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LEGAL FRAMEWORK OF INVESTMENT IN TURKEY

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Abstract:
Turkey has always been a country that attracts the attention of investors due to its geopolitical position. Legislation regarding investment is shaped in line with the social and economic policies of the country. It is seen that our country has accepted investment-friendly regulations in the process up to now. In this context, the "Foreign Direct Investments Law" dated 2003 and numbered 4875 is the Law which should be examined as a priority. This Law brought two important changes in investment law. One of these innovations is the transition from the permission system to the notification system in foreign investment. The other innovation is related to who can be considered as a foreign investor. With the new regulation, Turkish citizens residing abroad will also be able to get investor status. We define stocks and capital market investments less than 10% and not giving a control on the company as indirect investments. Within the scope of our study, direct investments, indirect investments and their legal framework will be explained in accordance with the relevant legislation.

Keywords:
Investment in Turkey, Foreign Direct Investment Law, Direct Investment, Indirect Investment.
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1. Introduction
The principals of international investment in Turkey are set forth with in the scope of Turkish Constitutional Code (hereinafter "Constitution") (art. 46, 47) and Foreign Direct Investments Law, additionally, bilateral (hereinafter "BITs") and multilateral international investment agreements of which Turkey is a party. By these principals, foreign investors and investments are protected in Turkey in terms of economic, political and legal risks. Essentially, the foreign investment is included in the concept of right to work for foreigners and that right is protected by the Constitution (art. 48, 49). According to Constitution art. 48, "Work, is everyone's right and duty" and art. 49, "Everyone has the freedom to work and contract in any field. Private entreprises are free to establish". These rights and freedoms may only be restricted by law for foreigners pursuant to international law principles (Constitution art. 16).
In this context, as it is related to right to work for foreigners, right to contract in any field, right to establish private entreprises etc., the "Foreign Direct Investments Law" dated 2003 and numbered 4875 is the Law which should be examined as a priority. Various special laws, such as Decision No. 32 on the Protection of the Value of Turkish Currency, the Petroleum Law, the Law for the Encouragement of Tourism and the Law on Industrial Districts, encompass provisions relating to foreign capital investments. However, the primary legislation governing foreign direct investments is the Foreign Direct Investments Law (hereinafter "FDI Law") No. 4875 (OG 17.6.2003-25141), accompanied by the Regulation for Implementation of Foreign Direct Investments Law (hereinafter "Regulation for Implementation").

2. Law on Foreign Direct Investments No. 4875
This Law brought two important changes in investment law. The first substantial amendment is the transition from the permission and approval system to the notification system in foreign investment. The second substantial amendment made in this law is the extension of the scope of the definitions "foreign investor" and "foreign

investment". With the new regulation, Turkish citizens residing abroad will also be able to get investor status (Çelikel/Öztekin Gelgel, 230; Ekşi, 519; Ekşi, 2012, 181; Gökyayla/Süral, 136).

2.1. Transition From Permission and Approval System to Notification System

FDI Law has been entered into force on June 17, 2003 and the aim of this law is the promotion and protection of foreign investments. For this purposes, two substantial amendments have been made to the FDI Law. The first one is, the transition from the permission and approval system, which was the accepted method by the previous law, to the notification system for the direct foreign investors (Çelikel/Öztekin Gelgel, 230; Ekşi, 521; Ekşi, 2012, 186; Doğan, 236; Gökyayla/Süral, 135).

The provision of how to provide information on foreign direct investments is regulated in detail in the 5 of Regulation for Implementation (Çelikel/Öztekin Gelgel, 233). Notification shall be made through a form (see Regulation for Implementation, Annex-1) to the Ministry of Industry and Tecnology. The former authority was the Ministry of Trade, Undersecretariat of Treasury, General Directorate of Incentive Implementation and Foreign Investment before the amendment made in Regulation with Official Gazette dated 16/10/2020 and numbered 31276). Aforesaid notification should be made until the end of May at the latest each year (Regulation art.5/2). However, the circumstances require to obtain permission, concerning the area to be invested, in special laws are reserved (Çelikel/Öztekin Gelgel, 233).

According to new law, the obligation to obtain a permission from the Undersecreteriat of Treasury (former authority) required by the previous law is abolished. Therefore, foreign invested companies may also be established based on the same procedure with the Turkish Companies. However, even if the new law abolishes the obligations to obtain a permission for the transactions such as establishment, capital increase, share transfer, the new law brings the obligation to provide information for these transactions through specific forms at certain times to the Ministry of Industry and Tecnology, General Directorate of Incentive Implementation and Foreign Investment (Regulation art.5).

On June 1, 2018, new requirements have been introduced regarding the notification to the Ministry. Accordingly, all these informations (such as shareholding structure, share transfers and/or increase or decrease of the share capital) will be provided to Ministry via online platform, namely the Electronic Incentive Application and Foreign Investment Information System (E-TUYS). Companies with foreign shareholders are now required to register certain information (such as shareholding structure, share transfers and/or increase or decrease of the share capital) on the aforesaid online platform (Regulation art.5). However, Liasion Offices still notify on paper (Regulation art.6).

In summary, under the FDI Law, investors are only required to notify of their investment (e.g. greenfield investment, share transfer or otherwise) and the amount of foreign capital brought to Türkiye, except for opening a liaison office which is still subject to the prior written consent of the Ministry of Industry and Technology (FDI Law art. 3/h, Regulation art.5).

2.2. Term of "Foreign Investor" and "Foreign Investment"

The second substantial amendment made in the law is the extension of the scope of the definitions "foreign investor" and "foreign investment".

2.2.1. Term of "Foreign Investor" in FDI Law

As stated in FDI Law (art.2/a), "foreign investor" is;

a) any natural person who is a citizen of a foreign country,

b) any natural person whose citizenship is Turkish, but who is resident of a foreign country,

c) any legal person incorporated or constituted in accordance with the legislation of a foreign country or any international institution.

Aswell as in FDI Law, in BITs, foreign investor are defined. In some BITs, the scope of foreign investor concept is more extensive than FDI Law, in some BITs, more constricted (Şensöz Malkoç, 110). The favorable provision of the FDI Law shall be applied fort he investors in Turkey.

In any case, in order to benefit from the protection and the advantages provided to foreign investors by FDI Law and concerning BITs, it is not important to be just a foreign investor in accordance with FDI Law and concerning BITs; it is also necessary that foreign investor should invest a value of foreign investment (existed in home country) determined in the FDI Law and in the concerning BIT of the host country (Çelikel/Öztekin Gelgel, 230; Ekşi, 519;

Ekşi, 2012, 181). Host country term includes the land boundaries, territorial waters and continental shelves according to the bilateral agreements. In other words, it means the country which remains within the boundaries of the sovereignty and the jurisdiction of the host country for the investment in accordance with the international law.

2.2.2. Term of Foreign Invesment

2.2.2.1. According to FDI Law

According to FDI law, the values of "investments" which shall be invested by investors in Turkey shall mean;
a) Capital in cash in the form of convertible currency bought and sold by the Central Bank of the Republic of Turkey,
b) Stocks and bonds of foreign companies (excluding government bonds),
c) Machinery and equipment,
d) Copy-rights and industrial property rights.
For these kinds of values of investment are accepted as foreign investment values according to FDI Law, they should be brought into Turkey from foreign countries (FDI Law art 2/b/1).
Besides, "returns" as a result of investments including in particular profit, dividends, interest, license fees, technical assistance and service fees, pecuniary claim and other rights related to the investment having an economic value, and the reinvested earnings, revenues, financial claims, or any other investment-related rights of financial value and commercial rights for the exploration and extraction of natural resources acquired from Turkey by foreign investor, are accepted as value of investment as economic assets (FDI Law art 2/b/2).
Share certificates acquired in the stock exchange market are not accepted as direct Foreign investments. However, acquisition of the shares exceeding 10% in the stock exchange markets or acquisiton of the shares providing equal voting rights are accepted as foreign investments (FDI Law, art 2/b/2/ii).

2.2.2.2. According to BITs

In bilateral investment treaties (BITs) to which Turkey is a party, definitions related to foreign investment are also made (see BIT between Turkey and Russia art 1 as an example). The scope of concept of foreign investment in BITs is more extensive than the scope of foreign investment in FDI Law. All kind of monetary capital is accepted as investment under the concept of "investment" in BITs (Hüseynov, 93; Kostunina/Livensev, 106; Şensöz Malkoç, 111). Movable and immovable property as well as property rights accepted as a foreign investment asset (Şensöz Malkoç, 111). Despite that, the host country may accept another value, which is not stated in the bilateral agreement, as the investment. In this case, the dispute arising from the aforesaid investment shall be resolved in accordance with the procedure envisaged under the provisions of the bilateral agreement (Hüseynov, 94). In my opinion, in that case, the equity principle and the most favored nation clause stated in BIT should be consired.

3. Principals of Foreign Investment Provided by FDI Law and BITs

Some measures shall be implemented concerning the treatments to be made for the investments in FDI Law and in bilateral agreements.

3.1. Equity Principle

"Fair and equitable treatment to investments" is one of these measures. It means "Each Contracting Party shall accord fair and equitable treatment to investments made by investors of the other Contracting Party in its territory". The other measure "Equity principle" shall mean (a) Freedom to invest (FDILaw art.3/a) and national treatment (FDILaw art. 3/2) "Contracting Party shall accord to investments made in conformity with its legislation in its territory by investors of the other Contracting Party a no less favorable treatment that it accords to investments by its own investors" and (b) The most favored nation clause, "The fair and equitable treatment shall be as favorable as that granted to investments by its own investors or investors of any third State".
The Parties shall provide the necessary incentive and protection for the investment to be made by opposing party investors. Besides, the most favored nation clause shall be taken into consideration for the contracting party investors at the stage of approval or permission or during the transaction after beginning the activity. The investors shall exceedingly (at least mutually) benefit from the rights provided by the host country to its own citizens (Çelikel/Öztekin Gelgel, 233; Ekşi, 520) or third country citizen. Arbitrary prohibitions and restrictions, which are

different from the implementations subjecting to the other investors, shall not be imposed to the other contracting party investors.

3.2. Key Personnel- Employment of Foreign National Personnel

Except for the regulation of the transactions relating to the key personnel to be employed concerning the investments in BITs (e.g. BIT between Turkey and Russian Federation), Foreign Direct Investment Law (art 3/g) and regulations on implementation of this law and other legislation define the procedures and principles in relation to the key personnel (Çelikel/Öztekin Gelgel, 235; Ekşi, 526, Doğan, 237). Those are International Labour Law numbered 6735 (O.G. 13.08.2016-29800) (former law - Law on Work Permits of Foreigners), the Regulation on the Employment of Foreign National Personal in Direct Foreign Investments and Foreigners (O.G. 29.8.2003-25214) and International Protection Law numbered 6458 (O.G. 11.4.2013-28615). In addition to BITs, the provisions of Residence and Trade Agreements signed between the Republic of Turkey and other contracting parties, which set forth the legal status of the citizens mutually, shall be taken into consideration.

3.3. Free Transfer of Interest and Capital

As the purpose of the foreign investments is making profit, transfers freely through banks and private financial institutions should be allowed (FDI Law art. 3/c). The concept of transfer includes all the transferable values (Çelikel/Öztekin Gelgel, 234). The profit to be acquired should also be transferred under certain conditions. In one of the article of BITs, the conditions for the transfer of the profit and the capital out of Turkey are determined. For example, Article 8 of the BIT between the Republic of Turkey and the Russian Federation determines the conditions for the transfer of the profit and the capital out of Turkey. According to BIT art. 8, "Each Contracting Party shall permit the investors of the other Contracting Party, upon fulfilment by them of all tax obligations, unimpeded transfer abroad of payments in connection with their investments, and in particular: (a) returns, (b) principal and interest payments arising under a loan agreement related to an investment, (c) proceeds from sale or liquidation of all or one part of an investment, (d) compensation stipulated in Article VI of this Agreement, (e) wages and other remunerations received by the nationals of one Contracting Party who have obtained work permits relative to an investment in the territory of the other Contracting Party. Transfer of payments shall be made without delay in freely convertible currency at the rate of exchange applicable on the date of transfer pursuant to the currency regulations in force of the Contracting Party in whose territory the investment was made".

3.4. Expropriation and Compensation of Losses

Investments shall not be expropriated, nationalized except for instances when such measures are taken in public interest and accompanied by an effective compensation (FDI Law m.3/b; Constitution art. 46, 47). The compensation shall be equivalent to the real value of the expropriated investment at the time the expropriatory action was taken or at the time when the impending expropriation became known. Compensation shall be paid without delay and shall be fully realizable, and freely transferable. In case of a delay the compensation shall bear interest until the date of payment. In BITs, general principles of the implementation of expropriation are determined. They are not discriminatory and are accompanied by payment of prompt, adequate and effective compensation (Çelikel/Öztekin Gelgel, 234; Ekşi, 520).

3.5. Compensation for Losses Related to Force Majeur or Non-Commercial Risks Connected with an Investment and The Principle of Equity and The Most Favorable Nation Treatment

In BITs, investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war, civil disturbances or other similar occurrences shall be accorded no less favorable treatment by such other Contracting Party that is accorded to investors of any third state, as regards any measures it adopts in connection with such losses.

3.6. Stabilization

Stabilisation clauses specified in articles of BITs shall mean "not to realize any administrative transactions and actions and legal amendments which negatively effect the implementation of BIT Agreement".

3.7. Transparency of Laws

Additionally, each Contracting Party shall, with a view to promoting the understanding of its laws that pertain to or affect investments in its territory made by investors of the other Contracting Party, provide such laws public and readily accessible. This rule shall be named as "Transparency of Laws".

4. Legal Forms of Investment in Turkey in Accordance with FDI Law and BITs

Pursuant to art. 2/2, legal forms of investment in accordance with FDI Law and BITs, (1) establishment of a new Turkish Company in all incorporated company types designated in Turkish Commercial Code or unincorporated partnerships established through agreements designated in Turkish Code of Obligations under names such as ordinary partnerships, consortiums, business partnerships, joint ventures (2) participating in an existing Turkish Company, (3) purchase of the share certificates equivalent to 10% of a Turkish Company.

Besides, foreing investor shall invest through (4) license, know-how, technical assistance and management agreements, (5) BOTs or BTs subject of construction bridge, tunnel, barrage, watering, energy, manufacturing and similar services in accordance with the law dated June 8, 1994 numbered 4501), (6) opening a branch office of a foreign company in Turkey, (7) setting up a liaison office of a foreign company in Turkey. Furthermore, (8) purchase of movable and immovable property or any percentage of stocks shall also accepted as a foreing investment in BIT's.

5. Dispute Resolution Methods

Investment disputes may be arisen out of, between the Contracting Parties concerning the interpretation and implementation of this Agreement or between a Contracting Party and an investor of the other Contracting Party arising in connection with investment activities.

As well as in FDI Law, dispute resolution methods for both kind of disputes, are defined in details in BITs e.g. BIT between Russian and Turkey art. 10 "settlement of disputes between contracting parties" and art. 11 "settlement of disputes between a contracting party and an investor of the other contracting party". According to FDI Law (art. 3/e, Constitution art. 125, Law No. 3996, Law no. 4501, Law No. 4686, Law No. 6100 XI Part), investment disputes may be resolved by national or international arbitration. According to BITs, disputes between host country and an investor arising in connection with investment activities may be related to the amount and procedure of payment of compensation to be paid in accordance with BIT or procedure of transfer to be made according to BIT.

Generally, according to BITs, in the first step, parties in dispute shall try to negotiate in extend possible and seek a settlement to this dispute in an amicable manner. In case the dispute cannot be settled in this manner within a period determined in BITs, dispute shall be submitted for consideration to national courts or national arbitration tribunals or international institutional arbitration (ICSID, ICC, SCC etc.) or ad hoc arbitration with UNCITRAL Rules as determined in BITs. The investors generally apply to the arbitration due to the its independency, impartiality, confidentiality and efficiency (Akıncı, 154; Tiryakioğlu, 141).

Investment conflicts between a contracting state and an investor of other contracting state may be resolved before ICSID (Convention on the Settlement of Investment Disputes Between States and Nationals of the Other States) Arbitration. If both of parties of investment dispute are not contracting party of ICSID, the dispute can not be submitted for consideration to ICSID even it is agreed on investment agreement signed between the parties (Şanlı, 576). On the other hand, the parties may be agreed on ICSID Additional Facility Rules. The decision of an arbitral award shall be final and binding upon both parties to the dispute (Şanlı, 591). Each Contracting Party shall undertake to enforce this award in accordance with its legislation.

6. Conclusion

As a result of this study it is concluded that, Turkish regulations has been accepted investment-friendly regulations. "Foreign Direct Investments Law" and "Regulation of Implementation" brought appropriate ammendments for the promotion of foreign investment. To continue being an investment-friendly host country, it is observed that Turkey refrained from taking harmful measures against foreign investors.

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