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COMPARISON OF THE APPROACHES OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE TURKISH CONSTITUTIONAL COURT TO THE NE BIS IN IDEM PRINCIPLE IN TAX CRIMINAL LAW

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Emine Sevcan ARTUN[*] - Burcu DEMİRBAŞ AKSÜT[**]

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ABSTRACT

In Turkish Tax Criminal Law, the establishment of the sanctions of some acts as both administrative and criminal and the regulations that the judgments made in this regard will not bind each other have been discussed within the framework of the ne bis in idem principle for a long time. Practices based on similar regulations existing in many countries were brought before the ECtHR on the grounds that they violated the "prohibition of more than one trial and punishment for the same crime". The same issue was brought before the Turkish Constitutional Court as an individual application and an annulment case; Finally, the regulation that criminal court decisions and tax court decisions do not bind each other was annulled on the grounds that it violated the prohibition of double trial. In the study, the decisions of the Turkish Constitutional Court and the European Court of Human Rights are examined and compared. In addition, by assessing the existing regulations, certain solutions were introduced that will not result in a violation of the principle in domestic law.

Key Words: Tax Law, Tax Criminal Law, Ne Bis in Idem, Tax Penalty, Tax Evasion

ÖZET

Türk Vergi Ceza hukukunda bazı fiillerin yaptırımlarının hem idari hem de cezai olarak belirlenmesi ve bu hususta yapılan yargılamaların birbirini bağlamayacağına yönelik düzenlemeler öteden beri ne bis in idem ilkesi çerçevesinde tartışılmaktadır. Birçok ülkede mevcut olan benzer düzenlemelere dayalı uygulamalar "aynı suç sebebiyle birden fazla yargılama ve cezalandırma yasağını" ihlal ettiği gerekçesi ile AİHM önüne götürülmüştür. Aynı husus Türk Anayasa Mahkemesi nezdinde de gerek bireysel başvuru gerek iptal davası olarak götürülmüş; nihayetinde ceza mahkemesi kararları ile vergi mahkemesi kararlarının birbirini bağlamayacağına ilişkin düzenleme çifte yargılanma yasağını ihlal ettiği gerekçesi ile iptal edilmiştir. Yapılan çalışmada konuya ilişkin Türk Anayasa

There is no requirement of Ethics Committee Approval for this study.

[*] Assist. Prof. Dr., Yaşar Üniversitesi Hukuk Fakültesi, e-mail: sevcan.artun@yasar.edu.tr, ORCID ID: 0000-0001-7582-6964

[**] Dr., Res. Assist., Dokuz Eylül Üniversitesi Hukuk Fakültesi, e-mail: burcu.demirbas@deu.edu.tr, ORCID ID: 0000-0002-4753-9156

Mahkemesi ve Avrupa İnsan Hakları Mahkemesi'nin vermiş olduğu kararlar irdelenerek, karşılaştırılmakta. Ayrıca mevcut düzenlemelere ilişkin bir değerlendirme yapılarak, iç hukukta ilkenin ihlali sonucunu doğurmayacak çözüm önerileri getirilmeye çalışılmaktadır.

Anahtar Kelimeler: Vergi Hukuku, Vergi Ceza Hukuku, Ne bis in Idem, Vergi Cezası, Vergi Kaçakçılığı

INTRODUCTION

In Turkish tax law, the sentence of imprisonment for the freedom of those who commit the crime of tax evasion does not prevent the tax penalty from being applied separately in case of tax loss due to the crime of evasion.

In cases where tax evasion is in question if the taxpayer files a lawsuit against the tax loss or irregularity penalties, two different judicial processes continue simultaneously. In the last paragraph of Article 367 of the Code of Tax Procedure, with stating: "Criminal court decisions are not effective on the transactions and decisions of the authorities that will apply the tax penalties written in the second part of the fourth book of this code as the decisions to be made by the authorities also do not bind the judges of criminal court.", it settles that these judicial decisions arising from the same act will not bind each other even if they contradict. This situation was criticized on the grounds that it undermined the final judicial authority of the courts and also the legal security of the taxpayer within the framework of the principle of ne bis in idem.

The principle of ne bis in idem, which is accepted as one of the main principles of judicature and criminal law, states that a person should not be tried more than once for an act, not be sanctioned, and only be subjected to criminal prosecution once for a crime. The accused who have been acquitted rests in confidence knowing that no further prosecution can be made on the same act. The principle of ne bis in idem prevents multiple lawsuits or judgments against the same person for the same act. This principle, as an extension of the principle of a fair trial, is a criminal law principle, which stipulates that it is not possible to prosecute or punish repeatedly due to the same act and the same subject.

In the study, initially, the legal precedent of the European Court of Human Rights on the subject is given and afterward continued with the decisions of the Turkish Judiciary and the views of its doctrine. Finally, the legal regulations on the subject are evaluated in terms of the principle of ne bis in idem and certain solutions are offered on the subject.

I. THE APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS

A. General Description

'Ne bis in idem' as a provision was not included in the original text of the Convention, which was opened for signature in 1950, but was regulated

in Article 4 of the 7th Additional Protocol opened for signature in 1984[1]. According to this regulation; *"No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State"*.

The term of "uniqueness in punishment and trial" in the article applies only to cases where a person has been tried and convicted twice for the same offense by the courts of the same State[2]. The concept of "criminal proceedings", which is necessary for the implementation of this principle, should be interpreted in the light of the general principles regarding the concepts of "criminal charge" and "penalty" in Articles 6 and 7 of the European Convention on Human Rights[3]. This classification is also important for tax misdemeanors.

For many countries, the use of autonomous interpretation by the European Court of Human Rights on "the concepts of crime and punishment" creates hesitation about whether to include administrative sanctions within the scope of punishment regarding this article. Thus, subjecting an act to both administrative and criminal sanctions is a practice that is seen not only in our country but also in many other countries. The European Court of Human Rights has determined three basic criteria, also known as the Engel criteria, for an act to be considered as a crime[4]. In accordance with these criteria, first of all, only as a starting point the classification of the alleged crime in domestic law will be considered, although it is not decisive. If national law considers an offense to be criminal in nature; Articles that the Convention may apply in the event of a crime find an area of application (art. 6, article 7, Article 4 of the Additional Protocol 7), and there will be no need an evaluation according to the other two criteria. The second criterion is the nature of the punishment. At this point, it is taken into consideration how the act in question is evaluated in other states,

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1 The Protocol was opened for signature on 22 November 1984 and entered into force on 1 November 1988. Turkey signed the Protocol on 14 March 1985. Assent Code dated 10 March 2016 and numbered 6684 was published in the Official Gazette dated 25 March 2016 and numbered 29664. The official Turkish translation of the Protocol was published in the Official Gazette dated 8 April 2016 and numbered 29678, with the Council of Ministers Decision dated 28 March 2016 and numbered 2016/8717, which decided to ratify Protocol No 7. The ratifications were deposited with the General Secretariat of the Council of Europe on 2 May 2016 and the Protocol entered into force on 1 August 2016 for Turkey. (https://www.mfa.gov.tr/the-european-convention-on-human-rights.en.mfa, 20.09.2022).

2 A. Şeref Gözübüyük and Feyyaz Gölcüklü, Avrupa İnsan Hakları Sözleşmesi ve Uygulaması (10. Bası, Turhan Kitabevi, Ankara 2016) 314.

3 See Burcu Demirbaş, *"Avrupa İnsan Hakları Sözleşmesi Açısından Vergilendirme Süreci"* (Unpublished Master Thesis, DEÜ Sosyal Bilimler Ensititüsü, İzmir 2012), 102-106; Oter, 152.

4 Engel and Others v. The Netherlands, App. no., 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECHR).

its jurisdiction and sanction procedure and whether it considered as a crime because of its scope or because of the purpose of public interest in general. In the last stage, an evaluation will be made by looking at the nature and severity of the punishment. The European Court of Human Rights established for the first time the criminal nature of tax misdemeanors by applying the Engel criteria in the Bendenoun Case[5].

In Janosevic decision, the criteria were applied collectively, and the possibility of reaching very large amounts in the fines applied as multiples of the tax loss was sufficient for the severity of the penalty; the fact that fines are not commuted to imprisonment if they are not paid were not considered as a factor that would affect the quality of the sentence[6]. The Jussila decision, it is stated that for the criminal character of tax penalties, it is not necessary to meet the quantitative weight criteria in addition to the qualitative criteria. In the decision, also emphasized that the selective application of the criteria is also valid for tax penalties[7].

When these decisions are considered together, it is clear that the sanctions for tax misdemeanors also have a criminal nature.

Under this heading, the main decisions of the European Court of Human Rights are examined and the opinion of the Court on the subject is presented.

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5 *"In the first place, the offences with which Mr Bendenoun was charged came under Article 1729 para. 1 of the General Tax Code (see paragraph 34 above). That provision covers all citizens in their capacity as taxpayers, and not a given group with a particular status. It lays down certain requirements, to which it attaches penalties in the event of non-compliance.*
Secondly, the tax surcharges are intended not as pecuniary compensation for damage but essentially as a punishment to deter reoffending.
Thirdly, they are imposed under a general rule, whose purpose is both deterrent and punitive.
Lastly, in the instant case the surcharges were very substantial, amounting to FRF 422,534 in respect of Mr Bendenoun personally and FRF 570,398 in respect of his company (see paragraph 13 above); and if he failed to pay, he was liable to be committed to prison by the criminal courts (see paragraph 35 above).
Having weighed the various aspects of the case, the Court notes the predominance of those which have a criminal connotation. None of them is decisive on its own, but taken together and cumulatively they made the "charge" in issue a "criminal" one within the meaning of Article 6 para. 1 (art. 6-1), which was therefore applicable" Bendenoun v. French, App no. 12547/86 (ECHR), (https://hudoc.echr.coe.int/eng?i=001-57863, 20.09.2022). As seen in the decision, it was also discussed whether the last two criteria should be fulfilled at the same time, and whether the fact that the act is subject to a light sanction changes the criminal nature of the act.

6 Janosevic v. Sweeden, App. no. 34619/97(ECHR), (https://hudoc.echr.coe.int/eng?i=001-60628, 20.09.2022).

7 Jussila v. Finland, App. no. 73053/01 (ECHR), (https://hudoc.echr.coe.int/eng?i=001-78135, 20.09.2022).

B. Approach of the European Court of Human Rights to the Subject Before the Bjarni Decision

By applying various criteria in many cases, the European Court of Human Rights points out that administrative sanctions and criminal sanctions tend to have different purposes. While the Court is evaluating whether the administrative sanctions resulting from tax misdemeanors and judicial crimes in the field of tax law and their sanctions carry the feature of punishing twice; it decides by looking at their legal qualifications, the scope of application, purpose, implementing authority, whether they are in different types of sanctions in terms of results and effects, that is, by looking at the elements of the crime.

In one of the decisions Ponsetti and Chesnel[8], the Court stated that the elements of the crimes arising from the act of not filing a declaration within the legal period are not exactly the same; while there is an intentional responsibility for tax evasion crime, it has come to the conclusion that the constituent elements of other financial crimes are different and therefore they do not regulate the same crime[9].

In the Manasson decision, the Court stated that it would examine whether the basic elements of the crimes were the same; emphasizing that the removal of the applicant's commercial business license is not a penal sanction, leaving this situation out of the investigation. It is said that the basis of the prison sentence given by the court is the violation of a general obligation to accurately record the information about the activity in the books, and the tax loss penalty applied as multiples of the tax lost by the administration is deliberately declaring false information in the tax returns; It was decided that the elements of the crime were different, and no violation decision was made[10].

In another decision, the court made an examination in terms of the purpose of the penalties and again decided that the purposes of the two sentences were different[11].

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8 Ponsetti and Chesnel v.French, App no 36855/97 and 41731/98 (ECHR), (http://echr.ketse.com/doc/36855.97-41731.98-en-19990914/view, 17.01.2022).

9 Ponsett and Chesnel v. French, para.5. isd. (ECHR), Rosenquist v. Sweden, App no 60619/00, (ECHR), (hudoc.echr.coe.int/webservices/content/pdf/001-66713, 17.01.2022). In the decision, intent or culpable negligence must be present for a prison sentence based on tax evasion, and these elements are not required in a fine; At the same time, it has been stated that the purpose of punishing tax crimes is not only the satisfaction of tax loss, but both sanctions serve a different purpose.

10 Manasson v. Sweden, App no 41265/98, (ECHR), http://hudoc.echr.coe.int/eng?i=001-23169, 18.01.2022. See for evalution, Mualla Buket Soygüt, "Avrupa İnsan Hakları Sözleşmesi ve Mahkemesi Kararlarında Mükellefin Suç ve Cezalara İlişkin Hakları" (2006/2) 10, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, 253-265, 262.

11 Rosenquist v. Sweden, App no 60619/00, (ECHR), http://hudoc.echr.coe.int/eng?i=001-66713, 18.01.2022. See for evalution, Soygüt, (n 6) 261.

In Zolotukhin's decision, which was also referred to in subsequent decisions, the Court stated that different criteria were used when evaluating whether there was a double trial and that these criteria (approach) differences violate the rights guaranteed in Article 4 of Protocol No. 7. According to the European Court of Human Rights, what is to be understood from Article 4 of Protocol No. 7 is to prohibit the prosecution or trial of a second "crime" arising from the same fact or facts that are essentially the same[12]. With the Zolotukhin decision, the court put forward a new view in terms of the concept of "same crime". According to this decision, in order to talk about the same crime concept, the events must be related to the same accused and the events must be inextricably linked in terms of place and time. In the later A. and B. - Norway decision, it was stated that the difference in Zolotukhin decision was that it adopted a fact base solution instead of "essential elements" to determine the content of the concept of "idem"[13].

In the Glantz decision[14], which was given after these decisions, it is stated that in the case of two proceedings arising from the same act, failure to conclude the second trial despite the conclusion of the first trial will result in a violation of the Convention. In this decision, the Court concludes that the Finnish system[15], in which there are two separate and independent proceedings in case of the existence of evasion, means double trials[16].

In the Lucky Dev decision, because the other tax investigations against Ms. Dev were not concluded despite the finalization of the criminal investigation against her, the Court concluded that Ms. Dev was double tried for a tax offense that she had already been acquitted of. The Court stated that "as a result, the trials and penalties of tax and financial crimes and the trials and penalties of the additional taxes basically resulted from the same series of facts" [17].

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12 Sergey Zolotukhin v. Russia, App no 14939/03, (ECHR), para. 81-82, https://hudoc.echr.coe.int/tur?i=001-91222; Boman v. Finland, App no 41604/11, para. 33, https://hudoc.echr.coe.int/tur?i=001-152247, 05.01.2022.

13 A and B v. Norway, para 108.

14 Glantz- Finland, App no 37394/11, (ECHR), 01.12.2021.

15 Following the aforementioned decision, a legal amendment was made in Finnish legislation that if the tax administration decides to impose a fine, it is not possible to file a criminal complaint to the police unless a newly revealed event or evidence is found. (Billur Yaltı, "İHAM'ın Glantz Kararının Ardından: Kaçakçılıkta Para Cezası ve Hapis Cezası Uygulamasının Non bis in idem İlkesine Aykırılığı Üzerine", (Şubat 2015) 317 Vergi Sorunları Dergisi, 85-92.

16 It has been expressed by the doctrine that this case should be reviewed in terms of Turkish law as well. See, Yaltı (n 10) 91-92; Ahmet Emrah Geçer, "İnsan Hakları Avrupa Mahkemesi'nin Vergi Cezalarında "Non bis in idem" İlkesine İlişkin A ve B v. Norveç Kararının Türk Vergi Hukuku Uygulamasına Etkileri" (2017) 40 Vergi Sorunları Dergisi 108-120, Geçer, A ve B v. Norveç (n 11) 120.

17 Lucky Dev v. Sweden, App no 7356/10 (ECHR). See for evaluation, Ayşe Nil Tosun, "Türk

In its later decision A and B[18], the Court concluded that the sanctions were part of an integrative plan and that these two punishments were not repetitive proceedings, but different and complementary proceedings, which were carried out by two different authorities, resulting in two different actions, imposing different sanctions. According to the decision *"(...) The competent national authorities found that the first applicant's reprehensible conduct called for two responses, an administrative penalty under chapter 10 on Tax Penalties of the Tax Assessment Act and a criminal one under chapter 12 on Punishment of the same Act (see paragraphs 15, 16 and 41-43 above), each pursuing different purposes. As the Supreme Court explained in its judgments of May 2002 (see paragraph 46 above), the administrative penalty of a tax surcharge served as a general deterrent, as a reaction to a taxpayer's having provided, perhaps innocently, incorrect or incomplete returns or information, and to compensate for the considerable work and costs incurred by the tax authorities on behalf of the community in carrying out checks and audits in order to identify such defective declarations; it was concerned that those costs should to a certain extent be borne by those who had provided incomplete or incorrect information. Tax assessment was a mass operation involving millions of citizens. For the Supreme Court, the purpose of ordinary tax penalties was first and foremost to enhance the effectiveness of the taxpayer's duty to provide complete and correct information and to secure the foundations of the national tax system, a precondition for a functioning State and thus a functioning society. Criminal conviction under chapter 12, on the other hand, so the Supreme Court stated, served not only as a deterrent but also had a punitive purpose in respect of the same anti-social omission, involving the additional element of the commission of culpable fraud".*

In the A and B Norway decision, the necessity of the following elements was determined[19]:

- tax jurisdiction and criminal jurisdiction, which are different jurisdictions, should have complementary purposes,

- bilateral proceedings must be foreseeable,

- there should be an interaction between the two proceedings regarding the collection and evaluation of evidence,

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Vergi Ceza Hukukunda Ne Bis In Idem İlkesi: Avrupa İnsan Hakları Mahkemesinin Verdiği Kararlardan Lucky Dev Davası", (2017) 7 (2) Hacettepe HFD., 95-104, 97-103.

18 A and B v. Norway, App no 24130/11 and 29758/11(ECHR), (http://hudoc.echr.coe.int/eng, 12.02.2022).

19 For elements see. Denizhan Horozgil, "AİHM ve Anayasa Mahkemesi Kararları Işığında Vergi Cezalarında "Non Bis In Idem" İlkesi", 2021 157 TBB Dergisi 255-294, 276-277. Barış Bahçeci, "İHAM İçtihadı Açısından Türkiye'de Vergi ve Ceza Yargılamalarının Etkileşimi Sorunu" (2022) 10(2) Ceza Hukuku ve Kriminolojisi Dergisi https://doi.org/10.26650/JPLC2022-1039688, 15.09.2022, Bahçeci, "Etkileşim" (n 17) 8-9.

- Before the second verdict, the first sanction should also be considered so that an unmeasurable result should not arise. With this decision, the connection between the two jurisdictions was also widened, and administrative processes were also considered in criminal proceedings. It was emphasized that the evidence collected by the administration during the administrative process should be taken into account in criminal proceedings[20].

In A. and B Norway Decision, it was concluded that the administrative and judicial procedures regarding tax loss penalty and imprisonment continue in parallel, complement each other, and therefore lead to predictable, fair and measured results. In addition, it has been determined that the material facts identified during the administrative process are used exactly in the criminal proceedings as well.

A. and B.- The Norway decision and the Glantz-Finland decisions are based on the same foundation, although they ultimately reach different conclusions. However, in the A. and B.- Norway decision, the case-law expressed in the Glantz-Finland decisions to terminate the second trial along with the first decision was reversed; The Court has accepted that if the sanctions foreseen for the same act form a whole, repetition will not occur[21].

C. Bjarni Decision

In the Bjarni-Ireland decision, which is the more recent decision of the Court, it has been decided that the Convention has been violated. The decision also mentions the differences between the Bjarni v. Ireland case and the A. and B. v. Norway case [22].

In the case subject to the decision, on 3 May 2011, the Directorate of Tax Investigations initiated an audit of the applicant's tax returns for the tax years 2007 and 2008. The audit was aimed at examining whether the applicant had failed to report his financial income, including income arising from forwarding contracts concluded with a bank. The applicant was questioned by the Directorate of Tax Investigations on 30 June and 30 November 2011. On 10 October 2011, the accountant who had prepared the applicant's tax returns was questioned. By a letter of 13 December 2011, the Directorate of Tax Investigations sent the applicant the report of the audit, dated 9 December 2011, and invited him to submit his comments. By a letter of 23 December 2011, the applicant raised certain objections. The Directorate of Tax Investigations thereafter prepared an amended report, dated 30 December 2011. The conclusion of that report was

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20 A. and B. v. Norway, para 146. Also see Bahçeci, "Etkileşim" (n 17) 9.

21 Barış Bahçeci "İHAM İçtihadında Vergi Cezalarında "Ne Bis in İdem", (2018) 67 (2) Ankara Üniversitesi Hukuk Fakültesi Dergisi, 275-276.

22 Bjarni Ármannsson v. Ice Land, App no 72098/14, (ECHR), (http://hudoc.echr.coe.int/eng?i=001-192202, 02.02.2022).

that the applicant had filed substantially incorrect tax returns for the tax years 2007 and 2008.

By a letter of 5 November 2012, the Directorate of Internal Revenue stated its intention to re-assess the applicant's taxes for the tax years 2007 and 2008 and to impose a 25% surcharge on the unreported tax base. The Directorate of Tax Investigation's report was attached to the letter.

By a letter of 22 November 2012, the applicant objected to the planned re-assessment. He also demanded that a 25% surcharge not be imposed, since he had had no intention of filing substantially incorrect tax returns. In the meantime, by a letter of 12 November 2012, the Directorate of Tax Investigations referred the applicant's case to the Office of the Special Prosecutor for investigation, forwarding its audit report concerning the applicant. On the same day, the applicant was informed by letter that his case had been referred to the Office of the Special Prosecutor.

On 11 April 2013, the applicant was interviewed by the Office of the Special Prosecutor ("the prosecutor"). The applicant was informed that the investigation concerned the offences that he was alleged by the Directorate of Tax Investigations to have committed. On 14 August 2013, the applicant was again interviewed by the prosecutor.

The applicant submitted that the two sets of proceedings against him had both constituted "criminal proceedings" for the purpose of Article 4 of Protocol No. 7 to the Convention and that both sets of proceedings had concerned the "same offence". Then The Government submitted that it was not necessary to determine whether and when the first set of proceedings had become final, as there had been a sufficient connection in time and substance between the two sets of proceedings as to avoid duplication. They submitted that the two sets of proceedings had constituted the foreseeable consequences of the applicant's conduct and that they had been initiated and conducted in accordance with the applicable legislation, which pursued separate and complementary objectives. Furthermore, the Government submitted that the applicant had enjoyed the guarantees afforded him in both sets of proceedings and that proportionality had been ensured.

Court stated that, *"Turning to the connection in time between the two sets of proceedings, the Court notes that the overall length of the proceedings was about four years and ten months. During that period, the proceedings in effect progressed in parallel only between 1 March 2012, when the Directorate of Tax Investigation reported the matter to the Special Prosecutor, and August 2012, when the Directorate of Internal Revenue's decision became final, that is for a period of little more than five months. Moreover, the applicant was indicted on 17 December 2012, seven months after the final decision was taken by the Directorate of Internal Revenue and about four months after it acquired*

legal force. The criminal proceedings then continued on their own for one year and five months: the District Court convicted the applicant on 28 June 2013, more than a year after the decision of the Internal Revenue, and the Supreme Court's judgment was not pronounced until almost one year later".

"57. Having regard to the above circumstances, in particular the lack of overlap in time and the largely independent collection and assessment of evidence, the Court cannot find that there was a sufficiently close connection in substance and in time between the tax proceedings and the criminal proceedings in the case for them to be compatible with the bis criterion in Article 4 of Protocol No. 7. It does not alter this conclusion that the Directorate of Tax Investigation accepted in November 2010 the applicant's request to postpone its decision on possible criminal proceedings until the Directorate of Internal Revenue had issued its notification letter on the reassessment of the applicant's taxes. It is incumbent on the member State to ensure that criminal proceedings fulfil the requirements of the ne bis in idem rule".

In the A. and B. Norway judgment, the Court observed that the administrative and criminal proceedings were carried out in parallel and were interlinked. The facts found in one of the cases were also relied on in the other, and the penalty given in the criminal proceedings was considered in the tax penalty. According to the court, although different punishments were applied by different authorities in different processes in that case, there was still a sufficiently close connection between them in terms of both actual meaning-reality and time. These sanctions were part of an overall sanctions plan implemented under Norwegian Law[23]. The Court stated that it reached different conclusions from the decisions of A. and B. Norway and Johanesson-Iceland, as both the proceedings in the Johannesson case were criminal in nature and were not sufficiently connected with each other[24]. According to the court; Additional protocol 7 article 4 of the European Convention on Human Rights does not exclude parallel criminal and administrative proceedings for the same offence, but there must be a sufficiently close connection between these proceedings so that it is not concluded that there is a double trial on account of the two proceedings[25].

In the Bjarni decision, the Court has given the reason for its violation decision that the criminal proceedings continue for 1 year and 5 months after the finalization of the administrative process and the decision of the Supreme Court is not announced for 1 year. Similarly, in Johannesson and others v.

[23] Bjarni Ármannsson- Ice Land, para. 48.
[24] Bjarni Ármannsson- Ice Land, para 49.
[25] Bjarni Ármannsson- Ice Land, para 49.

Iceland[26] and Gudmundur Kristjansson v. Iceland[27] cases, also, the criminal proceedings took more than two years after the administrative process had become final. The Court concluded that the principle had been violated in these cases as well. In general, in these decisions, it is seen that the total duration of the proceedings, the duration of the simultaneous execution of the criminal and tax proceedings, and the duration of the criminal proceedings after the conclusion of the tax proceedings are taken into account[28].

II. THE APPROACH OF THE TURKISH JUDICIARY AND DOCTRINE TO THE SUBJECT

A. General Description

As a basic principle, the principle of not being tried and punished twice for the same crime- ne bis in idem is not included as a principle in the Constitution. However, in the decisions of the Constitutional Court, the principle is considered as the norm supporting the general law principles[29].

In accordance with the Code of Tax Procedure (CTP), in the scenario where the acts that cause tax evasion and the crimes of doing the private business of the taxpayers also cause tax loss, the result is that there are both criminal sanctions due to these crimes and administrative sanctions due to the occurrence of tax loss misdemeanor. In fact, if tax loss occurs due to tax evasion, the administrative sanction to be applied is calculated as three times the tax lost. In other words, in the event that a tax evasion crime is committed, it is not possible to apply *conceptual aggregation*, which means that the person who causes more than one crime to occur with one of his acts is punished for the crime that requires the heaviest penalty. In addition, the proceedings against the tax penalty imposed by the relevant tax administration in accordance with the administrative law procedures regarding the tax loss arising from the act that constitutes the subject of the tax evasion crime are carried out before the tax courts in the administrative jurisdiction. The trial regarding the tax evasion crime is carried out by the criminal courts in the judicial branch. The decisions made by these authorities do not affect each other (CTP art. 367/5). These two mentioned issues have been discussed by both Turkish doctrine and judiciary for many years in terms of the principle of ne bis in idem, and in the legal precedents of the European Court of Human Rights.

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26 Johannesson and others v. Iceland, App. No. 22007/11 (ECHR), (https://hudoc.echr.coe.int/eng?i=001-173498, 20.09.2022).

27 Gudmundur Kristjansson v. Iceland, App. No. 12951/18 (ECHR), (https://hudoc.echr.coe.int/eng?i=001-211660, 20.09.2022).

28 See Bahçeci, "Etkileşim" (n 17) 13.

29 See the Turkish Constitutional Court 01.04.2010, F.N.2008/114, D.N.2010/53, O.J. 06.07.2010-27633.

Under this heading, the subject is evaluated primarily in terms of applying different penalties to the same acts, and then in terms of tax and criminal court decisions not affecting each other.

B. Application of Different Penalties Regarding the Same Acts

Article 15 of the Code of Misdemeanors No. 5326[30], which regulates the institution of conceptual aggregation of crimes and misdemeanors, states that in case of committing more than one misdemeanor with one act, the heaviest fine will be imposed if only an administrative fine is prescribed for these offenses, and if an act is defined as both a misdemeanor and a crime, only sanctions will be applied for the crime. In addition, in Article 3 of the Code of Misdemeanors states; "This law is applicable where;

a) Provisions regarding legal remedy against administrative sanction decisions, unless there is a contrary provision in other laws,

b) Its other general provisions are applicable to all acts that require an administrative fine or the sanction of transferring the property to the public." In this case, the problem arises between the provisions of the Tax Procedure Law and the Misdemeanors Law. This is essentially a problem that needs to be resolved according to the previous - subsequent law, special - general law[31] rules.

Although in cases where the previous law is special and the next law is general, it is accepted that the implementation of the special law will be given priority, in this case, the most appropriate act is to determine the will of the legislator[32]. In this respect, when the unique structure of the tax law and the necessity of the Code of Tax Procedure to be a special law are evaluated together, it is accepted that the provision of the Code of Tax Procedure should

30 O.J. 31.03.2005-25772.

31 In determining the special law rule-general law rule, it is accepted that the provision with a wider application area is the general and the narrower one is the special provision. When there was no provision of law in question, if another provision could be applied to that event, the second provision is general and the first provision is special. See. Kemal Gözler, Türk Anayasa Hukuku (Ekin 2018) 102. Regarding the special-general provision, see also. Tahir Çağa, "Özel Hüküm Genel Hükmü Daima Bertaraf Eder Mi?" (1991/3) TBB Dergisi, 369 ff.

32 Çağa (n 21) 368; Ahmet Emrah Geçer, "Vergi Ceza Hukukunda Non Bis in İdem İlkesi", (2016) 65 (2) Ankara Üniversitesi Hukuk Fakültesi Dergisi, 332. Although it is a controversial topic how the situation in question will be resolved, it is accepted that the previous special law was not repealed by the later general law. See. Gözler (n 21) 103-104; Muhammet Özekes, Temel Hukuk Bilgisi (11. Bası, On İki Levha 2021) 100. See Özekes (n 22) 100 that it is appropriate to apply the new general law in matters regulated by the new general law provision, and to apply the old law provision in matters that do not regulated by the new general law.

be applied to the issue of aggregation[33]. For this reason, due to the last paragraph of Article 359 of the CTP, the third paragraph of Article 15 of the Code of Misdemeanors does not find application in terms of tax misdemeanors. In terms of jurisdiction, tax courts are responsible for dealing with cases filed regarding tax misdemeanors and penalties applied to them, pursuant to the Additional Article 1 added to the Code of Misdemeanors with Article 5 of the Law No. 5348[34].

A 1991 decision of the Turkish Constitutional Court, regarding the application of both administrative and penal sanctions in accordance with the special aggregation provision in the Code of Tax Procedure, stated that the fines imposed by tax administrations are not technically penal, but rather an administrative disciplinary sanction and even a financial law enforcement measure[35].. Likewise, the Court underlined that the tax liability must be fulfilled on time and completely in order to perform public services, and the main purpose of the administrative punishment of violation of tax legislation is to eliminate the loss of income suffered by the public, also stating that the purpose of foreseeing and punishing this as a crime is to prevent disruption of public order and to punish acts that do so. In this context, it has been stated that

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33 For detailed information on the relationship between the Tax Procedure Law and the Misdemeanor Law, see. Karakoç, Vergi Ceza, 86-87. The conflict areas of the provisions of the Tax Procedure Law and the Misdemeanor Law should be determined, the Misdemeanor Law should be applied in the points where there is no conflict, and the Tax Procedure Law should be applied in the points where there is a conflict. Yılmazoğlu, 346; For the opinion that not only the provisions of the Misdemeanors Law regulating the issues not included in the Tax Procedure Law, but also the provisions that conflict with the Tax Procedure Law will find an area of application for tax misdemeanors see Funda Başaran Yavaşlar, *"Vergi Ceza Hukuku'ndaki Değişim Süreci ve Bu Sürecin Vergi Ceza Sistemine Etkileri"* (Şubat 2018) 233 Vergi Sorunları Dergisi, 72-93, 75. Also see. Simay Doğmuş, *"Türk Vergi Ceza Hukukunda Ne Bis İn İdem İlkesi"*, (2020) 17 (1) Yeditepe Üniversitesi Hukuk Fakültesi Dergisi, 79.

34 Law on Misdemeanors Additional Article 1- (Annex: 11/5/2005-5348/5 art.) (1) The provisions regarding the duties of tax courts in the Tax Procedure Law No. 213 dated 4.1.1961.

35 "In this case, the rule examined is not contrary to Article 38 of the Constitution, as considered it does not authorize the Ministry of Finance and Customs to establish a new crime type to prevent tax loss and evasion. In addition, considering the opinions that the fines given by the tax administrations are not technically penal, but administrative sanctions, the violation of the administrative regulations regarding the document order may not be considered a crime, but a disciplinary offense, even a kind of financial law enforcement measure. In this case, there can be no offense without law" (Turkish Constitutional Court, D. 15.10.1991, N.1990/29, 1991/37, O.J.05.02.1992-21133). *The decisions of the Council of State before this Constitutional Court decision were opposite. it was stated that the penalties applied against tax misdemeanors do not serve to compensation for damage but also serve to penalization.* See Unified Decisions of Council of State, 12.06.1980, F.1977/1, D.1980/2, *01.03.2022).*

although different legal values are protected this way in terms of administrative and judicial processes and different qualifications are made as misdemeanor and crime, the actions that cause these processes should be accepted as a whole because they are interconnected in terms of purpose, time and place, pointing out that the act is the same in the legal sense. The issue was brought before the Constitutional Court more than once.

In a case related to customs, due to the fact that some customs declarations regarding import transactions were filled incorrectly, both additional value-added tax (VAT) and penalty were accrued to a company due to the misdemeanor of tax loss. Then, criminal proceedings were initiated for the crime of tax evasion committed by using false invoices against company officials. Thereupon, the applicant company, pointing out the Article 15 of the Code of Misdemeanors, which states that "if an act is both a misdemeanor and a crime, a sanction can only be applied because of the crime" stated that both a penalty tax assessment was held and this assessment was accrued, and a criminal trial was held against their company officials, claiming that these proceedings were against the said article and the principle of ne bis in idem. At this point, the Constitutional Court has decided that the principle of ne bis in idem has not been violated, stating that the legal benefits protected by the regulation of tax delinquency for VAT not paid on time and the regulation of tax evasion for using false invoices are different, and the lawsuits regarding these misdemeanors and crimes belong to two different disciplines[36].

In Ünal Gökpınar's application, which is related to the crime of pos usury, in the incident subject to the application, in addition to the application of tax loss and special irregularity penalties due to the act of generating income by issuing false invoices in return for the commission, the conviction of tax evasion by using and issuing fake invoices were not found contrary to the principle of ne bis in idem by the Court due to the fact that the realization of different purposes and legal benefits as a result of administrative and judicial processes were desired[37]. Some authors in the doctrine do not agree with the

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36 Turkish Constitutional Court, ABP Gıda San. Tur. and Tic. Ltd. Şti., App. No. 2014/72, D. 25.03.2015.

37 *"... On the other hand, the fact that there are different legal values protected in terms of administrative and judicial processes or having different qualifications as misdemeanors and crime does not change the fact that the violated act is one. In the concrete case, both complained proceedings were conducted against the same person and the same taxation periods. Accordingly, the actions of the applicant that caused the criminal proceedings should be considered as the same act in the legal sense, since they form an integrity within themselves in terms of purpose, time and place. In other words, as a result, it is understood that in both proceedings in the concrete case, there is only one act based on the same facts in essence. However, when the concrete case is evaluated in the light of the above principles, there is nothing contrary to the principle of not being re-trial or punished for*

Constitutional Court on this issue. The opinions of the authors are that the penalty for loss of tax cannot be accepted as an administrative fine; because although there are penalties imposed by the administration, not by the courts, these penalties are not only for the purpose of redressing the damages arising from the violation; it is also based on the point that it tends towards the goal of deterrence[38]. Opinions to the contrary in the doctrine are based on the fact that similar to the legal precedent of the Constitutional Court, the sanctions of tax evasion crime and special irregularity misdemeanor tend to have different purposes and have different characteristics[39].

In its previous decisions, the European Court of Human Rights focuses on whether there is a similarity in terms of the elements and purposes of the crime. At this point, a point that needs to be discussed is whether there is a similarity in terms of the elements and purposes of tax loss misdemeanor and tax evasion crime. In order to impose a tax penalty, an act of failure to accrue the tax on time or incomplete accrual due to the taxpayer's failure to fulfill his/her duties related to taxation on time or incomplete fulfillment, regardless of whether there is an intentional element should cause the tax to be incompletely accrued and returned unjustly with false statements about personal, marital or family status and other reasons (CTP art. 341 and article 344/1). As a rule, the tax loss is mandatory for the penalization of this misdemeanor. However, tax loss may

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the same act by imposing tax penalties at the end of the administrative process and sentence to imprisonment at the end of the judicial process, in order to achieve different purposes and legal benefits. Therefore, in the circumstances of the concrete case, the right to a fair trial in the context of the principle of not being tried or punished again for the same act has not been violated." Turkish Constitutional Court, M. Ünal Gökpınar, App. No.2018/9115, D.27.03.2019. See for evaluation, Turgut Candan, https://turgutcandan.com/2019/05/25/bir-anayasa-mahkemesi-karari-vergi-cezalari-ve-non-bis-in-idem-kurali/, 12.02.2022; Begüm Dilemre Öden, *"Non Bis In Idem İlkesi Çerçevesinde 27/3/2019 Tarihli Türk Anayasa Mahkemesi Kararının Değerlendirilmesi"* (Nisan 2020) 5 (1) Çankaya Üniversitesi Hukuk Fakültesi Dergisi, 2437-2454, 2443 etc. About evaluation of "the same act" also see Şenol 210-211.

38 Şenol Kocaer, *"Artık Sahte Faturaya Hapis Cezası Yok! (AİHM'in Glantz/Finlandiya kararının tahlili)"*, (Mart 2015) 403 Vergi Dünyası Dergisi, 41-49, 46-47; Tuğçe Karaçoban Güneş, "Vergi Yaptırım Hukukunda Non Bis In Idem İlkesi" (2016) 15 (2) İKÜHFD, 85-106, 90-91 and 102; Geçer, Non bis in İdem (n 21) 344. The reason why the decision is contrary to the principle of ne bis in idem is that there were two different final judgments and two separate proceedings in the proceedings in the tax court and in the criminal court. Dilemre Öden (n 27) 2449-2450.

39 See. Yusuf Karakoç, "Evaluatıon of Tax Crımınal Law (Regulatıon-Practıce-Trıal)" 34.International Public Finance Conference / Turkey April 24-27, 2019, Antalya – Turkey, 577-582, www.maliyesempozyumu.org/wp-content/uploads/2019/11/34th-international-public-finance-conferenceturkey-proceedings-book.pdf, (Evaluation), 580. Also see. Hakan Üzeltürk, "Ne Bis İn İdem: Bir Anayasa Mahkemesi Kararı" (2019/2) YÜHFD XVI 229-231.

be caused intentionally or by negligence (Code of Misdemeanors. Art. 9)[40]. The crime of tax evasion, on the other hand, can occur only by performing one of the actions specified in Article 359 of the Code of Tax Procedure. With the completion of these actions, a crime occurs. Although many of the acts that constitute the crime of evasion in the article are suitable for causing tax loss, it is seen in the regulation that tax loss is not necessary for the crime to occur. However, since in some provisions of the article, the realization of tax loss is sought, the tax loss is also essential in terms of tax evasion crime in these regulations[41]. Since the crime of tax evasion is a crime in the sense of criminal law, the occurrence of the crime depends on the existence of intent (TCC. art. 21/2). In this case, it is evaluated that both the criminal prosecution in the criminal court and the verdict of a penalty that binds freedom along with the penalty of tax loss by the tax administration will not directly violate the principle of ne bis in idem - the right of uniqueness in the trial or penalty[42]. Because tax evasion crime can only be committed intentionally, the constituent elements of the crime differ from each other. In addition, although an element of consequence is sought in the tax loss misdemeanor, the fact that this element is not sought in terms of acts related to tax evasion, causes these acts to be not the same[43]. As can be understood from the decisions of the European Court of Human Rights cited above, the application of more than one sanction that is of different nature for the same action is not against the principle by itself. The absence of an integrity relationship between these sanctions is a violation of the principle.

After the Glantz decision of the European Court of Human Rights, it is stated that the imposition of a prison sentence for tax evasion and an administrative fine equal to three times the tax lost due to tax misdemeanor

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40 With this regulation in the Law on Misdemeanors, objective liability has been transferred to the principle of fault liability, and in this sense, in order to talk about the existence of tax delinquency, the existence of unlawful activity is not sufficient, but the act must be committed with negligence at least. See Funda Başaran Yavaşlar, *"İdari Nitelikli Vergi Suç ve Cezaları"* (https://www.fundabasaran.com/pdf/idari-nitelikli-vergi-suc-ve-cezalari.pdf, 18.10.2021, 131-178), (İdari), 152. Yılmazoğlu (n 64) 265-266, Şenol (n 36) 261.

41 Yusuf Karakoç, *Genel Vergi Hukuku* (7. Bası, Yetkin 2014) 519; Nihal Saban, *Vergi Hukuku* (9. Baskı, Beta Basım, İstanbul 2019) 519.

42 See. Burcu Demirbaş, *"Avrupa İnsan Hakları Sözleşmesi Açısından Vergilendirme Süreci"* (Unpublished Master Thesis, DEÜ Sosyal Bilimler Ensititüsü, İzmir 2012) 124; Aziz Taşdelen, *Vergi Usul Kanunu Yönünden Vergi Kabahatleri* (Turhan Kitabevi, Ankara 2010) 209; Tahir Erdem, Vergisel Kabahatler (Beta 2010), 69; Doğmuş (n 23) 111. Also see Candan, "Suçlar" (n 60) 607-608. For example, if the penalty is acquitted because there is no intent, this acquittal does not show that the penalty for tax loss is unlawful. However, it is thought that a single tax penalty should be applied here. Candan, "Suçlar" (n 60) 608 dn 893.

43 Taşdelen (n 32) 209.

violate the principle of ne bis in idem[44]. Accordingly, it is emphasized that the purpose of the penalty imposed due to tax loss penalty is punishment and deterrence rather than compensation, therefore there is no difference between the said violations. It is stated that there is no qualitative difference between the acts requiring fines and the crimes, but rather a quantitative difference, and that the quantitative difference that occurs in some cases is not a substantive difference but arises from the preference of the legislator[45].. On the other hand, it is also stated that after the Glantz decision, the crime of tax evasion due to the misdemeanor of tax loss is not against the principle of ne bis in idem in terms of identity. Emphasizing that the tax loss misdemeanor is committed at the moment when the resulting tax debt should be accrued, it is emphasized that there is a difference between the acts called tax evasion crimes and the tax loss in terms of the date that they occur[46].

There is a similarity between the tax evasion crime acts and the special irregularity misdemeanor acts, since they are linked to the result of a danger occurring, and in such a case, it is stated that the act should be subjected to the evaluation of the special norm-general norm principal and punished for only one of them[47]. However, in case of an identity occurring between the act causing the special irregularity offense and the acts constituting the crime of evasion, imposing a sanction for both evasion and special irregularity will result in a violation of the principle[48].

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44 Yaltı (n 10) 90; Nurettin Bilici and Funda Başaran Yavaşlar, *"Non Bis in İdem Kuralı ve Yasallık İlkesi"* Ed. Nevzat Saygılıoğlu in Prof. Dr. Şükrü Kızılot'a Armağan, (Ankara 2014), 49-72, 57-58 dn. 18; Karaçoban Güneş (n 28) 102. For the view that the application of a three-fold tax loss penalty in addition to the freedom-binding penalty may pose a problem in terms of the ne bis in idem principle, since it has a deterrent and punitive nature rather than a compensatory nature, see. Doğmuş (n 23) 112.

45 Kaneti, Ekmekçi, Güneş and Kaşıkçı (n 35) 339.

46 Bahçeci, "Uyum Sorunu", (n 3) 154. Candan emphasizes that the existence of these actions is not sufficient in order to impose a penalty for loss of tax, also tax loss must have arisen in the sense defined in Article 341 of the Tax Procedure Law. He states that the difference between the birth dates and elements of the crime of tax evasion and the tax loss misdemeanor clearly shows that there are two different situations that should be punished, therefore, there is no violation of the principle in this sense. See. Candan, https://turgutcandan.com/2019/05/25/bir-anayasa-mahkemesi-karari-vergi-cezalari-ve-non-bis-in-idem-kurali/, accessed on 12.02.2021. For the opposite view, see Tosun (n 12) 103.

47 Bahçeci, "Uyum Sorunu", (n 3) 158. For the opinion that imposing also an irregularity penalty on individuals who have been convicted for tax evasion would be contrary to the principle of ne bis in idem, see. Doğmuş (n 23) 113.

48 Candan, https://turgutcandan.com/2019/05/25/bir-anayasa-mahkemesi-karari-vergi-cezalari-ve-non-bis-in-idem-kurali/, 12.02.2021; Bahçeci, "Uyum Sorunu", (n 3) 158. In Bahçeci's study, the sameness between the words "Failure to give or receive documents like bills, vouchers or selfemployed invoices or to include amounts different from the real amount in these issued documents" (Article 353) with "issuing misleading documents" (article 359) is

In its newly dated decision, the Turkish Constitutional Court[49] bases the determination of whether there is more than one trial or punishment for the same act in a Court's decision to impose both administrative and judicial penalties for the same act, are based on five criteria. Accordingly, for it to be deemed that more than one trial has been held, there must be: a trial process related to the "Penalty", this said process being resulted in a final/conclusive conviction or acquittal, another trial process conducted regarding (re) "penalty", both trial processes being related to the same act and lastly it not being one of the exceptions to the ne bis in idem principle. In the evaluation within the framework of these criteria, the Court concluded that there was no violation of the principle of ne bis in idem. According to the court, "The rules that are the subject of the objection are basically stipulated that being punished with a prison sentence for the crime of evasion will not prevent the perpetrator from being punished with an administrative fine for tax misdemeanors, and that these penalties will not be combined according to the provisions of aggregation, therefore, the application of more than one penalty for the same act and not combining the penalties are regulated. The principle of "not being tried or punished more than once for the same act" does not exclude a dual trial/punishment process, and therefore the application of more than one punishment, provided that certain conditions are met is possible. If guarantees are provided for the interconnected execution of the processes as parts of a whole, the application of more than one penalty is at the discretion of the legislator. Accordingly, the rules that do not exclude the interconnected conduct of the criminal proceedings, but only apply more than one sentence and not allow them to be combined, do not contradict the principle of not being tried or punished more than once for the same act.

In our opinion, the application of both administrative and criminal sanctions against an act is a common situation, and the existence of this situation does not constitute a violation of the principle of ne bis in idem by itself. However, considering the weight of the total penalty, the legal regulation regarding the tax loss penalty, which should be tripled in case of loss of tax due to smuggling, needs to be reviewed. Otherwise, there will be a violation of the principle due to the disproportionateness of the total penalty[50].

given as example of this issue.

49 Turkish Constitutional Court, 04.11.2021, F. 2019/4, D. 2021/78, O.J. 09.03.2022-31773.

50 For criticism of the three folds of the tax penalty see Yıldırım Taylar, "Ölçülülük İlkesi Bağlamında Vergi Ziyaı Cezasının Anayasa'ya Uygunluk Sorunu" (2015) Ceza Hukuku Dergisi 28, 187-221; Candan (n 60) 615; Yılmazoğlu (n 64) 323.

C. The Matter That Criminal and Tax Court Decisions Are Not Binding Each Other's.

Pursuant to the last paragraph of Article 367of the Code of Tax Procedure, the decisions of the criminal court will not bind the decision of the tax administrations and the tax court, and the decisions to be made by these authority and authorities do not bind the criminal judge[51]. In accordance with the same article, it is obligatory to report the situation to the Chief Public Prosecutor's Office by the tax inspectorate or deputy tax inspectors who have determined that they have committed the offences in Article 359 of the Code of Tax Procedure directly with the opinion of the relevant report evaluation commission and by other officers authorized to examine the tax by the opinion of the relevant report evaluation commission. With the Tax Crime Report, the Public Prosecutor starts the investigation and files a public lawsuit if there is sufficient suspicion that the tax evasion crime has been committed. Otherwise, it is decided that there is no room for prosecution. The prosecutor is not bound by the opinion given by the administration and makes her/his own assessment of whether the action constitutes the crime of tax evasion[52]. The tax inspection report, which proposes the assessment of the tax incurred and the imposition of a 3-fold tax penalty, is sent to the tax office. Upon the notification of the tax penalty notice to the taxpayer and the filing of a lawsuit against the notice and the filing of a lawsuit by the Public Prosecutor, the simultaneous litigation process begins[53].In the face of the regulation that the decisions of the criminal court do not influence the decisions of the authorities that will apply the tax penalties; and the decisions of these authorities do not influence the decisions of the criminal court (Article 367 of the CTP), the processes are carried out independently from each other. In the reasoning of the Law No. 5728, which amends the said article, it is stated that the books and records kept in a commercial relationship reflect a real commercial relationship and the final provision of the criminal court, which has given an acquittal on the grounds that they are correct in terms of their contents, constitutes an obstacle to the imposition of a tax penalty as an administrative fine for causing tax loss due to the commercial relations subject to these documents[54]. In practice, it is stated that the criminal courts make the conclusion of the lawsuits filed in the tax court a pending issue considering the technical nature of tax crimes[55].

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51 For criticism of the provision, see Mustafa Akkaya, "Vergi Mahkemesi ve Ceza Mahkemesi Kararlarının Etkileşimi Üzerine Bir İnceleme" (2000) 49 Ankara Üniversitesi Hukuk Fakültesi Dergisi, 88 et al.; Geçer, Non bis in İdem (n 21) 334-335.

52 Bahçeci, "Etkileşim" (n 17) 19.

53 See. Kocaer (n 28) 44.

54 Law No. 5728 O.J. 08.02.2008-26781) For Law's preamble see. Kocaer (n 28) 44-45.

55 Kocaer (n 28) 45. For the same direction also cf. Akkaya (n 40) 92-93.

At this point, the matter of connection is essentially taken into consideration in the more recent decisions of the European Court of Human Rights. Although the processes for tax inspection and 3-fold tax loss penalty tax evasion process generally proceed simultaneously, they are carried out independently and independently. As a matter of fact, in terms of Turkish Law, the fact that the decisions of the tax court and the decisions of the criminal court may be in a different direction is criticized on the grounds that the definitive judgment authority of the courts and also the legal security of the addressee of the tax penalty are damaged[56]. Although the provision of the law expresses the opposite; in addition to the opinion that if the tax court, which is a specialized court, has reached the conclusion that tax evasion does not occur in one case and this decision is finalized, criminal sanctions should not be imposed on this case[57], it is also stated that the case should be dismissed due to the final verdict not to continue the trial in the other case after any of the verdicts given in one of these courts are finalized, regardless of whether it is in tax or criminal proceedings[58]. However, it is seen that these views were not adopted by the Court of Cassation. According to the jurisprudence of the Court of Cassation, the criminal courts will evaluate whether there is tax evasion or not, and whether there is an intention to evade tax. In a case brought before it, the Court of Cassation found it unlawful to grant an acquittal based on the tax court's decision, which was finalized after the Council of State's assessment that there was no need to apply a triple tax loss penalty because tax evasion did not occur[59]. Here, whether the perpetrator committed the act knowingly or not is discussed in the final decision after the examination of the Council of State. While there is a final judgment given by the Council of State, it is emphasized that the legal characterization of the same act again and the re-trial of the perpetrator constitute a violation of the principle of ne bis in idem[60].

Since tax loss is not required as a rule for the tax evasion crime to exist, the tax loss misdemeanor was not committed will not be made. In this case, if the Supreme Court decides that the act was committed intentionally and that the tax evasion crime was committed, there are two separate provisions, but this situation will not constitute a violation of the principle[61].

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56 See. Yusuf Karakoç, *"Türk Vergi Ceza Hukuku Üzerine Bir Değerlendirme"* (2010) 12 Prof. Dr. Burhan Ceyhan'a Armağan, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 3-26, 11-14; Karakoç, Genel Vergi (n 33) 502-503; Karakoç, Vergi Ceza (n 23) 186-187; Akkaya (n 40) 91-95; Bilici and Başaran Yavaşlar (n 34) 54; Yaltı (n 10) 90-91; Kocaer (n 28) 44-45; Geçer, Non bis in İdem (n 21) 334-335.

57 Erman, *"Ticari Ceza"* 88 (quoted. Akkaya (n 40) 88); Akkaya (n 40) 93.

58 See. Kocaer (n 28) 48-49.

59 SCPD., 16.10.2001 F.2001/11-213, D.2001/219, kazancı içtihat bankası, 01.03.2021.

60 Geçer, Non bis in İdem (n 21) 335.

61 See. Geçer, *"Non bis in İdem"* (n 21) 336-337.

In the criminal court, the acquittal decision made within the scope of "not being certain that the charged crime was committed by the defendant" (Article 223/2-b of the Code of Criminal Procedure) and based on the determination of veracity should be taken into consideration in the trial in the tax court. However, if the acquittal decision is given in the criminal court because the crime is certain, the intentional examination by the tax court will result in a repeated trial[62].

And also, it is not expected in every case that the result will be favorable or unfavorable in both criminal and tax proceedings for the perpetrator of the act subject to the proceedings. In contrast with the tax loss penalty was imposed on the real person representative of the legal entity on the grounds that he caused tax loss by using false documents by the tax administration, in the trial held by the criminal court, this person may be acquitted on the grounds that it cannot be proven that he is the person who committed the crime. The acquittal of the legal entity representative on the ground that "it is not proven that the offence was committed by the accused" is not sufficient to prove that there is no tax loss due to the false document used by the legal entity[63]. In addition, the European Court of Human Rights argues that the principle of ne bis in idem will not need to be applied in cases where the perpetrator of the misdemeanor of tax loss and the perpetrator of the tax evasion crime are not the same[64]. However, since taxation is based on the same material issue, it must be accepted that the principle of ne bis in idem is also in question in tax crimes of legal entities[65].

It may be possible for the judge of the criminal court to decide in a different direction not only in the case of legal entities committing a tax crime, but also in cases where the tax court accepts the case due to reasons such as the statute of limitations and unlawfulness of the notification without going into the merits of the case. In such cases, the principle of ne bis in idem cannot be justified necessity to decide in the same direction.

On the other hand, the acquittal decision of the criminal court by determining the real commercial relationship, existence of the act, the existence of the element of intent should also be taken into consideration by the tax

62 See. Bahçeci, *"Uyum Sorunu"* (n 3) 162-163; cf. Torun (n 60) 606.

63 Bahçeci, *"Etkileşim"* (n 17) 17-19. Also see Candan, "Suçlar" (n 60) 310, Yılmazoğlu (n 64) 300.

64 Manasson İsveç 20.07.2004 App. No. 41265/98. The Constitutional Court also has decisions in the same direction. See, the Turkish Constitutional Court Mehmet Turgay Özbekler, App. No: 2017/20779, 11/3/2020 Also see Torun (n 62) 572.

65 In a similar direction cf. Rençber and Özalp (n 63) 33-35. cf. Torun (n 60) 591; Yunus Emre Yılmazoğlu "Anayasa Mahkemesi'nin 213 sayılı Vergi Usul Kanunu'nun 367. Maddesinin Son Fıkrasının İptali Yönündeki Kararının Vergi Uyuşmazlığından Doğan İdari Davalara Etkileri" (Temmuz 2022) Ankara Barosu Dergisi 80, 267, 276. For evaluation about "idem factum" see. Şenol (n 36) 213-218.

court[66]. Also, if the judge of criminal court, for example, made an "intentional examination" in the judicial process, this issue should also be evaluated by the tax court judge. Likewise, if the tax court has made determinations regarding the material event in its decision, these issues should also be considered by the criminal court[67].

The fact that tax and criminal courts can give independent and different decisions does not comply with the criteria underlined by the European Court of Human Rights in its Glantz and Bjarni decisions[68]. When evaluated together with the final decisions, in accordance with the principle of ne bis in idem, in case of tax evasion crime and tax loss, both imprisonment and administrative fine are should not be applied[69]; it is emphasized that the application of one of the two sanctions should take place[70].

The last paragraph of Article 367, which was highly criticized by the doctrine to be contrary to this jurisprudence of the European Court of Human Rights, was annulled by the recent decision of the Constitutional Court[71]. In the court decision, the European Court of Human Rights emphasizes "the completely independent progress of the proceedings and their lack of integrity" in accordance with its jurisprudence. According to the Court, *"The right to a fair trial basically guarantees that the trial process and procedure are carried out in accordance with fairness, and for this reason, it is necessary to take into account the issues that may affect this process in the trial/punishment process. In this context, it may be necessary to ensure an adequate connection between the processes, otherwise consequences may arise that violate the guarantees of the right to a fair trial. The right to a reasoned judgment even if there is no sufficient connection between the prosecution/punishment processes related to tax evasion offences and tax offences committed in connection (see Mehmet Okyar, App. No: 2017/38342, 13/2/2020), decisions may be made in a way that is incompatible with the guarantees of the right to a fair trial such as the presumption of innocence.*

It cannot be argued that the decisions of different bodies, authorities, which deal with the acts of tax evasion offences and misdemeanors that can be

66 Candan, "Suçlar" (n 60) 609, Torun (n 60) 615, Yılmazoğlu (n 64) 268-270.

67 Candan, "Suçlar" (n 60) 613- 615. See for the opinion that the decisions not related to the detection and evaluation of the evidence in the criminal justice system do not need to be taken into account in the administrative jurisdiction, Candan, "Suçlar" (n 60) 614; Torun (n 60) 606. cf. Yılmazoğlu (n 64) 271.

68 In a similar direction see. Yaltı (n 10) 90-91; Geçer, A ve B v. Norveç (n 11) 118.

69 Bilici and Başaran Yavaşlar (n 34) 53; Karaçoban Güneş (n 28) 102.

70 Yaltı (n 10) 91; Geçer, Non bis in İdem (n 21) 338; Dilemre Öden (n 27) 2451. For the opinion that only imprisonment should be applied out of the two sanctions in question, see. Bilici and Başaran Yavaşlar (n 34) 53.

71 Constitutional Court 04.11.2021, F. 2019/4, D. 2021/78, (O.F. 09.03.2022-31773).

committed in connection with the provision of sufficient connection regarding procedural guarantees in different dimensions, and which characterize and evaluate them according to their own procedures and rules, should bind each other in all cases and conditions, nor is it possible to conclude that they should not bind each other under any circumstances. Therefore, it is understood that the rule that prevents the establishment of a connection between the tax evasion offence committed by related acts and the trial/punishment processes related to tax offences may constitute a violation of the guarantees within the scope of the right to a fair trial."

It is controversial what kind of practice it will be after the annulment of the Constitutional Court. At this point, it is thought that it is useful to remind the solution proposals before the annulment decision. It is rightly stated that the criminal court should decide that the crime has been determined in order to give three folds penalty to the taxpayer due to the occurrence of the crime of evasion[72]. Another solution proposal brought to ensure interaction in tax and criminal proceedings is that one makes the disposition of the other case a pending issue[73]. A proposed way to resolve this contradiction in two ways is by imposing a basic sentence on the basis of the review report and completing the sentence upon the finalization of the conviction of the criminal court[74]. And also, it is recommended that the prior decision made should affect the ongoing proceedings, even without making a pending issue[75].

The second way was to define the monetary penalty to be determined as the secondary penalty of the tax evasion if the court decides to convict the crime[76].

Another solution proposal is to find a solution by looking at the realization of the crime in the article regulating the tax evasion crime. It is suggested that the criminal court should make the decision of the tax court a pre-

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72 See. Özgür Biyan, *"Aynı Fiil Nedeniyle Vergi Ziyaı Cezası ve Hapis Cezasının Birlikte Uygulanması: Non Bis in İdem İlkesi"* (2016) 145 Lebib Yalkın Mevzuat Dergisi, 100-107, 105-106; Bahçeci, "Uyum Sorunu" (n 3) 163; Dilemre Öden (n 27) 2452; Burcu Demirbaş Aksüt, *Vergi Anlaşmazlıklarının Çözüm Yolu Olarak Uzlaşma* (On İki Levha 2021) 231.

73 Akkaya (n 40) 96; Horozgil (n 16) 289. The French Tax Code is given an example, see Candan, "Suçlar" (n 60) 617-618.

74 Karakoç, "Değerlendirme" (n 44) 13-14; Yusuf Karakoç, *"Vergi Ceza Hukukuna İlişkin Tesbit ve Öneriler"* (2020) Prof. Dr. Nami Çağan Anısına Armağan (Atılım Üniversitesi), 321-382, 336-340; Biyan (n 55) 105-106. Biyan adds that it is also possible to consider imposing this amount in the form of a judicial fine. Also see, Doğmuş (n 23) 112-113. For the opinion that the punishment for the crime of smuggling should be rearranged, see. Demirbaş Aksüt (n 55) 231.

75 Candan, "Suçlar" (n 60) 617.

76 Karakoç, "Değerlendirme" (n 44) 13-14; Karakoç, "Öneriler" (n 56) 336-340. On the other hand, it is also stated that it is not possible to implement these solution proposals if the penalty is imposed on a legal entity, Bahçeci, "Etkileşim" (n 17) 23. It is also recommended that the prison sentence be suspended in cases where public loss is remedied. Şenol (n 36) 301.

emptive matter for the actions which are regulated in Article 359 of the Tax Procedure Law and which require tax techniques to be prosecuted. According to this view, in this case the criminal court should be bound by "the intention examination" by the tax court. For other cases, it is stated that it would be more appropriate for the tax court to wait for the decision of the criminal court. It is also emphasized that this solution should not be provided by an amendment to the Tax Procedure Law, but by the case law to be established by the Court of Cassation and the Council of State[77].

EVALUATION AND CONCLUSION

When the jurisprudence of the European Court of Human Rights on the subject is examined, we can briefly summarize its approach as follows: The Court does not consider the imposition of two different sanctions due to the same act but the operation of two different enforcement processes as a violation of the double trial prohibition. At this point, it primarily looks at the nature of sanctions and whether they serve the same purpose. It then focuses on the relationship between the judgments made about them. If the proceedings proceed in the same process in connection with each other, then it is concluded that there is no contradiction to Article 4 of the additional 7th protocol regulating the prohibition of double proceedings. In the practice of many countries, including our country, it is seen that the crime of tax evasion is subject to both criminal and administrative sanctions, and these two regulations indeed serve different purposes. In terms of our country, what was thought to be contrary to the jurisprudence of the European Court of Human Rights and the principle of proportionality was that the proceedings related to these sanctions should be conducted separately from each other. As a matter of fact, when a taxpayer who is decided that he does not have an intention to commit a crime by a criminal court decision or that the documents that form the basis of the tax administration's decision by the tax court, which is a specialized court, were not found fake, the act of finding the taxpayer guilty in the other court harms the legal security of the taxpayer.

With its recent decision, the Constitutional Court annulled the provision that "the decisions of the criminal and tax courts will not bind each other" in accordance with the jurisprudence of the European Court of Human Rights. As a matter of fact, the fact that there was no connection between both judgments and that these judgments were not part of the same whole constituted a violation of the right to a fair trial and ne bis in idem principles. The question of what kind of practice will be after the annulment decision has not yet been answered.

[77] Bahçeci, "Etkileşim" (n 17) 23 and 30. Also see Tosun (n 60) 615.

In the current situation, in order not to violate the ne bis in idem principle whichever of the tax and criminal courts decide first, the other should take that decision into account at the stage of the proceedings. In order to comply with the principle, the existence of regulations- adhibitions that will ensure the simultaneous execution of the proceedings is necessary. The connection between the proceedings can be established by the information-document-evidence they will demand from each other while the proceedings continue between the tax and criminal courts. In the same way, whichever of the tax and criminal proceedings is finalized first, the other should proceed with his judgment by taking this decision into account.

Although it is not very common in practice, if the criminal trial ends first and the outcome of the trial is a conviction or acquittal decision based on the merits of the case, the tax court should consider and adhere to this decision. In this context, the tax court must establish a connection with the process in criminal proceedings (in terms of collection-evaluation of evidence and determination of facts) in making its decision. In the same way, in case the tax proceedings are concluded earlier, as is common in practice, the scope of the annulment or rejection decision given by the tax court should be considered. The criminal court has to make a decision in connection with the process of the tax case. For example, if the tax court gives an annulment decision for a procedural reason without depends on the merits of the case, this decision will not bind the criminal court judge. Thus, if the tax court as a specialized court, makes an examination of the tax technique report, the determinations made here have to be considered by the criminal judge.

As a result, it is necessary to establish a connection between the cases, to use the case material used by the first one and benefit from it while making a decision. In cases where a different decision is required due to the nature of the concrete case, the reason for making a different decision should be clearly stated. For example, an annulment decision due to the lapse of time or inadequacy of notice in the tax court may be a reason for a different decision for the judge of the criminal court. As a matter of fact, the tax court judge has not made a decision depending on the merits of the case. This situation does not constitute a violation of the ne bis in idem principle.

Considering the current judicial processes and durations, it is seen that tax proceedings are mostly concluded before the criminal proceedings. In this case, it would be in accordance with the ne bis in idem principle for the criminal court to make a decision by using the determinations in the tax proceedings and making a connection. It would already be more appropriate for criminal court to consider the decision of the tax court, for reasons such as the tax law requires special expertise and the tax examination report-tax technique report is the basis of the proceedings.

At this point, the question comes to mind whether it would be appropriate to make a regulation that the criminal court should wait for the decision of the tax court. In our opinion, considering the current regulations, this process should be carried out with the case law. As a matter of fact, a legal regulation to be made in this way will make the process compatible with the principle, but may also cause other problems in practice. A legal regulation or obligation does not always appear as a solution when different concrete events are evaluated. In exceptional cases, a determination made by the criminal court may be more important in the tax judgment process. Also, considering the weight of the total penalty, the legal regulation regarding the tax loss penalty, which should be tripled in case of loss of tax due to smuggling, needs to be reviewed. Otherwise, there will be a violation of the principle due to the disproportionateness of the total penalty.

Apart from the suggestions regarding the current situation, ultimately it is necessary to make changes in the regulations regarding the tax loss misdemeanor and the crime of tax evasion. In other words, legal regulations regarding tax evasion need radical change. First of all, the connection between the tax loss misdemeanor and the tax evasion crime should be abated. If tax loss has occurred without the suspicion of smuggling has arisen, the tax loss penalty should be imposed. The process- trial regarding this penalty should also be resolved in tax courts. In case of suspicion of tax evasion along with tax loss or only tax evasion, the file should be sent to the Prosecutor's Office without applying a tax loss penalty. In this case, the tax loss penalty should not be applied separately. At the stage of individualization of the punishment, in addition to the prison sentence by taking into consideration the tax loss an additional judicial fine should be imposed in an amount that will not be less than this tax loss. However, a case in this direction should be tried by the "Tax Criminal Courts", which also have technical expertise in the field of tax law. The Council of Judges and Prosecutors has also decided that some criminal courts of first instance will serve as specialized courts in the field of taxation in order to ensure this specialization (O.F. 30.11.2021-31675).

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GLOBALISATION OF HOMO ECONOMICUS AND PLASTIC BAG REGULATIONS

Küreselleşen Homo Economicus ve Plastik Poşet Düzenlemeleri

Mehmet ÖZYÜREK*

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ABSTRACT

Globalisation creates some negative and positive outcomes. Environmental problems that stem from plastic waste can be one of the examples of these negative outcomes. Governments all around the world look for strategies to reduce plastic waste. In this way, neoliberal policies and regulations based upon market actors in reducing the use of plastics can be seen as strategies popularly used by governments. Such policies and regulations are favoured by free-market economists as letting people make their own free choices without any interference by the government. Environmental governance strategies based upon consumer choices can be good examples in this regard. In fact, one of these strategies, plastic bag charges/taxes, has become globalised in recent years. This study specifically explores such regulations evident in steering the individuals' behaviour by highlighting the concept of homo economicus. Rather than focusing on whether these strategies are efficient or not, the study emphasises that homo economicus oriented plastic bag charges/taxes are away from to target the real cause of the global pollution stemming from use of plastics by criticising the neoliberal philosophy of plastic bag charges/taxes from a normative and qualitative perspective.

Key Words: Globalisation, Environmental Law, Neoliberalism, Homo Economicus, Law and Economics

ÖZET

Küreselleşme birçok olumlu ve olumsuz sonucu beraberinde getirmektedir. Plastik atıklar sonucu ortaya çıkan çevre kirliliği küreselleşmenin yarattığı olumsuz sonuçlardan biri olarak görülebilir. Dünyanın farklı yerlerindeki hükümetler plastik atık sorununa çözüm stratejileri aramaktadır. Bu hususta piyasa aktörlerinin tercihleriyle şekillenen neoliberal politikalar ve düzenlemeler birçok hükümet tarafından kullanılan uygulamalar haline gelmiştir. Bu politikalar ve düzenlemeler serbest piyasa ekonomistlerinin ateşli bir şekilde savundukları devlet müdahalesi yerine

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* Assist. Prof. Dr., Yalova University, Faculty of Economics and Administrative Sciences, e-mail: mehmet.ozyurek@yalova.edu.tr, ORCID ID: 0000-0002-7980-4655

özgür birey tercihlerinden yana olan bir bakış açısını öne çıkartmaktadır. Tüketici tercihleri üzerine kurulu çevresel yönetişim düzenlemeleri bunların en güzel örneği olabilir. Bu çalışma söz konusu düzenlemelerden olan ve son yıllarda küresel bir boyuta ulaşan plastik poşetleri ücretli hale getiren/vergilendiren yasal düzenlemeleri incelemektedir. Bu inceleme ekonomik insan anlamına gelen homo economicus kavramına odaklanmaktadır. Çalışma söz konusu hukuki düzenlemelerin başarılı olup olmadığıyla ilgilenmekten ziyade bu uygulamaların normatif ve nitel bir bakış açısı ile eleştirisini hedeflemektedir. Çalışmanın amacı bireylerin özgür tercihleri üzerine kurulu olduğu iddia edilen söz konusu düzenlemelerin sınırlarına dikkat çekmek ve bu düzenlemelerin plastik atık sorununun küresel yönetişiminde kullandığı neoliberal yaklaşımın ne ölçüde sorunlu olduğunu irdelemektir.

Anahtar Kelimeler: Küreselleşme, Çevre Hukuku, Neoliberalizm, Homo Economicus, Hukuk ve Ekonomi

INTRODUCTION

Plastic is cheap and durable. In today's world, in almost every single technological device has plastic parts. Although plastic plays a significant role as the main material in the products that we use in everyday life, plastic pollution constitutes a significant global problem since plastics are made from fossil fuels, such as oil, gas and coal. Plastic bags made from non-biodegradable high-density polyethylene (HDPE) can be one example of these products that we use daily.[1] Around the world today, trillions of plastic bags are being used every year.[2] Such non-biodegradable bags have an enormously negative impact on the environment globally. Against this global problem, national governments have already started passing laws restricting or banning the single use of plastic bags.[3]

Over the last few decades, globalisation has transformed the regulatory power of nation states.[4] The idea of small governments that are reluctant to interfere in the economic and social lives of their populations has become the fashion all over the world. In this environment, less interventionist regulatory strategies, grounded in the private choices of market actors, have become more favourable. Neoliberal policies and regulatory strategies relying on market

1 Chris Edwards and Jonna Meyhoff Fry, Life Cycle Assessment of Supermarket Carrier Bags: Draft Report (Great Britain Environment Agency 2010)

2 Kurt Spokas 'Plastics-still young, but having a mature impact' (2008) 28 Waste Management 473, 473-474.

3 United Nations Environment Programme (UNEP), 'Legal Limits on Single-Use Plastics and Microplastics: A Global Review of National Laws and Regulations' (UNEP 2018) <https://www.unenvironment.org/resources/report/legal-limits-single-use-plastics-and-microplastics> accessed 5 August 2022.

4 Andreas G Scherer and Guido Palazzo 'The New Political role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy' (2011) 48 (4) Journal of Management Studies 899, 909.

actors and requiring minimum state intervention are used in different areas of social and economic life. These strategies are being used to solve environmental issues as well.[5] The environment, which was previously regulated by the state, has become an area that can be regulated by market actors in this neoliberal fashion. Policies and strategies based upon environmental taxes, tradable permit systems and targeted subsidies are being chosen by many governments.[6] Some of the neoliberal policies and strategies specifically focus on the willingness of consumers to act in an environmentally friendly manner. Plastic bag charges/taxes can be good examples in this respect. Rather than banning plastic bags, for example, governments have begun to tax plastic bag consumption or require retailers and shops to charge for plastic bags.[7] These strategies merely aim to influence the behaviour of consumers by increasing the cost of consuming plastic bags.

In accordance with such neoliberal strategies, consumers are seen as economic actors making rational choices. By letting people take their own decisions, plastic bag charges/taxes enable consumers to consider the cost of a plastic carrier bag. This philosophy of plastic bag charges/taxes by giving more freedom to consumers can be seen as a strategy that relies upon the concept of homo economicus (economic man). Homo economicus can be defined as 'an entrepreneur of himself'.[8] Homo economicus acts as an entrepreneur who never stops investing, rather than a mere consumer.[9] By letting consumers take their own decisions, plastic bag charges/taxes enable individuals to consider the cost of a plastic carrier bag. In other words, such regulatory strategies enable consumers to act as homo economicus.

Yet to what extent plastic do bag charges/taxes based on the concept of homo economicus play a role in stopping global plastic waste? What role can they play in the developing world? Are these neoliberal strategies likely to focus on the real cause of the plastic waste problem? The following study aims to answer the above questions. For this purpose, section 1 begins with the definition of neoliberalism. In section 1.1, the main arguments of neoliberal thought are traced back to the early founders of liberalism. The section also shows how neoliberalism plays a role in the regulatory environment all over the world. Then, in section 1.2, the concept of homo economicus and its role

5 Karen Bakker, 'The Limits of 'Neoliberal Natures': Debating Green Neoliberalism' (2010) 34 (6) Progress in Human Geography 715, 735.

6 European Commission (EC) Environment, Environmental Economics (EC) <Https://ec.europa.eu/environment/enveco/mbi.htm> accessed 5 August 2022.

7 UNEP, 'Legal Limits on Single-Use Plastics and Microplastics' (n 3).

8 Michel Foucault, the Birth of Biopolitics: Lectures at the Collège de France, 1978-79 (Graham Burchell tr, François Ewald and Alessandro Fontana ed, Palgrave Macmillan 2008) 226

9 Todd May, The Philosophy of Foucault (Acumen Press 2006)158.

in neoliberalism are briefly introduced. In this respect, homo economicus and neoliberalism are scrutinised as an art of governance. Next, in section 2, globalisation of plastic charges/taxes is analysed. In this section, the plastic bag charges/taxes in different countries are exemplified to show the pros and cons of the regulatory strategies placed upon homo economicus. Yet, a comprehensive investigation of all neoliberal policies and regulatory strategies placed upon homo economicus is beyond the limits of section 2, which rather criticises some of the plastic bag charges/taxes applied by the governments in developing countries to reduce plastic waste. Rather than focusing on whether these strategies are successful, the section critically analyses homo economicus from a normative perspective.

A. Liberalism, Neoliberalism and Homo Economicus

Neoliberalism is mostly defined as the dominant ideology of today's world.[10] What factors play a role in its dominance? On which foundations is it built upon? It may be difficult to answer these questions without understanding what neoliberalism is. Therefore, before beginning, it is crucial to conceptualise neoliberalism. To do this, one should understand what classical liberalism is since some have depicted neoliberalism as 'an updated version of classical liberalism'.[11]

1. Classical Liberalism and Historical Background of Neoliberalism

Chronologically, classical liberalism can be traced back to John Locke. One of the main arguments of Locke is the significance of the creation of a constitutional government against absolutism.[12] In this way, Locke pays undivided attention to the protection of 'rights to life, liberty and property'.[13] This view constitutes the early foundation of liberalism as a political ideology. Thus, it appears that the early version of liberalism aims to restrict absolute monarchies. Therefore, it can be seen as libertarian.

Free market and laissez-faire economics, undoubtedly, constitute other pillars of classical liberalism.[14] According to these pillars, for example, 'the state is to refrain from "interfering" with the economic activities of self-interested citizens…'[15] In this view, the role of the liberal state is no more than a 'night-

10 Alfredo Saad-Filho and Deborah Johnston (eds), Neoliberalism: A Critical Reader (Pluto Press 2005) 1.

11 Andrew Heywood, Politics (5th edn, Palgrave Macmillan 2013) 295-296.

12 ibid 80.

13 John Locke and Peter Laslett, Two treatises of government: A Critical Edition with an Introduction and Apparatus Criticus by Peter Laslett (Cambridge University Press 1970) 289.

14 Manfred B Steger and Ravi K Roy, Neoliberalism: A Very Short Introduction (Oxford University Press 2010) 2-3.

15 ibid.

watchman'.[16] From this perspective, the liberal state can be described as responsible for 'market expansion and stability'.[17] In this environment, individual choices of self-interested people become significant. In the Wealth of Nations, Adam Smith clarifies this self-interested nature of individuals by stating that '[i] t is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest'.[18] Smith depicts a world of barter. In the world he depicts, rational individuals act in accordance with their self-interests. There is no need for the intervention of the State in this world where the 'invisible hand' of the market works without any intervention.[19] The state's intervention in the market or society may not be successful because the State has a limited knowledge.[20] The 'invisible hand', shaped by the egoistic behaviour of individuals, however, creates the public good.[21]

Nonetheless, economic and social inequalities stem from the capitalist system caused the birth of the new version of liberalism called modern liberalism.[22] After the great depression, Keynesian economics, theorised by John M. Keynes, seeing the government intervention in the economy as vital, became the most important approach in economics.[23] Despite classical liberalism, against the government intervention in social and economic life, Keynesian economics favours government spending by highlighting its importance in creating jobs and increasing consumer spending.[24] According to Keynes, laissez faire economics constituted one of the reasons of the great depression.[25]

In the 1970s, however, the economic crises and the oil shock damaged the popularity of Keynesian economics. The opposition against Keynesian economics triggered a deregulation movement all around the world and neoliberal policies become fashionable. In the following years, neoliberal governments seized the power. Margaret Thatcher in the UK and Ronald Reagan in the US were two figures symbolizing this fashion of neoliberalism.[26]

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16 Heywood (n 11) 63.

17 Majia H Nadesan, Governmentality, Biopower, and Everyday Life (Routledge 2010) 20.

18 Adam Smith, On the Division of Labour: The Wealth of Nations, Books I–III (Penguin Classics 1986) 119.

19 ibid.

20 Thomas Lemke, Foucault's Analysis of Modern Governmentality: A Critique of Political Reason (Verso Books 2019) 384-385.

21 Collin Gordon, 'Governmental Rationality: An Introduction' in Graham Burchell, Colin Gordon, and Peter Miller (eds) The Foucault Effect: Studies in Governmentality: with two Lectures by and an Interview with Michel Foucault (Harvester Wheatsheaf 1991) 15.

22 Heywood (n 11) 33.

23 Sarwat Jahan, Ahmed Mahmud and Chris Papageorgiou, 'What is Keynesian Economics' in J M Rowe (ed), Finance and Development: Back to Basics: Economic Concepts Explained, 4-5 (IMF 2017) 53-54.

24 Steger and Roy (n 14) 6.

25 Heywood (n 11) 287.

26 David Harvey; A Brief History of Neoliberalism (Oxford University Press 2007) 9.

As mentioned above, neoliberalism is introduced as 'an updated version of classical liberalism'. [27] It has some similarities with classical liberalism such as the idea that States should not be interfering with the economic activities of individuals. As classical liberalism, neoliberalism considers market regulations as burdensome. Therefore, with the rise of neoliberalism, the deregulation movement becomes fashionable. Furthermore, in neoliberalism the State pays attention to the needs of the market.[28] The market becomes an actor that may affect the public policies. There is no doubt that this affects the regulatory policies.

With the rise of neoliberalism, most states have turned towards market-oriented strategies more than ever before. The change from the command-and-control type regulations to more autonomous regulatory strategies has accelerated. Command-and-control regulations, in which the States play the key role, have been abandoned since they were seen as inefficient and inflexible.[29]

Even though neoliberalism can be seen as an updated version of liberalism, there is no doubt that it is broader than that depiction. Neoliberalism can be described as a concept beyond an economic or a political ideology.[30] As Harvey highlights, neoliberalism also has an impact on how we interpret the world.[31] Rather than impinging on the mere economic aspect of life, neoliberalism affects almost all aspects of life. From this perspective, neoliberalism can be depicted as a concept changing human behaviour. It makes individuals internalise 'economic calculation' in their decisions with respect to the different aspects of life, such as having a child or getting married.[32]

In this environment, in which utility maximisation plays the key role, the most distinguishing feature of neoliberalism may be its undivided attention to competition in the market. In neoliberalism human beings are barely defined as homo economicus asserting that economic factors play the major role in the decisions that human beings take.[33] The next section elaborates the investigation of how the concept of home economicus plays a role in neoliberal thought.

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27 Heywood (n 11) 295-296.

28 Wendy Brown, Edgework: Critical Essays on Knowledge and Politics (Princeton University Press 2009) 41.

29 Jennifer A Zerk, Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law (Cambridge University Press 2006) 37.

30 Jason Read, 'A Genealogy of Homo-Economicus: Neoliberalism and the Production of Subjectivity' (2009) 6 Foucault Studies 25, 26.

31 Harvey (n 26) 1.

32 Geoffroy De Lagasnerie, Foucault Against Neoliberalism? (Rowman & Littlefield Publishers 2020) 76-77.

33 Wendy Brown, Undoing the Demos: Neoliberalism's Stealth Revolution (MIT Press 2015) 81.

2. Neoliberalism as Governmentality and Homo Economicus

Foucault approaches both liberalism and neoliberalism from a broader perspective during his lectures at the Collège de France in 1978–79.[34] He starts his lectures with an explanation of the historical change in 'the art of government' by touching upon the 'rationalization of governmental practice in the exercise of political sovereignty'.[35] According to him, political economy leads to an internal limitation of governmental rationality starting from the middle of the 18th century with the rise of liberalism. In this regard, liberalism shapes 'the art of government' and limits governmental action.[36] With the limitation of governmental action individual freedom becomes broader. Homo economicus who exchanges goods constitutes the main principle in the efficiency of the market and wealth for society. In this environment, free choices of self-interested homo economicus not only improve individual wealth but also the public good. As mentioned above, this also constitutes the chief argument of Smith's theory of an invisible hand, which relies on barter in the market.[37]

Self-interested homo economicus constitutes the efficiency of the market in both liberalism and neoliberalism. In Foucault's depiction of neoliberalism, however, homo economicus individuals compete with each other. Foucault focuses on the alteration in the character of homo economicus which is now an 'entrepreneur, an entrepreneur of himself' rather than 'the man of exchange' as Smith defines him.[38] As Foucault depicts, in neoliberalism, even though barter still plays a role in the market, economic, social and political relations are all determined by competition amongst people. Therefore, from the Foucauldian perspective, neoliberalism can be understood more as a concept broader rather than as a mere economic or political ideology. Neoliberalism should be seen as a type of governmentality in which people are being controlled or they control themselves. Individuals internalise some of the control mechanisms as well. In other words, neoliberalism can be depicted as a way for production of the subjectivity.[39] In this process, people become their own guardians.[40]

The nature of the State also changes with neoliberalism. Rather than classical liberalism, in which State intervention in the market is seen as undesirable, the

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34 Foucault (n 8)

35 Michel Foucault, the Birth of Biopolitics: Lectures at the Collège de France, 1978-79 (Graham Burchell tr, François Ewald and Alessandro Fontana ed, Palgrave Macmillan 2008) 2.

36 Foucault (n 8) 17.

37 Smith (n 18) 119.

38 Foucault (n 8) 225-226.

39 Read (n 30).

40 Foucault (n 8) 119.

neoliberal State seems more eager to intervene in the market conditions to sustain the competition amongst individuals.[41] Even though the main claims of neoliberalism rely upon minimum government intervention in the market, the government intervention in neoliberalism is merely required to focus upon the continuation of market conditions. This intervention, however, differs from the traditional meaning of intervention in the market as criticised under classical liberalism. As Lemke lucidly highlights, in neoliberalism the market shapes the State rather than the State shaping the market.[42] This undeniably leads to a metamorphism in the nature of the State. With this change, some of the traditional responsibilities and obligations of the State towards society are being transferred to the market actors. Social control, which traditionally belongs to the State, occurs through self-regulation.[43] Therefore, this new control mechanism requires freedom rather than coercion.[44]

In a nutshell, neoliberalism creates a change in the behaviour of both individuals and the State to sustain competition in the market. In this way, the fashion of plastic bag charges/taxes can be a useful example to be examined. Such regulatory strategies are promoted as letting people make their own free choices without any interference in the market. By introducing these strategies, governments aim to enable homo economicus to take their own decisions in paying extra money for each plastic bag, rather than banning plastic bags. These strategies are being presented as mechanisms to reduce plastic waste and environmental damage globally. The next section touches upon how these strategies may fail to be sustainable to obtain that purpose.

B. Plastic Waste as a Global Problem and the Globalisation of Plastic Bag Charges/Taxes

As highlighted above, plastic waste and pollution constitute a significant global problem. Trillions of plastic bags being used by individuals make up the significant portion of this waste problem.[45]Against this problem, individual governments have started passing laws restricting the use of plastic bags.[46] Governments, for example, pass laws to charge extra money for each plastic bag. By these laws, governments let consumers make their own free choices, rather than banning use of all plastic bags by a command-and-control type of regulation. These regulations claim to make market players, particularly consumers, more significant actors in terms of reducing plastic consumption.

41 ibid 119.
42 Lemke, Foucault's Analysis of Modern Governmentality (n 20) 401.
43 Nancy Fraser, 'From Discipline to Flexibilization? Rereading Foucault in the Shadow of Globalization' (2003) 10(2) Constellations 160, 164.
44 Lemke, Foucault's Analysis of Modern Governmentality (n 20) 419-428.
45 Spokas (n 2) 473-474.
46 UNEP, 'Legal Limits on Single-Use Plastics and Microplastics' (n 3).

More specifically, by letting individuals make their own decisions, these laws enable consumers to consider the cost of a plastic carrier bag. In other words, they enable homo economicus to take their own decisions.

According to the statistics, in more than 80 countries free plastic bags are banned now.[47] Several countries in Africa, South America, Asia, Europe and the Middle East have taxed particular types of plastic bags.[48] In some countries, even if the national/federal government has not passed a plastic bag law, local governments have some restrictions such as charges/taxes on free plastic bags.[49] Developing nations, as well as the developed ones, have also been using plastic bag charges/taxes to reduce plastic waste. In fact, some governments in the developing world passed such plastic bag regulations earlier than the countries in the global north.[50] There is no doubt that the inadequate infrastructure for waste management and recycling in developing countries may be seen as a key factor for such countries in restricting the use of free plastic bags.

Plastic bag charges/taxes may play a role in reducing the number of bags used by consumers. For example, in England, the use of plastic bags decreased 95% between 2015 and 2020 after the government introduced the law requiring the supermarkets to charge 5p for single use plastic bags. [51] In Ireland, the tax on plastic bags is strongly supported by the public and has decreased the use of plastic bags dramatically as well.[52] Bans on free plastic bags in developing African countries are also appreciated as successful. In Kenya, it is asserted that the strict ban on plastic bags brought about the saving of 100 million bags a year.[53] Another example can be Rwanda. In this country, the ban on plastic bags is seen as an important factor in making Kigali, the capital of Rwanda, one of the cleanest cities in the African continent.[54]

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47 ibid 10.

48 Rachel M Miller, 'Plastic Shopping Bags: An Analysis of Policy Instruments for Plastic Bag Reduction' (MSc Thesis, Universiteit Utrecht 2012) 13.

49 UNEP, 'Legal Limits on Single-Use Plastics and Microplastics' (n 3) 10.

50 Jennifer Clapp and Linda Swanston, 'Doing Away with Plastic Shopping Bags: International Patterns of Norm Emergence and Policy Implementation' (2009) 18(3) Environmental Politics 315

51 Rebecca Smithers, 2020, 'Use of plastic bags in England drops by 59% in a year' The Guardian (30 July 2020) <https://www.theguardian.com/environment/2020/jul/30/use-of-plastic-bags-in-england-drops-by-59-in-a-year> accessed 3 July 2022

52 Scientist Action and Advocacy Network (ScAAN), 'Effectiveness of Plastic Regulation Around the World' (2019) <https://plasticpollutioncoalitionresources.org/wp-content/uploads/2017/03/Effectiveness_of_plastic_regulation_around_the_world_4_pages.pdf> accessed 18 July 2022, 1-2.

53 Laura Parker, 'Plastic Bag Bans are Spreading. But are they Truly Effective?' National Geographic (17 April 2019) <https://www.nationalgeographic.com/environment/article/plastic-bag-bans-kenya-to-us-reduce-pollution> accessed 5 July 2022.

54 UNEP, 'Single-Use Plastics: A Roadmap for Sustainability (rev. 2)' (UNEP 2018) <http://hdl.handle.net/20.500.11822/25496> accessed 3 July 2022, 50.

However, although the number of governments restricting/banning free plastic bags is increasing dramatically, 'plastic pollution is still a [growing] global problem'.[55] There may be a myriad of reasons for this. First, even though plastic bag charges/taxes reduce plastic bag consumption in some countries, in other countries consumers continue using plastic bags even if they pay for them. For instance, in Botswana, the continuing willingness of the consumers to pay for plastic bags can serve as a good example for an ineffective plastic bag charges/taxes. Second, banning free plastic bags does not mean banning plastic bags.[56] Plastic bag charges/taxes focus only on the consumption of a particular type of single-use plastic bag. Such rules do not regulate the actual production of bags as well. Thus, even if these strategies succeed in reducing a certain type of plastic bag, plastic bag producing companies continue manufacturing those bags and some other bags not taxed by law.

Moreover, plastic bag charges/taxes are likely to make people use thicker re-usable bags, which may create a more harmful impact on the environment. According to statistics in some countries, even though plastic bag charges/taxes led to a decrease in consumption of single-use plastic bags, there has been an increase in the use of stronger reusable plastic bags.[57] With the impact of the taxes and charges on single-use plastic bags mentioned above, consumers have turned to re-usable thicker plastic bags designed to be used multiple times. Reusable plastic bags are not environmentally friendly either as their efficiency depends on how many times the consumers use them.[58]

Yet more importantly, plastic bag charges/taxes may seem unlikely to solve the plastic waste problem of most developing countries due to the global neoliberal economic system. Ongoing trade of plastic waste from the developed countries to the developing ones may be one example in this regard. Even if developing countries pass new laws to tax single use plastic bags these laws may not help them reduce the plastic pollution as plastic waste mostly from western countries continues to come. Although the governments of some of these countries passed laws to restrict the use of plastic bags, trading plastic waste is still a crucial problem.[59]

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55 Carole Excell, '127 Countries Now Regulate Plastic Bags. Why Aren't We Seeing Less Pollution?' World Resources Institute (11 March 2019) <https://www.wri.org/insights/127-countries-now-regulate-plastic-bags-why-arent-we-seeing-less-pollution> accessed 3 July 2022.

56 ScAAN (n 52) 4.

57 UNEP, 'Single-Use Plastics' (n 54) 27-44.

58 Kat Eschner, 'Reusable Grocery Bags Aren't as Environmentally Friendly as you Might Think' Popular Science (28 October 2020) <https://www.popsci.com/story/environment/single-use-plastic-misconceptions/> accessed 22 July 2022.

59 Kutoma Wakunuma, 'Plastic Waste is Hurting Women in Developing Countries – but There are Ways to Stop it' The Conversation (22 October 2021) <https://theconversation.com/

In many developing countries there are now restrictions on single use plastics. However, even though the governments of these countries pass new laws to ban free plastic bags, plastic waste is still a crucial problem. In this regard, Turkey can serve as a good example of this phenomenon in Europe. In 2018, with an amendment made in the Environmental Law No. 2872 free plastic bags were banned in supermarkets. The regulation, which requires supermarkets to charge TL 0.25 (of which 0.10 liras consist of factory cost and 0.15 liras for environmental projects) per a plastic bag, entered into force on January 1, 2019. In accordance with the regulation consumers are required to pay extra money for each plastic bag. With this law, the Turkish government aimed to prevent ecocide by decreasing plastic bag consumption since more than 200.000 tonnes of plastic bags were being used in the country per year. In fact, the law led to a dramatic decrease in the use of plastic bags in the country.[60]

However, even though plastic bag charges/taxes reduces the number of plastic bags being used by citizens, the plastic waste import of Turkey has increased recently.[61] Turkey's import of plastic waste from Europe has increased dramatically over the last few years.[62] For instance, plastic waste trade from the UK to Turkey has increased sharply in recent times.[63] In 2022, an experiment showed that recycled plastic products with tracking devices of one of the largest British retailer companies ended up, after a long journey, in Adana, in the south of Turkey.[64] It is alleged that these products are not properly recycled and pollute the environment in the country.

In addition to Turkey, there may be many examples to illustrate the increase in plastic waste exported from the developed countries to the developing ones.[65] Malaysia, Vietnam, Thailand and Indonesia can serve as some leading

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plastic-waste-is-hurting-women-in-developing-countries-but-there-are-ways-to-stop-it-166596#:~:text=Developing%20countries%20are%20likely%20to,into%20extreme%20poverty%20during%202021> accessed 3 July 2022.

60 Gokhan Ergocun, 'Turkey: Plastic Bag Use Down 50 pct with New Regulation' Anadolu Agency (4 January 2019) <https://www.aa.com.tr/en/economy/turkey-plastic-bag-use-down-50-pct-with-new-regulation/1355806#:~:text=Plastic%20bag%20usage%20in%20Turkey,urbanization%20minister%20said%20on%20Friday.> accessed 21 July 2022.

61 Kathryn Snowdon, 'UK Plastic Waste being Dumped and Burned in Turkey, says Greenpeace' BBC News (17 May 2021) <https://www.bbc.co.uk/news/uk-57139474> accessed 21 July 2022.

62 Selin Ugurtas, 'Why Turkey became Europe's garbage dump' Politico (18 September 2020) <https://www.politico.eu/article/why-turkey-became-europes-garbage-dump/> accessed 21 July 2022.

63 ibid.

64 Kit Chellel and Wojciech Moskwa, 'A Plastic Bag's 2,000-Mile Journey Shows the Messy Truth About Recycling' Bloomberg (29 March 2022) <https://www.bloomberg.com/graphics/2022-tesco-recycle-plastic-waste-pledge-falls-short/> accessed 21 July 2022.

65 Wakunuma (n 59).

examples in this respect.[66] Most of these countries have introduced plastic bag charges/taxes based upon the concept of homo economicus.[67] For instance, even though single use plastic bags are banned in Jakarta, most of the plastic waste from western countries goes to Indonesia.[68] Waste from the developed world, such as Germany, Australia, the Netherlands and the UK, to Indonesia increased considerably over the last few years.[69]

In order to fight the plastic waste problem in the developing world, there is indubitably a need for international regulations. Nation-states, both the developing and developed ones need to agree upon an international treaty to reduce the production of plastics and plastic waste export.[70] However, even if nations agree upon an international treaty to reduce plastic waste, this treaty may not be successful in ending plastic waste, as plastic is still the cheapest and easiest to use material for homo economicus. Such treaty may be insufficient to prevent the exportation of plastic waste to the developing world since plastics are often transported to developing countries illegally.[71] Therefore, the concept of homo economicus deserves a further critique.

1. Critique of Homo Economicus

More important critiques of plastic bag charges/taxes may be related to the concept of homo economicus on which the global neoliberal policies are built. In fact, listing the shortcomings of homo economicus can help us to contemplate to what extent plastic bag charges/taxes are likely to be sufficient in the war against the global plastic waste.

Urbina and Ruiz-Villaverde clearly list the problematical aspects of homo economicus.[72] One criticism originates from behavioural economics.

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66 Greenpeace, 'Data from the Global Plastics Waste Trade 2016-2018 and the Offshore Impact of China's Foreign Waste Import Ban' (23 April 2019) <https://www.greenpeace.org/eastasia/publication/5907/data-from-the-global-plastics-waste-trade-2016-2018-and-the-offshore-impact-of-chinas-foreign-waste-import-ban/> accessed 21 July 2022, 1.

67 UNEP, 'Single-Use Plastics' (n 54).

68 Interpol, 'Emerging Criminal Trends in the Global Plastic Waste Market since January 2018' (Interpol 2018) <https://www.interpol.int/en/News-and-Events/News/2020/INTERPOL-report-alerts-to-sharp-rise-in-plastic-waste-crime> accessed 21 July 2022,

69 ibid 13.

70 In March 2022, the commitment by the States to build a legally binding treaty to reduce plastic waste at the United Nations Environment Assembly of the UNEP can be an important step in this regard. United Nations Environment Assembly of the UNEP, 'End Plastic Pollution: towards an International Legally Binding Instrument' (7 March 2022) UNEP/EA.5/Res.14

71 Jake Kwoon, 'South Korea's Plastic Problem is a Literal Trash Fire' CNN (3 March 2019) <https://edition.cnn.com/2019/03/02/asia/south-korea-trash-ships-intl/index.html> accessed 16 August 2022; Interpol (n 67).

72 Dante A Urbina and Alberto R Villaverde, 'A Critical Review of Homo Economicus from Five Approaches' (2019) 78(1) American Journal of Economics and Sociology 63

Behavioural economics, argue that humans suffer some cognitive and non-cognitive biases.[73] From this perspective, in some circumstances, it is possible to claim that homo economicus may not act rationally even if they have enough information.[74] Individuals occasionally make mistakes as they have partial data, and sometimes they modify their decisions according to their culture. Individuals may not also spend sufficient time in thinking about the consequences of their choices. Therefore, today, many governments in different countries use behavioural regulatory strategies, such as nudging, to steer the bad choices of their citizens.[75] In such strategies, paternalistic governments aim to help or control the thoughts of individuals while they are making choices.[76]

Second, with respect to the choices of homo economicus there may be another question: Can individuals take decisions without any social considerations? There is no doubt that as social creatures, individuals can also be depicted as homo sociologicus (sociological humans).[77] Social relations and values may affect the decisions of homo economicus. Individuals, for example, individuals may consider what other people think about their behaviour.[78] According to a research about psychological predictors of plastic bag consumption, individuals who care about their physical appearance are more likely to purchase plastic bags.[79] In the same research, it is highlighted that young people are inclined to pay extra money for a plastic bag. These findings show that the decisions of homo economicus may differ according to the social groups to which they belong. In other words, social factors may affect the decisions of individuals.

Third, regulatory strategies based upon the concept of homo economicus can be criticised for being anthropocentric. In anthropocentricism, human needs, rather than the needs of the environment, are considered as the central factor in decision making.[80] This approach seems to reflect the main philosophy of liberalism in which nature is understood as useful for human needs. In strategies like plastic bag charges/taxes, consumers who may agree to pay additional money for plastic bags are free to create plastic waste in the ecosystem for their own needs. In other words, homo economicus can take decisions 'at the

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73 ibid 67.

74 Peter Fleming, The Death of Homo Economicus: Work, Debt and the Myth of Endless Accumulation (Pluto Press 2017) 105.

75 Will Leggett, 'The Politics of Behaviour Change: Nudge, Neoliberalism and the State' (2014) 42(1) Policy & Politics 3

76 ibid 8.

77 Irene CL Ng and Lu-Ming Tseng, 'Learning to be Sociable: The Evolution of Homo Economicus' (2008) 67(2) American Journal of Economics and Sociology, 265

78 ibid 273-277.

79 Rosa Lavelle-Hill and others, 'Psychological and Demographic Predictors of Plastic Bag Consumption in Transaction Data' (2020) 72 Journal of Environmental Psychology 101473

80 Heywood (n 11) 113.

expense of the environment'.[81] In fact, some of these decisions may even create negative consequences for homo economicus individuals themselves in the long run. It can even be claimed that individuals' short-term myopic decisions can be one of the reasons for today's environmental degradation.[82]

The decisions taken by homo economicus do not only affect their life but also affect the needs of future generations. In this regard, even if individuals can be free to make their own choices, one may ask whether they are free to make choices on behalf of future generations. In fact, homo economicus may contradict sustainability. In accordance with the concept of sustainability, individuals are supposed to consider the needs of future generations. According to the United Nations Brundtland Commission, sustainability means 'meeting the needs of the present without compromising the ability of future generations to meet their own needs'.[83] This definition clearly highlights the necessity that individuals are expected to consider the needs of future generations. That point of view exceeds the short-sighted nature of homo economicus. Sustainable decisions can be seen as beyond the economic interests of individuals. It is also clear that letting individuals take decisions that are associated with the interests of the next generations may not be sustainable. Thus, two concepts, sustainability and homo economicus, are likely to contradict each other.

Plastic bag charges (and other neoliberal regulatory strategies relying upon homo economicus) see individuals as self-interested creatures. If individuals are expected to act like entrepreneurs, it is likely to see them who jeopardise the common heritage of humanity for their own short-term interests. Plastic bag charges/taxes are based upon the neoliberal philosophy that individuals perceive almost everything from a commercial perspective. Therefore, even the environment is commodified and commercialised from this perspective. As Lemke highlights, in neoliberalism, nature has been commercialised and become exploitable as well.[84]

Finally, yet importantly, neoliberal strategies like plastic bag charges/taxes based upon homo economicus are unlikely to stop the plastic waste problem especially in developing countries. Unquestionably, plastic waste does not only stem from the use of plastic bags. In daily life plastic is an inseparable part of

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81 Sirca S Gogus, 'Can "Homo Economicus" Help Save the Environment?' Climate Exchange (20 September 2014) <https://climate-exchange.org/2014/08/20/can-homo-economicus-help-save-the-environment/> accessed 21 July 2022.

82 Urbina and Villaverde (n 71) 78.

83 World Commission on Environment and Development, 'Our Common Future' (Oxford University Press 1987) 383.

84 Thomas Lemke, 'Foucault, Governmentality, and Critique' (Rethinking Marxism Conference, University of Amherst, 21-24 September 2002) <http://www.thomaslemkeweb.de/publikationen/Foucault,%20Governmentality,%20and%20Critique%20IV-2.pdf> accessed 18 July 2022, 8.

the items that we use. Thus, plastic bag charges/taxes may not be sufficient to solve the plastic waste problem. Moreover, plastics compare to other materials are cheap as well. Hence, neoliberal strategies make individuals turn towards plastics. Such strategies that rely upon homo economicus produce mere economic subjects. Thus, in this neoliberal world, in which people act as self-interested entrepreneurs, the export of plastic waste from rich countries to poor countries proliferates dramatically.[85]

From both the perspective of the exporting developed country government and importing developing country governments, the concept of homo economicus constitute the main justification for such neoliberal strategies. As highlighted above, many governments tend towards neoliberal strategies like plastic bag charges/taxes. Undoubtedly, economic benefits of plastics play a role in this respect. Rather than banning the production of certain types of plastics, neoliberal strategies expect homo economicus to take decisions with respect to plastic consumption. Whereas these strategies aim at making individuals more responsible for their consumption habits, they do not focus on reducing the production of plastics. In this regard, in some of the developed countries, companies, such as the ones producing consumer goods and making a profit from fossil fuels, enjoy a lack of strict regulations to reduce the production of single-use plastics.[86] In developing countries, on the other hand, the economic revenue from the plastic waste sector makes governments less eager to pass strict laws as hundreds of thousands of people are employed in this sector.[87] Therefore, developing countries become the final destination of the plastic waste.

CONCLUSION

The current study puts an emphasis upon regulatory developments in favour of the free choices of individuals. In this regard, governments' tendencies to use strategies based upon homo economicus, more specifically plastic bag charges/taxes, are analysed to criticise neoliberalism. The main point made in this study is that even though plastic bag charges may play a role in reducing the consumption of plastic bags to some extent, they do not aim to change the philosophy of neoliberalism which is causing plastic waste. The laws passed by governments charging fees for the use of plastic bags show how the governments make individuals responsible for plastic pollution. Such laws enable homo economicus to take a decision about the money to spend for an extra plastic bag. In this respect, self-interested home economicus is expected

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85 Greenpeace (n 66).

86 Kate Lin, 'Why Plastic Pollution is an Environmental Justice Issue' Greenpeace (23 April 2019) <https://www.greenpeace.org/international/story/21792/plastic-waste-environmental-justice/> accessed 15 August 2022.

87 Wakunuma (n 59).

to take economically rational decisions that may affect the consumption of plastic bags.

Despite the arguments of both liberalism and neoliberalism in favour of free choices of homo economicus, homo economicus should not be completely free to take decisions that may affect future generations. Regulatory strategies investigated in this study, based upon the free choices of homo economicus, contradict the concept of sustainability. These strategies, which enable customers to take decisions to pay extra money for a plastic bag, allow them to contribute to environmental degradation. Sustainability requires taking decisions without harming the environment for future generations. Thus, it is significant to keep in mind that today's homo economicus does not have a right to take decisions on behalf of generations to come.

Furthermore, although the globalisation of plastic bag charges can be seen as a good development in reducing the use of plastic bags, the global neoliberal system plays a crucial role in the creation of the plastic waste problem in the developing world. Even if some countries, especially developing ones, have plastic bag charges/taxes in practice, they suffer more than rich developed countries in terms of plastic waste. Strategies like plastic bag charges/taxes seem to fail to be adequate in stopping plastic pollution and protecting the environment in developing countries since neoliberalism itself seems to reproduce environmental degradation. Thus, there is a need for much more robust policies to reduce the production of plastic products, rather than neoliberal policies that are based upon homo economicus.

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BINDING ARBITRATION OF DISPUTES ARISING FROM SPACE ACCIDENTS

Uzay Kazalarından Doğan Uyuşmazlıkların Zorunlu Tahkim Yoluyla Çözülmesi

İnan ULUÇ*

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ABSTRACT

The desire to discover space's unique environment, mine its resources, and changes in national regulations in favor of private enterprises have brought about significant technological advancement. This technological advancement has concomitantly helped humanity to exponentially increase its presence and activities in space. Alas, the law as to outer space has failed to precede this progress. The existing space legal regime is centered around States' dominance in space and comprised of mechanisms purposed to resolve disputes between two or more States. Hence, it is bereft of effective procedures for the resolution of disputes among private actors, international organizations, and other non-governmental bodies with satellites and spacecrafts in outer space. In this respect, whilst outer space emerges as a new habitat where state and non-state actors are compelled to co-exist, how humanity will address unavoidable, extraterrestrial disputes between these actors becomes a pressing concern. Notably, the non-appropriable nature of space, the cornucopia of actors operating in it, and the abstruse nature of space-related disputes demand a resolution mechanism that may be readily adjusted to protect the interests of public or private enterprises. In light of this, this article assesses the viability of arbitration as an effective means of dispute settlement for accidents that occur in outer space. More specifically, this article analyzes the current international regulations as to outer space, the dispute resolution mechanisms enshrined in them, and how arbitration may play a key role in the effective and efficacious resolution of disputes in space accident cases.

Key Words: The Outer Space Treaty, the Liability Convention, Dispute Resolution Mechanisms, Arbitration.

There is no requirement of Ethics Committee Approval for this study.

* Assist. Prof. Dr., Ankara Sosyal Bilimler Üniversitesi Hukuk Fakültesi, Medenî Usûl, İcra ve İflâs Hukuku Anabilim Dalı, e-mail: inan.uluc@asbu.edu.tr, ORCID ID 0000-0001-6261-3142

ÖZET

Uzayın sıra dışı yapısını keşfetme ve minerallerinden faydalanma isteği, özel sektör lehine yapılan ulusal düzenlemeler ve teşvikler sonrası önemli teknolojik atılımlar elde edilmiştir. Bu atılımlar sayesinde insanoğlu uzaydaki varlığını ve etkinliğini de önemli ölçüde arttırmıştır. Ne yazık ki, uzay hukuku bu gelişmelerin gerisinde kalmıştır. Mevcut uluslararası düzenlemeler ve bu düzenlemelerin benimsediği uyuşmazlık çözüm metotları devlet merkezli bir anlayışla kaleme alınmış, uzayda faaliyet gösteren özel hukuk kişileri ve onların menfaatleri dikkate alınmamıştır. Bu durum özel sektörün uzaydaki varlığını önemli ölçüde arttırmasıyla birlikte daha da önem arz eden bir hale gelmiş, mağdurunun ve/veya failinin özel hukuk tüzel kişisi olduğu uzay kazalarının hangi uyuşmazlık çözüm metodu ile daha etkili ve etkin bir şekilde çözüme kavuşturulabileceği tartışılmaya başlanmıştır. Bu metodun tespitinde uzayın devletlerin egemenliğine tabi olmayan yapısı, uzayda faaliyet gösteren aktörlerin çeşitliliği ve uzay kazalarından doğacak uyuşmazlıkların karmaşık yapısı dikkate alınmalı, esnek ve somut olayın özelliklerine ve tarafların tercihlerine göre düzenlenebilecek ve uzayda faaliyet gösteren gerek kamu gerekse özel hukuk tüzel kişilerinin menfaatlerini koruyabilecek bir uyuşmazlık çözüm sistemi tercih edilmelidir. Bu bağlamda işbu makalede uzaya ilişkin uluslararası düzenlemeler, bu düzenlemelerce benimsenmiş uyuşmazlık çözüm metotları, bu metotların noksanlıkları incelenmiş olup, tahkimin neden bu metotların yerine tercih edilmesi gerektiği ve uzay kazalarından doğan uyuşmazlıkların etkili ve etkin çözümünde oynayabileceği rol analiz edilmiştir.

Anahtar Sözcükler: Uzay Anlaşması, Sorumluluk Sözleşmesi, Uyuşmazlık Çözüm Mekanizmaları, Tahkim.

INTRODUCTION

Space constitutes physically and legally a unique environment for humanity. It is still difficult and financially burdensome to get to, not survivable for humankind without special paraphernalia, and even perilous for satellites and robots to operate in. Yet, these drawbacks have not dispirited humanity from endeavoring to escape gravity and venture beyond the perceived limits of Earth. With the defiance of gravity and risks have come the invention of tools and technologies both transforming our world and helping to realize sustainable development goals.[1]

While this defiance was spearheaded by the United States and the former Soviet Union in the early years of space exploration,[2] there are currently

[1] Does Earth's Future Depend on Space? <https://www.morganstanley.com/ideas/space-earth-sustainability> accessed 4 August 2022 ("While increased space exploration could certainly present new sustainability issues – space debris and the potential impact of increased launches on the atmosphere among them – there are many potential benefits emerging from the space theme such: •Food security; •Greenhouse-gas monitoring; •Utilities; Access to Renewable Energy; •Supply- Demand Optimization; •Internet Access for Billions of People;•Tertiary Benefits.").

[2] George Khoukaz, 'ADR That is Out of This World: A Regime for the Resolution of Outer-

more than 30 countries with significant space industries and new States yet to come.[3] Further, with States' policies to foster a private aerospace sector,[4] there is an ever-increasing number of privately-funded outer space endeavors.[5] Currently, it is believed that there are globally more than 10,000 space-focused companies, 55.82% of which are from the United States.[6]

Further, pursuant to the reports published by prominent financial institutions, the global space economy's value reached US$424 billion in 2020, having

Space Disputes' (2018) 2018(1) Journal of Dispute Resolution 265, 265-266.

3 One of these new States implementing a national space program is Türkiye. Under the leadership of the Turkish Space Agency, Türkiye aims to enhance its indigenous technological capabilities and increase its existence and operations in outer space. For further information, *see* <https://tua.gov.tr/en/national-space-program> accessed 5 August 2022.

4 For example, the Commercial Space Launch Act 51 U.S.C. § 50901(a)(7) (1984) ("[T]he United States should encourage private sector launches, reentries, and associate services and, only to extent necessary, regulate those launches, reentries, and services to ensure compliance with international obligations of the United States and to protect the public health and safety, safety of property, and national security and foreign policy interests of the United States."). *See also* Carson W. Bennett, 'Houston, We Have an Arbitration: International Arbitration's Role in Resolving Commercial Aerospace Disputes' (2019) 19(1) Pepperdine Dispute Resolution Law Journal 61, 64 ("President George W. Bush signed Executive Order 13326 that created the Commission on Implementation of United States Space Exploration Policy (Commission). The Commission's final report recommended that 'NASA's role must be limited to only those areas where there is irrefutable demonstration that only government can perform the proposed activity' and that 'the preferred choice for operational activities must be competitively awarded contracts with private [companies].'").

5 Bennett (n 4) 63 ("Space, once the exclusive domain of national space programs, is now becoming a crowded marketplace with ambitious businessmen seeking to change the world (and turn a profit) [...]. Today, a new group of 'Space Barons' featuring Elon Musk, Jeff Bezos, and Sir Richard Branson, have started a new space race and raised the stakes. The initial vision of the [Google Lunar] XPrize was commercial space travel, but these young companies – Space Exploration Technologies (SpaceX), Blue Origin, Virgin Atlantic, Virgin Orbit, and Vulcan Aerospace (now Stratolaunch) – have started exploring new ways to launch commercial satellites, send supplies (and crew members) to the International Space Station, and are even attempting to colonize Mars."); Svetla Ben-Itzhak, 'Companies are commercializing outer space. Do government programs still matter?' *The Washington Post* (Washington, 11 January 2022)<https://www.washingtonpost.com/politics/2022/01/11/companies-are-commercializing-outer-space-do- government- programs-still-matter/> accessed 4 August 2022 ("2021 was a big year for private companies and space travel, and 2022 will probably be just as busy. Last year, three companies – SpaceX, Blue Origin and Virgin Galactic – achieved key feats in space travel previously reserved for countries. They transported astronauts to the International Space Station, flew space enthusiasts into space, delivered cargo to low Earth orbit and developed reusable booster rockets.").

6 John Koetsier, 'Space Inc: 10,000 Companies, $4T Value…And 52% American' *Forbes* (22 May 2021) <https://www.forbes.com/sites/johnkoetsier/2021/05/22/space-inc-10000-companies-4t-value--and-52- american/?sh=1f90d38e55> accessed 4 August 2022.

expanded 70% since 2010.[7] Also, it is projected that the space industry could generate US$ 1 trillion or more in annual revenue by 2040.[8]

Alas, the considerable strides that have been made in outer space have not been witnessed in the legal sphere. Though private enterprises from varying nations pierced States' dominance in outer space and emerged as co-players/ partners, the existing international treaties as to space realm and activities have stagnated since Cold War. They have maintained their focus on preserving peaceful relations between spacefaring nations, namely the United States and the Soviet Union, and have failed to espouse revisions corresponding to the shifting dynamics of space exploration and the developing diversity among both actors operating in space and interests in space assets.[9]

To date, this stagnation has not become the center of attention mainly because there have been no significant international disputes arising out of outer space accidents that have inflicted severe economic damage on States or private actors. Yet, along with both the increasing number of satellites and spacecrafts launched into space[10] and space debris originating from purposeful

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7 Michael Sheetz, 'The space industry is on its way to reach $1 trillion in revenue by 2040, Citi says' *CNBC* (21 May 2022)<https://www.cnbc.com/2022/05/21/space-industry-is-on-its-way-to-1-trillion-in-revenue-by-2040- citi.html#:~:text=America%20and%20others.,The%20global%20space%20economy's%20value%20reached%20%24424%20billion%20in%202020,satellite%20sector%2C%E2%80%9D%20Citi%20said> accessed 4 August 2022.

8 Ibid.

9 Henry R. Hertzfeld and Timothy G. Nelson, 'Binding Arbitration as an Effective Means of Dispute Settlement for Accidents in Outer Space' (2013) 2013 Proc. Int'l Inst. Space L. 129, 130 ("The set of international space treaties were negotiated and ratified during the early period of human space activity in the 1960s and early 1970s and reflect the drafters' focus on government rather than commercial uses of space."); Jack Busby, 'Dispute resolution in a vacuum? Arbitration's role in resolving space disputes' (*Allen&Overy*) <https://www.allenovery.com/en-gb/global/news-and-insights/international- arbitration-review/dispute-resolution-in-a-vacuum-arbitrations-role-in-resolving-space-disputes> accessed 4 August 2022 ("Much like the onset of the digital age, the space industry is developing at a faster pace than the supporting legal framework. The international legal regime governing liability for incidents in outer space is directed at States and is out-of-date, with no specific regulation on the rights and obligations of private enterprises.").

10 Busby (n 9) ("2021 was a record-breaking year in the space industry. It witnessed the most active satellites in orbit (over 4,000); the most successful orbital missions (134); the most space tourist flights (6); the most people in weightless space at the same time (19); the most SpaceX rocket launches (31); and the launch of the world's most powerful space telescope (James Webb Space Telescope). There were 7,389 individual satellites – active and inactive – in Space at the end of April 2021, which is an increase of 27.97% compared to 2020.").

acts[11] or collisions,[12] the potential for space accidents grows yearly. This potential inevitably prompts a question as to the existence and adequacy of dispute resolution mechanisms embraced by the international space treaties governing liability for outer space accidents. Indeed, as will be discussed in further detail below, only one of the five major international treaties makes any mention of a dispute resolution mechanism, which can only be initiated by state parties, and, even then, the outcome of the mentioned mechanism is non-binding.

In the face of this legal black hole, this article explores the role that may be played by arbitration and discusses whether arbitration may constitute a venue where both commercial and government interests in space are catered to. Specifically, Part I analyzes the major treaties governing the space realm and activities. Part II examines the tools at States' disposal to resolve space accidents. Finally, Part III addresses the current stance of arbitration in the present matrix of outer space dispute resolution mechanisms and looks at how arbitration may fill the very black legal hole in the system.

I. CURRENT STATE OF SPACE LAW

To better understand the reasons why arbitration may play an essential role in the resolution of space disputes, it is of importance to analyze the current space legal regime, which is comprised of the five United Nations (the "U.N.") treaties, the U.N. resolutions, the documents issued by the Committee on the

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11 For example, in November 2021, Russia conducted a strike against a Soviet-era satellite in space. According to the data shared by the U.S. State Department spokesman, the anti-satellite test generated more than 1,500 pieces of trackable debris and hundreds of thousands of pieces of smaller orbital debris that threaten the interests of all nations. For further information, *see* Paul Sonne, Missy Ryan and Christian Davenport, 'In first, Russian test strikes satellite using Earth- based missile' *The Washington Post* (16 November 2021) <https://www.washingtonpost.com/national-security/russia- satellie-weapon/2021/11/15/0695621c-4648-11ec-973c-be864f938c72_story.html > accessed 4 August 2022.

12 Space Debris and Human Spacecraft <https://www.nasa.gov/mission_pages/station/news/orbital_debris.html> accessed 4 August 2022 (On Feb. 10, 2009, a defunct Russian spacecraft collided with and destroyed a functioning U.S. Iridium commercial spacecraft. The collision added more than 2,300 pieces of large, trackable debris and many smaller debris to the inventory of space junk."); United Nations General Assembly: Committee on the Peaceful Uses of Outer Space: Note verbal dated 3 December 2021 from the Permanent Mission of China to the United Nations (Vienna) addressed to the Secretary General <https://www.unoosa.org/res/oosadoc/data/documents/2021/aac_105/aac_1051262_0_html/AAC105_1262E.pdf> accessed 4 August 2022 ("Starlink satellites launched by Space Exploration Technologies Corporation (Space X) of the United States of America have had two close encounters with the China Space Station. For safety reasons, the China Space Station implemented preventive collision avoidance control on 1 July and 21 October 2021, respectively.").

Peaceful Uses of Outer Space (the "COPUOS"), bilateral and multilateral agreements, and national space regulations.[13]

The treaties that amount to the legal foundation of all space activities are as follows:

- The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the Outer Space Treaty);
- The 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (the Rescue Agreement);
- The 1972 Convention on International Liability for Damage Caused by Space Objects (the Liability Convention);
- The 1976 Convention of Registration of Objects Launched into Outer Space (the Registration Convention); and
- The 1984 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the Moon Agreement)

Of these five treaties, the Outer Space Treaty and the Liability Convention remain to be the motherships of international space law. Thus, these two treaties will be the center of our analysis under this title.

A. The Outer Space Treaty[14]

Negotiated and drafted during the heightened political tensions of the Cold War, the Outer Space Treaty is mainly the materialization of efforts by the United States and the former Soviet Union to establish ground rules and minimum standards with the aspiration of de-escalating the potential confrontation.

The Outer Space Treaty was largely based on the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space[15] and was opened for signature in 1967. Notably, despite being an echo of the Cold War era and the geopolitical interests of the two superpowers,

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13 National space legislations and bilateral and multilateral agreements lie outside of the scope of this article. Thus, the United Nations' treaties constitute the subject matter of the analysis conducted under this title. However, more information as to national space legislations and bilateral and multilateral agreements may be found at the Office for Outer Space Affairs' website; https://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw.html.

14 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies ('Outer Space Treaty') (1967) <https://www.unoosa.org/pdf/gares/ARES_21_2222E.pdf>.

15 U.N. G.A. Res. 1962 (XVIII), the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space <https://www.unoosa.org/oosa/en/ourwork/spacelaw/principles/legal-principles.html>.

since it entered into force,[16] the Outer Space Treaty has been ratified by over 100 countries and is referred to as the constitution of international space law.[17]

With the emphasis it places upon free and equal access to and use of outer space,[18] international cooperation,[19] and purposing to benefit all humanity,[20] the Outer Space Treaty is believed to conserve space as an international domain and evade 'land grab' and colonialism.[21]

From a pertinent legal perspective, the Outer Space Treaty both establishes international responsibility for signatory States and addresses their liability in case of harm inflicted upon another contracting state or upon its natural or juridical persons, by an object which they launched or procured the launching of into outer space. More specifically, Article VI places international responsibility upon signatory States for their national activities in outer space, including the Moon and other celestial bodies, whether such activities are conducted by public or private entities.[22] Apropos of liability, according to

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16 Khoukaz (n 2) 272; Status of International Agreements relating to activities in outer space as at 1 January 2022 (A/AC.105/C.2/2022/CRP.10) <https://www.unoosa.org/res/oosadoc/data/documents/2022/aac_105c_22022crp/aac_105c_22022crp_10_0_html/AAC105_C2_2022_CRP10E.pdf>.

17 Stefan Pislevik, 'Law Without Gravity: Arbitrating Space Disputes at the Permanent Court of Arbitration and the Relevance of Adverse Inferences' (2019) 43(2) Journal of Space Law 280, 284; Khoukaz (n 2) 272.

18 The Outer Space Treaty (n 14) Article I ("(1) The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind; (2) Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies."). Additionally, by providing that outer space is not subject to national appropriation through claim of sovereignty, the Outer Space Treaty further emphasizes the importance it attaches to every nation's equal and free access to and use of outer space. Article II of the Treaty States that "[o]uter space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."

19 ibid Article I ("(3) There shall be freedom of scientific investigation in outer space, including the Moon and other celestial bodies, and States shall facilitate and encourage international co-operation in such investigation."). In addition to Article I, Articles IX, X, XI, and XII also aim to elevate international co-operation among States signatory to the Treaty.

20 Preamble of the Outer Space Treaty ("*Believing* that the exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of their economic or scientific development.").

21 Matthew J.P. Horton, 'Consolidating Space: A Proposal to Establish a Central Forum for the Settlement of Space-Related Disputes' (2020) 22(3) Vanderbilt Journal of Entertainment & Technology Law 627, 634.

22 The Outer Space Treaty (n 14) Article VI ("State Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and

Article VII, a signatory state will be held liable for damages caused by a space object that the state has either launched or assisted in its launching.[23]

The Outer Space Treaty still maintains its status as the cornerstone in the regulation of activities in space. However, changing dynamics of the space race and the emergence of new issues that were not foreseen then pose a great test for the Treaty in terms of adequacy and enforcement issues.

First, despite being the most comprehensive treaty regulating space activities, the Outer Space Treaty does not reflect the current commercialization of outer space by private companies. While the Treaty does not prohibit the activities of private enterprises in space, it places its primary focus on States. This failure inevitably deprives the Treaty of the competence to cater to the interests of private entities with assets in space. Second, this state-oriented perspective concomitantly limits the dispute settlement procedures to primarily diplomatic negotiations (direct diplomacy), which may resolve state-to-state disputes, but may easily become futile for disputes involving or between private entities.

Undoubtedly, these primary shortcomings, which cast doubt upon the Treaty's adequacy today, may be correlated with the period in which it was created. As stated before, this Treaty was negotiated and drafted under rather extraordinary circumstances of the Cold War with a noble objective to de-escalate military confrontation and prevent the armament of outer space. Thus, the priority of the drafters was understandably not to herald and regulate a new space era. The end of the Cold War, however, marked the beginning of the new space era, which is increasingly commercialized by private enterprises[24] and militarized by States.[25] In this respect, while the Outer Space Treaty thankfully lays the groundwork for tackling the militarization of space by States, its

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other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring those national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.").

23 ibid Article VII ("Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the Moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or outer space, including the Moon and other celestial bodies.").

24 Trevor Kehrer, 'Closing the Liability Loophole: The Liability Convention and the Future of Conflict in Space' (2019) 20(1) Chicago Journal of International Law 178, 189-190.

25 ibid 190-191.

failure to regulate the rights, obligations, and dispute settlement of private enterprises creates a substantial lacuna and inhibits its functionality. As will be discussed in further detail below, the Outer Space Treaty falls short from a legal standpoint when it comes to facilitating the economic exploitation of outer space.[26]

B. The Liability Convention

The Outer Space Treaty established the foundation for a system of international liability for damages caused by objects in outer space, but did not set forth rules regarding the liability regime and its operation. This task was instead assigned to the Liability Convention. The Liability Convention essentially expounds upon Article VII of the Outer Space Treaty and "elaborate effective international rules and procedures concerning liability for damage caused by space objects and to ensure, in particular, the prompt payment under the terms of [the] Convention of a full and equitable measure of compensation to victims of such damage."[27]

The liability addressed by the Convention is that of "launching States"[28] towards foreign States and their nationals. Notably, a launching State shall not bear international liability if the damage is inflicted upon the launching State's own nationals or foreign nationals who participate in the operation of the space object in question.[29] The damage that will result in the launching State's liability is defined as "loss of life, personal injury or other impairment of health; or loss of or damage to property of States or persons, natural or juridical, or property of international intergovernmental organizations."[30]

As to the extent of a launching State's liability, the Convention embraces different standards premised on the location where the damage occurred. Article II implements a strict liability standard for any damage that is caused

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26 Rachel O'Grady, 'Star Wars: The Launch of Extranational Arbitration?' (2016) 82(4) CIArb Arbitration Journal 3.

27 Convention on International Liability for Damage Caused by Space Objects ('Liability Convention') (1972), Preamble <https://www.unoosa.org/pdf/gares/ARES_26_2777E.pdf>.

28 ibid Article I ("For the purposes of this Convention: (c) The term 'launching State' means: (i) A State which launches or procures the launching of a space object; (ii) A State from whose territory or facility a space object is launched.").

29 ibid Article VII ("The provisions of this Convention shall not apply to damage caused by a space object of a launching State to: (a) Nationals of that launching State; (b) Foreign nationals during such time as they are participating in the operation of that space object from the time of its launching or at any stage thereafter until its decent, or during such time as they are in the immediate vicinity of a planned launching or recovery area as the result of an invitation by that launching State.").

30 ibid Article I.

"on the surface of the Earth or to aircraft in flight."[31] Article III, on the other hand, espouses a negligence standard according to which a launching state shall be liable if the damage is caused "in outer space" due to the launching State's fault or the fault of persons for whom it is responsible.[32]

Besides establishing the liability and compensation regime, the Liability Convention also accords a means by which disputes arising out of space accidents may be settled. Following the occurrence of an actionable harm, a claim by a damaged state should be presented to a launching State through diplomatic channels[33] within one year following the date of the occurrence of the damage or the identification of the launching State which is liable.[34] Diplomatic negotiations are expected to take place thereafter. Should the negotiations come to no fruition, the parties concerned establish a claims commission,[35] which shall be composed of three members: one appointed by each party (or collection of parties) and one chosen jointly.[36] If one State fails to appoint its member within 2 months, the other State may request the Secretary-General of the United Nations to constitute a single-member claims commission.[37] After its constitution, the commission issues its decision within one year, which shall be final and binding if the parties have so agreed.[38]

As seen, the Liability Convention purposes to both orderly settle disputes among States and equitably redress damages inflicted by space objects.[39] It is, however, believed that neither of these purposes is fully actualized. The reasons why the Convention fails to actualize the former purpose will be discussed under the title concentrating on the current means to resolve space accident cases. Thus, the following paragraphs will delve into the problems inhibiting the Liability Convention's ability to actualize the latter purpose.

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31 ibid Article II ("A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight."). Here, it should be noted that Article VI of the Convention furnishes exoneration from strict liability imposed under Article II. According to Article VI, "exoneration from absolute liability shall be granted to the extent that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents."

32 ibid Article III ("In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.").

33 ibid Article IX.

34 ibid Article X.

35 ibid Article XIV.

36 ibid Article XV.

37 ibid Article XVI.

38 ibid Article XIX.

39 Kehrer (n 24) 181.

The first problem is the Convention's lack of standard whereby 'fault' may be judged. As touched upon before, Article III embraces a fault-based liability regime for the damages that occurred in outer space. Thus, for compensation to be owing to a victim state injured by a space object in outer space, the elements of causation, damage, and more notably, proof of fault must be satisfied.[40] Alas, the Convention does not define fault or, at least, establish a standard of care according to which a launching State's conduct(s), which resulted in harm, may be judged. It is possible to resort to the general principles of law to interpret fault under the Liability Convention. Yet, whether this is the suitable interpretation of fault for the purposes of the Convention is to remain unclear. Considering that the exploration and exploitation of outer space will continue, a clear and consistent legal regime must be developed. With the development of proper interpretation of Article III, the Liability Convention may operate as intended and may serve its purpose of providing an effective liability and compensation regime.[41]

The second problem with the Convention's liability regime is rooted within the strict liability standard implemented under Article II. Article II attributes strict liability to a launching State for damage caused by its space object on the surface of Earth or to aircraft in flight. With this wording, Article II deviates from analogous international law's liability standard, which recognizes 'control' as the essential element of responsibility[42] and links a State's liability to the mere ownership or assistance in launching the space object.[43]

It is unknown whether this deviation from the control-based liability standard was intentional. It is, however, believed that the drafters' failure to envisage probable changes in the character and volume of human spatial activities contributed to the departure. Today, the bar to access to space has

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40 Joel A. Dennerley, 'State Liability for Space Object Collisions: The Proper Interpretation of 'Fault' for the Purposes of International Space Law' (2018) 29(1) The European Journal of International Law 281, 282.

41 For an in-depth analysis of the lack of fault's definition under the Liability Convention, *see* ibid.

42 Kehrer (n 24) 181 ("The customary law of war at sea provides that whichever state takes control of a ship via capture also assumes ownership and responsibility for it. Moreover, under the U.N. Convention on the Law of the Sea, individuals who seize ships for private ends are pirates subject to any penalties an apprehending state sees fit, and their stolen ships are understood to be pirate ships while under pirate control…Thus, the customary law of the sea comprehends that responsibility for harm flows not from ownership, but from effective control.").

43 ibid 203 ("[U]nder the Liability Convention, the legal liability does not flow from agency or control, but instead from ownership."). Also, *see* the commentary to Article 1 of the "Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries" <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf>.

been lowered and commercialization of space is nigh-universal. In the face of these facts, such a farcical launch-oriented liability standard not only curtails the Liability Convention's ability to reach its professed objectives[44] but also places an undue burden on launching States and disincentivizes international cooperation.[45] Moreover, this standard lacks the capacity to handle giant leaps taken in technological capabilities and the threats radiating from these capabilities, such as cyberwarfare.[46] Understandably, the Convention's drafters would not have been expected to have forecasted this kind of science-fictional threat in the 1960s,[47] especially considering the fact that their motivation was to promote peaceful and cooperative uses of outer space.[48]

Yet, today, cyberwarfare in space is present. For example, there is a real possibility that the control of a satellite launched by Country A may be gained by a malevolent private or state actor with the purpose of inflicting harm upon Country B on Earth.[49] Under the extant liability regime established by Article II of the Convention, as a launching state, Country A will probably be held strictly liable for the damage suffered by Country B on Earth even if it had no hand in bringing the harm about.

This scenario may seem unrealistic. Yet, it gracefully depicts the perceived loophole in Article II's launch-based liability standard[50] and the probable

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44 The Liability Convention (n 27), Preamble ("Recognizing the need to elaborate effective international rules and procedures concerning liability for damage caused by space objects and to ensure, in particular, the prompt payment under the terms of this Convention of a full and equitable measure of compensation to victims of such damage.").

45 Kehrer (n 24) 195 ("Such absurd ownership-based punishment makes little sense if the Liability Convention's purpose is to create 'effective international rules and procedures concerning liability' that strengthen 'international cooperation.' Presently, it would be unreasonable for launching States…to cooperate and pay restitution without some sort of security for when they are not at fault. Because of this, the result of the [liability] regime may well be more international tension and armed conflict instead of dispute resolution.").

46 ibid 184 ("Cyberwarfare is a broad term that refers generally to operations with the goal of hostile exploitation of networked infrastructure within or belonging to a state.").

47 The Liability Convention was drafted and negotiated by the Legal subcommittee from 1963 to 1972. The agreement was reached by the General Assembly in 1971 and the Convention entered into force in September 1972.

48 The Liability Convention (n 27) ("The General Assembly, reaffirming the importance of international co-operation in the field of the exploration and peaceful uses of outer space, including the Moon and other celestial bodies, and of promoting the law in this new field of human endeavor.").

49 Kehrer (n 24) 184-185; ibid 191-192 ("It is now possible for purely commercial satellites to be turned into weapons or be used in support of an armed attack on Earth – even if that was not part of their original design – by a sophisticated actor or state. The rapid commercialization of space also means that there are now several more tools for bad actors to take advantage of.").

50 For more information as to this loophole, *see* ibid.

unfair attribution of liability that may be caused by this very standard due to its blindness to possible intervening acts of third parties. Further, Article VI of the Liability Convention rubs salt in the wound by conditioning exoneration from strict liability upon gross negligence or omission on the part of a claimant state or of natural or juridical persons it represents.[51] Thankfully, however, the Convention vests a claims commission with authority "to decide the merits of the claim for compensation and determine the amount of compensation payable, if any."[52] Via this authority, the claims commission may adjudicate a launching State's arguments as to possible intervening third party acts and, if finds them credible, may absolve the launching State from liability for harm to the claimant State.

II. CURRENT MEANS TO RESOLVE DISPUTES ARISING FROM SPACE ACCIDENTS

To date, there has been no significant international dispute arising from space accidents to warrant a review of the dispute resolution instruments available in the space legal regime's repertoire. Yet, with a notable increase in human activity in space, the prospect of such accidents grows exponentially. With this prospect in mind, of critical importance for space law is to precede the occurrence of accidents and to offer mechanisms for the orderly settlement of disputes. In this respect, this chapter analyzes the current dispute resolution mechanisms and discusses their adequacy.

A. Litigation

The first mechanism that may be utilized to have damages redressed is litigation. Domestic courts may assert jurisdiction over an array of claims on the basis of territoriality (territory-based jurisdiction) and nationality (nationality-based jurisdiction). Territory is deemed to be the exclusive basis for jurisdiction. According to the general understanding of international law, "each nation-state, being a sovereign entity under international law, has exclusive jurisdiction within its territorial boundaries over all persons, whether nationals or foreigners, and all things, whether tangible or intangible."[53] In addition to the territory-based jurisdiction, international law also recognizes the nationality-based jurisdiction whereby domestic courts may assert jurisdiction over issues, regardless of territorial location.[54]

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51 The Liability Convention (n 27) Article VI.

52 ibid Article XVIII.

53 Horton (n 21) 641.

54 *See* generally Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84(1) British Yearbook of International Law 187. *See also* Horton (n 21) 641 ("In addition to this broad territorial principle of jurisdiction, international law recognizes a series of principles

Through either of these jurisdictions, domestic courts may exercise their judicial powers over disputes arising from space accidents. As a result, a plaintiff may file a lawsuit in its domestic courts, as well as the domestic courts of the defendant inflicted the harm. The most notable advantage of litigation is that it grants space companies a direct access to dispute resolution without requiring a State to espouse their claim. Alas, this advantage is not enough to compensate for the caveats affiliated with litigation.

First, it is an exigent probability that a domestic court trying the case may be biased against either the plaintiff or the defendant, depending on in whose state the lawsuit is filed. Second, domestic judges' likely lack of familiarity with the space law regime and industry may inhibit them from grasping the details of the case and may cause significant delays or adversely impact the fair resolution of the disputes. Other obstacles that may complicate the resolution of space accident cases via litigation involve determining the applicable law, the procedure for collection of evidence, the standard of proof, and the level of confidentiality.

Of greater concern, however, is the prospect that a private party may not be even able to litigate its dispute at all.[55] In cases where a private party brings the legal action against a state party, the state may have recourse to the doctrine of sovereign immunity, which shield it from being brought into a lawsuit in a foreign court without consent.[56]

Finally, presuming a private actor manages to overcome all these limitations of litigation and acquires a resolution to its dispute, there is still one colossal problem standing before the plaintiff company: enforcement of the judgment on a foreign plaintiff. According to international custom, there are four fundamental criteria to which the recognition and enforcement of a foreign judgment is subject: (1) the judgment must be rendered by a competent court; (2) the foreign court proceedings led to the judgment must be in conformity with the principles of due process; (3) there must be no fraud vitiating the

that expand the jurisdiction of domestic courts, including (1) the nationality principle of jurisdiction over a nation's citizens located outside national territory; (2) the passive personality principle of jurisdiction over disputes with a citizen victim.").

55 Horton (n 21) 642.

56 Report on Sovereign Immunity: Past, Present, and Future: Session 9 of the Congressional Study Group (11 May 2022) < https://www.brookings.edu/research/sovereign-immunity-past-present-and-future/> ("Rooted in customary international law, sovereign immunity generally protects states and their officials from a range of legal proceedings in other foreign states' domestic courts. These immunities were initially quite broad but, over the course of the twentieth century, many states (including the United States) began to adopt a 'restrictive theory' that treated foreign states and their agencies and instrumentalities the same as private actors for commercial activities while retaining sovereign immunity for states' sovereign and public activities."); Horton (n 21) 642

judgment; (4) the judgment must not contravene the public policy of the enforcing state.[57]

Fortunately, there are global attempts to overcome the complications inherent in international litigation, enhance access to justice, and facilitate international trade and investment by heartening the mutual recognition of judgments across national borders.[58] In this regard, the most noteworthy step was taken in Hague with the "Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" (the "Hague Judgments Convention").[59] As of 23 June 2022, by adopting JURI Committee Report A9-0177/2022,[60] the European Parliament consented to the accession of the European Union (the "EU") to the Hague Judgments Convention and, as of 12 July 2022, the Council of the EU adopted a decision completing the EU's accession to the Convention.[61] Further, on 15 July 2022, the President of Ukraine signed the law on ratifying the Hague Judgments Convention. With the EU's accession and Ukraine's ratification, the Hague Judgments Convention clears an important hurdle standing before its entry into force, which, by Article 28, is conditioned upon the ratification, accession, acceptance of two States.[62] Current developments satisfy the preceding condition stipulated by Article 28 and pave the way for the Convention's entry

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57 ibid 643. These criteria that will become applicable while deciding the enforcement and recognition of a foreign judgment may vary from one country to another. *See* 28 U.S.C. § 2467(d)(1)(A) - (E) for the United States; Article 54 of the Code of Private International Law and Procedure for the Republic of Türkiye.

58 The United States Becomes the Sixth Signatory to the 2019 Hague Judgments Convention on the Recognition and Enforcement of Foreign Judgments (18 March 2022) <https://www.gibsondunn.com/the-united-states-becomes-the-sixth- signatory-to-the-2019-hague-judgments-convention-on-the-recognition-and-enforcement-of-foreign-judgments/> accessed 4 August 2022.

59 Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> accessed 4 August 4, 2022.

60 European Parliament Legislative Resolution of 23 June 2022 on the Draft Council Decision Concerning the Accession of the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (13494/2021–C9-0465/2021–2021/0208(NLE)) <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0261_EN.pdf> accessed 4 August 2022.

61 Convention on the recognition of judgments: Council adopts decision on EU accession (12 July 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/07/12/convention-on-the-recognition-of-judgements- council-adopts-decision-on-eu-accession/>.

62 With respect to the entry into force, Article 28 of the Hague Judgments Convention stipulates that it shall enter into force 12 months after the ratification, acceptance, approval or accession of two States.

into force. The Hague Judgments Convention will become enforceable for the EU and Ukraine on 1 September 2023.[63] Yet, so far, there is no data available to analyze the Hague Judgments Convention's performance in facilitating recognition and enforcement of foreign judgments across the globe.

However, even if the Hague Judgments Convention acquires worldwide recognition and enforcement, it is sincerely doubted that it will morph litigation into a viable dispute resolution mechanism for spacefaring companies unless the above-mentioned obstacles concerning private litigation are overcome.

At the end, there is an array of inherent problems inhibiting litigation from catering to the interests of private enterprises and accordingly rendering it unappealing within the context of space accident cases. In this respect, the methods embodied in the Liability Convention may be turned to as feasible alternatives to litigation, but alas, as delineated below, they fall short of accomplishing this undertaking.

B. Direct Diplomacy and Claims Commission

As delineated before, the Liability Convention not only establishes the liability regime upon the groundwork laid by the Outer Space Treaty but also blueprints a two-tier process for the resolution of disputes resulted from space accidents.

The first tier of the process is diplomatic negotiations.[64] For the commencement of the negotiations, Article X of the Convention requires a claim for damage compensation to be presented to the relevant launching State within one year following the date of the damage's occurrence or the identification of the launching State.[65] In history, diplomatic negotiations were actually resorted to for the amicable resolution of Canada's damage claims arising from the crash of Cosmos 954.

When a Soviet spy satellite, Cosmos 954, depressurized and deorbited to Earth, it crashed in uninhabited Canadian territory. Since the satellite was powered by a nuclear reactor, the collection and disposal of debris necessitated the utmost care and urgency.[66] Nigh a year after the accident, Canada presented a claim for damages premised upon the Liability Convention and general

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63 European Commission, the European Union joins the Hague Judgments Convention, *Daily News* (29/08/2022) <https://ec.europa.eu/commission/presscorner/detail/en/mex_22_5224>.

64 The Liability Convention (n 27) Article IX.

65 ibid Article X.

66 Alexander P. Reinert, 'Updating the Liability Regime in Outer Space: Why Spacefaring Companies Should Be Internationally Liable For Their Space Objects' (2020) 62(1) William&Mary Law Review 325, 337.

principles of international law[67] and initiated diplomatic negotiations with the Soviet Union.[68] While the Soviet Union initially argued that "Canada had taken excessive measures to restore the environment"[69] and refused to pay C$6.94 million,[70] diplomatic negotiations came to fruition and the Soviet Union accepted to pay C$3 million to settle the claim.[71] The Cosmos 954 accident remains to be the only invocation of the Liability Convention to date[72] and has set a precedent of utilizing diplomacy for inter-state disputes arising from space accidents. Notably, however, the success of the diplomacy in this case might not have necessarily flown from the sweeping terms of the Liability Convention, but perhaps from Canada's cognizance of the frailty of its claim for property damage under the Convention.

The Canadian claim described damage to property as "the deposit of hazardous radioactive debris from the satellite throughout a large area of Canadian territory, and the presence of that debris in the environment rendering part of Canada's territory unfit for use."[73] It is not, however, certain that damage as contemplated under the Liability Convention[74] occurred, given that the satellite landed in an uninhabited territory.[75] While the crash indisputably altered the conditions of the land and rendered it unsafe, the *actual* damage remained unmeasurable.[76] The unclarity as to the actual damage inevitably cast doubt upon Canada's access to the eventual restitution under the Liability

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67 Settlement of Claim Between Canada and the Union of Soviet Socialist Republics for Damage Caused by "Cosmos 954" (Released on April 2, 1981), Statement of Claim by Canada, paras. 17 < https://www.jaxa.jp/library/space_law/chapter_3/3-2-2-1_e.html>.

68 ibid paras. 14-23

69 Reinert (n 66) 337.

70 ibid.

71 Settlement of Claim Between Canada and the Union of Soviet Socialist Republics for Damage Caused by "Cosmos 954" (n 67) Articles I & II of the Protocol.

72 Reinert (n 66) 337.

73 Settlement of Claim Between Canada and the Union of Soviet Socialist Republics for Damage Caused by "Cosmos 954" (n 67), Statement of Claim, para. 15.

74 The Liability Convention (n 27) Article I ("For the purposes of this Convention: (a) The term 'damage' means loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organizations.").

75 Joseph A. Burke, 'Convention on International Liability for Damage Caused by Space Objects: Definition and Determination of Damages After the Cosmos 954 Incident' (1984) 8(2) Fordham International Law Journal 255, 276; Kehrer (n 24) 185-186 ("[R]adioactive debris from the Soviet Cosmos 954 satellite landed in uninhabited Canadian land and Canada's claim was the cost of cleanup rather than property damage, so it was not clear that the terms of the Liability Convention controlled.").

76 ibid 276-277.

Convention.[77] This lack of legal coverage experienced by Canada,[78] indeed, raises the question of whether diplomatic negotiations may be relied upon as an efficient and efficacious dispute settlement mechanism unless a disputant State has a reason to compromise.

Maybe, this very same question had sprung to the minds of the Liability Convention's drafters, given the fact that there is a second tier of dispute resolution process instituted, should the diplomatic negotiations fail. Articles XIV through XX of the Convention regulate the constitution of a claims commission and the adjudication of claims by this commission. After the parties have unsuccessfully negotiated for one-year through diplomatic conduits,[79] Article XIV calls for the establishment of a commission consisting of three members.[80] It is the duty of this commission to "decide the merits of the claim for compensation and determine the amount of compensation payable, if any."[81]

Rightfully, even without the launching State's consent and participation, Article XVI (1) of the Convention allows the establishment of a one-member claims commission and the adjudication of the claimant State's claim for damages.[82] Unfortunately, however, Article XIX (2) of the same Convention States that the award of the claims commission is *not* binding unless the disputant States agree for it to be binding.[83] If they do not agree, then the commission's award is merely "recommendatory."[84]

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77 ibid 277 ("Unless there was damage within the article I meaning of the word, article XII was powerless to supply the compensation Canada sought in its claim despite its reference to international law and the principles of justice and equity. If the property damage issue had come before a Claims Commission pursuant to articles XIV through XX of the Liability Convention, it is conceivable that Canada could have been denied recovery on this basis.").

78 ibid 275 ("Canada's use of a secondary claim based on general principles of international law is illustrative of the problems a state faces in attempting to frame a claim for damages under the Liability Convention.").

79 The Liability Convention (n 27) Article XIV ("If no settlement of a claim is arrived at through diplomatic negotiations as provided for in article IX, within one year from the date on which the claimant State notifies the launching State that it has submitted the documentation of its claim, the parties concerned shall establish a Claims Commission at the request of either party.").

80 For the details regarding the composition of a claims commission, please *see* ibid Articles XV & XVI.

81 ibid Article XVIII.

82 ibid Article XVI (1) ("If one of the parties does not make its appointment within the stipulated period, the Chairman shall, at the request of the other party, constitute a single-member Claims Commission.").

83 ibid Article XIX (2) ("The decision of the Commission shall be final and binding if the parties have so agreed; otherwise, the Commission shall render a final and recommendatory award, which the parties shall consider in good faith.").

84 ibid Article XIX (2).

Consequently, good faith cooperation and collaboration of the launching State become the sine qua non of the commission's proper adjudication and the enforcement of the final award. This inevitably accords the launching state an opportunity to avert liability and renders both the claims commission process and the Liability Convention toothless. At the end of the day, an award without enforcement does not go beyond being a piece of paper.

In addition to the potential advisory status of an award, the claims commission also suffers from a jurisdictional bar against natural or juridical persons. While harms suffered by these persons are considered to be damage within the context of the Liability Convention, they are not afforded direct recourse to the claims commission. Thus, the mechanism that may be utilized to resolve a space accident case involving a private party depends on who the other party is.

If the "defendant" is a state party, the private owner cannot resort to the claims commission directly but may enlist the help of its State to make a claim on its behalf. Upon the espousal of the claim, the respective State may invoke Article IX for diplomatic negotiations and, should the negotiations fail, Article XIV for the constitution of the claims commission.[85] In the opposite scenario (state *v*. private party), the definition of a "launching State" given under Article I of the Convention becomes determinative because the liability scheme is predicated upon launching State status. In this respect, even if the space object that inflicted harm is owned by a private party, the State, whose territory was used to launch the private party's space object, is considered to be the launching State under Article I and may be held liable for the damages. As a result, it becomes possible for the claimant State to evoke Articles IX and XIV for diplomatic negotiations and the claims commission process respectively, rather than filing a lawsuit in a national court. Finally, if both disputants are private parties, the claimant private party may enlist the support of its state to make a claim on its behalf. And, if the state espouses the claim, it may raise the claim against the respondent private party's state based on the launching State status as explained in the second scenario above. If this espousal does not take place, the dispute may be referred to litigation in either the claimant's or the respondent's national court. Regardless of the venue, however, litigation is accompanied by legal complications, such as competent court, applicable law, evidence collection, and judgment enforcement. Thus, to bypass these complications, private parties may opt into arbitration via a submission agreement.[86]

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85 Hertzfeld and Nelson (n 9) 133 ("Alternatively, the private owner might seek to sue the foreign government for damages in a national court (either its home court or that of the foreign government) – assuming it can overcome any objections to sovereign immunity.").

86 Submission agreements are agreements to arbitrate made after the dispute has arisen.

Irrespective of the scenario, due to the state-centric, impractical dispute resolution regime of the Liability Convention and its ineffective award enforcement proceedings, many spacefaring private actors are incentivized to find ways to estop the Convention from being invoked if their space objects were to damage an international party or to be damaged by an international party. Indeed, many companies aim to resolve disputes arising from space accidents extra-judicially.[87] Companies implement "cross-waivers of liability"[88] via which "each party agrees bear its own risk."[89] As a result, if something goes awry, the parties adjudicate the dispute as a matter of contract law in municipal court, rather than effectuating the terms of the Liability Convention.[90]

These legal moves made by spacefaring companies illustrate that the Liability Convention is woefully underdeveloped and fails to cater to the interests of private actors. If private enterprises are to be encouraged to spearhead the advancement of space technologies and exploration of space in the years to come, it is of importance that the Liability Convention is amended to provide private companies with effective dispute resolution and award enforcement mechanisms. Otherwise, the Liability Convention fails to serve its purpose of establishing effective procedure for settling international disputes and becomes obsolete.

C. International Court of Justice

Another forum for the resolution of space accident cases is the International Court of Justice (the "ICJ"). Founded by the Charter of the United Nations in 1945, the ICJ is considered to be a reflection of global commitment to the pacific settlement of international disputes. In this regard, Article 33 of the United Nations Charter lists the pacific methods for the settlement of disputes.[91]

As an international court operating under the aegis of international law,[92] the

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87 Dan St. John, 'The Trouble with Westphalia in Space: The State-Centric Liability Regime' (2012) 40(4) Denver Journal of International Law & Policy 686, 712.

88 *See* 14 CFR Chapter V – National Aeronautics and Space Administration, Part 1266 <https://www.govinfo.gov/content/pkg/CFR-2021-title14-vol5/pdf/CFR-2021-title14-vol5-sec1266-102.pdf>.

89 John (n 87) 712.

90 Reinert (n 66) 345.

91 United Nations Charter (1945), Article 33(1) <https://www.un.org/en/about-us/un-charter/chapter-6> ("The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.").

92 Statute of the International Court of Justice, Article 38(1) <https://www.icj-cij.org/en/statute> ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or

ICJ may be perceived to be an ideal forum for international disputes pertaining to space. This perception is furthered by some other key factors, such as the neutral and impartial third-party nature of judges, the ICJ's experience in enforcing international treaties and tackling interstate conflicts, and the final and binding nature of judgments furnished by the Court.

When compared with domestic litigation and the Liability Convention's claims commission process, these features are much appreciated. Unfortunately, however, they are not enough to render the ICJ "the venue" for the settlement of disputes arising from space accidents.

The foremost inadequacy limiting the ICJ's role in dispute settlement is its restrictive jurisdiction. Pursuant to Article 34 of the Statute of the ICJ, "only States may be parties in cases before the Court."[93] As a result, spacefaring companies have no standing to bring a legal action before the ICJ unless their claims are espoused by their respective States. Moreover, even in a scenario where a State espouses its company's claim for damages resulted from a space incident, jurisdictional issues remain to exist. According to Article 36(1) of the Statute of ICJ, "[t]he jurisdiction of the Court comprises all cases which the parties refer to it." In other words, notwithstanding its prominence, the ICJ is principally not granted a general and unrestricted competence in dispute settlement under its Statute. It primarily derives its jurisdiction from the consent of the disputant States.[94] This inevitably inhibits the ICJ's ability to address space accident disputes. Further, the Court lacks recognition among major spacefaring nations when it comes to its competence and this lack of recognition also obstructs the Court's emergence as an ideal venue for the resolution of space accident cases.

In sum, the ICJ appears to embody some most-needed elements integral to resolution of disputes arising from space accidents.[95] Yet, it may not become instrumental in the orderly settlement of such disputes unless the States parties to the ICJ Statute is divested of their discretion to deny the Court jurisdiction and private companies are endowed with a direct recourse to the Court.

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particular, establishing rules expressly recognized by the contesting States; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

93 ibid Article 34.

94 *See generally* Hanqin Xue (ed), Jurisdiction of the International Court of Justice (Brill 2017).

95 *See generally* George Paul Sloup, 'Peaceful Resolution of Outer Space Conflicts through the International Court of Justice: The Line of Least Resistance' (1971) 20(3) DePaul Law Review 618; Horton (n 21) 645-646.

D. The Permanent Court of Arbitration

Established in 1899, the Permanent Court of Arbitration (the "PCA") is an intergovernmental body dedicated to provide dispute resolution services to international community. Traditionally, the PCA administered arbitrations between States. In 1934, however, subsequent to the PCA Administrative Council's approval of a request for the administration of an arbitration among the Radio Corporation of America and the Republic of China,[96] the precedent has been set for the PCA's involvement in disputes among private parties and States, including today's investor-state arbitrations. The number of investor-state arbitrations currently being administered by the PCA unmistakably exhibit that this expansion of the Court's role is appreciated in the arbitral arena. Indeed, according to the PCA's website, the Court "is currently acting as registry in 4 interstate proceedings, 105 investor-state arbitrations and 65 cases under contracts or other agreements involving a state or other public entity."[97]

In 2011, the PCA made another elevating move through the adoption of the "Optional Rules for Arbitration of Disputes Relating to Outer Space Activities" (the "Optional Rules") and extended the Court's reach to aerospace disputes. Notably, these rules, which were modelled after the 2010 UNCITRAL Arbitration Rules, are tailored to the particular needs of the space industry. Indeed, the introduction to the Optional Rules provides that the Rules reflect "the particular characteristics of disputes having an outer space component"[98] and "the public international law element that pertains to disputes that may involve States and the use of outer space, and international practice appropriate to such disputes."[99]

Unlike the United Nations' aforementioned treaties, the Optional Rules actually reflect the exponentially changed dynamics of spatial activities. Among these reflections is the recognition of the commercialization of space by private enterprises.[100] The Rules afford not only States but also private enterprises access to binding arbitration process, subject to the consent of all involved

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96 For the details and award of the case between the Radio Corporation of America and the National Government of the Republic of China, *see* Radio Corporation of America *v*. the National Government of the Republic of China, PCA Case No. 1934-01, Award of the Tribunal (13 April 1935) <https://pca-cpa.org/en/cases/16/>.

97 For more information about the PCA's caseload, *see* <https://pca-cpa.org/cases/>.

98 Optional Rules for Arbitration of Disputes Relating to Outer Space Activities ('Optional Rules') (2011) <https://docs.pca- cpa.org/2016/01/Permanent-Court-of-Arbitration-Optional-Rules-for-Arbitration-of-Disputes- Relating-to-Outer-Space- Activities.pdf>.

99 ibid.

100 ibid 4 ("[Optional] Rules…reflect the particular characteristics of disputes having an outer space component involving the use of outer space by States, international organizations and private entities.").

parties.[101] Further, with the foresight concerning possible difficulties private companies may face vis-à-vis state parties, Article 1(2) of the Optional Rules bars States from resorting to sovereign immunity. Specifically, Article 1(2) states that "[a]greement by a party to arbitration under these Rules constitutes a waiver of any right of immunity from jurisdiction, in respect of the dispute in question, to which such party might otherwise be entitled." For the award enforcement stage, however, under Article 1(2), a waiver of immunity must be explicitly expressed.

Other notable aspects of the Optional Rules account for the highly complex nature of space disputes: specialized panel of arbitrators,[102] specialized panel of scientific experts,[103] non-technical documents,[104] and confidentiality.[105]

With these principal traits, the Optional Rules is considered to be the much-longed filling to the void in the existing space law regime. Alas, there is virtually no demand for the Rules. There are currently no publicly reported arbitration cases where the Optional Rules have been implemented.[106] The lack of cognizance may be "a" reason behind this almost non-implementation, if not "the" reason. Undoubtedly, the PCA is a prominent institution that enjoys the confidence of States and international organizations. It may, however, not have the same level of prominence and/or confidence among private entities. At least an informal survey conducted with space industry respondents indicates inadequate awareness of the PCA and its work. According to the survey, while respondents desired technical expertise in the field, the PCA expert panels and arbitrators were not referred to by any of the respondents.[107] This may connote insufficient awareness of the PCA's work among practitioners or insufficient acceptance of the procedure or arbitrator and expert panels formed by the PCA.[108]

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101 ibid Article 1(1) ("Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Outer Space Activities, then such disputes shall be settled in accordance with these Rules subject to modification as the parties may agree.").

102 ibid Article 10(4).

103 ibid Article 29(1) & (7).

104 ibid Article 27(4).

105 ibid Article 17(6).

106 Charles B. Rosenberg and Vivasvat Dadwal, 'The 10 Year Anniversary of the PCA Outer Space Rules: A Failed Mission or The Next Generation?' (*Kluwer Arbitration Blog*, 16 February 2021) <http://arbitrationblog.kluwerarbitration.com/2021/02/16/the-10-year-anniversary-of-the-pca-outer-space-rules-a- failed- mission-or-the-next-generation/> accessed 4 August 2022.

107 Viva Dadwal and Eytan Tepper, 'Arbitration in Space-related Disputes: A Survey of Industry Practices and Future Needs' <https://www.mcgill.ca/iasl/files/iasl/iac-19e723x50661_dispute_settlement_in_space_law.pdf> accessed 4 August 2022.

108 ibid 9.

With the increasing size of the space industry and actors there will be a concomitant increase in types of space-related disputes. As portrayed before, mechanisms incorporated into the U.N. treaties do not hold any future promise as to the orderly settlement of such disputes. On the other hand, as discussed in further detail below, arbitration emerges as a viable option in settling a perceivably growing space-related disputes. In this respect, while there is a need for refinement, the Optional Rules essentially embody the features valued by spacefaring actors, such as party autonomy, confidentiality, technical expertise, timeliness, award enforceability[109] and accordingly have a potential to facilitate the utilization of arbitration in the resolution of space-related disputes.

III. BINDING ARBITRATION FOR THE RESOLUTION OF SPACE ACCIDENT CASES

The first recorded collision between two satellites in outer space took place on February 10, 2009, when an American commercial satellite collided with a decommissioned military satellite of Russia.[110] The collision caused the destruction of satellites and created at least two thousand pieces of large space debris.[111] More recently, in September 2019, a satellite from SpaceX's Starlink constellation was on a collision course with a wind monitoring satellite of the European Space Agency (the "ESA").[112] As the odds of collision neared 1 in 1,000 – "ten times higher than the threshold that requires a collision avoidance maneuver"[113] – the ESA unilaterally altered its satellite's orbit to evade the collision.[114] In the last major instance, in December 2021, according to the reports, Chinese space station Tianhe was nearly struck by Starlink satellites of SpaceX in two different occasions, both of which were evaded after the Chinese Space Station's implementation of preventive collision avoidance control.[115]

Collectively, these incidents show the risk of accident inherent in space activities. Certainly, this risk will grow exponentially in the coming years as

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109 ibid 5.

110 Reinert (n 66) 338.

111 ibid.

112 Jonathan O'Callaghan, 'SpaceX Declined To Move A Starlink Satellite At Risk Of Collision With A European Satellite' *Forbes* (2 September 2019) <https://www.forbes.com/sites/jonathanocallaghan/2019/09/02/spacex-refused-to-move-a- starlink-satellite-at-risk-of-collision-with-a-european-satellite/?sh=7f38a75b1f62> accessed 4 August 2022.

113 ibid.

114 Reinert (n 66) 338.

115 'China says SpaceX satellites nearly collided with its three-member crew space station' (*PBS*, 29 December 2021) <https://www.pbs.org/newshour/world/china-says-spacex-satellites-nearly-collided-with-its-three-member-crew-space- station> accessed 5 August 2022.

a result of the increase in the number of objects launched into outer space and cascading debris.[116] In this respect, of important is to recognize that disputes arising from space accidents will be intricate and high-value. Further, the resolution of these disputes will demand confidentiality, technical expertise, and timeliness. Yet, as analyzed under Chapter-II, the current means of dispute resolution available to space actors are not capable of addressing this kind of disputes, nor can they meet these demands. They are far from accommodating the interests and appeasing the concerns of private ventures as they are notably state-centric.

More specifically, there is currently no established framework for the resolution of disputes arising from space accidents involving a private enterprise. The dispute settlement mechanism that may be initiated by or against the enterprise is primarily incumbent upon who the other party is. If the defendant party is a State, the private claimant may either enlist the support of its state or file a lawsuit in its or defendant State's national courts. In the opposite scenario where a private enterprise is a defendant, the claimant State may resort to either litigation against the enterprise or the diplomatic negotiations and the claims commission process against the private actor's State, if it is the launching State, under the Liability Convention. Finally, so far as a purely private dispute is concerned, the current U.N. treaties fall short in according private actors a direct and effective dispute settlement instrument. Further, as again delineated under the prior chapter, regardless of the scenario in play, current dispute settlement mechanisms are not binding and prove inadequate in terms of impartiality and neutrality, access to necessary expertise and confidentiality, and lastly, enforcement.

These inadequacies have inevitably created a lacuna in the space legal regime's dispute resolution front. Fortunately, with the rapid growth of the space industry and global space economy have come with many renewed efforts to establish effective and binding dispute settlement methods to fill this lacuna.[117]

The leading contender in such efforts is international arbitration. This method of dispute resolution is frequently utilized for the resolution of disputes among parties that are located in different jurisdictions or disputes involving

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116 Mike Wall, 'Space collision: Chinese satellite got whacked by hunk of Russian rocket in March' (*Space.com*, 17 August 2021) <https://www.space.com/space-junk-collision-chinese-satellite-yunhai-1-02> accessed 5 August 2022.

117 Hertzfeld and Nelson (n 9) 133 ("It has long been recognized that accidents will occur in outer space and that the provisions included in the space treaties do not provide for effective enforcement or resolution of many potential types of disputes that are likely to occur. Beginning in the late-1970s, there were a series of proposals for new dispute resolution mechanisms to be incorporated into the space legal regime.").

a cross-border element.[118] Arbitration is premised upon the consent of parties and is governed by the principles of confidentiality and party autonomy. Arbitral procedures provide a better setting,[119] as parties may dispense with the redundant formalities and procedures that are inherent in other forms of dispute resolution mechanisms and fashion procedures tailored to their particular needs and disputes.[120] As a rule, the decisions of arbitrators are final and binding. There are no or very limited grounds whereby arbitrators' awards may be appealed to the domestic courts.[121] Also, the grounds via which arbitral awards' validity or enforcement and recognition may be challenged are equally restricted.[122]

In fact, with the help of these virtues, international arbitration has already made its way into space law. It has been utilized by state and non-state actors for the resolution of disputes arising from commercial contracts. For example, "the European Space Agency (ESA) has long used arbitration as its preferred method of dispute resolution in its model contracts with contractors."[123] Also, arbitration clauses have been incorporated into collaboration and project-based agreements, such as the "2010 Cooperation Agreement Between the Government of Canada and the European Space Agency."[124]

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118 Viva Dadwal and Madeleine Macdonald, 'Arbitration of Space-Related Disputes: Case Trends and Analysis' <https://www.mcgill.ca/iasl/files/iasl/arbitration_of_space-related_disputes.pdf> accessed 4 August 2022.

119 Hertzfeld and Nelson (n 9) 136; ibid 137 ("Although arbitration is often a private process, there may be instances where
some third-party transparency is appropriate (e.g., in cases involving environmental damage that affects third parties). The experience of investor-state arbitration under the ICSID Convention and UNCITRAL Rules (including UNCITRAL cases administered by the [Permanent Court of Arbitration]) shows that it is possible to incorporate procedures for third parties or *amici* to participate in the arbitral process.").

120 Inan Uluc and Kristi R. Sutton, Esq., 'Without Silence, There is No Golden Rule; Without Dissent, There is No Progress' (2018) 20 Oregon Review of International Law 219, 220. More specifically, the principle of party autonomy affirms the parties' freedom to select the arbitral seat, number of arbitrators, language of arbitral proceedings, substantive and procedural laws applicable to the proceedings, and waiver of means of recourse against the final award.

121 Julian D.M. Lew, Loukas A. Mistelis and Stefan Michael Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 7.

122 ibid.

123 Dadwal and Macdonald (n 118) 2.

124 For other cooperation and project-based contracts involving an arbitral clause, *see* ibid ("1969 United States-Italy Memoranda of Understanding between the Università degli Studi di Roma (Aerospace Research Centre) and the National Aeronautics and Space Administration (NASA) for Launching Satellites from the San Marco Range; and the 1972 France-Federal Republic of Germany Agreement for the Construction, Launch and Utilization of an Experimental Telecommunications Satellite.").

Likewise, arbitration has been embraced by the constitutional treaties of the intergovernmental bodies, which regulate various outer space activities.[125] For example, the "International Telecommunications Satellite Organization's Agreement" (the "ITSO Agreement") stipulates that all disputes arising from the Agreement, either among its 149 member or among those States and the ITSO, shall be submitted to arbitration.[126] The "Convention of the European Telecommunications Satellite Organization" (the "EUTELSAT Convention") also mandates that disputes arising between parties or between EUTELSAT and a party or parties in connection with the interpretation or application of the Convention must be resolved via arbitration, should the negotiations result in failure.[127]

This prevalence of arbitration vis-à-vis other dispute resolution methods connotes the trust placed upon arbitration by institutions regulating outer space activities and actors operating in outer space. Yet, considering the fact that arbitration's competence is not yet tested within the ambit of space accident cases, it is not known whether this trust will follow arbitration to the realm of accident cases. Further, due to this lack of testing, it is still questionable whether arbitration is "the" panacea to the absence of an effective and efficient dispute resolution mechanism for space accident cases. It is, however, believed to be "a" panacea, if not "the" panacea, that is equipped well to tackle space accident cases and cater to the interests of both private and state actors operating in space.

First, unlike the diplomatic negotiations and claims commission process, arbitration is available to all spacefaring private and state actors. Through the

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125 O'Grady (n 26) 4.

126 International Telecommunication Satellite Organization Agreement ('ITSO Agreement') (1973), Article XVI https://itso.int/wp-content/uploads/2018/01/ITSO-Agreement-Booklet-new-version-FINAL-EnFrEs.pdf ("(a) All legal disputes arising in connection with the right and obligations under this Agreement between Parties with respect to each other, or between ITSO and one or more Parties, if not otherwise settled within a reasonable time, shall be submitted to arbitration in accordance with the provisions of Annex A to this Agreement.").

127 European Telecommunications Satellite Organization Amended Convention ('EUTELSAT Convention') (2002), Article XV < https://www.eutelsatigo.int/wp-content/uploads/2022/07/E-Amended-Convention-281102.pdf>
("(a) All disputes arising between Parties or between EUTELSAT and a Party or Parties in connection with the interpretation or application of the Convention shall be submitted to arbitration in accordance with Annex B to the Convention, if not otherwise settled within one year of the time a party to the dispute has notified the other party of its intention to settle such a dispute amicably."). Similar provisions may be found in the constitutional documents of the European Organization for the Exploitation of Meteorological Satellites (EUMESAT), the International Mobile Satellite Organization (IMSO), the European Space Agency (ESA), and the International Telecommunications Union (ITU).

party autonomy vested within the parties, each party may not only appoint its own arbitrator based on the sought technical or industry experience but also tailor the procedures in accord with their needs and preferences. Also, as mentioned before, the arbitral procedure is governed by the principle of confidentiality whereby parties can avoid the disclosure of highly sensitive intellectual property associated with high-technology spacecraft or of national security matters. Finally, unlike other means of dispute resolution analyzed before, international arbitration comes with a legal framework whereby the majority of nations have agreed to enforce the decisions of arbitral tribunals.[128]

On the other hand, there are some drawbacks that may render arbitration an unviable option for space accident cases. Under the cloak of the confidentiality principle, States and private enterprises may attempt to evade submitting classified, proprietary information, even with the appropriate safeguards. In this kind of scenario, while an arbitral tribunal does not have the same coercive powers with a domestic court to enforce compliance with the document production requests, it has a quasi-coercive power to draw an adverse inference from the act of non-compliance and may infer the withheld document to be adverse to the non-compliant party's interest.[129] The other drawback emanates from the lack of rules and institutional framework that may be utilized to avert parties' guerilla tactics[130] hindering efficient and expeditious conduct of the arbitration. Notably, the rules of major arbitral institutions impose a duty upon parties to act, at all times, "in good faith for the fair, efficient and expeditious conduct of the arbitration, including the arbitral tribunal's discharge of its

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128 Hertzfeld and Nelson (n 9) 137 ("Under [the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards], which currently has 149 parties, the courts of each contracting state are required to recognize and enforce arbitral awards rendered in other contracting States, subject to certain relatively narrow criteria for denying enforcement (e.g., that the award violates of important norms of international public policy). The New York Convention, as well as a number of other regional treaties such as the 1975 Panama Convention on International Commercial Arbitration, thus provides a mechanism for the worldwide enforcement of awards arising out of international commerce."). For further information as to why arbitration is well-suited to resolve space-related disputes, *see* Susan Cone Kilgore, 'Arbitration Rules for Disputes Arising From Space Activity' (2018) Federal Lawyer 58, 60-61; Khoukaz (n 2) 276-277.

129 For further information, *see* Pislevik (n 17).

130 Oliver Browne and Robert Price, 'A collision of two heads' (2018) <https://www.lw.com/admin/upload/SiteAttachments/CLJ82%20p18-21%20Browne.pdf> accessed 5 August 2022 ("Guerilla tactics in arbitration take many forms, including: • attempts to bribe tribunals, intimidation of parties, witnesses and counsel, and forging of documents; and • inappropriate and unethical conduct including failing to produce documents in accordance with a tribunal's orders, introducing evidence for the first time at a hearing, excessive document requests, late filing of submissions, and failure to pay deposits/advances on costs.").

general duty."[131] Despite this duty, some parties may continue gamesmanship and engage in improper tactics obstructing the conduct of the arbitration. Of notable in this context is that the authority of arbitral tribunals to levy sanctions on actors acting in bad faith has usually been circumscribed by the terms of the arbitration agreement or remains unaddressed by arbitral institutions. Thus, while there are some tools available to arbitral tribunals to deter parties from dilatory tactics,[132] tribunals' reluctance to employ these tools[133] and the existing legal gap continue to increase parties' temptations to misbehave and casts doubt upon arbitration's adequacy as a venue for disputes arising from space accidents.

The most important drawback of arbitration, however, originates from the lack of an international legal framework that obliges parties to resolve their dispute via arbitration. In the commercial realm, parties primarily agree on employing arbitration as a dispute resolution mechanism during the negotiations of the main contract. In other words, parties undertake a contractual duty to submit their dispute to arbitration before any dispute arises. In the realm of space accidents, due to the inability to foresee these accidents and their victims, it is almost impossible for spacefaring States or private actors to enter into an arbitration agreement until after the accident occurred. Upon the occurrence of the accident, parties may opt into a submission agreement and submit themselves to arbitration, but the finalization of this agreement is highly incumbent upon good faith of the party at fault. If this party acts with recalcitrance, the dispute cannot be resolved via arbitration and the claimant has to have recourse to other dispute resolution methods and tackle inherent difficulties of these methods that are analyzed under Chapter-II.

With the aforementioned characteristics arbitration offers a great potential to remedy the inadequacy suffered by the space legal regime in terms of dispute resolution. Yet, for this potential to be tapped, of significant is to reconcile

131 Article 14.2 of the Arbitration Rules of the London Court of International Arbitration. *See also* Article 22(1) of the 2021 Arbitration Rules of the International Chamber of Commerce ("The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.").

132 For more information, *see* Browne and Price (n 130).

133 ibid ("[R]espondents to the 2015 International Arbitration Survey conducted by the Queen Mary University of London lamented the 'lack of effective sanctions during the arbitral process.' The Queen Mary survey found that this was the second worst feature of arbitration (46% of respondents), behind the linked problems of excessive costs (68% of respondents). Users of arbitration expect tribunals to deal with [guerilla tactics]. Some respondents to the Queen Mary survey suggested that tribunals are reluctant effectively to use their powers for fear that their awards will be challenged. But users highlight an important point: tribunals should be more mindful of the rights of parties suffering the consequences of guerilla tactics than the potential for guerillas to challenge the award.").

the last drawback mentioned above and find a method mandating spacefaring actors, whether state or private, to resolve their disputes via arbitration.

One method to actualize this mandate is the amendment of the Liability Convention. The Convention's amendment process is governed by Article XXV.[134] According to the article, any State Party to the Convention may initiate the amendment process via proposing amendments. With extensive negotiations and political will, the Liability Convention may be effectively amended to address the modern realities of outer space. The proposed amendments comprise rendering arbitration binding, abolishing the jurisdictional bar refraining private enterprises from initiating the claims commission process, and making the outcome of the claims commission process binding. While these amendments, along with others,[135] are poised to accomplish all the objectives professed in the annex of the Convention, the task of amending an international legal instrument is an arduous and time-consuming one to undertake. Further, an attempt to amend one article may catalyze attempts to amend other articles and accordingly may jeopardize coherence and foreseeability that currently exists in the space liability regime.[136]

The second method propounded to morph arbitration into the overarching dispute resolution mechanism utilizes national licenses[137] issued by States. Article VI of the Outer Space Treaty requires States to ensure that outer space activities, whether conducted by governmental agencies or by non-governmental entities, are in conformity with the provisions set forth in the Treaty.[138] According to the same article, so far as the spatial activities of non-

134 The Liability Convention (n 27) Article XXV ("Any State Party to this Convention may propose amendments to this Convention. Amendments shall enter into force for each State Party to the Convention accepting the amendments upon their acceptance by a majority of the States Parties to the Convention and thereafter for each remaining State Party to the Convention on the date of acceptance by it.").

135 For other amendment proposals to reform the Liability Convention, *see* Kehrer (n 24); Sam Logterman, 'Astronomical Arbitration: Why Amending the Liability Convention is the Best Step Forward for Interstellar Adjudication' (2020) 30(1) Minnesota Journal of Int'l Law 183.

136 In the same vein, *see* Logterman (n 135) 199 ("[B]roaching the issue of amending the Liability Convention could prompt other States to bring up their own issues with the Liability Convention or other United Nations treaties dealing with space.").

137 Names, types, and scopes of licenses may vary from one State to another in accord with the respective State's space capabilities. For the implementation of this method, however, licenses authorizing the launch and/or operation of a spacecraft are considered to be essential.

138 The Outer Space Treaty (n 14) Article VI ("States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty.").

governmental entities are concerned, the conformity with the treaty will be ensured via authorization and continuing supervision by the appropriate state party to the Treaty.[139] Thus, spacefaring States have instituted licensing and regulatory regimes to authorize and oversee the private actors' spatial activities and ensure that they adhere to the provisions of the Outer Space Treaty and other pertinent treaties.[140]

In light of this, the advocates of the second method propose to utilize these national licensing regimes and make the issuance of a launching and/or operator license conditional upon the private party (licensee)'s consent to arbitration given in advance of space accidents.[141] Indisputably, via this method, arbitration becomes a mandatory dispute settlement mechanism for the claims between private parties. Yet, while the balance in exploration and use of outer space has indisputably shifted towards private enterprises, States and state entities are still key players in outer space endeavors and possess assets in space. Thus, space accidents may – and will – arise between a private entity and a State or state entity. In such a scenario, arbitration becomes operative if the State party accepts the standing offer to arbitrate made by the private party through the launching and/or operator license. In sum, the implementation of this method requires the revision of States' domestic regulations. Yet, more importantly, the utilization of it is highly contingent upon States' receptiveness to accepting the standing offer of a private party by initiating arbitration or to opting into the arbitration initiated by a private party. In this regard, the approach of top spacefaring nations, such as the United States and China, is believed to be determinative of whether this method may actually acquire universal implementation.

The penultimate method is a centralized, convention-based arbitration of space-specific disputes. While this method is primarily elevated for the resolution disputes arising from space contracts, it will here be analyzed in the context of disputes emanating from space accidents.

More specifically, this approach ventures the idea of establishing an institution analogous to the International Centre for Settlement of Investment

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139 ibid ("The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty.").

140 Reinert (n 66) 343.

141 Hertzfeld and Nelson (n 9) 137-138 ("[A] network for arbitration of collision cases could be developed through an agreed system of national laws or regulations, making it a standard condition of any launch license that the launching party agree in advance to: (1) accept international arbitration of any collision claims involving any private or public actor which is also engaged in space-faring activity; and (2) publishes its consent to arbitration so as to notify potential claimants of the availability of arbitration.").

Disputes ("ICSID") and arbitrating space-related disputes via this institution.[142] Promoters of this method call for the development of an International Convention on the Settlement of Outer Space Disputes (the "ICSOD Convention") and for the foundation of International Centre for the Settlement of Outer Space Disputes (the "ICSOD") "before which private companies and individuals could bring claims directly against States, who have unlawfully interfered with their outer space activities."[143]

The institution of such a centre would centralize the resolution of space-related cases and would "prevent the fragmentation of space law by providing a single and unique forum […] thereby avoiding the unsystematic application of international and domestic law."[144] On the other hand, this proposal is erected upon the investor-state arbitration model and overlooks the fact that disputes may occur solely between private actors.[145] Besides, within the specific context of space accident cases, given that these accidents may happen between parties who have not submitted to the ICSOD's jurisdiction via a bilateral or multilateral agreement, unless the ratification of the ICSOD Convention constitutes a standing consent given by a state to arbitration on an ad hoc basis, the ICSOD approach may not succeed to render arbitration "the" venue for the resolution of disputes arising from space accidents. Finally, even in a scenario where these flaws are addressed, materializing the ICSOD proposal is a colossal task requiring a grave amount of time, collaborative effort, and expertise.[146]

Today, as a result of the exponential increase in outer space activities, there is more attentiveness to the need for an effective dispute resolution mechanism in the space law regime. Arbitration, in this regard, is viewed to be a viable option to meet this need. Thus, as analyzed above, different methods have been set forth to promote arbitration and mandate space industry adherence to the resolution of space accident cases through arbitration. In this respect, it is believed that the PCA and its Optional Rules merit a renewed attention. The Optional Rules are tailored to reflect the particular characteristics of space

142 O'Grady (n 26) 8-9.

143 ibid 8.

144 ibid 9.

145 Bennett (n 4) 13 ("The ICSOD proposal continues the presumption that space arbitration is primarily an investor-state model. While States remain an essential consideration for any space-related arbitral solution, a space-specific dispute resolution forum should not overlook the growing number of private actors and the expected commercial disputes between aerospace investors themselves.").

146 O'Grady (n 26) 9 ("The drafting of such an ICSOD Convention will clearly require an astronomic amount of time and effort from anyone bold enough to embrace the challenge, not least with respect to difficulty of defining the extent of its extraterritorial scope. However, the magnitude of such a feat does not render it any less necessary.").

disputes and cater to the interests of both public and private actors operating in outer space. While these rules are not perfect, they constitute a significant progress in the space legal regime with the provisions addressing the need for specialized panel of arbitrators and scientific experts, setting forth standards as to handling confidential information and award enforcement. Further, using the PCA to resolve space accident cases may facilitate the actualization of the objectives of the Outer Space Treaty[147] and may render States more receptive to submitting themselves to binding arbitration. In addition, it may become possible to insulate the resolution process from political pressure, to create binding awards complemented by an enforcement mechanism, and to develop a body of precedent.

Vis-à-vis the suggestion of adopting a centralized approach to space accident cases, some scholars may assert that there is no practicality of such approach given that the demand is unknown.[148] Yet, the increase in human's spatial activities and cascading space debris will indisputably come with a concomitant increase in the prospects of space accidents. Resultantly, it is the ideal time for the space legal regime to prepare for a centralized approach embracing the PCA and its administration of arbitration.

CONCLUSION

The current space legal regime was developed in an era defined by the Cold War. As a result, the main objectives of the regime were the aversion of the armament of space, the promotion of the peaceful use and exploration of space, and the amicable resolution of disputes among States. Where this state-centric approach played an essential role in the actualization of these critical objectives during the Cold War, it has become increasingly antediluvial and inoperative in the 21st century's modern space industry, which has borne witness to a shift in the dynamics of spatial activities. The industry's control that once belonged to States has been assumed by spacefaring private enterprises.

Alas, despite this shift in the dynamics, the space legal regime has remained stagnant. Neither the Outer Space Treaty nor the Liability Convention has been amended or updated to correspond to the new dynamics. This loss of touch of the legal regime rises more concern given the fact that the currently available dispute resolution mechanisms under this regime are ineffective for resolving disputes involving a private enterprise. Remedying this legal black

147 The Outer Space Treaty (n 14) Annex.

148 Hertzfeld and Nelson (n 9) 141 ("Unlike other sectors of the economy, there have been so few litigated incidents within space law (except for breach of contract) to warrant any special court or tribunal to be devoted solely to those cases. It would be impractical today to form a standing court or tribunal composed of full-time judges to handle such disputes when the demand is unknown and in the indefinite future.").

hole is of consequence as the risk of space accident grows exponentially due to increasing commercialization of spatial activities and rapid congestion of outer space with new space objects and cascading debris. To decrease this risk of space accidents, governments of major space nations strive both to establish minimum standards applicable to space activities[149] and to manage existing space debris and minimize the creation of new ones.[150] These governmental actions, however, do not meet the urgent need for a dispute resolution mechanism that caters to the interests of both public and private space actors and provides foreseeability via final and binding decisions.

In this respect, due to reasons delineated before, arbitration is deemed to be a very viable and workable mechanism to address this need. The implementation of arbitration may help to resolve space accident cases in an effective, efficacious, and amicable manner and, in the long run, may "contribute to [a] broad[er] international co-operation in the scientific as well as the legal aspects of the exploration and use of outer space."[151] The utilization of the PCA and its Optional Rules, in this regard, emerges as a preferable method to succeed this implementation, rather than forming a new institution or substantially amending prominent international law instruments.

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149 The most prominent example of these endeavors to establish the minimum standards via which the civil exploration and use of outer space may be enhanced is the Artemis Accords. As of August 2022, more than a dozen countries have signed the Artemis Accords. Some of the principles incorporated into the Accords are as follows: the peaceful use of outer space, transparency, registration of space objects, release of scientific data, interoperability of systems, emergency assistance, and orbital debris and spacecraft disposal. For further information as to the Artemis Accords, *see* the Artemis Accords <https://www.nasa.gov/specials/artemis-accords/index.html> accessed 5 August 2022.

150 ibid; Ramin Skibba, 'The US Space Force Wants to Clean Up Junk in Orbit' *Wired* (17 November 2021) < https://www.wired.com/story/the-us-space-force-wants-to-clean-up-junk-in-orbit/> accessed 5 August 2022; 'Remove Debris: Testing technology to clear out space junk' *AIRBUS* <https://www.airbus.com/en/products-services/space/in-space-infrastructure/removedebris> accessed 5 August 2022.

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COMPENSATING DAMAGES SUFFERED BY THIRD PARTY INVESTORS DUE TO RELYING TO CREDIT RATING AGENCIES

Üçüncü Kişi Yatırımcıların Kredi Derecelendirme Kuruluşlarına Güvenilmesinden Doğan Zararların Tazmini

Tuba AKÇURA KARAMAN*

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ABSTRACT

We are used to hearing country credit ratings that demonstrate the economic force and performance of the country however ratings are also carried out for companies individually. In such a case rating information allow investors to assess the risks related with the corporations listed in Capital Market. Therefore, ratings announced by Credit Rating Agencies (CRAs) are one of the main data used by investors especially before buying or selling company stocks. The reliability of the ratings is important for the trust in the market and the sustainability of the activities of the CRAs. However, putting liability to CRAs for any third party who uses the data announced would it be fair or possible?

The Capital Market Law no. 6263 adopted in 2012 clearly accepted liability to CRAs to any third party who suffered damages due to the misleading information announced. This newly accepted liability against third parties investors is a result of an endeavour to harmonise our Capital Market Law with the European Union (EU Regulation No. 1060/2009). This paper is examining this newly adopted liability of CRAs to third party investors.

Key Words: Credit Rating Agencies, liability to third party investors, tort liability

ÖZET

Haberlerde sık sık ülkenin ekonomik gücü ve gelişimini temsil eder şekilde kredi derecelendirme notlarının ilan edildiğini duymaya alışık olsak da esasen kredi derecelendirme münferit olarak şirketler için de yapılmaktadır. Şirket derecelendirme raporları özellikle sermaye piyasasında yatırım yapanların şirket hisselerini alıp satmadan önce dikkate aldıkları önemli verilerdendir. Yatırımcıların doğru karar verebilmesi dolayısıyla zarara uğramaması için bu derecelendirmelerin

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* Assoc. Prof. Dr., Galatasaray University, Law Faculty, Civil Law Department, tkaraman@gsu.edu.tr, e-mail: karaman.tuba@gmail.com, ORCID ID: 0000-0002-9128-1308

de titizlikle yapılmış olması önemlidir. Fakat açıklanan verileri kullanan herhangi bir üçüncü taraf için Kredi Derecelendirme Kuruluşlarına sorumluluk yüklemek adil mi veya mümkün müdür?

2012 yılında yürürlüğe giren 6362 sy Sermaye Piyasası Kanunu ile kredi derecelendirme kuruluşlarının faaliyetleri dolayısıyla zarara uğrayan üçüncü kişi yatırımcılara karşı sorumlu olacakları açıkça düzenlenmiştir. Üçüncü kişi yatırımcılar lehine kabul edilmiş olan bu yeni sorumluluk düzenlemesi esasında, Sermaye Piyasası Kanununun Avrupa Birliği (1060/2009 sayılı AB Direktifi) kurallarıyla uyumlaştırılma çabasının bir sonucudur. Bu makale ile Kanunda getirilen bu yeni sorumluluğun koşulları incelenecektir.

Anahtar Kelimeler: Kredi Derecelendirme Kuruluşları, haksız fiil sorumluluğu, üçüncü kişi yatırımcıya karşı sorumluluk

INTRODUCTION: CREDIT RATING AGENCIES (CRAS) AND HOW THEY AFFECT INVESTMENT DECISIONS

Credit rating agencies (CRAs) play an important role in global securities and banking markets, as their credit ratings are used by investors, borrowers, issuers, and governments as part of making informed investment and financing decisions.[1] A credit rating (or note) is an independent opinion of a rating agency on the ability of a public or private issuer to reimburse its debt. The rating allows investors to assess the issuer's risk of default, that is, the risk of non-reimbursement.

Credit institutions, investment firms, etc. may use those credit ratings as the reference for the calculation of their capital requirements for solvency purposes or for calculating risks in their investment activity. Consequently, credit ratings have a significant impact on the operation of the markets and the trust and confidence of investors and consumers. It is essential, therefore, that credit rating activities are conducted in accordance with the principles of integrity, transparency, responsibility, and good governance to ensure that resulting credit ratings are independent, objective, and of adequate quality.

The agencies use three letters to present their ratings, sometimes accompanied by a plus or minus sign. The rating allows investors to immediately identify the degree of risk, with the letters representing a scale of potential default, from AAA (the famous triple-A or highest rating) to D (no reimbursement possible, the issuer is bankrupt). While all rating agencies use the same letters, they differentiate themselves by using different combinations of upper- and

[1] For more information see Frank Partnoy, 'The Siskel, and Ebert of Financial markets? : Two Thumps Down for The Credit Rating Agencies' (1999) 77/3 WULQ 633, 634, 640; Colin Bradshaw, 'Credit Rating Agencies: Regulation and Liability', (2020) 24/4 Lewis & Clark LR 1502; Mete Feridun 'Küresel Bankacılık Düzenlemelerinin Dünü, Bugünü ve Yarını' (2020) 335 TBB 46, 127

lower-case letters, different scales, and above all different methodologies to determine their ratings. Moreover, the agencies have adopted different rating methods depending on the debt security they are rating (bonds, sovereign debt, etc.).

A credit rating can be assigned to securities, especially bonds (issue rating), but also the issuers of debt or securities, including sovereigns (issuer rating, sovereign rating). Credit ratings are used by professional investors such as companies listed on the stock exchange to incite investors to invest either in their issued stocks or bonds.

CRAs act as neutral third parties providing information concerning for the creditworthiness of investments. With the expertise CRAs have they evaluate the credit risk level of various firms and businesses. However, over time it is commonly understood that over-reliance to CRAs could be hazardous. As experienced in 2008, over-reliance on credit ratings contributed to the global financial crisis that escalated in 2008. The 2008 crises are mostly believed to be triggered by the unrealistic rating of the CRAs.[2] The exaggerated ratings caused an artificially rapid growth of the market which then led to the collapse of the banking sector.

The global crises of 2008 mobilized the European Commission to pursue reforms. Thus, the European Parliament and the Council issued the Regulation on Credit Rating Agencies No. 1060/2009[3] to strengthen the internal risk assessments of institutional investors and banks.[4] Thence as of the 2010s, credit ratings became a regulated activity in many parts of the world, and/or existing duties have been tightened.

Additionally, the International Organization of Securities Commissions (IOSCO)[5] which was initially formed in 1983 and which now regulates the world's securities and future markets, published widely accepted Code of Conduct Fundamentals for Credit Rating Agencies.[6] The Code was first published in 2003[7] than following the global crises revised in 2014, reflects internationally accepted rating practices.

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2 Ali Küçükçolak, Kredi Derecelendirme Sektörü (Hiperlink 2020) 48.

3 EC Regulation 1060/2009 concerning Credit Rating Agencies [2009] OJ L302/1 (Regulation 1060/2009).
Regulation (EU) No 462/2013 of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies [2013] OJ L 146/1, Consolidated version: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02009R1060-20190101&from=EN

4 For further information see Güray Özsu 'Regulation of Credit Rating Agencies in Terms of Conflict of Interest and Civil Liability in European Union'(2022) 12/24 Law & Justice R 55-71.

5 See https://www.iosco.org

6 See https://www.iosco.org/library/pubdocs/pdf/IOSCOPD437.pdf

7 See IOSCO Technical Committee, Statement of Principles Regarding the Activities of Credit Rating Agencies (2003), http://www.iosco.org/library/pubdocs/pdf/IOSCOPD151.pdf.

As a developing country that needs funds for its professional investors/ corporations and financial institutions such as banks, Turkey is also closely following the regulations entered into force in the EC and OECD countries. Turkish Capital Market Law No. 6263 (CML no 6263)[8] has been amended in 2020 to comply with Regulation no. 1060/2009 related to the CRAs.

I. THE LEGAL FRAME WORK OF CREDIT RATING ACTIVITIES IN CML

Activities related to corporate rating in Turkey are quite new. The new system, aligned with EU Regulations and Basel Accords, expands the scope of information to be disclosed under the offerings. With the recent legislative changes, regulations related to credit rating operations in Turkey took a similar form to European and US equivalents. As said above Turkey is closely following the regulations entered into force in the EC and OECD countries. CML 6263 (CML no. 6263) has been amended in 2020 to comply with EC Regulation no. 1060/2009 related to the CRAs.

Turkey has adopted a dual rating system where credit ratings of capital market instruments and financial market instruments are being regulated by different legal regulations and supervised by different authoritative bodies. Thus, credit ratings of corporations that are listed in the Turkish stock market, their securities, and bonds (issuer/ issue rating) are regulated as per the CML No. 6263 under the supervision of the Capital Market Board (CMB). On the other hand, credit ratings of financial institutions such as banks, and the creditors of the banks are regulated as per the Turkish Banking Law (BL) No. 5411[9] under the supervision of the Banking Regulation and Supervision Agency (BRSA).

With this paper we are only examining the credit rating of capital market instruments which are subject to CML no. 6263. As said above Capital Market Board (CMB) is authorized to regulate and supervise the CRAs that rate corporations listed in the Stock Market. The ability of CRAs to carry out rating activities in Turkey is also conditional on obtaining authorization from the Capital Market Board (Article 62/2 of the CML no. 6362).

In order to regulate the principles regarding the authorization and activities of the Rating Agencies, CMB issued Communiqués Serial VIII, no. 51 which had to be altered many times in line with the changes in the relevant laws, the EU Regulation No. 1060/2009, and the needs of the market. "Communiqué on Principles of Rating Activities and Rating Agencies in Capital Market", Serial: VIII, No: 51 (Communiqué)[10] of the CMB was first published in 2007,

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8 Turkish Capital Market Law No. 6263, 2012 OJ 28513. For official English translation see https://www.cmb.gov.tr/Sayfa/Dosya/116

9 Turkish Banking Law No. 5411, 2005 OJ 25983 (duplicative). For official English translation see https://www.bddk.org.tr/Mevzuat/DokumanGetir/961

10 See official English translation in https://www.cmb.gov.tr/Sayfa/Dosya/145

and after being amended many times, it was lastly updated on 11/10/2019 with Serial: VIII, no. 79.

Turkish CRAs that want to rate the corporations listed in the Turkish Stock Market need to provide all the conditions listed in Art. 9, 10, 11 of the Communiqué and obtain a license from the CMB. Accordingly, CRAs can only be established in the form of joint-stock company with all its shares registered. Art. 8 of the Communiqué regulates the international CRAs and requires them to apply and be approved by the CMB and open representative offices in Turkey. With the Communiqué, the international CRAs following their authorization by the CMB, need to open their representative offices in Turkey within 1 year (Communiqué, Art. 8/3, Provisional Article 3).

Although the CMB has communicated in August 2008 its decision regarding the obligation for foreign rating agencies to open an office in Turkey; we see that international CRAs have not acted accordingly till now. In other words, although Moody's and S&P have not opened offices in Turkey, they continue to rate Turkish sovereigns and corporations. Thus, by not obeying the decision of the Board dated 07/07/2008 obliging Moody's and S&P to open offices in Turkey; they violate the Communiqué.

Following the authorization given by the CMB, the information is announced on the official web page of the CMB (www.spk.gov.tr). As of today, CMB has authorized 9 CRAs in total, three of which are the big three (Fitch, Moody's, S&P).[11]

II. NEW LIABILITY REJIM

Prior to the adoption of CML no. 6263, the legal regime of the liabilities that will arise as a result of the activities of the CRAs were not specifically regulated, thus those activities were evaluated as per the general liability regime in the Turkish Code of Obligations (TCO) no. 6098.

With the CML no. 6362 which entered into force in 2012 special provisions have been introduced regarding the liability for the damages caused by the activities of the CRA. A general responsibility provision has been included with Article 63 in the CML not only for CRAs but also for the audit and appraisal firms. The second sentence of the provision clearly stipulates that the CRAs are liable for damages arising from their activities. The provision is as follows:

CML no 6362

"Independent audit firms shall be responsible, with the auditors that have signed the report, within the limited scope of their duties, for damages that may result from the fact that financial statements and reports they have audited have not been audited in accordance with legislation. Independent audit firms,

[11] https://www.spk.gov.tr/SiteApps/EVeri/Detay/derkur

credit rating agencies, and appraisal firms shall be liable for damages they have caused due to false, misleading, and incomplete information included in reports they have prepared as a result of their activities."

Above quoted Art. 63 is not the only liability provision in CML. Special liability for "public disclosure documents" is stipulated in Art. 32; for "the rating reports included in the prospectus" is stipulated in Art. 10/2, for "the certificate of the issue without a public offer" is stipulated in Art. 11/3 of CML.

Additionally, the Communiqué (Serial VIII, No. 51) also includes detailed liability provisions specific to CRAs. Article 27 of the Communiqué gives us the main liability rule. The provision is as follows:

Art. 27, Communiqué

"(1) Without prejudice to the general law provisions pertaining thereto, the rating agency and the relevant rating surveyors and rating committee members shall be severally liable for all kinds of damages and losses that may be incurred by customers and third parties due to failure in performance of rating activities in compliance with principles, rules, and procedures set forth in this Communiqué.

(2) Rating agencies authorized by the Board must take out a professional liability insurance cover against probable damages and losses that may arise out of their rating activities.

(3) Criminal liabilities of shareholders, directors, managers, rating committee members, controllers, rating surveyors and other employees of rating agency are, however, reserved."

As also seen from the above-quoted Article 27 of the Communiqué, the CRAs, and the rating surveyors and rating committee members shall be severally liable for all kinds of damages and losses that may be incurred by customers and third parties due to failure to perform rating activities in compliance with principles, rules and procedures set forth in this Communiqué.

In consideration with other legislation, the Communiqué has regulated in a more detailed way the responsibility of the CRAs. The Communiqué sheds light on whom the CRAs are liable and the reason for their responsibility. The primary reason for the legal liability of CRAs against customers and third parties is the rating's not being carried out in accordance with the principles and rules set forth in the Communiqué.

It should also be kept in mind that the fact that the liability provisions incorporated in the CML no. 6362 and the Communiqué does not remove CRAs' liability arising from the general provisions in accordance with the Turkish Code of Obligations (TCO).

III. CONDITIONS OF THE LIABILITY STIPULATED IN CML no. 6362 AND COMMUNIQUÉ

As explained where the legal bases of the liability of CRAs lies in CML (art. 63, art. 32) the details are stipulated in the Communiqué. The primary reason for the legal liability of CRAs against third party is the rating's not being carried out in accordance with the principles and rules outlined in the Communiqué. We will look into those principles in detail below.

Before starting, it should be noted that Art 27/I of Communiqué states that the CRAs would be liable to the customers and third parties. The concept of customer is any person who solicited rating, in other words who has a contractual relation with CRA. On the other hand, the concept of a third party is not as clear as the concept of a customer and it is not defined in the Communiqué. We assume that third party refers to the information users other than the customers of the CRAs. Information users may be anyone who invests by relying on financial statements and reports. An unsolicited investor may claim compensation for damages incurred due to relying on the credit rating reports of the CRA. The Communiqué does not limit the number of third parties (plaintiffs) as long as a failure to comply with the principles and procedures of the rating activity is established. With this paper we examine the compensation possibility provided for third party investors who suffered losses due an activity failure of a CRA.

A. LEGAL BASIS FOR TORT LIABILTY IN GENERAL

The investor who has suffered a loss due to relying to the rating (or the information) announced by a CRA could claim to be compensated based on alternative reasons each of which requires the fulfilment of different conditions.

An investor that has solicited a credit rating directly from CRA may make a **contractual damage claim** against the CRA. Under Turkish contract law, the plaintiff must prove that contract is breached and that he has suffered a loss due to the breach, while the burden of proof for negligence is shifted to the defendant (Art. 112, TCO). If the defendant cannot prove that he was not faulty, he is assumed faulty due to the "presumption of fault principle" recognized in contractual law provisions of TCO.

An investor that has not solicited the credit rating from CRA, cannot base his claim on contractual liability but he can base his compensation claim on general **tort law** provided the conditions are met. To hold someone liable for tort, four conditions need to be realized in Turkish Law: (1) unlawful act, (2) fault, (3) causation (4) damages. [12] The first condition being an "unlawful act"[13]

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12 See Fikret Eren, Borçlar Hukuku Genel Hükümler (Yetkin 2020), N. 1611, 584; Kemal Oğuzman and Turgut Öz, Borçlar Hukuku Genel Hükümler Cilt 2 (Vedat Kitapçılık 2021), N. 37, 14.

13 See for details Tuba Akçura Karaman "Comparative study on the Liability of Classification Societies To Third Party Purchasers with reference to Turkish, Swiss; German and US Law" (2011) 42/1 JMLC 130, 134.

appears less clear when we are claiming for pure-economic damages. As per the vastly accepted doctrine in Turkey, likewise in Germany and Switzerland, **general tort law** limits liability for pure economic loss, with few exceptions to cases of intentional damage (TCO, art. 49/2).[14] Thus, if the plaintiff proves that CRA has issued misleading data with the intention of causing harm to the plaintiff then CRA could be held liable for tort for damages caused.

Another exception to **tort liability** limitation **on pure economic loss** is accepted when there is a legal norm protecting such economic interest. This limitation for claims on pure economic loss roots in the unlawfulness requirement of the tort liability. The notion of unlawfulness is controversially discussed among academics. The majority accepts that an act harming an absolute right such as "right in rem" or personal right is unlawful in nature; whereas, an act harming all other interests, especially harming pure economic rights, is unlawful if such an economic interest is being protected by a legal norm.[15] In capital markets, the economic interests of issuers and investors are both protected by the liability provisions of CRAs in CML no. 6362. [16] As explained above as of 2012 following the adoption of CML no. 6362, pure economic rights of the issuers and investors are protected with art. 10, 32, 63 of the CML no. 6362 and with art. 27 of the Communiqué. Those regulations ended the legal debate on the pure economic losses, securing tort claims via law. Thus, an investor may initiate a tort claim against the CRA in order to compensate his pure economic loss incurred due to reliance on CRA's misleading rating report.

In light of the above explanations, the provisions stipulated in CML and the Communiqué are protecting the **pure economic loss** of the investors aroused due to activities of CRAs. Thus, when an investors is suffering an economic loss due to an activity carried out by CRA then CRAs are accepted to have acted unlawfully. Given that the other three conditions (fault, damage, causation) are also fulfilled then the CRA would be held liable.

The Capital Market Law emphasizes on CRAs' carrying out their activities in compliance with principles, rules, and procedures outlined in the Communiqué. The Communiqué (art. 27) states that CRAs will be liable for all kinds of third-party damage due to failure to operate rating activities in compliance with the principles, rules, and procedures.

Therefore, if a plaintiff proves that CRA has not complied with the principles or that the information included in CRA's report is false, misleading, and incomplete then CRA then this is enough to fulfil the requirement for

14 ibid 130-132.

15 ibid 132.

16 For a similar assessment on tort liability of independent audit firms see Aytekin Çelik, Bağımsız Denetim Kuruluşlarının Sorumluluğu (Yetkin 2005) 152.

unlawfulness. As explained below art 32 of the CML no. 6362 has also incorporated a presumption of fault for a CRA which fails to comply with the rules and the principles. Further, the plaintiff still needs to prove the causality between the damage incurred and such faulty behaviour of CRA.

Below we will examine each of the conditions (unlawfulness, fault, damage, causation) in details one by one.

B. UNLAWFUL ACT: BREACH OF A DUTY IMPOSED BY LAW

CML no. 6362 imposes liability for CRAs for damages they have caused due to false, misleading, and incomplete information they have used or announced (art. 63, 32/2). Thus, the main duty that CML no. 6362 imposes to CRAs is, to use or announce proper, correct and complete data for CRAs. Additionally, the "Communiqué on Principles of Rating Activities and Rating Agencies in Capital Markets, Serial VIII, No. 51" (the Communiqué) imposes liability to CRAs due to failure in performance of rating activities in compliance with principles, rules and procedures outlined in this Communiqué (art. 27). [17]

Communique is listing the principles that CRAs are required to follow and any failure to fulfil any of the principles is accepted to be unlawful. As per the principles set down in the Communiqué, CRAs should be impartial (Art. 18), independent (art.19), prudent, should use reliable financial data for their evaluations, avoid information that might be misleading or false, appoints experienced experts in their activities, etc. to provide high-quality reports (art. 15).

Related regulations emphasize liability for false, misleading, or incomplete data. The scope of such liability is interpreted broadly to prove full protection to investors. For example, late announced/reported data is considered misleading/incomplete information. The Communiqué requires the data used in the rating to be reliable and correct. For this reason, financial data should be duly approved by independent auditors, and the rating activity and rating methodologies should be carried out duly accordingly to the principles shown in the CMB Communiqué**.** CRA is obliged to verify information provided by the issuer, statutory auditor, or publicly available information.

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[17] Communiqué, Liability Arising out of Rating Activities, art. 27:
(1) Without prejudice to the general law provisions pertaining thereto, the rating agency and the relevant rating surveyors and rating committee members shall be severally liable for all kinds of damages and losses that may be incurred by customers and third parties due to failure in performance of rating activities in compliance with principles, rules and procedures set forth in this Communiqué.
(2) Rating agencies authorized by the Board must to take out a professional liability insurance cover against probable damages and losses that may arise out of their rating activities.
(3) Criminal liabilities of shareholders, directors, managers, rating committee members, controllers, rating surveyors and other employees of rating agency are, however, reserved.

As per art. 17 of the Communiqué, CRAs should continuously follow the changes in the data or circumstances between the ones used in their report and should do the revisions accordingly. The provision is as follows:

Communiqué, art. 17:

(1) After making a rating public as above, the rating agency is under obligation to continuously keep that rating updated by:

a) Regularly reviewing information regarding the relevant client and/or capital market instruments representing indebtedness;

b) Being aware of all kinds of information which may affect the rating operations and decisions, also including those which require termination of the rating contract;

c) Reassessing the rating works in a timely manner depending on review outcomes.

(2) A rating work may not be terminated with the intention of refraining from making the ratings public. With the exception of this case, a decision regarding termination of a rating work shall be made public by the relevant rating agency. The public disclosure relating thereto shall also declare the last date of revision of ratings, and the reasons underlying termination of the rating work.

(3) The maximum time of revision of solicited or unsolicited country credit ratings shall be implemented as 6 months.

As it can be seen from the above provision, CRAs are under the obligation to review and update the rating information that they have declared to the public.

Article 19 of the Communiqué, emphasizes the obligation of being independent and being refrained from conflict of interest.[18] Further art. 20 of the Communiqué exemplifies situations where independence is deemed to be lost. If one of the situations is proven then CRA shall be deemed to violate the principle of independence. For example, if it is detected that a benefit is obtained directly or indirectly from or is promised to be provided by the client or any other persons, entities, or corporations related to the client, other than those specified in the rating contract is deemed to have compromised the independence (art. 20/a1). Another example where it is deemed that independence is broken is; if it is demonstrated that a shareholding relationship is entered into with the client, or the shareholders holding 10% or more of the capital of the client, or natural persons or legal entities which are directly or indirectly affiliated with the client in terms of management, audit and/or capital or are or controlled by the client (art. 20/a2).

The burden of proof that a CRA does not comply with any of the principles set forth in the legislation is on the plaintiff. For a third-party investor it is not

[18] See also Özsu (n. 4) 55-71.

easy to follow up and show such a behaviour. For that reason, a presumption is accepted in CML no. 6362 to help the investors in their claims. art. 32/4 of the CML no. 6362 establishes liability to CRAs as long as the investor can prove that he has suffered losses due to an investment decision that is taken right after the rating data is announced.

However, CML no. 6362 also incorporated opportunities for CRAs to be freed from liability. Article 32/5 of CML no. 6362 has listed four situations where the compensation claim will be rejected. The provision is as follows:

CML no. 6362, art. 32/5:

"Compensation requests arising from inaccurate, misleading or incomplete public disclosure documents may be rejected in the event that;

a) The purchase or sale of capital market instruments is not based on the public disclosure document,

b) The purchase or sale of capital market instruments has been realised although it was known that the information contained in the public disclosure document was inaccurate, misleading or incomplete,

c) The correction regarding the inaccurate, misleading, or incomplete information contained in public disclosure documents has been disclosed before the investment decision has been taken or before the transaction based on this document has been made,

ç) The investors would have incurred a loss even though the information contained in the public disclosure documents was not inaccurate, misleading or incomplete."

In case a CRA could prove any of the facts listed above in art. 42/5 a-ç in CML no. 6362 then it would not be liable for the losses incurred.

C. FAULT

In general, even slight negligent is enough for both in tort and contractual liability in Turkish Law. Only in art 49/II of TCO requires intention for the wrongdoer to be liable due to his immoral acts.

TCO, art. 49:

"Any person who unlawfully causes damage to another, whether wilfully or negligently, is obliged to provide compensation.

A person who wilfully causes damage to another in an immoral manner is likewise obliged to provide compensation."

Contrary to the general principle of tort liability (TCO, art 49), art. 32/3 of the CML no. 6362 required gross negligent or intention for CRA for liability. This requirement of intention approximating the liability of CRA to the liability

for immoral behaviour stipulated in art. 49/2 of TCO. Art. 32/3 of the CML no. 6362 is as follows:

"Persons who prove that they were not informed about the inaccurate, misleading or incomplete information included in public disclosure documents and that this information deficiency does not arise from their intention or gross negligence shall not be responsible."

As seen in the above quoted art. 32 of the CML no. 6362, liability is based on intentional or gross negligent act of the CRAs. While requiring a more severe fault for liability, the wording of the article clearly demonstrates a fault assumption in favour of the claimant. The above quoted provision states that if the CRA can prove that it was not grossly negligent then it may be freed from liability. Conversely thinking, the provision accepts a presumption as to CRA's being grossly negligent[19], providing an opportunity to CRA to prove the opposite to free itself. Here it should also be remembered that any careless behaviour within the expertise of an expert is deemed as being grossly negligent.[20] In general liability principles the duty of care is aggravated and referred to as professional care (pater familias). CRAs, being experts, any minor omission or careless behaviour within their expertise area would be deemed as gross negligence before the Turkish courts.

Therefore, it is not easy for a CRA to prove that their experts are not acted grossly negligent in not being informed or aware of a piece of information. Since any slight negligence is assumed as being gross negligent if it is related to his/her area of expertise. An expert needs to be aware of all the data within the scope of its expertise. Not knowing data cannot be an excuse. Therefore, it is commonly accepted that the expert may only claim that he was slightly negligent for not being aware of an information if the information is not within the scope of his expertise.[21]

As explained above art. 63 of the CML no. 6362 states that CRAs are responsible for the damages they cause due to incorrect, misleading, and incomplete information included in their rating reports. Thus, it shall be enough for the investor to show that he suffered damage due to the rating report; he does not have to show the CRA was at fault. Then the burden is on CRA to prove that it's not in fault (acted neither intentionally nor gross negligently) as per art. 32/3 of the CML no. 6362.

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19 See also, Nevin Meral, Sermaye Piyasasında Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk (Onikilevha 2021) 346. The reference EC Regulation no. 1060/2009 art. 35a also requires gross negligence or intention for liable however it does not include any wording on the burden of proof. Regarding this issue see also Özsu (n. 4) 67 etc.

20 Oğuzman and Öz (n. 12), N. 159, 160, 162, 163, at 62, 63, 64.

21 See Meral (n. 19) 349. Also see the other authors Meral referred in the same page.

D. CAUSATION

To hold the CRA liable for any loss incurred, the claimant has to establish the causal link between the unlawful act of CRA and the damage suffered. In other words, it should be proven that the CRA failed to perform in accordance with the principles outlined in the Communiqué and the damage incurred by the investors is due to said failure.

In general, the burden to prove the causation between the act and the damage is on the claimant (investor). However, CML no. 6362 has enacted provisions that would ease the way for the investors to prove the causalities.[22] If the damage caused is due to an investment decision that is taken right after the rating data is announced then the causation between damage and the rating is deemed established (art. 32/4, CML no. 6363).[23] Such an assumption of causation in favour of investors does not prevent a CRA to prove that there is no causation between their rating and the fluctuation in the market which caused the investor to lose money. Therefore, we may assume that the burden of proof is transferred to the CRA with the presumption provision enacted in art. 32/4 of the CML no. 6362.

The Communiqué regulates the principles of the CRAs and their rating activities. Article 27 of the Communiqué bases the liability of CRA on the failure to comply with the principles and procedures of the rating activity specified in the Communiqué. It also adopts several presumptions where the failure is deemed to exist. For example, Article 20 of the Communiqué listed the below examples among several others where the essential independent character of the CRA is deemed vanished:

- Customers' not paying or paying less or more than the contractually determined rating fee for previous years without a valid reason.
- The rating fee's being conditional or tied to a pre-agreed rating estimate or be determined after completion of the rating process or being different significantly from the market value

In case of any hesitation by the customers or other relevant parties regarding the independence of the CRA, the independence is deemed removed. In cases where independence is lost, the Board (CMB) should be immediately informed.

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22 For a parallel opinion see Meral (n.19) 370.

23 Art 32/4, CML:
"During the validity period of the prospectus containing inaccurate, misleading or incomplete information and immediately after the disclosure of the other public disclosure documents to public, in the event that a loss arises in the assets of investors upon the sale or purchase on the exchange of capital market instruments, purchased at the initial public offer or purchased or sold on exchange immediately after the date when the information consistent with the reality has arisen, a casual link shall be deemed as established between the public disclosure documents and the loss, in regards of the compensation requests to be asserted according to this Article."

The CRA together with its rating experts and rating committee members are deemed jointly and severally liable for the damages suffered by the customers and third parties due to their failure to comply with the principles and procedures of the rating activity specified in the Communiqué, without prejudice to the general provisions (Communiqué, art. 27).

E. DAMAGES

According to the Turkish Code of Obligations, the maximum amount of compensation is the damage suffered.[24] The amount of compensation cannot exceed the damage. As per Art. 50 of the TCO, a person claiming damages must prove that damage has occurred. Where the exact value of the damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the person suffering damage.

The plaintiff needs to materially prove the loss incurred due to relying on the information disclosed as a result of a rating activity of CRA and investing accordingly. In speculative markets such as stock markets, it is very difficult to materially prove the real loss.

In cases of taking investment decisions relying on rating reports publicly disclosed the calculation is even confusing. For example, relying on the accuracy of the information disclosed by CRA the investor might have bought at a high price or sold the papers in his hand at a very low price. However, only a possibility of loss is not enough for investors should prove material loss. Therefore, an expectation of market effect is not enough, the investor cannot base his legal claim on an assumption; the market price should be affected by the announced rating note.

As explained above, CML no. 6362 has adopted provisions that would ease the way for the investors in proving their loss. If the damage caused is due to an investment decision that is taken right after the rating data is announced then the causation between damage and the rating is deemed established (CML, art. 32). It is the same if the loss suffered occurs right after the announcement of the correction data by CRA then the causation is deemed established.

CML no. 6362 has accepted another presumption of causation when the investor himself reverses the initial transaction -and does the opposite of the one based on the incorrect rating- immediately after the announcement of the correction of the rating. Article 32/4 of the CML states that in case of damage to the assets of the investors due to the sale or purchase of the capital market instruments purchased or sold on the stock exchange immediately after the disclosure of the rating and purchase or sale of the same instruments

[24] For detailed explanation see Oğuzman and Öz (n. 12) pp. 48-56; Eren (n. 12), 871; Meral (n. 19) 419.

immediately after the correction announcement; a causal link is deemed to have been established between the rating and the damage.

Loss of the investor mainly consists of the difference between the undistorted price and the distorted price (too high purchase price) which is due to the incorrect credit rating. Or the loss might occur due to the sale of the investor at a low price relying on the incorrect rating and then having to buy at a high price after the correction. To calculate the amount of the compensation to be paid by CRA, the court needs to have proof of such differences and transactions.

Loss of an investor may also occur when he stops buying an instrument following a rating disclosed by a CRA. Had he not seen the unrealistic rating he would have bought the financial papers and would have earned money. This kind of loss is referred to as loss of profit. It is mostly accepted that such a loss of profit is almost impossible to prove and it does not fall into the scope of the losses stipulated in art. 32/4 of the CML.[25]

In general, if the plaintiff can prove only the existence of the loss but not the amount, then it is the judge's duty to calculate the exact amount of the compensation to be paid (TCO, art. 51). However, it's the plaintiff's duty to prove that the damage has occurred and that there is causation between the damage and the incorrect rating. To be able to show the causation, it should first be proved that the incorrect rating has affected the prices in the market. Since the market does not always react very quickly it shall not be easy to establish such a causation. Thus, the first and the correcting transactions should have to be carried out physically to be able to calculate the price differences. It should also be kept in mind that not every loss following a declaration could be linked to the rating of a CRA.[26] Even following correct rating data, it is possible to see an unexpected downwards fluctuation of the market. Due to the assumption of causation deemed in art. 32/4, it would be CRA's duty to prove that there is no causal link between its rating activity and the loss incurred.

IV. STATUE OF LIMITATION

Under Turkish law, liability in tort is subject to a limitation period of two years starting from the date on which the victim learns about the damage and the identity of the wrongdoer. For an incurred loss, the maximum period is 10 years from the date of the tortious act (TCO, art. 72). Under Turkish law, contractual liability is generally subject to a limitation period of 10 years from the date on which a damage claim is due (TCO, art. 146).

CML no. 6362 incorporated a shorter limitation period for the damage claims caused due to relying on the inaccurate, misleading, or incomplete

[25] For a similiar opinion see also Meral (n. 19) 365; Mehmet Murat İnceoğlu, Sermaye Piyasasında Aracı Kurumların Hukuki Sorumluluğu, (Seçkin 2004) 134.

[26] See also, Meral (n. 19) 365.

information included in all kinds of public disclosure documents. As per article 32/6 of the CML no. 6362, the compensation requests arising from public disclosure documents shall lapse within ***six months starting from the date when the loss has occurred.*** The loss is deem occurred when the investor/ issuer becomes aware of the correct data which is when the correction rating is declared. The investors will not be damaged until the real rating is declared and the loss becomes apparent.

The rather short period (6 months) stipulated in art. 32/6 of the CML no. 6362 is criticized in doctrine. It should also be remembered that any unlawful act of CRA that does not fall in the scope of the art. 32 would be subject to the general limitation periods in the TCO.[27] However, in such a case the investor could not profit from the presumptions in the Art. 32 which are favouring the plaintiff.[28]

CONCLUSION

Investors have obtained a solid legal reason to base their damage claims against CRAs thanks to the Art. 63 and Art. 32 of the CML. Prior to those regulations an investor who has invested as per the data announced by an CRA was having hard time to compensate his damages. Such regulations supervising rating activities in favour of individual investors, establish trust and high-quality activities within in the stock market transactions.

It should be noted that the legal regulations and the domestic CRAs are rather new in Turkey and the investors have not yet been aware of their legal rights. Therefore, it is not surprising not to have any jurisdiction issued pursuant to newly enacted laws. Hopefully the effects of the new liability regime accepted in favour of third-party investors will be seen gradually by time.

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[27] See Meral (n 19) 421.

[28] ibid 421, 422.

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AN ANALYSIS OF THE CONCEPT OF HEAD OF STATE IMMUNITY IN THE POST-WESTPHALIAN WORLD ORDER*

Vestefalya Sonrası Dünya Düzeninde Devlet Başkanlarının Yargı Bağışıklığı Kavramı Üzerine Bir Analiz

Merve GERTİK**

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ABSTRACT

In the era of globalization, the Westphalian concept of state sovereignty is eroding. Although still the sole creator of international law, sovereign states are not the sole actors or subjects of international law anymore. The subjects now include individuals as well as non-state actors. As Westphalian sovereignty is considerably affected by the changes in the world order, inevitably, the privileges derived from it would also be affected. One focus point to observe such influence is the concept of 'The Head of State Immunity' which is derived from the immunity granted to states on the basis that equals do not have authority over one another. However, the new dynamics of the international order are more concerned with ending impunity rather than the preservation of jurisdictional immunity, particularly for international crimes. However, despite all the measures taken, it is still difficult to claim that the immunity of the head of state has been entirely abolished. This article analyzes the concept of immunity of the head of state in light of changes in the Post-Westphalian era.

Key Words: individual criminal responsibility, post-westphalia, international criminal court, human rights, head of state immunity

ÖZET

Küreselleşme çağında, Vestfalyan devlet egemenliği kavramı aşınmaktadır. Egemen devletler, hâlâ uluslararası hukukun tek yaratıcısı olsa da, artık

There is no requirement of Ethics Committee Approval for this study.

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** Research Fellow, Near East University, Faculty of Law, International Law Department, e-mail: merve.gertik@neu.edu.tr, ORCID ID: 0000-0001-6158-8539

uluslararası hukukun tek aktörü veya öznesi değildir. Uluslararası hukukun süjeleri artık bireyleri olduğu kadar devlet dışı aktörleri de içermektedir. Vestfalya egemenliği, dünya düzenindeki değişimlerden önemli ölçüde etkilendiğinden, egemenlikten kaynaklanan ayrıcalıklar da kaçınılmaz olarak etkilenmiş durumdadır. Bu tür bir etkiyi gözlemlemek için odak noktalarından biri, eşitlerin birbirleri üzerinde yetki sahibi olmadığı temelinde devletlere tanınan dokunulmazlıktan türetilen 'Devlet Başkanlarının Yargı Bağışıklığı' kavramıdır. Bununla birlikte, uluslararası düzenin yeni dinamikleri, özellikle uluslararası suçlar bakımından, yargı bağışıklığının korunmasından çok cezasızlığın sona erdirilmesine odaklanmaktadır. Ancak alınan tüm tedbirlere rağmen, devlet başkanının dokunulmazlığının tamamen kaldırıldığını iddia etmek hâlâ güçtür. Bu makale, devlet başkanlarının yargı bağışıklığı kavramını Vestfalya sonrası dönemdeki değişimler ışığında incelemektedir.

Anahtar kelimeler: bireysel cezai sorumluluk, post-vestfalya, uluslararası ceza mahkemesi, insan hakları, devlet başkanı bağışıklığı

INTRODUCTION

The Treaty of Westphalia created and spread sovereign state-oriented world order. Sovereign equality was empowered by the principles of non-intervention and national self-determination. In this context, states were benefitting from absolute immunity from the jurisdiction of foreign states. As the heads of state are the main representatives of the states in the international order, they started to benefit from the jurisdictional immunity derivatively. The ongoing process of globalization has become the key factor in understanding the current world order. The globalization process is also called as the end of sovereign states in literature, which symbolizes that the states lost significant power in their institutional autonomy. While states were engaging in trading activities, their absolute immunity from the jurisdiction has been changed into a restrictive immunity form. The changes regarding the sovereign privileges were not limited to this. In this era, human rights and the idea of international justice stand out as universal values, causing the emergence of concepts that can be considered more sacred than sovereignty has been, so the acts concerning human rights abuses which have reached the peremptory norm status resulted in committing the international crimes.

As the traditional international law approach was not even recognizing the individuals as actors, the international crimes committed by the heads of state were being categorized as the acts of the sovereign state. However, as a result of the terrific events that took place during the world wars, the international legal order started to adopt a more humanitarian ideology. Consequently, the traditional international law approach started to deteriorate with the establishment of new substantive laws and involvement of non-state actors.

After the formation of individual criminal responsibility, a major contradiction arisen between the idea of ending impunity and the protective shield of state officials granted by the traditional international law. This research aims to find out the answer to the question of "To what extent the international justice succeeded in removing the immunity of the head of state regarding the international crimes?"

I. THE LEGAL FOUNDATION OF HEAD OF STATE IMMUNITY IN INTERNATIONAL LAW

The idea of sovereign and equal states was first established with the Westphalian State System. The system held legal personality and governmental power of the states as crucial elements, and the modern international system between states built on the main principles of the state sovereignty and national self-determination, non-interference in the domestic affairs of an external state, and equality between states. State immunity was seen as the key to isolate the administrative power of the states and prevent potential interference by other states. [1]1 Article 2 of the UN Charter also confirms the equality and self-determination principles with the intention to develop friendly relations among the nations.[2]

States usually utilize from two forms of immunity The restriction on the forum state's ability to exercise jurisdiction over a foreign state is known as immunity from jurisdiction. In order to safeguard sovereign rights from outside intervention and to uphold the independence and dignity of states in the international sphere, immunity from enforcement forbids the forum state from applying any limitation orders on the foreign state.[3] The absolute form of sovereign immunity could not adapt to the necessity of the world order as the states began to engage in trading activities more. Immunity was providing an unfair advantage to states in competition with private institutions, so the restrictive theory of state immunity was improved. The activities of the state were categorized as sovereign and non-sovereign activities. [4] According to the restrictive approach, states are not immune from the cases arising out of the acts that can be carried on also by private actors such as commercial activities. However, the states are still immune to the claims arising out of governmental activities.[5]

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1 Hazel Fox and Philippa Webb, *The Law Of State Immunity* (Oxford University Press 2013) 225.

2 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

3 Eva Wiesinger, 'State Immunity From Enforcement Measures' <https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/wiesinger.pdf> accessed 27 September 2022.

4 Xiaodong Yang , *State Immunity in International Law* (Cambridge University Press 2012) 11-19.

5 Lakshman Marasinghe, 'The Modern Law Of Sovereign Immunity' (1991) 54 The Modern Law Review 664, 681.

The head of state is responsible to exemplify the state among international relations, and take actions on behalf of it as the highest representative. The doctrine of the head of state immunity in international law forbids foreign state courts from exercising jurisdiction over the head of state of another nation. The heads of state benefit from this extended privilege as representatives which is in theory, granted to the states for the protection of sovereignty and enforcement of non-interference.[6]

Currently, there is no definite international convention that can be shown as the primary legal ground of the immunity utilized by heads of state. The scope of the Vienna Convention on Diplomatic Relations,1961, is restricted with diplomats and diplomatic staff. [7] As the role of the head of state does not belong to this circle, it is not possible to reflect this Convention as the origin of heads of state immunity. Although Article 21 of the Convention of the Special Missions mentions the head of state immunity, the article points out the idea of the head of state immunity as an already existing concept. [8] The convention refers that the heads of state can benefit from the immuny granted to them by international law during the special missions in foreign states. For this reason, interpreting the article as a recognition of the immunity for a specific condition is a more appropriate approach than referring it as the primary legal basis of the immunity. The main aim of the article is to specifically indicate that immunity for the highest representatives is not precluded during the commission of the special mission.[9] The definition of the Convention on Jurisdictional Immunities of States and Their Property considers the instruments of the state in its definition and extends the state immunity to the representative when they are functioning for the official duties. However, the convention does not explicitly touch upon the concept of head of state immunity.[10] There is no particular written document to be counted as a legal basis immunity of highest officials, customary international law provides a sufficient legal basis for the procedural exemption of the head of state from the jurisdiction of the foreign states.[11]

Even though the Treaty of Westphalia highlights only the sovereignty of the state, the agreement also became the unofficial legal base for the immunity of heads of state. The modern system of international relations was accepting

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6 Ramona Pedretti, *Immunity Of Heads Of State And State Officials For International Crimes* (2014) 13.

7 Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Done at Vienna, April 18,1961.

8 United Nations, *Treaty Series*, Convention on Special Missions, 8 Dec. 1969, Article 21

9 Pedretti (n 6) 33-35.

10 UN General Assembly, *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004.

11 Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 *European Journal of International Law* 815, 818.

the head of states as a part or instrument of the state. Therefore, any breach committed the head of the state was being considered as the breach of state.[12] Eventually, the criteria for the custom to originate is fulfilled with the common belief. In the case of Lafontant v Aristide, the US court ruled that the foreign heads of state have and protected by absolute immunity. [13] Many cases heard by national courts upheld the immunity of the head of state, but more importantly, the International Court of Justice has decided on the existence of the immunity of state representatives as custom.

The ICJ ruled that Belgium should have respected the immunity of the Democratic Republic of the Congo's minister of foreign affairs and should not have issued an arrest warrant. Belgium claimed that the benefitting from the immunities over the crimes against humanity is not possible. However, the court ruled for Belgium to revoke the arrest warrant and notify all authorities that they circulated this warrant. The judgment was final and binding for the parties. The decision of the court included that absolute immunity for an incumbent foreign minister even extends for committed international criminal acts. This principle also counts as valid and applicable to all other state officials and diplomats.[14]

A. FORMS OF IMMUNITY

The personal immunity is granted only for the high-ranking state officials and provides a shield for both official and personal acts as the state officials would not be able to fulfill their international duties without the guarantee of not to be detained in a foreign country. The immunity even provides protection for the acts committed before the acquirement of the office. The main justifications are to provide the freedom and independence of both speeches and actions of the highest representatives and to enable peaceful international relations between states. The personal immunity stops when the official position of the relevant person is terminated. Therefore, the state official can only benefit from the functional immunity afterward. [15]

The functional immunity is directly linked to the act in question instead of the official person. For this reason, it does not end even though the person resigns from the office. The functional immunity doctrine is explained on the ground

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12 Alina Kaczorowska-Ireland, *Public International Law* (2015) 355-356.

13 *Lafontant v Aristide*, Ruling on motion to dismiss, 844 F.Supp. 128 (E.D.N.Y. 1994), ILDC 1677 (US 1994), 27 January 1994, United States; New York.

14 *the Arrest Warrant* of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), International Court of Justice (ICJ).

15 Riccardo Pisillo Mazzeschi 'The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories', (2015), 2 Questions of International Law 3, 4-6.

that the official acts by a representative of the state are actually acts of the state. The state representative shall only be seen as an instrument that undertakes the actions of the state on behalf of it. Consequently, the responsibility of the taken actions must belong to the relevant state instead of the individual.[16] The critical point is that nowadays functional immunity is not a direct obstacle for a legal proceeding. It requires the test to see whether the subject action of the case is attributable to the state or not. [17]

B. WAIVER OF IMMUNITY

The immunity for the highest representative is given for the sake of the state, not for the personal advantage of the individual, so it can be waived by the state if necessary.[18] When the cases, concerning the waiver of immunity, are examined, the common state practices reflect that states are more prone to waive the immunity of the former heads of states in comparison to the incumbent head of state. The waiver of immunity is out of the question if the state does not express it clearly. [19]

C. THE DRAFT WORK OF THE INTERNATIONAL LAW COMISSION

As the concept of immunity from criminal jurisdiction is becoming a massive contradiction in international law, the International Law Commission started a draft work to create a convention for the issue in 2007. In 2017, the Commission provisionally adopted some draft articles of the fifth report. The provisionally adopted articles were also including the international crimes in which functional immunity could not be applied. In the meetings, that were held in 2018 and 2019 the Comission discussed the procedural aspects of the immunity.[20] In 2021, the Comission focused on the relation amid the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals in order to find solutions for the problems that arise in practice. As the International Law Commission is in charge of developing and codifying international law, even the draft articles can be pointed out as a guide. The draft work of ILC is still under the progress.[21]

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16 Roger O'Keefe, 'Immunity Ratione Materiae From Foreign Criminal Jurisdiction And The Concept Of Acts Performed In An Official Capacity' 1,6-8.

17 Mazzeschi (n 15) 25-30.

18 Xiaodong Yang , *State Immunity in International Law* (Cambridge University Press 2012) 434.

19 Pedretti (n 6) 82.

20 'Chapter VII - Report Of The International Law Commission: Sixty-Ninth Session (1 May-2 June And 3 July-4 August 2017) (*Legal.un.org*).

21 'Chapter VI - Report Of The International Law Commission: Seventy-Second Session (26 April-4 June and 5 July-6 August 2021) (*Legal.un.org*).

II. APPROACHES OF THE NATIONAL COURTS CONCERNED

The state-centered order of public international law was recognizing the states as only the actors and the individuals were not involved as a part of this order. In this context, the individuals did not own any rights or obligations under international law. As the states are corporate bodies, they are not subject to similar punishments with individuals; the crimes attributed to them were remaining unpunished. However, with the rise of human rights law, the principle of individual criminal responsibility was also established over the commission of international crimes. In this regard, it must be noted that the immunities do not refer to the complete removal of legal liability but a procedural obstacle to the jurisdiction.[22]

Pedretti evaluated the criminal responsibility separately for distinct forms of immunity. The first evaluation is about the contradiction between the functional immunity and individual criminal responsibility. While functional immunity aims to direct the responsibility of the official acts to the state, individual criminal responsibility imposes the responsibility of the serious offenses over the individuals including state officials. As individual criminal responsibility is a more recent custom, some scholars argue that it overrides the custom of functional immunity. In contrast, others claim that there is no contradiction between personal immunity and the individual criminal responsibility as both concepts are different in nature.As specified by the verdict of ICJ in the Arrest Warrant case, the personal immunity can only be a procedural delay for the prosecution, which cannot contradict with the substantive nature of the individual criminal responsibility. To sum up, personal immunity can delay the prosecution for the period of incumbency but cannot completely exempt the individual from criminal responsibility. [23]

Immunities arising from international law must be separated from any immunity granted to the state officials by the domestic law of the origin state. Even though two concepts coincide with each other, their justifications and applications may differ from each other. The main difference is the state officials can rely on the immunity principle, which arises from the international law before the national courts of the foreign states. On the other hand, immunity arising from a domestic law is only reliable within the national law system of the relevant state. [24]

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22 Jimena Sofía Álvarez, 'The Balance Of Immunity And Impunity In The Prosecution Of International Crimes' (*Fibgar.org*, 2016) <https://fibgar.org/upload/publicaciones/28/es/the-balance-of-immunity-and-impunity-in-the-prosecution-of-international-crimes.pdf> accessed 29 Sep 2022.

23 Pedretti (n 6) 29-34.

24 Antonio Cassese and others, *International Criminal Law: Cases And Commentary* (Oxford University Press 2011) 264.

The officials have no privileges in their national courts that arise from the international law. However, immunity from prosecution before the national courts of the origin state still exists in order to guarantee that heads of state act independently and effectively while carrying out their official responsibilities. While the immunity of the highest official before the foreign domestic courts is the issue of international law, immunity before the state of origin is the issue of domestic law. In this regard, some constitutions are providing absolute immunity; others are providing limited immunity. The rest of the countries do not have any codification about the domestic immunity of the officials.

When considering the approaches of the national courts of the foreign states over the concept, it must be noted that although a state has jurisdiction for every individual within its territory, the customary law brought a restriction for specific individuals. The head of state immunity concept aims to provide smooth international relations between the states. [25]

According to Akande and Shah, states have a consensus about the application of personal immunity and the principle even extends for the international crimes committed by serving heads of state. In this context, personal immunity before the foreign national courts is uncontroversial. State practices reflect that there is no evidence or attempt to challenge a serving head of state's immunity. So far, the only denial regarding the personal immunity of a head of state occurred in the case of US v Noriega. However, the reason for the denial is that the US was not even recognizing the de facto ruler of Panama as the official head of the state. Consequently, it did not recognize the personal immunity to General Noriega.[26]

Even though the Democratic Republic of the Congo v. Belgium case was about the arrest warrant established against the foreign minister of Congo, ICJ specifically underlined the applicability of the rule for the heads of state. The Arrest Warrant of 11 April 2000 was the first case in which the International Court of Justice decided about the immunity of high representatives of the state before a foreign national court. The ICJ confirmed that the immunity of high representatives is a custom, and there is no exception under customary international law to apply jurisdiction over the officials for the war crimes and crimes against humanity. Although, the ICJ decisions only bind the sides of the legal dispute, the Arrest Warrant decision has a guiding aspect regarding the issue. There is no enough state practice to form a custom of the denial of the personal immunity for international crimes before the foreign national courts.[27]

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25 Salvatore Zappala, 'Do Heads Of State In Office Enjoy Immunity From Jurisdiction For International Crimes? The Ghaddafi Case Before The French Cour De Cassation' (2001) 12 European Journal of International Law 595, 600.

26 Akande and Shah (n 11) 819-820.

27 *the Arrest Warrant* of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), International Court of Justice (ICJ).

The controversial question about the immunity before the foreign courts is whether the heads of state will utilize from the functional immunity for the international crimes they committed during the incumbency. [28] International crimes are more severe in nature as they affect and harm large populations. In this regard, the core crimes are genocide, crimes against humanity, and war crimes. It has been argued that acts of international crimes are in contradiction with jus cogens norms and shall not be defined as sovereign acts. While some views claim that committing international crimes cannot be count as the function of the government officials, the opposite view argues that committing these kinds of serious crimes are not likely to be possible without the support of government policy.[29]

A. PINOCHET CASE

The Pinochet case is regarded as the landmark in questioning the functional immunity of heads of state before foreign national courts. In 1998, Spain made an international arrest warrant for Pinochet and demanded the UK to extradite Pinochet to Spain for trial as the former president was being sued to be responsible for the murder, disappearance, kidnapping, and systematical torture of many people, including the citizens of Chile, Argentine, Spain, and Britain.[30] The Divisional Court decided that Pinochet was entitled to utilize from immunity against the legal proceedings including extradition.[31]The Commissioner of Metropolitan Police and the Government of Spain appealed against the decision before the House of Lords. In the first appeal, the Lords held that even though the heads of states are granted the functional immunity against the potential litigation that may start for the acts that they commit for their duties, the torture and hostage-taking could never be accepted as the functions of the heads of states. The majority of the lords approved the appeal and changed the decision of the Divisional Court. However, as Lord Hoffman was blamed not to be unbiased as he failed to declare his close link with Amnesty International Charity before taking the official position in the appeal, the decision was set aside.[32] In the second appeal, the House of Lords reapproved that Pinochet cannot utilize from the functional immunity for the

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28 Adil Haque, 'Immunity For International Crimes: Where Do States Really Stand? - Just Security' (*Just Security*, 2018) <https://www.justsecurity.org/54998/immunity-international-crimes-states-stand/ > accessed 30 Sep 2022.

29 Akande and Shah (n 11) 817.

30 Andrew D. Mitchell, 'Leave Your Hat On? Head Of State Immunity And Pinochet' (1999) 25 Monash University Law Review 225, 228.

31 'United Kingdom High Court of Justice, Queen's Bench Division (Divisional Court): In Re Augusto Pinochet Ugarte' (1999) 38 International Legal Materials 68.

32 Antonio Cassese, *The Oxford Companion To International Criminal Justice* (Oxford University Press 2009) 874.

commission of the act of torture. The Lords argued that upholding functional immunity for officials would violate the duties of the parties under the Convention against Torture.

As the decision affected the judicial decisions in national courts, the Pinochet case is called as the Pinochet effect in the literature.[33] Even though the Geneva Convention of 1949 required states to enforce universal jurisdiction over the crimes against humanity and the war crimes, before the Pinochet case, national courts were not invoking the principle.[34]

Following the Pinochet case, Spain proceeded to establish arrest warrants for previous heads of state, including the two previous presidents of Guatemala. Spain is just one example from many. [35] In this context, the Pinochet case has an encouraging over the subsequent investigations of international offenses committed by the heads of state. However, the case was insufficient in setting up a principle of removing the functional immunity in concern of international crimes. This is due, in part, to the fact that the Pinochet decision found its legal basis from the universal criminal jurisdiction arising from the Convention against Torture. The states who are non-party to the convention do not have liability to comply with it. Furthermore, the party states to the convention are only liable to apply jurisdiction for the crime of torture.[36]

B. REPEALING OF THE UNIVERSAL JURISDICTION BY BELGIUM

Although the removal of immunities is mainly the concern of domestic and international law, the additional consequence is also evident; judging the preceding or incumbent head of state of a foreign country causes political consequences that affect the relations between the states. The states which attempt to start legal proceedings for the issue are deterred by more powerful and more dominant states of international area. Belgium is one of the most evident examples of this.

In 1993, the Kingdom of Belgium codified the application of universal jurisdiction principles over both its domestic criminal law rules and international war crimes. The following year crimes against humanity and genocide were

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33 Naomi Roht-Arriaza, *The Pinochet Effect* (University of Pennsylvania Press 2011) 52.

34 Veronica Diaz-Cerda, 'General Pinochet Arrest: 20 Years On, Here's How It Changed Global Justice' (*The Conversation*, 2018) <https://theconversation.com/general-pinochet-arrest-20-years-on-heres-how-it-changed-global-justice-104806> accessed 30 Sep 2022.

35 Joanne Foakes, 'Immunity For International Crimes? Developments In The Law On Prosecuting Heads Of State In Foreign Courts' (*Chatham House*, 2011). <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf> accessed 30 Sep 2022.

36 Ingrid Wuerth, 'Pinochet's Legacy Reassessed' (2012) 106 The American Journal of International Law 731, 765-766.

also included within the scope of jurisdiction. The accepted principle was foreseeing to discard the status and title of the officials. Due to its universal nature, even the officials who do not reside in Belgium would be subject to the court's jurisdiction. Even though neither the victim nor the perpetrator had any relation to Belgium, the codification of universal jurisdiction in internal law allowed the victims to file a complaint before Belgian courts. Belgian law even refused the immunity of the incumbent head of state of the foreign country arising from the customary law. However, in the Arrest Warrant case, the ICJ ruled that Belgium was violating the customary law by establishing a warrant of arrest for Abdoulaye Yerodia Ndombasi. [37]

Several Iraqi families demanded jurisdiction against former US president George W. Bush in Belgium in 2003. The families were claiming that the 1991 bombing of a civilian air raid shelter in Baghdad, which resulted in the murder of their family, was the fault of George Bush and a few other former US officials. In response to this complaint, the US began to put pressure on Belgium by threatening to move the NATO headquarters out of Belgium.Even Belgium, which can be called as a progressive country regarding the universal protection of human rights, could not bear the pressure and quickly removed the universal jurisdiction provisions. According to current Belgian law, the judiciary has the authority to reject applications from individuals apart from Belgian nationals and individuals who lived in Belgium minimum three years.

C. GADDAFI CASE BEFORE THE COURT OF CASSATION

The Cour of Cassation upheld Muammar Gaddafi's immunity under customary international law in the case it heard against the Libyan leader. Despite the fact that France is a signatory to the Rome Statute, the Court of Cassation noted that this circumstance should not be interpreted to indicate a responsibility to apply jurisdiction in all situations. Also, the accusations were about the act of terrorism, which is not included in the Rome Statute's list of international crimes.Although Gaddafi did not come to power via the formal procedures in Libya, his personal immunity as de facto head of state arising from the customary law was confirmed by the Cour De Cassation.[38]

The states are still respecting the personal immunity of acting foreign heads of state even in the commission of the international crimes. The reason for this protection is the consideration of the possible critical results of taking legal action against an acting official of a foreign country. The attempt for jurisdiction is likely to result in a political crisis and harmed international relations.

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37 Malvina Halberstam, 'Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics' (2003) 25 Cardozo L Rev 247, 248-255.

38 Zappala (n 25) 598-601.

However, following the Pinochet case, states began to develop an understanding that the immunity from jurisdiction must be temporary, and the officials shall not be allowed to avoid the consequences of committing international crimes after their term of office. Functional immunity cannot be used as a defense against international crimes. In this regard, it is crucial to determine if the act was carried out as part of the official responsibility or at the individual's choice.The opposite view argues that for a head of state to commit serious crimes, the government policy is needed to be set accordingly. Regarding the acceptance or rejection of functional immunity in the conduct of international crimes, the states are still unable to reach a consensus. There is no sufficient state practice to establish a custom. In addition to legal considerations, also political pressure may prevent states from denying the existence of either type of immunity

III. THE EFFECTS OF POST-WESTPHALIAN WORLD ORDER OVER THE CONCEPT

The Westphalian order secularized international politics and rooted it in the principles of national interests. Also, it introduced the idea of sovereignty without any higher authority standing above the states. It embraced a view of an international society founded on the equality of the states and regarded the states as supreme sovereign authorities within their territories with lawful authority over all inhabitants.

In the increasingly globalized and cosmopolitan world, sovereignty has been eroding as the nation-states have integrated themselves into a complex web of global governance that includes regional and international organizations, transnational and subnational organizations, multinational corporations, non-governmental organizations, citizen movements, and individuals who have emerged as independent actors with the potential to challenge states. Additionally, the field of international relations has broadened by addressing new subject matters. The field has been expanded to include human rights, gender, women, the environment, democratization, population movements, and energy politics among many other subjects. Also, the focus of international relations shifted from only state-to-state interactions to interactions between states and sub-national and supra-national actors as well. [39]

The main character of world order as provided in the Treaty of Westphalia remained unchanged until World War I. Since then the structure of the world order began to change significantly and still progressing. [40] Hence, the traditional

[39] Ebru Ogurlu, 'Understanding the Distinguishing Features of Post-Westphalian Diplomacy' (2019) 24 Perceptions: Journal of International Affairs 175, 176-177.

[40] Kenneth Carlston, 'World Order And International Law' (1967) 20 Journal of Legal Education 127, 131.

international law approach also started to change with the appearance of new actors and the improvement of new substantive norms such as human rights law. In this era human rights highlighted as a more sacred value than sovereignty. [41]

According to Falk, Westphalian world order was uniting the idea of equal states with the reality of geopolitical and hegemonic inequality. Hague Conferences of 1899 and 1907 were reflecting the idea that as a consequence of the interacting sovereign states, the war was actually part of the Westphalian world, and the peace could only be sustained through stateless world order. Although, the so-called utopia of stateless world order has not yet achieved, beginning from 1990 the ongoing process of globalization has become the key factor in understanding the current world order. The process also called as the end of sovereign states in literature which symbolizes that the states lost power in their institutional autonomy. As a matter of fact, democracy and human rights stand out as universal values, causing the emergence of concepts that can be considered more sacred than sovereignty has been.[42]

By the 21st century, the world order completely depending on the sovereign states converted with the rise of European regionalism, the invention of weapons of mass destruction, the establishment of international organizations, the rise of global market forces, and the form of global civil society. The state-centered and military-oriented sense of security began to be reconsidered during the post cold war period with the effect of the globalization process. Despite all changes, it would be incorrect to deny the presence of the sovereign states as the world order is still composed of them. However, the state and sovereignty concepts are being transformed by globalization, accordingly, the acts and preferences of the state are determined and limited by the powers beyond the territory of the sovereign. [43]As the Westphalian world order is changing according to some views immunities must be limited or even abolished for the purpose of preventing grave violations of human rights. On the other hand, the opposite view argues that considering the pluralization of the actors in the globalized world, even the scope of individuals protected by immunities must be extended.

The Treaty of Versailles was the first act to call into question the criminal responsibility of the head of state for serious infringements of international law. Unfortunately, the first questioning ended up with a failure. Also, the attempt to judge Wilhelm II for the atrocities committed during the World War I was not successful as there was not enough legal framework for the judgment and Holland refused to extradite Wilhelm II due to his official status as a head of state. After the second world war, another attempt came up to undermine

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41 Rosanne Alebeek, 'Immunity And Human Rights? A Bifurcated Approach' (2010) 104 American Society of International Law 66, 67.

42 Richard Falk, *The Declining World Order* (Taylor and Francis 2004) 6-10.

43 ibid 12.

the immunity of the state's high representatives. The victors of the war set up the international military tribunals of Nuremberg and the Far East. The legal framework for the tribunals specifically stated the criminal responsibility of the head of state and denial of immunity in concern of crime against humanity, crimes against peace and war crimes. However, both international military tribunals were unable to try the head of states committed these crimes. The fundamental human rights and freedoms are secured following the end of World War II.

A. HUMANITARIAN INTERVENTIONS IN THE POST-COLD WAR ERA

Under the Charter of UN, the Security Council's responsibility is defined as maintaining peace and security universally. Accordingly, the council is granted the authority to decide on the measures that must be established to sustain or bring back peace and security at an international level.[44] The Security Council was effective in resolving conflicts of the post soviet era when the members' veto power was ended. The conflicts arising within the states have reduced the power of the anti-interventionist structure of the international community.As a response to this situation, during period of the aftermath of the Cold War, the concept of humanitarian intervention started to rise at once in order to end serious human rights violations. [45] The legitimacy of these interventions was controversial because according to the non-intervention principle, any interference in the domestic affairs of a state is not allowed. On the other hand, states and international organizations shall not ignore the violation of human rights during the ongoing civil wars, genocide, and ethnic cleansing.

Apart from the self-defense or being authorized by the Security Council for the aim of restoration of peace and security, Article 2(4) of the UN Charter prohibits the states from the threat or use of force against the territorial unity or political freedom. [46] In total, ten interventions took place with or without the UN authorization in this era. The security council authorized the interventions in Rwanda, Somalia, Bosnia, Albania, Haiti, and East Timor. Among these states, four host governments gave their consent to the UN for the intervention, so interventions were unproblematic from the legal perspective. However, it must be noted that the interventions in Haiti and Somalia took place without state consent. This situation was analyzed as the reflection of the UN's authority over humanitarian interventions as it was seen as the appropriate body for authorization.

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44 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Pg 7.

45 ' The United Nations: 'Fifty Years Of Keeping The Peace' (*Crf-usa.org*, 2020) <https://www.crf-usa.org/bill-of-rights-in-action/bria-12-3-a-the-united-nations-fifty-years-of-keeping-the-peace> accessed 03 Oct 2022.

46 United Nations, *Charter of the United Nations*, 1945.

However, during the same period, interventions have started without the official permission of the security council. The Economic Community of West African States carried out an intervention to Liberia to prevent the killings of civilians in 1990. The US, UK, and France proclaimed no-fly zones in Iraqi intending to protect ethnic Kurdish minority and Shiite Muslims. ECOWAS also intervened in Sierra Leone in 1997 to protect human rights. Even though all these interventions took place without the Security Council's authorization, the international community's responses were positive. They were justified on the grounds of following the Security Council's resolution. Among all the interventions that took place in the 1990s, the NATO intervention in Yugoslavia is highlighted as the most controversial about the authority over the evolution of the state practices. [47] NATO justified the actions taken as some crimes are so extreme that the state becomes responsible for them, and military intervention can take place even though the intervention violates the principle of sovereignty.[48]

Justifying the foreign state's interventions on the grounds of the Security Council's resolutions, paved the way for violating the non-intervention principle without facing any legal consequences. The humanitarian intervention in the post-cold war era can be defined as the first significant step of limiting the sovereignty of the states. Significantly, Yugoslavia conflicts granted a new basis for the way the international community deal with internal conflicts of a nation.[49] The interventions were the signs of shifting from Westphalian to the Post-Westphalian era by undermining the main principles of the Westphalian order and weakening of the sovereignty may be interpreted as the weakening of the privileges arising from sovereignty.

B. THE COURTS ESTABLISHED BY THE UN SECURITY COUNCIL

The UN Security Council established the International Criminal Tribunal for Rwanda and The International Criminal Tribunal for the former Yugoslavia respectively relying on Article 39 and Article 41 of the UN Charter. The terrific events in both countries were interpreted as the international community's failure to prevent atrocity crimes. Both tribunals were arranged in ad hoc nature to prosecute perpetrators of serious offenses. The establishment of the tribunals was an important step in the reconsideration of the state official's

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47 Cristina Gabriela Badescu, *Humanitarian Intervention And The Responsibility To Protect: Security And Human Rights* (Routledge 2010) 60-69.

48 Adam Roberts, 'NATO's 'Humanitarian War' Over Kosovo' (1999) 41 Survival 102, 103.

49 Scott Grosscup, 'The Trial Of Slobodan Milosevic: The Demise Of Head Of State Immunity And The Specter Of Victor's Justice' (2004) 32 Denver Journal of International Law & Policy 355, 356.

criminal responsibility, including the heads of state when they commit core crimes. The statutes of the ICTR and ICTY both deny the immunities granted to state officials. The member states of the UN were liable to associate with the decisions of the tribunals. For this reason, the member states under the jurisdiction of the courts, are counted as accepting to waive immunity for the officials who committed international crimes.[50]

Slobodan Milošević was the first head of state who is judged before an international court with the claim of committing war crimes. The trial is interpreted as the turning point for international justice.[51] In Milošević's case, it's challenging to analyze the situation personal immunity for international crimes because when Milošević was brought before the court, he already gained the status of the former president. However, a similar and recent trial of Charles Taylor supports the idea that although the incumbent head of state is still granted absolute immunity by the national courts, this situation is different before the international and internationalized courts. The international courts deny the acting head of state's personal immunity in the commitment of the grave violations of human rights as also clearly stated in the statute of the ICTY.[52] Even though, Milošević tried to benefit from functional immunity as a former president, he benefits from the functional immunity, the Trial Chamber clarified that putting forward the official status as an obstacle before the jurisdiction for the crimes falling under the scope of court is invalid even for the heads of state. [53]Milošević's trial was an important step in reflecting individual criminal responsibility of the heads of state in the commission of international crimes.

Following the civil war, the president of Sierra Leone requested the UN Security Council to create the Special Court of Sierra Leone. In this regard, an agreement between the Government of Sierra Leone and the UN Security Council led to the establishment of the Special Court of Sierra Leone as a hybrid international-domestic court, also known as an internationalized court.[54] The court is established to prosecute the perpetrators of international crimes

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50 Dapo Akande, 'International Law Immunities And The International Criminal Court' (2004) 98 The American Journal of International Law 407, 417.

51 'Slobodan Milošević Trial - The Prosecution's Case | International Criminal Tribunal For The Former Yugoslavia' (*Icty.org*, 2020) <https://www.icty.org/en/content/slobodan-milo%C5%A1evi%C4%87-trial-prosecutions-case> accessed 05 Oct 2022.

52 Chiara Ragni, 'Immunity of the Heads of State: Some Critical Remarks on the Decision of the Special Court of Sierra Leone in the Charles Taylor Case' (2004) 1 Italian Year Book of International Law 273, 274.

53 Udoka Nwosu, 'Head Of State Immunity In International Law' (*Etheses.lse.ac.uk*, 2011) <http://etheses.lse.ac.uk/599/1/Nwosu_head_state_immunity.pdf> accessed 18 Oct 2022.

54 Charles Chernor Jalloh, 'Special Court of Sierra Leone: Achieving Justice?' (2010) 32 Mich. J. Int'l L. 395, 398.

and the committed acts which constitute crimes under Sierra Leonean law.[55] The scope of the jurisdiction was including the highest officials the court statute clearly indicates that "the official position of the accused person whether the head of state or a government official shall not relieve that person from the criminal responsibility."[56]

The SCLS indicted Charles Taylor for crimes against humanity. Followingly, an arrest warrant has been issued during his visit to Gana. However, Gana did not co-operate with the arrest request. Taylor referred a motion against the decision of the court and demanded immunity on several reasonings which also included ICJ's decision on the Arrest Warrant case. Taylor argued that he was also the incumbent president of Liberia and had personal immunity when the indictment is issued. The Appeals Chamber declined the motion and stated that the Special Court of Sierra Leone is not a national court, therefore the decision on the Arrest Warrant is not related to the indictment. The court concluded the decision as the sovereign equality does not preclude an international court from prosecuting a head of state.[57] After his resignation, Taylor was extradited from Nigeria where he was hiding to Liberia and arrested by the peacekeeping forces. The Trial Chamber convicted Charles Taylor for 50 years in prison. [58]

Although Taylor was a former head of state during the trial, he was acting president when the SCLS issued an indictment against him. For this reason, the trial carries importance regarding the individual criminal responsibility of the incumbent heads of state.

IV. HEAD OF STATE IMMUNITY AND THE INTERNATIONAL CRIMINAL COURT

After the adaption of the Convention on the Prevention and Punishment of the Crime of Genocide, the UN General Assembly realized the necessity for a permanent criminal court for the aim of dealing with international crimes. Despite all criticisms, ad hoc tribunals had a catalyzer impact on the establishment of the International Criminal Court. The drafters included most of the features of the formerly established ad hoc courts in the Rome Statute. [59] Contrarily, the different characteristics of the court also arise from the legal basis it relies on.

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55 Michael Scharf, 'The Special Court For Sierra Leone | ASIL' (*Asil.org*, 2000). <https://www.asil.org/insights/volume/5/issue/14/special-court-sierra-leone> 11 Oct 2022.

56 Statute of the Special Court for Sierra Leone 2002.

57 Bartram S Brown, *Research Handbook On International Criminal Law* (Edward Elgar 2012) 246.

58 'The Special Court For Sierra Leone, The Residual Special Court For Sierra Leone - The Prosecutor vs. Charles Ghankay Taylor' (*Rscsl.org*, 2020) «http://www.rscsl.org/Taylor.html» accessed 14 Oct 2022.

59 Stuart Ford, 'The Impact Of The Ad Hoc Tribunals On The International Criminal Court' [2018] SSRN Electronic Journal 1, 2.

The International Criminal Court is established by the Rome Statute, which is a multilateral treaty between states. The creation of an international permanent court was one of the major events that shaped the contemporary international legal order. Although the Rome Statute was negotiated within the UN, the International Criminal Court is an independent judicial institution with the international legal personality. However, UN Security council has the authority to refer the situations for the jurisdiction of ICC when necessary.[60]

The crimes fitting within the jurisdiction of the ICC is determined as crimes against humanity, the crime of genocide, war crimes, the crime of aggression. [61] The ICC functions according to the complementarity principle which gives the priority for the jurisdiction to the national courts. [62] The states are giving consent for the jurisdiction of the ICC when becoming a party to the Rome statute. The court has the authority to exercise jurisdiction if the perpetrator is the national of the state party or the crime took place within the territory of the party-state.

The states which are not a party to the treaty can also admit the jurisdiction of the court. In this context, the ICC becomes eligible to apply jurisdiction over the non-party state national if the individual perpetrated the crime within the territory of a party state or within a state that admitted the scope of authority of the court. The jurisdiction of the ICC is individual criminal responsibility oriented and the Rome Statute denies the exemption from the prosecution due to the function or the position of the individual.[63] Thus, the effectiveness of the ICC also relies on the cooperation of the states as the institution has no police force or military to investigate crimes and arrest individuals. Article 86 of the Rome Statute appoints the duty over state parties for the general commitment of collaboration. Respectively, Article 88 defines the responsibility of parties to adjust their domestic laws to permit cooperation with the court. [64] Generally, a large number of people are involved in the commission of international crimes. However, as seen by the ad hoc tribunals established by the UN Security Council, the ICC also focuses on the masterminds and coordinators of the international crimes among the perpetrators. [65]Article 27 (2) of the statute denies

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60 Jennifer Trahan, 'The Relationship Between The International Criminal Court And The U.N. Security Council: Parameters And Best Practices' (2013) 24 Criminal Law Forum 417,419.

61 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

62 Linda E. Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem' (2010) 8 Santa Clara Journal of International Law 165, 176-177.

63 UN General Assembly, *Rome Statute of the International Criminal Court* (1998).

64 Valerie Oosterveld, Mike Perry and John McManus, 'The Cooperation Of States With The International Criminal Court' (2001) 25 Fordham International Law Journal 767, 768.

65 Barbara Goy, 'Individual Criminal Responsibility Before The International Criminal Court'

any immunities arising from national or international law so the immunities of the state officials end where the individual criminal responsibility for the core crimes arises.[66]

A. THE CO-OPERATION LIABILITY OF STATES

The formation of the ICC has been the success of international criminal law and human rights law. However, according to its different structure, the court cannot work effectively without the co-operation of the states. The ICC is not authorized to judge individuals unless they become present in the courtroom. The lack of state co-operation results with the inability of the ICC to investigate, arrest, and apply jurisdiction because no police or military forces are working under the command of the court. The obligations require the absolute cooperation of party states with the court. To fulfill their cooperation liability party states must harmonize their national laws with the procedural framework foreseen by the Rome Statute.[67]

Article 87 mentions that the court may also ask for the assistance of a non-party state relying on an ad hoc agreement. Due to the correlation between UN Security Council and the ICC, even the non-party states may have a compulsory duty to collaborate with the court. The competence of the Security Council comes from the UN Charter, so its verdicts are obligatory on the UN member states. As the ICC has a complementary role, apart from the prosecutor, also the member states and party states or the UN Security Council refer to trigger the jurisdiction of the court. In this regard, the Security Council owns the power to authorize a state to cooperate with the ICC when it refers a case to the jurisdiction of the court to maintain world peace. Although the treaty only reflects the voluntary co-operation of the non-party states, in the practice with the authorization the UN Security, the non-party states also act with a mandatory obligation towards the ICC.[68]

In the case of the failure to conform with the demand of cooperation and prevent the court from enforcing its functions, the ICC can assign the issue to the Assembly of State Parties or the UN security council. By becoming a party of the Rome Statute, the states waive the head of state immunity arising from the customary international law. There is no confusing element about the implied waiver of immunity for the official who is accused by the ICC when he is found within the territory of the state party where he/she is a citizen. In this case, the national jurisdiction still has priority, but apart from that, the party-

(2012) 12 International Criminal Law Review 1, 7-9.

66 UN General Assembly, *Rome Statute of the International Criminal Court* (1998).

67 Oosterveld, Perry and McManus (n 65) 835.

68 Zhu Wenqi, 'On Co-Operation By States Not Party To The International Criminal Court' (2006) 88 International Review of the Red Cross 87, 90-92.

state is obligated to detain and hand over the official to the ICC's jurisdiction. A similar approach shall be followed by the foreign party states if the accused official of another state party is found within its territory. The foreign state party arrests and surrenders on behalf of the ICC. By doing that, they do not breach the customary rule as both states are accountable for the obligations of the Rome Statute.[69]

The main contradiction begins when the immunity of the non-party state officials becomes the subject of the cooperation. The officials of non-party states are still subject to immunity arising from customary international law, and the other states are obliged to respect their immunities. [70] Additionally, the Rome Statute validates the circumstance by stating that "the court may not proceed request that would require the party-state to act inconsistently with its obligations arising from international law." [71] However, the recent practices of the ICC regarding the resolutions of the Security Council in Darfur and Libya is completely different from the provisions of Article 98.

B. AL-BASHIR CASE

In regards to broad-scale atrocities and human rights abuses that took place against civilians in Darfur, the Security Council established a resolution which was including the requirements to be met by the Government of Sudan. The resolution was also stating that in the case of failure to comply with the security council, the council will consider taking further action.[72] As the Government of Sudan did not act within the framework of the resolution, another resolution is established by the UN Security Council. This time the Security Council demanded the formation of the international commission of consultation to investigate the category of the crimes within the framework of the humanitarian law and the human rights law. The investigators considered whether the policy of genocide was followed or not, rather than individual intents of the perpetrators. According to the report submitted by the investigators, the acts were not falling under the applicability extend of the crime of genocide. The Government of Sudan and the rebel military group Janjaweed were both found responsible for the commitment of the crimes against humanity and the war crimes. Senior government officials were also found responsible under the notion of command. [73] The resolutions of the UN and the report of investigation

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69 Akande (n 51) 419-428.

70 Fox and Webb (n 1) 1869- 1871.

71 UN General Assembly, *Rome Statute of the International Criminal Court (*1998).

72 UN Security Council, Security Council resolution 1556 (2004).

73 Report Of The International Commission Of Inquiry On Darfur To The United Nations Secretary-General Pursuant To Security Council Resolution 1564' (*Un.org*, 2020). <https://www.un.org/ruleoflaw/files/com_inq_darfur.pdf> accessed 15 Oct 2022.

are crucial as they laid the foundation for the ICC to apply jurisdiction over the event. Sudan is not a party to the treaty so the ICC could not start a verdict without the referral of the security council.

The further resolution 1593 established by the council which assigned the cases that occurred in Darfur to the ICC. [74] The prosecutor applied to the pre-trial chamber of ICC to publish an arrest warrant with the aim to bring the President of Sudan for the jurisdiction. In his application, the prosecutor mentioned that the acts of genocide are taking place and Omar Hassan Bashir is liable for the ranging international crimes as the mastermind. [75] The pre-trial chamber agreed on the reasonable demonstration which shows the suspect that Al Bashir was an indirect co-perpetrator for war crimes and crimes against humanity and issued the arrest warrant against Al Bashir in 2009. Thus, the warrant was not including the crime of genocide within the listed crimes. The warrant established towards Al Bashir is crucial as it is the first arrest warrant established by the ICC against an acting head of state.

Followingly, the ICC established a cooperation request to party state Malawi when Al Bashir was within the territory of the state. However, Malawi rejected the cooperation request relying on Article 98. [76] The pre-trial chamber evaluated the attitude of Malawi, as a defect in collaborating with the obligations of the statute and accordingly refused the justification of Malawi which based on Article 98. Malawi contended that the non-party status of Sudan is to the Rome Statute still protects immunity of the president Bashir arising from the international customary law. The pre-trial chamber refused Malawi's argument which was relying on an exception arising from the customary international law and referred the non-cooperation to the Assembly of State Parties and the UN Security Council.[77] The ICC was relying on the resolution 1593 as justification for its decision. According to the pre-trial chamber, the referral by the security council also renders the immunities.[78] The decision of the pre-trial chamber is evaluated as unclear by scholars as it completely denies the conflict between article 27 and article 98 in case of arresting and surrendering of Bashir as the

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74 'Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court' Meetings Coverage And Press Releases (*Un.org*, 2020) <https://www.un.org/press/en/2005/sc8351.doc.htm> accessed 18 Oct 2022.

75 Roza Pati, Due Process And International Terrorism (Martinus Nijhoff Publishers 2009) 161.

76 Dire Tladi, 'The ICC Decisions on Chad and Malawi' (2013) 11 Journal of International Criminal Justice 199, 200-203.

77 Rebecka Buchanan, 'Obligations Of State Parties To Arrest And Surrender Omar Al-Bashir' (*Human Security Centre*, 2020) <http://www.hscentre.org/global-governance/bashir-still-large-obligations-state-parties-arrest-surrender-bashir/> accessed 20 Oct 2022.

78 Guénaël Mettraux, John Dugard and Max du Plessis, 'Heads Of State Immunities, International Crimes And President Bashir's Visit To South Africa' (2018) 18 International Criminal Law Review 577, 579.

acting president of the non-party state who is granted immunity by customary international law.[79]

The second arrest warrant established towards Al Bashir by the ICC, which additionally compromised the crime of Genocide. By including the crime of genocide, the court imposed an additional obligation on the states via the Genocide Convention as the convention mentions the liability of states to collaborate with international courts to arrest the suspects of the crime of genocide.[80]

In 2017, the ICC requested Jordan to cooperate with the arrest and surrender request regarding Al-Bashir while he was visiting Jordan. Jordan also argued that Al Bashir is benefitting from the sovereign immunity as acting head of state of Sudan and the immunity is not waived by either the customary international law or the UN Security Council Resolution. Consequently, Jordan refused the application of waiver the immunity over the third country which is non-party to the Rome Statute. Moreover, the reasoning was also including that the resolution by the security council also did not suspend the customary duty to act with respect to the immunity granted for a foreign head of state, even though it had the power to do so arising from Chapter 7 of the UN Charter. The ICC refused the defense of Jordan and stated that Jordan, as a state party to the Rome Statute, was liable to arrest and surrender Al-Bashir on the cooperation request by the court.[81]

The ICC referred Jordan to the Assembly of State Parties and the UN Security Council as a result of the non-cooperation.[82] Jordan appealed against the decision before the ICC Appeals Chamber. Appeals Chamber decided that the heads of state do not have any immunity arising from the customary international law which precludes them from the criminal prosecution of international courts. Accordingly, they have no immunity from arrest and surrender by foreign states which are actually acting on behalf of the ICC. For this reason, Jordan failed to fulfill its obligation under the Rome Statute, however by the majority of votes the Appeals Chamber changed the referral decision of the pre-trial chamber.[83]

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79 Buchanan n (77).

80 Saher Valiani, 'Genocide Left Unchecked: Assesing the ICC's Difficulties Detaining Omar Al-Bashir' (2017) 35 Berkeley Journal of International Law 150, 161-168. Göran Sluiter 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case' (2010) 8 Journal of International Crime and Justice 365, 366-367.

81 Victor Tsilonis, *The Jurisdiction Of The International Criminal Court* (Springer 2019) 179.

82 'Al-Bashir Case: ICC Pre-Trial Chamber II Decides To Refer Jordan's Non-Cooperation To The ASP And UNSC' (*Icc-cpi.int*, 2020) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1349> accessed 28 Oct 2022.

83 John Oltean and Nicholas Zebrowski, 'ICC Appeals Chamber Judgment On Jordan: Analysis And Implications On The Question Of Immunity' (*International Justice Monitor*, 2020)

Bashir obtained the capacity in Sudan by a military coup d'état, his dismission from the office occurred by another military coup d'état. Bashir was arrested by the Government of Sudan. After the jurisdiction of national courts, in February 2020, the Government of Sudan accepted to hand over Al-Bashir to the ICC for the jurisdiction of international crimes.[84] The case became an important key to evaluate the level of effectiveness of the ICC and reflected that party states are avoiding to comply with the arrest and surrender requests of the court when the immunity of the highest state officials is concerned.

C. GADDAFI CASE

As a result of systematic violence by the governmental forces in Libya, the UN Security Council established the resolution 1970 which is followed by the transfer of the events for the jurisdiction of the ICC as the violence against the civilians was falling under the scope of crimes against humanity. As the attacks were taking place by the forces under governmental control, the ICC established an arrest warrant against Muammar Mohammed Abu Minyar Gaddafi. The arrest warrant also touched upon the immunity arising from customary international law, as Libya was not party state of the Rome Statute. The pre-trial chamber followed a similar approach with Al-Bashir's case and justified the establishment of an arrest warrant against the official of non-party state depending on the referral by the UN Security Council.[85] However, the arrest warrant was withdrawn within the same year due to his death.[86]

In similar cases regarding the immunity of the non-party state officials, the ICC followed a similar approach. By relying on the resolutions of the UN Security Council, the ICC completely denied the privileges of acting head of states. The justification of ICC mainly relies on the fact that state officials do not have any privileges which arise from customary international law that will protect them from the jurisdiction of international courts.[87]

On the other hand, the ICC is having difficulties while trying to meet with the expectations as it mainly relies on the cooperation of the party states. The

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<https://www.ijmonitor.org/2019/05/icc-appeals-chamber-judgment-on-jordan-analysis-and-implications-on-the-question-of-immunity/> accessed 29 Oct 2022.

84 'Sudan Agrees Bashir Must Face International Court' (*BBC News*, 2020) <https://www.bbc.com/news/world-africa-51462613> accessed 03 Nov 2022.

85 Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi', Decision of the Pre-Trial Chamber I, 27 June 2011.

86 'Situation In Libya' <https://www.icc-cpi.int/libya> 05 Nov 2022.

87 'The Role Of The International Criminal Court In Ending Impunity And Establishing The Rule Of Law' (*Unchronicle.un.org*,2012). https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law 07 Nov 2022.

authority of the ICC only works if the states recognize its authority or UN Security Council refers the situation to its jurisdiction. This situation extremely limits the functioning ability of the ICC as even the member states refuse to cooperate with the court by offering the customary law as an excuse for the failure to arrest the highest representatives. Moreover, the world's major powers; US, China, Russia are not even party to the Rome Statute.[88] As the ICC started to investigate the situation in Ukraine, the scholars began to evaluate the possible arrest Russian president Vladimir Putin. From previous cases, it is clear that without the support of the home state, the president's arrest and surrender to the ICC will be highly challenging.[89] The crucial effect of state cooperation is reflected in the Al-Bashir case. In this regard, the attempt of the ICC to remove the head of state immunity to end impunity still relies on state practices.

CONCLUSION

In this study, the concept of the head of state immunity over the criminal jurisdiction in the post-westphalian era is evaluated by the examination of changes in international law area and the practices of the differently structured courts.

The result of case evaluations reflected that the foreign national courts are still actively respecting the absolute personal immunity of the incumbent heads of state with the aim to protect international relations and avoid political consequences. From the perspective of the national courts, individual criminal responsibility idea mostly affected the functional immunity of the head of states. After the Pinochet case many states developed a similar belief that even though the heads of state have immunity as a procedural obstacle against the legal proceedings, their exemption from the prosecution in the commission of the international crimes shall not be eternal. For this reason, the practices of some states turned into not recognizing any functional immunity for the former officials in the commission of international crimes as they believe that the acts of international crimes cannot be official acts. However, the states could not sustain the consensus about functional immunity yet as the opposite view argues that a head of state cannot commit an international crime without the support of government policy. Although the Pinochet effect significantly reduced the effectivity of the functional immunity against international crimes before foreign national courts, there is no enough state practice to form a custom.

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88 Andrew Henderson, 'Six Countries That Aren't Part Of The ICC' (*Nomad Capitalist*, 2020) <https://nomadcapitalist.com/2018/08/29/countries-arent-part-of-icc/> accessed 10 Nov 2022.

89 Aghem Hanson Ekori and Paul S. Masumbe, 'Putin on Trial: the Reality of Head of State Immunity before International Criminal Court' (2022) 2 Polit Journal: Scientific Journal of Politics 29.

In comparison to national courts, the practices that are foreseen by the international courts against international crimes are more strict about both forms of immunity. The statutes of ad hoc and permanent criminal courts deny the existence of both forms of immunity which are related to the heads of state in the commission of international crimes. As an intergovernmental organization, the United Nations had an essential role in sustaining the grounds for the jurisdictions of the ad hoc tribunals of ICTY and ICTR. The first trial towards a head of state has been carried out after the post-cold war era by ICTY. In this regard, it can be said that ad hoc tribunals had been successful in denial of the immunity of the heads of state. However, as the ad hoc tribunals were established for the specific purposes and areas, their scope of jurisdiction was limited with these events and areas. Although the ICC is dedicated to end the impunity against the international crimes with the support of the security council, as the court has no executive powers and trigger mechanism, this creates many obstacles towards the dedication of the court.

To sum up, the ICC provided the necessary legal basis to make the head of the state immunity concept completely ineffective in the commission of international crimes. However, as the arrest and surrender rely on state co-operation, the court is having difficulties to fulfill its duties. In this regard, the formation of the court was a major step to end impunity and provide global justice, however as the states are avoiding to cooperate with the court, the measures which are taken by ICC are remaining ineffective.

Although the sovereign states lost significant power in the era of globalization, the complete ineffectiveness of the head of state immunity concept is still relying on the states' will. If the states wish to end the immunity they have the power to do so by reaching a consensus, if not the heads of state will remain untouchable even before the ICC.

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SOME EXAMPLE ORGANIZATIONS AND COMMERCIAL LAW STUDIES IN THE COMMON ECONOMIC AREA STRATEGY OF THE ORGANIZATION OF TURKIC STATES*

Türk Devletleri Teşkilatı'nın Ortak Ekonomik Alan Stratejisinde Bazı Örnek Teşkilatlar ve Ticaret Hukuku Çalışmaları

Metin KIRATLI**

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ABSTRACT

The Organization of Turkic States is a global and regional organization formed after the Cold War. The Organization, which took on an institutional structure in Nakhchivan in 2009, started to be called the Organization of Turkic States with the decision taken at the summit in Istanbul on November 12, 2021. This Organization has important strategies in education, culture, science, economy and law. The Organization of Turkic States announced the 2040 Turkic World Vision Document in 2021. With this document, the Organization has set targets in order to complete its institutional structure. Coorperation within the Turkic States in terms of the economy is one of the most important goals in this aspect. In order for the economy to have an institutional structure, studies have been started in the fields of commercial law and other law. It will be useful to examine the structure of the Eurasian Economic Community and the Shanghai Cooperation Organization in this institutionalization process of the Organization, which also aims for a Common Economic Area. In this article, within the framework of the institutionalization goals of the Organization of Turkic States, the Eurasian Economic Community, depending on the economy-based structure of the Shanghai Cooperation Organization, especially the studies on commercial law and the decisions on the goals of establishing a legal union in the Organization of Turkic States have been tried to be examined.

Key Words: Organization of Turkic States, Commercial Law, Eurasian Economic Community, Shanghai Cooperation Organization, Customs Union, Common Economic Area.

There is no requirement of Ethics Committee Approval for this study.

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** Director of Administrative Affairs of the Presidency, e-mail: cb.metinkiratli@gmail.com, ORCID ID: 0000-0001-5203-2053.

ÖZET

Türk Devletleri Teşkilatı, Soğuk Savaş sonrası oluşan küresel ve bölgesel bir örgüttür. 2009 yılında Nahçıvan'da kurumsal bir yapıya bürünen örgüt, 12 Kasım 2021 tarihinde İstanbul'daki zirvede alınan kararla Türk Devletleri Teşkilatı olarak anılmaya başlanmıştır. Bu teşkilatın eğitim, kültür, bilim, ekonomi, hukuk alanında önemli stratejileri bulunmaktadır. Türk Devletleri Teşkilatı, 2021 yılında 2040 Türk Dünyası Vizyon Belgesini ilan etmiştir. Bu belge ile kurumsal yapısını tamamlayabilmek için hedefler belirlenmiştir. Bu hedefler içerisinde ekonomi önemli yer tutmaktadır. Ekonominin kurumsal bir yapıya kavuşması için de ticaret hukuku ve diğer hukuk alanlarında çalışmalar başlatılmıştır. Ortak Ekonomik Alan hedefi de olan teşkilatın bu kurumsallaşma sürecinde Avrasya Ekonomik Birliği ve Şanghay İşbirliği Teşkilatı yapısının incelenmesi faydalı olacaktır. Bu makalemizde Türk Devletleri Teşkilatı'nın kurumsallaşma hedefleri çerçevesinde Avrasya Ekonomik Birliği, Şanghay İşbirliği Örgütünün ekonomi temelli yapısına bağlı olarak Türk Devletleri Teşkilatı'nda özellikle ticaret hukukuna dair çalışmalar, hukuk birliği kurma hedeflerine yönelik kararlar incelenmeye çalışılmıştır.

Anahtar Kelimeler: Türk Devletleri Teşkilatı, ticaret hukuku, Avrasya Ekonomik Birliği, Şanghay İşbirliği Teşkilatı, Gümrük Birliği, Ortak Ekonomik Alan.

INTRODUCTION

Today, the acceleration of global trade and the fact that political borders are gradually replaced by the borders determined by economic unions cause the establishment of regional unions and organizations. Countries such as the United States of America (USA), China, Russia and Türkiye, especially Europe, support the commercial integration that they started in their own regions with free trade agreements and customs unions over time.

The fact that Türkiye's European Union (EU) membership process has not come to a conclusion allows Türkiye to seek alternatives or to establish new associations. Competition outside the EU is now concentrated in Central Asia. The Eurasian Economic Community was formed under the leadership of Russia, the Shanghai Cooperation Organization under the leadership of China, and the Organization of Turkic States under the leadership of Türkiye, and these organizations are still trying to complete their institutional structures. Apart from these countries, the USA is also involved in the power race in Central Asia. Factors such as the fossil fuels of Central Asia, geographical location, and being on logistics lines increase the competition between countries. China is trying to strengthen its influence by transferring financial resources to the countries in the region through the Silk Road Project. With its historical and bureaucratic influence, Russia creates opportunities for itself in post-Soviet countries. The USA, on the other hand, is trying to gain the trust of these countries through the fight against terrorism and the China-Russia pressure. The Organization of Turkic States, including Türkiye, has a more advantageous position compared to these countries because ethnic, historical

and cultural unity gives Türkiye more opportunities than other countries do. Another advantage of Türkiye is that it tries to establish a system of equal partnership with Central Asian countries.

The loss of confidence in the European Union after the Ukraine conflict and the economic difficulties due to the closure of logistics lines encouraged many countries to establish new unions. In these new unions, economic integration takes priority. It is known that economic integration includes concepts such as cooperation, political and economic unification, integration, liberalization and opening trade to circulation.[1] In this integration, the fact that countries are border neighbours is also effective for success. The principles of regional-global integration that started in trade can be explained as follows:

- Trade integration occurs when trade barriers are removed.
- Factor integration occurs with the liberalization of factor movements.
- Political integration occurs with the harmonization of the economic policies implemented by the countries.
- Full integration is created by realizing all of these policies at once.[2]

Globalization not only increases the circulation of information but also supports the removal or facilitation of borders. The biggest reason EU countries provide visa-free transit among themselves is the easy circulation of labour and information. The circulation of factors such as labour, capital, labour and knowledge and the removal of barriers to the circulation of goods and services increase economic cohesion.[3]

Today, globalization and regionalization processes are experienced simultaneously. The global approaches pioneered by the World Trade Organization (WTO) are no longer sufficient. The European Union is a good example in terms of both globalization and regional cohesion. Although the Turkic Republics, which gained their independence after the collapse of the Union of Soviet Socialist Republics(USSR), are trying to harmonize with the West in terms of trade, they cannot establish the link between law and trade; in this sense, there are difficulties in terms of trade with other EU countries, especially Türkiye. Law in Türkiye, and especially commercial law, has generally developed on the axis of Continental Europe.For this reason, there

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1 Aydın Sarı,'Bölgelerarası Ekonomik Entegrasyonlar ve Türkiye'nin Ödemeler Bilançosuna Etkileri'(2005) 10(1) Süleyman Demirel University Economic and Administrative Sciences Faculty, 117,130

2 Ahmet Can Bakkalcı, 'Avrupa Birliği İle Türkiye Arasında Gerçekleştirilen Gümrük Birliği'nin Kaynak Dağılımı Üzerine Etkileri' (2002) Dokuz Eylül University EASF Journal, 17(2) 39,53

3 Hasan Alp Özel, Küreselleşme Sürecinde Ticari ve Finansal Açıklığın Ekonomik Büyüme Üzerine Etkisi: Türkiye Örneği (Administrative Sciences Journal, (2012) 10(19), 21,43

are problems in legal legislation between post-Soviet countries and Türkiye. Although commercial law is one of the oldest branches of law in Russia, which affected the Central Asian Turkic Republics, the socialist regime established in Soviet Russia after the October 1917 Revolution did not leave any place for commercial law in the planned economic system while removing commercial relations from private law. In Russian law, commercial relations have been regulated for a long time by various contracts, commercial charters, statutes and regulations. The law-codex distinction, maintained during the Soviet period, is also continued in the legal legislation of post-Soviet countries. For example, in Kyrgyz Language it is called as Criminal Codex, in Kazakh Language is is called as Commercial Codex, in Azerbaijani Language it is called as Civil Mecelle etc. While the basic laws of important branches of law are prepared in the form of codices, this is not the case in terms of commercial law. However, there is no naming that expresses the commercial law itself and is accepted by everyone.[4] Under the influence of the USSR, restructuring as a commercial code in Russia and other Turkic republics created problems in trade and legal compliance with Türkiye in general. While significant emphasis was placed on commercial relations in the liberal economic system that developed with the disintegration of the Soviet Union, there were also discussions about creating a separate commercial code. However, the discussions that have been going on for thirty years have not been resolved. Russia's inability to fully align with Western economies or the frequent arbitration problems stem from the lack of general harmonization with commercial law. Russia's inclusion of some Central Asian countries in the Eurasian Economic Community and the adoption of its legal system in those countries are one of the main reasons for the harmonization problems with the Turkic states today.

In this article, within the framework of organizations such as the Eurasian Economic Union and Shanghai Cooperation Organization, which the Organization of Turkic States can take as an example in the strategy of establishing a common economic space, developments in the field of commercial law and studies in other areas of law that will support integration within the framework of the general structure of the Organization of Turkic States and its 2040 vision are discussed.

I. THE STRUCTURE OF THE ORGANIZATION OF TURKIC STATES AND ITS VISION OF THE COMMON ECONOMIC AREA

With the disintegration of the USSR in the 1990s, the phenomenon of the Turkic World came to the fore in Türkiye, especially in Central Asia. In the process of adaptation to the new world after the declaration of independence of the Turkic Republics, Türkiye has undertaken important tasks in this

[4] V. N. Kovalenko, ТорговыйкодексРоссии - основакоммерческогоправа (Zakon i Pravo, № 12, 2008,.110).

regard.[5]The Turkic States first gathered in Ankara on 30-31 October 1992, hosted by President Turgut Özal.[6]The strong cooperation that started in the period of Turkish President Turgut Özal has been effective in the formation of the institutional structure of the Organization of Turkic States today.[7]With the Nakhchivan Agreement signed by Türkiye, Azerbaijan, Kazakhstan and Kyrgyzstan on October 3 2009, institutionalization steps were taken, and the Turkic Council was established.[8] At the Turkic Speaking Countries Summit held in İstanbul on 15-16 September 2010, the Turkic Council officially started to work.[9]Turkmenistan and Uzbekistan are not parties to this agreement. Turkmenistan did not ratify the agreement due to its neutrality status.[10]This Organization, which started to be known as Turkic Speaking Countries at the 2001 İstanbul meeting, was renamed as the Organization of Turkic States after the 2021 Istanbul Summit.

Relations and cooperation between Turkic states have developed based on the principles of independence, sovereignty, respect for territorial integrity, non-interference in internal affairs and equality. The Organization of Turkic States, with its new name, which was established with the aim of the Turkic World to act together around common goals, declared that it is loyal to the purposes and principles of the United Nations (UN) Charter and that it has adopted the universally recognized principles of international law. This organisation's main purpose was to deepen comprehensive cooperation among Turkic speaking states and contribute to regional and global peace and stability.[11]The Organization of Turkic States is an international actor that performs very important functions in international politics and supports member states on the one hand and as a braking mechanism on the other. It has a permanent

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5 Halil Akıncı 'Türk Cumhuriyetleri Arasındaki Siyasi İlişkiler: Değerlendirme, Sorular ve Öneriler Bağımsızlıklarının 20. Yılında Türk Cumhuriyetleri' Murat Yılmaz (ed), (Ankara, Ahmet Yesevi University Publications, 2012) 191,192

6 "Ankara Summit Declaration" (31 October 1992) < www.turkkon.org/Assets/ dokuman/11_ AnkaraBildirisi 1992_1. Devlet BaskanlariZirvesi_20140418_104048.pdf>, Date of Access 18.09.2020

7 Bilal Şimşir 'Turkey's Relations with Central Asian Turkic Republics' (1992) 6 Turkish Review Quarterly Digest, 14,16

8 "Nachkchivan Summit Declarationi" (2-3 October 2009) <www.turkkon.org/tr-TR/ nahcivan_bildirisi/4/56/56/290>, Date of Access 15.11.2017

9 "İstanbul Summit Declaration" (16 September 2010) < www.turkkon.org/Assets/ dokuman/01_a_IstanbulBildirisi_ 16Eylul 2010_Turkce_20140418_102924.pdf>, Date of Access 13.11.2017; Şükrü Haluk Akalın, Geleceğe Atılan İmza: Türk Dili Konuşan Ülkeler İşbirliği Konseyi Anlaşması Türk Dili, 98(696) (2009), 675,679

10 Süleyman Sırrı Terzioğlu, 'Uluslararası Hukuk Açısından Türkmenistan'ın Daimi Tarafsızlık Statüsü' (2012) 14 (2) Dokuz Eylül Universtiy Law Faculty Journal, 39

11 Salih Yılmaz, SaadettinYağmur Gömeç and Victoria Bilge Yılmaz, Çağdaş Türk Dünyası Tarihi El Kitabı (Ankara Nobel Publications, 2022), 472,475

mechanism operating in a closed, geographically regional and general scope in terms of recruiting members.[12]

The Organization of Turkic States has given importance to economic cooperation since its establishment. At the meeting held in Almaty on October 20-21, 2011, with the theme of Economic and Commercial Cooperation, agreements and regulations regarding the institutionalization of the Organization were finalized. In addition, the Turkic Business Council was established to bring together the business circles of the member countries.[13] The Organization of Turkic States has tried to support economic integration by making important collaborations on education, culture, history and language. At the summit held in Bishkek on 22-23 August 2012 with the theme of Education, Science and Cultural Cooperation, the Turkic Academy in Astana and the Turkic Culture and Heritage Foundation in Baku were established.[14]

The efforts of the Organization of Turkic States to create cooperation in the common economic area and trade have come a long way in the last experiment. Uzbekistan joined the Turkic Council as a full member at the 7th summit that was held on October 15 2019, with the theme of Supporting SMEs in Baku. It was decided to accelerate the process by conducting feasibility studies on the establishment of the Joint Investment Fund among the member states.[15]The Turkic World 2040 Vision, which includes establishing the Turkic Investment Fund and the organisation's medium and long-term goals and program, was approved at the 8th Turkic Council Summit that was held online in Istanbul on November 12 2020.[16]

The Organization of Turkic States also acts as an umbrella organization for existing cooperation mechanisms such as the Turkic States Parliamentary Assembly (TURKPA), the Turkic Business Council, the Turkic Academy and the International Turkic Culture Organization (TÜRKSOY), the Union of Turkic World Common Chambers and Commodity Exchanges. TÜRKSOY's cultural

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12 Çiğdem Şahin, 'Uluslararası Örgüt İşlevleri Açısından Türk Konseyi (Türk Keneşi)' A. Vecdi Can, Köksal Şahin ve Muhammed Kürşad Uçar (eds), 13. Uluslararası Türk Dünyası Sosyal Bilimler Kongresi Bildiriler Kitabı, (Türk Dünyası Araştırmaları Vakfı, 2016), 1165,1174

13 Muhittin Kaplan and others, 'One Nation, Many Voices? External Cohesion of the Turkic Council States in the United Nations General Assembly 1993-2011' Bilig Dergisi, [Summer 2015] 131,132

14 'Türk Konseyi II. Zirvesi Bişkek'te düzenlendi' (22 Agust 2012) <www.mfa.gov.tr/ turk-konseyi-II-zirvesi-biskekte-duzenlendi.tr.mfa> Date of Access 14.07.2022

15 Cengiz Tomar, 'Türk dili konuşan ülkelerden Türk devletlerine' (15 November 2021) < www.aa.com.tr/tr/analiz/turk-dili-konusan-ulkelerden-turk-devletlerine/2421214> Date of Access 15.06.2022.

16 'Türk Dünyası 2040 Vizyonu' (13 November 2021) <www.turkkon.org/tr/haberler/ turk-dunyasi-2040-vizyonu_2396> Date of Access 12.06.2022

diplomacy activities strengthen the regional influence of the Organization.[17] The activities of this Organization in the field of cultural diplomacy set an example in the Organization of economic activities. We can say that the Organization focused on economic integration in the process that started with the 2008 Georgian crisis and the 2014 Ukraine crisis.

The Organization of Turkic States brings together the entrepreneurs operating in the member countries with the studies of the Turkic Business Council established within the Organization for economic integration and presents joint investment opportunities. "Memorandum of Understanding on Sharing Information and Experience Between Various Economic Zones" was signed at the 10th Meeting of Ministers in Charge of the Economy held in Baku on September 10, 2021. At this meeting, the "Feasibility Study" and "Establishment Agreement" of the Turkic Investment Fund, the legal status and other activities of the Turkic Chamber of Commerce and Industry (TCCI), additional mechanisms for further liberalization of trade and investment regimes in the Turkic Council region, and the Turkish Trade House in member states were discussed. Agenda items such as the establishment of the Completion of the trade facilitation document, preparation of the free trade agreement and e-commerce protocol in the field of investments and services were discussed among the members of the Organization. A Memorandum of Understanding on Sharing Knowledge and Experience between Various Economic Zones was signed at this meeting.[18]

The Organization of Turkic States, with a population of 160 million and an economical size of 1.1 trillion dollars, has the power to influence the global economy. These countries have become the focus of attention in the new period with their rich natural resources, agricultural and industrial infrastructure and geographical location. The Preferential Trade Agreement between Türkiye and Azerbaijan, which entered into force in 2021, sets an example for economic integration in general. Türkiye signed a Preferential Trade Agreement with Uzbekistan in 2022. The Turkic Council's 8th Summit, which convened in Istanbul on November 12, 2021, where the Organization of Turkic States accepted the 2040 Turkic World Vision, also gives important clues about the common economic area regarding the decisions taken.

The 2040 Turkic World Vision document's primary purpose is to create prosperous communities in Turkic States. Emphasis was placed on different areas of good governance, such as supporting economic and social reforms

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17 Fırat Purtaş 'Cultural Diplomacy Initiatives of Turkic Republics' Perceptions: Journal of International Affairs' (April 2017), 22(1), 91,114

18 'Anadolu Agency:Türk Konseyi ekonomiden sorumlu bakanları Bakü'de bir araya geldi.' (10 September 2021) < www.aa.com.tr/tr/dunya/turk-konseyi-ekonomiden-sorumlu-bakanlari-bakude-bir-araya-geldi/2361060> Date of Access 15.08.2022

on the path to democracy, the rule of law, inclusive institutions, transparency, efficiency, gender equality, accountability and fighting corruption. Economic integration constituted the most weighty part of the vision document. The 2040 Turkic World Vision document adopted by the Organization of Turkic States at the summit in Istanbul on November 12, 2021, has generally set goals in terms of establishing a common economic zone in terms of economy. This Organization has determined the free movement of capital, common energy policies, transportation corridors and common agricultural policy as targets within the scope of the common economic area project. Among these targets, institutional provisions such as free movement of goods and trade policy, agricultural products, customs provisions, and harmonization of laws have been determined. Free movement of goods and necessary institutionalization must be functional in the strategy of establishing a common economic space.[19]

The fact that the member countries of the Organization of Turkic States have the opportunity to reach the high seas through Türkiye is an important advantage for the realization of free trade in a short time. Developments in the field of trade among the Organization of Turkic States members will naturally lead to the development of commercial law and the creation of a common law system. By establishing their own economic space in Central Asia, China and Russia are trying to limit other countries' movement in the region. The Organization of Turkic States can take the lead in removing these obstacles by institutionalizing them. For Central Asia, regional cooperation is not an option but a necessity.[20]

Russia established the Eurasian Economic Community by taking the functioning of the European Union as an example. Today, although the Organization of Turkic States has accepted the Turkish World-2040 Vision Document, there is also a 2025 Strategy by the Eurasian Economic Community. The 2025 Strategy was discussed at the meeting of the Eurasian Economic Community countries on May 19, 2020, and a protocol was signed on the establishment of the staff of the Eurasian Economic Commission.[21]In the Eurasian Economic Community, Russia wants to focus on political integration, while Kazakhstan advocates economic integration.[22]It will be useful to examine

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19 Cihan Dura, Hayriye Atik and Cüneyt Dumrul, Avrupa Birliği, Gümrük Birliği ve Türkiye, ("Nobel Akademik YayıncılıkAnkara, 2015) 9; Fukuchi, Takao and Akio Hosono, The Economic Integration Effects of the Andean Common Market (1973), 11, (2), The Developing Economies,11, (2), 184,195

20 Starr, S. F. 'Central Asia in the Global Economy' Foreign Policy, (September/October, 2004), 6

21 Aleksandr Prihotko, 'Евразийская интеграция за неделю: главные события' (Eurasia Expert, 24.05.2020) <eurasia.expert/evraziyskaya-integratsiya-za-nedelyu-glavnye-sobytiya-25-may-2020> accessed 21.02.2021

22 Glenn Diesen, Russia's Geoeconomic Strategy for a Greater Eurasia, (Oxford: Taylor & Francis 2017), 206

the institutional structure and economic policies of organizations such as the Eurasian Economic Community (EurAsEC) and Shanghai Cooperation Organization (SCO) in the common economic space and integration strategy of the Organization of Turkic States.

A. Eurasian Economic Community(EurAsEC)

The Eurasian Economic Community (EurAsEC) establishment process started with the Customs Union Agreement signed between Russia and Belarus on January 6, 1995. Today, it is argued that the Organization of the Eurasian Economic Community can set an example for the common economic area and customs union to be created by the Organization of Turkic States. The Eurasian Economic Community, which was established in 1996 with the aim of developing economic cooperation, became official with the signatures of the Presidents of Russia, Belarus, Kazakhstan, Kyrgyzstan and Tajikistan on October 10, 2000, in Astana.[23]In 2010, a customs union was established between Russia, Kazakhstan and Belarus. The leaders of these three countries signed the agreement on the establishment of the Eurasian Economic Community at the summit held in Minsk, the capital of Belarus, on October 10, 2014. Armenia also became a member of the Eurasian Economic Community at this summit. The agreement on establishing the Eurasian Economic Community entered into force on January 1, 2015.[24]

In the post-USSR period, the Central Asian Republics came together in 1991 to solve especially the economic cooperation and common security problems between them. In 1994, Kazakhstan, Kyrgyzstan and Uzbekistan came together with common policies on credit, prices, customs and money, and the free movement of goods, capital and persons. The Central Asian Union (CAU) was established, aiming at the common economic area, including the issues related to the economy.[25]On the other hand, Turkmenistan did not accept the invitation to join the CAU because it is a neutral state.[26]Tajikistan joined the Central Asian Union (CAU) in 1998. After Tajikistan joined the union, the name of the Organization was changed to Central Asian Economic Union

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23 Kozymenko, V., and Sagindikov R. "Tomojenniy Soyuz Rossii, Kazakhstana i Belarusi –Osnova ih Ekonomicheskoy Bezopasnosti" Vestnik RUDH, Seriya Mejdunarodniye Otnoshenii, (4), 2014, 87,94

24 S.A. Avcu, 'Avrasya Gümrük Birliği ve Kırgızistan Avantajları ve Dezavantajları' (2014) 45(1) Republic of Turkey Turkicand Coordination Agency Department, Eurasian Studies, 269,297

25 Ushakova, N. Central Asian Cooperation: Toward Transformation. Central Asia And he Caucasus, (2003) 3 (21), < www.ca-c.org/journal/2003/ journal_eng/cac-03/16. usaeng. shtm>

26 A. Bohr, 'Regionalism in Central Asia: New Geopolitics, Old Regional Order' (2004) International Afairs, 80(3), 485,502

(CAEU). In 2001, the name of the Organization was changed to the Central Asian Cooperation Organization (CACO). The Central Asian Cooperation Organization aims to contribute to the development of economic integration in the region and encourage all kinds of political, social, scientific-technical, cultural and educational cooperation. Russia became a member of the Central Asian Cooperation Organization (CACO) in 2004, causing this Organization to turn into the Eurasian Economic Union. In 2005, the Central Asian Cooperation Organization united with the Eurasian Economic Community.[27]

After the collapse of the USSR, the post-Soviet countries wanted to become stronger militarily and economically by establishing unions among themselves. New initiatives such as Georgia, Ukraine, Azerbaijan and Moldova (GUAM) and the Central Asian Cooperation Organization (OCAC) acted independently of Russia.[28]While the Eurasian Economic Union was established under the leadership of Russia, there were discussions that this union would also have political aims. However, the general objectives of this union are listed as follows:

- Implementation of a full free trade regime,
- The mutual application of tariffs and restrictions in trade,
- Elimination of administrative, financial and other restrictions that prevent the free movement of commercial goods,
- Establishment of a single customs zone between member countries,
- Determination of common customs tariff between member countries,
- Abolition of customs control at internal borders between member states,
- Building a Customs Union that brings together economic and commercial mechanisms among member states,

The establishment of the Single Economic Area ensures the implementation of a common economic policy and the creation of a common market among the member states.[29]

While establishing the Eurasian Economic Community, Russia tried to determine a common trade policy for third countries with a single customs area. In 2009, the Customs Law Agreement, which determines the legal framework of relations between the countries included in the Customs Union, was signed

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27 Nazım Çatalbaş, 'Uluslararası Ticaretin Serbestleştirilmesi Sürecinde Orta Asya Ülkelerinin Yaklaşımları' (2014) 14(1) Anadolu University Social Sciences Journal, 151

28 Lapenko, M. EAES: Prostranstvo Ekonomicheskoy İntegratsyii, Moskova, Rossiyskiy Sovet po Mejdunarodnim Delam (2018), 16

29 N. Vorontsova, Evraziyskoe Ekonomicheskoe Soobshestvo kak Mejdunarodnoe Regionalnoye Obyedineniye (Vestnik Tomskogo Gosudarstvennogo Universiteta, 2004), 283

in Minsk.[30]With this agreement, the period of filing declarations at the borders between the member states since 2010 has ended. Russia wanted to create a common economic area with the legal introduction of the customs union agreement. At this meeting, the structure of the Eurasian Economic Union Court was also approved.[31]

In 2003, at the Yalta Summit, Russia, Ukraine, Belarus, and Kazakhstan signed an agreement of intent on the creation of the Common Economic Area.[32]However, Ukraine's relations with the EU and military cooperation with the United States have jeopardized Russia's common economic space strategy. Perhaps, in the attack of Russia on Ukraine in 2022, the strategy of seizing the logistics lines within the borders of Ukraine was also effective for the operation of this common economic area. The common economic space strategy is not only applicable between Russia and Belarus. Russia's main goal was to control foreign trade policies, free trade agreements, and cooperation with international organizations. Although the economy is a priority in the customs union created with the initiative of Russia, it is also aimed for these countries to reintegrate with Russia.[33] This process was considered a plan for Russia to unite the member states economically and to gather other post-Soviet states under the same roof in the long run.

Russia's Eurasian Economic Union project was envisaged to strengthen the economic ties in Central Asia. Although Türkiye's participation in the union has been discussed, we can say that the agreements between Türkiye and the EU will not allow this process legally because the Ankara Agreement and the Additional Protocol record that Türkiye cannot be in two different customs unions at the same time. A customs union model to be established between Türkiye and the member states of the Organization of Turkic States will also negatively affect the Eurasian Economic Community. Customs union agreements between the Eurasian Economic Union (Russia, Kazakhstan, Belarus, Armenia, Kyrgyzstan) countries will cause conflicts, especially between Customs and Transport Laws. As such, the customs union among

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30 S., Ovsyannikov, Tamojenniy Soyuz Rossii, Belorussii i Kazakhstana: Problemi Stanovleniya i Perspektivi Razvitiya, Materiyali Mejdunarodnoy Nauchno-Prakticheskiy Konferentsyi, Saratov, (Poligrafiya Povoljiya, 2011) 5

31 'Eurasian Economic Union Charter, Eurasian Economic Comission' (29 May 2014), <www.eurasiancommission.org/ru/act/trade/dotp/commonSytem/Documents/pdf>, accessed 18.07.2022

32 Lagun, D. Edinoye 'Ekonomicheskoe Prostranstvo: Stanovleniye i Razvitiye, Aktualeniye Voprosi Sovershenstovaniya Pravovoy Sistemi na Sovremennom Etape' Materiali Mejdunarodnoy Nauchno –Prakticheskiy Konferentsyi 90-letiyu Professora S. Drobyazko, (Minsk, 2012), 2

33 Ksenia Kirkham, 'The Formation of the Eurasian Economic Union: How Successful is the Russia Regional Hegemony?.' (2016) 7(2) Journal of Eurasian Studies, 28,111

the Eurasian Economic Community member states works to the detriment of Türkiye. Due to the article, only the member of the Eurasian Economic Community can carry out transport within the Eurasian Economic Community, Türkiye has had problems with transportation for a long time. This clause was later removed with the new regulation in 2018. However, in the new laws, it is stipulated that third-country carriers must obtain appropriate CEMT or transit documents for transportation within the Eurasian Economic Union. In accordance with the Decision number 293 of the Eurasian Economic Community Commission dated December 25, 2012, the forms of certificates to be applied in the Customs Union have been legalized within the framework of technical regulations. EAC Customs Union Certificate EAC Certificate has started to be requested. This practice came into effect on February 15, 2013. Today, this application is valid for the Eurasian Customs Union countries, the Russian Federation, Kazakhstan, Belarus and Kyrgyzstan. As such, it has become obligatory to obtain a permit or transit document in outbound logistics from Türkiye. Since the receipt of these documents is determined by a quota, the Eurasian Customs Union creates important problems in Türkiye's trade with Central Asian countries. The common economic area project that Russia is trying to establish with the Eurasian Economic Union negatively affects the current economic institutionalization of the Organization of Turkic States.

While establishing the customs union, the Russian Federation also planned to cooperate with the union countries against possible embargoes. Conditions have been established for the safe trade of oil and natural gas without being affected by embargoes. In 2022, the customs union between the Eurasian Economic Community countries in Russia's attack on Ukraine gave Russia advantages in this respect. Thanks to the customs union, Russia can sell fossil fuels, which it cannot sell through the West, through Central Asian countries. While creating the customs union, Russia also aimed to prevent Central Asian countries from entering the economic sphere of China. The entry of Chinese goods into the member states has been prevented to a certain extent.[34]The Ukraine crisis makes the Eurasian Economic Community project more valuable for Russia. Russia's plan to unite the post-Soviet countries primarily economically by 2050 has been discussed for a long time. After the Ukraine crisis in Russia's Eurasian Economic Union project, the importance of Iran and Türkiye has also increased. Although Russia has prioritised Iran, Türkiye is the gateway to the West, which may cause these plans to change again. Russia plans to eliminate the imbalance caused by the customs union by expanding the free trade agreement with Türkiye and the trade in national currencies. Sanctions on Russian business people and companies after the Ukraine crisis

[34] M. Krotov and V. Muntiyan, 'Evraziyskiy Ekonomicheskiy Soyuz: İstoriya, Osebennosti' Perspektivi, (2015) 11(83) Upravlencheskoe Konsultirovaniye, 33

led many Russian entrepreneurs to Türkiye. On the other hand, Russia can make suggestions to support a free trade agreement with Türkiye and trade in national currencies to make these initiatives more profitable. Establishing Free Trade Zones is one of the first priorities of Russia in commercial cooperation with the region's countries. Among the reasons for Russia's support to Azerbaijan in the Karabakh War is the opening of logistics lines that will connect the North Caucasus to Türkiye via Azerbaijan and the removal of obstacles to the establishment of free trade zones. The EU, NAFTA (USMCA), and ASEAN are among the organizations Russia takes as an example in the common economic area project.

Within the scope of the common economic area project, Russia created a Free Trade Zone on August 12, 2015, which removed the mutual trade restrictions between 5 member countries.[35]The establishment of the same process with Türkiye and Iran is currently being discussed as a priority. Within the framework of the common economic area's development strategy, the union members signed an agreement with Vietnam on creating a free trade zone on May 29, 2015.[36] In 2018, an interim agreement was signed at the Astana Economic Forum to establish a free trade zone with Iran. Free trade agreements were also authorized with India, Egypt, Singapore, Serbia and Israel. On May 17, 2018, a trade and economic cooperation agreement was signed with China. Free trade agreements were signed with Singapore and Serbia in 2019.[37]Russia's efforts to create a common economic space with Ukraine, Moldova and Georgia failed. The strategy announced in 2017 within the scope of Russia's project to establish a common economic space in Eurasia has a significant impact. The Customs Law, which was put into effect by the Eurasian Economic Union on January 1, 2018, was arranged according to this strategy. With the strategy announced by Russia, the institutional structure of the Supreme Council, Intergovernmental Council, Eurasian Commission and Eurasian Court has been defined in the customs union to be established in the Eurasian region. In 2015, the Eurasian Economic Union Court, headquartered in Minsk, started to work.[38]This court plays an important role in implementing the Union Treaty and in resolving disputes that may arise.

In terms of the ideas about customs union, Eurasian Economic Union has taken the European Union as an example trade in local currencies and common market. It has achieved developments as the first economic integration

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35 V. Holodkov, 'Evraziyskiy Ekonomicheskiy Soyuz: Problemi Razvitiya i Otnosheniye k EAES v Chentralnoy Aziyi' Problemi Natsionalnoy Strategiyi, (2019) 1(52), 9

36 V. Shakmatov, 'ЕАЭС и региональное сотрудничество в Евразии' (2019) < ru.valdaiclub.com/a/highlights/eaes-i-regionalnoe-sotrudnichestvo/>, accessed 17.07.2020

37 Holodkov, (n 35), 9

38 V. Shakmatov, 'ЕАЭС и региональное сотрудничество в Евразии' (2019), < ru.valdaiclub.com/a/highlights/eaes-i-regionalnoe-sotrudnichestvo/> accessed 17.07.2020

models of the European Union. It would be beneficial for the Organization of Turkic States to take the European Union model and the Eurasian Economic Community model as an example in trade and law. Because the European Union started integrating with the customs union and the common market, it became politically institutionalized. While Germany is the leading actor in the European Union, Russia has assumed this role in the Eurasian Economic Union. In the Organization of Turkic States, Türkiye should take a leading role and expand its activities. While the European Union has been able to form a systematic bureaucracy by completing its establishment, for now, the Eurasian Economic Union and the Organization of Turkic States are still in the process of building their institutional identity. Considering that both the Eurasian Economic Community and the European Union member countries have signed a Customs Union Agreement among themselves, it would be beneficial for the Organization of Turkic States members to produce a formula on the customs union. The Eurasian Economic Community and Türkiye continue their negotiations on free trade. Türkiye's free trade agreements with the Eurasian Economic Community will naturally accelerate the customs union work between the Organization of Turkic States members. For Türkiye, the war in Ukraine will cause an increase in trade with this region. Türkiye's positive relations with the Eurasian Economic Community will also positively affect the resolution of crises with Armenia. The start of trade in national currencies between Türkiye and Russia will naturally positively affect the trade of Central Asian countries with Türkiye. Due to the sanctions imposed on Russia due to the war in Ukraine, Türkiye can take advantage of Russia's and Central Asian countries' access to the south and being the only gateway to the Mediterranean.

The fact that Russia is the dominant actor in the Eurasian Economic Union prevents some countries, which are also members of the Organization of Turkic States, from establishing close economic relations with Türkiye. For example, with the influence of Russia, the Eurasian Economic Union granted Türkiye the status of a developing country at the end of 2021. Thus, Türkiye has become one of the countries that cannot benefit from the preferential regime (GTS).[39] The 25% discount application for various products originating in Türkiye has been terminated in the Russian Federation and other EEU countries. Since the customs union studies and free trade agreements of the Eurasian Economic Union are mainly carried out with the Central Asian republics, it would be beneficial to take a similar model as an example by the Organization of Turkic States.

[39] Republic of Türkiye Ministy of Trade, Custom General Directory 12.10.2021 dated 68110039 numbered declaration, <agm.org.tr/wp-content/uploads/2021/11/FormA-AvrasyaEkonomikBirligi-1.pdf>, accessed 14.07.2022

B. Shanghai Cooperation Organization (SCO)

With the coming together of five countries under the leadership of Russia and China, a new regional union was formed under the name of "Shanghai Five" with the participation of Russia, China, Tajikistan, Kyrgyzstan and Kazakhstan in 1996. At the summit held in Kazakhstan in 1998, it was decided to cooperate not only on regional issues but also on economic issues. In 2001, with the participation of Uzbekistan, the Organization has renamed the Shanghai Cooperation Organization (SCO). Shanghai Cooperation Organization has 9 members (Russia, China, Tajikistan, Kyrgyzstan, Kazakhstan, Uzbekistan, India, Pakistan, Iran), 2 observer countries (Afghanistan, Mongolia) and 5 dialogue countries (Türkiye, Sri Lanka, Belarus, Egypt, Qatar). Shanghai Cooperation Organization is an organization established with the supremacy of China, and this Organization aims at China's border security, regional security and economic interests. China aims to control the energy resources of Central Asia and Russia on the platform of the Shanghai Cooperation Organization and to make it its market.[40] By joining this Organization, Russia also aimed to put an end to China's expansionist policies towards Russia. It has also strategically determined to take advantage of China's economic infrastructure and workforce. Although the main purpose of this organisation's establishment was economical, China's desire for easy access to natural gas and oil in Russia and Central Asia was also effective. This Organization is the symbol of cooperation between Russia and China. Although the economy's strength was based on the establishment of this Organization, the inclusion of agreements on protecting border security and terrorism over time transformed the Organization from an economic structure to a political one.[41]

The Shanghai Cooperation Organization's goal of establishing free trade zones also brought up the goal of a common economic area of this union. On September 23, 2004, a 100-item plan was signed and economic targets were determined. Interbank was established to finance joint projects.[42] Objectives to develop the economy, such as establishing the Interbank, Shanghai Business Board and the Shanghai Development Fund, and creating the "Central Asia Common Market", have not yet been achieved.[43] For this reason, it will not

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40 Marcel De Haas, 'Relations of Central Asia with the Shanghai Cooperation Organization and the Collective Security Treaty Organization' (2017) 30(1) The Journal of Slavic Military Studies 1,16

41 Mustafa Gökçe, 'Sovyet Sonrası Dönemde Hazar Çevresinde Yaşanan Rekabet', 2008 1(3) Uluslararası Sosyal Araştırmalar Dergisi 177, 209

42 Niklas Swanström and Nicklas Norling, 'The Shanghai Cooperation Organization Trade and The Roles Of Iran, India and Pakistan' (2007) Central Asian Survey 432

43 Burak Kartal and Çiğdem Sofyalıoğlu, 'Türkiye'deki Gençliğin Şanghay İşbirliği Örgütüne Yönelik Tutumuna Pazarlama Perspektifiyle Bakış'(2011) International Conference On Eurasian, Oturum 1B: Uluslararası İlişkiler 24

be successful for the Organization of Turkic States to take the structure of this Organization as an economic example.

Shanghai Cooperation Organization members form economic zones (China-Russia, China-Kazakhstan, China-Uzbekistan) among themselves in order to increase economic cooperation. Establishing free trade zones with this goal also caused China to plan the Silk Road Project through this Organization.[44] Eight bilateral free trade agreements have been signed between Central Asian countries, but only two (Kyrgyzstan-Kazakhstan and Kyrgyzstan-Uzbekistan) are in force.[45] Before the Organization of Turkic States institutionalizes and establishes free trade agreements and customs union legislation, Russia and China strive to complete their agreements, especially with Azerbaijan, Turkmenistan and Uzbekistan.

One of the most important goals of the Shanghai Cooperation Organization is to complete the Silk Road Project safely. It can be said that China's Silk Road Project is an international and even intercontinental infrastructure, trade and finance project.[46] The Silk Road, which was initiated by China in 2013, consists of a highway, railway, oil pipelines, power transmission lines, ports and other infrastructure projects that will connect China to the world.[47] This project aims to revitalize the historical silk road that reaches Europe from China by crossing the Yellow Sea, Indian Ocean, Red Sea, Suez Canal and the Mediterranean Sea, starting from China and reaching Europe from the ports of Piraeus in Greece and Venice in Italy. It aims to establish a maritime network.[48] The Asian Infrastructure Investment Bank was also designed as the financial institution to finance projects.[49] Although Russia stands out as one of the main partners of the Silk Road Project, it is afraid of the long-term geopolitical consequences of the project.[50] For this purpose, it aimed to make

44 Chien-Peng Chung, 'Phases in the Development of the Shanghai Cooperation Organization' in Mark Beeson and Richard Stubbs (eds), Routledge Handbook of Asian Regionalism, (Routledge 2012) 93, 384

45 Çatalbaş 143,158

46 D. Cameron, 'Can OBOR Bring Together the EU and China Closer?' (Eu-asia Centre, 17 April 2017) www.eu-asiacentre.eu/pub_details.php?_id=209 accessed 18 Temmuz 2022

47 Clarke Michael, 'The Belt and Road Initiative: China's New Grand Strategy?' (2017) 21(1) Asia Policy 9, 9-71; Ersan Bocutoğlu 'Çin'in Bir Kuşak-Bir Yol Projesinin Ekonomik ve Jeopolitik Sonuçları Üzerine Düşünceler' International Conference on Eurasian Economies (Bishkek, 2017) 265

48 Andrew Sheng, 'OBOR and EuroAsia's New Great Game' (2017) 53(2) China Report 52,232

49 Mike Callaghan and Paul Hubbard 'The Asian Infrastructure Investment Bank: Multilateralism on the Silk Road (2016) 9(2) China Economic Journal 39,116

50 Samue Charap, John Drennan and Pierre Noël, 'Russia and China: A New Model of Great Power Relation' (2017) 59 (1) Survival 25,42

the Eurasian Economic Union Project functions quickly.[51] Türkiye, on the one hand, tries to make the Organization of Turkic States more functional on the other hand, Türkiye became a founding partner of the Asian Infrastructure Investment Bank, which will finance the Silk Road Project. It is interested in this project by establishing close relations with China.[52] Türkiye's distrust of the Western alliance causes it to invest in the creation of a new economic and logistics line through China-Central Asia-Caspian Sea-Azerbaijan-Georgia-Türkiye. The increasing influence of China in Central Asia also pushes Türkiye and Russia to cooperate.[53] The Turkic States in Central Asia, which is a buffer zone between Russia and China, will be able to secure themselves both economically, politically and militarily once the Organization of Turkic States established under the leadership of Türkiye becomes more functional.

China's economic space strategy covers three continents, namely Asia, Africa and Europe. For this reason, it may not be expected to establish a common economic market such as the Eurasian Economic Community, the European Union or the Organization of Turkic States because China mostly aims to sell its goods and get rid of the US influence.[54] In this sense, it will be very difficult to establish a common legal infrastructure in this project. China's mixed economic and geopolitical goals also reduce confidence in this project. Knowing the importance of China, Iran and Pakistan for the Silk Road Project, it invests in these two countries. Russia also increases its economic and military support to these two countries. In this sense, we can say that Russia and China are competing with Iran and Pakistan. In fact, Russia is increasing its cooperation with India in order to maintain a balance.[55]

Central Asian countries still see Russia and China as hegemonic powers.[56] The strengthening of the Organization of Turkic States will also cause this thought to change. Türkiye applied for membership to the Shanghai Cooperation Organization in 2005. However, due to the opposition of China, it was not accepted to membership. Türkiye applied again in 2011 for the second time,

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51 J.L Wilson, 'As China Rises, Russia Tries to Make the Best of a Tough ituation' (2017) www.russianmatters.org accessed 12 July 2022

52 Selim Koru and Timur Kaymaz, 'Türkiye: Perspectives on Eurasian Integration' (European Council on Foreign Relations (ECFR), 2016)

53 Michael Clarke, 'China's Strategy in "Greater Central Asia: Is Afghanistan the Missing Link?' (2013) 40(1) Asian Affairs: An American Review 1, 19

54 Katherine Koleski, 'The Thirteenth Five-Year Plan, US–China Economic and Security Review Commission: Staff Research Report' (2017) <www.uscc.gov/sites/ default/files/ Research/The%2013th%20Five-Year%20Plan.pdf.> accessed 11 June 2022

55 Andrew F. Cooper and Asif B. Farooq, 'The Role of India and China in the G20 and BRICS: Commonalities or Competitive Behaviour?' (2016) 45(3) Journal of Current Chinese Affairs 73, 106

56 Christian Dargnat, 'China's Shifting Geo-economic Strategy' (2016) 58(3) Survival 63,76

but was given the status of dialogue partner in 2021. After the 2022 Ukraine crisis, both Russia and China have started to act more willingly about Türkiye's membership in the unions, which they lead, due to Türkiye's geopolitical position. However, Türkiye has taken important steps towards establishing its own regional unity by focusing on the Organization of Turkic States.

The fact that Iran will become a member of the Shanghai Cooperation Organization has weakened Türkiye's membership process in this Organization. Because Türkiye as a NATO member, taking part in the same Organization with Iran, Russia and China, which NATO sees as enemies, brings important drawbacks. However, Türkiye has gained more importance in the transfer of energy resources between Central Asian and European countries.[57] The Organization of Turkic States can participate in China's projects on the economic common area, but this organisation's institutional structure has not yet been established in terms of legislation.

II. COMMERCIAL LAW STUDIES AND LAW UNION IN THE ORGANIZATION OF TURKIC STATES

The Organization of Turkic States, including Türkiye, declared the 2040 Turkic World Vision Document with the 2021 Istanbul Summit and set goals for itself not only in the economic field but also in the field of law. Within the scope of the Organization of Turkic States, the following plans were made in the field of law[58]:

- Establishment of the Council of Ministers of Justice of the Organization of Turkic States,
- To hold a meeting at the level of Ministers of Justice at least once a year in order to consult on the work of the Council of Ministers of Justice of the Organization of Turkic States,
- Establishment of the "justice working group" and sub-working committees affiliated with this group as a basis for the work to be done between the parties,
- Organizing seminars, conferences and workshops on the subjects to be determined in order to increase the function of the working groups and ensure cooperation,
- Organizing mutual training, internship, course and exchange programs for judges, prosecutors and other justice personnel,

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57 Linda Dieke and Mirja Schroder, 'Türkiye as an Energy Hub? Introduction to Türkiye's Role in Energy Supply' (Nomos Verlagsgesellschaft 2017) 15, 26

58 'The Organization of Turkic States 8. Summit İstanbul Declaration, 12 November', [2021] < tccb.gov.tr/assets/dosya/2021-11-12-turkkonseyi-bildiri.pdf> accessed 14 July 2022

- Carrying out joint legislative studies in order to identify and mutually share good practices,
- Working together to develop digital applications needed by the parties for more effective judicial cooperation on issues such as international organized crime and terrorism,
- Establishment of the Turkic judicial network for more effective judicial cooperation on issues such as international organized crime and terrorism,
- Ensuring the development of judicial cooperation by signing multilateral agreements on extradition, transfer of convicts and legal assistance,
- Sharing institution experiences by establishing relations between judge and prosecutor training centers,
- Exchange of experiences in the fight against transnational organized crime, including human trafficking, crime prevention, reforms in prisons and probation, notification and document security.

2040 Turkic World Vision Document is an individual and joint action plan for member states to develop their administrative capacities further to serve the needs and wishes of their people. At the Organization of Turkic States summit in Istanbul, certain main principles were determined to guide the next phase of its priorities, development and course in the next 20 years. Among these principles, we can list those in the field of law as follows[59]:

- *Appreciate and encourage the continuation of cooperation in justice sphere and urge launching collaboration among the Justice Ministries and other relevant authorities of the Member States (Article 21)*
- *Instruct the relevant authorities of Member States to accelerate their work towards finalization of the "Trade Facilitation Strategy Paper" through a "Working Group " to be established, agree to work for the establishment of the Turkic Trade Houses (TTH) to increase intra-trade, export potential and investments of Member and Observer States, and instruct the relevant government bodies to elaborate new initiatives to increase trade complementarities and eliminate quantitative restrictions and non-tariff measures among the Member States (Article 26).*
- *Urge the implementation of facilitative measures to the agreed essential goods with a view to signing the "Protocol on Establishment of Simplified Customs Corridor among the Governments of the Member States of the Organization of Turkic States" (Article 46).*
- *Agree to ease customs and administrative procedures to exploit the full*

[59] The Organization of Turkic States 8. Summit İstanbul Declaration, 12 November (n 58)

> *potential of the Trans-Caspian International East-West Middle Corridor and revitalize Silk Road through customs cooperation within the framework of the Caravanserai Project that will contribute to harmonization and simplification of border crossing procedures (Article 47)* (Organization of Turkic States 8th Summit Istanbul Declaration, November 12).

Although the 2021 Istanbul Summit is generally based on language, culture, history and economy, the cooperation of the member states of the Organization of Turkic States in the jurisdiction field will also positively affect the economy in general. Legislative unity in common and international law will also lead to the creation of common legislation in the trade between these countries. The member and observer states of the Organization of Turkic States have an economical size of 1.1 trillion dollars, a foreign trade volume of 560 billion dollars and a population of 160 million. This power brought this organisation's necessity to start the harmonization process in commercial law as well. Turkic states established the Turkic Chamber of Commerce and Industry with the agreement they signed in Astana in 2019 to strengthen their cooperation in the field of trade. Turkic Chamber of Commerce and Industry Business Forum was held in Türkiye on November 10, 2021, within the scope of the 3rd General Assembly of the Turkic Chamber of Commerce and Industry, which was established to support the development of mutual trade and investment relations between Türkiye, Azerbaijan, Kazakhstan, Kyrgyzstan, Uzbekistan and Hungary. Türkiye aims to make trade between Turkic states more liberal through preferential trade agreements. A preferential trade agreement was signed between Türkiye and Azerbaijan. The Preferential Trade Agreement entered into force on March 1, 2021. In 2022, an agreement was signed with Uzbekistan. Türkiye is working towards establishing an international standard arbitration system so that investors can invest in Turkic states. It is necessary to standardize the customs processes of the Organization of Turkic States and speed up the transitions. Determining common standards in customs procedures and making processes simple and fast will only be possible with common law legislation. For the middle corridor to come to the fore in the trade on the China-Europe line, legal arrangements must be made as soon as possible. In this context, it would be beneficial for the member states of the Organization of Turkic States to remove the transition quotas for each other.

By making commercial law common among the member states of the Organization of Turkic States, more trade, more entrepreneurs, and a stronger private sector will be created. In this respect, it is important to establish a strong and common chamber of commerce system under the leadership of Türkiye. Türkiye can ensure the establishment of a common system by sharing its achievements and experiences in this field with other member states. Thanks to the joint chambers of commerce, it is possible to start implementing new

projects in the field of informatics and software. In order to achieve a free trade regime among the member states of the Organization of Turkic States, legal arrangements must be made in a short time. The preferential agreements system in trade is expected to be completed by the end of 2022. Secondly, a free trade agreement in services and investments is considered. Efforts are also being made to establish Turkic Trade Houses in the Organization's member states. It is planned that Turkic Trade Houses will help member states increase their trade volumes, facilitate their export processes and strengthen their positions in other markets. Azerbaijan Export and Investment Development Agency (AZPROMO) is currently working on establishing the first Turkic Trade House as a pilot project in Baku.[60]

The legal documents on which the Organization of Turkic States is based are an international structure with the personality of international law, the highest decision-making mechanism, how the decision-making mechanism is known, and permanent organs. In the previous meetings of this Organization, although not directly, some references were made to the commercial law for trade development. Employees of the Organization of Turkic States benefit from the privileges accorded to similar-level officials of international organizations regarding foreign exchange transactions.[61] From this point of view, international commercial law legislation is generally taken into account in operation.

At the summits of the Organization of Turkic States, some decisions focused on the development of trade and regulations on commercial law. At the 1992 Summit, the President of Türkiye, Turgut Özal, harmonized the customs legislation between the Turkic republics to establish a free trade order that allows the free movement of persons, goods and services, to establish a joint investment and development bank, to develop railway, road and air connections and telecommunication opportunities. It focused on the transfer of the natural resources of the republics to Europe via Türkiye and the development of coordination and cooperation opportunities in economic matters in order to be integrated into the world economy.[62] At the summit, hosted by Karimov who is President of Uzbekistan on October 21, 1996, in Tashkent, the capital of Uzbekistan, the heads of state decided for the first time to facilitate economic cooperation between real and legal persons in order to create a common market for goods, services, capital and labour. They stated that they favour establishing a suitable legal environment.[63] In the 17th Article of the Fourth

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60 'Turkic Trade Houses' (7 November 2021) <www.turkkon.org/tr/isbirligi-alanlari/ekonomik-isbirligi_2/turk-ticaret-evleri_41> accessed 5 April 2022

61 Mustafa Bıyıklı, 25 Yıllık Tecrübenin Ardından Türk Keneşi Bünyesindeki Ülkelerde Ortak Kuruluşlar İlişkiler ve İş Birlikleri (Türkiye Manas Üniversitesi Yayınları 2018) 19

62 'Ankara Zirve Bildirisi' (1992) <www.turkkon.org/Assets/dokuman/11_ AnkaraBildirisi 1992_1. Devlet BaskanlariZirvesi_20140418_104048.pdf> accessed 18 September 2020

63 'Taşkent Zirve Bildirisi' (1996) < www.turkkon.org/Assets/dokuman/08_

Summit Declaration dated June 5, 2014, in Bodrum-Türkiye, the importance of the Meetings of Heads of Customs Administrations was underlined in order to intensify efforts to facilitate freight and passenger transport by encouraging the use of mechanisms to simplify import-export procedures and increase transit potential.[64] The Istanbul Declaration, published at the 8th Summit of the Organization of Turkic States, organized by the Turkic States in 2021, is important in terms of the trade union and the creation of common structures in commercial law and judicial regulation.

The works of the Organization of Turkic States on commercial law within the framework of the common economic area strategy also lead to developments in other legal regulations and the formation of new institutions together. The fact that the Turkic World should have a common commercial law has become more understandable with recent disagreements in trade. On the occasion of the thirtieth anniversary of the independence of the Turkic States, in order to facilitate the transition of the Turkic States to the common commercial law and to develop trade, Economy and Trade in Türkiye-Turkic Republics Conference, hosted by the Ministry of Commerce and the Organization of the Foreign Economic Relations Board (DEİK), was held on November 11, 2021, in Istanbul. In this conference, especially the issue of joint institutional arbitration came to the fore. The Organization of Turkic States needs to resolve the arbitration issue in the near future. Trade between the Turkic states is faced with many problems in general. Different legal rules and tax systems reduce the cooperation of countries. For this reason, arbitration can be a transitional process in this regard. Arbitration is the resolution of a possible dispute by the arbitrator or arbitrators. This arbitration system will be a special judicial activity supervised by the state, whose decisions are final and can be enforced like court decisions.[65] The Organization of Turkic States needs an institutional arbitration system. There are different examples in the world of how this funktions.[66] The Organization of Turkic States can take as an example the Iberoamerican Arbitration Center (CIAR), which entered into force on

TaskentBildirisi1996_ 4.DevletBaskanlariZirveBildirisi_20140418_103822.pdf> accessed 11 September 2017

64 'Türk Dili Konuşan Ülkeler İşbirliği Konseyi Dördüncü Zirve Bildirisi' (2014) < www.mfa.gov.tr/turk-dili-konusan-ulkeler-isbirligi-konseyi-dorduncu-zirvesi- taslak-bildirisi_-5-haziran-2014_-bodrum_-turkiye.tr.mfa> accessed 17 June 2022

65 Ejder Yılmaz, Hukuk Sözlüğü (Yenilenmiş 4. Baskı, Yetkin Yayınları, 2012) 715-716 ; İzzet Karataş Ulusal (İç) Tahkim (Adalet Yayınları 2013) 21 ; Burak Huysal Milletlerarası Ticari Tahkimde Tahkime Elverişlilik (Vedat Kitapçılık, 2010) 7 ; Cemal Şanlı Milletlerarası Ticarî Tahkimde Esasa Uygulanacak Hukuk (Banka ve Ticaret Hukuku Araştırma Enstitüsü Yayınları 1986) 96

66 M. Tevfik Birsel, 'Milletlerarası Ticari Tahkim ve Türkiye' (1980) 1 (1) Ege Üniversitesi Hukuk Fakültesi Dergisi 101

March 19, 2015, on institutional arbitration[67] because besides legal persons, chambers and commercial organizations, trade and industry or other similar bodies and individual federated, provincial, state, regional bar associations or lawyer associations can become members of this arbitration system. This arbitration system was created by countries with a common language, culture and history, just like the Organization of Turkic States. The establishment of the Organization of Turkic States Arbitration Center as soon as possible and the preparation of its statute will both facilitate and accelerate the trade volume between countries. In this sense, establishing the arbitration centre in Istanbul will also provide significant advantages in the trade network with Europe.

The meeting of the Judiciary Boards of Turkic Speaking Countries on the creation of common law legislation in the Organization of Turkic States was held on 22-23 December 2015 in Istanbul, hosted by the HSYK.[68] This cooperation has strengthened the sharing of experience among the judicial boards. Within the scope of the experience-sharing plan where judges and prosecutors come together, the first meeting of the chief prosecutors of the member states of the Organization of Turkic States was held in Baku, the capital of Azerbaijan, on 31 October-3 November 2021. After the meeting, the founding document of the Council of Attorneys General within the Organization of Turkic States was signed. With the signing of this document, a joint judicial leg was established between the Turkic states. The founding document, signed after the first meeting of the chief prosecutors of the member states of the Organization of Turkic States, provided the establishment of a permanent consultation and working mechanism in order to develop and strengthen the cooperation between the chief prosecutors of the Turkic states. It was decided to start an exchange and training program for members of the judiciary within the framework of the necessity of establishing the Union of Turkic Judicial Academies under the umbrella of the Organization of Turkic States and establishing a common judicial culture.[69] Within the scope of the 2040 Turkic World Vision of the Organization of Turkic States, important steps have been taken within the framework of the Union of Turkic Judicial Academies (TYEA), which was initiated among judicial institutions in order to create a legal union.

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67 İbrahim Özbay, Murat Erdem, 'Bir Kurumsal Tahkim Merkezi Örneği: İberoamerikan Tahkim Merkezi' (2020) 11 (42) Türkiye Adalet Akademisi Dergisi 449-470

68 'Türk Dili Konuşan Ülkeler Yargı Eğitim Kurumları, Türk Konseyi ve Türkiye Adalet Akademisi Temsilcilerinin Kurulumuzu Ziyareti' (October 2021) <www.hsk.gov. tr/turk-dili-konusan-ulkeler-yargi-egitim-kurumlari-turk-konseyi-ve-turkiye-adalet- akademisi-temsilcil> accessed 13 July2022

69 'Yargıtay Cumhuriyet Başsavcısı Sayın Bekir ŞAHİN'in Türk Dili Konuşan Devletler Başsavcılar Şurasının İlk Toplantısına Katılımları' (4 November 2021) <www.yargitaycb.gov.tr/kategori/14/ziyaret-haberleri?page=2> accessed 12 June 2022

The Turkic Justice Academy carries out important studies within the scope of establishing common law legislation in the Organization of Turkic States. It is planned to develop mechanisms that will ensure the rule of law by establishing the Turkic Judicial Education Network (TYEA) together with the countries included in the Turkic world, by sharing the best practice examples and research in the field of education of the members of the judiciary, by establishing cooperation between the institutions. A draft memorandum of understanding regarding the establishment of TYEA has been prepared. TYEA's cooperation with the Turkic World countries will develop and contribute to the stability of the region in the long run, and it will provide beneficial results. It is thought that it would be beneficial to include judicial law enforcement units and their superiors within this project's scope. Türkiye supported the establishment of judicial education institutions in Azerbaijan, Kazakhstan, Kyrgyzstan, Mongolia, Uzbekistan, Tajikistan and Turkmenistan. A program was organized in Ankara between October 4-8, 2021, in cooperation with the General Secretariat of the Organization of Turkic States, in order to share the intention of establishing TYEA under the umbrella of the Organization of Turkic States with its counterpart judicial training academies. Representatives from Azerbaijan, Uzbekistan, Kazakhstan and Kyrgyzstan judicial education institutions attended the aforementioned meeting. Although a consensus was reached in principle regarding establishing TYEA at the meeting, the participants expressed some reservations and suggestions for amendments regarding the draft memorandum of understanding. The Turkish Justice Academy made amendments to the draft memorandum of understanding, taking into account the reservations and proposals for amendments, and it was conveyed to the judicial training institutions in the member countries of the Organization through the General Secretariat of the Organization of Turkic States in order to receive their opinions and suggestions about the draft. These views were finalized in the memorandum of understanding by organizing an online meeting in September 2022 with the participation of judicial training institutions in member and observer member countries of the Organization of Turkic States. It was decided to cooperate in the field of justice according to the 21st article of the 121-item joint declaration of the Cooperation Council of Turkic Speaking Countries' (Turkic Council) 8th Summit of the Heads of State that convened on November 12, 2021. The founding objectives of TYEA have been determined as follows[70]:

[70] 'Türk Devletleri Teşkilatı İş Birliğiyle Türk Yargı Eğitim Ağı (TYEA) Kurulmasına Dair Mutabakat Zaptı İmzalandı' <taa.gov.tr/haber/turk-devletleri-teskilati-is-birligiyle-turk-yargi-egitim-agi-tyea-kurulmasina-dair-mutabakat-zapti-imzalandi> accessed 17 December 2022

- One of the purposes of establishing TYEA is to create a common dictionary among the countries included in the Turkic World.
- Another target is to organize a Turkic Legal History Symposium and, as a result, to publish a joint Turkic Legal History book.
- With the establishment of TYEA, it is aimed to take a step towards harmonization of legal systems by holding the International Turkic Law Congress.
- The analysis of electronic justice practices in member and observer member countries of the Organization of Turkic States and sharing good examples through education are also among the objectives.
- With TYEA, it is also aimed to organize exchange programs between countries for judges and deputy prosecutors and candidates and for judges and prosecutors.

CONCLUSION

The Organization of Turkic States has been viewed with suspicion for a long time both Russia, China and Iran since it is an international intergovernmental organization established by states with an international treaty within the framework of international law. However, the recent Russian-Turkish cooperation strengthens the comments that this Organization also has advantages for Russia. Türkiye's vision of cooperation in economic and cultural fields with the member states of the Organization expands the areas of economic cooperation with the Turkic World due to Russia's problems with the West. The establishment of a common market and legal union by the Organization of Turkic States is perceived as Russia's finding a partner in its competition with both China and the West. Unlike the European Union, the Organization of Turkic States is an organization that aims for cooperation, not integration. Perhaps for this reason, it is considered one of the most prominent international organizations to cooperate with Russia. When we look at it from the point of view of international law, we see that some international organizations accept federated states, regions that form a part of the state, and affiliated countries such as protectorates and colonies, apart from states. By changing its name to the Organization of Turkic States, the Organization has eliminated for now the worries that the Turkic nations, which is actually Russia's biggest fear, might be accepted as members. The Organization of Turkic States is concerned with the development of cooperation between member states. For now, the Organization does not have a plan for other Turkic communities or autonomous republics other than the independent Turkic states.

The Organization of Turkic States needs to harmonize indirect taxes in order to accelerate the establishment of a common economic area. Differences in tax rates between countries also bring price differences. A common economic

area has been created by harmonizing VAT rates in EU countries. Türkiye's cooperation with the Organization of Turkic States members on industry and production will accelerate the formation of a common economic area. In this way, joint investment and joint industrial zones will be created. Free trade circulation will lead to joint production and a common economic and legal regulation. The biggest advantage of the Organization of Turkic States members is that they have common ethnic, historical, cultural, linguistic and religious similarities. Using its Soviet period past, Russia primarily cooperates economically and militarily with Central Asian countries. Türkiye can also turn this situation into an advantage by using its cultural and linguistic proximity. For the Organization of Turkic States to succeed in integration, they need to bring their economic structures closer to each other. Türkiye and Central Asian countries have economically complementary characteristics. If they had a competing economic order or industry, there would have been difficulties with integration. The fact that countries such as Russia and China are competitors in production also complicates integration with each other. It can be said that the customs union formed by complementary economies will provide more profit in terms of trade creation than a customs union established by rival economies. The establishment of financial institutions and the establishment of a common law infrastructure among the countries of the Organization of Turkic States are among the tasks that should be done as a priority. It is seen as a successful policy that Türkiye prepares itself for the new process by establishing a balance between the West and the East. The understanding of the rising East and the declining West also causes the competition to turn into wars in the new period.

The extreme pragmatist policies of Russia and China may adversely affect the Organization of Turkic States. Russia, China, India, Türkiye, Kazakhstan and Iran come to the fore with their economic and military powers in Eurasia. In this sense, geography, where the Organization of Turkic States, the Eurasian Economic Community and the Shanghai Cooperation Organization Project do not see each other as rivals, can only compete with the West. Combining energy and underground resources, production potential, and investment opportunities of Eurasian countries with Türkiye's trained human and entrepreneurial power can lead to the formation of a new global economic structure.

The cooperation of countries in the field of trade has also brought legal cooperation to the agenda. Türkiye supports studies in the field of commercial law in order to create a common free trade market and to make regulations regarding the customs union. The increase in trade among the member states of the Organization of Turkic States makes it necessary to make legal arrangements.

Organization of Turkic States 2021 Istanbul Summit is a summit that draws the strategy of cooperation in both economic and legal fields. With the

announcement of the 2040 Turkic World Vision document at this summit, the road map was determined in which conditions the Turkic World will take place in the new world order in general. While the Eurasian Economic Community and the European Union can be taken as an example of the institutionalization strategy of the Organization of Turkic States, the Shanghai Cooperation Organization may not be included in this equation because it has not completed its institutionalization.

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JUSTICE ACADEMY OF TÜRKİYE

Ahlatlıbel Mahallesi
İncek Şehit Savcı Mehmet Selim Kiraz Bulvarı
06095 Çankaya / ANKARA - TÜRKİYE
T. +90 (312) 489 81 80 •F. +90 (312) 489 81 01
lawandjustice.taa.gov.tr