



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

PROMOTION AND PROTECTION OF INVESTMENT BILL



**5th DEMOCRATIC
PARLIAMENT**

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PREAMBLE

- The preamble speak to the aspirations the Bill must achieve once enacted as law and guides on the intention of the legislature.
- As an intention of the legislature and appreciation of the context, the Bill in the preamble acknowledges the need to protect and promote constitutional rights and obligations.
- This appreciates the supremacy of the Constitution

DEFINITIONS

- One submission indicated that “need” used in the preamble should be altered to “obligation”.
- Is there a difference in ordinary meaning of these two words?
- Need denotes a want or requirement due to necessity whilst obligation is a moral or legal requirement
- There is a constitutional obligation to protect rights found in s7 Constitution

CONSTITUTION

international
agreements =
consensual law s231



International
law s231-233

Customary
international
law= non-
consensual law
s232

Sovereignty of a state : three arms
of government : **LEGISLATURE**

EXECUTIVE AND JUDICIARY

Domestic
law/sovereignty
=right to regulate
s233



CONSTITUTION

- S 7(2) indeed obliges the state to respect, protect, promote and fulfil the rights in the Bill of Rights
- Therefore in respect of protecting and promoting rights in the Constitution there is both a need and an obligation imposed on the state to fulfil that task.
- So the use of “obligation” and consistently with its definition may be a better term.



DEFINITIONS

- Definitions not expressed in the Act take their ordinary dictionary meaning.
- “dispute” the removal of the proviso is justified and legally sound.
- Because it is not clear how can parties agree when there is a dispute or what it is that is intended to be achieved by this proviso.
- A dispute can never arise when parties agree or once they agree so in actual fact there is a contradiction in terms of the words used herein.

Definitions

- “measure” either delete whole definition or remove “administrative action” and incorporate the definition suggested by EU.
- The use of the term “administrative action” restricts it to the definition of the Promotion of Administrative Justice Act (PAJA) and the content of the Bill does not justify such interpretation.
- The actions envisaged herein are broader than the scope of PAJA.



DEFINITIONS

- “investment” v terms of the Competition Act
- Shares mean= a part or portion of something owned, allotted to or contributed by a person or group
- Debentures= a long term bond normally bearing fixed interest and unsecured issued by a company or government agency
- Lawful enterprise = a lawful/legal project or undertaking, readiness to embark on a venture or business, its an initiative or a business unit



Clause 7: National treatment

- “like circumstances” normal term used in the world trade organisation (WTO) to mean circumstances that can only be ascertained and clarified case by case basis but do have consistency
- “subject to national legislation” is a standard phrase utilised as a catch all term to ensure that even the non-expressed or referenced legislation where relevant it shall apply.

Clause 8

- Does it not amount to expropriation by the qualifying phrase that says protection can only be accorded if resources and capacity permit?
- This is a justified standard provision which enables the state to meet its obligations within its capacity and available resources
- Investors utilising existing laws and this Bill once enacted can provide the protection their require through their own and state available resources.

- without an understanding of the extent of “a level of security” that needs be accorded to foreign investors and it does not come out as to what is intended to be achieved or the mischief addressed by enabling the Republic to accord foreign investors a level of security. Department explained that this is restricted to physical security level that the states affords all its citizen.
- Perhaps an additional word for clarity will suffice.



Section 25 Constitution and clause 9

- Property is protected. Section 25 expand beyond land.
- S25(4)(b) stipulates that property is not limited to land
- Deprivation can only occur in terms of law of general application.
- So there will never be a case by case basis as the Expropriation Act must find application.

Contrast of clause 7 and 11

- Appreciating the content of the property clause and its application in respect of the Bill let us interrogate what exactly is the intention of the two clauses:
- (1) require foreign nationals to comply with domestic legislation in the same manner as citizens would do.
- This is a self-imposed protection and obligation that the state must treat foreign and domestic investors in the like manner

Contrast clause 7 v 11

- (2) “like circumstances” is defined to confine its meaning to the context of clause 7 with a restriction of such exercise to foreign investors. So herein there is a distinction between domestic investors and foreign investors but a positive differentiation.
- The phrase “like circumstances overall examination ... taking into account all terms of foreign investment” is instructive to the above conclusion.

Clause 7

- There is no ambiguity about clause 7.
- It explains how the Republic will accord national treatment whenever an entity or enterprise decides to invest in South Africa.
- This provision does not advocate for different treatment on foreign investors as opposed to that which domestic investors will enjoy.

Clause 8

- Provides a guarantee subjected to the availability and capacity to give effect to such guarantee
- Republic binds itself to the policy statement that foreign investors must be accorded a level of security.
- So the foreign investors are not thrown into uncertainty as argued but the Republic binds itself by regulating as such and therefore will not renege on its own legislation and bring itself to disrepute.

Clause 10

- Indeed “funds” need be defined otherwise the term is meaningless even if one take the dictionary meaning of the word
- In fact for an investment to be an investment there shall be a need for the commodity that will be used and in this instance in monetary value will be funds and such funds coming from a foreign investor will definitely be in the currency where the investor comes from so an exchange in funds is bound to occur



Legislate and jurisdiction

- Clause 11 may seem to defer the power to legislate in detail to government (executive) or any other organ of state
- In other words the matter is left open ended for both the legislature and the executive to address issues as and when matters arise or should it be necessary.
- (2) does not take away the power conferred in terms of section 231 to 233.





Does this create an anomaly

- In law not necessarily however it leaves open the space for consultation, engagement and involvement between state parties thus consensual engagement and agreed terms rather than a rigid determined instance, which would have resulted had the legislation stipulated.
- Therefore in no way is sections 231 to 233 of the Constitution disregarded.

Clause 12: JURISDICTION

- This has been the main contested provision by almost a measure of submissions
- Extra-territorial jurisdiction is not barred nor prohibited but is sub-ordinated to the exhaustion of internal domestically available litigation
- This makes sense and is aligned to the principle of finding jurisdiction



Common international principle on jurisdiction

- Jurisdiction follows the cause of action or
- Jurisdiction follows the parties to the dispute
- If the dispute arose in SA why should it not be tried and litigated in South Africa applying the South African laws? The arguments advanced seem to ignore this principle and puts paramount international law **Kaunda v President CC**
- Following that there is both consensual international law and non-consensual international it makes sense that application of these principles takes precedent
- It also makes sense the foreign investor will come to invest in the Republic with consent from the state and willingness to comply with its domestic laws



International law

- It must be clear than that clause 12 does not do away with applicability of international law or inter-states litigation as seem assumed through presentations. It does not take away extra-territorial jurisdiction by international courts of forums.
- All submissions are based on speculations or likely perceptions that may or may never be reality

Purpose of the Bill

- It becomes clear that the intention of the government was to take its rightful space to legislate and control the space of investing within its territories arising from the principle of sovereignty.
- That is the mandate and prerogative of the Republic as a sovereign state.
- The principle of sovereignty allows this.

Clause 14

- As a sunset clause it provides the necessary application of the retrospective principle for any law and the rule of law principle.
- What is already protected remains protected and any investment entered before this law comes into effect shall have the law of that time applicable to it unless consensual changes are made or termination of whatever was the authority for the claim of retrospective protection.

DRAFTING

- Certain proposals are justified that re-draft be considered
- For an example definition of “measure” and “dispute”
- Certain clarity as policy position need be clarified by the Department e.g what was intended by the use of “funds” used in clause 10.
- Most clarities have however been presented by the Department during the past day’s engagements with the Committee.



THANK
YOU!
