dentons.com

大成 DENTONS

Doing Business in BRICS

Edition 1

Contents

Welcome to the first edition of our Doing Business in BRICs newsletter

In 2001, Goldman Sachs Group economist Jim O'Neill coined the BRICS acronym with the initials of these five large emerging economies, Brazil, Russia, India, China and later, South Africa. With economic growth rates above the global average, the BRICS countries together form the most influential economies in the world today for business and investment. They are growing rapidly, applying their available capital into long-term growth assets and creating new wealth among their rapidly increasing middle-classes.

No matter where your interests in the BRICS nations reach, Dentons supports you with experience and understanding. For more information on doing business in BRICS, please contact any of the key regional contacts listed below

China

Alex Wang
Partner
D +86 21 2315 6188
alex.wang@dentons.com

Russia

Florian Schneider
Managing Partner
D +7 495 644 0500
florian.schneider@dentons.com

Latin America

Jorge Alers
Latin America and the Caribbean
Chief Executive Officer
D +1 202 408 3240
jorge.alers@dentons.com

South Africa

Noor Kapdi
Partner
D +27 11 326 6257
noor.kapdi@dentons.com


Release
Release

Foreign investment in the Brazilian healthcare market

Mattos Muriel Kestener Advogados

Since the publication of Law 13,097[1], some large foreign investments have been made in the Brazilian healthcare market. The Law's section 142 opened up Brazil's healthcare market to greater involvement from foreign companies and foreign capital.

As reported by the press, in April 2015, the investment fund Carlyle Group LP obtained an 8.3 per cent interest in the corporate capital of Rede D'or, which is one of the largest private hospital groups in Brazil. The following month, the GIC – a sovereign fund established by the Government of Singapore – purchased a 15.3 percent interest in the co rporate capital of the same Brazilian group. Also, the private equity fund Broad Street acquired 33 per cent of the common shares of the capital stock of Oncoclínicas, a clinic specialising in oncology. Another example is the acquisition by Advent of a stake corresponding to 13 percent of the corporate capital of clincal analysis laboratory Fluery.

These are only a few examples of a process that is just beginning. The current scenario allows many opportunities for foreign investment in health services in Brazil.

What has changed?

Section 142 of Law 13,097/2015 opened up the Brazilian healthcare sector to direct or indirect investments from companies or foreign capital, by changing Law 8,080/90 – the Health Statute (Lei Orgânica da Saúde or "LOS") – which is now in effect and includes an amended section 23 and a new section 53-A:

"Section 23. Foreign companies or capital are allowed to take a direct or indirect stake, or take a controlling interest, in the healthcare industry in the following situations:

- via donations from international bodies linked to the United Nations, from technical cooperation bodies and organisations providing finance and loans;
- via legal entities created to establish, implement or operate:
  - a) general or philanthropic hospitals, specialised hospitals, polyclinics, general clinics and specialised clinics; and
  - b) family planning research or activities;
- non-profit health services supported by companies to serve their employees and dependants, at no cost to social security; and
- in other cases provided by specific legislation." (NR)

"Section 53-A. Within the category of healthcare operations and services, healthcare support activities are those activities provided by laboratories involved in human genetics, the production and supply of medications and health products, clinical analysis, anatomical pathology and diagnostic imaging laboratories, and they are free to accept direct or indirect participation of foreign capital or companies."

Item II, line a) of section 23 is the provision that opened up the market to foreign investment. With this provision, the LOS now allows foreign investors or companies to invest in, hold stakes in or take a controlling interest in general specialist hospitals, polyclinics, general clinics or specialist clinics, which was previously prohibited because there was no specific law authorising such investments. There are no limitations on the type of investment nor on the healthcare professions that can receive such investment.

The remaining provisions in the new section 23 simply reinforce existing permissions. Item II line b), which allows foreign companies or investors to hold stakes in family planning research or other activities, repeats the provision of section 7 in Law 9,263/96 – the Family Planning Act.

Items I and III reproduce permissions already included in the previous version of section 23. Item IV embraces other situations mentioned in specific legislation, such as the permission provided by Law 9,656/98 – the Healthcare Plan Act – allowing foreign investment in private healthcare plans.

The new section 53-A confirms a long-standing constitutional interpretation: healthcare support activities are exempt from foreign investment restrictions because they only play a supporting role. This section simply acknowledges that these support activities were already and remain open to foreign investment.

Investment possibilities

The changes brought about by article 142 of Law 13,097/2015 opened new investment opportunities in the healthcare market. On the one hand, foreign companies and investors are now investing in the Brazilian market; on the other, Brazilian companies are having fresh alternatives for raising capital and building strategic partnerships abroad.

Amongst the main investment mechanisms available are:

- Sale and purchase of participating interests in Brazilian healthcare companies by other companies or private equity funds, including taking a controlling interest in such companies.
- Stock investment, via initial or subsequent public offerings on Brazil's primary or secondary market, or by issuing securities abroad – with foreign investors also allowed to take a controlling interest.
- Joint venture agreements, between Brazilian and foreign companies or just foreign companies with a view to operating in the Brazilian market.
- Indirect participation via foreign or Brazilian investment funds (including private equity funds).

> The Law's section 142 opened up Brazil's healthcare market to greater involvement from foreign companies and foreign capital.

- Setting up a subsidiary of a foreign company in Brazil.

Brazilian companies that wished to enter the healthcare market to consolidate or pursue cost synergies, but faced restrictions because their shareholders included foreign investors, may now amend their bylaws to move into the healthcare business.

Current legal questions

After Law 13,097/2015 was published, the National Confederation of Liberal University Students questioned the constitutionality of the Law at the Federal Supreme Court (STF)[2], based on an adverse opinion from the Federal Attorney General. As yet, there has not been any decision by the Court. Nevertheless, the Senate and the General Counsellor of the Union have stated that they believe the Law to beconstitutional. If the Court finds that the law is invalid, there maybe serious consequences for foreign investments made before the decision. Added to that, the Law 1,721/2015, which is currently in the House of Representatives, seeks to repeal the provisions of article 142.

Conclusion

Law 13,097/2015 is influencing Brazil's healthcare market significantly. New opportunities have arisen both for companies already in the market and for others now wishing to enter or invest in the healthcare industry. We recommend that those interested in doing so should carefully assess the economic and legal alternatives available to them under the new legislation.

Key contacts

Rubens Granja
Partner
D +55 11 3149 6127
rgranja@mmk.com.br

Beatriz Kestener
Partner
T +55 11 3149 6106
biakestener@mmk.com.br

Ubiratan Mattos
Partner
T +55 11 3149 6102
umattos@mmk.com.br

Fabio Alonso Vieira
Partner
T +55 11 3149 6111
fabiovieira@mmk.com.br

1Law 13,097/2015 was published in the Federal Register on 20 January 2015.

2STF. ADI nº 5239, rel. Min. Rosa Weber.

Localisation: customs considerations

Inna Elisanova, Dentons

Mattos Muriel Kestener Advogados

Currently, confirming the country of origin (including the local production) of any goods in Russian territory is generally governed by the provisions of the customs legislation.

Confirmation of localisation is a matter of some urgency for companies in the following cases:

- participation in government procurement;
- setting up the industrial assembly of vehicles and components and assemblies thereof in Russia;
- the use of certain customs procedures (e.g., use of free customs zone treatment); and
- the confirmation of the country of origin when removing (exporting) goods (if obtaining a country of origin certificate for the goods is provided for by the laws of the import country, contract terms, etc.).

The matter of determining the country of origin of goods also arises when importing products into Russia using tariff preferences. Each such case is governed in detail by a separate regulatory legal act.

For example, references to the customs legislation with regard to confirming the country of origin (localisation) of certain goods for the purpose of clearance for central and local government procurement are contained in Government Resolutions.

Medical devices are subject to the provisions of RF Government Resolution No. 102 of 5 February, Localisation: customs considerations continued

2015, "On limiting the clearance of certain types of medical devices of foreign origin for the purposes of central and local government procurement". According to the current version of Resolution No. 102, products whose country of origin is the Russian Federation, the Republic of Armenia, the Republic of Belarus, or the Republic of Kazakhstan are eligible for participation in procurement. This is subject to the availability of a certificate of origin of goods issued in accordance with the Rules for Determining the Country of Origin of Goods in the Commonwealth of Independent States, which was approved by the Agreement of the Governments of the CIS Member States of 20 November, 2009 (the Rules).

Central and local government procurement of various machine building products is governed by RF Government Resolution No. 656 of 14 July , 2014, "On prohibiting the clearance of certain types of machine building products of foreign origin for the purposes of central and local government procurement". This Resolution also contains references to the Rules for Determining the Country of Origin of Goods. With respect to various machine building products for the purposes of clearance for procurement, a certificate of origin of goods must be submitted confirming the production or sufficient processing thereof, which guarantees the required localisation of production.

Thus, according to the Rules, the country of origin of goods is deemed to be the state in the territory of which the goods were produced in their entirety or underwent sufficient processing/treatment.

Goods produced in their entirety include natural resources (subsoil assets and mineral commodities, water, land and air resources) extracted from the subsoil of the given state, in the territory thereof, or in its territorial waters or from the ground thereof, or from the atmosphere in the territory of the given state. They also include waste and scrap (recovered materials) obtained as a result of manufacturing or other processing operations, as well as previously used items collected in the given country and which are suitable only for processing into raw materials.

The legislation on the topic of localisation is currently undergoing rather rapid development

The sufficient processing/treatment criteria for the purposes of determining the country of origin according to the Rules are as follows:

- a change in at least one of the first four digits of the commodity heading under the Eurasian Economic Union (EAEU) Foreign Economic Activity Commodity Nomenclature (FEACN), occurring as a result of processing/treatment

(this is the principal sufficient processing/treatment criterion);

- fulfilment of the necessary conditions for manufacturing and production operations; and
- the ad valorem percentage rule, when the value of foreign materials used reaches a specified percentage of the price of the final product.

The above are the basic criteria for the purposes of fulfilment of the localisation condition. Depending on the type of processed or treated goods, a particular criterion or a combination of criteria is used. Additional conditions which when met enable an industrial product to be regarded as a product made in Russia are established in the context of RF Government Resolution No. 719 of 17 July, 2015, "On criteria for classifying an industrial product as an industrial product having no comparable counterparts that are made in the Russian Federation" (effective as from 1 January, 2015). Resolution No. 719 establishes additional criteria for the following product groups:

- machine tool industry products;
- automotive industry products;
- special machinery sector products;
- photonics and lighting engineering sector products;
- power engineering and electrical and cable industry products; and
- heavy machinery products.

These additional conditions may be, for example, a criterion for the company to have rights to design and technical documentation to an extent sufficient for the production, upgrading, and development of the relevant products for a period of at least five years; a criterion for having an authorised service for performing repairs and after-sales and warranty service on products in the territory of one of the Eurasian Economic Union member states; and the use of particular equipment, components or raw materials produced on the territory of Eurasian Economic Union member states.

It must be noted that a draft Agreement on the Harmonised System to Confirm the Origin of Goods Exported from the Customs Territory of the Eurasian Economic Union is currently at the domestic approval stage.

Thus, the legislation on the topic of localisation is currently undergoing rather rapid development. On the one hand, this makes it difficult to evaluate the entire scope of regulation on localisation, since the legislation is under development. On the other hand, however, it offers an opportunity for potential investors to get involved in the process of the creation of the regulatory framework for localisation.

Key contact

Inna Elisanova
Associate
T + 7 495 644 05 00
inna.elisanova@dentons.com

The Russian tax system

Anna Zvereva and Hava Kadyrova, Dentons

The Russian taxation system comprises 12 taxes divided into federal, regional and local levels, which are administered by the Federal Tax Service and its local departments and inspectorates.

Regional authorities have control over certain elements of regional and local taxes (within the limits set out in the Russian Tax Code). Designated "special economic zones" give their residents (manufacturing, R&D, IT, tourism) tax benefits, including corporate income tax holidays, reduced property and land tax rates and other advantages.

Corporate income tax

This tax is levied on taxable profit, calculated as sales revenue and other income, less economically justified expenses. The standard rate is 20 percent; it may be reduced to 15.5 percent under regional law.

Dividends are taxed at 13 percent (or even 0 percent under certain conditions) if received by a Russian company, or at 15 percent if received by a foreign company. Interest and royalties are taxed at 20 percent.

Passive income of foreign companies is subject to withholding tax in Russia unless the applicable double taxation treaty (DTT) provides otherwise.

Business income of foreign companies is taxed if their activities constitute a permanent establishment (PE) in Russia.

Russian tax legislation provides thin capitalisation rules applicable to loans received from related foreign companies (as defined under the transfer pricing rules) or their Russian related companies, and to loans secured by such foreign or Russian companies. The rules are applied on the basis of a 3:1 debt-to-equity ratio (12:1 ratio for banks and financial leasing companies), limit interest deductibility and require taxation of excessive interest as "dividends". Under current court practice, DTTs do not serve as protection against these rules.

Equity financing that a direct Russian/foreign parent company makes to a Russian company in cash in the form of a contribution to share capital, or a contribution increasing the net assets of the subsidiary (financial aid), is tax-free in Russia for both parties to the transaction.

VAT and excise duties

VAT applies to value of goods, works and services transferred to counterparties and/or for a taxpayer's own needs. The standard rate is 18 percent. Certain types of goods and services may benefit from 10 percent or 0 percent rates, or even exemption (e.g., certain financial and similar operations, transfer of IP rights for patents, software and trade secrets).

Input VAT is fully recoverable if the acquired goods/services are for operations that are subject to VAT. Input VAT is partially recoverable if the goods/services are used for both taxable and non-taxable operations.

Excise duties primarily apply to alcohol, tobacco, cars and fuel. The tax is charged on the basis of either the quantity or value of goods produced/processed/refined, depending on the type of goods. Each type of goods is taxed at special rates.

Property taxes

Property tax applies to the movable and immovable property of Russian companies and all fixed assets of foreign companies. The tax base is either (i) the net book value or (ii) the cadastral value (for certain listed commercial buildings and real estate of foreign companies with no PE in Russia). The annual rate is determined at the regional level (within the 2.2 percent limit). As from 2016, buildings taxed at cadastral value will be taxed at a rate not exceeding 2 percent.

Transport tax is payable by owners of motor vehicles and other mechanical means of transport at the rates set by regional authorities. The tax rates and tax base depend on the vehicle type.

Land tax is paid by land plot owners at rates not exceeding 1.5 percent of the cadastral value. Local authorities set the rates.

Personal income tax and social contributions

Employers are required to withhold personal income tax at 13 percent (for Russian tax residents) or 30 percent (for non-Russian residents). Highly qualified foreign specialists may qualify for the 13 percent rate under certain conditions.

Social contributions are based on payroll for employees and other individuals. The standard combined rate is 30 percent. The rate, however, depends considerably on various factors, including residence/citizenship, total annual income, etc.

Injury insurance contributions are collected at rates ranging from 0.2 percent to 8.5 percent depending on the level of risk inherent in the employer's industry.

Other taxes

Water tax and mining tax are levied on companies involved in water use or mining activities. Mining tax is most significant for the oil and gas sector.

Special tax procedures are provided for small businesses (restaurants, taxis, etc.) but they do not apply to the subsidiaries of other companies.

Transfer pricing (TP) rules

Cross-border transactions within the same group of companies should be at arm's length under the threat of TP adjustment. Generally, intra-group operations between two Russian companies are regarded as controlled transactions subject to TP rules if the sum of all sales revenues reported by both parties for these transactions exceeds RUB 1 billion (net of VAT).

The Russian TP model generally follows OECD guidelines: e.g., the rules establish practically the same principles of functional analysis and the same set of price tests to determine an arm's length price or margin for controlled transactions (CUP, RPM, CPM, TNMM, PSM).

CFC rules in Russia

Russian CFC rules came into effect on 1 January 2015 and require a controlling company to pay the 20 percent tax (or the 13 percent tax if a CFC is controlled by a Russian resident individual) levied on the income of a CFC in proportion to its share in this company. This obligation may be eliminated or reduced if the CFC pays out its net income to equity holders as dividends by the end of the calendar year following the calendar year in which a fiscal period ends.

A Russian tax resident (company or individual) is recognised as the controlling person of a CFC (on the basis of either a significant stockholding or significant influence/control over a CFC (with certain exemptions).

Key contacts

Anna Zvereva
Of Counsel
T +7 495 644 0500
anna.zvereva@dentons.com

Hava Kadyrova
Associate
T +7 495 644 0500
hava.kadyrova@dentons.com

Draft New Foreign Investment Law in China

Victor Zhang, Dentons

On 19 January 2015, the Chinese Ministry of Commerce (MOFCOM) published a draft Foreign Investment Law (the draft Law), for which it solicited public comments until 17 February 2015. The draft Law, once it is actually promulgated and passed by the Standing Committee of the National People's Congress, will be a landmark in China's foreign investment legislative history since China's reform and opening-up began at the end of the 1970s. The draft Law will abolish the existing legal regime regulating foreign investment activities in China, which is mainly comprised of three basic laws: the Sino-foreign Equity Joint Venture Law, the Sino-foreign Cooperative Joint Venture Law and the Wholly Foreign Owned Enterprise Law, together with their implementing rules, and will rationalise the relationship between the existing foreign investment laws and PRC Company Law. The conflicts between those three foreign investment laws and PRC Company Law cause considerable trouble to foreign investors and their legal advisers, because in many cases they are not clearly told which rule should be followed.

The main feature of the draft Foreign Investment Law is that it creates many brand new rules that cannot be found in the existing foreign investment law regime.

(I) National treatment. Under the existing regime, foreign investment is subject to case-by-case approval by the Chinese government. This means that each foreign investment must be approved by MOFCOM and its local counterparts before the foreign-invested company can be registered with the State Administration for Industry and Commerce (the AIC) and its local counterparts. However, a domestic investor does not need to obtain MOFCOM approval before the invested company is registered with the AIC.

Under the draft Law, case-by-case approval is no longer required, and the foreign-invested company will be established and operated in line with PRC Company Law and will be treated the same as a domestic company, except that foreign investments which fall in the "Negative List" (see below) will be subject to foreign investment approval and special reporting requirements.

(II) Reporting requirements. The draft Law switches its focus from approving the establishment of a foreign-invested company to imposing a comprehensive reporting system for the foreign-invested company after its establishment. Under the draft Law, a foreign investor will be required to file regular information reports on the status of its investment, generally on an annual basis. Quarterly reports will be required if the foreign investor has more than 10 subsidiaries in China or has more than RMB 10 billion in total assets, revenue or income.

The State Council of China lifted the burden on domestic companies in respect of information reporting obligations in 2014, including but not limited to abolition of annual inspection with the AIC. However, the scope of information reporting for a foreign-invested company under the draft Law is broader than the current requirements for a domestic company. In this respect, a foreign-invested company will not enjoy national treatment. It remains to be seen whether this contemplated heavy reporting requirement will be changed at a later stage.

(III) Negative List. The draft Law will introduce the "Negative List" system into China's foreign investment approval sector. Under this system, MOFCOM will not conduct case-by-case approval of foreign investment, and will only approve the foreign investments falling into specific categories of industries appearing on the Negative List. The Negative List is not included in the draft Law, which contemplates that it will be published by the State Council at a later stage.

The Negative List will adopt the concept from the existing foreign investment industry guidance catalogue for guiding MOFCOM's foreign investment approval. Under this concept industries are divided into three categories based on the foreign investment's access into China: "encouraged", "restricted" and "prohibited". The contemplated Negative List under the draft Law will include two categories: "prohibited" and "restricted". The Negative List is also expected to set a monetary threshold over which investments will require market access approval regardless of sector.

On 2 October 2015, the State Council issued an Opinion on Implementing the Negative List of Market Access.

Draft New Foreign Investment Law in China continued

Under that opinion, the Negative List includes (i) the Negative List of market access and (ii) the Negative List of foreign investment. According to the opinion, the Negative List of market access will be applicable to domestic and foreign investors and will be the general requirement for market access in China, and the Negative List of foreign investment will be applicable for foreign investment and will be the special requirement for foreign investment's access into China. Under this opinion, China will make a trial run in implementing the Negative List of market access in some pioneering areas from 1 December 2015 to 31 December, 2017 and will officially implement the Negative List of market access nationwide from 2018. However, the Negative List of foreign investment will be separately stipulated and will not be given a timetable for its formation and implementation.

It is apparent that the scope of the Negative List for foreign investment will be a key concern for all foreign investors. The Negative List is expected to take into account all market access commitments previously made by the Chinese government and also include its commitments as a WTO member. The Negative List is also expected to take into account the Chinese economy's urgent needs on upgrading products, technologies and personnel resources in many industrial fields which are closed to foreign investment in China's critical economic transition period. However, another concern exists that the Negative List will come into being with a narrow scope, but the Chinese government will impose additional burdens on foreign investors in other respects so as to achieve its purpose of limiting foreign investments to certain fields in practice. The national security review may play such a role.

(IV) National security review. The draft Law incorporates a national security review regime, under which foreign investments will be scrutinised for their potential harm to national security. According to the draft Law, the State Council will establish a joint committee in charge of national security review. The joint committee's decisions will be immune from administrative review or litigation. The national security review will take into account the influence of the foreign investment on: the national defence and military industry; the spread of nuclear matter and technology; key infrastructure, information and networks; energy and food safety; national economy stability; and public welfare and public order, as well as whether the foreign investment is controlled by a foreign government.

The draft Law permits a wide range of interested parties to raise national security concerns for any foreign investment project. If a foreign party does not submit a project for national security review, and such project is subsequently deemed a national security risk, such project will be subject to related penalties.

On 1 July, 2015, the National People's Congress passed the National Security Law. Although it cannot be regarded as corresponding to the draft Law, Article 59 of the National Security Law provides that certain types of foreign investments, key technologies, network information technology and services, construction projects and other major activities that have national security concerns will be subject to national security review.

The draft Law devotes a separate chapter, comprising a considerable number of sections, to providing the national security review mechanism in respect of foreign investment. However, since the Chinese government has unchallenged power in national security review, it will surely bring uncertainties to foreign investors engaged in certain industries as mentioned above.

Under the draft Law, the foreign investor may propose conditions on his investment, and such foreign investment may be approved with conditions agreed by the joint committee and the foreign investor.

(V) Control concept and expanded definition of "foreign investment". Unlike the existing three foreign investment laws, which use the source of equity ownership as the sole standard to distinguish the foreign investment from domestic investment, the draft Law expands the definition of "control" so that the control of a domestic company by means of contractual arrangement by a foreign investor will be regarded as foreign investment instead of a domestic investment under the existing foreign investment laws.

The expanded definition of "control" under the draft Law reflects that the draft Law will recognise the foreign investment based on the principle of "substance over form".

Therefore, under the draft Law, foreign investment will include the following activities conducted by foreign investors: (i) establishing a domestic company; (ii) obtaining the equity interests, shares, voting rights and similar rights of a domestic company; (iii) providing financing with a term of over one year to the domestic companies in which foreign investors hold the interests mentioned in (ii); (iv) obtaining a concession to exploit and develop national resources in China to build and operate an infrastructure project in China; (v) obtaining land use rights or real property ownership rights in China; (vi) establishing control over or obtaining interests in a domestic enterprise by contract, trust or other means; and (vii) an acquisition of an offshore company that results in actual control of a domestic company by the foreign investor.

The newly incorporated definition of "control" and the expanded definition of "foreign investment" significantly enlarge the applicable scope of the draft Law, so that it will cover not only greenfield investment, which is the only focus under the existing three foreign investment laws, but also mergers and acquisitions of domestic companies by foreign investors, VIE structures, foreign financing, exploration and exploitation activities and construction projects by foreign investors, real estate transactions by foreign investors, etc. These additional activities by

foreign investors are regulated by special laws, regulations or rules. Based on the expanded definition of "foreign investment" and the newly-introduced control concept, it seems that the Chinese government may aim to make the draft Law a fundamental law regulating all kinds of investments in China having foreign elements. However, this means that the draft Law will enter into considerable conflicts with those special laws, regulations and rules relating to various foreign investments outside of greenfield investment, and those conflicts will not be resolved unless the Chinese government reorganises the entire foreign investment legislation regime.

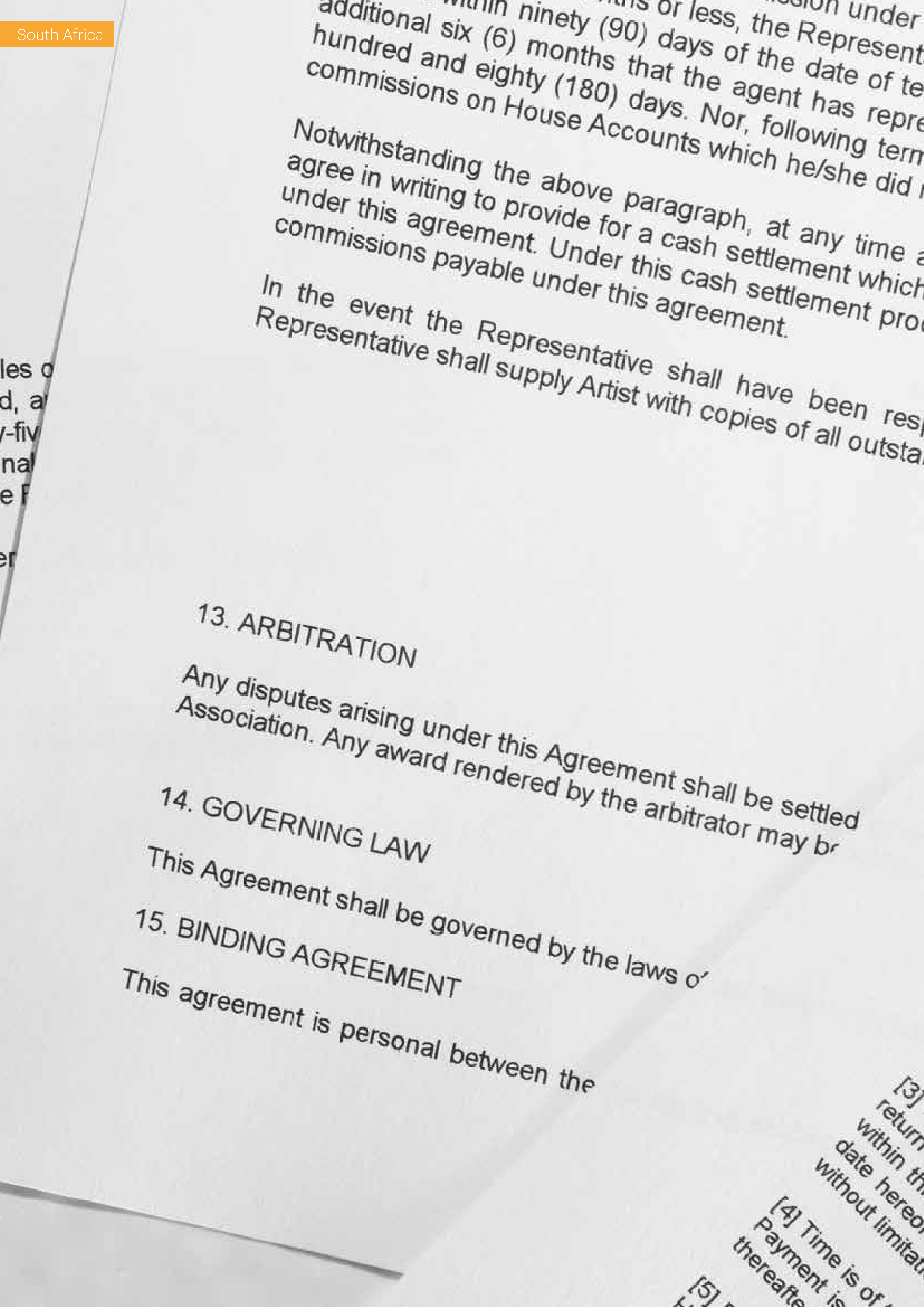
Conclusion

The draft Law brings about more changes to China's existing foreign investment legal regime than the summarised points above, and many changes can be regarded as revolutionary transformations to the existing foreign investment laws. The draft Law will be subject to amendments from different government authorities that have a strong voice in the foreign investment regulatory field, such as the National Development and Reform Commission, the State Administration for Foreign Exchange, and the AIC, and its enactment will not occur right away. Nevertheless it can be expected that the key legal principles and mechanisms designed by the draft Law will largely remain, subject to technical changes, because the draft Law represents the Chinese government's efforts to unify the foreign investment legislation regime and modernise foreign investment legislation.

The draft Law lifts foreign investors' burden in some respects. On the other hand it strengthens the governmental review of foreign investment and imposes new requirements on foreign investors. It remains to be seen what the draft Law will be like when it is officially enacted and what influences it will have on foreign investment in China in practice.

Key contact

Victor Zhang
China Associate
T +86 10 6583 7292
victor.zhang@dentons.com


additional six (6) months within ninety (90) days of the date of te
hundred and eighty (180) days. Nor, following term
commissions on House Accounts which he/she did
Notwithstanding the above paragraph, at any time
agree in writing to provide for a cash settlement which
under this agreement. Under this cash settlement pro
commissions payable under this agreement.
In the event the Representative shall have been res
Representative shall supply Artist with copies of all outsta
13. ARBITRATION
Any disputes arising under this Agreement shall be settled
Association. Any award rendered by the arbitrator may b
14. GOVERNING LAW
This Agreement shall be governed by the laws o
15. BINDING AGREEMENT
This agreement is personal between the
[3]
return
within th
date hereo
without limita
[4] Time is of
Payment is
thereafte
[5]

The China-Africa Joint Arbitration Centre

In August 2015, the Arbitration Foundation of Southern Africa (AFSA) announced the establishment of the China-Africa Joint International Arbitration Centre (CAJAC), which will serve to address resolution of commercial disputes between Chinese and African parties. The CAJAC was created as a result of the agreement reached by the AFSA, Africa ADR (AFSA's external arm), the Association of Arbitrators and the Shanghai International Trade Arbitration Centre after over two years of negotiations and collaboration between the Chinese and South African delegations.

The Beijing Consensus, calling for a joint dispute resolution framework to be developed between China and Africa, was signed in June 2015 by a wide range of Chinese trade commissions, arbitral bodies and universities, as well as delegates from Africa. It was followed by the signing of a similar consensus in Johannesburg in August 2015, resulting in the establishment of CAJAC.

The reasons for the creation of CAJAC are many. China is one of the largest sources of investment into Africa and one of South Africa's largest trading partners. Due to the increasing trade and investment cooperation between China and African countries, including South Africa, there has been a growing need for a neutral and cost-effective mechanism for resolving commercial disputes between African and Chinese parties.

Prior to the establishment of CAJAC, the African and Chinese parties to the dispute could either pursue their claims in local courts, submit their dispute for arbitration locally in China or South Africa or one of the international arbitration forums, for example the ICC, the International Court of Arbitration or the London Court of International Arbitration, or resolve their disputes via ad-hoc arbitration. The available alternatives to resolve commercial disputes, however, have their drawbacks, including, amongst others, concerns related to inefficiency, impracticality and fear of prejudice, regulatory obstacles related to local arbitration or litigation, as well as the high costs of international arbitration. Although resolution of disputes at the main international arbitration centres is well established, it has not always been considered the most or effective or cost-effective solution for the Chinese and South African parties.

CAJAC aims to address these problems. It will have an arbitral committee consisting of arbitrators nominated by both China and South Africa, from which the parties to the dispute can appoint arbitrators for the purposes of resolving their disputes. CAJAC Johannesburg is expected to operate as a fully administered arbitration centre initially using arbitration rules of Africa ADR until the standard CAJAC arbitration rules are developed in conjunction with CAJAC Shanghai.

It is intended that CAJAC will operate in Johannesburg and Shanghai and will provide dispute resolution services that will include arbitration, mediation and conciliation. Disputes arising out of the Chinese business activities in Africa will be resolved in Johannesburg and the disputes arising out of African business activities in China will be resolved in Shanghai.

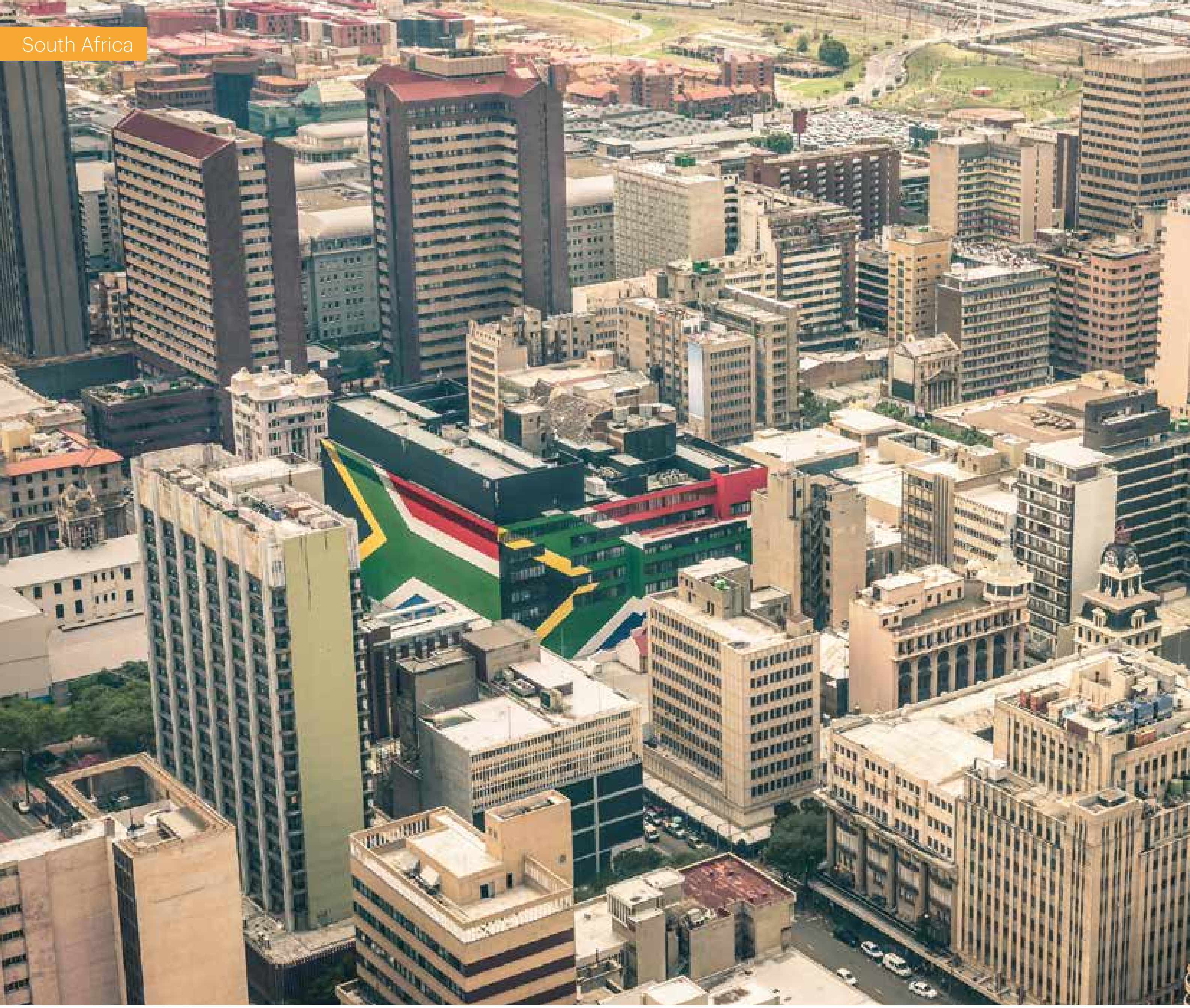
South Africa adoption of the new International Arbitration Act is expected in 2016. The South African Law Commission has recommended adoption of the UNCITRAL Model Law in South Africa for international commercial arbitrations, which would significantly modernise the South African arbitration legal framework.

Generally, adoption of the new International Arbitration Act as well as the creation of CAJAC is regarded as a positive development for South Africa, allowing it to enter an international arbitration stage and become an important international arbitration hub on the African continent.

Key contacts

Noor Kapdi
Managing Partner
T +27 11 326 6257
noor.kapdi@dentons.com

Zithu Twala
Partner
T +27 21 686 0740
zithu.twala@dentons.com



South Africa's Protection of Investment Act

Historically, countries have developed a network of international investment agreements with different countries in the global community, in the form of either bilateral investment treaties (BITs) or free trade agreements. These are based on principles of reciprocal respect for the sovereignty of another country and treating investors from other countries in accordance with certain binding legal standards. Prior to 1994, South Africa experienced isolation and inconsistency from international enforcement of investment protection principles. Since its democratisation in 1994, South Africa has become a signatory to numerous BITs. However, in 2009, the Department of Trade and Industry (DTI) stated that BITs "extend far into developing countries' policy space" and recommended that South Africa should review its BITs with a view to developing a model BIT which is in line with its own development needs.

In November 2013, the DTI published a draft Promotion and Protection of Investment Bill for public comment stating that this was a significant milestone in the process "to update and modernise South Africa's legal framework to protect investment in South Africa". In December 2015, the Bill was signed by the State President and came into being as the Protection of Investment Act 22 of 2015 (Act). The date of commencement of the Act has not yet been proclaimed. In this article, we provide an overview of the Act.

The preamble of the Act recognises the importance that investment plays in job creation, economic growth, sustainable development and the wellbeing of the people of South Africa. It thus seeks to promote investment by creating a facilitating environment and "providing a sound legislative framework for the protection of all investments, including foreign investments". As recently stated by the Minister of Trade and Industry of South Africa, the Act aims to confirm the government's right to pursue constitutionally-driven national development objectives and recognises the right of governments to regulate in the public interest.

The cornerstone principle of the proposed new legal regime of investment protection contemplated in the Act is national treatment, resulting in the same levels of protection of both foreign and local investors guaranteed by the Constitution of South Africa (Constitution). Thus, for example, the issue of expropriation is dealt with in the Act by making a reference to section 25 of the Constitution, which guarantees that no one may be arbitrarily deprived of property except in terms of the law of general application. We presume that the issue of expropriation will also be regulated by the Expropriation Act, which is also currently in the pipeline.

The Act also provides for a broad range of measures in which the government is entitled to exercise its regulatory authority, which may include: (a) redressing historical, social and economic inequalities and injustices; (b) upholding the values and principles espoused in section 195 of the Constitution (basic values and principles governing public administration); (c) upholding the rights guaranteed in the Constitution; (d) promoting and preserving cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage; (e) fostering economic development, industrialisation and beneficiation; (f) achieving the progressive realisation of socioeconomic rights; or (g) protecting the environment and the conservation and sustainable use of natural resources. Furthermore, the government or any organ of state may take measures that are necessary for the fulfilment of South Africa's obligations in regard to the maintenance, compliance or restoration of international peace and security, or the protection of the security interests, including the financial stability of South Africa. Notably, the list of these measures is not exclusive, with the possibility of broad interpretation of what steps the government or organs of state can take in regard to these measures.

The dispute resolution clause gives the investor the options to submit a claim within six months after the investor became aware of the dispute for: i) mediation at the DTI or another competent authority, ii) local courts or iii) an independent tribunal or statutory body within South Africa. Firstly, an investor may request the DTI or another competent authority to facilitate resolution of the dispute by appointing a mediator or other competent authority. Secondly, the Act further provides that, subject to applicable legislation, an investor is not precluded from approaching any competent court. In practice, however, a court may not entertain the claim, until the mediation process is complete. Finally, the Act provides that the government may give its consent only to state-to-state international arbitration in respect of investments covered by the Act, subject to the exhaustion of domestic remedies.

The Act will ultimately replace the BITs that South Africa has concluded with a number of countries. Since 2012, South Africa has terminated the BITs with some of the European countries, such as Denmark, Germany, Spain, Belgium-Luxembourg, Switzerland and the Netherlands and, reportedly, intends to terminate or renegotiate the BITs still in force. South Africa's BITs with China and Russia still remain in force. Additionally, South Africa is still a signatory to several other investment instrument agreements such as the SADC Investment Protocol (aimed at creating a favourable investment climate within the SADC region).

Importantly, according to the Act, its promulgation will not have an immediate impact on the existing foreign investments made in South Africa under the BITs. These investments will still be protected by the underlying BITs for the period and terms stipulated in the BITs. However, any investments made after the termination of such BITs will be governed by the Act.

Key contacts

Rabia Achmat
Senior Associate
T +27 21 686 0740
rabia.achmat@dentons.co.za

Simla Ramdayal
Senior Associate
T +27 11 326 6257
simla.ramdayal@dentons.co.za

Dentons is the world's first polycentric global law firm. A top 20 firm on the Acritas 2015 Global Elite Brand Index, the Firm is committed to challenging the status quo in delivering consistent and uncompromising quality and value in new and inventive ways. Driven to provide clients a competitive edge, and connected to the communities where its clients want to do business, Dentons knows that understanding local cultures is crucial to successfully completing a deal, resolving a dispute or solving a business challenge. Now the world's largest law firm, Dentons' global team builds agile, tailored solutions to meet the local, national and global needs of private and public clients of any size in more than 125 locations serving 50-plus countries. www.dentons.com.

CS29107-Doing Business in BRICS-Final — 27/05/2016