

INVESTMENT BILL 2020
(BILL NO. 49 OF 2020)

CLAUSES

PART 1—PRELIMINARY

1. Short title and commencement
2. Interpretation
3. Objectives
4. Application
5. Reserved and restricted activities

PART 2—ESTABLISHMENT OF FOREIGN INVESTMENTS

6. Foreign investor establishment and reporting obligations
7. Protection of national security interests

PART 3—INVESTOR RIGHTS AND OBLIGATIONS

8. National treatment and most-favoured-nation principle
9. Minimum standard of treatment
10. Freedom to invest
11. Freedom to manage one's own business
12. Freedom from compulsory or arbitrary acquisition of property
13. Access to freely usable currency
14. Transfer of funds
15. Access to land
16. Right to employ foreign staff
17. Responsibility of investors to comply with the laws of Fiji

PART 4—INVESTMENT INCENTIVES

18. Investment incentives

PART 5—DISPUTE SETTLEMENT

19. Dispute settlement
20. Right to arbitration

PART 6—MISCELLANEOUS

21. Act to prevail
22. Regulations
23. Repeals
24. Transitional
25. Consequential amendments

BILL NO. 49 OF 2020**A BILL**

FOR AN ACT TO ESTABLISH LEGAL, SOCIAL AND ECONOMIC PRINCIPLES
FOR THE DEVELOPMENT OF INVESTMENT ACTIVITY IN FIJI, DEFINE THE
RIGHTS, DUTIES AND RESPONSIBILITIES OF DOMESTIC AND FOREIGN
INVESTORS AND FOR RELATED MATTERS

ENACTED by the Parliament of the Republic of Fiji—

PART 1—PRELIMINARY*Short title and commencement*

1.—(1) This Act may be cited as the Investment Act 2020.

(2) This Act comes into force on a date or dates appointed by the Minister by notice in the Gazette.

Interpretation

2. In this Act, unless the context otherwise requires—

“Agency” means the Investment Fiji Board established under section 3 of the Investment Fiji Act 1980;

“direct investment” means an investment, whether single or combined, new, current or successive, which enables an investor or group of investors to establish, acquire or have a lasting interest in a business;

“domestic investor” means—

- (a) any natural person who is a Fijian citizen; or
 - (b) any legal person with its headquarters registered or incorporated in Fiji,
- making a direct investment in Fiji;

“foreign investor” means—

- (a) any natural person who is not a Fijian citizen; or
 - (b) any legal person having its headquarters registered or incorporated outside of Fiji,
- making a direct investment in Fiji;

“freely usable currency” means currency defined as such by the International Monetary Fund and approved by the Reserve Bank of Fiji;

“investment” means a direct contribution of domestic or foreign capital to establish or expand a business undertaking including—

- (a) a company;
- (b) shares, stock, partnership interests and other forms of equity participation, bonds, debentures and other forms of debt interests in a company;
- (c) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts;
- (d) tangible property, including real property;
- (e) intangible property, including rights such as leases, mortgages, liens and pledges;
- (f) intellectual property, including copyright and related rights, patents, rights in plant varieties, industrial designs, rights in semi-conductor layout designs, trade secrets, including know-how and confidential business information;
- (g) trade and service marks, and trade names; and
- (h) rights conferred under any written law, such as licences and permits,

but does not include claims to money that arise solely from commercial contracts for the sale of goods and services and the domestic financing of such contracts;

“investment dispute” means a dispute between an investor and the State over an investment in Fiji or the interpretation of this Act in relation to an investment;

“investor” means a domestic investor or foreign investor;

“lasting interest in a business” means ownership of at least 10% of the voting power in an incorporated, or the equivalent in an unincorporated, enterprise;

“Minister” means the Minister responsible for investment;

“reserved activity” means investment in an area reserved for domestic investors only; and

“restricted activity” means investment in an area restricted for foreign investments.

Objectives

3. The objectives of this Act are to—

- (a) contribute to an attractive investment climate in Fiji to increase investments;
- (b) generate employment;
- (c) contribute to sustainable and social development;
- (d) promote growth for the benefit of all Fijians; and
- (e) provide equity for investors with transparent, reliable, efficient and fair rules and procedures.

Application

4. This Act applies to all direct investments made by an investor in Fiji.

Reserved and restricted activities

5.—(1) The Minister may, with the approval of Cabinet and following consultations with relevant stakeholders, prescribe by regulations, a complete and exclusive list of reserved activities and restricted activities.

(2) Reserved activities and restricted activities are to be applied as an exception and only in areas in Fiji where domestic businesses are considered vulnerable.

(3) Restricted activities must have preference over reserved activities where the objective can be achieved by both measures.

(4) Restricted activities may have a minimum investment threshold or an ownership ceiling applied generally or to specific activities, or any other measure that achieves its objective effectively.

(5) The Minister must review the list prescribed in subsection (1) every 2 years.

PART 2—ESTABLISHMENT OF FOREIGN INVESTMENTS

Foreign investor establishment and reporting obligations

6.—(1) Like any domestic investor, a foreign investor intending to invest in Fiji must register its business in accordance with the Companies Act 2015 before establishing in Fiji.

(2) The business registration does not replace any other clearance, licence or registration an investor may be required to obtain under any other written law before establishment or during operation.

(3) Individual foreign investors must obtain relevant visas or permits under the Immigration Act 2003 to stay and operate a business in Fiji.

(4) Foreign investors must report and update information regarding the foreign investors' investment to the Agency.

(5) The report made to the Agency does not exempt the foreign investor from reporting requirements under any other written law.

(6) The Minister may prescribe by regulations the details and procedure of the reporting obligations including fees and penalties in case of breach.

Protection of national security interests

7.—(1) The Minister may prohibit a foreign direct investment for the protection of national security interests.

(2) A foreign investor intending to invest in a sector that may have potential effects on, *inter alia*—

(a) critical infrastructure such as energy, transport, communications, data storage or financial infrastructure;

(b) critical technologies such as artificial intelligence, robotics, semiconductors, technology with potential dual use application, cyber security or nuclear technology;

(c) the security of supply of critical inputs; or

(d) access to sensitive information or the ability to control sensitive information,

must submit a proposal of the investment to the Minister for an approval to invest in that sector.

(3) The process for an approval made under subsection (2), may be prescribed by regulations.

PART 3—INVESTOR RIGHTS AND OBLIGATIONS

National treatment and most-favoured-nation principle

8.—(1) Subject to this Act or any other written law, foreign investors must be treated no less favourably, in like circumstances than domestic investors with respect to the acquisition, expansion, management, conduct, operation, sale or other disposition of investments in Fiji.

(2) Subject to this Act, any other written law or international obligations, Fiji is to accord to foreign investors treatment no less favourable than it accords, in like circumstances, to other foreign investors and their investments with respect to the establishment, management, conduct, operation, sale or other disposition of investments in its territories and their investments.

Minimum standard of treatment

9.—(1) Capital invested by an investor must at all times receive fair and equitable treatment, and must enjoy full protection and security as a minimum standard in accordance with the rules of customary international law.

(2) Fair and equitable treatment—

(a) refers to treatment that is free of any arbitrary conduct, discrimination or lack of reasonableness of a manifest character and that does not constitute a gross deviation from the principles of substantive and procedural justice; and

(b) includes that the Government of the Republic of Fiji take measures such as making publicly available laws, regulations, procedures, administrative rulings and adjudicatory decisions in matters related to this Act.

(3) The respective standards of fair and equitable treatment and full protection and security do not create additional substantive rights in favour of the capital invested.

(4) The Government of the Republic of Fiji has the right to take measures conducive to legitimate objectives dictated by its policies, including measures taken to satisfy international obligations so long as the measures implemented is not incompatible with subsections (1) to (4).

(5) The Minister may prescribe by regulations specific guidance on how to implement the guarantees provided in this section.

Freedom to invest

10. Subject to this Act or any other written law, investors are free to invest in all sectors and regions in Fiji.

Freedom to manage one's own business

11. Subject to this Act or any other written law, an investor has the freedom to manage the investor's own business such as the freedom to hire and lay-off workers, the freedom to determine the production process, inputs, outputs and prices, and the freedom to close and sell the business.

Freedom from compulsory or arbitrary acquisition of property

12.—(1) An investor is, in respect of their investments, afforded the freedom under section 27 of the Constitution of the Republic of Fiji from compulsory or arbitrary acquisition of property.

(2) For the avoidance of doubt, an investor may not be subject to compulsory acquisition of property, save—

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, just and equitable compensation; and
- (d) in accordance with this Act or any other written law.

(3) The compensation referred to in subsection (2)(c) must be determined on the basis that the investor will be promptly paid the agreed compensation for the property, or failing agreement, just and equitable compensation as determined by a court or tribunal, after considering all relevant factors, including—

- (a) the public purpose for which the property is being acquired;
- (b) the history of its acquisition by the owner;
- (c) the market value of the property;
- (d) the interests of any person affected by the acquisition; and
- (e) any hardship to the owner.

(4) Notwithstanding section (3), compensation for compulsory acquisition of land must be determined in accordance with the State Acquisition of Lands Act 1940.

Access to freely usable currency

13. Investors, with respect to all payments related to their investments in Fiji, have the right to freely convert the Fijian currency into any other freely usable currency in accordance with the Exchange Control Act 1950.

Transfer of funds

14.—(1) Investors are entitled to convert and transfer funds overseas, freely and without delay, in a freely usable currency, including—

- (a) contributions to capital;
- (b) profits, dividends, capital gains generated by investment activities;
- (c) proceeds from the sale or liquidation of all or any part of the investment;
- (d) interest, royalty payments and management fees;
- (e) payments made under a contract, including a loan agreement;
- (f) compensation for compulsory acquisition; and
- (g) payments arising from a dispute.

(2) Notwithstanding subsection (1), the Government of the Republic of Fiji may delay or prevent a transfer through the equitable, non-discriminatory and good faith application of any written law relating to—

- (a) bankruptcy, insolvency or the protection of the rights of creditors;

- (b) issuing, trading or dealing in securities, futures, options or derivatives;
- (c) criminal offences;
- (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
- (e) fiscal prudential rules specified and published by the Reserve Bank of Fiji.

Access to land

15.—(1) All investors have access to land according to written law.

(2) Notwithstanding subsection (1), a foreign investor may be subject to the Land Sales Act 1974 in relation to the sale, transfer or lease of land.

Right to employ foreign staff

16. Subject to this Act or any other written law, investors have the right to employ foreign qualified staff for necessary management and skilled positions.

Responsibility of investors to comply with the laws of Fiji

17.—(1) Investors must comply with the laws of Fiji and in the event of non-compliance, are subject to any penalties or sanctions specified in those laws.

(2) Investors have the following duties and obligations—

- (a) to adhere to the national standards of Fiji as required by any written law;
- (b) to maintain separate accounts and records in respect of the business enterprise in accordance with the applicable accounting standards;
- (c) to supply, in a timely manner, the required information to the Fiji Revenue and Customs Service, the Department of Immigration, the ministry responsible for employment or any other authority under any other written law to enable them to implement their functions efficiently and effectively;
- (d) to facilitate access of the relevant investment support institutions to information on their business enterprises as required by any written law;
- (e) to undertake investment activities in a manner that best contributes to consumer and environmental protection, and the development of human resources;
- (f) to observe workers' rights relating to collective bargaining in accordance with any written law;
- (g) employers and employees are free to enter labour contracts except that these labour contracts must not establish standards lower than the mandatory standards in accordance with any written law; and
- (h) investors must contribute to the social insurance and welfare programmes for their workers in accordance with any written law.

PART 4—INVESTMENT INCENTIVES

Investment incentives

18.—(1) The Government of the Republic of Fiji may provide fiscal or non-fiscal incentives for investors to attract and promote investments.

(2) Investment incentives may be granted by law to investors to achieve the objectives set out in section 3, if such incentives comply with the following—

- (a) incentives must be designed and precisely targeted to achieve specific policy objectives;
- (b) incentives must be granted according to a clearly pre-defined eligibility criteria in a transparent and non-discretionary manner;
- (c) incentives must be based on a cost-benefit analysis and subject to periodic monitoring and evaluation mechanisms to ensure their effectiveness and fiscal sustainability; and
- (d) incentives must be consistent with Fiji's international obligations.

PART 5—DISPUTE SETTLEMENT

Dispute settlement

19.—(1) An investment dispute must be settled promptly and amicably through consultations and negotiations between the parties.

(2) Where an amicable solution cannot be reached, the foreign investor has the same right as a domestic investor to any form of recourse according to written law.

(3) Without prejudice to international agreements ratified by Fiji, the parties may agree to seek remedies accepted by private international law for settlement of disputes, including arbitration.

(4) Should the parties agree to settle the dispute by way of arbitration, the International Arbitration Act 2017 must be complied with.

Right to arbitration

20.—(1) If a investor considers that the Government of the Republic of Fiji has failed to accord to the investor treatment in accordance with this Act, giving rise to an investment dispute, then—

- (a) the investor must first attempt to resolve the investment dispute with the Government of the Republic of Fiji, including by corresponding with the Agency, for a period of no less than 3 months; and
- (b) if, after 3 months, the investment dispute remains unresolved, the investor may commence arbitration proceedings in respect of the investment dispute against the State.

(2) A foreign investor and the Government of the Republic of Fiji may seek to resolve the investment dispute through arbitration in accordance with the Arbitration Act 1965 or the International Arbitration Act 2017, as the case may be.

PART 6—MISCELLANEOUS

Act to prevail

21. This Act has effect notwithstanding any provision of any other written law, and accordingly, to the extent that there is any inconsistency between this Act and any other written law, this Act prevails.

Regulations

22.—(1) The Minister may make regulations to prescribe matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act and generally for achieving the purposes of this Act.

(2) Without limiting the generality of subsection (1), the Minister may prescribe offences and penalties, not exceeding—

- (a) in the case of a natural person, a fine of \$50,000 or imprisonment for a term of 10 years or both; or
- (b) in the case of a body corporate, a fine of \$1 million.

Repeals

23. The Foreign Investment Act 1999 and Foreign Investment Regulations 2009 are repealed.

Transitional

24.—(1) Any right, exemption or foreign investment registration certificate granted under the Foreign Investment Act 1999 prior to the commencement date of this Act continues according to its tenor and may be varied or revoked accordingly.

(2) For the avoidance of doubt, any right, exemption or foreign investment registration certificate granted under the Foreign Investment Act 1999 must not be extended.

Consequential amendments

25.—(1) The Companies Act 2015 is amended by deleting section 56(1)(a).

(2) The Companies Regulations 2015 is amended by—

- (a) in regulation 9, deleting “Foreign Investment Act 1999” and substituting “Investment Act 2020”; and
- (b) in Schedule 2—
 - (i) in Form A2, deleting Part I;
 - (ii) in Form A2A, deleting Part I;
 - (iii) in Form A12, deleting Part F;
 - (iv) in Form A12C, deleting Part F;

- (v) in Form A17, Part F deleting “ A copy of the foreign investment registration certificate granted to the foreign company under the Foreign Investment Act 1999.”; and
 - (vi) in Form A17A, Part F deleting “ A copy of the foreign investment registration certificate granted to the foreign company under the Foreign Investment Act 1999.”.
- (3) The Immigration Regulations 2007 is amended by—
- (a) deleting regulation 39 and substituting the following—

“39. The Permanent Secretary may grant a non-citizen an investor permit if the Permanent Secretary is satisfied that the non-citizen is a foreign investor.”; and
 - (b) deleting regulation 41(4).
- (4) The Land Use Regulations 2011 is amended in Schedule 2, Annexure B to Form 3 in paragraph 4(d)(ii) by deleting “Foreign Investment Act 1999” and substituting “Investment Act 2020”.
- (5) The Liquor Regulations 2008 is amended by deleting regulation 3(2)(b)(i).

December 2020

INVESTMENT BILL 2020

EXPLANATORY NOTE

(This note is not part of the Bill and is intended only to indicate its general effect)

1.0 BACKGROUND

1.1 The Investment Bill 2020 (**‘Bill’**) seeks to replace the Foreign Investment Act 1999 (**‘Act’**) and aims to—

- (a) contribute to an attractive investment climate in Fiji;
- (b) increase both foreign and domestic investments;
- (c) generate employment;
- (d) contribute to sustainable and social development; and
- (e) promote growth for the benefit of Fijians.

1.2 The Bill seeks to strengthen the following 5 fundamental principles important for the attraction, retention and expansion of investments in Fiji—

- (a) **Clarity**—the Bill provides key definitions and provisions that are in line with international standards. As a comprehensive investment law, it establishes one single source for the fundamental rights and obligations of investors;
- (b) **Transparency**—the Bill increases transparency of the legal framework for investment by combining all relevant rights and obligations under one umbrella law;
- (c) **Openness and predictability**—a fundamental change to the current Act is that the Foreign Investment Registration Certificate is removed and replaced by an automatic investor registration process. The Bill entails, *inter alia*—
 - (i) an investor permit for individual investors are to be managed by the Department of Immigration;

- (ii) foreign investment reporting through the Registrar of Companies at the time of business registration;
- (iii) annual reporting to Investment Fiji; and
- (iv) protection of national security interests.

This change allows foreign investors to establish a business in Fiji under the same conditions as domestic investors;

- (d) Basic investor rights — the core part of the Bill is the guarantee of investor rights in line with international best practice. Investors coming and investing in Fiji will have a legal pledge that basic rights are guaranteed according to international best practice. This includes the protection of property (e.g. freedom from compulsory or arbitrary acquisition of property) as well as the right to transfer funds abroad or to be treated fairly. The Bill also includes the national treatment principle, the most-favoured nation principle and a fair and equitable treatment clause; and
- (e) Legal recourse and enforcement rights—the Bill includes a part on dispute settlement that provides investors with the option of national and international dispute settlement to help de-risk investments.

2.0 CLAUSES

- 2.1 Clause 1 of the Bill provides for the short title and commencement. If passed by Parliament, the new legislation will come into force on a date or dates appointed by the Minister by notice in the Gazette.
- 2.2 Clause 2 of the Bill provides for the definitions of the terms used throughout the Act.
- 2.3 Clause 3 of the Bill provides the objectives of the Act which are to—
 - (a) contribute to an attractive investment climate in Fiji to increase investments;
 - (b) generate employment;
 - (c) contribute to sustainable and social development;
 - (d) promote growth for the benefit of all Fijians; and
 - (e) provide equity for investors with transparent, reliable, efficient and fair rules and procedures.
- 2.4 Clause 4 of the Bill provides that the Act is applicable to all direct investments made by a domestic or foreign investor in Fiji.
- 2.5 Clause 5 of the Bill empowers the Minister to prescribe by regulations a complete and exclusive list of reserved and restricted activities following consultations with relevant stakeholders and approval of Cabinet.

- 2.6 Clause 6 of the Bill provides provisions relating to foreign investor establishment and its reporting obligations. The reporting and updating requirements by foreign investors under clause 6 is intended to be used for statistical and policy-making purposes.
- 2.7 Clause 7 of the Bill provides that the Minister may prohibit a foreign direct investment in Fiji for the protection of national security interests. A foreign investor must submit a proposal of their intention to invest to the Minister for an approval, the process of which is to be prescribed by regulations, if the investment has a potential effect on, *inter alia*—
- (a) critical infrastructure such as energy, transport, communications, data storage or financial infrastructure;
 - (b) critical technologies such as artificial intelligence, robotics, semiconductors, technology with potential dual use application, cyber security or nuclear technology;
 - (c) the security of supply of critical inputs; or
 - (d) access to sensitive information or the ability to control sensitive information.
- 2.8 Clause 8 of the Bill provides for national treatment provisions guaranteeing foreign investors the same treatment when operating in Fiji as domestic investors.
- 2.9 Clause 9 of the Bill provides a guarantee to investors of fair and equitable treatment and full protection and security as a minimum standard of treatment.
- 2.10 Clause 10 of the Bill provides that subject to any written law, investors are free to invest in all sectors and regions in Fiji.
- 2.11 Clause 11 of the Bill provides that subject to any written law, investors are free to manage their own business.
- 2.12 Clause 12 of the Bill provides for provisions dealing with compulsory or arbitrary acquisition of property. It provides a guarantee that investors are afforded the freedom under section 27 of the Fijian Constitution from compulsory or arbitrary acquisition of property.
- 2.13 Clause 13 of the Bill provides that with respect to all payments related to investments in Fiji, investors have the right to freely convert Fijian currency into foreign currency in accordance with the Exchange Control Act 1950.
- 2.14 Clause 14 of the Bill provides that investors are entitled to transfer funds abroad. This clause protects a key part of international business operations and foreign investors, particularly the larger and export-oriented investors who would insist on such a guarantee before starting a business in Fiji. Clause 14 of the Bill also gives the Fijian Government the right to suspend international transactions for specific reasons, which is also in line with international best practice.

- 2.15 Clause 15 of the Bill provides that investors have access to land in Fiji according to written law. However, a foreign investor may be subject to the Land Sales Act 1974 in relation to the sale, transfer or lease of land.
- 2.16 Clause 16 of the Bill provides that subject to any written law, investors have the right to employ foreign staff.
- 2.17 Clause 17 of the Bill provides that an investor must comply with the laws of Fiji and that in the event of non-compliance, are subject to any penalty or sanction specified in such law. Clause 17 of the Bill also provides certain duties and responsibilities of investors.
- 2.18 Clause 18 of the Bill provides that an investor has a right to arbitration if an investment dispute arises between an investor and the State.
- 2.19 Clause 19 of the Bill provides that the Fijian Government may provide fiscal or non-fiscal incentives for investors. It provides that these incentives may be granted by laws.
- 2.20 Clause 20 of the Bill opens the way to investor-State international dispute settlement and sets up the requirements as well as the applicable mechanisms.
- 2.21 Clause 21 of the Bill provides that the Act will prevail over other legislation in case of inconsistencies.
- 2.22 Clause 22 of the Bill empowers the Minister to make regulations.
- 2.23 Clause 23 of the Bill provides for the repeal of the Foreign Investment Act 1999 and the Foreign Investment Regulations 2009.
- 2.24 Clause 24 of the Bill provides for the transitional provisions for the rights, exemptions and foreign investment registration certificate under the Foreign Investment Act 1999.
- 2.25 Clause 25 of the Bill provides for consequential amendments made to other legislation.

3.0 MINISTERIAL RESPONSIBILITY

- 3.1 The Act comes under the responsibility of the Minister responsible for investment.

A. SAYED-KHAIYUM
Attorney-General