Real Mining. Real People. Real Difference.

SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON TRADE & INDUSTRY ON THE PROMOTION AND PROTECTION OF INVESTMENT BILL, 2015

ANGLO AMERICAN SOUTH AFRICA LIMITED

15 September 2015

ABOUT
ANGLO AMERICAN SOUTH AFRICA LIMITED

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OUTLINE

Scope of presentation

- **About** Anglo American South Africa Limited
- **Background** to the Promotion and Protection of Investment Bill, 2015 (**the Bill**)
- **Creating a more attractive and competitive investment climate:**
  The manner in which the Bill can –
  - foster investor-state **trust and transparency**
  - **modernise** South Africa's investment regime, by -
    - meeting **SADC's** investment standards
    - embracing **BRICS** practices
    - understanding the **UNCTAD** framework

SADC: Southern African Development Community

BRICS: Brazil, Russia, India, China and South Africa

UNCTAD: United Nations Conference on Trade and Development

ABOUT
ANGLO AMERICAN SOUTH AFRICA LIMITED

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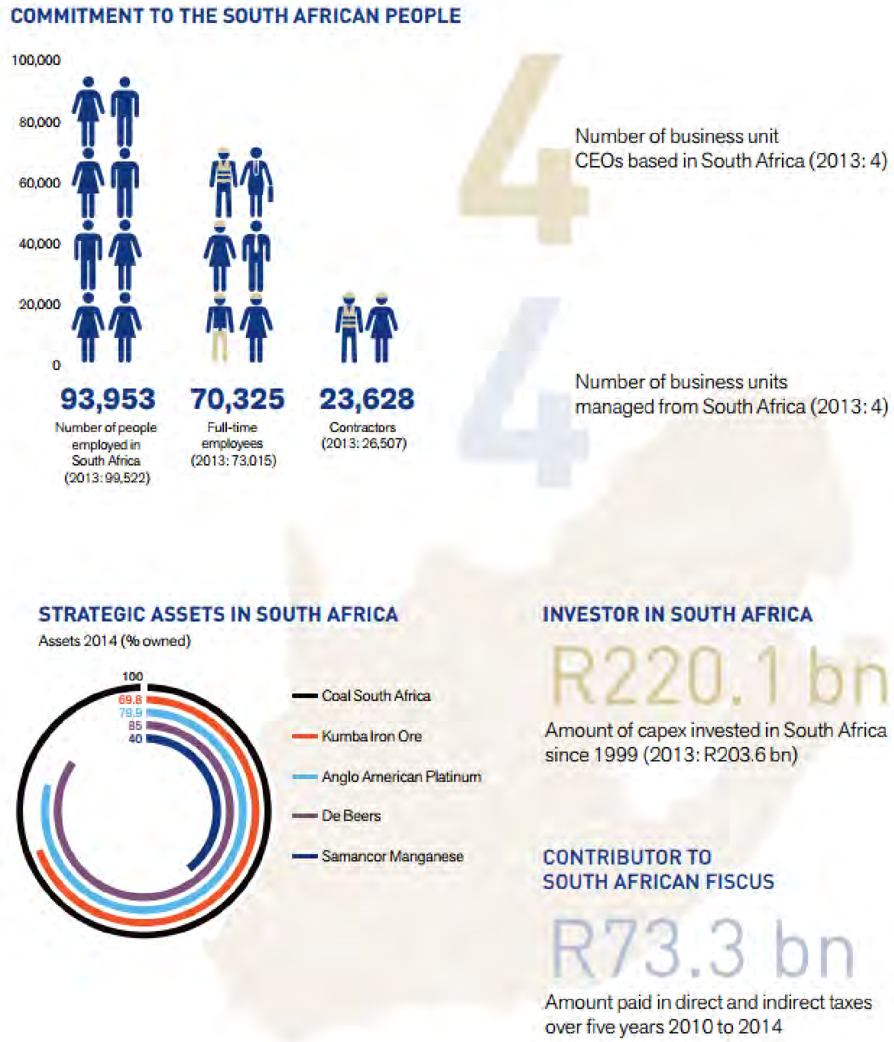
Creating shared value together

- Anglo American is a diversified global mining company established in 1917 in South Africa
- South African operations represent a material portion of Anglo American Group's portfolio
- Business Units (**BUs**) in South Africa include
  - Anglo American Platinum Limited
  - Anglo American Coal South Africa
  - Kumba Iron Ore Limited
  - De Beers Mining Consolidated Limited and its related companies
  - Samancor Manganese
- Since its establishment, Anglo American has contributed substantively to local and foreign investment in the South African economy



BACKGROUND
TO THE BILL

BACKGROUND TO THE BILL

Development of international investment law

- Historically, there was inconsistency and injustice in the exercise of **diplomatic protection** (state-state enforcement of investment protection principles)
- Countries thus developed a global network of international investment agreements (**IIAs**): mainly bilateral investment treaties (**BITs**) and free trade agreements (**FTAs**)
  - IIAs are based on states' **reciprocal respect** for one another's sovereignty
  - each state agrees to treat the other state's investors in accordance with certain binding legal standards, established and enforceable at the **international level**
  - **typically** these include:
    - full protection and security
    - national treatment
    - free transfer of funds
    - protection from strife
    - fair and equitable treatment
    - most-favoured nation treatment
    - market value compensation for expropriation
    - investor-state dispute settlement (**ISDS**)

BACKGROUND TO THE BILL

Shifts in South Africa's BIT policy

- From 1994 to 2009, South Africa **signed 45 BITs** and **ratified 22** of these
- In 2006, South Africa signed the SADC Protocol on Finance and Investment (**SADC Protocol**), including most of the typical **BIT standards** of protection. South Africa ratified the Protocol in 2008 which came into force in 2010.
- In 2009, the Department of Trade & Industry (**DTI**) completed a **BIT Policy Review**:
  - *"BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for development"*
  - *South Africa "should review its BIT practices, with a view to developing a model BIT which is in line with its development needs"*
- By June 2012, South Africa had helped develop a **SADC Model BIT Template**
  - to harmonize investment policies in accordance with the SADC Protocol
  - to assist SADC states in negotiating more balanced BITs

BACKGROUND TO THE BILL

Termination of South Africa's BITs

- **However**, from September 2012, rather than renegotiating BITs following the SADC Protocol and the new SADC Model BIT, the DTI **unilaterally terminated 13 BITs** with European Union trading partners:
  - Belgium-Luxembourg • Germany • Switzerland • The Netherlands • Spain • **AND**
  - United Kingdom • France • Denmark • Austria • Greece • Italy • Finland • Sweden
- The **initial set** of terminations took place **without any prior consultation** with: Parliament; the affected states; major investors from those states; major South African investors in those states; the South African business community generally; and the public at large
- The **second set** of terminations took place **without even any formal notification** to the South African public, SADC or UNCTAD
- South Africa has **BITs remaining in force** with: • China • Russia • Argentina • Cuba • Czech Republic • Iran • Mauritius • Mozambique • South Korea

BACKGROUND TO THE BILL

Development of the Bill

- In **November 2013**, the DTI published a draft of the Bill for public comment, saying:
  - *"The Bill is a significant milestone in the process to **update and modernise** South Africa's legal framework to protect investment in South Africa"*
  - *"The Bill clarifies standards of protection for investors - both foreign and domestic - by setting out **provisions ordinarily found in BITs** in a manner that is consistent with South Africa's Constitution and existing legal framework"*
- **The Bill**, however, does not achieve these objectives, as it would retard South Africa's investment regime further, by reverting to a regime of **diplomatic protection**, which is **out of step** with -
  - the standards required by the SADC Protocol
  - the practices of other BRICS Members
  - UNCTAD's framework for reforming international investment law

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MODERNISING SOUTH AFRICA'S INVESTMENT REGIME:

MEETING THE SADC INVESTMENT STANDARDS

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
TOWARDS A COMMON FUTURE

MODERNISING SOUTH AFRICA'S INVESTMENT REGIME: MEETING THE **SADC** INVESTMENT STANDARDS

South Africa's obligations under the SADC Protocol

- pursue **harmonisation of investment regimes**, including policies, laws and practices in accordance with the best practices
- establish predictability, confidence, trust and integrity by adhering to and enforcing **open and transparent** investment policies, practices, regulations and procedures
- create **favourable conditions** to attract investments in its territory through suitable administrative measures and expeditious clearance of authorisations
- no expropriation or nationalisation without a public purpose, a non-discriminatory basis, due process of law and **prompt, adequate and effective compensation**
- afford foreign investors **fair and equitable treatment**, **no less favourable** than that granted to investors from any other state
- provide facilities for the **repatriation of investments and returns** and encourage the free movement of capital
- ensure that investors have **access to the courts**, as well as direct recourse to **international arbitration**, after the exhaustion of local remedies

MODERNISING SOUTH AFRICA'S INVESTMENT REGIME: MEETING THE **SADC** INVESTMENT STANDARDS

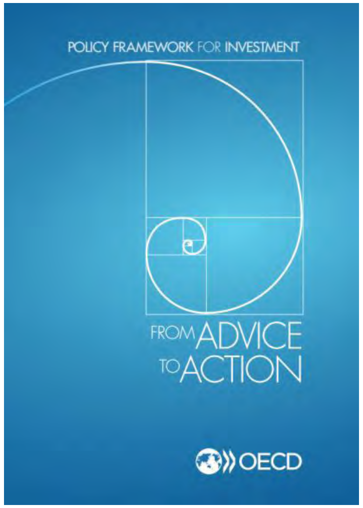
Measuring the Bill against the SADC Protocol

- The Bill is **inconsistent** with the SADC Protocol in its underlying **premise**, its **provisions** as well as the **procedure** by which it was developed
- The Bill is **based** on domesticating or 'de-internationalising' investment protection, but the SADC Protocol intrinsically requires **international** standards and mechanisms
- The Bill's **provisions** are inconsistent with the SADC Protocol, as they would:
  - dilute the **definitions** of 'investment' and 'dispute'
  - remove or weaken the **guarantees** of fair and equitable treatment, non-discrimination and market value compensation for expropriation
  - entirely exclude foreign investors' recourse to **international arbitration**, even after the exhaustion of local remedies
- There is no public record that the **procedure** preceding the Bill involved coordination and consultation with other SADC Members under the SADC Protocol, which requires "***harmonisation*** *of their investment regimes, including policies, laws and practices, in accordance with the best practices within the overall strategy towards integration*"

MODERNISING SOUTH AFRICA'S INVESTMENT REGIME: MEETING THE **SADC** INVESTMENT STANDARDS

Implementation of the SADC Protocol: Regional Action Plan on Investment

- In June 2012, a SADC drafting committee (including South Africa) completed the **SADC Model BIT Template**, to be used by SADC States "*as a basis for developing their own specific Model Investment Treaty or as a guide through any given investment treaty negotiation*"
- In 2012, SADC decided to engage the assistance of the **OECD** in developing a **SADC Policy Framework for Investment**, due for release in November 2015, which emphasises the following reforms:
  - strengthening security and protection of investors' property rights
  - providing well-defined rights for land access and use
  - reducing and refining restrictions on foreign investment
  - facilitating private participation in infrastructure investments and promoting good governance of state-owned enterprises
  - building a coherent and transparent investment environment
  - ensuring responsible and inclusive investment for development



MODERNISING SOUTH AFRICA'S INVESTMENT REGIME: MEETING THE **SADC** INVESTMENT STANDARDS

The Mauritian Model

- **Mauritius** has placed itself at the **forefront of modern investment promotion**, signing 8 new BITs since 2010
- **Investment Promotion Act** (enacted in 2000, updated annually since 2011)
  - established a dedicated Board of Investment, to improve the investment environment and promote Mauritius as an attractive base for investments
  - from 2015, established a One-Stop Shop to facilitate high-value investments
  - provided for international investment protection and promotion agreements (BITs)
- Mauritius has become the **regional hub for international commercial arbitration**
  - enacted International Arbitration Act in 2008 based on modern UNCITRAL Model
  - replaced South Africa as Permanent Court of Arbitration's African Facility in 2009
- **Budget Speech 2011**: *"We will use the new economic diplomacy initiative to position Mauritius as the preferred gateway for investment into Africa"*

MODERNISING SOUTH AFRICA'S INVESTMENT REGIME: MEETING THE **SADC** INVESTMENT STANDARDS

South Africa in regional context

WEF Africa Competitiveness Report 2015:

- *"The region's current best-performing economy, **Mauritius** (at 39th, **replacing South Africa** two years ago) has made impressive strides toward improved competitiveness on the back of the wide-ranging structural reforms that began in 2006, … particularly visible in its creation of an **enabling environment** in its financial, goods, and labor markets…*
- *… in contrast to the performance of **South Africa**, which has been experiencing a gradual but **steady decline** in its competitiveness since 2006 and ranks 56th in this year's Report, down from 35th in 2006."*

WORLD ECONOMIC FORUM

OECD BETTER POLICIES FOR BETTER LIVES

Global Competitiveness Index 2014–2015: Africa and selected comparators

Economy	GCI 2014–2015 Rank/144	GCI 2014–2015 Direction
China	28	↑
Mauritius	39	↑
Russian Federation	53	↑
South Africa	56	↓
Brazil	57	↓

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MODERNISING SOUTH AFRICA'S INVESTMENT REGIME:

KEEPING UP WITH **BRICS** PRACTICES

MODERNISING SOUTH AFRICA'S INVESTMENT REGIME: KEEPING UP WITH THE **BRICS** MEMBERS

BRICS Fortaleza Summit (2014)

BRICS 2014
Fortaleza · Brasil

- **BRICS Trade and Investment Facilitation Plan**
  - increasing transparency and awareness
  - promoting simplification and efficiency
  - ensuring consistency and predictability
  - enhancing communication and consultation
  - encouraging cooperation and harmonization
- **BRICS Perspective on International Investment Agreements**
  - **IIAs** should encourage foreign investors to support national development and offer greater attention to **investment promotion and facilitation**
  - BRICS Member States are encouraged to **build common approaches** in various multilateral dialogues on international investment policy
- **However**, South Africa's approach appears at variance with other BRICS Members

MODERNISING SOUTH AFRICA'S INVESTMENT REGIME: KEEPING UP WITH **BRICS** PRACTICES

Recent IIAs adopted by BRICS Members

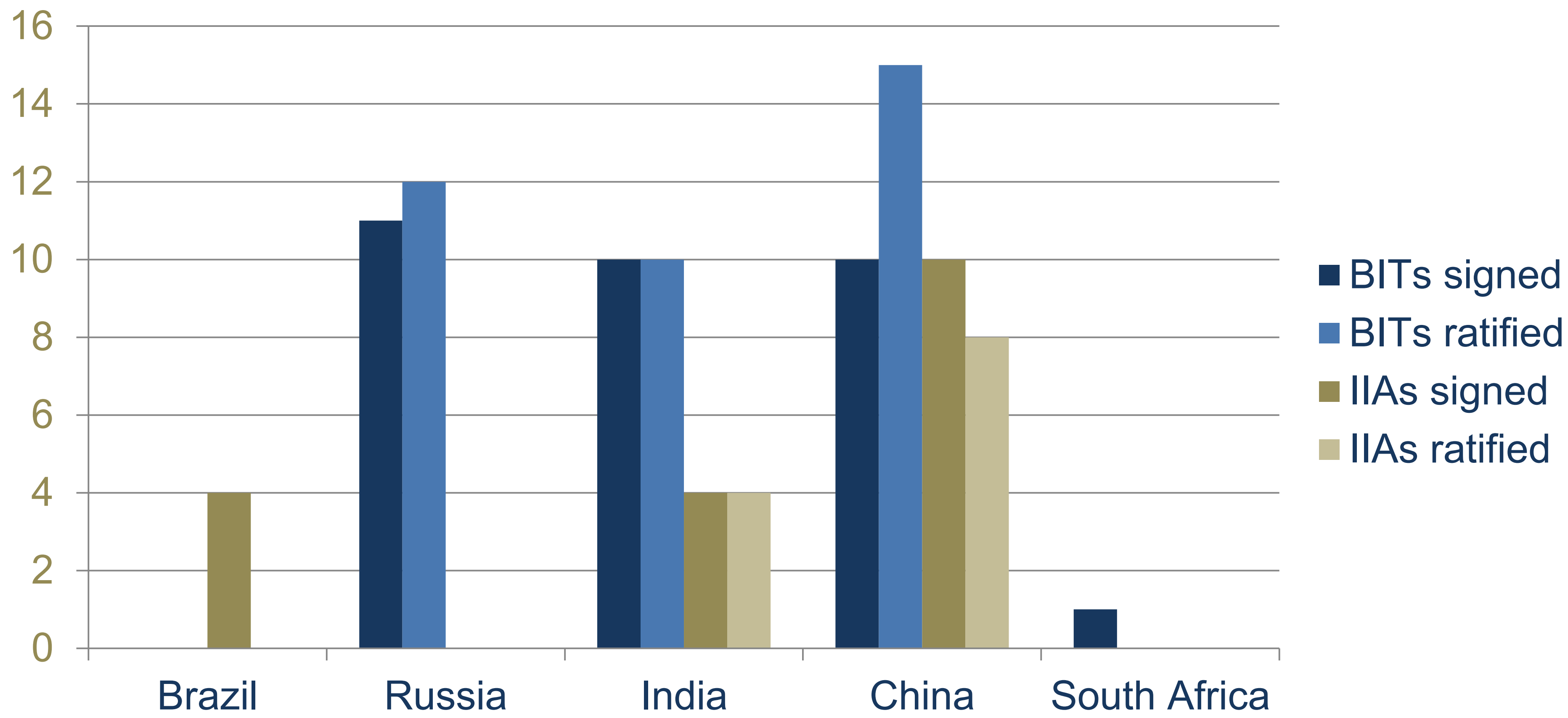
● standard protection
○ qualified protection

Agreement	Signature	FPS	FET	NT	MFN	MVC	FTF	ISDS
India's New Model BIT	pending		○	●		●	●	●
Brazil - Malawi CFIA	2015-06-25		○	●	●	●	●	
China - Australia FTA (confirming 1988 BIT)	2015-06-17	○ ●	○ ●	● ●	● ●	○ ●	○ ●	● ●
China - S Korea FTA	2015-06-01	●	●	●	●	●	●	●
Brazil - Angola CFIA	2015-04-01		○	●	●	●	●	
Brazil - Mozambique	2015-03-30		○	●	●	●	●	
India - ASEAN IIA	2014-11-12	●	●	●	●	●	●	●
Russia - Guatemala BIT	2013-11-27	○	●	●	●	●	●	●
China - Canada BIT	2012-09-09	●	●	●	●	●	●	●
China - India BIT	2006-11-21	○	●	●	●	●	●	●
China - Russia BIT	2006-11-09	○	●	●	●	●	●	●

FPS: full protection and security; FET: fair and equitable treatment; NT: national treatment; MFN: most-favoured-nation treatment
MVC: market value compensation for expropriation; FTF: free transfer of funds; ISDS: investor-state dispute settlement

MODERNISING SOUTH AFRICA'S INVESTMENT REGIME: KEEPING UP WITH **BRICS** PRACTICES

IIA activity of BRICS Members since 2009



China now has 130 BITs *(the second most in the world after Germany)*

MODERNISING
SOUTH AFRICA'S
INVESTMENT REGIME:

UNDERSTANDING THE
UNCTAD FRAMEWORK

INVESTMENT POLICY FRAMEWORK
FOR SUSTAINABLE DEVELOPMENT
2015

UNITED NATIONS
UNCTAD

MODERNISING SOUTH AFRICA'S INVESTMENT REGIME: UNDERSTANDING THE **UNCTAD** FRAMEWORK

UNCTAD's Investment Policy Framework for Sustainable Development

- UNCTAD's framework for *"**reforming international investment governance**"*
  - remains premised on the **internationalised** nature of investment protection
  - aims to **improve IIAs** to make them more supportive of sustainable development goals and to make ISDS more transparent, consistent and accountable
  - **termination** of BITs is **neither** part of this framework **nor** of the international trend (South Africa and Indonesia are the ***only*** countries terminating their BITs)
- In fact, UNCTAD **warns against** -
  - unilateral termination of BITs, as the lengthy 'savings' or 'sunset' clauses cannot be amended after termination, but only by prior renegotiation
  - excluding ISDS (in favour of domestic litigation and state-state arbitration), as it may result in even greater inequality among investors, as well as among States
  - states embarking on separate reforms, as this *"risks achieving only piecemeal change and potentially creating new forms of fragmentation and uncertainty"*

QUESTIONS

AND

ANSWERS