THE LEGAL DESIGNING OF REGIONAL GAS PIPELINES: AN APPRAISAL

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I. Introduction

Energy and Energy products act as a central element of human well-being as well as national development. Availability of these products and resources, on a regular basis and at an affordable price, is crucial for the smooth functioning of the economy. Given that the patterns of distribution of energy resources vary across countries and continents, some countries and geographic regions have virtual 'monopoly' over some of the energy goods and materials. However, most countries would require import of their vital supplies. For instance, Venezuela, Saudi Arabia, Iraq, Kuwait and the other States in the Middle East, along with the Central Asian Republics have, among them, a substantial share of the world's petroleum resources. Likewise, Russia, Qatar and Iran account for more than half of the world's natural gas reserves. The US, South and Central America, Far East and Africa, also possess respectable reserve estimates. On the other hand, European/OECD countries and large economies such as China and India have inadequate domestic energy resources to meet the industrial development as well as human and social needs. These states are heavily dependent on import from producing countries, leading to the formation of inter-state and regional markets and in the case of oil, the development of a global market.[1]

As the former Director General of the World Trade Organization (WTO) Pascal Lamy noted, Energy serves as an essential input to the production of goods and services, and hence has an effect on countries' comparative advantage and the composition of international trade flows. Energy powers

[1]According to energy expert Claudia Kemfert, "by 2030, the OECD as a whole would import two-thirds of its oil needs, compared with 56% today. Much of the additional imports come from the Middle East, along vulnerable maritime routes. The concentration of oil production in a small group of countries with large reserves-notably Middle East OPEC members and Russia-will increase their market dominance and their ability to impose higher prices. An increasing share of gas demand is also expected to be met by imports, via pipeline or in the form of liquefied natural gas from increasingly distant suppliers". See: Kemfert C. (2012) Global Energy Markets: Challenges and Opportunities – Energy Vision for 2050. In: Herrmann C., Terhechte J. (eds) European Yearbook of International Economic Law 2012. European Yearbook of International Economic Law, vol 3. Springer, Berlin, Heidelberg.

the movement of goods and people across borders. Without energy, there is no international trade.[2]Indeed, there is an enormous amount of empirical data that points towards the direct relationship between the access to energy services and the economic development and growth prospects of nations. The level of consumption of energy is, in so many different ways, a strong indicator of its level of economic development and growth potential. One of the defining features of our times is the scramble for oil and natural gas resources by the biggest importers of energy that compete among themselves to get their energy footprints, to secure national economic interests in the resource–rich and under-developed regions around the globe. Countries such as China and India have emerged as major consumers in the world energy market as their economies have registered impressive growth rates. Since national economic development is possible only through securing access to energy, this in turn, explains the growing global trade in energy products in recent times. The global quest for energy, in a scenario where traditional oil fields have exceeded their production capacity, is taking the trans-national energy corporations to the last frontiers of the geographic Earth for deep-sea drilling in the Arctic and to the Brazilian and African coasts.

Energy trade in both primary forms and processed forms (of energy-related goods and services), is today global in scope and effect for crude oil and other petroleum products constitute the most widely traded commodity in the world. Trade in the field of energy products account for almost one-fourth of the world trade that is growing every year across the world. It is estimated that over half of the world's oil production is traded across at least one border now a days. Among all the non-renewable sources of energy, petroleum is the most important as it constitutes almost 40 per cent of world energy consumption and is estimated to be constant in the coming decades as well as in powering the growth prospects of the nations.[3]Hence, energy interdependence is an inevitable element of the modern international scenario.

[2]WTO, *Lamy calls for dialogue on trade and energy in the WTO* (29th April 2013) http://www.wto.org/english/news_e/sppl_e/sppl279_e.htm(Last visited August 9, 2014).

[3]For a review of international trade in energy goods and materials, see: WTO, World Trade Report 2010-Trade in Natural Resources, (2010) http://www.wto.org/english/res_e/publications_e/wtr10_e.htm (Last visited August 05, 2014).

In the past, a handful of powerful, western transnational companies dominated the energy sector of major resource-rich, but otherwise, underdeveloped countries in Asia and elsewhere. These foreign corporations derived their authority for petroleum exploration and exploitation from a system of long- term concessions or exploration and exploitation license regimes.[4] The sovereign heads, in many cases, were co-opted to gift their economic control over vast lands for exploitation and extraction of resources to the few multinational companies that dominated all aspects of the business chain from production to distribution to the transportation networks.[5] It is worth recalling that the exploitative practices of western transnational corporations in the natural resources sector of eastern Host states and also their brazen meddling in the internal political affairs to suit their business requirements have had profound impact on the national consciousness in several developing countries. The energy-related disputes between Host States and transnational corporations that are a corollary to this history of colonial exploitation have had a constitutive role in the development of the principles of international investment law as well.

The national regulatory frameworks for energy as well as the policies for transnational energy relations have deep resonance across the international community in this era of globalisation. Due to the heavy impact of the energy sector on the global political and economic order and the question of the regulations being implemented on an international level, has urgent policy relevance as well. And there is little dispute that the rules and principles of international law undergird the global architecture of energy relations in various ways. Global energy regulations, today, cover a range of topics such as national sovereignty over natural resources, applicable norms for transit pipelines, multilateral negotiations for norms on energy services, resource nationalism, expropriation and fair compensation, rights of indigenous communities and environmental protection imperatives in energy exploration and exploitation projects and the responsibility and accountability of multinational corporations, etc. Scholars argue that the thickening web of international agreements and institutional mechanisms,

[4]Smith & Dzienkowski, *A Fifty Year Perspective on World Petroleum Arrangements*, 24 TEXAS INTERNATIONAL LAW JOURNAL13 (1989).
[5]Yergin, Daniel, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY AND POWER, (1991).

including dispute settlement arrangements, provide the very basis of a new sub-discipline of International Law that is 'international energy law'.[6]

II. Transnational Pipelines: Political Economy of Energy

International trade in oil and natural gas is carried out either through cross-border pipelines[7]or in the form of Liquefied Natural Gas (LNG) transported by tankers. Considering the huge capital investments required for the construction of LNG infrastructure, LNG shipment, as a method of transportation, becomes attractive in commercial terms only when the market distances are very high.[8]Hence, trade of natural gas is especially dependent upon the pipeline networks for reasons of commercial considerations and as such, the market for natural gas is, predominantly, regional at the moment.

Owing to substantial improvements in the field of technology in recent times, there is a remarkable increase in the number and type of the pipelines that carry hydrocarbon resources over long distances, both underwater and overland. Hence, pipeline networks carrying oil and gas

[6]The availability and affordability of energy products in the international market, special issues of energy transportation through the high seas, rights and obligations of energy transit through third countries, energy sustainability, standards of investment protection, security of energy supply, etc. constitute the central concerns of the global energy governance debate. The international petroleum transactions typically raise the issues of contract formation, interpretation and enforceability. See: Andrei Konoplyanik, *Energy Security and the Development of International Energy Markets*, in ENERGY SECURITY: MANAGING RISK IN A DYNAMIC LEGAL AND REGULATORY ENVIRONMENT (Barry Burtonet al. eds. 2004).

[7]As Rainer Lagoni notes, "a pipeline is a connected series of pipes with pumping installations and control devices for the conveyance of liquids, gases, or materials. Pipelines are mainly used for the transport of natural gas, crude oil, chemical products, or coal slurry. Cross-border pipelines connect a wellhead or the interconnection to a pipeline system in one territory or on a continental shelf with a terminal or a pipeline system in another territory or on another continental shelf". See: Rainer Lagoni, *Pipelines* in MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW, Vol. VIII, 315-320 at 315, (Rudiger Wolfrum ed., 2012).

[8]James T. Jensen, THE DEVELOPMENT OF A GLOBAL LNG MARKET (2004).

products are crossing national frontiers, connecting the distant areas of production with eventual customers in foreign lands. With a consistent rise in global demand over the last decade, the natural gas sector is expected to require and attract massive investment in energy supply capacity, transportation and delivery infrastructure and the economic projections for it to retain these rates for the next two decades.[9]As a corollary to this, exporters and consumers within the global energy industry have become increasingly and mutually dependent upon the transportation of hydrocarbon products through these pipelines.

This speciality of the trade in natural gas can be seen in the pattern of the established energy transportation networks in Western Europe. As Sanam S. Haghighi notes, "*From Algeria, gas travels through Morocco to reach Spain or through Tunisia to reach Italy. From Russia it passes through countries in the Baltic region or Ukraine, and from the Caspian region it goes through Azerbaijan and Georgia, or through Turkey and the Balkan region.*"**[10]**In the European context, where the dependence on imports is very high, transnational pipeline networks are a vital part of the energy security architecture. For many decades now, the member States of the European Union source their energy requirements from Russia and elsewhere through a network of transnational pipelines. In the early 1990s, against the political backdrop of the disintegration of Former Soviet Union, the European leaders initiated the development of a multilateral treaty called the Energy Charter Treaty, with a significant component for issues dealing with the construction and operation of cross-border pipelines. It sought to reduce the political anxieties associated with the predominance of Russian corporations in the energy sector of Europe and to put energy relations with the newly independent Central Asian states on a firm transnational legal context.[11]

[9]To meet demand growth, the International Energy Agency estimates that government and industries will need to invest more than US$16 trillion over the next 25 years.For a comprehensive assessment, see: David G. Victor, Amy M. Jaffe and Mark H. Hayes (eds.), NATURAL GAS AND GEOPOLITICS: FROM 1970 TO 2040, 508(2006).

[10]Sanam S. Haghighi, ENERGY SECURITY: THE EXTERNAL LEGAL RELATIONS OF THE EUROPEAN UNION WITH MAJOR OIL AND GAS SUPPLYING COUNTRIES, 28(2007).

[11]For a brief overview, see the Section on Energy Charter Treaty.

In the last five years, due to the development of hydraulic fracturing and horizontal drilling techniques responsible for reducing production costs, the United States has witnessed a shale gas boom increasing the prospects for its self-sufficiency in the field of energy. This may have significant implications for the US energy and foreign policies in the coming decades.[12]On the other hand, with large and growing economies, India and China are likely to account for a huge share of the increasing Asian demand for the supply of natural gas. In recent years, China has heavily invested in the development of its domestic natural gas market and in the establishment of international energy transportation networks in its extended neighbourhood, including cross-border gas transmission pipelines, with a number of States rich in resources.[13]The Central Asian states of Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan and Turkmenistan, have entered into bilateral and regional agreements with China for the purpose of establishing an ambitious Central Asia- China natural gas pipeline system through long-term contractual agreements.[14]Likewise, the cooperation between Russia and China in the field of energy has been set on a firm legal footing recently with the signing of a bilateral agreement between the two countries for a natural gas transmission pipeline system, the construction of the Russian part of the Eastern Route of which has just been commenced.[15]

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[12]According to the latest Annual Energy Outlook 2013 (AEO 2013), the Energy Information Administration (EIA) projects the U.S. natural gas production will increase by about 40% by 2040 from its current level of 27.4 trillion cubic feet (tcf), mainly because of expected increases in shale gas production over the next two decades. Shale gas is projected to account for more than 50% of total U.S. natural gas production by 2040.

[13]Zhou Jiping, *The Rapidly Growing World and Chinese Natural Gas Markets: Speech at the 25th World Gas Conference, Kuala Lumpur, Malaysia* (June 7, 2012)http://www.cnpc.com.cn/en/speeches/201407/658c2d0d1abc4624b515aaf0798e91cc.shtml (last visited September 15, 2014).

[14]See, http://www.cnpc.com.cn/en/FlowofnaturalgasfromCentralAsia/FlowofnaturalgasfromCentralAsia.shtml; See also,: http://www.cnpc.com.cn/en/nr2014/201409/695bdbe775c94f8581c1e4eb234c2c6a.shtml

[15]CNPC, *Construction of Russian part of Eastern Route of Russia-China Gas Pipeline commenced* (September 2, 2014).

While energy experts in India have long debated and advocated the merits and commercial viability of a natural gas pipeline from Myanmar to India through Bangladesh, the project did not materialize due to various reasons and in the meanwhile, China was able to propose an alternative natural gas pipeline from the western coast of Myanmar to its south-western Yunnan province and establish it within the contractually-stipulated period of time.[16]China's ability to combine the proposals for the constructions of transnational pipeline projects in its extended neighbourhood from Central Asian states- Kazakhstan, Turkmenistan, Uzbekistan, Tajikistan and Kyrgyzstan-to-Myanmar, with other foreign economic assistance programmes in the countries concerned, seem to have had a huge impact upon the successful conclusions of these otherwise complex transnational negotiations which requires the balancing of rights and interests of different stakeholders in the system. As part of its larger international energy security framework, China is also actively considering the Membership of the Energy Charter Treaty so as to effectively leverage the multilateral institutional mechanism, especially considering the security of its large exposure to, and heavy energy investments in, the Central Asian region and elsewhere.[17]

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http://www.cnpc.com.cn/en/nr2014/201409/4710dbc6fc804b66a732de9cbc06eccc.shtml (Last visited September 14, 2014). For an analysis of the Russia-China gas pipeline dynamics, see: Irina Mironova, *Russian Gas in China – Complex Issues in Cross-Border Pipeline Negotiations* (2010) http://www.encharter.org/fileadmin/user_upload/Publications/Russian_Gas_in_China_2010_ENG.pdf (Last visited August 14, 2014).

[16]For a related news, see: CCTV, *China-Myanmar joint pipeline starts delivering gas*, http://english.cntv.cn/2014/08/06/VIDE1407301800241634.shtml (Last visited August 23, 2014).

[17]More than a decade ago, China was granted the status of Observer to the Energy Charter Treaty on 17 December 2001. For a recent report on China's increasing interactions with the Charter framework and negotiation processes, see: http://www.encharter.org/index.php?id=21&id_article=540&L=0 (Last visited September 09, 2014); see also an article debating China's membership on the Treaty, Noriko Yodogawa and Alexander M. Peterson, *An Opportunity for Progress: China, Central Asia, and the Energy Charter Treaty*, TEXAS JOURNAL OF OIL, GAS AND ENERGY LAW, Vol. 8, No. 1, 111-142 (2013).

The energy security of South Asian states such as Afghanistan, Pakistan and India can be greatly enhanced by creating a network of cross-border pipelines, linking the gas producing states which are situated at the immediate or extended neighbourhood of the region.**[18]** For instance, India's increasing demand for natural gas can be met through the establishment of transnational gas pipeline networks originating from countries such as Iran on the West and Myanmar in the East.[19]There are also other such proposals for regional gas infrastructure projects connecting Central Asia and South Asia[20], linking Turkmenistan, Kazakhstan[21] and even Russia with India through such networks.[22]

But such pipelines will have to be routed through countries with internecine conflicts and other governance challenges, thus throwing up complex geostrategic and political issues, and investment risks.[23]These complexities are, in addition to, the omnipresence of US foreign-energy

[18]Tongia, Rahul and VS Arunachalam, *Natural Gas Imports by South Asia: Pipelines or Pipedreams?*, ECONOMIC AND POLITICAL WEEKLY, Vol. 37: 18, May 1, (1999); M. Ramzan Ali, GAS PIPELINES AND REGIONAL COOPERATION", SOUTH ASIA JOURNAL, July- September (2005); S. Pandian, S. (2005), *The political economy of trans-Pakistan gas pipeline project: assessing the political and economic risks for India*, ENERGY POLICY, 33 659–670(2005); David Temple, *The Iran Pakistan- India Pipeline: The Intersection of Energy and Politics*, IPCS(2007); Anoop Singh, *The Economic of Iran-Pakistan-India Natural Gas Pipeline*, ECONOMIC AND POLITICAL WEEKLY, Vol. 43: 37, 57-65, September 13, (2008).

[19]For a view from India, see: Girijesh Pant, INDIA: THE EMERGING ENERGY PLAYER, (2008).

[20]K. Warikoo (ed.), CENTRAL ASIA AND SOUTH ASIA: ENERGY COOPERATION AND TRANSPORT LINKAGES, 293 (2012). Also See: Rashmi Doraiswami (ed.), ENERGY SECURITY: INDIA. CENTRAL ASIA AND THE NEIGHBOURHOOD (2013).

[21]Sanjay Kumar Pandey, *Energy Cooperation between India and Kazakhstan* in ENERGY SECURITY: INDIA. CENTRAL ASIA AND THE NEIGHBOURHOOD, 86 – 93. (Rashmi Doraiswami ed., 2013).

[22]Rajeev Sharma: "*Modi, Putin to Discuss $40 Billion India-Russia Gas Pipeline* FIRSTPOST (Jul 14, 2014) http://www.firstpost.com/world/modi-putin-to-discuss-40-billion-india-russia-gas-pipeline-1617059.html (Last visited September 19, 2014).

[23]Boyko Nitzov EMERGING TRANSCONTINENTAL ENERGY ROUTES IN ASIA: INVESTMENT RISKS AND FRAMEWORKS (2003).

policies in South Asia, Caspian Sea and the Central Asia/ Former Soviet Union regions as well as the accompanying US domestic legislations that are designed to be applied extraterritorially impinge upon transnational corporations and other Project Investors in countries such as Iran.[24] By threatening to impose economic sanctions on commercial banks, corporate entities and even foreign State instrumentalities that are interested to execute cross-border pipeline projects involving Iran, the United States has effectively blocked the development of the Iran-Pakistan-India (IPI) natural gas pipeline.[25] At the same time, it has diplomatically promoted the construction of an alternative pipeline that excludes Iran from the scene, linking Turkmenistan-Afghanistan-Pakistan and India (TAPI).[26]

Despite the enormous, natural and commercial potentialities for developing a transnational, regional energy market linking Iran to India being identified from the late 1980's, the imperial presence of the United States in the Middle East and its considerable diplomatic and political influence over the South Asian states meant that transnational energy cooperation in South Asia can only progress in a direction that sub-serves the US policies for the region. It is patently obvious to anyone who looks at the diverging fortunes of the two pipeline project proposals in South Asia-IPI and the TAPI- that the US policies in the region loomed large on

[24]For an overview of the imposition of economic sanctions as a foreign policy tool under US domestic law, see: Arthur B. Culva house, Jr., *A Practical Guide to International Sanctions Law and Lore*, HOUSTON JOURNAL OF INTERNATIONAL LAW, Vol. 32:3, 587-604 (2010).

[25]The News International, *US may impose sanctions on Pakistan over Iran gas deal*, THE NEWS INTERNATIONAL, (Karachi, Pakistan: February 21, 2013), http://www.thenews.com.pk/article-88980-US-may-impose-sanctions-on-Pakistan-over-Iran-gas-deal-- (Last visited September 19, 2014).

[26]As M. Ramesh noted: "From the Indian perspective, the IPI passes through one 'difficult' country — Pakistan — but TAPI via two, including Afghanistan. Yet, it is the TAPI that looks closer to reality. The reason could be that TAPI is backed by the US to keep Iran out of the oil business. According to former Petroleum Minister Mani Shankar Aiyar, the US never pressured India to drop the IPI. Yet, New Delhi decided to back-pedal on the project as it saw a stumbling block in the Iran Libya Sanctions Act, though the law has never been invoked. Due to Iran's isolation, the IPI lost its appeal". See M. Ramesh, *The Iran-Pakistan-India gas pipe-dream*, THE HINDU (Chennai, November 29, 2013). http://www.thehindubusinessline.com/economy/the-iranpakistanindia-gas-pipedream/article5405591.ece(Last visited August 22, 2014).

the decision-making capacity of the parties concerned, given the overt and covert threats of US economic sanctions on the Project Investors. Hence, whatever frames of reference one may adopt to deeply analyse the energy cooperation situation in South Asia, one cannot discount the short arm of international law to deal with the long shadows of powerful states. In other words, extra-legal factors such as the US domestic obligations and foreign policy considerations have a disproportionate impact upon the development of international legal frameworks for regional energy cooperation in Central Asia and South Asia.

III. Legal Aspects of International Pipelines

The construction and maintenance of regional transportation networks and natural gas pipelines raise a multitude of complex political, commercial, fiscal, environmental, technical and legal issues.[27]For instance, consider the construction and maintenance of submarine gas pipelines that cross the 'maritime borders' of different States and may traverse the High Seas as well. Such infrastructure projects worth billions of dollars of investment in regional economic cooperation and commercial relationships, naturally, raise significant international law issues. The interests of the coastal states in the different maritime zones and the protection of the marine environment in the divergent jurisdictional spheres, including territorial seas and 'semi enclosed areas', may need to be addressed and accommodated within the legal design of such under-water pipelines. Historically, such ocean-related, transnational cable and pipeline laying activities derive their basis from the principles of freedom of the Seas.[28]The freedom to lay submarine cables and pipelines, as an aspect of the larger freedom of the Seas, was confirmed by the Geneva Conventions of 1958 on the High Seas and the Continental Shelf. Likewise, the United Nations Convention on the Law of the Sea (UNCLOS) has a number of provisions that specifically deal with trans-boundary pipelines. In particular, Article 79 of UNCLOS clearly states that, subject to certain conditions:

[27]Michael Dulaney and Robert Merrick, *Legal Issues in Cross-Border Oil and Gas Pipelines*, JOURNAL OF ENERGY & NATURAL RESOURCES LAW, Vol. 23, No. 3 (August, 2005).

[28]E. Lauterpacht (1958), *Freedom of Transit in International Law,* 44 TRANSACTIONS OF THE GROTIUS SOCIETY, 332 (1958–59).

(a)All States are entitled to lay submarine pipelines on the continental shelf; and
(b)A coastal State may not impede the laying or maintenance of such pipelines.[29]

Under the applicable normative framework, the coastal State is entitled to prescribe necessary conditions concerning all stages of pipelines construction and functioning and the delineation of the course for the laying of such pipelines in the exclusive economic zones and on the continental shelf is subject to its consent. Though the coastal State may not impede the laying or maintenance of pipelines considering the right of other States to carry out such activities, it also has the right to authorise and to regulate drilling on the sea bed. While the consent of the coastal State is required for the delineation of the particular course of a seabed pipeline, the real building of the pipeline does not need such consent. Though, ambiguities surrounding the scope of the prescribed 'reasonable

[29]Article 79 of the UNCLOS is entitled: " Submarine cables and pipelines on the continental shelf" and it has five provisions:
"1. All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article.
2. Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.
3. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.
4. Nothing in this Part affects the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.
5. When laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced". UNCLOS, available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (Last visited on September 20, 2014).

measures' and the extent of the requirement of consent may impact the balancing of scales in the regime.[30]

Energy business is highly-capital intensive and the development of oil and gas fields and the construction pipelines are subject to numerous risks. Such transnational infrastructure systems require large-scale investments and long term stable relations between supplier corporations and the eventual consumers – foreign project investors, and the Host-state governments. The rights and obligations of exporting, transiting, and importing nations need to be clearly spelt out. The framework for investment protection and risk mitigation may present complex challenges for the parties involved, as many studies point to the complexity of these issues as frequently posing a formidable barrier to the realisation of cross-border pipeline projects.[31]

Apart from the question of transit, regional gas pipelines, also, raise other significant issues: sanctity of contracts, protection of investment, and risk mitigation. Pipelines that straddle different national borders, inherently, raise political issues and may even witness the clash of strategic interests among the impugned states. The question of investment protection is bound to emerge as a central issue of project management. Private investors are unlikely to fund projects in high risk business environments. The protection of investment is central to the economic viability of heavy risk projects. Against political upheavals impacting adversely on the fate of the project concerned, insurance underwriters may impose additional premium in high risk environments. Political risks may be defined as the complications that businesses may face as a result of what are commonly

[30]*Ibid*. Also See: J. Symonides, *International Legal Regulations for laying submerged marine pipelines in exclusive economic zone, on Continental shelf and the high seas*, MARITIME LAW, 22: 7-25(2006). For a recent analysis of the concerns, see: David Langlet, *Trans boundary Transit Pipelines: Reflections on the Balancing of Rights and Interests in Light of the Nord Stream Project*, INTERNATIONAL AND COMPARATIVE LAW QUARTERLY,1-21 (September, 2014).

[31]BoykoNitzov, supra note 23; Paul Stevens, *Pipelines or Pipe Dreams? Lessons from the History of Arab Transit Pipelines*, MIDDLE EAST JOURNAL, Vol. 54, No. 2, 224-241 (Spring, 2000).

referred to as political decisions.[32]In order to mitigate the complex range of risks, the designing of a legal framework is indispensable to any transnational pipeline project, defining the respective roles and balancing the rights and entitlements of the various stakeholders. For only the legal and institutional framework can provide the requisite transparency, predictability and reliability in the system over the vast terrain of issues that the development of transnational pipeline systems entail.[33]

A. *Pipeline Agreements: Different Models*

The international pipelines implicate the rules of public international law in different ways, for such cross-border transportation projects raise issues relating to the applicable scope and ambit of principles generally recognised in international law. For instance, States exercise sovereign control over pipelines that run through their territories. As such, an international pipeline needs to be carefully calibrated with a Host State through clear principles so as to reduce the chances of potential conflicts between the major stakeholders. Since the legal framework for cross-border pipeline projects determine the content and contours of the political and business relationship between the parties, the legal designing may have significant implications associated with it. Given the centrality of State sovereignty, a transnational pipeline project may either be envisaged as the Interconnector model or as the Unified Project model.[34]

As Herbert Smith points out, under the Interconnector model, two separate pipelines are joined together at the common boundary between the two States, with each of the States retaining separate and distinct sovereignty

[32]According to Boyko Nitzov, political risks are "any political change that alters the expected outcome and value of a given economic action by changing the probability of achieving business objectives." See: *supra* note. 23.
[33]Ishrak Ahmed Siddiky, *Towards a new framework for cross-border pipelines: The International Pipeline Agency (IPA)*, ENERGY POLICY, 39, 5344-5346 (2011).
[34]Ishrak Ahmed Siddiky, *The International Legal Instruments for Cross-Border Pipelines*, 308-328, in RESEARCH HANDBOOK ON INTERNATIONAL ENERGY LAW, (Kim Talus ed. 2014).

over that part of the pipeline that lies within its territory.[35]In such a model, national laws on taxation, employment, health and safety and so on are applied separately by each country on 'its' part of the pipeline. Since the two interconnected pipelines are built by two separate entities, there is no requirement for an interstate agreement for an Interconnector model pipeline, although the commercial execution of such a project will be greatly simplified by a properly drafted agreement. The legal regime applicable will be the national laws of the relevant States, and any coordination can be accomplished by way of a Host State Agreement between the central or federal government of the State and the Project Investors.[36] On the other hand, the Unified Project model envisages an international pipeline. It is a single pipeline that straddles one or more boundaries. One single legal regime is created between the relevant States that applies to the entire length of the pipeline and all coordination problems (such as a common fiscal, safety and employment regime) are resolved by way of an Inter-Governmental Agreement. This model has many other advantages such as simplifying the rules to be applied to the construction and maintenance of the pipeline.[37]

The most significant difference between the two models revolves around the issue of national jurisdiction over the pipeline. In the Interconnector model, there must be a prior agreement as to the location of the common boundary. Without that agreement, the delineation of sovereignty by virtue of control over a segment of the pipeline will, in practice, prejudice the territorial claims of the countries concerned. By way of contrast, the Unified Project model enables countries to by-pass sovereignty issues, and isolate territorial and boundary disputes, without prejudicing a State's

[35]Herbert Smith, *International Law Regime of Trans boundary Pipelines*, (2002) http://www.mondaq.com/x/18195/international+trade+investment/International+Law+Regime+of+Transboundary+Pipelines (Last visited September 15, 2014).

[36]*Ibid*. Also See: Energy Charter Secretariat MODEL INTERGOVERNMENTAL AND HOST GOVERNMENT AGREEMENTS FOR CROSS BORDER PIPELINES, (2008); Ishrak Ahmed Siddiky, *The International Legal Instruments for Cross-Border Pipelines* in RESEARCH HANDBOOK ON INTERNATIONAL ENERGY LAW, 308-328 (2014).

[37]For a Book-length treatment of the many legal questions surrounding the development of cross-border pipelines, see: Chowdhury Ishrak Ahmed Siddiky, CROSS BORDER PIPELINE ARRANGEMENT: WHAT WOULD A SINGLE REGULATORY FRAMEWORK LOOK LIKE? (2011).

territorial or boundary claims. It is informative to note that the Interconnector model has never been used in situations where a pipeline would be required to traverse disputed territory, for the model requires the two governments to agree on a physical separation of the pipeline into two national sectors, over which their separate national sovereignty and control would be exercised.[38]

Historically, transnational pipelines have been established through bilateral or regional agreements signed by the respective Heads of Governments or Heads of States. Such agreements date as early as the 1930s and 1940s.The 1938 Agreement between the Governments of Brazil and Bolivia on the exportation and use of Bolivian petroleum is one of the earliest in this genre.[39] Likewise, the1941Convention on Construction of Oil Pipelines signed by Argentina, Bolivia, Brazil, Paraguay and Uruguay at Montevideo constitutes another early example.[40]During this period, a number of cross-border pipelines were constructed in the Middle Eastern states as well.[41]These international legal instruments, primarily, sought to encourage and promote the construction and operation of cross-border pipelines by 'setting forth the principles of non-discrimination with regard to their use, and of non-interference with the flow'.[42]However, it was only with the significant increase in international trade in oil and gas as well as the beginning of offshore petroleum development in the 1970s and 1980s that bilateral and multilateral agreements dealing with the establishment of cross-border and transit petroleum infrastructures began to be established on a frequent basis.

In recent years, transnational pipeline agreements have become more elaborate and sophisticated, reflecting the complexity of the legal and jurisdictional issues involved. Pipeline-related agreements may take the form of a 'framework' international (multilateral or bilateral) agreement establishing a set of general principles and obligations concerning cross-

[38]See Smith, Herbert (2002), *supra* note 35.
[39]Signed and entered into force on 25 February 1938; 51 UNTS 1938, cited in R Lagoni, *supra* note 7.
[40]Signed and entered into force on 06 February 1941; (MO Hudson, ed.), *International Legislation*, Vol. 6, 623, Washington: Carnegie Endowment for International Peace, 1949; Also See: R Lagoni, *supra* note 7.
[41]Paul Stevens, *supra* note 31.
[42]R Lagoni, *supra* note 7, at 316.

border pipelines and applicable to all trans-boundary pipelines between the parties. A classic example of this type of international agreement is the 1977 Agreement between the Government of Canada and the Government of the United States of America concerning the transit pipelines.[43]The Framework Agreement between the United Kingdom and Norway relating to the laying, operation, and the jurisdiction of inter- connecting submarine pipelines, also belong to this category. There are, also, other forms of exhaustive agreements that deal with specific pipeline projects. Among such types of agreements one may include, for example, the 1973 Crude Oil Pipeline Agreement between Turkey and Iraq, the 1977 Agreement on Principles Applicable to a Northern Natural Gas Pipeline between USA and Canada, and the 1993 Agreement Relating to the Transmission of Natural Gas by Pipeline between the United Kingdom and Ireland.

B. *Pipeline-related International Agreements*

The question of state sovereignty and demarcation of jurisdiction over pipelines straddling different national boundaries isan important issue in the context of cross-border infrastructure projects. The scope and ambit of the freedom of energy transit in international law has its implications for the development of regional gas pipeline networks. Historically, freedom of transit emerged as a right of land-locked states to have access to and from the Sea. The 1921 and the subsequent 1923 Barcelona Statute on freedom of transit recognised the principle that traffic in transit should be facilitated as far as possible and should not be used as a means for unjust enrichment.

A host of other bilateral and regional agreements define the rules of traffic in transit.[44]Article 5 of the GATT 1947 pertains to the rules for the transit

[43]Signed 28 January 1977; entered into force 1 October 1977; See Jimmy Carter's statement: "The Agreement is applicable both to existing and future pipelines transiting the United States and to future pipelines transiting Canada." in "United States-Canada Transit Pipeline Agreement Message to the Senate Transmitting the Agreement.," March 30, 1977. Gerhard Peters and John T. Woolley, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=7257(Last visited September 14, 2014).

[44] The 1965 New York Convention on Transit Trade of Landlocked Countries and the 1982 UN Convention on the Law of the Sea explicitly recognizes the several dimensions of freedom of transit in varying contexts, especially as it relate to

of goods.[45]It is, essentially, built upon the 1921 Barcelona Statute and elaborated the following aspects of transit: (a) equal treatment, independent of the flag of vessel, origin, departure, entry, exit, destination or ownership of the goods, vessels; (b) prohibition to make traffic in transit subject to unnecessary delays or restrictions; (c) prohibition to levy custom duties, transit duties and other transit related charges (except for charges for transportation or those commensurate with administrative expenses entailed by the transit, or with the cost of services rendered); (d) level of charges levied should be reasonable to the conditions of traffic; (e) Most favoured nation treatment with regards to charges, regulations and formalities.[46]

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access to and from the Sea and passage rights across the territories of states in the case of land locked states. Notwithstanding these bilateral, regional and international arrangements, the question of transit is a contentious issue in international law. This is mainly because transit freedom essentially limits the sovereignty of states over their territory. For a detailed review, see: Kishore Uprety, THE TRANSIT REGIME FOR LANDLOCKED STATES: INTERNATIONAL LAW AND DEVELOPMENT PERSPECTIVES (2006).

[45] UNCTAD (2009), *Freedom of Transit,* Technical Note 9, Trust Fund for Trade Facilitation Negotiations, Geneva: UN. See also UNCTAD (2000), *Trade Agreements, Petroleum and Energy Policies,* Geneva and New York: UN.

[46]GATT Article V on *'Freedom of Transit'* states:

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit".

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays

One significant question in the context of the regional gas pipelines is this: does the freedom of transit extend to the establishment of pipelines, gas lines and electricity grids? It may be noted that the long term nature of regional infrastructure projects has implications not just for the producing countries and consuming markets, but for the transit states as well. For, the transit countries have to handle the potential long term impacts of the gas pipelines on the landscape and the environment. In many cases, negotiating a beneficial agreement for gas transportation would depend upon the technical and administrative capacity within the transit countries.

Given the complex linkages between economic interests and national political mobilisations, transit disputes may assume divisive undertones and may exacerbate transnational energy relations among the countries concerned. For instance, the question of energy transit has become a vexed political issue in recent times. In the last decade alone, there has been a recurring episode of energy transit problems between Russia and Ukraine,

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or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.*

6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage). See: http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleV(Last visited September 15, 2014).

an issue that shows the limits of existing frameworks to address serious transit disputes. With increased trade in natural gas, it is assumed that more transit options are necessary. In managing the transit corridor, political stability in transit countries and multilateral engagements in designing an adequate framework are necessary conditions. The UN General Assembly, in a recent resolution, observed that it 'recognizes the need for extensive international cooperation in determining ways of ensuring the reliable transportation of energy to international markets through pipelines and other transportation systems'.[47]

The legal content of GATT Article 5 is yet to be interpreted in the context of fixed infrastructure for transmission of energy goods and materials, as the Article has never been litigated upon this particular question.[48]Where differences of interpretation or application of the provision arose between states in the past, such matters were settled among the states concerned through bilateral diplomatic processes and negotiations. While some argue that the freedom of transit includes the construction and maintenance of cross border pipelines, others point out that such an interpretation might be stretching the language of the Article too unrealistically, rather than reflecting what it actually says. Needless to add, clarity is conspicuous by its absence on the principle's scope and ambit at the moment.[49]

Given the vital significance of transit in bringing the consuming and producing countries together for the purpose of natural gas transmission, clarity of legal rules and regulatory arrangements are central to consistent, secure and fair delivery of the products. Historically, much of the global energy trade took place through special agreements between Host States and a few dominant multinational corporations that enjoyed virtual

[47] UNGA, Reliable and stable transit of energy and its role in ensuring sustainable development and international cooperation, A/RES/63/210/ 3 February 2009; See also UNGA, Reliable and stable transit of energy and its role in ensuring sustainable development and international cooperation, A/RES/67/263/ 17 (May, 2013).

[48]Julia Selivanova, THE WTO AND ENERGY: WTO RULES AND AGREEMENTS OF RELEVANCE TO THE ENERGY SECTOR (2007).

[49]For a comprehensive review, see: Lothar Ehring and Yulia Selivanova, *Energy Transit* in "Regulation of Energy in International Trade: WTO, NAFTA and Energy Charter" 49-107 (Yulia Selivanova ed., 2011).

monopoly over production, transportation and distribution networks. The special characteristics of the energy sector and the virtual lack of participation of major energy players within the multilateral trading regime of the GATT/WTO has meant that much of the international trade in energy took place beyond its regulation.[50]

However, in recent times, the situation is changing remarkably. With questions of global warming and climate change looming large on global governance debates, it has been identified that one of the most important international legal frameworks to look at questions of global energy governance is the global trade regime. With key energy producers such as Saudi Arabia and key energy transit states such as Kazakhstan and Ukraine becoming members to the WTO and, many other important energy producing States such as Algeria negotiating their accession into the system, binding trade norms may impact the development of cross-border energy transportation networks as well. For, the WTO Agreements constitute the fulcrum of contemporary international trading regime and virtually, a vast terrain of cross-border transactions are covered under these agreements, including the segment of energy goods and materials.[51]

It may, also, be noted that at the WTO negotiations on Trade Facilitation, countries like India advocate the creation of multilateral rules on international energy pipelines to mitigate the legal complexities associated

[50]Francis N. Botchway, *International Trade Regime and Energy Trade*, SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE, 28:1, (2001); Also See:MG Desta, *The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements*, JOURNAL OF WORLD TRADE 37(3) : 523-551 (2003); M.G. Desta, *The GATT/ WTO System and International Trade in Petroleum: An Overview*, JOURNAL OF ENERGY AND NATURAL RESOURCE LAW, 21(4): 385-398 (2003).

[51]Julia Selivanova, *supra* note 48; Julia Selivanova, *World Trade Organization Rules and Energy Pricing: Russia's Case*, JOURNAL OF WORLD TRADE,38(4): 559-602 (2004); E Smith and D. Cluchey, *GATT, NAFTA and the Trade in Energy: A US Perspective*, JOURNAL OF ENERGY AND NATURAL RESOURCES LAW, 12 (1): 27 (1994).

with transit issues.[52] For, long-term transit arrangements are important for perspective planning and for prudent investment decisions. Likewise, the issues which are under negotiation at the Doha Development Round have a bearing on the energy industry and the wider legal framework for international trade in energy products, including gas transportation networks.[53]For, these agreements prescribe the general principles and rules applicable to the domain of trade, transport, and transit. The fundamental provisions of these agreements, such as the principles of "freedom of transit," "non-interference," "non-discrimination," "equal treatment," etc. are applicable to various modes of transportation and directly relevant to the construction and operation of regional petroleum infrastructures as well.[54]The ways in which the GATT/WTO rules and various related trade disciplines impact several dimensions of global energy trade they have become part of the scholarly discourse in recent years.[55]

C. *Energy Charter Treaty*

[52]Amitav Ranjan, *India wants transit pipelines under WTO umbrella*, : THE INDIAN EXPRESS (New Delhi, March 07, 2007). http://expressindia.indianexpress.com/story_print.php?storyId=24898 (Last visited August 22, 2014).

[53]UNCTAD, ENERGY AND ENVIRONMENTAL SERVICES: NEGOTIATING OBJECTIVES AND DEVELOPMENT PRIORITIES,(2003).Also See: S.Zarrilli, *The Doha Work Programme: Possible Impact on Energy Trade and on Domestic Policies in Energy-Producing Developing Countries*, JOURNAL OF ENERGY AND NATURAL RESOURCES LAW, 21, 399 (2003); YuliaSelivanova (ed.), REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW: WTO, NAFTA AND ENERGY CHARTER, (2011).

[54]UNCTAD, THE ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES, COMPETITION AND THE WORLD TRADE ORGANIZATION: MIGHT A WTO AGREEMENT ON COMPETITION CONSTITUTE A THREAT TO OPEC?, UNCTAD/DITC/CLP/2003/11 (2004).

[55]*Ibid*. Also See: D Mac Dougal, *Trade in Energy and Natural Resources: The Role of GATT in Developing Countries*, JOURNAL OF NATURAL RESOURCES LAW, 12 (1): 95 (1994). Julia Selivanova, *supra* note 48. Danae Azaria, *Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade*, JOURNAL OF ENERGY & NATURAL RESOURCES LAW, 559-596 (November, 2009); Y. Selivanova, ENERGY DUAL PRICING IN THE WTO: ANALYSIS AND PROSPECTS IN THE CONTEXT OF RUSSIA'S ACCESSION TO THE WORLD TRADE ORGANIZATION (2008).

Given the complexity of multilateral trade negotiations and the difficulties involved in reaching consensus within the GATT processes and also the fact that many energy producing States remained outside its membership and processes; powerful states and influential members in the global system initiated parallel forums and promoted trade negotiations beyond the GATT framework. They promoted the development of norms and principles under Regional Trade Agreements (RTAs) and other investment protection frameworks, including a multilateral treaty applicable to the energy sector – Energy Charter Treaty. The birth of Energy Charter Treaty (ECT)[56]and the development of a special Chapter on energy within the North American Free Trade Agreement (NAFTA) *may be seen as important milestones in this context*.[57]

As noted earlier, the development of the ECT owes its origins to a European quest for energy security *in the aftermath of the end of the Cold War and the disintegration of the Former Soviet Union (FSU).*It was the European Energy Charter Declaration, signed and endorsed by the Heads of States in Europe, who assembled in the immediate aftermath of the disintegration of the FSU that provided the initial thrust, triggering the process leading to the eventual adoption of the ECT in 1994. *By providing an international legal framework for the development and production of energy resources in the Central Asian Republics and through facilitation\and the creation of pipeline/transportation networks to Europe,*

[56]For the official text of the Energy Charter Treaty, see: 34 ILM 373 (1995). Signed in 1994 and came into force in 1998, ECT has now undertaken a significant, internal process for recalibrating itself as a premier multilateral forum for international energy governance. See Marat Terterov (2013), "Testing the Water for Global Energy Governance Reform: Can the Energy Charter Provide a New Benchmark?", Brussels: Energy Charter Secretariat, available at (Last visited August 22, 2014).
http://www.encharter.org/fileadmin/user_upload/Knowledge_Centre/Occasional_Papers/ECT_and_GEG.pdf

[57]Energy Charter Secretariat (2004), *The Energy Charter Treaty and Related Documents*, Brussels: ECT; Energy Charter Secretariat (2001), *Trade in Energy: WTO Rules Applying under the Energy Charter Treaty,* Brussels: ECT.

the Charter founders, politically, underscored the interdependence of energy security architecture.[58]

Though the Charter was envisioned and championed by European leaders to essentially design a legal and institutional framework to facilitate European investment in the newly independent states of Central Asia, the 'neutral' legal language of the Treaty facilitated the framework to be applicable beyond the region and opened the membership to all countries across the world willing to abide by it.[59] *The Treaty, essentially, followed the GATT/WTO framework, in terms of its basic principles and normative expectations, whereby the Contracting Parties to the Treaty could leverage their credentials of abiding by ECT obligations in their respective accession negotiations for potential WTO membership.* As a legally binding multilateral instrument, the ECT has attracted considerable attention in recent times. Over fifty countries are Contracting Parties to the Treaty and several other important States are observers, including the U.S., China, Saudi Arabia, Iran, Venezuela, Tunisia, United Arab Emirates, and many other Persian Gulf states.[60]Several international organizations have also signed the Treaty or are associated with it in the capacity of observers.[61]

The Charter is designed to protect and promote the interests of foreign investors in the national economic and administrative systems of the Contracting Parties to it. It has put forward binding rules to be observed by all national governments, whereby the political and regulatory risks associated with energy-related investments and trade are sought to be

[58]Thomas W Waelde(ed.), THE ENERGY CHARTER TREATY: AN EAST WEST GATEWAY FOR INVESTMENT AND TRADE (1996).

[59]Ishrak Ahmed Siddiky, *supra* note 36.

[60]On September 15, 2014 Palestine became the 65th signatory to the 1991 Energy Charter which is the first step towards accession to the Energy Charter Treaty. See: Palestine Becomes 65th Signatory to the 1991 Energy Charter, http://www.encharter.org/(Last visited September 20, 2014).

[61]Among the international organizations with observer status are the following: ASEAN, BASREC, BSEC, CIS Electric Power Council, EBRD, IEA, IRENA, OECD, UN-ECE, World Bank, WTO. For a list of Members and Observers, see
http://www.encharter.org/index.php?id=7&L=0%3Fiframe%3Dtrue
(Last visited on September 20, 2014).

adequately managed. Considering that transmission systems and other hugely capital intensive projects in the energy sector require stable legal frameworks on a longer period, the Treaty caters to the *issues of concern that have the potential to emerge in the context of the energy trade, transit, investment or dispute settlement.*[62]

To provide a commercially attractive and viable environment for foreign investments in energy projects, the Treaty addresses the likely impediments for the realization of such projects by prescribing norms that have a bearing on technical, financial, commercial and legal issues as well as on political considerations that may impact national policy choices in the sector. The law making under the ECT was primarily driven by a political process anxious to attract private capital for energy investment and the resource-rich, but developing countries which were seeking these foreign capital investments went along with the new approach and associated norms by becoming parties/ Contracting Parties to the Treaty.[63]

a. ECT Framework for Regional Gas Pipelines

Considering that the capital intensive and long term nature of the investments in the energy sector including construction and operation of transnational transmission networks necessitate a stable and fixed legal regime from the perspective of both importers and exporters; the Energy Charter Treaty seeks to balance the rights and obligations applicable to the stakeholders in the system and gives attention to the specific transit context of regional gas pipelines as well. Hence, the Treaty addresses some of the most important questions that are at the centre of most disputes surrounding the development of cross-border pipelines in a

[62]A. Konoplayanik, *Energy Security: the role of business, governments, international organizations and international framework*, INTERNATIONAL ENERGY LAW AND TAXATION REVIEW 6, 85-93 (2007). Also See: RiccardoSciaudone, *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, JOURNAL OF ENERGY AND NATURAL RESOURCES LAW, Vol. 29, No. 4 (2011).

[63]A. Konoplyanik and T. Waelde, *Energy Charter Treaty and its Role in International Energy*, JOURNAL OF ENERGY AND NATURAL RESOURCES LAW, Vol. 24 No. 4, 523-558 (2006).

regional context by providing a comprehensive framework of multilateral rules for cooperation on transit matters.

Article 7 of the Energy Charter Treaty specifically deals with the question of freedom of transit. It essentially builds upon the framework of Article 5, GATT and imposes new disciplines applicable to specific aspects of transit, in relation to energy materials, products and grid-bound energies.[64]Article 7 is meant to facilitate transit via energy transport facilities and to promote non-discriminatory use of existing capacity, non-interruption of existing flows, non-discrimination as to origin, destination, ownership and pricing, and the expectation of no unreasonable delays, restrictions or charges. Additionally, in the event of a dispute, it envisages that there should be no interruption of transit flows.[65]

b. Draft ECT Transit Protocol

In order to further strengthen and elaborate on the provision on Transit, a separate Transit Protocol to the Charter was envisaged and discussions started in 1999. The diverging interests of exporting countries, importing countries and the transit countries remain a roadblock to any progress in the area even after a decade of such negotiations. Finding mutually acceptable rules remain a significant issue till date. The Draft Protocol, nevertheless, is designed to strengthen the existing transit related

[64]For a comprehensive treatment of the relation between Article V, GATT and Article 7, the ECT; see Danae Azaria, *supra* note 55. Also See: Arnoud Willems and Jung-ui Sul, *Using WTO rules to Enforce Energy Transit through Pipelines*, EUROPEAN ENERGY REVIEW (September/October, 2008).

[65]Article 7 (6), ECT states: "A Contracting Party through whose Area Energy Materials and Products transit shall not, in the event of a dispute over any matter arising from that Transit, interrupt or reduce, permit any entity subject to its control to interrupt or reduce, or require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in paragraph (7), except where this is specifically provided for in a contract or other agreement governing such Transit or permitted in accordance with the conciliator's decision." See: Energy Charter Secretariat The Energy Charter Treaty and Related Documents, (2004):http://www.encharter.org/fileadmin/user_upload/document/EN.pdf (Last visited September 10, 2014).

obligations of states which are Contracting Parties to the Energy Charter Treaty. The Draft Protocol seeks to ensure that energy flows remain uninterrupted in transit and that the transit fee is based on objective, reasonable and non-discriminatory basis. It envisions that transit charges are to be linked to the actual contribution of a transit state to the maintenance and operation of a pipeline network throughout its territory. The Draft Protocol, in short, seeks to avoid arbitrary claims of transit States for special fee or other additional charges by virtue of sheer geographical advantage as such demands can hinder the efficient and economic linking of regional markets. The Draft Protocol appears to strike a fine balance between the rights and obligations of various stakeholders in the field. For, it includes definitions for 'available capacity' and sets non-discriminatory and transparent access to capacity. Further, the Draft proposes principles for objective, non-discriminatory, transparent and cost-reflective transit tariffs and sets standards (technical, environmental, health, safety, social, accounting) and curtails the possibility of unauthorized taking of energy in transit.[66]

c. ECT Model Pipeline Agreements

Inter-state agreements are, increasingly, being used to facilitate the multi-jurisdictional pipeline projects, regardless of the particular chosen model. Inter-governmental agreements and Host state agreements together can constitute the regulatory framework for regional gas pipelines. The need of the project investors for predictability of investment conditions and enforceable contract rights, business freedom to run the operations without hindrance are recognized in express legal provisions within such agreements. The Host state agreements often include 'stabilization clauses' that address changes in law in the Host state, during the life of the project. These stabilisation clauses are, sometimes, drafted so as to insulate investors from having to implement new environmental and social laws, or to provide investors with an opportunity to be compensated for compliance with such laws. Lenders, often, view stabilisation clauses as an essential element of the bankability of an investment project, particularly in emerging markets and they may insist that at least the fiscal terms of an agreement are stabilized. Host states have viewed stabilisation clauses as a

[66]A. Konoplyanik and T. Waelde, *supra* note 63.

way to foster a favourable investment climate.[67]Notwithstanding the merits associated with a predictable and stable legal framework, stabilisation clauses and other provisions in private investment contracts between states and foreign corporations/project investors may undermine important public policy objectives in the developing countries.[68]

It is interesting to note that the ECT conforms to the principle of national sovereignty over energy resources.**[69]** Member countries remain free to conduct their national energy policies and exploit their natural resources,

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[67]John Ruggie, Stabilization Clauses and Human Rights (May, 2009), http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES (Last visited September 15, 2014).

[68]Amnesty International (2003), "Human Rights on the Line: The Baku-Tbilisi-Ceyhan Pipeline Project", London: Amnesty International UK.; Amnesty International (2005), "Contracting out of Human Rights, the Chad-Cameroon Pipeline Project" (2005), POL34/12/2005, see: http://www.amnesty.org/en/library/asset/POL34/012/2005/en/76f5b921-d4bf-11dd-8a23-d58a49c0d652/pol340122005en.pdf (Last visited September 15, 2014).

[69]Article 18 of the ECT states:

(1)The Contracting Parties recognize state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law.

(2) Without affecting the objectives of promoting access to energy resources, and exploration and development thereof on a commercial basis, the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources.

(3) Each state continues to hold in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the optimalization of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area, and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises.

(4) The Contracting Parties undertake to facilitate access to energy resources, inter alia, by allocating in a non-discriminatory manner on the basis of published criteria authorizations, licenses, concessions and contracts to prospect and explore for or to exploit or extract energy resources.

provided that they exercise their sovereign rights in accordance with their Treaty obligations. For instance, the ECT does not touch upon issues such as the structure of domestic energy markets in general, the legal structure of energy companies or the third party access. The Treaty also respects that member countries take appropriate measures for the protection of national security or other justified reasons.[70] It is, however, unclear how these different provisions of the ECT that apparently seek to balance the interests of project investors with the state's need to respond to regulatory issues will play out.

The *Model Intergovernmental and Host Government Agreements*, developed under the Energy Charter process, provides a comprehensive voluntary guideline that addresses almost all major issues dealt within the context of cross- border pipelines. The model agreements are designed to be able to be adapted in the context of regional gas pipelines as well. In the absence of a comprehensive, specific international agreement governing the construction and maintenance of cross border pipelines, the model agreements provide a convenient starting point to facilitate negotiations on relevant legal and regulatory arrangements that need to be institutionalized in the context of the project. Both the model agreements also aim at providing 'transparency regarding present practices in the areas of cross-border pipeline construction, operation and investment', shortening lead-times for the mobilization of project specific investment and thereby reducing the cost of project implementation.[71]

In the last two decades of the existence of the Energy Charter Treaty, scholars evaluating the Treaty process have pointed to the modest scale of the progress achieved so far, as against the great promise the original vision encompassed. The Treaty's appeal seem to have been confined largely to the Euro-Central Asian region and the lingering perception that it is, normatively, tweaked in favour of the energy-importing nations and their concerns rather than to recognise and protect the specific interests of the most important energy-producing States. This may explain why they have largely kept themselves away from signing on the obligations under this multilateral instrument. The future of the Treaty is linked to its

[70]Article 24, ECT.

[71]Energy Charter Secretariat, Model Intergovernmental and Host Government Agreements for Cross Border Pipelines, 2nd Edn., (2008).

capacity to revitalise its processes and to position itself as the principal governance framework for international energy and the ongoing process of outreach, expansion and revitalisation may yet help the Charter to renew itself with the much needed breath of fresh air.[72]

IV. Conclusion

There is little doubt that the construction and operation of regional energy transportation networks are a significant component of the energy security strategies of import-dependent states. Likewise, resource-rich states, also, stand to benefit from efficient exploitation practices and transportation linkages to the consumer markets abroad. Hence, international law has a seminal role in providing an enabling framework to facilitate the balancing of competing rights and interests of all stake holders, including Project Investors and Host States. However, given the fact that the content and contours of the discourse on international energy law is largely shaped by the dominant states in the international system, the international legal framework for such cross-border/regional energy transportation systems are vulnerable to great power politics.

Put differently, just as the strategic dimension of petroleum resources became quite evident during the two World Wars and also in other critical moments in the last century, global political developments and strategic considerations of powerful states heavily impact upon the policy choices and economic options available for developing countries in their respective energy sectors. For instance, the strategic containment policy of Iran, propelled by the military presence of the United States all around the country through the occupation of Iraq and Afghanistan in the last decade as well as the US force deployment in the Persian Gulf waters and in the Caspian Sea Basin has foreclosed the option of South Asian states like Pakistan and India to construct and operate regional pipeline system

[72]ECT, Third Round of Negotiations on the Updated Energy Charter, (June 18, 2015), http://www.encharter.org/index.php?id=19&id_article=550&L=0 (Last visited September 26, 2014); Also See: Dr. Marat Terterov, Testing the Water for Global Energy Governance Reform: Can the Energy Charter Provide a New Benchmark? (2013) http://www.encharter.org/fileadmin/user_upload/Knowledge_Centre/Occasional_Papers/ECT_and_GEG.pdf (Last visited September 06, 2014).

involving Iran-Pakistan and India. By the extraterritorial application of its domestic legislations and policy measures relating to the economic sanctions on resource-rich states such as Iran, the United States and its allied states alter and control the market dynamics of demand and supply of global energy.[73]

Such imposition of unilateral measures/domestic legislations and the colourable exercise of collective measures under the rubric of the UN system on States with significant energy resources have doubtful validity and questionable legitimacy under the lofty, fundamental principles of international law, which insist upon the sovereign equality of States, State sovereignty over natural resources, non-intervention in the internal affairs or domestic jurisdiction of a State among others. Yet, the extra-territorial application of domestic legislations and other unilateral policies to reshape the policies of other states are very much a part of the existing international system today. The balance of power calculations and strategic containment policies of certain powerful states appears to determine the nature of international cooperation in a region, including the development of cross-border energy infrastructure systems and regional transportation networks. In short, the efforts to 'de-link' energy from wider strategic anxieties and to secure regional energy cooperation through legal norms will have to be appreciated and negotiated within the 'prison house' of international energy law and policy where economic superiority and military power cast their long shadow over the equal application of normative principles and the integrity of the international system.

[73]Ozden Zeynep Oktav, *American Policies Towards the Caspian Sea and the Baku-Tbilisi-Ceyhan Pipeline*, PERCEPTIONS, Spring 2005, 17-33 (2005).