The Foreign Investment Regulation Review

Ninth Edition

Editors
Calvin Goldman QC, Michael Koch and Alex Potter

The Law Reviews

THE FOREIGN INVESTMENT REGULATION REVIEW

NINTH EDITION

Editors
Calvin Goldman QC, Michael Koch and Alex Potter

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PREFACE

This ninth edition of *The Foreign Investment Regulation Review* provides a comprehensive guide to laws, regulations, policies and practices governing foreign investment in key international jurisdictions. It includes contributions from leading experts around the world from some of the most widely recognised law firms in their respective jurisdictions. This year, in keeping with the considerable increase in prominence of foreign investment review, we are delighted to include new chapters on Austria, Belgium, India, Israel, Japan and the Netherlands, along with several new contributors for countries covered in previous editions. We have also revised the format to focus on the aspects of foreign investment rules that are most critical for dealmakers.

Unprecedented challenges have arisen in 2020–2021 not only to the health and well-being of persons around the globe, but also to globalisation itself and, with it, the flow of capital. Whereas foreign investment has for a number of years been attracting increased attention, this trend has accelerated throughout the past 18 months. Prior to the covid-19 pandemic, the global economy was continuing its trend towards further integration, even with indications of emerging protectionism, and the number of cross-border and international transactions was increasing, while national governments continued to intervene in foreign investment based on a broadening set of criteria. Foreign investment reviews of cross-border mergers could not help but be affected by shifts in economic relations between countries, which in turn were driven by evolving geopolitical considerations. These included structural developments such as Brexit, now in its early post-implementation stages, as well as increased tensions over trade and related policies, as we have seen between the United States and China. These increased tensions have heightened concerns over national interest considerations such as the export of jobs, essential supply chains and industrial policies, as well as heightened national security concerns over cybersecurity, new technologies, communications and other strategic areas.

These and other developments discussed below have led, in the case of certain merger reviews, to increased tensions between normative competition and antitrust considerations, on the one hand, and national- and public-interest considerations on the other hand, the latter sometimes weighing heavily against the former. An example of the kind of differing regulatory decisions between the competition authorities and the Ministerial decision making in relation to concurrent foreign investment reviews occurred when BHP Billiton, the global leader in mining based in Australia, which has already engaged in previous significant mining investments in Canada, proposed to acquire the Potash Corporation of Saskatchewan, at an amount of approximately US$40 billion. Both Australia and Canada are members of the Five Eyes with respect to national security matters. That regulatory review process became a highly publicised matter of public interest through much of 2010. In the end, while the Canadian

Competition Bureau cleared the proposed merger, the federal Minister of Industry, following his review under the Investment Canada Act and consultation with his Cabinet colleagues, issued an interim negative decision, in November 2010, on national interest grounds that were never really articulated. Rather than trying to then make further submissions, BHPB decided to withdraw the proposed acquisition. Some commentators at that time suggested that the reasons for the Ministerial position had more to do with the pending elections at the provincial level in Saskatchewan and at the federal level than any significant national interest issue (Potash Corp had a long standing perception among people in Saskatchewan as a historical corporate leader in that province).

A similar split in such regulatory decision making subsequently occurred in November 2013 in relation to the proposed acquisition of Grain Corp of Australia by Archer Daniels Midland Company of the United States. That also was cleared by the competition authority (the Australian Competition and Consumer Commission) following its competition review; however, following subsequent concerns raised by the Foreign Investment Review Board, the Treasurer of Australia, one of the most senior Cabinet members, decided to block the proposed acquisition. Farmer concerns and distribution networks were apparently factors in that decision. Again, some commentators suggested real-world political considerations had some bearing on that negative decision.

As a result of cases such as these and other evolving considerations discussed below, more cross-border mergers have been scrutinised more intensely, with the process delayed or in some cases thwarted, by foreign investment reviews that are increasingly broader in scope.

Since the pandemic has taken hold, the underlying considerations that had been driving trends in the review of foreign investment moved to the front of national agendas, with the result that these trends have both been accelerating and increasing in scope. Concerns about the benefits of globalisation have been on the rise in an environment where nations have found themselves competing for supplies of critical medicines, equipment and personal protective equipment necessary to meet the public health emergency. This has led to a broadening of the types of businesses the takeover of which might be viewed as raising strategic, public interest or national security considerations. The increased focus on the stream of capital flowing from state-owned enterprises (SOEs) that had already driven greater scrutiny of proposed investments took on heightened importance, particularly in economic sectors viewed as being critical to the pandemic response, such as public health and supply chains. As the impacts of the worldwide economic shutdown on the valuation of domestic businesses began to be felt, concerns around opportunistic hollowing-out of domestic sectors rose to the forefront of considerations of such matters as lowering financial thresholds that trigger foreign investment reviews.

This has all taken place in the context of efforts to overhaul the regulatory landscape that were already under way in the United States and Europe. In the United States, which saw the introduction of a mandatory notification regime and expansion of the review authority of the Committee on Foreign Investment in the United States (CFIUS) following the enactment of the Foreign Investment Risk Review Modernization Act (known as FIRRMA) in August 2018, greater resources are now being allocated to monitoring and enforcement activities. This is making the voluntary filing calculus even more complex as there is no statute of limitations on CFIUS's jurisdiction if it has not cleared a transaction. As the policy focus has shifted to supply chain security across the globe, CFIUS is being used in conjunction with other US government authorities to wean critical US supply chains off their reliance on Chinese inputs; for example, by either blocking or subjecting to review even ordinary course transactions with blacklisted Chinese companies. Heightened CFIUS interest and commentary pertaining to certain China-related transactions, such as occurred in relation to TikTok, is a reflection of some of these evolving developments.

In turn, there is greater focus on foreign investment in Europe, where the European Union's foreign investment screening regulation, which became fully operational in October 2020, gives the European Commission a new central advisory role in coordinating increased scrutiny by Member States and obliges Member States to notify other Member States and the European Commission of foreign investments that they are screening under their national regimes. Furthermore, Member States have themselves introduced new foreign investment regimes (e.g., the Czech Republic and Denmark), are planning to do so (e.g., the Netherlands and Slovakia) or have further updated or tightened their existing foreign investment laws (e.g., Germany by introducing a variety of new sectors that it considers to be sensitive such as artificial intelligence, robotics and nanotechnology). Currently, 18 EU countries have an FDI screening mechanism in place and a senior EU trade official has confirmed that dozens of foreign-investment vetting requests have been notified to the European Commission through the new EU screening mechanism since it came into force.

The United Kingdom has now aligned itself more closely with other countries by significantly strengthening its powers to intervene in deals that may threaten national security. The National Security and Investment Act 2021 marks a step change in the UK government's power to screen, impose conditions on and block deals that pose unacceptable risks. Once the new regime comes into force on 4 January 2022, it will require mandatory notification of investments in 17 strategically sensitive sectors that cross certain share or voting rights thresholds – a significant change in light of the UK's (continuing) voluntary merger filing regime. Transactions in all other sectors will be susceptible to 'call in' by the government should there be concerns.

The United States and Europe are not alone in elevating concerns over foreign investment during the pandemic and in response to increasing concerns over China's global influence. In Canada, during 2020–2021, timelines for national security reviews were temporarily extended and investments by SOEs as well as in Canadian businesses related to public health or the supply of critical goods and services were subjected to heightened scrutiny in response to the pandemic. The Canadian government has issued more detailed guidelines for the review of foreign investments, among other things, to include national security concerns relating to the potential of the investment to enable access to sensitive personal data that could be leveraged to harm Canadian national security through its exploitation, including personal data concerning government officials, such as members of the military or intelligence community. In Australia, on 1 January 2021, the Foreign Investment Reform Act came into effect, ushering in sweeping changes to that country's foreign investment review law. The temporary A$0 monetary screening thresholds for all investments that had been introduced in response to covid-19 were removed; however, this threshold was continued through provisions for the mandatory review of investments in sensitive national security businesses. New Australian regulations list businesses in critical infrastructure, telecommunications, military goods or defence or intelligence technology, the provision of service to defence or intelligence forces, the storage or access to classified security information and the storage, collection, or maintenance of personal information of defence and intelligence personnel. The symmetry between the Canadian guidelines and the Australian regulations should not be considered coincidental. Both countries are members of the Five Eyes together with the United States, the United Kingdom and New Zealand. The

Australian Treasurer has also been given new, stronger enforcement and review powers under the legislation, including a new 'last resort' power, under which the Treasurer may review previously approved transactions where national security risks have emerged after approval by the Foreign Investment Review Board.

In addition to these significant developments, differences in foreign investment regimes (including in the timing, procedure and thresholds for and substance of reviews) and the mandates of multiple agencies (often overlapping and sometimes conflicting) continue to contribute to the relatively uncertain and at times unpredictable foreign investment environment. This gives rise to greater risk of inconsistent decisions in multi-jurisdictional cases, with the potential for a significant 'chilling' effect on investment decisions and economic activity. Foreign investment regimes are increasingly challenged by the need to strike the right balance between maintaining the flexibility required to reach an appropriate decision in any given case and creating rules that are sufficiently clear and predictable to ensure that the home jurisdiction offers the benefits of an attractive investment climate notwithstanding extraordinary circumstances.

The recently increasing breadth, scope and timelines for proposed acquisitions by SOEs and other proposed acquisitions giving rise to national security considerations have raised a potentially challenging issue in the context of proposed acquisitions of failing firms. There is a widely held view that, as a result of the disruptive economic effects of the covid-19 pandemic, there may be a sizeable number of distressed industries and failing firms in sectors that have been most significantly impacted by the pandemic. The number of failing firm cases is likely to increase the longer the pandemic continues to substantially affect the timeline for economic recovery from the effects of the pandemic.

In this exceptional environment, there may be failing firm cases where the proposed acquirer is an SOE, which in some foreign direct investment reviews includes a corporation that may be influenced directly or indirectly by a foreign government. There may also be proposed acquisitions of failing entities in the public health or supply chain markets, which may be regarded as more sensitive transactions in the context of the pandemic. If these types of proposed acquisitions are subjected to increased scrutiny and longer timelines in foreign investment reviews where the acquiree is a failing firm, and to the extent that there may be a parallel competition review conducted on a considerably more expeditious basis, the proposed acquisition risks not being completed if the acquiree cannot be sustained during that period. That may lead to an anticompetitive acquirer with existing operations in the same jurisdiction becoming the only purchaser in a position to complete the proposed acquisition, thereby avoiding liquidation of the assets and loss of jobs. The same result may follow even where the proposed acquirer is not an SOE or the failing firm is not in an apparently sensitive business because the increasing scope and timelines for foreign investment reviews, coupled with continuing geopolitical tensions, may raise sufficient uncertainty to dissuade a foreign entity from making a proposed acquisition. These developments could have a significant impact on domestic market concentrations going forward.

With respect to the interface of national interest and public interest considerations and the evolving breadth of national security reviews, including, in some cases, as they may relate to or interface with, normative competition reviews, the American Bar Association Antitrust Law Section (ABA ALS) Task Force on National Interest and Competition Law prepared a report that was considered and approved by the Council of the ABA ALS in August 2019. In that report, the Task Force examined a number of cases in selected jurisdictions where these issues have been brought to the forefront. In addition, the ABA ALS Task Force on the Future of Competition Law Standards has delivered a further report in early August 2021 to the Council of the ABA ALS that, among other subjects, has considered recent developments pertaining to national interests and national champions in competition reviews. These evolving considerations in competition reviews cannot be viewed in isolation from the increasing scope of national interest factors in foreign investment reviews.

In the context of these significant developments, we hope this publication will prove to be a valuable guide for parties considering a transaction that may trigger a foreign investment review, which often occurs in parallel with competition reviews. It provides relevant information on, and insights into, the framework of laws and regulations governing foreign investment in each of the 21 featured jurisdictions, including the timing and mechanics of any required foreign investment approvals, and other jurisdiction-specific practices. The focus is on practical and strategic considerations, including the key steps for foreign investors planning a major acquisition or otherwise seeking to do business in a particular jurisdiction. The recent trends and emerging issues described above and their implications are also examined in this publication. Parties would be well advised to thoroughly understand these issues and to engage with regulatory counsel early in the planning process so that deal risk can be properly assessed and managed. Having regard to the changing regulatory environment pertaining to foreign investment reviews and the evolving protectionism as well as geopolitical considerations across a number of jurisdictions, regulatory counsel may recommend approaching the relevant government authorities at a comparatively early stage to engage in constructive discussions and to obtain an initial view from government officials of the proposed transaction.

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Please note that the views expressed in this book are those of the authors and not those of their firms, any specific clients, or the editors or publisher.

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Chapter 18

SOUTH AFRICA

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I INTRODUCTION

Foreign direct investment (FDI) inflows into South Africa fell from US$4.6 billion in 2019 to US$2.5 billion in 2020. The reduction in FDI inflows was in line with the global FDI reduction of 42 per cent. Key FDI investments into South Africa have included New York-headquartered PepsiCo's acquisition of Pioneer Foods for 24 billion South African rand[2] and Google's establishment of Equiano, which is a new private subsea cable that will connect Portugal and South Africa.

The Competition Amendment Act of 2018 continued to dominate attention from a foreign direct investment perspective. As reported in the previous year's review, the Competition Amendment Act of 2018 seeks to amend the Competition Act of 1998 by, inter alia, obliging the President of the Republic of South Africa to establish a committee to consider and, where appropriate, block proposed acquisitions of South African businesses by foreign acquiring firms if, in the view of this committee, the implementation of the merger might have an adverse effect on the country's national security interests. The Competition Amendment Act defines a foreign acquiring firm as an acquiring firm incorporated, established or formed under the laws of a country other than South Africa or whose place of effective management is outside South Africa. The provisions of the Competition Amendment Act that relate to such a committee are yet to take effect.

II FOREIGN INVESTMENT REGIME

The South African government encourages foreign direct investment and has acknowledged that such investment is necessary to support the country's growth and development objectives. However, the South African government requires that the benefits of foreign direct investment be balanced against its costs to the South African economy.

For this reason, public interest considerations, which are generally embedded in licences and state tenders, are increasingly serving as criteria for the approval or rejection of foreign investment in the country. Public interest considerations are varied, including the need to protect jobs, promote localisation and enhance the ability of small businesses or firms controlled or owned by historically disadvantaged persons, to become competitive. 'Historically disadvantaged persons' refers to black South African citizens, by virtue of their disenfranchisement during apartheid South Africa, as well as female and disabled South

1 Deon Govender is of counsel at Covington & Burling (Pty) Ltd.

2 Approximately US$1.657 billion as at 31 December 2020.

African citizens. The advancement of historically disadvantaged persons is often facilitated through the promotion of Broad-based Black Economic Empowerment (B-BBEE). B-BBEE is a socio-economic programme endorsed by the Constitution of the Republic of South Africa. It is designed to redress the inequalities of apartheid through transformative measures that enhance participation by black people (and certain other designated groups of South Africans) in the South African economy.

The principal law governing foreign investment in South Africa is the Protection of Investment Act of 2015 (Investment Act). The Investment Act defines investment within the context of foreign direct investments widely, as:

a any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic of South Africa, committing resources of economic value over a reasonable period in anticipation of profit;

b the holding or acquisition of shares, debentures or other ownership instruments of such an enterprise; or

c the holding, acquisition or merger by such an enterprise with another enterprise outside the Republic to the extent that the holding, acquisition or merger with another enterprise outside the Republic has an effect on an investment contemplated by *a* and *b* in the Republic.

The Investment Act does not compel a review of inbound foreign investment, irrespective of the nature of the investment proposed. However, as noted above, the Competition Amendment Act (which was passed in 2019) permits the blocking of a merger involving a foreign acquiring firm if in the view of a President-appointed committee its implementation poses national security concerns for the country. While the President is yet to identify and publish a list of national security interests the committee must consider, the Competition Amendment Act provides that the President must, when determining what constitutes national security interests for purposes of that Act, take into account all relevant factors, including the potential impact of a merger transaction:

a on the country's defence capabilities and interests;

b on the use or transfer of sensitive technology or know-how outside the Republic of South Africa;

c on the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of citizens and the effective functioning of government;

d on the supply of critical goods or services to citizens or the supply of goods or services to government;

e to enable foreign surveillance or espionage or hinder current or future intelligence or law enforcement operations;

f on the Republic's international interests, including foreign relationships;

g to enable or facilitate the activities of illicit actors, such as terrorists, terrorist organisations or organised crime; and

h on the economic and social stability of the Republic.

Unlike mergers and acquisitions, there is no review of new businesses established or joint ventures formed by foreigner investors.

III TYPICAL TRANSACTIONAL STRUCTURES

Foreign investors who seek to establish a physical presence in South Africa for the purpose of setting up new facilities or engaging in merger and acquisition activity typically establish a company to serve as a subsidiary. There are no restrictions on foreign investors incorporating a company as a subsidiary (or otherwise) in South Africa under the Companies Act of 2008 (the Companies Act). Most foreign investors incorporate a private company, which must have at least one director and shareholder. The directors of a private company need not be South African. However, a private company may not have more than 50 members (shareholders). Should the foreign investor require an entity that may have more than 50 members, a public company may be its optimal corporate vehicle. Public companies are generally used where the founders anticipate offering securities to the public through IPOs, for instance. Both private and public companies attract limited liability, meaning that a shareholder's liability is restricted to its investment in the company. These companies are categorised as profit companies; other profit companies include personal liability companies, which are used by professional services providers, such as law firms. The Companies Act also makes provision for non-profit companies, which are obliged to apply their income and assets exclusively towards the promotion of the company's main objects.

The Companies Act also permits foreign investors to set up an external or domesticated company. An external company is a foreign company conducting business activities in South Africa through a branch office (referenced in the discussion of foreign banks below). The Companies Act requires that external companies submit their annual returns to the Companies and Intellectual Property Commission Office. The Companies Act also provides for the domestication of foreign companies. A foreign company may make application for the transfer of its registration in a foreign jurisdiction to South Africa and upon approval of that application the foreign company will 'exist' as a company in terms of the Companies Act (as if it had originally been incorporated and registered as such). Except as set out in the discussion in Section II, there are no requirements for the shareholders or directors of any of these companies to be South African. Where a foreign investor incorporates a local subsidiary, that subsidiary is treated as a local company for all intents and purposes. South African Exchange Control regulations apply to that subsidiary, including (without limitation) the requirement that the local subsidiary's transfer of intellectual property to an offshore affiliate be licensed to the affiliate and made subject to a taxable royalty payable to the local subsidiary.

Where foreign investors enter into joint ventures with South African or foreign investors to pursue investment opportunities in South Africa, the joint ventures are treated as partnerships under South African law. Where the partnership is unincorporated (i.e., not folded into a company), each partner attracts unlimited liability for the debt and other obligations of the partnership and of each other partner. Where the partnership is incorporated into a limited liability company, the Companies Act applies to that partnership and liabilities of the shareholders are limited to their respective investments in the company. Under South Africa law, although permissible, trusts are seldom used as vehicles for the operation of businesses.

Except for the national security interest considerations under the Competition Act (discussed above), there are no rules under South African law pertaining to takeover bids by foreign companies.

Where a foreign investor's transaction in South Africa is limited to the purchase of movable property, that investor's obligations are limited to settling tax and import duty liabilities accruing to that purchase. While there are no restrictions on a foreign investor's acquisition of immovable property (such as land and buildings), the purchase of immovable property by a non-resident foreign investor must be undertaken through a locally established company, in respect of which the foreign investor must appoint a South African resident public officer. Although a discussion on taxes relating to specific transactions falls outside the scope of this review, we point out that if the foreign investor subsequently sells the shares in this company at a time when 80 per cent or more of the market value of those shares is attributable directly or indirectly to the immovable property, the sale will attract capital gains tax liability for the investor. The foreign investor may, however, get relief from double taxation under an applicable Double Taxation Agreement.

As part of its efforts to attract FDI into the country, the South African government has established the Special Economic Zone (SEZ) programme under the Special Economic Zones Act of 2014. This programme seeks to promote regional industrial development by providing incentives for foreign (and local) investors that elect to operate within the country's eight SEZs. These incentives include a reduced rate of corporate income tax, building allowances, a customs controlled area and tax relief, including tax incentives designed to support both greenfield (i.e., new industrial projects) and brownfield investments (i.e., expansions or upgrades of existing industrial projects).

Where a foreign investor purchases securities, the foreign investor is obliged to notify an authorised dealer (generally commercial banks) of the purchase and have the securities endorsed 'non-resident'. This allows the foreign investor to repatriate dividends and other distributions paid in respect of those securities, as well as the capital realised from the ultimate sale of the securities. Authorised dealers are obliged to assess documentary evidence from the investor to ensure that the securities purchase transaction concluded with the foreign investor is at arm's length, at fair market related prices and financed in an approved manner. The financing must be in the form of the introduction of foreign currency or rand from a non-resident rand account.

IV REVIEW PROCEDURE

i Overview

Although the South African government has identified the need for a uniform policy for the assessment of foreign direct investment in the country, South Africa has yet to adopt laws giving effect to this policy. Consequently, there is no uniform oversight and review of foreign investments in the country. However, the country does regulate foreign investment in and ownership and control of its strategic industries through sectoral regulation, including within the banking, insurance, and broadcasting and telecommunications sectors. The foreign investment restrictions in respect of each of these sectors are briefly discussed below.

Banking sector

The Banks Act of 1990 (the Banks Act) permits a foreign bank to apply to the Prudential Authority (operating within the administration of the South African Reserve Bank) for consent for the establishment of a representative office or a local branch of that foreign bank in South Africa. The Prudential Authority may grant the application, either unconditionally or subject to such conditions as the Prudential Authority may determine. A representative office has authority to promote and assist the business of a foreign bank, while a branch is authorised by the Prudential Authority to conduct the business of a bank. Consent to operate a branch of a foreign bank is subject to, inter alia, the relevant foreign bank fulfilling capital adequacy, risk management and other operational requirements. The Prudential Authority will not grant an application for the establishment of a branch office, unless it is satisfied that the responsible supervisory authority of the foreign bank's country of domicile will exercise proper supervision over the foreign bank.

Insurance sector

The Insurance Act of 2017 prohibits persons from conducting insurance business in South Africa without being appropriately licensed by the Prudential Authority under that Act. The provision of reinsurance services directly or through agents or intermediaries in South Africa is considered to be the conduct of insurance business in the country. However, in instances where a South Africa-based customer secures insurance with a foreign insurer or reinsurer, the actions of the foreign insurer or reinsurer would not qualify as conducting insurance business in South Africa. The Insurance Act permits a foreign reinsurer to conduct insurance business in South Africa, subject to that foreign reinsurer being granted a licence and establishing both a trust (for the purposes of holding the prescribed security) and a representative office in South Africa. The requirements for a Lloyd's underwriter conducting insurance business in South Africa are similar to those applicable to a foreign reinsurer, except that a Lloyd's underwriter is not required to establish a representative office in South Africa. In addition, to qualify for a licence as a branch of a foreign reinsurer or a Lloyd's underwriter, an applicant's proposed licensing must not be contrary to the interests of prospective policyholders or the public interest.

Broadcasting and telecommunications sector

The Electronic Communications Act of 2005 (ECA) imposes limitations on foreign control of commercial broadcasting services. The ECA provides that a foreign investor may not, directly or indirectly (1) exercise control over a commercial broadcasting licensee; or (2) have a financial interest or an interest in voting shares or paid-up capital in a commercial broadcasting licensee exceeding 20 per cent. The ECA further caps the percentage of foreigners serving as directors of a commercial broadcasting licensee at 20 per cent. In terms of the regulations issued under the ECA, the Independent Communications Authority of South Africa (the electronic communications regulator) may refuse to transfer a licence where the transferee's ownership and control by historically disadvantaged persons is less than 30 per cent. The ECA further regulates cryptography. In terms of that Act, a foreign cryptographer must be registered with the Department of Communications as such prior to rendering cryptography services and supplying cryptography products in (or to persons in) South Africa. This registration obligation applies to foreign cryptography providers rendering their services or selling their products in South Africa, irrespective of whether they have a physical presence in the country.

ii Additional information

There are restrictions on foreign investors rendering business services (such as legal and investment brokerage services) without due authorisation. There are no explicit prohibitions against foreign state-owned enterprises making foreign investments in South Africa. However, transactions of this kind could be blocked under the Competition Act or public interest considerations embedded in various pieces of legislation, some of which has been discussed above.

V FOREIGN INVESTOR PROTECTION

The South Africa government has resolved not to enter into any new BITs. Furthermore, the country will not renew any BITs that come up for renewal. Instead, the Investment Act will serve as a uniform position for investor protection and a substitute for all the country's BITs. The Investment Act provides for foreign investors and their respective investments to be treated no less favourably than South African investors in like circumstances. The expression 'like circumstances' is defined as meaning the requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment, including a host of factors specific to South Africa and not the investor. Factors cited include:

a the effect of the foreign investment on the Republic and the cumulative effects of all investments;
b the sector that the foreign investments are in;
c the effect on third persons and the local community;
d the effect on employment; and
e the direct and indirect effect on the environment.

The Investment Act further provides for qualified physical security and legal protections for the foreign investor. Foreign investors and their respective investments will receive a level of physical security, 'as may be generally provided to domestic investors in accordance with minimum standards of customary international law, subject to available resources and capacity'. The investors will also receive legal protection of investments in accordance with the right to property in terms of the South African Constitution. The Constitution qualifies the right to property by permitting expropriation for a public purpose or in the public interest, subject to compensation, the amount of which and the time and manner of payment of which have either been agreed by those affected, or decided or approved by a court. The South African government is considering amending the Constitutional right to property to allow for expropriation without compensation in certain circumstances. The Investment Act empowers foreign investors to repatriate funds, subject to complying with taxation and other applicable laws.

The Act clarifies that the South African government or any organ of state may take the following measures, inter alia:

a to redress historical, social and economic inequalities and injustices, presumably through the promotion of B-BBEE;
b to promote and preserve cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage;
c to foster economic development, industrialisation and beneficiation; and
d to protect the environment and the conservation and sustainable use of natural resources.

These measures could potentially have the impact of unilaterally eroding foreign investors' rights under the Investment Act.

With regard to investment disputes, the Investment Act provides that the foreign investor may request that the Department of Trade, Industry and Competition facilitate mediation within six months of the investor becoming aware of the dispute. The Department of Trade, Industry and Competition has issued regulations spelling out the rules of the mediation. Furthermore, the Investment Act provides that the government may consent to international arbitration in respect of the relevant investment, but only subject to the exhaustion of domestic remedies (these being either local arbitration or courts).

South Africa recently adopted the International Arbitration Act of 2017, incorporating the UNCITRAL Model Law on International Commercial Arbitration (2006 version) into South African law. This Act may only apply to foreign investors' disputes with non-governmental South African entities. As indicated above, the Investment Act applies to foreign investors' investment-related disputes with the South African government, both in the local courts and in arbitration proceedings. South Africa has yet to accede to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and, having regard to the dispute resolution provisions of the Protection of Investment Act of 2015, the South African government is unlikely to accede to the ICSID Convention in the near future.

VI OTHER STRATEGIC CONSIDERATIONS

Foreign investors planning to enter the market will be well placed if they understand the public interest considerations that the South African government is advancing in the industries or sectors in which they propose investing, particularly if their proposed market entry will be pursuant to a state-issued licence, public private partnership or other form of state procurement. As noted above, the promotion of B-BBEE initiatives generally features prominently as a criterion for the award of licences and state procurement. Accordingly, the foreign investor may be required to enter into agreements with historically disadvantaged persons relating to, inter alia, ownership and management of its bid entity, and could possibly be required to consider the adoption of additional B-BBEE measures in its proposal to shore up its chances of success. In the minerals sector, for instance, a new mining right holder is obliged to have a minimum B-BBEE shareholding of 30 per cent.

Appendix 1

ABOUT THE AUTHORS

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Deon Govender focuses his practice on project development and corporate and project finance transactions across Africa, with a particular emphasis on southern Africa. His experience includes advising on the development and financing of renewable energy and thermal power projects and various other infrastructure assets in the transportation and telecommunications sectors. Deon's experience additionally includes advising on financing independent power producer projects under the South African government's Renewable Energy Independent Power Producer Procurement Programme.

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