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Author: Ms. Merve ERDEM
Türkiye

IS NON-EXISTENCE OF A TREATY EQUAL TO INEFFECTIVE TREATY? AN EXAMINATION ON
THE APPLICATION OF THE MOON AGREEMENT

Abstract

As a matter of the *pacta sunt servanda* principle, every treaty in force is binding upon the the parties to it.” This means that, third states are not bound by treaty provisions unless its provisions have transformed into customary law. Hence *erga omnes* or *jus cogens* obligations of any treaty have also binding effect on third parties. In todays international community, even declarations, non-binding decisions of the international institutions or resolutions etc. are considered by international actors as legal instruments. So international community is familiar with the concept that some treaty provisions or texts could have binding effect or consideration effect on the third parties. On the other hand, the application of the treaty could not totally bound on the consent of the creator of the law, but it is in the hand of practitioner and application the law could be shaped via interpretation of the practitioner. Consequently, law could be made care of interpretation.

The settled legal regime of space and space activities is transformed into customary international law and today no international subject could deny the bindingness of 1967 Outer Space Treaty (OST) on third states. However, what about binding effect of the 1979 Moon Agreement (MA) which is not considered as customary law? This study, specifically aims on the bindingness and effectiveness of the MA by reason of latest developments on the mining activities on the Moon.

It is observed that, legal analysis on the mining activities of private entities pretend as if the MA does not exist. Nevertheless, the MA has solved property rights and commercial exploitation of the Moon by Art. 11 providing common heritage of mankind principle. I believe that there must be a difference between the non-existence of a treaty on a certain subject and ineffectiveness of a treaty in force. Thus there is no reason to not give the MA a consideration effect by international actors. I think this could be possible normatively by the way of interpretation of the OST Art I. through general rules on the treaty interpretation of the 1969 Vienna Convention on the Law of the Treaties. Provision of Art. I of the OST regarding space activities shall be carried out for the benefit and in the interest of all countries is indistinct, so the Art 11. of the MA as specific provision could be considered as a interpretation instrument for the Art. I of the OST.