AngloAmerican

Real Mining. Real People. Real Difference.

ANGLO AMERICAN SOUTH AFRICA LIMITED

SUPPLEMENTARY WRITTEN SUBMISSION
TO THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY
ON THE PROMOTION AND PROTECTION OF INVESTMENT BILL, 2015

23 SEPTEMBER 2015

1. Introduction

1.1 Anglo American South Africa Limited ("**Anglo**") has addressed the Portfolio Committee on Trade and Industry ("**the Committee**") on the Promotion and Protection of Investment Bill, 2015 ("**the Bill**"), in the form of a written submission on 25 August 2015, and an oral presentation at the public hearings on 15 September 2015.

1.2 Anglo is grateful for the Committee's invitation to provide a further written submission on certain specific issues raised during the public hearings, namely:

1.2.1 the termination of South Africa's bilateral investment treaties ("**BITs**") with members of the European Union ("**EU**"), South Africa's largest trading partner;

1.2.2 the exclusion from the Bill of the following international investment law principles typically included in BITs:

1.2.2.1 fair and equitable treatment ("**FET**");

1.2.2.2 market value compensation for expropriation; and

1.2.2.3 international arbitration of investor-state disputes, more commonly known as investor-state dispute settlement ("**ISDS**").

1.3 It is noted that the Department of Trade and Industry ("**the DTI**") has recently responded to the written submissions on the Bill, including Anglo's.[1] This submission accordingly takes the opportunity to address certain of those responses which have a direct bearing on the above issues.

1.4 Anglo is encouraged by the spirit of consultation and careful consideration demonstrated by the Committee in its approach to the Bill. Anglo is confident that, through this approach, the Committee can ensure that the Bill achieves three critical goals:

1.4.1 compliance with the Constitution of the Republic of South Africa, 1996 ("**the Constitution**");

1.4.2 co-operation with other Southern African Development Community ("**SADC**") member states in advancing the regional investment agenda; and

[1] DTI, *Summary of Submissions on the Promotion and Protection of Investment Bill (PPIB) [B18-2015]*, 16 September 2015 ("**DTI Summary**"); and DTI, *Presentation to the Portfolio Committee on Trade and Industry*, 16 September 2015 ("**DTI Presentation**").

1.4.3 co-ordination with progressive investment law reforms at the international level, as led by the United Nations Conference on Trade and Development ("**UNCTAD**").

2. The SADC Investment Agenda

2.1 Anglo's submissions to the Committee have centred on the SADC Protocol on Finance and Investment, specifically Annex 1: Co-operation on Investment ("**SADC Protocol**"), which is not only legally binding on South Africa, both internationally and constitutionally, but is also a balanced framework for the promotion and protection of foreign investment into developing countries. This is because the SADC Protocol includes most of the key features of investment protection that constitute international best practice, together with provisions for the attainment of sustainable development goals. Most significantly, the SADC Protocol binds member states to co-operate, co-ordinate and harmonise their investment promotion measures, which is why the Bill cannot be considered in isolation from the SADC Protocol.

2.2 It may assist the Committee to set out the institutional context. The SADC Protocol has its origins in the Treaty of the Southern African Development Community ("**SADC Treaty**"), which was adopted in 1992 by independent states who were collectively:

> *DETERMINED to ensure, through common action, the progress and well-being of the peoples of Southern Africa;*
>
> *CONSCIOUS of our duty to promote the interdependence and integration of our national economies for the harmonious, balanced and equitable development of the Region;*
>
> *CONVINCED of the need to mobilise our own and international resources to promote the implementation of national, interstate and regional policies, programmes and projects within the framework for economic integration…*[2]

2.3 South Africa acceded to the SADC Treaty in 1994,[3] shortly after becoming a constitutional democracy, and from that date became bound towards other SADC member states to "*cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit*",[4] as well as to "*coordinate, rationalise and harmonise their overall macro-economic and sectoral*

---

2 See SADC Treaty, Preamble.

3 South Africa signed the SADC Treaty on 29 August 1994, and ratified it on 13 and 14 September 1994, through the erstwhile Senate and National Assembly respectively.

4 SADC Treaty, Article 21(1).

policies and strategies, programmes and projects in the areas of cooperation".[5] These designated areas of co-operation included "*industry, trade, investment and finance*".[6] The SADC member states undertook to "*conclude such Protocols as may be necessary in each area of cooperation, which shall spell out the objectives and scope of, and institutional mechanisms for, cooperation and integration*".[7] The binding status of SADC Protocols, both internationally and constitutionally, has recently been affirmed by the Constitutional Court.[8]

2.4 The SADC Protocol forms the foundation of what may be called the SADC Investment Agenda, on which two pillars are constructed. The first pillar, designed to guide treaty negotiators, is the *SADC Model BIT Template*, which was completed in June 2012 (with South Africa's significant input).[9] The second pillar, designed to guide policy and law makers, is the *SADC Investment Policy Framework* developed in co-operation with the Organization for Economic Cooperation and Development ("**OECD**"), which is due to be completed in November 2015.[10] A recent OECD-SADC policy brief on this Framework is attached to this submission as Appendix A, in case it has not already been provided to the Committee. The policy brief advises that the key areas for reform include:

2.4.1 strengthening security and protection of investors' property rights;

2.4.2 providing well-defined rights for land access and use;

2.4.3 reducing and refining restrictions on foreign investment;

2.4.4 facilitating private participation in infrastructure investments and promoting good governance of state-owned enterprises;

2.4.5 building a coherent and transparent investment environment;

2.4.6 ensuring responsible and inclusive investment for development.

2.5 In response to Anglo's submissions, the DTI has stated that the SADC Protocol "*was concluded in line with first generation BITs. Various risks were associated with the*

5 SADC Treaty, Article 21(2).

6 SADC Treaty, Article 21(3)(c).

7 SADC Treaty, Article 22(1).

8 See *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC).

9 A copy of the SADC Model BIT Template with Commentary is available online at the following address (last accessed on 21 September 2015): http://investmentpolicyhub.unctad.org/Download/TreatyFile/2875.

10 See http://www.oecd.org/daf/inv/investment-policy/sadc-regional-investment-policy-framework.htm (last accessed on 21 September 2015).

vague formulations found in such BITs which represented unacceptable risks to governments' right to regulate."[11] This description is not correct. The term "*first-generation BITs*" refers to those concluded in the second half of the last century, which were focused exclusively on investors' rights, with little consideration for the needs of developing countries.[12] The SADC Protocol, however, which was concluded in 2006, does not fall within this description, as it explicitly includes several elements specifically designed to safeguard the policy space necessary for sustainable development (which in many ways distinguish the SADC Protocol as a world leader in reforming the investment protection landscape):

2.5.1 the definition of "*investment*", which permits SADC member states to exclude any "*short-term portfolio investments of a speculative nature or any sector sensitive to its development or which would have a negative effect on its economy*";[13]

2.5.2 the obligation to use foreign investment to "*support the development of local and regional entrepreneurs*";[14]

2.5.3 the provision that SADC states "*may in accordance with their respective domestic legislation grant preferential treatment to qualifying investments and investors in order to achieve national development objectives*";[15]

2.5.4 corporate responsibility for foreign investors, who "*shall abide by the laws, regulations, administrative guidelines and policies of the Host State*";[16]

2.5.5 recognition that "*it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures*";[17]

2.5.6 importantly, the preservation of each state's "*right to regulate in the public interest and to adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns*";[18] and

---

11 DTI Presentation, slide 37.

12 See UNCTAD, *World Investment Report 2015*, 122-123.

13 SADC Protocol, Article 1(2).

14 SADC Protocol, Article 3(1).

15 SADC Protocol, Article 7(1).

16 SADC Protocol, Article 10.

17 SADC Protocol, Article 13.

18 SADC Protocol, Article 14.

2.5.7 the qualification that investor-state international arbitration shall only be resorted to "*after exhausting local remedies*".[19]

2.6 The DTI has also indicated that the SADC Protocol "*has been reviewed*" and "*will be considered by the Committee of Ministers before the end of the year*".[20] It is at present not clear precisely why and how particular provisions of the SADC Protocol have been or will be redrafted. It would be beneficial for the Committee to be provided with a copy of the reviewed version of the SADC Protocol, and an update on its exact legal status, so that the Committee's work on the Bill may be appropriately aligned and timed. Also, as the SADC Protocol is an international treaty, it would be appropriate for the Committee to have oversight of any proposed amendments to it, bearing in mind that it was ratified by Parliament as recently as 2008.

2.7 More importantly, the current version of the SADC Protocol will remain legally binding, both internationally and constitutionally, until a formal amendment has been tabled, debated and adopted by three quarters of the SADC member states.[21] This could take several years, considering that it took four years for *two-thirds* of the member states to ratify the original SADC Protocol. It must also be borne in mind that three quarters of the SADC member states may not be able to agree on an amendment at all, or may agree on an amendment substantially different from the version currently being considered by the DTI. It would thus be premature to deviate from the dictates of current constitutional and international law, on the basis of a draft amendment which has not yet been put before the Committee, nor considered and adopted by three quarters of the SADC member states.

2.8 It would be more appropriate to incorporate the current contents of the SADC Protocol into the Bill, and then table an amendment to the resulting Act as and when the SADC Protocol is amended in future. Alternatively, the Committee could wait until the SADC Protocol is amended. It would also be beneficial first to consider the second pillar of the SADC Investment Agenda, namely the *SADC Investment Policy Framework*, which will be completed in November 2015.

2.9 It is submitted that the overarching consideration is that the Bill should be handled in such a manner that South Africa complies with its binding obligation under the SADC

---

19 SADC Protocol, Article 28(1).

20 See DTI Summary, 5.

21 SADC Protocol, Article 26(3). The SADC Secretariat has confirmed that the current draft amendment has not even been circulated to SADC member states for comment.

Protocol to "*pursue harmonisation with the objective of developing the region into a SADC investment zone, which shall, among others, include the harmonisation of investment regimes including policies, laws and practices in accordance with the best practices within the overall strategy towards regional integration*".[22] It does not appear that this overarching obligation under the SADC Protocol is under review. Accordingly, international and constitutional law requires that the Bill be crafted to align with the SADC Investment Agenda, and not the other way around.

3. Termination of the BITs

3.1 The Chairperson has rightly, and repeatedly, enquired about the manner in which South Africa's BITs with several EU member states were terminated. In response to concerns that the BITs were unilaterally terminated, the DTI stated that these were first-generation BITs which had merely expired or not been renewed when the window for renewal arrived.[23] As indicated during the public hearings, the effect would in any event be the same, but more clarity is called for to ensure that the Committee is fully apprised of the legal position.

3.2 The "*non-renewal*" of a BIT is not a passive event but an *outward diplomatic act*, in which one state party unilaterally sends the other state party a written notice of termination. The BITs themselves invariably describe this process as a "*termination*",[24] as does the United Nations Conference on Trade and Development ("**UNCTAD**"). It is a matter of some concern that South Africa has unilaterally terminated its BITs with EU states only,[25] but not with other states.[26] The given reason is that the former were first-generation BITs which would be automatically renewed if they were not terminated immediately, while the latter had not yet reached the date for termination. This is not correct: most of the terminated BITs (including the BIT with the UK) did not have automatic renewal provisions; and many of the remaining BITs (including the BIT with China) are *also* first-generation BITs and have been ripe for termination for several years.

---

22 SADC Protocol, Article 19 (emphasis added).

23 See the Minutes of the Committee, *SA foreign direct investment obligations & Promotion and Protection of Investment Bill [B18-2015]: Seminar*, 25 August 2015; and DTI, *Presentation to the Portfolio Committee on Trade and Industry*, 1 September 2015, slide 10.

24 See, e.g., Article 14 of South Africa's BIT with the United Kingdom ("**UK**"). The term "*termination*" has also been used consistently by Ambassador Xavier Carrim, South African Permanent Representative to the WTO, in his address at the 62nd Session of UNCTAD's Trade and Development Board in Geneva on 16 September 2015.

25 Belgium-Luxembourg, Germany, Switzerland, The Netherlands, Spain, the UK, France, Denmark, Austria, Greece, Italy, Finland and Sweden.

26 China, Russia, Argentina, Cuba, Czech Republic, Iran, Mauritius, Mozambique and South Korea.

3.3 It is also quite concerning that the decision to terminate BITs does not appear to have been preceded by any public participation or Parliamentary deliberation, despite the fact that these BITs all became legislative instruments when they were ratified by Parliament. There has also not been any notice in the Government Gazette that a BIT would be or has been terminated. More critically, there does not appear to have been a proper policy decision to this effect at the Executive level. Following the *DTI Policy Review* in 2009, where it was recommended that South Africa "*should review its BIT practices, with a view to developing a model BIT which is in line with its development needs*",[27] the Cabinet decided that this review would be "*the basis on which BITs could be evaluated and renegotiated*".[28] No mention was made of unilateral termination (as opposed to bilateral renegotiation) until the first termination notice had been issued to Belgium-Luxembourg in August 2012, unexpectedly, a few weeks after the *SADC Model BIT* was developed for the renegotiation process envisioned in the *DTI Policy Review*.

3.4 The unfortunate result of the unilateral termination of selected BITs is that the Bill cannot create a uniform investment protection regime. Instead, there will be at least *four fragmented regimes*: one under the Bill itself; one (or more) under the survival provisions of the terminated BITs; one (or more) under the BITs which have not been terminated; and one under the SADC Protocol (until it is amended, after which there may be another regime).

3.5 This is inconsistent with the SADC Investment Agenda, which envisions conformity with the SADC protocol, (re)negotiation of balanced BITs in accordance with the *SADC Model BIT*, development of a complementary domestic framework under the *SADC Investment Policy Framework*, and above all greater harmonisation of the investment regimes across the SADC region. It is also out of step with international best practice. UNCTAD specifically warns against states embarking on their own isolated reforms, as this "*risks achieving only piecemeal change and potentially creating new forms of fragmentation and uncertainty*".[29]

3.6 The UNCTAD Investment Policy Framework for Sustainable Development ("***UNCTAD Framework***") remains squarely premised on the internationalised nature of investment protection. It provides guidance to *improve* international investment agreements ("**IIAs**") by renegotiating them on more balanced terms and making them more conducive to

---

27 DTI, *Bilateral Investment Treaty Policy Framework Review: Government Position Paper*, June 2009 ("**DTI Policy Review**"), para 10.1.

28 See Government Communications and Information Service, *Statement on Cabinet Meeting*, 20 July 2010.

29 UNCTAD, *World Investment Report 2015*, 155.

sustainable development. The termination of BITs is not part of this Framework nor of the international trend. UNCTAD has noted that the *only* countries currently terminating their BITs are South Africa and Indonesia,[30] following the isolated example of Bolivia, Ecuador and Venezuela, which had taken a concerted decision to *minimise* (not to optimise) foreign direct investment. Thus, UNCTAD notes that, while many nations are engaged in investment policy reform, "*by far a smaller group, have announced a moratorium on future IIA negotiations, while still others have chosen a more radical approach by starting to terminate existing IIAs*".[31]

4. Fair and equitable treatment

4.1 The SADC Protocol clearly requires that "*[i]nvestments and investors shall enjoy fair and equitable treatment in the territory of any State Party*".[32] As this is a binding duty under an international treaty, it must necessarily be incorporated into the Bill. If the potential ambiguity of the clause is cause for concern, this may be easily remedied by including interpretive guidance in the Bill itself, which has now become best practice in BIT drafting. For example, the recent BIT between China and Tanzania (a copy of which is attached to this submission as Appendix B) provides as follows:

> *ARTICLE 5: FAIR AND EQUITABLE TREATMENT*
>
> *1. Each Contracting Party shall ensure that it accords to investors of the other Contracting Party and associated investments in its territory fair and equitable treatment and full protection and security.*
>
> *2. "Fair and equitable treatment" means that investors of one Contracting Party shall not be denied fair judicial proceedings by the other Contracting Party or be treated with obvious discriminatory or arbitrary measures.*
>
> *3. "Full protection and security" requires that Contracting Parties take reasonable and necessary police measures when performing the duty of ensuring investment protection and security. However, it does not mean, under any circumstances, that investors shall be accorded treatment more favourable than nationals of the Contracting Party in whose territory the investment has been made.*

4.2 Excluding provision for fair and equitable treatment is thus not an appropriate remedy for the DTI's concern that it "*is a highly problematic provision internationally wherein it has been widely interpreted in many arbitral decisions due to its vagueness*".[33]

---

30 Id, 4 and 109-110.

31 Id, 124.

32 SADC Protocol, Article 6(1).

33 See DTI Summary, page 8.

4.3 The *SADC Model BIT* itself proposes alternative drafting, which was included at South Africa's insistence in 2012:

> *Article 5: Option 2: Fair Administrative Treatment*
>
> *5.1. The State Parties shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural [justice] [due process] to investors of the other State Party or their investments [taking into consideration the level of development of the State Party].*
>
> *5.2. Investors or their Investments, as required by the circumstances, shall be notified in a timely manner of administrative or judicial proceedings directly affecting the Investment(s), unless, due to exceptional circumstances, such notice is contrary to domestic law.*
>
> *5.3. Administrative decision-making processes shall include the right of [administrative review] [appeal] of decisions, commensurate with the level of development and available resources at the disposal of State Parties.*
>
> *5.4. The Investor or Investment shall have access to government-held information in a timely fashion and in accordance with domestic law, and subject to the limitations on access to information under the applicable domestic law.*
>
> *5.5. State Parties will progressively strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes in accordance with their respective domestic laws and regulations.*

4.4 It is necessary to note that the guarantee of fair and equitable treatment remains an integral feature of international best practice, and is cited as one of the "*key components of investment protection*" under Core Principle 7 of the *UNCTAD Framework*, which also provides guidance on how to draft the clause in more precise terms.[34] While the DTI has included a table listing the Core Principles in its response to the submissions,[35] the Committee may benefit from viewing the annotations to the Core Principles from the *UNCTAD Framework*, attached to this submission as Appendix C.

4.5 FET is thus invariably included in China's BITs, including its BITs with BRICS partners Russia and India, as well as with SADC members such as Mauritius and Tanzania. Most recently, the latest draft of the landmark Transatlantic Trade and Investment Partnership between the United States and the EU ("**the US-EU TIPP**") includes an FET clause, with interpretive guidance. This example is particularly instructive as it is the product of prolonged and intense deliberation and negotiation by parties with broadly

[34] *UNCTAD Framework*, 31 and 94-95.

[35] DTI Presentation, slide 39.

equivalent bargaining power, which contradicts the suggestion by some international commentators that FET was simply a trap for unsuspecting developing countries by more powerful capital-exporting nations.

5. Expropriation

5.1 The SADC Protocol requires that "*[i]nvestments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation*".[36] As a matter of international law, this provision refers not only to direct acquisition of investments by the state but also to any other measure or series of measures that have an equivalent effect to expropriation, in the sense that "*they permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way*".[37] The provision also requires that the investor be compensated with the fair market value of any investment directly or indirectly expropriated.

5.2 The Bill simply provides that investors will enjoy protection of their property under section 25 of the Constitution. While it is not suggested that section 25 of the Constitution provides an inadequate standard, the Committee must be made aware that it differs from international investment law in three key respects. First, it does not extend to *indirect* expropriation, as the Constitutional Court has recently made clear.[38] Second, it only protects "*property*", which is not precisely defined and, in light of the most recent jurisprudence of the Constitutional Court,[39] is to be construed much more narrowly than the definition of "*investment*" under the SADC Protocol and most other treaties. Third, it does not require that the compensation for expropriation should amount to market value - on the contrary, it makes it clear that market value is one of a range of factors to be taken into account to determine "*just and equitable*" compensation.

5.3 The DTI states that the SADC Protocol's standard of compensation "*has now been amended to fair and adequate compensation under the amended [SADC Protocol] which now aligns with section 25 of South Africa's Constitution*".[40] This seems

---

36 SADC Protocol, Article 5.

37 UNCTAD, *Series on International Investment Agreements II: Expropriation* (2012), 6.

38 See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

39 See *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape and Others* [2015] ZACC 23.

40 See DTI Summary, 40.

premature, as the SADC Protocol has not yet been amended, and will not be amended for some time, as explained above. Also, the most recent official report on the review of the SADC Protocol does not suggest that it will align with section 25 of the Constitution but rather with the following clause from the SADC Model BIT:[41]

> *Fair and adequate compensation shall normally be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier. However, where appropriate, the assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking account of: 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.*

5.4 This provision is substantively different from section 25 of the Constitution, as it creates a legal presumption that market value compensation will be paid for expropriation, while section 25 does not. It is submitted that the inclusion of such a formulation would provide far greater clarity to foreign investors about the standard of compensation they may expect.

5.5 The DTI also states that there is "*no contradiction*" between the current SADC Protocol and section 25 of the Constitution "*since courts in South Africa have upheld market value as a core principle in the determination of compensation*".[42] This is not quite correct.[43] In any event, if it were, then there would then be no harm in incorporating the SADC Protocol's expropriation clause in the Bill.

5.6 Finally, it is important to note that market value compensation (including for indirect expropriation) remains an indispensable part of international best practice. It is invariably included in China's modern BITs, including its BITs with BRICS partners Russia and India, as well as with SADC members such as Mauritius and Tanzania. It is also included in India's new Model BIT, as well as the draft US-EU TTIP.

---

41 See SADC Subcommittee on Investment, *Report of the Chair*, 13-14 February 2014, Gaborone, Botswana.

42 See DTI Summary, 40.

43 See, for example, *Nhlabathi and Others v Fick* [2003] ZALCC 9 at para 33, where the Land Claims Court held that "*[t]here can be circumstances where the absence of a right to compensation on expropriation is reasonable and justifiable, and in the public interest (which includes the nation's commitment to land reform)*".

6. International arbitration

6.1 The SADC Protocol provides for investor-state disputes to be referred to international arbitration, after exhausting local remedies.[44] The latter qualification is significant, as it strikes an equitable balance between the sovereignty of the host state and the rights of investors to effective relief.

6.2 The Bill deliberately excludes this remedy, in favour of *optional state-state* international arbitration after the exhaustion of domestic remedies. That provision is, however, legally meaningless, as customary international law has always provided for the home state of an injured investor to exercise diplomatic protection against the host state by any means recognised under international law, including state-state arbitration, but also including diplomatic and economic countermeasures. Diplomatic protection was superseded by ISDS in the second half of the last century, precisely because it was unsuited to the modern international investment environment, which demanded the *de-politicisation* of investment disputes.

6.3 As noted in Anglo's original written submission, investor-state international arbitration had the effect of "*internationalising*" the legal relationship between host states and foreign investors,[45] which relieved participating states from three competing political pressures:

(a) the *horizontal* tension between the home state and the host state;

(b) the vertical tension between the *home state* and *its* nationals, whose requests for diplomatic protection may contradict or complicate its foreign policy; and

(c) the vertical tension between the *host state* and *its* nationals, whose democratic demands may be frustrated by diplomatic concessions extracted by an influential home state.

6.4 The Bill does not offer foreign investors themselves any modern remedy at all, but rather reverts to the antiquated doctrine of diplomatic protection, which is a system *far less* consistent, transparent and equitable than ISDS.

6.5 The DTI states that ISDS "*has in most cases been in favour of the investor and to the detriment of the host country… It should be noted that the high number of international arbitration cases initiated against governments remain a significant feature of the*

---

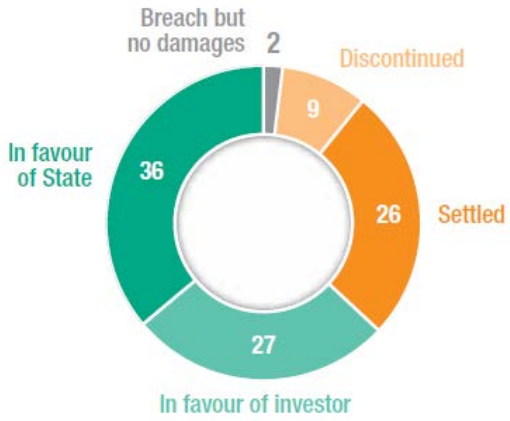
[44] SADC Protocol, Article 28.

[45] UNCTAD, *Series on Issues in International Investment Agreements: Dispute Settlement - Investor-State* (2003), 13.

international landscape."[46] This is not correct. According to UNCTAD's *World Investment Report 2015*, by the end of 2014, out of the 405 cases concluded so far (which is a relatively small number considering that there are well over 3,000 international investment agreements worldwide, and hundreds of thousands of multinational companies covered by those agreements):[47]

> *36 per cent (144 cases) were decided in favour of the State (all claims dismissed either on jurisdictional grounds or on the merits), and 27 per cent (111 cases) ended in favour of the investor (monetary compensation awarded). Approximately 26 per cent of cases (105) were settled and 9 per cent of claims (37) discontinued for reasons other than settlement (or for unknown reasons). In the remaining 2 per cent (8 cases), a treaty breach was found but no monetary compensation was awarded to the investor (figure III.10).*

Figure III.10. **Results of concluded cases, total as of end 2014**
(Per cent)



Source: UNCTAD, ISDS database.

6.6 The DTI also states that "*South Africa's policy space and the implementation of its developmental policies will be put at great risk if such arbitration is allowed. Any measure that is introduced to develop the economy and to carry out the very large mandate of radical transformation will be subject to legal challenge through international arbitration even if exhaustion of local remedies is required.*"[48] This cannot be correct, as ISDS has already been available to hundreds of thousands of foreign investors since 1994 under various BITs, and all of the country's foreign investors since 2010 under the SADC Protocol, yet only two ISDS cases have ever been brought against South Africa,

46 See DTI Summary, 54.

47 See UNCTAD, *World Investment Report 2015*, 116.

48 See DTI Summary, 54.

without any of the calamitous consequences cited by the DTI. It is an incident of the rule of law that any exercise of public power is subject to review by the courts (at least against the baseline standard of rationality), and thus the potential for costly litigation against the government over economic reforms already exists in the domestic system. The provision for ISDS after exhaustion of local remedies merely extends the rule of law to include enforcement of commitments South Africa has made to other nations on the international plane, in the form of agreements which it has duly negotiated and ratified.

6.7 ISDS is still overwhelmingly regarded as "*essential to a regime of protection of foreign direct investment*".[49] It is thus included in China's modern BITs, including its BITs with BRICS partners Russia and India, as well as with SADC members such as Mauritius and Tanzania. It is also included in India's new Model BIT, as well as the draft US-EU TTIP, subject to additional safeguards to improve the consistency, transparency and accountability of arbitral decision-making.

6.8 UNCTAD rightly warns against replacing ISDS with state-state dispute settlement, as the latter:

- *Could politicize investment disputes - commercial disputes would become a matter of State-State diplomatic confrontation.*
- *Investor interests could become a bargaining chip in international relationships.*
- *May be more cumbersome and lengthy for investors due to bureaucracy in either or both disputing States.*
- *May disadvantage SMEs vis-à-vis larger companies.*[50]

6.9 For all of the above reasons, it is submitted that the Bill should be aligned with the SADC Protocol's provisions on dispute settlement, as they are currently available to all foreign investors in South Africa, and will remain so until such time as they are removed from the Protocol. It would thus make little legal sense, and would give South Africa no advantage, for the Bill to purport to exclude ISDS. It would be unfavourable to retain a clause that sends a negative message to foreign investors while making no impact on the legal position prevailing on South Africa internationally.

---

[49] See *Gas Natural SDG, SA v The Argentine Republic*, ICSID Case No ARB/03/10, Decision on Jurisdiction, 17 June 2005, para 29. See also *Eastern Sugar BV v The Czech Republic*, UNCITRAL, Partial Award, 27 March 2007, para 165; *Mafezzini v Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para 54; *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No ARB/03/17, Decision on Jurisdiction, 16 May 2006, para 57.

[50] UNCTAD, *World Investment Report 2015*, 153; see also UNCTAD, *Investment Policy Framework*, 102.

7. Conclusion

7.1 The Bill undoubtedly carries significant implications for the attractiveness of South Africa as an investment destination distinguishable from our peers. It presents the Committee with a historic opportunity to pass a law that will put South Africa at the forefront of progressive international investment law, by ensuring that it is not only consistent with the Constitution, but harmonised with the SADC Investment Agenda and synchronised with international best practice.

7.2 It is, however, respectfully submitted that the current version of the Bill will not achieve these goals, as it will result in further fragmentation and retrogression of South Africa's already opaque and outdated investment protection regime. The complementary goals of co-operation and harmonisation within SADC, as well as international co-ordination and cohesion under the guidance of UNCTAD, both demand that the Bill be based on more patient and thorough consideration of the most up-to-date resources.

7.3 Anglo is available to assist the Committee in any way that may be considered valuable, including by providing the Committee with copies of the various resources referred to in our submissions, including:

7.3.1 the SADC Protocol;

7.3.2 the SADC Model BIT Template with Commentary;

7.3.3 the SADC Investment Policy Framework (once it is released in November 2015);

7.3.4 the UNCTAD World Investment Report 2015;

7.3.5 the UNCTAD Investment Policy Framework for Sustainable Development; and

7.3.6 the BITs and other treaties concluded by various states.

7.4 Anglo looks forward to working with the DTI and the Committee to make a meaningful contribution to developing legislation that will move South Africa forward as a destination of choice for sustainable investment.