

George Chr. Pelaghias
ERPIC Executive Director

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CYPRUS' RESPONSE TO A TURKISH NATURAL GAS PIPELINE TO ISRAEL

INTRODUCTION

It has been reported for several years that Turkish official and commercial circles have approached Israeli authorities, and Israeli energy companies, with proposals regarding the purchase of Israeli natural gas found in the Israeli Exclusive Economic Zone (“EEZ”).¹ Such proposals include the construction of a deep-water pipeline to the Turkish coast. In the event that such proposals materialise, and a pipeline is in fact built, there is a high probability that it will have to cross Cyprus’ EEZ.² Hereunder, we examine the rights of the Republic of Cyprus regarding this matter.

LEGAL FRAMEWORK

The main international conventions discussed are: the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”); the 1994 Energy Charter Treaty and Related Documents (“ECT”); and the United Nations Economic Council for Europe Convention on Environmental Impact Assessment in a Trans-boundary Context (“Espoo Convention”) 25 February 1991.

The Cyprus legislative regime consists of: the Assessment of Impact on the Environment from Certain Plans and/or Programs Law (No. 102(I)/2005) implementing EU Directive 2001/42/EC; the Assessment of Environmental Impact (EIA) from Certain Projects Law (No. 140(I)/2005) implementing EU Directive 97/11/EC; the Exclusive Economic Zone Laws of 2004 (No. 64(I)/2004) and 2014 (No. 97(I)/2014); the Hydrocarbons (Prospecting, Exploration and Exploitation) Law (No. 4(I)/2007); the Submarine Pipelines for Transfer of Oil and other Hydrocarbon Products Regulation of 1995; the Geological Surveys Law of 2013 (No. 140(I)/2013); the Environmental Responsibility Regarding the Prevention and Restoration of Environmental Damage Law (No. 189(I)/2007) implementing EU Directive 2004/35/EC, and amended by EU Directive 2013/30/EU; the Convention for the protection of the Mediterranean Sea Against Pollution and Related Protocols (Ratification) Law of 1979; the Agreement between the Government of the State of Israel and the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone of 17 December 2010; and the Submarine Pipelines Regulations of 2014 (No. 579/2014), issued pursuant to the Exclusive Economic Zone and Continental Shelf Laws of 2004 and 2014 (the “2014 Regulations”).

IMPLEMENTATION

The right to lay offshore pipelines in a third state’s EEZ, as well as cross-border transit of energy via pipelines, is primarily regulated by UNCLOS, the ECT, related international legal principles, and the transit state’s domestic

* This briefing note is a revised edition of an original note circulated in July 2013.

¹ *Turkey's Zorlu Group Pushing Israel to Approve Gas Exports*, Today’s Zaman, 14.02.13, <http://todayszaman.com/> (Last accessed 20.07.13); Bar-Eli Avi, Trilnick Itai ‘*Turkish Company Lobbying Israel for Gas Exports to Turkey*’, Haaretz, 14.02.13, <http://www.haaretz.com/> (Last accessed 20.07.13); Bryza Matthew, ‘*Israel-Turkey Pipeline Can Fix Eastern Mediterranean*’, Bloomberg, 20.01.14, <https://www.bloomberg.com/> (Last accessed 08.05.17); Girit Selin ‘*Gas Pipeline Hope Heals Rupture in Israel-Turkey Ties*’ BBC News, 19.10.16, <http://www.bbc.com/> (Last accessed 08.05.17); Yuval Ben-David, Clarke David (ed.) ‘*Israel-Turkey Gas Pipeline Could be Ready in Four Years*’, Reuters, 02.03.17, <http://www.reuters.com> (Last accessed 08.04.17)

² *Israel, Turkey and Gas*, Jerusalem Post Editorial, 18.05.13, <http://www.jpost.com/> (Last accessed 20.07.13); Barkat Amiram, ‘*Pipeline to Turkey and LNG to China*’ Globes, 19 June 2013, <http://www.globes.co.il> (Last accessed 22.07.13); Wainer David ‘*Turkey Sees No Need for Cyprus to Approve Israel Gas Pipeline*’, Bloomberg, 13.04.17, <https://www.bloomberg.com/> (Last accessed 08.04.17).

legislation.³ Cyprus has signed and ratified both UNCLOS and ECT, while Israel is a signatory of neither. Turkey has signed the ECT, but is not a signatory of UNCLOS.

The International Court of Justice, in the *Libya vs. Malta Case*⁴, stated that a coastal state has the customary right to establish an EEZ, and that the principles in Part V of UNCLOS, regulating the EEZ, could be considered as customary law.⁵ UNCLOS Part V Article 56 grants coastal states sovereign rights within its EEZ, but not sovereignty over it. The rights granted in Article 56 covers exploration, exploitation, conservation and management of natural and living resources, and the activities adjunct to the EEZ. The coastal state also has jurisdiction over artificial structures built, and marine scientific research conducted in its EEZ, as well as the protection of the marine environment. Furthermore, Article 56(3) states that the rights set-out in Article 56, with respect to the seabed and subsoil, shall be exercised in accordance with Part VI of UNCLOS. As such, the right to lay offshore pipelines on the continental shelf within the EEZ is recognised under Article 58 of Part V, and Article 79 and 87 of Part VI. However, a coastal state can still safeguard its interests as a transit state. The protective principle grants coastal states the right to take reasonable measures for the prevention, reduction and control of pollution from pipelines crossing the state's continental shelf.⁶

In the case of the ECT, which regulates cross-border co-operations in the energy industry, such as trade, transit, investments and energy efficiency, Article 7, which in turn regulates transit of energy, including pipelines, obliges signatories not to refuse transit, or refuse to agree to the construction of a new pipeline or network capacity, solely on the basis of the origin, destination or ownership.

While the ECT Article 7 makes clear that Cyprus could not obstruct the project, excluding Cyprus from the process could at a later stage deny Cyprus, as a transit state, valuable transfer tariffs. The ECT, similar to UNCLOS Article 208, recognises the principle of national sovereignty over energy resources. This sovereignty, granted in Article 18(1), must be exercised in accordance with, and subject to, the rules of international law. The ECT Article 7(8) also guarantees a signatory's rights and obligations under international law, customary international law, existing bilateral or multilateral agreements, including rules concerning submarine cables and pipelines. It could be argued that since the treaty is legally binding upon the signatories, including its dispute resolution procedures, Turkey, by signing the ECT, not only recognises the Republic of Cyprus as a counter-party, but also acknowledges its rights and obligations under bilateral and multilateral agreements, such as UNCLOS. This could provide Cyprus with the possibility of opening a state-to-state arbitration process against Turkey under ECT Article 27.

Furthermore, Cyprus is obligated under UNCLOS, as well as EU legislations to prevent, reduce and control pollution of the marine environment arising from, or in connection with, seabed activities. Cyprus must ensure that the project is in line with the environmental requirements of the Strategic Environmental Assessment (SEA) Directive 2001/42/EC, which is part of Cypriot domestic law⁷, and that the company's EIA procedures follow Directive 2011/92/EU.

The Espoo Convention obliges the Parties to assess the environmental impact of certain activities at an early stage of planning. According to Article 2, the Parties either individually or jointly must take all appropriate and effective measures to prevent, reduce and control significant adverse trans-boundary environmental impact from proposed activities (including the transport of oil and gas through pipelines). Article 2(4) puts an obligation on the Party of origin (i.e. a Contracting Party or Parties in whose jurisdiction a proposed activity is envisaged to take place) to notify affected Parties of a proposed activity that is likely to cause a significant adverse trans-boundary impact.

³ Mudrić Mišo, *Rights of States Regarding Underwater Cables and Pipelines*, (2010), <http://academia.edu/> (Last accessed 15.07.13).

⁴ *Libyan Arab Jamahiriya-Malta case*, ICJ Reports (1985).

⁵ *Libyan Arab Jamahiriya-Malta case*, ICJ Reports (1985), 13, para. 33. See also: Alsied Omar Adel, *Delimitation of Maritime Boundaries with Special reference to the EEZ and the IMO Conventions Regime: A Libyan Case Study*, United Nations Nippon Foundation (2006) p.14. <http://www.un.org/>; Labaf Aرسالon, *Costal State Jurisdiction in Offshore Pipeline Projects*, Faculty of Law, Lund University (2010), p. 29. <http://www.lunduniversity.lu.se/>

⁶ Labaf Aرسالon, *Costal State Jurisdiction in Offshore Pipeline Projects*, Faculty of Law, Lund University (2010), pp. 34. <http://www.lunduniversity.lu.se/>

⁷ Implemented into Cyprus Law by the Assessment of Impact on the Environment from Certain Plans and/or Programmes Law (No.102(I)/2005)

PRECEDENTS

An example of offshore cross-border pipeline transit is the Nord Stream Project, which crosses the territorial waters of Russia, Denmark and Germany, as well as the EEZ's of Finland and Sweden. None of the transit states refused authorization of the project. However, they did put certain requirements upon the construction company in order to ensure that the project was in line with their domestic legislation, as well as bilateral and multilateral agreements.⁸

In the case of Nord Stream, all states involved were signatories of UNCLOS, and all states except Russia had ratified the Espoo Convention. However, Russia, who had signed the Convention in 1991, agreed to follow the Convention provisions as far as they did not contradict Russia's national legislation.⁹ The international consultation process set-out in the Espoo Convention proved to be a good instrument to prevent delays in obtaining authorizations, identifying mitigation measures involving recycling and recovery of components of waste streams, creating a cleaner working environment and identifying lower cost alternatives.¹⁰

The process conducted by the Swedish government is a good example of the obligations that can be placed on entities operating cross-boarder pipeline projects. The Nord Stream Consortium's original proposal was submitted to the Swedish government on 21 December 2007, but the company had to submit additional information on several occasions between 2008 and 2009 due to the fact that it did not satisfy Swedish requirements.¹¹ The final approval was delivered in November 2009.

The requirements set-forth by Sweden included: approval of the route of the pipes by the Swedish Geological Survey; obligation to develop and monitor all activities with the relevant Swedish authorities; control of the turbidity caused by work on the seabed; avoid construction work during the mating season of the cod fish (between May and October); consult Swedish authorities to protect against disruption of shipping and ship safety; and commitment to remove the pipeline, with the Swedish government having the right to decide the extent of the removal, and other measures necessary to restore the seabed to as near-original condition as possible.

While in the case of Nord Stream all parties agreed to apply the Espoo Convention, and agree to notify and participate in the EIA procedure, Sweden could still have relied on UNCLOS Article 214 which states that contracting states shall enforce their laws and regulations, adopted in accordance with UNCLOS Article 208¹², and that they shall adopt laws and regulations, and take other measures necessary to implement applicable international rules and standards to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities.

TURKISH CLAIMS AGAINST CYPRUS' EEZ

The Turkish government has laid claims, on behalf of the Turkish Occupied Areas of Cyprus ("TOAC"), to a large part of Cyprus' EEZ. Turkey may further claim that any proposed pipeline will not cross Cyprus' EEZ, but rather pass through the EEZ claimed by the TOAC. The areas of Cyprus' EEZ which are claimed by the TOAC, have already been licensed out to the Turkish state-owned oil and gas company (TPAO) for seismic studies and future exploration.

In this case, the Republic of Cyprus must pursue all its rights under international conventions including the ECT, which Turkey has signed and ratified. The ECT makes clear that the sovereign rights of each signatory, guaranteed in Article 18, must be exercised in accordance with and subject to the rules of international law. Cyprus, declared its EEZ in 2004, abiding by its obligations under UNCLOS, especially when rights and duties of other states are

⁸ The applicable legal texts were: UNCLOS, the 1992 Convention on Biological Diversity, the 1992 Helsinki Convention, the 1996 London Protocol, (ASCOBANS) 1991 Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas, the 1972 World Heritage Convention (and Underwater Cultural Heritage), the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, and the ECT.

⁹ *Notification in accordance with Article 3 of the Convention on Environmental Impact Assessment in a Trans-boundary Context (Espoo Convention) for the Nord Stream Extension*, 12.04.13 www.naturvardsverket.se (Last accessed 20.07.13)

¹⁰ Labaf Arsalon, *Coastal State Jurisdiction in Offshore Pipeline Projects*, Faculty of Law Lund University 2010, p. 43. <http://www.lunduniversity.lu.se/>

¹¹ *Memorandum on the Authorization of the Nord Stream Pipeline in the Baltic Sea 05.11.09*, Swedish Government Website, <http://www.regeringen.se/> (Last accessed 20.07.13).

¹² That a Coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities, and from artificial islands, installations and structures under its jurisdiction.

concerned.¹³ In addition, Cyprus offshore exploration licensing rounds, and the legal framework that governs them, are based on EU Directive 94/22/EC. Cyprus' sovereign rights have also been accepted by the international community. Turkey's outright refusal to respect Cyprus' sovereign rights could provide Cyprus with a possibility of opening a state-to-state arbitration process against Turkey under ECT Article 27.

CONCLUSIONS AND RECOMMENDATIONS

The case of a deep-water pipeline from Israel to Turkey, via Cyprus' EEZ, is unique since Cyprus and Turkey have diplomatic relations with Israel, but not with each other. In fact, Cyprus and Turkey are technically still at war since there has not been an official end to the 1974 war between the two states, other than the agreed ceasefire of 16 August 1974. Meanwhile, Cyprus is the only state among the three that have signed and ratified UNCLOS. Both Turkey and Cyprus are signatories to the ECT, Israel is not.

It would be difficult for Cyprus to prevent Israel and Turkey from laying a pipeline within its EEZ based on national and international law. However, Turkey and Israel would not be able to deny Cyprus' rights as a transit state under such laws, and will have to satisfy Cyprus' regulations and environmental concerns, a process that may involve considerable delays.

In line with the Barcelona Traction Case¹⁴ of the International Court of Justice, it can be argued that a company owning and/or operating a pipeline should be regarded a national of the state of its incorporation and subject to the jurisdiction of such state in accordance with the nationality principle. If the incorporation state is a member of UNCLOS, the provisions of the convention would be applicable. Therefore, in the event that Cyprus is not able to enforce its rights directly against Turkey, it may proceed against international companies established outside Turkey.

Cyprus, with the support of UNCLOS, the ECT, other international conventions, and internationally accepted legal principles, such as the protective principle, must insist on maintaining its rights as a transit state throughout the planning, implementation and operational stages of the pipeline. It is, therefore, recommended that Cyprus:

- Ensure that its legal framework for the evaluation and authorization of offshore pipeline construction is strictly enforced.
- Ensure that the evaluation process is of the highest environmental standard, and that it involves relevant Cypriot ministries and authorities, such as the ministries of Justice, Environment, and Commerce, Agriculture, Defense and Foreign Affairs, the Environmental Protection Agency, the Maritime Administration, the Transport Agency, the Board of Fisheries, the Geological Survey, the Cyprus Meteorological Service, the Armed Forces, as well as any other relevant ministry/authority in order to make the procedure as transparent as possible.¹⁵
- Cyprus should explore the possibility of initiating procedures against Turkey based on Article 27 of the ECT for violations of Article 18 of the ECT.
- Cyprus should explore the possibility initiating procedures against the company that will be responsible for the construction and implementation of the pipeline in the event that the company fails to respect Cyprus's rights as a transit state.
- Cyprus as a full EU Member should insist that Turkey, as a candidate member state, fully respect Cyprus' rights as a transit state and Turkey's own obligations thereto, as a condition to Turkey's EU accession.
- Cyprus should invite Israel and Turkey to voluntarily accept the process provided by the Espoo Convention as a way to ensure regional co-operation and avoid delays in the proposed project.

European Rim Policy and Investment Council (ERPIC)
27 Gregory Afxentiou
P.O. Box 40758, 6307 Larnaca, Cyprus
Tel.: + 357 24 658380, Fax: + 357 24 620319
E-mail: erpic@erpic.org
www.erpic.org

¹³ Article 5(I) of the Exclusive Economic Zone Law 2004, states that the Republic shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of UNCLOS. Furthermore, Article 5(2) states that other States shall enjoy the rights to perform the duties provided under UNCLOS but that they shall comply with the laws and regulations adopted by the Republic of Cyprus in accordance with UNCLOS and other rules of international law.

¹⁴ *Barcelona Traction, Light & Power Co Ltd (Belgium v. Spain)*, 1970, <http://www.icj-cij.org/>

¹⁵ The 2014 Regulations incorporate by reference related Cyprus legislation, and should be used to ensure the involvement of other Cyprus government agencies.