

Kluwer Arbitration Blog

Arbitration to Fight Piracy: Greece, France, Italy, USA, Israel, Qatar, South Korea vs. Turkey in Support of Cyprus?

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This is a follow-up post that updates on developments in the escalating tensions between Cyprus and Turkey over hydrocarbon explorations in the Mediterranean Sea. In the previous [post](#) it was argued that the Italian oil company ENI could launch an arbitration against Turkey under the [Italy-Turkey Bilateral Investment Treaty \(BIT\)](#) in the aftermath of the Turkish navy blockade of a drill-ship operated by ENI that was exploring gas reserves off Cyprus with a Greek Cypriot license. This post suggests further arbitration options are available, including a sort of class-action investment arbitration and State-to-State arbitration (both based on bilateral treaties), and even an arbitration between Cyprus and Turkey based on a multilateral treaty binding the two countries and covering the subject-matter of this gas dispute.

Recent developments

Since the forced expulsion of ENI by Turkish warships from Cyprus' waters in 2018, the situation got considerably worse. In defiance of the EU Foreign Affairs Council's [sanctions](#) of mid-July 2019, Turkey has [intensified](#) its hydrocarbon activities in the waters off Cyprus.

At the beginning of [October](#) 2019, two Turkish drill-ships – owned and operated by the Türkiye Petrolleri Anonim Ortaklığı (TPAO) – have been sent into Cyprus' waters to start operations off the west, east and south coast of the island drilling wells in the same blocks where the Greek Cypriot authorities have previously awarded hydrocarbon exploration rights to ENI and the French energy major Total. The Turkish drill-ships were accompanied by military armed [drone](#) and the Turkish Foreign Affairs Minister warned that Turkey may resort to the use of [force](#) to halt any unauthorized exploratory gas drilling in waters off Cyprus, claiming that over 44% of Cyprus' Exclusive Economic Zone (EEZ) pertains to Turkey and Turkish Cyprus. To back up this claim, in November 2019 Turkey signed a maritime boundaries [agreement](#) with Libya's internationally recognized government. Neighboring Greece, Egypt and Cyprus have [denounced](#) the agreement as lacking in legal basis and contrary to international law.

Cyprus considers Turkey's gas explorations as [acts of piracy](#). In December 2019 its Foreign Affairs Minister, hon. Nikos Christodoulides, [invited](#) Turkey and Cyprus to settle their differences on the EEZ before the International Court of Justice (ICJ). However, Turkey has not responded to the unilateral petition filed by Cyprus to submit the dispute to the ICJ. Cyprus is [probably](#) aware

Turkey will not accept this referral. Meanwhile, Cyprus' [Defense](#) Ministry has announced that Cyprus will conduct joint naval maneuvers with the navies of [France](#) and [Italy](#) off the island's southern coast.

The ENI-Total consortium for its part has announced that it will go ahead with a new round of exploratory drilling in 2020. The consortium is licensed to conduct exploratory drilling in [seven](#) out of the thirteen blocks in which Cyprus' EEZ is partitioned. In three of the seven blocks, Korea's Kogas joins forces with the Italian-French consortium. Other licensed companies prospecting oil and gas in Cyprus' EEZ are the US-based giant ExxonMobil venturing with Qatar Petroleum and the US-based Noble Energy teaming up with the Dutch Shell and Israeli Delek. At the beginning of [November](#) 2019, the Noble-Shell-Delek consortium obtained the first exploitation license granted by Cyprus to commercialize the Aphrodite gas field in Cyprus' block 12.

From diplomatic standoff to overt gas dispute through impractical solutions

The diplomatic stalemate has turned into a dangerous dispute about natural resources on the verge of a regional crisis. EU measures have proved ineffective and the show of strength by different States' navies may only exacerbate the conflict.

Providing companies operating in the region with a naval escort is an impractical solution. [Firstly](#), not every country has the naval capacity of the USA to accompany the drill-ships flying its own flag; [secondly](#), it does not prevent Turkish drill-ships from conducting operations inside the same blocks as the ships holding a Greek Cypriot license; [thirdly](#), in the long run, public opinion may not support the use of the military and the related expenditure to protect what essentially are private companies' interests abroad, although labeled as in the national interest; [fourthly](#), naval escort in foreign waters can result in further international controversies like the [Enrica Lexie case](#), which originated from the military protection of an Italian oil tanker as part of an anti-piracy mission off Indian coast.

Given that Turkey is not a signatory to the [1982 United Nations Convention on the Law of the Sea](#) (UNCLOS), the International Tribunal for the Law of the Sea (ITLOS) is not an available forum to settle this maritime boundary dispute between the two countries. In a such situation, the wiser avenue seems to be the one undertaken by Cyprus' Foreign Affairs Minister to refer the resolution of the conflict to the ICJ. However, obtaining Turkey's consent to submit the dispute to the ICJ may be a daunting and lengthy endeavour in itself.

In the past, Greece already tried once to institute proceedings before the ICJ against Turkey in a dispute concerning the delimitation of the maritime boundary on the Aegean Sea continental shelf. However, Turkey did not consent to submit the dispute to the ICJ and objected to its jurisdiction. In the [Judgment](#) delivered in 1978, the ICJ found that jurisdiction to entertain the case was not conferred upon it by the instruments relied upon by Greece.

An additional hurdle for Cyprus' access to the ICJ to address the dispute with Turkey is that Turkey does not recognize the Republic of Cyprus. Only States may apply to and appear before the ICJ, pursuant to Article 35 of the ICJ [Statute](#). Consequently, if Turkey consented to be a party to a proceeding against Cyprus before the ICJ, it would implicitly recognize the Republic of Cyprus as a State, thus contradicting its stance over Cyprus's statehood (which is very unlikely). Therefore, resorting to the ICJ – just as the naval escort – remains an impractical alternative.

If obtaining Turkey's consent to submit the dispute to the ICJ is a hard task, and instead of deploying its navy, might Cyprus rather rely on Turkey's consent already contained in its BITs?

Swiss and Dutch courts on the Crimea awards

Cyprus might draw inspiration from the “Crimea awards”, well-received by Swiss and Dutch courts. These awards were rendered as a result of the investment arbitrations filed by Ukrainian investors in Crimea against Russia under the Russia-Ukraine BIT in reply to the annexation of Crimea and subsequent expropriation of their assets by Russia. These awards first showed that foreign investors in a partially occupied country could avail themselves of the protection under the BITs ratified by the trespassing State.

In upholding the enforcement of the Crimea awards or denying their suspension, the Swiss Federal Supreme Court in 2018 and the Court of Appeal in The Hague in 2019 have both confirmed the possibility of expanding the protection of BITs against the unlawful interference of occupying powers, reiterating that a State may incur international responsibility for affecting foreign investments in a territory where it exercises *de facto* control.

Investors-State or States-to-State?

Bolstered by the Crimea awards and the following Swiss and Dutch rulings, ENI and Total could advance claims against Turkey under the Italy-Turkey and France-Turkey BITs. Turkish Navy blockades of ENI's drill-ship in 2018 and now Turkish drill-ships conducting operations in the blocks licensed to Total and ENI may constitute violations of the obligations to accord fair and equitable treatment (FET) and full protection and security (FPS). That's not all. Turkey's adverse actions may have spillover effects on the other foreign oil & gas companies' investments in the region, whose value might have been undermined. Quoting the *CME vs. Czech Republic Partial Award* at paragraph 613, under the FET and FPS standards “the host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.” By granting exploration rights to TPAO over some of the same blocks for which Cyprus previously granted its explorations licenses, Turkey may have indirectly devalued the worth of all Greek Cypriot exploration and exploitation licenses, thereby decreasing also the regulatory protection of Shell's, Kogas', ExxonMobil's, Qatar Petroleum's, Noble Energy's and Delek's investments in Cyprus.

All these companies' home States have a BIT with Turkey, therefore they could also file investment arbitrations against Turkey. Alternatively, France, Italy, USA, Israel, Qatar, South Korea could come to the rescue of Cyprus by filing State-to-State investment arbitrations against Turkey in accordance with the same BITs in the form of diplomatic protection of their companies. Interestingly, Italy is one of the few countries to have ever initiated a State-to-State investment arbitration, so it could repeat itself. Further, Greece and Cyprus could initiate a State-to-State arbitration against Turkey by invoking the breach of the Energy Charter Treaty, as all three States are party to that instrument and the dispute relates to the energy sector.

A considerable advantage of an investment arbitration is that the claimant/s (be it the companies or

the States) may request to the tribunal/s to order provisional measures to the effect that, pending the proceedings, Turkey may not engage in exploration or research with respect to the blocks in question, making the naval escort unnecessary (provided that Turkey complies with tribunal's order).

Eventually, these multiple international arbitrations may exert an international pressure equal to the naval escort, while being a more peaceful and cost-effective tool.


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