Self-assessment of South Africa’s investment regime in relation to the OECD Codes of Liberalisation and the principle of National Treatment

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OECD-South Africa investment policy dialogue

Self-assessment of South Africa’s investment regime in relation to the OECD Codes of Liberalisation and the principle of National Treatment
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FOREWORD

This self-assessment report looks at South Africa’s investment regime in the light of the OECD Codes of Liberalisation and the principle of National Treatment. It has been prepared within the context of a broader policy dialogue between the Investment Committee of the OECD and the Department of Trade and Industry of the Republic of South Africa.

This paper provides an analysis and evaluation of South Africa’s investment regime and the extent to which South Africa’s investment regime is consistent with the OECD legal instruments on international investment as articulated in the OECD Codes of Liberalisation; and the principle of National Treatment articulated in the OECD Declaration and Decisions on International Investment and Multinational Enterprises.

Through an analysis of South Africa’s national policies, sectoral policies and legal framework, it shows the consistency between South Africa’s investment regime and the OECD standards articulated in the OECD’s Codes of Liberalisation and National Treatment instrument.

This report was prepared by Kekeletso Mashigo, from the International Trade and Economic Development Division (ITED) of the Department of Trade and Industry of South Africa, based on terms of reference jointly agreed between Xavier Carim, Deputy Director General, International Trade and Economic Development Division, Department of Trade and Industry, South Africa, and Pierre Poret, Counsellor in the OECD Directorate of Financial and Enterprises Affairs.

While the opinions in this paper are those of the author and should not be interpreted as the official view of South Africa’s Department of Trade and Industry, nor of the OECD, this paper has been the result of consultations within South Africa’s government department and agencies, under the guidance of Mr. Xavier Carim. It has benefited from contributions by Mr. Brendan Vickers (Head, Policy and Research, International Trade and Economic Development Division, Department of Trade and Industry, South Africa) who provided valuable input to the initial draft; and Ms. Mankaleme Letswalo (Deputy Director, Asia Desk, International Trade and Economic Development Division, Department of Trade and Industry, South Africa) who provided useful data. The author has also received comments from the OECD Secretariat.

The OECD Investment Committee considered the discussion of South Africa’s self-assessment an important and timely exercise. Building on this paper, the co-operation between South Africa and the OECD will continue to allow for a better understanding of South Africa’s investment policy stance. The OECD Investment Committee therefore looks forward to further strengthening this cooperation and nurturing a mutually beneficial dialogue with South Africa on investment policy issues.
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PREFACE

Emerging from many years of economic sanctions and international isolation, post-apartheid democratic South Africa confronted enormous challenges to re-integrate its economy and society into a rapidly globalising world economy while, at the same time, effecting wide-ranging policy, legal and institutional changes that were necessary to address the profound social and economic legacies of apartheid.

Over the past 20 years, South Africa has implemented a series of macro- and micro-economic policies that aim to promote structural economic change, industrialisation, employment andcompetitiveness. South Africa is deeply integrated into the global economy. This is fully reflected in the policy framework impacting on foreign investment, including foreign direct investment (FDI). According to the OECD’s restrictiveness index, South Africa ranks amongst the most open jurisdictions for FDI in the world and openness is also reflected in the continuous, long-term growth of inward FDI. It has been estimated that the stock of FDI to GDP in South Africa is approximately between 38 and 42%. Foreign companies are present in almost every formal sector and they are the most significant players in important sectors, mining, notably autos and information technology.

More recently South Africa has undertaken a review of its investment protection regime. This was prompted by shifts in international policy thinking around the world and by the need to accelerate structural transformation in the South African economy to address high and unsustainable levels of poverty and inequality. Internationally, there is clear evidence of policy development to ensure that FDI contribute more decisively to inclusive growth objectives and sustainable development.

As part of our review, we thought it would be important to benchmark South Africa’s investment against international practice, and the OECD Codes on Liberalisation and principle of National Treatment provide an important set of standards that need to be considered. In this regard, we deeply appreciate the offer from the OECD Investment Committee for a secondment of one of our officials, Ms. Kekeletso Mashigo, to the Secretariat for ten months to undertake work on these issues. The secondment was beneficial in terms of her personal development as well as in making a contribution to investment assessment process in South Africa.

The work Ms. Mashigo undertook uncovered in a systematic manner the policies, legal frameworks and specific sectoral regulations that affect investment in South Africa – both foreign and domestic. The approach has been to build up, step by step, in a systematic manner, a simple unified assessment of the policy and legal framework in existence and the specific sectoral regulations applicable in various sectors; highlighting and explaining at the end of each chapter, the extent to which South Africa’s investment regime is consistent with the OECD Codes and identifying any divergences that exist. The study also set out an overview of South Africa’s investment history and climate pre- and post-1994, alongside an overview of investment incentives and national investment promotion agencies.

The outcome of the benchmark assessment concludes that South Africa’s investment regime for FDI is comparable with OECD countries. It concludes that South Africa’s investment regime is consistent with the guidelines set out in the Codes of Liberalisation and the principle of National Treatment. Furthermore, where restrictions or limitations exist, these are not unusual, even among OECD adherents, and are necessary for specific sectors to function optimally.
In conclusion, I want to again express our gratitude to the OECD Investment Committee for agreeing to the secondment and for a meaningful collaboration that has delivered important insights for ourselves and, we hope, for the OECD itself.

Xavier Carim,
Deputy Director General
International Trade and Economic Development Division
Department of Trade and Industry
South Africa
### ACRONYMS AND ABBREVIATIONS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACSA</td>
<td>Airports Company South Africa Ltd</td>
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<tr>
<td>ADSL</td>
<td>Asymmetric digital subscriber line</td>
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<td>ASGISA</td>
<td>Accelerated and Shared Growth Initiative for South Africa</td>
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<td>ADF</td>
<td>Africa Development Fund</td>
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<td>AIS</td>
<td>Automotive Investment Scheme</td>
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<td>BBFEE</td>
<td>Broad Based Black Economic Empowerment</td>
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<td>Basic Conditions of Employment Act</td>
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<td>COMESA</td>
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<td>ICT</td>
<td>Information and Communications Technology</td>
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<td>Acronym</td>
<td>Description</td>
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<td>ICASA</td>
<td>Independent Communications Authority of South Africa</td>
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<td>Industrial Development Corporation</td>
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<td>IRBA</td>
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<td>MIDP</td>
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<td>MPRDA</td>
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<td>MPRRAA</td>
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<td>NAMA</td>
<td>Non-agricultural market access</td>
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<td>MTN</td>
<td>Mobile Telephone Networks</td>
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<td>NA</td>
<td>National Assembly</td>
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<td>National Ports Authority</td>
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<td>National Qualification Framework</td>
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<td>National Treatment</td>
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<td>OAU</td>
<td>Organization of African Unity</td>
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<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>Organisation of the Petroleum Exporting Countries</td>
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<td>PIC</td>
<td>Public – Private Partnership</td>
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<td>PR</td>
<td>Performance Requirement</td>
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<td>R &amp; D</td>
<td>Research and Development</td>
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<td>RDP</td>
<td>Reconstruction and Development Programme</td>
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<td>REDs</td>
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<td>RA</td>
<td>Registered Auditors</td>
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<td>SARB</td>
<td>South African Reserve Bank</td>
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<td>SARS</td>
<td>South African Revenue Service</td>
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<td>SATPSF</td>
<td>South African Trade Policy and Strategy Framework</td>
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<td>Southern African Development Community</td>
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<td>STP</td>
<td>SEDA Technology Programme</td>
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<td>Skills Development Act</td>
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<td>SDL</td>
<td>Skills Development Levy</td>
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<td>SNO</td>
<td>Second Network Operator</td>
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<td>SOEs</td>
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<td>SPII</td>
<td>Support Programme for Industrial Innovation</td>
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<td>Securities Regulation Panel</td>
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<td>STC</td>
<td>Secondary Tax on Companies</td>
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<td>TISA</td>
<td>Trade and Investment South Africa</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<td>TRIMs</td>
<td>Trade-related Investment Measures</td>
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<td>Takeover Regulation Panel</td>
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<td>UN</td>
<td>United Nations</td>
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<td>VANS</td>
<td>Value-added Network Services</td>
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<td>VAT</td>
<td>Value Added Tax</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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<tr>
<td>YD</td>
<td>Yamoussoukro Decision</td>
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EXECUTIVE SUMMARY

This paper only deals with inward foreign direct investment (into South Africa) and not outward investment. Part one provides an overview of South Africa’s investment history and climate, covering the pre-1994 and post-1994 era. It also highlights the attractiveness of South Africa as an investment destination as it is open to foreign investment, which it views as a means to drive growth, improve international competitiveness, and obtain access to foreign markets.

Part two outlines the legal framework within which investments operate, and indicates that although South Africa does not have a general law concerning foreign investment, FDI related policies are pursued in specific sectors, and specific regulatory measures are in place directed towards mitigating any risks that foreign investors may face. The primary aim of these policies is to create a friendly and predictable business environment where foreign investors are confident in the legal and financial framework of the country, and have the potential to reap the benefits from economically viable businesses.

Part three sets out various government policies that have been introduced to attract investors and build a modern, vibrant, and outward-oriented economy that is internationally competitive. Since 1994, South Africa has implemented economic policies that are geared towards making the economy more outward orientated, and to promote domestic competitiveness, employment, equity and economic growth. These policy changes have also contributed to produce an enabling business environment for both local and foreign investors. All these policies reflect an open trade and investment regime, with an economy opening up to international competition, lowering of tariffs, reforming the regulatory regime, and providing growth and investment. The overall framework articulated in the various policies ensures predictability and certainty for those operating within its parameters.

Part four discusses the various sectoral regulations applicable in each sector that may have a bearing on investment. It determines the level of openness to investment at sector level, focusing on specific sector legislation and regulations. An analysis of the sectors indicates that regulations enforced within the sectors are in line with the OECD Codes.

Part five outlines the various incentives available to both local and foreign investors. The incentives are there as policy instruments to attract and stimulate investment from both local and foreign investors in specified types of capital expenditure, investment in high unemployment, and to grow South African business, employment and product mix. The investment incentives supplement the already attractive enabling environment for investment in South Africa.

Part six covers investment promotion agencies, which operate at both national and regional (i.e. provincial) level, catering to all categories of investors. The main objectives of these agencies are to promote, increase and retain the level of domestic and foreign direct investment in the country as well as abroad; and increase South Africa's capability and capacity to promote exports into targeted markets.

Part seven concludes the paper, indicating that the analysis of the various policies and legal framework illustrates that overall, South Africa’s investment regime for foreign direct investment (FDI) is open in international comparison and that the level of openness is comparable with the OECD
country average and well above that of other emerging market economies (EMEs), as measured by the OECD FDI Regulatory Restrictiveness Index, illustrated in the Annex to this paper. Furthermore, the analysis illustrates that where restrictions or limitations do exist, these are not unusual, even among OECD adherents as these are recognised in the Codes and are necessary for specific sectors to function optimally.
INTRODUCTION

The purpose of this paper is to provide an overview of South Africa’s investment regime and the extent to which South Africa’s investment regime is consistent with the OECD legal instruments on international investment and trade in services as articulated in the OECD Codes of Liberalisation of Capital Movements and Liberalisation of Current Invisible Operations; and the principle of National Treatment1 articulated in the Declaration and Decisions on International Investment and Multinational Enterprises.

The Code of Liberalisation of Capital Movements (covering capital movements, direct investment and establishment) and the Code of Liberalisation of Current Invisible Operations (covering services) constitute legally binding rules, and stipulate progressive, non-discriminatory liberalisation of capital movements, the right of establishment and current invisible transactions (mostly services). The Codes contain the principal legal commitments of OECD members and provide an essential yardstick by which the liberalisation efforts of member countries can be assessed and compared over time, and have become the sine qua non in the accession procedure of new members. Both Codes contain a list of items (listed in Annex A of each Code) that member countries must work towards achieving. Members do not select the items to which they wish to subscribe as all items apply across the board, subject to specific reservations which may have been lodged by countries under the country reservation annex. All non-conforming measures must be listed in country reservations against the Codes. The reservations can only be reduced or deleted, but not added to or extended. The concept of standstill thus applies once a commitment has been made. Implementation of the Codes, in particular by removing restrictions on cross-border capital flows and trade in services and the concomitant lifting of country reservations against the Codes, involves "peer pressure" exercised through policy reviews and country examinations to encourage unilateral rather than negotiated liberalisation. The Codes’ main objectives are to promote liberalisation of international trade in goods and services and the progressive freedom of capital movements.

The principle of National Treatment articulated in the Declaration is a voluntary undertaking by adhering countries to the Declaration to accord foreign-controlled enterprises operating in their territories treatment no less favourable than that accorded to domestic enterprises in like situations. National treatment addresses treatment of foreign-controlled enterprises after establishment. This differs from the Code of Liberalisation of Capital Movements, which seeks non-discriminatory right of establishment of foreign-controlled enterprises.

The analysis is done by setting out the policy and legal frameworks in existence and the specific sectoral regulations applicable in various sectors; highlighting and explaining at the end of each section the extent to which South Africa’s investment regime is consistent with the Codes and identifying any divergences that exist. It is important to recall that South Africa is not a member of the OECD and nor is it a signatory to the Codes of Liberalisation or the Declaration and Decisions on International Investment and Multinational Enterprises, and is thus not bound by them. However, the South African Constitution upholds the core principle of National Treatment, and as a World Trade Organization (WTO) member, South Africa further applies this principle to trade amongst WTO members. Although the situation has not arisen, the Codes may be open to adherence by non-members that are able and willing to meet their requirements.

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1 National Treatment refers to the treatment of foreign service suppliers in no less favourable terms than those accorded to domestic service suppliers.
The paper is structured as follows: Part one provides an overview of South Africa’s investment history and climate; part two outlines the legal framework within which investments operate; part three sets out government policies that have a bearing on investment; part four discusses the various sectoral regulations applicable in each sector that may have a bearing on investment; part five outlines the various incentives available to both local and foreign investors; part six covers investment promotion agencies; and part seven concludes the paper.

The paper concludes that South Africa’s investment regime is comparatively open. In addition, it concludes that South Africa’s investment regime is consistent with the guidelines articulated in the Codes of Liberalisation and the principle of National Treatment. Furthermore, the paper concludes that where restrictions or limitations exist, these are not unusual, even among OECD adherents as these are recognised in the Codes and are necessary for specific sectors to function optimally.
1. FOREIGN DIRECT INVESTMENT IN SOUTH AFRICA

1.1 Investment history

Foreign direct investment (FDI) played an important role in South Africa’s early development, particularly in the mining and minerals industries of the colonial era. Foreign mining houses gradually became South African companies through the first part of the twentieth century, and later diversified into other sectors of the economy. Investments by British, European, and United States companies in South Africa also played an important role in the development of secondary industry from the 1920s to the 1970s.²

The 1948 political developments in South Africa that introduced the National Party’s apartheid policy installed a rigid system of territorial, social, and political segregation along racial lines. The increasing authority of whites over blacks and the repression resulting therefrom provoked and fuelled black resistance. The resistance intensified in later years as actions that were taken by the Apartheid government became increasingly harsh and institutionalised through an expanding legislation framework. During this period, South Africa was also more inward looking; enforcing a policy of import substitution,³ and capital controls. As repression increased and black resistance grew, world opinion intensified against the Apartheid regime, resulting in trade and economic sanctions.⁴ Disinvestment from South Africa was advocated in the 1960s, in protest against South Africa’s system of apartheid, but became more pronounced in the mid-1980s.

South Africa’s foreign trade and investment were affected by the boycotts and sanctions, especially during the 1980s and early 1990s. The sanction measures included: a voluntary arms embargo instituted by the United Nations (UN) in 1963, which was declared mandatory in 1977; the 1978 prohibition of loans from the United States Export-Import Bank; an oil embargo first instituted by the Organisation of the Petroleum Exporting Countries (OPEC) in 1973 and strengthened in a similar move by Iran in 1979; a 1983 prohibition on International Monetary Fund (IMF) loans; a 1985 cut-off of most foreign loans by private banks; the United States 1986 Comprehensive Anti-apartheid Act, which limited trade and discouraged United States investors; and the 1986 European Economic Community (EEC) ban on trade and investment. The Organization of African Unity (OAU) also discouraged trade with South Africa. The most effective sanctions measure was the withdrawal of short-term credits in 1985 by a group of international banks. Immediate loan repayments took a heavy toll on the economy. More than 350 foreign corporations, at least 200 of which were United States owned, sold off their South African investments. Many disinvesting companies sold their assets cheaply to local businessmen, but maintained non-equity links such as franchise, licensing, and technology agreements that permitted them to keep operating.⁵ In the 1980s with growing repression against the majority of its people, South

³ A trade and economic strategy for economic development based on the premise that a country should attempt to reduce its foreign dependency through the local production of industrialised products. It encourages industrial growth within a nation in order to reduce imports of manufactures, save foreign exchange, provide jobs, and reduce dependency
⁴ Some of the countries that imposed sanctions on South Africa were: Australia, Hong Kong, USA, UK, France, Brazil, Norway, Sweden, Finland, Denmark, Iceland, Netherlands, Japan to mention a few
⁵ Philip I. Levy, Sanctions on South Africa: What did they do?, Yale University, Economic Growth Centre, Centre Discussion Paper No. 796, February 1999, p. 8
Africa was increasingly denied access to international capital markets. By and large, the investment climate in South African remained unchanged until 1994.

International sanctions contributed to the untenable apartheid policies that were destroying the economic fabric of South Africa. The apartheid government tentatively explored reform measures. These included the repeal of some Apartheid legislation beginning in 1986. In 1991, both the EEC and the United States lifted many official sanctions in view of measures taken to begin dismantling apartheid. However, foreign investors were slow to return to South Africa and most banking institutions considered the country too unstable. 6

Following a five (5) year negotiation between the African National Congress (ANC) and the apartheid government, free elections in 1994 ushered in multi-racial democracy and represented the turning point in South Africa’s economic and social development. Sanctions were lifted and the new government introduced a more open trade and investment policy, adopting outward looking policies that aimed to attract investment. Since 1994, the South African business environment has changed dramatically, with the economy opening up to international competition through tariff liberalisation, abolishing most import controls, undertaking some privatisation, reforming the regulatory regime, and introducing new opportunities for growth and investment. In 1994 and 1995, many of the United States companies that had sold off shares or operations in South Africa during sanctions returned to do business.7

1.2 Investment Climate

South Africa represents an attractive investment destination for investors as it is open to foreign investment, which it views as a means to drive growth, improve international competitiveness, and obtain access to foreign markets. In addition, South Africa has a steadily growing market with significant further growth potential, exceptional access to other markets in Africa, well-developed financial institutions and capital markets, strong communication and transport links, lower labour costs than western industrialised countries, and significant reserves of raw materials. All sectors are open to investors; no government approval is required; there are few restrictions on the form or extent of foreign investment; foreign investors are allowed 100 per cent ownership or shareholding in South Africa; all foreign and domestic private entities are entitled to own land for business purposes; there is liberal repatriation of profits and other earnings; government does not impose performance requirements (PRs) on foreign companies as a condition for establishing, maintaining or expanding investments, or for access to tax and investment incentives; does not screen foreign investment; and does not require new investments to comply with specific requirements (although the Government encourages investments that strengthen, expand, or enhance technology in various strategic sectors). The opportunities for investment abound.

Overall, South Africa's regime for FDI is open in international comparison. Its level of openness is comparable with the OECD country average and well above that of other major EMEs, as measured by the OECD FDI Regulatory Restrictiveness Index (FDI RRI), 2010 update (see Annex). South Africa’s openness is reconfirmed in the 2013 OECD FDI RRI (see Annex). The FDI RRI measures statutory restrictions on FDI in 58 countries, including all OECD and G20 countries, and covers 22 sectors. It gauges the restrictiveness of a country's FDI rules by looking at four types of restrictions: foreign equity limitations; screening or approval mechanisms; restrictions on the employment of foreigners as key


7 Byrnes, op.cit.
personnel; and operational restrictions – restrictions on branching and on capital repatriation or on land ownership.

Although South Africa does not enforce PRs, the issue of PRs requires further clarity as some have distinguished between ‘voluntary’ and ‘obligatory’ PRs in South Africa. Under its World Trade Organization (WTO) Trade Related Investment Measures (TRIMS) commitments, South Africa does not impose PRs, local content requirements (labour or suppliers) or require new investment to comply with specific criteria. South Africa does not limit a foreign investor’s use of imported products to the volume or value of locally manufactured products that it exports, a measure generally used by governments to ensure that they have sufficient foreign exchange reserves for essential imports. Some have however, distinguished between ‘voluntary’ and ‘obligatory’ PRs in South Africa. In the case of the former, PRs are coupled to the receipt of a particular advantage (e.g., an incentive) and companies need only comply if they decide to access the advantage. Obligatory PRs, on the other hand, are mandatory for all domestic and foreign firms, as they are established by national legislation.

Exports, technology transfer and research and development requirements are all voluntary in nature, in that they are applied as a condition for the attainment of some sort of advantage. Meanwhile, employment and training requirements as well as domestic equity requirements are mandatory in character. In implementing its policies, South Africa follows the basic principle of National Treatment. Thus, all performance requirements, whether mandatory or arising out of an advantage, apply equally to domestic and foreign investors. Foreign and domestic investors have access to identical services and incentives from government and have to fulfil equal obligations in adhering to national legislation and policy.

1.3 Foreign Direct Investment (FDI) in South Africa

South Africa is a relatively open economy for both foreign trade and foreign direct investment (FDI). FDI plays an important role in strengthening the international integration of the South African economy. The attractiveness for foreign investors of an environment of steady economic growth and stability has been complemented by public policies that have sought to ease the regulatory burden on business and to accommodate South Africa’s increasing international economic engagement.

Available data, shown in table 1 indicate that during the period 2009-2013 the top ten source countries for FDI have been the United Kingdom, United States, Germany, India, Australia, Switzerland, Japan, China, Norway and Canada (in order of priority).

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9 The data is from the Reserve Bank of South Africa, which is the principal source of international investment statistics for South Africa. It publishes regular data on investment flows in the context of the balance of payments.
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<th>2011</th>
<th>2012</th>
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2. GENERAL LEGAL FRAMEWORK FOR FDI

2.1 Legislation

South Africa does not at this stage have a specific law concerning foreign investment. Although South Africa has clearly acknowledged the importance of FDI in its broad macroeconomic policies, there is no specific FDI policy dealing with foreign investment. However, FDI related policies are pursued in specific sectors, and specific regulatory measures are in place directed towards mitigating any risks that foreign investors may face. A number of departments have the responsibility for formulating and implementing FDI-related policy. The primary aim of these policies is to create a friendly and predictable business environment where foreign investors are confident in the legal and financial framework of the country, and have the potential to reap the benefits from economically viable businesses.

Foreign investors, once established in South Africa, benefit from legal protection of property rights. Private rights are fully protected under the Constitution and property may only be expropriated pursuant to specific constitutional provisions: expropriations may only be executed on grounds of public policy or national interest and expropriated parties have a right to compensation for the material damage caused, which is established by mutual agreement and in terms of the law.

2.2 Company Law

A new Companies Act 2008 (the New Act) was promulgated on 9 April 2009 and came into force on 1 May 2011. In terms of the New Act, the old Companies Act of 1973 (the Old Act) has been repealed and the Close Corporations Act has been amended. The purpose of the New Act is to modernise and reform commercial law, ensure an efficient system of company registration and to provide business rescue provisions for companies in distress.

In terms of the New Act, the Companies and Intellectual Property Commission (CIPC), previously the Companies and Intellectual Property Registration Office - CIPRO), the Companies Tribunal (the Tribunal), the Takeover Regulation Panel (TRP, previously Securities Regulation Panel - SRP), and the Financial Reporting Standards Council (FRSC) are the institutions that regulate, administer and enforce the Companies Act. The CIPC is responsible for registering corporate entities and intellectual property rights; maintaining information on juristic persons; ensuring compliance with and enforcing the Act; ensuring a regulatory framework that promotes: growth, employment, innovation, stability, good governance, confidence and international competitiveness; and raising public awareness of company law. The CIPC also has the power to investigate companies, including seizing documents and

10 The Department of Trade and Industry (DTI) is currently developing a National Promotion and Protection of Investment Bill

11 South Africa Constitution. Act No. 108 of 1996 Article 25 (2) and (3).

12 Act 71 of 2008, read with the Companies Amendment Act, Act No. 3 of 2011.

13 To officially publicly declare or announce.


addressing the issue of corporate hi-jacking. Furthermore, the CIPC is able to refer alleged offences for prosecution to the courts or the Companies Tribunal (the Tribunal). The Tribunal serves as a forum for voluntary alternative dispute resolution in relation to matters. The TRP replaces the SRP. The TRP performs the same functions as those which were performed by the SRP: regulate affected transactions and offers (mergers and takeovers); investigate complaints with respect to affected transactions and offers; apply for a court order to wind up a company in appropriate circumstances; and consult with the Minister in respect of additions, deletions or amendments to the Takeover Regulations. In addition the TRP is also empowered to: require the filing for approval of any document in respect of affected transactions and offers if such a document is required in terms of the Takeover Regulations; consult with any person with a view to advising that person on the application of the Act and the Takeover Regulations; deal with any representations by parties on any matter in respect affected transactions or offers; issue, amend or withdraw policy issues dealing with any affected transactions or offers; and issue compliance notices or compliance certificates. Any person may lodge a complaint with the TRP whereupon the TRP may investigate, or appoint an inspector or investigator to investigate the complaint. On conclusion of the investigation, the TRP may:

- Refer the matter to the National Prosecuting Authority (NPA) or other authority where it believes that an offence has been committed;
- Issue a notice of non-referral to the complainant;
- Initiate legal proceedings in the name of the complainant in appropriate cases or
- Issue a compliance notice.

When a compliance notice is issued to a person, a copy of such a notice must also be sent to the licensing authority that granted the license authorising that person to conduct business. A compliance notice issued by the TRP may be set-aside by the Takeover Special Committee (TSC) on review and a compliance notice issued by the TSC may be set-aside by a court on review or on appeal. The TSC is a committee of the TRP established in terms of the new Act. The functions of the TSC are: to hear and

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Corporate hi-jacking includes the following practices: (a) Changing the names of directors of a company and altering company registrations without the real directors being aware of the changes being effected; (b) In other instances, it involves predatory companies making highly attractive offers - of up to twice the value - of financially vulnerable companies. These, often small to medium-sized businesses, are then stripped of their assets and sucked dry by new directors who give themselves huge salaries and withdraw more cash from the business than it can sustain. The target companies are then left with less than what they started off with and little or no legal recourse; (c) Yet another form of corporate hijacking involves investors - sometimes overseas entities - buying the assets of local companies. Existing directors or management are then trusted to oversee the transfer of ownership to the new entity but before the deal is concluded the former management use their big cash payout from the deal to set up a new business. Assets such as equipment, staff and clients are then moved over to the new business. The purchasing company then inherits a shell instead of a company that may have been worth millions at the time of the acquisition.

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17 Companies Act, Act No.71 of 2008, section 196

18 “Affected transactions” or “offers” refer to mergers and takeovers. An affected transaction is one which has or will have the effect of vesting control of any company in any person(s) in whom such control did not vest prior to the transaction, or where any person(s) acquires all the securities of a particular class in a company or where a person in whom control of any company vests, acquires further securities of that company in excess of the limits prescribed. For purposes of determining control, the specified percentage is prescribed at 35 percent or more of the voting rights in a company. Specifically, these are transactions that relate to the acquisition of more than 35 percent of the voting securities of a regulated company, disposal of major assets or undertakings in a company, schemes of arrangements, amalgamations, mergers, acquisitions and compulsory acquisitions and squeeze outs.

19 Companies Act, Act No.71 of 2008, Section 202
decide on any matter referred to it by the TRP, and to review rulings and compliance notices issued by the TRP. Failure to comply with a compliance notice issued may result in a person being fined up to 10 percent of annual turnover by a court on application by the TRP. Failure to comply with a compliance notice also constitutes an offence and a person may be prosecuted for such an offence and on conviction by a court such a person may be imprisoned for a period of 12 months.

The TRP regulates mergers and takeovers involving a profit company or securities of that company if the company is a public company, a state owned company (unless the state owned company has been exempted) and or private companies if the memorandum of incorporation of the company so provides or if 10 percent of the issued securities of the company have been transferred in a period of 24 months before the date of the particular transaction, except if the transfer is between related or interrelated persons.

2.2.1 Company formation

In terms of the New Act, two (2) main categories of companies are provided for, namely “non-profit companies” and “profit companies.” Non-profit companies must have a “public benefit” objective or an objective relating to cultural or social activities or communal or group interests. Profit companies are companies operating for the purpose of profit making, and these include the following: private companies, public companies, personal liability companies, and state owned companies (SOEs). One (1) person may incorporate a profit company. Other forms of business entities that can be established in South Africa are: partnerships, joint ventures and business trusts.

Investment by individuals and companies not residing in South Africa is generally unrestricted, and direct investment may be made through a new or existing company incorporated in South Africa or through the establishment of a branch. South Africa treats foreign investment essentially the same as domestic investment. Foreign companies receive national treatment. The main area in which foreign investors are treated differently from domestic investors is that of local borrowing, where foreign investors are restricted in the amount of local borrowing they can make in South Africa, depending on whether borrowing is for long term and short term investment. The limitation is discussed in paragraphs 3.10.5 and 3.10.6.

2.2.2 Local branch (external company) of foreign company

If a foreign company wishes to establish a branch in South Africa, registration is required as an “external company,”[20] and the branch is not recognised as a separate legal entity. An external company is in most respects subject to the same regulations as a South African company. External companies can register either as a profit or a non-profit company. To do this, a company must register with the Companies and Intellectual Property Commission (CIPC) within 20 days of establishing its office and must comply with the provisions of the Companies Act.[21] On registration of the external company, the Companies Registrar issues a registration number and Certificate of Incorporation.[22] The external company must appoint a local auditor[23] and submit statutory returns and file audited annual financial

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20 An “external company” is a company that is registered in another country and that wishes to establish a company in South Africa. For instance, AERO BENIN is a company that is registered in Germany. Its main business focus is air and sea freight and passenger transport. It established an external company in South Africa known as AERO BENIN SA.

21 Section 23 (1) of the Companies Act, Act No. 71 of 2008

22 Ibid., Section 23 (5)

23 Ibid., Section 9
statements for its entire operations\textsuperscript{24} (and not only its South African operations) with the CIPC, where they are open to public scrutiny. The external company is not required to appoint a local board of directors, but is required to appoint a South African resident who is authorised to accept services of process and notices served on the company. There are no local equity requirements.

2.3 Competition Law

Business operations in South Africa are regulated by the Competition Act, Act No. 71 of 1998, which came into force on 1 September 1999. Competition policy is an instrument through which the South African government ensures that its markets are functioning efficiently, competitively and in the interest of consumers. South Africa uses competition policy as an economic policy that focuses on economic structures, economic conduct and economic effects.

When the Competition Act was introduced, three (3) independent bodies were established in terms of the Competition Act. These are the Competition Commission\textsuperscript{25}, the Competition Tribunal\textsuperscript{26} and the Competition Appeal Court.\textsuperscript{27} These institutions were created to achieve the objectives of the Competition Act. The Competition Act makes it compulsory for firms to notify the Commission and/or the Tribunal about mergers and acquisitions above a certain monetary threshold.\textsuperscript{28} The Commission is the investigation and enforcement agency, enforcing competition law. The Commission is empowered to investigate, control and evaluate restrictive business practices, abuse of dominant positions and mergers in order to achieve equity and efficiency in the South African economy. The Tribunal is the adjudicative body, very much like a court. The Tribunal’s main functions are to grant exemptions, authorise or prohibit mergers (with or without conditions), adjudicate in relation to any conduct prohibited in terms of chapter 2 (prohibited practices) or 3 (merger control) of the Act and to grant an order for costs on matters presented to it by the Commission. The Appeal Court considers appeals against decisions of the Tribunal.

The principal goal of South Africa’s Competition Act,\textsuperscript{29} is to promote and maintain competition in South Africa in order to achieve the following objectives: to promote the efficiency, adaptability and development of the economy; provide consumers with competitive prices and product choices; promote employment and advance the social and economic welfare of South Africans; expand opportunities for South African participation in world markets and recognise the role of foreign competition in South Africa; ensure that small and medium-sized enterprises (SMEs) have an equitable opportunity to participate in the economy; and promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.\textsuperscript{30}

The Competition Act applies to all economic activity within or having an effect in South Africa, which includes nationals and foreigners, private and public companies and goods as well as service sectors. In practice, the Competition Act regulates two (2) broad areas of competition: mergers and acquisitions on the one hand and prohibited practices (anti-competitive conduct) on the other hand. A merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect

\textsuperscript{24} Ibid., Section 30
\textsuperscript{25} Ibid., sections 19-25
\textsuperscript{26} Ibid., sections 26-35
\textsuperscript{27} Ibid., sections 36-39
\textsuperscript{28} Ibid., section 11
\textsuperscript{29} Act No. 89 of 1998
\textsuperscript{30} Ibid., section 2
control over the whole or part of the business of another firm.\textsuperscript{31} The Competition Act prohibits anti-competitive practices, which includes: competitor’s agreements aimed at fixing prices; limiting output or dividing markets; as well the abusive exploitation of a dominant position by means of prices, tying, dividing markets, and refusing to deal or predatory pricing.\textsuperscript{32} In addition, non-competition factors are incorporated into the Competition Act. Specifically, certain public interest objectives are incorporated into the Competition Act.\textsuperscript{33} Inclusion of public interest objectives envisages Competition Authorities engaging in the balancing of various interests, namely those of workers and consumers when adjudicating competition matters. Here the regulation of competition is considered an instrument for economic development, which seeks to correct the socio-economic imbalances of South Africa as a result of its peculiar history and development.

The provisions promoting public interest which are expressly incorporated into the Competition Act relate to exemptions and mergers. The exemption provisions\textsuperscript{34} permit a firm to apply to the Commission to have agreements or practices of the firm exempted from the application of those provisions of the Competition Act which deal with restrictive practices. The implication of this is that conduct of a firm that would ordinarily be prohibited by the Competition Act in that it amounts to a horizontal restrictive practice, a vertical restrictive practice, or an abuse of dominance, would, if exempted, not be prohibited and the firm would be immune from penalty in terms of the Act, in respect of such conduct. The Commission is, however, only permitted to grant such an exemption application if the agreement or practice in question is required to obtain one of a specific list of objectives contained in the Competition Act.\textsuperscript{35} An anticompetitive agreement or practice may, for instance be granted if it promotes the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive.

The second area of South African Competition law in which public interest considerations feature prominently is in respect of mergers. In determining whether a merger can or cannot be justified on public interest grounds, the Commission or Tribunal must consider the effect that the merger will have on a particular industrial sector or region; employment; the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and the ability of national industries to compete in international markets.\textsuperscript{36} The Commission or Tribunal must determine whether or not a merger is likely to substantially prevent or lessen competition, and determine whether the merger can or cannot be justified on substantial public interest grounds.\textsuperscript{37} This means that the Commission or Tribunal is required to consider two (2) questions. The first is the likely effect of the merger on competition, the second is whether substantial public interest grounds arise and are affected by the merger.

2.4 Intellectual Property Rights (IPRs)

South Africa has a developed system of intellectual property (IP) law which complies with international standards. South Africa is a signatory to the Agreement on Trade-Related Aspects of

\textsuperscript{31} A merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.

\textsuperscript{32} Ibid., 29, sections 4, 5, 6, 8, 9

\textsuperscript{33} Ibid., section 10, 12, 12A

\textsuperscript{34} Ibid., section 10

\textsuperscript{35} Ibid., section 10(3)(b)

\textsuperscript{36} Ibid., section 12A(3)

\textsuperscript{37} Ibid., section 12
Intellectual Property Rights (TRIPS). However, accession to TRIPS did not involve a significant leap in South Africa’s IPRs regime, as at that time South Africa had relatively developed intellectual property laws and was already a signatory to most international treaties that the TRIPS Agreement incorporates.

IPRs are protected under a variety of laws and regulations. The IP law covers patents, industrial designs, copyrights and trademarks. Patents may be registered under the Patents Act of 1978 and are granted for 20 years. Trademarks can be registered under the Trademarks Act of 1993, and protected indefinitely, provided they are renewed every ten (10) years upon payment of a renewal fee. New designs may be registered under the Industrial Designs Act of 1993, which grants protection to aesthetic designs for 15 years and functional designs ten (10) years. Literary, musical and artistic works, cinematographic films and sound recordings are eligible for copyrights, under the Copyright Act of 1978, and the rights are protected for 50 years.

Amendments to the intellectual property system have been introduced through a: cabinet approved policy on indigenous knowledge (IK) (2007); draft national policy on intellectual property (IP) of South Africa, A Policy Framework (2013); and the Intellectual Property Law Amendment Act (2013). The policy and amendment act have been formulated to ensure adequate protective mechanisms for IK in South Africa. The policy framework (2013) focuses on issues like: public health, agriculture and genetic resources, compulsory licensing, technology transfer and IK. Placing IK in the realm of IP will enable it to play a social development role within poor communities. Existing pieces of legislation do not contain sufficient provisions to provide adequate levels of protection for the intellectual component of IK, thus existing legislation has been amended. The Act aims to: improve the livelihoods of IK holders and communities; benefit the national economy; prevent bio-piracy; provide a legal framework for protection and empowerment of local communities; prevent exploitation of knowledge; raise awareness within communities of the importance of IK for development; establish community trusts and facilitate the recording, documentation and storage of IK. The legislation also introduces an alternative dispute resolution mechanism into all areas of IP. The idea behind this is to assist poor communities defend their IK.

The Act provides amongst others: that the law of trademarks / geographical indications (GIs) may be able to provide protection of certain names or features associated with traditional knowledge, for instance rooibos and honey bush tea; that a National Council consisting of experts on traditional knowledge must advise the Minister and the Registrar of IP on traditional intellectual property (TIP) rights; that communities may form business enterprises such as collecting societies in order to

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38 The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) looks at different kinds of intellectual property rights and how to protect them. The purpose is to ensure that adequate standards of protection exist in all member countries by establishing minimum levels of protection that each government has to give to the intellectual property of fellow WTO members.


40 Patents Act, Act No. 57 of 1978

41 Trade Marks Act, Act No. 194 of 1993

42 Industrial Designs Act, Act No. 195 of 1993

43 Copyright Act, Act No. 98 of 1978

administer their TIP, as well as commercialising such TIP; that such business enterprises may enter into licensing agreements (commercialisation of TIP) with third parties; that other rights in the copyright regime should preferably also be subjected to "collective management of copyright regime."

2.5 Labour Laws

South Africa's labour market has undergone a transformation since 1994, with an emphasis being placed on strategies that eliminate the labour inequalities of the past and improve general working conditions for all South Africans. The introduction of new labour legislation has had a profound impact on the South African labour market, notably in terms of the Labour Relations Act (LRA)\textsuperscript{45}, the Basic Conditions of Employment Act (BCEA)\textsuperscript{46}, the Employment Equity Act (EEA)\textsuperscript{47}, the Occupational Health and Safety Act (OHSA),\textsuperscript{48} the Skills Development Act (SDA),\textsuperscript{49} and the Skills Development Levy (SDL).\textsuperscript{50} The purpose of the LRA, the BCEA and the EEA is to give effect to the right to fair labour practices as contained in Section 23 of the Constitution.

The LRA is the cornerstone of the entire regulatory structure. The LRA aims to promote economic development, social justice, labour peace and democracy in the workplace. It sets out to achieve this by providing a framework for the rights of employers and employees and regulating the relationship between employers, employees, unions and organisations. The LRA establishes the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court (LC) and Labour Appeal Court (LAC). The CCMA is an independent dispute resolution body to which certain work disputes are referred for resolution via conciliation and arbitration. The Labour Court and Labour Appeal Court are also established in terms of the LRA.

The BCEA establishes and governs minimum terms and conditions of employment. The EEA governs the implementation of affirmative action measures in the workplace in order to eradicate discrimination against those who were previously disadvantaged, prohibits unfair discrimination in any employment policy or practice, provides the method for resolving disputes arising out of unfair discrimination, and requires employers to formulate employment equity plans and report on implementation of such plans. The OHSA provides for the health and safety of persons at work and for the establishment of an advisory council for occupational health and safety. The SDA and SDL provide for an institutional framework to devise and implement national, sector and workplace strategies to develop and improve the skills of the South African workforce and provide for the imposition of a skills development levy payable by employers. The SDL is a compulsory levy scheme for the funding of education and training. South African Revenue Service (SARS) administers its collection (employers pay the levy monthly to SARS not later than seven (7) days after the end of every month). The rate is 1 percent of payroll and is payable by employers who are registered with SARS for employees' tax purposes and have an annual payroll in excess of R500 000. The levies paid to SARS are transferred to a special fund and employers who have paid their skills levies qualify to receive money back from the Fund to use on training and developing their own employees' skills, having satisfied other

\textsuperscript{45} Labour Relations Act, Act No. 66 of 1995.
\textsuperscript{46} Basic Conditions of Employment Act, Act No. 75 of 1997.
\textsuperscript{47} Employment Equity Act, Act No. 55 of 1998.
\textsuperscript{49} Skills Development Act, Act No. 97 of 1998.
\textsuperscript{50} Skills Development Levy Act, Act No. 9 of 1999.
requirements.\textsuperscript{51} Employers paying annual remuneration of less than R500,000 are exempt from the payment of skills development levies.

In December 2010, the Department of Labour published a new Employment Services Bill. Between 2010 and 2013, the Bill underwent the necessary commentary process (including public and parliamentary hearings) and amendment procedures. The Bill was adopted by Parliament’s Portfolio Committee on Labour, the National Assembly (NA) the National Council of Provinces (NCOP). The Bill was signed into law in April 2014, becoming an Act. The Act has its origins in the growing “casualisation” of work that has become a feature of the South African labour force for some time. The Act intends to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship; introduce laws to regulate contract work; subcontracting and outsourcing; address the problem of labour broking;\textsuperscript{52} and prohibit certain abusive practices. The new Employment Services Act will amongst other things regulate the employment of foreign workers. Section 8 and 9 of the Act set out the terms, conditions, processes and procedures in terms of which a foreign national may be employed and prohibited acts in respect of foreign nationals. These sections protect South African citizen employment and opportunities, economic development and social stability from being affected as a result of employment of foreign workers. Procedures that employers must follow if they have to employ a foreign worker are also outlined, including the consequences for not complying or abusing foreign qualifying workers. South Africa has a host of other legislation that has implications on the employment relationship.\textsuperscript{53}

\subsection{2.6 Environmental Laws}

South Africa’s considerable and diverse natural resources open up a wide array of investment possibilities. South Africa has since the mid-1990s developed ambitious and far-reaching environmental legislation. Since 1994, much attention has been devoted to the protection of natural resources and the promotion of their sustainable use, and various environmental legislation has been adopted to this effect. In its environmental laws, South Africa attempts to strike a balance between encouraging investment and growth, and the need to protect the environment. Legislation makes it compulsory for particular projects to undergo environmental impact assessments.

Section 24 read with section 38 of the Constitution\textsuperscript{54} provides that everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that: prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable

\begin{itemize}
  \item Appoint a Skills Development Facilitator responsible for developing and planning the skills development strategy and follow all the rules and regulations in the Act.
  \item Labour broking is the procurement and providing of employment by Temporary Employment Services to companies. In terms of section 198 of the Labour Relations Act, the definition of temporary employment service is:
    \begin{itemize}
    \item “any person who, for reward, procures for or provides to a client other persons –
    \item (a) Who render services to, or perform work for, the client; and
    \item (b) Who are remunerated by the temporary employment service.”
    \end{itemize}
  \end{itemize}

In the new Bill, section 198 has been repealed.

\begin{itemize}
  \item Constitution of the Republic of South Africa, 1996.
\end{itemize}
development and use of natural resources while promoting justifiable economic and social development. Enforcement of this right is through section 38, which provides for certain persons listed in that section to approach a competent court if the right in terms of Section 24 of the Constitution has been infringed or threatened. These foundations have provided the starting point for the development of an encompassing environmental policy and promulgated the development of ambitious national policies, strategies, action, and implementation plans in order to ensure compliance with international accords.

Environmental law in South Africa is constituted in a number acts. The National Environmental Management Act (NEMA) is the main act on environmental law. It provides a co-operative framework of environmental governance by establishing principles for environmental decision-making, defining the scope of actions of the institutions in environmental policy, and advocating an integrated approach to environmental management. The Act furthermore details compliance and enforcement mechanisms, the provision of environmental information, and foresees the incorporation of international environmental instruments in the South African policy context. In addition, the Act also enforces “the polluter pays principle.”

Of specific relevance for all industry sectors is legislation on environmental impact assessments (EIA) and licensing for operations. Comprehensive regulations on environmental impact assessment have been promulgated under NEMA. The purpose of these Regulations is to regulate the procedure and criteria of integrated environmental management relating to the submission, processing and consideration of, and decision on, applications for environmental authorisations for the commencement of activities in order to avoid detrimental impacts on the environment, or where it cannot be avoided, ensure mitigation and management of impacts to acceptable levels, and to optimise positive environmental impacts. The current environmental impact assessment regime requires that the potential impact on the environment of listed activities must be considered, assessed and reported to the competent authority.

2.7 Codes and National Treatment

The Codes set out binding rules aimed at progressive non-discriminatory liberalisation and the right to establishment. Direct investment in terms of the Code of Liberalisation of Capital Movements includes the right of establishment. This means that foreign investors must have the right to choose

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57 Section 28 of National Environmental Management Act. The polluter pays principle is an environmental policy principle which requires that the costs of pollution be borne by those who cause it. The Principle is a generally recognised principle of International Environmental Law.


59 The 2006 regulations were updated and replaced on 2 August 2010.

60 National Environmental Management Act, Section 23 and 24.

their form of establishment, for instance, by incorporating a new wholly owned company, acquiring ownership or part ownership of an existing company and establishing a branch or a subsidiary. In South Africa, investment by individuals and companies not residing in South Africa is generally unrestricted, and direct investment may be made through a new or existing company incorporated in South Africa or through the establishment of a subsidiary or a branch. Foreign investment is treated essentially the same as domestic investment with regards to any regulations and practices that may be applicable, thus according national treatment.

The residence requirements stipulated for purposes of establishing a branch (appointment of a local auditor and appointment of a South African resident who is authorised to accept services of process and notices served on the company) are not contrary to the obligations of the Codes. These can be regarded as minimal forms of local presence requirements which are a matter of formality that do not constitute any impediments for carrying out operations, and are not discriminatory against foreign investors. The Codes recognise instances when a foreign enterprise operating in another country appoints as its representatives, any competent person who is domiciled and actually resident in the country of operation, irrespective of nationality.62

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Emerging from isolation in the 1990s, democratic South Africa faced enormous challenges to establish institutions, policies and processes to attract investors. A central challenge was to build a modern, vibrant, and outward-oriented economy that is internationally competitive, whilst addressing also the massive backlogs in access to social and economic services. South Africa thus underwent a series of policy reforms to meet these challenges. Since 1994, South Africa has implemented macro- and micro-economic policies that were geared towards making the economy more outward orientated, and to promote domestic competitiveness, employment, equity and economic growth. These policy changes have also contributed to producing an enabling business environment for both local and foreign investors. South Africa’s policy towards foreign direct investment (FDI) has evolved over time in line with requirements of the process of development.

3.1 The Reconstruction and Development Programme (RDP)

The RDP was a socio-economic policy framework implemented by the African National Congress (ANC) government in 1994. The chief aim in developing and implementing the RDP was to address the immense socioeconomic problems brought about by the consequences of the struggle against apartheid. Specifically, the aim was to alleviate poverty and address the massive shortfalls in social services across the country by having a stronger macroeconomic environment. Achieving poverty alleviation and a stronger economy were thus seen as deeply interrelated and mutually supporting objectives - development without growth would be financially unsustainable, while growth without development would fail to bring about the necessary structural transformation within South Africa's deeply inequitable and largely impoverished population. Hence the RDP attempted to combine measures to boost the economy such as contained fiscal spending, sustained or lowered taxes, reduction of government debt, trade liberalisation, provision of social services, and infrastructural projects.

3.2 The Growth, Employment and Redistribution strategy (GEAR)

The government’s commitment to market oriented economic policies was further confirmed and underlined in 1996 when it adopted GEAR. GEAR demonstrated South Africa’s commitment to an outward macroeconomic strategy, which recognised the need for accelerated growth through having open markets, privatisation and a favourable investment climate. GEAR proposed a set of medium-term policies aimed at the rapid liberalisation of the South African economy. These policies included a relaxation of exchange controls, trade liberalisation, regulated flexibility in labour markets, strict deficit reduction targets, and monetary policies aimed at stabilising the rand through market interest rates. The policy set government the goals of achieving sustained annual real growth of six (6) percent or more from 2010 while creating 400,000 new jobs each year. In addition, GEAR’s aim was to increase investment, especially Foreign Direct Investment (FDI) in the country to help achieve these goals. The idea was that high levels of new investment would support rapid rates of economic growth which, in turn, would increase jobs, and would allow South Africa to overcome vast inequalities and allow for the eventual expansion of social services, the provision of infrastructure and raise incomes.

3.3 Broad Based Black Economic Empowerment (BBBEE)

South Africa's first democratic government elected in 1994 had a clear mandate to redress the inequalities of the past in every sphere: political, social and economic. Since then, government has

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embarked on a comprehensive programme to provide a legislative framework for the transformation of South Africa's economy. South Africa's policy on Broad Based Black Economic Empowerment (BBBEE) was introduced in 2003 through the Broad Based Black Economic Empowerment Act. BBBEE is not simply a moral initiative to redress the wrongs of the past. It is a pragmatic growth strategy that aims to realise the country's full social and economic potential while helping to bring the majority of its citizens into the economic mainstream. BBBEE is a government program to redress the inequalities of apartheid by giving black people namely African, Coloured and Indian South Africans economic opportunities previously not available to them. It includes measures such as employment equity, skills development, ownership, management, socioeconomic development, enterprise development and preferential procurement. BBBEE is not an affirmative action policy and nor does it aim to take wealth from certain minority groups of people and give it to others. The BBBEE policy is an all-inclusive policy that's seeks to ensure that all South Africans benefit from and are able to sustain themselves through the wealth within the South African landscape. It is essentially a growth strategy that seeks to ensure that the majority of South Africans are able to meaningfully participate and benefit from the mainstream economy.

3.3.1 Rationale

In the decades before South Africa achieved democracy in 1994, the apartheid government systematically excluded African, Indian and coloured people from meaningful participation in the country's economy. This inevitably caused much poverty and suffering – and profound inequality. Since 1994 transformation in the South African economy was very slow. In 1998 the President of South Africa established a BBBEE Commission, which was responsible for assessing the economic landscape and advising on what was key to achieving true and meaningful transformation in the country. In 2001 the Commission released a report that revealed that in order to ensure that the majority of South Africans benefit, three (3) key areas should be taken into consideration, namely: the political, economic and social imperatives of the country.

The 2001 Commission Report defined BBBEE as follows:66

the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include but are not limited to increasing the number of black people that manage, own and control enterprises and productive assets; facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises; human resource and skills development; achieving equitable representation in all occupational categories and levels in the workforce; preferential procurement; and investment in enterprises that are owned or managed by black people.

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64 Act No. 53 of 2003
65 This group includes African, Indian and coloured people. Worldwide, historically disadvantaged groups are the most powerless and marginalised sections of any population. The Dalits (Untouchables) of South Asia (including those known in Pakistan as Chuhras and Musallis) are conspicuous among them. Indigenous peoples or aborigines - such as the Adivasis of South Asia, the Sami or Lapp people of Scandinavian countries, and the Australian aborigines - also suffer from long historical disadvantage. Closely following such stigmatised groups are those dispersed at all levels of mainstream society but socially and culturally considered inferior.
The report went further, stating that BBBEE is an integrated and coherent socio-economic process. It is located within the context of the country's national transformation programme, namely the Reconstruction and Development Programme (RDP). It is aimed at redressing the imbalances of the past by seeking to substantially and equitably transfer and confer ownership, management and control of South Africa's financial and economic resources to the majority of the citizens. It seeks to ensure broader and meaningful participation in the economy by black people to achieve sustainable development and prosperity.

No economy can grow by excluding any part of its people, and an economy that is not growing cannot integrate all of its citizens in a meaningful way. As such, the BBBEE strategy stresses a process that is associated with growth, development, enterprise development, and the redistribution of existing wealth. BBBEE is thus an important policy instrument aimed at broadening the economic base of the country – and through this, at stimulating further economic growth and creating employment.

3.3.2 Strategy, Act and Objectives

The BBBEE Act\(^{67}\) was preceded by the BBBEE strategy, which clearly outlined the objectives of government’s overall transformation agenda.

The Act provides a legislative framework for the promotion of BBEEE, empowering the Minister of Trade and Industry to issue Codes of Good Practice and publish Transformation Charters; and paves the way for the establishment of the BBBEE Advisory Council, whose members are appointed by the President of South Africa. The BBBEE Advisory Council provides guidance and overall monitoring of the state of BBBEE performance in the economy, with a view to making policy recommendations to address challenges in the implementation of this transformation policy.

The objectives of the BBBEE Act are to facilitate broad-based black economic empowerment by:

- Promoting economic transformation in order to enable meaningful participation of black people in the economy;
- Achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;
- Increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;
- Increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;
- Promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;
- Empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills; and
- Promoting access to finance for black economic empowerment.

\(^{67}\) Act No. 53 of 2003.
In order to ensure that these objectives are met every organ of state and public entity must take into consideration and apply all or any relevant Code of Good practice issued in terms of the Act in:

- Determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law;
- Developing and implementing a preferential procurement policy;
- Determining qualification criteria for the sale of SOEs; and
- Developing criteria for entering into partnerships with the private sector.

BBBEE reflects the government's approach, which is to situate BBBEE within the context of a broader national empowerment strategy.

3.3.3 Codes of Good Practice and Scorecard

The Codes of Good Practice for BBBEE were gazetted on 9 February 2007. The BBBEE Codes are an implementation framework for BBBEE policy and legislation. These Codes provide the public and private sector with the base for implementing transformation within their organisations and entities. The BBBEE Codes of Good Practice provide a standard framework for the measurement of BBBEE across all sectors of the economy. The Codes of Good Practice require that all entities operating in the South African economy make a contribution towards the objectives of BBBEE.

The first phase of the Codes of Good Practice encourages all entities, public and private, to implement proper BBBEE initiatives through the issuing of licences, concessions, sale of assets and preferential procurement.

The second phase of the Codes of Good Practice covers the five (5) components of the generic BBBEE scorecard, namely: ownership; management control (MC); skills development (SD); enterprise and supplier development (ESD); and socio-economic development (including industry-specific and corporate social investment initiatives). Three of the components are recognised as minimum requirements: Ownership, Skills Development, and Enterprise and Supplier Development. All measured entities must comply with the minimum priority requirements. Point values are assigned to the five (5) components of the generic BBBEE scorecard as follows:
### 3.3.3.1 Scope of Codes of Good Practice

The BBBEE Act makes the Codes of Good Practice binding on all Organs of State and public entities, and the government is required to apply them when making economic decisions on:

- procurement,
- licensing and concessions,
- public-private partnerships, and
- the sale of state-owned assets or businesses.

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68 Measures effective ownership of entities by Black people; Government Gazette on Broad Based Black Economic Empowerment Act (53/2003)- Issue of Codes of Good Practice, Gazette No. 36928, General Notice No. 1019, 11 October 2013, pg. 10

69 Measures effective control of entities by Black people; Government Gazette on Broad Based Black Economic Empowerment Act (53/2003)- Issue of Codes of Good Practice, Gazette No. 36928, General Notice No. 1019, 11 October 2013, pg. 10

70 Measures the extent to which employers carry out initiatives designed to develop the competencies of Black employees and Black people internally and externally; Government Gazette on Broad Based Black Economic Empowerment Act (53/2003)- Issue of Codes of Good Practice, Gazette No. 36928, General Notice No. 1019, 11 October 2013, pg. 10

71 Measures the extent to which entities buy goods and services from Empowering Suppliers with strong BBBEE recognition level. This element also measures the extent to which enterprises carry out supplier development and enterprise development initiatives to assist and accelerate the growth sustainability of Black enterprises; Government Gazette, on Broad Based Black Economic Empowerment Act (53/2003)- Issue of Codes of Good Practice, Gazette No. 36928, General Notice No. 1019, 11 October 2013, pg. 11

72 Measures the extent to which entities carry out initiatives that contribute towards socio-economic development of Sector-specific initiatives that promote access to the economy for Black people; Government Gazette, on Broad Based Black Economic Empowerment Act (53/2003)- Issue of Codes of Good Practice, Gazette No. 36928, General Notice No. 1019, 11 October 2013, pg. 11
Private companies must apply the Codes of Good Practice if they want to do business with any government enterprise or Organ of State – that is, to tender for business, apply for licences and concessions, enter into PPPs, or buy state-owned assets.

Companies are also encouraged to apply the Codes of Good Practice in their interactions with one another, since preferential procurement will affect most private companies throughout the supply chain.

### 3.3.3.2 Sector scorecards

There are various other scorecards that can be used for rating enterprises. Sectors develop transformation plans which subsequently evolve into sector scorecards. These sector scorecards like all others need to be gazetted in terms of the BBBEE Act to become an official sector code. Prior to gazetting as official sector scorecards, they are gazetted for comment. Until gazetted as official sector scorecards the scorecards cannot be used. 5 point values are assigned to the five (5) components identified in the generic BBBEE scorecard.

### 3.3.4 Qualifying Small Enterprises (QSE)

Significant leniency for Small Enterprises has been built into the Codes. An entity with an annual total revenue of between R 10 million and R 35 million (until 30 April 2015) or between R10 million and R50 million (in terms of 2013 Codes of Good Practice) qualifies as a Qualifying Small Enterprise (QSE). A QSE must comply with all five (5) components of the scorecard and more specifically with at least two (2) of the priority elements – ownership is compulsory and either ESD or Skills Development.

Large entities must comply with all three (3) priority components.

### 3.3.5 Exempted Micro Enterprises (EMEs)

All companies with an annual total turnover of between R 0 and R 5 million (until 30 April 2015) or between R 0 and R10 Million (in terms of 2013 Codes of Good Practice) or less qualify as an Exempted Micro Enterprise (EME), are completely exempt from BBBEE, and automatically qualify as a level 4 contributor or achieve 100 percent BBBEE contribution recognition.

Start-up enterprises are measured as an EME for the first year following their formation or incorporation. This provision applies regardless of the total value of the Start-Up Enterprise. A Start-Up Enterprise does not include any newly constituted enterprise, which is merely a continuation of a pre-existing enterprise.

### 3.3.6 Equity Equivalent Investment Programme for multinationals

The Codes of Good Practice require that all entities operating in the South African economy make a contribution towards the objectives of BBBEE. The Codes of Good Practice however recognise that there may be multinationals that have global practices preventing them from complying with the ownership element of BBBEE through the traditional sale of shares. The Codes thus allow foreign

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73 Enterprises with an annual turnover between R10 million and R35 million (until 30 April 2015) or between R10 million and R50 million (in terms of 2013 Codes of Good Practice)

74 Enterprises with an annual total turnover of R35 million and above (until 30 April 2015) or R50 million and above (in terms of 2013 Codes of Good Practice)

75 These businesses are exempt from measurement in terms of the DTI’s codes of Good Practice for BBBEE and automatically qualify as 100 percent contributors towards BEE. Exempt certificates can be issued by verification agents provided enough supporting evidence is available to prove exemption.
multinational companies that do business in South Africa some flexibility in how they structure their empowerment deals. In such cases, the codes allow for contributions in lieu of a direct sale of equity. These contributions, known as "equity equivalent - EE" contributions, count towards the ownership element of BBBEE. The value of these contributions may be measured against 25 percent of the value of a multinational's South African operations, or against 4 percent of the total revenue from its South African operations annually over the period of continued measurement.

EE entails a public programme/scheme and/or private programme/scheme designed to fulfil the requirements of BBBEE ownership. EE may also entail a programme targeting investment or any other programme that promotes socio-economic advancement/ development within the South African economy. A proposal for an EE Programme has to be developed by a representative entity of the foreign multinational for submission to the Department of Trade and Industry (the dti) and approval by the Minister of the dti.

The EE programme has to comply with the following principles and criteria: the EE programme’s economic impact must be aligned to the objectives of the BBBEE Act; the EE programme must not displace other BBBEE initiatives to be undertaken as per the scorecard; the EE programme must be broad based in its impact on the black population and the South African economy; the multinational must illustrate causality of the EE programme, for instance that the EE programme is the basis for the multinational to comply with the EE Statement of the BBBEE Codes of Good Practice; the EE proposals must demonstrate commercial viability and long term sustainability (economically and operationally); the EE proposals must be aligned to the overall objectives of BBBEE; there must be a transfer of accredited business and/or technical skills; the EE proposals must be measurable against the value of the multinational’s operations locally with tangible measurable outputs; and the EE proposal must demonstrate the benefit accruing to the South African economy beyond the core business activities of the multinational.

The Objectives of an EE must be: enterprise creation and initiatives that support Enterprise Development; FDI by the multinational into the EE Programme; accelerating the empowerment of black rural women, youth and communities; sustainable growth and development; human resource development with a focus on education and skills development; infrastructure investment with an emphasis on developing the country’s research and development infrastructure; economic programmes, which, give effect to the objectives of the National Industrial Policy Framework (NIPF); economic programmes which give effect to the objectives of any other government initiatives as identified by the dti and the relevant line ministries; and initiatives that support socio-economic development programmes.

3.3.7 BBBEE Amendment Bill, 2011

On 9 December 2011, the BBBEE Amendment Bill was released for public comment by the Minister of Trade Industry, Dr. Rob Davies. The proposed amendments to the BBBEE Act intend to achieve the following objectives, to: align the BBBEE Act with other legislation impacting on BBBEE and with the Codes, for instance, the Preferential Procurement Policy Framework Act, (PPPFA) Act No. 5 of 2000; promote compliance with the Act by Organs of State and Public Entities (all Organs of State are strongly brought into the process which means that all organisations that deal with government will be required to produce a BBBEE scorecard – this requirement is re-enforced with the revised PPPFA); establish the BBBEE Commission for purposes of strengthening the institutional environment for evaluation and monitoring of compliance with the Act and with BBBEE; provide for regulation of the verification industry by the Independent Regulatory Board of Auditors; and deal with non-compliance and circumvention by, inter alia, introducing offences and penalties.
The BBBEE Commission which is proposed in the BBBEE Amendment Bill is a juristic body that will play a critical role including, but not limited to: overseeing supervising and promoting adherence with the BBBEE Act and Codes of good practice in the interest of the public; strengthening and fostering collaboration between the public and private sector in order to promote and safeguard the objectives of BBBEE; promoting advocacy, access to opportunities, and educational programmes and initiatives of BBBEE; and promoting good governance and accountability by creating an effective and efficient environment for the promotion and implementation of BBBEE.

Fronting is clearly defined and fronting (for instance benefit diversion, opportunistic intermediaries and window dressing) practices are now punishable. The Bill introduces offences of the following acts of fronting, which include: misrepresenting or attempting to misrepresent the BBBEE status of an enterprise; providing false information or misrepresenting information to Verification Personnel in order to secure a particular BBBEE status; providing false information or misrepresenting information relevant to assessing the BBBEE status of an enterprise to any organ of state or public entity; and failure by a BBBEE Verification Professional or any procurement officer or other official of an organ of state or public entity to report offences to an appropriate law enforcement.

Any person convicted of an offence in terms of the Bill is liable to a fine or to imprisonment for a period not exceeding ten (10) years or to both a fine and imprisonment; or to imprisonment for a period not exceeding 12 months or to both a fine and imprisonment; or to a fine of 10 percent of that enterprise’s annual turnover. Furthermore, the Bill makes provisions for empowering the Special Investigations Unit (SIU) to investigate all offences involving fronting or corruption committed by both the public and private sector with regard to application of the Act and BBBEE Codes of Good Practice.

3.3.8 Preferential Procurement Policy Framework Act (PPPFA) and amended Regulations

Section 217 of the Constitution of the Republic of South Africa states that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Furthermore, it stipulates the need to implement a procurement policy that will provide for categories of preference in the allocation of contracts; and the protection or advancement of persons, or categories of persons disadvantaged by unfair discrimination.

The Preferential Procurement Policy Framework Act (PPPFA) was enacted as a result of the aforementioned Section of the Constitution. The PPPFA stipulates that when government assesses contracts, it must take into account a preference point system which prescribes functionality, price and reconstruction development programme (RDP) goals.

In December 2006, when the BBBEE Codes of Good Practice were approved for gazetting, Cabinet directed the dti and National Treasury to amend the PPPFA and its regulations so as to advance the objectives of the BBBEE Act and the Codes of Good Practice, as these two pieces of legislation were not appropriately aligned. The abovementioned process led to the amendment of the PPPFA regulations to align them to the BBBEE Codes of Good Practice.

The PPPFA regulations were amended and effective as of 7 December 2011. The PPPFA and its regulations explain how government undertakes procurement. The regulations apply to all government and provincial departments, including parastatals like, Eskom, Transnet, Telkom, Airports Company South Africa (ACSA), Universities and numerous others. The amended regulations make BBBEE level contribution and commitments to local production and content a prerequisite for doing business with all state organs. The biggest impact of the amended regulations is that government tenders can no longer be awarded to "tenderpreneurs". The PPPFA provides for the implementation of a policy and system where
bids (tenders) are awarded not only on being to specification and having the lowest price but also based on the prescribed point system in terms of the BBBEE scorecards. It completely changes how government tenders are adjudicated. For instance, there will be no room for arbitrary sub-contracting because the new regulations use a BBBEE certificate to evaluate tenders. This means that all tenders that are evaluated and awarded by government will consider bidders’ BBBEE scorecards.

3.3.8.1. Procurement and Sector Designations

Procurement of locally manufactured products is one of the levers identified by Government to support industrial development. The first phase of procurement reform - amendment of the PPPFA regulations - coincided with the dti developing a sector designation methodology, compiling the necessary research, guidelines and instruction for National Treasury, and leading the South African Bureau of Standards (SABS) process for the development of a South African Technical Standard on local content. The amended PPPFA regulations enabled the dti to designate key industries, sectors and sub-sectors for local production at a specified level of local content. The preferential procurement regulations aim to promote local production and manufacture. The regulations require all organs of state to purchase only locally produced services, works or goods from the designated sectors.

The Minister of Trade and Industry made the first round of sector designations for local procurement in December 2011. The list included: Buses; Rolling Stock; Steel Power Pylons; Canned / processed Vegetables; Clothing, Textiles, Leather and Footwear; and Set Top Boxes for television digital migration. Further designations have been made with the addition of furniture products (office and school furniture, bases and mattresses); components of solar water heaters; electrical and telecommunication cables. Other industries, sectors and sub-sectors are undergoing research and are still being considered for designation.

All designated products require a minimum level of local content in terms of the PPPFA regulations. However, the minimum level of local content differs between sectors and products. The designations are not intended to take the place of, but rather support other efforts by government institutions, particularly SOEs, to encourage local procurement and supplier development strategies. Government retains the right to un-designate sectors, where there is no progress with respect to co-commitments by manufacturers and/or where any anti-competitive behaviour takes place.

3.3.8.2 Local Procurement Accord

A Local Procurement Accord signed on 31 October 2011 commits public sector buyers and a large number of businesses that agreed to it to ensuring 75 per cent of their purchasing is local. Procurement from local suppliers refers to the purchase of locally-manufactured goods and locally produced services. The Accord commits businesses, public organisations, community groups and trade unions that signed up to it to contribute to the up-scaling of manufacturing in South Africa, thereby boosting jobs and

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76 Designated sector or sub-sector refers to a sector or sub-sector that has been designated for local production where only locally produced goods, services or works or locally manufactured goods that meet the minimum threshold requirement for local production and content, are considered.

77 The South African Bureau of Standards (SABS) is the appointed local content verification body in South Africa. As part the verification of local content; the SABS will visit factories in the designated sectors, at least twice a year. Once the SABS is satisfied that a supplier has met the requirements for local content, that supplier will be issued with a Local Content Verification Certificate by the SABS. Businesses affected by the new regulations will have to comply with the South African Technical Specification (SATS 1286), which has been developed by the SABS to measure and verify local content.
industrial development. The Accord outlines concrete actions and commitments to be undertaken individually and collectively by the social partners, to increase the quantum of local procurement by public and private companies. Business, Organised Labour and the Community groups have made individual and shared commitments in the Accord, to support localisation through their own procurement interventions. They have agreed to develop purchasing strategies and analyse their supply chains to identify where they can buy more from local suppliers. Companies agreed to drive localisation for the private sector and will report annually on their targets. Companies also agreed to eliminate collusive and unethical pricing practices in public tenders and promote competitive pricing policies. A committee of representatives from these groups will meet every six months to review progress.

3.3.8.3 Alignment of PPPFA and BBBEE Act

The revised preferential procurement regulations of 2011 align the PPPFA and BBBEE Act through:

- Adopting the BBBEE Act's definition of a black person
- Adopting the BBBEE Act's classification of companies into the following categories:
  - Exempted Micro Enterprises (EMEs) between R 0 and R 5 million (until 30 April 2015) or between R 0 and R10 Million R (in terms of 2013 Codes of Good Practice)
  - Qualifying Small Enterprises (QSEs) between R 10 million and R 35 million (until 30 April 2015) or between R10 million and R50 million (in terms of 2013 Codes of Good Practice)
  - Generic - All companies with an annual turnover of above R35 million and above (until 30 April 2015) or R 50 million and above (in terms of the 2013 Codes of Good Practice)
- Using the BBBEE Act's Codes of Good Practice to measure BBBEE
- Using the BBBEE Act’s gazetted sector codes

Further, the regulations retain the 80/20 and 90/10 preference point systems. However, the 80/20 system will apply to procurement of up to R1 million while the 90/10 system will apply to procurement exceeding R1 million. In the 80/20 system, 80 points will go toward price while 20 points will go toward BBBEE. Similarly, in the 90/10 system, 90 points will go toward price while 10 points will go toward BBBEE.

3.3.8.4 BBBEE Verification

In terms of the revised regulations, as of 7 December 2011 any company which wants to do business with government must obtain a valid BBBEE certificate. The preferential procurement regulations require that all entities, if they wish to qualify for preferential points when bidding for work from the State, will need to be rated by accredited rating agencies in terms of the BBBEE Codes and businesses will need to be in possession of a valid rating certificate reflecting such rating.

In order to be valid, a BBBEE certificate must have been issued by one of the following types of companies:
• Verification agencies who are accredited by the South African National Accreditation System (SANAS)

• Registered auditors approved by the Independent Regulatory Board of Auditors (IRBA) in accordance with approval granted by the Department of Trade and Industry (the dti).

3.3.8.5 **BBBEE Verification for Exempted Micro Enterprises (EMEs)**

EMEs automatically receive Level 4 BBBEE status irrespective of ownership. EMEs can submit one of the following documents to claim their BBBEE status:

• Auditor’s certificate/EME letter

• Certificate issued by an accounting officer

• Verification by agency.

3.3.9 **Impact of BBBEE on Investment**

The main obstacle to international investment is the widespread misperception among investors about BBBEE. It must be emphasised that the correct understanding of BBBEE and its implementation is necessary and that it is of great importance that BBBEE is driven from within the business. With the international community understanding why and how BBBEE works, from a long term perspective, BBBEE can be seen to contribute to FDI since it promotes skills development and economic participation. These factors contribute to a positive economic environment in which FDI can flourish.

Measures directed at historically disadvantaged groups are not unique to South Africa. For instance, several OECD member countries maintain measures that are directed at historically disadvantaged groups; such as the indigenous populations of some countries. Such measures are not reflected in member countries’ reservations under the OECD Codes of Liberalisation, nor are they listed as exceptions under the National Treatment instrument, as they do not introduce discriminatory treatment on the basis of the nationality or residency of investors. This is the same criteria that has been applied in the case of similar measures maintained by countries that are not adherents to the OECD Declaration on International Investment and Multinational Enterprises, such as South Africa.

3.4 **Accelerated and Shared Growth Initiative for South Africa (ASGISA)**

The adoption of the Accelerated and Shared Growth Initiative for South Africa (ASGISA) in February 2006 signalled the Government’s intention to pursue a developmental strategy that would promote and accelerate economic growth along a path that would generate sustainable and decent jobs. In order to achieve the earlier GEAR Policy target of six (6) percent growth from 2010 onwards, and to reduce unemployment and poverty by half by 2014, AsgiSA recognised the fact that the South Africa needed to undergo some fundamental restructuring, and explicitly recognised the central role of a strong and coherent industrial policy in driving this process. Focus was on the identification of major binding constraints on growth and development and the subsequent design and implementation of policies to ease or eliminate these constraints. AsgiSA’s approach to economic growth and development was that of a limited and specific set of initiatives that were intended to help spur rapid shared growth in South Africa.

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78 Accelerated Shared Growth Initiative South Africa, p. 4-6, 6-16.
Africa through key targeted sectors that had been identified not only for their growth potential but also for their high “sharing” possibilities.\textsuperscript{79}

### 3.5 National Industrial Policy Framework (NIPF)

South Africa has implemented a number of industrial policy initiatives since 1994. However, it has not until recently produced a comprehensive statement of government's approach to industrialisation and industrial policy. The National Industrial Policy Framework (NIPF), adopted by Government in January 2007, articulates government's broad approach to industrialisation and has a fundamental role to play in achieving the goals of accelerating growth and reducing unemployment and poverty, and further intensifying industrialisation. The primary objective of the NIPF is to set out government’s approach to industrial development of the South African economy and help align both private and public sector efforts towards this end. More specifically, the NIPF’s objectives are to:

- facilitate diversification beyond current reliance on traditional commodities and non-tradable services, which require the promotion of increased value-addition, characterised particularly by movement into non-traditional tradable goods and services that compete in export markets and also against imports;
- ensure the long-term intensification of South Africa’s industrialisation process and movement towards a knowledge economy;
- promote a more labour-absorbing industrialisation path, with emphasis on tradable labour absorbing goods and services, and economic linkages that create employment;
- promote industrialisation, characterised by the increased participation of historically disadvantaged people and marginalised regions in the industrial economy; and
- contribute towards industrial development in Africa, with a strong emphasis on building the continent’s productive capacity.

Through the NIPF, Government has deployed a range of complementary and integrated measures to grow the economy and create jobs. Consequently, the NIPF sets out a vision for the industrial economy for both the short-medium and medium-long term. The NIPF is a Framework rather than a blueprint for South Africa’s industrialisation process focusing on a set of principles and strategic processes through which structural change will be achieved. The NIPF focuses on identifying and addressing the cross-cutting and sector-specific constraints and opportunities prevailing in the industrial economy through 13 strategic strategies.\textsuperscript{80} The conceptualisation of industrialisation is not restricted to the manufacturing sector but involves a structural change in growth path towards a more labour-absorbing and value-adding economy. While the NIPF is aimed at unlocking constraints that will benefit the entire economy, there is a particular emphasis on growing non-traditional tradable goods and

\textsuperscript{79} For instance tourism and Business Process Outsourcing (BPO – call centres), bio-fuels, chemicals, agriculture, agro-processing, the creative sectors, metals and metallurgy.

services in the primary and manufacturing services sectors due to their relative intensity in low-skilled labour and potential for value-addition. These sectors include manufactured products outside of mineral processing, services that can compete in export markets as well as against imports, including certain non-traditional agricultural and mining activities. The NIPF is subject to review and adaptation on a rolling basis every three (3) years in order to link in with the Medium Term Expenditure Framework (MTEF).\textsuperscript{81}

Guided by the NIPF, the implementation of industrial policy is set out in Industrial Policy Action Plans (IPAP). Each year, the dti launches a revised three-year rolling IPAP with a 10-year outlook in a context of rapid economic change and significant global uncertainty. This is a robust formula, which allows continual scaling up of interventions and sufficient flexibility to respond to change. In August 2007 Cabinet approved the first 2007/8 IPAP (IPAP 1), which commenced in 2008 and in February 2010 it adopted IPAP 2 for 2010/11-2012/13. IPAP 3 for 2011/12-2013/14 was adopted in February 2011, IPAP 4 for 2012/13 - 2014/15 was adopted in April 2012 and IPAP 5 2013/14-2015/16 in April 2013.

IPAP 1 is built on the NIPF and has largely been implemented.\textsuperscript{82} IPAP 1 sets out in detail key actions and timeframes for the implementation of the initial round of industrial policy. IPAP 1 has three (3) main components: (1) sectoral actions – this involves fast tracking implementation of four (4) lead sectors that emerged from research and intensive interaction with stakeholders – capital/transport equipment and metals; automotives and components; chemical, plastic fabrication and pharmaceuticals; and forestry, pulp, paper and furniture; (2) a set of cross-cutting actions of particular importance for industrial policy; and (3) measures to improve Government’s organisation and capacity to implement industrial policy.

IPAPs 2-4 build on the NIPF and IPAP 1:

“IPAP 2 represents a significant step forward in scaling up government’s efforts to promote long term industrialization and industrial diversification beyond the current reliance on commodities and non-tradable services. Its purpose is to expand production in value added sectors with high employment and growth multipliers that compete in export markets as well as compete in the domestic market against imports. In so doing, the action plan also places emphasis on more labour absorbing production and services sectors, the increased participation of historically disadvantaged people and regions in the South Africa economy.”\textsuperscript{83}

IPAP 2 has four (4) horizontal themes around which a number of interventions are built, namely: industrial financing, procurement, competition policy and developmental trade policies.\textsuperscript{84} In addition, it

\textsuperscript{81} The MTEF is annual, rolling three (3) year-expenditure planning. It sets out the medium-term expenditure priorities and hard budget constraints against which sector plans can be developed and refined. It is a tool to encourage cooperation across ministries and planning over a longer horizon than the immediately upcoming fiscal year. This holistic approach is preferable to piecemeal, reactive, short term decisions that ordinarily characterise budgeting.


\textsuperscript{83} National Assembly Statement on the Industrial Policy Action Plan (IPAP) by Dr Rob Davies, Minister of Trade and Industry, 18 February 2010.

\textsuperscript{84} Department of Trade and Industry, Industrial Policy Action Plan (IPAP 2) 2010/11-2012/13, p. 18-34.
comprises 13 vertical sector strategies that are clustered into three (3) groups: (1) qualitatively new areas of focus, i.e.,– metals fabrication capital and transport equipment, green & energy saving industries, agro-processing; (2) scaled-up and broadened interventions in existing IPAP sectors, i.e., – automotive products and components, plastics, pharmaceuticals, chemicals, biofuels, forestry, paper, pulp, furniture and business process servicing; and (3) sectors with potential for the development of long-term advanced capabilities, i.e., – nuclear, advanced aerospace. It also sets out the economic rationale; key constraints and opportunities. IPAP 2 focuses on a number of critical cross-cutting issues: at the macro level the need to ensure a stable and competitive exchange rate is emphasised; the strategy also advocates for a more developmental trade policy and a more competitive real interest rate regime for industrial financing; more effective management of state procurement to benefit local industry; and better coordination of skills development, innovation and technology upgrading initiatives. IPAP2 outlines a range and combination of industrial policy interventions and instruments to address the critical challenges of the South Africa economy.

IPAP 3 represents the consolidation and strengthening of plans and programmes outlined in IPAP 2. Economic data and sector profiles have been updated and Key Action Programmes (KAPs) designed to strengthen and take forward development of the IPAP. IPAP 3 highlights seven (7) sets of policies that are critical to achieving a scaled up industrial policy and shift towards the productive side of the economy in general: Stronger articulation between macro- and micro-economic policies; Industrial financing channelled to real economy sectors; Promotion of public and private procurement, to raise domestic production and employment in a range of sectors, including the alignment of BBBEE and industrial development objectives, and influence over private procurement; Developmental trade policies that deploy trade measures in a selected and strategic manner, including tariffs, enforcement, and Standards, Quality Assurance, Accreditation and Metrology measures (SQAM); Competition and regulation policies that lower costs for productive investments, and for poor and working-class households; Skills and innovation policies that are aligned to sectoral priorities; and deployment of these policies in general and in relation to more ambitious sector strategies, building on work already done.

IPAP 4 is a confidence-building IPAP. Significant achievements in implementing transformative IPAPs at the sectoral level and the development of stronger transversal platforms set the basis for further strengthening of industrial policy interventions. Special emphasis is placed on the three (3) clusters of sectors identified in earlier IPAPs that are particularly well placed for scaling up through leveraging market growth and associated upgrading of supply capacity and capabilities. Firstly, sectors including metals fabrication, capital and transport equipment; green and energy-saving industries; and agro-processing, are qualitatively new areas of focus of the Action Plan. Secondly, the up-scaled IPAP builds on and broadens interventions in sectors which were identified in the first IPAP, namely automobiles and components; medium and heavy vehicles; plastics, pharmaceuticals and chemicals; clothing, textiles, footwear and leather; bio-fuels; forestry, paper, pulp and furniture; creative and cultural industries; and Business Process Services. The third cluster focuses on sectors in which South Africa has the potential to develop long-term advanced capabilities, namely nuclear, advanced materials, aerospace and defence, and electro-technical and information communication technologies (ICT) sectors.

IPAP 5 is an opportunity to reflect on key achievements, constraints and challenges experienced since the publication of the first IPAP in 2007 as well as an intended review of the various policy and operation platforms that have been put in place since then. The intention is to provide a foundation upon which an extension, deepening and more timely deployment of industrial policy instruments can be achieved. IPAP 5 can be considered as a very constructive five-year review of the process thus far, reflecting on the respective (specific and general) interventions put in place since 2007 as well as a statement of proposed areas of planned interventions of the forthcoming three-year period. IPAP 5’s
analysis of the importance of a thriving manufacturing sector to the economy places a lot of emphasis on downstream and upstream linkages for those value-adding sectors demonstrating high employment and growth opportunities. IPAP 5 has as its core focus not only the need to reverse the threat of deindustrialisation, but also to nurture and defend industrial development. IPAP5 attempts to identify those opportunities that possibly exist in achieving this. Key areas of focus are: beneficiation, infrastructure development, regional economic development and industrial integration, creation of new export markets, local procurement and supplier development, and BRICS (Brazil, Russia, India, China and South Africa). These opportunities if exploited can offer dynamic possibilities for the future of industrial policy in South Africa.

Implementation of successive versions of IPAP has resulted in significant achievements and ongoing scaling up of interventions to retain, grow and diversify South Africa's industrial base. All IPAPs are for a three-year (3) rolling period, which enables strengthening and refining on an annual basis to ensure the desired economic outcomes are achieved.

3.6 The New Growth Path (NGP)

Towards the end of 2010, the government released its new policy framework on growth, the New Growth Path (NGP), which seeks to foster more inclusive growth and create ‘decent’ jobs, thus addressing unemployment, inequality and poverty by unlocking employment opportunities in South Africa. The NGP responds to emerging investment and employment opportunities and risks, while building on the policies advanced since the achievement of democracy. It is a broad framework that sets a vision and identifies key areas where jobs can be created, placing employment at the centre of economic policy. The NGP sets the targets of 7 per cent growth and 5 million new jobs by 2020, and of lowering the official unemployment rate from 25 per cent to 15 per cent. The NGP essentially calls for a new social compact between the state and its social partners to resolve key structural challenges in the economy, namely:

- Bottlenecks and backlogs in logistics, energy infrastructure, and skills, which constrain economic growth and raise costs;
- Low domestic savings and inadequate levels of investment in the productive sectors of the economy;
- Economic concentration and price collusion in key parts of the economy, which raises costs and limits innovation and new enterprise development;
- An uncompetitive currency that limits employment growth in manufacturing, mining, agriculture, and tourism; and
- A persistent balance of trade deficit, funded with short-term capital inflows attracted largely by high interest rates relative to the world.

The International Labour Organisation (ILO) defines ‘decent work’ as involving opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organise and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.


Ibid., p. 5.
The NGP focuses on unlocking the employment potential in six (6) sectors and activities, namely:

- Infrastructure, through the massive expansion of transport, energy, water, communications capacity and housing, underpinned by a strong focus on domestic industry to supply the components for the build-programmes;
- The agricultural value-chain, with a focus on expanding farm output and employment and increasing the agro-processing sector;
- The mining value-chain, with particular emphasis on mineral beneficiation as well as on increasing the rate of minerals extraction;
- The ‘green economy’, with programmes in green energy, component manufacture, and services;
- Manufacturing sectors in IPAP 2; and
- Tourism and certain high-level services.

In each of these areas, clear targets of the jobs potential have been developed and state agencies have been directed to work on implementation plans. Monitoring mechanisms and delivery forums oversee the implementation progress. Reports are made to Cabinet on key developments on achievements of core economic aims. The reports include early warning systems to indicate unforeseen economic difficulties, shortfalls in anticipated employment creation and undesirable trends in overall equality.

The NGP sets out a developmental package consisting of macroeconomic strategies, microeconomic measures, and stakeholder commitments. On the macroeconomic front, the state envisages more active monetary policy interventions to achieve growth and job targets, inter alia through a more competitive rand exchange rate and a lower cost of capital. Public spending is reprioritised to ensure sustainability. The microeconomic package includes reforms in policies on skills, competition, industry, small business, the labour market, rural development, regional integration, and trade policy. The stakeholder commitments require a national consensus on wages, prices, and savings to support job creation and address the concerns of vulnerable workers and reduce income inequality.

3.7 Trade Policy

Since 1994, South Africa has entered into various trade agreements with other countries and regional groupings to reduce trade barriers. As a member of the World Trade Organisation (WTO) (since 1994), South Africa pursues a trade policy that is compatible with its multilateral commitments and consistent with the fundamental principles of National Treatment and most-favoured nation.

South Africa’s initiatives at trade facilitation have over the years reduced the time and cost involved in foreign trade procedures. This has helped improve its international competitiveness and

88 Ibid., p. 10.
90 South Africa has entered into a number of multilateral, regional and bilateral agreements. The list is available on the following link: http://www.dfa.gov.za/foreign/index.html.
represents an additional advantage for attracting foreign investors to South Africa. All these factors have resulted in a steady rate of economic growth and strong export growth.

3.7.1 Review of Trade Policy

In mid-2007, South Africa initiated a review of its trade policy. The review was motivated by the need to mainstream trade into the government's broader growth and development strategy and to ensure that trade policy explicitly supports and is aligned to the NIPF. In 2010, the South African Trade Policy and Strategy Framework (TPSF) was finalised and approved by Cabinet. The TPSF set out how trade policy and trade strategy can contribute to economic development objectives. Against the background of South Africa’s tariff reform since 1994, South Africa’s current and forward looking approach (in terms of the TPSF) to trade policy and tariff setting is more strategic than in earlier years. Tariff reform is considered against the measure of building a diversified industrial economy capable of producing increasingly sophisticated, higher value added products and generating employment opportunities. The idea is to ensure that the tariff reform programme is carefully calibrated with respect to its pace and sequencing, taking into account the specifics of each sector and its production possibilities.

The TPSF sets out the key principles and approaches to South Africa’s strategy for global integration with respect to South Africa’s engagements and negotiations at multilateral, regional and bilateral levels. As trade policy is an instrument of industrial policy in the context of narrowing options under multilateral and bilateral trade arrangements, the fundamental approach is that trade policy will be informed and decided primarily on a sector by sector basis, dictated by the needs and imperatives of sector strategies (as identified in the NIPF), at both the negotiating and administrative levels. In this context, the TPSF sets out the contribution trade policy should make to advancing industrial development, upgrading, and diversifying along a growth path that addresses structural constraints in the economy, including unemployment and poverty. Particular focus is on lowering input costs into labour-absorbing and value-adding manufacturing sectors; targeting export and foreign direct investment promotion; continuing efforts to ensure a developmental outcome in the Doha round, particularly with respect to the elimination of agricultural subsidies in developed countries; bilaterally, considering a broader range of possible trade and investment agreements; and seeking to leverage South Africa’s strategic advantages such as mineral reserves. The strategic idea is that trade policy complements and supports South Africa’s industrial upgrading and diversification objectives.

The TPSF was reviewed and updated in 2012. The update reaffirms the TPSF perspective, updates key policy positions (including building bilateral trade and investment relations with strategic and priority countries in Africa; consolidating and extending developmental integration in the Southern African Customs Union (SACU), Southern African Development Community (SADC), Tripartite Free Trade Agreement (TFTA) and Continental Free Trade Agreement (CFTA); consolidating links with key economies in North; building industrial complementarities with emerging economies of the South to support South Africa’s industrial development and shift the structure of trade; reinforcing that a developmental outcome in the WTO’s Doha Round that addresses imbalances is more important than its early conclusion) and notes that SA should accelerate efforts to boost value-added exports.

In line with the NGP South Africa’s trade policy has become more focused, identifying opportunities for exports in external markets and using trade agreements and facilitation to achieve

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92 Ibid.
93 Ibid., p. 2.
these. It is pursuing core socio-economic goals, particularly decent work and inclusive and balanced growth. Trade policy is supporting balanced economic growth and building on the advantages won by a more competitive currency through:

- Monthly monitoring of trade with major economies to identify opportunities and to address unbalanced outcomes;
- Strategic interventions to maximise the benefits from trade relations with dynamic markets like China, India and Brazil and giving effect to the commitments for more balanced trade, greater exports of value-added manufacturing from South Africa and increased beneficiation at source;
- Programmes to establish a developmental trade model in Africa;
- Active support for new trade opportunities, for example specialised industrial products and ethical and organic goods;
- Targeted export promotion and other support for employment opportunities identified in the NGP, particularly in agriculture, light industry and services;
- Export marketing providing strategic assistance to knowledge intensive industries identified in IPAP2;
- Reciprocal commitments for tariff changes and rebates are being explored for purposes of addressing areas of investment and employment creation;

At the WTO, South Africa maintains efforts to advocate protection of policy space for development strategies, and resist rigid formula driven reductions in industrial and agricultural tariffs that would undermine employment and growth.

South Africa’s trade policy is cognisant of the fact that diversification requires more than simply identifying sectors and product niches, it also requires markets. In this context, South African businesses are encouraged to actively pursue exports to and investments from fast-growing economies like China, India and Brazil, and to further develop and deepen regional trade relations.

Two (2) strategies have been proposed by the NGP to achieve this:

- To deepen the domestic and regional market by growing employment, increasing incomes and undertaking other measures to improve equity and income distribution; and
- To widen the market for South African goods and services through a stronger focus on exports to the region and other rapidly growing economies.

3.7.2 **Multilateral**

As a strong proponent of multilateralism, South Africa has historically played an active part in the WTO, including in the ongoing Doha Development Agenda (DDA) negotiations where it is a key

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94 Ibid., 78, p. 24.
95 Ibid., p. 7.
96 Ibid., p. 8.
member of various configurations under the agriculture and non-agriculture market access (NAMA) areas of the negotiations.\textsuperscript{97} In South Africa’s view, the DDA negotiations offer WTO Members an opportunity to strengthen the rules-based trading system in a manner that reduces imbalances and inequities, and supports development-related issues, which had not been an integral part of any previous multilateral trade negotiation under the WTO.

3.7.3 \textbf{Regional}

Africa is South Africa’s home, and it is South Africa’s future. It is a market of over one billion people and it is growing rapidly. The National Development Plan (NDP) acknowledges the global shift of economic power from West to East, and highlights the rise of Africa. South Africa has already begun to see its trade patterns shift from traditional partners in Europe and the United States to new markets in Asia and Africa. As a result, along with its efforts at multilateral trade liberalisation and its national initiatives to facilitate trade, South Africa has been pursuing an active policy in the area of regional trade agreements. South Africa’s integration into the world economy involves intensifying its regional economic ties in Southern Africa. Being an important player in the region, South Africa seeks to restructure regional arrangements by pursuing policies to promote industrialisation. This implies encouraging regional exports to South Africa, and promoting outward investment to the region.\textsuperscript{98} These regional agreements encourage businesses from signatory countries to work together to improve their competitiveness and attract investments to the region. It is hoped that these regional agreements will expand intraregional trade, through efforts at reducing non-tariff barriers and upgrading regional infrastructure. Success on these fronts would open up new opportunities for foreign investors, including investors from the respective regions.

The NGP recognises that regional development is an imperative for sustainable prosperity in South Africa. South Africa cannot succeed with regional development without strong partnerships with other countries on the continent. Government is working jointly with African partners to identify mutually beneficial opportunities for trade and development, mindful of regional differences in resources and development. On this basis, South Africa is undertaking initiatives to strengthen SADC and connect it with the East African Community (EAC) and the Common Market for East and Central Africa (COMESA).\textsuperscript{99} Together, they are identifying key regulatory blockages to increased regional trade and investment. The strategic objective when it comes to regional relations is to:\textsuperscript{100}

- improve logistics, with clear priorities and timeframes, including a “smart ports” network that integrates common systems, people and technology platform across a number of countries to improve port efficiencies and costs;
- integrate the road and rail system across the continent;

\textsuperscript{97}The membership forged in coalitions in the WTO, such as the Africa Group, the Cairns Group of agricultural exporters, G-20 and NAMA-11 has been important to advancing South Africa’s views.

\textsuperscript{98}The actions foreseen include: implementing the Southern Africa Development Community (SADC) Trade Protocol to aid market access, for regional exports; linking regional trade, development, and industrial restructuring to reflect comparative advantages across the region; promoting coordinated infrastructure and resource-based industrial development through spatial development initiatives (SDIs); encouraging South African firms to invest regionally by relaxing foreign exchange controls on capital destined for the region; and promoting regional trade facilitation, strengthening customs control and administration, and eliminating non-tariff measures.

\textsuperscript{99}Ibid., 86, p. 25.

\textsuperscript{100}Ibid., p. 14.
• implement measures that will expand regional investment and trade;

• develop integrated supply-chains and industrial corridors particularly in mining and agro-processing; and

• reduce regulatory obstacles to trade and travel.

In line with the NGP, South Africa is also working with South African development finance institutions (DFIs) and SOEs to address backlogs in regional logistics, water and electricity infrastructure. In addition, South Africa will launch an appropriately structured Africa Development Fund (ADF) to assist in financing this kind of infrastructure, and at the same time play the role of a sovereign wealth fund in helping to achieve a more competitive rand. Economic ministries are developing proposals for funding South African suppliers of capital equipment and construction materials for regional infrastructure projects. Priorities to achieve these objectives include the following:\textsuperscript{101}

• developing and implementing proposals to improve the road/rail/ports system serving southern and central Africa;

• strengthening regional integration on energy, including the Southern African Power Pool, linked to urgent improvements in electricity interconnectors, and exploring other opportunities for enhancing clean energy across central and southern Africa, including gas; and

• developing proposals to improve telecommunications and internet connectivity across the region and from the region to Europe, Asia and the Americas.

South Africa is also identifying viable new productive activities in the region, especially: (a) in the agricultural value chain, including horticulture for South African owned retail chains; (b) electricity (hydro and other green energy generation); (c) beneficiation of minerals; and (d) integrated manufacturing supply chains.\textsuperscript{102} Proposals in this area will have to support development corridors across southern and central Africa.

3.7.4 \textit{Bilateral}

In addition to its regional agreements, South Africa has a series of bilateral investment treaties (BITS). A key factor of these various agreements is to reduce political and legal uncertainty, and ensure a more stable environment, to help improve the investment climate. Between 2007 and 2010, South Africa undertook a review of its BITS that resulted in a new investment policy framework that was approved by the Cabinet in July 2010. The new framework is the product of a comprehensive review of South Africa’s approach to investment policy and treaty making. The new framework does not introduce any new obstacles to investment. Instead, the framework aims to modernise and strengthen South Africa’s investment regime by implementing a series of policy measures that will ensure South Africa remains open to foreign investment, provides adequate security and protection to all investors, while preserving the sovereign right of the South African Government to pursue developmental public policy objectives. Five (5) measures have been undertaken to implement the new framework policy:\textsuperscript{103}

\textsuperscript{101} Ibid., p. 25.

\textsuperscript{102} Ibid.

\textsuperscript{103} Internal DTI document.
• Develop a new National Investment Act to codify and clarify typical BIT-provisions into domestic law, and strengthen investor protection;\textsuperscript{104}

• Terminate first generation BITs and offer partners possibility to renegotiate - most of the BITs that South Africa has entered into are now open for either review or termination. South Africa will offer partner countries the opportunity to re-negotiate the terms of the treaties. The same opportunity to renegotiate will be offered to BITs that have been signed but not yet ratified;

• Refrain from entering into BITs in future, unless there are compelling economic and political reasons;

• Develop new Model BIT as basis for (re-)negotiation in which standard provisions will be formulated to reduce the scope for unpredictable, inconsistent and arbitrary interpretations; and

• Establish an Inter-Ministerial Committee (IMC) on investment to oversee the process and implementation of these measures. The IMC will also assess whether South Africa should enter into new investment treaties in future on the basis of an assessment of political and economic costs and benefits.

Following the 2010 Cabinet decision, Government has begun to implement the measures. An intra-governmental process was initiated that resulted in South Africa’s Draft Promotion and Protection of Investment Bill 2013, which was published for public comment on 1 November 2013 in Government Gazette No. 36995, Notice No. 1087 of 2013. The same intra-governmental process is responsible for developing the Model BIT Template that will be used as a basis for negotiation or re-negotiation of BITS going forward. This intra-governmental process also benefits from consultations with and participation from the IMC. The termination process of BITs due to expire is currently underway and partners will be offered the opportunity to re-negotiate the terms of the treaties based on the new BIT Template. The same opportunity to renegotiate will be offered to BITs that have been signed but not yet ratified. Termination of BITS is not automatic upon notice of termination as most BITS (depending on the wording in the BIT) have a grandfathering clause that allows for protection for a stated period (a further five, ten, fifteen or twenty years depending on the period stated in the BIT) after notice of termination.

The draft Investment Bill and Model BIT seek to strengthen South Africa’s domestic legislation in respect of the protection offered to foreign investors by, amongst other things, codifying typical BIT-provisions into domestic law and clarify their meaning in line with the South African Constitution.

Both the draft Investment Bill and Model BIT seek to achieve several balances. Balance is sought between the rights and obligations of investors, the need to provide adequate security and protection to all investors, the need to ensure that South Africa’s constitutional obligations are upheld, and the need to preserve the sovereign right of Government to regulate in the public interest and to pursue developmental public policy objectives and ensure that constitutional obligations are upheld. It is these broad policy perspectives that underpin the draft Investment Bill and Model BIT together with the need to better align investment with the country’s development objectives.

Furthermore, the draft Investment Bill and Model BIT seek to clarify, amongst other things, the definitions of investor and investment along with several substantive provisions to ensure consistency

\textsuperscript{104} South Africa’s Draft Promotion and Protection of Investment Bill, 2013 was published for public comment on 1 November 2013 in Government Gazette No. 36995, Notice No. 1087 of 2013.
and reflect the proper scope and subject matter. To offer substantive and substantial protection to foreign investors, the draft Investment Bill and Model BIT also seek to clarify the international investment law concepts of national treatment, expropriation, compensation and transfer of funds.

As South Africa updates and strengthens the investment regime, it will ensure that it remains open to foreign investment. South Africa is not introducing any new obstacles to investment, but is establishing a framework for more equitable relationships between investors and Government based on respect for human rights, the rule of law and due process, sustainable development, and security of tenure and property rights.

South Africa has in place a legal framework that offers robust protection to all investors. As it modernises and strengthens its investment regime, all investors can rest assured that they will continue to receive protection that is comparable to the highest international levels, offered to all investors in a non-discriminatory manner.

3.8 National Development Plan (NDP) 2030

The National Development Plan (NDP) 2030 launched in 2012, is a broad strategic framework. It sets out a coherent and holistic approach to confronting poverty and inequality based on focused and interlinked priorities. The NDP offers a long-term perspective for South Africa (until 2030). It defines a desired destination and identifies the role different sectors of society need to play in reaching that goal. The NDP aims to eliminate and reduce inequality by 2030.

The objectives of the NDP require progress on a broad front, but three (3) priorities stand out:

- Raising employment through faster economic growth;
- Improving the quality of education, skills development and innovation; and
- Building the capability of the state to play a developmental, transformative role.

The NDP recognises and acknowledges that a sustainable increase in employment requires a faster growing economy and the removal of structural impediments, such as poor-quality education or spatial settlement patterns that exclude the majority. These are essential to achieving higher rates of investment and competitiveness, and expanding production and exports. Business, labour, communities and government need to work together to achieve faster economic growth. As such, the NDP specifically focuses on: the Economy and Employment; Economic infrastructure; Environmental sustainability and resilience; Inclusive rural economy; South Africa in the region and the world; Transforming Human Settlements; Improving education, training and innovation; Social protection; Building Safer Communities; Building a capable and developmental state and Fighting corruption. According to the plan, South Africa can realise these goals by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnership through society.

The NDP presents a long-term strategy to increase employment and broaden opportunities through education, vocational training and work experience, public employment programmes, health and nutrition, public transport and access to information. While there are “quick wins” to be achieved in each of these areas, the strategies will take time to have a large-scale effect on poverty. To reduce the acute effects of poverty on millions of South African over the short term, the NDP proposes to:

- Introduce active labour market policies and incentives to grow employment, particularly for young people and in sectors employing relatively low-skilled people;
Expand public employment programmes to one million participants by 2015 and two million by 2020. As the number of formal- and informal-sector jobs expands, public work programmes can be scaled down;

- Strengthen primary health-care services and broaden district-based health programmes, such as the community health worker and midwife programmes, and health education;

- Expand welfare services and public employment schemes, enabling the state to service and support poor communities, particularly those with high levels of crime and violence;

- Introduce a nutrition programme for pregnant women and young children and extend early childhood development services for children under five;

- Improve the quality of education in underperforming schools and further education and training colleges;

- Promote mixed housing strategies and more compact urban development to help people access public spaces and facilities, state agencies, and work and business opportunities; and

- Invest in public transport, which will benefit low-income households by facilitating mobility.

3.9 National Infrastructure Plan (NIP)

Governments around the world rank infrastructure policy among their greatest concerns. The modernisation of infrastructure is seen as being critical to future economic competitiveness and crucial to accommodating expanding populations in urbanising environments. South Africa is no exception: infrastructure lies at the heart of government’s stimulatory fiscal policy to drive growth over the next few years. South Africa realises the importance of accelerating the investments in infrastructure to boost the country’s economy. This planned investment, if it is realised, can propel the country’s economic growth to a higher trajectory.

In 2012 the South African Government adopted a National Infrastructure Plan (NIP) that intends to transform the South African economic landscape while simultaneously creating significant numbers of new jobs, and strengthening the delivery of basic services. The plan also supports the integration of African economies.

3.9.1 Strategic Importance of Investment in Infrastructure for South Africa

For South Africa, investment in infrastructure is important as it has the potential to:

- Contribute to raising the quality of life by creating amenities, providing consumption goods (transport and communication services), and contributing to macroeconomic stability

- Promote balanced economic development

- Unlock economic opportunities

- Promote mineral extraction and beneficiation

- Address socio-economic needs
• Promote job creation
• Help integrate human settlements and economic development
• Support African development and integration
• Significantly increase the tax base and tax revenues
• Attract FDI through various projects and economic activity
• Increase exports and trade
• Improve the quality of life for all citizens
• Address the backlog in basic services.

Given the pivotal role of infrastructure in driving a new growth path, alongside the recognition that there are gaps in state capacity for infrastructure delivery, South Africa in its call to addressing socio-economic challenges (i.e. poverty and unemployment) through infrastructure up-grading and development is guided by a number of policy frameworks - the NDP, the NIP, the NGP and Industrial Policy. South Africa is implementing these policies with the aim of:

• transforming the economic landscape of South Africa
• creating a significant numbers of new jobs
• reducing inequality
• poverty alleviation
• strengthening the delivery of basic services to the people of South Africa
• supporting the integration of African economies
• promoting re-industrialisation through:
  • manufacturing of inputs, components and machinery
  • skills development aimed at critical categories
  • greening the economy and
• empowerment.

Infrastructure investment needs to: advance South Africa’s national priorities and objectives as set out in the NDP, the NIP and the Industrial Policy; it must be strategically targeted and directed into high growth areas to advance development; it must also promote long-term industrialisation and diversification beyond traditional commodities and non-tradable services, expanding production in value-added sectors with high employment and growth opportunities; it must be directed at labour absorbing production and services sectors, increasing access to the economy of historically disadvantaged people and regions, and building South Africa’s contribution to industrial development
beyond its borders; and in addition, it must create a dynamic manufactured goods sector and be capable of creating a sufficient number of jobs to make a meaningful impact on unemployment.

3.9.2 Targeted Investment in Infrastructure

Targeted investment in infrastructure is critical for South Africa. The investment in infrastructure needs to be efficient, competitive and responsive as it lays the basis for higher growth, inclusivity and job creation – it is an enabler of socio-economic development; contributing to economic growth, through both supply and demand channels, by reducing costs of production, contributing to diversification of the economy and providing access to the application of modern technology.

3.9.3 Challenges

The NIP sets out the challenges that South Africa needs to respond to in the building and developing of infrastructure:

- High unemployment levels
- Skills constraints
- Structural problems in the economy
- Weak implementation capacity in parts of the state (with unspent monies) and poor project development planning
- Projects are not always strategic, integrated or aligned with national priorities
- Poor co-ordination, which slows projects and limits their impact

3.9.4 Enablers addressing the challenges

The NIP also sets out the enablers that will assist South Africa in the process. South Africa is currently in the process of shifting the Infrastructure Plan to an active implementation phase with state-led monitored infrastructure projects. Eighteen Strategic Integrated Projects (SIPs), which are regarded as the enablers, have been developed to support economic development and address service delivery in the poorest provinces. For instance: Investment in rail, water pipelines, energy generation and transmission infrastructure; Strengthening the logistics and transport corridor between SA’s main industrial hubs; Accelerating of identified investments in roads, rail, bulk water and water treatment and transmission infrastructure; Supporting sustainable green energy initiatives through a diverse range of clean energy options; Building and refurbishing hospitals, other public health facilities; to mention a few.

The SIPs cover a range of economic and social infrastructure areas including, but not limited to transport, health, water, construction, and rural access. Infrastructure investment needs to happen in these specifically identified areas.

The crucial steps to achieve infrastructure objectives are to:

- maintain high levels of public investment with a sustainable step change in investment by general government and public sector corporations, backed by investment in skills development and measures to prevent non-competitive pricing by contractors;
strengthen local procurement of inputs in order to maximise the multiplier effect, including through the development of new industries to provide for renewable energy; and

- use labour-based production methods where appropriate; and to target infrastructure provision to support broad-based growth and rising competitiveness linked to a coherent and sustainable strategy on rural development.

3.9.5 Funding

Infrastructure funding is largely provided by South Africa’s national Government. Parastatal companies also undertake infrastructure development in some sectors, while other initiatives include the government's Expanded Public Works Programme (EPWP), and public-private partnerships (PPPs).

South African is making increasing use of PPP investment structures to achieve its infrastructure aims. With a greater number of priorities (and industries) competing for public funds in the wake of the credit crisis, Government is under more pressure to be creative about how infrastructure needs are met. Narrowing infrastructure gaps means that traditional models of financing and delivering infrastructure must give way to new models and a portfolio of hybrid approaches. There is a diversity of delivery models available.

The central question facing infrastructure policymakers is: What is the optimal mixture of public and private sector participation in the project to maximise public value? The right mix of public and private involvement in infrastructure financing and delivery needs to be determined. There is no one-size-fits-all answer.

Considerations for further appropriate funding could include:

- Assessing the capacity of domestic and international financial markets to fund the amount required;
- Assessing the capacity of Government to provide the guarantees, loan or equity in support of infrastructure build; and or
- Opportunities for innovative funding.

3.10 Foreign Exchange Policy

The responsibility for exchange control policy is vested with the Minister of Finance, who delegates certain powers and functions to officials of the South African Reserve Bank (SARB), predominantly the Financial Surveillance Department (FSD), which implements and administers such policy on behalf of the South African Government. The responsibility of the FSD entails: implementing exchange control policy and administering the Exchange Control Regulations; gathering, analysing and...

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105 On 2 August 2010, the Exchange Control Department in the South African Reserve Bank was re-named the Financial Surveillance Department. This move is in line with the gradual change in the functions and responsibilities of the Exchange Control Department after the Minister of Finance announced in his 2010 Budget, the shift from exchange controls to a system of prudential regulation. The shift entails replacing unnecessary administrative controls with improved surveillance and prudential limits on foreign exposure risks. The broad strategy remains prudential management of foreign exposure risk, along with improved management of capital flows and maintaining macroeconomic and financial stability. The change does not affect the application of the Exchange Control Regulations, Orders and Rules of 1961, issued in terms of the Currency and Exchanges Act, 1933 (Act No. 9 of 1933).
disseminating information on cross-border flows; appointing Authorised Dealers in foreign exchange with limited authority (discussed in detail in next paragraph); and ensuring compliance by Authorised Dealers in foreign exchange with limited authority with anti-money laundering control measures in terms of the Financial Intelligence Centre Act (FICA).\textsuperscript{106}

All foreign exchange policy decisions are taken by the Minister of Finance, and therefore SARB only acts in an advisory capacity to the Government relating to decisions on exchange control policy. In terms of the Orders and Rules under the Exchange Control Regulations,\textsuperscript{107} the Minister of Finance has appointed certain banks to act as “Authorised Dealers” in foreign exchange.\textsuperscript{108} Their function is to assist the FSD in administering exchange control by having the right to buy and sell foreign exchange, subject to conditions and within limits prescribed by the FSD. Authorised Dealers are not the agents of FSD, but act on behalf of their customers. In addition, there are also Authorised Dealers in foreign exchange with limited authority,\textsuperscript{109} including, Bureaux de Change. These are authorised by National Treasury to deal in foreign exchange for the sole purpose of facilitating travel related transactions.

In terms of section 43B of FICA, as off 1 December 2010, all Authorised Dealers in foreign exchange with limited authority, including all accountable and reporting institutions, listed in Schedules 1 and 3 of FICA respectively, are legally required to register with the Financial Intelligence Centre (FIC) within the prescribed period and in the prescribed manner. With regards to persons carrying on the business of dealing in foreign exchange, all head offices of authorised dealers with limited authority and their respective branches must register with FIC; and all authorised dealers, e.g. a bank that carries on the business of dealing in foreign exchange, must register its head office. Failure to register with FIC or failure to provide information in terms of section 43B are offences in terms of section 61A of the FICA and can result in imprisonment for a period not exceeding five (5) years and or a fine not exceeding R10 million.

All applications relating to exchange control are required to be made through an Authorised Dealer. South African subsidiaries and branches of foreign companies are considered to be South African residents, and, are subject to exchange control by the SARB.

\textsuperscript{106} Financial Intelligence Centre Act, Act No. 38 of 2001.
\textsuperscript{107} Paragraph 3 of Orders and Rules under the Exchange Control Regulations, last updated 30 December 2010.
3.10.1 **Surge in portfolio capital inflows**

The surge in foreign capital inflows into emerging market economies (EMEs) is a major concern for a number of EMEs, including South Africa. The surge in capital inflows, especially portfolio inflows, was induced by: the low interest rates (near-zero interest rates in the United States, Japan and the euro region) and declining asset investment returns in advanced economies; investor demand for opportunities in emerging market portfolio assets; diversification of risk; speculative activities; relaxation of regulatory restrictions on foreign portfolio investments in some countries; and monetary liquidity. The capital inflows have been accompanied by exchange rate appreciation, increases in liquidity, and a rise in asset prices. Many of the flows are perceived to be temporary, reflecting interest rate differentials, which may be at least partially reversed when policy interest rates in advanced economies return to more normal levels. Many EMEs are concerned that the surge in capital inflows causes problems for their economies, contributing to financial instability and having negative impacts on their economies. Financial market stability is critical to macroeconomic management and these inflows have therefore become a significant consideration in policy making. Against this backdrop, capital controls are again in the news.

### 3.10.1.1 Benefits and undesirable effects

The apparent rise in capital flows to emerging markets creates threats as well as opportunities. Capital inflows can help emerging economies in various ways: allow countries with limited savings to attract financing for productive investment projects; foster diversification of risk; promote trade; provide lower-cost financing and thus help finance domestic investment and contribute to long-run economic growth; provide a better opportunity for local capital market development, generally providing increased liquidity; and indicate market confidence in the economy.

Notwithstanding these benefits, large capital inflows may also produce undesirable macroeconomic effects: complicate macroeconomic management; appreciate the exchange rate; undermine competitiveness of the tradable sector, possibly causing damage even when capital inflows abate or reverse; rapid capital outflow can often follow periods of rapid inflow, generating boom-bust

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110 Portfolio capital inflows include portfolio debt flows (domestic bonds purchased by foreign investors) and non-debt portfolio equity flows (country funds, depository receipts, and direct purchases of shares by foreign investors).

111 Brazil, China, Indonesia, Israel, Korea, Taiwan, Turkey are some of the countries that have been affected by large capital inflows.

112 Capital flows have taken diverse forms as investors from advanced economies have spread their assets internationally, and now an increasing number of institutional investors, including insurance companies, pension funds, and hedge funds are investing in emerging markets. At the same time global cyclical factors such as lower rates and higher liquidity favour increasing cross-border capital flows.


114 Recent cases include Brazil and China. The IMF’s Articles of Agreement recognise that members in general may exercise such controls as are necessary to regulate international capital movements (Article VI, Section 3). However, the general right of members to regulate international capital movements is qualified by members’ obligations subject to IMF surveillance under Article IV.

cycles where the initial period of capital inflows is often characterised by exchange rate appreciation, domestic credit expansion, booming consumption and/or investment, and asset price bubbles, but over time, the process tends to reverse itself and the exchange rate appreciation weakens the current account and reduces the attractiveness of domestic assets to foreign investors; net capital inflows turn into net outflows, and the boom turns to bust, with adverse consequences for local asset prices and, often, the economy. The main concern from the financial fragility perspective is that large capital inflows may lead to excessive foreign borrowing and foreign currency exposure, possibly fuelling domestic credit booms and asset bubbles, with significant adverse effects in a case of sudden reversal.

This is when countries consider imposing capital controls as a means of limiting the appreciation of the exchange rate and to limit crisis vulnerability due to excessive or particularly risky forms of foreign borrowing.

3.10.2 South Africa’s response to surge in portfolio capital inflows

South Africa has joined the club of developing countries experiencing relatively large capital inflows. A large proportion of the inflows are short-term and highly volatile. The rand has strengthened impinging on exports as their competitiveness is affected and the exchange rate has been impacted significantly. Unlike Brazil, South Africa did not impose a tax on foreign capital inflows to curb the rand’s gains because it depends on that money to finance its current account deficit - South Africa relies on foreign portfolio investment to finance its import requirements. Nor did South Africa move to weaken its currency. Brazil, China, Turkey and other emerging markets moved to weaken their currencies, and countries such as Israel and Turkey bought dollars to limit gains in their currencies.

South Africa looked at the type of actions other countries have taken to curb their currencies. The National Treasury (NT) followed and continues to follow the debate taking place globally on whether governments should impose a tax on capital inflows to curb currency volatility. The SARB is in continuous talks with NT to determine the best way of addressing the problem. The NT is looking for the “best mechanism” to deal with the rising foreign capital inflows. In looking for the best mechanism, it is also engaging on and addressing the current portfolio diversification debate that has also brought the composition of capital flows into South Africa to the forefront of the debate on capital inflows. Most of the capital flows entering South Africa have been short-term portfolio flows, rather than long-term FDI flows. The two (2) different types of flows have different effects. FDI can be expected to facilitate the transfer of new technology help improve workers’ skills, and improve market access; it is generally considered to be the most resilient form of capital flows during periods of financial distress. In contrast, when it comes to portfolio investments, a sudden shift in sentiment can result in large reversals of portfolio flows, which in turn can cause detrimental economic effects. These differences between capital flows raise a number of policy questions for South Africa.

What is important is that policy in South Africa guard against huge surges in capital and ensure that capital inflows into the country are invested in growth and not used wastefully. One of the lessons

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116 Ibid., 113, p. 3.
117 Ibid., 115, p. 6.
118 Statement made by the National Treasury Director-General, Lesetja Kganyago, on 7 September 2010, to Bloomberg.
119 What determines the level and composition of capital flows? Why is the composition of capital flows biased towards portfolio flows? What are the policies that can alter the composition of capital flows? These are some the questions that South Africa will have to consider and address in an attempt to change the composition of capital flows into the country.
of the surge in capital flows from the early 1990s and the 2001 currency crisis is that uncontrolled capital flows have been very disruptive for the South African economy. Another lesson is that there should be adoption of effective capital management techniques that include not only prudential regulations but an early warning system and different types of temporary and permanent capital controls. Management of capital flows is necessary for successful implementation of policies aimed at promoting economic development. Inadequate control of capital flows will reduce the ability of the country and firms to implement development policy and increase value-added production. A combination of macroeconomic policies, capital controls and prudential regulation may be the answer to insulate the economy, maintain economic stability, support export competitiveness and to pursue industrial policy.

3.10.3 Control Measures introduced by some countries

3.10.3.1 Brazil

On 18 October 2010, Brazil increased the rate of the Tax on Financial Transactions (IOF) levied on non-residents’ investment in fixed-income securities to 6%, up from 4% to prevent strong capital inflows that could lead to asset price bubbles and to ease upward pressure on the Real. The second increase to 6% came shortly after a first increase to 4% on 5 October 2010. The initial levy at a rate of 2% had been introduced on 19 October 2009. The 2% levy on investments in the capital markets remained unchanged.\textsuperscript{120}

3.10.3.2 Israel

On 20 January 2011, the Bank of Israel imposed a 10% reserve requirement on banking corporations for foreign exchange derivative transactions with non-residents, effective 27 January 2011. The requirement, introduced through an amendment to the Liquidity Directives, applies to NIS/foreign exchange swap transactions and NIS/foreign exchange forwards.\textsuperscript{121}

3.10.3.3 Indonesia

On 16 June 2010, the Central Bank of Indonesia introduced measures to slow down short-term capital flows. These include: \textsuperscript{122}

- a one-month minimum holding period on Sertifikat Bank Indonesia (SBIs), a debt instrument, with effect from 7 July 2010; and
- regulations on banks’ net foreign exchange positions.

3.10.3.4 Korea

On 13 June 2010, Korea announced macro-prudential measures to mitigate volatility of capital flows, including:

\textsuperscript{120} Decree No. 7.412, of 30 December 2010, Decree No. 7.330, of 18 October 2010; Decree No. 7.323 of 4 October 2010. This is a Tobin tax on short-term cross-border capital transactions and is levied to discourage such inflows and help stabilise exchange rates by curbing speculation

\textsuperscript{121} Imposition of a Reserve Requirement on Foreign Exchange Derivative Transactions by Non-residents, Bank of Israel press release, 20 January 2011

\textsuperscript{122} Reports on G20 Trade and Investment Measures (Mid-May to Mid-October 2010), 4 November, 2010, p. 68
- Limits on banks' forward exchange positions of banks (including FX forward, FX swap, cross currency interest rate swap, non-deliverable forward, etcetera): 50% of domestic banks' capital; 250% of foreign bank branches' capital;
- Foreign currency loans granted by financial institutions to residents can only be used for overseas purposes;
- Tighter regulations on banks' FX liquidity ratio and mid- to long-term financing ratio in foreign loan portfolios.  

3.10.4 Available policy options

The question is how best to handle surges in inflows that may pose both prudential and macroeconomic policy challenges. A number of authors highlight the well-known tools: fiscal policy, monetary policy, exchange rate policy, foreign exchange market intervention, domestic prudential regulation, and capital controls; but also caution that the appropriate policy mix is likely to depend on: the state of the economy (i.e., how close it is to potential); the level of reserves (is further accumulation desirable or appropriate?); the quality of existing prudential regulation (can prudential tools effectively tackle the boom or bust credit or asset price cycle); the scope to allow the currency to strengthen (is the currency already overvalued?); and the likely persistence of the inflows (with permanent inflows less likely to warrant a policy response than temporary inflows).

The appropriate policy response is likely to be multifaceted and there is no one-size-fits-all way to deal with the impact of potentially destabilising short-term capital inflows. From an individual country point of view, the above mentioned tools may be used, however, sometimes the usual macro policy remedies are not appropriate (maybe because the currency is already too strong, or more reserves are inadequate). At times it may not be possible to quickly address financial fragility concerns through the domestic prudential framework alone. For both macroeconomic and prudential reasons, therefore, there may be circumstances in which capital controls are a legitimate component of the policy response to surges in capital inflows. The aim of using capital controls would be to prevent inflows of cross-border speculative funds (hot money) from boosting the value of the home currency excessively, thereby undermining competitiveness. Another justification would be to reduce vulnerability to sudden changes in financial-market sentiment, which could have an impact on domestic growth and employment.

Some countries are resorting to capital controls to counter surges in capital inflows. The controls are imposed to maintain monetary control while reducing pressures on the exchange rate and to address prudential concerns in the presence of large, short-term inflows. The effectiveness of such controls is, however, a much debated and key issue. The sense is that the jury is still out on this, and it is difficult to get the data to speak loudly on the issue. Controls seem to be quite effective in countries that maintain extensive systems of restrictions on most categories of flows, but the present context relates mainly to the re-imposition of controls by countries that already have largely open capital accounts. Effectiveness of controls depends on whether the country has some existing controls and therefore the administrative

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123 Ibid., p. 71.
124 Ibid., 115, p. 4.
125 Ibid., p. 6-8.
126 Ibid., p. 9.
127 Ibid., p. 8.
apparatus is already in place. The effectiveness of controls in regulating inflows depends on how extensive they are, whether the country maintains the necessary administrative and institutional infrastructure to enforce the controls, and the incentives investors have to circumvent them. For countries that have a substantially closed capital account, strengthening controls will be easier. Countries with substantially open capital accounts may need to design and implement new controls and likely strengthen them over time without creating excessive distortions.

In all instances though, multilateral dimensions are an important consideration. In the present circumstances, global recovery is dependent on macroeconomic policy adjustment in EMEs, which could be undercut by capital controls and slow needed reforms. Thus, any decision to impose capital controls needs to take account of their multilateral repercussions. The greatest concern is that widespread use of capital controls by EMEs could have harmful effects on the efficient allocation of investment across countries. In addition, the adoption of controls by some countries might lead others to follow suit. A multilateral framework governing the re-imposition of capital controls and balancing the various considerations could be helpful in managing the problem.

3.10.4.1 Effectiveness of capital controls

How well the South African domestic capital market functions has a major bearing on whether capital inflows enhance growth without exacerbating financial stability. The greater presence of foreign capital inflows, should, in principle, deepen local financial markets, enhance investor diversity and improve liquidity. But it can also exacerbate the domestic macroeconomic and liquidity crisis, and may cause a crisis through later massive liquidation of the foreign investments. Overall, it is a combination of sound macroeconomic policies, prudent debt management, exchange rate flexibility, the effective management of the capital account, accumulation of appropriate levels of reserves as self-insurance and development of resilient domestic financial markets that provides the optimal response to large and volatile capital flows into South Africa.

3.10.5 Capital transactions of foreign investors

Non-residents may freely invest in South Africa, provided that suitable documentary evidence is presented that such transactions are concluded at arm’s length, at fair market-related prices and financed in an approved manner. Financing must be in the form of the introduction of foreign currency. A distinction is made between financing of short term capital flows and financing of long-term investment. Financing of short term capital inflows such as portfolio investments as well as the acquisition of residential and commercial property must be through the introduction of at least 50% of the investment amount in foreign currency and the balance may be borrowed in the local market where a 1:1 ratio will apply. Local borrowing facilities granted to non-residents in respect of long-term inward foreign direct investment in South Africa are not restricted in any way. The distinction is elaborated further in the next paragraph.

3.10.6 Local financial assistance to affected persons and non-residents

There is a general restriction regarding the granting of local financial assistance to “affected persons” and non-residents. An affected person is a South African registered entity that is 75 percent

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128 Ibid., p. 5.
129 Exchange Control Manual issued by the Financial Surveillance Department of the South African Reserve Bank, section Q, 6.2
or more foreign-controlled. Permission for the granting of financial assistance in the above circumstances must be obtained from the FSD except where Authorised Dealers have been authorised to do so. Borrowing is limited to the amount of capital introduced from offshore. Only requests for excess local financial assistance facilities need to be referred to the FSD for authorisation. The control over the rendering of financial assistance to non-residents or affected persons is intended as a form of rationing of domestic capital resources.

In instances where an affected person wishes to borrow locally to finance a foreign direct investment into South Africa or for domestic working capital requirements, there is no restriction on the amount that can be borrowed locally. However, specifically excluded from this relaxation are the acquisition of residential and commercial properties and funds used for financial transactions such as portfolio investments, securities lending, hedging, and repurchase agreements, etcetera by non-residents and affected persons. Where the funds are required for commercial properties, financial transactions and/or the acquisition of residential property in South Africa, the 1:1 ratio applies. In effect, this means that the restriction does not apply in respect to local borrowing for what is recognised as a "bona fide foreign direct investments in South Africa."

The FSD does not generally permit the remittance of profits or repayment of loans where, as a result of the remittance, the local financial assistance limit will be exceeded and will require that the local financial assistance be reduced before remittance, unless a motivated application with firm details on how excess borrowings are to be reduced, is submitted to and is approved by the FSD.

3.10.7 Foreign loans

3.10.7.1 Prior Approval

Permission is generally granted for residents to raise foreign loans, though it is necessary for prior approval to be obtained from Authorised Dealers or the FSD. Authorised Dealers may approve applications by residents, to the avail of inward foreign loans and foreign trade finance facilities from any non-resident, subject to the specific criteria applicable to inward foreign loans being adhered to. For requests which fall outside the applicable criteria, an application must be submitted to FSD for consideration. The approval is necessary since the country will be placing itself in a position where the foreign creditor has a call on the country's foreign exchange reserves at the time of repayment. The objective of the control is not to restrict borrowing abroad but to ensure that the repayment and servicing of loans does not disrupt the balance of payments; and to ensure that the level of interest rates

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130 Financial assistance includes the lending of currency, the granting of credit, the taking up of securities, the conclusion of an installment and/or hire purchase sale or a lease, the financing of sales or stocks, discounting, factoring, the guaranteeing of acceptance credits, the guaranteeing or accepting of any obligation, a suretyship, a buy-back and a lease-back, but excludes trade credit, which comprises: (1) The granting of credit by a seller in respect of any commercial transaction directly involving the passing of ownership of the goods sold from seller to purchaser; and (2) the granting of credit solely in respect of the payment for services rendered. Exchange Control Regulations, 1961, Regulation 1
131 Exchange Control Regulations, 1961, Regulations 3(1)(e) and 3(1)(f)
132 Ibid., Regulation 1
133 Ibid., 129, section Q, 6.2.1.1
134 Ibid., section Q, 6.2.1.3 (c)
135 Ibid.
136 Ibid., section O, 6.1.7.1; 6.7.1.3
paid is reasonable in terms of prevailing international rates. The policy applies to both corporate entities and individuals.

3.10.7.2. Interest

There are no restrictions on interest payments, provided the required approval has been obtained for the loan facility. As of 1 March 2014, a 15 percent withholding tax will be levied on interest paid to non-residents.

3.10.8 Payments of a business nature (Local sale or redemption and remittance of dividends, profit and income from South Africa)

3.10.8.1 Capital

There are no restrictions on the repatriation of capital investments by non-residents. The general rule with regards to outward capital flows is that the transfer of payments must be made via an Authorised Dealer without delay, in a freely convertible currency, at the market rate of exchange, applicable on the date of transfer.

3.10.8.2 Dividends

The local sale or redemption proceeds of non-resident owned assets in South Africa may be regarded as freely remittable. Authorised Dealers may allow the transfer of dividends, profit and/or income distributions from quoted companies, non-quoted companies and other entities to non-residents in proportion to their percentage shareholding and/or ownership.

3.10.8.3 Royalties and fees

Agreements by South African companies to pay royalties, licence and patent fees to non-residents in respect of the local manufacturing of a product, are subject to approval from the Department of Trade and Industry (DTI). Where no local manufacturing is involved, prior approval of an Authorised Dealer is required. In instances where the royalties or fees are percentage based or the contract is between related parties the prior approval of the FSD is required. Once approved by either the DTI or FSD and provided the Authorised Dealer is satisfied that the payments fall within the terms of the relative agreement and the application is accompanied by an auditor’s statement showing the amount due has been correctly calculated, the royalty payments, licence and patents fees are freely transferable.

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137 Ibid., section O, 6.1.7.2
138 Ibid., section Q, 6.2 and 6.2.2
139 Ibid., section I, 2.3.1
140 Royalty agreements involving the local manufacture of goods must first be referred to the DTI. This is done by submitting a draft agreement supported by a completed questionnaire on prescribed form. The DTI makes a determination and passes on its recommendation to the FSD, which then makes a final decision. Exchange Control Manual issued by the Financial Surveillance Department of the South African Reserve Bank, section I, 2.3.2.
141 Ibid., 129, section I, 2.3.2.
142 Ibid.
143 Ibid.
percentage of the net ex-factory selling price, excluding any taxes such as value added tax. A distinction is made by the DTI between royalty agreements covering consumer goods and those for intermediate and capital goods - for consumer goods a royalty of up to 4 percent of the ex-factory selling price is regarded as acceptable; and in the case of intermediate and capital goods, a payment of up to 6 percent is regarded as acceptable. A withholding tax of 12 percent of the gross royalties payable or that become due or payable to non-residents is levied on the payment of royalties unless the rate is reduced under an applicable double tax treaty. On 1 January 2015, this rate will increase to 15 percent.

3.11 Taxation Policy

South Africa has a well-developed and regulated taxation regime based on international best practice. http://www.sars.gov.za/. The tax regime is set by the National Treasury and managed by the South African Revenue Service (SARS). South African residents are (subject to certain exemptions) taxed on their worldwide income, while non-residents are only taxed on South African sourced income (subject to the provisions of any Double Taxation Agreement (DTA). Tax is levied on taxable income that, in essence, consists of gross income less exemptions and allowable deductions as per the Income Tax Act. The rates of tax chargeable on taxable income are determined annually by Parliament, and are generally referred to as “marginal rates of tax” or “statutory rates”. The rate of tax levied on an individual is set on a sliding / progressive scale which results in the tax increasing as taxable income increases. Every year, the Minister of Finance announces the rates to be levied by publishing the applicable tax tables during the annual budget speech (delivered February of every year). The tax bands for individuals vary between 18 percent and 40 percent depending on the annual income.

Resident companies are taxed at a flat rate of 28 percent. Previously, they were also subject to secondary tax on companies (STC) of 10 percent of the ‘net amount’ of dividends declared. STC which was payable regardless whether the shareholder was a resident or non-resident was abolished on 31 March 2012 and replaced from 1 April 2012 with a 15 percent withholding tax on dividends (WTD) paid to resident and non-resident shareholders. The 15 percent dividend tax is withheld by the company paying the dividend or a paying intermediary, and the net dividend is paid to the shareholder. One of the major benefits of the dividend tax is that it aligns SA’s tax treatment of dividends with international tax trends and potentially makes it more attractive to foreign investors - most countries throughout the world impose a tax on dividends declared by companies, payable by the shareholders, but with the tax being withheld by the company itself. STC was little understood in the international

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144 The seller owns the goods until they are picked up at his factory, and the selling price is the cost of the goods.

145 Ibid., 129, section I, 2.3.2.

146 Act No. 58 of 1962.

147 Secondary tax on companies (‘STC’) was levied on resident companies distributing dividends to shareholders (resident and non-resident) at a flat rate of 10 percent of the ‘net amount’ of the dividends declared. The company’s STC liability was determined by reference to the amount of dividends declared by it. STC was a tax on the company distributing the dividend and not on the dividend itself, and was thus not a withholding tax.

148 The legislation providing for the dividend tax, which replaced the secondary tax on companies (STC), was enacted in 2008, and the National Treasury had to renegotiate this provision with all affected countries it has treaties with and all these countries had to ensure ratification by their respective legislatures. On 23 February 2011, the Minister of Finance, Pravin Gordhan announced during his Budget Speech in Parliament that the dividends tax would come into effect 1 April 2012. 2011 Budget Speech, 23 February 2011, p. 30
As the dividends tax is a withholding tax, it will be relieved by Double Tax Agreements (DTAs) where applicable.

Non-resident companies (foreign companies), which trade in South Africa through a branch are subject to taxation at a rate of 28 percent on South African source income, but no dividends tax is imposed on the remittance of profits. Partnerships are not recognised as separate entities for tax purposes. Instead, the individual partners are taxed separately on their share of the partnership profits. Trusts (other than special trusts – trusts established for the benefit of ill or disabled persons and testamentary trusts established for the benefit of minor children) are taxed at a flat rate of 40 percent on income that does not vest in a beneficiary of the trust during the tax year in question. Income that vests in a trust beneficiary is taxed in the hands of the beneficiary.

South Africa does not allow for taxation on a group or consolidated basis. Each company in a group of companies is a taxpayer in its own right. Thus tax losses incurred by group companies cannot be set off against the taxable income of other companies in the group. There are provisions in the income tax act that allow for deferral of tax in certain intra-group transactions.

3.11.1 Double Tax Agreements (DTA)

South Africa’s domestic tax system is complemented by an extensive tax treaty network. These tax treaties generally waive or reduce the South African withholding tax on dividends, interest and royalties. South Africa’s treaties generally follow the OECD Model Treaty. Thus the tax liability of a foreign company is dependent on the nature of the income derived by it, as well as the existence of a DTA. Where it is established that the income is derived from a South African source, the question that follows is whether there is a DTA with that other country. The number of DTAs entered into by South Africa in recent years has increased rapidly, encompassing most of Europe (including an increasing number of Eastern European countries), in addition to a number of American, African and Asian countries. A DTA will usually provide that the foreign company will be subject to South African tax on its ‘business profits’ only where it has a ‘permanent establishment’ or a ‘fixed place of business’ as defined in a DTA. Generally, these two (2) phrases are defined according to the model definition proposed by the OECD, and include a branch, office, place of management, factory, workshop, mine or construction site.

3.11.2 Value Added Tax (VAT)

The principal source of indirect taxation revenue in South Africa is Value Added Tax (VAT). VAT is levied at a standard rate of 14 percent on all goods and services subject to certain exemptions, exceptions, deductions, zero rated goods, and adjustments provided for in the VAT Act, as amended. VAT is levied on the supply of all goods and services rendered by registered vendors throughout the business cycle. VAT is also levied on the importation of goods and services into South Africa. If a subsidiary or branch of a foreign-owned company sells goods or provides services, it must register as a vendor with SARS and charge and pay over VAT to SARS.

149 The other two (2) countries are Estonia and India
150 The list of South Africa’s DTAs is available on the following SARS website: http://www.sars.gov.za/home.asp?pid=3919
151 Mainly certain financial services, residential accommodation and public transport
152 For instance: exports, certain foodstuffs and other supplies.
3.11.3 Capital Gains Tax

The happening that triggers any capital gains tax (CGT) event is the disposal of an asset. Unless such a disposal occurs, no gain or loss arises. Once a person’s taxable capital gain has been determined, it is included in the person’s taxable income for that year of assessment in terms of section 26A. ¹⁵⁴ For legal persons (companies) in South Africa, 66.6 percent of their net profit attracts CGT (effective CGT is 18.6 percent) and for natural persons 33.3 percent (effective CGT is 13.3 percent). If a person or company sustains an assessed capital loss for the year, that loss cannot be off-set against the person’s or company’s taxable income, but is carried forward to subsequent years, for off-set against any future taxable capital gains. Any person (an individual) or any legal person (including a company, close corporation, a trust or individual policyholder fund of an insurer) resident in South Africa is liable for CGT in respect of capital assets held both in South Africa and outside South Africa.

Non-residents are only liable for CGT on immovable property and assets of a permanent establishment in South Africa.¹⁵⁵ In other words, CGT is levied on non-residents to the extent that they dispose of immovable property situated in South Africa, or have a permanent establishment in South Africa and dispose of an asset of that establishment.

Non–residents are only subject to CGT on the following categories of assets:

- Immovable property or any interest or right of whatever nature of the non-resident person to or in immovable property situated in South Africa. Examples include a flat, house, farm, or vacant land.

- Equity shares in a company when 80 percent or more of the market value of those equity shares, is attributable directly or indirectly to immovable property in South Africa

- A vested interest in a trust if 80 percent or more of the market value of that vested interest is directly or indirectly attributable to immovable property in South Africa

- The assets of any permanent establishment of a non-resident in South Africa. A permanent establishment is generally considered to be a fixed place of business through which the business of an enterprise is wholly or partly carried on.

Generally non-residents are not subject to CGT on the sale of shares. There is, however, an exception to this rule in the case of property owning companies. The disposal of shares in a property company owned by a non-resident will be subject to CGT if that non-resident:

- directly or indirectly owns 20 percent or more of the shares in that company; and

- 80 percent or more of the market value of the net assets of that company consist of immovable property in SA.

In effect, this means that where a natural or legal person is not a resident of South Africa, a liability in respect of CGT will arise where a disposal occurs in respect of immovable property (including mineral rights) or any interest or right of whatever nature of the non- resident person to or in immovable property situated in South Africa. An interest includes a direct or indirect interest of at least

¹⁵⁴ Ibid., 146.
¹⁵⁵ Ibid., para 2 of the Eighth Schedule.
20 per cent in a company or any other entity where 80 per cent or more of the net value of the assets owned by that company or other entity at the time of disposal is attributable to immovable property situated in the Republic.

The assets of any permanent establishment, branch or agency in South Africa through which a trade, profession or vocation is being carried on by the non-resident are also subject to CGT on disposal.

3.12 Accounting Policy

The Companies Act requires all public and private companies, both local and foreign, to maintain accounting records and to follow the standards laid out in the Generally Accepted Accounting Principles (GAAP) in preparing their final statements. Foreign companies with branches in South Africa are required to apply the same standards and file their financial statements with the Registrar of Companies. Each year, companies must prepare annual financial statements within six (6) months after the end of their financial years. All companies must have a registered office; maintain certain categories of records for seven (7) years; make the register of members and register of directors available for inspection during business hours for reasonable periods; file an annual return in the prescribed form; have a fixed financial year; maintain accurate and complete accounting records; and prepare annual financial statements. Annual financial statements must be audited in the case of public companies. Other companies must have their financial statements audited voluntarily at the option of the company or be independently reviewed.

3.13 Land and Property ownership policies

There are no restrictions on property ownership by non-residents and nor are there any national treatment limitations, save for a prohibition on illegal aliens owning immovable property within South Africa. In addition, the only restriction on foreigners, with regard to financing, is on loans to a non-resident purchasing property. In other words a 1:1 ratio applies in terms of which a non-resident can borrow locally to purchase property. The non-resident may only borrow locally up to 100 percent of the

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156 Ibid., 12, section 30 (1).
157 Ibid., sections 24-30.
158 Ibid., section 30 (2)(a).
159 Ibid., section 30 (2)(b)(i) and (ii).
160 However, it is important to note that South Africa is in the process of reviewing its land and property ownership policies, to ensure the actualisation of the core constitutional values articulated in the constitution. Despite government’s concerted effort to address the land question through restitution, tenure security, and facilitating access to land through redistribution and the provision of housing as mandated by sections 25 and 26 of the Constitution, there remains a strong and growing public opinion and impression that more needs to be done, and be done at a faster pace. There is also very strong public opinion and perception that an unregulated ownership of land and landed property, such as housing, by foreigners contributes significantly to the lack of readily available and affordable land for land reform. Given the history of racially based exclusion of the majority of citizens from land ownership, development and use under the colonial and apartheid regimes, unregulated acquisition and disposal of land and landed property without some priority of access being given to those who were arbitrarily excluded can only lead to perpetuating the status quo.
amount invested by the non-resident in the purchase of the property. The loan is, however, subject to foreign exchange approval by SARB.\footnote{161}

Land may be owned by foreign natural persons or foreign legal entities persons. In principal, any foreign legal person recognised as such in the country of its origin and/or registration may own property in South Africa. There are, however, procedures and requirements which must be complied with in certain circumstances. Land is normally acquired by the conclusion of an agreement of sale between the relevant parties and the subsequent transfer of the land through registration of a deed of transfer. The agreement of sale must comply with certain formalities.\footnote{162} All disposals of immovable property are subject to transfer duty, which is based on the value of the property and paid to SARS. If the seller is a VAT vendor, the transaction will be subject to VAT. If the purchaser is also a VAT vendor, he or she will also have to pay VAT and will be able to reclaim the VAT paid to the seller as an input credit. VAT is always the liability of the seller who is responsible for paying the tax to SARS from the proceeds of the sale.

All funds introduced to South Africa from outside South Africa to acquire fixed property within South Africa, may be repatriated together with any profit on the resale of the property, provided the title deed of the property has been endorsed ‘non-resident’. Like South Africa residents, any rental income earned by non-residents from the South African property is subject to tax. Similar to South Africa residents, non-residents are liable to pay Capital Gains tax (CGT) on the disposal of immovable property situated in South Africa, including any right or interest in immovable property. CGT is payable in the year in which the asset is disposed of, and is calculated by adding a certain percentage of the capital gain or profit made from the property to an individual’s or company’s income for that year. However, CGT is not paid on the first 1.5 million profit made on the disposal of primary residence. However, non-residents will not qualify for this exception if their primary residence is not in South Africa but elsewhere.

3.14 Codes and National Treatment

The objectives of the Codes are to promote liberalisation of international trade in goods and services and progressive liberalisation of capital movements. All the policies listed above apply to both local and foreign companies operating in South Africa and reflect an open trade and investment regime, with an economy opening up to international competition, lowering of tariffs, reforming the regulatory regime, and providing growth and investment. The overall framework articulated in the various policies ensures predictability and certainty for those operating within its parameters, allowing each to reap benefits created by the investment opportunities. These policies are market-oriented, allowing for private enterprise participation and growth. Since 1994, South Africa has been welcoming foreign investment, and is taking further steps to make the economy more attractive to foreign investors.

In terms of foreign exchange rules, there are no restrictions on the repatriation of capital investments. In addition, the local sale or redemption proceeds of non-resident owned assets in South Africa are freely remittable, and the transfer of dividends, profit and/or income distributions from quoted companies, non-quoted companies and other entities to non-residents in proportion to their percentage shareholding and/or ownership is allowed. Royalties, licence and patent fees are also payable to foreign investors. These policies are in line with the guidelines articulated in the Codes as they ensure the free flow of capital which is a vital component of investment. With solid and stable institutions, South Africa has a well-developed and regulated policy system.

\footnote{161} Ibid., 129, section Q, 6.2.1.3.
\footnote{162} It must be in writing, it must contain the essentials of the agreement, which are: the identities of the parties, the description of the subject matter, and the purchase price.
4. SECTORAL REGIME

4.1 Sectoral Regulations

To determine the level of openness to investment at sector level, specific sectoral legislation and regulations in place in the various sectors are referred to. With regards to service sectors, consideration is also given to the commitments scheduled in the WTO’s General Agreement on Trade in Services (GATS). Analysing South Africa’s GATS Schedule of commitments is another way of determining the level of openness in the service sectors and identifying any limitations or restrictions applicable.

4.1.1 National Treatment exceptions across all services sectors and sub-sectors

With regards to the services inscribed in South Africa’s schedule of commitments, there are two (2) horizontal limitations that apply to every sector and sub-sector. The first limitation applies when commercial presence is established by a foreign company in South Africa. In all instances, local borrowing by South African registered companies with a non-resident shareholding of 75 per cent or more is limited - discussed in paragraphs 3.10.6. The practical effect of this restriction is that a foreign owned South African entity is limited to borrow in South Africa up to the amount of capital introduced from offshore. Permission for the granting of financial assistance over the stipulated limits must be obtained from the FSD through Authorised Dealers. The second limitation applies to the physical presence of foreign natural persons in South Africa: temporary presence for Services Salespersons is limited to a ninety-day (90) period; intra-corporate transferees - this includes executives, managers, specialists and professionals, and personnel engaged in establishment

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163 South Africa’s WTO Schedule of GATS Commitments; ibid., 129, section Q, paragraph 6.2.1.1; Ibid., 131 Regulation 3(1)(f)

164 A services salespersons refers to natural persons not based in South Africa and acquiring no remuneration from a source located within South Africa, who are engaged in activities related to representing a services provider for the purpose of negotiating for the sale of the services of that provider, without engaging in making direct sales to the general public or supplying services. South Africa’s WTO Schedule of GATS Commitments

165 Intra-corporate transferees are natural persons who are either executives, managers, specialists or professionals who have been employed by a juridical person that provides services within South Africa through a branch, subsidiary, or affiliate established in South Africa and who have been in the prior employ of the juridical person outside South Africa for a period of not less than one year immediately preceding the date of application for admission. South Africa’s WTO Schedule of GATS Commitments

166 Executives refers to natural persons within the organisation who primarily direct the management of the organisation or establish goals and policies for the organisation or a major component or function of the organisation, exercise wide latitude in decision-making, and receive only general supervision or direction from higher-level executives, the board of directors, or stockholders of the business. South Africa’s WTO Schedule of GATS Commitments

167 Managers are natural persons within an organisation who primarily direct the organisation, or a department or subdivision of the organisation, supervise and control the work of other supervisory, professional or managerial employees, have the authority to hire and fire or recommend hiring, firing, or other personnel actions and exercise discretionary authority over day-to-day operations at a senior level. South Africa’s WTO Schedule of GATS Commitments

168 Specialists refers to natural persons within an organisation who possess knowledge at an advanced level of continued expertise and who possess proprietary knowledge of the organisation's product, service, research equipment, techniques, or management. South Africa’s WTO GATS Commitments
are all allowed a temporary presence for a period of up to three (3) years. Both these limitations apply to all sectors and subsectors discussed below. Notwithstanding the limitations inscribed in South Africa’s Schedule, South Africa’s framework is considerably open to foreign service providers.

4.2 Manufacturing

South Africa has a significantly established, developed and diversified manufacturing industry sector. Since 1994 the country’s manufacturing sector has particularly focused on creating employment opportunities and fostering economic empowerment, along with the objective of advancing economic growth in the country.

The manufacturing sector is diverse, dominated by six (6) major industry sectors that play important key roles in the development of the country’s manufacturing sector: agriculture and agro-processing; automotive; chemicals; information and communications technology (ICT) and electronics; mining and metallurgy; and textiles and clothing production.

Investment in all manufacturing sectors is open to both local and foreign investors. All public and private companies, both local and foreign, must be registered in terms of the Companies Act and must also maintain accounting records and follow the standards laid out in General Accepted Accounting Principles (GAAP) in preparing their final statements. Foreign companies with branches in South Africa are required to apply the same standards and file their financial statements with the Registrar of Companies. To encourage investment in the sector, the government offers a comprehensive range of incentives to both domestic and foreign investors, most of which are discussed under the incentives heading in this paper. In addition, there are several other schemes.

4.3 Mining

Regulation of South Africa’s mineral and petroleum industry changed fundamentally from 1 May 2004, the date on which the Mineral and Petroleum Resources Development Act (MPRDA) came into operation. The MPRDA extinguishes private ownership of mineral rights and replaces it with a system where South Africa’s mineral (and petroleum) resources are under the State’s custodianship.

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169 Professionals are natural persons who are engaged, as part of a services contract negotiated by a juridical person at a professional level in a profession set out in Part II, provided such persons possess the necessary academic credentials and professional qualifications, which have been duly recognised, where appropriate, by the professional association in South Africa. South Africa’s WTO Schedule of GATS Commitments

170 Natural persons who have been employed by a juridical person for a period of longer than one year immediately preceding the date of application for admission and who occupy a managerial or executive position and are entering South Africa for the purpose of establishing a commercial presence on behalf of the juridical person. South Africa’s WTO Schedule of GATS Commitments

171 Finance for Expansion of Manufacturing; Duty Credit Certificate Scheme (DCCS) for exporters of textiles and clothing; tourism promotion scheme called Tourism Development Finance; Agro-Industries Development Fund established to develop the agricultural, food, beverage and marine sectors; Entrepreneurial Mining and Beneficiation Finance aimed to develop Small, Micro and Medium Enterprises (SMMEs) in the mining and beneficiation sector, and jewellery manufacture; Sector Partnership Fund aimed at promoting collaborative projects enhancing the productivity and competitiveness of the manufacturing and agro-processing companies; and Techno-industries supported through the IDC’s Techno-industries Development Finance.

172 Act No. 28 of 2002.

173 Ibid., preamble, section 2 (a) and section 3.
Under the new system, the State, as custodian, and acting through the Minister of Minerals and Resources, may grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right.

Both nationals and foreigners have the right to apply for a prospecting right, mining permit, reconnaissance permit, beneficiation right, exploration right, and/or mining right as long as they comply with the requirements set out in the law. The law makes no reservations for South African citizens; however, it empowers the Minister to give preference to applications from historically disadvantage people when considering applications received on the same date.

Application procedures for the different rights are similar: in all cases applications must be lodged with Regional Office where the land is situated, with all the required documents, including farm name and number, title deed, applicant’s details, company name and registration number, proof of technical and financial ability, and type of mineral. The applicant must pay a non-refundable application fee, which varies according to activity. The rights applied for may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without prior written consent from the Minister. This consent must be granted if the person to whom the right will be alienated or disposed of is capable of carrying out and complying with the obligations and the terms and conditions of the right in question and satisfies the requirements of the MPRDA. The rights are usually for two (2) years and can be renewed by lodging an application, and the length of the renewal periods for the different rights varies. Any person who applies for a prospecting right or mining right must submit an environmental management plan or programme, as the case may be, as prescribed. An applicant for a prospecting right and a mining right is required to simultaneously apply for an environmental authorisation.

The holder of a prospecting right or mining right must apply for a closure certificate from the Regional Manager of the region in which the land in question is situated, upon: the lapsing, abandonment or cancellation of the right in question; cessation of the prospecting or mining operation; the relinquishment of any portion of the land to which a right, permit or permission relates; or completion of the prescribed closing plan to which a right, permit or permission relates. No closure certificate may be issued unless the Chief Inspector and each government department charged with the administration of any law which relates to any matter affecting the environment have confirmed in writing that the provisions pertaining to health, safety and management pollution to water resources, the pumping and treatment of extraneous water and compliance to the conditions of the environmental authorisation have been addressed. The holder of the prospecting right or a mining right remains responsible for any environmental liability, pollution or ecological degradation, and the management thereof, until the Minister has issued a closure certificate to the holder concerned.

Mining companies extracting diamonds and other minerals and base metals, except gold, are levied an income tax rate of 28 percent and a STC rate of 10 percent. Income derived from gold mining is taxed on the basis of a formula. Mining companies are liable for VAT on goods and services supplied to them, but exports of mining products are zero rated. In addition, the MPRDA provides for the payment of ‘prescribed royalties to the State’ by holders of the various forms of rights granted by the

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174 Ibid., 172.
175 Ibid., section 11.
176 Ibid., sections 16 and 22.
177 Ibid., section 43.
178 Ibid.
Minister. These royalties are paid in terms of the Mineral and Petroleum Royalty Act\textsuperscript{179} and the Mineral and Petroleum Resources Royalty (Administration) Act.\textsuperscript{180} All rights holders must register with SARS for purposes of paying the royalty. The royalty is determined by multiplying the royalty rate (for the year of assessment) by the gross sales of the extractor in respect of the mineral resource during the year of assessment. The Royalty Act distinguishes between a refined mineral resource (i.e., gold and platinum) and an unrefined mineral resource (i.e., coal and iron) as defined in Schedules 1 and 2 to the Royalty Act. The royalty rate in respect of a refined mineral resource must not exceed 5 percent and the royalty rate in respect of an unrefined mineral resource must not exceed 7 percent.

4.4 Legal services

South Africa maintains restrictions on the provision by foreigners of legal services. As such, when it comes to the provision of legal services, there are two (2) categories: legal services in foreign and international law only, and legal services in domestic law only. With respect to the former, South Africa accords national treatment to foreign lawyers to the extent that they are providing legal advice on their home country laws and on international law only, through a commercial presence in South Africa.\textsuperscript{181} For the latter, foreign attorneys are not allowed to practice South African law through a commercial presence.\textsuperscript{182} This in effect means that only South Africa lawyers are authorised to plead a case in South African courts. The limitation is due to accreditation restrictions in legal services.

4.5 Auditing services

National treatment is granted for auditing services, except the accreditation of auditing services, which is reserved for South African citizens.\textsuperscript{185}

The regulatory framework for auditors in South Africa is established through the Auditing Professions Act.\textsuperscript{184} The Act provides for the establishment of the Independent Regulatory Board for Auditors (IRBA);\textsuperscript{185} education, training and professional development of registered auditors, the accreditation of professional bodies, the registration of auditors, and regulation of the conduct of registered auditors. The IRBA is responsible for; \textit{inter alia}, the registration, regulation and discipline of registered auditors (RAs).\textsuperscript{186} The primary objective of the IRBA as set out in section 2 of the Act is to protect the public in South Africa through regulation of the auditing profession. Such regulation is intended to advance the development and maintenance of internationally comparable ethical and auditing standards and to advance the implementation of appropriate standards of competence and good ethics. The IRBA thus ensures quality of entry into the audit profession. The Act provides the IRBA with the option to either provide the education, training and assessment programmes of potential auditors.\textsuperscript{185}

\textsuperscript{179} Act No. 28 of 2008.
\textsuperscript{180} Act No. 29 of 2008.
\textsuperscript{181} South Africa’s WTO Schedule of GATS Commitments.
\textsuperscript{182} Ibid.
\textsuperscript{183} Ibid.
\textsuperscript{184} Act No. 26 of 2005.
\textsuperscript{185} The IRBA is the successor to the Public Accountants and Auditors Board (PAAB).
\textsuperscript{186} The IRBA prescribes minimum qualifications; competency standards and requirements for registration of auditors. It also considers and decides on any application for registration of auditors.
auditors directly (direct provision), or to accredit professional bodies to conduct all or some of such education, training and assessment programmes. The Act further provides the IRBA with the right to conduct the final test, known as the Public Practice Examination (PPE) that assesses the professional competence of registered auditors (RAs).

Registration of individuals as registered auditors is set out in section 37 of the Auditing Professions Act, and requires the following: complying with prescribed education, training and competency requirements; arrangement for continuing professional development if applicant is not a member of an accredited professional body; is a resident in South Africa; and is a fit and proper person to practice the profession. Upon registration, the applicant’s name is entered into the auditor’s register and the applicant is issued a certificate of registration on payment of the prescribed fee.

In terms of section 38 of the Auditing Professions Act the following can register as auditing firms: partnerships of which all partners of the partnership must be registered auditors; sole proprietors where the proprietor is registered as an auditor; and companies which are incorporated and registered as companies in terms of the Companies Act. The companies must also have a share capital and the memorandum of association must provide that the directors and past directors shall be jointly and severally liable, together with the company, for its debts and liabilities contracted during their periods of office; only individuals who are registered auditors can be shareholders of the company; every shareholder of the company must be a director of the company, and every director a shareholder.

Requirements set out for individuals and companies are applicable to both local and foreign applicants wanting to offer auditing services.

4.6 Architectural services

There are no national treatment limitations in architectural services. Foreign investors have full market access into this service. However, in terms of market access for foreign architects that have not established a commercial presence in South Africa, there is a requirement that locally registered architects must be used for building plans of 500 square meters or more. This effectively means that architects that do not have an office, branch, or subsidiary in South Africa will be subjected to this requirement.

The Architectural Profession Act provides for the registration of professionals, candidates and specified categories in the architectural profession. A person must apply in the prescribed application form, to the South African Council for the Architectural Profession. Foreign architects are permitted to register and practice independently in South Africa. Providing that they have a work permit, the registration procedure is the same as for local architects. The following documentation is required:

187 The IRBA prescribes the minimum requirements for accreditation of professional bodies, and considers and decides on any accreditation application, together with the period of validity of the accreditation – Ibid., 184, section 5.
188 Ibid., 184, section 7 (1) (b).
189 In general, architectural services include the following: site study, blueprint design, design development, final design, contract administration, overseeing the construction of projects, and post construction services.
190 Ibid., 181
191 Act No. 44 of 2000
192 Professional Architects, Senior Architectural Technologists, Architectural Technologists and Architectural Draughtspersons
recognised degree in architecture, identity documents, proof of current registration in home country, proof of financial situation, and proof of employment (if available). It is strongly recommended that foreign architects form joint ventures/associations with local architects.

4.7 Engineering services

There are no national treatment limitations in engineering services. To practice as an engineer in South Africa, one has to be registered as such with the Engineering Council of South Africa (ECSA), as required by section 19(1) of the Engineering Profession Act. As part of the registration process, ECSA evaluates the academic qualification of all applicants wishing to register as professional engineers in terms of section 19(2)(a) of the Act. Foreign applicants are likely to be called in for Qualification Evaluation Committee interviews. This is to further assess their qualification and its equivalence to the South African degrees. After the assessment process, ECSA advises applicants about which category of qualification they may apply for. The assessment is undertaken at a fee. Once the assessment has been done, and a candidate has been notified of the equivalence of their qualification, and what they are eligible to apply as, they then fill in the application form, and pay an additional fee.

Engineers with qualifications covered under the Washington Accord, the Sydney Accord, or the Dublin Accord, are not required to undergo the assessment process - the registering bodies in countries such as Australia, Canada, Chinese Taipei, Hong Kong, Ireland, Japan, Korea, Malaysia, New Zealand, Singapore, United Kingdom, and United States have agreed to recognise each other’s accredited university degrees in engineering. ECSA has existing agreements with these organisations, and qualifications under these accords are based on international accreditation of engineering qualifications. This not only confirms that one’s academic qualification is internationally acceptable, but also enhances one’s marketability. Registration with ECSA is vital in order to get a work permit in South Africa, as well as to enable an individual to tender for engineering projects in South Africa. Foreign engineering practitioners will not qualify for a work permit in the country without registering with ECSA.

4.8 Telecommunication services

Telecommunication services refer to both basic and enhanced, or value-added, telecommunication services, and include both fixed line and mobile telecommunication. Generally, basic services entail transmitting voice and data signals over telecommunication networks, without changing the form or

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193 In general engineering services include the following: technical feasibility studies, project impact, studies planning, design, construction, and management services

194 Ibid., 181

195 ECSA is a statutory body created in terms of the Engineering Profession Act, 2000, Act No. 46 of 2000

196 Act No. 46 of 2000

197 Foreign applicants sometimes apply for what they believe is the equivalent qualification, as an engineer for example, only to have their registration declined because the qualification of the applicant was actually equivalent to an ECSA technician, or technologist qualification.

198 The Washington Accord, signed in 1989, is an international agreement among bodies responsible for accrediting engineering degree programs. It recognises the substantial equivalency of programs accredited by those bodies and recommends that graduates of programs accredited by any of the signatory bodies be recognised by the other bodies as having met the academic requirements for entry to the practice of engineering – accessed 29 February, http://www.ieagreements.org/Washington-Accord/
content of the signal. Enhanced services add value to the transmission of basic voice and data signals. With regards to basic telecommunications services, there are no limitations on national treatment. However, the provision of telecommunication services by a foreign investor through commercial presence in South Africa is restricted in that foreign investment in South African service suppliers is limited to a cumulative maximum of 30 percent. With respect to enhanced telecommunication services, there are limitations on the bypass of South African facilities for routing of domestic and international traffic - enhanced service providers cannot bypass domestic and international network facilities controlled by the network monopoly, Telkom, in offering their services.

The Independent Communications Authority of South Africa (ICASA) regulates all wireless transmissions and issues licences to providers of telecommunication services and broadcasters. ICASA regulates not only fixed line and mobile telecommunication services, but is also mandated to regulate electronic communications, broadcasting services, and postal services. The Telecommunications Act determines the procedures for applications for all the specialised licences.

At present, there are two (2) fixed-line operators: Telkom and Neotel Ltd. Telkom, the incumbent operator, is partly privatised. Its main activity remains fixed telephony but it has diversified its services to offer Asymmetric Digital Subscriber Line (ADSL). Telkom has three subsidiaries. Since 2006, the fixed-line market has been open to competition. Telkom had until 1 November 2011 to

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199 Basic services for South Africa include the following: Voice services, except over value-added network, packet and circuit switched data transmission services, telex service, facsimile services and private leased circuit services, paging services, personal radio communication services, and trunked radio system services, Mobile Cellular, including mobile data, and satellite-based services.

200 Enhanced services for South Africa include the following: Electronic mail; voice mail; on-line information and data base retrieval; Electronic data interchange (EDI); enhanced/value-added facsimile services, including store and forward, store and retrieve; code and protocol conversion; on-line information and/or data processing (including transaction processing).

201 Ibid., 181.

202 Ibid., 181.

203 The Independent Communications Authority of South Africa (ICASA) is the regulator for the South African communications, broadcasting and postal services sector. ICASA was established by the Independent Communications Authority Act, Act No. 13 of 2000.

204 Act No. 103 of 1996

205 The state has 39.8 percent of direct shares and a further 10.9 percent indirect interest through the Public Investment Corporation (PIC). Other shareholders include: Government of South Africa (ZA) 39.76%; PIC 10.61; Allan Gray Investment Council (ZA) 9.19%; Old Mutual Asset Managers 3.07%; Boston Company Asset management LLC 2.99%; Acadian Asset Management 2.55%; STANLIB Asset Management 2.03%; Kagiso Asset Management (Pty) Ltd 2.01%; Dimensional Fund Advisors 1.97%; GMO LLC 1.84%; Oasis Asset Management 1.73%; Control Account 1.57%; Acajou Investments Ltd 1.56%; LSV Asset Management 1.54%; Investec Asset Management 1.37%; The Vanguard Group Inc 1.31%; Momentum Asset Management 0.89%; Sanlam Investment Management 0.64%; ADR Holders Not Identified 0.51%; Ashmore EMM LLC 0.50% - as at 31 March 2013.

206 Asymmetric Digital Subscriber Line (ADSL) is a type of broadband communications technology used for connecting to the Internet. It is a high-speed Internet access service that utilises existing copper telephones lines to send and receive data at speeds that far exceed conventional dial-up modems. ADSL service requires an Internet service provider (ISP), an ADSL modem and that subscribers must be in close geographical locations to the provider's central office to receive ADSL service.

207 Trudon (Pty) Limited, Swiftnet (Pty) Limited and iWay Africa Group
unbundle the local loop that links the national telecom network to homes and businesses.\textsuperscript{208} Telkom has not met the target date and is still in the process of unbundling. Local-loop unbundling is seen as a way of spurring competition in the fixed-line market, driving down prices and fostering innovation and product development. Neotel Ltd became South Africa’s second fixed line operator in 2006.\textsuperscript{208} but its services for businesses began only in 2007 and for private consumers in 2008. Neotel is licensed as South Africa’s first alternative infrastructure-based telecom provider, able to deliver wireline and wireless data telecoms services at national and international levels.\textsuperscript{210}

Mobile phone operators include Vodacom, Mobile Telephone Networks (MTN), Cell C, and Virgin Mobile.\textsuperscript{211}

4.9 Construction services

South Africa has opened up its construction services sector for general construction work for buildings, general construction work for civil engineering, installation and assembly work, and building completion and finishing work. All these services are subject to national treatment requirements. There are almost no restrictions on the form or extent of foreign investment, except that, as government is the big infrastructure spender in South Africa, if foreign investors want to do business with any government enterprise or organ of state – that is, to tender for business, apply for licences and concessions, enter into PPPs, or buy state-owned assets, they need to identify suitable parties and tender jointly on projects. This is often done through a joint venture (JV) or partnership.

4.10 Distribution services (Wholesale and Retail services)

The distribution services industry provides wholesale trade services and retail trade services. Wholesalers acquire products supplied by others and subsequently resell them to retailers. Retailers sell goods and services to the public for personal or household use. South Africa accords national treatment to foreign investors in wholesaling and retailing services.\textsuperscript{212} For manufacturers, suppliers and brand owners, the right distribution strategy is key to maximising margins and commercial success. Whilst selling direct can enable the supplier to retain control of the supply chain, an agency or distribution model can provide quicker access to distant markets together with the benefit of local knowledge.

\textsuperscript{208} Government Communication and Information System (2008)

\textsuperscript{209} Neotel is owned by Nexus Connexion Ltd (19%), Communitel (12.5%) and Tata Communications (68.5%). In May 2014 a buyout offer of R7bn from cellular network Vodacom was accepted. Regulatory approval by the Independent Communications Authority of South Africa was still pending at the end of May 2014.


\textsuperscript{211} All are privately owned: Vodacom is owned by Vodafone (65 percent) and Telkom; MTN is owned by several private investors Public Investment Corp Ltd 16.9%; M1 Ltd. 8.38%; Dodge & Cox, Inc. 2.39%; Old Mutual Investment Group (South Africa) (Pty) Ltd. 2.16%; The Vanguard Group, Inc. 2.01%; Capital Research & Management Co. (World Investors) 1.92%; Capital Research & Management Co. (Global Investors) 1.41%; Coronation Asset Management (Pty) Ltd. 1.25%; Mobile Telephone Networks Holdings Pty Ltd. 1.19%; Liberty Group Ltd. (Investment Management) 1.17%; Cell C has three shareholders: Oger Telecom South Africa, Lanun Securities 5A (Lanun) and (CellSAF) (Pty) Limited, which respectively hold 60 percent, 15 percent and 25 percent of the shares in 3C Telecommunications (Pty) Limited (3C) which in turn owns 100 percent (Cell C) (Pty) Limited and Virgin Mobile is a joint venture between Virgin Group and Cell C.

\textsuperscript{212} Ibid., 181
South Africa offers foreign suppliers a variety of methods to distribute and sell their products, including using an agent or distributor, selling through established wholesalers or dealers, selling directly to department stores or other retailers, or establishing a branch or subsidiary. When appointing a distributor in South Africa, the same considerations apply as when appointing an agent. A distribution or agency agreement is entered into between the manufacturer and the supplier to distribute and/or sell the manufactured items. The supplier may enter into a distribution agreement with separate stores to sell the product. The agreement may also detail how the goods will be merchandised, how much supplies will be available to the store, and how the product(s) are to be advertised. Generally the manufacturer pays a fee to enter into a distribution or agency agreement with a supplier.

4.11 Electricity generation and distribution

Wholly state-owned enterprise Eskom is in charge of electricity generation and transmission. Eskom owns and operates the national transmission system and produces electricity for the domestic market and exports to neighbouring countries. Additional electricity is generated and distributed by South African licensed municipalities and private companies. In 2003, EDI Holdings (a company wholly owned by government) was established to address the issue of energy distribution and to facilitate the process of restructuring the electricity distribution industry in South Africa; and to invest into financially viable independent Regional Electricity Distributors (REDS) to ensure a more effective and efficient distribution industry capable of providing affordable and accessible electricity to consumers. In 2011 EDI Holdings became accountable to the Ministry of Energy.

The National Energy Regulator (NER) enforces the national electricity regulatory framework and provides for licences and registration for generation, transmission, distribution, trading, and the import of electricity. No person may, without a licence issued by the Regulator operate any generation, transmission or distribution facility; or import or export any electricity; or be involved in trading. The applicant must publish in prescribed format a notice in newspapers and or other media circulating in the area of the proposed activity in at least two (2) official languages. Any generation or transmission licence issued is valid for a period of 15 years or such longer period as the Regulator may determine; and any distribution or trading licence issued is valid for the period determined by the Regulator, and licensees may not assign a licence to another party. The reason for government regulation is because electricity is not just a commodity that should be traded in the market place, but rather an essential service that needs to be controlled and supplied by government to ensure its availability, reliability and affordability.

Competition is being gradually introduced into the market for electricity generation. This is being achieved with the creation of independent generating companies to compete with each other in order to achieve greater market efficiencies. This will be followed by the introduction of private-sector participation in generation. The aim is to have 30 percent of the country's power generated by the private sector while Eskom generates the remaining 70 percent.

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213 Botswana, Namibia and Swaziland. Swaziland imports 80 percent of its electricity from South Africa
214 Part of its objective is to review the value chain with a view to develop a holistic approach to revitalising electricity infrastructure, energy security as well as financial implications.
215 Electricity Regulation Act No. 4 of 2006, section 8 (1)
216 Ibid., section 12
217 Ibid., section 21

77
South Africa’s first private sector-owned power generation gas-turbine plants were built and operate in Durban and Port Elizabeth. Most of the funding came from foreign direct investment, with some contribution from South African companies. AES Pacific Oceans Holdings financed, designed, constructed, owns, operates and maintains the two (2) power plants. The power plants will contribute to meeting the country’s security of supply and are an integral part of the National Integrated Resource Plan developed by the NER. The project was initiated to introduce private sector participants, and thus competition, to the generation segment of the electricity supply industry. The introduction of an independent power producer (IPP) means that Eskom will purchase the electricity from the power plants over a period of 15 years, subject to the developer meeting specified performance requirements.

4.12 Financial services

Financial institutions in South Africa have had several years of robust economic growth, supported by prudent macroeconomic management. The financial sector has also benefited from an effective regulatory framework. Commercial banks are the largest segment of the financial sector followed by life insurance companies.

4.12.1 Insurance services

South Africa's insurance industry comprises long-term (mostly life) insurance, short-term insurance (corporate, general, personal motor vehicle), and reinsurance. Investors can invest in direct life insurance, direct non-life insurance, reinsurance, insurance intermediation and auxiliary services. There is no state ownership in the sector and there are no national treatment limitations. However, both local and foreigner investors are subject to certain conditions.

All insurers/reinsurers (and insurers on whose behalf policies are sold) must be incorporated as a public company in South Africa and registered with the supervisory authority to carry on insurance business in South Africa; in addition, the acquisition of shares or any other interest (by a resident or non-resident) in a registered insurer resulting in the holding of 25 per cent or more of the value of all the shares or other interest in that business, requires the written approval of the Registrar of Insurance; furthermore, the executive chairman, public officer and the majority of directors must be resident in South Africa; life insurance actuaries must also be resident in South Africa; all licence holders are required to submit quarterly and annual financial statements; and pay an annual levy to the Financial Services Board (FSB).

The minimum capital requirement for long-term insurers (for one or more kinds of long-term insurance policies) is R 10 million, or an amount equal to the operating expenses, or an amount equal to

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218 AES Pacific Oceans Holdings (foreign investors), Tiso Energy (Pty) Ltd, Mbane Power (Pty) Ltd, and Kurisani Youth Development Trust (South African investors)

219 Auxiliary services would include for instance: consultancy, actuarial, risk-assessment etcetera

220 Ibid., 181; Long Term Insurance Act, No. 52 of 1998, section 7

221 Ibid., 181; Long Term Insurance Act, No. 52 of 1998, section 26 (1) and (2) and Short Term Insurance Act, No. 53 of 1998, section 25 (1) and (2)

222 Ibid., 181; Long Term Insurance Act, No. 52 of 1998, section 16.

223 Ibid., 181; Long Term Insurance Act, No. 52 of 1998, section 20 (3).

224 The minimum capital requirement means the capital or solvency margin, as the case may be, required for that institution by the regulatory authority concerned.
0.3 percent of its gross contingent liabilities under unmatured policies, whichever is higher.\textsuperscript{225} The Registrar may, however, relax the minimum capital adequacy requirement for a specific insurer upon conditions and for the duration that the Registrar determines necessary.\textsuperscript{226}

For short-term insurers (for one or more kinds of short-term insurance policies) the minimum capital requirement is an amount equal to or greater than R 5 million or such smaller amount as the Registrar may, in a particular case and for a determined period approve; or 15 percent of the greater of the amount of the premium income of the insurer after deduction of all premiums payable by it in terms of any reinsurance policies entered into by it in respect of any policies.\textsuperscript{227} The actual capital will, however, be dictated by the type and volume of business to be conducted, as set out in the five-year (5) projections submitted with the application. Before the applicant is registered as a long-term or short-term insurer, the company auditors must confirm that the required capital has been paid. The Registrar must be satisfied that the proposed shareholders have the financial means to provide the minimum start-up capital as well as the ability to provide further capital to the insurer when required. The specific capital requirement is intended for the protection of policyholders and to ensure that there are sufficient local assets to back-up domestic contracts in the event of failure of the insurer.

Every long-term and short-term insurer must pay an annual levy to the FSB, which is responsible for regulating South Africa’s non-banking financial services sector, including insurance companies, securities firms, participation bond schemes, portfolio management, pension funds mutual funds and insurance intermediaries.\textsuperscript{228}

4.12.1.1 Limitation on control and certain shareholding or other interest in long-term insurers

The Long-Term Insurance Act limits control and shareholding in long-term insurers. The limitations apply to both local and foreign investors. Section 26\textsuperscript{229} states that no insurer shall without the approval of the Registrar, acquire or hold shares or any other interest in a long-term insurer, which results in that person, directly or indirectly, alone or with a related party, exercising control over that long-term insurer. If the aggregate nominal value of shares to be acquired in a long-term insurer will amount to 25 percent or more of the total nominal value of all of the issued shares of the long-term insurer concerned, prior approval to purchase has to be sought from the Registrar.\textsuperscript{230} Approval may be given subject to above limitations and any other conditions that may be determined by the Registrar. Approval will not be given if it would be contrary to the public interest; or the interests of the policyholders, or of persons who may become policyholders, of the long-term insurer.\textsuperscript{231} The same limitations are applicable in the short-term insurance sector.\textsuperscript{232}


\textsuperscript{226} Ibid., Paragraph 10.

\textsuperscript{227} ST Board Notice 27 of 2010, Paragraph 5, Prescribed requirements for the calculation of the value of assets, liabilities and capital adequacy requirement of Short-term insurers.

\textsuperscript{228} Financial Services Board, 2008.

\textsuperscript{229} Long Term Insurance Act, Act No. 52 of 1998.

\textsuperscript{230} Ibid., section 27 (2).

\textsuperscript{231} Ibid., section 3 (b).

\textsuperscript{232} Short Term Insurance Act, No. 53 of 1998, section 25.
4.12.2 Banking

In 1994 it was deemed appropriate to allow foreign banks to conduct the business of a bank in South Africa by means of branches.\textsuperscript{233} Owing to the fact that the Banks Act,\textsuperscript{234} had in effect prevented the establishment of branches in South Africa by foreign banks, the Banks Act was amended by the Banks Amendment Act, 1994.\textsuperscript{235} Section 11 of the Banks Amendment Act, \textit{inter alia}, inserted section 18A into the Banks Act, under the provisions of which section it was made legally possible for a bank established in a country other than South Africa, with the prior written consent of the Registrar of Banks and subject to specified conditions, to conduct the business of a bank by means of a branch in South Africa. The amended provisions of the Banks Act came into operation on 1 May 1995.\textsuperscript{236} Conditions for conducting the business of a bank by a foreign institution by means of a branch in South Africa were made by the Minister of Finance under section 90 of the Banks Act.\textsuperscript{237} These conditions effectively clothe a branch with what may be regarded as some form of legal personality. The provisions of the Banks Act, 1990, as amended, as well as the Regulations relating to Banks apply equally to foreign branches.

The Bank Supervision Department (BSD) of the South African Reserve Bank (SARB) is responsible for commercial banking regulation and supervision. The BSD is governed by the Banks Act, amendments to the Banks Act,\textsuperscript{238} and the Mutual Banks Act,\textsuperscript{239} under which the SARB must assign a Registrar of Banks to be in charge of banking supervision. The Registrar must be approved by the Ministry of Finance. Banking supervision has been strengthened in recent years through SARB’s implementation of Basel II, Basel 2.5 and Basel III frameworks.\textsuperscript{240} In addition, the National Credit

\begin{enumerate}
\item In terms of the Banks Act, 1990 (Act No. 94 of 1990), a branch means an institution that is not a public company, but by means of which a foreign institution conducts the business of a bank in South Africa under the authorisation of the Registrar of banks.
\item Act No. 94 of 1990.
\item Act No. 26 of 1994.
\item Operation was effected through a Proclamation by the President issued under section 58 of the Banks Amendment Act and published in \textit{Government Gazette} No. 16380 of 28 April 1995.
\item The conditions were published in \textit{Government Gazette} No. 16356 of 3 April 1995. Subsequently various amendments and refinements were made to the conditions in accordance with international best practices. The latest conditions were published in \textit{Government Gazette} No. 30627 of 1 January 2008.
\item Amendments to the Banks Act have been proposed by the South African Reserve Bank (SARB) to align its provisions to the new Companies Act as banks are public companies and amendments brought about by the new Companies Act will have an impact on both the business of banks and the regulatory framework governing banks. The Banks Amendment Act, 2013, was published in \textit{Government Gazette} No. 37144 of 10 December 2013.
\item Act No. 124 of 1993.
\item Basel II, Basel 2.5 and Basel III are internationally agreed frameworks containing minimum requirements for banks and banking groups, issued by the Basel Committee on Banking Supervision. The purpose of the Basel II, Basel 2.5 and Basel III frameworks is to establish international best practices and standards regarding bank regulation and supervision, including creating regulations about how much capital banks need to guard against the types of financial and operational risks banks face. The Basel Committee on Banking Supervision provides a forum for regular cooperation on banking supervisory matters. Its objective is to enhance understanding of key supervisory issues and improve the quality of banking supervision worldwide. It seeks to do so by exchanging information on national supervisory issues, approaches and techniques, with a view to promoting common understanding. At times, the Committee uses this common understanding to develop guidelines and supervisory standards in areas where they are considered desirable. The Committee’s members come from Argentina,
Regulator (NCR), established under the National Credit Act,\textsuperscript{241} regulates the “credit industry” in South Africa,\textsuperscript{242} and all types of household credit extended by banks and non-banking institutions.

\subsection*{4.12.2.1 Openness of sector to FDI}

South Africa's banking sector comprises commercial banks (foreign and domestically owned), mutual banks, co-operative banks, and development banks. In terms of South Africa’s GATS commitments, there is a host of banking services that can be offered.\textsuperscript{243} Overall, the banking services sector in South Africa is fairly open. A company may conduct banking operations in South Africa through one of three (3) mediums. All of these require the approval of the Registrar of Banks, who heads up the Banking Supervision Department of the Reserve Bank. The three (3) mediums are: a separate banking company, a branch of an international bank, and a representative office of an international bank.

To establish a separate banking company, the investor must begin by incorporating a public company with the Registrar of Companies and Intellectual Property Commission. Incorporation may entail establishing a South African subsidiary of the foreign institution. The greater of R250m or 8 percent of risk weighted exposure is required as capital to establish a bank\textsuperscript{244} (the minimum capital requirements for establishing a domestic or foreign bank are the same). The investor must also supply specified information as required by the Banks Act. The conditions and procedures for establishing a branch in South Africa are discussed in detail in paragraph 4.12.2.2 below. The requirements for establishing a representative office are less onerous, and it takes considerably less time to obtain approval for a representative office. However, representative offices cannot take deposits - they merely act as information conduits to the parent company. The rule that only locally established and supervised entities may offer banking services is a key element in assuring the effective protection of investors operating in the domestic market.

\textsuperscript{241} Act No. 34 of 2005

\textsuperscript{242} Department of Trade and Industry, The National Credit Regulator (NCR)

\textsuperscript{243} Banking services include the following: accepting of deposits and other repayable funds from the public; lending of all types, including, \textit{inter alia}, consumer credit, mortgage credit, factoring and financing of commercial transactions; financial leasing; all payments and money transmission services, including credit, charge and debit cards, travellers cheques and bank drafts; guarantees and commitments; trading for own account or for account of customers the following including - money market instruments, foreign exchange, derivative products, exchange rate and interest rate instruments, transferable securities, other negotiable instruments; participation in issues of all kinds of securities, including underwriting and placement as an agent; money broking; asset management, such as cash or portfolio management, all forms of collective investment management, custodial depository and trust services; settlement and clearing services for financial assets, including securities, derivative products and other negotiable instruments; provision and transfer of financial information, and financial data processing and related software by providers of other financial services; and advisory and other auxiliary financial services\textsuperscript{243}

\textsuperscript{244} Conditions for the conducting business of the business of a bank by foreign institutions through a branch, Government Gazette Notice No. 30627 of 1 January 2008, section 3(c)(i) and (ii)
4.12.2.2 Conditions for conducting the business of a bank by a foreign bank by means of a branch in South Africa

Prior written authorisation of the Registrar\(^{245}\) to conduct the business of a bank by means of a branch in South Africa and subject to prescribed conditions is required.\(^{246}\) To obtain the prior authorisation of the Registrar, the foreign institution concerned must in the manner and on the form prescribed by the Regulations relating to branches, lodge with the Registrar a written application.\(^{247}\) If the Registrar grants an application he or she then issues to the foreign institution concerned a certificate of authorisation to conduct the business of a bank by means of a branch in South Africa.\(^{248}\) However, there are a number of conditions that are in place for the conducting, by a foreign bank, of the business of a bank by means of a branch in South Africa. Certain prudential, management, business operation, supervisory, name, application and fee requirements have to be met. Once issued, a banking licence is not transferable.

4.12.2.3 Prudential requirements

During the period commencing not earlier than 18 months prior to its application to establish a branch, the foreign bank must have held, and at all times during the operation of its branch hold, net assets, as certified by its auditors and reflected in its audited financial statements, to a total value exceeding USA $1 billion;\(^{249}\) the foreign bank must have been afforded a long-term investment grade debt rating, acceptable to the Registrar of Banks, by an internationally recognised rating agency;\(^{250}\) the branch has to manage its affairs in such a way that the sum of its branch capital does not at any time amount to less than the greater of an amount of R 250 million, or 8 per cent of the amount of the assets and other risk exposures of the branch, calculated, as in the case of a bank registered in terms of the Banks Act, in accordance with the relevant provisions of the Banks Act;\(^{251}\) (the Registrar is however, afforded the power under certain specific circumstances, to allow a foreign branch that is currently registered to hold capital below the above-mentioned threshold of R 250 million, subject to certain conditions); and the branch has to hold liquid assets\(^{252}\) in South Africa, as in the case of a bank registered in terms of the Banks Act, to a prescribed value.\(^{253}\)

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245 The Registrar is the Registrar of Banks, who is responsible for the registration of all banks and all other associated duties
246 The Banks Act, 1990 including all amendments of the Banks Act, 2007 (Act No. 20 of 2007), section 18A (1)
247 Ibid., section 18A (2)
248 Ibid., section 18A (6)
249 Ibid., 244, section 3(a)
250 Ibid., section 3(b)
251 Ibid., section 3(c)(i) and (ii)
252 Level one high-quality liquid assets means cash; gold coin and bullion; such percentage or amount of central bank reserves as may be determined by the Governor of the Reserve Bank from time to time; marketable securities representing claims on or claims guaranteed by sovereigns, central banks, non-central government public sector entities, the Bank for International Settlements, the International Monetary Fund, the European Commission or multilateral development banks that comply with such requirements or such conditions as may be prescribed in the Regulations relating to Banks. The Banks Act, 1990 (including all amendments to the Banks Act) section 1
253 Ibid., 244, section 3(d)
4.12.2.4 Management

Every person who holds, or stands to hold, the office of an executive officer of a branch has to be a person who is fit and proper. At least two (2) natural persons residing in South Africa who are authorised to conduct the management of the business of the branch have to be appointed by the foreign institution, and at least one (1) of them has to be appointed as the chief executive officer of the branch. The appointed person is responsible for fulfilling the responsibilities of the board of directors of a bank.\(^{254}\)

4.12.2.5 Business operations

A branch may accept deposits from both juristic persons and natural persons.\(^{255}\) A foreign bank that has been granted authorisation to establish a branch in South Africa, may conduct such business by means of more than one branch in South Africa, provided written approval from the Registrar is obtained before any additional branch is opened, and all the different branches are deemed to constitute a single entity.\(^{256}\) The business operations of a branch have to be covered and supported at all times by a valid letter of comfort\(^ {257}\) and undertaking issued by the relevant foreign parent bank, whereby the foreign parent bank confirms its understanding and acceptance of a number of obligations.\(^ {258}\)

4.12.2.6 Supervisory obligations

The Registrar must be satisfied that the foreign institution lawfully conducts business similar to the business of a bank in a country other than South Africa and that the responsible home-country supervisory authority of the foreign institution: has duly authorised the foreign bank’s proposed establishment of a branch in South Africa;\(^ {259}\) accepts, is committed to and complies with the proposals, guidelines and pronouncements of the Basel Committee on Banking Supervision;\(^ {260}\) is not legally impeded from complying with the proposals, guidelines and pronouncements of the Basel Committee;\(^ {261}\) accepts its responsibilities in terms of the above as the home-country supervisory authority;\(^ {262}\) as far as may be reasonably possible, ensures that the members of the board and the

\(^{254}\) Ibid., section 4

\(^{255}\) Ibid., section 5 (a)

\(^{256}\) Ibid., section 5 ((b) (i) and (ii))

\(^{257}\) A letter of comfort is a letter issued to a lending institution by a parent company acknowledging approval of a subsidiary company’s attempt for financing. The letter merely gives assurance to the lending institution that the parent company is aware and approves the situation. The letter in no way guarantees the loans approval for the subsidiary company

\(^{258}\) Ibid., 244, section 5

\(^{259}\) The Banks Act, 1990 (including all amendments to the Banks Act) section 1; Conditions for the conducting of the business of a bank by foreign institutions through a branch (Branch Regulations), Government Gazette Notice No. 30627 of 1 January 2008, section 6 (b) (i)

\(^{260}\) The Banks Act, 1990 (including all amendments to the Banks Act) section 1; Conditions for the conducting of the business of a bank by foreign institutions through a branch (Branch Regulations), Government Gazette Notice No. 30627 of 1 January 2008, section 6(b) (ii)

\(^{261}\) The Banks Act, 1990 (including all amendments to the Banks Act) section 1; Conditions for the conducting of the business of a bank by foreign institutions through a branch (Branch Regulations), Government Gazette Notice No. 30627 of 1 January 2008, section 6 (b) (iii)

\(^{262}\) Ibid., 244, section 6 (b) (iv)
executive management of the foreign bank at all times consists of fit and proper persons;\textsuperscript{263} is satisfied with the standard of risk management maintained by the foreign bank;\textsuperscript{264} and is committed to keeping the bank supervisory authorities in South Africa informed of any material information regarding the financial soundness of the foreign bank and its branch, since issues such as the solvency and the liquidity of a foreign bank fall within the regulatory responsibility of the home-country supervisory authority of the foreign bank.\textsuperscript{265} The foreign bank and its branch have to ensure that the home-country and host-country supervisory authorities are at all times enabled to adhere to the Basel Committee’s minimum standards for the consolidated supervision of banking groups and their cross-border establishments.\textsuperscript{266}

4.12.2.7 Name

A branch may use only the name, under which it was authorised, or any literal translation or abbreviation thereof, or any other name that has been approved by the Registrar, and may refer to itself only by the aforementioned approved names.\textsuperscript{267} The name of a branch cannot: be identical to the name of an existing bank or mutual bank; closely resemble the name of an existing bank or mutual bank; be identical to, or closely resemble the name under which any bank, mutual bank or mutual building society was registered.\textsuperscript{268}

4.12.2.8 Fees and annual licence

A branch of a foreign bank must obtain from the Registrar a business licence pertaining to its particular business in respect of each year ending on the thirty-first day of December against payment of the prescribed licence fees.\textsuperscript{269}

4.12.2.9 Representative offices of foreign banks\textsuperscript{270}

The written consent of the Registrar is required for a foreign institution which lawfully conducts a business similar to the business of a bank in its country, to establish a representative office in South Africa. The consent is obtained by way of a written application to the Registrar in which is specified:\textsuperscript{271} the name of the foreign institution; the country in which it is established; the name of its proposed chief representative officer in South Africa; and the address of its proposed representative office in South Africa. The detailed information to be furnished to the Registrar of Banks by a representative office of a

\begin{itemize}
\item \textsuperscript{263} Ibid., section 6 (b) (v)
\item \textsuperscript{264} Ibid., section 6 (b) (vi)
\item \textsuperscript{265} The Banks Act, 1990 (including all amendments to the Banks Act) section 1; Conditions for the conducting of the business of a bank by foreign institutions through a branch (Branch Regulations), Government Gazette Notice No. 30627 of 1 January 2008, section 6 (vii)
\item \textsuperscript{266} Ibid., 244, section 6 (c)
\item \textsuperscript{267} Ibid., section 7 (a)
\item \textsuperscript{268} Ibid., section 7 (b)
\item \textsuperscript{269} Ibid., 246, section 35
\item \textsuperscript{270} There are currently 46 representative banks in South Africa. The list can be viewed at: http://www.resbank.co.za/RegulationAndSupervision/BankSupervision/Pages/SouthAfricanRegisteredBanksAndRepresentativeOffices.aspx
\item \textsuperscript{271} Ibid., 246, section 34 (1) and (2)
\end{itemize}
foreign banking institution is set out in the SARB regulations relating to representative offices of foreign banking institutions.²⁷²

The application must be accompanied by the prescribed fee and a certificate of the competent authority in the other country in question to the effect that the foreign institution concerned is by or under the laws of that other country authorised to conduct a business in such country similar to the business of a bank.²⁷³ Having considered all the necessary information, the Registrar may grant the application either unconditionally or subject to such conditions as he or she may determine, having been satisfied that all necessary conditions have been met.²⁷⁴ Upon granting an application for consent to the establishment of a representative office in South Africa, the Registrar, against payment of the prescribed fee by the foreign institution, issues a certificate of authorisation for the establishment of a representative office in South Africa. Important to note is that a representative office may not conduct the business of a bank in South Africa,²⁷⁵ and is limited to promoting business on behalf of its parent enterprise.

4.12.2.9.1 Annual licence

A representative office of a foreign bank must obtain from the Registrar a business licence pertaining to its particular business in respect of each year ending on the thirty-first day of December against payment of the prescribed licence fees.²⁷⁶

4.12.2.10 Permission for the acquisition of shares in bank or controlling company of a bank

The acquisition of shares in a bank or controlling company²⁷⁷ (whether by local or foreign investors) has to be approved by the Registrar of Banks or the Minister of Finance, depending on certain thresholds.²⁷⁸ The thresholds are 15 percent, 24 percent, 49 percent and 74 percent and are calculated on the total nominal value or the total voting rights of issued shares. Permission for the first two (2) thresholds is sought from the Registrar of Banks while permission for the latter two (2) is sought from the Minister of Finance. In considering granting permission the Registrar or the Minister, as the case may be, may consult with the Competition Commission created in terms of the Competition Act. Section 37(4) of the Banks Act,²⁷⁹ is peremptory in its requirement that permission for the proposed acquisition not be granted, unless the Minister of Finance is satisfied that the proposed acquisition will not:

- be contrary to the public interest; or
- be contrary to the interest of the bank concerned; or

²⁷³ Ibid., 246, section 34 (2).
²⁷⁴ Ibid., section 34 (2B).
²⁷⁵ Ibid., section 34 (4).
²⁷⁶ Ibid., section 35.
²⁷⁷ A controlling company means a public company registered in terms of the Banks Act, 1990 as a controlling company in respect of a bank – Banks Act 1990, section 1.
²⁷⁸ Ibid., 246, section 37(1).
²⁷⁹ Act No. 94 of 1990.
• be contrary to the interest of the depositors; or

• be contrary to the interest of the controlling company concerned.

4.13 Operations in securities

4.13.1 Inward Listings by Foreigners on the JSE Limited

Since 2004, foreign companies have been allowed to list on the JSE Limited. Any foreign company wishing to list on the JSE requires prior approval from the Financial Surveillance Department (FSD). Similarly, an Authorised Dealer wishing to facilitate inward listed securities transactions requires approval from the FSD and will have to comply with the specific FSD reporting requirements prior to approval being granted. South African private individuals, corporates, trusts and partnerships can invest in approved inward listed instruments without restrictions, while institutional investors \(^{280}\) are allowed to invest in debt and derivative instruments in line with their foreign investment allowance. Authorised Dealers may invest in approved debt and derivative instruments subject to the macro-prudential limit. Foreign companies are able to use shares as acquisition currency and corporate shareholders are allowed to accept these shares as acquisition currency on application to FSD.

4.13.1.1 Measures for Inward Listed Debt Instruments on the JSE

The general measures regarding inward listings of bond instruments on the JSE are: debt issues may only be denominated in the Rand, and the foreign issuer must open a special designated account with an Authorised Dealer, until maturity of the debt instruments, for purposes of receiving the capital raised, effecting coupon payments, redemption payments etcetera.\(^{281}\)

4.13.1.2 Measures for Inward Listed Equity Issues on the JSE

For the issue of shares for cash (capital raising through an Initial Public Offering – IPO), the foreign entity must open a special designated account for the duration of the listing with an Authorised Dealer for purposes of receiving and recording capital raised in terms of the prospectus; on application to the FSD exchange control, South African institutional investors, corporate investors, private individuals and Authorised Dealers are allowed to exercise their rights in terms of a rights offer.

4.13.1.3 Measures for Inward Listed Derivative Instruments on the JSE

The listing and trading of derivative instruments based on foreign reference assets are allowed subject to the following conditions:

• For every buyer there should be a seller;

• the loss for one party is paid as the profit of the counterparty;

• participants may not hedge their exposures by physically trading in the underlying reference asset, unless that particular asset is also inward listed on the JSE Limited; and

\(^{280}\) All retirement funds, long-term insurers, collective investment scheme management companies and investment managers registered with FSD.

\(^{281}\) Exchange Control Circular No 20/2001: Inward Listings by Foreign Issues on the Bond Exchange of South Africa (BESA), p. 5

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• all settlements should take place locally in Rand.

4.13.1.4 Suspension of Inward Listings

Inward listed shares suspended from the JSE must be retained on the investor’s balance sheet for six (6) months, at the last price struck (closing price) before suspension.282

4.13.2 JSE and BESA Merger

On 1 July 2009, the JSE and BESA merged into one company and BESA became a wholly-owned subsidiary of the JSE, the JSE having acquired the entire issued share capital of BESA pursuant to a Scheme of Arrangement between the JSE, BESA and its shareholders. Following the approval of the Scheme of Arrangement by BESA shareholders, BESA business was transferred into the JSE, enabling the JSE to conduct the business of BESA with the JSE’s existing businesses.

The JSE’s intention with the merger is to harness the respective areas of expertise of the two (2) exchanges to deliver increased liquidity, increased functionality and a broader range of products and services to market participants, bond issuers and investors, such as retirement funds, insurance companies and their members. The JSE operates in a number of markets that provide trading, clearing and settlement services across a number of asset classes which include equities, equity derivatives, agricultural derivatives and interest rate derivatives. The JSE also provides a wide range of professional and public financial data, which is provided to a wide selection of users, ranging from trading firms, data vendors, investors and financial institutions and fund managers. BESA’s core services on the other hand, relate to the interest-rate market, listing debt instruments and derivatives as well as providing electronic trade capture and matching facilities for authorised users. In the long term, the JSE intends to integrate the business of BESA into the business of the JSE through consultations with all stakeholders on the formulation of a fixed income growth strategy. On completion of the transaction, BESA will be wound up.

4.13.2.1 Effect of Merger

As a result of the merger, the JSE is currently the only licensed securities “exchange” in terms of the Securities Services Act 283 in South Africa. Debt instruments may be listed on one of two platforms of the JSE: (i) the Yield-X board of the JSE or (ii) the Bond Market of the JSE. The Bond Market is the separate platform or sub-market of the JSE designated as the Bond Market on which debt securities, which were listed on BESA prior to its merger with the JSE on 1 July 2009, may continue to be listed and on which future “new” debt securities may be listed.

The benefits of inward listings are considered to be the following: attracting foreign direct investment into the domestic economy, increasing market capitalisation and liquidity of South Africa’s capital market, supporting the New Partnership for Africa’s Development (NEPAD) Initiative, and supporting the enhancement of foreign investment diversification through domestic channels.284

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282 Ibid., p. 3-6
4.14  **Collective Investment Schemes (CISs)**

Collective Investment Schemes (CIS) are accessible to all investors, both local and foreign, and according to the same rules and regulations. CISs provide a relatively secure means of investing on the Stock Exchange, and other financial instruments. The Collective Investment Schemes Control Act (CISCA)\textsuperscript{285} regulates the collective investment industry, including equity unit trusts, property unit trusts and participation mortgage bond schemes. The CISCA is based on internationally accepted principles and best practice, and ensures that all types of collective investment schemes are within the scope of the legislation, thereby providing protection to a wide group of investors involved in a diverse range of schemes. The act makes provision for four (4) different types of collective investment schemes,\textsuperscript{286} and the attraction of both local and foreign investors to South African CISs can be attributed to five (5) main factors: risk, access to securities investments, cost, professional management and regulation.

**Diversification of Risk** – Investors can secure a much wider diversification of risk, because these funds usually invest in different investments. The greater the diversification of a portfolio, the lower the risk in relation to the return.

**Access to Securities Investments** - By investing a small sum, an investor through the CIS can achieve a personal portfolio spread over several securities.

**Lower Transactions Costs** – By investing in a CIS, investors incur lower costs than if they were to buy and sell a portfolio of individual securities directly. This is because transaction costs are generally related to the size of the transaction. Fund managers can also reallocate portfolios more efficiently than can individual investors.

**Professional Management** – Due to the complexity of analysing information regarding individual securities, most investors do not have the professional skills to manage their own investments. CISs give you access to experts and the decisions about which underlying assets to buy or sell are made by professional asset managers.

**Investor protection** – CISs in South Africa have succeeded due to an effective legal and regulatory framework. Investors need to have confidence that their money is protected from fraud, theft and other abuses. The CIS Act\textsuperscript{287} and regulations made under it provide the desired regulatory framework that protects investors.

4.15  **Tourism services**

The Tourism Act\textsuperscript{288} remains the main legislation regulating tourism and related activities. The Act aims to regulate the sector by coordinating the activities of those engaged in tourism and establishing standards for tourism facilities and other services provided to tourists. In terms of tourism services,

\textsuperscript{285} Act No. 45 of 2002.
\textsuperscript{286} Collective Investment Schemes (CISs) in securities (the portfolio consists mainly of securities and includes all local and foreign funds registered with the FSB - most collective investment schemes fall in this category); CIS in properties (the portfolio consists mostly of property shares.); CIS in participation bonds (the portfolio consists mainly of participation bonds); and declared CIS (any scheme the minister declares a CIS).
\textsuperscript{287} Collective Investment Schemes Act, Act No. of 45 of 2002
\textsuperscript{288} Act No. 72 of 1993, as amended by the Tourism Amendment Act (No. 105 of 1996), the Tourism Amendment Act (No. 8 of 2000), and the Tourism Second Amendment Act (No. 70 of 2000)
South Africa welcomes investment from investors investing in hotel and restaurant services (excluding catering services\textsuperscript{289}); travel agencies and tour operator services; and tourist guide services. All investors in these areas are accorded national treatment.

All tourist guides must be registered in each province in which they wish to work as guides. In addition, foreigners may only register as tour guides if they have a valid work permit or have obtained South African residency, completed the relevant accredited guiding training, and are registered with the provincial registrar of tour guides in the province in which they wish to operate. Foreign travel agents must register (like most other businesses) under the South African Companies Act, and comply with any relevant regulations including those of the International Air Transport Association (IATA). Most travel agencies in South Africa are members of the Association of South African Travel Agents (ASATA); membership is voluntary. However, for a foreign-owned travel agent to be registered as a member, ASATA requires the operating enterprise to be registered in South Africa (under the Companies Act), all foreign directors to have a South African Bank Account; and a letter of comfort from the parent company, if based outside South Africa, as a type of insurance should the local-based operation default on its contracts.

4.16 Maritime services

Transnet National Ports Authority (NPA), established in 2000, controls South Africa’s eight (8) commercial ports: Cape Town, Durban, East London, Mossel Bay, Port Elizabeth, Richards Bay, Saldanha and Ngqura. Each port handles different commodities, and offers different types of services and facilities.

Any person, natural or juristic, may own a South African ship or share in a ship. But South African nationals, including companies, close corporations and trusts, must own the majority of the 64 shares of the ship. The foreign partners may own up to 31 shares in the ship for the ship to stay on the South African register. A ship may be owned by a company which has any number of foreign shareholders, provided that the company is locally registered and has a 'place of business in South Africa. If a ship is sold to a majority of foreign buyers and is not registered in South Africa, the ship then loses its character as a ship entitled to be on the South African register. Application must then be lodged to delete the ship’s records from the register. This is done by letter confirming the details of the foreign buyer(s).

Registration is valid for five (5) years after which it must be renewed. Registration of a chartered ship is valid for 5 years or until the end of the charter period (whichever is the earlier). Cabotage has been allowed since 1996, and South Africa also allows local and foreign-owned vessels on international trade routes to carry its coastal cargoes.\textsuperscript{290}

\textsuperscript{289} Catering is the business of providing foodservice at various locations. The food may be prepared on site, i.e., made completely at the event, or the caterer may choose to bring prepared food and put the finishing touches on once it arrives. Catering has been excluded to boost local entrepreneurship and self-employment, as a number of South Africans are active in this area that does not call for specialised expertise. Accordingly, South Africa has not opened up catering services to foreign investors as strong domestic capabilities already exist.

\textsuperscript{290} Department of Transport, 2008. Cabotage is the transport of goods or passengers between two points in the same country by a vessel or an aircraft registered in another country. In aviation terms, it is the right to operate within the domestic borders of another country. Most countries do not permit cabotage by foreign companies, although this is changing within Europe for member states of the European Union. If British Airways has a flight from London Heathrow that stops at New York JFK and continues on to
4.17 Air services

South Africa has ten (10) major airports, of which three (3) are international (Johannesburg, Cape Town, and Durban).\(^{291}\) The majority state-owned Airports Company South Africa Ltd (ACSA) owns and operates South Africa's main airports. Third parties must participate in a tender organised by ACSA to be eligible to supply "certain" airport services. South Africa follows the Chicago Convention on International Civil Aviation (Chicago Convention)\(^{292}\) with regard to policy on airline ownership and control.\(^{293}\) Therefore, South Africa only allows foreign ownership in one of its designated national airlines, up to a maximum of 25 percent of the equity of the company. There are several possible reasons that have been advanced by countries that are members of the Chicago Convention, for retaining control over foreign investment in airlines.\(^{294}\)

No person can operate or attempt to operate an air service or an international air service, unless it is operated under and in accordance with the terms and subject to the conditions of an air service licence issued to that person in terms of either the Air Services Licensing Act\(^{295}\) or the International Air Services Act.\(^{296}\) The application is made on prescribed form to the Air Service Licensing Council or to the International Air Services Council. In addition, the Air Services Licensing Act requires that: \(^{297}\) the

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291 Chicago O'Hare, it would not allow passengers to board in New York and fly to Chicago if that violated U.S. cabotage regulations. Only passengers who boarded in London could be carried on to Chicago.

292 The other seven for domestic use only, are: Bloemfontein, East London, George, Kimberley, Pilanesburg, Port Elizabeth, and Upington.

293 The Convention establishes rules of airspace, aircraft registration and safety, details the rights of the signatories in relation to air travel (it introduced nine (9) freedoms of the air for those states that have adopted the Convention and enter into bilateral treaties), and also exempts air fuels from tax.

294 Chicago Convention read with section 6 of the International Air Transport Agreement, 1944.

295 National security - Foreign ownership of airlines could compromise national security, since civilian aircraft capacity may be widely used by the military, particularly in times of national emergency. Foreign owners could not be counted on to supply this capacity. Economic security - In countries largely dependent on tourism, it would be unwise to turn over the nation's principal earner of foreign exchange into foreign hands. In addition, in difficult economic times, foreign owners would be tempted to discontinue vital air links, leaving the country vulnerable to a serious disruption in the availability of air transport services. Furthermore there are labour concerns that job losses will follow once foreign owners take control of an airline. Safety - There is a concern that foreign ownership could result in weakening of safety standards, coupled with concerns that foreign-owned carriers which have their aircraft registered in other countries could be subject to less strict safety tests than airlines having aircraft registered in the country of designation. By extension, it is argued, there will be a move towards creating "flag of convenience" airlines in the same way that flag of convenience shipping operates in maritime transport. Competition issues - Doubts about confidentiality and the willingness of airlines to compete vigorously with one another when they have overlapping ownership and boards of directors.

296 Bilateral issues - Foreign takeovers would run counter to bilateral agreements, most of which, require "substantial ownership and control" by local nationals of the airline. Other legal issues – a final argument made by some governments is that there must be a clearly identifiable locus of responsibility for the safety, security and economic integrity of airline companies. If a carrier is owned by nationals who are not citizens of the designating country it may be difficult to demonstrate the designating government's continuing competence in the technical aspects of airline and aircraft certification.

air service be operated in a safe and reliable manner; the applicant, if a natural person, must be a resident of South Africa, or if a company must be incorporated in South Africa; at least 75 percent of voting rights must be held by South African residents, meaning foreign ownership can only be up to a maximum of 25 percent should a carrier intend operating services in the South African air services market; the resident applicant or incorporated company must be actively and effectively in control of the air service.

The International Air Services Act requires that: the applicant is fit and able to operate the international air service - this means the applicant, if a natural person, must be a resident of South Africa, or if a company, must be incorporated in South Africa; the voting rights in the company must be substantially held by South African residents, meaning that foreign ownership can only be up to a maximum of 49 percent should the carrier intend operating regional or international operations; the international air service concerned can be operated within the structure of the existing international air service system in South Africa; the resident applicant or incorporated company must be actively and effectively in control of the air service.

Cabotage is not allowed. Furthermore, South Africa does not have any open skies agreements, but has started to renegotiate and review existing agreements in line with the key principles of the Yamoussoukro Decision (YD) within the continent.

4.18 Real Estate Services

Real estate services in terms of the GATS covers own or leased property and on a fee or contracting basis property. In these service areas, there is no national treatment limitation, though there are certain requirements that have to be adhered to in order for foreign investors to be able to offer such services. Overseas estate agents and agencies that wish to do business in South Africa must meet the same registration and qualification requirements as those based in South Africa.

The real estate industry is controlled by the Estate Agency Affairs Board (EAAB) established in terms of the Estate Agency Affairs Act. All estate agents must be registered with the EAAB. The EAAB is responsible for the following: licensing estate agents; investigating complaints against estate agents, and, if necessary, to take disciplinary action; managing a fidelity fund, which can be used to

298 Ibid., 296, section 17 (4)-(5).
299 Defined in footnote 290.
300 Open skies is an international policy concept which calls for the liberalisation of rules and regulations on international aviation industry most especially commercial aviation - opening a free market for the airline industry. Its primary objectives are to: liberalise the rules for international aviation markets and minimise government intervention - the provisions apply to passenger, all-cargo and combination air transportation, and encompass both scheduled and charter services; or to adjust the regime under which military and other state-based flights may be permitted.
301 The Yamoussoukro Decision creates a single space in Africa. It regulates commercial air transport activity in a single African space and aims at creating conditions for the emergence of a viable and quality African air transport that meets the integration imperatives of the Continent, with liberalisation as its sole ultimate objective.
302 Act No. 112 of 1976.
303 A fidelity fund protects customers and can be used to reimburse persons who suffer pecuniary loss by reason of theft of trust money, or the failure of an estate agent to comply with section 32(1) - keeping a separate account or section 32(2)(e) - estate agent fails to retain investment in a separate savings or other interest bearing account until being lawfully entitled to it or instructed to make payment therefrom to any person.
compensate consumers who have lost money at the hands of estate agents; and determining and maintaining educational standards.\(^{304}\)

By law, every estate agent and estate agency firm which operates in South Africa must be registered with the EAAB, and it is an offence to practice as an estate agent without being registered. Registration is subject to annual renewal. An estate agent who collects rentals must also register as a debt collector, with the Council for Debt Collectors. This registration is also subject to an annual renewal. All agents are issued (annually) with a fidelity fund certificate\(^{305}\) and must comply with the Board’s Code of Conduct. All Estates Agents must also undertake the National Qualification Framework's (NQF) Level Four examinations for estate agents. Any agent failing to comply with the training requirements will not be issued with a Fidelity Fund Certificate and will, therefore, be disqualified from selling property. The NQF criteria also make it obligatory for estate agency principals to pass the Level Five examination, designed specifically for agency principals. If they fail to do this, they are disqualified from acting as principals. The qualifications go a long way to raising standards among estate agents, with a strong emphasis on correct business practice, accounting, and communication.

4.19 Codes and National Treatment

An analysis of the sectors seems to indicate that regulations enforced within the sectors are in line with the Codes. The residence requirements stipulated for purposes of establishing a branch of a foreign bank (at least two (2) natural persons residing in South Africa must be appointed and authorised by the foreign parent enterprise to conduct the management of the business of the branch) or a branch of a foreign insurance company (the executive chairman, public officer and the majority of the directors must be resident in South African) are not contrary to the obligations of the Codes. These can be regarded as minimal forms of local presence requirements, which are a matter of formality, do not constitute any impediments for carrying out operations, and are not discriminatory against foreign investors. The Codes recognise instances when a foreign enterprise operating in another country appoints as its representatives, any competent person who is domiciled and actually resident in the country of operation, irrespective of nationality.\(^{306}\)

Generally, the OECD Code of Liberalisation of Current Invisible Operations states that laws, regulations and administrative practices shall ensure equivalent treatment of domestic enterprises and of branches or agencies of non-resident enterprises operating in the field of banking or financial services so that the establishment of branches and agencies of non-resident enterprises shall not be subject to more burdensome requirements than those applying to domestic enterprises.\(^{307}\) South Africa’s domestic laws, regulations and administrative practices apply equally, on a non-discriminatory basis, to both domestic and foreign investors, creating a level playing field for those operating in the area.

With regards to the conditions (prudential, capital requirement, management) highlighted in the paper for the establishment and operation of branches in the banking and financial services sectors, all these are in line with the Codes. In terms of prudential requirements for insurance services, the OECD Code of Liberalisation of Current Invisible Operations allows for regulatory measures to protect the interest of policy holders and beneficiaries, provided the measures do not discriminate against foreign

\(^{304}\) Ibid., 302.

\(^{305}\) Ibid., sections 12, 15 and 16.


In addition, the Code also allows prudential requirements for both banking and insurance services, to assure the soundness of the financial system and to protect depositors, savers and other claimants, provided this does not prevent the establishment of branches of foreign enterprises on terms and conditions equivalent to those applying to domestic enterprises offering banking and financial services. South Africa’s prudential requirements that are applicable to insurance and to banking services are recognised in the Code and are applicable to both local and foreign insurance and banking service providers, and thus do not discriminate against foreign insurance or foreign banking service providers. Thus, the Code allows for measures to be taken for the maintenance of fair and orderly markets, and for the protection of investors or other users of banking, financial and insurance services, provided these measures do not discriminate against foreign service providers in these areas.

The Code of Liberalisation of Current Invisible Operations further stipulates that where financial requirements are imposed for the establishment of a branch of any foreign enterprise offering banking and financial services, the total amount of such financial requirements must be not more than that required from domestic enterprises engaged in similar activities. The capital requirements required for purposes of establishing a branch of a foreign bank or insurance company are the same for both local and foreign investors in these service areas.

In line with the Code of Liberalisation of Capital Movements, South Africa provides for operation in securities by allowing foreign companies to list on the BESA and JSE Exchanges, and allowing both South African private individuals and institutional investors to invest in such listings. The Code recognises that liberalisation in this area is subject to regulations that may be applicable in the security market concerned, and that any transactions or transfer must be carried out through an authorised resident agent, as is the practice in South Africa. These regulations do not discriminate against foreign securities and are there for prudential reasons.

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309 Ibid., 307, p. 38.
310 Ibid.
5. INCENTIVES

South Africa, like other developing countries, has also implemented a number of incentive schemes to encourage foreign investment and grow South African business. South Africa’s incentives seek to promote innovation; improve the competitiveness and efficiency of existing operations; establish, or expand, manufacturing; and promote exports of manufactured goods. Existing incentives are accessible to national and foreign investors without distinction. The President of South Africa, Mr. Jacob Zuma, in his 2011 State of the Nation Address, and the Minister of the National Treasury, Mr. Pravin Gordhan, in his 2011 Budget Speech, announced details of several initiatives and proposals to boost job creation in South Africa, including: the establishment of a jobs fund of 9 billion rand over the three years to finance new job-creation initiatives in areas of enterprise development, infrastructure support for work seekers and institutional capacity building; the setting aside of R10 billion by the Industrial Development Corporation (IDC) over five years for investment in economic activities with a high jobs potential; increased funding for small, medium and micro enterprises (SMME’s); and spending on skills, rural development and industrial support.

The list of available incentive schemes are as follows:

5.1 Research and Development (R & D)

The R&D Tax Incentive Programme was introduced in November 2006 in terms of Section 11D of the Income Tax Act. It is administered by the Department of Science and Technology (DST) in conjunction with SARS and the National Treasury to encourage innovation, scientific and technological research and development (R&D) by taxpayers/companies in South Africa. The incentive is two-fold. Firstly, it consists of a deduction of 150 percent in respect of scientific or technological R&D undertaken by taxpayers within South Africa. Secondly, it allows for the accelerated depreciation of assets for the purposes of scientific and technological R&D over four years, starting from the year of assessment in which the asset is first brought to use. Taxpayers can claim for eligible scientific or technological R&D expenditure on salaries and wages, material, buildings, machinery, equipment and contracted R&D. Certain eligibility criteria as specified in the Income Tax Act have to be met, and ineligible activities and expenditure are listed in the Act.

\[312\] 2011 State of the Nation Address, 10 February 2011, p. 7-8
\[313\] 2011 Budget Speech, 23 February 2011, p. 16-17, 21, 31
\[315\] Ibid., 146, Section 11D (1)
\[316\] Ibid., Section 11D (2)(b)
\[317\] Ibid., Section 11D (5): Non-eligible expenditure: exploration and prospecting; management of internal business processes; management of trademarks; social sciences or humanities; and market research, sales or marketing promotion.
5.2 Industrial Development Zones (IDZs)\textsuperscript{318}

Industrial Development Zones (IDZ) are designed to encourage international competitiveness in South Africa's manufacturing sector. An IDZ is a purpose built, industrial estate linked to an international air or sea port, which might contain one or multiple Customs Controlled Areas (CCA) tailored for manufacturing and storage of goods to boost beneficiation, investment, economic growth and, most importantly, the development of skills and employment in these regions. The CCA is exempt from VAT and import duty on machinery and assets, and is administered by SARS in terms of section 21A of the Customs and Excise Act\textsuperscript{319} and the Customs and Excise Rules.

An IDZ aims to encourage export oriented manufacturing FDI by providing investors with: a duty free status for imported raw materials; tax incentives; easy access to airports and seaports, world class infrastructure and services, suitability for export-oriented production; customs support services to expedite excise inspection and clearing, duty-free importation of production-related raw materials and inputs, a zero rate of VAT on supplies procured from South African sources, import status for finished goods which are sold into South Africa, government incentive schemes, reduced taxation and exemption for some activities/products. This in turn leads to demand-driven infrastructure, sustainable local and foreign investment, and improved international competitiveness. In IDZs, production is segregated into different stages. Each stage can be carried out by a different enterprise in a different country to benefit from the comparative advantages offered, and to keep costs to a minimum. There are currently four (4) IDZs in South Africa, all strategically positioned close to an international seaport or airport - the Coega and East London IDZs in the Eastern Cape, the OR Tambo International Airport IDZ in Gauteng and the Richards Bay IDZ in KwaZulu-Natal.

5.3 Critical Infrastructure Programme (CIP)\textsuperscript{320}

The Critical Infrastructure Programme (CIP) is an incentive in the form of a cash grant (to a maximum of 30 percent capped at R30 million of the development cost of quality infrastructure), designed to improve critical infrastructure in South Africa. It is a non-refundable, cash grant available to an approved beneficiary upon the completion of the infrastructure project. There are various criteria to be met to qualify for this grant in terms of the company involved and the infrastructure being developed. The incentive covers between 10 to 30 percent of the total development costs in qualifying infrastructure. The rationale behind providing such a grant is in the benefits that the country will accrue from the development of critical infrastructure by independent companies.

The aim of the CIP is to: improve and support the competitiveness of South African industries by lowering business costs and risks; provide financial support for physical infrastructure; stimulate upstream and downstream linkages; achieve economic growth and create employment; support the development of industrial activities that have strategic economic advantage for South Africa; achieve a geographical spread of economic activities within South Africa; and prioritise rural and economically depressed areas. Private sector enterprises, private/public partners, industrial development project operators, strategic incentive programme applicants and investors in strategic economic projects are eligible to apply for the CIP. Qualifying infrastructure may be the structural foundations or permanent network facilities via which enterprises and society in general receive or supply basic services such as transport, electricity and water, sanitation, telecommunications etcetera. Examples of infrastructure


\textsuperscript{319} Act No. 91 of 1964

include roads and bridges, electricity transmission lines, water pipelines, sewers, and telephone lines, as well as their associated generation, storage, purification and other facilities that supply, protect or in any way facilitate the networks and systems.

5.4 Automotive Investment Scheme (AIS)\textsuperscript{321}

The AIS is part of the Automotives Productions Development Programme (APDP). It replaced the Motor Industry Development Programme (MIDP) in 2012 and will last until 2020. The AIS also replaces the Productive Assets Allowance scheme (PAA) of the Motor Industry Development Programme (MIDP) which elapsed in December 2009. The AIS is intended to grow and develop the automotive sector through investment in new and technologically-advanced replacement automotive models, as well as the manufacturing of automotive components. Eligible Enterprises include light motor vehicle manufacturers that have achieved or can demonstrate that they will achieve a minimum of 50,000 annual units of production per plant, within a period of three years; or component or deemed component manufacturers that are part of the Original Equipment Manufacturer (OEM) supply chain and will achieve at least 25 percent of a total entity turnover of R10 million by the end of the first full year of commercial production as part of a light motor vehicle manufacturer supply chain, locally and/or internationally.

The objective of the AIS is to increase plant production volumes, sustain employment, and strengthen the automotive domestic value chain, while being consistent with South Africa's multilateral obligations. AIS provides for a taxable cash grant of 20 percent of the value of qualifying investment in productive assets. An additional taxable cash grant of 5 percent or 10 percent over and above the 20 percent is available to certain “strategic projects,” which must achieve certain economic benefit requirements.

5.5 Enterprise Investment Programme (EIP)\textsuperscript{322}

The EIP is an investment incentive designed to stimulate investment growth, in line with the NIPF. The EIP was introduced to provide sector-specific financing in order to encourage growth in key areas. The scheme currently operates under two sub-programmes – the Manufacturing Investment Programme (MIP) and the Tourism Support Programme (TSP) – though further sub-programmes are expected to be added in the future to address the needs of other specific sectors. The EIP works through an investment grant of between 15 percent and 30 percent towards qualifying investment in plant, machinery and equipment and customised vehicles required for establishing new or expanding existing production facilities, or upgrading production capability in existing clothing and textiles operations.

The primary objective of the MIP is to stimulate investment within manufacturing and related services sectors as part of the government’s efforts to create further employment and ensure sustained growth within the industry.\textsuperscript{323} The incentive programme provides investment support to both local- and foreign-owned entities, by offering an investment grant of up to 30 percent of the value of qualifying investment in machinery, equipment, commercial vehicles, land and buildings, required for establishing


\textsuperscript{323} Although the MIP can be accessed by a range of sectors in the manufacturing industry, the government is focusing on four (4) key sectors that it has identified as having the most potential for achieving its growth objectives: Metal fabrication, Capital and Transport equipment; Automotive and components; Chemicals, plastic fabrication and pharmaceuticals; and Furniture sectors.
a new production facility; expanding an existing production facility; or upgrading production capability in an existing clothing and textile production facility. The incentive scheme ends in 2014.

The aim of the TSP is to specifically promote sustainable job creation outside of the traditional tourism destinations of Durban, Cape Town and Johannesburg, as well as encouraging greater transformation in the sector. The TSP offers a grant of up to 30 percent of qualifying capital investment by enterprises, provided the enterprises are located outside the three (3) established tourism areas.

5.6 Foreign Investment Grant (FIG)

The Government has sought to maximise technology transfers by providing incentives to foreign investors to bring in new machinery and equipment used for local production. The FIG compensates qualifying foreign investors for costs incurred in moving qualifying new machinery and equipment (excluding vehicles) from abroad to South Africa.

The Grant is available only to foreign entities establishing production facilities for the first time in South Africa, and is offered once only to any single entity. It is only available to projects of registered incorporated legal entities in South Africa, and is the lower of 15 percent of the cost of qualifying imported machinery and equipment or the actual transport costs of relocating qualifying new machinery and equipment from abroad to a maximum of R10m. While the Grant is not focused on a specific industry or technology, the Government reserves the right to reject applications in areas where strong domestic capabilities already exist or where the market is saturated. Payment of the grant is subject to certain conditions.324

5.7 Business Process Services (BPS)325

The South African government implemented a Business Process Outsourcing & Offshoring (BPO & O) incentive programme from July 2007 to March 2010. As a result of this incentive, the BPO & O industry has grown and has also become more competitive, with a number of new providers entering the market. To address this growth and development, and as part of a process of continuing improvement of South Africa as an investment destination, a new scheme was developed by the dti aimed at rewarding long term sustainable investment. On 23 November 2010,326 the DTI announced a package of incentives under the BPS programme to attract new foreign investments in the country’s BPO & O industry. This is a five-year (5) program that is part of a continuous endeavour to reinforce the country’s presence in

324 Some of the requirements for eligibility: the FIG is conditional on the approval of the MIP project for the incorporated legal entity in South Africa; the application for the FIG is to be submitted prior to shipment from abroad and together with the MIP application; relocations are limited to a maximum of two (2) phases per project, provided that all phases are executed within one (1) year of commencement of production; only new machinery and equipment (vehicles excluded) acquired from abroad and required for a manufacturing project in South Africa are considered. In exceptional cases, second-hand or used machinery and equipment may qualify, where a dti-appointed consulting engineer (CE) certifies that the machinery and equipment represent the latest technology. The Grant is not considered where obsolete technology is to be relocated to South Africa, irrespective of whether the machinery and equipment is new. There must be at least a 50 percent direct foreign shareholding and this must be maintained for a period of at least two (2) years after completion of the investment project and certification of being in production. DTI may recoup the grant advanced if the level of foreign direct shareholding is not maintained at a minimum of 50 percent in this two (2) year period. A detailed list of qualifying and non-qualifying expenditure is also provided.


the multi-billion dollar global outsourcing industry. This initiative by the DTI is intended to lower the cost for BPO operations in the country by approximately 20 per cent, whilst providing flexibility in usage and simplifying administration. A base incentive of R112,000 (tax exempt) will be given to investors for creating as well as maintaining every full-time employment. This inducement is offered for a period of three years (3) as part payment of R40,000 in 2011, R40,000 in 2012 and the remaining R32,000 in 2013. These incentives may be offset against all types of expenditure at the discretion of the investor. In addition, a graduated bonus incentive amounting up to 30 percent is available for investors that exceed certain job creation targets. While this program will run for a period of five years (5), the incentives may be used by the firms in any three (3) years during this time. The incentive is available to both local and foreign investors registered as legal entities in South Africa that create at least 50 full-time offshore jobs over a period of three years and are delivering services to clients located outside South Africa.

The types of business processes that can benefit from the incentive include: back office processes, contact centres, finance and accounting services, human resource functions, information technology and technical services, and other specialist services.

5.8 Support Programme for Industrial Innovation (SPII)\(^\text{327}\)

The Support Programme for Industrial Innovation (SPII) is an innovation support programme of the dti that is administered by the Industrial Development Corporation (IDC). SPII is designed to promote technology development in South African industry through the provision of financial assistance for projects that develop innovative products and/or processes. SPII specifically focuses on the development phase, which begins at the conclusion of basic research and ends when a pre-production prototype has been produced. The SPII currently consists of three (3) schemes: Product Process Development (PDP), Matching and Partnership Schemes; and SPII partnership scheme. The project size rather than the company size determines the type of funding/scheme for project development. However, the company size is used to determine the qualification to various incentives offered by SPII.

Criteria for SPII Support:

- Development should represent significant advance in technology;
- Development and subsequent production must take place within South Africa;
- Intellectual Property to reside in South African registered company;
- Participating businesses should (must) be South African registered enterprises;
- Government funded institutions (e.g. CSIR) do not directly qualify for support but may participate as subcontractor(s) and;
- No simultaneous applications from the same company.

5.9 SEDA Technology Programme (STP)\textsuperscript{328}

The STP is a programme of the dti, housed within the Small Enterprise Development Agency (SEDA). It was created to provide technology and business development support services to small enterprises as a means to drive the national technology and business incubation agenda. STP seeks to stimulate economic growth and development through facilitating technological innovation and increasing the accessibility to, and utility of, technologies and technical support for small enterprises, whilst at the same time improving the sustainability and international competitiveness of small enterprises supported through the programme. STP contributes to South Africa’s economic development through the creation and support of technology business centres, including incubators and technology demonstration centres. These centres provide a variety of business support services and office infrastructure to small enterprises. STP also provides a range of services that enable industry and in particular small enterprises in the second economy to access and transfer technology.

5.10 Film and Television Production Incentive (FTPI)\textsuperscript{329}

The film and television production incentive comprises of the Foreign Film and Television Production and Post-Production Incentive to attract foreign-based film productions to shoot on location in South Africa and conduct post-production activities; and the South African Film and Television Production and Co-Production Incentive, which is intended to increase local content generation and improve location competitiveness for filming in South Africa.

The Foreign Film and Television Production and Post-Production Incentive is only available to foreign-owned productions with Qualifying South African Production Expenditure (QSAPE) of R12 million and above.

The South African Film and Television Production and Co-Production Scheme was introduced to provide more financial support for locally-owned productions and co-productions. It is available to both South African productions and official treaty co-productions\textsuperscript{330} with a total production budget of R2.5 million and above. It provides a rebate of 35 percent for the first R6 million of QSAPE, and 25 percent of the QSAPE for the remainder of the qualifying production expenditure. The following formats are eligible: feature films, telemovies, television drama series, documentaries, animation and short form animations. The value of the rebate for any qualifying production under either of the two (2) incentives is capped at a maximum of R10 million. The incentive is structured in such a way that it provides necessary impetus to the growth of the South African film and television production industry, thus creating an environment conducive for South African producers to attract investment and develop stable output and sustainable production companies.


\textsuperscript{330} In filmmaking, an international co-production is a film made by production companies from different countries. This is due to the expense of filmmaking. International co-productions open new markets for films and television programs and can increase the output of high quality productions through the sharing of equity investment. Official co-productions are made possible by agreements between countries. Co-production agreements seek to achieve economic, cultural and diplomatic goals. For filmmakers, the key attraction of a treaty co-production is that it qualifies as a national production in each of the partner nations and can access benefits that are available to the local film and television industry in each country. Benefits may include government financial assistance, tax concessions and inclusion in domestic television broadcast quotas. International co-productions can also occur outside the framework of official co-productions, for example with countries that do not have an agreement in place, or projects that do not satisfy official co-production criteria.
In addition to the financial support provided through the two (2) incentives, a number of other measures have been implemented as part of the broader sector development strategy. These include capacity development for emerging production companies, the development of writers and editors through the enterprise development programme and the establishment of five (5) pilot programmes in different locations to address distribution infrastructure, local content and audience expansion.

5.11 Clothing and Textile Competitiveness Programme (CTCP)\(^{331}\)

In order for companies in the clothing and textiles sectors to be in a position to compete with international competitors in the domestic and international markets, it is essential that they advance their operational competitiveness to world class performance levels. Through the CTCP and its four (4) elements,\(^{332}\) the DTI has developed a set of support instruments for the clothing and textiles sector in order to stabilise employment and to facilitate the restructuring of the domestic manufacturing industries to increase their competitiveness. The CTCP together with five (5) other core projects\(^{333}\) of the Clothing and Textile Customised Sector Programme (CSP) represent a fundamental shift in DTI’s strategic approach to restructuring this sector for long-term sustainability and competitiveness. Such competitiveness encompasses issues of cost, quality, flexibility, reliability, adaptability and the capability to innovate. The main objective is to assist the industry in upgrading processes, products and people, and to re-position it to compete effectively, domestically and globally.

The CTCP is administered by the Industrial Development Corporation (IDC) and consists of the following elements: a capital upgrading programme available to clothing, textiles and footwear manufacturers via the EIP administered by the dti together with preferential loans via the IDC at prime less 5 percent; and a firm and cluster level Clothing Textiles Competitiveness Improvement programme (CTCIP) which is provided on an attractive cost-sharing basis.

5.12 Export Marketing and Incentive Assistance Scheme (EMIA)\(^{334}\)

In its continuing efforts to promote investment and entrepreneurship in South Africa, the DTI launched the EMIA Scheme to: assist South Africa in exporters in establishing export markets for their products, to partially compensate exporters for costs incurred in respect of activities aimed at developing export markets for South African products and services, and to recruit new FDI into South Africa.

Through the EMIA programme, DTI may subsidise expenses relating to: primary export market research and FDI research, individual inward bound trade missions, exhibits at international pavilions, exhibits at individual exhibitions, outward selling trade missions, outward investment recruitment missions, inward buying trade missions, and inward investment missions. In order to apply for assistance through EMIA, an application form, obtainable through TISA or EMIA, must be submitted at least a month in advance; the application must be completed in compliance with all approval criteria; and applicants must be registered with SARS for Customs and Excise.

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332 The Capital and Technology Upgrading Programme; the Preferential Financing Scheme; the Competitiveness Improvement Programme; and the core funding mechanism, the Production Incentive (PI).
333 A skills development plan, broad-based black economic empowerment, a technology and innovation plan, the review of import tariffs on raw material, and combating customs fraud.
5.13 Section 12I Income Tax Allowance Incentive to support Greenfield and Brownfield Investments

This is an incentive that falls under the Income Tax Act and has been introduced to raise the productivity of South Africa’s manufacturing sector by supporting investments in manufacturing assets and subsidising training for employees to improve skills and labour productivity. The incentive programme replaces the Strategic Industrial Projects (SIP) programme.

In terms of the incentive, investors in "greenfield" projects (new industrial projects that use new and unused manufacturing assets) and "brownfield" projects (expansions or upgrades of existing projects) that involve capital of more than R200-million but less than R1.6-billion, can apply for a tax allowance equal to between 35 percent and 55 percent of a project's value. The incentive offers a maximum of R900-million in tax breaks for greenfield projects, and a maximum of R550-million in tax breaks for brownfield projects. Companies will also be able to deduct from taxable income, a training allowance of R36 000 per employee, with the maximum training allowance for a single company ranging from R20-million to R30-million. There are a number of requirements that have to be met to qualify for the incentive, and there are also a number of sectors that have been excluded from the incentive. The incentive runs until 31 December 2015.

5.14 Codes and National Treatment

As indicated earlier, South Africa enforces the basic principle of National Treatment. Thus all incentives are available to local and foreign investors on the same terms and conditions. The incentives are there as policy instruments to: attract and stimulate investment from both local and foreign investors in specified types of capital expenditure, attract investment in high unemployment, and grow South African business, employment and product mix. The investment incentives supplement the already attractive enabling environment for investment in South Africa. These incentives will hopefully create spillovers in South Africa in that both local and foreign corporate presence will: trigger transfers of technology and know-how; assist enterprise development; contribute to fuller international (trade) integration; bolster business sector competition; and support human capital growth.

The Code of Liberalisation of Current Invisible Operations recognises systems of aid in the production of printed films for cinema exhibition for cultural reasons, provided that they do not significantly distort international competition in export markets. The purpose of the South African Film and Television Production and Co-Production Scheme is to ensure the continuance of culture production and to support the production of films for cinema exhibition. The Code states that the purpose of the scheme is to ensure the continuance of culture production and to support the production of films for cinema exhibition. The Code states that the purpose of the scheme is to ensure the continuance of culture production and to support the production of films for cinema exhibition.
because of the extent to which television programs and films are an efficient mechanism for the promotion of national culture and identity. Providing more financial support for locally-owned productions and co-productions provides the necessary impetus to grow the local South African film and television production industry, without distorting international competition.
Apart from implementing the legal framework and policies documented above, South Africa has investment promotion agencies operating both at national and regional (i.e. provincial) level. The investment promotion agencies cater to all categories of investors - domestic and foreign, and all types of investments - large, moderate and small. The main objectives of these agencies are to promote, increase and retain the level of domestic and foreign direct investment in the country as well as abroad; and increase South Africa's capability and capacity to promote exports into targeted markets.

The principal body responsible at national level for investment promotion is Trade and Investment South Africa (TISA), which is a division of the Department of Trade and Industry (DTI). TISA is composed of three business units that focus on the following: investment promotion and facilitation – attracting FDI as well as developing and promoting local direct investment; export development and promotion – development and promotion of South African goods and services including specific assistance in terms of export advice, matchmaking and market intelligence; and international operations – effective management and administration of DTI’s foreign network of investment promoters based at its various embassies world-wide. In addition, there are nine (9) independent regional investment promotion agencies (one in each of the nine (9) provinces).

Investment promotion activities of the regional offices are co-ordinated with the national investment promotion agency, TISA. The investment promotion agencies provide the following services to prospective and/or current investors: promotion of investment opportunities; marketing of investment projects; information on the various investment sectors and industries within South Africa; facilitation of investment missions, including travel itineraries; introduction to key stakeholders in the private and public sectors; introduction to potential joint venture partners and other partners; consultation on the prevailing regulatory environment; information on incentive packages; guidance on plant/site locations of Industrial Development Zones (IDZs); assistance with work permit applications; logistical support for relocation; and dedicated aftercare service.

Gauteng: Gauteng Economic Development Agency (GEDA); Mpumalanga: Mpumalanga Economic Growth Agency (MEGA); KwaZulu-Natal: Trade and Investment KwaZulu-Natal (TIKZN); Eastern Cape: Eastern Cape Development Corporation (ECDC); Western Cape: The Western Cape Investment and Trade; Promotion Agency (Wesgro); Free State: Free State Investment Promotion Agency (FDC); Northern Cape: Department of Economic Affairs and Tourism; North West Province: Invest North West; Limpopo: Trade and Investment Limpopo (TIL)

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7. CONCLUSION

South Africa is receptive to foreign investment and has made good progress in addressing the constraint on sustained economic growth imposed by apartheid social and economic policies. The government has reduced import taxes and subsidies to local firms, relaxed foreign exchange rules, and reduced the income tax and secondary tax on corporate dividends payable by companies. In addition, South Africa has also taken steps to restructure private sector involvement in state controlled enterprises.

Virtually all business activities are open to international investors, although in a few sectors, ceilings have been placed on the permitted extent of foreign involvement. Foreign investments are treated in essentially the same way as domestic investments, and receive national treatment for various investment incentives, tax allowances, and trade regulations. The main difference in treatment between domestic and foreign investment being in terms of the general local borrowing restriction imposed by the exchange control authorities, which is intended to form a rationing of domestic capital resources.
ANNEX: OECD FDI REGULATORY RESTRICTIVENESS INDEX

CHART A1: 2010 FDI REGULATORY RESTRICTIVENESS INDEX

OECD (2010), OECD FDI Regulatory Restrictiveness Index, 2010 Update
### TABLE A1: 2010 FDI REGULATORY RESTRICTIVENESS INDEX - DATA

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OECD (2010), OECD FDI Regulatory Restrictiveness Index, 2010 Update

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CHART A2: 2013 FDI REGULATORY RESTRICTIVENESS INDEX

2013 FDI RR Index

Closed = 1; Open = 0

Source: OECD

OECD (2013), OECD FDI Regulatory Restrictiveness Index
### TABLE A2: 2013 FDI REGULATORY RESTRICTIVENESS INDEX - DATA

Report date: 20/03/2013

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OECD (2013), OECD FDI Regulatory Restrictiveness Index
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www.oecd.org/investment