

South Africa and Bilateral Investment Treaties

Presented by

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to

SAIIA Event

**“How Should Foreign Investments Into South And Southern
Africa Be Regulated And Protected?”**

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Background

- SA provides and will continue to provide robust investor protection.
- South African has systematically strengthened its investment protection regime since 1994.
- Protection against expropriation without compensation guaranteed in the Constitution adopted in 1996.
- SA ranks amongst the most open investment jurisdictions in the world and provides protection consistent with the high international standards (WTO obligations and OECD standards).
- Foreign investment present across the economy and continues to grow.
- When SA undertook democratic transition in 1994, some foreign investors were unclear about the future direction of economic policy.
- SA concluded a series of BITs to give comfort that investment would be protected.
- Of the 15 BITs entered into at the time, 11 were with European countries.
- Other BITs negotiated subsequently, but most not ratified (18 total).

SA BITs Review 2007-2010

- Soon aware of challenges posed by investment treaties (OECD MAI, WTO, spike in legal challenges following 2001 global financial crisis).
- Two challenges to SA: under Swiss BIT in 2004 and Italian/Belgo-Lux BITs in 2006). Threats of others.
- All this prompted BITs Review 2007-2010. Key findings:
- Proponents argue BITs attract FDI and offer protection to foreign investors in jurisdictions where legal regime is weak or biased against foreigners.
- This premise does not hold in SA: Constitution (NT, expropriation with compensation); Companies, Competition Acts; IPR; Administrative Justice.
- Protection in line with OECD standards.
- No clear relationship between BITs and increased FDI inflows (World Bank and UNCTAD studies, amongst others).
- South Africa receives no FDI from many countries with whom we have a BIT, receives FDI from countries without BITs (USA, Japan, India).



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SA BITs Review 2007-2010

- Serious deficiencies in first generation BITs arising from the lack of precision/ambiguity in the core legal provisions:
 - Broad definitions of investor/investment can cover any asset (goodwill, holiday home);
 - Most favoured nation allows 'importing' provisions from other treaties;
 - Expropriation and fair and equitable treatment provisions may be defined as any measure that impacts on the use of property that deprives investor of expected economic benefit;
 - Free transfer is inconsistent with IMF Articles on safeguards for balance of payments problems.
- BITs thus clear way for foreign (not domestic) investors to challenge almost any measure deemed to undermine their 'expectation' of profit.
- Can pose serious risk to legitimate policy making in the public interest.

International Experience

- Deficiencies in treaties are accompanied by shortcomings in the functioning of the international investment arbitration 'regime'.
- Fragmented system without common standards.
- Recurring episodes of inconsistent awards.
- Divergent legal interpretations of identical or similar provisions and differences in assessment of the merits of cases involving the same facts.
- No appeal mechanism to rectify incorrect awards or ensure consistency.
- Inconsistent interpretations lead to uncertainty about the meaning of key treaty obligations compounding problems of unpredictability of treaties.
- Also questions whether arbitration process by three individuals, appointed on an *ad hoc* basis, possesses sufficient legitimacy to assess acts of State on particularly on sensitive public policy issues.
- Undermines the domestic legal system and can pose challenge to democratic decision making.

International Experience

- Growing number of cases: first in 1987, growing cumulatively to 50 by 2000, and 514 by 2012.
- 62 claims in 2012: the highest number in any one year to date.
- Two-thirds of claims brought against developing country governments.
- 75% of the awards in favour of investors.
- Significant arbitration costs: more than \$8 million on average/case.
- Claims of up to \$114 billion and awards of up to \$1.77 billion.
- Widening scope of challenges to government measures: changes to the domestic regulatory framework, the tax regime, public tenders, public health, environment and recently measures to address the financial crisis (bailouts and withdrawal of subsidies).
- From “shield of last resort to a sword of first resort” for disputes.

International Experience

- Similar reviews occurred in Australia, Brazil, Canada, Norway, USA, Sweden, and more recently EU and India.
- Widespread amendments, re-interpretation of BITs clauses (US, Canada).
- Brazil refuses to enter into BITs; Australia now excludes investor-state dispute provisions; a re-think is underway in EU and India.
- New approaches to investment treaty emerging to mitigate risks of earlier agreements through more precise drafting of provisions.
- New approach pays more attention to provisions that support inclusive growth and sustainable development objectives.
- Secures right of governments to regulate in the public interest (environment and public health, for example).
- Locates investment protection within broader human rights framework.

Cabinet Decision

Key outcomes of the Review:

- Relationship between BITs and FDI is ambiguous, at best.
- BITs and international arbitration pose unacceptably high risks to governments legitimate and sovereign right to regulate in the public interest.
- Strengthen/clarify national legal framework for investor protection, in line with SA Constitution and drawing on international experience.
- Update BITs and ensure alignment with national legislation, the Constitution, and developments in international investment treaty-making.

Cabinet Decision: 5 Core Elements

- (1) Develop New Investment Act to codify and clarify typical BIT-provisions into domestic law, and strengthen investor protection;
- (2) Terminate first generation BITs and offer partners possibility to renegotiate;
- (3) Refrain from entering into BITs in future, unless there are compelling economic and political reasons;
- (4) Develop new Model BIT as basis for (re-)negotiation; and
- (5) Establish an Inter-Ministerial Committee (IMC) to oversee process (DTI, NT, DIRCO, EDD, DAFF).

Current Work

- SA participates actively in international dialogue on investment treaty-making in UNCTAD, OECD, other fora.
- Investment protection taken up in BRICS dialogue.
- Termination process underway: Partners informed as from May 2011.
- Most SA BITs with EU Member States (13).
- Competence for investment treaty negotiation moved from MS to Commission: No longer possible to negotiate with individual MS.
- EC seeks changes: right to regulate; expropriation/compensation; disputes (transparency, appellate process, pool of arbitrators).
- Without termination, some BITs automatically renew for 10 years.
- Required to notify Belgo-Lux BIT in Sept 2012; Spain in July 2013; others to follow.
- Protection remains for 10-15 years (so-called 'survival' clauses).
- Opening discussion with others partners.

Current Work

- Ongoing work to develop New Model BIT.
- Participated in new SADC Model BIT: Implications for SADC Finance and Investment Protocol annex on investment protection.
- Dialogue at AU level.
- Key elements of Draft Foreign Investment Act:
 - Update, modernise and strengthen investor protection in SA;
 - Remain open to FDI (no new restrictions);
 - Provide security and protection to all foreign investors (non-discrimination);
 - Appropriate balance between rights/obligations of investors and government; and
 - Preserve right to regulate in the public interest.
 - Incorporate relevant BITs-type provisions into national legislation ensuring consistency with Constitution and law;



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