

PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY
FOR CONSIDERATION ONLY
DRAFT AMENDMENTS TO
PROMOTION AND PROTECTION OF INVESTMENT BILL

[B 18 of 2015]

SHORT TITLE

1. On page 1, to omit “**PROMOTION AND**”.

LONG TITLE

1. On page 2, in the first line of the long title, to omit “legislative”.
2. On page 2, in the first and second line of the long title, to omit “the protection and promotion of” and to substitute “their”.

PREAMBLE

1. On page 2, in the terminology of “**CONSCIOUS**”, to omit “need” and to substitute “obligation”.
2. On page 2, in the terminology of “**CONSIDERING**” to omit “promotion and”.
3. On page 2, in the terminology of “**EMPHASISING**”, to omit “the right to just administrative action” and to substitute “the rights related to access to just administrative action, access to justice, access to information and all other rights set out in the Bill of Rights;”.
4. On page 2, in the terminology of the second “**RECOGNISING**”, to omit “need” and to substitute “obligation”.
5. On page 2, in the terminology of “**ACKNOWLEDGING**”, to omit “promoted and encouraged”.

ARRANGEMENT OF SECTIONS

1. On page 3, in line 10, to omit “Right of establishment” and to substitute “Establishment”.
2. On page 3, in line 12, to omit “Security of investment” and to substitute “Physical security of property”.
3. On page 3, in line 13, to omit “Protection of property” and to substitute “Legal protection of investment”.

CLAUSE 1

1. On page 3, in line 23, to omit “of Trade and Industry” and to substitute “responsible for trade and industry;”.
2. On page 3, to omit lines 26 and 27.
3. On page 3, from line 34, to omit the definition of “**measure**” and to substitute: “**measure**” refers to binding governmental action directly affecting an investor or its investment, and includes laws, regulations and administrative action;”.
4. On page 3, in line 43, to omit “Promotion and”.

CLAUSE 2

1. On page 3, in line 45, to omit “**2**” and to substitute “**2(1)**”.
2. On page 3, from line 51, to omit paragraph (c) and to substitute:

“(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) of this Act in the Republic;

(2) For the purposes of this definition, an enterprise may possess assets such as, *inter alia*-

 - (a) Shares as defined by the Companies Act 2008 (Act 71 of 2008), stocks, debentures, securities as defined in the Financial Markets Act, 2012 (Act No. 19 of 2013), and other equity instruments of the enterprise or another enterprise;
 - (b) A debt security of another enterprise;
 - (c) Loans to an enterprise;
 - (d) Movable or immovable property and other property rights such as mortgages, liens or pledges;
 - (e) Claims to money or to any performance under contract having a financial value;
 - (f) Copyrights, know how, goodwill, and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognised under the law of South Africa;
 - (g) Returns such as profits, dividends, royalties and income yielded by an investment; or

(h) Rights or concessions conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources;”.

CLAUSE 3

1. On page 4, from line 5, to omit subparagraph (i) and to substitute:
“(i) the interpretation of the Bill of Rights contemplated in section 39 of the Constitution;”.

CLAUSE 4

1. On page 4, in line 15, to omit “promote and”.
2. On page 4, from line 18, to omit paragraph (b) and to substitute:
“(b) confirm the protection of investments in respect of national treatment and physical security of property;”.
3. On page 4, in line 20, after “investments”, to insert “in the public interest”.
4. On page 4, in line 22, after “investors”, to insert “and their investments”.

CLAUSE 5

1. On page 4, in line 24, after the first “to” to insert “all lawful”.
2. On page 4, in line 24 and 25, to omit “which are subject to national legislation and”.

NEW CLAUSE

1. That the following be a new Clause
“Fair administrative treatment
6. (1) The government shall ensure administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural justice to investors or their investments as provided for in the Constitution and applicable legislation.
(2) Administrative decision-making processes shall include the right to be given written reasons and administrative review of decision consistent with section 33 of the Constitution and applicable legislation.
(3) Investors or their investments shall have access to government-held information in a timely fashion and consistent with section 32 of the Constitution and applicable legislation.
(4) Investors or their investors shall have the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a

court or, where appropriate, another independent and impartial tribunal or forum consistent with section 34 of the Constitution and applicable legislation.”.

CLAUSE 6

1. Clause rejected.

NEW CLAUSE

1. That the following be a new clause:

“Establishment

6. (1) All investments must be established in compliance with the laws of the Republic.

(2) This Act does not create a right for a foreign investor or prospective foreign investor to establish an investment in the Republic.”.

CLAUSE 7

1. On page 4, in line 31, to omit “Subject to national legislation, foreign”, and to substitute “Foreign”.
2. On page 5, from line 11, to omit paragraph (g).

CLAUSE 8

1. On page 5, in line 13, to omit “**Security of investment**” and to substitute “Physical security of property”.
2. On page 5, in line 15, before “security”, to insert “physical”.
3. On page 5, in line 15, after “investors”, to insert “in line with minimum standards of customary international law and”.

CLAUSE 9

1. On page 5, in line 17, to omit “**Protection of property**” and to substitute “**Legal protection of investment**”.

CLAUSE 10

1. On page 5, in line 20, to omit “transfer” and to substitute “repatriate”.

CLAUSE 12

1. On page 5, from line 46, to omit subsections (2) and (3), and to substitute:
“(2) (a) The Department shall maintain a list of qualified mediators of high moral character and recognised competence in the fields of law,

commerce, industry or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators.

(b) The mediator shall be appointed by agreement of the government and the foreign investor (the “parties”).

(c) The parties may jointly request [the Department] [a competent authority] to appoint a mediator from the list established pursuant to this section, or, in the absence of a list, from individuals proposed by either Party.

(d) Recourse to mediation shall be governed by the rules set out in Annex I. Any time limit mentioned in Annex I may be modified by agreement between the disputing parties.

(3) In order to facilitate a resolution of a dispute contemplated in subsection (1), the following information and forms must be submitted by an investor -

(a) contact details of the Foreign Investor, including a physical address in the Territory, email address, facsimile number and telephone number;

(b) a summary of the claim, including the measures giving rise to the Investment Dispute;

(c) the specific organ, agency, province or other subdivision of South Africa allegedly responsible for the measures which the Foreign Investor alleges constitute a breach of any of the investment protection contained in this Act;

(d) the provisions of this Act that the Foreign Investor alleges have been breached; and

(e) the relief sought.”.

2. On page 6, in line 2, after “remedies.” To insert “The consideration of a request for international arbitration will be subject to the administrative processes set out in section 6.”

CLAUSE 13

1. On page 6, from line 6, to omit paragraphs (a) and (b), paragraphs (c) and (d) becoming paragraphs (a) and (b) respectively.
2. On page 6, from line 13, to omit subsection (2).

CLAUSE 15

1. On page 6, in line 21, to omit "Promotion and".