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The Honourable Ms J Fubbs
Chairperson: Portfolio Committee on Trade and Industry
Parliament of the Republic of South Africa
60 Plein Street
CAPE TOWN
8000

Attention: Mr Andre Hermans
Portfolio Committee: Trade and Industry
Email: ahermans@parliament.gov.za

Dear Ms Fubbs

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

1. The Portfolio Committee on Trade and Industry ("the Committee") requests the Office of the Chief State Law Adviser ("the OCSLA") to provide a legal opinion on whether the Promotion and Protection of Investment Bill [B 18—2015] ("the Bill"), makes provision for extra-territorial protection of investment, whether the current Bill could provide such protection, and if we have the right to legislate extra-territorially.

DOES THE BILL MAKE PROVISION FOR EXTRA-TERRITORIAL PROTECTION OF INVESTMENT

2. The Bill¹ seeks to provide for the legislative protection of investors and the protection and promotion of investment and to achieve a balance of rights and obligations that apply to all investors. In clause 1 of the Bill it is proposed that an "investor" be defined

¹ See long title of the Bill.

to mean "an enterprise making an investment in the Republic regardless of nationality". It follows that the Bill seeks to provide protection to an enterprise making an investment in the Republic. The Bill therefore does not make provision for the extra-territorial protection of investment. This is confirmed by the Preamble to the Bill, which provides as follows:

"PREAMBLE

CONSCIOUS of the need to protect and promote the rights enshrined in the Constitution;

RECOGNISING the importance that investment plays in job creation, economic growth, sustainable development, and the well-being of the people of South Africa;

AFFIRMING that the State is committed to maintaining an open and transparent environment for investments;

DESIROUS of promoting investment by creating an environment that facilitates processes that may affect investments;

CONSIDERING the responsibility of the government to provide a sound legislative framework for the promotion and protection of all investments, including foreign investments, pursuant to constitutional obligations;

SECURING a balance of rights and obligations of investors to increase investment in the Republic;

EMPHASISING the right to just administrative action;

RECOGNISING the need to take measures to protect or advance persons, or categories of persons, historically disadvantaged in the Republic due to discrimination;

ACKNOWLEDGING that investment must be protected, promoted and encouraged in accordance with the law, administrative justice and access to information;

REAFFIRMING the government's right to regulate in the public interest in accordance with the law;

COGNISANT of the government's commitment in respect of international law to ensure that human rights, fundamental freedoms and protection of peoples' resources are adequately protected."

COULD THE BILL PROVIDE EXTRA-TERRITORIAL PROTECTION AND DOES PARLIAMENT HAVE THE RIGHT TO LEGISLATE EXTRA-TERRITORIALLY

3. The Constitution of the Republic of South Africa, 1996 ("the Constitution"), states that the national legislative authority vests in Parliament and the national executive

authority of the Republic vests in the President.² In the case of **Mashave v The President of the Republic of South Africa and Others**³, the Constitutional Court stated that the Constitution is the source of legislative and executive authority as it determines how the country is to be governed and how legislation should be enacted. Section 44 of the Constitution provides as follows:

“National legislative authority

- 44.** (1) *The national legislative authority as vested in Parliament—*
- (a) *confers on the National Assembly the power—*
- (i) *to amend the Constitution;*
- (ii) *to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and*
- (iii) *to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and*
- (b) *confers on the National Council of Provinces the power—*
- (i) *to participate in amending the Constitution in accordance with section 74;*
- (ii) *to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and*
- (iii) *to consider, in accordance with section 75, any other legislation passed by the National Assembly.*
- (2) *Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—*
- (a) *to maintain national security;*
- (b) *to maintain economic unity;*
- (c) *to maintain essential national standards;*
- (d) *to establish minimum standards required for the rendering of services; or*
- (e) *to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.*
- (3) *Legislation with regard to a matter that is reasonably necessary for or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.*
- (4) *When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.”.*

4. The question of extraterritorial application of the Constitution was discussed by the Constitutional Court in **Kaunda v President of the Republic of South Africa**⁴. The

² Section 85(1) of the Constitution.

³ SALR 2005(2) SA 476 (CC).

⁴ 2004(10) BCLR 1009 (CC).

Constitutional Court per Chaskalson CJ, in paragraphs 36 and 37, had the following to say in respect of extraterritoriality within the constitutional text:

"[36] The starting point of the enquiry into extraterritoriality is to determine the ambit of the rights that are the subject matter of section 7(2). To begin with two observations are called for. First, the Constitution provides the framework for the governance of South Africa. In that respect it is territorially bound and has no application beyond our borders. Secondly, the rights in the Bill of Rights on which reliance is placed for this part of the argument are rights that vest in everyone. Foreigners are entitled to require the South African state to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa. Clearly, they lose the benefit of that protection when they move beyond our borders. Does section 7(2) contemplate that the state's obligation to South Africans under that section is more extensive than its obligation to foreigners, and attaches to them when they are in foreign countries?"

[37] Section 7(1) refers to the Bill of Rights as the

'cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'

The bearers of the rights are people in South Africa. Nothing suggests that it is to have general application, beyond our borders."

Section 7(2) of the Constitution requires the State to "respect, protect, promote and fulfil the rights in the Bill of Rights".

5. The Constitutional Court per Chaskalson CJ, at paragraph 38, referring to the principle of extraterritoriality in the context of international law, stated the following:

*"It is a general rule of international law that the laws of a state ordinarily apply only within its own territory. It is recognised, however, that a state is also entitled, in certain circumstances, to make laws binding on nationals wherever they may be. This can give rise to a tension if laws binding on nationals conflict with laws of a foreign sovereign state in which the national is. As (John) Dugard (**International Law - A South African Perspective**, Fourth Edition at p.146) points out, sovereignty empowers a state to exercise the functions of a state within a particular territory to the exclusion of all other states. In most instances, the exercise of jurisdiction beyond a state's territorial limits would under international law constitute an interference with the exclusive territorial jurisdiction of another state. In *The Case of the S.S. Lotus*, the Permanent Court of International Justice described this principle as follows:*

'Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from

international custom or from a convention . . . all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.' (footnotes omitted)".

6. The Constitution in its entirety is meant for governance of South Africa and for no other. It does not have extraterritorial reach (subject to the exception that a state is also entitled, in certain circumstances, to make laws binding on nationals wherever they may be)⁵. The Constitutional Court per Chaskalson CJ, acknowledged in paragraph 44, that

"(t)here may be special circumstances where the laws of a state are applicable to nationals beyond the state's borders, but only if the application of the law does not interfere with the sovereignty of other states. For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign state and its officials meet not only the requirements of the foreign state's own laws, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of state sovereignty. Section 7(2) should not be construed as imposing a positive obligation on government to do this" (footnote omitted).

7. The Constitutional Court in paragraph 209 per Ngcobo J. clearly and unambiguously accepted the jurisdictional limitations of the Constitution where he stated the following:

"The fundamental flaw in the applicants' case is that it was premised on the proposition that the government has a constitutional duty to require Zimbabwe and Equatorial Guinea to comply with the rights contained in our Bill of Rights. The rights in the Bill of Rights bind this government and not foreign governments. Our government cannot require foreign governments to act in accordance with our Constitution. The applicants misconceived the nature of their rights and their remedies."

The applicants in this case approached the Constitutional Court seeking an order that their constitutional rights be enforced even though they were in Zimbabwe.

⁵ See for example section 4 of the Anti-Personnel Mines Prohibition Act, 2003 (Act No. 36 of 2003).

CONCLUSION

8. In respect of the first question, it is clear that the Bill in its current form does not provide for extra-territorial protection of investment by investors. It is furthermore our view that the current Bill may not provide protection of investment by South African citizens in other countries.

Yours sincerely

A handwritten signature in black ink, appearing to be 'A Small'.

**For CHIEF STATE LAW ADVISER
A Small / G Hoon / A Johaar**