

REPUBLIC OF SOUTH AFRICA

**PORTFOLIO COMMITTEE AMENDMENTS
TO
PROMOTION AND
PROTECTION OF INVESTMENT
BILL**

[B 18—2015]

*(As agreed to by the Portfolio Committee on Trade and Industry
(National Assembly))*

[B 18A—2015]

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AMENDMENTS AGREED TO

PROMOTION AND PROTECTION OF INVESTMENT BILL [B 18—2015]

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, in line 24, to omit “12” and to substitute “13”.
3. On page 3, from lines 25 to omit “, provided that a dispute will only arise once the parties agree, or as prescribed by the law”.
4. 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;
5. On page 3, in line 43, to omit “Promotion and”.

CLAUSE 2

1. On page 3, in line 45, after “2.” to insert “(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(1)(a) and (b) of this Act in the Republic.
 - (2) For the purposes of the definition of “investment”, an enterprise may possess assets such as, amongst others—
 - (a) shares as defined by the Companies Act, 2008 (Act No. 71 of 2008), stocks, debentures, securities as defined in the Financial Markets Act, 2012 (Act No. 19 of 2012), or 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 or 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, or intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent that they are recognised under the law of South Africa;
 - (g) returns such as profits, dividends, royalties or 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).
3. On page 4, in line 20, to omit "(c)" and to substitute "(b)".
4. On page 4, in line 20, after "investments" to insert "in the public interest".
5. On page 4, in line 21, to omit "(d)" and to substitute "(c)".
6. 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".
2. On page 4, from line 24, to omit "subject to national legislation and".

CLAUSE 6

Clause rejected.

NEW CLAUSES

1. That the following be new Clauses:

Fair administrative treatment

6. (1) The government must ensure administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural justice to investors in respect of their investments as provided for in the Constitution and applicable legislation.

(2) Administrative decision-making processes must 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 must, in respect of their investments, have access to government-held information in a timely fashion and consistent with section 32 of the Constitution and applicable legislation.

(4) Investors must, in respect of their investments, 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.

Establishment

7. (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 “7” and to substitute “8”.
2. On page 4, in line 31, to omit “Subject to national legislation, foreign” and to substitute “Foreign”.
3. On page 5, in line 7, after “heritage” ; to insert “or”.
4. On page 5, in line 10, to omit “; or” and to substitute “.”.
5. 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 14, to omit “8” and to substitute “9”.
3. On page 5, in line 15, before “security” to insert “physical”.
4. On page 5, in line 15, to omit “investors.” and to substitute “investors in accordance 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**”.
2. On page 5, in line 18, to omit “9” and to substitute “10” .

CLAUSE 10

1. On page 5, in line 20, to omit “10” and to substitute “11”.
2. On page 5, in line 20, to omit “transfer” and to substitute “repatriate”.

CLAUSE 11

1. On page 5, in line 23, to omit “11” and to substitute “12”.

CLAUSE 12

1. On page 5, in line 41, to omit “12” and to substitute “13”.
2. On page 5, in line 43, to omit “or any other competent authority”.
3. On page 5, from line 44, to omit “or other competent body”.

4. On page 5, from line 46, to omit subsections (2) and (3) and to substitute:

(2) (a) The Department must 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 must be appointed by agreement between the government and the foreign investor (hereinafter referred to as the parties) from the list contemplated in paragraph (a), or, in the absence of a list, from individuals proposed by either party.

(c) In the event of the Department being party to the dispute, the parties may jointly request the Judge President of one of the divisions of the High Court to appoint a mediator.

(d) Recourse to mediation must be governed by the prescribed rules and any prescribed time limit may be adjusted by agreement between the disputing parties.

(3) In order to facilitate a resolution of a dispute contemplated in subsection (1), the following information and prescribed form must be submitted by the foreign investor:

(a) contact details of the foreign investor, including a physical address in the Republic or territory where the investor is predominantly resident, or where it is incorporated, its 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 the Republic 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.

5. 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, in line 5, to omit “13. (1)” and to substitute “14.”.
2. On page 6, from line 6, to omit paragraphs (a) and (b).
3. On page 6, in line 10, to omit “(c)” and to substitute “(a)”.
4. On page 6, in line 11, to omit “(d)” and to substitute “(b)”.
5. On page 6, in line 11, to omit “or expendent”.
6. On page 6, from line 13, to omit subsection (2).

CLAUSE 14

1. On page 6, in line 16, to omit “14” and to substitute “15”.
2. On page 6, in line 16, to omit “Bilateral Investment Treaties” and to substitute “bilateral investment treaties”.
3. On page 6, in line 18, to omit “such” and to substitute “bilateral investment”.

CLAUSE 15

1. On page 6, in line 21, to omit “15” and to substitute “16”.
2. On page 6, in line 21, to omit “Promotion and”.

LONG TITLE

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

PREAMBLE

1. On page 2, in the first paragraph, to omit “need” and to substitute “obligation”.
2. On page 2, in the fifth paragraph, to omit “promotion and”.
3. On page 2, in the seventh paragraph, 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 eighth paragraph, to omit “need” and to substitute “obligation”.
5. On page 2, in the ninth paragraph, to omit “promoted and encouraged”.

ARRANGEMENT OF SECTIONS

1. On page 3, from line 5, to omit the arrangement of sections and to substitute:
 1. Definitions
 2. Investment
 3. Interpretation of Act
 4. Purpose of Act
 5. Application of Act
 6. Fair administrative treatment
 7. Establishment
 8. National treatment
 9. Physical security of property
 10. Legal protection of investment
 11. Transfer of funds
 12. Right to regulate
 13. Dispute resolution
 14. Regulations
 15. Transitional arrangements
 16. Short title and commencement

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