

Protection of Investment Act may deter foreign investment

The Protection of Investment Act of 2015, which was activated by a notice published in the *Government Gazette*, on Friday 13 July, has been criticised nationally and internationally for its approach with respect to a number of aspects. The European Union's Regional Chamber of Commerce and Industry stated that foreigners are hesitant to invest in SA for fear that there will be a lack of protection over their investment.



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Expropriation without compensation

The section of the Act that most concerns foreign investors is whether their assets can be expropriated without compensation? Previously, South Africa was party to a number of bilateral investment treaties (BITs) that ensure countries are bound to treat investors from other countries fairly. A key aspect to BITs is that they contain clauses which state that in the event of assets being expropriated from foreign investors, these investors must be adequately compensated. For expropriation to be lawful, according to BITs, it must occur against compensation, which should be 'prompt, adequate, and effective' or 'immediate, full and effective'. This means that the compensation for expropriation to be paid to investors must reflect the market value of the expropriated investment.

BITs are now replaced by the new Protection of Investment Act. The expropriation clause in the Act intentionally mirrors Section 25 of the Constitution. It states that foreign investors have the right to property, and may only be expropriated for a public purpose or in the public interest and subject to compensation (the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court). This is where the concern lies, because BITs provided a safety net in that compensation must be 'prompt, adequate, and effective' or 'immediate, full and effective' and the Protection of Investment Act omits this.

Foreign entities will no longer have the protection of international dispute resolution

The other area of concern is dispute resolution. The Protection of Investment Act states that if an investor has a dispute regarding an action taken by the South African government, they may within six months request the Department of Trade and Industry to facilitate the resolution by appointing a mediator. A foreign investor may also approach any competent court, independent tribunal or statutory body within South Africa for the resolution of the dispute.

Access to international arbitration provides security to investors. In case of a dispute, the settlement mechanism takes the

form of international arbitration, often under the auspices of the World Bank's ICSID (International Centre for the Settlement of Investment Disputes), referred to as investor-state dispute settlement. Foreign investors could feel prejudiced in that the arbitration process will now occur in South Africa, and the process is at the mercy of the minister of trade and industry. The Act does go on to state that if all domestic remedies have been exhausted the South African government may consent to international arbitration, but it is not clear how long and at what point this would be deemed to have occurred."

Negative impact on foreign direct investment

Minister of the Department of Trade and Industry, Rob Davies, announced in 2014 that BITs will be replaced with the Protection of Investment Act. Since 2015, the South African government began cancelling BITs as these came up for renewal. So far, BITs have not been renewed with European Union member countries that include Belgium, Denmark, Germany, Luxembourg, Spain, Switzerland and the Netherlands.

Much of South Africa's FDI comes from these countries where BITs have been terminated. The European Union's Regional Chamber of Commerce and Industry stated at the time that the withdrawal of the BITs does not reflect well on SA. It sets the scene of a developing country struggling for power and wanting to dominate foreign investors, rather than an attitude of wanting to work together for the benefit of both parties.

South African Reserve Bank (Sarb) statistics show that FDI into South Africa declined from around R76bn in 2008 to just R17.6bn in 2017. A UN report, the [Global Investment Trends Monitor](#) indicates that in 2015 FDI into South Africa fell by 74% to \$1.5bn. However, the Department of Trade and Industry claims that there is very little to no correlation between investment inflows and BITs.

All of the above would seem to be odds with President Cyril Ramaphosa's \$100bn investment initiative that was announced a couple of months ago. It would not seem that the cancellation of BITs will assist in making investors confident of investing into South Africa. In particular, it is noted that the gazetting of the legislation was at or about the same time that the UAE announced its commitment to investing \$10bn into South Africa which was as a result of initiatives by the president and his counsel.

An uncertain regulatory landscape will not instill confidence in foreign investors, something that our economy can ill afford. It is critical now that the South African government swiftly adopts a stance on investment protection for foreigners and makes explicit the definitions of when and how this could occur without compensation. The various Acts and laws that affect expropriation and compensation must be finalised, harmonised and promulgated in order for foreign investors to factor in this risk.