THE PROMOTION AND PROTECTION OF INVESTMENT BILL 2013: SUBMISSION BY EU-SA BUSINESS LINKS

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Part A. Introduction

EU-SA Business Links welcomes the opportunity to comment on the Promotion and Protection of Investment Bill 2013.

EU-SA Business Links is a forum for EU businesses in South Africa on matters concerning the South African business landscape. Its aim is to strengthen the partnership between the EU business community and South African stakeholders by improving communication and advocacy.

EU companies and investors continue to be an important long-term and substantive contributor to South Africa's economic growth, development and transformation. As at June 2013, at least 2,000 EU companies had invested over €75.9 billion (R1,184 billion) in South Africa, and created over 350,000 direct jobs (with the indirect impact on job creation being much higher). The creation of jobs has also been accompanied by the widespread provision of vocational and educational training, up-skilling opportunities, and management development. EU investors have played an important part in technology transfer, with many high tech, high skill companies located in South Africa. They also play a key role in export development, not just directly, but also by locating in South Africa to service operations throughout Africa. Additionally, EU investment contributes significantly to the achievement of broad-based Black Economic Empowerment.

In this regard, the EU investor community sees itself in a mutually advantageous partnership with the South African government and the people of South Africa. Such a partnership requires businesses to feel that they are in a secure and predictable environment, in which they are made to feel welcome.

After talking to EU businesses in South Africa on issues concerning the Promotion and Protection of Investment Bill 2013 (the Bill), EU-SA Business Links wishes to express that the withdrawal of South Africa's BITs with EU member states has sent a negative message to the

EU business community regarding the standard of protection of investments in South Africa. And the new Bill does not sufficiently allay those concerns.

Part B. General Comments

This submission is divided into general comments on the Bill; a section-by-section highlighting of a number of salient issues; and a conclusion.

The Bill has been described by government as a codification of BIT-type clauses, which in its substance, retains adequate protection and certainty for investors in South Africa. It is also described as intended to equalise standards of treatment among all groups of investors in South Africa. The EU business community notes this, as well as the stated right and duty of government to regulate in the public interest.

However, after considering the substance and detail of the Bill, viewed against its purpose, it is the view of the EU business community that the Bill does not present an adequate replacement of the investment protection regime. In general, it does not appear to EU investors to provide sufficient substantive protection – both absolutely and relative to other categories investors (both local and foreign).

- B.1 A lower standard of treatment

Firstly, the Bill offers lower standards of treatment than typically offered in bilateral investment treaties (BITs). It also contains a restrictive, and imprecise definition of what kind of investment it covers. The EU business community further observes that, despite the Bill's stated purpose of offering equal treatment to all investors in South Africa it appears, in parts, to lock-in less favourable treatment for certain groups of investor.

- B.2 Uncertainty over the value of treatment offered by the Bill

Several areas of the bill are drafted in an open-ended manner. Most investor rights contained in the Bill are subject to exceptions – and these, in turn, are by and large designated as non-exhaustive. It is the view of the EU business community that this does not provide for sufficient certainty or clarity regarding the domestic investment regime. As a law of general application, particularly one which influences and informs investment decisions, more precise wording would be welcomed.

The EU businesses community further notes that it is difficult to assess the scope and content of several of the provisions of the Bill, particularly those which rely on other pieces of legislation (some of which are not yet in operation) to give shape and content to them.

- B.3 Quality of investment is based on long term certainty and a policy environment that reflects the contribution of foreign investors

Against the overall context of the Bill, the EU business community appreciates that the value of investment is also assessed against its substantive contribution to South Africa's socio-economic imperatives. EU business operations continually invest in, and are involved in, initiatives to promote *inter alia*: the creation of sustainable and quality jobs; skills transfer and development; technology transfer; broad-based black economic empowerment; local beneficiation and value-added manufacturing; and supplier diversification in South Africa. In continuing to make a quality contribution to these objectives, it is crucial that the substance and detail of investment protections provide security, and are also clear, transparent and predictable. These are critical factors influencing individual investor's long-term decisions to invest or reinvest, and at what levels.

Part C. Section-by-section comments

- **Definitions**

The definition of investment, which is already limited, is further limited by the qualification "material economic investment". It is not clear from the context what the concept "material economic investment" entails. The following questions arise, for example:

- Is it a capital requirement? If so, is there a quantum or baseline?
- Is it an economic needs test based, for example, on a consideration of *inter alia* priority economic sectors? If the latter is the case, it may well become the case that investments in some sectors are not protected by the act, and/or could potentially cease to be protected if certain economic factors change.

- **Section 3: Purpose of Act**

Within the stated objective of consistency with the public interest, it is the stated need of the Bill to promote and protect investment. It is the view of the EU business community that, read as a whole, the Bill does not reflect adequately the need to promote and protect investment.

- **Section 6: National treatment**

The EU business community notes that the bill contains a national treatment section, a typical buffer against (relative) discriminatory treatment of foreign investments. In theory, the national treatment section should give investors the assurance that they will not be discriminated against.

In the context of the present Bill, however, there are a number of substantive, interpretative, and drafting aspects that cause the EU business community to be uncertain of the protections available to their investments under the national treatment section.

As with all the other sections in the Bill, the protection provided by this section is subject to open-ended exceptions. Within the section itself, the "like circumstances" qualification leaves the scope and content of the national treatment protection unclear. It is not immediately clear how likeness will be transposed into the context of domestic legislation. Even the guidelines provided in s6(4) contain broadly-worded language. If a narrow definition of likeness is locked-in, this could result in foreign investors being seldom in like circumstances with local investors, and in them being *de facto* excluded from the extension of national treatment protection.

Given that this Bill does not contain any complementary or absolute standards of treatment (such as a form of "fair and equitable treatment" section), recourse for EU investors who perceive that they have been treated unfairly will be limited. Overall, this skews protection in favour of domestic investors and foreign investors that might have other avenues of recourse under bilateral investment treaties that are still in operation or have been renegotiated.

- **Section 7: Security of Investment**

The section does not make clear what the obligations of government are, nor make clear the nature of protections investors will be entitled to. The source of much of this uncertainty lies in the wording of s7(3)(b).

Firstly, it is the view of the EU business community that, because the scope and limits of the apparent qualification "or appropriate compensation" are not clearly set out, it gives no indication of the levels of compensation that have been set out in the section.

Additionally, the EU business community notes the internal qualification; "not required by the necessity of the situation". It is not immediately clear what the scope of "necessity of the situation" will be when viewed against the different standards in common law, domestic legislation, and customary international law.

- **Section 8: Principles relating to expropriation**

The manner in which expropriation is handled is a key consideration for EU investors in their investment decision-making. The change in the value of compensation from the typical BIT formulation of "full market value" is a concern for EU businesses.

Additionally, the EU investor community is conscious of the fact that there is no current (up-to-date) legal framework for expropriation. While the expropriation criteria in s8 is aligned to s25 of the Constitution, the law of general application under which s25 must be given effect to, is not in place. Without reference to the actual act that will govern expropriation it is not possible to know how the detail and substantive elements of expropriation will be handled. It also precludes an informed assessment of this section, and its scope and content. The investor community is also cognisant that there are a number of issues of contention surrounding the Expropriation Bill itself.

Lastly, the EU investor community notes that s8 contains a list of internal limitations which includes instances of action that might constitute indirect expropriation, and further that that list has been designated as non-exhaustive.

Read as a whole, this adds to the uncertainty aspects of the present Bill.

- **Section 10, read with s4(3): Sovereign right to regulate public interest**

While general and subject exceptions are a natural upshot of the stated public interest balance, as well as the stated right to regulate, it is our general assessment that the manner in which they have been crafted does not provide for sufficient clarity.

We note that it is a stated purpose of the Bill to promote and protect investment and ensure a *balance* of rights and obligation. The nature of this balance, and thus the inherent value of protections contained in the entire Bill can only be assessed against how precisely the public policy exceptions contained in the Bill are defined.

There is a need for the inclusion of more precise language. We note that, depending on how expansive the exceptions are drafted and how expansively they may eventually be interpreted, the value of any protections in this Bill could be obviated.

- **Section 11: Dispute resolution**

Another area of concern for the EU business community is the issue of dispute settlement.

The loss of investor – state dispute settlement

The complete exclusion of international investor-state dispute settlement from the investment protection regime has generated negative signals within the EU investor community. In the case of most EU investors, its availability is also a factor which influences investment decisions, as well as the nature and duration of investment.

Since the Bill already seems to favour a local remedies requirement, it will be the case that recourse will be had to domestic legal processes. But the EU investor community does not believe that international arbitration should be written-out, if the conditions for such recourse are appropriately ring-fenced.

Other dispute settlement options

The other dispute settlement options offered in the Bill, mediation and arbitration, are supported in so far as they are suited to commercial exigencies. However, the following recommendations are made:

Mediation

If it is to have any value relative to a court, or any other statutory body, it will be important for the mediator to be designed as a specialised structure for dealing with investment disputes. Implicit in that is the expectation that the structure will be sensitive to issues around commercial exigencies, the need for speedy resolution of disputes, and issues around confidentiality. For the purposes of independence, and given the fact that the disputed action might be one taken by the department itself, it is also important that the mediator should be an independent structure, or at least one appointed by both parties.

Arbitration

The Arbitration Act of 1965, under which arbitration is now to be governed, is widely believed to be antiquated and not suited to modern commercial disputes. It is also not

immediately clear to the EU business community how arbitration under the auspices of the Arbitration Act of 1965 will would operate in practice. From within s11 itself, there is the appearance that arbitration is an automatic process. However, assent to arbitration under the 1965 act is not generally universal. Given that government will not be party to standalone arbitration agreements with every investor, unless the Bill's reference to arbitration under the 1965 act signifies universal assent by the government, then it is not immediately clear what the value of the Arbitration Act option is. Does it leave open the possibility of government actually refusing to assent to arbitration in a particular case?

If the act's reference to arbitration under the Arbitration Act is taken as tacit assent by Government to arbitration, then it is important to know whether agreement is activated once there is a dispute.

International arbitration under the 1965 act

Also, given that the 1965 act was originally designed for domestic commercial arbitration, the EU business community is of the view that it is ill-equipped to deal with international arbitration. In line with developments in other jurisdictions, and similar calls domestically, we urge engagement on the modernisation of this act. In the case of the present Bill, this is crucial given the possibly different nationalities of respondents, extraterritoriality, and the cross-border nature of international investment.

Part D. Conclusion

The EU business community plays a key role in the creation of sustainable jobs, and economic growth and development in South Africa. And we remain committed to a mutually advantageous long-term relationship with the South African government and the South African people. As already noted, the withdrawal of South Africa's BITs with EU member states has sent a negative message to the EU business community regarding the standard of protection of investments in South Africa. The new Bill does not sufficiently allay those concerns. In playing a constructive role in the economy, we underscore the importance of a secure and predictable investment regime, which offers adequate protections to investors. The contributions made in this submission are provided in the light of our partnership, and we look forward to further engagement on the issues raised in this submission.

EU-SA BUSINESS LINKS

1. Austrian Business Chamber
2. Finpro
3. France – South Africa Chamber of Commerce and Industry
4. South African – German Chamber of Commerce and Industry
5. Wallonia Brussels (Belgian) Trade Commission
6. Bulgarian Chamber of Commerce and Industry (SADC)
7. Italian – South African Chamber of Trade and Industries
8. South Africa - Netherlands Chamber of Commerce (SANEC)
9. Spanish Chamber of Commerce (SA)