



# **PROTECTION AVAILABLE TO TURKISH INVESTORS DOING BUSINESS IN SAUDI ARABIA PURSUANT TO THE BILATERAL INVESTMENT PROTECTION TREATY BETWEEN TURKEY AND SAUDI ARABIA**

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# Protection Available To Turkish Investors Doing Business in Saudi Arabia Pursuant to the Bilateral Investment Protection Treaty Between Turkey and Saudi Arabia

## I. FACTS

1. For a period of longer than a year, there has been reports from business people that there is an ongoing informal boycott in Saudi Arabia against products imported from Turkey. As the political confrontations between the two countries tend to escalate, the boycott is also expected to deepen and influence the bilateral commercial relations negatively in the near future.
2. In October 2020, the head of the Council of the Saudi Chambers of Commerce, Ajlan Al-Ajlan, made a declaration, calling for a large boycott campaign against Turkey with the following words: “No investment, no imports, and no tourism. We, as citizens and businessmen, will not have any dealings with everything that is Turkish.”<sup>1</sup> Before these statements, there already had been a social media campaign in Saudi Arabia, encouraging a boycott against Turkey.
3. It is widely known that Turkish investors are engaged in important projects in Saudi Arabia, particularly in the construction sector. However, figures show that the ongoing boycott also had a significant impact on those investments. The total amount of projects with Turkish contractors in Saudi Arabia had amounted to USD 2.1 billion in 2017 and USD 3 billion in 2018, whereas this number fell down to USD 559 million in 2019, and could only reach USD 21 million in the first 9 months of this year.<sup>2</sup>

<sup>1</sup> <https://www.reuters.com/article/saudi-turkey-trade-int/saudi-business-leader-urges-boycott-of-goods-from-hostile-turkey-idUSKBN26Q0FT>

<sup>2</sup> <https://www.cumhuriyet.com.tr/haber/muteahhitler-de-zorda-ortadoguda-3-milyar-dolarlik-kayip-1773089>.

4. Although Saudi officials defend that it is a popular boycott that is not backed by the Saudi government, there are reports showing that Saudi custom officials are currently holding goods imported from Turkey for longer than necessary upon arrival at the Saudi border; that Turkish contractors are arbitrarily excluded from public tenders; and that even exporters from other countries manufacturing their products in Turkey face serious problems when shipping their products to Saudi Arabia.<sup>3</sup> These reports hint at a direct intervention of the Saudi state institutions albeit the emphasis on the “unofficial character” of the boycott.

## II. QUESTION

5. What is the protection available to Turkish investors with business in Saudi Arabia and affected by the boycott under international law?

## III. LEGAL ANALYSIS

### A. JURISDICTIONAL MATTERS

6. The bilateral investment treaty (“BIT”) between the Kingdom of Saudi Arabia and the Republic of Turkey, which was signed on 8 August 2006 and came into force on 5 February 2010, applies to the protection of investments made by Turkish investors in Saudi Arabia. This memorandum focuses on the analysis of the protection provided under the BIT, and briefly analyzes under which conditions the BIT can provide protection to Turkish investors with business in Saudi Arabia.
7. Article 8 clarifies which investments benefit from the protection provided by the BIT. It states:

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<sup>3</sup> <https://thearabweekly.com/unofficial-effective-saudi-boycott-strikes-blow-turkey>; <https://www.reuters.com/article/us-saudi-turkey-trade-idUSKBN2741XF>; <https://www.jpost.com/middle-east/saudi-business-leaders-call-for-boycott-of-hostile-turkey-646945>.

This Agreement shall apply to **all investments** as defined in Article 1 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. However, this Agreement shall not apply to any disputes that have arisen before its entry into force.

[emphasis added]

8. Article 1 of the BIT sets forth a broad definition of investment. It states:

The term “investment” means every kind of asset, owned or controlled by an investor of a Contracting Party in the territory of the other Contracting Party according to its laws and regulations and in particular, but not exclusively includes:

- a) movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges, and similar rights as defined in conformity with the laws and regulations of the Contracting Party in whose territory the property is situated,
- b) shares, stocks and debentures of companies and any other form of participation in companies
- c) returns reinvested, claims to money such as loans or to any performance having an economic value, associated with an investment;
- d) industrial property rights and intellectual property rights such as patents, industrial designs, technical processes, as well as trademarks, trade and business secrets, trade names, goodwill, know-how and other similar rights;
- e) any right conferred by law or under public contract or business concessions issued according to law.

9. Based on the broad definition of investment and the jurisdictional scope, it is possible to conclude that a wide range of claims would fall within the scope of the BIT, such as claims regarding real estate investments, loans and contractual rights, IP and IT rights, and rights arising from public tenders.

10. On the other hand, most tribunals apply the “Salini Test” to examine whether an investment exists within the meaning of the applicable treaty.<sup>4</sup> The four criteria of the Salini test, which was pronounced by the tribunal in *Salini Costruttori S.p.A. v. Kingdom of Morocco*, and developed by subsequent case law, are as follows: (i) contribution of money/assets, (ii) participation in the risks of the transaction, (iii) a certain duration of performance of the contract, and (iv) a contribution to the host State’s economy. It is generally accepted that these elements are examined in their totality depending on the circumstances of each case.
11. The assessment under the Salini Test is important in order to assess, among others, whether pure contractual claims arising from import transactions or claims based on construction agreements would fall within the scope of the BIT. While a simple sale agreement is generally not considered as an investment, there may be other circumstances that support the argument that a contractual claim falls within the scope of the BIT.

#### A. SUBSTANTIVE PROTECTION

12. In this section, only the most commonly applied investment protection standards are analyzed. Further protection might be available, based on other provisions or the most favored nation standard of the BIT. Furthermore, the Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference (the “**IOC Agreement**”) can be invoked based on Article 7 of the BIT in an arbitration proceeding initiated pursuant to the BIT. The IOC Agreement sets forth additional standards of protection, the applicability of which must be analyzed on a case-by-case basis.

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<sup>4</sup> The Salini Test was first pronounced by the tribunal in *Salini Costruttori S.p.A. v. Kingdom of Morocco*, and developed by subsequent case law. Although Salini test originates from Article 25 of the ICSID Convention, some non-ICSID tribunals have also considered it as essential for determination as to whether there is an investment, and thus, if the relevant investment protection treaty is applicable.

## 1. Fair and Equitable Treatment

13. Fair and equitable treatment (“FET”) is a universally accepted standard in investment protection treaties. Article 2(2) of the BIT also sets forth this standard:

Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Contracting Party.

14. The most frequently used standards in case law for the evaluation of FET are legitimate expectations of the investor, stability of the legal and business framework in the host state, transparency and consistency in the host state’s conduct towards investment.
15. One of the host state’s duties under the FET standard is to maintain a stable framework for the investors. In this regard, the tribunal in *Occidental Exploration & Production Co. (OEPC) v. Ecuador* found that “*there is certainly an obligation not to alter the legal and business environment in which the investment has been made*”.<sup>5</sup> Even though the legislation of the host state remains the same, if the business framework changes through arbitrary decisions or actions of the state, it would suffice for a finding of violation of the FET standard.
16. As mentioned in the “Facts” section, there are already Turkish investors claiming that they were arbitrarily excluded from public tenders in Saudi Arabia. If these claims were proven, Saudi Arabia would be found to be violating the FET standard. For instance, in *Joseph C. Lemire v. Ukraine*, the ICSID tribunal found “*a blatant disregard of applicable tender rules, distorting fair competition among tender participants*”<sup>6</sup> which violated the FET standard under the USA-Ukraine BIT.
17. In this respect, it is important to stress that the acts that amount to the breach of the fair and equitable treatment standard of the BIT must be attributable to the Saudi state or to state authorities. This is an analysis that must be made on a case-by-case basis based on the specific

<sup>5</sup> *Occidental Exploration and Production Company v. Ecuador*, UNCITRAL/LCIA Case No. UN 3467, Final Award, 1 July 2004, para. 191.

<sup>6</sup> *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 385.

circumstances of each case. In particular, the acts of state entities must be carefully analyzed in each case, taking into account, among others, the nature of the business relationship, the influence of the state authorities on such state entities, and the acts in question.

## **2. Non-Discrimination, National Treatment, and Most Favored Nation Treatment**

18. Article 3 of the BIT provides that the Contracting Parties shall grant the investors of the other Contracting Party “*a treatment not less favorable*” than that accorded to investments and investment returns of investors of any third State or of its own investors.
19. The national treatment and most favored nation (“**MFN**”) treatment provide a relative standard, whereby the host state guarantees the same level of protection as granted to its own investors in the former and to the foreign investors of any third State in the latter case; whereas the non-discrimination obligation constitutes an absolute standard which prohibits “misconduct or arbitrary conduct that impairs the operation of the investment”.<sup>7</sup>
20. The rationale behind these standards is to ensure that no investor is put at a competitive disadvantage, and to prevent investors from being distorted by discrimination based on nationality considerations.<sup>8</sup>
21. In *Corn Products International Inc. v. the United Mexican States*, the ICSID tribunal found that the non-discrimination standard would be violated, “*when the clear impact of that discrimination falls on the foreign investor.*”<sup>9</sup>
22. The Saudi boycott against Turkey targets at discriminating solely against Turkish investors. When taking into consideration that there is no legitimate public policy basis of such boycott, it would

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<sup>7</sup> Most-Favoured Nation Treatment, UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2010, p. 23.

<sup>8</sup> Most-Favoured-Nation Treatment, UNCTAD Series on Issues in International Investment Agreements, New York and Geneva, 1999, p. 8.

<sup>9</sup> *Corn Products International Inc. v. the United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, para. 126.

constitute an arbitrary action and violate the absolute standard of non-discrimination as well as the relative standards of national treatment and most favored nation treatment. However, the discriminatory treatment must be attributable to the state or to state authorities, and this is an assessment to be made in each case based on its specific circumstances.

### 3. Expropriation without Compensation

23. Article 4 of the BIT provides the following:

Investment by investors of either Contracting Party shall not be expropriated, nationalized or directly or indirectly subjected to any other measure the effects of which would be tantamount to expropriation or nationalization by the other Contracting Party 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.

24. The expropriation may be in the form of “*direct takings*” or certain measures that “*destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way*”.<sup>10</sup> The former is referred to as “*direct expropriation*”, whereas the latter is described as “*indirect expropriation*”.

25. The test applied to evaluate whether there is an expropriation involves the following steps:<sup>11</sup>

- (i) whether the measure is attributable to the host state;
- (ii) whether there is an investment that is capable of being expropriated;
- (iii) whether the state conduct has resulted in a total or near-total deprivation of the investor’s investment (loss of investment’s value or of investor’s control over the investment), and whether the effect of the measure is permanent.

<sup>10</sup> Expropriation, UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2012, p. xi (Executive Summary).

<sup>11</sup> *Id.*, p. 104-105.

26. If the above mentioned criteria are assessed in favor of the investor, and there is “no genuine public purpose, executed in a non-discriminatory manner and in accordance with the due process of law”,<sup>12</sup> the host state would be deemed to have expropriated the investment unlawfully, and would be held liable for this violation by having to pay compensation to the investor.
27. In this analysis, the attributability of the acts to the Saudi government would play a very important role as the first threshold, because the Saudi government officials already perceive the threat and emphasize that the boycott has a popular and unofficial character. However, regardless of these statements, if the conducts that are tantamount to expropriation can be directly or indirectly attributable to the Saudi government, it could be held liable under the BIT. For instance, if an investor has a contract with a state-owned entity, or if the decisions or measures that give rise to expropriation are directly taken or influenced by state authorities, this threshold could be fulfilled.
28. For the assessment as to whether there is an investment that is capable of being expropriated, we refer to our explanations related to Article 1 of the BIT. There is no category of investment that is accepted *per se* as incapable of being expropriated because, as long as the host state’s actions may affect the investor’s ability to own, manage, use, or control such investment in a meaningful way, it would be capable of being expropriated.
29. The host states would not be responsible for their bona fide regulatory acts; however, a boycott decision and subsequent acts relying on such decision would not constitute a legitimate basis to defend that there was a genuine public policy and subsequent bona fide regulatory acts in this case.

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<sup>12</sup> *Id.*, p. 105.

#### IV. CONCLUSION

30. The BIT between Saudi Arabia and Turkey provides a wide protection to investors from one state party who invested in the other state party. Based on the broad definition of investments and the jurisdictional scope, it is possible to conclude that a wide range of claims would fall within the scope of the BIT, such as claims regarding real estate investments, loans and contractual rights, IP and IT rights, and rights arising from public tenders. Whether contractual rights would fall within the definition must be analyzed in each case separately, taking account of the criteria set by investment treaty tribunals. In principle, a simple sale agreement does not fall within the definition of an investment; however, each case must be assessed based on its circumstances.
31. The BIT provides foreign investors with the investment protection standards customary in most bilateral investment protection treaties. To give a few examples, fair and equitable treatment, non-discrimination, national treatment, most favored nation treatment clauses, and the provisions regarding expropriation, are the most frequently used BIT standards in investor-state arbitration. Also, in potential disputes of Turkish investors against Saudi Arabia within the framework of the latter's boycott, these protection standards would be evaluated on a case-by-case basis. Besides the BIT, it is possible to refer to the provisions of the IOC Agreement, as both Saudi Arabia and Turkey are parties to this agreement.
32. One of the challenging issues in such a dispute remains to be the attribution of the acts violating the protection standards and causing damage to the foreign investor to the host state, namely the attribution of these acts to the Saudi state or state authorities. This is an important issue of proof that should be evaluated on a case-by-case basis.

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