

PRESENTATION TO THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

PROMOTION AND PROTECTION OF INVESTMENT BILL

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Global development in investment policy making

- **UNCTAD 2015 report**

- There have been fundamental changes in the investment and investor landscape;
- Movement away from freedom of investment to investment for sustainable development;
- A new generation of investment policies is emerging- pursuing a broader and more intricate development policy agenda while maintaining a favourable investment climate.
- Investment policy framework connected to an overall development strategy or industrial development policy of states to ensure policy coherence.

Global development in investment policy making

- Internationally, investment policy environment is changing and is giving rise to:
 - To strengthen the development dimension of the international investment policy regime
 - Balance between right and obligations of States and investors.
 - Dealing with gaps, overlaps and inconsistencies in IIA coverage and content and resolving institutional and dispute settlement issues



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BIT Review Framework

- **the dti** initiated a review of BITs in 2008/2009.
- Culminated in the policy paper “Bilateral Investment Treaty Policy Review Framework” which
 - outlines the international history and evolution of BITs, and highlights its main features, dangers and challenges;
 - contains policy guidelines for an approach to BITs that would mitigate the risks to South Africa in future.



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BITs Impact on Policy Space

- Government must retain the policy space to implement legitimate public policy objectives;
- Guard against wide-ranging and arbitrary application of investment rules that could unduly constrain policy space;
- BITs tend to privilege narrow commercial or economic considerations without due consideration to the other, wider legal obligations of the Government.



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Issues Identified in BITs Review (I)

- BITs favour the private interests of foreign investors over public interests;
- Investors' claims against Governments can be brought directly to international arbitration, bypassing national courts;
- Subjects matters of national public policy to a process where arbitrators tend to focus on narrow commercial interests over broader societal or developmental considerations;
- Core provisions of BITs, such as “expropriation” and “standards of treatment”, are often ill-defined;



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Issues Identified in BITs Review (II)

- National treatment provision found in all SA BITs provides that foreigners will not be discriminated against;
- Policies that privilege historically disadvantaged South Africans construed by foreigners as breaching national treatment provisions;
- BIT provisions dealing with compensation may also conflict with the Constitution.
 - BITs calls for „immediate, *full* and effective compensation“, Constitution provides for compensation on the basis of „just and equitable“
- BITs obligations may override constitutional obligations placed on the SA Government



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Policy Approach

- Cabinet adoption of investment policy framework – July 2010
- Purpose of framework : modernise and strengthen SA’s investment regime by implementing a series of policy measures that will ensure:
 - SA remains open to foreign investment;
 - adequate security and protection to all investors;
 - preserving the sovereign right to regulate in the public interest;
 - pursue developmental policy objectives.

Cabinet Decision

- Five core measures will be undertaken to implement the new policy framework for investment:
 - Development of a national Investment Act;
 - South Africa will only enter into BITs in future on the basis of compelling economic or political reasons;
 - Development of a new BIT negotiating template;
 - Review and termination of BITs in force;
 - Establishment of an Inter-Ministerial Committee (IMC) on BITs and investment.



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Implementation

- BITs terminations commenced with 13 terminations effected – unfolding indiscriminately
- Promotion and Protection of Investment Bill developed as an investment regulatory framework - completed by **the dti** and introduced into Parliament in July 2015
- Model BIT is finalised – subject to final IMC approval
- IMC has met several times to consider various issues around the implementation and coordination of investment policy framework



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Key Objectives of the Bill

- It confirms that SA remains open to foreign investment.
- It does not impose any new obligations on investors.
- It does not override existing legislation protecting investment in SA.
- It achieves a balance between the rights and obligations of investors and of Government, particularly in respect of the Constitutional obligations to safeguard the public interest.
- It 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 SA's Constitution and existing legal framework



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Promotion and Protection of Investment Bill cont...

Long title of the Bill :

- Explicitly states the objective that is sought to be achieved by Government, ie.:
 - Protection of investors;
 - Protection and promotion of investment;
 - Balance of rights and obligations applicable to investors.
- Sets the scene for the substantive provisions

Promotion and Protection of Investment Bill cont...

Preamble :

- Confirms SA's commitment to an open, transparent environment for foreign investment that supports sustainable development and international human rights law .

Promotion and Protection of Investment Bill cont...

Section 1: Definitions

- Contains explanatory list of terms used in the Bill



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Promotion and Protection of Investment Bill cont...

Section 2: Investment

- Separate provision
- Type of investment to be protected under this legislation is „enterprise-based“
- Must be made in accordance with the laws of SA

Promotion and Protection of Investment Bill cont...

Section 3: Interpretation of Act

- In accordance with Section 4 (Purpose of Act);
- Interpreted and applied in a manner that is consistent with the Constitution:
 - Just administrative action;
 - Customary international law;
 - International law
- International agreements / conventions

Promotion and Protection of Investment Bill cont...

Section 4 : Purpose of the Act

- Promote and protect investments
- Confirms protection of investments
- Sovereign right to regulate
- Confirms the Bill of rights and laws applicable to investors

Promotion and Protection of Investment Bill cont...

Section 5 : Application of the Act

- Investments are subject to national legislations
- In accordance with the requirements of Section 2



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Promotion and Protection of Investment Bill cont...

Section 6 : Right of establishment

- No automatic right of establishment
- Investments must comply with laws of SA



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Promotion and Protection of Investment Bill cont...

Section 7 : National treatment

- Grants an investor the right to be treated no less favourably than SA investors so long as their investments are “in like circumstances”



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Promotion and Protection of Investment Bill (PPIB) cont...

Section 8 : Security of investment

- South Africa bears no greater obligation to foreign investors than to its own investors in respect of their investments
- Subject to available resources and capacity



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Promotion and Protection of Investment Bill (PPIB) cont...

Section 9 : Protection of Property

- Right to property in terms of Section 25 of the Constitution
- Expropriation issues will be dealt with in terms of the provisions in the Constitution and the Expropriation Act.



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Promotion and Protection of Investment Bill (PPIB) cont...

Section 10 : Transfer of funds

- Reflects that South Africa has a liberal transfer regime;
- Specific limitations in terms of applicable legislation.



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Promotion and Protection of Investment Bill (PPIB) cont...

Section 11: Right to regulate

- Confirms the right of Government to regulate in the public interest.
- Is necessary to redress historical, social and economic inequalities, and
- Uphold rights guaranteed in the South African Constitution.



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Promotion and Protection of Investment Bill (PPIB) cont...

Section 12 : Dispute Resolution

- The Bill facilitates a dispute prevention approach to investment.
- Investors retain full legal rights to pursue any avenue available under SA law.
- Provides for state-to-state international arbitration subject to exhaustion of domestic remedies.



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Promotion and Protection of Investment Bill (PPIB) cont....

Section 13 : Regulations

- The Minister may make regulations in matters prescribed thereunder;
- For matters relating to the facilitation of disputes, it is mandatory for the Minister to gazette such regulations



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Promotion and Protection of Investment Bill (PPIB) cont...

Section 14 : Transitional arrangements

- Transitional arrangements caters for the survival period contained in BITs
- Where BITs have been terminated, this period continues to prevail for existing investments made under such BITs
- Reassures existing investors on the non-interference of their investments



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Promotion and Protection of Investment Bill (PPIB) - Process

- PPIB was subject to a rigorous consultation process with Government and stakeholders, inclusive of an expansive public comment period and consultations within NEDLAC;
- Cabinet endorsed the Bill on 24 June 2015;
- OCSLA Justice certified the Bill on 16 July 2015 and it was introduced into Parliament at the end of July 2015.
- Public hearings will be conducted during Sept 2015



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Conclusion

Purpose of Bill:

- To encourage investment through the regulatory framework;
- To provide protection to all investors - foreign and domestic
- Provide a stable environment for investors in light of BITs terminations;
- Strengthening of government's regulatory space in pursuit of its transformation objectives.



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