

SUMMARY OF THE KEY AMENDMENTS TO ANNEX 1 OF THE SADC FINANCE AND INVESTMENT PROTOCOL

1. Definition of Investment and Scope of coverage of investors

Currently, the definition of an investment is asset based. The Subcommittee noted that the current asset based definition was broad and less precise. The asset based definition covers the assets listed, whether or not such assets are part of a functioning business or enterprise in the Host State. It was proposed that the asset based definition of an investor be replaced with an enterprise based definition. Notably, an enterprise based definition covers the similar basket of assets, but only when they are assets of an enterprise in the Host State.

With regard to the scope of coverage of investors, discussions centred on whether the coverage should be extended to SADC investors only or to investors from other countries. It was ultimately recommended that cover be extended to all foreign investments from any State, not just SADC Member States. Notably, this all-inclusive coverage of investors is in line with the Promotion and Protection of Investment Bill ("Investment Bill") which South Africa published in November 2013. However, any dispute that arises between an investor and a member state would be adjudicated under the national law of such a member.

2. Expropriation

On the issue of expropriation, the Subcommittee recommended the adoption of the language in the SADC Model BIT, with option 2 to be used as the option on the valuation for an expropriation. Option 2 provides that due process of law be followed on a non-discriminatory basis and provides for fair and adequate compensation. Option 2 provides that fair market value is the starting point, but is not definitive since a valuation exercise allows Government, where appropriate, to show why an alternative valuation, consummate with a fairer valuation for all parties, should prevail.

An alternative valuation seeks to strike a balance between the public interest and interests of those affected, having regard to all relevant circumstances and taking into account, *inter-alia* the current and past use of the property, the history of its acquisition, the fair market value of the investment, the purpose of the expropriation, the extent of previous profit made by the foreign investor through the investment and the duration of the investment. More importantly, the flexibility on valuation accommodates the use and or application of the standard of compensation contemplated in Section 25 of the South African Constitution and the draft Promotion and Protection of Investment Bill.

3. National Treatment

Article 6 of the FIP provides that Investments and investors shall enjoy fair and equitable treatment in the territory of any State party and that such treatment shall be no less favourable than that granted to investors of the third State. It is clear that the

drafters confused the terms “national treatment” and “most favoured nation treatment”, with the result that there was no clear carve out for policies in respect of national treatment. Any ambiguity would have had to be interpreted by a tribunal and given the expansive approach that tribunals have taken in the past, amendment of this provision was needed.

The Subcommittee recommended that the above provision be replaced with a more substantive provision which entrenches national treatment. The recommended provision obliges the State party to accord to Investors and their 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. The principle of non-discrimination between domestic and foreign investors or investments in, like circumstances, will be entrenched. This provision is consistent with the Promotion and Protection of Investment Bill.

4. Right of State to regulate

The Subcommittee recommended that Article 14 which provides for the rights of the State party to regulate in the public be redefined. It is recommended that the current provision be replaced with a clearer and detailed provision. The recommended provision provides *inter-alia* “In accordance with customary international law and 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.” In order to provide *inter-alia* certainty and avoid or minimize disputes and litigation, the sovereign rights of the State party to regulate in the public interest must be preserved. This recommendation is consistent with the Investment Bill.

5. Resolution of Investor-State disputes

The Subcommittee recommended that Article 28 be removed from the Annex. Article 28 deals with the settlement of Investment disputes. It provides, *inter-alia* for the right of either Investor or State Party to refer a dispute to the SADC Tribunal, International Centre for the Settlement of Investment Disputes (ICSID) or an international arbitrator or ad hoc arbitral tribunal for arbitration in the event that a dispute is not amicably resolved and after exhausting domestic remedies.

The recommendation to remove Article 28 entirely from the Annex was prompted by concerns by Member States relating to the settlement of Investor-State disputes by international tribunals. Such concerns include *inter-alia* perceived lack of transparency, legitimacy of the international arbitration process, conflicting arbitral jurisprudence, independence of arbitrators and the prohibitive legal costs associated with international commercial arbitration and excessive damages.

Article 28 presents significant risks not only to South Africa but to all SADC Member States. Removing the said Article will help to obviate the risks associated with

international arbitration of Investor-State disputes. Investor-State disputes may be competently resolved or settled through domestic courts or tribunals. Article 27 of the Annex makes it obligatory for Member States to ensure that investors have the right of access to courts, judicial and administrative tribunals and other competent authorities under the laws of the Host State in relation to any investment-related matter.

