Emerging Market Economies and International Investment Law: Turkey-Africa Bilateral Investment Treaties

Uche E. Ofodile

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Emerging Market Economies and International Investment Law: Turkey–Africa Bilateral Investment Treaties

Uche Ewelukwa Ofodile*

ABSTRACT

This Article offers a critical and penetrating insight into the bilateral investment treaties (BITs) between Turkey and countries in Africa. Since 2003, Turkey has concluded BITs with twenty-eight countries in Africa. This Article seeks answers to some very important questions. In the BITs between Turkey and countries in Africa, is Turkey merely conforming to the norms and standards established by Western countries, or is Turkey changing these norms in fundamental ways? Compared to BITs between Western nations and countries in Africa, are Turkey–Africa BITs more oriented towards sustainable development and, if so, in what respects? In what ways are emerging market economies such as Turkey transforming the global economic landscape and international economic law?

This Article fills an important gap in the literature on international investment law and the role of emerging market economies in the global economic system. Thus, although focused on Turkey–Africa investment relations, this Article sheds important light on three broader issues. First, this Article offers a glimpse into the way emerging market economies are using and sometimes transforming international economic law. Second, this Article takes on one of the most important issues in international economic law today—the crisis in the international investment law—and examines how different stakeholders are grappling with this crisis. Third, this Article sheds important light on the dynamics of South–South economic relations and how countries in Africa are moving beyond traditional (Western) partners and are engaging or attempting

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to engage with new partners in Asia, the Middle East, and Latin America. Although emerging market economies and emerging market multinationals are playing an incredibly significant role in the global economy and are changing global economic governance in significant ways, their involvement in the making and unmaking of international economic law is frequently ignored or misunderstood. This Article addresses this by offering critical insight into how emerging market economies are using, adapting, and sometimes abandoning established international economic norms.

TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 953

II. TURKEY–AFRICA RELATIONS: BACKGROUND AND ECONOMIC DIMENSIONS ........................................... 962

A. Background ........................................................................... 962
   1. Turkey–Africa Relations: Before 1923................................. 962
   2. Turkey–Africa Relations: Between 1923 and 1998 .......... 963
   3. Turkey–Africa Relations: After 1998 ............................. 963

B. Economic Dimensions .......................................................... 964
   1. Foreign Direct Investment .............................................. 965
   2. Trade .............................................................................. 965
   3. Development Assistance .............................................. 966

C. Political/Diplomatic Cooperation ........................................... 968
   1. Bilateral Relations.......................................................... 969
   2. Relations with Continental and Subregional Organizations ........ 970

D. Global Governance/Multilateralism ....................................... 972

III. TURKEY–AFRICA RELATIONS: EMERGING LEGAL AND INSTITUTIONAL FRAMEWORK ...................................... 973

A. Legal Instruments in Turkey–Africa Relations ......................... 973

B. Principles That Underpin Turkey–Africa Relations ................. 975

C. The Agenda for Turkey–Africa Cooperation .......................... 976

D. Turkey–Africa Relations: Emerging Institutional Framework .... 976

IV. TURKEY IN AFRICA: FOREIGN POLICY TOOLS AND INSTITUTIONS ................................................................. 977

A. Turkey's Display of Soft Power in Africa .............................. 978

B. Turkey's Foreign Policy Institutions ...................................... 980
   1. Türk Eximbank.................................................................. 981
2. Foreign Economic Relations Board (DEIK) .................................................. 982
3. Turkish Cooperation and Coordination Agency (TIKA) .... 982

V. TURKEY–AFRICA BILATERAL INVESTMENT TREATIES...
A. Trends of Turkey–Africa BITs .................. 984
B. Investor Protection Elements in Turkey–Africa BITs ................ 985
   1. National Treatment .......................... 986
   2. Most Favored Nation Treatment .......... 987
   3. Absolute Standard of Treatment: Fair and Equitable Treatment, Full Protection and Security, and Nonimpairment .......... 987
   4. Protection Against Expropriation .......... 989
   5. Right to Transfer Capital .................. 991
   6. Transparency Obligations .................. 992
   7. Investor–State Dispute Settlement ......... 993
C. Sustainable Development Elements in Turkey–African BITs ........ 994
   1. Economic Development in the Preamble .................................................. 996
   2. Scope of Application Clause ............. 998
   3. Postestablishment Rights: the Right of Host State to Restrict Admission of Investor/Investments ........ 999
   4. General Exception .......................... 1000
   5. Limits on Expropriation ................. 1002
   6. The “Not Lowering of Standards” Clause ................................................. 1003
   7. Nonderogation Clause ..................... 1004
   8. Limits on Investor Rights and Guarantees ........................................... 1005

VI. TURKEY–AFRICA BILATERAL INVESTMENT TREATIES: A CRITIQUE .................................................. 1006
A. Turkey–Africa BITs: Missing Elements ... 1007
   1. Sustainable Development Not Explicitly Mentioned as a Treaty Objective ................................................. 1007
   2. Corporate Social Responsibility Ignored ........................................... 1009
   3. Lack of Policy Space in “Old-Generation” BITs ............ 1012
   4. Legal Minefields Arising from Broad and Vague Obligations .......... 1015
5. Variations among Turkey–Africa BITs ........................................ 1020
6. Development Dimension not Prioritized ........................................ 1021
7. The Right to Regulate Is Not Affirmed Explicitly ............................. 1022

B. Reforming Turkey–Africa BITs: Options for Countries in Africa ................. 1024
   1. Termination and Renegotiation ........................................... 1024
   2. Consultation and Treaty Review ........................................... 1026
   3. Treaty Amendment .......................................................... 1028
   4. Treaty Replacement ......................................................... 1030

VII. Reforming Turkey–Africa BITs: Complicating Policy Factors Practical Considerations ........................................... 1029

A. Key Policy Considerations that Shape Turkey–Africa BIT Regime ................. 1030
   1. Turkey's Desire to Be Seen as Africa's "Friend" .................................. 1030
   2. Turkey's Membership in the Council of Europe .................................. 1031
   3. Turkey's Self-Interest ......................................................... 1033
   4. Ankara Ability or Inability to Deliver on Its Many Promises to Countries in Africa ......................................................... 1034
   5. Competition for Capital From Emerging Markets .................................. 1034
   6. Disturbing Questions that Critics May Dare to Ask ................................ 1035
   7. Crisis in International Investment Law and Ongoing Reform Efforts .......... 1038

B. Practical Considerations ......................................................... 1044
   1. Turkey's Immense Experience with BITs ........................................ 1044
   2. Turkey's Deployment of Soft Power in the African Continent .................. 1045
   3. Lack of Coordination on the African Side ........................................ 1045

VIII. Conclusion ........................................................................... 1047
I. INTRODUCTION

Slowly, steadily, and silently, the Republic of Turkey (Turkey) is concluding important and far-reaching BITs with countries in Africa. To date, Turkey has concluded BITs with about twenty-eight different countries in Africa. While much attention has focused on China–Africa economic relations, economic cooperation arrangements between African states and other emerging market economies have largely flown under the radar. Relations between Turkey and countries in Africa have been deepening and widening since 1998 when Ankara adopted an Africa Action Plan and stepped up in 2005 when Turkey launched its “Opening to Africa” policy and declared the year the “Year of Africa.” The result is that, although Turkey is still relatively new in African politics, trade, and aid circles, “it has already expanded its area of influence in the continent by linking its soft power tools of transportation links, trade, and education closely


2. Id.


5. Seale, supra note 4.

6. Ottoman Dreaming, supra note 4.
with its foreign policy." 7 Once limited to North Africa, Ankara’s interest in Africa is now extending to all parts of the continent. 8 From every indication, African countries, individually and collectively, are responding positively to Ankara’s overtures. 9 The African Union (AU), a continental union consisting of fifty-five countries, 10 granted Turkey “Observer Status” in 2005. 11 In 2008, the AU declared Turkey a “Strategic Partner” of the African Continent. 12 In January 2013, Turkey became the twenty-sixth nonregional member of the African Development Bank and the twenty-sixth State Participant to the African Development Fund. 13 Since 2003, Turkey has concluded BITs with more than half of the countries in Africa. 14 Turkey has concluded more bilateral investment treaties with countries in Africa than partners, such as the United States (nine BITs with countries in Africa) 15 and Japan (three BITs with countries in Africa). 16

9. The author’s assessment is based on deepening economic, diplomatic and cultural ties between Turkey and countries in Africa. See infra Part I.
12. The framework of Africa’s strategic partnership takes four distinct forms: (i) continent to continent partnerships; (ii) continent to country partnerships such as Africa-India, Africa-Turkey, Africa-China, and Africa-Japan; (iii) partnerships in demand as new states or regions request additional partnerships; and (iv) partnership with other institutions such as the Organisation of American States (OAS), the Organisation of Islamic Conference (OIC) the Commonwealth and La Francophonie. Africa’s Strategic Partnership with Other Parts of the World, AFRICAN UNION, https://au.int/en/partnerships/intro (last visited Sept. 8, 2019) [https://perma.cc/V835-BB9A] (archived Aug. 11, 2019).
Turkey–Africa economic engagements underscore the shifting, and growing role of emerging market economies in the global economy and in the economies of many developing countries. Over the last two decades, emerging market economies have slowly and steadily established themselves as key players in the world economy and as major players on the foreign direct investment (FDI) scene. According to the World Bank’s *Global Economic Prospects 2018*, capital flows to emerging economies strengthened in 2016 and again in 2017. In turn, emerging market economies are exporting more and more capital to developed countries, to other emerging market economies, and to developing economies. Outward FDI from emerging economies has grown even as emerging market multinationals (EMNCs) have become more dominant on the global stage. Since 1990, emerging market economies have launched more than seventeen thousand large companies according to McKinsey Global Institute. In 2013, emerging market multinationals accounted for 26 percent of the Fortune 500, up from 5 percent.

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percent between 1980 and 2000. Experts predict that by 2025, emerging market multinationals will “account for more than 45 percent of the Fortune Global 500.”

Turkey and countries in Africa are concluding BITs at a time when international investment law is in crisis and is witnessing defections and facing multiple calls for fundamental overhaul. While some countries are exiting the system, many others are keen on reforming the system. The United Nations Conference on Trade and Development (UNCTAD) has long acknowledged this crisis and

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24. Id.
25. Id.

27. On January 21, 2014, the EU Trade Commissioner Karel De Gucht announced plans “to pause” the investor protection and ISDS portion of the Transatlantic Trade and Investment Partnership (T-TIP). In March 2014, the European Commission launched an “online” public consultation on how to improve the system. In 2015, following the public consultation, the EU Trade Commissioner concluded that the consultation showed among other things that “[t]he vast majority of [international investment agreements] do not include the kind of guarantees that the EU would like to see.” See Improving ISDS to Prevent Abuse—Statement by EU Trade Commissioner Karel De Gucht on the Launch of a Public Consultation on Investment Protection in TTIP, EUROPEAN COMM’N (2014); see also Report Presented Today: Consultation on Investment Protections in EU-US Trade Talks, EUROPEAN COMM’N (2015); Questions and Answers: Public Online Consultation on Investor Protection in TTIP, EUROPEAN COMM’N (2014).


led the movement for reform.30 In its 2012 Investment Policy Framework for Sustainable Development (updated in 2015), UNCTAD presented the organization's vision on designing international investment policies for sustainable development.31 In 2016, the Group of Twenty (G20) Ministers adopted the G20 Guiding Principles for Global Investment Policymaking and essentially acknowledged the need for reform.32

This Article underscores a new normal for countries in Africa—increased engagement with emerging partners in Asia, the Middle East, and Latin America.33 Thanks to emerging partners, the patterns of trade, investment, and aid to Africa are shifting.34 Is Africa ready to engage emerging partners and, if so, on what terms? Does the shift in global wealth really spell the end of postcolonialism?35 Does Africa have a strategy for engaging with emerging partners? Does Africa need a strategy? Is Africa effectively harnessing its emerging partnerships for sustainable development?

The changing role of emerging market economies in the global economy is raising a number of interesting questions for international lawyers and for international economic law. For example, as emerging markets' economies are transforming the global economy, are they also transforming or attempting to transform international economic law and policy? And if emerging markets' economies are transforming international economic law and policy, to what

30. See UNCTAD’s Reform Package for the International Investment Regime, U.N. Conference on Trade & Dev. 7–8 (2018) (discussing the crisis in international investment law, the push for reform over the past several years, and the options for reform); see also World Investment Report 2015: Reforming International Investment Governance, supra note 22.


degree. In their engagements with other developing countries, are emerging market economies using and asserting the same norms and principles that Western nations developed and have deployed for years? In 2011, an editorial in the OECD Observer aptly asked: “Before the talk was in dollars. Now leaders speak equally of Chinese renminbi, Indian rupees and Brazilian reals. Are the last shackles of colonialism finally being broken? Or is another form of dependence taking over, this time based on commodity hungry emerging markets?”

Against the backdrop of the changing role of emerging markets in the global economy and the renewed emphasis on sustainable development among world leaders, this Article takes a look at the BITs that Turkey has concluded, and is still concluding, with countries in Africa. In the BITs with countries in Africa, is Turkey merely conforming to the norms and standards established by developed countries, or is Turkey changing these norms in fundamental ways? Compared to BITs between Western nations and countries in Africa, do Turkey–Africa BITs espouse purposes other than investor protection, and are Turkey–Africa BITs more oriented towards sustainable development? Are Turkey–Africa BITs designed to provide sufficient policy space for host states?

Since 2003, Turkey has concluded thirty-one BITs with twenty-eight countries in Africa (including two separate BITs with

36. Joseph Joyce, How have emerging economies transformed the global economy?, WE Forum (Dec. 3, 2015), https://www.weforum.org/agenda/2015/12/how-have-emerging-economies-transformed-the-global-economy/ [https://perma.cc/EAX7-2AKA] (archived Aug. 11, 2019) (arguing that “In recent decades the global economy has been transformed by the rise of the emerging market economies. Their growth lifted millions out of poverty and gave their governments the right to call for a larger voice in discussions of international economic governance.”).


38. Africa’s Emerging Partnerships, supra note 34.

39. The Sustainable Development Goals (SDGs) are a collection of 17 global goals that the United Nations General Assembly set in 2015 and are part of Resolution 70/1 of the United Nations General Assembly. The goals which are set forth in Paragraph 54 of Resolution A/RES/70/1 cover social and economic development issues including poverty, hunger, health, education, global warming, gender equality, water, sanitation, energy, urbanization, environment, and social justice. See G.A. Res. 70/1 (Oct. 21, 2015).

40. At a historic UN Summit in September 2015, world leaders adopted the 2030 Agenda for Sustainable Development and its seventeen Sustainable Development Goals (SDGs). The SDG goals went into effect in January 2016. The SDGs are enshrined in UN Resolution 70/1 of the United Nations General Assembly. See id.


42. Investment Policy Hub – Turkey, supra note 1.
Nigeria, Sudan, and Tunisia). Out of the fifty-four countries in Africa, twenty-eight countries have concluded BITs with Turkey (See Annex A and B). Since 2011, with the exception of 2012 and 2015, Turkey has concluded at least two BITs every year with countries in Africa. 

Turkey concluded two BITs in 2018, four BITs in 2017, four BITs in 2016, two BITs in 2014, four BITs in 2013, and two BITs in 2011 with countries in Africa.

This Article focuses on six BITs that Turkey has with countries in Africa that are actually in force and are available in English (BITs with Egypt, Ethiopia, Libya, Morocco, Senegal, and


47. Investment Policy Hub – Turkey, supra note 1.

48. In 2018, Turkey concluded BITs with Mali, on March 2, 2018, and Mauritania, on February 28, 2018. See id.

49. In 2017, Turkey concluded BITs with Burundim on June 14, 2017, Chad, on February 26, 2017, Mozambique, on January 24, 2017, and Tunisia, on December 27, 2017. See id.

50. In 2016, Turkey concluded BITs with Rwanda, on November 3, 2016, Somalia, on June 1, 2016, Côte d'Ivoire, on February 29, 2016, and Ghana, on March 1, 2016. See id.

51. In 2014, Turkey concluded BITs with Kenya, on April 8, 2014, Sudan, on April 30, 2014. See id.

52. In 2013, Turkey concluded BITs with Djibouti, on September 25, 2013, Gambia, on March 12, 2013, Guinea, on June 18, 2013, and Benin, on December 11, 2013. See id.


Tunisia\textsuperscript{59}). In addition, this Article also reflects on ten additional BITs that are available and are in English but not in force (BITs with Algeria,\textsuperscript{60} Cameroon,\textsuperscript{61} Gabon,\textsuperscript{62} Gambia,\textsuperscript{63} Nigeria,\textsuperscript{64} Kenya,\textsuperscript{65}


59. Turkey–Tunisia BIT, supra note 45.


64. Turkey–Nigeria BIT (2011), supra note 43.

Rwanda, South Africa, Sudan, and Tanzania). This Article is divided into six Parts. Part I examines the history and economic dimensions of Turkey–Africa relations. Part II offers an overview of the legal instruments and fundamental principles that underpin Turkey–Africa relations. The policy tools and institutions that drive Turkey’s foreign policy are examined in Part III. With a focus on BITs, Part IV examines trends in Turkey–Africa BITs, reviews the investor-protection elements in these BITs, as well as the sustainable development elements in the agreements. Drawing on international best practices, Part V offers a thorough critique of Turkey–Africa BITs. Part VI discusses policy and practical considerations that could complicate any effort to reform Turkey–Africa BITs.

Emerging market economies are playing an incredibly significant role in the global economy and in the economies of developing and the least developed countries. This Article fills a very important gap in the available literature by offering critical insight into how emerging market economies are using, adapting, and sometimes abandoning established international economic norms.


68. Turkey–Sudan BIT, supra note 44.


70. Emerging market economies are important for a number of reasons including: contribution to the world GDP as a result of rising productivity, income and demand, contribution to the achievement of the sustainable development goals, and foreign direct investment in other countries. See Woetzel, supra note 21, at 5 (“Collectively, the outperformers have been the engine for lifting about one billion people out of extreme poverty, helping to meet a key United Nations Sustainable Development Goal. Indeed, rising prosperity in these countries has not just reduced poverty, but also enabled the emergence of a new wave of middle and affluent classes.”); see also Hal Hill & Juthathip Jongwanich, Emerging East Asian Economies as Foreign Investors: An Analytical Survey, 59 SING. ECON. REV. 1, 1–26 (2014) (discussing the growing role of emerging market economies in foreign investment).
II. TURKEY–AFRICA RELATIONS: BACKGROUND AND ECONOMIC DIMENSIONS

Turkey–Africa relations have evolved in three stages: the period before 1923 when Turkey became a modern nation-state, the period between 1923 and 1998, and the period since 1998. Much of this Article focuses on Turkey–Africa relations as they have developed since 1998. Turkey–Africa relations are evolving on multiple fronts, including on the economic, development, political, and social fronts. The relationship is deepening and is measured by indicators such as institutionalized diplomatic engagement, highly structured multiyear and/or multicountry development interventions, trade and investment-facilitating mechanisms, technical assistance, technological transfer, formal financial engagement, and even security cooperation.

A. Background

1. Turkey–Africa Relations: Before 1923

Turkey and Africa have long-standing historical ties as a result of the reach and influence of the Ottoman Empire in the sixteenth century. At its height, the Ottoman Empire had its tentacles in Egypt, Tunisia, Algeria, Libya, Morocco, and the Horn of Africa. In its engagement with Africa, Turkey has routinely stressed these historical ties. According to the Ministry of Foreign Affairs (MFA), Turkey “has long-standing historical and cultural relations with the African continent, dating back centuries,” and the first state founded by the Turks in Africa was the Tulunid Dynasty, which ruled today’s Egypt in the ninth and tenth centuries. The MFA asserts on its website that “[b]eing an Afro-Eurasian state, Turkey’s policy of opening up to Africa is not just the reflection of a transient political


73. Özkan & Akgün, supra note 71, at 530 (observing that the Turks’ relations with Africa go back centuries).


75. Shaw, supra note 74.
and economic expectation” but “is the product of a process with strong historical and cultural aspects.”

2. Turkey–Africa Relations: Between 1923 and 1998

The period between 1923 and 1998 has been described as a dead era as far as Turkish–African relations are concerned. Upon its independence in 1923, when the Turkish Republic was created, Ankara adopted a foreign policy based on westernization and secularism, which reflected the Kemalist perception of international relations. The building blocks of this policy, according to Abdinor Hassan Dahir, “were secularism and modernization by looking to the West for direction (westernization) and cutting ties with the Ottoman past, keeping the country together through securitization based on the defined borders of the republic, and pursuing inward-looking noninterventionist/nonrevisionist norms.” Against the backdrop of Atatürk’s “Peace at Home, peace in the world” approach, Turkey–Africa relations received little or no attention during this period and were relegated to the background. Nevertheless, Turkey maintained diplomatic relations with a number of countries in Africa. For example, Turkey opened the Turkish Consulate General in Lagos in 1956.

3. Turkey–Africa Relations: After 1998

Turkish activism in Africa started with Ankara’s “Opening to Africa Policy” adopted in the 1998 Action Plan and gained momentum when the Justice and Development Party’s (Turkish: Adalate ve Kalkınma Partisi (AKP)) rule began in the early 2000s. In 2003, the Turkish government launched “The Strategy Development of Economic Relationships with Africa,” and in 2005, the government

76. Id.
78. Dahir, supra note 72.
79. Id.
80. Özkan & Akgün, supra note 71, at 531 (noting that in the republican era, Turkey–Africa relations were down-graded to the lowest level).
81. Id.
82. Id.
83. Turkey–Africa Relations, supra note 4.
84. Dahir, supra note 72 (“One notable project that has marked a turning point in Africa-Turkey economic relations was the launching of ‘The Strategy Development of Economic Relationships with Africa’ in 2003.”).
unveiled Turkey’s “Open to Africa Policy.”85 The Turkish Government also declared 2005 the “Year of Africa.”86 Also in 2005, Turkish Prime Minister Recep Tayyip Erdoğan visited Ethiopia and South Africa making it “the first official visit by a Turkish prime minister to a country south of the equator.”87

The year 2008 marked a significant year in Turkey–Africa relations. In 2008, the AU declared Turkey a strategic partner of the Continent.88 The first ever “Turkey–Africa Cooperation Summit” was held in 2008.89 The “Second Turkey–Africa Partnership Summit” was held in 2014.90 The Summit had the theme of “A New Model of Partnership for the Strengthening of Sustainable Development and Integration.”91 The Summit adopted the Declaration and Joint Implementation Plan for the Period of 2015–2019.92 The third Turkey–Africa Partnership Summit will be held in 2019.93 In between the summits, high-level official meetings have occurred.94

B. Economic Dimensions

Economic considerations play a major role in Turkey’s Africa policy.95 One visible dimension of Turkey’s economic activism is Ankara’s interest in entering new markets beyond those in the West and in Turkey’s immediate neighborhood.96 Turkey’s involvement in

85. Turkey-Africa Relations, supra note 4.
86. Id.
87. Özkan & Akgün, supra note 71, at 533.
89. Turkey-Africa Relations, supra note 4.
91. Id.
92. Turkey-Africa Relations, supra note 4.
93. Id.
94. The first Turkey–Africa Cooperation High Level Official Meeting took place in December 2010. This meeting culminated in the adoption of the Joint Implementation Plan of Africa-Turkey partnership for the period 2010–2014 [hereinafter First Joint Implementation Plan]. The first Turkey–Africa Agriculture Ministerial Meeting and Agribusiness Forum took place in 2017.
96. Hakan Fidan, A Work in Progress: The New Turkish Foreign Policy, 20 MIDDLE E. POLY 91, 91 (2013) (discussing the dawn of “a new era of activism” in Turkey’s foreign policy that sees Turkey “increasingly assertiong itself as a rising actor that is determined to make a unique contribution to regional and global affairs”); see also SECOND TURKEY-AFRICA PARTNERSHIP SUMMIT, supra note 90 (noting that
Africa is both wide and multifaceted. From every indication, Turkey–Africa economic relations are gaining momentum on multiple fronts: FDI, trade, and development assistance.

1. Foreign Direct Investment

There are conflicting figures on the volume of Turkish FDI in Africa. Turkish direct investment to Africa has seen a tenfold increase since 2004 and is now between $5 to $8 billion. Turkish FDI in Africa was less than $100 million in 2003 but surpassed $6 billion in 2015 and $6.5 billion in 2017. In Africa, Ethiopia is the largest investment destination for Turkish FDI. Over $2.5 billion of the total $6 billion Turkish FDI in Africa goes to Ethiopia. In Ethiopia, Turkish companies are engaged in the textile and apparel industry but are showing growing interest in sectors, such as energy, steel, ceramics, and construction. Beyond FDI, Turkish contractors are undertaking projects in Africa and have so far undertaken over 1,150 projects in Africa worth $55 billion.

2. Trade

Trade “is one of the most important drivers of Turkey’s recent emphasis on Africa.” There are conflicting figures of the volume of Turkey–Africa trade, a clear indication that the exact volume of Turkey–Africa trade is not known. According to the Anadolu

"Ankara's increased interest towards the states across the Mediterranean sea and to the South was initially driven by economical reasons at large.")

97. Ozkan & Akgun, supra note 71, at 528 (describing Turkey’s foreign policy in general as being “a multi-faceted foreign policy.”).
98. SHINN, supra note 8, at 11 (“There are conflicting figures on Turkey’s foreign direct investment in SSA.”).
100. Id.
101. Id.
102. Id.
104. Id.; see also Turkey-Africa Relations, supra note 4 (discussing the deepening relationship between Turkey and Ethiopia).
105. Derso, supra note 109.
107. SHINN, supra note 8.
108. Id.
Agency, an international news agency based in Ankara, Turkey’s trade with African countries has grown sixfold in the past fifteen years to $17.5 billion in 2017. According to the Turkish Ministry of Trade, “Turkey’s trade volume with Africa totaled USD 19.5 billion in 2015, up 16% from 2008 and 258% from 2003. Turkey’s export in 2003–2015 increased almost sixfold and import has more than doubled in the same period.”

Turkey’s trade with the continent was and is still concentrated in North Africa, but this is gradually changing. In 2016, Turkey reportedly had more than $10 billion in trade with Egypt, Algeria, and Morocco. In 2015, Turkey exported $4 billion in goods to sub-Saharan African countries, up from $750 million in 2004. South African Republic, Nigeria, Ethiopia, Ghana, and Côte d’Ivoire are among Turkey’s top customers in sub-Saharan Africa. Turkey’s trade with South Africa constitutes approximately 40 percent of Turkey’s trade with sub-Saharan African countries; in 2015, trade volume between the two countries stood at $1.4 billion.

3. Development Assistance

Humanitarian aid and development assistance are relatively new instruments in Turkey’s foreign-policy tool kit. Turkey is contributing to the geopolitical landscape of humanitarian assistance, and of development aid more widely. Over the past decade, the

109. Turkey’s Africa initiative sees six-fold rise in trade with continent, supra note 99.
111. Turkey’s Africa initiative sees six-fold rise in trade with continent, supra note 99.
112. Id.
113. Id.
116. Id.
118. See TURKISH COOPERATION AND COORDINATION AGENCY (TIKA), TURKISH DEVELOPMENT ASSISTANCE 2013 REPORT (2014); TURKISH COOPERATION AND...
position of Turkey has gradually moved from that of being an aid recipient to that of being a donor country. Turkey is now considered one of the world’s top donors and is now a net contributor of official development assistance (ODA). According to Luca Ventura:

Turkey spent US$6 billion on humanitarian aid, more than any other country except the US ($6.3 billion). Percentage-wise, Turkey’s largesse—0.75% of its 121 gross national income (GNI)—dwarfs every member of the G20 and is well ahead of No. 2, United Arab Emirates, at 0.18% of GNI. The OECD has slightly different numbers, but also shows Turkey’s official development assistance (ODA), which includes humanitarian aid, as having risen sharply in the last five years.

In terms of economic assistance to countries in Africa, sub-Saharan Africa was reportedly the first region to begin receiving Turkish aid; Turkey is steadily increasing its footprint. In 2011, Erdoğan (then Prime Minister of Turkey) travelled to Somalia to raise awareness in the international community about the ongoing conflict in Somalia and was the first non-African leader to visit Somalia over the past two decades. Since 2011, Turkey has committed development assistance to Somalia and other predominantly Muslim countries in Africa and other regions. From 2011–2012, Erdoğan committed to help Somalia recover from years of war and famine, and Turkey quickly became “the largest donor among non-OECD-DAC countries and one of the most active actors in humanitarian aid and peace-building” efforts in Somalia. In Somalia, Turkish aid has gone beyond direct financial transfers. Turkish aid organizations, such as Turkish Red Crescent (Kizilay)

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120. Fidan, *supra* note 96, at 94 (discussing Turkey’s increasing participation in development assistance and humanitarian aid).
121. SHINN, *supra* note 8, at 13.
124. Id. (discussing the increase in Turkish aid to Africa from $10 million in 1985 to $31 million in 2006 and to $52 million in 2008. By the end of 2011, Turkey had undertaken 113 development assistance projects in 37 African countries).
125. Id.
126. Id.
127. Id.
129. Id.
and the Turkish International Cooperation and Development Agency (TIKA) "are highly active in a wide range of infrastructure, welfare and service sector programmes in the country such as clearing rubbish, providing clean water, building hospitals and running the Mogadishu's permanent settlement for displaced Somalians."\textsuperscript{130} As of 2013, Africa was reportedly the largest overall beneficiary of aid from the TIKA, receiving 33.7 percent of the agency's total disbursement.\textsuperscript{131}

Development cooperation between Turkey and countries in Africa will likely continue. Both sides plan to enhance cooperation in a wide variety of areas, including the fields of health, youth development, women's empowerment, and infrastructure development.\textsuperscript{132} In the Second Africa-Turkey Summit Declaration (2014): "New Model of Partnership for the Strengthening of Sustainable Development and Integration" (2014 Malabo Declaration) adopted in 2014, both sides reaffirmed their commitment to cooperating with each other.\textsuperscript{133}

\textbf{C. Political/Diplomatic Cooperation}

Political relations between Turkey and countries in Africa are deepening. Turkey is engaging bilaterally and regionally through continental-wide institutions, such as the AU and the African Development Bank.\textsuperscript{134} Faced with major challenges to European Union accession\textsuperscript{135} and shifting alliances in the Middle East,\textsuperscript{136}

\textsuperscript{130} Id.
\textsuperscript{131} SHINN, supra note 8.
\textsuperscript{132} See generally New Model of Partnership for the Strengthening of Sustainable Development and Integration, SECOND AFRICA-TURKEY SUMMIT DECLARATION (2014).
\textsuperscript{133} Id.
\textsuperscript{134} Founded in 1964, the African Development Bank is a multilateral development finance institution with a focus on the continent of Africa. The overarching objective of the African Development Bank (AfDB) Group is to spur sustainable economic development and social progress in its regional member countries (RMCs). See Mission & Strategy, supra note 10.
\textsuperscript{135} After more than a decade negotiation to join the European Union, Turkey is not anywhere near joining the EU. In fact, Turkey's EU bid appears to have all but collapsed. Turkey's formal EU accession negotiations began in October 2005. However, in April 2017, the European Parliament called for a formal suspension of Turkey's EU membership bid. Furthermore, in September 2017, German Chancellor Angela Merkel announced that she will seek an end to Turkey's membership talks. Negotiation talks are now effectively frozen. Although Turkey remains a candidate for membership and although the Turkish Prime Minister has said the Turkey still seeks full EU membership many experts do not see the possibility of that happening anytime soon. See Factbox: Turkey's Collapsing EU membership bid, REUTERS, Sept. 4, 2017, https://www.reuters.com/article/us-germany-turkey-eu-factbox/factbox-turkeys-collapsing-eu-membership-bid-idUSKCN1BPYTH [https://perma.cc/5G27-ANV9] (archived Aug. 11, 2019); see also Tom Batchelor, Turkey still wants 'full membership' of EU, Erdogan says, INDEPENDENT, Mar. 26, 2018, https://www.independent.co.uk/
Turkey is going farther to find trade, investment, and diplomatic partners.

1. Bilateral Relations

    Enlarging the level of its representation in the continent is important to Ankara. Consequently, the last decade has seen Turkey decisively opening new embassies in Africa and supporting numerous official visits to the continent.

In 2009, Turkey had only twelve Embassies in Africa. Since 2009, Turkey has embarked on an ambitious goal of opening embassies and consulates in almost every country in Africa. According to David Shinn:

        Turkey has engaged in an ambitious programme to establish diplomatic missions in SSA countries, and has encouraged the reciprocal opening of embassies in Ankara. Embassies were established in Côte d’Ivoire and Tanzania in 2009, adding to its existing missions in the [Democratic Republic of Congo], Ethiopia, Kenya, Nigeria, Senegal, South Africa and Sudan. Further embassies were opened in 2010 (in Angola, Cameroon, Ghana, Madagascar, Mali and Uganda), 2011 (The Gambia, Mauritania, Mozambique, Somalia, South Sudan, Zambia and Zimbabwe), 2012 (Burkina Faso, Gabon, Namibia and Niger) and 2013 (Chad, Guinea, Djibouti and Eritrea). When Turkey opened its embassy in Eritrea in 2013, it became the first country in the world to have ambassadorial representation in every country in the Horn of Africa.

In 2017, Turkey announced plans to open five new embassies in Africa, bringing Turkish embassies in the region to about forty-four. Turkey plans to open even more embassies in Africa. In

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137. SHINN, supra note 8, at 6.
138. Id.
139. Id.
140. Id.
141. Id.
response to Ankara’s diplomatic overtures, a growing number of
countries in Africa now have embassies in Turkey, and more have declared their decisions to open embassies in Ankara.144

High-level official visits are also a very important tool in Ankara’s opening up to Africa agenda.145 To strengthen bilateral relations with countries in Africa, President Erdoğan has stepped up his visits to Africa.146 Indeed, “[b]etween 2009 and 2011 there were 37 visits to Africa made by either the Turkish president, prime minister, parliamentary speaker or minister of foreign affairs. Over the same period, there were 76 visits to Turkey by African leaders of similar rank.”147 In the last ten years, President Erdoğan has paid more than thirty visits to twenty-eight African countries as both prime minister and president prompting Alexey Boguslavskiy to observe, “[t]he President of Turkey R. Erdoğan has become an absolute record-breaker among leaders of non-African states by the number of visits on the African continent, Sub-Saharan African countries being the major focus.”148 Official visits from African leaders to Turkey are increasing.149

2. Relations with Continental and Subregional Organizations

Beyond bilateral relations, Turkey is also pursuing relations with regional organizations in Africa, such as the African Union and the African Development Bank (the Bank).150 Turkey has been an Observer Country since 2005 and Strategic Partner since 2008 of the African Union.151 Since 2009, Turkey has been making an annual

143. Turkey aims to open more embassies in Africa, says Erdoğan, HURRIYET DAILY NEWS (Sept. 7, 2018), http://www.hurriyetedailynews.com/turkey-aims-to-open-more-embassies-in-africa-says-erdogan-136561 [https://perma.co/DHW4-FJTW] (archived Aug. 11, 2019) (discussing Turkey’s plan to increase the number of it embassies in Africa from 41 to 54).


145. Boguslavskiy, supra note 106 (discussing Erdoğan’s numerous visits to the African continent).

146. Id.

147. Id. at 7.

148. Id.; Boguslavskiy, supra note 106.


150. Turkey-Africa Relations, supra note 4.

contribution of $1 million to the African Union.\textsuperscript{152} Turkey has also pledged to “remain committed to support the institutional capacities of the African Union and other regional organizations in achieving progress on the priority areas which will consolidate African ownership of African matters.”\textsuperscript{153} In his 2014 speech delivered on the occasion of the second Turkey–Africa Partnership Summit, President Erdoğan “welcome[d] the increasing political significance of the African Union in addition to its forceful representation, and the active role it plays in solving the problems arising in the member countries,” and pledged that Turkey “will continue [its] financial contribution to the budget of the African Union in the coming years.”\textsuperscript{154}

Turkey is increasingly involved in the activities of the African Development Bank.\textsuperscript{155} In January 2013, Turkey became the twenty-sixth nonregional member of the African Development Bank and the twenty-sixth State Participant of the African Development Fund.\textsuperscript{156} In March 2014, Turkey gave its consent for the African Development Bank to issue bonds denominated in Turkish Lira.\textsuperscript{157} To date, the African Development Bank has issued numerous bonds denominated in Turkish Lira, and has raised 1,337.4 million TRY since 2009 through forty-four transactions.\textsuperscript{158} In 2016, the African Development Bank, together with the Under Secretariat of the Turkish Treasury and Foreign Economic Relations Board of Turkey, organized the first Business Opportunities Seminar to strengthen partnerships between the Bank and stakeholders in Turkey.\textsuperscript{159} In April 2018, the Bank initiated technical cooperation with the Türk Eximbank.\textsuperscript{160}

\begin{footnotes}
\item[153] Id.
\item[154] Recep Tayyip Erdoğan, President of the Republic of Turkey, Address at Second Turkey–Africa Partnership Summit (Nov. 21, 2014) (transcript available in the Second Turkey–Africa Partnership Summit website).
\item[156] Id.
\item[157] Id.
\item[158] Id.
\item[159] Id.
\item[160] Id.
\end{footnotes}
Turkey is also engaging countries in Africa at the level of regional economic communities and has obtained observer status in most of the regional economic communities (RECs) in Africa.\textsuperscript{161}

D. Global Governance/Multilateralism

Turkey is gradually positioning itself as a leading international voice in Africa and as a voice for and a strategic ally of Africa on the global stage.\textsuperscript{162} In 2013, when Turkey was actively campaigning for a seat on the United Nations Security Council, Ankara promised African states that “[i]f elected, Turkey’s UNSC membership in 2014–2015 will be an opportunity for the AU to be even much more stronger on the international scene, as Turkey, an Afro-Eurasian country, will indeed be the voice of Africa in this century which is the Century of Africa.”\textsuperscript{163} In 2010, Turkey cochaired the “International Donor’s Conference for the Reconstruction and Development of Darfur.”\textsuperscript{164} In May 2011, Turkey hosted the Fourth United Nations Conference on the Least Developed Countries in Istanbul.\textsuperscript{165} In line with its resolve to pursue robust comprehensive policy in Africa, in 2016, Turkey hosted the High Level Partnership Forum for Somalia in Istanbul.\textsuperscript{166}

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\textsuperscript{161} Since 2005, the Turkish Embassy in Abuja has been accredited to the Economic Community of West African States. Since 2010, the Turkish Embassy in Dar-es-Salaam has been accredited to the East African Community. In 2012, the Turkish Embassy in Lusaka became accredited to Common Market for Eastern and Southern Africa, and in 2012, the Turkish Embassy in Addis Ababa became accredited to the Intergovernmental Authority on Development Partners Forum. Since 2013, the Turkish Embassy in Libreville has been accredited to Economic Community of Central African States. See Turkey-Africa Relations, supra note 4; see also Turkey-Africa Partnership High Level Officials Meeting (Talking Points), supra note 114.


\textsuperscript{163} Turkey-Africa Partnership High Level Officials Meeting (Talking Points), supra note 114.


\textsuperscript{166} The Somalia High Level Partnership Forum is the highest decision-making mechanism of a process in which the Somali Government, the United Nations (U.N.), and key donor countries are parties. The sixth meeting of the Forum was held in Istanbul under the co-chairmanship of President Erdoğan, H.E. Hassan Sheikh Mohamud, President of Somalia, and H.E. Jan Eliasson, U.N. Deputy Sec’y-Gen. See Press Release, Turkish Ministry of Foreign Affairs, Press Release Regarding the High Level Partnership Forum on Somalia to be Held on 23-24 February 2016 in Istanbul (Feb. 22, 2016), http://www.mfa.gov.tr/no_-48_-22-february-2016_-press-release-
At the global level, Turkey has attempted to champion causes important to Africa. Turkey "defined its G20 presidency as representing the interests of low income, least developed, and SSA countries." During the Turkish G20 Presidency, G20 Leaders adopted a framework to strengthen the dialogue between G20 and low income developing countries.

III. TURKEY–AFRICA RELATIONS: EMERGING LEGAL AND INSTITUTIONAL FRAMEWORK

A number of legal instruments underpin the unfolding economic relations between Turkey and countries in Africa. These documents set out the vision for Turkey–Africa relations, identify key areas of cooperation, and map the agenda for deepening the relationship between the two sides in the coming years.

A. Legal Instruments in Turkey–Africa Relations

A growing number of legal instruments are shaping Turkey–Africa relations. While some instruments (e.g., BITs) are binding if and when they are ratified, most of the instruments that underpin Turkey–Africa relations are not binding and could be classified as "soft law" instruments. Free trade agreements are not very common in Turkey–Africa relations. Turkey has signed free trade...
agreements with four African countries: Egypt (December 27, 2005),\textsuperscript{171} Morocco (April 7, 2004),\textsuperscript{172} Tunisia (November 25, 2004),\textsuperscript{173} and Mauritius (2011).\textsuperscript{174} There are reports that Turkey is currently in trade talks with Cameroon, the DRC, and Seychelles, but these reports cannot be substantiated.\textsuperscript{175} Overall, key legal instruments in Turkey–Africa relations include

- \textit{The Istanbul Declaration on Turkey–Africa Partnership: Cooperation and Solidarity for a Common Future} adopted at the First Turkey–Africa Cooperation Summit in 2008 (2008 Istanbul Declaration);\textsuperscript{176}
- \textit{The Cooperation Framework for Turkey–Africa Partnership} adopted at the First Turkey–Africa Cooperation Summit in 2008;\textsuperscript{177}
- \textit{The Joint Implementation Plan of Turkey–Africa Partnership 2010–2014} (First Implementation Plan);\textsuperscript{178}
- \textit{The Joint Declaration and the Joint Action Plan} adopted at the first Ministerial meeting held on the 16th December 2011 in Istanbul;\textsuperscript{179}

\begin{itemize}
  \item \textsuperscript{171} Agreement Establishing a Free Trade Area Between the Arab Republic of Egypt and the Republic of Turkey, Egypt-Turk., Dec. 27, 2005.
  \item \textsuperscript{172} Free Trade Agreement Between the Kingdom of Morocco and the Republic of Turkey, Morocco-Turk., Apr. 7, 2004.
  \item \textsuperscript{173} Free Trade Agreement Between the Republic of Turkey and the Republic of Tunisia, Tunis.-Turk., Nov. 25, 2004.
  \item \textsuperscript{174} Free Trade Agreement Between the Republic of Turkey and the Republic of Mauritius, Turk.-Mauritius, Sept. 9, 2011.
  \item \textsuperscript{175} Nail Ersoy, \textit{Free Trade Agreements of Turkey}, Republic of Turkey, MINISTRY OF ECONOMY, REPUBLIC OF TURK. (Sept. 2013), http://yoikk.gov.tr/upload/IDB/FTAsCompatibilityMode.pdf [https://perma.cc/3UCE-2EFB] (archived Sept. 8, 2019).
  \item \textsuperscript{176} The Istanbul Declaration on Africa–Turkey Partnership: Solidarity and Partnership for a Common Future, Second Turkey-Africa Partnership Summit, Ministry of Foreign Affairs Turkey (adopted Aug. 19, 2008) [hereinafter Istanbul Declaration]. According to Turkey's Ministry of Foreign Affairs, forty-nine African countries participated in the "Turkey-Africa Cooperation Summit" which was held August 18–21, 2008. See \textit{Turkey-Africa Relations, supra} note 4.
  \item \textsuperscript{177} Framework of Cooperation for Africa-Turkey Partnership, Second Turkey-Africa Partnership Summit, Ministry of Foreign Affairs Turkey (adopted Aug. 19, 2008) [hereinafter Framework of Cooperation 2008].
  \item \textsuperscript{178} First Joint Implementation Plan, supra note 94.
The Turkey–Africa Joint Implementation Plan 2015–2019, adopted at the Second Turkey–Africa Partnership Summit in 2014; and

Thirty-eight Economic Cooperation Agreements, including at least thirty-one known BITs.

In addition to the legal instruments that underpin Turkey–Africa relations, there are numerous investment contracts and construction agreements between Turkish businesses and countries in Africa. Security pacts between Turkey and a growing number of countries in Africa are also important, such as the pact that laid the foundation for Ankara to establish and launch Turkey’s biggest overseas military base in Mogadishu, Somalia, in 2017.

B. Principles That Underpin Turkey–Africa Relations

The principles that underpin Turkey–Africa relations are spelled out in the 2008 Istanbul Declaration and the 2014 Malabo Declaration. In the Istanbul Declaration, the parties identified several principles that will guide the Africa–Turkey partnership. These include inter alia the principles of: respect for the principles of the United Nations (UN) Charter and the Constitutive Act of the African Union, sovereign equality of states, the universality of human rights and respect of fundamental freedoms, and peaceful settlement of disputes.

In the Malabo Declaration, the parties reaffirmed their adherence to the goals and principles stipulated in the Istanbul Declaration.

almost 30 African countries participated in the Malabo Summit held in November 2019. See Turkey-Africa Relations, supra note 4.


182. Turkey-Africa Relations, supra note 4.

183. Given rising Turkish investments in Africa and construction deals, it stands to reason that the investments and construction projects are all on the basis of binding contracts between Turkish companies and governments in Africa. Id.


185. See Istanbul Declaration, supra note 176.

186. See Malabo Declaration, supra note 178.

187. See Istanbul Declaration, supra note 176.

188. See Malabo Declaration, supra note 178, at 4 (“[S]trengthen the follow up mechanism which was established by the Framework of Cooperation for Africa-Turkey Partnership, done in Istanbul on 19 August 2008; through regular and intensified contacts...”).
C. The Agenda for Turkey–Africa Cooperation

The agenda for Turkey–Africa cooperation is quite extensive. At the Turkey–Africa Cooperation Summit held in 2008 with the participation of forty-nine countries, the two sides agreed to cooperate with vigor, in nine areas: (1) intergovernmental cooperation; (2) trade and investment; (3) agriculture, agribusiness, rural development, water resources management, and small and medium scale enterprises (SMEs); (4) health; (5) peace and security; (6) infrastructure, energy, and transport; (7) culture, tourism, and education; (8) media, information, and communication technology; and (9) the environment. To advance the identified agenda, the parties adopted the Framework of Cooperation for implementing the Istanbul Declaration. In 2014, the two sides expressed interest in deepening collaboration in a number of fields. Specifically, the two sides agreed to continue collaboration in a number of fields including the fields of peace and security, trade, investment, agriculture, and infrastructure development.

D. Turkey–Africa Relations: Emerging Institutional Framework

In 2008, the Parties adopted the Joint Implementation Plan of Turkey–Africa Partnership 2010–2014 (First Implementation Plan) in accordance with the Istanbul Declaration. In 2014, the parties adopted the Joint Implementation Plan of Africa–Turkey Partnership 2015–2019 (Second Implementation Plan). The two documents lay down the basis for establishing the strengthening institutional mechanisms that will shape Turkey–Africa cooperation arrangements. the parties have agreed to, inter alia, “strengthen their inter-governmental links and explore new areas of cooperation”; “promote the exchange of high level visits”; and “conduct regular inter-governmental dialogue and cooperation in order to create and maintain a favorable climate for business contacts and trade between Africa and Turkey.”

The parties have also agreed to establish follow-up mechanisms at several levels as follows:

189. Istanbul Declaration, supra note 176. The information about the number of countries that participated in the the Turkey–Africa Cooperation Summit in 2008 is from Turkey’s Ministry of Foreign Affairs. Whether the countries that participated were represented at by their heads of state, at the ministerial level, or by lower-level officials is hard to tell. See Turkey–Africa Relations, supra note 4.


191. Istanbul Declaration, supra note 176.

192. See Second Joint Implementation Plan, supra note 179.

193. First Joint Implementation Plan, supra note 94.
(a) "the Africa–Turkey Summit to be held every five years in Africa and in Turkey, on a rotational basis";

(b) "[a] Ministerial Review Conference that will meet every third year in the period between Summits to assess and evaluate the progress of implementation of the Programme of Action and prepare for the Summit meeting";

(c) "[a] meeting of Senior Officials that will take place twice in between two summits to review the progress of implementation of agreed programs and projects, disseminate information about cooperation arrangements, propose new initiatives, and report to and prepare for the Ministerial Review Conference."194

IV. TURKEY IN AFRICA: FOREIGN POLICY TOOLS AND INSTITUTIONS

Using a multitude of strategies, tools, and institutions, Turkey has been fairly successful in penetrating Africa.195 In the last decade, "a wide array of new liberal instruments has been added to the toolkit of Turkish diplomats."196 Turkey is using both traditional tools of foreign policy (e.g., trade, aid, and investment) and soft power (e.g., development assistance, humanitarian aid, and cultural diplomacy) to make an influence in Africa.197

194. Second Joint Implementation Plan, supra note 179, at ¶ 17(1)–(3).
195. Turkey-Africa Relations, supra note 4 (discussing Turkey's engagement with countries in Africa).
196. Id.
197. Coined by Joseph S. Nye back in the 1980s, the term soft power generally refers to the ability of a country to persuade other countries to do what it wants without resorting to military force or coercion. Agents of soft power are typically companies, foundations, universities, religious organizations, and other institutions of civil society. See Joseph S. Nye, Jr., Soft Power, 80 FOREIGN POL’Y 153, 167 (1990). To Nye, proof of power "lies not in resources but in the ability to change the behavior of states." Id. at 155. He argues that today, "[t]he ability to affect what other countries want tends to be associated with intangible power resources such as culture, ideology, and institutions." Id. at 166–67. Nye defines 'co-optive power' as "getting others to want what you want" and identifies soft power resources to include cultural attraction, ideology, and international institutions. According to Nye:

    Soft co-optive power is just as important as hard command power. If a state can make its power seem legitimate in the eyes of others, it will encounter less resistance to its wishes. If its culture and ideology are attractive, others will more willingly follow. If it can establish international norms consistent with its society, it is less likely to have to change. ge. If it can support institutions that make other states wish to channel or limit their activities in ways the dominant state prefers, it may be spared the costly exercise of coercive or hard power. Id. at 167.

With soft power, some countries try to shape the long-term attitudes and preferences of people of other nations. Whether successful states need both hard and soft power and whether soft power is effective are continuing debate in international relations circles.
A. Turkey’s Display of Soft Power in Africa

Turkish foreign policy makers are constantly adding new instruments to their tool kit even while improving conventional tools. Conventional devices deployed so far by Turkey in Africa include trade, aid, and FDI. Soft power has also been an important tool in Turkey’s foray into Africa. Turkey is using new means, such as flights, hospitals, schools, scholarships, and other civil society organizations to get into Africa. In March 2018, National Public Radio’s Peter Kenyon observed

> There are now over 40 Turkish embassies in Africa, and state-controlled Turkish Airlines flies to more than 50 African destinations. Last fall, Turkey opened a military base in Somalia, its first in Africa and the largest of its overseas bases. If you get sick in Somalia, you may be treated at the Recep Tayyip Erdogan Hospital. Visitors arrive at an airport terminal run by a Turkish company, and travel on roads built by Turkey’s development authority. Garbage collection is handled by the Turkish Red Crescent.

Schools and hospitals are very important in Turkey’s Africa agenda and are some of the primary tools that Turkey relies on for its soft projection of power in Africa. “The Gülen movement—founded by Turkish cleric Fethullah Gülen—was initially an instrument of Turkey’s soft power approach in Africa.” However, since the Turkish government’s fallout with Fethullah Gülen, the government

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198. See infra Part II.B.


200. Fidan, supra note 96, at 92 (observing that Turkish diplomats now “have a larger set of instruments to draw on as they launch new policies to advance the country’s regional and global agenda . . . Turkey’s soft power now comprises, among others things, cultural diplomacy, development assistance and mediation services.”).


202. See Sharma, supra note 199 (“The primary tool it relied on for this soft projection of power was Fethullah Gülen’s educational institutions.”).

has tried to steer its activities through government-run agencies.\(^{204}\)

The Maarif Foundation, a government-run agency, is beginning to operate schools in Africa.\(^{205}\) Established in 2016 by the ruling Justice and Development Party, the Maarif Foundation has taken over seventy-six schools linked to the Gülen movement in ten countries in Africa.\(^{206}\) The Maarif Foundation has reportedly "opened 32 new schools in eleven countries: Gambia, Sierra Leone, Djibouti, Sao Tome and Principe, the United States, Kosovo, Afghanistan, Georgia, Bosnia and Herzegovina, Tanzania and Macedonia, having a total of 1,127 students."\(^{207}\) The Turkish Ministry of National Education, and the Maarif Foundation, hosted the first Turkey–Africa Education Ministers Conference in 2017.\(^{208}\) Since 1992, Turkey has reportedly provided undergraduate, graduate, and doctorate scholarships to over eight thousand African students.\(^{209}\)

Turkish Airlines’ “bullish African expansion” has been noted by external observers and is welcomed—even celebrated—by many in Africa.\(^{210}\) Today, Turkish Airlines is “the largest international carrier in Africa in terms of total number of destinations.”\(^{211}\) In 2012, when Turkish Airlines launched twice daily service to Mogadishu, Somalia, it became the “third carrier to operate at Mogadishu International Airport and the first carrier from outside Africa to offer scheduled flights to and from Mogadishu in 21 years.”\(^{212}\) Africa Experience Sharing Program, a program akin to the U.S. Peace Corps, provides an opportunity for Turkish students to visit several African countries.
to volunteer.\textsuperscript{213} "The program is organized by the Turkish Cooperation and Coordination Agency (TIKA) in cooperation with Turkish Airlines, Anadolu Agency, and state broadcaster Turkish Radio and Television (TRT)."\textsuperscript{214}

\section*{B. Turkey's Foreign Policy Institutions}

At the forefront of Turkish foreign policy is the Ministry of Foreign Affairs (Ministry).\textsuperscript{215} The Ministry was established in 1920 and is responsible for Turkey's foreign relations.\textsuperscript{216} Between 1923 and 2001, Turkey's foreign policy was largely based on the Western-inspired reforms of Mustafa Kemal Atatürk, which placed heavy emphasis on Turkey's relationship with the Western world.\textsuperscript{217} Since the end of the Cold War, Turkey's foreign relations have been characterized by relation diversification.\textsuperscript{218} In 1924, Turkey had a total of thirty-nine missions abroad.\textsuperscript{219} In 2002, Turkey only had 163 diplomatic missions abroad.\textsuperscript{220} Today, Turkey is represented by about 233 official missions throughout the world.\textsuperscript{221} According to the Lowy

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{214} Id.
\item\textsuperscript{217} Id.
\item\textsuperscript{218} Id.; see F. Stephen Larrabee & Ian O. Lesser, \textit{TURKISH FOREIGN POLICY IN AN AGE OF UNCERTAINTY} 128 (Rand Corp. 2003) (observing that although Turkey's business community tends to be secular and highly supportive of Turkish integration in European and Western institutions and is generally not a community that looks South or East, culturally or politically, it is nonetheless among the most active proponents of Turkish economic engagement in Eurasia and the Middle East); see also Yusuf K. Bagir, \textit{Impact of the Presence of Foreign Missions on Trade: Evidence from Turkey}, MUNICH PERSONAL REPEC ARCHIVE 4 (2017), https://mpra.ub.uni-muenchen.de/80845/1/MPIRA_paper_80845.pdf [https://perma.cc/88RT-ENHS] (archived Oct. 21, 2019) ("Turkey has experienced a significant change in its foreign policy objectives since the beginning of the 21\textsuperscript{st} century. The main goal of this change was to develop a multi-dimensional and more proactive foreign policy which in part led to the expansion of relations with long-time neglected Sub-Saharan Africa, Latin America and Asia-Pacific regions.");
\item\textsuperscript{219} See Foreign Relations of Turkey, supra note 217.
\item\textsuperscript{220} Turkey to open 5 new embassies in African countries, supra note 142 (discussing the steady rise in the number of Turkish missions since 2002, when the ruling Justice and Development Party came to power).
\item\textsuperscript{221} Of Turkey's 233 missions around the world, 135 are embassies, thirteen are permanent representations, eighty-four are consulates-general and one is a trade office. See \textit{List of Diplomatic Missions of Turkey}, WIKIPEDIA, https://en.wikipedia.org/wiki/}
\end{itemize}
\end{footnotesize}
Institute’s *Global Diplomacy Index “2017 Country Ranking,”* Turkey is the sixth country, only after United States, China, France, Russia, and Japan, in the number of worldwide representations.223 “In the year 2009 there were only 12 Turkish embassies in African countries (5 of them in North Africa).”223 Today, Turkey has some forty-four embassies in the continent and reportedly plans to open an embassy in every capital city in Africa.224 In its engagement with countries in Africa three Turkish institutions are proving very important: Türk Eximbank, Turkey’s Foreign Economic Relations Board, and TIKA.

1. Türk Eximbank

Türk Eximbank was established in 1987 as Turkey’s official export credit agency.225 The main objectives of Türk Eximbank are

Increasing the volume of exports; Diversification of export goods and services; Developing new export markets; Increasing the exporters’ share of international trade and providing necessary support for their initiatives; Gaining competitiveness and bringing assurance to exporters, overseas contractors, and investors on the international markets; and “romoting and supporting the production and sale of investment goods for export through overseas investments.226 Türk Eximbank plays a very important role in supporting Turkey’s efforts in Africa and is eyeing more international cooperation.227 Thus far, Türk Eximbank’s loans are supporting a number of infrastructure and development projects throughout Africa.228 Countries in Africa are also turning to the bank for financing.229 In the 2008 *Cooperation Framework for Turkey–Africa Partnership,* the parties “welcome[d]
the willingness of the Turkish Eximbank as well as the Turkish government to provide loans for the financing of African development projects including continental infrastructure network in Africa."

2. Foreign Economic Relations Board (DEIK)\textsuperscript{231}

Established in 1986, the Foreign Economic Relations Board (DEIK) is responsible for leading and managing the foreign economic relations of the Turkish private sector.\textsuperscript{232} In executing its task, the DEIK focuses particularly on foreign trade, international investment and services, international construction activities, and logistics. One of its tasks is to explore inward and outward investment opportunities, work towards increasing exports for Turkish businesses, and help with coordinating other business development activities.\textsuperscript{233} Pursuant to Law No. 6552 enacted on September 11, 2014, the DEIK has full responsibility of “managing the foreign economic relations of the Turkish private sector.”\textsuperscript{234}

Through entities called the Business Councils, the DEIK establishes business-to-business cooperations with other countries.\textsuperscript{235} Suggesting a desire to deepen economic ties with Africa, the DEIK has opened Business Councils with its counterparts in thirty-one African countries.\textsuperscript{236}

3. Turkish Cooperation and Coordination Agency (TİKA)

TİKA is a government department of the Prime Ministry of Turkey and is directly responsible for organizing the majority of Turkey’s official development assistance to developing countries.\textsuperscript{237} Established in 1992 to as a technical aid organization under the Ministry of Foreign Affairs, to deal with some of the humanitarian

\textsuperscript{230} Framework of Cooperation 2008, supra note 177.
\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id. (“The Business Councils constitute the backbone of DEİK, while their Executive Committees are responsible for the implementation of the decisions taken.”). Published in 2017, “The Regulation on Working Procedures and Principles of Foreign Economic Relations Board and Business Councils” (the “Regulation”) sets out the functions of the Business Council. The Regulation was published in Official Gazette no. 30252 on November 26, 2017, and entered into effect on the same date. There are three different types of Business Councils, namely Bilateral Business Councils, Sectoral Business Councils, and Special Purpose Business Councils. Id.
\textsuperscript{236} The Foreign Economic Relations Board (DEIK) established business councils with forty-two African countries.
\textsuperscript{237} About DEİK, supra note 231.
crisis resulting from the disintegration of the Soviet Union. On May 28, 1999, TİKA became an organization working under the Prime Ministry of the Republic of Turkey. Although the initial focus of TİKA was on the Turkic (Turkish-speaking) countries in Central Asia, the agency’s focus has expanded considerably since the end of the Cold War. The number of TİKA’s Programme Coordination Offices went from twelve in 2002, to twenty-five in 2011, thirty-three in 2012, and sixty-one today. Today, TİKA is considered an integral part of Turkish foreign policy and its focus extends well beyond Turkey’s immediate neighborhood. Through its sixty-one Programme Coordination Offices located in about fifty-nine countries, TİKA is engaged in a wide variety of development cooperation activities in many countries around the world. Since 2002, Turkey’s budget for development assistance has grown. In 2002, Turkey’s development aid comprised about $85 million, by 2015, this amount increased to $3.9 billion.

Of TİKA’s sixty-one Programme Coordination Offices around the world, twenty-one offices are in Africa. “In 2008, TİKE [sic] initiated an African Agricultural Development Programme” that initially targeted thirteen countries in Africa. Today, TİKA’s agricultural assistance program can be found in many countries in Africa including Somalia, Sudan, and Kenya. “TIKA’s projects

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239. Id.
240. History of TIKA, supra note 238 (“In the ’90s, our country’s first priority regarding the issue of Central Asia became the recognition of the young Turkic countries by the international community. This was followed by our country carrying out projects for our cognates living in the newly founded countries of Central Asia in various fields, such as the social, economic and cultural ones.”).
241. Id.
242. Id.
243. Id.
244. Id.
245. Id.
246. Id.
248. Ozkan & Akgün, supra note 71, at 538.
250. Id.
and activities in Africa are designed to serve long-term purposes such as the development of social infrastructure, cultural co-operation and communication, the production sectors, economic infrastructure, and to a lesser extent provide support in urgent humanitarian crises."

In conclusion, in its charm offensive in Africa, Turkey has used and is using every tool at its disposal. While traditional tools of foreign policy are important in Turkey–Africa relations, in its engagement with countries in Africa, Turkey is relying heavily on soft power.

**V. TURKEY–AFRICA BILATERAL INVESTMENT TREATIES**

Since 2011, and with the exception of 2012 and 2015, Turkey has concluded at least two BITs every year with countries in Africa. This Part reviews BITs that Turkey has concluded with states in Africa that are publicly available and are in English.

**A. Trends of Turkey–Africa BITs**

Turkey has concluded BITs with twenty-eight countries in Africa. However, in total, Turkey has concluded thirty-one BITs with countries in the region: two each with Nigeria, Sudan, and Tunisia. In terms of trends, Turkey–Africa BITs share some similarities. First, a relatively large number of BITs that Turkey has with countries in Africa are not in force. Out of the thirty-one BITs concluded since 1999, only seven are in force (See Annex A and B).

Second, Turkey–Africa BITs are fairly recent. A majority of Turkey–Africa BITs were concluded only in the past ten years. Only four Turkey–Africa BITs were concluded prior to 2010—the BITs with Algeria (June 3, 1998), Sudan (December 19, 1999), Nigeria (October 8, 1996), and South Africa (June 23, 2000). Third, similar to traditional BITs between developed countries and...
developing countries, Turkey–Africa BITs address investor rights and protection and afford significant protections to investors.\textsuperscript{266}

\textbf{B. Investor Protection Elements in Turkey–Africa BITs}

Bilateral investment treaties establish "minimum guarantees regarding the treatment of foreign investment."\textsuperscript{267} The \textit{G20 Guiding Principles for Global Investment Policymaking} (2016) states that "[i]nvestment policies should provide legal certainty and strong protection to investors and investments, tangible and intangible."\textsuperscript{268} Very similar to the BITs that countries in Africa have concluded with Western nations, Turkey–Africa BITs are designed primarily to protect investors, and they provide investors with seven core benefits. First, the BITs require that investors and their "covered investments" are treated as favorably as the host state treats its own investors and their investments (national treatment).\textsuperscript{269} Second, the BITs require that investors and their covered investments are treated as favorably as the host state treats investors and investments from any third country (most favored nation treatment).\textsuperscript{270} Third, almost all Turkey–Africa BITs guarantee investors absolute standard of treatment including "fair and equitable treatment" (FET), "full protection and security" (FPS), and protection against unreasonable or discriminatory measures.\textsuperscript{271} Fourth, the BITs establish "clear limits on the expropriation of investments and provide for payment of prompt, adequate, and effective compensation" in the event of an expropriation.\textsuperscript{272} Fifth, the BITs provide for the transferability of investment-related funds into and out of a host state without delay.


\textsuperscript{269} Bilateral Investment Treaties, supra note 266.

\textsuperscript{270} \textit{Id}.

\textsuperscript{271} \textit{Id}.

\textsuperscript{272} \textit{Id}. 
and using a market rate of exchange. 273 Sixth, the BITs guarantee investors and their investments most favored nation (MFN) treatment in the event of a loss due to war. 274 Seventh, in the event of an investment-related dispute between an investor and a host state, the BITs give investors the right to submit such disputes to international arbitration. 275

1. National Treatment

The concept of national treatment has been defined as “a principle whereby a host country extends to foreign investors treatment that is at least as favourable as the treatment that it accords to national investors in like circumstances.” 276 Essentially, “the national treatment standard seeks to ensure a degree of competitive equality between national and foreign investors.” 277 The concern about the national treatment standard is that although it is extremely important to investors, it can reach deeply into the domestic policy space of host states. According to UNCTAD:

The national treatment standard is perhaps the single most important standard of treatment enshrined in international investment agreements (IIAs). At the same time, it is perhaps the most difficult standard to achieve, as it touches upon economically (and politically) sensitive issues. In fact, no single country has so far seen itself in a position to grant national treatment without qualifications, especially when it comes to the establishment of an investment. 278

National treatment protection is available in all Turkey–Africa BITs. 279 Article 3(2) of the Turkey–Senegal BIT provides that once established, each Contracting Party shall accord to the investments, “treatment no less favourable than that accorded in like circumstances to investments of its investors.” 280 Article 3(2) of the Libya–Turkey BIT states: “[n]either Contracting Party shall in its territory subject investments or returns of investors of other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own investors.”

273. Id.
274. Id.
275. Id.
277. Id.
278. Id.
279. See, e.g., Turkey–Egypt BIT, supra note 54, at art. II(2); Turkey–Ethiopia BIT, supra note 55, at art. II(2); Turkey–Rwanda BIT, supra note 66, at art 4; Turkey–Nigeria BIT (2011), supra note 43, at art. 5(4).
280. Turkey–Senegal BIT, supra note 58, at art. 3(2).
281. Turkey–Libya BIT, supra note 66, at art. 3(2).
2. Most Favored Nation Treatment

The MFN treatment “ensures that a host country extends to the covered foreign investor and its investments, as applicable, treatment that is no less favourable than that which it accords to foreign investors of any third country.”282 In the context of foreign investment, the MFN standard ensures an equality of competitive conditions between foreign investors of different nationalities seeking to set up an investment or operating that investment in a host country.283 The MFN treatment is provided for in all Turkey–Africa BITs.284

Article 4 of the Turkey–Rwanda BIT, states:

ARTICLE 4

Treatment of Investments

1. Each Contracting Party shall admit in its territory investments on a basis no less favourable than that accorded in like circumstances to investments of investors of any third State, within the framework of its laws and regulations.

2. Each Contracting Party shall accord to these investments, once established, treatment no less favourable than that accorded in like circumstances to investments of its investors or to investments of investors of any third State, whichever is the most favourable, as regards the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of the investment.285

3. Absolute Standard of Treatment: Fair and Equitable Treatment, Full Protection and Security, and Nonimpairment

Almost all Turkey–Africa BITs guarantee investors absolute standard of treatment including fair and equitable treatment (FET), full protection and security, and protection against unreasonable or discriminatory measures.286

283. Id. at 14.
284. See, e.g., Turkey–Egypt BIT, supra note 54, at art. II(1)–(2); Turkey–Ethiopia BIT, supra note 55, at art. III(1)–(2); Turkey–Rwanda BIT, supra note 66, at art. 4; Turkey–Nigeria BIT (2011), supra note 43, at art. 5(4); Turkey–Senegal BIT, supra note 58, at art. 3(1)–(2); Turkey–Kenya BIT, supra note 65.
286. The Turkey–Egypt BIT and Turkey–Tunisia BIT do not guarantee investors absolute standards of treatment. See Turkey–Egypt BIT, supra note 54; Turkey–Tunisia BIT, supra note 45.
The fair and equitable treatment standard is available in almost all the BITs examined, including Turkey's BIT with Cameroon, Ethiopia, Gabon, Gambia, Senegal and Kenya. Article 2(2) of Libya–Turkey BIT states that "[i]nvestments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment." The fair and equitable treatment standard is found in the preamble of the Turkey–Ethiopia BIT as well as in the text of the treaty. Article 2(2) of the Turkey–Morocco BIT simply states that "[e]ach Contracting party shall ensure fair and equitable treatment."

The full protection and security guarantee is found in numerous Turkey–Africa BITs including those with Cameroon, Ethiopia, Gabon, Gambia, and Kenya. Article 2(2) of Libya–Turkey BIT states that "[i]nvestments of investors of each Contracting Party . . . shall enjoy full protection in the territory of the other Contracting Party." Article 2(2) of the Turkey–Morocco BIT provides: "Each Contracting party shall . . . subject to the strictly necessary measures to maintain the public order provide full protection and security for investments of investors of the other Contracting Party."

The guarantee of protection against unreasonable or discriminatory measures is found in many of the BITs reviewed, including those between Turkey and Cameroon, Ethiopia, Gabon, Gambia, and Kenya. The second sentence of Article 2(2) in the Libya–Turkey BIT states that: "[n]either Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, 

287. Turkey–Cameroon BIT, supra note 61, at art. 3(2).
288. Turkey–Ethiopia BIT, supra note 55, at art. II(2).
289. Turkey–Gabon BIT, supra note 62, at art. 3(2).
290. Turkey–Gambia BIT, supra note 63, at art. 3(2).
291. Turkey–Senegal BIT, supra note 58, at art. 2(2).
292. Turkey–Kenya BIT, supra note 65, at art. 2(2).
293. Turkey–Libya BIT, supra note 56, at art. (2)(2).
294. Turkey–Ethiopia BIT, supra note 55, Preamble ("Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.").
295. Turkey–Morocco BIT, supra note 57.
296. Turkey–Cameroon BIT, supra note 61, at art. 3(2).
297. Turkey–Ethiopia BIT, supra note 55, at art. II(2).
298. Turkey–Gabon BIT, supra note 62, at art. 3(2).
299. Turkey–Gambia BIT, supra note 63, at art. 3(2).
300. Turkey–Kenya BIT, supra note 65, at art. 2(2).
301. Turkey–Libya BIT, supra note 56, at art. 2(2).
302. Turkey–Morocco BIT, supra note 57.
303. Turkey–Cameroon BIT, supra note 61, at art. 3(2).
304. Turkey–Ethiopia BIT, supra note 55, at art. II(2).
305. Turkey–Gabon BIT, supra note 62, at art. 3(2).
306. Turkey–Gambia BIT, supra note 63, at art. 3(2).
307. Turkey–Kenya BIT, supra note 65, at art. 2(3).
or disposal of such investments.\textsuperscript{308} The standard is worded a bit differently in Article 2(2) of the Turkey–Morocco BIT, which stipulates, "[c]ontracting Party shall impair by discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of other Contracting Party."\textsuperscript{309}

Article 3 of the Turkey–Rwanda BIT states:

\begin{quote}
\textbf{ARTICLE 3}

Promotion and Protection of Investments

2. Investments of investors of each Contracting Party shall at all times be accorded treatment in accordance with international law minimum standard of treatment, including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of such investments by unreasonable or discriminatory measures.\textsuperscript{310}

4. Protection Against Expropriation

Under customary international law, "states have a sovereign right to take property held by nationals or aliens through nationalization or expropriation for economic, political, social, or other reasons."\textsuperscript{311} Not every expropriation triggers the international responsibility of a state; a distinction is made between lawful and unlawful expropriation. To be considered lawful, international law requires that four conditions are met: an investment asset has to be taken for a public purpose, on a nondiscriminatory basis, in accordance with due process of law, and the taking must be accompanied by compensation.\textsuperscript{312} Over the years, particularly during the first and second phase of mass expropriation in the 1960s and 1970s,\textsuperscript{313} the exercise by states of the right to expropriate investment property triggered conflicts, debates, and disagreements, and

\textsuperscript{308} Turkey–Libya BIT, \textit{supra} note 56, at art. 2(2).
\textsuperscript{309} Turkey–Morocco BIT, \textit{supra} note 57.
\textsuperscript{310} Turkey–Rwanda BIT, \textit{supra} note 66.
\textsuperscript{311} U.N. \textsc{Conference on Trade & Dev.}, \textsc{Expropriation}, at 1, U.N. \textsc{Doc. UNCTAD/DIAE/IA/2011/7}, U.N. \textsc{Sales No. E.12.II.D.7} (2012).
\textsuperscript{312} \textit{Id.}
\textsuperscript{313} \textit{Id.} (observing that "In the first part of the twentieth century, the first major phase of mass expropriations (nationalizations) occurred during revolutionary movements in Russia and Mexico." Also noting that "A second wave of nationalizations and expropriations followed the period of decolonization that took place after the Second World War.").
prompted states to use BITs to clarify the rights and duties of host states vis-à-vis those of foreign investors.\textsuperscript{314}

Turkey–Africa BITs do not prohibit expropriation but rather impose strict limits on the right of a host state to expropriate an investment. In general, expropriation must be for a public purpose, must be on a nondiscriminatory basis, and must be against the payment of compensation.\textsuperscript{315}

Regarding compensation that must be paid when an investment is expropriated, some BITs call for prompt, adequate, and effective compensation\textsuperscript{316} and some do not.\textsuperscript{317} Some BITs provide that expropriation must be in accordance with legal due process and others do not.\textsuperscript{318} Consider the following examples:

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\textsuperscript{314} Id.

\textsuperscript{315} See generally Bilateral Investment Treaties 1995–2006, supra note 267 (stating "In general, BITs allow countries to expropriate foreign investments on a non-discriminatory basis, for a public purpose and against the payment of compensation."); see, e.g., Turkey–Tunisia BIT, supra note 45, at art. III(1) (stating that investments shall not be expropriated . . . except for a public purpose in a non-discriminatory manner, upon payment of prompt adequate and effective compensation, and in accordance with due process of law."). Not all BITs between Turkey and countries in Africa require that all four standards be met. The BIT between Turkey and Morocco only requires that expropriation be for public purpose and on a nondiscriminatory basis. Article 4(1) states that "[m]easures of nationalization, expropriation or any other measures having an equivalent effect . . . must be neither discriminatory nor taken other than for a public purpose.")

\textsuperscript{316} Turkey–Morocco BIT, supra note 57, at art. 4(1).

\textsuperscript{317} Turkey–Egypt BIT, supra note 54, at art. III(1) (calling for "prompt, adequate and fair compensation"); see also Turkey–Morocco BIT, supra note 57, at art. 4(2) ("The contracting Party that takes such measures shall, give to the beneficiaries a fair and equitable compensation which shall amount to the market-value of the concerned investment on the day before the one the said measures were taken or became public knowledge.").

\textsuperscript{318} The following BITs have a due process requirement in the expropriation clause: Turkey–Egypt BIT, supra note 54, at art. 3(1); Turkey–Ethiopia BIT, supra note 55, at art. IV(1); Turkey–Senegal BIT, supra note 58, at art. 5(1). Some BITs do not have a due process requirement. See, e.g., Turkey–Morocco BIT, supra note 57, at art. 4(2).
5. Right to Transfer Capital

Transfer of funds provisions constitute one of the core provisions in international investment agreements. Investors need assurance that they “will be able to enjoy the financial benefits of a successful investment.” Consequently, transfer provisions typically “set forth a host country’s obligation to allow free flow of all investment related transactions, guaranteeing the transfer, conversion and liquidation of any form of capital, proceeds, payments, profits and others without restraints.” Transfer provisions also define the nature of transfers covered, the nature of the obligation on host states, and any permissible exceptions and derogations.

Turkey-Africa BITs guarantee investors the right to transfer capital out of the host state. For example, Article IV of the Turkey-Egypt BIT declares that “[e]ach Party shall permit in good faith all transfers related to an investment to be made freely and without unreasonable delay into and out of its territory.” Article 6(1) of the Turkey-Morocco BIT stipulates that “[e]ach Contracting Party shall permit to investors of the other Contracting Party the free transfer,

| expropriation) except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article 3 of this Agreement.319 | non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article 3 of this Agreement.320 | non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II of this Agreement.321 |

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319. Turkey–Senegal BIT, supra note 58.
320. Turkey–Libya BIT, supra note 56.
321. Turkey–Sudan BIT, supra note 44.
324. Id. at I-258.
325. Turkey–Egypt BIT, supra note 54.
after discharge of fiscal obligations, of their assets invested.”\textsuperscript{326} Article IV(1) of the Turkey–Tunisia BIT provides that “[s]ubject to the laws and regulations each Party shall permit all transfers related to an investment to be made freely and without unreasonable delay into and out of its territory.”\textsuperscript{327}

6. Transparency Obligations

In investment treaties, transparency “denotes a state of affairs in which the participants in the investment process are able to obtain sufficient information from each other in order to make informed decisions and meet obligations and commitments.”\textsuperscript{328} Generally, the aim of transparency provisions is “to enhance the predictability and stability of the investment relationship and to provide a check against circumvention and evasion of obligations, by resort to covert or indirect means.”\textsuperscript{329} The 2012 United States Model BIT incorporates transparency standards,\textsuperscript{330} as does Canada’s Model Foreign Investment Protection Act (FIPA).\textsuperscript{331}

Transparency provisions are not common in Turkey–Africa BITs. However, at least one BIT (Turkey–Rwanda) obliges the contracting states to be transparent.\textsuperscript{332} Article 13 of the Turkey–Rwanda BIT stipulates:

Each Contracting Party shall to the extent possible, ensure that its laws, regulations and administrative rulings of general application respecting any matter governed by this Agreement are promptly published or otherwise made available in such a manner as to enable interested investors of the other Contracting Party to become acquainted with them.\textsuperscript{333}

\textsuperscript{326} Turkey–Morocco BIT, \textit{supra} note 57 (emphasis added).
\textsuperscript{327} Turkey–Tunisia BIT, \textit{supra} note 45.
\textsuperscript{329} INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES, \textit{supra} note 323, at 282.
\textsuperscript{332} Turkey–Rwanda BIT, \textit{supra} note 66.
\textsuperscript{333} \textit{Id.} at art. 13.
7. Investor–State Dispute Settlement

Traditionally, BITs allow investors to bypass the domestic courts of host states by giving them rights to initiate claims against host states with international tribunals. Increasingly, investors are activating BITs by bringing arbitral claims to challenge a broad range of actions by host states. Claims have been brought challenging host state measures relating to drinking water, the environment, taxation, and health. African countries are not immune to international investment arbitration, and a growing number of countries in the region are just now facing their first (known) claims. The Republic of Benin (Benin) faced its first international investment arbitration case in 2017, the Republic of Madagascar (Madagascar) in 2013, and the Republic of Equatorial Guinea (Equatorial Guinea) in 2012.

Turkey–Africa BITs all provide for investor–state dispute settlement (ISDS). Examples can be seen with the BITs between Turkey and Algeria, Cameroon, Ethiopia, and Gambia.
Economic factors are very important in Turkey’s foreign policy, and this is reflected in the number of BITs Turkey has concluded in the past decade.\textsuperscript{346} Turkey’s BITs are conceived primarily “as a valuable tool to promote and protect foreign investment.”\textsuperscript{347} As Turkey’s Ministry of Trade noted, “[t]he main purposes of Turkey’s BIT program are to increase the bilateral flows of capital and technology, and provide protection to the investments of international investors in Turkey [as] well as Turkish investors abroad against non-commercial risks in the framework of international law.”\textsuperscript{348}

C. Sustainable Development Elements in Turkey–African BITs

International investment agreements were originally designed primarily to protect investors and foreign investments. Today, “[a] shared view has emerged on the necessity to ensure that the international investment treaty regime works for all stakeholders” and advances the goals of sustainable development.\textsuperscript{349} While recognizing that investment policies should protect both investors and investments, the G20 Guiding Principles state unequivocally that “[i]nvestment policies and other policies that impact on investment should be . . . consistent with the objectives of sustainable development and inclusive growth.”\textsuperscript{350}

Very similar to many BITs that countries in Africa have concluded with Western nations,\textsuperscript{351} Turkey–Africa BITs do not directly address sustainable development.\textsuperscript{352} However, a growing number of Turkey–Africa BITs, particularly recent agreements, appear to support sustainable development goals to the extent that they appear to be designed to respect the right of host states to regulate in the public interest.\textsuperscript{353} First, Turkey–Africa economic

\textsuperscript{344} Turkey–Ethiopia BIT, \textit{supra} note 55, at art. VII.
\textsuperscript{345} Turkey–Gambia BIT, \textit{supra} note 63, at art. 10.
\textsuperscript{346} Fidan, \textit{supra} note 96 (noting that economic factors “have increasingly occupied a major role in the making of Turkish foreign policy.”).
\textsuperscript{347} \textit{Bilateral Investment Treaties, supra} note 266.
\textsuperscript{348} \textit{Id.}
\textsuperscript{349} UNCTAD’s \textit{REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, supra} note 30, at 7 (noting that in recent years countries are redesigning their international investment treaties and are undertaking reform actions in the pursuit of sustainable development-oriented investment treaties).
\textsuperscript{350} \textit{G20 Guiding Principles, supra} note 287, ¶ V.
\textsuperscript{352} Sustainable development is not mentioned explicitly in most of the BITs that Turkey has concluded with countries in Africa. \textit{See Investment Policy Hub – Turkey, supra} note 1.
\textsuperscript{353} The argument is that if the regulatory powers of a state are not constrained, the state can regulate in the public interest and can adopt laws and regulations to
development is mentioned in the preamble as an expected outcome of foreign direct investment in an increasing number of Turkey–Africa BITs. Increasingly, contracting parties affirm, in the preamble, that treaty objectives can be achieved without relaxing health, safety, and environmental measures as well as internationally recognized labor rights. Second, treaty protection typically extends only to investments made in accordance with the host state’s domestic laws. Third, under almost all Turkey–Africa BITs, contracting parties retain the right to admit only investments that are in compliance with domestic law. Fourth, a growing number of Turkey–Africa BITs contain a “General Exception” clause somewhat akin to Article XX of the General Agreement on Tariffs and Trade.

ensure corporate responsibility and accountability. Conversely, when BITs restrict the regulatory powers of a state, the result is regulatory chill and an inability of the state to protect human rights and advance other sustainable development goals. Increasingly the right to regulate is explicitly addressed in BITs.

354. Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Burundi Concerning the Reciprocal Promotion and Protection of Investments, Turk.-Burundi, June 14, 2017, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5838/download [https://perma.cc/HH6Z-FGG3] (archived Oct. 21, 2019) [hereinafter Turkey–Burundi BIT] (“Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of capital and technology and the economic development of the Contracting Parties.”); see also Turkey–Gabon BIT, supra note 62, Preamble (“Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of capital and technology and the economic development of the Contracting Parties.”).

355. See, e.g., Turkey–Rwanda BIT, supra note 66, Preamble (“Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights.”); see also Turkey–Gabon BIT, supra note 62, Preamble (“Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights.”).

356. See, e.g., Turkey–Rwanda BIT, supra note 66, at art. 2 (“This Agreement shall apply to investments in the territory of one Contracting Party, made in accordance with its national laws and regulations, by investors of the other contracting party . . .”); see also Turkey–Gabon BIT, supra note 62, at art. 2 (“This Agreement shall apply to investments in the territory of one Contracting Party, made in accordance with its national laws and regulations, by investors of the other Contracting Party.”).

357. See, e.g., Turkey–Gabon BIT, supra note 62, at art. 4(1) (“Each Contracting Party shall admit in its territory investments . . . within the framework of its laws and regulations.”).

358. Id. at art. 5 (“General Exceptions”). Article XX of the GATT provides inter alia: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health; . . .
(e) relating to the products of prison labour;
Fifth, in a growing number of BITs, contracting parties make a distinction between indirect expropriation, which is impermissible and the so-called regulatory takings, which are permissible.\textsuperscript{359} Thus, "[n]on-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety, and environment," are increasingly explicitly protected.\textsuperscript{360} Sixth, the "no lowering of standards" clause is beginning to appear in Turkey–Africa BITs.\textsuperscript{361} With the "no lowering of standards" clause, contracting parties declare their expectation that they will not encourage foreign investment by relaxing domestic health, safety, and environmental measures.\textsuperscript{362} Seventh, a nonderogation clause is found in a few (older) BITs and generally provides that the agreements shall not derogate from certain obligations, including international legal obligations, assumed by the contracting parties.\textsuperscript{363}

1. Economic Development in the Preamble

Economic development and improvement of living standards are mentioned as a treaty objective in the preamble of Turkey's BITs with Cameroon,\textsuperscript{364} Egypt,\textsuperscript{365} Ethiopia,\textsuperscript{366} Gabon,\textsuperscript{367} Gambia,\textsuperscript{368} Kenya,\textsuperscript{369} Rwanda,\textsuperscript{370} and Nigeria.\textsuperscript{371} Economic development does not appear as a treaty objective in some BITs, however.\textsuperscript{372} In the preamble to a

\begin{itemize}
\item[(f)] imposed for the protection of national treasures of artistic, historic or archaeological value;
\end{itemize}
number of BITs (e.g., the Turkey–Senegal BIT,\textsuperscript{373} the Turkey–
Rwanda BIT,\textsuperscript{374} and the Turkey–Kenya BIT\textsuperscript{375}), contracting parties
state their understanding that the treaty “objectives can be achieved
without relaxing health, safety, and environmental measures of
general application, as well as internationally recognized labor
rights.”\textsuperscript{376} In the preamble to the Turkey–Kenya BIT, contracting
parties while

"DESIRING to promote greater economic cooperation between them
particularly with respect to investment by investors of one Contracting Party in
the territory of the other Contracting Party,"

were also

"CONVINCED that these objectives can be achieved without relaxing health,
safety and environmental measures of general application as well as
internationally recognized labour rights."\textsuperscript{377}

There is a noticeable difference between the treaty objectives listed in
the preamble to the Turkey–Morocco BIT (1997) and the treaty
objectives identified in the preamble to the Turkey–Cameroon which
is a more recent agreement. The preambles to the two agreements
provide as follows:

<table>
<thead>
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<tbody>
<tr>
<td>The Government of the Republic of Turkey and the Government of the Kingdom of Morocco hereinafter referred to as the “Contracting Parties,”</td>
<td>The Government of the Republic of Turkey and The Government of the Republic of Cameroon, hereinafter referred to as “the Contracting Parties,”</td>
</tr>
<tr>
<td>Desiring to create favourable conditions for greater economic cooperation between them and in particular through investments by investors of one State in the territory of the other State;</td>
<td>Desiring to promote greater economic cooperation between them, particularly with respect to investment by investors of one Contracting Party in the territory of the other Contracting Party;</td>
</tr>
<tr>
<td>Recognising the importance of</td>
<td>Recognizing that agreement upon</td>
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\textsuperscript{373} Turkey–Senegal BIT, supra note 58.
\textsuperscript{374} Turkey–Rwanda BIT, supra note 66.
\textsuperscript{375} Turkey–Kenya BIT, supra note 65.
\textsuperscript{376} Id.
\textsuperscript{377} Id.
the reciprocal encouragement and protection of investments and its contribution to stimulate inflows of capital and business initiative and to increase prosperity in both States;

Have agreed as follows:378

the treatment to be accorded such investment will stimulate the flow of capital and technology and the economic development of the Contracting Parties;

Agreeing that fair and equitable treatment of investments is desirable in order to maintain a stable framework for investment and will contribute to maximizing effective utilization of economic resources and improve living standards;

Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights; and

Having resolved to conclude an agreement concerning the reciprocal promotion and protection of investments;

Have agreed as follows:379

2. Scope of Application Clause

In BITs, the scope of application clause is used to define the scope of the temporal and substantive scope of the treaty. Generally, these clauses address whether or not a treaty is retroactive but can also be used to limit the scope of a treaty in other ways.380 In Turkey–

378. Turkey–Morocco BIT, supra note 57.
379. Turkey–Cameroon BIT, supra note 61 (emphasis added).
380. For example, in the India–BIT (2018), Contracting Parties addressed reproactivity but also excluded several economic sectors and government measures from the scope of the agreement. Article 2 of the BIT is titled “Scope and General Provisions. In Article 2.4, the Contracting Parties agreed that the BIT shall not apply inter alia to “any measure by a local government,” “any law or measure regarding taxation, including measures taken to enforce taxation obligations,” and “subsidies or grants provided by a Party.” See Treaty Between the Republic of Belarus and the Republic of India on Investment, Belr.-India, art. 2.4, Sept. 24, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download [https://perma.cc/J3LX-SR94] (archived Sept. 11, 2019) [hereinafter India–Belarus BIT].
Emerging Market Economies and Investment Law

Africa BITs, the scope of application clause tends to address the temporal scope of the agreements and nothing else. Essentially, contracting parties are not making any effort to limit the subject matter or geographic scope of the agreements. However, by limiting treaty protection to only those investments made in accordance with domestic law of a host state, contracting states retain some control over foreign investors and foreign investments and can introduce sustainable development objectives and criteria into their domestic law. For example, Article 12 of the Turkey–Kenya BIT states: “This Agreement shall apply to investments in the territory of one Contracting Party, made in accordance with its national laws and regulations, by investors of the other Contracting Party, whether prior to, or after the entry into force of the present Agreement.” A similar provision is found in other BITs including the Turkey–Cameroon BIT (Article 2), the Turkey–Rwanda BIT (Article 2), and the Turkey–Gabon BIT (Article 2). Article 2 of the Turkey–Rwanda BIT reads:

Scope of Application

This Agreement shall apply to investments in the territory of one Contracting Party, made in accordance with its national laws and regulations, by investors of the other Contracting Party, whether prior, or after the entry into force of the present Agreement. However, this Agreement shall not apply to any disputes that have arisen before its entry into force.

3. Postestablishment Rights: the Right of Host State to Restrict Admission of Investor/Investments

In BIT practice, “the issue of admission and establishment refers to the entry of investments of investors of a contracting party into the territory of another contracting party.” Under customary international law, countries “have the right to regulate the admission of foreign investors and their investments in their territories.” Historically, “most countries refrain from granting foreign nationals an unrestricted right to invest in their economies,” as such unrestricted access can undermine their economic and security

381. Turkey–Kenya BIT, supra note 65.
382. Turkey–Cameroon BIT, supra note 61.
383. Turkey–Rwanda BIT, supra note 66.
384. Turkey–Gabon BIT, supra note 62.
385. Turkey–Rwanda BIT, supra note 66.
387. Id.
interests. In BIT practice, two basic models are used. The "admission clause" model makes "the admission and establishment of foreign investment subject to the domestic laws of the host country." The "right of establishment" model grants foreign investors a right of establishment, but "not in an absolute manner," meaning that the entry of foreign investors and investors is not typically subject to domestic laws and regulations.

Turkey–Africa BITs adopt the admission clause model. In all Turkey–Africa BITs, the host state retains the right to admit foreign investors based on their domestic law. Article 3 of the Turkey–Kenya BIT is titled "Treatment of Investment" and essentially obliges each contracting party to admit investments by investors of the other contracting party in accordance with its domestic laws. Article 3 states: "Each Contracting Party shall admit in its territory investments by investors of the other Contracting Party on a basis no less favourable than that accorded in like circumstances to investments of investors of any third State, and in accordance with its laws and regulations." In the same vein, Article 4(1) of the Turkey–Cameroon BIT provides, "[e]ach Contracting Party shall admit in its territory investments on a basis no less favourable than that accorded in like circumstances to investments of investors of any third State, within the framework of its laws and regulations."

4. General Exception

In the past, "general exceptions" clauses were not common in BITs but are now beginning to appear in a growing number of investment treaties. In principle, a general exceptions clause can provide ample flexibility for host states to regulate in the public interest because they are generally designed to "relieve host states from treaty liability for good faith measures taken to pursue public welfare objectives." In many investment treaties, "the general

388. Id. (noting that "[a]ccess limitations imposed on foreign investment have been justified on economic, social, political or national security grounds.").
389. Id.
390. Id.
391. Id.
392. See, e.g., Turkey–Kenya BIT, supra note 65, at art 2.
393. Id.
394. Id. at art. 3.
395. Turkey–Cameroon BIT, supra note 61.
396. See generally Andrew Newcombe, General Exceptions in International Investment Agreements, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 351 (Marie-Claire Cordonier Segger et al. eds., Wolters Kluwer 2011); see also Koter Akira & Mori Tadashi, General Exception Clauses in International Investment Agreements Concluded by Japan, RES. INST. ECON., TRADE & INDUSTRY 14007 (2014).
exception clause is very closely modeled on, or incorporates the
general exception provisions in Article XX of the General Agreement
on Tariffs and Trade (GATT)." Typically, general exception clauses
share three important elements. First, "[a]n exhaustive list of
permissible policy objectives; for example, the protection of human,
animal, or plant life or health, or the conservation of natural
resources." Second, "[a] nexus requirement, denoting the required
link between a state measure and a permissible objective; frequently
used nexus requirements include 'necessary for,' 'relating to,' and
'designed and applied for.'" Third, "[a] prohibition of discriminatory
or arbitrary application." Most general exception clauses state that
nothing in the agreements can or shall be construed to prevent a
contracting party from adopting, maintaining, or enforcing
nondiscriminatory legal measures that are designed and applied to
promote public interest objectives in the areas of public health and
environmental protection.

A general exception clause is found in several of the BITs that
Turkey has concluded with African countries including the BITs
between Turkey and Tanzania, Cameroon, Gabon, Gambia, Kenya,
Nigeria, and Rwanda. General exception clauses are absent from most of the older treaties that Turkey has with countries in Africa such as Turkey’s BITs with Algeria and Ethiopia. An example of a general exception clause from Article 5 of the Turkey–Rwanda BIT is as follows:

Article 5

General Exceptions

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measures:


398. See Akira & Tadashi, supra note 410.
399. Sabanogullari, supra note 397.
400. Id.
401. Id.
402. Canada’s Model BIT, supra note 345, at art. 10.
403. Turkey–Tanzania BIT, supra note 69.
404. Turkey–Cameroon BIT, supra note 61, at art. 5.
405. Turkey–Gabon BIT, supra note 62, at art. 5.
406. Turkey–Gambia BIT, supra note 63, at art. 5.
407. Turkey–Kenya BIT, supra note 65, at art. 4.
409. Turkey–Rwanda BIT, supra note 68, art. 5.
410. Turkey–Algeria BIT, supra note 60; Turkey–Ethiopia BIT, supra note 55.
(a) designed and applied for the protection of human, animal or plant life or health, or the environment;

(b) related to the conservation of living or non-living exhaustible natural resources.

2. Nothing in this Agreement shall be construed:

(a) to require any Contracting Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;

(b) to prevent any Contracting Party from taking any actions that it considers necessary for the protection of its essential security interests;

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) taken in time of war or other emergency in international relations, or

(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or

(c) to prevent any Contracting Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

A modest version of the general exception clause is found in Article IX of the Turkey–Tunisia BIT which provides that “[t]his agreement shall not preclude the application by either Party of measures necessary for the maintenance of public order and morals, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”

5. Limits on Expropriation

Expropriation raises significant issues in international investment law. Investors need assurance that their property is protected. However, unless it is carefully drafted, the expropriation clause in an international investment agreement can expose a host state to considerable legal liability. In many investment arbitration cases involving African states, claimants successfully asserted claims

411. Id.
412. Turkey–Tunisia BIT, supra note 45, at art. IX.
of direct and indirect expropriation. Ideally, an expropriation clause should be drafted with a view to accommodating the concerns of foreign investors as well as national policy makers. The goal should be to afford investors meaningful protection and at the same time limit exposure to liability for nondiscriminatory public interest regulation.

All Turkey–Africa BITs protect investors and their investment from unlawful and discriminatory expropriation. However, a growing number of Turkey–Africa BITs provide policy space for a host state by limiting the types of measures that constitute indirect expropriation. For example, Article 6(2) of the Turkey–Rwanda BIT explicitly states that “[n]on-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.” A similar provision can be found in Turkey's BITs with Gabon, Gambia, and Nigeria.

6. The “Not Lowering of Standards” Clause

Turkey–Africa BITs do not provide for corporate social responsibility but most contain the “not lowering of standards” clause. The not lowering of standards clause is designed to discourage states from relaxing environmental and labor standards to attract investment. In a growing number of agreements, contracting parties declare their expectation that protecting foreign investment "can be achieved without relaxing health, safety, and environmental measures and internationally recognized labor rights.” Although typically found in the preamble, this not lowering of standards clause is found in the body of some BITs. For example, Article 4 of the Turkey–Ethiopia BIT provides:

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413. See, e.g., Goetz v. République du Burundi, ICSID Case No. ARB/95/3, Award (Feb. 10, 1999); Siag & Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award (June 1, 2009); Funnekotter v. Republic of Zim., ICSID Case No. ARB/05/6, Award (Apr. 22, 2009); Bernhard von Pezold v. Republic of Zim., ICSID Case No. ARB/10/15, Award (July 28, 2015).
415. Turkey–Rwanda BIT, supra note 68.
417. Turkey–Gambia BIT, supra note 63, at art. 6(2).
419. See, e.g., Turkey–Rwanda BIT, supra note 66.
420. See e.g., Turkey–Senegal BIT, supra note 58, Preamble (“Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights.”).
421. See Turkey–Senegal BIT, supra note 58, Preamble (“Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights.”).
The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety and environmental measures. Accordingly, a Party should not waive or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.\textsuperscript{422}

7. Nonderogation Clause

In a few BITs between Turkey and some countries in Africa, contracting parties explicitly state that the agreements do not derogate from some obligations including international legal obligations, laws and regulations, administrative practices or procedures, or the administrative or adjudicatory decisions of contracting states. An example is seen below:

\begin{center}
\textbf{Turkey–Egypt BIT}
\end{center}

\textbf{Article VI}

\textbf{Derogation}

This agreement shall not derogate from:

(a) laws and regulations, administrative practices or procedures or administrative or adjudicatory decisions of either Party,

(b) international legal obligations, or,

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization.\textsuperscript{423}

Surprisingly, the nonderogation clause appears in the older BITs that Turkey has with countries in Africa (e.g., the Turkey–Algeria BIT\textsuperscript{424} and the Turkey–Egypt BIT seen above \textsuperscript{425}) but not in more recent agreements (e.g., the Turkey–Rwanda BIT).\textsuperscript{426} One possible explanation for why the nonderogation clause does not feature in more recent BITs involving Turkey may simply be that it has been

\begin{flushright}
\textsuperscript{422} Turkey–Ethiopia BIT, supra note 55.
\textsuperscript{423} Turkey–Egypt BIT, supra note 54.
\textsuperscript{424} Turkey–Algeria BIT, supra note 60.
\textsuperscript{425} Turkey–Egypt BIT, supra note 54.
\textsuperscript{426} Turkey–Rwanda BIT, supra note 66.
\end{flushright}
replaced by the “general exceptions” clause, which arguably affords more policy space to host states.427

8. Limits on Investor Rights and Guarantees

In some Turkey–Africa BITs, particularly recent agreements, the host country’s right to regulate is preserved through carve-out clauses that qualify and/or limit the rights and privileges afforded to investors.428 For example, in most of the BITs, the right of investors to transfer capital in and out of a host state is conditioned on the investor fulfilling all tax obligations.429 Article 7(1) of the Turkey–Kenya BIT provides that “[u]pon fulfillment of all tax obligations, each Contracting Party shall permit in good faith all transfers, related to an investment, to be made freely and without delay into and out of its territory. “In addition, Article 7 states the host state is allowed to limit transfers of capital in the event of a serious balance of payment crisis. Article 8(3) of the Turkey–Cameron BIT stipulates: “Where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties, each Contracting Party may temporarily restrict transfers, provided that such restrictions are imposed on a non-discriminatory and in good faith basis.”430

In conclusion, sustainable development is not explicitly mentioned as a treaty objective in most of the BITs that Turkey has concluded with countries in Africa and most of the agreements do not contain provisions specifically designed to promote sustainable development in a host state.431 Moreover, none of the BITs reviewed oblige contracting parties to respect human rights or protect the investment.432 However, a growing number of Turkey–Africa BITs provide some policy space for host states to regulate in the public

427. This conclusion is based on a side-by-side comparison of Article 6 of the Turkey–Egypt BIT (Derogations) and Article 5 of Turkey–Rwanda BIT buttresses this point. Investment tribunals have not interpreted either clause or determined their precise scope and effectiveness. See generally Turkey–Egypt BIT, supra note 54; Turkey–Rwanda BIT, supra note 66.
428. Turkey–Cameroon BIT, supra note 61, at art. 8 (stating that "upon fulfillment of all tax obligations, each Contracting Party shall permit in good faith all transfers related to an investment to be made freely and without delay into and out of its territory.") (emphasis added).
429. Id.
430. Similar provisions are found in Turkey's BITs with the following countries: Gambia (Art. 8(3)), Rwanda (Article 8(3)), Gabon (Article 8(3)), Tanzania (Article 8(3)), and Kenya (Article 7(3)).
431. Id.
432. Turkey–Cameroon BIT, supra note 61.
interest and advance sustainable development goals. There is a growing realization that although economic agreements create economic opportunities for states, "they can also affect the domestic policy space of Governments," and make it extremely difficult for states to fully implement human rights and environmental legislation.

VI. TURKEY–AFRICA BILATERAL INVESTMENT TREATIES: A CRITIQUE

BITs are not benign policy instruments. BITs can chill regulatory action and can expose host states to considerable legal risks and to legal claims before international investment tribunals. Questions are increasingly being asked about the impact of investment treaties on human rights, the environment, and sustainable development more generally. Increasingly, states are urged to "ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection." According to Principle 9 of the United Nations Guiding Principles on Business and Human Rights, "[s]tates should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts."

433. Turkey–Gabon, supra note 62.
435. See generally Turkey–Gabon, supra note 64; Turkey–Egypt BIT, supra note 54; Turkey–Ethiopia BIT, supra note 55.
439. Id.
This begs the question, based on the evolving best practices of states and developments in international law, generally, is anything missing from Turkey–Africa BITs? This Part analyzes shortcomings in Turkey–Africa BITs and discusses options for countries in Africa that wish to reform their BITs with Turkey.

A. Turkey–Africa BITs: Missing Elements

Explicit commitments to sustainable development, provisions addressing corporate social responsibility and the obligations of investors, and policy space for host states are missing from Turkey–Africa BITs, particularly in older BITs.

1. Sustainable Development Not Explicitly Mentioned as a Treaty Objective

Economic development, but not “sustainable economic development,” appears in most of the BITs that Turkey has with countries in Africa.440 Sustainable development has been defined as “development that meets the needs of the present, without compromising the ability of future generations to meet their own needs.”441 At its core, sustainable development “is an approach to development that looks to balance different, and often competing, needs against an awareness of the environmental, social and economic limitations we face as a society.”442 Sustainability is at the very core of the 2030 Agenda for Sustainable Development, the leading global framework for international cooperation today.443

Although health, safety, and environmental measures are mentioned in the preamble to some of the BITs that Turkey has with countries in Africa, sustainable development is not explicitly listed as a treaty objective.444 Rather, contracting parties express an expectation that the treaty objective (investor protection) can be

440. A common formulation is that found in the preamble to the Turkey–Egypt BIT, supra note 54; see also Turkey–Ethiopia BIT, supra note 55, Preamble.


442. Id.

443. G.A. Res. 70/1, supra note 39, at ¶ 1–2.

444. See, e.g., Turkey–Senegal BIT, supra note 58, Preamble (contracting parties expressed a conviction that the treaty objectives “can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights.”).
achieved without lowering human rights, labor, and environmental standards.\footnote{Id.}

This lack of explicit reference to sustainable development in the preambles to Turkey–Africa BITs is concerning for three reasons. First, sustainable development is driving investment treaty reform today and explicit reference to sustainable development can potentially affect how an investment treaty is construed and interpreted.\footnote{UNCTAD'S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, supra note 30, at 10 (noting that "[g]rowing concerns with the functioning of the IIA regime, together with the evolution of the global investment landscape and the sustainable development imperative, have in recent years triggered a move towards reforming international investment rule-making.").} Although preambles do not directly create rights and obligations, under Article 31(2) of the Vienna Convention on the Law of Treaties, preambles are considered part of treaties for purposes of interpretation.\footnote{Vienna Convention on the Law of Treaties, art. 31(2), May 23, 1969, 1155 U.N.T.S. 18232.} Thus, mentioning sustainable development, even in the preamble to a BIT, could potentially shape the meaning and scope of a BIT. Second, in a growing number of IIAs, treaty parties articulate the goals of sustainable development and explicitly reaffirm the right of host states to regulate in the public interest. For example, in the preamble to the Comprehensive and Economic Trade Agreement (CETA), a trade deal between the EU and Canada, contracting parties: "RECOGNISE[ED] the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation" and "REAFFIRM[ED] their commitment to promote sustainable development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions."\footnote{See Comprehensive Economic and Trade Agreement (CETA), Can.-EU, art. 8, Sept. 21, 2017, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5380/download [https://perma.cc/TK8E-XVT5] (archived Sept. 11, 2019) (discussing the 'investment' portion of the trade agreement).} In the preamble to the Brazil–United Arab Emirates BIT (2019), contracting parties "[r]ecogniz[ed] the essential role of investment in promoting sustainable development."\footnote{See Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and the United Arab Emirates, Braz.-U.A.E., Preamble, Mar. 15, 2019 [hereinafter Brazil–UAE BIT].} Third, increasingly continental policy instruments in Africa stress the importance of sustainable development. In the preamble to the Draft PAIC, African Union member states "RECOGNIZ[ED] their right to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promoting sustainable development objectives."\footnote{DRAFT PAN-AFRICAN INVESTMENT CODE, AFRICAN UNION COMM’N ECON. AFF. DEPT’ 3 (Dec. 2016), https://au.int/en/documents/20161231/pan-african-
Draft PAIC stipulates that “[i]nvestors shall contribute to the economic, social and environmental progress with a view to achieving sustainable development of host States.”

2. Corporate Social Responsibility Ignored

None of the BITs that Turkey has concluded with countries explicitly address corporate social responsibility or corporate accountability and none impose specific obligations on investors. In this regard, Turkey–Africa BITs are no different from the BITs that African countries have with Western countries.

The fact that Turkey–Africa BITs do not address corporate social responsibility or investor liability is of concern for a number of reasons. The absence of corporate social responsibility clauses from Turkey–Africa BITs is at odds with regional and continental standards in Africa. Chapter 4 of the 2016 Draft Pan African Investment Code (Draft PAIC), a nonbinding comprehensive guiding instrument on investment for all African Union member states, is titled “Investor Obligation.” Chapter 4 of the Draft PAIC addresses a number of important topics including, “Framework for Corporate Governance” (Article 19), “Socio-political Obligations” (Article 20), “Bribery” (Article 21), “Corporate Social Responsibility” (Article 22), “Obligations as to the use of Natural Resources” (Article 23), and “Business Ethics and Human Rights” (Article 24). Article 22 of the Draft PAIC states that investors “shall abide by the laws, regulations, administrative guidelines and policies of the host State;” “shall, in pursuit of their economic objectives, ensure that they do not conflict with the social and economic development objectives of host States and shall be sensitive to such objectives;” and “shall contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host State.” Article 23 of the Draft PAIC is focused on natural resource extraction and declares that investors “shall not exploit or use local natural resources to the
detriment of the rights and interests of the host State" and "shall respect rights of local populations, and avoid land grabbing practices vis-à-vis local communities." Article 24 lists principles that should govern compliance by investors with business ethics and human rights. Principles listed include inter alia: support and respect the protection of internationally recognized human rights; eliminate all forms of forced and compulsory labor, including the effective abolition of child labor; and ensure equitable sharing of wealth derived from investments.

The absence of explicit reference to corporate social responsibility in Turkey–Africa BITs is also at odds with the evolving best practices of states. References to corporate social responsibility are found in a growing number of international investment treaties and Model BITs. Chapter III of India's Model BIT is titled "Investor, Investment and Home State Obligations" and "prescribes the minimum obligations for investors and their investments for responsible business conduct." The chapter addresses a number of topics including "Obligation against Corruption" (Article 9), "Disclosure" (Article 10), "Taxation" (Article 11), and "Compliance with Law of Host State" (Article 12). The objective of the chapter is "to ensure that the conduct, management and operations of Investors and their Investments are consistent with the Law of the Host State, and enhance the contribution of Investments to inclusive growth and sustainable development of the Host State." Corporate social responsibility clauses are also found in investment treaties involving a growing number of countries including Brazil, Canada, and Australia.

458. Id. at art. 23(1).
459. Id. at art. 23(2).
460. Id. at art. 24.
461. Id. at art. 24(a).
462. Id. at art. 24(c).
463. Id. at art. 24(e).
465. Id.
466. Id. at arts. 9–12.
467. Id. at art. 8.1.
468. Brazil–UAE BIT, supra note 449, at art. 15 (titled "Corporate Social Responsibility" and addressing the obligation of investors).
469. See, e.g., Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Guinea, May 27, 2014, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5095/download [https://perma.cc/TP94-7CV2] (archived Sept. 11, 2019) [hereinafter Canada–Guinea BIT]. Article 16 of the Canada-Guinea BIT is titled "Corporate Social Responsibility" and states that "[e]ach Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as..."
The omission of direct reference to corporate social responsibility in Turkey–Africa BITs is also troubling because as members of the United Nations and members of regional organizations, such as the European Union and the African Union, Turkey and countries in Africa have made commitments to address the growing challenge of business and human rights.\textsuperscript{471} On April 16, 2014, the Committee of Ministers of the Council of Europe adopted the Declaration of the Committee of Ministers supporting the UN Guiding Principles.\textsuperscript{472} In 2016, the Committee of Ministers adopted Recommendation CM/Rec(2016)3 on Human Rights and Business (Recommendation).\textsuperscript{473} On the whole, the Recommendation offers guidance “to assist states in preventing and remedying human rights violations by business enterprises.”\textsuperscript{474} The Recommendation requires states to consider possible human rights impacts of the trade and investment agreements that they conclude.\textsuperscript{475} Paragraph 23 of the Recommendation states:

23. When concluding and during the term of trade and investment agreements or other relevant conventions, member States should consider possible human rights impacts of such agreements and take appropriate steps, including through the incorporation of human rights clauses, to mitigate and address identified risks of adverse human rights impacts.\textsuperscript{476}
3. Lack of Policy Space in “Old-Generation” BITs

There is widespread concern that international investment agreements unduly restrict the host state’s right to regulate in the public interest.\(^{477}\) This concern is particularly directed at treaties concluded before 2010 before sustainable development-oriented reform “entered the mainstream of international investment policymaking.”\(^{478}\)

Although most of Turkey’s BITs with countries in Africa are of fairly recent origin (concluded after 2010),\(^{479}\) some can be considered “old-generation,” agreements having been concluded between 1985–2010.\(^{480}\) Among the old-generation Africa–Turkey BITs are Turkey’s BITs with Egypt (1997),\(^{481}\) Morocco (1997),\(^{482}\) Algeria (1998),\(^{483}\) Ethiopia (2000),\(^{484}\) South Africa (2000),\(^{485}\) and Libya (2009).\(^{486}\) Most of the old-generation BITs lack the policy space found in more recent agreements. A good example is the Turkey–Ethiopia BIT (2005).\(^{487}\)

The Turkey–Ethiopia BIT does not have a “general exception” clause and does not provide exceptions to most of the obligations on host states.\(^{488}\) Article V of the Turkey–Ethiopia BIT provides for the right of investors to repatriate capital but does not make this right contingent upon fulfillment of tax obligations and does not provide policy space for a host state to address a balance of payment crisis should the need arise.\(^{489}\)

\(^{477}\) Sabanogullari, \textit{supra} note 397.

\(^{478}\) UNCTAD’s \textit{REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME}, \textit{supra} note 30, at 71 (observing that old-generation treaties abound and that 95 per cent of all treaties in force were concluded before the year 2010).

\(^{479}\) Investment Policy Hub – Turkey, \textit{supra} note 1 (indicating that most BITs that Turkey has with countries in Africa were only signed in the last ten years).

\(^{480}\) UNCTAD has used the term “old-generation” IIAs to refer to investment agreements concluded prior to 2010. The treaties are considered old-generation in large part because they lack most of the reform features found in an increasing number of recent treaties. See UNCTAD, \textit{Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties}, IIA ISSUE NOTE (2017) (noting more than 2,500 IIAs in force today—ninety-five percent of all treaties in force—were concluded before 2010 and that the continued existence of these treaties “creates overlaps and fragmentation in treaty relationships and poses interaction challenges.”).

\(^{481}\) Turkey–Egypt BIT, \textit{supra} note 54.

\(^{482}\) Turkey–Morocco BIT, \textit{supra} note 57.

\(^{483}\) Turkey–Algeria BIT, \textit{supra} note 60.

\(^{484}\) Turkey–Ethiopia BIT, \textit{supra} note 55.

\(^{485}\) Turkey–South Africa BIT, \textit{supra} note 67.

\(^{486}\) Turkey–Libya BIT, \textit{supra} note 56.

\(^{487}\) Turkey–Ethiopia BIT, \textit{supra} note 55.

\(^{488}\) \textit{Id}.

\(^{489}\) \textit{Id}. at art. V (“Each Party shall allow all transfers related to an investment to be made freely and without delay into and out of its territory in accordance with its laws and regulations.”).
clause of the Turkey–Gabon BIT (2012) to that in the Turkey–Egypt BIT (1997): 490

<table>
<thead>
<tr>
<th>Turkey–Gabon BIT</th>
<th>Turkey–Egypt BIT</th>
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</thead>
<tbody>
<tr>
<td>Article 8</td>
<td>Article 4</td>
</tr>
<tr>
<td><strong>Repatriation and Transfer</strong></td>
<td><strong>Repatriation and Transfer</strong></td>
</tr>
<tr>
<td><strong>1. Upon fulfillment of all tax obligations,</strong> each Contracting Party shall permit in good faith all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include:</td>
<td>1. Each Party shall permit in good faith all transfers related to an investment to be made freely and without unreasonable delay into and out of its territory such transfers include:</td>
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<td>...</td>
<td>...</td>
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<tr>
<td>2. Transfers shall be made in the convertible currency in which the investment has been made or in any convertible currency at the rate of exchange in force at the date of transfer, unless otherwise agreed by the investor and the hosting Contracting Party.</td>
<td>2. Transfers shall be made in the convertible currency in which the investment has been made or in any convertible currency at the rate of exchange in force in the host country at the date of transfer, unless otherwise agreed by the investor and the hosting Party.</td>
</tr>
</tbody>
</table>

Where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties, each Contracting Party may temporarily restrict transfers, provided that such restrictions are imposed on a non-discriminatory and in good faith basis.

A similar problem is found in the provision dealing with expropriation. Missing from the old-generation BITs are safeguards designed to limit the otherwise broad scope of the treaties and immunize a host state’s regulatory measures taken in the public

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490. Compare Turkey–Gabon BIT, supra note 62, at art. 8, with Turkey–Egypt BIT, supra note 54, at art. 4 (emphasis added).
interest. Specifically, the Turkey–Ethiopia BIT, does not have a provision comparable to Article 6(2) of the Turkey–Gabon BIT which state:

<table>
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<tbody>
<tr>
<td>1. Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in the Article III of this Agreement.</td>
<td>1. Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects (hereinafter referred as expropriation) except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article 4 of this Agreement.</td>
</tr>
<tr>
<td>2. Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.</td>
<td></td>
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</table>

Old-generation BITs are not benign legal instruments that contracting states can simply ignore. UNCTAD is right in its warning that “old treaties bite” and pose legal risks for host states. At the end of 2017, almost every known treaty-based investment arbitration claim involving African states was filed pursuant to treaties concluded before 2000. Congo v. Mitchell was based on the 1984

491. UNCTAD’s REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, supra note 30, at 72 (noting most old-generation treaties contain broadly worded definitions and substantive provisions, and safeguards).  
492. Turkey–Ethiopia BIT, supra note 55.  
493. Turkey–Gabon BIT, supra note 62 (emphasis added).  
494. UNCTAD’s REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, supra note 30, at 72 (noting international investment agreements are not harmless political declarations and have serious legal consequences).  
495. Id. at 73 (stating that at the end of 2016, virtually all of the known treaty based investment arbitration were filed pursuant to treaties concluded before 2010).
BIT between the United States and the Democratic Republic of Congo.\textsuperscript{496} \textit{Wena Hotels Ltd. v. Arab Republic of Egypt} was based on the United Kingdom–Egypt BIT of 1975\textsuperscript{497} and \textit{Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt} was based on the Egypt–Greece BIT of 1993.\textsuperscript{498}

4. Legal Minefields Arising from Broad and Vague Obligations

In almost every Turkey–Africa BIT, the obligations imposed on contracting parties are vaguely worded and ill-defined. Lack of clarity in treaty obligations exposes host states to considerable legal risks and can create regulatory chill.\textsuperscript{499} As UNCTAD notes, broad and vague formulation of investment treaty provisions “has generated unanticipated (and at times inconsistent) interpretations by arbitral tribunals, and has resulted in a lack of predictability as to what [international investment agreements] actually require from States.”\textsuperscript{500}

In almost all the BITs reviewed, absolute guarantees, such as to the guarantee of “fair and equitable treatment,” “full protection and security,” and protection against “unreasonable or discriminatory measures” are not defined nor is their scope limited.\textsuperscript{501} In some of the BITs (e.g., the Turkey–Gabon BIT) an attempt is made to limit the scope of the guarantees by linking them to international minimum standards of protection, but this is not found in most of the other BITs (e.g., the Turkey–Ethiopia BIT). These examples are seen below:

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<tbody>
<tr>
<td>Investments of investors of each Contracting Party shall at all times be accorded treatment in accordance with international law minimum standard of</td>
<td>Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the</td>
</tr>
</tbody>
</table>

\textsuperscript{496} Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Award (Feb. 9, 2004).
\textsuperscript{497} Wena Hotels Ltd. (U.K.) v. Arab Republic of Egypt, ICSID Case No ARB/98/4, Award (Dec. 8, 2000).
\textsuperscript{498} Middle East Cement Shipping & Handling Co. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002).
\textsuperscript{499} UNCTAD'S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, supra note 30, at 16 (observing that “[b]road and vague formulation of IIA provisions has allowed investors to challenge core domestic policy decisions, for instance in the area of environmental, energy and health policies.”).
\textsuperscript{500} Id.
\textsuperscript{501} See generally Turkey–Ethiopia BIT, supra note 55; Turkey–Gabon BIT, supra note 62.
Overall, when it comes to clarifying treaty obligations, Turkey–Africa BITs are out of step with a growing number of recent BITs that other countries are concluding. Increasingly, states are taking extra care to reduce exposure to legal risks by defining their obligations carefully and circumscribing those obligations when appropriate.

Regarding the FET standard, one option is for states to qualify the standard by deference to the minimum standard of treatment under customary international law; this approach is found in a growing number of treaties. Second, in some BITs, contracting parties clarify the meaning and scope of the FET standard by providing an open-ended list of the types of measures that are prohibited. Third, in some recent treaties, contracting parties clarify the FET standard with an exhaustive “closed list” of the protection to be accorded investors. Fourth, a growing number of investment treaties contracting parties include a clause that provides for a review, upon request, of the content and scope of the FET standard. Fifth, some states are choosing to provide a list of factors that should be taken into account in determining if the FET standard has been violated. For example, Article 2.4(3) of the EU–Singapore IPA states that

| treatment, including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. | other Party. |

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502. Id.
503. Turkey–Ethiopia BIT, supra note 55.
505. See, e.g., Agreement for the Promotion and Protection of Investment, Arg.-Japan, art. 4(2)(a), Dec. 1, 2018 (“Fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”).
506. See, e.g., Free Trade Agreement Between the European Union and the Republic of Singapore, EU-Sing., art. 2.4(2), Oct. 12, 2018 [hereinafter EU–Singapore IPA]; SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE, supra note 504, at art. 5.
507. See, e.g., EU–Singapore IPA, supra note 506, at art. 2.4(4).
508. Id. at art. 2.4(3).
investor and which were reasonably relied upon by the covered investor, but that the Party subsequently frustrated.

Finally, although still relatively rare, some BITs omit the FET standard altogether.\(^{509}\) In the Brazil–UAE BIT (2019), the contracting parties are explicit and clear about their intention to exclude the FET standard and replace it with a list of prohibited conduct. Article 4 of the Brazil–UAE BIT provides as follows:

**Article 4**

**Treatment**

1. Each Party shall treat investors of the other Party and their investments according to its applicable rules and regulations and in conformity with this Agreement.

2. Based on the applicable rules of international law as recognized by each of the Parties and their respective national law, no Party shall subject investors of the other Party and their investments to measures which constitute:

   (i) Denial of access to justice in any judicial or administrative proceedings;

   (ii) Breach of due process;

   (iii) Targeted discrimination, such as gender, race, religious or political beliefs;

   (iv) Manifestly abusive treatment, such as coercion, duress and harassment; or

   (v) Discrimination against investments of investors of the other Party in law 1 enforcement and the provision of public security.\(^{510}\)

A comparison of the FET clause in the Kazakhstan–Singapore BIT (2018) and that in the Turkey–Rwanda BIT (2016) highlights some of the deficiencies in the BITs that Turkey has with countries in Africa:

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<tr>
<td>2. Investments of investors of each Contracting Party shall at</td>
<td>Each Party shall accord to investments of investors of the</td>
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\(^{509}\) The FET standard is omitted from the Rwanda–Morocco BIT (2016) and from the India–Belarus BIT (2018). The FET standard is also absent from the draft EAC Model Investment Treaty.

\(^{510}\) Brazil–UAE BIT, *supra* note 449, at art. 4.
all times be accorded treatment in accordance with international law minimum standard of treatment, including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of such investments by unreasonable or discriminatory measures.511

State of the other Party fair and equitable treatment and full protection and security in accordance with customary international law. The obligation to provide “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.

The obligation to provide “full protection and security” requires each Party to provide the level of police protection required under customary international law. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required under customary international law and do not create additional substantive rights.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.512

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511. Turkey–Rwanda BIT, supra note 66 (emphasis added).
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<tr>
<td><strong>Article 3</strong></td>
<td><strong>Article 3</strong></td>
</tr>
<tr>
<td><strong>Promotion and Protection of Investment</strong></td>
<td><strong>Promotion and Protection of Investment</strong></td>
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</tbody>
</table>

2. Investments of investors of each Contracting Party shall at all times be accorded treatment in accordance with international law minimum standard of treatment, including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of such investments by unreasonable or discriminatory measures.\(^{513}\)

Each Party shall accord to investments of investors of the State of the other Party fair and equitable treatment and full protection and security in accordance with customary international law.

*The obligation to provide “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.*

*The obligation to provide “full protection and security” requires each Party to provide the level of police protection required under customary international law.*

The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required under customary international law and do not create additional substantive rights.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.\(^{514}\)

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5. Variations among Turkey–Africa BITs

Turkey–Africa BITs are not all created equal in the sense that some afford more policy space for host states than others. Variations can be found even as between relatively recent BITs that Turkey has concluded with countries in Africa. Compare, for example, Article 8 of the Turkey–Rwanda BIT ("Repatriation and Transfer") with Article 7 of the Turkey–Kenya BIT ("Repatriation and Transfer"). In both agreements, the right of investors to repatriate capital is contingent upon the fulfillment of all tax obligations. In both agreements, contracting states reserve the right to temporarily restrict capital transfers “where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties.” However, a very important provision in the Turkey–Rwanda BIT (Article 8(4)) is completely absent from the Turkey–Kenya BIT—this is the provision that allows a host state to prevent a transfer of capital through the equitable and good faith application of its domestic laws. Article 8(4) of the Turkey–Rwanda BIT provides:

Turkey–Rwanda BIT

Article 8

Repatriation and Transfer

4. A Contracting Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;

(d) criminal or penal offences;

(e) ensuring compliance with orders or judgments ill judicial or administrative proceedings; or (f) social security, public retirement or compulsory savings schemes.

515. Rwanda–Turkey BIT, supra note 66, at art. 8.
516. Turkey–Kenya BIT, supra note 65, at art. 7.
517. Compare id. at art. 8, with Rwanda–Turkey BIT, supra note 66, at art. 8.
518. See Turkey–Kenya BIT, supra note 65, at art. 7(3). Identical language can be found in the Rwanda–Turkey BIT. Rwanda–Turkey BIT, supra note 66, at art. 8 (3).
519. Rwanda–Turkey BIT, supra note 66, at art. 8(4).
As already noted, in BITs, broad treaty scope could chill regulatory action by host states, trigger investment arbitration even for routine non-discriminatory regulatory measures, and make it difficult for a host state to effectively enforce its criminal, fiscal and securities laws and policies.  

6. Development Dimension not Prioritized

Turkey–Africa BITs do not address development concerns in a meaningful or coherent fashion. To the extent that development dimension is addressed, it is only addressed in the preamble through hortatory statements. In some BITs, preambular paragraphs typically refer to the promotion of development as one of the main objectives of the agreement. Only one BIT, the Turkey–Gabon BIT, addresses the issue of technology transfer, and it merely calls on contracting parties to encourage technology transfer.  

Although in the past, BITs focused almost exclusively on investment protection and rarely addressed issues of concern to host states, this is now changing. Increasingly BITs address a host of issues not traditionally found in investment agreements, such as prudential measures, balance of payment, denial of benefits, temporary safeguards, intellectual property rights (IPRs), rule of law, consumer protection, and corruption.

Addressed in the Draft PAIC, but not in most of the BITs between Turkey and countries in Africa, are topics such as:

520. Id.
521. Turkey–Gabon BIT, supra note 62, at art. 9 (Article 9, titled “Transfer of Technology and Formation,” provides that “subject to its laws and regulations, each Contracting Party may encourage their investors who invest in the territory of the other Contracting Party to organize professional training programs, and facilitate transfer of technology and know-how for the benefit of the host Contracting Party.”).


524. See, e.g., Argentina–Japan BIT, supra note 522, at art. 23 (Denial of Benefits); see also, Kazakhstan–Singapore BIT, supra note 512, at art. 18 (Denial of Benefits).

525. See, e.g., Japan–UAE BIT, supra note 504, at art. 19 (Temporary Safeguard Measures).

526. See, e.g., id. at art. 21 (Intellectual Property Rights).

527. See, e.g., Argentina–Japan BIT, supra note 522, at art. 9 (Measures Against Corruption).
“Competition Law and Policy” (Article 28); “Transfer of Technology” (Article 29); “Environment and Technologies” (Article 30); “Human Resource Development” (Article 36); and “Consumer Protection” (Article 40). The Netherlands Model Investment Agreement addresses a host of issues not traditionally found in BITs including, Rule of Law (Article 5) and Sustainable Development (Article 6).

7. The Right to Regulate Is Not Affirmed Explicitly

BITs establish rights for investors and not corresponding rights for states or obligations for investors. By establishing broad protection for investors, BITs “inevitably place limits on contracting parties’ sovereignty in domestic policymaking.” To avoid this problem, in a growing number of recent treaties, contracting states explicitly affirm their respective rights to regulate in the public interest. Article 23 of the Morocco–Turkey BIT (2016) is titled “Right of State to Regulate,” and Article 23(1) provides in part that “the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.” Article 23(3) states further that “[f]or greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement.”

Although in Turkey–Africa BITs, an attempt is made to respect domestic regulatory space, the BITs do not explicitly acknowledge the right of states to regulate in the public interest. In this regard, the

528. DRAFT PAIC, supra note 463, at arts. 28, 29, 30, 36, 40.
530. UNCTAD’S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, supra note 30, at 22.
532. Id.
533. The right to regulate is mentioned in a number of EAC BITs including: Tanzania–China BIT; Rwanda–UAE BIT; Kenya–Japan BIT. See, e.g., Agreement Between the Government of the People’s Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments, China-Tanz., Mar. 24, 2013; Agreement Between the Republic of Rwanda and the United Arab Emirates Concerning the Promotion and Reciprocal Protection of Investments, Rwanda-U.A.E., Jan. 11, 2017; Agreement Between the Government of
BITs examined are at odds with continental policy instruments and with evolving best practices. In the Draft PAIC, African Union Member States, “RECOGNIZ[ED] their right to regulate all the aspects relating to investments within their territories.”534 In the preamble to the Agreement Establishing the African Continental Free Trade Agreement that went into effect on May 30, 2019, Member States “REAFFIRM[ED] the right of State Parties to regulate within their territories and the State Parties’ flexibility to achieve legitimate policy objectives in areas including public health, safety, environment, public morals and the promotion and protection of cultural diversity.”535 A right to regulate clause appears in a good number of recent investment treaties. For example:

- “RECOGNISING their right to regulate and resolving to preserve their flexibility to set legislative and regulatory priorities, safeguard public welfare and protect legitimate public welfare objectives.” Australia–Hong Kong (2019).536
- “RECOGNISING their inherent right to regulate and resolving to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.” Australia–Uruguay BIT (2019).537
- “Reaffirming the right of Parties to regulate investments in their territory in accordance with their law and policy objectives.” India–Belarus BIT (2018).538
- “Reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the

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534. DRAFT PAIC, supra note 450.
536. Australia–Hong Kong BIT, supra note 470.
538. India–Belarus BIT, supra note 380, Preamble.
measures in place—the particular need of developing countries to exercise this right.” SADC Model BIT (2012).539

- “REAFFIRMING each Party’s right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity.” EU–Singapore IPA (2018).540
  
- “The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection privacy and data protection and the promotion and protection of cultural diversity.” EU–Singapore IPA (2018).541

B. Reforming Turkey–Africa BITs: Options for Countries in Africa

There are undoubtedly many positive features in the BITs that Turkey has concluded with countries in Africa. In the evolution of Turkey–Africa BITs, an attempt to keep in step with evolving best practices is noticeable. However, despite many positive features, many, if not all, Turkey–African BITs have major shortcomings. Countries in Africa can choose to ignore the shortcomings and accept the agreements as they are. On the other hand, countries in Africa may choose to address the shortcomings in these agreements as part of a broader agenda to engage in comprehensive reform of their BITs. Since 2012, UNCTAD has encouraged countries to modernize their investment treaties and move toward a new generation of IIAs.542

With older BITs (those concluded before 2010), the best approach may well be to terminate those agreements after their initial term expires and to negotiate new ones in their place. With respect to more recent agreements, a distinction must be made between unratified treaties and the treaties that have been ratified and are binding.

1. Termination and Renegotiation

Countries in Africa may choose to terminate those BITs that do not appear to be balanced and oriented towards sustainable development.543 In the last ten years, a growing number of countries

539. SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE, supra note 504.
540. EU–Singapore IPA, supra note 506, Preamble.
541. Id. at art. 2.2(1).
542. WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, supra note 31, at xxiii.
EMERGING MARKET ECONOMIES AND INVESTMENT LAW

(e.g., India, Indonesia, and South Africa) have taken steps to terminate most of their BITs. To avoid legal liability, it is important that countries adhere to the provisions of each BIT relating to termination. Article 54 of the Vienna Convention on the Law of Treaties stipulates that the termination of a treaty or the withdrawal of a party may take place “in conformity with the provisions of the treaty” or “at any time by consent of all the parties after consultation with the other contracting States.”

Although a growing number of states have taken steps to unilaterally terminate their BITs, two factors complicate the termination of BITs. First, almost all Turkey–Africa BITs have an initial fixed duration of ten years, and termination, to be considered lawful, can only be done at the end of the initial term of a BIT (See Annex D). For example, Article 13 (3) of the Turkey–Kenya BIT states: “Either Contracting Party may, by giving one year’s written notice to the other Contracting Party, terminate this Agreement at the end of the initial ten-year period or at any time thereafter.”

Second, all Turkey–Africa BITs have survival (sunset) clauses that have the effect of prolonging the effect of a treaty even after the treaty has been terminated. Most Turkey–Africa BITs specify a ten-year survival period (See Annex D). For example, Article 3(5) of the Turkey–Kenya BIT stipulates: “With respect to investments made or acquired prior to the date of termination of this Agreement and to which this Agreement otherwise applies, the provisions of all of the other Articles of this Agreement shall thereafter continue to be effective for a further period of ten (10) years from such date of termination.”

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544. Ilge & Singh, supra note 29.
548. Turkey–Kenya BIT, supra note 65, at art. 13 (stating “this Agreement shall remain in force for a period of ten (10) years and shall continue in force unless terminated in accordance with paragraph 3 of this Article.”).
549. Id. (emphasis added).
550. See, e.g., Turkey–Nigeria BIT (2011), supra note 43, at art. 8; Turkey–Cameroon BIT, supra note 63, at art. 12; Turkey–Ethiopia BIT, supra note 55, at art. 9.
551. Turkey–Kenya BIT, supra note 65 (emphasis added).
The question of termination is particularly pertinent with regards to older treaties because most lack important reform features found in more recent agreements. Surprisingly, even when new treaties are concluded, presumably to replace older BITs, contracting states are often not in a hurry to ratify such treaties. Turkey and Tunisia concluded their first BIT on May 29, 1999, and their second BIT on December 27, 2017.552 Presently, only the 1999 BIT is in force.553 Overall, although Turkey has negotiated new BITs with three countries in Africa—Nigeria, Sudan, and Tunisia—presently none of the new agreements have entered into force, as seen below.

**Turkey–Africa BITs: Termination and Renegotiation**

<table>
<thead>
<tr>
<th>Short Title of BIT</th>
<th>Date of Adoption</th>
<th>In force</th>
</tr>
</thead>
<tbody>
<tr>
<td>Turkey–Tunisia BIT</td>
<td>May 29, 1991</td>
<td>Y</td>
</tr>
<tr>
<td>Turkey–Tunisia BIT</td>
<td>Dec. 27, 2017</td>
<td>N</td>
</tr>
<tr>
<td>Turkey–Sudan BIT</td>
<td>Dec. 19, 1999</td>
<td>N</td>
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<tr>
<td>Turkey–Sudan BIT</td>
<td>Apr. 30, 2014</td>
<td>N</td>
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<tr>
<td>Turkey–Nigeria BIT</td>
<td>Oct. 8, 1996</td>
<td>N</td>
</tr>
<tr>
<td>Turkey–Nigeria BIT</td>
<td>Feb. 2, 2011</td>
<td>N</td>
</tr>
</tbody>
</table>

*Source: Author's Compilation from Information Available on UNCTAD's Website*554

2. Consultation and Treaty Review

Turkey and countries in Africa could consider reviewing their different BITs with a view to addressing perceived flaws and possibly amending relevant clauses. The bad news is that, with the exception of the Turkey–Kenya BIT, most BITs that Turkey has concluded with countries in Africa do not provide for periodic meetings of contracting parties nor do they provide for consultation upon request.555 Furthermore, although the Turkey–Kenya BIT provides for consultation between the contracting parties, it does not mandate consultation, and it does not spell out the modalities for consultation.556 In this regard, Article 11 of the Turkey–Kenya BIT is very different from Articles 36(1) and (2) of the India–Belarus BIT, which address the issue of consultation in clear detail. A side-by-side comparison of the two provisions is as follows:

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553. *Id.*
554. *Id.*
555. *Id.*
556. Turkey–Kenya BIT, *supra* note 65, at art. 11.
| **Turkey–Kenya BIT**  
**Article 11**  
**Consultation** | **India–Belarus BIT (2018)**  
**Article 36**  
**Consultations and Periodic Review** |
|---|---|
| The Contracting Parties shall, at the request of either Contracting Party, hold consultations for the purpose of reviewing the implementation of this Agreement and studying any issue that may arise from this Agreement. Such consultations shall be held between the competent authorities of the Contracting Parties in a place and at a time agreed on through appropriate channels. \(^{557}\) | 36.1 Either Party may request, and the other Party shall promptly agree to, consultations in good faith on any issue regarding the interpretation, application, implementation, execution or any other matter including, but not limited to:  
(i) reviewing the implementation of this Treaty;  
(ii) reviewing the interpretation or application of this Treaty;  
(iii) exchanging legal information; and  
(iv) subject to Article 30, addressing disputes arising under Chapter IV of this Treaty or any other disputes arising out of investment. |
|  
36.2 Further to consultations under this Article, the Parties may take any action as they may jointly decide, including making and adopting rules supplementing the applicable arbitral rules under Chapter IV or Chapter V of this Treaty, issuing binding interpretations of this Treaty, and adopting joint measures in order to | |
In addition to providing for consultation, recent BITs provide for the periodic meetings of contracting parties. Consider Article 36(3) of the India–Belarus BIT (2018), which stipulates: “The representatives of the Parties shall meet every five years after the entry into force of this Treaty to consult and review the operation and effectiveness of this Treaty as may be necessary.”

3. Treaty Amendment

The BITs between Turkey and countries in Africa can be amended in accordance with international law. Pursuant to Article 39 of the Vienna Convention on the Law of Treaties, “[a] treaty may be amended by agreement between the parties.” Whether a treaty can be amended and the process of amending the treaty are issues that are typically addressed in a treaty. Most of the BITs that Turkey has concluded with countries in Africa explicitly provide for treaty amendment (See Annex D). Turkey’s BIT with Gambia, Cameroon, and Kenya all address treaty amendment. A common formulation of the amendment clause is found in Article 13(3) of the Turkey–Kenya BIT, which states “[t]his Agreement may be amended by mutual written consent of the Contracting Parties at any time.”

To date, no country in Africa has recorded any amendments to any of the BITs involving Turkey.

4. Treaty Replacement

Treaty replacement is an option for a state unhappy with a particular treaty. Treaty replacement essentially involves terminating an old treaty and renegotiating a new treaty. Historically, BIT replacement occurred rarely and infrequently.
However, in recent years, more and more states are resorting to treaty replacement. In short, recently, “the emphasis of treaty negotiations has shifted somewhat to replacing older treaties and away from creating treaties with countries with which no previous treaty relation existed.” Surprisingly, even when African countries conclude new treaties, presumably to replace older agreements, they often do not appear to be in any hurry to ratify the new treaties. Although Turkey and Tunisia concluded their first BIT on May 29, 1999, and their second BIT on December 27, 2017, only the 1999 BIT is in force. Overall, as previously discussed above, Turkey has negotiated new BITs with three countries in Africa—Nigeria, Sudan, and Tunisia—but presently none of these new agreements have entered into force.

VII. REFORMING TURKEY—AFRICA BITs: COMPLICATING POLICY FACTORS PRACTICAL CONSIDERATIONS

A growing number of countries are reforming their BITs and other investment treaties to make them more oriented towards sustainable development. Countries are undertaking reform because it is increasingly recognized that international investment agreements “are concluded in a specific historic, economic and social context and respond to the then existing needs and challenges” and that today there is a need to design treaties that respond to new challenges. Indeed, “[i]n the last ten years, the need for systematic reform of the global international investment agreements . . . regime has become increasingly evident.” UNCTAD estimates that “since 2012, over 150 countries have undertaken at least one reform action in the pursuit of sustainable development-oriented IIAs and most new treaties contain key reform elements.” To UNCTAD, reform of international investment agreement has made significant progress and has entered the mainstream of international investment

566. Id.
567. Id.
568. Investment Policy Hub – Turkey, supra note 1.
569. Id.
570. See generally UNCTAD’s REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, supra note 30.
571. Id. at 14.
572. Id. at 7 (observing that as more than half a century has passed since the first BIT was concluded, it is no surprise that BITs have gone through a significant evolutionary process during this period and that today they face a new context and new challenges).
573. Id. at 4.
policymaking. This begs several questions: Will countries in Africa press Turkey to address perceived shortcomings in Turkey–Africa BITs? If pressed, is Turkey likely to agree to improve the BITs that it has concluded with countries in Africa? What policy and practical considerations are likely to affect the Turkey–Africa BIT regime now and in the future? The policy and practical considerations that shape Turkey–Africa relations and are likely to influence any discussions about possible reform of Turkey–Africa BITs are analyzed in this Part.

A. Key Policy Considerations that Shape Turkey–Africa BIT Regime

A number of policy considerations are likely to shape the dynamics of Turkey–Africa BITs now and in the future. Key among these factors are: Turkey’s desire to be seen as a friend of Africa, Turkey’s membership in the Council of Europe, Turkey’s own self-interest and possible pressure from Turkish investors and businesses, Turkey’s ability or inability to deliver on many of its promises to countries in Africa, and Turkey’s so-called mosque-building diplomacy that is raising serious concerns and critiques.

1. Turkey’s Desire to Be Seen as Africa’s “Friend”

Turkey is clearly casting herself as a true friend of Africa. According to the “talking points” for a Turkey–Africa Partnership High Level Officials Meeting, in 2013, “Turkey considers herself a full member of the AU, and it is for this very reason that Turkey formulates her African policies in line with the decisions and declarations of the AU.” In a 2014 speech, Erdoğan declared that all sides had mutually completed the opening up process and that it

574.  Id.
575.  See infra Part VII.(A)(1).
576.  See infra Part VII.(A)(2).
577.  See infra Part VII.(A)(3).
578.  See infra Part VII.(A)(4).
579.  See infra Part VII.(A)(5).
581.  Turkey-Africa Partnership High Level Officials Meeting (Talking Points), supra note 114.
was "now necessary to move to a new and more advanced stage based on equal partnership." As Erdoğan put it:

At this point, I would like to point out that we are ready to stand by and execute a more efficient and a deeper cooperation especially in priority areas of African Union and its member countries such as agriculture, energy, health, education, small and medium-sized enterprises, employment, promotion of investment, energy and transport. As highlighted in the theme of the Summit, we will walk together and resolutely, towards a new partnership model on the path to development and integration.

The Turkish Minister of Foreign Affairs, Mevlüt Çavuşoğlu, has also echoed the promises of solidarity, equal partnership, a win-win outcome, and mutual benefit. "Our approach to Africa is based on transparent, long-termed, and strategic partnership," the Turkish Minister of Foreign Affairs reiterated in a 2018 speech given in celebration of Africa Day. "As I mark the Africa Day with joy, I underline Turkey's commitment to our partnership with Africa based on the principles of equality, partnership, solidarity, sustainability, and mutual respect,” Mevlüt Çavuşoğlu stated in his 2018 speech.

According to Çavuşoğlu:

The continent has the aspiration to take strides across all Sustainable Development Goals. Africa’s aspirations include not only eliminating absolute poverty, but also reducing inequality, offering a wealth of valuable education opportunities to all and reinforcing good governance as the norm . . . . We have every reason to be proud a partner of the African nations. Turkey’s engagement is based on building lasting relationships. Our principal purpose is to establish deep-rooted cooperation with our African counterparts in a manner that is sustainable and mutually productive.

2. Turkey’s Membership in the Council of Europe

As a member of the Council of Europe, Turkey is obliged to abide by the principles of the organization and to promote the
organization's agenda.\textsuperscript{588} Human rights and sustainable development are high on the agenda of the Council of Europe.\textsuperscript{589} In a 2015 letter to then-Secretary General of the United Nations Ban Ki-Moon, the Council of Europe Secretary General, Thorbjorn Jagland, observed that “[t]he Council of Europe is an organization founded on the universal values of human rights, democracy and the rule of law. Our contribution must therefore focus on these values. They are not only values in their own right, but important factors of sustainability for any societal model.”\textsuperscript{590} Sustainable development also features prominently in the agenda and programs of the Council of Europe.\textsuperscript{591} The Council of Europe is addressing issues at the intersection of business and human rights. In policy instruments, such as the Declaration (16 April 2014) of the Committee of Ministers supporting the UN Guiding Principles\textsuperscript{592} and Recommendation CM/Rec(2016)3 on Human Rights and Business,\textsuperscript{593} the organization calls on member states to consider the human rights impact of the trade and investment agreements that they negotiate and sign and to take appropriate steps, including through the incorporation of human


\textsuperscript{589} See Council of Europe Contribution to the United Nations 2030 Agenda for Sustainable Development Goals, COUNCIL OF EUR., https://www.coe.int/en/web/un-agenda-2030/home (last visited Sept. 11, 2019) [https://perma.cc/AA62-7GVT] (archived Sept. 11, 2019) (observing that “With its global and overarching political approach, UN Agenda 2030 for Sustainable Development has been highly relevant for the Council of Europe, which has, from the outset, been contributing to the process which led to the adoption of Agenda 2030.”).


rights clauses, to mitigate and address identified risks of adverse impacts on human rights. 594

3. Turkey’s Self-Interest

Western nations, in their role as capital exporters, relied heavily on BITs to protect the interest of their investors in overseas markets. 595 Today, as emerging market economies increasingly export capital to foreign markets, it is not surprising that they are turning to BITs to protect the interest of their investors. 596 With growing investments in Africa and other overseas markets, Ankara is clearly under pressure to protect its investors and investment and is, in turn, putting pressure on new partners to conclude BITs. 597 During his visit to Algeria, Erdoğan reportedly “praised the good relations between Algeria and Turkey, but put pressure on the topic of investment protection.” 598 According to the report, Erdoğan argued “that with the help of a bilateral agreement that secures investments in Algeria, trade between the two countries could increase to more than double in the coming years.” 599 The main purposes of Turkey’s BIT programs are to increase the bilateral flows of capital and technology, and to provide protection to the investments of international investors in Turkey as well as Turkish investors abroad. 600

594. Id.


596. Author’s assessment is based on recent BIT practice of countries like Turkey, United Arab Emirates, and Brazil.


598. Wilhelm, supra note 597.

599. Id.

600. See Bilateral Investment Treaties, supra note 266 (“[T]he main purposes of Turkey’s BIT program are to increase the bilateral flows of capital and technology, and provide protection to the investments of international investors in Turkey well as Turkish investors abroad against non-commercial risks in the framework of international law.”).
4. Ankara Ability or Inability to Deliver on Its Many Promises to Countries in Africa

Whether countries in Africa are willing and able to press Turkey on the BIT issue will depend on whether Ankara can deliver on its promises of aid to the continent. Arguably, some African leaders are apt to ignore flaws in investment agreements if they believe that they can secure other benefits from Turkey. Will Erdoğan's current excursion to Africa deliver the desired outcome for all actors, and what happens if it does not? 

The long-term sustainability of Turkey's humanitarian engagement in Africa is questioned in some circles. Experts believe that Turkey's primary challenge “will be sustaining its lofty ambitions in Africa.” According to Alex Vines and Daragh Neville, “despite significant rhetoric, the economic impact has been limited. Although bilateral trade reached $19.5 billion in 2015, a threefold increase in volume compared to 2003, Africa’s share of Turkey's total global trade remains minimal.” Vines and Neville add:

Turkey's relatively slow progress, however, has been criticized by African leaders. At the second Turkey-Africa Partnership Summit in Equatorial Guinea in 2014, Nkosazana Dlamini-Zuma, chair of the African Union Commission, noted: “Many of the outcomes of the first Africa-Turkey summit are yet to be realized.” This inertia has had real-world implications: while Turkey received the support of all but two African countries in its bid for a non-permanent seat on the U.N. Security Council in 2009-10, such support was not forthcoming in a subsequent and ultimately unsuccessful bid in 2015-2016.

5. Competition for Capital From Emerging Markets

African countries are not the only countries seeking to increase their FDI inflow, nor are they the only countries trying to attract capital from emerging market economies. The intense competition

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601. See Neville & Vines, supra note 203 (“It remains to be seen whether Erdoğan's current excursion to Africa will deliver the desired outcome for all actors.”).
602. Some scholars have pointed out a major gap between Turkey's mounting aid expenditures and its long-term capacity. In a 2014 report, the Graduate Institute of Geneva observed that “As with most other emerging economies, Turkey's economic growth is not yet sustained and is vulnerable to global economic developments,” and concluded that “Given the current level of development within Turkey, it is safe to assume that an economic decline would immediately affect the scope of Turkish humanitarian donorship.” See Andrea Binder, The Shape and Sustainability of Turkey's Booming Humanitarian Assistance, 5 INT'L DEV. POL'Y 1, ¶ 35 (2014).
603. Neville & Vines, supra note 203.
604. Id.
605. Id.
606. Id.
for capital from emerging market economies may make it more challenging for countries in Africa to press Ankara to address perceived flaws in their BITs. As one observer put it, “[w]ith a strong impetus coming from the business associations that represent the private sector, Turkey has introduced new campaigns to bolster its economic and trade ties with Africa, Latin America and East Asia.”

6. Disturbing Questions that Critics May Dare to Ask

The real motives behind Ankara’s interest in Africa and generosity to countries in the region is an issue that critics are wondering about. Questions are also increasingly asked about the effectiveness of Turkey’s engagement in Africa.

Ankara’s apparent Pan-Islamic inclination is a concern in some quarters. In 2006, the Religious Leaders Meeting of African Muslim

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610. Fidan, supra note 96, at 93.

Countries was held in Istanbul.\textsuperscript{613} In October 2015, the first summit of Muslim religious leaders from the Asian and Pacific opened in Turkey.\textsuperscript{614} In 2018, Turkey hosted the “World Muslim Minorities Summit.”\textsuperscript{615} Turkey’s “mosque-building diplomacy” has been noted by many.\textsuperscript{616} Some critics are concerned that the religious undertone in Ankara’s Africa policy could stoke the flames of religious intolerance in the continent and undermine efforts to stem religious extremism in Africa.\textsuperscript{617} Abdullah Bozkurt, the Ankara Bureau Chief for Today’s 
\textit{Zaman}, reputed to be Turkey’s best-selling English daily newspaper, has argued that “[b]ehind the façade of trade, investment and aid initiatives lies a sinister campaign of turning Africa into a hotbed of Turkish Islamists who want to create proxies as leverage like they have done in Syria, Libya and other Arab and African countries.”\textsuperscript{618}

In a recent article in the \textit{National Review}, Michael Rubin notes that in its outreach to countries in Africa, “Turkey has promoted Islamist causes”\textsuperscript{619} and warns that “[a]s Turkey has invested in Africa, it has sought to promote itself and more-extreme Islamist interpretations at the expense of the West and the post-World War II liberal order.”\textsuperscript{620} “What Saudi Arabia was to Islamic Extremism across the Arab world in the late 20th century, Turkey could be to Africa in the 21st,” Rubin opines. According to Rubin:
A half century ago, Saudi Arabia pumped money to extremist organizations across the globe while, for the sake of diplomatic nicety and strategic convenience, the United States stayed silent. Today, Turkey is doing the very same thing, trying to radicalize a generation of Africans through a combination of aid, anti-Western propaganda, religious indoctrination, and military training. That the United States and Europe turn a blind eye toward Turkey’s African agenda effectively cedes to Erdogan the strategic advantage on the second-largest continent in terms of both population and land area.  

Criticism has also come from other Gulf states. Saudi Arabia’s Crown Prince Mohammed bin Salman has accused Erdogan of trying to build an “Ottoman caliphate” in Africa.

Some critics point to a lack of transparency and accountability in many Turkey–Africa arrangements. According to Kemal Kirisci, a senior fellow at the Brookings Institution, “[t]he greatest challenge here is that, increasingly, Turkish humanitarian and developmental assistance is not transparent and suffers from little accountability.”

The effectiveness of Turkey’s representational role at the G20 2015 Summit and Ankara’s claim of solidarity with poor developing countries has also been questioned. According to one editorial, “[m]uch of the G20’s 2015 progress on its development agenda reflected processes begun before Turkey’s presidency. Turkey did little to leverage or otherwise specify these processes in terms of its stated intent to represent low income, least developing, or SSA countries.” According to this editorial, “[a]side from its hosting of the WTO Trade Ministers’ meeting, Turkey failed to strategically apply its G20 presidency . . . to engage other development platforms on behalf of low income, least developed, and SSA countries.”

Overall, the editorial concludes that Turkey “has yet to realize its self-styled description as a leader of, and model for, low income, least

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621. Id.
624. Ventura, supra note 119 (discussing Turkey’s increasing involvement in development assistance and criticisms of this new role).
626. Id. (“Turkey’s role in the G20 was more one of continuing pre-existing processess than adopting direct, active representation of low income, least developed, and SSA countries.”).
627. Id.
developed, and SSA countries." Unfortunately, "given Turkey's current domestic and regional challenges including those of a security and economic nature, representation of these countries is no longer a priority."

7. Crisis in International Investment Law and Ongoing Reform Efforts

Across the globe government officials, scholars, lawyers, and civil society organizations are voicing concerns about the international investment legal regime and about bilateral investment treaties in particular. Concerns have been raised regarding the nature, content, and scope of international investment law. One

628. Id.
629. Id.
631. In 2015, law professors wrote several open letters to members of Congress urging them to omit ISDS from the Trans Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership ("TTIP"). See, e.g., Open letter by the Alliance for Justice, to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi, and Ambassador Froman (Mar. 2015) (on file with author) (expressing opposition to the inclusion of Investor-State Dispute Settlement (ISDS) provisions in the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP)).
633. See generally FABIAN FLUES, THE MULTILATERAL INVESTMENT COURT LOCKING IN ISDS: TEN REASONS WHY THE EU’S PROPOSAL FOR A MULTILATERAL INVESTMENT COURT DOESN’T FIX A FUNDAMENTALLY FLAWED SYSTEM (2017); EBERHARDT & OLIVET, supra note 436.
634. Australia–Uruguay BIT, supra note 536.
635. In a March 7, 2019 letter to the UNCITRAL Working Group, seven independent human rights experts appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues from a thematic or country-specific perspective, stressed their continuing continuing concern regarding the content and effect of international investment agreements. The letter noted stressed that international investment agreements “have often proved to be incompatible with international human rights law and the rule of law.” The letter was authored by: (i) the Working Group on the issue of human rights and transnational corporations and other business enterprises; (ii) the Special Rapporteur on the right to development; (iii) the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; (iv) the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; (v) the Special Rapporteur on the rights of indigenous peoples; (vi) the Independent Expert on the promotion of a democratic and equitable international order; and (vii) the Special Rapporteur on the human rights to safe drinking water and sanitation. See Letter from Independent Human Rights Experts Appointed and
strand of criticism focuses on perceived imbalances in investment treaties. Critics argue that most BITs are unbalanced in the sense that they focus on investor protection but not on investor obligation, and they focus on the obligation of host states but not on the rights of host communities. Critics are also concerned that BITs restrict domestic policy space and make it extremely difficult for host states to regulate in the public interest. While these concerns are prompting some countries to withdraw from the system altogether, most countries are simply focusing their attention on reforming and updating their BITs. After a multiyear BIT review, India revamped its IIA regime. In 2016, India released a new Model BIT. Recent BITs have a tendency to contain provisions designed to preserve domestic policy space and to balance the rights and obligations of investors vis-à-vis those of host states. Intergovernmental organizations such as UNCTAD are also calling for reform of international investment policy. Reform elements found in recent BITs but not typically found in Turkey–Africa BITs include:

- A security exception;
- A balance of payment exception;


636. Id.
637. Id.
638. Id. at 2 (noting that IIAs pose risks to the regulatory space required by States to comply with their international human rights obligations as well as to achieve the Sustainable Development Goals). Following a review of South Africa's BITs, South Africa's Department of Trade and Industry concluded that: "Major issues of concern for developing countries are not being addressed in the BIT negotiating processes . . . New investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally. Under such conditions, investment fails to encourage or enhance sustainable development." REPUBLIC S. AFR., DEPT OF TRADE & INDUS., BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW: GOVERNMENT POSITION PAPER 1, 11 (2009).


640. See, e.g., Netherlands Model BIT, supra note 529. On October 19, 2018, the Dutch government adopted Netherlands’s new model BIT.

641. See 2016 Indian Model BIT, supra note 29; see also Ilge & Singh, supra note 29.

642. See generally UNCTAD’s REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, supra note 30 (discussing reform of international investment agreements and noting that a growing number of countries are engaging in reform).

643. See generally WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, supra note 31.

644. See, e.g., Kazakhstan–Singapore BIT, supra note 512, at art. 20.
645. See, e.g., id. at art. 9.
• Limits on the national treatment guarantee through the protection of sensitive sectors;\textsuperscript{646}
• Clarification of vague obligations such as the obligation to accord foreign investors “full protection and security”;\textsuperscript{647} and
• A clause on investor responsibility and corporate social responsibility.\textsuperscript{648}

In a BIT, a security exception allows contracting parties to apply measures they consider necessary to protect their essential security interests.\textsuperscript{649} Article 20 of the Singapore–Kazakhstan BIT is an example and provides:

\textbf{ARTICLE 20}

\textbf{SECURITY EXCEPTIONS}

Nothing in this Agreement shall be construed to:

(a) require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.\textsuperscript{650}

In a growing number of BITs, policy space is provided to enable host states to address serious balance-of-payments crises and external financial difficulties. For example, Article 9 of the Singapore–Kazakhstan BIT Provides:

\textbf{ARTICLE 9}

\textbf{RESTRICTIONS TO SAFEGUARD THE BALANCE OF PAYMENTS}

In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Party may adopt or maintain restrictions on payments or transfers related to investments. It is recognised that particular pressures on the balance of payments of the State of a Party in the process of economic development may necessitate the use of restrictions to ensure, inter alia, the

\textsuperscript{646} See, e.g., \textit{id.} at art. 4.
\textsuperscript{647} See, e.g., Kazakhstan–Singapore BIT, \textit{supra} note 512, at art. 3.
\textsuperscript{648} See, e.g., Brazil–UAE BIT, \textit{supra} note 449, at art. 15; Australia–Hong Kong BIT, \textit{supra} note 470, at art. 16.
\textsuperscript{649} See, e.g., India–Belarus BIT, \textit{supra} note 380, at art. 33.
maintenance of a level of financial reserves adequate for the implementation of its programme of economic development. 651

Even while guaranteeing national treatment, in a growing number of recent BITs, contracting states reserve the right to exclude sensitive sectors of the economy from the national treatment obligation. 652 Article 4 of the United Arab Emirate–Kazakhstan BIT is an example:

ARTICLE 4

NATIONAL TREATMENT

1. Each Party shall accord to investors of the State of the other Party and their investments treatment no less favorable than a treatment which it accords to investors of its State and their investments concerning the management, maintenance, use, enjoyment or any other form of disposition of investments unless otherwise provided in its national legislation, governmental policies and guidelines.

2. Each Party in accordance with its national legislation, governmental policies and guidelines reserves the right to identify the sensitive sectors of economy and/or other related activities that would be limited or excluded from the scope of this obligation. 653

Compare the National Treatment clause in the Kazakhstan–Singapore BIT (2018) with the national treatment clause in Turkey–Rwanda BIT (2016):

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<td>1. Each Party shall accord to investors of the State of the other Party and their investments treatment no less favorable than a treatment which it accords to investors of its State and their investments</td>
<td>2. Each Contracting Party shall accord to these investments, once established, treatment no less favourable than that accorded in like circumstances to investments of its investors or to</td>
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651. Id.


653. Id. at art. 4.
investments concerning the management, maintenance, use, enjoyment or any other form of disposition of investments unless otherwise provided in its national legislation, governmental policies and guidelines.

2. Each Party in accordance with its national legislation, governmental policies and guidelines reserves the right to identify the sensitive sectors of economy and/or other related activities that would be limited or excluded from the scope of this obligation.654

In recent BITs, contracting states are taking care to limit legal liability by clarifying the meaning of vague terms.656 For example, the obligation on host states to offer investors “full protection and security” is increasingly defined and clarified.657 Article 3 of the Kazakhstan–UAE BIT is an example:

Article 3

Protection of investments

1. Investments by investors of either Contracting Party and returns shall enjoy full protection and security in the territory of the other Contracting Party in a manner consistent with national legislation and this Agreement and applicable rules of international law...

2. Full protection and security shall not create any obligation to the Contracting Party other than what the host state accords to its own nationals and other aliens.658

Compared to the “full protection and security” obligation in the Turkey–Rwanda BIT, Article 3 of the India–Belarus BIT (2018) is more carefully worded:

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654. See Kazakhstan–Singapore BIT, supra note 512, art. 4.
655. See Rwanda–Turkey BIT, supra note 66, art. 4.
656. UNCTAD'S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME, supra note 30, at 33–47 (discussing strategies countries are using to limit exposure to legal risks associated with BITs).
657. Id.
658. Kazakhstan–UAE BIT, supra note 652, at art. 3.
### Article 3

#### Treatment of investments

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<td>2. Investments of investors of each Contracting Party shall at all times be accorded treatment in accordance with international law minimum standard of treatment, including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of such investments by unreasonable or discriminatory measures.</td>
<td>3.2 Each Party shall accord in its territory to investments of the other Party and to investors with respect to their investments full protection and security. For greater certainty, &quot;full protection and security&quot; only refers to Party's obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever.</td>
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659. Rwanda–Turkey BIT, supra note 66, at art. 3.2.  
660. India–Belarus BIT, supra note 380, at art. 3.2.
Finally, some recent investment agreements explicitly address corporate social responsibility. Article 9 of the Brazil–Malawi Cooperation and Facilitation Investment Agreement is titled “Corporate Social Responsibility.” Article 9 stipulates that investors and their investment “shall strive to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in [the] Agreement.” Investors are required to use their best efforts to, inter alia, “[r]espect the human rights of those involved in the companies’ activities, consistent with the international obligations and commitments of the Host Party”, “[e]ncourage the strengthening of local capacities building through close cooperation with the local community”, “[e]ncourage the development of human capital, especially by creating employment opportunities and facilitating access of workers to professional training”, and “[s]upport and maintain good corporate governance principles, and develop and apply good practices of corporate governance.”

B. Practical Considerations

1. Turkey’s Immense Experience with BITs

Compared to countries in Africa, Turkey is not a newcomer to BITs. Turkey signed its first BIT in 1962 with Germany. Today Turkey has concluded about one hundred and twenty-eight BITs and an additional twenty-one treaties with investment provisions (TIPs). Turkey has signed BITs with developed as well as developing countries. Compared to most African countries, Turkey has a dynamic BIT program and has its own Model BIT. The

662. Id. at art. 9(1).
663. Id. at art. 9(2)(b).
664. Id. at art. 9(2)(c).
665. Id. at art. 9(2)(d).
666. Id. at art. 9(2)(f).
667. Id. at art. 9(2)(f).
668. Id. at art. 9(2)(f).
669. See Investment Policy Hub – Turkey, supra note 1 (indicating that Turkey’s first BIT was concluded in 1962, with Germany).
670. Id.
671. Id. (“Turkey also follows a dynamic program to conclude new BITs and modify the old ones in line with the new developments in global investment law.”).
implications for countries in Africa are evident. To negotiate from the position of strength, countries in Africa must be prepared and use experts experienced in international investment law and treaty making.

2. Turkey's Deployment of Soft Power in the African Continent

Turkey's deployment of soft power in Africa is a complicating factor. Turkey–Africa BITs are negotiated and concluded against the backdrop of increased display of Turkish soft power in the continent. Turkey’s increased deployment of soft power can make it difficult for African leaders to press Ankara when it comes to renegotiating BITs. In October 2017, Turkey opened its largest overseas military base in Mogadishu, Somalia. In January 2017, Erdoğan, announced plans to open an embassy in every African capital. “Our goal is to have embassies in all African countries, and turn Africa into a continent with which we have much closer bilateral ties,” Erdoğan declared in January 2017, before departing for his four-day Africa tour which included stops in Tanzania, Mozambique, and Madagascar.

3. Lack of Coordination on the African Side

Most countries in Africa lack a coherent international investment policy and most lack a well-defined BIT strategy. In their engagement with Turkey, there is no evidence that African countries have a coordinated or synchronized approach to the BITs.
they are concluding or that they are negotiating against the backdrop of continental vision and goals.679

A careful study of Turkey–Africa BITs suggests that most are not the products of intense negotiations, but were hastily concluded to coincide with visits of high-ranking Turkish officials to Africa.680 By some accounts “[w]ith the exception of the year 2008, President Erdoğan [has] traveled to Africa at least once yearly since 2005.”681 Since 2004, Erdoğan has made about forty trips to twenty-four countries in Africa.682 Between February and March 2018, Erdoğan visited four African countries.683 Erdoğan also visited six African countries in 2017,684 seven in 2016,685 and three in 2015.686 Erdoğan is the first leader in the history of Turkey to visit twenty-three African countries and is now among the world leaders with the most visits to Africa.687 From every indication, some countries in Africa chose to reward these visits with BITs and other investment contracts.688

Erdoğan Visit by Year and Turkey–Africa BITs by Year

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<th>Year of Visit</th>
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<tbody>
<tr>
<td>2018</td>
<td>Mali</td>
<td>Turkey–Mali BIT (2018)</td>
</tr>
<tr>
<td>2018</td>
<td>Mauritania</td>
<td>Turkey–Mauritania BIT (2018)</td>
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<td>2017</td>
<td>Chad</td>
<td>Turkey–Chad BIT (2017)</td>
</tr>
<tr>
<td>2017</td>
<td>Mozambique</td>
<td>Turkey–Mozambique BIT</td>
</tr>
</tbody>
</table>

679. Author's expert conclusion is based on a survey of all BITs between Turkey and countries in Africa. The similarity in the text of Turkey's BITs with countries in Africa suggests that Turkey negotiates on the basis of a Model BIT and is the 'rule giver' in the unfolding relationship.

680. Author's conclusion is based on a study of the relationship between President Erdoğan's visits to Africa and the dates that the different BITs that Turkey has with countries in Africa were concluded.

681. Id.


683. Id. (Algeria, Mauritania, Senegal, and Mali).

684. Id. (Sudan, Chad and Tunisia, Tanzania, Mozambique, and Madagascar).


686. Id. (Somalia, Ethiopia, and Djibouti).


688. Author's conclusion is based on a study of the relationship between President Erdoğan's visits to Africa and the dates that the different BITs that Turkey has with countries in Africa were concluded.
Presently, Africa–Turkey relations are growing, deepening, and widening. From every indication, relations between Turkey and countries in Africa have reached the stage of strategic partnerships. In a little over a decade the position of Turkey in Africa moved from that of having an “Observer Status” in the African Union to that of becoming a “Strategic Partner” of the African continent. According to the Joint Implementation Plan 2015–2019, “the relations between Africa and Turkey have reached the stage of a mutually reinforced Strategic Partnership.” In October 2018, the African Union Commission Department of Economic Affairs and the Turkish Embassy signed a Framework Cooperation Agreement. In October 2018, the Turkey–Africa Second Economic and Business Forum (Turkey–Africa II. Economic and Business Forum) was jointly organized by the Turkish Ministry of Commerce, the African Union Commission and DEiK under the motto of “Building a Sustainable Future Together through investments and joint ventures.”

<table>
<thead>
<tr>
<th>Year</th>
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<th>Country 2</th>
<th>BIT Date</th>
</tr>
</thead>
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<tr>
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<td>Turkey–Tunisia BIT (2017)</td>
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<td>Côte d'Ivoire</td>
<td>Turkey–Côte d'Ivoire BIT (2016)</td>
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<td>2016</td>
<td>Somalia</td>
<td>Turkey–Somalia BIT (2016)</td>
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<td>2016</td>
<td>Ghana</td>
<td>Turkey–Ghana BIT (2016)</td>
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VIII. CONCLUSION

689. Turkey—Partnership Overview, supra note 155; see also Chigozie Enwere & Mesut Yılmaz, Turkey’s Strategic Economic Relations with Africa: Trends and Challenges, 1 J. ECON. & POL. ECON. 216, 221 (2014).

690. In 2005, the African Union granted Turkey an “Observer Status.” See Non-African States and Organisations Accredited to the AU, AFRICAN UNION, https://au.int/en/organs/Non-African-States [https://perma.cc/2P87-NWL4] (archived Aug. 18, 2019). In 2008, the AU declared Turkey a “Strategic Partner” of the African Continent. See Africa’s Strategic Partnership with Other Parts of the World, AFRICAN UNION, https://au.int/en/partnerships/intro [https://perma.cc/6U2H-SK46] (archived Aug. 18, 2019). The framework of Africa’s strategic partnership takes four distinct forms: (i) continent to continent partnerships; (ii) continent to country partnerships such as Africa-India, Africa-Turkey, Africa-China, and Africa-Japan; (iii) partnerships in demand as new states or regions request additional partnerships; and (iv) partnership with other institutions such as the Organisation of American States (OAS), the Organisation of Islamic Conference (OIC) the Commonwealth and La Francophonie.


Signaling another important milestone in the Turkey–Africa relationship, during the Turkey–Africa II. Economic and Business Forum, the African Union Commission and the Ministry of Trade of the Republic of Turkey signed a Memorandum of Understanding on Trade and Investment Cooperation.693

Developed countries have had a long presence in Africa. Following in their footsteps, emerging powers are establishing their presence in the continent and are seeking to grow their presence.694 Although Turkey has adopted a nuanced and multitrack approach in its engagement with countries in Africa, Turkey’s engagements with Africa are largely driven by economic considerations and are occurring against the backdrop of renewed competition for Africa’s natural resources and geostrategic positioning by developed countries and emerging powers alike.695 In the Joint Implementation Plan 2015–2019, all sides agreed to: “[e]xplor[e] the possibilities to support the common objectives of the parties to expand trade and investment volume from US$30 billion in 2013 to US$50 billion by 2019.”696 Furthermore, a communique issued in February 2018 following the Second Ministerial Review Conference of African Union–Turkey Partnership, “noted the importance of trade and investment as key components of relations between African countries and Turkey” and reiterated the desire “to further strengthen economic and commercial relations.”697

Turkey’s President Recep Tayyip Erdoğan appears to be invested in Africa for the long-term, although Turkey’s trade and investment in the region is presently very modest compared to its trade and investment with other regions of the world.698 Thus far, President Erdoğan and the Justice and Development Party have been

693. Press Release, Foreign Econ. Relations Board of Turk. (DEIK), Turkish President Erdogan Calls on Africa to do Business in Local Currency (Oct. 10, 2018) (on file with author).
695. Alexis Habiyaremye & Tank Oğuzlu, Engagement with Africa: Making Sense of Turkey’s Approach in the Context of Growing East-West Rivalry, 11 ULUSLARARASI İLİSKİLER 65, 66 (2014) (suggesting an economic underpinning to Turkey-Africa relations and noting that “Turkish interest in, and opening up to Africa, came at a time when many African economies had started to enjoy relatively robust growth rates as a result of a booming trade with China.”).
696. Second Joint Implementation Plan, supra note 179, at ¶ 6(h).
698. SHINN, supra note 8, at 17 (stating that “The breadth of Turkey’s involvement in SSA suggests that its intention is to engage for the long term.”).
instrumental in forging Turkey–Africa relations. Whether Turkey–Africa relations will survive any future change of government in Turkey is anyone’s guess.

In its forays into Africa, is Turkey using the same types of legal instruments, for example BITs, that Western nations used in the past and are still using? To the extent that Turkey is using the same legal instruments that Western nations used in the past, is Turkey using these instruments in the same way or are these instruments serving a completely different purpose in unfolding relationships? Specifically, do Turkey–Africa BITs depart markedly from the BITs that countries in Africa concluded with Western nations? Compared to traditional BITs, are Turkey–Africa BITs more oriented towards sustainable development? Are the principles of solidarity, equal partnership, a win-win outcome, and mutual benefit, which underpin Turkey–Africa relations, reflected in the BITs? And if so, to what degree?

First, like most Western nations, Turkey has embraced the international investment law in general and BITs in particular. Turkey has not shown any interest in following in the footsteps of emerging market economies like India, Indonesia, and South Africa that are terminating their BITs and appear to be rejecting the international investment law regime. In sharp contrast to many

699. Id. at 18 (noting that Erdoğan has been the chief architect of Turkey’s renewed engagement in SSA).

700. Id. (predicting that while a change in government could cause Turkey to reduce, for example, its huge political and humanitarian engagement in Somalia, “Ankara will almost certainly continue to retain its strong commercial relations with SSA countries” and that “business and cultural connections are too deeply embedded to allow interest in Turkey’s Africa strategy to cease.”).


703. To date, South Africa has terminated BITs with a number of countries, including Argentina, Austria, Belgo-Luxembourg Economic Union, Denmark, France, Germany, the Netherlands, Spain, Switzerland, Sweden, and the United Kingdom. See International Investment Agreements Navigator—South Africa, U.N. CONFERENCE ON TRADE & DEV., https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa (last visited Aug. 10, 2019) [https://perma.cc/6M8T-FCCC] (archived Oct. 9, 2019) [hereinafter Investment Policy Hub – South Africa]; see also Qobo & Soko, supra note 545.
developing countries that have been critical of bilateral investment treaties, Turkey has stepped up its investment treaty-making practice. In the last decade, since 2009, Turkey has concluded forty-nine known BITs with countries in diverse regions of the world.704

Second, Turkey's conception of BITs as primarily investor-protection instruments mirrors those of most Western nations. With its role changing from that of a capital importer to that of both a capital importer and exporter, Turkey is clearly under pressure to protect Turkish investors and is increasingly using BITs, not necessarily to attract investors, but to protect Turkish investors who are venturing into oversea markets. In years past, Turkey viewed BITs primarily as a tool to improve domestic investment climate and to attract foreign investment. Today, Turkey increasingly views BITs as "the only tool that can be relied on by the Turkish entrepreneurs investing all around the world to protect their investments and related rights."705

Third, despite its avowed commitment to the principles of solidarity, equal partnership, win-win outcomes, and mutual benefit in Turkey–Africa relations, these principles are not reflected in the BITs that Turkey has concluded or is concluding with countries in the region. For the most part, these principles are only found in hortatory instruments such as the 2008 Istanbul Declaration and the 2014 Malabo Declaration.

Finally, very much like traditional BITs, Turkey–Africa BITs are not development cooperation instruments and were not specifically designed promote and sustainable development in host states. However, although Turkey–Africa BITs are primarily investor-protection instruments, they are constantly evolving and more recent BITs appear to have been drafted with a view to striking a more appropriate balance between investor/investment protection and sustainable development. Indeed according to Turkey's Ministry of Trade, "Turkey . . . follows a dynamic program to conclude new BITs and modify the old ones in line with the new developments in global investment law."706 While improvements are undoubtedly called for, recent Turkey–Africa BITs do provide some policy space for host states.

It is up to countries in Africa to review their BITs and design BIT programs that strike an appropriate balance between investment and sustainable development. It is imperative that countries in Africa approach BIT negotiations seriously and strategically. Policy coherence is important in investment policymaking.707 It is

704. Investment Policy Hub – Turkey, supra note 1.
705. Bilateral Investment Treaties, supra note 266.
706. Id.
707. G20 Guiding Principles, supra note 268, at ¶ V ("Investment policies and other policies that impact on investment should be coherent at both the national and
imperative that countries in Africa develop a coherent international investment policy and ensure that the BITs that they conclude are consistent with national, regional, and continental development goals and strategies. For example, *African Union Agenda 2063* is the "continent's strategic framework that aims to deliver on its goal for inclusive and sustainable development." The vision of Agenda 2063 is that of "an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the international arena." Among the "Aspirations" identified in Agenda 2063 are those of: "A prosperous Africa based on inclusive growth and sustainable development," (Aspiration 1), "An Africa of good governance, democracy, respect for human rights, justice and the rule of law" (Aspiration 3); and "An Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children" (Aspiration 6). Although in their engagement, both sides emphasize the centrality of the African Union Agenda 2063 as one of the guiding frameworks for the unfolding partnership, it is debatable and, even doubtful, that Turkey–Africa BITs modeled as they are after traditional BITs, will help the two sides achieve their desired goals.

Countries in Africa must look beyond the charm offensive of emerging partners and critically evaluate the values, motivations, and strategies of each partner. This begs several questions. First, what are Turkey’s real motivations? The question is important because as some commentators have noted, "the question of why Turkey has shown what some consider to be an unexpected interest in the continent still does not have a clear answer for Turkey’s African partners." Second, while Turkey is ready and prepared to engage with countries in Africa, are these countries prepared and well-equipped to engage with Turkey? While Turkey appears to be ready and fully-equipped to engage with countries in Africa, most countries in Africa appear to be ill-prepared to engage strategically with a country like Turkey. For one thing, Turkish foreign policy

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709. Id.

710. Id.


makers have an array of instruments in their tool kit that would enable them to engage with countries in Africa from a position of strength.\textsuperscript{713} For another, the suppliant position of most countries in Africa \textit{vis-à-vis} Turkey undermines their ability to engage in hard bargaining in any trade and investment agreement. It is important that African leaders pay careful attention to the links between Turkey's humanitarian diplomacy and its economic diplomacy in Africa.\textsuperscript{714}

Turkey's claims of a win-win economic partnership need to be routinely interrogated and Turkey's overall ambition in the continent constantly reassessed. In a recent article, \textit{Turkey and the New Scramble for Africa: Ottoman Designs or Unfounded Fears?}, Zach Vertin rightly notes that "[a] right-sized assessment of Turkish ambitions and its influence in the Horn of Africa requires zoom, medium, and wide-angle lenses" and highlights how Turkey's regional competition with Gulf rivals may be playing out in Africa.\textsuperscript{715} It is imperative to examine Turkish multifaceted and nuanced engagements in Africa. There are many questions that African leaders must answer as they forge deeper ties with Turkey. What are the costs and benefits of Turkey's humanitarian diplomacy in Africa? Does Turkey's humanitarian diplomacy weaken the capacity of African leaders to press Ankara on important trade and investment issues? Given deep rivalry between Turkey and Gulf States such as Saudi Arabia and the United Arab Emirates, what are the opportunity costs for Africa, of unquestioned alliance with Turkey? It is important to move beyond Turkey's anticolonial and benevolent partner discourse and ask some hard questions. What is in it for countries in Africa and are the legal instruments that underpin Turkey–Africa unfolding relationships really designed to deliver win-win outcomes and sustainable development benefits to all sides? This question is very important because while there are many noneconomic factors at play, Turkey's engagement with Africa is largely driven by economic considerations.\textsuperscript{716} As Ali Bilgic and Daniela Nascimento put it:

\begin{itemize}
\item \textsuperscript{713} Gonca Biltekin & Volkan İpek, \textit{Turkey's Foreign Policy Implementation in Sub-Saharan Africa: A Post International Approach}, 49 NEW PERSPECTIVES ON TURKEY 121, 121 (2013).
\item \textsuperscript{714} Elem Eyrice Tepeçiklioğlu et al., \textit{Turkish and BRICS Engagement in Africa}, 8 J. SUSTAINABLE DEV. L. & POLY 48, 51 (2017) (observing that studies show that Turkey's soft power initiatives in SSA "have been an important complement to its official diplomatic and developmental efforts as well as its business and political interests in SSA.").
\item \textsuperscript{716} Tepeçiklioğlu et al., \textit{supra} note 713, at 49 (observing that Turkey's engagement with Africa is also mostly driven by economic considerations,
Turkey's increasing involvement in Africa can be understood in terms of its political, economic, and development aid ambitions and motivations, framed through close economic ties with sub-Saharan countries (in the form of diplomatic activity, trade and aid), which are not only aimed at exploiting the sub-Saharan market, but also at establishing a Turkish presence in Africa vis-à-vis other, mainly Western, but also Southern, donor countries.\textsuperscript{717}

An exhaustive analysis of the political economy of Turkey--Africa relations is beyond the scope of this paper. It is too early to determine whether Turkey's initiatives in Africa will deliver sustainable development benefits that benefit ordinary Africans.\textsuperscript{718} This Article suggests that countries in Africa are yet to develop a robust strategy for engaging Turkey. Some commentators have described African reaction to Turkey's African diplomacy as a "mixture of mild expectation and confusion."\textsuperscript{719} In their BITs with Turkey, countries in Africa have been "rule takers" rather than "rule makers" with the result that, like traditional BITs, Turkey--Africa BITs are primarily designed to protect capital exports and not capital importers. Regarding Turkey--Africa economic relations, countries in Africa must start by educating themselves about the values and motivation that underpin Turkey's foreign policy\textsuperscript{720} and must pay close attention to Turkey's foray into countries outside of Africa.\textsuperscript{721} Countries in Africa must also educate themselves about the role of emerging markets and middle powers in global governance and seek to understand the strategies of these new actors.\textsuperscript{722} Beyond Turkey--predominantly by a quest for new export opportunities for Turkish companies. That is, the Turkish government aspires to create markets for Turkish products.").

\textsuperscript{717} Bilgic & Nascimento, supra note 710, at 3.

\textsuperscript{718} Id. (observing that it is still yet to be established to what extent Turkey's new approaches in Africa "can actually help to build up a sustainable and mutually beneficial cooperation relationship that has a positive impact on the living conditions of African people, or whether Turkey's new orientation towards Africa simply ends up reflecting the old principle of 'business as usual'.").

\textsuperscript{719} Mehmet Özkan, Turkey's Rising Role in Africa, 9 TURKISH POLY Q. 93, 103 (2010).

\textsuperscript{720} İbrahim Kalin, Turkish Foreign Policy: Framework, Values, and Mechanisms, 67 INT'L J. 7, 7 (2011); see also Kemal Kirisci, The Transformation of Turkish Foreign Policy: The Rise of the Trading State, 40 NEW PERSPECTIVES ON TURKEY 29, 29 (2009).

\textsuperscript{721} Paul Kubicek, Debating the Merits of the "Turkish Model" for Democratization in the Middle East, 12 ALTERNATIVES TURKISH J. INT'L REL. 66, 66 (2013); see also T.C. Başbakanlık Diş Ticaret Müsteşarlığı, Turkey Trade Development Strategy Towards the Americas, ANKARA DTM (2006).

Africa relations, countries in Africa must develop strategies for engaging with emerging partners, must develop their own foreign policy instruments, and must train and deploy a seasoned, educated, committed, and diversified pool of actors involved in the foreign policy domain.

[https://perma.cc/8STJ-HU93] (archived Aug. 18, 2019); Únay, Economic Diplomacy for Competitiveness, supra note 712.
### Annex A
Turkey–Africa Bilateral Investment Treaties: In Force Treaties

<table>
<thead>
<tr>
<th>Country</th>
<th>Status</th>
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<th>Date in Force</th>
<th>Text Available</th>
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Source: Author's Compilation from Information Available on UNCTAD's Website

### Annex B
Turkey–Africa Bilateral Investment Treaties: Signed But Not in Force

<table>
<thead>
<tr>
<th>Country</th>
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<th>Date of Signature</th>
<th>Date of Entry into Force</th>
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## Annex C

Turkey–Africa Bilateral Investment Treaties By Year of Conclusion

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Tunisia (29/05/1991)

Source: Author's Compilation from Information Available on UNCTAD's Website

Annex D
Turkey–Africa BITs: General Excetions/Security Exceptions

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<tr>
<th>Country</th>
<th>General Exception</th>
<th>Security Exception</th>
<th>Corporate Responsibility/Investor Accountability</th>
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## Annex E

**Turkey–Africa BITs: Termination, Consultation, and Amendment**

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<th>Country</th>
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724. In 2017, Turkey negotiated a new treaty with Tunisia. However, the Turkey–Tunisia BIT is not yet in force. Turkey–Tunisia BIT, supra note 45.

725. *Id.* at art. IX ("This agreement shall not preclude the application by either Party of measures necessary for the maintenance of public order and morals, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.").
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*Source: Author’s Compilation from Information Available on UNCTAD’s Website*