Summary of Submissions for the Promotion and Protection of Investment Bill (PPIB) [B18-2015]

1. List of stakeholders

The following stakeholders made written submissions on the Bill:

1. Agri SA
2. Anglo American South Africa Limited (AA)
3. The Banking Association South Africa (BASA)
4. Business Unity South Africa (BUSA) (Awaiting the final submission)
5. Centre for Applied Legal Studies (CALS)
6. Centre for Constitutional Rights (CFCR)
7. European Union Chamber of Commerce and Industry in Southern Africa (EU Chamber)
8. Financial Services Board (FSB)
9. Hennie Botha*
10. Mandela Institute (MI)
11. National Union of Metalworkers of South Africa (NUMSA)
12. Offshore Petroleum Association of South Africa (OPASA)
13. René de Villiers*
14. South African Human Rights Commission (SAHRC)
15. South African Institute of Race Relations (IRR)
16. South African Property Owners Association (SAPOA)
17. Vodacom
18. Western Cape Government (WCG)

* These submissions were not summarised, as they did not raise substantive issues related to the Bill.

Comments relating to the FIP are confidential as it is pending Summit approval.

2. General comments

The following general comments were made:

Issue/concern	Description	the dti's response
Level of protection in comparison to Bilateral Investment Treaties (BITs)	**OPASA**: It is of the view that a number of protections extended to investors in BITs have been omitted from the Bill, which may lead to investors seeking compensation for the additional risk from the government in other forms. **WCG**: There are insufficient substantive measures in the Bill to ensure the protection and promotion of investment, which may become a barrier to investment. It is also unclear whether the proposed legislation is on par with internationally accepted principles relating to foreign direct investment (FDI).	The Bill contains international investment law concepts which include National Treatment, Protection of Property and Transfer of Funds. Investment law concepts that are problematic internationally have be excluded from the Bill in a bid to mitigate risk and make SA less susceptible to legal challenges.
Clarity of the Bill	**WCG**: It is unclear what the Bill requires from potential investors.	The Bill does not impose any new obligations on investors. With regards to new investors, the Bill requires that all investments being established comply with applicable legislation in respect of registration with the Companies and Intellectual Property Commission (CIPC).
Measures to promote investment	**WCG**: The current version of the Bill remains unclear as to how FDI is to be promoted. Therefore, the Bill does not address the stated objectives contained in the preamble, the purpose clause, and the memorandum on the objectives of the Bill.	By codifying national investment legislation, the Bill seeks to promote investment through the protection accorded to investors by the Bill. The Preambular language aims to affirm SA's commitment in upholding the constitutional principles. It sets out key policy considerations that provide context to the Bill and highlights, *inter alia*, SA's commitment to maintaining an open and transparent environment for foreign investors, while recognising the importance of maintaining sufficient scope for government to regulate all investments in order to fulfil legitimate national policy objectives.
Regulatory impact	**WCG**: It is unclear whether a rigorous RIA was undertaken and the impact on the economy was considered.	A Regulatory Impact Assessment was conducted on the Bill. As part of the RIA, a comprehensive evaluation of the

Issue/concern	Description	the dti's response
assessment (RIA)		policy proposals was performed, together with impacts, costs and benefits associated thereto. The outcomes of this RIA have confirmed that the Bill: (i) does not create additional obstacles to foreign investors; (ii) achieves a balance between Government's right to regulate in the public interest and rights and obligations that may arise for investors under South African law; (iii) the level of protection that qualifying investors may expect in the Republic of South Africa under the PPI Bill; (iv) how international principles such as national treatment, protection and security and transfer of funds will be dealt with under the Act; (iv) that constitutional standards apply to the protection of all investment in respect of any measure that may be deemed expropriatory; and (v) accords investors the right to protect investments through access to appropriate legal processes and are entitled to due process in respect of any matter related to such investment. The Bill addresses not only investors rights, but also confirms the right of Government to regulate in the public interest, measures that are non-discriminatory, complies with due process and has a public purpose at heart should not be considered expropriatory per se. This is in line with

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		international investment law pronouncements. In Saluka Investments BV v Czech Republic, the tribunal held that economic injuries resulting from bona fide regulations within the police powers of a state are not compensable. The Tribunal held that: "…It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare". The Bill is entirely consistent with the position outlined in the above-mentioned case. The guidelines in the Bill ensures that Government's policy space is retained and the equalisation measures in respect of previously disadvantaged individuals and communities can be implemented without any threat or extension to investors not so situated.
Regional obligations	**Anglo American SA Ltd:** The SADC Protocol is binding on South Africa internationally and constitutionally.[1] It promises protection to foreign investors from *any state* in the world, not only from other SADC states. Consistent with modern international investment law, the SADC Protocol "*internationalises*" the relationship between the host state and its foreign investors, by creating a set of investor rights that are *fixed* at the international level (and thus cannot be unilaterally changed at the national level by a host state), and	**The SADC FIP is based on the old generation BITs. In view of the challenges faced by Member States, SADC has reviewed the FIP and will be considered by the Committee of Ministers before the end of the year.**

[1] See section 231 of the Constitution; *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC), paras 27 and 69.

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	are *enforceable* at the international level (if the host state's national courts do not or cannot provide remedies for alleged breaches of such rights). This is overwhelmingly regarded as "*essential to a regime of protection of foreign direct investment*".	The new SADC FIP provides for State-State Arbitration
	By removing the defining international character of investment protection, the Bill would deprive South Africa of its only international law defence against *diplomatic protection* by the home states of foreign investors who claim to have been wronged - an arena in which disputes are settled purely according to political advantage and leverage, with no precedents or rules of procedure, as well as insight or oversight by the citizenry.	The standard of compensation has now been amended to fair and adequate compensation under amended FIP which now aligns with section 25 of South Africa's constitution. Furthermore reference to "fair and equitable" treatment in Article 6 has been deleted and the provisions of Article 6 now align with National Treatment provisions as contained in the bill. Annex 1, has been amended to comply with this mandate and amended Annex will soon be adopted.
	CFCR: In terms of the *Southern African Development Community Protocol on Finance and Investment*, member states are obliged to "*create favourable conditions for investments through a predictable investment climate*". The Protocol provides that investments may not be nationalised or expropriated except for a public purpose against full market value compensation, and further that investors must be given fair and equitable treatment. As such, the provisions of the Bill appear to repudiate South Africa's treaty obligations under the Protocol. The provisions of the Protocol are nowhere reflected in the Bill. In terms of sections 39 and 233 of the Constitution, our Courts must consider and apply International Law, including international treaties binding South Africa, such as the aforementioned Protocol. A failure by the Bill to reflect South Africa's obligations in terms of this Protocol, will most likely result in applicable parts of the Bill being declared invalid by a Court.	In terms of Section 3 of the Bill, the SADC Protocol would be covered herein. Specific reference to the Protocol in the Bill would mean that all SA's obligations in terms of other agreements would have to enlisted – this is impractical.

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Tagging of the Bill	**WCG**: The WCG is of the view that the Bill should be tagged a section 76 Bill, as the substantive provisions of the Bill regulates matters which in substantial measure relate to the concurrent functional area of trade, as can be seen in section 2*(a).*	The State Law Advisors legal opinion of May 2015[2] confirms that the Bill should be tagged as a Section 75 Bill. "Trade" is listed as part A of Schedule 4 of the Constitution which is the functional areas of concurrent national and provincial legislative competence. After considering the Bill, the State Law Advisors opined that the Bill does not contain elements of trade and thus classified the tagging as Section 75. The classification was further deliberated on by the Joint Committee of Parliament which was confirmed as Section 75 by way of the Government Gazette. **the dti** concurs with this position.
Anti-avoidance	**CALS: Calls for the reinsertion of** the anti-avoidance provision. 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: 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***	Could consider reinsertion and if an investor feels that the Minister's decision is irrational can declare a dispute in terms of section 12.

[2] Pre-certification opinion: Promotion and Protection of Investment Bill 26 May 2015

Issue/concern	Description	the dti's response
	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.	
Fair and Equitable Treatment	**Anglo American SA Ltd**: The Bill does not contain any provision for "*fair and equitable treatment*", which is guaranteed under the SADC Protocol,[3] and essentially requires the maintenance of a transparent and predictable regulatory environment and protects investors from arbitrary or abusive conduct by host states **Vodacom**: The international investment law principle of Fair and Equitable Treatment ("**FET**") is an important principle for foreign investors, as it provides a form of guarantee to foreign investors to be treated "fairly and equitably" by the host government. The omission of this principle from the Investment Bill 2015 is concerning and a major departure from the nature and extent of protection foreign investors derives from IIA. The fact that South Africa in future only intends to regulate most of its investment relationship with other states with the Investment Bill 2015, as opposed to IIA is even of more concerning for foreign investors. The inclusion of the FET in the Investment Bill 2015 with reference to customary international law will provide the necessary comfort to foreign investor, but simultaneously provide the South African government with the ability within the scope of the Constitution and national legislation to adapt public policies in light of changing objectives. This all-encompassing provision for investors re-enforces other provisions within the Investment Bill 2015 that any "measure"	The majority of the member States recommended changing Article 6.1 of the SADC from the open-ended fair and equitable treatment language to a more carefully restricted provision. The suggested language was considered as illustrative for this purpose. Reference back to the SADC Template, Article 5 was suggested for drafting assistance. Reference to "fair and equitable" treatment in Article 6 has since been deleted and the provisions of Article 6 now align with National Treatment provisions as contained in the bill. Omission from the Bill: FET, like MFN, are non-discriminatory standards. It is a highly problematic provision internationally wherein it has been widely interpreted in many arbitral decisions due to its vagueness. The exclusion of FET is a risk mitigation effort by the SA Government to avoid such wide interpretations. FET provisions has brought to light the need to balance investment protection with competing policy objectives of the host State, and in particular, with its right to regulate in the public interest. Measures that the SA Government is desirous of implementing in its pursuit of its transformational based

[3] See article 6(1) of Annex 1 to the SADC Protocol.

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	the state takes relating to an investment/s shall not be arbitrary or amount to egregious mistreatment of foreign investors. Vodacom requests that the Portfolio Committee reconsider the inclusion of an FET provision in the Investment Bill 2015 to bring South Africa in line with international practice in respect of protection of foreign investment. A middle-ground could be achieved by providing for a qualified FET standard. As well as being inherently incompatible with the SADC Protocol (and modern international investment law as a whole), the Bill is further inconsistent with several specific provisions of the SADC Protocol and the SADC Model BIT which South Africa played a prominent role in developing. This is so particularly in respect of the Bill's provisions on qualification for protection; regulatory reliability; expropriation, as well as dispute settlement.	agenda may be inconsistent with this non-discriminatory obligation. Thus The Government is of the view that the public policy space may be unduly constrained with the FET provision. More specific language is being used in more recent treaties and as suggested in the Vodacom submission ("providing for a qualified FET standard"). However, reference to customary international law, or even the customary international law on the treatment of aliens, does not appear to restrain arbitrator creativity in this regard (as evidenced in arbitral decisions and academic writings). In a Special Note, the Drafting Committee of the SADC Model BIT has recommended against the inclusion of an FET provision in treaties due to its problematic nature. The same is applicable to national legislation. Nevertheless, a Member State is free to exercise its prerogative for the inclusion of an FET provision in investment agreements with suggested drafting proposals contained in the Model. The SA Government has opted against the inclusion of the provision for the aforegoing reasons. The substantive and procedural fairness is confirmed by the rule of law, further to the access to information as affirmed in the Constitution
Additional definitions	**Anglo American:** The Bill does not define "*lawful*", "*resources of economic value*" or "*a reasonable period of time*", and thus it is impossible to determine which investors may qualify for the Bill's protection. The Bill also warns that	**Lawful** means that the enterprise must established in terms of the law and or that such enterprise must not be involved in illegal business activities.

Issue/concern	Description	the dti's response
	investments must be established "*in compliance with the laws of the Republic*".[4] The meaning of this is unclear, and thus so is the scope of the Bill's protection. It is submitted that the Bill should follow the guidance in the SADC Model BIT in determining meaningful definitions and a clear set of criteria to qualify for foreign investment protection	Committing **resources of economic value** could for example include amongst other things committing financial resources in order to operationalise the enterprise's business i.e setting up of a manufacturing plant. The onus would reside with the investors in terms of proving the economic value of the investment. The mere registration of a "post box" company would not constitute a "resource of economic value". A **reasonable period** would depend on the circumstances of every case and will be considered by the courts in order to make a determination on the matter. What constitutes a reasonable period would depend on sector specific practices which means contractual and customary practices in a specific sector would have to be taken into account when establishing what a reasonable period of time would be. South African law recognised this approach. The meaning of "in compliance with the laws of the Republic" is self explanatory .

3. Specific comments

The following specific comments were made:

Clause	Issue raised	the dti's response
Title	**CFCR**: The title of the Bill is misleading because the effect of the Bill will arguably be to result in less protection to foreign investors than they enjoyed in terms of the BITs that the	In April 2010, **the dti,** began drafting the Bill which aims to strengthen the Republic's investment regime by seeking to achieve that: (a) the Republic remains open to foreign direct investment

[4] See clause 6(2) of the Bill.

Clause	Issue raised	the dti's response
	government is in the process of terminating. Due to this, the Bill will most likely not serve to promote – but will rather discourage – investment.	(''FDI''); (b) the Republic provides adequate protection to FDI; and (c) these objectives are balanced with the right of the government of the Republic to regulate in the national and public interest. The intention of **the dti** is to clarify provisions typically found in Bilateral Investment Treaties (''BITs''), by codifying them in the Bill and ensuring compliance with the Constitution. The Bill therefore seeks to balance the rights and obligations of investors, to provide adequate protection to foreign investors, to ensure that SA's constitutional obligations are upheld, and to ensure that government retains the policy space to regulate in the public interest. Given the aforegoing, the title of the Bill confirms the constitutional principles in terms of protecting investments thus serving as a legislative framework for the promotion of investment. This Bill extends protection more broadly to every investor and not only to investors covered under BITs. The scope of protection is thus wider than applied in the past. It therefore cannot be said that the Bill provides less protection. Furthermore, the Bill creates a regulatory framework to promote investment in the SA economy. It therefore provides an enabling environment by protecting the rights of investors in accordance with the SA Constitution. In conjunction with the indirect promotion of investment by the Bill, there are other more specific governmental initiatives for the promotion of investment. These range from the establishment of one stop shops to facilitate inward and outward investment, as well as specific

Clause	Issue raised	the dti's response
		measures directed at the setting up of SEZs etc. The Bill has to be read in conjunction with these initiatives as well as the sectoral competence granted in other legislation or draft norms.
Preamble	**CALS:** We making 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. Propose Amendments: Para 1: Conscious of the ~~need~~ ***obligation*** to protect, ***respect***, ***fulfil*** and promote the rights enshrined in the Constitution and the Bill of Rights; Para 8: Recognising the ~~need~~ ***obligation*** to take measures to protect or advance persons, or categories of persons, historically disadvantaged in the Republic due to discrimination; Para 10: Reaffirming the Government's ~~need~~ ***obligation*** to regulate in the public interest in accordance with the law. 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***;	[5]**"need" :** Expressing necessity or obligation **"obligation" :** An act or course of action to which a person is morally or legally bound; a duty or commitment From the aforegoing, it is apparent that such a replacement of words compels Government to take decisive action and be bound thereto. Recognising a need does not necessarily imply that fulfillment can take place based on whatever constraints faced by Government. Even if obligatory language is used, the replacement does not change the nature of the assertion. Preambular language may be important where there is uncertainty in the primary mode of interpretation, then it may be used as an ancillary mode of interpretation to provide clarity as to the meaning of a word / phrase. It does not impose an obligation on Government to act in a particular way. *Given the further submission made in respect of the text, the inclusion of "access to justice, access to information and all other rights set out in the Bill of Rights" can also be considered. With regards to transparency and access to*

[5] Oxford Dictionary

Clause	Issue raised	the dti's response
	CALS: that explicit mention be made of inclusive socioeconomic development in the Investment Bill to the following effect: 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. **CFCR**: Although the Preamble correctly recognises the socio-economic importance that investment plays, its effect will not promote the State's commitment to "*maintaining an open and transparent environment for investments*" nor will it promote "*investment by creating an environment that facilitates processes that may affect investment.*" **SAHRC**: Despite affirmations related to transparency and access to information, the Bill makes no provisions relating to information disclosure, which would facilitate the realisation of transparency, which has been one of the key human rights concerns of investments. The ambit of the Bill should be extended to include provision relating to transparency. In particular, the Bill should emphasise under section 12 transparency as a component of the dispute resolution process. In addition, an obligation should be placed on investors to ensure compliance with all relevant national laws and standards which provide for information disclosure.	*information in disputes however, certain information in the dispute process would have to remain confidential, example business information by investor and / or non-disclosure of state information of a confidential nature in the interest of security.* The proposal to substitute "need" with "obligation" can be considered. This would be repetitive as reference is already made in Section 11(1)(f) to the socio-economic rights : "*achieving the progressive realisation of socio-economic rights;"* The bill does maintain an open and transparent environment for investment by offering the protection while at the same time recognising that Government needs the necessary policy space to regulate for developmental reasons. This is iterated in the Preamble: "***AFFIRMING*** *that the State is committed to maintaining an open and transparent environment for investments*;"
1: Definition of "Constitution"		Defined in Bill
1: Definition of "Department"	**SAPOA**: To follow the more flexible formulation given in the definition of "Minister", they propose the following amendment: "**"Department"** means the Department *responsible for t*rade	This request can be considered.

Clause	Issue raised	the dti's response
	and *i*ndustry".	
1: Definition of "dispute"	**BASA**: The definition as it stands is unclear, creates uncertainty and is broader than the definition contained in the Bilateral Investment Treaties. Should a dispute arise; it would be unsound and an unfair process for the parties themselves to agree that a dispute exists as it could be difficult for the parties to agree that a dispute exists. Given that there is a dispute resolution process in section 12, it will be prudent to delete this requirement. Proposal: BASA recommends that the wording: "***provided that a dispute will only arise once the parties agree, or as prescribed by the law;"*** included in the definition must be deleted in its entirety. Alternatively, the definition of "***dispute***" as proposed in the previous draft version of the Bill must substitute the definition of "***dispute***" in this draft version of the Bill to read as follows: "*dispute means a claim by an investor that the Government of the Republic has allegedly breached an investment protection guaranteed under this Act and that the investor has incurred loss or damage by reason of, or arising out of, that alleged breach*". Further, should the alternative as recommended be unachievable a set of criteria as to what constitutes a "***dispute***" needs to be included. **CALS:** The current definition of "dispute" is confusing. Proposal:	The rationale behind this provision is that the mere allegation by an investor that protection afforded by the act has been breached does not amount to a dispute as the alleged breach can be remedied before actual dispute is declared, it would be premature to allege a breach. The "cooling off period" can be undertaken between an investor and the state by way of Section 12(1) where an investor can approach the state on the dispute. This proposal may be implemented. The text may then read as follows: *"dispute" means a claim by an investor, instituted in accordance with section 12 that the government has allegedly breached the protection provided in this Act."* . In line with the explanation given above, there is no need to amend.

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	"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. **SAPOA**: The provisions of section 12 are sufficient. If the dispute only arises "once the parties agree" there will be an added flow of unnecessary litigation where people take the failure to agree that a dispute has arisen to the courts for review under the Promotion of Administrative Justice Act. The words "as prescribed by the law" are unnecessary because the legislation is subject to the law in general. They therefore propose the removal of the phrase "*provided that a dispute will only arise once the parties agree, or as prescribed by the law*". **WCG**: The current definition of "dispute" sets out substantive criteria for what triggers a dispute. This cannot be done by way of a definition. A substantive provision of this nature must be incorporated in the body of the Bill. In addition, the substantive provisions governing what will constitute a dispute which may be referred to mediation are of central importance and should be set out in the Bill and not prescribed by way of regulation (see comments under section 12).	**CALS** proposes deletion of "*provided that a dispute will only arise once the parties agree*," Resorting to dispute needs to be consensual as per the definition stipulated. Dispute prevention and facilitation to be considered. **SAPOA** raises the same issue as CALS in respect of the deletion: **SAPOA** proposes deletion of "*provided that a dispute will only arise once the parties agree, or as prescribed by the law*;" Proposal can be agreed to.
1: Definition of "enterprise"	**Agri SA**: Proposal: Delete the definition of "enterprise" **BASA**: The definition provides no guidance as to what constitutes a juristic person, for instance would the definition include a non-government organization or a non-profit organization. Furthermore, various pieces of legislation provide	A complete definition of "enterprise" is contained in the VAT Act http://www.acts.co.za/value-added-tax-act-1991/ Furthermore**,** the Companies Act makes a distinction between "enterprise" and "entity", the former referring only to "State Owned Enterprises" while the latter connotes

Clause	Issue raised	the dti's response
	for different definitions of a juristic person. Proposal: BASA recommends that a definition be included in the Bill to define a "***juristic person***" and that such definition, for the sake of consistency, be aligned to the definition of "***juristic person***" as defined in the Companies Act which reads: "*In this Act the term "juristic person" includes – (a) a foreign company (also defined); and (b) a trust, irrespective of whether or not it was established within or outside the Republic;"*. **SAPOA**: A juristic person cannot be "unincorporated". Extra categories of enterprise are needed for the definition to be more inclusive. They recommend the following wording: "**"enterprise"** means any natural person or juristic person *and includes any* incorporated or unincorporated *association, trust or foundation establishing an investment in the Republic*".	"private and publically listed entities" which also includes foreign entities. The inclusion of the definition of juristic person from the Companies Act may be considered for the sake of uniformity. However, this definition includes a trust which the State Law Advisors have advised against. They opine that trusts are not juristic persons and will therefore not constitute part of an enterprise. Assets of a trust will vest in the trustee who will deal with it according to the trust agreement. [6] Further consultation will be required to resolve this matter.
1: Definition of "government"		Defined in Bill
1: Definition of "investment"	**Vodacom:** The definition of investment contained in section 2 of the Investment Bill 2015 has been narrowed to a so-called enterprise-based definition which provides uncertainty relating to whether certain assets which may constitute an investment would be protected, such as contracts and claims to money, technical process, goodwill, intellectual property and know-how. Vodacom/Vodafone requires clarity whether assets such as contracts, claims, goodwill, intellectual property and know-how	IPR's are protected under the relevant legislation. However, assets derived from IPR's that constitute part of business operations is considered as an investment, as the economic value of an IPR is recognised. The inclusion of IPR's would mean a stipulation of an exhaustive list which is not a practical means of addressing this issue in the Bill. The asset classes mentioned are all protected; there is no need to mention every type of asset.

[6] State Law Advisor's legal opinion dated 24 Dec 2014. Case: Lupacchini NO & Another v Minister of Safety and Security

Clause	Issue raised	the dti's response
	would constitute an investment in terms of section 2(a) of the Investment Bill 2015. The nature and extent of an investment deserving of protection contemplated by section 2(c) in Vodacom's view requires clarification and rewording in light of the uncertainty it creates. The intention here appears to be to exclude investments which do not have an effect on South Africa from protection in terms of the Investment Bill 2015. However, the wording of section 2(c) does not convey such a message as it appears to suggest that should Vodacom hold, acquire or merge with another enterprise outside South Africa, such holding, acquisition or merger with an outside enterprise will only be deemed as an investment should it have an effect on investment which qualifies in terms of section 2(a) or (b) of the Investment Bill 2015. This is not clear and the explanatory note to the Investment Bill 2015 in respect of section 2 does not clarify this part of the definition. Proposal: Vodacom suggests the following clarification of section 2(c) – *"the holding, acquisition or merger by such an enterprise with another enterprise outside the Republic to the extent that such holding, acquisition or merger with another enterprise outside the Republic has an effect on an investment contemplated by section 2(a) and (b) in the Republic."*	This proposal may be considered given the greater clarity it may add to the definition of investment.
1: Definition of "investor"	**Agri SA**: Proposed the following amendment to the definition of investor": "investor means a**[n enterprise]** <u>natural or juristic person, whether incorporated or unincorporated,</u> making an investment in the Republic regardless of nationality"	The definition of "investor" does stipulate *"regardless of nationality"* – this would take care of "foreign investors".

Clause	Issue raised	the dti's response
	Vodacom: Vodacom is of the view that Portfolio Committee consider the introduction of a definition for foreign investor, specifically having regard to the use of the phrase "foreign investor" in section 6, 7, 8, 10 and 12 of the Investment Bill 2015. The definition of foreign investor is of particular importance to Vodacom as a company registered in South Africa with its majority shareholder, Vodafone, incorporated in the Netherlands. Vodacom maintains its earlier request for clarification on this issue, which could be achieved through a definition of foreign investor. Proposal: definition of foreign investor "*an enterprise established outside the Republic which made an investment in the Republic*", specifically to provide clarity when a distinction is made between domestic and foreign investor in the Investment Bill 2015. The Investment Bill 2015 also refers interchangeably to domestic and South Africa investor, Vodacom propose that a uniform reference be made to a domestic investor.	The *test to determine the nationality of an entity is not shareholding. The Companies act requires incorporation in the Republic. It is evident that Vodacom is a South African entity since it is incorporated in South Africa, irrespective of the nature of its shareholding. Ownership and control of an entity may be important for other purposes. The proposal by Vodacom is already covered under South African legislation and may be implied from a proper reading of the Bill in context of the Companies Act.*
1: Definition of "measure"	**EU Chamber of Commerce:** It is not clear to the EU Chamber why the definition of ''measure'' ascribes the term to only administrative action. This definition is unduly limited, and does not cover the full gamut of measures as they are envisaged in this Bill. In the various references to measures contained in the Bill, it is clear that policy, legislation, and regulations are also included in the definition. **Proposal:** "**measure** refers to binding governmental action directly affecting an investor or its investment, and includes laws, regulations, and administrative action …"	The definition of "measure" as defined in the SADC Model BIT is: "***Measure*** *means any form of legally binding governmental act directly affecting an investor or its investment, and includes any law, regulation, procedure, requirement, final judicial decision, or binding executive decision [subject to the exclusion of measures of a [state][provincial] [municipal] level government]."* The EU proposal has partly been taken from the aforegoing definition.

Clause	Issue raised	the dti's response
		A measure may be judicially reviewable in terms of PAJA if it takes the form of an administrative action but not reviewable under PAJA if it took the form of legislative or executive action. [7] This matter is to be discussed with the State Law Advisors. WTO definition of "measure" is to be considered. The proposal by the EU Chamber can be considered as it is much narrower as compared to that which is provided for in the Bill in that an action would have to directly impact on the investor. The current definition caters very broadly for an administrative action as opposed to the narrower proposal by the EU Chamber.
1: Definition of "Minister"		Defined in Bill
1: Definition of "organ of state"		Defined in Bill
1: Definition of "prescribe"		Defined in Bill
1: Definition of "regulation"		Defined in Bill
1: Definition of "Republic"		Defined in Bill
1: Definition of "this Act"		Defined in Bill

[7] State Law Advisors legal opinion dated 13 Feb 2015

Clause	Issue raised	the dti's response
2: Investment	**BASA**: In subsection (a), the use of the words "***enterprise***" creates uncertainty in that the definition of "***enterprise***" includes a reference to both a natural and juristic person which in the context of the subsection does not make sense. Additionally, the use of the words "***resources of economic value over a reasonable period of time***" are vague in that it is uncertain as to what exactly constitutes "***resources***" or "***over a reasonable period of time***". Further, as the Bill currently stands, if the intention of an investor is not to make a profit, such an investor will not receive the same protection under the Bill.	In many situations South African law recognises various forms "enterprise" conducted by natural persons whether such endeavours are regulated by statute or common law. There is no contradiction in this assertion. The definition of "investment" adopts an enterprise-based approach which is one of the models proposed in the SADC Model BIT. It requires the establishment or acquisition of an enterprise, as associated with FDI. The assets of the enterprise (shares, debentures, other ownership instruments) are also included in the investment. Enterprise would mean, as per the definition, "any natural or juristic person…".In the NEDLAC process and on a consensus basis, this term replaced the term "**entity**" which was defined at the time to mean "…any juristic person, whether incorporated or unincorporated". The final NEDLAC report was signed off on by the Minister of Trade and Industry. Definitions of "enterprise" and "entity" The Companies Act does make a distinction between "state owned company" and "public company". It further defines entity in conjunction with a regulated person as follows: "regulated person or entity means a person that has been granted authority to conduct business by a regulatory authority;" There is no specific definition of "enterprise" in the Companies Act – it is however, contained in the VAT Act http://www.acts.co.za/value-added-tax-act-1991/ May consider replacing the phrase "shares, debentures or other ownership instruments" with "securities", however

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		ownership instruments is much wider and may include other asset classes which do not equate with the meaning of "securities". It is proposed that the current wording more than adequately covers all possible scenarios may arise under the definition of investment.
	In subsection (b) the use of the words "***shares, debentures or other ownership instruments***" creates ambiguity in that it does not align with existing legislation such as the Companies Act.	This statement is not correct since the formulations are aligned with the legislation mentioned.
	In subsection (c) the use of the words "***holding, acquisition, or merger"*** creates ambiguity in that it does not align with existing legislation such as the Companies Act and Competition Act and are not clearly indicative as to whether these obligations are imposed on domestically regulated entities. Proposals: BASA recommends that for subsections: 1. (a) the word "***enterprise***" be substituted with the word "**entity**" and that the definition of the word "**entity**" as was included in the previous draft version of the Bill be included in this draft version of the Bill to read: "*entity means any juristic person, whether incorporated or unincorporated*". Additionally, subsection (a) needs to accurately describe what constitutes "***resources***" or "***over a reasonable period of time***".	Reference to page 14 – definition of "**investment**" states that: IPR's are protected under the relevant legislation. However, assets derived from IPR's that constitute part of business operations is considered as an investment, as the economic value of an IPR is recognised. The inclusion of IPR's would mean a stipulation of an exhaustive list which is not a practical means of addressing this issue in the Bill. The term "**reasonable period**" is meant to ensure that SA protects investments that contribute to the economic development objectives of the country and clarifies that portfolio investments will not be protected. Investment must therefore involve a commitments of resources of

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	2. (b) the words "***shares, debentures or other ownership instruments***" be replaced with the word "***securities***" as stated in the Companies Act to create certainty and alignment with existing legislation. We recommend that for subsection (c) clarity must be provided as to whether the obligations imposed in respect of "***holding, acquisition, or merger****"* is obligatory for domestically regulated entities. **CALS**: Section 2(a) The term *"reasonable period of time"* should be defined in the definition section of the Bill is vague and uncertain and could prove an impediment to the realisation of the aspirations of the Investment Bill. **EU Chamber of Commerce**: The definition of "investment" does not comprehensively clarify whether minority equity investments by investors, i.e. portfolio or venture capital investments for example, who may or may not have established a corporation in South Africa, fall under the definition stipulated in the Bill and the memorandum. However, these financial investors provide relevant capital transfers into growth sectors, such as renewable energy projects and SMME's in general. Further to that point, does the sole fact of being incorporated in South Africa constitute "a physical presence" as mentioned in the Memorandum? **IRR**: An "investment" will be protected under the Bill only if it is a "lawful enterprise", constituted under South African law, which "commits resources of economic value over a reasonable period of time, in anticipation of profit". This wording excludes most	economic value. Reasonable period would depend on specific facts and the sector in which it is applied. This has already been addressed in our previous intervention above. As already mentioned, an investment may be established through an enterprise, the Bill does not prescribe how this should be done, merely that it should be complied with. Even if such investors have a place of business in South Africa, they may be recognised as "external companies" and would have to comply with the requirements of the Companies Act. That would be sufficient to establish any investment that such investors may make. Whether an entity has a physical presence is linked, in the definition of investment, to an economic activity test, which means the presence must a real presence. Portfolio investments would not qualify as "investments" under the Bill since these constitute instances where investors do not participate in the management of the entity and such investments do not take a long term view hence will not benefit from the additional substantive and procedural benefits under the Bill. It however does not mean that portfolio investments are not protected under general South African law. Furthermore, underlying rights such as intellectual property rights are protected under South African law while the Bill specifically protects the economic value of such rights constituting a "class of assets".

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	portfolio investments and all intellectual property rights. Yet portfolio investments play a vital part in helping South Africa fund its generally large budget and current account deficits, and need adequate protection if foreign investors are to have the confidence to keep putting their money here. In addition, the patents and other intellectual property rights of foreign investors often rank high among their key assets and need proper protection too. This provision is sufficient in itself to differentiate the Bill from most bilateral investment treaties, which generally do protect portfolio investments and intellectual property rights. **MI**: The Bill combines an enterprise- (subsections (a) and (c)) and asset-based (sub-section (b)) definition of "investment". This may create confusion. They agree with sub-section (a) in light of the NEDLAC discussions but is of the view that the reference to "other ownership instruments" in sub-section (b) could create ambiguity, as it could be interpreted to include the acquisition of intellectual property rights, portfolio investments, leases, licenses, mortgages or other foreign interests related to an enterprise and affect its ownership. This could also be interpreted too strictly to only include debt and equity instruments and exclude other interest and rights. In addition, the illustrative list of assets that was in the draft Bill was useful in providing clarity as to what constitutes an investment. A similar approach was adopted in the SADC Model BIT 2012. They are of the view that the Bill should follow one of the three proposed approaches as outlined in the 2012 SADC Model BIT. **OPASA**: The inclusion of the phrase "movable and immovable property and rights conferred by law to carry out economic and commercial activities, such as licences, authorisations and	The meaning to be attributed to the definition of investment must be such that "other ownership instruments" should bear a wider meaning to include all the other asset classes. More specific drafting could emphasise this aspect. In respect of the illustrative list, only listing some asset classes is not feasible and reflecting a more general indicator is perhaps less confusing. Reference to page 14 – definition of "**investment**": IPR's are protected under the relevant legislation. However, assets derived from IPR's that constitute part of business operations is considered as an investment, as the economic value of an IPR is recognised. The inclusion of IPR's would mean a stipulation of an exhaustive list which is not a practical means of addressing this issue in the Bill. The definition is wide enough to include both movable and immovable property, corporeal and incorporeal property. The Bill is in line with general South African law. Hence SAPOA's proposal is catered for in the current wording of the Bill. Without having it explicitly stated, "movable and

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	permits", to cover investments made in oil and gas projects, which include exploration drilling. **SAPOA**: The following proposed wording will put the members of SAPOA on an equal footing with foreign investors in fixed property: "**2.** For the purpose of this Act, an investment is— (a) *establishing, acquiring or expanding* any lawful enterprise in accordance with the laws of the Republic *which commits* resources of economic value *for* a reasonable period of time, in anticipation of profit; (b) the holding or acquisition of shares, debentures or other ownership instruments of such an enterprise; ~~*or*~~ (c) the holding, *acquiring or merging of an enterprise* with another enterprise outside the Republic *which* has an effect on *such* an investment in the Republic; (d) *investing in any immovable property including a right in such immovable property*."	immovable" property is covered in the definition of "investment" as it is not possible to have an exhaustive list of assets stipulated under "investment".
3: Interpretation of Act	**CALS:** 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	Section 33 of the Constitution aims to cause administrative decision-making to be open, transparent and rational, to provide a safeguard against capriciousness and autocratic tendencies, and promote administrative accountability and justice [8]. By virtue of the fact that Section 3(b) already references the Constitution and includes just administrative action only as part of the

[8] https://en.wikipedia.org/wiki/South_African_administrative_law1

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	Proposal:	sub-provision, there is not exclusion of these rights.
	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***;	This proposal can be considered.
	MI: Sub-section 3(c) can be interpreted to mean that this Bill must be consistent with all international agreements to which South Africa is a party to including BITs and the SADC Protocol on Finance and Investment. However, the provisions of these agreements are inconsistent with those in the Bill.	This statement is correct to the extent that South Africa has undertaken international obligations. Such obligations bind the Republic at the level of international law. The FIP has been incorporated into South Africa law and creates no rights in South Africa. The material provisions referred to have also been amended and await adoption by the Ministers of Finance and Investment. Since the Bill only applies in
	SAPOA: The proposed wording below brings the clause into line with sections 39, 232 and 233 of the Constitution. For instance, the Act cannot be interpreted in a manner that is "consistent with international law". That goes unacceptably much further than the Constitution. They propose the following wording:	Reference to the specific provisions in the Constitution achieve exactly the same objectives.
	"**3.** This Act must be interpreted and applied in a manner that: *(a) is consistent with* its purposes as contemplated by section 4; *(b) promotes the spirit, purport and objects of the Bill of Rights in* the Constitution, including just administrative action provided for in section 33 of the Constitution; *(c) ~~any relevant convention or international agreement to which the Republic is or becomes a party.~~*	Section 3 of the Bill already makes reference to the Bill of Rights in Section 4 which includes "*(d) confirm the Bill of Rights in the Constitution and the laws that apply to all investors in the Republic."* The proposal can however, be considered for inclusion.

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	consistent with customary international law that is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament; *(d) when interpreting this Act, every court must prefer, over any alternative inconsistent interpretation, any reasonable interpretation of the legislation that is consistent with international law or any relevant convention or international agreement to which the Republic is or becomes a party.*"	
4: Purpose of Act	**Agri SA**: Clause 4(d) The Bill cannot "confirm" the Bill of Rights as the Bill itself is subservient to the Constitution. In this regard section 2 of the Constitution clearly states that the "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid…" Presumably, the intention is not to 'confirm' the Bill of Rights but rather to reaffirm that the Bill of Rights applies to all investors in the Republic. Agri SA proposes that the text be amended accordingly to reflect this. **EU Chamber of Commerce:** Within the stated objective of consistency with the public interest, it is the stated need of the Bill to promote and protect investment. As already noted, it is the view of the EU business community that, read as a whole, the Bill does not adequately reflect the need to promote and protect investment. **IRR**: According to the Bill, its purpose is to "promote and protect investment" in a way that "balances the public interest and the	Whilst stated in the Preamble "**CONSCIOUS** of the need to protect and promote the rights enshrined in the Constitution", **the dti** is amenable to amending the text in Section 4(b) as suggested ie. to "***reaffirm*** *the Bill of Rights …*" By codifying national investment legislation, the Bill seeks to promote investment through the protection accorded to investors by the Bill. Public interest is a much wider concept and cannot be

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	rights and obligations of investors", while also "affirming the Republic's sovereign right to regulate investment". Coupled with other clauses in the Bill, this provision puts significantly more emphasis on the Government's regulatory powers than on the legitimate needs of foreign investors for policy certainty and an economic environment conducive to investment. Moreover, while Section 25(4) of the Constitution defines "the public interest" in fairly narrow terms, as "including the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources", the Bill suggests that the Government is seeking to give "the public interest" a much wider meaning.	limited only to land reform.
	MI: They agree with the stance to address the existing imbalance presented by BITs that curtail the right to regulate in the public interest. However, they propose an amendment to Section 4(d): *"(d)* confirm the Bill of Rights in the Constitution and the laws that apply to all investors *and their investments* in the Republic.", as this would clarify that the investment, which may receive different treatment than the investor and is differentiated between in Sections 7 and 8, is also protected as under the Constitution and other laws.	This drafting proposal may be considered.
	SAHRC: The Bill does not provide corresponding obligations to the rights given to investors. It also does not explicitly link the Bill of Rights in the Constitution with any obligations on behalf of investors. It recommends that the Bill should be revised to include specific obligations on investors to comply with the Bill of Rights and with all relevant international human rights law binding on South Africa. Such obligations should include: i) the establishment of a grievance mechanism, in line with	The Bill confirms compliance with existing legislation which requires investors to act in a particular way. These norms apply even not specifically mentioned in the Bill. i) This is a non-binding instrument, South African has not incorporated its provisions into domestic law. ii) Already covered under South African law iii) Already covered

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	Pillar 3 – " Remedy" – of the United Nations Guiding Principles on Business and Human Rights; ii) disclosure of information in line with national laws and standards, specifically the Promotion of Access to Information Act (No. 2 of 2000), in order to promote transparency and public participation; iii) protection of the rights of workers in line with the Bill of Rights, and particularly section 23; and iv) recognition of the implications of section 8 of the Constitution which provides that 'the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right'.[9]	iv) Already covered
	It is submitted that investor protections should be conditional on minimum investor responsibilities, including the obligation to respect all relevant human rights laws and standards similar to those outlined in the Southern Africa Development Community (SADC) Model BIT Template.	This is provided for under South African law, specific legislation applies and the Bill merely confirms the application of the more specific legal norms.
	Furthermore, it recommends that section 4(c) be redrafted to read: "affirm the Republic's sovereign right to regulate investments *in the public interest*". This will ensure that the purpose of the Bill is unequivocally articulated.	This proposal can be considered.
	SAPOA: The Bill of Rights cannot be "confirmed"; therefore they propose the following wording to Section 4(d): "confirm the *applicability of the* Bill of Rights in the Constitution and the laws that apply to all investors in the Republic."	Misreading of the provision, it should be read with the chapeau.

[9] Section 8 (2) of the Constitution of the Republic of South Africa, Act 108 of 1996.

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		Addressed in the AgriSA response – wording will change.
5: Application of Act	**Agri SA**: This Act applies to investments in the Republic which are subject to national legislation…" This wording makes it seems as if there could be investments that are not subject to national legislation. Agri SA recommends that the wording of this section be amended to clarify the intention. **MI**: They suggest moving sub-section 14(1) to section 5, as this appears to have permanent application. They also suggest moving away from reference to BITs as this may lead to a loophole to breach other investment-related agreements. Proposed amendment to Section 5: "**5.** *(1)* This Act applies to investments in the Republic which are subject to national legislation and made in accordance with the	The Act applies to investments made in the Republic which will be subject to other national legislations, such as the Companies Act. Furthermore, the Act will only apply to investments made in accordance with the requirements contained in Section 2 of the Act which gives a demarcation of what an investment would constitute Any existing investor protected specifically under BITs will seek a measure of comfort in respect of protection of their investments through the inclusion of the Transitional Arrangements provision. Following the expiration of the BITs protection period, all investors will be on an equal footing in terms of investment protection. Hence clause 14 should stay in the transitional section of the Bill.

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	requirements set out in section 2. *(2) Existing investments that are made under international investment agreements concluded in accordance with Section 231 of the Constitution will continue to be protected for the period and terms stipulated in the treaties.*" **SAPOA**: Investments are defined in section 2; therefore, they suggest deleting the words "and made in accordance with the requirements set out in section 2".	
6: Right of establishment	**Agri SA**: During the deliberations at Nedlac, the social partners agreed to include a definition for a right of establishment which read as follows: *"**"Right of Establishment"** means the right of an investor through an enterprise, whether incorporated or unincorporated, to conduct business activities in the Republic of South Africa*" We propose that this definition be reintroduced for the sake of providing clarity. **IRR**: The Bill makes it clear that neither current foreign investors nor prospective ones have "a right…to establish an investment in South Africa". This wording will allow the Government to veto foreign investments in agricultural land or other spheres if it so chooses. Alternatively, this wording would allow the Government to lay down damaging and unduly onerous conditions for investment, on issues such as local procurement and Black Economic Empowerment ownership. Yet South Africa is urgently in need of FDI and needs to do all within its power to retain current inflows and attract many more.	Foreign investors or prospective foreign investors do not have the automatic right to establish an investment in the Republic. All investments must be established in compliance with the laws of South Africa as enunciated throughout the Bill. The content of this provision was unanimously decided upon at NEDLAC by the three constituencies and which report emanating therefrom was signed off on by the Minister of Trade and Industry. This statement is irrational and incorrect. The right of establishment is subject to the right to regulate. Governments the world over reserve the right not to admit an investment or to set various requirements to ensure that such investment do not arm any interest that may relevant to such investments. Australia exercises this right to regulate investments in property, the USA uses national security to veto investment in infrastructure and technology sectors for example. The proposals by MI may be considered to the extent that: 1. Change title of the clause to: "Establishment"

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	MI: The Bill does not create a right to establish in the Republic, rather it addresses post-establishment obligations. Therefore they propose an amendment to the title of Section 6 to "***Establishment of foreign investments***". **SAPOA**: In view of the proposed expanded definition of "investments" in section 2 the word "made" is required as well as "established"; thus amending section 6(2) to read: "(2) All investments must be *made or* established in compliance with the laws of the Republic."	2. Reverse order of clause 6. This proposal cannot be considered since establishment has a technical meaning in international investment law, which differs from the connotation associated with the term "made". Customary international law subjects entry of aliens to the discretion of states. Admission and establishment is an aspect of market access. Protections will only start to apply once an investment is admitted and established. South African follows a post-establishment model which is predicated upon compliance with domestic law.
7: National treatment	**CFCR**: The central assurance to foreign investors in section 7(1) of the Bill is entirely contingent on the degree to which the property rights of South African investors will not be negatively affected by present or future legislation. **EU Chamber of Commerce:** The EU Chamber 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. As presently drafted, however, the EU business community has reason to have reservations about the overall utility of this section.	National treatment standard is relative standard which is assessed relative to treatment of nationals of the host country. It is typical for states to circumscribe the specific content of the national treatment standard. National treatment seeks to establish a degree of competitive equality national and foreign investors. States can apply negative list exceptions to areas where national treatment does not apply or positive list of areas where national treatment does apply. In addition several other exceptions

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	Firstly, the inclusion of the phrase "subject to national legislation" in the context of a national treatment section is curious. Quite apart from being all-encompassing, it is inherently contradictory. In general, it is not national legislation that gives content to a national treatment obligation in a BIT (or, in this case BIT-inspired) national treatment clause. In fact, subject to internal limitations, it would typically be the opposite. The EU Chamber is cognisant that there will be, in some cases, instances of legitimate differentiation by government between different categories of investor. However, in the case of the current Bill internal limitations covering these instances are contained in the "like circumstances" qualification (read with 11), which is discussed below. For its part, the wording of the "like circumstances" qualification still leaves the scope and content of the national treatment protection unclear. While interpretive guidelines have been included in the Memorandum to the Bill, it is still not immediately clear how likeness will be transposed into the context of domestic legislation or interpreted in a court of law. Even the guidelines provided in s7(2) are non-exhaustive and have been couched in broadly worded language. As we have cautioned in previous submissions, 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 applies to all investors, and does not contain any complementary absolute standards of treatment (such as a	to national treatment exist concerning areas such as public health, safety, national security etc. National treatment is a flexible standard that may accommodate "economic asymmetry" where "infant industries" or "infant entrepreneurs" may be in a disadvantageous situation in comparison to mature, economically powerful transnational corporations. The "like circumstances test" determines that if foreign investors are not "in like circumstances" in respect of South African investors, then national treatment will not be granted. This test has its origin in international investment law and has been applied in respect whether certain government measures directed to specific domestic policy objectives can be accessed by any foreign investor. For example, if a tax or rebate system is designed to stimulate the development of domestic small businesses in a particular sector (example cut flowers), it stands to reason that a multi-million dollar company that operates in the oil and gas sector cannot come and claim the same rebate or tax treatment. If the like circumstance test is applied under these circumstances, it would be apparent that the factors assist in determining whether the respective companies are in "like circumstances". For instance, are the companies in the "same sector, what is the "economic rationale" for such a measure, etc. The criteria for "like circumstances" is to ensure that a broad view is taken, rather than a narrow question of

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	form of "fair and equitable treatment" section), recourse for EU investors who perceive that they have been treated unfairly may well be limited. Overall, this skews protection in favour of domestic investors *and foreign investors* who have other avenues of recourse under BITs that are still in operation (or have been renegotiated). Lastly, they also note the addition of subsection 4 to this section (which was not in the original national treatment section of the bill). The insertion of this subsection merely reinforces the concerns discussed. **IRR**: The Investment Bill states that "foreign investors and their investments must not be treated less favourably than South African investors in like circumstances". However, this apparent promise of equal treatment is undermined by various other provisions. First, Section 7(1) subjects foreign investors to national legislation and so this promise can always be trumped by other statutes. Secondly, the Bill has a complicated definition of "like circumstances" which is generally too vague to give	whether the investors are in the same or a related or competitive sector, as evidenced in many arbitrations. In essence, it seeks to ensure a degree of competitive equality between national and foreign investors. However, the wording is more closely aligned to the Constitution, which permits measures to overcome past discrimination. National treatment provisions in BITs created a degree of uncertainty and risks to national legislation for Black Economic Empowerment, public health, and environmental and economic development, including beneficiation There is similarity in Section 7(2) and Article 17 of COMESA in respect of the criteria enlisted. Section 7(4) in the Bill is in line with UNCTD's IPFSD Policy option[10] by stipulating a reservation list. This assertion is not correct; states are always able to impose limitations to how national treatment applies to what extent national treatment is excluded. Various governments have taken similar steps to regulate access to agricultural or commercial land. Australia is a good example, while the USA uses national security as a basis to exclude admission of investments.

[10] http://investmentpolicyhub.unctad.org/Upload/Documents/PACER_4%20National%20Treatment.pdf

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	foreign investors any clarity. Also Section 7(4)(g) is disturbing, as it suggests that foreign investors can expect little protection from laws such as the Private Security Industry Regulation Amendment (PSIRA) Bill. This Bill, which has already been adopted by Parliament but still needs the President's assent, will require foreign-owned security companies to transfer 51% of their equity or assets to South Africans. PSIRA could herald the imposition of similar indigenisation requirements in other sectors, while the Bill seems intended to ensure that foreign investors will not be able to object to "indirect" expropriations of this kind. The mere possibility of this will deter the FDI South Africa so badly needs. **MI**: Sub-section 7(3) stipulates that the criteria in subparagraph (2) "shall not be limited to or be biased towards any one factor". Yet it does not specify whether the comparison should address all of these factors, or whether this is something left to the discretion of the adjudicator. If, in every case, the criteria in Section 7(3) are to be cumulative, the legal test for determining that two investments are "in like circumstances" appears to be too strict, since they do not only refer to the nature of the investment or the economic / business sector where the investments operate; some of the criteria also allude to elements of social policy; environmental considerations; or the aim of any measure relating to foreign investments. They are of the view that the test should focus on the nature of the investment or the economic / business sector and the other factors will be covered by sub-section 7(4) and section 11. Furthermore, national treatment is subject to a second test, that	Same comment as above. An overall assessment is required, the provision is very clear in this respect.

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	of whether a foreign investment has been treated less favourably than the domestic investment. This is a more objective test and involves weighing and balancing a number of regulatory considerations. In this regard, the public considerations in sub-section 7(2) can be applied. This would address any arbitrariness to the in "like circumstances" test. In addition, the Bill excludes "most-favoured nation" provisions, which would ensure that equal treatment among foreign investors in "like circumstances" are achieved. They are of the view that excluding this may be interpreted as giving South Africa indiscriminate accord to discriminate among foreign investors. Thus, creating unnecessary tensions with countries that are not beneficiaries of certain preferential treatment. *Proposed amendment to Section 7*: "***Non-Discrimination*** **7.** (1) Subject to national legislation *and any international agreement to which South Africa is or becomes a party in accordance with Section 231 of the Constitution*, foreign investors and their investments must not be treated less favourably than South African investors *and their investments, or other foreign investors and their investments,* in like circumstances. (2) For the purposes of this section, ''like circumstances'' means the requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment*, in particular the nature of the investment and the economic or business sector in which the investments are.* (3) *For purposes of subsection (1), treatment is no less favourable if any detrimental impact on foreign investments*	The Bill is not an international treaty and it would make no sense to include such a provision. The Bill further does not use nationality as a criterion to distinguish among investors. This proposal does not add any more than the current formulation.

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	stems from a legitimate distinction. (4) …" **SAHRC**: Section 7(2) alludes to a 'case' which will be reviewed. This is again made reference to in section 7(3). The Bill, however, does not provide clarity with regard to such 'cases': either who will be the party responsible for reviewing cases, nor the process when and by which the review takes place. It therefore recommends that this section be clarified to avoid any potential misinterpretation. In addition, the committee may wish to consider establishing an independent body to perform this function. **SAPOA**: They propose a textual improvement to section 7(1): "(1) Subject to national legislation, foreign investors and their investments must not be treated less favourably than South African investors *and their investments* in like circumstances." Furthermore, in terms of section 7(4), they propose the following word, as they are of the view that foreign investors will clearly have the benefit of any treatment under tax laws and the other laws referred to: "(4) Subsection (1) *must* not be interpreted in a manner that will require the Republic to extend to foreign investors and their investments the benefit of any *special* treatment, preference or privilege resulting from". **Vodacom:** It is of significant concern to Vodacom/Vodafone that sections 7(2) and 7(4) appear to depart comprehensively from the principle of national treatment that is well established in	This intervention is based on a misreading of meaning of "case". Case in this context connotes "situation" or "scenario" not a legal case If investors are not in like circumstances then national treatment does not apply. This proposal is confusing. This assertion is not correct, the like circumstances test has a basis under international investment law as well as the provisions of Article 7(4).

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	international law. Section 7(2) – the Criteria for "*Like Circumstances*" Vodacom/Vodafone is concerned with the inclusion of the factors listed at section 7(2) of the Investment Bill 2015 in determining "*like circumstances*" between foreign investors and domestic investors – a) effect of the foreign investment on the Republic, and the cumulative effects of all investments; b) sector that the foreign investment are in; c) aim of any measure relating; d) factors relating to the foreign investor or foreign investment in relation to the measures concerned; e) effect on third persons and local community; f) effect on employment; g) direct and indirect effect on the environment The rationale for taking into account these factors in determining "*like circumstances*" is not understood, nor explained by the DTI. It is wholly unclear what objective measures will be used to make an assessment of these factors, save for what is already contained in legislation which a foreign investor must in any event comply with for its specific type of enterprise. Vodacom submits that the inclusion of these factors merely adds to uncertainty when assessing what is "like circumstance" in a particular case is and therefore requests that section 7(2), including the new factors (e) to (g) be deleted from the Investment Bill 2015. Notwithstanding, if the provisions are maintained, Vodacom requests clarifications to limit the scope of the reasons why foreign investors would not be considered to be in "like	Rational already explained. This proposal is irrational and cannot be supported.

Clause	Issue raised	the dti's response
	circumstances", including – a) Clarification in subsection 7(2)(b) so that consideration is clearly limited to whether the investments are in the same sector or different sectors, it should not be intended to justify differential treatment within a sector; b) Removal or restriction of subsection 7(2)(d) which opens up a non-exhaustive list and confers a wide discretion on the decision maker, creating significant uncertainty for foreign investors; and c) Removal of subsections 7(2)(e) to (g) which do not appear to be assessed against objective criteria and are in any case covered by national legislation with which the foreign investor would be obliged to comply. Section 7(4) – Preferential Treatment Vodacom is of the view that DTI to clarify the rationale for the inclusion of the provisions in section 7(4) of the Investment Bill 2015. Vodacom submits that any preferential treatment afforded to domestic investors in terms of section 7(4) must be limited to what is prescribed by national legislation, in order to avoid any arbitrary exclusion of foreign investors from certain preferences or privileges. The current wording of section 7(4) is ambiguous and open to abuse should it not be clarified that any exclusion must be by virtue of a law of general application. Further, Vodacom submit that – a) it is important to clarify with reference to the definition of "investment" what type investment would be excluded. b) by virtue its incorporation and business in South Africa it cannot merely be excluded from accessing certain preferences or privileges in South Africa merely because Vodafone is its majority shareholder. The Portfolio	

Clause	Issue raised	the dti's response
	Committee needs to carefully consider the implication of the linkage created by the phrase ""…*foreign investors and their investments…*" in section 7(4) of the Investment Bill 2015 as it could have serious consequences for investors. Vodacom accordingly submits that the Portfolio Committee must reconsider the factors contained in section 7(2)(a)-(g) in considering "like circumstances", clarify the justification for each of the preferential treatments referred to in section 7(4)(a) to (g), constrain the application so that it clearly does not encompass domestic investors, and introduce safeguards to ensure it is only applied in accordance with national legislation. Without these amendments, sections 7(2) and 7(4) appear to be unable to fulfil the purpose of the Act as stated in section 4 and in Vodacom's view reconsideration should be given to whether they are included.	
8: Security of investment	**Agri SA**: *The Republic must accord foreign investors and their investments a level of security as may be generally provided to domestic investors, subject to available resources and capacity."* This wording is open to two possible interpretations, namely: 1. That the state will offer foreign and domestic investors the same level of security, both subject to the resources and capacity of the state; or 2. That the state will offer the level of security afforded to domestic investors to foreign investors only when there are enough resources to offer the same level of capacity. The second interpretation would create a distinct preference towards domestic investors, which would not be justifiable in the	This proposal can be considered. It should be clear that security of investment does not relate to the legal recognition and protection of an investment or any underlying right associated with it, including any procedural rights to seek recourse for infringement of such a right. Under customary international law governments must provide a minimum level of physical protection to any aliens or their asset or investment. Physical security and protection is provided by the police and this provision indicates that foreigners are entitled to the level of protection.

Clause	Issue raised	the dti's response
	context of security. Agri SA proposes that the wording should be amended so as to remove any possibility of the second interpretation. **Anglo American SA Ltd:** The Bill provides that "*investors have the right to property in terms of section 25 of the Constitution*".[11] While this is unobjectionable, it is important that it cannot be interpreted to exclude the expropriation guarantees under the SADC Protocol:	The Bill does not create such an exclusion.
	Investments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation. There are two important differences between the standards of property protection under the SADC Protocol and section 25 of the Constitution. First, expropriation under international law is not limited to direct acquisition of property by the state, but extends to *indirect or constructive* expropriation (measures that neutralise the economic value of an investment through measures other than direct state acquisition).[12] Such expansive scope is not expressed in the Constitution and in fact has been explicitly *rejected* by the Constitutional Court.[13] Accordingly, any measures *short of direct acquisition by the state would not require compensation* at all, although they may be set aside as unconstitutional if they are arbitrary (i.e. irrational or grossly	The standard of compensation has now been amended to fair and adequate compensation under the amended FIP which now aligns with section 25 of South Africa's constitution. In any event the FIP creates certain exception in respect of domestic policy space and exceptions in Articles 7 and 14. There is no contradiction since courts in South Africa have upheld market value as a core principle in the determination of compensation.

11 See clause 9 of the Bill.

12 See article 5(1) of the SA-UK BIT.

13 See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

Clause	Issue raised	the dti's response
	disproportional). Secondly, the SADC Protocol, employing the so-called "*Hull formula*" of "*prompt, adequate and effective compensation*",[14] requires compensation to amount to the market value of the expropriated investment, and to be paid at or prior to the date of expropriation.[15] The Constitution, however, requires only that the amount, time and manner of compensation be "*just and equitable*", which makes market value only one factor in the balance between the investor's interest and the public interest. The amount of compensation may thus be less than market value,[16] and it may be quantified and paid after the expropriation has already occurred. It is submitted that, as the Bill must be interpreted "*in a manner that is consistent with*" the SADC Protocol,[17] and that any court interpreting section 25 of the Bill of Rights "*must consider international law*",[18] the amount of "*just and equitable*" will necessarily be market value where a foreign investor endures expropriation. This should, however, be made much clearer in clause 9 of the Bill itself.	This statement is incorrect. This proposal may be considered.

[14] See article 5 of Annex 1 to the SADC Protocol.

[15] See generally UNCTAD, *Series on Issues in International Investment Agreements II: Expropriation* (2012); as well as *Compañía de Aguas del Aconquija SA & Vivendi Universal SA v The Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, para 8.2.10; *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Award, 6 February 2007, para 353.

[16] See, e.g., AJ van der Walt, "Reconciling the State's Duties to Promote Land Reform and to Pay 'Just and Equitable' compensation for expropriation ", 123 *SALJ* 23 (2006)

[17] See clause 3(c).

[18] See section 39 of the Constitution.

Clause	Issue raised	the dti's response
	IRR: This clause shows that, even if "like circumstances" are found to exist under the vague and complex provisions set out in Section 7, foreign investors may still have no guarantee of equal treatment with domestic ones. Instead, the "level of security" to be provided to them – a concept which is not defined, but could mean the amount of compensation to be paid to them – will also depend on the Government's "available resources and capacity". This could prove a significant limitation, as the State's resources and capacity are steadily being reduced by inefficient governance, anaemic economic growth, limited tax revenues, and rising debt. **MI**: This section is reduced to a national treatment provision by the inclusion of the phrase "generally provided to domestic investors" and not a stand-alone "security of investment" provision. As the provision is phrased as a relative protection, the phrase "subject to available resources and capacity" is confusing. This could be interpreted to mean that foreign investors would not be afforded the same level of security if the state's resources and capacity was not sufficient. Proposed amendment to Section 8: "The Republic must accord foreign investors and their investments a level of security as may be generally provided to domestic investors *and their investments. The level of security provided to all investors and their investments shall* be subject to available resources and capacity." **OPASA**: It is concerned with the expropriation of assets. Although this clause provides some protection, it moves away from guaranteeing compensation at fair market value, as	Redrafting can be considered as highlighted above. Bill protects competitive opportunity, not that investors will make a profit or return on investments.

Clause	Issue raised	the dti's response
	contained in BITs. **SAPOA**: They propose substituting the word "as" with "that". EU Chamber of Commerce: In general, the section is overly broadly worded, and does not make clear what the obligations of government are, nor make clear the nature of protections investors will be entitled to. As with other broadly worded sections, the EU Chamber is unclear what the content of this section is. The wording "subject to available resources and capacity" indicates a caveat that may have far-ranging administrative and financial ramifications. Proposal: Omit wording as it could constitute a poison pill for the intended purpose of the Bill, that is, to provide assurance and clarity. In the present version, the terms "and returns" and "equal" have been deleted. While it is not clear why this change has been effected, it would appear that this dilutes the content of this protection for foreign investors. Proposal: That the two deleted words be reinserted into the Bill. **Vodacom:** Similar to its concern regarding the omission of protection of property, Vodacom is disappointed that provisions covering restitution and compensation for investments affected by times of strife have not been included in the Investment Bill 2015. As a whole, the protections afforded to foreign investors have been significantly lessened and not always in accordance with international custom, so Vodacom would encourage the	The Bill provides for the security of investors and their investments. It seeks to clarify that the Republic bears no greater obligation to foreign investors than to its own investors in respect of their investments.

Clause	Issue raised	the dti's response
	reinsertion of such a provision. Vodacom submit that the Portfolio Committee consider the manner in which section 8 is currently phrased to ensure that it does not unintentionally create a double standard.	
9: Protection of property	**Agri SA**: Current wording: "Investors have a right to property ito Section 25 of the Constitution". We propose that the section be worded as follows to better reflect the contents of the constitutional provision for the benefit of potential investors: "*The guarantees regarding property and rights in property as articulated in section 25 (1) of the Constitution apply to all investors*". **CFCR**: Section 25 of the Constitution also provides for the expropriation of property, under a non-arbitrary law of general application, subject to compensation. The fact that the Bill makes provision for any number of unspecified regulatory measures in respect of investments possibly renders the provision arbitrary due to the vagueness of its nature. As such, the Bill may not meet the constitutional obligation to give adequate protection to property rights. **EU Chamber of Commerce:** The EU Chamber notes that section 9 of the Bill refers to the constitutional right to property -	The decision on this Section on the Protection of Property was jointly taken by **the dti** and DPW in that there will be no expansion herein save for the reference to Section 25 of the Constitution which contains sufficient details with regard to how expropriation should be effected. It is not the intention of the Bill to supersede provisions in the Expropriation Bill once promulgated. Furthermore, aligning it by way of referencing the Constitution avoids future encumbrances of legislative amendments to this Bill if the expropriation legislation is amended. There is nothing vague about this Section. Further, recalling the entire Section 25 in entirety of the Constitution in the Bill is redundant. The proposal here refers only to 25(1) The measures which may the subject of regulation are clearly outlined in section 11. Section 11 is clear in that such measures will be taken "in accordance with the Constitution and applicable legislation". Therefore there is no need to be specific with regard to such measures as the specific details of the measures will dealt with in the relevant legislation.

Clause	Issue raised	the dti's response
	without elaboration. Given the centrality of expropriation principles to an investment protection scenario and to a piece of legislation such as this one, it would have been (under normal circumstances), ideal to have more detail. For present purposes, the EU Chamber records concerns around the following issues: • as we have noted in previous submissions, the standard value of compensation in many of the BITs to which EU member states were party with South Africa was "full market value"; • the EU investor community is fully aware that the formulation in the Constitution is "fair and equitable" market value, and further that this is one in a list of considerations to be taken into account. However, there are divergent views (even among academics and property rights practitioners) on the content of constitutional jurisprudence on the matter of compensation; and • the Expropriation Bill is still the subject of intense debate, and the EU investor community notes that there remain a number of issues of contention surrounding that Bill. **IRR**: Section 25 of the Constitution is the property clause in the Bill of Rights. It, among other things, bars any "arbitrary" or irrational deprivation of property at the hands of the State. It also lays down various criteria for the expropriation of property, which must be: • "for public purposes" or "in the public interest", as defined in the Constitution; and • accompanied by "just and equitable compensation", which strikes "an equitable balance" between the public	Compensation remains at "just and equitable" in accordance with the Constitution.

Clause	Issue raised	the dti's response
	interest and the interests of those affected, and has (in the absence of agreement) been "decided or approved by a court". However, the protections in Section 25 are currently being undermined by various statutes and bills and, in particular, by the Expropriation Bill currently before Parliament. If adopted in its present form, the Expropriation Bill will apply to property of virtually every kind and will ride roughshod over the provisions of Section 25. It will expose all investors to the risk of expropriations which are unconstitutional. Therefore, this provision in the Bill will not suffice to reassure either domestic or foreign investors that their property rights will be adequately upheld. In addition, even if the Expropriation Bill is amended to comply with the Constitution, the protections in Section 25 will still be less than those provided by the bilateral investment treaties South Africa is busy terminating. These treaties require compensation on expropriation to be "prompt, adequate, and effective". This formula requires the payment of market value at minimum, whereas Section 25(3) of the Constitution allows market value to be reduced by the "current use" of the property, the "history of its acquisition and use", "the purpose of the expropriation", and the extent to which the State has previously funded the purchase or capital improvement of the property. Investors are thus likely to receive significantly less than the market value of their investments: perhaps only 60% of that value. This is a major difference from the comprehensive compensation currently available to foreign investors under the bilateral investment treaties.	The Constitution remains the supreme law of the land. It is premature to state that a Bill intends to displace the Constitution. Non-renewed BITs will continue to prevail until expiration of the survival provisions. The terms in the BITs are binding, thus the compensation standards contained therein will be of effect

Clause	Issue raised	the dti's response
	In addition, the Bill allows the "level of security" provided to foreign investors to be reduced in line with the State's "available resources and capacity". This could allow the State to argue that its resources are too limited for it to pay even 60% of market value to the foreign investors whose properties it has expropriated. Also important is the timing of compensation payments. Bilateral investment treaties require "prompt" payment, but the Bill, read together with the Expropriation Bill, could allow the Government to delay payment until well after it has taken ownership and possession of the properties in issue. This prospect is also likely to deter fresh FDI.	
	MI: Proposed amendment to Section 9 to make it consistent with sections 3(c) and 14(1) and Section 233 of the Constitution: "Investors have the right to property in terms of Section 25 of the Constitution *or any applicable international agreement to which South Africa is a party at the time the investment is made*."	The Constitution is specific on compensation – Government is bound by this prescript. The comment is speculative in nature.
	Vodacom: Vodacom reiterates its submissions to DTI of the importance of having an expropriation provision in the Investment Bill 2015 which provides for compensation at a "market-related compensation" or "genuine value of the investment" for expropriation measure of foreign investor's investment in South Africa, subject to such measures of the state being for public purpose, non-discriminatory and following due process. The protection afforded to foreign investors in terms of section	This will be repetitive in nature as Section 14(1) states that "….. continue to be protected for the period and terms stipulated in the treaties". Thus the terms of BITs will be of full force and effect.

Clause	Issue raised	the dti's response
	25 of the Constitution in the event of expropriation by the state does not accord to the practice in international investment law to afford foreign investors compensation at fair market value, as opposed to merely just and equitable compensation where market value is merely one of the factors to be taken into account. The payment of fair market value to foreign investors for expropriation is also in line with the SADC Protocol in Finance and Investment and the Investment Agreement of the Common Market for Eastern and Southern Africa to which South Africa is a party too. Vodacom proposes that the Bill should be brought in line with the broader international approach and South Africa's commitments in terms of the SADC Protocol in Finance and Investment and the Investment Agreement of the Common Market for Eastern and Southern Africa. Vodacom accordingly submits that the Portfolio Committee must re-consider the inclusion of a provision which provides for "market-related" compensation for foreign investors expropriated by the South Africa state with no regard to the "just and equitable" principles.	The standard of compensation has now been amended to fair and adequate compensation under the amended FIP which aligns to Section 25 of the Constitution. This will be inconsistent with the Constitution.
10: Transfer of funds	**CALS:** 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. CALS therefore recommends that the Committee heed the African Commission's call by amending the wording of section	It is not the intention of this Bill to prescribe on tax matters associated with the concept of Transfer of Funds. This provision reflects the fact that while South Africa has a liberal transfer regime, there are specific limitations in terms of the applicable legislation. The fact that such

Clause	Issue raised	the dti's response
	10 to the following effect: Proposal: 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 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) trade mis-invoicing; and*** ***(iii) abusive transfer pricing"*** **IRR**: Foreign investors need an assurance that they will be able to repatriate both the capital they have invested and the income it has yielded. Such income (or "returns") includes any "profits, interest, dividends, capital gains, fees, and royalties" that the investor may have garnered. However, the Bill gives foreign investors no right to repatriate either capital or returns. All it says is that "a foreign investor may, in respect of any investment, transfer funds, subject to taxation and other applicable legislation". This provision is too vague and open-ended to give foreign investors the assurances they need; and is likely in itself to become a major impediment to future FDI. **OPASA**: The term funds should be more clearly delineated, i.e. BITs guarantee repatriation of "returns" including profits, interest, dividend, capital gains, fees and royalties. **Vodacom:** As noted in Vodacom's previous submission, an	limitations are not present in BITs creates an inconsistency with South Africa's foreign payment regime. Line function legislation contain all the norms that apply to transfer of funds and need not specifically be mentioned here. This assertion is not correct since the right to transfer funds is unequivocal.

Clause	Issue raised	the dti's response
	amendment to section 10 of the Investment Bill 2015 would provide foreign investors with certainty with regards to return on investment, as follows: "A foreign investor may, in respect of an investment and returns on investment, transfer funds subject to taxation and other applicable legislation."	
11: Right to regulate	**CFCR**: The measures provided for by this section are unspecified and are presented as a set of goals without any apparent limit. This provision is vague and fails to lend guidance in the exercise of these powers. In the absence of precise wording, the wide powers which are made available to any organs of state may be open to abuse. Moreover, certain matters related to maintaining international peace and security are specifically regulated by the Constitution – for instance how the security services may be employed. This section appears to have no regard for those relevant constitutional provisions. These wide powers may contravene the doctrine of vagueness, which requires that laws be clear and accessible. Furthermore, the right of the State to regulate in terms of section 11 is reconcilable with the ostensible purposes of the Bill to protect and promote investment only insofar as it will not result in any dilution of the property rights of investors or their ability to conduct their business without unreasonable interference. **EU Chamber of Commerce:** 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	This article confirms that the treaty does not alter the Host State's basic right to regulate. The right to regulate is a basic attribute of sovereignty under international law. This Section should be read with the more specific articles such as national treatment and the protection of property. All of these provisions are intended to work together. Given the wide scope of obligations in BITs, it is useful to reaffirm the Host State's right to regulate investments in the public interest.[19] South African experience include challenges by investors against measures directed as affirmative action, corrective measures to address injustices of the past, Broad based black economic empowerment legislation, challenges by mining companies against developmental aspects of the MPRDA, public health measures to address access to critical medicines, DOH intends introducing regulations in respect of plain packaging and it is widely expected that these measures will be challenged in terms of various BITs that the Republic has signed. Internationally, measures subject to challenge by investors have included measures imposing and attempting to collect taxes; measures changing domestic fiscal policy; decisions regarding whether to grant development permits; government bans on harmful chemicals; bans on mining;

[19] SADC Model BIT Commentary

Clause	Issue raised	the dti's response
	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 obligations. 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. Indeed, in adding the following terms in s11(1) (which were not in its original version), the Bill has made the exceptions even more expansive and open-ended, which has only served to magnify the Chamber's initial concerns: • "notwithstanding anything to the contrary in this Act"; • "and applicable legislation"; • "which may include". **FSB**: An explicit reference to financial regulation in subsection 11(2) be made in relation to financial stability, where this covers regulatory decisions aimed at protecting financial customers and the integrity of the financial system. **IRR**: BITs generally include guarantees of "fair and equitable" treatment for foreign investors. This provision allows the investors covered by these treaties to seek compensation for vague and damaging regulation that are in breach of this	environmental restrictions on the manner in which mining can take place; environmental regulations, requirements for environmental impact assessments; regulations regarding transport and disposal of hazardous waste; regulations governing health insurance; measures aiming to reduce smoking; measures affecting the price and delivery of water; regulations aiming to improve the economic situation of minority populations; and measures aiming to increase revenues gained from production and export of natural resources. " security interests" is an all encompassing term to include amongst others, financial stability. It may be necessary that there are other measures that the Government (or organ of state) may take for the protection of security interests, not necessarily financially related. This proposal is not feasible and cannot be considered.

Clause	Issue raised	the dti's response
	guarantee. However, the Bill puts its emphasis on the Government's "right to regulate" in pursuit of various policy objectives, such as historical socio-economic redress; economic development, industrialisation, and beneficiation; environmental protection; protection of security interests, including the financial stability, of the country; and fulfilling the Republic's obligations regarding the maintenance or restoration of international peace and security. These provisions are so wide-ranging and open-ended that their full ramifications cannot be predicted. What is clear, however, is the sweeping mandate they give the Government to adopt the Expropriation Bill and various other measures that will severely limit the property rights of both domestic and foreign investors. These laws are being enacted in the supposed interests of "redress", but in fact they will hobble the economy and hurt the previously disadvantaged. **SAPOA**: They propose substituting the word "Notwithstanding" with "Despite" in sub-section 11(1). **Vodacom:** Vodacom is of the view that section 11 of the Investment Bill 2015 does not need to be included as part of the Act as it merely restates the authority South Africa may exercise as a sovereign state within the bounds of its Constitution. Vodacom therefore requests that section 11 of the Investment Bill 2015 be removed to avoid any ambiguity as to its effect. In the case that section 11 remains to be included, Vodacom requests that in the interests of legal certainty, the wording of section 11(2) be amended to incorporate a reference to the Constitution and applicable legislation as has been done in	Discussed above.

Clause	Issue raised	the dti's response
	section 11(1), i.e.: *"The government or any organ of the state may, in accordance with the Constitution and applicable legislation, take measures that are necessary…"* **WCG**: While it is acknowledged that the regulation of FDI in South Africa is an important aspect and should be dealt with in the Bill, in its current form, the clause portrays itself as a potential barrier to a possible investor that may become a reason not to invest in South Africa. As such, the clause is in no way linked to the stated objective of promoting investment into South Africa. Clause 11 must be revised so as to draw a balance between the need to regulate and the need to promote South Africa as a destination of choice for investment.	
12: Dispute resolution	**Agri SA**: Propose that the discretion afforded by the word "may" in sub-clauses (2) and (3) be removed and replaced with "must", coupled to a specified timeframe. As such, the sub-clauses should read: "(2) The Minister **[may]** must prescribe criteria for the appointment of a mediator within 3 months of this Act coming into effect. (3) In order to facilitate the resolution of a dispute contemplated in subsection (1), The Minister must prescribe the information and forms to be submitted by an investor within 3 months of this Act coming into effect." Agri SA does not believe that access to international arbitration should be subject to the consent of government. They of the view that an investor should be permitted to defer	The fundamental insertion since the previous iteration of the Bill is the option for international arbitration via the state-to-state mechanism where the Government of South Africa may consent to such arbitration with the home state of the investor after the investor has exhausted domestic remedies. In general, consent to arbitration through national investment legislations constitutes an offer made to the foreign investment community as a whole. When an investment treaty (eg, a BIT) or an investment contract explicitly allows for recourse to investment arbitration, only then does this supersede settlement by domestic courts. In South Africa's instance, this is applicable to existing investments that are still currently protected under the survival clauses of terminated BITs or BITs that have not yet reached their termination dates. The Bill contains no provisions in respect of investor-state arbitration and limits dispute resolution to domestic

Clause	Issue raised	the dti's response
	the matter to international arbitration in the first instance if it is expedient to do so. **Anglo American SA Ltd:** The Bill's definition of "*dispute*" limits it to a claim by an investor that the state has allegedly breached "*the protection provided for in this Act*". Inexplicably, this is limited further by the proviso that "*a dispute will only arise once the parties agree, or as prescribed by the law*", which does not make legal sense. It is not apparent why any specific definition is required (there is no definition of "*dispute*" in either the SADC Protocol or the SADC Model BIT), and thus it may safely be omitted. The Bill provides that "*the government may consent to international arbitration… with the home state of the applicable investor*". This is, at best, superfluous, as *state-state* arbitration has always been available in customary international law, as an incident of diplomatic protection. By excluding *investor-state* international arbitration, the Bill defeats the defining feature of international investment law, for the reasons set out in detail above. Under the SADC Protocol, a foreign investor may refer any investment dispute against South Africa to international arbitration under the rules of ICSID or the United Nations Commission on International Trade Law ("**UNCITRAL**"), if all available domestic remedies have first been exhausted.[20] South	remedies and subject to exhaustion of such remedies, state-to-state arbitration may ensue. Investor-state arbitration allows for private individuals to make claims against foreign states. The result of the international arbitration cases has in most cases been in favour of the investor and to the detriment of the host country. There has been much controversy around such arbitrations and the decisions taken which has resulted in divergent or even conflicting outcomes in similar cases. It should be noted that the high number of international arbitration cases initiated against governments remain a significant feature of the international landscape. South Africa's policy space and the implementation of its developmental policies will be put at great risk if such arbitration is allowed. Any measure that is introduced to develop the economy and to carry out the very large mandate of radical transformation will be subject to legal challenge through international arbitration even if exhaustion of local remedies is required. The dynamics in a state-to-state dispute will be significantly different from the outset, because states are presumably less likely to challenge certain types of regulatory measures, or make certain types of legal arguments that could be brought against them in the future. [21] States have, under customary international law, a right to make claims for damages suffered by their citizens or

[20] See article 28(1) of Annex 1 to the SADC Protocol: "*Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.*"

Clause	Issue raised	the dti's response
	Africa is thus *obliged* to submit to investor-state international arbitration in such circumstances. This is contradicted by the Bill's provision that South Africa "*may consent*" to state-state arbitration only. In this respect, the Bill's premise - that foreign investment disputes are *capable* of being confined to domestic legal and judicial systems - is not only inconsistent with international investment law but indeed incompatible with South Africa's own constitutional architecture. In South Africa, as in most, if not all, other domestic jurisdictions, public control of regulatory authority is primarily *political* (exerted by citizenry over the legislature and, in turn, by the legislature over the executive), rather than judicial. The role of the courts in restraining or rectifying the errant exercise of regulatory power by executive and legislative authorities is delimited by the doctrine of the separation of powers. The courts cannot trench on the powers of the executive and legislative arms of government unless the latter have acted irrationally, or have unreasonably or unjustifiably limited constitutional rights. Courts are particularly reluctant to assume authority over the "*policy-laden and polycentric*" decisions that fall within the expertise and experience of executive and	businesses due to breaches of international law by a State. The provisions allowing for a State Party to make a claim on behalf of an investor here reflects a concrete application of this customary law right.[22] **SADC FIP:** With regard to the FIP, certain provisions of the dispute settlement process have been amended. Reference to international arbitration has now been excluded but member states must give investors the right of access to courts, tribunals in line with relevant host states domestic laws in their respective jurisdictions.

[21] State–State Dispute Settlement in Investment Treaties , October 2014 , Author:Nathalie Bernasconi-Osterwalder

Other Sources:
Ministerial briefing on "*Investment arbitration under domestic laws: Patterns of design, options and legal consequences*" Author: Prof Mustaqeem de Gama

[22] SADC Model BIT

Clause	Issue raised	the dti's response
	legislative functionaries. Typically, this description would apply to major executive and legislative decisions about the economic direction of the country and related regulatory interventions in industry. Thus the Constitutional Court has held that "*the power to formulate and implement domestic and international trade policy resides in the heartland of national executive authority*"; that "*courts are not well suited to judge international trade policy and related polycentric decisions properly suited to specialist bodies*"; and that they "*may not without justification trench upon the polycentric policy terrain of international trade and its concomitant foreign relations or diplomatic considerations reserved by the constitution for the national executive*". Accordingly, the Bill's assumption that investor-state disputes could, let alone should, be dealt with by domestic courts is misconceived. The doctrine of the separation of powers precludes the courts from second-guessing the substance of regulatory decisions, which would exclude many, if not most, investor-state disputes from substantive judicial protection. The Bill's proposed scheme of limiting foreign investors to the domestic judicature would thus place South Africa's courts in the invidious (and constitutionally inappropriate) position of entering the realm of economic and foreign policy. It is submitted that this clause in the Bill would impose an intolerable strain on the separation of powers, and is thus incompatible with our constitutional scheme, as well as inconsistent with the SADC Protocol.	Direct access to international arbitration is indicative of a blatant disregard for the SA's legal system, hence

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	BASA: Proposal: We recommend that for subsection 12(1) the wording: "***provided that a dispute will only arise once the parties agree, or as prescribed by the law;"*** included in the definition of "***dispute***" must be deleted in its entirety. BASA recommends that for subsection 12(5) the wording is amended to read as follows: "*12(5) The government may consent to international arbitration in respect of investments covered by this Act, without the need for the exhaustion of domestic remedies. Such arbitration will be conducted between the Republic and the home state of the applicable investor.* **CALS:** CALS recommends that section 12 be amended to the following effect: 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*** **CFCR**: The provision for international arbitration in subsection 12(5) appears to fall short of international requirements and the protection granted in most BITs insofar as it is conditional on a decision by the Minister and would be limited to arbitration "*between the Republic and the home state of the applicable investor.*"	undermining the judiciary. The domestic mechanism affords SA the opportunity to build capacity whilst ensuring that the country's policy space is preserved further to understanding of the measures the Government is desirous of implementing. This drafting proposal can be considered. The forum head mentioned here would be the arbitration forum head.

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	EU Chamber of Commerce: In our original submission to the Department, we expressed particular concern regarding the exclusion of international investor-state dispute settlement from the Bill. In itself, this has generated a negative signal to some from within the EU investor community. The EU Chamber's submission argued that as the Bill already seemed to favour a local remedies requirement, it would be the case that recourse would be had to domestic legal processes. The Chamber, therefore, expressed the view that international arbitration should be completely written-out, if the conditions for such recourse were appropriately ring-fenced. We note that the Department has introduced a concession in the form of state-state dispute settlement. Section 12(4): It is not clear why the qualification "subject to applicable legislation" has been added here. In our view, what this section was intended to relay is that investors "*are not precluded*" by anything in the Bill from pursing litigation in the courts or from referring a matter for review (or similar). And the applicable legislation, in this case, for claims under the Bill is the Bill itself. Proposal: Replace current wording with wording from the original version of the Bill: "Subsection (1) does not preclude an investor from approaching any court, competent, independent tribunal or statutory body for the resolution of a dispute relating to an investment" *Mediation:* In the current version of the Bill, dispute settlement options such as mediation and arbitration, are supported in so far as they are	**"applicable legislation"** would mean legislation that would assist in, amongst others, dispute settlement. By way of example, the Arbitration Act of SA, also considering whether the investment was made in accordance with SA laws. These are a few applicable legislations to name.

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	suited to commercial exigencies. The EU Chamber, however, infers from the wording of s12(1) that the Bill is non-committal on the issue of mediation. Under the current wording of ss12(1) and 12(2); the Department can decline to accede to the request for mediation by an investor; and the Minister can also elect to not define criteria for the appointment of mediators. *Arbitration:* The EU business community notes that the Bill has introduced recourse to international arbitration, in the form of state-state arbitration, into the Bill. We would like to preface our comments on this section by indicating that state-state arbitration has certain diplomatic aspects, in respect to which we would not be in a position to fully comment. The section represents a codification of the customary international law right of home states to make claims, for damages suffered, on behalf of an investors. But it is not entirely clear how this will be given effect to, given that there is no specific legislative arrangement governing international arbitration of this nature in South Africa. Also, South Africa does not have pre-existing agreements with all investor home states consenting to submit claims to arbitration. It is presumed that an updated arbitral law would clarify some of these concrete aspects of application of this section and answer some of these questions. Only then can the practical utility of this section become clear With the presently available information, the EU Chamber	Indeed, there is no legislation in place that governs international arbitration. The International Arbitration Bill has been developed by the Dept of Justice but the focus of this Bill is on commercial disputes. If and when a dispute warrants for international arbitration, the parties to the dispute can elect on the arbitration rules that will be applied by the tribunal to the dispute. Amongst others, a tribunal can utilize the ICSID arbitration rules, which are fully accessible at any time to the public, without having to utilize the ICSID process if it does not wish to. Similarly, the UNCITRAL arbitration rules can be adopted, or any other rules.

Clause	Issue raised	the dti's response
	makes the observation that: • Because it is state-state arbitration, the investor would have to lobby its own (home state) government to institute a claim. It is not guaranteed that the home state government will agree to embark on the arbitration; and • As the use of the word "may" in s12(5) suggests the process, from the side of the South African government, is voluntary to begin with; • Presumably, issues around: how consent to arbitration occurs; which arbitration centre will be designated; the procedures and rules that will be followed; and which arbitration rules will apply, will all be given effect to in new legislation. **FSB**: The FSB has dispute resolution mechanisms and more will be established through the Financial Services Board Bill once enacted. Therefore, the application of the dispute resolution mechanism should be limited to instances where no alternative dispute resolution mechanism is available to aggrieved persons. **IRR**: Under South Africa's BITs, the power to adjudicate disputes lies with international arbitrators who are unlikely to be swayed by domestic political considerations. By contrast, the Bill requires an aggrieved foreign investor to get the Government to agree that "a dispute has arisen", and then either: • request the DTI (or any other competent authority) to "facilitate the resolution of the dispute by appointing a mediator or other competent body; or • "approach any competent court, independent tribunal, or statutory body within the Republic" for the resolution of	According to the FSB, certain state institutions already have in-built dispute resolution process as such section 12 may create a loophole for aggrieved investors to avoid exhausting such procedures before they approach **the dti** Minister to facilitate the resolution of the dispute. Perhaps an addition of the words "subject to applicable legislation" may cure this defect.

Clause	Issue raised	the dti's response
	the dispute. Only after domestic remedies have been exhausted, may the dispute be referred to international arbitration – and then only if the Government gives its "consent" to such a step. In addition, any such arbitration will take place solely "between the Republic and the home state of the applicable investor". The Bill thus makes provision only for a "state-to state" form of arbitration, which excludes the participation of the affected investor and requires that investor to persuade his own government to take up his dispute with the South African State. This is out of line with the global trend towards the internationalisation of investment protection. It also overlooks the fact that international arbitration "provides investors with increased certainty and contributes to investor confidence" [*Business Day* 28 October 2013, 6 August 2015], as foreign investors have a greater degree of comfort that they will receive equal treatment and, importantly, privacy. Although South African courts do generally function well in commercial matters and have a significant degree of institutional independence, the Bench has also been weakened by a number of poor appointments since 1994. These have eroded business confidence in the capacity of the high courts to decide complex commercial cases, while there has always been limited commercial experience within the Constitutional Court. In addition, the alleged political interference within the Judiciary, if successful, could undermine its autonomy. Moreover, some of the rulings of the Constitutional Court on contentious political or "transformation" issues have clearly been executive-minded.	

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	The Bill's alternative option – that foreign investors may ask the DTI or any other authority to refer a dispute to mediation – is also far from satisfactory. This is compounded by the fact that the Minister will be able to prescribe both the "criteria for the appointment of a mediator" and "the information…to be submitted by the investor". These provisions give the Minister a broad discretion over matters which should be set down in the statute, not left to political decision-making on a case-by-case basis. **MI**: In terms of mediation (sub-section 12(1)), there are no time periods within which the DTI can initiate the process of facilitating the dispute resolution. Similarly, the auxiliary verb "may" should be replace with "should" or "shall" in order to generate a more forthcoming response from the Minister in sub-section 12(2). Without these amendments, sub-section 12(1) currently gives full discretion to the authority to engage with the aggrieved investor or disregard the request for mediation at all. This seeks to create more accountability on the part of Government by implementing time limits and an obligation to engage with a view to finding a mutually agreed solution. The verb "seek" should also be inserted, as the parties may not, through mediation, reach a solution. With respect to international arbitration, sub-section 12(5) constitutes a departure from the practice in international investment law where disputes usually take place between individual foreign investors and the government of the host country. Investor-state dispute settlement ("ISDS") has however sparked a great deal of criticism over the last decade because it	

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	is believed that foreign investors are afforded the right to challenge legitimate policies put in place by the host country. This can be improved by: • Making reference to what applicable law will guide this form of international arbitration and similarly, this affects what will be the choice of forum for such international arbitration. This may be the international arbitral tribunal; the relevant international investment treaty; or both. If the international arbitral tribunal is called upon to pass on the interpretation and application of the Bill, Section 3 enjoins to interpret the Bill in accordance with the Constitution. Will the international arbitral tribunal interpret the Bill having regard to the Constitution? This may create an oddity. The use of the BIT international arbitration mechanism may be more appropriate. • Introducing a mechanism whereby a South African investor could prompt Government to initiate arbitration proceedings when some of the standards of investment protection have been violated in another country. The obligation for Government would be to accord sympathetic consideration to this request and motivate a negative response. Government may decline the request on a number of grounds such as, the lack of merit in the alleged claim; the relative importance of the investment; and the particular legal, political and economic relations between South Africa and the country concerned. The administrative mechanism we propose would not bind Government to institute proceedings but would require it to provide a reasoned explanation as to why it is not pursuing the protection of a South African investor/investment abroad. This will provide	

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	investors with some certainty regarding the available options for dispute resolution where domestic remedies have been exhausted without satisfaction for disputing investors. Proposed amendments to Section 12: "(1) An investor that has a dispute in respect of action taken by the government, which action affected an investment of such foreign investor, may within six months of becoming aware of the dispute request the Department or any other competent authority to facilitate the resolution of such dispute by appointing a mediator or other competent body. *(2) The Department or any other competent authority shall, within XX months from the filing of a request, appoint a mediator or other competent body and shall, at all times, seek to find a mutually agreed solution.* (3) The Minister *shall / should* prescribe criteria for the appointment of a mediator *and the conduct of the mediation*. … (5) The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. Such arbitration will be conducted between the Republic and the home state of the applicable investor, *and shall concern the interpretation and application of the relevant investment agreement governing the relations between the Republic and the state concerned*. *(6) A domestic investor who has been aggrieved by a measure taken by another state in a manner inconsistent with an international investment agreement in force between that state and the Republic, may request the Department to initiate consultations and, if necessary, international arbitration against such a state in order to resolve the dispute.*	

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	(7) If the Department declines the request, it shall explain the reasons therefor. If the Department accepts to initiate international arbitration, the costs and expenses in relation to such proceedings must be borne by the investor concerned. *(8) The Minister shall / should develop guidelines governing the circumstances and the procedure under which an investor can request the Department to initiate state-to-state international arbitration.*" **NUMSA: T**he draft Bill does not address the fact that the Finance and Investment Protocol (FIP) of the Southern African Development Community (SADC), an agreement to which South Africa is party, allows foreign investors who have invested in the SADC region (including South Africa) to take investment-related disputes against a party to the agreement to international arbitration. In practice, this might mean that South Africa's cancellation of its BITs has not actually foreclosed the possibility of foreign investors taking South Africa to international arbitration. Given that such a loophole exists, then the provisions of the *Bill* to settle investment disputes internally through domestic remedies could well be redundant since foreign investors can still have recourse to international arbitration by simply exercising their rights afforded in the FIP agreement. Proposal: That all disputes are resolved in the legal process available in South Africa. **OPASA**: Clause 12(5) – the requirement to exhaust domestic remedies before the South African government consents to	It is indeed correct that until the survival provisions of BITs cease to exist, that investors are able to embark on legal challenges via the investor-state mechanism. Upon expiration of this period, all investors will be subjected to the local courts for dispute resolution, prior to advancing to international arbitration.

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	international arbitration is not useful, as this right is subject to being instituted by the investor's home state. Petroleum companies tend to want to reduce the "above-ground" risk and consider recourse to an impartial international tribunal in contractual disputes, an essential way to achieve this. **SAHRC**: It supports the establishment of a national mechanism as indicated. This will ensure that justice is brought close to home to those negatively affected by investment agreements. However, it makes the following recommendations to strengthen the dispute resolution process in line with regionally and internationally established best practice: • Given that the state will be a party in most investment disputes, the provisions of this section are not extensive enough to ensure effective separation of powers and independent review of disputes. Therefore, an independent oversight body to review matters, ensure transparency (taking into account legitimate confidentiality requirements), as well as compliance with the Constitution and all relevant international human rights laws and standards binding on South Africa should be established. • The inclusion of provisions for public participation and the submission of complaints by civil society and local communities who are aggrieved by the actions of investors. By doing so, the Bill would be in line with national, regional and international human rights standards. • The Bill be revised to include provisions relating to the establishment of an independent oversight body. This body would be tasked with monitoring the implementation of the Bill (and ensuing regulations), as well as exercising	The Minister may make regulations for the matters relating to disputes as stated in the Bill. Albeit not independent and not able to intervene from a legal standpoint, the Inter-Ministerial Committee will be appraised of disputes. The oversight body as suggested would not be beneficial for such a purpose given that upon the dispute escalating to domestic courts, the matter will start anew. The *amicus curiae* procedure is gradually entrenching itself as part of judicial and legal practice. Human rights

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	oversight over the proceedings of investment disputes. A human rights expert should form part of this body in order to ensure compliance with national and international human rights laws and standards, including transparency. **SAPOA**: In sub-section 12(4), they propose deleting the phrase ", upon becoming aware of a dispute as referred to in subsection (1),". **Vodacom:** Vodacom recognises that governments are encouraging alternative dispute resolution (ADR) with foreign investors. However, Vodacom has a number of concerns with the provisions of section 12 of the Investment Bill 2015 relating to ADR as well as fundamental concerns regarding the effectiveness of the arbitration provisions. These are; a) In respect of mediation proceedings to resolve a dispute with a foreign investor, the criteria for the appointment of a mediator must be by mutual consent by both the investor and the state. As such the criteria for the appoint of a mediator cannot be reserved to the Minister of Trade and Industry, as it will take away from the essence of mediation and not provide the necessary comfort to a foreign investor. b) The Investment Bill 2015 essentially removes any right of a foreign investor to arbitration or international arbitration against the state as the remedies for a foreign investor is now limited to the following – i. mediation or conciliation process with the host government; ii. domestic courts and/or tribunals; iii. International arbitration between South Africa and the	activists and advocates using this procedure in both domestic and international courts as a tool for influencing the outcomes of judicial proceedings. The procedure is used to ensure that courts are responsive to the human rights needs of vulnerable and marginalised groups and individuals. South Africa has adopted the procedure by entrenching it in its procedural laws and embracing it as part of judicial practice. Many organisations in South Africa have taken advantage of this by making timely, well researched and invaluable interventions. This has contributed a lot to the development of the now envied South African human rights judicial jurisprudence. Thus public participation can be ensured by way of *amicus curiae* representation. Vodacom: Addressed in aforegoing comments for this provision.

Clause	Issue raised	the dti's response
	home state of the foreign investor (thus only State-to-State arbitration), subject to the pre-requirement that – a. The exhaustion of domestic remedies without any limitation. b. Consent by the South Africa government. In respect of the restriction of foreign investor's recourse to international arbitration, Vodacom submit the following – a) The removal of direct access to international arbitration for foreign investors is a fundamental departure from the protection that such foreign investors would expect when considering whether to invest significant capital. Vodacom submit that international arbitrations cannot merely be limited to State-to-State arbitrations, as in certain instances state will not initiate arbitrations on behalf of its investor due to a variety of reasons, despite the fact that the investor may be commercially prejudiced. Vodacom submits that there should be specific provision for Investor-and-State arbitration and not merely State-to-State arbitrations. b) Vodacom considers that time-limits need to be imposed within which a disputes must be resolved failing which the foreign investor could proceed with the initiation of arbitration process. c) Vodacom is concerned that the proposal that express consent will be required to proceed to international arbitration, even when local remedies have been exhausted, could render this important safeguard for investors unworkable. The requirement to obtain consent should be removed in order to make arbitration a credible recourse for investors whose rights under the Act have been breached.	

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	Vodacom accordingly submits that the Portfolio Committee must have specific regard to how certain aspects of the disputes resolution provision will be reworded to ensure sufficient protection is provided to foreign investors in order to promote foreign investment. Vodacom accordingly submits that the Portfolio Committee must have specific regard to how certain aspects of the disputes resolution provision will be reworded to ensure sufficient protection is provided to foreign investors in order to promote foreign investment. **WCG**: Subsection 12(1): The attempt is laudable to introduce the concept of mediation within the arena of FDI disputes, especially insofar as mediation is recognized internationally as a mechanism through which protracted disputes can be effectively resolved. However, a generic clause on mediation does not appear to be suitable given the specific nature of the subject. This clause needs to be much more comprehensive. Subsection 12(2): The Minister's discretion to make regulations in respect of the criteria for the appointment of a mediator or competent authority for the resolution of a dispute must be clarified in terms of what the criteria should cover; e.g. the criteria for a dispute to be triggered and/or the requirements for a person or body to be appointed as a mediator. Subsection 12(5): The reference to an investor being able to refer a dispute to arbitration in terms of the Arbitration Act, 1965 (Act 42 of 1965) has been omitted in the current version. The new provision subsection 12(5) provides that the government may, subject to the exhaustion of domestic remedies, consent to international arbitration in respect of investments covered by the	

Clause	Issue raised	the dti's response
	Act, to be conducted between the Republic and the home state of the applicable investor. It is, however, unclear what mechanisms and procedures will govern the arbitration. What body will conduct the arbitration and what rules will apply? What is intended by *"the exhaustion of domestic remedies"*? Subsection 12(4): It is difficult to make sense of this clause in light of the definition of "dispute" quoted above. Is it the intention that an investor may only approach a Court (or other stated body) provided that the government agrees, or if permitted by regulations? If so, this appears to impermissibly infringe the right of access to courts as provided for in section 34 of the Constitution. It also appears from this clause that the investor may act independently of the home state. If so, this is contrary to clause 12(5). Furthermore, it is not entirely clear whether it is the intention that arbitration will be compulsory or optional. It appears likely, however, from the wording of clauses 12(4) and (5) that it is the intention that arbitration will only take place with the consent of the government. If this is the case it is unlikely to offer sufficient reassurance to investors who will face the possibility of a dispute being subject to the jurisdiction of an unfamiliar foreign court. The clauses governing mediation and arbitration must be revised to clearly set out the detail of the procedures which will apply and to take account of the issues set out above.	The different legal options are available to the investor which the investor can elect: mediation, domestic courts / independent tribunal / statutory bodies prior to international arbitration.

Clause	Issue raised	the dti's response
13: Regulations	**EU Chamber of Commerce:** It appears that it is peremptory for the Minister to issue regulations under sections 12(3) and s13(2) while, under sections 12(2) and 13(1) it is not. We are not sure why this distinction has been made. We further note that this represents a *change* from the original Bill (from "must" to "may"), which had directed the Minister to issue regulations, under each of all these subsections. The EU Chamber would, nevertheless, like to make some comments in that regard: • We are, in any case, of the view that the default should be that mediation should be available, particularly because it is an effort at dispute avoidance. • It is our view that, where a party is, for good cause, unwilling or unable to submit to mediation, the regulations should be able to make provision for this. • Even if is mediation is not considered mandatory, we do not support the defining the criteria for the appointment of a mediator of the rules and procedures governing mediation should be optional. o the rules and procedures must exist so that they govern it when it does take place. Furthermore, the general investor community would need to know the full gamut rules and procedures are in case they should need to take the route in the future. The rules and procedures, and criteria for the appointment of	Regulations enlisted in the Bill serves to empower the Minister who may make regulations to address various aspects covered by the Bill. The Minister is obliged to pass regulations within one year from date of promulgation of the Act. Thus the full range of matters to be regulated on will be gazetted within this time frame, thus making it precise.

Clause	Issue raised	the dti's response
	the mediators would, in any case, be standard ones that would apply to every case. **SAPOA**: They are of the view that there is no reason to separate 12(1) and 12(3) in the way regulations are referred to. They propose moving sub-section 13(2) to form part of the list of items the Minister may make regulations on.	
14: Transitional arrangements	**IRR**: The Bill confirms the "sunset" clauses in the BITs the Government has terminated (or plans still to end). Such clauses are supposed to protect existing investments for specified periods – generally between ten and 20 years – after the termination of the relevant treaties. It also continues protection for investments under existing BITs. Investments "made after the termination of such treaties" will be governed either by "the general South African law" or by its own provisions. However, these provisions will not suffice to restore investor confidence or encourage fresh FDI. **MI**: Proposed amendment to replace Section 14: "Any investments made after the termination of *any Bilateral Investment Treaties*, but before promulgation of this Act, will be governed by the general South African law." **NUMSA:** The transitional arrangements do not adequately explain how BITS will coexist with the *Bill*. NUMSA is of the view that BITS should not only be cancelled, but that they must be declared null and void.	Transitional measures have been inserted as Section 14 into the Bill. The Bill intends merely to regulate investments within the borders of South Africa made after the promulgation of the Bill. It has no extra territorial effect, hence it does not impact on the position of investors that are covered under BITs that have been cancelled. This Section does not intend to restore investor confidence nor encourage FDI but serves to clarify the position in terms of the co-existence of BITs and the Act. The treaties have survival clauses that cover investments for an additional period up to 20 years after cancellation. Such an insertion avoids any doubt and gives the reassurance to existing investors that the promulgation of the Bill will not impact their investments or affect their protection in any way. SA would not be able to declare BITs null and void given that BITs are binding contractual instruments and any right, obligation or legal situation of the parties protected under BITs would be affected in declaring it as such, would thus render the State susceptible to legal challenges.

Clause	Issue raised	the dti's response
15: Short title and commencement		

Sources:
SADC Model IT
UNCTAD Series on issues in international investment treaties