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GENERAL NOTICE

NOTICE 1087 OF 2013

DEPARTMENT OF TRADE AND INDUSTRY

PROMOTION AND PROTECTION OF INVESTMENT BILL, 2013

INVITATION FOR THE PUBLIC TO COMMENT ON THE PROMOTION AND PROTECTION OF INVESTMENT BILL, 2013

I, Pravin Gordhan, acting Minister of Trade and Industry, having obtained Cabinet approval, hereby publish the Promotion and Protection of Investment Bill, for broader public comments.

Interested persons may submit written comments on the proposed policy not later than three (3) months from the date of publication of this notice to:

Director-General
Department of Trade and Industry
Private Bag X84
Pretoria
0001

Or hand deliver to:

77 Meintjies Street
Block B – 3rd floor
Sunnyside
Pretoria
For attention: Ms V Gilbert

Email :investment@thedti.gov.za

Mr Pravin Gordhan
Acting Minister of Trade and Industry
29 **October 2013**

REPUBLIC OF SOUTH AFRICA

PROMOTION AND PROTECTION OF INVESTMENT BILL

(As introduced in the National Assembly (proposed section 76); explanatory summary of Bill published in Government Gazette No. of) (The English text is the official text of the Bill)

(MINISTER OF TRADE AND INDUSTRY)

[B - 2013]

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 and the Bill of Rights;

RECOGNISING the importance that investment plays in job creation, economic growth, 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 a business environment that expeditiously facilitates all processes that may affect investment;

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 justice;

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;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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Definitions

1. In this Act, unless the context indicates otherwise:

"**Department**" means the Department of Trade and Industry;

"**dispute**"means a claim by an investor that the Government of the Republic has allegedly breached an investment protection guaranteed under this Act and that the investor has incurred loss or damage by reason of, or arising out of, that alleged breach;

"entity" means any juristic person, whether incorporated or unincorporated;

"investment" includes the following assets held by an investor in the Republic:

(a) An entity;

(b) securities as defined in the Financial Markets Act, 2012 (Act No. 19 of 2013), and a share as defined by the Companies Act 2008 (Act 71 of 2008);

(c) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions or other similar contracts;

(d) movable and immovable property, including commercial property, leases, mortgages, liens or pledges;

(e) intellectual property rights such as copyrights, patents, utility model patents, registered designs, trade-marks, trade-names, trade and business secrets and technical processes; and

(f) rights conferred by law to carry out economic and commercial activities, such as licences, authorisations and permits;

Provided that in the above—

(i) the investment relates to a material economic investment or significant underlying physical presence in the Republic, such as operational facilities; and

(ii) commercial contracts for the sale of goods or services and the extension of credit in connection with such commercial contracts, including claims thereunder, do not qualify as investments under this Act.

"investor" means any person who holds an investment in the Republic and, in the case of a natural person, means a person who holds an investment in the Republic regardless of nationality;

"Republic" means the Republic of South Africa;

"this Act" means the Promotion and Protection of Investment Act, 2013;

Interpretation of Act

2. This Act must be interpreted and applied with due regard to—

(a) the Constitution;

(b) international law consistent with the Constitution;

(c) customary international law consistent with the Constitution; and

(d) any other relevant convention or international agreement to which the Republic is or becomes a party.

Purpose of Act

3. The purpose of this Act is to—

(a) promote and protect investment in a manner that is consistent with public interest and a balance between the rights and obligations of investors; and

(b) ensure the equal treatment between foreign investors and citizens of the Republic, subject to applicable legislation.

Application of Act

4. (1) This Act applies to investments made for commercial purposes, which investment is made before or after the commencement of this Act and irrespective of whether the source of the investment is either from the public or private sector, or from a domestic or foreign source.

(2) This Act does not preclude the operation of any domestic legislation that is applicable to investments in the Republic.

(3) This Act does not preclude or affect the duty of the Government of the Republic or any organ of State, to take the measures contemplated in section 10, including but not limited to, the operation of—

(a) any existing taxation legislative measures or provisions;

(b) subsidies or grants provided by the Government of the Republic or any organ of State as defined in section 239 of the Constitution;

(c) government procurement processes;

(d) any existing or future customs union, free trade area, common market, any similar international agreement or any interim arrangement leading up to such customs union, free trade area or common market to which the Republic is or may become a party; or

(e) any special advantages accorded by the Republic to development finance institutions established for the purpose of development assistance or the development of small and medium businesses or new industries.

Protection of investment

5. (1) The investment protection under this Act applies to investors and their investments where those investments have been—

(a) made in accordance with applicable legislation; and

(b) acquired and used in the expectation, and for the purpose, of economic activity or other business purposes.

(2) This Act must not be interpreted so as to create a right of establishment for foreign investors or potential foreign investors in the Republic.

(3) The protection of foreign investment is subject to compliance with applicable domestic legislation and international agreements.

(4) A change in the legal form in which assets are invested or re-invested does not affect their character as foreign investments under this Act, provided that the other criteria for foreign investments are met.

National treatment

6. (1) The Republic must give effect to national treatment and treat foreign investors, their foreign investments and returns not less favorably than it treats South African investors in their business operations that are in like circumstances.

(2) The national treatment referred to in subsection (1) only applies to foreign investors and foreign investments held in accordance with applicable legislation.

(3) A foreign investor may conduct without restraint various activities of foreign investment in the Republic, subject to applicable legislation.

(4) For the purposes of this section, "like circumstances" means the requirement for an overall examination on a case-by-case basis of all the terms of a foreign investment including, the following factors:

(a) The effect of the foreign investment on the Republic, including the cumulative effects of all investments;

(b) the sector that the foreign investment is in;

(c) the aim of any measure relating to foreign investments; and

(d) other factors relating to the foreign investor or the foreign investment in relation to the measure concerned.

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

Security of investment

7. (1) The Republic must accord foreign investors and their investments and returns, equal level of security as may be generally provided to other investors and subject to available resources and capacity.

(2) All investors that suffer losses or damages owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot must be accorded equal treatment and redress as regards any restitution, indemnification, compensation or other settlement, without any discrimination and subject to applicable domestic legislation, international law and international customary law.

(3) An investor who suffers loss or damage resulting from—

(a) requisitioning of their property by the forces or authorities of the Republic; or

(b) destruction of their property by the forces or authorities of the Republic, which was not caused in combat action or was not required by the necessity of the situation,

must be accorded restitution or appropriate compensation.

Principles relating to expropriation of investment

8. (1) An investment may not be expropriated except in accordance with the Constitution and in terms of a law of general application for

public purposes or in the public interest, under due process of law, against just and equitable compensation effected in a timely manner.

(2) The following acts, which are not limited, do not amount to acts of expropriation:

(a) A measure or series of measures taken by the government of the Republic that have an incidental or indirect adverse impact on the economic value of an investment;

(b) a measure aimed at protecting or enhancing legitimate public welfare objectives, such as public health or safety, environmental protection or state security;

(c) the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property; and

(d) any measure which results in the deprivation of property but where the State does not acquire ownership of such property provided that—

(i) there is no permanent destruction of the economic value of the investment; or

(ii) the investor's ability to manage, use or control his or her investment in a meaningful way is not unduly impeded.

(3) The compensation contemplated in subsection (1) must reflect an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances including—

(a) the current use of the investment;

(b) the history of the acquisition and use of the investment;

(c) the market value of the investment; and

(d) the purpose of the expropriation.

(4) The value calculated in accordance with subsection (3) must be taken as the value of the investment immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, and must include interest based on the average deposit rate prevailing in the national banking system from the day of taking until the date of payment, and must be made without delay, and be effectively realisable.

(5) An investor affected by the expropriation has the right to a review by a competent court, including whether the valuation of his or her investment was done in accordance with the factors contemplated in subsection (2).

Transfer of funds

9. A foreign investor may, in respect of any investment, transfer funds, subject to taxation and other applicable legislation.

Sovereign right to regulate in the public interest

10. (1) The Government of the Republic and any organ of State may, in accordance with the Constitution, take measures—

(a) to redress historical, social and economic inequalities;

(b) to uphold the values and principles espoused in section 195 of the Constitution;

(c) to uphold the rights guaranteed in the Constitution;

(d) to promote and preserve cultural heritage and practices, indigenous knowledge and biological resources related thereto or national heritage;

(e) to foster economic development, industrialisation and beneficiation; and

(f) to achieve the progressive realisation of socio-economic rights.

(2) The Government of the Republic and any organ of State, may take measures that are necessary for the fulfillment of the Republic's obligations with respect to the maintenance, compliance or restoration of international peace and security, or

the protection of the essential security interests, including with respect to financial stability, of the Republic.

Dispute resolution

11. (1) A foreign investor that has a dispute in respect of action taken by the Government of the Republic or any organ of State, which action affected an investment of such foreign investor, may 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 must make regulations on the processes and procedures relating to the settlement of disputes contemplated in subsection (1).

(3) In order to facilitate a resolution of a dispute contemplated in subsection (1), the investor must provide the following information:

(a) Contact details of the investor, including a physical address in the Territory, email address, facsimile number and telephone number;

(b) a summary of the claim, including the grounds giving rise to the dispute;

(c) the specific details of the party allegedly responsible for the grounds on which the investor alleges constitute a breach of any of the investment protection under this Act; and

(d) the relief sought.

(4) Subsection (1) does not preclude an investor from approaching any court, competent, independent tribunal or statutory body for the resolution of a dispute relating to an investment.

(5) An investor may refer an investment dispute to arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965).

Anti-avoidance

12. If the Minister considers that a transaction, agreement, arrangement, scheme, promise or understanding has been made or carried out by any person, has the sole or dominant purpose or the effect of circumventing the ambit of any provisions of this Act, the Minister may take such steps as is reasonably considered necessary, within the scope of the law, to prevent such avoidance.

Short title and commencement

13. (1) This Act is called the Promotion and Protection of Investment Act, 2013, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

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