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PROTECTION OF INVESTMENT: HOW SAFE ARE SOUTH AFRICA'S 'INVESTMENTS'?

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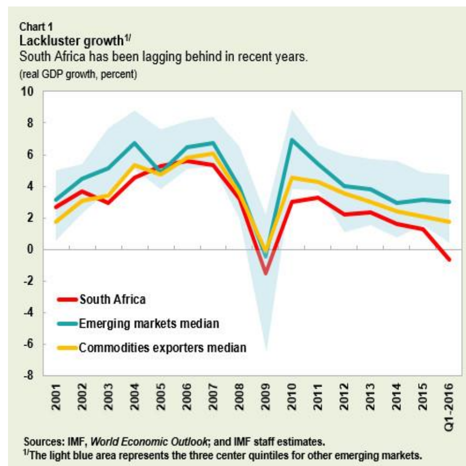
At the time when South Africa re-entered the global economic arena in 1994 -- amongst a number of critical tasks set by the late President Nelson Mandela -- the newly elected democratic government realised the importance of establishing Bilateral Investment Treaties ('BITs') with foreign countries. These BITs were established in order to inter alia; boost the then ailing economy through international trade, as well as to attract their much needed foreign investment to South Africa.



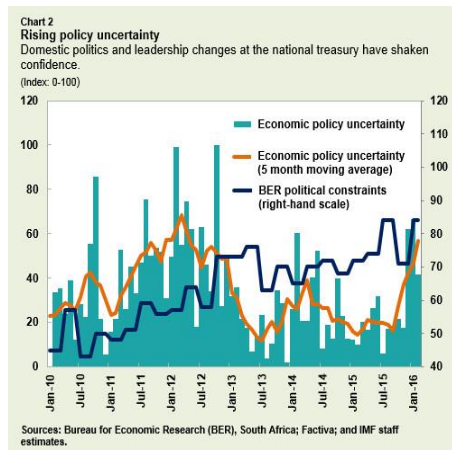
Following South Africa's return to the global economy, the country concluded approximately forty-nine (49) BITs with countries across the globe; some which were fully operational and others with countries such as Canada, Israel, Ghana, Tanzania and Turkey which were signed but were not in force. However, over the last few months, South Africa has cancelled numerous BITs with countries such as Austria, Belgium, Denmark, France, Germany, Netherlands, Spain, Switzerland and even the United Kingdom.

Against the backdrop of South Africa's cancellations of the afore-mentioned international investment treaties, including the unfolding of the post-Brexit economic uncertainties, there is a critical need for the government to urgently reassess many of the country's heavy handed legislation and various investor-unfriendly policies which appear to be deterring long term commitments by both local and foreign businesses.

Furthermore, the recent International Monetary Fund annual assessment of South Africa's ailing economy does not inspire confidence, and the country's economic growth forecast has been slashed once again; this time from 0.6% to a mere 0.1%. This so-called 'growth' is certainly no way to address the massive social ills being experienced in South Africa, characterised by unemployment figures upward of 25%, scandalous corruption, escalating crime and political uncertainty, to name a few areas of alarm. To even suggest, as the Minister of Finance Pravin Gordhan recently stated, that South African businesses should not take the "easy way out" by amongst others downsizing the workforce in tough economic times, is bizarre. Simply put, whilst the government sets the rules, business simply reacts in the best possible way it knows, in order to survive.

In order to revive the country's growth -- which is currently the worst it has been since the 2009 recession -- it will take monumental courage on the part of the government to scrap its current ideologies, which in many instances is being outwardly rejected by many local and international businesses, and indeed vested stakeholder communities. It is true that since South Africa's 1994 democratic elections, there have been considerable economic and social advances. However the effect of the change has not benefitted the majority of its citizens. In this regard, income inequalities and unemployment in South Africa have remained amongst the worst in the world. Yet sadly, there is no commonly agreed or accepted plan of action between the government, business and civil society that will change matters any time soon. In reality, the National Development Plan (NDP) will remain nothing more than an idealistic dream for politicians to talk about, and this will continue for as long as the ‘rules of business engagement’ are not geared toward business-friendly regulation and energised growth. It is also critical that investors are assured of a stable environment which is safe, and that the rule of law is upheld, where all its citizens are protected by the Constitution and its Chapter 9 institutions.

Against the stark realities of the country’s massive challenges, it is important to note that under the leadership of President Jacob Zuma, the government has decided to revoke all South Africa’s BITs. The government anticipates re-negotiating international trade agreements, essentially under the auspices of the contentious Protection of Investment Act, 22 of 2015 (‘the Act’), which President Zuma assented to on 15 December 2015 and which was signed into law in January 2016. Notwithstanding the argument provided by the Minister of Trade and Industry -- Mr. Rob Davies -- stating that the Act will, amongst other benefits, provide equal protection to foreign and local investors, as well as ensuring that there is a balance of rights and obligations, many foreign investors have expressed unease, in view of the fact that the Act has in fact withdrawn many of the previous protections found in the BITs which were negotiated separately between their countries and South Africa.



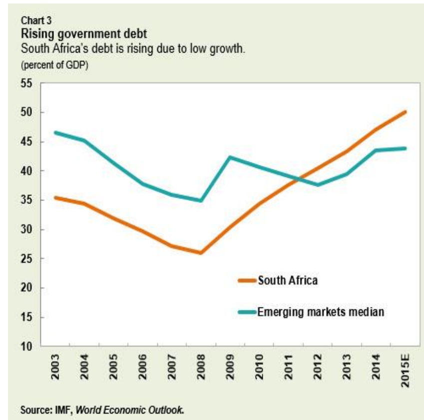
As it is perhaps still too early to determine whether or not the Act will have a negative affect on the South African economy, already many investors have expressed deep concerns regarding the implications the Act will have on their businesses in South Africa. This is especially the case in respect of the intricate manner in which the Act is seemingly linked with the wider “public interest” provisions found in the Act, and supported by other South African legislation such as the Expropriation Bill, the Minerals and Petroleum Resources Development Act, the Broad-Based Black Economic Empowerment Act, the Employment Equity Act and the Competition Act 89 of 1998 (as amended).

Unlike the BITs which provided certainty in matters such as international arbitration, repatriation of funds and expropriation; foreign investors are of the opinion that their investment protection is very restricted and that the South African government is more focussed on protecting its sovereign rights, rather than those of the investors. Expectedly, both the European and the American Chambers of Commerce -- which jointly represent the largest of international investors in South Africa -- have strongly opposed the Act, stating that the Act will only further exacerbate the country’s dire economic situation which is thwarted by an average annual growth rate of less than one percent.

“Business has to have “the confidence to invest in the current environment and ensure that you don’t take the easy route out when in difficulty, i.e. cut staff, because unemployment is our collective challenge, you and ourselves need to do as much as possible to keep as many workers at work…” - Finance Minister Pravin Gordhan

Source: South African businesses should not take the “easy way out” in tough times (12 July 2016)

South Africa has not featured in the renowned A.T. Kearney Foreign Direct Investment Confidence Index® since 2014, and has been surpassed in this index by our BRICS counterparts, China, India and Brazil. According to the United Nations Conference on Trade and Development's 2016 World Investment Report, South Africa's foreign direct investment (FDI) dropped 69% last year to $1.8 billion (out of a total of $1.7 trillion global FDI) which is the lowest our country has seen in the last decade.



Foreign investors are already nervous of South Africa's pending downgrade to "junk-status", which was narrowly missed in June 2016 when Standard & Poors maintained their credit rating for South Africa at BBB- with a negative outlook. Besides the rating itself, South Africa is seemingly no longer the first destination of choice for foreign investment by the developed economies, and it would appear that the Act is adding yet a further reason not to invest in our country. Indeed, countries such as Nigeria and Egypt -- which are not as developed as South Africa -- are becoming more attractive for foreign investment especially since their economies are showing robust growth. Unquestionably, investors understand the risks associated with developing markets, and they are generally prepared to take these risks provided they understand the macro economic environment and that there is medium to long-term regulatory certainty.
Indeed, both these components -- including access to power, exchange rate volatility and political instability to name just a few additional investor 'red-flags' -- are reportedly scarring investors away from South Africa.

The Act has undoubtedly left many foreign investors with more questions than answers, and if the Act does not provide the clarity which was previously contained in the BITs, and such where foreign investors enjoy benefits and protection on par with those they can expect in other developing countries, then the reality is simply that foreign investment will continue to move to more investor-friendly destinations.

As South Africa is a signatory to the SADC Protocol on Finance and Investment which came into effect in April 2010, it would be interesting to know how the government will defend the cancellations of the regional BITs, and whether the dispute provisions in the Act will undermine those of the Protocol.

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