Investment protection legislation in South Africa

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Introduction

On July 13, 2018, the Protection of Investment Act 22 of 2015 came into operation, providing a degree of protection to investors in relation to their investments and aiming to achieve a balance of rights and obligations that apply to all investors. The Act attempts, among other things, to codify standard bilateral investment treaty (BIT) provisions and provide domestic legislation that deals with investor-state relations.

As one of the leading countries in terms of foreign direct investment (FDI) influx on the African continent, South Africa is clearly an attractive destination for investment, but as in any country it is not without a certain level of risk. The enforcement of the Act may go some way to mitigating some of those potential dangers by offering protection to investors against state action that can affect their investments in South Africa.

Foreign investment in South Africa

In Piero Foresti, Laura de Carli & Others v The Republic of South Africa a group of European mining investors submitted a request to the International Centre for Settlement of Investment Disputes (ICSID) for international arbitration against the South African government in relation to the Italy-South Africa BIT and the Belgium and Luxembourg-South Africa BIT. The claimants' submissions in Piero Foresti included an allegation that they had been denied fair and equitable treatment when required to divest 26 percent of their investments to historically disadvantaged South Africans following the enactment of the Mineral and Petroleum Resources Development Act, as part of South Africa's Black Economic Empowerment requirements pertaining to the issuing of mining rights. The claimants asserted that this threatened their economic interests in South Africa and breached each of the BITs' prohibitions on expropriation. The ICSID issued an arbitral award dismissing the claims against the South African government on a "with prejudice" basis, and ordered the claimants to pay part of the South African government's legal fees and costs.

Following the decision in Piero Foresti, the Department of Trade and Industry (the Department) undertook a review of all BITs to which South Africa was a signatory and the main findings of the review were that:

- The terms of the BITs varied widely.
- Most had been entered into with European countries in 1994 and 1995, when South Africa had emerged from international isolation and there was widespread investor uncertainty about the policy direction of the country; as a result BITs were used to strengthen relations with strategic countries and as a tool to promote investment.
- Efforts to attract investment had resulted in South Africa agreeing to unequal and unsustainable terms as a result of separate negotiations with each country.
The recommendations from that review process were endorsed by Cabinet in April 2010, and South Africa subsequently gave notice of its intention to terminate several BITs, including those entered into with Denmark, Spain, Germany, Belgium, Luxembourg, Switzerland and the Netherlands. The government also stated its intention not to renegotiate or renew BITs once they expired. This notice was given to each country's diplomatic representative in South Africa by way of a diplomatic note issued by the Minister of International Relations, stating that, as South Africa was exercising its right to unilaterally terminate each BIT, investments made prior to the date of termination of the BITs would continue to be protected by the BIT for ten years from the date of termination.

**Investments covered by the Act**

Investment is defined broadly in the Act, and so foreign investors may find it relatively easy to fall within its scope and enjoy the protection it offers. An investment is defined as:

- any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of South Africa, committing resources of economic value over a reasonable period of time, in anticipation of profit;
- the holding or acquisition of shares, debentures or other ownership instruments of such enterprise; or
- the holding, acquisition or merger by such an enterprise with another enterprise outside South Africa to the extent that such holding, acquisition or merger with another enterprise outside South Africa has an effect on an investment in South Africa.

The Act refers to investors and foreign investors interchangeably, without defining either term appropriately, but there are several notable sections where the legislature saw it fit to refer specifically to foreign investors:

- **Physical security of property**
  South Africa must accord foreign investors and their investments a level of physical security as may be generally provided to domestic investors in accordance with minimum standards of customary international law and subject to available resources and capacity.

- **National treatment**
  Foreign investors and their investments must not be treated less favorably than South African investors in similar circumstances.

- **Transfer of funds**
  A foreign investor may, in respect of an investment, repatriate funds subject to taxation and other applicable legislation.

The direct protection against expropriation or unfair and inequitable treatment of a foreign investor that can be found in most BITs, and that the claimants in *Piero Foresti* relied on, has not been replicated in the Act. In fact, section 12 of the Act empowers the government or any state entity to take measures that may include:

- Redressing historical, social, economic inequalities and injustices.
- Upholding the rights guaranteed in the Constitution.
- Promoting and preserving cultural heritage and practices, indigenous knowledge and biological resources or national heritage.
- Fostering economic development, industrialization and beneficiation.
- Achieving the progressive realization of socio-economic rights.
- Protecting the environment.

These regulatory measures are couched in broad terms and could be used to justify almost any constitutional state action taken by the government. Plausibly, a constitutional amendment could make it permissible for the government to implement a policy that might otherwise have fallen foul of standard protections provided for in BITs. Applying constitutionality as a yardstick introduces an element of uncertainty that BITs avoided, because a constitutional amendment can be implemented with relative ease if the governing party gathers the required number of votes in the legislature.

**Dispute resolution**

Section 13 of the Act sets out the dispute resolution process to be followed by an aggrieved investor and emphasizes the need to exhaust domestic remedies. Its main features are:
• Within six months of becoming aware of a dispute in respect of an action taken by the South African government that has affected that investor's investment, an affected investor may approach the Department to appoint a mediator to resolve the dispute.
• The Department must maintain a list of qualified mediators of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators.
• The mediator must be appointed by agreement between the government and the foreign investor from the list maintained by the Department, failing which, by agreement between the Department and the foreign investor. In the event of the Department being a party to the dispute, a joint request by the parties must be made to the Judge President of one of the divisions of the High Court to appoint a mediator.
• Importantly, and subject to applicable legislation, an investor, on becoming aware of a dispute, is not precluded from approaching any competent court, independent tribunal or statutory body in South Africa for the resolution of a dispute relating to an investment.
• Provided domestic remedies have been exhausted, the South African government may consent to international arbitration between South Africa and the home state of the affected investor.

Speaking in July 2012, the Minister of Trade and Industry highlighted South Africa's concerns about investor-state arbitration, which underpins the remedies available to an investor in terms of BITs, saying:

“Investor-state dispute resolution that opens the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration is of growing concern to constitutional and democratic policy-making. In short, international jurisprudence is no substitute for multilateral cooperation to strengthen global governance in the area of investment policy.”

In spite of the Minister's remarks against "unpredictable" international arbitration, section 13(5) of the Act allows the South African government to consent to international arbitration. This is an important departure from the investor-state arbitration position contained in BITs, and leaves foreign investors exposed to the risk of political considerations that might render their home state reluctant to pursue state-state international arbitration on their behalf. More importantly, the Minister's remarks are skeptical regarding innovations in investor-state dispute settlement procedures, and the surrounding body of international investment law, which has brought predictability and control over the execution of arbitration procedures.

In terms of the transitional arrangements provided for in the Act, existing investments that were made under previously applicable BITs will continue to be protected in accordance with the terms and periods stipulated by those BITs, and any investments made after the termination of a BIT, but before the enforcement of the Act, will be governed by general South African law. It is likely that the Act will be the subject of much litigation as the South African government positions itself to implement changes to its land reform policies.

In conclusion

In a somewhat ironic twist, South Africa has almost traveled full circle; its response to foreign investor uncertainty and the urge to attract foreign direct investment following its first democratic elections in 1994 drove it to sign a raft of BITs, on terms that it might otherwise not have done so. Almost 25 years later, it has jettisoned most of those BITs and finds itself anxious to court foreign investors who bemoan the current political uncertainty and populist rhetoric that prevails in relation to matters of nationalization and expropriation.

Whether this Act satisfies its stated objective of providing protection to investors will largely depend on how it is implemented; however, a single piece of legislation aimed at all investors offers a more transparent and equitable approach when compared to the conditions under various disparate BITs.

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1 ICSID Case No. ARB(AF)/07/01