

Promotion & Protection of Investment Bill [B18-2015]

By IRR (SA Institute of Race Relations)
To Portfolio Committee on Trade &
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Problems with Investment Bill

- Limited definition of “investment”
- No guarantee of equal treatment with domestic investors. Instead, this depends on:
 - “national legislation”, present and future, +
 - a vague definition of “like circumstances”, with broad and uncertain criteria
- Plus, the “level of security” provided to foreign investors will depend on the State’s “available resources and capacity”

Problems with Investment Bill

- Limited compensation: market value, minus the four “discount” factors, less deduction based on the State’s “available resources”
- Repatriation of capital/returns dependent on “applicable legislation”, present and future
- Limited access to international arbitration
- Only if the State agrees there is a dispute and gives “consent”, only once domestic remedies are exhausted, and only on a “State-to-State” basis

Problems with Investment Bill

- No promise of “fair and equitable treatment”
- This requires State to enact laws that are “transparent, reasonable, and certain”
- This is also what the Constitution demands
- Constitution recognises “the supremacy of the rule of law” as one of its founding values, along with “accountability” and “openness”
- Rule of law requires certainty, predictability

Problems with Investment Bill

- In practice, little hope of effective redress through laws that breach these principles
- Eg, vague MPRDA and proposed amendments have harmed mining sector; cf Botswana's clear and certain mining legislation
- Bill's emphasis on State's "regulatory powers" will encourage more harmful laws, that also conflict with Constitution's requirements

Problems with Investment Bill

- Not enough to give foreign (and domestic) investors “the right to property in terms of Section 25 of the Constitution” when Section 25 is being undermined or breached by:
 - Expropriation Bill of 2015
 - Private Security Ind Reg Amend Bill (PSIRA)
 - 51% BEE ownership requirements
 - MPRDA amendments + various land measures

Necessary changes to Inv Bill

- Expand definition of “investment” to cover “every kind of asset”, including shares and intellectual property rights
- Prohibit “direct” and “indirect” expropriation, except where court (in cases of dispute) has confirmed constitutional validity of proposal
- Provide compensation based on market value, less discount factors, plus damages for all direct losses resulting from expropriation

Necessary changes to Inv Bill

- Guarantee all investors “fair and equitable treatment”, as the Constitution requires
- This is also the best way to provide redress, open up opportunities for the disadvantaged
- Give international investors the right to international arbitration
- Guarantee repatriation of capital and returns
- Pledge + **provide** sound investment climate

Changes needed/best way forward

- Remove vague provisions on “like treatment”, and State’s “available resources and capacity”
- Define “the public interest” in the way set out in Section 25 of Constitution
- Better option: withdraw Bill and redraft
- Current draft too vague to be constitutional
- Time allowed for public consultation also too short to meet constitutional requirements

Importance of growth/jobs

- Redistribution not enough to meet needs of growing population
- Population up from 40m in 1995 to 54m in 2014, now growing at almost 1m a year
- Despite more jobs, number unemployed is up from 3.7m in 1994 to 8.4m in 2015
- For jobs, we need growth at 5% to 7% of GDP
- Average growth rate: 1.8% of GDP since 2009

Importance of growth

- Growth rate was 1.5% of GDP in 2014 and is zero so far this year
- Growth rate per person was 0.1% of GDP in 2014 (down from 1.1% in 1994)
- GDP per person has shrunk in past (took until 2006 to get back to where we'd been in 1981)
- This could happen again without growth rate above 2.6% (rate of population growth)

We need investment for growth

- NDP urges 30% of GDP in fixed investment (on economic and social infrastructure)
- Actual rate: 20% of GDP in 2014
- Gross domestic savings to GDP: 16% of GDP
- Current account deficit: -5.4% of GDP in 2014
- Budget deficit: -4% of GDP, interest = R132bn this year, rising to R158bn in 2017/18
- FDI in SA 1Q 2015: -R22bn, portfolio R39bn

We need investment for growth

- Cumulative value of FDI in SA now R1 600bn
- Some 85% of total has come from the West: particularly from the UK, Europe, the US
- Cumulative value of indirect investment (mainly equities/bonds) is now R2 700bn
- Some 90% of total has come from West
- FDI from China: R57bn, less than 4% of total
- Indirect investment from China: R15bn, 0.5%

We need investment for growth

- UK investment: R1 650bn in total, Netherlands and Germany: R410bn in total (R2 060bn)
- Termination of these BITs a major deterrent to fresh FDI, severely undermines confidence
- So too will flawed provisions of Inv Bill, plus false claim that Bill “codifies” clauses in BITs
- We need a new Bill that is constitutional and helps counter many other investment barriers