

UPDATE ON IMPLEMENTATION OF PROTECTION OF INVESTMENT ACT

PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

**Ambassador X Carim, DDG
Trade Policy, Negotiations and Cooperation
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the dtic

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Trade, Industry and Competition
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Acronyms

BIT	Bilateral Investment Treaty
PIA	Protection of Investment Act, Act No 22 of 2015
FDI	Foreign Direct Investment

Outline of Presentation

- Bilateral Investment Treaties
- SA Investment Protection Policy Framework
- Protection of Investment Act (PIA) - Process
- Key Features of the PIA
- Main Provisions of the PIA
- Mediation

Bilateral Investment Treaties (BITs)

- While BITs have a long history, they proliferated in the 1990s on a view that BITs encourage FDI inflows
- As BITs proliferated, international arbitration based on alleged violations also increased, notably after the financial crisis in the late 90s
- Many serious concerns have since arisen about BITs:
- BITs allow foreign investors to challenge any government measure deemed to undermine profits and expectation of profits
- The scope and number of challenges to (legitimate) government public policies (tax, environment, labour, economic development, amongst others) have increased exponentially
- Arbitration decisions and awards have been unpredictable, inconsistent and contentious, compounding concerns about the arbitration system
- No unambiguous evidence of a relationship between BITs and FDI flows

Bilateral Investment Treaties (BITs)

- A “crisis of legitimacy” over BITs and international investment arbitration ensued
- The global response has seen governments terminating or withdrawing from BITs, or re-negotiating and re-interpreting their provisions
- Concern that arbitration panels and their decisions override democratic policy-making and national judicial systems
- SA undertook a 4-year review of our BITs from 2007 to 2010, and these concerns were confirmed
- The Review also revealed inconsistencies between BITs and the SA Constitution

SA Investment Protection Policy Framework

- SA Government adopted a new investment policy framework in 2010:
 - Establish new SA legislation to provide clarity on the protection afforded to all investors that is aligned to SA law and Constitution
 - Like many other countries, terminate existing BITs
- SA initiated a process to terminate its BITs
- SA also initiated a process to develop the Protection of Investment Act (PIA):
 - Ensures SA remains open to foreign investment
 - Provides adequate security and protection to all investors (domestic and foreign)
 - Preserves sovereign right to regulate in the public interest
 - Preserves right to pursue developmental policy objectives

Protection of Investment Act (PIA) - Process

- PIA was subject to consultations within Government and with NEDLAC constituencies
- Benefited from extensive inputs from international and national investment policy and law experts
- Parliamentary process over 5 months; 4 public hearings; and 20 submissions
- The Bill was assented to in December 2015
- The Act and its Mediation Regulations came into force on 13 July 2018.

Key Features of the PIA

- PIA did not impose any new obligations on investors
- PIA did not override existing legislation protecting investment in SA
- Sought a balance between the rights and obligations of investors and of Government, and is aligned to Constitutional obligations to safeguard the public interest
- Clarified standards of protection for all investors – both foreign and domestic
- Set out provisions ordinarily found in BITs in a manner that is consistent with SA's Constitution and existing legal framework

Main Provisions in the PIA

- Foreign investors must adhere to SA law
- National treatment grants foreign investors the right to be treated no less favourably than SA investors for investments “in like circumstances”
- Expropriation is addressed by reference to Section 25 of the Constitution
- Fair Administrative Action confirms administrative, legislative and judicial processes are not arbitrary - procedural justice
- Investment disputes must be resolved in national courts
- Disputes may be referred to state-to-state arbitration, if parties agree
- Novel provision: Mediation to avoid disputes (set out in accompanying regulations)

Mediation

- The Regulations set out procedures and timelines for Mediation where an investor feels aggrieved by governmental action
- They oblige **the dtic** to facilitate efforts to resolve a dispute within six months if an investor requests mediation
- Additional details include administrative procedures for pursuing mediation such as 'forms' requesting mediation, criteria for appointing mediators, the treatment of information amongst others
- TPNC Branch works with Invest-SA as focal point for mediation in **the dtic**
- To date there have been no requests for mediation

Thank you

