I. Introduction
The concept of foreign direct investment was introduced in Turkey in 2003.

This legal concept, new to Turkish Law is preferred to encourage foreign investments.

Economic crises in Turkey in recent years have demonstrated that the performance of short term portfolio investments have not been satisfactory.

Short term portfolio investments are not favoured as they lead to hot money mobility in the market.

Instead, it has been asserted that long term investments reduce the resource deficit in developing countries to a great extent, hence making them the favoured option.¹

Foreign direct investment manifests traits that are in complete opposition to short term indirect investments. Accordingly, foreign direct investment is the type of investment where foreigners retain the control and management powers in the company; that intends to stay in the host country for the long term and therefore main-

tains a physical presence therein and is prepared for possible risks in that host country.\(^2\)

In order for foreign direct investment to have access to all these facilities, it needs certain structural arrangements it desires in the host country.

These arrangements relate to the conditions – or the investment climate, as doctrine usually refers to it – of the host country.

Foreign investor would want the economic, political and legal climate of the host country to be suitable.\(^3\) Therefore we may argue that legal regulations alone would not suffice to create an adequate environment for investments.

**II. Changes in The Legal Order in Turkey**

The first legislative regulation concerning foreign investment was the Foreign Investments Act, dated 1951. Right after this act, Promotion of Foreign Investment Act, dated 1954 has been enacted. This latter act stayed in force until 2003, subject to certain amendments and supplements. This act which was drafted by the American expert Randall has for long years shaped the Turkish system relating to foreign investments.\(^4\)

The first changes which may be called as radical in the area of foreign investments in Turkey came about after 1980.

The economic resolutions promulgated on the 24th of January, 1980 in a way laid down the foundations which are deemed important for contemporary legal developments.\(^5\)

Foreign Investment Framework Decree (FIFD), resolutions under the Preservation of the Value of the Turkish Currency Act

\(^2\) TİRYAKİOĞLU; 9-10. ÇELİKEL/GELGEL; 147. Deniz Kırlı AYDEMİR; Yabancı Yatırımların Korunması (Protection of Foreign Investments); 26-27. Rifat ERTEN; Doğrudan Yabancı Yatırımlar Kanunu Türk Yabancılar Hukuku Sistemi İçindeki Yeri ve Rolü (The Status and Role of the Foreign Direct Investment Act in the Regime of Turkish Law of Aliens); 25-27. Amanda PERYY; Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence (Int Comp Law Quarterly Vol 49-October 2000); 779, 781, 782, 783.

\(^3\) TİRYAKİOĞLU; 33-34, 62-67, 80-92. AYDEMİR; 34, 35-40.

\(^4\) ÇELİKEL/GELGEL; 148-149. ERTEN; 51-53. Deniz ARIKAN; Türkiye’de Doğrudan Yabancı Sermaye Yatırımları; 23-24 vd; Sibel ÖZEL; Doğrudan Yabancı Yatırımlar Kanunu Üzerine Bir Değerlendirme; 599-600-601 (MHB-Gülören Tekinalp’e Armağan, Yıl 23/Sayı 1-2-2003); Aysel ÇELİKEL; Yabancı Yatırımların Teşviki Amacıyla Yapılan Yeni Yasal Düzenlemeler 161-162, 164 et seq. (MHB-Tekinalp’e Armağan).

\(^5\) ÇELİKEL/GELGEL; 149. ERTEN; 54, 55-59.
(PVTCA) have been proclaimed and restructured during this period.

Tourism Encouragement Act, Petroleum Act, Banking Act, Act concerning the Auditing of Insurance Companies have been restructured and modeled.

However, the contemporary approach to foreign investments which is subscribed to globally has not been achieved through these changes.

Currently, there are two models which provide for increased resources to developing countries. One is the model of indirect foreign investment which had been endorsed in Turkish law until the present time, and the second is the direct foreign investment model we have adopted in 2003.6

Believing foreign investment to be an important source for paying off external debts, Turkey is persuaded that this could be more easily solved by foreign direct investment.

Foreign direct capital is seen as serving to this end better than short term indirect capital.

The withdrawal of capital from the stock exchange by short term portfolio investors during periods of crises which in turn lead to a deeper crisis was a factor in opting for the foreign direct capital model.

A. The Fundamental Change Brought by the Foreign Direct Investment Act

With the adoption of this model, certain fundamental legal changes concerning the entry and establishment of foreign capital are effected.

Firstly, this act has abolished the system of approvals and permissions previously required for the entry of foreign capital. Instead, it provides for a system of notification.

Previously; pre-permits issued by the Undersecretariat of Treasury’s General Directorate of Foreign Investment (GDFI) are abolished. However, all foreign companies established or to be established in Turkey are still responsible for obtaining those local licences required for a comparable Turkish company.

The act expands the notion of investment and investor. Accordingly, not only the areas that a foreign investor may invest in

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6 TİRYAKİOĞLU; 10. ERTEN; 24-25, 54-69. AYDEMİR; 26, 27. PERRY; 780 et seq.
are not subject to any restrictions, but the definition and scope of the investor is also expanded.

Thus, real persons of foreign nationality, Turkish citizens who are resident abroad, legal persons established under the laws of foreign countries, and international institutions are to be considered as investors.

The purpose of this fundamental change lies in the definition and content of foreign capital.

Foreign direct investor is a foreign person or partners who hold the majority in the management and control of a company, who has assumed the risks which may arise in the long run and who has a physical presence in the host country.\(^7\)

Due to these attributes, the legal status of the foreign investor ought to be on equal footing with domestic investors. Therefore, there can be no place in the legal order for bureaucratic stipulations which may discourage or hinder the investor.\(^8\)

The choice of host country for the foreign investor is directly linked to this end.

The institution of a favourable legal background for the foreign investor will be possible through eliminating bureaucratic obstacles, changing the legal circumstances creating these obstacles, and having confidence in the foreign capitalist.

- Company and Branch establishment Pre-Permits,
- Foreign partner participation Pre-Permits,
- Investment Permits,
- Permits regarding changes in field of activity of foreign companies,
- Permits regarding capital increase or sale of shares of foreign companies,
- Indirect participation Permits,
- Registrations of license, know-how, technical assistance and similar agreements formerly granted by GDFI will not be issued from now on.

The Foreign Direct Investment Act has created this radical legal structuring.

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7 AYDEMİR; 27, 38. ERTEN; 83-89, 93. TİRYAKİOĞLU; 10 et seq. Süleyman DOST; Yabancı Yatırım Uyuşmazlıkları ve ICSID Tahkim; 13-14, 15.
8 ÇELIKEL/GELGEL; 146-148. PERRY; 780-781. AYDEMİR; 34-40. TİRYAKİOĞLU; 33-36, 42-47.
B. New Regulations Pursuant to the Foreign Direct Investment Act (FDIA)

The foreign investor who will invest in the country will have been shielded from many legal stipulations and circumstances that foreigners face in general; and as such is in a privileged position.

The new Law guarantees national treatment and comprehensive investor rights. All companies established with a foreign capital contribution and under the rules of the Turkish Commercial Code (existing and newly established foreign companies) are regarded as a Turkish company. Therefore equal treatment both in rights and responsibilities as stated in the Constitution and other laws is applicable to all such companies (including national treatment, a guarantee against expropriation without compensation, transfer of proceeds, access to real estate and to expatriate personnel, and international arbitration or any other means of dispute settlement).

Investors will be exempted from permits formerly granted by GDFI are abolished. However, all foreign companies established or to be established in Turkey are still responsible for obtaining those local licences required for a comparable Turkish company.

Companies having a legal entity with foreign capital in Turkey have the same rights to own or use land as domestic investors. The new Law reasserts these rights. However, the principle of reciprocity is still valid for foreign real persons.

There are no additional requirements. The establishment procedure of liaison offices has not changed.

Pre-permits issued by General Directorate of Foreign Investment are abolished. These branches can be established under rules of Turkish Commercial Code with the permit of Ministry of Industry and Trade.

All companies with foreign capital established under Law No. 6224 (dated 18 January 1954) are subject to the new Law, with their previously-granted rights grandfathered. Therefore they will no longer require any approvals from GDFI, though they will now have to send yearly information forms (just like newly-established foreign companies) based on procedures to be determined by new regulations.

We have so far examined two important issues but have not touched upon other privileges and specifications.
Two other areas where the foreign investor is privileged compared to other foreigners concern employment and acquisition of real estate.

1. **Key Personnel to be Employed in the Company Investing in Turkey pursuant to FDIA**

Persons making an investment by direct foreign capital will transfer the foreign capital into the country through various means. These are, through establishing a company, establishing partnerships in Turkey, acquisition of shares in a Turkish Partnership, participation in an existing Turkish company, establishing a liaison office, establishing a branch office, licensing know-how, franchise technical assistance and management contracts and special foreign credit agreements.

Accordingly, an investor bringing in foreign direct investment by one of these means will be able to employ key personnel.9

(Regulations on the Employment of Personnel of Foreign Nationality In Direct Investment; Scope Art (2): The Present regulations shall be applicable for key personnel of foreign nationality to be employed in special direct investments and liaisons offices.

However for the work permits of

a) personnel of foreign nationality apart from the key personnel to be employed with special direct foreign investments.

b) all kind of personnel of foreign nationality to be employed in direct foreign investments apart from those special direct investments.)

If the qualified foreign direct capitalist is transferring this capital by means of establishing a company in Turkey, then it needs to be a foreign direct investor that has fulfilled the condition of having invested as a foreign investor in at least one other country.

If he is introducing the capital for the purpose of establishing a branch, then he needs to bring in a capital exceeding the set amount, that limit being 10 billion Turkish Lira.

If it will be a partnership, again, he needs to be a partner in possession of over a certain amount of the capital.10

This direct investor is the qualified direct investor. Technical personnel, upper level managerial personnel and the capitalists are considered the key personnel.

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9 ERTEN; 116-124.
10 ERTEN; 118-120.
Key personnel may take advantage of the exceptional work permit provided in The Law on the Work Permit for Foreigners (LWPF).

This means that key personnel may work in Turkey without fulfilling the conditions set out in articles 7 and 13 of the Implementation Bylaw of the LWPF.

Article 7 of the Bylaw concerns the residence requirement. It stipulates that in order to obtain work permit, the foreigner wishing to work in Turkey has to hold a residence permit for no less than six months. *(Art 7 : Foreigners holding the status of key personnel to be employed in special direct foreign investments, may apply their work permit at the representations of the Republic of Turkey in the country of their nationality or their permanent reside.)*

*The representations shall send these applications directly to the Ministry along with their probable assessments related to the work permit.*

*The representations of the Republic of Turkey as well as the Ministry conduct the transactions related to the work permit ap be filed from abroad by means of electronic mails. Whereas the documents requested during the application shall be subm Ministry by the employer of the foreigner within three working days the latest from the date of the foreigner’s applica Representation.)*

This requirement has been dispensed with for key personnel.

Article 13 of the Bylaw grants an even more important privilege in respect of key personnel.

This article specifies that in the assessment of the request of a foreigner to work in a specific occupation, a right of discretion is to be used depending exclusively on the conditions of the work market and changes in the economic conjecture for the specific workplace or enterprise or profession. The Ministry of Labour and Social Security will evaluate whether that specific occupation provides adequate opportunities for Turkish workforce.

However, such an evaluation is not required for key personnel.

In fact, what makes the key personnel an exception is that the criterion of discretion as stated in article 13 is not applicable to them.
2. Acquisition of Real Estate in Turkey pursuant to FDIA

The companies established by foreigners investing in Turkey in accordance with this Act or companies having legal personality which such foreigners participate in, may acquire real estate in the regions accessible to acquisition by Turkish citizens. (FDIA art. 3/d)

In this sense, they are not subject to the provisions of article 35 of the Land Registry Act, and may acquire property as a Turkish company would.

However, if the foreign capital has entered in the form of an ordinary partnership by means of Joint Venture, then the foreign party to this partnership would be able to acquire property in Turkey subject to the provisions of article 35 of the Land Registry Act.\(^{11}\)

Therefore, the privileges and facility concerning acquisition of real estate by direct investors pursuant to FDIA that are set up as ordinary partnerships is not regulated by the said Act.

Article 3 paragraph (d) of the Act has blocked this option for other investors by explicitly referring to companies and partnerships having a legal personality.

III. Conclusion

FDIA which has entered into force in 2003 is a legal regulation enacted on the basis of the conviction that the resource deficit in Turkey would be mended by the encouragement of foreign capital.

This Act which has introduced in Turkey the concept of foreign direct investment, sets the appropriate legal background to encourage foreign investors.

It is believed that this model, advocated globally by opponents of indirect capital, will also eliminate the risk of crisis that short term portfolio investments cause.

On the other hand, it has also been put forward that this model of capital which is favoured by the multinational corporations comprised of capitalists of the developed countries which dominate world trade, bears a colonialist viewpoint; and in this sense fails to

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\(^{11}\) ERTEN; 142-143. Selim LEVI; Yabancıların Taşınmaz Edinmeleri (Acquisition of Real Estate by Aliens); 71 et. seq. Rona AYBAY; Yabancılar Hukuku (Law of Aliens); 191-194. Fügyen SARGIN; Yabancı Gerçek Kişilerin Türkiye’de Taşınmaz Mal Edinmeleri ve Sınırlı Ayni Haklardan Yararlanmaları: 10-19, 97-599. Nuray EKŞİ; Yabancıların Türkiye’de Taşınmaz Mallar Üzerindeki Hakları; 30-32, 110-117, 200.
thrust the developing countries to the level of developed ones. It is extensively argued by specialists of the subject that this is a legal fact beyond mere contention.12

Our legal outlook is that, the conviction that this system will eliminate the resource deficit in Turkish economy corresponds to actuality. The legal structure that most satisfactorily allows access for foreign capital which is one of the most effective means to reduce the resource deficit, can only be instituted through the recognition of direct investment system.

12 PERRY; 779 fn. 1,2,3,4. 780-782, 784-786.