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FPS Application in Cases Involving Turkey as the Home State

Selim Can Bilgin

Introduction

The full protection and security (FPS) standard is one of the essential protection standards of international investment treaties. It plays a significant role in ensuring the physical protection of foreign investments, with obligations imposed on host states to both refrain from causing harm to investors and protect them from third-party actions. In recent years, following events such as the Arab Spring and Russia's aggression towards Ukraine, the FPS standard has regained prominence in international investor–state disputes. It has also been an important part of the case law involving Turkish parties, in particular with the cases against Libya. Considering the ongoing conflicts in the territories where Turkish investors are active, it seems that there may be an increase in cases involving FPS discussion in the coming years as well. This article examines the recent cases regarding Turkish investors that have an FPS component and looks ahead to the potential further use of the standard.

Resurgence of FPS Cases

The FPS standard primarily concerns the physical protection of the foreign investment. It imposes two main obligations on the host state: (i) to refrain from harming investors/investments through its own organs or actions attributable to it, and (ii) to protect the investors and/or investments against actions of private

parties, for instance when there is an armed conflict.[1] Considering these two aspects, the FPS standard can be breached by both state actions and inaction.

The physical protection of investment was historically the key for the protection of foreigners having investment abroad. During the 19th and early 20th centuries, this was the main issue in most of the proceedings before various international adjudication mechanisms. After World War II, this aspect relatively lost its importance. However, since 2010, events such as the Arab Spring and Russia's aggression towards Ukraine have revived the significance of the FPS standard; there have been increasingly more cases relating to the physical protection of investments as a result of these conflicts against states such as Egypt, Libya, Yemen, Syria, and Russia.[2]

FPS and the Turkish BIT

Similar to the general trend, the Turkish bilateral investment treaties (BITs) usually contain an FPS standard too. At present, there are 58 effective Turkish BITs that include an FPS clause, using varying language.[3] Of these, 20 BITs use phrases such as 'full protection and security' or 'full security and protection,' while 11 BITs use only 'full protection.' Some BITs further qualify the FPS standard with references to international law rules/standards or define its scope in other ways. Despite these differences, the relevant case law suggests that the phrasing of the FPS standard does not impact its application concerning the physical protection of the investments. [4] In short, apart from a few exceptions, most of the Turkish BITs provide for the physical protection of the investor and investments.

The application of these FPS standards in the cases involving Turkish investors has contributed to the abovementioned increase in the number of physical

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[1] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017) para 7242 330.

[2] Jure Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict* (OUP 2019) 2–4; Suzanne Spears and Maria Fogdestam Agius, 'Protection of Investments in War-Torn States: A Practitioner's Perspective on War Clauses in Bilateral Investment Treaties' in Katia Fach Gómez, Anastasios Gourgourinis and Catharine Titi (eds) *International Investment Law and the Law of Armed Conflict,* (Springer 2019) 283–317.

[3] UNCTAD Investment Policy Hub, International Investment Agreements Navigator, Türkiye Country Profile, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/214/t-rkiye> accessed 11 May 2023.

[4] *Addiko Bank AG v Montenegro*, ICSID Case No. ARB/17/35, Award dated 24 November 2021, para 775; Infinito Gold Ltd. v Republic of Costa Rica, ICSID Case No. ARB/14/5, Award dated 3 June 2021, paras 623-624.

protection-related cases in the period following 2010. Before 2015, the majority of cases brought by Turkish investors under BITs were directed towards the Turkic states and centred on the host states' administrative and judicial actions.[5] In 2015, Tekfen Insaat and TML, Turkish investors, filed an investment claim against the Libyan state under the Libya–Turkey BIT, focusing on the physical security of their investment.

Relevant Case Law Involving Turkish Investors

The Tekfen case was the first of a series of claims by Turkish investors against Libya, particularly relating to the period following the uprising against the Gaddafi regime. Additionally, there has been a case involving Syrian events that took place after the outbreak of hostilities in 2011.[6] In some of the concluded cases, the tribunals found that the standard was violated, while in other cases, the tribunals found that it was not. There are two further such public cases still pending. Regardless of the specific facts of each case, which will be detailed below, one common thread runs through them: the existence of a conflict situation does not absolve the host state of its obligation to ensure the physical protection of investments.

The abovementioned Tefken case involved Tekfen TML JV as the claimant. The tribunal's decision in this case remains confidential; however, available information indicates that the tribunal did not conclude that Libya violated the FPS standard.[7]

In the *Cengiz v Libya* case, the tribunal found that Libya did breach the FPS standard, as it failed to take adequate measures to protect the construction project and investor's personnel from the effects of the civil war. The tribunal found that the acts of the insurgents in 2011 were attributable to the Libyan state, as they subsequently became part of the government that toppled Gadhafi. Furthermore, the tribunal rejected the argument that the FPS standard

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[5] UNCTAD Investment Policy Hub, International Dispute Settlement Navigator, Türkiye Country Profile, Cases as home state of the investor <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/214/t-rkiye> accessed 11 May 2023.

[6] *Güriş İnşaat ve Mühendislik Anonim Şirkezti (Güris Construction and Engineering Inc) and others v Syrian Arab Republic*, ICC Case No. 21845/ZF/AYZ, Award dated 31 August 2020.

[7] Luke Eric Peterson, 'Libya Round-up: New Investment Treaty Claims, New Rulings and Updates on Arbitrator Appointments' (2019) IAReporter <https://www.iareporter.com/articles/libya-round-up-new-investment-treaty-claims-new-rulings-new-set-aside-petitions-and-updates-on-arbitrator-appointments/> accessed 11 May 2023.

is inapplicable during times of conflict.[8] The tribunal awarded Cengiz İnşaat compensation for the damages it suffered, including lost profits, costs and interest. The award amounted to approximately EUR 59 million.[9]

In the *Güriş v Libya* case, Güriş had argued that, as opposed to the state's obligation to protect the investor from third parties, when the acts in question are those of the state itself, the FPS standard imposes an obligation of result. However, the tribunal rejected the claimant's interpretation of the FPS standard, stating that there was no support for this interpretation in the case law. In rejecting the claimant's approach, the tribunal stated that *Cengiz v Libya*, which endorsed the claimant's argument, was only an exception.[10] The tribunal maintained that the state was obliged only to exercise due diligence in protecting investments, even from its own forces, particularly during times of major internal upheavals. After these findings, the tribunal found that, while it was difficult to establish a link of attribution for most of the acts that were allegedly a violation of the FPS, the attack by the police forces on the project site constituted a violation.[11] Once again, the tribunal rejected exclusion of the obligation based on the existence of a conflict.

In the *Öztaş v Libya* case, there was no conventional FPS claim. In that case, the claimant argued that Libya violated its FPS obligation (along with the fair and equitable treatment (FET) obligation) by inadequately responding to civil unrest, which later escalated into a civil war. The tribunal rejected this argument and stated there was no precedent for liability to be found based on the state's failure to avoid revolution or civil war, and that international law considers such situations extraordinary.[12]

Currently, there are two other cases pending against Libya by Turkish investors: Nurol and Üstay.[13] In both cases, the respective tribunals are tasked with

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[8] *Cengiz İnşaat Sanayi ve Ticaret A.S v Libya*, ICC Case No. 21537/ZF/AYZ, Award dated 7 November 2018, paras 353-370, 413-434.

[9] ibid 693.

[10] Damien Charlotin, 'Analysis: Tribunal in Guris v. Libya award draws contrast with Cengiz Award on FPS interpretation and sides with majority of prior Libya awards with respect to war losses clause' (IAReporter, 5 May 2020) <https://www.iareporter.com/articles/analysis-tribunal-in-guris-v-libya-award-draws-contrast-with-cengiz-award-on-fps-interpretation-and-sides-with-majority-of-prior-libya-awards-with-respect-to-war-losses-clause/> accessed 11 May 2023.

[11] ibid.

[12] *Öztaş Construction, Construction Materials Trading Inc. v State of Libya*, ICC Case No. 21603/ZF/AYZ, Award dated 14 June 2018, paras 161-162.

[13] Damien Charlotin, 'Libya Round-Up: An update on arbitration cases against the state' (*IAReporter*, 26 April 2023) <https://www.iareporter.com/articles/libya-round-up-an-update-on-arbitration-cases-against-the-state/> accessed 11 May 2023.

examining the potential violation of the FPS standard as one of the key issues. The tribunals have established jurisdiction, and the parties are awaiting the final award.

Finally, in the *Güriş and others v Syria* case, the FPS standard was pleaded by the parties. In that case, the tribunal did not delve into the assessment of the violation of the FPS obligation, as it found violation of the war clause in the Syria–Italy BIT, which it had imported by virtue of the most favoured nation (MFN) clause in the Turkey–Syria BIT.[14] This case could be another opportunity for examination of the FPS obligation during times of conflict, as well as the relationship of the standard with the war clauses, but the tribunal found it unnecessary to go through the investors' claims under other causes of action.

The cases mentioned above represent the publicly known instances in which tribunals have interpreted, applied, or considered the FPS provisions in Turkish BITs. The conflicts in Libya since 2011 have given rise to the majority of these cases, with the exception of *Güriş and others v Syria*. Given the ongoing impact of the conflict on Turkish investors in Libya and the absence of any time limitation to bring such claims, it is possible that more cases involving FPS-related questions under this treaty may arise in the future.

On the Horizon: Potential for New FPS Cases

Apart from these concluded or pending cases, there is one additional potential case under a Turkish BIT involving an FPS claim. Nur-Ak, a Turkish construction company, served a notice of dispute on Yemen alleging the violation of the FPS standard, along with certain other claims for violation.[15] If this notice evolves into arbitration, it means that there will be another FPS claim under a Turkish BIT involving an internal conflict situation.

Further, as a result of the Russian occupation of certain Ukrainian territories, there may be more FPS cases. Article 2 of the Turkey–Russia BIT also provides for the FPS protection that has a traditional wording: 'Investments of investors of one of the Contracting Parties made in the territory of the other Contracting Party shall be accorded fair and equitable treatment and shall enjoy full protection and security.' Therefore, based on the case law that finds territorial jurisdiction

[14] *Güriş and others v Syrian Arab Republic*, *supra* note 7, paras 249–251, 326–328.

[15] *Nur-Ak İnşaat Ticaret Limited Şirketi v Yemen*, Notice of Dispute dated 22 August 2022.

in cases by investors having investments in Crimea,[16] Turkish investors present in Crimea or current conflicted territories may also consider bringing claims against Russia under the said BIT.

In conclusion, in parallel with the general trend in the investor–state disputes, there has been a rise of FPS-related cases since 2010 for Turkish investors. The majority of these cases stem from conflicts in Libya, with the exception of *Güriş and others v Syria*. The ongoing impact of these conflicts on Turkish investors suggests that there may be more cases involving FPS-related questions in the future.

[16] Athina Fouchard Papaefstratiou, 'Crimea as Russian Territory for the Purposes of the Russia-Ukraine BIT: Consent v. International Law?' (*Kluwer Arbitration Blog*, 5 February 2023) <https://arbitrationblog.kluwerarbitration.com/2023/02/05/crimea-as-russian-territory-for-the-purposes-of-the-russia-ukraine-bit-consent-v-international-law/> accessed 11 May 2023.

The EU AI Act: The First Comprehensive Legal Framework for AI

Dr. Osman Gazi Güçlütürk

Introduction

The European Union's (EU) proposal for a regulation on harmonised rules on artificial intelligence (AI)[1] was published back in April 2021 by the European Commission, initiating the ordinary legislative procedure as per Article 294 of the Treaty on the Functioning of the European Union (TFEU).

The EU AI Act was not the first initiative to regulate AI. In addition to regulatory attempts and numerous documents outlining principles for AI, in 2019, the Council of Europe established the Ad-Hoc Committee on Artificial Intelligence (CAHAI), which completed its mandate in 2021 and was succeeded by the Committee on Artificial Intelligence (CAI) to explore the feasibility of an international instrument. However, the EU AI Act emerged as the pioneering legal instrument in AI regulation over time due to various reasons, including the so-called Brussels Effect as well as the EU's intention to make the EU AI Act in AI regulation what the General Data Protection Regulation (GDPR) is in data protection. This article will first explore current situation of the AI Act. Subsequently, it will briefly explain the Act's general structure. Finally, the practical implications of the Act will be considered, taking the effects of the Act on AI systems in non-EU states into account.

[1] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts' (COM/2021/206 final, Document 52021PC0206) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>.

The legislative path of the EU AI Act

The EU AI Act was contemplated as a regulation, meaning that, if adopted, it would automatically be binding for all EU Member States, without requiring additional national legislation. However, it is not yet binding.

At the time of writing, the EU AI Act was in the final stages of the EU's ordinary legislative procedure. Similar to many other major legislative pieces concerning the digital domain, the AI Act has gone through an extensive Trilogue procedure with the involvement of European co-legislators –the Council of the EU and the European Parliament– under the moderation of the Commission. A political agreement was reached between the Council and the Parliament on 9 December 2023.[2] As the latest step at the time of writing, the draft, which was prepared in accordance with the political agreement, was approved by the European Parliament on 13 March 2024, which followed prior endorsements by the Council of the EU Coreper I on 2 February 2024 and by the IMCO-LIBO committees of the European Parliament on 13 February. Next step is another approval by the European Parliament of the text after the lawyer-linguists involvement and, subsequently, the final seal by the Council of the EU. The Act is expected to be adopted and published in the Official Journal of the EU before the European Elections, scheduled to take place in June. In the remaining sections of this article, reference is made to the latest text endorsed by the Coreper.[3]

What does the EU AI Act bring?

The core subject of the AI Act is AI systems. The Act defines an AI system as 'a machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.' This is a broad definition, leaving room for interpretation on whether a given system is an AI system for the purposes of the Act. As explained below, systems falling under the purview of the Act may be

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[2] European Parliament, 'Artificial Intelligence Act: deal on comprehensive rules for trustworthy AI' (Press Release, 9 December 2023) <https://www.europarl.europa.eu/news/en/press-room/20231206IPR15699/artificial-intelligence-act-deal-on-comprehensive-rules-for-trustworthy-ai>.

[3] Council of the European Union, ST 5662 2024 INIT, Note (26 January 2024) <https://data.consilium.europa.eu/doc/document/ST-5662-2024-INIT/en/pdf>.

subjected to strict legal as well as technical requirements. Hence, creating an AI inventory and identifying AI systems correctly is crucial for AI developers, firms, and users.

The EU AI Act adopts a risk-based approach and classifies AI systems according to their risk levels. With the assumption that some AI applications pose unacceptable risks, the Act prohibits some AI use cases, such as manipulative uses of AI and the use of AI systems in social scoring. It then classifies some other AI systems as high-risk AI systems, which are subject to a set of stringent technical requirements and legal obligations. It should be noted that the high-risk AI systems (HRAI) include certain quite common AI systems, such as AI-powered CV monitoring systems and the use of AI systems in biometric identification. The Act presumes that the remaining systems pose minimal risk and thus it does not impose mandatory requirements thereon.

In addition to the risk-based approach, the Act regulates two other classes of AI systems. First, the Act introduces a set of transparency obligations for the providers or deployers of AI systems interacting with natural persons. Second, it creates another two-layered risk-based classification for AI models that are capable of being used for various tasks and downstream applications, which are referred to as general purpose AI (GPAI) models. Large language models or image generation models are examples of GPAI models. Among these, depending on the computing power used to train the GPAI model, the Act classifies some as GPAI models with systemic impact and provides more stringent obligations for the providers of these models. Currently, very few models exceed this threshold, the most popular of which are OpenAI's GPT-4 and Google's Gemini.

How will the AI Act be enforced?

The EU AI Act is quite complex legislation with different classifications, technical requirements, conformity assessment procedures, monitoring obligations, and hefty penalties of up to EUR 35 million. Like the GDPR, not only natural and legal persons developing, deploying, and using AI systems but also the Member States and the enforcement bodies will need some time to actually comply with the Act. Recognising this need, the Act comes with a gradual application timeline and a general 2-year grace period starting from its entry into force. There are exceptions to this general grace period. The provisions on prohibitions have a 6-month grace period, whereas the provisions on notified bodies, GPAIs, and penalties have a 12-month grace period. On the other hand, the provisions on requirements for HRAIs associated with the Union harmonisation legislation

listed under Annex II of the Act will become applicable 36 months after the Act's entry into force.

Just like its application, the Act's implementation shall be gradual as well, and it will start before the application. The Commission will promote early voluntary commitment to the rules and principles of the AI Act with the participation of the industry under a scheme called the AI Pact.[4] In fact, the implementation steps have already started to take place. The Commission established the AI Office, a function of the Commission to which certain tasks are delegated under the Act, on 24 January 2024, even before the official adoption of the Act.[5]

What is the significance of the AI Act for AI operators and users in non-EU states?

The AI Act is a European legislation with global implications for two main reasons. Firstly, the AI Act will have an extraterritorial effect as its scope covers providers of AI systems located outside the EU if their AI system is placed on the market or put into service within the EU, or if the outputs of the AI system are used in the EU. Secondly, it is expected to emerge as the golden standard for AI regulation influencing further regulatory attempts. Lastly, it should be noted that compliance with complex regulatory frameworks such as the AI Act takes time. With adoption and early commitment schemes on the horizon, it can be anticipated that discussions regarding the AI Act and its implementation will become more prevalent, along with significant regulatory questions in the near future. It is important for all companies involved in developing, deploying, using, or engaging with the supply chain of AI systems in any capacity to start their compliance efforts as soon as possible and closely follow the developments in this field.

[4] European Commission, 'AI Pact' <https://digital-strategy.ec.europa.eu/en/policies/ai-pact>,

[5] European Commission, 'Commission Decision Establishing the European AI Office' (Policy and Legislation, 24 January 2024) <https://digital-strategy.ec.europa.eu/en/library/commission-decision-establishing-european-ai-office#:~:text=A%20European%20Artificial%20Intelligence%20Office,to%20its%20annual%20management%20plan>.

Voluntary Carbon Markets and Carbon Credits

International Legal Framework and Turkish Practice

Yusuf Kumtepe & Zeynep Ekinci

Introduction

'Türkiye intends to peak its emissions at the latest in the year 2038 […] a step forward toward to long-term objective of achieving a net zero target by 2053.'[1] The first paragraph of Turkey's Nationally Determined Contribution (NDC), a non-binding action plan communicated by member states under the Paris Agreement, sets an ambitious target. To meet these targets, Turkey must implement a mechanism that makes it more costly to emit greenhouse gases and offer incentives for those that reduce their emissions, that is, carbon pricing. This article explores the legal aspects of voluntary carbon markets, the only (mild) type of carbon pricing that has been practised thus far in Turkey.

Carbon pricing can take two forms: a carbon tax or an emissions trading system (ETS). A carbon tax follows a bottom-up approach; it aims to raise the cost of carbon emissions but does not guarantee minimum emissions. An ETS, or cap-and-trade mechanism, by contrast, sets a gradually declining upper limit on emissions and allows emitters to sell and buy emissions units, measured in tonnes of carbon dioxide-equivalent (MtCO2e). The price of carbon is set by the market of each particular scheme. Established in 2005, the European Union (EU) ETS is the world's first carbon market, covering 40% of the emissions in the EU.[2] Other prominent schemes are California's Cap-and-Trade Program, which was

[1] Republic of Turkey, *Updated First Nationally Determined Contribution* submitted on 13 April 2023 in accordance with Article 4, paragraph 12 of the Paris Agreement, 2.

[2] European Commission, *EU Emissions Trading System (EU ETS)* <https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en>.

initiated in 2013 and applies to 80% of the state's greenhouse gas emissions,[3] and China's national ETS, which started its operations in 2021.

Where no cap-and-trade mechanism exists, emitters may purchase carbon credits in voluntary carbon markets to achieve self-defined goals for reducing emissions. These differ from compulsory carbon markets (dubbed compliance carbon markets), in which governments impose a cap on emissions. Therefore, voluntary carbon markets do not impose a fee on emissions, but instead direct funds to emission-reducing projects that would otherwise be more economically challenging. Independent organisations set project eligibility requirements, monitoring, reporting and verification (MRV) procedures, and an infrastructure to purchase, sell or retire carbon credits, i.e. remove them from the market.

This article first explains the international legal framework for carbon credit trading under the United Nations Framework Convention on Climate Change regime (UNFCCC). It then examines the Turkish legislative and regulatory environment on MRV requirements and ETS plans. The third section outlines the global practice of issuing and trading carbon credits. The final section focuses on the practices of Turkish operators in voluntary carbon markets.

International Law Background

The main international legal instrument to combat climate change is the UNFCCC. Signed in 1992 and effective since 1994, the UNFCCC aims to stabilise the greenhouse gas concentrations of the atmosphere at a level that would prevent 'dangerous anthropogenic interference with the climate system.'[4] Turkey ratified the UNFCCC in 2004 and is listed among the developed states in Annex I of the convention that have undertaken to 'adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases.'[5]

Two international treaties that have been adopted under the framework of the UNFCCC are the Kyoto Protocol of 1997 and the Paris Agreement of 2015. Turkey ratified the former in 2009 and the latter in 2021.

[3] California Air Resources Board, *Cap-and-Trade Program* <https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en>.

[4] UNFCCC, art 2.

[5] UNFCCC, art 4.2(a).

The Kyoto Protocol operationalises the UNFCCC's objective of reducing greenhouse gas emissions by imposing binding emission reduction targets on developed countries listed in its Annex B (which does not include Turkey). In addition, the clean development mechanism (CDM), as set forth in Article 12 of the Kyoto Protocol, allows a country that is not listed in Annex I of the UNFCCC to benefit from projects resulting in saleable certified emission reductions (CER).[6] Turkish projects are not eligible to earn CERs, as Turkey is listed in Annex I of the UNFCCC.

The Paris Agreement set the goal of limiting global warming to well below 2°C above pre-industrial levels and to pursue efforts to limit it to 1.5°C.[7] Article 6 of the agreement foresees a framework for voluntary cooperation between member states to achieve emission reduction targets.[8] Article 6.2 allows countries to internationally transferred mitigation outcomes (ITMOs) that will count towards their NDCs. This will potentially create a new market (in addition to the voluntary market) for carbon credits. Article 6.4 of the Paris Agreement establishes a mechanism that will work in a similar way to the CDM of the Kyoto Protocol. Activities that remove or reduce emissions in host countries will generate tradeable carbon credits, dubbed A6.4ERs. Currently, the voluntary carbon market and the markets under Articles 6.2 and 6.4 of the Paris Agreement are separate but they may converge in the future.[9] Due to its recent introduction, both in Turkey and worldwide, the Paris Agreement has seen limited application with respect to its impact on voluntary carbon markets. Yet, it holds the promise of establishing a new market for carbon credits that will complement existing voluntary ones, featuring credits issued in accordance with standards aligned with the guidance from the Conference of Parties, the managing authority of the UNFCCC.[10]

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[6] Kyoto Protocol, art 12.

[7] Paris Agreement, art 2.

[8] Paris Agreement, art 6.

[9] International Emissions Trading Association, *The Evolving Voluntary Carbon Market* (March 2023) 10.

[10] Decision 2/CMA.3, Guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement, FCCC/PA/CMA/2021/10/Add.1 (8 March 2022); International Emissions Trading Association, *The Evolving Voluntary Carbon Market* (March 2023) 10.

Turkish Legislative Framework

In the last decade, Turkey has enacted a series of laws aiming to reduce the country's greenhouse gas emissions. A recent amendment to the Environment Law numbered 2872, the main legislation for the protection of the environment, provides the basis for emissions trading in the country:

> *The general principles for the protection and rehabilitation of the environment and prevention of its pollution are as follows: [...] h) [...] market-based mechanisms, such as carbon trading to monitor greenhouse gas emissions, and economic instruments and incentives shall be used [...] to combat climate change.*[11]

The law authorises the Ministry of Environment, Urbanisation and Climate Change (hereinafter 'the Ministry of Environment') to establish rules and procedures for the implementation of this principle. It provides for administrative fines of up to TRY 173,207 to entities that do not timely submit an emissions monitoring plan and a verified emissions report.[12] The Ministry of Environment has also enacted a number of regulations and communiqués that impose MRV obligations on industries responsible for 50% of the country's total emissions.[13]

Turkey does not currently have a cap-and-trade mechanism. However, the Medium-Term Programme (2023–2025) prepared jointly by the Ministry of Treasury and Finance and the Presidency of Strategy and Budget stipulates that '[a]n effectively functioning National Emission Trading System will be developed within the scope of harmonisation with CBAM [Carbon Border Adjustment Mechanism].'[14] The forthcoming compliance ETS will be based on the existing MRV structure in Turkey.[15]

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[11] Environment Law numbered 2872 dated 9 August 1983, Art 3(h).

[12] ibid, art 20.

[13] Regulation on Monitoring of Greenhouse Gas Emissions published on the Official Gazette numbered 29003 dated 17 May 2014; Communiqué on Monitoring and Reporting of Greenhouse Gas Emissions published on the Official Gazette numbered 29068 dated 22 July 2014; Communiqué on Verification of Greenhouse Gas Emissions and Accreditation of Verification Organisations, published in the Official Gazette numbered 30258 dated 2 December 2017; Republic of Turkey, *Updated First Nationally Determined Contribution*, submitted on 13 April 2023 in accordance with Article 4, paragraph 12 of the Paris Agreement 5.

[14] The Ministry of Treasury and Finance and the Presidency of Strategy and Budget, The Medium-Term Programme (2023–2025), Presidential Decree numbered 6003 and dated 4 September 2022, Section 2.9.

[15] Republic of Turkey, *Updated First Nationally Determined Contribution*, submitted on 13 April 2023 in accordance with Article 4, paragraph 12 of the Paris Agreement 6.

The Ministry of Environment has also attempted to establish its own voluntary carbon market through the Communiqué on Voluntary Carbon Market Project Registration of 2013.[16] However, it appears that the programme of the Ministry of Environment has attracted few submissions, and the programme is currently inactive.

Global Practice of Voluntary Carbon Markets

The voluntary carbon market operates on a patchwork of independent standard-setting organisations. These entities monitor and certify projects that avoid or remove carbon emissions according to their standards and award carbon credits to their operators. The credits can be sold over the counter or in special exchanges to companies or individuals. Purchasers who would like to offset their emissions can retire these carbon credits.

There are two types of credits. Avoidance credits are issued for projects such as renewable energy plants that avoid/reduce carbon that would otherwise have been emitted. Projects such as direct air capture that draw down CO2 from the atmosphere issue removal credits. Avoidance credits are more abundant, constituting over 80% of the market, but removal credits are more expensive, since it is easier to ascertain their quality.[17] This is because the amount of carbon that is reduced can be directly calculated when CO2 is withdrawn from the atmosphere, and therefore private individuals or companies wishing to buy carbon credits in voluntary markets can be sure that the credits that they buy correspond to the exact amount of carbon removed from the atmosphere.

The current state of the global voluntary carbon market is far from perfect. Unlike a compliance ETS with emission caps, the demand depends on ethical imperatives of firms and individuals, making the price vulnerable to considerations that shift with time.[18] The price is also depressed by the varying quality of credits. Accounting and verification methods change from one standard-setting organisation to another, and therefore the pool

[16] The Communiqué on Voluntary Carbon Market Project Registration (*Official Gazette* numbered 28790, 9 October 2013).

[17] Shell plc and BCG, 'The voluntary carbon market: 2022 insights and trends' (19 January 2023) 16 <https://www.shell.com/shellenergy/othersolutions/carbonmarketreports.html>.

[18] 'Offset markets struggle in the face of surging commodity prices' *The Economist* (19 May 2022) <https://www.economist.com/finance-and-economics/2022/05/19/offset-markets-struggle-in-the-face-of-surging-commodity-prices>.

of high-quality carbon credits is not large.[19] For example, to generate high-quality carbon credits, an emissions-reducing project should not have been undertaken without the proceeds from the sale of credit, an attribute known as additionality.[20] Since the Chicago Carbon Exchange (which used to manage half of the world's credit trading) closed in 2010, the market is dominated by over-the-counter transactions.[21] This has also led to low liquidity and a lack of transparency.[22] To achieve a daily, reliable price signal, the Taskforce on Scaling Voluntary Carbon Markets, a private sector-led initiative, recommends creating core carbon reference contracts based on a set of agreed principles that can be traded on exchanges.[23]

Turkey's Experience with the Voluntary Carbon Markets

Without access to the CER market under the Kyoto Protocol, Turkish renewable energy developers instead tapped into the lucrative voluntary carbon markets since as early as 2005 and managed to attract low-carbon investments as a major host country of the voluntary carbon market.[24]

In voluntary carbon markets, each certification organisation sets its own carbon credit standard or standards. The main certification standards used by Turkish projects have been Verified Carbon Standard (VCS), popular among hydropower projects, and Gold Standard (GS), preferred by wind plants.[25] As of 2020, Turkey has 288 projects registered under VCS and GS, which makes it the third largest host country in number of registered projects and one of the

[19] Christopher Blaufelder, Cindy Levy, Peter Mannion, and Dickon Pinner, 'A blueprint for scaling voluntary carbon markets to meet the climate challenge, McKinsey & Company', (*McKinsey*, January 2021) 4 <https://www.mckinsey.com/capabilities/sustainability/our-insights/a-blueprint-for-scaling-voluntary-carbon-markets-to-meet-the-climate-challenge>.

[20] The Taskforce on Scaling Voluntary Carbon Markets, 'Final Report' (January 2021) 119 <https://www.iif.com/tsvcm> .

[21] ibid 41.

[22] ibid 41.

[23] ibid 41.

[24] Ethemcan Turhan and Arif Cem Gündoğan, 'Price and prejudice: the politics of carbon market establishment in Turkey' (2018) *Turkish Studies* 20(4) 518; Ferhan Can, 'Türkiye'de Uygulanan ve Gönüllü Karbon Piyasalarında Faaliyette Bulunan Projelerin Paydaş Katılımı Açısından Değerlendirilmesi' (2018) *Ekonomi Politika ve Finans Araştırmaları Dergisi* 3(1) 4.

[25] Burcu Ergün Yüksel, Mustafa Özcan and Elif Ocaklı, 'Türkiye Gönüllü Karbon Piyasaları'nın Değerlendirilmesi' (2022) *Düzce Üniversitesi Bilim ve Teknoloji Dergisi* 10(5) 13.

largest sellers of voluntary carbon credits.[26] However, as of 2020, these two organisations do not accept new projects from Turkey.[27]

Currently, the Global Carbon Council (GCC), a MENA-based standard established in 2019, accepts project applications from the countries in the region.[28] GCC accepts new registrations for projects that started operations in Turkey after 2016.[29]

In line with the upcoming national compliance ETS mechanism, Turkey is expected to establish a specialised exchange for the trading of carbon credits at Borsa İstanbul, the country's main stock exchange.[30]

The Path Forward

Turkey should deploy effective carbon pricing mechanisms to reduce its emissions in the path towards the net-zero goal of 2053. To date, renewable energy projects have spearheaded these efforts by issuing carbon credits that have been sold in the voluntary carbon markets. The decision by VCS and GS, the two most popular standards, to stop accepting Turkish projects will likely direct operators to seek certification under alternative standards. Turkish lawmakers are also planning to establish an ETS based on a cap-and-trade mechanism, which is expected to create a compliance carbon market. The already existing MRV legal framework may help with the transition to the ETS.

One of the most imminent climate policy challenges facing Turkish companies is the Carbon Border Adjustment Mechanism (CBAM) of the EU, Turkey's largest export market. CBAM aims to price carbon emitted during the production of goods that are imported to the EU. It will start with a transitional phase in October 2023, when importers will first need to report the embedded emissions in

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[26] Climate Focus and Gaia Carbon Finance, Mid-size Sustainable Energy Financing Facility (MidSEFF), European Bank for Reconstruction and Development, *Carbon markets in Turkey* <http://turkishcarbonmarket.com/background/carbon-markets-in-turkey>.

[27] Burcu Ergün Yüksel, Mustafa Özcan and Elif Ocaklı, 'Türkiye Gönüllü Karbon Piyasaları'nın Değerlendirilmesi' (2022) *Düzce Üniversitesi Bilim ve Teknoloji Dergisi*, 10(5) 13.

[28] Solar 3GW, 'Karbon Azaltım Sertifikaları Hakkında Sıkça Sorulan Sorular' 4 <https://www.solar3gw.org/wp-content/uploads/2021/09/Karbon-Azaltim-Sertifikalari-Hakkinda-V2.pdf> accessed 15 November 2023.

[29] Global Carbon Council, Clarification No. 01 v1.3, (2022) 11 <https://www.globalcarboncouncil.com/wp-content/uploads/2021/12/Clarification No. 01.pdf>.

[30] 'Borsa İstanbul Karbon Piyasası kuracak' *Dünya Gazetesi* (29 November 2022) <https://www.dunya.com/ekonomi/borsa-istanbul-karbon-piyasasi-kuracak-haberi-675457>.

the goods that they bring in. The mechanism will enter a permanent phase in January 2026, when importers will have to start purchasing CBAM certificates.[31] The EU plans to link the price of CBAM certificates with the price of EU ETS allowances.[32] A study commissioned by the European Bank for Reconstruction and Development (EBRD) found that Turkish exporters could be paying extra charges of EUR 777 million in 2026 under the CBAM.[33] In the present circumstances, carbon credits purchased at the voluntary markets will not help with meeting CBAM targets. However, a potential collaboration between the forthcoming Turkish ETS and the EU's programme may relieve Turkish exporters of the need to purchase CBAM certificates.

[31] European Commission, Taxation and Customs Union, *Carbon Border Adjustment Mechanism* <https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en> accessed 15 November 2023.

[32] ibid.

[33] Vanora Bennett, 'Turkish exporters could face steep extra costs under new EU carbon rules', (*EBRD*, 29 July 2021) <https://www.ebrd.com/news/2021/turkish-exporters-could-face-steep-extra-costs-under-new-eu-carbon-rules.html> accessed 15 November 2023.

The Implications of Skipping FIDIC's Dispute Adjudication Board Process

Tülay Çalışkan Bayraktar

Introduction

The International Federation of Consulting Engineers (FIDIC) publishes standard contracts that are widely used in the construction industry for international projects. These contracts include multi-tiered dispute resolution provisions, which typically involve adjudication by a Dispute Adjudication Board (DAB) or a Dispute Avoidance and Adjudication Board (DAAB). This paper focuses on the DAB/DAAB process in the Red, Yellow and Silver Books of FIDIC forms of contract by examining whether the DAB process can be skipped and exploring the jurisdictional and/or procedural implications of doing so.

When faced with a dispute and having irreconcilable views, parties may want to skip the DAB process and proceed directly with arbitration. The non-imperative language used in certain DAB provisions has led to divergent interpretations regarding their application and caused uncertainty as to whether the DAB process can be skipped. Courts in Switzerland, England, and Italy have adopted varying and flexible approaches to decide whether the DAB process is mandatory, but have generally ruled that bypassing the DAB process does not necessarily prove fatal to the arbitration process. In practice, when parties skip the DAB process, arbitral tribunals often view this as an admissibility issue and choose to stay the proceedings to allow the parties to complete the DAB process. While this is the general observation for the FIDIC forms of contract, variations may occur depending on the specific language and the governing law of the contract in question.

The Dispute Adjudication Board Process and Its Shortcomings

The DAB process is envisaged in Sub-Clauses 20.2 to 20.8 of FIDIC forms of contract dated 1999 (FIDIC 1999) and Clause 21 of FIDIC forms of contract dated 2017[1] (FIDIC 2017). A DAB can be described as a body consisting of independent and impartial member(s), typically engineers, architects and/or lawyers, who are appointed by the parties and are charged with the task of issuing a decision on the dispute in 84 days.[2]

The parties may make provision for a standing or an ad hoc DAB. Standing DABs are constituted right after the commencement of the project, whereas ad hoc DABs are constituted after a dispute arises.[3] Shortcomings relating to the DAB's constitution usually arise from ad hoc DABs, so the discussions in this article will focus on these.

Sub-Clause 20.2 of FIDIC 1999 and Sub-Clause 21.1 of FIDIC 2017 use the word 'shall' when stipulating the requirement to refer the dispute to the DAB.[4] This wording imposes a mandatory nature on the DAB process. However, Sub-Clause 20.8 of FIDIC 1999 and Sub-Clause 21.8 of FIDIC 2017 provide that, if a DAB is not 'in place whether by expiry [...] *or otherwise*', the parties can proceed with arbitration.[5]

Some parties have relied on the literal reading of Sub-Clause 20.8 of FIDIC 1999 to skip the DAB process altogether at the beginning of a dispute.[6] This is because a literal interpretation of Sub-Clause 20.8 in isolation allows a party to bypass the DAB in favour of arbitration because necessarily no DAB will be 'in place' at the very beginning of a dispute.[7] In this case, FIDIC Guide suggests complying with Sub-Clauses 20.2 and 20.3 before invoking arbitration in Sub-Clause 20.8.[8] FIDIC also includes the DAB process 'as a condition

[1] Please note that the FIDIC 2017 was reprinted with minor amendments to be effective as of 1 January 2023; however, these amendments do not concern Sub-Clause 21. The amendments can be accessed free of charge from FIDIC's website.

[2] FIDIC 1999, Sub-Clause 20.4; FIDIC 2017, Sub-Clause 21.4.

[3] Taner Dedezade, 'Can a party ignore FIDIC's DAB process and refer its dispute directly to arbitration?' <https://www.howardkennedy.com/Latest/Article/Can-a-party-ignore-FIDICs-DAB-process-and-refer-its-dispute-directly-to-arbitration> accessed 15 August 2023.

[4] FIDIC 1999, Sub-Clause 20.2; FIDIC 2017, Sub-Clause 21.1.

[5] FIDIC 1999, Sub-Clause 20.8 (emphasis added); FIDIC 2017, Sub-Clause 21.8 (emphasis added).

[6] Peterborough City Council v Enterprise Managed Services Limited [2014] EWHC 3193 (TCC), para 20.

[7] Dedezade, 'Can a party ignore FIDIC's DAB process and refer its dispute directly to arbitration?'.

[8] FIDIC Contracts (1999 editions) Guide 1st Ed (2000), at 317.

precedent to arbitration' in one of its 'Golden Principles' and invites parties not to deviate from these principles in preparing their particular conditions of contract.[9] However, whether the exhaustion of the DAB process is mandatory is still open to interpretation, with Sub-Clause 21.8 of FIDIC 2017 keeping the same wording as Sub-Clause 20.8 of FIDIC 1999. Consequently, it remains imperative to stay abreast of the case law in relevant jurisdictions and prioritize clear contract drafting to ensure legal foreseeability.

Recent Case Law on Non-Exhaustion of the DAB Process

The courts of England, Switzerland, and Italy have had to consider the issue of non-exhaustion of the DAB process prior to arbitration.[10] The English and Swiss courts acknowledged the tension between: (i) the opening wording of Sub-Clause 20.2 of FIDIC 1999, which uses mandatory language for the parties to refer their dispute to the DAB, and (ii) the wording in Sub-Clause 20.8 of FIDIC 1999, which provides that, if a DAB is not 'in place whether by expiry [...] or otherwise', the parties can bypass the DAB. The Italian court, however, overlooked the wording of Sub-Clause 20.2 and focused on Sub-Clauses 20.6 and 20.8, which stipulate that the dispute shall be settled by arbitration where there is no final DAB decision in relation to that dispute.[11]

These decisions demonstrate that a uniform interpretation of the nature of the DAB is still not achieved internationally, and the facts of the case, as well as the governing law, are crucial.

Swiss Federal Supreme Court Decision

The Swiss Federal Supreme Court examined Clause 20 of FIDIC 1999 in 2014,[12] in the context of a challenge of a partial award, in which an arbitral tribunal found it had jurisdiction, despite the DAB process not having been completed.[13]

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[9] FIDIC Golden Principles (2019), at 8, Golden Principle 5.

[10] These decisions were chosen in this article for being the few publicly available decisions on this issue.

[11] FIDIC 1999, Sub-Clause 20.4 (emphasis added).

[12] Swiss Federal Supreme Court, No. 4A_124/2014, 7 July 2014.

[13] Matthias Scherer, 'Supreme Court – DAB proceedings precondition for arbitration under FIDIC Conditions' (*Lexology*, 13 October 2014) <https://www.lexology.com/commentary/projects-construction-infrastructure/switzerland/lalive/supreme-court-dab-proceedings-precondition-for-arbitration-under-fidic-conditions> accessed 15 August 2023.

In the case before the Swiss Federal Supreme Court, the appointment of the DAB lasted several months and a DAB agreement was never signed.[14] Consequently, the contractor initiated arbitration and the owner/employer challenged the arbitral tribunal's jurisdiction. The tribunal found that the mandatory language of Sub-Clause 20.2 should be interpreted in the context of Sub-Clause 20.4, which states that 'either Party *may* refer the dispute in writing to the DAB', and of Sub-Clause 20.8.[15] It stated that Sub-Clause 20.8 also applies where a DAB has never been put in place and concluded that the DAB process was optional.

The Swiss Federal Supreme Court did not agree with the tribunal on the interpretation of Clause 20. The Court interpreted the clause according to Swiss law, as the law of the seat of arbitration, which required looking beyond the literal meaning of the contract to establish the real and common intention of the parties in each case.[16] Accordingly, the Court concluded that the pre-arbitration steps contained in Sub-Clause 20, especially the mandatory language of Sub-Clause 20.2, were clear and mandatory in nature.[17] It considered that any other approach would render the entire dispute resolution mechanism redundant.[18] On the other hand, the Court concluded that there are exceptions to the DAB requirement, arising under Sub-Clause 20.8 and the general principle of good faith under Swiss law.[19] The Court stated that such exceptional circumstances were present in that case, namely (i) the parties' positions were already irreconcilable after the completion of works, and (ii) the DAB agreement was not signed in 15 months owing to the owner's reluctance.[20]

Thus, the Swiss Court stated that this was an exceptional situation under Sub-Clause 20.8 of FIDIC 1999 and concluded that that non-exhaustion of the DAB was not fatal to the tribunal's jurisdiction.

English Court Decision

The English High Court, also in 2014, ruled on the nature of the DAB in *Peterborough City Council v Enterprise Managed Services Ltd* (hereinafter the

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[14] ibid

[15] Swiss Federal Supreme Court, No. 4A_124/2014, 7 July 2014, para 3.1.1.

[16] ibid

[17] ibid, paras 3.4.3.1-3.4.3.2.

[18] ibid, para 3.4.3.3.

[19] ibid, para 3.4.4.

[20] ibid, para 3.5.

Peterborough Case).[21] The contract in this case provided for an ad hoc DAB and final adjudication by litigation.[22] A few weeks after the contractor initiated the DAB process, the employer commenced litigation before the English court.[23] The contractor applied for a stay of this court action.

The employer's argument in proceeding straight to litigation was that Sub-Clause 20.8 of FIDIC 1999 provided an opt out for a party to refer the dispute to court if it did not want to have the dispute resolved by the DAB.[24] The employer also argued that the DAB provisions in Sub-Clauses 20.4 to 20.7 should be unenforceable for lack of certainty.[25]

The English court disagreed with the employer, stating that Sub-Clause 20.8 probably applied only in cases where there is a standing DAB, rather than to appointing an ad hoc DAB after a dispute has arisen.[26] The court has ordered a stay on the basis that this would uphold the parties' contractual agreement as to how disputes would be determined.[27]

Italian Court Decision

The Court of Lecce issued a recent decision regarding the nature of the DAB process under the FIDIC 1999 Red Book.[28] In this case, the contractor commenced litigation right after the dispute arose. The employer argued, among other things, that the claim was inadmissible because the contract provided for adjudication by DAB first.[29]

The Court of Lecce held that DAB was not a condition precedent to arbitration by focusing on the wording of Sub-Clause 20.6, which provides that, in disputes in respect of which the DAB's decision, if any, has not become final, the parties

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[21] *Peterborough City Council v Enterprise Managed Services Limited* [2014] EWHC 3193 (TCC). *See also* Herbert Smith Freehills, 'FIDIC dispute adjudication boards: mandatory or optional?' <https://www.lexology.com/library/detail.aspx?g=ee018fa3-0cb9-4f83-8431-722688c797fb> accessed 15 August 2023.

[22] ibid, para 14.

[23] ibid, paras 7-8.

[24] ibid, para 20.

[25] ibid, para 24.

[26] ibid, para 33.

[27] ibid, para 44.

[28] Court of Lecce, No. 1003, 16 April 2020.

[29] Giuseppe Franco, 'To adjudicate, or not to adjudicate – that is the question (before Italian courts)' (*DLA Piper*, 29 June 2022) <https://www.dlapiper.com/en-bh/insights/publications/2022/06/to-adjudicate-or-not-to-adjudicate-italian-courts> accessed 15 August 2023.

shall refer the matter directly to arbitration.[30] Thus, the Court of Lecce did not consider Sub-Clause 20.6 in its full context, ie together with Sub-Clauses 20.2 and 20.4, and chose to ignore the mandatory wording in Sub-Clause 20.2. The Court of Lecce also relied on a literal and broad interpretation of Sub-Clause 20.8, which is in contrast with the Swiss and English courts.[31]

Implications for Arbitral Jurisdiction

If a party skips the DAB process entirely or partly and initiates arbitration, the arbitral tribunal will determine whether it can deal with the dispute without a prior DAB decision. If the tribunal decides that recourse to the DAB is mandatory, then it must answer an equally important question: whether this determination will be an issue of jurisdiction or admissibility. Unfortunately, this question does not have a straight answer either.

If the lack of a DAB decision is treated as an issue of jurisdiction, the tribunal will dismiss the case. On the other hand, if the lack of a DAB decision is treated as an issue of admissibility, the tribunal may suspend the arbitration proceedings until the DAB has been constituted and/or the DAB has issued a decision on the dispute, depending on which part of the DAB process was skipped in the first place.

In the above-mentioned Swiss case and the Peterborough Case, the admissibility approach has been preferred. Although not directly related to the DAB, French and German courts also considered non-compliance with multi-tiered dispute resolution clauses as a matter of admissibility.[32] Similarly, in a case regarding a mandatory pre-tier to arbitration that is not DAB, the Swiss Federal Supreme Court referenced its above-mentioned decision dated 7 July 2014 and stated its preference for staying the case until the pre-arbitral step is finished instead of finding a lack of jurisdiction.[33] Thus, there is a trend to perceive DAB and other

[30] Court of Lecce, No. 1003, 16 April 2020, at 6.

[31] ibid.

[32] Breach of an alternative dispute resolution clause is considered as giving rise to a plea of inadmissibility (fin de non-recevoir) under the French Civil Procedure Code: Cour de Cassation, Chambre Mixte, 14 February 2003, no. 00-19.423; Cour de Cassation, 1ère Chambre Civile, 30 October 2007; Cour de Cassation, 1ère Chambre Civile, 9 November 2006; Cour d'Appel de Paris, 28 June 2016, no. 15/03504. *See also* the decisions of the German Federal Court of Justice dated 2016: I ZB 50/15, BGHZ [14.01.2016]; I ZB 1/15, BGHZ [09.08.2016].

[33] Swiss Federal Supreme Court, No. 4A_628/2015, 16 March 2016, para 1.2.

pre-arbitral alternative dispute resolution clauses as an issue of admissibility rather than jurisdiction.

Choosing admissibility over jurisdiction gives more flexibility to the arbitral tribunal to deal with the issues in the most effective and just way. This is because, when the lack of a DAB decision is considered as an admissibility issue, it cannot be entirely separated from the principle of good faith. Although the principle of good faith comes in different forms depending on the governing law, this principle may be used by tribunals to prevent a party from benefiting from its own delay or failure to engage in the DAB process and then resorting to jurisdictional or procedural objections.[34]

In addition to considerations of good faith, there may be other reasons to uphold the arbitral tribunal's jurisdiction despite the non-exhaustion of the DAB. As seen from the case law, the contractual intention of the parties should be respected. While doing so, the purpose of ensuring efficiency and flexibility in dispute resolution should be kept in mind. For instance, if the parties are unable to appoint the members of the DAB for months, there may be no justifiable reason to suspend arbitral proceedings to finish the DAB process, given that it has not yet even started. This is not a new method, as English and French courts have referenced futility of the alternative dispute resolution when evaluating the enforceability of mediation clauses in multi-tiered dispute resolution provisions.[35] Thus, futility of the DAB process may also be taken into consideration when deciding on whether to uphold the tribunal's jurisdiction.

Conclusion

Case law is not established on the nature of the DAB and its jurisdictional implications, although there is a tendency to be flexible and not perceive it as a matter of jurisdiction. To be on the safe side, a tailor-made dispute resolution clause could be inserted into the contract. In any event, the governing law of the contract as well as the seat of arbitration should be chosen wisely. The issue

[34] *See eg* Swiss Federal Supreme Court, No. 4A_124/2014, 7 July 2014. *See also* Lindy Patterson KC and Nicholas Higgs, 'Dispute Boards' in *The Guide to Construction Arbitration - Fifth Edition* (2023) <https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition/article/dispute-boards> accessed 15 November 2023.

[35] Colman J explained in Cable & Wireless that, where mediation would be 'a completely hopeless exercise', the court can refuse to penalize the breach of a mediation clause: *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] All ER (D) 277. Similarly, the Court of Cassation in France treated the likelihood of mediation's being successful or futile as a relevant factor for the enforceability of mediation clauses: Cour de Cassation, 1ère Chambre Civile, 4 January 1961.

of whether multi-tiered dispute resolution provisions are treated as issues of jurisdiction or admissibility under a particular law should be considered before choosing that law as the governing law of the contract or seat of arbitration. In this regard, the importance of drafting contracts clearly to prevent disputes and staying well-informed about case law developments before deciding whether to bypass the DAB phase cannot be overstated.

German Act on Due Diligence in Supply Chains

A New Era for Human Rights and Environment in Turkey?

Kazım Berkay Arslan

Introduction

Environmental, social, and corporate governance (ESG) is a framework that focuses on a company's impact on the environment, society and on its own internal decision-making systems and structures. In connection with this framework, international efforts such as the United Nations Guiding Principles on Business and Human Rights (UNGPs) have focused on preventing or minimising transnational companies' negative effects on human rights and the environment. An important pillar in this context is the regulation of global value chains[1] through domestic regulations, such as in Australia, France, the Netherlands, Norway, the UK, and the USA.[2]

In Germany, the response to these developments culminated into the adoption of the Act on Due Diligence in Supply Chains (*Lieferkettensorgfaltspflichtengesetz*

[1] Caroline Omari Lichuma, '(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains' (2021) 81(2) Heidelberg Journal of International Law 497, 501; Anne-Christin Mittwoch and Fernanda Luisa Bremenkamp, *The German Supply Chain Act – A Sustainable Regulatory Framework for Internationally Active Market Players?* (1st edn, Institut für Wirtschaftsrecht 2022) 6-8; Kellie R. Tomin, 'Germany Takes Action on Corporate Due Diligence in Supply Chains: What the United States Can Learn From International Supply Chain Regulations' (2022) 18(2) *Loyola University Chicago International Law Review* 189.

[2] *See* Robert Grabosch, 'Companies and Human Rights: A Global Comparison of Legal Due Diligence Obligations' (2020) Friedrich Ebert Stiftung <https://library.fes.de/pdf-files/iez/16784.pdf>; Markus Krajewski, Kristel Tonstad and Franziska Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) 6(3) *Business and Human Rights Journal* 550.

or LkSG), which entered into force on 1 January 2023.[3] The LkSG is aimed at turning the UNGPs into binding obligations for companies[4] and at enhancing the protection of human rights and the environment by introducing due diligence obligations for certain companies and their domestic and international supply chains.

Being a novel legislation, there remain many questions with respect to the application of the LkSG both in Germany and abroad.[5] However, we can safely expect the LkSG to have an impact on companies domiciled in Turkey in light of Germany being Turkey's biggest trade partner in the EU.[6] This article provides a brief overview of the LkSG before exploring its potential implications for companies domiciled in Turkey.

General Overview of the LkSG

Personal Scope

The LkSG creates human rights and environmental due diligence obligations for companies domiciled in Germany. The scope of application of the LkSG covers sale of goods as well as provision of services (including financial services), and the LkSG applies to companies from all sectors, whether public or private.[7]

[3] Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains of 16 July 2021 <https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile>; Christian Gehling, Nicolas Ott and Cäcilie Lüneborg, 'Das neue Lieferkettensorgfaltspflichtengesetz – Umsetzung in der Unternehmenspraxis' (2021) 14(5) *Corporate Compliance Zeitschrift* 230, 231. For a brief description of the legislative history: *See* Krajewski, Tonstad and Wohltmann (n 2).

[4] Bettina Braun, Sarah Dadush and Daniel Schönfelder, 'Complying with Mandatory Human Rights Due Diligence Legislation through Shared-Responsibility Contracting: The Example of Germany's Supply Chain Act (LkSG)', *forthcoming* in 'Contracts for Responsible and Sustainable Supply Chains: Model Contract Clauses, Legal Analysis, and Practical Perspectives' (ABA Business Law Section 2023) 10 <https://ssrn.com/abstract=4389817>; Christian Stemberg, 'Die drei „Schlüsselkriterien" des Beschwerdeverfahrens nach § 8 Lieferkettensorgfaltspflichtengesetz' (2022) 15(4) *Corporate Compliance Zeitschrift* 92, 94-95; Gunther Meeh-Bunse, 'The German Supply Chain Act in the Context of Sustainable Development' (2022) 4(1) Proceedings of FEB Zagreb International Odyssey Conference on Economics and Business 63, 64-67.

[5] Lucina Berger, 'Lieferkettenverantwortung aus Unternehmens- und Beratersicht: Notwendigkeit oder Überforderung?' (2022) 51(4-5) *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 607, 613-616.

[6] Turkish Ministry of Trade, *Monthly Foreign Trade Statistics Tables - February 2023* <https://www.trade.gov.tr/statistics/foreign-trade-statistics/monthly-foreign-trade-statistics-tables-february-2023>.

[7] Maximilian Bettermann and Volker Hoes, 'Das Lieferkettensorgfaltspflichtengesetz – Besondere Pflichten für Kreditinstitute?' (2022) 22(1) *Zeitschrift für Bank- und Kapitalmarktrecht* 23, 23-34.

Section 1(1) of the LkSG stipulates that German companies that have at least 3,000 employees are subject to the provisions of the LkSG. This threshold has been decreased to 1,000 employees starting from 1 January 2024. Although the LkSG applies to sizeable companies, small and medium-sized companies may also be affected by the LkSG insofar as they are subsidiaries[8] or suppliers[9] of companies subject to the LkSG.

The companies within the scope of the LkSG are under due diligence obligations in connection with the activities of their subsidiaries (including their subsidiaries' supply chains) if they exercise a 'decisive influence' on them (Section 2(6)). The LkSG employs the term decisive influence in lieu of 'controlling influence' that is used in the German Stock Corporation Act (*Aktiengesetz* or AktG) but does not define what decisive influence means. It is generally accepted that decisive influence constitutes a high threshold and exists if the companies concerned are so closely intertwined in terms of capital which creates the possibility of uniform management that is actually exercised.[10]

In terms of suppliers, the LkSG makes a distinction between direct and indirect suppliers:[11] A direct supplier is defined as 'a partner to a contract for the supply of goods or the provision of services whose supplies are necessary for the production of the enterprise's product or for the provision and use of the relevant service' (Section 2(7)), whereas an indirect supplier is 'any enterprise which is not a direct supplier and whose supplies are necessary for the production of the enterprise's product for the provision and use of the relevant service' (Section 2(8)). It is noteworthy that the LkSG limits the definition of direct and indirect suppliers by referring to "necessary" supplies for a company's product or services.[12] For instance, a cotton producer may be considered as a supplier of a textile company, whereas a catering company providing optional meals to the same textile company's employees may not be a supplier under the LkSG because the service it provides is not *necessary* for the textile company's products.

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[8] Vera Rothenburg and Hanna Rogg, 'Die Umsetzung des Lieferkettensorgfaltspflichtengesetzes im Konzern' (2022) 67(8) *Die Aktiengesellschaft* 257, paras 15-16, 52.

[9] Erik Ehmann and Daniel F. Berg, 'Das Lieferkettensorgfaltspflichtengesetz (LkSG): ein erster Überblick' (2021) 13(15) *Gesellschafts- und Wirtschaftsrecht* 287, 292.

[10] Rothenburg and Rogg (n 8) paras 20-22.

[11] For a criticism of this distinction *see* David Krebs, 'Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains' in Peter Gailhofer, David Krebs, Alexander Proelss, Kirsten Schmalenbach and Roda Verheyen (eds) Corporate Liability for Transboundary Environmental Harm: An International and Transnational Perspective (Springer 2023) 267.

[12] Bettermann and Hoes (n 7) 25.

Due Diligence Obligations

Pursuant to Section 3(1) of the LkSG, companies must comply with due diligence obligations in their supply chains with respect to the human rights and environment-related risks enumerated in Sections 2(2) and 2(3). The due diligence obligations provided by the LkSG are obligations of conduct (means) rather than obligations of result.[13] The exact scope of these obligations should be assessed on a case-by-case basis (Section 3(2)). Relevant criteria in this regard may include the nature and scope of business activities, the company's ability to influence it supply chain, severity of a violation and the company's causal contribution to a violation.[14]

The LkSG puts a great emphasis on human rights when compared to the environment. Indeed, the human rights risks include general descriptions of child labour, forced labour, slavery, workplace safety and health, freedom of association, discrimination, adequate living wage, protection of food and water resources, protection of farmlands and use of security forces in line with numerous international conventions listed in the LkSG's Annex, whereas environment-related risks are limited to the activities under three environmental conventions: the Minamata Convention on Mercury, the Stockholm Convention on Persistent Organic Pollutants, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.[15]

The companies, to which the LkSG applies, must comply with human rights and environmental due diligence obligations along their supply chains, including for activities in Germany or abroad and starting from the extraction of raw materials until the delivery of final products or services (Section 2(5)). In connection with the abovementioned human rights and environment-related risks, the LkSG foresees the following due diligence obligations for the company's own business operations:

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[13] Vanessa Dohrmann, 'Das deutsche Lieferkettensorgfaltspflichtengesetz als Vorbild für den europäischen Gesetzgeber? – Eine kritische Analyse' (2021) 14(6) *Corporate Compliance Zeitschrift* 265, 267; Eric Wagner and Marc Ruttloff, 'Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung' (2021) 74(30) *Neue Juristische Wochenschrift* 2145, paras 4-5.

[14] Initiative Lieferkettengesetz, 'FAQ on Germany's Supply Chain Due Diligence Act' (2021) <https://lieferkettengesetz.de/wp-content/uploads/2021/11/Initiative-Lieferkettengesetz_FAQ-English.pdf>.

[15] Patricia Sarah Stöbener de Mora and Paul Noll, 'Grenzenlose Sorgfalt? – Das Lieferkettensorgfaltspflichtengesetz' (2021) 24(28) *Neue Zeitschrift für Gesellschaftsrecht* 1237, 1239-1340.

- Establishing an appropriate and effective risk management system to comply with due diligence obligations (Section 4(1))
- Designating a person or persons within the company who would be responsible for monitoring risk management (Section 4(3))
- Performing regular risk analyses (Section 5)
- Taking and reviewing appropriate preventive and remedial measures (Sections 6(1), 6(3), and 7(1))
- Issuing a policy statement on the company's human rights strategy which must be adopted by the senior management (Section 6(2))
- Establishing an appropriate internal complaints procedure for reporting human rights and environment-related risks and violations (Section 8)
- Documenting the fulfilment of due diligence obligations (Section 10(1)) and preparing an annual report on the fulfilment of due diligence obligations (Section 10(2))

For violations of due diligence obligations, Sections 22-24 of the LkSG foresee the exclusion from the award of public contracts up to three years and establishes financial penalties and administrative fines up to EUR 800,000 (or 2% of the average annual turnover for companies whose average annual turnover exceeds EUR 400 million) enforced by the Federal Office for Economic Affairs and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle* - BAFA). Besides these administrative procedures, the LkSG does not constitute a separate basis for liability under civil law or the German Civil Code (*Bürgerliches Gesetzbuch* - BGB).[16]

[16] Giesela Rühl, 'Cross-border Protection of Human Rights: The 2021 German Supply Chain Due Diligence Act', forthcoming in Borg-Barthet, Živković et al (eds), Gedächtnisschrift in honor of Jonathan Fitchen <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4024604> 5-7. *See* Abbo Junker, 'Das Lieferkettensorgfaltspflichtengesetz - Und wo bleibt das Positive' (2021) 52(4) *Zeitschrift für Arbeitsrecht* 437; Raphael Koch, 'Das Lieferkettensorgfaltspflichtengesetz Compliance, Sorgfaltspflichten und zivilrechtliche Haftung' (2022) 76(1) *Monatsschrift für Deutsches Recht* 1; Aline Fritz and Jonatan Klaedtke, 'Lieferketten im Vergabeverfahren: Sofortige und zukünftige Änderungen durch das Lieferkettensorgfaltspflichtengesetz' (2021) 23(3) *Neue Zeitschrift für Baurecht und Vergaberecht* 131.

The LkSG's Potential Implications in Turkey

Domestic due diligence regulations on supply chains such as the LkSG produce extraterritorial effects in that they affect the business operations of companies located in countries other than where the regulation is adopted.[17] In view of the high trade volume between Germany and Turkey, it is expected that the LkSG would impact the activities of two types of companies domiciled in Turkey: (1) subsidiaries[18] and (2) direct and indirect suppliers[19] of German companies that are subject to human rights and environmental due diligence obligations under the LkSG.

The LkSG creates due diligence obligations for German companies in connection with their subsidiaries and suppliers (in Germany or abroad). Although Turkish subsidiaries and suppliers of companies subject to the LkSG are not directly required to comply with any due diligence obligations, the LkSG provides for certain obligations in this respect which are to be observed by the German companies themselves. Complying with these obligations would likely require German companies to make certain changes to their existing relationships with their Turkish subsidiaries and suppliers.

As explained above, a foreign subsidiary of a German company falls within the business area of its parent company if it exercises decisive influence over its subsidiary. As a result of this, German companies must fully comply with all due diligence obligations under the LkSG for their Turkish subsidiaries fulfilling this decisive influence criterion.

The companies subject to the LkSG must conduct appropriate risk analyses (Section 5) and adopt preventive (Section 6(4)) and remedial measures (Section

[17] Galit A. Sarfaty, 'Shining Light on Global Supply Chains' (2015) 56(2) Harvard International Law Journal 419, 421. *See also* Anna-Maria Heil, 'Menschenrechte in Lieferketten: Trend zur Verrechtlichung' (2022) 36(8) Wirtschaftsrechtliche Blätter 438, 443.

[18] Rothenburg and Rogg (n 8) para 38.

[19] Çiçek Ersoy and Hatice Çamgöz Akdağ, 'Recent Developments in Supply Chain Compliance and in Europe and Its Global Impacts on Businesses' in Numan M. Durakbaşa and M. Güneş Gençyılmaz (eds) Digitizing Production Systems (Springer 2022) 579. *See also* Letter from the Turkish Ministry of Trade's Directorate General of International Service Trade numbered E-86541099-724.01.01-00076474188 and dated 19 July 2022 <https://www.gebzeto.org.tr/wp-content/uploads/2022/08/Almanya-Tedarik-Zinciri-%C3%96zen-Y%C3%BCk%C3%BCml%C3%BCl%C3%BC%C4%9F%C3%BC-Yasas%C4%B1.pdf>.

7(1)) for human rights and environment-related risks at direct suppliers.[20] In contrast to these continuous due diligence obligations in connection with direct suppliers,[21] the LkSG foresees human rights and environmental due diligence obligations for indirect suppliers in the event that the company has 'substantiated knowledge' regarding a violation (Section 9).[22] Substantiated knowledge exists if the company has verifiable and serious information about a possible human rights or environmental violation committed by its indirect suppliers.[23] Examples for sources of obtaining substantiated knowledge may include complaints received via the internal complaint procedure under Section 8, NGO reports on poor human rights or environmental conditions in the production region of an indirect supplier, indirect supplier's involvement in high-risk industries in terms of human rights, and the environment or previous incidents involving an indirect supplier.[24]

Other obligations of companies vis-à-vis their direct and indirect suppliers include defining in the company's policy statement the human rights and environment-related expectations placed on suppliers (Section 6(2)) and ensuring that the complaints procedure of the company covers the activities of its suppliers (Sections 8 and 9(1)).

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[20] *See* Mehmet Köksal, *Alman Tedarik Zinciri Özen Yükümlülüğü Kanunu Çerçevesinde Risk Analizi ve Rapor Hazırlama Yöntemleri* (1st edn, Aristo 2022); Federal Office for Economic Affairs and Export Control, 'Identifying, weighting and prioritizing risks: Guidance on conducting a risk analysis as required by the German Supply Chain Due Diligence Act 'Lieferkettensorgfaltspflichtengesetz' or 'LkSG'' (2022) <https://www.bafa.de/SharedDocs/Downloads/EN/Supply_Chain_Act/guidance_risk_analysis.html?nn=1444740>; Livia Buttke, Hannes Rössel and Frank Ebinger, 'Risikoanalyse nach den Anforderungen des deutschen Lieferkettensorgfaltspflichtengesetzes' (2022) 37(3) *Ökologisches Wirtschaften* 27.

[21] *See* Stefan Korch, 'Überprüfungs- und Aktualisierungspflichten nach dem Lieferkettensorgfaltspflichtengesetz' (2022) 75(29) *Neue Juristische Wochenschrift* 2065.

[22] Krajewski, Tonstad and Wohltmann (n 2) 556. *See also* Initiative Lieferkettengesetz, 'What the New Supply Schain Act Delivers – and What It Doesn't' (2021) <https://lieferkettengesetz.de/wp-content/uploads/2021/06/Initiative-Lieferkettengesetz_Analysis_What-the-new-supply-chain-act-delivers.pdf>.

[23] *See* Christian Stemberg, 'Zur substantiierten Kenntnis nach § 9 III Lieferkettensorgfaltspflichtengesetz' (2022) 25(23) Neue Zeitschrift für Gesellschaftsrecht 1093.

[24] Gehling, Ott and Lüneborg (n 3) 237; Ehmann and Berg (n 9) 290. *See also* Wagner and Ruttloff (n 13) para 30; Stemberg (n 4).

Considering the absence of a legal framework in Turkey aimed at holding businesses liable for their human rights and environment-related violations,[25] Turkish subsidiaries and suppliers of companies subject to the LkSG may face difficulties in complying with their due diligence obligations. For example, a leading Italian chocolate company, Ferrero Rocher has announced that they are facing child labour problems in their hazelnut supply chains in Turkey.[26] Similarly, a major French cosmetics company, Yves Rocher, currently faces court proceedings under the French law on the duty of vigilance based on claims relating to its Turkish subsidiary's violations of workers' rights and trade union rights.[27] Since the LkSG covers child labour and workers' rights as human rights-related risks,[28] had these two companies been subject to the LkSG, the activities of their suppliers and subsidiaries could have given rise to breaches of the LkSG (eg, obligation to take preventive or remedial action).

Although German companies expect little to no change in their supply chains and do not largely plan to relocate their foreign production as a result of the LkSG,[29] it is highly probable that they would require additional safeguards from their suppliers and subsidiaries in Turkey in terms of the protection of human rights and the environment. For instance, they can obtain contractual warranties that a supplier would comply with human rights or environment-related expectations (Section 6(4)(1)), provide training (Section 6(4)(2)) or require their suppliers in Turkey to only use products or raw materials from approved providers or regions.[30] Indeed, some companies, such as BASF, a

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[25] Zeynep Derya Tarman, 'İş Dünyası ve İnsan Hakları Zorunlu İnsan Hakları Durum Tespit Yükümlülükleri' (2022) 71(3) *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 1183, 1214; Çiğdem Çımrın, Pınar Kara and Fatmanur Caygın, 'Alman Tedarik Zincirleri Yasası'nın Türkiye'ye Etkileri: Şirketlerin durum tespiti yükümlülükleri ve öngörüler' (2023) Friedrich Ebert Stiftung 8 <https://library.fes.de/pdf-files/bueros/tuerkei/20112.pdf>. *See also* Mehmet Köksal, Alman Tedarik Zinciri Özen Yükümlülüğü Kanunu Çerçevesinde Şirketlerin Sorumluluğu (1st edn, Aristo 2022) 55-59.

[26] Tarman (n 25) 1187.

[27] Sherpa, 'French cosmetics company Yves Rocher facing court proceedings for failure to ensure freedom of association and workers' rights in Turkey' (2022) <https://www.asso-sherpa.org/french-cosmetics-company-yves-rocher-facing-court-proceedings-for-failure-to-ensure-freedom-of-association-and-workers-rights-in-turkey>.

[28] Ulaş Baysal and Çiçek Ersoy, 'Alman Tedarik Zincirleri Özen Yükümlülükleri Kanunu (Lieferkettensorgfaltspflichtengesetz) ve Türkiye'deki Çalışma İlişkilerine Etkileri' (2022) 48(2) *Sicil İş Hukuku Dergisi* 72, 81-82.

[29] Anastasiia Omelchuk and Achim Sponheimer, 'Bedeutung des Lieferkettensorgfaltspflichtengesetzes (LkSG) für die pharmazeutische Industrie' (2023) 85(3) *Pharmind* 234, 238; Galina Kolev and Adriana Neligan, 'Effects of a supply chain regulation: Survey-based results on the expected effects of the German Supply Chains Act' (2022) *Institut der Deutschen Wirtschaft Report* 8/2022, 14.

[30] Tobias Brouwer, 'Noch viele offene Rechts- und Auslegungsfragen zum Lieferkettensorgfaltspflichtengesetz – Hinweise zum VCI-Diskussionspapier zur Umsetzung des LkSG' (2022) 15(5) *Corporate Compliance Zeitschrift* 137, 144; Ehmann and Berg (n 9) 293.

large German chemistry company, started to include new clauses in their (and their subsidiaries') contracts providing for due diligence obligations vis-à-vis their Turkish suppliers.[31]

As a result, Turkish suppliers that can demonstrate a high level of compliance with respect to human rights and the environment may gain a competitive advantage.[32] This could lead to a new business environment in Turkey where companies give great importance to human rights and environmental due diligence[33] and to the future adoption of a regulation in this regard by the Turkish parliament, following the footsteps of the Human Rights Action Plan and Implementation Schedule published by the Turkish Ministry of Justice.[34]

Conclusion

The German government is expected to evaluate the effectiveness of the LkSG in 2026. By then, many Turkish subsidiaries and suppliers of German companies will have to adapt to the changes brought about by these new human rights and environmental due diligence obligations. Although the LkSG contains comprehensive obligations, early adaptors in Turkey (especially suppliers) may gain significant advantages over their competitors, both in Turkey and elsewhere. In addition, preparing for compliance with the LkSG may also help Turkish companies in the event of a new regulation in Turkey or when the European Supply Chain Directive[35] is adopted, likely by 2025.

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[31] Article 5, General Conditions of Purchase of BASF Türk Kimya Sanayi ve Ticaret Ltd. Şti. and its Subsidiaries in Turkey <https://www.basf.com/global/documents/en/about-us/suppliers-and-partners/download-center/BASFGroupTurkey_GeneralConditionsofPurchase_TR.pdf >.

[32] Köksal (n 25) 68. *See also* Sebastian Konrads and Stine Walter, 'Das neue Lieferkettensorgfaltspflichtengesetz – Herausforderungen, Chancen und Ausblick' (2022) 15(4) *Zeitschrift für Außen- und Sicherheitspolitik* 373, 380; Muhammed Tarhan, 'New German supply chain law offers opportunities for Türkiye, says envoy' (2023) *Anadolu Ajansı* <https://www.aa.com.tr/en/economy/new-german-supply-chain-law-offers-opportunities-for-turkiye-says-envoy/2796078>.

[33] *See* Değer Akal, 'Tedarik Zinciri Yasası: Türkiye nasıl etkilenecek?' (2023) Deutsche Welle <https://www.inspiredminds.de/tr/tedarik-zinciri-yasas%C4%B1-t%C3%BCrkiye-nas%C4%B1l-etkilenecek/a-63291647>; Wanja Wellbrock, 'Ganzheitliches Risikomanagement in der Lieferkette – Strategisches Potenzial des Lieferkettensorgfaltspflichtengesetzes' (2022) 75(1) *ifo Schnelldienst* 12, 15; Andreas Rühmkorf, 'The German Supply Chain Law: A First Step Towards More Corporate Sustainability' (2023) 20(1) *European Company Law* 6, 12-13.

[34] Tarman (n 25) 1214.

[35] *See* Ludger Giesberts, 'Sorgfaltspflichten für die Lieferkette: Das deutsche Gesetz und der EU-Richtlinienentwurf' (2022) 41(20) *Neue Zeitschrift für Verwaltungsrecht* 1497; Peter Jung, 'Werteschöpfung in der Liefer- und Absatzkette? — Zum Kommissionsvorschlag für eine Richtlinie über die Sorgfaltspflichten von Unternehmen im Hinblick auf Nachhaltigkeit' (2022) 19(3) *Zeitschrift für das Privatrecht der Europäischen Union* 109.

KABİNE
LAW OFFICE

Büyükdere Cad No. 201
Levent Loft 1, D:68
34394, Istanbul, TÜRKİYE
+90 (212) 278 64 13
info@kabinelaw.com
www.kabinelaw.com

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