

Ratification of the Agreement Amending Annex 1 (Co-operation on Investment) of the SADC Protocol on Finance and Investment (FIP)

**Select Committee on
Trade and International Relations
07 November 2018**



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

Purpose

- To present to the Select Committee the Memorandum on **Ratification of the Agreement Amending Annex 1 (Co-operation on Investment) of the SADC Protocol on Finance and Investment** ; and
- Request the Select Committee to consider the amendment for ratification



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Background

- The Finance and Investment Protocol (FIP) was signed in August 2006 and entered into force in April 2010
- The purpose of the FIP is to ensure harmonisation of investment policies among SADC Member States in line with the region's economic integration efforts
- Challenges with the Bilateral Investment Treaties (BITs) including Investor to state disputes, reducing policy space/regulatory autonomy, necessitated SADC to review the Protocol
- A Model BIT was also developed for Member States to use as a guide to negotiate future BITs

Background

- Signatories of the FIP who have valid BITs in place may face investment disputes initiated using the old FIP, hence the need for the amendment
- Signatories of the FIP shall have to align their Investment Protection laws to the FIP
- Prior to the amendment, the FIP contained all the clauses which were considered challenging in old BITs e.g a broad definition of investor and investment, international arbitration as recourse for investor-state dispute and most favoured nation treatment accorded to foreign investors

The South African Context

- The investment dispute cases that were initiated against South Africa challenged state's right and responsibility to regulate in the public interest
- MPRDA (2004) and BEE legislation: investors demanding MFN treatment
- South Africa terminated most of its BITs, subsequently developing the Protection of Investment Act (PIA) of 2015
- The Amendment was developed in consultation with Departments of DIRCO, National Treasury as well as Justice and Constitutional Development

Amendments

- Article 1(1): Definition of investment; emphasis on registration and establishment in line with host state laws
- Article 1(2): Definition of investor; natural or juridical person of a State Party making an investment in another State Party
- Article (2)3: removes prohibition on modification of terms, conditions and benefits agreed to, on admission of investment
- Article 5: Compensation related to expropriation shall be *fair and adequate* instead of *prompt and effective* and more detail provided on how to determine fair and adequate compensation



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Amendments

- Article 6 (1) accords investors national treatment instead of most favoured nation treatment
- Preferential treatment can be accorded to national investments (discriminatory)
- The right to regulate previously linked to health, safety and environmental concerns; new version separates these from the right to regulate for developmental purposes (social and economic)
- New version only makes provision for settlement of State – to – State dispute settlement in line with the SADC Protocol on the Tribunal; no reference to international arbitration

Conclusion

- There are 11 SADC countries that are signatories to the FIP, 10 have signed the amendment, South Africa signed in August 2016
- The Amendment came into force on 24 August 2017, 30 days after the 8th member deposited their instrument of ratification
- The amendment to the Protocol needs to be ratified by Parliament in line with Section 232(2) of the South African constitution
- The amendment to the Protocol is in conformity with the PIA



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Recommendation

the dti requests for the Select Committee to:

- **Consider and approve ratification of the Agreement Amending Annex 1 (Co-operation on Investment) of the SADC Protocol on Finance and Investment**



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