THE APPLICABILITY OF GATT RULES TO GAS TRANSIT AGAINST THE BACKDROP OF THE "BELT AND ROAD INITIATIVE": CHINA'S PIPELINE TRANSIT TRANSPORT

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ABSTRACT

By analysing the transit countries of the Central Asia-China Gas Pipeline (CACGP), it is determined that some of the countries have the potential to hinder transit. The only multiple legally binding mechanism which China could resort to is the World Trade Organization (hereinafter "WTO"). However, there is doubt about whether the General Agreement on Tariffs and Trade (hereinafter "GATT") Article V can be applied to pipeline gas transit issues. This research attempts to interpret GATT Article V in light of Article 31 of the Vienna Convention on the Law of Treaties (hereinafter "VCLT") to demonstrate the applicability of GATT Article V to gas pipeline transit disputes. This applicability of GATT Article V was enhanced when the interpreter refers to the Trade Facilitation Agreement (hereinafter "TFA") as a subsequent agreement; and refers to the Energy Charter Treaty (hereinafter "ECT") as another international agreement in the sense of Article 31(3) of the VCLT. Therefore, this article maintains that China should promote the implementation of the TFA in Central Asian countries since the TFA

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resonates with the "interconnection" goal of China's "Belt and Road Initiative" (BRI). China should join the ECT during the application of the BRI. When the freedom of transit is disrupted and the WTO dispute settlement mechanism is chosen, there will be a better reason to invoke the ECT to obtain the benefit of the contemporary meaning of certain terms in GATT Article V.

KEYWORDS: *belt and road initiative, freedom of transit, GATT Article V, pipeline gas transit*

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I. INTRODUCTION

In China, there are the Central Asia-China Gas Pipeline (hereinafter "CACGP"), the China-Myanmar pipeline, and the China-Russian pipeline. Among these pipelines, the China-Myanmar and China-Russian pipelines are cross-border pipelines, and only the CACGP is a transit pipeline.[1] The CACGP traverses five Central Asian countries. If one transit country interrupts the gas transit, the interruption will threaten the national energy security of China.

From the *European Energy Charter* of the 1990s to the contemporary *International Energy Charter Declaration*, Europe has continued its efforts to integrate energy trade and investment with Russia and Central Asia into a multilateral legalization framework. China's current natural gas consumption and imports indicate that China's role and interests are very similar to Europe's, but there is no binding multilateral energy mechanism between China and its pipeline partner countries. As China's economy continues to develop and mature in international affairs, China should enhance its rule awareness and integrate more deeply into the international community.

Some commentators argue that energy resources are not covered by the General Agreement on Tariffs and Trade (hereinafter "GATT").[2] Thomas Cottier maintains that the current World Trade Organization (hereinafter "WTO") rules do not deal properly with trade in energy, which would best be handled within a future WTO framework agreement on energy.[3] Another argument maintains that GATT Article V does not address issues of transit through fixed infrastructure since this article was negotiated in the 1940s. At that time, most of goods were traded in discrete packages or containers and were transported by "mobile" carriers such as vessels, trucks, trains, etc.[4] According to these opinions, GATT Article V could not apply to gas pipeline transit issues.

This article attempts to interpret GATT Article V in light of Article 31 of the Vienna Convention on the Law of Treaties (hereinafter "VCLT") to demonstrate the applicability of GATT Article V to gas pipeline transit disputes. China should promote the implementation of the Trade Facilitation

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[1] If a pipeline passes from one country to another, the first country is an exporting country, and the other country is an importing country; this is a cross-border pipeline rather than a transit pipeline. A transit pipeline involves at least three main countries, namely, the producer country of natural gas, the consumer country, and the transit country. *See* PAUL STEVENS, TRANSIT TROUBLES: PIPELINES AS A SOURCE OF CONFLICT 16 (2009), https://www.chathamhouse.org/publications/papers/view/108992.

[2] Baurzhan Kurmanov, *Transit of Energy Resources Under GATT Article V*, 4 TRANSNATIONAL DISPUTE MGMT. (forthcoming 2013) (manuscript at 7).

[3] Thomas Cottier et al., *Energy in WTO Law and Policy* 3 (Swiss Nat'l Ctr. of Competence in Research Trade, Working Paper No. 2009/25, 2009).

[4] Andrey A. Konoplyanik, *Gas Transit in Eurasia: Transit Issues Between Russian and the European Union and the Role of the Energy Charter*, 27 J. ENERGY & NAT. RESOURCES L. 445, 466 (2009).

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Agreement (hereinafter "TFA") in Central Asia countries during the Belt and Road Initiative (hereinafter "BRI") construction process and join the Energy Charter Treaty (hereinafter "ECT"). This suggestion is highly consistent with the "interconnection" requirement for this initiative. In this paper, the purpose of this proposal is only to assist in the interpretation of GATT Article V under Article 31 of the VCLT when GATT Article V is applied by the Panel or appellate body for transit interruption disputes.

Part II introduces the current status of natural gas pipeline transportation in China and examines the possibility of transit countries to interrupt transit. Part III attempts to prove that the existing bilateral, regional and most of the multilateral treaties cannot competently resolve transit disputes. Part IV explores the protection provided under GATT Article V. Part V discusses the applicability of GATT Article V to pipeline gas transit disputes through the clarification of the terms "good" and "means of transportation". Part VI recommends that the Chinese government promote the implementation of the TFA under the BRI and join the ECT to resort to these two treaties when China invokes GATT Article V to protect the country's pipeline gas transit freedom.

II. CURRENT STATUS AND ASSESSMENT OF CHINA'S PIPELINE GAS TRANSIT TRANSPORTATION

A. Gas Consumption Status of and Expectations for China

The proportion of natural gas in China's energy consumption continues to increase with the increasing degree of public attention to environmental protection and China's joining of the *Paris Agreement*. According to the International Energy Agency's *World Energy Outlook*, China will account for a quarter of global gas demand by 2040, second only to the European Union (hereinafter "EU").[5] This prediction coincides with the *Planning of the National Energy Administration of China*, which indicates that natural gas consumption will account for 15% of total energy consumption by 2030.[6] As also seen in the table below, there is an increasing need for natural gas when compared to the United States (hereinafter "US") and the EU.

[5] *World Energy Outlook 2017 Executive Summary*, INT'L ENERGY AGENCY (February 26, 2018), http://www.iea. org/Textbase/npsum/weo2017sum.pdf.

[6] *Energy Production and Consumption Revolutionary Strategy (2016-2030)*, NAT'L DEV. & REFORM COMM'N & NAT'L ENERGY ADMIN. 8 (2016), http://www.gov.cn/xinwen/2017-04/25/5230568/files/286514af354e41578c57ca38d5c4935b.pdf.

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TABLE 1: United States, China, and European Union Natural Gas Consumption Statistics from 2008-2018

One billion cubic metres	2008	2013	2018	Average annual growth rate (2007-2017)	Share of consumption in the world (2018)
United States	628.9	707.0	817.1	1.7%	21.2%
China	81.9	171.9	283	13%	7.4%
EU	625.6	554.4	549.0	-1.0%	14.3%

SOURCE: Author's Work, Based on the BP World Energy Statistics Review 2019[7]

In 2019,[8] China imported 87.11 million tons of natural gas, an increase of 3.8% over the same period in 2018.[9] Members of the Commonwealth of Independent States (hereinafter "CIS") will become the most dynamic region for the development of energy transportation systems for at least the next twenty years.[10] China's future natural gas imports may still rely mainly on the CIS countries.

B. Current Status and Expectation of Pipeline Gas Transit Transportation in China

At present, the CACGP include the four lines, namely, A, B, C, and D. From 2009 to 2014, the A, B and C lines were completed and ensured to operate smoothly.

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[7] BRITISH PETROLEUM [hereinafter BP], BP STATISTICAL REVIEW OF WORLD ENERGY 34 (68th ed., 2019), https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2019-full-report.pdf.

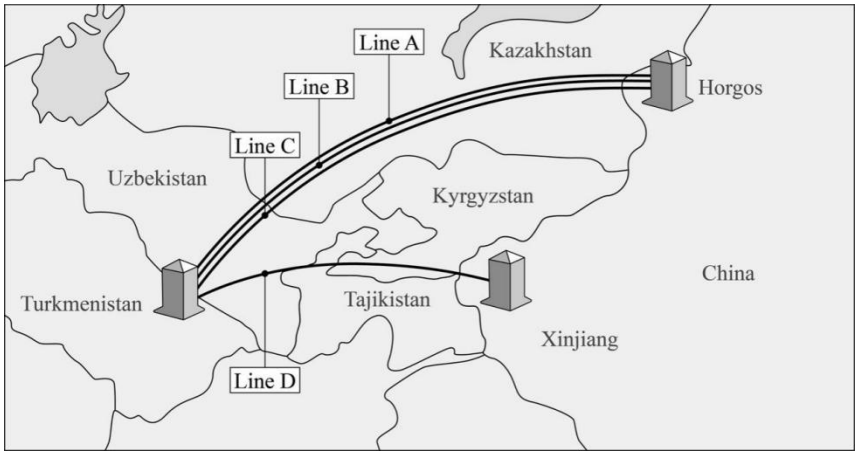
[8] From January 2019 to November 2019.

[9] *2019 Nian 11 Yue Jinkou Zhuyao Shangpin Liangzhibiao* [*Main Commodity Imported Value Table in November 2019*] (2019), GENERAL ADMIN. OF CUSTOMS OF THE PEOPLE'S REPUBLIC OF CHINA [GACC], http://www.customs.gov.cn//customs/302249/302274/302277/302276/2791508/index.html.

[10] BRITISH PETROLEUM, BP STATISTICAL REVIEW WORLD ENERGY 34 (66th ed., 2017), https://www.connaissancedesen ergies.org/sites/default/files/pdf-actualites/bp-statistical-review-of-world-energy-2017-full-report.pdf.

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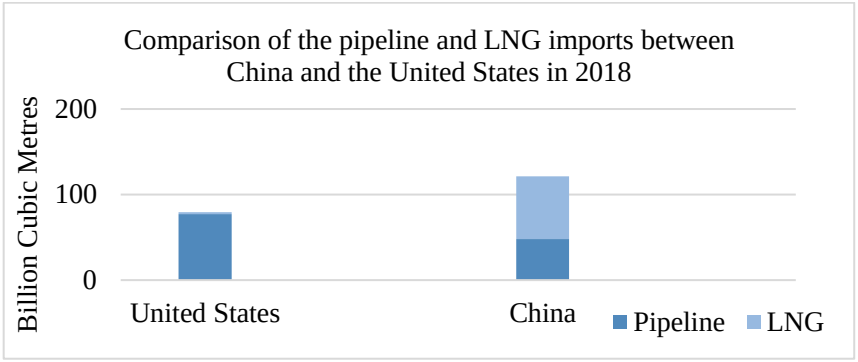
FIGURE 1: Map of the China-Central Asia Gas Pipeline



SOURCE: Author's Work, Based on the Map Named "the introduction of CACGP"[11]

As seen in Figure 2, there is still room for improvement in China's pipeline gas import when compared to that of the US. China will inevitably build more cross-border or transit natural gas import pipeline networks in the future.

FIGURE 2: Comparison of the Pipeline and LNG Imports Between China and the United States in 2018



SOURCE: Author's Work, Based on the BP World Energy Statistics Review

[11] *Zhongguo Zhongya Tianranqi Guandao de Jieshao* [*The Introduction of Central Asia-China Gas Pipeline*], BAIDU, https://reurl.cc/ex5Zlm (last visited Jan. 5, 2020).

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2019[12]

C. Factors that Affect the Performance of Transit Countries

In practice, there are "good" transit countries and "bad" transit countries. Good transit countries are the countries that create transit environments in which all parties can accept and predict the terms, negotiate the most economical transport routes, and minimize the obstacles to the construction and operation of transit pipelines.[13] First, if transit fees account for a large proportion of the transit country's revenue and foreign exchange, there will be greater pressure to push for more.[14] If the transit country considers that its transit charges are lower than its neighbours, it may also result in the transit country's request to restart the negotiation of the transit charge.[15] Second, if the country of transit also uses natural gas from the transit pipeline, it may not challenge the export country for fear of losing its supply.[16] Third, assuming that transit-dependent countries have another alternative route that can provide lower costs, the threat of using this potential option may be sufficient to ensure the "good" performance of the transit country.[17] Fourth, if there is a competitive relationship between the transit and export countries, this may lead to the "bad" behaviour of the transit country. Any disruption to the transit supply may be beneficial to the transit country as it may increase its own export price.[18]

D. Assessment of the Countries Involved in the CACGP

1. Turkmenistan — At present, 64.5% of gas imports from the China-Central Asia natural gas pipelines come from Turkmenistan.[19] Turkmenistan has developed a diversification strategy for oil and gas exports. With multiple buyers, Turkmenistan increased its price and reduced its gas transmissions to China by an average of fifty million cubic metres per day in January 2018, which is still higher than the total average gas consumption per day of Shan Xi Province and Inner Mongolia Province of China.[20]

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[12] BP, *supra* note 7, at 38.
[13] STEVENS, *supra* note 1, at 11.
[14] *Id.* at 12.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 13.
[18] *Id.*
[19] GENERAL ADMIN. OF CUSTOMS, CHINA, 7 YUE FEN WO GUO TIAN RAN QI JIN KOU LIANG ZENG JIA 7.3% [CHINA'S NATURAL GAS IMPORTS INCREASE IN JULY] (2019), http://www.customs.gov.cn//customs/resource/cms/article/333551/2606355/2019092414210277564.doc.
[20] Meiqi Zixun [Gas information], *Zhongya Guojia Dui Hua Tianranqi Shusongliang Kandiao Yiban, Yuanlai Shi Yinwei Zhege Yuanyin?* [*Central Asian Countries Cut Half of the Natural Gas Transmission to China. Was It Because of This Reason?*], SOHU (Feb. 5, 2018, 12:58 PM),

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2. Kazakhstan — The A, B and C lines of the CACGP all pass through Kazakhstan. Kazakhstan is not only a transit country for the CACGP, but it is also a natural gas-dependent country and an exporter.[21] However, the export scale of Kazakhstan is insufficient to compete with Turkmenistan's natural gas exports; therefore, it is unlikely that Kazakhstan will hinder transit for reasons of competition.

3. Uzbekistan — The four lines of A, B, C and D of the CACGP all pass through Uzbekistan. At the same time, Uzbekistan is one of the gas source countries of the CACGP. Uzbekistan receives large sums of money from the transit fees for this pipeline.[22] However, Uzbekistan is currently not in competition with Turkmenistan with respect to gas exports.[23] The possibility of obstructing transit for competitive reasons is small, but there is no other transit country that can replace Uzbekistan, which may lead Uzbekistan to ask for a re-negotiation of the transit fee.

4. Tajikistan — Tajikistan is a transit country and will be an exporting country for the D line of the CACGP. The joint venture *China and Tajikistan Gas Pipeline Company*'s 32-year revenue will reach $15 billion, from which Tajikistan can earn $1.2 billion in revenue and $2.5 billion in dividend income.[24]

5. Kyrgyzstan — Kyrgyzstan is a transit country for the D line. Kyrgyzstan's natural gas resources are relatively scarce, and its output is low, far from meeting domestic demand. Supplemental energy is mainly imported from neighbouring Uzbekistan.[25] Therefore, Kyrgyzstan can only be a transit country for the CACGP.

III. LEGAL PROTECTION FRAMEWORKS FOR FREEDOM OF TRANSIT OF CACGP

A. Bilateral Intergovernmental Agreement

The construction and operation of the pipelines rely on a series of bilateral bespoke agreements signed by China and Central Asian countries.

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https://www.sohu.com/a/221009566_652961.

[21] *Energy Cooperation Between China and Kazakhstan: A Model of Mutual Benefit and Win-Win*, CHINA DAILY (May 8, 2017) http://world.people.com.cn/n1/2017/0508/c1002-29259308.html.

[22] Li Ran, Research on the Diplomatic Game of the Caspian-Central Asian Gas Pipeline — Centered on the Nabucco Plan 129 (2013) (Ph.D. thesis, Foreign Affairs College).

[23] The sources of China's pipeline natural gas imports in 2016 were 29.4 billion cubic metres from Turkmenistan and 400 million cubic metres from Kazakhstan. *See* BP, *supra* note 10, at 34.

[24] *Tukumansitan–Zhongguo Tianranqi Guandao zai Ta Jingnei Bufen Kaishi Pushe* [*China's Central Asian Natural Gas Pipeline Begins to Be Laid in Tajikistan*] (Feb. 1, 2018), THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA [MOFCOM], http://www.mofcom.gov.cn/article/i/jyjl/e/201802/20180202707138.Sh tml.

[25] Zhakisheva Lazzat, Research on Energy Cooperation Between Central Asia and China 66 (2017) (Ph.D. thesis, Shanghai International Studies University).

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Most agreements have not been made public, only the *China-Kazakhstan Agreement* has been discussed in the book of Danae Azaria. The preamble of the agreement mentions that its purpose is "to develop the long-term cooperation of China and Kazakhstan in the transportation of natural gas from Turkmenistan to China through new capacity facilities between Kazakhstan and China." [26] The existing bilateral intergovernmental agreements between China and the Central Asia countries are more concerned with the systematic maintenance of pipeline operations and pay little attention to dispute settlements.[27] A multilateral legal instrument to secure the energy flow of the CACGP is essential.

B. Multilateral Legal Mechanism

There are two main multilateral international legal instruments applicable to the international transit of energy, namely ECT and WTO.[28] The ECT is a binding multilateral agreement that covers the entire energy industry chain. All five Central Asian countries are members of the ECT, while China is not. With Russia terminating its provisional application to the ECT in 2009, the impact of the ECT has been greatly weakened.

The WTO is the best multilateral mechanism to protect the freedom of pipeline gas transit for four reasons. First, primary energy-exporting countries have joined the WTO. Second, GATT Article V is the basis for the negotiation of the ECT, and its provisions contain many rules that are highly relevant to energy transit. [29] Third, the WTO rules are implemented uniformly on a global scale and can be implemented through a binding dispute resolution mechanism. Since it is unlikely that a multilaterally accepted rule tailored for energy transit will emerge in the WTO in the short term, this will increase the possibility of the GATT playing a role in future pipeline transit disputes.

IV. FREEDOM OF GAS PIPELINE TRANSIT UNDER GATT ARTICLE V

Article V of the GATT 1994, entitled "Freedom of Transit", was not sufficiently detailed. Although this situation can be resolved through an interpretation of the Panel or the Appellate Body, the cases of *Colombia* –

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[26] DANAE AZARIA, TREATIES ON TRANSIT OF ENERGY VIA PIPELINES AND COUNTERMEASURES 125 (2015).

[27] ZHUWEI WANG, SECURING ENERGY FLOWS FROM CENTRAL ASIA TO CHINA AND THE RELEVANCE OF THE ENERGY CHARTER TREATY TO CHINA 44 (2015).

[28] Kurmanov, *supra* note 2, at 3.

[29] Lothar Ehring & Yulia Selivanova, *Energy Transit*, *in* REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW: WTO, NAFTA AND ENERGY CHARTER 49, 81 (Yulia Selivanova ed., 2011).

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Ports of Entry[30] and *Russia — Measures Concerning Traffic in Transit*[31] are the only two cases that clarify Article V. Panel Reports of these two cases interpreted Article V:2[32] and V:6.[33]

Article V:I presents a definition of "traffic in transit". The first sentence of Article V:2 provides that "[t]here shall be freedom of transit, for traffic in transit to or from the territory of other members." The panel in *Russia — Measures Concerning Traffic in Transit* believed that this sentence creates an obligation for each Member to guarantee transit freedom. "Or" means each Member should guarantee freedom of transit through its territory to the territory of any other Member, or from the territory of any other Member.[34] Thus, if a Member precludes transit from "another Member from entering at all points along a shared land border, the measure will necessarily be inconsistent with the first sentence of Article V:2."[35] The panel in *Columbia — Ports of entry* maintains that the first sentence of Article V:2 imposes a limiting condition on the freedom of transit obligation, e.g. that freedom should be provided on the most convenient routes.[36] The Panel believes that the transit state is the one who decides convenience.

A Member may abuse this limiting condition to preclude transit through its territory.[37] When this happens, remedies are available in TFA. TFA Article 11(5) stipulates that "members are encouraged to make available, where practicable, physically separate infrastructure (such as lanes, berths and similar) for traffic in transit." Article 11(16) requires "members shall endeavor to cooperate and coordinate with one another with a view to enhancing freedom of transit."[38] Convenient routes are at the discretion of

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[30] In July 2005, Colombia introduced a measure that required the textiles, clothing and footwear that originated in Panama and China or that were transported from Panama and China to enter only from Bogota Airport or Barranquilla Harbor. Panama considers this restriction on Panamanian goods to be a violation of Article V of the GATT. The focus of the dispute is whether Colombia's port entry measures violate Article V:2 of GATT 1994. Panel Report, *Colombia — Indicative Prices and Restrictions on Ports of Entry*, WTO Doc. WT/DS366/R (adopted May 20, 2009) [hereinafter *Colombia — Ports of Entry* Panel Report].

[31] Ukraine has challenged Russia over a series of bans and restrictions on road and rail transport from Ukraine through Russia to its destination Kazakhstan and the Kyrgyz Republic. One of Ukraine's claims is that these measures violate Article V. The focus of the dispute, in this case, is whether the World Trade Organization [hereinafter WTO] panels have jurisdiction over Article XXI measures. Panel Report, *Russia — Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter *Russia — Traffic in Transit* Panel Report].

[32] *Colombia — Ports of Entry* Panel Report, *supra* note 30, ¶ 7.431; *Russia — Traffic in Transit* Panel Report, ¶ 7.168.

[33] *Colombia — Ports of Entry* Panel Report, ¶ 7.481.

[34] *Russia — Traffic in Transit* Panel Report, ¶ 7.168.

[35] *Id.* ¶ 7.174.

[36] *Colombia — Ports of Entry* Panel Report, ¶ 7.400.

[37] Kurmanov, *supra* note 2, at 12.

[38] The preamble of the Agreement on Trade Facilitation [hereinafter TFA] stipulates that the TFA desires to clarify and improve Articles V, VIII and X of the GATT 1994. Article 1,2,3,4,5 of TFA clarify GATT Article X; TFA Articles 6, 7, 8, 9, 10 clarify GATT Article VIII; Article 11 clarifies GATT Article V. Article 11 of TFA is entitled "Freedom of Transit", which contains 17 paragraphs.

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the transit country, but only if best efforts are made to provide infrastructure and to cooperate and coordinate to improve freedom of transit.

The second sentence of Article V:2 establishes a Most-Favoured Nation (hereinafter "MFN") obligation. The panel in *Columbia — Ports of Entry* clarifies that the second sentence of Article V:2 requires goods from all Members to be given an identical level of access and equal conditions when proceeding in international transit.[39] However, "identical level of access" obligation means third parties, often competitors of the pipeline owner, are legally entitled to use the pipeline.[40] Azaria maintains that this mandatory third party access (hereinafter "TPA") to pipelines is not provided by GATT Article V.[41] For CACGP, because of the large upfront investment of pipelines, the full-capacity operation is essential.[42] The best way to ensure the full-capacity operation is for the pipeline owner to own the upstream natural gas field or at least get an extended contract of throughput.[43] CACGP is operated in a monopolized market with one user and is regarded as a strategic facility, which may serve national purposes and can be dedicated to a specific gas field.[44] Enforcing the use of TPA in such a market could violate the property rights of investors and even the national energy security of importing states.[45] Hence, the non-discrimination treatment about access and condition in the second sentence of Article V:2 is hard to be effective. When the transport infrastructure matures in this area, TPA and MFN treatment will be a meaningful topic. Nevertheless, the non-discrimination treatment between different means of transport is essential when a transit country is allowing Liquefied Natural Gas (hereinafter "LDG") transit and restricting gas pipeline transit.

Article V:3 prohibits any unnecessary delays or restrictions as well as any transit duties concerning traffic in transit to guarantee the freedom of transit. A member is allowed to impose three types of charges: transportation charges, charges for administrative expenses entailed by transit, and charges for the cost of services rendered. Regarding the interpretation of "necessary",

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GATT Article V:2, V:3,V:4 may protect the transit freedom of CACGP according to this paper, so only TFA Articles 11 (1), (5), (6), (16) which clarifying the above provisions are discussed in this paper.

[39] *Colombia — Ports of Entry* Panel Report, *supra* note 30, ¶ 7.402.

[40] Thomas W. Wälde & Andreas J. Gunst, *International Energy Trade and Access to Energy Networks* 6 (2002), https://www.energycharter.org/fileadmin/DocumentsMedia/Events/20021003-EPS_Seminar_Waelde_Gunst.pdf.

[41] Danae Azaria, *Energy Transit Under the Energy Charter Treaty and the General Agreement on Tariffs and Trade*, 27(4) J. ENERGY & NAT. RESOURCES L. 559, 572 (2009).

[42] PAUL STEVENS, CROSS-BORDER OIL AND GAS PIPELINES: PROBLEMS AND PROSPECTS 16 (2003).

[43] *Id.*

[44] Pogoretskyy Vitaliy, *Freedom of Transit and the Principles of Effective Right and Economic Cooperation-Can Systemic Interpretation of GATT Article V Promote Energy Security and the Development of an International Gas Market?*, 16 (2) J. INT'L ECON. L. 313, 341 (2013).

[45] *Id.*

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Article 11(6) of TFA makes it clear that "formalities, documentation requirements, and customs control in connection with traffic in transit shall not be more burdensome than necessary to: (a) identify the goods; and (b) ensure fulfilment of transit requirements."

Article V:4 requires that all charges and regulations imposed by each Member on traffic in transit shall be reasonable. As to how to interpret "reasonable", Article 11(1) of TFA makes a clarification, any regulations or formalities with traffic in transit is not reasonable when "the changed circumstances or objectives can be addressed in a reasonably available less trade restrictive manner; applied in a manner that would constitute a disguised restriction on traffic in transit."

A pipeline is a combination of transportation (charges allowed) and routes (charges prohibited for the reason of transit). The transit country and the importing country may both be investors in the pipeline, making it difficult to distinguish between "rent" and transportation charges as well as government administrative cost. Therefore, the transparency of the contract and importing price, especially the calculation is a crucial requirement for China to invoke GATT Article V:3 and V:4 when transit states impose higher and unwarranted charges out of the contract.

Article V:5 extends MFN treatment to all charges, regulations and formalities for all "traffic in transit".[46] However, in practice, each pipeline usually has a bespoke contract in which the charges varies depending on geographical parameters, financing costs and ownership.[47] There is no "like" criterion for charges, regulations and formalities for different pipelines.

The argument of Article V:6 is mainly about whether the transit state or the destination state is obliged to give MFN treatment.[48] The panel in the *Columbia — Ports of Entry* case believes that Article V:6 extends MFN protection to a member which is the final destination of the goods.[49]

Through the analysis above, under GATT Article V, a cut off of existing pipeline transit will constitute a violation of the first sentence of Article V:2,which requires the absence of restrictions on transit and may be served as a basis for bringing a claim under Dispute Settlement Body (hereinafter "DSB"). Imposing high and unwarranted transit charges is not allowed by Article V:4. When a transit state interfere (or stop) the transit, it may resort to Article V:3 to demonstrate that this prohibition is based on local regulations, but these regulations and charges should be "reasonable" under Article V:4.[50]

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[46] *Colombia — Ports of Entry* Panel Report, *supra* note 30, ¶ 7.468.
[47] Azaria, *supra* note 41.
[48] *Colombia — Ports of Entry* Panel Report, *supra* note 30, ¶ 7.449.
[49] *Id.* ¶ 7.466.
[50] Kurmanov, *supra* note 2, at 24.

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V. APPLICABILITY OF GATT ARTICLE V TO PIPELINE GAS TRANSIT

A. Whether Gas Is a "Good"

Some scholars question whether gas and oil fall within the framework of the WTO multilateral trading system or whether GATT contractors intended for this.[51] The specifics of production and consumption distinguish energy from other products.[52] Nevertheless, the clarification of the GATT, according to the VCLT, reveals that this argument cannot be established.

First, the objects of adjustment in Article V:1 of GATT are "goods, ships and other means of transport". The general meaning of "goods" is broad and includes all "goods" and "transported items" to distinguish them from passengers.[53] The broad definition of "goods" can include energy because energy is a combination of substances (a mixture of hydrocarbons) that are bought and sold on the market like other commodities and then transported through pipelines.

Second, the *Harmonized Commodity Description and Coding System* includes headings for liquified natural gas (hereinafter "LNG") (code 2711.11) and gaseous natural gas (code 2711.21).[54] The *Harmonized Commodity Description and Coding System* is an international agreement outside the WTO, but the Appellate Body has determined that the *Harmonized Commodity Description and Coding System* is the context of the WTO Agreement in the sense of Article 31, paragraph 2 (a) of the VCLT.[55] The tariff schedules of WTO members and the *Harmonized Commodity Description and Coding System* thus prove that the term "goods" in the GATT includes energy products and gas.

Third, WTO members expressed particular concern about the pipeline gas transit issue when some gas transit countries and exporting countries entered the WTO.[56] This situation constitutes a subsequent practice of the provisions of Article 31, paragraph 3 (b) of the VCLT. For example,

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[51] Kenneth Aidelojie & Zen Makuch, *Multilateral Organizations, Fossil Fuel and Energy Law and Policy: The Tower of Babel Re-visited*, 17(4) EUR. ENERGY & ENVT'L. L. REV. 227, 230 (2008).

[52] Apart from energy, no other sector is so significant for the development of other sectors, including goods manufacturing and service provision. YULIA SELIVANOVA, THE WTO AND ENERGY: WTO RULES AND AGREEMENTS OF RELEVANCE TO THE ENERGY SECTOR 12 (2007), https://www.ictsd.org/sites/default/files/research/2012/03/the-wto-and-energy.pdf.

[53] The definition includes "(1) movable property or merchandise [and] (2) things to be transported". *See* DELLA THOMPSON, THE OXFORD DICTIONARY OF CURRENT ENGLISH (1993).

[54] World Customs Org. [WCO], *The Harmonized Commodity Description and Coding System*, U.N. TRADE STAT. (2017), https://unstats.un.org/unsd/tradekb/Knowledgebase/50018/Harmonized-Commodity-Description-and-Coding-Systems-HS.

[55] Appellate Body Report, *European Communities — Customs Classification of Frozen Boneless Chicken Cuts*, ¶¶ 194-99, WTO Doc. WT/DS269/AB/R, WT/DS286/AB/R (adopted Sept. 27, 2005) quoted in AZARIA, *supra* note 26, at 32.

[56] Mireille Cossy, Energy Transport and Transit in WTO, Panel at the Global Challenges at the Intersection of Trade, Energy and the Environment Conference (Oct. 22, 2009).

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Ukraine's WTO accession report includes energy-related commitments; the representative of Ukraine ensures that all its laws, regulations and other measures to regulate the transit of goods (including energy) are consistent with Article V of the GATT 1994 and other WTO-related provisions.[57] Russia's WTO Working Group Report noted that some members expressed concern about whether some oil and gas-related measures from Russia are consistent with GATT Article V. The representative from Russia stated that all measures for the transit of pipeline gas would be in line with Article V of the GATT.[58]

Fourth, the DSB has addressed cases of energy trade, such as the *US — Gasoline* dispute and the *Canada — Renewable Energy* dispute.[59] In these cases, whether gasoline and electricity are "goods" or "products" did not create an obstacle for the application of the GATT or the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[60]

B. Whether the Pipeline Is a "Means of Transport"

GATT Article V:1 covers "goods, ships and other means of transport." GATT Article V:2 stipulates that "no distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport." The word "means of transport" appears in both paragraphs of this article. "Other means of transport" opens the door for the interpretation to include pipelines while there are also conservative views.This view holds that if the means of transport or at least part of the means of transport does not pass through the territory of a country but is transported by a fixed facility, such as a wire or an oil and gas pipeline, then the transport is not considered to be transit.[61]

This opinion is specious and ignoring the fact that the train tracks are fixed as an integral part of train transport.[62] If we refuse to recognize

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[57] WTO, *Report of the Working Party on the Accession of Ukraine to the WTO*, ¶ 367, WTO Doc. WT/ACC/UKR/15 (Jan. 25, 2008).

[58] WTO, *Report of the Working Party on the Accession of Russian Federation to the WTO*, ¶ 1157, WTO Doc. WT/ACC/RUS/70 (Nov. 17, 2011), quoted in AZARIA, *supra* note 26, at 32.

[59] *See* Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter *US — Gasoline* Appellate Body Report]; Appellate Body Report, *Canada — Certain Measures Affecting the Renewable Energy Generation Sector*, WTO Doc. WT/DS412/AB/R, WT/DS426/AB/R (adopted May 24, 2013) [hereinafter *Canada — Certain Measures* Appellate Body Report].

[60] Panel Report, *Canada — Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ 7.328, WTO Doc. WT/DS412/R, WT/DS426/R (adopted May 24, 2013).

[61] *See* Mireille Cossy, *Energy Trade and WTO Rules: Reflections on Sovereignty over Natural Resource, Export Restrictions and Freedom of Transit*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 281, 297 (2012).

[62] Rafael Leal-Arcas et al., *Multilateral, Regional and Bilateral Energy Trade Governance*, 6 RENEWABLE ENERGY L. & POL'Y REV. 38, 45 (2015).

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pipelines as a means of transport, why are there charges of transport? Even if pipelines are not deemed to be a "means of transport", GATT Article V is still applicable to gas pipeline transit for such goods can be "traffic in transit". However, it is crucial to realize that if pipelines are not deemed to be a means of transport, then non-discrimination obligation between different means of transport contained in Article V:2 will be ineffective in the case of pipeline transit. That is to say, if a transit country prevents natural gas from transiting through a pipeline and claims to allow natural gas to transit through LNG, this measure does not violate Article V:2 because it does not constitute discrimination between different "means of transport".

Nevertheless, this research maintains that the pipeline constitutes a "means of transport" constantly and permanently "traffic in transit".[63] Several factors explain.

First, this article does not list all possible modes of transport but refers only to "ships" and "other means of transport". The only mode of transport that is explicitly excluded is the transit of aircraft, which is explicitly mentioned in Article V:7. This exclusion is mainly because the *1944 Chicago Convention* covers aircraft transit. Transit infrastructure such as pipelines and wires do not transit by themselves, but the transported goods are transiting and can be deemed to be "traffic in transit" in a broad sense.[64] Therefore, Article V itself does not support the interpretation of the exclusion of fixed infrastructure.

Second, Article 11 "Freedom of Transit" of the 31 May 2013 version of the TFA stipulates that it applies to the transport of goods through fixed facilities, such as wires or pipelines. However, the TFA that finally came into effect did not use the expression "through fixed infrastructure, such as wires or pipelines". Instead, there are two provisions that guide member states to implement their obligations under GATT Article V:2, when there are technical difficulties in transit freedom. Article 11(5) encourages members to provide physically separate infrastructure (such as lanes, berths and similar facilities) for transit wherever practicable. It is a non-exhaustive list of infrastructure, and other similar fixed infrastructure (such as grids and pipelines) can be included.[65] Article 11(16) states that members shall endeavour to cooperate and coordinate with one another with a goal of enhancing the freedom of transit. Both paragraphs require members to promote transit freedom through good-faith cooperation and coordination by providing separate infrastructure wherever practicable. Therefore, although the TFA failed to adopt the 2013 version, this does not mean that the final version excludes pipelines. The final version still uses the term "physically

[63] Azaria, *supra* note 41, at 569.
[64] Cossy, *supra* note 61.
[65] BEATRIZ HUARTE MELGAR, THE TRANSIT OF GOODS IN PUBLIC INTERNATIONAL LAW 286 (2015).

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separate infrastructure", and this term may include a "fixed infrastructure such as grids and pipelines".

Third, the term "means of transport" has a very general nature that must consider changing circumstances. The latest International Law Commission (hereinafter "ILC") *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation Of Treaties* (2018) have already acknowledged the interpretation of treaty terms as capable of evolving over time.[66] Thus, it is essential to determine the source of applicable law that can be consulted to assist in the interpretation of the evolving meaning of a treaty term.

The Appellate Body maintained that WTO agreements should not be read in isolation from public international law, which is a direct guide to its practice.[67] Therefore, all "relevant rules of international law applicable in the relations between the parties" should be relied on for the interpretation by virtue of Article 31(3)(c) of the VCLT.[68] The "rules of international law" include other international agreements, customary international law, and general principles of law.[69] These rules of international law provide a contemporary interpretation of the ordinary meaning of a term.[70]

As to what type of international agreements can be consulted, the Appellate Body of the *Shrimp — Turtle* case referred to the *United Nations Convention on the Law of the Sea* and the *Convention on Biological Diversity* to seek the contemporary meaning of "exhaustible natural resources", even though not all of the parties to the dispute were signatories of these instruments.[71] The Appellate Body constructed the meaning of the instrument through a legal technique that involves considering its normative environment.[72]

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[66] Conclusion 8 of the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties (2018) states that : "subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time." The TFA as a subsequent agreement regarding the interpretation of GATT Article V and the commitment of Ukraine and Russia about energy transit as subsequent practices demonstrate the evolving nature of the term in GATT Article V, see *Canada — Certain Measures* Appellate Body Report, *supra* note 59; Leal-Arcas et al., *supra* note 62.

[67] *US — Gasoline* Appellate Body Report, *supra* note 59, ¶ 17.

[68] Anja Lindroos & Michael Mehling, *Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO*, 16 EUR. J. INT'L L. 857, 865 (2005).

[69] ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 177 (2007).

[70] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 432 (2009).

[71] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 130, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *US — Shrimp* Appellate Body Report].

[72] Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 447, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

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However, the Panel of the *EC — Biotechnical Products* case maintained that all the parties to the treaty to be interpreted needed to be parties to the treaty that was consulted for interpretation under VCLT Article 31(3)(c).[73] Koskenniemi stated that this would have the ironic effect that when a multilateral treaty has more members, it is easier to be isolated from other public international laws.[74] Instead, it is better to allow the consultation of another treaty as long as the parties in dispute are also parties to this other treaty.[75]

In future cases, the WTO Panel and Appellate Body may refer to other treaties to clarify the general term "means of transport" in GATT Article V as long as the parties to the dispute are parties to the other treaties. For example, Article 7(10) of the ECT states that: "energy transportation facilities consist of high-pressure gas transmission pipelines, . . . and other fixed facilities specifically for handling energy materials and products." These are not traditional means of transport but are covered by the ECT, which may be consulted to provide the contemporary meaning of "means of transport" as long as the parties to the dispute are parties to the ECT.

VI. PROPOSAL FOR CHINA TO INVOKE GATT ARTICLE V TO PROTECT PIPELINE GAS TRANSIT FREEDOM

A. Promote the Acceptance of the TFA Under the BRI

The TFA plays an authentic role in the interpretation of GATT Article V. As a subsequent agreement, promoting the commitment of TFA could assist in the interpretation of GATT Article V.

The TFA is a legally binding multilateral trade agreement concluded by all of the WTO members. Under *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization*, the TFA should be inserted as an amendment into Annex 1A of *the WTO Agreement.*[76] In August 2018, the ILC issued *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties*. These conclusions provide the definition of a "subsequent agreement." Under VCLT Article 31(3)(a), "a subsequent agreement as an authentic means of interpretation under article 31, paragraph 3(a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation

[73] Panel Report, *EC — Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.68, WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R (adopted Nov. 21, 2006).
[74] Koskenniemi, *supra* note 72, ¶ 471.
[75] *Id*. ¶ 472.
[76] General Council, *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization*, at 2, WTO Doc. WT/L/940 (Nov. 28, 2014).

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of the treaty or the application of its provisions."[77] "The parties" in the conclusion above was clarified in the commentary: "The term 'the parties' indicates that such an agreement must be reached between all the parties to the treaty."[78] Furthermore, the commentary states that an agreement "regarding" the interpretation of the treaty or the application of its provisions is a subsequent agreement under VCLT Article 31(3)(a):

> The parties must therefore intend, possibly among other aims, to clarify the meaning of a treaty or how it is to be applied. Whether an agreement is one "regarding" the interpretation or application of a treaty can sometimes be determined by some reference that links the "subsequent agreement" to the treaty concerned.[79]

Besides, the preamble of the TFA stipulates that the TFA desires to clarify and improve Articles V, VIII and X of the GATT 1994.[80] Therefore, the TFA is a subsequent agreement that was reached among all the GATT parties regarding the interpretation or the application of the GATT provisions and is thus an authentic means of interpretation[81] under VCLT Article 31(3)(a).

The transit-related provisions in the TFA are in Article 11. Special differential treatment allows developing country and least developed country members to submit A, B, and C notices on the commitments that intend to apply the TFA. Category A refers to the provisions implemented as soon as the TFA is in effect, Category B refers to the provisions implemented after the designated transition period after the TFA takes effect, and Category C refers to the implementation after the specified transition period after entry into force and requires the acquisition of assistance and support for capacity building.[82]

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[77] Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 27 (Sept. 18, 2018).
[78] *Id*. at 28.
[79] *Id*. at 31.
[80] Ministerial Conference, *Agreement on Trade Facilitation*, WTO Doc. WT/MIN(13)/36, WT/L/911 (Dec. 11, 2013).
[81] In the *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, the Conclusion 3 states subsequent agreements is authentic means of interpretation. *See* Int'l Law Comm'n, *supra* note 77. Rep. of the Int'l Law Comm'n (Seventieth session), Chapter IV. *Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties,* U.N. Doc.A/73/10 (Sept. 18, 2018).
[82] *See* Agreement on Trade Facilitation, § 2, art. 14.1, added to the Marrakesh Agreement by General Cou cccvncil, *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization*, WTO Doc. WT/L/940 (Nov. 28, 2014) [hereinafter TFA].

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TABLE 2: Notification of Article 11(1), (5), (6), (16) by China and China-Central Asia pipeline transit WTO members

	Article11(1)	Article11(5)	Article11(6)	Article11(16)
China[83]	A	A	A	A
Kazakhstan[84]	A	C[85]	A	A
Tajikistan[86]	A	A	A	A
Kyrgyzstan[87]	A	Not yet notified	Not yet notified	Not yet notified

SOURCE: Author's Work, Based on the Notification List of TFA[88]

Kazakhstan is an important transit country for the CACGP, but the country notifies 11(5) under the category C, which means that the country is unable to implement this obligation until 2023. Kyrgyzstan has not notified under Article 11(5), (6), (16).

BRI proposes to promote "interconnection" among countries and regions along the route, and this will be achieved through some projects of infrastructure investment and capacity building. The implementation of BRI is inseparable from trade facilitation, and the two are inherently related. The *2017 Joint Communique of the Leaders Roundtable of the Belt and Road Forum for International Cooperation* proposed "promoting practical cooperation on roads, railways, ports, maritime and inland water transport, aviation, energy pipelines, electricity, . . . and major trunk lines to put in place an international infrastructure network over time."[89] Such an international forum can seek consensus through a soft law approach, reach a consensus and even an agreement, and facilitate the implementation of the TFA. For example, the Chinese government signed an *International Transport and Strategic Cooperation Agreement* with Uzbekistan, Turkey and Belarus in

[83] WTO, *Notification of Category a Commitments Under the Agreement on Trade Facilitation: Communication from China*, WTO Doc. WT/PCTF/N/CHN/1 (July 1, 2014).
[84] WTO, *Notification of Category a Commitments Under the Agreement on Trade Facilitation: Communication from Kazakhstan*, WTO Doc. WT/PCTF/N/KAZ/1 (Mar. 1, 2016).
[85] WTO, *Kazakhstan Makes Notification to Implement Article XI (5) on 22 February 2023. Notification of Category a Commitments Under the Agreement on Trade Facilitation: Communication from Kazakhstan – Addendum*, WTO Doc. G/TFA/N/KAZ/2/ADD.1 (July 26, 2019).
[86] WTO, *Notification of Category a Commitments Under the Agreement on Trade Facilitation: Communication from Tajikistan*, WTO Doc. G/TFA/N/TJK/1 (Aug. 12, 2019).
[87] WTO, *Notification of Category a Commitments Under the Agreement on Trade Facilitation: Communication from Kyrgyz Republic*, WTO Doc. WT/PCTF/N/KGZ/1 (Aug. 4, 2014).
[88] *Notification List*, TRADE FACILITATION AGREEMENT FACILITY (Jan. 5, 2020), http://www.tfafacility.org/notifications.
[89] Ministry of Foreign Aff. of the PRC [hereinafter FMPRC], *Joint Communique of the Leaders Roundtable of the Belt and Road Forum for International Cooperation*, FMPRC (May 16, 2017), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1462012.shtml.

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the forum.[90] China should adopt this new international platform for cooperation to promote the commitment of Central Asia countries to the TFA .[91]

B. Join the ECT

Transit is one of the highlights of the ECT.[92] The regulation of transit issues by the ECT is more specific than that of the GATT.[93] In this article, ECT is functioning as a source to assist in clarifying GATT Article V in light of VCLT, rather than functioning as a substitute of WTO.

WTO practice shows that one treaty could be interpreted by reference to another treaty.[94] ECT Article 7 can be used by a panel or an appellate body to codify the meaning of some general terms of GATT Article V. China is not a party to the ECT, but all other countries involved in the CACGP are parties to the ECT. The vague terminology in Article V of the GATT may be explained by invoking the provisions of the ECT once China joined it. In addition, when China signs a bilateral intergovernmental agreement with a transit country on pipeline transit, if both parties are parties to the ECT, it is natural to incorporate the provisions of the treaty into bilateral agreements, thereby increasing the standard of the freedom of transit. This will strengthen China's commitment to the rule of law and help China integrate more deeply into the international community.

The countries along the BRI geographically coincide with the Energy Charter and its potentially expanding regions. The majority of countries on the 'Silk Road Economic Belt' are already parties to the ECT. This coincidence shows that the close cooperation between China and the Energy Charter may achieve a strategic win-win situation and bring substantial benefits to both sides and the international community.[95]China's current energy demand and foreign investment are very similar to the energy demand and foreign investment in Europe when the Energy Charter was

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[90] *Yidaiyilu Guoji Hezuo Gaofeng Luntan Chengguo Qingdan* [*List of achievements of the Belt and Road Forum for International Cooperation*], MINISTRY FOREIGN AFF. CHINA (May 16, 2017), https://www.fmprc.gov.cn/web/zyxw/t1461873.shtml.

[91] FMPRC, *supra* note 89.

[92] Rainer Liesen, *Transit Under the 1994 Energy Charter Treaty*, 17 J. ENERGY NAT. RESOURCES L. 56, 56 (1999).

[93] WANG, *supra* note 27, at 44.

[94] Appellate Body Report, *United States — Tax Treatment for "Foreign Sales Corporations"*, WTO Doc. WT/DS69/AB/R (adopted July 23, 1998); Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/AB/R (adopted Jan. 10, 2001); Panel Report, *EC — Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc. WT/DS291/R (adopted Nov. 21, 2006); *US — Shrimp* Appellate Body Report, *supra* note71.

[95] WENHUA SHAN, ENERGY CHARTER SECRETARIAT, REPORT ON THE COMPATIBILITY OF CHINESE LAWS AND REGULATIONS WITH THE ENERGY CHARTER TREATY 12 (2015).

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established.[96] The cooperation between China and Central Asian countries has extended from the upstream exploitation of the value chain to downstream activities such as pipeline construction.[97] China should be used to building international law frameworks to resolve disputes, rather than through diplomacy.

VII. CONCLUSION

Frequent energy transit disputes indicate that issues related to energy transit are among the most essential issues in the multilateral energy trading system. Although the circumstances of the CACGP transit countries are diversified, the analysis shows that this pipeline is very vulnerable to the interruption of transit by transit countries.

By interpreting Article V of the GATT in accordance with Article 31 of the VCLT, GATT Article V can be applied to pipeline gas transit problems. As the GATT 1994's subsequent agreement in the sense of Article 31(3)(a) of the VCLT, the TFA plays an authentic role in the interpretation of GATT Article V. However, due to the weak binding nature of the TFA and the old infrastructures of Central Asia countries, their commitments to the TFA are not satisfied. According to Article 31(3)(c) of the VCLT and the practice of the Appellate Body, the ECT may be consulted to interpret GATT Article V. Becoming an ECT member state gives China a better reason to invoke its provisions to obtain the benefit of the contemporary meaning of certain terms in GATT Article V. Hence, while implementing the BRI, China should promote the commitment of the TFA along the route and join the ECT.

[96] *Id.*
[97] WANG, *supra* note 27, at 14.

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