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SA's regional obligations in relation to Foreign Investment: Impact on PPI Bill

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Overview



Regional Investment Obligations / considerations:

- ❖ **SADC Financial and Investment Protocol**
- ❖ **SADC Model BIT**
- ❖ **TFTA: COMESA Investment Agreement**

Current Trends / Concerns in Investment Regulation / Protection

Impact on PPI Bill?

SADC FIP

- ❖ **Signed 18 Aug 2006**
- ❖ **Entered into force 16 April 2010**
- ❖ **Preamble: Recognising the role played by investment and the importance of the link between Trade and Investment – the need for greater regional cooperation to enhance attractiveness of region as investment destination**



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SADC FIP



Objectives: Art 2:

- ❖ **Harmonisation of investment policies – ensure changes in one State do not necessitate undesirable adjustments in other State Parties**
- ❖ **Done by: creating a favourable investment climate within SADC to promote and attract investment in Region**

Obligation: Art 3:

- ❖ **States shall co-ordinate investment regimes and cooperate to create favourable investment climate as per Annex 1**

Definitions:

- ❖ **Investor: Person admitted to make an investment**
- ❖ **Person: natural person or company**
- ❖ **Company: any entity constituted under laws of any State, including State owned and non-profit, corporation, partnership, trust, joint venture or other organisation**

Not limited to investors from SADC Parties, no nationality requirement



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PPI BILL



PPI BILL:

Definition of investor: any enterprise, incorporated or not, natural or juristic person, but who makes investment for profit

Not linked to nationality.

In line with definition in FIP

Definitions:

- ❖ **Investment: Purchase, acquisition or establishment of productive and portfolio investment assets, including:**
 - ❖ Movable / immovable property or property rights,
 - ❖ Shares, stocks and debentures of companies or interest in property of companies
 - ❖ Claims to money and loans
 - ❖ Intellectual property rights
 - ❖ Contract rights eg licenses to search for or extract natural resources
- ❖ **States may exclude short-term portfolio investment, or any sector sensitive to development or that would have negative impact on economy, but must notify SADC Secretariat within 3 months**



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SADC Model BIT



Investment: 3 options provided (countries can choose):

Option 1: enterprise based, corresponding with def in PPI BILL, excluding portfolio investment and additional rights

Option 2: Wider def, including specified list of assets, such as IP, excluding portfolio investment

Option 3: Very wide def (based on US Model BIT and found in most current BITs) including contractual rights, IP, etc, but excluding portfolio investment

NB:

“This is the approach in most existing SADC BITs and it is recommended that this be rejected for all future treaties in favour of Option 1 in particular”



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PPI BILL

PPI BILL:

- ❖ Any lawful enterprise established, acquired or expanded by investor in accordance with laws of Republic, committing resources of economic value, reasonable period of time, anticipation of profit;
- ❖ Holding / acquisition of shares / debentures or other ownership of such enterprise

Much more limited than FIP def. Excludes contractual rights, licences, IP rights, and excludes portfolio investment.

In line with SADC Model BIT recommended option 1

Notification obligation in terms of FIP?



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Admission of FDI:



SADC FIP: Art 2

Promotion and Admission of Investments:

- ❖ States shall promote investments in territory and admit such investment in accordance with its laws and regulations

SADC Model BIT: Art 3

- ❖ States shall promote and admit Investments in accordance with their applicable law

PPI BILL: CI 6

No right of establishment, all investments must be established in compliance with laws of the Republic



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Expropriation:

SADC FIP: Art 5

No nationalisation / expropriation except for public purpose, under due process of law, non-discriminatory, subject to prompt, adequate and effective compensation.

SADC Model BIT: Art 6

No direct or indirect nationalisation / expropriation except: in the public interest; under due process of law; and on payment of fair and adequate compensation within a reasonable period of time.



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Expropriation:

SADC Model BIT: Art 6

Options for determining “fair and adequate compensation”

Either:

balance between the public interest and interest of those affected, having regard for all relevant circumstances, taking into account the current and past use of the property, history of acquisition, fair market value of the property, the purpose of the expropriation, the extent of previous profit made by the foreign investor through the investment, and the duration of the investment.

Or: basis of market value, but can refer to balance above

Or: market value



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Expropriation:

PPI BILL:

No provision for expropriation – to be determined by art 25 of Constitution

Constitution follows approach similar to SADC Model BIT – Compensation just and equitable, reflecting equitable balance between public interest and interest of affected parties. Reference to history / use of property, market value and land reform.

SA position conflicting with FIP, more in line with SADC Model BIT – more recent thinking



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Investor Rights:

Fair and Equitable Treatment: (FET)

SADC FIP: Art 6

Investments / Investors shall enjoy FET, which shall be no less favourable than granted to investors of third state (MFN)

SADC Model BIT: Art 5 (2 options)

1: States shall accord to Investments/Investors FET according to customary international law on the treatment of aliens, with clarification on what would qualify as breach of FET – acts that are “outrage, in bad faith, a wilful neglect of duty....

2. No FET, but provision for Fair Administrative Treatment



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Investor Rights:

Fair and Equitable Treatment: (FET)

PPI BILL:

No FET clause included

In line with recent developments advising against inclusion of FET, due to onerous interpretations by tribunals – as also advised by drafters of SADC Model BIT



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Investor Rights:

National Treatment: (NT)

SADC FIP:

No provision for national treatment

SADC Model BIT: Art 4

States shall accord to Investors / Investments treatment no less favourable than the treatment it accords, in like circumstances, to its own investors and their investments with respect to the management, operation and disposition of Investments in its territory.

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Investor Rights:

National Treatment: (NT)

SADC Model BIT: Art 4

“like circumstances” – overall examination on a case-by-case basis of all the circumstances of an Investment including, inter alia: its effects on third persons and the local community; its effects on the local, regional or national environment, the sector the Investor is in; the aim of the measure concerned; the regulatory process generally applied in relation to the measure concerned; and other factors directly relating to the Investment or Investor in relation to the measure concerned.



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Investor Rights:

National Treatment: (NT)

PPI BILL : CI 7

Subject to national legislation, foreign investors / investments must not be treated less favourably than SA investors in like circumstances

Definition of “like circumstances” similar to that of SADC Model BIT

Additional subject specific (taxation, procurement, subsidies) exceptions, as well as equality, national heritage and development measures

And: exception for “domestic laws designed to regulate foreign ownership In specified sector”



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Investor Rights:

Repatriation of profits:

SADC FIP: Art 9

States shall ensure that investors allowed repatriation of investments and returns in accordance with rules and regulations stipulated by Host State

SADC Model BIT: Art 8

States must allow for repatriation of assets, profits, etc, but states may prevent / delay transfers based on laws relating to taxation, bankruptcy, financial reporting, etc.



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Investor Rights:

Repatriation of profits:

PPI BILL: CI 10

Investor may transfer funds in respect of investment subject to taxation and other applicable legislation

In line with both FIP and Model BIT



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Investor Rights:

Protection and Security:

SADC FIP:

No provision for state duty to provide for safety / security for investment

SADC Model BIT: Art 9

State shall provide investments protection and security no less favourable than that which it accords to investments of its own investors or to investments of investors of any third State. (NT and MFN)



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Investor Rights:

Protection and Security:

PPI BILL: CI 8

Republic must accord investors / investment level of physical security as generally provided to domestic investors - subject to available resources and capacity (NT)

**In line with SADC Model BIT, with addition of reference to resources, but still subject to NT
(MFN not relevant in national legislation)**



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Rights of States:

SADC FIP: Art 7

States may in terms of domestic legislation grant preferential treatment to qualifying investments to achieve national development objectives

Art 14:

Nothing shall prevent State from exercising its right to regulate in public interest and to adopt, maintain or enforce measures considered appropriate to ensure investments sensitive to health, safety or environmental concerns.



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Rights of States:

SADC Model BIT: Art 20

In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.

Non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement

Art 21: State may favour investors to achieve development goals and may take measures to address historic disparities



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Rights of States:

PPI BILL: CI 11

Government or organ of state may, in accordance with Constitution and legislation, take measures to:

Address inequality, uphold administrative values and rights in Constitution,

Promoting / preserving cultural heritage, fostering economic development,

Realise socio –economic rights

Take measures to uphold international peace and security, protect security interests, including financial stability

In line with SADC FIP and Model BIT



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Rights of States:

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In line with SADC FIP and Model BIT



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Dispute Settlement:

SADC FIP: Art 27

States shall ensure investors have access to courts, tribunals, etc to address grievances including expropriation / nationalisation

Art 28:

Disputes between investor and State not amicably settled, submitted to international arbitration after 6 months, and exhaustion of local remedies, if either party so wishes

International arbitration can include SADC Tribunal (?), ICSID, or ICSID Additional Facility, International arbiter / ad hoc tribunal under UNCITRAL rules.

If no agreement within 3 months, dispute shall be submitted to Arbitration under UNCITRAL rules



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Dispute Settlement:

SADC Model BIT: Art 28

State-State Dispute Settlement:

Art 28 (3)

State Party may submit a claim to arbitration seeking damages for an alleged breach of this Agreement on behalf of an Investor or Investment,

28(4) only after exhaustion of local remedies by investor or demonstrating no reasonably available domestic legal remedies capable of providing effective relief for the dispute concerning the underlying measure, or that the legal remedies provide no reasonable possibility of such relief in a reasonable period of time.



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Dispute Settlement:

SADC Model BIT: Art 29

Strong recommendation not to include investor / state dispute settlement clause, but if included:

Disputes to be settled through consultation, negotiation, mediation.

May submit to arbitration after 6 months, after exhaustion of local remedies, or demonstrating there are no reasonably available legal remedies capable of providing effective remedies of the dispute concerning the underlying measure, or the legal remedies provide no reasonable possibility of such remedies in a reasonable period of time.

Arbitration at ICSID, or ICSID Additional Facility, International arbiter / ad hoc tribunal under UNCITRAL rules.

Regional facility or any other agreed upon



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Dispute Settlement:

PPI Bill : CI 12

Mediation at request of Investor affected by government action

Subject to applicable legislation, investor not precluded from approaching any competent court, independent tribunal / statutory body in Republic for resolution of investment dispute

Government may consent to international State-State arbitration, subject to exhaustion of domestic remedies



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Dispute Settlement:

PPI Bill : CI 12

Contrary to FIP that provides for Investor – State Dispute Settlement

In line with recommendation of SADC Model BIT not to include Investor-State Dispute Settlement and to rather use State-State Dispute Settlement after exhaustion of local remedies

Tri-Partite Free Trade Agreement: (TFTA)

Signed June 2015

Combining SADC, COMESA and EAC

Objectives: Including facilitating cross-border investment.

Art 24: States undertake to market Tripartite member states as single investment area

Undertake to develop policies and strategies promoting cross-border investments...



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Potential Regional Implications:

COMESA Investment Agreement:

Scope:

Based on nationality – applies only to investments from COMESA States

Investor Rights:

FET based on customary international law minimum standard of treatment for aliens

Repatriation of Profits / assets, etc. (no reference to national laws)



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Potential Regional Implications:

COMESA Investment Agreement:

National Treatment: Treatment no less favourable than provided to own investors in like circumstances

“Like Circumstances” defined similar to PPI Bill and SADC Model BIT

Exceptions: National Treatment not applicable to exclusion list provided by countries



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Potential Regional Implications:

COMESA Investment Agreement:

Expropriation:

**No Nationalisation / expropriation of investments except:
in the public interest; on a non-discriminatory basis;
in accordance with due process of law; and
on payment of prompt adequate compensation.**

Appropriate compensation shall normally be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place



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Potential Regional Implications:

COMESA Investment Agreement:

Right to Regulate:

Right of States to take measures to protect national security, public morals, human, animal or plant life or health, the environment.

Dispute Settlement:

Investor-State Dispute Settlement at either local court, COMESA Court of Justice, International arbitration under ICSID or ICSID Additional Facility, UNCITRAL Rules or any other arbitration agreed to.

May choose only one forum....



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Current Regional Trends in Protecting Investment:



FDI protection still mostly done via International Investment Agreements (Bi-lateral or Regional).

Currently major concerns around traditional formulation of IIA's:

- ❖ **Definitions Investor / Investments too wide**
- ❖ **Inclusion of FET and FPS problematic and onerous for states**
- ❖ **Clarification on the compensability of indirect expropriation**
- ❖ **Lack of policy space / Government's right to regulate in public interest – more regular use of general exception clauses (eg CETA)**



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Current Regional Trends in Protecting Investment:



FDI protection still mostly done via International Investment Agreements (Bi-lateral or Regional).

- ❖ **Investor – State Dispute Settlement: Either improve the ISDS system to be more transparent and predictable, establish appellate process, etc and only after exhaustion of local remedies,**
- ❖ **Purely rely on local remedies (State Courts)**
- ❖ **Or to create stand-alone International Investment Court**
- ❖ **Or to resort to State-State Dispute Settlement**

Conclusion:

**PPI Bill attempts to address most of these
current concerns / trends in protection of FDI
from a national perspective**

**Generally in line with regional perspective as
expressed in SADC Model BIT**