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Investing in South Africa

By Rian Geldenhuys

or 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 invest-

protection ment 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.

cided 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.

The first signal came in 2012 when Unfortunately the draft Promotion the South African government de- 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 AfTrade Law Chambers

vestment expropriated.

rican government at international

arbitration institutions such as the

World Bank's International Centre

for Settlement of Investment Dis-

putes. Foreign investors will thus

be reliant on South Africa's domes-

tic courts in the event of a dispute

arising which may in fact be much

less desirous, from an investor's per-

spective, than international arbitra-

tion. Secondly the draft Promo-

tion and Protection Bill attempts to

change the compensation payable to

foreign investors in the event of ex-

propriation. According to the draft

Promotion and Protection Bill, an

investment may not be expropri-

ated save in accordance with the

Constitution and law of general ap-

plication 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 pro-

vided for under the BITs. In terms

of the draft Promotion and Protec-

tion 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-

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 as 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.

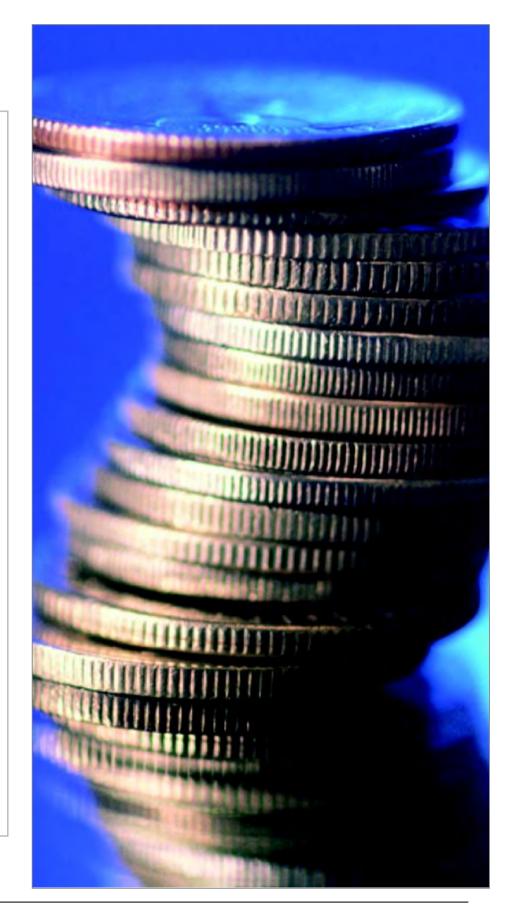
Foreign investors therefore need to carefully consider their investment options in South Africa in order to make sure that any risk is in fact mitigated. South Africa is still an excellent investment destination which can be used as a gateway into the African continent, especially given the current negotiation 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 crossborder investment, customs issues, trade remedies, trade in services) and commercial aspects of cross-border trade.

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