

The Boğaziçi Law Review

ISSN: 3023-4611

Journal homepage: <https://dergipark.org.tr/tr/pub/blr>

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To cite this article: R. Gülmisal Akkale Çelebi, 'Legal Tools and Components for Attracting FDI, a Comparative Study: Türkiye and the United States' (2025) 3(1) The Boğaziçi Law Review 1.

Submission Date: 23 April 2025

Acceptance Date: 27 June 2025

Article Type: Research Article



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Published online: June 2025



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LEGAL TOOLS AND COMPONENTS FOR ATTRACTING FDI, A COMPARATIVE STUDY: TÜRKİYE AND THE UNITED STATES*

YASAL DÜZENLEMELERİN ULUSLARARASI DOĞRUDAN YATIRIMLARA ETKİSİNE İLİŞKİN BİR KARŞILAŞTIRMA: TÜRKİYE VE ABD ÖRNEĞİ

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ABSTRACT

This paper examines the differences and similarities between the Foreign Direct Investment (FDI) regulations of Türkiye and the United States (US) and their economic impacts by analyzing the evolution of their legal frameworks. The first section provides an overview of FDI and discusses both global and local trends. In the following sections, the FDI legislation and regulations in Türkiye and the US are analyzed comparatively. The final section reviews existing literature on the factors influencing FDI in both countries, highlighting how their legal frameworks may have affected FDI inflows. The study finds that in the US, FDI is influenced by fundamental principles protected by the Constitution. While through several amendments, Türkiye's FDI codes have evolved over the years, resulting in a somewhat more liberal legislative framework. The "national security" is a buzzword in the contemporary US FDI legal framework, which began in the 1970s, and FDI screening mechanism has been settled throughout the years with a deeper institutionalized structure. Türkiye stands with the come as you are policy, while the recent FDI screening wave in developed countries addresses international relations positions and critical sectors. Türkiye has made significant progress in attracting FDI by implementing legal regulations aimed at restoring investor confidence. In Türkiye's experience, the FDI liberalization came into force when stability, the market-friendly reform calendar, the EU harmonization process, positive expectations, and macroeconomic stability were evident and acted as an anchor of the legal system. In the US, in addition to the GDP size, growth, infrastructure, labor price and quality; technology spillover purposes also illustrate that industrialization, technology, and micro capacities make cross-cutting elements for FDI attraction. While a liberal legal framework is a necessary condition for attracting investment, it is not sufficient on its own. Beyond a certain point, structural factors become more influential.

Key words: FDI, legal tools, FDI regulations, law and economics, FDI in Türkiye

ÖZET

Bu makalede, Türkiye'nin ve Amerika Birleşik Devletleri'nin (ABD) Uluslararası Doğrudan Yatırım (UDY) düzenlemeleri arasındaki farklar, benzerlikler ve yasal çerçevelerin oluşum süreci, ekonomik etkileriyle birlikte incelemektedir. İlk bölümde UDY'ye genel bir bakış sunulmakta ve hem küresel hem de yerel eğilimler kısaca tartışılmakta, ardından Türkiye ve ABD'deki UDY mevzuatı ve düzenlemeleri karşılaştırmalı olarak ele alınmaktadır. Son bölümde ise her iki ülkede UDY'yi etkileyen belirleyici faktörlerle ilgili mevcut literatür gözden geçirilerek, yasal çerçevenin UDY akımlarına etkisi incelenmektedir. ABD'de UDY'nin Anayasa tarafından korunduğu ancak doğrudan UDY adıyla

* This article was supported by TÜBİTAK 2219 Post-Doc Research Fellowship.

hazırlanan bir kanun bulunmadığı, bunun yanında çeşitli kanunlarda UDY'nin farklı boyutları esas alınarak düzenleme getirildiği vurgulanmaktadır. Türkiye'deki UDY mevzuatının ise yıllar içinde değişikliklere uğrayarak daha liberal bir çerçeveye ulaştığı görülmektedir. "Ulusal güvenlik", kavramı, 1970'lerden itibaren ABD'de UDY'ye ilişkin yaklaşım açısından önem arz etmekte, UDY izleme mekanizması yıllar içinde kurumsallaşmış görünmektedir. Türkiye'de ise UDY için detaylı izleme veya bazı istisnalar dışında kısıtlamanın ABD kadar belirgin olmadığı bir yaklaşım benimsenmektedir. Türkiye, yatırımcı güvenini sağlamayı amaçlayan yasal düzenlemelerle UDY alanında önemli mesafe kaydetmiştir. Türkiye'deki UDY serbestleşmesinin ekonomik istikrar, piyasa dostu reform takvimi, AB uyum süreci, olumlu beklentiler ve makroekonomik istikrar sağlandığında bir ivme sağlayabildiği dikkat çekmektedir. ABD'de ise GSYH büyüklüğü, büyüme, altyapı, işgücü fiyatı ve kaliteye ek olarak; teknoloji transferi amaçları da sanayileşme, teknoloji ve mikro kapasitelerin UDY alanında ilgili sektörleri yatay kesen unsurlar teşkil etmektedir. Liberal bir yasal çerçeve, yatırım çekmek için gerekli bir koşul olsa da tek başına yeterli olmamakta, belirli bir eşikten sonra yapısal faktörlerin belirleyici olduğu görülmektedir.

Anahtar kelimeler: UDY, Türkiye'de UDY, hukuk ve ekonomi, uluslararası doğrudan yatırımların hukuki çerçevesi, hukuki araçlar

1. INTRODUCTION

Foreign Direct Investment (FDI), an inherent economic phenomenon of globalization, is quite famous in bureaucratic, academic, and political domains, and FDI determinant factor literature is quite vast because of its fame. In this article, FDI determinant literature will not be at the core of a conceptual investigation; rather, it will be a complementary information source to infer how FDI codes of Türkiye and the United States (US) differ or resemble each other and their role in FDI developments. The aim will be to explain the legal and economic effects to understand and help the legal evolution in Türkiye, where FDI policy still means a lot.

The first section will briefly explain the FDI concept, and then global and Turkish FDI inflow developments will be touched upon for groundwork. The following two consecutive sections will contain Turkish and the US FDI regulation frameworks, each discussed chronologically. Afterward, the FDI determinant factor literature in each country will be analyzed to seize the effect of the legal framework covering all the differentiating aspects before deductions.

2. FDI IN BRIEF

FDI is a transaction when a company establishes production facilities in countries other than its headquarters or acquires existing production facilities or businesses in that country

to expand its production beyond the borders of the country where it is established.¹ Another definition is also brought forward regarding the type of capital flows that distinguish FDI from portfolio (indirect) investments.² Accordingly, FDI is a cross-border investment transaction in which a firm resident in one country exercises control or significant influence over the management of a firm resident in another country.³ An FDI transaction must involve a firm's current economic activity, and this relationship should take place across borders. The control and managerial influence criterion are determined as %10 share ownership, and investments below this threshold are no longer deemed as FDI transactions and become portfolio investments.⁴

2.1. GLOBAL FDI FLOWS

Private-sector investment decisions are conceptualized in terms of risk and return. Accordingly, the expected return on investments must exceed the investment cost plus the risk premium for an investment transaction.⁵ Considering the FDI flows this way, making an overseas decision in a completely different climate becomes inherently more sensitive. Thus, FDI inflows are also prone to global or regional developments as they rely on domestic fundamental factors.

FDI flows have risen worldwide, especially in the second half of the 1990s and the 2000s, along with increasing globalization trends (Figure 1). United Nations Trade and Development (UNCTAD) derives an indicator called *the internationalization* of production, which measures the extent to how worldwide production has become internationalized by spre-

¹ Sebastian Mantilla Blanco, *Full Protection and Security in International Investment Law* (Springer 2019) 5 ff.; Rudolf Dolzer, Ursula Krierbaum and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2022) 5 ff.; Mustafa Alper Ener, *Uluslararası Yatırım Hukuku* (2nd Edn. Seçkin 2024) 7 ff.; Halil Seyidoğlu, *Uluslararası İktisat* (Güzem Can Yayınları 2007) 598; Pınar Baklacı and Esen Akıntürk, 'Foreign Direct Investment in Turkey: Legal Framework' (2008) 1(2) International Journal of Emerging and Transition Economics 17 ff.; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2021) 10 ff.; Bahadır Erdem 'Foreign Direct Investment Law' (2004) 36(53) Annales de la Faculte de Droit d'Istanbul 377 ff.; Deniz Arıkan, *Türkiye'de Doğrudan Yabancı Sermaye Yatırımları* (Arıkan Yayınları 2006) 10 ff.

² For detailed explanation of the term *investment*, see: Lale Ayhan İzmirli, 'Uluslararası Yatırım Hukukunda 'Yatırım' Kavramı' (2018) 8(2) Süleyman Demirel Üniversitesi Hukuk Fakültesi Dergisi 89 ff.; Olcay Işık, 'Uluslararası Hukukta Yatırım Kavramı: Antlaşmalar Temelinde Bir Değerlendirme' (2011) 7(28) Uluslararası Hukuk ve Politika 126; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2008) 1; Bilgin Tiryakioğlu, *Doğrudan Yatırımların Uluslararası Hukukta Korunması* (Dayınlarlı Hukuk Yayınları 2003) 2; Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar Publishing 2020) 50 ff.; Sezgin Açıkalin and Seyfettin Ünal, *Doğrudan Yatırımlar ve Portföy Yatırımları, Global ve Yerel Faktörlerin Türkiye Üzerindeki Göreceli Etkisi* (Ekin Yayınevi 2008) 5 ff.; Dennis Campbell, *International Protection of Foreign Investment Vol. II* (Yorkhill Law Publishing 2008) 590 ff.; Zeynep Çalışkan 'Türkiye'nin Taraf Olduğu İkili ve Çok Taraflı Anlaşmalarda Yatırım Kavramı' (2009) 29(2) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 85 ff.

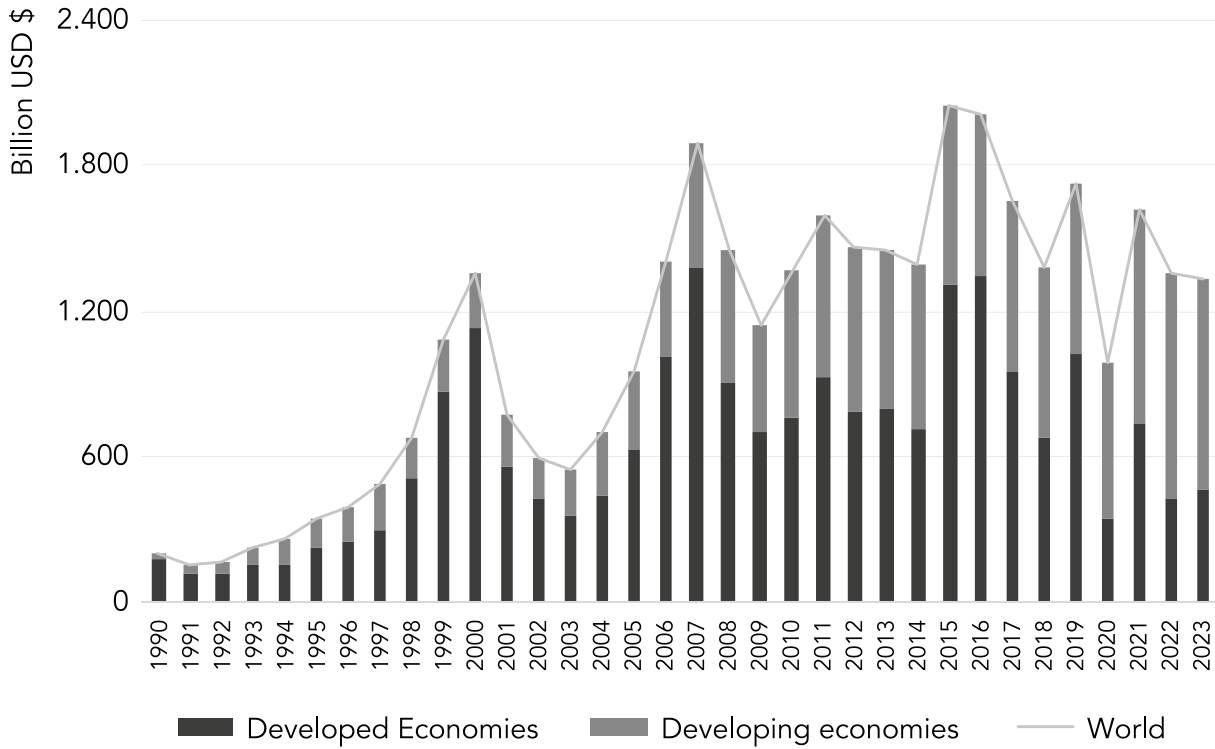
³ International Monetary Fund (IMF), *Balance of Payments and International Investment Position Manual* (6th Edition, IMF 2009) 100.

⁴ Central Bank of Republic of Türkiye (CBRT), 'Balance of Payments Statistics. The Data: Coverage, Periodicity and Timelines' (2024) 9.

⁵ Bruce Bolnick, 'Effectiveness and Economic Impact of Tax Incentives in the SADC Region' (2004) Prepared by Nathan Associates for USAID under the SADC-TIFI Project, 33.

ading to different countries through FDI based on sales, production, assets, exports, and employment data.⁶ Accordingly, internationalization of production has steadily increased over the last 15 years, with expanding production networks, including periods of crisis. For instance, the value added by foreign affiliates has increased 7-fold, and the total assets of foreign affiliates have increased 20-fold since 1990.

Figure.1 Global FDI Inflows



Source: UNCTAD 2024 World Investment Report⁷

2.2. FDI INFLOWS IN TÜRKİYE

The concept of FDI has been expressed as a target component in state policy documents and even development plans since the 2000s. For instance, while the 2001-2005 Development Plan did not mention the FDI term under the investment policies section⁸, the 2007-2013 Development Plan included the statement that “*FDI will be encouraged*” in the investment policies section.⁹ The liberalization of FDI inflows and the removal of domestic/foreign discrimination were enabled with the Foreign Direct Investment Code¹⁰ No. 4875, which will be detailed further in the next section.

⁶ United Nations Trade and Development (UNCTAD), ‘World Investment Report Investment Facilitation and Digital Government’ (2024) 35.

⁷ *ibid.*

⁸ State Planning Organization (SPO), *8th 5-Year Development Plan: 2001-2005* (Prime Ministry, 2000) 31-33.

⁹ SPO, *9th Development Plan: 2007-2013* (Prime Ministry 2007) 66.

¹⁰ Official Journal (OJ), 17.06.2003, No. 25141.

In the 1980s and 1990s, the FDI/GDP ratio in Türkiye was significantly lower than in the following years, averaging %0.5, and remained lower than in peer countries despite geo-political advantages, economic relations with the US and the European Union (EU), and liberalization of capital flows in 1989.¹¹

Figure.2 FDI Flows in Türkiye



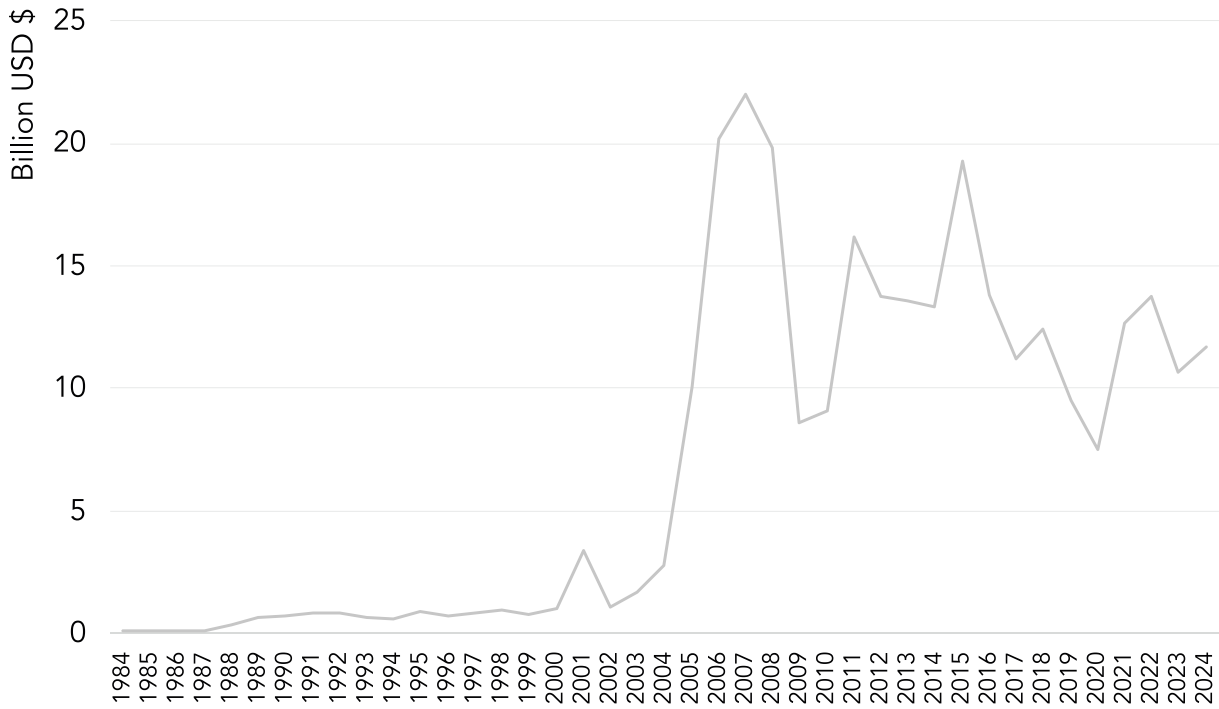
Source: Central Bank of the Republic of Türkiye (CBRT)¹²

Considering the trends at both global and local levels, since the mid-2000s, FDI inflows have increased sharply in Türkiye, in comparison to global developments in which the trend was relatively gradual, yet especially in recent years, FDI inflows in Türkiye have been on a downward trend, at least far from its buoyant period. The recent equity trend is worse when real estate acquisitions are excluded from FDI inflows (Figure.3).

¹¹ Miguel Eduardo Sanchez-Martin, Gonzalo Escribano Frances and Rafael de Arce Borda, 'How Regional Integration and Transnational Energy Networks Have Boosted FDI in Turkey (and may cease to do so): A Case Study: How Geo-political Alliances and Regional Networks Matter' (2014) World Bank Policy Research Working Paper 6970 11-12.

¹² Balance of Payment Statistics April 2025. <<https://tcmb.gov.tr/wps/wcm/connect/EN/TCMB+EN/Main+Menu/Statistics/Balance+of+Payments+and+Related+Statistics/Balance+of+Payments+Statistics/>> accessed 22.06.2025.

Figure.3 FDI Components in Türkiye

Source: CBRT¹³

Therefore, this study aims to contribute to the recent FDI insight in Türkiye to infer what could have been done under legal practices and/or what the legal framework's role is and what the US experience could tell about. In the course of the paper, the legal framework of FDI and determinant factors for each country are isolated and compared in terms of the roles of the legal frameworks.

3. FDI LEGISLATION IN TÜRKİYE

Under the arguments in İzmir Economy Congress took place in 1923 when prominent figures gathered to navigate an economic perspective for the Republic of Türkiye, Atatürk, the founder president, said *"When we think and speak in the field of economics, gentlemen, we should not think that we are against foreign capital. No, our country is very prosperous, and we need capital. Therefore, we are always ready to give the necessary guarantees to foreign capital, provided that our laws are respected. Moreover, we desire foreign capital to contribute to our industry and national wealth."*¹⁴ Nevertheless, the nationalization policy and the Great Depression in 1930, caused the foreign capital to be limited to a couple of joint stock company partnerships¹⁵ such as Konsolide Boraks, İstanbul Tramvay, Havagazı ve Elektrik.¹⁶ Yet, no

¹³ Balance of Payment Statistics April 2025. <<https://tcmb.gov.tr/wps/wcm/connect/EN/TCMB+EN/Main+Menu/Statistics/Balance+of+Payments+and+Related+Statistics/Balance+of+Payments+Statistics/>> accessed 19.06.2025.

¹⁴ Harun Bal and Devlet Göz, 'Doğrudan Yabancı Sermaye Yatırımları ve Türkiye' (2010) 19(2) Çukurova Üniversitesi Sosyal Bilimler Enstitüsü Dergisi 458.

¹⁵ Erdinç Tokgöz, *Türkiye'nin İktisadi Gelişme Tarihi 1914-2001* (İmaj Yayınevi 2001) 39-42.

¹⁶ Sefer Şener and Cüneyt Kılıç, 'Osmanlı'dan Günümüze Türkiye'de Yabancı Sermaye' (2008) 1 Bilgi Sosyal Bilimler Dergisi 28.

specific FDI regulation was issued until 1951, when the Turkish economic approach tended towards a more market-based sense.¹⁷

The first code regulating FDI transactions in Türkiye is the Foreign Capital Investment Incentive Code¹⁸ No. 5821, dated 01.08.1951, with the primary purpose of paving the way for mechanization in agriculture, which had suffered severely from a long-lasting Independence War. It is also unsurprising that this Code's enforcement coincides with the Marshall Plan.¹⁹ However, during the three years the Code was in force, only 42 applications were received, and only 10 were accepted, indicating that the law or the circumstances did not yield the expected results.²⁰

The Foreign Capital Investment Incentive Code²¹ No. 6224, which entered into force on 23.01.1954, repealed Code No. 5821, which was deemed to be liberal among its international peers and revealed efforts to establish a regime to attract FDI.²² Legal guarantees for FDI have been argued to be increased by this codification.²³ While the profit transfer was previously permitted only by %10 of the capital (Code No. 5821 Art. 3), it was abolished under the 1954 dated Code. The primary purpose of the law is to reflect a liberal and egalitarian approach. Although it has positively impacted FDI applications, almost half of the applications until the end of 1960 were rejected, and the FDI flows remained below the permitted level.²⁴

In the aftermath of World War II, seeking opportunities in machinery-equipment-intensive FDI in agriculture motivated policymakers to reduce the productivity gap with Western countries. In 1954, Code No. 6224 provided foreign investors with wider working opportunities. In 1951, the sectoral eligibility for foreign investors was limited; however, in 1954, any sector deemed beneficial to economic development became eligible for FDI transactions.²⁵

The FDI legislation framework is relatively stable in Türkiye that, with Code No. 6224 has been in force ever since until the Foreign Direct Investment Code²⁶ No. 4875 came into force in 2003, which is still in force and shaped the FDI regulatory framework and accom-

¹⁷ Before the enactment of Code No. 5821, the previous regulations, Code No. 1447, Code No. 1567, Code No. 5583, and Code No. 6326 contained provisions that could be related to foreign investments. However, the Foreign Capital Investment Incentive Code No. 5821 is the first code specifically regulating foreign investments by that name. For more see: Ener (n 1) 161 ff.; Rifat Erten, 'Yabancılar ve Uluslararası Koruma Kanunu Hakkında Genel Bir Değerlendirme' (2015) 19(1) Gazi Üniversitesi Hukuk Fakültesi Dergisi 3 ff.

¹⁸ OJ. 09.08.1951, No. 7880.

¹⁹ Barry Eichengreen and Marc Uzan, 'The Marshall Plan: Economic Effects and Implications for Eastern Europe and the Former USSR' (1992) 7(14) Economic Policy 37-38.

²⁰ Şafak Altun, *Türkiye'de Yabancı Sermayenin Tarihsel Gelişimi* (G.M. Matbaacılık 2008) 126.

²¹ OJ. 23.01.1954, No. 8615.

²² Bal and Göz (n 14) 458.

²³ *ibid* 134.

²⁴ *ibid* 135.

²⁵ Avni Zarakoğlu, 'Yabancı Sermayeyi Teşvik Kanunu' (1954) 11(1) Ankara Üniversitesi Hukuk Fakültesi Dergisi 594-600.

²⁶ OJ. 17.06.2003, No. 25141.

panied the most significant FDI leap in history. The legal scope introduced by Code No. 4875 can be briefly stated as follows:

Article 3, paragraph “a” of the Code: *“Freedom of investment and national treatment: Unless otherwise provided by international agreements and provisions of particular regulation;*

1- Foreign direct investment in Türkiye by foreign investors is free.

2- Foreign investors are subject to equal treatment with domestic investors.”

Thus, FDI has been liberalized, and the Turkish investment environment has been fully opened to foreign investors unless otherwise stipulated by another Code or international agreement.²⁷ According to Code No. 6224 Art. 8, foreign investors were required to obtain permission from the Undersecretariat of Treasury if they wanted to establish a company in Türkiye, to join an existing partnership, to change their share ratios, or to open a branch or a liaison office. In 2003, investment permits, capacity increase permits, merger and liquidation permits, permits for changes in the field of activity, capital increase and share transfer permits, and indirect participation permit obligations were abolished (Code No. 4875, Art.1).

Before 2003, foreign investors were only allowed to establish corporations; however, with the new Code, the establishment of all types of companies was permitted, and the requirement for non-residents to bring capital of a minimum of USD 50,000 to establish/partner in a company or open a branch in Türkiye was abolished²⁸. With Code No. 4875, the concept of foreign investor has been revised based on residency, and Turkish citizens residing abroad are accepted as foreign investors when investing in Türkiye (Art. 3).

In subparagraph “b” of Article 3 of Code No. 4875, it is stipulated that any foreign affiliated company shall not be expropriated unless the public interest requires it, and indemnification is paid. Although this provision seems new, as it was not included in the previous Code, the Constitution of the Republic of Türkiye²⁹ already frames the general expropriation principles. Countries and investors are also looking for alternatives to protect their investments and ensure that they do not expose themselves only to the domestic law of the country where they will operate. Therefore, countries are developing bilateral investment treaties with each other to reinforce the means of legal protection.³⁰

²⁷ See Selcen Nur Kışla, *Uluslararası Yatırım Andlaşmalarının Yorumlanması* (Adalet Yayınevi 2022).

²⁸ According to Code No. 6224 and the related Foreign Capital Framework Decree, each foreign investor who wants to establish a company, join a commercial partnership, open a branch or office in Türkiye must bring a minimum capital of USD 50,000 to Türkiye. Foreign Capital Framework Decree was decided by the Council of Ministers on 07.06.1995 upon the letter of the Ministry of State dated 06.06.1995, No. 23263.

²⁹ Expropriation titled Art. 46 of Constitution of Republic of Türkiye states: “(As amended on October 3, 2001; Act No. 4709) *The State and public corporations shall be entitled, where the public interest requires, to expropriate privately owned real estate wholly or in part and impose administrative servitude on it, in accordance with the principles and procedures prescribed by law, provided that the actual compensation is paid in advance.*” Constitution of Republic of Türkiye, official translation published by the Grand National Assembly of Türkiye. Department of Laws and Resolutions, May 2019 <https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf> accessed 10 April 2025.

³⁰ Rashimi Banga, ‘Impact of Government Policies and Investment Agreements on FDI Inflows’ (2003) 116 Working Paper 21-22.

The requirement in the abrogated Code that the established enterprise must be “*beneficial to the economic development of the country*” (Code No. 6224, Art. 1) has been abolished in the Code in force.³¹ The latest Code aims to remove obstacles and to reassure investors while upholding the definition of international standards.³²

FDI regulation in Türkiye is one of those that could be deemed relatively liberal. According to the FDI restrictiveness index prepared by the Organization for Economic Cooperation and Development (OECD), considering the parameters such as foreign capital restrictions, monitoring, pre-acceptance requirements, and qualification restrictions for foreign personnel, Türkiye’s restrictiveness index was measured as %5.9 more liberal than the OECD average, which is %6.3 in 2020 (latest). As an example, the restrictiveness index scores are %13.5 in Korea, %14.9 in Australia, and %16.1 in Canada, where FDI legislation was found to be more restrictive than the average, while %5.2 in Japan and Italy, %4.5 in France, %3.2 in Greece, %2.3 in Germany, %1.5 in the Netherlands and %0.4 in Luxembourg where the legislation is more liberal.³³

Foreign Direct Investment Code No. 4875 aims to broaden the concept of FDI and investors, provide assurances, clarify expropriation, arbitration and profit transfer, ensure equal treatment with domestic peers, and remove bureaucratic permitting processes.³⁴ The aim was to encourage FDI inflows, and instead of permits and approvals, only the obligation to provide informative notification was introduced (Art. 4). Thus, Code No. 6224, dated 1954, on the FDI is repealed, and FDI transactions have been liberated ever since.

There are arguments that the current FDI Code is against the principle of reciprocity, although Turkish foreign law does not systematically refer to it when it is not explicitly recognized. The political-economic administration preferred a liberal FDI approach in seeking competitiveness among developing countries.³⁵

In the international arena, two-thirds of FDI regulations prohibit discrimination between

³¹ Ensari Yücel, ‘Doğrudan Yabancı Yatırımlara İlişkin Türk Mevzuatının Değerlendirilmesi’ (2019) 18(71) Elektronik Sosyal Bilimler Dergisi 1473.

³² İrem Töre, ‘Geçmişten Günümüze Türkiye’de Yabancı Sermaye Mevzuatı’ (2015) 19(3-4) Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi 140-141.

³³ OECD, *FDI Restrictiveness Index*, data for 2020 <<https://www.oecd.org/en/data/indicators/fdi-restrictiveness.html?oecdcontrol-712178cb81-var3=2020>> accessed 10 April 2025.

³⁴ Cemile Demir Gökyayla and Ceyda Süral, ‘4875 Sayılı Doğrudan Yabancı Yatırımlar Kanunu Ve Getirdiği Yenilikler’ (2004) 6(2) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi 166.

³⁵ *ibid* 140.

domestic and foreign investors³⁶, and most of the codes that include the principle of national treatment are limited to “special regulations or international treaties” and to specific sectors.³⁷ In other words, these constraints are commonplace in other countries to a certain extent, which will also be mentioned in the US case.

4. FDI LAW IN THE US

There is no explicit constitutional provision authorizing the regulation of FDI in the US. One must, therefore, look at other federal powers set out in the constitution to justify such regulation.³⁸ The FDI legislation grounds hinge on the interpretation of the Supreme Court of the Fifth³⁹ and Fourteenth Amendments⁴⁰; such phrases grant every person the right to have property and prohibit confiscation of any kind without compensation or due process law. Specifically, the phrase in the Fourteenth Amendment of, “*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws*” is interpreted by the Supreme Court in favor of not only citizens but also the aliens in terms of equal protection.⁴¹ Because the phrase applies to *persons*, these provisions ensure that states cannot restrict the rights of foreign nationals within the US states.⁴² Bilateral investment treaties and trade agreements could also be deemed secondary laws that mostly include the term “*national treatment*,” which compels the US to provide no less favorable treatment than domestic

³⁶ Although foreign investors have equal rights with their domestic peers under the Law, there are certain limitations, such as foreign share limits, local partner requirements, or official authorization in some transactions relating to border, maritime and resource security, national security, financial stability, or some technical reasons. These restrictions are rather exceptional and common by the nature of sovereignty and listed as; foreign owners’ share in a company providing radio, television, or media services cannot exceed %50. A foreign media group or individual may be a shareholder in a maximum of two media companies. Foreign owners’ share in civil aviation and maritime transportation companies cannot exceed %49. Foreigners cannot obtain fishing licenses, while port services are carried out under concession agreements. Accounting and auditing firms are subject to authorization by the Ministry of Finance. The establishment of financial companies is subject to the special permission of the Banking Regulation and Supervision Agency. Foreigners can only carry out mining activities (with the exemption of boron, uranium, and thorium) in operational cooperation with another Turkish company. Foreign ownership of real estate in a town cannot exceed %10, and a foreigner can only own real estate corresponding to 30 hectares of land and foreign real or legal persons cannot open educational institutions unless all students are foreigners, and in the universities, the majority of administrators must be Turkish citizens. World Trade Organization (WTO), ‘Text of the World Trade Organization Trade Policy Review’ (2016) World Trade Organization Trade Policy Review - Report by the Secretariat 194-196.

³⁷ UNCTAD, ‘World Investment Report, Investment and the Digital Economy’ (2017) 108-109.

³⁸ Michael V. Seitzinger, ‘Foreign Investment in the United States: Major Federal Statutory Restrictions’ (2018) Congressional Research Service Library of Congress Report RL33103 3.

³⁹ Constitution of the United States-Fifth Amendment-: <<https://constitution.congress.gov/constitution/amendment-5/>> accessed 10 April 2025.

⁴⁰ Constitution of the United States-Fifth Amendment: <<https://constitution.congress.gov/constitution/amendment-14/>> accessed 12 April 2025.

⁴¹ Michael A. Almond and M. Goldstein Shelley, ‘Foreign Direct Investment in the United States: An Overview’ (1982) 7 NCJ Int’l L. & Com. Reg. 154.

⁴² Seitzinger (n 38) 5.

companies.⁴³ The US is currently a party to 48 Bilateral Investment Treaties⁴⁴.

FDI in the US involves several legal aspects governed by various statutes and regulations. According to United States Code Service (USCS) Title 22, Foreign Relations and Intercourse, Chapter 46A, Foreign Direct Investment and International Financial Data⁴⁵ (22 USCS §3146), FDI is defined as direct investment by foreign persons in any business enterprise that is a United States person.⁴⁶ This definition is further elaborated in USCS §3102, which specifies that direct investment means the ownership or control, directly or indirectly, by one person of 10 percent or more of the voting securities of an incorporated business enterprise or an equivalent interest in an unincorporated business enterprise.⁴⁷ The principal negotiating objectives of the US regarding FDI, as outlined in 19 USCS §2901, include reducing or eliminating artificial or trade-distorting barriers to FDI, expanding the principle of national treatment, and developing internationally agreed-upon rules, including dispute settlement procedures.⁴⁸ Similarly, 19 USCS Trade Negotiating Objectives⁴⁹ §4201 emphasizes the importance of ensuring that foreign investors are not accorded greater substantive rights than US investors and securing important rights for investors comparable to those available under US legal principles and practice.

Additionally, 19 USCS §2114a. negotiating objectives with respect to trade in services, foreign direct investment, and high technology products highlights the need to consider legitimate US domestic objectives, such as the protection of health, safety, essential security, environmental, consumer, or employment opportunity interests, when pursuing FDI objectives.⁵⁰ Regulations such as §810.10 Rules and Regulations for BE-12, Benchmark Survey of Foreign Direct Investment in the US⁵¹ and §801.7 Rules and Regulations for the BE-13⁵², survey of New Foreign Direct Investment in the US mandate periodic surveys

⁴³ Almond and Shelley (n 41) 155.

⁴⁴ United States Bilateral Investment Treaties <<https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties/>> accessed 21 June 2025.

⁴⁵ 22 USC Ch. 46a: Foreign Direct Investment and International Financial Data <<https://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter46A&edition=prelim>> accessed 23 June 2025.

⁴⁶ 22 USCS §3146 Definitions: “(1) the terms “foreign”, “direct investment”, “international investment”, “United States”, “business enterprise”, “foreign person”, and “United States person” have the meanings given those terms in section 3 of the International Investment and Trade in Services Survey Act (22 U.S.C. 3102); and (2) the term “foreign direct investment in the United States” means direct investment by foreign persons in any business enterprise that is a United States person.”. plus.lexis.com, accessed 22 June 2025. For the definition of “United States Person” see also: Stephen C. Carey, ‘Foreign Investment in United State Real Property-The Withholding Requirements’ (1985) 9 Suffolk Transnat’l LJ 27.

⁴⁷ 22 U.S.C. Foreign Relations and Intercourse Chapter 46 International Investment and Trade in Services Survey §3102. Definitions (10) <<https://uscode.house.gov/>> accessed 23 June 2025.

⁴⁸ 19 U.S.C. §2901 U.S. Code - Unannotated Title 19. Customs Duties §2901. Overall and principal trade negotiating objectives of the United States, <<https://www.govinfo.gov/content/pkg/USCODE-2023-title19/pdf/USCODE-2023-title19-chap17-sec2901.pdf>> accessed 23 June 2025.

⁴⁹ 19 U.S.C. 4201 Trade Negotiating Objectives §4201 (2) <<https://uscode.house.gov/>> accessed 23 June 2025.

⁵⁰ 19 U.S.C. §2114a- Negotiating objectives with respect to trade in services, foreign direct investment, and high technology products <<https://www.law.cornell.edu/uscode/text/19/2114a>> accessed 23 June 2025.

⁵¹ 15 CFR 801.10 <<https://www.ecfr.gov/current/title-15/section-801.10>> accessed 23 June 2025.

⁵² 15 CFR 801.7 <<https://www.ecfr.gov/current/title-15/section-801.7>> accessed 23 June 2025.

and reporting requirements for US business enterprises with significant foreign ownership, ensuring compliance and data collection for assessing the impact of FDI. These regulations require US affiliates of foreign parents to report their financial and operational details to the Bureau of Economic Analysis (BEA) to facilitate comprehensive monitoring and analysis of FDI trends and impacts.⁵³

FDI in the US is not a new phenomenon, as international investors have participated in the US economy since the early days of the Union.⁵⁴ For example, European funds helped build the Erie Canal and developed the American railroad system. Even after World War II, the US was deemed to be relatively free in terms of FDI.⁵⁵

Between World War II and the 1970s, the characteristics of the US policy approach in the FDI could be defined as openness. The re-emergence of European investors' interest in the US companies and the Japanese companies joining with them for the first time in FDI and, more importantly, the FDI appetite of some of the Organization of the Petroleum Exporting Countries (OPEC) stemming from petrodollar accumulation after the oil prices surge somewhat alarmed the American public and prompted reform in long-dormant regulations targeting FDI, culminating in the creation of Committee on Foreign Investment in the United States (CFIUS), with authority to examine the potential national security implications of any FDI transaction. As an example of the public reaction to the "*Japanese takeover*" in a 1988 poll, %73 of respondents believed that the Japanese were the largest investors in the US business, while only %3 believed that the British and %2 that the Germans were.⁵⁶ Another poll in 1988 indicates that %74 of Americans believed that FDI investment had receded their economic independence.⁵⁷

As a result, with the Exon-Florio amendment to the Omnibus Trade and Competitiveness Act of 1988⁵⁸, the federal government obtained an intervention right in foreign acquisitions based on "*national security*," and it was deemed as a milestone in the US FDI inflows for establishing a mechanism for the federal government to screen FDI the first time in the

⁵³ U.S. Department of Commerce Economics and Statistics Administration, A Guide to BEA's Direct Investment Surveys <<https://www.bea.gov/sites/default/files/2018-04/a-guide-to-bea-direct-investment-surveys.pdf>> accessed 23 June 2025.

⁵⁴ In 1980s, international investors do not require prior authorization in the US; generally, they are not subject to registration or approval for the investment at the federal level. There are also no restrictions on the transfer of capital, the remittance of profits, or the royalties in manufacturing activities. Adis M. Vila, 'Legal Aspects of Foreign Direct Investments in the United States' (1982) 16 Int'l L. 10.

⁵⁵ Almond and Shelley (n 41) 153.

⁵⁶ CS Elliot Kang, 'US Politics and Greater Regulation of Inward Foreign Direct Investment' (1997) 51(2) International Organization 317.

⁵⁷ Thomas Omestad, 'Selling off America' (1989) 76 Foreign Policy 119.

⁵⁸ 100-418 - Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418, 102 Stat. 1107, Aug. 23, 1988) (As Amended Through P.L. 115-254, Enacted October 05, 2018) <<https://www.govinfo.gov/content/pkg/COMPS-10232/pdf/COMPS-10232.pdf>> accessed 23 June 2025.

US.⁵⁹ In May 1986, even a tough reciprocity rule was proposed under the Foreign Investment Disclosure and Reciprocity Act under the Bryant Amendment. However, the White House rejected the proposal due to the probable deterring effect on FDI inflows.⁶⁰ The Exon-Florio Act differed from the Bryant Amendment in giving the President discretion to eliminate only undesired transactions instead of a blanket regulation targeting all.⁶¹ Though the Exon-Florio amendment did not substantially change liberal US FDI policy, it brought uncertainty for international investors with embedded vagueness and interpretability. The law allowed for discretionary requests for changes to investment conditions, creating an informal screening process with potential performance requirements.⁶² CFIUS is chaired by the Secretary of the Treasury, and its other members include the heads of the Departments of Justice, Homeland Security, Commerce, Defense, State, Energy, the Office of the US Trade Representative, and the Office of Science and Technology Policy. The Director of National Intelligence and the Secretary of Labor also serve as *ex officio* members.⁶³

However, the scope of CFIUS has not remained limited to sectors such as defense and telecommunications and has expanded towards sectors with minimal relevance to national security. Since 9/11, CFIUS has evolved into a broad, multi-sector surveillance course and allegedly raising concerns about investor uncertainty.⁶⁴ Another milestone in the legislative environment is the Foreign Investment and National Security Act⁶⁵ (FISIA), which was passed into law in 2007 and amends the Exon-Florio Act. FISIA provides for an investigation of whether a cross-border acquisition jeopardizes critical infrastructure, security of energy supply, or technologies vital to national defense on an institutional basis.⁶⁶ FISIA aimed to establish a broader scope and alleviate irregularities in the bureaucratic loopholes.

The CFIUS-based perspective on US FDI inflows sustained till then and somewhat broadened in 2018 with the changes made by the Foreign Investment Risk Review Modernization Act⁶⁷ (FIRRMA), which the US Congress passed by 400 votes against 2 in August 2018. FIRRMA expands CFIUS' jurisdiction in 4 areas: (1) the purchase, lease, or concession by a foreign person of real property near sensitive government facilities; (2) "other

⁵⁹ As discussed in analytical materials, the Exon-Florio Amendment authorizes the President to suspend or prohibit acquisitions, mergers, or takeovers by foreign persons that threaten to impair national security, with the Committee on Foreign Investment in the United States (CFIUS) overseeing these reviews. See also: Kang 302-303.

⁶⁰ *ibid* 323.

⁶¹ *ibid* 325.

⁶² *ibid* 326. See also: Ener (n 1) 317 ff.

⁶³ Jason Jacobs, 'Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European Union' (2019) 47(2) *International Journal of Legal Information* 108.

⁶⁴ Paul Connell and Tian Huang, 'An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States' (2014) 39 *Yale J. Int'l L.* 131-132.

⁶⁵ Public Law 110-49-July 26, 2007 <<https://www.congress.gov/110/plaws/publ49/PLAW-110publ49.pdf>> accessed 23 June 2025.

⁶⁶ UNCTAD, 'World Investment Report' (2008) 77.

⁶⁷ H.R. 5841 Foreign Investment Risk Review Modernization Act of 2018 115th Congress (2017-2018) <<https://www.congress.gov/bill/115th-congress/house-bill/5841/text>> accessed 23 June 2025.

investments” that provide a foreign person access to nonpublic technical information under a US business; (3) any change in the rights of a foreign investor that results in foreign control of a local business; (4) any change in foreign investors’ rights that result in foreign control of a local business or an “other investment” in certain US businesses; and any other transaction, transfer, agreement, or arrangement designed to circumvent CFIUS jurisdiction.⁶⁸ Thereby, the Act expands the coverage towards sensitive personal data and critical infrastructure and technologies⁶⁹ to address national security concerns⁷⁰ more effectively.⁷¹

In addition to allowing CFIUS to review non-mergers and acquisitions (M&A) deals and lowering the ownership threshold for reviewing all foreign acquisitions, FIRRMA gives the Department of Commerce more leeway in regulating technology transfers.⁷² Another development that can be interpreted in this context came up in 2021 when the US began requiring publicly traded companies to declare that they are not owned or controlled by a foreign government. US citizens are also banned from investing in Chinese firms that the administration considers to be associated with the Chinese military.⁷³ These restrictions obviously target sustainable national tech industry dominance against Chinese takeovers and hazardous information interaction contingency. Though it seems restrictive in its core presence, positive views also emphasize that a compelling national security⁷⁴ review mechanism can actually reduce overly protectionist pressures by building confidence.⁷⁵ In addition

⁶⁸ Jacobs (n 63) 113.

⁶⁹ UNCTAD, ‘World Investment Report, Special Economic Zones’ (2019) 97.

⁷⁰ “*In Ralls Corp. v. Comm. on Foreign Inv., the court held that it had jurisdiction to review the due process claims of a corporation owned by Chinese nationals, despite the statutory bar on reviewing the President’s determinations under the Defense Production Act, as the corporation was denied due process in the review process.*” *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296.

⁷¹ UNCTAD, ‘World Investment Report, Investment and New Industrial Policies’ (2018) 84.

⁷² Kelan Lu and Glen Biglaiser, ‘The Politics of Chinese Foreign Direct Investment in the USA’ (2020) 55(2) *Journal of Asian and African Studies* 267.

⁷³ UNCTAD, ‘World Investment Report, Investing in Sustainable Recovery’ (2023) 114.

⁷⁴ “...the D.C. Circuit Court of Appeals upheld the Act’s provisions targeting TikTok, ruling that they did not violate the First Amendment, Fifth Amendment, or constitute an unlawful bill of attainder. The court emphasized the government’s compelling interest in national security and the narrow tailoring of the Act’s measures.” *TikTok Inc. & ByteDance Ltd. v. Garland*, 2024 U.S. App. LEXIS 30916.

⁷⁵ Lucyna G. Kornecki, ‘Inward FDI in the United States and Its Policy Context’ (2013) *Columbia FDI Profiles* 7.

to the restrictions⁷⁶, any international investor engaging in business in the US must comply with the same regulations applied to local investors under the major regulatory laws in the areas of antitrust, securities, and labor, as many would expect.⁷⁷

It is no secret that governments increasingly use vague concepts such as “*national interests*” to regulate FDI, mainly focusing on sovereign wealth funds and state-owned enterprises.⁷⁸ UNCTAD compiles information on particularly screened investment projects during 2019-2022, and the number of screened projects is rising across developed countries, albeit with lower rejection rates. In the US, the trend is similar to other developed countries, where 1,420 transactions are evaluated. Only 5 projects (%0.4 of the total) were rejected, 52 projects (%3.7 of the total) were withdrawn during the evaluation period, and 232 projects (%8.2 of the total) were authorized with modifications or conditions. National security concerns are becoming more prevalent, and their effect is more obvious on deals amended or dissuaded. As the diversion effect predominates, many more may die in vain in the forthcoming years.⁷⁹

According to the OECD’s FDI Regulatory Restrictiveness Index, the US ranks (score is %8.9) above the OECD average (%6.3), which means a stricter regulatory environment than the OECD average. The sectors identified by the OECD as having the highest barriers are maritime and fisheries, which, by type of restriction, are predominantly in the category of equity restrictions.⁸⁰

FDI regulation in the US is liberal, and certain restrictions and national security review

⁷⁶ The US is considered to be encouraging FDI by the WTO, and there are long-standing requirements and restrictions on foreign ownership in various sectors, as outlined in Türkiye. As detailed below, these are mainly inherently highly regulated sectors, including transportation, natural resources, and investment/financial services. According to the regulation, the Ministry of Agriculture must be notified in case of foreign ownership of agricultural land. Foreign ownership of the US-registered vessels is restricted. Government cargo tonnages valued over USD 20 million will be carried by privately owned US-flagged vessels. US vessels must be owned and crewed by US citizens, with limited exceptions. Passenger and goods cabotage are limited to US-flagged vessels owned by US citizens and built in the US. Similar restrictions apply to fishing vessels for both catching and transportation. Cabotage in land transportation is limited to US people using buses and trucks registered in the US and manufactured or duty-paid in the US. The Department of Transportation requires authorization for cross-border bus or truck services. FDI in US-registered aircraft and engaging in domestic air services is restricted. US citizenship or being a US corporation are required to explore, lease or purchase land with mineral deposits such as oil and coal; similar restrictions apply for rights-of-way for oil or gas pipelines on federal lands. Licenses for the construction, operation, or maintenance of facilities for the transmission and use of energy on land and water are under the control of the federal government and are limited to US citizens and domestic companies. A license from the Nuclear Regulatory Commission is required for the production, manufacture, transfer, use, import, or export of nuclear and atomic energy, including medical treatment. Citizenship requirements apply to claim rights under the Desert Land Act and to obtain permission to graze on public lands. Foreign ownership and operation of mass media is restricted. Tighter regulations or restrictions apply to bank holding companies, such as citizenship requirements for national banks. There are limitations on foreign banking companies and branches of foreign banks. WTO, *Text of the World Trade Organization Trade Policy Review. World Trade Organization Trade Policy Review* (Report by the Secretariat 2023).

⁷⁷ Vila (n 54) 31.

⁷⁸ Karl P. Sauvart, ‘FDI Protectionism is on the Rise’ (2009) World Bank Policy Research Working Paper 5052 8.

⁷⁹ UNCTAD, ‘World Investment Report, Investment Facilitation and Digital Government’ (2024) 58.

⁸⁰ OECD, *FDI Restrictiveness Index* (2020).

screening apply.⁸¹ According to the FDI restrictiveness index prepared by the OECD, considering the parameters such as foreign capital restrictions, monitoring, pre-acceptance requirements, and qualification restrictions for foreign personnel, Türkiye's legal framework is even slightly more liberal than the US; however, the difference is highly minimal, and these are mainly stemmed from the sector-specific regulation approaches.

5. DETERMINANTS OF FDI IN TÜRKİYE

Liberalization efforts got steam after 1980 in Türkiye, where the liberalization of capital flows took place in 1989 before FDI flows were liberalized in 2003. Therefore, research in the FDI field emerged gradually after the 1990s, starting with foreign trade capabilities and the impact of the Customs Union. According to a survey⁸² of multinational companies in 1996, the executives see Türkiye as a base for accessing the markets of the EU, the Baltic States and the Turkic Republic, underlining foreign trade and economic cooperation opportunities. Loewendahl and Loewendahl⁸³ referred to a survey by the World Bank in 2000. They inferred that Türkiye's FDI attraction is below its potential due to political and economic instability, institutional weakness and high inflation. Other studies also underline non-compliance with international intellectual property rights protection standards in addition to inflation and economic instability.⁸⁴ A comparative analysis among new EU members and candidate countries inferred that GDP size is a driver, while external debt decelerates FDI.⁸⁵ The positive effect of GDP size is quite common⁸⁶, while others named market size⁸⁷ and GDP growth.⁸⁸ A causality analysis also revealed the positive effect of per capita GDP and exchange rate depreciation.⁸⁹ Some studies also imply a mutual relationship regarding the effect of GDP or GDP growth.⁹⁰ Net international reserves are also found to be a positive determinant.⁹¹ Another regression model infers that accountability and control of cor-

⁸¹ Ener (n 1) 318 ff.

⁸² Deniz Erden, *A Survey of Foreign Direct Investment Firms in Turkey* (Boğaziçi University Press 1996) 192.

⁸³ Henry Loewendahl and Ebru Ertugal-Loewendahl, 'Turkey's Performance in Attracting Foreign Direct Investment: Implications of EU Enlargement' (2004) Centre for European Policy Studies 27.

⁸⁴ Süleyman Tuluğ Ok, 'What Drives Foreign Direct Investment into Emerging Markets? Evidence from Turkey' (2004) 40(4) *Emerging Markets Finance and Trade* 112.

⁸⁵ Mehmet Başar and Şebnem Tosunoğlu, 'EU Integration Process: Will Turkey Overcome the FDI Obstacles?' (2006) 4(2) *Managing Global Transitions* 126-127.

⁸⁶ Sevda Yapraklı, 'Türkiye'de Doğrudan Yabancı Yatırımların Ekonomik Belirleyicileri Üzerine Ekonometrik Bir Analiz' (2006) 21(2) *DEÜ İİBF Dergisi* 39-40.

⁸⁷ Devrim Dumludağ, 'An Analysis of the Determinants of Foreign Direct Investment in Turkey: the Role of the Institutional Context' (2009) 1 *Journal of Business Economics and Management* 27.

⁸⁸ Mehmet Mucuk and Mustafa Tahir Demirel, 'Türkiye'de Doğrudan Yabancı Yatırımlar ve Ekonomik Performans' (2009) 21 *Selçuk Üniversitesi Sosyal Bilimler Enstitüsü Dergisi* 370-371.

⁸⁹ Hüseyin Özer and Taha Bahadır Saraç, 'Türkiye'de Doğrudan Yabancı Sermaye Girişlerini Belirleyen Faktörler: 1980-2006' (2008) 45(523) *Finans Politik & Ekonomik Yorumlar* 36.

⁹⁰ Ali Acaravcı and Fikret Bostan, 'Makroekonomik Değişkenlerin Doğrudan Yabancı Yatırımlar Üzerine Etkileri: Türkiye Ekonomisi İçin Ampirik Bir Çalışma' (2011) 8(2) *Çağ Üniversitesi Sosyal Bilimler Dergisi* 66-67.

⁹¹ Güner Koç Aytekin, 'Türkiye'de Uluslararası Doğrudan Yatırımların Belirleyicilerine Yönelik Bir Model Denemesi' (2011) 4(2) *Hitit Üniversitesi Sosyal Bilimler Enstitüsü Dergisi* 13.

ruption also have a positive impact.⁹²

Other empirical studies underline the presence of other preliminary international companies (agglomeration effect) and the EU accession prospects⁹³, the depth of domestic financial markets, the quality of human capital, and access to ports.⁹⁴ Agglomeration⁹⁵ and trade openness are also common.^{96, 97} Transportation, energy, technological infrastructure, competent and diverse human capital, and sectoral diversity are also emphasized.⁹⁸

In some studies, yet they represent rather a minority of investment incentives found to be effective in a positive way.⁹⁹ Some others found that the corporate tax rate does not have an explanatory power on FDI¹⁰⁰, contrary to common belief.

Erdilek¹⁰¹ breaks Türkiye's FDI underperformance reasons into economic and non-economic reasons. The author indicates economic reasons such as market entry costs, bureaucratic formalities, chronically high inflation, economic instability, failure to protect intellectual property rights, noncompliance with international accounting standards, poor privatization performance, and infrastructure problems, especially energy, as other studies indicate. Non-economic factors include regional tensions, political instability, lack of FDI promotion, and the negative perception of civil and military bureaucracy on the presence of foreigners in the economy, which is deemed to be caused by capitulations granted to foreigners during the Ottoman Empire period. Like most literature, the study also suggests enhanced international integration and EU accession. Negative foreign perception is particularly important for our study to illustrate the transformation of the Turkish approach over the years. Welcoming a new wave of players can always be complex to some extent for most cultures, but Türkiye is relatively new to an open arms policy compared to its peers in Europe and, indeed the US.

⁹² Bilal Özel, 'Doğrudan Yabancı Yatırımların Temel Belirleyicileri Üzerine Bir Analiz: Türkiye Örneği', (Published PhD Thesis, Selcuk University 2018) 118-125.

⁹³ Hakan Güngör and Ayla Oğus Binatlı, 'The Effect of European Accession Prospects on Foreign Direct Investment Flows' (2010) 10(6) Working Papers in Economics 24-25.

⁹⁴ Joel Deichmann, Socrates Karidis and Selin Sayek, 'Foreign Direct Investment in Turkey: Regional Determinants' (2003) 35(16) Applied Economics 1776-1777.

⁹⁵ Fatma Turan Koyuncu, 'Türkiye'de Seçilmiş Makroekonomik Değişkenlerin Doğrudan Yabancı Sermaye Yatırımları Üzerindeki Etkisinin Yapısal Var Analizi: 1990-2009 Dönemi' (2007) 2(1) Ekonomi Bilimleri Dergisi 60.

⁹⁶ Kadir Karagöz, 'Türkiye'de Doğrudan Yabancı Yatırım Girişlerini Belirleyen Faktörler: 1970-2005' (2007) 2(8) Yaşar Üniversitesi E-Dergisi 946.

⁹⁷ Selin Sayek, 'FDI in Turkey: The Investment Climate and EU Effects' (2007) 1(2) The Journal of International Trade and Diplomacy 131.

⁹⁸ Hasan Bülent Kantarcı and Ali Sanlıtürk, 'Compliance in the Process of European Union of Foreign Direct Investment Effects of Turkish Economy.' (2016) 11(1) Global Conference on Business & Finance Proceedings Institute for Business & Finance Research 232.

⁹⁹ Cem Payaslıoğlu and Burak Polat, 'Determinants of Foreign Direct Investment to Turkey: A Sectoral Approach' (2015) 17(2) Journal of WEI Business and Economics 72.

¹⁰⁰ Metehan Yılğör, Alpaslan Serel and Mehmet Emin Erçakar, 'Doğrudan Yabancı Yatırımların Gelişini Etkileyen Faktörler: Türkiye Üzerine Bir Model' (2011) 14(26) Balıkesir Üniversitesi Sosyal Bilimler Enstitüsü Dergisi 129.

¹⁰¹ Asım Erdilek, 'A Comparative Analysis of Inward and Outward FDI in Turkey' (2003) 12(3) Transnational Corporations 80-83.

Microeconomic reform underperformance and lack of consistent institutional capacity are also underlined through a couple of real-time examples¹⁰² from mining, mobile phone, and sugar merchandise sectors where the rule of law in the business environment was found to be lacking; legal framework may fall short of providing protection and predictability as well as independent organizations could act against the executive body due to unclear framework. Failure of regulations and legislation to catch up with operational requirements can lead to problems in business practice. For this reason, the regulatory authority must be strong; the legislation must be clear.

The literature on the determinants of FDI in Türkiye is centered around structural economic factors. The prominent factors are political and macroeconomic stability, reform capability related to international/regional integration (especially the EU accession), foreign trade opportunities, market size, economic growth, FDI legislation, and reform dedication.

6. FDI DETERMINANTS IN THE US

The literature on determinant factors has matured since the US is a long-lasting top destination for FDI inflows. Unlike other countries, US-based studies have investigated intra-state differences in FDI attraction factors where the fundamental aspects and components are accepted to be roughly the same, such as political and economic stability, inflation, exchange rate, overall policy approach, and infrastructure.

A historical comparison provides interesting insights into the motivation and profile of the FDI in the US. Many of the FDI before World War I in the US were called as “*free-standing*” businesses as they were owned by foreigners rather than foreign firms.¹⁰³ Such businesses were probably much more likely to become domesticated over time, as their primary driver factor is the owners’ migration.¹⁰⁴ Undoubtedly, considering an investment location as a complementary factor for an international business operation, motives are extremely different from local purposes. As an investment site option on the world map, the legal framework and predictability become much more important for a company with sustainable production and market penetration aspirations.

A working paper underlines that the research and development (R&D) potential measured with actual expenditure on R&D in the US is a significant driver of Eurozone outward FDI in the US and the relationship could be mutual as other studies imply that R&D in Europe is also an important determinant factor of FDI from the US and Japan to Europe continent.¹⁰⁵ The technology frontier seems to make a difference among developed count-

¹⁰² Mark Dutz, Melek Us and Kamil Yılmaz, ‘Turkey’s Foreign Direct Investment Challenges: Competition, the Rule of Law, and EU Accession’ (2005) *Turkey: Economic Reform and Accession to the European Union* 269-274.

¹⁰³ Robert E. Lipsey, ‘Foreign Direct Investment in the United States: Changes Over Three Decades’ in Kenneth A. Froot (ed.) *Foreign Direct Investment* (University of Chicago Press, 1993) 114.

¹⁰⁴ *ibid.*

¹⁰⁵ Roberto A. De Santis, Robert Anderton and Alexander Hijzen, ‘On the Determinants of Euro Area FDI to the United States: the Knowledge-capital-Tobin’s Q Framework’ (2004) Available at SSRN 526992, 22, 26, 29.

ries.¹⁰⁶ Tobin Q value¹⁰⁷ was also effective in the US as intuitively expected.¹⁰⁸ The direction of the relationship of the real exchange rate is found to be significantly negative in the study, as the US dollar appreciates, Eurozone FDI is more encouraged to invest in the US and the authors infer that the increase of the real value of profits is the underlying reason. However, this is quite the opposite of the several studies in the domain^{109, 110} which argue that depreciation enhances FDI flows from the Eurozone to the US through more affordable share acquisition values. The discrimination could probably originate from the type of FDI that cheaper shares could entail new mergers or acquisitions, while the overvalued US dollar might spark capital expansion to enlarge market dominance or revenue volume to get more profit. Or the relative valuation between the US dollar and the Euro is rather small, and the effect may not be as sound as the data implies.

The estimates run by UNCTAD from 1999 to 2007 indicate that FDI inflows in the US are negatively correlated to the dollar's value, reflecting the wealth-effect argument.¹¹¹

Another regression model found that the stock market level (S&P returns) and volatility (VIX) are the only significantly effective variables, among others, on the location choice of multinational enterprises' (MNEs) production facilities in the US, underscoring stock market reflections.¹¹²

Relative increases in real economic growth in the US and sector-specific growth seem to have some positive impact on international companies' investment in the US, while tariff elimination may not be as evident as it is thought to be,¹¹³ apart from the Turkish FDI literature.

A survey analysis¹¹⁴ based on the company owner respondents from Japan, Canada, and Western Europe recognizes the impact of the market size and cites that non-American firms engage in FDI to acquire US technology and know-how. As a side comment, the authors indicate that companies opt to preserve markets established by exporting.¹¹⁵ This explanation tended to compare the sum of the marginal production cost of exports and transporta-

¹⁰⁶ *ibid.*

¹⁰⁷ Tobin's Q basically, is an economic ratio used to compare a company or index's market value to its book or replacement value. For more see: Robert Bartlett and Frank Partnoy, 'The Misuse of Tobin's Q,' (2020) 73 *Vand. L. Rev.* 353.

¹⁰⁸ Santis et al (n 105) 26.

¹⁰⁹ Michael W. Klein and Eric Rosengren, 'The Real Exchange Rate and Foreign Direct Investment in the United States' (1994) 36 *Journal of International Economics* 385.

¹¹⁰ Bruce A. Blonigen, 'Firm-Specific Assets and the Link Between Exchange Rates and Foreign Direct Investment' (1997) 87 *American Economic Review* 460.

¹¹¹ UNCTAD, 'World Investment Report, Transnational Corporations, and the Infrastructure Challenge', (2008) 21.

¹¹² Burhan F. Yavas and Rama K. Malladi, 'Foreign Direct Investment and Financial Markets Influences: Results from the United States' (2020) 53(101182) *The North American Journal of Economics and Finance* 8.

¹¹³ Edward John Ray, 'The Determinants of Foreign Direct Investment in the United States, 1979-85' in Robert C. Feenstra (ed.) *Trade Policies for International Competitiveness*, (University of Chicago Press 1989) 70.

¹¹⁴ Riad A. Ajami and David A. Ricks, 'Motives of Non-American Firms Investing in the United States' (1981) 12 *Journal of International Business Studies* 32.

¹¹⁵ *ibid.*

tion with the production in the US land, particularly citing the Japanese car manufacturers' auto parts production investments. This could be related to the vibrant car market in the US and companies' desire to respond to demand for spare parts.¹¹⁶ Other empirical evidence from developed countries, including the US, has also shown that FDI and home-country exports are complementary rather than substitutive. There is a positive relationship between the two, implying that FDI also subserves the export capacity of investors in the US.¹¹⁷

A survey¹¹⁸ of 101 senior company executives focused on researching sequential location choices of investors in the US and factors were sorted by priority as follows: (1) availability of competent labor force, (2) transportation facilities, (3) income tax rate, (4) regulatory legislation on investment, (5) property tax, (6) proximity to major highways and ports, (7) proximity to major airports, (8) cost of government services, (9) construction cost, (10) airport availability. The results emphasize the importance of the labor force and logistics while investors are still paying significant attention to the regulatory framework that they probably encounter at the state level.

An intra-state econometric study¹¹⁹ analyzes the period between 1997 and 2007. It states that real education expenditure per capita of states, R&D expenditure, and capital expenditure are the variables found to have statistically significant effects on FDI inflows. There are other studies¹²⁰ that underline the role of labor productivity and relative education expenditure in addition to the relative crime rate in intra-state site selection. Relative tax incentives became evident when the state contest came down to two states. These are also supporting pieces of evidence that the financial aspects matter when fundamentals are in place. Another regression study¹²¹ on intra-state locational determinants emphasizes energy costs, infrastructure, transportation, and labor capabilities.

A sound attraction component is deemed to be the long-lasting liberal market approach of the US as a flagbearer of market economics so that investors shall not worry about expropriation or capital flow restrictions. A US Government Accounting Office survey revealed that 35 of 50 states strongly encouraged FDI and have particular budget funds for such incentives, while 45 states declared other promotion types.¹²² A survey¹²³ by the UNCTAD revealed that the US remains an attractive investment site, according to the major multina-

¹¹⁶ Alenka S. Giese, William J. Kahley and Roger F. Riefler, 'Foreign Direct Investment: Motivating Factors and Economic Impact' (1990) 20(1) *Journal of Regional Analysis and Policy* 108-110.

¹¹⁷ UNCTAD, 'World Investment Report, FDI from Developing and Transition Economies: Implications for Development' (2006) 181.

¹¹⁸ Fahri Karakaya and Cem Canel, 'Underlying Dimensions of Business Location Decisions' (1998) 98(7) *Industrial Management & Data Systems* 329.

¹¹⁹ Lucyna Kornecki and E.M. Ekanayake, 'State-based Determinants of Inward FDI Flow in the US Economy' (2012) 3(3) *Modern Economy* 307.

¹²⁰ Kostas Axaroglou, 'What Attracts Foreign Direct Investment Inflows in the United States' (2005) 19(3) *The International Trade Journal* 285-308.

¹²¹ Norman J. Glickman and Douglas P. Woodward, 'The Location of Foreign Direct Investment in the United States: Patterns and Determinants' (1988) 11(2) *International Regional Science Review* 149.

¹²² Giese et al (n 116) 113.

¹²³ UNCTAD, 'World Investment Report. Transnational Corporations and Export Competitiveness' (2002) 39-40.

tional investors and the leader in the investment potential index in 2002.

An intra-state FDI motives analysis mainly run for Chinese FDI in the US indicates that political partisanship affects FDI location. Chinese firms tend to invest in states governed by the Republican Party, and authors argue that promoting a lower-cost business agenda plays a role. Authors find a negative correlation with the technology level of the states due to national security-driven restrictions on tech-based investments.¹²⁴

As a side factor resulting from the fact that the US is the origin of large multinational companies operating worldwide and of those that also invest in the US, debt and other types of intra-company flows also cast effect on investment trends as observed since the beginning of the 2000s, when international subsidiaries in the US have paid a large amount of intercompany debt as they reimbursing the debt they had accumulated during the M&A boom of 1998-2001, non-equity flows dominated the short term trends.¹²⁵ Similarly, in the last decade or two, tax inversion deals have greatly affected FDI inflows to the US. While tax inversion deals continue, the third wave of rules against tax inversion introduced by the US Treasury Department in April 2016 is expected to reduce the volume of such transactions.¹²⁶

From the perspective of the developing countries' outward FDI motivation, organizational learning often plays a role as Korean MNEs actively invested in the US in the 1990s and successfully leveraged technological resources in the country through minority stakes in joint ventures, which enables reverse technology spillovers.¹²⁷ It can also positively impact management practices and the skill composition of employment in the home country.¹²⁸

Considering the recent digitalization wave around the globe, tech-focused FDI could hover around the US for a while longer since, most digital MNEs are based mainly in the US (almost two-thirds of the total) and their attitude of keeping most of their tangible assets at home, significantly skews the distribution of geographical sub-affiliates in which %40 of subsidiaries of digital MNEs are based in the US, almost double the proportion of MNEs in other sectors.¹²⁹ However, the volume of the informatics sector investment deals can be lower than the traditional sectors¹³⁰ as they do not require mass equipment transfer or buy-out, named after *asset-lightness* by the UNCTAD¹³¹ as it deflates worldwide FDI volume. In this vein, another study found the market-seeking motive to be weak while the efficiency-seeking impetus is more decisive in knowledge-intensive industries, as expected.¹³²

¹²⁴ Lu and Biglaiser (n 72) 267.

¹²⁵ UNCTAD, 'World Investment Report, The Shift Towards Services' (2004) 80.

¹²⁶ UNCTAD, 'World Investment Report, Investment and the Digital Economy' (2017) 76.

¹²⁷ UNCTAD, World Investment Report (2006) 173.

¹²⁸ *ibid* 177.

¹²⁹ UNCTAD, 'World Investment Report, Investment and the Digital Economy' (2017) 174.

¹³⁰ UNCTAD, 'World Investment Report Investment facilitation and digital government' (2024) 76.

¹³¹ UNCTAD, 'World Investment Report International Production Beyond the Pandemic' (2020) 126.

¹³² Lilach Nachum and Zaheer Srilata, 'The Persistence of Distance? The Impact of Technology on MNE Motivations for Foreign Investment' (2005) 26(8) Strategic Management Journal 759-761.

Another study that focuses on locational determinants within the breakdown of the size of the investment indicates that smaller knowledge-intensive investments prefer urbanized states as expected, while in rural states, large deals in traditional sectors could be more attractive. Furthermore, investments from a home country can build up investments in the same states and surrounding states, implying an enhanced agglomeration effect. The geographical proximity of the home country, the GDP of the host state, lower wages, and workers not being unionized positively impact FDI.¹³³

7. CONCLUSION

The US implements FDI liberty in its foundation principles as the Constitutional interpretation already permits it, while FDI legislation in Türkiye was liberated step by step throughout the years with a couple of amendments. Both legal systems are liberal, although the Turkish FDI framework is a bit more liberal; FDI liberation matters when the actual liberation message is conveyed to the investors authentically; thereby, legal liberty is rather a necessary condition than a sufficient condition. After a threshold, structural factors dominate and underpin the effect of the legal framework.

Sector-specific restrictions are in effect in both Türkiye and the US, and the regulated sectors are alike. This seems to be the natural outcome of the long-standing political sovereignty perspectives.

Considering the legal developments on FDI in Türkiye, fundamental economic and political reasons have seemed dominant, while the significant FDI leap took place right after FDI liberalization. In Türkiye's experience, the effect of FDI liberalization came into effect when factors such as stability, the market-friendly reform calendar, the EU harmonization process, positive expectations, and macroeconomic stability became evident and acted as an anchor of the legal system. From the legal perspective, what matters most is not the degree of liberalization itself. However, governance is an important determinant of FDI, mainly characterized by policies promoting competition, transparent legal and regulatory regimes, and efficient and predictable public services. While market friendly liberal investment environment is still a strong determinant.

The buzzword in the contemporary US FDI legal framework is "*national security*," which began in the 1970s, and FDI screening has been settled throughout the years with a deeper institutionalized structure. However, the number of rejected deals is utterly minimal, though withdrawn, altered, and other unheard cancelled transactions are still notable. Türkiye stands with the *come as you are* policy, while the recent FDI screening wave in developed countries addresses international relations positions and critical sectors.

In the US, in addition to the regular determinants such as GDP size, growth, infrastructure, share prices, profitability, labor price, and quality, technology spillover purposes also illustrate that industrialization, technology, and micro capacities are cross-cutting elements for FDI attraction.

¹³³ Thomas Halvorsen, 'Size, Location and Agglomeration of Inward Foreign Direct Investment (FDI) in the United States' (2012) 46(5) *Regional Studies* 679-680.

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