

EIAS Briefing Paper
No. 2/2020



Energy Transit Schemes and Conflict Resolution - Afghan Border Areas -

Mika OKOCHI

*Associate Professor at Tokyo University of
Marine Science and Technology and Visiting Fellow at the
European Institute for Asian Studies*

February 2020

Abstract

This study aims to analyse and clarify the significant role of energy transit schemes in conflict resolution processes. The EU places major importance on energy security and gas deliveries from Central Asia. This state of affairs has the potential to act as a catalyst for improving the stability and prosperity of Central Asia and consequently Afghanistan. The EU's energy security perspective consists of two main pillars: energy transit schemes and regional stability. Both pillars face a common challenge, the instability of Afghanistan. To remove this challenge in the energy supply chain, establishing Safety Management Systems (SMSs) for gas transportation and conflict resolution has been the *leitmotif* of the EU's energy security policy and post-conflict reconstruction of Afghanistan. The creation of SMSs for gas transportation will result in two main priority areas; accident prevention during transportation (safety), and physically protecting pipelines from attack (security). This study aims to analyse the significance of the TAPI Pipeline, which is part of the EU's energy transit scheme, and the function of SMSs for gas transportation as an aspect of border-conflict resolution. This study concludes that the realisation of safe gas transport under the auspices of comprehensive energy transit schemes and coordinated practices by diverse actors such as international institutions, states, the military and private actors (local communities in particular), will actively contribute to conflict resolution and post-conflict reconstruction in Afghanistan and Central Asia.

Keywords: The TAPI Pipeline, Safety Management Systems, Security, Afghanistan, NATO

1. Introduction

The European Union (EU) emphasises the importance of energy security and gas deliveries from Central Asia. This has the potential to act as a catalyst for improving the stability and prosperity of Central Asia and consequently, the Islamic Republic of Afghanistan (Afghanistan).¹ The EU's energy security perspective consists of two main pillars: energy transit schemes and regional stability. Both pillars face a common challenge, the instability of Afghanistan. To remove this challenge in the energy supply chain, establishing Safety Management Systems (SMSs) for gas transportation and conflict resolution has been the leitmotif of the EU's energy security policy and post-conflict reconstruction of Afghanistan. The creation of SMSs for gas transportation will result in two main priority areas: accident prevention during transportation (safety), and physically protecting pipelines from attack (security). In fact, the EU's strategic objective in Central Asia cannot be achieved without ensuring security in Afghanistan.²

The EU and the North Atlantic Treaty Organisation (NATO) have taken up roles as the civilian and military pillars of the post-conflict reconstruction within the borders of Afghanistan. For example, NATO has assisted the Afghan National Defence and Security Forces (ANDSF) by leading the International Security Assistance Force (ISAF).³ After completion of the mission in 2014, NATO has been supporting the ANDSF through the Resolute Support Mission (RSM) since 2015.

The realisation of safe gas transport under the auspices of comprehensive energy transit schemes and coordinated practices of diverse actors such as international institutions, states, the military and private actors (local communities in particular) will pave the way for Afghanistan to move away from its state of persistent insurgency.

This study aims to analyse the significance of the Turkmenistan-Afghanistan-Pakistan-India Pipeline (TAPI Pipeline), which is part of the EU's energy transit schemes and a function of SMSs for gas transportation as an aspect of border-conflict resolution. Finally, this paper examines outcomes of energy transit schemes in the post-conflict reconstruction of Afghanistan based on the EU's energy security perspective.

2. Energy Transit Schemes and the TAPI Pipeline

How can international legal frameworks for energy transit contribute to safe and secure gas transportation and conflict resolution? First, intergovernmental agreements are indispensable for achieving these goals. Resolutions can be swiftly adopted by international institutions such as the EU to manage emerging crises. Furthermore, domestic laws, military practices and the petroleum industry's practices are structured in accordance with international legal frameworks. Legal frameworks for the energy transit and the TAPI Pipeline will be evaluated below.

¹ Council of the European Committee (2007). The EU and Central Asia: Strategy for a New Partnership. Retrieved from file:///D:/EUAsiastrategy2007.pdf.

² European Parliamentary Research Service (2016). TAPI Natural Gas Pipeline Project Boosting Trade and Remedying Instability? *Briefing*, pp. 1-12.

³ UN Security Council Resolution (2001). No. 1386, para. 1 authorizes the ISAF to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas in accordance with Bonn Agreement.

1) Legal frameworks for energy transit schemes

Western European states created a solid foundation for energy security in the aftermath of the dissolution of the Union of Soviet Socialist Republics (USSR). The Energy Charter Treaty (ECT) and the Transit Protocol grew out of the aspiration of European states to cooperate closely with Russia, Eastern Europe and Central Asia in 1991.⁴ The EU, its Member States and Central Asian states ratified the ECT as a legal foundation for energy transit. However, Russia did not ratify the ECT. Instead, it proposed the Draft Convention on Ensuring International Energy Security to design a new comprehensive legal framework in 2010.⁵ These treaties formed an integrated scheme of energy transit and safety management and are supplemented by detailed regional agreements such as the Caspian Oil Pipeline Agreement, which consists of three separate types of agreement. The first is a government-to-government agreement, concluded between the governments of Georgia, Azerbaijan and Turkey to build a legal framework for the Baku-Tbilisi-Ceyhan (BTC) Pipeline, which became fully operational in 2006. The second is a government-to-company agreement, concluded in order to stipulate the specific conditions between host governments and investing companies. The third is a company-to-company agreement for pipeline procurement and construction.⁶

While sovereign states have built the legal frameworks of energy transit, energy transportation must be realised through multi-layered agreements, which request that states and companies adhere to international standards, especially SMSs. SMS is defined as "a structured and documented system enabling company personnel to implement effectively the company safety and environmental protection policy", especially in shipping operations.⁷

Subsequently, the petroleum industry has developed Health, Safety and Environmental Management Systems (HSEMSs) based on the SMS model. Companies set up committees, designate personnel and keep on improving the HSEMSs in accordance with the Research-Plan-Do-Check-Action (R-PDCA) cycle. HSEMSs help identify, mitigate, prepare for, and respond to, risks, preventing accidents and managing the safe transportation of oil and gas. Companies' operational groups also provide incident information, risk assessment, alerts and security information, as well as training programs to prevent incidents.⁸

When companies are required to adhere to HSEMSs, intergovernmental agreements will also stipulate clauses for the implementation of HSEMSs. HSEMSs will integrate complicated, multi-layered energy transit contracts for pipeline operation between diverse actors from the viewpoint of safety, security and environmental protection. In this way, HSEMSs function as a subsystem, which coordinates diverse actors' code of conduct within a legal mechanism.

⁴ Doltzer, R. and Schreuer, C. (2012). *Principles of International Investment Law*, 2nd ed., Oxford: Oxford University Press.

⁵ Draft Convention on Ensuring International Energy Security.

⁶ Agreement among the Azerbaijan Republic, Georgia and the Republic of Turkey Relating to the Transportation of Petroleum via the Territories of the Azerbaijan Republic, Georgia and the Republic of Turkey through the Baku-Tbilisi-Ceyhan Main Export Pipeline; Host Government Agreement between and among the Government of the Azerbaijan Republic and the State Oil Company of the Azerbaijan Republic BP Exploration (Caspian Sea) Ltd., Statoil BTC Caspian AS., Ramco Hazar Energy Ltd., Turkiye Petrolleri A.O., Unocal BTC Pipeline Ltd., Itochu Oil Exploration (Azerbaijan) Inc., Delta Hess (BTC) Ltd.

⁷ International Maritime Organisation (1993). Resolution A. 741 (18).

⁸ INPEX (2018). Retrieved from <https://www.inpex.co.jp/english/csr/hse/management.html>.

2) Legal frameworks of the TAPI Pipeline

First, the TAPI Pipeline project is led by an international consortium: the TAPI Pipeline Company Limited, which consists of Turkmengaz State Concern, Afghan Gas Enterprise, Inter State Gas Systems (Private) Limited (Pakistan) and GAIL (India) Limited, under the Build, Operate and Own (BOO) policy. The megaproject enables Turkmenistan to transport gas from the Galkynysh through Herat and Kandahar (Afghanistan) to Quetta (Pakistan) and Fasilka (India).

Besides the international consortium, the feasibility of pipeline protection by NATO was occasionally discussed.⁹ A declaration on the European Defence and Security Policy adopted by NATO in 2002 and its detailed agreements enabled the EU to access NATO mechanisms to conduct EU-led crisis management operations.¹⁰ The Afghan government declined protection by foreign forces but a 7,000-strong Afghan security force was assembled.¹¹

Second, the TAPI project consists of multi-layered agreements: the Intergovernmental Agreement, the Gas Pipeline Framework Agreement, the Transit Fee Agreement, the Gas Sales and Purchase Agreement, an Operational Agreement and finally an Investment Agreement.¹²

Despite diverse actors and multi-layered agreements being coordinated to establish an integrated legal matrix and accomplish safe gas transport, optimism and scepticism persist and indeed, coexist. The optimistic view believes that transit fees will be beneficial for Afghanistan, while the sceptical view fears that the insecurity of Helmand, Kandahar and Afghan border areas may hinder pipeline operations. The White Paper of the Interagency Policy Group's Report on the U.S. Policy toward Afghanistan and Pakistan recommends relevant parties enhance regional trade by encouraging foreign investment in key sectors, such as energy. Meanwhile, it describes that "[w]ithout more effective action against these [extremist] groups in Pakistan, Afghanistan will face continuing instability".¹³

Therefore, the challenges faced by the TAPI Pipeline are twofold. First, the realisation of energy transit in unstable areas is the *raison d'être* of this "peace pipeline". However, safe operation may not yet be possible under international consortiums' HSEMSs because underlying conflicts like undefined border issues between neighbouring states have not yet been resolved.

Though 'no outsider has ever conquered Afghanistan',¹⁴ it has been analysed by, and for, outsiders. The TAPI Pipeline is considered to be worthy to promote India-Pakistan

⁹ Foster, J. (2010). Afghanistan, the TAPI Pipeline, and Energy Geopolitics, *Journal of Energy Security*, March 2010 Issue.

¹⁰ NATO (2002). EU-NATO Declaration on EDSP; Sands, P. and Klein, P. (2009). *Bowette's Law of International Institutions*, 6th ed. London: Sweet & Maxwell.

¹¹ Chinkin, C. and Kaldor, M. (2017). *International Law and New Wars*. Cambridge: Cambridge University Press.

¹² Asian Development Bank (2018). Turkmenistan-Afghanistan-Pakistan-India Natural Gas Pipeline Project, Phase 3. Retrieved from <https://www.adb.org/projects/44463-013/main#project-pds>.

¹³ White House (2009). White Paper of the Interagency Policy Group's Report on U.S. Policy toward Afghanistan and Pakistan. Chinkin and Kaldor, *International Law and New Wars*, p. 494 puts it that "[v]iolence in Afghanistan can only be contained and managed if the neighbouring states, especially Pakistan, are involved."

¹⁴ Liwal, A. G. (2010). Areas between Afghanistan and Pakistan and the Present Turmoil, *Eurasia Border Review*, Vol.1, No.1, pp. 75-86.

cooperation.¹⁵ Pakistan is a stakeholder in establishing stability in Afghanistan and is considered to be dealing with its national security in the context of facing an ongoing threat from India, and *vice versa*.¹⁶ The TAPI pipeline is also placed as a competitor to curtail the Iran-Pakistan-India (IPI) Pipeline.¹⁷ It is imperative to identify the root cause and remove such conflicts in order to achieve the ultimate purpose: post-conflict reconstruction of Afghanistan.

3. Border Conflict and Lack of Stability

Territorial borders limit sovereign states' geographical space in relation to others so that these states refrain from intervening in others' territory. States should have clear borders as well as effective governments, which control over their territories and permanent populations.¹⁸ However, legal settlements of border-conflicts tend to come to a standstill.

1) Causes of border-conflict in Afghanistan

Border areas between Afghanistan and Pakistan are oft-cited as one of the hotbeds of insurgencies in Afghanistan. The border is 2,640 km long of which 2,430 km is covered by the Durand Line. The Durand Line was drawn in accordance with the Durand Agreement between the Amir of Afghanistan, 'Abd al-Rahman Khan and the Foreign Secretary of British India, Mortimer Durand in 1893. Afghanistan refuses to acknowledge the Durand Line as its territorial border, while Pakistan asserts its validity based on international law theories.

The two legal views oppose each other on the validity of Durand Line. First, the *Uti Possidetis* principle is referred to as the foundation for the validity of the Durand Line.¹⁹ The principle recognises that 'states emerging from the dissolution of a larger entity inherit as their borders those administrative boundaries which were in place at the time of independence'²⁰. Yet, international law scholars take a mixed stance, as the principle respects the administrative boundaries within the former colonial boundaries and 'bypass[es] self-determination in the interests of stability'.²¹ As a result, people of different tribal affiliations who were caught by colonial boundaries may have the identity-oriented goal of wars.²² This might apply to Pashtun tribal peoples in Afghan border areas.²³

¹⁵ Huda, M. S. and Ali, S (2017). Energy Diplomacy in South Asia: Beyond the Security Paradigm in Accessing the TAPI Pipeline Project, *Energy Research and Social Science*, Vol. 34, pp. 202-213; Kheran, M. S. (2017): Turkmenistan-Afghanistan-Pakistan-India (TAPI) Gas Pipeline, *Institute of Strategic Studies Issue Brief*, pp. 1-4; D' Souza, S. M. (2011): The TAPI Pipeline: A Recipe for Peace or Instability? *ISAS Brief*, No. 194-1, pp. 1-5.

¹⁶ Omrani, B. (2018). The Durand Line: Analysis of the Legal Status of the Disputed Afghanistan-Pakistan Frontier, *University of Miami International and Comparative Law Review*, Vol. 26, pp. 74-126.

¹⁷ D' Souza, The TAPI Pipeline: A Recipe for Peace or Instability? p. 2.

¹⁸ Lowe, V. (2007). *International Law*, Oxford: Oxford University Press.

¹⁹ Yousafzai, I. A. and Yaqubi, H. (2017). The Durand Line: Its Historical, Legal and Political Status, *Journal of Research Society of Pakistan*, Vol. 54, No. 1, pp. 78-97.

²⁰ Crawford, J. (2008). *Brownlie's Principles of Public International Law*, 8th ed., Oxford: Oxford University Press.

²¹ Crawford, J. (2014). *Chance, Order, Change: the Course of International Law*, Maubeuge: Hague Academy of International Law.

²² Chinkin and Kaldor, *International Law and New Wars*, p. 9.

²³ Lee. J. L. (2018). *Afghanistan, A History from 1260 to the Present*, London: Reaktion Books.

Second, *estoppel* respects consistent conducts of states and precludes inconsistent conduct that cause the other party to suffer some prejudice. Nevertheless, 'such a principle must be used with caution, more particularly in dealing with territorial issues'.²⁴ Therefore, voluntary and unambiguous conduct of parties related to the Durand Line should be scrutinized.

Third, the legal principle respects the binding force of treaties, which rests on the principle that what has been agreed to be adhered to.²⁵ The principle is incontrovertible, still the arguments made by Pakistan and Afghanistan are incompatible, i.e. division of 'territory' or 'spheres of influence'.

The instability of the border area may not only originate from the Durand Line. The Federally Administered Tribal Area (FATA) might be another cause of conflict. However, insufficient governance of the undefined border is still a dominant cause of cross-border insurgencies and drug trafficking.²⁶ Therefore, some practical solutions have been suggested such as 'a cross-border arrangement'²⁷ and the concept of 'environmental peacebuilding'. Those methods have been proposed to end border-conflicts.²⁸

2) Border-conflict resolution process

Bilateral negotiations between neighbouring states have proven to be effective in border-conflict resolution practises. But resolution processes vary. For instance, Russia and Norway agreed to the Treaty Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean in 2010 despite the fact that they had a 40-year dispute.²⁹ It is noteworthy that environmental and technical issues filled the role in furtherance of developing the resolution. The Barents Sea Agreement will give suggestions on conflict resolution process as follows:

First, Russia and Norway requested that companies not explore the disputed area as a moratorium, while the two governments continued sequential negotiations to combat oil spills. In 1992, they agreed on the joint contingency plan against oil pollution in the Barents Sea. The cooperative interaction between governments built strong confidence between them, serving as a foundation for further negotiations.

Second, the Barents Sea Treaty of 2010 could not be agreed without two previous agreements. Russia had a vital interest in the Varangerfjord area, since the mouth of the bay opens eastward and the delimitation line held the risk of intruding into Russian territorial waters. Against this backdrop, Russia and Norway first reached an agreement in 1957 without intrusion into territorial waters.³⁰ Fifty years after the first agreement, they revised it to extend the delimitation line northward up to the intersection of the two states'

²⁴ Crawford, *Brownlie's Principles of International Law*, pp. 234 and 420.

²⁵ Thirlway, H. (2019). *The Sources of International Law*, 2nd ed., Oxford: Oxford University Press.

²⁶ United Nations Office on Drugs and Crime (2007). *Afghanistan Opium Survey 2007*.

²⁷ Omrani, The Durand Line: Analysis of the Legal Status of the Disputed Afghanistan-Pakistan Frontier, p. 124.

²⁸ Dupuy, P.-M. and Viñuales, J. E. (2015). *International Environmental Law*, Cambridge: Cambridge University Press.

²⁹ Treaty between the Russian Federation and the Kingdom of Norway concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, 2010.

³⁰ Agreement between the Royal Norwegian Government and the Government of the Union of Soviet Socialist Republics Concerning the Sea Frontier between Norway and the USSR in the Varangerfjord, 1957.

assertions in 2007.³¹ Finally, the Barents Sea Treaty of 2010 completed the delimitation of the entire Barents Sea as an extension of the previous arrangements.

Border-conflicts may be solved through intertwined phases and processes, i.e. a moratorium, joint management and zone-by-zone agreements. The TAPI Pipeline may function as a conflict resolution apparatus if it leads up to technical cooperation in order to respond to gas explosion and zone-by-zone agreements on a *need-to-draw* basis to clarify the limits to their state responsibilities.

3) The TAPI Pipeline and post-conflict reconstruction of Afghanistan

Energy transit schemes will create a common legal and operational platform in disputed areas via harmonisation of multi-layered agreements and coordination of diverse actors' conducts. However, it is essential to give enough thought to the pros and cons of the TAPI Pipeline in post-conflict reconstruction of Afghanistan.

First, it is necessary to be conscious of the importance of Shari'ah law in Afghan society. As professor Izutsu wrote, "in the Qu'rān, religion is the source and ultimate ground of all things. In this sense, the ethico-religious concepts are the most important and most basic of all that have to do with morality."³² It is necessary to search for a common legal platform adapted to the host states' legal system.

Second, the operational mechanism of HSEMSs can calibrate international companies' codes of conduct to ANDFS's and foreign forces' Rules of Engagement. The international companies' conducts should be scrutinized in order not to infringe on Afghanistan's sovereign rights.³³

Finally, the TAPI Pipeline needs to be created based upon a fundamental understanding of Afghan society. A pipeline must function as part of a long supply chain consisting of environmental impact assessment, exploration, procurement, construction of plant, facilities, trunk and feeder roads that withstand transport of materials and modules, exploitation, storage and the hinterland. Energy transit schemes cannot be operated without understanding of the social, historical and industrial structures of local communities. However, Afghanistan tends to be analysed from geopolitical viewpoints. It is occasionally even sidelined in context of India-Pakistan relations. This is the issue confronting the international community. The TAPI Pipeline is conducive to gaining a deeper understanding of Afghanistan.

4. Conclusion

The EU's energy security policy leads up to the energy transit scheme, contributing to the stability of Central and South Asia. This perspective is also worthwhile to promote conflict resolution in other unstable regions. Based on the EU's strategic goals for energy security and regional stability, this paper aimed to clarify the significant role played by energy transit schemes in conflict resolution processes, focusing on the function of HSEMSs for

³¹ Agreement between the Russian Federation and the Kingdom of Norway on the Maritime Delimitation in the Varangerfjord area, 2007.

³² Izutsu, T. (2002). *Ethico-Religious Concepts in the Qurān*, London: McGill-Queen's University Press.

³³ Chimni, B. S. (2004). International Institutions Today: A Imperial Global State in the Making, *European Journal of International Law*, Vol. 15, No. 1, pp. 1-37.

safe and secure gas transportation. This study demonstrates this by assessing two likely outcomes for conflict resolution produced by the energy transit scheme.

First, a legal mechanism of energy transit can serve as an architect of a common legal platform through multi-layered agreements between diverse actors, such as host states, international institutions and foreign investors. Second, the operational mechanisms of HSEMSs can coordinate codes of conduct among states, the military, civil engineering, petroleum companies and Afghan local communities. HSEMSs thus function as a subsystem within the legal mechanism to operationally harmonize international legal frameworks, host states' laws and private companies' code of conduct through the safe operation of gas transport.

In conclusion, energy transit schemes in disputed areas might bring back the integrity in legal and operational coordination, thus contributing to conflict resolution. Energy transit schemes and HSEMSs may sound like technical issues, but they encourage the Afghan government, international institutions, the military, and local communities to surmount intractable conflicts within and across the Afghan border.