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International Arbitration, Sovereignty and Environmental Protection: The Turkish Case

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There have long been debates about the challenges of 'globalisation' to state sovereignty. Two dominating perspectives can be identified. The first emphasises that sovereignty is in terminal decline by virtue of the dissolving effects of globalisation on national economic policies and the increasing influence of international organisations and NGOs on governmental decisions (Bauman, 1998: 64-8; Booth, 1991: 542; Taylor, 1999). The second argues in favour of continuity by suggesting that as the international norms concerning sovereignty have guided the development of the state in the sense that each state recognises the others as having sovereignty within their own borders, and as even the biggest multinational company cannot be a rival of states in terms of control of the means of violence, 'the history of the past two centuries is thus not one of the progressive loss of sovereignty on the part of the nation-state' (Giddens, 1990: 67; see also James, 1999). Environment–sovereignty relations are also discussed from within the decline–continuity duality (Conca, 1994: 701-2; Litfin, 1998). Global environmental degradation is not merely regarded as testimony to the inefficacy of the sovereign state but as a challenge to the concept of sovereignty. On the other hand, the emergence of international institutions for environmental protection is seen as expanding states' capacity to deal with the problem, thereby consolidating sovereignty.

The views about international arbitration can be articulated into the decline–continuity debate as the formation of new legal practices that mainly employ the international arbitration method, poses a problem of national sovereignty and territory. The intensifying internationalisation of capital has been accompanied by the creation of new legal regimes through GATT/WTO, NAFTA, the proposed MAI and arbitration proceedings since world-wide operations of capital in trade, finance, services and investments required the introduction of innovations in national legal systems. These new regimes negotiate between national sovereignty and international economic practices by creating viable systems of co-ordination and order among corporate economic actors and between those actors and the state (Sassen, 1996: 26; 1999: 167). Seen in this light, one might claim that the recognition and enforcement of foreign arbitral awards is meant to be intervention in sovereignty rights of the state within its territory, hence the end of sovereignty. However, one can contrast this view with the claim that sovereignty continues to matter as it is the state itself that consents to arbitration processes.

These two perspectives are valuable in their own right since sovereignty has undergone changes as well as keeping its significance (Sorensen, 1999). But what is problematic is that, as Ken Conca (1994: 707) puts it, 'sovereignty in both perspectives is essentially conceived as freedom from external constraints on state action and choice. This one dimensional view overlooks the fact that sovereignty looks inward as well as outward. It finds its basis not only in autonomy relative to external actors, but also in the state's jurisdictional power over civil society'. That is to say that neither helps us to grasp the multi-faceted dimensions of sovereignty. Recognising the multidimensional character of the concept, this article seeks to analyse the effects of the international arbitration method on sovereignty and environmental protection in the Turkish case. The article discusses these effects in terms of both the outward aspects (non-intervention, territorial integrity and independence) and inward aspects of sovereignty (judicial jurisdiction, rule making and state–society relations).

To do so, it raises three related points: i) the combination of international and national dynamics, ii) the dual role of the international domain in rule making, and iii) the jurisdictional shift from the realm of public law to the realm of the international private arbitration method. It concludes that sovereignty in the Turkish case has been becoming a device to serve the demands of international/domestic capital, and in turn that this has implications for both the environment and the legitimacy of the state. Before embarking on a discussion about the effects of international arbitration on environmental protection and sovereignty, a brief account of the development of international arbitration in Turkey should be given.

I

World-wide, international commercial arbitration has,

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over the past 20 years, become a widely accepted method for settling international commercial disputes. Through arbitration, parties avoid being forced to submit to the regime of national courts. There are usually three arbitrators selected by the parties. The arbitrators are private individuals and act as private judges, holding hearings and issuing binding judgements in a secret process with no public access. Arbitration is, by and large, privatisation of the justice system (Dezalay and Garth, 1995: 31; also see Karrer, 1999; Wagoner, 1999). International procedures of commercial arbitration have become harmonised through international conventions and regulations. Among them are the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the 1961 European Convention on International Commercial Arbitration (the Geneva Convention). Turkey approved both conventions in 1991 (*Official Gazette*, no. 21002, 25/9/1991; no.21000, 23/9/1991). The UN Commission on International Trade Law (UNCIDRAL) established in 1966 has also important functions for unifying the law of international trade. The UNCIDRAL arbitration rules of 1976 have been adopted by most of the arbitral organisations throughout the world, except the International Chamber of Commerce. The UNCIDRAL Model Law of 1985 has been also adopted, without change or with minor refinements, or followed as a model by a significant number of UN member states when establishing or modifying their commercial arbitration statutes (Wagoner, 1999:18-9).

With regard to investments, international arbitral tribunals to settle disputes between foreign investors and states are not as widely used and internationally institutionalised compared with their use in international commercial disputes. An important convention in this field is the 1958 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the Washington Convention). On the basis of this convention, many bilateral agreements between states have been made, and within which international arbitration for settlement of international investment disputes have been accepted (www.worldbank.org/icsid/treaties/treaties.htm).
However, it would not be inaccurate to note that the Convention and bilateral agreements do not provide harmonised and unified rules of international arbitration for investment disputes, especially considering the intensifying internationalisation of capital flows during the last three decades. It seems that the proposed Multilateral Agreement on Investment (MAI) was partly designed to provide signatory states with comprehensive international regulation on the settlement of investment disputes.

The MAI negotiations initiated in 1995 were intended to provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes, the protection of investment, and effective dispute-settlement procedures. When adopted, the MAI allows foreign investors to sue national and local governments before a binding international arbitration panel, challenge national legislation, and seek compensation from the state for the investor's loss of income and reputation (UNCTAD, 1998: 64-74; Hoedeman, 1998: 156-8). In a similar vein, for instance, the US Ethyl Corporation filed a claim for compensation under NAFTA, which is a model for the MAI, against the government of Canada which had banned the use of its toxic gasoline additive, and the Canadian government had to make a settlement agreement with the corporation to pay for the loss of profits (www.ethyl.com/news/4-17-97.htm; Monbiot, 2000: 310-11). However, unlike NAFTA, the MAI has not yet been allowed to come into effect because of disagreements among states especially on protectionist attitudes towards some sectors, and because of strong resistance and demonstrations organised since early 1998, particularly during the WTO meeting of 1999 in Seattle, by trade unions, NGOs, environmental groups and organisations opposing the MAI in favour of labour rights, consumer and environmental standards (Clair, 1999; Menotti, 1999; Retallack, 2000; Roberts, 1998; Shrybman, 1999; Tabb, 1999).

Turkey has taken part in the MAI negotiations, and declared itself, with some reservations, to be ready to adopt it so as to attract more foreign investment (Hazine Müsteşarlığı, 1998). And it has even been among the leading countries nationally adopting some provisions of the proposed MAI on international arbitration. It was in mid-1999 that Turkish governmental bodies (including the President) and representatives of business began highlighting the necessity for the inclusion of the principle of international arbitration for investments into national legislation for further liberalisation, deregulation and restructuring of the economy, and thereby for foreign investment inflows (*Cumhuriyet daily*, 28/5/1999; 2/6/1999; 7/7/1999; *Milliyet daily*, 4/6/1999; *Hürriyet daily,* 7/6/1999). The domestic bourgeoisie and its prominent organisation TÜSİAD (the Turkish Industrialists' and Businessmen's Association) were supporting international arbitration (which was in favour of foreign investors and investments by definition) simply because domestic capital could enter into partnerships with foreign capital to take a share of the supposed US$ 30 billion worth of foreign investments

(notably in the energy sector) for which the legislative reform was believed to make way. A few months later Parliament passed three constitutional amendments (Law no. 4446, 13/8/1999) in a difficult procedure that needs a two-thirds majority in a Parliament with 550 seats.

With the amendment to Article 125 Turkey accepts national and international arbitration for settling disputes arising from conditions and contracts under which concessions are granted by the state concerning public services and investments. The amendments to Articles 47 and 155 limit the scope of the administrative law in favour of the private law (in this case arbitration law), and by-pass the sanction of the Council of State regarding these concessions.

The amendments and related new laws have adopted the arbitration method only for disputes arising from public service concession contracts and conditions between the Turkish state and the investor. Generally speaking, infrastructure investments—such as bridges, tunnels, dams, water treatment, drainage systems, motorways, railways, airports and harbours—and electricity generation, transmission and distribution are regarded as public services in the Turkish law order, which means that if they are to be undertaken by private companies, it is only possible through concession conditions and contracts between the state and the investor. Before the amendments and new laws, administrative courts and the Council of State were seen as the mechanisms to be followed for the resolution of disputes between the state and the investor. The new legislation has, however, adopted arbitration proceedings functioning outside the jurisdiction of administrative law. Following these developments was the passing of the International Arbitration Law (No. 4686, 21/6/2001) in Parliament. This Law extends the scope of arbitration (which has become the settlement method not just for concession disputes but for any dispute the parties of which accept arbitration as the means of dispute settlement), establishes the rules for the constitution of the arbitral tribunal, arbitral proceedings and the award.

II

Surprisingly enough, the International Arbitration Law of 2001 did not face any opposition either from the public or the media. This silence was surprising because various groups had demonstrated against the 1999 arbitration laws that have regulated only concession disputes, rather than having generalised arbitration for foreign investments as in the International Arbitration Law of 2001. In 1999, trade unions, professional chambers, environmental organisations, the working group against the MAI, and other groups showed their strong opposition to international arbitration in massive demonstrations organised before and during the parliamentary sittings on the issue. Among the protestors were the people from the Bergama movement. It is necessary here to mention the Bergama movement, which has become a symbol of environmentalist resistance in Turkey, to show not only the sociological perception of arbitration but also the importance of administrative courts in protecting the environment.

The movement was organised in opposition to a noxious gold-mining investment by a multinationally-controlled company called Eurogold in the small town of Bergama (historically called 'Pergamon') in the early 1990s. It was because of the cyanide leaching method used for recovering gold and silver from the ore that the Bergama community saw the mine as a threat to life, the environment and their future. The community has been struggling for ten years against the mine by employing direct actions tactics and judicial mechanisms. For our purposes, the judicial struggle and its outcome is important. The judicial struggle started when a group of 794 Bergama villagers brought the case to court. As it was the Ministry of the Environment which, in response to Eurogold's demand, issued an act according to which there were no health and environmental drawbacks to constructing and operating the mine, they petitioned against the ministerial act at the İzmir Administrative Court (File nos. 1994/501 and 1994/643). At the end of the 4-year long judicial process, the final ruling emphasised that the ministerial act was in violation of the principles stipulated in Constitutional Article 17 that reads 'everyone has the right to life and the right to develop his/her material and spiritual entity', and Article 56 which reads 'everyone has the right to live in a healthy, decent environment. It is the duty of the state and citizens to improve the natural environment and to prevent environmental pollution' (the decision of the Council of State, file no. 1996/5477, decision no. 1997/2312, dated 13/5/1997). Although the government authorities were reluctant to act in accordance with the judgement, in the face of the court order and the resistance of the community they had to seal the plant in early 1999. The plant was ready to be operated as of 1997 according to the plant manager (*Milliyet daily*, 27/7/1997) but could not be put into operation because of the Bergama movement and the decision of the administrative court.

During the discussions on arbitration and the parliamentary sittings on the issue in 1999, participants in the Bergama movement suggested that arbitration

laws would render it possible for Eurogold to bring the case to an international arbitration tribunal and as a result it could put the mine into operation (*Cumhuriyet daily*, 25/7/1999; 16/8/1999). In fact, this was a misreading of the constitutional amendments and related arbitration laws of 1999 since the changes were merely confined to concession contracts as explained above. According to the Mining Law of 1985, mining activities as in Bergama are allowed not through concession contracts but through permits given by the Ministry of Energy and Natural Resources. Thus, it seems that the arbitration changes of 1999 cannot be employed in the Bergama case. However, what was not taken into consideration in this view is that there is some other evidence showing that it could yet be possible for Eurogold to take the case before an arbitration panel.

The first evidence is the international conventions approved by Turkey. First of all, it must be noted that according to Turkish Constitution Article 90 'international agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the grounds that they are unconstitutional'. The constitutional status of international agreements leads us to suggest that Turkey has already adopted arbitration for settling investment disputes since when the Washington Convention (*Official Gazette*, no. 20011, 6/12/1988) was duly put into effect in 1988 (see similar views in Birsel, 1998: 23-6; Duran, 1991: 170; Şanlı, 1998: 38-50; Tan, 1999: 14-6). The corollary of the approval of the Convention is that Turkey recognises the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID), established by the Convention, to settle any legal dispute arising directly out of *an investment*, between a contracting state and a national of another contracting state. The notion of investment is not described in detail in the Convention but it is argued in the literature that the notion encompasses any investment relation, such as capital contributions, service contracts, technology transfers and investment rights (Nomer, Ekşi, Gelgel, 2000: 57). Similarly, 43 bilateral investment agreements prepared by taking the Convention as a model and approved by Turkey define 'investments' in a broad sense, including (among other things) rights given by permits, contracts, concessions or decisions of the authority to search for, extract or exploit natural resources (see the website of Turkish Treasury at www.hazine.gov.tr/english/ybsweb/yktk.htm). According to the Convention (Article 25/b), an investing company which has the nationality of the contracting state other than the state party to the dispute or an investing company which is controlled by foreign capital even though it has the nationality of the state party to the dispute, is considered as a 'national of another contracting state'. So, a company as such becomes the party to the dispute. One can conclude from these principles of the Convention that there is no legal obstacle to Eurogold taking the case to international arbitration with a claim for compensation as was established in accordance with the Law Concerning the Encouragement of Foreign Capital as a 'Turkish company' (see the petition of Eurogold's lawyer presented to the İzmir Administrative Court, dated 28/2/1995, p. 3) but controlled by the foreign capital groups, home states of which are parties to the Convention.

The second piece of evidence which also backs up the first can be found in the written statement by the Under-Secretariat of the Prime Ministry. According to the Prime Ministerial statement which instructed the related six ministries to do the necessary work in order that Eurogold could operate the mine, Eurogold's investment is a foreign investment subject to international arbitration (Circular no. B.02.0.MUS.0.13-263, dated 5/4/2000; *Cumhuriyet daily*, 23/6/2000; the *Turkish Daily News*, 23/6/2000). It was also reported in *Milliyet daily* (6/1/2001) that Eurogold had the right to file a claim for compensation of US$ 300 million. Following the evidence, what does seem clear is that both parties to the dispute agree on the fact that there is a case applicable to international arbitration. As a result, even the applicability of arbitration itself enabled the corporation to succeed without recourse to arbitration because, under the circumstances, the corporation has been allowed to operate the mine. In May 2001, production started by using 657 kilograms of cyanide a day to obtain 10 kilograms of gold and silver (*Hürriyet daily*, 28/5/2001; *Zaman daily*, 28/5/2001; *Milliyet daily*, 12/6/2001) in spite of the binding court decision ruling that the mining activity would be detrimental to human health and harmful to nature. The Bergama case shows that the possibility of instituting an international arbitral proceeding has paved the way for a noxious mining activity. One could draw a conclusion from the case that national judicial processes are better established in terms of environmental protection than international arbitration proceedings. This is a part of the fact that the latter is particularly established and institutionalised to protect trade, investments and investors rather than the environment, as examples of arbitration awards have shown, such as the tuna–dolphin decision of a GATT panel, the shrimp–turtle ruling of a WTO tribunal (French, 2000: 116-23) and the award of an ICSID arbitral tribunal regarding the dispute over a hazardous waste

landfill between Metalclad corporation and the United Mexican States (www.worldbank.org/icsid/-cases/mm-award-e.pdf). It is therefore understandable why environmentalists have been against international arbitration and in favour of national judicial remedies. However, the supposed national–international dichotomy presents a rather complex problem, as will be discussed below.

III

Sovereignty issues and environmental concerns have not adequately been considered in academic-theoretical debates on international arbitration in Turkey (e.g., Banka ve Ticaret Hukuku Araştırma Enstitüsü, 1999; Birsel, 1998; Nomer, Ekşi and Gelgel, 2000; Şanlı, 1990, 1998; Tan, 1999; Ünal, 1990; Yılmaz, 1990). These aspects of the question have, however, become the main points of objection raised by those opposed to international arbitration. Opposing views have emphasised that: international arbitration lets foreign capital restructure the sovereign Turkish state as a part of the 'imperialist kingdom of globalisation'; the implementation of international arbitration means environmental degradation, the resurrection of the capitulations [which were in force during Ottoman times and were abolished after the foundation of the Republic of Turkey], and the destruction of national independence; in our own country it will be no longer the Turkish public or national courts but foreign firms and their international tribunals that will hold the right to decide on investments.[128]

These views invite us to elaborate three related points. First, the opposition has, in general, proceeded in a nationalistic manner within which international arbitration is presented as the death of national independence, the fading away of national sovereignty, the end of the national state and the selling-off of national assets to foreigners. What has not been taken into consideration in these views is the combination of international and national dynamics, and the relationship between the national state and international/national capital. Underlying the nationalistic idea is an attribution of 'all the evils' in the country to foreigners, so much so that there were even some members of the Bergama community who suggested that the mine should be operated by a Turkish company (*Zaman daily*, 17/7/1997) as if this would ensure that there would be no harm to people or nature. This sort of nationalistic perspective is not particular to Turkey. There is no doubt that multinational corporations tend to relocate their noxious activities in underdeveloped countries, as is well documented in many works (Asente-Duah and Nagy, 1998: 78-80; French, 2000: 71-86; Karliner, 1997: 148-59; Low and Yeats, 1992: 93-102; and Lucas, Wheeler and Hettige, 1992: 67-80). To resist the displacement of pollution as such is of primary importance in protecting the environment and public health. The bias or prejudice against multinationals might help raise public environmental concern about their polluting activities in particular locales.

However, the prejudicial advocacy of the national bourgeoisie might, in turn, obscure the fact that it is not the nationality of capital but capitalist accumulation (a process of configuration of various elements including domestic and foreign capital and the state) that is likely to degrade the environment. The view that national companies should have a privileged position vis-à-vis international capital since they contribute to national independence and use natural resources in an environmentally friendly way is problematic in the face of evidence showing that the Turkish bourgeoisie supported international arbitration. Besides, those companies which polluted, for instance, Turkey's rivers and seas for years (Somersan, 1993: 143-68) were national companies. The national Turkish state itself, upholding national independence and sovereignty, has been producing silver for years by using 600 tons of cyanide a year at the state-owned mining plant in a Turkish village (Dulkadir-Tavşanlı). There it was found (Özdemir, 1993) that there have been many unusual deaths from very high rates of lung and skin cancer, and deaths without 'specific reason'. More importantly, the nationalistic-statist point of view that dominated the argument against the introduction of international arbitration into Turkish legislation is also problematic in that they see the state as an apparatus in itself immune from mediation with domestic capital, but under the threat of the 'globalisation of capital'. Here, the state is seen as a 'victim' of globalisation as well as a 'saviour' if it retains and defends sovereignty, territorial integrity and independence. However, the state is neither a victim nor a saviour but has a symbiotic relationship with domestic and international capital and a part in the process of the internationalisation of capital.

Without recourse to Marxist theories of the state, the role of the state as a 'partner, catalyst, and facilitator' in capitalist accumulation processes can yet be shown by drawing on the analysis of the *World Development Report 1997* published by the World Bank (1997), a long-term supporter of a neoliberal political project.

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[128] Deveci, 2000: 78-9; KİGEM, 1997: 14-24; Minibaş, 2001: 64; Soysal and Ertuğrul, 2000: 38; *Cumhuriyet daily*, 24/7/1999, 25/7/1999, 16/8/1999, 17/11/1999.

Criticising the view that pits state against capital, the Report suggest that 'the state is essential for putting in place the appropriate institutional foundations for markets' (World Bank, 1997: 4) by ensuring social order, establishing the foundations of law, providing the conditions for a well-working judicial system, protecting property rights, maintaining a business environment including macroeconomic and political stability, investing in physical infrastructure, building industrial policy designed to foster markets, and developing domestic policies and institutions for more openness to the world economy and more responsiveness to international economic integration. Suffice it to say that far from being a victim or saviour the state, to use the Marxist terminology, plays an essential role in the process of the reproduction of capitalist relations of production by depicting its conditions as constituents of the productive relations themselves (Wood, 1981: 79). The forms of particular judicial systems such as arbitration are constituents as well as institutions of internationally-organised economic relations.

The fact that international arbitration takes place outside national territory and outside the national judicial system does not necessarily mark the fading away of sovereignty. This is because, first, there is the existence of an enormously elaborate body of national and international law that secures the exclusive territory and sovereignty of the national state within and outside its jurisdiction. Second, it is the sovereign state itself that accepts the competence of the international private arbitral tribunal or produces and legitimises a nationally acting arbitration system outside the public justice regime but inside the national territory. Third, specific international institutions as sets of rules (e.g., the Ozone Treaty), economic processes (e.g., physical infrastructure, tax regime, managing labour markets and controlling labour resistance) and environmental processes (e.g., countries usually meet their water demands with their own water resources available within their national borders (Fischer-Kowalski and Haberl, 1997)), all these, though having important international implications and articulations, materialise in national territories as geographical and institutional arrangements. It is because of this national level of materialisation that sovereign national states have become deeply involved in the implementation of international economic and environmental rules by making changes in the legal system (e.g., arbitration) as well as in the economic structure (e.g., liberalisation, privatisation, re-regulation of the economy and so on). Then, the more significant question is not whether or not international arbitration marks the end of sovereignty but in what politico-economic structure sovereignty functions[129]. The role of the state in the formation, expansion and review of the legal forms that bypass national legal systems or/and privatise the justice system is to bring about the intersection of national law and the present requirements of capital. The internationalisation of capital imposes tension on the institution of sovereignty towards serving capitalist interests so as to mobilise capital further. The further mobilisation of capital requires the creation of new judicial methods such as arbitration which secures the capital's rights. This process is pointing to a new content for sovereignty as an institution: it is assuming a new form as having turned into a complete means to serve private ends, i.e., the interests of national and international capital. We shall elaborate on this in the third point below while discussing how private ends are realised in the new judicial regimes that consolidate the position of some groups and classes in relation to those of others.

The second point to be addressed about international arbitration concerns the role of the international domain. It is true, to some extent, that international arbitration is at odds with national independence in the sense that it brings a dual system of judicial law into being, so to speak, a capitulation that allows investors to sue the state at international judicial panels outside the realm of the national judicial system. What is missing in this interpretation, however, is that the international cannot be conceived of as being a 'good' or a 'bad' thing in itself in terms of national independence and sovereignty. One might, for instance, remember the contribution of international tribunals to advances in 'national' human rights law. Similarly, the international domain strengthens national sovereignty regarding environmental issues in many cases, such as the extension of territorial waters (exclusive economic zone) as a geographical expansion of the nation-state (Litfin, 1993: 105) and the UNCED Statement of Forest Principles that reinforces states' sovereign rights to forests (Elliott, 1998: 87). However, in all these cases international practice also restricts, to a lesser degree, the nation's activities in order to establish some protective arrangements in favour of human rights, exclusive economic zones and forests. Beyond any judgements of 'good' or 'bad', the international domain has, then, two facets with 'enabling' and 'regulatory' functions, as explored by Levy and Egan (1998: 338). The enabling function provides the infrastructure of the

[129] For instance, Christopher Clapham (1999) draws attention to the function of sovereignty as a device to serve ruling elites for the entrenchment of their control over the rest of the population in the formerly colonial states in Africa, Asia, the Pacific and the Caribbean.

world trade, finance and investment regime with a trend towards liberalisation, by means of international rules and regimes that further mobilise capital in its operations world-wide. The regulatory function tends to establish internationally uniform environmental principles and regulations that, by definition, lead to establish environmentally sound obligations on the state and the industry. With regard to the regulatory function, international institutions have undoubtedly contributed to the development of Turkish environmental regulations and policies. Turkey has not only ratified various international environmental conventions, treaties, agreements, declarations and protocols but also, to some extent, modified its national environmental policies accordingly (Keleş and Hamamcı, 1993; OECD, 1999; Pazarcı, 1987; Türk—AT Mevzuat Uyumu Sürekli Özel İhtisas Komisyonu, 1997). It was, for instance, just after the Stockholm Conference that Turkey, as a signatory of the Stockholm Declaration, adopted an objective of environmental protection in the national development plan (DPT, 1973: 120-1) as binding for the public sector and stimulating for the private sector. And similarly, sustainable development came to the fore in Turkish environmental policy priorities drawn up in conjunction with the plan (DPT, 1989: 312-13) just after the Brundtland Report.

On the other side of the coin, the enabling function of international institutions has contributed to the further liberalisation of the Turkish economy (see Kazgan, 1994: 183-259), and in turn to the further destruction of the environment and the further exploitation of natural resources, as in the case of international arbitration. While the constitutional amendments bill was under scrutiny in the sub-commissions of Parliament, the Trabzon Administrative Court made a decision that a hydroelectric plant that was going to be built by a Turkish company in a protected natural park was incompatible with the Environmental Law. After the court's decision, the company entered into partnership with two foreign companies, aiming for international arbitration review, so as to carry on the environmentally destructive project (*Cumhuriyet daily*, 21/7/1999). Here we have to emphasise that, if there is anything to blame for economic liberalisation, it is not merely the international terrain but rather the dialectic between the national and the international. One could remark that just as it is accurate to suggest that the transition of Turkey from an inward economy to a more liberal economy with the adoption of the rules of the capitalist world economy has essentially been the result of the changes taking place since the mid-1980s in the domestic politico-economic structure (Öniş, 1996), so it is also accurate to argue that there has been a push from international institutions including the IMF, the World Bank, GATT and MAI-like international regulations towards the liberalisation of the Turkish economy.

The third point regarding international arbitration raises the problem of recourse to judicial review within and outside national tribunals' jurisdiction. Litigation is a common means used by environmental and community movements[130] all over the world from the US (Edwards, 1995: 46), Ecuador (Gedicks, 1995: 101-2) to India (Birnie and Boyle, 1992: 195), and to Turkey (Demircioğlu et al., 1986; Kaboğlu, 1996: 115-33; Turgut, 1998: 291-99). It may be a lawsuit for compensation for actual environmental damage and for detrimental effects on human health as in the case of the suit filed by 981 workers living in Costa Rica against Shell and Dow Chemical in Texas courts in the US (the workers won a US$ 20 million compensation) (Greer and Bruno, 1996: 56). Or it may be a legal action against decisions and actions detrimental to nature and humans before the imminent harm takes place, as in the Bergama case. What is crucial in terms of environmental protection and the right to life in the latter is the enhanced participation of individuals and groups in environmental decision-making via judicial review. Litigation makes it possible for individuals and groups to make use of national judicial systems and judicial remedies. To seek review of governmental actions and acts secures for citizens rights of access to administrative and judicial remedies and to participation in decision-making processes as well as serving as a means of making public bodies accountable for their actions under law (Birnie and Boyle, 1992: 194-96).

In this context, the constitutional amendments and new legislation in Turkey abolished the right to recourse to administrative judicial review of environmentally unfriendly investments allowed by the state. To put it simply, according to the new law, if arbitration is provided for a possible dispute, environmentally concerned citizens can no longer bring a case to administrative courts and the Council of State which have made landmark decisions devoted to environmental protection, such as the Aliaga decision (Anadol, 1991) and the Bergama decision. While access to judicial remedies has been limited for environmentally concerned people, corporations are endowed with the right to seek judicial review at arbitration tribunals to

[130] Corporations, too, take civil court actions against environmentally concerned citizens who oppose corporations' plans and operations. These lawsuits are called 'strategic lawsuits against public participation'. For some examples, see Beder, 1997: 63-74.

which local communities and environmental groups have no access. In the name of capital flows, this is a violation of not only the right to recourse to judicial review, but also the universal and Turkish constitutional principle (Article 10), 'equality before the law', which reads: 'all are equal before the law… No privilege shall be granted to any individual, family, group or class.' The great danger embedded in the jurisdictional shift from the realm of public law providing access for all, to the realm of private arbitration proceedings providing access for only corporations, lies within the fact that arbitration in its present form serves to consolidate the domination of the capitalist class over other classes, groups and communities. The corollary of this would be further exploitation and destruction of the environment.

IV

This article analyses in the Turkish case the effects of the international arbitration method on the institution of sovereignty on the one hand, and on the environment on the other. The discussion about the modifications in the institution of sovereignty to meet the requirements of capital more overtly was made in the paper particularly in terms of the creation and expansion of new judicial practices in Turkey, namely the arbitration method. The analysis has hopefully shown that international arbitration does not mark the end of sovereignty but the consolidation of the power of the capitalist classes. The institution of sovereignty is not vanishing or fading away but gaining a new content to adapt to challenges arising out of the internationalisation of capital which brings about the need for innovations in judicial processes. Arbitration is the kind of an innovation which allows multinational corporations to escape from judicial jurisdiction of sovereign states and submit to private arbitral tribunals. As it is established to protect the rights of capital not the right to the environment, arbitration has adverse consequences for environmental protection. As was discussed above, the environment is at stake not because of the fading away of sovereignty as a result of destructive effects of international processes and dynamics, but because of the new content of it within which sovereign rights are more appropriately used to protect investments and investors' rights no matter how detrimental they may be to the environment.

As far as the Turkish case is concerned, sovereignty is becoming a complete means to serve capitalist ends and thereby the class pertinence of the institution is becoming more transparent. Thus seen, this also has implications for state legitimacy. The fact that the right to recourse to judicial review within and outside national jurisdiction is being limited for some groups and classes but particular dispute resolution arrangements are formed for some other groups and classes is likely to undermine the discourse of abstract, formal, general and non-discriminative law and judicial practices. This discourse is a pillar of state legitimacy as an important factor in organising the consent of the population and at the same time this law is a constituent of 'national unity' as it 'institutes individuals as juridico-political subjects-persons by representing their unity in the people-nation' (Poulantzas, 1980: 86-7). When supposedly abstract, formal, general and non-discriminative law and judicial practices discriminate against a group of people and in favour of another group of people (i.e., all are not equal before the law), state legitimacy and the political unity of the social formation are to be called into question. As a result, the political authority and the social recognition of state legitimacy, in turn, sovereign claims of the state are likely to be questioned by the dominated classes and groups. It remains to be seen whether the problem of sovereignty will turn into that of legitimacy.

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