

THE FOREIGN  
INVESTMENT  
REGULATION  
REVIEW

SEVENTH EDITION

**Editors**

Calvin S Goldman QC and Michael Koch

THE LAWREVIEWS

THE FOREIGN  
INVESTMENT  
REGULATION  
REVIEW

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This article was first published in October 2019  
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Published in the United Kingdom  
by Law Business Research Ltd, London  
Meridian House, 34-35 Farringdon Street, London, EC2A 4HL, UK  
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[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

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ISBN 978-1-83862-060-8

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALRUD

ASBZ AVOGADOS

BOYANOV & CO

CLEARY GOTTlieb STEEN & HAMILTON LLP

COVINGTON & BURLING (PTY) LTD

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# PREFACE

This seventh 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.

Foreign investment continues to garner a great deal of attention. This trend is expected to continue as the global economy further integrates, the number of cross-border and international transactions keeps increasing, and national governments continue to regulate foreign investment in their jurisdictions to an unprecedented degree. Reviews of cross-border mergers have, in some instances, been characterised recently by a rising tension between normative competition and antitrust considerations on the one hand, and national and public-interest considerations on the other; the latter sometimes weighing heavily against the former. As a result, more large, cross-border mergers are being scrutinised, delayed or thwarted by reviews that are progressively broad in scope.

Many factors are driving these emerging trends – the rise in populist political movements has increased the focus on national interest considerations such as protectionism; there are concerns over the export of jobs and industrial policy; heightened concerns over cybersecurity have led to enhanced national security protection measures; and an increased focus in some jurisdictions on the stream of capital flowing from state-owned enterprises has driven greater scrutiny of proposed investments, particularly those in economic sectors such as information technology and natural resources. Where, historically, national security concerns were limited to businesses involved in manufacturing or supplying military equipment and to infrastructure industries critical to national sovereignty, the scope of transactions reviewed on the basis of national security has broadened significantly. Transactions in sectors such as banking and finance, media, telecommunications, and other facets of the digital economy, as well as transportation industries and even real estate, may be potential focal points for foreign investment review.

Efforts to overhaul the regulatory landscape have been seen in the United States with the expansion of the review authority of the Committee of Foreign Investment in the United States (CFIUS), including a broadening of transactions under CFIUS's scrutiny. In turn, France is trying to generate support to revise the European Union's competition reviews to, among other things, more closely scrutinise mergers in the technology sector. Other major jurisdictions in Europe, including Germany and the United Kingdom, have shown greater interest in increased regulatory authority in regard to foreign investment reviews.

Differences in foreign investment regimes (including in the timing, procedure, thresholds for and substance of reviews) and the mandates of multiple agencies (often overlapping and sometimes conflicting) are contributing to the relatively uncertain and 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 may be 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.

The American Bar Association Antitrust Law Section (ABA ALS) Task Force on National Interest and Competition Law has built on the work of the ABA ALS previous Task Force on Foreign Investment Review. It has looked more closely at the potential implications of national interest considerations and evolving breadth of national security reviews, including, in some cases, as they may relate to, or interface with, normative competition reviews. In so doing, the Task Force has examined a number of cases in selected jurisdictions where these issues have been brought to the forefront. In August 2019, the report of the Task Force was considered and approved by the Council of the ABA ALS.

These emerging trends and the evolving issues in the interface of foreign investment and competition reviews were the subject of panel discussions at the Annual Conference of the International Bar Association in Rome in October 2018 and the ABA ALS Global Seminar Series in Düsseldorf, Germany in May 2018, among others in recent years. The evolving issues have also attracted attention in recent years in international fora of public authorities, such as the International Competition Network and the Organisation for Economic Co-operation and Development’s Competition Committee.

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 17 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.

We are thankful to each of the chapter authors and their firms for the time and expertise they have contributed to this publication, and also thank Law Business Research for its ongoing support in advancing such an important and relevant initiative.

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.

**Calvin S Goldman QC and Michael Koch**

Goodmans LLP  
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September 2019



# SOUTH AFRICA

*Deon Govender*<sup>1</sup>

## I INTRODUCTION

According to the UN Conference on Trade and Development Global Investment Trends Monitor, South Africa has successfully managed to turn around the sharp decline in foreign direct investment since 2014. The country attracted US\$7.1 billion in foreign direct investment (FDI) in 2018, representing an increase of 446 per cent on the 2017 FDI number.

This increase was largely attributed to President Cyril Ramaphosa's calls for investment in South Africa, which culminated in the South Africa Investment Conference at the end of 2018. The conference formed part of President Ramaphosa's plan to attract some US\$100 billion in new investments in South Africa over the next five years to kick-start the country's lagging economy. The foreign direct investment in the country was predominantly in the mining, petroleum refinery, food processing, information and communications technologies and renewable energy sectors. Some of the headline foreign investments and investment pledges in 2018 included: (1) the US\$750 million joint venture between Chinese car manufacturer, BAIC International and state-owned corporation, Industrial Development Corporation of South Africa for the establishment of an automotive assembly plant; (2) Daimler AG's Mercedes Benz unit pledging to invest US\$20 billion in South Africa; and (3) Saudi Arabia pledging to invest US\$10 billion into South Africa's troubled energy sector.

The more significant legal and policy developments impacting foreign investment in 2018 included the passing of the Protection of Investment Act of 2015 (the Investment Act) and the introduction of the Competition Amendment Bill. The Investment Act is intended to provide holistically for the protection of foreign investors and their investments, and thus obviate the South African government entering into Bilateral Investment Treaties (BITS) individually with its trading partners. The Competition Amendment Bill sought to amend the Competition Act of 1998 by, *inter alia*, obliging the President of South Africa to establish a committee to consider, and where appropriate, block proposed acquisitions by foreign acquiring firms of South African businesses if, in the view of this committee, the implementation of such mergers may have an adverse effect on the national security interests of the country. The Bill defines a 'foreign acquiring firm' as an acquiring firm, which was incorporated, established or formed under the laws of a country other than South Africa, or whose place of effective management is outside of South Africa.

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<sup>1</sup> Deon Govender is of counsel at Covington & Burling (Pty) Ltd.

## 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 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 Investment Act. That Act defines 'investment' within the context of foreign direct investments widely, as: (1) 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 of time, in anticipation of profit; (2) the holding or acquisition of shares, debentures or other ownership instruments of such an enterprise; or (3) the holding, acquisition or merger by such an enterprise with another enterprise outside the Republic to the extent that such holding, acquisition or merger with another enterprise outside the Republic has an effect on an investment contemplated by (1) and (2) 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 Bill (which was passed early 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 such committee must consider, the Competition Amendment Act provides that the President must, when determining what constitutes national security interests for purposes of this 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 foreign investors.

### **III TYPICAL TRANSACTIONAL STRUCTURES**

Foreign investors seeking 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 its income and assets exclusively towards the promotion of its 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 above). 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). Save 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 such affiliate and made subject to a taxable royalty payable to the local subsidiary.

Where foreign investors enter into joint ventures with or without South African investors, such 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.

Save for the security interest rules under the Competition Act (discussed above), there are no rules under South Africa 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 of 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.

Where a foreign investor purchases securities, the foreign investor is obliged to notify an authorised dealer (generally 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 these 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 is financed in an approved manner. Such 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 is 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, ownership and control of, its strategic industries through sectoral regulation, including the banking, insurance, and broadcasting and telecommunications sectors. The foreign investment restrictions in respect of each of these sectors are briefly discussed hereunder.

#### ***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 such 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 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, save 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. Public interest is not defined in the Insurance Act.

### ***Broadcasting and telecommunications sector***

The Electronic Communications Act of 2005 (ECA) imposes limitations of foreign control of commercial broadcasting services. The ECA provides that a foreign investor may not, whether 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, such transactions could be blocked in terms of the Competition Act or public interest considerations embedded in various 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. Further, 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 of 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 the (1) effect of the foreign investment on the Republic, and the cumulative effects of all investments; (2) sector that the foreign investments are in; (3) effect on third persons and the local community; (4) effect on employment; and (5) 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'. Such 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 to 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 measures to, *inter alia*, (1) redress historical, social and economic inequalities and injustices, presumably through the promotion of B-BBEE; (2) promote and preserve cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage; (3) foster economic development, industrialisation and beneficiation; and (4) 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 and Industry facilitate a mediation within six months of the investor becoming aware of the dispute. The Department of Trade and Industry has issued regulations spelling out the rules of the mediation, meaning that there is no room to negotiate amendments to those rules. Further, 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 (being either local arbitration or courts).

South Africa recently adopted the International Arbitration Act of 2017, incorporating the UNCITRAL Model Law on International Commercial Arbitrations (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' disputes with the South African government relating to investments to the local courts, or to arbitration. South Africa is yet to accede to the International Centre for

Settlement of Investment Disputes 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 that 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 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 possibly propose the adoption of additional B-BBEE measures into 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.

# 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 ranges from 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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ISBN 978-1-83862-060-8