

DISPUTE RESOLUTION ALERT

4 November 2013

THE SUBSTITUTION OF INVESTMENT PROTECTION FOR FOREIGN INVESTORS IN BILATERAL INVESTMENT TREATIES BY MEANS OF THE PROPOSED PROMOTION AND PROTECTION OF INVESTMENT BILL, 2013

The majority of the bilateral investment treaties (BITs) South Africa concluded with countries it has trade and investment relationships with are near completion or are in the process of being terminated by the South African government (pursuant to the relevant BITs terms), as the intention is for South Africa to in future regulate the protection of foreign investments by means of national legislation in the form of the draft Promotion and Protection of Investment Bill, 2013 (**Investment Bill**) released for public comment on 1 November 2013.

The intention of the Investment Bill is to incorporate international investment protection principles usually found in BITs into South Africa's domestic legislation to ensure that all investors (whether foreign or national) are treated equally in all aspects of investment in South Africa. It is proposed that the Investment Bill will have retrospective application in respect of commercial investments made prior to the Investment Bill being proclaimed as law. The Investment Bill incorporates the following principles of investor protection:

- **National treatment:** South Africa must give effect to national treatment and treat foreign investors, their foreign investments and returns not less favourably than it treats South African investors in their business operations that are in like circumstances;
- **Security of investment:** South Africa 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;
- **Expropriation:** An investment in South Africa may not be expropriated except in accordance with the Constitution and in terms of a law of general application for public purposes or public interest, under due process, against just and equitable compensation effected in a timely manner;
- **Transfer of funds:** A foreign investor may, in respect of any investment, transfer funds, subject to taxation and other applicable legislation;
- **Dispute resolution:** A foreign investor who raises a dispute in respect of its investment against the government of South Africa may resolve the dispute as follows:
 - by means of a mediation with Department of Trade and Industry (DTI);
 - independent tribunal or statutory body for the resolution of a dispute relating to investment;
 - court action and/or application;
 - domestic arbitration in terms of the Arbitration Act, No 42 of 1965.

continued

All interested and affected parties have three months from 1 November 2013 to provide DTI with comments whether the proposed Investment Bill will provide sufficient legislative protection to investors in its current form. It is still early days to ascertain the views of the investor communities, but it would appear that a major concern is the limitation of the dispute resolution mechanisms available to foreign investors to domestic courts, tribunals or arbitration as opposed to international arbitration as provided for in the BITs South Africa has concluded. A further concern appears

to be the proposal that foreign investors will not be guaranteed compensation at full market value in the event of an expropriation by the state, but merely as provided for by the Constitution. DTI can expect opposition to certain of the proposed sections to the Investment Bill which are deemed not to provide sufficient protection or recourse to foreign investors aggrieved by the conduct (perceived as a threat to their investment) of the South African government.

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