

# **ENERGY ON THE MOVE: TREATIES ON TRANSIT OF ENERGY VIA PIPELINES**

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The Panel Session ‘Energy on the Move: Treaties on Transit of Energy via Pipelines’ was part of the 110<sup>th</sup> Annual Meeting of the American Society of International Law, on 31 May, at 1pm. Dr. Danae Azaria acted as speaking moderator and the speakers were Professor Gabrielle Marceau, Mr. Matthew Kronby, and Mr. Matthew Weiniger. Each speaker gave a seven-minute talk on a case study involving a dispute concerning a transit pipeline. The rest of the session took the form of a discussion based on questions by the moderator. The panel discussion was followed by fifteen minutes of questions from the audience.

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## **I. INTRODUCTION**

Energy is an indispensable resource for the economic development of states and the survival of their populations. However, energy resources are located unevenly in the world, and their transportation may require the crossing of multiple borders. Transit is the passage *through* the territory (or areas where a state exercises sovereign rights) of one or multiple states.<sup>1</sup> As such, transit is essential for exporters to reach energy markets (‘security of demand’) and importers to reach energy sources

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<sup>1</sup> DANAЕ AZARIA, TREATIES ON TRANSIT OF ENERGY VIA PIPELINES AND COUNTERMEASURES 26-30 (2015).

(‘security of supply’). It is thus not surprising that in the twenty-first century states attach to pipelines the importance they attached to rivers in the nineteenth century and to international canals since the nineteenth century.<sup>2</sup> The control of routes for energy transit is a valuable political and economic ‘asset’ for states through whose territory a pipeline crosses. At the same time, transit states themselves depend on energy exports and imports by user states of transit pipelines.

In light of this interdependence, international law has, throughout the last century and in this century, witnessed a proliferation of treaties in this field: some treaties prescribe general obligations regarding exports, imports, and transit that apply to pipelines, such as the General Agreement on Tariffs and Trade (‘GATT’) and the Energy Charter Treaty (‘ECT’); others do not specifically define and regulate transit, but may include rules which apply to carriage of energy, including transit, such as the North American Free Trade Agreement (‘NAFTA’), or may include rules for the protection of investment, which apply to transit pipelines, such as the ECT and NAFTA; and others are tailor-made for a particular pipeline, such as the Nabucco Pipeline Agreement, the Trans-Adriatic Pipeline Treaty, the Baku-Ceyhan-Tbilisi Pipeline Treaty, the West Africa Gas Pipeline Treaty, and the Sudan/South Sudan Oil Agreement.

This treaty practice differs from transit rights of landlocked states. In relation to the latter, three multilateral treaties<sup>3</sup> have been concluded that establish rights intended to correct a geographical inequality with a view to ensuring freedom of the high seas for all states. In contrast, treaties on transit pipelines are concerned with securing uninterrupted energy flows through pipelines. Furthermore, those treaties

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<sup>2</sup> *Id.*, at 1.

<sup>3</sup> Convention on the High Seas (29 April 1958) 450 UNTS 11; Convention on Transit Trade of Landlocked States (8 July 1965) 597 UNTS 42; Part X, United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3.

that do not exclusively apply to transit via pipelines have, in the post World War I and II eras, represented the historical belief that transit, as part of trade, is a pillar of peace and can ensure stable international relations, while also addressing a need for transit brought about by changes to geographical borders.

The contemporary importance of transit pipelines for international peace and security is illustrated by the dispute between Sudan and South Sudan. In 2011, upon secession of South Sudan from Sudan, the previously domestic oil pipeline in Sudan, which connected oil deposits located in South Sudan to the sea, became a transit pipeline carrying oil from South Sudan through Sudan to the sea. The income from oil sales accounts for more than 90 per cent of South Sudan's total annual revenues and, at the time of the 2011 secession referendum, the oil sales accounted for more than 70 per cent of Sudan's revenues, which it lost after the secession. In January 2012, South Sudan and Sudan failed to agree on transit fees, and Sudan unilaterally took oil in transit as compensation for transit services. In response, South Sudan stopped exports to Sudan and to third states through the transit pipeline (e.g. China, Malaysia, Japan, and Saudi Arabia). In April 2012, South Sudan's military invaded Sudan and occupied part of Sudan's territory, and the Sudanese forces gained control over an area in the territory of South Sudan. The UN Security Council, acting under Chapter VII, required the two states to cease all hostilities and 'unconditionally to resume negotiations concerning oil'.<sup>4</sup> An Oil Agreement, alongside a Security Agreement, was included in the 2012 umbrella Cooperation Agreement between the two states, which was intended to finally resolve their wider bilateral dispute.<sup>5</sup> The rationale

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<sup>4</sup> SC Res. 2046 (May 3, 2012).

<sup>5</sup> Cooperation Agreement between the Republic of the Sudan and the Republic of South Sudan (27 September 2012); Agreement between the Government of the Republic of South Sudan and the Government of the Republic of the Sudan on Oil and Related Economic Matters, appendix to Cooperation Agreement between the Republic of the Sudan and the Republic of South Sudan (27 September 2012).

underpinning the Cooperation Agreement was to put an end to the spiral of unilateral responses by each state against each other. However, the agreement's formulation, which has also established a 'Petroleum Monitoring Committee' composed of the Oil Ministers of each to oversee the agreement's implementation and serve as a forum for dispute resolution (without providing for compulsory judicial dispute settlement), does not necessarily achieve the exclusion of unilateral countermeasures under the law of international responsibility in response to breaches of any covered agreement under the umbrella Cooperation Agreement (including in the form of suspending compliance with obligations within the covered agreement breached, or by 'cross-suspension of obligations').<sup>6</sup> It is thus questionable whether the Oil Agreement/Cooperation Agreement has (or could have) achieved its objectives.

More generally, despite the conclusion of treaties on energy trade and transit, most of the international disputes involving oil or gas transit in the twenty-first century have involved the suspension of exports in response to interference with transit or the suspension of transit in response to interference with exports to the transit state.<sup>7</sup> The paradigmatic example of such a dispute is that between Ukraine and Russia concerning gas transit and exports in the midst of a harsh winter in 2009, which left populations in seventeen states, some of them members of the European Union ('EU') and others situated in the Balkan region, without gas and heating for two weeks. This dispute and ensuing energy crisis has had an unprecedented influence on European energy policy and law.<sup>8</sup> All states involved were bound by agreements establishing international obligations regarding transit, imports and exports of gas, for

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<sup>6</sup> For analysis of the dispute and the agreement, and its relationship to responses to breach under the law of treaties and state responsibility: AZARIA, *supra* note 1, at 148-151.

<sup>7</sup> *Id.*, at 89-93, 224-227.

<sup>8</sup> Danae Azaria, State Responsibility and Community Interest Obligations in International Energy Law: A European Perspective, 5(2) CAMBRIDGE J. INT'L AND COMP L. (forthcoming)(2016).

example, the ECT and/or the WTO Agreement.<sup>9</sup> Notwithstanding the widespread effects of the interruption of transit of energy via pipelines, affected states and the EU did not formally invoke the responsibility of the transit state (or the exporting state) for a breach of obligations regarding transit (or exports respectively). However, as discussed below, this silence is not evidence that international law does not apply or that international responsibility was not engaged.

## **II. THE WTO AGREEMENT, THE ENERGY CHARTER TREATY AND BESPOKE PIPELINE AGREEMENTS**

For the WTO, transit of energy via pipelines is of increasing importance, as numerous oil and gas exporting and transit states have acceded to the WTO; Russia's accession (2012) being the most recent. As at 30 April 2016, eight of the twelve members to the Organization of the Petroleum Exporting Countries ('OPEC'), and seven of the eleven state parties to the Gas Exporting Countries Forum ('GECF') are WTO members. While there is no framework agreement on trade in energy 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,<sup>10</sup> pursuant to the customary rules on treaty interpretation set forth in Articles 31-32 of the Vienna Convention on the Law of Treaties ('VCLT'), the terms 'goods' or 'products' in GATT includes oil and gas. The subsequent practice of WTO members in the application of GATT establishes the agreement of WTO members to oil and gas

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<sup>9</sup> The EU and its Member States were WTO Members and ECT Contracting Parties at the time of the dispute. Ukraine was a WTO Member and ECT Contracting Party. Russia had not as yet acceded to the WTO, but was provisionally bound by the ECT pursuant to the latter's Article 45: *Yukos Universal Ltd. (UK—Isle of Man) v. Russia*, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 394. On 20 August 2009, Russia expressed its intention not to become party to the ECT and since 19 October 2009 is not provisionally bound by the treaty (ECT Article 45(3)(a)).

<sup>10</sup> The only 1947 GATT case dealing with energy activities: Panel Report, *US—Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136 (17 June 1987).

falling within the scope of GATT (VCLT Article 31(3)(b)), and in any event, supplementary means of interpretation confirm this interpretation (VCLT Article 32).

Moreover, GATT Article V on freedom of transit applies to transit via pipelines and if a WTO Member interrupts energy transit via a pipeline within its territory this act may constitute a breach of GATT Article V,<sup>11</sup> albeit disputes may be expected to arise in the future as to whether the scope of GATT Article V covers transit via pipelines. On the other hand, there is no evidence that this provision requires WTO Members to construct or to permit the construction of transit pipelines within their territory. Thus, in the context of the Keystone XL transit pipeline dispute between Canada and the US,<sup>12</sup> Canada would not have been successful in bringing a complaint under the Dispute Settlement Understanding ('DSU') against the US concerning the construction of the Keystone XL Pipeline on the basis of GATT Article V.

As a separate matter, the DSU is an exclusive and mandatory mechanism for settling disputes concerning violations (and non-violations) of WTO obligations, and standing under the DSU is generous allowing any WTO Member to invoke responsibility for breaches of WTO obligations, including those under GATT Article V. It thus accommodates the particular realities of the oil and gas markets: there is one world oil market and gas market prices depend on oil prices.

However, other aspects of the DSU are not appropriate for dealing with energy trade and transit in situations where energy crises may occur. First, under the DSU, in cases of urgency, it may take more than to 5 months before the Dispute Settlement Body adopts an Appellate Body ('AB') Report. Second, good offices, conciliation, and mediation can be initiated at any time, but they depend on the consent of the

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<sup>11</sup> AZARIA, *supra* note 1, at 36-38.

<sup>12</sup> Report Opens Way to Approval for Keystone Pipeline, New York Times, 31 January 2014.

parties to the dispute (DSU Article 5), and recourse to arbitration by establishing tighter time frames than those under the general DSU proceedings (DSU Article 25) is possible, but this option also depends on the consent of the parties to the dispute. Third, the DSU lacks (institutional) interim measures.<sup>13</sup> A restriction of oil or gas transit may persist during consultations and the process before a Panel and the AB, and may have catastrophic consequences on energy markets, domestic economies and the populations in states of destination and origin, such as occurred in Europe owing to the 2009 energy crisis. While it is not realistic to expect that the DSU may be amended to address these issues, its current structure begs the question whether WTO Members will bring disputes similar to the 2009 Ukraine/Russia dispute to the DSU, as their significant and immediate security of supply and security of demand interests would not be accommodated by the current legal architecture of the DSU.

On the other hand, the Energy Charter Treaty – the first sector-specific treaty open to universal accession – specifically addresses transit of energy via pipelines. ECT Article 7 requires Contracting Parties to take the necessary measures to facilitate transit (paragraph 1), and (in contrast to GATT Article V) to permit the construction of transit pipelines through their territory, unless they can demonstrate to the other ECT Contracting Parties concerned that such construction would endanger the security of its energy systems (paragraph 5). It requires ECT Contracting Parties not to interrupt or permit any entity subject to their control to interrupt or require any entity under their jurisdiction to interrupt existing transit flows in the event of a dispute over any matter arising from transit.

The ECT provides for a conciliation procedure for settling transit disputes, which can lead to *binding* interim measures (paragraph 7), and transit disputes also

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<sup>13</sup> For analysis of DSU in this respect: AZARIA, *supra* note 1, at 168-172.

fall within the jurisdiction of the inter-ECT Contracting Party arbitral tribunal (ECT Article 27).<sup>14</sup> None of these provisions have been resorted to despite the number of transit disputes between ECT Contracting Parties. However, beyond the political reasons that may surround the choice not to resort to them, the legal architecture of the dispute settlement provisions may contribute to the inaction of affected ECT Contracting Parties in this respect. The conciliation procedure (ECT Article 7(7)) is not compulsory and is subject to the exhaustion of previously agreed remedies between Contracting Parties or between entities of Contracting Parties (which may include inter-state arbitration or commercial arbitration respectively thus making recourse to the conciliation procedure unlikely). Additionally, the conciliator only has ‘jurisdiction’ to deal exclusively with the transit dispute under Article 7, and cannot adopt binding measures vis-à-vis terms and conditions or prices for exports or imports, which may be (an often is) an important aspect of the overall dispute surrounding transit.<sup>15</sup> Furthermore, the *ad hoc* arbitration under Article 27 is available only after exhausting diplomatic means (paragraph 1), and it may take up to 180 days for such a tribunal to be established, and thus to be capable to issue provisional measures (paragraph 2).<sup>16</sup> Since ECT provisions have been transposed *verbatim* into treaties between states that are not ECT Contracting Parties, such as the Energy Protocol to the ECOWAS Treaty,<sup>17</sup> similar questions about the scope and content of obligations set forth in the ECT and the dispute settlement provisions may arise in other regions of the world in the future.

Moreover, transit pipelines are mega-projects; they require intensive long-term investment and are constructed and operated on the basis of a network of agreements

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<sup>14</sup> *Id.*, at 177-178.

<sup>15</sup> *Id.*, at 178-184.

<sup>16</sup> *Id.*, at 177-178.

<sup>17</sup> ECOWAS Energy Protocol (A/P4/1/03) (31 January 2003) 42 ECOWAS OJ 71.

between states and enterprises (state-owned, state-controlled or private enterprises). They are often governed by (a) a treaty tailor-made for the project ('bespoke pipeline treaty'); (b) an agreement between the state and the project investor, the entity which will construct, own and operate the pipeline (often called 'host-governmental agreement'); and (c) agreements between the entity operating the transit pipeline and an entity which makes use of the infrastructure for transportation purposes. Examples of such frameworks are those for the Trans-Adriatic Pipeline, the Baku-Ceyhan-Tbilisi Pipeline and the West Africa Gas Pipeline. Additionally, international financial institutions (e.g. World Bank, Asian Development Bank, African Development Bank, and the European Bank for Reconstruction and Development) are often involved in such projects and establish standards (including environmental and social standards) by which the borrower entities (private entities or states) have to comply as part of the loan agreement with the financial institution.

A particular development in the field of bespoke pipeline treaties pertains to their institutional equipment. They often establish Pipeline Committees or Implementation Commissions, which are composed of representatives of each treaty party and serve as a forum for the long-term cooperation between treaty parties. They also enjoy competences in relation to facilitating the implementation of and overseeing compliance with the treaty, and at times (but not always) are involved in dispute settlement. The competences of each pipeline committee vary, and are broad. The architecture for implementing the mandate of each pipeline committee could emerge differently. However, currently the practice of the committees is minimal (and in relation to some committees altogether absent). Hence, although it cannot be doubted that their practice may have some effect on the interpretation of each treaty

over time,<sup>18</sup> it is difficult to give a definitive answer as to the full scope of competences of the committees, and their relationship with the implementation of international responsibility for breaches of obligations therein (for instance, in the form of interrupting transportation) by recourse to countermeasures under customary international law.

### **III. EFFECTS ON HUMAN RIGHTS AND THE ENVIRONMENT: REGULATORY MEASURES AND THE PLACE OF THE INDIVIDUAL**

Transit pipeline projects can have significant consequences for local populations and the environment. The conduct of states that permit (or undertake obligations for) the construction and operation of such pipelines in their territory may be incompatible with their international obligations under human rights treaties, and it is thus possible that a complaint by an individual may find its way before a human rights court or tribunal (or quasi-judicial body), where available. As a separate matter, where an international financial institution is involved in the project, in case of non-compliance by the financial institution with its own operational (environmental, human rights and social) standards, affected individuals may bring complaints under the accountability mechanisms of these financial institutions.

Moreover, transit pipeline projects may raise questions about the compatibility of the transit state's conduct, which may be taken in order to comply with human rights obligations or environmental obligations, vis-à-vis the project investor with its obligations under the host-governmental agreement and investment treaties. The

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<sup>18</sup> Vis-à-vis the impact on treaty interpretation of the practice of Conferences of Parties: Draft Conclusion 10, Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-sixth session, Report of the International Law Commission, Sixty-sixth session (with commentary), A/69/10, pp. 168-217.

investor may under these arrangements have standing to resort to arbitration against the state, for a breach of the host-governmental agreement or of the investment treaty respectively (where applicable). Disputes of this kind will revolve around the transit state's right to regulate. This type of regulatory measure and the ensuing dispute involve the conflict between (or need to balance) the 'regulatory space' of the transit state, with the need of other states to construct and to operate the pipeline in the long run for their economic development, and importantly with the regard to the investors' economic interests. A recent example of a claim by an investor against a state for breaches of investment protection obligations is that between TransCanada Corporation & TransCanada Pipelines Limited against the US under Chapter 11 of NAFTA, on the ground that the US denied the permit to construct the pipeline within its territory, although the US had concluded that the pipeline would not have a significant impact on climate change.<sup>19</sup> This dispute also illustrates the potential intersection of inter-state and investor-state proceedings: should there have been an obligation on the US under WTO/GATT and/or NAFTA to permit the construction of transit pipelines within its territory, there could have been inter-state proceedings under NAFTA and/or WTO, and investor-state proceedings under NAFTA.

Furthermore, the engagement of civil society concerning the effect of such projects on human rights and the environment may influence the interpretation and implementation of the applicable legal framework. For instance, in 2003, in response to civil society action, the BTC Pipeline Implementation Committee and the BTC Investor made a Joint Declaration affirming the compatibility of the BTC Pipeline

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<sup>19</sup> TransCanada is suing the U.S. over Obama's rejection of the Keystone XL pipeline, *The Washington Post*, 8 January 2016.

Treaty and the relevant Host-Governmental Agreement with human rights obligations of the three pipeline states and with environmental and labour standards.<sup>20</sup>

More generally, because transit rights are exercised in the territory of another state, they face the risk of being subject to the transit state's regulatory measures (environmental or social). Disputes surrounding such measures may involve the conflict of, and need to strike a balance between, community interest obligations (e.g. human rights obligations and some environmental protection obligations) with bilateral obligations such as those in bilateral or multilateral treaties, or other collectively owed obligations (*erga omnes partes* or interdependent) under bespoke pipeline treaties.<sup>21</sup> Importantly, owing to the involvement of and effects on individuals, transit pipelines and disputes surrounding them contextualise the place of the individual in the development and enforcement of international law.

#### **IV. INTERRUPTING TRANSIT AS A MEANS OF ENFORCEMENT**

In the UN era, where forcible responses to wrongfulness are prohibited, countermeasures under the law of state responsibility 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. Transit pipelines may be seen as a tool for the enforcement of international law. The Sudan/South Sudan dispute and the potential responses that Ukraine could take against Russia's unlawful use of force in Crimea by suspending compliance with its obligations concerning transit of gas and oil brilliantly illustrate the contemporary

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<sup>20</sup> Catherine Redgwell, Contractual and Treaty Arrangements Supporting Large European Transboundary Pipeline Projects: Can Adequate Human Rights and Environmental Protection be Secured?, in M.M. ROGGENKAMP et al (eds.), *ENERGY NETWORKS AND THE LAW* (2012) at 102-117.

<sup>21</sup> AZARIA, *supra* note 1, at 110-124.

importance of this issue, which pertains to the relationship between countermeasures as circumstances precluding wrongfulness under customary international law on state responsibility, and treaty language which may overlap and displace this function of countermeasures.

Some treaties concerning energy trade and investment contain security exceptions: for instance, GATT Article XXI and ECT Article 24 ('nothing shall prevent the parties from'). A number of arbitral tribunals, in a series of investor-state arbitrations against Argentina under bilateral investment treaties to which Argentina is party, have dealt with the relationship between security exceptions and circumstances precluding wrongfulness under the law of state responsibility differently.<sup>22</sup> However, the more persuasive position is that, when the language used in the security exception is (or resembles substantially) the language in GATT Article XXI and ECT Article 24, the exception delineates the scope of primary treaty obligations. In contrast, circumstances precluding wrongfulness are part of secondary rules and preclude the wrongfulness of conduct that would otherwise be wrongful: conduct that would not fall within the scope of security exceptions.<sup>23</sup> The WTO Panels and AB have not dealt with this particular question substantively, although one may presume that they would be inclined to prioritize the 'closure' of WTO law, and

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<sup>22</sup> Treaty exceptions are *lex specialis* and supersede the customary circumstances precluding wrongfulness: *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 245-261. Interpreting treaty exceptions through VCLT Article 31(3)(c) to incorporate conditions from circumstances precluding wrongfulness under custom: *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award of the Tribunal, 12 May 2005, paras. 315-382.

<sup>23</sup> Text of the draft articles on responsibility of States for 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'), p. 71, para. 1; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment, 25 September 2007, paras. 129-135; *Sempre Energy International v. Argentina*, ICSID Case No. ARB/02/16, Ad hoc Committee, Decision on the Request for Annulment, 29 June 2010, paras. 200-204.

thus the displacement of countermeasures taken in the form of suspending compliance with WTO obligations in response to breaches of obligations outside WTO law.<sup>24</sup>

On the other hand, most bespoke pipeline treaties do not contain security exception provisions, but contain other language that may displace countermeasures in the form of interrupting transportation in response to breaches outside these treaties. For instance, the Trans-Adriatic Pipeline Treaty permits non-performance of treaty obligations only by prior consent of all parties (Article 12). This treaty provision may be interpreted as displacing countermeasures in this particular form – albeit such interpretation would entail the displacement of any other unilaterally operational circumstance precluding wrongfulness under customary international law. Avoiding energy flows via pipelines becoming a means of enforcing international obligations is a crucial interest of states dependent on the established energy flows via a particular pipeline. But, by excluding countermeasures in the form of suspending compliance with obligations concerning uninterrupted energy flows, pipeline states forego an important tool for their protection against breaches of international obligations by states dependent on the pipeline. In light of the opposing interests between treaty parties and the opposing interests that each treaty party may have (some may be importers at the same time as being transit states), the relationship between these treaties and circumstances precluding wrongfulness under custom is a matter of interpretation, and will likely be the subject of a dispute as to the correct interpretation. The ambiguity of the language in bespoke pipeline treaties allows

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<sup>24</sup> Implied inclination (yet misplaced reasoning): Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 24 March 2006, paras. 69-76, 79. For further analysis and criticism of the *lex specialis* argument here: AZARIA, *supra* note 1, at 83-88.

parties to make arguments in the future to the effect that countermeasures are or are not excluded permitting them to better pursue their interests in different situations.<sup>25</sup>

## V. CONCLUSION

It has been argued that disputes regarding transit of energy are ‘commercial’, technical, or political. This proposition intends to cast doubt over the application of international law in this context. Such doubt is unfounded. The fact that disputes have political, economic, scientific, and technical aspects does not mean they are not disputes ‘capable of being settled by the application of [...] international law’.<sup>26</sup> A dispute may involve a disagreement about facts, as was partly the case in the 2009 Russia/Ukraine dispute, but a dispute about facts does not exclude a dispute about law.<sup>27</sup> Settling a dispute by non-judicial means does not mean that international law does not apply. The decision to invoke the international responsibility of a state may be political, but the fact that responsibility has not been invoked does not mean that responsibility has not been engaged.<sup>28</sup>

Placing treaties on transit of energy via pipelines alongside each other and in the wider context of public international law, provides an opportunity to reflect on the infinite variety of treaty obligations concerning transit of energy via pipelines, but also the infinite variety of the interests that states wish to protect and pursue by such obligations over time. The trend of ‘treatification’ in this area may be due to a number

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<sup>25</sup> As to the lawfulness of such countermeasures under custom (to the extent that they are not displaced by treaty *lex specialis*), e.g. on the basis of their effect on fundamental human rights obligations, and on the basis of proportionality: AZARIA, *supra* note 1, at 232-247.

<sup>26</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 ICJ REP. 136 (July 9), para. 41.

<sup>27</sup> Mavrommatis Palestine Concessions (UK v. Greece), 1924 PCIJ (ser. A) No. 2, at 11 (Aug. 30).

<sup>28</sup> When a state invokes the responsibility of another it has implicitly made its own determination that responsibility has ensued from an internationally wrongful act. Non-invocation of responsibility may mean that the invoking state has made the determination that there is no breach, but it may be due to numerous other (e.g. political and/or economic) reasons. ILC Commentary to the ASR, pp. 116-117, para. 2.

of different factors. First, it is inconclusive whether general customary international law exists concerning transit over territory.<sup>29</sup> Even assuming *arguendo* that it does, it is inconclusive whether such customary rules apply to transit via pipelines. Second, the rules in treaties of general scope (e.g. GATT), may not be perceived as sufficiently detailed or appropriate for transit via pipeline generally or even for particular pipeline projects (owing to the particular geopolitical context), and thus even parties to such treaties of general scope may prefer to conclude bespoke pipeline agreements. Third, numerous treaties provide for dispute resolution or create institutions often endowing them with dispute settlement or compliance supervision competences, which would otherwise be unavailable. Fourth, bespoke pipeline treaties and the overall legal framework for such projects provide for the protection of corporations involved in the construction and operation of transit pipelines allowing them to protect and pursue their financial interests by recourse to arbitration against pipeline states, which may otherwise be unavailable. Fifth, geopolitics in particular regions may be better accommodated by bespoke pipeline treaties, and energy security interests of states may change over time making treaty interpretation an important method for accommodating the long-term and short-term interests of states in relation to transit pipelines.

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<sup>29</sup> The customary freedom to lay pipelines on the high seas applies in the continental shelf and the exclusive economic zone, while the delineation of the pipeline's route on the continental shelf is subject to the coastal state's consent.