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Where East Meets West: An Overview of Türkiye's BIT Program

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The Republic of Türkiye is a strategic market which straddles Europe and Asia, providing an intersection of various cultures, languages, and religions. Türkiye is also well-versed in foreign investment, both inward and outward, in large part due to its geographical location and long history. Indeed approximately one-fifth of economic activity in Türkiye depends on foreign markets.

To this end, Türkiye signed its first bilateral investment treaty ("**BIT**") with Germany in 1962. To date, Türkiye has signed more than 130 BITs, approximately 80 of which are currently in force. Most recently, Türkiye signed BITs with Hong Kong (2023), Venezuela (2023), Uruguay (2022), Congo (2021), and Angola (2021).

While historically a capital importing State, since the early 2000s Türkiye has started to become a capital exporter in the region. According to the World Bank, Türkiye's outward foreign direct investment has increased significantly over the past three decades and was eight times larger in 2021 than it was in the 1990s. This significant increase illustrates the growing global presence (most notably in Central Asia, Eastern Europe, Northern Africa, the Balkans, and the Middle East) of Turkish investors in a variety of key sectors, including construction, energy, manufacturing, telecommunications, and finance. As a result, the terms of the BITs negotiated by Türkiye, notably in the recent decade, have taken this new reality into consideration.

This post provides an overview of Türkiye's current BIT program.

"Investments" and "Investors"

Türkiye's BITs generally broadly define an "investment" as "every kind of asset." However, nearly all of Türkiye's BITs that were signed between 2009 and 2013 (as Türkiye was becoming a larger capital exporter) exclude minority ownership (<10%) in publicly traded companies – possibly a reaction by the other Contracting Parties to minimize future investment disputes by Turkish minority shareholders.

Türkiye's BITs also generally broadly define natural persons as "investors" and allow for a natural person to constitute an "investor" if the person has the nationality of either Contracting Party. In contrast, Türkiye's BITs generally narrowly define legal persons as "investors." More than half of

Türkiye's BITs require a legal person to either have its headquarters or substantial business activity in a Contracting Party to constitute an "investor." Starting in 2010, Türkiye's BIT program made a marked switch from generally imposing a "headquarters" requirement to a "substantial business activity" requirement, arguably broadening the scope of protected legal persons.

Substantive Protections

Most of Türkiye's BITs contain a "fair and equitable treatment" ("**FET**") clause with notable exceptions being its older BITs with Japan (1992), Bulgaria (1994), and Oman (2007). Most of the newer BITs signed since 2011 expressly tie the FET standard to the international law minimum standard of treatment – again possibly a reaction by the other Contracting Parties to minimize their potential liability with respect to future investment disputes brought by Turkish investors. In contrast, the majority of Türkiye's older BITs signed prior to 2011 (at a time when Türkiye was attempting to attract foreign investment) do not expressly tie the FET standard to the international law minimum standard of treatment.

The majority of Türkiye's BITs also contain a "full protection and security" ("**FPS**") clause. As with the FET clause, most of the newer BITs signed since 2011 expressly tie the FPS clause to the international law minimum standard of treatment. In *PSEG Global v. Turkey (2007)*, the ICSID tribunal analyzed the FPS clause in Article II(3) of the United States-Türkiye BIT (1985), which (although an older Turkish BIT) provides that "[i]nvestments . . . shall enjoy full protection and security in a manner consistent with international law." The tribunal interpreted this FPS clause as limited to physical safety and security and that only may be extended to legal security in an "exceptional" situation.

Most of Türkiye's BITs – particularly those it has signed in recent years – do not contain an "observance of obligations" or "umbrella" clause. Exceptions include some of the earliest BITs that it signed (with Germany (1962), the United States (1985), the Netherlands (1986), Switzerland (1988), Denmark (1990), and the United Kingdom (1991)) which all include an umbrella clause.

Most Favored Nation Treatment

The vast majority of Türkiye's BITs do not specify whether the most favored nation ("**MFN**") clause encompasses the dispute resolution provisions in the treaty. However, since 2010 starting with the Kuwait-Türkiye BIT (2010), each of Türkiye's BITs has expressly provided that the MFN clause does not apply to dispute resolution provisions. For example, Article 4(3)(c) of the Uzbekistan-Türkiye BIT (2017) provides: "[t]he most-favored nation treatment provisions of this Agreement shall not apply to settlement of disputes between one Contracting Party and investors of the other Contracting Party." This change may have been made to avoid binding Türkiye to the prior commitments that it made in the approximately 60 BITs that it had signed prior to 2010.

Exceptions

Recent Turkish BITs are more likely to include exceptions allowing for the Contracting Parties to take generalized measures to preserve national security or public safety. For example, Article V(2)(b) of the Kyrgyzstan-Türkiye BIT (2018) provides that "[n]othing in this Agreement shall be construed . . . to prevent any Contracting Party from taking any actions that it considers necessary for the protection of its essential security interests."

As environmental concerns have become more prevalent in recent years, Türkiye has included mention of the environment in its BITs since 2010. For example, Article IV(2) of the Kuwait-Türkiye BIT (2010) specifically excludes certain environmental measures from the definition of indirect expropriation: "[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." Other more recent BITs, such as the Guatemala-Türkiye BIT (2015), specifically reference the environment in the Preamble of the treaty, noting that the objectives of the treaty "should be achieved in a manner consistent with the protection of health, security, environment and labor rights of each Contracting Party."

Limitations Period

Only four of Türkiye's BITs – all of which were signed in the last decade – contain a limitation period restricting a foreign investor's ability to bring an international arbitration against a host State. Türkiye's BIT with Mexico (2013) has a four-year limitation period, while its BITs with China (2015), Georgia (2016), and Uzbekistan (2017) have five-year limitation periods. These provisions may have been a reaction by the other Contracting Parties to minimize future investment disputes by Turkish investors.

Investor-State Arbitration

As ICSID is the "go to" institution for investor-State arbitration, ICSID is a fixture in Türkiye's BIT program, particularly in its most recently signed BITs. Only three Turkish BITs signed in the 1990s do not allow for ICSID arbitration: its BITs with Iran (1996), Cuba (1997), and Russia (1997).

ICSID tribunals have diverged in interpreting the investor-State arbitration provisions of certain Turkish BITs. In *Ickale v. Turkmenistan (2016)***,** the parties disagreed on whether Article VII(2) of the Turkmenistan-Türkiye BIT (1992) – which provides that if a dispute cannot be settled within six months it can be submitted to international arbitration "provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year" – imposed a domestic litigation requirement. The parties' divergent positions were based on the drafting of the English version of the BIT, as well as the fact that the English version of the BIT provides that it was done "in two authentic copies in Russian and English," whereas the Russian version stated that it was executed in "the Turkish, Turkmen, English [and] Russian languages." Ultimately, the *Ickale* Tribunal held that the proper interpretation of Article VII(2) imposed a domestic litigation requirement. However, its interpretation diverged from the ruling just one year earlier by the ICSID tribunal in *Muhammet Cap v. Turkmenistan (2015)* which held that Article VII(2) of the BIT does not require an investor to pursue domestic litigation prior to commencing ICSID arbitration.

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Türkiye provides an interesting case study for how a State may adapt its BIT program as it evolves from a capital importer to a capital exporter. In addition to the changes in the BIT language discussed above, Türkiye has also made notable decisions with its treaty partners. For example, in recent years, Türkiye has signed BITs with new treaty partners, likely with the primary objective of protecting Turkish investments, such as Congo (2021), Angola (2021), and Cambodia (2018). It also has signed new BITs with existing BIT partners to modernize and replace older BITs, such as with the United Arab Emirates (2023) (to replace the 2005 BIT), Kyrgyzstan (2018) (to replace the 1992 BIT), Belarus (2018) (to replace the 1995 BIT), and Uzbekistan (2017) (to replace the 1992 BIT). Türkiye's robust BIT program may serve as a useful example for other States as their economies develop and their priorities change from attracting inward investment to protecting outward investment.

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