

Kiribati

FOREIGN INVESTMENT ACT 1985 (1985)

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The year indicated in brackets after the title of the law refers to the year of publication in the Official Gazette or, when this is not available, the year of adoption of the law.

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REPUBLIC OF KIRIBATI

FOREIGN INVESTMENT ACT 1985

AN ACT TO PROVIDE FOR THE SUPERVISION AND CONTROL OF FOREIGN INVESTMENT IN KIRIBATI

3 of 1985

(INCORPORATING AMENDMENTS FROM OCTOBER 1985 UP TO JUNE 2004)

6 of 1989

9 of 1992

10 of 1996

24 of 1997

5 of 2000

Commencement: 10/9/1985

MADE by the Maneaba ni Maungatabu and assented to by the Beretitenti.

Short Title

1. This Act may be cited as the Foreign Investment Act 1985.

Interpretation

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

"business" includes any profession, trade, occupation, manufacture, industry or undertaking carried on for pecuniary gain;

"carrying on business" means carrying on an economic activity and includes -

(a) establishing or using a share transfer or share registration office; or

(b) administering, managing or otherwise dealing with property, both real and personal, as an agent legal personal representative or trustee and whether by an employee, agent or other representative or otherwise; or

(c) maintaining an agent or other representative for the purpose of soliciting or procuring business whether or not such agent or representative is continuously resident in Kiribati; or

(d) maintaining an office, agency or branch in Kiribati;

and excludes -

(e) aid and development projects funded by foreign donors negotiated, arranged or contracted by or through the Government of Kiribati unless the project contractor is, at any time up to the completion of the project, registered by any other circumstances hereunder; and,

an enterprise shall not be regarded as carrying on business by reason solely that it -

(f) maintains a bank account;

(g) secures or collects any of its debts or enforces its rights in regard to any securities relating to any such debts; or

(h) conducts a transaction which is completed within a period of 31 days not being one of a number of similar transactions in a series; or

(i) collects information or undertakes a feasibility study and "to carry on business" has a similar meaning:

(Amended by No. 5 of 2000 Act Sec. 2)

"Commission" means the Foreign Investment Commission established by Section 4 of this Act;

"enterprise" means any person, natural or corporate or body or association of persons engaged or proposing to become engaged in the carrying on of business;

"foreign enterprise" means -

(a) in the case of an enterprise that is a corporation, an enterprise-

(i) in which any of the voting shares or power of the corporation is held or controlled by a person who is not a local person; or

(ii) in which any share or the value of any such share is beneficially owned by a person who is not a local person; or

(iii) that is incorporated or established by or under the law of a place outside Kiribati; and

(b) in the case of any other enterprise -

(i) an enterprise in which any member or partner thereof is not a local person; or

(ii) an enterprise in which any or all of the beneficial ownership is held by a person who is not a local person; or

(iii) an enterprise that is a person other than a local person.

(Amended by No 9 of 1992 Act Sec. 3)

"foreign investment" means carrying on business in Kiribati by a foreign enterprise and includes the acquisition by a foreign enterprise of any of the shares in any company registered in Kiribati;

(Amended by No 9 of 1992 Act Sec. 3)

"local person" means a citizen of Kiribati;

"Ministry" means a department or agency of the Government for the time being responsible for dealing with foreign investment in Kiribati.

Application

3. Subject to section 14(3) of this Act nothing in this Act shall in any way affect the operation of any business activity lawfully being carried on in Kiribati at the time this Act comes into force.

Establishment of Commission

4. (1) There is hereby established for the purpose of this Act a Foreign Investment Commission.

(2) The Commission shall be responsible to the Minister in the exercise of its powers and the performance of its functions under this Act.

(3) The Ministry shall provide the Commission with secretarial and administrative services.

Membership of the Commission

5. (1) The Commission shall comprise the following members ex officio:-

- (a) the Secretary for Commerce, and Industry;
- (b) the Secretary for Finance and Economic Planning;
- (c) the Secretary for Foreign Affairs;
- (d) the Secretary for Home Affairs and Rural Development;
- (e) the Secretary for Labour, Employment and Cooperatives;
- (f) the Secretary for Natural Resources and Development;
- (g) the Commissioner of Police;
- (h) the Solicitor General;

(Amended and inserted by No 10 of 1996 Act Sec. 2)

- (i) the Secretary for Information, Communication and Transport;

(Amended and inserted by No 24 of 1997 Act Sec. 2)

- (j) the Secretary for the Line and Phoenix Development.

(Amended and inserted by No 24 of 1997 Act Sec. 2)

(2) A member of the Commission may, with the approval of the Minister in writing, appoint an alternate who shall, in the absence of the Member, stand in the place of that member for all purposes of this Act and who shall be eligible to vote in any meeting of the Commission which he attends.

(3) The Minister shall appoint a member of the Commission to be Chairman and another member to be Deputy Chairman who shall, in the absence or unavailability of the Chairman, exercise all the function of the Chairman.

(3A) In the absence of the Chairman or Deputy Chairman at any meeting of the Commission, the members of the Commission present at such meeting may elect one of their member to preside at such meeting.

(Amended and inserted by No 6 of 1989 Act Sec. 3)

(4) The Commission may co-opt a temporary member to the Commission who shall advise the Commission on particular applications for foreign investment but who shall not be entitled to vote.

Meetings of the Commission

6. (1) Meetings of the Commission shall be convened on the instructions of the Chairman or on the requisition in writing of not less than 5 members of the Commission and shall be held on such dates and at such times, being not less than once every month, as the Chairman or such 5 members may direct.

(Amended and substituted by No 6 of 1989 Sec. 4)

(Amended by No 24 of 1997 Act Sec. 3)

(2) The quorum necessary for the transaction of business at any meeting shall be 4 members.

(3) Every question before a meeting of the Commission shall be decided by a majority of the valid votes of the members present.

(4) Subject to the provisions of this Act and of any regulations made under this Act the Commission may regulate its procedure in such manner as it thinks fit.

Functions of the Commission

7. The Commission shall –

(a) receive consider and assess all applications by foreign enterprises for foreign investment in Kiribati;

(b) approve those applications for foreign investment in Kiribati which the Commission is empowered to approve;

(c) recommend to Cabinet, for approval or otherwise, those applications for foreign investment which the Commission is not empowered to approve;

(d) provide for the registration of foreign investment;

- (e) supervise and monitor the performance of any condition or obligation imposed by the Commission or by Cabinet as a part of any approval granted to a foreign enterprise pursuant to this Act;
- (f) prepare such reports on and plans for the development and direction of foreign investment as the Commission may from time to time consider necessary or appropriate;
- (g) advise Cabinet on all aspects of foreign investment and on planning requirements for such foreign investment;
- (h) promote the possibility and advantages of foreign investment in Kiribati as widely as possible;
- (i) actively assist any foreign enterprise to establish and maintain investment in Kiribati;
- (j) cooperate with local Government councils in Kiribati over the sitting and licensing of foreign enterprises;
- (k) consult with interested department of Government and local government councils over particular application for foreign investment by which they may be affected;
- (l) invite to attend its meeting the president who shall have the right to vote in such meeting or in his absence the vice president of a local government council if such local government council is to be directly affected by or concerned or interested in a foreign investment for which application for approval has been made by a foreign enterprise to the Commission.

Foreign Enterprises commencing business in Kiribati

8. Except with the approval of the Commission or of Cabinet no foreign enterprise not lawfully carrying on business at the commencement of this Act shall commence or carry on business in Kiribati.

Applications for Foreign Investment

9. (1) An application for approval for a foreign investment shall be made to the Commission.
- (2) An application for approval for a foreign investment shall be in writing and shall specify:-
- (a) the nature of the proposed investment;
 - (b) the capital structure of the proposed investment together with the source and form of such capital;
 - (c) where the enterprise is proposed to be a corporate body, the shareholding and shareholders of that corporate body, the names and addresses of the directors or proposed directors and the name and address of the secretary or proposed secretary;
 - (d) the principal office of the enterprise and where that is outside Kiribati the place of business or proposed place of business in Kiribati;

- (e) the likelihood of leased land, where necessary, being available to the enterprise for the purposes of the enterprise;
 - (f) the persons to be employed by the enterprise and whether they are local persons or not;
 - (g) where persons other than local persons are to be employed by the enterprise, details of the visa and work permit requirements of those persons;
 - (h) the provisions for training of local persons in the enterprise;
 - (i) the nature and source of raw materials or resources to be used or exploited in Kiribati;
 - (j) what plant, equipment, machinery or raw material is required to be imported to Kiribati and to what extent, if any, the enterprise is to contribute to exports or foreign exchange earnings from Kiribati; and
 - (k) such further or other information as the Commission may in any particular case require.
- (3) On receipt of an application for foreign investment the Commission shall forthwith forward a copy thereof to the Minister.

Seeking exemptions from requirements for foreign investments

- 9A. (1) Where a person submits an application for approval of foreign investment under section 9, such person may simultaneously apply to the Commission to be exempted also from any or all of the requirements for foreign investment under this Act.
- (2) Upon receiving an application for exemption from the requirements for foreign investment under subsection (1), the Commission shall –
- (a) consider the application as whether or not an exemption as sought be granted; and
 - (b) having consider the application, communicate its decision to the Minister; and
- where the Commission proposes that an exemption as sought from any or all of the requirements or obligations for foreign investments be granted on such application under this Act -
- (a) give its reasons for its opinion; and
 - (b) forward that decision together with the file and other documents on the matter to the Minister for presentation to the Cabinet for approval or disapproval as the case bay be.
- (3) Upon receiving the recommendations of the Commission under subsection (2), the Beretitenti, acting in accordance with the advice of the Cabinet shall consider such recommendation and may in writing either approve or disapprove any or all of the recommendations of the Commission as the case may be.

(4) Where the Commission is not of the opinion that exemptions should be permitted, it shall communicate its decision to the applicant, who may request the Minister to seek review of the decision by the Beretitenti, acting in accordance with the advice of the Cabinet.

(Amended and inserted by No 5 of 2000 Act Sec. 3)

Consideration of applications for investment

10. (1) In considering any application by a foreign enterprise to carry on business the Commission shall, in addition to any other matters, take into account the extent to which the proposed investment is to:

- (a) provide employment for local persons;
- (b) expand exports from and reduce imports into Kiribati;
- (c) require large capital contributions in cases where the local contribution can be made in the form of a resource to be exploited;
- (d) utilise foreign technology and management skills with consequent transfer of such skills to local persons;
- (e) provide access to foreign markets;
- (f) affect the local natural and social environment;
- (g) the extent to which the proposed investment is to detrimentally affect local businesses.

(2) Before approving or recommending for approval as the case may be, any application for foreign investment the Commission may require the foreign enterprise to furnish it with such reports and feasibility studies including any environmental or social impact reports as the Commission may consider necessary for the proper consideration of the application.

Approval of foreign investment

11. (1) In any case where the Commission is empowered to approve an application for foreign investment the Commission may approve the application subject to such conditions as it thinks fit.

(2) In any case where the Commission is not empowered to approve an application for foreign investment the Commission shall recommend to Cabinet either the approval or otherwise of the application it shall further recommend to Cabinet such terms to be attached to the approval as the Commission may think fit.

(3) Upon receipt of a recommendation from the Commission for the approval or otherwise of an application for foreign investment Cabinet may-

- (i) approve the application subject to such conditions as it shall think fit; or
- (ii) decline the application; or

(iii) remit the application to the Commission with a request for further or other information, and a further recommendation.

(4) In particular and without limiting the powers of the Commission or Cabinet under subsections (1), (2) and (3) of this section the Commission or the Cabinet may in granting approval to any foreign investment pursuant to this section:-

(a) declare that the business carried on or to be carried on by the foreign enterprise is a protected industry pursuant to section 3 of the Protected Industries Ordinance;

(b) advise the Principal Immigration Officer of the visa and work permit requirements of such person other than local persons as may require entry into Kiribati by reason of the approval granted for foreign investment.

(Amended by No 24 of 1997 Sec. 4)

Power of Commission to approve applications for foreign investment

12. (1) The Commission may approve applications for foreign investment –

(a) where the total capital input to the foreign investment is less than \$250,000; and

(b) the Minister has not directed the Commission in writing within 28 days of receipt by the Minister of a copy of the application for foreign investment pursuant to section 9(3) of this Act, that the decision to approve or decline the application is to be taken by Cabinet.

(2) Where the approval of an application for foreign investment under this section necessarily involves the fixing of a fee to be paid by a foreign enterprise, the Commission may fix such fee.

(Amended by No 6 of 1989 Sec. 5)

13. (Deleted by No 24 of 1997 Act Sec. 5)

Register of foreign investment

14. (1) The Commission shall maintain a register of foreign investments.

(2) No foreign investment shall be permitted in Kiribati after the date of commencement of this Act, unless that foreign investment is registered pursuant to this Act.

(3) For the purpose of this section where a foreign enterprise was lawfully carrying on business in Kiribati at the date of commencement of this Act the foreign enterprise shall be deemed to have complied with section 3 of this Act if, within 3 months of the date of commencement of this Act, that foreign investment is registered pursuant to this Act.

(4) For the purpose of registration, a foreign enterprise shall furnish to the Commission the following information:

(a) the date the enterprise commenced or proposes to commence business;

(b) its existing activities;

- (c) where the foreign enterprise is a Corporation:
 - (i) the nominal value of its authorised issued and paid up shares;
 - (ii) the names and addresses of its Directors and Secretary;
- (d) where the foreign enterprise is not a Corporation:
 - (i) the capital of the enterprise;
 - (ii) the names of those persons beneficially entitled to an interest in that capital and any profits from the enterprise;
- (e) the financial year of the enterprise and the date of annual balance;
- (f) the address in Kiribati of the enterprise for service of notices;
- (g) in the case of any enterprise not carrying on business at the date of commencement of this Act a copy of the approval of the Commission or the Cabinet granted for the foreign investment pursuant to this Act;
- (h) the prescribed fee if any.

Annual Accounts

15. (1) A foreign enterprise shall in every year within 60 days after the end of its financial year in such year as notified to the Commission pursuant to section 14 of this Act, file with the Commission a copy of its annual profit and loss account and balance sheet for the foreign investment for which approval has been granted under this Act.

(2) Failure on the part of a foreign enterprise to supply copies of its annual accounts as required by subsection (1) of this section shall constitute a failure to comply with the terms and conditions of approval for the purposes of section 16 of this Act.

Issue of Certificate of registration

16. On receipt of the information set out in section 14 and on the Commission being satisfied as to its correctness the Commission shall subject to the payment of a prescribed fee issue to the foreign enterprise a certificate of registration in the prescribed form of the foreign investment for which approval has been granted.

Cancellation of registration

17. The Commission may cancel the registration of a foreign investment where:

- (a) a foreign enterprise has failed to comply with any terms or conditions of approval granted for foreign investment under this Act and;
- (b) a notice requiring the foreign enterprise to comply with any such terms and conditions within a period of three months from the date of such notice has been served on the foreign enterprise at its address for service of notices; and

- (c) the foreign enterprise has failed to comply with such notice within the said period of three months and;
- (d) the Commission has not waived compliance with any such terms or conditions, or;
- (e) the foreign investment has ceased and it appears to the Commission that the foreign investment is unlikely to be resumed.

Offence to carry on unregistered investment

18. (1) No person or foreign enterprise shall carry or continue to carry on business in Kiribati without a valid certificate of registration issued under section 16 of this Act.
- (2) Any person who or foreign enterprise which contravenes the provisions of subsection (1) of this section commits an offence and shall be liable on conviction to a fine of \$10,000.
- (3) Where a foreign enterprise is a corporation and such foreign enterprise commits an offence under this section an officer, director or agent of the foreign enterprise who directed, authorised assented to, acquiesced in, or participated in, the commission of the offence to is a party to and commits the offence and is liable on conviction to the punishment provided for the offence under this section.
- (4) In addition to any fine imposed pursuant to subsection (2) of this section the Court may order the forfeiture of all or any of the assets of a person or foreign enterprise in Kiribati to the Republic.

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19. Nothing in this Act shall be deemed to waive the requirement for an external company, as provided for by section 140(1) of the Companies Ordinance, to comply with the requirements of the Companies Ordinance.

Guarantee to Foreign Enterprises

20. (1) No property of any description of any foreign enterprise relating to an investment registered pursuant to this Act shall be compulsorily taken possession of, and no interest in or right over property of any description shall be acquired except in accordance with the provisions of section 8 of the Constitution of Kiribati.
- (2) Subject to the laws of Kiribati any foreign enterprise shall, in respect of any investment registered pursuant to this Act, be entitled to:-
- (a) remit earnings and capital overseas;
 - (b) remit overseas such amounts necessary to meet payments of principal, interest and service charges and similar liabilities on foreign loans and other foreign financial obligations;
 - (c) remit overseas compensation received in accordance with subsection (1) of this section.

Regulations

21. The Minister acting in accordance with the advice of the Cabinet, may make Regulations:-

- (a) prescribing forms to be used for the purpose of giving effect to the provisions of this Act;
- (b) prescribing fees to be charged on an application pursuant to this Act or for any other matter or thing to be done under this Act;
- (c) for any other matter or thing which may be required to be done under this Act.

FOREIGN INVESTMENT ACT 1985

EXPLANATORY MEMORANDUM

A. Reasons for Act

1. It is well recognised that Kiribati has limited resources for development and limited means of generating foreign exchange earnings. Foreign investment is an essential part of the development of the country's natural resources. By making Kiribati an attractive place for foreign investment the country will attract not only capital to develop investment the country will attract no only the capital to develop natural resources but also capital for commercial purposes.

2. To be attractive to foreign investors Kiribati must offer:-

- (i) A stable Government
- (ii) Consistency in decision making
- (iii) Clear guidelines upon which a foreign investor can plan
- (iv) A simple, cohesive and prompt process for consideration and approval of investment proposals
- (v) Incentives

3. At present potential foreign investors are hampered and often deterred in their efforts to invest in Kiribati because of an apparent lack of co-ordination both between Government Ministries and between central and local Government. If foreign investment is to be promoted then, not only must Government develop a procedure for dealing efficiently with applications, it must also actively assist foreign investors to establish themselves in the country.

4. The purpose of the Act therefore is to provide a clear cut, simple and consistent means to deal with foreign investment proposals. The Act also purposely endeavours to move the responsibility for decision-making (at least for investments up to \$250,000) from the political arena to the public service, to a Commission that will function within the broad guidelines laid down in the Act but subject also to the overriding direction of Cabinet in appropriate cases.

B. Scheme of the Act

(i) The Commission: Clause 4

The Act establishes a Foreign Investment Commission to replace the present foreign investment advisory committee.

The Commission has been kept to a relatively small number of five people. They are representatives of the Ministries most involved with foreign investment proposals and include the Senior State Advocate to ensure the assistance of legal and commercial expertise to the Commission.

Because of the relatively small member of members of the Commission each member will have particular responsibility for ensuring that all matters that must be dealt with within his own Ministry are in fact dealt with so that he is in a position at the appropriate time to advise the Commission on the particular matters for which he is responsible.

(ii) Power of the Commission: Clauses 7 and 12

The Act provides for the Commission to approve applications with a capital input of up to \$250,000 unless Cabinet decides in a particular case that it should make the final decision. The strength of the Act is in the simple and straightforward mechanism it provides for dealing with and approving applications. A consistent approach will develop if the Commission is permitted as much scope as possible to approve appropriate applications.

(iii) Dealing with Applications: Clause 9

The Commission is responsible for setting up its own procedures. It is envisaged that the Ministry of Trade, Industry and Labour will co-ordinate dealing with applications. It will be responsible for obtaining the usual information from the Applicant, obtaining status and police reports etc. The representatives of the various ministries will deal, within their Ministries, with the particular matters relevant to that department, for example land requirements, tax and customs incentives. These matters can all be dealt with simultaneously to avoid lengthy delays in the processing of applications.

(iv) Matters to be taken into account: Clause 10

As can be seen from the Act there are certain matters to which the Commission must have regard when dealing with applications. These are policy matters which have been identified as being desirable features for foreign investment. They are matters which will promote the development and use of natural resources and assist Kiribati towards greater self reliance.

(v) Incentives: Clause 11(4)

The Commission or Cabinet has power to grant tax and customs incentives under the Act. This provision will require some amendment to the Income Tax Ordinance and the Customs Ordinance. The purpose here is to enable the question of incentives to foreign investment to be dealt with within the one organisation instead of the investor having to make individual applications to each Ministry. The representatives of the Ministries involved, who are on the Commission, will be responsible for dealing with those particular matters within their respective departments so they are in a position to advise the Commission on whether incentives should or should not be granted.

(vi) Registration: Clause 14

The Act provides for a register of foreign investments with a requirement for annual returns to be filed. This will enable the Commission to control and monitor the progress and development of foreign investment in Kiribati.

(vii) Local Government requirements: Clause 13

5. As in the case of the granting of incentives it is desirable that, having been approved by the Commission or Cabinet, a foreign investment does not collapse because of difficulties with local authorities. If an investment is in the national interest it must be allowed to go ahead as promptly and as smoothly as possible. Accordingly the Commission is empowered to grant appropriate licences to a foreign enterprise but only in respect of a foreign investment which has been approved by the Commission or Cabinet as the case may be.

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