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Emerging Market Economies and International Investment Law: Turkey-Africa Bilateral Investment Treaties

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Emerging Market Economies and International Investment Law: Turkey–Africa Bilateral Investment Treaties

Uche Ewelukwa Ofodile*

ABSTRACT

This Article offers a critical and penetrating insight into the bilateral investment treaties (BITs) between Turkey and countries in Africa. Since 2003, Turkey has concluded BITs with twenty-eight countries in Africa. This Article seeks answers to some very important questions. In the BITs between Turkey and countries in Africa, is Turkey merely conforming to the norms and standards established by Western countries, or is Turkey changing these norms in fundamental ways? Compared to BITs between Western nations and countries in Africa, are Turkey–Africa BITs more oriented towards sustainable development and, if so, in what respects? In what ways are emerging market economies such as Turkey transforming the global economic landscape and international economic law?

This Article fills an important gap in the literature on international investment law and the role of emerging market economies in the global economic system. Thus, although focused on Turkey–Africa investment relations, this Article sheds important light on three broader issues. First, this Article offers a glimpse into the way emerging market economies are using and sometimes transforming international economic law. Second, this Article takes on one of the most important issues in international economic law today—the crisis in the international investment law—and examines how different stakeholders are grappling with this crisis. Third, this Article sheds important light on the dynamics of South–South economic relations and how countries in Africa are moving beyond traditional (Western) partners and are engaging or attempting

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to engage with new partners in Asia, the Middle East, and Latin America. Although emerging market economies and emerging market multinationals are playing an incredibly significant role in the global economy and are changing global economic governance in significant ways, their involvement in the making and unmaking of international economic law is frequently ignored or misunderstood. This Article addresses this by offering critical insight into how emerging market economies are using, adapting, and sometimes abandoning established international economic norms.

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I. INTRODUCTION

Slowly, steadily, and silently, the Republic of Turkey (Turkey) is concluding important and far-reaching BITs with countries in Africa.¹ To date, Turkey has concluded BITs with about twenty-eight different countries in Africa.² While much attention has focused on China–Africa economic relations,³ economic cooperation arrangements between African states and other emerging market economies have largely flown under the radar. Relations between Turkey and countries in Africa have been deepening and widening since 1998 when Ankara adopted an Africa Action Plan⁴ and stepped up in 2005 when Turkey launched its “Opening to Africa” policy⁵ and declared the year the “Year of Africa.”⁶ The result is that, although Turkey is still relatively new in African politics, trade, and aid circles, “it has already expanded its area of influence in the continent by linking its soft power tools of transportation links, trade, and education closely

1. All of the bilateral investment treaties involving Turkey that are publicly available can be found on the ‘Investment Policy Hub’ developed by the United Nations Conference on Trade and Development (UNCTAD). Altogether, Turkey has concluded 109 BITs of which seventy-seven are in force. *International Investment Agreements Navigator—Turkey*, U.N. CONFERENCE ON TRADE & DEV., <https://investmentpolicy.unctad.org/international-investment-agreements/countries/214/turkey> (last visited Oct. 8, 2019) [<https://perma.cc/D8V2-YARW>] (archived Aug. 11, 2019) [hereinafter Investment Policy Hub – Turkey].

2. *Id.*

3. See Uche E. Ofodile, *China-Africa Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT’L L. 131, 131 (2013); see also Uche E. Ofodile, *Trade, Empires and Subjects: China-Africa Trade: A New Fair Trade Arrangement or The Third Scramble For Africa?*, 41 VAND. J. TRANSNAT’L L. 505, 505 (2008).

4. *Turkey-Africa Relations*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF TURK., <http://www.mfa.gov.tr/turkey-africa-relations.en.mfa> (last visited Sept. 8, 2019) [<https://perma.cc/83EJ-WWQK>] (archived Aug. 11, 2019). The deepening relationship between Turkey and countries in Africa has been noted in some quarters. See also Patrick Seale, *The Rise and Rise of Turkey*, N.Y. TIMES, Nov. 5, 2009, <https://www.nytimes.com/2009/11/05/opinion/05iht-edseale.html> [<https://perma.cc/LU8H-SFSH>] (archived Aug. 11, 2019); *Ottoman Dreaming*, ECONOMIST, Mar. 27, 2010, <https://www.economist.com/europe/2010/03/25/ottoman-dreaming> [<https://perma.cc/EM5Z-B83W>] (archived Aug. 11, 2019); *Turkish Foreign Policy, The Great Mediator*, ECONOMIST, Aug. 21, 2010, <https://www.economist.com/europe/2010/08/19/the-great-mediator> [<https://perma.cc/NVN2-KUDN>] (archived Aug. 11, 2019); *Turkish economy gets Mobius nod of approval*, BUS. REP., July 30, 2010, <https://www.iol.co.za/business-report/economy/turkish-economy-gets-mobius-nod-of-approval-691144> [<https://perma.cc/HY53-PJC7>] (archived Aug. 11, 2019); Owen Matthews, *Ankara in the Middle: Once an unquestioning U.S. ally, and at odds with most of its neighbors, Turkey is now forging a new foreign policy, with itself at the very center*, 156 NEWSWEEK INT’L, Aug. 2, 2010.

5. Seale, *supra* note 4.

6. *Ottoman Dreaming*, *supra* note 4.

with its foreign policy.”⁷ Once limited to North Africa, Ankara’s interest in Africa is now extending to all parts of the continent.⁸ From every indication, African countries, individually and collectively, are responding positively to Ankara’s overtures.⁹ The African Union (AU), a continental union consisting of fifty-five countries,¹⁰ granted Turkey “Observer Status” in 2005.¹¹ In 2008, the AU declared Turkey a “Strategic Partner” of the African Continent.¹² In January 2013, Turkey became the twenty-sixth nonregional member of the African Development Bank and the twenty-sixth State Participant to the African Development Fund.¹³ Since 2003, Turkey has concluded BITs with more than half of the countries in Africa.¹⁴ Turkey has concluded more bilateral investment treaties with countries in Africa than partners, such as the United States (nine BITs with countries in Africa)¹⁵ and Japan (three BITs with countries in Africa).¹⁶

7. Alpaslan Özerdem, *How Turkey is emerging as a development partner in Africa*, GUARDIAN, Apr. 10, 2013, <https://www.theguardian.com/global-development-professionals-network/2013/apr/10/turkey-development-partner-africa> [https://perma.cc/JZ5F-3JMF] (archived Aug. 11, 2019).

8. See generally Mehmet Ozkan, *Turkey discovers Africa: implications and prospects*, SETA FOUND. FOR POL., ECON. & SOC. RES. (2008); DAVID SHINN, *TURKEY’S ENGAGEMENT IN SUB-SAHARAN AFRICA: SHIFTING ALLIANCES AND STRATEGIC DIVERSIFICATION* (Chatham House 2015).

9. The author’s assessment is based on deepening economic, diplomatic and cultural ties between Turkey and countries in Africa. See *infra* Part I.

10. See AFRICAN UNION, <https://au.int/> (last visited Sept. 8, 2019) [https://perma.cc/M3CA-EATD] (archived Aug. 11, 2019); *Mission & Strategy*, AFRICAN DEV. BANK GROUP, <https://www.afdb.org/en/about/mission-strategy> (last visited Sept. 8, 2019) [https://perma.cc/2MV8-FQYK] (archived Aug. 11, 2019).

11. *Turkey and The African Union*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF TURK., <http://www.mfa.gov.tr/turkey-and-the-african-union.en.mfa> (last visited Sept. 8, 2019) [https://perma.cc/E3DV-SRTM] (archived Aug. 11, 2019).

12. The framework of Africa’s strategic partnership takes four distinct forms: (i) continent to continent partnerships; (ii) continent to country partnerships such as Africa-India, Africa-Turkey, Africa-China, and Africa-Japan; (iii) partnerships in demand as new states or regions request additional partnerships; and (iv) partnership with other institutions such as the Organisation of American States (OAS), the Organisation of Islamic Conference (OIC) the Commonwealth and La Francophonie. *Africa’s Strategic Partnership with Other Parts of the World*, AFRICAN UNION, <https://au.int/en/partnerships/intro> (last visited Sept. 8, 2019) [https://perma.cc/V835-BB9A] (archived Aug. 11, 2019).

13. With this admission, Turkey became the following the country’s admission as the 26th State Participant in the African Development Fund and the 78th Member State of the African Development Bank. Felix Njoku, *The Republic of Turkey Joins African Development Bank Group*, AFRICAN DEV. BANK GROUP (Sept. 12, 2013), <https://www.afdb.org/en/news-and-events/the-republic-of-turkey-joins-african-development-bank-group-12660/> [https://perma.cc/53CL-E6Q3] (archived Aug. 11, 2019).

14. Investment Policy Hub – Turkey, *supra* note 1.

15. *International Investment Agreements Navigator—United States of America*, U.N. CONFERENCE ON TRADE & DEV., <https://investmentpolicy.unctad.org/international-investment-agreements/countries/223/united-states-of-america> (last visited Sept. 8, 2019) [https://perma.cc/UNR9-EJJ8] (archived Aug. 11, 2019).

Turkey–Africa economic engagements underscore the shifting, and growing role of emerging market economies in the global economy¹⁷ and in the economies of many developing countries.¹⁸ Over the last two decades, emerging market economies have slowly and steadily established themselves as key players in the world economy and as major players on the foreign direct investment (FDI) scene.¹⁹ According to the World Bank's *Global Economic Prospects 2018*, capital flows to emerging economies strengthened in 2016 and again in 2017.²⁰ In turn, emerging market economies are exporting more and more capital to developed countries, to other emerging market economies, and to developing economies.²¹ Outward FDI from emerging economies has grown even as emerging market multinationals (EMNCs) have become more dominant on the global stage.²² Since 1990, emerging market economies have launched more than seventeen thousand large companies according to McKinsey Global Institute (McKinsey).²³ In 2013, emerging market multinationals accounted for 26 percent of the Fortune 500, up from 5

16. *International Investment Agreements Navigator—Japan*, U.N. CONFERENCE ON TRADE & DEV., <https://investmentpolicy.unctad.org/international-investment-agreements/countries/105/japan> (last visited July 10, 2019) [<https://perma.cc/B6UW-5BQA>] (archived Aug. 16, 2019).

17. Joseph Joyce, *How have emerging economies transformed the global economy?*, WE FORUM (Dec. 3, 2015), <https://www.weforum.org/agenda/2015/12/how-have-emerging-economies-transformed-the-global-economy/> [<https://perma.cc/GYL9-DMAK>] (archived Aug. 11, 2019); see also Tarun Khanna & Krishna G. Palepu, *How to define emerging markets*, FORBES, May 27, 2010, <http://www.forbes.com/2010/05/27/winning-in-emerging-markets-opinionsbook-excerpts-khanna-palepu.html> [<https://perma.cc/U5SJ-LFXB>] (archived Aug. 11, 2019).

18. Khanna & Palepu, *supra* note 17.

19. Peter Gammeltoft, *Emerging multinationals: outward FDI from the BRICS countries*, 4 INT'L J. TECH. & GLOBALISATION 1, 5–22 (2008); Peter Gammeltoft & Ari Kokko, *Introduction: Outward foreign direct investment from emerging economies and national development strategies: Three regimes*, 6 INT'L J. TECH. LEARNING, INNOVATION & DEV. 1, 1–20 (2013); Andrea Goldstein, *Multinational Companies from Emerging Economies Composition, Conceptualization & Direction in the Global Economy*, 45 INDIAN J. INDUS. REL. 137, 137 (2009).

20. GLOBAL ECONOMIC PROSPECTS: THE TURNING OF THE TIDE, WORLD BANK (2018).

21. See generally Jonathan Woetzel, *Outperformers: High-Growth Emerging Economies and the Companies that Propel Them*, MCKINSEY & CO. 1 (Sept. 2018), <https://www.mckinsey.com/featured-insights/innovation-and-growth/outperformers-high-growth-emerging-economies-and-the-companies-that-propel-them> [<https://perma.cc/5URY-ULGF>] (archived Aug. 11, 2019).

22. U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2014—INVESTING IN THE SGDS: AN ACTION PLAN, U.N. Doc. UNCTAD/WIR/2014, U.N. Sales No. E.14.II.D.1 (2014); U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE, U.N. Sales No. E.15.II.D.5 (2015).

23. MCKINSEY & CO., PLAYING TO WIN: THE NEW GLOBAL COMPETITION FOR CORPORATE PROFITS 1, 41 (McKinsey Glob. Inst. 2015).

percent between 1980 and 2000.²⁴ Experts predict that by 2025, emerging market multinationals will “account for more than 45 percent of the Fortune Global 500.”²⁵

Turkey and countries in Africa are concluding BITs at a time when international investment law is in crisis and is witnessing defections²⁶ and facing multiple calls for fundamental overhaul.²⁷ While some countries are exiting the system,²⁸ many others are keen on reforming the system.²⁹ The United Nations Conference on Trade and Development (UNCTAD) has long acknowledged this crisis and

24. *Id.*

25. *Id.*

26. In May 2007, Bolivia denounced the ICSID Convention and became the first state in history to do so. See *Bolivia Submits a Notice under Article 71 of the ICSID Convention*, ICSID News Release, May 16, 2007, www.worldbank.org/icsid [<https://perma.cc/V69H-GGFB>] (archived Aug. 16, 2019). Countries like India, South Africa and Indonesia are taking steps to terminate most of their BITs. In 2017, India sent termination notices to as many as 58 countries, including EU states. See *India's Bilateral Investment Pact Under Cloud*, BUS. LINE (Jan. 15, 2018), <https://www.thehindubusinessline.com/economy/indias-bilateral-investment-pacts-under-cloud/article9625580.ece> [<https://perma.cc/2CAZ-NUGN>] (archived Aug. 11, 2019).

27. On January 21, 2014, the EU Trade Commissioner Karel De Gucht announced plans “to pause” the investor protection and ISDS portion of the Transatlantic Trade and Investment Partnership (T-TIP). In March 2014, the European Commission launched an “online” public consultation on how to improve the system. In 2015, following the public consultation, the EU Trade Commissioner concluded that the consultation showed among other things that “[t]he vast majority of [international investment agreements] do not include the kind of guarantees that the EU would like to see.” See *Improving ISDS to Prevent Abuse—Statement by EU Trade Commissioner Karel De Gucht on the Launch of a Public Consultation on Investment Protection in TTIP*, EUROPEAN COMM’N (2014); see also *Report Presented Today: Consultation on Investment Protections in EU-US Trade Talks*, EUROPEAN COMM’N (2015); *Questions and Answers: Public Online Consultation on Investor Protection in TTIP*, EUROPEAN COMM’N (2014).

28. Since 2014, Indonesia has progressively terminated each of the sixty-seven BITs it has signed since the late 1960s. See *Investment Treaty Hub – Indonesia*, U.N. CONFERENCE ON TRADE & DEV., <https://investmentpolicy.unctad.org/international-investment-agreements/countries/97/indonesia> (last visited Sept. 8, 2019) [<https://perma.cc/YY7B-JPGL>] (archived Aug. 11, 2019). Although Indonesia has terminated many of its BITs, it does not appear to be Indonesia’s intention to completely abandon the IIA regime. See Antony Crockett, *The Termination of Indonesia’s BITs: Changing the Bathwater, But Keeping the Baby?*, 18 J. WORLD INV. & TRADE 836, 836 (2017).

29. On October 19, 2018, the Dutch government adopted Netherland’s new model BIT. See *Model Agreement on Encouragement and Reciprocal Protection of Investments* (May 16, 2018), <https://www.internetconsultatie.nl/investeringsakkoorden> [<https://perma.cc/V6EJ-QZM5>] (archived Oct. 8, 2019). After a multi-year BIT review, India revamped its IIA regime. In 2016, India released a new Model BIT. See *Model Text for the Indian Bilateral Investment Treaty 2016*, GOV’T OF INDIA, http://www.dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf (last visited Sept. 8, 2019) [<https://perma.cc/ASQ6-ACE9>] (archived Sept. 11, 2019) [hereinafter 2016 Indian Model BIT]; see also Burghard Ilge & Kavaljit Singh, *India Overhauls Its Investment Treaty Regime*, FIN. TIMES, July 15, 2016, <https://www.ft.com/content/53bd355c-8203-34af-9c27-7bf990a447dc> [<https://perma.cc/A326-7XMF>] (archived Aug. 11, 2019).

led the movement for reform.³⁰ In its 2012 *Investment Policy Framework for Sustainable Development* (updated in 2015), UNCTAD presented the organization's vision on designing international investment policies for sustainable development.³¹ In 2016, the Group of Twenty (G20) Ministers adopted the *G20 Guiding Principles for Global Investment Policymaking* and essentially acknowledged the need for reform.³²

This Article underscores a new normal for countries in Africa—increased engagement with emerging partners in Asia, the Middle East, and Latin America.³³ Thanks to emerging partners, the patterns of trade, investment, and aid to Africa are shifting.³⁴ Is Africa ready to engage emerging partners and, if so, on what terms? Does the shift in global wealth really spell the end of postcolonialism?³⁵ Does Africa have a strategy for engaging with emerging partners? Does Africa need a strategy? Is Africa effectively harnessing its emerging partnerships for sustainable development?

The changing role of emerging market economies in the global economy is raising a number of interesting questions for international lawyers and for international economic law. For example, as emerging markets' economies are transforming the global economy, are they also transforming or attempting to transform international economic law and policy? And if emerging markets' economies are transforming international economic law and policy, to what

30. See UNCTAD'S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, U.N. CONFERENCE ON TRADE & DEV. 7–8 (2018) (discussing the crisis in international investment law, the push for reform over the past several years, and the options for reform); see also WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE, *supra* note 22.

31. *Investment Policy Framework for Sustainable Development*, U.N. CONFERENCE ON TRADE & DEV. (2012); U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, U.N. Doc. UNCTAD/WIR/2012, U.N. Sales No. E.12.II.D.3 (2012).

32. *G20 agrees Guiding Principles for Global Investment Policymaking*, ORG. FOR ECON. COOPERATION & DEV. (Nov. 11, 2016), <https://www.oecd.org/investment/g20-agrees-principles-for-global-investment-policymaking.htm> [https://perma.cc/24DT-A4FL] (archived Aug. 11, 2019).

33. OECD ET AL., *African Economic Outlook 2011*, in AFRICA AND ITS EMERGING PARTNERS (2011); see also Uche Ewelukwa Ofodile, *India-Africa Trade and Investment: Ten Critical Questions Africans Should be Asking Their Leaders*, AILA BLOG (Apr. 15, 2016), <http://blogaila.com/2016/04/15/india-africa-trade-and-investment-ten-critical-questions-africans-should-be-asking-their-leaders-by-dr-uche-ewelukwa-ofodile-sjd-harvard/> [https://perma.cc/4QHQ-4ZJ2] (archived Aug. 16, 2019).

34. *Africa's Emerging Partnerships*, ORG. FOR ECON. COOPERATION & DEV. OBSERVER (2011), http://oecdobserver.org/news/fullstory.php/aid/3558/Africa_92s_emerging_partnerships.html [https://perma.cc/2QMT-588T] (archived Aug. 11, 2019).

35. Uche Ewelukwa Ofodile, *South-South Trade and Investment: The Good, the Bad and the Ugly – African Perspectives*, 20 MINN. J. INT'L L. 513, 513–87 (2011).

degree?³⁶ In their engagements with other developing countries, are emerging market economies using and asserting the same norms and principles that Western nations developed and have deployed for years?³⁷ In 2011, an editorial in the *OECD Observer* aptly asked: “Before the talk was in dollars. Now leaders speak equally of Chinese renminbi, Indian rupees and Brazilian reals. Are the last shackles of colonialism finally being broken? Or is another form of dependence taking over, this time based on commodity hungry emerging markets?”³⁸

Against the backdrop of the changing role of emerging markets in the global economy and the renewed emphasis on sustainable development among world leaders,³⁹ this Article takes a look at the BITs that Turkey has concluded, and is still concluding, with countries in Africa.⁴⁰ In the BITs with countries in Africa, is Turkey merely conforming to the norms and standards established by developed countries, or is Turkey changing these norms in fundamental ways? Compared to BITs between Western nations and countries in Africa, do Turkey–Africa BITs espouse purposes other than investor protection, and are Turkey–Africa BITs more oriented towards sustainable development?⁴¹ Are Turkey–Africa BITs designed to provide sufficient policy space for host states?

Since 2003, Turkey has concluded thirty-one BITs with twenty-eight countries in Africa⁴² (including two separate BITs with

36. Joseph Joyce, *How have emerging economies transformed the global economy?*, WE FORUM (Dec. 3, 2015), <https://www.weforum.org/agenda/2015/12/how-have-emerging-economies-transformed-the-global-economy/> [<https://perma.cc/EAX7-2AKA>] (archived Aug. 11, 2019) (arguing that “In recent decades the global economy has been transformed by the rise of the emerging market economies. Their growth lifted millions out of poverty and gave their governments the right to call for a larger voice in discussions of international economic governance.”).

37. Tanvi Kothari, Masaaki Kotabe & Priscilla Murphy, *Rules of the Game for Emerging Market Multinational Companies from China and India*, 19 J. INT’L MGMT. 276, 276–99 (2013).

38. *Africa’s Emerging Partnerships*, *supra* note 34.

39. The Sustainable Development Goals (SDGs) are a collection of 17 global goals that the United Nations General Assembly set in 2015 and are part of Resolution 70/1 of the United Nations General Assembly. The goals which are set forth in Paragraph 54 of Resolution A/RES/70/1 cover social and economic development issues including poverty, hunger, health, education, global warming, gender equality, water, sanitation, energy, urbanization, environment, and social justice. See G.A. Res. 70/1 (Oct. 21, 2015).

40. At a historic UN Summit in September 2015, world leaders adopted the 2030 Agenda for Sustainable Development and its seventeen Sustainable Development Goals (SDGs). The SDG goals went into effect in January 2016. The SDGs are enshrined in UN Resolution 70/1 of the United Nations General Assembly. See *id.*

41. *Investment Policy Framework for Sustainable Development*, *supra* note 31; WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, *supra* note 31.

42. Investment Policy Hub – Turkey, *supra* note 1.

Nigeria,⁴³ Sudan,⁴⁴ and Tunisia⁴⁵). Out of the fifty-four countries in Africa, twenty-eight countries have concluded BITs with Turkey (See Annex A and B).⁴⁶ Since 2011, with the exception of 2012 and 2015, Turkey has concluded at least two BITs every year with countries in Africa.⁴⁷ Turkey concluded two BITs in 2018,⁴⁸ four BITs in 2017,⁴⁹ four BITs in 2016,⁵⁰ two BITs in 2014,⁵¹ four BITs in 2013,⁵² and two BITs in 2011 with countries in Africa.⁵³

This Article focuses on six BITs that Turkey has with countries in Africa that are actually in force and are available in English (BITs with Egypt,⁵⁴ Ethiopia,⁵⁵ Libya,⁵⁶ Morocco,⁵⁷ Senegal,⁵⁸ and

43. Agreement Between the Government of the Republic of Turkey and the Government of the Federal Republic of Nigeria Concerning the Reciprocal Promotion and Protection of Investments, Nigeria-Turk., Oct. 8, 1996, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5196/download> [<https://perma.cc/6SSQ-FJEH>] (archived Sept. 11, 2019) [hereinafter Turkey–Nigeria BIT (1996)]. Agreement Between the Government of the Republic of Turkey and the Government of the Federal Republic of Nigeria Concerning the Reciprocal Promotion and Protection of Investments, Nigeria-Turk., Feb. 2, 2011, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2109/download> [<https://perma.cc/G5BR-M5RL>] (archived Sept. 11, 2019) [hereinafter Turkey–Nigeria BIT (2011)].

44. Agreement Between the Government of the Republic of Turkey and the Republic of the Sudan Concerning the Reciprocal Promotion and Protection of Investments 1999, Sudan-Turkey, Dec. 19, 1999, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3596/download> [<https://perma.cc/RDG2-7ZQN>] (archived Sept. 11, 2019) [hereinafter Turkey–Sudan BIT].

45. Agreement Between the Government of the Republic of Turkey and the Republic of Tunisia Concerning the Reciprocal Promotion and Protection of Investments 1991, Tunis–Turkey, May 29, 1991, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2350/download> [<https://perma.cc/Z9DA-NGQ3>] (archived Sept. 11, 2019) [hereinafter Turkey–Tunisia BIT].

46. See *infra* Annexes A, B.

47. Investment Policy Hub – Turkey, *supra* note 1.

48. In 2018, Turkey concluded BITs with Mali, on March 2, 2018, and Mauritania, on February 28, 2018. See *id.*

49. In 2017, Turkey concluded BITs with Burundim on June 14, 2017, Chad, on February 26, 2017, Mozambique, on January 24, 2017, and Tunisia, on December 27, 2017. See *id.*

50. In 2016, Turkey concluded BITs with Rwanda, on November 3, 2016, Somalia, on June 1, 2016, Côte d'Ivoire, on February 29, 2016, and Ghana, on March 1, 2016. See *id.*

51. In 2014, Turkey concluded BITs with Kenya, on April 8, 2014, Sudan, on April 30, 2014. See *id.*

52. In 2013, Turkey concluded BITs with Djibouti, on September 25, 2013, Gambia, on March 12, 2013, Guinea, on June 18, 2013, and Benin, on December 11, 2013. See *id.*

53. In 2011, Tanzania concluded BITs with Tanzania, on March 11, 2011, and Nigeria, on February 2, 2011. See *id.*

54. Agreement Between the Government of the Republic of Turkey and the Arab Republic of Egypt Concerning the Reciprocal Promotion and Protection of Investments, Egypt-Turk., Oct. 4, 1996, <https://investmentpolicy.unctad.org/>

Tunisia⁵⁹). In addition, this Article also reflects on ten additional BITs that are available and are in English but not in force (BITs with Algeria,⁶⁰ Cameroon,⁶¹ Gabon,⁶² Gambia,⁶³ Nigeria,⁶⁴ Kenya,⁶⁵

international-investment-agreements/treaty-files/1117/download [https://perma.cc/LR8C-NLPU] (archived Sept. 11, 2019) [hereinafter Turkey–Egypt BIT].

55. Agreement Between Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments, Eth.-Turk., Nov. 16 2000, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1179/download> [https://perma.cc/4Z82-NLX7] (archived Sept. 11, 2019) [hereinafter Turkey–Ethiopia BIT].

56. Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya on the Reciprocal Promotion and Protection of Investments, Libya-Turk., Nov. 25, 2009, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5021/download> [https://perma.cc/99W2-PU7R] (archived Sept. 11, 2019) [hereinafter Turkey–Libya BIT].

57. Agreement Between the Government of the Republic of Turkey and the Government of the Kingdom of Morocco Concerning the Reciprocal Promotion and Protection of Investments, Morocco-Turk., Apr. 8, 1997, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2048/download> [https://perma.cc/2SKF-P8CP] (archived Sept. 11, 2019) [hereinafter Turkey–Morocco BIT].

58. Agreement Between the Government of the Republic of Turkey and the Government of the Federal Republic of Senegal Concerning the Reciprocal Promotion and Protection of Investments, Sen.-Turk., June 15, 2010, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2247/download> [https://perma.cc/3PWN-43U7] (archived Sept. 11, 2019) [hereinafter Turkey–Senegal BIT].

59. Turkey–Tunisia BIT, *supra* note 45.

60. Agreement Between the Government of the Republic of Turkey and the Government of the Democratic and Popular Republic of Algeria Concerning the Reciprocal Promotion and Protection of Investments, Alg.-Turk., June 3, 1998, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/60/download> [https://perma.cc/X46N-ARWP] (archived Sept. 11, 2019) [hereinafter Turkey–Algeria BIT].

61. Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Cameroon Concerning the Reciprocal Promotion and Protection of Investments, Cameroon-Turk., Apr. 24, 2012, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/597/download> [https://perma.cc/N4ZY-F762] (archived Sept. 11, 2019) [hereinafter Turkey–Cameroon BIT].

62. Agreement Between the Government of the Republic of Turkey and the Government of the Gabonese Republic Concerning the Reciprocal Promotion and Protection of Investments, Gabon-Turk., July 18, 2012, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1307/download> [https://perma.cc/QU83-NQCY] (archived Sept. 11, 2019) [hereinafter Turkey–Gabon BIT].

63. Agreement Between the Government of the Republic of Turkey and the Government of the Republic of the Gambia Concerning the Reciprocal Promotion and Protection of Investments, Gam.-Turk., Mar. 12, 2013, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3345/download> [https://perma.cc/SWC7-G853] (archived Sept. 11, 2019) [hereinafter Turkey–Gambia BIT].

64. Turkey–Nigeria BIT (2011), *supra* note 43.

65. Agreement Between the Government of the Republic of Kenya and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, Kenya-Turk., Apr. 8, 2014, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty->

Rwanda,⁶⁶ South Africa,⁶⁷ Sudan,⁶⁸ and Tanzania⁶⁹). This Article is divided into six Parts. Part I examines the history and economic dimensions of Turkey–Africa relations. Part II offers an overview of the legal instruments and fundamental principles that underpin Turkey–Africa relations. The policy tools and institutions that drive Turkey’s foreign policy are examined in Part III. With a focus on BITs, Part IV examines trends in Turkey–Africa BITs, reviews the investor-protection elements in these BITs, as well as the sustainable development elements in the agreements. Drawing on international best practices, Part V offers a thorough critique of Turkey–Africa BITs. Part VI discusses policy and practical considerations that could complicate any effort to reform Turkey–Africa BITs.

Emerging market economies are playing an incredibly significant role in the global economy and in the economies of developing and the least developed countries.⁷⁰ This Article fills a very important gap in the available literature by offering critical insight into how emerging market economies are using, adapting, and sometimes abandoning established international economic norms.

files/5543/download [https://perma.cc/RT8X-QVP8] (archived Sept. 11, 2019) [hereinafter Turkey–Kenya BIT].

66. Agreement Between the Government of the Republic of Rwanda and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, Rwanda-Turk., Nov. 3, 2016, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5415/download> [https://perma.cc/AB4E-ENE4] (archived Sept. 11, 2019) [hereinafter Turkey–Rwanda BIT].

67. Agreement Between Republic of Turkey and the Republic of South Africa Concerning the Reciprocal Promotion and Protection of Investments, S. Afr.-Turk., June 23, 2000, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2279/download> [https://perma.cc/LR72-N6J2] (archived Sept. 11, 2019) [hereinafter Turkey–South Africa BIT].

68. Turkey–Sudan BIT, *supra* note 44.

69. Agreement Between the Government of the Republic of Turkey and the Government of the United Republic of Tanzania Concerning the Reciprocal Promotion and Protection of Investments, Tanz.-Turk., Mar. 3, 2011, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2342/download> [https://perma.cc/EK76-K3C3] (archived Sept. 11, 2019) [hereinafter Turkey–Tanzania BIT].

70. Emerging market economies are important for a number of reasons including: contribution to the world GDP as a result of rising productivity, income and demand, contribution to the achievement of the sustainable development goals, and foreign direct investment in other countries. See Woetzel, *supra* note 21, at 5 (“Collectively, the outperformers have been the engine for lifting about one billion people out of extreme poverty, helping to meet a key United Nations Sustainable Development Goal. Indeed, rising prosperity in these countries has not just reduced poverty, but also enabled the emergence of a new wave of middle and affluent classes.”); see also Hal Hill & Juthathip Jongwanich, *Emerging East Asian Economies as Foreign Investors: An Analytical Survey*, 59 SING. ECON. REV. 1, 1–26 (2014) (discussing the growing role of emerging market economies in foreign investment).

II. TURKEY–AFRICA RELATIONS: BACKGROUND AND ECONOMIC DIMENSIONS

Turkey–Africa relations have evolved in three stages: the period before 1923 when Turkey became a modern nation-state, the period between 1923 and 1998, and the period since 1998.⁷¹ Much of this Article focuses on Turkey–Africa relations as they have developed since 1998. Turkey–Africa relations are evolving on multiple fronts, including on the economic, development, political, and social fronts. The relationship is deepening and is measured by indicators such as institutionalized diplomatic engagement, highly structured multiyear and/or multicountry development interventions, trade and investment-facilitating mechanisms, technical assistance, technological transfer, formal financial engagement, and even security cooperation.

A. Background

1. Turkey–Africa Relations: Before 1923

Turkey and Africa have long-standing historical ties as a result of the reach and influence of the Ottoman Empire in the sixteenth century.⁷² At its height, the Ottoman Empire had its tentacles in Egypt, Tunisia, Algeria, Libya, Morocco, and the Horn of Africa.⁷³ In its engagement with Africa, Turkey has routinely stressed these historical ties.⁷⁴ According to the Ministry of Foreign Affairs (MFA), Turkey “has long-standing historical and cultural relations with the African continent, dating back centuries,” and the first state founded by the Turks in Africa was the Tulunid Dynasty, which ruled today’s Egypt in the ninth and tenth centuries.⁷⁵ The MFA asserts on its website that “[b]eing an Afro-Eurasian state, Turkey’s policy of opening up to Africa is not just the reflection of a transient political

71. Mehmet Özkan & Birol Akgün, *Turkey’s Opening to Africa*, 48 J. MOD. AFR. STUD. 525, 525–46 (2010) [hereinafter Özkan & Akgün] (describing Turkey’s relations with Africa as falling into three periods).

72. Abdinor Hassan Dahir, *How effective is Turkey’s Africa initiative?*, DAILY SABAH (Sept. 19, 2017), <https://www.dailysabah.com/op-ed/2017/09/19/how-effective-is-turkeys-africa-initiative> [<https://perma.cc/GZ2P-DCD7>] (archived Aug. 11, 2019) (“Turkey has had historical ties with Africa that date back to the 15th and 16th centuries.”).

73. Özkan & Akgün, *supra* note 71, at 530 (observing that the Turks’ relations with Africa go back centuries).

74. See *Ottoman Dreaming*, *supra* note 4; see generally Stanford J. Shaw, *The Apogee of Ottoman Power, 1451–1566*, in 1 HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY 55 (Cambridge Univ. Press 1976).

75. Shaw, *supra* note 74.

and economic expectation” but “is the product of a process with strong historical and cultural aspects.”⁷⁶

2. Turkey–Africa Relations: Between 1923 and 1998

The period between 1923 and 1998 has been described as a dead era as far as Turkish–African relations are concerned.⁷⁷ Upon its independence in 1923, when the Turkish Republic was created, Ankara adopted a foreign policy based on westernization and secularism, which reflected the Kemalist perception of international relations.⁷⁸ The building blocks of this policy, according to Abdinor Hassan Dahir, “were secularism and modernization by looking to the West for direction (westernization) and cutting ties with the Ottoman past, keeping the country together through securitization based on the defined borders of the republic, and pursuing inward-looking noninterventionist/nonrevisionist norms.”⁷⁹ Against the backdrop of Ataturk’s “Peace at Home, peace in the world” approach, Turkey–Africa relations received little or no attention during this period and were relegated to the background.⁸⁰ Nevertheless, Turkey maintained diplomatic relations with a number of countries in Africa.⁸¹ For example, Turkey opened the Turkish Consulate General in Lagos in 1956.⁸²

3. Turkey–Africa Relations: After 1998

Turkish activism in Africa started with Ankara’s “Opening to Africa Policy” adopted in the 1998 Action Plan and gained momentum when the Justice and Development Party’s (Turkish: *Adalate ve Kalkinma Partisi (AKP)*) rule began in the early 2000s.⁸³ In 2003, the Turkish government launched “The Strategy Development of Economic Relationships with Africa,”⁸⁴ and in 2005, the government

76. *Id.*

77. Tom Wheeler, *Turkey and South Africa: Development of Relations 1860–2005*, SAIIA Rep. No. 47 (observing that “There is little of substance in South African–Turkish relations between 1922 and the late 1980s.”).

78. Dahir, *supra* note 72.

79. *Id.*

80. Özkan & Akgün, *supra* note 71, at 531 (noting that in the republican era, Turkey–Africa relations were down-graded to the lowest level).

81. *Id.*

82. *Id.*

83. *Turkey-Africa Relations*, *supra* note 4.

84. Dahir, *supra* note 72 (“One notable project that has marked a turning point in Africa–Turkey economic relations was the launching of ‘The Strategy Development of Economic Relationships with Africa’ in 2003.”).

unveiled Turkey's "Open to Africa Policy."⁸⁵ The Turkish Government also declared 2005 the "Year of Africa."⁸⁶ Also in 2005, Turkish Prime Minister Recep Tayyip Erdoğan visited Ethiopia and South Africa making it "the first official visit by a Turkish prime minister to a country south of the equator."⁸⁷

The year 2008 marked a significant year in Turkey–Africa relations. In 2008, the AU declared Turkey a strategic partner of the Continent.⁸⁸ The first ever "Turkey–Africa Cooperation Summit" was held in 2008.⁸⁹ The "Second Turkey–Africa Partnership Summit" was held in 2014.⁹⁰ The Summit had the theme of "A New Model of Partnership for the Strengthening of Sustainable Development and Integration."⁹¹ The Summit adopted the Declaration and Joint Implementation Plan for the Period of 2015–2019.⁹² The third Turkey–Africa Partnership Summit will be held in 2019.⁹³ In between the summits, high-level official meetings have occurred.⁹⁴

B. Economic Dimensions

Economic considerations play a major role in Turkey's Africa policy.⁹⁵ One visible dimension of Turkey's economic activism is Ankara's interest in entering new markets beyond those in the West and in Turkey's immediate neighborhood.⁹⁶ Turkey's involvement in

85. *Turkey-Africa Relations*, *supra* note 4.

86. *Id.*

87. Özkan & Akgün, *supra* note 71, at 533.

88. A.U. Dec. 397 (XII), A.U. Doc. EX.CL/374 (XII), at 1 (2007).

89. *Turkey-Africa Relations*, *supra* note 4.

90. SECOND TURKEY-AFRICA PARTNERSHIP SUMMIT, <http://afrika.mfa.gov.tr/default.en.mfa> (last visited Sept. 8, 2019) [<https://perma.cc/PNC9-XS2V>] (archived Aug. 11, 2019).

91. *Id.*

92. *Turkey-Africa Relations*, *supra* note 4.

93. *Id.*

94. The first Turkey–Africa Cooperation High Level Official Meeting took place in December 2010. This meeting culminated in the adoption of the Joint Implementation Plan of Africa-Turkey partnership for the period 2010–2014 [hereinafter First Joint Implementation Plan]. The first Turkey–Africa Agriculture Ministerial Meeting and Agribusiness Forum took place in 2017.

95. See Nicole Sobecki, *Turkey seeks economic salvation in Africa*, GLOB. POST, Mar. 11, 2009, <http://www.globalpost.com/dispatch/turkey/090309/turkey-seeks-economic-salvation-africa> [<https://perma.cc/ED8Y-JENC>] (archived Aug. 11, 2019); see *Turkey-Africa Relations*, *supra* note 4; see *supra* Part I (discussing the economic dimensions of Turkey-Africa Relations); see also J. Peter Pham, *Turkey's Return to Africa*, WORLD DEF. REV. (May 27, 2010), <http://worlddefensereview.com/pham052710.shtml> [<https://perma.cc/W6QU-TZCE>] (archived Aug. 18, 2019).

96. Hakan Fidan, *A Work in Progress: The New Turkish Foreign Policy*, 20 MIDDLE E. POL'Y 91, 91 (2013) (discussing the dawn of "a new era of activism" in Turkey's foreign policy that sees Turkey "increasingly assert[ing] itself as a rising actor that is determined to make a unique contribution to regional and global affairs"); see also SECOND TURKEY-AFRICA PARTNERSHIP SUMMIT, *supra* note 90 (noting that

Africa is both wide and multifaceted.⁹⁷ From every indication, Turkey–Africa economic relations are gaining momentum on multiple fronts: FDI, trade, and development assistance.

1. Foreign Direct Investment

There are conflicting figures on the volume of Turkish FDI in Africa.⁹⁸ Turkish direct investment to Africa has seen a tenfold increase since 2004 and is now between \$5 to \$8 billion.⁹⁹ Turkish FDI in Africa was less than \$100 million in 2003¹⁰⁰ but surpassed \$6 billion in 2015¹⁰¹ and \$6.5 billion in 2017.¹⁰² In Africa, Ethiopia is the largest investment destination for Turkish FDI.¹⁰³ Over \$2.5 billion of the total \$6 billion Turkish FDI in Africa goes to Ethiopia.¹⁰⁴ In Ethiopia, Turkish companies are engaged in the textile and apparel industry but are showing growing interest in sectors, such as energy, steel, ceramics, and construction.¹⁰⁵ Beyond FDI, Turkish contractors are undertaking projects in Africa and have so far undertaken over 1,150 projects in Africa worth \$55 billion.¹⁰⁶

2. Trade

Trade “is one of the most important drivers of Turkey’s recent emphasis on Africa.”¹⁰⁷ There are conflicting figures of the volume of Turkey–Africa trade, a clear indication that the exact volume of Turkey–Africa trade is not known.¹⁰⁸ According to the Anadolu

“Ankara’s increased interest towards the states across the Mediterranean sea and to the South was initially driven by economical reasons at large.”)

97. Özkan & Akgün, *supra* note 71, at 528 (describing Turkey’s foreign policy in general as being “a multi-faceted foreign policy.”).

98. SHINN, *supra* note 8, at 11 (“ There are conflicting figures on Turkey’s foreign direct investment in SSA.”).

99. *Turkey’s Africa initiative sees six-fold rise in trade with continent*, DAILY SABAH (Feb. 27, 2018), <https://www.dailysabah.com/economy/2018/02/28/turkeys-africa-initiative-sees-six-fold-rise-in-trade-with-continent> [https://perma.cc/6S9D-R3M6] (archived Aug. 11, 2019).

100. *Id.*

101. *Id.*

102. *Id.*

103. Bilal Derso, *Africa: Ethiopia Tops Turkish Investment Destinations of Africa – EIC*, ETHIOPIAN HERALD (Jan. 31, 2018), <https://allafrica.com/stories/201801310663.html> [https://perma.cc/P5G3-G5JN] (archived Aug. 11, 2019).

104. *Id.*; see also *Turkey-Africa Relations*, *supra* note 4 (discussing the deepening relationship between Turkey and Ethiopia).

105. Derso, *supra* note 109.

106. Alexey Boguslavskiy, *Turkey’s Venture into Africa*, RUSSIAN INT’L AFF. COUNCIL (May 22, 2017), <http://russiancouncil.ru/en/analytics-and-comments/analytics/turkey-s-venture-into-africa/> [https://perma.cc/B23L-9J9P] (archived Aug. 11, 2019).

107. SHINN, *supra* note 8.

108. *Id.*

Agency, an international news agency based in Ankara, Turkey's trade with African countries has grown sixfold in the past fifteen years to \$17.5 billion in 2017.¹⁰⁹ According to the Turkish Ministry of Trade, "Turkey's trade volume with Africa totaled USD 19.5 billion in 2015, up 16% from 2008 and 258% from 2003. Turkey's export in 2003–2015 increased almost sixfold and import has more than doubled in the same period."¹¹⁰

Turkey's trade with the continent was and is still concentrated in North Africa, but this is gradually changing. In 2016, Turkey reportedly had more than \$10 billion in trade with Egypt, Algeria, and Morocco.¹¹¹ In 2015, Turkey exported \$4 billion in goods to sub-Saharan African countries,¹¹² up from \$750 million in 2004.¹¹³ South African Republic, Nigeria, Ethiopia, Ghana, and Côte d'Ivoire are among Turkey's top customers in sub-Saharan Africa.¹¹⁴ Turkey's trade with South Africa constitutes approximately 40 percent of Turkey's trade with sub-Saharan African countries;¹¹⁵ in 2015, trade volume between the two countries stood at \$1.4 billion.¹¹⁶

3. Development Assistance

Humanitarian aid and development assistance are relatively new instruments in Turkey's foreign-policy tool kit.¹¹⁷ Turkey is contributing to the geopolitical landscape of humanitarian assistance, and of development aid more widely.¹¹⁸ Over the past decade, the

109. *Turkey's Africa initiative sees six-fold rise in trade with continent*, *supra* note 99.

110. *Turkey-Africa Trade and Economic Relations*, MINISTRY OF TRADE, REPUBLIC OF TURK. (Sept. 4, 2018), <https://www.trade.gov.tr/multinational-relations/turkey-africa-economic-and-business-forum/turkey-africa-relations> [https://perma.cc/693U-8SA2] (archived Oct. 8, 2019).

111. *Turkey's Africa initiative sees six-fold rise in trade with continent*, *supra* note 99.

112. *Id.*

113. *Id.*

114. *Turkey-Africa Partnership High Level Officials Meeting (Talking Points)*, AFRICAN UNION (June 19, 2013), https://au.int/sites/default/files/newsevents/working_documents/26682-wd-turkey-africa_partnership_high_level_officials_meeting.pdf [https://perma.cc/9FVB-KHTX] (archived Sept. 11, 2019).

115. *Relations between Turkey and the Republic of South Africa (RSA)*, REPUBLIC OF TURKEY, <http://www.mfa.gov.tr/relations-between-turkey-and-the-republic-of-south-africa.en.mfa> (last visited Sept. 8, 2019) [https://perma.cc/778R-HESC] (archived Aug. 11, 2019) (discussing the deepening relationship between Turkey and Ethiopia).

116. *Id.*

117. Jeannine Hausmann, *Turkey as a Donor Country and Potential Partner in Triangular Cooperation*, GERMAN DEV. INST. (2014); see also Johanna Morden, *Humanitarian assistance: Turkey's rise shows growing importance of emergence donors*, DEVEX (July 22, 2013), <https://www.devex.com/news/humanitarian-assistance-turkey-s-rise-shows-growing-importance-of-emerging-donors-81485> [https://perma.cc/5ZJD-B6XQ] (archived Aug. 11, 2019).

118. See TURKISH COOPERATION AND COORDINATION AGENCY (TIKA), *TURKISH DEVELOPMENT ASSISTANCE 2013 REPORT* (2014); TURKISH COOPERATION AND

position of Turkey has gradually moved from that of being an aid recipient to that of being a donor country.¹¹⁹ Turkey is now considered one of the world's top donors and is now a net contributor of official development assistance (ODA).¹²⁰ According to Luca Ventura:

Turkey spent US\$6 billion on humanitarian aid, more than any other country except the US (\$6.3 billion). Percentage-wise, Turkey's largesse—0.75% of its 121 gross national income (GNI)—dwarfs every member of the G20 and is well ahead of No. 2, United Arab Emirates, at 0.18% of GNI. The OECD has slightly different numbers, but also shows Turkey's official development assistance (ODA), which includes humanitarian aid, as having risen sharply in the last five years.¹²²

In terms of economic assistance to countries in Africa, sub-Saharan Africa was reportedly the first region to begin receiving Turkish aid;¹²³ Turkey is steadily increasing its footprint.¹²⁴ In 2011, Erdoğan (then Prime Minister of Turkey) travelled to Somalia to raise awareness in the international community about the ongoing conflict in Somalia¹²⁵ and was the first non-African leader to visit Somalia over the past two decades.¹²⁶ Since 2011, Turkey has committed development assistance to Somalia and other predominantly Muslim countries in Africa and other regions.¹²⁷ From 2011–2012, Erdoğan committed to help Somalia recover from years of war and famine, and Turkey quickly became “the largest donor among non-OECD-DAC countries and one of the most active actors in humanitarian aid and peace-building” efforts in Somalia.¹²⁸ In Somalia, Turkish aid has gone beyond direct financial transfers.¹²⁹ Turkish aid organizations, such as Turkish Red Crescent (Kızılay)

COORDINATION AGENCY (TIKA), TURKISH DEVELOPMENT ASSISTANCE 2014 REPORT (2015); TURKISH COOPERATION AND COORDINATION AGENCY (TIKA), TURKISH DEVELOPMENT ASSISTANCE 2015 REPORT (2016); TURKISH COOPERATION AND COORDINATION AGENCY (TIKA), TURKISH DEVELOPMENT ASSISTANCE 2017 REPORT (2018).

119. Luca Ventura, *Turkey—Now Among World's Top Donor Nations*, GLOB. FIN. MAG. (Oct. 2, 2017), <https://www.gfmag.com/magazine/october-2017/turkey-now-among-worlds-top-donor-nations> [<https://perma.cc/YK7G-5CP7>] (archived Aug. 11, 2019).

120. Fidan, *supra* note 96, at 94 (discussing Turkey's increasing participation in development assistance and humanitarian aid).

121. SHINN, *supra* note 8, at 13.

122. Ventura, *supra* note 119.

123. SHINN, *supra* note 8, at 13.

124. *Id.* (discussing the increase in Turkish aid to Africa from \$10 million in 1985 to \$31 million in 2006 and to \$52 million in 2008. By the end of 2011, Turkey had undertaken 113 development assistance projects in 37 African countries).

125. *Id.*

126. *Id.*

127. *Id.*

128. Özerdem, *supra* note 7.

129. *Id.*

and the Turkish International Cooperation and Development Agency (TIKA) “are highly active in a wide range of infrastructure, welfare and service sector programmes in the country such as clearing rubbish, providing clean water, building hospitals and running the Mogadishu’s permanent settlement for displaced Somalians.”¹³⁰ As of 2013, Africa was reportedly the largest overall beneficiary of aid from the TIKA, receiving 33.7 percent of the agency’s total disbursement.¹³¹

Development cooperation between Turkey and countries in Africa will likely continue. Both sides plan to enhance cooperation in a wide variety of areas, including the fields of health, youth development, womens’ empowerment, and infrastructure development.¹³² In the *Second Africa-Turkey Summit Declaration (2014): “New Model of Partnership for the Strengthening of Sustainable Development and Integration”* (2014 Malabo Declaration) adopted in 2014, both sides reaffirmed their commitment to cooperating with each other.¹³³

C. Political/Diplomatic Cooperation

Political relations between Turkey and countries in Africa are deepening. Turkey is engaging bilaterally and regionally through continental-wide institutions, such as the AU and the African Development Bank.¹³⁴ Faced with major challenges to European Union accession¹³⁵ and shifting alliances in the Middle East,¹³⁶

130. *Id.*

131. SHINN, *supra* note 8.

132. *See generally New Model of Partnership for the Strengthening of Sustainable Development and Integration*, SECOND AFRICA-TURKEY SUMMIT DECLARATION (2014).

133. *Id.*

134. Founded in 1964, the African Development Bank is a multilateral development finance institution with a focus on the continent of Africa. The overarching objective of the African Development Bank (AfDB) Group is to spur sustainable economic development and social progress in its regional member countries (RMCs). *See Mission & Strategy*, *supra* note 10.

135. After more than a decade negotiation to join the European Union, Turkey is not anywhere near joining the EU. In fact, Turkey’s EU bid appears to have all but collapsed. Turkey’s formal EU accession negotiations began in October 2005. However, in April 2017, the European Parliament called for a formal suspension of Turkey’s EU membership bid. Furthermore, in September 2017, German Chancellor Angela Merkel announced that she will seek an end to Turkey’s membership talks. Negotiation talks are now effectively frozen. Although Turkey remains a candidate for membership and although the Turkish Prime Minister has said the Turkey still seeks full EU membership many experts do not see the possibility of that happening anytime soon. *See Factbox: Turkey’s Collapsing EU membership bid*, REUTERS, Sept. 4, 2017, <https://www.reuters.com/article/us-germany-turkey-eu-factbox/factbox-turkeys-collapsing-eu-membership-bid-idUSKCN1BF1TH> [<https://perma.cc/5G27-ANV9>] (archived Aug. 11, 2019); *see also* Tom Batchelor, *Turkey still wants ‘full membership’ of EU, Erdogan says*, INDEPENDENT, Mar. 26, 2018, <https://www.independent.co.uk/>

Turkey is going farther to find trade, investment, and diplomatic partners.

1. Bilateral Relations

Enlarging the level of its representation in the continent is important to Ankara.¹³⁷ Consequently, the last decade has seen Turkey decisively opening new embassies in Africa and supporting numerous official visits to the continent.¹³⁸

In 2009, Turkey had only twelve Embassies in Africa.¹³⁹ Since 2009, Turkey has embarked on an ambitious goal of opening embassies and consulates in almost every country in Africa.¹⁴⁰ According to David Shinn:

Turkey has engaged in an ambitious programme to establish diplomatic missions in SSA countries, and has encouraged the reciprocal opening of embassies in Ankara. Embassies were established in Côte d'Ivoire and Tanzania in 2009, adding to its existing missions in the [Democratic Republic of Congo], Ethiopia, Kenya, Nigeria, Senegal, South Africa and Sudan. Further embassies were opened in 2010 (in Angola, Cameroon, Ghana, Madagascar, Mali and Uganda), 2011 (The Gambia, Mauritania, Mozambique, Somalia, South Sudan, Zambia and Zimbabwe), 2012 (Burkina Faso, Gabon, Namibia and Niger) and 2013 (Chad, Guinea, Djibouti and Eritrea). When Turkey opened its embassy in Eritrea in 2013, it became the first country in the world to have ambassadorial representation in every country in the Horn of Africa.¹⁴¹

In 2017, Turkey announced plans to open five new embassies in Africa, bringing Turkish embassies in the region to about forty-four.¹⁴² Turkey plans to open even more embassies in Africa.¹⁴³ In

news/world/europe/erdogan-turkey-eu-full-membership-european-union-commitment-president-a8274166.html [https://perma.cc/7SB7-CRPE] (archived Aug. 11, 2019).

136. Ryan Crocker, Hussein Ibish, Bülent Aras, *Saudi Arabian-Turkish Rivalry in the Middle East*, 25 MIDDLE E. POL'Y (2018), <https://www.mepc.org/journal/saudi-arabian-turkish-rivalry-middle-east> [https://perma.cc/9X5K-5S3J] (archived Oct. 21, 2019) (discussing the growing tension between Turkey and Saudi Arabia); *Turkey and Iran: Bitter Friends, Bosom Rivals*, CRISIS GROUP MIDDLE EAST BRIEFING N°51 Istanbul/Tehran/Brussels, Dec. 13, 2016, <https://d2071andvip0wj.cloudfront.net/b051-turkey-and-iran-bitter-friends-bosom-rivals.pdf> [https://perma.cc/W5Q9-CVEP] (archived Oct. 21, 2019) (observing that a profound disagreement over core interests in Iraq and Syria is putting Turkey and Iran on a major collision course); see also, Robert Malley, *The Unwanted Wars: Why the Middle East Is More Combustible Than Ever*, FOREIGN AFF. (2019).

137. SHINN, *supra* note 8, at 6.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Turkey to open 5 new embassies in African countries*, DAILY SABAH (Oct. 31, 2017), <https://www.dailysabah.com/diplomacy/2017/11/01/turkey-to-open-5-new->

response to Ankara's diplomatic overtures, a growing number of countries in Africa now have embassies in Turkey, and more have declared their decisions to open embassies in Ankara.¹⁴⁴

High-level official visits are also a very important tool in Ankara's opening up to Africa agenda.¹⁴⁵ To strengthen bilateral relations with countries in Africa, President Erdoğan has stepped up his visits to Africa.¹⁴⁶ Indeed, "[b]etween 2009 and 2011 there were 37 visits to Africa made by either the Turkish president, prime minister, parliamentary speaker or minister of foreign affairs. Over the same period, there were 76 visits to Turkey by African leaders of similar rank."¹⁴⁷ In the last ten years, President Erdoğan has paid more than thirty visits to twenty-eight African countries as both prime minister and president prompting Alexey Boguslavskiy to observe, "[t]he President of Turkey R. Erdoğan has become an absolute record-breaker among leaders of non-African states by the number of visits on the African continent, Sub-Saharan African countries being the major focus."¹⁴⁸ Official visits from African leaders to Turkey are increasing.¹⁴⁹

2. Relations with Continental and Subregional Organizations

Beyond bilateral relations, Turkey is also pursuing relations with regional organizations in Africa, such as the African Union and the African Development Bank (the Bank).¹⁵⁰ Turkey has been an Observer Country since 2005 and Strategic Partner since 2008 of the African Union.¹⁵¹ Since 2009, Turkey has been making an annual

embassies-in-african-countries [<https://perma.cc/H9SM-NEVQ>] (archived Aug. 11, 2019).

143. *Turkey aims to open more embassies in Africa, says Erdoğan*, HURRIYET DAILY NEWS (Sept. 7, 2018), <http://www.hurriyetdailynews.com/turkey-aims-to-open-more-embassies-in-africa-says-erdogan-136561> [<https://perma.cc/DHW4-FJTW>] (archived Aug. 11, 2019) (discussing Turkey's plan to increase the number of its embassies in Africa from 41 to 54).

144. *Gabon to open embassy in Ankara in 2015*, HURRIYET DAILY NEWS (May 12, 2015), <http://www.hurriyetdailynews.com/gabon-to-open-embassy-in-ankara-in-2015-82303> [<https://perma.cc/L922-HR5K>] (archived Aug. 11, 2019).

145. Boguslavskiy, *supra* note 106 (discussing Erdoğan's numerous visits to the African continent).

146. *Id.*

147. *Id.* at 7.

148. *Id.*; Boguslavskiy, *supra* note 106.

149. Kgalema Motlanthe, *Motlanthe on Africa Day*, POLITICSWEB (May 25, 2010), <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=177864&sn=Detail> [<https://perma.cc/2MPC-2T7C>] (archived Aug. 18, 2019).

150. *Turkey-Africa Relations*, *supra* note 4.

151. A number of emerging economies are also non-African members of the AfDB including China, India, Saudi Arabia, Brazil. *See Member Countries*, AFRICAN DEV. BANK GROUP, <https://www.afdb.org/en/about-us/corporate-information/members/> (last visited Sept. 8, 2019) [<https://perma.cc/DK5M-Q8MB>] (archived Aug. 11, 2019).

contribution of \$1 million to the African Union.¹⁵² Turkey has also pledged to “remain committed to support the institutional capacities of the African Union and other regional organizations in achieving progress on the priority areas which will consolidate African ownership of African matters.”¹⁵³ In his 2014 speech delivered on the occasion of the second Turkey–Africa Partnership Summit, President Erdoğan “welcome[d] the increasing political significance of the African Union in addition to its forceful representation, and the active role it plays in solving the problems arising in the member countries,” and pledged that Turkey “will continue [its] financial contribution to the budget of the African Union in the coming years.”¹⁵⁴

Turkey is increasingly involved in the activities of the African Development Bank.¹⁵⁵ In January 2013, Turkey became the twenty-sixth nonregional member of the African Development Bank and the twenty-sixth State Participant of the African Development Fund.¹⁵⁶ In March 2014, Turkey gave its consent for the African Development Bank to issue bonds denominated in Turkish Lira.¹⁵⁷ To date, the African Development Bank has issued numerous bonds denominated in Turkish Lira, and has raised 1,337.4 million TRY since 2009 through forty-four transactions.¹⁵⁸ In 2016, the African Development Bank, together with the Under Secretariat of the Turkish Treasury and Foreign Economic Relations Board of Turkey, organized the first Business Opportunities Seminar to strengthen partnerships between the Bank and stakeholders in Turkey.¹⁵⁹ In April 2018, the Bank initiated technical cooperation with the Türk Eximbank.¹⁶⁰

152. *African Union–Turkey Partnership Joint Implementation Report, 2015-2017*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF TURK. (Feb. 12, 2018), http://www.mfa.gov.tr/african-union---turkey-partnership-joint-implementation-report_-2015-2017_-12-february-2018_en.en.mfa [https://perma.cc/Y86Q-KRYN] (archived Oct. 8, 2019) (providing a report of the African Union–Turkey Partnership Implementation Plan, 2015–2019).

153. *Id.*

154. Recep Tayyip Erdoğan, President of the Republic of Turkey, Address at Second Turkey–Africa Partnership Summit (Nov. 21, 2014) (transcript available in the Second Turkey–Africa Partnership Summit website).

155. *Turkey—Partnership Overview*, AFRICAN DEV. BANK GROUP, <https://www.afdb.org/en/countries/non-regional-member-countries/turkey> (last visited Sept. 8, 2019) [https://perma.cc/4KM7-5NAC] (archived Aug. 11, 2019).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

Turkey is also engaging countries in Africa at the level of regional economic communities and has obtained observer status in most of the regional economic communities (RECs) in Africa.¹⁶¹

D. Global Governance / Multilateralism

Turkey is gradually positioning itself as a leading international voice in Africa and as a voice for and a strategic ally of Africa on the global stage.¹⁶² In 2013, when Turkey was actively campaigning for a seat on the United Nations Security Council, Ankara promised African states that “[i]f elected, Turkey’s UNSC membership in 2014–2015 will be an opportunity for the AU to be even much more stronger on the international scene, as Turkey, an Afro-Eurasian country, will indeed be the voice of Africa in this century which is the Century of Africa.”¹⁶³ In 2010, Turkey cochaired the “International Donor’s Conference for the Reconstruction and Development of Darfur.”¹⁶⁴ In May 2011, Turkey hosted the Fourth United Nations Conference on the Least Developed Countries in Istanbul.¹⁶⁵ In line with its resolve to pursue robust comprehensive policy in Africa, in 2016, Turkey hosted the High Level Partnership Forum for Somalia in Istanbul.¹⁶⁶

161. Since 2005, the Turkish Embassy in Abuja has been accredited to the Economic Community of West African States. Since 2010, the Turkish Embassy in Dar-es-Salaam has been accredited to the East African Community. In 2012, the Turkish Embassy in Lusaka became accredited to Common Market for Eastern and Southern Africa, and in 2012, the Turkish Embassy in Addis Ababa became accredited to the Intergovernmental Authority on Development Partners Forum. Since 2013, the Turkish Embassy in Libreville has been accredited to Economic Community of Central African States. See *Turkey-Africa Relations*, *supra* note 4; see also *Turkey-Africa Partnership High Level Officials Meeting (Talking Points)*, *supra* note 114.

162. See generally Aylin Taşhan, *Turkey’s Emergence as a Global Actor in Africa: A Special Focus on Mozambique*, FOREIGN POL’Y INST. (Aug. 8, 2016), <http://foreignpolicy.org/tr/dis-politika-foreign-policy-vol-xxxiii-no-1-2016-turkeys-emergence-as-a-global-actor-in-africa-a-special-focus-on-mozambique/> [<https://perma.cc/8FGN-5WQU>] (archived Aug. 11, 2019).

163. *Turkey-Africa Partnership High Level Officials Meeting (Talking Points)*, *supra* note 114.

164. *Darfur donor meeting in March eyes \$2 billion – Egypt*, REUTERS, Mar. 11, 2012, <https://www.reuters.com/article/idUSMCD175712> [<https://perma.cc/PU4L-DD36>] (archived Aug. 11, 2019).

165. *Fourth United Nations Conference on the Least Developed Countries*, UNITED NATIONS, <http://www.un.org/en/conf/ldc/> (last visited Sept. 8, 2019) [<https://perma.cc/NLB9-KYK2>] (archived Aug. 11, 2019).

166. The Somalia High Level Partnership Forum is the highest decision-making mechanism of a process in which the Somali Government, the United Nations (U.N.), and key donor countries are parties. The sixth meeting of the Forum was held in Istanbul under the co-chairmanship of President Erdoğan, H.E. Hassan Sheikh Mohamud, President of Somalia, and H.E. Jan Eliasson, U.N. Deputy Sec’y-Gen. See Press Release, Turkish Ministry of Foreign Affairs, Press Release Regarding the High Level Partnership Forum on Somalia to be Held on 23-24 February 2016 in Istanbul (Feb. 22, 2016), http://www.mfa.gov.tr/no_-48_-22-february-2016_press-release-

At the global level, Turkey has attempted to champion causes important to Africa.¹⁶⁷ Turkey “defined its G20 presidency as representing the interests of low income, least developed, and SSA countries.”¹⁶⁸ During the Turkish G20 Presidency, G20 Leaders adopted a framework to strengthen the dialogue between G20 and low income developing countries.¹⁶⁹

III. TURKEY–AFRICA RELATIONS: EMERGING LEGAL AND INSTITUTIONAL FRAMEWORK

A number of legal instruments underpin the unfolding economic relations between Turkey and countries in Africa. These documents set out the vision for Turkey–Africa relations, identify key areas of cooperation, and map the agenda for deepening the relationship between the two sides in the coming years.

A. *Legal Instruments in Turkey–Africa Relations*

A growing number of legal instruments are shaping Turkey–Africa relations. While some instruments (e.g., BITs) are binding if and when they are ratified, most of the instruments that underpin Turkey–Africa relations are not binding and could be classified as “soft law” instruments.¹⁷⁰ Free trade agreements are not very common in Turkey–Africa relations. Turkey has signed free trade

regarding-the-high_level-partnership-forum-on-somalia-to-be-held-on-23_24-february-2016-in-istanbul.en.mfa [https://perma.cc/C98D-GK2J] (archived Aug. 11, 2019).

167. *Turkey-Africa Relations*, *supra* note 4 (noting that Turkey, under its G20 Presidency in 2015, organized events in line with the Africa’s “Agenda 2063.” In this regard, the High Level Conference on Access to Energy in Sub-Saharan Africa was held on October 1, 2015 for the first time under G20 framework).

168. *Id.*; see also *G20 2015 Turkey, the Group Development Agenda, and Sub-Saharan Africa Representation1*, HEINRICH BÖLL STIFTUNG ISTANBUL (June 23, 2016), <https://tr.boell.org/de/2017/06/23/g20-2015-turkey-group-development-agenda-and-sub-saharan-africa-representation1> [https://perma.cc/QK8K-R3UT] (archived Aug. 11, 2019).

169. *G-20*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF TURK., <http://www.mfa.gov.tr/g-20-en.en.mfa> (last visited Sept. 8, 2019) [https://perma.cc/8J5V-WC4J] (archived Aug. 19, 2019).

170. See generally W. Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, in 1 ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS 135, 135 (Bola A. Ajibola & Emmanuel G. Bello eds., 1992); Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 172 (2010) (“Thus, soft law is most commonly defined to include hortatory, rather than legally binding, obligations.”); Timothy Meyer, *Soft Law as Delegation*, 32 FORDHAM INT’L L.J. 888, 890 (2009) (noting that “soft legal obligations are those international obligations that, while not legally binding themselves, are created with the expectation that they will be given some indirect legal effect through related binding obligations under either international or domestic law.”).

agreements with four African countries: Egypt (December 27, 2005),¹⁷¹ Morocco (April 7, 2004),¹⁷² Tunisia (November 25, 2004),¹⁷³ and Mauritius (2011).¹⁷⁴ There are reports that Turkey is currently in trade talks with Cameroon, the DRC, and Seychelles, but these reports cannot be substantiated.¹⁷⁵ Overall, key legal instruments in Turkey–Africa relations include

- *The Istanbul Declaration on Turkey–Africa Partnership: Cooperation and Solidarity for a Common Future* adopted at the First Turkey–Africa Cooperation Summit in 2008 (2008 Istanbul Declaration);¹⁷⁶
- *The Cooperation Framework for Turkey–Africa Partnership* adopted at the First Turkey–Africa Cooperation Summit in 2008;¹⁷⁷
- *The Joint Implementation Plan of Turkey–Africa Partnership 2010–2014* (First Implementation Plan);¹⁷⁸
- *The Joint Declaration and the Joint Action Plan* adopted at the first Ministerial meeting held on the 16th December 2011 in Istanbul;¹⁷⁹
- *The Second Africa–Turkey Summit Declaration (2014): “New Model of Partnership for the Strengthening of Sustainable Development and Integration”* (2014 Malabo Declaration);¹⁸⁰

171. Agreement Establishing a Free Trade Area Between the Arab Republic of Egypt and the Republic of Turkey, Egypt-Turk., Dec. 27, 2005.

172. Free Trade Agreement Between the Kingdom of Morocco and the Republic of Turkey, Morocco-Turk., Apr. 7, 2004.

173. Free Trade Agreement Between the Republic of Turkey and the Republic of Tunisia, Tunis.-Turk., Nov. 25, 2004.

174. Free Trade Agreement Between the Republic of Turkey and the Republic of Mauritius, Turk.-Mauritius, Sept. 9, 2011.

175. Nail Ersoy, *Free Trade Agreements of Turkey*, Republic of Turkey, MINISTRY OF ECONOMY, REPUBLIC OF TURK. (Sept. 2013), <http://yoikk.gov.tr/upload/IDB/FTAsCompatibilityMode.pdf> [<https://perma.cc/3UCE-2EFB>] (archived Sept. 8, 2019).

176. The Istanbul Declaration on Africa–Turkey Partnership: Solidarity and Partnership for a Common Future, Second Turkey-Africa Partnership Summit, Ministry of Foreign Affairs Turkey (adopted Aug. 19, 2008) [hereinafter Istanbul Declaration]. According to Turkey’s Ministry of Foreign Affairs, forty-nine African countries participated in the “Turkey-Africa Cooperation Summit” which was held August 18–21, 2008. See *Turkey-Africa Relations*, *supra* note 4.

177. Framework of Cooperation for Africa-Turkey Partnership, Second Turkey-Africa Partnership Summit, Ministry of Foreign Affairs Turkey (adopted Aug. 19, 2008) [hereinafter Framework of Cooperation 2008].

178. First Joint Implementation Plan, *supra* note 94.

179. Joint Declaration and Joint Action Plan, First Ministerial Review Conference of the Africa-Turkey Partnership, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF TURK., Dec. 16, 2011, <http://www.mfa.gov.tr/the-first-ministerial-review-conference-of-the-turkey-africa-cooperation-december-16-2011.en.mfa> [<https://perma.cc/4EKQ-75GR>] (archived Oct. 23, 2019).

180. Declaration, Second Africa-Turkey Summit, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF TURK., Nov. 21, 2014, <http://afrika.mfa.gov.tr/data/21-november-2014-summit-declaration.pdf> [<https://perma.cc/96VY-FM4H>] (archived Sept. 8, 2019) [hereinafter Malabo Declaration]. According to Turkey’s Ministry of Foreign Affairs,

- *The Turkey–Africa Joint Implementation Plan 2015–2019*, adopted at the Second Turkey–Africa Partnership Summit in 2014; and¹⁸¹
- Thirty-eight Economic Cooperation Agreements, including at least thirty-one known BITs.¹⁸²

In addition to the legal instruments that underpin Turkey–Africa relations, there are numerous investment contracts and construction agreements between Turkish businesses and countries in Africa.¹⁸³ Security pacts between Turkey and a growing number of countries in Africa are also important, such as the pact that laid the foundation for Ankara to establish and launch Turkey’s biggest overseas military base in Mogadishu, Somalia, in 2017.¹⁸⁴

B. Principles That Underpin Turkey–Africa Relations

The principles that underpin Turkey–Africa relations are spelled out in the 2008 Istanbul Declaration¹⁸⁵ and the 2014 Malabo Declaration.¹⁸⁶ In the Istanbul Declaration, the parties identified several principles that will guide the Africa–Turkey partnership.¹⁸⁷ These include *inter alia* the principles of: respect for the principles of the United Nations (UN) Charter and the Constitutive Act of the African Union, sovereign equality of states, the universality of human rights and respect of fundamental freedoms, and peaceful settlement of disputes.

In the Malabo Declaration, the parties reaffirmed their adherence to the goals and principles stipulated in the Istanbul Declaration.¹⁸⁸

almost 30 African countries participated in the Malabo Summit held in November 2019. See *Turkey-Africa Relations*, *supra* note 4.

181. Joint Implementation Plan of Africa-Turkey Partnership 2015–2019, Afr.–Turk., Nov. 21 2014, <http://afrika.mfa.gov.tr/data/turkey-africa-joint-implementation-plan-2015-2019.pdf> [<https://perma.cc/7NDZ-R6U7>] (archived Sept. 8, 2019) [hereinafter Second Joint Implementation Plan].

182. *Turkey-Africa Relations*, *supra* note 4.

183. Given rising Turkish investments in Africa and construction deals, it stands to reason that the investments and construction projects are all on the basis of binding contracts between Turkish companies and governments in Africa. *Id.*

184. *Turkey Sets Up Largest Overseas Army Base in Somalia*, AL JAZEERA (Oct. 1, 2017), <https://www.aljazeera.com/news/2017/10/turkey-sets-largest-overseas-army-base-somalia-171001073820818.html> [<https://perma.cc/2ABN-2SR7>] (archived Aug. 19, 2019) (observing that the military base “cost about \$50 million, will train 10,000 Somali troops and has the capacity to train at least 1,500 soldiers at a time.”).

185. See Istanbul Declaration, *supra* note 176.

186. See Malabo Declaration, *supra* note 178.

187. See Istanbul Declaration, *supra* note 176.

188. See Malabo Declaration, *supra* note 178, at 4 (“[S]trengthen the follow up mechanism which was established by the Framework of Cooperation for Africa-Turkey Partnership, done in Istanbul on 19 August 2008; through regular and intensified contacts . . .”).

C. *The Agenda for Turkey–Africa Cooperation*

The agenda for Turkey–Africa cooperation is quite extensive. At the Turkey–Africa Cooperation Summit held in 2008 with the participation of forty-nine countries, the two sides agreed to cooperate with vigor, in nine areas: (1) intergovernmental cooperation; (2) trade and investment; (3) agriculture, agribusiness, rural development, water resources management, and small and medium scale enterprises (SMEs); (4) health; (5) peace and security; (6) infrastructure, energy, and transport; (7) culture, tourism, and education; (8) media, information, and communication technology; and (9) the environment.¹⁸⁹ To advance the identified agenda, the parties adopted the Framework of Cooperation for implementing the Istanbul Declaration.¹⁹⁰ In 2014, the two sides expressed interest in deepening collaboration in a number of fields. Specifically, the two sides agreed to continue collaboration in a number of fields including the fields of peace and security, trade, investment, agriculture, and infrastructure development.

D. *Turkey–Africa Relations: Emerging Institutional Framework*

In 2008, the Parties adopted the *Joint Implementation Plan of Turkey–Africa Partnership 2010–2014* (First Implementation Plan) in accordance with the Istanbul Declaration.¹⁹¹ In 2014, the parties adopted the *Joint Implementation Plan of Africa–Turkey Partnership 2015–2019* (Second Implementation Plan).¹⁹² The two documents lay down the basis for establishing the strengthening institutional mechanisms that will shape Turkey–Africa cooperation arrangements. The parties have agreed to, *inter alia*, “strengthen their inter-governmental links and explore new areas of cooperation”; “promote the exchange of high level visits”; and “conduct regular inter-governmental dialogue and cooperation in order to create and maintain a favorable climate for business contacts and trade between Africa and Turkey.”¹⁹³

The parties have also agreed to establish follow-up mechanisms at several levels as follows:

189. Istanbul Declaration, *supra* note 176. The information about the number of countries that participated in the the Turkey-Africa Cooperation Summit in 2008 is from Turkey’s Ministry of Foreign Affairs. Whether the countries that participated were represented at by their heads of state, at the ministerial level, or by lower-level officials is hard to tell. See *Turkey-Africa Relations*, *supra* note 4.

190. Framework of Cooperation 2008, *supra* note 177.

191. Istanbul Declaration, *supra* note 176.

192. See Second Joint Implementation Plan, *supra* note 179.

193. First Joint Implementation Plan, *supra* note 94.

- (a) "the Africa-Turkey Summit to be held every five years in Africa and in Turkey, on a rotational basis";
- (b) "[a] Ministerial Review Conference that will meet every third year in the period between Summits to assess and evaluate the progress of implementation of the Programme of Action and prepare for the Summit meeting";
- (c) "[a] meeting of Senior Officials that will take place twice in between two summits to review the progress of implementation of agreed programs and projects, disseminate information about cooperation arrangements, propose new initiatives, and report to and prepare for the Ministerial Review Conference."¹⁹⁴

IV. TURKEY IN AFRICA: FOREIGN POLICY TOOLS AND INSTITUTIONS

Using a multitude of strategies, tools, and institutions, Turkey has been fairly successful in penetrating Africa.¹⁹⁵ In the last decade, "a wide array of new liberal instruments has been added to the toolkit of Turkish diplomats."¹⁹⁶ Turkey is using both traditional tools of foreign policy (e.g., trade, aid, and investment) and soft power (e.g., development assistance, humanitarian aid, and cultural diplomacy) to make an influence in Africa.¹⁹⁷

194. Second Joint Implementation Plan, *supra* note 179, at ¶ 17(1)-(3).

195. *Turkey-Africa Relations*, *supra* note 4 (discussing Turkey's engagement with countries in Africa).

196. *Id.*

197. Coined by Joseph S. Nye back in the 1980s, the term soft power generally refers to the ability of a country to persuade other countries to do what it wants without resorting to military force or coercion. Agents of soft power are typically companies, foundations, universities, religious organizations, and other institutions of civil society. See Joseph S. Nye, Jr., *Soft Power*, 80 FOREIGN POL'Y 153, 167 (1990). To Nye, proof of power "lies not in resources but in the ability to change the behavior of states." *Id.* at 155. He argues that today, "[t]he ability to affect what other countries want tends to be associated with intangible power resources such as culture, ideology, and institutions." *Id.* at 166-67. Nye defines 'co-optive power' as "getting others to want what you want" and identifies soft power resources to include cultural attraction ideology, and international institutions. According to Nye:

Soft co-optive power is just as important as hard command power. If a state can make its power seem legitimate in the eyes of others, it will encounter less resistance to its wishes. If its culture and ideology are attractive, others will more willingly follow. If it can establish international norms consistent with its society, it is less likely to have to change. ge. If it can support institutions that make other states wish to channel or limit their activities in ways the dominant state prefers, it may be spared the costly exercise of coercive or hard power. *Id.* at 167.

With soft power, some countries try to shape the long-term attitudes and preferences of people of other nations. Whether successful states need both hard and soft power and whether soft power is effective are continuing debate in international relations circles.

A. Turkey's Display of Soft Power in Africa

Turkish foreign policy makers are constantly adding new instruments to their tool kit even while improving conventional tools. Conventional devices deployed so far by Turkey in Africa include trade, aid, and FDI.¹⁹⁸ Soft power has also been an important tool in Turkey's foray into Africa.¹⁹⁹ Turkey is using new means, such as flights, hospitals, schools, scholarships, and other civil society organizations to get into Africa.²⁰⁰ In March 2018, National Public Radio's Peter Kenyon observed

There are now over 40 Turkish embassies in Africa, and state-controlled Turkish Airlines flies to more than 50 African destinations. Last fall, Turkey opened a military base in Somalia, its first in Africa and the largest of its overseas bases. If you get sick in Somalia, you may be treated at the Recep Tayyip Erdogan Hospital. Visitors arrive at an airport terminal run by a Turkish company, and travel on roads built by Turkey's development authority. Garbage collection is handled by the Turkish Red Crescent.²⁰¹

Schools and hospitals are very important in Turkey's Africa agenda and are some of the primary tools that Turkey relies on for its soft projection of power in Africa.²⁰² "The Gülen movement—founded by Turkish cleric Fethullah Gülen—was initially an instrument of Turkey's soft power approach in Africa."²⁰³ However, since the Turkish government's fallout with Fethullah Gülen, the government

See Eric X. Li, *The Rise and Fall of Soft Power*, FOREIGN POL'Y MAG. (Aug. 20, 2018, 1:25 PM), <https://foreignpolicy.com/2018/08/20/the-rise-and-fall-of-soft-power/> [<https://perma.cc/S7QK-3B35>] (archived Aug. 19, 2019). On Turkey's use of soft power, see Zafer Yoruk & Pantelis Vatikiotis, *Soft Power Or Illusion of Hegemony: The Case of the Turkish Soap Opera "Colonialism,"* 7 INT'L J. COMM. 2361, 2361 (2013). See also Ibrahim Kalin, *Soft Power and Public Diplomacy in Turkey*, 16 PERCEPTIONS: J. INT'L AFF. 5, 7 (2011).

198. See *infra* Part II.B.

199. See Suraj Sharma, *Turkey Scrambles for Africa: Ankara Eyes New Empire in Old Backyard*, MIDDLE E. EYE (Aug. 7, 2017, 11:45 AM), <http://www.middleeasteye.net/news/turkey-scramble-africa-1794375465> [<https://perma.cc/YLE2-UUZC>] (archived Aug. 19, 2019) (stating that "[w]hen the AKP government began its push into Africa in 2005, it relied heavily on soft power to find leverage in Africa, particularly in eastern and southern Africa.").

200. Fidan, *supra* note 96, at 92 (observing that Turkish diplomats now "have a larger set of instruments to draw on as they launch new policies to advance the country's regional and global agenda . . . Turkey's soft power now comprises, among others things, cultural diplomacy, development assistance and mediation services.").

201. Peter Kenyon, *Turkey is Quietly Building Its Presence in Africa*, NAT'L PUB. RADIO (Mar. 8, 2018, 11:27 AM), <https://www.npr.org/sections/parallels/2018/03/08/590934127/turkey-is-quietly-building-its-presence-in-africa> [<https://perma.cc/L2ZN-BQ8E>] (archived Aug. 19, 2019).

202. See Sharma, *supra* note 199 ("The primary tool it relied on for this soft projection of power was Fethullah Gulen's educational institutions.").

203. Daragh Neville & Alex Vines, *President Erdogan's Africa Agenda: From Business to Embassy-Building*, NEWSWEEK (Jan. 26, 2017, 8:59 AM), <https://www.newsweek.com/erdogans-agenda-turkey-africa-548136> [<https://perma.cc/6AA8-QCAY>] (archived Aug. 18, 2019).

has tried to steer its activities through government-run agencies.²⁰⁴ The Maarif Foundation, a government-run agency, is beginning to operate schools in Africa.²⁰⁵ Established in 2016 by the ruling Justice and Development Party, the Maarif Foundation has taken over seventy-six schools linked to the Gülen movement in ten countries in Africa.²⁰⁶ The Maarif Foundation has reportedly “opened 32 new schools in eleven countries: Gambia, Sierra Leone, Djibouti, Sao Tome and Principe, the United States, Kosovo, Afghanistan, Georgia, Bosnia and Herzegovina, Tanzania and Macedonia, having a total of 1,127 students.”²⁰⁷ The Turkish Ministry of National Education, and the Maarif Foundation, hosted the first Turkey–Africa Education Ministers Conference in 2017.²⁰⁸ Since 1992, Turkey has reportedly provided undergraduate, graduate, and doctorate scholarships to over eight thousand African students.²⁰⁹

Turkish Airlines’ “bullish African expansion” has been noted by external observers and is welcomed—even celebrated—by many in Africa.²¹⁰ Today, Turkish Airlines is “the largest international carrier in Africa in terms of total number of destinations.”²¹¹ In 2012, when Turkish Airlines launched twice daily service to Mogadishu, Somalia, it became the “third carrier to operate at Mogadishu International Airport and the first carrier from outside Africa to offer scheduled flights to and from Mogadishu in 21 years.”²¹² Africa Experience Sharing Program, a program akin to the U.S. Peace Corps, provides an opportunity for Turkish students to visit several African countries

204. See Kareem Shaheem, *Erdoğan v the Gülenists: from political allies to Turkey's bitter rivals*, GUARDIAN (July 19, 2019, 2:54 PM), <https://www.theguardian.com/world/2016/jul/19/thousands-detained-as-turkey-vows-to-smoke-out-gulen-supporters> [https://perma.cc/4UXR-MKQN] (archived Aug. 19, 2019).

205. *Erdoğan's foundation takes over 76 Gülen movement schools in 10 countries*, TURKISH MINUTE (Apr. 24, 2018), <https://www.turkishminute.com/2018/04/24/erdogans-foundation-takes-over-76-gulen-movement-schools-in-10-countries/> [https://perma.cc/56YW-XRPG] (archived Aug. 19, 2019).

206. The ten countries are: Guinea, Somalia, Sudan, People's Republic of the Congo, Mali, Mauritania, Niger, Tunisia, Senegal, and Chad with their 8,506 students. *Id.*

207. *Id.*

208. Pinar Dost-Niyego, *Turkey's Growing Presence in Africa, and Opportunities and Challenges To Watch in 2018*, ATLANTIC COUNCIL (Mar. 26, 2018), <https://www.atlanticcouncil.org/events/past-events/turkey-s-growing-presence-in-africa-and-opportunities-and-challenges-to-watch-in-2018> [https://perma.cc/DFS9-B4MQ] (archived Aug. 19, 2019).

209. *Id.*

210. *Natural Resources and Economic Growth Draw Turkish Airlines to Africa*, CTR. FOR AVIATION (Jan. 29, 2012, 5:41 PM), <https://centreforaviation.com/analysis/reports/natural-resources-and-economic-growth-draw-turkish-airlines-to-africa-66908> [https://perma.cc/VP5Z-3GWV] (archived Aug. 19, 2019).

211. *Id.*

212. *Id.*

to volunteer.²¹³ “The program is organized by the Turkish Cooperation and Coordination Agency (TİKA) in cooperation with Turkish Airlines, Anadolu Agency, and state broadcaster Turkish Radio and Television (TRT).”²¹⁴

B. Turkey's Foreign Policy Institutions

At the forefront of Turkish foreign policy is the Ministry of Foreign Affairs (Ministry).²¹⁵ The Ministry was established in 1920 and is responsible for Turkey's foreign relations.²¹⁶ Between 1923 and 2001, Turkey's foreign policy was largely based on the Western-inspired reforms of Mustafa Kemal Atatürk, which placed heavy emphasis on Turkey's relationship with the Western world.²¹⁷ Since the end of the Cold War, Turkey's foreign relations have been characterized by relation diversification.²¹⁸ In 1924, Turkey had a total of thirty-nine missions abroad.²¹⁹ In 2002, Turkey only had 163 diplomatic missions abroad.²²⁰ Today, Turkey is represented by about 233 official missions throughout the world.²²¹ According to the Lowy

213. *Turkish Students Continue Volunteer Work in Africa*, DAILY SABAH (Aug. 25, 2017), <https://www.dailysabah.com/turkey/2017/08/26/turkish-students-continue-volunteer-work-in-africa> [https://perma.cc/TRC4-MTS8] (archived Aug. 19, 2019).

214. *Id.*

215. *See generally* MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF TURK., <http://www.mfa.gov.tr> (last visited Sept. 8, 2019) [https://perma.cc/A2LB-8YE5] (archived Aug. 19, 2019).

216. *Brief History of the Ministry of Foreign Affairs of the Republic of Turkey*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF TURK., <http://www.mfa.gov.tr/turkiye-cumhuriyeti-disisleri-bakanligi-tarihcesi.en.mfa> (last visited Sept. 8, 2019) [https://perma.cc/W5BA-CN49] (archived Aug. 19, 2019).

217. *Id.*

218. *Id.*; *see* F. STEPHEN LARRABEE & IAN O. LESSER, *TURKISH FOREIGN POLICY IN AN AGE OF UNCERTAINTY* 128 (Rand Corp. 2003) (observing that although Turkey's business community tends to be secular and highly supportive of Turkish integration in European and Western institutions and is generally not a community that looks South or East, culturally or politically, it is nonetheless among the most active proponents of Turkish economic engagement in Eurasia and the Middle East); *see also* Yusuf K. Bagir, *Impact of the Presence of Foreign Missions on Trade: Evidence from Turkey*, MUNICH PERSONAL REPEc ARCHIVE 4 (2017), https://mpra.ub.uni-muenchen.de/80845/1/MPra_paper_80845.pdf [https://perma.cc/88RT-ENHS] (archived Oct. 21, 2019) (“Turkey has experienced a significant change in its foreign policy objectives since the beginning of the 21st century. The main goal of this change was to develop a multi-dimensional and more proactive foreign policy which in part led to the expansion of relations with long-time neglected Sub-Saharan Africa, Latin America and Asia-Pacific regions.”)

219. *See Foreign Relations of Turkey*, *supra* note 217.

220. *Turkey to open 5 new embassies in African countries*, *supra* note 142 (discussing the steady rise in the number of Turkish missions since 2002, when the ruling Justice and Development Party came to power).

221. Of Turkey's 233 missions around the world, 135 are embassies, thirteen are permanent representations, eighty-four are consulates-general and one is a trade office. *See List of Diplomatic Missions of Turkey*, WIKIPEDIA, <https://en.wikipedia.org/wiki/>

Institute's *Global Diplomacy Index "2017 Country Ranking,"* Turkey is the sixth country, only after United States, China, France, Russia, and Japan, in the number of worldwide representations.²²² "In the year 2009 there were only 12 Turkish embassies in African countries (5 of them in North Africa)."²²³ Today, Turkey has some forty-four embassies in the continent and reportedly plans to open an embassy in every capital city in Africa.²²⁴ In its engagement with countries in Africa three Turkish institutions are proving very important: Türk Eximbank, Turkey's Foreign Economic Relations Board, and TİKA.

1. Türk Eximbank

Türk Eximbank was established in 1987 as Turkey's official export credit agency.²²⁵ The main objectives of Türk Eximbank are

Increasing the volume of exports; Diversification of export goods and services; Developing new export markets; Increasing the exporters' share of international trade and providing necessary support for their initiatives; Gaining competitiveness and bringing assurance to exporters, overseas contractors, and investors on the international markets; and "romoting and supporting the production and sale of investment goods for export through overseas investments."²²⁶

Türk Eximbank plays a very important role in supporting Turkey's efforts in Africa and is eyeing more international cooperation.²²⁷ Thus far, Türk Eximbank's loans are supporting a number of infrastructure and development projects throughout Africa.²²⁸ Countries in Africa are also turning to the bank for financing.²²⁹ In the *2008 Cooperation Framework for Turkey–Africa Partnership*, the parties "welcome[d]

List_of_diplomatic_missions_of_Turkey (last visited Sept. 8, 2019) [<https://perma.cc/86YV-PZFD>] (archived Aug. 19, 2019).

222. *Global Diplomacy Index: 2017 Country Ranking*, LOWY INST. (2017), https://globaldiplomacyindex.lowyinstitute.org/country_rank.html# [<https://perma.cc/8T5J-BHY2>] (archived Aug. 19, 2019).

223. *Turkey-Africa Relations*, *supra* note 4.

224. Neville & Vines, *supra* note 203.

225. See TÜRK EXIMBANK, <https://www.eximbank.gov.tr/en> (last visited Sept. 8, 2019) [<https://perma.cc/8N4P-TKFE>] (archived Aug. 19, 2019).

226. *Türk Eximbank in Brief*, TÜRK EXIMBANK, <https://www.eximbank.gov.tr/en/about-us/corporate> (last visited Sept. 8, 2019) [<https://perma.cc/FC6Y-GAVH>] (archived Aug. 19, 2019).

227. *Türk Eximbank hits road for more international cooperation*, HURRIYET DAILY NEWS (Feb. 18, 2018), <http://www.hurriyetdailynews.com/turk-eximbank-hits-road-for-more-international-cooperation-127479> [<https://perma.cc/WQH5-2MBT>] (archived Aug. 19, 2019).

228. *Id.*

229. *Tanzania seeks Turkish loan for railway*, AFR. NEWS (Jan. 1, 2017), <http://www.africanews.com/2017/01/24/tanzania-seeks-turkish-loan-for-railway/> [<https://perma.cc/PW63-GKXE>] (archived Aug. 19, 2019).

the willingness of the Turkish Eximbank as well as the Turkish government to provide loans for the financing of African development projects including continental infrastructure network in Africa.”²³⁰

2. Foreign Economic Relations Board (DEİK)²³¹

Established in 1986, the Foreign Economic Relations Board (DEİK) is responsible for leading and managing the foreign economic relations of the Turkish private sector.²³² In executing its task, the DEİK focuses particularly on foreign trade, international investment and services, international construction activities, and logistics. One of its tasks is to explore inward and outward investment opportunities, work towards increasing exports for Turkish businesses, and help with coordinating other business development activities.²³³ Pursuant to Law No. 6552 enacted on September 11, 2014, the DEİK has full responsibility of “managing the foreign economic relations of the Turkish private sector.”²³⁴

Through entities called the Business Councils, the DEİK establishes business-to-business cooperations with other countries.²³⁵ Suggesting a desire to deepen economic ties with Africa, the DEİK has opened Business Councils with its counterparts in thirty-one African countries.²³⁶

3. Turkish Cooperation and Coordination Agency (TIKA)

TIKA is a government department of the Prime Ministry of Turkey and is directly responsible for organizing the majority of Turkey’s official development assistance to developing countries.²³⁷ Established in 1992 to as a technical aid organization under the Ministry of Foreign Affairs, to deal with some of the humanitarian

230. Framework of Cooperation 2008, *supra* note 177.

231. *About the Foreign Economic Relations Board of Turkey (DEİK)*, TURK.–U.S. BUS. COUNCIL, <http://www.taik.org.tr/about-deik.php> (last visited Sept. 8, 2019) [<https://perma.cc/6C9V-HDTL>] (archived Aug. 19, 2019) [hereinafter *About DEİK*].

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* (“The Business Councils constitute the backbone of DEİK, while their Executive Committees are responsible for the implementation of the decisions taken.”). Published in 2017, “The Regulation on Working Procedures and Principles of Foreign Economic Relations Board and Business Councils” (the “Regulation”) sets out the functions of the Business Council. The Regulation was published in Official Gazette no. 30252 on November 26, 2017, and entered into effect on the same date. There are three different types of Business Councils, namely Bilateral Business Councils, Sectoral Business Councils, and Special Purpose Business Councils. *Id.*

236. The Foreign Economic Relations Board (DEİK) established business councils with forty-two African countries.

237. *About DEİK*, *supra* note 231.

crisis resulting from the disintegration of the Soviet Union.²³⁸ On May 28, 1999, TİKA became an organization working under the Prime Ministry of the Republic of Turkey.²³⁹ Although the initial focus of TİKA was on the Turkic (Turkish-speaking) countries in Central Asia,²⁴⁰ the agency's focus has expanded considerably since the end of the Cold War.²⁴¹ The number of TİKA's Programme Coordination Offices went from twelve in 2002, to twenty-five in 2011, thirty-three in 2012, and sixty-one today.²⁴² Today, TİKA is considered an integral part of Turkish foreign policy and its focus extends well beyond Turkey's immediate neighborhood.²⁴³ Today, through its sixty-one Programme Coordination Offices located in about fifty-nine countries, TİKA is engaged in a wide variety of development cooperation activities in many countries around the world.²⁴⁴ Since 2002, Turkey's budget for development assistance has grown.²⁴⁵ In 2002, Turkey's development aid comprised about \$85 million, by 2015, this amount increased to \$3.9 billion.²⁴⁶

Of TİKA's sixty-one Programme Coordination Offices around the world, twenty-one offices are in Africa.²⁴⁷ "In 2008, TIKE [sic] initiated an African Agricultural Development Programme" that initially targeted thirteen countries in Africa.²⁴⁸ Today, TİKA's agricultural assistance program can be found in many countries in Africa including Somalia,²⁴⁹ Sudan,²⁵⁰ and Kenya.²⁵¹ "TIKA's projects

238. *History of the Turkish Cooperation and Coordination Agency (TİKA)*, MINISTRY OF CULTURE & TOURISM, REPUBLIC OF TURK., http://www.tika.gov.tr/en/page/history_of_tika-8526 (last visited Sept. 8, 2019) [<https://perma.cc/5RG2-TSBU>] (archived Aug. 19, 2019) [hereinafter *History of TİKA*].

239. *Id.*

240. *History of TİKA*, *supra* note 238 ("In the '90s, our country's first priority regarding the issue of Central Asia became the recognition of the young Turkic countries by the international community. This was followed by our country carrying out projects for our cognates living in the newly founded countries of Central Asia in various fields, such as the social, economic and cultural ones.")

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Overseas Offices*, TİKA, <http://www.tika.gov.tr/en/overseasoffices> (last visited Sept. 9, 2019) [<https://perma.cc/GKN7-SNWE>] (archived Aug. 19, 2019).

248. Özkan & Akgün, *supra* note 71, at 538.

249. *Agriculture School Project in Somalia Brings Results*, TİKA, http://www.tika.gov.tr/en/news/agriculture_school_project_in_somalia_brings_results-19330 (last visited Sept. 9, 2019) [<https://perma.cc/A48Z-ASBD>] (archived Aug. 19, 2019).

250. *Id.*

251. *Turkey's TİKA launches projects to support education, economy in Africa*, DAILY SABAH (May 31, 2016), <https://www.dailysabah.com/life/2016/06/01/turkeys-tika-launches-projects-to-support-education-economy-in-africa> [<https://perma.cc/9JTA->

and activities in Africa are designed to serve long-term purposes such as the development of social infrastructure, cultural co-operation and communication, the production sectors, economic infrastructure, and to a lesser extent provide support in urgent humanitarian crises.”²⁵²

In conclusion, in its charm offensive in Africa, Turkey has used and is using every tool at its disposal. While traditional tools of foreign policy are important in Turkey–Africa relations, in its engagement with countries in Africa, Turkey is relying heavily on soft power.²⁵³

V. TURKEY–AFRICA BILATERAL INVESTMENT TREATIES

Since 2011, and with the exception of 2012 and 2015, Turkey has concluded at least two BITs every year with countries in Africa.²⁵⁴ This Part reviews BITs that Turkey has concluded with states in Africa that are publicly available and are in English.

A. Trends of Turkey–Africa BITs

Turkey has concluded BITs with twenty-eight countries in Africa.²⁵⁵ However, in total, Turkey has concluded thirty-one BITs with countries in the region:²⁵⁶ two each with Nigeria,²⁵⁷ Sudan,²⁵⁸ and Tunisia.²⁵⁹ In terms of trends, Turkey–Africa BITs share some similarities. First, a relatively large number of BITs that Turkey has with countries in Africa are not in force. Out of the thirty-one BITs concluded since 1999, only seven are in force (See Annex A and B).²⁶⁰ Second, Turkey–Africa BITs are fairly recent. A majority of Turkey–Africa BITs were concluded only in the past ten years.²⁶¹ Only four Turkey–Africa BITs were concluded prior to 2010—the BITs with Algeria (June 3, 1998),²⁶² Sudan (December 19, 1999),²⁶³ Nigeria (October 8, 1996),²⁶⁴ and South Africa (June 23, 2000).²⁶⁵ Third, similar to traditional BITs between developed countries and

B2U4] (archived Aug. 19, 2019) (discussing the donation of agricultural equipment to provide sustainable agricultural development and food security in regions with important agricultural potential and fertile lands in Kenya).

252. Özkan & Akgün, *supra* note 71, at 537.

253. See Kalin, *supra* note 197; Özerdem, *supra* note 7.

254. Investment Policy Hub – Turkey, *supra* note 1.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* (Egypt, Ethiopia, Libya, Mauritius, Morocco, Senegal, and Tunisia).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

developing countries, Turkey–Africa BITs address investor rights and protection and afford significant protections to investors.²⁶⁶

B. Investor Protection Elements in Turkey–Africa BITs

Bilateral investment treaties establish “minimum guarantees regarding the treatment of foreign investment.”²⁶⁷ The *G20 Guiding Principles for Global Investment Policymaking* (2016) states that “[i]nvestment policies should provide legal certainty and strong protection to investors and investments, tangible and intangible.”²⁶⁸ Very similar to the BITs that countries in Africa have concluded with Western nations, Turkey–Africa BITs are designed primarily to protect investors, and they provide investors with seven core benefits. First, the BITs require that investors and their “covered investments” are treated as favorably as the host state treats its own investors and their investments (national treatment).²⁶⁹ Second, the BITs require that investors and their covered investments are treated as favorably as the host state treats investors and investments from any third country (most favored nation treatment).²⁷⁰ Third, almost all Turkey–Africa BITs guarantee investors absolute standard of treatment including “fair and equitable treatment” (FET), “full protection and security” (FPS), and protection against unreasonable or discriminatory measures.²⁷¹ Fourth, the BITs establish “clear limits on the expropriation of investments and provide for payment of prompt, adequate, and effective compensation” in the event of an expropriation.²⁷² Fifth, the BITs provide for the transferability of investment-related funds into and out of a host state without delay

266. *Bilateral Investment Treaties*, MINISTRY OF TRADE, REPUBLIC OF TURK. (Sept. 5, 2018), <https://www.trade.gov.tr/legislation/bilateral-investment-treaties> [<https://perma.cc/R7MT-PGUV>] (archived Sept. 11, 2019) (highlighting the protections available to investors under Turkey’s BITs); see also Ismail G. Esin et al., *Turkey, GETTING THE DEAL THROUGH – INV. TREATY ARB.* 89, 89–90 (2015), <https://www.esin.av.tr/wp-content/uploads/2014/12/GTDT-Investment-Treaty-Arbitration-2015.pdf> [<https://perma.cc/TR6L-SH5D>] (archived Sept. 11, 2019).

267. See *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*, U.N. CONFERENCE ON TRADE & DEV. 1 (2007), https://unctad.org/en/Docs/iteiia20065_en.pdf [<https://perma.cc/6TL8-SPGX>] (archived Oct. 8, 2019) [hereinafter *Bilateral Investment Treaties 1995–2006*].

268. *G20 Guiding Principles for Global Investment Policymaking, Annex III to the G20 Trade Ministers Meeting Statement*, ORG. FOR ECON. COOPERATION & DEV. (July 9–10, 2016), <https://www.oecd.org/daf/inv/investment-policy/G20-Trade-Ministers-Statement-July-2016.pdf> [<https://perma.cc/WE5Y-MA6Z>] (archived Oct. 8, 2019) [hereinafter *G20 Guiding Principles*].

269. *Bilateral Investment Treaties*, supra note 266.

270. *Id.*

271. *Id.*

272. *Id.*

and using a market rate of exchange.²⁷³ Sixth, the BITs guarantee investors and their investments most favored nation (MFN) treatment in the event of a loss due to war.²⁷⁴ Seventh, in the event of an investment-related dispute between an investor and a host state, the BITs give investors the right to submit such disputes to international arbitration.²⁷⁵

1. National Treatment

The concept of national treatment has been defined as “a principle whereby a host country extends to foreign investors treatment that is at least as favourable as the treatment that it accords to national investors in like circumstances.”²⁷⁶ Essentially, “the national treatment standard seeks to ensure a degree of competitive equality between national and foreign investors.”²⁷⁷ The concern about the national treatment standard is that although it is extremely important to investors, it can reach deeply into the domestic policy space of host states. According to UNCTAD:

The national treatment standard is perhaps the single most important standard of treatment enshrined in international investment agreements (IIAs). At the same time, it is perhaps the most difficult standard to achieve, as it touches upon economically (and politically) sensitive issues. In fact, no single country has so far seen itself in a position to grant national treatment without qualifications, especially when it comes to the establishment of an investment.²⁷⁸

National treatment protection is available in all Turkey–Africa BITs.²⁷⁹ Article 3(2) of the Turkey–Senegal BIT provides that once established, each Contracting Party shall accord to the investments, “treatment no less favourable than that accorded in like circumstances to investments of its investors.”²⁸⁰ Article 3(2) of the Libya–Turkey BIT states: “[n]either Contracting Party shall in its territory subject investments or returns of investors of other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own investors.”²⁸¹

273. *Id.*

274. *Id.*

275. *Id.*

276. U.N. CONFERENCE ON TRADE & DEV., NATIONAL TREATMENT, at IV-1, U.N. Doc. UNCTAD/ITE/IIT/11, U.N. Sales No. E.99.II.D.16 (1999).

277. *Id.*

278. *Id.*

279. See, e.g., Turkey–Egypt BIT, *supra* 54, at art. II(2); Turkey–Ethiopia BIT, *supra* note 55, at art. II(2); Turkey–Rwanda BIT, *supra* note 66, at art. 4; Turkey–Nigeria BIT (2011), *supra* note 43, at art. 5(4).

280. Turkey–Senegal BIT, *supra* note 58, at art. 3(2).

281. Turkey–Libya BIT, *supra* note 56, at art. 3(2).

2. Most Favored Nation Treatment

The MFN treatment “ensures that a host country extends to the covered foreign investor and its investments, as applicable, treatment that is no less favourable than that which it accords to foreign investors of any third country.”²⁸² In the context of foreign investment, the MFN standard ensures an equality of competitive conditions between foreign investors of different nationalities seeking to set up an investment or operating that investment in a host country.²⁸³ The MFN treatment is provided for in all Turkey–Africa BITs.²⁸⁴

Article 4 of the Turkey–Rwanda BIT, states:

ARTICLE 4

Treatment of Investments

1. Each Contracting Party shall admit in its territory investments on a basis no less favourable than that accorded in like circumstances to investments of investors of any third State, within the framework of its laws and regulations.

2. Each Contracting Party shall accord to these investments, once established, treatment no less favourable than that accorded in like circumstances to investments of its investors or to investments of investors of any third State, whichever is the most favourable, as regards the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of the investment.²⁸⁵

3. Absolute Standard of Treatment: Fair and Equitable Treatment, Full Protection and Security, and Nonimpairment

Almost all Turkey–Africa BITs guarantee investors absolute standard of treatment including fair and equitable treatment (FET), full protection and security, and protection against unreasonable or discriminatory measures.²⁸⁶

282. U.N. CONFERENCE ON TRADE & DEV., MOST FAVORED NATION TREATMENT, at 13, U.N. Doc. UNCTAD/ITE/IIT/10, U.N. Sales No. E.99.II.D.11 (2010).

283. *Id.* at 14.

284. *See, e.g.*, Turkey–Egypt BIT, *supra* note 54, at art. II(1)–(2); Turkey–Ethiopia BIT, *supra* note 55, at art. III(1)–(2); Turkey–Rwanda BIT, *supra* note 66, at art. 4; Turkey–Nigeria BIT (2011), *supra* note 43, at art. 5(4); Turkey–Senegal BIT, *supra* note 58, at art. 3(1)–(2); Turkey–Kenya BIT, *supra* note 65.

285. Turkey–Rwanda BIT, *supra* note 66.

286. The Turkey–Egypt BIT and Turkey–Tunisia BIT do not guarantee investors absolute standards of treatment. *See* Turkey–Egypt BIT, *supra* note 54; Turkey–Tunisia BIT, *supra* note 45.

The fair and equitable treatment standard is available in almost all the BITs examined, including Turkey's BIT with Cameroon,²⁸⁷ Ethiopia,²⁸⁸ Gabon,²⁸⁹ Gambia,²⁹⁰ Senegal,²⁹¹ and Kenya.²⁹² Article 2(2) of Libya–Turkey BIT states that “[i]nvestments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment.”²⁹³ The fair and equitable treatment standard is found in the preamble of the Turkey–Ethiopia BIT as well as in the text of the treaty.²⁹⁴ Article 2(2) of the Turkey–Morocco BIT simply states that “[e]ach Contracting party shall ensure fair and equitable treatment.”²⁹⁵

The full protection and security guarantee is found in numerous Turkey–Africa BITs including those with Cameroon,²⁹⁶ Ethiopia,²⁹⁷ Gabon,²⁹⁸ Gambia,²⁹⁹ and Kenya.³⁰⁰ Article 2(2) of Libya–Turkey BIT states that “[i]nvestments of investors of each Contracting Party . . . shall enjoy full protection in the territory of the other Contracting Party.”³⁰¹ Article 2(2) of the Turkey–Morocco BIT provides: “Each Contracting party shall . . . subject to the strictly necessary measures to maintain the public order provide full protection and security for investments of investors of the other Contracting Party.”³⁰²

The guarantee of protection against unreasonable or discriminatory measures is found in many of the BITs reviewed, including those between Turkey and Cameroon,³⁰³ Ethiopia,³⁰⁴ Gabon,³⁰⁵ Gambia,³⁰⁶ and Kenya.³⁰⁷ The second sentence of Article 2(2) in the Libya–Turkey BIT states that: “[n]either Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension,

287. Turkey–Cameroon BIT, *supra* note 61, at art. 3(2).

288. Turkey–Ethiopia BIT, *supra* note 55, at art. II(2).

289. Turkey–Gabon BIT, *supra* note 62, at art. 3(2).

290. Turkey–Gambia BIT, *supra* note 63, at art. 3(2).

291. Turkey–Senegal BIT, *supra* note 58, at art. 2(2).

292. Turkey–Kenya BIT, *supra* note 65, at art. 2(2).

293. Turkey–Libya BIT, *supra* note 56, at art. (2)(2).

294. Turkey–Ethiopia BIT, *supra* note 55, Preamble (“Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.”).

295. Turkey–Morocco BIT, *supra* note 57.

296. Turkey–Cameroon BIT, *supra* note 61, at art. 3(2).

297. Turkey–Ethiopia BIT, *supra* note 55, at art. II(2).

298. Turkey–Gabon BIT, *supra* note 62, at art. 3(2).

299. Turkey–Gambia BIT, *supra* note 63, at art. 3(2).

300. Turkey–Kenya BIT, *supra* note 65, at art. 2(2).

301. Turkey–Libya BIT, *supra* note 56, at art. 2(2).

302. Turkey–Morocco BIT, *supra* note 57.

303. Turkey–Cameroon BIT, *supra* note 61, at art. 3(2).

304. Turkey–Ethiopia BIT, *supra* note 55, at art. II(2).

305. Turkey–Gabon BIT, *supra* note 62, at art. 3(2).

306. Turkey–Gambia BIT, *supra* note 63, at art. 3(2).

307. Turkey–Kenya BIT, *supra* note 65, at art. 2(3).

or disposal of such investments.”³⁰⁸ The standard is worded a bit differently in Article 2(2) of the Turkey–Morocco BIT, which stipulates, “[c]ontracting Party shall impair by discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of other Contracting Party.”³⁰⁹

Article 3 of the Turkey–Rwanda BIT states:

ARTICLE 3

Promotion and Protection of Investments

2. Investments of investors of each Contracting Party shall at all times be accorded treatment in accordance with international law minimum standard of treatment, including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of such investments by unreasonable or discriminatory measures.³¹⁰

4. Protection Against Expropriation

Under customary international law, “states have a sovereign right to take property held by nationals or aliens through nationalization or expropriation for economic, political, social, or other reasons.”³¹¹ Not every expropriation triggers the international responsibility of a state; a distinction is made between lawful and unlawful expropriation. To be considered lawful, international law requires that four conditions are met: an investment asset has to be taken for a public purpose, on a nondiscriminatory basis, in accordance with due process of law, and the taking must be accompanied by compensation.³¹² Over the years, particularly during the first and second phase of mass expropriation in the 1960s and 1970s,³¹³ the exercise by states of the right to expropriate investment property triggered conflicts, debates, and disagreements, and

308. Turkey–Libya BIT, *supra* note 56, at art. 2(2).

309. Turkey–Morocco BIT, *supra* note 57.

310. Turkey–Rwanda BIT, *supra* note 66.

311. U.N. CONFERENCE ON TRADE & DEV., EXPROPRIATION, at 1, U.N. Doc. UNCTAD/DIAE/IA/2011/7, U.N. Sales No. E.12.II.D.7 (2012).

312. *Id.*

313. *Id.* (observing that “In the first part of the twentieth century, the first major phase of mass expropriations (nationalizations) occurred during revolutionary movements in Russia and Mexico.” Also noting that “A second wave of nationalizations and expropriations followed the period of decolonization that took place after the Second World War.”).

prompted states to use BITs to clarify the rights and duties of host states *vis-à-vis* those of foreign investors.³¹⁴

Turkey–Africa BITs do not prohibit expropriation but rather impose strict limits on the right of a host state to expropriate an investment. In general, expropriation must be for a public purpose, must be on a nondiscriminatory basis, and must be against the payment of compensation.³¹⁵

Regarding compensation that must be paid when an investment is expropriated, some BITs call for prompt, adequate, and effective compensation³¹⁶ and some do not.³¹⁷ Some BITs provide that expropriation must be in accordance with legal due process and others do not.³¹⁸ Consider the following examples:

Turkey–Senegal BIT Article 5 Expropriation and Compensation	Turkey–Libya BIT Article 4 Expropriation	Turkey–Sudan BIT Article 3 Expropriation and Compensation
1. Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects (hereinafter referred as	1. Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects except for a public purpose, in a	1. Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects except for a public purpose, in a

314. *Id.*

315. See generally *Bilateral Investment Treaties 1995–2006*, *supra* note 267 (stating “In general, BITs allow countries to expropriate foreign investments on a non-discriminatory basis, for a public purpose and against the payment of compensation.”); see, e.g., Turkey–Tunisia BIT, *supra* note 45, at art. III(1) (stating that investments shall not be expropriated . . . except for a public purpose in a non-discriminatory manner, upon payment of prompt adequate and effective compensation, and in accordance with due process of law.”). Not all BITs between Turkey and countries in Africa require that all four standards be met. The BIT between Turkey and Morocco only requires that expropriation be for public purpose and on a non-discriminatory basis. Article 4(1) states that “[m]easures of nationalization, expropriation or any other measures having an equivalent effect . . . must be neither discriminatory nor taken other than for a public purpose. Turkey–Morocco BIT, *supra* note 57, at art. 4(1).

316. Turkey–Ethiopia BIT, *supra* note 55, at art. IV(1).

317. Turkey–Egypt BIT, *supra* note 54, at art. III(1) (calling for “prompt, adequate and fair compensation”); see also Turkey–Morocco BIT, *supra* note 57, at art. 4(2) (“The contracting Party that takes such measures shall, give to the beneficiaries a fair and equitable compensation which shall amount to the market-value of the concerned investment on the day before the one the said measures were taken or became public knowledge.”).

318. The following BITs have a due process requirement in the expropriation clause: Turkey–Egypt BIT, *supra* note 54, at art. 3(1); Turkey–Ethiopia BIT, *supra* note 55, at art. IV(1); Turkey–Senegal BIT, *supra* note 58, at art. 5(1). Some BITs do not have a due process requirement. See, e.g., Turkey–Morocco BIT, *supra* note 57, at art. 4(2).

expropriation) except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article 3 of this Agreement. ³¹⁹	non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article 3 of this Agreement. ³²⁰	non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II of this Agreement. ³²¹
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5. Right to Transfer Capital

Transfer of funds provisions constitute one of the core provisions in international investment agreements.³²² Investors need assurance that they “will be able to enjoy the financial benefits of a successful investment.”³²³ Consequently, transfer provisions typically “set forth a host country’s obligation to allow free flow of all investment related transactions, guaranteeing the transfer, conversion and liquidation of any form of capital, proceeds, payments, profits and others without restrains.”³²⁴ Transfer provisions also define the nature of transfers covered, the nature of the obligation on host states, and any permissible exceptions and derogations.

Turkey–Africa BITs guarantee investors the right to transfer capital out of the host state. For example, Article IV of the Turkey–Egypt BIT declares that “[e]ach Party shall permit in good faith all transfers related to an investment to be made freely and without unreasonable delay into and out of its territory.”³²⁵ Article 6(1) of the Turkey–Morocco BIT stipulates that “[e]ach Contracting Party shall permit to investors of the other Contracting Party the free transfer,

319. Turkey–Senegal BIT, *supra* note 58.

320. Turkey–Libya BIT, *supra* note 56.

321. Turkey–Sudan BIT, *supra* note 44.

322. See generally *Bilateral Investment Treaties 1995–2006*, *supra* note 267.

323. U.N. CONFERENCE ON TRADE & DEV., INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES, at I-257, U.N. Doc. UNCTAD/ITE/IIT/2004/10, U.N. Sales No. E.05.II.D.6 (2004).

324. *Id.* at I-258.

325. Turkey–Egypt BIT, *supra* note 54.

after discharge of fiscal obligations, of their assets invested.”³²⁶ Article IV(1) of the Turkey–Tunisia BIT provides that “[s]ubject to the laws and regulations each Party shall permit all transfers related to an investment to be made freely and without unreasonable delay into and out of its territory.”³²⁷

6. Transparency Obligations

In investment treaties, transparency “denotes a state of affairs in which the participants in the investment process are able to obtain sufficient information from each other in order to make informed decisions and meet obligations and commitments.”³²⁸ Generally, the aim of transparency provisions is “to enhance the predictability and stability of the investment relationship and to provide a check against circumvention and evasion of obligations, by resort to covert or indirect means.”³²⁹ The 2012 United States Model BIT incorporates transparency standards,³³⁰ as does Canada’s Model Foreign Investment Protection Act (FIPA).³³¹

Transparency provisions are not common in Turkey–Africa BITs. However, at least one BIT (Turkey–Rwanda) obliges the contracting states to be transparent.³³² Article 13 of the Turkey–Rwanda BIT stipulates:

Each Contracting Party shall to the extent possible, ensure that its laws, regulations and administrative rulings of general application respecting any matter governed by this Agreement are promptly published or otherwise made available in such a manner as to enable interested investors of the other Contracting Party to become acquainted with them.³³³

326. Turkey–Morocco BIT, *supra* note 57 (emphasis added).

327. Turkey–Tunisia BIT, *supra* note 45.

328. U.N. CONFERENCE ON TRADE & DEV., TRANSPARENCY, at 3, U.N. Doc. UNCTAD/ITE/IIT/2003/4, U.N. Sales No. E.04.II.D.7 (2004).

329. INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES, *supra* note 323, at 282.

330. See 2012 U.S. MODEL BILATERAL INVESTMENT TREATY, art. 10, <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (last visited Sept. 10, 2019) [<https://perma.cc/XAF3-FG7J>] (archived Aug. 13, 2019); see also Agreement Between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, Can.-Burk. Faso, Apr. 20, 2015, art. 12, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/burkina_faso/fipa-apie/index.aspx?lang=eng#b12 [<https://perma.cc/TZB7-E3VN>] (archived Aug. 13, 2019).

331. See Model Agreement for the Promotion and Protection of Investments, GOV’T OF CAN., art. 19, <https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (last visited Oct. 8, 2019) [<https://perma.cc/SL8P-DN25>] (archived Aug. 13, 2019) [hereinafter Canada’s Model BIT].

332. Turkey–Rwanda BIT, *supra* note 66.

333. *Id.* at art. 13.

7. Investor–State Dispute Settlement

Traditionally, BITs allow investors to bypass the domestic courts of host states by giving them rights to initiate claims against host states with international tribunals. Increasingly, investors are activating BITs by bringing arbitral claims to challenge a broad range of actions by host states.³³⁴ Claims have been brought challenging host state measures relating to drinking water,³³⁵ the environment,³³⁶ taxation,³³⁷ and health.³³⁸ African countries are not immune to international investment arbitration, and a growing number of countries in the region are just now facing their first (known) claims. The Republic of Benin (Benin) faced its first international investment arbitration case in 2017,³³⁹ the Republic of Madagascar (Madagascar) in 2013,³⁴⁰ and the Republic of Equatorial Guinea (Equatorial Guinea) in 2012.³⁴¹

Turkey–Africa BITs all provide for investor–state dispute settlement (ISDS). Examples can be seen with the BITs between Turkey and Algeria,³⁴² Cameroon,³⁴³ Ethiopia,³⁴⁴ and Gambia.³⁴⁵

334. See *Investment Dispute Settlement Navigator*, U.N. CONFERENCE ON TRADE & DEV., <http://investmentpolicyhub.unctad.org/ISDS> (last visited Sept. 10, 2019) [<https://perma.cc/B94T-DLF5>] (archived Aug. 13, 2019).

335. See *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶ 105 (Jul. 24, 2008).

336. See *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 44 (Aug. 30, 2000); *Methanex Corp. v. U.S.*, NAFTA-UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, ¶ 2 (Aug. 3, 2005), <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf> [<https://perma.cc/9FNV-FGTH>] (archived Aug. 13, 2019).

337. See *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, L.C.I.A. Case No. UN3467, Final Award, ¶¶ 37, 64 (July 1, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf> [<https://perma.cc/PYE9-WEQP>] (archived Sept. 11, 2019).

338. See *Philip Morris Asia Ltd. v. Commonwealth of Austl.*, UNCITRAL PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 5 (Dec. 17, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf [<https://perma.cc/FFU5-YFLB>] (archived Sept. 11, 2019); *Philip Morris Brands Sàrl, Philip Morris Prods. S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, ¶ 10 (July 8, 2016).

339. *Puma Energy Holdings S.A.R.L. v. Republic of Benin*, SCC EA Case No. 2017/092, Award (June 8, 2017), <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/820/puma-energy-v-benin> [<https://perma.cc/4JEP-ALYZ>] (archived Aug. 13, 2019).

340. *De Sutter et al. v. Republic of Madag.*, ICSID Case No. ARB/17/18, Award (Aug. 29, 2014); see also *Courts (Indian Ocean) Ltd. & Courts Madag. S.A.R.L. v. Republic of Madag.*, ICSID Case No. ARB/13/34, Request for Institution of Arbitration Proceedings (Dec. 23, 2013).

341. *Grupo Francisco Hernando Contreras v. Republic of Equatorial Guinea*, ICSID Case No. ARB(AF)/12/2, Notice of Arbitration (Mar. 23, 2012).

342. Turkey–Algeria BIT, *supra* note 60.

343. Turkey–Cameroon BIT, *supra* note 61, at art. 10.

Economic factors are very important in Turkey's foreign policy, and this is reflected in the number of BITs Turkey has concluded in the past decade.³⁴⁶ Turkey's BITs are conceived primarily "as a valuable tool to promote and protect foreign investment."³⁴⁷ As Turkey's Ministry of Trade noted, "[t]he main purposes of Turkey's BIT program are to increase the bilateral flows of capital and technology, and provide protection to the investments of international investors in Turkey [as] well as Turkish investors abroad against non-commercial risks in the framework of international law."³⁴⁸

C. Sustainable Development Elements in Turkey–African BITs

International investment agreements were originally designed primarily to protect investors and foreign investments. Today, "[a] shared view has emerged on the necessity to ensure that the international investment treaty regime works for all stakeholders" and advances the goals of sustainable development.³⁴⁹ While recognizing that investment policies should protect both investors and investments, the G20 Guiding Principles state unequivocally that "[i]nvestment policies and other policies that impact on investment should be . . . consistent with the objectives of sustainable development and inclusive growth."³⁵⁰

Very similar to many BITs that countries in Africa have concluded with Western nations,³⁵¹ Turkey–Africa BITs do not directly address sustainable development.³⁵² However, a growing number of Turkey–Africa BITs, particularly recent agreements, appear to support sustainable development goals to the extent that they appear to be designed to respect the right of host states to regulate in the public interest.³⁵³ First, Turkey–Africa economic

344. Turkey–Ethiopia BIT, *supra* note 55, at art. VII.

345. Turkey–Gambia BIT, *supra* note 63, at art. 10.

346. Fidan, *supra* note 96 (noting that economic factors "have increasingly occupied a major role in the making of Turkish foreign policy.").

347. *Bilateral Investment Treaties*, *supra* note 266.

348. *Id.*

349. UNCTAD'S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, *supra* note 30, at 7 (noting that in recent years countries are redesigning their international investment treaties and are undertaking reform actions in the pursuit of sustainable development-oriented investment treaties).

350. *G20 Guiding Principles*, *supra* note 287, ¶ V.

351. See *Bilateral Investment Treaties 1995–2006*, *supra* note 286, at xiv (stating that "[c]urrent BIT practice does not, in general, expressly deal with development matters beyond the inherent objective of BITs of investment protection."); see generally *Investment Policy Hub – IIAs by Economy*, U.N. CONFERENCE ON TRADE & DEV., <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy> (last visited Oct. 21, 2019) [<https://perma.cc/3M5A-RKUN>] (archived Oct. 21, 2019).

352. Sustainable development is not mentioned explicitly in most of the BITs that Turkey has concluded with countries in Africa. See *Investment Policy Hub – Turkey*, *supra* note 1.

353. The argument is that if the regulatory powers of a state are not constrained, the state can regulate in the public interest and can adopt laws and regulations to

development is mentioned in the preamble as an expected outcome of foreign direct investment in an increasing number of Turkey–Africa BITs.³⁵⁴ Increasingly, contracting parties affirm, in the preamble, that treaty objectives can be achieved without relaxing health, safety, and environmental measures as well as internationally recognized labor rights.³⁵⁵ Second, treaty protection typically extends only to investments made in accordance with the host state’s domestic laws.³⁵⁶ Third, under almost all Turkey–Africa BITs, contracting parties retain the right to admit only investments that are in compliance with domestic law.³⁵⁷ Fourth, a growing number of Turkey–Africa BITs contain a “General Exception” clause somewhat akin to Article XX of the General Agreement on Tariffs and Trade.³⁵⁸

ensure corporate responsibility and accountability. Conversely, when BITs restrict the regulatory powers of a state, the result is regulatory chill and an inability of the state to protect human rights and advance other sustainable development goals. Increasingly the right to regulate is explicitly addressed in BITs.

354. Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Burundi Concerning the Reciprocal Promotion and Protection of Investments, Turk.-Burundi, June 14, 2017, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5838/download> [<https://perma.cc/HH6Z-FGG3>] (archived Oct. 21, 2019) [hereinafter Turkey–Burundi BIT] (“Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of capital and technology and the economic development of the Contracting Parties.”); see also Turkey–Gabon BIT, *supra* note 62, Preamble (“Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of capital and technology and the economic development of the Contracting Parties.”).

355. See, e.g., Turkey–Rwanda BIT, *supra* note 66, Preamble (“Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights.”); see also Turkey–Gabon BIT, *supra* note 62, Preamble (“Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights.”).

356. See, e.g., Turkey–Rwanda BIT, *supra* note 66, at art. 2 (“This Agreement shall apply to investments in the territory of one Contracting Party, made in accordance with its national laws and regulations, by investors of the other contracting party . . .”); see also Turkey–Gabon BIT, *supra* note 62, at art. 2 (“This Agreement shall apply to investments in the territory of one Contracting Party, made in accordance with its national laws and regulations, by investors of the other Contracting Party.”).

357. See, e.g., Turkey–Gabon BIT, *supra* note 62, at art. 4(1) (“Each Contracting Party shall admit in its territory investments . . . within the framework of its laws and regulations.”).

358. *Id.* at art. 5 (“General Exceptions”). Article XX of the GATT provides *inter alia*: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health; . . .
- (e) relating to the products of prison labour;

Fifth, in a growing number of BITs, contracting parties make a distinction between indirect expropriation, which is impermissible and the so-called regulatory takings, which are permissible.³⁵⁹ Thus, “[n]on-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety, and environment,” are increasingly explicitly protected.³⁶⁰ Sixth, the “no lowering of standards” clause is beginning to appear in Turkey–Africa BITs.³⁶¹ With the “no lowering of standards” clause, contracting parties declare their expectation that they will not encourage foreign investment by relaxing domestic health, safety, and environmental measures.³⁶² Seventh, a nonderogation clause is found in a few (older) BITs and generally provides that the agreements shall not derogate from certain obligations, including international legal obligations, assumed by the contracting parties.³⁶³

1. Economic Development in the Preamble

Economic development and improvement of living standards are mentioned as a treaty objective in the preamble of Turkey’s BITs with Cameroon,³⁶⁴ Egypt,³⁶⁵ Ethiopia,³⁶⁶ Gabon,³⁶⁷ Gambia,³⁶⁸ Kenya,³⁶⁹ Rwanda,³⁷⁰ and Nigeria.³⁷¹ Economic development does not appear as a treaty objective in some BITs, however.³⁷² In the preamble to a

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” See also General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]; see also GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW & PRACTICE 519–20 (6th ed. 1994); Elissa Alben, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410, 1431 (2001).

359. See, e.g., Turkey–Rwanda BIT, *supra* note 66, at art. 6(2) (stating “Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.”).

360. *Id.*

361. See, e.g., Turkey–Cameroon BIT, *supra* note 61, Preamble (“Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights.”).

362. *Id.*

363. See, e.g., Turkey–Egypt BIT, *supra* note 54, at art. 6.

364. See, e.g., Turkey–Cameroon BIT, *supra* note 61.

365. See, e.g., Turkey–Egypt BIT, *supra* note 54.

366. See, e.g., Turkey–Ethiopia BIT, *supra* note 55.

367. Turkey–Gabon BIT, *supra* note 62.

368. Turkey–Gambia BIT, *supra* note 63.

369. Turkey–Kenya BIT, *supra* note 65.

370. Turkey–Rwanda BIT, *supra* note 66.

371. Turkey–Nigeria BIT (2011), *supra* note 43.

372. Turkey–Algeria BIT, *supra* note 60; see also Turkey–Nigeria BIT (1996), *supra* note 43.

number of BITs (e.g., the Turkey–Senegal BIT,³⁷³ the Turkey–Rwanda BIT,³⁷⁴ and the Turkey–Kenya BIT³⁷⁵), contracting parties state their understanding that the treaty “objectives can be achieved without relaxing health, safety, and environmental measures of general application, as well as internationally recognized labor rights.”³⁷⁶ In the preamble to the Turkey–Kenya BIT, contracting parties while

“DESIRING to promote greater economic cooperation between them particularly with respect to investment by investors of one Contracting Party in the territory of the other Contracting Party,”

were also

“CONVINCED that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labour rights.”³⁷⁷

There is a noticeable difference between the treaty objectives listed in the preamble to the Turkey–Morocco BIT (1997) and the treaty objectives identified in the preamble to the Turkey–Cameroon which is a more recent agreement. The preambles to the two agreements provide as follows:

Turkey–Morocco BIT (1997) Preamble	Turkey–Cameroon BIT (2012) Preamble
The Government of the Republic of Turkey and the Government of the Kingdom of Morocco hereinafter referred to as the “Contracting Parties,”	The Government of the Republic of Turkey and The Government of the Republic of Cameroon, hereinafter referred to as “the Contracting Parties,”
Desiring to create favourable conditions for greater economic cooperation between them and in particular through investments by investors of one State in the territory of the other State;	Desiring to promote greater economic cooperation between them, particularly with respect to investment by investors of one Contracting Party in the territory of the other Contracting Party;
Recognising the importance of	Recognizing that agreement upon

373. Turkey–Senegal BIT, *supra* note 58.

374. Turkey–Rwanda BIT, *supra* note 66.

375. Turkey–Kenya BIT, *supra* note 65.

376. *Id.*

377. *Id.*

<p>the reciprocal encouragement and protection of investments and its contribution to stimulate inflows of capital and business initiative and to increase prosperity in both States;</p> <p>Have agreed as follows:³⁷⁸</p>	<p>the treatment to be accorded such investment will stimulate the flow of capital and technology and the economic development of the Contracting Parties;</p> <p>Agreeing that fair and equitable treatment of investments is desirable in order to maintain a stable framework for investment and will contribute to maximizing effective utilization of economic resources and improve living standards;</p> <p>Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights; and</p> <p>Having resolved to conclude an agreement concerning the reciprocal promotion and protection of investments;</p> <p>Have agreed as follows:³⁷⁹</p>
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2. Scope of Application Clause

In BITs, the scope of application clause is used to define the scope of the temporal and substantive scope of the treaty. Generally, these clauses address whether or not a treaty is retroactive but can also be used to limit the scope of a treaty in other ways.³⁸⁰ In Turkey–

378. Turkey–Morocco BIT, *supra* note 57.

379. Turkey–Cameroon BIT, *supra* note 61 (emphasis added).

380. For example, in the India–BIT (2018), Contracting Parties addressed reproductivity but also excluded several economic sectors and government measures from the scope of the agreement. Article 2 of the BIT is titled “Scope and General Provisions. In Article 2.4, the Contracting Parties agreed that the BIT shall not apply *inter alia* to “any measure by a local government,” “any law or measure regarding taxation, including measures taken to enforce taxation obligations,” and “subsidies or grants provided by a Party.” See Treaty Between the Republic of Belarus and the Republic of India on Investment, Belr.-India, art. 2.4, Sept. 24, 2018, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download> [<https://perma.cc/J3LX-SR94>] (archived Sept. 11, 2019) [hereinafter India–Belarus BIT].

Africa BITs, the scope of application clause tends to address the temporal scope of the agreements and nothing else. Essentially, contracting parties are not making any effort to limit the subject matter or geographic scope of the agreements. However, by limiting treaty protection to only those investments made in accordance with domestic law of a host state, contracting states retain some control over foreign investors and foreign investments and can introduce sustainable development objectives and criteria into their domestic law. For example, Article 12 of the Turkey–Kenya BIT states: “This Agreement shall apply to investments in the territory of one Contracting Party, made in accordance with its national laws and regulations, by investors of the other Contracting Party, whether prior to, or after the entry into force of the present Agreement.”³⁸¹ A similar provision is found in other BITs including the Turkey–Cameroon BIT (Article 2),³⁸² the Turkey–Rwanda BIT (Article 2),³⁸³ and the Turkey–Gabon BIT (Article 2).³⁸⁴ Article 2 of the Turkey–Rwanda BIT reads:

Scope of Application

This Agreement shall apply to investments in the territory of one Contracting Party, made in accordance with its national laws and regulations, by investors of the other Contracting Party, whether prior, or after the entry into force of the present Agreement. However, this Agreement shall not apply to any disputes that have arisen before its entry into force.³⁸⁵

3. Postestablishment Rights: the Right of Host State to Restrict Admission of Investor/Investments

In BIT practice, “the issue of admission and establishment refers to the entry of investments of investors of a contracting party into the territory of another contracting party.”³⁸⁶ Under customary international law, countries “have the right to regulate the admission of foreign investors and their investments in their territories.”³⁸⁷ Historically, “most countries refrain from granting foreign nationals an unrestricted right to invest in their economies,” as such unrestricted access can undermine their economic and security

381. Turkey–Kenya BIT, *supra* note 65.

382. Turkey–Cameroon BIT, *supra* note 61.

383. Turkey–Rwanda BIT, *supra* note 66.

384. Turkey–Gabon BIT, *supra* note 62.

385. Turkey–Rwanda BIT, *supra* note 66.

386. *Bilateral Investment Treaties 1995–2006*, *supra* note 267, at 21.

387. *Id.*

interests.³⁸⁸ In BIT practice, two basic models are used.³⁸⁹ The “admission clause” model makes “the admission and establishment of foreign investment subject to the domestic laws of the host country.”³⁹⁰ The “right of establishment” model grants foreign investors a right of establishment, but “not in an absolute manner,” meaning that the entry of foreign investors and investors is not typically subject to domestic laws and regulations.³⁹¹

Turkey–Africa BITs adopt the admission clause model. In all Turkey–Africa BITs, the host state retains the right to admit foreign investors based on their domestic law.³⁹² Article 3 of the Turkey–Kenya BIT is titled “Treatment of Investment” and essentially obliges each contracting party to admit investments by investors of the other contracting party in accordance with its domestic laws.³⁹³ Article 3 states: “Each Contracting Party shall admit in its territory investments by investors of the other Contracting Party on a basis no less favourable than that accorded in like circumstances to investments of investors of any third State, and in accordance with its laws and regulations.”³⁹⁴ In the same vein, Article 4(1) of the Turkey–Cameron BIT provides, “[e]ach Contracting Party shall admit in its territory investments on a basis no less favourable than that accorded in like circumstances to investments of investors of any third State, within the framework of its laws and regulations.”³⁹⁵

4. General Exception

In the past, “general exceptions” clauses were not common in BITs but are now beginning to appear in a growing number of investment treaties.³⁹⁶ In principle, a general exceptions clause can provide ample flexibility for host states to regulate in the public interest because they are generally designed to “relieve host states from treaty liability for good faith measures taken to pursue public welfare objectives.”³⁹⁷ In many investment treaties, “the general

388. *Id.* (noting that “[a]ccess limitations imposed on foreign investment have been justified on economic, social, political or national security grounds.”).

389. *Id.*

390. *Id.*

391. *Id.*

392. *See, e.g.*, Turkey–Kenya BIT, *supra* note 65, at art 2.

393. *Id.*

394. *Id.* at art. 3.

395. Turkey–Cameron BIT, *supra* note 61.

396. *See generally* Andrew Newcombe, *General Exceptions in International Investment Agreements*, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW* 351 (Marie-Claire Cordonier Segger et al. eds., Wolters Kluwer 2011); *see also* Kotera Akira & Mori Tadashi, *General Exception Clauses in International Investment Agreements Concluded by Japan*, RES. INST. ECON., TRADE & INDUSTRY 14007 (2014).

397. Levant Sabanogullari, *The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice*, INV. TREATY NEWS (May 21, 2015), <https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general->

exception clause is very closely modeled on, or incorporates the general exception provisions in Article XX of the General Agreement on Tariffs and Trade (GATT).³⁹⁸ Typically, general exception clauses share three important elements. First, “[a]n exhaustive list of permissible policy objectives; for example, the protection of human, animal, or plant life or health, or the conservation of natural resources.”³⁹⁹ Second, “[a] nexus requirement, denoting the required link between a state measure and a permissible objective; frequently used nexus requirements include ‘necessary for,’ ‘relating to,’ and ‘designed and applied for.’”⁴⁰⁰ Third, “[a] prohibition of discriminatory or arbitrary application.”⁴⁰¹ Most general exception clauses state that nothing in the agreements can or shall be construed to prevent a contracting party from adopting, maintaining, or enforcing nondiscriminatory legal measures that are designed and applied to promote public interest objectives in the areas of public health and environmental protection.⁴⁰²

A general exception clause is found in several of the BITs that Turkey has concluded with African countries including the BITs between Turkey and Tanzania,⁴⁰³ Cameroon,⁴⁰⁴ Gabon,⁴⁰⁵ Gambia,⁴⁰⁶ Kenya,⁴⁰⁷ Nigeria,⁴⁰⁸ and Rwanda.⁴⁰⁹ General exception clauses are absent from most of the older treaties that Turkey has with countries in Africa such as Turkey’s BITs with Algeria and Ethiopia.⁴¹⁰ An example of a general exception clause from Article 5 of the Turkey–Rwanda BIT is as follows:

Article 5

General Exceptions

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measures:

exception-clauses-in-contemporary-investment-treaty-practice/ [https://perma.cc/7S3X-AYH4] (archived Aug. 19, 2019).

398. See Akira & Tadashi, *supra* note 410.

399. Sabanogullari, *supra* note 397.

400. *Id.*

401. *Id.*

402. Canada’s Model BIT, *supra* note 345, at art. 10.

403. Turkey–Tanzania BIT, *supra* note 69.

404. Turkey–Cameroon BIT, *supra* note 61, at art. 5.

405. Turkey–Gabon BIT, *supra* note 62, at art. 5.

406. Turkey–Gambia BIT, *supra* note 63, at art. 5.

407. Turkey–Kenya BIT, *supra* note 65, at art. 4.

408. Turkey–Nigeria BIT (2011), *supra* note 43.

409. Turkey–Rwanda BIT, *supra* note 68, art. 5.

410. Turkey–Algeria BIT, *supra* note 60; Turkey–Ethiopia BIT, *supra* note 55.

(a) designed and applied for the protection of human, animal or plant life or health, or the environment;

(b) related to the conservation of living or non-living exhaustible natural resources.

2. Nothing in this Agreement shall be construed:

(a) to require any Contracting Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;

(b) to prevent any Contracting Party from taking any actions that it considers necessary for the protection of its essential security interests;

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) taken in time of war or other emergency in international relations, or

(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or

(c) to prevent any Contracting Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.⁴¹¹

A modest version of the general exception clause is found in Article IX of the Turkey–Tunisia BIT which provides that “[t]his agreement shall not preclude the application by either Party of measures necessary for the maintenance of public order and morals, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”⁴¹²

5. Limits on Expropriation

Expropriation raises significant issues in international investment law. Investors need assurance that their property is protected. However, unless it is carefully drafted, the expropriation clause in an international investment agreement can expose a host state to considerable legal liability. In many investment arbitration cases involving African states, claimants successfully asserted claims

411. *Id.*

412. Turkey–Tunisia BIT, *supra* note 45, at art. IX.

of direct and indirect expropriation.⁴¹³ Ideally, an expropriation clause should be drafted with a view to accommodating the concerns of foreign investors as well as national policy makers. The goal should be to afford investors meaningful protection and at the same time limit exposure to liability for nondiscriminatory public interest regulation.

All Turkey–Africa BITs protect investors and their investment from unlawful and discriminatory expropriation.⁴¹⁴ However, a growing number of Turkey–Africa BITs provide policy space for a host state by limiting the types of measures that constitute indirect expropriation. For example, Article 6(2) of the Turkey–Rwanda BIT explicitly states that “[n]on-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.”⁴¹⁵ A similar provision can be found in Turkey’s BITs with Gabon,⁴¹⁶ Gambia,⁴¹⁷ and Nigeria.⁴¹⁸

6. The “Not Lowering of Standards” Clause

Turkey–Africa BITs do not provide for corporate social responsibility but most contain the “not lowering of standards” clause.⁴¹⁹ The not lowering of standards clause is designed to discourage states from relaxing environmental and labor standards to attract investment. In a growing number of agreements, contracting parties declare their expectation that protecting foreign investment “can be achieved without relaxing health, safety, and environmental measures and internationally recognized labor rights.”⁴²⁰ Although typically found in the preamble, this not lowering of standards clause is found in the body of some BITs.⁴²¹ For example, Article 4 of the Turkey–Ethiopia BIT provides:

413. See, e.g., *Goetz v. République du Burundi*, ICSID Case No. ARB/95/3, Award (Feb. 10, 1999); *Siag & Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009); *Funnekotter v. Republic of Zim.*, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009); *Bernhard von Pezold v. Republic of Zim.*, ICSID Case No. ARB/10/15, Award (July 28, 2015).

414. Investment Policy Hub – Turkey, *supra* note 1.

415. Turkey–Rwanda BIT, *supra* note 68.

416. Turkey–Gabon BIT, *supra* note 62, at art. 6.

417. Turkey–Gambia BIT, *supra* note 63, at art. 6(2).

418. Turkey–Nigeria BIT (2011), *supra* note 43, at art. 7(2).

419. See, e.g., Turkey–Rwanda BIT, *supra* note 66.

420. See e.g., Turkey–Senegal BIT, *supra* note 58, Preamble (“Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights.”).

421. See Turkey–Senegal BIT, *supra* note 58, Preamble (“Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights.”).

ARTICLE 4

Health, Safety and Environmental Measures

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety and environmental measures. Accordingly, a Party should not waive or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.⁴²²

7. Nonderogation Clause

In a few BITs between Turkey and some countries in Africa, contracting parties explicitly state that the agreements do not derogate from some obligations including international legal obligations, laws and regulations, administrative practices or procedures, or the administrative or adjudicatory decisions of contracting states. An example is seen below:

Turkey–Egypt BIT

Article VI

Derogation

This agreement shall not derogate from:

- (a) laws and regulations, administrative practices or procedures or administrative or adjudicatory decisions of either Party,
- (b) international legal obligations, or,
- (c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization....⁴²³

Surprisingly, the nonderogation clause appears in the older BITs that Turkey has with countries in Africa (e.g., the Turkey–Algeria BIT⁴²⁴ and the Turkey–Egypt BIT seen above ⁴²⁵) but not in more recent agreements (e.g., the Turkey–Rwanda BIT).⁴²⁶ One possible explanation for why the nonderogation clause does not feature in more recent BITs involving Tyekry may simply be that it has been

422. Turkey–Ethiopia BIT, *supra* note 55.

423. Turkey–Egypt BIT, *supra* note 54.

424. Turkey–Algeria BIT, *supra* note 60.

425. Turkey–Egypt BIT, *supra* note 54.

426. Turkey–Rwanda BIT, *supra* note 66.

replaced by the “general exceptions” clause, which arguably affords more policy space to host states.⁴²⁷

8. Limits on Investor Rights and Guarantees

In some Turkey–Africa BITs, particularly recent agreements, the host country’s right to regulate is preserved through carve-out clauses that qualify and/or limit the rights and privileges afforded to investors.⁴²⁸ For example, in most of the BITs, the right of investors to transfer capital in and out of a host state is conditioned on the investor fulfilling all tax obligations.⁴²⁹ Article 7(1) of the Turkey–Kenya BIT provides that “[u]pon fulfillment of all tax obligations, each Contracting Party shall permit in good faith all transfers, related to an investment, to be made freely and without delay into and out of its territory. “In addition, Article 7 states the host state is allowed to limit transfers of capital in the event of a serious balance of payment crisis. Article 8(3) of the Turkey–Cameron BIT stipulates: “Where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties, each Contracting Party may temporarily restrict transfers, provided that such restrictions are imposed on a non-discriminatory and in good faith basis.”⁴³⁰

In conclusion, sustainable development is not explicitly mentioned as a treaty objective in most of the BITs that Turkey has concluded with countries in Africa and most of the agreements do not contain provisions specifically designed to promote sustainable development in a host state.⁴³¹ Moreover, none of the BITs reviewed oblige contracting parties to respect human rights or protect the investment.⁴³² However, a growing number of Turkey–Africa BITs provide some policy space for host states to regulate in the public

427. This conclusion is based on a side-by-side comparison of Article 6 of the Turkey–Egypt BIT (Derogations) and Article 5 of Turkey–Rwanda BIT buttresses this point. Investment tribunals have not interpreted either clause or determined their precise scope and effectiveness. *See generally* Turkey–Egypt BIT, *supra* note 54; Turkey–Rwanda BIT, *supra* note 66.

428. Turkey–Cameron BIT, *supra* note 61, at art. 8 (stating that “upon fulfillment of all tax obligations, each Contracting Party shall permit in good faith all transfers related to an investment to be made freely and without delay into and out of its territory.”) (emphasis added).

429. *Id.*

430. Similar provisions are found in Turkey’s BITs with the following countries: Gambia (Art. 8(3)), Rwanda (Article 8(3)), Gabon (Article 8(3)), Tanzania (Article 8(3)), and Kenya (Article 7(3)).

431. *Id.*

432. Turkey–Cameron BIT, *supra* note 61.

interest and advance sustainable development goals.⁴³³ There is a growing realization that although economic agreements create economic opportunities for states, “they can also affect the domestic policy space of Governments,” and make it extremely difficult for states to fully implement human rights and environmental legislation.⁴³⁴

VI. TURKEY–AFRICA BILATERAL INVESTMENT TREATIES: A CRITIQUE

BITs are not benign policy instruments.⁴³⁵ BITs can chill regulatory action and can expose host states to considerable legal risks and to legal claims before international investment tribunals.⁴³⁶ Questions are increasingly being asked about the impact of investment treaties on human rights, the environment, and sustainable development more generally.⁴³⁷ Increasingly, states are urged to “ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.”⁴³⁸ According to Principle 9 of the *United Nations Guiding Principles on Business and Human Rights*, “[s]tates should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.”⁴³⁹

433. Turkey–Gabon, *supra* note 62.

434. Office of the High Comm’r for Human Rights, *U.N. Guiding Principles on Business and Human Rights*, at 11, U.N. Doc. HR/PUB/11/04 (2011).

435. See generally Turkey–Gabon, *supra* note 64; Turkey–Egypt BIT, *supra* note 54; Turkey–Ethiopia BIT, *supra* note 55.

436. PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELING AN INVESTMENT ARBITRATION BOOM 16 (Helen Burley ed., 2012).

437. In Canada, negotiations on international investment agreements are subject to the 2001 Framework for Conducting Environmental Assessment of Trade Negotiations. The Canadian government takes the position that environmental assessments of trade negotiations are “an important decision-making tool for promoting sustainable development, can contribute to more open decision-making, and can also improve overall policy coherence at the national level by assisting decision-makers to understand environmental implications of trade policy.” *Framework for Conducting Environmental Assessments of Trade Negotiations*, GLOB. AFF. CAN. (Feb. 2001), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/env/framework-cadre.aspx?lang=eng> [<https://perma.cc/84DG-J4YZ>] (archived Sept. 11, 2019); see also Minister of Public Works and Government Services Canada, *Strategic Environmental Assessment: The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*, GOV’T OF CAN. (2010), <https://www.canada.ca/en/impact-assessment-agency/programs/strategic-environmental-assessment/cabinet-directive-environmental-assessment-policy-plan-program-proposals.html> [<https://perma.cc/W9KP-3AMG>] (archived Sept. 11, 2019).

438. *U.N. Guiding Principles on Business and Human Rights*, *supra* note 434, at 11.

439. *Id.*

This begs the question, based on the evolving best practices of states and developments in international law, generally, is anything missing from Turkey–Africa BITs? This Part analyzes shortcomings in Turkey–Africa BITs and discusses options for countries in Africa that wish to reform their BITs with Turkey.

A. Turkey–Africa BITs: Missing Elements

Explicit commitments to sustainable development, provisions addressing corporate social responsibility and the obligations of investors, and policy space for host states are missing from Turkey–Africa BITs, particularly in older BITs.

1. Sustainable Development Not Explicitly Mentioned as a Treaty Objective

Economic development, but not “sustainable economic development,” appears in most of the BITs that Turkey has with countries in Africa.⁴⁴⁰ Sustainable development has been defined as “development that meets the needs of the present, without compromising the ability of future generations to meet their own needs.”⁴⁴¹ At its core, sustainable development “is an approach to development that looks to balance different, and often competing, needs against an awareness of the environmental, social and economic limitations we face as a society.”⁴⁴² Sustainability is at the very core of the *2030 Agenda for Sustainable Development*, the leading global framework for international cooperation today.⁴⁴³

Although health, safety, and environmental measures are mentioned in the preamble to some of the BITs that Turkey has with countries in Africa, sustainable development is not explicitly listed as a treaty objective.⁴⁴⁴ Rather, contracting parties express an expectation that the treaty objective (investor protection) can be

440. A common formulation is that found in the preamble to the Turkey–Egypt. Turkey–Egypt BIT, *supra* note 54; *see also* Turkey–Ethiopia BIT, *supra* note 55, Preamble.

441. *What is Sustainable Development?*, SUSTAINABLE DEV. COMM’N, <http://www.sd-commission.org.uk/pages/what-is-sustainable-development.html> (last visited Sept. 10, 2019) [<https://perma.cc/EVK5-4DNX>] (archived Aug. 19, 2019); *see also* Rep. of the World Comm’n on Env’t & Dev., *Our Common Future*, ¶ 27, U.N. Doc. A/42/427 (Aug. 4, 1987).

442. *Id.*

443. G.A. Res. 70/1, *supra* note 39, at ¶ 1–2.

444. *See, e.g.*, Turkey–Senegal BIT, *supra* note 58, Preamble (contracting parties expressed a conviction that the treaty objectives “can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights.”).

achieved without lowering human rights, labor, and environmental standards.⁴⁴⁵

This lack of explicit reference to sustainable development in the preambles to Turkey–Africa BITs is concerning for three reasons. First, sustainable development is driving investment treaty reform today and explicit reference to sustainable development can potentially affect how an investment treaty is construed and interpreted.⁴⁴⁶ Although preambles do not directly create rights and obligations, under Article 31(2) of the Vienna Convention on the Law of Treaties, preambles are considered part of treaties for purposes of interpretation.⁴⁴⁷ Thus, mentioning sustainable development, even in the preamble to a BIT, could potentially shape the meaning and scope of a BIT. Second, in a growing number of IIAs, treaty parties articulate the goals of sustainable development and explicitly reaffirm the right of host states to regulate in the public interest. For example, in the preamble to the Comprehensive and Economic Trade Agreement (CETA), a trade deal between the EU and Canada, contracting parties: “RECOGNIS[ED] the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation” and “REAFFIRM[ED] their commitment to promote sustainable development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions.”⁴⁴⁸ In the preamble to the Brazil–United Arab Emirates BIT (2019), contracting parties “[r]ecogniz[ed] the essential role of investment in promoting sustainable development.”⁴⁴⁹ Third, increasingly continental policy instruments in Africa stress the importance of sustainable development. In the preamble to the Draft PAIC, African Union member states “RECOGNIZ[ED] their right to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promoting sustainable development objectives.”⁴⁵⁰ Article 22(3) of the

445. *Id.*

446. UNCTAD’S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, *supra* note 30, at 10 (noting that “[g]rowing concerns with the functioning of the IIA regime, together with the evolution of the global investment landscape and the sustainable development imperative, have in recent years triggered a move towards reforming international investment rule-making.”).

447. Vienna Convention on the Law of Treaties, art. 31(2), May 23, 1969, 1155 U.N.T.S. 18232.

448. See Comprehensive Economic and Trade Agreement (CETA), Can.-EU, art. 8, Sept. 21, 2017, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5380/download> [<https://perma.cc/7K8E-XVT5>] (archived Sept. 11, 2019) (discussing the ‘investment’ portion of the trade agreement).

449. See Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and the United Arab Emirates, Braz.-U.A.E., Preamble, Mar. 15, 2019 [hereinafter Brazil-UAE BIT].

450. DRAFT PAN-AFRICAN INVESTMENT CODE, AFRICAN UNION COMM’N ECON. AFF. DEPT 3 (Dec. 2016), <https://au.int/en/documents/20161231/pan-african->

Draft PAIC stipulates that “[i]nvestors shall contribute to the economic, social and environmental progress with a view to achieving sustainable development of host States.”⁴⁵¹

2. Corporate Social Responsibility Ignored

None of the BITs that Turkey has concluded with countries explicitly address corporate social responsibility or corporate accountability and none impose specific obligations on investors. In this regard, Turkey–Africa BITs are no different from the BITs that African countries have with Western countries.⁴⁵²

The fact that Turkey–Africa BITs do not address corporate social responsibility or investor liability is of concern for a number of reasons. The absence of corporate social responsibility clauses from Turkey–Africa BITs is at odds with regional and continental standards in Africa.⁴⁵³ Chapter 4 of the *2016 Draft Pan African Investment Code* (Draft PAIC), a nonbinding comprehensive guiding instrument on investment for all African Union member states, is titled “Investor Obligation.”⁴⁵⁴ Chapter 4 of the Draft PAIC addresses a number of important topics including, “Framework for Corporate Governance” (Article 19), “Socio-political Obligations” (Article 20), “Bribery” (Article 21), “Corporate Social Responsibility” (Article 22), “Obligations as to the use of Natural Resources” (Article 23), and “Business Ethics and Human Rights” (Article 24). Article 22 of the Draft PAIC states that investors “shall abide by the laws, regulations, administrative guidelines and policies of the host State;”⁴⁵⁵ “shall, in pursuit of their economic objectives, ensure that they do not conflict with the social and economic development objectives of host States and shall be sensitive to such objectives;”⁴⁵⁶ and “shall contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host State.”⁴⁵⁷ Article 23 of the Draft PAIC is focused on natural resource extraction and declares that investors “shall not exploit or use local natural resources to the

investment-code-paic [<https://perma.cc/7EW8-G77L>] (archived Sept. 11, 2019) [hereinafter DRAFT PAIC].

451. *Id.* at art. 22(3).

452. UNCTAD’S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, *supra* note 30, at 66 (acknowledging that corporate social responsibility clauses are not common in BITs but also observing that “[t]he last decade has seen the development of CSR standards as a unique dimension of ‘soft law’ that is rapidly evolving.”).

453. DRAFT PAIC, *supra* note 450.

454. *Id.*

455. *Id.* at art. 22(1).

456. *Id.* at art. 22(2).

457. *Id.* at art. 22(3).

detriment of the rights and interests of the host State”⁴⁵⁸ and “shall respect rights of local populations, and avoid land grabbing practices vis-à-vis local communities.”⁴⁵⁹ Article 24 lists principles that should govern compliance by investors with business ethics and human rights.⁴⁶⁰ Principles listed include *inter alia*: support and respect the protection of internationally recognized human rights;⁴⁶¹ eliminate all forms of forced and compulsory labor, including the effective abolition of child labor;⁴⁶² and ensure equitable sharing of wealth derived from investments.⁴⁶³

The absence of explicit reference to corporate social responsibility in Turkey–Africa BITs is also at odds with the evolving best practices of states. References to corporate social responsibility are found in a growing number of international investment treaties and Model BITs.⁴⁶⁴ Chapter III of India’s Model BIT is titled “Investor, Investment and Home State Obligations” and “prescribes the minimum obligations for investors and their investments for responsible business conduct.”⁴⁶⁵ The chapter addresses a number of topics including “Obligation against Corruption” (Article 9), “Disclosure” (Article 10), “Taxation” (Article 11), and “Compliance with Law of Host State” (Article 12).⁴⁶⁶ The objective of the chapter is “to ensure that the conduct, management and operations of Investors and their Investments are consistent with the Law of the Host State, and enhance the contribution of Investments to inclusive growth and sustainable development of the Host State.”⁴⁶⁷ Corporate social responsibility clauses are also found in investment treaties involving a growing number of countries including Brazil,⁴⁶⁸ Canada,⁴⁶⁹ and Australia.⁴⁷⁰

458. *Id.* at art. 23(1).

459. *Id.* at art. 23(2).

460. *Id.* at art. 24.

461. *Id.* at art. 24(a).

462. *Id.* at art. 24(c).

463. *Id.* at art. 24(e).

464. Chapter III of India’s Model BIT is titled “Investor, Investment and Home State Obligations,” and addresses the concept of corporate social responsibility extensively. See 2016 Indian Model BIT, *supra* note 29.

465. *Id.*

466. *Id.* at arts. 9–12.

467. *Id.* at art. 8.1.

468. Brazil–UAE BIT, *supra* note 449, at art. 15 (titled “Corporate Social Responsibility” and addressing the obligation of investors).

469. See, e.g., Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Guinea, May 27, 2014, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5095/download> [<https://perma.cc/TP94-7CV2>] (archived Sept. 11, 2019) [hereinafter Canada–Guinea BIT]. Article 16 of the Canada–Guinea BIT is titled “Corporate Social Responsibility” and states that “[e]ach Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as

The omission of direct reference to corporate social responsibility in Turkey–Africa BITs is also troubling because as members of the United Nations and members of regional organizations, such as the European Union and the African Union, Turkey and countries in Africa have made commitments to address the growing challenge of business and human rights.⁴⁷¹ On April 16, 2014, the Committee of Ministers of the Council of Europe adopted the *Declaration of the Committee of Ministers supporting the UN Guiding Principles*.⁴⁷² In 2016, the Committee of Ministers adopted *Recommendation CM/Rec(2016)3 on Human Rights and Business* (Recommendation).⁴⁷³ On the whole, the Recommendation offers guidance “to assist states in preventing and remedying human rights violations by business enterprises.”⁴⁷⁴ The Recommendation requires states to consider possible human rights impacts of the trade and investment agreements that they conclude.⁴⁷⁵ Paragraph 23 of the Recommendation states:

23. When concluding and during the term of trade and investment agreements or other relevant conventions, member States should consider possible human rights impacts of such agreements and take appropriate steps, including through the incorporation of human rights clauses, to mitigate and address identified risks of adverse human rights impacts.⁴⁷⁶

statements of principle that have been endorsed or are supported by the Parties.” *Id.* at art. 16.

470. See Investment Agreement, Austl.-H.K., Mar. 23 2019, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5830/download> [<https://perma.cc/TV3F-6HK4>] (archived Sept. 11, 2019) [hereinafter Australia–Hong Kong BIT]. Article 16 of the Australia – Hong Kong BIT is titled “Corporate Social Responsibility” and provides that “[t]he Parties affirm the importance of each Party encouraging enterprises operating within its Area or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.” *Id.* at art. 16.

471. See, e.g., *U.N. Guiding Principles on Business and Human Rights*, *supra* note 434.

472. *Declaration of the Committee of Ministers on the UN Guiding Principles on Business and Human Rights*, COUNCIL OF EUR. (Apr. 16, 2014), <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/work-completed/human-rights-and-business> [<https://perma.cc/NBQ3-GZQN>] (archived Aug. 19, 2019).

473. See Recommendation of the Committee of Ministers to Member States on Human Rights and Business, Council of Eur., Mar. 2, 2016 (adopted at the 1249th meeting of the Ministers’ Deputies).

474. *Id.*

475. *Id.*

476. *Id.*

3. Lack of Policy Space in “Old-Generation” BITs

There is widespread concern that international investment agreements unduly restrict the host state’s right to regulate in the public interest.⁴⁷⁷ This concern is particularly directed at treaties concluded before 2010 before sustainable development-oriented reform “entered the mainstream of international investment policymaking.”⁴⁷⁸

Although most of Turkey’s BITs with countries in Africa are of fairly recent origin (concluded after 2010),⁴⁷⁹ some can be considered “old-generation,” agreements having been concluded between 1985–2010.⁴⁸⁰ Among the old-generation Africa–Turkey BITs are Turkey’s BITs with Egypt (1997),⁴⁸¹ Morocco (1997),⁴⁸² Algeria (1998),⁴⁸³ Ethiopia (2000),⁴⁸⁴ South Africa (2000),⁴⁸⁵ and Libya (2009).⁴⁸⁶ Most of the old-generation BITs lack the policy space found in more recent agreements. A good example is the Turkey–Ethiopia BIT (2005).⁴⁸⁷ The Turkey–Ethiopia BIT does not have a “general exception” clause and does not provide exceptions to most of the obligations on host states.⁴⁸⁸ Article V of the Turkey–Ethiopia BIT provides for the right of investors to repatriate capital but does not make this right contingent upon fulfillment of tax obligations and does not provide policy space for a host state to address a balance of payment crisis should the need arise.⁴⁸⁹ Compare the “Repatriation and Transfer”

477. Sabanogullari, *supra* note 397.

478. UNCTAD’S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, *supra* note 30, at 71 (observing that old-generation treaties abound and that 95 per cent of all treaties in force were concluded before the year 2010).

479. Investment Policy Hub – Turkey, *supra* note 1 (indicating that most BITs that Turkey has with countries in Africa were only signed in the last ten years).

480. UNCTAD has used the term “old-generation” IIAs to refer to investment agreements concluded prior to 2010. The treaties are considered old-generation in large part because they lack most of the reform features found in an increasing number of recent treaties. See UNCTAD, *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, IIA ISSUE NOTE (2017) (noting more than 2,500 IIAs in force today—ninety-five percent of all treaties in force—were concluded before 2010 and that the continued existence of these treaties “creates overlaps and fragmentation in treaty relationships and poses interaction challenges.”).

481. Turkey–Egypt BIT, *supra* note 54.

482. Turkey–Morocco BIT, *supra* note 57.

483. Turkey–Algeria BIT, *supra* note 60.

484. Turkey–Ethiopia BIT, *supra* note 55.

485. Turkey–South Africa BIT, *supra* note 67.

486. Turkey–Libya BIT, *supra* note 56.

487. Turkey–Ethiopia BIT, *supra* note 55.

488. *Id.*

489. *Id.* at art. V (“Each Party shall allow all transfers related to an investment to be made freely and without delay into and out of its territory in accordance with its laws and regulations.”).

clause of the Turkey–Gabon BIT (2012) to that in the Turkey–Egypt BIT (1997):⁴⁹⁰

Turkey–Gabon BIT Article 8 Repatriation and Transfer	Turkey–Egypt BIT Article 4 Repatriation and Transfer
<p>1. <i>Upon fulfillment of all tax obligations, each Contracting Party shall permit in good faith all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include:</i></p> <p>...</p> <p>2. Transfers shall be made in the convertible currency in which the investment has been made or in any convertible currency at the rate of exchange in force at the date of transfer, unless otherwise agreed by the investor and the hosting Contracting Party.</p> <p><i>Where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties, each Contracting Party may temporarily restrict transfers, provided that such restrictions are imposed on a non-discriminatory and in good faith basis.</i></p>	<p>1. Each Party shall permit in good faith all transfers related to an investment to be made freely and <i>without unreasonable delay</i> into and out of its territory such transfers include:</p> <p>...</p> <p>2. Transfers shall be made in the convertible currency in which the investment has been made or in any convertible currency at the rate of exchange in force in the host country at the date of transfer, unless otherwise agreed by the investor and the hosting Party.</p>

A similar problem is found in the provision dealing with expropriation. Missing from the old-generation BITs are safeguards designed to limit the otherwise broad scope of the treaties and immunize a host state's regulatory measures taken in the public

490. Compare Turkey–Gabon BIT, *supra* note 62, at art. 8, with Turkey–Egypt BIT, *supra* note 54, at art. 4 (emphasis added).

interest.⁴⁹¹ Specifically, the Turkey–Ethiopia BIT, does not have a provision comparable to Article 6(2) of the Turkey–Gabon BIT which state:

Turkey–Ethiopia BIT (2000) Article IV Expropriation and Compensation	Turkey–Gabon BIT (2012) Article 6 Expropriation
<p>1. Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in the Article III of this Agreement.⁴⁹²</p>	<p>1. Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects (hereinafter referred as expropriation) except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article 4 of this Agreement.</p> <p>2. <i>Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.</i>⁴⁹³</p>

Old-generation BITs are not benign legal instruments that contracting states can simply ignore. UNCTAD is right in its warning that “old treaties bite” and pose legal risks for host states.⁴⁹⁴ At the end of 2017, almost every known treaty-based investment arbitration claim involving African states was filed pursuant to treaties concluded before 2000.⁴⁹⁵ *Congo v. Mitchell* was based on the 1984

491. UNCTAD’S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, *supra* note 30, at 72 (noting most old-generation treaties contain broadly worded definitions and substantive provisions, and safeguards).

492. Turkey–Ethiopia BIT, *supra* note 55.

493. Turkey–Gabon BIT, *supra* note 62 (emphasis added).

494. UNCTAD’S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, *supra* note 30, at 72 (noting international investment agreements are not harmless political declarations and have serious legal consequences).

495. *Id.* at 73 (stating that at the end of 2016, virtually all of the known treaty based investment arbitration were filed pursuant to treaties concluded before 2010).

BIT between the United States and the Democratic Republic of Congo.⁴⁹⁶ *Wena Hotels Ltd. v. Arab Republic of Egypt* was based on the United Kingdom–Egypt BIT of 1975⁴⁹⁷ and *Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt* was based on the Egypt–Greece BIT of 1993.⁴⁹⁸

4. Legal Minefields Arising from Broad and Vague Obligations

In almost every Turkey–Africa BIT, the obligations imposed on contracting parties are vaguely worded and ill-defined. Lack of clarity in treaty obligations exposes host states to considerable legal risks and can create regulatory chill.⁴⁹⁹ As UNCTAD notes, broad and vague formulation of investment treaty provisions “has generated unanticipated (and at times inconsistent) interpretations by arbitral tribunals, and has resulted in a lack of predictability as to what [international investment agreements] actually require from States.”⁵⁰⁰

In almost all the BITs reviewed, absolute guarantees, such as to the guarantee of “fair and equitable treatment,” “full protection and security,” and protection against “unreasonable or discriminatory measures” are not defined nor is their scope limited.⁵⁰¹ In some of the BITs (e.g., the Turkey–Gabon BIT) an attempt is made to limit the scope of the guarantees by linking them to international minimum standards of protection, but this is not found in most of the other BITs (e.g., the Turkey–Ethiopia BIT). These examples are seen below:

Turkey–Gabon BIT (2013) Article 3	Turkey–Ethiopia BIT (2005) Article II (2)
Investments of investors of each Contracting Party shall at all times be accorded treatment <i>in accordance with international law minimum standard of</i>	Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the

496. *Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Award (Feb. 9, 2004).

497. *Wena Hotels Ltd. (U.K.) v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000).

498. *Middle East Cement Shipping & Handling Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002).

499. UNCTAD’S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, *supra* note 30, at 16 (observing that “[b]road and vague formulation of IIA provisions has allowed investors to challenge core domestic policy decisions, for instance in the area of environmental, energy and health policies.”).

500. *Id.*

501. See generally Turkey–Ethiopia BIT, *supra* note 55; Turkey–Gabon BIT, *supra* note 62.

<i>treatment</i> , including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. ⁵⁰²	other Party. ⁵⁰³
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Overall, when it comes to clarifying treaty obligations, Turkey–Africa BITs are out of step with a growing number of recent BITs that other countries are concluding. Increasingly, states are taking extra care to reduce exposure to legal risks by defining their obligations carefully and circumscribing those obligations when appropriate.

Regarding the FET standard, one option is for states to qualify the standard by deference to the minimum standard of treatment under customary international law; this approach is found in a growing number of treaties.⁵⁰⁴ Second, in some BITs, contracting parties clarify the meaning and scope of the FET standard by providing an open-ended list of the types of measures that are prohibited.⁵⁰⁵ Third, in some recent treaties, contracting parties clarify the FET standard with an exhaustive “closed list” of the protection to be accorded investors.⁵⁰⁶ Fourth, a growing number of investment treaties contracting parties include a clause that provides for a review, upon request, of the content and scope of the FET standard.⁵⁰⁷ Fifth, some states are choosing to provide a list of factors that should be taken into account in determining if the FET standard has been violated.⁵⁰⁸ For example, Article 2.4(3) of the EU–Singapore IPA states that

[i]n determining whether the fair and equitable treatment obligation . . . has been breached, a Tribunal may take into account, where applicable, whether a Party made specific or unambiguous representations to an investor so as to induce the investment, that created legitimate expectations of a covered

502. *Id.*

503. Turkey–Ethiopia BIT, *supra* note 55.

504. *See, e.g.*, Agreement for the Promotion and Protection of Investment, Japan–U.A.E., arts. 5(1)–(2), Apr. 30, 2018, <https://www.mofa.go.jp/files/000360123.pdf> [<https://perma.cc/QG4D-BKTI>] (archived Sept. 11, 2019) [hereinafter Japan–UAE BIT]; SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE, SOUTHERN AFRICAN DEVELOPMENT COMMUNITY art. 5 (2012).

505. *See, e.g.*, Agreement for the Promotion and Protection of Investment, Arg.–Japan, art. 4(2)(a), Dec. 1, 2018 (“[F]air and equitable treatment’ includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”).

506. *See, e.g.*, Free Trade Agreement Between the European Union and the Republic of Singapore, EU–Sing., art. 2.4(2), Oct. 12, 2018 [hereinafter EU–Singapore IPA]; SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE, *supra* note 504, at art. 5.

507. *See, e.g.*, EU–Singapore IPA, *supra* note 506, at art. 2.4(4).

508. *Id.* at art. 2.4(3).

investor and which were reasonably relied upon by the covered investor, but that the Party subsequently frustrated.

Finally, although still relatively rare, some BITs omit the FET standard altogether.⁵⁰⁹ In the Brazil–UAE BIT (2019), the contracting parties are explicit and clear about their intention to exclude the FET standard and replace it with a list of prohibited conduct. Article 4 of the Brazil–UAE BIT provides as follows:

Article 4

Treatment

1. Each Party shall treat investors of the other Party and their investments according to its applicable rules and regulations and in conformity with this Agreement.
2. Based on the applicable rules of international law as recognized by each of the Parties and their respective national law, no Party shall subject investors of the other Party and their investments to measures which constitute:
 - (i) Denial of access to justice in any judicial or administrative proceedings;
 - (ii) Breach of due process;
 - (iii) Targeted discrimination, such as gender, race, religious or political beliefs;
 - (iv) Manifestly abusive treatment, such as coercion, duress and harassment; or
 - (v) Discrimination against investments of investors of the other Party in law 1 enforcement and the provision of public security.⁵¹⁰

A comparison of the FET clause in the Kazakhstan–Singapore BIT (2018) and that in the Turkey–Rwanda BIT (2016) highlights some of the deficiencies in the BITs that Turkey has with countries in Africa:

Turkey–Rwanda BIT (2016) Article 3 Promotion and Protection of Investment	Kazakhstan–Singapore BIT (2018) Article 3 Promotion and Protection of Investment
2. Investments of investors of each Contracting Party shall at	Each Party shall accord to investments of investors of the

509. The FET standard is omitted from the Rwanda–Morocco BIT (2016) and from the India–Belarus BIT (2018). The FET standard is also absent from the draft EAC Model Investment Treaty.

510. Brazil–UAE BIT, *supra* note 449, at art. 4.

<p>all times be accorded treatment <i>in accordance with international law minimum standard of treatment</i>, including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of such investments by unreasonable or discriminatory measures.⁵¹¹</p>	<p>State of the other Party fair and equitable treatment and full protection and security <i>in accordance with customary international law</i>.</p> <p><i>The obligation to provide “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.</i></p> <p><i>The obligation to provide “full protection and security” requires each Party to provide the level of police protection required under customary international law.</i></p> <p>The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required under customary international law and do not create additional substantive rights.</p> <p>3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.⁵¹²</p>
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511. Turkey–Rwanda BIT, *supra* note 66 (emphasis added).

512. Agreement Between the Government of the Republic of Kazakhstan and the Government of the Republic of Singapore on the Promotion and Mutual Protection of Investments, Kaz.-Sing., art. 3, Nov. 21, 2018 [hereinafter Kazakhstan–Singapore BIT].

Turkey–Rwanda BIT (2016) Article 3 Promotion and Protection of Investment	Kazakhstan–Singapore BIT (2018) Article 3 Promotion and Protection of Investment
<p>2. Investments of investors of each Contracting Party shall at all times be accorded treatment <i>in accordance with international law minimum standard of treatment</i>, including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of such investments by unreasonable or discriminatory measures.⁵¹³</p>	<p>Each Party shall accord to investments of investors of the State of the other Party fair and equitable treatment and full protection and security <i>in accordance with customary international law</i>.</p> <p><i>The obligation to provide “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.</i></p> <p><i>The obligation to provide “full protection and security” requires each Party to provide the level of police protection required under customary international law.</i></p> <p>The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required under customary international law and do not create additional substantive rights.</p> <p>3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.⁵¹⁴</p>

513. Turkey–Rwanda BIT, *supra* note 66 (emphasis added).

514. Kazakhstan–Singapore BIT, *supra* note 512, at art. 3 (emphasis added).

5. Variations among Turkey–Africa BITs

Turkey–Africa BITs are not all created equal in the sense that some afford more policy space for host states than others. Variations can be found even as between relatively recent BITs that Turkey has concluded with countries in Africa. Compare, for example, Article 8 of the Turkey–Rwanda BIT (“Repatriation and Transfer”)⁵¹⁵ with Article 7 of the Turkey–Kenya BIT (“Repatriation and Transfer”).⁵¹⁶ In both agreements, the right of investors to repatriate capital is contingent upon the fulfillment of all tax obligations.⁵¹⁷ In both agreements, contracting states reserve the right to temporarily restrict capital transfers “where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties.”⁵¹⁸ However, a very important provision in the Turkey–Rwanda BIT (Article 8(4)) is completely absent from the Turkey–Kenya BIT—this is the provision that allows a host state to prevent a transfer of capital through the equitable and good faith application of its domestic laws.⁵¹⁹ Article 8(4) of the Turkey–Rwanda BIT provides:

Turkey–Rwanda BIT

Article 8

Repatriation and Transfer

4. A Contracting Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
- (c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
- (d) criminal or penal offences;
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings; or (f) social security, public retirement or compulsory savings schemes.

515. Rwanda–Turkey BIT, *supra* note 66, at art. 8.

516. Turkey–Kenya BIT, *supra* note 65, at art. 7.

517. Compare *id.* at art. 8, with Rwanda–Turkey BIT, *supra* note 66, at art. 8.

518. See Turkey–Kenya BIT, *supra* note 65, at art. 7(3). Identical language can be found in the Rwanda–Turkey BIT. Rwanda–Turkey BIT, *supra* note 66, at art. 8 (3).

519. Rwanda–Turkey BIT, *supra* note 66, at art. 8(4).

As already noted, in BITs, broad treaty scope could chill regulatory action by host states, trigger investment arbitration even for routine non-discriminatory regulatory measures, and make it difficult for a host state to effectively enforce its criminal, fiscal and securities laws and policies.⁵²⁰

6. Development Dimension not Prioritized

Turkey–Africa BITs do not address development concerns in a meaningful or coherent fashion. To the extent that development dimension is addressed, it is only addressed in the preamble through hortatory statements. In some BITs, preambular paragraphs typically refer to the promotion of development as one of the main objectives of the agreement. Only one BIT, the Turkey–Gabon BIT, addresses the issue of technology transfer, and it merely calls on contracting parties to encourage technology transfer.⁵²¹

Although in the past, BITs focused almost exclusively on investment protection and rarely addressed issues of concern to host states, this is now changing. Increasingly BITs address a host of issues not traditionally found in investment agreements, such as prudential measures,⁵²² balance of payment,⁵²³ denial of benefits,⁵²⁴ temporary safeguards,⁵²⁵ intellectual property rights (IPRs),⁵²⁶ rule of law, consumer protection, and corruption.⁵²⁷

Addressed in the Draft PAIC, but not in most of the BITs between Turkey and countries in Africa, are topics such as:

520. *Id.*

521. Turkey–Gabon BIT, *supra* note 62, at art. 9 (Article 9, titled “Transfer of Technology and Formation,” provides that “subject to its laws and regulations, each Contracting Party may encourage their investors who invest in the territory of the other Contracting Party to organize professional training programs, and facilitate transfer of technology and know-how for the benefit of the host Contracting Party.”).

522. *See, e.g.*, Agreement Between the Argentine Republic and Japan for the Promotion and Protection of Investment, Arg.-Japan, art. 20, Jan. 12, 2018, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5799/download> [<https://perma.cc/AWT7-WJHP>] (archived Sept. 11, 2019) [hereinafter Argentina–Japan BIT]; Japan–UAE BIT, *supra* note 504, at art. 20; Australia–Hong Kong BIT, *supra* note 470, at art. 21 (Prudential Exception and Related Exception).

523. Investment Agreement for the COMESA Common Investment Area, art. 25, May 23, 2007, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download> [<https://perma.cc/47F5-JXVT>] (archived Sept. 11, 2019).

524. *See, e.g.*, Argentina–Japan BIT, *supra* note 522, at art. 23 (Denial of Benefits); *see also*, Kazakhstan–Singapore BIT, *supra* note 512, at art. 18 (Denial of Benefits).

525. *See, e.g.*, Japan–UAE BIT, *supra* note 504, at art. 19 (Temporary Safeguard Measures).

526. *See, e.g., id.* at art. 21 (Intellectual Property Rights).

527. *See, e.g.*, Argentina–Japan BIT, *supra* note 522, at art. 9 (Measures Against Corruption).

“Competition Law and Policy” (Article 28); “Transfer of Technology” (Article 29); “Environment and Technologies” (Article 30); “Human Resource Development” (Article 36); and “Consumer Protection” (Article 40).⁵²⁸ The Netherlands Model Investment Agreement addresses a host of issues not traditionally found in BITs including, Rule of Law (Article 5) and Sustainable Development (Article 6).⁵²⁹

7. The Right to Regulate Is Not Affirmed Explicitly

BITs establish rights for investors and not corresponding rights for states or obligations for investors. By establishing broad protection for investors, BITs “inevitably place limits on contracting parties’ sovereignty in domestic policymaking.”⁵³⁰ To avoid this problem, in a growing number of recent treaties, contracting states explicitly affirm their respective rights to regulate in the public interest. Article 23 of the Morocco–Turkey BIT (2016) is titled “Right of State to Regulate,” and Article 23(1) provides in part that “the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.”⁵³¹ Article 23(3) states further that “[f]or greater certainly, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement.”⁵³²

Although in Turkey–Africa BITs, an attempt is made to respect domestic regulatory space, the BITs do not explicitly acknowledge the right of states to regulate in the public interest.⁵³³ In this regard, the

528. DRAFT PAIC, *supra* note 463, at arts. 28, 29, 30, 36, 40.

529. Agreement on Reciprocal Promotion and Protection of Investments (Netherlands Draft Model BIT), GOV'T OF THE NETH., https://globalarbitrationreview.com/digital_assets/820bcd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf (last visited Sept. 8, 2019) [<https://perma.cc/G72P-UZFY>] (archived Sept. 11, 2019) [hereinafter Netherlands Model BIT].

530. UNCTAD'S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, *supra* note 30, at 22.

531. Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Morocco–Nigeria, art. 23(3), Dec. 3, 2016, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download> [<https://perma.cc/FT3E-8YDV>] (archived Oct. 9, 2019) [hereinafter Morocco–Nigeria BIT].

532. *Id.*

533. The right to regulate is mentioned in a number of EAC BITs including: Tanzania–China BIT; Rwanda–UAE BIT; Kenya–Japan BIT. *See, e.g.*, Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments, China–Tanz., Mar. 24, 2013; Agreement Between the Republic of Rwanda and the United Arab Emirates Concerning the Promotion and Reciprocal Protection of Investments, Rwanda–U.A.E., Jan. 11, 2017; Agreement Between the Government of

BITs examined are at odds with continental policy instruments and with evolving best practices. In the Draft PAIC, African Union Member States, “RECOGNIZ[ED] their right to regulate all the aspects relating to investments within their territories.”⁵³⁴ In the preamble to the *Agreement Establishing the African Continental Free Trade Agreement* that went into effect on May 30, 2019, Member States “REAFFIRM[ED] the right of State Parties to regulate within their territories and the State Parties’ flexibility to achieve legitimate policy objectives in areas including public health, safety, environment, public morals and the promotion and protection of cultural diversity.”⁵³⁵ A right to regulate clause appears in a good number of recent investment treaties. For example:

- “RECOGNISING their right to regulate and resolving to preserve their flexibility to set legislative and regulatory priorities, safeguard public welfare and protect legitimate public welfare objectives.” Australia–Hong Kong (2019).⁵³⁶
- “RECOGNISING their inherent right to regulate and resolving to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.” Australia–Uruguay BIT (2019).⁵³⁷
- “Reaffirming the right of Parties to regulate investments in their territory in accordance with their law and policy objectives.” India–Belarus BIT (2018).⁵³⁸
- “Reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the

Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment, Japan-Kenya, Aug. 28, 2016.

534. DRAFT PAIC, *supra* note 450.

535. Agreement Establishing the African Continental Free Trade Area, Preamble, Mar. 21, 2018, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf [<https://perma.cc/8QSV-99B3>] (archived Oct. 9, 2019).

536. Australia–Hong Kong BIT, *supra* note 470.

537. Agreement Between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments, Austl.-Uru., Preamble, Apr. 5, 2019, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5853/download> [<https://perma.cc/L3CG-57T3>] (archived Sept. 11, 2019) [hereinafter Australia–Uruguay BIT].

538. India–Belarus BIT, *supra* note 380, Preamble.

measures in place—the particular need of developing countries to exercise this right.” SADC Model BIT (2012).⁵³⁹

- “REAFFIRMING each Party’s right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity.” EU–Singapore IPA (2018).⁵⁴⁰
- “The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection privacy and data protection and the promotion and protection of cultural diversity.” EU–Singapore IPA (2018).⁵⁴¹

B. *Reforming Turkey–Africa BITs: Options for Countries in Africa*

There are undoubtedly many positive features in the BITs that Turkey has concluded with countries in Africa. In the evolution of Turkey–Africa BITs, an attempt to keep in step with evolving best practices is noticeable. However, despite many positive features, many, if not all, Turkey–African BITs have major shortcomings. Countries in Africa can choose to ignore the shortcomings and accept the agreements as they are. On the other hand, countries in Africa may choose to address the shortcomings in these agreements as part of a broader agenda to engage in comprehensive reform of their BITs. Since 2012, UNCTAD has encouraged countries to modernize their investment treaties and move toward a new generation of IIAs.⁵⁴²

With older BITs (those concluded before 2010), the best approach may well be to terminate those agreements after their initial term expires and to negotiate new ones in their place. With respect to more recent agreements, a distinction must be made between unratified treaties and the treaties that have been ratified and are binding.

1. Termination and Renegotiation

Countries in Africa may choose to terminate those BITs that do not appear to be balanced and oriented towards sustainable development.⁵⁴³ In the last ten years, a growing number of countries

539. SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE, *supra* note 504.

540. EU–Singapore IPA, *supra* note 506, Preamble.

541. *Id.* at art. 2.2(1).

542. WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, *supra* note 31, at xxiii.

543. WORLD INVESTMENT REPORT 2014: INVESTING IN SDGs: AN ACTION PLAN, *supra* note 22, at 116.

(e.g., India,⁵⁴⁴ Indonesia,⁵⁴⁵ and South Africa⁵⁴⁶) have taken steps to terminate most of their BITs. To avoid legal liability, it is important that countries adhere to the provisions of each BIT relating to termination. Article 54 of the Vienna Convention on the Law of Treaties stipulates that the termination of a treaty or the withdrawal of a party may take place “in conformity with the provisions of the treaty” or “at any time by consent of all the parties after consultation with the other contracting States.”⁵⁴⁷

Although a growing number of states have taken steps to unilaterally terminate their BITs, two factors complicate the termination of BITs. First, almost all Turkey–Africa BITs have an initial fixed duration of ten years, and termination, to be considered lawful, can only be done at the end of the initial term of a BIT (See Annex D).⁵⁴⁸ For example, Article 13 (3) of the Turkey–Kenya BIT states: “Either Contracting Party may, by giving one year’s written notice to the other Contracting Party, terminate this Agreement at the end of the initial ten-year period or at any time thereafter.”⁵⁴⁹ Second, all Turkey–Africa BITs have survival (sunset) clauses that have the effect of prolonging the effect of a treaty even after the treaty has been terminated. Most Turkey–Africa BITs specify a ten-year survival period (See Annex D).⁵⁵⁰ For example, Article 3(5) of the Turkey–Kenya BIT stipulates: “With respect to investments made or acquired prior to the date of termination of this Agreement and to which this Agreement otherwise applies, the provisions of all of the other Articles of this Agreement shall thereafter continue to be effective for a further period of ten (10) years from such date of termination.”⁵⁵¹

544. Ilge & Singh, *supra* note 29.

545. Arif Havas Oegroseno, *Indonesia’s Bilateral Investment Treaties: Modernising for the 21st Century*, 140 RSIS COMMENTARY 1 (Nanyang Tech. Univ. 2014) [hereinafter Oegroseno, *Indonesia’s Bilateral Investment Treaties*].

546. Mzukisi Qobo & Mills Soko, *SA’s Cancellation of Bilateral Investment Treaties—Strategic or Hostile?*, FIN24 (Sept. 28, 2018), <https://www.fin24.com/Opinion/sas-cancellation-of-bilateral-investment-treaties-strategic-or-hostile-20180928-3> [<https://perma.cc/BLB4-535S>] (archived Sept. 11, 2019); Jackwell Feris, *Challenging the Status Quo – South Africa’s Termination of its Bilateral Trade Agreements*, DLA PIPER (Dec. 10, 2014), <https://www.dlapiper.com/en/us/insights/publications/2014/12/international-arbitration-newsletter-q4-2014/challenging-the-status-quo/> [<https://perma.cc/K3TG-BUSV>] (archived Sept. 11, 2019).

547. Vienna Convention on the Law of Treaties, *supra* note 447, at art. 54.

548. Turkey–Kenya BIT, *supra* note 65, at art. 13 (stating “this Agreement shall remain in force for a period of ten (10) years and shall continue in force unless terminated in accordance with paragraph 3 of this Article.”).

549. *Id.* (emphasis added).

550. See, e.g., Turkey–Nigeria BIT (2011), *supra* note 43, at art. 8; Turkey–Cameroon BIT, *supra* note 63, at art. 12; Turkey–Ethiopia BIT, *supra* note 55, at art. 9.

551. Turkey–Kenya BIT, *supra* note 65 (emphasis added).

The question of termination is particularly pertinent with regards to older treaties because most lack important reform features found in more recent agreements. Surprisingly, even when new treaties are concluded, presumably to replace older BITs, contracting states are often not in a hurry to ratify such treaties. Turkey and Tunisia concluded their first BIT on May 29, 1999, and their second BIT on December 27, 2017.⁵⁵² Presently, only the 1999 BIT is in force.⁵⁵³ Overall, although Turkey has negotiated new BITs with three countries in Africa—Nigeria, Sudan, and Tunisia—presently none of the new agreements have entered into force, as seen below.

Turkey–Africa BITs: Termination and Renegotiation

Short Title of BIT	Date of Adoption	In force
Turkey–Tunisia BIT	May 29, 1991	Y
Turkey–Tunisia BIT	Dec. 27, 2017	N
Turkey–Sudan BIT	Dec. 19, 1999	N
Turkey–Sudan BIT	Apr. 30, 2014	N
Turkey–Nigeria BIT	Oct. 8, 1996	N
Turkey–Nigeria BIT	Feb. 2, 2011	N

*Source: Author's Compilation from Information Available on UNCTAD's Website*⁵⁵⁴

2. Consultation and Treaty Review

Turkey and countries in Africa could consider reviewing their different BITs with a view to addressing perceived flaws and possibly amending relevant clauses. The bad news is that, with the exception of the Turkey–Kenya BIT, most BITs that Turkey has concluded with countries in Africa do not provide for periodic meetings of contracting parties nor do they provide for consultation upon request.⁵⁵⁵ Furthermore, although the Turkey–Kenya BIT provides for consultation between the contracting parties, it does not mandate consultation, and it does not spell out the modalities for consultation.⁵⁵⁶ In this regard, Article 11 of the Turkey–Kenya BIT is very different from Articles 36(1) and (2) of the India–Belarus BIT, which address the issue of consultation in clear detail. A side-by-side comparison of the two provisions is as follows:

552. Investment Policy Hub – Turkey, *supra* note 1.

553. *Id.*

554. *Id.*

555. *Id.*

556. Turkey–Kenya BIT, *supra* note 65, at art. 11.

Turkey–Kenya BIT Article 11 Consultation	India–Belarus BIT (2018) Article 36 Consultations and Periodic Review
<p>The Contracting Parties shall, at the request of either Contracting Party, hold consultations for the purpose of reviewing the implementation of this Agreement and studying any issue that may arise from this Agreement. Such consultations shall be held between the competent authorities of the Contracting Parties in a place and at a time agreed on through appropriate channels.⁵⁵⁷</p>	<p>36.1 Either Party may request, and the other Party shall promptly agree to, consultations in good faith on any issue regarding the interpretation, application, implementation, execution or any other matter including, but not limited to:</p> <ul style="list-style-type: none"> (i) reviewing the implementation of this Treaty; (ii) reviewing the interpretation or application of this Treaty; (iii) exchanging legal information; and (iv) subject to Article 30, addressing disputes arising under Chapter IV of this Treaty or any other disputes arising out of investment. <p>36.2 Further to consultations under this Article, the Parties may take any action as they may jointly decide, including making and adopting rules supplementing the applicable arbitral rules under Chapter IV or Chapter V of this Treaty, issuing binding interpretations of this Treaty, and adopting joint measures in order to</p>

557. *Id.*

	improve the effectiveness of this Treaty. ⁵⁵⁸
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In addition to providing for consultation, recent BITs provide for the periodic meetings of contracting parties. Consider Article 36(3) of the India–Belarus BIT (2018), which stipulates: “The representatives of the Parties shall meet every five years after the entry into force of this Treaty to consult and review the operation and effectiveness of this Treaty as may be necessary.”⁵⁵⁹

3. Treaty Amendment

The BITs between Turkey and countries in Africa can be amended in accordance with international law. Pursuant to Article 39 of the Vienna Convention on the Law of Treaties, “[a] treaty may be amended by agreement between the parties.”⁵⁶⁰ Whether a treaty can be amended and the process of amending the treaty are issues that are typically addressed in a treaty. Most of the BITs that Turkey has concluded with countries in Africa explicitly provide for treaty amendment (See Annex D). Turkey’s BIT with Gambia,⁵⁶¹ Cameroon,⁵⁶² and Kenya⁵⁶³ all address treaty amendment. A common formulation of the amendment clause is found in Article 13(3) of the Turkey–Kenya BIT, which states “[t]his Agreement may be amended by mutual written consent of the Contracting Parties at any time.”⁵⁶⁴ To date, no country in Africa has recorded any amendments to any of the BITs involving Turkey.

4. Treaty Replacement

Treaty replacement is an option for a state unhappy with a particular treaty. Treaty replacement essentially involves terminating an old treaty and renegotiating a new treaty. Historically, BIT replacement occurred rarely and infrequently.⁵⁶⁵

558. India–Belarus BIT, *supra* note 380, at art. 36.3.

559. *Id.* at art. 36.2.

560. Vienna Convention on the Law of Treaties, *supra* note 447, at art. 39.

561. Turkey–Gambia, *supra* note 63, at art. 13(3).

562. Turkey–Cameroon BIT, *supra* note 61, at art. 12(3).

563. Turkey–Kenya BIT, *supra* note 65, at art. 13(4).

564. *Id.*

565. Kathryn Gordon & Joachim Pohl, *Investment Treaties Over Time – Treaty Practice and Interpretation in a Changing World*, 2 OECD WORKING PAPERS ON INT’L INV. 4, 36 (2015), <http://www.oecd.org/industry/inv/investment-policy/WP-2015-02.pdf> [<https://perma.cc/N79P-GEY6>] (archived Oct. 9, 2019) (observing that treaty replacements have not been a major channel used by countries seeking to change the way their treaties are interpreted and that this may reflect the high political and economic costs of treaty renegotiation and possibly the difficulty in getting both treaty partners to agree to a replacement).

However, in recent years, more and more states are resorting to treaty replacement.⁵⁶⁶ In short, recently, “the emphasis of treaty negotiations has shifted somewhat to replacing older treaties and away from creating treaties with countries with which no previous treaty relation existed.”⁵⁶⁷ Surprisingly, even when African countries conclude new treaties, presumably to replace older agreements, they often do not appear to be in any hurry to ratify the new treaties. Although Turkey and Tunisia concluded their first BIT on May 29, 1999, and their second BIT on December 27, 2017, only the 1999 BIT is in force.⁵⁶⁸ Overall, as previously discussed above, Turkey has negotiated new BITs with three countries in Africa—Nigeria, Sudan, and Tunisia—but presently none of these new agreements have entered into force.⁵⁶⁹

VII. REFORMING TURKEY–AFRICA BITS: COMPLICATING POLICY FACTORS PRACTICAL CONSIDERATIONS

A growing number of countries are reforming their BITs and other investment treaties to make them more oriented towards sustainable development.⁵⁷⁰ Countries are undertaking reform because it is increasingly recognized that international investment agreements “are concluded in a specific historic, economic and social context and respond to the then existing needs and challenges” and that today there is a need to design treaties that respond to new challenges.⁵⁷¹ Indeed, “[i]n the last ten years, the need for systematic reform of the global international investment agreements . . . regime has become increasingly evident.”⁵⁷² UNCTAD estimates that “since 2012, over 150 countries have undertaken at least one reform action in the pursuit of sustainable development-oriented IIAs and most new treaties contain key reform elements.”⁵⁷³ To UNCTAD, reform of international investment agreement has made significant progress and has entered the mainstream of international investment

566. *Id.*

567. *Id.*

568. Investment Policy Hub – Turkey, *supra* note 1.

569. *Id.*

570. *See generally* UNCTAD’S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, *supra* note 30.

571. *Id.* at 14.

572. *Id.* at 7 (observing that as more than half a century has passed since the first BIT was concluded, it is no surprise that BITs have gone through a significant evolutionary process during this period and that today they face a new context and new challenges).

573. *Id.* at 4.

policymaking.⁵⁷⁴ This begs several questions: Will countries in Africa press Turkey to address perceived shortcomings in Turkey–Africa BITs? If pressed, is Turkey likely to agree to improve the BITs that it has concluded with countries in Africa? What policy and practical considerations are likely to affect the Turkey–Africa BIT regime now and in the future? The policy and practical considerations that shape Turkey–Africa relations and are likely to influence any discussions about possible reform of Turkey–Africa BITs are analyzed in this Part.

A. Key Policy Considerations that Shape Turkey–Africa BIT Regime

A number of policy considerations are likely to shape the dynamics of Turkey–Africa BITs now and in the future. Key among these factors are: Turkey’s desire to be seen as a friend of Africa,⁵⁷⁵ Turkey’s membership in the Council of Europe,⁵⁷⁶ Turkey’s own self-interest and possible pressure from Turkish investors and businesses,⁵⁷⁷ Turkey’s ability or inability to deliver on many of its promises to countries in Africa,⁵⁷⁸ and Turkey’s so-called mosque-building diplomacy that is raising serious concerns and critiques.⁵⁷⁹

1. Turkey’s Desire to Be Seen as Africa’s “Friend”

Turkey is clearly casting herself as a true friend of Africa.⁵⁸⁰ According to the “talking points” for a Turkey–Africa Partnership High Level Officials Meeting, in 2013, “Turkey considers herself a full member of the AU, and it is for this very reason that Turkey formulates her African policies in line with the decisions and declarations of the AU.”⁵⁸¹ In a 2014 speech, Erdoğan declared that all sides had mutually completed the opening up process and that it

574. *Id.*

575. *See infra* Part VII.(A)(1).

576. *See infra* Part VII.(A)(2).

577. *See infra* Part VII.(A)(3).

578. *See infra* Part VII.(A)(4).

579. *See infra* Part VII.(A)(5).

580. *See* Richaed Gueli & Oguzhan Kase, *Turkey Ready to Befriend Africa*, SUNDAY INDEP. (Feb. 10, 2008, 4:24 PM), <http://www.iol.co.za/news/world/turkey-ready-to-befriend-africa-1.388625> [<https://perma.cc/AU53-MRNE>] (archived Sept. 11, 2019) (written after the authors’ participation in the third International Turkish-African Congress in December 2007); Recep Tayyip Erdoğan, *Turkey: Africa’s Friend, Compatriot, and Partner*, AL JAZEERA (June 1, 2016), <http://www.aljazeera.com/indepth/opinion/2016/06/turkey-africa-friend-compatriot-partner-160601070207148.html> [<https://perma.cc/HR8E-4RQM>] (archived Sept. 11, 2019).

581. *Turkey-Africa Partnership High Level Officials Meeting (Talking Points)*, *supra* note 114.

was “now necessary to move to a new and more advanced stage based on *equal partnership*.”⁵⁸² As Erdoğan put it:

At this point, I would like to point out that we are ready to stand by and execute a more efficient and a deeper cooperation especially in priority areas of African Union and its member countries such as agriculture, energy, health, education, small and medium-sized enterprises, employment, promotion of investment, energy and transport. As highlighted in the theme of the Summit, we will walk together and resolutely, towards a new partnership model on the path to development and integration.⁵⁸³

The Turkish Minister of Foreign Affairs, Mevlüt Çavuşoğlu, has also echoed the promises of solidarity, equal partnership, a win-win outcome, and mutual benefit.⁵⁸⁴ “Our approach to Africa is based on transparent, long-termed, and strategic partnership,” the Turkish Minister of Foreign Affairs reiterated in a 2018 speech given in celebration of Africa Day.⁵⁸⁵ “As I mark the Africa Day with joy, I underline Turkey’s commitment to our partnership with Africa based on the principles of equality, partnership, solidarity, sustainability, and mutual respect,” Mevlüt Çavuşoğlu stated in his 2018 speech.⁵⁸⁶ According to Çavuşoğlu:

The continent has the aspiration to take strides across all Sustainable Development Goals. Africa’s aspirations include not only eliminating absolute poverty, but also reducing inequality, offering a wealth of valuable education opportunities to all and reinforcing good governance as the norm . . . We have every reason to be proud a partner of the African nations. Turkey’s engagement is based on building lasting relationships. Our principal purpose is to establish deep-rooted cooperation with our African counterparts in a manner that is sustainable and mutually productive.⁵⁸⁷

2. Turkey’s Membership in the Council of Europe

As a member of the Council of Europe, Turkey is obliged to abide by the principles of the organization and to promote the

582. Recep Tayyip Erdoğan, President of the Republic of Turk., Speech at the Turkey-Africa Partnership Summit (Nov. 21, 2014) (transcript available at Turkey’s Ministry of Foreign Affairs website).

583. *Id.*

584. Mevlüt Çavuşoğlu, *How Turkey and Africa are Building a Solid Partnership*, CITIZEN (May 25, 2018), <http://www.thecitizen.co.tz/oped/How-Turkey-and-Africa-are-Building-a-Solid-Partnership/1840568-4579932-10lvypw/index.html> [<https://perma.cc/NC57-XJC7>] (archived Aug. 18, 2019) (published on the occasion of Africa Day).

585. *Id.*

586. *Id.*

587. *Id.*

organization's agenda.⁵⁸⁸ Human rights and sustainable development are high on the agenda of the Council of Europe.⁵⁸⁹ In a 2015 letter to then-Secretary General of the United Nations Ban Ki-Moon, the Council of Europe Secretary General, Thorbjørn Jagland, observed that "[t]he Council of Europe is an organization founded on the universal values of human rights, democracy and the rule of law. Our contribution must therefore focus on these values. They are not only values in their own right, but important factors of sustainability for any societal model."⁵⁹⁰ Sustainable development also features prominently in the agenda and programs of the Council of Europe.⁵⁹¹

The Council of Europe is addressing issues at the intersection of business and human rights. In policy instruments, such as the *Declaration (16 April 2014) of the Committee of Ministers supporting the UN Guiding Principles*⁵⁹² and *Recommendation CM/Rec(2016)3 on Human Rights and Business*,⁵⁹³ the organization calls on member states to consider the human rights impact of the trade and investment agreements that they negotiate and sign and to take appropriate steps, including through the incorporation of human

588. See 47 Member States, COUNCIL OF EUR., <https://www.coe.int/en/web/portal/47-members-states> (last visited Sept. 11, 2019) [<https://perma.cc/W7WH-3RHH>] (archived Sept. 11, 2019) (Turkey became the thirteenth member of the Council of Europe on Apr. 13, 1950).

589. See *Council of Europe Contribution to the United Nations 2030 Agenda for Sustainable Development Goals*, COUNCIL OF EUR., <https://www.coe.int/en/web/un-agenda-2030/home> (last visited Sept. 11, 2019) [<https://perma.cc/AA62-7GVT>] (archived Sept. 11, 2019) (observing that "With its global and overarching political approach, UN Agenda 2030 for Sustainable Development has been highly relevant for the Council of Europe, which has, from the outset, been contributing to the process which led to the adoption of Agenda 2030.").

590. Letter from Thorbjørn Jagland, Sec'y-Gen. of the Council of Eur., to Ban Ki-Moon, U.N. Sec'y-Gen., on the Council of Europe's contribution to the 2030 Agenda for Sustainable Development (May 29, 2015); see also SEC'Y-GEN. OF THE COUNCIL OF EUR., STATE OF DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW: POPULISM – HOW STRONG ARE EUROPE'S CHECKS AND BALANCES? (Council of Eur. 2017).

591. See COUNCIL OF EUR., ENDING ALL FORMS OF VIOLENCE AGAINST CHILDREN BY 2030: THE COUNCIL OF EUROPE'S CONTRIBUTION TO THE 2030 AGENDA AND THE SUSTAINABLE DEVELOPMENT GOALS (2017); Letter from Thorbjørn Jagland, Sec'y-Gen. of the Council of Eur., to António Guterres, U.N. Sec'y-Gen., on the Council of Europe's Contribution to the U.N. 2030 Agenda for Sustainable Development (May 17, 2017) (on file with author); Letter from Amina J. Mohammed, Deputy Sec'y-Gen. of the U.N., to Thorbjørn Jagland, Sec'y-Gen. of the Council of Eur., on the Council of Europe's contribution to the 2030 Agenda for Sustainable Development (May 8, 2019).

592. Comm. of Ministers, *Declaration of the Committee of Ministers on the UN Guiding Principles on Business and Human Rights*, COUNCIL OF EUR. (Apr. 16, 2014), <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/work-completed/human-rights-and-business> [<https://perma.cc/SH97-SPCY>] (archived Sept. 11, 2019).

593. Comm. of Ministers, *Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on Human Rights and Business*, COUNCIL OF EUR. (Mar. 2, 2016), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4 [<https://perma.cc/HJ53-J366>] (archived Sept. 11, 2019).

rights clauses, to mitigate and address identified risks of adverse impacts on human rights.⁵⁹⁴

3. Turkey's Self-Interest

Western nations, in their role as capital exporters, relied heavily on BITs to protect the interest of their investors in overseas markets.⁵⁹⁵ Today, as emerging market economies increasingly export capital to foreign markets, it is not surprising that they are turning to BITs to protect the interest of their investors.⁵⁹⁶ With growing investments in Africa and other overseas markets, Ankara is clearly under pressure to protect its investors and investment and is, in turn, putting pressure on new partners to conclude BITs.⁵⁹⁷ During his visit to Algeria, Erdoğan reportedly “praised the good relations between Algeria and Turkey, but put pressure on the topic of investment protection.”⁵⁹⁸ According to the report, Erdoğan argued “that with the help of a bilateral agreement that secures investments in Algeria, trade between the two countries could increase to more than double in the coming years.”⁵⁹⁹ The main purposes of Turkey's BIT programs are to increase the bilateral flows of capital and technology, and to provide protection to the investments of international investors in Turkey as well as Turkish investors abroad.⁶⁰⁰

594. *Id.*

595. *See, e.g.,* Bilateral Investment Treaties, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/bilateral-investment-treaties> (last visited Sept. 11, 2019) [<https://perma.cc/9644-F5LP>] (archived Sept. 11, 2019) (explaining that “The U.S. bilateral investment treaty (BIT) program helps to protect private investment, to develop market-oriented policies in partner countries, and to promote U.S. exports.”).

596. Author's assessment is based on recent BIT practice of countries like Turkey, United Arab Emirates, and Brazil.

597. Turkey has negotiated a lot of BITs in recent years. In 2018 alone, Turkey negotiated eight BITs with diverse partners including: Serbia (Jan. 31, 2018), Belarus (Feb. 14, 2018), Mali (Mar. 2, 2018), Mauritania (Feb. 28, 2018), Cambodia (Oct. 21, 2018), Krygyzstan (Apr. 9, 2018), Lithuania (Aug. 28, 2018), and Zambia (July 28, 2018). Turkey also concluded a BIT with Palestine, on Sept. 5, 2018). *See* Investment Policy Hub – Turkey, *supra* note 1; *see also* Jan Philipp Wilhelm, *Turkey's Erdogan Seeks More Influence in Africa*, DEUTSCHE WELT (Mar. 2, 2018), <https://www.dw.com/en/turkeys-erdogan-seeks-more-influence-in-africa/a-42788010> [<https://perma.cc/779A-J3W3>] (archived Aug. 18, 2019).

598. Wilhelm, *supra* note 597.

599. *Id.*

600. *See Bilateral Investment Treaties, supra* note 266 (“[T]he main purposes of Turkey's BIT program are to increase the bilateral flows of capital and technology, and provide protection to the investments of international investors in Turkey well as Turkish investors abroad against non-commercial risks in the framework of international law.”).

4. Ankara Ability or Inability to Deliver on Its Many Promises to Countries in Africa

Whether countries in Africa are willing and able to press Turkey on the BIT issue will depend on whether Ankara can deliver on its promises of aid to the continent. Arguably, some African leaders are apt to ignore flaws in investment agreements if they believe that they can secure other benefits from Turkey. Will Erdoğan's current excursion to Africa deliver the desired outcome for all actors, and what happens if it does not?⁶⁰¹

The long-term sustainability of Turkey's humanitarian engagement in Africa is questioned in some circles.⁶⁰² Experts believe that Turkey's primary challenge "will be sustaining its lofty ambitions in Africa."⁶⁰³ According to Alex Vines and Daragh Neville, "[d]espite significant rhetoric, the economic impact has been limited."⁶⁰⁴ Although bilateral trade reached \$19.5 billion in 2015, a threefold increase in volume compared to 2003, Africa's share of Turkey's total global trade remains minimal.⁶⁰⁵ Vines and Neville add:

Turkey's relatively slow progress, however, has been criticized by African leaders. At the second Turkey-Africa Partnership Summit in Equatorial Guinea in 2014, Nkosazana Dlamini-Zuma, chair of the African Union Commission, noted: "Many of the outcomes of the first Africa-Turkey summit are yet to be realized." This inertia has had real-world implications: while Turkey received the support of all but two African countries in its bid for a non-permanent seat on the U.N. Security Council in 2009-10, such support was not forthcoming in a subsequent and ultimately unsuccessful bid in 2015-2016.⁶⁰⁶

5. Competition for Capital From Emerging Markets

African countries are not the only countries seeking to increase their FDI inflow, nor are they the only countries trying to attract capital from emerging market economies.⁶⁰⁷ The intense competition

601. See Neville & Vines, *supra* note 203 ("It remains to be seen whether Erdoğan's current excursion to Africa will deliver the desired outcome for all actors.").

602. Some scholars have pointed out a major gap between Turkey's mounting aid expenditures and its long-term capacity. In a 2014 report, the Graduate Institute of Geneva observed that "As with most other emerging economies, Turkey's economic growth is not yet sustained and is vulnerable to global economic developments," and concluded that "Given the current level of development within Turkey, it is safe to assume that an economic decline would immediately affect the scope of Turkish humanitarian donorship." See Andrea Binder, *The Shape and Sustainability of Turkey's Booming Humanitarian Assistance*, 5 INT'L DEV. POL'Y 1, ¶ 35 (2014).

603. Neville & Vines, *supra* note 203.

604. *Id.*

605. *Id.*

606. *Id.*

607. See generally McKinsey & Co., *The Tough Competitors in Emerging Market*, MCKINSEY Q. (Mar. 2019), <https://www.mckinsey.com/business-functions/strategy-and->

for capital from emerging market economies may make it more challenging for countries in Africa to press Ankara to address perceived flaws in their BITs.⁶⁰⁸ Turkey is courting countries in Africa at the same time that it is courting countries in Asia, the Caucasus, and Latin America.⁶⁰⁹ As one observer put it, “[w]ith a strong impetus coming from the business associations that represent the private sector, Turkey has introduced new campaigns to bolster its economic and trade ties with Africa, Latin America and East Asia.”⁶¹⁰

6. Disturbing Questions that Critics May Dare to Ask

The real motives behind Ankara’s interest in Africa and generosity to countries in the region is an issue that critics are wondering about.⁶¹¹ Questions are also increasingly asked about the effectiveness of Turkey’s engagement in Africa.⁶¹²

Ankara’s apparent Pan-Islamic inclination is a concern in some quarters. In 2006, the Religious Leaders Meeting of African Muslim

corporate-finance/our-insights/the-tougher-competitors-in-emerging-markets [https://perma.cc/8R5J-P52X] (archived Aug. 18, 2019); Jonathan Woetzel et al., *The Best-Performing Emerging Economies Emphasize Competition*, HARV. BUS. REV. (Sept. 17, 2018), <https://hbr.org/2018/09/the-best-performing-emerging-economies-emphasize-competition> [https://perma.cc/9UXW-XCM3] (archived Aug. 18, 2019).

608. McKinsey & Co., *supra* note 607; Woetzel et al., *supra* note 607.

609. Sadik Ünay, *Turkey’s Emerging Power Politics in Latin America*, DAILY SABAH (Feb. 14, 2015), https://www.dailysabah.com/columns/sadik_unay/2015/02/14/turkeys-emerging-power-politics-in-latin-america [https://perma.cc/36G3-BLQW] (archived Aug. 18, 2019); Juan Vagni, *América Latina y el mundo árabe: un acercamiento desde la diplomacia pública y la cooperación cultural*, FLACSO-ISA Joint International Conference, Buenos Aires (July 23–25, 2015), <http://web.isanet.org/Web/Conferencias/FLACSO-ISA%20BuenosAires%202014/Archive/c58a6c98-e430-4857-8bde-e43b5ca7a57e.pdf> [https://perma.cc/LF8R-XEJK] (archived Oct. 9, 2019); *see also* Ariel Gonzalez & Huseyin Zengin, *A Decade of Opening: Turkey’s New International Role in Sub-Saharan Africa and Latin America*, 3 TIEMPO DEVOTADO 262 (2016); Ariel Gonzalez Levaggi, *Turkey and Latin America: A New Horizon for a Strategic Relationship*, 18 PERCEPTIONS 99 (2013); Meliha Altunisik, *The Turkish Model and Democratization in the Middle East*, 27 ARAB STUD. Q. 45, 45 (2005); Meliha Altunisik, *The Possibilities and Limits of Turkey’s Soft Power in the Middle East*, 10 INSIGHT TURK. 41, 41 (2008); Deha Erpek, *Turkey and the Least Developed Countries: A New Partnership*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF TURK., http://www.mfa.gov.tr/turkey-and-the-least-developed-countries_-a-new-partnership.tr.mfa (last visited Oct. 9, 2019) [https://perma.cc/7SM2-HX9F] (archived Aug. 18, 2019).

610. Fidan, *supra* note 96, at 93.

611. *See* Ömer Taspınar, *Turkey’s Middle East Policies Between Neo-Ottomanism and Kemalism*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Oct. 7, 2008), <https://carnegieendowment.org/2008/10/07/turkey-s-middle-east-policies-between-neo-ottomanism-and-kemalism-pub-22209> [https://perma.cc/P7TX-4JW5] (archived Aug. 18, 2009); *see also* Mehmet Özkan, *What Drives Turkey’s Involvement in Africa?*, 37 REV. AFRICAN POL. ECON. 533 (2010).

612. *See* Neville & Vines, *supra* note 203.

Countries was held in Istanbul.⁶¹³ In October 2015, the first summit of Muslim religious leaders from the Asian and Pacific opened in Turkey.⁶¹⁴ In 2018, Turkey hosted the “World Muslim Minorities Summit.”⁶¹⁵ Turkey’s “mosque-building diplomacy” has been noted by many.⁶¹⁶ Some critics are concerned that the religious undertone in Ankara’s Africa policy could stoke the flames of religious intolerance in the continent and undermine efforts to stem religious extremism in Africa.⁶¹⁷ Abdullah Bozkurt, the Ankara Bureau Chief for *Today’s Zaman*, reputed to be Turkey’s best-selling English daily newspaper, has argued that “[b]ehind the façade of trade, investment and aid initiatives lies a sinister campaign of turning Africa into a hotbed of Turkish Islamists who want to create proxies as leverage like they have done in Syria, Libya and other Arab and African countries.”⁶¹⁸

In a recent article in the *National Review*, Michael Rubin notes that in its outreach to countries in Africa, “Turkey has promoted Islamist causes”⁶¹⁹ and warns that “[a]s Turkey has invested in Africa, it has sought to promote itself and more-extreme Islamist interpretations at the expense of the West and the post-World War II liberal order.”⁶²⁰ “What Saudi Arabia was to Islamic Extremism across the Arab world in the late 20th century, Turkey could be to Africa in the 21st,” Rubin opines. According to Rubin:

613. Özkan & Akgün, *supra* note 71, at 538.

614. *First Summit of Asian, Pacific Muslims to Focus on Cooperation*, DAILY SABAH (Oct. 13, 2015), <https://www.dailysabah.com/turkey/2015/10/14/first-summit-of-asian-pacific-muslims-to-focus-on-cooperation> [<https://perma.cc/96BV-24Z2>] (archived Aug. 18, 2019).

615. Turkey has also hosted Muslim leaders from Latin America. See *Turkey’s Top Religious Body to Host Latin American Muslim Leaders*, HURRIYET DAILY NEWS (Sept. 15, 2004), <http://www.hurriyetdailynews.com/turkeys-top-religious-body-to-host-latin-american-muslim-leaders-.aspx?pageID=238&nID=71736&NewsCatID=393> [<https://perma.cc/5W96-U6R8>] (archived Aug. 18, 2019).

616. See, e.g., Thomas Seibert, *Turkey’s Mosque-Building Diplomacy*, AL-MONITOR (Feb. 13, 2015), <http://www.al-monitor.com/pulse/originals/2015/02/turkey-mosque-building-soft-power.html> [<https://perma.cc/5N2Y-XQJG>] (archived Aug. 18, 2019); see also STEPHEN KINZER, CRESCENT AND STAR: TURKEY BETWEEN TWO WORLDS (Farrar, Straus and Giroux 2008).

617. See Behlül Özkan, *Turkey, Davutoglu and the Idea of Pan-Islamism*, 56 SURVIVAL 119 (2014); Behlül Özkan, *Repairing the Legacy of the AKP’s Pan-Islamism*, EUR. COUNCIL ON FOREIGN RELATIONS (July 16, 2015), https://www.ecfr.eu/article/repairing_the_legacy_of_the_akps_pan_islamism3068 [<https://perma.cc/C8UK-QXJJ>] (archived Oct. 9, 2019).

618. *Turkey’s Erdoğan Sowing the Seeds of Jihadist Ideology Among African Students*, TURKISH MINUTE (Mar. 1, 2018), <https://www.turkishminute.com/2018/03/01/opinion-turkeys-erdogan-sowing-the-seeds-of-jihadist-ideology-among-african-students/> [<https://perma.cc/TZ2F-TU94>] (archived Aug. 18, 2019).

619. Michael Rubin, *Turkey’s Africa Strategy Threatens to Breed Islamist Extremism*, NAT’L REV. (June 26, 2019, 6:30 AM), <https://www.nationalreview.com/2019/06/turkey-africa-strategy-threatens-to-breed-islamist-extremism/> [<https://perma.cc/4RL5-AZCX>] (archived Oct. 9, 2019).

620. *Id.*

A half century ago, Saudi Arabia pumped money to extremist organizations across the globe while, for the sake of diplomatic nicety and strategic convenience, the United States stayed silent. Today, Turkey is doing the very same thing, trying to radicalize a generation of Africans through a combination of aid, anti-Western propaganda, religious indoctrination, and military training. That the United States and Europe turn a blind eye toward Turkey's African agenda effectively cedes to Erdoğan the strategic advantage on the second-largest continent in terms of both population and land area.⁶²¹

Criticism has also come from other Gulf states. Saudi Arabia's Crown Prince Mohammed bin Salman has accused Erdoğan of trying to build an "Ottoman caliphate" in Africa.⁶²²

Some critics point to a lack of transparency and accountability in many Turkey–Africa arrangements.⁶²³ According to Kemal Kirisci, a senior fellow at the Brookings Institution, "[t]he greatest challenge here is that, increasingly, Turkish humanitarian and developmental assistance is not transparent and suffers from little accountability."⁶²⁴

The effectiveness of Turkey's representational role at the G20 2015 Summit and Ankara's claim of solidarity with poor developing countries has also been questioned.⁶²⁵ According to one editorial, "[m]uch of the G20's 2015 progress on its development agenda reflected processes begun before Turkey's presidency. Turkey did little to leverage or otherwise specify these processes in terms of its stated intent to represent low income, least developing, or SSA countries."⁶²⁶ According to this editorial, "[a]side from its hosting of the WTO Trade Ministers' meeting, Turkey failed to strategically apply its G20 presidency . . . to engage other development platforms on behalf of low income, least developed, and SSA countries."⁶²⁷ Overall, the editorial concludes that Turkey "has yet to realize its self-styled description as a leader of, and model for, low income, least

621. *Id.*

622. *Erdogan trying to build new "Ottoman caliphate" – Saudi Crown Prince*, AHVAL (Mar. 7, 2018), <https://ahvalnews.com/saudi-turkey/erdogan-trying-build-new-ottoman-caliphate-saudi-crown-prince> [<https://perma.cc/WJ84-Q7E2>] (archived Oct. 9, 2019).

623. Neville & Vines, *supra* note 203.

624. Ventura, *supra* note 119 (discussing Turkey's increasing involvement in development assistance and criticisms of this new role).

625. *G20 2015 Turkey, the Group Development Agenda, and Sub-Saharan Africa Representation 1*, HEINRICH BÖLL STIFTUNG (June 23, 2017), <https://tr.boell.org/de/2017/06/23/g20-2015-turkey-group-development-agenda-and-sub-saharan-africa-representation1> [<https://perma.cc/G3MH-D5SD>] (archived Aug. 18, 2019).

626. *Id.* ("Turkey's role in the G20 was more one of continuing pre-existing processes than adopting direct, active representation of low income, least developed, and SSA countries.")

627. *Id.*

developed, and SSA countries.”⁶²⁸ Unfortunately, “given Turkey’s current domestic and regional challenges including those of a security and economic nature, representation of these countries is no longer a priority.”⁶²⁹

7. Crisis in International Investment Law and Ongoing Reform Efforts

Across the globe government officials,⁶³⁰ scholars,⁶³¹ lawyers,⁶³² and civil society organizations⁶³³ are voicing concerns about the international investment legal regime and about bilateral investment treaties in particular.⁶³⁴ Concerns have been raised regarding the nature, content, and scope of international investment law.⁶³⁵ One

628. *Id.*

629. *Id.*

630. *See, e.g.*, Press Release, European Comm’n, Improving ISDS to Prevent Abuse- Statement by EU Trade Commissioner Karel De Gucht on the Launch of a Public Consultation on Investment Protection in TTIP (Mar. 27, 2014).

631. In 2015, law professors wrote several open letters to members of Congress urging them to omit ISDS from the Trans Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (“TTIP”). *See, e.g.*, Open letter by the Alliance for Justice, to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi, and Ambassador Froman (Mar. 2015) (on file with author) (expressing opposition to the inclusion of Investor-State Dispute Settlement (ISDS) provisions in the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP)).

632. *An Open Letter From Lawyers to the Negotiation of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement*, TPP LEGAL (May 8, 2012), <http://tpplegal.wordpress.com/open-letter/> [<https://perma.cc/892P-7BMH>] (archived Aug. 18, 2019).

633. *See generally* FABIAN FLUES, THE MULTILATERAL INVESTMENT COURT LOCKING IN ISDS: TEN REASONS WHY THE EU’S PROPOSAL FOR A MULTILATERAL INVESTMENT COURT DOESN’T FIX A FUNDAMENTALLY FLAWED SYSTEM (2017); EBERHARDT & OLIVET, *supra* note 436.

634. Australia–Uruguay BIT, *supra* note 536.

635. In a March 7, 2019 letter to the UNCITRAL Working Group, seven independent human rights experts appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues from a thematic or country-specific perspective, stressed their continuing concern regarding the content and effect of international investment agreements. The letter noted stressed that international investment agreements “have often proved to be incompatible with international human rights law and the rule of law.” The letter was authored by: (i) the Working Group on the issue of human rights and transnational corporations and other business enterprises; (ii) the Special Rapporteur on the right to development; (iii) the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; (iv) the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; (v) the Special Rapporteur on the rights of indigenous peoples; (vi) the Independent Expert on the promotion of a democratic and equitable international order; and (vii) the Special Rapporteur on the human rights to safe drinking water and sanitation. *See* Letter from Independent Human Rights Experts Appointed and

strand of criticism focuses on perceived imbalances in investment treaties.⁶³⁶ Critics argue that most BITs are unbalanced in the sense that they focus on investor protection but not on investor obligation, and they focus on the obligation of host states but not on the rights of host communities.⁶³⁷ Critics are also concerned that BITs restrict domestic policy space and make it extremely difficult for host states to regulate in the public interest.⁶³⁸ While these concerns are prompting some countries to withdraw from the system altogether,⁶³⁹ most countries are simply focusing their attention on reforming and updating their BITs.⁶⁴⁰ After a multiyear BIT review, India revamped its IIA regime. In 2016, India released a new Model BIT.⁶⁴¹ Recent BITs have a tendency to contain provisions designed to preserve domestic policy space and to balance the rights and obligations of investors *vis-à-vis* those of host states.⁶⁴² Intergovernmental organizations such as UNCTAD are also calling for reform of international investment policy.⁶⁴³ Reform elements found in recent BITs but not typically found in Turkey–Africa BITs include:

- A security exception,⁶⁴⁴
- A balance of payment exception,⁶⁴⁵

Mandated by the U.N. Human Rights Council to the UNCITRAL Working Group 1–2 (Mar. 7, 2019) (on file with U.N. Office of the High Comm’r for Human Rights).

636. *Id.*

637. *Id.*

638. *Id.* at 2 (noting that IIAs pose risks to the regulatory space required by States to comply with their international human rights obligations as well as to achieve the Sustainable Development Goals). Following a review of South Africa’s BITs, South Africa’s Department of Trade and Industry concluded that: “Major issues of concern for developing countries are not being addressed in the BIT negotiating processes. . . . New investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally. Under such conditions, investment fails to encourage or enhance sustainable development.” REPUBLIC S. AFR., DEP’T OF TRADE & INDUS., BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW: GOVERNMENT POSITION PAPER 1, 11 (2009).

639. Indonesia is an example of a country that has terminated most of its BITs and is exploring reform options. See Arif Havas Oegroseno, *Revamping Bilateral Treaties*, JAKARTA POST, July 7, 2014, <https://www.thejakartapost.com/news/2014/07/07/revamping-bilateral-treaties.html> [<https://perma.cc/TXE8-JSG8>] (archived Aug. 18, 2019) [hereinafter, Oegroseno, *Revamping Bilateral Treaties*]; see also Oegroseno, *Indonesia’s Bilateral Investment Treaties*, *supra* note 544.

640. See, e.g., Netherlands Model BIT, *supra* note 529. On October 19, 2018, the Dutch government adopted Netherlands’ new model BIT.

641. See 2016 Indian Model BIT, *supra* note 29; see also Ilge & Singh, *supra* note 29.

642. See generally UNCTAD’S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, *supra* note 30 (discussing reform of international investment agreements and noting that a growing number of countries are engaging in reform).

643. See generally WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, *supra* note 31.

644. See, e.g., Kazakhstan–Singapore BIT, *supra* note 512, at art. 20.

645. See, e.g., *id.* at art. 9.

- Limits on the national treatment guarantee through the protection of sensitive sectors;⁶⁴⁶
- Clarification of vague obligations such as the obligation to accord foreign investors “full protection and security”;⁶⁴⁷ and
- A clause on investor responsibility and corporate social responsibility.⁶⁴⁸

In a BIT, a security exception allows contracting parties to apply measures they consider necessary to protect their essential security interests.⁶⁴⁹ Article 20 of the Singapore–Kazakhstan BIT is an example and provides:

ARTICLE 20

SECURITY EXCEPTIONS

Nothing in this Agreement shall be construed to:

(a) require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.⁶⁵⁰

In a growing number of BITs, policy space is provided to enable host states to address serious balance-of-payments crises and external financial difficulties. For example, Article 9 of the Singapore–Kazakhstan BIT Provides:

ARTICLE 9

RESTRICTIONS TO SAFEGUARD THE BALANCE OF PAYMENTS

In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Party may adopt or maintain restrictions on payments or transfers related to investments. It is recognised that particular pressures on the balance of payments of the State of a Party in the process of economic development may necessitate the use of restrictions to ensure, inter alia, the

646. See, e.g., *id.* at art. 4.

647. See, e.g., Kazakhstan–Singapore BIT, *supra* note 512, at art. 3.

648. See, e.g., Brazil–UAE BIT, *supra* note 449, at art. 15; Australia–Hong Kong BIT, *supra* note 470, at art. 16.

649. See, e.g., India–Belarus BIT, *supra* note 380, at art. 33.

650. Agreement Between the Government of the Republic of Kazakhstan and the Government of the Republic of Singapore on the Promotion and Mutual Protection of Investments, Kaz.-Sing., Nov. 21, 2018, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5700/download> [https://perma.cc/U6WX-7FFK] (archived Oct. 21, 2019) [hereinafter Singapore–Kazakhstan BIT].

maintenance of a level of financial reserves adequate for the implementation of its programme of economic development.⁶⁵¹

Even while guaranteeing national treatment, in a growing number of recent BITs, contracting states reserve the right to exclude sensitive sectors of the economy from the national treatment obligation.⁶⁵² Article 4 of the United Arab Emirate–Kazakhstan BIT is an example:

ARTICLE 4

NATIONAL TREATMENT

1. Each Party shall accord to investors of the State of the other Party and their investments treatment no less favorable than a treatment which it accords to investors of its State and their investments concerning the management, maintenance, use, enjoyment or any other form of disposition of investments unless otherwise provided in its national legislation, governmental policies and guidelines.

2. Each Party in accordance with its national legislation, governmental policies and guidelines reserves the right to identify the sensitive sectors of economy and/ or other related activities that would be limited or excluded from the scope of this obligation.⁶⁵³

Compare the National Treatment clause in the Kazakhstan–Singapore BIT (2018) with the national treatment clause in Turkey–Rwanda BIT (2016):

Kazakhstan–Sing. BIT (2018) Article 4 National Treatment	Turkey–Rwanda BIT (2016) Article 4 Treatment of Investments
1. Each Party shall accord to investors of the State of the other Party and their investments treatment no less favorable than a treatment which it accords to investors of its State and their	2. Each Contracting Party shall accord to these investments, once established, treatment no less favourable than that accorded in like circumstances to investments of its investors or to

651. *Id.*

652. *See, e.g.,* Agreement Between the Government of the Republic of Kazakhstan and the Government of the United Arab Emirates on Promotion and Reciprocal Protection of Investments, art. 4(2), Kaz.-U.A.E., Mar. 24, 2018, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5733/download> [https://perma.cc/5G43-WUUC] (archived Sept. 11, 2019) [hereinafter Kazakhstan–UAE BIT] (“The Contracting Party in accordance with its national legislation shall reserve the right to identify the sensitive sectors of economy and/ or other related activities that shall be limited or excluded.”).

653. *Id.* at art. 4.

<p>investments concerning the management, maintenance, use, enjoyment or any other form of disposition of investments <i>unless otherwise provided in its national legislation, governmental policies and guidelines.</i></p> <p>2. <i>Each Party in accordance with its national legislation, governmental policies and guidelines reserves the right to identify the sensitive sectors of economy and/ or other related activities that would be limited or excluded from the scope of this obligation.</i>⁶⁵⁴</p>	<p>investments of investors of any third State, whichever is the most favourable, as regards the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of the investment.⁶⁵⁵</p>
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In recent BITs, contracting states are taking care to limit legal liability by clarifying the meaning of vague terms.⁶⁵⁶ For example, the obligation on host states to offer investors “full protection and security” is increasingly defined and clarified.⁶⁵⁷ Article 3 of the Kazakhstan–UAE BIT is an example:

Article 3

Protection of investments

1. Investments by investors of either Contracting Party and returns shall enjoy full protection and security in the territory of the other Contracting Party in a manner consistent with national legislation and this Agreement and applicable rules of international law...
2. Full protection and security shall not create any obligation to the Contracting Party other than what the host state accords to its own nationals and other aliens.⁶⁵⁸

Compared to the “full protection and security” obligation in the Turkey–Rwanda BIT, Article 3 of the India–Belarus BIT (2018) is more carefully worded:

654. See Kazakhstan–Singapore BIT, *supra* note 512, art. 4.

655. See Rwanda–Turkey BIT, *supra* note 66, art. 4.

656. UNCTAD’S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, *supra* note 30, at 33–47 (discussing strategies countries are using to limit exposure to legal risks associated with BITs).

657. *Id.*

658. Kazakhstan–UAE BIT, *supra* note 652, at art. 3.

Article 3

Treatment of investments

Turkey–Rwanda BIT (2016) Article 3 Promotion and Protection of Investment	India–Belarus BIT (2018) Article 3 Treatment of investments
<p>2. Investments of investors of each Contracting Party shall at all times be accorded treatment in accordance with international law minimum standard of treatment, including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of such investments by unreasonable or discriminatory measures.⁶⁵⁹</p>	<p>3.2 Each Party shall accord in its territory to investments of the other Party and to investors with respect to their investments full protection and security. <i>For greater certainty, “full protection and security” only refers to Party’s obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever.</i>⁶⁶⁰</p>

659. Rwanda–Turkey BIT, *supra* note 66, at art. 3.2.

660. India–Belarus BIT, *supra* note 380, at art. 3.2.

Finally, some recent investment agreements explicitly address corporate social responsibility. Article 9 of the *Brazil–Malawi Cooperation and Facilitation Investment Agreement* is titled “Corporate Social Responsibility.”⁶⁶¹ Article 9 stipulates that investors and their investment “shall strive to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in [the] Agreement.”⁶⁶² Investors are required to use their best efforts to, *inter alia*, “[r]espect the human rights of those involved in the companies’ activities, consistent with the international obligations and commitments of the Host Party”;⁶⁶³ “[e]ncourage the strengthening of local capacities building through close cooperation with the local community”;⁶⁶⁴ “[e]ncourage the development of human capital, especially by creating employment opportunities and facilitating access of workers to professional training”;⁶⁶⁵ and “[s]upport and maintain good corporate governance principles, and develop and apply good practices of corporate governance.”⁶⁶⁶

B. Practical Considerations

1. Turkey’s Immense Experience with BITs

Compared to countries in Africa, Turkey is not a newcomer to BITs. Turkey signed its first BIT in 1962 with Germany.⁶⁶⁷ Today Turkey has concluded about one hundred and twenty-eight BITs and an additional twenty-one treaties with investment provisions (TIPs).⁶⁶⁸ Turkey has signed BITs with developed as well as developing countries.⁶⁶⁹ Compared to most African countries, Turkey has a dynamic BIT program⁶⁷⁰ and has its own Model BIT.⁶⁷¹ The

661. Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi, Braz.-Malawi, art. 9, June 26, 2015, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4715/download> [<https://perma.cc/UQE8-QYNZ>] (archived Oct. 9, 2019).

662. *Id.* at art. 9(1).

663. *Id.* at art. 9(2)(b).

664. *Id.* at art. 9(2)(c).

665. *Id.* at art. 9(2)(d).

666. *Id.* at art. 9(2)(f).

667. See Investment Policy Hub – Turkey, *supra* note 1 (indicating that Turkey’s first BIT was concluded in 1962, with Germany).

668. *Id.*

669. *Id.*

670. *Id.* (“Turkey also follows a dynamic program to conclude new BITs and modify the old ones in line with the new developments in global investment law.”).

671. According to a 2011 PowerPoint presentation of the Ministry of Economy, Republic of Turkey, “Turkey has its own BIT Model text, and updates it regularly to

implications for countries in Africa are evident. To negotiate from the position of strength, countries in Africa must be prepared and use experts experienced in international investment law and treaty making.

2. Turkey's Deployment of Soft Power in the African Continent

Turkey's deployment of soft power in Africa is a complicating factor.⁶⁷² Turkey–Africa BITs are negotiated and concluded against the backdrop of increased display of Turkish soft power in the continent.⁶⁷³ Turkey's increased deployment of soft power can make it difficult for African leaders to press Ankara when it comes to renegotiating BITs.⁶⁷⁴ In October 2017, Turkey opened its largest overseas military base in Mogadishu, Somalia.⁶⁷⁵ In January 2017, Erdoğan, announced plans to open an embassy in every African capital.⁶⁷⁶ “Our goal is to have embassies in all African countries, and turn Africa into a continent with which we have much closer bilateral ties,” Erdoğan declared in January 2017, before departing for his four-day Africa tour which included stops in Tanzania, Mozambique, and Madagascar.⁶⁷⁷

3. Lack of Coordination on the African Side

Most countries in Africa lack a coherent international investment policy and most lack a well-defined BIT strategy.⁶⁷⁸ In their engagement with Turkey, there is no evidence that African countries have a coordinated or synchronized approach to the BITs

meet international standards as well as reflect its experience gained through international arbitration cases involving Turkey.” Hasan Aslan Akpınar, *Bilateral Treaties*, MINISTRY OF ECON., REPUBLIC OF TURK. (Oct. 13, 2011).

672. See Kahn, *supra* note 197, at 7 (offering a definition of soft power and explaining why it could explain Turkey's “success” in Africa).

673. *Id.*

674. *Id.*

675. Orhan Coskun & Abdurahman Hussein, *Turkey Opens Military Base in Mogadishu to Train Somali Soldiers*, REUTERS, Sept. 30, 2017, <https://www.reuters.com/article/us-somalia-turkey-military/turkey-opens-military-base-in-mogadishu-to-train-somali-soldiers-idUSKCN1C50JH> [<https://perma.cc/V3R5-4JLA>] (archived Aug. 18, 2019).

676. Andac Hongur & Izzet Taskiran, *Turkey Seeks to Boost Diplomatic Ties with Africa*, ANDALOU AGENCY (Jan. 22, 2017), <https://www.aa.com.tr/en/turkey/turkey-seeks-to-boost-diplomatic-ties-with-africa/732499> [<https://perma.cc/A35B-GNM5>] (archived Aug. 18, 2019).

677. *Id.*

678. Author's expert conclusion is based on her study over the years of more than one hundred and fifty BITs involving African states. Wide disparities in the BITs of any single country suggests that countries are willing to sign any BIT that a negotiating partner presents.

they are concluding or that they are negotiating against the backdrop of continental vision and goals.⁶⁷⁹

A careful study of Turkey–Africa BITs suggests that most are not the products of intense negotiations, but were hastily concluded to coincide with visits of high-ranking Turkish officials to Africa.⁶⁸⁰ By some accounts “[w]ith the exception of the year 2008, President Erdoğan [has] traveled to Africa at least once yearly since 2005.”⁶⁸¹ Since 2004, Erdoğan has made about forty trips to twenty-four countries in Africa.⁶⁸² Between February and March 2018, Erdoğan visited four African countries.⁶⁸³ Erdoğan also visited six African countries in 2017,⁶⁸⁴ seven in 2016,⁶⁸⁵ and three in 2015.⁶⁸⁶ Erdoğan is the first leader in the history of Turkey to visit twenty-three African countries and is now among the world leaders with the most visits to Africa.⁶⁸⁷ From every indication, some countries in Africa chose to reward these visits with BITs and other investment contracts.⁶⁸⁸

Erdoğan Visit by Year and Turkey–Africa BITs by Year

Year of Visit	Country Visit	BIT
2018	Mali	Turkey–Mali BIT (2018)
2018	Mauritania	Turkey–Mauritania BIT (2018)
2017	Chad	Turkey–Chad BIT (2017)
2017	Mozambique	Turkey–Mozambique BIT

679. Author’s expert conclusion is based on a survey of all BITs between Turkey and countries in Africa. The similarity in the text of Turkey’s BITs with countries in Africa suggests that Turkey negotiates on the basis of a Model BIT and is the ‘rule giver’ in the unfolding relationship.

680. Author’s conclusion is based on a study of the relationship between President Erdoğan’s visits to Africa and the dates that the different BITs that Turkey has with countries in Africa were concluded.

681. *Id.*

682. *President Erdoğan to Embark on Four-Country Africa Tour*, HURRIYET DAILY NEWS (Feb. 24, 2018), <http://www.hurriyetdailynews.com/president-erdogan-to-embark-on-4-country-africa-tour-127846> [<https://perma.cc/94PF-P5CC>] (archived Aug. 18, 2019).

683. *Id.* (Algeria, Mauritania, Senegal, and Mali).

684. *Id.* (Sudan, Chad and Tunisia, Tanzania, Mozambique, and Madagascar).

685. *Id.* (Ivory Coast, Ghana, Nigeria, and Guinea in Feb.–Mar. 2016; Kenya, Uganda and Somalia).

686. *Id.* (Somalia, Ethiopia, and Djibouti).

687. *Erdoğan Becomes First Turkish Leader to Visit 23 African Countries*, YENİ ŞAFAK (Jan. 28, 2017), <https://www.yenisafak.com/en/news/erdogan-becomes-first-turkish-leader-to-visit-23-african-countries-2604064> [<https://perma.cc/B8MV-ZUSN>] (archived Aug. 18, 2019).

688. Author’s conclusion is based on a study of the relationship between President Erdoğan’s visits to Africa and the dates that the different BITs that Turkey has with countries in Africa were concluded.

		(2017)
2017	Tunisia	Turkey–Tunisia BIT (2017)
2016	Côte d'Ivoire	Turkey–Côte d'Ivoire BIT (2016)
2016	Somalia	Turkey–Somalia BIT (2016)
2016	Ghana	Turkey–Ghana BIT (2016)

VIII. CONCLUSION

Presently, Africa–Turkey relations are growing, deepening, and widening. From every indication, relations between Turkey and countries in Africa have reached the stage of strategic partnerships.⁶⁸⁹ In a little over a decade the position of Turkey in Africa moved from that of having an “Observer Status” in the African Union to that of becoming a “Strategic Partner” of the African continent.⁶⁹⁰ According to the *Joint Implementation Plan 2015–2019*, “[t]he relations between Africa and Turkey have reached the stage of a mutually reinforced Strategic Partnership.” In October 2018, the African Union Commission Department of Economic Affairs and the Turkish Embassy signed a Framework Cooperation Agreement.⁶⁹¹ In October 2018, the Turkey–Africa Second Economic and Business Forum (Turkey–Africa II. Economic and Business Forum) was jointly organized by the Turkish Ministry of Commerce, the African Union Commission and DEiK under the motto of “Building a Sustainable Future Together through investments and joint ventures.”⁶⁹²

689. *Turkey—Partnership Overview*, *supra* note 155; see also Chigozie Enwere & Mesut Yilmaz, *Turkey's Strategic Economic Relations with Africa: Trends and Challenges*, 1 J. ECON. & POL. ECON. 216, 221 (2014).

690. In 2005, the African Union granted Turkey an “Observer Status.” See *Non-African States and Organisations Accredited to the AU*, AFRICAN UNION, <https://au.int/en/organs/Non-African-States> [<https://perma.cc/2P87-NWL4>] (archived Aug. 18, 2019). In 2008, the AU declared Turkey a “Strategic Partner” of the African Continent. See *Africa's Strategic Partnership with Other Parts of the World*, AFRICAN UNION, <https://au.int/en/partnerships/intro> [<https://perma.cc/6U2H-SK46>] (archived Aug. 18, 2019). The framework of Africa's strategic partnership takes four distinct forms: (i) continent to continent partnerships; (ii) continent to country partnerships such as Africa-India, Africa-Turkey, Africa-China, and Africa-Japan; (iii) partnerships in demand as new states or regions request additional partnerships; and (iv) partnership with other institutions such as the Organisation of American States (OAS), the Organisation of Islamic Conference (OIC) the Commonwealth and La Francophonie.

691. Press Release, African Union, Signature of the Framework Cooperation Agreement Between the AUC Department of Economic Affairs and the Turkish Embassy (Sept. 10, 2018) (on file with author).

692. Press Release, African Union, Africa and Turkey Hold Second Africa Turkey Forum to Promote Cooperation Opportunities (Oct. 11, 2018) (on file with author).

Signaling another important milestone in the Turkey–Africa relationship, during the Turkey–Africa II. Economic and Business Forum, the African Union Commission and the Ministry of Trade of the Republic of Turkey signed a Memorandum of Understanding on Trade and Investment Cooperation.⁶⁹³

Developed countries have had a long presence in Africa. Following in their footsteps, emerging powers are establishing their presence in the continent and are seeking to grow their presence.⁶⁹⁴ Although Turkey has adopted a nuanced and multitrack approach in its engagement with countries in Africa, Turkey’s engagements with Africa are largely driven by economic considerations and are occurring against the backdrop of renewed competition for Africa’s natural resources and geostrategic positioning by developed countries and emerging powers alike.⁶⁹⁵ In the *Joint Implementation Plan 2015–2019*, all sides agreed to: “[e]xplor[e] the possibilities to support the common objectives of the parties to expand trade and investment volume from US\$30 billion in 2013 to US\$50 billion by 2019.”⁶⁹⁶ Furthermore, a communique issued in February 2018 following the Second Ministerial Review Conference of African Union–Turkey Partnership, “noted the importance of trade and investment as key components of relations between African countries and Turkey” and reiterated the desire “to further strengthen economic and commercial relations.”⁶⁹⁷

Turkey’s President Recep Tayyip Erdoğan appears to be invested in Africa for the long-term, although Turkey’s trade and investment in the region is presently very modest compared to its trade and investment with other regions of the world.⁶⁹⁸ Thus far, President Erdoğan and the Justice and Development Party have been

693. Press Release, Foreign Econ. Relations Board of Turk. (DEİK), Turkish President Erdogan Calls on Africa to do Business in Local Currency (Oct. 10, 2018) (on file with author).

694. Judd Devermont, *The World is Coming to Sub-Saharan Africa. Where is the United States?*, CTR. FOR STRATEGIC & INT’L STUD. (Aug. 24, 2018), <https://www.csis.org/analysis/world-coming-sub-saharan-africa-where-united-states> [<https://perma.cc/5BSX-JLYP>] (archived Oct. 9, 2019).

695. Alexis Habiyaremye & Tarık Oğuzlu, *Engagement with Africa: Making Sense of Turkey’s Approach in the Context of Growing East-West Rivalry*, 11 ULUSLARARASI İLİŞKİLER 65, 66 (2014) (suggesting an economic underpinning to Turkey-Africa relations and noting that “Turkish interest in, and opening up to Africa, came at a time when many African economies had started to enjoy relatively robust growth rates as a result of a booming trade with China.”).

696. Second Joint Implementation Plan, *supra* note 179, at ¶ 6(h).

697. The Second Ministerial Review Conference of African Union: Turkey Partnership, *Communique*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF TURK. (Feb. 12, 2019), http://www.mfa.gov.tr/the-second-ministerial-review-conference-of-african-union-_turkey-partnership_en.en.mfa [<https://perma.cc/ATL4-F3E3>] (archived Oct. 9, 2019).

698. SHINN, *supra* note 8, at 17 (stating that “The breadth of Turkey’s involvement in SSA suggests that its intention is to engage for the long term.”).

instrumental in forging Turkey–Africa relations.⁶⁹⁹ Whether Turkey–Africa relations will survive any future change of government in Turkey is anyone’s guess.⁷⁰⁰

In its forays into Africa, is Turkey using the same types of legal instruments, for example BITs, that Western nations used in the past and are still using? To the extent that Turkey is using the same legal instruments that Western nations used in the past, is Turkey using these instruments in the same way or are these instruments serving a completely different purpose in unfolding relationships? Specifically, do Turkey–Africa BITs depart markedly from the BITs that countries in Africa concluded with Western nations? Compared to traditional BITs, are Turkey–Africa BITs more oriented towards sustainable development? Are the principles of solidarity, equal partnership, a win-win outcome, and mutual benefit, which underpin Turkey–Africa relations, reflected in the BITs? And if so, to what degree?

First, like most Western nations, Turkey has embraced the international investment law in general and BITs in particular. Turkey has not shown any interest in following in the footsteps of emerging market economies like India,⁷⁰¹ Indonesia,⁷⁰² and South Africa⁷⁰³ that are terminating their BITs and appear to be rejecting the international investment law regime. In sharp contrast to many

699. *Id.* at 18 (noting that Erdoğan has been the chief architect of Turkey’s renewed engagement in SSA).

700. *Id.* (predicting that while a change in government could cause Turkey to reduce, for example, its huge political and humanitarian engagement in Somalia, “Ankara will almost certainly continue to retain its strong commercial relations with SSA countries” and that “business and cultural connections are too deeply embedded to allow interest in Turkey’s Africa strategy to cease.”).

701. Amiti Sen, *India’s Bilateral Investment Pacts Under Cloud*, BUS. LINE (Apr., 9, 2017), <https://www.thehindubusinessline.com/economy/indias-bilateral-investment-pacts-under-cloud/article9625580.ece> [<https://perma.cc/M59X-9G5V>] (archived Aug. 18, 2019).

702. In March 2014, Indonesia announced publicly plans not to renew its BIT with Netherlands but let the said treaty expire effective July 1, 2015. Subsequently, Indonesia announced plans to let all of its sixty-seven BITs expire. Oegroseno, *Revamping Bilateral Treaties*, *supra* note 639; *see also* Phuong Nguyen, *Indonesia’s Foreign Policy under Jokowi: A Giant Comes Knocking*, COGITASIA (Jan. 13, 2015), <http://cogitasia.com/indonesiasforeign-policy-under-jokowi-a-giant-comes-knocking/> [<https://perma.cc/SK7T-KQVJ>] (archived Aug. 18, 2019).

703. To date, South Africa has terminated BITs with a number of countries, including Argentina, Austria, Belgo-Luxembourg Economic Union, Denmark, France, Germany, the Netherlands, Spain, Switzerland, Sweden, and the United Kingdom. *See International Investment Agreements Navigator—South Africa*, U.N. CONFERENCE ON TRADE & DEV., <https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa> (last visited Aug. 10, 2019) [<https://perma.cc/6M8T-FCCC>] (archived Oct. 9, 2019) [hereinafter Investment Policy Hub – South Africa]; *see also* Qobo & Soko, *supra* note 545.

developing countries that have been critical of bilateral investment treaties, Turkey has stepped up its investment treaty-making practice. In the last decade, since 2009, Turkey has concluded forty-nine known BITs with countries in diverse regions of the world.⁷⁰⁴

Second, Turkey's conception of BITs as primarily investor-protection instruments mirrors those of most Western nations. With its role changing from that of a capital importer to that of both a capital importer and exporter, Turkey is clearly under pressure to protect Turkish investors and is increasingly using BITs, not necessarily to attract investors, but to protect Turkish investors who are venturing into oversea markets. In years past, Turkey viewed BITs primarily as a tool to improve domestic investment climate and to attract foreign investment. Today, Turkey increasingly views BITs as "the only tool that can be relied on by the Turkish entrepreneurs investing all around the world to protect their investments and related rights."⁷⁰⁵

Third, despite its avowed commitment to the principles of solidarity, equal partnership, win-win outcomes, and mutual benefit in Turkey–Africa relations, these principles are not reflected in the BITs that Turkey has concluded or is concluding with countries in the region. For the most part, these principles are only found in hortatory instruments such as the *2008 Instabul Declaration* and the *2014 Malabo Declaration*.

Finally, very much like traditional BITs, Turkey–Africa BITs are not development cooperation instruments and were not specifically designed promote and sustainable development in host states. However, although Turkey–Africa BITs are primarily investor-protection instruments, they are constantly evolving and more recent BITs appear to have been drafted with a view to striking a more appropriate balance between investor/investment protection and sustainable development. Indeed according to Turkey's Ministry of Trade, "Turkey . . . follows a dynamic program to conclude new BITs and modify the old ones in line with the new developments in global investment law."⁷⁰⁶ While improvements are undoubtedly called for, recent Turkey–Africa BITs do provide some policy space for host states.

It is up to countries in Africa to review their BITs and design BIT programs that strike an appropriate balance between investment and sustainable development. It is imperative that countries in Africa approach BIT negotiations seriously and strategically. Policy coherence is important in investment policymaking.⁷⁰⁷ It is

704. Investment Policy Hub – Turkey, *supra* note 1.

705. *Bilateral Investment Treaties*, *supra* note 266.

706. *Id.*

707. *G20 Guiding Principles*, *supra* note 268, at ¶ V ("Investment policies and other policies that impact on investment should be coherent at both the national and

imperative that countries in Africa develop a coherent international investment policy and ensure that the BITs that they conclude are consistent with national, regional, and continental development goals and strategies. For example, *African Union Agenda 2063* is the “continent’s strategic framework that aims to deliver on its goal for inclusive and sustainable development.”⁷⁰⁸ The vision of Agenda 2063 is that of “an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the international arena.”⁷⁰⁹ Among the “Aspirations” identified in Agenda 2063 are those of: “A prosperous Africa based on inclusive growth and sustainable development,” (Aspiration 1), “An Africa of good governance, democracy, respect for human rights, justice and the rule of law” (Aspiration 3); and “An Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children” (Aspiration 6).⁷¹⁰ Although in their engagement, both sides emphasize the centrality of the African Union Agenda 2063 as one of the guiding frameworks for the unfolding partnership, it is debatable and, even doubtful, that Turkey–Africa BITs modeled as they are after traditional BITs, will help the two sides achieve their desired goals.

Countries in Africa must look beyond the charm offensive of emerging partners and critically evaluate the values, motivations, and strategies of each partner. This begs several questions. First, what are Turkey’s real motivations? The question is important because as some commentators have noted, “the question of why Turkey has shown what some consider to be an unexpected interest in the continent still does not have a clear answer for Turkey’s African partners.”⁷¹¹ Second, while Turkey is ready and prepared to engage with countries in Africa, are these countries prepared and well-equipped to engage with Turkey?⁷¹² While Turkey appears to be ready and fully-equipped to engage with countries in Africa, most countries in Africa appear to be ill-prepared to engage strategically with a country like Turkey. For one thing, Turkish foreign policy

international levels and aimed at fostering investment, consistent with the objectives of sustainable development and inclusive growth.”).

708. *Agenda 2063: The Africa We Want*, AFRICAN UNION COMM’N, <https://www.un.org/en/africa/osaa/pdf/au/agenda2063.pdf> (last visited Oct. 9, 2019) [<https://perma.cc/F2UB-RVBC>] (archived Oct. 9, 2019).

709. *Id.*

710. *Id.*

711. Ali Bilgic & Daniela Nascimento, *Turkey’s New Focus on Africa: Causes and Challenges*, NORWEGIAN PEACEBUILDING RES. CTR. (Sept. 2014), https://repository.lboro.ac.uk/articles/Turkey_s_new_focus_on_Africa_causes_and_challenges/9467291 [<https://perma.cc/N6D5-8NZL>] (archived Oct. 9, 2019).

712. Sadik Ünay, *Economic Diplomacy for Competitiveness: Globalization and Turkey’s New Foreign Policy*, 15 PERCEPTIONS 21, 21 (2010) [hereinafter Ünay, *Economic Diplomacy for Competitiveness*].

makers have an array of instruments in their tool kit that would enable them to engage with countries in Africa from a position of strength.⁷¹³ For another, the suppliant position of most countries in Africa *vis-à-vis* Turkey undermines their ability to engage in hard bargaining in any trade and investment agreement. It is important that African leaders pay careful attention to the links between Turkey's humanitarian diplomacy and its economic diplomacy in Africa.⁷¹⁴

Turkey's claims of a win-win economic partnership need to be routinely interrogated and Turkey's overall ambition in the continent constantly reassessed. In a recent article, *Turkey and the New Scramble for Africa: Ottoman Designs or Unfounded Fears?*, Zach Vertin rightly notes that "[a] right-sized assessment of Turkish ambitions and its influence in the Horn of Africa requires zoom, medium, and wide-angle lenses" and highlights how Turkey's regional competition with Gulf rivals may be playing out in Africa.⁷¹⁵ It is imperative to examine Turkish multifaceted and nuanced engagements in Africa. There are many questions that African leaders must answer as they forge deeper ties with Turkey. What are the costs and benefits of Turkey's humanitarian diplomacy in Africa? Does Turkey's humanitarian diplomacy weaken the capacity of African leaders to press Ankara on important trade and investment issues? Given deep rivalry between Turkey and Gulf States such as Saudi Arabia and the United Arab Emirates, what are the opportunity costs for Africa, of unquestioned alliance with Turkey? It is important to move beyond Turkey's anticolonial and benevolent partner discourse and ask some hard questions. What is in it for countries in Africa and are the legal instruments that underpin Turkey–Africa unfolding relationships really designed to deliver win-win outcomes and sustainable development benefits to all sides? This question is very important because while there are many noneconomic factors at play, Turkey's engagement with Africa is largely driven by economic considerations.⁷¹⁶ As Ali Bilgic and Daniela Nascimento put it:

713. Gonca Biltekin & Volkan İpek, *Turkey's Foreign Policy Implementation in Sub-Saharan Africa: A post International Approach*, 49 *NEW PERSPECTIVES ON TURKEY* 121, 121 (2013).

714. Elem Eyrice Tepecikliglu et al., *Turkish and BRICS Engagement in Africa*, 8 *J. SUSTAINABLE DEV. L. & POL'Y* 48, 51 (2017) (observing that studies show that Turkey's soft power initiatives in SSA "have been an important complement to its official diplomatic and developmental efforts as well as its business and political interests in SSA.").

715. Zach Vertin, *Turkey and the New Scramble for Africa: Ottoman Designs or Unfounded Fears?*, BROOKINGS INST. (May 19, 2019), <https://www.brookings.edu/research/turkey-and-the-new-scramble-for-africa-ottoman-designs-or-unfounded-fears/> [https://perma.cc/NGL8-MX4L] (archived Oct. 9, 2019).

716. Tepecikliglu et al., *supra* note 713, at 49 (observing that "Turkey's engagement with Africa is also mostly driven by economic considerations,

Turkey's increasing involvement in Africa can be understood in terms of its political, economic, and development aid ambitions and motivations, framed through close economic ties with sub-Saharan countries (in the form of diplomatic activity, trade and aid), which are not only aimed at exploiting the sub-Saharan market, but also at establishing a Turkish presence in Africa vis-à-vis other, mainly Western, but also Southern, donor countries.⁷¹⁷

An exhaustive analysis of the political economy of Turkey–Africa relations is beyond the scope of this paper. It is too early to determine whether Turkey's initiatives in Africa will deliver sustainable development benefits that benefit ordinary Africans.⁷¹⁸ This Article suggests that countries in Africa are yet to develop a robust strategy for engaging Turkey. Some commentators have described African reaction to Turkey's African diplomacy as a “mixture of mild expectation and confusion.”⁷¹⁹ In their BITs with Turkey, countries in Africa have been “rule takers” rather than “rule makers” with the result that, like traditional BITs, Turkey–Africa BITs are primarily designed to protect capital exportees and not capital importers. Regarding Turkey–Africa economic relations, countries in Africa must start by educating themselves about the values and motivation that underpin Turkey's foreign policy⁷²⁰ and must pay close attention to Turkey's foray into countries outside of Africa.⁷²¹ Countries in Africa must also educate themselves about the role of emerging markets and middle powers in global governance and seek to understand the strategies of these new actors.⁷²² Beyond Turkey–

predominantly by a quest for new export opportunities for Turkish companies. That is, the Turkish government aspires to create markets for Turkish products.”).

717. Bilgic & Nascimento, *supra* note 710, at 3.

718. *Id.* (observing that it is still yet to be established to what extent Turkey's new approaches in Africa “can actually help to build up a sustainable and mutually beneficial cooperation relationship that has a positive impact on the living conditions of African people, or whether Turkey's new orientation towards Africa simply ends up reflecting the old principle of ‘business as usual.’”).

719. Mehmet Özkan, *Turkey's Rising Role in Africa*, 9 *TURKISH POL'Y Q.* 93, 103 (2010).

720. İbrahim Kalin, *Turkish Foreign Policy: Framework, Values, and Mechanisms*, 67 *INT'L J.* 7, 7 (2011); see also Kemal Kirişçi, *The Transformation of Turkish Foreign Policy: The Rise of the Trading State*, 40 *NEW PERSPECTIVES ON TURKEY* 29, 29 (2009).

721. Paul Kubicek, *Debating the Merits of the “Turkish Model” for Democratization in the Middle East*, 12 *ALTERNATIVES TURKISH J. INT'L REL.* 66, 66 (2013); see also T.C. Başbakanlık Dış Ticaret Müsteşarlığı, *Turkey Trade Development Strategy Towards the Americas*, ANKARA DTM (2006).

722. Joshua Walker, *Learning Strategic Depth: Implications of Turkey's New Foreign Policy Doctrine*, 32 *INSIGHT TURK.* 32, 32 (2007); see also Hongying Wand & Erik French, *Middle Range Powers in Global Governance*, 34 *THIRD WORLD Q.* 985, 985 (2013); Dmitri Trenin & Sinan Ulgen, *A Place in the Sun or Fifteen Minutes of Fame? Understanding Turkey's New Foreign Policy*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 18, 2011), <https://carnegieendowment.org/2011/04/18/place-in-sun-or-fifteen-minutes-of-fame-understanding-turkey-s-new-foreign-policy-event-3266>

Africa relations, countries in Africa must develop strategies for engaging with emerging partners, must develop their own foreign policy instruments, and must train and deploy a seasoned, educated, committed, and diversified pool of actors involved in the foreign policy domain.

Annex A

Turkey–Africa Bilateral Investment Treaties: In Force Treaties

	Country	Status	Date Concluded	Date in Force	Text Available
1	Egypt	In force	04/10/1996	31/07/2002	Yes
2	Ethiopia	In force	16/11/2000	10/03/2005	Yes
3	Libya	In force	25/11/2009	22/04/2011	Yes
4	Mauritius	In force	07/02/2013	30/05/2016	No
5	Morocco	In force	08/04/1997	30/05/2004	Yes
6	Senegal	In force	15/06/2010	17/07/2012	Yes
7	Tunisia	In force	29/05/1991	28/04/1994	Yes

Source: Author's Compilation from Information Available on UNCTAD's Website

Annex B

Turkey–Africa Bilateral Investment Treaties: Signed But Not in Force

	Country	Status	Date of Signature	Date of Entry into Force	Text Available
1	Algeria	Signed (not in force)	03/06/1998		Yes
2	Benin	Signed (not in force)	11/12/2013		No
3	Burundi	Signed (not in force)	14/06/2017		No
4	Cameroon	Signed (not in force)	24/04/2012		Yes
5	Chad	Signed (not in force)	26/12/2017		No
6	Côte d'Ivoire	Signed (not in force)	29/02/2016		No
7	Djibouti	Signed (not in force)	25/09/2013		No
8	Gabon	Signed	18/07/2012		Yes

		(not in force)			
9	Gambia	Signed (not in force)	12/03/2013		Yes
10	Ghana	Signed (not in force)	01/03/2016		No
11	Guinea	Signed (not in force)	18/06/2013		No
12	Kenya	Signed (not in force)	08/04/2014		Yes
13	Mali	Signed (not in force)	02/03/2018		No
14	Mauritania	Signed (not in force)	28/02/2018		No
15	Mozambique	Signed (not in force)	24/01/2017		No
16	Nigeria	Signed (not in force)	08/10/1996		No
16	Nigeria	Signed (not in force)	02/02/2011		Yes
17	Rwanda	Signed (not in force)	03/11/2016		Yes
18	Somalia	Signed (not in force)	01/06/2016		No
19	South Africa	Signed (not in force)	23/06/2000		Yes
20	Sudan	Signed (not in force)	30/04/2014		No
20	Sudan	Signed (not in force)	19/12/1999		Yes
21	Tanzania	Signed (not in force)	11/03/2011		Yes

22	Tunisia	Signed (not in force)	27/12/2017		No
25	Zambia	Signed (not in force)	28/07/2018		No

Source: Author's Compilation from Information Available on UNCTAD's Website

Annex C

Turkey–Africa Bilateral Investment Treaties By Year of Conclusion

Year	Treaty Concluded
2018	Zambia (28/07/2018) Mali (02/03/2018) Mauritania (28/2/2018)
2017	Burundi (14/6/2017) Chad (26/12/2017) Mozambique (24/01/2017) Tunisia (27/12/2017)
2016	Rwanda (03/11/2016) Somalia (01/06/2016) Côte d'Ivoire (29/02/2016) Ghana (01/03/2016)
2015	No BITs
2014	Kenya (08/04/2014) Sudan 30/04/2014 (N)
2013	Benin (11/12/2013) Djibouti (25/09/2013) Gambia (12/03/2013) Guinea (18/06/2013) Mauritius (07/02/2013)
2012	Gabon (18/07/2012) Cameroon (24/04/2012)
2011	Tanzania (11/03/2011) Nigeria (02/02/2011)
2010	Senegal (15/06/2010)
2009	Libya (25/11/2009)
2001–2008	No BITs
1991–2000	Ethiopia (16/11/2000) South Africa (23/06/2000) Sudan (19/12/1999) Algeria (03/06/1998) Morocco (08/04/1997) Nigeria (08/10/1996) Egypt (04/10/1996)

	Tunisia (29/05/1991)
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Source: Author's Compilation from Information Available on UNCTAD's Website

Annex D

Turkey–Africa BITs: General Excetions/Security Exceptions

	General Exception	Security Exception	Corporate Responsibility/Investor Accountability	Social
Algeria (1998)	No	No	No	
Cameroon (2012)	Yes	Yes	No	
Cote D'Ivoire (2016)	Yes	Yes	No	
Egypt (1997)	No	No	No	
Ethiopia (2000)	No	No	No	
Gabon (2012)	Yes	Yes	No	
Gambia (2013)	Yes	Yes	No	
Ghana (2016)	Yes	Yes	No	
Kenya (2014)	Yes	Yes	No	
Libya (2009)	No	No	No	
Morocco (1997)	No	No	No	
Nigeria (1996)	No	No	No	
Nigeria (2011)	Yes	Yes	No	
Rwanda 2016	Yes	Yes	No	
Senegal 2010	No ⁷²³	Yes	No	
South Africa	No	No	No	

723. Turkey–Senegal BIT, *supra* note 58, at art. 4 (Article 4, titled "Right to Regulate", contains a security exception but not a standard general exceptions clause).

(2000)			
Sudan (1999)	No	No	No
Tunisia (1994) ⁷²⁴	Yes ⁷²⁵	Yes	No
Tanzania (2011)	Yes	Yes	No

Source: Author's Compilation from Information Available on UNCTAD's Website

Annex E

Turkey–Africa BITs: Termination, Consultation, and Amendment

	Initial Term	Survival clause	Consultation	Amendment
Algeria (1998)	10	10	No	Yes
Cameroon (2012)	10	10	No	Yes
Cote D'Ivoire (2016)	10	10	No	Yes
Egypt (1997)	10	10	No	Yes
Ethiopia (2000)	10	10	No	Yes
Gabon (2012)	10	10	No	Yes
Gambia (2013)	10	10	No	Yes
Kenya (2014)	10	10	Yes	Yes
Libya (2009)	10	10	No	Yes
Morocco (1997)	10	10	No	No
Nigeria (1996)	10	10	No	Yes

724. In 2017, Turkey negotiated a new treaty with Tunisia. However, the Turkey–Tunisia BIT is not yet in force. Turkey–Tunisia BIT, *supra* note 45.

725. *Id.* at art. IX (“This agreement shall not preclude the application by either Party of measures necessary for the maintenance of public order and morals, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”).

Nigeria (2011)	10	10	No	Yes
Rwanda (2016)	10	10	No	Yes
Senegal (2010)	10	10	No	Yes
South Africa (2000)	10	10	No	Yes
Sudan (1999)	10	10	No	Yes
Tunisia (1994)	10	10	Yes	Yes
Tanzania (2011)	10	10	No	Yes
Ghana (2016)	10	10	No	Yes

Source: Author's Compilation from Information Available on UNCTAD's Website