



THE BANKING  
ASSOCIATION  
SOUTH AFRICA

# **THE PROMOTION AND PROTECTION OF INVESTMENT BILL (B18-2015)**

**National Assembly Portfolio Committee on Trade and Industry  
Presented By: Cas Coovadia**

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# THE BANKING ASSOCIATION SOUTH AFRICA

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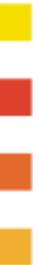
- ❑ The Banking Association South Africa (BASA) is the industry representative body for commercial banks and consists of 32 local and international member banks.
- ❑ BASA promotes and contributes to the enablement of a conducive, competitive and sustainable banking sector.
- ❑ BASA understands and supports Governments initiatives to regulate, protect and promote local and foreign investment.





## APPROACH TO THE BILL

- ❑ **BASA's** view is that the reform of investment regimes needs to be balanced, gradual, transparent, provide clarity and be beneficial to all impacted stakeholders
  
- ❑ BASA is concerned that:
  - The Bill provides foreign investors with less protection than Bilateral Investment Treaties, thus devaluing the investment protection currently being afforded to foreign investors.
  
  - Certain clauses in the Bill are vague. This could impact negatively on the attractiveness of SA Inc. as a destination for foreign investment and threaten the protection of South African investments abroad.





## DEFINITIONS

### **"DISPUTE":**

- ❑ The definition is vague, and it thus creates uncertainty.
- ❑ It is also broader than the definition contained in the Bilateral Investment Treaties.
- ❑ It will be a flawed resolution process and promote bias as all parties need to agree that a **"dispute exists"**. Should one party disagree that there is a **"dispute"**, then the other parties will be prejudiced.

### **RECOMMENDATION:**

- ❑ The definition of **"dispute"** as proposed in the previous draft version of the Bill should be reinstated.

### **The definition read as follows:**

*"dispute means a claim by an investor that the Government of the Republic has allegedly breached an investment protection guaranteed under this Act and that the investor has incurred loss or damage by reason of, or arising out of, that alleged breach."*

Alternatively a set of criteria which clearly defines what constitutes a **"dispute"** needs to be included in this Bill.





### **“ENTERPRISE”**

- ❑ The definition provides no guidance as to what constitutes a juristic person, for instance will the definition include a non-government organization or a non-profit organization?
- ❑ Various pieces of legislation provide for different definitions of a juristic person, thus, alignment and consistency are required.
- ❑ Sub-section (a):
  - The use of the word **“enterprise”** creates uncertainty in that the definition of **“enterprise”** includes a reference to both a natural and juristic person which in the context of the subsection does not make sense.

### **RECOMMENDATION:**

- ❑ A definition be included in the Bill to define a **“juristic person”** and that such definition, for the sake of consistency, be aligned to the definition of **“juristic person”** as defined in the Companies Act which reads:

“In this Act the term **“juristic person”** includes – (a) a foreign company (also defined); and (b) a trust, irrespective of whether or not it was established within or outside the Republic.”





### ❑ “ENTERPRISE” – CONT.

#### ❑ **Subsection (a):**

- the word “enterprise” be substituted with the word “entity” and that the definition of the word “entity” as was included in the previous draft version of the Bill be included in this draft version of the Bill to read:
- “entity means any juristic person, whether incorporated or unincorporated”.





# DEFINITIONS

## “INVESTMENT”:

- ❑ The use of the words “**resources** of economic value over a reasonable period of **time**” is vague in that it is uncertain as to what exactly constitutes “**resources**” or “**over** a reasonable period of time.”

## Sub-section (b):

- ❑ The use of the words “shares, debentures or other ownership instruments” creates ambiguity in that it does not align with existing legislation such as the Companies Act.

## Sub-section (c):

- ❑ The use of the words “**holding**, acquisition, or **merger**” creates ambiguity in that it does not align with the Companies Act and Competition Act and is not clearly indicative as to whether these obligations are imposed on domestically regulated entities.





# DEFINITIONS

## RECOMMENDATIONS:

### Subsection (a)

- ❑ needs to accurately describe what constitutes “resources” and “over a reasonable period of time”.

### Subsection (b):

- ❑ the words “shares, debentures or other ownership instruments” should be replaced with the word “securities” as stated in the Companies Act to create certainty and alignment with existing legislation.

### Subsection (c):

- ❑ clarity must be provided as to whether the obligations imposed in respect of “holding, acquisition, or merger” are obligatory for domestically regulated entities.





## SECTION 8- SECURITY OF INVESTMENT

### **Section 8 states:**

*“The Republic must accord foreign investors and their investments a level of security as may be generally provided to domestic investors, subject to available resources and capacity”*

- ❑ Typical Bilateral Investment treaties provide for full protection to foreign investors as this increases investor confidence.

### **RECOMMENDATION:**

- ❑ The qualification of providing security to investors which is “**subject** to available resources and **capacity**” is unclear and will result in interpretational issues. This section should be redrafted in similar terms to the International Bilateral Treaties.





## SECTION 9 – PROTECTION OF PROPERTY

- ❑ One of the concerns that a foreign investor would have is that its assets are confiscated, appropriated or nationalised. Typical Bilateral Investment Treaties include protection against expropriation -unless the expropriation is within public interest.
  
- ❑ In terms of the Bill, section 9 provides:  
***“Investors have the right to property in terms of Section 25 of the Constitution”***
  
- ❑ A foreign investor is granted the same protection as a domestic investor under s25 of the Constitution. This promotes uncertainty because s25 expressly provides for expropriation of property for **“public interest”** and **“public purpose”**- both of which are not adequately defined.
  
- ❑ South **Africa’s** Bilateral Investment Treaties provide for terms which are akin to **“market value”**- however, the Constitution provides for compensation which is **“just and equitable,”** therefore, it is unlikely that compensation will be provided at market value.

### **RECOMMENDATION:**

The Bill should guarantee compensation at market value to investors in line with international protocols.





## SECTION 10- TRANSFER OF FUNDS

### **SECTION 10 provides:**

*"a foreign investor may, in respect of an investment, transfer funds, subject to taxation and other applicable legislation"*

- ❑ Foreign Investors would want reassurance that having invested in a foreign country they would be entitled to repatriate the capital invested and the income arising from that investment.
- ❑ This section does not expressly provide for repatriation due to uncertain terminology- for example:
  - Whether **"funds"** implies **"returns"**
  - What is **"other applicable legislation"**

### **RECOMMENDATION:**

This section needs to be certain and unambiguous to encourage more foreign investments in South Africa. Thus, it should be redrafted similarly to the provisions in the Bilateral Investment Treaties.





## SECTION 12: DISPUTE RESOLUTION

### **SECTION 12(1) states:**

*"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 or any other competent authority to facilitate the resolution of such dispute by appointing a mediator or other competent body."*

- ❑ Having regard to the definition of "dispute", the six month period as contemplated promotes uncertainty as Government can determine whether or not there is a dispute and subsequently alert parties to the dispute. This does not provide for a fair and independent process in the event Government decides that there is no such dispute.

### **RECOMMENDATION:**

- ❑ Subsection 12(1) the wording: *"provided that a dispute will only arise once the parties agree, or as prescribed by the law;"*  
**- should be deleted**





## SECTION 12: DISPUTE RESOLUTION

### **SECTION 12(5) states:**

*"The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. Such arbitration will be conducted between the Republic and the home state of the applicable investor."*

- ❑ Bilateral Investment Treaties usually grant an investor the right to bring an action against the host state in an international arbitration without requiring the investor to first exhaust all domestic remedies.
- ❑ From a global economy perspective there is a need to consider this point more closely and to amend section 12(5) to allow for international arbitration provided that both parties consent, without the need to exhaust all domestic remedies first.

### **RECOMMENDATION:**

#### **Subsection 12(5) must be amended to read:**

*"12(5) The government may consent to international arbitration in respect of investments covered by this Act, without the need for the exhaustion of domestic remedies. Such arbitration will be conducted between the Republic and the home state of the applicable investor."*





**Thank you**

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## **QUESTIONS**

