

[note: text indicated in green relates to amendments agreed to in principle;
text indicated in red relates to proposed amendments not agreed to.]

REPUBLIC OF SOUTH AFRICA

PROTECTION OF INVESTMENT BILL

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. 39009 of 22 July 2015) (The English text is the official text of the Bill)

(MINISTER OF TRADE AND INDUSTRY)

[B 18B—2015]

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:—

ARRANGEMENT OF SECTIONS

Sections

1. Definitions
2. Investment
3. Interpretation of Act
4. Purpose of Act
5. Application of Act
6. Establishment
7. National treatment
8. Physical security of property
9. Legal protection of investment
10. Transfer of funds
11. Right to regulate
12. Dispute resolution
13. Regulations
14. Transitional arrangements
15. Short title and commencement

Definitions

1. 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 12, 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;

"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;

"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

"this Act" means the Protection of Investment Act, 2015.

Investment

2. (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;
- (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(a) and (b) of this Act in the Republic;

(2) For the purposes of this definition, an enterprise may possess assets such as, inter alia-

- (a) Shares as defined by the Companies Act 2008 (Act 71 of 2008), stocks, debentures, securities as defined in the Financial Markets Act, 2012 (Act No. 19 of 2013), and other equity instruments of the enterprise or another enterprise;
- (b) A debt security of another enterprise;
- (c) Loans to an enterprise;
- (d) Movable or immovable property and other property rights such as mortgages, liens or pledges;
- (e) Claims to money or to any performance under contract having a financial value;
- (f) Copyrights, know how, goodwill, and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognised under the law of South Africa;

- (g) Returns such as profits, dividends, royalties and income yielded by an investment; or
- (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;
- (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
 - (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

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) confirm the protection of investments in respect of national treatment and physical security of property;
- (c) affirm the Republic's sovereign right to regulate investments in the public interest; and
- (d) 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 lawful investments in the Republic which are made in accordance with the requirements set out in section 2.

Fair administrative treatment

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

(2) Administrative decision-making processes shall 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 or their investments shall have access to government-held information in a timely fashion and consistent with section 32 of the Constitution and applicable legislation.

(4) Investors or their investments shall 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.

Right of establishment

6. (1) All investments must be established in compliance with the laws of the Republic.

(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

7. (1) Foreign investors and their investments must not be treated less favourably than South African investors in like circumstances.

(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;
- (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;

- (f) effect on employment; and
- (g) direct and indirect effect on the environment.

(3) The examination referred to in subsection (2) shall not be limited to or be biased towards any one factor.

(4) Subsection (1) shall 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—

- (a) taxation provisions in any international agreement or arrangement or any law of the Republic;
- (b) government procurement processes;
- (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;
- (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;
- (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; or

[Paragraph (g) omitted]

Physical security of property

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

Legal protection of investment

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

Transfer of funds

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

Right to regulate

11.(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;
- (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 knowl-

- edge and biological resources related thereto, or national heritage;
- (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.

Dispute resolution

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

(2)(a) The Department shall 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.

(b) The mediator shall be appointed by agreement of the government and the foreign investor (the "parties").

(c) The parties may jointly request [the Department] [a competent

authority] to appoint a mediator from the list established pursuant to this section, or, in the absence of a list, from individuals proposed by either Party.

(d) Recourse to mediation shall be governed by the rules set out in Annex I. Any time limit mentioned in Annex I may be modified by agreement between the disputing parties.

(3) In order to facilitate a resolution of a dispute contemplated in subsection (1), the following information and forms must be submitted by an investor -

- (a) contact details of the Foreign Investor, including a physical address in the Territory, email address, facsimile number and telephone number;
- (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 South Africa allegedly responsible for the measures which the Foreign Investor alleges constitute a breach of any of the investment protection contained in this Act;
- (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.

(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.

Regulations

13. 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 or expedient in order to achieve the purposes of this Act.

[Subsection 2 has been omitted]

Transitional arrangements

14. (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 such treaties, but before promulgation of this Act, will be governed by the general South African law.

Short title and commencement

15. 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*.

