



# Israel–Japan bilateral investment treaty

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Despite geographical distance, Japan and Israel have certain similar characteristics.<sup>[1]</sup> Although not abundant in natural resources, they are two of the most economically developed countries in the world.<sup>[2]</sup> Their development relies on advanced technology, which enables them to overcome a lack of natural resources.<sup>[3]</sup> In addition, they have a close relationship with the United States, both politically and economically.<sup>[4]</sup> It is sensible, therefore, for Japan and Israel to cooperate with each other in order to enhance their technological and economic position. Indeed, David Ben-Gurion, Israel's first Prime Minister, noted that: 'Israel and Japan are situated at opposite ends of Asia, but this is a fact which binds them together rather than separates them. The vast continent of Asia is their connecting link, and the consciousness of their Asian destiny is their common thought'.<sup>[5]</sup>

Despite their common ground, the bilateral relationship between these two countries failed to flourish for a long period of time. While they established a diplomatic relationship in the early 1950s, for many decades they went through a period of chilled relations, until the 1990s.<sup>[6]</sup> The political tension between Israel and the Arab nations, together with Japan's reliance on oil produced in the Middle East, created an invisible wall between these countries.<sup>[7]</sup>

In the 1990s, as the Middle East conflict became less intense, the Japan-Israel relationship gradually began to improve. In 1995, Japan sent its sitting Prime Minister, Tomiichi Murayama, to Israel for the first time in its history.<sup>[8]</sup> The bilateral relationship kept steadily growing in the early 2000s. This improvement has been encouraged by Japan's current Prime Minister, Shinzo Abe, who has been in the office since 2012.<sup>[9]</sup>

In accordance with the recent improvement of bilateral relations, investment activities between these countries are significantly expanding. In February 2017, Japan and Israel entered into the Israel–Japan bilateral investment treaty (the 'Israel–Japan BIT'),<sup>[10]</sup> which is expected to promote the flow of bilateral investment between the two countries.

This article provides an overview of relations between Israel and Japan, from the establishment of a diplomatic relationship to recent cooperation in the fields of science and technology. It goes on to examine the variety of investment protection mechanisms contained in the Israel–Japan BIT.

## *History of the Israel–Japan relationship*

The Israel–Japan relationship goes back to the early twentieth century. One can find Japan's friendly attitude towards the Zionist movement in its support for the Balfour Declaration,<sup>[11]</sup> which declared that the British government 'view with favour the establishment in Palestine of a national home for the Jewish people'.<sup>[12]</sup> During the Second World War, while allied with Germany, Japan did not implement the Nazis' anti-Jewish policies.<sup>[13]</sup> It is well-known that Sugihara Chiune, Vice Consul for the Japanese Government in Lithuania, saved 6,000 Jewish people from Nazi holocaust camps and Russian internment camps by issuing group transit visas to Japan.<sup>[14]</sup>

After the Second World War, a diplomatic relationship between Israel and Japan was established. On 14 May 1948, Israel was created when David Ben-Gurion, the first Prime Minister of Israel, delivered its declaration of independence.<sup>[15]</sup> Four years later, in January 1952, Israel proposed mutual recognition and the exchange of diplomatic missions to Japan, which was preparing for the end of the occupation by the Allied Powers.<sup>[16]</sup> In February 1952, Japan approached many countries, including Israel, proposing the establishment of diplomatic relations.<sup>[17]</sup> These efforts brought about results: Japan regained its independence on 28 April 1952;<sup>[18]</sup> in the same year, Japan recognised Israel. In 1952, Israel became the first Middle Eastern country to open a diplomatic mission in Tokyo.<sup>[19]</sup> Shortly after, in 1955, Japan also opened its legation in Tel Aviv.<sup>[20]</sup> In 1963, both countries elevated these diplomatic missions by establishing embassies.<sup>[21]</sup>

Despite the early establishment of diplomatic ties, the Israel–Japan relationship did not flourish until the 1990s. The main reason it understood to have been Japan's dependence on oil produced in the Middle East.<sup>[22]</sup> A structural shift in energy consumption from domestic coal to imported oil<sup>[23]</sup> meant that by 1957, Japan had become one of the largest consumers of the oil produced by the Arab countries of the Middle East, which had a tense relationship with Israel.<sup>[24]</sup> Although Japan initially took a neutral position on the conflict between Israel and the Arab world, it eventually adopted a pro-Arab position in 1973. The Government of Japan took a position in support of the Palestine Liberation Organization<sup>[25]</sup> and Japanese companies participated in a boycott against Israel, refusing to sell their products to Israeli entities.<sup>[26]</sup> Japan also declined to send its high-level officials to Israel until the mid 1980s.<sup>[27]</sup>

The Israel–Japan relationship began to improve in the 1990s, following the end of the Gulf War and the cancellation of the Japanese anti-Israel boycott. In 1995, Japan’s Tomiichi Murayama became the very first sitting Japanese Prime Minister to visit Israel; he met Israeli Prime Minister Yitzhak Rabin in Jerusalem.<sup>[28]</sup> Japan and Israel entered into a number of treaties, including: a double taxation treaty (1993),<sup>[29]</sup> a cooperation agreement in science and technology (1994)<sup>[30]</sup> and an air services agreement (1999).<sup>[31]</sup> The bilateral relationship kept steadily growing in the early 2000s: Japanese companies expanded their business activities in Israel, and in the early 2000s, approximately half the cars running in Israel were made-in-Japan.<sup>[32]</sup> Japan’s Prime Minister Junichiro Koizumi visited Israel in 2006, and in response, Israel’s Prime Minister Ehud Olmert visited Japan in 2008.<sup>[33]</sup>

Japan’s current Prime Minister, Shinzo Abe, is making further efforts to enhance the Israel–Japan relationship, recognising Israel’s strength in the field of technology.<sup>[34]</sup> In May 2014, Israel’s Prime Minister Benjamin Netanyahu and Japan’s Shinzo Abe held a summit meeting in Tokyo, during which they signed a Joint Statement on Building a New Comprehensive Partnership, which declared enhanced bilateral relations.<sup>[35]</sup> The following year, in January 2015, Shinzo Abe visited Israel accompanied by the top executives of Japanese business giants, including NEC Corp, Panasonic and Mitsubishi Chemical Holdings.<sup>[36]</sup> In February 2017, recognising the mutual benefits of promoting investment between them, Japan and Israel entered into the Israel–Japan BIT.<sup>[37]</sup> The continuing development of their bilateral relationship can be seen in Abe’s second visit to Israel in May 2018, again, accompanied by top business executives.<sup>[38]</sup>

## ***Israel–Japan BIT***

### *Background*

The Israel–Japan BIT aims to promote investment between Israel and Japan. Japanese companies are expanding their investment in Israel: during the three years from 2013 to 2016, investment by Japanese companies in the Israeli market increased twenty-fold.<sup>[39]</sup> An increasing number of Japanese companies are interested in accessing Israeli markets in the fields of technology, including: cyber security, medical equipment, IT, software, semiconductors and healthcare.<sup>[40]</sup> The most remarkable examples include Rakuten’s acquisition of Viber, an Israeli messaging and voice over internet protocol (VoIP) services operator, for US\$900m in 2014,<sup>[41]</sup> and Sony’s acquisition of Altair, an Israeli long-term evolution (LTE) technology company, for US\$212m in 2016.<sup>[42]</sup> Investment in the other direction – from Israel to Japan – is also growing. For instance, in December 2017, it was reported that Yozuma Group, an Israeli venture capital company, planned to invest at least US\$88m in Japanese technology startups.<sup>[43]</sup>

Aiming to encourage further bilateral investment, the two countries entered into negotiations of a bilateral investment treaty at an Israel–Japan summit meeting held on 12 May 2014.<sup>[44]</sup> Subsequently, the two parties had their first meeting in Tokyo in May 2015 and reached a substantial agreement at the fourth meeting, held in Israel in December 2016.<sup>[45]</sup> In the following year, on 1 February 2017, the parties signed the Israel–Japan BIT in Tokyo, which came into effect on 10 May 2017.<sup>[46]</sup>

### *Scope of protection: definition of ‘investment’*

Article 1(a) of the Israel–Japan BIT provides that: ‘the term “investment” means every kind of asset made in accordance with applicable laws and regulations, owned or controlled, directly or indirectly, by an investor’, and provides a non-exhaustive list of examples of investment.<sup>[47]</sup>

Under this definition, ‘every kind of asset’, including enterprise, shares, bonds, derivatives, contractual rights, intellectual property, licenses and movable and immovable property, can constitute an ‘investment’. This is consistent with the traditional approach to include any form of investment in the scope of the investment protection.<sup>[48]</sup> The Israel–Japan BIT clarifies that such assets include ‘an enterprise and a branch of an enterprise’, as well as ‘shares, stocks or other forms of equity participation in an enterprise.’<sup>[49]</sup> These assets can be ‘directly’ or ‘indirectly’ owned or controlled by an investor in order to qualify as ‘investment’.<sup>[50]</sup> These distinctions are particularly important when investment was made through a multi-layered corporate structure. For example, if Corporation A owns, indirectly through its subsidiary Corporation B, the shares of Corporation C established in the host state, both Corporation A and Corporation B can bring an arbitration as, respectively, indirect and direct investors.<sup>[51]</sup> In addition, the Israel–Japan BIT does not provide a limitation on when an asset is ‘owned’ by an investor. This silence can be interpreted as meaning that minority or non-controlling shareholders are entitled to bring a claim seeking reimbursement of damages incurred by the company.<sup>[52]</sup>

The coverage of ‘investment’ is not indefinite. The Israel–Japan BIT removes from the scope of ‘investment’ sovereign debt and monetary claims solely arising from commercial contracts for sales of goods or services, as well as credits granted in relation to these contracts.<sup>[53]</sup> In addition, the Israel–Japan BIT requires investment to be ‘made in accordance with applicable laws and regulations’.<sup>[54]</sup> As a result, investment made in violation of local laws and regulations cannot qualify as ‘investment’ under the Israel–Japan BIT.<sup>[55]</sup> Moreover, the Israel–Japan BIT adopts, by its Article 21, a denial of benefits provision. This is aimed to control so-called treaty-shopping, that is, ‘legal operations aimed at a strategic invocation, creation, or change of nationality with the aim of accessing more beneficial investment treaties’.<sup>[56]</sup> However, the scope of Article 21 is narrow,<sup>[57]</sup> and the contracting states can deny the benefits of the treaty only in limited situations where, in essence, the investor is majority-owned by person(s) of a state that the denying party does not maintain diplomatic relations with; or person(s) with whom the denying party prohibits transactions.<sup>[58]</sup>

### *Substantive provisions*

The Israel–Japan BIT provides a variety of investment protection provisions. These include:

- national treatment;<sup>[59]</sup>
- most-favoured-nation treatment;<sup>[60]</sup>

- fair and equitable treatment;[\[61\]](#)
- full protection and security;[\[62\]](#)
- access to the courts of justice;[\[63\]](#)
- prohibition of performance requirements;[\[64\]](#)
- prohibition of illegal expropriation;[\[65\]](#) and
- transfer of funds.[\[66\]](#)

Among these, the national treatment, most-favoured-nation treatment and prohibition of performance requirements apply not only to the post-establishment phase, but also to the pre-establishment phase of investment.[\[67\]](#) In addition, Article 9 mandates the contracting parties to ‘promptly publish, or otherwise make publicly available, its laws, regulations, administrative procedures, administrative rulings and court decisions of general application as well as international agreements which pertain to or affect the implementation and operation of [the Israel–Japan BIT]’. A breach of this transparency provision does not constitute a basis for investor–state arbitration.[\[68\]](#) The Israel–Japan BIT, however, does not contain an ‘umbrella clause’, which requires each contracting state to observe obligations with respect to investment by an investor of the other contracting state.

In addition, the Israel–Japan BIT provides clarifications on several controversies where investment tribunals sit in diversity. With respect to the most-favoured-nation treatment, Article 3(2) clarifies that it does not apply to the dispute settlement provisions of other treaties. This means that the Israel–Japan BIT does not take a position that allows an otherwise-precluded investor to file an arbitration by importing a more favourable dispute settlement provision.[\[69\]](#) In addition, the treaty clarifies that the most-favoured-nation clause does not import provisions from: the treaties that had already existed upon the promulgation of the Israel–Japan BIT, or any existing or future customs union, economic or monetary union, free trade area or similar international agreements.[\[70\]](#)

With respect to the fair and equitable treatment provision, Article 4 contains a reference to customary international law: ‘Each Contracting Party shall... accord to investments of investors of the other Contracting Party treatment in accordance with customary international law, including fair and equitable treatment’. This reference appears to express the contracting parties’ view that the fair and equitable treatment provision under the Israel–Japan BIT is only to provide protection under the minimum standard for treatment of aliens under customary international law, instead of creating an autonomous treaty standard,[\[71\]](#) which may require more favourable treatment than that under the minimum standard. Article 4, however, lacks the further clarification that the fair and equitable treatment provision is not intended to go beyond the minimum standard. Pointing out this lack of clear connection to the minimum standard, a commentator notes that the Israel–Japan BIT ‘may give rise to interpretations more favourable to investors than treaties more clearly limiting the [fair and equitable treatment] FET obligation to obligations under customary international law.’[\[72\]](#)

#### *Exceptions*

These substantive provisions are not necessarily applicable to all measures taken by the contracting states. The Israel–Japan BIT provides, in its Article 19(1), a so-called tax carve-out provision. Pursuant to this provision, the investment protections under the Israel–Japan BIT do not apply to ‘taxation measures’. However, because the treaty does not define the term ‘taxation measures’, it is difficult to determine the actual scope of the carve-out. In this regard, it is generally understood that a host state may not escape from a treaty obligation by merely categorising its regulatory measure as taxation.[\[73\]](#) In addition, it should be noted that Article 19(3) creates many exceptions to the carve-out, such as the following, which are all applicable to taxation measures:

- fair and equitable treatment;
- full protection;
- access to the courts of justice;
- transparency; and
- prohibition of illegal expropriation.[\[74\]](#)

In addition, the Israel–Japan BIT contains several exceptions, which authorise the contracting states to adopt regulatory measures in order to protect or maintain public interest. Article 15 provides general exceptions that permit the contracting states to adopt or enforce measures, as follows:

- ‘necessary to protect human, animal or plant life or health’;[\[75\]](#)
- ‘necessary to protect public morals or to maintain public order’;[\[76\]](#)
- ‘necessary to secure compliance with the laws or regulations’;[\[77\]](#)
- ‘imposed for the protection of national treasures of artistic, historic or archaeological value’;[\[78\]](#) or

- ‘relating to the conservation of living or non-living exhaustible natural resources’.[\[79\]](#)

These exceptions do not directly cover measures for environmental protection, but do cover those to the extent ‘necessary to protect human, animal or plant life or health.’[\[80\]](#) In addition, Article 16 allows the contracting states to adopt or maintain measures to: restrict ‘cross-border capital transactions’ and ‘payments or transfers’ in order to deal with ‘serious balance-of-payments and the external financial difficulties or threat’; or to prevent ‘serious difficulties for macroeconomic management’.[\[81\]](#)

#### *ISDS provision*

The Israel–Japan BIT includes a traditional investor–state dispute settlement (ISDS) provision.[\[82\]](#) In the event of an investment dispute, Article 24 allows the investor to file an arbitration against the host state. In contrast to recent EU investment treaties,[\[83\]](#) the case is heard by an ad hoc arbitral tribunal and both parties can freely appoint their arbitrator. The tribunal’s decision is final and there is no appeal mechanism.[\[84\]](#)

In order to file an arbitration, the investor first needs to try to resolve the dispute through consultation and negotiation for six months.[\[85\]](#) After this cooling-off period, the investor can initiate an arbitration under either the *International Centre for Settlement of Investment Disputes (ICSID) Rules*, the ICSID Additional Facility, the United Nations Commission on International Trade Law (UNCITRAL) Rules, or any other arbitration rules agreed by the parties.[\[86\]](#)

It should be noted that, under the Israel–Japan BIT, arbitration is not confidential in the traditional sense. Article 24(14) authorises the respondent to publish all documents submitted or issued in the arbitration, including exhibits. In addition, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration apply to UNCITRAL arbitrations initiated under the Israel–Japan BIT.[\[87\]](#) All briefs, witness statements, expert reports, lists of exhibits (exclusive of the exhibits themselves), hearing transcripts and the tribunal’s orders and decisions become public.[\[88\]](#)

#### **Conclusion**

After 50 years of inactivity, a growing number of Japanese companies are investing in Israeli markets. The Israel–Japan BIT provides the foundation for these investment activities. The scope of investment protection is large. The treaty adopts the traditional approach of including ‘every kind of asset’ in the definition of ‘investment’, and only provides limited grounds for the denial of treaty benefits.[\[89\]](#) In addition to a comprehensive set of substantive protections, the treaty provides a transparency provision through which investors are guaranteed to have prompt access to the latest laws and regulations concerning their investment.[\[90\]](#) In the event of an investment dispute, the ISDS provision enables the investor to bring an investor–state arbitration against the host state.

Nevertheless, it should be noted that the Israel–Japan BIT leaves a good amount of policy space to the contracting states. In particular, the fair and equitable treatment provision can be interpreted to be limited to protection under the minimum standard on treatment of aliens under customary international law.[\[91\]](#) In addition, the contracting states are entitled to introduce measures to maintain public interest, or to deal with extreme financial difficulty, although it is unclear how these provisions actually function in practice.[\[92\]](#)

The Israel–Japan BIT appears to be very pro-investment but does contain many mechanisms to prevent indefinite expansion of investment protection. Before making an investment decision, it is always recommended to understand what legal protections are available for that investment.

#### **Notes**