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**RESEARCH ARTICLE**

# Protection of Foreign Investments in Türkiye under International Law: Alignments and Dissociations with International Tendencies

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**Abstract**

*Protection of foreign investments under international law is treaty-based. Investment treaties are mostly bilateral, i.e. they are concluded between two states and provide the investors of each contracting party rights to a minimum standard of treatment in the territory of the other contracting party. Foreign investments in Türkiye, too, are protected by bilateral investment treaties. Türkiye has concluded a total of 132 bilateral investment treaties with 113 different states. As of today, 82 of these bilateral investment treaties are in force. We examined all bilateral investment treaties that Türkiye has been party to, including those that have not entered into force yet and those that have entered into force but that were subsequently terminated. We, thus, sought to determine how Türkiye established and developed its bilateral investment treaty network. In order to get a complete picture of the establishment and development of the Turkish network, we compared it with international tendencies of bilateral investment treaty network establishment programmes. As a result of this comparison, we determined that Türkiye's bilateral investment treaty network mostly aligned with international tendencies, especially between 1960 and 2000. We observed that Türkiye behaved more like developing and transition economies in this time period; hence it first concluded investment treaties with investment exporting states. However, we remarked a dissociation from international tendencies in the 2010s. As a result of our examination of the Turkish bilateral investment treaty practice in the 2010s, we made the following findings: Türkiye did not align with the tendency to withdraw from the network of investment treaties, a tendency popular among developing and transition economies, and it mostly dissociated from the tendency to replace existing investment treaties with new generation treaties, a tendency pioneered by developed economies.*

***Keywords:*** *foreign investment, international investment agreement, international law, investment arbitration, international arbitration*

***Jel Codes:*** *K30, K33, O20*

## *Türkiye'deki Yabancı Yatırımların Milletlerarası Hukukta Korunması: Milletlerarası Temayüllerle Uyuşma ve Ayrışmalar*

***Özet***

*Yabancı yatırımlar milletlerarası hukukta devletlerin akdettikleri iki taraflı yatırım anlaşmalarıyla korunur. Türkiye'deki yabancı yatırımlar da milletlerararası hukukta Türkiye'nin taraf olduğu iki taraflı yatırım anlaşmalarıyla korunur. Türkiye bugüne kadar 113 devletle, toplam 132 adet iki taraflı yatırım anlaşmasına taraf olmuştur. Bunlardan 82'si hâlihazırda yürürlüktedir ve Türkiye'deki yabancı yatırımların milletlerarası hukukta korunmasına temel teşkil eder. Çalışmamızda Türkiye'nin bugüne kadar taraf olduğu yatırım anlaşmalarının tamamını inceledik. İncelememize yalnızca yürürlükteki yatırım anlaşmalarını değil, taraf olunmuş olmasına rağmen yürürlüğe hiç girmemiş anlaşmaları ve yürürlüğe girmiş olmasına rağmen sonradan yürürlüğüne son verilmiş anlaşmaları da dâhil ettik. Böylece Türkiye'nin yatırım anlaşmaları ağını nasıl oluşturup, geliştirdiğini tespit etmeyi amaçladık. Türkiye'nin yatırım anlaşmaları ağının oluşum ve gelişiminin tam bir resmini görebilmek adına da dünyadaki yerini tayin etmeye gayet ettik. Bu amaçla, Türkiye'nin yatırım anlaşmaları ağını oluşturma ve geliştirme çalışmalarını, bu alanda dünyada hâkim olan genel temayüllerle karşılaştırdık. Bu karşılaştırma sonucunda Türkiye'nin, özellikle 1960-2000 tarihleri arasında, dünyada hâkim olan temayüllere uygun*

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*davrandığını, bu zaman diliminde çoğunlukla gelişmekte olan ekonomilere ve geçiş ekonomilerine sahip devletler gibi davrandığını, bu kapsamda öncelikle geleneksel olarak yatırım ihraççısı devletlerle yatırım anlaşmaları imzaladığını tayin ettik. 2010'lu yıllardan itibaren ise dünyada hâkim olan temayüllerle ayrışan kimi uygulamalarının olduğunu gördük. 2010'lu yıllardaki anlaşmalara dair incelemelerimiz sonucunda şu tespitleri yaptık; bu tarihlerde Türkiye, gelişmekte olan ve geçiş ekonomilerine sahip devletler arasında hâkim olan, yatırım anlaşmaları ağından çıkma temayülüne dâhil olmadığı gibi; gelişmiş ekonomilere sahip devletlerin önayak oldukları, mevcut yatırım anlaşmalarının yeni kuşak yatırım anlaşmaları ile değiştirilmesi temayülünün de büyük ölçüde dışında kalmıştır.*

***Anahtar kelimeler:*** *yabancı yatırım, milletlerarası yatırım anlaşması, milletlerarası hukuk, yatırım tahkimi, milletlerarası tahkim*

***Jel Kodu:*** *K30, K33, O20*

## 1. INTRODUCTION

As a rule, states are sovereign in all matters (e.g. social, legal and economic) within their territory. In other words, states have the exclusive and ultimate authority for the determination and enforcement of political, social, legal and economic systems within their own territory. State sovereignty, particularly in economic matters, exposes investors to political and administrative risks. Indeed, the exercise of state sovereignty (e.g., changes in existing political and economic policies or regime change) can expose investors - especially foreign investors - to political and administrative risks (Dolzer and Schreuer, 2012: 21; Salacuse, 2010: 109, 110).

The political and administrative risks foreign investors face deserve some elaboration. Suppose you are an investor in the textile industry, manufacturing garments in a foreign country. The sovereign state of that country will have a say in the profitability and even in the ownership structure of your investment. In that, sovereign regulatory measures of the state may reduce your profitability by changing the safety and sanitation requirements for your product, forcing you either to make additional investments to meet the new requirements or to withdraw your products from the market. State measures may also deprive you of the economic benefits of your investment by prohibiting the import of certain raw materials on the grounds of protecting public health, thereby making your investment inoperable, or it may completely destroy the economic value of your investment by expropriating it on the grounds of national security. As the example shows, for long-term investments to be under sovereign threat, they do not have to be in strategic sectors such as defence, energy, telecommunications, etc. Even an investment in garment manufacturing can be under sovereign threat, especially if it is owned by a foreigner (Salacuse, 2010: 27, 28). This is because foreign investors are often deprived of political rights and tools to protect themselves against the kind of sovereign measures we have illustrated. The primary means of protection available to foreign investors against such measures is legal protection, particularly that provided by international law (which significantly limits the exercise of state sovereignty).

The type of legal protection that first comes to mind when private property is harmed by state measures is the legal protection provided by the sovereign's national administrative law. However, most states have some control over their administrative courts, which renders the legal protection provided by national laws ineffective or inadequate at best. The additional protection provided by international law is therefore necessary to effectively promote and protect foreign investment. This additional layer of legal protection ensures that aggrieved foreign investors can claim compensation for damages caused by host state measures in breach of international investment law (IIL). If the host state is found to be in breach of IIL, it will be internationally responsible, and it will be under the obligation to pay compensation -directly- to the foreign investor (Salacuse, 2020: 127, 128). In short, what is meant by the phrase “protection of foreign investments under international law" in the title -and more generally in this article- is the legal protection of foreign investments against state measures breaching the IIL and the enforcement of IIL through compensation payments made by breaching host states to aggrieved foreign investors.

The principles of IIL are mostly found in bilateral investment treaties (BITs)[1] (Dolzer and Schreuer, 2012: 13). BITs are international agreements signed between two states, in which each contracting party undertakes to promote and protect the investors of the other contracting party investing in its territory. Most of these treaties provide minimum standards of treatment of foreign investors -i.e. investor rights- and host state obligations (to pay compensation) for when they take measures that

[1] Multilateral investment treaties are also a source of international law for the protection of foreign investors. However, BITs are considered to be the backbone of IIL, as the majority of normative sources of IIL are found in BITs (Newcombe and Paradell, 2009: 57, 58).

do not meet these standards. Minimum standards typically found in BITs are the prohibition of expropriation without compensation, the fair and equitable treatment standard, the full protection and security standard, the most-favoured-nation standard, the national treatment standard, and the free transfer of funds standard. Foreign investors may bring claims against the host state for breaches of BIT standards under most BITs. Such claims are typically brought through investor-state arbitration (McLachlan, Shore and Weiniger, 2008: 26 ff.; Newcombe et al. Paradell, 2009: 65).

The 1960s saw the beginning of the state practice of concluding international agreements for the protection of foreign investments[1]. The need of developed economies to protect their investors abroad was the driving force behind the growth in popularity of investment treaties. Early BITs were mostly concluded at the request of home states to foreign investment. Today, however, almost all states, regardless of their level of economic development, tend to become parties to BITs (United Nations Conference on Trade and Development [UNCTAD], 1998: 65; Newcombe and Paradell, 2009: 42, 43). This tendency in state practice has led to the emergence of an extensive and complex network of BITs in international law. As of October 2022, the BIT network consists of approximately 3000 treaties and constitutes the primary normative source of IIL ("List of Bilateral Investment Treaties in the World" 2022).

The Republic of Türkiye has taken its place in the BIT network from the very beginning. One may confidently say that foreign investments in Türkiye are mainly protected by BITs under international law ("Türkiye's List of Bilateral Investment Treaties" 2022). However, Türkiye's BIT practice did not strictly follow international trends. In this study, we aim to take a close look at Türkiye's BIT practice throughout history in order to develop a broader understanding of the protection of foreign investments in Türkiye. To this end, we highlight areas where Turkish BITs' investment protection aligns and dissociate with international tendencies. Furthermore, we draw conclusions about the causes and consequences of such alignments and dissociations. In order to identify these alignments and dissociations and to draw conclusions on their causes and consequences, we have analysed all the BITs to which Türkiye is a party. On the other hand, in order to identify prevailing international tendencies in BIT practice, we consulted scientific literature and data from the United Nations Conference on Trade and Development (UNCTAD), which analyses investment agreements worldwide and identifies overarching patterns and common trends.

The extent of the legal protection enjoyed by foreign investors in a given country depends on two main features of the host state's BIT network; first, the breadth of the network, and second, the comprehensiveness of the investment protection provisions in the BITs. Therefore, in order to determine the extent of legal protection enjoyed by foreign investors in Türkiye, both the breadth of the Turkish BIT network (see below, title 2) and the comprehensiveness of the investment protection provisions in Turkish BITs (see below, title 3) will be examined.

[1] It should be borne in mind that international law already contained norms of investment protection before the "invention" of BITs. Indeed, customary international law norms on investment protection existed before the BITs era. However, the content of these norms was not easy to determine. Customary international law norms include, for example, the obligation to comply with international minimum standard of treatment of foreign investors and the obligation to pay compensation when foreign property is taken over by host states. Although, the exact content of the international minimum standard of treatment or the manner in which the compensation for expropriation should be calculated is not unanimously agreed upon. Therefore, customary international law is not considered to provide adequate promotion and protection to foreign investments. (UNCTAD, 1998: 3).

## 2. THE BREADTH OF BIT NETWORKS

BITs are international agreements between two states that establish minimum standards of treatment to be observed by the host state -party to the agreement- when taking measures affecting investments belonging to nationals of the other contracting party. Most BITs contain similar standards of treatment, with very few variations in the wording, as if they were cast from the same mould (United Nations Conference on Trade and Development [UNCTAD], 2007: 141). BITs provide legal protection only to nationals of the contracting states investing in each other's territory. In technical terms, the scope of application of BITs covers only investments made by nationals of contracting states. Thus, the extent of legal protection enjoyed by foreign investors in general in a given host country can be determined by the breadth of the BIT network of the country. In other words, BITs do not provide legal protection to every foreign investor but to foreign investments of nationals of the other contracting state. Therefore, the extent of legal protection that foreign investors enjoy in a given country depends primarily on how many BITs that state has signed.

To date, Türkiye has signed 132 BITs with 113 different states[1]. These figures show that foreign nationals of 132 different states enjoy the legal protection of international law when they invest in Türkiye. The fact that Türkiye has concluded investment treaties with 113 of the 192 member states of the United Nations shows that it has an extensive BIT network and an investor-friendly stance[2]. In establishing this broad BIT network, Türkiye aligned itself with certain international trends (see below, title 2.1.) and dissociated from others (see below, title 2.2.), demonstrating its nuanced approach to investment protection.

### 2.1 Alignment with International Tendencies

Treaty-based international investment law is a relatively new phenomenon in international law. Germany is considered to have pioneered this phenomenon of treaty-based investment protection. The first ever BIT was signed between Germany and Pakistan in 1959 ("Germany-Pakistan Investment Treaty" 2022). Germany was also the first country to launch a BIT programme, encouraging host countries to sign BITs with Germany. Many other investment-exporting states, such as the Netherlands, France, Sweden, Italy, England, and the USA followed the lead of Germany and introduced their own BIT programmes (Newcombe and Paradell, 2009: 42, 43). In other words, historically, the impetus for treaty-based investment protection came from developed economies seeking protection for the investments of their nationals in developing countries. By the 1980s, a clear trend had emerged in the international state practice towards the conclusion of BITs between investment-exporting and investment-importing states. (Newcombe and Paradell, 2009: 46, 47).

Türkiye did not wait long to align itself with the prevailing trend in international state practice. Indeed, the first Turkish BIT was signed in 1962 with Germany (Official Gazette of the Republic of Türkiye, 11525, 8 October 1963). Following this first BIT, most of the early Turkish BITs concluded in the 1980 were signed with investment-exporting states such as the USA, the Netherlands, Belgium, Switzerland and Austria (Official Gazette of the Republic of Türkiye 20251, 13 August 1989; Official Gazette of the Republic of Türkiye 20276, 8 September 1989; Official Gazette of the Republic of Türkiye 20306, 8 October 1989; Official Gazette of the Republic of Türkiye 20304, 6 October 1989; Official Gazette of the Republic of Türkiye 20782, 10 February 1991). As reflected in this picture,

[1] The remaining 19 treaties are revised and renewed versions of older-generation investment treaties with existing BIT partner states.

[2] Of the 79 states with which Türkiye has not signed BITs with, Brazil, Canada, Iraq Ireland, New Zealand, Norway and Northern Republic of Cyprus are particularly noteworthy. Türkiye signing investment treaties with these states will further strengthen the position of Türkiye and Turkish investors in IIL.

during the initial phase of its BITs journey, Türkiye adhered to the prevailing international state practices of the time by mostly becoming a party to BITs with investment-exporting states. In this equation, Türkiye held the position of an investment-importing state with the primary objective of attracting more foreign investments by offering a safer investment climate to investors from major investment-exporting states (Şit Köşgeroğlu, 2013: 156).

The 1990s saw the emergence of a new international trend, whereby investment-importing states began to sign BITs with not only investment-exporting states but also with other investment-importing states (UNCTAD, 1998: 15; Newcombe and Paradell, 2009: 47, 48; Salacuse, 2010: 96). The 1990s were the years when many developing and transition economies sought to attract foreign investments, leading to increased competition among investment-importing states to sign BITs. Having a broader BIT network became a way to signal to potential investors that a country had a favourable investment climate compared to other investment-importing states (UNCTAD, 1998: 10). The competition to sign BITs was so intense that the number of investment treaties signed worldwide was 286 prior to 1990; however, by the year 2000, this number had risen to nearly 2,000, indicating a significant increase in the signing of investment treaties (United Nations Conference on Trade and Development [UNCTAD], 2022: 65). Another reason for this trend is thought to be the fall of the Soviet Union and the subsequent increase in the appeal of market economy policies among developing and transition economies (UNCTAD, 1998: 15).

Türkiye has aligned itself with both international trends. From 1962, the year it signed its first BIT, until 1990, Turkey had signed BITs with only 8 states. However, in the 1990s, the number of BITs signed increased significantly, reaching 51 states. Moreover, only 6 of these 51 treaties were signed with investment-exporting states, while the remaining 45 were signed with investment-importing states, all in line with international trends ("Türkiye's List of Bilateral Investment Treaties" 2022).

By the year 2000, almost all investment-exporting and investment-importing countries worldwide had signed investment treaties. In other words, the international BIT network had taken on a structure similar to that of today. As a result, the pace at which new BITs were signed slowed in the 2000s compared to the 1990s. The total number of BITs signed during this decade did not exceed 1,000 (UNCTAD, 2022: 65). Türkiye was no exception to this trend as it became a party to only 25 BITs during this period, indicating a significant decrease in the number of BITs Türkiye became a party to in the 2000s compared to the 1990s.

### 2.2 Dissociation from International Tendencies

The signing of new BITs is a trend that broadens the overall legal protection offered to foreign investors, as it provides international legal protection to broader groups of new foreign investors. However, this trend largely faded away in the 2010s. Many countries stopped signing new investment treaties during this decade. The total number of BITs signed worldwide in the 2010s is around 300 (UNCTAD, 2022: 65). As shown by the figures, this number is even lower than the number of such treaties signed in the 2000s.

Türkiye began to dissociate from international trends in the 2010s by increasing its efforts to sign BITs as opposed to the global tendency. The number of BITs signed by Türkiye in the 2010s approached the number of BITs signed in the 1990s, mimicking the era of the competition to sign BITs. Indeed, Türkiye signed 51 BITs in the 1990s and 45 in the 2010s ("Türkiye's List of Bilateral Investment Treaties" 2022). We foresee that Türkiye's efforts to expand its BIT network will slow down in the 2020s. In other words, we believe that in the coming decade, Türkiye will catch up with the trend that emerged in the 2010s. This anticipation takes into account the fact that -although we are at the beginning of this decade- Türkiye has so far signed only three BITs in the 2020s.

In the 2010s, Türkiye dissociated from international trends not only by increasing its efforts to expand its BIT network despite the global halt in such treaty expansion but also by refraining from aligning itself with the trend of terminating existing BITs, which we can roughly identify as the narrowing of BIT networks. This trend is led by a number Central and South American states and is primarily observed among investment-importing states with developing or transition economies. States aligning themselves with this trend have two main concerns; that future investment arbitration cases brought by foreign investors against these states will place a significant burden on their public finances and that investment treaties are not as effective in attracting foreign investment as previously thought (Lavopa, Berreiros, and Bruno, 2013: 871). This trend was pioneered by Ecuador. Starting from 2008, Ecuador terminated 25 out of its 27 existing BITs ("Ecuador's List of Bilateral Investment Treaties" 2022). Similarly, Bolivia, another developing economy, terminated 17 of its 23 BITs since 2009 ("Bolivia's List of Bilateral Investment Treaties" 2022). The international tendency to terminate BITs and thereby narrow BIT networks is not limited to Central and South America, as India, Indonesia and South Africa have also adopted this approach. Since 2011, India has terminated 76 out of its 82 existing BITs ("India's List of Bilateral Investment Treaties" 2022). Indonesia, a major recipient of FDI in Asia, has also joined this trend, terminating 31 out of its 58 existing BITs since 2014 ("Indonesia's List of Bilateral Investment Treaties" 2022). South Africa has terminated 12 of its 23 BITs starting from 2012, particularly those with investment-exporting countries such as Germany, Austria, Belgium, Luxembourg, the United Kingdom, Denmark, France, the Netherlands, Spain, Switzerland, and Italy ("South Africa's List of Bilateral Investment Treaties" 2022).

Despite being a transition economy, Türkiye has not followed the trend of narrowing BIT networks that has been popular among developing and transition economies in the 2010s. Indeed, 14 out of the 96 Turkish BITs have been terminated[1]. Out of the 14 terminated BITs, only three have not been replaced with a new BIT between the same parties. The termination of the remaining 11 BITs was due to renegotiations between the parties, which resulted in the replacement of the outdated BITs with new ones. In short, the Turkish BIT network reduced by a mere three BITs during the 2010s. These three BITs terminated without replacement were those signed between Türkiye and India, Indonesia, and Uzbekistan. Even though Indonesian and Uzbek investors in Türkiye are no longer covered by a BIT, they remain protected under international law through the multilateral investment agreement of the Organization of Islamic Cooperation, to which Türkiye, Indonesia, and Uzbekistan are all parties. Therefore, the non-replacement of these two BITs with new ones should not be misinterpreted as a signal of Türkiye's disengagement from the IIL system. However, following the termination of the Türkiye-India BIT, Indian investors in Türkiye -and Turkish investors in India- are no longer protected by any international investment treaty in force[2]. It is worth noting that this treaty was terminated as part of India's withdrawal policy from the IIL regime (a policy which we briefly explained above). Thus, none of the three Turkish BITs that have been terminated without

[1] It is worth noting that Türkiye has another terminated BIT, namely the 1990 BIT between Türkiye and the Russian Federation. As this BIT had never entered into force prior to its termination, we did not consider its termination as an act narrowing the Turkish BIT network. Moreover, the 1990 BIT was terminated only two days after the entry into force of the 1997 Türkiye-Russia BIT. In this respect, the termination in question was not aimed at narrowing Türkiye's BIT network, but at updating an old-generation BIT.

[2] Most international investment treaties continue to protect investments that fall within their scope of application for a certain period of time after their termination (Harrison, 2012: 937). In the literature, these provisions are referred to as 'sunset clauses'. The Türkiye-India BIT includes such a provision (Official Gazette of the Republic of Türkiye 25232, 17 September 2003). Pursuant to Article 10 of the treaty, the treaty standards continue to have legal effect for another 10 years following the termination of the agreement. Accordingly, the Türkiye-India BIT, which was terminated on 08.07.2019, although not in force, will continue to protect both Turkish and Indian investors until 08.07.2029.

replacement does imply that Türkiye has an exit policy from the IIL regime. We therefore conclude that, despite its classification as a transition economy, Türkiye does not follow the prevailing trend among other transition economies to reduce their BIT networks. This is indicative of Türkiye's divergent approach to investment treaties.

## 3. THE COMPREHENSIVENESS OF INVESTMENT PROTECTION PROVISIONS IN BITs

The scope of legal protection provided to foreign investors is certainly not only determined by the breadth of a country's BIT network. The comprehensiveness -i.e. the content- of the treatment standards included in the BITs is another important determinant of the scope of protection.

BITs have been drafted in accordance with the same framework since the beginning of the BITs era. Meaning they contain treatment standards very similar at first glance, as if they were standardized. Most BITs have the following sections: a preambular section providing background information on the treaty and the parties; a definitions section, clarifying the meaning of key terms, such as "protected investor" and "protected investment"; a minimum standards of treatment section, setting out investor rights and host state obligations with respect to the treatment of protected investments, such as fair and equitable treatment, full protection and security, national treatment and most favoured nation standards; a section prohibiting expropriation without compensation; a dispute settlement section and finally a general provisions section containing provisions on the duration, termination and amendment of the treaty (Dolzer and Schreuer, 2012: 13).

Even though the general structure of the majority of BITs remains the same, the specific wording of BIT provisions may vary from one treaty to another. Some BITs may provide higher or lower treatment standards compared to others. Therefore, to determine whether an investor has received treatment below the standard they are entitled to, a careful examination of the treaty provisions governing the investment is necessary. The extent to which the host state will be held responsible under international law often depends on the scope and comprehensiveness of the relevant provisions of the applicable BIT.

States follow international trends not only in terms of the decision to conclude BITs, but also in terms of the comprehensiveness of the provisions included in BITs when they do decide to conclude one. At the global level, significant disparities have been observed between the level of legal protection provided by BITs signed before 2010 and those signed since (United Nations Conference on Trade and Development [UNCTAD], 2018: 15, 16). Türkiye, has at times, aligned itself with these global trends in its pre- and post-2010 BITs (see below, title 3.1.), but it has also dissociated from them in certain respects (see below, title 3.2).

### 3.1 Alignment with International Tendencies

In the early period of the BIT era, investment agreements were seen as tools to promote economic growth and employment in investment-receiving countries. Consequently, this early period (roughly from 1960 to 2000) saw not only hundreds of BITs signed, but also a tendency to draft BITs to protect foreign investment "at all costs". By this we mean that foreign investors were given the right to claim compensation for even the slightest damage caused to their investment by measures taken by the host State, without regard to the public policy underlying those measures.

It came as no surprise that BITs mandate the payment of compensation to foreign investors in the event of direct expropriation of their investments or discriminatory measures in favour of local investors. What was not expected of BITs, however, was that their open-ended language would allow foreign investors to rightfully claim compensation for legitimate measures taken by the host state, such as those designed to protect the environment, human rights and other public interests in the host country. Simply put, it was later realised by the states parties to the early BITs that the broad language used therein made predictability difficult to achieve, especially for the host states (UNCTAD,

1998: 7; Salacuse, 2010: 4). To give a clearer picture, host states did not anticipate that state measures aimed at protecting natural resources such as underground and surface water from industrial pollution (Methanex Corporation v. United States, NAFTA-UNCITRAL Award, Jurisdiction and Merits, 3 August 2005), measures aimed at preventing nuclear power plants from causing harm to human life through possible accidents (Vattenfall AB et al v. Germany, ICSID Case No. ARB/12/12) or measures aimed at reducing the harm caused by tobacco use to the public health (Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Merits, 8 July 2016) could give rise to their international responsibility.

It was only when investors began to bring their first investment arbitration cases against host states, in the 1990s, that contracting states became aware of the degree to which early BITs had restricted their freedom to take measures safeguarding public interests. (Dolzer and Schreuer, 2012: 11; Methymaki and Tzanakopoulos, 2016: 157). As a result of this realisation, states made changes to their norm-setting practices in IIL. While some states took a radical approach and terminated their BITs, others chose to remain within the IIL regime and worked towards BIT reform. From the 2010s onwards, we observe a trend in state practice towards modernising the existing stock of BITs. Compared to the old generation of BITs, revised BITs focus more on sustainability and the host state's right to regulate (United Nations Conference on Trade and Development [UNCTAD], 2009: 26; UNCTAD, 2018: 7; Newcombe and Paradell, 2009: 61).

It is worth noting that the new-generation BITs still maintain adequate protection of foreign investments when focusing on the host state's right to regulate. They do not deprive investors of traditional investment protection rights. On the contrary, new-generation BITs include classic investor rights such as; prohibition of expropriation without compensation, fair and equitable treatment standard, full protection and security standard, most-favoured-nation treatment, and national treatment standards. However, unlike the old-generation BITs, reformed BITs explicitly state that foreign investors are not entitled to compensation for harm done to their investments if the state measure causing the damage effectively protects public interests. In other words, certain state measures are carved out of the scope of protection of new-generation BITs. These carving-out provisions either create exceptions to the investment protection provided by the BIT or establish conditions for exemptions from the international responsibility of the host state (Newcombe and Paradell, 2009: 482).

Exceptions and exemptions found in new-generation BITs are not uniform. Depending on the precise wording of the treaty, they can leave a relatively wide or narrow policy space for the host state. Some exception or exemption clauses in BITs leave a relatively narrow policy space, carving out host state measures -objectively- *necessary* for the protection of international peace, national security, and public order. Other, however, may leave the determination of whether state measures are necessary for the protection of public interests to the discretion of the host state, with the BIT explicitly stating that it does not prevent the host state from taking measures that *it deems* necessary for such purposes. The latter approach provides the host state with a relatively wide policy space (UNCTAD, 2009: 71 ff.).

Whether narrow or broad, provisions confirming the sovereignty authority of the host state in protecting various public interests were not common provisions in the BITs of the mid-1990s (UNCTAD, 1998: 86). The inclusion of such provisions in BITs became common in the 2010s. It was not only investment-receiving countries that sought to incorporate these provisions into their BITs, but also investment-exporting states (UNCTAD, 2018: 16). At first glance, it may seem paradoxical that investment-exporting states would sign BITs that include policy space exceptions or exemptions since their primary goal is to offer their investors the highest level of protection possible, rather than to preserve the policy space of the host countries their investors invest in. This paradox can be explained by the changing landscape of investment flows towards developed economies in the 2000s.

As investment flows have shifted towards developed economies, and as the latter have become the host state for foreign investors, there has been a growing interest in preserving the regulatory autonomy of the host state[1]. In other words, this shift in global investment patterns has, in turn, led to a paradigm shift in the way BITs are drafted. This paradigm shift has been reinforced by investment arbitration cases involving significant claims against developed economies such as the United States, Canada, Germany and Spain (Glamis Gold Ltd. v. USA, NAFTA/UNCITRAL, Award on Jurisdiction, 8 June 2009; S.D. Myers Inc v. Canada, NAFTA-UNCITRAL, Partial Award, 13 November 2000; Vattenfall AB et al v. Germany, ICSID Case No. ARB/12/12; Charanne B. V. and Construction Investments S.A.R.L. v. Spain, SCC Arbitration Institute, Case No. 062/2012, Award on Jurisdiction, 21 January 2016; Eiser Infrastructure Limited and Energía Solar Luxembourg S.A.R.L. v. Spain, ICSID Case No. ARB/13/36, Award on Jurisdiction, 4 May 2017; Antin Infrastructure Services Luxembourg SARL and Antin Energia Termosolar B.V v. Spain, ICSID Case No. ARB/13/31, Award on Jurisdiction, 15 June 2018; Foresight Luxembourg Solar v. Spain, SCC Arbitration Institute, Case No. 2015/150, Final Award, 14 November 2018; REEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux SARL v. Spain, ICSID Case No. ARB/13/30, Decision on Liability and Principles of Calculation of Damage, 30 November 2018, etc.). To recapitulate, the rise of investment arbitration triggered a new trend in the drafting of BITs, which was adopted not only by developing and transition countries but also by developed countries. This is because most states have realised that they might, at times, find themselves in the position of the host state and need to retain regulatory autonomy. This trend is backed up by data. According to a study conducted by UNCTAD, while only 12% of investment treaties signed before 2010 included general exception provisions, the percentage has risen dramatically, with 58% of treaties signed after 2010 including such provisions (United Nations Conference on Trade and Development [UNCTAD], 2016: 114).

In the 2010s, Türkiye aligned itself with the emerging trend of including general exception and exemption provisions in investment agreements. Indeed, out of 83 BITs to which Türkiye was a party before 2010, 71 did not have general exception provisions, while only 3 out of 45 BITs signed after 2010 did not have such provisions[2]. In our view, Türkiye's convergence with this global trend can be attributed, at least in part, to the introduction of the general exception clause in Türkiye's 2009 Model BIT.

In line with international trends, Türkiye's post-2010 BITs included not only general exception provisions but also obligation-specific exception and exemption provisions. Obligation-specific exception and exemption provisions referred to in this context aim to allow the host state to deviate from that particular BIT obligation in certain circumstances rather than creating a general exception for the entire scope of application of the BIT (Newcombe and Paradell, 2009: 506).

[1] Although BITs have been "bilateral" and created investment promotion and protection opportunities for both states parties "reciprocally" since the first BIT was signed, investment-exporting states have traditionally believed that no foreign investor could invest in their country under these agreements, and therefore they could not be sued in investment arbitration (Newcombe and Paradell, 2009: 43; Methymaki and Tzanakopoulos, 2016: 157). It was not until the 2000s that it became clear that these assumptions were incorrect.

[2] In fact, Türkiye has a total of 84 investment treaties signed before 2010 and 48 investment treaties signed after 2010. However, one investment treaty signed before 2010, and three investment treaties signed after 2010 could not be taken into consideration in our evaluation above. This is because we could not find a copy of these treaties -in the Official Gazette archive or in the UNCTAD database- in any one of the languages we could read and research (i.e. in Turkish, English, French, German, or Spanish). Among the treaties mentioned above, no copies of the 2017 Türkiye-Tunisia BIT, the 2021 Türkiye-Angola BIT and the 2021 Türkiye-Congo could be found. The 1990 Türkiye-Russia BIT was available only in Russian in the UNCTAD database. As Russian is not a language we are able to read and research, we could not include this treaty in our assessment above.

The most common obligation-specific exceptions are those pertaining to expropriation provisions in BITs. Indeed, a considerable number of BITs signed after 2010 stipulate in their expropriation provisions that certain host state measures do not constitute expropriation, such as those protecting certain public interests listed in the obligation-specific exception. In such cases, the host state would not be under the obligation to pay compensation for the measure that would have otherwise constituted expropriation (UNCTAD, 2018: 38). For instance, the obligation-specific exception pertaining to the prohibition of expropriation in the 2009 Turkish Model BIT, reads as follows: "non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation and are not subject, therefore, to any compensation requirements." This obligation-specific exception provision is found only in one of the 83 BITs signed by Türkiye before 2010, whereas it is found in 38 of the 45 treaties signed after 2010. We are of the opinion that the only pre-2010 BIT that contains this obligation-specific exception is also based on the 2009 Turkish Model BIT. This is because the 2009 Turkish Model BIT was published in May 2009, and the aforementioned pre-2010 BIT -i.e. Türkiye-Slovakia BIT) was signed on October 13, 2009, five months after the publication of the Model BIT (Official Gazette of the Republic of Türkiye 28745, 24 August 2013). We, therefore, believe that the Türkiye-Slovakia BIT should also be included in the group of post-2010 BITs so as not to leave any obligation-specific exception in the old-generation Turkish BITs. Türkiye's adherence to the global trend of incorporating exceptions and exemptions in BITs is not solely attributable to the 2009 Turkish Model BIT, as it is also reflected in the 2016 Turkish Model BIT.

To recapitulate, Türkiye has responded to the global trend of incorporating exceptions and exemptions in BITs by promptly revising its Model BIT to include such provisions and subsequently negotiating the terms of its newly signed BITs to align with this model. It should be noted, however, that this shift in Türkiye's foreign investment policy does not represent a significant change in the substantive scope of protection afforded to foreign investors. This is because a significant number of the Turkish BIT currently in force were signed before 2010. Only 18 of 82 Turkish BITs in force are post-2010 treaties. In fact, this is also in line with global trends. Despite the efforts worldwide to update investment treaties, the majority of BITs in force today still belong to the old generation and do not include any exceptions or exemptions (UNCTAD, 2018: 10). However, a meaningful change in the investment protection policy of Türkiye can be expected, with the prospective entry into force of 27 new generation investment treaties Türkiye signed after 2010.

### 3.2 Dissociation from International Tendencies

As discussed in more detail in the previous section, developed economies realised that they could potentially be respondents in investment arbitration cases, leading to the development of new-generation BITs that seek to balance the protection of foreign investments with the regulatory powers of host states. Of course, to achieve this result, it is not enough for newly signed investment treaties to be in line with the new generation of investment treaties. The existing stock of old-generation BITs in force should also be revised. The 2010s witnessed not only the trend of signing new BITs in line with the tendency of balancing investment protection and host state regulatory autonomy but also the trend of updating existing stocks of old-generation BITs (UNCTAD, 2018: 15). Türkiye has largely departed from this latter trend.

A significant part of Türkiye's BITs in force consists of treaties signed before 2010. Of 82 Turkish BITs in force, 64 are from the pre-2010 period. Thus, the Turkish BIT network is still part of the older generation of investment treaties. Moreover, Türkiye has been notably reluctant to update this stock of old-generation BITs. Of the 48 Turkish BITs signed after 2010, only 17 aimed to revise existing old-generation BITs with the same state party. This suggests that contrary to the global trend, Türkiye's investment treaty practice is more focused on expanding its existing BIT network than on updating it.

Türkiye's departure from the global trend of updating old-generation BITs has another dimension. While old-generation BITs offer investors broader protection against host state measures, new-generation BITs offer investors narrower protection and broader protection of host state regulatory space. Due to this difference between the two generations, states that are willing to rewrite and update old-generation investment treaties often choose to be strategic in their updating efforts. More precisely, they tend to provide broader protection to their own exercise of sovereignty by updating their investment treaties with states from which they predominantly attract investors, whereas they prefer to provide broader protection to their investors abroad by leaving their investment treaties as they are with states in which their nationals predominantly choose to invest.

Türkiye dissociates itself from this strategic dimension of the said tendency. Turkish BITs with states from which Türkiye primarily attracts investments, such as Germany, the United States, the Netherlands, Belgium, Switzerland, Austria, Denmark, the United Kingdom, Japan, Spain, Italy, and Israel, belong to the old-generation BITs, signed in the 1990s (respectively published in Official Gazette of the Republic of Türkiye 11525, 8 October 1963; Official Gazette of the Republic of Türkiye 20251, 13 August 1989; Official Gazette of the Republic of Türkiye 20276, 8 September 1989; Official Gazette of the Republic of Türkiye 20306, 8 October 1989; Official Gazette of the Republic of Türkiye 20304, 6 October 1989; Official Gazette of the Republic of Türkiye 20782, 10 February 1991; Official Gazette of the Republic of Türkiye 21240, 27 May 1992; Official Gazette of the Republic of Türkiye 22631, 9 May 1996; Official Gazette of the Republic of Türkiye 21467, 16 January 1993; Official Gazette of the Republic of Türkiye 23187, 1 December 1997; Official Gazette of the Republic of Türkiye 25390, 2 March 2004; Official Gazette of the Republic of Türkiye 23451, 2 September 1998). In this respect, investors from the aforementioned countries are granted extensive protection in Türkiye. On the other hand, as a host state, Türkiye cannot benefit from the general and obligation-specific exceptions or exemptions, as such provisions are not common in these old-generation BITs (Şit Köşgeroğlu, 2013: 156). Surprisingly, the small number of states with which Türkiye has rewritten and updated its BITs after 2010 are mostly the countries in which Turkish investors invest. Some of these countries are; Bangladesh, Belarus, Georgia, Kyrgyzstan, Moldova, Nigeria, Uzbekistan, Pakistan, Sudan, Tunisia, and Ukraine ("Türkiye's List of Bilateral Investment Treaties", 2022). In summary, the strategy to update the investment treaties with countries to which Türkiye primarily exports investments, rather than attracting investments, has protected the regulatory powers of the host countries where Turkish investors invest, rather than maximising the protection of Turkish investors investing abroad. We believe that in the near future, Türkiye will gradually update its BIT stock, including those investment treaties under which Türkiye primarily attracts investors and thus acts as a host state. We estimate that this strategic imbalance will gradually diminish over time as a result of Türkiye's efforts to modernise its BIT network.

## 4. CONCLUSION

The international protection of foreign investment has undergone a period of treatification since the 1960s. The signing of bilateral investment treaties gained momentum in the 1990s. Our study revealed that Türkiye's BITs programme is in line with the prevailing international trends. From the 1960s to the end of the 1990s, Türkiye acted more like developing economies and transition economies, thereby expanding its BIT network. During this period, Türkiye signed BITs first with developed economies and then with other developing and transition economies. We have observed that the Turkish BITs signed during this period are also in line with international trends, offering the highest level of protection to foreign investors while leaving little room for the host state's policy space.

In the 2010s, Türkiye began to dissociate itself from international tendencies. Indeed, the rate at which Türkiye signed new BITs did not decrease, even though the number of new investment treaties signed worldwide decreased significantly during these years. Moreover, in the 2010s, Türkiye did

not follow the trend of withdrawing from the international investment law regime by terminating investment treaties (which was prevalent among developing and transition economies), nor did it follow the trend of revising and replacing old-generation investment treaties with new-generation investment treaties (which was pioneered by developed economies).

This overall picture we have drawn of Türkiye's BIT network allows us to predict how Türkiye's future BIT practice is likely to be. We are of the opinion that Türkiye will continue to adopt an investor-friendly approach in the coming years, as it has in the past. In this regard, we expect Türkiye to sign BITs with the 79 states with which it does not yet have an investment treaty. We believe it will be preferable to prioritise states with which it has relatively intensive relations in terms of foreign investment flows, such as Ireland, Canada and the Turkish Republic of Northern Cyprus. We also believe that Türkiye's existing network of BITs will be updated in the coming years by replacing old-generation BITs with new ones. It should be borne in mind that it will give Türkiye, as a host state, greater regulatory authority to initiate this updating effort through BITs with states that are significant sources of investment flows to Türkiye.

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