

Evaluation of Tanap Agreements in Terms of International Law and Expropriation Law

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Abstract

Trans Anatolian Natural Gas Pipeline Project (TANAP) is a project, between Azerbaijan and Turkey, on the World's front burner realized in order to transport the natural gas produced from the Şahdeniz 2 field to Europe through Turkish territory. Legal details of TANAP are included in the Intergovernmental Agreement (IA) between two states and in the Hosting Government Agreement (HGA) signed between Turkey and TANAP Project Company. Having looked at the aforesaid agreements, IA is mainly considered as an outline agreement, on the other hand, HGA is considered as a private law contract including more detailed provisions. TANAP Agreements, having the characteristics of a bilateral investment agreement, include provisions mostly protecting the interests of the investor, namely Azerbaijan. Considering either participating interests of parties in the project, or that the source country is Azeri land, it should be admitted that the situation is natural and legal.

Keywords

TANAP, intergovernmental agreement, host government agreement, energy law, international agreements, international law

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INTRODUCTION

Energy is irreplaceable in today's World. In parallel with improving technology, energy necessity increases day by day and states, in order to supply their nations' demand for energy, are in search of sources. Azerbaijan is a state that has quite a lot natural gas reservoir. On the other hand, Turkey's natural gas reservoirs are very limited. Considering the historical tie between two states and that Azerbaijan is exporting and Turkey is importing states, it is understood that Trans Anatolian Natural Gas Pipeline Project (TANAP- Trans Anadolu Doğalgaz Boru Hattı Projesi) is a gainful project for both sides.

TANAP is Turkish pace of a project aiming to bring national gas from Shah Deniz gas field, the largest natural gas field in Azerbaijan's Caspian Sea, to Europe through Georgia and Turkey.¹ The binding intergovernmental agreement of the Project was signed on 26th June 2012 between The Government of The Republic of Turkey and The Government of The Republic of Azerbaijan.² In TANAP project, Turkish Pipeline Company (BOTAS) represents Turkey while Azerbaijan is represented by Azerbaijan's State Oil Company (SOCAR) both state owned companies. On May 26, 2014, memorandum of understanding and amendment were signed between The Government of The Republic of Turkey and the Government of the Republic of Azerbaijan concerning the Trans Anatolian Natural Gas Pipeline System.³ Further to that SOCAR and BOTAS has signed a contract, in Istanbul for the sale of SOCAR's %10 share in the TANAP project, which increased the BOTAS's share in the project to 30%.⁴

The agreements, TANAP, Intergovernmental Agreement (IA) and Hosting Government Agreement (HGA) should be examined in terms of international law. Because some provisions set forth in these agreements are significantly different from similar agreements. Accordingly, our article primarily deals with, international agreement types and what IA and HGA mean in terms of international law, which type of provisions it may contain and status of these agreements in view of Vienna Convention on the Law of Treaties (VCLT). Afterwards, getting into detail on TANAP in the light of this information, legal occurrence of TANAP, legal content of TANAP, IA and HGA will be examined. Subsequently, by examining the provisions of international law regarding terminability of agreements, termination possibility

of TANAP, IA and HGA will be reviewed. Finally, the manner of expropriation in terms of international law, the conditions that make a state's expropriation legitimate and investing companies' rights arising from international law against this procedure will be reviewed under a separate section. In the light of this information, content of the provisions in the agreements will be examined by reviewing expropriation provisions of TANAP HGA.

I. INTERGOVERNMENTAL AGREEMENT AND HOST GOVERNMENT AGREEMENT IN TERMS OF INTERNATIONAL LAW ON TREATIES

A. Types of International Agreements

Agreements vary as politic, military, commercial, scientific, cultural and judiciary according to their subject. It is possible for an agreement to be done on more than one subject. A military agreement containing commercial provisions may be an example for this.

It is known that agreements are categorized as bilateral, multilateral, regional and plurilateral agreements.⁵ Classification of agreements may also vary in legal systems of various states.⁶

B. Legal Character of Intergovernmental Agreements

An agreement made between states regarding establishment, operation and termination of an international project is called as "intergovernmental agreement". According to article 2 of VCLT, an agreement made between states explicitly has the characteristic of international agreement. In this context, there is no doubt that IA has the characteristic of international agreement in terms of international law. In other words, VCLT will be applicable on IA. Inasmuch as, IA is an agreement that is made between sovereigns and more than one subjects of international law. IA can be bilateral or multilateral (Poirier 2001: 7). Obligations of the states regarding the project, their contributions to the project and other matters that are agreed on take place in the IA.

The reason for signing IA in investment projects is to ensure that the project results in internationally by turning party states' obligations for reaching the project's target into a binding international agreement. By this means, each state turns into the issue to an international matter supported by government guarantees by framework agreements such as IA, instead of individual

arrangements in accordance with their domestic private law (Çal 2008: 96). In this context, it can be said that the reason for signing IA is to establish a system where both domestic and international law are effective. In addition, it should not be forgotten that, besides the party states, contractor companies are also granted rights with IA (Muratoğlu 2002: 5-6).

By IA, in case of a dispute that may arise in the future, the companies undertaking the project have the opportunity to rely on a second agreement that states are party to, besides the private law agreements that only they are party to. By this means, regarding the issue, they have the support of the beneficiary state pursuant to IA. Thus, they are protected on grounds of international law. In practice, the issue is resolved by means of international law by relying on IA, where domestic legislation creates trouble (Hildyard vd. 2006: 47).

C. Legal Characteristic of Host Government Agreements

Host Government Agreements have the characteristic of appendix of IA and are agreements made between investing companies and the states generally have low shares while having more obligations than other states. In practice, HGA does not impose obligations on contractor companies, contrarily, sets forth the rights granted by the concerned states to the companies regarding the construction, maintenance and operation of the project (Çal 2008: 111).

Pursuant to VCLT, it is impossible to categorize HGA as an international agreement. That is because, one of the parties to HGA is not an international law subject that is a legal entity in terms of international law. One of the parties to HGA is the investing company which is not a legal entity in terms of international law. Accordingly, VCLT is not applicable to HGA.

In principle, HGA should be in compliance with the legislation of the states that are party to IA. It should be said that HGA is invalid in case of absence of said complete compliance. However, in practice, it can be observed that states may ignore this kind of non-compliances in order to realize major investment projects and, by this means, to obtain economic returns by attracting large companies. This choice may be made voluntarily by the state or may be made through the pressure of another state or direct pressure of the investing large company (Hekimoğlu 2012: 85).

II. REVIEW OF TANAP AGREEMENTS IN TERMS OF INTERNATIONAL LAW

A. Legal Occurrence of TANAP

TANAP, primarily revealed as a project by BP but later discontinued with the worry of harming their investments in Russia⁷, is a project to transport the natural gas produced from the Şahdeniz 2 field at Caspian Sea and other natural gas fields located at the south of Caspian Sea to Europe market by 1850 km long main line through Turkish territory. TANAP constitutes south natural gas corridor by connecting with Trans Adriatic Pipeline (TAP) and South Caspasia Pipeline (SCP).

The agreement that brings out TANAP is “Intergovernmental Agreement Between The Government of The Republic of Turkey And The Government of The Republic Of Azerbaijan Concerning The Trans Anatolian Natural Gas Pipeline System” and its appendix “Host Government Agreement Concerning The Trans Anatolian Natural Gas Pipeline System”. Both agreements were signed in Istanbul on 26.06.2012. Agreements entered into force on 19.03.2013 in Turkey when promulgated on Official Gazette. “Host Government Agreement” was resigned on 26.05.2014 after some revisions and “Amendment Agreement” entered into force on 1.10.2014 when promulgated on Official Gazette.⁸

TANAP, created great influence in the World and called attention of energy actors, especially Russia. Coming up of a strong alternative to Russia’s national oil company Gazprom disturbed Russia (Cohen 2014: 4). Inasmuch as, market-share of Russia, as the most extensive exporter in Europe market, will decrease after the project and natural gas prices will decrease at the same time (Cohen 2014: 4). As a matter of fact, Russia for that reason brought up “Turkish Flow”⁹ project and aimed to protect its current position.

It, beyond question, will bring important advantages for Turkey. Turkey, by this means, will become a strong energy actor of the region and its land will gain the qualification of being a transit energy corridor. Domestic consumption will increase by this way and easy access to energy will be possible.

B. Intergovernmental Agreement Signed Between Turkey and Azerbaijan

IA primarily secures free transition of natural gas. The provisions of the agreement in this aspect aim preventing possible activities that may inter-

rupt free transition and imposed certain obligations on Turkey for the reason that the route is the land of Turkey. The 6 billion cubic-meters of the 16 billion cubic meter gas that is transported via this pipeline will be reserved for Turkey's domestic market and the remaining will be transported to the Europe market. (IEA Reports 2014: 460)

Indeed, Turkey shall ensure that the Transit Passage Gas shall not be interrupted, delayed, restricted or curtailed except as permitted as the case may be under the Host Government Agreement. Neither the Republic of Turkey nor any State Authority nor State Entity shall demand or require to be paid any fee, charge or requirement for payment of any kind for the right of Transit Passage save as expressly set out in the Host Government Agreement.

Likewise, it is aimed with IA to prevent possible harms by emphasizing international technical, safety and environmental standards.

Considering that especially transboundary transit petroleum and natural gas pipelines may cause transboundary environmental harm, we are in the opinion that IA's should give wide coverage to the provisions regarding the matter.¹⁰

Another matter set forth in TANAP IA to ensure fast and easy progress in the project is to stipulate rights and obligations, especially expropriations, regarding the land on which the project to be installed.

Party states settled the outline of their rights and obligations by IA. In addition, it is not contented with it and Energy Charter Treaty is referred to. According to article 2.2 of IA, nothing in IA shall derogate from the rights or obligations of any State under the Energy Charter Treaty or any other international treaty or rule of international law.

HGA is also mentioned in IA and it is stated that HGA is an appendix of IA. This indicates that the obligations arising out of HGA is also guaranteed under IA. When IA provisions are examined in general, it is noticed that Turkey's obligations are detailed rather than both parties'. Moreover, refers in many places of the agreement made to other agreements provided within the scope of international obligations.

According to IA, parties will take actions to ensure smooth operation of TANAP under their domestic laws. IA refers to HGA regarding the issues of tax exemptions and obligations and states that the provisions under HGA will apply.

It is agreed in the agreement that a commission will be established to ensure expedition and supervision of the project.

C. Host Government Agreement Signed Between Turkey and TANAP Project Company (The Trans Anatolian Gas Pipeline Company B.V.)

HGA aims to transport Azerbaijan natural gas to Turkey and to Europe market via Turkey.

Arrangement of 6 billion cubic meters of said gas, differs TANAP HGA from its counterparts. Because, these kinds of agreements set forth passage from a state but do not address domestic markets. This situation brings out the question whether the transportation of natural gas, which normally does not have the characteristics of public service, is a public service or not. Well, is consumption of the natural gas in domestic market adequate to answer the question as yes? In our opinion, additional criteria are essential for this answer. For example, public force is not overwhelming in HGAs. Contrarily, private enterprises are given precedence. The situation is the same in TANAP HGA. Utilization of public property, as another criterion, also takes place in the agreement (Çal 2007: 645-646).

Since domestic consumption is not adequate for the activity of transportation of natural gas to be a public service, it can be clearly stated that TANAP HGA is not an administrative contract. In other words, the nature of HGAs that does not regard the balance between host governments and project companies, is reflected under TANP HGA in same way.

Differently from IA, HGA goes into details and stipulates private law provisions concerning the project. Commercial terms arising from the agreement are observed.

The most notable aspect in the HGA's is that party states in some cases accept restriction of their sovereign rights. For example, according to article 7/2-6, of Transit State Agreement regarding Baku-Tbilisi-Ceyhan Pipeline Project (BTC) - equivalent of HGA-, any matter that damages the project

by interfering the implementation of the project, resulting from any domestic law or international agreement etc., or any other reason, will be regarded as adverse effect on the rights arising from the agreement and, consequently, breaching state will pay compensation. It can be argued that these provisions stipulated under these kind of projects, interferes the obligation of states to protect and improve human rights in line with international law. Inasmuch as, by limiting their sovereign rights, states become unable to intervene human rights violations on individuals that projects may cause, especially in environmental aspect. A provision in BTC that draws reaction is not stipulated under TANAP HGA and, by this means, sovereign right of Turkey is not limited.

According to articles 33 and 34 regarding the matter, if there is a dispute that cannot be settled amicably within sixty (60) days from the date on which either Party to the dispute has requested amicable settlement, the dispute shall be finally resolved under the ICC Rules. In the event of any conflict between the ICC Rules and the arbitration provisions of this Agreement, this Agreement shall govern. The Parties may agree in writing upon an alternative arbitration procedure. In addition, it is provided that the agreement is subject to the laws of Switzerland.

D. Characteristics of TANAP In Terms of International Law

TANAP agreements are undoubtedly commercial agreements considering the abovementioned legal evaluations made in general for international agreements and in particular for IA and HGA. In addition, TANAP, with respect to both two agreements it contains, have characteristics of bilateral agreements. Considering the international law subjects party to the agreements, TANAP IA is an agreement made between a state and a state while HGA is a private law contract made between a state and a private law entity.

TANAP agreements are indisputably written agreements and it observed from the ratification of the Grand National Assembly of Turkey (TBMM) dated 02.01.2013¹¹ that the agreements are subject to approval. When TANAP IA is examined, considering that it is a written agreement made between two sovereign international law entities, it coincides, with the IA's accepted by international law. In this aspect, TANAP IA is an agreement that VCLT is applicable to. "The Intergovernmental Agreement Between

Government of the Republic of Turkey and Government of the Republic of Azerbaijan on Trans Anatolian Natural Gas Pipeline” made in Istanbul on 26 June 2012 and its appendix “Host Government Agreement” constitute the legal basis of the project. Mentioned Host Government Agreement later amended and signed on 26 May 2014 and amended version was ratified on 10 September 2014 by the Grand National Assembly of Turkey.¹²

When TANAP HGA is reviewed, it is observed that at the least it stipulates the obligations of TANAP Project Company, but, on the other hand, it imposes a lot more obligations on Turkey. From this aspect, it is possible to state that it has the general characteristics of HGA’s. The obligation of compensation imposed to the governments under HGAs takes place under similar agreements. However, the scope of this obligation is more comprehensive in HGAs. This situation deprives the state from its power to regulate and brings out problems in sustainable development, environmental and human rights (Remer 2005: 24).

In addition, like other HGA’s, TANAP HGA does not have the feature of international agreements. Because, TANAP Project Company, a party to the contract, does not have a personality in terms of international law. For this reason, VCLT will not be applied on TANAP HGA. Finally, it can easily be stated that TANAP HGA does not have contradictions with Turkish domestic law.

E. Terminability Problem of TANAP Agreements In Terms of International Law

In order to evaluate terminability of TANAP agreements, cases that constitute cause for termination under VCLT should be examined. In this context, articles 26, 54 and 62 come into prominence. According to the general rule stipulated under article 26 of VCLT, parties to international agreements shall in good faith fulfill their obligations arising out of the agreements. Article 54 stipulates that parties may terminate the agreement only if there is a provision in the agreement. In case of absence of a termination right under the agreement, termination is possible only if it is interpreted from the nature of the agreement or parties consent to termination. According to article 62, a fundamental change of circumstances may be invoked as a ground for termination by the affected party, if the effect revolutionizes the will to be bound by the treaty or if the effect of the change is radically to transform the extent of obligations.

However, termination for fundamental changes in circumstances is not applicable to IA and HGA (Hekimoğlu 2012: 87). It is the situation for TAN-AP IA and HGA.

Considering that TANAP HGA is not an international agreement as per VCLT, all termination causes stipulated under VCLT and mentioned above are inapplicable for HGA. However, this should not mean that HGA and accordingly IA cannot be terminated in any way. Article 35 of HGA stipulated the causes for termination in detail. When the relevant article is examined, it will be noticed that only causes that are explicitly provided under the agreement may be a justification for termination. It is observed that the agreement rather provides different ways to retain it in force. Prominent one of them is the way of termination if an obligation is not fulfilled after a period of time given by means of a notice to remedy the breach. According to article 35.2, such termination shall become effective three hundred and sixty (360) days after receipt by the TANAP Project Entity of such termination notice, unless within said three hundred and sixty (360) day period the TANAP Project Entity take final investment decision in respect of the TANAP Project. Likewise, according to article 35.3 it provides a 180-day notice period in case of failure in commencing the project construction in determined time and in case of material breach of the obligations under article 35.3.

In other words, it is impossible to state that TANAP IA and HGA cannot be terminated in any circumstance. However, exercise of termination right is made difficult. In this context, either IA or HGA may be terminated for the causes explicitly stipulated under the agreement on the condition that time periods are complied with.

III. EXPROPRIATION TERMS UNDER HGA IN TERMS OF INTERNATIONAL LAW

A. The Concept of Expropriation

According to Article 46 of the Constitution of Turkey, The State and public corporations shall be entitled, where the public interest requires, to expropriate privately owned real estate wholly or in part and impose administrative servitude on it, in accordance with the principles and procedures prescribed by law, provided that the actual compensation is paid in advance.

When this provision of domestic legislation is examined, it is easily understood that it is possible to publicize privately owned real estate wholly or in part in case of existence of public interest and advance payment.

B. Expropriation in International Law

From the aspect of international law, existence of four conditions is essential.¹³ First one is the existence of public interest. Public interest condition is accepted in international law besides being a common principle of law (Reinisch 2008: 178). According to this, in order for an expropriation to be valid pursuant to international law, public interest should not only exist formally but should also exist materially.¹⁴ Another condition is that there should not be discrimination in the exercise of expropriation. This condition is also taken place both in traditional law and judicial decisions. Third condition is that expropriation is made in compliance with procedural rules (Reinisch 2008: 187-193). This condition is considered in connection with equal and objective treatment and minimum standard criterion (Rudolf and Schreuer 2008: 91). Last condition is to compensate. Compensation condition is adopted both by international law and traditional law but no rule has been set up regarding the amount of compensation. Method of “Hull Formula” (Radu 2008: 255), providing the characteristics of promptness, adequacy and efficiency for payment, is not adopted by international traditional law (Reinisch 2008: 194-199).

First international document regarding expropriation is a resolution of General Assembly of United Nations made in 1962. According to the decision titled “Permanent Sovereignty over Natural Resources”¹⁵, a state has exclusive sovereign rights over the natural resources it owns. In addition, the resolution also stipulates the concepts of requisition, nationalization and expropriation. According to resolution, nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement

by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

In this case, it is understood from the text of item that conditions of public utility, national interest and national security should exist expropriation and an appropriate compensation should be paid. Another international document concerning expropriation is “Charter of Economic Rights and Duties of States”¹⁶. According to 2/1 of the Charter adopted by UN in 1974, states have full permanent sovereignty, over natural resources and its wealth, over and underground. Under article 2/2-c only public utility and compensation is mentioned but contrary to the resolution dated 1962, it does not mention national interest and security. According to this, to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

Judicial decisions have remarkable impact on the matter of expropriation to become its present status. Decisions of Iran-United States Claims Court are the primary ones. Mentioned court has made directly and in directly around sixty decisions in twenty years on expropriations (Heiskanen 2003: 176-187).

When the statements of abovementioned decisions are reviewed, with respect to the results, it is important whether the expropriation is just or not. A rightful expropriation should bear the aim of public utility and should be exercised by paying an appropriate compensation. In other words, compensation is the result of a rightful expropriation according to general principles of international law (Sornarajah 2004: 345). Unlawful expropriation has the characteristics of unjust requisition and priority is the restitution of the subject of requisition. If this is impossible, compensation should become the main topic. (Reinisch 2008: 200). Undoubtedly, in case of an unjust expropriation, the state’s liability will come into question (Rudolf vd. 2008: 92).

Principles such as respect to other states' rights, equitable and fair treatment, minimum standard criterion and national treatment will be approached together with expropriation, when a dispute arise regarding expropriation on international grounds (Volterra 2003).

Expropriation arises as two types as direct and indirect when looked at from the aspect of international law. Besides, indirect expropriation has a sub-branch called "creeping expropriation" (Schreuer 2005: 1).

Direct expropriation is identifiable, clearly and deliberate (Isakoff 2013: 191-192). Indirect expropriation, right of ownership remains but some restrictive results on the right arise on it (Reinisch 2008: 358-395).

Concept indirect expropriation is given place in some of the bilateral investment agreements that Turkey is party to. "Treaty between the United States of America and the Republic of Turkey concerning the Reciprocal Encouragement and Protection of Investment"¹⁷ is an example for this.

Creeping expropriation is defined as an indirect expropriation that arise as a result of series of actions (Isakoff 2013: 195-196). Marvin Feldman v. Mexico¹⁸ and Tecmed v. Mexico¹⁹ cases may be examples for international trials that the concept of creeping expropriation is mentioned. As also stated in Tecmed case, simultaneous and serial actions exist in creeping expropriations. This type of expropriations has characteristics from de facto expropriations. From this aspect, the matter should be evaluated in line with the character of concrete case.

It is possible to find the concept of indirect expropriation in International Court of Justice (ICJ) and USA-Iran Claims Court decisions (Rudolf vd. 2008: 93).

Considering the definition of indirect expropriation above, it is observed that possible effects on the right come to the forefront. In this context, effect doctrine is defined as the effect on owner in the exercise of ownership right, and many international cases resolved in line with this doctrine. For example, effect circumstances in Energy Chart Treaty and NAFTA are provided as deprivation, defraudation, material and serious loss (Hoffmann 2007: 156-157). In some cases, intensity of intervention on the economic value of the investment is evaluated.²⁰ Contrarily, the effective purpose of the states is generally considered in cases²¹ and the condition of prosperity

of the state is not sought (Hoffmann 2007: 160). Another group of cases exercise effect review on the “legitimate expectation” basis which is one of the general principles of international law (Rudolf vd. 2008: 105).

Because of the expropriation conducted by the state, the right is affected in a very intensive way in indirect expropriations. The degree of effect derogates the right and makes it unusable. In other words, as a result, the effect and consequence is similar although the ownership right is not taken away as in direct expropriations (Hoffmann 2007: 157).

C. Expropriation Provisions in TANAP HGA

It should be mentioned primarily that there is not any provision regarding expropriation in TANAP IA. The reason for this is that the provisions in HA have the characteristics of outlining HGA and that they do not go into details. According to HGA, expropriation should be for a purpose which is in the public interest, not discriminatory, carried out under due process of law and accompanied by the payment of prompt, adequate and effective compensation.

Considering that the conditions of expropriation under international law are public interest, nondiscrimination, compliance with procedural laws and compensation, it is observed that these four conditions take place in the TANAP. In other words, compliance with international law in expropriations conducted for TANAP is guaranteed under HGA. In addition, any dispute relating to an Expropriation may be submitted to arbitration.

The expression takes place in “Charter of Economic Rights and Duties of States” adopted by United Nations (UN) in 1974 disregarding stating that the disputes regarding expropriation shall be resolved in accordance with domestic laws and competent courts of concerned state and effective control of a possible unlawfulness in expropriation is aimed through this article of HGA. By this means, four conditions requisite for a legitimate expropriation can be controlled by impartial arbitral tribunals.

Article 30 of HGA mentions only “public interest” as the purpose of expropriation. On the other hand, the purposes of “national interest” and “public security” that take place in some other international agreements are not mentioned. On that sense, to limit seeking expropriation is targeted by deviating from the abovementioned decision of UN taken in 1962.

When HGA, occurred as a bilateral agreement, expropriation provisions is reviewed, it is observed that the aim is to protect the investor. The stipulation of objective and equitable treatment and arbitration as the way of dispute resolution is confirming this idea when the concerned provision is reviewed in general.

Although the concept of “indirect expropriation” is not mentioned literally in HGA, it is referred with the expression of “...subject to a measure or measures having effect equivalent to nationalization or expropriation”.

CONCLUSION

International agreements may differ according to subject matter, number of parties, legal functions and roles of parties, their character whether written or verbal, approval procedure. An agreement that is made between states regarding establishment, operation and termination of a project is an international agreement. In this aspect, VCLT is applicable to IA. IA is an agreement made between sovereigns that are subjects of international law. Party states’ obligations regarding the project, level of their contribution to the project and other agreed matters take place in IA. IA’s function is to make the project result in internationally by reducing party states’ obligations for project’s succeed to an internationally binding document. By IA, investing companies have the right to rely on a second agreement that states are party to, besides the private w agreements that only they are party to.

HGA is not an international agreement pursuant to VCLT. Because one of the parties to HGA is an investing company and it is not a subject of international law. Host Government Agreements have the character of appendix of IA. The parties of HGA are, investing companies and the states that have lower shares in the project and have more obligations compared to other states. In practice, HGA does not impose obligations on contactor companies, contrarily, sets forth the privileges granted by the concerned state to the companies regarding the construction and operation of the project.

IA primarily secures free transition of natural gas. It is aimed with IA to prevent possible harms during the maintenance of the project by setting forth international technical, safety and environmental standards. In addition, it is indicated by referring Energy Charter Treaty that international standards concerning the matter is valued.

It is observed that, unlike similar agreements, provisions that limit sovereign rights are not stipulated under TANAP HGA. In addition, it is provided that the agreement is subject to the laws of Switzerland and ICC arbitration procedures will be applicable to disputes. Besides, both IA and HGA may be terminated under the circumstances explicitly stipulated under HGA if conditions regarding periods are complied with.

Conditions of expropriation under international law are public interest, nondiscrimination, compliance with procedural laws and compensation. Both immaterial rights and material rights are within the scope of expropriation under international law. Expropriation divided into two types as direct and indirect expropriation. Creeping expropriation is also within the scope of indirect expropriation. Right owner's right is directly affected and the right of ownership is abolished in direct expropriation. In indirect expropriation, right of ownership remains but some restrictive results on the right arise on it. Creeping expropriation is an indirect expropriation conducted as a result of successive and more than one action.

Compliance with international law in expropriations conducted for TANAP is guaranteed under HGA. Four primary expropriation conditions mentioned above is protected under HGA. When the expressions used in this context are reviewed, it is observed that both direct and indirect expropriation is provided under HGA.

Endnotes

- ¹ <http://www.tanap.com/tanap-projesi/tanap-nedir/>, (Erişim Tarihi: 26.04.2016).
- ² <http://www.tanap.com/haber/enerjinin-ipek-yolu-strongtanap-strong-icin-imzalar-atildi/>, (Erişim Tarihi: 26.04.2016).
- ³ The Official Gazette of the Turkish Republic dated 21.10.2014 and numbered 29152.
- ⁴ "Energy", Turkish Republic Ministry Of Foreign Affairs, Energy, Water and Environment Management, April-June 2014. <http://www.mfa.gov.tr/data/Kutuphane/Yayinlar/enerjisucevre102014.pdf> , (Erişim Tarihi: 28.07.2016).
- ⁵ United Nations Conference on Trade and Development, *International Investment Agreements: Key Issues*, Vol. 1, 2004, s. 17.

- 6 For more information see, Knaupp Benjamin D., "Classifying International Agreements Under U.S. Law: The Beijing Platform as a Case Study, Brigham Young University Law Review, 1998/01/01, Vol. 1998.
- 7 "The British Planned, Azerbaijan Developed, Turkey has signed", EUD, 2012. <http://www.eud.org.tr/TR/Genel/BelgeGoster.aspx?F6E10F-8892433CFFA79D6F5E6C1B43FFF78DC9BBD0367EBD> , (Erişim Tarihi: 28.07.2016).
- 8 The Official Gazette of the Turkish Republic dated 01.10.2014 and numbered 29136.
- 9 This project is a gas pipeline project that starting point is Russia and final destination is Turkey.
- 10 For detailed information on subject, İslam Safa KAYA, "Preventing Transboundary Harm Arising from Hazardous Activities in International Law: Example of Transportation by Transit Pipelines", *Legal Journal Of Law, Vol. 13, Iss. 148, April 2015, p. 61-77.*
- 11 The Official Gazette of the Turkish Republic dated 17.01.2013 and numbered 28531.
- 12 <http://www.tanap.com/kurumsal/hakkimizda/> (11.10.2016).
- 13 United Nations Conference on Trade and Development (UNCTAD), Taking of Property, UNCTAD Series on issues in international investment agreements, 2000.
- 14 ADC v. Macaristan, ICSID ARB/03/16, 02.10.2006, para. 432.
- 15 United Nations General Assembly's decision about that Permanent Sovereignty Over Natural Resources, No. 1803, dated 1962.
- 16 Regarding the Charter of Economic Rights and Duties of States. United Nations General Assembly's decision No. 3281 (XXIX).
- 17 The Official Gazette of the Turkish Republic dated 13.08.1989 and numbered 20251.
- 18 Case No. ARB(AF)/99/1, 16.12.2002, para. 101-103.
- 19 Case No. ARB(AF)/00/2, 29.05.2003.
- 20 PSEG Global, Inc., The North American Coal Corporation and Konya İngin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey, ICSID Case No. ARB/02/5.
- 21 Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, <http://www.italaw.com/cases/1026#sthash.RCGiaLka.dpuf> (Erişim Tarihi: 19.11.2015).

References

- ADC v. Hungary, ICSID ARB/03/16, 02.10.2006.
- Charter of Economic Rights and Duties of States. United Nations General Assembly's decision No. 3281 (XXIX).
- Cohen, Ariel (2014). "Caspian Gas, TANAP and TAP in Europe's Energy Security". *IAI*: 1-17.
- Çal, Sedat (2007). "Kamu Hizmeti: Bir Tanım Denemesi". *Gazi Üniversitesi Hukuk Fakültesi Dergisi* XI (1-2): 599-655.
- (2008). "Bakü-Tiflis-Ceyhan Boru Hattı Projesi Kapsamındaki Anlaşmaların Hukuki Yönden Değerlendirilmesi". *Ankara Üniversitesi SBF Dergisi* 63 (4): 89-134.
- Heiskanen, Veijo (2003). "The Contribution of the Iran –United States Claims Tribunal to The Development of The Doctrine of Indirect Expropriation". *International Law Forum* 5 (3): 176-187.
- Hekimoğlu, Mehmet Merdan (2012). "Bakü-Tiflis-Ceyhan Boru Hattı Projesi'nin Hukuki Boyutları". *Bilig Türk Dünyası Sosyal Bilimler Dergisi* 63: 77-92.
- Hildyard, Nicholas ve Greg Muttitt (2004). "Turbo-Charging Investor Sovereignty: Investment Agreements and Corporate Colonialism". *Destroy And Profit*: 43-63.
- Hoffmann, Anne K. (2008). "Indirect Expropriation" in *Standards of Investment Protection*. Oxford: Oxford University Press.
- IEA Reports (2014). "Energy Supply Security- Emergency response systems of individual IEA countries".
- Isakoff, Peter D. (2013). "Defining the Scope of Indirect Expropriation for International Investments". *Cleveland State University The Global Business Law Review Law Journals*: 189-209.
- Kaya, İslam Safa (2015). "Preventing Transboundary Harm Arising from Hazardous Activities in International Law: Example of Transportation by Transit Pipelines". *Legal Journal Of Law* 13 (148): 61-77.
- Knaupp, Benjamin D. (1998). "Classifying International Agreements Under U.S. Law: The Beijing Platform as a Case Study". *Brigham Young University Law Review*. 1998/01/01.
- Marvin Feldman v. Mexico, Case No. ARB(AF)/99/1, 16.12.2002.
- Muratoğlu, Reha Aykul (2002). "Trilateral Agreements: Bakü-Tiflis-Ceyhan Pipeline Case Study". *Conference on Natural Gas Transit and Storage in South East Europe*. İstanbul.
- Poirier, Johanne (2001). *The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective*. The Constitution Unit School of Public Policy UCL, London.
- PSEG Global, Inc. The North American Coal Corporation and Konya Ingin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey, ICSID Case No. ARB/02/5.

- Radu, Anca (2008). "Foreign Investors in the EU—Which 'Best Treatment'? Interactions Between Bilateral Investment Treaties and EU Law". *European Law Journal* 14 (2): 237-260.
- Reinisch, August (2008). *Legality of Expropriation, Standards of Investment Protection*. Oxford: Oxford University Press.
- Remer, Terre-Eve Lawson (2005). "A Role for the IFC in Integrating Environmental & Human Rights Standards into Core Project Covenants: Case Study of the Baku-Tbilisi-Ceyhan Oil Pipeline Project". *Houser Global Law School Program, NYU School of Law*. 1-41.
- Rudolf, Dolzer ve Christoph Schreuer (2008). *Principles of International Investment Law*. Oxford: Oxford University Press.
- Schreuer, Christoph (2005). *The Concept of Expropriation under the ETC and other Investment Protection Treaties*. http://www.univie.ac.at/intlaw/pdf/csunpublpa-per_3.pdf (Erişim Tarihi: 10.08.2016).
- Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, <http://www.italaw.com/cases/1026#sthash.RCGiaLka.dpuf> (Erişim Tarihi: 19.11.2015).
- Sornarajah, Muthucumaraswamy (2004). *The International Law on Foreign Investment*. Cambridge: Cambridge University Press.
- Tecmed v. Mexico Case No. ARB(AF)/00/2, 29.05.2003.
- United Nations Conference on Trade and Development (UNCTAD). Taking of Property, UNCTAD Series on issues in international investment agreements, 2000.
- United Nations General Assembly's Decision About that Permanent Sovereignty Over Natural Resources, No. 1803, dated 1962.
- Volterra, Robert (2003). "Mitigating Expropriation Risk for Oil&Gas Investment in the Caspian Region". A Presentation to IEA Roundtable on Caspian Oil&Gas Scenarios, April 15.
- The Official Gazette of the Turkish Republic dated 13.08.1989 and numbered 20251.
- The Official Gazette of the Turkish Republic dated 17.01.2013 and numbered 28531.
- The Official Gazette of the Turkish Republic dated 01.10.2014 and numbered 29136.
- The Official Gazette of the Turkish Republic dated 21.10.2014 and numbered 29152.
- United Nations Conference on Trade and Development, International Investment Agreements: Key Issues, Vol. 1, 2004.
- <http://www.eud.org.tr/TR/Genel/BelgeGoster.aspx?F6E10F8892433CFFA79D-6F5E6C1B43FFF78DC9BBD0367EBD> , (Erişim Tarihi: 28.07.2016).
- <http://www.tanap.com/tanap-projesi/tanap-nedir/> , (Erişim Tarihi: 26.04.2016).
- <http://www.tanap.com/haber/enerjinin-ipek-yolu-strongtanapstrong-icin-imzalar-atil-di/> , (26.04.2016).
- <http://www.mfa.gov.tr/data/Kutuphane/Yayinlar/enerjisucevre102014.pdf> , (Erişim Tarihi: 28.07.2016).

TANAP Antlaşmalarının Uluslararası Hukuk ve Kamulaştırma Hukuku Açısından Değerlendirilmesi

İslam Safa Kaya*

Öz

Türkiye ile Azerbaycan arasında, Şahdeniz 2 sahasından çıkarılan doğalgazın Türkiye toprakları üzerinden Avrupa'ya nakledilmesi amacıyla gerçekleştirilen Trans Anadolu Doğal Gaz Boru Hattı Projesi (TANAP), dünyanın gündeminde olan bir projedir. TANAP'ın hukuksal detayları, iki devlet arasında imzalanan Hükümetlerarası Antlaşma (HA) ve Türkiye ile TANAP Proje Şirketi arasında imzalanan Ev Sahibi Hükümet Antlaşması'nda (ESHA) yer almaktadır. Adı geçen antlaşmalara bakıldığında HA'nın daha çok çerçeve antlaşma niteliğinde olduğu, bunakarşın ESHA'nın ise daha detaylı hükümler içeren bir özel hukuk sözleşmesi olduğu görülmektedir. İki taraflı bir yatırım antlaşması niteliğinde olan TANAP Antlaşmaları, daha çok yatırımcının, yani Azerbaycan'ın haklarını korur nitelikte hükümler içermektedir. Zira, gerek tarafların projedeki payları, gerekse kaynak ülkenin Azeri toprakları olduğu düşünüldüğünde bu durumun da doğal ve hukuki olduğu kabul edilmelidir.

Anahtar Kelimeler

TANAP, hükümetlerarası antlaşma, ev sahibi hükümet antlaşması, enerji hukuku, uluslararası antlaşmalar, uluslararası hukuk

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Оценка соглашения по Трансанатолийскому газопроводу (TANAP) с точки зрения международного права и законодательства об экспроприации

Ислам Сафа Кая*

АННОТАЦИЯ

Проект Трансанатолийского газопровода (TANAP), осуществляемый между Турцией и Азербайджаном для транспортировки в Европу по территории Турции природного газа, добываемого на месторождении Шахдениз-2, представляет большой интерес. Юридические детали TANAP содержатся в Межправительственном соглашении (IA) между двумя государствами и в Соглашении о хостинге (HGA), подписанном между Турцией и консорциумом TANAP. Рассматривая упомянутые выше соглашения, можно назвать HA скорее рамочным соглашением, тогда как ESHA является специальным юридическим договором с более подробными положениями. Соглашения TANAP, являющиеся двусторонними инвестиционными договорами, содержат положения, которые в большей степени защищают права инвестора, а именно Азербайджана. Принимая во внимание как интересы участвующих в проекте сторон, так и то, что страной-источником ресурсов является Азербайджан, следует признать, что такое положение является естественным и законным.

Ключевые слова

TANAP, межправительственное соглашение, соглашение правительства принимающей страны, энергетическое право, международные соглашения, международное право

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