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ENVIRONMENTAL RIGHTS in TÜRKİYE UNDER BUSINESS and HUMAN RIGHTS

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About Business and Human Rights Association (Minerva BHR)

Minerva BHR, is the first independent NGO in Türkiye with a central focus on business and human rights. In light of the United Nations Guiding Principles on Business and Human Rights, Minerva BHR aims to promote responsible business conduct, combat modern slavery and advocates for corporate responsibility and accountability to respect human rights. According to this objective, it works to prevent, mitigate or remedy human rights violations arising from the business activities of multinational companies and their suppliers in global value chains.

Through bridging a dialogue between all public, private, and civil actors; Minerva BHR aspires to collaborate with all stakeholders to develop and implement viable, feasible and practical solutions using its local expertise.

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Introduction

The Right to a Clean, Healthy, and Sustainable Environment in Türkiye from the Perspective of Business and Human Rights[1]

Business and human rights refer, in the most general sense, to an area of human rights that investigates business-related human rights violations. Considering the history and theoretical development of human rights law, it is accepted that the primary responsibility for human rights is borne by the State. This acceptance is now being questioned due to the presence of multinational enterprises that may sometimes be more powerful than many States. Accordingly, human rights obligations of enterprises standing as non-State actors have become a significant topic of debate in the world.[2]

Business enterprises can cause severe environmental disasters through their activities. For this reason, the goal of protection of the environment acts as the highlight of the agenda of business and human rights issues. It has become clear that concrete steps should be taken to protect the environment, particularly as the global climate crisis has reached unrecoverable levels for humanity. Multinational fossil fuel companies have a major part in global carbon emission, which indicates that the relevant actors of business constitute one of the factors triggering the climate crisis.[3]

Through a Türkiye-specific examination of the goal of protection of the environment from the perspective of business and human rights, this memorandum aims to draw attention to Türkiye's problems in this respect. Within this framework, in the first section of the report, international and national legislation on environmental law will be examined within the context of business and human rights. In the second section, primary problems concerning the protection of the environment will be identified with an analysis of current events in Türkiye that have attracted the attention of the public, which are accessed upon scanning the news in the press and the reports issued by non-governmental organisations. Finally, in the recommendations section, suggestions for solutions will be provided on the basis of the findings.

Evaluation of Legislative Instruments on the Protection of Environment in Terms of Business and Human Rights

Türkiye recently suffered severe drought and major natural disasters such as fire, flood, etc. with the impact of the global climate crisis.[4] It also appears that the Turkish legislation and its implementation have not yet reached an adequate level in meeting the standards in the field of business and human rights. In Türkiye, no step has been taken yet concerning national legal regulations providing for mandatory human rights due diligence, which is an up-to-date topic in the field of business and human rights, nor any step on adopting a national action plan on business and human rights. **Goal 9.3 titled *"Raising Public Awareness on Human Rights"* of the Human Rights Action Plan and Implementation Calendar[5] states that a national set of guiding principles about business and work life will be prepared with reference to the UN Guiding Principles on Business and Human Rights (the "UNGPs") [6] and awareness-raising activities will be conducted. The Ministry of Labour and Social Services has been appointed to issue the mentioned set of guiding principles on business and work life, which has for the time being not yet been made public.**

On the other hand, the **Green Deal Action Plan** aiming at **"supporting the switch to a sustainable and resource-efficient economy in line with our country's development goals considering such change and transformation in the international trade and economy",** which was prepared in light with the European Green Deal[7], was published in July 2021 by the Turkish Ministry of Commerce.[8] Türkiye has ratified the Paris Agreement on October 7, 2021[9], declaring a zero-emission target for 2053.[10] Furthermore, on February 21-25, 2022, a climate council was held in Konya to *"address Türkiye's new climate change vision within the framework of evolving and changing conditions and actively presenting the green transformation approach"*.[11] The foregoing developments can be considered as positive steps taken within the context of protection of the environment and combat the global climate crisis.

To this extent, effective steps should be taken in Türkiye just as in the entire world, to prevent environmental disasters and fight against the global climate crisis. In the following sections, key points of international and national legislative instruments on the protection of the environment will first be examined and subsequently, current environmental issues will be addressed in an effort to identify the main problems in the protection of the environment in Türkiye from the perspective of business and human rights.

International Legislative Instruments

The systematisation of international environmental law dates back to the 1970s, and the UN Conference on Human Rights held in Stockholm in 1972 is considered a milestone.[12] The Stockholm Declaration signed upon the completion of the mentioned conference has significantly affected the development of the environmental law thanks to the principles therein[13], and despite not being a binding instrument, it is considered the foundation of international environmental law.[14] The UN Conference on Environment and Development (the "**UNCED**") organised thereafter in Rio de Janeiro, Brazil in 1992 is known as the most important environmental meeting of the twentieth century.[15] The Rio Declaration and other instruments signed upon the conference are major steps in the development of environmental law.[16] Currently, it is observed that sources of international environmental law extend to a wide area, and there are tens of international legal instruments related to different issues on the protection of the environment.[17] Furthermore, prohibition of causing significant transboundary environmental harm, obligation to cooperate, precautionary principle and principle of fair use are essential principles of the international customary law serving as sources of the international environmental law.[18]

The legislation concerning international environmental law requires states to take effective measures for the protection of the environment. However, today, many states, particularly those underdeveloped or developing countries in the need of foreign capital, fail to adopt effective administrative, criminal and legal measures for the protection of the environment and, in some cases, the measures taken remain insufficient with the impact of lobbying of multinational enterprises which are more powerful than many states both politically and financially.[19] This simply triggers the irresponsible approach of business enterprises that are capable of causing significant harm to the environment through their activities. At this point, the field of business and human rights gains prominence in this context and aims to identify the duties of business enterprises for human rights and the environment.

Due to the State-centric nature of the human rights law, conventions on human rights impose duties with respect to the human rights law on the States. Accordingly, conventions on human rights do not contain any directly binding duty for business enterprises. However, **considering the horizontal effect of human rights, States are liable to protect individuals from violations that may be caused also by non-State actors.**[20]

Sustainable Development Goals (the "**SDGs**")[21], which were adopted by the General Assembly of the United Nations in September 2016 and entered into force in January 2016, are a call for action to end poverty, protect our planet and ensure that all people live in prosperity and wealth.[22] With the motto "*leave no one behind*", the SDGs work for not leaving any country and any person behind in the development process through 17 main goals.[23]

All States feel the impacts of climate change excessively, unlike other issues spelled out in the SDGs. With this motivation, environment-related goals are associated with many goals within the SDGs in essence and set for countries the goal of taking urgent actions for combatting climate change and its effects. Respectively in **Goal 6 "Clean Water and Sanitation", Goal 7 "Affordable and Clean Energy", Goal 8 "Decent Work and Economic Growth", Goal 9 "Industry, Innovation and Infrastructure", Goal 13 "Climate Action", Goal 14 "Life Below Water" and Goal 15 "Life on Land",** the high importance of solving environmental problems for development is emphasised.

Goal 13 addresses the matter from the broadest perspective, whereby *strengthening resilience and adaptive capacity to climate-related hazards*

(13.1), *integrating climate change measures into policies and plans*, (13.2), *improving knowledge and capacity on the matter* (13.3) and *promoting relevant mechanisms* (13.a) are set as goals. Finally, it is stated that, with *the implementation of the UN Framework Convention on Climate Change* (13.b), a world sustainable for everyone is possible if urgent action is taken.[24]

In the field of business and human rights, there are various soft legal instruments regulating the obligations to be abided by business enterprises within the framework of their activities.[25] Those instruments including the **UN Global Compact[26], the International Labour Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[27] and the OECD Guidelines for Multinational Enterprises[28]** impose various duties on business enterprises for matters such as human rights, protection of the environment and labour rights.[29] To this extent, the UNGPs with a three-pillar structure being the State duty to protect human rights, the corporate responsibility to respect human rights and access to remedy has particular importance.[30] The UNGPs include the term *human rights due diligence* within the scope of the pillar on the corporate responsibility to respect human rights. According to this concept, **companies have the duty to conduct human rights due diligence to identify, prevent and mitigate their adverse impacts on human rights and disclose how those violations are addressed.**[31] The human rights due diligence process should involve evaluating the impacts of current and potential human rights violations, integrating findings and acting accordingly, monitoring results and declaring how those impacts are addressed.[32] Currently, as a significant development in the world, human rights due diligence requirements for business enterprises are currently entering national laws.[33] Indeed, the European Commission adopted a proposal of the draft EU Directive on Corporate Sustainability Due Diligence ("**EU Directive**") on February 23, 2022, which regulates mandatory human rights due diligence for business enterprises.[34] Finally, in this context, it is important to note that the UN is currently preparing a convention on business and human rights, aiming that State actors sign and adopt a legally binding international convention to regulate business responsibility for human rights violations in their national laws.[35]

Harm to environment violates the right to a clean, healthy and sustainable environment categorised within the **third-generation human rights,** which is also adopted by the decision dated October 2021 of the UN Human Rights Council.[36] Further, pollution of the environment may also adversely affect **the right to life, a first-generation right,** and **the right to healthcare**[37] and **the right to nutrition, second-generation human rights.** A declaration published by the Committee of Ministers of the Council of Europe states that a healthy environment is a precondition for the enjoyment by human beings of their rights and liberties under the Universal Declaration of Human Rights and the European Convention on Human Rights.[38]

Accordingly, the responsibilities of business enterprises related to human rights also become concrete specifically for the right to environment, and business enterprises should carry on their operations without harming the environment.

As a matter of fact, the Fourth Revised Draft of the UN ("Revised Draft") legally binding instrument concerning business and human rights emphasises the right to a safe, clean, healthy and sustainable environment in defining human rights violations.[39]

Furthermore, it is outlined in the Revised Draft that, within the scope of human rights due diligence, business enterprises should make impact assessments on the environment and climate change throughout their activities and also issue reports on those matters on a regular basis.[40] The draft EU Directive also imposes significant obligations on enterprises within the context of their existing or potential adverse impacts on both human rights and the environment.[41]

That is to say, within the scope of the mentioned developments, **enterprises will be responsible for respecting the right to the environment, and will be liable to identify, prevent and mitigate their adverse impacts on the environment and disclose how such violations are addressed within the scope of human rights due diligence.**

As a final point to this extent, regulations in business and human rights instruments against cases of violence towards environmentalists in the entire world should also be noted. **In the section concerning access to remedy within the UNGPs , it is stipulated that States should ensure the non-obstruction of legitimate and peaceful activities of human rights defenders.**[42] The Revised Draft legally binding instrument also acknowledges the crucial and legitimate role of civil society actors, including human rights defenders in the field of business and human rights.[43] In another instrument published by the Office of the United Nations High Commissioner for Human Rights (the "**OCHR**") which focuses on human rights, climate change and business, the valuable roles of environmentalists within the measures to be taken against global climate crises are emphasised, stating that activities of the press, civil society and human rights defenders should be protected against any threats and harassment from business enterprises.[44] Likewise, a recommendation published by the Council of Ministers contains a provision concerning the protection of human rights defenders and provides for an obligation for EU Member States to ensure within their jurisdiction that activities of human rights defenders working on business-related human rights violations are not obstructed for reasons such as pressure, harassment and violence.[45]

National Legislation

Article 56 of the Constitution of the Republic of Türkiye[46] regulates the right to environment, stipulating that "Every person has the right to live in a healthy and balanced environment". The second paragraph of the mentioned article emphasises that it is the duty of the State and the citizens to develop the environment, protect environmental health and prevent environmental pollution. The primary resource in Turkish law concerning the protection of the environment and environmental issues is the Environment Act[47], yet the legislation concerning the environment appears to be very broad. In this context, the legislation on the environment may be looked into from two perspectives, one regulating the preventive stage and the other after the occurrence of the environmental harm.[48] Recognised as one of the most important preventive tools in the prevention of environmental disasters and incorporated into the legislation of many countries, environmental impact analysis ("**EIA**") has also taken its place in Turkish positive law by virtue of the Environment Act.[49] Turkish law provides for different administrative law, criminal law and private law sanctions against polluters following the occurrence of environmental harm.

Preventive Regulations

In the Environment Act, EIA is defined as ***"studies to be carried out for the determination of the likely positive or negative impacts of planned projects on the environment, determination and evaluation of measures to be taken to prevent negative effects or to minimize them to a level not causing harm to the environment, and of locations and alternative technologies preferred to this end, and monitoring and control of the implementation of such projects".***[50] To this extent, the EIA process serves as a preventive measure and aims to prevent any potential environmental disaster. However, as demonstrated by the cases mentioned below, it appears that there are several problems in Türkiye concerning the implementation of the EIA process and it does not function as necessary.[51]

Regulations on Sanctions

Under Turkish law, various sanctions are stipulated in the administrative law, criminal law and private law to be applicable after the occurrence of the environmental harm.

Administrative sanctions

In this context, other legislative instruments on environmental law also provide for different administrative sanctions, yet as the primary source, the Environment Act stipulates various sanctions for the polluter. The Environment Act "*considers all acts harming or endangering the environment and impairing the ecological balance as administrative violations, and imposes administrative sanctions for those acts*".[52] The Environment Act identifies acts that constitute a violation on different matters such as air pollution, water pollution, soil pollution, noise, etc., and requires the imposition of administrative sanctions.[53] In the Environment Act, polluters are defined as ***"real persons and legal entities who directly or indirectly cause environmental pollution and impairment of ecological balance and environment during or after their activities".***[54] The fact that the Environment Act emphasises legal entities in the definition of polluters is considerable in terms of business and human rights, as business enterprises, i.e. companies, can be direct addressees of the administrative sanctions stipulated therein.

Criminal sanctions

Turkish law also provides for criminal sanctions against polluters for effective protection of the environment and in this context, environmental offences are stipulated in the Turkish Criminal Code (the "**TCC**").[55] Even though a major part of environmental offences is committed by enterprises, the TCC does not provide for criminal liability of legal entities.[56] Instead, as per the TCC, safety measures can be applied against legal entities for certain offences. In other words, according to the TCC, legal entities are not considered the perpetrator of an offence.[57] Instead, it is stipulated that security measures will be applied concerning private law legal entities for certain offences regulated under the law.[58] According to Article 60 of the TCC, those security measures include cancellation of the operating license granted by governmental authorities and confiscation.[59] The section titled offences against the environment of the TCC regulates intentional pollution of the environment, negligent pollution of the environment, causing noise and causing pollution through construction. Security measures are provided for legal entities in terms of certain acts that constitute the material element of the offence of intentional pollution of the environment. Accordingly, security measures may be applied against legal entities for those acts. However, no regulation has been made with respect to legal entities in terms of other environmental offences and therefore, no security measures may be ruled for legal entities due to those offences.

On the other hand, in terms of environmental offences committed by enterprises, personal liability may arise within the relevant enterprise[60]: ***"... the perpetrator of an environmental offence committed within the enterprise will differ depending on the circumstances in the concrete case. In this extent, criminal liability may sometimes be borne by the owner or partners of the enterprise, sometimes by the business manager and sometimes by employees."***[61] For instance, when a factory causes environmental pollution due to leakage from its waste storage, it may be suggested that both the technical manager who has failed to notice and prevent such leakage in time and the board chairman who has rejected the request for replacement of the waste storage to eliminate the leakage have committed a misdemeanour.[62] For this reason, criminal liability of both those persons may be resorted to due to the resulting environmental pollution.[63]

Civil liability

Turkish law also attributes civil liability to the polluter and primary stipulations in this respect are included in the Environment Act.[64] The Environment Act provides for two kinds of liability against the polluter.[65] The first of those liabilities are stated in Article 3.g. of the Act, which provides for the polluter's liability towards public entities and organisations due to the environmental pollution caused by the polluter.

The second type of civil liability is provided for in Article 28 titled liability of the polluter of the Environment Act. This article sets forth a strict liability, stipulating that "*Those who pollute and harm the environment are liable for the damages arising from the pollution and deterioration they have caused, without seeking any requirement of fault*". In other words, as per the mentioned article, the element of fault will not be sought for attribution of civil liability to the real person or legal entity having caused the pollution of the environment, i.e. the polluter. Those who suffer damages from the pollution of the environment will be entitled to claim their damages from the polluter on grounds of the relevant article.[66] The relevant article does not set forth any distinction in terms of operations and acts for the occurrence of the polluter's liability.[67] For this reason, "*All kinds of environmental pollution and harmful acts that occur on air, on soil and in water due to operations are within the scope of the relevant article by virtue of their subject matter*".[68]

The second paragraph of the article concerning the polluter's liability stipulates that "*The polluter's compensation liability for the resulting damages under the general provisions are also reserved*". Thus, it is stipulated that it is possible to resort to the liability of the polluter under other provisions apart from its liability under the Environment Act.[69] This stipulation in the second paragraph refers to the principle of competing liabilities; that is to say, among those provisions concerning liabilities, a person who suffers any damage from an environmental impact may rely on the provision that fits his/her benefits the most.[70] For this reason, in terms of environmental liability, those norms other than the Environment Act are also important. To this extent, the Turkish Code of Obligations (the "**TCO**"), the Turkish Civil Code and other laws may provide for different liability provisions that may be relied upon within the context of environmental liability.[71]

Among environmental liability norms apart from the Environment Act, particular emphasis should be placed on Article 71 of the TCO. Article 71 concerning liability for abnormally dangerous activities, a case of strict liability, stipulates that **"In case a danger arises from the activities of a business posing danger to a significant extent, business owner and, if any, business manager are jointly and severally liable for such damage".**[72] Accordingly, if a business posing a significant level of danger gives rise to environmental pollution, the person who suffers any harm, for this reason, will be entitled to rely on the mentioned article.[73] Environmental damages are mostly caused by the activities of business enterprises that may fall within the scope of this article. Therefore, article 71 of the TCO constitutes a considerable article concerning strict liability which the victims may rely on for their claims for damages. The subsequent part of the article states that "*Even though the rule of law allows such activity of a business enterprise posing a significant danger, the aggrieved parties may claim reconciliation of the damages caused by such activity of the business enterprise for an appropriate consideration*". Thus, as per the relevant article, even though the activity of the relevant business enterprise is allowed under the rule of law or, in other words, even though approvals such as a license, permit, etc. are granted, any person who suffers from the environmental pollution caused by such business enterprise will be entitled to claim compensation.

Current Situation in Türkiye with Examples

The Kaz Dağları (Mount Ida) Incident

The opening of rich ecosystems in Türkiye to mining activities gives rise to critical debates.[74] The Kaz Dağları incident stands as one of the prevailing examples in this respect. The Ministry of Environment, Urbanisation and Climate Change granted an EIA's positive decision for Kirazli mining projects in Kirazlı district of Kaz Dağları in 2012, and thereafter, a wider area was included in the project through a capacity increase.[75] However, due to the environmental concerns in the subsequent process, an administrative judicial proceeding was initiated against the EIA positive decision.[76] While the administrative judicial proceeding was pending, the company carried on its operations with permission obtained from administrative bodies.[77]

One of the hottest topics of debate in the Kaz Dağları incident was the number of trees cut down. This is because it was alleged that the number of trees cut down was more than the number indicated in the EIA report.[78] Those irregularity allegations concerning the EIA report and the EIA positive decisions passed with respect to the opening of rich ecosystems to mining activities strengthen the criticisms of the presence of considerable problems in the implementation of the EIA process. On the other hand, in this incident, the relevant mining company should have identified, prevented and mitigated the adverse impacts of its mining project on the environment and explained how such violations were addressed, as required by human rights due diligence. However, the company failed to fulfil such an obligation as Türkiye's national legislation does not regulate human rights due diligence on a binding basis, and consequently, the ecosystem of Kaz Dağları suffered irreparable damages.

After the mentioned multinational company killed a huge number of trees within the scope of its activities in the district, a considerable public protest arose, and the Ministry of Energy and Natural Resources did not renew the company's mining license.[79] Thereupon, based on the bilateral investment treaty between Türkiye and the Netherlands[80], the company initiated an investment arbitration proceeding against Türkiye, alleging that expropriation and other protection provisions under the mentioned treaty were violated.[81]

As this incident reveals, **measures taken by a State to protect human rights and the environmental and economic interests of foreign investors may conflict, which may end up in investment arbitration.**[82] Countries that need foreign investment for their economic development may soften the standards for the protection of the environment and human rights to attract foreign investment, which leads to a race to the bottom.[83] Especially considering the global climate crisis and environmental disasters, it may well be anticipated that similar cases will be brought to investment arbitration in the forthcoming period.[84] For this reason, as emphasized by the British academician *Philippe Sands*, **arbitral tribunals should be sensitive to challenges faced by those States which strive to balance different purposes in their decision-making processes.**[85]

30 Metropolitan Cities and Zonguldak Incident

Another hot topic on the agenda concerning the protection of the environment in Türkiye is the thermal power plants. One of the cases where potential damages that thermal power plants can cause to the environment have become concrete is being experienced in Zonguldak, since Zonguldak is under the shadow of intense air pollution. The report issued by Greenpeace states that "*Coal-fired thermal power plants are the most important source causing air pollution in Zonguldak. The pollutant that the coal-fired thermal power plants generate in the highest volume is the particulate matter that goes above limits throughout a major part of the*

year", which explains the impact of thermal power plants on air pollution.[86]

Prohibitions applied in Türkiye during the Covid-19 period were introduced for 30 metropolitan cities as well as for Zonguldak due to having a high ratio of respiratory diseases. However, the expression "30 Metropolitan Cities and Zonguldak" heard during those Covid-19 prohibitions in fact addresses to a considerable business and human rights matter. This is because the alleged reason behind such a high ratio of those diseases in Zonguldak is the thermal power plants operated in Zonguldak, besides mining works.[87]

When an evaluation is made based on the three pillars of the UN Guiding Principles, both the State and the company should bear obligations and liabilities for this incident. As per its duty to protect human rights and its obligations under environmental law, the State should inspect thermal power plants more frequently and apply deterrent sanctions in case of breach of the applicable legislation. Besides, as per their obligations for human rights due diligence within the scope of their responsibility to respect human rights, companies operating those thermal power plants should carry out their operations without harming the environment. According to the UN Guiding Principles, those two aspects are independent of each other. Hence, **the gaps in the legislation and in practice, which should be eliminated by the State within the scope of its duty to protect human rights, cannot constitute a ground for companies' failure to fulfil their responsibility to respect human rights.**

Opening of Olive Groves to Mining Projects

On March 1, 2022, the Regulation Amending the Mining Regulation was published in Türkiye by the Ministry of Energy and Natural Resources.[88] The Regulation stipulates that *"In the event that mining activities conducted to meet the country's need for electricity fall on areas registered as olive groves and it is not possible to operate those activities in other areas ..., the Ministry may permit the performance of mining activities on the site"*.[89] Even though, for the opening of olive groves to mining projects, the Regulation requires "*the person who will carry out the mining activity to undertake to rehabilitate and restore the site upon the completion of the activities*", it is not hard to foresee that the fulfilment of this requirement will be quite difficult considering that growing olive trees would take decades.

The Regulation has been heavily criticised on the grounds that Türkiye may lose its olive groves.[90] In the statement made by the Union of Turkish Bar Associations, it is expressed that *"It is contrary to the ideal of a sustainable world to sacrifice lifetime olive groves- a limited resource-, for coal, to harm agricultural lands that are under constitutional guarantee as well as agricultural workers, and to open the 'right to property' to intervention under the name of mining activities"*.[91] It is further asserted that the Regulation is contrary to Article 20 of the Law on the Improvement of Olive Cultivation and Immunisation of Wild Ones[92] stipulating that *"Other than olive oil factories, no facility that leaves chemical wastes and generates dust and smoke in a way to prevent vegetative and generative development of olive groves can be constructed and operated within olive grove sites and at a distance of minimum 3 kilometres to those sites"*. As a matter of fact, the Union of Turkish Bar Associations and some opposition parties stated that they would resort to judicial proceedings against the mentioned regulation which will enable the opening of olive groves to mining projects.[93] The current outcome has resulted pursuant to the statement that the amendment will cause irreparable damages, the Council of State decided to suspend the execution.[94]

Within the context of business and human rights, explanations similar to the foregoing can be made concerning this incident. It appears that the opening of olive groves to mining projects is contrary to the measures that the State must take within the scope of its duty to protect human rights.

On the other hand, according to the UNGPs, this should not constitute a legitimate ground for enterprises to not fulfil their responsibility to respect human rights. **As per their obligations under human rights due diligence, the relevant enterprises should conduct human rights impact assessments and conduct meaningful consultations with stakeholders who will be affected by the project. By fulfilling their obligations under human rights due diligence, enterprises will be able to identify risks of violation in advance and take remedial measures.**

"EIA Not Required" Decision Passed Immediately after the Fire in Marmaris

With the impact of severely hot air in Türkiye caused by climate change, forest fires occurred simultaneously in multiple cities in the summer of 2021. Areas of hundreds of hectares were lost to fire and forests were heavily damaged due to the fires between July 28 and August 12, 2021. According to the data of the European Forest Fire Information System ("**EFFIS**"), the forest area lost to fire only in Muğla and Antalya between those dates was around 124.000 hectares.[95] Due to those fires, eight people lost their lives and thousands of cattle, sheep and goats, bee hives, fowls and wild animals passed away.[96] There was also severe damage to the agricultural areas and vegetation.[97] Revealing the destructive impact of climate change on Türkiye, this incident shows that the country should take urgent action against climate change.

However, right after the fire, Muğla Governor's Office passed a decision of "EIA not required" for a hotel and time-sharing property in Marmaris.[98] Marmaris City Council initiated administrative judicial proceedings against the mentioned decision on the grounds of possible damages that the project might cause in the region.[99] According to the current status as reported in the press, the court has decided that the "EIA not required" decision cannot be accepted and is null.[100]

For this incident, within the scope of human rights due diligence, the company that owns the project should have conducted a thorough environmental impact assessment and identified how the project would affect the region which was in a sensitive condition due to the fire. However, as mentioned before, the obligations on human rights due diligence are not yet of a binding nature for Turkish companies; and therefore, in this specific case, the company directly commenced its activities under the EIA not required decision without taking any other measure.

Suggestions

- Severe environmental disasters in Türkiye demonstrate that, for the protection of the environment, both the legislation must be strengthened and the gaps in practice must be remedied. In this context, awareness on business and human rights should be developed and enterprises operating in Türkiye should abide by their responsibility to respect human rights under the UNGPs. Legal regulations that render human rights due diligence, the most important tool of countries' responsibility for human rights, obligatory are currently being drafted and enacted in developed and developing countries. In line with those developments, the adoption of a similar national law in Türkiye will serve as a major step in the prevention of business-related human rights violations and environmental disasters.[101]
- Türkiye has ratified the Paris Agreement; yet, whether enterprises in Türkiye are ready for the green deal or not is a critical point of debate.[102] A potential binding law on human rights due diligence would facilitate the fulfilment of the green deal requirements.
- The role of civil society in protecting the environment and combatting the global climate crisis should be emphasised. As the Kaz Dağları incident shows, a successful civil society movement has the potential to undertake a major mission in the protection of the environment. Accordingly, follow-up and supervision of the activities of public and private entities by non-governmental organisations as watchdogs, which constitute an integral part of a democratic society, may achieve a considerable function in identifying any setbacks and evaluating offers for solutions.

Son Notlar

1 Due to the limited scope of the study, this memorandum aims to outline the issue of environmental protection from a business and human rights perspective and to reflect current and most prominent issues. In this framework, first of all, national and international legislation on the protection of the environment will first be examined; afterwards, environmental issues selected from current events, which made a strong impression on the public, will be evaluated.

As Minerva Business and Human Rights Association, we would like to thank Galatasaray University PhD Student Betül Karagedik for her support during the preparation of this memorandum.

2 Betül Karagedik, "Uluslararası Yatırım Hukukunda Yatırımcının İnsan Hakları Yükümlülüğü" (Human Rights Obligation of the Investor in International Investment Law), 12 Levha Yayıncılık, December 2021.

3 "Küresel karbon emisyonlarının üçte birinden 20 şirket sorumlu" (20 firms behind one third of global carbon emissions), 10 October 2019, see *https://www.bbc.com/turkce/haberler-dunya-50001565,* Date of Access 02.03.2022.

4 "İklim krizi kapıdan girdi: Türkiye nasıl etkilenecek?" (Climate crisis coming through: How Türkiye will be affected?), 16.08.2021, see *https://www.cnnturk.com/turkiye/iklim-krizi-kapidan-girdi-turkiye-nasil-etkilenecek?page=1,* Date of Access: 02.03.2022.

5 Action Plan on Human Rights Action Plan and Implementation Schedule, Ministry Justice of Türkiye, April 2022, see *https://inhak.adalet.gov.tr/Resimler/Dokuman/3042021072054Action%20Plan%20on%20Human%20Rights%20and%20Implementation%20Schedule.pdf*.

6 UN Guiding Principles on Business and Human Rights, 2011, *https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf*.

7 A European Green Deal, European Commision, 2019, see *https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en*.

8 "Yeşil Mutabakat Eylem Planı Yayımlandı" (Green Deal Action Plan is Published), Turkish Ministry of Commerce, 16.07.2021, see *https://ticaret.gov.tr/haberler/yesil-mutabakat-eylem-plani-yayimlandi*

9 Decree on the Ratification of the Paris Agreement with the Attached Statement, Decree No: 4618, Official Gazette Dated 07.10.2021 No 31621.

10 "Paris Agreement", Turkish Ministry of Foreign Affairs, see *https://www.mfa.gov.tr/paris-anlasmasi.tr.mfa*, Date of Access: 05.03.2022.

11 "Climate Council 2022", see *https://iklimsurasi.gov.tr/sayfa/sûranin-amaci-ve-hedefleri*, Date of Access: 05.03.2022. The Climate Council is governed by the provisions of the Regulation on the Formation and Working Procedures and Principles of the Ministry and Urbanisation Council and the Working Groups. See Regulation on the Formation and Working Procedures and Principles of the Ministry and Urbanisation Council and the Working Groups, Official Gazette Dated 05.09.2012 No. 28402.

12 Ahmet M. Güneş, "Uluslararası Çevre Hukuku Üzerine Bir İnceleme" (An Analysis on International Environmental Law), Journal of Istanbul University Faculty of Law, 70(1), 2012, p. 85.

13 ibid, p. 86.

14 Marc Pallemaerts, "International Environmental Law from Stockholm to Rio: Back to the Future?", Turkish Translation by Bülent Duru, Journal of Ankara University Faculty of Political Sciences, 52(1), 1997, p. 614.

15 Ahmet M. Güneş, "Uluslararası Çevre Hukuku Üzerine Bir İnceleme" (An Analysis on International Environmental Law), p. 87.

16 ibid, p. 87-88.

17 ibid, p. 91. The Framework Convention on Climate Change accepted in 1992, the Kyoto Protocol signed in 1997 and the Paris Agreement signed in 2015 are among the prominent international instruments.

18 ibid, p. 98-102.

19 For a more detailed evaluation, please see Joseph E. Stiglitz, "Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities", American University International Law Review, 23(3), 2007.

20 Betül Karagedik, ibid., p. 18.

21 United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development, *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf*.

22 UNDP Türkiye, Sustainable Development Goals, *https://www.tr.undp.org/content/Türkiye/tr/home/sustainable-development-goals.html*

23 Presidency of the Republic of Türkiye, Strategy and Budget Department, "Sustainable Development Goals Evaluation Report", *https://www.sbb.gov.tr/wp-content/uploads/2020/03/Surdurulebilir-Kalkinma-Amaclari-*

Degerlendirme-Raporu_13_12_2019-WEB.pdf

24 Global Goals for Sustainable Development, 13 Climate Action, see *https://sdgs.un.org/goals/goal13*.

25 Betül Karagedik, "The Turkish Translation of Second Revised Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises and A General Comment Regarding Draft", Public and Private International Law Bulletin, 41(2), 2021, p. 1042.

26 The Ten Principles of the UN Global Compact, see *https://www.unglobalcompact.org/what-is-gc/mission/principles.*

27 For full English text of the Declaration, see *https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf*.

28 For full English text of the Guidelines, see *https://www.oecd.org/daf/inv/mne/48004323.pdf*.

29 Betül Karagedik, "The Turkish Translation of Second Revised Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises and A General Comment Regarding Draft", p. 1042.

30 United Nations (2011) UN Guiding Principles on Business and Human Rights Implementing the United Nations: "Protect, Respect and Remedy" Framework, HR/PUB/11/04.

31 ibid, art. 17.

32 ibid, art. 17.

33 Markus Krajewski, Kristel Tonstad, Franziska Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?", Business and Human Rights Journal, 6(3), 2021, p. 550.

34 European Commission (2022) Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

35 UNGA, Human Rights Council, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (2014) A/HRC/RES/26/9, para. 1.

36 Oktay Uygun, Devlet Teorisi (State Theory), 4th Edition, 12 Levha Yayıncılık, 2017, p. 506; UNGA, Human Rights Council, 'The human right to a clean, healthy and sustainable environment' (2021) A/HRC/RES/48/13, para. 1. For an evaluation on the matter, see Cate Bonacini, Historic Recognition of a New Human Right and Response to Climate Harm, Center for International Environmental Law, 8 October 2021, see *https://www.ciel.org/news/historic-recognition-of-a-new-human-right-and-response-to-climate-harm/*, Date of Access: 21.03.2022.

37 For an analysis of the World Health Organisation on the effects of climate change on public health, see "Public Health and Environment", *https://www.who.int/data/gho/data/themes/public-health-and-environment*.

38 Final Declaration by the Georgian Presidency of the Committee of Ministers, Environmental Protection and Human Rights, High-Level Conference organised under the aegis of the Georgian Presidency of the Committee of Ministers, Strasbourg, 27 February 2020, see *https://www.coe.int/en/web/human-rights-rule-of-law/final-declaration-by-the-presidency-of-the-committee-of-ministers*, Date of Access: 21.03.2022.

39 Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect human rights, Third Revised Draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (2021), *https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf*, Date of Access: 02.03.2021, art. 1.2.

40 ibid, art. 6.4.

41 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, art. 1.

42 UN Guiding Principles on Business and Human Rights Implementing the United Nations: "Protect, Respect and Remedy" Framework, p. 29.

43 Third Revised Draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, p. 3, (PP12).

44 United Nations Human Rights Office of the High Commissioner, Human Rights, Climate Change and Human Rights Key Messages, s. 8, see *https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/materials/KMBusiness.pdf*.

45 Recommendation CM/ Rec (2016)3 of the Committee of Ministers to member States on human rights and business, (Adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers' Deputies), para. 69, 70, see *https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4*, Date of Access: 21.03.2022.

46 Turkish Constitution of the Republic of Türkiye, see *https://www.anayasa.gov.tr/en/legislation/turkish-constiution*.

47 Environment Act of the Republic of Türkiye, see ***https://www.mevzuat.gov.tr/mevzuatmetin/1.5.2872.pdf.***

48 Ali D. Ulusoy, "Çevre Kirlenmesinin Oluşmasından Sonraki Aşamada Medeni Hukuk, Ceza Hukuku ve İdare Hukuku Çözümlerine Genel Bir Bakış" (An Overview to Civil Law, Criminal Law and Administrative Law Remedies after Occurrence of Environmental Pollution), Journal of Ankara University Faculty of Law, 43(1), 1993, p. 125.

49 Süheyla Suzan Alıca, "Çevresel Etki Değerlendirmesinin Yargı Kararları Çerçevesinde İrdelenmesi" (An Overview on the Environmental Impact Assessment in the Frame of Turkish Case Law) Journal of Ankara Hacı Bayram Veli University Faculty of Law, 15(3), 2011, p. 97.

50 Environment Act, Act No: 2872, Date of Adoption: 9.8.1983, Official Gazette Dated 11.8.1983 No. 18132.

51 Ahmet M. Güneş, Çevre Hukuku (Environmental Law), 4th Edition, Adalet Yayınları, 2021, p. 204-205.

52 Süheyla Suzan Alıca, İdari Yargı Kararları Çerçevesinde 2872 Sayılı Çevre Kanunu ve İlgili Yönetmeliklerin Uygulanmasından Doğan Uyuşmazlıklar (Disputes Arising from the Implementation of the Environment Act No. 2872 and the Relevant Regulations within the Framework of Administrative Case Law), Ankara University, Institute of Social Sciences, Department of Social Environmental Sciences, PhD Thesis, Ankara, 2005, as cited by Ilgın Özkaya Özlüer from p. 220, "İdari Yaptırımların Özellikleri ve Çevre Kanunu" (Characteristics of Administrative Sanctions and Environmental Law), Journal of Ankara Bar Association, Volume 1, 2015, p. 167.

53 See Environment Act, article 20.

54 See Environment Act, article 2.

55 Turkish Criminal Code, Law No: 5237, Date of Adoption, 26.09.2004, Official Gazette Dated 12.10.2004 No. 25611. Furthermore, article 26 of the Environment Act regulates environmental offences.

56 Ahmet M. Güneş, Çevre Hukuku (Environmental Law), p. 262.

57 Nur Centel, "Ceza Hukukunda Tüzel Kişilerin Sorumluluğu -Şirketler Hakkında Yaptırım Uygulanması" (The Responsibility of Legal Persons in Criminal Law - Application of Sanctions on Companies), Journal of Ankara University Faulty of Law, 65(4), 2016, p. 3314.

58 ibid.

59 ibid, p. 3319.

60 Onur Özcan, "Çevre Suçlarında Şirketlerin Cezai Sorumluluğu" (Criminal Liability of Companies in Environmental Offences), Galatasaray University Institute of Social Sciences, Unpublished Master's Thesis, 2007, p. 131.

61 ibid, p. 133.

62 ibid, p. 113-134.

63 ibid, p. 134.

64 Ahmet M. Güneş, Çevre Hukuku (Environmental Law), p. 314.

65 "Expenditures made to prevent, limit and eliminate pollution and deterioration and to improve the environment are covered by those who cause the pollution or deterioration. Expenditures made by public entities and organisations due to the polluter's failure to take the necessary measures to stop, eliminate or reduce pollution and deterioration or due to the implementation of those measures directly by the competent authorities are collected from the polluter as per the provisions of the Law No. 6183 on the Procedure for Collection of Public Receivables."

66 Hasan Demir, Çevreyi Kirletenin Hukuki Sorumluluğu (Civil Liability of Those Causing Environmental Pollution), Ankara University Institute of Social Sciences, Unpublished Master's Thesis, 2011, p. 127.

67 ibid, p. 83.

68 ibid.

69 Ahmet M. Güneş, Çevre Hukuku (Environmental Law), p. 314.

70 ibid, p. 324-325.

71 ibid, p. 325.

72 Turkish Code of Obligations, Law No: 6098, Date of Adoption: 11.1.2011, Official Gazette Dated 4.2.2011 No. 27836.

73 Ahmet M. Güneş, Çevre Hukuku (Environmental Law), p. 326.

74 "Kaz Dağları Yöresi'nde Madencilik" (Mining in Kaz Dağları District), Tema Foundation, April 2020, see ***https://www.tema.org.tr/basin-odasi/basin-bultenleri/kaz-daglari-yoresinde-madencilik-raporu***, Date of Access: 04.03.2021.

75 Kaz Dağları Kronolojisi (Chronology of Kaz Dağları), see ***https://www.kazdaglariistanbul.org/kaz-daglarinda-kronolojisi/***, Date of Access: 19.02.2022.

76 ibid.

77 ibid.

78 ibid; "How Many Trees Cut Down on Ida Mountains Because of Gold Mine?", Istanbul BİA News Center, 6 August 2019, see ***https://bianet.org/english/environment/211368-how-many-trees-cut-down-on-ida-mountains-because-of-gold-mine***, Date of Access: 19.02.2022.

79 Kaz Dağları Kronolojisi (Chronology of Kaz Dağları), see ***https://www.kazdaglariistanbul.org/kaz-daglarinda-kronolojisi/***, Date of Access: 19.02.2022.

80 The relevant company based in Canada initiated a lawsuit against Türkiye via its

affiliates in the Netherlands. According to the trade registry records, the company, which is a local affiliate of the multinational mining company, switched from Canada nationality to the Dutch nationality in 2018. Thus, the arbitration process could be commenced on the basis of the bilateral investment treaty between Türkiye and the Netherlands.

81 "Alamos Gold Announces US$1 Billion Investment Treaty Claim Against the Republic of Türkiye", 20 April 2021, see ***https://www.alamosgold.com/news-and-events/news/news-details/2021/Alamos-Gold-Announces-US1-Billion-Investment-Treaty-Claim-Against-the-Republic-of-Türkiye/default.aspx***, Date of Access: 04.03.2022; Alamos Gold Holdings Coöperatief U.A. and Alamos Gold Holdings B.V. v. Republic of Türkiye, ICSID Case No. ARB/21/33, see ***https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/33***, Date of Access: 04.03.2022.

82 Betül Karagedik, Uluslararası Yatırım Hukukunda Yatırımcının İnsan Hakları Yükümlülüğü (Human Rights Obligation of the Investor in International Investment Law), p 43.

83 ibid, p. 144.

84 Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Partial Dissent of Professor Philippe Sands Qc, 9 September 2021, para. 28.

85 ibid.

86 "Zonguldak'ta Kömür Endüstrisinin Halk Sağlığı ve Çevre Üzerindeki Etkisinin Analizi" (Analysis on the Impact of Coal Industry in Zonguldak on Public Health and Environment), Author: Dr. Tuğba Ağaçayak, Contributed by: Onur Akgül, June 2021, Greenpeace, see ***https://www.greenpeace.org/static/planet4-Türkiye-stateless/2021/07/46a82f2e-cevreraporuzonguldak_05.07.pdf***, Date of Access: 04.03.2022, p. 35.

87 "Zonguldak: Koronavirüs Döneminin '+1' Kenti" (Zonguldak: +1 City of the Coronavirus Period), Video- News: Ege Tatlıcı, Mahmut Hamsici, 29 May 2020, see ***https://www.bbc.com/turkce/haberler-turkiye-52857040***, Date of Access: 19.02.2022.

88 "Regulation Amending the Mining Regulation", Ministry of Energy and Natural Resources, Official Gazette Dated 01.03.2022 No. 31765.

89 ibid.

90 "Zeytinlikler İçin Gözler Yargıya Çevrildi" (Eyes on the Court for Olive Groves), Yıldız Yazıcıoğlu, 3 March 2022, see ***https://www.amerikaninsesi.com/a/zeytinlikler-icin-gozler-yargiya-cevrildi/6468558.html***, Date of Access: 05.03.2022.

91 "Ömürlük Zeytin Alanlarının, Sınırlı Maden Temini için Müdahaleye Açılması Hukuk Dışıdır" (It is Unlawful to Open Life-Time Olive Groves to Intervention for Limited Mine Supply), Union of Turkish Bar Associations, 03.03.2022, see ***https://www.barobirlik.org.tr/Haberler/omurluk-zeytin-alanlarinin-sinirli-maden-temini-icin-mudahaleye-acilmasi-hukuk-disidir-82422***, Date of Access: 05.03.2022.

92 Law on the Improvement of Olive Cultivation and Immunisation of Wild Ones, Law No: 3573, Date of Adoption: 26.01.1939, Official Gazette Dated 07.02.1939 No. 4126.

93 "Zeytinlikler İçin Gözler Yargıya Çevrildi" (Eyes on the Court for Olive Groves), Yıldız Yazıcıoğlu, 03.032022, see ***https://www.amerikaninsesi.com/a/zeytinlikler-icin-gozler-yargiya-cevrildi/6468558.html***, Date of Access: 05.03.2022.

94 "Zeytinliklere Yargı Kalkanı" (Judical Shield for Olive Groves), Gökay Başcan, 29.04.2022 ***https://www.birgun.net/haber/zeytinliklere-yargi-kalkani-385995***. Date of Access: 05.08.2022

95 "Madalyonun tek yüzü: İklim krizi ve 2021 Türkiye orman yangınları" (One side of the medallion: Climate crisis and forest fires in Türkiye in 2021), Onur Akgül, 13.08.2021, see ***https://www.greenpeace.org/Türkiye/blog/madalyonun-tek-yuzu-iklim-krizi-ve-2021-turkiye-orman-yanginlari/***, Date of Access: 05.03.2022.

96 "Temmuz-Ağustos 2021 Orman Yangınları Değerlendirme Raporu" (July-August 2021 Forest Fires Evaluation Report), Turkish Medical Association, 10.01.2022, see ***https://www.ttb.org.tr/haber_goster.php?Guid=760386a0-7204-11ec-a83c-469e4684c346***, Date of Access: 05.03.2022.

97 ibid.

98 "Bilirkişi Sinpaş Projesine "ÇED Gerekli Değil Kararı Uygun Değil" Dedi" (Experts Says "EIA Not Required Decision for Sinpaş Project is Not Right"), Beritan Yücel, see ***https://www.muglagazetesi.com.tr/sinpasin-kizilbukte-otel-projesine-yargidan-engel-139180h.html***., Date of Access: 05.08.2022.

99 ibid.

100 ibid.

101 Betül Karagedik, "Elephant in the room: Code-29 and the need for mandatory human rights due diligence in Türkiye", 31,08.2021, see ***https://www.business-humanrights.org/en/blog/elephant-in-the-room-code-29-and-the-need-for-mandatory-human-rights-due-diligence-in-Türkiye/***, Date of Access: 19.02.2022.

102 "Türkiye'de şirketler Yeşil Mutabakat'a hazır mı?" (Are enterprises in Türkiye ready for the Green Deal?), Aram Ekin Duran, 29.10.2021, see ***https://www.dw.com/tr/türkiyede-şirketler-yeşil-mutabakata-hazır-mı/a-59669453***, Date of Access: 19.02.2022.