The Foreign Investment Regulation Review

Tenth Edition

Editors

Calvin Goldman, KC and Alex Potter

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THE FOREIGN INVESTMENT REGULATION REVIEW

TENTH EDITION

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PREFACE

This tenth edition of *The Foreign Investment Regulation Review* provides a comprehensive guide to laws, regulations, policies and practices governing foreign investment in key international jurisdictions. This year, the publication begins with summaries of the more detailed country chapters that follow. These chapter summaries should make the text even more user-friendly.

This book is being published at a time of unprecedented geopolitical tensions. The combined effects of the invasion of Ukraine by Russia over the last number of months, together with the continuing escalation of issues between China and the United States in relation to Taiwan and other international matters, have created an environment in which foreign investment reviews across many jurisdictions will be heightened in both substantive terms and related timelines, particularly in relation to possible issues of national security and national interests. In our view, the tenth edition is exceptionally timely in this respect.

Foreign investment has been attracting increased attention for a number of years and this trend has accelerated throughout the past two years. Prior to the covid-19 pandemic, the global economy was continuing its trend towards further integration, even with indications of emerging protectionism, and the number of cross-border and international transactions was increasing, while national governments continued to intervene in foreign investment based on a broadening set of criteria. Foreign investment reviews of cross-border mergers could not help but be affected by shifts in economic relations between countries, which in turn were driven by evolving geopolitical considerations. These included structural developments such as Brexit, now in its post-implementation stages, as well as increased tensions over trade and related policies, as we have seen between the United States and China and now between much of the western world and Russia.

In addition, unprecedented challenges have arisen during the past year or so in relation to supply chains of many essential products, from food supplies to computer chips to building materials, among many other products. These exceptional developments have served only to increase the focus of regulatory authorities on their respective national interests, which may enhance product supplies across many markets and economic sectors. In this regard, Russia's invasion of Ukraine has sent shock waves through the global economy and led to major changes in trade and investment. The significance of Russia's recent actions were exemplified by the exceptional decision of the Steering Group of the International Competition Network (ICN) to disinvite the Competition Authority of Russia from participating in the ICN's Annual Conference in Berlin in May 2022, in which more than 80 national delegations participated, as part of the broader exceptional decision of the Steering Group to suspend Russia's continuing participation in the ICN. This was an unprecedented step, especially for an international organisation that is generally considered to be apolitical and focused on promoting international cooperation and convergence in relation to competition law

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principles, which include the regulatory review of proposed mergers that may overlap with concurrent foreign investment reviews, particularly in high-profile trans-border cases. That exceptional ICN decision is also particularly significant having regard to the fact that Russia hosted the ICN Annual Conference in Moscow in 2007.

These increased tensions overall have continued to heighten concerns about national interest considerations (such as the export of jobs, essential supply chains and industrial policies) and about cybersecurity, new technologies, communications and other strategic areas.

These and other developments discussed below have led, in the case of certain merger reviews, to increased tensions between normative competition and antitrust considerations on the one hand, and national- and public-interest considerations on the other hand, the latter sometimes weighing heavily against the former. An example of the kind of differing regulatory decisions between the competition authorities and the ministerial decision-making in relation to concurrent foreign investment reviews occurred when BHP Billiton, the global leader in mining based in Australia, which had already engaged in previous significant mining investments in Canada, proposed to acquire the Potash Corporation of Saskatchewan for approximately US$40 billion. Both Australia and Canada are members of the Five Eyes with respect to national security matters. That regulatory review process became a highly publicised matter of public interest through much of 2010. In the end, although the Canadian Competition Bureau cleared the proposed merger, the federal Minister of Industry, following his review under the Investment Canada Act and consultation with his Cabinet colleagues, issued an interim negative decision, in November 2010, on national interest grounds that were never really articulated. Rather than trying to then make further submissions, BHP Billiton decided to withdraw the proposed acquisition. Some commentators at that time suggested that the reasons for the ministerial position had more to do with the pending elections at the provincial level in Saskatchewan and at the federal level than any significant national interest issue (Potash Corporation had a long-standing perception among people in Saskatchewan as a historical corporate leader in that province).

A similar split in regulatory decision-making occurred in November 2013 in relation to the proposed acquisition of Grain Corporation of Australia by Archer Daniels Midland Company of the United States. That also was cleared by the competition authority (the Australian Competition and Consumer Commission) following its competition review. However, following subsequent concerns raised by the Foreign Investment Review Board, the Treasurer of Australia, one of the most senior Cabinet members, decided to block the proposed acquisition. Concerns voiced by farmers and distribution networks were apparently factors in that decision. Again, some commentators suggested that real-world political considerations had some bearing on that negative decision.

In May 2022, the UK government decided to subject the acquisition by Nexperia, a Dutch subsidiary of Chinese tech company Wingtech, of Newport Wafer Fab, a UK semiconductor manufacturer, to a detailed retrospective review under the UK National Security and Investment Act 2021, some 10 months after the deal closed. Press reports have suggested that politicians in the United States put pressure on the UK government to act.

As a result of cases such as these and other evolving considerations discussed below, more cross-border mergers have been scrutinised more intensely, with the process delayed or in some cases thwarted by foreign investment reviews that are increasingly broader in scope.

When the pandemic took hold, the underlying considerations that had been driving trends in the review of foreign investment moved to the front of national agendas, with the result that these trends have both been accelerating and increasing in scope. Concerns

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about the benefits of globalisation have been on the rise in an environment where nations have found themselves competing for supplies of critical medicines, equipment and personal protective equipment necessary to meet the public health emergency. This has led to a broadening of the types of businesses the takeover of which might be viewed as raising strategic, public interest or national security considerations. The increased focus on the stream of capital flowing from state-owned enterprises (SOEs) that had already driven greater scrutiny of proposed investments took on heightened importance, particularly in economic sectors viewed as being critical of the pandemic response, such as public health and supply chains. As the effects of the worldwide economic shutdown on the valuation of domestic businesses began to be felt, concerns around opportunistic hollowing-out of domestic sectors rose to the forefront of considerations of such matters as lowering financial thresholds that trigger foreign investment reviews.

This has all taken place in the context of efforts to overhaul the regulatory landscape that were already under way in the United States and Europe. In the United States, which saw the introduction of a mandatory notification regime and expansion of the review authority of the Committee on Foreign Investment in the United States (CFIUS) following the enactment of the Foreign Investment Risk Review Modernization Act (known as FIRRMA) in August 2018, greater resources are now being allocated to monitoring and enforcement activities. This is making the voluntary filing calculus even more complex as there is no statute of limitations on CFIUS's jurisdiction if it has not cleared a transaction. As the policy focus has shifted to supply chain security across the globe, CFIUS is being used in conjunction with other US government authorities to wean critical US supply chains off their reliance on Chinese inputs; for example, by either blocking or subjecting to review even ordinary course transactions with blacklisted Chinese companies. Heightened CFIUS interest and commentary pertaining to certain China-related transactions, such as occurred in relation to TikTok, is a reflection of some of these evolving developments.

The scope of national security and national interests is clearly continuing to grow. For example, in the United States in February 2022, a revisited and broadened list of technologies was announced as critical or potentially critical to the United States in national security and economic terms. Concurrently in Canada, the minister responsible for the Investment Canada Act was called before a parliamentary committee early in 2022 to explain the reasoning that led to a China-based company being permitted to acquire a Canada-based company that is developing its only mine for lithium, which is located in Argentina, having regard to lithium generally being considered a critical mineral under classifications that apply both in Canada and the United States.

In turn, the greater focus on foreign investment has continued in Europe, where the European Union's foreign investment screening regulation, which became fully operational in October 2020, gives the European Commission a new central advisory role in coordinating increased scrutiny by Member States and obliges Member States to notify other Member States and the Commission of foreign investments that they are screening under their national regimes. After nearly two years of implementation, the regular exchanges of information between the European Commission and the EU Member State authorities driven by the regulation appear to be increasing levels of scrutiny, with several examples of national authorities approaching parties to a transaction to initiate enquiries where notifications have not been made proactively. The momentum to introduce foreign investment review has been given added impetus by the Russian invasion of Ukraine, with the European Commission urging all EU Member States to implement foreign investment screening mechanisms as

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a matter of urgency in light of the risks flowing from investment from Russia and Belarus. At the time of writing, 18 Member States have foreign investment screening regimes on their books, and a further seven countries are in the process of introducing them.

In the United Kingdom, the National Security and Investment Act 2021 is now in force and marks a step change in the UK government's power to screen, impose conditions on and block deals that pose unacceptable risks. The new Act requires mandatory notification of investments in 17 strategically sensitive sectors that cross certain share or voting rights thresholds – a significant change in light of the United Kingdom's (continuing) voluntary merger filing regime. Transactions in all other sectors will be susceptible to 'call in' by the government should there be concerns. Early experience testifies to the effects of the new Act: 222 notifications in the first three months of operation, one transaction prohibited (the first formal prohibition in the United Kingdom on national security grounds) and several cases subject to detailed reviews; this coupled with several national security interventions – including far-reaching remedies – under the outgoing UK public interest regime in its last months.

The United States and Europe are not alone in elevating concerns regarding foreign investment during the pandemic and in response to increasing concerns about China's global influence. In Canada, during 2020–2021, timelines for national security reviews were temporarily extended and investments by SOEs, as well as in Canadian businesses related to public health or the supply of critical goods and services, were subjected to heightened scrutiny in response to the pandemic. The Canadian government has issued more detailed guidelines for the review of foreign investments, among other things, to include national security concerns relating to the potential of the investment to enable access to sensitive personal data that could be leveraged to harm Canadian national security through its exploitation, including personal data concerning government officials, such as members of the military or intelligence community. The most recent annual report on the application of the Investment Canada Act (released by the Canadian government in early February 2022) reflects the Canadian government's increased application of national security screening for more proposed foreign investments on a proportionate basis than in past years. In this respect, while as a result of the pandemic there were fewer proposed foreign investments, the 2022 report indicates that there were considerably more national security screenings in the immediately prior year than in the previous year; moreover, there were almost as many investments that were subjected to increased national security screenings in the immediately prior year as compared with the number of proposed investments that were reviewed during the combined total of the previous four years. The highest percentage of these increased screenings pertained to China-based acquirers relative to other nations. This reflects an example of the increased scrutiny that Canada, one of the members of the Five Eyes alliance, is applying to foreign investment reviews in the context of the current geopolitical environment.

In Australia, the Foreign Investment Reform Act came into effect on 1 January 2021, ushering in sweeping changes to the country's foreign investment review law. The temporary A$0 monetary screening thresholds for all investments that had been introduced in response to covid-19 were removed; however, this threshold was continued through provisions for the mandatory review of investments in sensitive national security businesses. New Australian regulations list businesses in critical infrastructure, telecommunications, military goods or defence or intelligence technology, the provision of services to defence or intelligence forces, the storage of or access to classified security information and the storage, collection or maintenance of personal information about defence and intelligence personnel. The symmetry

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between the Canadian guidelines and the Australian regulations should not be considered coincidental. Both countries are members of the Five Eyes alliance (with the United States, the United Kingdom and New Zealand). The Australian Treasurer has also been given new, stronger enforcement and review powers under the legislation, including a 'last resort' power, under which the Treasurer may review previously approved transactions where national security risks have emerged after approval by the Foreign Investment Review Board.

In addition to these significant developments, differences in foreign investment regimes (including in the timing, procedure and thresholds for and substance of reviews) and the mandates of multiple agencies (often overlapping and sometimes conflicting) continue to contribute to the relatively uncertain and at times unpredictable foreign investment environment. This gives rise to a 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 are increasingly 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 notwithstanding extraordinary circumstances.

The recently increasing breadth, scope and timelines for proposed acquisitions by SOEs and other proposed acquisitions giving rise to national security considerations have raised a potentially challenging issue in the context of proposed acquisitions of failing firms. There is a widely held view that, as a result of the disruptive economic effects of the covid-19 pandemic, there may be a sizeable number of distressed industries and failing firms in sectors that have been most significantly affected by the pandemic. The number of cases of failing firms is likely to increase the longer the pandemic continues to substantially affect the timeline for economic recovery from the effects of the pandemic.

In this exceptional environment, there may be cases of failing firms in which the proposed acquirer is an SOE, which in some foreign direct investment reviews includes a corporation that may be influenced directly or indirectly by a foreign government. There may also be proposed acquisitions of failing entities in the public health or supply chain markets, which may be regarded as more sensitive transactions in the context of the pandemic. If these types of proposed acquisitions are subjected to increased scrutiny and longer timelines in foreign investment reviews where the acquiree is a failing firm, and to the extent that there may be a parallel competition review conducted on a considerably more expeditious basis, the proposed acquisition risks not being completed if the target cannot be sustained during that period. That may lead to an anticompetitive acquirer with existing operations in the same jurisdiction becoming the only purchaser in a position to complete the proposed acquisition, thereby avoiding liquidation of the assets and loss of jobs. The same result may follow even where the proposed acquirer is not an SOE or the failing firm is not in an apparently sensitive business because the increasing scope and timelines for foreign investment reviews, coupled with continuing geopolitical tensions, may raise sufficient uncertainty to dissuade a foreign entity from making a proposed acquisition. These developments could have a significant effect on domestic market concentrations going forward.

With respect to the interface of national interest and public interest considerations and the evolving breadth of national security reviews (including, in some cases, as they may relate to or interface with normative competition reviews), the American Bar Association Antitrust Law Section (ABA ALS) Task Force on National Interest and Competition Law prepared a report that was considered and approved by the Council of the ABA ALS in August 2019.

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In that report, the Task Force examined a number of cases in selected jurisdictions where these issues have been brought to the forefront. In addition, the ABA ALS Task Force on the Future of Competition Law Standards delivered a further report in early August 2021 to the Council of the ABA ALS that, among other subjects, considered recent developments pertaining to national interests and national champions in competition reviews. These evolving considerations in competition reviews cannot be viewed in isolation from the increasing scope of national interest factors in foreign investment reviews.

In the context of these significant evolving developments, including the heightened geopolitical tensions and the unprecedented challenges that have arisen in relation to supply chains following the pandemic, 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. The book provides relevant information about, and insights into, the framework of laws and regulations governing foreign investment in each of the 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.

This publication examines the emerging issues described above and the recent trends that have continued to evolve, together with their implications. Parties would be well advised to ensure that they 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. Having regard to the changing regulatory environment pertaining to foreign investment reviews and the evolving protectionism, as well as serious geopolitical considerations across a number of jurisdictions, regulatory counsel may recommend approaching the relevant government authorities at a comparatively early stage to engage in constructive discussions and to obtain an initial view from government officials of the proposed transaction.

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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.

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Chapter 19

SOUTH AFRICA

Deon Govender and Sibusiso Ngwila[1]

I OVERVIEW

The South African Reserve Bank reported in March 2022 that South Africa's foreign direct investment (FDI) inflows for 2021 were approximately US$37.6 billion. This is a significant increase from the FDI inflows of approximately US$3.1 billion reported in 2020. The increase in FDI inflows for 2021 have been largely attributed to the renewed focus on FDI opportunities in the South African economy following the country's extended covid-19 lockdowns, which shut out potential investors, and a significant cross-border transaction, involving Prosus NV's acquisition of approximately 45 per cent of Naspers Ltd from the latter's existing shareholders.

Although various provisions of the Competition Amendment Act of 2018 were brought into force by the President of the Republic of South Africa in July 2019 and February 2020 by notices in the Government Gazette, the provisions of that Act that are of particular interest for FDI inflows are yet to be brought into force. The provisions in question are the new Section 18A of the Competition Amendment Act, which obliges the President of the Republic of South Africa to establish foreign investment committees to consider and, where appropriate, block proposed acquisitions of South African businesses by foreign acquiring firms if, in the view of a foreign investment committee, the implementation of the merger might have an adverse effect on the country's national security interests. The Competition Amendment Act defines a foreign acquiring firm as one that is incorporated, established or formed under the laws of a country other than South Africa or whose place of effective management is outside South Africa. Section 18A(12) expressly prohibits the Competition Commission or the Competition Tribunal from approving a merger in instances where a foreign investment committee has blocked the implementation of the merger.

Note, however, that the acquisition of a minority interest in a South African business, albeit an interest that does not amount to exercising direct or indirect control over that business, is generally not subject to the provisions of the Competition Amendment Act (as amended), and as such the acquisition of a minority interest in a South African business by a foreign entity would not require the approval of a foreign investment committee.

1 Deon Govender is of counsel and Sibusiso Ngwila is an associate at Covington & Burling (Pty) Ltd.

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II YEAR IN REVIEW

The proposed amendment of Section 25 of the Constitution of the Republic of South Africa 1996 (the Constitution) has attracted significant attention for more than a decade – ever since certain public groups called for the Constitution to be amended to allow for the state to expropriate privately owned land without providing compensation. Section 25 of the Constitution affords every person the right not to be deprived of property, except in terms of the law of general application providing for expropriation for compensation to achieve a public purpose or to realise an objective in the public interest. The call for the amendment of Section 25 of the Constitution ultimately received attention from certain political parties, and this culminated in the proposed 18th Amendment to the Constitution being tabled before Parliament in the latter part of 2021. Although the 18th Amendment was the cause of substantial anxiety for current and prospective investors in the Republic, the proposed Amendment failed to garner the requisite number of votes in the National Assembly (i.e.,, the lower house of the South African Parliament) for it to be passed into law. Presently, there are no apparent further reforms to policy or legislation to amend Section 25 of the Constitution.

III FOREIGN INVESTMENT REGIME

i Policy

The South African government encourages FDI and has acknowledged that foreign investment is necessary to support the country's growth and development objectives. However, the South African government requires that the benefits of FDI 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. 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 legislature has prescribed a narrow meaning for what constitutes a 'black person' for the purposes of B-BBEE in the Broad-Based Black Economic Empowerment Act of 2003 (B-BBEE Act). That Act provides that a 'black person' is a person of African, coloured or Indian descent who is a citizen of South Africa by birth or descent, or who became a citizen of South Africa by naturalisation before 27 April 1994, or on or after that date, provided that the person would have been entitled to acquire citizenship by means of naturalisation prior to 27 April 1994.

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ii Laws and regulations

The principal law governing foreign investment in South Africa is the Protection of Investment Act of 2015 (the Investment Act), which defines 'investment' within the context of FDI widely as:

a 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 in anticipation of profit;

b the holding or acquisition of shares, debentures or other ownership instruments of such an enterprise; or

c the holding, acquisition or merger by such an enterprise with another enterprise outside the Republic to the extent that the holding, acquisition or merger with another enterprise outside the Republic has an effect on an investment contemplated under points (a) and (b), above, in the Republic.

The Immigration Act of 2002 (the Immigration Act) provides for foreign investors to obtain a business visa to allow for them to lawfully enter the Republic for the purposes of investing in and carrying on a business. A business visa may be obtained from the South African Department of Home Affairs in terms of Section 15 of the Immigration Act, provided that the applicant for the visa is intending to, or has already, established or invested in a business within the Republic. Business visas are granted for a period not exceeding three years at a time.

iii Scope

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 Act (which was passed in 2019) permits the blocking of a merger involving a foreign acquiring firm if, in the view of a President-appointed foreign investment committee, its implementation is a cause for concern for the national security of the country. Unlike mergers and acquisitions, there is no review of new businesses established by foreign investors or joint ventures formed by foreign investors.

The Immigration Act requires that an applicant for a business visa must invest the prescribed financial or capital contribution into the relevant business, and that contribution must form part of the intended book value of the business. The prescribed financial or capital contribution is determined by the Minister of Home Affairs by a notice in the Government Gazette, and the applicable financial contribution in 2021 was 5 million rand,[2] whereas the capital contribution must be in the form of new machinery and equipment. Notwithstanding the foregoing, the Immigration Act allows for the Director General of the Department of Home Affairs to reduce or waive the financial or capital contribution requirements in instances where the nature of the business of the applicant is prescribed to be in the national interest.

The types of business activities that the Minister of Home Affairs considers to be within the national interests during the year under review include:

a agro-processing;

b business process outsourcing and information technology enabled services;

c capital and transport equipment, metals and electrical machinery and apparatus;

d textiles, clothing and leather;

2 Approximately US$315,000 as at August 2022.

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e electro technical (this includes, for example, advanced telecommunications, software development and smart metering);
f green economy industries (including power generation and renewable energy);
g oil and gas; and
h mineral benefaction and infrastructure development.

Moreover, an applicant for a business visa must ensure (or prove, if they have already invested or established the business, that they have ensured) that the business is duly registered with the South African Revenue Service and other prescribed government authorities and relevant professional bodies, boards or councils. No fewer than 60 per cent of the staff permanently employed within the applicant's business must be South African citizens or permanent residents.

The Immigration Act allows for an application for a business visa to be refused if the industry in which the business operates is considered to be 'undesirable'. The Minister of Home Affairs issues a list of such industries from time to time, by notice in the Government Gazette. The industries that are currently considered undesirable are:
a businesses that import second-hand motor vehicles into the Republic for the purpose of exporting to other markets outside the Republic;
b the exotic entertainment industry; and
c the security industry.

For an application for a business visa to be approved, the applicant is also required to procure a letter of recommendation from the Department of Trade, Industry and Competition regarding the feasibility of the business and its contribution to the national interests of the Republic.

iv Voluntary screening

There are no procedures for a filing of a voluntary screening of a transaction that entails FDI in South Africa.

v Procedures

The Competition Act, as amended, does not make provision for the appeal of a decision by a foreign investment committee. However, a foreign acquiring firm that is aggrieved by the decision of a foreign investment committee may apply to the competent high court for a review of the committee's decisions under the terms of the Promotion of Administrative Justice Act of 2000.

vi Prohibition and mitigation

The amendments to the Competition Act permit the blocking of a merger involving a foreign acquiring firm if, in the view of a foreign investment committee, its implementation poses concerns for the national security of the country. Although the President is yet to identify and publish a list of national security interests that a foreign investment committee must consider, the amendments to the Competition Act provide that the President, when determining what constitutes national security interests for the purposes of that Act, must take into account all relevant factors, including the potential effects 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;

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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.

IV SECTOR-SPECIFIC REQUIREMENTS

i Prohibited sectors

There are currently no complete prohibitions against FDI in relation to any particular sector.

ii Restricted sectors

South Africa does regulate foreign investment in, and ownership and control of, its strategic industries through sectoral regulation, including within the banking, insurance, and broadcasting and telecommunications sectors. The foreign investment restrictions in respect of each of these sectors are briefly discussed below.

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 the 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, whereas 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. The Banks Act provides that no person, other than the controlling entity of the bank (whether a local or foreign entity), may acquire more than 15 per cent of the total nominal value or the total voting rights in respect of the issued shares of a bank without the prior approval of the Prudential Authority or the Minister of Finance, depending on the number of shares or voting rights that are to be acquired.

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

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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 a 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, except 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.

Broadcasting and telecommunications sector

The Electronic Communications Act of 2005 (ECA) imposes limitations on foreign control of commercial broadcasting services. The ECA provides that a foreign investor may not, 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 and notices issued under the ECA, the Independent Communications Authority of South Africa (the electronic communications regulator) will not approve the transfer of an individual licence where the transferee's ownership and control by historically disadvantaged persons is less than 30 per cent. However, the final regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT [information and communication technology] Sector Code, published on 31 March 2021 (the Equity Regulations), now require that in addition to compliance with the 30 per cent ownership requirement in respect of historically disadvantaged people, each holder of an individual licence must also comply with a 30 per cent ownership requirement in favour of black people (as defined in the B-BBEE Act). The Equity Regulations provide that compliance with the black ownership requirement will also constitute compliance with the equity requirements in respect of historically disadvantaged persons. The 30 per cent ownership requirement in respect of black people is not yet operative, and will become effective on a date to be determined by the Independent Communications Authority of South Africa.

The ECA further regulates cryptography. Under the terms of the ECA, 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.

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, transactions of this kind could be blocked under the Competition Act or public interest considerations embedded in various pieces of legislation, some of which has been discussed above.

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V TYPICAL TRANSACTIONAL STRUCTURES

Foreign investors who seek 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 one 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 initial public offerings, 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 their income and assets exclusively towards the promotion of the company's 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 in Section IV, 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 an 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). Except as set out in the discussion in Section IV, above, there are no requirements for the shareholders or directors of any of these companies to be South African. When 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 the affiliate and made subject to a taxable royalty payable to the local subsidiary.

When foreign investors enter into joint ventures with South African or foreign investors to pursue investment opportunities in South Africa, the joint ventures are treated as partnerships under South African law. If a 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. If a partnership is incorporated into a limited liability company, the Companies Act applies to that partnership and the 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.

Except for the national security interest considerations under the Competition Act (discussed above), there are no rules under South African law pertaining to takeover bids by foreign companies.

When 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. Although there are no restrictions on a foreign investor's

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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 the scope of this review, we would 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.

As part of its efforts to attract FDI into the country, the South African government has established the special economic zone (SEZ) programme under the Special Economic Zones Act of 2014. This programme seeks to promote regional industrial development by providing incentives for foreign (and local) investors that elect to operate within the country's eight SEZs. These incentives include a reduced rate of corporate income tax, building allowances, a customs controlled area and tax relief, including tax incentives designed to support both greenfield (i.e., new industrial projects) and brownfield investments (i.e., expansions or upgrades of existing industrial projects).

When a foreign investor purchases securities, the foreign investor is obliged to notify an authorised dealer (generally commercial 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 those 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 financed in an approved manner. The financing must be in the form of the introduction of foreign currency or rand from a non-resident rand account.

VI OTHER STRATEGIC CONSIDERATIONS

The South Africa government has resolved not to enter into any new bilateral investment treaties (BITs). Furthermore, 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 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:

a the effect of the foreign investment on the Republic and the cumulative effects of all investments;
b the sector that the foreign investments are in;
c the effect on third persons and the local community;
d the effect on employment; and
e the direct and indirect effects on the environment.

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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'. The 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 by those affected, or decided or approved by a court. 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 the following measures, inter alia:

a to redress historical, social and economic inequalities and injustices, presumably through the promotion of B-BBEE;

b to promote and preserve cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage;

c to foster economic development, industrialisation and beneficiation; and

d to protect the environment and the conservation and sustainable use of natural resources.

These measures could potentially have the effect 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, Industry and Competition facilitate mediation within six months of the investor becoming aware of the dispute. The Department of Trade, Industry and Competition has issued regulations spelling out the rules of mediation. Furthermore, 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 (these being either local arbitration or courts).

South Africa adopted the International Arbitration Act of 2017, thereby incorporating the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration (as amended in 2006) 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' investment-related disputes with the South African government, both in the local courts and in arbitration proceedings. South Africa has yet to accede to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and, having regard to the dispute resolution provisions of the Investment Act, the South African government is unlikely to accede to the ICSID Convention in the near future.

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 form of 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, a

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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 could possibly be required to consider the adoption of additional B-BBEE measures in 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.

VII OUTLOOK

The South African government is aware that the policy and regulatory frameworks applicable to various strategic sectors may be complex and cumbersome for foreign investors, and has acknowledged this in its latest country investment strategy published in the Government Gazette. There are some interventions by government institutions to streamline and simplify policy and regulation in order to make the investment case for South Africa more appealing, but these are yet to yield significant results.

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Appendix 1

ABOUT THE AUTHORS

DEON GOVENDER

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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 includes 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.

SIBUSISO NGWILA

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Sibusiso Ngwila is a South Africa-qualified lawyer and is an associate in the firm's project development and finance practice group. He specialises in infrastructure development, energy, oil and gas, road and rail transportation, ports, as well as public sector law (including general public procurement and public–private partnerships). Sibusiso has advised on regulatory and transactional project development and finance-related matters in South Africa and other sub-Saharan African countries and has acted for both South African and international large-scale corporates, commercial lending institutions, investment institutions, project developers and organs of state. His general experience includes advising on a variety of energy, infrastructure and oil and gas-related projects, focusing on corporate and commercial aspects; conducting due diligence investigations; the drafting and negotiation of key project documents, such as concession agreements, power purchase agreements, public–private partnership agreements and gas transportation and supply agreements; policy and regulatory considerations, including the drafting of opinion memorandums on key regulatory considerations; and project development-related activities.

Firm description

In an increasingly regulated world, we have an exceptional ability to navigate clients through their most complex business problems, deals and disputes. From our offices in Beijing, Brussels, Dubai, Frankfurt, Johannesburg, London, New York, Los Angeles, Palo Alto, San Francisco, Seoul, Shanghai and Washington, we practise as one firm. We hold closely to core values that start with a deep commitment to our clients and the quality of our work on their behalf, and that includes an emphasis on teamwork among our lawyers and other professionals.

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Our office in Johannesburg gives us a critical presence on the African continent, providing our clients with an advantage that many international law firms do not have. We offer our clients a team of specialist transactional lawyers and advisers who focus specifically on cross-border emerging markets work across Africa. Built on the firm's model of collaboration across practices, industry sectors and geographies, our Africa practice has unparalleled experience in helping clients navigate the challenges of investing and operating on the continent.

Our team includes a rare mixture of lawyers and advisers with decades of experience working on the ground in Africa. This offers our clients broad expertise of transactional, regulatory, dispute resolution and compliance matters, coupled with unparalleled experience of working internationally to solve complex problems at senior levels of government. We have also developed a network of highly skilled local lawyers in many African jurisdictions to assist us with local law issues; with the flexibility to select the best lawyers in each jurisdiction.

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