

## The new UAE Investment Law: A first look (Part 1)

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### Introduction

In the final quarter of 2018, the United Arab Emirates (UAE) adopted Federal Decree Law No. 19/2018 on Foreign Direct Investment,<sup>1</sup> in shorthand the “UAE Investment Law” or the “FDI Law”. The FDI Law entered into force on 1<sup>st</sup> October 2018, one day after publication.<sup>2</sup> Even though it is too early days to tell what precise impact the FDI Law has had on the foreign direct investment (FDI) landscape in the UAE since its entry into force, a first look at the law is timely in order to provide some initial guidance to existing foreign direct investors and those from outside the UAE that are contemplating to make investments within the UAE in coming years.

Importantly, before adoption of the FDI Law, the UAE did not have a stand-alone law dedicated to the promotion of foreign direct investment. Having adopted the new Law, the UAE join the majority of Gulf Corporation Council (GCC) countries<sup>3</sup> that have in place stand-alone FDI legislation. These include Kuwait<sup>4</sup>, Oman<sup>5</sup>, Qatar<sup>6</sup> and Saudi Arabia<sup>7,8</sup>. Some of these, such as Kuwait and Saudi Arabia, have also contemplated issuing implementing measures in order to facilitate the implementation of the investment regime and policies contemplated by their individual investment laws.<sup>9</sup>

From a comparative perspective, the FDI Law is in some ways more progressive and in other ways more conservative than the other GCC investment laws. A brief initial look at the main provisions of the other GCC investment laws will assist in setting a comparative analytical framework within which to assess the objectives pursued and opportunities offered by the UAE Investment Law.

This article is published in two parts. **Part 1** discusses the landscape of existing investment laws in the GCC, with a focus on the main investment protections and dispute resolution mechanisms they offer. **Part 2**, to be published in a forthcoming issue of *MENA Outlook*, will address the main provisions of the new

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<sup>1</sup> Issued on 23<sup>rd</sup> September 2018 and published in annex to the Official Gazette No. 637, at pp. 137 *et seq.*, on 30 September 2018.

<sup>2</sup> Art. 21, FDI Law.

<sup>3</sup> I.e. Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE.

<sup>4</sup> Kuwait Law No. 116/2013 Amending the Law on the Regulation of Direct Investment of Foreign Capital in the State of Kuwait in force since 16 December 2013 (“Kuwait Investment Law”), which replaced Kuwait Law No. 33/1964 on Expropriation and Temporary Possession for Public Interest, in force from 9 July 1964, and Kuwait Law No. 8/2001 on the Regulation of Direct Investment of Foreign Capital in the State of Kuwait, in force from 17 April 2001.

<sup>5</sup> Foreign Capital Investment Law, Oman Sultani Decree No. 102/1994 to Promulgate the Foreign Capital Investment Law, in force since 2 November 1996 (“Oman Investment Law”).

<sup>6</sup> Qatar Law No. 13/2000 on the Regulation of the Foreign Capital Investment in the Economic Activity in force since 25 November 2000 (“Qatar Investment Law”), which replaced Qatar Decree-Law No. 25/1990 related to the Qatari Foreign Capital Investment Law, amended by Qatar Law No. 9/1995 and Qatar Decree-Law No. 11/1993 abrogated by Qatar Law No. 21/2009 Promulgating the Income Tax Law.

<sup>7</sup> Saudi Arabia Royal Decree No. M1/1421 on the Approval of the Foreign Investment Law, in force since 16 September 2002 (“Saudi Investment Law”).

<sup>8</sup> Only Bahrain does presently not have a stand-alone FDI law.

<sup>9</sup> At the time of writing, no such measures have been adopted in any of the GCC countries. As a result, the operation of the investment regime in most of them continues to lack precision, thus posing difficulties of practical implementation.

UAE Investment Law and how these compare to the investment regimes established by existing GCC investment laws.

## **The GCC Investment Laws**

Most, albeit not all, GCC countries have adopted investment laws in order to promote and stimulate FDI in the Gulf and more specifically in their respective economy.

### ***Objective***

The objective pursued by the GCC investment laws is to attract FDI on a grand scale in an attempt to counteract the volatility of oil prices and its dampening impact on revenue generation for public spending as well as to develop industry and service sectors for sustained economic development in the face of steadily diminishing regional oil reserves. The provision for arbitration as the prevailing dispute resolution method under most of these laws is to provide comfort to the foreign investor that in the event of a dispute arising from the investment justice will be done before a reliable and experienced international tribunal.

### ***Investment guarantees***

The GCC investment laws all seek to protect FDI by affording a number of basic, yet fundamental, *investment guarantees* to foreign investors. These include:

- Protection of the investment from expropriation<sup>10</sup> and confiscation<sup>11</sup>, subject to public interest considerations and fair compensation;
- free disposal or transfer of ownership of the investment<sup>12</sup>;
- free transfer and repatriation of funds, including the imported capital and the income generated therefrom<sup>13</sup>, to be made in any exchangeable currency<sup>14</sup>. This may include the free transfer of savings and entitlements by employees in the investment entity<sup>15</sup>; and
- use of land for investment projects<sup>16</sup>.

### ***Investment incentives***

In addition, in order to attract FDI on a larger scale, the GCC investment laws also offer foreign investors a number of *investment incentives*, such as:

- Tax exemptions in relation to the income generated from the investment<sup>17</sup>; and
- exemptions from custom duties arising from material imported in relation to the investment<sup>18</sup>.

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<sup>10</sup> Art. 19, Kuwait Investment Law; and Art. 8, Qatar Investment Law.

<sup>11</sup> Art. 12, Oman Investment Law; and Art. 11, Saudi Investment Law.

<sup>12</sup> Art. 20, Kuwait Investment Law; and Art. 9, Qatar Investment Law.

<sup>13</sup> Art. 22, Kuwait Investment Law; Art. 11, Oman Investment Law; Art. 9, Qatar Investment Law; and Art. 7, Saudi Investment Law.

<sup>14</sup> Art. 9(2), Qatar Investment Law.

<sup>15</sup> Art. 22, Kuwait Investment Law.

<sup>16</sup> Art. 27(4), Kuwait Investment Law; Art. 10, Oman Investment Law; and Art. 5, Qatar Investment Law.

<sup>17</sup> Art. 27(1) and (2), Kuwait Investment Law; and Art. 8, Oman Investment Law.

<sup>18</sup> Art. 27(3), Kuwait Investment Law; and Art. 9, Oman Investment Law.

Taken in the round, despite their generally favourable, pro-investment language, the GCC investment laws are not as advanced as the bi- and multi-lateral investment instruments that individual GCC countries have in place. Importantly, none of them contains provisions on equal and non-discriminatory treatment between local and foreign investors.

### ***Dispute resolution/arbitration***

In addition, not all of the GCC investment laws feature dispute resolution provisions that empower a dissatisfied investor to take the host State to arbitration in the event of a dispute and to the extent that they do, they provide for arbitration *ad hoc*, i.e. outside a designated institutional framework.

More specifically, Article 14 of the Oman Investment Law allows the parties (in terms similar to Article 11 of the Qatar Investment Law) to agree on referring a dispute to a “*local or international arbitration tribunal*”. Article 26 of the Kuwait Investment Law entitles the parties to refer investment disputes to “*arbitration*” despite designating the Kuwaiti courts as “*solely competent to consider any disputes arising between investment projects and third parties*”. Article 13 of the Saudi Investment Law envisages settlement of investment disputes “*in accordance with the relevant laws*” failing “*amicable settlement*”. The wording of these clauses contains a number of pathologies that may ultimately make a successful reference by a dissatisfied investor to arbitration comparatively difficult, if not impossible.

### ***“Investor” and “investment***

Finally, it is also important to mention that for a person or an individual company to be able to benefit from any of the investment guarantees and/or incentives provided for under the individual GCC investment laws, it must qualify as an “investor” making an “investment” within the meaning given to it under that law.

All GCC investment laws allow investments by:

- Both individual and corporate investors<sup>19</sup>; and
- of a foreign nationality<sup>20</sup>.

Most GCC investment laws require the investor to obtain a foreign investment licence for their investment activity in the host State<sup>21</sup>. The Kuwait Investment Law, by contrast, distinguishes between foreign direct investments made by an “*Investor*”, who is defined as a “*natural or legal person of any nationality*”<sup>22</sup> on the one hand and investments made by a licensed “*Investment Entity*” on the other<sup>23</sup>. Some GCC investment laws do not allow 100% foreign corporate ownership and require partnering with a local investor<sup>24</sup>, subject to exceptions<sup>25</sup>.

Qualifying investments under the GCC investment laws vary in scope and variously include:

- Tangibles, such as physical assets relating to the investment activity in question<sup>26</sup>, cash, securities and negotiable instruments<sup>27</sup>;

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<sup>19</sup> Art. 1, Kuwait Investment Law; Art. 1, Oman Investment Law; Art. 1, Qatar Investment Law; and Art. 1, Saudi Investment Law.

<sup>20</sup> *Ibid.*

<sup>21</sup> Arts 1-2, Oman Investment Law; Ch. II, Qatar Investment Law; and Art. 2, Saudi Investment Law)

<sup>22</sup> Art. 1, Kuwait Investment Law.

<sup>23</sup> Arts 1, 12 and 30, Kuwait Investment Law.

<sup>24</sup> Art. 1, Oman Investment Law; and Art. 2, Qatar Investment Law.

<sup>25</sup> Art. 12, Kuwait Investment Law; and Art. 2, Qatar Investment Law.

<sup>26</sup> Art. 1, Kuwait Investment Law; and Art. 1, Qatar Investment Law.

<sup>27</sup> Art. 1, Saudi Investment Law.

- intangible rights, such as intellectual property rights, patents, trademarks, licences<sup>28</sup>; and
- capital, including cash and proceeds from the investment in question<sup>29</sup>.

The Oman Investment Law does not define investment. Article 1 of the Qatar Investment Law expressly requires any qualifying investments to be made in the State of Qatar. Some sectors are expressly excluded from foreign direct investment, including e.g.:

- Audio and visual services<sup>30</sup>;
- banks<sup>31</sup>;
- communication services<sup>32</sup>;
- education<sup>33</sup>;
- insurance companies<sup>34</sup>;
- commercial agencies<sup>35</sup>;
- real estate brokerage<sup>36</sup>;
- production of petroleum products and pipeline transport services<sup>37</sup>; and
- land and air transport services<sup>38</sup>.

Other than that, no other specifications are made, e.g., in relation to timing of the investment.

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<sup>28</sup> Art. 1, Kuwait Investment Law; Art. 1, Qatar Investment Law; and Art. 1, Saudi Investment Law.

<sup>29</sup> *Ibid.*

<sup>30</sup> Art. 18, Saudi Investment Law.

<sup>31</sup> Art. 1, Qatar Investment Law.

<sup>32</sup> Art. 18, Saudi Investment Law.

<sup>33</sup> Art. 18, Saudi Investment Law.

<sup>34</sup> Art. 1, Qatar Investment Law.

<sup>35</sup> Art. 1, Qatar Investment Law; and Art. 18, Saudi Investment Law.

<sup>36</sup> Art. 1, Qatar Investment Law; and Art. 18, Saudi Investment Law.

<sup>37</sup> Art. 18, Saudi Investment Law.

<sup>38</sup> *Ibid.*