

EXPERT GUIDE

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Investing in South Africa

By Rian Geldenhuys

For quite some time South Africa has been a much favoured investment destination on the African continent. Of course there are many factors potential investors do consider prior to investing, but undoubtedly South Africa's strong foreign investment protection played a key role. South Africa's foreign investment protection was underpinned by its Constitution, its World Trade Organisation (WTO) commitments, its bilateral investment protection treaties (BITs) and its investor friendly domestic regulatory framework. Recent actions by the South African government are perhaps signalling a change in the South African government's treatment of foreign investors.



The first signal came in 2012 when the South African government decided not enter into any new BITs. In addition it was then stated that all current BITs will be reviewed with a view to terminate them. This in fact occurred some time later when the

South African government failed to renew certain European BITs which had come up for renewal. Although the expired BITs would still provide protection for some years after its expiration (in some instances as long as 20 years after expiration), this decision was met with very strong opposition from both business and the countries on the opposite side of the expired and soon to be expired BITs. The South African government responded by stating that it was in fact conceptualising a model law which would provide protection for all foreign investment. Late in 2013 the South African government released this model law, the Promotion and Protection of Investment Bill, for public comment.

Unfortunately the draft Promotion and Protection Bill does not provide the same level of protection foreign investors enjoyed under the BITs. The first difference in level of protection is that foreigners no longer have recourse against the South Af-

rican government at international arbitration institutions such as the World Bank's International Centre for Settlement of Investment Disputes. Foreign investors will thus be reliant on South Africa's domestic courts in the event of a dispute arising which may in fact be much less desirable, from an investor's perspective, than international arbitration. Secondly the draft Promotion and Protection Bill attempts to change the compensation payable to foreign investors in the event of expropriation. According to the draft Promotion and Protection Bill, an investment may not be expropriated save in accordance with the Constitution and law of general application for public purposes or in the public interest. Thus although the Constitution protects against expropriation it does not protect against expropriation at the same level of compensation as that provided for under the BITs. In terms of the draft Promotion and Protection Bill the compensation must be just and equitable. This is arguably less compensation than that offered under most BITs, being typically the genuine full market value of the in-

vestment expropriated.

In addition the draft Promotion and Protection Bill does not allow investors to rely on protection or seek compensation if the conditions (regulations) change under which they invested in South Africa. The draft Promotion and Protection Bill excludes the affirmation that investors will enjoy fair and equitable treatment and full protection and security which is generally contained in BITs. In fact it contains provisions specifically allowing for such measures or a series of measure to be put in place by government which would not amount to expropriation.

The second signal from the South African government came in the form of another draft bill, the Private Security Industry Regulation Amendment Bill. The Private Security Industry Regulation Amendment Bill was introduced in 2012 and has earlier this year been approved by Parliament and is waiting on the signature of President Zuma. The Private Security Industry Regulation Amendment Bill is controversial as it requires that at least

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51% of the ownership and control of security services companies must be exercised by South African citizens. This requirement appears to be a clear violation of South Africa's commitments undertaken in terms of the General Agreement on Trade in Services (GATS) at the WTO. In terms of South Africa's GATS commitments, the country undertook that it would never impose a market access barrier against foreign ownership in this industry nor would it ever discriminate against foreign ownership in this industry. Therefore the restriction on foreign ownership as contained in the Private Security Industry Regulation Amendment Bill is in fact a violation of South Africa's WTO commitments and hence illegal. Should the Private Security Industry Regulation Amendment Bill be challenged, either at the WTO, in South Africa's courts or in arbitration, it would appear unlikely that South Africa has a justifiable defence for insisting on

this foreign ownership restriction.

The third recent signal comes in the form of proposed amendments to the immigration regulations. According to the draft reform foreign investors would need approval from the Department of Labour verifying that at least 60% of their workforce are South African. In addition the minimum investment required for approval may be increased. The minimum local employee requirement could furthermore constitute a violation of South Africa GATS commitments.

Foreign investors therefore need to carefully consider their investment options in South Africa in order to make sure that any risk is in fact mitigated. South Africa is still an excellent investment destination which can be used as a gateway into the African continent, especially given the current negotiation on establishing the Tripartite Free Trade Agreement

between the regional trading blocks of SADC, the EAC and COMESA.

Rian Geldenhuys is an international trade and commercial attorney and Director of Geldenhuys Joubert Inc. Rian has specific expertise in cross-border investment, customs issues, trade remedies, trade in services) and commercial aspects of cross-border trade.

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Rian has extensive experience in corporate and commercial law, international trade law and financial services & banking law and has advised numerous industries and major companies. He lectures on international trade law at various universities though South African and Africa.

