

TURKISH LEGAL SYSTEM OF FOREIGN INVESTMENTS (*)

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I. INTRODUCTION :

Foreign investment is an old historical fact. When Phoenicians from Tyre settled at Memphis in Egypt possibly in the reign of Proteus (1294-1244 B.C.) and in the Sixth Century B.C. when Egyptian King Amasis (596-526 B.C.) allowed Greek merchants to establish themselves at Naucratis, these foreigners were in fact mostly investing their wealth that they were able to conserve after consumption.

However the first forms of foreign investments were not all always in peaceful way, but rather they were imposed by force. Individual campaign of wars and systematic colonizations are examples of use of foreign or international investment in form of armed might. This nature of international investment which military in the beginning began to change and became more economic¹.

(*) This report was presented as a national report to the Section II. B. Conflict of Laws . The legal regimes relating to investment of Foreign Capital of the VII th International Congress of Comparative Law held in Uppsala 6-13 August, 1966.

1) R. Y. Jennings, Foreign Investment and Foreign Aid, A Brief History and Description of the Present Situation, Paper presented to Colloque en Foreign Investment of the Institute of International Law and International Affairs of Istanbul University, April 1964.

It is true that in modern times foreign investment meant mostly exploitation, a very instaisfactory condition for the capital importing country.

The Industrial Revolution is seen as the beginning era of modern international investment, when capital investment by more advanced countries in less advanced countries gained momentum.

Inventive genius and private capital are cited as the causes of the great industrial development which is accompanied by the rising standards of living for ordinary man and which happened in the second half of the last century². This private capital investment was first within the national borders later "as more wealth was generated, so outlets for further investment were sought overseas"³.

Turkey has been considered by the merchant adventurers a land worthy of risking their capital in order to make huge benefits. Turkish economy was in full strength, Turkey was at the peak of its power and might in the beginning of the Seventeenth Century. Turkey had began to grant Capitulations in the Fifteenth Century but the real important ones were granted in the Sixteenth Century and later on. These Capitulations were grants of friendship and amity. There is no precedent in the history of the Ottoman Empire in the Sixteenth, Seventeenth or Eighteenth Centuries, that a Capitulation was granted as the result of war⁴. Later on the Turkish Capitulations turned to be a real *minutio majestatis* of the Turkish Empire. Eventhough it was possible "to regard this privileged status of foreigners, not as a bitter humiliation for the Turk but rather as very much to his credit." accepting these immunities "as an evidence of a more enlightened and a more liberal interpretation of the law of the nations than had been granted in Europe"⁵ the Capitulations legalized the permanent application of the national laws of foreigners.

2) Lord Shawcross, "The Problems of Foreign Investment in International Law", *Recueil des Cours*, 1961, 1, v. 102, p. 340.

3) *Ibid.* s. 341.

4) Yılmaz Altuğ, *Turkey and Some Problems of International Law*, Istanbul, 1958, p. 31.

5) Philip Marshal Brown, *Foreigners in Turkey*, Princeton, Princeton University Press, 1914, p. 4.

This fact explains the refusal of Turkish Government to accept foreign investments and nationalizations of many foreign enterprises in the era just after the proclamation of Turkish Republic. In fact no foreign investments was possible after 1926 until 1950 when on March 4 the law no : 5583 was enacted by Turkish Parliament permitting and guaranteeing investments of foreign capital.

A Survey shows that in 1923-1924 amount of foreign capital was about 250 million Turkish liras. Of 87 foreign companies British and French ones were 23 in number for each nationality British with an approximate capital of 96 million Turkish liras and French with an approximate capital of 27 million Turkish liras. There were 11 Italian, 8 German and 7 American companies with the respective approximate capital of 20 million, 62 million and 38 million Turkish liras. 15 other foreign companies with the non determined nationalities in the survey had all together 12 million Turkish liras invested. So these 87 foreign companies had invested an amount of 225 million Turkish liras in 1924⁶. These 255 million Turkish liras's equivalent value is estimated to be about 5 billion Turkish liras of to day.

II. EVOLUTION OF THE PRESENT LEGAL SYSTEM :

The above mentioned law no : 5583 was guaranteeing investments of foreign capitals by Turkish Treasury. This law was found insufficient. So a new law was enacted on August 1, 1951. This is the first law in Turkey which is openly entitled Law for the Encouragement of Foreign Capital. This law no : 5821 was permitting the import of foreign capital on condition that the business in which the investment will be made was usefull for the economic development of Turkey and was used in a field of activity open to Turkish private enterprise and did not entail any monopoly or any special concession. The law no : 5821, also defined the fields where the investments were expected. These were industry, energy, mines, public works, transport and communications and tourism.

6) Rasim Cenani, Foreign Capital Investments in Turkey, Revised Ed. 1958, p. 9.

The following items were permitted to be imported from abroad for the efficient establishment or expansion of an enterprise :

- 1 — Capital in the form of foreign currency,
- 2 — Machinery, equipment, tools and similar articles, machinery components, spare parts and materials and other necessary commodities to be approved,
- 3 — Services and rights over immaterial property such as patent rights, licences and trade marks.

The law was guaranteeing that remittances abroad were unrestricted in respect to :

1 — any annual profits, interest, and dividends, not exceeding 10 per cent as vouched by such returns as are relied upon in the assesment of income and companies, taxes,

2 — all or part, in the kind and quantity or foreign exchange in which it was initially imported up to a sum not exceeding the new assets shown by the winding up balance sheet of any capital imported under the provisions of this law, within such period as may be prescribed by the Council of Ministers in their decision provided for in the last paragraph of Article 1, which period shall not be less than three years in the case of capital imported in money and not less than five years in the case of capital imported either in kind, or in the form of choses in action, as from the date of incoming of such capital.

Whenever the aggregate amount of any annual profits, interest, and dividends exceeds 10 percent of the capital the fraction in excess may be remitted abroad during any subsequent year when the yield is below 10 per cent by raising to 10 per cent the rate of allowed transfer. Any returns over and above such rate may be remitted together, with, and subject to the same provisions as are applicable to the principal, or alternate they may be paid into Cental Bank of Turkish Republic on behalf of the creditor, in accordance with the provisions of the decrees issued under the Law for Safeguarding the Value of Turkish Currency, for eventual remittance abroad by the exportation of certain specified commodities.

Upon any application filed for the remittance abroad of any capital due for transfer and or of any balance of profits subject

to transfer together with such capital the Ministry of Finance shall issue the requisite permit forthwith in respect to one third and within six months at the latest for the remainder of the amount involved.

Two years later when the Industrial Development Bank of Turkey set up a study group to find out the positive and negative points in the application of the above mentioned law no : 5821 there was a complaint that 10 per cent limit on the transferable profits was too low. This point was taken into consideration in the enactment of the Law no : 6224 of January 18, 1954 and this limit was not re-imposed in the new law.

The law no : 5821 was establishing in its Article 7 for the first time in Turkey a Committee presided over by the General Manager of the Central Bank of Turkey and including the Director General of the Treasury, the Director General of Home Trade, Ministry of Economy and Commerce; the Chairman of the Industrial Operations Division, Ministry of State Industrial Operations and the Director of General Office of Statistics.

This Committee was invested with power to determine whether any foreign capital proposed to be imported does satisfy or not the conditions and requirements set forth by this Law.

The decision of the Committee was not final, it could be appealed against within 30 days as from the date of notification thereof to any parties concerned. These appeals are decided by a board including the Ministers of Finance, of Economy and Commerce and State Industrial Operations. This time the decision is final. However the foreign investor had not yet the power to import his capital from abroad. The Council of Ministers had the power, at discretion to recognize or to refuse the benefit of this Law to any Capital which above mentioned Committee had certified as meeting the foregoing conditions.

This Law no : 5821 was granting national treatment to foreign invested capital. In fact Article 4 was providing such treatment in the following terms : "Any rights, immunities and accommodations granted to domestic capital and concerns in the fields of business and production mentioned in Article 1 (these fields were namely industry, power, mining, public works, communications and tou-

rism) shall be available on like terms to foreign capital and concerns engaged in similar ventures”.

As seen above the measures designed to attract foreign investment were mainly used as a mechanism for securing the development of selected industries or economic sectors. But they did not include time limits and geographical delimitations.

Beside capital investments long terms loans from abroad were profiting from this Law if they were used to finance any of the ventures — and the farming was added beside the fields already mentioned. The Committee had to certify that such long — term loans were conform to the conditions set forth by the Law. So the principal and the interest accrued on any long term loans approved by the Committee could be remitted abroad in accordance rules accepted for the transfer of interests and capital of foreign investments.

More over the Ministry of Finance was authorised subject to a decree of the Council of Ministers to tender its guaranty, against collateral surety, in respect to any such indebtedness up to an aggregate amount of 300 million Turkish liras. Such guaranty was automatically lapse in respect to any fraction remitted abroad, of any capital so procured.

This law was first detailed Law on Promotion of Foreign Capital Investments, enacted during the Turkish Republic. Before this Law a Law for Guarantees to be Given to Private Enterprises and Treasury Foreign Exchange Undertakings no : 5583, as mentioned above was enacted this was a short Law with only four following Articles⁷ :

“*Article 1.* The Ministry of Finance is authorized, subject to a decree of the Council of Ministers, to tender its guaranty against collateral surety in respect of any indebtedness up to an aggeragte amount of 300 million Turkish liras for long term loans raised from foreign countries by private enterprises, for use in organisations, public works and tourism considered useful for the development of the country and in other businesses of a nature which augments production and increases exports.

7) *ibid.* p. 16. This translation of this Law is the exact copy of the perfect English translation done by Mr. Cenani. There was no lieu of adding or changing.

Article 2. The Ministry of Finance can enter into an engagement in favour of these ventures for the issue of foreign exchange permit required for the transfer abroad of all or part of the assets of the venture, of the income of the capital imported from foreign countries as foreign exchange, and of facilities for use in ventures mentioned in Article 1.

Article 3. This law shall take effect as from the day of its promulgation.

Article 4. The Minister of Finance is charged with the enforcement of this Law".

Only the Minister of Finance is authorized, there is no Committee to check the conditions and the final approval of Council of Ministers is not required.

These two Laws no : 5583 and the more detailed one no : 5821 were these which have preceded the present Law no : 6224. However a Decree no : 13 (3/5843) was issued by the Turkish Government on May 22, 1947⁸ under the authority given to Government by Law no : 1567. This Law no : 1567 entitled Law for the Protection of the Value of Turkish Money was enacted on February 20, 1930 as a measure taken against the economic crises of the nineteen thirties⁹.

Only the Article 31 of the Decree 13 issued under the authority of the Law for the Protection of the Value of Turkish Money was connected with foreign capital. This Article 31 was giving power to the Ministry of Finance to enter into an engagement at the outset for the issuance of the foreign exchange permit required for the transfer abroad of all or part of the assets of the ventures and for the income of the capital imported from foreign countries as foreign exchange or facilities for use in industry, agriculture, communications and public works businesses considered useful for the development of the country and in commercial business of a nature that augments exports.

8) Published on May 26, 1947 in the Official Gazette no : 6615.

9) Published on February 27, 1930 in the Official Gazette no : 1433.

III. THE PRESENT LEGAL SYSTEM OF FOREIGN INVESTMENTS IN TURKEY :

The purpose of enacting the Law no : 5821, namely the import of foreign capital sufficient to play an important part in the economic development was not realized. Three years of application of the said Law has shown that only 15 million Turkish liras worth of investments were made under the Law.

On the other hand the Industrial Development Bank of Turkey which was set up to promote the industrialization of Turkey had ordered the formation of a study group of expert to reports on the shortcomings of the Law no : 5821 and to advise the new means to promote the foreign investments. The objections to the Law no : 5821 were that there was a risk of double taxation as the provision of the Act governing Corporation Tax, Income Tax, and Tax Procedures are not yet firmly rooted and no agreements have been concluded to obviate this risk of double taxation. A second objection was impairment of the liquidity of the shares in the case of a Turkish corporation founded on foreign capital. The shares of the persons resident abroad had to be blocked with a bank and changes in ownership of the shares registered with the Ministry of Finance. A third objection was already mentioned complaint about the transfer of only of that part of the profit equivalent to 10 percent of the capital invested.

The study group advised the following measures to do away with the objections : to eliminate the risk of double taxation state clearly those provisions of Turkish taxation system which are applicable to foreign capital, to insure the liquidity of shares representing foreign capital write and give to each of them the transfer guaranty irrespective of the nationality of the holder, to insure the transfer of all profits the abolition of 10 percent limitation.

Knowing that the private foreign capital market has a competitive nature and that a large number of countries in the Western Hemisphere and in southern and central Africa, in Asia are engaged in development programs for which they sought and obtained substantial private foreign capital Turkey invited an American advisory mission headed by C.B. Randall, Chairman of the Commission for the Planning of U.S. Foreign Economic Policy.

This mission almost repatted the measures advised by the study Group of Industrial Development Bank. So the present Law no : 6224 for the Encouragement of Foreign Capital was enacted on January 18, 1954¹⁰ and it is still in force.

The innovations brought about by Law no : 6224 may be summarized under two principles :

- 1) This Law permits foreign investment in all enterprises instead of those cited in the previous Law No. 5821, which tend to promote the economic development of the country, that are open to Turkish Private enterprises and that entail no monopoly or special privileges.
- 2) Under the Law, foreign investors are entitled to transfer without any time restrictions, the net profits that accrue to them, the proceeds of the sale, at reasonable prices, of part or the whole of their capital, or the principal and the interest of a foreign loan.

The standing Committee set up by the previous Law No. 5821 still exists but with a different composition. The General Manager of the Central Bank of Turkish Republic is still chairman, the Director General of the Treasury, the Director - General of Home Trade, the Director - General of Industrial Affairs, the Chairman of the Department of Research and Planning of the Ministry of the State Industrial Operations and the Secretary - General of the Union of the Chambers of Commerce and Industry and Commodity Exchanges are the other members.

The decisions of the Committee are not final may be appelaed within 30 days as from the date of their notification there of. The competent authority to deal with the appeal is the same one consti-tued under the previous Law No. 5821. Thus aboard formed by the Ministers of Finance, Economy and Commerce and State Industrial Operations. Since the enactment of this Law the Ministry of Commerce and Economy is renamed as the Ministry of Commerce and the Ministry of State Industrial Operations as Ministry of Industry.

In the present law as in the previous ones no percentage of domestic capital participation is required for the import of ap-

10) Published January, 23, 1954 in the Official Gazette No : 8615.

proved foreign investment. The philosophy behind this is that if in a business the profitmargin is considered reasonable, an inflexible provision excluding more than a certain percentage of foreign capital in any enterprise may result in holding back development because of shortage of domestic capital.

The Law No. 6224 is not the only legislation intended to attract private foreign capital. Petroleum and Mining Laws were also enacted for this purpose.

The Petroleum Law was enacted by the Grand National Assembly on March 7, 1954 as Law No. 6326¹¹.

Prior to passage of the Petroleum Law, foreign corporations were not allowed to exploit Turkey's oil resources. The Law No. 6326 divided the country in nine regions and permitted the participation of foreign corporations in the development of oil resources of seven regions. Two regions are closed to foreign investments for national defense reasons and as a national reserve.

The reason for enactment of the Law No. 6326 is stated as follows in the legislative memoranda : "The continuation of our development and the rise in our standart of living at least with today's impetus is only possible in the event we are able to satisfy our increasing demands for liquid fuels. This need is presently met only through the allocation of a great amount of foreign currency. When it is extracted in an amount to meet the country's needs, petroleum is a very valuable subterranean resource which will enable us to save some fifty million dollars we are now paying each year and, when exported in the proportion anticipated, will become a great source of foreign exchange, providing the country with large sums of foreign currency. The attainment of these results depends on the finding and exploitation of petroleum in sufficient amounts... To realize this in a short time is a must. In order to overcome this exingency we need large quantities of materials and installations as well as an exploration technology which has its own exceptional characteristics and which demands extremely specialized fields. Further more we definitely need large amounts of foreign currency to spend over a short period of time... and our experiences thus far show un that the discovery and exploita-

11) Published March 16 1954 in the Official Gazette No. 8658.

tion of our petroleum resources in a speedy and extensive way by the hand and capital of the state is impossible. For these reasons it became necessary to transfer the exploration and exploitation of our country's petroleum resources and possibilities to the field of private enterprise and capital investments... No company formed with national capital is engaged in this field. Because of the great risks involved, knowledge and experience required, it is believed that domestic capital will not take a place in this field, the importation of materials, installations and personnel from foreign sources will free our country from the burden of finding and allotting million of liras of foreign currency... Petroleum Law No. 792 actually in force does not suffice to deal with private and foreign capital¹²⁾.

The Petroleum Law No. 792 which dated March 24, 1924 was modeled on a Roumanian Law of 1924, but two years later Roumanian Law was abolished.

The new Petroleum Law No. 6326 created also the Turkish Petroleum Company (Türkiye Petrolleri Anonim Ortaklığı) to take over the production and refining operations of the Mineral Research and Exploration Institute. The Turkish Petroleum Company is governed by commercial law and has the same rights as do private companies under the Petroleum Law.

The Turkish Petroleum Administration (Petrol İdaresi) was created to administer the Petroleum Law and has complete administrative authority in petroleum matters. The Petroleum Administration must act on applications for exploratory permits within 90 days after the receipt of the application. It may issue non exclusive exploration permits for fixed periods in specified areas subject to any limitations it deems necessary.

The Administration may grant exclusive licences to holders of permits for geological investigation and drilling for a 6 year period, which may be extended for two periods of 2 years each. If a disco-

12) The Petroleum Law of Turkey, Compiled by **Kenneth Redden** and **Jhon Huston**, Legal Research Institute Faculty of Law, University of Ankara, New York University, Graduate School of Public Administration and Social Service. Joint Publication Series No. 4, 1956, İstanbul pp. 64-66.

13) Published on May 21, 1955 in the Official Gazette No. 9011.

very is made the license may be extended for 5 years. A license may not cover more than 50,000 hectares, and a licensee may not hold more than eight licences in any one region.

The Petroleum Law has been amended twice by Law No. 6558 enacted on May 13, 1955¹³ and by Law No. 6987 enacted on May 29, 1957¹⁴.

A third legislation to attract foreign capital is the Mining Law enacted on March 3, 1954 as Law No. 6309¹⁵.

The new Mining Law replaced complex legal controls over mining dating back to 1905. Whereas formerly the state had priority to exploit large mineral resources, the new Law gives priority to the discoverer to exploit his find provided that he can fulfill certain technical requirements.

Nonrenewable prospecting permits valid for two years may be obtained by Turkish companies formed for mining activities, and an operating licences valid for 10 to 15 years, may be obtained by a holder of an exploration permit.

Concessions valid for 40 to 99 years may be held only by a limited or joint-stock Turkish company formed for mining activities, or by state minerals institutions.

Applications, permits, and concessions were made transferable for the first time under the new Law. Foreign capital participation is permitted in Turkish mining so long as it is effected through a company established under the Laws of Turkey.

These three legislations brought foreign capital to Turkey "but the total was considerably below the amount desired by Turkey¹⁶".

Of the three legislations above mentioned the Petroleum Law has brought one and half billion Turkish liras and the Law for the Encouragement of Foreign Capital 112 million Turkish liras.

IV. BUSINESS ORGANIZATION FOR FOREIGN FIRMS DOING BUSINESS IN TURKEY :

Doing business here means to work as a firm in Turkey, investments by loans are not considered even though such loans are

14) Published on June 6, 1957 in the Official Gazette No. 9626.

15) Published on March 11, 1954 in the Official Gazette No. 8655.

16) **Tuğrul Ansay**, *Legal Aspects of Foreign Investments*, edited by Wolfgang G. Friedmann, "Turkey", p. 545, Boston, 1959.

possible under the Law for the Encouragement of Foreign Capital. Foreign firms establishing a business in Turkey may take out Turkish corporate papers and register as domestic concerns or they may establish direct branches without assuming local corporate identity. Domestic concerns may have unlimited foreign participation.

A third way of doing business is to carry a few isolated business transaction in Turkey .

According the Turkish Commercial Code there are six different types of companies :

- 1 — Stock corporation (anonim şirket)
- 2 — Limited liability company (limited şirket)
- 3 — General partnership (kollektif şirket)
- 4 — Special partnership (komandit şirket)
- 5 — Special partnership with shares (sermayesi paylara bölünmüş komandit şirket).
- 6 — Cooperative.

Stock corporation is common to much of Europe where the shares are bought and sold on exchanges. Stock Corporation must have a trade name, a fixed capital not less than 500.000 Turkish liras and the capital must be divided into shares with liability to sums invested. At least five founder shareholders are required to establish a corporation. The organization may "immediate" with all of the capital shares being subscribed by the founders, or "progressive", where a portion of the shares is taken up by the founders and the public is permitted to subscribe to the remainder.

The consent of the Ministry of Commerce is necessary for the formation of a Turkish stock corporation. (Art. 273 of the Commercial Code). The corporate charter (Esas mukavele) is submitted to the Ministry of Commerce for its consent... One fifth of the capital is to be deposited in a bank if the organization is "immediate", thus of the capital, is wholly subscribed by the founders, and one tenth of the capital is to be deposited of the organisation is "progressive", thus the capital is not wholly subscribed by the founders.

The Ministry of Commerce has to give its content of the corporate charter is in accord with the obligatory provisions of the

Commercial Code, the corporate charter may be in disaccord with the non-obligatory provisions of the Commercial Code. After the authorization is obtained the corporation must submit the documents to the court in the place where the principal office of the corporation is located.

The founders are required to invite public participation, in case of "progressive" organisation by publishing a prospectus in the newspapers, indicating the object and duration of the corporation, the amount of capital, the value of each share, and other pertinent information.

The Court examines the documents, if all the statutory requirements are fulfilled and any defects are eliminated, it must ratify the incorporation. This decision is final and a ratified corporation cannot be declared void later on except within one month following the registration and publication of the formation of the corporation.

General Assembly of shareholders chooses a board of directors from its member, if it is not already appointed by the corporate charter, General Assembly chooses a board of controllers which can not be appointed by the corporate charter. The board of Directors must be composed at least of three directors.

Limited liability company, is formed by shareholders whose number must be less than fifth and the minimum capital is 10.000 Turkish liras. Two partners can form such an company according to the Commercial Code. There is no Board of Directors requirement for this type of corporation. Limited liability company is formed upon the authorization of the Ministry of Commerce. Shareholders may jointly run the company but usually one or several managers irrespective whether they are or are not partners are appointed. Limited liabilities company can do business in all fields except in banking and selling insurance.

General meeting is held by shareholders.

General Partnership, in this form no limited liability exists for any partners, all of them are fully and jointly liable for the debts of the corporation. It is available only to real persons. The partnership is formed by a notarized written agreements of the partners. This agreement must be registered in the commercial register of the city where the firm is to be located and must be published.

Special Partnership has two kinds of partners, ones with liability limited to a fixed amount and the others who are jointly liable without limit.

Special partnership with shares is a combination of a corporation and a special partnership.

Cooperative is formed under a firm name for the protection of collective economic interests.

V. PRIVATE INTERNATIONAL LAW PROBLEMS INVOLVED IN THE INVESTMENT OF FOREIGN CAPITAL :

Private International Law in Turkey comprises three main parts : Nationality, Legal Status of Aliens and Conflict of Laws including choice of law and conflict of jurisdiction. We will proceed according to this division.

1. Nationality :

A — *Foreign investor forms a Turkish corporation or company :*

Nationality is not important for the forming of any of six types above mentioned. Foreigners, in fact five of them as required by the Law can form even a stock corporation. Furthermore all shareholders in a Turkish corporation may be foreigners.

The only restriction because of nationality is in the case of controllers. If there is only one controller he must be Turkish citizen or if there is a board of controllers majority must be Turkish according Art. 347 of the Commercial Code. As the controllers may be appointed from the partners or outside of partners all partners may be foreigners as pointed out.

B — *Foreign investment is done through branches of foreign companies :*

This kind of investment is not possible in mining field, only Turkish corporation formed for mining activities can invest. The procedure and requirements for establishing a direct branch are governed largely by the legal nature of the interested concern in the country of origin. In other words, a foreign company of limited liability would proceed differently from a foreign company of unlimited liability.

Corporations and special partnership with shares which want to open a branch or agency in Turkey are subject to the Law on Foreign Limited Partnership in which the Capital is Divided into Shares 1915, (November 30, 1330 under old Turkish calendar).

The nationality of the foreign firm is determined according to the law the country where it is incorporated or by the law of the country where it has its head office (*siège social*). The difference of these criteria brings out several questions to mind: "When a company which has decided to extend its operations to a foreign state faces a choice between opening a branch there or establishing a locally incorporated subsidiary or affiliate, how can it be sure that its choice will be given effect? If it elects to do business as a foreign corporation through a branch, is there any risk that its choice will be nullified by a determination that the branch is really a local corporation under the law? If it elects to set up a locally incorporated subsidiary or affiliate, is there any risk that its efforts will be frustrated by a holding under the local law that it is really a foreign corporation doing business in the state¹⁷."

We will try to answer these questions. The examination of several treaties concluded between Turkey and other powers shows that¹⁸ the foreign corporation is recognized as a foreign legal entity in Turkey if it is formed in accordance of the Laws of the other High Contracting Party where its head Office is situated.

17) Milton Katz and Kingman Brewster Jr. *International Transactions and Relations*, Brooklyn, 1960 p. 196.

18) Turkey has concluded treaties with the following powers on given dates. The reference is the Turkish Collection of Laws: Hungary, on December 28, 1926, *Düstur* t. 8, p. 718; Germany, on January 11, 1927, *Düstur* v. 9, s. 22, Czechoslovakia, on May, 31, 1927 *Düstur* v. 9, p. 104, Switzerland on August 7, 1927, *Düstur* v. 9, p. 114, Bulgaria, February 12, 1928, v. 9, p. 992, Roumania, on June 11, 1929, *Düstur*, v. 11, p. 1966; Finland, on August 12, 1929, *Düstur* v. 11, p. 1886, Estonia, on Septembre 16, 1929, *Düstur* v. 11, p. 1740; Sweden, on Septembre 29, 1929, *Düstur*, v. 11, p. 1376, Great Britain, on March 1, 1930, *Düstur*, v. 11, p. 1515, Denmark, on May 31, 1930, *Düstur* v. 11, p. 1766, Greece, on October 30, 1930, *Düstur*, v. 12, p. 114, Russia, on March 16, 1931, *Düstur*, v. 12, p. 1022, Norway, on March 16, 1931, *Düstur*, v. 13, p. 1043, Belgium, on July, 30, 1931, *Düstur*, v. 13, p. 1000; Irak, on January 9, 1932, *Düstur*, v. 13, p. 524, Iran on March 14, 1937; *Düstur* v. 18, p. 1186, Egypt, on April, 7, 1937, *Düstur* v. 18, p. 1407.

A second and reasonable condition is that the purpose of the corporation must not be against general morals or must not be illegal according to Turkish Law. In the treaties of Amity, Friendship, Commerce and Navigation with Finland, Egypt, Hungary, Czechoslovakia, Estonia, Switzerland and Belgium both criteria of incorporation and head office are looked for¹⁹. In another group of such treaties only Head office is the criteria for the nationality of foreign firm. Treaties with Iran, Bulgaria, Poland, Roumania, Norway, Denmark, Austria, and Albania. Incorporation is the criterion of nationality in the treaties with Germany, Russia and Yugoslavia²⁰. So the law of treaties has accepted the incorporation and centre of management, head office criteria. The following Turkish Laws carry provisions on the nationality of foreign subsidiaries and affiliates : The Commercial Code No. 6762, Petroleum Law No. 6326, The Law on the Control of Insurance Companies No : 7397, the Law on Banks No. 7129 and Mining Law No. 6309. The Commercial Code accepts in its Article 42 the criterion of Head Office for the nationality of a foreign firm. This is conform to Article 15 of the Law on Foreign Corporations and Foreign Limited Partnerships which states that any foreign corporation which brings to Turkey its centre of management, head office becomes a Turkish corporation.

The Petroleum Law in its Article 37 accepts the criterion of incorporation and of head office in the same time. The Law on Control of Insurance Companies adopts the criteria of incorporation with centre of management in its Article 4.

The Law on Banks has adopted incorporation, control of assets and head office, centre of management criteria.

For the other types of business organizations than joint stock corporation and limited partnership with shares the nationality is determined by the law of the country of its centre of management or head office.

2. Legal Status of Aliens :

A — *Employment of Aliens :*

The policy to fight against unemployment was to reserve most of occupations and professions to Turkish nationals. The Laws

19) Nihal Uluocak, Devletler Hususi Hukuku, 1965, p. 14.

20) *ibid*, p. 15.

No. 2007 and 2818 were enacted for this purpose. The Law No. 2007 reserves for Turks small trades. The law, the medicine, dentistry, etc. are also reserved for Turkish nationals. Foreign management and employment are specifically provided for in foreign investments coming under the 1954 Law for the Encouragement of Foreign Capital No. 6224. A similar provision existed in the previous Law No. 5821 on the Promotion of Foreign Capital Investments. In fact the Article 7 read : "The qualifications and prohibitions laid down by Law No. 2007 and No. 2818 shall not apply in the case of any foreign investors who have imported capital into Turkey in compliance with the provisions of this Law, nor to any alien who will have been certified necessary by the Committee referred to in Art. 7, and such derogation be extended to include in the latter case any period survey and erection work. The provisions of the above paragraph shall likewise apply in the case of any alien experts and foremen in the employment of domestic concerns whoa are certified by the Committee, to be engaged in business coming within the purpose of this law".

The new Article is the following one : "Art. 7. a) During the period of survey, foundation and operation of a business mounded in accordance with the present law, the conditions and prohibitions set forth by Laws No. 2007 and 2818 shall not apply to aliens investing in such a concern to alien representatives of such investors, to alien experts, foremen and other skilled personnel, for a perod deemed necessary by the Committee for the efficient establishment, expansion or operation of the concern or for its being put again into activity.

b) The above provision shall also apply to alien experts, foremen and other skilled personnel to be employed by local concerns that are certified by the Committee as meeting the conditions provided by Art. 1 of this Law.

c) Aliens employed in accordance with the provisions of this Article may, with the prior permission of Ministry of Finance transfer in the currency of their own country at the current official rate of exchange that part of their earnings as are stipulated in their contract of employment for the purposes of supporting their families or remitting their normal savings abroad.

No further comment is necessary on this self explanatory Article.

The Turkish Mining Law permits the employment of foreign engineers, technicians, supervisors, and specialists as needed, under prior approval of the Ministry of Commerce.

Specife provision also is made in the Petroleum Law for the holder of a Petroleum right to employ such foreign executive, professional, and skilled personnel as may be necessary for the effective conduct of his operations. The holder is required, however to send abroad Turkish technical personnel numbering not less than 15 percent of the foreign personnel employed in Turkey, for shoolding and practical experince in petroleum operations.

B — Taxation of foreign Investments :

The Income Tax Law No. 5421 which was enacted in June 1949 and became effective with the calendar year 1950 is amended on January 6, 1961 by the Law No. 193.

The items that constitute the total income of any person consist of commercial earnings, salaries and wages, earnings of liberal professions, returns from immovable property or the like, return from movable assets or the like (interest, dividends, etc.) and other revenues. The net sum of all earnings and income accruing during a calendar year comprises taxable income.

According to Income Tax Law the individual have two kinds of tax liability : full and limited. Residents of Turkey whether Turkish or foreign nationals have full tax liability and non residents limited tax liability. The legal persons who have their legal or management center (head office) in Turkey have the full tax liability. Residence in Turkey is established either if the individual has his legal domicile in Turkey or if he lives in Turkey more than six consecutive months during a calendar year.

The full tax liability of residents means that all their income is taxable, whether the source of income is in only on income derived from Turkish sources. In the case of business income, the individual should have an office or a permanent representative in Turkey and the income should be derived from activities carried on through this office or through the permenent representative.

The forms of business organization in Turkey can be classified into three main classes as regards their basic structure. The general and limited partnership are "individual associations". The limited liability company and stock corporation are "capital associations". The stock-limited partnership represents a "mixed" character, and the cooperative has a unique structure of its own.

The general and limited partnership are not subject to the Corporation tax on their profits because they are considered as individual associations. The stock corporation and the limited liability company are subject to Corporation Tax as capital associations. The limited stock partnerships represent a mixed character in the sense that the partners who have limited liability are treated like shareholders in a corporation and the partners with unlimited liability are treated like the owners of a partnership. The cooperatives are subject to a special tax system which is adapted to their particular structure²¹.

3. Conflict of Laws :

A. Choice of Law

It is a rule on conflict of Laws that the conditions of establishment of a Branch of foreign company are governed by *lex loci*.

21) The liability for corporation tax is also of two kinds : full tax liability and limited tax liability. Those corporations that have their legal office or main office in Turkey are taxable on the whole of their income whether the source of their income is Turkey or not. Foreign corporations that have their legal office or main office outside of Turkey are taxable only on their income from Turkish sources. Full tax liability for the corporation tax is determined by the location of the legal office or the main office instead of by the residence requirements under the income tax. The legal office is defined as the main office established in the charter or contract of the corporation, and the main office is defined as the place from which the whole concern is administered. The tax base for the corporation tax is the actual net income of the corporation. However in the case of foreign transport companies, the actual net income does not constitute the tax base, which is computed by special methods. The tax base is calculated by approximation (lump sum method.) i.e., by applying an average coefficient to determine the revenue derived from Turkish sources.

The branch of foreign company is governed by *lex Societatis* as to the rights. *Lex Societatis* is determined by *lex fori*. The activities of the branch of foreign company are governed by *lex Societatis*.

The winding up of the branch of the foreign company is governed also by *Lex Societatis*.

In case of Bankruptcy the *lex loci* governs all transactions.

B. Conflict of Jurisdiction

The branches of Foreign companies have access to Turkish Court the places of branches are considered the legal domicile of the corporations and limited partnership with shares according Art. of the Law on Foreign Corporations and Foreign Limited Partnerships in Which the capital is divided into shares.
