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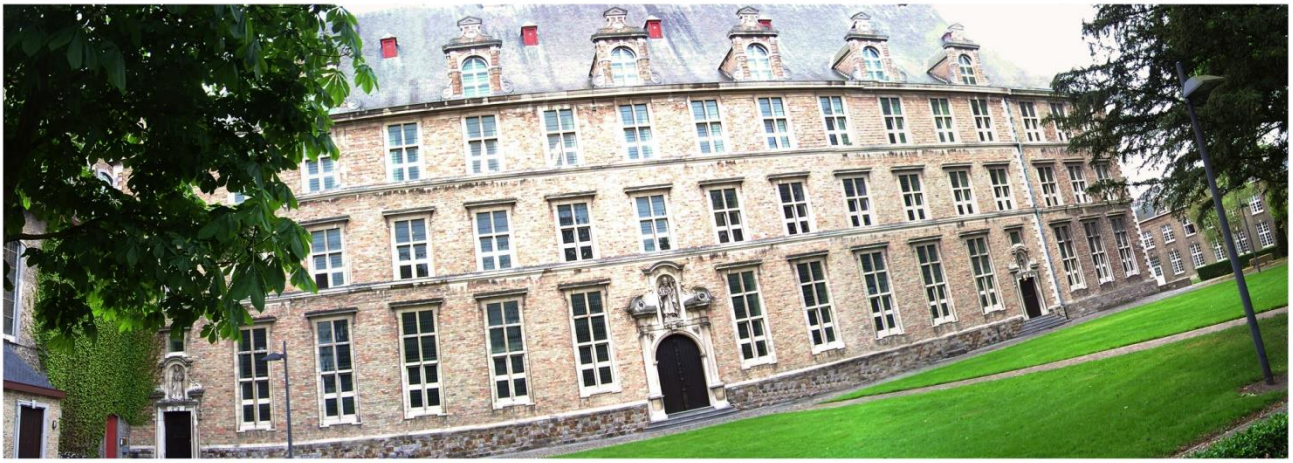
Inter-State Cooperation in Energy Transit



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Abstract

The authors discuss the ambiguities surrounding allusions often made to global energy governance, focusing mainly on the question of energy transit. They discuss how the issue has been sanctioned in various regimes in international law (including the UN Convention on the Law of the Seas, the Energy Charter Treaty and Article V of the General Agreement on Tariffs and Trade). They go further to expatiate on the complexities of this governance regime that is rendered even more convoluted by regional energy transit provisions included in important regional treaties such as those of the North American Free Trade Agreement (NAFTA), the Association of Southeast Asian Nations and the European Union (EU).

Introduction to Global Energy Governance

Energy engages almost every aspect of human endeavor in modern times. In the words of the Secretary-General of the United Nations (UN) Ban Ki-moon: "it is unimaginable that today's economies could function without electricity and other modern energy services. From job creation to economic development, from security concerns to the status of women, energy lies at the heart of all countries' core interests" (Ki-moon, 2011). Moreover, according to the International Energy Agency (IEA), "energy alone is not sufficient for creating the conditions for economic growth, but it is certainly necessary. It is impossible to operate a factory, run a shop, grow crops or deliver goods to consumers without using some form of energy" (OECD/IEA).

Furthermore, energy is the mainstay of today's economy in the developed world, in the rapidly industrializing developing world, and in other parts of the world. Such is its importance to the modern economy that energy security has been linked to national security. Yet one in five people in the world today has no access to electricity, and there are large inequalities in per capita energy consumption across countries (Hongbo, 2013). Such inequalities often have their roots in history, but some crucial questions arise: Is the global energy economy being collectively managed in an effective way that is steering us towards greater energy security for all? Is the global governance framework for energy security comprehensive and inclusive?

This paper examines, through the lenses of transnational policy networks,[1] the structure, mandate, membership, regulatory framework and extent of interconnection of one of the various pieces that comprise the patchwork that forms global energy governance today, namely energy transit. It aims to identify specific major omissions, failings and gaps in the global energy governance system. The very nature of energy – namely, its centrality to almost every field of human endeavor – and the very nature of traditional energy resources – namely finiteness, patchy global distribution, and high desirability – lead to the politicization of energy by creating the conditions for intense competition for control over energy resources between actors (Anghie , 2008). Whilst energy supply and consumption are important aspects of the global energy economy, they do not exist in an equilibrious relationship (Yergin, 2008). Rather, they are heavily mediated by political considerations and by the very operation of global markets, which dictate the extent to which energy needs are ultimately met (Yergin, 2008).

[1] Interesting literature has been published on transnational policy networks. See for instance A.-M. Slaughter, *A New World Order*, Princeton, NJ: Princeton University Press, 2004 (arguing that global governance is done through a complex global web of government networks by, for instance, exchanging information transnationally to solve global issues).

This paper is divided into four sections. After the introduction, Section II explains why the currently fragmented and multi-layered global energy governance is not conducive to global energy security. Section III deals with the cross-border and cross-regional transportation of energy resources as a key aspect of inter-State energy cooperation. The paper concludes with Section IV.

Fragmented and Multi-layered Global Energy Governance[2]

We argue that the currently fragmented and multi-layered global energy governance is not conducive to energy security that is truly global for a number of reasons. Despite the seeming overlaps between institutions and regimes dealing with the global energy governance system, gaps seem to emerge were one to examine the putative system in relation to its capacity to address global energy governance issues (Bhattacharyya, 2009; Florini, A. & Sovacool, 2009). It is not surprising that the current governance system over the global energy economy fails to address global energy security needs. A plausible way to improve global energy security for the near future is to promote more cohesive models and methods of inter-State cooperation and to promote more cohesive collaboration among the various institutions and processes that are connected to the global energy economy. It is necessary to address the weaknesses of the current energy governance system due to its fragmented nature through cooperation and partnerships, whether bilaterally, regionally or multilaterally.

Factors affecting the global energy governance regime

A thorough assessment of the evolution and workings of the current global energy governance regime is necessary, for which we need to consider the following factors:

Lack of cohesiveness of the energy governance system

That is to say, the energy governance system exists incidentally as an aggregation of various institutions and processes linked to the energy economy. In fact, very little suggests that the international community handles the global energy economy as a cohesive entity or concept. In this respect, it lacks the ontological basis - that is to say, both the mandate and the cohesive structure - to address global energy security.

Fragmentation of the global energy governance regime

Firstly, the fragmentation of the global energy governance regime reflects the progressive nature of its development. For instance, in 1947 a number of sovereign actors came together to lay down arrangements for the General Agreement on Tariffs and Trade (GATT) to provide disciplines focusing on global trade. Some years later,

[2] For further analysis, see Leal-Arcas, R. and Filis, A. "The Fragmented Governance of the Global Energy Economy: A Legal-Institutional Analysis," *Journal of World Energy Law and Business*, Vol. 6, Issue 4, pp. 1-58, 2013, Oxford University Press.

several States ratified the Kyoto Protocol in order to deal with greenhouse gas (GHG) emissions in the context of climate change mitigation (Leal-Arcas, 2010). Although neither of the two examples (namely the trading system and the climate change regime) is exclusively concerned with the global energy economy, they are significant elements of the global energy economy's trade and climate change aspects, respectively.[3]

Secondly, the fragmentation of the governance system over the global energy economy may also be viewed as reflecting the fact that sovereign States engage with one another to the extent that it is in their national interest. Efforts among States to promote their collective – let alone universal – energy security are considerably undercut by systemic constraints: namely by the very nature of international relations that are profoundly conditioned by market dynamics and by the fact that the international community is composed of States fiercely defensive of their respective national interests (Wenger, 2009).

Plethora of relevant entities

There is a plurality of international institutions, organizations and bodies that affect the global energy economy. Moreover, there is an obvious diversity of interests, including conflicts of interests, at the national, regional and international levels, pertaining to the energy economy and energy security. This plurality of international organizations relating to global energy as well as the diversity and variety of energy interests illustrate the sophisticated and fragmented complexity of global energy governance. At the same time, they render global energy economy governance not only highly fragmented, but also incoherent, controversial and unstable, encompassing several conflicts of interests.

Diversity of energy sources

Current over-reliance on traditional sources of energy (e.g., coal, petroleum, natural gas), which are finite and patchily distributed, leads to intense competition and renders energy security that is truly global less attainable (Andrews-Speed, 2008). There have even been calls to defend energy infrastructure militarily.[4] Were we to shift reliance of energy production to the exploitation of renewables (e.g., power derived from the sun, wind, oceans, and from the heat of the earth), which are abundant, more sustainable and

[3] For an analysis on the link between climate change mitigation and international trade, see generally Leal-Arcas, R. *Climate Change and International Trade*, Edward Elgar, 2013.

[4] See for instance Leibert, R.A. "The War on Energy: Why the United States and the International Community need Cohesive Energy Infrastructure Security Policy" (2007) 29 Hous J Int'l Law 453.

distributed more widely, the zero-sum logic that underlines inter-State energy relations could become obsolete.

Pursuit of national interests

For the most part, the genesis and evolution of international law suggests it to be a creature of consent between hegemonic States and, in the final analysis, to reflect the balance of their interests (Koskenniemi, 2005). The international community is merely a totality of disparate actors in that sovereign States have distinct interests and disparate levels of economic strength. Inter-State cooperation takes place to the extent that the interests of the most influential States sufficiently coincide. On certain aspects of the global energy economy – namely in relation to its trade aspects – there is sufficient agreement of interests that has resulted in degrees of global governance; on others, there is not. For instance, the exploration, extraction, production and allocation of energy resources currently take place on a very different footing to that of addressing global energy security. Namely, it takes place to the extent that it is profitable to the actors at the various stages of energy exploration and exploitation (Victor & Yueh, 2010). In an increasingly more globalized economy in which, to paraphrase Henry Kissinger, sovereign States consider their national interests over their *ad-hoc* alliances, it is perhaps naïve to currently expect there to be sufficient political will to set up a global energy security governance regime. Or rather, it is perhaps naïve to consider that the international community is composed of States that are economically equal or whose interests are sufficiently aligned to make such a global governance regime likely.

No unitary, cohesive and comprehensive universal regime to address global energy security

Starting from a universal perspective, it becomes clear that there is no unitary, cohesive and comprehensive universal regime exclusively set up to address global energy security. One may view the UN Charter, and the organization it has set up, as providing some loose top-level global governance that has incidental implications for the global economy, including for the global energy economy. For instance, it contains a normative framework with which inter-State relations ought to comply. It effectively prohibits international acts of aggression and preserves sovereign prerogatives over domestic matters, including the management of natural resources and especially of energy-related resources (Schrijver, 1997; Abu-Gosh & Leal-Arcas, 2013; Sornarajah, 2004; Lauterpacht, 1958). Other than this, arguably, there is neither a universal regime nor norms that could be said to be truly universal or that may be universally espoused. This is particularly the case in

relation to the position under general international law relating to the protection of investor interests (Sornarajah, 2004).

Whilst one witnesses instances of inter-State cooperation on energy security, these are evidently not global. For instance, although the regime under the Energy Charter Treaty (ECT) – principally concerned with promoting trade and investment interests in the energy/extractive industries of its Members – may, at best, promote the energy security of its membership, it is not of universal scope.

Given the enormity of the subject in scope, it would be reasonable to assume that there is a high degree of international cooperation around the governance of energy (Dubash, 2011). In reality, global energy governance – if indeed such a thing exists - is fragmented along thematic lines, and is normatively patchy at that. This is unsurprising given the realities of international cooperation. International cooperation does not occur on a disinterested basis; it occurs to the extent that it draws in the most influential States relevant to the matter in hand, and, conceivably, when their respective interests are sufficiently accommodated (Goldsmith, 2005).

Energy Transit

Global energy consumption continues to draw heavily on primary energy resources that, in addition to being highly polluting, are finite and patchily distributed across the globe. Very few States are truly energy sufficient and energy independent, hence the importance of transnational policy networks. Against this backdrop, it is no surprise that the cross-border and cross-regional transportation of energy resources (hereinafter 'energy transit') is no new phenomenon. This energy transit relies on a variety of means, including vessels and other means of transportation, and conduits such as cross-border overland and underwater pipelines, for bringing energy goods to markets. For instance, States such as Turkey and Ukraine are important energy transit States for European Union (EU) energy imports from the Caspian Sea region and from Russia.[5] Spats between, for instance, energy exporting States and transit States may cause such shocks to energy flows that have negative implications for consumer States' energy security. One such incident was the Russia-Ukraine dispute,[6] which brought the issue of energy transit sharply into focus by affecting EU energy markets and consumers, given that up to 20% of EU gas supplies transit via Ukraine[7].

Inter-State cooperation in relation to energy transit issues is less institutionalized than other areas of inter-State cooperation engaging energy (such as trade, investment protection or environmental protection) since there are no international agreements solely devoted to transit; rather, there are norms here and there that come together to produce some sort of inter-State governance framework for transit. The *freedom of transit* provisions of a number of international agreements and the *freedom of transit* norms of general international law (that is to say, norms not flowing from particular

[5] See for instance the report for the Committee on Foreign Relations, US Senate, "Energy and Security from the Caspian to Europe," 112th Congress, Second Session, 12 December 2012.

[6] Ukraine has historically enjoyed preferential prices for Russian gas imports destined for consumption in Ukraine. Presumably, the attempts from sections of Ukraine's economic and political elites to take a more pro-Western stance – e.g., through seeking NATO membership – may have led to Russia's decision to increase the price of gas sold for consumption in Ukraine. Ukraine reacted by continuing to use gas as if it had been purchased at historical rates and, as a consequence, less Russian gas transiting Ukraine pipelines destined for markets outside Ukraine ended up in those destinations. This resulted in several EU States experiencing energy shortages. For a rundown of this dispute, see http://news.bbc.co.uk/1/hi/world/europe/7240462.stm.

[7] See the 2011 EU Commission Communication to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, 'On security of energy supply and international cooperation - "The EU Energy Policy: Engaging with Partners beyond Our Borders"', 7 September 2011 (COM(2011) 539 final) (at p. 5). The IEA estimates that up to 84% of Russian gas supplies to the EU transit through Ukraine. See http://www.iea.org/countries/non-membercountries/ukraine/.

international law) are important elements of whatever inter-State governance exists in relation to energy transit.

UN and its Legal Order

On the occasion of the adoption of the 1958 Convention on the High Seas,[8] which enshrined the notion of a *freedom of transit* in a multilateral international agreement – an innovation up to that point – Lauterpacht carried out a comprehensive review of the notion of *freedom of transit* in international law, linking it to historical notions and to practices that had taken place between States, be these practices due to conventional or customary norms or due to other circumstances. In that respect, the legal notion of *freedom of transit* and its implications for such acute matters – such as sovereign prerogatives (e.g., to exclude others from their territory) and the voluntarist nature of international law – may properly be understood with reference to Lauterpacht's extensive study (Lauterpacht , 1958). There is debate as to the status of the notion of *freedom of transit* under customary international law[9]. This has implications for energy transit. In the absence of *freedom of transit* norms that flow from international agreements relevant to the States concerned, it remains unclear to what extent general international law countenances *freedom of transit*.

Successive international agreements adopted within the context of the UN – namely, the 1958 Convention on the High Seas[10], the 1958 Convention on the Territorial Sea and Contiguous Zone[11], the 1958 Convention on the Continental Shelf[12], and the 1982

[8] 450 UNTS 11. Done in Geneva on 29 April 1958 and entered into force on 30 September 1962. This international legal agreement at the time involved 46 signatories and currently involves 63 parties. See its status at http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XXI-2&chapter=21&lang=en#Participants.

[9] For instance, Ehring and Selivanova refer to this as a controversial notion that cannot be assumed to be reflected in customary international law. Their argument is predicated on the view that given that States had historically included transit provisions frequently in their bilateral treaties, that this may suggest the absence of an equivalent binding norm in customary international law. See Chapter 2 *Energy Transit* in Selivanova, Y., (ed.,), Regulation of Energy in International Trade Law: WTO, NAFTA, and Energy Charter, Alphen aan den Rijn: Wolters Kluwer 2012) (at pp. 51-52).

[10] See Article 3 of the Convention on the High Seas.

[11] See Section III *Right of Innocent Passage* (Articles 14-20), which restricts sovereign acts in the territorial sea of coastal States to the extent that the right of innocent passage is protected.

[12] See Articles 4 and 5.1 of the Convention on the Continental Shelf. Furthermore, whilst this international agreement allows coastal States to set up safety zones around their continental shelf installations from which to curtail the freedom of navigation and of laying cables or pipelines by third States, these safety zones should not exceed 500 meters beyond the installations in question (see Articles 15.2 and 15.3).

Convention on the Law of the Sea (UNCLOS)[13] – have come to strengthen the notion of *freedom of transit* in modern international maritime law. In that respect, these international agreements may be important elements to the notion of maritime energy transit – and, consequently, to inter-State governance of energy transit – to the extent that the States concerned are parties to these agreements. What is more, where these agreements are inapplicable, one would have to identify the strictures of customary international law that come to bear to such matters (Abu-Gosh & Leal-Arcas, 2013; Filis & Leal-Arcas, 2013).

World Trade Organization (WTO)

Within the WTO legal order, Article V GATT enshrines the *freedom of transit* of such commodities deemed to be *traffic in transit* (Article V:1). What is considered for the purposes of the WTO system to be *traffic in transit* is commodities from State X that are temporarily traversing the territory of State Y in order to be consumed in one (or more) third State. Under Article V, such *traffic in transit* ought to be exempt from customs duties and other encumbrances.[14] Moreover, Article V:2 expressly requires that the 'most convenient' route for international transit be made available to such traffic. This means whatever route is most convenient for the purposes of international trade, rather than for the purposes of the transit State.

However, it is not entirely clear how the tension is resolved between what is convenient to the transit State and what is convenient to the exporting and/or importing States (Azaria, 2009). As in the entire WTO legal system, Article V (namely Article V:2 & V:5)

[13] UNCLOS has come to revolutionize international maritime law by codifying norms over a wide range of maritime issues, including the delimitation of the territorial sea, continental shelf, and exclusive economic zone of coastal States, and the rights and obligations of third party States, including landlocked States. What is more, it promotes the *freedom of transit* in that several UNCLOS provisions touch upon transit/navigation and communication matters. Whilst UNCLOS lays down extensive rules that enshrine coastal States' rights to their territorial sea and other adjacent maritime areas, it also places restrictions on their sovereign control of these maritime areas in order to promote the interests of other States to navigation and communication. For instance, Part II, Section 3 (Articles 17 – 32) relates to the right of innocent passage through the territorial sea of coastal States; Part III, Section 2 (Articles 34 – 44) relates to the rights of States concerning the use of straits for international navigation; Part III, Section 3 relates to innocent passage (Article 45); Article 58 relates to the rights and obligations of other States in the exclusive economic zone of coastal States; Part IV, Article 79 relates to the rights of other States to lay cables and pipelines on the continental shelf of coastal States; Part VII, Article 87 relates to the freedom of the high seas, and Article 90 on the rights of navigation on the high seas; Part X (Articles 124-132) relates to the rights of landlocked States to and from the sea and their freedom of transit. For analyses on the delimitation of exclusive economic zones specifically in the East Mediterranean Basin, see

[14] Article V:3 GATT.

prohibits the application of the *freedom of transit* in a manner that discriminates between WTO members. What is more, as also is the case with other WTO provisions, Article V does not single out energy commodities, or any other type of commodity for that matter. In that sense, Article V incidentally, rather than expressly, applies to the transit of energy commodities, given that it is a general provision with scope over all intra-WTO trade in goods. That said, it is less clear what the implications of Article V are for energy commodities that are being transported via fixed infrastructure through the territory of a transit State. Does Article V mandate that a transit State ought to make, say, gas or oil pipelines in its territory – in other words, infrastructure that is fixed to its territory – available to all its WTO peers in an even-handed manner?

There is some controversy around this point. Azaria argues that we cannot assume that Article V applies automatically to such infrastructure.[15] Cossy, on the other hand, argues that nothing in the wording of Article V suggests that transportation via fixed structures ought to be excluded under Article V. She refers to the express exclusion in Article V of aircraft in transit and therefore seeks to argue that transit through fixed infrastructure falls within Article V[16] (Cossy, 2009). Faced with the strength of these arguments, and given what is at stake – namely the imposition of a potentially wider and more onerous obligation on WTO members that could amount to an unjustified incursion to their sovereign prerogatives – the authors consider Azaria's to be the better view.

It should be noted that *freedom of transit* within the WTO system has not concerned much the WTO's dispute resolution mechanism. There is a 2009 report by a WTO Panel in which the Panel interpreted the Article V *freedom of transit* as one that must be extended by a WTO member to all traffic in transit via the most convenient routes for the purposes of the trading WTO peer who seeks its goods to traverse the territory of the former (WTO Panel Report, 2009). The case involved the restriction on the part of Colombia of the

[15] Azaria argues that we cannot assume that Article V applies automatically to such infrastructure. Azaria argues this point by relating it to how the *freedom of transit* is envisaged elsewhere – namely in the ECT. ECT Article 7 expressly applies to fixed infrastructures. Incidentally, Azaria also makes a finer point about the possible interplay of Article V GATT and Article 7 ECT to state that, whilst GATT systemically influences the interpretation of ECT norms (for instance, Article 4 ECT expressly mandates non-derogation from GATT obligations, and, notably, the ECT mentions the term 'GATT' on 100 occasions), the reverse is not the case. Furthermore, she argues that the interpretation of Article 7 ECT is not influenced by Article 5 GATT, in that Article 7 ECT, on its own strength, mandates ECT contracting parties – who incidentally are also GATT/WTO parties - to facilitate transit, including via fixed pipes. Article V GATT does not condition this effect. Nor does the Article 7 ECT norm, on its own strength, condition how Article V GATT ought to be applied between WTO parties *inter se.*

[16] Cossy seems to rely on the interpretative principle that to expressly refer to one matter would imply the exclusion of whatever is not mentioned (namely *expressio unius est exclusio alterius*) by arguing that transit through fixed structures is within the scope of Article V.

points of entry for imports and for traffic in transit relating to textiles, apparel, and footwear. This restriction was underpinned by Colombia's concerns on the smuggling of such goods via Panama. The Panel found the measure inconsistent with Article V in that it restricted access in ways that were not convenient to trade flows, and in ways that discriminated between goods and between places of origin. This violated the requirement for unrestricted and non-discriminatory access for traffic in transit under Article V. The Panel's finding however, has no special relevance to energy transit. What is more, it does not address whether *freedom of transit* under Article V within the WTO context extends to fixed infrastructure such as gas and oil pipelines. This is hardly surprising given that the dispute in question did not relate to energy resources (Ehring & Selivanova, 2012).

Energy Charter Conference (ECC)

Within the ECT regime, freedom of transit is considered "a critical issue for the collective energy security [of ECT parties]… since energy resources are increasingly being transported across multiple national boundaries on their way from producer to consumer" (Energy Charter Secretariat, 2004). Article 7 ECT is a far more comprehensive provision than Article V GATT, not least due to Article 7 ECT being part of an energy sector specific regime. Similarly to Article V GATT, Article 7 prohibits discrimination in how the freedom of transit is extended between ECT parties[17]. Furthermore, Article 7 contains provisions on dispute resolution[18] and expressly refers to the *freedom of transit* extending to such fixed infrastructure as oil and gas pipelines[19] (Energy Charter Secretariat, 2004).

[17] See Article 7§1 &7§3. However, under Article 7§3, discrimination due to 'an existing international agreement' would not necessarily amount to a breach. In that sense, while there is a general *erga omnes partes* obligation to extend the freedom of transit 'in a manner no less favorable', this is displaced when there is a particular legal agreement in place. In that respect, the 'most favored nation' principle – that is to say, that a party extend towards all parties the most favorable conditions that are enjoyed by another party – does not apply to the Article 7 ECT freedom of transit. Also, note that Article 7§8 states that: "Nothing in this Article shall derogate from a Contracting Party's rights and obligations under international law including customary international law, existing bilateral or multilateral agreements, including rules concerning submarine cables and pipelines," thus elevating particular norms that may exist.

[18] Namely Article 7§6 & 7§7.

[19] See Article 7§10 (b). However, ECT parties are bound by a list of *understandings*, including one on Article 7, which states that: "The European Communities and their Member States and Austria, Norway, Sweden and Finland declare that the provisions of Article 7 are subject to the conventional rules of international law on jurisdiction over submarine cables and pipelines or, where there are no such rules, to general international law. They further declare that Article 7 is not intended to affect the interpretation of existing international law on jurisdiction over submarine cables and pipelines, and cannot be considered as doing so".

Unsurprising for an energy-focused regime, ECT provides the most elaborate governance for energy transit between its parties.

Shortly after the ECT came into force in 1998, the ECC decided in 2000 to launch negotiations for more specific rules on energy transit for the adoption of a separate *Transit Protocol* that have yet to result in any such agreement. These negotiations started in 2000 and were concerned with matters such as secure, efficient, uninterrupted and unimpeded transit; the efficient use of transit infrastructure, and the facilitation of construction and/or updating of transit infrastructure. However, on 29 November 2011, the ECC repealed the negotiation mandate for a Transit Protocol. This has not fully closed the door to future negotiations. The ECC Trade and Transit Group intended to consult on the prospects of future negotiations and to make recommendations to the ECC.[20]

North American Free Trade Agreement (NAFTA)

According to the web site of the US Department of Transportation's Federal Motor Carrier Safety Administration, the principal means of commercial transportation between the parties to NAFTA – namely Canada, Mexico, and the US – is territorial and vehicular via trucks. At that site, there is a rundown of the principal provisions with implications for transit issues. US trucks are not permitted to operate in Mexico, whilst Mexican trucks' operations are restricted to certain border zones within the US. This is so despite the initial plan for these restrictions to be entirely phased out between 1995 and 2000. This evidently places restrictions on transportation; however, it is not clear what the *freedom of transit* implications are concerning, say, traffic in transit originating in the territory of whichever NAFTA member, traversing the territory of either of the other NAFTA members in and destined for consumption in the remaining NAFTA member and/or any other State. What appears to have been happening is that traffic in transit, say, from Mexico to Canada or any other point in the US was required to be unloaded and then reloaded on other trucks in a buffer zone within the US for onward transportation[21].

[20] As of April 2013, no announcements had been publicized on the resumption of Transit Protocol negotiations. See the historical rundown in relation to the Transit Protocol negotiations and related activity at http://www.encharter.org/index.php?id=37.

[21] See http://www.fmcsa.dot.gov/intl-programs/naftatrans.htm for a more expansive version. Also, see the following article on this matter referring to a brief piloting of lifting these restrictions http://transportationnation.org/2011/10/25/first-ever-mexican-truck-crosses-border-under-nafta/.

Mexico appended Annex 602.3 to NAFTA to reserve the exclusive right to strategic activities, including the transportation of energy[22]. Whilst it is not clear what the implications on the *freedom of transit* may be in terms of Canada or US energy transit traversing Mexico for consumption to a third State, this appears to be a significant restriction to unbridled access to each other party's road infrastructure.

In relation to energy transit, the reservation on the part of Mexico illustrates that it is less free than general traffic in transit. All three NAFTA parties are WTO members. In that respect, the relationship between their obligations to ensure that there be *freedom of transit* according to Article V GATT and their NAFTA commitments and reservations would be of particular interest in instances where another WTO member such as Nicaragua commissions Mexican transportation services to transfer coal from Nicaragua to Canada, via Mexico and the US. In this arrangement, a third party – namely Nicaragua – would want to argue that the loading and reloading requirement breaches its *freedom of transit* rights under Article V.

Association of Southeast Asian Nations (ASEAN)

The Association of Southeast Asian Nations provides for some governance of transit between its members. However, this is not energy sector specific, although it does extend over energy goods in transit, given that these have not been excluded. Similarly to the WTO's Article V GATT regime, Article 5 of the 1998 ASEAN Agreement on the Facilitation of Goods in Transit relates to the freedom of transit, to which it refers in Article 3 and throughout the Agreement as 'transit transport'. Furthermore, the 2009 ASEAN Agreement on the Facilitation of Inter-state Transport further supports the freedom of transit of ASEAN members by obligating parties to that Agreement to grant

[22] See Annex 602.3: Reservations and Special Provisions: "The Mexican State reserves to itself the following strategic activities, including investment in such activities and the provision of services in such activities: a) exploration and exploitation of crude oil and natural gas; refining or processing of crude oil and natural gas; and production of artificial gas, basic petrochemicals and their feedstocks and pipelines; b) foreign trade; transportation, storage and distribution, up to and including the first hand sales of the following goods: (i) crude oil, (ii) natural and artificial gas, (iii) goods covered by this Chapter obtained from the refining or processing of crude oil and natural gas, and(iv) basic petrochemicals; c) the supply of electricity as a public service in Mexico, including, except as provided in paragraph 5, the generation, transmission, transformation, distribution and sale of electricity; and d) exploration, exploitation and processing of radioactive minerals, the nuclear fuel cycle, the generation of nuclear energy, the transportation and storage of nuclear waste, the use and reprocessing of nuclear fuel and the regulation of their applications for other purposes and the production of heavy water. In the event of an inconsistency between this paragraph and another provision of this Agreement, this paragraph shall prevail to the extent of that inconsistency" (emphasis added).

each other the right to 'inter-state transport' by allowing transport operators of each party to undertake transport of goods into and/or from the territories of the other parties, and to grant the right to load and discharge goods destined for or coming from other parties[23]. The 2009 Agreement defines 'inter-state transport' to mean transport of goods and the movement of means of transport into and/or from parties to that Agreement[24].

Neither the 1998 nor the 2009 Agreement makes any reference to traffic in transit/transit transport/inter-State transport in relation to fixed infrastructure such as pipelines, or even to energy, for that matter[25]. That said, energy-specific agreements exist within the context of ASEAN. The 1986 ASEAN Agreement on Energy Cooperation sets out the fields of cooperation. This Agreement was amended by its 1995 Protocol to add further fields of inter-State cooperation, including over the transportation and distribution of energy[26]. This is an element of the governance of energy transit within the context of ASEAN.

Furthermore, a 2002 Memorandum of Understanding between ASEAN members on the trans-ASEAN Gas Pipeline requires parties to conduct relevant studies on several cross-border matters, including transit issues[27]. There is also a 2007 Memorandum of Understanding on the ASEAN Power Grid that lays the foundations for cooperation over the progressive development of an ASEAN-wide electricity power grid, which would also be viewed as an important element of ASEAN governance over energy transit.

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[23] See Article 5.1 (a) & (b).
[24] See Article 3(e).
[25] The 1998 Agreement (at Article 3(c)) refers to *means of transport* to mean: "road vehicles, railway rolling stock, sea and inland waterways craft and aircraft" and the 2009 Agreement (at Article 3(f)) refers to *means of transport* to mean: "road vehicle, including those on-board roll-on/roll-off vessels".
[26] See Article 1 of 1995 Protocol, which amends Article 1.2 of the 1986 Agreement so as to include the "processing, handling, transport and distribution of various energy forms" as a field of cooperation between the parties to that Agreement. See http://www.asean.org/news/item/protocol-amending-the-agreement-on-asean-energy-cooperation-bangkok-15-december-1995.
[27] See Article III(f), which refers to: "acceptable measures which would facilitate the issuance of permits, licenses, consents, or other authorizations for transit Pipelines and natural gas being transported through the territory of such Member Country" as the transit issues within scope of this duty to carry out studies. For more information on the gas pipeline project, see http://www.petronas.com.my/our-business/gas-power/gas-processing-transmission/Pages/gas-processing-transmission/trans-asean-gas-pipeline.aspx.

European Union (EU)

The freedom of movement of goods across the EU is constitutionally entrenched[28]. This applies for energy flows across EU territory.[29] However, the EU has also energy-specific legislation in place to facilitate the integration of the energy markets across the EU[30]. Currently, the EU energy market and its infrastructure are not fully integrated. This is not down to the lack of a normative framework, but to the economic and geographic relations of energy. According to the Treaty on the Functioning on the European Union (TFEU), EU energy policy ought to aim at the promotion of the interconnection of energy networks[31]. The EU seeks to fully integrate its 28 members' electricity and gas markets by 2014 into the Internal Energy Market (IEM) (Commission to the European Parliament, the Council, the European Economic and Social Committee & the Committee of the Regions, 2011).

The EU has drawn several neighboring States into energy relations on the basis of the Energy Community Treaty with the aim of enhancing EU energy security by promoting regulatory convergence amongst the parties with a view to future integration of their respective gas and electricity markets[32] (Commission to the European Parliament, the Council, the European Economic and Social Committee & the Committee of the Regions, 2011; The Energy Community, 2015). In that respect, intra-EU energy transit and energy transit with neighboring partners are certainly no afterthought within the EU order. The TFEU (Article 26 and Title XXI TFEU) along with EU policies pursuant to it (e.g., the IEM and the Energy Community) are important elements of EU governance over energy transit within the EU and several neighboring third party States.

So far, the above provisions relate to energy transit within the EU, but not with the outside world. However, the relationship of the EU with the outside world also contains *freedom of transit* obligations. For instance, the EU alongside its 28 members (and the

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[28] See Article 26 of the Treaty on the Functioning of the European Union (TFEU).
[29] For a detailed analysis of EU energy security, see Leal-Arcas, R. and Filis, A. "Conceptualizing EU Energy Security through an EU Constitutional Law Perspective," *Fordham International Law Journal*, Vol. 36, Issue, 1, 2013.
[30] Under Article 4§1(i) TFEU, *energy*, in its wide sense, is expressly referred to as a matter of shared competence. This allows the EU to act (including to legislate) in relation to energy in a manner that is proportionate and effective without unduly encroaching on the sovereign rights of EU member states. That said, certain energy related matters however are the exclusive competence of the EU under Article 3 TFEU, given that they may engage the competitive conditions of energy trade within the internal market, the question of tariffs when third country energy commodities cross an EU border.
[31] Article 194§1(d) TFEU.
[32] The Energy Community Treaty is an international agreement between the EU and several third-party States. It currently involves the following parties: the EU, Albania, Bosnia & Herzegovina, Kosovo, Macedonia, Moldova, Montenegro, Serbia, and Ukraine. The European Commission states that the Energy Community ought to be promoted with third-party States who are negotiating or concluding an FTA with the EU.

broader membership of the European Economic Area) are parties to WTO and thus subject to GATT Article V *freedom of transit* obligations owed to WTO members. What is more, the EU is also a party to the ECT – in that respect, ECT Article 7 *freedom of transit* obligations (which, as we have seen are energy specific and extend to transit though fixed infrastructure) that are owed to its ECT peers must also be respected.

Conclusion

There is not a single international organization that deals with global energy governance, nor is there a single agreement that deals with energy in a comprehensive manner. Instead, there is a multitude of instances of inter-State cooperation that touches upon energy and thus the global energy economy. The realities of inter-State cooperation – namely the nonlinear and *ad hoc* occurrence of cooperation – have led to matters relating to energy being dealt with in a manner that lacks absolute cohesion. There is a wide range of institutions that pertains to the global energy economy; yet there is a misalignment between their respective purposes and mandates.

Although there is a degree of overlap between the remits of a number of relevant institutions, there is insufficient cohesiveness between these. In that respect, the fragmentation of international law is simply a reflection of the realities of inter-State cooperation. Though jurisprudential tools exist to cohesively integrate the international obligations of States in a manner that such obligations be discharged sympathetically *inter se*,[33] the issue is essentially political and can be more effectively addressed through those means. In reality, obligations are discharged outside the remit of judicial processes, and when disputes arise, not all of these end up before an adjudicative agency. So it is one thing to ask how these obligations ought to be discharged, and quite another what ends up happening on the ground.

There is a normative patchwork that emerges to amount to a global energy governance system of sorts. However, in our view, it is more accurate to describe it as an aggregation of stand-alone instances of inter-State cooperation that relate to energy, but that insufficiently link up on other levels, including scope and governance. In that sense, there is currently insufficient cohesive governance amongst the various fields of energy-related inter-State cooperation to justify the presumption of an emerging global governance system. Nor is it helpful that much of the literature refers to *global energy governance* without sufficiently highlighting the arbitrary nature of this abstraction. Though we might see much merit in such a system, it is more accurate to talk about governance in the specific themes that engage, or otherwise relate to, global energy governance, which incidentally is never truly *global*, though there are examples of near universal reach – e.g., the WTO in relation to trade and the UN Framework Convention on Climate Change in relation to environmental protection.

[33] See McLachlan, C. 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention,' *ICLQ* Vol. 54, April 2005 [279-320], for an exposition of the means and how these have been deployed by the International Court of Justice, the WTO Panel and Appellate Body, and the European Court of Justice.

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