

Community Interest Obligations in International Energy Law: A European Perspective

1. Introduction

It is a *fact* that the EU and its Member States are major oil and gas importers. The EU imports 90% of the oil it consumes, and 66% of the gas it consumes.¹ It is thus not surprising that one of the major legislative reforms in the Treaty of Lisbon was the addition of a new Title on Energy, and that EU Energy Law is expanding, with further developments to be expected as the European Commission has made a new proposal for an 'Energy Union'. It is also *true* to say that given the need for imports of energy the relationship of the EU and Member States with third states in the energy sector cannot be underestimated. The 2009 gas crisis that occurred in Europe, owing to a dispute concerning exports and transit between Ukraine and Russia, affected numerous EU Member States and states in the Balkan region.² The conduct of third states in this respect has triggered the development of EU secondary legislation (e.g. the 2009 crisis led to the adoption of the 2010 Gas Security of Supply Regulation).³ At the same time, the relationship with third states is governed by international law. The EU and its Member States are party to numerous treaties with third states that apply to energy trade and investment, and the number of treaties concluded between Member States and third states has been growing, demonstrating a move by Member States to diversify sources of supply and routes of supply.

This treaty practice - partly driven by an effort to secure uninterrupted energy supply - raises a number of legal questions.⁴ This study focuses on the relationship of treaties concerning energy activities with the law of international responsibility. Whether and in which manner and to what extent 'reciprocity', 'global reciprocity' or 'community interests' are reflected in primary rules of international law determines who has standing to invoke responsibility, and which remedial rights and enforcement means, including countermeasures, are available to the injured subject and to subjects other than the injured subject, under the secondary rules on international responsibility.⁵ At the same time, because access to energy is vital for states - their economies

¹ Information available at: <https://ec.europa.eu/energy/en/topics/energy-strategy/energy-security-strategy>.

² Deal to End Russia's Cut off of Gas Remains Uncertain, New York Times, 9 January 2009. For analysis of the 2009 dispute between Ukraine and Russia: D. Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* (OUP, 2015), pp. 4-5 and 90-93.

³ *Regulation 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 L295/1, 12.11.2010.

⁴ Other questions that fall beyond the scope of this study include the allocation of external competence in relation to energy trade, the compatibility of EU law with treaties between EU member states and third states, and the relationship between these treaties and customary international law.

⁵ On definition and distinction of primary and secondary rules: Special Rapporteur Ago, *First Report on State Responsibility*, ILCYB 1970, Vol. II, p. 306, para. 66.c: 'it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper'. Injured subjects may invoke the responsibility of the responsible subject with a view to claiming cessation, guarantees of non-repetition and reparation: Article 42, *Text of the draft articles on the responsibility of States for internationally wrongful acts*, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001, Vol. II, pp. 26-30 ('ASR'); Article 43, *Text of the draft articles on the responsibility of international organizations*, Report of the International Law Commission, Sixty-third session (26 April-3 June and 4 July-12 August 2011), General Assembly, Official Records, Sixty-sixth session, Supplement No. 10 (A/66/10), pp. 52-66 ('ARIO'). Subjects other than an injured subject may invoke the responsibility of the responsible subject claiming cessation and guarantees of non-repetition (ASR Article 48(2)(a); ARIO Article 49(4)(a)). As a matter of progressive development of the law (rather than *lex lata*), the latter subjects may claim reparation in the interest of the injured subject or of the beneficiaries of the obligation breached (ASR Article 48(2)(b); ARIO Article 49(4)(b)). Injured subjects may resort to countermeasures (ASR Article 49; ARIO Article 51), while in 2001 and 2011, when the ASR and ARIO were adopted (respectively) by the International Law Commission ('ILC'), it was contested that subjects other than the injured subject were entitled do so (ASR Article 54; ARIO Article 57). Contra: L.-A. Sicilianos, in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility* (OUP, 2010), pp. 1137-1148 at 1146-1148.

and the survival of their populations depend on it⁶ - countermeasures in the form of suspending compliance with obligations in the energy sector rank high among the permissible responses to wrongfulness carrying significant effect and corresponding persuasiveness. The nature of primary obligations of international energy law, meaning the rules of public international law that govern energy activities, may also be relevant for determining whether suspending compliance with such obligations can be a lawful countermeasure.

These issues are of exceptional practical importance to the EU, its Member States and its neighbourhood, as they lie at the heart of energy security considerations. The following analysis will first place primary obligations of international energy law of particular relevance to EU and/or EU Member States in the context of the pendulum that swings between bilateralism and community interest, and second it will examine how secondary rules on (energy-related) countermeasures take into account community interest obligations. The intention is to place international energy law within the broader field of public international law. The European angle is used as a context that reveals the complexities surrounding the exercise of identifying the structure of primary rules, and that assists in better understanding the application of international responsibility in the context of international energy law.

2. From Bilateralism to Community Interest in Treaties of European Concern

Standing to invoke responsibility for a breach of an international obligation depends on the nature of primary obligations. In 2009, transit and export of gas to the EU were interrupted contrary to Ukraine's obligations of transit (under the WTO Agreement and the ECT) and Russia's obligations of export (under the ECT). Yet the EU and its Member States did not invoke the responsibility of either of the two states. However, the fact that responsibility has not been invoked does not perforce mean that responsibility has not been engaged; nor does it necessarily mean that the EU and/or its Member States lacked standing to invoke responsibility. The decision to invoke responsibility is a political one.

The following sections will discuss: first, the classification of international obligations with a view to identifying standing to invoke responsibility for their breach; and second, the classification of obligations relevant to energy activities in the following treaties to which either the EU and/or EU Member States are parties along with third states in the following sequence: the WTO Agreement, the Energy Charter Treaty ("ECT"), and bespoke pipeline treaties: the Nabucco Pipeline Agreement,⁷ the Trans-Adriatic Pipeline Treaty,⁸ and the bilateral treaties for the South Stream pipeline.⁹

⁶ *Case 72/83 Campus Oil and Others v. Minister for Industry and Energy* [1984] ECR 2727, para. 34.

⁷ Agreement among the Republic of Austria, the Republic of Bulgaria, the Republic of Hungary, Romania and the Republic of Turkey Regarding the Nabucco Project, 13 July 2009: http://www.mfa.gov.hu/kum/en/bal/actualities/spokesman_statements/090713_nabucco.htm.

⁸ Agreement among the Republic of Albania, the Hellenic Republic and the Italian Republic relating to the Trans-Adriatic Pipeline Project, 13 February 2013: <http://nomoi.info/ΦΕΚ-Α-267-2013-σελ-93.html>

⁹ Treaties for the South Stream pipeline between Russia and EU member states: Agreement between the Government of the Republic of Bulgaria and the Government of the Russian Federation on Cooperation in the Construction and Operation of the Gas Pipeline in the Territory of the Republic of Bulgaria, 18 January 2008; Agreement between the Government of the Republic of Hungary and the Government of the Russian Federation on Cooperation in the Construction and Operation of the Gas Pipeline in the Territory of the Republic of Hungary, 28 February 2008; Agreement between the Government of the Hellenic Republic and the Government of the Russian Federation on Cooperation in Construction and Operation of the Gas Pipeline on the Territory of the Hellenic Republic, 29 April 2008; Agreement between the Government of the Republic of Slovenia and the Government of the Russian Federation on Cooperation in the Construction and Operation of the Gas Pipeline in the Territory of the Republic of Slovenia, 14 November 2009; Agreement between the Government of the Republic of Austria and the Government of the Russian Federation on Cooperation in the Construction and Operation of the Gas Pipeline in the Territory of the Republic of Austria, 24 April 2010; Agreement between the Government of the Republic of Croatia and the Government of the Russian Federation on Cooperation in the Construction and

2.1 Classifying International Obligations for the Purpose of Standing to Invoke Responsibility

In relation to the invocation of international responsibility, the Articles on the Responsibility of States for Internationally Wrongful Acts ('ASR')¹⁰ are premised on a tripartite classification of international obligations (primary rules).¹¹ International obligations are classified on the basis of the question 'to whom are these obligations owed'.

First, bilateral obligations or 'bilateralisable' obligations. The latter, for instance, may be established in a multilateral treaty, but the obligations are owed in pairs between the parties. The treaty would create bundles of bilateral relationships.¹² An example of such an obligation is the one that corresponds to the right of innocent passage through the territorial sea.¹³ In case of breach, the individually injured state may invoke responsibility, including by recourse to countermeasures (ASR Articles 42(a) and 49).

Second, 'interdependent obligations', meaning obligations owed to a group of states collectively, but premised on 'global reciprocity'.¹⁴ Non-performance by one permits everyone else not to perform: a paradigmatic example of such an obligation is the obligation of disarmament. Under the ASR, the breach of such an obligation, which is of such character as to radically to change the position of all other states to which the obligation is owed with respect to further performing it, allows all other states to which the obligation is owed to invoke responsibility, as injured states, including by recourse to countermeasures (ASR Articles 42(b)(ii) and 49).

Third, community interest obligations (*erga omnes* or *erga omnes partes*), which are obligations owed to a group of states established for the protection of a collective interest of the group (or even for a wider common interest) above the individual interests of the group.¹⁵ These are genuinely multilateral obligations and owed indivisibly.¹⁶ In case of breach, the specially affected state is injured and may invoke responsibility, including by recourse to countermeasures (ASR Articles 42(b)(i) and 49). States other than the injured state may claim cessation of the wrongful act and assurances and guarantees of non-repetition. As a matter of progressive development of international law, the ASR suggest that the state other than the injured state may claim reparation in the interest of the injured state, assuming that an injured state exists. It is questionable whether states other than the injured state may resort to countermeasures (ASR Article 54).¹⁷

Operation of the Gas Pipeline in the Territory of the Republic of Croatia, 2 March 2010 (Croatia was not an EU Member State when it concluded this treaty with Russia).

¹⁰ *Supra* note 5.

¹¹ For distinction between primary and secondary rules, *supra* note 5. The classification of primary obligations bears some similarities to - but is different from - the one proposed by the ILC Special Rapporteur Fitzmaurice in his work on the Law of Treaties. Special Rapporteur Fitzmaurice, *Second Report on the Law of Treaties*, A/CN.4/107, ILCYB 1957, Vol. II, p. 53, paras 115 and 120, p. 54, paras. 125-126; Special Rapporteur Fitzmaurice, *Third Report on the Law of Treaties*, A/CN.4/115, ILCYB 1958, Vol. II, (Article 18(2)), p. 27 and p. 44, para. 91.

¹² B. Simma, Bilateralism and Community Interest in the Law of State Responsibility, in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff, 1989), pp. 821-844 at 822-823.

¹³ L.-A. Sicilianos, The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility, 13 *EJIL* (2002) 1127-1145 at 1133-1134; J. Crawford, Multilateral Rights and Obligations in International Law, 319 *RCADI* (2006) 325-482 at 343.

¹⁴ Sicilianos (2002), *supra* note 13, p. 1135; *Text of the draft articles on responsibility of States for (in footnotes) internationally wrongful acts with commentaries thereto*, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001, Vol. II, pp. 31-143 ('ILC Commentary to the ASR') at 118, fn 669.

¹⁵ ILC Commentary to the ASR, p. 126, para. 7.

¹⁶ Simma (1989), *supra* note 12.

¹⁷ ILC ASR Commentary, p. 129, para. 8; p. 137, para. 3; p. 139, paras. 6-7. J.A. Frowein, Reactions by Not Directly Affected States to Breaches of Public International Law, 248 *RCADI* (1994) 345-437; M. Koskenniemi, Solidarity Measures: State Responsibility as a New International Order?, 72 *BYIL* (2001) 337-356. Arguing that

Community interest obligations and interdependent obligations are obligations that are collectively owed and indivisible, but their main difference is the feature of ‘global reciprocity’ which is present in interdependent obligations but is lacking in community interest obligations.

According to the ILC Commentary to the ASR the determination of the nature of the obligation takes place by interpreting the primary rule.¹⁸ However, there is no clarification as to which rules are to be used for such interpretation. In the absence of a reasonable alternative, it is logical to argue that at least in relation to treaty obligations the customary rules on treaty interpretation set forth in Articles 31-32 of the Vienna Convention on the Law of Treaties (‘VCLT’) are to be used.¹⁹ Furthermore, international case law has placed the focus on the object and purpose in order to identify the nature of international obligations,²⁰ and scholars have suggested that *inter se* modifications are prohibited in cases of treaties that establish community interest obligations.²¹

Having explained the classification of international obligations for the purposes of determining standing to invoke responsibility, in the absence of special rules concerning standing, and the method for such classification, the following sections classify obligations in the realm of international energy law.

2.2 Classifying Obligations within the Realm of International Energy Law

Reciprocity dominates economic activities in the energy sector. Prior to the rise of multilateral treaties that either specifically deal with trade of energy products (e.g. ECT) or also apply to trade in energy products (e.g. WTO Agreement), energy trade has fallen within the scope of bilateral treaties on friendship, navigation and commerce. A case concerning the breach of such obligations that found its way to the International Court of Justice (‘ICJ’) was the *Oil Platforms case*, which was couched in terms of energy commerce.²²

On the other hand, there are a number of obligations of customary international law concerning the energy sector that are *erga omnes*: the prohibition to interfere with permanent sovereignty of other states,²³ the freedom of navigation on the high seas²⁴ and by implication the

countermeasures of states other than the injured state are permitted under *lex lata*. Sicilianos (2010), *supra* note 5, at 1146–1148.

¹⁸ ILC ASR Commentary, p. 118, para. 6. Special Rapporteur Fitzmaurice in his work on the law of treaties had similarly suggested that the nature of treaties is determined by the ‘correct interpretation of the treaty according to its terms’: Special Rapporteur Fitzmaurice, *Fourth Report on the Law of Treaties*, A/CN.4/120, ILCYB 1959, Vol. II, p. 54, para. 18.

¹⁹ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

²⁰ *S.S. Wimbledon*, Judgment of 17 August 1923, [1923] PCIJ Ser A, No. 1, p. 11 at 22–23; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422, para. 66. In relation to the EU founding treaties: Case 26/62 *NV Algemene Transport—en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1 at 12.

²¹ Individual Opinion by M. Anzilotti, *Customs Regime between Germany and Austria*, 1931 PCIJ (Ser. A/B), No. 41, Advisory Opinion, 5 September 1931, p. 55 at 64; Separate Opinion of Judge van Eysinga, *Oscar Chinn (United Kingdom v. Belgium)*, Judgment, 12 December 1934, [1934] PCIJ Ser A/B, No. 63, p. 131 at 133–134.

²² *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment of 12 December 1996, ICJ Reports 1996, p. 803; *Oil Platforms (Islamic Republic of Iran v. United States of America)* Judgment, ICJ Reports 2003, p. 161.

²³ No international court or tribunal has thus far upheld the proposition that the obligation to respect another state’s sovereignty over natural resources is an obligation *erga omnes*. In 1995, the ICJ found that the obligation to respect self-determination is *erga omnes*. *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90 at 102, para. 29. Since permanent sovereignty over natural resources is an aspect of self-determination, it is arguable that the obligation to respect the permanent sovereignty over natural resources of other states is of the same character.

²⁴ In 1973, Australia, in the proceedings it brought before the ICJ against France, argued that France’s nuclear tests in the Pacific Ocean *inter alia* violated freedom of navigation on the high seas, and that Australia had standing to invoke France’s responsibility owing to the *erga omnes* nature of this obligation. Memorial on Jurisdiction and Admissibility submitted by Australia, 23 November 1973, *Nuclear Tests (Australia v. France)*, ICJ Reports 1974, para. 462. In 2014, the Netherlands in the *Arctic Sunrise* proceedings against Russia complained of the unlawfulness

freedom of the high seas to lay pipelines and cables. The focus of this contribution is treaties, and especially those between third states and the EU and/or Member States in relation to energy trade.

2.2.1 WTO Agreement and Trade in Energy Goods

While there is no framework agreement on energy trade in the WTO, and under the 1947 GATT and in the first two decades of the life of the WTO Agreement disputes concerning energy trade were not prominent,²⁵ the scope of application of the WTO Agreement encompasses a number of aspects of the energy sector. For example, freedom of transit (GATT Article V) and the prohibition of import and export restrictions (GATT Article XI) apply to oil and gas products.²⁶

The nature of WTO obligations has been considered by a Panel in *EC—Bananas*²⁷ and by an Arbitrator in *US—Tax Treatment for Foreign Sales Corporations*.²⁸ *EC—Bananas* dealt with standing to bring a claim under the WTO Dispute Settlement Understanding (‘DSU’) for a breach of the GATT. In its reasoning, the Panel did not uphold expressly that the GATT obligations are bilateralisable, *erga omnes partes*, or interdependent.²⁹ Rather its reasoning was based on the factual interconnectedness of international markets (‘interdependence of global economy’) and the risk of economic impact, including in the form of supplies and prices, faced by any other WTO member in cases where violations of GATT occur. In support of its findings, the Panel cited the Judgment of the Permanent Court of International Justice (‘PCIJ’) in *S.S. Wimbledon*,³⁰ as well as the provisionally adopted ILC Draft Articles on State Responsibility (1996), particularly Article 40(e) and (f), which encompass bilateral, interdependent, *erga omnes* (Article 40(e)) and *erga omnes partes* obligations (Article 40(f)). By including collective interest obligations and without distinguishing among these bases, the Panel opened up the debate about whether GATT obligations are *erga omnes partes*. However, the fact that it cited the page of the *S.S. Wimbledon* Judgment where the PCIJ addressed the issue of jurisdiction (and by implication standing),³¹ rather than the judgment’s operative part, which touches implicitly on the nature of the primary obligations in question, offers support to the understanding that rules on standing in the WTO Agreement may be generous and unconnected to the nature of the primary obligations therein.

In *US—Tax Treatment for Foreign Sales Corporations*, the Arbitrator did not deal with standing, but with the quantitative amount of the countermeasure agreed between the parties to the dispute. In that context, he explained that the prohibition of the subsidy under the Agreement

of enforcement measures by the latter against a vessel carrying the flag of the Netherlands, in response to the protest action and the attempt of members of the vessel’s crew to board a gas extraction platform placed in Russia’s exclusive economic zone (‘EEZ’). The Netherlands claimed that freedom of navigation (in the EEZ) is an obligation *erga omnes* (*erga omnes partes*, under LOSC), providing it with standing on this basis too: *Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits, 14 August 2015, para. 182. The Tribunal did not find it necessary to address standing on this point, since it had found that the Netherlands had standing as the flag state. *Ibid.*, para. 186.

²⁵ The only 1947 GATT case that dealt with energy activities was Panel Report, *US—Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136 (adopted on 17 June 1987).

²⁶ Azaria (2015) *supra* note 2, pp. 30-35.

²⁷ Panel Report, *EC—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA adopted 25 September 1997, as modified by AB Report.

²⁸ Decision of the Arbitrator, *US—Tax Treatment for Foreign Sales Corporations—recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, circulated 30 August 2002.

²⁹ Panel Report, *EC—Bananas*, *supra* note 28, para. 7.50.

³⁰ *S.S. Wimbledon*, Judgment of 17 August 1923, [1923] PCIJ Ser A, No. 1, p. 11.

³¹ Jurisdiction and standing are two different issues, but they come up in international courts and tribunals as preliminary objections. On distinction between jurisdiction and admissibility: *Hochtief AG v. the Argentine Republic*, ICSID Case no ARB/07/31, Decision on Jurisdiction, 24 October 2011, paras. 90-96.

on Subsidies and Countervailing Measures ('SCM Agreement') was an *erga omnes* obligation.³² Presumably the Arbitrator meant *erga omnes partes* given that the obligations are binding only on WTO members. However, his reasoning is not supportive of the community interest nature of WTO obligations (or of the SCM Agreement specifically). He substantiated his finding by reference to the effects of the measure in question, rather than the obligations' nature and the treaty's object and purpose: 'once such a measure is in operation, its real world effects cannot be separated from the inherent uncertainty that is created by the very existence of such an export subsidy.'³³

Therefore, notwithstanding the cases discussed above, GATT obligations are bilateralisable.³⁴ However, the rules on standing, as developed under the DSU, permit any WTO member to resort to the DSU in case of breach of a WTO obligation. Having examined trade obligations in the WTO Agreement, which apply to energy, the following section discusses the obligations of the ECT.

2.2.2 The Energy Charter Treaty

The ECT is the first sector-specific multilateral treaty governing numerous aspects of the energy sector: e.g. trade (Articles 5 and 29), transit (Article 7), protection of foreign investment (Part III), protection of the environment (Article 19), and competition (Article 6). The ECT has 51 Contracting Parties, including the EU and its Member States (with the exception of Italy, since 1 January 2016).³⁵

The nature of ECT obligations has yet to be addressed in the publicly available ECT case law. However, a close examination of each obligation in the ECT leads to the conclusion that each obligation is of a different nature. The following sections examine some ECT obligations separately with a view to showing that the ECT contains obligations that vary in terms of their nature which has implications in terms of standing to invoke responsibility either by recourse to ECT dispute settlement procedures, or by recourse to countermeasures (where the latter are not excluded by *lex specialis* in the ECT).³⁶

2.2.2.1 Investment Protection Obligations

The ECT obligations on protection of investment (Part III and Article 26) apply solely to investors that bear the nationality of other ECT Contracting Parties. They do not extend to all foreign investors in ECT Contracting Parties or to investors that are nationals of a host ECT Contracting Party.

Since nationality is a predominant feature of these obligations, they are better classified as bilateralisable. They reflect primarily the individual interest of each Contracting Party for the protection of its own nationals abroad.

2.2.2.2 Trade and Transit Obligations

Similarly, trade and transit obligations (ECT Articles 5, 29 and 7) are bilateralisable. They are based on reciprocal exchanges between ECT Contracting Parties.

³² Decision of the Arbitrator, *US—Tax Treatment for FSC*, *supra* note 29, para. 6.10.

³³ *Ibid*, para. 6.8.

³⁴ T. Gazzini, The Legal Nature of WTO Obligations and the Consequences of their Violation, 17 *EJIL* (2006) 723–742.

³⁵ Italy submitted a notification of withdrawal from the ECT to the Depository on 31 December 2014. Its withdrawal took effect on 1 January 2016, pursuant to ECT Article 47(2).

³⁶ Azaria (2015), *supra* note 2, pp. 173-184.

Where violations of obligations concerning transit (ECT Article 7) and exports (ECT Article 29) have either occurred or the lawfulness of the measures taken by the transit and exporter/importer states could at least have been challenged, ECT Contracting Parties, which would be ‘other than the injured party’, if ECT obligations under ECT Article 7 and 29 were classified as *erga omnes partes*, did not make claims of ‘relatively formal form’ for the cessation of the wrongful acts. However, neither did those parties that would have been injured (specially affected, if the obligations are *erga omnes partes*, or individually injured, if the obligations are bilateralisable).³⁷ There is no evidence that the trade and transit obligations are not bilateralisable.

2.2.2.3 Environmental Obligations

In contrast, Article 19, the provision on the protection of the environment from energy activities, sets out *erga omnes partes* obligations. More specifically, ECT Article 19 comprises of three paragraphs. Paragraph 1 sets out the substantive and procedural obligations of ECT Contracting Parties vis-à-vis the protection of the environment in relation to energy activities. Paragraph 2 provides a special procedure for the resolution of disputes between ECT Contracting Parties concerning the application and interpretation of Article 19 (mandatory review by the Charter Conference). Paragraph 3 contains definitions of some terms used in Article 19.

Paragraph 1 consists of a *chapeau*, containing framework obligations, and a (non-exhaustive) list of obligations specifying the obligations in the *chapeau*. The *chapeau* establishes an obligation on ECT Contracting Parties to ‘strive to minimize in an economically efficient manner harmful Environmental Impacts occurring either *within or outside its Area from all operations within the Energy Cycle in its Area* [...]’.³⁸ Contrary to LOSC, where the term ‘Area’ defines a space beyond national jurisdiction, the term ‘Area’ in the ECT expressly means spaces within national jurisdiction.³⁹ Additionally, contrary to customary international law, which only requires that states prevent *significant transboundary harm*,⁴⁰ Article 19 deals with environmental harm (i.e. *any* effect on the environment) occurring outside the jurisdiction of the ECT Contracting Party where the harmful energy activity takes place, as well as with environmental harm occurring within the jurisdiction of the ECT Contracting Party in whose jurisdiction the harmful energy activity takes place. This language indicates that the obligation in ECT Article 19(1) protects a community interest: the environment *per se*, rather than only addressing harm on the environment within the jurisdiction of another ECT Contracting Party. It is an obligation *erga omnes partes*.

2.2.2.4 Dispute Settlement Provisions and Standing

³⁷ Ibid, pp. 89-94: the 2004 Belarus-Russia gas export/transit dispute; the 2006 and 2009 Ukraine-Russia gas transit/export dispute; the 2007 Belarus-Russia oil transit/export dispute; the 2010 interruption of gas transit by Belarus.

³⁸ The wording ‘shall strive’ does not affect the normative character of the rule. The obligation is one of conduct, and the question is about the manner in which and the time at which such obligation is to be breached.

³⁹ Compare LOSC Article 1(1) and ECT Article 1(10).

⁴⁰ P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (OUP, 2009), pp. 137, 167. Contra: P. Sands and J. Peel, A. Fabra and R. MacKenzie, *Principles of International Environmental Law* (CUP, 2012), pp. 201. International case law has only found violations of the obligation not to cause (and subsequently to prevent) transboundary harm (or harm in the context of a shared resource), not of harm on the environment within one state’s jurisdiction: *Trail Smelter arbitration (United States/Canada)*, 11 March 1941, RIAA, Vol. III, pp. 1905-1982, p. 1965; *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 22; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29; *Case concerning Pulp Mills on the river Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, p. 14, para. 101. Cf: *Iron Rhine “IJZEREN RIJN” Railway (Belgium v. Netherlands)*, Award of 24 May 2005, para. 59. The relevant passage in the latter award could be interpreted as recognising an obligation to prevent environmental harm generally only by taking the tribunal’s reasoning out of the dispute’s context, which involved harm caused by activities of one state (Belgium) taking place in the territory of another state (the Netherlands).

The ECT contains a number of dispute settlement mechanisms: a general inter-ECT Contracting Parties arbitration mechanism (ECT Article 27), an investor-ECT Contracting Parties arbitration provision (ECT Article 26), a special transit conciliation procedure (ECT Article 7(7)), a special provision for the settlement of environmental disputes (ECT Article 19(2)), and a special procedure for settling trade disputes concerning Articles 5 and 29 (Article 19 and Annex D). Since none of these provisions contain detailed rules concerning standing, standing to resort to dispute settlement under the ECT depends on the nature of each obligation the breach of which would be invoked.

Given that the transit obligations under ECT Article 7 are bilateralisable, only specially affected ECT Contracting Parties (individually injured) can resort to conciliation or to general inter-state dispute settlement (ECT Article 27). Similarly, the obligation concerning the protection of foreign investment (ECT Part III) being bilateralisable, only individually injured ECT Contracting Parties may resort to general inter-state dispute settlement (ECT Article 27).⁴¹ Since the obligations concerning trade under Articles 5 and 29 are bilateralisable, standing to resort to Annex D should be available only to individually injured ECT Contracting Parties. However, it is arguable that given the intention to parallelise Annex D to the WTO DSU, Annex D could be interpreted as affording more generous standing to all ECT Contracting Parties. Finally, given the *erga omnes partes* nature of environmental obligations, any ECT Contracting Party may resort to dispute resolution under Article 19(2).⁴²

2.3 Bespoke Pipeline Treaties between EU Member States and Third States

In the post-Cold War period, the trend to conclude bespoke pipeline treaties is increasing significantly. A number of reasons may have prompted this trend, but this question falls beyond the scope of this study.⁴³ This treaty practice is by no means unique to Europe. Numerous such treaties have been concluded in relation to cross-border and transit pipelines in the Middle East, Central Asia, and Africa.

However, the treaty practice involving EU member states is of interest because of the context in which it is taking place. *First*, it can be seen as a reaction to the need to diversify routes and sources in the aftermath of the 2009 gas crisis that occurred in Europe owing to the gas transit and export dispute between Russia and Ukraine. *Second*, it will continue to be observed - if not to increase - as numerous of these projects are eligible for funding by the EU, when characterized as 'projects of common interest' (under *Decision No 1364/2006*)⁴⁴ or as 'priority corridors' (under *Regulation 347/2013*),⁴⁵ with a view to reinforcing the security of energy supplies by strengthening relations with third countries.⁴⁶ *Third*, the compatibility with EU law (especially competition law and the internal energy market legislation) of the treaties and other

⁴¹ ECT Article 27(2) expressly excludes from the inter-ECT Contracting Parties *ad hoc* arbitral tribunal's jurisdiction the last sentence of ECT Article 10(1), leaving within the scope of the tribunal's jurisdiction disputes concerning Part III, including the rest of the provisions of Article 10.

⁴² Annex D does not expressly provide for standing. However, there was an intention to parallelise Annex D to the WTO DSU. While the obligations concerning trade under ECT Article 29 are bilateralisable, arguably wide standing is available under Annex D. No subsequent practice of ECT Contracting Parties supports this interpretation as yet.

⁴³ Azaria (2015), *supra* note 2, pp. 7 and 58.

⁴⁴ *Decision No 1364/2006/EC laying down guidelines for trans-European energy networks*, 22.9.2006, OJ L 262/1.

⁴⁵ *Regulation 347/2013 on guidelines for trans-European energy infrastructure*, OJ L 115/39 repealing *Decision No 1364*, includes a list of 'priority corridors' that are eligible for EU financial aid (Article 6(3)).

⁴⁶ The Nabucco Pipeline, which was listed in Annex III of EU *Decision No 1364/2006/EC*, *supra* note 44, was recognized as a project of common interest and was eligible for EU financial aid (Article 6(3)). *Regulation 347/2013*, *supra* note 45, included a list of priority corridors that include all member states in whose territory the Nabucco pipeline would be constructed. The Trans-Adriatic Pipeline has been listed since 2006 in Annex III of *Decision 1364/2006* as a project of common interest, and eligible for EU financial aid (Article 6(3) and section 9.25, Annex III).

arrangements for these projects has been a matter of concern for the European Commission.⁴⁷ From the point of view of public international law, EU Member States may conclude treaties with third states, but they remain obliged to comply with their existing EU law obligations. If there is an incompatibility between treaty provisions with third parties and EU law provisions, the treaty with the third states will be the applicable legal standard between them and the third state, while the applicable legal standard in their relationship with EU Member States will be EU law (VCLT Article 30(4)(b)). EU member states will incur responsibility for the breach of their obligations under EU law (VCLT Article 30(5)). A possible solution may be to withdraw from the treaties with a third state, which can take place either in accordance with the relevant provisions of these treaties or in the absence of such provisions by reference to extraneous grounds under custom or the VCLT (where applicable);⁴⁸ or to pursue the amendment of these treaties (VCLT Article 40) with a view to ensuring compatibility with EU law. However, both choices are politically and procedurally cumbersome. For states that became EU Member States after the conclusion of treaties with third states that are incompatible with EU law (e.g. Croatia that concluded a bilateral treaty with Russia concerning the South Stream pipeline prior to its accession to the EU), Article 351 of the Treaty on the Functioning of the European Union ('TFEU') provides that the TFEU does not affect such treaties.⁴⁹ However, to the extent that they are incompatible with the TFEU, the Member States(s) are obliged to 'take all appropriate steps to eliminate the incompatibilities established'.⁵⁰ EU Member States are thus obliged under EU law to choose between two options: either to amend treaties with third states or to withdraw from them.

Fourth, in February 2016, the Commission proposed to amend *Decision No 994/2012*.⁵¹ EU Member States would be obliged to abstain from expressing consent to be bound by treaties with third states in the energy sector (including bespoke pipeline treaties) before the Commission has made an assessment as to their compatibility with EU law, and to 'take [into] utmost account' the Commission's assessment when concluding the negotiation of such treaties.⁵² *Fifth*, existing EU law and the proposal of the Commission to amend existing EU law favours *multilateral* treaties with third states. This express preference implies that bilateral energy related treaties are not the option favoured by the Commission.⁵³

Against this background, it is valuable to examine a number of bespoke pipeline treaties between EU Member States and third states: two plurilateral treaties (the Nabucco Pipeline Treaty and the Trans-Adriatic Pipeline Treaty), and the bilateral treaties for the South Stream pipeline. The term 'plurilateral bespoke pipeline treaties' is to be contrasted with 'bilateral bespoke pipeline treaties', and to 'multilateral treaties' (e.g. the WTO Agreement and the ECT), which are not tailor-made for a particular pipeline. The use of the term 'plurilateral' here is only

⁴⁷ *Proposal for a Decision of the European Parliament and of the Council on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU*, 16.2.2016, COM(2016)53 final, ('Commission's Proposal for Regulation repealing Decision No 994'), p. 10, para. 4.

⁴⁸ None of the grounds for termination under the VCLT and custom permit termination on the ground that one or more of the treaty parties are obliged to comply with other conflicting international obligations.

⁴⁹ Case 812/79 *Burgoa* [1980] ECR 2787, para. 8; Case C-84/98 *Commission v Portugal* [2000] ECR I-5215, para. 53.

⁵⁰ Where necessary, the Member States must assist each other with a view to eliminating the incompatibilities established and must adopt, where appropriate, a common attitude. '[T]he Commission [...] may facilitate mutual assistance between the Member States concerned and their adoption of a common attitude.' Case C-205/06 *Commission v. Republic of Austria*, Judgment, Grand Chamber, 3 March 2009, para. 44.

⁵¹ *Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy*, OJ L 299, 27.10.2012.

⁵² Article 5(4), Commission's Proposal for Regulation repealing Decision No 994.

⁵³ Article 7, *Decision No 994/2012/EU*, *supra* note 51; Article 9(d), Commission's Proposal for Regulation repealing Decision No 994.

descriptive of the treaties' form, which is essentially multilateral, and does not entail legal consequences under the law of treaties in relation to the topic discussed here.

Each treaty and each treaty obligation has to be interpreted separately. The following analysis mainly focuses on obligations concerning uninterrupted energy flows via the pipelines.

2.3.1 Plurilateral Bespoke Pipeline Treaties

The Nabucco Pipeline Treaty requires treaty parties 'not to permit or require the Interruption of gas transportation in the Nabucco [pipeline]' (Article 7). The object and purpose of the treaty is to ensure 'security of supply [since] this is necessary for the welfare and security of each citizen and [...] States Parties are therefore determined to act in a spirit of solidarity *to achieve collective energy security*' (Article 1.2).

The Trans-Adriatic Pipeline Treaty requires parties not to interrupt flows of gas through the pipeline (Article 7). The Preamble of the treaty states that the treaty forms part of an effort to promote cooperation in ensuring the reliable supply of gas from states in Central Asia to the EU, none of which is party to the treaty, and 'to create *uniform [...] conditions and standards* for the [...] construction, and operation of [the Pipeline]'. Additionally, the treaty categorically prohibits unilateral denunciations and *inter se* modifications (Article 12).

These features of the Nabucco Pipeline Treaty and the Trans-Adriatic Pipeline Treaty support the proposition that the obligations concerning uninterrupted energy flows therein are *erga omnes partes*. They are established primarily for a common interest (collective energy security), including a wider common interest of states beyond the treaty parties, and in any event they are intended to set uniform standards for a regional project.⁵⁴

Having shown that two plurilateral bespoke pipeline treaties that EU Member States have concluded with third states (Turkey in relation to the Nabucco Pipeline Treaty, and Albania in relation to the Trans-Adriatic Pipeline Treaty) establish obligations *erga omnes partes* and thus all treaty parties have standing to invoke responsibility (albeit it is questionable whether those other than the injured state may resort to countermeasures),⁵⁵ the following section touches on the compound of bilateral treaties that EU Member States, and other third states in the Balkan region, have concluded with Russia concerning the South Stream pipeline.

2.3.2 Bilateral Bespoke Pipeline Treaties for One Physically Indivisible Pipeline in the Territory of Multiple States

In addition to multilateral treaties governing the construction and operation of a physically indivisible pipeline that crosses the territory of numerous states, the practice of states also reveals compounds of bilateral treaties concluded for such projects. A paradigmatic example of European interest is the bilateral treaties concluded between Russia, the exporting state of gas, on the one hand, and each transit and importing state for the South Stream pipeline on the other hand, some of which are EU Member States.⁵⁶ These include provisions concerning the

⁵⁴ The obligations not to interrupt transportation of energy via an integral pipeline system, which crosses the territory of numerous states, could be classified as 'interdependent obligations'. What connects interdependent obligations is their negative nature: they require states for instance not to acquire arms or not to acquire nuclear weapons. Additionally, like interdependent obligations, parties to plurilateral bespoke pipeline treaties have a strong interest in cessation of the international wrongful act, pertaining to the breach of the obligation not to interrupt carriage, restitution (ASR Article 35) and assurances of non-repetition, rather than in compensation. Their interest is primarily to guarantee the 'regime' by re-establishing energy flows. Owing to these features, this is the natural classification of obligations concerning energy transportation via pipelines in the context of multilateral bespoke pipeline treaties, unless there is evidence to the contrary, as is the case for the Nabucco Pipeline Treaty and the Trans-Adriatic Pipeline Treaty.

⁵⁵ *Supra* note 5 and 17.

⁵⁶ *Supra* note 9.

construction and operation of the pipeline, including an obligation not to interrupt energy transportation through the pipeline.

Owing to the vehicle used to establish such obligations (bilateral treaties) the obligations under each treaty are bilateral and are owed between the parties to them. There is no evidence in the treaties that EU Member States have concluded with Russia or in the circumstances of their conclusion that there is an intention to establish rights (e.g. concerning uninterrupted transportation) for third states through whose territory the pipeline will be constructed or for a wider group of states.⁵⁷

Placing these two practices (compounds of bilateral treaties vs. plurilateral treaties for on indivisible pipeline) next to each other allows the understanding that they may be connected: by concluding bilateral treaties as a matter of *form* is a vehicle that permits the avoidance of the establishment of indivisible obligations, which would have been created, if a (single) multilateral treaty had been used.

2.4 Interim Conclusions

Within the ambit of international energy law community interest obligations appear in the treaty practice of EU Member States (e.g. obligations in bespoke pipeline treaties with third states, such as the Nabucco Pipeline Treaty and the Trans-Adriatic Pipeline) and in some multilateral treaties to which the EU is party itself (e.g. ECT environmental protection obligations). However, the EU and EU Member States have also undertaken bilateral or bilateralisable obligations in the energy sector. WTO obligations apply to trade in energy and are bilateralisable, despite the fact that generous standing has been afforded to all WTO members to invoke responsibility for breaches of WTO obligations under the DSU. The ECT contains numerous bilateralisable obligations, such as those concerning trade, transit, and investment protection, and EU Member States conclude bilateral treaties with third states in the energy sector (e.g. the compounds of bilateral treaties between numerous EU Member States with Russia for the South Stream pipeline).

Having explained that community interest obligations appear along with bilateral and bilateralisable obligations within the rules of international energy law that are of particular interest for the EU and its Member States, the following section examines whether suspending compliance with energy-related obligations may be a lawful countermeasure.

3. Suspending Compliance with Community Interest Obligations in International Energy Law

Countermeasures have a dual function in international law. They are a means of invoking responsibility, and circumstances that preclude wrongfulness. In the ASR, countermeasures are placed in the section concerning the conditions for the engagement of international responsibility, among the circumstances precluding wrongfulness (Article 22 in Part I on the Internationally Wrongful Act), and in the section concerning implementation of international responsibility (Part III, Articles 49–53). Countermeasures in the form of suspending compliance with obligations in the energy sector rank high among the available (non-forcible) responses to wrongfulness in the UN era, given that they can have weighty effects and consequent persuasiveness. Therefore, it is their function as a circumstance that precludes wrongfulness that is of importance for the purposes of the analysis in the following sections, which consider whether a state may lawfully suspend compliance with treaty obligations in the energy sector, focusing on obligations of community interest nature.

⁵⁷ VCLT Article 36.

3.1. Displacing Countermeasures as Circumstances Precluding Wrongfulness

The argument that countermeasures as circumstances precluding wrongfulness may be displaced as *lex specialis* may be founded on two different bases: treaty language that displaces countermeasures, as circumstances precluding wrongfulness; and the nature of the obligations whose performance is to be suspended implicitly displaces countermeasures.

First, some treaties concerning energy trade and investment contain security exceptions: for instance, GATT Article XXI and ECT Article 24. The relationship between security exceptions and circumstances precluding wrongfulness under the law of state responsibility has been the focus of a series of investor-state arbitrations against Argentina on the basis of bilateral investment treaties to which Argentina is party. While a number of arbitral tribunals have dealt with this issue differently,⁵⁸ the more persuasive position is that when the language used in the security exceptions is (or resembles substantially) ‘nothing shall prevent the parties from’, as is the language in GATT Article XXI and ECT Article 24, such language suggests that the exception delineates the scope of primary treaty obligations. In contrast, circumstances precluding wrongfulness are part of secondary rules and preclude the wrongfulness of a conduct that would otherwise be wrongful: in other words, conduct that would not fall within the scope of security exceptions.⁵⁹ This was also the reasoning of the PCIJ in the *Railway Traffic Advisory Opinion* (1931).⁶⁰

However, most bespoke pipeline treaties do not contain security exception provisions, as is the case for those examined here. However, some contain other language that may displace countermeasures, as circumstances precluding wrongfulness. The Trans-Adriatic Pipeline Treaty permits non-performance of treaty obligations only by prior consent of all parties. This rule is located in a provision, which deals with the treaty’s operation that is separate from the provisions requiring states not to interrupt energy flows (Article 12). The argument could be made that this treaty provision displaces countermeasures under the law of international responsibility taken in this particular form – albeit such interpretation would entail the displacement of any unilaterally operational circumstance precluding wrongfulness.

Second, as a separate argument, the indivisible nature of obligations of international energy law could be seen as entailing *ipso facto* non-susceptibility to unilateral countermeasures. In his work on state responsibility, ILC Special Rapporteur Arangio-Ruiz suggested that owing to their indivisible nature *erga omnes partes* obligations may not be susceptible to countermeasures.⁶¹ This argument may extend also to interdependent obligations, given that the criterion for this argument is the indivisible nature of the obligation that is a common feature between community interest obligations and interdependent obligations. However, his proposal was not taken up by the ILC: it was rather changed into a clause that severs the preclusion of wrongfulness towards the responsible state from the non-preclusion of wrongfulness towards the non-responsible affected states.⁶²

⁵⁸ Treaty exceptions are *lex specialis* and supersede the customary circumstances precluding wrongfulness: *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 245-261; *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7 (US/DRC BIT), Decision on the Application for Annulment of the Award, 9 February 2004, para. 55. Interpreting treaty exceptions through VCLT Article 31(3)(c) to incorporate conditions from secondary rules under custom: *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of the Tribunal, 12 May 2005, paras. 315-382.

⁵⁹ ILC Commentary to the ASR, p. 71, para. 1; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, paras. 129-135; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Ad hoc Committee, Decision on the Argentine Republic’s Request for Annulment of the Award, 29 June 2010, paras. 200-204.

⁶⁰ *Railway Traffic between Lithuania and Poland (Railway Sector Landwarón-Kaisiadorys)*, Advisory Opinion of 15 October 1931, [1931] PCIJ Ser A/B, No. 42, p. 107 at 113-114 and 122.

⁶¹ Special Rapporteur Arangio-Ruiz, *Fourth Report on State Responsibility*, ILCYB 1992, Vol. II, pp. 33-35, paras. 92-93.

⁶² ILC Commentary to the ASR, p. 130, para. 4.

Security exceptions in treaties concerning energy trade do not *ipso facto* displace as *lex specialis* countermeasures, as circumstances precluding wrongfulness. Whether they overlap with circumstances precluding wrongfulness is a matter of interpreting each security exception. However, some treaty provisions in bespoke pipeline treaties may be interpreted as overlapping with and displacing circumstances precluding wrongfulness. Additionally, arguments about the non-suspendability of indivisible obligations (*erga omnes partes* and interdependent) are based on logic, although they may be challenged as not reflective of *lex lata*. The following section examines whether suspending compliance with obligations concerning energy trade, transportation and transit would meet the conditions of lawfulness of countermeasures under custom.

3.2. Conditions of Lawfulness of Countermeasures under Customary International Law

Countermeasures in order to be lawful have to meet a number of conditions under customary international law.⁶³ One of these conditions is that a countermeasure has to be targeted against the responsible state (ASR Article 49(1)). This condition - according to the ILC - is based on the 'relative preclusion of wrongfulness'.⁶⁴ The wrongfulness of the countermeasure is precluded vis-à-vis the responsible state, but not vis-à-vis a third non-responsible state. This condition does not sit harmoniously with the indivisible nature of community interest obligations (or of interdependent obligations).

However, other conditions of lawfulness of countermeasures may be more attuned to the community interest nature of international obligations. Some reflect the need to protect community interests *per se*; others do not deal specifically with this issue, but may coincidentally allow the consideration of the community interest nature of a primary obligation when assessing the lawfulness of a countermeasure. Two conditions of lawfulness of countermeasures are discussed in the following sequence: that countermeasures cannot affect fundamental human rights obligations (ASR Article 50) and that they have to be proportionate to the injury suffered (ASR Article 51).

3.2.1 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. This is far from an academic discussion. During the 2009 gas crisis in Europe deaths were reported in Poland and Bulgaria.⁶⁵

The rule that countermeasures shall not 'affect obligations for the protection of fundamental human rights' covers situations where the state resorting to the countermeasure suspends compliance with its human rights obligations *per se*; and situations where the state resorting to the countermeasure by suspending compliance with other international obligations affects its human rights obligations. It is this second situation that relates to countermeasures in the form of energy-trade restrictions.

However, this prohibition faces numerous limitations. The following analysis touches on two of these limitations:⁶⁶ the extraterritorial application of human rights obligations, and the effect on human rights.

⁶³ ASR Articles 49-53.

⁶⁴ *Supra* note 62.

⁶⁵ Deal to End Russia's Cut-off of Gas Remains Uncertain, *New York Times*, 9 January 2009.

⁶⁶ Another limitation is that ASR Article 50 refers to '*fundamental* human rights', which implies a smaller group of obligations within human rights generally. The term cannot mean only *jus cogens* rights; such requirement would be

3.2.1.1 Extraterritorial Application of Human Rights

Human rights obligations apply within the territory of the state resorting to countermeasures ('reacting state'), and extraterritorially, where the reacting state exercises control. Unlike situations where state organs are present in areas outside the state's territory and exercise control over a particular area⁶⁷ or over a particular individual,⁶⁸ interrupting energy exports or transit involves conduct in the territory of the reacting state, which produces effects on individuals located in the territory of the responsible state ('targeted state').

The case law of the European Court of Human Rights ('ECtHR') concerning territorial conduct, which has extraterritorial effects, is limited. However, the ECtHR has considered that individuals fall within the 'jurisdiction' of a state within the meaning of Article 1 of the European Convention on Human Rights ('ECHR'), in circumstances 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 causal link between their conduct and the effect on the individual concerned.⁶⁹

Interruptions of energy exports or transit may in certain circumstances fulfill the vicinity and the causation link criteria; for instance, where the importing state is wholly dependent on established energy flows from the exporter or transit route. Such instances include Belarus' dependence on Russia's exports of gas, and the dependence of Moldova on gas transiting through Ukraine, and gas exports from Russia.⁷⁰

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. By contrast, it is doubtful that obligations to take positive measures to protect the right to life, freedom from degrading treatment or the right to health by providing energy apply in such an 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.⁷¹

3.2.1.2 'Effect' on Human Rights Obligations

superfluous, since the requirement that countermeasures do not affect obligations *jus cogens* is a separate condition for lawfulness (ASR Article 50(1)(d)). The term 'fundamental human rights' was proposed by Rapporteur Arangio-Ruiz based on the distinction adopted at the time between 'core' or 'basic' human rights and 'other' human rights. Special Rapporteur Arangio-Ruiz, *Fourth Report on State Responsibility*, ILCYB 1992, Vol. II, p. 31, para. 80. For further analysis: Azaria (2015), *supra* note 2, pp. 234-236.

⁶⁷ *Loizidou v. Turkey (Preliminary Objections)*, ECHR, Series A no. 310, 23 March 1995, para. 62. In relation to full and exclusive control over a prison or a ship respectively: *Al-Saadoon v. The United Kingdom*, No. 61498/08, Admissibility Decision, 30 June 2009, paras. 86-89; *Medvedev v. France* [GC], no. 3394/03, 29 March 2010, para. 67.

⁶⁸ *Öcalan v. Turkey*, Judgment [GC], no. 46221/99, (Merits and Just Satisfaction), 12 May 2005, para. 91.

⁶⁹ *Andreou v. Turkey (Decision)*, no. 45653/99, 3 June 2008, [section A.3(c)]. Additional support of the Court's reasoning in this respect can be drawn from *Nada v. Switzerland* [GC], Judgment (Merits and Just Satisfaction), no. 10593/08, 12 September 2012. The claimant resided in an Italian enclave surrounded by Switzerland. The ECtHR presumed that the individual fell within Switzerland's 'jurisdiction' without giving reasons: *Nada v. Switzerland*, para. 122. It found that Switzerland by prohibiting the claimant entering or transiting through its territory violated his right to private life. Neither Switzerland nor any intervening state objected on the grounds that Nada was outside Switzerland's 'jurisdiction'. The exceptional situation, which involved an enclave of 1.6 sq.km of Italian territory, where the claimant resided, may have prompted the Court's reasoning, but Switzerland's conduct was territorial producing extraterritorial effects.

⁷⁰ See information in: Gas Coordination Group, Member State General Situation According to Significance of Impact, Memo 09/3, 9 January 2009: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/3&type=HTML>.

⁷¹ For counterarguments concerning the extraterritorial application of obligations and the conduct discussed here: Azaria (2015), *supra* note 2, pp. 243-244.

However, even assuming *arguendo* that the ‘jurisdiction’ threshold was to be fulfilled,⁷² 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, and may not be easily identified. Furthermore, the reacting state may 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 own territory, for instance by mitigating the effects of an energy crisis by taking pre-emptive or other measures, such as storage or entering into energy sharing mechanisms, such as the International Energy Agency mechanism of oil stockpiling and demand restraints, or the EU Gas Security mechanism.⁷³

Hence, in the current state of international law, the rule that countermeasures cannot affect human rights obligations is unlikely to result in countermeasures in the form of interrupting energy flows being unlawful.

3.2.2 Proportionality

Under customary international law, countermeasures have to be proportionate to the injury suffered, taking into account the rights in question (ASR Article 51). The following sections explain how the condition of proportionality of countermeasures accommodates community interest obligations in the context of countermeasures taken in the form of suspending compliance with obligations in the energy sector. First, the effects on human rights obligations of the targeted state will be discussed, and second how the condition of proportionality takes into account the community interest nature of obligations whose performance is suspended as a countermeasure. In relation to the former issue the question as to the existence of a human right to energy will be touched on. The analysis is put in the context of European legal instruments.

3.2.2.1 Effects on Human Rights Obligations of the Targeted State: A Human Right to Energy?

Countermeasures in the form of suspending compliance with exports or transit of energy can 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. A countermeasure that has such an effect is likely to be disproportionate to the injury suffered, taking into account the rights in question. Since this criterion covers the *rights* of the injured and responsible states,⁷⁴ all the more so it covers the ability of the targeted state to comply with its human rights obligations.

It is in this context that the question arises as to whether there is a ‘human right to energy’. There is no human rights treaty specifically establishing the right to energy, or referring to energy in connection with the rights established in the treaty.⁷⁵ However, the interpretation of existing treaty instruments may establish obligations not to arbitrarily deprive access to energy in relation to vulnerable individuals (especially those dependent on the state) and especially in cases where such deprivation has no connection to the conduct of the individuals in question (e.g. non-

⁷² As a separate matter, there is no evidence that a stricter jurisdictional link is required for the customary right to life and freedom from inhuman treatment, or the right to health (assuming that it attains customary status) other than the one applicable to human rights treaties.

⁷³ Articles 2-3, *Agreement on an International Energy Program*, 1040 UNTS 271, 18 November 1974 (amended 2002); *Regulation 994/2010 supra* note 3.

⁷⁴ ILC Commentary to the ASR, p. 135, para. 6.

⁷⁵ The only exception is Article 14(2), *Convention on the Elimination of Discrimination against Women* (“CEDAW”), which obliges parties to take all appropriate measures to eliminate discrimination against women in rural areas and in particular to ensure their right to enjoy adequate living conditions, particularly in relation to *electricity*. This provision is limited in scope of beneficiaries (“women in rural areas”) and purpose (“elimination of discrimination”).

payment of utility bills). Such argument can also be made in relation to customary human rights law, where available.

Access to energy (oil, gas or electricity) is central for heating, cooking, use of medical equipment at home and hospitals, and for ensuring access to water, including for the purposes of sanitation. In light of this, it may be argued that when states arbitrarily deprive individuals of access to energy they may violate their obligation not to employ degrading treatment, their obligation to protect the right to life, their obligation to respect individuals' right to health, and the right to housing under human rights treaties (and customary international law, where available), such as the ECHR, and the European Social Charter ('ESC').⁷⁶

The question has far-reaching implications for states: would such right include only access to electricity, gas and oil or does it require states to provide uninterrupted energy or ensure the uninterrupted provision of energy by private entities (in cases other than non-payment of utility bills), and under which conditions (for free, on payment and if so what would be the charges)? However, these issues do not fall within the ambit of this article, which examines a different issue: access to energy in situations where individuals already have access to energy, and where provision of energy is interrupted for reasons that do not have to do with the human right-holder.

In relation to degrading treatment, in 1991 the European Commission on Human Rights rejected the admissibility of a complaint which argued that Belgium violated ECHR Article 3 because '*in the case at issue*, the cutting off or the threat of cutting off electricity did not reach the level of humiliation or debasement needed for there to be inhuman or degrading treatment'.⁷⁷ This decision does not rule out the possibility that interfering with access to electricity may meet the threshold of treatment that would be inhuman or degrading. However, the decision did not provide detailed reasoning. Furthermore, subsequent case law of the ECtHR has taken into account a number of the conditions present in the case of the applicant in this case, when it has accepted that a breach of ECHR Article 3 has taken place: the economic conditions of the applicant were poor, her mental and physical state were frail (she suffered from depression and respiratory problems), the lack of electricity was protracted and took place during winter periods, and the facilities in the flat where she resided allowed for no alternative sources of energy.⁷⁸

Additionally, subsequent ECtHR case law has clarified that the 'absence of [...] a purpose [to humiliate] cannot conclusively rule out a finding of a violation of Article 3',⁷⁹ and that a breach of Article 3 may occur 'in circumstances [where the individual is] wholly dependent on State support, [is] faced with official indifference when in a situation of serious deprivation or incompatible with human dignity'.⁸⁰ Situations where arbitrary interruption of access to energy for heating, sanitation, light, cooking or the use of essential medical equipment to individuals dependent on the state, may amount to a violation of their right to be free from degrading treatment under ECHR Article 3, or of their right to health, as part of the right to private life (ECHR Article 8).⁸¹ Moreover, in relation to the ESC, the European Committee of Social Rights has recognised in its long-standing case law that the right to adequate housing under ESC Article 31(1) includes a dwelling with all basic amenities, such as water, heating, [and] electricity.⁸² In relation to vulnerable individuals dependent on the state, interruption of energy for heating,

⁷⁶ *European Social Charter*, 18 October 1961, 529 UNTS 89.

⁷⁷ Emphasis added. *Francine van Volsem v. Belgium*, Decision, No. 14641/89, 9 May 1990.

⁷⁸ A. Casesse, Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?, 2 *EJIL* (1991) 141-145.

⁷⁹ *Valašinas v. Lithuania*, Judgment (Merits and Just Satisfaction), no. 44558/98, 24 July 2001, para. 101.

⁸⁰ *MSS v. Belgium and Greece* [GC], Judgment, No. 30696/09, 21 January 2011, para. 253.

⁸¹ *Nada v. Switzerland*, para. 151; *Glor v. Switzerland*, Judgment (Merits and Just Satisfaction), No. 13444/04, 30 April 2009, para. 54.

⁸² *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Complaint No. 58/2009, Decision on Merits, 25 June 2019, para. 54.

sanitation, and cooking and medical support may constitute degrading treatment, a breach of the right to health, or the right to adequate housing.

To some extent, EU secondary legislation (incidentally) is compatible with the obligations of EU Member States under the ECHR: Article 3(3) of *Directive 2009/73/EC concerning common rules for the internal market in natural gas* requires EU Member States to ‘take appropriate measures to protect final customers, [and] in particular, [to] ensure that there are adequate safeguards to protect vulnerable customers. In this context, each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of gas to such customers in critical times.’⁸³ However, the ECHR (and other international obligations of EU member states) may require further measures vis-à-vis vulnerable individuals, and the protection of a wider group of individuals than those protected by *Directive 2009/73*.⁸⁴

In the extreme situations, where the targeted state is placed in a position where it cannot comply with its negative and positive obligations concerning the right to life, the right to be free from degrading treatment, and the right to health,⁸⁵ such countermeasure would be disproportionate.

3.2.2.2 In relation to Targeting Collectively Owed Obligations

As a separate matter, targeting collectively owed obligations (community interest obligations or interdependent obligations) may not meet the condition of proportionality. The reasoning of the ICJ in *Gabčvkovo-Nagymaros* supports this interpretation.

Hungary had violated a bilateral treaty with Slovakia, which required both states to construct works for energy development on a part of the River Danube crossing the two states. Slovakia unilaterally responded by diverting a part of the river and by constructing alternative works along the course of the diversion. Slovakia claimed that its conduct was a lawful countermeasure against Hungary’s prior breach. The ICJ found that ‘[t]he effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.’⁸⁶

The Court did not explain the precise criteria by which it assessed proportionality. It could be argued that the Court’s criterion was the aim pursued by Slovakia when resorting to the alleged countermeasure. Factually Slovakia’s measures meant that the adverse effects of Hungary’s conduct were wiped out and Slovakia managed to enjoy unilaterally the benefits it would have enjoyed had Hungary performed its treaty obligations.⁸⁷ Thus, the measure’s aim was not to induce Hungary to comply with its obligations, but rather an attempt to benefit from non-compliance.

Although this interpretation is defensible, especially in light of the facts, the Court’s reasoning in paragraph 85 of the Judgment allows for a different interpretation. The ICJ alluded to the findings of the PCIJ in *River Oder* concerning the creation of a ‘community of interest on a

⁸³ *Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC*, OJ L 211/94.

⁸⁴ First, the term ‘vulnerable customers’ within Directive 2009/73 is to be determined by each EU Member State and in any event it does not necessarily coincide with the definition of vulnerable individuals as referred to in the case law of the ECtHR. Second, the Directive seems to require that disconnection from gas cannot take place, but there is no equivalent obligation concerning oil.

⁸⁵ The right to life and the right to be free from degrading treatment would qualify as ‘fundamental human rights’ within the meaning of ASR Article 50(1)(b). Special Rapporteur Arangio-Ruiz, *Fourth Report on State Responsibility*, ILCYB 1992, Vol. II, pp. 31-32, paras. 80-83. Given the close connection between the right to health and the right to life and freedom from degrading treatment, it is arguable that the right to health is also covered by the term ‘fundamental human rights’. See also Azaria (2015) *supra* note 66.

⁸⁶ *Gabčvkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, p. 7, para. 85.

⁸⁷ E. Cannizzaro, The Role of Proportionality in the Law of International Countermeasures, 12 *EJIL* (2001) 889–916.

navigable river [which] becomes the basis for a common legal right' (of navigation) of riparian states on international rivers.⁸⁸ Although it did not specifically link the community interest nature of those obligations to the assessment of the lawfulness of the countermeasure in question, it made an analogy between the common legal right of navigation and the modern developments of international law concerning non-navigational uses of international watercourses. This reasoning allows for the argument that the indivisible nature of the obligation whose performance is being suspended as a countermeasure may be a qualitative criterion for measuring proportionality.⁸⁹ For instance, given that the obligations concerning the protection of the environment in ECT Article 19, and obligations concerning uninterrupted energy flows under the Nabucco Pipeline Treaty and the Trans-Adriatic Pipeline Treaty are *erga omnes partes*, suspending their performance would not constitute a lawful countermeasure, because it would not meet the condition of proportionality.

4. Conclusion

Reciprocity and the making of bilateral or bilateralisable obligations dominate the economic aspects of the energy sector under international law. While multilateral treaties that apply to energy trade (e.g. WTO) or specifically in relation to the energy sector (e.g. ECT) have been concluded since the end of the Cold War, the rise of multilateralism has not necessarily brought about community interest obligations in this field. GATT obligations and ECT obligations concerning trade and investment are bilateralisable.

However, to suggest that this is the whole picture would be misleading. The EU founding treaties and by implication the secondary sectoral legislation on energy do not establish reciprocal undertakings between EU Member States according to *Van Gend Loos*.⁹⁰ But, even outside EU law, as a species of international law, a contemporary treaty practice is growing in the form of 'plurilateral' bespoke pipeline treaties, and EU Member States have participated in this development. Some of these treaties contain obligations *erga omnes partes* concerning uninterrupted energy flows. However, bilateral treaties may be an option that avoid the community interest obligations that would have been established had the instrument used been multilateral.

Finally, some conditions of lawfulness of countermeasures may be affected by the community interest nature of international obligations, which may have an impact on whether international subjects can take countermeasures in the form of suspending compliance with obligations in relation to the energy sector. Some conditions of lawfulness of countermeasures protect community interests *per se*; others incidentally allow the consideration of the community interest nature of a primary obligation when assessing whether the conditions of lawfulness of a countermeasure have been met. While countermeasures in the form of interrupting energy supplies to the responsible state are not unlawful because the human rights obligations (community interest obligations) of the state taking such countermeasures do not apply in such extraterritorial situation, the condition of proportionality may not be met because either the collective structure of obligations (whenever that is the case) is a qualitative criterion for measuring proportionality, or because in some circumstances countermeasures taken in the form of interrupting energy flows may curtail the ability of the targeted state to comply with its own human rights obligations.

⁸⁸ *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder (Czechoslovakia, Denmark, France, Germany, Great Britain, Sweden v. Poland)*, Judgment of 10 September 1929, PCIJ (1929) Ser A, No. 23, p. 5 at 27.

⁸⁹ According to the ILC, the criteria for proportionality in the framework of the ASR are quantitative and qualitative. ILC Commentary to the ASR, pp. 134-135, paras. 4-6.

⁹⁰ *Supra* note 20.