

Foreign Direct Investments Restrictions of Turkey

Postgraduate student **Can ÇELİK**¹

Abstract

Investment preferences have also been affected by globalisation. In this direction, Foreign Direct Investments gained importance. Countries that realised this importance early have achieved significant gains. After the establishment of efficient legal guarantees, an increase was observed in Foreign Direct Investments, and Foreign Direct Investments made to countries providing legal assurance increased. With the increase in Foreign Direct Investments, employment opportunities have increased in the host country, it contributes to human capital development in the invested country, the process of adaptation to technological developments has accelerated that cannot be achieved through financial investments or trade in goods and services, and a transfer of technology positively affects local productivity. In this context, the Foreign Direct Investment Law No. 4875 came into force in Türkiye in 2003. Within the scope of the European Union, the European Union's Regulation on foreign direct investment entered into force on 10 April 2019. On the other hand, Countries take action to prevent negative consequences facet of Foreign Direct Investments. These restrictions can be classified into three groups, which screen the investments, removing incentives such as tax incentives; to prohibit or limit foreign investors for certain sectors, like mining or media. In this study, after the historical development of Foreign Direct Investments has been discussed, then Foreign Direct Investment Restrictions will be addressed within the scope of the Türkiye.

Keywords: foreign direct investments, investment law, globalisation, investment arbitration.

JEL Classification: K22, K33

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1. Introduction

The evolution of globalisation has significantly influenced investment preferences. In line with these shifts, foreign direct investments (FDI) have gained prominence. In other words, the importance of foreign investments, which began to rise after World War II, has further intensified with globalisation.² Countries that recognised this significance early reaped substantial benefits. The primary driver behind the growing importance of FDI is the legal security afforded to investors. Following the establishment of robust legal safeguards, FDI inflows increased, particularly into countries offering such protections. To elaborate, international organisations initially

¹ Can Çelik - LLM Candidate at Ankara University, Lawyer based in Türkiye, Legal Committee Member of the Turkish Volleyball Federation, Turkey, canmcelik.99@gmail.com.

² Dimopoulos, Angelos. *EU Foreign Investment Law*, Oxford University Press, Oxford, 2012, p. 8; Foreign Investment: How to Make it Work for Developing Countries – WAIPA | The Global Reference Point for FDI.

spearheaded efforts to promote foreign investments, which were subsequently reinforced by legal frameworks at both national and international levels to protect these investments. It is worth emphasising that these developments are relatively recent. The rise in FDI has facilitated technological advancements and employment generation in host countries. Moreover, developing nations have actively sought FDI to fuel economic growth, particularly in sectors such as manufacturing, where such investments have enhanced productivity. However, as FDI volumes grew, so did concerns over legal security. Many of these concerns are justified, as foreign investments face risks such as expropriation under the domestic laws of host countries or unilateral alterations to contractual terms post-investment. To mitigate these risks, solutions were developed to safeguard FDI. These include international treaties, domestic legal reforms (e.g. Türkiye's Foreign Direct Investments Law No. 4875, enacted in 2003), and national-level guarantees for investors. Examples of such measures include participation in international organisations, bilateral investment treaties, investment promotion agencies (e.g. the Investment Office of Türkiye), and Double Taxation Avoidance Agreements.

Even though there are decent advantages of the FDI, it would be wise to emphasise that measures shall be taken by countries to mitigate unfavourable features of FDI, like national sovereignty, possible detriment to capital movements, public interest and competition. These measures are named FDI restrictions. According to the United Nations Trade and Development (UNCTAD) World Investment Report, these restrictions can be classified into 3 groups, which screen the FDI, completely or partially restricting foreign investments in certain sectors, removing the incentives.³

Within this framework, developing countries have prioritised taking necessary steps to attract investments because of their necessity. The advantages of FDI are mostly technology transfer, employment opportunities, and new funding opportunities, while developed countries have focused on securing legal guarantees for their investors. In other words, the protection of investment is a crucial factor for foreign investors in the investment climate of the home state. Consequently, Türkiye enacted its Foreign Direct Investments Law in 2003, whereas the European Union introduced its legal framework on foreign direct investments in 2019. On the other hand, countries still impose restrictions on the FDI. However, these measures shall be a negative sight for investors due to a lack of knowledge about the restrictions. Against this backdrop, the primary focus of this study will centre on the FDI Restriction Regime of the Türkiye to make a view of the Türkiye FDI Environment.

2. What is foreign direct investment

First, it is essential to emphasise that foreign direct investments (FDI) are not a use of funds but rather a source of funds.⁴ The definition and scope of FDI hold

³ Mérette, Marcel & Georges, Patrick & Dissou, Yazid, 2008. 'Liberalising Foreign Direct Investment Restrictions in Canada: A Multi-Country Computable General Equilibrium Analysis,' Conference papers 331,743, Purdue University, Center for Global Trade Analysis, Global Trade Analysis Project, p. 4; Montfaucon, Angella Faith Lapukeni & Senelwa, Victor Kidake & Doarest, Afa, 2023. 'Early Impacts of Indonesia's Investment Reforms: A Preliminary Analysis,' Policy Research Working Paper Series 10,478, The World Bank, pp. 1–2.

⁴ Mr. Edward M. Graham, 1995, 'Foreign Direct Investment in the World Economy' IMF Working Papers Volume 1995: Issue 059.

significant importance from both economic and legal perspectives.⁵ At the same time, there is ongoing debate regarding the precise content of this concept. These debates primarily revolve around questions such as which investments qualify as direct and which are considered indirect, the scope of the term ‘investment’, and how the field of FDI should be addressed within the framework of the Turkish Legal System.⁶

Article 2 of Law No. 4875 on Foreign Direct Investments defines the concept of foreign direct investment (FDI) under two distinct categories: investments brought from abroad and investments sourced domestically. Specifically, FDI is defined as follows:⁷ Investments brought from abroad include Cash capital in convertible currency traded by the Central Bank of the Republic of Türkiye; Company securities (excluding government bonds); Machinery and equipment; Industrial and intellectual property rights. Investments sourced domestically refer to economic assets such as profits, revenues, or monetary claims reinvested in ventures; Rights with financial value linked to the investment, including rights related to the exploration and extraction of natural resources. These investments may take the form of Establishing a new company or opening a branch or acquiring shares outside stock exchanges; Obtaining at least a 10% share ratio or an equivalent voting right in an existing company through stock exchange transactions.

For a considerable period, the European Union (EU) avoided addressing the concept of foreign direct investment (FDI) in a clear and definitive manner. While some attribute this avoidance to concerns over potential conflicts of authority between the European Commission and the EU, the underlying reason is that the dominant member states within the EU did not see a pressing need for such a definition at the Union level. This is largely because investment flows typically move from countries like France and Germany to countries such as the Czech Republic and Poland. As a result, the regulation and treatment of FDI were primarily left to the domestic legal frameworks of individual member states rather than being addressed at the EU level. Furthermore, for many years, the EU refrained from explicitly mentioning FDI in its treaties and legal regulations. However, the concept of FDI is explicitly referenced in Article 206 of the Treaty on the Functioning of the European Union (TFEU). Article 206 falls under Title II – Common Commercial Policy, which outlines the EU’s framework for trade and investment relations with third countries. In Regulation (EU) No. 2019/452, foreign direct investments are defined as ‘any investment aimed at establishing or maintaining a connection between the foreign investor and the entrepreneurial or organisational entity provided to them, including investments that enable effective participation in the management or control of a company engaged in economic activity in the Member State, for the purpose of carrying out economic activities.’⁸ According to the case law of the Court of Justice of the European Union (CJEU), foreign direct investments are defined as ‘any investment made by natural or legal persons with the intention of carrying out an economic activity, which serves to establish and maintain permanent and direct links

⁵ Cristina Elena Popa Tache, Cătălin Silviu Săraru, ‘Evaluating today’s multi-dependencies in digital transformation, corporate governance and public international law triad’, *Cogent Social Sciences*, Volume 10, 2024 – Issue 1, pp. 2–4.

⁶ Göçmen, İlke, *Avrupa Birliği Dış İlişkiler Hukuku: Ticari Boyut*, 1. Baskı, Seçkin Yayıncılık, 2021, p.122

⁷ Law No. 4875 on Foreign Direct Investment Code.

⁸ Alexandr Svetlicinii, *Chinese State Owned Enterprises and EU Merger Control*, Routledge, 2020, pp. 91–102.

between the capital contributors and the enterprises in which the capital is invested. With its ruling in case 2/15, the Court of Justice of the European Union (CJEU) accepted that, under certain conditions, the Commission may exercise its exclusive competence under Article 207 (1) of the Treaty on the Functioning of the European Union (TFEU) in the trade agreement with Singapore.⁹ With this opinion, for the first time, foreign direct investments were directly addressed. According to this view, investments will be considered within the scope of the common commercial policy if they improve and facilitate trade, having an immediate and direct impact on international trade¹⁰. In other words, they will fall under the Commission's exclusive competence under Article 207 of the TFEU.¹¹

According to the World Bank, the concept of foreign direct investment (FDI) is defined as the net inflow of investment aimed at acquiring a lasting management interest (10% or more of voting shares) in an enterprise operating in an economy other than that of the investor. It includes equity capital, reinvestment of earnings, and other long-term and short-term capital, as reflected in the balance of payments.¹²

The United Nations defines FDI as 'an investment made to acquire a lasting

⁹ Velten, Jons, *Screening Foreign Direct Investment in the EU*, Springer Cham, 2022, p. 42-43-44; GCR European Union: Foreign direct investment regulations <https://globalcompetitionreview.com/guide/foreign-direct-investment-regulation-guide/second-edition/article/european-union>.

¹⁰ Wolf Zwartkruis, 'The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?', *European Business Law Review*, 2020, 9.11.

¹¹ More information about the screening system of the EU about the FDI is that The Regulation on the Screening of Foreign Direct Investments (2019/452) does not cover investments made within the European Union (EU) member states but rather applies to investments made by foreign investors residing in non-member countries within the EU. However, there are issues regarding effectiveness and efficiency. This is due to the fact that the European Union does not have veto powers or similar authorities regarding the scrutiny of foreign direct investments. In other words, its powers are limited. The primary responsibility for scrutinising foreign direct investments still lies with the member states. It is also necessary to ensure that no discrimination occurs against countries outside the EU and that foreign investors are granted the right to object. Member states are subject to a notification obligation to the European Union. The scope of this notification includes the ownership structure of the investment, the value of the investment, the completion date, the financing of the investment, and the investor's commercial activities. The Trade F-4 Unit within the European Union has been established for this purpose. This unit is responsible for scrutinising foreign direct investments, analysing reports sent by member states, coordinating between member states, and providing other services. The country of origin, the EU member state receiving the investment, must notify both the affected countries and the Trade F-4 Unit within 15 days. Member states reserve the right to ask questions and provide comments on this notification. At this point, member states can request additional information. The principle of proportionality is applied when requesting the flow of information. The European Union's report containing its views on the relevant investment will be published within 35 days after the notification is made. This period can be extended by up to 20 days if additional information is requested. However, the views of the other member states conducting the review and those of the European Union regarding the foreign investment are not binding on the EU member state that is the recipient of the investment. Nevertheless, it is emphasised that member states should show due diligence and give importance to the views. Additionally, member states are recommended to establish their own foreign direct investment review and screening structures. As of May 10, 2022, 18 out of the 27 member states have such mechanisms in place, while the remaining countries are working on this issue. Bulgaria and Cyprus have not yet undertaken such initiatives. Especially after the Russia-Ukraine war, the European Union has adopted a more conservative approach and is encouraging member states to establish and expand investment screening structures to protect Europe's strategic assets.'

¹² World Bank-DataBank Metadata Glossary, <https://databank.worldbank.org/metadata/glossary/jobs/series/BX.KLT.DINV.WD.GD.ZS#:~:text=Foreign%20direct%20investment%20are%20the,than%20that%20of%20the%20investor.>

interest or effective control in an enterprise operating outside the economy of the investor'.¹³

The World Trade Organization (WTO) describes FDI as 'arising when an investor based in one country acquires an asset in another country with the intent of managing that asset'.¹⁴

According to the Organisation for Economic Co-operation and Development (OECD), FDI is 'a category of cross-border investment in which an investor resident in one economy establishes a lasting interest and a significant degree of influence in an enterprise resident in another economy. Evidence of such a relationship is established when the investor owns 10% or more of the voting power in the enterprise'.¹⁵

According to the Foreign Direct Investments and Türkiye Report published in 2002, foreign direct investments are defined as 'investments made with the aim of obtaining long-term commercial benefits, achieved through the acquisition of a sufficient level of shares to have a significant influence in the management of the company in the long term'.¹⁶

It is important to note that, today, foreign direct investments (FDI) are classified into two main categories. The first is referred to as 'greenfield investment', which involves establishing a new operation or facility from the ground up. The second is known as 'brownfield investment', which typically involves mergers and acquisitions (M&A) of existing enterprises.¹⁷

Foreign direct investment (FDI), a concept central to commercial activities and one that continues to evolve, has been the focus of extensive work by international organisations. These efforts have guided states in their own studies and regulatory frameworks on the subject. Furthermore, since investment arbitration tribunals often rely on these concepts in their assessments, the definitions provided by international organisations, as well as those within the Turkish legal system – which is the focus of this study – have been critically examined. From these definitions, it is evident that the Turkish legal system has adopted an FDI concept that is well integrated into the international commercial landscape.

3. Development of foreign direct investment in the context of legal framework

As mentioned above, the primary reason for the development of foreign direct investment is the stability promised by the legal framework and the creation of a reliable investment environment. When considering foreign direct investment in terms of both national and international law, the development process primarily began with Bilateral

¹³ United Nations https://www.un.org/esa/sustdev/natlinfo/indicators/methodology_sheets/global_econ_partnership/fdi.pdf.

¹⁴ Richard Blackhurst, Adrian Otten, 1996, 'Trade and foreign direct investment', WTO NEWS: 1996 Press Releases Press/57 9 October 1996, https://www.wto.org/english/news_e/pres96_e/pr057_e.htm.

¹⁵ OECD [https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-fdi/indicator-group/english_9a523b18-en#:~:text=Foreign%20direct%20investment%20\(FDI\)%20is,enterprise%20resident%20in%20another%20economy](https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-fdi/indicator-group/english_9a523b18-en#:~:text=Foreign%20direct%20investment%20(FDI)%20is,enterprise%20resident%20in%20another%20economy), accessed on 1.10.2024.

¹⁶ Foreign Direct Investment ve Türkiye Report, ISO Publisher, 2002

¹⁷ FDI Overview – WAIPA | The Global Reference Point for FDI, <https://waipa.org/fdi-overview/>, accessed on 1.10.2024.

Investment Treaties (BITs). This process continued with the establishment of the International Centre for Settlement of Investment Disputes (ICSID) under the principles of the 1966 ‘Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,’ which was established under the World Bank. ICSID provides an alternative dispute resolution mechanism for disputes arising between home countries (investor countries) and host countries (investment countries). Its main purpose is to protect international investment flows. Key milestones in the legal development of foreign direct investment include the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; the United Nations Commission on International Trade Law, established in 1966; the International Chamber of Commerce, founded in 1919; Free Trade Agreements; and Double Taxation Avoidance Agreements.

By the early 2000s, countries began to address foreign direct investment at the legislative level. For example, Bulgaria enacted the Investment Promotion Act in 1997¹⁸; Lithuania introduced the Investment Law in 1999¹⁹; and Türkiye enacted the Foreign Direct Investment Law in 2003²⁰. While foreign direct investment laws were introduced earlier in emerging economies, developed economies introduced these regulations at a later stage. For instance, Germany passed the ‘Foreign Trade and Payments Act’ in 2013²¹; Belgium implemented its legislation in 2018; and the United States passed the ‘Foreign Investment Risk Review Modernisation Act’ in 2018²². In light of these developments, it becomes clearer why the European Union issued a regulation on foreign direct investment in 2019. In foreign direct investment relations, the investor is typically based in a developed economy, while the host country, where the investment is made, is usually an emerging or developing country. Countries seeking to attract investment typically adopt legal regulations to provide assurance to investors. Therefore, it is common for legal frameworks regarding foreign direct investment to be developed earlier in emerging and developing economies compared to developed economies.²³

4. Foreign direct investment in the Turkish legal system

There are several elements that provide the framework for foreign investment in Türkiye. Some of these developments are Türkiye’s main investment law, the Foreign Direct Investment Law No. 4875 which provides the main legal framework for investment in Türkiye; Türkiye’s arbitration law, Civil Procedure Law No. 6100 and

¹⁸ Bulgaria – Investment Promotion Act | Investment Laws Navigator | UNCTAD Investment Policy Hub, <https://investmentpolicy.unctad.org/investment-laws/laws/37/bulgaria-investment-promotion-act>, accessed on 1.10.2024.

¹⁹ 7 July 1999 No. VIII-1312; Lithuania – Investment Law | Investment Laws Navigator | UNCTAD Investment Policy Hub, <https://investmentpolicy.unctad.org/investment-laws/laws/117/lithuania-investment-law>, accessed on 1.10.2024.

²⁰ Code No. 4875 on Foreign Direct Investments Code.

²¹ Foreign Trade and Payments Act of 6 June 2013.

²² SEC. 1701. Short Title: Foreign Investment Risk Review Modernisation Act of 2018; United States of America – Foreign Investment Risk Review Modernisation Act | Investment Laws Navigator | UNCTAD Investment Policy Hub, <https://investmentpolicy.unctad.org/investment-laws/laws/285/united-states-of-america-foreign-investment-risk-review-modernization-act>, accessed on 1.10.2024.

²³ Latvia – National Security Law | Investment Laws Navigator | UNCTAD Investment Policy Hub, <https://investmentpolicy.unctad.org/investment-laws/laws/237/latvia-national-security-law>, accessed on 1.10.2024.

International Arbitration Law No. 4686, which provide the main legal framework for International Arbitration in Türkiye; The Istanbul Arbitration Centre (ISTAC), which was active on 26 October 2015. The primary legal text that forms the foundation of foreign investments in Turkish law is Code No. 4875 on Foreign Direct Investments (2003). FDI Regulatory Restrictiveness Index of the Türkiye is 0.059 in 2020, down from 0.283 in 2003²⁴. In addition, Türkiye is the 6th country in FDI reformers towards liberalisation between 1997 and 2017.²⁵ Moreover, Türkiye has only had 18 arbitration claims filed against it by foreign investors under international investment treaties, which is a low figure compared with other countries in the region, such as Czechia (42), Poland (39), and Romania (27) in comparison to their FDI inflows (\$ BILLION). Of the 18 investment arbitration cases where Türkiye is the defendant. Only one case was decided in favour of the investor (2002), and nine of them were decided in favour of Türkiye. Five cases are still pending. One case was discontinued, and two cases resulted in a settlement.²⁶ These data indicate that Türkiye's reform process towards liberating the investment environment in terms of FDI is in compliance with international norms and free trade rules. Addendum, FDI Legislation of the Türkiye grants foreign investors the right to receive equal treatment with local investors and provides them the freedom to invest in Türkiye. However, this is not the first legal regulation related to promoting foreign capital in Türkiye. After World War II, Türkiye, seeking to integrate into the dominant economic and commercial understanding of the world, enacted legal regulations to attract foreign capital. The first of these regulations was the Code on the Promotion of Foreign Capital Investments No. 5281, dated August 1, 1951.²⁷ Until 1950, no new foreign investment had been made in Türkiye. During the Ottoman Empire, in the 19th century, foreign investments were primarily monopolistic. These investments were not in manufacturing, real estate, or similar fields, but rather in sectors such as railways, shipping, and port construction. Debts owed to these investors were paid through instalment plans until the 1950s, and as a result, there was a reluctance to attract foreign investors in Türkiye until the 1950s.²⁸ This law, due to various inefficiencies, such as limiting profit transfer, failed to attract foreign investors, which led to the introduction of the Foreign Capital Promotion Code in 1954.²⁹ Under Article 8 of the Code, the Foreign Capital Promotion Committee, similar to the current Turkish Republic's Investment Office, was established. According to the Code, investments must meet certain conditions: firstly, the investment must contribute to the country's economic development, and secondly, it should not create a monopoly. This law was abolished by Code No. 4875, which came into force in 2003. The 2003 Code replaced the permission and approval system introduced by the 1954 law. Unlike the 1954 Code, Code No. 4875 allowed foreign investors to freely invest in various sectors within

²⁴ 1 means closed to FDI, and 0 means open to FDI.

²⁵ OECD FDI Regulatory Restrictiveness Index Report 2024, OECD Business and Finance Policy Papers, No. 72.

²⁶ UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub, <https://investmentpolicy.unctad.org/investment-dispute-settlement>, accessed on 1.10.2024.

²⁷ Çelikel, Ayşe, *Yabancılar Hukuku*, Beta Publisher, 2021, p. 227-284

²⁸ Ibid, p. 227-284; Tiryakioğlu Bilgin, *Doğrudan Yatırımların Uluslararası Hukukta Korunması*, Yetkin Publisher, 2022, p. 67.

²⁹ RG. 23.01.1954 – 8615 No. 6224 Code, <https://www.resmigazete.gov.tr/arsiv/8615.pdf>, accessed on 1.10.2024.

Türkiye. With this law, the system shifted from a permission-based system to an information-based system for the realisation of foreign direct investments. Code No. 4875 provided a liberal environment for foreign investments and ensured the protection of foreign investors. With Code No. 4875, foreign investors are granted the principle of freedom to transfer their profits. Investors can notify the Ministry of Treasury and Finance about their earnings and transfer them abroad without restriction.³⁰ The exception to this rule concerns the opening of liaison offices, which requires prior written approval from the Ministry of Industry and Technology. While the general rule is freedom, there are certain restrictions on foreign direct investment in specific sectors, such as maritime and air transportation, tourism, mining, and oil. Legal regulations that govern the relevant sectors, along with legal regulations containing foreign investments and international agreements, are applied together. The regulations governing foreign investments include Code No. 4875 on Foreign Direct Investments; the Regulation on the Implementation of the Foreign Direct Investments Law; and the Regulation on the Employment of Foreign Nationals in Foreign Direct Investments.³¹

It is necessary to address certain concepts regarding direct foreign investments regulated by Code No. 4875. In this context, pursuant to Article 2 of Code No. 4875, a foreign investor includes natural persons who are either citizens of foreign countries or Turkish citizens residing abroad; and in terms of legal entities and international organisations, it refers to legal entities established in accordance with the laws of foreign countries.

The principles outlined in the Foreign Direct Investment Code No. 4875 include: Investment Freedom: Foreign investments are generally allowed, except where international agreements specify otherwise; Non-Discrimination: Foreign and domestic investors are treated equally; Freedom of Transfer: Profits, dividends, and other funds can be transferred abroad freely, including through banks or financial institutions; Dispute Resolution: Investors are granted the right to resolve disputes through international arbitration, alongside Turkish courts or alternative dispute resolution methods.

The legal implementation of direct foreign investment to be made in Türkiye is also outlined in our legislation. The procedures for making direct foreign investment in Türkiye were mentioned above. Accordingly, investments can be made in the form of ‘greenfield investment’ or ‘brownfield investment’. Greenfield investment refers to foreign investors establishing ventures from scratch in Türkiye. The Turkish Commercial Code and the Turkish Code of Obligations (the general partnership is included in the Turkish Code of Obligations) do not impose any citizenship restrictions on the founders or partners of companies to be established in Türkiye.³² In other words, a foreign investor can establish a company without the need for a partner who is a citizen of the home country. Although this is the general rule, certain sectors, as determined by law, require the presence of a partner who is a citizen of the home country, i.e. a Turkish citizen. It is important to note that foreign investors cannot engage in the establishment

³⁰ RG. 20.08.2003 – 25,205; RG. 29.08.2003 – 25,214

³¹ Türkiye’de Yabancı Sermayenin Tarihsel Gelişimi, YASED, 2007, p. 84; Faruk, Giray, *Yabancı Sermayeyi Teşvik Mevzuatında Lisans, Teknik Yardım, Know-How, Yönetim ve Franchise Anlaşmalarının Yürürlüğü İçin Öngörülen Tescilin Hukuki Niteliği*, MHB, Yıl 22, Sayı 2, 2002, p. 214.

³² The Turkish Commercial Code No. 6102 and the Turkish Code of Obligations No. 6098.

of companies or partnerships beyond the company types defined under Turkish law. This is specified in Article 9 of the Implementation Regulation of the Foreign Direct Investment Code. Another method is ‘brownfield investment,’ which refers to foreign investors acquiring a stake in a company already established in Türkiye, without making a new investment from scratch, by obtaining at least 10% of voting rights in the company. This approach is also referred to as investment through company marriage or through mergers and acquisitions. Finally, foreign legal entities can make investments by opening a branch in Türkiye.

Turkish law includes fundamental principles regarding direct foreign investments. These principles are expressed in Article 3 of Code No. 4875. In Article 3 of Code No. 4875, investment freedom and national treatment are first regulated. Accordingly, as a general rule, unless otherwise stipulated by law or international agreements, foreign investment freedom is the rule. Additionally, there will be no distinction between foreign investors and domestic investors; in other words, the principle of equal treatment between foreign and domestic investors will apply. Another fundamental principle is expropriation and nationalisation. According to the law, foreign investments cannot be expropriated or nationalised unless there is a public interest and compensation is paid (the method of calculating the compensation amount is determined in bilateral agreements between countries). Another principle is the freedom of transfer. According to this principle, foreign investors will be able to freely transfer abroad through banks or private financial institutions the net profits, dividends, sales, liquidation, and compensation payments obtained from activities in Türkiye, as well as amounts payable under licensing, management, and similar agreements, and principal and interest payments of foreign loans. The ability to carry out transfers through private financial institutions, in addition to banks, is an important convenience for investors. Perhaps the most crucial principle is the resolution of disputes. This is because, while economic advantages for foreign investors have existed for many years, the fundamental factor in the expansion of direct foreign investments is the legal guarantee, which was emphasised above. The most significant manifestation of this guarantee is seen in the area of dispute resolution. Accordingly, international arbitration is available to investors who make direct foreign investments. In addition to international arbitration, Turkish courts that are competent and authorised, as well as other alternative dispute resolution methods, can also be utilised, as stipulated in the law. In terms of non-cash capital, the determination of value, excluding cash, will be made in accordance with the Turkish Commercial Code; however, in cases where investments are made through assets owned by legal entities residing in foreign countries, the law also specifies that evaluations made through experts appointed by the country of origin or international valuation institutions will be considered. The final principle outlined in the law is the employment of foreign personnel. Accordingly, foreign workers to be employed under direct foreign investments must obtain a work permit from the relevant ministry, which is the Ministry of Labor and Social Security.

The importance of international agreements in the field of Direct Foreign Investment Code was mentioned above. When evaluating direct foreign investments, it was emphasised that the legal regulations in Turkish law and the agreements that Türkiye has made in accordance with the proper procedures – agreements that have now become an integral part of the law – should be considered together. At this point, it is important

to highlight that Türkiye is one of the countries with the highest number of bilateral investment treaties (BITs) in the world. Türkiye ranks second, with 121 bilateral investment agreements, following China (123) and Germany (120). Out of the 121 bilateral trade agreements signed by Türkiye, 83 are currently in effect.³³

When examining the law of Direct Foreign Investments in terms of countries, it can be said that the most important issues are the Bilateral or Multilateral International Agreements between the country of origin of the foreign investor and the host country, the limitations on direct foreign investments, and the adopted dispute resolution methods. This is because, in International Arbitration decisions, disputes are often centred around issues such as violations of international agreements and unjust expropriation. Foreign investment limitations are significant in terms of attracting the interest of foreign investors, as well as concerns regarding public order and public security, which are important from the perspective of domestic law. However, this situation is quite different in the European Union. In the European Union, the issue of jurisdiction is of primary importance. Jurisdictional conflicts between member states and the European Union often arise in International Arbitration decisions or in rulings made within the framework of the European Union. Specifically, the issue of jurisdiction is particularly emphasised in International Arbitration decisions regarding the European Union. In this context, the limitations on direct foreign investments under Turkish law will be addressed first, followed by the dispute resolution methods adopted.

Firstly, restrictions in the broadcasting and telecommunications sector will be addressed. According to Establishment and Broadcasting Services of Radio and Television Code³⁴, the direct foreign capital share in a media service provider organisation cannot exceed fifty percent of the paid-up capital. A foreign natural or legal person can be a direct partner in a maximum of two media service provider organisations. In cases where foreign natural or legal persons become indirect partners in broadcasting organisations by participating in the companies that are partners of media service provider organisations, it is mandatory that the chairman of the board of directors, the vice chairman, the majority of the board of directors, and the general manager of the broadcasting organisation be citizens of the Republic of Türkiye. Additionally, the majority of votes at the general assemblies of broadcasting organisations must belong to natural or legal persons who are citizens of the Republic of Türkiye. Provisions ensuring this requirement must be explicitly stated in the company's articles of association. Domestic or foreign shareholders cannot hold privileged shares under any circumstances. Private radio and television organisations, after evaluating the characteristics and importance of the broadcast services they will offer, appoint one or more responsible directors. The responsible director(s) of broadcasting organisations operating at the national and regional levels must have completed higher education, be Turkish citizens, not be prohibited from public service, and their place of residence must be in Türkiye. The Supreme Board may reject license applications for reasons arising from national security, public order, or public interest, after consulting the relevant institutions.

Secondly, the aviation sector or Commercial Air Transportation and Operation

³³ International Investment Agreements Navigator | UNCTAD Investment Policy Hub, <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy>, accessed on 1.10.2024.

³⁴ Articles 19–46 of Code No. 6112 on the Establishment and Broadcasting Services of Radio and Television

in Turkish Airspace. According to the Turkish Civil Aviation Code, the Commercial Air Transportation Enterprises Regulation, and the Airport Ground Services Regulation³⁵, a minimum of 50 + 1% equity participation by Turkish citizens is required. Passenger, mail, and cargo transportation between two points within the Republic of Türkiye for commercial purposes is carried out by Turkish aircraft. When applying for an operating license, the business or its major shareholder must submit a reference letter demonstrating creditworthiness from at least two banks located abroad, or one bank located in Türkiye, which has a correspondent bank in Türkiye, during the preliminary approval stage. For ground service organisations seeking to obtain an A or C Group Work Permit, it is mandatory that the majority of those authorised to manage and represent the company be Turkish citizens and that, according to the company's articles of association, the majority of voting rights be held by Turkish partners.

In maritime transportation, the Cabotage Code and the Turkish Commercial Code³⁶ stipulate that every Turkish ship must fly the Turkish flag. Ships owned by Turkish citizens are considered Turkish ships. Ships owned by more than one person are regarded as Turkish ships if the majority of the shares in joint ownership or the majority of the owners in co-ownership are Turkish citizens. Cabotage is reserved for national flag carriers. Ships registered in the Turkish commercial registry are considered Turkish ships if more than half of their shares are owned by Turkish citizens, and the majority of shareholders authorised to manage the subsidiary are Turkish citizens.

Regarding the fishing sector, under the Fisheries Code, the Turkish Commercial Code, and the Regulation on the Regulation of Amateur Fishing for Aquatic Species³⁷, ships owned by foreigners cannot be registered as fishing vessels in Türkiye unless they are owned by Turkish citizens or by companies where the majority of shares or voting rights are held by Turkish citizens. Businesses established in accordance with Türkiye's direct foreign investment regulations are subject to the preliminary approval and licensing requirements of the Ministry of Agriculture and Forestry. Foreign nationals residing permanently in Türkiye, official guests, or those temporarily working in Türkiye may fish with a Guest's Amateur Fisherman's Certificate. If these individuals document their status, the provincial directorates will issue a Guest Amateur Fisherman's Certificate for a period of two years. The Guest Amateur Fisherman Certificate is issued in accordance with the form in Annex-2. Foreign tourists amateur fishermen may fish in the seas from the shore within the scope of amateur or sports fishing competitions without obtaining any permits or documents. According to Notification No. 2016/36, tourist amateur fishermen may fish in the seas from the shore within the scope of amateur or sports fishing competitions without the need for any permits or documents.

Regarding accounting, auditing, and bookkeeping services, according to the Profession of Certified Public Accountants and Sworn-in Certified Public Accountants, and the Decree – the Organisation and Duties of the Public Oversight, Accounting, and

³⁵ Article 49 of the Turkish Civil Aviation Code No. 2920, Articles 9–22 of the Commercial Air Transportation Enterprises Regulation (SHY-6A), and Article 7 of the Airport Ground Services Regulation (SHY-22).

³⁶ Articles 1, 2, 3, and 5 of the Cabotage Code No. 815 and Articles 44 of the Turkish Commercial Code No. 6102.

³⁷ Fisheries Code No. 1380, the Turkish Commercial Code No. 6102, and Regulation on the Amateur Fishing for Aquatic Species (Notification No: 2016/36).

Auditing Standards Authority³⁸, foreign nationals from countries where the profession of certified public accounting is formally regulated may perform services under the title of certified public accountant in Türkiye, within the scope of services outlined in Article 2, provided they meet the qualifications required for certified public accountants in Türkiye and are authorised by the President. This is subject to the conditions of reciprocity and approval by the President. Furthermore, foreign auditing organisations and auditors authorised to conduct independent audits in Türkiye, based on the principle of reciprocity, will cooperate with the relevant authorities of foreign countries in areas within the scope of the Authority's responsibilities, and these foreign audit organisations and auditors will be listed and announced. They will be recorded in an official register, which will be kept publicly accessible on the Authority's website.

Regarding the financial sector, according to the Banking Code, the Bank Cards and Credit Cards Code, the Financial Leasing, Factoring, Financing and Savings Financing Companies Code, the Code of the Payment Systems, Securities Settlement Systems, Payment Services, and Electronic Money Institutions, the Capital Markets Code, the Financial Leasing Code, and the Insurance Code³⁹, foreign nationals authorised for supervision according to the laws of foreign countries, and their equivalent authorities, are allowed to conduct supervision and request information related to institutions operating in financial markets in their own countries for branches or subsidiaries in Türkiye, based on the principle of reciprocity, subject to the approval of the Board. Permission to establish a bank in the form of a joint-stock company or to open the first branch of a foreign bank in Türkiye is granted by the Banking Regulation and Supervision Board. Only banks not authorised to accept deposits and financial leasing companies are allowed to engage in financial leasing activities. However, the savings amounts committed by customers under savings financing contracts are not considered within the scope of this article. Establishing a financial leasing, factoring, or financing company in the form of a joint-stock company is subject to the preliminary approval of the Banking Regulation and Supervision Board (the Board). After the establishment, an operating license must also be obtained. Operating licenses granted by the Board are published in the Official Gazette. Banks are prohibited from trading on the Borsa İstanbul Equity Market but may receive orders for execution to be forwarded to licensed intermediaries. All payment and electronic money services may only be provided by banks and institutions authorised under Law No. 6493. Payment institutions and electronic money institutions must be established as joint-stock companies. A company granted operating permission must notify the relevant authority within ten days of starting operations. An electronic money institution is required to transfer the funds collected in exchange for issuing electronic money into a separate account opened at a bank as defined in the Banking Code No. 5411. Electronic money institutions are prohibited from engaging in lending activities. Banks and other institutions are authorised to issue bank cards or credit cards, and must be established as joint-stock

³⁸ Code No. 3568 on the Profession of Certified Public Accountants and Sworn-in Certified Public Accountants, and Decree – Code No. 660 on the Organisation and Duties of the Public Oversight, Accounting, and Auditing Standards Authority.

³⁹ The Banking Code No. 5411, the Bank Cards and Credit Cards Code No. 5464, the Financial Leasing, Factoring, Financing and Savings Financing Companies Code No. 6361, the Code No. 6493 on Payment Systems, Securities Settlement Systems, Payment Services, and Electronic Money Institutions, the Capital Markets Code No. 6362, the Financial Leasing Code No. 3226, and the Insurance Code No. 5684.

companies under Code No. 5464. Card system institutions with their headquarters abroad may open a branch or representative office in Türkiye with the Board's prior approval, provided they do not set up a credit card system, issue cards, or enter into merchant agreements. The establishment and operation of a portfolio management company require permission from the Board. Pension funds are established by individual pension companies established in Türkiye. Portfolio management and investment advisory services may be provided by non-bank security firms, banks that do not accept deposits, and portfolio management companies established in Türkiye. As mentioned in the WTO report, no restrictions have been found in the relevant regulations on this issue. An insurance company or reinsurance company operating in Türkiye must be established as a joint-stock company or cooperative. Foreign insurance and reinsurance companies may operate in Türkiye by opening a branch, provided they are not prohibited from doing so in the country where they are located. After the establishment of insurance and reinsurance companies, they must obtain an operating license from the Undersecretariat of Treasury. A separate license is issued for each insurance branch. With certain exceptions, the cross-border supply of insurance services is prohibited.

In terms of the mining sector, according to mining Code⁴⁰, foreigners can only invest in the mining subsector through companies established in Türkiye in compliance with the relevant regulations. However, the exploration and operation of boron, uranium, and thorium are exclusively the responsibility of the state.⁴¹

In terms of the real estate sector, under the provisions of the Title Deed Code⁴², individuals who are citizens of the countries determined by the President may acquire real estate in Türkiye. Foreign nationals may acquire any type of real estate in private ownership (residential, commercial, land, field, etc.). Foreign nationals who acquire real estate without buildings (such as land, fields, etc.) are obligated to develop a project within two years and submit the project for approval to the relevant ministry. A foreign national may acquire limited real rights over properties nationwide. The total area of the real estate and independent, continuous limited real rights acquired by foreign nationals cannot exceed ten percent of the total land area of the district in private ownership, and thirty hectares per person nationwide. The President is authorised to increase the maximum amount of real estate a foreign national may acquire nationwide by up to two times. A foreign legal entity, such as a company established abroad, may acquire real estate and limited real rights in Türkiye. Foreign legal entities, other than corporations (such as foundations, associations, etc.), are not allowed to acquire real estate, and limited real rights cannot be established in their favour. For joint-stock companies established as legal entities in foreign countries, the acquisition of real estate in Türkiye is only possible under international agreements or special legal provisions. Foreign nationals who are citizens of the countries designated by the President, provided they comply with legal restrictions, may acquire real estate and limited real rights in Türkiye. The President, in cases where national interests require, may determine, restrict, partially or fully halt, or prohibit the acquisition of real estate and limited real rights by foreign nationals and foreign commercial companies established as legal entities under their countries' laws. These determinations may be made based on factors such as country,

⁴⁰ Articles 6, 7, and 24 of the Mining Code No. 3213.

⁴¹ Çelikel, Ayşe, *op. cit.*, pp. 227–284.

⁴² Title Deed Code No. 2644.

person, geographical region, duration, quantity, type, nature, area, and amount.⁴³

In terms of the electricity sector, according to the Electricity Market Code⁴⁴, the total amount of electricity energy that any individual or private sector legal entity may produce through the production companies it controls cannot exceed twenty percent of the total electricity production in Türkiye published for the previous year. The amount of electricity energy that private sector legal entities holding a supply license may purchase from production and import companies cannot exceed twenty percent of the total electricity consumption in the country for the previous year. Furthermore, the amount of electricity energy these private sector legal entities sell to the final consumer cannot exceed twenty percent of the total electricity consumption in the country for the previous year.⁴⁵

In terms of the education sector, according to Articles 3, 4, 5, 8, and 13 of the Private Educational Institutions Code⁴⁶, the regulations on foundations, foreign individuals or legal entities may not establish educational institutions unless all of the students are not foreign. Only international private educational institutions, where foreign students are the sole attendees, can be established by foreign individuals and legal entities or through partnerships with Turkish citizens, in accordance with the Direct Foreign Investments Law No. 4875, with the approval of the President. For higher education institutions, the majority of the administrative bodies must be composed of Turkish citizens.

Another important issue is the protection of foreign investments against non-commercial risks, in other words, legal guarantees. One of the most significant guarantees in this regard is the amendment made to Article 125 of the Constitution with the 1999 constitutional change. According to this amendment, international arbitration has been accepted for disputes involving foreign elements. Additionally, for disputes arising from concession agreements with foreign elements, ad hoc arbitration or institutional arbitration may also be pursued. As a legal regulation, the International Arbitration Code was adopted in 2001⁴⁷. The foreign element here refers to the capital brought in accordance with legal regulations related to Direct Foreign Investments.

Subsequently, for reasons such as protecting foreign capital, providing legal guarantees, and integrating with international developments, Türkiye is a party to the Multilateral Investment Guarantee Agency (MIGA) Agreements, conducted under the leadership of the World Bank, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID). In addition to these developments, Türkiye has signed 116 bilateral trade agreements, Free Trade Agreements with 28 countries and the European Union, and Double Taxation Avoidance Agreements with 86 countries. According to the 5th paragraph of Article 90 of the Constitution, it is explicitly stated that international agreements duly signed will have the force of law.

As mentioned above, the FDI Regulatory Restrictiveness Index of the Türkiye is 0.059 in 2020, down from 0.283 in 2003. It would be wise to emphasise that there are

⁴³ Çelikel, Ayşe, *op. cit.*, pp. 227–284.

⁴⁴ Electricity Market Code No. 6446

⁴⁵ Çelikel, Ayşe, 2021, pp. 227–284

⁴⁶ Articles 3, 4, 5, 8, and 13 of the Private Educational Institutions Code No. 5580.

⁴⁷ The International Arbitration Code No. 4686 was adopted.

fewer restrictions remain to be removed in Türkiye. Türkiye's reform process for FDI, which accelerates the FDI. For instance, the number of International Companies in Türkiye increased 82,700 in 2023 from 5600 in 2002. Also, the average annual FDI inflow growth (%) between 2002 and 2020 is 11,6, which is more decent points than the FDI competitor of Türkiye: Bulgaria 5.5%, Poland 5.2%, Romania 4%, Hungary 1.8%.⁴⁸

Türkiye launched a Foreign Direct Investment Strategy for the 2024–2028 term to shape Türkiye's FDI strategies and economic development goals. It includes strategic policies and action plans. The strategy report can be outlined that 10 key points will shape the strategy. As a general it is outlined primarily green transformation and sustainability will be more crucial determinants of FDI flows. In addition, start-ups are gaining prominence as FDI flows. Their main target is increasing Quality FDI⁴⁹ investments as well as preserving the current FDI flows. Finally, the goals of the report are increasing Türkiye's share of the global FDI to 1.5%; increasing Türkiye's regional share in FDI inflows to 12%; achieving the targeted total number of projects in each quality FDI profile over a 5-year period. The action plan comprises actions regarding how to access policy aims.⁵⁰ Also, Türkiye hosting huge FDI, like BYD, Istanbul New Airport, as a PPP model.

5. Conclusion

The development of Foreign Direct Investments (FDI) has accelerated with globalisation, the evolution of international organisations, and the development of alternative dispute resolution mechanisms such as arbitration. It cannot be said that this development is complete. The reform process regarding Türkiye's Foreign Direct Investments, which is the subject of this study, has been rapidly progressing within an investor-friendly framework since 2002. Alongside the benefits brought by foreign direct investments, there are also negative aspects. For these reasons, countries are taking measures regarding foreign direct investments. UNCTAD's The World Investment Report 2024 mentions three types of measures⁵¹. These include completely or partially restricting foreign investments in certain sectors, such as energy and defence, state monopolies in sensitive sectors such as infrastructure, public transportation, and telecommunications; removing incentives like tax; and screening foreign direct investments. In the context of Turkish law, these measures are referred to as investment restrictions. Within the scope of the European Union⁵², the approach of screening investments has been preferred⁵³.

⁴⁸ WEO Database April 2021.

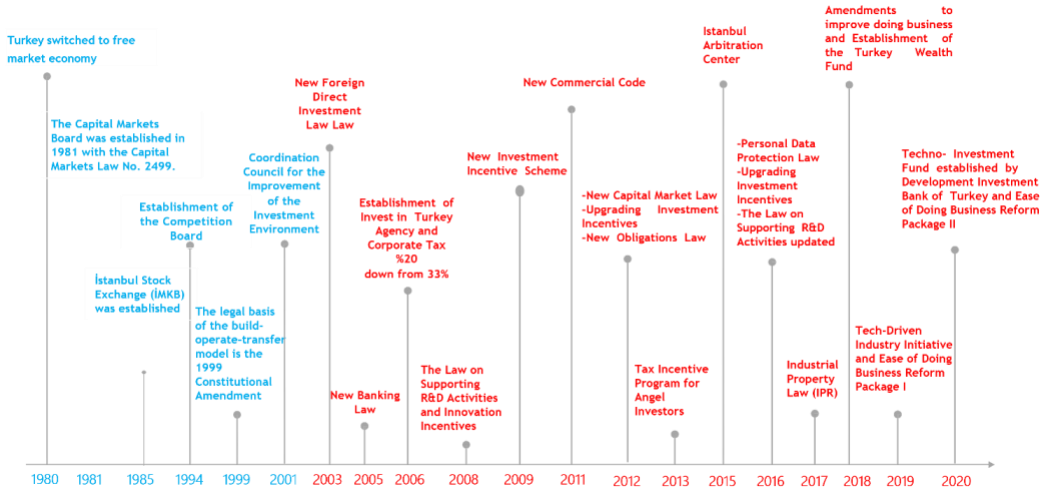
⁴⁹ It is listed with 8 points: Climate FDI, Digital FDI, Global Value Chain-related FDI, Knowledge Intensive FDI, High-quality Job Generating FDI, High-end Service FDI, High-quality Financial FDI and Regional Development Oriented FDI.

⁵⁰ Türkiye Foreign Direct Investment (FDI) Strategy (2024–2028), <https://www.invest.gov.tr/en/pages/fdi-strategy.aspx>, accessed on 1.10.2024.

⁵¹ UNCTAD, World Investment Report (2024) unctad.org/system/files/official-document/wir2024_en.pdf, accessed on 1.10.2024.

⁵² Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

⁵³ Wolf Zwartkruis, 'The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?', *European Business Law Review*, 2020, p. 7.

Figure 1. Türkiye's Reform Process (author's work)

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