

2. Issues arising from legal regime for BTC project (Turkey section)

Evaluation of compliance of project agreements with Turkey's international obligations, and of compliance between project implementation and undertakings in project agreements

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2.1 Summary

The BTC project is subject to a specially negotiated legal regime, set out in an international agreement between Turkey, Azerbaijan and Georgia (the Intergovernmental Agreement) and a private contract between the BTC Consortium and the Government of Turkey (the Host Government Agreement).

A number of concerns have been raised with respect to:

- Conflicts between the IGA/ HGA and Turkey's international obligations on environment and human rights;
- Conflicts between the HGA and Turkey's Accession Agreements with the European Commission (EC);
- Incompatibilities between undertakings in the Joint Statement on adherence to the OECD Guidelines on Multinational Enterprises and BP's record in respect of the project.

This review finds that:

- **Although BTC Co. has moved to resolve some of the issues raised through the publication of a 'Deed Poll' (the BTC Human Rights Undertaking, 26 September 2003), legal opinion continues to cast serious doubts on its efficacy.** In particular, the fact that it is not binding upon host governments; the continuing uncertainty over third party rights and the failure to waive the 'stabilisation clause' with regard to third party claims; and continuing concerns over virtually unlimited security powers suggest that the Deed Poll still does not do enough to protect the rights of affected people.
- **The conflicts between the HGA and Turkey's accession agreements remain unresolved.** In addition, NGOs have drawn attention to conflicts between the BTC project agreements and a Memorandum of Understanding reached between the EC and IFIs on financing for EU accession countries.
- **BP has failed to comply with the OECD guidelines, as required by the project agreements.** A complaint by NGOs is in the process of being adjudicated upon by the relevant authorities.

2.2 Introduction

The BTC project is to be designed, built and operated in a manner intended to conform with a number of legislative measures, the main categories of which are listed hierarchically below:

1. The Constitution of the Republic of Turkey;
2. The Inter-Government Agreement (IGA);
3. The Host Government Agreement (HGA);
4. Turkish domestic law not superseded by the IGA or HGA;
5. Other regulatory requirements such as Governmental Decrees, Regulations, Communiqués, Ministerial Orders, Instructions, to the extent that they do not conflict with the IGA or HGA.

Upon publication in Turkey's Official Gazette on 10th September 2000 (No 24166),¹ the IGA and HGA for Turkey constitute binding international law and are part of the Turkish legal system; they constitute the prevailing domestic law of Turkey governing the BTC project. These Agreements define the capital and resources that each signatory is to provide to the project, the timetable by which it would be developed and the standards that it must meet.

The IGA is an international agreement signed by the three transit countries (the Azerbaijan Republic, Georgia and the Republic of Turkey) and thus is binding only on these three countries. The HGA is defined as a private law contract signed by the Republic of Turkey and the oil companies² ("the Consortium", BTC Co.).

In addition, two other agreements have been incorporated into the project agreements for BTC and are thus, according to BTC Co., part of the legal regime for the pipeline. In May 2003, BTC Co and the host governments executed a Joint Statement,³ which, among other commitments, bound the project sponsors to observing the OECD Guidelines for Multinational Enterprises. And, in September 2003, BTC Co. signed a Human Rights Undertaking, which took the form of a Deed Poll.⁴ However, in both of these cases, and especially the Joint Statement, there are major legal questions over their legal status relative to the HGAs. Essentially, without testing them in a Turkish court, one cannot know whether they would achieve the amendments they purport to.

This chapter examines the project agreements' potential conflicts first with Turkey's human rights and environmental obligations, then with Turkey's Accession Agreement with the European Commission, and finally with the OECD Guidelines on Multinational Enterprises.

1 Environmental Impact Assessment, June 2002, Appendix A3-13.

2 The State Oil Company of the Azerbaijan Republic, BP Exploration (Caspian Sea) Ltd, Statoil BTC Caspian AS, Ramco Hazar Energy Limited, Turkiye Petrolleri A.O., Unocal BTC Pipeline LTD, Itochu Oil Exploration (Azerbaijan) Inc., Delta Hess (BTC) Limited.

3 Joint Statement on BTC project, 16 May 2003

4 BTC Co. Human Rights Undertaking, 22 September 2003

2.3 The HGA and Turkey's human rights and environmental obligations

Under the HGA, the Turkish Government has exempted the consortium seeking to build the pipeline from any obligations under Turkish law, aside from the Constitution, which conflict with the terms of the HGA/IGA.⁵ In doing so, it has effectively abrogated its executive and legislative powers to protect Turkish citizens from potential environmental damage and associated health and safety hazards or to improve the regulatory regime should changes in our understanding of the risks require it.

Under the HGA, the Turkish Government has also effectively granted BP exemption from the financial impacts of any new environmental, social or any other laws affecting the pipeline that Turkey may introduce in the next forty years, the lifetime of the Agreement. In addition, it has undertaken to compensate the BTC consortium if taxes or health or safety or environment laws adversely affect the "economic equilibrium" of the project.⁶

Once the project is underway, only BP and its partners have the power to terminate the HGA, except in extraordinary circumstances. The Turkish Government is thus not in a position to regulate or ensure *de facto* oversight of the operation or construction of the pipeline. Even a future Turkish Government committed to human rights would not have the ability to invoke its executive powers to amend the agreement so as to afford its citizens greater protection.

The HGA gives the security forces controlling the project permission to take action in cases of "civil war, sabotage, vandalism, blockade, revolution, riot, insurrection, civil disturbance, terrorism, kidnapping, commercial extortion, organised crime or other destructive events."⁷ The extraordinary vagueness of a rubric like "civil disturbance" would be worrying enough in a region with a decent human rights record; in Turkey, where the responsibility for security has been handed to the Gendarmerie, a paramilitary force implicated in the very worst atrocities of the civil war against the region's Kurds, it is of grave concern.

Concern has been expressed that such undertakings place the project in potential violation of the European Convention on Human Rights, European Union laws and other international law instruments. These concerns were first raised in an international Fact Finding Mission report submitted to the World Bank and other IFIs in August 2002.⁸

Subsequently, a report and legal opinion by Amnesty International⁹, arguing in particular that the HGA's clauses regarding payment of compensation to the BTC consortium, in the event of new laws being introduced that adversely affect the profitability of the project, are likely to have a "chilling effect" on the State's adherence to human rights standards. In addition, Amnesty expressed grave reservations about the HGA's stipulation that the pipeline may only be shut down in the event of an "imminent, material threat" (which directly conflicts with Turkey's undertakings under the European Convention on Human

5 The Agreement has the same legal standing as any domestic law and prevails "over all Turkish law (other than the Constitution)".

6 HGA Turkey Article 7.2 (xi): "The State Authorities shall take all actions available to them to restore the Economic Equilibrium established under the Project Agreements if and to the extent the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change . . . in Turkish law . . . occurring after (1) the effective date . . ."

7 HGA Turkey, Article 12.1

8 International Fact-Finding Mission Preliminary Report, Baku-Tbilisi-Ceyhan Pipeline Project, Turkey Section, August 2002, section 2.1 pp.15-25

9 Amnesty International, Human Rights on the Line, 2003.

Rights); the restricted remedies available to third parties damaged by the pipeline;¹⁰ the removal of the project from the domain of the public interest, thus creating immunity from intervention by the state; and the wording of the clauses relating to security along the pipeline route.¹¹

Neither the Amnesty report, nor the August 2002 FFM report, are addressed in the EIA approved as “fit for purpose” by IFC and EBRD staff, placing the EIA in possible violation of the World Bank’s requirement that project comply with host country law, which, in this case, would include Turkey’s obligations under the European Convention on Human Rights.

In September 2003, in an effort to assuage concerns within the legal community, the BTC Co. published a Deed Poll, entitled the BTC Human Rights Undertaking, in which it undertook, *inter alia*, not to invoke the compensation clauses in the HGA in the event of new laws being introduced for human rights or environmental reasons. The Deed Poll argues that such undertakings will help ensure that the rights of third parties to gain redress are not compromised by the HGA.

Legal opinion, however, is divided on the efficacy of the Deed Poll. The following concerns, among others, have been raised:

1. Unilateral Instrument

The Deed poll is only signed by the BTC Co. It is not therefore binding on the Turkish state, which, if it so chose, could still invoke the HGA’s “stabilisation” clauses to override existing environmental and social legislation that conflicts with the commercial imperatives driving BOTAS or which the government simply finds inconvenient. Given the invocation of emergency powers by Turkey to leapfrog resettlement procedures and curtail consultation on the EIA, this is a far from abstract concern (see chapter 4, Resettlement, chapter 3, Consultation, and chapter 6, Environmental Assessment).

2. Uncertainty of Third Party Rights:

The sole beneficiaries of the Deed Poll are the three host governments. It thus confers no direct rights on third parties – indeed, it expressly excludes rights under the Contracts (Rights of Third Parties) Act 1999. Whether the Deed Poll could be relied upon by an individual complainant to enforce his or her rights would depend on how it was interpreted by a Turkish court. In our opinion, it is unacceptable that funding should be provided for the BTC project whilst the third party rights of affected people remain ambiguous. Absolute legal clarity is required. Those who are affected should not be required to wait upon the Deed Poll to be tested in a Turkish court before knowing whether or not their rights to third party redress have been protected.

3. Stabilisation Clause not waived for actions brought by third parties

Whilst the Deed Poll states that BTC Co. will not rely upon its right to compensation from Turkey under the “economic equilibrium” clause, it does not state that it will waive its rights under the clause in action brought by third parties

¹⁰ Presentation of Philip Moser, barrister, to seminar on BTC and Turkey’s Accession Agreements. Mr. Moser points out that, although Article 11.2 of the HGA grants access to justice for third parties, it does so in a context which limits the BTC Co.’s liability to third parties (indeed the clause appears under the heading “Limitation of Liability”).

¹¹ Amnesty International, Human Rights on the Line: The Baku-Tbilisi-Ceyhan Pipeline Project, May 2003, p.5

4. Continuing concerns over security clauses

Finally, the Deed Poll leaves unaddressed the concerns expressed by NGOs over the wording of the **security clauses** in the HGA, and of the virtual impunity with which it empowers the respective security forces to act to ensure the pipeline's security. Again, this is of even greater concern given that the huge fines to which both BOTAS and the Turkish state are potentially subject give both bodies strong commercial imperatives not to apply necessary human rights protections.

We recommend that no financing be approved for the project until these issues have been resolved. If, as the Deed Poll suggests, BTC Co. now has no intention of seeking compensation under the HGA's stabilisation clause in the event of action by Turkey to protect its citizens, and if other parties are agreeable to this as suggested by the acceptance of the Deed Poll by host governments, then we see no reasons why the HGA itself should not be changed to strike out the stabilisation clause. Specifically, we would urge that IFIs insist on the HGA and/or the Deed Poll being revised so that they:

- **Contain a clear-cut undertaking to grant rights to third parties;**
- **Rescind the economic equilibrium clauses;**

We also recommend that the security clauses be redrafted in order to protect the rights of those along the pipeline route.

2.4 The HGA and Turkey's Accession Agreements with the European Commission

A recent legal submission to the European Commission, made by a number of UK Non-Governmental Organisations (NGOs) and project-affected citizens living on the pipeline route in Turkey, argues that the HGA for Turkey violates Turkey's accession agreements for entry into the European Union. According to the submission, the clauses in the HGA exempting the BTC consortium from all Turkish laws that might affect the project "amount to a clear potential breach of what would be Turkey's EU law obligations, namely accepting the supremacy of Community law."¹²

In a letter to the Commission, the NGOs stated: "The Accession Partnership with Turkey is severely undermined by the construction of this pipeline. Turkey has agreed a move towards the Community *acquis* and the Copenhagen criteria, yet the pipeline project agreements represent a step in entirely the wrong direction. The implementation of this project involves actual and/or potential breaches of EU, Human Rights and International Law."

The Commission replied to the complaint on 4 August 2003, acknowledging the NGOs' view of the violations concerned, and promising to investigate further and report in their "regular report" on Turkey's compliance with the Copenhagen political criteria for accession to the EU.

The issue is of particular relevance to the IFC and EBRD given the Memorandum of Understanding that both institutions have signed with the European Commission on cooperation for accession preparation.¹³ That Memorandum is said to cover the Bank's "respective financial assistance instruments", in particular to help "fostering the adoption of the EC *acquis*". **In failing to meet the *acquis*, the project agreements for BTC could therefore place both the IFC and the EBRD in breach of their undertaking under the Memorandum should a decision be made to fund the BTC project.**

12 Philip Moser, In the Matter of the Baku-Tbilisi-Ceyhan Pipeline, Counsel's Opinion (redacted), July 2003.

13 Amended Memorandum of Understanding The European Commission, in liaison with the European Investment Bank, The European Bank For Reconstruction And Development, The International Bank For Reconstruction And Development, The International Finance Corporation, The Nordic Investment Bank, The Nordic Environment Finance Corporation, and The Council of Europe Development Bank
The Black Sea Trade & Development Bank on Cooperation for Accession Preparation of Central and East European Countries, Cyprus, Malta and Turkey,

2.5 The Joint Statement and the OECD Guidelines on Multinational Enterprises

The joint statement executed between BTC Co and the host governments specifically commits the project to complying with the OECD guidelines on Multinational Enterprises:

“We confirm that the principles and policies set out in the OECD guidelines on Multinational Enterprises . . . were fully considered during the negotiation of the BTC Project Agreements and are reflected in the BTC Agreement Structure . . . We confirm all activities undertaken and contemplated to be undertaken with regard to the Intergovernmental Agreement, the Host Government Agreement and other BTC Project Agreements have been and shall be consistent with the Guidelines in all material respects.”¹⁴

The extent of compliance with the OECD guidelines is, however, contested. In April 2003, NGOs from five countries submitted a complaint arguing that the project broke the guidelines on five major counts. **The complaint has been accepted as admissible by the UK national contact point for the OECD guidelines, who is co-ordinating the OECD response.¹⁵ The complaint, however, is not considered in the EIA, despite the joint statement being issued prior to the release of the EIA by the IFIs and compliance with the OECD guidelines therefore being part of the legal regime that the EIA should have considered.**

The sections of the complaint that are relevant to Turkey are summarised below:

1. Exerting undue influence on the regulatory framework

“The Applicants contend that the BTC Consortium exerted an undue influence on the drafting of the HGAs, thereby circumscribing the Governments’ right to prescribe the conditions under which multinational enterprises operate. In doing so, BP is not adhering to Chapter I, Paragraph 7 of the Guidelines.”

2. Seeking or accepting exemptions related to social, labor, tax and environmental laws

“The Applicants contend the Consortium has sought exemptions with respect to environmental legislation, labor, health and safety regulations and taxation. In doing so, BP is not adhering to Chapter II, Paragraph 5 of the Guidelines, which calls on multinational enterprises to “refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labor, taxation, financial incentives, or other issues.”

3. Failing to operate in a manner contributing to the wider goals of sustainable development

“The Applicants contend that the Consortium has failed to take due account of the need to protect the environment, public health and safety, and generally conduct

¹⁴ Joint statement, para 5, May 2003, p.2

¹⁵ Email from Duncan Lawson to N. Hildyard, 29 August 2003: “there is no question of the NCP not accepting this complaint on eligibility grounds”

their activities in a manner contributing the wider goals of sustainable development.¹⁶ In doing so, BP is not adhering to Chapter V, Paragraph 1.

4. Failing to adequately consult with project-affected communities on pertinent matters

Based on the findings of the FFM, the Applicants contend that the Consortium has failed to provide timely, reliable and relevant information concerning its activities¹⁷ and to make official documents, such as ESIA¹⁸, available to all project-affected communities. In doing so, BP is not adhering to Chapter III, Paragraphs 1¹⁹ and Chapter V, Paragraphs 2a and 2b²⁰ of the Guidelines.

5. Undermining the host governments' ability to mitigate serious threats to the environment and human health and safety

"In exerting undue influence through the HGAs, the Applicants contend the Consortium is undermining the Governments' ability to mitigate serious threats to the environment and human health and safety. In doing so, BP is not adhering to Chapter V, Paragraph 4 of the Guidelines, which states that multinational enterprises "not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimize such damage."

In order not to undermine due process, we would urge that IFIs postpone any decision on funding the BTC project until a ruling has been reached by the national contact points assessing the complaint submitted by NGOs.

¹⁶ Revised Guidelines, Section V, Environment, para 1.

¹⁷ Georgia FFM: Pgs. 13-14 and 18-20; Turkey FFM: Pgs. 26-32; Azerbaijan FFM: Pg. 14

¹⁸ Georgia FFM: Pgs 20-23; Turkey FFM: Pgs. 26-32; Azerbaijan FFM: Pgs. 14.

¹⁹ Enterprises should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance. This information should be disclosed for the enterprise as a whole and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.

²⁰ Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights: a) Provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and b) engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.