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BOOK REVIEW

Cross-Border Energy Transit: Legal Considerations

TREATIES ON TRANSIT OF ENERGY VIA PIPELINES AND COUNTERMEASURES.
By Danae Azaria. Oxford: Oxford University Press. 2015. Pp. 336. Hardback $120.

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Bilateral and multilateral treaties are critical to ensuring vital energy transit between states. However, frequent and ongoing interruptions to cross-border energy transit highlight the inherent geopolitical difficulties in securing transit—an essential element in the security of energy supply to consumers down the energy chain, which is as strong only as its weakest link. Because of the strategic and geopolitical importance of free and unhindered transit, the international norm applicable today places the burden of proving the legality of any interruption on the party who initiated it. However, this primary consideration gives rise to a secondary consideration, one that has thus far been rarely considered and that has escaped academic rigour entirely: can interruptions to transit qualify as countermeasures under international law? Countermeasures constitute bilateral action taken by one state against another because "the latter has violated an obligation owed to the former" (p. 22). Therefore, the question is, can an injured state lawfully interrupt transit as an action or reprisal taken to respond to a prior wrong when such action would, in other circumstances, violate international law? In *Treaties on Transit of Energy via Pipelines and Countermeasures*, Dr. Danae Azaria seeks to address the interface between energy transit and countermeasures against the background of the frequency and intensity of transit disputes.

The central point of Azaria's detailed analysis is simple and well executed: the relationship between global energy demand and domestic economic growth means states have a vested interest in governing transit through their territories. This creates international power dynamics between states, which are essentially two-fold: first, the dependence of importers on energy exports places the exporter and transit states in a position with enforcement leverage against the importer; and second, exporters reliant on transit are in a vulnerable position vis-à-vis the transit state, which can again utilize its geographic position as a "considerable weapon" (p. 251). The disputes to

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date have largely occurred in a "'commercial', political or technical" vacuum (p. 5). For the most part, they have escaped legal recourse, and, without exception, have attracted no in-depth analysis or academic debate as to their relationship with the broader principles of customary international law. Azaria identifies this gap and persuasively explains its practical significance, adhering to a logical structure and referencing numerous "real world" examples.

The starting point for Azaria's monograph is the large number of relevant treaty provisions governing transit through the pipelines included in her study. Despite what Azaria terms the increasing "treatification" of this area of law (p. 7), the interpretation of the various provisions governing transit is potentially subject to a multitude of jurisdictions as might be defined in their respective host agreement. This is one of Azaria's key justifications for embarking on a study that seeks to address the *relationship* between such treaty provisions and the unilateral measures states can lawfully employ as a form of self-help when vital energy transit is interrupted.

Azaria's analysis focuses on the two key multilateral agreements governing energy transit among states: the Energy Charter Treaty ("ECT") and the World Trade Organisation Agreement ("WTO Agreement"). She also includes sixteen bespoke pipeline agreements, which provide useful points of comparison throughout the various layers of her analysis. The commonalities between the agreements assist in providing a complete analysis, and as the inaugural legal text on the topic, this aspect could easily be leveraged as one of the book's key strengths.

The opening chapters of Azaria's substantive analysis unpick the obligations at the very heart of the treaties themselves. Azaria argues that an understanding of the scope and content of each of the treaty obligations pertaining to transit is pivotal to all the questions she then sets out to answer. The basic distinction between primary and secondary rules is an important one for Azaria, recalling that primary rules prescribe the ways in which states must conduct themselves, whereas secondary rules contain the consequences for breaches of these rules. Importantly, states may contract out of customary secondary rules through the express provisions of a treaty, but the provisions of a treaty must be clear and unambiguous in attempting to displace customary rules.

Azaria also dedicates a considerable amount of her legal analysis to an in-depth, technical examination of the nature of the different obligations created by the treaties. She adheres to the criteria for classification adopted in the Vienna Convention on the Law of Treaties[3] (and similar to that followed in the Draft Articles on the Responsibility of States[4] and the Draft Articles on the Responsibility of

[3] Vienna Convention on the Law of Treaties, arts. 31 and 32, May 23, 1969, 1155 U.N.T.S 331 [hereinafter Vienna Convention on Law of Treaties].

[4] U.N. Int'l Law Comm'n, Report of the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 53rd Sess., Supp. No. 10, arts. 42 and 48, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles on State Responsibility].

International Organizations[5]). Understanding whether treaty obligations are "bilateralizable" or indivisible is key to answering Azaria's two fundamental questions (pp. 101−102): To which parties are transit obligations owed? And further, which parties can invoke the responsibility of the transit state? Bilateralizable obligations are those that can be reduced to a reciprocal relationship between two states, even where they exist as part of a multilateral treaty (p. 104). Conversely, indivisible obligations are those which are owed to groups of states and which seek to protect "collective interests" (p. 110).

Azaria ultimately concludes that the main provisions establishing freedom of transit in the key multilateral agreements on energy transit (the WTO Agreement and the ECT) are bilateralizable—that is, reducible to obligations owed between two member states only. However, questions remain as to (1) the multilateral nature of the instruments and (2) the increasing interconnectedness of the global economy and the flow on effects interruption to energy transit may have further down the customer chain (for example, the position of some EU members in the Russia-Ukraine transit disputes). Indeed, Azaria appears to struggle when trying to reconcile her conclusion that the majority of ECT obligations are bilateralizable with the observations of a WTO Panel Report confirming that "[m]embers have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly."[6] All things being equal, this report also shows that the members of a trade-based treaty (such as ECT or WTO Agreement) can be individually, and potentially collectively, affected by the non-compliance of one member. This is perhaps more so for ECT members than for WTO members due to the particularity of cross-border energy trade (see introduction above). Therefore, members are equally interested in seeing each member comply with their obligations.

Azaria does accept, however, that bilateralism of obligations "cannot be considered the norm" (p. 103). She remains true to this stance when later analyzing the lawfulness of unilateral responses to interrupted transit. Azaria contends that the bespoke plurilateral agreements, such as the Nabucco Agreement,[7] create indivisible obligations, either interdependent because they operate on the basis of global reciprocity, or *erga omnes partes* because they represent interests owed to states collectively. Such a classification immediately presents issues for states under these agreements because it means recourse to countermeasures will generally be prohibited despite not being expressly precluded within the treaties themselves. Azaria aptly observes that countermeasures would be disproportionate on the grounds that they target commonalities as opposed to individual interests and would therefore be prohibited under customary international law.

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[5] U.N. Int'l Law Comm'n, Draft Articles on Responsibility of International Organizations, arts. 43 and 49, U.N. Doc. A/66/10 (2011) [hereinafter Draft Articles on the Responsibility of International Organizations].

[6] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* WT/DS27/R/MEX (May 22, 1997) ¶ 7.50.

[7] The Nabucco Agreement was created to govern the Nabucco pipeline, which was initially planned to carry gas from the Caspian Sea through to Austria. The agreement was ratified by Austria, Bulgaria, Hungary, Romania, and Turkey.

Perhaps an effective way to circumvent this issue—and indeed what Azaria proposes—is to frame larger pipeline "projects" as a series of bilateralizable agreements, as opposed to one plurilateral agreement. In relation to the China-Central Asia Pipeline, for example, China (destination state) has concluded separate bilateral agreements with Turkmenistan (state of origin), Uzbekistan, and Kazakhstan (transit states). Azaria argues "the *vehicle* of bilateral agreements is an effort to ensure the bilateralisation of transit obligations, which are (separately) owed to China" (p. 126). The bilateralization of obligations would allow a destination state to specifically invoke the responsibility of one transit state, for example, without it affecting the interests of the other states within the broader umbrella agreement. However, one should also bear in mind the preventive, even cathartic nature, of the multilateral agreement which, while serving as overarching framework for the various bilateral relations, also often serves to positively address the natural imbalance of interests of the producer, transit, and consumer countries along the transit chain.

The final chapters of Azaria's book are wholly a consideration of the remedies available to injured states when transit of vital energy flows is interrupted. Although they present the same depth of legal analysis as the first half of the book, these chapters are more focused on practical applications, which allow the reader to better grapple with the significance of her conclusions. Aside from those grounded in the express provisions of the treaties, such as dispute resolution mechanisms, Azaria argues that states have two primary forms of recourse when transit obligations are breached: remedies available under the law of treaties, and remedies available under the law of international responsibility, with a specific focus on countermeasures. Importantly, as Azaria clearly explains, remedies under the law of treaties and countermeasures serve entirely different purposes. Responses under treaty law are intended to re-establish the balance between the parties, whereas countermeasures are "intended to induce compliance with the secondary obligations . . . to cease the wrongful act and to make reparation" (p. 187).[8] It is for this reason, she posits, that they should not be viewed as mutually exclusive and can, in fact, be complementary.

Azaria then sequentially deals with the different types of responses available to injured states. Under treaty law, Articles 60 and 72 of the Vienna Convention on the Law of Treaties confer a right of suspension upon the occurrence of a material breach and provide for consequences of suspension, respectively. Azaria argues that any breach of a transit provision is a breach of a provision "essential to the accomplishment of the object or purpose of the treaty"[9] and would, therefore, amount to a material breach. However, the classification of obligations is paramount to how this right can be exercised. She goes on to discuss the relationship between express treaty provisions providing for dispute resolution or compliance mechanisms and countermeasures under the law of responsibility. Although this entails further legal analysis of the specific provisions included in each of the agreements, Azaria does so to effectively draw out commonalities. First, she argues that clauses which specifically provide for the peaceful settlement of disputes do not *ipso facto* exclude

[8] Draft Articles on State Responsibility, art. 49.
[9] Vienna Convention on the Law of Treaties, art. 60.

countermeasures, although where the language indicates that the mechanisms within the treaty were intended to be exclusive, she concludes that it is likely countermeasures have been displaced. In contrast, Azaria argues that "[o]bligations to negotiate do not exclude countermeasures as a means of implementing responsibility" (p. 193). Further, when the treaties provide for particular implementation committees, Azaria argues the better approach is to understand that countermeasures can exist concurrently until such a time that an ad hoc tribunal is constituted and the wrongful act ceases (pp. 187−188).

Throughout Azaria's monograph she clearly unpacks her hypotheses, with each chapter building on the findings of the previous until she reaches the capstone in Chapter 8—an analysis of whether, despite her preliminary legal conclusions, countermeasures would satisfy the general conditions of lawfulness under customary international law. The most salient criteria in Azaria's study are the need for countermeasures to be reduced to bilateral measures taken by an injured state against a responsible state and to be proportionate to the harm suffered (pp. 210–212). In light of Azaria's findings that many of the plurilateral treaties contain indivisible obligations, the ability for states to comply with the former of these requirements is nullified, and consequently so too with the latter—a countermeasure taken against the responsible state that has the effect of targeting all parties to the agreement will inevitably be incommensurate with the original harm.

Azaria's academic legal analysis tends to find its limits when attempting to validate the relevance of these legal findings in a real world context—a context where the range of considerations and geopolitics governing relations between states is broader and more delicate than those found in the Draft Articles on State Responsibility. However, this by no means undermines the significance or strength of her monograph, which analyzes substantially unexplored territory and is a solid reference for academics and practitioners alike. As the first legal scholarship on this subject, the extent to which Azaria thoroughly records each aspect of her analysis is likely to be respected as a necessary trade-off.

The parting reader is left with one unanswered question: will these legal solutions ever find real world footing? This is the very question subsequent studies should embrace, and there is no doubt that Azaria's monograph provides an excellent foundation for such an undertaking.