

REPUBLIC OF SOUTH AFRICA

PROTECTION OF INVESTMENT BILL

(As amended by the Portfolio Committee on Trade and Industry (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF TRADE AND INDUSTRY)

[B 18B—2015]

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BILL

To provide for the protection of investors and their investment; to achieve a balance of rights and obligations that apply to all investors; and to provide for matters connected therewith.

PREAMBLE

CONSCIOUS of the obligation to protect and promote the rights enshrined in the Constitution;

RECOGNISING the importance that investment plays in job creation, economic growth, sustainable development, and the well-being of the people of South Africa;

AFFIRMING that the State is committed to maintaining an open and transparent environment for investments;

DESIROUS of promoting investment by creating an environment that facilitates processes that may affect investments;

CONSIDERING the responsibility of the government to provide a sound legislative framework for the protection of all investments, including foreign investments, pursuant to constitutional obligations;

SECURING a balance of rights and obligations of investors to increase investment in the Republic;

EMPHASISING the rights related to access to just administrative action, access to justice, access to information and all other rights set out in the Bill of Rights;

RECOGNISING the obligation to take measures to protect or advance persons, or categories of persons, historically disadvantaged in the Republic due to discrimination;

ACKNOWLEDGING that investment must be protected, in accordance with the law, administrative justice and access to information;

REAFFIRMING the government's right to regulate in the public interest in accordance with the law;

COGNISANT of the government's commitment in respect of international law to ensure that human rights, fundamental freedoms and protection of peoples' resources are adequately protected,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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Definitions

- In this Act, unless the context indicates otherwise—
 - “**Constitution**” means the Constitution of the Republic of South Africa, 1996;
 - “**Department**” means the Department responsible for trade and industry;
 - “**dispute**” means a claim by an investor, instituted in accordance with section 13, 25 that the government has allegedly breached the protection provided for in this Act;
 - “**enterprise**” means any natural person or juristic person, whether incorporated or unincorporated;
 - “**government**” means the government of the Republic of South Africa;
 - “**investment**” has the meaning assigned under section 2; 30
 - “**investor**” means an enterprise making an investment in the Republic regardless of nationality;
 - “**measure**” refers to binding governmental action directly affecting an investor or its investment and includes laws, regulations and administrative action;
 - “**Minister**” means the Minister responsible for trade and industry; 35
 - “**organ of state**” means an organ of state as defined in section 239 of the Constitution;
 - “**prescribe**” means prescribe by regulation;
 - “**regulation**” means a regulation made under this Act;
 - “**Republic**” means the Republic of South Africa; and 40
 - “**this Act**” means the Protection of Investment Act, 2015.

Investment

- (1) For the purpose of this Act, an investment is—
 - (a) any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic, committing resources of economic value over a reasonable period of time, in anticipation of profit; 45
 - (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 such holding, acquisition or merger with another enterprise outside the Republic, has an effect on an investment contemplated by section 2(1)(a) and (b) of this Act in the Republic; 50
- (2) For the purposes of the definition of “investment”, an enterprise may possess assets such as, amongst others— 55

- (a) shares as defined by the Companies Act, 2008 (Act No. 71 of 2008), stocks, debentures, securities as defined in the Financial Markets Act, 2012 (Act No. 19 of 2012), or other equity instruments of the enterprise or another enterprise;
- (b) a debt security of another enterprise; 5
- (c) loans to an enterprise;
- (d) movable or immovable property or other property rights such as mortgages, liens or pledges;
- (e) claims to money or to any performance under contract having a financial value; 10
- (f) copyrights, know how, goodwill, or intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent that they are recognised under the law of South Africa;
- (g) returns such as profits, dividends, royalties or income yielded by an investment; or 15
- (h) rights or concessions conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources.

Interpretation of Act

3. This Act must be interpreted and applied in a manner that is consistent with—
- (a) its purposes as contemplated by section 4; 20
 - (b) the Constitution, including—
 - (i) the interpretation of the Bill of Rights contemplated in section 39 of the Constitution;
 - (ii) customary international law contemplated in section 232 of the Constitution; and 25
 - (iii) international law contemplated in section 233 of the Constitution; and
 - (c) any relevant convention or international agreement to which the Republic is or becomes a party.

Purpose of Act 30

4. The purpose of this Act is to—
- (a) protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors;
 - (b) affirm the Republic's sovereign right to regulate investments in the public interest; and 35
 - (c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.

Application of Act

5. This Act applies to all investments in the Republic which are made in accordance with the requirements set out in section 2. 40

Fair administrative treatment

6. (1) The government must ensure administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural justice to investors in respect of their investments as provided for in the Constitution and applicable legislation. 45

(2) Administrative decision-making processes must include the right to be given written reasons and administrative review of decision consistent with section 33 of the Constitution and applicable legislation.

(3) Investors must, in respect of their investments, have access to government-held information in a timely fashion and consistent with section 32 of the Constitution and applicable legislation. 50

(4) Investors must, in respect of their investments, have the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a

court or, where appropriate, another independent and impartial tribunal or forum consistent with section 34 of the Constitution and applicable legislation.

Establishment

7. (1) All investments must be established in compliance with the laws of the Republic. 5
 (2) This Act does not create a right for a foreign investor or prospective foreign investor to establish an investment in the Republic.

National treatment

8. (1) Foreign investors and their investments must not be treated less favourably than South African investors in like circumstances. 10
 (2) For the purposes of this section, "like circumstances" means the requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment, including the—
 (a) effect of the foreign investment on the Republic, and the cumulative effects of all investments; 15
 (b) sector that the foreign investments are in;
 (c) aim of any measure relating to foreign investments;
 (d) factors relating to the foreign investor or the foreign investment in relation to the measure concerned;
 (e) effect on third persons and the local community; 20
 (f) effect on employment; and
 (g) direct and indirect effect on the environment.
 (3) The examination referred to in subsection (2) must not be limited to or be biased towards any one factor.
 (4) Subsection (1) must not be interpreted in a manner that will require the Republic to extend to foreign investors and their investments the benefit of any treatment, preference or privilege resulting from— 25
 (a) taxation provisions in any international agreement or arrangement or any law of the Republic;
 (b) government procurement processes; 30
 (c) subsidies or grants provided by the government or any organ of state;
 (d) any law or other measure, the purpose of which is to promote the achievement of equality in South Africa or designed to protect or advance persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability in the Republic; 35
 (e) any law or other measure, the purpose of which is to promote and preserve cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage; or
 (f) any special advantages accorded in the Republic by development finance institutions established for the purpose of development assistance or the development of small and medium businesses or new industries." 40

Physical security of property

9. The Republic must accord foreign investors and their investments a level of physical security as may be generally provided to domestic investors in accordance with minimum standards of customary international law and subject to available resources and capacity. 45

Legal protection of investment

10. Investors have the right to property in terms of section 25 of the Constitution.

Transfer of funds

11. A foreign investor may, in respect of an investment, repatriate funds subject to taxation and other applicable legislation. 50

Right to regulate

12. (1) Notwithstanding anything to the contrary in this Act, the government or any organ of state may, in accordance with the Constitution and applicable legislation, take measures, which may include—
- (a) redressing historical, social and economic inequalities and injustices; 5
 - (b) upholding the values and principles espoused in section 195 of the Constitution;
 - (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; 10
 - (e) fostering economic development, industrialisation and beneficiation;
 - (f) achieving the progressive realisation of socio-economic rights; or
 - (g) protecting the environment and the conservation and sustainable use of natural resources.
- (2) The government or any organ of state may take measures that are necessary for the fulfilment of the Republic'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 the Republic. 15

Dispute resolution

13. (1) An investor that has a dispute in respect of action taken by the government, which action affected an investment of such foreign investor, may within six months of becoming aware of the dispute request the Department to facilitate the resolution of such dispute by appointing a mediator. 20
- (2) (a) The Department must maintain a list of qualified mediators of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators. 25
- (b) The mediator must be appointed by agreement between the government and the foreign investor (hereinafter referred to as the parties) from the list contemplated in paragraph (a), or, in the absence of a list, from individuals proposed by either party. 30
- (c) In the event of the Department being party to the dispute, the parties may jointly request the Judge President of one of the divisions of the High Court to appoint a mediator.
- (d) Recourse to mediation must be governed by the prescribed rules and any prescribed time limit may be adjusted by agreement between the disputing parties. 35
- (3) In order to facilitate a resolution of a dispute contemplated in subsection (1), the following information and prescribed form must be submitted by the foreign investor:
- (a) contact details of the foreign investor, including a physical address in the Republic or territory where the investor is predominantly resident, or where it is incorporated, its email address, facsimile number and telephone number; 40
 - (b) a summary of the claim, including the measures giving rise to the investment dispute;
 - (c) the specific organ, agency, province or other subdivision of the Republic allegedly responsible for the measures which the foreign investor alleges constitute a breach of any of the investment protection contained in this Act; 45
 - (d) the provisions of this Act that the foreign investor alleges have been breached; and
 - (e) the relief sought.
- (4) Subject to applicable legislation, an investor, upon becoming aware of a dispute as referred to in subsection (1), is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment. 50
- (5) The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. The consideration of a request for international arbitration will be subject to the administrative processes set out in section 6. Such arbitration will be conducted between the Republic and the home state of the applicable investor. 55

Regulations

14. The Minister may, by notice in the *Gazette*, make regulations regarding—
- (a) any matter which may or must be prescribed in terms of this Act; or
 - (b) any other matter the regulation of which may be necessary in order to achieve the purposes of this Act.

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Transitional arrangements

15. (1) Existing investments that were made under bilateral investment treaties will continue to be protected for the period and terms stipulated in the treaties.

(2) Any investments made after the termination of bilateral investment treaties, but before promulgation of this Act, will be governed by the general South African law. 10

Short title and commencement

16. This Act is called the Protection of Investment Act, 2015, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE PROTECTION OF INVESTMENT BILL

1. BACKGROUND

- 1.1 The Bill seeks to achieve a balance between the rights and obligations of all investors in South Africa, to provide adequate and equal protection to foreign investors and domestic investors, and to promote investment. The Bill confirms the legal position that foreign and domestic investors and, their investments are protected under the Constitution of the Republic of South Africa, 1996 ("Constitution"), and applicable domestic legislation. The Bill seeks to treat foreign investors and their investment not less favourably than South African investors in like circumstances are treated.
- 1.2 The Bill confirms a commitment by the Republic of South Africa ("Republic") to protect all investments irrespective of their origin. The underlying philosophy of the Bill is to clarify the standard of protection that an investor may expect in the Republic, and to promote all types of investments by creating a predictable business environment that is readily understandable to an investor.
- 1.3 The Bill also confirms that both foreign and domestic investors are protected under the Constitution. In some instances it may be unavoidable to differentiate between foreign and domestic investors. However these instances are limited and do not violate the principle of equal treatment. Government's right to regulate is emphasised since legitimate policy measures should be implemented in the public interest.
- 1.4 In April 2010, the Department of Trade and Industry ("Department"), began drafting the Bill which aims to strengthen the Republic's investment regime by seeking to achieve that:
 - (a) the Republic remains open to foreign direct investment ("FDI");
 - (b) the Republic provides adequate protection to FDI; and
 - (c) these objectives are balanced with the right of the government of the Republic ("government") to regulate in the national and public interest.
- 1.5 The intention of the Department is to clarify provisions typically found in Bilateral Investment Treaties ("BITs"), by codifying them in the Bill and ensuring compliance with the Constitution.
- 1.6 The Bill therefore seeks to balance the rights and obligations of investors, to provide adequate protection to foreign investors, to ensure that South Africa's constitutional obligations are upheld, and to ensure that government retains the policy space to regulate in the public interest.
- 1.7 Furthermore, the Bill draws on a review of international experience as well as recent national experiences across a wide spectrum of both developed and developing countries.
- 1.8 The following clauses, in turn, outline the policy perspectives and objectives of the core substantive provisions to be found in the Bill.

2. CLARIFYING SUBSTANTIVE PROVISIONS IN BILL

2.1 Preamble

The Preamble of the Bill sets out key policy considerations that provide context to the Bill. It highlights, amongst other things, South Africa's commitment to maintaining an open and transparent environment for foreign investors, while recognising the importance of maintaining sufficient scope for government to regulate all investments in order to fulfil legitimate national policy objectives.

2.2 Investment (Clause 2)

The definition of “investment” is designed to clearly demarcate the kind of FDI that would be protected under the Bill. The Bill applies only to investment which is established, acquired or expanded by an investor in accordance with the laws of the Republic, committing resources of economic value over a reasonable period of time, in anticipation of profit.

2.3 Interpretation of Act (Clause 3)

It is understood that in some instances the status of foreign investments must be clarified in a manner that is consistent with the Constitution, including the Bill of Rights, in accordance with both customary international law and international law. The Bill clarifies the international investment law concepts of national treatment, and transfer of funds in line with the Constitution and domestic laws.

2.4 Fair administrative treatment (Clause 6)

Investors, in respect of their investments, can expect: fair administrative treatment that is not arbitrary or that denies administrative or procedural justice; access to government-held information; to be given reasons for any administrative action taken. Investors will also, in respect of their investments, have the right to resolve disputes in a public hearing before a court or independent and impartial tribunal or forum.

2.5 National treatment (Clause 8)

National treatment is codified in domestic legislation in a manner that will grant foreign investors the right to be treated no less favourably than South African investors as long as their investments are “in like circumstances”. This wording is more closely aligned to the Constitution, which permits measures to overcome past discrimination. National treatment provisions in BITs created a degree of uncertainty and risks to national legislation for Black Economic Empowerment, public health, and environmental and economic development, including beneficiation.

2.6 Physical security of property (Clause 9)

The Bill provides for the physical security of investors and their investments. It seeks to clarify that the Republic bears no greater obligation to foreign investors than to its own investors in respect of their investments.

2.7 Legal protection of investment (Clause 10)

Investors have the right to property in terms of section 25 of the Constitution.

2.8 Transfer of funds (Clause 11)

The issue of the transfer of funds reflects the fact that South Africa has a liberal transfer regime, and that foreign investors in particular has the right to repatriate returns on their investments, subject to taxation and other applicable legislation.

2.9 Right to regulate (Clause 12)

The Bill reiterates the right of the Republic to regulate in the public interest. Such measures may be necessary to redress historical, social and economic inequalities, and to uphold rights guaranteed in the Constitution.

2.10 Dispute resolution (Clause 13)

The Bill provides that investor disputes are settled in accordance with South African domestic laws and seeks to clarify the right of any investor to bring proceedings in a domestic forum most appropriate for that investor's type of claim. The option of alternative dispute resolution and early detection of a dispute is promoted through the Bill. Interventions by the Department are provided for as an optional dispute mechanism, whereas independent mediators may be appointed to further facilitate such matters.

2.11 Regulations (Clause 14)

The Minister of Trade and Industry ("Minister") may make regulations to address various aspects covered by the Bill. The Minister must, by notice in the *Gazette*, make regulations regarding the information and forms to be submitted by an investor, contemplated in section 12(3).

3. DEPARTMENTS AND PARTIES CONSULTED

- 3.1 The draft Bill was published for public comment and comments were received from numerous organisations, the Departments of Home Affairs; Rural Development and Land Reform; Internal Relations and Cooperation and National Treasury.
- 3.2 The Department consulted the American Chamber of Commerce, the National Energy Regulator, EU-SA Business Links (representation from Austria, France and Germany), and the Public Investment Corporation.
- 3.3 The Bill also went through a NEDLAC process.
- 3.4 The Bill was considered in consultation with the Directors-General of the Economic Cluster and the ICTS Cluster.
- 3.5 The Bill was presented to the Inter-Ministerial Committee on BITs and Investment and finalised pursuant to discussions at this forum.

4. FINANCIAL IMPLICATIONS

None

5. PARLIAMENTARY PROCEDURE

- 5.1 The State Law Advisers and the Department are of the view that the Bill does not contain the elements of "trade" which is a functional area found in Schedule 4 to the Constitution. The Bill deals with any other matter, since the Bill in a substantial measure deal with the promotion and protection of investment, which is not a matter listed in either Schedule 4 or 5 to the Constitution. Section 44 of the Constitution states that the national legislative authority as vested in Parliament confers on the National Assembly the power to pass legislation with regard to any matter, and confers on the National Council of Provinces the power to consider, in accordance with section 75, any other legislation passed by the National Assembly.
- 5.2 The State Law Advisers and the Department are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provisions to which the procedure set out in sections 74 or 76 of the Constitution applies.
- 5.3 The State Law Advisers and the Department are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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