

South Africa's Promotion and Protection of Investment Bill (PPIB)

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

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Context



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Context

- 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.
- Implementation of this ambitious development agenda requires the development of new policies and regulations while ensuring SA remains open to foreign investment and trade.

Context

- 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 and the role that Government has to play in achieving socio-economic objectives and does not interfere with any norms that may be relevant to investment e.g. labour legislation.
- The Bill does not seek to change the application of the current tax regime.
- Whilst the Bill applies generally to investment, other policies will address the more specific issues contained in the Bill, which policies are inclusive of the: the Expropriation Bill and the Property Valuation Act and the Infrastructure

Context

- The PPI Bill interacts with a broad range of legislative norms;
- It applies as a general norm that is based on constitutional imperatives and further explained by line function or specific legislation;
- The result is that the Bill may recall or emphasise relevant line function or applicable legislation without giving the final word on any matters so regulated in deference to such legislation;
- The PPIB ensures that investment policy contributes to the broader development strategy of SA.

Context cont.....

- Ensures that the Government has the policy space to pursue the development agenda in the public interest while maintaining a favourable investment climate.
- Ensures the balance between the rights and obligations of States and investors.
- Addresses the challenges associated with BITs.

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.



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BITs...

- 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.



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Promotion and 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 have commenced as from beginning Sept 2015



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Stakeholder Submissions

- 20 Stakeholder submissions received
- Stakeholders include, *inter alia*:
 - Academic institutions (Mandela Institute, CALS)
 - Unions (NUMSA)
 - Policy think-tanks (SAIRR)
 - National (SAHRC) and Independent (FSB) organisations
 - Companies – mining (Anglo-American), Vodacom



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Critical issues raised in the submissions



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Critical Areas

- Critical areas raised – common to many stakeholder submissions
- Critical areas include:
 - General comments
 - Title of the Bill
 - Definition of investment
 - Right of establishment
 - Fair and Equitable Treatment (FET) exclusion
 - National Treatment
 - Protection of Property
 - Disputes (incl community participation)
 - Right to Regulate



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Title of the Bill



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Title of the Bill

- Some submissions raise
 - Not clear how the PPIB promotes investment
 - Not clear what are the obligations of investors, only includes rights.
- PPIB
 - Provides a legislative framework for the promotion of investment
 - The State implements strategies and mechanisms to facilitate and promote investment.
 - Government is also establishing the Inter-Departmental Clearing House to facilitate investment.



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Definition of investment



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Definition

- Definition of terms :
 - Reasonable period (context specific which may influence the meaning attributed);
 - Economic value (no ambiguity since the ordinary applies);
 - Measure (proposals in this regard may be considered);
 - Enterprise / Entity (various proposals may be considered)

Some of these proposal have merit and may be considered or even consented to subject to consultation with the State Law Advisors.

Definition of Investment

- Assets constituting investment:
 - Intellectual Property Rights (covered by the definition)
 - Movable / Immovable property (covered as an asset class)
 - Minority equity investments (covered in so far such investments are established in accordance with the requirements of the Bill)
- Enterprise v Entity (Consideration in the VAT Act and the Companies Act can be considered. Further deliberation is required).
- Alignment to FIP (The Bill complies with the content of the Amended FIP, specifically Annex 1)

Right of establishment



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Right of establishment

- States maintain the right to make regulations governing admission of investment.
- Bill provides for post-establishment rights- investment is subject to national legislation.
- We can consider proposals on the title of Article 6 of the Bill as proposed.

BIT-type provisions



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Fair & Equitable Treatment

- Purpose: Absence of FET standard in Bill – it is a non-discriminatory standard for the equal treatment of all investors (domestic and foreign).
 - Most submission decry the omission of the this standard. The omission is justified on the basis that the standard is vague and subject to abuse by investors
 - Procedural and substantive standards contained in the constitution and various piece of legislation protect legitimate interests that investors may have.
- Concerns raised:
 - Inclusion in line with international practice
 - Alignment to SADC Protocol



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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”
- Concerns raised:
 - Scope and content unclear / vague
 - Non-exhaustive criteria
 - Skews in favour of domestic investors
 - Case review: review process and comparison of all factors are discretionary
- Limitations imposed on the concept of national treatment are legitimate and entirely in line with international legislative and treaty practice.



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

Protection of property



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Protection of Property

- Purpose: reference 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 PPI Bill defers to the more specific legislation, the PPI Bill creates no tension with said bill or other applicable norms

Right to regulate



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Right to Regulate

- Purpose: Government has the right to take measures to regulate in the public interest
- Concerns raised:
 - Wide powers to organs of state in absence of precise language
 - No regard for constitutional provisions
 - Open-ended exceptions

Government has the obligation to regulate in the public interest. The police space to do so must be preserved.

Right to Regulate

- 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.

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.

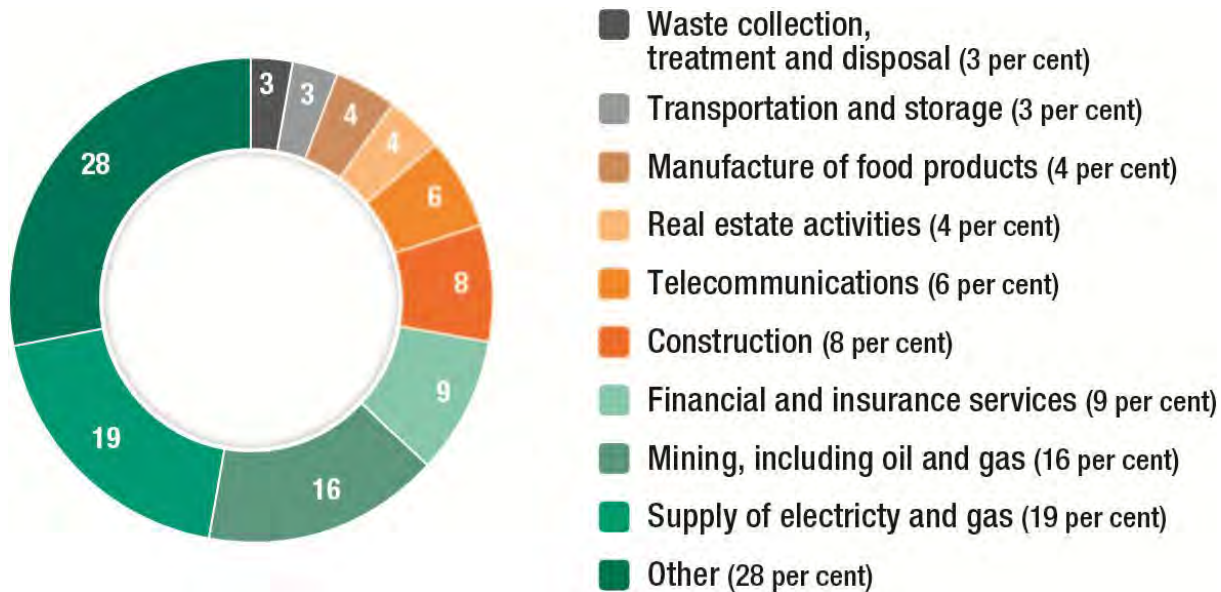


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ISDS cases by economic sector

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



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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



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Dispute Resolution

- Purpose: Exhaustion of domestic remedies prior to international arbitration
- Concerns raised:
 - Investor-State arbitration is absent
 - SADC Protocol provides for Investor-State dispute – contradicts the Bill
 - Powers of domestic courts pronouncing on regulatory matters taken by executive / legislative arm of Government
 - Bypass domestic remedies
 - Mediation - non-committal
 - Arbitration - rules and procedures, lack of governing legislation
 - Lack of judiciary independence, limited experience of ConCourt
 - Participation of aggrieved civil society and communities



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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



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Conclusion

- All submission have been reviewed and matrix has been developed to reflect such submissions;
- **the dti** has also developed a set of comprehensive responses which react to various aspects of the abovementioned submissions;
- PPIB is aligned to the core principles as confirmed by UNCTAD.



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