

# SAHRC Presentation on the Promotion and Protection of Investment Bill [B18-2015]

*Portfolio Committee on Trade and Industry  
September 2015*





# Introduction

- The SAHRC acknowledges the introduction of the Promotion and Protection of Investment Bill [B18-2015].
- The Bill seeks to promote and protect foreign and domestic investment into South Africa, in accordance with the Constitution.
- It further aims to strike a balance between the role of the state to regulate in the public interest and the rights and obligations of investors; establish a mechanism for the domestic resolution of investment disputes, to be managed by the Department of Trade and Industry; and afford equal treatment to local and foreign investors.



# Investment and Human Rights

- With the spread of globalisation, a commonly invoked narrative is that economic investment and growth can be a panacea for an array of social ills, including by promoting the realisation of human rights and the alleviation of poverty.
- However, within the billion dollar mining sector, for example, it has been well documented how communities are worse off after hosting mining activity; reap none of the financial benefits of the mineral resources of their soil; as well as suffer environmental degradation with effects that can outlive generations. Such communities remain some of the most marginalised and exploited communities across the African continent.
- The SAHRC recently conducted a nationwide campaign on the right to food which noted widespread food insecurity. One of the main factors causing this was nobly unaffordable food prices caused, in part, by South Africa's privatised and commercialised food economy which is dominated by a small number of global food production companies.
- The SAHRC has often noted how global economic and trade policy drives poverty, inequality and the vulnerability of women, in particular, to the abuse of their human rights. The SAHRC has subsequently called for economic policy choices, including trade agreements, to be scrutinised for their negative human rights impacts.



# Mandate of SAHRC

- Established under Chapter 9 of the Constitution as an independent body to support South Africa's constitutional democracy.
- In September 2014, the new South African Human Rights Commission Act 40 of 2013 came into effect, repealing its predecessor, the Human Rights Commission Act 54 of 1994. Section 13 of the new Act expands on the powers and functions of the SAHRC, including:
  - The Commission may recommend to Parliament or any other legislature the adoption of new legislation which will promote respect for human rights and a culture of human rights.
  - If the Commission is of the opinion that any proposed legislation might be contrary to Chapter 2 of the Constitution or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it must immediately report that fact to the relevant legislature.
- In accordance with the above outlined mandate, power and functions, the SAHRC makes this submission on the Bill to the Portfolio Committee.

# Commentary on the Bill (1)

## ‘Rights and obligations of investors’

- The first listed purpose of the Bill is to promote and protect investment, whilst balancing the ‘rights and obligations of investors’ against the public interest (Clause 4(a)). Although the Bill affords a number of rights to investors, **it does not provide any corresponding obligations.**
- Clause 4(d) sets out another listed purpose of the Bill, to: ‘confirm the Bill of Rights in the Constitution’, but **does not explicitly link this to any obligations on behalf of investors in the proceeding content of the Bill.**

**Recommendation:** The SAHRC therefore recommends that the Bill should be revised to include specific obligations on investors to comply with the Bill of Rights and with all relevant international human rights law binding on South Africa.

# Commentary on the Bill (1)

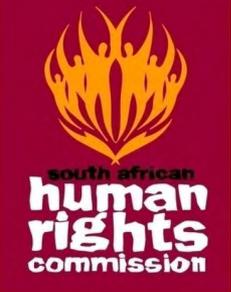
## ‘Rights and obligations of investors’

Such obligations on investors should include:

- the establishment of a grievance mechanism, in line with Pillar 3 – “Remedy” – of the United Nations Guiding Principles on Business and Human Rights
- disclosure of information in line with national laws and standards, in order to promote transparency and public participation;
- protection of the rights of workers in line with the Bill of Rights, and particularly section 23 (labour relations); and
- recognition of the implications of section 8 of the Constitution which provides that ‘the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right’.

It is submitted that **investor protections should be conditional on minimum investor responsibilities.**

Placing specific obligations upon investors to respect all relevant human rights laws and standards would align the Bill with the **Southern Africa Development Community (SADC) Model Bilateral Investment Treaty Template** which includes numerous provisions relating to the protection of human rights, including worker rights.



# Commentary on the Bill (2)

## ‘Sovereign right to regulate investments’

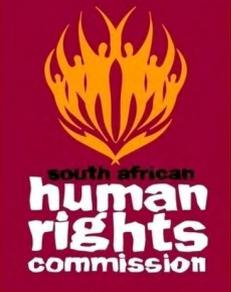
- The SAHRC supports the need to affirm the state’s right to regulate investments, as outlined in clause 4(c).
- However, it is recommended that clause 4(c) be redrafted to read:
  - ‘...affirm the Republic’s sovereign right to regulate investments **in the public interest**’.
- The SAHRC submits that clarifying the language to include the qualification ‘**in the public interest**’, will ensure the purpose of the Bill is unequivocally articulated.



# Commentary on the Bill (3)

## Clause 7 National Treatment

- Clause 7(2) of the Bill defines “like circumstances” to denote ‘the requirement for an overall examination of the merits **of the case** by taking into account all the terms of a foreign investment’.
- The clause alludes to a ‘case’ which will be reviewed. This is again made reference to in clause 7(3) which speaks of ‘the examination referred to in subsection (2)’.
- The Bill, however, does not provide clarity with regard to such ‘cases’: either who will be the party responsible for reviewing cases, nor the process when and by which the review takes place.
- The SAHRC therefore recommends that this clause be clarified to avoid any potential misinterpretation.
- The Portfolio Committee may wish to consider establishing an **independent body** to perform this function.



# Commentary on the Bill (4)

## Transparency and information disclosure

- The preamble to the Bill reads that the ‘State is committed to maintaining an **open and transparent environment** for investments’, and further, that ‘investment must be protected, promoted and encouraged in accordance with [...] access to information’.
- Despite these affirmations, **the Bill makes no provisions relating to information disclosure**, which would facilitate the realisation of transparency.
- Noting that a lack of transparency has been one of the key human rights concerns of investments, the SAHRC submits that the ambit of the Bill be extended to include provision relating to transparency.
- The Bill should emphasise under clause 12 - ‘Dispute Resolution’ – transparency as a core component of the dispute resolution process.
- In addition, an obligation should be placed on investors to ensure compliance with all relevant national laws and standards which provide for information disclosure (e.g. PAIA).



# Commentary on the Bill (5)

## National dispute resolution mechanism (1)

- The SAHRC supports the establishment of a national mechanism as indicated under clause 12.
- However, noting the concerns surrounding international investment dispute resolution mechanisms, particularly with regard to access to justice and transparency, the SAHRC has a number of recommendations to strengthen the dispute resolution process in line with regionally and internationally established best practice.

### **(1) Limiting power invested in the Minister**

- The Bill vests much power in the hands of the Minister to make decisions regarding the management of investment disputes.
- Clause 12 affords the Minister the powers to: 'prescribe criteria for the appointment of a mediator (subsection (2)); and 'prescribe the information and forms to be submitted by an investor (subsection (3)).
- Given that the state will be a party in most investment disputes, the SAHRC is concerned that the provisions of this clause are not extensive enough to ensure effective separation of powers and independent review of disputes.



# Commentary on the Bill (5)

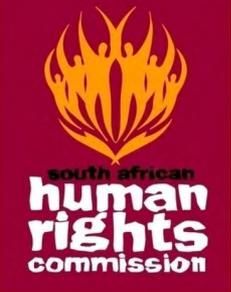
## National dispute resolution mechanism (2)

### (2) Public participation provisions to be included

- Public participation is a significant aspect of democracy and the realisation of human rights.

#### International best practice:

- The **Model International Agreement on Investment for Sustainable Development** was developed to provide a best practice guide to states, in order to regulate investment and engage with the public. The Agreement provides for civil society and communities to submit complaints to government authorities regarding the negative conduct of investors: the authorities are obliged to make public their responses to such complaints.
- The ***UN Guiding Principles on Business and Human Rights*** are structured upon a three pillar framework of “protect, respect and remedy” which serves to guide business practice in ensuring respect for human rights. While all three pillars promote the importance of public participation and meaningful engagement with affected communities, the third pillar – “remedy” – speaks to the significance of ensuring that grievance mechanisms (both state and non-state, judicial and non-judicial) are established to ensure access to justice for those negatively affected by business operations.
- The SAHRC submits that **the Bill needs to include provisions for public participation** and the submission of complaints by civil society and local communities who are aggrieved by the actions of investors. By doing so, the Bill would be in line with national, regional and international human rights standards.



# Commentary on the Bill (5)

## National dispute resolution mechanism (3)

**Recommendation:** The SAHRC recommends the establishment of an **independent oversight body** to:

- Monitor the implementation of the Bill (and any ensuing regulations);
- review matters relating to national treatment;
- ensure transparency (taking into account legitimate confidentiality requirements);
- ensure compliance with the Constitution and all relevant international human rights laws and standards binding on South Africa; and
- exercise oversight over the proceedings of investment disputes.
- The SAHRC further recommends that a **human rights expert** form part of this body in order to ensure compliance with national and international human rights laws and standards, including transparency.



# Conclusion

- The SAHRC seeks to encourage the advancement of economic development in a way that is compatible with human rights and the transformative agenda of the Constitution.
- The SAHRC recommends that the Bill is thoroughly reviewed and that the aforementioned aspects are considered during the Portfolio Committee's deliberations on the Bill.
- The Commission is available to further discuss any of the issues contained herein with the Portfolio Committee.



**Thank you**

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