

A UNIQUE LEGAL STRUCTURING APPROACH OFFERED
IN THE LEGAL DOCUMENTATION FOR A RECENT
TRANSNATIONAL PIPELINE PROJECT:

THE PRECEDENT SET BY THE BAKU-TBILISI-CEYHAN MAIN EXPORT
PIPELINE PROJECT AGREEMENTS

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Turkey has been a focal point of certain recent transnational pipeline projects concerning the transportation of natural gas or petroleum through pipelines originating from elsewhere but either ending in or crossing the territory of Turkey. Primary examples of such projects are the so called Baku-Tbilisi-Ceyhan Petroleum Pipeline Project involving the Azerbaijan Republic, Georgia and Turkey; the Trans-Caspian Natural Gas Pipeline Project involving Turkmenistan, the Azerbaijan Republic, Georgia and Turkey; the Trans-Balkan Natural Gas Pipeline Project involving Moldavia, Romania, Bulgaria and Turkey; the Blue Stream Natural Gas Pipeline Project involving Russia and Turkey; and, the Shah Deniz Natural Gas Pipeline Project involving the Azerbaijan Republic, Georgia and Turkey.

Of these major transnational pipeline projects, the legal documentation for the Baku-Tbilisi-Ceyhan Petroleum Pipeline Project was executed in İstanbul on 18 November 1999. Such legal documentation involves an international treaty in the form of an Intergovernmental Agreement ("IGA") signed among The Republic of Turkey, The Azerbaijan Republic and Georgia relating to the transportation of petroleum via the territories of The Azerbaijan Republic, Georgia and The Republic of Turkey

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through the Baku-Tbilisi-Ceyhan Main Export Pipeline ("MEP"). Appended to the international treaty as an annex is an agreed upon text of a Host Government Agreement ("HGA") to be signed among the government of The Republic of Turkey and the yet unnamed MEP Project participants. Also appended to the IGA as annexes are agreed upon texts of two other HGAs to be signed among the governments of The Azerbaijan Republic and Georgia and the yet unnamed MEP Project participants. Finally, appended to the Turkish HGA as annexes are agreed upon texts of a Turnkey Agreement to be signed between the international investors of the MEP Project, i.e. the yet unnamed MEP Project Participants and the Turnkey Contractor, and a Government Guarantee to be issued by the Republic of Turkey to the MEP Project Participants guaranteeing the payment obligations of the Turnkey Contractor.

The legal structuring introduced in the legal documentation outlined above is a unique one and can be expected to affect the legal structuring used in most of the other transnational pipeline projects. Therefore, this article will focus on such legal structure and will briefly discuss its underlying premises.

The Azerbaijan Republic and Georgia have recently duly ratified the IGA, together with all of its annexes. The ratification of the IGA has also been found to be proper by the Turkish Grand National Assembly ("TGNA")¹ and the ratification process of the treaty has been completed by the issuance of a ratification decree by the Council of Ministers². According to Article VIII of the IGA, the treaty will enter into force upon ratification by the relevant authorities of the three respective states. Therefore, now that the Turkish ratification process has been completed, the treaty has entered into force between The Republic of Turkey, The Azerbaijan Republic and Georgia. It is important to note here that according to the Turkish Constitution, duly ratified international treaties have the force of law and their constitutionality cannot be challen-

¹ Law No. 4585 dated 22.06.2000 published in the Official Gazette dated 24.06.2000.

² Council of Ministers Decree No. 2000/1127 dated 03.08.2000 published in the official Gazette dated 10.09.2000.

ged³. It is also important to note that simultaneous with the enactment of a law by the TGNA finding it proper that The Republic of Turkey shall ratify the IGA, a law on the Transit Passage of Petroleum Via Pipelines (“Transit Law”) was also enacted by the TGNA⁴.

It should be appreciated that in order to avoid any conflicts, there is needed to state clearly the rights and obligations of all interested parties in a transnational project at both the national and international law levels. This is particularly important from the perspective of international investors of transnational pipeline projects whose investments are frequently made in the magnitude of multibillion US Dollars.

The Baku-Tbilisi-Ceyhan MEP Project aims to carry the petroleum produced in the Caspian Sea through a transit petroleum pipeline from the Caspian Sea to one of the Mediterranean port cities of Turkey called Ceyhan. The MEP Project could only be realized through an international treaty, which would provide an adequate legal basis at the international law level for the construction of a transnational pipeline and the transportation of petroleum via such pipeline through the territories of three different States, and through the necessary national law level “enabling” legislation.

It is envisaged that the legal structure offered in the Baku-Tbilisi-Ceyhan MEP Project, i.e. the IGA, together with all of its appendices, and the Transit Law, the national law level “enabling” legislation, will achieve the clarity sought by its international investors. This unique structure aims to create in the MEP Project Participants, through the IGA, the HGA and the Transit Law, fully enforceable legal rights, which cannot be successfully challenged or subsequently changed under Turkish law.

Attaching the agreed upon text of the Turkish HGA to the IGA is done to create such fully enforceable legal rights in the yet unnamed MEP Project Participants. It is aimed that once the IGA, together with its appendices, is ratified based on the law recommending such ratification and published in the Official Gazette of the Republic of Turkey together

³ Last paragraph of Article 90.

⁴ Law No. 4586 dated 23.06.2000 published in the Official Gazette dated 29.06.2000.

with all of its annexes, the attachment exercise will secure recognition and acknowledgement, both at the national and international law level, of the rights, exemptions, privileges and other benefits granted to the MEP Project Participants in the HGA. Enactment and adoption of enabling pieces of national legislation, such as the Transit Law, together with the attachment of the HGA as part of the duly ratified IGA, aims to create the enabling legal environment recognizing and supporting the enforcement of the rights, exemptions, privileges and other benefits granted to the MEP Project Participants in the HGA. The signing and ratification of the IGA together with all of its annexes, the enactment and adopting of enabling Turkish legislation such as the Transit Law and the signing of the HGA -- once all of the international investors of the MEP Project are named -- will each play a very important role in the MEP Participants satisfying themselves and their various lending institutions that they have acquired fully enforceable legal rights with respect to the MEP Project.

Both international and Turkish law provides a legal basis for the unique legal structure offered in the Baku-Tbilisi-Ceyhan MEP Project legal documentation. In this respect, a number of sovereign states can agree in an international treaty on the text of a contract to be signed by each one of them with private parties and to be effective in the territory of each such sovereign state. This is exactly what is aimed by attaching the HGA to the IGA. The attachment of the HGA serves the purpose of having three sovereign states recognize and acknowledge, and commit themselves to, both at the international level and at the national level, after the IGA is duly ratified together with all of its annexes, the rights, exemptions, privileges and other benefits granted to the MEP Project Participants in the HGA. In this context, as part of the IGA, the HGA would, among other things, serve as an indication of the three sovereigns' recognition and acknowledgement of, and commitment to, the text thereof, but not by the eventual parties to the HGA. As a part of this process and within the legal context of the ratified IGA and the Transit Law, the full version of the HGA will be entered into by and between the MEP Project Participants, once they are named, and the Turkish Government, and an enabling legal environment for the realization of the MEP Project will have been effectively created.

This structure aims to provide the international investors, i.e. the MEP Project Participants with comfort of knowing that their rights, exemptions, privileges and other benefits will have been recognized in a Turkish law document in the form of an international agreement, i.e. the duly ratified IGA together with all of its annexes including the HGA. This structure further provides them with the assurance that the process of "mirror imaging" the rights, exemptions, privileges and other benefits granted to the MEP Project Participants as provided in the HGA in the national law level enabling law, the supporting by-laws and decrees will be accomplished in a manner which will minimize the risk of coverage omissions and any constitutionality challenges.

I believe that while preventing conflicts between national laws and HGA, this legal structuring precedent set by the Baku-Tbilisi-Ceyhan Petroleum Pipeline Project legal documentation also provides to interested parties the comfort of knowing that their rights and exemptions, privileges and other benefits are recognized in a Turkish law document in the form of an international agreement.