

REPUBLIC OF SOUTH AFRICA

PROMOTION AND 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)

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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 need 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 promotion and 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 right to just administrative action;

RECOGNISING the need 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 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	5
2.	Investment	
3.	Interpretation of Act	
4.	Purpose of Act	
5.	Application of Act	
6.	Right of establishment	10
7.	National treatment	
8.	Security of investment	
9.	Protection of property	
10.	Transfer of funds	
11.	Right to regulate	15
12.	Dispute resolution	
13.	Regulations	
14.	Transitional arrangements	
15.	Short title and commencement	

Definitions 20

- 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;
 - “**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, provided that a dispute will only arise once the parties agree, or as prescribed by the law; 25
 - “**enterprise**” means any natural person or juristic person, whether incorporated or unincorporated;
 - “**government**” means the government of the Republic of South Africa; 30
 - “**investment**” has the meaning assigned under section 2;
 - “**investor**” means an enterprise making an investment in the Republic regardless of nationality;
 - “**measure**” means an administrative action by a person or body duly authorised thereto, acting within the scope of authority granted by the Constitution or a law of general application; 35
 - “**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; 40
 - “**regulation**” means a regulation made under this Act;
 - “**Republic**” means the Republic of South Africa; and
 - “**this Act**” means the Promotion and Protection of Investment Act, 2015.

Investment

- For the purpose of this Act, an investment is— 45
 - (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 50
 - (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 on an investment in the Republic.

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) just administrative action provided for in section 33 of the Constitution; 5
 - (ii) customary international law contemplated in section 232 of the Constitution; and
 - (iii) international law contemplated in section 233 of the Constitution; and 10
 - (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; 15
 - (b) confirm the protection of an investment in respect of national treatment and the security of an investment;
 - (c) affirm the Republic's sovereign right to regulate investments; and 20
 - (d) confirm the Bill of Rights in the Constitution and the laws that apply to all investors in the Republic.

Application of Act

5. This Act applies to investments in the Republic which are subject to national legislation and made in accordance with the requirements set out in section 2. 25

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

National treatment 30

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— 35
- (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; 40
 - (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 45 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 50 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; 5
- (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 10
- (g) domestic laws designed to regulate foreign ownership in respect of a specified sector.

Security of investment

8. The Republic must accord foreign investors and their investments a level of security as may be generally provided to domestic investors, subject to available resources and capacity. 15

Protection of property

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, transfer funds subject to taxation and other applicable legislation. 20

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— 25

- (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; 30
- (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. 35

(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 40

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. 45

(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.

(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. 50

(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— 5
- (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; or 10
 - (d) any other matter the regulation of which may be necessary or expedient in order to achieve the purposes of this 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 15

- 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 20

15. This Act is called the Promotion and Protection of Investment Act, 2015, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE PROMOTION AND PROTECTION OF INVESTMENT BILL

1. BACKGROUND

- 1.1 The Bill seeks to achieve a balance between the rights and obligations of all investors in South Africa, to provide adequate and equal protection to foreign investors and domestic investors, and to promote investment. The Bill confirms the legal position that foreign and domestic investors, their investments are protected under the Constitution of the Republic of South Africa, 1996 (“Constitution”), and applicable domestic legislation. The Bill seeks to treat foreign investors and their investment not less favourably than South African investors in like circumstances are treated.
- 1.2 The Bill confirms a commitment by the Republic of South Africa (“Republic”) to protect all investments irrespective of their origin. The underlying philosophy of the Bill is to clarify the protection that an investor may expect in the Republic, and to promote all types of investments by creating a predictable business environment that is readily understandable to an investor.
- 1.3 The Bill also confirms that both foreign and domestic investors are protected under the Constitution. In some instances it may be unavoidable to differentiate between foreign and domestic investors. However these instances are limited and do not violate the principle of equal treatment. Government’s right to regulate is emphasised since legitimate policy measures should be implemented in the public interest.
- 1.4 In April 2010, the Department of Trade and Industry (“Department”), began drafting the Bill which aims to strengthen the Republic’s investment regime by seeking to achieve that:
 - (a) the Republic remains open to foreign direct investment (“FDI”);
 - (b) the Republic provides adequate protection to FDI; and
 - (c) these objectives are balanced with the right of the government of the Republic (“government”) to regulate in the national and public interest.
- 1.5 The intention of the Department is to clarify provisions typically found in Bilateral Investment Treaties (“BITs”), by codifying them in the Bill and ensuring compliance with the Constitution.
- 1.6 The Bill therefore seeks to balance the rights and obligations of investors, to provide adequate protection to foreign investors, to ensure that South Africa’s constitutional obligations are upheld, and to ensure that government retains the policy space to regulate in the public interest.
- 1.7 Furthermore, the Bill draws on a review of international experience as well as recent national experiences across a wide spectrum of both developed and developing countries.
- 1.8 The following clauses, in turn, outline the policy perspectives and objectives of the core substantive provisions to be found in the Bill.

2. CLARIFYING SUBSTANTIVE PROVISIONS IN BILL

2.1 Preamble

The Preamble of the Bill sets out key policy considerations that provide context to the Bill. It highlights, *inter alia*, South Africa’s commitment to maintaining an open and transparent environment for foreign investors, while recognising the importance of maintaining sufficient scope for government to regulate all investments in order to fulfil legitimate national policy objectives.

2.2 Investment (Clause 2)

The definition of “investment” is designed to clearly demarcate the kind of FDI that would be protected under the Bill. The Bill applies only to investment which has a physical presence in the Republic and is acquired or used in the expectation, and for the purpose, of economic activity or other business purposes.

2.3 Interpretation of Act (Clause 3)

It is understood that in some instances the status of foreign investments must be clarified in a manner that is consistent with the Constitution and in line with both customary international law and international law. The Bill clarifies the international investment law concepts of national treatment, and transfer of funds in line with the Constitution and domestic laws.

2.4 National treatment (Clause 7)

National treatment is codified in domestic legislation in a manner that will grant an investor the right to be treated no less favourably than South African investors as long as their investments are “in like circumstances”. This wording is more closely aligned to the Constitution, which permits measures to overcome past discrimination. National treatment provisions in BITs created a degree of uncertainty and risks to national legislation for Black Economic Empowerment, public health, and environmental and economic development, including beneficiation.

2.5 Security of investment (Clause 8)

The Bill provides for the security of investors and their investments. It seeks to clarify that the Republic bears no greater obligation to foreign investors than to its own investors in respect of their investments.

2.6 Transfer of funds (Clause 10)

The issue of the transfer of funds reflects the fact that South Africa has a liberal transfer regime, and that foreign investors in particular has the right to repatriate returns on their investments, subject to taxation and other applicable legislation.

2.7 Right to regulate (Clause 11)

The Bill reiterates the right of the Republic to regulate in the public interest. Such measures may be necessary to redress historical, social and economic inequalities, and to uphold rights guaranteed in the Constitution.

2.8 Dispute resolution (Clause 12)

The Bill provides that investor disputes are settled in accordance with South African domestic laws and seeks to clarify the right of any investor to bring proceedings in a domestic forum most appropriate for that investor’s type of claim. The option of alternative dispute resolution and early detection of a dispute is promoted through the Bill. Interventions by the Department are provided for as an optional dispute mechanism, whereas independent mediators may be appointed to further facilitate such matters.

2.9 Regulations (Clause 13)

The Minister of Trade and Industry (“Minister”) may make regulations to address various aspects covered by the Bill. 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).

3. DEPARTMENTS AND PARTIES CONSULTED

- 3.1 The draft Bill was published for public comment and comments were received from numerous organisations, the Departments of Home Affairs; Rural Development and Land Reform; Internal Relations and Cooperation and National Treasury.
- 3.2 The Department consulted the American Chamber of Commerce, the National Energy Regulator, EU-SA Business Links (representation from Austria, France and Germany), and the Public Investment Corporation.
- 3.3 The Bill also went through a NEDLAC process.
- 3.4 The Bill was considered in consultation with the Directors-General of the Economic Cluster and the ICTS Cluster.
- 3.5 The Bill was presented to the Inter-Ministerial Committee on BITs and Investment and finalised pursuant to discussions at this forum.

4. FINANCIAL IMPLICATIONS

None

5. PARLIAMENTARY PROCEDURE

- 5.1 The State Law Advisers and the Department are of the view that the Bill does not contain the elements of “trade” which is a functional area found in Schedule 4 to the Constitution. The Bill deals with any other matter, since the Bill in a substantial measure deal with the promotion and protection of investment, which is not a matter listed in either Schedule 4 or 5 to the Constitution. Section 44 of the Constitution states that the national legislative authority as vested in Parliament confers on the National Assembly the power to pass legislation with regard to any matter, and confers on the National Council of Provinces the power to consider, in accordance with section 75, any other legislation passed by the National Assembly.
- 5.2 The State Law Advisers and the Department are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provisions to which the procedure set out in sections 74 or 76 of the Constitution applies.
- 5.3 The State Law Advisers and the Department are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

