

Alpha BIT: Awaiting The First Arab-Israeli Bilateral Investment Treaty

Kluwer Arbitration Blog

November 18, 2020

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Please refer to this post as: Craig D. Gaver, 'Alpha BIT: Awaiting The First Arab-Israeli Bilateral Investment Treaty', Kluwer Arbitration Blog, November 18 2020, <http://arbitrationblog.kluwerarbitration.com/2020/11/18/alpha-bit-awaiting-the-first-arab-israeli-bilateral-investment-treaty/>

The announcement on 13 August 2020 of a rapprochement between Israel and the United Arab Emirates ('UAE') took the world by surprise. Seasoned regional observers noted quiet cooperation and cross-border transactions over the past few years, but few expected these covert relationships to burst into public view so fully and wholeheartedly. The joint declaration, soon replicated by Bahrain and Sudan, was meant to lead to the full normalization of relations between the countries, including a subsequent series of binding bilateral agreements. Most interesting to the readers of this Blog is the promise of agreements on finance and investment, including the first ever Arab-Israel bilateral investment treaty ('BIT'). A series of Arab-Israeli BITs would be noteworthy not only in their own right, but also in light of the current period of widespread ISDS reform. The purpose of this post, therefore, is to examine the ISDS practices of the primary parties to the Abraham Accords (at the moment, Israel, Bahrain, Sudan, and the UAE) and to anticipate whether and how the forthcoming BITs may appear.

Setting the Stage: From the Abraham Accords to the First BIT

The Abraham Accords, signed 15 September 2020, are a framework agreement to establish "peace, diplomatic relations and full normalization of bilateral ties"

between these States, and envision further binding international agreements on a broad range of subjects, including security cooperation, civil aviation, exchange of science and technology, telecommunications, and energy.. Under the Accords, Israel and the UAE have agreed to “deepen and broaden bilateral investment relations,” including by giving “high priority to concluding agreements in the sphere of finance and investment.” They also “reaffirm their commitment to protecting investors, consumers, market integrity and financial stability, as well as maintaining all applicable regulatory standards.” (See [here](#), Annex, p. 1.) Since the UAE agreed to establish normal relations with Israel, Bahrain and Sudan have followed suit, with several other Arab States expected to follow this template as well.

[Press reports](#) suggest that the UAE and Israel have agreed to sign the first Arab-Israeli BIT, though the text of the agreement is not yet publicly available. Might a series of Arab-Israeli BITs follow? Egypt and Jordan have had diplomatic relations with Israel for decades, but neither has concluded a BIT despite having many of their own. Yet Middle Eastern States are sophisticated actors in investor-State dispute settlement (‘ISDS’). According to ICSID’s [most recent caseload statistics report](#), State Parties from the Middle East and North Africa (‘MENA’) region are involved in 11% of ICSID’s proceedings historically, and 10% of new proceedings in the 2020 (US) financial year. Despite a high number of regional BITs, they form an incomplete patchwork quilt across the MENA region, leading litigants to turn to the underutilized [OIC Investment Agreement and the Arab Investment Agreement](#) in [increasing numbers](#). The [OIC’s reform efforts](#) have anticipated and reflected much of the ISDS reform discussion elsewhere in the world. [Recent scholarship](#) has revealed the “Euro-Arab Investment Treaty that nearly was”, including to consider its influence on the subsequent development of ISDS. Middle Eastern States also challenge the strict dichotomy of developed/capital-exporting versus developing/capital-importing States.

Previous Practice of Abraham Accords States towards Investor-State Dispute Settlement

Of the four States, the UAE is perhaps the most active vis-à-vis investment treaty protection and arbitration. Over the past decade, like other Gulf Cooperation Council (‘GCC’) States, it has gradually liberalized its domestic investment laws in

a bid to diversify and stimulate its national economy in a post-oil world. This activity was not only matched, but surpassed, by its enthusiasm for negotiating, signing and ratifying BITs. Remarkably, the UAE has signed 52 BITs in the past decade (of which 21 were subsequently brought into force), for a total of 52 in force with a further 36 signed, but not yet in force. [fn]The figures in this section are derived from UNCTAD record-keeping.[/fn] In the past two years alone, the UAE has signed BITs with Panama, Mali, Kazakhstan, Argentina, Japan, Zimbabwe, Uruguay, Brazil, Gambia, and Hong Kong SAR, though only the last one has been brought into force as yet.

Sudan and Bahrain are less active treaty participants in comparison: Sudan has 14 BITs in force and a further 19 that have been signed, but not yet in force; whereas those figures for Bahrain are 25 and six. In the past decade Sudan and Bahrain have signed three and four BITs respectively. With 34 BITs in force and two signed but not yet in force, Israel falls in the center of BIT activity between the UAE on the one hand and Bahrain and Sudan on the other. That Israel and its bilateral partners appear much more committed to ratifying BITs after they have been signed—Japan in 2017, Myanmar in 2014, and Ukraine in 2010—suggests that Israel takes investment promotion and protection seriously as a matter of policy. That Bahrain and Sudan are less likely to bring recent signed treaties into force suggests that they are less of a priority.

For its middling number of BITs, investors claiming Israeli nationality have not been shy to use Israeli BITs, having acted as claimants in at least five known cases. Three of these are canonical, having made meaningful contributions to ISDS jurisprudence: Phoenix Action v. Czech Republic, Fuchs v. Georgia, and Metal-Tech v. Uzbekistan. While Israel does not appear to have been haled as a respondent, however, Bahrain has acted as a respondent in investor-State proceedings at least twice and Sudan at least once. The UAE, again, is much more seasoned in investment arbitration proceedings. At least thirteen known cases involve investors invoking their Emirati nationality, while the State has been named respondent in at least five.

The other countries rumored to establish normal relations—Saudi Arabia, Oman, Kuwait, Qatar, Morocco, Niger—show a similar diversity of ISDS experience. Morocco and Kuwait each have sixty or more BITs in force (and several proceedings apiece as respondent), while plucky Niger has only five—including two of the earliest BITs with Germany and Switzerland from the 1960s.

Each State's familiarity or novelty with concluding and enacting BITs, as well as their relative success in ISDS proceedings, might influence their desire to conclude BITs with Israel in the wake of the Abraham Accords. There is also a degree of path dependency: the ease with which the UAE concludes its BIT with Israel might induce other Abraham Accords States to follow suit. It might even induce the Arab Abraham Accords States to conclude BITs as among themselves. For instance, Sudan has signed, but not yet enacted, BITs with each of the UAE and Bahrain; and there is no BIT signed between the UAE and Bahrain. As noted above, the OIC Investment Agreement and Arab Investment Agreement may fill some gaps in the region such, but these three States and others might wish to strengthen their bilateral ties with each other to the same extent they do so with Israel.

A Conservative or Progressive Approach towards Investor-State Dispute Settlement?

As the text of the draft Israel-UAE BIT is not yet publicly available, it is not yet clear whether the parties will choose a cautious or more ambitious approach. For instance, Israel's recent BITs with Ukraine (2010) and Myanmar (2014) closely resemble its Model BIT (2003), while its most recent BIT with Japan (2019) does not.

According to press reports, the Israel-UAE BIT will include protections against "nationalisation, confiscation, judicial seizures, freezing assets, [as well as provisions on] establishing licenced investments, and transferring profits and revenues in convertible currencies." Further, "the agreement also provides national and MFN treatment, no interference on all investment related topics, fair and immediate compensation for the investor in case of seizures according to the law, without any form of discrimination and according to the market value of the investment." These fairly standard provisions will need to be analyzed in greater detail when the final text is released.

It is no guarantee, however, that the Israel-UAE BIT, or any others that follow, will stick to the same old script. It bears noting that the UAE and Sudan are both parties to the OIC Investment Agreement (though not Bahrain: Member States of the OIC are not automatically parties to the OIC Investment Agreement). Recently, that agreement has been the subject of a reform effort aimed at dramatically

scaling back both the scope of investment protection as well as the procedural mechanisms afforded to aggrieved investors. That the Israel-UAE BIT seems unlikely to follow suit might speak to the durability of conventional BITs, as well as the likelihood or not that the OIC succeeds in its reform efforts. Perhaps, on the other hand, the Israel-UAE BIT will instead contain procedural innovations, such as the mandatory conciliation provision included in the 2019 Hong Kong-UAE BIT. Morocco—another possible Abraham Accords State—attracted attention for the public interest provisions and Joint Committee established by its 2016 BIT with Nigeria. Further, in a region where dual nationality is common and offshore business operations are familiar and routine, the treaty drafters might pay special attention to the definition of investor, as well as the desirability of denial of benefits clauses.

Finally, a brief word on the matter of Palestine. The effect of the Abraham Accords with respect to Israeli-Palestinian relations is far beyond the scope of this post. Yet, several Arab States make significant investments in Palestine, particularly its infrastructure. One might expect more detail than usual to be paid to the definition of “territory” under the Israel-UAE BIT to clearly define an investment “in Israel.” On the other hand, the issue might draw more attention to Palestine’s five BITs, including ones with Egypt (1998) and Jordan (2012).

The Middle East has been an important but under-heralded player in ISDS. Come what may, the forthcoming Israel-UAE BIT and other Abraham Accords-inspired agreements should bring the region to the fore.