

Bilateral Investment Treaties Protect UAE Investors Engaged in Foreign Direct Investment

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Many investors who engage in foreign direct investment (FDI)—defined as investment by an investor residing in one State with the objective of obtaining a lasting interest in an enterprise located in a different State—may be unaware that their investments are not only governed by local law, but may also be protected by international law. Expropriation without fair compensation, discrimination, unfair or inequitable treatment, and arbitrary and unreasonable conduct by State

officials may all be forbidden by treaty. A series of bilateral investment treaties between States, commonly called “BITs,” grant investors broad legal protections and often provide the right to initiate arbitration against the host State (the State where the investment is made) for failing to observe those protections. The UAE is a party to over 35 BITs with other countries. It is also a party to the Convention on the Settlement of Investment Disputes Between States and

Nationals of Other States (the ICSID Convention), which established the International Centre for Settlement of Investment Disputes (ICSID) in Washington, D.C. UAE nationals who invest abroad and foreign nationals investing in the UAE may have treaty rights and the right to commence arbitration at ICSID or elsewhere against the host State.

These treaty rights are all the more important given the large number of FDI projects in the UAE and by UAE nationals abroad. Last year, more FDI projects were conducted in the UAE than in any other State in the Middle East or Africa. And UAE nationals also led outbound FDI for the region in 2011. Rather than relying exclusively on local courts or even commercial arbitration to resolve disputes arising out of FDI projects, nationals of State parties to BITs often can arbitrate claims for violations of the treaties directly against the host State.

This Article provides a brief overview of the rights granted by the BITs to which the UAE is a party, including the protections for investors and how investors can vindicate their treaty rights in arbitration.

The UAE Investment Treaties

The UAE is a party to more than 35 BITs with developed and developing countries alike, including Algeria, Austria, Armenia, Azerbaijan, Bangladesh, Belarus, Belgium, China, Czech Republic, Egypt, Finland, France, Germany, Italy, Jordan, Lebanon, Malaysia, Mongolia, Morocco, Pakistan, Poland, Romania, the Russian Federation, South Korea, Sudan, Sweden, Switzerland, Syria, Tajikistan, Tunisia, Turkey, Turkmenistan, Ukraine, the United Kingdom, Uzbekistan, Vietnam, and Yemen. The stated purposes of these treaties are to create favorable conditions for cross-border economic cooperation and to encourage investment and reciprocal protection of foreign nationals' investments. As discussed in more detail below, the BITs establish substantive legal standards of treatment that the States promise

to provide to the investments of each other's investors.

In addition to the BITs, the UAE is a party to the ICSID Convention, a multilateral treaty of which over 140 States are members. As an ICSID Convention member, the UAE has given its consent to arbitrate disputes at ICSID, an autonomous international institution that provides facilities for and administers conciliation and arbitration of international investment disputes.

Investments Covered By BITs

The definition of an "investment" under the UAE's BITs is critical for determining an investor's legal rights and remedies. Only investments covered by the treaty receive the substantive protections that the treaty guarantees. The definition varies from BIT to BIT, but, generally speaking, investment treaties broadly define an "investment." For example, the UAE-UK BIT defines "investment" as "every kind of asset owned or controlled by investors of either of the Contracting States," including (but not exclusively):

- movable and immovable property and property rights such as mortgages, liens, or pledges;
- shares in and stock and debentures of a company and any other form of participation in a company;
- liquid assets, deposits, and claims to money or to performance under a contract having a financial value;
- intellectual property rights, goodwill, technical processes and know-how; and
- business concessions conferred by law or under contract, including concessions to exploit natural resources.

Although not all BITs contain identical phrasing, most establish a wide ambit of protected investments. Investors should consult the text of the applicable BIT to evaluate whether they have made a covered investment.

Substantive Legal Protections for Foreign Investments Under BITs

For an investor considering whether to invest in a State or an investor involved in a dispute with a State, it is essential to know and understand the standards of treatment that the applicable BIT requires. Not all UAE BITs contain the same standards of treatment or express standards of treatment in the same way, but there are some common BIT provisions that protect foreign investments. Investors should review the applicable BIT for these and other substantive guarantees.

Fair and Equitable Treatment

The requirement of fair and equitable treatment (often called the FET Clause) is one of the most common provisions in the UAE's BITs, as well as BITs in general. It ordinarily states, as in the BIT between the UAE and Austria, that "[e]ach Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment." Sometimes, however, the treaty expressly references fair and equitable treatment consistent with international law. For example, the UAE-France BIT states: "Each of the Contracting Parties undertakes to ensure, on its territory and within its maritime zone, fair and equitable treatment, in accordance with principles of international law, to the investments of investors of the other Party"

The meaning of FET Clauses has been the subject of debate among commentators and arbitral tribunals, with some arguing that they require States to treat foreign investments in accordance with a customary international-law minimum

standard, that is, an international minimum regardless of the treatment afforded to nationals of the host State. The content of this minimum standard is also subject to debate; it is sometimes said to prohibit outrageous conduct by a State toward foreign nationals in a manner that cannot be accepted by the international community. The relationship between customary international law and fair and equitable treatment is clear in some treaties, as in the UAE-France BIT. When there is no express reference to international law (taken to mean customary, or general, international law), or some other evidence demonstrating the States' intent to incorporate a customary standard, many tribunals have found that an FET Clause provides more protection than just a minimum standard of treatment. Arbitral tribunals have concluded that FET Clauses require the host State not to frustrate the legitimate expectations of the investor and to act in good faith, consistently, transparently, non-arbitrarily, and with due process toward investments. It is hard to state a general rule for application of the FET Clause: whether a State has failed to treat an investment fairly and equitable depends in large part on the particular facts of the case. The FET Clause is frequently cited in arbitrations against States for a variety of conduct that harms an investor's investment.

Unreasonable, Arbitrary, or Discriminatory Measures

BITs to which the UAE is a party often prohibit government measures that are unreasonable, arbitrary, and/or discriminatory and that impair or harm an investment. For instance, the UAE-Malaysia BIT provides: "Each Contracting State shall ensure that the management, maintenance, use, enjoyment, acquisition or disposal of investments or rights related to investment . . . in its territory of investors of the other Contracting State shall not in any way be subjected to or impaired by arbitrary, unreasonable or discriminatory measures." The UAE-Pakistan BIT similarly prohibits impairment by "arbitrary, unreasonable

or discriminatory measures,” while the UAE-South Korea BIT prevents impairment by “unreasonable or discriminatory measures.”

Like fair and equitable treatment, these clauses are abstract and must be interpreted as applied to specific facts and in light of prior arbitral awards. In general, they shield investors from acts of the host State that are not founded in reasoned decision-making, are contrary to the rule of law, or are discriminatory against foreign investments.

National Treatment and Most-Favored-Nation Treatment

The requirement of national treatment accords investors of the other State party to the BIT treatment equal to what the host State gives its own nationals. A Most-Favored-Nation (MFN) Clause in a BIT requires each contracting State to provide treatment that is at least as favorable as it provides to the nationals of any third State. The UAE-Switzerland BIT combines the two standards in the same provision: “Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is more favourable to the investor concerned.”

The UAE-Russian Federation BIT contains the same clause but provides that the most-favored-nation requirement does not require the State parties to offer investors the same treatment as the States guarantee to members of free-trade areas, customs and economic unions, and similar arrangements, including the Unified Economic Agreement between the Countries of the Gulf Cooperation Council. Other UAE BITs have similar exceptions.

Expropriation

Most BITs address the nationalization or expropriation of foreign investments. BITs, like customary international law, do not forbid all expropriation but impose limits on it. The text of the BIT should be closely examined. In general, expropriation must be for a public purpose, be followed by fair compensation (the meaning of which is sometimes disputed), and not be discriminatory.

By way of example, the UAE-China BIT requires expropriations to be: (a) done for a public purpose, (b) accomplished under the relevant domestic laws, (c) nondiscriminatory, and (d) accompanied by “reasonable, effective and non discriminatory compensation.” Investors are granted the right to review by local courts to determine whether there has been a legal expropriation. The BIT also states that the compensation to be granted is “computed on the basis of the market value of the investment immediately prior to the point of time when the decision for expropriation or nationalization was announced.” When a market value cannot be readily ascertained, compensation must be based on “generally recognized principles of valuation and on equitable principles,” taking into account a number of listed factors. Compensation also includes interest from the date of expropriation to the date of payment.

The UAE-Italy BIT contains similar provisions, but also prohibits expropriation in violation of a contractual provision regarding stabilization or expropriation and defines the required compensation as “prompt, adequate and effective.” In another example, the limits on expropriation in the UAE-UK BIT, as in many other UAE BITs, expressly apply to indirect expropriation. In a slightly different formulation, the UAE-Finland BIT permits expropriation only based on measures: “taken for an ultimate and basic public interest,” taken “in accordance with the domestic constitution and general principles of international law,” that are not discriminatory, that “are taken under due process of law by the competent court” with the investor having a right to contest the expropriation, and that are

accompanied by “prompt, adequate and effective compensation.”

In addition to the specific text of each treaty, arbitral case law and scholarly commentary may be consulted to determine the application of standards like “indirect expropriation” and “prompt, adequate and effective compensation.”

Umbrella Clause

Some BITs require States to observe commitments or obligations that they have made with regard to foreign investments, a provision commonly called the “Umbrella Clause.” Not all UAE BITs contain this provision, but some do.

The UAE-UK BIT states: “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.” The UAE-Belarus treaty contains the same language. The UAE-Switzerland treaty requires each State to “observe any particular obligation it has assumed with regard to an investment.” The UAE-Armenia BIT provides: “Each Contracting State shall observe any obligation or undertaking it may have entered into with regard to investments in its territory made by investors of the other Contracting State.” The UAE-China BIT is more specific: “Each Contracting State shall observe any obligation it may have entered into in the documents of approval of investments or the approved investments contracts by investors of the other Contracting State.”

The meaning of an Umbrella Clause is controversial. Some commentators and arbitrators believe that, depending on the clause’s specific terms, it may turn a violation of any obligation ordinarily enforceable under domestic law like a contract into a treaty breach. Others give the Umbrella Clause a more modest interpretation, distinguishing between actions attributable to a State as a sovereign (which might breach the treaty) and commercial acts (which do not). If the relevant BIT contains an Umbrella Clause, however, the investor has an additional potential avenue for redress against a State’s alleged mistreatment of its investment.

Arbitration Under a BIT

Most UAE BITs permit an investor to bring an investment dispute against the State to arbitration. No involvement of the investor’s home State is required. What type of arbitration and whether domestic legal remedies must first be exhausted depend on the terms of the treaty and the State parties to it. Because the UAE is a party to the ICSID Convention, investment disputes with the UAE or between UAE nationals and other host States can often be submitted to ICSID arbitration. The other State party to the BIT must also be an ICSID member. A few examples illustrate the types of arbitration clauses in the UAE’s treaties.

Some BITs allow for immediate resort to arbitration, including ICSID arbitration, while others require a claimant first to seek a remedy through negotiations and/or in the host State’s courts. The UAE-Austria BIT says that investment disputes should be settled amicably, but barring successful negotiations, an investor may submit a dispute: (a) to the local courts of the host State, (b) in accordance with a previously agreed dispute settlement procedure (possibly in a contract between the State and the investor), or (c) to arbitration. Arbitration may be commenced before ICSID (Austria is an ICSID party) or an ad hoc tribunal. The treaty specifically provides that exhaustion of domestic legal proceedings is not necessary. The UAE-Pakistan BIT provides that an investor must first seek to resolve the dispute through negotiations and requires an investor to wait six months before submitting the dispute to a local court or filing for arbitration under the ICSID Convention.

The UAE-Switzerland BIT also mandates consultations for six months. After that period, the investor can bring a claim to the host State’s courts. But to commence arbitration, the investor must wait two years from the request for consultations. The investor may bring an ad hoc arbitration under the UNCITRAL rules or an ICSID arbitration. The treaty with the Russian Federation also requires negotiations, but does not immediately permit arbitration. Instead,

the investor must first raise the dispute with the appropriate administrative body in the host State. If “the dispute has not been settled” by the host State’s administrative body, the investor can submit the dispute to a local court, to an ad hoc arbitral tribunal under the UNCITRAL rules, to ICSID (if both States are parties to the ICSID Convention), or to an arbitral tribunal under ICSID’s Additional Facility Rules. The Russian Federation has not ratified the ICSID Convention (although it has signed the treaty), so submission under the ICSID Convention is not currently possible. However, the parties can arbitrate a dispute under ICSID’s Additional Facility Rules, which allow ICSID to administer arbitrations that are not conducted under the ICSID Convention when either the host State or the investor’s State of nationality is an ICSID member.

The arbitration clauses in the UAE-China BIT are less favorable to arbitration. If, after six months, an investment dispute between an investor and the host State has not been resolved amicably, the investor can file a claim with an administrative or judicial authority in the host State. Disputes regarding the amount of compensation due after an expropriation and other disputes that both States agree are subject to arbitration may be submitted to ad hoc arbitration; the procedures for selecting arbitrators are set out in the BIT. A protocol to the treaty, signed in July 1993, says that when both States have become parties to the ICSID Convention, they will discuss the possibility of ICSID arbitration for disputes under the BIT. The UAE became a party to the ICSID Convention in 1982, and China became a party in February 1993. However, China included a reservation with its instrument of ratification stating that it only consents to ICSID jurisdiction over claims related to compensation due after expropriation. Thus, it appears that ICSID arbitration is not currently available under the UAE-China BIT and that most investment-related disputes must still be submitted to the host State’s courts.

Arbitral awards are binding on the parties to

the arbitration. Awards issued under the ICSID Convention are not subject to any national-court review. Instead, the Convention itself establishes an annulment process, which permits limited review of an award, mainly on procedural grounds, by an ad hoc committee. If the arbitration is not conducted under the ICSID Convention, enforcement of the award is likely governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention), to which the UAE and most other States are parties. There is some judicial review available under the New York Convention, but courts in New York Convention States must recognize an award issued in another Convention State, and, like the ICSID Convention, the New York Convention severely limits the grounds to refuse recognition of an award. Of course, winning an award and collecting money on it are two different things. States are bound to comply with arbitral awards, but execution on assets to satisfy arbitral awards are still subject to the law of sovereign immunity, which restricts attachment of State assets.

Conclusion

The existence and terms of a BIT between the UAE and another State may be one important consideration in a UAE investor’s decision to engage in FDI and other investors’ decisions to invest in the UAE. Investment treaties may provide a means of redressing acts of the host State that impair, hinder, or destroy investments. Because the UAE has entered into BITs with many States, both developed and developing, foreign nationals in the UAE and UAE nationals investing abroad should keep the potential for investor-State arbitration in mind when evaluating their rights in a dispute with a host State. Host State officials, moreover, may also wish to consult BITs and the body of investment jurisprudence developed under them when dealing with foreign investors, to ensure that their conduct conforms to the State’s treaty obligations.

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