

## Regulating Business Abroad

### Introduction

On March 6<sup>th</sup> a new law came into force in Turkey which criminalises getting pregnant by artificial insemination abroad. Before the passing of the law, artificial insemination was already banned inside Turkey, so the new law extended the ban on a territorial basis. Some have suggested that there are hidden reasons for this legislation, despite the official explanation of Irfan Sencan, director of the health services department of the Ministry of Health, which states that the legislation aims “to protect the descent, to ensure that the newborn's mother and father are known...”<sup>1</sup> According to Sencan, the legislation is in accord with article 231 of the Turkish Criminal Code which makes it a crime to conceal paternity. However, it seems that the objective of the Criminal Code is the protection of a child’s inheritance rights, and women’s rights activist Pinar Ilkcaracan finds that the new amendment is not consistent with this philosophy.<sup>2</sup>

It is possible that the true reason is the government’s opposition of artificial insemination for single women and gay couples. Another possible reason might be of religious character, despite the fact that Turkey is a secular country. Some might argue that there is a racial purity issue involved, which is something that might be deducted from Irfan Sencan’s statement; however this seems unlikely due to the fact that before this law there was already a ban on sperm donation in Turkey.<sup>3</sup>

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<sup>1</sup> As cited in “Turkey: Ban on Travelling Abroad for Artificial Insemination” (16 March 2010) online: ANSAMED <http://www.ansamed.info/en/news/ME03.XAM10272.html>

<sup>2</sup> Jonathan Head, “Turkey Bans Trips Abroad for Artificial Insemination” (15 March 2010) online: BBC World News <http://news.bbc.co.uk/2/hi/europe/8568733.stm>

<sup>3</sup> *Supra* note 2.

The factual presentation above aims to give an overall idea about the situation. However, for the purposes of this paper a hypothetical fact will be added to the reality, assuming that Turkey has made it a criminal offence for foreign medical clinics to perform artificial insemination for Turkish citizens. This hypothetical case will be compared to other cases (namely, that of the US banning the manufacturing of cars without safety belts by American companies abroad) in view of providing a discussion from the point of view of government control of business.

### **Part 1. The US Case**

In order to better shed light on some interesting points in the American case, it is worth discussing it by drawing parallels with the Google controversy in China, which came to its climax recently.

Google was being subjected to Chinese regulations on internet censorship. After operating in the country for quite some years the company finally decided to stop censoring its search engine, thus, basically, pulling out of China.<sup>4</sup> This decision could have been politically motivated. However it appears to have been a business decision about not adhering to regulations that the company found to be wrong. Google decided to respect the standards set in its home country even at the price of opposing the ones in the country it was operating in: China. As opposed to this, in the case at hand, it seems that the American car manufacturers did not want to respect their home regulations abroad, so the US government made them compulsory.

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<sup>4</sup>Tania Branigan, "Google Raises Stakes in China Censorship Row" *The Guardian* (22 March 2010) online: Guardian Unlimited <http://www.guardian.co.uk/technology/2010/mar/22/google-china-shut-down-censorships>

If in the Google case, the Chinese regulation could be construed as being protectionist, because of the fact that access and operations in the Chinese market are indirectly being made more difficult for foreign companies (since it is easier for local companies to understand and implement the required self-censorship), then in the US case the situation is the opposite, with a reverse effect. The involvement of the US government will make access and operation in the foreign market less favourable for US companies, because they will be subjected to more stringent rules, as opposed to those in force in the country allowing manufacture of cars without safety belts. If they are not subjected to this more stringent home regulation then they will have easier access and more profitable business in the less regulated market. Therefore, strictly from a business point of view, in comparison with local companies US car manufacturers will have disadvantages of a more regulated business.

## **Part 2. The Turkish Case**

By enacting such legislation Turkey is indirectly regulating the business activities of a foreign company by not allowing a clinic to provide service to its nationals.<sup>5</sup> The territoriality principle and the nationality principle are generally recognised bases of jurisdictions, which means that a country has jurisdiction over activities carried out on its territory and over its nationals abroad.<sup>6</sup> In the American case the US is regulating the business activities of US companies, albeit abroad, whereas in the Turkish case Turkey is trying to regulate the activities of foreign companies abroad. This does not correspond to any of the jurisdiction bases mentioned above. What is more

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<sup>5</sup> In order not to divert the discussion towards criminal law principles, the criminal nature of the Turkish legislation will be disregarded to the extent that it doesn't have a business dimension.

<sup>6</sup> Isaac N.P. Stokes, "Limits Imposed by International Law on Regulation of Extraterritorial Commercial Activity" (September 1970) 64:4 American Journal of International Law 135 at 135.

is the difference of reasons (motivation) of the regulation. In the American case, the US government is concerned with the safety of foreign consumers, because it is their safety that is compromised by car manufacturers not installing safety belts in cars they produce. This is, of course the obvious and most probable reason for the regulation, but it is probably not the only one. It is possible that the US is also concerned with the reputation of the American companies and/or that of the US legislation. Something worth mentioning is that when drafting policies and regulations states will often take into consideration the concerns and opinion of the sector they are regulating. Thus, it is highly possible that the US government takes into consideration the demands of the car manufacturers before enacting such regulations. In this context the US regulation does seem to be acceptable, if only for the obvious concerns and reasons behind it.

As opposed to the abovementioned, in Turkey there hasn't even been a public debate about the criminalisation of going abroad and getting pregnant.<sup>7</sup> Turkey's reasons of regulation are not very clear. They seem, however, to be self-centred. The immediate reason seems to be the determination to eliminate possibilities of Turkish women getting artificial insemination. In this case then it is possible to establish that the same reasons behind the ban on artificial insemination inside of Turkey must be behind the hypothetical ban on foreign clinics. These reasons, as mentioned in the introduction to this paper, are not very apparent. But perhaps the only way to validate such regulation would be to establish that Turkey was trying to defend the human rights of its citizens. But this seems to be unrealistic, given the fact that if there were a human right of the child concerned in artificial insemination then the practice would've been illegal everywhere. It is rather the opposite; the case arguably involves a human right issue if one can prove that

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<sup>7</sup> "Turkey Bans Trips Abroad for Artificial Insemination" (22 March 2010) online: Public Radio International <http://www.pri.org/world/turkey-bans-trips-abroad-for-artificial-insemination1918.html>

artificial insemination, as an alternative to natural childbearing were part of the “right to found a family”<sup>8</sup>. If so, then it can be argued that the companies in question must not respect the Turkish regulation because it violates human rights. The opposite logic could be applied for the US case if having a safety belt in the car could be linked to a human right. American companies would have to respect this right irrespective of what their domestic or the foreign regulations said. This would involve analysis of Guidelines, like the Guidelines for Multinational Enterprise (1976) of the OECD and other international instruments.

Another important point which demonstrates the difference between the two cases is the enforcement of the respective regulations. The purposes of a law can only be achieved if there are adequate enforcement mechanisms. If the US companies in foreign countries don't respect the US requirements then there will be legal consequences, enforced in the US or in the foreign country if there is collaboration between the two countries. Also, there can always be economic consequence, such as cutting any existing subsidies etc. One important factor is that the company has its headquarters in the US, so that is a major element distinguishing this case from the Turkish one, where there is no link whatsoever between the clinic and Turkey. As a consequence, even if Turkey criminalises or regulates in another manner the activities of a foreign clinic outside of its territory then it has no mechanism of enforcing its regulation. The second country might and probably will collaborate with the US in enforcing its regulation, because it is the safety of its citizens that is in question, but it is hard to imagine any kind of collaboration whatsoever with Turkey, if only simply because the second country does not have any interest in the matter, if not the opposite: the protection of its national companies against

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<sup>8</sup> *European Convention on Human Rights* at article 12 and of *Covenant of Civil and Political Rights* at article 23.2.

such a regulation which deprives them of business benefits to be received from rendering services to Turkish citizens.

### **Part 3. From Company Morals to State Regulation**

What if neither the US nor Turkey had enacted the legislations in question? Would the companies and clinics in question have a responsibility to act in the same manner those regulations require them to? This part will discuss the notion of Corporate Social Responsibility (CSR) in an attempt to demonstrate the weak or strong foundations of the US and Turkish regulations.

In 2007 the Food and Drug Administration (FDA) issued a warning to Americans not to buy Jermuk, a type of mineral water bottled in Armenia. The reason was that according to FDA tests it contained 50-60 times more arsenic than their standard of 10 microgram per litre.<sup>9</sup> The official Armenian response was that in Armenia the standard is 700 microgram per litre, and also that arsenic is naturally found in Jermuk water. After the USA, Canada and Hong Kong followed with banning the water.<sup>10</sup> Of course, there can be no doubt that the Armenian companies were to respect the US regulations.

The above case (although concerning importation) is mentioned because it demonstrates how we perceive differences of standards. When the standard in the second country is higher than that in

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<sup>9</sup> FDA New Release P07-39 (7 May 2007) online: US Food and Drug Administration <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2007/ucm108863.htm>

<sup>10</sup> Sara Khojoyan, "Jermuk Banned in US: Armenian Producers Say Difference in Standards is to Blame" (9 March 2007) online: ArmeniaNow <http://www.armenianow.com/hy/node/7133>

the original country, it seems only logical that a company should respect those standards. But if, for the US case, we consider that a car manufacturer has to respect its home standards in a second country in the name of customer safety, shouldn't the Jermuk producer, by the same token, lessen the arsenic levels in the water it bottles and sells in Armenia? This is a dilemma that can be understood if two aspects of the question are separated:

1. State regulations
2. The idea of conducting ethical business, in other words CSR

In the first case the company will have to respect all regulations it is subjected to. In the absence of the US and Turkish regulations in question, both the car manufacturer and the medical clinic will be doing so by respecting the regulations of the countries they operate in. This aspect of the issue stops here. There wouldn't be anything to condemn the companies for at this level. This leaves only the idea of CSR. At this level, there can be three logical answers:

1. If the home standards are less stringent than those of the second country, a company does not have to respect the home standards in the second country
2. If the home standards are stricter than those of the second country, a company must respect the former even in the second country
3. If the home standards are less stringent than those of the second country, a company has to respect the second country's standards in its home country.

If we assume that scientific proof makes the more stringent national regulation better for safety reasons, then the company will be considered immoral not to respect its home standards abroad in the 2<sup>nd</sup> case. The third case would follow the exact same logic.<sup>11</sup> It is very much similar to the hypothesis that a company would not put substance A in its products if it knew this was harmful

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<sup>11</sup> It is not of interest to us whether and why a country would have loose regulation even if there was scientific proof as to the harm it may cause to consumers.

to consumer health, even in absence of any regulation about it. If there was no scientific proof, as in the Google case, then it would have all been a matter of opinion, as is the case with different people judging Google's decision differently. When the question is not that of Google but that of car manufacturers, then the scientific evidence plays a big role, changing the balance of the issue from simply moral to safety.

Something that demonstrates the difference between the US and the Turkish cases is that in the US case, if there were no regulation, then it would have been easy to argue that, as established above (case no.2), car manufacturers should have CSR towards the customers and that they should respect their home regulation in the foreign country. In other words: they should not produce such unsafe cars. This gives solid ground to favour regulation by the US government arguing that customers' safety shouldn't be left to the companies' discretion. As opposed to this, the Turkish case doesn't fall within the above classification at all, simply because there is no link between Turkey and the foreign company abroad. This means that in the Turkish case a clinic cannot be accused of any irresponsible practice because it is neither violating any regulation nor is engaged in immoral practices, given the fact that the motivation behind the Turkish legislation seems to be strictly national. So is there really a wrongful conduct that needs to be banned? Where in the absence of the US regulation the American companies would still be criticised for their unsafe products, the clinics in question would not be put under scrutiny in the absence of the Turkish legislation. It is quite the opposite, if a clinic refuses to perform artificial insemination, the customer might sue them for violation of human rights and could claim that refusal of artificial insemination, which is a treatment for infertility, is refusal to medical treatment. If the company was Turkish or at least in Turkey then it would have had the defence

of claiming that it is only respecting domestic regulation. In this case any potential claim of human rights violations would have been directed against the Turkish government.

This is a big problem that could rise from the Turkish regulation.<sup>12</sup>

### **Conclusion: Regulating Business Abroad and Harmonisation**

The most evident differences between the Turkish and American cases were demonstrated above. Despite of the business difficulties it might create for American car manufacturers abroad, the US legislation seems to be reasonable as to its motivation. As opposed to this, the Turkish legislation seems absurd in that it attempts to regulate the activities of foreign companies abroad. The cases are also different as to their enforcement: the American one is enforceable (at least theoretically) but the Turkish one does not seem to be so. The only similarity between the two cases is that both states are trying to regulate businesses abroad, so they both evolve around the notions of state sovereignty and territorial jurisdiction. This calls for a brief mention of international instruments that can be applied in regulating business abroad.

The United Nations Guidelines on Consumer Protection, which was adopted in 1985.<sup>13</sup> There are a number of codes in specific fields, e.g. the World Health Organisation Marketing Code of Pharmaceuticals, the Food and Agriculture Organisation Code of Conduct on the Distribution and Use of Pesticides, which aim to control international trade.<sup>14</sup> However, these regulations are

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<sup>12</sup> In reality, human rights activists are already concerned with Turkey's ban on trips abroad for artificial insemination, which might even affect Turkey's membership to the EU. See *Supra* note 7.

<sup>13</sup> Hans-W. Micklitz, "International Regulation on Health, Safety, and the Environment – Trends and Challenges" (2000) 23 *Journal of Consumer Policy* 3 at 4.

<sup>14</sup> *Supra* note 13 at 6.

not the product of one single state and they regulate export, whereas in the present case the companies manufacture goods (or render services) in a third country. It is worth mentioning the Code of Conduct on Transnational Corporations, which, unfortunately has not entered into force. There are also the Guidelines for Multinational Enterprise (1976) of the Organization for Economic Cooperation and Development which, although soft law, have been widely used and require multinational companies to respect the human rights of affected parties.<sup>15</sup>

It seems that for business purposes, differences between national legislations should best be abolished. It is especially true for the American case (the Turkish case is more controversial and not as simple to assess, therefore it needs a more profound analysis). If, for instance, World Trade Organisation member countries were able to harmonise their customer protection rules, including product safety rules, then production of cars without safety belts would be impossible (assuming, that installation of safety belts would be classified as a product safety requirement). The question is: is such harmonisation possible? The GATT Agreement on Technical Barriers to Trade (TBT) aims to make countries take into consideration international standards when drafting national legislations. This means that TBT tries to enforce otherwise non-binding international rules through national laws.<sup>16</sup> This can be seen as a mechanism for harmonisation. However, this model will only have effect if countries take action (e.g. enact or amend their standards).

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<sup>15</sup> Olivier de Shutter *Transnational Corporations and Human Rights: an Introduction* (Global Law Working Paper 01/05, Symposium – “Transnational Corporations and Human Rights”, NYU School of Law)

<sup>16</sup> *Supra* note 13 at 16.

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