Investment Protection Bill out for comments

On November 1st 2013 the Department of Trade and Industry (DTI) published the Promotion and Protection of Investment Bill, 2013. The DTI is seeking comments from interested parties by January 31st 2014.

In a strategic move, the Government has published for public comments, an investment protection bill aimed at replacing the standards of investment protection embodied in the international agreements that South Africa has recently terminated.

The proposed legislation contains a number of investment protection rules, namely:

- **National treatment**, which means that the treatment accorded to foreign investments must be no less favorable than that accorded to South African investments, provided that they are “in like circumstances”;

- **Security of investments and returns** to the same degree as the security afforded to other investments; in case of damages on account of dire situations such as war, revolt, insurrection or riot, investors may be able to apply for redress (e.g. restitution, indemnification or compensation);

- **Prohibition on expropriation of investments**, except when grounded on public interest, after a due process, and against just and equitable compensation. The proposed legislation enumerates, in a non-exhaustive way, situations that do not amount to “expropriation”;
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- **Freedom to repatriate funds** subject to taxation and other applicable legislation;

- The so-called “sovereign right to regulate in the public interest”, whereby the Government or any other public body may adopt measures affecting investments to pursue any of the objectives listed in the proposed legislation; and

- A **system of dispute resolution** that favours conciliation procedures. It also allows foreign investors to approach “any court, competent, independent tribunal or statutory body”, as well as an arbitration tribunal in accordance with the Arbitration Act 1965.

In contrast, the proposed legislation does not include a number of standards of investment protection that were present in the bilateral investment agreements recently terminated. Such standards include:

- The **most-favored nation** standard, whereby investments from one country were entitled to enjoy any preferences or advantages granted to investments from any other country;

- The **fair and equitable treatment** standard has lost its autonomy, as under the proposed legislation some of its constituent elements are set out only in relation to other investment protection standards;

- The **full protection and security** standard is framed only as a non-discrimination provision (i.e., relative to the security afforded to other investments), and no longer as an autonomous rule;

- The notion of “indirect expropriation” (i.e. governmental measures whose effects are equivalent to expropriation) is not present in the proposed legislation; and

- The definitive structure of the **system of dispute resolution** remains to be seen, as the proposed legislation leaves considerable discretion to the Minister of Trade and Industry to determine the rules and mechanisms to resolve disputes.

The period for comments from interested parties ends on January 31st 2014. PwC has the technical capacity to support foreign investors in analysing the impact of the proposed legislation on your business, and to assist you in the drafting of comments. Should you have any enquiries on this matter, please contact one of our advisors listed below:

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