

THE PROTECTION AND PROMOTION OF INVESTMENT BILL



Presentation to the Portfolio Committee on
Trade and Industry by the Mandela Institute,
University of Witwatersrand

Dr. Fola Adeleke

Presentation Outline



- Highlight main features of the Bill
- Purpose of the Bill
- Definition of Investment
- Interpretation of the Bill
- Standards of Protection in the Bill
- Dispute Resolution
- PPIB and Regional Integration
- Public Participation and transparency
- Conclusion

Features of the Promotion and Protection of Investment Bill



- Limited definition of investment
- Right to regulate in the public interest
- Constitutional approach to expropriation and compensation
- Removal of some investor protection standards such as fair and equitable treatment and most favoured nation standards
- Preference for domestic dispute settlement and state-state international arbitration

Purpose of the Bill



- Recognition of the legitimate right to regulate in the public interest.
- Consistency with constitutional and legal principles.

However,

- Need for acknowledgment of the separation between investors and their investment and for both to be subject to the Bill of Rights and the Constitution.

Definition of Investment



- Enterprise-based and Asset-based definitions of "investment" adopted.
- Recommendation in the SADC Model BIT 2012 for the adoption of enterprise definition which allows most assets to be covered in investment.

For purposes of clarity:

- Perhaps a more expansive approach along the lines of the SADC Model BIT should be taken.

Interpretation of the Bill



- Interpretation and application subject to consistency with international agreements. These include BITs and the SADC Protocol on Finance and Investment.
- Inconsistency between the provisions of the Bill and existing BITs in areas such as:
 - Presence of traditional investment protection standards of fair and equitable treatment and the most-favoured nation treatment standard of investors;
 - Broader definition of investment in the BITs;
 - Compensation for expropriation is determined by Section 25 of the Constitution in the Bill;
 - International arbitration is subject to the consent of the government in terms of the Bill and is confined to State-to-State proceedings.

Interpretation of the Bill



- Section 14 addresses the inconsistencies by providing for the continued application of BITs, however:
- The inconsistencies apply to other international agreements such as the SADC Finance and Investment Protocol which section 14 does not cover.
- As a result, section 14 should cover all international agreements concluded in accordance with section 231 of the Constitution.

Substantive standards of investment protection



- National Treatment Provision

Strictness of criteria-potential arbitrariness

- Absence of fair & equitable treatment AND most-favoured nation provisions

Room for preferential treatment?

- Protection of property

Application of Section 25 of the Constitution and Calvo doctrine which is supported.

(Perhaps add any applicable international agreement subject to any agreement South Africa may be a party to)

Dispute Resolution Clause



- Mediation

Determination of set time period to initiate and conduct the facilitation of a dispute by the DTI;

- International Arbitration

- No reference to applicable law to guide international arbitration- the Bill, the relevant international investment treaty or both?
- Potential for an international tribunal to decide what is constitutional or not given that interpretation of the Bill is subject to the constitution.
- Introduction of a clause that allows an official request to be made for state-state arbitration to be instituted with an administrative requirement to give reasons in favour or against the request.

PPIB vs SADC Finance and Investment Protocol/SADC Model BIT



- Right to regulate in the public interest recognised across all three texts
- Presence of guarantees of fair and equitable treatment in the Protocol but absent in Bill. Preference for fair administrative treatment in the Model BIT.
- Absence of Most Favoured Nation provision across all three texts
- Traditional international arbitration provided in the Protocol and Model BIT after the exhaustion of local remedies but preference for state-state arbitration in Model BIT.

Public Participation & Transparency



- Possible introduction of an administrative treatment standard: slight variation of the SADC Model BIT approach

This is consistent with the emerging framework of global administrative law that applies domestic administrative law principles to international law.

This approach supports the fledgling democracy within SADC member states that is striving towards principles of transparency, participation and accountability.

*Possible introduction of a clause that mandates public disclosure of information by government, investors and their investment. Introduction of an administrative procedure for public lodgement of complaints and to access information.

Conclusion



- **Misalignment between the PPIB and South Africa's regional policy** within the SADC:

South African investors stand to benefit from wider protection and the option of international arbitration, without similar protection being reciprocally offered for inward investments.

- Practical application of state-state arbitration
- Concern around preferential treatment for investors from some countries;
- Possible expansion of the definition of investment;
- Need for promotion of public interest regulation.