

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

DOES THE INVESTMENT BILL USHER-IN A NEW ERA OF UNEQUITABLE TREATMENT AMONG FOREIGN INVESTORS IN SOUTH AFRICA IN 'LIKE CIRCUMSTANCES'?

The Protection of Investment Bill (Investment Bill), has been passed by the National Assembly on 17 November 2015, and transmitted to the National Council of Provinces for concurrence. The Investment Bill has seen significant amendments since it was first released for public comment in November 2013 by the Department of Trade and Industry.

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Despite these changes, the Investment Bill still contains serious concerns for foreign investors, specifically from the European business community for the lack of a number of international investment law protection measures to encourage future trade and investment in South Africa.

Of greater concern appears to be the fact that the South African Constitution excludes compensation for deprivation or indirect expropriation of property rights, where most BITs provide for compensation for indirect expropriation.

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Despite these changes, the Investment Bill still contains serious concerns for foreign investors, specifically from the European business community for the lack of a number of international investment law protection measures to encourage future trade and investment in South Africa. The pertinent concerns for foreign investors remain the following:

- inadequate protection in the event of both direct and indirect expropriation;
- fair and equitable treatment in 'like circumstances'; and
- access to international arbitration to resolve disputes with the state.

Expropriation

The right against expropriation without compensation is guaranteed in terms of the South African Constitution, [albeit 'fair and equitable' compensation as opposed to pure market related compensation contained in Bilateral Investment Treaties (BITs)]. Of greater concern appears to be the fact that the South African Constitution excludes compensation for deprivation or indirect expropriation of property rights, where most BITs provide for compensation for indirect expropriation.

Indirect expropriation is usually associated with circumstances where the state does not obtain actual ownership of property

(no property right vests in the state), but by means of a law of general application which deprives everyone in the country (national or foreign) of certain proprietary rights. A good example is the Mineral and Petroleum Resources Development Act, 2002, as amended (MPRDA) which resulted in the deprivation of all mineral and petroleum rights privately owned by persons, subject to a transitional period, were the state became the custodian of all mineral and petroleum resources in South Africa – without being vested with the proprietary rights of the mineral or petroleum resources. The state only regulates on behalf of the people of South Africa the granting of rights, permits and permissions for the mining of minerals and production of petroleum.

It is the sovereign right of South Africa to decide what type of deprivation of property rights will be entitled to compensation. However, the unrestricted exclusion of all types of indirect expropriation may be perceived by investors to significantly lower the protective value found in BITs, even those BITs currently in the process of being reformed by other countries or regions. From a foreign investors' perspective, such protection is particularly desirable where the perception exists that governance is weak and that the domestic laws of the relevant host state may not be seen as

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reliable. In the absence of protection for indirect expropriation, investors may seek investment insurance from private or public providers in the country, potentially increasing the opportunity cost of doing business in South Africa.

Fair and Equitable Treatment (FET) and Most Favoured Nation (MFN)

Despite one of the main objectives of the Investment Bill being to foster equality between investors in South Africa, it appears to actually usher-in a new era of unequal treatment among foreign investors (or investors in general). The unequal treatment between foreign investors stem from the following:

- foreign investors from countries who have no bilateral investment agreements with South Africa for any new investments will only be entitled to rely on the rights it derives in terms of the Investment Bill or Constitution;
- foreign investors from countries with whom South Africa has bilateral investment agreements or still intend to conclude such agreements will be entitled to the rights in such BITs, including any other rights provided for in the domestic law.

The rights contained in BITs are in most instances more beneficial than the rights a foreign investor will have in terms of the Investment Bill. South Africa has indicated that in future it still intends to conclude BITs with states or regions which serves the economic and political interest of the

country. Foreign investors without any BIT protection will not be treated equally in 'like circumstances' as foreign investors with BITs in South Africa. They would derive more protection, unless those BITs are aligned to the Investment Bill, (which then makes no sense to conclude any new BITs with states).

Internationally there is a movement to reform BITs by either limiting or excluding protection measures such as MFN and FET. However, in these instances states still conclude that international investment agreements regulate other international investment law principles, as opposed to adopting domestic legislation such as South Africa. The exclusion of MFN and FET provides maximum flexibility to the state in respect of the various socio-economic policy objectives it must meet. However, it is important for South Africa which requires foreign direct investment (FDI) to meet its developmental goals and not to deter investments through, among others, creating circumstances where in 'like circumstances' foreign investors are treated differently without any objective basis.

There is no indication in the Investment Bill that among foreign investors in specific economic sectors there will be objective factors taken into account to justify 'unequal' treatment, similar to the national treatment provision. Should the Investment Bill indeed usher-in a new era of unequal treatment, this will also account for domestic investors and go against the

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fundamental basis of the Investment Bill 'to achieve a balance of rights and obligations that apply to all investors' as investors with BITs will be treated more favourably than any South African investors. We should be cautious not to create double standards among foreign investors (or domestic investors) in South Africa which could harm South African investments abroad in terms of the principle of reciprocity.

South Africa has taken a bold step to regulate future FDI through domestic legislation. It appears that other nations are also following an approach to provide states with more flexibility by limiting investors' rights, albeit through negotiating reforms to BITs. Once Parliament passes

the Investment Bill and transmits the bill to the president for his assent and proclaimed as law, we trust that the policy stands South Africa has adopted in respect of certain BITs does not deter the flow of FDI to the country as one of the preferred points of entry into the African market. Only time will tell whether the government's regulatory impact assessment prior to initiating the termination of the various BITs was correct and that the opportunity cost of not maintaining BITs with certain states (even in a reformed manner) outweighed any benefits (such as FDI inflow etc) from foreign investors subject to such BIT.

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