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An Israeli - UAE BIT - a significant step for the promotion of investments

Israel and the UAE signed a promotion and protection of investments agreement between them on 20 October 2020, granting reciprocal protection to investors

Background

On 20 October 2020, the State of Israel and the United Arab Emirates signed the Promotion and Protection of Investments Agreement ("Israel-UAE BIT"). The Israel-UAE BIT is one of several agreements signed in the wake of the Abraham Accords (the Treaty of Peace, Diplomatic Relations and Full Normalization between the United Arab Emirates and the State of Israel, signed in Washington DC on 15 September 2020) [[see our previous update](#)].

What is a BIT?

Bilateral Investments Treaties are bilateral treaties, which, generally, provide investors of one country certain protections when investing in the territory of the other country. Such treaties also generally provide an investor from one country with direct access to arbitration against the other country in which it invested.

The Israel-UAE BIT - General

The Israel-UAE BIT generally conforms to the model of other modern BITs entered into by Israel in recent years and includes those provisions that would be expected in such a BIT, such as the main substantive protections to investors and affording an investor the right to initiate arbitration against the host state. However, as in many other modern BITs, the Israel-UAE BIT also includes significant carve outs and provisions which aim to clarify certain provisions of the BIT and afford the countries protection against claims relating to policies which, for example, aim to protect security or public health. These type of BITs are usually referred to as 4th generation BITs, marking the generational development of the model BITs. Therefore, any investor seeking to rely on the protection afforded by the Israeli-UAE BIT should undertake a careful analysis of its provisions.

Additionally, any investor would be wise to consider the benefits and protections potentially afforded by BITs Israel or the UAE may have with other third countries, and whether reliance on such BITs would be preferential to the Israel-UAE BIT. If that is the case, investors can consider structuring an investment in a way that will afford protection under such other BITs Israel or the UAE are party to which may have wider or stronger protections. An examination of the concrete investment and the possibilities to maximize protections under BITs is of crucial importance.

The Israel-UAE BIT – The Details

Scope of Coverage

The protections afforded by the Israel-UAE BIT are generally afforded to investors of one country, who carry out investments in the territory of the other country. Importantly, investments are defined rather broadly, but do not include, for example, commercial contracts for the sale of goods between Israel and the UAE. Investors of either country are defined as a natural person who is a national of such country (but excluding dual nationals of Israel and the UAE) or an entity of one of the parties.

Also importantly, the Israel-UAE BIT includes a definition of the Territory of each Party. While the definitions are not fully symmetrical, they both include the territorial sea, maritime exclusive economic zone, etc. Such definition may give rise to questions as to the applicability of the Israel-UAE BIT in relation to investments made in the West Bank, for example.

Substantive Protections

The Israel-UAE BIT includes the key protections that would be expected in such a BIT, such as:

- The right to fair and equitable treatment;
- The right to full protection and security;
- "National Treatment", or in other words, the right to treatment no less favorable than the treatment provided to that country's own investors and investments in like circumstances;
- "Most Favoured Nation Treatment" (MFN), or in other words, the right to treatment no less favourable than accorded, in like circumstances, to investors of other third countries;
- Right to compensation for losses or damages in cases such as war, armed conflict of other similar activity on terms no less favourable than those provided to its own investors;
- Protection against expropriation or nationalization, unless carried out for a public purpose, in accordance with law, in a non-discriminatory manner and accompanied by fair compensation;
- The right to transfer (or, in other words, repatriate) funds relating to investments freely, without delay and in a freely usable currency at market rate of exchange;

Exceptions to the Protections

Alongside the important substantive protections described above, the Israel-UAE BIT also includes certain exceptions and protections for Israel and the UAE. These are mostly aimed at affording them protections against claims relating to genuine measures taken for reasons of public policies. Such exceptions include, for example (subject to certain limitations):

- Measures necessary to protect human, animal or plant life or health;
- Protect public morals or maintain public order;
- Protection of national treasures;
- Conservation of living or non-living exhaustible natural resources;
- Measures required for prudential reasons relating to the maintenance, integrity or stability of the financial system or financial institutions;

Denial of Benefits

The rights under the Israel-UAE BIT may be denied to investors in cases where the relevant enterprise is owned or controlled by persons of another country which does not maintain diplomatic relations or prohibits transactions with the relevant country. Interestingly, the provision defines ownership as over 50% of the equity interests and control as the right to appoint a majority of directors or otherwise to legally direct actions.

While this provision is in line with other Israeli BITs (e.g., the Israel-Japan BIT), in the unique geo-political context of the Israeli-UAE relationship and the closeness of the UAE to the rest of the Arab world, this provision could raise potential issues. Such issues could include, for example, the applicability of the BIT to investments from the UAE with non-majority or non-controlling stakes from countries such as Lebanon, Syria or Iran, which are subject to the Israeli Trading with the Enemy Ordinance or other sanction regimes.

Dispute Settlement

The Israel-UAE BIT affords investors of one Party the right to initiate arbitration against the other Party in which they invested. These dispute resolution provisions include:

- The right of the investor to select whether to initiate arbitration in ICSID, under the UNCITRAL Arbitration Rules or to another arbitration body or under other arbitration rules, if the investor and the host state so agree;
- An investor is required, prior to pursuing a claim in arbitration, to seek to resolve the dispute through consultations and negotiations, and for this purpose is required to provide a written request setting a brief description of the facts regarding the measure or measures in issue;
- An investor is required to submit, at least 90 days before filing its claim to arbitration, a written notice setting out its intention to submit the claim to arbitration;
- Where the dispute cannot be settled by consultation and negotiation, within 6 months of the claimant's written request, the claimant may submit the dispute to arbitration;
- A limitations period of 3 years from the date on which the Investor knew (or should have known) about the breach of the Israel-UAE BIT and the damage suffered by the breach;
- There is a "Fork in the Road" provision in the Israel-UAE BIT, requiring waiver from the Claimant and the discontinuance of any proceedings initiated by him in the past also including a specific condition to jurisdiction – that no judgement or award has been delivered on the subject matter of the dispute;
- The Israel-UAE BIT also includes certain provisions relating to the conduct of the arbitration, such as the appointment of arbitrators, certain waivers, limitation periods, the conduct of the arbitrators, etc.

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