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Israel's foreign investment protection regime
in view of developments in its energy sector

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**ISRAEL'S FOREIGN INVESTMENT PROTECTION REGIME
IN VIEW OF DEVELOPMENTS IN ITS ENERGY SECTOR**

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Abstract

This paper discusses the foreign investment protection regime and policy of Israel, analyzes the central features of its bilateral investment treaties (BITs), and argues that time has come to use these treaties as a tool to attract foreign investment to the country, in particular in the energy sector. It shows that until now, BITs have been concluded mainly with developing and transition-economy countries and as a means to protect Israeli investors in those countries. This policy has been based on the perception that only developing countries with politically unstable regimes and corrupt or non-independent judiciaries need such treaties, while Israel can rely on its good reputation of being a democratic state, based on the rule of law, with a free-market economy and a well-reputed judiciary to attract FDI. The paper argues that not only is this viewpoint incompatible with current trends in International Investment Law where more and more BITs are concluded between developed countries, it must also be revised on the background of what has occurred in Israel over the last few years in the energy sector. The paper describes the long saga of the regulatory changes in relation to the natural gas sector, ever since huge offshore gas fields were discovered, including the Supreme Court's rulings on the changes of the tax regime and on the stabilization clause, and analyses its impact on the investment climate. The paper presents original data on this impact and suggests policy recommendations based on the analysis of the situation.

Keywords

Foreign Investment Protection; Bilateral Investment Treaties; Stabilization Clause; Regulatory Instability and FDI; Natural Gas Sector

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Introduction*

As I will show in this article, Israel has traditionally not seen international investment treaties as a means to attract foreign investment. The perception among the officials in charge of the field in Israel's Ministry of Finance has been that only developing countries with politically unstable regimes and corrupt or non-independent judiciaries need such treaties as a means to provide steadfast protection against arbitrary governmental actions. Since Israel has a good reputation of being a democratic state, based on the rule of law, with a free-market economy and a well-reputed judiciary with a proven record of independence, they believe that foreign investors can feel confident that their investments will not be arbitrarily harmed by the government. And if harm should befall them, they can rest assured that they will be duly compensated. In fact, the policy makers feared that to sign bilateral investment treaties (BITs) with developed countries might send a bad signal to the international markets and cause investors to view Israel as an unstable developing economy.

In this article, I will argue that not only is this viewpoint mistaken and incompatible with current trends in International Investment Law where more and more BITs are concluded between developed countries, it can also not be maintained any longer given what has occurred in Israel over the last few years in the energy sector. There are reasons for concern that the Via Dolorosa that a major foreign investor has been subjected to, with endless recurring changes of the rules and policies that apply to one of the largest single foreign investments in the country's history, has seriously harmed its reputation and almost brought to a halt foreign investment in energy exploration. In view of these developments, it is imperative to reassess the country's investment policies. In particular, one should reconsider the use of international investment treaties as a means to restore the trust of potential foreign investors in the energy sector, so that oil and natural gas exploration in Israel can be resumed at an optimal level.

The article will proceed as follows: Section 2 will describe Israel's existing bilateral investment treaties and analyze briefly their provisions and the rationales behind them. Section 3 will proceed to describe the ongoing saga of the attempt to regulate the development of the rich natural gas fields discovered in Israel's Exclusive Economic Zone and the many regulatory setbacks experienced by the US company Noble Energy and the other investors in the natural gas sector, including the recent ruling by the Israel Supreme Court that struck down the stabilization clause of the gas framework. In Section 4, I will argue for a reassessment of Israel's foreign investment policies based on these and other recent developments.

Israel's foreign investment protection regime: A brief survey of the relevant international treaties

Israel's Bilateral Investment Treaties

Israel is a party to around forty BITs, about 35 of which are in full force. The rest of them have either been terminated or have not yet been ratified. Because of incomplete available information and

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conflicting accounts about which BITs are in force, the present author has compiled a list of Israel's current BITs (including one free trade agreement with an investment protection chapter) with details about their date of signature, date of entry into force, amendments and current legal status. The list is attached as Annex 1 to this paper.

Almost all of these forty treaties were concluded with developing countries or with Eastern European countries in transition. Only two of the BITs are with developed countries, namely with Germany and France. It is however doubtful whether the BIT with France, concluded in 1983, is still in force,¹ and the BIT with Germany, concluded in 1976, is a quite old and not very sophisticated agreement, and it does not include an Investor-State Dispute Settlement ("ISDS") clause.² Its importance is also very limited, because it only applies to German investments in Israel if such investments have been "admitted by Israel by a document of admission",³ and apparently very few, if any, such investments have been made.⁴

The vast majority of the states on the list are from Eastern Europe (21), some of which are today EU member states (12). Several others are in the Eurasia region (such as Armenia, Azerbaijan, Kazakhstan, Turkmenistan and Uzbekistan) and some in the Far East (China, India, Korea, Mongolia, Myanmar and Thailand). Four are in Latin America (Argentina, El Salvador, Guatemala and Uruguay) and only three in Africa (Congo, Ethiopia and South Africa).

Israel is not a party to any regional or plurilateral investment treaty (such as the Energy Charter Treaty), and none of its current Free Trade Agreements ("FTAs") that are in force include investment protection chapters. The only exception to date is the FTA with Colombia, signed in 2013 but not yet ratified by Colombia.⁵ This FTA includes a detailed chapter on reciprocal investment protection (Chapter 10), including an ISDS mechanism. In addition, in some of the new FTAs being negotiated now, especially with Asian countries, an investment chapter is contemplated.⁶

Israel's policy in relation to international investment treaties

The fact that almost none of the states on the list are from developed, traditionally capital-exporting countries, can teach us a few things about Israel's global investment policy. First, it means that the Israeli Government views BITs primarily as a tool to protect Israeli investments abroad and not as a tool to

¹ According to information obtained from Israel's Ministry of Finance, the status of the treaty is in dispute between the parties: Israel is of the opinion that it expired in 1995, ten years after its entry into force, and only applied for another 20 years to investments made prior to 1995 (in accordance with Article 12 of the Agreement). Hence, in 2015, the treaty expired completely. France, however, maintains that it is still in force. It was therefore included in the list of the bilateral investment agreements with third countries notified by EU Member States as agreements in force that they wish to maintain. See OJ C 149, 27.4.2016, p. 1–124. In the UNCTAD database, it is also designated as "in force".

² Treaty between the Federal Republic of Germany and the State of Israel concerning the Encouragement and Reciprocal Protection of Investments (24.6.1976), Article 10.

³ *Ibid.*, Article 1(c)(ii) which provides that the said term "investment" shall refer: "in respect of investments in the territory of the State of Israel, to all investments admitted by Israel by a document of admission." The meaning of such a document is elaborated in the Protocol to the agreement, which in Ad Article 1(a), provides: "The expression 'document of admission' shall mean a document by which the State of Israel admits into its territory **for the purposes of the Treaty** an investment by a national or company of the Federal Republic of Germany." (emphasis added – A.R.). In other words, the Israeli authorities must have issued such a document, which in effect acknowledges that the investment will be subject to the BIT, in order for the BIT to apply to it. In contrast, for Israeli investments in Germany, there is no such formal requirement. Rather, the definition is: "in respect of investments in the territory of the Federal Republic of Germany, to all investments made in accordance with its legislation".

⁴ Israeli officials that I spoke to were not aware of any such "document of admission" ever issued.

⁵ Free Trade Agreement between the State of Israel and the Republic of Colombia, signed 30.9.2013. Available here: <http://www.mof.gov.il/chiefecon/internationalconnections/doclib1/colombia.pdf>.

⁶ Information obtained from Israel's Ministry of Economy.

attract Foreign Direct Investment (FDI) to Israel. FDI in Israel comes primarily from developed countries, such as the United States, Canada and Western Europe. For instance, in 2012-2014, the most important source was the United States, which accounted for about 24% of total FDI.⁷ Europe accounted for about 21%. If the Israeli Government had thought that BITs are needed in order to boost FDI from those countries, one would expect it to have made efforts to conclude BITs with them. Instead, the Government's efforts have to date been almost exclusively directed towards developing countries, and in particular former members of the Communist Bloc, which have been very attractive to Israeli investors since the fall of the Iron Curtain,⁸ and countries in Asia,⁹ none of which have been major sources for investments in Israel.¹⁰ As recounted by one of the officials in charge of Israeli BITs in 1999: "We are mainly interested in countries that are potential targets for Israeli exports and investments, such as Eastern Europe, China, India, Korea, with which we already have agreements, Latin America, Russia, Singapore, Brazil, Chile and other with which we intend to sign agreements in the near future."¹¹

One must therefore ask oneself why the Government thinks that BITs are not required in order to attract FDI to Israel. It would seem that the policy makers are of the opinion that Israel's reputation as a democratic state based on the rule of law, with an independent judiciary and strong protection of private property, makes BITs unnecessary¹² (although they still believe investment incentives are required¹³). Unlike the situation in politically unstable regimes, or in countries with a corrupt or non-independent judiciary, where BITs are required in order to provide a steadfast protection against arbitrary governmental actions, none of the kind is required in Israel, they reason.¹⁴ They see that foreign investment is flowing in abundance from the West without the international guarantees provided by BITs, and it must be because foreign investors know that in Israel their investments will not be subject to expropriation or other arbitrary government measures, or at least if they are, there will be full compensation. In fact, interviews with officials in charge of this field in the Ministry of Finance,¹⁵ as well as a published article by one of them,¹⁶ reveal that the perception among them is that to sign BITs with developed countries might send a bad signal to international markets that could hurt Israel's credit

⁷ Based on figures published by Israel's Central Bureau of Statistics, "Foreign Direct Investment in Israel and Direct Investment Abroad. By Industries and Countries, 2012-2014" (Publication 104/2016; 14 April 2016). The average of investment transactions for 2012-2014 from the whole world was \$9.2 billion, and from the U.S.A. it was \$2.2 billion. FDI from Europe (including Eastern Europe) amounted to \$1.9 billion.

⁸ For instance, in 2014, Israelis invested over \$1.5 billion in European former Communist countries (*ibid.*).

⁹ In 2014, total Israeli investment in Asia and Oceania amounted to \$5.8 billion. If we subtract the shares of Australia and Japan (developed countries), the amount is \$3.3 billion.

¹⁰ Only lately, China has become a growing source for foreign investment in Israel, but that was not the case over twenty years ago when the BIT with China was signed.

¹¹ Oded Boneh, "Foreign Investment Protection Agreements and the Israeli Context", 26 *Israeli Tax Quarterly* Vol. 104, 45 (1999) (Hebrew). One should mention that many of those intentions never materialized: Israel still has no BITs with Russia, Singapore, Brazil or Chile and only three more BITs have been signed with other Latin American countries since the article was published: Colombia, El Salvador and Guatemala.

¹² Boneh, *supra* note 16, p. 57.

¹³ Incentives for foreign investors are governed mainly by the Law for the Encouragement of Capital Investment, enacted in 1959, and include both tax breaks and capital grants. For a discussion of the existing incentives, see Avi Nov, "Investment Incentives in Israel, 51 *Tax Notes International* No. 5, 443 (2008).

¹⁴ A similar reasoning was expressed by Justice Rubinstein of the Israeli Supreme Court in his judgment in relation to the stabilization clause of the Natural Gas Framework, that will be discussed below (see section 4.7 The Supreme Court Strikes Down the Framework). It should be mentioned, that before his appointment to the Supreme Court, Justice Rubinstein served in several government positions, including as the Legal Advisor to the Ministry of Foreign Affairs and as the Attorney General of Israel and as such must have been familiar with the considerations that guide the policies in this field.

¹⁵ As reflected in Efraim (Efi) Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement and the Israeli Case* (A Doctoral Dissertation, University of Michigan Law School, 2008), Chapter 3 (see footnotes 18 and 20).

¹⁶ Boneh, *supra* note 16, p. 57.

rating by international agencies and its image as a developed and stable country.¹⁷ According to Chalamish, Israel even rejected several attempts by the Swiss Government to initiate negotiations on a bilateral investment treaty as a prerequisite for a double taxation treaty between the two countries, because Israel did not want to signal that it is open to negotiate BITs with developed countries.¹⁸ Bad experience with past negotiations with developed countries has also had an impact. In such negotiations, Israel was asked to give up its right to maintain regulatory flexibility in the field of foreign currency control and it was felt that this may harm state sovereignty in case of emergency situations.¹⁹ Finally, one could speculate that the desire to protect the state from international law suits has also played a role. If most of the FDI comes from (developed) countries with which there are no BITs, it means that the risk of an ICSID (or other international tribunal) claim by disgruntled foreign investors is significantly reduced.

Main features of existing BITs

Israel's existing BITs extend protection to foreign investments and investors, as defined in the respective treaty, originating from the parties to the treaty. The BIT's are centered on the post-establishment phase, and generally do not relate to the pre-establishment phase. In other words, Israel has not committed itself to permit free and equal entry to foreign investors, although, in practice, restrictions on entry are rare. While most of the treaties include commitments to "encourage and create favorable conditions for investments by investors of the other Contracting Party" as well as a commitment to "admit such investments",²⁰ this last commitment is subject to the Party's legislation. Thus, to the extent that existing legislation restricts entry, the treaty does not overcome such a restriction.

The substantive protections extended to foreign investors by Israel's BITs include most of the regular ambit: Fair and Equitable Treatment (FET), National Treatment, Most Favored Nation (MFN) Treatment, Full Protection and Security, Compensation in case of Direct or Indirect Expropriation and Right of Repatriation, although there are differences in formulations that need to be noted.

The FET provision is not limited to the minimum standards of Customary International Law,²¹ as in the 2004 US Model BIT.²² The same applies to the Full Protection and Security provisions. These provisions therefore provide an effective source of protection against substandard treatment by host governments. However, in Israel's Model BIT, adopted in 2003, and in BITs concluded since then, the FET obligation has an addition to it that may be restrictive: "in accordance with the provisions of this Agreement".²³ The precise meaning and significance of this addition is unclear and the government did not provide any

¹⁷ Boneh, *supra* note 16, p. 57. See also Chalamish, *supra* note 15, p. 72.

¹⁸ Chalamish, *supra* note 15, in footnote 23.

¹⁹ Boneh, *supra* note 16, p. 58. These were concerns that were valid at the time. The foreign currency control regime was repealed in 2003 and since then there are no more restrictions on the movement of foreign currency.

²⁰ See for example Article 2.1 of the Israel-Azerbaijan BIT of 2007, as well as Article 2.1 of the Israel-Slovakia BIT of 1999.

²¹ See for instance Article 2.2 of the Israel-Slovakia BIT (1999) which provides: "Investments made by investors of each Contracting Party shall be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party."

²² See Article 5 in the United States Model Bilateral Investment Treaty of 2004, available here: <http://www.state.gov/documents/organization/117601.pdf>

²³ See Article 2.2 of Israel's Model Bilateral Investment Treaty of 2003, available here: <http://www.financeisrael.mof.gov.il/financeisrael/Docs/En/InternationalAgreements/IPa.pdf>. This language is to be found also in the BITs with the following countries: Azerbaijan (2007), Guatemala (2006), Serbia and Montenegro (2004), Ethiopia (2003), Mongolia (2003). This language does not appear in BITs from before 2003.

explanations to the change.²⁴ On the one hand, it is untenable that because of this addition, the content of the FET obligation is limited to the protection provided by other provisions of the BIT. That cannot be the correct interpretation, because it would mean that the FET provision is redundant and does not add anything to the already existing provisions. It would go against the principle of effectiveness in treaty interpretation.²⁵ On the other hand, that very same principle also mandates that we give some meaning to these added words (“in accordance with the provisions of this Agreement”). It would seem to me that this addition should be read on the backdrop of the debate that has erupted over the last few years on whether the FET treatment guaranteed by BITs is identical to the FET standard guaranteed by Customary International Law (which is a quite minimal standard, especially if we interpret it according to the 1926 Neer Case),²⁶ or whether it represents a higher, treaty-based, standard. Most investment arbitration tribunals have ruled in accordance with the latter approach, which entails a higher level of protection for foreign investors.²⁷ Unlike the North American Free Trade Agreement (NAFTA) and the US Model BIT, where the standard is explicitly linked to “international law” and comes under the heading “minimum standard of treatment”,²⁸ Israel’s Model BIT and the BITs signed since 2003 link the FET treatment to “this Agreement”. I would submit, therefore, that the intention is to clarify that the standard is not the minimum one ensured by Customary International Law, but rather a higher *treaty-based* standard. According to this proposed interpretation, we give meaning and significance both to the FET provision as a whole, saving it from redundancy, as well as to the added words “in accordance with the provisions of this Agreement”.

It should be noted that the 2003 Model BIT, and the BITs signed since 2003, also include a limitation on the application of the MFN obligation to the effect that it does not apply to benefits resulting from BITs signed before 2003. Hence, the limitation arising from the additional wording in the FET provision discussed above cannot be circumvented by relying on the MFN provision. On the other hand, while there is no FET provision in the Israel-Kazakhstan BIT of 1995, the MFN provision in this BIT is not restricted, so that an FET obligation can be “imported” from other treaties.²⁹

Most of Israel’s BITs do not include an umbrella clause, i.e., a provision where the host state undertakes – as a matter of public international law – to observe contractual obligations entered towards the foreign investor. Such provisions are found only in eight out of Israel’s BITs, namely those with Belarus (2000), Bulgaria (1993), Latvia (1994), Lithuania (1994), Slovakia (1999), Turkey (1996), Turkmenistan (1995) and Ukraine (1994).

All of Israel’s BITs, except for the one with Germany (1976), include provisions on binding dispute settlement procedures between the foreign investor and the host state (ISDS). In addition, there are provisions for binding inter-state dispute resolution. Most of the BITs do not restrict the types of disputes that are subject to ISDS.³⁰ Some of them talk about “dispute on an investment”,³¹ which would seem to exclude other types of disputes. Two BITs limit the application of the dispute settlement mechanism to

²⁴ In the official brief published on the new Model BIT, where changes are explained, this change is not even mentioned. See State of Israel, Ministry of Finance, International Affairs Department, *Israel's BIT model*, available here: <http://www.financeisrael.mof.gov.il/financeisrael/Docs/En/InternationalAgreements/IPb.pdf>.

²⁵ See for example H. Lauterpact, K.C., *Restrictive Interpretation and the Principle of Effectiveness in the Interpretations of Treaties*, 26 *Brit. Y.B. int'l.*

²⁶ United Nations, *Reports of International Arbitral Awards*, 1926, IV, pp. 60ff.

²⁷ See e.g., *Pope & Talbot Inc. v. Canada, Award on the Merits Phase 2*, award of April 10, 2001; *CME Czech Republic B.V. v. The Czech Republic*, partial award of September 13, 2001; *MTD Equity v. Chile* award of May 25, 2004.

²⁸ See NAFTA, Article 1105.1.

²⁹ For Kazakhstan investors in Israel, almost any treaty could be used as a source for the FET obligation. For Israeli investors in Kazakhstan, one could use for example the 2014 Kazakhstan-Japan BIT, Article 5.1. Available here: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3283>.

³⁰ For instance, the BITs with Poland, Slovakia, Mongolia, Guatemala, Lithuania, Latvia, Turkmenistan and Georgia.

³¹ For instance, the BITs with Cyprus, Argentina, Belarus, Kazakhstan, Slovakia and Moldova.

certain defined disputes only, and not others. The most restrictive one is the BIT with China (1995), which limits such arbitration to “the amount of compensation in the case of expropriation”.³² Hence, if there is a dispute about any of the other substantive obligations under the BIT, including the question of whether an expropriation, as defined in the Treaty, has occurred, a foreign investor will probably not be able to bring the dispute to binding arbitration, unless the host state consents.³³ A less drastic limitation is found in the BIT with Bulgaria (1993) where ISDS claims between the investor and the host-state can only be brought in relation to disputes under Article 4 (Compensation for Losses), Article 5 (Expropriation), Article 6 (Repatriation of Investment and Returns) and Article 11 (Application of Other Rules).³⁴ Hence, violations of the FET (Article 2), MFN and National Treatment (Article 3) obligations cannot be enforced through ISDS.³⁵

All of the BITs provide that prior to binding arbitration, the investor and the host state shall try to settle their differences amicably, some as a binding requirement and others “as far as possible”. Most of them set a minimum time period for such efforts that range from three months (most common)³⁶ to six months,³⁷ and in one case even 18 months.³⁸

As for the venues for arbitration procedures, many of the BITs refer only to the International Center for the Settlement of Investment Disputes (ICSID).³⁹ Others provide for ICSID or ad-hoc arbitration, some to domestic courts of the host state or ICSID,⁴⁰ and some provide a choice from five alternatives: a domestic court of the host state, conciliation, ICSID, Additional Facility Rules of ICSID, and ad hoc arbitration under UNCITRAL rules.⁴¹ The BIT with Poland refers only to ad hoc arbitration⁴² and the

³² Article 8.1 of the Israel-China BIT, available here: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3371> . This is a limitation quite common in China’s BITs. See for instance Article XII of the China-Australia BIT of 1988, available here: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/148> .

³³ Such investor could, however, try to use the Most-Favored-Nation clause of this BIT (found in Article 3) in order to obtain a broader jurisdiction of an arbitration tribunal. For instance, a Chinese investor in Israel could rely on most of Israel’s other BITs which have general investor-state dispute resolution mechanisms not limited to the amount of compensation for expropriation, as in the China-Israel BIT. An Israeli investor in China could try to rely on the China-Germany BIT of 2003, which also includes an unlimited investor-state dispute resolution mechanism (Article 9). This raises the question of whether an MFN clause could be used to import procedural rights, and in particular to create jurisdiction, where such jurisdiction would otherwise not exist. This is a question that has been much disputed in both case law and the academic literature. One case where this was allowed is *RosInvestCo UK Ltd v Russia* (SCC Case No V 079/2005, Award, 12 September 2010). But most tribunals have ruled against the expansion of jurisdiction *ratione materiae* based on an MFN clause. See for example *Salini Construttori SpA and Italstrade SpA v Jordan* (ICSID Case No ARB/02/13, Award, 31 January 2006); *Vladimir Berschander and Moïse Berschander v Russia* (SCC Case No 080/2004, Award, 21 April 2006), and *Telenor Mobile Communications AS v Hungary* (ICSID Case No ARB/04/15, Award, 13 September 2006) all of which deal with cases which are very similar to the case at hand.

³⁴ Article 8.2 of the Israel-Bulgaria BIT (1993). Available here: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/535>

³⁵ Again, unless an investor is successful in convincing a tribunal that the MFN provision of the BIT can be invoked to broaden jurisdiction. See discussion in footnote 33 above.

³⁶ For instance, this is the time period in the BITs with Slovenia, Uzbekistan, Lithuania, Latvia, Turkmenistan, Georgia, Kazakhstan, Slovakia, Turkey and Estonia.

³⁷ For instance, this is the time period in the BITs with India, Uruguay, Azerbaijan, Serbia, Montenegro, Mongolia, Guatemala, Belarus, Argentina and Ethiopia. The 2003 Model BIT also provides for a six months negotiation period.

³⁸ This was provided in the BIT with Hungary that was terminated in 2007.

³⁹ For instance the BITs with Slovenia, Uzbekistan, Ukraine, China, Hungary, Albania, Armenia, Korea, Slovakia, Lithuania, Latvia, Georgia and Turkmenistan.

⁴⁰ The BITs with Romania and Turkey.

⁴¹ For instance, the BITs with Azerbaijan, Thailand, the Czech Republic, Croatia, Ethiopia, Argentina and Serbia.

⁴² Probably because Poland was not an ICSID party when the BIT was signed.

BIT with Cyprus offers, in addition to domestic courts, ICSID or ad hoc arbitration, also ICC arbitration.⁴³ The choice of the venue is at the option of the investor.

The ongoing saga of natural gas regulation in Israel and its impact on the investment climate

The discovery of natural gas

After decades of Israel being almost exclusively dependent on imported energy, and five years after commencement of domestic natural gas production from the Mari-B project in 2004, in 2009-2010, private explorers finally found significant sources of energy that not only can supply a large share of the State's own needs, but also turn it into a future exporter of energy. This transformation occurred as a result of the finding of several gas fields within Israel's offshore Exclusive Economic Zone (EEZ) in the Mediterranean Sea. Two of the main fields – Tamar, estimated to hold 280 BCM (billion cubic meters) discovered in 2009 (and 310 BCM with “Tamar South-West” that was discovered later), and Leviathan 621 BCM,⁴⁴ discovered in 2010 – were the biggest deep-water natural gas finds in the world for those years.⁴⁵ These discoveries were followed by the Tanin gas field in 2012, with 22 BCM, and Karish in 2013, with 32 BCM. To get an idea of the magnitude of these discoveries, we should mention that Israel's total consumption of natural gas in 2015 was around 8.4 BCM.⁴⁶ There are high chances that more gas fields and even exploitable oil deposits will be found within Israel's EEZ.⁴⁷

Most of the license holders for these gas fields are Israeli companies, the largest of which is the Delek Group controlled by the Israeli tycoon Yitzhak Tshuva. But there is also one large foreign investor and explorer – Noble Energy Inc. – a U.S. oil and natural gas exploration and production company, which holds about 35% of the Tamar field, 40% of the Leviathan field, and 47% of the Tanin-Karish fields.⁴⁸ Noble entered the Israeli market in 2006.

⁴³ Article 8 of the Israel-Cyprus BIT.

⁴⁴ 621 BCM is the estimate of Noble Energy, backed up by a survey of SGS S.A. Delek also supports this figure, based on a survey by the international consulting firm NSAI, publicly presented pursuant to SEC regulations. Figures represent Best Estimates (2C or 2P) This is also the estimate that was the basis for the Gas Framework and was quoted by the Supreme Court in its judgment in this matter. Lately, a more modest estimate of 500 BCM has been published and espoused by Israel's Ministry of Energy as the basis for the export quota (Lior Gutman, “The Gas Companies Proposed Arbitration on the Volume of Leviathan”, *Calcalist* 5.6.16, p. 3 (Hebrew)). Noble and Delek maintain that their estimate is the correct one.

⁴⁵ Simon Henderson, “Natural Gas Export Options for Israel and Cyprus”, Mediterranean Paper Series, Sept. 2013, German Marshall Fund of the United States, available: <http://www.washingtoninstitute.org/uploads/Documents/opeds/Henderson20130901-NaturalGasExportOptions.pdf>

⁴⁶ Figure based on Annual Budget Proposal for years 2017-2018, Ministry of National Infrastructure, Energy & Water, and Explanations (Hebrew), p. 23, available here: http://mof.gov.il/BudgetSite/statebudget/budget2017_2018/ministeriesbudget/Foundations/DocLib/TashtiyotEnergyWater_Prop.pdf. The 2016 consumption is estimated at 9.5 BCM.

⁴⁷ The U.S. Geological Survey estimated in March 2010 that there was 122 trillion cubic feet (3,416 billion cubic meters) of natural gas in the Levant Basin, an area bounded by the Jordan Valley in the east and stretching towards Cyprus, including the coast of the Gaza Strip, Israel, Lebanon, and Syria. The U.S. Geological Survey study of the Levant Basin also forecast a mean of 1.7 billion barrels of recoverable oil. See <http://pubs.usgs.gov/fs/2010/3014/pdf/FS10-3014.pdf>. The principal explorer and operator in Israel's EEZs, Noble Energy of the United States, performed a “deep oil test” in 2014 and has noted that there are “multiple similar prospects” in its acreage. <http://www.nobleenergyinc.com/Operations/International/Eastern-Mediterranean-128.html>

⁴⁸ Lately, in accordance with obligations imposed by the Israeli authorities (as will be discussed at length in Section 3 below), the Tanin and Karish gas fields were sold by the Delek Group to Energean Oil & Gas, a Greek firm incorporated in Cyprus. This sale was signed only in August 2016. Prior to that sale, Noble Energy had sold its holdings in Tanin and Karish to the Delek Group, so that the latter would have sole ownership over these fields before selling them to a new investor. See Sharon Udasin, “Greek Firm to Buy Israel's Karish and Tanin Gas Reservoirs for 148.5 mil”, *Jerusalem Post* (18.8.2016),

The Sheshinski committee – an increase in taxes

Following the discoveries, several Non-Governmental Organizations (“NGOs”) and Members of Knesset raised the claim that the people’s (i.e., the Government’s) share in these huge energy resources was too small. They called for a steep increase in the royalties that the concessionaires were required to pay the Government (12.5%) and in the taxes due on the enormous profits that they were expected to make. In response to these calls, and to various private bills introduced in the Knesset to this effect, the Government in April 2010 appointed the Committee to Review the Fiscal Policy in the area of Oil and Gas Resources, headed by the economist Prof. Eytan Sheshinski (“The Sheshinski Committee”). The Committee submitted its conclusions in January 2011.⁴⁹ It recommended introducing a levy on oil and gas profits that is to be determined according to the ratio between the accumulated income, after deducting the expenses of the project, royalties and levies paid in the past, and the total investment in the exploration and initial development of the field. The Committee recommended against changing the rate of the royalties. Subsequently, in April 2011, the Oil Profits Taxation Law, 2011 (later renamed the Natural Resources Profits Taxation Law, 2011), a law largely based on the Sheshinski Report, was passed by the Knesset.⁵⁰ As a result, the owners of the gas fields became liable to a much higher tax burden than they had expected when they acquired the concession to explore for the gas. This law was constitutionally challenged by some of the gas companies and their shareholders, but the Supreme Court dismissed the challenge in August 2012.⁵¹ The Court held that the government has the right to increase its stake in oil and gas discoveries and dismissed the claim that this was a retroactive imposition of a tax:

The new law that was legislated raises the tax rate on profits that will be produced from oil and gas after its legislation. It does not apply on revenue previously produced. This alone is enough to dismiss the retroactive tax argument altogether. That is so although the petitioners invested in discoveries at a certain tax rate, but the law and the rescindment of the deduction resulted in a higher tax rate. The future income of the petitioners is subject to the tax regime that will apply when the profits **are produced**. Therefore, the law that sets the new tax rate does not apply retroactively. This is a common legislative situation.⁵²

The Zemach Committee – export restrictions

Until the appointment of this committee, there had been no restriction on the amount of natural gas that the concessionaires were entitled to export to foreign markets. They were therefore free to decide to whom they would sell their gas based exclusively on commercial considerations. However, following lobbying by several NGOs that called for a total ban on gas exports, in order to guarantee long-term supply to the Israeli market of environment-friendly natural gas, the Government decided to appoint yet another committee, the Zemach Committee. This committee, headed by the Director-General of the Ministry of Energy, Shaul Zemach, was appointed in October 2011, with the mandate to examine Israel’s natural gas sector and its future development. The Committee’s Report was published in April 5, 2012.⁵³

available here: <http://www.jpost.com/Israel-News/Greek-firm-to-buy-Israel's-Karish-and-Tanin-gas-reservoirs-for-1485m-464385>

⁴⁹ Ministry of Finance, Summary of Draft Conclusions by the Sheshinski Committee, 10/11/2010. Available at: <http://www.financeisrael.mof.gov.il/financeisrael/pages/en/News/20101110.aspx>

⁵⁰ The Natural Resources Profits Taxation Law, 2011, *Sefer Hachukim* 5771 No. 2295 (10.4.2011), p. 806.

⁵¹ H.C.J. 3734/11 *Davidian et al. v. Knesset* (2012).

⁵² *Ibid.*, para. 19 of Deputy President, Justice Naor’s opinion (emphasis in the original).

⁵³ See *The Recommendations of the Inter-Ministerial Committee to Examine the Government's Policy Regarding Natural Gas in Israel – Executive Summary*. Available at: <http://energy.gov.il/English/PublicationsLibraryE/pa3161ed-B-REV%20main%20recommendations%20Zemach%20report.pdf>
The full report in Hebrew is available here: <http://energy.gov.il/Subjects/NG/Documents/NGReportSep12.pdf>

The Committee came to the conclusion that a total ban on gas export would not be in the interest of the country, considering that the domestic consumption was not very high, and that the possibility of exporting the gas is what served and will continue to serve as the incentive for private companies to invest in exploration and to obtain necessary financing.⁵⁴ Should the government impose such a ban, the committee was of the opinion that it would most likely deter the required level of exploration and development of gas fields in Israel's economic waters. All the same, the committee also acknowledged the importance of guaranteeing Israel's domestic consumption of natural gas and it decided that given the circumstances it would be reasonable to guarantee these needs for the next 25 years. It assessed that the quantity required to supply these needs was 450 BCM, and recommended to review and update the quantity every five years.⁵⁵ Hence, it recommended introducing export licensing for natural gas and determining an export quota for each gas field.

These recommendations were met with strong criticism and demonstrations by NGOs, but eventually the Government adopted the Zemach Committee's recommendations subject to the modification that the quantity that should be guaranteed to the domestic market is 540 BCM (about 57% of the estimated gas deposits, which would guarantee domestic consumption for 29 years).⁵⁶

As a result of this development, the gas companies had yet another restriction imposed on them: their exports are subject to a quota system, whereby they may export only around 43% of the gas in their possession, even in a situation where they can obtain significantly higher prices on the world market than in the Israeli market. This restriction also forces them to limit production according to the quantities that they are able to sell for domestic consumption.

Another Supreme Court challenge: "No exports should be allowed"

The Government decision to adopt the Zemach Committee's recommendations (with some modifications) was also challenged at the Supreme Court. The challenge was not submitted by the gas companies against the export restriction, but rather by several NGOs who were of the opinion that no export of the natural gas should be allowed and that it should all be reserved for domestic consumption. The main legal argument of the petitioners was that the government lacked authority to make this decision, and that being such a significant matter, with far-reaching implications for the economy and the environment, it must be legislated in the Knesset and not passed by the cabinet alone.⁵⁷ The argument was based on what is known as the "non-delegation doctrine", according to which so-called "primary arrangements" ought to be determined by the legislator and not delegated to the executive branch.

The petition was dismissed by a 5-2 majority decision in October 2013.⁵⁸ It should be noted that the exact status of the non-delegation doctrine in Israeli constitutional law is disputed, among both judges

See also Amiram Barkat, "Zemach Committee: Export 50% of Gas Reserves", *Globes* 5/4/2012 (Available at: <http://www.globes.co.il/en/article-1000739532>)

⁵⁴ See the full report, *ibid.*, p. 85.

⁵⁵ *Ibid.*, p. 4.

⁵⁶ Government Decision No. 422, 26.6.2013. It should be noted that the Zemach Committee's recommendations were adopted by seven out of the eight members of the committee. One of the members, the Director General of the Ministry of Environmental Protection, wrote a dissenting opinion according to which the government should wait three more years until taking a decision in this matter, because the factual basis for the committee's decisions was still too weak. If nevertheless the government should decide to disregard her recommendation, she recommended guaranteeing not 450 BCM, but 550 BCM for domestic consumption. Hence, in terms of the quantity of gas set aside for domestic consumption, the government's final decision was closer to this dissenting opinion than to that of the majority opinion.

⁵⁷ Yifa Yaacov, "High Court Gives Green Light to Gas Export", *Times of Israel* (21.10.13), available here: <http://www.timesofisrael.com/high-court-gives-green-light-to-gas-export/>

⁵⁸ H.C.J. 4491/13 College of Law & Business v. Government of Israel. The decision to reject the petition was issued on October 22, 2013. The full judgment with the reasons was issued on July 2, 2014. The judgment (in Hebrew) is available here: <http://elyon1.court.gov.il/files/13/910/044/s12/13044910.s12.htm> .

and scholars.⁵⁹ The President of the Supreme Court, Judge Asher Grunis, who wrote the majority opinion, expressed the prevailing opinion according to which the doctrine is at most an interpretative rule that creates a rebuttable presumption. Accordingly, the legislator is presumed not to have delegated to the administrative branch the authority to determine basic primary policy, but only to implement the policy according to the principles determined by the legislator.⁶⁰ Where the act of the executive branch is violating fundamental rights, the rule will be more strictly applied than when there is no such violation.⁶¹ In the present case, the petitioners tried to argue that there was such a violation, because the government's decision harms the rights of future generations, who may not be able to enjoy inexpensive and clean sources of energy, because the natural gas has run out. This argument was dismissed by the majority opinion, who found that there was no clear and concrete violation of fundamental rights but rather vague speculations about what might or might not happen in the future.⁶² The Court also found that the Knesset had in fact authorized by law the Minister of Infrastructures, Water and Energy to determine the amounts of oil or gas that right-holders were required to supply to the domestic market. The authorization is found in Article 33(a) of the Petroleum Law, 5712-1952, which provides:

The Minister may, after consultation with the Authority, require lessees to supply first, at the market price, out of the petroleum⁶³ produced by them in Israel and the petroleum products produced therefrom, such quantity of petroleum and petroleum products as, in his opinion, is required for Israeli consumption, and to refine it in Israel as far as they have refining facilities and to sell it in Israel.

President Grunis chooses to interpret this provision in the general context of the Petroleum Law, whose objective is to maximize the country's aggregate welfare and to balance between the need to preserve the State's natural resources, on the one hand, and the need to create appropriate incentives to oil and gas explorers in order to facilitate exploration and development of these resources, on the other hand. The Court is of the opinion that it is difficult for the prime legislator to make the detailed provisions that are required to reach the proper balance in this field, and that therefore it is reasonable for the legislator to delegate to the executive branch the authority to determine how much gas should be reserved for the domestic market.⁶⁴ The Vice President of the Court, Justice Miriam Naor, added that in her opinion, Article 34 of the Petroleum Law grants rights-holders an unlimited right to export the petroleum they find, unless this right is limited by a Minister decision under Article 33 of the Law, by regulations or by contract.⁶⁵ That is another reason that Article 33 must be seen as a general authorization to restrict

⁵⁹ See Gideon Sapir, "Nondelegation", 32 *Tel-Aviv University Law Review* 5 (2009) (Hebrew); Yoav Dotan, "Non Delegation and the Revised Principle of Legality", 42 *Mishpatim* 379-447, 2012) (Hebrew); Barak Medina, "The Constitutional Rule Regarding Non-Delegation – A Response to Yoav Dotan and Gideon Sapir", 42 *Mishpatim* (2012) (Hebrew); Aharon Barak, *Proportionality: Constitutional Rights and their Limitation* (Cambridge University Press, 2012) p. 112. H.C.J. 244/00 *Siach Chadash Association v. Minister of National Infrastructures* P.D. 56(6)25 (2002) on p. 58; H.C.J. 326/97 *Rubinstein v. Minister of Defense* IsrLR 139, 502 (Barak J.); H.C.J. 1800/07 *Israel Bar Association v. Civil Service Commission* (7.10.2008), para. 7 of Levy J.'s opinion.

⁶⁰ H.C.J. 4491/13, *supra* note 58, para. 26 of the opinion of President Grunis.

⁶¹ *Ibid.*, para. 21.

⁶² One should recall that there are high chances of finding more natural gas in Israel's EEZ, and even if no gas is found there, gas could always be imported from foreign sources. Hence, the argument about harming future generations' fundamental rights is not a very strong one.

⁶³ The term "petroleum" is defined in article 1 of the Law as: "any petroleum fluid, whether liquid or gaseous and includes oil, natural gas, natural gasoline, condensates and related fluid hydrocarbons and also asphalt and other solid petroleum hydrocarbons when dissolved in and producible with fluid petroleum".

⁶⁴ H.C.J. 4491/13, *supra* note 58, para. 42 of the opinion of President Grunis.

⁶⁵ *Ibid.*, para. 2 of the opinion of Vice President Naor. Article 34 of the Petroleum Law provides: "A lessee may, subject to the regulations, import petroleum and petroleum products into Israel and may refine petroleum, whether produced in Israel or imported from abroad and may process, transport, **export** and trade in such petroleum and petroleum products." (emphasis added).

exports and to determine the natural gas quantities required for the entire domestic economy, and not just for a particular right-holder.

The two dissenting judges, Jubran and Rubinstein, were of the opinion that to determine the export policy of natural gas, and the amount required for domestic consumption in Israel is a primary arrangement (I would add: similar to what Chief Justice Marshall of the U.S. Supreme Court once called “important matters”⁶⁶) that needs to be determined by the primary legislator.⁶⁷ Article 33, in their opinion, does not delegate such an authority to the Minister. Rather it authorizes him to implement in relation to each and every rights-holder the general policy that the Knesset has determined.⁶⁸ Since no such policy has been determined yet, the approval of the Zemach Committee’s recommendations in this regard must be brought before the Knesset as part of a general legislative scheme in relation to the natural gas sector.

In this specific challenge, the dissenting opinions of these two judges, standing up for what they considered the protection of democratic rule through the parliament, did not make the day. However, their positions are bound to make a difference in a later challenge against the government’s dealings with the gas companies, as we will soon see.

Antitrust problems

Although having overcome this legal challenge, the troubles of the investors were not over yet. Now comes the turn of the Antitrust Commissioner. It so happened that all of the proven gas fields were in the possession of the same two companies: Noble Energy and the Delek Group, whose partnership had majority holdings in all of the four fields.⁶⁹ There had been several other companies searching for natural gas in Israel in the past, including foreign ones, but only the Noble-Delek partnership was lucky to find any. Hence, the situation whereby a partnership of two companies is controlling Israel’s entire gas supply obviously raises serious competition concerns. Initially, the Antitrust Commissioner Ronit Kan, had in 2006 given the companies an exemption from the prohibition against restrictive agreements.⁷⁰ However, in 2011, the then Commissioner, Prof. David Gilo, notified the gas companies that he intends to declare them to be parties to a prohibited restrictive agreement in the Leviathan gas field.⁷¹ In 2012, he declared them to be a monopoly in the natural gas sector.⁷²

⁶⁶ In an often quoted passage dealing with the doctrine of non-delegation in U.S. constitutional law: “[t]he line has not been exactly drawn which separates those **important subjects**, which must be entirely regulated by the legislature itself, from **those of less interest**, in which a general provision may be made, and power given to those who are to act under such general provision to fill up the details.” *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), at p. 43.

⁶⁷ H.C.J. 4491/13, *supra* note 58, paras. 55-89 of the opinion of Justice Jubran; and para. 2 of the opinion of Justice Rubinstein.

⁶⁸ *Ibid.*, para. 3 of the opinion of Justice Jubran; and para. 15 of the opinion of Justice Rubinstein.

⁶⁹ They were not the sole partners. Other companies, such as Ratio Oil Exploration (1992) Limited Partnership, Dor Gas Exploration Limited Partnership, and Isramco Negev 2 Limited Partnership, have also certain percentages in some of the gas fields, but these are minority shares in relation to Delek and Noble’s holdings. Another partner is Avner Gas and Oil Exploration LP, but it is largely controlled by the Delek Group.

⁷⁰ Israel Antitrust Authority, “Decision under Article 14 of the Restrictive Trade Practices Act, 5748-1988 regarding the Granting of an Exemption for a Trade Restraint: Agreement between Delek Group and Isramco Negev, Noble Energy and others” (August 22, 2006) (Hebrew), available here: <http://www.antitrust.gov.il/files/7794/6178.pdf>

⁷¹ Press Release: “General Director of Restrictive Trade Practices Considers Declaring Delek to have a Monopoly in the Supply of Natural Gas and to determine that Delek, Avner, Noble and Ratio were Sides to a Restrictive Arrangement in relation to the 'Leviathan' Joint Venture” (September 6, 2011), available here: http://www.antitrust.gov.il/files/32860/Natural%20gas_2011.pdf .

⁷² Press Release: “The General Director of Restrictive Trade Practices Declares the Partners in the Natural Gas Reservoir 'Tamar' to have a Monopoly on Israel's Natural Gas Supply” (November 13, 2012), available here: <http://www.antitrust.gov.il/files/32858/Natural%20gas.pdf> .

After negotiations with the companies, in March 2014 a draft compromise in relation to Leviathan was reached whereby Delek, Avner and Noble will sell their holdings in Karish and Tanin (the small gas fields) to a buyer that will undertake to sell and market its gas only in Israel.⁷³ This buyer will also receive options to purchase 15.2 BCM gas from Leviathan. The gas companies can market the rest of the gas in Israel until January 1, 2020, at which time the Commissioner will reassess the competitive situation. The compromise also included certain arrangements in relation to the Tamar field. However, in December 2014, after holding a public hearing on the draft compromise, Prof. Gilo announced that he has changed his mind and will not submit the compromise to the anti-trust court.⁷⁴

The Gas Framework – An attempt to resolve all the regulatory issues

Therefore, the Government decided to appoint a team, headed by the chairperson of Israel's National Economic Council, Prof. Eugene Kandel, to look for an alternative solution. The team was composed of representatives from the Ministry of Finance, the Ministry of Energy, the Ministry of Justice, the Antitrust Authority and others. They heard the position of the gas companies and started designing the so-called "Gas Framework" that was to reflect a compromise between the Government and the companies. Without a solution, the companies would not and could not have proceeded to make the huge investments required to develop the Leviathan gas field and to sign gas sales contracts to support the financing of the development. It should be noted that the compromise was reached under the shadow of Noble Energy's threat to sue the State under the Cyprus-Israel BIT, although it is not clear how credible this threat was.⁷⁵ However, in May 2015, Prof. David Gilo announced his resignation from his position of Antitrust Commissioner, in view of his opposition to the emerging gas-framework. As a result, and because of the prolonged search for a new Commissioner, it was decided that the exemption under the antitrust law, as part of the gas framework, would be given by the Minister of Economy, making unprecedented use of Article 52 of the law.⁷⁶

⁷³ "Regulator orders Delek, Noble Energy to sell gas fields" 27/3/2014 (globes) available at: <http://www.globes.co.il/en/article-regulator-orders-delek-noble-energy-to-sell-gas-fields-1000927892>

⁷⁴ Avi Bar-Eli " Antitrust Chief Warns He May Break Up Natural Gas Monopoly" 23/12/2014 (Haaretz). Available at: <http://www.haaretz.com/israel-news/business/.premium-1.633228> .

⁷⁵ "Report: Noble Energy Threatens Legal Action Against Israel", Arutz Sheva, Israel National News (September 3, 2015) <http://www.israelnationalnews.com/News/News.aspx/200276#.Vzr2tJF95pg> : "Senior Noble executives delivered the ultimatum on the future of the offshore Leviathan field at a meeting with Prime Minister Binyamin Netanyahu this week, according to *Maariv*. It said the firm would pursue international arbitration if a framework deal with Israel laying out parameters for developing Leviathan, among other issues, is not enacted "in the near future." See also: <http://www.globes.co.il/news/article.aspx?did=1001089189> . This legal option has possibly become available because Noble Energy Mediterranean Inc., a Cayman Islands company, apparently transferred its holdings in the Israeli gas fields to a subsidiary incorporated in Cyprus, in order to come under the Cyprus-Israel BIT. The Israeli authorities, however, claim that under Noble's concession, it is under the obligation to receive approval from the Ministry of Energy for any transfer of its concessionary rights and that such approval has never been granted. Hence, the transfer of the holdings to the Cyprus company is invalid and an arbitration tribunal under the Israel-Cyprus BIT would have to dismiss the claim for lack of jurisdiction. From reports in the press it appears that Israel's State Comptroller is currently investigating whether government approval was or was not given, and how Noble Energy manage to reach a position where it could threaten to sue the government. See: Hedy Cohen, "The State Comptroller is probing whether Noble Energy asked to transfer ownership of its Israeli licenses to a Cypriot subsidiary." *Globes* (16.12.15), available here: <http://www.globes.co.il/en/article-israel-exposed-to-huge-noble-energy-lawsuit-in-cyprus-1001088620> . One should also mention that in the Supreme Court challenge of the Gas Framework discussed below, an "American Legal Opinion" regarding the possible implications of a change in policy under International Law was submitted to the Court by the government, but the Court decided not to refer to it (See H.C.J. 4374/15, *infra* note 87, on p. 75). This legal opinion is confidential, so we can only speculate about its contents.

⁷⁶ The Restrictive Trade Practices Law, 5748-1988, Article 52 provides: "The Minister may, following consultation with the Knesset's Economic Affairs Committee, exempt a restrictive trade practice from all or some of the provisions of this Law, if he believes that such action is necessary for reasons of foreign policy or national security."

The draft gas framework was published in July 2015, and it was made subject to a public hearing, both in writing and orally.⁷⁷ The framework requires Noble and Delek to sell their holdings in the relatively small Karish and Tanin gas fields within 14 months to a buyer that will be approved by the authorities.⁷⁸ Delek - through its units Delek Drilling and Avner Oil Exploration - will have six years to sell its entire 31.3 percent stake in the large and currently Israel's only producing Tamar gas field, and Noble will have to trim its stake in Tamar to 25 percent from 36 percent.⁷⁹ The companies will commit themselves to complete the development of the Leviathan gas field (an investment estimated at around \$5-6 billion⁸⁰) until 2019, so that natural gas can be extracted and supplied from there to the Israeli market by July 31, 2019. In return for the fulfilment of these obligations, and several other ones designed to ensure competition in the natural gas market in Israel, the companies will receive the required exemptions from the antitrust prohibitions. The framework also includes provisions on the sale price of the gas, setting a price ceiling and enabling consumers to choose the less expensive of two options. An element was introduced which ensures that domestic prices will always be lower than export prices. There are new provisions in the framework dealing with how to calculate and how to administer the export quotas.

Finally, at the demand of the companies and especially of Noble Energy, a stabilization clause was included in the deal. According to this chapter of the framework (chapter 10), titled "A Stable Regulatory Environment", the Government undertook to refrain from changing, for a period of 10 years, its policy and regulation in relation to the gas market within three of the areas discussed above (taxation, exports and antitrust). The government also undertook to oppose any private bill tabled in the parliament aimed at changing anything in the above fields. If such private bill should pass nevertheless, the government undertook to initiate a bill that would reinstate the previous situation.⁸¹ The government also undertook to carefully examine any change in the regulation of the gas market (i.e., changes to which the stabilization clause does not apply) and to aspire to design a policy that corresponds with accepted standards in OECD countries. The chapter includes two milestones – in 2017 and 2020 – that allow the government to re-evaluate its commitment if the development of the Leviathan gas field should not progress in accordance with the gas companies' commitments.

The gas framework was adopted by the Government, subject to some amendments, in August 2015.⁸² One of the amendments related to "domestic content": the companies undertook to invest at least \$500 million over a period of eight years in Israeli content, such as the employment of Israeli worker and purchase of equipment and services from companies registered in Israel (including foreign companies).⁸³

⁷⁷ Ministry of Energy, "The draft outline regarding the increase of the amount of natural gas extracted from the national gas field "Tamar" and fast development of the natural gas fields "Leviathan", "Karish" and Tanin" and other natural gas fields" (Hebrew), (hereafter referred to as "**the Gas Framework**") available at: http://energy.gov.il/abouttheoffice/newsandupdates/documents/shimua/dov_312_2015.pdf

⁷⁸ *Ibid.*, p.8.

⁷⁹ *Ibid.*, p.4-7.

⁸⁰ This is the updated estimate, as it appears in Delek and Avner's financial statements published in May, 2016.

⁸¹ This obligation was not in the original draft, but was added to the Framework by the Government's resolution (see next footnote).

⁸² Government Resolution No. 476 (16.8.15) (Hebrew), available here: <http://www.pmo.gov.il/Secretary/GovDecisions/2015/Pages/dec476.aspx>

⁸³ *Ibid.*, Chapter 9. Interestingly, the Resolution does not require that the products be made in Israel in order to qualify as "domestic content", only that they are bought from firms registered in Israel, including foreign firms. One may speculate that this was formulated so in order to avoid violation of Israel's obligations under international trade agreements, such as the GATT and the WTO TRIMS Agreement (see Article 1(a) of the Annex to this agreement). Salaries to domestic workers can qualify as "domestic content" up to a limit of 20% of the total undertaking. Expenditures on academic or industrial research undertaken in Israel, whether purchased by the companies themselves, or by related companies abroad that deal in the gas and oil sector, will also be considered "domestic content", as will expenditures on professional training in corporate social responsibility of the gas companies.

The framework was also brought to a vote in the Knesset and approved by a 59-51 majority in September 2015.⁸⁴ However, this was not a legislative process, but only as a political resolution.

Since the granting of a Ministerial exemption under Article 52 of the Restrictive Trade Practices Act was part of the Government's commitment under the framework, it now became crucial that Aryeh Deri, the Minister of Economy, would grant this exemption to the gas companies. However, Mr. Deri, the leader of the Shas Party, a religious socially oriented party that was a member of the coalition government, after lengthy deliberation, announced that he did not feel that he could grant the exemption. Hence, after more political wrangling, it was agreed in November that he would resign his post and assume a different ministerial position, so that his authorities would be reassigned to the Prime Minister. The Prime Minister, Benjamin Netanyahu, as the Acting Minister of Economy, then announced that he intended to make use of his authority under this article. After conducting the mandatory consultation procedure with the Knesset's Economy Committee – which recommended by a majority decision not to grant the exemption under Article 52⁸⁵ – the Prime Minister went ahead and granted the exemption in December 2015.⁸⁶

The Supreme Court strikes down the Framework

Less than two weeks later, several NGOs submitted a petition to the Supreme Court (in its capacity as the High Court of Justice) challenging the gas framework. The challenges focused on two central issues: (1) the exercise of the authority under Article 52, based on the claim that there were no genuine reasons of foreign policy or national security to justify the exemption and claims against the decision procedure; (2) the Stabilization Clause, challenging the legality and reasonableness of the Government's commitment to prevent itself and future governments from using its prerogative and duty to regulate, when this is needed.

On March 27, 2016, the Supreme Court handed down its earth-shaking decision, striking down the entire gas framework.⁸⁷ In a 4-1 judgment, the court found that the stabilization clause unduly restricted future governments' freedom to regulate the gas market and hence is undemocratic and unconstitutional. Deputy Supreme Court President Elyakim Rubinstein wrote: "The stabilization clause in this chapter of the framework, in which the government undertakes for a decade to not only not legislate but to also fight any legislation against the framework's provisions, was decided without authority – and as such is rejected. It was made in contrast to the general principle of administrative law regarding the prohibition of shackling the authority's ability to govern. The government does not have the power to decide not to decide and not to act." Rubinstein J. added that this was especially the case when the government seeks to limit the discretion of the next government, "whose composition and ideology will be different than this one's."⁸⁸ He also stated that the stabilization clause substantially binds the Knesset's ability to use its discretion. In reaching his decision, Rubinstein reviewed the

⁸⁴ "Controversial Natural Gas Deal Passes Knesset", *Times of Israel*, September 7, 2015, available at: <http://www.timesofisrael.com/controversial-natural-gas-deal-passes-knesset/>.

⁸⁵ This was expected, since the majority in the Committee is held by the Opposition, who turned the resistance to the Gas Framework into its major political objective.

⁸⁶ As reported in the "Annual Report on Competition Policy Developments in Israel", 15-17/6/2015, at p. 4, Available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR\(2016\)5&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2016)5&docLanguage=En)

⁸⁷ H.C.J. 4374/15 *The Movement for Quality Government in Israel v. Prime Minister* (27.3.16). See also Talam Yahav, "High Court rejects Israel's natural gas plan", Ynet News (27.3.16) <http://www.ynetnews.com/articles/0,7340,L-4783787,00.html>.

⁸⁸ *Ibid.*, p. 65-66. For a detailed description and discussion of the judgment, see the case comment of Rachel Frid-de Vries, "Stability Shaken? Israeli High Court Strikes Down the Stabilization Clause in the Israeli Government's Gas Plan", 18 *Journal of World Investment and Trade* 1-10 (2017).

international literature on stabilization clauses⁸⁹ and explained the background to their use. He quoted several examples of freezing clauses, while stressing the fact that the states involved are all developing countries. He notes that it is therefore not surprising that OECD countries do not include stabilization clauses in contracts with energy companies,⁹⁰ and that these are used mostly by states with a weak judicial system, in terms of independence, corruption, due process etc., which Coale calls “quasi-states”.⁹¹ This reasoning resonates with the perceptions that have shaped Israel’s BIT policy, discussed above,⁹² according to which Israel is a developed country with a stable regulatory environment and a reliable judiciary, and therefore does not need BITs to attract foreign investment.

Only one judge, Justice Noam Solberg, dissented and was of the opinion that the stabilization clause was valid. He stressed the fact that the clause did not restrict the Knesset’s right to legislate, and that it therefore remains free to initiate changes to the regulation if it thinks that such are required. The Government’s undertaking to actively oppose such attempts does not mean that the Knesset cannot succeed in making regulatory changes if the necessary majority is found. Judge Solberg also notes that government obligations to initiate certain laws in the parliament are not uncommon. Such obligations are undertaken, for instance, pursuant to international agreements concluded by the government (and which do not require parliamentary approval, like in other so-called dualistic legal systems, such as the United Kingdom) or pursuant to election promises by political parties, and there is nothing illegitimate in that. He does not see any meaningful distinction between the obligation to legislate a certain law and the obligation to actively oppose the legislation of a certain law. Both of them relate to how the Government is to use its governmental discretion in relation to legislation. While he agrees that an absolute denial of government discretion is unlawful, he is of the opinion that this is not the case here, since the government always has the right to depart from a government promise when special circumstances justify it.⁹³ In such case, the government will have to compensate the investors, and hence the clause in question is not very different from an economic balancing clause, which Justice Rubinstein appeared as willing to accept. Judge Solberg acknowledges that such duty of compensation may create a “chilling effect”, but he does not consider this as negating the government’s discretion. The extent of the effect (as a function of the amount of compensation) depends on the nature of the change and of the expenses it causes to the investors, and sometimes this will be found to be a so-called “efficient breach” where the gains from the change in regulation exceeds the costs of compensation.

The Government’s lawyers had argued before the Court that the stabilization clause is a prerequisite of the entire Gas Framework.⁹⁴ This proposition had, in fact, been presented before the Court by Netanyahu himself, who appeared before the Supreme Court, making it the first time in Israeli history that a prime

⁸⁹ Among them: Peter D. Cameron, *Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil and Gas Investors*, at p. 30 (Association of International Petroleum Negotiators, 2006). Margarita T.B Coale, “Stabilization Clauses in International Petroleum Transactions” 30 *Denv. J. Int’l L. & Pol’y* 217 (2001-2002)

⁹⁰ John G. Ruggie, *Stabilization Projects and Human Rights – A Research Project Conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights*, p. 19 (2009); Mario Mansour & Carole Nakhle, *Fiscal Stabilization in Oil and Gas Contracts: Evidence and Implication*, (The Oxford Institute for Energy Studies, January 2016), p. 13.

⁹¹ Coale, *supra* note 89, p. 221-222.

⁹² See chapter 2.2 above.

⁹³ This is an established rule in Israeli government contract law. See for instance, Gavriela Shalev, *The Law of Public Procurement* (1999), chap. 6 (Hebrew); and H.C.J. 4893/14 *Zoabi v. State of Israel* paras. 45-46 (3.3.16); H.C.J. 6133/14 *Gurevitz v. Israeli Knesset* para. 63 (2015). A similar rule can be found in German and French Administrative Law. See for instance, Mahendra P. Singh, *German Administrative Law in Common Law Perspective* (Springer, 2001), p. 101; and L. Neville Brown & John S. Bell, *French Administrative Law* (5th ed., Oxford, 1998) p. 203 (in French Law, administrative contracts are seen differently from private contracts, whereas for the former there is “an underlying need to recognize the predominance of the public interest, an interest which must prevail, even to the extent of overruling the express terms of the contract”).

⁹⁴ H.C.J. 4374/15, *supra* note 71, at p.83.

minister appears and addresses the Supreme Court.⁹⁵ Hence, and since the Court in its majority opinion decided that the clause was not valid, the Court reached the conclusion that the whole Framework had to be struck down.⁹⁶ It did so, although all of the other challenges that the petitioners had raised against the Framework were dismissed. The Court postponed the effect of its decision by 12 months, in order to give the government the time to reach an alternative arrangement. Rubinstein J. was of the view that such arrangement must be part of a legislative scheme approved by the Knesset.⁹⁷ However, the majority (3 against 2) of the judges rejected Justice Rubinstein's opinion that a new framework must be made by parliamentary legislation.⁹⁸

One cannot help but wondering about the logic of Justice Rubinstein's position, which seems to be self-contradictory. On the one hand, he considers the stabilization clause to be unconstitutional and undemocratic because it binds future governments – despite conceding that as a mere government decision, the government has the right to depart from its promise when special circumstances justify it.⁹⁹ On the other hand, he requires the government to fix the problem by having the entire gas framework, or at least its main principles, entrenched by legislation, thus making it much stronger and much harder to depart from. In this connection, one should note that during the negotiations with the gas companies leading up to the framework, it was Noble Energy that demanded that the stabilization clause be entrenched in legislation.¹⁰⁰ However, the Government, based on legal advice, so as to maintain some flexibility in case of significant changes of circumstances in the future, rejected this demand.¹⁰¹ If the Government were to follow Rubinstein's instructions, it would in fact only aggravate the problem that had caused the Court to strike down the gas framework in the first place. Fortunately, on this point, Rubinstein's opinion did not become the binding ruling of the Court.

A new compromise

In view of the Supreme Court's decision, the Government started examining its options in trying to salvage the Gas Framework. A team of government officials headed by Prof. Eugene Kandel started new deliberations and negotiations with the investors. The idea of granting a Government financial guarantee to the investors, which had been raised as an option, was rejected off-hand by the Ministry of Finance. In May 2016 a new compromise was reached. According to the amended version of the Gas Framework, the Government still commits itself to maintain and not change the regulatory regime that

⁹⁵ Yonah Jeremy Bob, "Netanyahu to High Court: Gas deal helps chance of peace with many countries", *Jerusalem Post* 14/2/1016. Available at: <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Netanyahu-confronts-High-Court-to-defend-natural-gas-policy-in-unprecedented-personal-appearance-444846>

⁹⁶ H.C.J. 4374/15, *supra* note 71, at p .180. Judge Hayut dissented on this point. While she agreed that the stabilization clause was unconstitutional and had to be struck down, she was of the opinion that there was no need to strike down the other parts of the Framework and that one could leave it to the gas companies to decide whether they want to accept the plan as is without the stabilization clause or reject it entirely.

⁹⁷ *Ibid.*, p.90 and 95.

⁹⁸ *Ibid.*, p.179, point D: Judges Fogelman, Hayut and Solberg rejected this requirement, against the dissenting opinions of Judges Rubinstein and Jubran. The reasoning of the majority judges on this issue differed. Judge Solberg agreed with Judges Rubinstein and Jubran that the Gas Framework could be seen as a Primary Arrangement, but he held that even so, the Knesset had already determined all of the principal issues dealt with in the framework and delegated the powers to implement the policies to the executive branch. Judge Chayut agreed with Solberg on that and made the point to disagree with Judges Rubinstein and Jubran's opinion according to which "the whole is greater than the sum of its parts" and that because of the aggregation of so many important issues in one government decision, it needed to be adopted as a whole by the Knesset. Judge Fogelman agreed with Solberg that all the necessary powers had been delegated by the Knesset and therefore found no need to decide on whether the framework was a "Primary Arrangement" or not.

⁹⁹ H.C.J. 4374/15, *supra* note 71, at p. 80 and p. 97.

¹⁰⁰ The source of this information is Dr. Yuval Steinitz, the Minister of Energy, in a speech in the Faculty of Law, Bar Ilan University, April 11, 2016, in the presence of the author.

¹⁰¹ *Ibid.*

applies to the gas sector. However, unlike the previous framework, it does not commit itself to fight private legislative initiatives in the Knesset. It also does not set a fixed time-period for its commitment, thus leaving discretion to future governments. However, the Government promises to propose alternative solutions in order to make up for any such changes that are detrimental to the gas companies, without committing in advance on the content of such solutions. In return for this change in the gas framework, the gas companies have received a benefit in relation to the original framework: instead of having to sell the Karish and Tanin gas fields within 14-18 months, they will have to do so within 16-20 months.¹⁰² The amended gas framework was approved by the Government with only one minister voting against it.¹⁰³

Antitrust class action for unfair gas prices

The gas companies have not yet solved all of their legal problems. There is still a pending class action lawsuit submitted in 2014 and valued around 13 billion dollars against the holders and operators of the Tamar gas field.¹⁰⁴ The plaintiffs claim that the defendants have been abusing their monopoly power to charge inflated prices for their natural gas sold to the Israel Electric Company (IEC). Since these unfair prices (“double its fair value”, according to the claim) have been passed on to the IEC’s costumers, the plaintiffs allege that they have the right to claim damages from the defendants on behalf of all the electricity consumers in Israel. After the Gas Framework was approved (and later its compromised version), the defendants claimed that the class action should be dismissed, since the Framework had dealt with all the antitrust issues and granted an exemption to the companies.¹⁰⁵ Interestingly, the Attorney-General (AG) appeared before the court and supported the defendants’ petition to dismiss the action. The AG argued that the drastic reduction in the gas prices, as demanded by the plaintiffs, might seriously harm the ability to develop new gas fields, prevent entry of new competitors and undermine the entire gas framework.¹⁰⁶ However, Judge Esther Stemmer of the Central District Court ruled that the exemption given to the gas monopoly in the Gas Framework did not exempt them from the provision in the antitrust law that forbids abuse of monopoly positions.¹⁰⁷ Hence, this class action suit is still looming over the gas companies and only future will tell how it will be resolved.

¹⁰² In practice, the Delek Group sold the rights in Tanin and Karish within just a few months to the Greek company Energean Oil & Gas, which has already started to raise capital and look for an operator to develop these two gas fields. See *supra* note 48.

¹⁰³ Hedy Cohen, “Israel Cabinet Approves New Gas Agreement”, *Globes* (22.5.16), available here: <http://www.globes.co.il/en/article-israeli-cabinet-approves-new-gas-agreement-1001126176>. The dissenting minister was Avi Gabay, the Minister for the Protection of the Environment.

¹⁰⁴ Ya’acov Zalel, “Israel Tamar Faces \$13BN Class Action”, in *Natural Gas World* (November 24, 2016).available here: <http://www.naturalgasworld.com/a-13-bn-class-action-against-tamar-go-ahead-34605>

¹⁰⁵ *Ibid.*

¹⁰⁶ Avi Bar-Eli, “The Government’s Explanation: Why the Price of Gas did not Come Down” *The Marker* (28.6.2016) (Hebrew), available here: <http://www.themarker.com/dynamo/1.2988838>

¹⁰⁷ Judge Stemmer’s decision: Class Action 35507-06-14 (Central) *Nizri v. Noble Energy Mediterranean Ltd. et al.* (23.11.2016). In her decision, Judge Stemmer found that the fact that the High Court of Justice had found the Gas Framework to be reasonable, does not prevent a non-administrative claim against the price charged by the monopoly holders. She also found that the Article 52 exemption does not relate to abuse of dominant position under Article 29A of the Trade Restraints Law. Indeed, the framework does not list Article 29A as one of the provisions that the gas companies are exempt from. The fact that the Gas Framework has been approved does not mean that the price that the companies have been charging is reasonable, although it may be taken into account at a later stage when the evidence on the reasonableness of the price will be examined. One would expect this decision to be appealed by the defendants before the Supreme Court. Ya’acov Zalel, *supra* note 104.

The impact of the Natural Gas Saga on the investment climate

It would be reasonable to presume that the regulatory turmoil experienced by Noble Energy since its discoveries of natural gas in Israel's EEZ in the Mediterranean, has had a negative impact on the investment climate in Israel for foreign investors, in particular in the natural resources sector. In addition to the many and frequent changes to the regulations applying to the natural gas sector, the Government also introduced drastic changes to the regulatory environment relating to all other natural resources. In 2013, the so-called "Second Sheshinski Committee" was appointed with the task of making recommendations in relation to the payments that should accrue to the government from the use of other natural resources. The committee recommended raising significantly the royalties for the use of such resources, as well as the taxes imposed on the profits from them.¹⁰⁸ Not surprisingly, these recommendations were met with fierce opposition from existing concessionaires, and in particular from the Israel Chemicals group, the owner of the Dead Sea Works and other natural resources companies.¹⁰⁹ The former is also reported to have suspended nearly \$2 billion in investment in Israel because of the plans.¹¹⁰ Instead, it has been expanding operations and buying companies in China, Britain and Spain. Nevertheless, the recommendations have been moving slowly through the system and were finally approved by legislation in November 2015.¹¹¹

Many of these changes may be justified in themselves, in particular those recommended by the two Sheshinski Committees.¹¹² However, it is the accumulation of so many changes in a short time and the uncertainty about what else one can expect in the future, that may cause serious damage to Israel's ability to attract much needed foreign investments in these fields. Add to that what appears to be the inability of the Government to deliver on its promises, to govern its own natural resources, and to create a stable and predictable investment climate, and one can understand why we may have a serious problem. This assessment was recently supported by a study performed by the Bank of Israel on the Government's policies in the natural gas field:¹¹³

Such policy [i.e., when the Government uses new information to improve the lot of the Israeli public at the expense of the entrepreneurs], when it is employed in moderation, in accordance with what is common abroad, and in view of the improvement of the lot of the entrepreneurs in relation to their original projections (as was the case, for instance in the adoption of the Sheshinski Committee recommendations), may benefit the citizens even in the long run. However, a series of decisions within

¹⁰⁸ *The Conclusions of the Committee Examining the State's Share Received for the Use by Private Players of National Nature Resources*, October 2014, available here: http://mof.gov.il/Committees/NatureResourcesCommittee/Maskanot_FinalReport.pdf

¹⁰⁹ See e.g., "Israel Chemicals Vows to Fight 'Erroneous' Tax Recommendations", *Israel Hayom* October 20, 2014, http://www.israelhayom.com/site/newsletter_article.php?id=20849

¹¹⁰ See Meirav Arlosoroff, Ora Cohen & Zvi Zrahiya, "Israel Chemicals Suffers Blow as MKs Approve Higher Taxes and Treasury seeks fines", *Haaretz* November 9, 2015, available here: <http://www.haaretz.com/israel-news/business/1.684942>

¹¹¹ This was done by the Economic Efficiency Law (Legislative Amendments to Reach the Objectives of the Budget for FY 2015 and FY 2016), 5776-2016, which introduced some amendments to the Natural Resources Profits Taxation Law, 5771-2011. According to this amendment, profits from natural resources can be taxed to up to 42%.

¹¹² The Second Sheshinski Committee was in fact assisted by a team of experts from the International Monetary Fund, as part of the Fund's technical assistance to its members. The team submitted its own assessment and recommendations to the Committee, noting, among others, that Israel's taxation of the profits from natural resources, was one of the lowest in the world. See p. 95 of the Second Sheshinski Report, *supra* note 108. I am not aware of any further legal or political actions taken by Israel Chemicals after the amended law was approved by the Knesset in November 2015.

¹¹³ Dr. Yoav Friedman, Research Department of the Bank of Israel, *The Government's Policy in the Field of Natural Gas Production, Seven Years after the Discovery of 'Tamar'*, Periodical Papers 2016.1 (March 2016), available here: <http://www.boi.org.il/he/NewsAndPublications/PressReleases/Documents/%D7%9E%D7%97%D7%A7%D7%A8-%20%D7%9E%D7%93%D7%99%D7%A0%D7%99%D7%95%D7%AA%20%D7%94%D7%9E%D7%9E%D7%A9%D7%9C%D7%94%20%D7%91%D7%A2%D7%A0%D7%A3%20%D7%94%D7%A4%D7%A7%D7%AA%20%D7%94%D7%92%D7%96%20%D7%94%D7%98%D7%91%D7%A2%D7%99.pdf>

a relatively short period, which repeatedly hurt the entrepreneurs to the benefit of the consumers, might be considered in the eyes of potential entrepreneurs and investors in the future as harming the business environment, may cause a decline in their investments in Israel and harm the economy. Such harm may exceed the benefit that can be obtained from these decisions in the short run.

The study also addresses the impact of the various restrictions, in particular those imposed on the exportation of natural gas, on the investment in the development of the gas fields:¹¹⁴

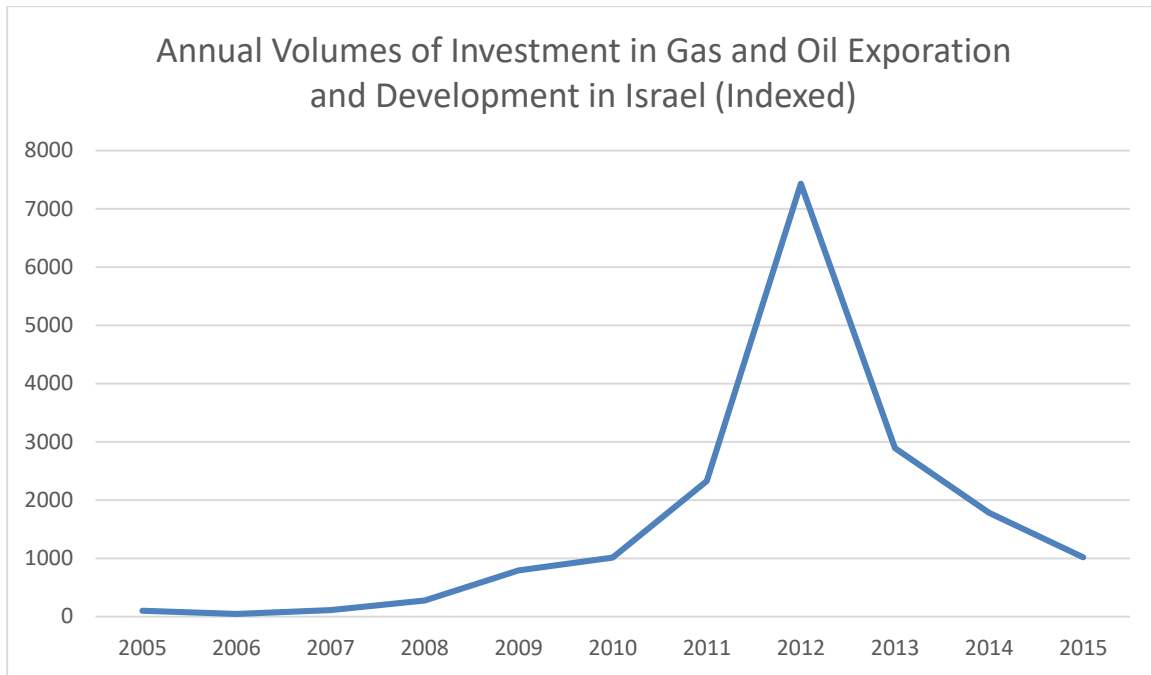
While the State is interested in the development of the gas fields for the domestic market, among other things in order to produce surplus and encourage competition, the entrepreneurs are interested in maximizing their profits, and they will have difficulty in financing expensive development of the natural gas reserves which will create a surplus of supply in the domestic market, in particular when they are not permitted or are unable to export the gas. This problem exists especially in relation to the development of the Tanin and Karish fields and it reduces the probability of their development in the short run. It also affects the exploration and development of new natural gas fields at the present time.

Can it be scientifically proven that this series of decisions to the detriment of the investors, and the regulatory instability described above, have caused, and will continue to cause, a decline in foreign investment in energy exploration? Clearly the answer is no. The economic reality is too complex, with too many factors influencing the decisions of investors whether, how much and when to invest in a certain country and certain sector, for us to be able to provide any conclusive evidence on this question. This is true even when we try to analyze figures from the past, and so much more when we try to make predictions about the future. Therefore, all we can do is to point to certain facts and to discuss their significance for the question we are pondering along with their limitations.

The first fact is that since the first Sheshinski Committee was appointed in 2010, and until the compromised Gas Framework was approved in May 2016, almost no new investors entered the natural gas or oil exploration market. The companies that already held concessions and gas fields in the Mediterranean continued to invest in their holdings, mainly in the Tamar field whose development was already close to completion. However, since that development was completed in 2012, and despite the fact that the more recently found gas fields of Leviathan (2010), Tanin (2012) and Karish (2013) required huge investments in order to be developed, there has been a sharp decline in the volumes of investment in gas and oil exploration from 2013 and onwards. This year coincides with the year that the Zemach Committee's recommendations were approved and once it became clear that the regulatory arrangements in the field were still extremely unpredictable. The figures showing this decline have been obtained by the present author from Israel's Central Bureau of Statistics, as showed below.¹¹⁵

¹¹⁴ *Ibid.*, p. 17.

¹¹⁵ The CBS was precluded from providing the author with actual dollar figures because of legal confidentiality reasons. Instead, they provided relative figures indexed on the basis of 2005.



The above figures represent both domestic and foreign investment volumes in gas and oil offshore exploration and development in Israel, including investment in the development of rigs, platforms, marine pipelines, offshore processing stations, coastal installations etc.

An important factor that must be taken into account when assessing the significance of these figures is that since June 2012 and until November 15, 2016, there were no new offshore licenses awarded as a result of a decision of the Minister of Energy to “close the sea” for new licenses¹¹⁶ in order to reorganize the system of licenses.¹¹⁷ This could account for part of the steep decline in investments. However, as noted, it does not account for the lack of investment in the development of the existing undeveloped gas fields, or of the low investment levels in exploration of existing licenses. According to a report by the State Comptroller, at the time of the “closure”, on more than 60% of Israel’s marine territory there were existing exploration rights, most of which had no connection to the Delek Group or to Noble. However, the explorations decreased gradually, so that in 2013 there were only three drills and in 2014 only one.¹¹⁸ For example, until 2015 there were two valid licenses in the offshore fields named Sara and Myra estimated to hold around 70% of the gas volumes of the Tamar field, held by a partnership of mainly Israeli companies, and which have not yet been fully explored.¹¹⁹ Two initial drills were not successful. However, seismic studies indicated the possibility of oil and gas at deeper strata that were not explored.¹²⁰ If the holders of the concession had been successful in convincing a strong financial investor

¹¹⁶ “Announcement on Changes in the Areas for Petroleum Exploration”, issued by Energy Minister Dr. Uzi Landau on 17 June 2012 under Article 5 of the Petroleum Law, 1952. The decision closed all of Israel’s offshore areas for new oil and gas exploration, except for existing concessions and rights.

¹¹⁷ The time was used in order to formulate new regulations under the Petroleum Law on the procedures for the award of new exploration licenses. The Petroleum Regulations (Principles of Operation for Offshore Petroleum Exploration and Production) 5777-2016 were published on November 15, 2016, followed by the launching of a new round of bids for the offshore licenses performed according to the new procedures.

¹¹⁸ The State Comptroller of Israel, *The Development of the Natural Gas Market* (Jerusalem, June 2015), p. 24.

¹¹⁹ See “Sara and Myra”, at https://en.wikipedia.org/wiki/Sara_and_Myra .

¹²⁰ According to information included in the Israeli company Modiin Energy’s 2013 Annual Report, p. 171, based on NSAI seismic analysis, the Sara license area had an estimated 20 BCM of gas in two deeper strata, with a 20-30% likelihood, and the Myra license had an estimated 64 million barrels of oil at a deeper strata, with a 16% likelihood .

or a foreign operator to join the project, more drills could have been undertaken with significant investments involved. One should also mention the failed attempt to sell 25% of the Leviathan gas field to Woodside Petroleum Ltd., Australia's second-biggest oil and gas producer, for \$2.6 billion. The negotiations started in early 2013, but according to press-reports dragged on for over 17 months "amid concerns over possible changes in Israeli tax and regulatory policies".¹²¹ Eventually the talks failed and the deal was cancelled. In order to raise the huge amount of \$5-6 billion required to develop Leviathan, the Delek-Noble Partnership needed to sell part of the field or to conclude long-term export contracts that could serve as collaterals for lenders. However, given the regulatory uncertainty and the restrictions on exports, this became a very difficult task.

The frustration with the lack of foreign investment in the gas sector was expressed by the Director-General of the Prime Minister's Office in December 2015:¹²²

There have been a few discoveries of gas in the last few years, in Egypt, Cyprus and Israel. Where isn't there a queue of investors that want to invest? In Israel.

Furthermore, in the Annual Budget Proposal for 2017-2018, in the section where the Government informs the Knesset about developments in the natural gas sector, it stated:¹²³

Exploration for natural gas in the Mediterranean territories that are within Israel's economic zone ceased in 2015 due to the uncertainty in the sector. In view of the approval of the Gas Framework in 2015, there is now new activity in the sector.

Apart from the frequent changes in the regulatory setting, one should also mention the "anti-tycoon" atmosphere that has evolved over the last few years,¹²⁴ along with a very strong anti-establishment civil society fighting for what it believes are the "people's rights".¹²⁵ As we have seen, this fighting, both on the streets, in the media and in the courts, have been at least partly successful, often at the expense of the investors. This may also serve to scare off some investors.

Another point that one needs to remember when assessing the impact of the regulatory instability on FDI flows, is that Israel operates in a competitive world. Even with the large discoveries of the last few

¹²¹ James Paton, "Woodside Scraps \$2.6 Billion Israeli Gas Deal as Talks Fail", *Bloomberg* (May 21, 2014), available at: <https://www.bloomberg.com/news/articles/2014-05-20/woodside-scraps-2-6-billion-leviathan-gas-deal-after-talks-fail>

¹²² Protocol of symposium held at the Globes Conference for Business in Israel, on December 7, 2015 (Hebrew, author's translation), available here: <http://www.globes.co.il/news/article.aspx?did=1001086552>. At the same symposium the Director-General of the Finance Ministry, Shai Babad, also said in relation to the negotiations with Noble Energy: "Usually there are more players in line who want to present a counter offer. We did not see any of those" (*ibid.*).

¹²³ Annual Budget Proposal for 2017-2018, *supra* note 46, at p. 24. (The author's translation).

¹²⁴ "Business in Israel: Turning against the tycoons", *The Economist* (September 14, 2013), available here: <http://www.economist.com/news/business/21586330-some-israels-leading-businessmen-are-suffering-backlash-turning-against-tycoons>.

¹²⁵ Several NGOs were involved in the protest against the Gas Framework, as well as in earlier protests against the Sheshinski and Zemach reports. These included: "Anu", an organization for social activism in Israel (http://www.anu.org.il/who_we_are_eng/); "The Social Guard", an NGO committed to monitoring the government and the politicians and fighting for social rights (<http://hamishmar.org.il/about-us-2/ourmission/>); "The Israeli Forum for Energy", an advocacy group committed "to secure a sustainable energy future for Israel" (<http://www.energia.org.il/english/>); "The Legal Forum for Israel", an NGO acting to defend by legal means the national interests of Israel (<http://www.haforum.org/about-us/>); "The Association for a Sustainable Economy", an NGO working to promote sustainability in Israel's economy (<http://www.ecoeco.org.il/>); and "Green Course", "a grassroots activist organization that works to influence decision makers in Israel to create public sustainable environmental and social policy" (<https://www.green.org.il/en/mission/>). All of these groups were organized under an umbrella framework called "The Gas Struggle Front", which coordinated the struggle of all of these NGOs against the Gas Framework, and organized demonstrations and public protests (<http://www.gas4israel.org/>). These demonstrations mobilized thousands of demonstrators all over Israel, which were also joined by several Members of the Knesset, mainly from the opposition. See for instance, Ynet Reporters, "Thousands across Israel demonstrate against the Gas Plan" (15.11.15) <http://www.ynetnews.com/articles/0,7340,L-4725735,00.html>

years, the combined reserves of the Tamar and Leviathan gas fields represent only around 0.4% of the world's total natural gas reserves, and the expected combined annual production from these fields is only 0.1% of global annual production.¹²⁶ Hence, Israel needs to maintain an investment climate that is competitive with other gas producing countries.¹²⁷

What can be done? Reassessment of Israel's foreign investment policy in light of recent developments

The developments described in the previous sections require a reassessment of Israel's investment policies. The natural gas discoveries could be a complete game-changer for the future of the country, both economically and geopolitically. From an economic perspective, they are expected to free the country from an almost 100% dependency on imports for its energy supply, while also opening up new lucrative sources of income from taxes and exports. The Knesset has by law set up a special sovereign wealth fund, named "The Fund for the Citizens of Israel", for all of the State's income from natural gas and oil taxes, in order to ensure that the public will gain maximum benefit from the gas finds.¹²⁸ The fund is meant to be a long-term wealth fund whose earnings can be used only for certain social, educational and economic purposes, as will be approved by a special public committee.¹²⁹ From a geopolitical perspective, the gas discoveries may establish the basis for future political agreements that can influence the stability of the region and create conditions for cooperation between former adversaries.¹³⁰ Such cooperation may have the type of positive spillover effects that classic liberals and functionalists have been talking about.¹³¹ However, for that to happen, huge investments of previously unprecedented magnitudes need to be made in the development of the Leviathan, Tanin and Karish gas fields and in laying of pipelines from them to the Israeli coast and to potential export destinations. The regulatory instability displayed in Israel since the gas was discovered has delivered a serious blow to the country's image as a reliable investor-friendly economy. When you add that to the serious security problems and frequent wars, military engagements and terror attacks that the country has experienced ever since its birth in 1948, one can understand why foreign investors may be hesitant to make huge long-term investments in its natural resource sector. The Israeli Government understands that. That is why in its recently published Offshore Bid Round Launch the Government tries to relieve the expected

¹²⁶ The proven reserves of Israel are estimated at 835 BCM, and a more optimistic estimate of the reasonable reserves sets them at 955 BCM. The estimates of the world's total reserves are 206,400 trillion metric cubes. Hence, Israel's reserves are around 0.43% of the total. See "Natural Gas in Israel", at https://ecowiki.org.il/wiki/%D7%92%D7%96_%D7%98%D7%91%D7%A2%D7%99_%D7%91%D7%99%D7%A9%D7%A8%D7%90%D7%9C.

¹²⁷ See also Uri Redler, "Crime and Punishment: The Social Protests Chase Away Investors", *Mida* (9.12.2015) (Hebrew), available here: <http://mida.org.il/2015/12/09/%D7%94%D7%97%D7%98%D7%90-%D7%95%D7%A2%D7%95%D7%A0%D7%A9%D7%95-%D7%94%D7%9E%D7%97%D7%90%D7%95%D7%AA-%D7%94%D7%97%D7%91%D7%A8%D7%AA%D7%99%D7%95%D7%AA-%D7%9E%D7%91%D7%A8%D7%99%D7%97%D7%95%D7%AA-%D7%90/>

¹²⁸ The Fund for the Citizens of Israel Law, 5774-2014, passed by the Knesset on July 14, 2014.

¹²⁹ *Ibid.*, Article 38(b) and Article 39. The Committee's mandate is to propose a detailed plan for the use of the annual earnings of the fund in accordance with the Government's proposal.

¹³⁰ Already at this stage we know of several letters of understanding that have been signed between the Israeli concessionaires (or their foreign partners) and Egyptian, Jordanian and Palestinian buyers that hopefully will lead to the signature of long-term supply contracts. See, for instance, "Israel will sell gas to Jordan for more than \$15 billion", *Globes* 3.9.2014 (Hebrew), available at: <http://www.globes.co.il/news/article.aspx?did=1000968817>.

¹³¹ Classic liberal thinkers such as Eméric Crucé in the 17th century and Adam Smith and Thomas Paine in the 18th century argued that free trade and economic interdependence promoted peaceful relations. See e.g. John R. Oneal and Bruce M. Russett, "The Classical Liberals were Right: Democracy, Interdependence and Conflict 1950-1985", *International Studies Quarterly* (1997) **41** 267-294, at 268; and S.W. Polachek, "Conflict and Trade", *Journal of Conflict Resolution* 24:55-78 (1980). For the functionalist approach, see David Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization* (Oxford University Press, 1943); Ernst B. Haas, "International Integration: The European and the Universal Process", 15 *International Organization* 366 (1961).

apprehensions of potential foreign investors by making the following statement: “We are committed to provide long-term regulatory stability and favorable environment for investment.”¹³² However, foreign investors will naturally ask themselves what guarantees there are for this promise.

There are in principle two levels on which the Israeli Government can try to address the situation and provide guarantees and incentives to foreign investors. One is the domestic level. Here the Government can offer various incentives and benefits to foreign investors, such as tax breaks, subsidies, and improved infrastructure,¹³³ hoping that these benefits can somehow offset the costs created by the political risks in the country and in the region. However, such benefits are not cheap and come at the expense of the taxpayers and of other worthy causes.¹³⁴ The other level at which the problem may be addressed is the international one. The Government can address the legitimate concerns of foreign investors by providing them with international, legally binding, guarantees that will minimize the political risks that jeopardize their investments. Such guarantees will ensure that the investors will not bear the costs of unreasonable or discriminatory acts of the host government or of broken commitments. They are likely to alleviate concerns and help to restore the trust of potential foreign investors in the energy sector. And as long as the government does not act in violation of its international commitments, such tools are considerably less expensive than subsidies, tax breaks and other financial incentives bestowed by governments upon foreign investors.

Do BITs in fact help to attract foreign investment? This is a question that is hotly debated in the empirical literature.¹³⁵ Some studies point to little or no effect.¹³⁶ A study conducted by Mary Hallward-Driemeier, for instance, finds only some correlation between the number of BITs a developing country has in force and the amount of FDI it receives.¹³⁷ However, according to her findings, the correlation is stronger for countries with strong domestic institutions, such as Israel.

Several other studies do find positive correlation between BITs and FDI. Neumayer and Spess, for instance, in a study in 2005, found a strong effect of BITs on FDI inflows.¹³⁸ They conclude:

The message to developing countries therefore is that succumbing to the obligations of BITs does have the desired payoff of higher FDI inflows ... BITs fulfill their purpose, and those developing

¹³² “Searching for Oil & Gas in Israel, 1st Offshore Bid Round” published on November <http://www.energy-sea.gov.il/English-Site/Pages/HomePage.aspx>

¹³³ Indeed, the Government is now considering to grant various incentives to developers of small and medium-sized gas fields (see Press Release of the Ministry of Energy of December 13, 2016, in Hebrew: <http://energy.gov.il/about-the-Office/SpeakerMessages/Pages/GxmsMniSpokesmanOS2Dec16.aspx>)

¹³⁴ Indeed, such investment incentives have been offered at great expense in the past to foreign investors and are still offered under the Law for the Encouragement of Capital Investment, 5719-1959. For instance, in 2014, the government granted up to \$600 million in tax breaks and grants to Intel in return for the company’s commitment to upgrade its computer chips production facility in Kiryat Gat. See <http://www.timesofisrael.com/intel-to-spend-6b-in-israels-biggest-ever-tech-investment/> . See also Avi Nov, *supra* note 13.

¹³⁵ Many of the studies have been collected and published in a collection edited by Karl Sauvant and Lisa Sachs: *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Karl P. Sauvant & Lisa Sachs, eds.), (Oxford University Press, 2009).

¹³⁶ See Emma Aisbet, “Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation” in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Karl P. Sauvant & Lisa Sachs, eds.), (Oxford University Press, 2009) 395-437; and Lauge N.S. Poulsen, “The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence” *Yearbook on International Investment Law and Policy* 2009/2010 (New York: Oxford University Press, 2010), pp. 539-574, available here: http://discovery.ucl.ac.uk/1471858/1/Poulsen_bits%20pri%20yearbook.pdf. These are two of the less supportive studies.

¹³⁷ Mary Hallward-Driemeier, “Do Bilateral Investment Treaties attract FDI? Only a Bit... and They Could Bite”, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=636541 .

¹³⁸ Eric Neumayer & Laura Spess, “Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?” 33 *World Development* 1567 (2005).

countries that have signed more BITs with major capital exporting developed countries are likely to have received more FDI in return.

Another study undertaken by the UN Commission on Trade and Development in 1998, found that BITs “have a consistently positive if somewhat marginal statistical (90%–95% significance levels) impact in the time-series study”, and that this “certainly implies that BITs do play a quantifiably positive role in promoting investment.”¹³⁹

Salacuse and Sullivan found that US BITs are more likely to induce FDI inflows than those concluded by other OECD countries, and that a host country with a US BIT is more likely to increase its overall FDI (from all OECD countries) than a country without a US BIT, holding other factors equal.¹⁴⁰ This finding was confirmed in another study by Yoram Haftel, whose research shows that mutually ratified BITs between the US and developing countries increase FDI inflows into those countries, because they operate as a costly signal of pro-investment climate and as a credible commitment to an irreversible protection of foreign investment.¹⁴¹ Both of these studies would suggest that Israel could benefit considerably from concluding a BIT with the US.

Thus, I believe it is time to reconsider the use of investment treaties as a tool to attract foreign investment to Israel. The belief that FDI will flow to here in abundance, in particular to the energy sector, without any international guarantees is not sustainable anymore, in view of what has happened. It is in the country’s interest that for each investment opportunity, several, not one, foreign investor should compete. Moreover, the view that to sign investment treaties with developed countries is a bad signal to international markets, is incorrect and outdated. Ever since NAFTA with its extensive investment chapter was signed in 1992, and in particular during the last few years, we are seeing more and more BITs or comprehensive trade and investment agreements negotiated and signed between developed countries.¹⁴² In an era where Canadian and Australian investors in the United States are protected by an international treaty (NAFTA and the US-Australia FTA¹⁴³, respectively) and vice versa; and at a time when such a treaty with an advanced investment-protection chapter was recently signed and ratified

¹³⁹ As summarized in Jeswald W. Salacuse & Nicholas P. Sullivan, “Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain”, Sauvart and Sachs, *supra* note 135, p. 146

¹⁴⁰ *ibid.*, p. 147-148.

¹⁴¹ Yoram Z. Haftel, “Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries”, *Review of International Political Economy* 17:2, 348-377 (2010). Haftel also provides a partial explanation to some of the less supportive findings by showing that only ratified treaties have a positive impact on FDI flows into developing countries, and not signed treaties that have not yet entered into force. Hence, studies (such as the 1998 UNCTAD study cited above) which count all treaties, including unratified ones, receive inaccurate results.

¹⁴² The two most famous agreements of this kind are the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP). The TPP was signed in February 2016 between 12 of the Pacific Rim countries, including the developed countries Australia, Canada, Japan, New Zealand, Singapore and the USA, and it contains an investment chapter with ISDS. The agreement is awaiting ratification, but now it seems unlikely that the USA will ratify it given the election of President Donald Trump who has vowed to withdraw from the agreement. However, Japan has already ratified, and other signatories may decide to follow. The TTIP is a proposed agreement between the USA and the EU, which has been negotiated since 2013 and also has a comprehensive and innovative investment chapter. If approved, this mega-agreement would cover the world’s two largest economies and cross-border investments totaling over \$3,300 billion, several times more than any other agreement to date. However, negotiations are not expected to finish before 2019 or 2020, and it remains to be seen if the agreement can be finalized and ratified, given the fierce opposition it arouses in some circles. There are also several other so-called North-North agreements, some of which are mentioned and discussed in the next footnote.

¹⁴³ See Chapter 11 of the Australia-US Free Trade Agreement of 2005, available here: <http://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Pages/chapter-eleven-investment.aspx>. It should be noted, however, that while this agreement provides comprehensive protection for investment, both pre- and post-establishment, it does not include an ISDS provision. One could also mention the Japan-Korea BIT of 2002, which also provides both pre- and post-establishment protections, and does have an ISDS mechanism.

between the European Union and Canada,¹⁴⁴ and another one between the EU and Singapore¹⁴⁵ awaits final approval, the view that such treaties are only appropriate in North-South relations is clearly obsolete.

In order for such treaties to be effective in attracting foreign investment, one needs to sign them with capital-exporting countries. Such treaties can have general application to all sectors, such as in most BITs, or they can be limited to the energy sector, as with the Energy Charter Treaty (ECT). In fact, the ECT offers many other benefits to Israel's emerging energy sector, in addition to investment protection, that are worth considering, such as market access and freedom of transit. Indeed, one needs to consider whether perhaps the problems described in length above are peculiar to the energy sector, and therefore an investment agreement focused on the energy sector, such as the ECT, may suffice. Another worthwhile option for Israel is to negotiate comprehensive trade and investment agreements with the economic powers in Asia, such as China, India, Japan and Australia. Such agreements are likely to boost both our trade with these countries and to help to attract the capital needed in order to explore and discover more of the gas and oil reserves that are hiding in the sea.

Indeed, we may be seeing a beginning of a reconsideration of Israel's investment policy, in the Government's recent decision to negotiate a comprehensive bilateral investment agreement with Japan.¹⁴⁶ If these negotiations are concluded successfully, this will mark Israel's first modern BIT with a developed country. It remains to be seen whether this is a one-time event or reflects a systematic change of policy as recommended in this article.

¹⁴⁴ The European Union-Canada Comprehensive Economic and Trade Agreement (CETA) was adopted by the EU Council and signed at the EU-Canada summit on October 30, 2016. It includes a comprehensive investment protection chapter, with both pre- and post-establishment protection, and with Investor-State dispute settlement provisions, including a permanent dispute settlement tribunal and an appeal mechanism.

¹⁴⁵ The EU and Singapore completed the negotiations for a comprehensive free trade agreement on 17 October 2014 and it is now awaiting final approval by the EU institutions. It includes a comprehensive investment chapter (Chapter 9) including ISDS. It should be noted that Singapore has a GDP per capita almost twice as high as Israel.

¹⁴⁶ Government Decision No. 2395, 4.1.2015, para. 3, available here: <http://www.pmo.gov.il/Secretary/GovDecisions/2015/Pages/dec2395.aspx>. It should be noted that the decision to negotiate this new BIT does not seem to be part of a systemic change in Israel's international investment treaty policy, but rather part of a targeted effort at strengthening the economic ties with Japan, following PM Netanyahu's official visit there in May 2014. Indeed, the heading of the decision is "Strengthening the Economic Relations and Cooperation with Japan", and the BIT negotiation is only one of a long list of suggested cooperation projects included in the Government's decision. On the comprehensive nature of the proposed BIT one can learn from the more recent Government Decision No. 1437, 4.5.2016, available here: <http://www.pmo.gov.il/Secretary/GovDecisions/2016/Pages/dec1437.aspx>. This decision, that probably reflects a more advanced stage of the negotiations with Japan, was taken in order to prepare the ministries and other government entities for the upcoming BIT and receive their input for the negotiations. It informs them that the BIT is going to include obligations to provide non-discriminatory treatment to Japanese investors and investments in all fields of economic activity. It will prohibit the imposition of performance requirements on such investors in relation to their investments or related activities, or restrictions on the composition of the management or Board of Directors of a corporation that is an "investment" under the BIT, except for as will be provided in the treaty. The non-discrimination obligations will apply to all stages of the investment, both in the pre- and post-investment stages.

Annex 1

Israel's Bilateral Investment Treaties¹⁴⁷

Contracting Party	Full title of the agreement	Date of signature	Status	Expiration Date
Albania	The Reciprocal Promotion and Protection of Investments	29.1.1996	In force since 18.2.1997.	10 years + 12 month from Termination. 10 years after termination ¹⁴⁸
Argentina	The Reciprocal Promotion and Protection of Investments	23.7.1995	In force since 10.04.1997.	10 years + 12 month from Termination. 10 years after termination
Armenia	The Reciprocal Promotion and Protection of Investments	19.1.2000	In force since 25.6.2003.	10 years + 12 month from Termination. 10 years after termination
Azerbaijan	The Reciprocal Promotion and Protection of Investments	20.2.2007	In force since 16.1.2009.	10 years + 12 month from Termination. 10 years after termination
Belarus	The Reciprocal Promotion and Protection of Investments	11.4.2000	In force since 14.08.2003.	10 years + 12 month from Termination. 10 years after termination
Bulgaria	The Reciprocal Promotion and Protection of Investments	6.12.1993	In force since 17.12.1999. Amended.	10 years + 12 month from Termination. 10 years after termination
Bulgaria	Amending Protocol	7.7.2011		
China	The Reciprocal Promotion and Protection of Investments	10.4.1995	In force since 13.1.2009.	5 years + 12 month from Termination. 10 years after termination
Colombia	Free Trade Agreement between Israel and Colombia (Chapter 10 – Investments)	30.9.2013	Signed – Not Ratified	
Congo	The Reciprocal Promotion and Protection of Investments	14.5.1985	Signed – Not Ratified	
Croatia	The Reciprocal Promotion and Protection of Investments	1.8.2000	In force since 18.3.2013	10 years + 12 month from Termination. 10 years after termination
Croatia	Additional Protocol between the Government of the Republic of Croatia and the Government of the State of Israel on Amendments to the	30.3.2011	Signed – Not Ratified	

¹⁴⁷ The list has been compiled based on several web-based sources and based on information obtained from Israeli Government officials. The official sources are: The UNCTAD International Investment Agreements Navigator: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/102#iiaInnerMenu> ; Israel's Ministry of Finance, Chief Economists Office, List of Bilateral Investment Agreements: <http://www.mof.gov.il/ChiefEcon/InternationalConnections/Pages/BIT.aspx?WPID=WPQ12&PN=1&ptoken=1420161317100> ; Israel's Ministry of Foreign Affairs, Database of Bilateral Treaties: <http://mfa.gov.il/MFA/AboutTheMinistry/LegalTreaties/Pages/Bilateral-Treaties.aspx>

¹⁴⁸ The Agreement is in force for a period of 10 years. Thereafter it shall continue in force until the Expiration of 12 months from the date on which either contracting party shall have given written notice of Termination to the other. In respect of investments made while this agreement in force, its provisions shall continue in effect with respect to such investments for a period of 10 years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

	Agreement between the Government of the Republic of Croatia and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments			
Cyprus	The Reciprocal Promotion and Protection of Investments	13.10.1998	In force since 17.6.2003	10 years + 12 month from Termination. 10 years after termination
Czech Republic	The Reciprocal Promotion and Protection of Investments	23.9.1997	In force since 16.3.1999	10 years + 12 month from Termination. 10 years after termination
El Salvador	The Reciprocal Promotion and Protection of Investments	3.4.2000	In force since 7.7.2003	10 years + 12 month from Termination. 10 years after termination
Estonia	The Reciprocal Promotion and Protection of Investments	14.3.1994	In force since 23.5.1995	10 years + 12 month from Termination. 10 years after termination
Ethiopia	The Reciprocal Promotion and Protection of Investments	26.11.2003	In force since 22.3.2004	10 years + 12 month from Termination. 10 years after termination
France	<i>Accord entre le Gouvernement de la République française et le Gouvernement de l'Etat d'Israël sur l'encouragement et la protection réciproques des investissements</i>	9.6.1983	In force since 11.1.1985	According to Israel's MOF, expired in 1995, but continued to apply for another 20 years to investments made before that date. Not listed under Israel's list, but France maintains that it is still in force and has notified it as such to the EU Commission. ¹⁴⁹
Georgia	The Reciprocal Promotion and Protection of Investments	19.6.1995	In force since 18.2.1997	10 years + 12 month from Termination. 10 years after termination
Germany	The Encouragement and Reciprocal Protection of Investment	24.6.1976	In force since 14.4.1980. According to MOJ, had only temporary effect. But notified by Germany to EU Commission. In Israel applies only to approved investments. ¹⁵⁰	Unlimited time. Need one year notice before termination

¹⁴⁹ See http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2016.149.01.0001.01.ENG&toc=OJ:C:2016:149:T OC. According to information obtained by the present author from Israel's Ministry of Finance, the status of the treaty is in dispute between the parties: Israel is of the opinion that it has expired, while France maintains that it is still in force.

¹⁵⁰ Article 1(c)(ii) provides that the term "investment" shall refer: "in respect of investments in the territory of the State of Israel, to all investments admitted by Israel by a document of admission." The meaning of such a document is elaborated in the Protocol to the agreement, which in Ad Article 1(a), provides: "The expression 'document of admission' shall mean a document by which the State of Israel admits into its territory for the purposes of the Treaty an investment by a national or company of the Federal Republic of Germany." (emphasis added – A.R.). In other words, the Israeli authorities must

Guatemala	The Reciprocal Promotion and Protection of Investments	7.11.2006	In force since 15.1.2009	10 years + 12 month from Termination. 10 years after termination
Hungary	The Reciprocal Promotion and Protection of Investments	14.5.1991	In force since 14.9.1992, but treaty terminated on 26.6.2007; existing investments are protected for ten years after termination.	10 years + 12 month from Termination. 10 years after termination
India	The Promotion and Protection of Investments	29.1.1996	In force since 2.1997	Unlimited time unless a contracting party gives one-year notice
Kazakhstan	The Reciprocal Promotion and Protection of Investments	27.12.1995	In force since 19.2.1997	10 years + 12 month from Termination. 10 years after termination
Korea	The Reciprocal Promotion and Protection of Investments, Including Protocol Ad Article 6	7.2.1999	In force since 19.6.2003.	10 years + 12 month from Termination. 10 years after termination
Latvia	The Reciprocal Promotion and Protection of Investments	27.2.1994	In force since 9.5.1995.	10 years + 12 month from Termination. 10 years after termination
Lithuania	The Reciprocal Promotion and Protection of Investments	2.10.1994	In force since 11.7.1996.	10 years + 12 month from Termination. 10 years after termination
Moldova	The Reciprocal Promotion and Protection of Investments	22.6.1997	In force since 16.3.1999.	10 years + 12 month from Termination. 10 years after termination
Mongolia	The Reciprocal Promotion and Protection of Investments	25.11.2003	In force since 2.9.2004 (UNCTAD) or since 13.2.2006 (Israel MOF)	10 years + 12 month from Termination. 10 years after termination
Montenegro	The Reciprocal Promotion and Protection of Investments	28.7.2004 (with Serbia)	In force since 7.2.2006	10 years + 12 month from Termination. 10 years after termination
Myanmar	The Reciprocal Promotion and Protection of Investments	5.10.2014	Signed – Not yet Ratified	
Poland	The Reciprocal Promotion and Protection of Investments	22.5.1991	In force since 6.5.1992. Amended.	10 years + 12 month from Termination. 20 years after termination
Poland	Protocol between the Government of the Republic of Poland and the Government of the State of Israel to Amend the Agreement for the Reciprocal Promotion and Protection of Investments	27.6.1997		

have issued such a document, which in effect acknowledges that the investment will be subject to the BIT, in order for the BIT to apply to it. In contrast, for Israeli investments in Germany, there is no such formal requirement. Rather, the definition is: “in respect of investments in the territory of the Federal Republic of Germany, to all investments made in accordance with its legislation”

Romania	Summary Record of the Negotiations Concerning An Agreement for The Promotion and Reciprocal Protection of Investment	5.6.1997	In force since 27.7.2003. Amended.	10 years + 12 month from Termination. 10 years after termination
Romania	Amending Protocol	12.8.2010		
Serbia	The Reciprocal Promotion and Protection of Investments	28.7.2004 (with Montenegro)	In force since 7.2.2006	10 years + 12 month from Termination. 10 years after termination
Slovakia	The Reciprocal Promotion and Protection of Investments	8.9.1999	In force since 24.6.2003.	10 years and shall continue until either contracting party notifies the other. 10 years after termination
Slovenia	The Reciprocal Promotion and Protection of Investments	13.5.1998	In force since 2.10.1999. ¹⁵¹	10 years + 12 month from Termination. 10 years after termination
South Africa	The Reciprocal Promotion and Protection of Investments	20.10.2004	Signed – Not Ratified: Pending ratification by South Africa, Israel ratified agreement on March 30, 2009	
Thailand	The Reciprocal Promotion and Protection of Investments	18.02.2000	In force since 28.08.2003	10 years + 12 month from Termination. 10 years after termination
Turkey	The Reciprocal Promotion and Protection of Investments	14.3.1996	In force since 27.8.1998.	10 years + 12 month from Termination. 10 years after termination
Turkmenistan	The Reciprocal Promotion and Protection of Investments	24.5.1995	In force since 17.3.1997.	10 years + 12 month from Termination. 10 years after termination
Ukraine	The Reciprocal Promotion and Protection of Investments	24.11.2010	In force since 18.2.1997.	10 years + 12 month from Termination. 10 years after termination
Uruguay	The Reciprocal Promotion and Protection of Investments	30.3.1998	In force since 7.10.2004.	10 years + 12 month from Termination. 10 years after termination
Uzbekistan	The Reciprocal Promotion and Protection of Investments	4.7.1994	In force since 18.2.1997.	10 years + 12 month from Termination. 10 years after termination

¹⁵¹ In the UNCTAD database this treaty is listed erroneously as “terminated”. The present author has obtained information from Israel’s Ministry of Finance (Mr. Boaz Fleischman-Alaluf, Chief Economist’s Office, in charge of BITs), according to which this is a result of a mistaken notification by Israel to UNCTAD, and that in fact, the treaty is still in force.

