

South Africa's Investment Policy

**Presentation to the Parliamentary Portfolio Committee
on Trade and Industry**

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Mandate

- South Africa engaged in a process of socio-economic transformation.
- The objectives of this agenda are set out in various policy instruments of Government as entailed in the National Development Plan, New Growth Path, National Industrial Policy Framework.
- **the dti's** contribution is through IPAP which is one of the programmes to give effect to NDP.
- Implementation of this ambitious development agenda requires the development of new policies and regulations while ensuring SA remains open to foreign investment and trade.

South Africa's Investment Policy



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IMPLEMENTATION

- In view of the risks associated with BITs, Cabinet approved:
 - Establishment of an intra-governmental process to explore the establishment of a National Investment Act for South Africa.
 - 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 in which standard provisions will be formulated to reduce the scope for unpredictable, inconsistent and arbitrary interpretations.
 - having been in force for ten years or more, most of the BITs that South Africa has entered into are now open for either review or termination.
 - Established an IMC to oversee the process.



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IMPLEMENTATION

- South Africa is a member of SADC and was instrumental in the development of the SADC Model BIT
- In 2011, the Committee of Ministers of Trade approved the development of a Model SADC Bilateral Investment Treaty Template. The main objective of the Template is to:
 - safeguard interests of SADC countries when concluding Treaties;
 - review current content of SADC Member States' Treaties in light of regional development goals;
 - improve consistency of investment negotiations and the Treaties concluded; and
 - the draft has been finalised, pending approval.



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Promotion and Protection of Investment Bill



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Promotion and Protection of Investment Bill (PPIB)

- PPIB was subject to a rigorous public consultation process which included an expansive public comment period and consultations within NEDLAC and government;
- Cabinet endorsed the PPIB on 24 June 2015;
- The OCSLA Justice certified the PPIB on 16 July 2015 and it was introduced into Parliament at the end of July 2015.
- Public hearings will be conducted during Sept 2015.
- The PPIB draws on a review of international experience as well as recent national experiences;

Promotion and Protection of Investment Bill (PPIB) cont.

- Introduces substantive standards of protection and includes:
 - National treatment: that will grant an investor the right to be treated no less favourably than South African investors so long as their investments are “in like circumstances”
 - Security of investment: seeks to clarify that the Republic bears no greater obligation to foreign investors than to its own investors in respect of their investments



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Promotion and Protection of Investment Bill (PPIB) cont.

- The PPIB facilitates a dispute prevention approach to investment, however investors retain full legal rights to pursue any avenue available under South African law
 - Also provides for state-to-state international arbitration subject to domestic exhaustion



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Promotion and Protection of Investment Bill (PPIB) cont.

- The PPIB does not include problematic standards such as:
 - **FET**: Fair and Equitable Treatment (Differences in wording and extensive interpretations of FET places undue burden on host states, and may infringe on right to regulate in public interest)
 - **MFN**: Most Favoured Nation Treatment (Not relevant in national legislation – all investors to be treated equally)
 - Full Protection and Security (FPS): This standard has been interpreted very widely and go beyond physical security



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International Trends

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Investment Policy ctd

- Trends:
 - Bilateral Investment Treaties (BITs) and international investment agreements (IIAs) have become the dominant international vehicle through which investment is regulated with implications for countries.
 - Most BITs allows 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.

Investment Policy ctd

- Trends:
 - The public discourse about the usefulness BITs, their implications, and the Investor State Dispute Settlement (ISDS) mechanism is gaining momentum.
 - It was necessary to assess the implications of entering into BITs and IIAs, the substantive shortcomings of provisions of current BITs and IIAs, the challenges posed by the ISDS mechanism, possible areas of reform and decide on the most appropriate way forward.

Weaknesses in the Investment system ctd

- Currently, the investment system suffers from the following weaknesses:
 - A highly fragmented dispute settlement (arbitration) system without any precedent system to moderate legal and interpretative divergence;
 - *A lack common standards of protection* – the treaties grant national treatment, fair and equitable treatment, investor protection to investors and expropriation; but these definitions are so flexible that investors are able to claim their rights are violated for wide range of reasons.



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Weaknesses in the Investment system ctd

- 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.

Weaknesses in the Investment system ctd

- Currently, the investment system suffers from the following weaknesses:
 - Lack of balance between investor rights and host state obligations – the system grants overbroad protection to foreign investors and interferes with host countries' right to regulate in the public interest.

Conclusion

- PPIB
 - South Africa 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.
- The latest version of the PPIB
 - Follows a consultative process and **the dti** considered all the submissions and revised as necessary;
 - Will be subjected to a Parliamentary consultative process, interested stakeholders encouraged to participate.



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