REAL ESTATE LEGAL DEVELOPMENTS IN TURKEY WITH RESPECT TO FOREIGN INVESTMENTS (*)

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SUMMARY

Ownership rights of foreign companies are regulated by multilateral and bilateral treaties or by the principles common acquired by international treaties such as reciprocity by which a national of a foreign country is allowed to be the owner of an immovable property in Turkey, on the condition that Turkish nationals are also permitted in pari passu conditions to own immovable property in the territory of that country. Also there are restrictions with respect to the laws and regulations applicable to real estate ownership of foreigners.

Additionally, this presentation deals with the issues relating to a real estate to be purchased in Turkey for the implementation of foreign investments with the explanations of real estate, independent and permanent rights entered in the land-titles register and mines.

The joint venture companies incorporated with foreign capital in Turkey under the Foreign Investment legislation shall own real estate in pari passu conditions with Turkish companies without being subjected to the reciprocity. Upon the amendment in the relevant article of TCC the establishment of mortgages in foreign currency has been made possible with regard to foreign-originated loans with a maturity of five years or more and in this way foreign lenders have been introduced as mortgagees in the Turkish legal system.

Problems arising from the foreclosure of mortgages and conversion of the proceeds of the foreclosure which are in TL into the currency of foreign loan are also explained in general aspects.

- 1. Ownership Rights of Foreign Companies and Joint Ventures
- (A) Foreign Companies:
- 1. Multilateral Treaties:
- (a) Regime accapted by Lausanne Treaty of 1923;
- (b) Articles of Agreement of IFC.
 - 2. Bilateral Treaties.
- 3. Principles Common to the Real Estate Ownership Rights of Foreign Companies acquired by the International Treaties:
 - (a) Recipracity;
- (b) Law and Regulations applicable to real estate to real estate ownership of foreigners;
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Real Estate Legal Developments

- (c) Restrictions proper to foreign corporate bodies; and
- (d) Vested Rights.
- 4. Regime accapted by the Parliament Enactments (the "Laws")
- (a) Petroleum Law;
- (b) Tourism Law;
- (c) Banking Law.
- (B) Joint Venture Companies:
- 1. Ownership Rights of Joint Venture Companies in Real Estate:
- (a) Real Estate;
- (b) Usufruct Rights; and
- (c) Mining Rights.
- 2. Principles Common to Joint Ventures:
- (a) The Equal Treatment Rule of the Foreign Investment Legislation of Turkey; and
- (b) The Rule Determining the Nationality of Corporate Entitites under the Laws of Turkey.
- 3. Regime established by Bilateral Treaties Concerning the Reciprocal Encouragement and Protection of Investments.
 - II. Foreign Lenders as Mortgages:
 - 1. Mortgages;
 - (a) Mortgage in Foreign Currency; and
 - (b) The validity of Negative Pledge.
 - 2. Mortgage of Mining Right
 - 3. Problems arising from the Foreclosure of Mortgages:
 - (a) Lex commissoria prohibition; and
- (b) Conversion of the Proceeds of the Foreclasure Collected in Turkish Lira into the Currency of the Foreign Loan.
 - III. Conclision.
 - I. OWNERSHIP RIGHTS OF FOREIGN COMPANIES AND JOINT VEN-TURES:
 - (A) Foreign Companies:
 - 1. The Multilateral Treaties:
 - (a) Regime accapted by Lausanne Treaty of 1923.

Pursuant to Article 3 of the Convention Respecting Conditions of Residance and Business and Jurisdiction done at Lausanne, on 24th 1923 "in Turkey the nationals of the nationals of the other Contracting Powers (the British Empire, France, Italy, Japan, Greece, Romania and the Serb-Croat-Slovene State) will have the right to possess and to dispose of all kinds of property both movable and immovable, subject to compliance with the local laws and regulations".

However, this Convention is concluded for a period of seven years (Art. 20) and since 1930 it is not in force.

The Constitutional Court of Turkey holds that, in this Convention, the right to acquire property is recognized, on reciprocal basis (see: Constitutional Court Decision dated June13, 1985 Number: E.1984/14;K.1985/7 Offical Gazette August 24, 1985 Number 18852 page 36), to the nationals (i.e. real persons) of the contracting states in Turkey; but such right, as the Convention stayed silend, was denied to the corporate entites of the Contracting States.

In the field of Real Estate Ownership, the Ottomans, for the first time and with sole exception of Hicaz Region have recognized, in equel terms with Ottomon subjects, ownership rights to foreign real persons by a Law promulgated in 1868. But, Sublime Porte (Babiali) did not accept to grant ownership rights to foreign corporate bodies, in particular to foreign companies and states.

At present, with certain amendments, this situation still prevails in its broad lines. In fact, a citizen or subject of a foreign state, may own real estate in Turkey as real person provided that:

- (i) his state, according to the rules of reciprocity applied in Turkey, recognize the ownership rights to Turkish citizens in owning immovable property in the territory of his home country and
- (ii) the legal restrictions imposed to foreign real persons (such sa the real estate will be situated within the municipal boundaries of a city or town and will be out of village boundaries as military zones) are observed and complied with.

Pursuant to the provisions of Article 632 of Turkish Civil Code (TCC), The Real Estate (the "Immovable Property") are classified under three headings:

- (i) Land (TCC 644),
- (ii) Independent and Separate Usufruct Titles (TCC. 652,751,751/a-j) and

- (iii) Mines (Mining Law and Petroleom Law).
- (b) Articles of Agreement of IFC:

The International Finance Corporation (IFC) is an international institution, which was created in 1956 by a treaty (Articles of Agreement) among its member countries in order to further economic development in such countries by investing without government quarantee in productive enterprises.

While IFC is an affiliate of the International Bank for Reconstruction and Development, it is independent in a formal and functinal sense within the World Bank.

Turkey has ratified the Articles of Agreement of IFC by a Law 6850 of Semtember 1, 1956 and became a member of IFC.

According to Article VI Section 2 of this Agreement, IFC, in Turkey, shall possess full juridical personality and in particular, the capacity "(ii) to acquire and dispose of immovable and movable property".

2. Bilateral Treaties:

(a) TheEstablishment, Commerce and Navigation or Consulate or Most Favoured Third Country treaties executed bilaterally between Turkey and other states (such as United States of America, Austria, United Kingdom, Germany, Denmark, Finland, Sweden, Norway, Belgium and Switzerland), contain provisions authorizing the companies of the contracting state to own real estate necassary for their activities in Turkey on a reciprocal basis and in compliance with the requirements of Turkish Legislation, provided that the object of the company in question shall not be the purchase and sale of real estate.

For example:

(i) The Establishment Convention between Turkey and Switzerland done at Ankara om 13th December, 1930, ratified by Turkey under Law No. 1855 dated July 20, 1931, in its Article 10 comtains the following provision:

Article 10 Les societes commerciales, industrielles ou financieres, y compris les societes les societes de transport et d'assurances valablement constituees d'apres les lois des Hautes Parties Contractantes et ayant leur siege sur son territoire, seront juridiquement reconnuesdans l'autre Pays pourvu qu'elles ne poursuivent pas un but illicite ou contraire aux moeurs, et leur capacite et droit d'ester en justice seront determines par les lois de leur d'origine.

Elles auront le droit de s'etablir sur le territoire de l'autre Partie et d'y exercer leur activite en se conformant aux lois et reglements qui y sont ou seront en vigueur.

Elles auront le droit d'acquerir sur le territoire de l'autre Partie, en se soumettantaux lois du pays, toute sorte de biens mobiliers ainsi que les biens immobiliers necessaires a leur fonctionnement, a l'exception des cas prevus par les legislations respectives, etant entendu dans ce cas que l'acquisitiondes immeubles n'est pas l'objet memede la societe".

(ii) The Establishment Convention between Turkey and Iraq done at Ankara on 9th January, 1932 in its Article 1 (penultimate and 1st paragraphs) contains the following provision:

En ce qui concerne le droit de propriete immobiliere, les ressortissants de chacune des Hautes Parties Contractantes jouiront sur les territoires de l'Autre du traitement de la plus favorisee, sous reserve des lois en vigueur dans les deux Pays.

L'pplication de cette dispositionest subordonneea la condition de parfaite reciprocite".

According to these treaties, in order to own real estate in Turkey a foreign corporate entity established in the territoire of one of the contracting states, should comply, without exception, with the following conditions:

- (i) there should be de facto and de jure reciprocity between Turkey and the foreign state where the corporation is situated. which enables Turkish Corporate entites to acquire real estate in the territory of the related contracting state,
- (ii) the foreign corporate entity should comply with the laws and regulations of Turkey,
- (iii) owning real estate should be necessary for the foreign corporate entity's activities in Turkey and
- (iv) the real estate business should not be the main object of the foreign corporate entity.

The reciprocity, law and regulations governing real estate ownership of foreigners and restrictions pertaining to foreign corporate entities, as well as vested rights recognized to foreigners in the field of real estate ownershipwill be explained in brief hereinbelow.

3. Principles Common relating to the Real Estate Ownership Of Foreign Companies Acquired by International Treaties:

(a) Reciprocity:

Reciprocity is one of the basic principle of the Private International Law of Turkey with respect to the legal status of foreigners. By virtue of this principle, a national of a foreign country is permitted to be the owner of an immovable property in Turkey, provided that Turkish nationals are also permitted in pari passu conditions to own immovable property in the territory of that country (Article 35 of LandTitles' Register Law of Turkey). Here de jure reciprocity is not sufficient; the existence of de facto reciprocity should also be inquired through the Ministry of Foreign Affairs of Turkey.

For example, in the event of a foreign national willing to acquire land at a castal area in Turkey, the investigation made by the Ministry of Foreign Affairs of Turkey prior to granting such a right, should conclude that in the legislation or practice of the state where the foreign national in question belongs to, there not any obstacle, restriction or prohibition, as the may be, which shall not permit Turkish nationals to own land at castal areas in the territory of that state (Court of Cassation 2nd, Civil Law Chamber's decision dated June 30, 1992 numbered E. 1992/6595; K. 1992/7379, Review of Court of Cassation Decisions, Volume 19, Number 2, February 1993, p.179-180).

This is the positive aspect of the reciprocity principal. There is also a negative aspect of this principal which renders legality to the acts of reprisal pursuant to the precepts international law.

In these premises the government of Turkey is empowered and authorized to take reprisal measures pursuant to Law 1062 dated May 28, 1927 against the governmental take-overs of real estate owned by Turkish citizens in territories of another state by applying the same take-over measures to the real estate owned by the national of that state in Turkey.

According to Article 1 of Law 1062, in the event that a foreign state, by virtue of an extra-ordinary or discriminatory legislative act or administrative decision, deprives or restricts ownership rights to Turkish citizens in its territory, the Turkish Government, in its turn, by virtue of the issuance of a Council of Ministers' decree is and empowered to take over partially or wholly the real estate owned in Turkey by the nationals of such state.

Upon the take-over of the real estate of foreign nationals situated in Turkey pursuant to a Council of Ministers' decree issued pursuant to Law

1062, the possession of government over such real estate precludes their sale or transfer and they cannot be object of any legal transaction; and if ever made such legal acts will be deemend null and void (Professor Aysel Celikel, Yabancilar Hukuku, 6th Edition, Istanbul 1993, page 205-206).

According to the Constitutional Court Decision dated Juned 6, 1985 [Supra I (A) (1) (a)], the principle of reciprocity is a balancing instrument to secure pari passu treatment in international relations (among individuals belonging to different nationalities). (Constitutional Court Decision referred to in Supra I/A/1a page 37).

Approximately ten years ago, the issue of the waiver of the reciprocity application for certain states and/or nationals of such states, created a serious controversy between legislative and executive powers on one side and the Constitutional Court of Turkey on the otherside.

In 1980's the Government of Turkey initiated amendment proposals to the Article 35 of Land-Titles Registry Law and to Article 87 of Law 442 on Villages to enable mainly the nationals of the Saudi Arabia, Kuwait, United Arab Emirates, Sultanate of Oman, Bahrain and Qatar to own real estate in Turkey without applying the principle of reciprocity.

The first amendment (Law No. 3029 dated June 21, 1984 has been cancelled by the Constitutional Court decision dated June 13, 1985 referred hereinabove and the second amendment (Law No. 3278 dated April 22, 1986) which was promulgated after the entry into force of the cancellation of Law No. 3029 was, also cancelled by a Constitutional Court decision dated 9th October 1986 (Offical Gazette January 31, 1987, No.19358).

According to the Constitutional Court decisions, the principle of reciprocity has its foundations in paragraphs 4 and 7 of the Preamble of the Constitution of Turkey.

However, upon full membership of Turkey to the European Economic Community, it seems that Turkey shall soften her rigorous application of the principal of reciprocity, presently, adopte 1 by the judicial bodies of Turkey vis-a-vis Article 54 paragraph 3 (e) of the Treaty of Rome.

(b) Laws and Regulations Applicable to Real Estate Ownership of Foreigners:

On this subject, the Turkish legislation contains three restrictions:

(i) at the military zones, foreign real persons or corporate entites can neither own nor lease real estate. The government of Turkey is also authorized to extend this prohibition to the areas situated at the vicinity of

military zones by a Council of Minister decree (Law 2565 dated December 18, 1981 Articles 7 (a), 9 (b) and 28);

- (ii) at villages and village lands, foreign real persons or corporate entites cannot own real estate, pursuant to Article 87 of Law 442 on Villages dated March 18, 1927;
- (iii) foreign persons cannot own farms or land more than 30 hectars even if they are situated out of village boundaries (Article 36 of Land Titles' Register Law).

Foreign persons to Article 16 of the Decree No. 32 (as amended by Decrees No. 91/1935 and No. 93/4143) governing foreign exchange rules of Turkey may freely transfer abroad the revenues or sale prices of real estate owned through banks or financial institutions in Turkey. Furthermore, under Decree No. 32, the importation of hard currency into Turkey is not required any more for purchasing real estate by a foreign person.

Besides these, any transactionin rem made in relation with real estate in Turkey owned by foreign nationals shall be subject to lex rei sitae, Turkish substantive law, e.g. sale and transfer of any such property shall be made in accordance with Art. 634 of Turkish CivilCode. The principle of free choice of free choice of applicable law by the contracting parties which applies in contractual relationships (International Private and Procedure Law of Turkey Art. 24) is not valid here (Ibid. Art. 23(4)).

Similarly, Turkish public law rules and duties relating to real estate ownership (e.g. tax laws and city planning and construction legislation) will be applied to foreign real estate owner.

(c) Restrictions Proper to Foreign Corporate Bodies:

In all these bilateral treaties, foreign corporate entities, foreign corporate entities are permitted to own real estate in Turkey to the extent that their respective corporate activities necessitate. For example, a foreign insurance company willing to open a branch in Turkey may own an immovable property in Turkey only to use it as an office buildings for its branch activities.

In addition, foreign corporate entities, having the real estate trade as main object, cannot own immovable property in Turkey. In other worlds, foreigners, except for activities considered by the compotent governmental authorities of Turkey as tourism activities, are not allowed to enter into real estate business.

(d) Vested Rights:

If a foreign person owns real estate in accordance with the terms of an international treaty, either multilateral or bilateral such ownership, his ownership, save eventual application of reprisal measures, will not be affected by the restrictions or prohibitions of a new statutory law subsequently promulgated because of the recognition and protection of vested rights acquired pursuant to an international treaty duly ratified by Turkey (The Communique of the General Directorate of Land-Titles dated May 3, 1950 number: 127-64/1168).

Furthermore, if a foreign person owns real estate in Turkey pursuant to a law enabling him to have property rights without entering into the reciprocity investigation, the cancellation of this law by the Constitutional Court will not affect the legal situation because of the vested rights concept of Turkish Law, the property rights of the foreign person acquired at the time of acquisition of the ownership under the laws and regulations of Turkey prevailing during the time-period betweenthe date of promulgation of the relevant law and the date of publication of the Constitutional Court's cancellation decision in Official Gazette of Turkey.

Lastly, in connection with the Convention regarding the conditions of residance and business signed at Lausanne on July 24, 1923 Turkey by same dated letters addressed to Sir H.Rumbold, British Delegate at the Lausanne Peace Conferance and General M.Pelle, French Delegate at the same conference, respectively (the "Letters signed by Ismet Pasha") recognised British and French religious, scholastic and medical establishments as well as of charitable institutions recognised as existing in Turkey before the 30th October 1914 and stated in the same letters that such establishments and institutions "will, as regards fiscal charges of every kind, be treated on a footing of equality with similar Turkish establishments and institutions, and will be sucject to the administrative arrangements of a public character, as well as to the laws and regulations, governing the latter".

the Article 3 of Land Titles' Register Law, in harmony with the Letters signed by Ismet Pasha at the Lausanne Conference, has broadened the application of vested rights towards foreign religious, educational and charitable institutionals, staying that such institutions upon their recognition by the government of Turkey shall be registered in the name of their respective owners.

- 4. Regime accepted by the Parliament Enactments (the "Laws"):
- (a) Petroleum Law:

The Petroleum resources of Turkey are in the possession and under the rule of the Turkish state (Article 1 of the Petroleum Law).

Pursuant to Article 6 of Petroleum Law 6326 dated March 7, 1954 (as amended by Law 2808 dated March 28, 1983), foreign corporations or private law legal entities having the features of a corporation under the relevant foreign state legislation may obtain geological investigation permit, exploration, development and protuction licences. Except that, according to Article 12 of Petroleum Law (as amended by Law 6558 dated May 13, 1955), foreign states or legal entities either directly or indirectly controlled by a foreign state cannot hold petroleum rights nor enter into petroleum operations in Turkey. However, by the issuance of an ad hoc Council of Minister' Decree this prohibition can be waived, pursuant to the last paragraph of Article 12 of Petroleum Law (as amended by Law 1702 dated April 5, 1973).

A licensee of petroleum right under Article 87 of Petroleum Law (as amended by Law 1702, dated April 5, 1973), is entitled to acquire the land in licence area or in its vicinity. Consequently, in the event the licensee is a foreign corporation, it will also have right to acquire the land needed for its petroleum operations.

(b) Tourism Law:

For tourism purposes, pursuant to the paragraph (E) Of Article 8 of Law on Encouragement of Tourism (Law No. 2634 dated March 12, 1982 (the "Tourism Law"), the restrictions set forth in Law on Villages (Law 442) and Land-Titles' Registar Law (Law 2644) for foreign persons may be overruled by the issuance of a Council of Ministers' Decree.

Under paragraps (C) and (D) of Article 8 of Tourism Law, the Ministry of Tourism can registar, also, usufruct rights in favour of foreign real or corporate persons over the real estate owned by the Treasury of Turkey in touristic areas.

A Council of Ministers' Decree (No. 83/6433) relating to the rules to be applied to persons having a foreign nationality and willing to acquire real estate in touristic areas or centers has been published in the Offical Gazette dated May 13, 1983 (No. 18046).

'However, to the best of my knowledge, up to now, there has not been any real estate acquired in touristic areas or centers of Turkey by a real or corporate foreign person for touristic purposes pursuant this Decree.

(c) Banking Law:

Branches of Foreign Banks operating in Turkey in compliance with the provisions of Banking Law (No.3182) dated April 25,1985 (as amended by Decree - Law 512 published at the Offical Gazette September 13, 1993)

may acquire real estate necessary for their banking activities under Banking Law. They are, subjected to the same conditions with local banks and hence they can bid and purchase real estate at public auctions initiated for collection of claims emanating from an accelerated bank claim because of the default of the borrower.

However, the real estate thus purchased should be liquidated within three years (which may be extended by the Undersecretariat of Treasury and Foreign Trade) following the transfer of titles to the bank (Article 50 of Banking Law).

(B) Joint Venture Companies:

1. Ownership rightsof Joint Venture Companies in Real estate:

The Law concerning the Encouragement of Foreign Capital (Law No. 6224 dated January 18, 1954), Foreign Capital Framework Decree No. 92/2789 dated March 4, 1992 and the Communique No. I (as amended) concerning the Foreign Capital Framework Decree constitute the Foreign Invested Legislation of Turkey (the "Foreign Investment Legislation of Turkey") Pursuant to this legislation, foreign persons and corporate entities with the permission of the Foreign Investment General Directorate of the Undersecretariat of Treasury and Foreign Trade, Prime Ministry are entitled to form corporations (Anonim Sirket) or companies with limited liability (Limited Sirket) (Communique No. I. Article 2) in Turkey under the prevailing laws and regulations with or without Turkish partners (hereinafter referred to as Joint Venture Companies).

In this part of the presentation, I shall deal with the issues relating to real estate to be purchased in Turkey for the implementation of foreign investments. Therefore, the term of the Joint Venture includes branhes of foreign companies opened in Turkey pursuant to the Foreign Investment Legislation of Turkey. Articles 1 and 2 of the Communique No. 1 reads as follows:

"Article 1. Field of Activity. Real persons and legal entities resident abroad may engage in all industrial, agricultural and other activities oriented to the production of goods and services, provided that such activity is related to subjects mentioned in permits and/or incentive certificates granted to them by the Foreign Investment General Directorate of the Undersecretariat of Treasury and Foreign Trade, Prime Ministry and included in the article of association as published in the Commercial Registry Gazetta of Turkey".

"Article 2. Investment and Commercial Activities. Persons and legal persons resident abroad, in order to establish corporations or limited liabil-

Real Estate Legal Developments

ity companies pursuant to the Turkish Commercial Code or open branch offices to invest in Turkey and conduct commercial activity shall apply to the Foreign Investment Directorate of the Undersecretariat of Treasury and Foreign Trade, Prime Ministry ...".

Pursuant to these provisions, such joint venture companies may engage in all industrial, commercial, agricultural and other activities oriented to the production of goods and services, provided that such activities are intra vires with the permit issued by the Foreign Investment General Directorate as reflected by the articles of incorporation of the Joint Venture Company.

These Joint Venture Companies may own real estate, independent and separate usufruct titles and mines in Turkey in pari passu conditions with corporations or limited liability companies incorporated, solely, by Turkish partners or branches of Turkish companies, as the case may be.

(a) Real Estate:

According to Turkish Civil Code (Article 644) "The ownership of the land implies on the ownership of the land implies on the ownership of all that is above and below the surface to such a height and depth respecting as the owner may require.

It extends, subject to certain legal restrictions, to all buildings on the ground, as well as plants and springs in it".

The Joint Venture Companies may own land or buildings or coownership, without being subjected to any restriction applicable to foreigners, on an equal fooling with Turkish companies.

(b) Independent and Permanent Rights Entered inthe Land-Titles Register

The Joint Venture Companies may, also, own Independent and Permanent Rights entered in Land-Ttitles Register. Such rights are deemend within the definition of real estate (=immovable property) under Turkish Law.

As referred to hereinabove, pursuant to paragraps (C) and (D) of Article 8 of the Tourism Law and Council of Ministers' Decree No. 83/6285 (Offical Gazette No. 18031 dated April 28, 1983), Ministry of can allocate against the payment of an annuel fee (like rental payment) and register in the Land -Titles Register in favour of Joint Venture Companies (alsoin favour of foreign real persons or corporateentities) usufruct rights for a period of 49 years (Decree 83/6285 Articles 18 and 20) over the real estate including forest and castal areas belonging to the Treasury of Turkey.

For this purpose, the National Properties' Directorate of the Minstry of Finance encumbers the usufruct title with a rent-charge (=charge fonciere =Grundlast) and registar it at the Land Titles Registar.

In 1990 an amendment law (Law No. 3678 dated November 14, 1990) amendedArticle 751 and inserted into the Civil Code ten new articles (Articles 751/a-j) to govern the usufruct rights having a duration of at least 20 year as independent and separate titles (Article 751 of TCC)

(c) Mines:

According to Article 168 of the 1982 Constitutional of Turkey: "Natural wealth abd resources constitute the commonwealth (ofthe Republic of Turkey) and are at the disposal of the State. The State can assign this right to real persons and legal entities for a certain period of time. Which of these natural wealth and resources shall be explored and exploited by the state in form of a joint venture with real persons and legal entities, or directly by real and legal entities, is subject to the explicit permission of the Law..."

On the other hand, the Mining Law numbered 3213dated 4.6.1985, in its Article 6 clearly permits the assignment of the mining rights "to Turkish citizen and to corporate bodies incorporated under the laws of Turkey, to State Economic Enterprises, or the subsidiaries, and affiliates (of state economic enterprises)".

However, pursuant to Law No. 2840 and dated 13th June 1983, the mines of Bor Salts, Trona [Natural Soda] (except exploration of Trona discovered after the effective date of Mining Law No. 3213 dated June 4, 1985 as provided in Article 49 of Law No. 3213), uranium and torium are under state monopoly and their explorationand exploitation are given to Etibank which is a State Economic Enterprise (Article 4 paragraph 8 of the Statues of Etibank).

Whereas foreign persons cannot own mining rights in Turkey, a corporation or a limited liability company incorporated pursuant to the Foreign Investment Legislation of Turkey and fully owned by foreign shareholders, or partners, save the exceptions referred to above may be holder of mining rights.

- 2. Principles Common to Joint Ventures:
- (a) The Equal Treatment Rules of the Foreign Investment Legislation of Turkey.

The Article 10 of Law No. 6224 concerning the Encouragement of For-

eign Capital under the heading of equal treatment application to domestic and foreign capital has the following provision: "All rights, exemptions and privileges granted to domestic capital and business shall be available under the same conditions to foreign capital and business working in the same field."

This legal provision which constitutes one of the foundation stones of Turkish Foreign Investment Legislation has three different fields of application:

- (i) Real persons and corporate entities resident abroad who are the shareholders or partners, as the case may be, of the Joint Venture Companies incorporated in Turkey pursuant to the provisions of the Foreign Investment Legislation of Turkey shall benefit from the same rights and legal media that Turkish shareholders or partners are enjoying;
- (ii) The Joint Ventures Companies having a foreign capital and incorporated in Turkey under Foreign Investment Legislation shall have the same rights, exemptions and privileges granted to companies incorporated with Turkish capital only and operating in the same field; and
- (iii) In my opinial, the "capital in the form of foreign currency" wording of Article 2(a) (1) of Law No. 6224 concerning the Encouragement of Foreign Capital includes "foreign loans" provided under the Foreign Investment Legislation of Turkey.

Consequently, foreign lenders of long and medium term loans extended to Joint Venture Companies enjoy the same rights as Turkish lenders by virtue of the equal treatment rule of Article 10 of Law No.6224 concerning the Encouragement of Foreign Capital.

The Joint Venture Companies incorporated with foreign capital in Turkey under the Foreign Investment shall own real estate in pari passu conditions with Turkish companies without being subjected to the reciprocity investigation (Düzceer, Ali Rıza: Yabancıların Türkiye'de Taşınmaz Mal İktisapları; Review of the Court of Cassation Tome 5, April 1979, No. 2 page 293).

- (b) The Nationality of Corporate Entities under the Laws of Turkey: In the event a company is incorporated in Turkey, it will:
- (i) be subject to the laws of Turkey;
- (ii) have its head office in Turkey.

Therefore even if its corporate capital shall be composed solely, of foreign capital, such company shall be deemed as a Turkish Company, (Ecnebi Anonim ve Sermayesi Eshama Münkasem Sirketlerle Ecnebi Sigorta Sir-

ketleri hakkında Kanunu Muvakkat dated 1914; penultimate paragraph of Article 42 of Turkish Commercial Code; penultimate paragraph of Article 8 of Law No. 2675 relating to International Private and Procedure Law of Turkey). Consequently, it can own real property or mining rights in pari passu conditions with companies incorporated in Turkey with Turkish equity only.

3. Regime Established by Bilateral Treaties concerning the Reciprocity Encouragement and Protection of Investments.

According to Article 16 of the 1982 constitutional of Turkey "with respect to foreigners, the fundamental lights and free oms may be restricted, in manner consistent with international Law, by virtue of a law". In addition, according to the Constitution of Turkey (last paragraph of Article 90) "international treaties duly promulgated have the force of Law. Their unconstitutionality cannot be claimed at the Constitutional Court".

Turkey has signed and ratified several bilateral treaties governing the field of the reciprocal encouragement and protection of Investment; namely with Germany (in 1962), United States of America (in 1985), Austria (in 1988), Denmark (in 1990) and Japan (in1992). these treaties contain Articles dealing with the acquisition of property of all-kinds in the event such acquisition will be need for the investment.

With respect paragraph (g) of Articles with I.1 of the Treaty Between the Republic of Turkey and the United States of America Concerning the Reciprocal Encouragement and Protection of Investment while listing the activities associated with the investment (the "Associated Activities") refers to "the acquisition, use, protection and disposition of property of all kinds". Also, in paragraph (c)(i) it is clearly mentioned that the term investment includes "tangible and intangible property, including rights, such mortgages, liens and pledges."

Furthermore, Articles II and III of this Treaty contains detailed clauses securing peaceable ownership to foreign investors in the investment:

"Articles II"

- 1.Each Party shall permit in its territory investments, and activities associated therewith, on a basis no less favorable than that accorted in like situations to investments of nationals or companies of any third country and, within the framework of its laws regulations, no less favorable than that accorded in like situations to investments of its own nationals and companies.
- 2. Each Party shall accord to these investments, once established, and associated activities, treatment no less favorable than that accorded in like situations to investments of its own nationals and companies or to invest-

ments of nationals and companies of any third country, whichever is the most favorable.

3.Investments shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security, in a manner consistend with international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments.

"Article III"

- 1. Investments shall not be expropriated or nationalized either directly or indirectly though measures tantamount to expropriation or nationalization ("expropriation") except for a public; 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 II(2).
- 2. Compensation shall be equivalent to the fair market value of the expropriation investment at the time the expropriatory action was taken or became known. Compensation shall be paid without delay; be fully realizable; and be freely transferable. In the event that payment of compensation is delayed, such compensation shall be paid in an amount which would put the investor in a position no less favorable than the position in which he would have been, had the compensation been paid immediately onthe date of expropriation.
- 3. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a rights to prompt reviewby the appropriate judical or administrative authorities of the other Party to determine whether such expropriation and any compansation therefore conforms to the principles of this Articles.
 - II. Foreign Lenders as Mortgagees:
 - 1. Mortgages
 - (a) Mortgage in Foreign Currency

In 1939 Turkish Court of Cassation has decided that foreign companies (in this case Deutsche Bank) can record mortgages for securing their respective money claims extended to Turkish legal entities. This practive since then is continuing and there is no legal obstacle in Turkish legislation to preclude the recording mortgages in favour of foreigners (Dr. Sait K. Obut [Mimaroğlu] Türk Hukukunda Yabancı Hakiki ve Hükmi Sahısların Ayni Haklardan İstifadesi, page 125-126, Ankara 1956). However, whether or not the

foreign mortgagee can own the mortgaged property by bidding at the auction is stillan open issue.

Until 1990, deeds of mortgage could, only, be executed and recorded in the Land-Title Register in Turkish lira amount (Article 766 of TCC). However, by a Law No. 3678 dated November 14, 1990 (Article 766/a of TCC) recording of mortgages in foreign currency has been introduced to Turkish legal system.

This Article reads as follows:

"It is possible to establish mortgageson real estate in foreign currency with regard to foreign currency with regard to foreign-originated loans carrying a maturity of five years or more (emphasis is made for drawing the attention on the requisite condition of mortgages to be recorded in foreign currency). In such a case, the amount representing each rank shall be shown in the kind of the foreign currency which is the currency of the loan to be secured by the mortgage. Therecannot exist more than one mortgage on the same rank showing more than one foreign currency.

In the case that a rank belonging to a mortgage with foreign currency becomes vacant; mortgage can be established in Turkish currency or in foreign currency up to the amount equivalent to the amount of the previous mortgage, such amount to be calculated on the date of the establishment of the subsequent mortgage. In the case that a rank belonging to a mortgage with Turkish currency becomes vacant; a mortgage can be established in foreign currency up to the amount equivalent to the amount of the previous mortgage, such amount to the calculated on the date of the establishment of the subsequent mortgage.

In calculations of equivalents of Turkish and foreign currencies the "Foreign Currency Buying Rate" of the Central Bank of Republic of Turkey on the date of calculation will be taken into account. Foreign currencies in which mortgages shall be permitted shall be determined by the Undersecretariat of Treasury and Foreign Trade."

(b) The Validity of Negative Pledge

Negative Pledge constitutes one of the standard clauses of loan agreements under which the borrower undertakes towards the lender not to encumber the immovable property by a mortgage or other encumbrance without obtaining his prior consent. The provisions of Turkish Civil Code do not contain any express provision directly prohibiting the recording of or insertion into the deed of mortgage the thenegative pledge clause.

Notwithstanding, Article 784 (first sentence) of Turkish Civil Code reads as follows:

The owner of the mortgaged property cannot validly deprive himself of the right to create further encumbrances on it".

According to the opinion of the General Directorate of Land-Titles, the mandatory provision of Article 784 precludes the recording of the negative pledge clause in the land-title register. However, validity of the negative pledge clause between the parties of the loan agreement as drafted in the loan documents is unquestionable.

2. Mortgage of Mining Rights

Pursuant to Article 42 of Mining Law, the holder of a mining right may execute a deed of mortgage for securing a borrowing relating to his mining operations and record such deed in the mine register. However, the duration of the mortgage cannot exceed the duration of the licence of the mining right mortgaged. According to Article 45 of MiningLaw, the provisions of Turkish Civil Code relating to mortgages are also applied to the mortgage of mining rights.

Consequently, the recording of a mortgage of mining rightsin a currency other than Turkish Lira, provided that the conditions setforth in Article 766/a of Turkish Civil Code are complied with, should be feasible.

3. Problems arising from the Foreclosure of Mortgages.

(a) Lex Commissoria Prohibition

According to first two sentences of Article 788 of Turkish Civil Code "where the debtor fails to fulfil his obligations, the creditor has the right to pay himself out of the proceeds of the sale of the mortgaged property (to be made according to the foreclosure of mortgage proceedings of the Code of Execution and Bankruptcy [Articles 145-153]). Any clause providing that the creditor shall become the owner of the property mortgaged if the debt is not paid in full is null and void" (Lex Commissoria Prohibition).

However, a mortgagee, under Turkish law, can (i) bid up to the Turkish Lira amount of his claim calculated by the execution officer at the foreclosure proceeding's file and (ii) own the mortgaged property, if he is the higest bidder, without paying the purchase price.

In my opinion, the acquisition of property rights by way of bidding at the auction during the foreclosure of mortgaged property should, also, be recognized to a foreign mortagagee if such mortgagee benefits from provisions of the said law, without reciprocity investigation, pursuant to the equal treatment rule of Article 10 of Law No. 6224 concerning the Encouragement of Foreign Capital

(b) Conversion of the Proceeds of the Foreclosure Collected in Turkish Liras into the Currency of the Foreign Loan

Although the mortgage for securing for a foreign loan having a maturity of five years or more can be recorded in foreign currency, in the event of default, the lender is obliged to request the foreclosure of the mortgaged property by forwarding to the debtor a payment order in Turkish Lira corresponding to equivalent of the claim in foreign currency. (Articles 148 and 58 of Code of Execution of Bankruptcy).

In a country like Turkey where inflation rate is quite high, the commencement of the foreclosure proceedings with Turkish Lira creates, to the detriment of the foreign lender, a huge difference between the amount of the claim in foreign currency and Turkish Liras collected.

According to the last paragraph of Article 83 of Turkish Code of Obligations ("TCO") (as amended by Law No. 3678 dated November 14, 1990) "in the event of default at the date payment date, the claimant may request the payment in Turkish Lira pursuant to the rate of exchange prevailing at the date of maturity or at the date of actual payment".

Pursuant to this provision, the claimant may reserve his rights for the collection of the difference accrued because of rate of exchange fluctuations while initiating his first foreclosure proceedings and subsequently may forward a second or more payment orders to the debtor in order to be able to collect fully his claims in foreign currency. However, the difficulties which are created, mainly by the inflation is obvious and there is a lacuna in Turkish legal system in this respect. It is hoped that Turkish law maker, inspired by the jurisprudence and economic necessities, shall regulate the field by amending the relevant provisions of the Code of Execution and Bankruptcy pursuant to the same guide lines with the amendments made in Civil Code and Code of Obligations of Turkey j.e. introduction of the mortgage recording in foreign currency (Article 766/a of TCC) and the regulation made in the foreign currency payment of obligations (Article 83 [last paragraph] of TCO).

CONCLUSION:

Turkey, as we have seen, is rather reluctant to grant to foreigners, in particular to foreign legal entities, the property right in real estate, in the event such ownership is not associated with an investment. But when the realization of an investment requires the ownership of real estate by foreign corporations or Joint Venture Companies, Turkey through Foreign Investment Legislation and bilateral treaties executed with several states for the reciprocal promotion and protection of investments, has a quite favorable legal envirement for such acquisitions.

Real Estate Legal Developments

Glossary of Turkish Laws and Regulations

Kanun No: 2709

Kabul Tarihi: 18.10.1982

Anayasa Mahkemesi Kararı

Bakanlar Kurulu Kararı

Bankalar Kanunu Kanun No: 3182

Kabul Tarihi: 25.4.1985 R.G: 2.5.1985- 18742

Etibank Ana Sözleşmesi

Kararname

Köy Kanunu Kanun No. 442.

Kabul Tarihi: 18.3.1927

R.G: 7.4.1924-68

Maden Kanunu Mining Law Kanun No. 3213

Kabul Tarihi: 4.6.1985 R.G: 15.6.1985-18785

Milletlerarası Ozel Hukuk ve Usul Hukuku Hak. Kanun

Kanun No: 2675

Kabul Tarihi: 2.5.1982 R.G: 22.5.1982-17701

Petrol Kanunu Petroleum Law Kanun No:6326

Kabul Tarihi: 7.3.1954 R.G: 16.3.1954-8659

Constitution

Constitutional Court Decision

Council of Ministers' Decree

Banmking Law

Statues of Etibank

Decree

Law on Villages

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International Private and Procedure Law of Turkey International Law

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T. Mahmut Birsel

Tapu Kadastro Genel Müdürlüğü Tamimi

Tapu Kanunu Kanun No: 2644

Kabul Tarihi 22 Kanunu evvel 1934 R.G: 29 Kanunu evvel 1934-2892

Tebliğ

Turizmi teşvik Kanunu Kanun No:2634 Kabul Tarihi:13.8.1982 R.G: 16.3.1982-17635

Türk Borçlar Kanunu Kanunu No: 818 Kabul Tarihi: 4.10.1926 R.G: 8.5.1926

Türk Medeni Kanunu Kanun No: 743 Kabul Tarihi: 4.10.1926 R.G: 4.4.1926

Y bancı rmaye Cerçeve Kararı R.G: 20.3.1992-21117

Yabancı Sermaye Mevzuatı

Yabancı Sermayeyi Teşvik Kanunu Kanun No: 6224 Kabul Tarihi: 18.1.1954

Yargıtay hukuk Dairesi

Communique of the General Directorate of Land-Titles

Land Titles' Registar Law

Communique

Law on Encouragement of Tourism

Turkish Code of Obligations (TCO)

Turkish Civil.Code (TCC)

Foreign Capital Framework Decree

Foreign Investment Legislation

The Law Concerning the Encouragement of Foreign Capital

Court of Cassation Civil Law Chamber ÖZET

Yabancı şirketlerin Türkiye'deki mülkiyet hakları, çok taraflı ve iki taraflı antlaşmalar veya milletlerarası antlaşmalarla kabul edilmiş olan, yabancı bir devlet vatandaşına, Türk vatandaşlarına o yabancı devlet ülkesinde tanınan gayrimenkul edinme hakkıyla aynı şartlarla tanınan gayrimenkul edinme hakkının bahsedildiği karşılıklılık ilkesi gibi ilkeler aracılığıyla düzenlenmiştir. Bunun yanısıra yabancıların gayrimenkul edinmesine uygulanacak kanun ve düzenlemeler açısından birtakım kısıtlamalar getirilmiştir.

Ayrıca, bu çalışma; arazi ve mütemmim cüzleri, tapu siclinde müstakil ve daimi olmak üzere ayrıca kaydedilen haklar ve madenlerin tanımını yapmak suretiyle, yabancı yatırımların yapılanmasında Türkiye'de gayrimenkul satın alınmasına ilişkin hususlara değinmiştir.

Türkiye'de Yabancı Yatırım Mevzuatı uyarınca yabancı sermaye ile kurulmuş olan Joint Venture koruluşları karşılıklığa tabi olmadan Türk şirketlerinin tabi olduğu hemen hemen aynı şartlarla gayrimenkul sahibi olabilir. türk Medeni Kanununun ilgili hükmünde yapılan değişiklikle, Türk hukuk sisteminde 5 yıl veya daha fazla vadeli dış kaynaklı borçlar için yabancı para üzerinden ipotek tesis edilmesine imkan verilmiştir.

İpoteğin paraya çevrilmesi ve bu paraya çevirme işleminden elde edilen Türk Lirası bedellerin yabancı para bazına çevrilmesinden doğan sorunlar da genel hatlarıyla açıklanmıştır.

KAYNAKÇA

ALTUĞ, Yılmaz: Yabancılarıların Arazi İktisabı Meselesi, İstanbul 1976.

BİRSEL, Mahmut T.- ERDEM, Ercüment: Yurt Dışından Alınan Yatırım Kredilerinin Cebri İcra Yoluyla Tahsilinde Ortaya Çıkan Sorunları (25 Şubat 1993 tarihli "Türk, İngiliz ve A.B.D. Hukukunda İşletmelerin Ödeme Güçlüğü Sorunları ve Banka İlişkileri" isimli Sempozyum) İstanbul Sanayi Odası - Marmara Üniversitesi Avrupa Topluluğu Enstitüsü ortak yayını olarak 1993 yılında İstanbul'da basılmıştır (sayfa 101-148).

ÇELİKEL, Aysel: Yabancılar Hukuku Dersleri, m 6. Bası, İstanbul 1993.

ÇELİKEL, Aysel - NOMER, Ergin: Devletler Hususi Hukuku (Örnek Olaylar - Mahkeme Kararları) 5. Bası, İstanbul 1993.

ÇELİKEL, Aysel - ŞANLI, Cemal: Türk Miletlerarası Özel Hukuk Mevzuatı, 5. Bası, İstanbul 1993.

- DÜZCEER, Ali Rıza: Yabancıların Türkiye'de Taşınmaz Mal İktisapları, Yargıtay Dergisi, Cilt 5, (Sayı 2, Nisan 1979, s. 293)
- GÖKNAR, Hikmet: Kat Mülkiyeti Devre Mülk ve Yabancıların Tasarrufu, Ankara 1988.
- OBUT (MIMAROĞLU) Sait K: Türk Hukukunda YabancıHakiki ve Hükmi Şahısların Ayni Haklardan İstifadesi, Ankara 1956.
- ÖKÇÜN, Gündüz: Türk Anlaşmaları Rehberi, 1920-1973, Ankara 1974.
- ŞANLI, Cemal: Türkiye'de Yabancı Dini,İlmi, Hayri Kurumların Hukuki Durumu ve Gayrimenkul İktisapları,Timur Armağanı, İstanbul 1979, S. 839-877
- TEKINALP, Gülören: Türk hukukunda Ortaklıkların Vatandaşlığı İstanbul Üniversitesi Hukuk Fakültesi Cumhuriyetin 50. yılı Armağanı, İstanbul 1973.
- TEKINALP, Gülören: Türk Yabancılar Hukuku 4. Baskı İstanbul 1992.

