

Submission

to the

Portfolio Committee on Trade and Industry

regarding the

PROMOTION AND PROTECTION OF INVESTMENT BILL, B18 of 2015

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A) INTRODUCTION

About the Centre for Applied Legal Studies and Its Work on Business and Human Rights

1. The Centre for Applied Legal Studies ('CALS') welcomes the opportunity to make written submissions on the Promotion and Protection of Investment Bill, B18 of 2015 ('Investment Bill') in response to a call by the Portfolio Committee on Trade and Industry ('Committee'). We understand that the Committee will host public hearings on the Investment Bill in the first and second week of September 2015 and hereby request that CALS be placed on the roll to make oral submissions.
2. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand. CALS is committed to the protection of human rights through the empowerment of individuals and communities and the pursuit of systemic change.
3. CALS' vision is a country and continent where human rights are respected, protected, promoted and fulfilled by the state, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice. It fulfils this mandate by:
 - challenging and reforming systems within Africa which perpetuate harm, inequality and human rights violations;
 - providing professional legal representation to survivors of human rights abuses; and
 - using a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable.
4. CALS operates across a range of human rights issues: basic services, business and human rights, environmental justice, gender, and rule of law. The business and human rights programme was formed in 2013 and seeks to ensure that corporate entities respect human rights and take steps to protect, promote and fulfil human rights. Where they adversely affect human rights, the business and human rights programme, attempts to hold corporate entities accountable for such adverse effect.
5. CALS also plays a role in changing the discourse, policies and legislation on the interaction between corporate activities and human rights. To that end CALS has made submissions on the Draft Financial Sector Regulation Bill, World Bank Performance Standards, the UN Binding Instrument on Business and Human Rights and the Draft Promotion and Protection of Investment Bill ('Draft Bill'). CALS' submissions on the Draft Bill were made to the Department of Trade and Industry ('DTI') in 2014 and the suggestions made were adopted, in part, by DTI

and appear in the Investment Bill. They are attached hereto and marked “**Annexure A**”. A table indicating the suggestions that were adopted is attached hereto and marked “**Annexure B**”. CALS, along with its partners, also intervened as amicus in the 2009 International Centre for the Settlement of Investment Disputes’ matter that pre-empted the development of the Investment Bill — *Piero Foresti*.¹ CALS’ amicus application is attached hereto and marked “**Annexure C**”.

CALS’ Submissions in Brief

6. CALS commends the DTI for preparing the Investment Bill. The Investment Bill serves to formalise, in investment terrain, the supremacy of the Constitution and the Bill of Rights.² It also ensures that foreign investors remain committed to the South Africa’s development agenda which is: sustainable in nature and speaks to improving socio-economic conditions in an inclusive manner.
7. CALS also commends the DTI for considering the suggestions made by it in January 2014 and incorporating some of them. However, CALS submits that the Investment Bill be improved to further meet its objectives and align with the Constitution. CALS submissions in summation are that:
 - 7.1. the language of the Investment Bill preamble be aligned with the Constitution and the Bill of Rights;
 - 7.2. the language of the Investment Bill be made consistent with South Africa’s development agenda on inclusive socio-economic development;
 - 7.3. vague and ambiguous terminology be clarified;
 - 7.4. the transfer of funds provision be amended to address illicit financial flows;
 - 7.5. community members be included in dispute resolution forums; and
 - 7.6. the Draft Bill’s anti-avoidance provision be reintroduced in the Investment Bill.
8. CALS also suggests amendments to provisions in the Investment Bill; these suggestions appear as ***bold italics*** below.

¹ *Piero Foresti, Laura de Carli & Others v Republic of South Africa*, ICSID Case No. ARB(AF)/07/01.

² Constitution of the Republic of South Africa, 1996.

B) PREAMBLE

Need vs Obligation vis-à-vis human rights

9. In our comments on the Draft Bill we made a submission for the replacement of the word '*need*' with the word '*obligation*' when regard is had to human rights or measures designed to provide redress to historically disadvantaged people.
10. A preamble, while not enforceable, is a significant aspect of any legislation. It sheds light on the historical context and the broad aims and purposes that motivate the law.³ It is therefore imperative that the preamble speak not only to the purpose of the law itself but also, where its purpose is aligned with the Constitution, speak in a manner consistent to the latter. Section 7(2) of the Constitution imposes a *duty* (not a need) 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.
11. The Constitution, in a number of provisions, calls upon the state to take positive measures to redress the unfair effects of past.⁴ The state is therefore permitted to take measure to advance and protect historically disadvantaged peoples. This is not a need or a privilege, but a constitutional imperative, and an obligation.
12. We therefore reiterate our recommendation on the inclusion of the word 'obligation' in the relevant paragraphs of the preamble; the paragraphs should be amended in the following way:
 - 12.1. Para 1: Conscious of the ***obligation*** to protect, ***respect***, ***fulfil*** and promote the rights enshrined in the Constitution and the Bill of Rights;
 - 12.2. Para 8: Recognising the ***obligation*** to take measures to protect or advance persons, or categories of persons, historically disadvantaged in the Republic due to discrimination;
 - 12.3. Para 10: Reaffirming the Government's ***obligation*** to regulate in the public interest in accordance with the law.

Inter-relatedness of human rights

13. Human rights are inter-related and indivisible. The Constitutional Court said, on this point, in the *Grootboom* case, that:

“The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and

³ *S v Shaik and Others* 2008 (5) SA 354 (CC), at para 50-51.

⁴ Sections 9(2), 23(6), 24(b), 25(5), 26(2), 27(2), 29(1)(b), 32(2), and 33(3) of the Constitution.

practical significance in a society founded on human dignity, equality and freedom.”⁵

14. In our experience as a law clinic, a right to just administrative action, as noted in the preamble, is often dependent on and indivisible from, other human rights. Therefore along with noting the right to just administrative action, the preamble should also note the right of access to justice, access to information and the other rights set out in the Constitution. The realisation of any one of these rights is often dependant on the others.

15. CALS therefore recommends that the preamble be amended as follows:

15.1. Para 7: Emphasising the right to just administrative action, ***access to justice, access to information and all other rights set out in the Bill of Rights***;

Sustainable and inclusive socio-economic development

16. The DTI is lauded for the inclusion of the term “sustainable development” in the preamble of the Investment Bill. The right to sustainable development is an important one and has been written into our Constitution.⁶ Support for the inclusion of “sustainable development” in the Investment Bill can be found in the Constitutional Court’s decision in *Fuel Retailers* when it said:

“Sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place. It recognises that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources. It envisages that decision-makers guided by the concept of sustainable development will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments.”⁷

17. Development on the African continent need not only be sustainable; it must include and relate to socio-economic conditions. The African Union’s Constitutive Act, African Charter on Human and People’s Rights, Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa and the Youth Charter all speak to socio-economic development.⁸ The fact that South Africa’s development needs relate to socio-economic conditions is also

⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 83.

⁶ Section 24(b)(iii) of the Constitution.

⁷ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC), at para 58.

⁸ Articles 3(j), 22, 19, and 10(1) respectively.

evident from the National Development Plan, 2030 which provides that economic infrastructure is designed to support South Africa's economic and social objectives. It also provides that the "economic infrastructure is a precondition for providing basic services such as electricity, water, sanitation, telecommunications and public transport".⁹

18. CALS therefore recommends that explicit mention be made of inclusive socio-economic development in the Investment Bill to the following effect:

- 18.1. Para 2: Recognising the importance that investment plays in job creation, ***inclusive socio-economic development***, sustainable development, and the well-being of the people of South Africa

C) DEFINITION, INVESTMENT, INTERPRETATION AND PURPOSE

Defining dispute

19. The current definition of "dispute" is confusing. The Investment Bill currently provides that "a dispute will only arise once the parties agree". If the parties are in disagreement about the existence of the dispute, their disagreement will not fall within the definition of the word dispute as they must agree that they dispute in order to in fact dispute.

20. CALS recommends the following definition for dispute:

- 20.1. Section 1: "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 or as prescribed by the law

Reasonable period of time

21. According to section 2(a) of the Investment Bill an investment requires the commission of economically valuable resources over a "reasonable period of time". The term — reasonable period of time — is vague and uncertain and could prove an impediment to the realisation of the aspirations of the Investment Bill. While the term "reasonable" is an objective one determined by reference to a reasonable person, this determination is often made by a court. It would not serve the purposes of the Investment Bill well to demand the opinion of the court every time a determination about whether an investment has taken place needs to be made.

⁹ National Planning Commission, *National Development Plan, 2030*, at 160.

22. It is recommended that the term “reasonable period of time” be defined in the definitions section of the Investment Bill.

Interpretation

23. As previously stated, the right to just administrative action is inter-related and indivisible from the rights of access to court, information and the other rights in the Bill of rights. Therefore, section 3(a)(i) which provides that the Investment Bill be interpreted in a manner consistent with just administrative action, should include access to courts and information and the other rights in the Bill of Rights.
24. CALS suggests that the language be amended to the following effect:

- 24.1. Section 3(b)(i): justice administrative action provided in section 33, ***access to information as provided in section 32, access to courts as provided in section 34 of the Constitution and the other rights in the Bill of Rights;***

Purpose of the Act

25. CALS notes that the purpose of the Investment Bill (as set out in section 4) has been amended. CALS lauds the inclusion of the word “Constitution” in section 4(a) and also the inclusion of sub-sections 4(c) and (d) which speak to the sovereign right of the Republic to regulate investments and the application of the Bill of Rights and other laws to investors.
26. On this point, the members of the Committee are reminded of the supremacy of the Constitution;¹⁰ and that section 8(2) of the Constitution prescribes the horizontal application of the Bill of Rights to juristic persons.¹¹ In the *Certification Judgement* the Constitutional Court rejected the objection to the horizontal application of the provision;¹² and in the *All Pay* decision the Constitutional Court imposed positive obligations on a corporation performing state functions.¹³

¹⁰ Section 1(c) of the Constitution.

¹¹ Section 8(2) of the Constitution reads:

“A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

¹² *Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), at para 53.

¹³ *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC), at para 66.

27. The integration of human rights considerations in corporate or business activities by means of legislation or regulation is not novel to South Africa. For instance, the Companies Act was enacted to “promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law” and to “reaffirm the concept of the company as a means of achieving economic and social benefits”.¹⁴
28. Further, regulation 28 to the Pension Fund Regulations incorporates human rights principles in that it imposes on pension fund trustees an obligation to consider environmental, social and good governance factors when making investment decisions. These factors should be considered especially where they may materially affect the long term sustainable performance of the asset.¹⁵ In a memo released by the National Treasury it stated that the purpose of the regulation was to “align pension fund regulations with government policy objectives of socially responsible investment and transformation.”¹⁶

D) TRANSFER OF FUNDS, RIGHT TO REGULATE, DISPUTE RESOLUTION AND ANTI-AVOIDANCE

Transfer of funds

29. Section 10 of the Investment Bill provides that foreign investors may transfer funds subject to taxation and other applicable legislation. As a right that exists in law, CALS supports this provision. However, the Committee is reminded that it does leave open the opportunity for foreign investors to engage in illicit financial flows (‘IFF’) which cost the continent more than US\$50 billion a year.¹⁷ IFF is defined, by the High Level Panel chaired by former president Thabo Mbeki, in relevant part as:

“Money that is illegally earned, transferred or utilized. These funds typically originate from three sources: commercial tax evasion, trade misinvoicing [sic] and abusive transfer pricing . . .”¹⁸

30. Tax avoidance, on the other hand, is defined as:

“The legal practice of seeking to minimize a tax bill by taking advantage of a loophole or exception to tax regulations or adopting an unintended

¹⁴ Sections 7(a) and (d) of the Companies Act, 71 of 2008.

¹⁵ Regulation 28(2)(c)(ix) of the Pension Fund Regulations, GN R98 in Government Gazette 162 of 26 January 1962.

¹⁶ Explanatory Memorandum on the Final Regulation 28 that gives effect to section 36(1)(bB) of the Pension Funds Act, 1956, *Government Gazette* 34070 of 4 March 2011.

¹⁷ African Union, *Illicit Financial Flow: Report of the High Level Panel on Illicit Financial Flows from Africa*, at 13.

¹⁸ *Ibid*, at 9.

interpretation of the tax code. Such practices can be prevented through statutory anti-avoidance rules; where such rules do not exist or are not effective, tax avoidance can be a major component of IFFs.”¹⁹

31. From the inclusion of the phrase “tax avoidance” it is clear that these practices may not always be unlawful, they often fall within the parameters of what is lawful and are served by legal lacunas.²⁰
32. In 2013, the African Commission on Human and Peoples Right (‘African Commission’) adopted a resolution — Resolution on Illicit Capital Flight — calling upon member states (i.e. African states) to “examine their national tax laws and policies towards preventing illicit capital flight in Africa”.²¹ It follows therefore that tax laws alone, will not prevent IFF.
33. CALS therefore recommends that the Committee heed the African Commission’s call by amending the wording of section 10 to the following effect:
 - 33.1. Section 10: “A foreign investor may, in respect of an investment, transfer funds subject to taxation and other application legislation, ***provided that they may not do so in a manner that intends to and serves to unjustly and intentionally deprive the Republic or its people of funds to which they are due using the following mechanism:***
 - (i) ***tax avoidance;***
 - (ii) ***tax evasion;***
 - (iii) ***trade mis-invoicing; and***
 - (iv) ***abusive transfer pricing***”

Right to regulate

34. CALS applauds the DTI for amending section 11 to include reference to the states obligation to take measures aimed at the progressive realisation of socio-economic rights (subsection (f)) and the protection of the environment and conservation and sustainable use of natural resources (subsection (g)) for the reasons set out in paragraphs 16 and 17 above.

Dispute resolution

35. It is imperative that community members’ right to participate in dispute resolution processes is acknowledged in the Investment Bill. Their agency, right of access

¹⁹ Ibid, at 10.

²⁰ Ibid, at 25.

²¹ African Commission on Human and People’s Rights, *Resolution on Illicit Capital Flight*, Resolution No. 236 of 23 April 2013.

to information and right to representation should also be explicitly stated in the Investment Bill.

36. In our work with communities affected by investment decisions, operations and abdication we often find that communities are not appropriately and meaningfully consulted in decisions that pertain to them or their communal land. The Investment Bill, if it is founded on constitutional rights and values, must explicitly reiterate the rights of communities affected by investments, particularly community members who are often marginalised from taking part in these decisions by gender norms, sexual orientation, age and class.
37. CALS recommends that section 12 be amended to the following effect:
 - 37.1. Section 12(1A): ***Communities who identify as such and have been adversely or positively affected by an investor's investment, may apply to the forum head to be admitted as intervening party in the resolution of the dispute and may make representation in the same by itself or by means of legal representation.***

Anti-avoidance

38. It is noted that the section, in the Draft Bill, that spoke to “anti-avoidance” has been removed. The Committee is reminded that the case that pre-empted the revocation of South Africa’s bilateral investment treaties (*Piero Foresti*) related to the very issue of avoidance. In it, the applicants alleged that legislation designed to redress the harmful and exploitative effects of South Africa’s past extractive industry, expropriated their property. Although the vast majority of mining corporations operating in South Africa at the time did not oppose the new legislation or complain against it on the basis of expropriation, the applicants in the *Piero Foresti* case did. Therefore it is conceivable that some investors will attempt to avoid the provisions of the Investment Bill, and therefore the Constitution in some way.
39. We therefore recommend that the anti-avoidance provision be reinserted. However, the provision of anti-avoidance as it appears in the Draft Bill grants the Minister of Trade and Industry, broad and irrational powers. It should be amended as follows:
 - 39.1. If the Minister, ***in consultation with all affected persons including the investor and communities affected by the investment***, considers that a transaction, agreement, arrangement, scheme 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 provision of this Act, the Minister may, ***in consultation with the Director Generals and***

Ministers of the departments relevant to the investor's business, investors and communities affected by the investment, issue compliance notices, suspensions and as a matter of last resort license revocations within the scope of the law to prevent such avoidance.

E) CONCLUSION

40. In conclusion, the DTI is lauded for taking the bold step of revoking South Africa's bilateral investment treaties and drafting the Investment Bill. However, in order to ensure that the Investment Bill meets its objectives and those set on in the various provisions of the Constitution, it needs to be consistent with the latter. It is also imperative the voices of the voiceless, i.e. community members are heard.