

28 January 2014

To: The Department of Trade and Industry
Attention: Ms V Gilbert
investment@thedti.gov.za

Comments on the Promotion and Protection of Investment Bill

The Centre for Applied Legal Studies (CALs) welcomes the opportunity to make submissions to the Department of Trade and Industry on the Promotion and Protection of Investment Bill as published under Notice Number 1087 of 2013, Government Gazette Number No. 3699.

CALS, a civil society organisation based at the School of Law at the University of the Witwatersrand, is committed to the protection of human rights through empowerment of individuals and communities and the pursuit of systemic change. CALs' vision is a country where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice. CALs' mission is to, *inter alia*, challenge and reform systems within South Africa which perpetuate harm, inequality and human rights violations, to provide professional legal representation to survivors of human rights abuses; and through a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable. CALs operates across a range of human rights issues, including gender justice, basic services, environmental justice, the rule of law and business and human rights.

The recently established Business and Human Rights Programme continues CALs' commitment to using the law to address human rights violations resulting from poverty and the activities of business enterprises. We welcome the opportunity to offer our input on the proposed legislation and look forward to participating in the deliberations on this important Bill.

Please do not hesitate to contact us should you require further information.

Sincerely,

Wendy Isaack

Attorney: Business and Rights Programme

Tel: 011 717 8606 / wendy.isaack@gmail.com



A. Introduction: Purpose of CALS' Comments

CALS commends the Department of Trade and Industry (the Department) for preparing the Promotion and Protection of Investment Bill (the Bill) and for conducting an extensive review of the bilateral investment treaty policy framework over the last few years, necessitated in part by international arbitration proceedings brought against the Republic of South Africa by a Swiss company in 2004 and Italian companies in 2008, respectively.

1. Contributing to the Broader Debate of Pro-Poor Development

We recognise that through the review process the Department grappled with a range of contentious issues, which are not only divisive in South Africa but speak to global economic power disparities. These issues include the definition and scope of investments and expropriation; the settlement of investment disputes in appropriate fora; the importance of ensuring that all foreign direct (and indirect) investment benefit the public; and, the need to balance the imperatives of poverty, development and the State's constitutional obligations.

CALS' comments have two broad aims. The first is to comment on the extent to which these contentious issues are addressed in the Bill. The second objective is to highlight those aspects of the Bill that require further attention and clarification. In so doing we hope to contribute to the Department's ongoing process of developing an appropriate legislative framework for the promotion of foreign investment in the country while simultaneously ensuring that Government retains adequate policy space to redress the economic legacy of apartheid.

We are aware that historically, Bilateral Investment Treaties (BITs) between developed and developing countries have been concluded against the backdrop of unbalanced power relations. Countries which host foreign investors (host countries), often developing countries, have been required to maintain policy frameworks that favour foreign investors. The result has been that some BITs do not further the interests of an impoverished population. This has had the effect of an uneven creation of wealth, where the prime beneficiaries are external to the majority of the citizens of a state. This tension is outlined by the Department in its Position Paper, *Bilateral Investment Treaty Policy Framework Review (2009)*, noting that previous BITs have been "heavily stacked in favour of investors without the necessary safeguards to preserve flexibility in a number of critical policy areas".¹ To be clear, sustainable and stable investment climates are a basic imperative to attract foreign investment. Arbitrary and unconstitutional law reform is incompatible with international investment law and principles. The question, however, is whether reform to adjust an inequitable, racist or oppressive regime is subject to the same constraint. In other words, should an investor's interests in a 'stable investment climate' trump the imperative of law reform to achieve equality and pro-poor development?

We are committed to contributing to a process that ensures that the proposed legislation addresses the shortcomings in BITs signed by South Africa, including those that have already been terminated. We believe this will result in an equitable sharing of all the country's resources and mutually beneficial investment contracts in future.

¹ Bilateral Investment Treaty Policy Framework Review, Government Position Paper June 2009



2. Reviewing the impact of Piero Foresti, Laura De Carli v Republic of South Africa and Agri South Africa v Minister for Minerals and Energy

CALS' interest in commenting on this Bill also stems from our involvement as non-disputing party (member of a coalition)² in the case of *Piero Foresti, Laura De Carli v Republic of South Africa (Piero Foresti)*,³ and as amicus curiae in the case of *Agri South Africa v Minister for Minerals and Energy (Agri SA)*.⁴

The Piero Foresti matter involved a claim before the International Centre for Settlement of Investment Disputes (ICSID) by a group of European investors (Italy and Luxembourg) against the government of South Africa. In the arbitration proceedings, the investors claimed that the government, by enacting the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), was in breach of the BITs' prohibitions on expropriation which it had signed with Italy⁵ and the Belgo-Luxembourg Economic Union.⁶ The claimants sought compensation in the amount of approximately R3 billion from the South African government. The ICSID ultimately dismissed the claimants' claims.

In the second case, Agri South Africa brought an application against the Minister for Minerals and Energy in the North Gauteng High Court arguing that the commencement of the MPRDA expropriated the coal rights of Sebenza (Pty) Ltd which had been ceded to Agri SA. Dismissing Agri SA's appeal, the Constitutional Court held that while the MPRDA deprived Sebenza of its coal rights, the deprivation did not rise to the level of expropriation at the time of the commencement of the MPRDA. The court stated that this conclusion was supported by, amongst other factors, the objects of the MPRDA which include facilitating equitable access to the mining industry; promoting sustainable development of South Africa's mineral and petroleum resources and advancing the eradication of all forms of discriminatory practises in the mining sector.

Collectively, these cases have brought to the fore the extent to which pro-poor regulatory reform has been challenged by the private sector. The regulatory response should be informed by the imperatives driving these cases, in which CALS was involved.

Specific Comments on text and principle

There are a number of specific provisions to which we respond, including:

- i. The definitions section;
- ii. The interpretation provisions;
- iii. Principles relating to expropriation of investment;
- iv. The sovereign right to regulate in the public interest; and
- v. The proposed dispute resolution mechanisms.

² The coalition four non-governmental organizations: Centre for Applied Legal Studies ("CALS"), the Center for International Environmental Law ("CIEL"), the International Centre for the Legal Protection of Human Rights ("INTERIGHTS"), and the Legal Resources Centre ("LRC") and collectively filed a petition as Non-Disputing Party in the proceedings.

³ *Piero Foresti* Award dispatched to parties on 4 August 2010 para 31

http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90

⁴ 2013 (4) SA 1 (CC).

⁵ Agreement between South Africa and Italy for the Promotion and Protection of Investments signed in 1997

⁶ Agreement between South Africa and the Belgo-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments signed in 1998



B. Specific Comments

The Preamble

Amendment: The word 'need' should be replaced with the word 'obligation'

Explanation: A preamble, while not enforceable, is a significant aspect of any legislation. It sheds light on the historical context and the broad aims that motivate the draft law. Section 7(2) of the Constitution imposes a duty on the State to protect the rights in the Bill of Rights which must be read together with section 237 requiring that all constitutional obligations be performed diligently and without delay. We therefore recommend use of the term '*obligation*' in the following paragraphs of the preamble.

PARA 1: Conscious of the *obligation* to protect and promote the rights enshrined in the Constitution and the Bill of Rights;

PARA 9: Reaffirming the Government's *obligation* to regulate in the public interest in accordance with *the Constitution, relevant domestic legislation and international law.*

The use of this terminology will serve to clarify the government's broad aims in respect of this specific legislation, as well as assist in the interpretation of the substantive provisions – as is the role of a preamble.

Definitions

Amendment: The definition of '*material investment*' must be amended

Explanation: The current definition of "investment" in clause 1(f)(i) is drafted in a manner that is overly vague, and, as such, may create difficulties in determining whether or not a transaction or agreement meets the constitutive elements of the definition. This in turn may create uncertainty regarding the application of the legislation.

In terms of the Bill, an investment will be subject to the legislation if it is material. The only benchmark, therefore, is one of materiality. The Bill does not provide any guidance as to what would constitute a material investment. We propose a threshold test. Such threshold criteria have been similarly used in the Johannesburg Stock Exchange Listing Requirements⁷ and the Merger and Acquisition requirements of section 11 of the Competition Act 89 of 1998. The definition would benefit from similarly conceived threshold criteria which would clarify the meaning of the term "material". A threshold test for materiality would help to alleviate any uncertainty regarding the scope of the term for the purposes of the Bill.

Amendment: The term '*operational facilities*' should be clarified

Explanation: It is unclear what the Department considers to be "operational facilities" for the fulfilment of the physical presence requirement in the definition of an investment. The absence of a definition for 'operational facilities' means that there is no clear standard to assist potential investors to determine whether or not they fall within the definition. For example, would operational facilities include both public and private facilities? And what types of arrangements would fall outside of the scope of operational facilities?

Finally, we recommend that the following terms be defined in clause 1:

⁷ Johannesburg Stock Exchange Listing Requirements available at: <<http://www.jse.co.za/How-To-List/Listing-requirements.aspx>>



- i. Right of establishment – clause 5(2); and
- ii. Security of investment – clause 7(1)

Interpretation of the Act

Amendment: Align the wording of clause 2(b) with the wording of section 233 of the Constitution

Explanation: The current wording of clause 2(b) is inconsistent with the provisions relating to international law in the Constitution. Section 2(b) references the application of international law to the provisions of the Bill. Similar provisions inhere in section 233 of the Constitution. Section 39(1), read with section 233 of the Constitution, requires courts to interpret legislation in a manner that is reasonably consistent with international law over any alternative interpretation that is inconsistent with international law.

The above-mentioned constitutional provisions necessitate the reframing of section 2(b) of the interpretation section to ensure consistency with the constitutional provisions.

We hereby reiterate our position, as set out in the *Foresti* case. In that matter, together with our coalition partners, we submitted that the South African government ought to have regard to international law which places certain regulatory and other obligations upon the Government in connection with the protection and promotion of human rights in investment treaties, specifically in relation to national resources. This should be balanced against international economic law. This tension – and the commensurate need for balance – became evident in the *Foresti* matter.

Many of the BITs concluded by South Africa relate to the extraction of South Africa's natural resources. Natural resources are inextricably linked to the question of property ownership, which in turn is protected by section 25(4) of the Constitution. Expropriation is possible, *inter alia*, when it is in the public interest. The public interest includes 'the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources'. Section 25(8) further provides that the state may take legislative and other measures to achieve land, water and related reform in order to redress the results of past racial discrimination, provided that such measures are in accordance with the limitation clause contained in section 36 of the Constitution. Thus, all future dealings with investments must comply with both international law and the public interest imperative. Relevant international law binding on South Africa includes:

1. The ***International Convention on the Elimination of All Forms of Racial Discrimination ('CERD')***, recognises that "special measures [may be taken] for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms".⁸
2. The ***International Covenant on Civil and Political Rights ('ICCPR')*** recognises that "all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principles of mutual

⁸ International convention on the Elimination of All Forms of Racial Discrimination (G.A. Res. 2106, Annex, U.N. GAOR, 20th Session., Supp No 14 at 47, (U.N. Doc. A/6014 (1966) entered into force Jan 4 1969), ratified by South Africa 10 Dec 1998, at art 14.



benefit, and international law. In no case may a people be deprived of its own means of subsistence”.⁹ The ICCPR also protects the right to equality before the law and equal and effective protection against discrimination, which has been interpreted by the Human Rights Committee as:

“Sometimes requir[ing] States Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population.”

3. The ***Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW')*** obliges states to undertake affirmative action and specifies that such measures should be aimed at addressing imbalances and past discriminatory practices.¹⁰
4. The ***African Charter on Human & Peoples' Rights*** recognises that the right to property may be encroached upon “in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”,¹¹ and entrenches the right of all peoples to “freely dispose of their wealth and national resources”, specifying that this right “shall be exercised in the exclusive interest of the people”.¹²

The provisions of these international treaties should be carefully considered when promulgating legislation related to foreign investment in order to ensure that the human rights, fundamental freedoms and protection of peoples' resources are adequately considered.

Application of the Act

Amendment: If the legislation is intended to apply to investments made prior to its commencement, we recommend that clear justification be set out for such application, including the manner in which this would benefit the public, redress historical disadvantage resulting from apartheid-era laws and policies and the unfair burden imposed on the country as a host government by existing BITs.

Explanation: We note the proposed retrospective application of the Bill as set out in clause 4(1). Ordinarily, this would be contrary to the basic principles of law and justice, given that it places obligations on the recipient which were not necessarily present at the time when the contract or arrangement was concluded. The proposed retrospective application of this legislation – ‘to investments made before the commencement of the Act’ – may be problematic in that it conflicts with a key South African constitutional principle: the rule of law entrenched in section 1 of the Constitution. It would appear that clause 4(1) of the Bill would be in breach

⁹ International Covenant on Civil and political Rights, G.A. Resolution 2200A (XXI), 21 U.N. GAOR Suppl. (No 16) at 52, U.N. Doc A6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, ratified by South Africa 10 March 1999, at article 1(2). Article 1(2) of the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), which has been signed by South Africa and which has been used by the Constitutional Court in the interpretation of the South African Constitution, is worded in identical terms. Article 2 of the ICESCR further provides that States Parties must “take steps...view a view to achieving progressively the full realization of the rights” and must “guarantee” the rights “without discrimination of any kind”. International covenant on Economic, Social and Cultural Rights (G.A. Res. 2200A, U.N. GAOR 21st Sess., Supp. No 16 at 49, U.N. Doc A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan 3, 1976, signed by South Africa 3 October 1994.

¹⁰ Convention on All Forms of Discrimination Against Women (G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp. No 46 at 193, U.N. Doc A/34/46, *entered into force* Sept. 3, 1981), ratified by South Africa 15 Dec 1995, at art 14.

¹¹ African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc CAB/Leg/67/3/rev. 5, 21 I.L.M 58 (1982), *entered into force* Oct 21, 1986, ratified by South Africa 7 Sept 1996, at art 14.

¹² *Ibid*, at art 21.



of this principle. Having regard to the review process that led to the development of this legislation, it may nevertheless be appropriate to consider the justification of retrospective application in certain narrowly defined instances.

Having outlined our understanding of the importance of the development of law in relation to a rights-based approach to investment law, both nationally and internationally, and noting the ten year duration of most of the BITs that remain in force, it is our view that the inclusion of retrospective application of the Bill is justified provided it is aimed at addressing historical imbalances resulting from apartheid. This includes those BITs that no longer meet the country's development agenda and nation-building goals. If the extended application of the Bill is intended to be interpreted within the context of ending economic apartheid, this could be justified in terms of the government's duty to ensure economic development for the benefit of all.

Noting our above-stated position, we are nevertheless concerned that the Bill does not provide a definition for the term "commercial purposes". This may create uncertainty for investors attempting to determine whether or not they would fall under the scope of the envisaged legislation. The specific reference to commercial purposes creates an uncertainty for those investments which were not made for commercial purposes, such as charitable investments, that would therefore be excluded from the protections provided for in the Bill. This gap in the legislation ought to be remedied to ensure clarity.

Principles Relating to Expropriation of Investment

Amendment: clause 8(2)(a) should be amended to read "The following acts taken by the Government of the Republic in the public interest to remedy the inequalities created by the past, do not amount to acts of expropriation:."

Explanation: We concur with the Department's inclusion of the expropriation clause, including that compensation for any act of expropriation should be "just and equitable [and] effected in a timely manner", in accordance with clause 8 of the Bill. However, clause 8(2)(a) should be amended so as to explicitly include in the public interest to remedy the inequalities created by the past." This will ensure that investments cannot be affected by measures that do not have some form of benefit for the people of South Africa and provides certainty for investors that their investments will only be affected by acts which have a public benefit.

In respect of the list of acts in section 8(2)(a) to (d), which are not to be interpreted as acts of expropriation, we shall refrain from providing detailed comment, save to place forward our position regarding expropriation in the *Agri SA case*.¹³ In this regard, we draw the Department's attention to the following arguments from a number of comparable jurisdictions, which have recognised that regulatory limitations which are proportionate and which are aimed at achieving an important public purpose are not expropriatory.

In German law, the individual guarantee against property invasion (associated with the classic negative aspects of the property guarantee) protects the individual property holder and concrete property holdings against specific state interference. But this individual guarantee does not mean that the state may not amend or affect individual property rights. The state may do so through regulation or expropriation in accordance with legal

¹³ CALS' Heads of Argument for the *Agri SA case* may be found on the website of the Constitutional Court at <http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/Plg8vWVD1W/MAIN/0/57/518/0/J-CCT51-12>.



requirements and for public purposes which justifiably override the individual property guarantee.¹⁴ There is thus a distinction in German law between expropriation and regulation.

The German law is concerned with regulatory excess, and in this respect the proportionality principle does much work. Of importance is the so-called grading or scaling of the social limitations of property according to its relation to the property holder and its social function. The closer a specific property right is involved in providing security for the personal liberty of its holder, the narrower the restrictions which prevent the legislature from interfering with that right; whereas in respect of property which is removed from the personal sphere and which serves a social function, the scope for legislative regulatory limitations is wider.¹⁵ The practical effect is that land, being an indispensable and limited resource of great social import, is regarded as a category of property which is characteristically subjected to stricter measures of social control and regulation.¹⁶

The question of regulatory excess is a central issue in determining the proportionality and thus justifiability of the measure in comparative jurisdictions.¹⁷ Open and democratic societies accept and permit a regulatory space for the state in its dealings with property rights. It is accepted in many jurisdictions that there exists a category of state interference which will only be treated as expropriation in circumstances where it 'goes too far' (i.e. its effects are so excessive that they resemble an expropriation rather than a regulatory restriction on the use of property).¹⁸

The property clause, as set out in section 25 of the Constitution, countenances regulatory measures which effect a deprivation of property rights, even if they do not provide for compensation, so long as they are not irrational or arbitrary. That is particularly so when one recalls – as the Constitutional Court stressed in *Minister*

¹⁴ See Van der Walt, *Constitutional Property Clauses: A Comparative Analysis*, 1999, p 128.

¹⁵ See *Mitbestimmung Case* BVerfGE 50, 290, 1979 – discussed in Van der Walt, *Constitutional Property Clauses: A Comparative Analysis*, 1999, p 140 and 141.

¹⁶ See Van der Walt, *Constitutional Property Clauses: A Comparative Analysis*, 1999, p 136.

¹⁷ This is further demonstrated by contrasting two leading cases in the field. In *Government of Malaysia v Selangor Pilot Association* [1977] 2 WLR 901 (PC) six licensed pilots formed an association to provide pilotage services in Port Swettenham. Under powers conferred by the Port Authorities Act 1963, the port authority declared Port Swettenham a 'pilotage district', thereby making it an offence for pilots other than those employed by the port authority to provide pilotage services. The association claimed that it was entitled to compensation for the loss of goodwill of the business, on the basis that there had been a 'compulsory acquisition' of property within the meaning of s 13 of the Malaysian Constitution. A majority of the Privy Council held that there had been no acquisition by the state, since "[e]ven if the right of the association to employ licensed pilots which was destroyed by the amending Act can be regarded as a right of property, in the view of the majority of their Lordships the association's right to employ pilots was not acquired or used by the port authority. Its right to employ them was given to it and acquired by it from the legislature" (at 907H-908A).

A different conclusion was reached by the Canadian Supreme Court in *Manitoba Fisheries Ltd v The Queen* 88 DLR (3d) 462. The plaintiffs owned a business which was involved in exporting fish caught in the lakes of Manitoba. The Fresh Water Marketing Act of 1970 created a statutory corporation, which was given the exclusive right to carry on the business of fish exporting from Manitoba. Private firms were prohibited from engaging in this business unless they were in possession of a licence. No such licence was issued to the plaintiff, which consequently ceased its business. The plaintiff claimed that it was entitled to compensation, since the legislation had the effect of putting it out of business. The Supreme Court of Canada held that the plaintiff was entitled to compensation. The Court held that the Act had deprived the plaintiff of its goodwill as a going concern by rendering valueless the plaintiff's physical assets: "goodwill, although intangible in character is a part of the property of a business just as much as the premises, machinery and equipment employed in the production of the product whose quality engenders that goodwill" (at 466-467). The Court held that there had been an acquisition of property by the state: "Once it is accepted that the loss of the goodwill of the appellant's business which was brought by the Act and by the setting up of the Corporation was a loss of property and that the same goodwill was by statutory compulsion acquired by the federal authority, it seems to me to follow that the appellant was deprived of property which was acquired by the Crown." In reaching this conclusion, the Court distinguished the *Selangor Pilot Association* case on the basis that there had been an "obliteration of the appellant's entire business", and the Corporation had in effect taken over the plaintiff's existing client base.

¹⁸ The international law on investment treaties is to similar effect. In disputes about the existence of a right to compensation for governmental regulatory measures, the question of proportionality is at the core of the enquiry. Thus, in the words of the tribunal in *LG & E Energy Corp et al v The Argentine Republic* (ICSID Case No ARB/02/01) Decision on Liability, 3 October 2006, para 195:

"With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measures must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed" (emphasis added).



of Finance and Other v Van Heerden – that restitutionary equality (which is inherent in our property guarantee) involves a proportionality enquiry. Measures taken to achieve restitutionary equality will only give rise to a constitutional complaint if they place disproportionate burdens on the previously advantaged; and “the balance when determining whether a measure promotes equality is fair will be heavily weighted in favour of opening up opportunities for the disadvantaged”.¹⁹

Therefore, while the Department ought to compensate investors for acts of expropriation, regulations made in the public interest or public welfare would not amount to an act of expropriation as long they are consistent with the Constitution and the guidance provided by our judiciary. In any event, all acts of expropriation should be visibly linked to the public interest and development of the South African economy.

Our position in this regard is bolstered by the international guidance of the United Nations in respect of the state’s obligation to regulate its affairs in the national interest. We discuss this issue further in the section below.

The Sovereign Right to Regulate in the Public Interest

In addition to the government’s sovereign right to regulate in the public interest as set out in the Constitution and provided for in clause 10 of the Bill, we draw the Department’s attention to relevant international standards, in particular, the guidance provided by the United Nation’s Guiding Principles on Business and Human Rights (the Guiding Principles).²⁰ The foundation of the Guiding Principles is the three pillar framework namely: the state’s duty to protect individual rights, including protection against abuse from non-state actors; the responsibility of corporations to respect human rights, essentially to ‘do no harm’; and finally, the ability for victims to access remedies where rights have been violated.

The state duty to protect human rights includes a duty to protect against human rights abuses “within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”²¹

In respect of BITs, it has been noted that in order to attract foreign investment, host states often propose protection through BITs and host government agreements. They offer to treat investors “fairly, equitably, and without discrimination, and to make no unilateral changes to investment conditions”. However, these protections have expanded with little regard to governmental duties to protect, thus tipping the balance between the two. As a result, host governments often find it challenging to strengthen national public interest agendas without fear of foreign investor opposition that often results in international arbitration.²²

¹⁹ 2004 (6) SA 121 (CC) at pg 97.

²⁰ Report of the Special Representative of the Secretary- General on the issue of human rights and Transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. 21 March 2011 UN DOC A/HRC/17/31

²¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* U.N. Doc A/HRC/17/31, pg 6.

²² Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie U.N. Doc A/HRC/8/5 pg 11.



In keeping with the principle of progressive realisation, states are required to use their available resources for the benefit of their citizens, and indeed in terms of section 25(8) of the Constitution.²³ In previous cases where a breach of a BIT contract resulted in large monetary losses to the state, particularly in contracts associated with the extraction of natural resources, this amounted to a breach of the principle of progressive realisation and a failure of the state to protect its people.

In this regard, Guiding Principle 9 provides that states should maintain “adequate domestic policy space to meet their human rights obligations when pursuing investment treaties and contracts”. In doing so, the Department should take into account the specific needs and vulnerabilities of previously disadvantaged peoples and affected communities and avoid restricting the state’s ability to meet its obligations towards such groups. Guiding Principle 8 also addresses “the need for policy coherence between business and investment agendas pursued by states and their human rights policies,” which is relevant for affected communities whose rights are regularly negatively impacted by business activities.²⁴

In conclusion, the Special Representative of the United Nations Secretary General for Business and Human Rights has called for state regulation to protect its citizens against human rights abuses that result from BITs, cautioning however, that “the right to regulate must be balanced against the investors wish for predictability, legal safeguards, minimum requirements regarding the actions of the State and compensation in the event of expropriation.”²⁵

It is our view that legislation must aim to protect the rights of the people of South Africa to benefit from the natural resources. Therefore, legislative and policy frameworks adopted for the public interest ought to take into account obligations imposed by international law, and as appropriate and relevant, the guidance provided by the United Nations through its various offices.

Dispute Resolution

Clause 11(1) states that a foreign investor that has a dispute in respect of action taken by the Government of the Republic or any organ of state....may request the Department or any other competent authority to facilitate the resolution of such dispute by appointing a mediator or other competent body.

Clause 11(2) calls on the Minister to make regulations on the processes and procedures relating to the settlement of disputes.

Clause 11(4), however, provides that an investor is not precluded from approaching any court, competent independent tribunal or statutory body for the resolution of a dispute relating to an investment.

Finally, clause 11(5) allows for the referral of a dispute to arbitration in terms of the Arbitration Act, 4 of 1965.

²³ See for example, The African Commission’s arguments in *Purohit v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 84, where the Commission called on the government of The Gambia to take concrete and targeted steps within its full available resources to progressively realise the socio economic rights of its citizens. In addition, article 2 of the ICESCR provides that its Members “take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”

²⁴ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, submitted pursuant to Human Rights Council resolution 17/4 on *Human rights and transnational corporations and other business enterprises* U.N. Doc A/68/279, pg 15.

²⁵ Business and human rights: Towards operationalizing the “protect, respect and remedy” framework, Report of the Special Representative of the Secretary-General, John Ruggie, U.N. GAOR, Human Rights Council, 11th Session, Agenda Item 3, U.N. Doc. A/HRC/11/13 (2009), at para 31.



The Bill in its current form does not provide adequate guidance regarding the hierarchy of these various forums. This may cause difficulties for the resolution of disputes. For instance, if all the forums have concurrent jurisdiction, it is not necessarily apparent which forum an investor should approach for the resolution of disputes.

Finally, clause 11 does not include the option for an aggrieved party to approach an international mechanism for the resolution of the dispute. While we recognise the significance of domestic dispute resolution, the right to approach an international forum should all domestic remedies be exhausted should not be excluded.

Standing

Amendment: the regulations should address the issue of 'standing'.

Explanation: The lack of guidance regarding 'standing' for persons or entities who may wish to enter proceedings between the state and an investor is an additional issue of concern. Drawing on our experience in the *Foresti* arbitration, it is imperative that interested parties are able to intervene in proceedings related to investment disputes, given the human rights implications outlined above. In international arbitration, cases are predominantly treated as commercial disputes in which human rights and public welfare considerations do not regularly feature. Additionally, arbitration proceedings are generally conducted in strict confidentiality, and civil society or community groups are excluded from the process. This is a matter of grave concern given that many BITs are signed concerning natural resources.

