

Pipelines and Countermeasures

1. Introduction

The question about the relationship between pipelines and countermeasures is crucial for energy security reasons, as well as owing to economic and human rights concerns.

In the UN era, where forcible responses to wrongfulness are prohibited, countermeasures in the form of suspending compliance with obligations in the energy sector rank high—if not first—among the available responses with significant effects and corresponding persuasiveness. This is because access to energy is vital for States: their economies and the survival of their populations depend on it.

Since there is no rule under customary international law that specifically requires States not to interfere with energy flows through pipelines in their territory, the issue is about the relationship between, on the one hand, treaties establishing such obligations, and the customary rules on State responsibility, on the other hand.

In my discussion, I will touch on some examples of treaties that deal with energy flows via pipelines: the WTO Agreement, GATT Article V, which deals with transit and applies to transit flows via existing pipelines; the Energy Charter Treaty Article 7 which requires CPs to facilitate transit through pipelines in their territory; and finally bespoke agreements concerning pipelines around the world, such as the West-Africa Gas Pipeline Agreement, the BTC Agreement, the Trans-Adriatic Pipeline Agreement – just to name a few. Bespoke pipeline treaties contain obligations not to interrupt transportation or flows through the specific pipeline, irrespective whether the flows are in transit or simply cross-border flows.

Countermeasures under custom, have a dual function: first, they are a means of implementing responsibility for a breach of international obligations - they are intended to induce the responsible State to comply with its obligation to cease the wrongful act and to make reparation. Second, countermeasures involve the breach of international law. However, because they are taken in response to a previously wrongful act by another State, their own wrongfulness is precluded. I will focus on the function of countermeasures as circumstance that preclude wrongfulness.

More specifically, first, I will discuss whether there are provisions in treaties concerning pipelines that exclude countermeasures. Second, I will examine whether the conditions of lawfulness of countermeasures under custom would be

met when countermeasures take the form of interrupting energy flows via pipelines.

2. The Relationship between Treaty Provisions and Countermeasures as Circumstances Precluding Wrongfulness

Countermeasures, as circumstances precluding wrongfulness, may be displaced by treaty *lex specialis*. For this to happen, there needs to be an overlap in subject matter and an intention to deviate from general rules. Both are a matter of interpretation of a particular treaty provision.

Two treaty practices have emerged: First, some treaties include security exceptions. Second, bespoke pipeline treaties do not include security exceptions. I will examine these different treaty provisions to assess whether they exclude countermeasures.

2.1 Security Exceptions

Examples of the first treaty practice are GATT Article XXI and ECT Article 24. They both use very similar language. GATT Article XXI reads:

‘nothing in this agreement shall be construed [...] (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests [...] (ii) taken in time of [...] other emergency in international relations’.

ECT Article 24(3) uses almost identical language:

‘The provisions of this Treaty [other than those referred to in paragraph (1)] shall not be construed to prevent any Contracting party from taking any measure which it considers necessary: (a) for the protection of its essential security interests including those [...] (ii) taken in time of [...] other emergency in international relations [...] Such measure shall not constitute a disguised restriction on Transit.’

2.1.1 Case law and Preparatory Works

Concerning ECT Article 24, there is no decision by an inter-State or investor-State arbitral tribunal that has dealt with the relationship of Article 24 with circumstances precluding wrongfulness under custom. The preparatory works of the ECT also do not reveal anything about whether the security exceptions were intended to displace countermeasures. My research in the subsequent practice of ECT CPs, especially in the context of transit and trade disputes, does not reveal

any agreement between them as to the relationship between Article 24 and countermeasures.

Concerning GATT Article XXI, the WTO AB has also not dealt with this question. However, the case brought by Qatar against UAE will likely deal with this issue.

The preparatory works of 1994 GATT they are inconclusive as to the relationship between Article XXI and countermeasures. The subsequent practice of 1947 GATT Contracting Parties (as supplementary means of interpretation of 1994 GATT) demonstrates the lack of agreement that countermeasures are excluded by virtue of security exceptions.

2.1.2 Ordinary Meaning

Under the law of State responsibility, to the extent that it is set forth in the Articles on State Responsibility adopted by the ILC in 2001, circumstances precluding wrongfulness are secondary rules.

However, the ordinary meaning of the language ‘nothing shall be construed to prevent States from action’ in both GATT Article XXI and ECT Article 24 indicates that the provision is concerned with permissible conduct of treaty parties; these provisions delineate the scope of the primary obligations under the GATT and the ECT respectively. If the conditions of security exceptions apply, there is no violation of GATT or the ECT, and there will be no recourse to the law of State responsibility, such as countermeasures.

The ad hoc annulment committees in *CMS v. Argentina* (2007) and in *Sempra v. Argentina* (2010) have taken this view in relation to state of necessity and its relationship to security exceptions in BITs. This was also the reasoning of the PCIJ in the *Railway Traffic* Advisory Opinion in relation to ‘reprisals’ and the vital interests exception in the Barcelona Convention (1931).¹

It could be argued that some circumstances precluding wrongfulness reflected in the ASR operate as justifications of wrongful conduct, while others as excuses of responsibility for wrongful conduct. Under this line of reasoning, countermeasures, for instance, may be justifications of wrongful conduct, while state of necessity is an excuse of responsibility.

¹ *Railway Traffic between Lithuania and Poland (Railway Sector Landwarón-Kaisiadorys)* (Advisory Opinion) PCIJ Rep Series A/B, No 39, 107.

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However, even if that were the case, Article XXI and ECT Article 24 would not overlap with the scope of countermeasures. The exceptions under GATT Article XXI and ECT Article 24 are concerned with protecting ‘essential security interests’ in times of ‘war or other emergency in international affairs’. In contrast, countermeasures are concerned with inducing compliance of a responsible State with its international obligations to cease wrongful conduct and to make reparation, irrespective of whether the essential security interests of the State taking the countermeasure are being protected, and irrespective of whether they are taken in time of war or other emergency in international affairs.

GATT Article XXI and ECT Article 24 do not exclude countermeasures as circumstances precluding wrongfulness – these remain available and the transit State may lawfully interrupt energy transit, assuming that this conduct meets the conditions of lawfulness of countermeasures under custom.

2.2 Language Other than Security Exceptions

On the other hand, often bespoke pipeline treaties do not include similar security exceptions.

Rather they include a provision that either use absolute language, such as ‘States shall at all times ensure that flows in the pipeline are not interrupted’ (e.g. BTC Agreement).

Others include a provision that expressly requires States not to suspend performance of the treaty, and as a separate matter they expressly prohibit parties from suspending the treaty’s operation on the ground of material breach under the law of treaties (e.g. West-Africa Gas Pipeline Agreement).

And others explicitly refer to the suspension of performance of treaty obligations, which is a paradigmatic language that overlaps with the function of countermeasures. However, they subject such suspension to the consent of all other parties (e.g. Trans-Adriatic Pipeline Agreement).

In all these cases, an argument may be made that the treaty provisions displace unilateral countermeasures in the form of suspending compliance with the treaty obligation not to interrupt energy flows via the pipeline. Treaty parties to such agreements would not be able to resort lawfully to countermeasures in this particular form.

3. Situations where no treaty governs the pipeline or where the measures do not meet the requirements of security exceptions within a treaty

It follows that countermeasures in the form of interrupting energy flows via pipelines are available to States: (a) where the treaty does not include language that prohibits unilateral countermeasures; and (b) in instances where security exceptions exist in the treaty, but the State invoking security exceptions has not met the requirements of the security exceptions.

In such cases the numerous and stringent conditions of lawfulness of countermeasures become important.

I will only touch on two conditions here that would render unlawful altogether the countermeasure in question, rather than precluding the wrongfulness vis-à-vis the responsible State but not vis-à-vis other innocent States. First, that countermeasures cannot affect fundamental human rights obligations; and second, that they have to be proportionate to the injury suffered.

3.1 Prohibition of an Effect on Fundamental Human Rights Obligations

If individuals are deprived of sufficient heating, water, sanitation and medical assistance or the use of medical equipment in hospitals or at home due to interruptions of electricity, oil and gas, there may be loss of life, or individuals may be subject to degrading treatment or their health may be put at risk.

2. The rule that countermeasures shall not ‘affect obligations for the protection of fundamental human rights’ covers situations where a State suspends compliance with international obligations and by such conduct affects its human rights obligations.

However, this prohibition faces numerous limitations.

3.2.1.1 Extraterritorial Application of Human Rights

4. I will focus on two: the extraterritorial *application* of human rights obligations, and the *effect* on human rights.

5. Human rights obligations apply within the territory of the State, and extraterritorially, where the State exercises control. Unlike situations where State organs are present in areas outside the State’s territory and exercise control over a particular area (*Loizidou v. Turkey*; or full and exclusive control over a prison or a ship respectively: *Al-Skeini v. UK*; *Medvedyev v. France*) or over a particular individual (*Ocalan*

v. Turkey), interrupting energy supplies involves **conduct in the territory of the reacting State, which produces effects on individuals located in the territory of the targeted State.**

9. The case law of the European Court of Human Rights concerning territorial conduct, which has extraterritorial effects, is limited. It has however found that individuals fall within the 'jurisdiction' of a State, where its organs are located within its own territory (or where the state exercises effective control), but are in close vicinity to the victims that are located in another State and there is a direct and immediate link between their conduct and the effect on the individual. (*Andreou v. Turkey* 2008; *Nada v. Switzerland*).

10. According to this line of reasoning, interruptions of energy flows may fulfil the vicinity and the causation link criteria in exceptional situations where the importing state is wholly dependent on established energy flows from the exporter or transit route.

11. However, the case law where such threshold has been established is confined to obligations to abstain from interfering with the enjoyment of rights. States are obliged not to kill, not to subject individuals to degrading treatment, and not to put at risk the health of individuals that are located in the territory of another state.

12. By contrast, obligations to take positive measures to protect the right to life, freedom from degrading treatment or the right to health by providing energy (or food and medicine for that matter) **does not apply** in such extraterritorial manner. No case law (or state practice) as yet supports (albeit it does not preclude) the view that obligations to take positive measures to protect human rights apply in such manner.

12. On the other hand, an attempt could be made to overcome altogether the distinction made between, on the one hand, obligations to respect human rights by abstention, and on the other hand, obligations to protect and fulfil the enjoyment of human rights by taking positive action.

13. *First*, it could be argued that the dichotomy is not doctrinally sound, especially given that the text of human rights treaties may be interpreted as not introducing this distinction when it comes to their application. Even ECHR Article 1 refers to the obligation of Contracting Parties to 'secure' the rights of individuals within their 'jurisdiction' and does not distinguish between negative and positive obligations. Nonetheless, no case law (or state practice) as yet supports (albeit it

does not preclude) the view that obligations to take positive measures to protect human rights apply in situations of territorial conduct having extraterritorial effect.

14. *Second*, in situations of established energy flows and of absolute dependence on energy from a particular exporter or coming through a particular transit state (with no conceivable or reasonable alternative source of energy, and where there has been reliance over time on the basis of contractual arrangements) by interrupting energy transit/exports to individuals in another state the transit/exporter state would breach its obligation not to interfere with the right to life and health. This argument is reasonable, but it has not yet been tested in case law.

15. *Third*, it could be argued that the condition that countermeasures do not affect human rights obligations is presumed to apply extraterritorially. Neither the ASR and its Commentary nor ARIO and its Commentary expressly address the extraterritorial application of the human rights obligations. The ILC Commentary to the ASR refers to General Comment No. 8, which deals with the extraterritorial effects of sanctions and countermeasures not only in the form of abstaining from interfering, but also with the positive aspects of obligations to protect human rights. However, there is insufficient evidence that the intention was to overcome the restrictive scope of application of human rights obligations through the *renvoi* established in the rule concerning the lawfulness of countermeasures in ASR Article 50(1)(b). Rather, the provision was heavily inspired by humanitarian considerations, and the complications of the rule envisaged in ASR Article 50(1)(b) were not directly addressed by the ILC.

3.2.1.2 'Effect' on human rights obligations

16. Even assuming *arguendo* that the 'jurisdiction' threshold would be fulfilled, it would have to be proven that the *effect* on human rights of individuals in the targeted State *is the result* of the countermeasure. Such link depends on the facts.

17. The reacting State could even argue against the existence of such link because the targeted state has not taken the necessary measures to protect the human rights of individuals within its territory (by mitigating the effects of energy crises by taking pre-emptive or other measures: such as storage or entering into energy sharing mechanisms, such as the IEA mechanism of oil stockpiling and demand restraints; or the EU Gas Security mechanism.)²

² IEA: Articles 2-3, *Agreement on an International Energy Program*, 1040 UNTS 271 (18 November 1974, as amended 2002); *Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC*, OJ L 295/1, 12.11.2010.

18. For all these reasons, it is unlikely that the rule that countermeasures shall not affect fundamental human rights obligations would render unlawful countermeasures in the form of interrupting energy flows via pipelines.

3.2.2 Proportionality

1. However, such countermeasures may in certain circumstances seriously affect the ability of the targeted State to perform its own human rights obligations vis-à-vis individuals within its own territory. These include obligations to respect human rights by abstention, and obligations to protect human rights by positive action.

2. A countermeasure that has such an effect is likely to be disproportionate to the injury suffered (ASR Article 51). This because the condition of proportionality under custom requires a State to take into account its own *rights* and the rights of the responsible targeted State. It may thus be argued that *all the more so it covers the ability of the targeted State to comply with its human rights obligations*.

4. Conclusion

To conclude, countermeasures in the form of interrupting energy flows via pipelines are not unlawful, despite their effect on individuals, except in *some circumstances*, such as where countermeasures may curtail the ability of the targeted State to comply with its own human rights obligations. In all other instances, and in the absence of *lex specialis*, such countermeasures remain an available and very convincing means of enforcement of international obligations.