

South Africa's Protection of Investment Bill (PIB)

**Presentation to the Select Committee on Trade and
International Relations**

Xolelwa Mlumbi-Peter

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Context

- South Africa engaged in a process of socio-economic transformation as entailed in the National Development Plan, New Growth Path, National Industrial Policy Framework.
- Implementation of this ambitious development agenda requires the development of new policies and regulations while ensuring SA remains open to foreign investment and trade.
- Foreign investors, once established in South Africa, benefit from legal protection of property rights as provided for in the Constitution.
- The Bill emphasises compliance with domestic law.
- Ensures Government right to regulate in the public interest while maintaining a favourable investment climate.

Challenges with BITs



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BITs

- BITs and international investment agreements (IIAs) have become the dominant international vehicle through which investment is regulated with implications for countries.
- It was necessary to assess the implications of entering into BITs and IIAs, the substantive shortcomings of provisions of current BITs and IIAs.
- Most BITs allow individuals to sue states in arbitral fora - the result of this development is that investors can bypass domestic courts and go directly to international arbitral tribunals that adjudicate matters on narrow financial interest and not broader social and public imperatives.
- BITs have expansive definitions of rights and protection open the door for narrow commercial interests to contest important policy matters of vital national interests..



BITs...

- Subject national policies to unpredictable international arbitration outcomes that could be interpreted as a direct challenge to constitutional and democratic policy-making.
- Currently, the investment system suffers from the following weaknesses:
 - Inconsistent interpretations by arbitration panels even on similar matters - the potential for contrasting decisions on the same (or very similar) issues of fact or law undermine the predictability of investment law.
 - Lack of transparency – investment arbitration cases are shrouded in secrecy and are conducted under confidential proceedings. Rulings are not published and affect not only governments but also other interested parties.

Protection of Investment Bill



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Protection of Investment Bill (Process)

- PPIB developed to mitigate against the risk presented by BITs, ensure development of legislation protecting all investment, ensure alignment with the Constitution.
- PPIB was subject to a rigorous consultation process with Government and stakeholders, inclusive of an expansive public comment period and consultations at 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 commenced from Sept 2015.

Definition

- The definition of “investment” adopts an enterprise-based approach which is one of the models proposed in the SADC Model BIT.
- The assets of the enterprise (shares, debentures, other ownership instruments, movable and immovable property, IP rights) are also included in the investment.
- For the purpose of this Act, an investment is—
 - any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic,
 - committing resources of economic value over a reasonable period of time, in anticipation of profit;
 - the holding or acquisition of shares, debentures or other ownership instruments of such an enterprise.



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Interpretation of the Act

- This Act must be interpreted and applied in a manner that is consistent with—
 - its purposes as contemplated by section 4;
 - the Constitution, including—
 - the interpretation of the Bill of Rights contemplated in section 39 of the Constitution;
 - customary international law contemplated in section 232 of the Constitution; and
 - international law contemplated in section 233 of the Constitution;
- any relevant convention or international agreement to which the Republic is or becomes a party.



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Purpose

- Protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors;
- Affirm the Republic's sovereign right to regulate investments in the public interest; and
- Confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.

Application of the Act

- Applies to all investments in the Republic which are made in accordance with the requirements set out in section 2 of the Bill.

Fair & Equitable Treatment (FET)

- FET NOT INCLUDED - frequently cited by investors, yet very vaguely defined in most treaties.
- Meant to protect an investor against a denial of justice and arbitrary and abusive treatment.
- Most problematic - includes protection of an investor's legitimate expectations for the investment.
- A broad definition of FET can greatly reduce a country's policy space.
- Expose the country to financial liability for pursuing legitimate policy objectives.

Fair & Equitable Treatment

- Treatment is not fair and equitable if :
 - Investors are denied justice in criminal, civil, or administrative proceedings;
 - if fundamental principles of due process are neglected;
 - if investors are abused (including coercion, duress, or harassment);
 - principles of effective transparency are disregarded.
- SA Constitution provides for:
 - access to information – Section 32
 - just administrative action- Section 33
 - Access to Courts – Section 34



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Fair Administrative Treatment

- Government must ensure administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural justice in accordance with the Constitution and applicable legislation.
- Guarantees right to be given written reasons and administrative review of the decision consistent with section 33 of the Constitution and applicable legislation.
- Access to government-held information consistent with section 32 of the Constitution and applicable legislation.
- Subject to section 13(4), investors must, in respect of their investments, have the right to have disputes resolved in a fair manner.

Establishment

- States maintain the right to make regulations governing admission of investment.
- Bill provides for post-establishment rights- investment is subject to national legislation.

BIT-type provisions



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Most Favored Nation

- Purpose: To ensure that any favourable treatment that is given to a foreign investor is extended to any third investor
 - There is no clause on MFN since the Bill applies only in the Republic
 - The Bill moves away from the concept of nationality and treats all investors in a similar manner irrespective of their nationality
 - Given the objectives of the Bill, such a clause would be redundant since any advantage given to an investor under the Bill is automatically extended to all investors irrespective of their nationality.



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National Treatment

- Purpose: grants an investor the right to be treated no less favourably than SA investors so long as their investments are —in like circumstances”.
- Limitations imposed on the concept of national treatment are legitimate and entirely in line with international legislative and treaty practice.
- Factors to be considered include:
 - effect of the foreign investment; sector that the foreign investments are in; aim of any measure relating to foreign investments; effect on third persons and the local community; effect on employment; and direct and indirect effect on the environment



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Physical security of Investment

- This provision refers to the government's obligation to provide —physical” security to investments covered by the Bill, this obligation can be further clarified in order not to create confusion in respect of the legal protection of such investments;
- Customary international law requires a state to provide a level of protection to the assets of aliens and the Bill emphasises the Republic must accord foreign investors and their investments a level of security as may be generally provide to domestic investors, subject to available resources and capacity
- In the modern era this refers to so called police powers to provide protection against unlawful interference with such

Legal Protection of Investment

- Purpose: reference to S 25 of the Constitution
- Concerns raised:
 - Initially the Bill contained norms addressing expropriation
 - However the —“Expropriation Bill” deals with these matters and as a result the PI Bill defers to the more specific legislation,
 - the PIB creates no tension with said bill or other applicable norms
 - Section 25 also deals with deprivation and there is emerging jurisprudence in this area and the Bill does not aim to clarify provisions of the Constitution.



Transfer of funds

- A foreign investor may, in respect of an investment, repatriate funds subject to taxation and other applicable legislation.



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Right to Regulate

- Purpose: Preserve Government's right to regulate in the public interest
- SA experience includes:
 - challenges by investors against measures directed at affirmative action,
 - corrective measures to address injustices of the past e.g. Broad based black economic empowerment legislation,
 - challenges by mining companies against developmental aspects of the MPRDA,
 - public health measures to address access to critical medicines.



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Right to Regulate

- Internationally, measures subject to challenge by investors have included:
 - measures imposing and attempting to collect taxes;
 - measures changing domestic fiscal policy;
 - decisions regarding whether to grant development permits;
 - bans on mining;
 - environmental regulations,
 - regulations governing health insurance;
 - measures aiming to reduce smoking e.g. Australia's plain packaging
 - regulations aiming to improve the economic situation of minority populations; and
 - measures aiming to increase revenues gained from production and export of natural resources.

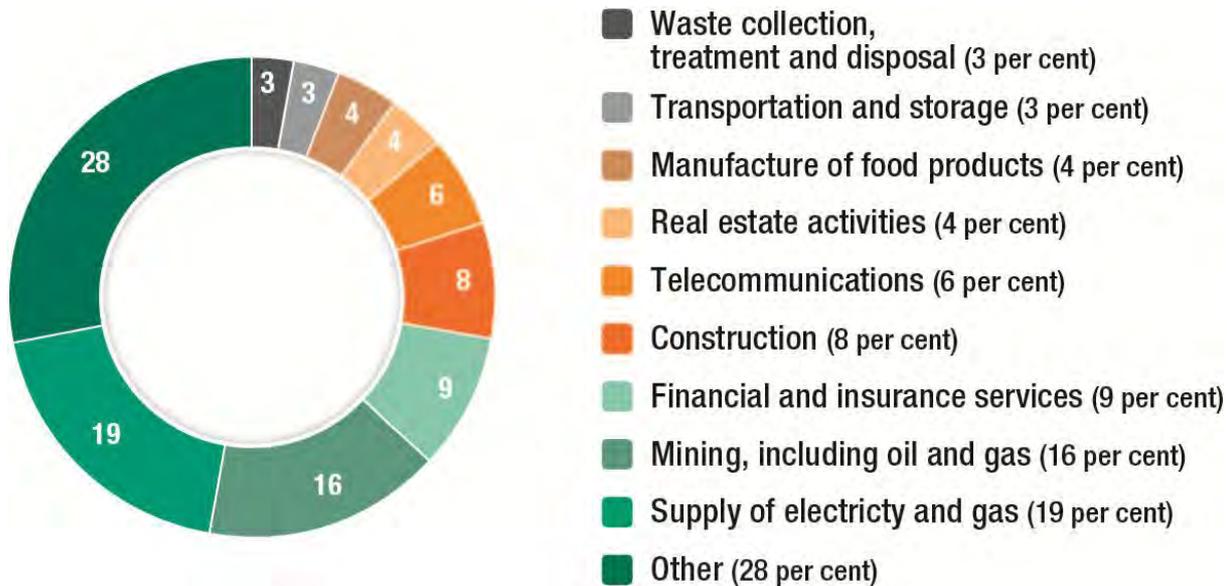


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ISDS cases by economic sector

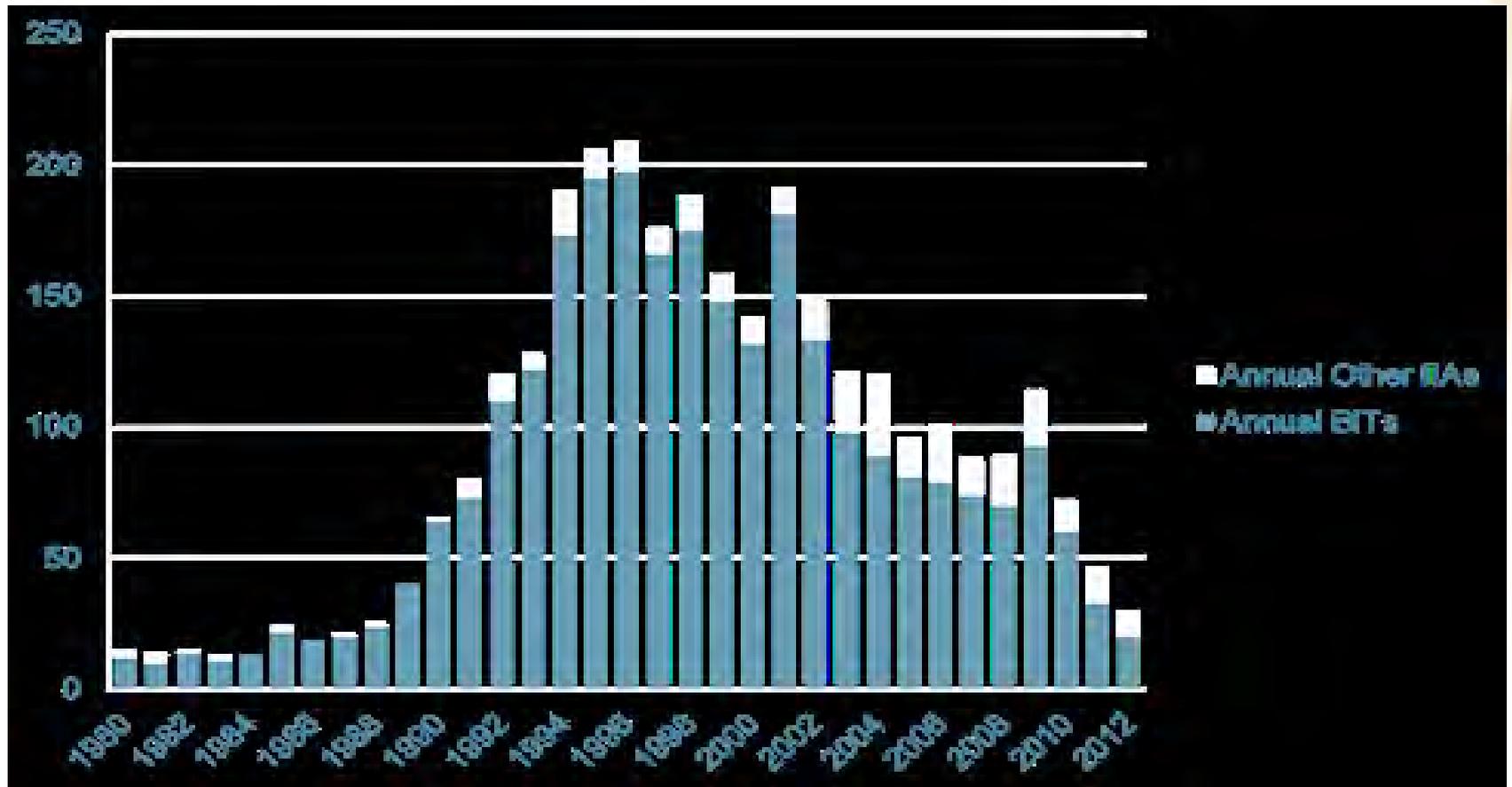
(per cent, total as of end 2014, UNCTAD)



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New BITs and IIAs



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Arbitration costs and size of awards

- Legal and arbitration costs average over US\$8 million per investor-state dispute, exceeding US\$30 million in some cases.
- Unprecedented amounts of compensation claimed and amounts awarded.
- 40 known claims at the end of 2012 were above US\$1 bn, the highest amounting to US\$114 bn against the Russian Federation, US\$50 bn claim against Peru and US\$31 bn against Venezuela;
- Other multi-billion dollar claims include Algeria; Argentina, Austria, Belgium, Cyprus, Ecuador, Egypt, India, Kazakhstan, Nigeria, Pakistan, Romania, Slovakia, **South Sudan**, Turkey, Ukraine and Uzbekistan;

Dispute Resolution

- Purpose: Exhaustion of domestic remedies prior to international arbitration
- Concerns raised:
 - Investor-State arbitration is absent
- PIB provides for:
 - alternative dispute resolution mechanism – mediation and outlines a clear process to be followed.
 - Access to Courts in SA
 - After exhaustion of domestic remedies – Government may consent to State- State arbitration.
 - Consideration will be subject to fair administrative process as set out in Section 6 of the PIB .



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SADC Protocol



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Alignment with SADC FIP

- The SADC FIP was concluded in line with first generation BITs;
- Various risks were associated with the vague formulations found in such BITs which represented unacceptable risks to governments' right to regulate;
- In view of global developments Annex 1 of the FIP has been reviewed to address shortcomings of the previous version including addressing governments' right to regulate, FET, dispute settlement, definition of investment etc.



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UNCTAD Principles on investment policy



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Core Principles for Investment Policymaking

Area	Core Principles
Investment for sustainable development	<ul style="list-style-type: none"> The overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development.
1 Policy coherence	<ul style="list-style-type: none"> Investment policies should be grounded in a country's overall development strategy. All policies that impact on investment should be coherent and synergetic at both the national and international level.
2 Public governance and institutions	<ul style="list-style-type: none"> Investment policies should be developed involving all stakeholders, and embedded in an institutional framework based on the rule of law that adheres to high standards of public governance and ensures predictable, efficient and transparent procedures for investors.
3 Dynamic policymaking	<ul style="list-style-type: none"> Investment policies should be regularly reviewed for effectiveness and relevance and adapted to changing development dynamics.
4 Balanced rights and obligations	<ul style="list-style-type: none"> Investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all.
5 Right to regulate	<ul style="list-style-type: none"> Each country has the sovereign right to establish entry and operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects.
6 Openness to investment	<ul style="list-style-type: none"> In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment.
7 Investment protection and treatment	<ul style="list-style-type: none"> Investment policies should provide adequate protection to established investors. The treatment of established investors should be non-discriminatory in nature.
8 Investment promotion and facilitation	<ul style="list-style-type: none"> Policies for investment promotion and facilitation should be aligned with sustainable development goals and designed to minimize the risk of harmful competition for investment.
9 Corporate governance and responsibility	<ul style="list-style-type: none"> Investment policies should promote and facilitate the adoption of and compliance with best international practices of corporate social responsibility and good corporate governance.
10 International cooperation	<ul style="list-style-type: none"> The international community should cooperate to address shared investment-for-development policy challenges, particularly in least developed countries. Collective efforts should also be made to avoid investment protectionism.

Conclusion

- To request the Select Committee on Trade and International Relations to approve the Promotion of Investment Bill, 2015.



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