

## Submission on the Protection of Investment Bill

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We are hereby humbly submit our views on the deficiencies of the current version of the Protection of Investment Bill (“the Bill”).

### 1. Objective and Deficiency of the Bill

- 1.1. The objective of the Bill is to protect the investment of foreign investors in the Republic of South Africa (“Republic”). Our understanding is that this is motivated by the following:
  - 1.1.1. It is part of a new international trend to move away from BIT’s that are used to abuse governments – in this case the SA Government (“Government”) – with frivolous claims on arbitration platforms that seem loaded against the government; and
  - 1.1.2. It is, therefore, to replace the existing Bilateral Trade Agreements (“BIT’s”) that will not be renewed due to the mentioned abuses.

The DTI sited a few examples of such abuse.

- 1.2. It is a fact the Bill will replace the BIT’s. It, therefore, stands be reasoned that the Bill must ensure that the reciprocal nature of the BIT’s must also reflected. In other words, it must reflect both the protection afforded to foreign investors in South Africa and that afforded South African investors in the foreign jurisdictions. **This is not the case**. The Bill only protects investments made in the Republic by foreign investors.
- 1.3. This indicates that a *lacuna* exists in so far South African investors are not protected when they invest in foreign jurisdictions.
- 1.4. This can, however, be remedied as will be discussed below.

### 2. Fixing the Bill

#### 2.1. Nature of Remedy:

- 2.1.1. The Government has a constitutional obligation to protect its citizens and the people who live within the Republic.
- 2.1.2. The remedy submitted will thus speak to the internal obligations of the Government only and is not in any way to be construed to present a remedy that must have extra-judicial application.

#### 2.2. The Remedy:

- 2.2.1. The Bill must be remedied to codify the Government's obligations with regard to South African investors investing – sometimes at great risk – in foreign jurisdictions.
- 2.2.2. While Government cannot exercise its own powers outside its borders, it can make use of international law remedies to assist South African investors who are prejudiced by foreign governments.
- 2.2.3. The problem at the moment, is that Government has a discretion whether it will assist any prejudiced South African investor.
- 2.2.4. We are arguing that the Government has a legal obligation to assist such a South African investor, subject to the meeting of certain criteria.

### **2.3. Implementing the Principle:**

- 2.3.1. We submit that the Bill must be amended to reflect a **defined obligation** by Government to protect South African investors as follows:
  - 2.3.1.1. When a South African investor has been prejudiced or the prejudice is ongoing, the investor can approach the Government for assistance.
  - 2.3.1.2. To ensure that no frivolous claims are entertained, certain criteria must be established against which every claim must be measured.
  - 2.3.1.3. In the event that the claim falls within the bounds of the set criteria, the Government's obligation is activated and the Government **MUST** then act on behalf of the South African investor.
  - 2.3.1.4. It is submitted that the criteria can match the definition of "investment" in the Bill itself. Therefore, as soon as an investment in a foreign jurisdiction fits the said definition, then the Government must take measures on behalf of the South African investor.
  - 2.3.1.5. Those measures include the following: At best any expropriation must be stopped. At worst the Government must ensure adequate compensation as per International Law guidelines. International Law prohibits expropriation without compensation. For any other injury experienced by a South African investor, Government must ensure adequate compensation or restoration of the previous position.
  - 2.3.1.6. The measures that the Government **MUST** take should consist of the following (in consultation with the affected South African investors):
    - a) Immediate initiation of diplomacy; and
    - b) Attempts to initiate mediation;
    - c) Failing which there must be a referral to regional arbitration platform if the two states involved are signatories thereto;

- d) Failing which or in the absence thereof, the Government must refer the matter to the arbitration platform created by the Convention on the Settlement of Investment Disputes between States and the Nationals of Other States of 1965 (“the Convention”) called the International Centre for the Settlement of Investment Disputes (“ICSID”). South Africa is not a member of this Treaty for reasons unknown. This means that the Government will have to become party to this Treaty.
- e) Failing which or in the absence thereof, the Government must refer the matter to the International Court of Justice (“ICJ”) if both states agree to its jurisdiction;
- f) Failing which or in the absence thereof, the Government must start taking other economic and trade measures to force the hand of the infringing state, with the worst case scenario being various forms of sanctions.

This submission is a high-level broad framework upon which the solution can be based to ensure fair and consistent treatment of foreign investors in South Africa and South African investors in foreign jurisdictions alike. Without bringing this balance, there would be a shirking of the Government’s Constitutional duty to afford protections to its own citizens parallel to and in equal measure to that provided to foreign investors. Those duties are outlined below.

### 3. CONSTITUTIONAL OBLIGATIONS

Without bringing this balance, this Bill may open for attack on a Constitutional basis as follows:

#### 3.1. Section 9 (Equality):

3.1.1. Clause 9(3) specifically states that the state may not unfairly discriminate against anyone on the basis of birth. The Bill, however, is designed to afford protections foreigners within South Africa, but does not afford any protection to South African investors investing outside the Republic as was the case with the reciprocal BIT’s. Clearly this lack of protection afforded South African investors is in breach of this Clause.

#### 3.2. Section 25 (Property):

3.2.1. This Section is applicable as follows:

3.2.1.1. **Direct Expropriation:** Rights can also be considered as property. The unilateral expropriation of rights without compensation or remedy, therefore, will fall foul of this Section. The Bill’s current objective to protect only the rights of foreign investors in the Republic represents a breach of this Section. The Government’s non-renewal of the BIT’s where both the foreign and local investors are protected and the

establishment of rights of protection for foreign investors **only** by virtue of the Bill clearly leaves a legal lacuna and imbalance with regards to the right of the local investor to be protected by Government. Surely this expropriation of rights of the local investor must be remedied by codifying their rights to protection by the Government in the Bill?

3.2.1.2. **Indirect Expropriation:** The unilateral withdrawal of rights without replacing those rights (in this Bill) allows for indirect expropriation as South African investors cannot raise any defence against a foreign state's acts of expropriation or other prejudice without compensation. They are purely reliant on the whims of the South African government to intercede or not.

### 3.3. Section 39 (Interpretation – International Law):

3.3.1. When interpreting the Bill of Rights in Chapter 2, Section 39(1)(b) **mandates** the application of **international law** when interpreting the Bill of Rights. International law states that expropriation is not unlawful unless it is committed without compensation. The implication is that any such expropriation in a foreign jurisdiction falls foul of international law and this informs the interpretation and implementation of the aforementioned Sections in the Bill of Rights. It is especially with regard to Section 9 (Equality) that Section 39 has the most profound effect. **To provide protection for foreign investors in South Africa but not for South African investors investing in foreign jurisdictions is clearly in breach of the right to equality as informed by the international law prohibition on expropriation without compensation.**

## 4. Technical Constitutional Matters

### 4.1. Tagging

4.1.1. The Bill is currently tagged as a Section 75 Bill. The Bill is purely concerned with international trade. However, Schedule 4 of the Constitution states that one of the functional areas of concurrent national and provincial legislative competence is trade. It is well known that provinces also enter into trade agreements with foreign jurisdictions. As the Constitutional Court has ruled that an incorrectly tagged Act is *ab initio* unconstitutional and will have no legal effect, it is important to ascertain if the tagging was correctly performed herein.

## 5. Conclusion

It is, therefore, submitted that the non-provision of certain rights and remedies to South African investors investing in foreign jurisdictions is in breach of the Government's Constitutional obligations. This can be remedied by codifying those rights in the Bill.

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