

SA, Germany investment treaty cancelled

In an attempt to overhaul its foreign investment protection regime, South Africa gave notice to cancel its Investment Protection Treaty with Germany, one of its most important trading partner. Subsequently, on 23 October 2013 the draft Promotion and Protection of Investment Bill ("the Bill") was published for public comment. The Bill is set to replace various foreign investment treaties.

 By Kay Schröder 11 Dec 2013



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The South African German Chamber of Commerce and Industry, representing about 600 companies, warned that South Africa's decision "could have a negative impact on general investor confidence". The commercial directors of WerthSchröder Inc. are of the opinion that this decision will result in decreasing investor confidence and a decline in foreign direct investment into the country by Germany and other continental European states.

Minster of Trade and Industry, Rob Davies, has however stated that the existence of bilateral investment treaties had shown no correlation with foreign direct investment into South Africa. It is not confirmed how he arrived at that conclusion.

Substantially less protection

A closer look at the Bill reveals that substantially less protection is afforded to foreign investment than by the cancelled investment treaties, specifically the one with Germany, in, inter alia, the following ways:

1. The dispute resolution mechanism in terms of the treaty is by means of international arbitration, whilst the Bill only allows for arbitration in terms of the Arbitration Act. The wording in the Bill needs clarity as to what the legislature actually wants to say. There is doubt why in fact there is a reference to the arbitration act at all and why the state has to regulate what the parties intend doing in terms of their contractual freedom in the first place.

2. The treaty allowed the state to expropriate property only at market value. The Bill however allows for investments to be expropriated against fair and equitable compensation and goes as far as to limit the definition of expropriation and thereby allows for de facto expropriations without any compensation. It is exacerbated with the last enumeration of the "preamble". The preamble contains the usual litany of all the good intentions and what is recognised and desirable and what the people of South Africa apparently want to which we have grown accustomed by now. However, the final listing therein, namely that the Bill "re-affirms" the Government's right to "regulate in the public interest" is confusing and unnecessary to mention in the preamble. Combined with the aforementioned lack of proper protection as regards expropriation, this l

has difficulties to justify its name.

3. The Bill clearly states in Section 3 that it promotes and protects investment in a manner that is "consistent with public interest" and a "balance between the rights and obligations of investors". Once again this is unclear as to its real meaning. The "favourable conditions", the "encouragement" and the "contractual protections of the investments", which the treaties provided for, has obviously been lost.

4. Section 12 allows the Minister (not the legislature), if he "considers" a "transaction, agreement, arrangement, scheme, promise or understanding" has been made or carried out by any person which has the "sole or dominant purpose or the effect of circumventing the ambit of any provision of this Act, to take such steps as is reasonably considered necessary, within the scope of the law, to prevent such avoidance. This section does not protect the investor, it threatens him. Who determines what is "reasonable"? And the "reasonable" only refers to the "consideration", not the steps. What should an investor "circumvent"?

5. Unlike the investment treaty, which was subject to agreement between the parties, the Bill, being national legislation, can be unilaterally altered by the government of South Africa.

6. The Bill puts international investments on par with local investments and no longer affords increased protection to the former.

Judging from Minister Davies' comment that South Africa believes that the bilateral investment treaties have served their purpose, it is unlikely that the treaty regime with the EU will be revived by this country, even though the EU remains committed to reinstating the treaties with SA. It is doubtful, whether the Bill, the wording of which shows signs of being ideologically soured, will be withdrawn upon the recommendations of the interested public. The Department of Trade and Industry has done no service to the people of South Africa by presenting a Bill which appears to constitute lip-service to its purpose and opens the sluices to the government to deal with the issues as it deems expedient. The "public interest" is an animal which has been seen to live in many zoos and the future of international investor protection in South Africa will now be in the hands of the South African government. That, however, is exactly where it shouldn't be.

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