

# CALS

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**Centre for Applied  
Legal Studies**

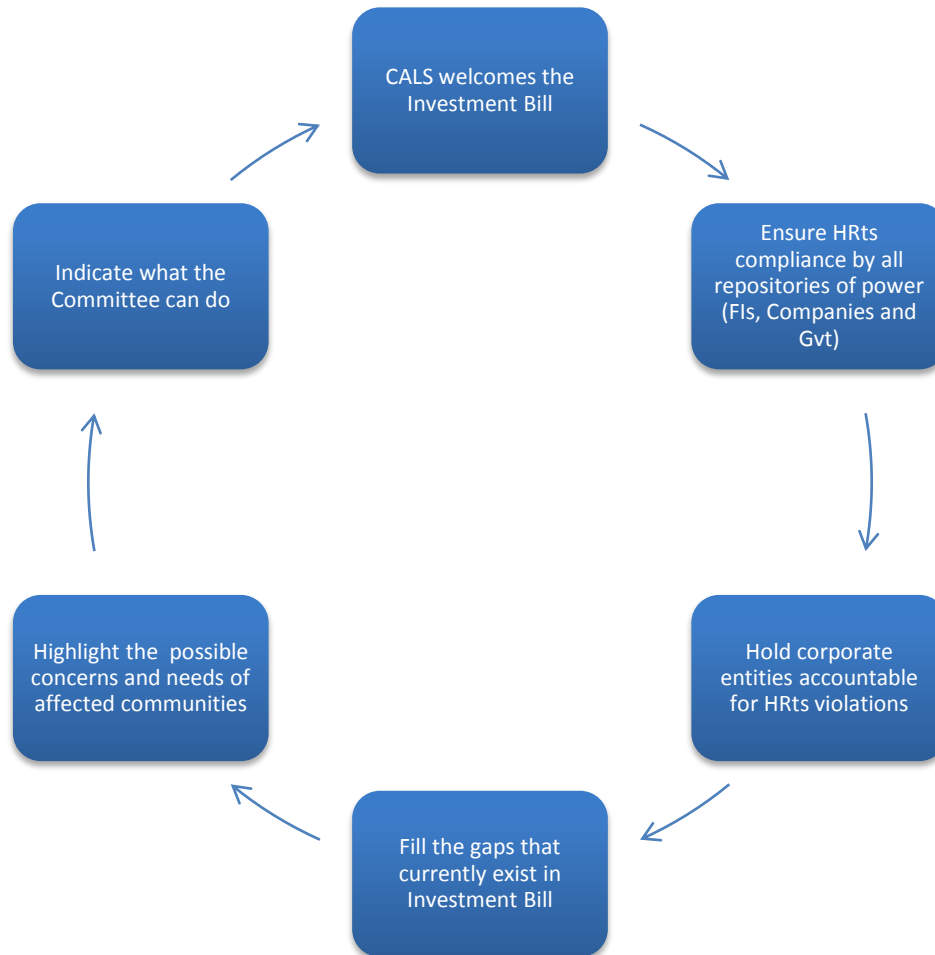
Portfolio Committee on Trade and Industry,  
Promotion and Protection of Investment Bill,  
B18 of 2015

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# Centre for Applied Legal Studies



# Purpose of Presentation



# SA's stance on business & hrts

- Binding Treaty
- Protocol on the Statute of the African Court of Justice and Human Rights
- Constitution; s 7 and s 8(2)
- National Development Plan, 2030
- BITs are often favourable to the Global North; *Piero Foresti Case*
- Pension Funds Regulations

# Submissions in Brief

- Language in the Preamble
- Vague and ambiguous terminology
- The transfer of funds
- Community members in dispute resolution forums
- The anti-avoidance provision

# Language in the Preamble

## - Need vs obligation

- Para 1: Conscious of the ***obligation*** to protect, ***respect, fulfil*** and promote the rights enshrined in the Constitution and the Bill of Rights;
- Para 8: Recognising the ***obligation*** to take measures to protect or advance persons, or categories of persons, historically disadvantaged in the Republic due to discrimination;
- Para 10: Reaffirming the Government's ***obligation*** to regulate in the public interest in accordance with the law.

# Language in the Preamble

## - Inter-relatedness of Human Rights

- Para 7: Emphasising the right to just administrative action, **access to justice, access to information and all other rights set out in the Bill of Rights;**

## - Sustainable and inclusive socio-economic development

- Para 2: Recognising the importance that investment plays in job creation, **inclusive socio-economic development**, sustainable development, and the well-being of the people of South Africa

# Vague and ambiguous terminology

- Definitions

- Dispute

**Section 1: “dispute” means a claim by an investor or community, instituted by an investor or community in accordance with section 12, that the government has allegedly breached the protection provided for in this Act as prescribed by the law**

- Reasonable period of time

Be defined in the definitions section



# Vague and ambiguous terminology

## - Interpretation

- Section 3(b)(i) justice administrative action be provided in section 33, **access to information as provided in section 32, access to courts as provided in section 34 of the Constitution and other rights in the Bill of Rights**

## - Purpose

# The transfer of funds

Section 10: “A foreign investor may... **provided that they may not do so in a manner that intends to and serves to unjustly and intentionally deprive the Republic or its people of funds to which they are due using the following mechanism:**

- (i) tax avoidance;**
- (ii) tax evasion;**
- (iii) trade mis-invoicing; and**
- (iv) abusive transfer pricing”**

# Community members in dispute resolution forums

*Section 12(1A): Communities who identify as such and have been adversely or positively affected by an investor's investment, may apply to the forum head to be admitted as intervening party in the resolution of the dispute and may make representation in the same by itself or by means of legal representation.*

# The anti-avoidance provision

If the Minister, *in consultation with all affected persons including the investor and communities affected by the investment*, considers ..., *in consultation with the Director Generals and Ministers of the departments relevant to the investor's business, investors and communities affected by the investment, issue compliance notices, suspensions and as a matter of last resort license revocations within the scope of the law to prevent such avoidance.*

# Summation

- Language in the Preamble
- Vague and ambiguous terminology
- The transfer of funds
- Community members in dispute resolution forums
- The anti-avoidance provision

# Contact Details

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