

22 September 2015

- \* **Red text** refers to amendments proposed but still being considered.
- Green text** refers to consensus reached.
- Text with strikethroughs (i.e. ~~deleted~~) are proposed deletions.

## REPUBLIC OF SOUTH AFRICA

### ~~PROMOTION AND~~ **THE** PROTECTION OF INVESTMENT BILL

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*(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)*  
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**(MINISTER OF TRADE AND INDUSTRY)**

**[B 18 - 2015]**

## **BILL**

To provide for the legislative protection of investors and the protection **and promotion** of 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 **needobligation** to protect and promote the rights enshrined in the Constitution and the Bill of Rights;

**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 on a non-discriminatory basis;

**DESIROUS** to promote investment by creating an environment that facilitates processes that may affect investment;

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**CONSIDERING** the responsibility of the government to provide a sound legislative framework for the ~~promotion and~~ protection of all investments, including foreign investments, pursuant to the 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 ~~need 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, ~~promoted and encouraged~~ 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 the 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. ~~Right of e~~Establishment
7. National treatment
8. ~~Physical security of property-investment~~
9. ~~Legal protection of investment~~ ~~Protection of property~~
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 ~~of Trade and Industry~~ responsible for trade and industry;

**"dispute"** means a claim by an investor, instituted in accordance to section 12, that the government has allegedly breached the protection provided in this Act, ~~provided that a dispute will only arise once the Parties agree, or as prescribed by the law;~~

**"enterprise"** means any natural persons or juristic persons, 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(s)"** ~~means an administrative action by a person or body duly authorised thereto, acting with the scope of authority granted by the Constitution or a law of general application;~~ refers to binding governmental action directly affecting an investor or its investment, and includes laws, regulations, and administrative action;

**"the 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;

“**this Act**” means the ~~Promotion and~~ 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 with another enterprise outside the Republic, only in so far as such holding, acquisition or merger with another enterprise outside the Republic has an effect in the Republic: 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) in the Republic.~~

(d) For the purposes of this definition, an enterprise may possess assets such as, *inter alia*:

(i) 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;

(ii) A debt security of another enterprise;

- (iii) Loans to an enterprise;
- (iv) Movable or immovable property and other property rights such as mortgages, liens or pledges;
- (v) Claims to money or to any performance under contract having a financial value;
- (vi) Copyrights, know how, goodwill, and **intellectual** property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognised under the law of South Africa;
- (vii) Returns such as profits, dividends, royalties and income yielded by an investment;
- (viii) Rights or concessions conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources;

### **Interpretation of the Act**

3. This Act must be interpreted and applied in a manner that is consistent with—
- a) its purpose as contemplated by section 4;
  - b) the Constitution, including-
    - (i) just administrative action consistent with section 33 of the Constitution, access to information as provided in section 32, access to courts as provided in section 34 of the Constitution and **the other rights in the Bill of Rights**;
    - (ii) **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 with 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) ~~promote and~~ 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 ~~an~~ investments in respect of national treatment and ~~the physical security of property-an investment~~;
  - (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 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 subject to national legislation and~~ made in accordance with the requirements set out in section 2 this Act.

## Right of Establishment

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

## National Treatment

7 (1) ~~Subject to national legislation,~~ 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;

(g) the 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 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; or
- (g) domestic laws designed to regulate foreign ownership in respect of a specified sector.

**Physical security of ~~Investment 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 as may be generally provided to domestic investors** and subject to available resources and capacity.

### **Protection of Property—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 any investment, ~~transfer~~ 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 knowledge 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 of 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 (6) 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) The Minister may prescribe criteria for the appointment of a mediator.

(3) In order to facilitate a resolution of a dispute contemplated in subsection (1), ~~the Minister must prescribe the information and forms to be submitted by an investor~~ the following information and forms ~~to~~ 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;<sup>1</sup>

(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. Such arbitration will be conducted between the Republic and the home state of the applicable investor.

## **Regulations**

**13.** (1) The Minister may, by notice in the *Gazette*, make regulations regarding -

- (a) the criteria for the appointment of a mediator or competent authority for the resolution of a dispute;
- b) the processes and procedures relating to the resolution of disputes contemplated in subsection 12(1);
- c) any matter which may or must be prescribed in terms of this Act;
- d) any other matter the regulation of which may be necessary or expedient in order to achieve the purposes of the Act.

(2) 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).

### **Transitional Arrangements**

**14.** (1) Existing investments that were made under Bilateral Investment Treaties will 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** (1) This Act is called the ~~Promotion and~~ Protection of Investment Act, 2015, and comes into operation on a date fixed by the President by proclamation in the Gazette.