

DEPARTMENT OF TRADE AND INDUSTRY
NOTICE 958 OF 2016

REGULATIONS IN TERMS OF THE PROTECTION OF INVESTMENT ACT,
NO. 22 OF 2015

INVITATION FOR THE PUBLIC TO COMMENT ON THE REGULATIONS IN
TERMS OF THE PROTECTION OF INVESTMENT ACT, NO. 22 OF 2015

I, Dr Rob Davies, Minister of Trade and Industry, hereby publish the Regulations on Mediation Rules in terms of the Protection of Investment Act, for broader public comments.

Interested persons may submit written comments on the proposed regulations not later than thirty (30) days from the date of publication of this notice to:

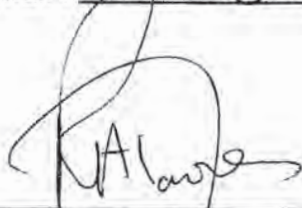
Director-General
Department of Trade and Industry
Private Bag X84, Pretoria
0001

Or hand deliver to:

Director-General
77 Meintjies Street
Block B – 3rd floor
Sunnyside, Pretoria

For attention: Ms V Gilbert

Email : investment@thedti.gov.za



Dr Rob Davies (MP)
Minister of Trade and Industry
7 December 2016

REPUBLIC OF SOUTH AFRICA

DEPARTMENT OF TRADE AND INDUSTRY

DRAFT REGULATIONS ON MEDIATION RULES

TABLE OF CONTENTS

REGULATIONS

Part A – Definitions

1. Definitions

Part B – General Provisions

2. Application of Rules
3. Declaration of Dispute
4. Service of Declaration of Dispute
5. Filing of Declaration of Dispute
6. Mediators
7. Appointment of Mediator
8. Place of Mediation
9. Representation of Parties
10. Preliminary Meeting
11. Role of Mediator
12. Role of Parties
13. Challenge of Mediator
14. Closure of Mediation
15. Termination of Mediation
16. Privileged
17. Confidentiality
18. Liability for Acts or Omissions
19. Fees and Costs

REGULATIONS

Where an investor that has a dispute in respect of action taken by government which action affected an investment of such foreign investor and the investor and the government have agreed that a dispute which has arisen between them shall be submitted to mediation, such mediation must be conducted in accordance with these Mediation Rules:

Part A – Definitions

1. Definitions

In these Regulations any word or expression to which a meaning has been assigned in the Protection of Investment Act, 2015 (Act No. 22 of 2015), shall have the meaning so assigned and, unless the context otherwise indicates –

“**Act**” means the Protection of Investment Act, 2015 (Act No. 22 of 2015);

“**agreement**” means any agreement between the parties embodying a submission of present or future disputes to mediation;

“**competent authority**” means the Judge President of one of the divisions of the High Court of South Africa;

“**day**” means normal working day and shall exclude Saturdays, Sundays and public holidays;

“**Department**” means the Department responsible for trade and industry;

“**dispute**” means a claim by an investor, instituted in accordance with section 13 of the Act, that the government has allegedly breached the protection provided for in the Act;

“**enterprise**” means any natural person or juristic person, whether incorporated or unincorporated;

“**government**” means the government of the Republic of South Africa, including an organ, agency, province or other subdivision of the government of the Republic of South Africa;

“**investor**” means an enterprise making an investment in the Republic of South Africa, regardless of nationality;

“**mediation**” means a process in which parties to a dispute, with the assistance of a neutral third party (‘the mediator’) identify the issue or issues

in dispute, develop options, consider alternatives and endeavour to reach an agreement;

“**mediator**” means a mediator who has been nominated by the “Competent Authority” or mutually agreed to by the parties, and who has accepted such appointment;

“**parties**” means an investor, as defined in the Act, and the government of the Republic of South Africa;

“**preliminary meeting**” means an initial meeting convened by the mediator to deal with procedural or administrative matters in connection with the mediation; and

“**regulation**” means a regulation made under the Act.

Part B - General Provisions

2. Application of Rules

- (1) These rules shall apply in the event of a dispute, as defined in the Act, between an investor and the government.
- (2) These rules are subject to the laws of the Republic of South Africa.
- (3) The parties to the dispute shall act in accordance with the rules of mediation and the reasonable directives of the mediator.
- (4) The parties shall conduct themselves in a spirit of cooperation with the view of actively seeking a resolution of the dispute in an amicable and consensus seeking fashion.

3. Declaration of Dispute

- (1) An investor may declare a dispute within six (6) months of becoming aware of the dispute by completing the prescribed form which shall be available from the Department.
- (2) The prescribed form shall contain the following information:

- (a) the contact details of the investor, including a physical address in the Republic of South Africa 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 government of the Republic of South Africa which the investor claims is responsible for the measures constituting a breach of investment protection contained in the Act;
 - (d) the provisions of the Act the investor claims have been infringed; and
 - (e) the relief sought.
- (3) An investor declaring a dispute must serve a notice of a dispute on the other party to the dispute, calling on any such party to serve a response on the investor within 30 thirty days of receipt of the notice of the dispute.
- (4) The investor shall lodge the declaration of the dispute in triplicate with the Department, who shall issue same by affixing a case number thereon and registering the dispute in the registry of pending disputes for resolution and thereafter the issued declaration of the dispute shall be returned to the investor.

4. Service of Declaration of Dispute

- (1) If the other party to the dispute is not the Department, the investor must serve a copy of the declaration of dispute on the other party by:
- (a) personally serving a copy of the declaration of dispute on the duly authorised official of the other party;
 - (b) emailing, faxing or telexing a copy of the declaration of dispute to the authorised email address, fax or telex of the other party; or
 - (c) sending a copy of the declaration of dispute by registered post to the authorised mailing address of the other party.

- (2) If the other party to the dispute is the Department, the Department must within thirty (30) days of receipt of the declaration of dispute, acknowledge receipt thereof by retaining a copy of the declaration and affixing its stamp detailing the date and the signature of the official who took receipt of the declaration on the original declaration as well as the investor's copy.

5. Filing of Declaration of Dispute

The investor shall after effecting service of the declaration of dispute on the other party, file the original declaration of dispute with the Department confirming that the declaration was served on the other party.

6. Mediators

- (1) The Department shall maintain a list of suitably qualified mediators, who are willing and able to serve as mediators.
- (2) The mediators shall be of high moral character with recognised competence in the fields of law, commerce, industry or finance.
- (3) The mediators shall, in the execution of their duties, exercise independent judgement.

7. Appointment of Mediator

- (1) A mediator shall be appointed within ten (10) days after receipt of the other party's response.
- (2) A mediator shall be appointed by agreement between the investor and the Department from the list of mediators provided for in regulation 6(1), alternatively, and only in the absence of the list of mediators, either the investor or the Department may nominate a mediator, who shall be so appointed if the other party so consents.
- (3) If the Department is a party to the dispute, the parties may jointly request the Judge President of one of the divisions of the High Court of South Africa to appoint a mediator.

- (4) In exercising his or her discretion to appoint a mediator, the Judge President may take into consideration mediators on the list of mediators compiled by the Department and may request parties to make representations relating to any suitable mediators.
- (5) The mediator shall within ten (10) days of his or her nomination accept or decline such nomination by filing a notice with the Department to that effect, which notice shall be communicated to the parties to the dispute.
- (6) The mediator shall specifically direct that the parties to the dispute engage with each other with the view -
 - (a) of defining the dispute or any ancillary issues;
 - (b) to determine whether any agreement could be reached in respect of the issues in dispute; or
 - (c) to determine whether agreement could be reached in respect of the most appropriate relief.
- (7) The mediator may impose any reasonable condition and request, which in the mediator's view will contribute to the speedy resolution of the dispute.
- (8) The mediator shall within ten (10) days of the issuing of the notice referred to in regulation 7(5) give notice to the parties to the dispute of the date on which and the venue where the mediation will take place.
- (9) The mediation process shall not take place before the expiry of thirty (30) days from the issuing of such notice unless the mediator and parties to the dispute determine otherwise.

8. Place of Mediation

The mediator may conduct the mediation at a place, which in his or her discretion is appropriate and convenient for the parties to the dispute, taking into account the circumstances of the parties.

9. Representation of Parties

The parties to the dispute shall in writing furnish the mediator and each other with the names, designations and addresses of the representatives who will be in attendance at the mediation at least ten (10) days after the appointment of the mediator.

10. Preliminary Meeting

(1) The mediator shall convene a preliminary meeting with the parties, in person or by teleconference unless the parties, with the mediator's concurrence, agree otherwise.

(2) The purpose of the preliminary meeting is to:

- (a) discuss and agree on the issues in dispute, or formulate a process in terms of which those issues can be clarified and agreed to;
- (b) plan and agree on how a negotiated resolution of the dispute should proceed including, where appropriate, a timetable for exchange of information, including position papers and other relevant documents, and the filing of same with the Department;
- (c) make arrangements, if necessary, for confidentiality undertakings to be signed by all parties to the mediation process; or
- (d) undertake such planning and administrative arrangements as may be required and necessary for the mediation process, including the terms of appointment of the mediator.

11. Role of Mediator

(1) The mediator shall assist the parties to negotiate a mutually acceptable resolution of the dispute by:

- (a) advising the parties to the dispute to attempt a resolution in a spirit

- of good will, cooperation, while using their best endeavours to maintain good institutional and personal relations with each other;
- (b) assisting the parties to identify and define the issues in dispute;
 - (c) implementing a procedure which is aimed at achieving resolution of the dispute expeditiously, fairly and cost-effectively;
 - (d) where appropriate, suggesting particular dispute resolution techniques for individual issues aimed at narrowing the issues in dispute expeditiously, fairly and cost-effectively; and
 - (e) acting as the facilitator in direct negotiations between the parties.
- (2) During the mediation process, the mediator may convene such meetings between the parties as the mediator considers appropriate, for the purpose of:
- (a) identifying and defining the issues in dispute; and
 - (b) resolving or narrowing the issues in dispute, on terms acceptable to the parties.
- (3) The mediator may decide on the most appropriate way of bringing clarity to the issues in dispute and may-
- (a) direct that meetings between the disputing parties take place;
 - (b) consult with the disputing parties jointly or individually;
 - (c) seek the assistance of or consult with relevant experts and stakeholders, only after the parties to the dispute agree to seek such assistance; or
 - (d) provide any additional support requested by the disputing parties.

12. Role of Parties

- (1) The parties shall do all things reasonably necessary for the proper, expeditious and cost-effective conduct of the mediation.
- (2) Without limiting the generality of regulation 12(1) above, each party shall:
 - (a) participate in good faith in the mediation process;
 - (b) comply without delay with any order made by the mediator on procedural matters; and

- (c) appear in person or through an authorised representative at the meeting scheduled by the mediator or agreed to between the parties.

13. Challenge of Mediator

- (1) Any party to the dispute may apply for the recusal of the mediator, should such party be of the view that such mediator may not be independent or impartial.
- (2) The application must be brought within seven (7) days of a party becoming aware of such a circumstance giving rise to such suspicion.
- (3) The mediator shall require the applicant applying for his or her recusal to set out the basis for the application.
- (4) The mediator may recuse himself or herself only if cogent and justifiable grounds for recusal are presented by the applicant.
- (5) In the event that the mediator does not recuse himself or herself and the other party is aggrieved by such decision of the mediator, the other party must within five (5) days notify the mediator and file a recusal application dispute with the Department outlining the reasons thereof.
- (6) The Department shall within five (5) days of receipt of such dispute request the mediator to provide reasons for his or her non – recusal.
- (7) Upon receipt of the reasons for non-recusal by the mediator, the Department must within five (5) days and by agreement with an investor nominate and appoint a mediator to resolve the recusal dispute.
- (8) The decision of the mediator appointed to resolve the recusal dispute shall be final.

14. Closure of Mediation

The mediator shall declare the mediation closed after being satisfied that the parties to the dispute have successfully facilitated the resolution of the dispute; alternatively that the parties to the dispute are in agreement that the dispute is incapable of being resolved by means of mediation or the mediator is of the view that the dispute is incapable of being productively resolved through the mediation process.

15. Termination of Mediation

Any party to the dispute may terminate the mediation by written notice to the opposing party or parties, including the mediator.

16. Privileged

(1) The mediation process and all documentation relating thereto are privileged and shall not be disclosed or relied upon or be subject to any disclosure with the view of proving any fact in any judicial proceedings arising out of or in connection with the dispute.

(2) The privilege shall extend to:

- (a) any view expressed, or admission or concession made, by or on behalf of a party;
- (b) any view expressed, or suggestion made by the mediator; and
- (c) any document created for the purpose of the mediation.

17. Confidentiality

(1) The mediator, the parties and all advisors and representatives of the parties shall:

- (a) except as provided in these rules, ensure that all information disclosed during and after the mediation process remains confidential;
- (b) only use any information disclosed during the mediation process for the purpose of the mediation;
- (c) if requested by the mediator or an opposing party, sign a non-disclosure undertaking and shall maintain the confidential nature of the proceedings and/or any information disclosed during such

proceedings.

- (2) The obligation to maintain the confidential nature of the proceedings and or information disclosed therein may be dispensed with:
 - (a) if disclosure is compelled by law;
 - (b) to the extent necessary to give effect to any agreement which the parties to the dispute may reach during these proceedings or to enforce any agreement to settle or resolve the whole or any part of the dispute; or
 - (c) if the parties to the mediation agree in writing to the disclosure of confidential information.
- (3) A party to the proceedings may not record the mediation proceedings or any part thereof, unless the other parties agree to such recording.
- (4) Should the dispute be resolved, any information relating to the parties in dispute or any confidential information shall not be disclosed.

18. Liability for Acts or Omissions

The parties agree that the mediator shall not be liable to any party for or in respect of any act or omission in the discharge or purported discharge of his or her functions under these Rules, unless such act or omission has been fraudulently committed.

19. Fees and Costs

- (1) The fees and costs of the mediation shall, in the absence of an agreement to the contrary, be borne jointly by all parties to the dispute.
- (2) The Department shall from time to time publish the schedule relating to the fees and costs related to the mediation of disputes.