comprise of an introduction into the background of the subject matter, the research problem, thesis statement, research questions, significance of the research, literature review and the research methodology.

Chapter two explores the historical origins and development of the freedom of transit principle under international law. The chapter also introduces Article V of the GATT and the concepts of third-party access and capacity establishment as well as discussing the historical origins and relevance of the third-party access right in the context of international gas transit regulation.

Chapter three provides an analysis of the different arguments advanced on whether third-party access and capacity establishment rights are inherent in the freedom of transit principle under Article V of the GATT. The chapter also introduces an innovative argument advanced by Pogoretsky that may be employed to incorporate third-party access and capacity establishment rights into the provision.

Chapter four makes use of Mozambican legislation to illustrate the strategic importance attached to pipelines in the achievement of disguised political objectives. The chapter also attempts to investigate if and the extent to which the SADC Treaty has addressed these two rights in the context of international gas transit regulation. Furthermore, chapter four, in essence, will demonstrate how the lack of rules at the WTO level regulating these two rights leads to a situation where WTO Member States, burdened by a lack of capacity, possess no legal avenue to

enforce their freedom of transit right under Article V of the GATT.

Lastly, the fifth chapter summarizes the key findings of the study, draws conclusions and makes recommendations.

1.9 Exclusions and limitations

1.9.1 Exclusions

The writer acknowledges that over and above the legal issues inherent in a project involving the construction of cross border pipelines and the granting of third-party access rights to such pipelines, other pressing political and economic issues are immediately triggered. However, the scope of this research is limited to only those pertinent legal aspects arising out of the construction of cross border energy pipelines, with the other facets of the discussion being reserved for the experts in their respective fields.

1.9.2 Limitations

Presently, Pogoretsky is the ‘only’ author who has attempted to employ an approach that moves away from discussing the issues merely within the limited context of WTO law to one that seeks to tackle the problem by engaging in a ‘contextual and systemic’ analysis of the GATT and by employing general principles of public international law as informed by the rules governing the interpretation of treaties. Hence, to the extent that no other author has attempted to employ an identical approach, making Pogoretsky the only available source and authority in this regard, his argument will be explored and analyzed in an extensive and detailed manner.

Given that this is a topic that has never been written about in the African context, the unavailability of hard copy sources (e.g. books) in both South Africa and Mozambique has not facilitated this research. Moreover, accessibility to journal articles dealing with the subject matter has been very limited as many of these journals have required subscription accompanied

by the payment of a fee. To the extent that authors like Dr. Selivanova have been easy to reach and kind enough to share their publications, access to other vital sources has unfortunately not been possible.

And finally, the announcement of the African Renaissance Pipeline's construction only came to the writer's attention on the 16th of April 2016 as evidenced by Scala's publication dated the 12th of April 2016.⁵⁰ Despite the fact it has resulted in the graduation of the writer's idea from a mere speculative one to a realistic possibility, the announcement has been accompanied by immense structural changes in the paper within a very limited time frame.

⁵⁰ See Scala (n 14 above).

CHAPTER TWO

HISTORICAL ORIGINS AND DEVELOPMENT OF FREEDOM OF TRANSIT AND ARTICLE V OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

2.1 Introduction

Freedom of transit, as a fundamental international law principle, finds its origins in land-locked states' inability to access bodies of water, such as the sea and rivers, for the purpose of trading in goods.⁵¹ For countries that find themselves land-locked, freedom of transit provides the only available means for importing and exporting goods via the ocean. Therefore, given the geographical limitation imposed on such states, the importance of accessing international markets cannot be overstressed.

Historically, transit states have utilised their strategic position to derive political and economic advantages over neighbouring land-locked states.⁵² In other instances, land-locked countries have had to seek alternative routes or means for the transport of their commodities to and from the sea. More frequently than not, transit states have issued orders for the seizure of goods in transit belonging to land-locked states as well as levying high custom duties and imposing costly procedural formalities for the movement of goods through the transit state's territory.⁵³ Consequently, land-locked developing countries are generally regarded as the poorest of the developing states, given their geographical constraints coupled by the difficulties imposed on them by neighbouring transit states in the form of *inter alia* costly international transportation

⁵¹ R Thapa 'Article V of General Agreement on Tariffs and Trade 1994: From the perspective of ensuring freedom of transit to landlocked countries' (2010) *15 Business Law Journal*.

⁵² M Sinjela 'Freedom of transit and the right of access for land-locked states: The evolution of principle and law' (1982) *12 Georgia Journal of International and Comparative Law* 31.

⁵³ As above.

services.⁵⁴ With all this said, the main legal question revolving around the development of the freedom of transit principle was whether land-locked states were in fact the subjects of a right of access to and from the sea or whether such access merely amounted to a privilege dependent on the terms and conditions imposed unilaterally by the transit state?⁵⁵

This chapter will begin by exploring the historical origins and development of the freedom of transit principle under international law prior to the establishment of the GATT. The chapter then proceeds to introduce Article V of the GATT as well as establishing, from the very outset, its applicability to international gas transit regulation and privately owned companies. Moving on, the chapter introduces the concepts of third-party access and capacity establishment prior to concluding with a brief discussion on the historical origins and relevance of the third-party access right in the context of international gas transit regulation.

2.2 Right of access to the sea for land-locked countries: Historical bases for the claim and counter arguments

Originally, land-locked states based their claim of a right of access to the sea on the principles of natural law where they argued that their very sovereignty was sufficient to confer such a right on them.⁵⁶ Subsequently, it was maintained that land-locked countries must be entitled to transit freely in the exercise of their equal rights within territories that are not subject to the legal title of any state.⁵⁷ The Roman concept of servitude was another theory supporting the right of access to and from the sea.⁵⁸ In this regard, Roman law stipulated that the owner of a piece of land had the right to use the land in any way he wished, as long as that use did not infringe on his neighbour's rights. Hence, Sinjela argues that due to this, land-locked states have a similar servitude to pass through neighbouring states, viewed as being a necessary extension of the sovereignty exercised by such states over their own respective territories.⁵⁹ The requirements to having a land-locked

⁵⁴ United Nations Development and International Economic Co-Operation: Report of the Secretary General 7 U.N Doc. A/10203 1975.

⁵⁵ See Sinjela (no 52 above) 32.

⁵⁶ H Grotius *The freedom of the seas* as cited in Sinjela (n 52 above) 32.

⁵⁷ See Sinjela (no 55 above).

⁵⁸ As above.

⁵⁹ See Sinjela (no 52 above) 33.

state's free access right legally recognized were summarized by Lauterpacht,⁶⁰ namely that the state claiming the right must be able to justify the right under 'necessity considerations' or 'convenience' and the land-locked state must cause no harm or prejudice to the transit state during the exercise of the free access right.⁶¹

On the other hand, coastal states argued territorial sovereignty in a show of disapproval toward granting land-locked states a guaranteed right of access to the sea.⁶² They argued that state sovereignty principles allowed them to either approve or disallow all transit through their respective territories.⁶³ Furthermore, transit states argued that the right to deny transit of land-locked states as a security matter was encompassed by the transit state's sovereign jurisdiction over all the activities taking place on its territory.⁶⁴ Some had even argued that the principle of reciprocity be applied to the granting and enforcement of transit rights, for example through the granting of concessions on the part of the land-locked state in exchange for utilizing the transit state's transport facilities.⁶⁵ Moreover, coastal states shared the view that access rights for land-locked states were not clearly and well resolved through a single international treaty or convention and as such were a matter for bilateral or regional deliberation.⁶⁶

2.3 The 1921 Barcelona Statute on Freedom of Transit

The Barcelona Statute on Freedom of Transit marked the first move by land-locked states toward having an internationally recognized and guaranteed right of access. However, the Statute only applied to water and rail transport, disregarding overland or air transport. Members to the Convention were permitted to depart from the freedom of transit principle for a limited period when serious events affecting the security or vital interests of their respective states occurred.⁶⁷

⁶⁰ E Lauterpacht 'Freedom of transit in international law' in *The Grotius Society Transactions for the years 1958 & 1959* (1958-59) as cited in Sinjela (n 52 above).

⁶¹ See Lauterpacht as cited in Sinjela (n 60 above) 33 fn 13.

⁶² See Sinjela (no 52 above) 34.

⁶³ As above.

⁶⁴ See Sinjela (n 52 above) 35.

⁶⁵ As above.

⁶⁶ As above

⁶⁷ Article 19 of the Barcelona Statute on Freedom of Transit.

A state could also refuse to permit the transit of goods or passengers for public health or security concerns, or under the authority of general international conventions.⁶⁸ With this said, the Statute made reference to ‘freedom’ of access and not to a ‘right’ of access in an attempt at establishing a balance between the freedom principles and those of state sovereignty.⁶⁹ The Barcelona Statute influenced the creation of several important agreements including the Geneva Convention on the International Regime of Maritime Ports.⁷⁰ The Geneva Convention was of great significance as it recognized that land-locked states and coastal states had equal access rights to the ports.⁷¹

However, from the perspective of land-locked states, over and above providing a positive initiative toward international recognition, the Barcelona Statute had its flaws in what concerned its scope of application.⁷² Firstly, the interests of land-locked states would have been better served had the transit right been declared of universal application as opposed to having been made applicable only to states that were party to the Convention.⁷³ Makil⁷⁴ argues that the proposal to have the Convention expressly state its universal application was rejected on the grounds that by permitting non-member states to enjoy the Convention’s benefits, fewer states would choose to ratify the Convention to begin with.⁷⁵ Secondly, the Convention was limited in that it only applied to railway and sea transport. By excluding overland and air transport from its scope of application, the Barcelona Statute proved useless toward land-locked developing states in large areas of Africa and Asia, the very same countries that depended on road transport for the sale of their goods to the international market.⁷⁶

2.4 The 1948 Havana Charter for an International Trade Organization and an introduction to the General Agreement on Tariffs and Trade (GATT)

⁶⁸ Articles 6 and 21 of the Barcelona Statute on Freedom of Transit.

⁶⁹ K Uprety *The transit regime for land-locked states: International law and development perspectives*’ Law, Justice and Development Series: The International Bank for Reconstruction and Development (2006)49.

⁷⁰ See Uprety (n 69 above) 50.

⁷¹ As above.

⁷² See Sinjela (n 52 above) 36.

⁷³ As above.

⁷⁴ R Makil *Transit rights of land-locked countries: An appraisal of international conventions* as cited in Sinjela (n 52 above).

⁷⁵ See Makil as cited in Sinjela (n 74 above) 36 fn 31.

⁷⁶ See Sinjela (n 52 above) 36.

In 1948, the United Nations Conference on Trade and Employment adopted the Havana Charter where it addressed freedom of transit for land-locked states.⁷⁷ The Charter aimed to create an organization to supervise the global trading system.⁷⁸ Although the Convention never entered into force, it contributed greatly to the creation of a set of binding freedom of transit rules for land-locked states.⁷⁹ The Charter also constituted an additional step in the process of providing land-locked states with free and secure access to the sea as it formed the basis for the adoption of the GATT.⁸⁰ Along with the Barcelona Statute, the Havana Charter has also obtained the status of customary international law and has impacted significantly on the issues related to free access to the sea, ultimately acting as a catalyst to the stimulation of international commerce.

After the Second World War, the GATT was adopted, with its main objective being the reduction of tariffs and non-tariff barriers to international commerce. The GATT played the role of reaffirming the freedom of transit principle enshrined in the Barcelona Statute.⁸¹ However, in the drafting of the freedom of transit provision, the GATT failed to expressly incorporate the cumbersome circumstances faced by land-locked states as it remained silent on whether this right of access was in fact a general international law principle applicable to all states.⁸²

2.5 The 1958 Geneva Convention on the High Seas

In 1958, at the first United Nations Conference on the Law of the Sea (UNCLOS I), the Fifth Committee, which was tasked with carrying out a study on free access for land-locked states, submitted its final recommendations.⁸³ These recommendations were eventually accepted by the UN conference as general principles of international law and later took the form of Article 3 of the 1958 Geneva Convention on the High Seas. Despite this milestone, land-locked states argued that the provision required an agreement with transit states prior to the recognition of the access

⁷⁷ Article 33 of the Havana Charter for an International Trade Organization.

⁷⁸ Article 33 of the Havana Charter for an International Trade Organization.

⁷⁹ Article 10 of the Havana Charter provided that facilities and special rights that the Convention granted to land-locked states due to their burdensome geographical situation are excluded from the operation of the most-favored nation clause.

⁸⁰ See Uprety (n 69 above) 57.

⁸¹ See Sinjela (n 52 above) 37.

⁸² As above.

⁸³ See Sinjela (n 52 above) 39.

right. In this regard, they further argued that the provision's wording created no obligation on transit states to allow land-locked countries to exercise the right, even in the event where final terms and conditions were being negotiated.⁸⁴

Furthermore, when interpreted, it can be concluded from Article 3 of the Convention that for land-locked states to claim a right of access, such state would have had to grant the transit state with a 'reciprocal' right. In essence, this meant that the exercise of an access right by the land-locked state was dependent upon the fulfillment of a condition. From a practical perspective, the most serious hindrance toward the recognition of the access right continued to be the principle of territorial sovereignty, a principle that overrode the free access claim raised by land-locked states.⁸⁵ In this context, land-locked states argued that free access to the sea is a right recognized and confirmed by international law as well as being a right deriving from the principles of freedom of the high seas and the juridical equality of states.⁸⁶

On the other hand, transit states argued that the principle of territorial sovereignty placed a limitation on the access right to the sea, hence making the exercise of the right dependent on the goodwill of the respective transit state. In this regard, the main unanswered legal question remained whether the access right must be regarded as a general rule of international law or whether it is a right subordinate to bilateral agreements?⁸⁷ By failing to provide a response, it could be concluded that UNCLOS I did not satisfy the demands made by land-locked states for a generally applicable free access right as well as making rights of transit dependent on the transit state's goodwill.⁸⁸

2.6 The 1965 New York Convention

In 1965, the most important step toward tackling the obstacles faced by land-locked states was taken and it took the form of the New York Convention on Transit Trade of Land-locked States. Unlike the previous Conventions, the New York Convention went a step further when it came to

⁸⁴ See Sinjela (n 52 above) 40.

⁸⁵ See Uprety (n 69 above) 63.

⁸⁶ As above.

⁸⁷ See Uprety (n 69 above) 64.

⁸⁸ See Uprety (n 69 above) 66.

the recognition of land-locked states' transit rights to and from the ocean. The Convention is regarded as the only multilateral instrument that attempted to provide solutions to the issues raised by land-locked states as it dealt specifically with their access to and from the sea.⁸⁹

Furthermore, it aimed at incorporating the rights and obligations of land-locked and transit states, with regard to the movement of goods in international transit, into treaty law, ultimately seeking to generate acceptance of the Convention on a universal basis.⁹⁰ The Convention was also targeted at prohibiting transit states from taking advantage of their geographical location by assessing taxes and duties imposed on transiting merchandise.⁹¹ Under this treaty however, transit states could prohibit free access if the reasoning was related to public order, the protection of the transit state's essential security interests, and the occurrence of a situation endangering the transit state's political existence, war or obligations that derive from international or regional agreements which the transit state has entered into.⁹² Hence, transit states were permitted to enforce measures to avoid abuse of the access right; however such restrictions had to be applied only in exceptional circumstances and had to be couched out in precise legal terminology.

However, as was the case with the Geneva Convention, the reciprocity provision under the New York Convention was heavily criticized.⁹³ The provision was flawed in that it failed to differentiate between the need to transit resulting from a state having no coast at all and other transit that served merely to ease communication and transport.⁹⁴ Uprety convincingly argues that by subordinating the free access right to the clause on reciprocity, the first right is cancelled by the second, acting as a limitation upon the access right.⁹⁵ Such provisions in a treaty that link the right of access to the principle of reciprocity are premised on the wrong assumption that land-locked and transit states find themselves in similar positions and possess similar transit needs.

⁸⁹ As above.

⁹⁰ See Uprety (n 69 above) 71.

⁹¹ Article 3 of the New York Convention on Transit Trade of Land-locked States.

⁹² Articles 11, 12 and 13 of the New York Convention on Transit Trade of Land-locked States.

⁹³ Article 15 of the New York Convention on Transit Trade of Land-locked States.

⁹⁴ See Sinjela (n 52 above) 42.

⁹⁵ See Uprety (n 69 above) 69.

As was the case in Geneva, land-locked states requested that an unrestricted free access right be recognized and that the recognition of such right was necessary in order to comply with the freedom on the high seas principle, subsequently allowing these states to derive benefits from the sea like their coastal state counterparts.⁹⁶ Nevertheless, it could be said that this Convention attempted to establish some form of balance between the principles of territorial sovereignty and freedom of the high seas.⁹⁷

Along with the heavily criticized reciprocity clause, Sinjela draws attention to one of the Convention's other shortcomings. She argues that the Convention failed to affirm that the principles of economic necessity and land-locked states' right to derive enjoyment of the freedom of the seas on equal terms with coastal states enjoyed the status of international law.⁹⁸ However, despite its shortcomings, the New York Convention illustrated that a universally applicable multilateral convention containing a binding set of rules for transit rights of land-locked states could be formulated.⁹⁹ Moreover, the Convention laid the foundation for the negotiation of land-locked states' transit rights in the Third United Nations Conference on the Law of the Sea (UNCLOS III).

2.7 The 1982 Third United Nations Conference on the Law of the Sea (UNCLOS III)

Given previous Conventions' failures to have the right of access recognized in international law, land-locked states continued demanding a formulation that was more universal and objective for the achievement of such recognition. Their next attempt at resolving the issue took the form of UNCLOS III. Over and above the creation of an entirely new seabed regime, UNCLOS III was also tasked with the remodeling of the classical rules that established coastal states' jurisdiction, taking into consideration *inter alia* the issues related to pollution, scientific research and fisheries.¹⁰⁰ Under this Convention, transit states' sovereignty claim over their respective territories was recognized and such states were under no obligation to allow land-locked countries to exercise their transit right, if the exercise of such right infringed on their 'legitimate

⁹⁶ See Uprety (n 69 above) 70.

⁹⁷ As above.

⁹⁸ See Sinjela (no 52 above) 42.

⁹⁹ See Uprety (n 69 above) 75.

¹⁰⁰ See Uprety (n 69 above) 79.

interests'.¹⁰¹ Every international convention that dealt with transit limited the exercise of this access right in the event of disturbances to the transit state's internal public order. Hence, under exceptional circumstances, a transit state, could for a limited period, restrict the right of access, in moments of domestic social unrest and war.¹⁰²

Most notably, the Convention, in an 'ostensible' manner, recognized a 'real legal right' in favor of land-locked states.¹⁰³ However, the legal force of this right was reduced significantly by the provision that followed, which stated that the terms and procedures for the exercise of freedom of transit had to be agreed upon by the respective transit and land-locked states, through either bilateral, sub-regional or regional arrangements.¹⁰⁴ Hence, when analyzed carefully, it can be concluded that Article 125 effectively failed to accord new rights to land-locked states.¹⁰⁵

On a positive note though, UNCLOS III stipulated that where a transit state had no transportation means to make freedom of transit effective or where such existing means were inadequate, the transit and land-locked states having an interest in the matter could 'cooperate' in the construction or improvement of transport capacity.¹⁰⁶ By employing the term 'cooperate', it is evident that this provision merely amounted to a 'best endeavour clause' capable of being ignored by the transit state in question. Despite this though, the flexibility offered by paragraph 124(d) of the Convention was quite notable as land-locked and transit states could, by agreement with each other, consider, for example, pipelines and gas lines as a means of transport.¹⁰⁷ However, practically speaking, a transit state could at any stage prohibit the exercise of the land-locked state's transit right. Once again, as was the case with the previous conventions, transit states were under no legal obligation to grant transit to land-locked states as the right of access gave rise to reciprocal obligations on the parties.¹⁰⁸

A very important feature of UNCLOS III was the concept of a 'common heritage of mankind',

¹⁰¹ Article 125(3) of the United Nations Convention on the Law of the Sea III.

¹⁰² See Uprety (n 69 above) 111.

¹⁰³ Article 125(1) of the United Nations Convention on the Law of the Sea III.

¹⁰⁴ Article 125(2) of the United Nations Convention on the Law of the Sea III.

¹⁰⁵ See Uprety (n 69 above) 87.

¹⁰⁶ Article 129 of the United Nations Convention on the Law of the Sea III.

¹⁰⁷ See Uprety (n 69 above) 87-88.

¹⁰⁸ See Uprety (n 69 above) 88.

which reflected the belief that resources in areas that transcend the boundaries of national sovereignty should not be exploited only by the states whose geographical proximity allowed them to do so.¹⁰⁹ Hence, under this concept, such resources constituted the ‘common heritage of mankind’ and belonged to all states. Uprety, however, argues that these rights were merely theoretical and were not capable of effective implementation by land-locked states.¹¹⁰

Hence, this Convention failed to reformulate those very rules that had been the subject of contention in previous international instruments, meaning that the potential for problems regarding transport means and other legitimate interests of the transit state remained a realistic possibility.¹¹¹ From the perspective of land-locked states, when analysed, it can be argued that UNCLOS III was of very little practical significance as the long and complex negotiation exercise resulted in a mere ‘renewal’ of rights that had already been recognized under other international instruments.¹¹² Therefore, despite the fact that the Convention may have benefited some land-locked states that were also transit states, most of the land-locked states in South America, Africa and Asia argued the exact opposite.¹¹³

The most recent embodiment of the freedom of transit principle has taken the form of Article V of the GATT, being the focal point of the discussion to follow. However, prior to delving extensively into Article V of the GATT, it is worth remembering from the preceding discussion that a state’s sovereignty over its territory places a limitation on another state’s ability to derive enjoyment from the freedom of transit principle. It is for this reason that transit rights and a transit state’s duty to permit transit across its territory has and continues to be a very contentious subject in international law.

This is evident in the texts of the New York Convention and UNCLOS III which stipulate that while exercising the right of free and unrestricted access to the sea, there may be no infringement

¹⁰⁹ See Uprety (n 69 above) 91.

¹¹⁰ See Uprety (n 69 above) 92.

¹¹¹ See Uprety (n 69 above) 94.

¹¹² See Uprety (n 69 above) 95.

¹¹³ See Uprety (n 69 above) 96.

on a transit state's 'legitimate interests'.¹¹⁴ Subsequently, a transit state also has a right to set out the conditions for the granting of such transit rights.¹¹⁵ On a practical level, these transit rights are generally regulated by bilateral, regional or multilateral treaties and set out the transit rights' terms and procedures, which include permits, licenses and quotas. Moreover, to the extent that transit involves goods, vehicles and infrastructure, it must be in compliance with the municipal legal regimes in force, for example traffic laws, licensing conditions, vehicle safety and immigration, all of which form part of these very same terms and conditions agreed upon by the parties at the moment of the agreement's conclusion.¹¹⁶

2.8 Article V of the General Agreement on Tariffs and Trade (GATT)

Article V of the GATT sets out the conditions which a WTO member is permitted to impose on goods transported through its territory by another state to a foreign territory. As expressly stated in the Provision's scope and application, the objective behind this clause is to permit freedom of transit of each member states' goods to or from the territory of other WTO members. Although the provision does not deal specifically with land-locked states, it plays the role of reaffirming the principles enshrined in the Barcelona Statute.¹¹⁷ By covering overland transport, the GATT went a step further than the Barcelona Statute by according member states with greater facilities than those provided for by the latter.

Under Article V of the GATT, goods are deemed to be in transit across the territory of a contracting party when the passage across such territory is only a portion of a journey beginning and terminating beyond the frontier of the member state across whose territory the traffic passes.¹¹⁸ Article V of the GATT makes provision for freedom of transit of goods, vessels and other means of transport across the territory of WTO members via the routes most convenient for international transit.¹¹⁹ The provision also provides for equal treatment independent of a vessel's

¹¹⁴ United Nations Conference on Trade and Development (UNCTAD) Trust Fund for Trade Facilitation Negotiations TN/REV.3 'Freedom of transit and regional transit arrangements' (2011) 1.

¹¹⁵ As above.

¹¹⁶ See UNCTAD Trust Fund for Trade Facilitation Negotiations (no 114 above) 2.

¹¹⁷ See Uprety (n 69 above) 58.

¹¹⁸ Article V(1) of the General Agreement on Tariffs and Trade.

¹¹⁹ Article V(2) of the General Agreement on Tariffs and Trade.

flag, origin, departure, entry, exit, destination or ownership of the goods or vessels.¹²⁰ It places an express prohibition on unnecessary delays or restrictions to traffic in transit as well as prohibiting the levying of customs duties, transit duties and other transit-related charges except transportation charges or those commensurate with administrative expenses entailed by transit.¹²¹

Furthermore, Article V of the GATT stipulates that the charges levied by WTO members on traffic in transit should be reasonable, having consideration for traffic conditions as well as providing for most favored nation treatment with regard to charges, regulations and formalities which are connected with transit.¹²² Moreover, it places an obligation on each member state to accord to products which have been in transit treatment no less favorable than that which would have been accorded to such products had they been transported from their place of origin to their final destination without transiting through the territory of such other member state.¹²³ The most notable impediments frustrating the achievement of the provision's objective are those factors accounting for high trade costs incurred by land-locked states, namely, poor infrastructure, trade imbalance, inefficient transportation, poor asset utilisation and a proliferation of burdensome government regulations in both developing transit and land-locked states.¹²⁴

2.8.1 The applicability of Article V of the GATT to international gas transit regulation

Means of transport are also covered under freedom of transit, however unlike the above-mentioned Conventions, the list of means under Article V is not a *numerus clausus*. With the list being open-ended, the question that inevitably surfaces is whether transit in the context of the GATT extends to pipelines and gas lines? Moreover, one of the main arguments that emerge in a discussion on international gas transit regulation under WTO rules involves determining whether gas transit is in fact subject to the GATT or the General Agreement on Trade in Services

¹²⁰ As above.

¹²¹ Article V(3) of the General Agreement on Tariffs and Trade.

¹²² Articles V(4) & V(5) of the General Agreement on Tariffs and Trade.

¹²³ Article V(6) of the General Agreement on Tariffs and Trade.

¹²⁴ See Uprety (n 69 above) 59.

(GATS)? Another issue involves determining whether gas qualifies as a ‘good’ as per Article V(1) of the GATT. If answered in the affirmative, does the term ‘goods’, within the definition of ‘traffic in transit’ cover the movement of goods via pipelines? The discussion to follow seeks to provide a response to these rather contentious issues.

The WTO Appellate Body has expressly held that the GATT and GATS obligations are not mutually exclusive and that each of them carries a certain level of autonomy.¹²⁵ What is of interest here is a scenario where obligations are included in a services schedule, but aim at providing minimum access guarantees for the goods that are being transported, rather than for the suppliers of the pipeline transportation services. With regard to whether the GATS addresses the transit of gas, it is argued that the agreement offers protection to the suppliers of pipeline transportation services and not the suppliers of the energy commodity itself.¹²⁶ Hence, a company that transports its own merchandise is not considered to be delivering a service but is performing what is known as an ‘in-house activity’. Therefore, only entities that transport energy products that are owned by other entities can invoke this additional commitment in order to gain access to or utilise a pipeline.¹²⁷

The GATS does not protect companies transporting their own products as such companies cannot be regarded as suppliers of services, thus falling outside the ambit of the GATS’s application.¹²⁸ Hence, as a consequence, the ambit of the WTO obligations arising under the GATT is not diminished by the GATS despite the fact that the latter agreement could play a critical role in the development of gas trade on the international level through the liberalisation of services such as those relating to pipeline transportation.¹²⁹ It is worth mentioning though that this research is primarily concerned with the suppliers of gas as a ‘good’ in terms of Article V of the GATT as opposed to the suppliers of the transportation service.

¹²⁵ WTO Appellate Body Report, European Communities- Regime for the importation, sale and distribution of bananas, WT/DS27/AB/R, adopted 25 September 1997, para 221; and WTO Panel Report, China- Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products, WT/DS363/R, adopted 19 January 2010, paras 7.127-28.

¹²⁶ See Cossy (n 34 above) 301.

¹²⁷ As above.

¹²⁸ As above.

¹²⁹ See Pogoretsky (n 21 above) 321.

Regarding whether gas qualifies as a ‘good’ as per the definition of goods under Article V(1), the position has been clarified and consequently gas is considered a good under the GATT.¹³⁰ Hence, if gas is considered a ‘good’ in terms of the GATT, it is encompassed under the definition of ‘traffic in transit’.¹³¹ Moreover, Article 11(1) of the Draft Consolidated Negotiating Text proposes that the term ‘goods’ within ‘traffic in transit’ under Article V of the GATT and the Trade Facilitation Agreement expressly incorporate the movement of goods via fixed infrastructure such as pipelines.¹³² Hence, despite the fact that pipelines are not themselves transiting, the goods transported by such pipelines are in fact in transit and thus fall under the definition of ‘traffic in transit’ under Article V.¹³³ Therefore, it is generally accepted that WTO rules do incorporate the transit of gas and from the viewpoint of trade in goods, gas transit does fall within the scope of the GATT’s applicability under Article V.

Furthermore, Cossy argues that there is nothing in the wording of Article V that seems to support a reading that excludes transit through fixed infrastructure such as pipelines.¹³⁴ The exclusion of fixed infrastructure from the applicability of Article V stemmed from concerns that pipelines are not identical to other modes of transport because they raise sensitive security and financial concerns, are privately owned and have a limitation on the available capacity. With this said, concerns relating to the distinct nature of transport via fixed infrastructure should not be sufficient to justify an ‘outright’ exclusion of such transport modes from the ambit of the Provision’s applicability.¹³⁵

2.8.2 The applicability of Article V of the GATT to privately owned companies

The transit of energy goods can be and in practice is significantly influenced by dominant companies, private and public, which more often than not monopolise the market for that

¹³⁰ H.S Code 2711.21 of the HS Nomenclature Available at: www.wcoomd.org/home_hsoverviewboxes.htm (accessed 20 April 2016).

¹³¹ See Pogoretsky (n 21 above) 320.

¹³² WTO Secretariat, Negotiating Group on Trade Facilitation Draft Consolidated Negotiating Text (21 April 2011) TN/TF/W/165/Rev.8 22.

¹³³ See Cossy (n 34 above) 297.

¹³⁴ As above.

¹³⁵ As above.

particular commodity. However, it remains unclear whether the obligations imposed by GATT Article V are in fact applicable to such companies.

In the case of *Korea-Measures affecting imports of fresh, chilled and frozen beef*,¹³⁶ the Panel, in providing a description of the legal status of Article XVII:1(a) held that the provision establishes the general obligation on state trading enterprises to engage in activities in accordance with the GATT non-discrimination principles. The Panel also held that the non-discrimination principle includes at least the provisions of Articles I and II of the GATT, leading Cossy to question whether the Panel's finding might be expanded to include other GATT obligations, such as Article V or in the minimum, the non-discrimination obligations under Article V.¹³⁷

Despite the fact that non-state actors are not bound by the WTO Treaty, there have been cases in WTO agreements where member states have undertaken that certain types of commercial entities comply with WTO standards, namely those with special privileges. Hence, it is argued that there is nothing preventing member states from including a similar provision in relation to transit.¹³⁸ In this regard, Roggenkamp argues that despite the fact that state trading enterprises are exempt of certain specific GATT obligations, as evidenced in the text of Article XVII of the GATT; this does not mean that such entities are generally exempted from the obligation to grant freedom of transit under Article V.¹³⁹

Furthermore, Ehring and Selivanova argue that despite the fact that the WTO treaty creates rights and obligations only for those states who have signed the Treaty, the fact that the infrastructure is owned by private entities or operators does not rule out WTO obligations upon such member states under Article V of the GATT.¹⁴⁰ They argue that the obligation imposed on WTO members to guarantee freedom of transit applies irrespective of who owns the infrastructure.¹⁴¹ They further argue that the obligations imposed on the governments of WTO member states at

¹³⁶WTO Panel Report, *Korea- Measures affecting imports of fresh, chilled and frozen beef*, WT/DS161/R, adopted 31 July 2000, para 753.

¹³⁷ See Cossy (n 34 above) 298 fn 52.

¹³⁸ See Cossy (n 34 above) 298.

¹³⁹ See Roggenkamp 'Implications of GATT and EEC on networkbound energy trade in Europe' as cited in Kurmanov (n 39 above) 25 fn 73.

¹⁴⁰ See Ehring & Selivanova (n 29 above) 68-69.

¹⁴¹ As above.

the international level effectively means that such states must take suitable measures vis-à-vis the private entity owning the transport infrastructure, in order to comply with its obligations at the WTO.¹⁴² Furthermore, failure on the part of such state to employ these measures when private entities are involved could turn WTO obligations worthless. Hence, although the obligation to grant freedom of transit under Article V of the GATT is only applicable to WTO member states, the government of such state can fail to comply with its WTO transit obligations, which Ehring and Selivanova describe as being ‘an obligation of a result’, should the private entity block or obstruct the transit of the respective goods.¹⁴³

Pogoretsky also provides his view on this highly contested issue. Firstly, it is important to mention at the very outset that the WTO creates obligations only for its member states and is thus primarily concerned with measures taken by the governments of such states. Hence, a measure taken by a private entity would logically fall outside the ambit of the WTO treaty. In this regard, the main question, Pogoretsky states, is how it can be ascertained whether a measure taken by a private pipeline operator falls under the definition of a governmental measure? In this context, he argues that for a private entity to act as a government, such entity must be in the state’s control or owned by such state.¹⁴⁴ Furthermore, he argues that such entity must be vested with ‘governmental authority’, phrased differently; it must perform what is referred to as a ‘governmental function’.¹⁴⁵

The Appellate Body in the *United States definitive anti-dumping and countervailing duties case*¹⁴⁶ held that performance of a governmental function can be deduced from, *inter alia*, an ordinary government practice, the actual performance of such function or an express statutory delegation of authority by law.¹⁴⁷ Furthermore, in *Japan-Measures affecting consumer photographic film and paper*¹⁴⁸ the Appellate Body stated that the performance of a governmental function can be inferred from an indirect advice or a recommendation by the

¹⁴² As above.

¹⁴³ As above.

¹⁴⁴ See Pogoretsky (n 21 above) 342.

¹⁴⁵ As above.

¹⁴⁶ WTO Appellate Body Report, United States- Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted 25 March 2011.

¹⁴⁷ See n 146 above, paras 297, 317 & 318.

¹⁴⁸ WTO Panel Report, Japan- Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, adopted 22 April 1998.

government of a state to a private entity, which in the view of the Appellate Body has a ‘binding or a quasi-binding’ effect on such private entity.¹⁴⁹

2.9 An introduction to the concepts of third-party access and capacity establishment: A model scenario in the context of energy security concerns

The concepts of third-party access to existing pipelines and capacity establishment in the absence of pipeline infrastructure can be explained in the form of a simplified hypothetical model scenario involving three WTO member states, namely a gas importer in the form of Burkina Faso, a land-locked gas exporter as Chad and the transit state as Niger.¹⁵⁰ The concepts of third-party access and capacity establishment are inevitably born upon the entering into of a gas sales contract, in terms of which the energy good would be delivered to Burkina Faso from Chad via the pipeline infrastructure spanning across Niger. To the extent that Chad is land-locked, the only means available for the country to export the energy commodity to Burkina Faso would be to make use of Niger’s pipeline, merely for its good to transit to Burkina Faso. Subsequently, the gas transits across Niger’s pipeline prior to reaching its final destination in the form of Burkina Faso.

In this scenario, for the energy good to transit across Niger’s pipeline to Burkina Faso, Niger would have to grant what is referred to as ‘third-party access’ to its infrastructure, hence giving rise to the concept of third-party access to existing infrastructure. However, where fixed infrastructure connecting the three countries is non-existent, the building of a pipeline across Niger, merely for the energy commodity to transit, is Chad’s only available alternative for exporting the good, hence giving rise to the concept of capacity establishment in the absence of pipeline infrastructure.

In the context of this study, the issue of energy security is triggered as to the extent that Niger refuses to grant third-party access to its infrastructure, Burkina Faso is forced to purchase the gas from another state, for instance Mali, which possesses the necessary infrastructure capacity,

¹⁴⁹ See n 148 above, paras 10.43-50.

¹⁵⁰ The use of a model scenario approach to introduce and explain the concepts of third party access and capacity establishment was transported from Pogoretsky, albeit replacing the examples with African WTO Member States. See Pogoretsky (n 21 above) 315.

albeit at a much higher cost. With regard to capacity establishment, in the event where the Government of Niger is unwilling to construct new pipelines and refuses to allow the construction of such infrastructure on its territory, Burkina Faso is once again forced to purchase the commodity from another source, thus touching on the issue of energy security.

2.10 The third-party access right: Definition and historical origins

Third-party access has been defined as a system where third parties are legally entitled to make use of facilities, either only for capacity that has not been utilised or on the basis of fair sharing of existing capacity, for a reasonable fee and on terms that are practical.¹⁵¹ Third-party access can also be defined as the legally enforceable right of economically independent undertakings to access and use, in certain circumstances, various energy network facilities owned by other companies.¹⁵² In the context of energy, the concept of third-party access is a right granted to the producers of electricity and gas as well as energy suppliers and customers, permitting them to utilise, trade and transport their energy commodity through electricity grids and gas pipelines that are either owned by or in the control of other private firms.¹⁵³

Essentially, third-party access plays the role of separating the ownership of the fixed infrastructure from the ownership of the energy product being transported in such infrastructure.¹⁵⁴ To the extent that third-party access involves making use of pipelines that have undergone a very costly development process, it is viewed as being a rather ‘unusual’ right,¹⁵⁵ at least from the perspective of the company that has invested heavily in the infrastructure’s construction and maintenance.

The concept of third-party access first emerged in Europe in the realm of Community Competition Law and was viewed by the European Internal Energy Market Directives (EIEMD)

¹⁵¹ See Walde & Gunst (n 37 above) 197.

¹⁵² A Kotlowski ‘Third-party access rights in the energy sector: A competition law perspective’ (2007) 16 *Utilities Law Review* 101.

¹⁵³ See Kotlowski (no 152 above) 102.

¹⁵⁴ M Onal ‘Third party access rights regime under European Union rules for natural gas pipelines and conditions for refusal of access’ (2012) 7 Available at: [file:///C:/Users/User/Downloads/cepmlp_car16_28_989765871%20\(8\).pdf](file:///C:/Users/User/Downloads/cepmlp_car16_28_989765871%20(8).pdf) (accessed 30 May 2016).

¹⁵⁵ See Kotlowski (n 152 above).

as a critical element in accessing the European energy infrastructure system.¹⁵⁶ Third-party access was also seen as the primary catalyst for the liberalisation of the Internal Energy Market to competition.¹⁵⁷ Taking into account the costs involved in constructing and maintaining gas pipelines, the companies that own or control the infrastructure may unilaterally wish to limit access to their pipeline, subsequently resulting in detrimental effects on competition in the absence of a regulator.¹⁵⁸ This explains why the concept of third-party access was born in the competition law sphere, namely to provide third parties with a legally enforceable right to have non-discriminatory access to existing pipeline infrastructure. This comes in light of the fact that such infrastructure cannot be replicated due to excessive costs involved in its construction and maintenance.

2.11 Conclusion

This chapter has explored the historical origins and development of the freedom of transit principle under international law prior to the entering into force of the GATT. The chapter then went on to introduce Article V of the GATT as well as establishing its applicability to international gas transit regulation and privately owned companies. Moving on, a basic introduction to the concepts of third-party access and capacity establishment was provided prior to concluding with a brief discussion on the historical origins and relevance of the third-party access right in the context of international gas transit regulation.

Throughout the development of the freedom of transit principle, the main legal question was whether land-locked states were in fact the subjects of a right of access to and from the sea or whether such access merely amounted to a privilege dependent on the terms and conditions imposed unilaterally by the transit state? The problem with most of the Conventions leading up to the GATT was that they failed to expressly incorporate the burdensome circumstances which plagued land-locked states, by remaining silent on whether the right of access was in fact a general international law principle applicable to all states. The biggest obstacle to the recognition of the access right continued to be the principle of territorial sovereignty, a principle that

¹⁵⁶ As above.

¹⁵⁷ As above.

¹⁵⁸ See Onal (n 154 above) 4.

trumped the claim raised by land-locked states who argued that free access to the sea is a right recognized and confirmed by international law.

UNCLOS III seemed like a milestone in what concerned the recognition of the free access right; however, as was the case with the previous Conventions, transit states were under no obligation to grant transit to land-locked states as the right of access gave rise to reciprocal obligations on behalf of the parties. Hence, from the perspective of land-locked states, when analysed, it can be argued that UNCLOS III was of very little practical significance as the long and complex negotiation exercise resulted in a mere 'renewal' of rights that had already been recognised under other international instruments. Therefore, to the extent that a state's sovereignty over its territory placed a limitation on another state's ability to derive enjoyment from the freedom of transit principle, transit rights and a transit state's duty to permit transit across its territory continued to be a very contentious issue in public international law.

With this said, the most recent embodiment of the freedom of transit principle has taken the form of Article V of the GATT. To the extent that the GATT's applicability to international gas transit regulation has been established, the GATT, has once again, been accorded with the unprecedented opportunity of clarifying the freedom of transit provision in the context of international gas transit regulation. For states burdened by infrastructural deficiencies, the effective implementation of GATT Article V is dependent on whether third-party access and capacity establishment rights are in fact inherent in the provision's applicability.

CHAPTER THREE

THIRD-PARTY ACCESS AND CAPACITY ESTABLISHMENT UNDER THE RULES OF THE WORLD TRADE ORGANIZATION

3.1 Introduction

The previous chapter sought to explore the historical origins and development of the freedom of transit principle under the rules of public international law prior to the entering into force of the GATT. The chapter introduced Article V of the GATT as well as establishing its applicability to international gas transit regulation and privately owned companies prior to providing a basic introduction to the concepts of third-party access and capacity establishment. Chapter two culminated with a brief discussion on the historical origins and relevance of the third-party access right in the context of international gas transit regulation.

This chapter will commence with an analysis of the different arguments advanced by several authors who have written extensively on whether third-party access and capacity establishment rights are inherent in the freedom of transit principle under Article V of the GATT. The chapter will proceed to introduce an innovative approach advanced by Pogoretskyy that may be used to incorporate third-party access and capacity establishment rights into the provision. Moving on, the scope of both the third-party access and capacity establishment rights as discussed under this new approach will be explored. The chapter concludes with Pogoretskyy's discussion on the enforcement mechanisms available to achieve the effective implementation of GATT Article V, should it be found to regulate third-party access and capacity establishment rights.

3.2 Third-party access and capacity establishment rights under Article V of the GATT

The question on whether third-party access and capacity establishment rights are incorporated under GATT Article V has and continues to be a very contentious topic in international trade law as quite a number of well renowned authors have expressed their views on the subject matter. Interestingly, the arguments advanced by these authors have yielded different conclusions with

several of them failing to agree on the issue at hand. The following discussion seeks to analyse these different arguments prior to arriving at a conclusion on whether these rights are in fact implicitly incorporated under Article V of the GATT.

Cossy argues that despite the fact that concerns relating to the distinct nature of transport via fixed infrastructure should not be sufficient to justify an ‘outright’ exclusion of such transport modes from the ambit of GATT Article V, the ‘specificities’ of grid-bound energy transport must still be taken into consideration when applying the provision.¹⁵⁹ She argues that from the wording of Article V, ‘most convenient routes’ means that the duty to grant free transit does not extend to all routes and as a consequence implies that transit must be granted only through those routes that are available. According to Cossy, WTO members are under no obligation to construct or permit the construction of new transit infrastructure as well as being under no obligation to provide access to existing pipeline infrastructure.¹⁶⁰ Thus, in her view, Article V of the GATT does not implicitly regulate third-party access and capacity establishment rights.¹⁶¹

Azaria argues that in interpreting the concept ‘most convenient routes’, the WTO may have to go well beyond mere geographical factors in order to consider the issue of restricted available pipeline capacity.¹⁶² In the case of *Colombia-Indicative prices and restrictions on ports (Colombia case)*,¹⁶³ the Panel interpreted Article V in a broad manner and concluded that Article V(2) required that goods from all the WTO member states must be granted an ‘identical level of access and equal conditions’ when proceeding in international transit.¹⁶⁴ Azaria argues that the requirement to provide an identical level of access may result in problems in the case of fixed infrastructure because it could equate to granting mandatory third-party access to such infrastructure.¹⁶⁵ In this regard, ‘identical level of access’ cannot be applied to energy transit via pipelines as a result of capacity constraints. Therefore, the only way to apply the findings of the Panel to transit via fixed infrastructure is to provide an interpretation of the words ‘identical level

¹⁵⁹ See Cossy (n 34 above) 297.

¹⁶⁰ See Cossy (n 34 above) 298.

¹⁶¹ As above.

¹⁶² See Azaria (n 33 above) 573-574.

¹⁶³ WTO Panel Report, *Colombia- Indicative prices and Restrictions on Ports*, WT/DS366/R, circulated 27 April 2009.

¹⁶⁴ See n 166 above, para 7.402.

¹⁶⁵ See Cossy (n 34 above) 298-299.

of access’ as requiring the transit state to formulate rules of procedure, such as requirements of transparency, granting the owners of the goods identical possibilities to access the pipelines.¹⁶⁶

An alternative route to ensuring a ‘non-identical yet non-discriminatory level of access’ could be through building new infrastructure. Thus, despite the fact that Article V covers ‘traffic in transit’ via fixed infrastructure, it places no obligation on the transit state to build or allow the building of new capacity. However, to the extent that Article V of the GATT covers both access to the transit state’s territory and the treatment of the traffic in transit within such territory, when applied to fixed infrastructure, such as pipelines, there in fact is an obligation created on the transit state to permit non-discriminatory access to its pipelines, when these are the most convenient routes.¹⁶⁷ Despite this, Azaria shares Cossy’s view that both third-party access and capacity establishment rights do not fall under the ambit of the provision’s applicability.

Konoplyanik is of the view that Article V of the GATT as applied to energy grid-bound systems lacks the detailed interpretation of all ‘mutually agreed’ and appropriate impediments to the freedom of transit principle.¹⁶⁸ He argues that a detailed interpretation of the agreed constraints to Article V is required for the purpose of ensuring the proper practical implementation of the provision, with the least possible risk arising out of unclear and ambiguous interpretation.¹⁶⁹ Along with Pogoretsky, Konoplyanik agrees with the fact that WTO rules fail to describe access to and do not provide a definition of available capacities required to secure the transit of energy. Furthermore, he states, that in the absence of legal clarifications setting out the impediments to the provision’s effective application, implementing the freedom of transit principle would only lead to higher transit-related risks for both states and investors alike, due to possibly vague and ambiguous interpretations.¹⁷⁰ Thus, he rejects the existence of both third-party access and capacity establishment rights under Article V of the GATT.

Rakhmanin is of the view that despite establishing a universally applicable non-discriminatory freedom of transit rule, Article V of the GATT fails to address issues of vital concern for the

¹⁶⁶ See Azaria (n 33 above) 572.

¹⁶⁷ As above.

¹⁶⁸ See Konoplyanik (n 35 above) 32.

¹⁶⁹ As above.

¹⁷⁰ See Konoplyanik (n 35 above) 33.

flow of energy, issues such as non-interrupted transit flow and non-impediment for the construction of new capacity should the available infrastructure prove to be insufficient.¹⁷¹ To that extent, he rejects the existence of both third-party access and capacity establishment rights under GATT Article V and argues that an effective investment framework is required to address the latter.¹⁷²

Although there is nothing in Article V of the GATT that places an obligation on WTO members to expand existing infrastructure or to permit its construction when capacity impediments exist, Roggenkamp argues that by making use of the words ‘routes most convenient’, Article V(2) of the GATT, implicitly, reflects a ‘deeper’ commitment when compared to the words ‘routes in use’ employed in the Barcelona Convention on Freedom of Transit.¹⁷³ Hence, she is of the view that Article V(2) can be interpreted as incorporating a capacity establishment right.¹⁷⁴

Ehring and Selivanova argue that freedom of transit in the context of energy trade is linked to the utilisation of existing infrastructure and to the possibility of constructing additional transit capacity should the need arise.¹⁷⁵ They argue that given the physical restrictions imposed by fixed infrastructure, rules regulating investment are required to ensure that additional capacity can be built, should existing networks fail to provide the required capacity.¹⁷⁶ They believe that where a state is burdened by the fact it has absolutely no transport infrastructure that it effectively amounts to a denial of the freedom of transit right, it could be argued that the wording under the GATT provision can be interpreted to incorporate the right to establish additional pipelines.¹⁷⁷

Furthermore, Ehring and Selivanova argue that WTO member states are under no obligation to build the additional capacity, however, should an investor wish to build pipelines for example; one could argue a denial of freedom of transit if the government unreasonably blocks the

¹⁷¹ See Rakhmanin (n 36 above) 124.

¹⁷² As above.

¹⁷³ See Roggenkamp as cited in Pogoretsky (n 27 above).

¹⁷⁴ As above.

¹⁷⁵ See Ehring & Selivanova (n 29 above) 51.

¹⁷⁶ As above.

¹⁷⁷ See Ehring & Selivanova (n 29 above) 70.

construction of such infrastructure.¹⁷⁸ Hence, they argue that an implicit capacity establishment right does not exist under this GATT provision.¹⁷⁹ They also state that it could be inferred from the Statute on Freedom of Transit, in the Barcelona Convention, that only free transit through those already existing routes had to be facilitated, meaning that states were under no obligation to allow the construction of new capacity.¹⁸⁰ Such reasoning flows from the premise that the decision regarding the construction of any infrastructure on a respective state's territory is one belonging to the sovereignty of such state.

With regard to third-party access, Ehring and Selivanova argue that should a WTO member state be burdened by infrastructural deficiencies, the freedom of transit and non-discrimination principles under Article V of the GATT do incorporate a third-party access right.¹⁸¹ They interpret the freedom of transit principle under Article V(2) to mean that WTO members must not prevent transit, meaning that they must grant access to the existing infrastructure.¹⁸² They further argue that transit must be permitted on the infrastructure that is available, irrespective of its limitations. Regarding third-party access rights, Ehring and Selivanova state that in order to guarantee freedom of transit, a WTO member state must begin by granting 'access for the purposes of transit'. With the use of an example, this means that for Country A to grant freedom of transit to Country B's gas, destined for Country C, A must first grant access to its pipelines for the energy good to transit, once again illustrating their support for implicit third-party access rights under GATT Article V.

The example used by Ehring and Selivanova for the purposes of illustrating that freedom of transit exists via the most convenient routes is quite a simple one, involving trucks being driven on motorways. According to these authors, motorways constitute the 'most convenient route' for the trucks. Such motorways are more often than not offered into concession to private operators and may well be fully owned by such operator. Hence, by blocking access to such motorways, it can be argued that the private entity has acted in direct contravention of the first sentence in

¹⁷⁸ As above.

¹⁷⁹ See Ehring & Selivanova (n 29 above) 70-71.

¹⁸⁰ See Ehring & Selivanova (n 29 above) 53.

¹⁸¹ See Ehring & Selivanova (n 182 above).

¹⁸² See Ehring & Selivanova (n 29 above) 67.

Article V(2) of the GATT.¹⁸³

Ehring and Selivanova's views regarding third-party access rights under GATT Article V is shared by Grewlich who too believes that the non-discrimination and freedom of transit principles under this GATT provision do in fact incorporate a third-party access right.¹⁸⁴ According to Grewlich, the third-party access right is derived from the Doctrine of Essential Facilities in the competition law sphere.¹⁸⁵ However, Pogoretskyy expressly rejects the argument presented by Grewlich and states that such an argument fails to interact practically with international law.¹⁸⁶ In this context, Pogoretskyy argues that due to the fact Grewlich's argument is heavily reliant on a theory that is not 'unified' in even the most sophisticated municipal laws regulating competition, it cannot be supported.¹⁸⁷

Walde and Gunst argue that for Article V of the GATT to be effective, a third-party access regime against energy transportation monopolies must be introduced.¹⁸⁸ They are of the view that as the link between the supply of energy and transportation infrastructure strengthens, a non-discriminatory third-party access regime must be recognized.¹⁸⁹ Here, the link between international commerce and international rules on investment is established in that as much as rules governing international trade are required to stimulate such trade, rules on investment are equally necessary to encourage the construction of infrastructure, the very same infrastructure that channels energy commodities across the respective territories.¹⁹⁰ By stating that the introduction of a third-party access regime is one way of ensuring the provision's effectiveness, it can be assumed that these authors implicitly accept third-party access rights under Article V of the GATT.

Kurmanov argues that where a WTO member state refuses to grant third-party access to existing pipeline infrastructure, such state has acted in contravention of Article V of the GATT and can

¹⁸³ See Ehring & Selivanova (n 29 above) 69.

¹⁸⁴ See Grewlich as cited in Pogoretskyy (n 32 above) 318 fn 22.

¹⁸⁵ As above.

¹⁸⁶ See Pogoretskyy (n 21 above) 341 fn 123.

¹⁸⁷ As above.

¹⁸⁸ See Walde & Gunst (n 37 above) 212.

¹⁸⁹ See Walde & Gunst (n 37 above) 217.

¹⁹⁰ As above.

be sued at the WTO.¹⁹¹ Moreover, he argues that the non-discrimination obligations under Article V of the GATT provide a vital tool for a transit dependent state should it wish to obtain fair and equitable access to such infrastructure.¹⁹² Kurmanov states that despite the fact that Article V fails to specify, in a clear manner, under which conditions third-party access can be granted, the provision establishes ‘a general substantive obligation’ for WTO member states to grant access to available infrastructure capacity.¹⁹³

Kurmanov goes a step further to state that such conditions must be non-discriminatory, and at the minimum, reasonable.¹⁹⁴ He argues that in the event where the construction of a new pipeline is required for energy to transit, then an unreasonable objection by a member state to permit the building of such infrastructure could be a ground upon which a legal claim can be brought under Article V of the GATT.¹⁹⁵ He further argues that the claim could be brought against the breaching state on the ground that such state has failed to grant freedom of transit via the most convenient routes in contravention of GATT Article V.

Hence, it is clear to note that according to Kurmanov, third-party access rights are in fact inherent in Article V of the GATT. Moreover, when it comes to the issue of capacity establishment, Kurmanov opines that Article V of the GATT provides states searching for new transit routes with a solid legal basis to argue for the building of new capacity. In this regard, he argues that Article V permits claiming a capacity establishment right if a WTO transit state, unwilling to construct new infrastructure, refuses to allow the construction of such infrastructure on its territory, on the basis that it prevents the transit dependent state from exercising its freedom of transit right.¹⁹⁶

Given the different views on this fascinating subject proposed by the various well renowned authors, it is clear to note that the question of whether third-party access and capacity establishment rights are implicitly regulated under Article V of the GATT has and continues to

¹⁹¹ See Kurmanov (n 39 above) 24.

¹⁹² As above.

¹⁹³ See Kurmanov (n 39 above) 29.

¹⁹⁴ As above.

¹⁹⁵ See Kurmanov (n 39 above) 28.

¹⁹⁶ As above.

be a contentious subject in international trade law, producing distinct and contradictory arguments with no concrete end result. Subsequently, Pogoretskyy has proposed a different and innovative approach to the resolution of this legal conundrum. This approach moves away from discussing the issues merely within the limited context of WTO law to one that seeks to tackle the problem by engaging in a ‘contextual and systemic’ analysis of the GATT and by employing general principles of public international law as informed by the rules governing the interpretation of treaties.¹⁹⁷ It is worth mentioning once again that Pogoretskyy is the only author who has attempted to employ this innovative approach to resolving the issue at hand. Hence, to that extent, his argument will be analysed extensively. He states that besides him, Ehring and Selivanova have to some extent attempted a similar approach.¹⁹⁸

3.3 Systemic interpretation of GATT Article V

Pogoretskyy argues that the existence of what he refers to as certain ‘ancillary’ rights, for instance, the right to access a WTO transit state’s infrastructure or the right to build new capacity on the territory of such transit state, are vital to achieving the effective implementation of GATT Article V. According to him, connecting the importers and exporters of gas with the use of pipelines is vital for the trade and transiting of this energy commodity and can only be achieved in practice through the invocation of third-party access to available infrastructure capacity and/or through the building of new infrastructure or by expanding such infrastructure should it exist.¹⁹⁹

Pogoretskyy begins his argument with a crucial legal provision contained in the WTO’s Dispute Settlement Understanding (DSU)²⁰⁰ which states that the DSU exists to provide clarification on the provisions contained in the agreements it applies to, in compliance with public international law interpretation rules.²⁰¹ Pogoretskyy, as per the decision of the Appellate Body in *China-Measures affecting trading rights and distribution services*²⁰² states that this DSU provision is

¹⁹⁷ See Pogoretskyy (n 21 above) 318.

¹⁹⁸ See Ehring & Selivanova (n 29 above) 51.

¹⁹⁹ See Pogoretskyy (n 21 above) 315.

²⁰⁰ Article 3(2) of the DSU Available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (accessed 26 May 2016).

²⁰¹ See Pogoretskyy (n 21 above) 319.

²⁰² WTO Appellate Body Report, *China-Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products*, WT/DS363/AB/R, adopted 19 January 2010.

viewed as being a portal to Articles 31 to 33 of the Vienna Convention on the Law of Treaties (Vienna Convention).²⁰³ Interestingly, he advances the argument that there is a ‘systemic integration principle’ incorporated in the Vienna Convention which states that in the process of interpreting a treaty:

*There shall be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties’.*²⁰⁴

Along with Pogoretsky, Verzijl convincingly argues that the principle of ‘systemic integration’ anticipates that each international convention must be deemed to refer to general international law principles in a tacit manner, for all the queries that it fails to resolve expressly.²⁰⁵ Together with Pogoretsky and Verzijl, Pauwelyn proceeds to state that all norms *inter alia* the WTO Treaty are created in the backdrop of existent general international law norms.²⁰⁶

In the case of *European communities and certain member states-Measures affecting trade in large civil aircraft*²⁰⁷ this principle was defined and expressly recognized by the WTO Appellate Body.²⁰⁸ In this case, the Appellate Body stated that Article 31(3)(c) of the Vienna Convention is considered an expression of the systemic integration principle, which in the words used by the International Law Commission (ILC), seeks to ensure that international obligations are interpreted by reference to their ‘normative’ environment, in a manner that accords ‘meaningfulness’ and ‘coherence’ to the legal interpretation process. The Appellate Body went a step further in stating that in a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO member’s international obligations and, on the other, ensuring a consistent and harmonious approach to the interpretation of WTO law amongst all WTO members.²⁰⁹

²⁰³ See n 205 above, para 348.

²⁰⁴ Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

²⁰⁵ See JHW Verzijl as cited in C McLachlan as cited in Pogoretsky (n 21 above) 319 fn 28.

²⁰⁶ See Pauwelyn as cited in Pogoretsky (n 46 above) 319 fn 28.

²⁰⁷ WTO Appellate Body Report, *European Communities and Certain Member States: Measures affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011.

²⁰⁸ See n 210 above, para 845.

²⁰⁹ As above.

The Panel in the *Colombia case* provided a broad interpretation of the obligations contained in Article V of the GATT and from its perspective, ‘any’ limitation on the freedom of transit principle could amount to a violation of the said Agreement. Hence, as a consequence, Pogoretskyy argues that it may be suggested that the term ‘freedom of transit’ is expansive enough to incorporate ‘ancillary’ rights, for instance, third-party access and capacity establishment rights, necessary for the purpose of implementing the ‘primary obligation’ to grant freedom of transit.²¹⁰ Furthermore, he argues that over and above complementing the freedom of transit provision under Article V of the GATT, the progressive evolution of the effective right and economic cooperation principles indirectly affect third-party access and capacity establishment rights and obligations.

3.3.1 The principle of effective right

Under the principle of effective right, even in circumstances where the enforcement of specific ancillary or accompanying rights inherent in the primary right is implied, Judges or States are instructed to provide effect to these primary rights and obligations that have been created under public international law rules.²¹¹ This principle’s historical roots are grounded in the Roman Law Doctrine of Servitude.²¹² Lauterpacht, in his analysis of accompanying rights inherent in a freedom of navigation treaty provided an explanation of this principle in a rather simplistic manner. He argued that a State which has been accorded rights in a territory under the control of a neighbouring State is under an obligation to carry out supplementary acts required to achieve the original right’s implementability, with the aim of taking ‘due and proper advantage of the rights granted’.²¹³ In this context, Pogoretskyy clarifies that the primary right takes the form of the freedom of transit principle enshrined in Article V of the GATT while the accompanying rights are those of third-party access and capacity establishment.

Pogoretskyy convincingly argues that in several WTO cases, when the successful implementation of a primary right or obligation has been dependent on acquiring access to

²¹⁰ See Pogoretskyy (n 21 above) 323.

²¹¹ See Pogoretskyy (n 21 above) 328.

²¹² See Pogoretskyy (n 21 above) 229.

²¹³ See Lauterpacht as cited in Pogoretskyy (n 21 above) 330 fn 71.

specific accompanying rights, the Judges have, to a certain extent, held the accompanying rights to be inherent under the main right at issue.²¹⁴ Despite the fact that these cases were mainly concerned with the interpretation of specific provisions contained in the respective treaties, the mere fact that the principle was recognised is adequate proof that it has crystallised into a general international law principle.²¹⁵ Pogoretsky thus contends that these cases provide evidence that the principle of effective right does in fact apply in the context of access to pipeline capacity.²¹⁶ Hence, he hints that when a State objects to the existence of an accompanying right of access to its pipelines, or where in the event of no capacity refuses to allow the construction of such pipelines on its territory, such State, in practice, has hindered the effective implementation of the freedom of transit principle under Article V of the GATT.²¹⁷

Moreover, Pauwelyn goes on to argue that the effective right principle in international law is to a certain degree related to the effective treaty interpretation principle in that it is based on the requisites contained under Article 31(1)(c) of the Vienna Convention, which states that a treaty shall be interpreted in good faith and in light of its object and purpose.²¹⁸ Pauwelyn also argues that should there be different interpretations of a specific treaty provision; the Vienna Convention directs that the interpretation allowing for the treaty to be effective be adopted.²¹⁹

In the *United States-Continued dumping and subsidy offset act case*,²²⁰ the Appellate Body noted that over and above recognising the interpretive effective right principle in international law as a vital tool in interpreting the WTO treaty, under such principle, clauses contained in the Treaty must not be interpreted in a manner that renders the provision wholly or partly inoperative.²²¹

²¹⁴ See WTO Panel Report, Colombia- Indicative prices and Restrictions on Ports, WT/DS366/R, circulated 27 April 2009; PCIJ-Oscar Chinn UK V Belgium, ser A/B n 63, judgment handed down on 12 December 1934; PCIJ- Jurisdiction of the European Commission of the Danube, circulated on 8 December 1927; ICJ-Oil Platforms (Islamic Republic of Iran v United States of America), decision handed down on 6 November 2003; and Saudi Arabia v Arabian American Oil Company (ARAMCO arbitration), 27 ILR 117, award handed down on 23 August 1958.

²¹⁵ See Pogoretsky (n 21 above) 333.

²¹⁶ As above.

²¹⁷ As above.

²¹⁸ See Pauwelyn as cited in Pogoretsky (n 46 above) 334 fn 89.

²¹⁹ See n 221 above, 334 fn 90.

²²⁰ WTO Appellate Body Report, United States-Continued Dumping and Subsidy Offset Act of 2000, WT/DS217,234/AB/R, adopted 27 January 2003.

²²¹ See n 223 above, para 271.

However, as noted by the Appellate Body in the *India patent protection case*,²²² the effective treaty interpretation principle does not permit reading into a treaty terms that are not expressly contained in the treaty itself as well as not allowing the importation of concepts that were not intended by the drafters of such treaty to begin with.²²³

Nevertheless, Pogoretsky is of the view that the principle of effective right stands as an ‘independent substantive’ public international law principle which may through the systemic integration principle play the vital role of filling gaps in treaties.²²⁴ He further argues that while Article 19(2) of the DSU places an express prohibition on the addition or lessening of the rights and obligations contained under the agreements which it applies to, this provision itself shall not be misunderstood as isolating WTO rules from other public international law sources, especially in the event where such rules are broad or not clearly defined to begin with.²²⁵ Such isolation, he argues, does not conform to Article 3(2) of the DSU.²²⁶ Pogoretsky goes a step further by arguing that the only condition which restricts the importation of terms into a treaty is that such terms must not conflict with the rights and obligations created by such treaty.²²⁷

3.3.2 The principle of economic cooperation

Article 55 of the United Nations (UN) Charter is a clear embodiment of the economic cooperation principle and provides that:

*‘with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the UN shall promote solutions of international economic cooperation’.*²²⁸

²²²WTO Appellate Body Report, *India- Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998.

²²³ See n 225 above, para 45.

²²⁴ See Pogoretsky (n 21 above) 335.

²²⁵ See Pogoretsky (n 21 above) 335 fn 94.

²²⁶ As above.

²²⁷ See Pogoretsky (no 225 above).

²²⁸ Chapter IX Article 55(b) of the UN Charter.

This provision finds its basis in Article 1 of the UN Charter, which lists the achievement of international cooperation in solving *inter alia* economic problems as one of the Charter's '*raison d'être*'.²²⁹ Moreover, the Declaration on Principles of International Law concerning Friendly Relations also makes reference to the ethical duty imposed on States to cooperate and stimulate economic growth across the globe, especially when it concerns developing nations.²³⁰ In the context of international trade law, the principle of economic cooperation is reflected *inter alia* in Article 3(10) of the DSU dealing with good faith efforts on the part of the member states to resolve disputes *inter se*.

Pogoretskyy convincingly links the economic cooperation principle to the improvement of gas transit capacity in the UN General Assembly Resolution 63/210, which recognises the urgency for cooperation at the international level in the process of identifying safe ways to transport energy to the global markets as well as welcoming such cooperation in the development of transit capacity.²³¹ As expressly recognized at the Almaty Ministerial Conference, pipelines provide a means of transporting natural gas that is cost effective and subsequently, transit developing and land-locked states should cooperate in the building of these pipelines 'along the most cost-effective and most suitable or shortest routes', taking into consideration the interests of the parties involved.²³² Thus, Pogoretskyy argues that the economic cooperation principle obliges States to cooperate on those specific transit technicalities that are not expressly provided for by the rules governing treaties but are nevertheless essential to achieve the effective implementation of such transit, for instance the construction or expansion of pipeline capacity.²³³

As observed however, the use of terms such as 'should', 'strive' and 'effort' reflect, at most, best endeavor obligations and subsequently, States are under no legal obligation to grant or improve such transit under these provisions. Nevertheless, Pogoretskyy argues that an honest intention to

²²⁹ Article I(3) of the UN Charter.

²³⁰ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations, approved by GA resolution 2625 XXV of 24 October 1970.

²³¹ UN Resolution 63/210 on Reliable and Stable Transit of Energy and its roles in ensuring Sustainable Development and International Cooperation, adopted on 3 February 2009.

²³² United Nations Report of the International Ministerial Conference on Land-locked and Transit Developing Countries and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation A/CONF.202/3 Almaty, Kazakhstan 28-29 August 2003 Priority 2(E)(26) & (27), 17.

²³³ See Pogoretskyy (n 21 above) 336.

cooperate is all that is required from the transit state in this regard.²³⁴

3.3.3 Scope of the capacity establishment obligation

Firstly, seeing from the fact that Article V of the GATT establishes the obligation to guarantee transit on the most convenient routes and not all, Pogoretskyy, at the very outset, clarifies that a capacity establishment right does not, under any circumstances, translate to an obligation on a WTO member state to open a specific route, such as a corridor for transit, to enable the building of a pipeline.²³⁵ Additionally, he opines that the argument that a capacity establishment obligation under Article V:2 of the GATT obliges a transit state to permit the making of an investment on its territory would be quite absurd, given the international law principle of territorial sovereignty. Furthermore, under such a scenario, international investment law rules would be triggered, rules that are based on a specific treaty, usually bilateral or regional, concluded between the parties pronouncing the rights and obligations of the investor vis-à-vis the State it wishes to invest in.

Pogoretskyy argues that the freedom of transit principle, enshrined in Article V:2 of the GATT, seems to provide a transit state with the wide discretion on how to ensure the provision's effective implementation as well as providing for who will construct, own and control the fixed infrastructure should such State agree on the expansion of the available pipeline capacity.²³⁶ In this regard, he states that the effective implementation of freedom of transit is directly linked to the establishment of gas transit terms that are reasonable, hence providing both the transit and transit dependent state with various options as to which routes to take or terms to incorporate.²³⁷

In the *Lithuania and Poland case*,²³⁸ the Permanent Court of International Justice (PCIJ) was asked to give an Advisory Opinion on whether Lithuania was under a specific obligation to make repairs to as well as open a specific railway line as part of the general obligation to maintain

²³⁴ See Pogoretskyy (n 21 above) 336 fn 102.

²³⁵ See Pogoretskyy (n 21 above) 338.

²³⁶ See Pogoretskyy (n 21 above) 340.

²³⁷ As above.

²³⁸ PCIJ-Railway Traffic between Lithuania and Poland, *Lithuania v Poland*, Advisory Opinion PCIJ Series A/B42, ICGJ 289, 15 October 1931.

freedom of communications and transit in accordance with Article 23(e) of the Treaty of Versailles. The Court held that deducing from the general obligation contained in the Versailles Treaty a duty on the Lithuanian State to open the Landwarow-Kaisiadorys Railway Corridor for international traffic, is in itself, not possible.²³⁹ Moreover, the Court stated that such an obligation could only be the product of a ‘special’ agreement between the parties.²⁴⁰ Pogoretsky further mentions that the question of whether a transit state is under a legal obligation to make freedom of transit operational only in the event where there is no different transit route for the transit dependent state is one that requires careful scrutiny. In this context, he makes his views quite clear by stating that such an analogy does not conform to the freedom of transit principle under international law.²⁴¹

In the *Corfu Channel case*²⁴² that dealt with a general right of innocent passage through straits, it was argued that due to the fact it was not the only available route, a strait was not an international highway required to cross the sea. As would be expected, the Court brushed this argument aside and held that the route was still useful for international sea traffic despite constituting a mere alternative route.²⁴³ In this regard, Lauterpacht argues that the very same reasons pronounced by the Court in the *Corfu Channel case*, in the context of navigation through territorial straits, can be applied to the passage over a particular State’s respective territory.²⁴⁴

On the other hand, Hyde²⁴⁵ argues differently, stating that the strength of a State’s claim to transit is dependent on the ‘level of necessity’.²⁴⁶ In the context of international gas transit, it is submitted that ‘level of necessity’ implies the extent to which a transit dependent state requires the transit state’s pipeline infrastructure for its gas to transit, in the absence of transit capacity. Equally, this would imply the extent to which a transit dependent state necessitates the construction of a cross border pipeline on the transit state’s territory for its gas to transit along to its final destination.

²³⁹ See (n 241 above) 15.

²⁴⁰ As above.

²⁴¹ See Pogoretsky (n 21 above) 340.

²⁴² ICJ-Corfu Channel Case (United Kingdom v Albania), decision handed down on 9 April 1949.

²⁴³ See (n 245 above) 28.

²⁴⁴ See Lauterpacht as cited in Pogoretsky (n 216 above) 340 fn 119.

²⁴⁵ Hyde, *CC International law chiefly as interpreted and applied by the United States* (Little, Brown and Co: USA 1951).

²⁴⁶ See Hyde (n 248 above) 618.

3.3.4 Scope of the third-party access obligation

Pogoretskyy states that the question raised in this context is whether a third-party access right to available transit capacity is a compulsory right? In this regard, it is argued that the concept of a compulsory third-party access right will fail to consistently provide an implementable solution agreed upon by both the transit and transit dependent state.²⁴⁷ Pogoretskyy further mentions that in an energy market which is liberalised and provides for compulsory third-party access rights in accordance with the respective local laws, transit infrastructure serves as a ‘common highway’ for the transportation of energy products such as natural gas. However, if the market is dominated by a monopoly and there is only one user of the fixed infrastructure, such capacity is viewed as strategic and as such, a compulsory third-party access right would lead to energy security concerns on the part of the transit state.²⁴⁸

Furthermore, another concern would be the infringement of an investor’s right to property in the event where the objective behind the construction of the pipeline is purely profit motivated.²⁴⁹ In this regard, Pogoretskyy submits that a compulsory third-party access right is not implicit in the freedom of transit principle under GATT Article V, particularly in the instance where a transit state’s local laws and regulations provide that such infrastructure or a part of its capacity are privately owned and not available for use by the general public.²⁵⁰

Pogoretskyy mentions that another very interesting question in this context is whether the government of a transit state can be said to have acted in contravention of the freedom of transit principle, should a private entity owning or operating the pipelines for private motives refuse to grant third-party access to such pipelines? As rightly stated by Pogoretskyy, this involves an establishment of the link between the private actions and the government of such State in the context of WTO law. This link has already been discussed extensively in the preceding chapter. However, for purposes of the present discussion, Pogoretskyy states that unless a third-party access law or regulation falls under the definition of a governmental function in the jurisdiction

²⁴⁷ See Pogoretskyy (n 21 above) 341.

²⁴⁸ As above.

²⁴⁹ As above.

²⁵⁰ See Pogoretskyy (n 21 above) 342.

of the transit state, it is very difficult to determine how the imposition of a compulsory third-party access right on a private company can be achieved, to the extent that such company is acting independently from the government of such State.²⁵¹

3.3.5 Limitations on the powers of the transit state

Pogoretskyy states that in light of the preceding discussion on the scope of third-party access and capacity establishment obligations imposed on the transit state, another interesting question that surfaces is, to what extent such obligation extends should negotiations on the principle's implementation lead to deadlocks of a technical nature, or when the transit state intentionally hinders transit by failing to provide the route or by imposing cumbersome terms and procedures on the transit dependent state? Phrased differently, does the fact that a transit and transit dependent state fail to reach agreement on the modalities or transit route extinguish the obligation to grant freedom of transit under GATT Article V?

Firstly, Pogoretskyy makes it very clear that the first limitation on the powers of a transit state with regard to freedom of transit is that such State's powers apply only to the transit terms and not the issue of transit itself.²⁵² In a commentary on Article 125 of the United Nations Convention on the Law of the Sea, it is explained that freedom of transit in itself is not dependent upon the entering into of a contractual arrangement between the transit and the transit dependent state.²⁵³ It is further argued that at the bilateral or multilateral levels, only the terms and procedures for exercising this principle may be the subject of agreements between the parties involved.²⁵⁴ Subsequently, a transit state is not permitted to abnegate the passage across its territory of traffic in transit, if such terms and procedures necessary for such traffic to transit, have been complied with by the transit dependent state.²⁵⁵ Pogoretskyy further argues that should a transit state's 'precise regulatory measure or requirement' result in the non-implementation of

²⁵¹ See Pogoretskyy (n 21 above) 343.

²⁵² See Pogoretskyy (n 21 above) 344.

²⁵³ Hague Academy of International Law *A Handbook on the New Law of the Sea* RJ Dupuy & D Vignes (eds) as cited in Pogoretskyy (n 21 above) 343 fn 138.

²⁵⁴ As above.

²⁵⁵ As above.

freedom of transit, such measure or requirement could be found to be in contravention of this sacrosanct international law principle.²⁵⁶

In the *Legality of the threat or use of nuclear weapons case*,²⁵⁷ the ICJ stated that when an obligation to arrive at a ‘precise’ result through multilateral negotiations exists, there is an obligation to pursue these negotiations *bona fide* and to conclude such negotiations under ‘effective and strict international control’.²⁵⁸ Hence, in this regard, Pogoretskyy argues for the assessment by a judicial body of unreasonable and arbitrary regulatory gas transit conditions, with the aim of ensuring the effective and unhindered implementation of the free transit principle.²⁵⁹ More importantly, in this context, he cites the importance of being able to distinguish a legally valid regulatory measure from a political move disguised behind unreasonable and cumbersome conditions of transit.²⁶⁰ Hence, he is of the view that in the context of international gas transit, this has the effect of turning the free transit principle from a mere set of words contained on paper into an enforceable and binding general international law principle capable of effective implementation.²⁶¹

3.3.6 Enforcement of GATT Article V

Taking into account the close relationship between WTO law and general international law, in the event where there is no available transit capacity, Pogoretskyy argues that the interpretation of the freedom of transit principle as applied to international gas transit, must be informed by other international law principles as part of a much wider legal setting. These principles, as already mentioned above are, according to Pogoretskyy, those of effective right and economic cooperation.²⁶² As evidenced from the preamble of the WTO treaty, broadening the trade in goods regime has been laid down as one of the WTO’s fundamental objectives.²⁶³ Pogoretskyy argues that this objective permits the interpretation of the WTO Treaty in the context of WTO

²⁵⁶ See Pogoretskyy (n 21 above) 345.

²⁵⁷ ICJ-Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Reports 226, 8 July 1996.

²⁵⁸ See n 260 above, paras 99 and 105 F.

²⁵⁹ See Pogoretskyy (n 21 above) 346.

²⁶⁰ As above.

²⁶¹ See Pogoretskyy (n 21 above) 347.

²⁶² As above.

²⁶³ Preamble of the Treaty Establishing the World Trade Organization.

member states' present-day concerns, for example that of energy security, concerns which to a greater degree are reliant on the development of cross border transit capacity.²⁶⁴

Moreover, in its report, the ILC's Study Group states, in express terms, that when States create a legal relationship, they do it bearing in mind the 'normative environment' which prevailed at the time when such relationship was formed.²⁶⁵ However, it is rightly argued that no legal relationship can remain unaffected by the passage of time as the views of the parties about the treaty's meaning and application are constantly developing.²⁶⁶ With it comes the accumulation of experience, new information and different circumstances, all of which call for the development of this legal relationship.²⁶⁷

Pogoretskyy further argues that due to the fact Article V is phrased broadly, the principle of evolutionary interpretation can in fact be applied to the provision in lieu of the rapidly developing international gas trade that poses new challenges for global commerce.²⁶⁸ Hence, he is of the view that the evolution process broadens the ambit of rights and obligations assumed under Article V of the GATT. However, Pogoretskyy warns that this process, as applied by Judges and WTO members must involve an exercise grounded in public international law principles in order to avoid 'arbitrariness' as to which new rights and obligations should be subsumed under Article V of the GATT.²⁶⁹

Subsequently, in the context of international gas transit, he believes that the principles of effective right and economic cooperation can play a significant role in the interpretation and enforcement of Article V of the GATT. Hence, in light of this, Pogoretskyy argues that a WTO Panel can in fact rule on whether a specific regulatory measure that obstructs transit is consistent with Article V(2), a measure such as refusing to negotiate the terms and procedures required to achieve the principle's effective implementation through a third-party access or capacity

²⁶⁴ See Pogoretskyy (n 21 above) 348.

²⁶⁵ ILC Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law A/CN.4/L.682, 13 April 2006, 241 para 476.

²⁶⁶ As above.

²⁶⁷ As above.

²⁶⁸ See Pogoretskyy (n 21 above) 349.

²⁶⁹ As above.

establishment right.²⁷⁰

3.3.7 The WTO Dispute Settlement Understanding

As discussed above, the WTO's Dispute Settlement Understanding (DSU) provides a vital tool for the achievement of the free transit principle's practical implementability and enforceability. In this context, the WTO DSU is of particular significance in that it proclaims that the Dispute Settlement Body is created to preserve WTO members' rights and obligations under the agreements covered by the Treaty.²⁷¹ It is suggested that in order to provide an assessment on whether a transit state's regulations are in compliance with the freedom of transit principle, the WTO Panel could engage in outsourcing the technical expertise as well as working together with international organisations that specialize in matters related to the technicalities surrounding gas transit.²⁷² The legal basis for such action by the Panel is grounded in Article 13(1) of the DSU that allows the Panel to pursue information and technical advice from any person or body which it regards as being appropriate. Presently, some of these organisations include the Organisation for Economic Cooperation and Development (OECD), the Energy Charter and the IEA.

Furthermore, should the transit state's regulations be found to be in contravention of Article V(2) of the GATT, the Panel or the Appellate Body is entitled to make suggestions regarding how such measure can be brought into compliance with the provision.²⁷³ Pogoretsky argues that such suggestions can be provided by determining a particular route of transit as well as the transit terms and procedures to be adopted, or by engaging in the formulation of principles according to which such compliance is to be achieved.²⁷⁴ Furthermore, it is suggested that in the event where a contravention of GATT Article V has been proven, the transit dependent state would be the subject of a right to retaliate under WTO rules, subsequently acting as an incentive on the part of the transit state to cooperate in the assessment of ways to achieve the provision's successful and practical implementability.²⁷⁵

²⁷⁰ As above.

²⁷¹ Articles 3(2) and 3(4) of the WTO Dispute Settlement Understanding.

²⁷² See Pogoretsky (n 21 above) 350.

²⁷³ Article 19(1) of the WTO Dispute Settlement Understanding.

²⁷⁴ See Pogoretsky (n 275 above).

²⁷⁵ As above.

However, in this context, the main question that beckons is whether there will be enough political will in the WTO system to approach the matter from the angle of systemic integration of general international law sources with WTO law, as opposed to engaging in political compromises and economic bargaining techniques.²⁷⁶ Hence, irrespective of whether an issue affects a transit or transit dependent state, Pogoretsky argues that WTO members must be ready to address limitations to transit capacity directly through the DSU.

3.4 Conclusion

This chapter has provided an analysis of the different arguments advanced on whether third-party access and capacity establishment rights are inherent in the freedom of transit principle under Article V of the GATT. The chapter also introduced an innovative approach, advanced by Pogoretsky, which could be used to incorporate third-party access and capacity establishment rights into the provision. Moving on, the scope of both the third-party access and capacity establishment rights as discussed under this new approach have been explored. The chapter concluded with Pogoretsky's discussion on the enforcement mechanisms available to achieve the effective implementation of GATT Article V, should it be found to regulate third-party access and capacity establishment rights.

Over the years, different views on whether third-party access and capacity establishment rights are in fact implicitly contained under Article V of the GATT have been advanced by several well renowned authors. Hence, the question on whether these two rights are incorporated under this provision has and continues to be a hotly-debated topic in the international trade law arena. However, the arguments have been advanced in a rather similar fashion, making use of identical general international law principles, albeit failing to agree on their interpretation. Hence, as a result of the deadlock experienced, it is submitted that a successful invocation of these two rights is heavily reliant on employing an innovative approach to arguing the issue at hand, an approach that moves away from isolating general international law principles from WTO law to one that treats them as a single integrated set of rules capable of recognising third-party access and capacity establishment rights. To the extent that Pogoretsky is the only author who has

²⁷⁶ See Pogoretsky (n 21 above) 351.

attempted to employ this innovative approach to resolving the current problem, the writer submits that in light of the deadlock experienced, such approaches will go a long way to providing solutions, both to this issue as well as to other future legal conundrums looming in the horizon.

As expressly stated by the ILC's Study Group in its report, that when States create a legal relationship, they do it bearing in mind the 'normative environment' which prevailed at the time when such relationship was formed. However, no legal relationship can remain unaffected by the passage of time as the views of the parties regarding the treaty's meaning and application are constantly developing. With it comes the accumulation of experience, new information and different circumstances, all of which call for the development of this relationship. Hence, the fact that Article V is couched out in broad terminology permits the application of the evolutionary interpretation principle to the provision, in light of the rapidly developing international gas trade that poses new challenges for global commerce, challenges that did not exist at the time when the GATT was initially drafted.

In this regard, the evolutionary process broadens the ambit of rights and obligations assumed under Article V of the GATT. However, it is warned that this process, as applied by Judges and WTO members must involve an exercise grounded in public international law principles in order to avoid 'arbitrariness' as to which new rights and obligations should be subsumed under Article V of the GATT. In this regard, the principles of effective right and economic cooperation can play a significant role in the interpretation and enforcement of GATT Article V in the context of international gas transit regulation.

And finally, the WTO's DSU provides a vital tool for the achievement of the free transit principle's practical implementability and enforceability. However, in this context, the main question that beckons is whether there will be enough political will in the WTO system to approach the matter from the angle of systemic integration of general international law sources with WTO law, as opposed to engaging in political compromises and economic bargaining exercises. Hence, irrespective of whether an issue affects a transit or transit dependent state,

WTO members, especially African gas dependent member states, must be daring enough to address limitations to transit capacity directly through the DSU.

CHAPTER 4

THE UNENFORCEABILITY OF FREEDOM OF TRANSIT UNDER ARTICLE V OF THE GATT: A MOZAMBICAN AND REGIONAL PERSPECTIVE

4.1 Introduction

The previous chapter sought to analyse the different arguments advanced on whether third-party access and capacity establishment rights are inherent in the freedom of transit principle under Article V of the GATT. The chapter also introduced an innovative approach, advanced by Pogoretsky, which could be used to incorporate third-party access and capacity establishment rights into the provision. Proceeding, the scope of both the third-party access and capacity establishment rights as discussed under this new approach were explored. The chapter concluded with Pogoretsky's discussion on the enforcement mechanisms available to achieve the effective implementation of GATT Article V, should it be found to regulate third-party access and capacity establishment rights.

This chapter will begin by introducing some of the provisions contained in the Constitution of the Republic of Mozambique which have a bearing on the exploration and exploitation of gas in an attempt at illustrating that some of these clauses are in fact a clear embodiment of the economic cooperation principle, advocating the sharing of pipeline infrastructure. The chapter will proceed to discuss the scope and application of the New Petroleum Law 21/2014 of 18 August, specifically in the context of third-party access prior to discussing the regulations issued under this new law. Proceeding, the chapter introduces the Enabling Law 25/2014 of 23 September together with its Decree Law 2/2014 for the Rovuma Basin LNG Project.

By introducing the Decree Law, the writer is in fact analysing the third-party access provisions applicable to the only international Mozambican gas pipeline to date. Moving on, the writer compares the third-party access provisions under the New Petroleum Law and the Decree Law in

order to illustrate that for purposes of attracting investment into the sector, these projects are usually exempt from local laws but nevertheless contain more onerous third-party access provisions to those contained in national legislation. In this regard, the writer essentially demonstrates the strategic importance attached to these pipelines, which ultimately serve as a leverage tool in the achievement of disguised political objectives in the context of energy security concerns.²⁷⁷

In the section to follow, the chapter illustrates how, in the longer term, the reluctance on the part of the WTO to regulate third-party access and capacity establishment rights under Article V will eventually give rise to monopolistic pipeline owners, whom in the absence of regulatory oversight, will consistently block access to the infrastructure, negatively impacting on competition and subsequently giving rise to all forms of economic problems resulting from disequilibrium in the market. Over and above the negative impact on the Mozambican economy and its people, this chapter will proceed to advocate that in the long term, the reluctance on the part of the WTO to enact rules regulating third-party access and capacity establishment rights under Article V will ultimately result in a huge gas crisis within the region, as these monopolies will unilaterally take the decision of cutting off the supply of the energy commodity in exchange for the granting of certain concessions.

Moving on, to the extent that Mozambique, as a member of various RTA's, seeks to export and transit in other member states, the chapter will proceed to employ a regional approach to the discussion by investigating whether and if so, to what extent the SADC Treaty regulates third-party access and capacity establishment rights under freedom of transit in the context of international gas trade. Proceeding, the writer will introduce what he considers a benchmark legal instrument that presently regulates third-party access and capacity establishment rights in the competition sphere, namely the EU Treaty, in an attempt at suggesting how these two rights can in fact be regulated at the level of African RTA's. Moving on, to the extent that bilateral investment treaties (BIT's) have and continue to be the legal instruments regulating these two rights in the context of international gas transit, the chapter goes on to analyse how the BIT's can serve as guiding principles in the formulation of clear and implementable rules regulating third-

²⁷⁷ See Pogoretsky (n 259 above).

party access and capacity establishment rights and obligations at the regional and ultimately international levels. The chapter concludes by transporting the model scenario discussed in chapter two and using it to illustrate how WTO member states are the subjects of a freedom of transit right which they are unable to effectively enforce in the event where they lack the necessary transit infrastructure to either import or export energy products such as gas.

4.2 Constitution of the Republic of Mozambique

The Constitution of the Republic of Mozambique²⁷⁸ (Mozambican Constitution) is the country's supreme law as it states in express terms that its rules shall prevail over any other rule of the legal order.²⁷⁹ Last amended in 2004, the Mozambican Constitution contains provisions specifically addressed at the regulation of the extractive industry sector of the economy, including the exploitation and exploration of natural resources such as gas. Contrary to the Constitutions of other developing States, it is quite modernised and its provisions are couched out in detailed terminology.²⁸⁰ The Mozambican Constitution clearly defines the State's role, refers specifically to the usefulness and relevance of the private sector for economic development, and mandates the promotion of knowledge as well as highlighting the importance of valorizing and rationally making use of its natural resources.²⁸¹

The first of the directly relevant provisions having a bearing on the exploration and exploitation of gas takes the form of Article 96 of the Constitution dealing with economic policy. It provides that the State's economic policy shall be directed towards laying the bases for development, improving Mozambican peoples' living conditions, strengthening the State's sovereignty and consolidating national unity through the participation of citizens and the efficient use of human and material resources.²⁸² By employing the word 'shall', it is clear that the provision merely amounts to a best endeavour clause. However, it is submitted that in order to improve the

²⁷⁸English version of the 2004 Constitution of the Republic of Mozambique Available at: [http://confinder.richmond.edu/admin/docs/Constitution_\(in_force_21_01_05\)\(English\)-Mozlegal.pdf](http://confinder.richmond.edu/admin/docs/Constitution_(in_force_21_01_05)(English)-Mozlegal.pdf) (accessed 31 May 2016).

²⁷⁹ Article 2(4) of the Mozambican Constitution.

²⁸⁰DAI & Nathan Associates 'Mozambique: Support in the development of legal frameworks for the LNG projects' 13 November 2014, 2.

²⁸¹ As above.

²⁸² Article 96(1) of the Mozambican Constitution.

Mozambican peoples' living standards and to achieve economic prosperity for the country in the long term, the pipelines must be made available to all WTO members in the region for the mere transiting of energy commodities, to the extent that the 'reasonable' terms and conditions imposed by the pipeline owners and the holders of the infrastructure's right of use have been complied with.²⁸³

Article 19 of the Constitution dealing with International Solidarity is quite unique in its own right as it amounts to a clear embodiment of the economic cooperation principle.²⁸⁴ It provides that the Republic of Mozambique shall be in solidarity with the struggle faced by its people and African States for *inter alia* the right to economic and social progress.²⁸⁵ The importance of this provision in the context of achieving a liberalised regional energy market, through the creation of a pipeline network system, available for all WTO member states in the region to utilise for their transiting energy commodities, is quite evident.

To the extent that clear, coherent and implementable rules regulating third-party access and capacity establishment are formulated at the WTO level, economic and social progress for African States in light of the past struggles ceases to become a distant dream. Furthermore, the enactment of these rules at the multilateral level will go a long way in safeguarding the economic interests of many African States, subsequently allowing all WTO members in the region to invoke a third-party access and/or capacity establishment right for their energy goods to transit, should they be constrained by a lack of the required transit infrastructure to either import or export such commodity. As has already been mentioned, these rights are currently regulated under bilateral and regional investment agreements along with their respective EPCC's, hence only applying between the parties to the respective treaty and subsequently excluding all others.

4.3 The New Petroleum Law 21/2014 of 18 August

In 2012, when huge gas reserves were discovered in the Rovuma Area, the Mozambican Government along with foreign investors realized that the Petroleum Law 3/2001 of 21

²⁸³ See Pogoretsky (n 21 above) 340.

²⁸⁴ See chapter 3 of this research paper for an extensive discussion on the economic cooperation principle.

²⁸⁵ Article 19 (1) of the Mozambican Constitution.

February²⁸⁶ (Old Petroleum Law) was no longer appropriate and would fail to provide an adequate framework for the promotion of further investment and infrastructure operations, especially for the exploration, processing and exportation of LNG.²⁸⁷ Subsequently, the Petroleum Law 21/2014 of 18 August²⁸⁸ (New Petroleum Law) came into force, revoking the Old Petroleum Law and ‘any’ other legislation found to be contrary to it. At its time of enactment, the main concerns included offering a competitive environment for businesses to operate, granting regulatory security as well as legal certainty and predictability to foreign and local investors alike.²⁸⁹ The securing of economic and social benefits for the Mozambican population in the long run was also viewed as a major concern that required immediate attention.²⁹⁰

Third-party access to available infrastructural capacity, such as gas pipelines, is regulated by Article 51 of the New Petroleum Law.²⁹¹ In this regard, the provision places an obligation on the owner of the infrastructure and the holder of the right of use of such infrastructure, to grant third-parties the right to use the pipelines, without discrimination and in reasonable commercial terms, to the extent that there is available capacity and there are no insurmountable technical problems which may prevent the infrastructure’s use to satisfy requests made by third-parties.²⁹²

Furthermore, the provision provides that if the infrastructure’s available capacity is not sufficient to accommodate the requests made by third parties, the owner of such infrastructure is under an obligation to increase its capacity in order to, in commercially reasonable terms, satisfy the third party’s request.²⁹³ However, the obligation to increase the infrastructure’s capacity is dependent on three conditions. Firstly, that the third party, through a reservation certificate, demonstrates the need for the infrastructure’s capacity to be increased, secondly, that the increase must not

²⁸⁶English version of the Petroleum law 3/2001 of 21 February Available at: <http://www.eisourcebook.org/cms/files/attachments/other/Mozambique%20Petrol%20Law,%202001.pdf> (accessed 31 May 2016).

²⁸⁷ See DAI & Nathan Associates (n 283 above) 21.

²⁸⁸English version of the Petroleum Law 21/2014 of 18 August Available at: <http://www.eisourcebook.org/cms/December%202015/Mozambique%20Petroleum%20Law%202014.pdf> (accessed 31 May 2016).

²⁸⁹ See DAI & Nathan Associates (n 283 above).

²⁹⁰ As above.

²⁹¹ See Definitions Annex in New Petroleum Law under (m) where infrastructure is said to include gas pipelines.

²⁹² Article 51(1)(a) & (b) of the New Petroleum Law.

²⁹³ Article 51(2) of the New Petroleum Law.

result in the creation of an adverse effect over the technical integrity or safe operation of the infrastructure and lastly, that the third party must have secured sufficient funds to sustain the costs of increasing the infrastructure's capacity.²⁹⁴

4.3.1 Regulations of the New Petroleum Law 21/2014 of 18 August

In the Mozambican legal system, regulations permit the clarification of the provisions contained in the enabling acts as well as allowing for the filling of *lacunas* in the achievement of an implementable and equally robust legal framework.²⁹⁵ In the context of third-party access, the regulations serve as the New Petroleum Law's implementation vehicles as they contain specific requirements defining the obligation of the operators as well as limiting their discretion. In the context of the New Petroleum Law, in what concerns the third-party access provision, the regulations provide the methodology for the fixing of the tariff rates charged to third parties for the infrastructure's use.

In this regard, Article 56 of the regulations provides that the calculation of the tariff rates for the use of the infrastructure by third parties shall be set out in the concession contract or by specific agreement subject to the terms and conditions of the concession agreement under three principles.²⁹⁶ These principles provide that the tariff rate is based on the infrastructure's total reserved capacity during the period in question, that capital and operational expenses shall be included in the calculation of the rate and its calculation shall incorporate the infrastructure's profitability, taking into account the owner's risk, not exceeding the investment's rate of return.²⁹⁷ Should the parties fail to reach agreement on the infrastructure's use or increase in its capacity within 6 months from the date of application of either of the two, depending on the contractual terms, the issue may be settled by arbitration or by the competent judicial authorities.²⁹⁸

²⁹⁴ Article 51(2)(a),(b) & (c) of the New Petroleum Law.

²⁹⁵ See DAI & Nathan Associates (n 283 above) 6.

²⁹⁶ Article 56 of the New Petroleum Law Regulations.

²⁹⁷ Article 2(a),(b) & (c) of the New Petroleum Law Regulations.

²⁹⁸ Article 3(a) & (b) of the New Petroleum Law Regulations.

4.4 The Enabling Law 25/2014 of 23 September

On the 23rd of September 2014, the Mozambican Parliament passed the Enabling Law 25/2014 (Enabling Law) which authorizes the Council of Ministers to legislate on a special regime for the Rovuma LNG projects, to be regulated in the form of a Decree Law.²⁹⁹ In essence, the Enabling Law permits the negotiation of special terms and conditions for these projects.³⁰⁰ The Enabling Law and its Decree Law were specifically formulated to create an environment that permits *inter alia* the construction, installation, ownership, operation as well as the maintenance and use of onshore and offshore equipment to extract, process, liquefy and sell the natural gas from the deposits located at Areas 1 and 4 of the Rovuma Basin.³⁰¹ Hence, in this regard, Article 3 of the Enabling Law provides that the Decree Law shall establish the necessary terms and conditions for the acquisition of goods and provision of services for the Rovuma Basin LNG Project.³⁰²

4.4.1 The Decree Law 2/2014

It is alleged that the EPCC signed by ENI and Anadarko in 2006 failed to anticipate the possibility of exporting the natural gas in its liquefied form, hence requiring a new contract to cover this part of the Rovuma project.³⁰³ The Mozambican Government took the decision that this new contract will enjoy the status of a Decree Law, with the aim of creating exemptions from existing Mozambican Laws and regulations in order to instill greater confidence in investors that the agreement will not be subject to further renegotiation in the future.³⁰⁴ Thus, the Decree Law was passed to establish a special legal and contractual regime applicable to any project developed in Areas 1 and 4 of the Rovuma Basin.³⁰⁵

The Mozambican Parliament has provided the Government with the authority to negotiate the Decree Law based on specific exemptions from the existing Mozambican national laws and

²⁹⁹Clifford Chance 'Mozambique's Rovuma Basin Decree-Law: Key uncertainties and their impact' July 2015, 1.

³⁰⁰ See DAI & Nathan Associates (n 298 above).

³⁰¹Davies, C USAID Speed Note 008/2014 'Analysis of the special regime for LPG Areas 1 and 4, Rovuma Basin' 19 August 2014, 1.

³⁰² Article 3(1)(d) of the Enabling Law 25/2014 of 23 September.

³⁰³Centre for Public Integrity 'Unprecedented legal reform in the extractive sector: An overview of the five/six laws of 2014' October 2014, 1.

³⁰⁴ As above.

³⁰⁵ See Clifford Chance (n 302 above) 2.

regulations.³⁰⁶ In this regard, the Government sought exemptions from specific legislation falling under the ambit of competition laws, an exemption that was eventually granted in the context of third-party access, as evidenced by the new third-party access provision contained in the Decree Law.³⁰⁷ However, weak and non-transparent governmental institutions as well as deep conflicting interests at the highest political levels has created concerns regarding whether the exemptions from existing Mozambican laws and regulations is in fact the right move.³⁰⁸ Under the Decree Law, the scope of the third-party access regime is viewed as being narrower than that imposed by the New Petroleum Law.³⁰⁹ In this regard, third parties are defined as entities which own ‘significant’ natural gas quantities with specifications similar to those of the gas produced by Areas 1 and 4, excluding the concessionaries of these two areas, the Mozambican Government and the Rovuma Basin Project companies.

The requirements for the provision of third-party access by the concessionaries are that there must be sufficient excess capacity in accordance with best industry practice, such access would not cause any adverse effect on existing owners and users of the infrastructure and there are agreements in place between the parties.³¹⁰ It is argued that despite these requirements, third-party access remains dependent on commercial contracts negotiated between the relevant parties and subject to the approval of the Mozambican Government.³¹¹ This has had the effect of clarifying the uncertainty created by the New Petroleum Law which appeared to place an obligation on the owners of the infrastructure to permit third-party access, irrespective of costs.³¹²

4.5 A comparison of the third-party access provisions under the New Petroleum Law and the Decree Law

³⁰⁶ See Centre for Public Integrity (n 306 above) 3.

³⁰⁷ As above.

³⁰⁸ See Centre for Public Integrity (n 306 above).

³⁰⁹ Shearman & Sterling LLP, ‘Mozambique’s Decree Law: Worth the wait’ (2015) 4. Available at: <http://www.shearman.com/~media/Files/NewsInsights/Publications/2015/01/Mozambique-Article-on-Decree-Law-Worth-the-Wait-PDF-013015.pdf> (accessed 31 May 2016).

³¹⁰ Articles 13(2) and 13(3) of the Decree Law 2/2014.

³¹¹ See Clifford Chance (n 302 above) 4-5.

³¹² As above.

Article 51 of the New Petroleum Law places an obligation on the owner of the infrastructure and the holder of the infrastructure's right of use to give third-parties the right to use the infrastructure, without discrimination and in reasonable commercial terms, if there is available capacity and there are no insurmountable technical problems which may prevent the infrastructure's use to satisfy requests made by third-parties.³¹³ Under the Decree Law, third parties are defined as entities which own 'significant' natural gas quantities with specifications similar to those of the gas produced by Areas 1 and 4. Hence, it is quite evident that under the Decree Law, the third-party access provision is more onerous as it requires entities to own 'significant' quantities of the commodity to qualify as third-parties in the first place.

Moreover, under the Decree Law, the requirements for the provision of third-party access by the concessionaries are that there must be 'sufficient excess capacity' in accordance with best industry practice.³¹⁴ Hence, it is argued that the 'sufficient excess capacity' requirement is clearly more onerous when compared to the 'available capacity' requirement under the New Petroleum Law. Moreover, the New Petroleum Law appeared to place an obligation on the owners of the infrastructure to permit third-party access, irrespective of costs. Under the Decree Law, third-party access remains dependent on commercial contracts negotiated between the relevant parties and subject to the approval of the Mozambican Government.³¹⁵ Hence, in this regard, it is submitted that the third-party access provision contained under the Decree Law imposes more onerous conditions on third parties when compared to the third-party access provision under the New Petroleum Law.

4.6 Pipelines as a leverage tool in the achievement of disguised political objectives

To the extent that the third-party access provision contained under the Decree Law imposes more onerous conditions on third parties when compared to the one under the New Petroleum Law, the question then becomes, for purposes of stimulating investment, how can exemptions from local laws translate to more onerous third-party access requirements capable of deterring investment and defeating the purpose of the exemptions in the

³¹³ See New Petroleum Law (n 295 above).

³¹⁴ See Decree Law (n 313 above).

³¹⁵ See Clifford Chance (n 314 above).

first place? Essentially, this has all the ingredients for a monopoly situation such as the one GAZPROM enjoys in Europe. The fact that the third-party access provision under the Decree Law imposes more onerous access terms and conditions, all in an attempt at blocking access to the pipelines, is an illustration of the strategic importance attached to these pipelines in the context of energy security concerns. Hence, given the fact that such infrastructural projects fall under sensitive sectors of high geo-political interest to governments, it becomes evident that these pipelines serve as a leverage tool in the achievement of disguised political objectives.³¹⁶

In this context, it is submitted that the reluctance on the part of the WTO to regulate third-party access and capacity establishment rights under Article V will result in the creation of monopolistic pipeline owners, which in the absence of regulatory oversight, will consistently block access to the infrastructure, negatively impacting on competition and subsequently giving rise to all forms of economic problems resulting from disequilibrium in the market.³¹⁷ Over and above the negative impact on the Mozambican economy and its people, the reluctance on the part of the WTO to enact rules regulating third-party access and capacity establishment rights under Article V will ultimately result in a huge gas crisis within the region, as these monopolies will unilaterally take the decision of cutting off the supply of the energy commodity in exchange for the granting of certain concessions.

In this context, the writer submits that by allowing other WTO member states to make use of the pipeline infrastructure for their energy commodity to transit, countries can continue to derive economic benefits by charging reasonable costs for the use of the infrastructure. It is therefore submitted that sharing the transit infrastructure will result in long term economic benefits for the owners of the pipelines and the WTO member states in the region that require the infrastructure's use for their goods to transit either to or from the territories of other WTO members.

4.7 The Southern African Development Community Protocol on Trade (SADC)

As a member of SADC who seeks to export and transit in other SADC member states, an

³¹⁶ See Pogoretsky (n 262 above).

³¹⁷ See Onal (n 158 above).

investigation into the possible application and implementation of the SADC Trade Protocol in what concerns the freedom of transit of energy products is imperative as it places the research problem in a regional context. In this regard, the SADC Trade Protocol expressly addresses the issue of transit trade by stating that products which a member state imports into or exports from another member state's respective territory, subject to Annex IV, enjoy the free transit right.³¹⁸

For purposes of this discussion, the definition of specific key terms in Annex IV warrants closer attention in an attempt at identifying whether the transit of gas via pipelines is in fact incorporated in the wording of this Agreement. In this regard, Annex IV of the SADC Trade Protocol provides the response by defining modes of transport to include pipelines and gas lines.³¹⁹ However, as is the case with the WTO Treaty, the SADC Trade Protocol is silent on third-party access and capacity establishment rights in the context of cross-border energy transit via the fixed infrastructure.

In this context, take the hypothetical example where two SADC member states, namely Botswana and Mozambique, intend on concluding an agreement for the sale of natural gas. Given the fact that Botswana is land-locked, one of the only means by which the gas can reach the country would be through a pipeline spanning across Zimbabwean territory. To the extent that Zimbabwe does in fact possess this pipeline and refuses to grant third-party access to the infrastructure, one may argue that both Mozambique's and Botswana's freedom of transit right as provided for under Article 15 of the SADC Trade Protocol is effectively being violated by the Zimbabwean Government. Nevertheless, Zimbabwe can retaliate by arguing that the provision does not impose an obligation on its Government to grant Botswana with third-party access to its pipeline as there is no specific wording to that effect. This example once again illustrates the *lacunae* in this provision should a third-party access dispute arise between member states, to the extent that the freedom of transit right provision under the Trade Protocol itself makes no mention whatsoever of these rights.

Thus, to the extent that a dispute requiring the application of Article 15 of the Protocol is yet to

³¹⁸ Article 15 of the SADC Trade Protocol.

³¹⁹ Annex IV of the SADC Trade Protocol.

take place, it is very difficult to imagine that a SADC member state can in fact successfully invoke third-party access and capacity establishment rights under the freedom of transit provision. In the absence of specific wording to that effect, the freedom of transit provision in the SADC Trade Protocol remains identical to that of the WTO, lacking a clear and implementable legal framework regulating these two rights and consequently amounting to an ineffective clause when applied to those States that lack the necessary capacity to import or export their energy commodity and merely require another State's infrastructure in order for the energy commodity to transit to or from their respective territories.

4.8 Treaty on the Functioning of the European Union (EU Treaty): A benchmark for African RTA's

As a benchmark for African regional agreements, the EU Treaty offers a very good example of the manner in which third-party access and capacity establishment rights can in fact be addressed and regulated. Under the EU Treaty, these concepts are regulated under EU Competition Laws. For example, Article 101 of the EU Treaty stipulates that all agreements which may affect commerce between EU member states and which have the prevention, restriction or distortion of competition as their objective or desired effect are expressly prohibited.³²⁰ Article 101 proceeds to set out certain specific prohibited practices and for purposes of this discussion, the prohibition of practices which limit or control production, markets, technical development or investment is of particular relevance.³²¹

One way of understanding Article 101 in the context of this discussion would be to apply the provision to the fictitious scenario set out in 2.9 above, where it was discussed that for the energy commodity to transit from Chad, across Niger's pipeline to Burkina Faso, Niger would have to grant what is referred to as 'third-party access' to its existing infrastructure. To the extent that Niger refuses to grant third-party access to its infrastructure, Burkina Faso is forced to purchase the gas from another State, for instance Mali, which possesses the necessary infrastructure capacity, albeit at a much higher cost. Hence, when applying Article 101(1), it can be argued that Niger's actions have effectively prevented, restricted or distorted competition in the region's gas

³²⁰ Article 101 of the EU Treaty.

³²¹ Article 101(1)(b) of the EU Treaty.

market, amounting to a contravention of Article 101(1). In this hypothetical case, the provision would place an obligation on Niger to grant third-party access to its pipeline as failure to do so would have a detrimental effect on competition.

However, where fixed infrastructure connecting the three countries is non-existent, the building of a pipeline across Niger, merely for the energy commodity to transit, is Chad's only available alternative for exporting the good. Thus, in the event where the Government of Niger is unwilling to construct new pipelines and refuses to allow the construction of such infrastructure on its territory, Burkina Faso is once again forced to purchase the commodity from another source. Hence, Article 101(1)(b) would be applicable as Niger's actions would effectively be limiting or controlling investment within the respective free trade area, amounting to a direct contravention of the provision.

The applicability of Article 101(1) is in fact very wide in that it also incorporates the situation where monopolies unilaterally take the decision of cutting off the supply of the energy commodity in exchange for the granting of certain concessions, being one of the major concerns raised in this mini-dissertation. This practice would be expressly prohibited under Article 101(1)(e), as it places a prohibition on practices that make the conclusion of contracts subject to the acceptance of additional obligations, which by their very nature or in accordance with commercial usage, are not linked with that particular agreement's subject matter.³²²

4.9 The role of bilateral investment treaties in the regulation of third-party access and capacity establishment rights in the context of cross-border energy transport

Presently, as discussed earlier, governments have entered into bilateral investment treaties which have included cross-border gas agreements to regulate third-party access and capacity establishment rights in the context of the specific cross-border pipeline project. For example, the Government of the Republic of South Africa entered into BIT's with the Mozambican Government to extract the natural gas and construct a cross-border pipeline to South Africa, hence making this specific cross-border agreement the main legal instrument regulating these

³²²Article 101(1)(e) of the EU Treaty.

two rights, albeit, strictly in the context of the Temane Pipeline Project, which stretches from the North of Mozambique down to Sasol's Secunda Plant in South Africa.³²³

Hence, to the extent that BIT's have and continue to be the legal instruments regulating third-party access and capacity establishment rights in the context of international gas transit, these very same BIT's can serve as guiding principles in the formulation of clear and implementable rules regulating third-party access and capacity establishment rights and obligations. To the extent that modern RTA's such as the Transatlantic Free Trade Area (TAFTA) have undertaken WTO plus commitments by inserting clauses which regulate *inter alia* environmental, labour, and investment issues, these very same BIT's can serve as a very useful legal source for African regional agreements in what concerns the regulation of third-party access and capacity establishment rights in the context of freedom of transit of energy commodities.

4.10 Unenforceability of freedom of transit under Article V of the GATT: A model scenario in the context of third-party access

Take the hypothetical situation discussed in chapter two involving three WTO member states, namely a gas importer in the form of Burkina Faso, a land-locked gas exporter as Chad and the transit state as Niger.³²⁴ To the extent that there is an existing pipeline on Niger's territory and the Government refuses to grant third-party access to its pipeline, then the lack of rules at WTO level regulating third-party access prevents Chad from making use of Niger's pipeline in order for the energy commodity to transit to Burkina Faso. Therefore, in this context, it is argued that the State of Niger's actions will have effectively blocked Chad's gas from transiting to Burkina Faso, amounting to a violation of Article V of the GATT that guarantees 'all' WTO members a freedom of transit right. In this context, it is worth mentioning that this does not, under any circumstance, entail the imposition of a compulsory third-party access obligation on the State of Niger as doing so would effectively fail to provide an implementable solution to the issue.³²⁵

³²³ Pretorius, L 'A case study of the development impact of the cross-border natural gas pipeline between Mozambique and South Africa' (2002) Available at: <https://www.somo.nl/wp-content/uploads/2002/06/gas-pipeline-case-study.pdf> (accessed 22 May 2016).

³²⁴ See Pogoretsky (n 150 above).

³²⁵ See Pogoretsky (n 250 above).

4.11 Unenforceability of freedom of transit under Article V of the GATT: A model scenario in the context of capacity establishment

Using the same example discussed above, in the event where pipeline infrastructure connecting the three countries is non-existent, the building of a pipeline spanning across Niger's territory, in order for the gas to transit to Burkina Faso, is Chad's only available alternative to export its energy commodity and equally, the only existing option for Burkina Faso to import the gas, taking into consideration the low cost charged by Chad for the energy good. Should the Government of Niger, unwilling to construct the infrastructure, unreasonably³²⁶ refuse to allow the building of the pipeline on its territory in order for the gas to transit to Burkina Faso, the lack of WTO rules regulating capacity establishment rights effectively means that both Chad and Burkina Faso are the subjects of a freedom of transit right which they cannot effectively enforce, in order to oblige Niger to permit the building of the pipeline on its territory.

Therefore, to the extent that there are no rules at the WTO level regulating capacity establishment rights, Chad and Burkina Faso essentially have no legal recourse under Article V of the GATT to enforce their freedom of transit right against the State of Niger. Thus, it is argued that Niger's actions will have effectively blocked Chad's gas from transiting to Burkina Faso, albeit with no legal repercussions on the infringer of the right, due to the lack of rules regulating capacity establishment under Article V of the GATT.

Furthermore, in the event where there is a pipeline on Niger's territory, it is submitted that the capacity establishment right also extends to the expansion of such pipeline.³²⁷ Hence, refusal on the part of Niger to allow Chad or Burkina Faso to expand the available infrastructure in order for the energy commodity to transit equally amounts to a violation of both States' freedom of transit right under Article V of the GATT. In this situation, once again, neither Chad nor Burkina Faso has legal recourse to enforce their freedom of transit right due to the fact that capacity establishment rights are presently not regulated under Article V of the GATT.

³²⁶ See Kurmanov (n 198 above).

³²⁷ See Pogoretsky (n 202 above).

4.12 Conclusion

This chapter began by introducing some of the provisions contained in the Constitution of the Republic of Mozambique which have a bearing on the exploration and exploitation of gas in an attempt at illustrating that some of these clauses are in fact a clear embodiment of the economic cooperation principle, advocating the sharing of pipeline infrastructure. The chapter proceeded to discussing the scope and application of the New Petroleum Law 21/2014 of 18 August, specifically in the context of third-party access prior to discussing the regulations issued under this new law. Proceeding, the chapter introduced the Enabling Law 25/2014 of 23 September together with its Decree Law 2/2014 for the Rovuma Basin LNG Project.

By introducing the Decree Law, the third-party access provision applicable to the only cross border Mozambican gas pipeline to date was analysed. Moving on, the writer compared the third-party access provisions under the New Petroleum Law and the Decree Law in order to illustrate that for purposes of attracting investment into the sector, these projects are usually exempt from local laws but nevertheless contain more onerous third-party access provisions to those contained in national legislation. In this regard, the writer essentially demonstrated the strategic importance attached to these pipelines, which in the context of energy security concerns, ultimately serve as a leverage tool in the achievement of disguised political objectives.³²⁸

Moving on, the chapter illustrated how, in the longer term, the reluctance on the part of the WTO to regulate third-party access and capacity establishment rights under Article V will eventually give rise to monopolistic pipeline owners, whom in the absence of regulatory oversight, will consistently block access to the infrastructure, negatively impacting on competition and subsequently giving rise to all forms of economic problems resulting from disequilibrium in the market.

Over and above the negative impact on the Mozambican economy and its people, this chapter proceeded to advocate that in the long term, the reluctance on the part of the WTO to enact rules regulating third-party access and capacity establishment rights under Article V will ultimately

³²⁸ See Pogoretsky (n 259 above).

result in a huge gas crisis within the region, as these monopolies will unilaterally take the decision of cutting off the supply of the energy commodity in exchange for the granting of certain concessions.

In this context, the writer submitted that by allowing other WTO member states to make use of the pipeline infrastructure, merely for their energy commodity to transit, countries can continue to derive economic benefits by charging reasonable costs for the use of the infrastructure. It was submitted that sharing the transit infrastructure will result in long term economic benefits for both the owners of the pipelines as well as the WTO member states in the region that require the infrastructure's use for their goods to transit either to or from the territories of other WTO members. Moving on, to the extent that Mozambique, as a member of various RTA's, seeks to export and transit in other member states, the chapter proceeded to employ a regional approach to the discussion by investigating whether and if so, to what extent the SADC Treaty regulates third-party access and capacity establishment rights under freedom of transit in the context of cross border gas trade.

Proceeding, the writer introduced what he considers a benchmark legal instrument that presently regulates third-party access and capacity establishment rights in the competition sphere, namely the EU Treaty, in attempt at illustrating how these two rights can in fact be regulated at the regional level under competition legislation. Moving on, to the extent that BIT's have and continue to be the legal instruments regulating these two rights in the context of international gas transit, the chapter went on to analyse if and how the BIT's can serve as guiding principles in the formulation of clear and implementable rules regulating third-party access and capacity establishment rights and obligations at the regional and ultimately international levels. To the extent that modern RTA's such as the Transatlantic Free Trade Area (TAFTA) have undertaken WTO plus commitments by inserting clauses that regulate *inter alia* environmental, labour, and investment issues, the BIT's can serve as a very useful legal source for African regional agreements in what concerns the regulation of third-party access and capacity establishment rights in the context of freedom of transit of energy commodities.

The chapter concluded by transporting the model scenario discussed in chapter two and using it

to illustrate how WTO member states are the subjects of a freedom of transit right which they are unable to effectively enforce in the event where they lack the necessary transit infrastructure to either import or export energy products such as gas. In this regard, the chapter has demonstrated how the enactment of clear and coherent rules regulating third-party access and capacity establishment rights under Article V of the GATT will go a long way in effectively tackling energy security concerns, liberalising energy trade and achieving long term economic prosperity for Mozambique and the entire region.

CHAPTER 5

FINAL CONCLUSION

5.1 Summary of findings and conclusion

Article V of the GATT, dealing with freedom of transit, has provided the most recent embodiment of the freedom of transit principle. To the extent that the GATT's applicability to international gas transit regulation has been established, it is submitted that the GATT, by failing to provide for third-party access and capacity establishment rights under Article V has been found wanting when it comes to the provision's effective implementability. For WTO member states that do not possess the necessary transit capacity to import or export energy commodities, the enactment of rules regulating third-party access and capacity establishment will equip such States with a legally enforceable right against transit states, which if successfully invoked can go a long way to liberalising energy trade and achieving much desired energy security for the region in the long term.

The argument on whether Article V of the GATT implicitly makes provision for third-party access and capacity establishment rights has and continues to be a very hotly-debated topic in the context of international trade law, with several well renowned authors providing their view on the subject matter. However, to the extent that these arguments have employed similar international law principles, albeit failing to agree on their interpretation, it is submitted that a successful invocation of these two rights under Article V requires that the matter be approached from a completely different angle. As stated by Pogoretsky, this approach treats general international law principles and WTO law as a single set of rules capable of recognising third-party access and capacity establishment rights, as opposed to isolating the two from one another.

As rightly stated by the ILC's Study Group, that when States sign and ratify an international treaty or convention, the accumulation of experience, new information and different circumstances over time results in the continuous evolution of their views regarding the treaty's meaning and scope of application. Therefore, the assumption that the legal relationship remains

stagnant is clearly a misinformed one as these factors actually call for its development. Thus, in light of the rapidly developing international gas trade that poses new challenges for global commerce, Pogoretskyy argues that the application of the evolutionary interpretation principle to Article V may in fact provide a solution, one that broadens the ambit of rights and obligations assumed under the provision, in lieu of the broad terminology employed by the initial drafters of the Agreement. However, to avoid ‘arbitrariness’ as to which new rights and obligations should be subsumed under Article V of the GATT, Pogoretskyy warns that this process must involve an exercise grounded in public international law principles. In this regard, the writer agrees with Pogoretskyy in that the principles of effective right and economic cooperation can play a critical role in the interpretation and enforcement of Article V in the context of international gas transit regulation.

As the freedom of transit provision’s enforcement tool, the WTO’s Dispute Settlement Understanding (DSU) provides the main vehicle to achieving the provision’s practical implementability and enforceability. However, as stated by Pogoretskyy, the time has come for WTO member states to garner enough political desire to approach the matter from the angle of systemic integration of general international law sources with WTO law and to be courageous enough to address restrictions to transit capacity directly through the DSU. In this regard, the writer submits that African gas dependent WTO member states burdened by infrastructural capacity need to make their voices heard at the WTO as this directly affects the livelihoods of their people and subsequently the development of their respective economies.

As stated by Pogoretskyy, the reluctance on the part of the WTO to regulate third-party access and capacity establishment rights under Article V of the GATT has resulted in the ineffectiveness of the provision when applied to WTO member states that lack the necessary transit capacity to either import or export energy goods. Considering that these rights are presently regulated under EPCC’s, as part of a BIT or regional investment agreement entered into by the respective States, the reluctance on the part of the WTO to make provision for third-party access and capacity establishment rights under Article V of the GATT has resulted in more onerous third-party access requirements, albeit only applying between the parties to the respective investment agreement.

From a practical perspective, the fact that these provisions defeat the purpose of what the legal regime regulating them seeks to achieve in the first place is a clear indication of the strategic value attached to the pipelines in the achievement of disguised political objectives. Hence, it was submitted that to the extent that Article V of the GATT fails to make provision for third-party access and capacity establishment rights, such reluctance is bound to give rise to a monopoly, which in the absence of regulatory oversight, will consistently block access to the pipelines, ultimately resulting in a huge gas crisis within the region as these monopolies will unilaterally take the decision of cutting off the supply of the energy commodity in exchange for the granting of certain concessions.

Moreover, as stated by Onal, blocking third-party access to pipeline infrastructure negatively impacts on competition and subsequently gives rise to all forms of economic problems resulting from disequilibrium in the market. Hence, for Mozambique, whose economy is presently undergoing serious challenges, the lack of efficiency brought about by disequilibrium in the market, in essence, translates to a failure to maximise its gas producing capacity. Ultimately, like many African States that have been blessed with an abundance of natural resources, Mozambique will have failed to translate this endowment into socio-economic development, subsequently resulting in increased poverty for its people brought about by the failure to achieve much desired economic prosperity. Furthermore, such reluctance acts as a serious threat toward the achievement of regional long term energy security.

In this regard, it is submitted that by allowing other WTO member states that are burdened by a lack of capacity to make use of the infrastructure merely for their energy commodity to transit, Mozambique and other WTO members that possess the pipelines can continue to derive economic benefits by imposing reasonable terms for the infrastructure's use. Hence, to the extent that the WTO remains silent on third-party access and capacity establishment rights under GATT Article V, member states lacking the required transit infrastructure are, in essence, the subjects of a freedom of transit right which they are unable to effectively enforce should transit states refuse to grant third-party access to existing pipelines or unreasonably refuse to permit the construction or expansion of such transit capacity on their respective territories.

In this context , it was found that the enactment of a clear set of implementable rules regulating third-party access and capacity establishment rights under Article V of the GATT is the key to resolving energy security concerns, liberalising energy trade and achieving long term economic prosperity for a region, which given its past struggles, already finds itself in an inferior economic position when compared to most of the other regions across the globe.

Furthermore, there is a lack of a legal framework in African regional agreements, namely SADC, regulating third-party access and capacity establishment rights in the context of international energy transit. To that extent, the writer has illustrated how Article 101(1) of the EU Treaty can serve as a benchmark for African regional agreements in the regulation of these two rights, namely under competition legislation. Furthermore, Article 101(1) can also be applied to resolving one of the major concerns highlighted in this mini-dissertation, namely the possibility of monopolistic pipeline owners cutting off supply of energy commodities in exchange for certain concessions.

Moreover, to the extent that BIT's have and continue to be the legal instruments regulating these two rights in the context of international gas transit, these BIT's can serve as guiding principles in the formulation of clear and implementable rules regulating third-party access and capacity establishment rights and obligations at the regional and ultimately international levels. To the extent that modern RTA's such as the Transatlantic Free Trade Area (TAFTA) have undertaken WTO plus commitments by inserting clauses that regulate *inter alia* environmental, labour and investment issues, the BIT's can serve as a very useful legal source for African regional agreements in what concerns the regulation of third-party access and capacity establishment rights in the context of freedom of transit of energy commodities.

In concluding, one of the main causes of economic instability plaguing both developed and developing States has and continues to be the lack of affordable and reliable energy supply. With developing countries claiming a greater share of natural resources for the purposes of supporting their economic growth, conflicts over these scarce resources are bound to take place. In this context, transparency and predictability in WTO rules can go a long way in achieving much desired energy security and a liberalised energy market. To the extent that the freedom of transit

principle enshrined under Article V of the GATT is of vital importance to energy trade, the time has come for a clarification and reinforcement of this provision in order to better serve the transit of energy products.

5.2 Recommendations

In pursuance of energy security and a liberalised energy market, this research proposes adding energy-specific provisions throughout the existing WTO Agreements, which entails amending those provisions for which aspects related to energy, are supplemented. However, WTO members would have to agree to these amendments in accordance with Article X of the Agreement. In essence, such action would effectively translate to an amendment of Article V of the GATT, with the new looking provision being one which contains coherent and implementable rules governing third-party access to existing transit infrastructure and capacity establishment in the absence of such infrastructure.

In this context, as argued by Rakhmanin, the WTO could also employ a different approach which involves adopting an ‘Interpretation Decision’ which clarifies how WTO rules apply to certain specific energy sectors. To the extent that an amendment is quite a complex and time consuming exercise, such an approach is advantageous in that the Interpretation Decision can be adopted by consensus by the General Council. However, in this regard, Rakhmanin warns that WTO members would have to decide amongst themselves on how the new specific rules governing energy transit would relate to the general WTO rules on transit. This is in light of the fact that WTO members are under an obligation to comply with their entire WTO obligations simultaneously, hence the idea behind the WTO Single Undertaking.

Regional trade agreements can also play an immense role when it comes to the regulation of international energy transit issues not covered specifically by the WTO Treaty. The undertaking of ‘WTO+’ commitments in these agreements would act as an implementation vehicle to Article V of the GATT. Hence, parties to these agreements may agree on the technicalities of transit and insert provisions specifically aimed at regulating third-party access and capacity establishment rights, albeit applying only between those States members to the respective regional trade

agreement. Given the fact that the Doha Development Agenda is currently at a standstill, in the short term, this allows for the addressing of these issues at the sub-regional and regional levels whilst awaiting multilateral intervention.

In this regard, the rules of the EU provide a perfect benchmark that African regional trade agreements could learn considerably from. Articles 101 and 102 of the EU Treaty, regulating competition rules is a great example of a clear and well defined legal framework capable of effective implementation. Furthermore, under EU competition laws, the conditions under which refusal may be permitted or when such refusal amounts to an abuse of market domination are clearly set out and further entrenched through the Gas Directive. Furthermore, the applicability of Article 101(1) to resolving one of the major concerns highlighted in this mini-dissertation, namely the possibility of monopolistic pipeline owners cutting off supply of energy commodities in exchange for certain concessions, is clearly evident.

Moreover, to the extent that BIT's have and continue to be the legal instruments regulating these two rights in the context of international gas transit of energy commodities, these very same BIT's can serve as guiding principles in the formulation of clear and implementable rules regulating third-party access and capacity establishment rights and obligations at the regional level. To the extent that modern RTA's such as the Transatlantic Free Trade Area (TAFTA) have undertaken WTO plus commitments by inserting clauses that regulate *inter alia* environmental, labour and investment issues, the BIT's can serve as a very useful legal source for African regional agreements in what concerns the regulation of third-party access and capacity establishment rights in the context of freedom of transit of energy commodities.