

THE PROMOTION AND PROTECTION OF FOREIGN INVESTMENT IN SOUTH AFRICA: A CRITICAL REVIEW OF PROMOTION AND PROTECTION OF INVESTMENT BILL 2013

by

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by

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submitted in accordance with the requirements for the degree of

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UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROFESSOR O S SIBANDA

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DECLARATION BY STUDENT

I, Mtandazo Ngwenya (36134201) declare that *The Promotion and Protection of foreign Investment in South Africa: A Critical Review of Promotion and Protection of Investment Bill 2013* is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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I, Professor Omphemetse Stephen Sibanda declare that the thesis *The Promotion and Protection of foreign Investment in South Africa: A Critical Review of Promotion and Protection of Investment Bill 2013* is of acceptable standard and can be submitted for examination by external examiners for the degree of Doctor of Laws in the Department of Public, Constitutional and International Law.

Signature:

Date:

DEDICATION

I dedicate this work to the following very special people:

To my loving wife Judy Ngwenya, thank you for all the support and encouragement you have given me. In accepting my long hours dedicated to this work and keeping the home fire burning, you make me so happy. To Nqobile Ngwenya and Nobuhle Ngwenya, you are the apples of my eye and a constant reminder of why this is all worthwhile. To my late father, Enock Ngwenya, I know you are smiling down from heaven. I am the man I am today because of you. To my mother, Agnes Nhlanla Ngwenya. Mother, you are a solid rock upon which I have leaned over the years. I am grateful for your many sacrifices, ensuring I received a proper education. I hope you know just how much I love you.

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I have fought the good fight, I have finished the race, I have kept the faith (2 Timothy 4:7)

He is the Alpha and the Omega.

SUMMARY

At the dawn of democratic rule in the period 1994–1998, South Africa concluded 15 bilateral investment treaties (BITs), mostly with European nations. Some of these treaties were concluded before the Constitution of 1996. The country has since concluded a total of 47 BITs, with the majority not in effect as they were not ratified per the required constitutional processes. The policy decision to enter into BITs was taken by the African National Congress (ANC) government, led by the late former state president Nelson Mandela. The BITs were seen as an important guarantee to attract foreign investment into the country. The aim was to provide added assurance that foreign investments were safe in a democratic South Africa after many years of international isolation and sanctions.

The conventional wisdom at the time was that BITs would increase foreign investor appetite to invest and the country would experience rising levels of foreign direct investment (FDI) as a result. This would facilitate economic growth and the transition of the country into the global economy. South Africa concluded BITs with seven of the top ten investor countries. In October 2013 the South African government cancelled a number of BITs with these European countries invested in South Africa. These countries – namely Belgium, Luxembourg, Spain, Switzerland, Germany and the Netherlands – complained of lack of consultation by the South Africans. On 1 November 2013 the Minister of Trade and Industry published, in *Government Gazette* No 36995, the Promotion and Protection of Investment Bill (PPIB or Investments Bill) as the proposed primary legislative instrument for the protection of foreign investments.

This created much uncertainty among many European nations as well as in the United States of America (US), who were concerned about the motivation for cancelling bilateral treaties in favour of domestic legislation. BITs had been a part of the policy instruments regulating foreign investments in the country for over 20 years. Globally these treaties have been used to regulate foreign investments in a number of areas, and to provide protection to investments

such as full protection and security, guaranteed pre-establishment rights, ease of repatriation of funds, most-favoured nation, fair and equitable treatment, national treatment and efficient dispute settlement mechanisms, among other provisions.

In most cases international arbitration via the International Centre for the Settlement of Investment Disputes (ICSID) and other international arbitral mediums has been a standard provision in the treaties. This has allowed foreign investors to bypass host countries' legal systems. The latter is believed to be a significant inducement for foreign investors, guaranteeing that should a dispute arise, or if an expropriation occurs, the investor could institute an international arbitral process against the host government. International arbitration is preferred by foreign investors for the reason that, in some cases, domestic courts may lack independence from the state, and may make partial rulings that do not protect investors.

Furthermore, international arbitration processes are more efficient and produce rulings faster than domestic courts, which are usually burdened with bureaucratic procedures and limited resources. In cases where delay exacerbates injury, prompt resolution of disputes is preferable. This study evaluates the Investments Bill and the rationale applied by the government of South Africa to cancel BITs with major trade and investment partners in favour of this legislation. The thesis focuses on the Investments Bill, in light of the objective provided by the Department of Trade and Industry (DTI) for its enactment to law. The Investments Bill is subjected to a constitutional analysis to determine its compliance therewith. Comparisons are also made between the Investments Bill provisions and the prevailing international law principles on foreign investments.

The Investments Bill is then critically evaluated against emerging trends on FDI regulation on the African continent to determine its congruence or lack thereof with best practice recommendations at regional economic community (REC) and African Union (AU) level. The thesis concludes with a set of policy recommendations to the DTI on how to improve South African policies related

to the regulation of foreign investments taking into account the national imperative as well as Southern African Development Community (SADC) and other broader African continental objectives of harmonisation of FDI regulation, including the Tripartite Free Trade Area (FTA) implementation. The timing of this thesis is significant for South Africa. It adds to various deliberations that are taking place as the Investments Bill is set to make its way through the legislative approval processes in 2015.

The Bill has been met with opposition from some segments of society. Others have expressed support – including several state departments, the ANC, the South African Communist Party (SACP) and other political formations. The summary of findings contained in the thesis will be presented to the DTI to influence policy directions of the state in terms of foreign investment regulations. Should the Bill be enacted, the Minister of Trade and Industry is required to promulgate the dispute resolution mechanism that will govern investment disputes. The findings of this study will be important to the determination of how such dispute resolution mechanisms may function. Furthermore, in 2010 Cabinet instructed the DTI to develop a model new-generation BIT Template to be utilised by South Africa, should a compelling reason arise to enter into bilateral agreements.

The research results will assist policy-makers to develop policies that are consistent with and align with the overarching Africa strategy that has been heavily promoted by South Africa. The country faces a number of challenges, particularly those related to low economic growth, high levels of poverty, unemployment and record levels of inequality. The gap between the rich and poor, in terms of the Gini coefficient, was 0,67 based on the World Bank Development Research Group Report of 2010. It is reported as one of the highest in the world and is believed to have worsened since the dawn of democracy.

This is occurring in a fiscal and microeconomic environment characterised by a shrinking tax base: of the 5.1 million assessed tax payers in 2012/2013, fewer than 10 per cent of the tax base contributed nearly 50 per cent of personal income tax revenues, according to the Budget presentation to Parliament by the then Minister of Finance, Pravin Gordhan, in February 2014.

It is clear that increasing the volume of FDI in the country, particularly Greenfield FDI, is one of the critical pillars of South Africa's economic growth story. In the main, FDI in the country has been characterised by equity purchases, mergers and acquisitions. What is required to create employment and increase the tax base are investors that set up manufacturing, mining or other greenfield industries. The current make-up of FDI investment to South Africa has high capital mobility. Greenfield FDI investors, because of the more rigid capital mobility, will be concerned about the safety of their investment over the long term. The policy and legal instruments a country implements have the potential to hamper foreign investments, and hence a critical evaluation of the Investments Bill is an important contribution to the policy efforts of tackling the country's social and economic challenges.

KEY TERMS

bilateral investment treaty, BIT, foreign investment, multilateral investment, free trade area, OAU, expropriation, dispute resolution, National Development Plan, NDP, Constitutional Court, SADC Tribunal, economic growth, World Trade Organization, WTO Dispute Settlement Body, customary international law

LIST OF ACRONYMS AND ABBREVIATIONS

ACHPR	Africa Court on Human and People's Rights
ACHR	African Commission on Human Rights
ACJHR	African Court of Justice and Human Rights
AEC	African Economic Community
AER	American Economic Review
African J. Int' & Com L	African Journal of International and Comparative Law
AGOA	African Growth and Opportunity Act
AIDS	Acquired immunodeficiency syndrome
Am. J. Int'l L	American Journal of International Law
Amer J CL	American Journal of Comparative Law
ANC	African National Congress
AU	African Union
B-BBEE	Broad-based black economic empowerment
BEE	Black economic empowerment
BIT	Bilateral investment treaty
BMR	Business and Management Review
BRICS	Brazil, Russia, India, China and South Africa
Brooklyn J. Int'l L	Brooklyn Journal of International Law
BYIL	British Year Book of International Law

CEN-SAD	Community of Sahel-Saharan States
CERDS	Charter of Economic Rights and Duties of States
CFTA	Continental Free Trade Area
CILSA	Comparative and International Law Journal of Southern Africa
CIME	(OECD) Committee on International Investment and Multinational Enterprises
COMESA	Common Market for Eastern and Southern Africa
Cornell Int'l LJ	Cornell International Law Journal
COSATU	Congress of South African Trade Unions
CSR	Corporate social responsibility
CTC	Commission on Transnational Corporations
DCF	Discounted cash flow
DG	Director General
DMR	Department of Mineral Resources
DRM	Dispute Resolution Mechanism
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
DTI	Department of Trade and Industry
EAC	East African Community
ECB	Expropriation Compensation Board
ECCAS	Economic Community of Central African States

ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
EEC	European Economic Commission
EFF	Economic Freedom Fighters
Emory L.J.	Emory Law Journal
EU	European Union
FDI	Foreign direct investment
FET	Fair and equitable treatment
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
GEAR	Growth, Employment and Redistribution Strategy
GINI	Gini index or coefficient
GPA	Agreement on Government Procurement
Harv Int'l LJ	Harvard International Law Journal
HIV	Human immunodeficiency virus
HJES	Humanitas Journal of European Studies
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes

IFC	International Finance Corporation
IGAD	Intergovernmental Authority on Development
IIA	International investment agreement
ILM	International Legal Material
ILO	International Labour Organization
ILR	International Law Review
IMF	International Monetary Fund
IISD	International Institute for Sustainable Development
IP	Intellectual property
IPAP	Industrial Policy Action Plan
IRR	Internal rates of return
IRSIA	Draft Convention on the International Responsibility of States for Injuries to Aliens 1961
ISQ	International Studies Quarterly
IT	Information technology
ITO	International Trade Organization
J. Int. Dev	Journal of International Development
JEI	Journal of Economic Integration
JESR	Journal of Educational and Social Research
JIBS	Journal of International Business Studies
JSE	Johannesburg Stock Exchange
JWIT	Journal of World Investment and Trade

LDC	Least developed country
MAI	Multilateral Agreement on Investments
MBAP	Mineral Beneficiation Action Plan
MFN	Most-favoured nation
MIGA	Multilateral International Guarantee Agency
MJSS	Mediterranean Journal of Social Science
MK	Umkhonto we Sizwe
MNC	Multinational Corporation
MPRDA	Mineral and Petroleum Resources Development Act
MTA	Multilateral trade agreement
NAFTA	North American Free Trade Agreement
NDP	National Development Plan
NEPAD	New Partnership for Africa's Development
NGO	Nongovernmental organisation
NIEO	New international economic order
NOFP	Net Open Forward Position
NP	National Party
NPC	National Planning Commission
NUMSA	National Union of Metalworkers of South Africa
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development

OPEC	Organization of the Petroleum Exporting Countries
PALU	Pan African Lawyers Union
PCIJ	Permanent Court of International Justice
PELJ	Potchefstroom Electronic Law Journal
PFI	(SADC) Protocol on Finance and Investments
PIA	Priority intervention area
PPIB	Promotion and Protection of Investment Bill
PSNR	Permanent Sovereignty of States over their Natural Resources
RDP	Reconstruction and Development Programme
REC	Regional economic community
RISDP	Regional Indicative Strategic Development Plan
RTA	Regional Trade Agreement
SACFU	South African Commercial Farmers Union
SACP	South African Communist Party
SADC	Southern African Development Community
SAIIA	South African Institute of International Affairs
SAIRR	South African Institute of Race Relations
SAJHR	South African Journal of Human Rights
SALC	Southern African Litigation Centre
SALJ	South Africa Law Journal
SA Merc LJ	South African Mercantile Law Journal

SARB	South African Reserve Bank
SAYIL	South African Yearbook of International Law
SCA	Supreme Court of Appeal
SEZ	Special economic zone
SJHR	South African Journal on Human Rights
SMME	Small, medium and micro enterprise
SONA	State of the Nation Address
Stell LR	Stellenbosch Law Review
SYBIL	Singapore Year Book of International law and Contributors
TDCA	Trade Development and Cooperation Agreement
TIL	The International Lawyer
TNC	Transnational Corporation
TRIMS	Agreement on Trade-related Investment Measures
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UDM	United Democratic Movement
UMA	Arab Maghreb Union
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

UNDP	United Nations Development Programme
UNIDO	United Nations Industrial development Organisation
US/USA	United States of America
USD	United States Dollar
Va. J. Int'l L	Virginia Journal of International Law
WEF	World Economic Forum
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
YLJ	Yale Law Journal

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CHAPTER 1

Introduction

1.1 General: The changing phase of investment promotion and protection in South Africa

South Africa has embarked on an intensive process of dismantling protectionist business and trade policies. The objective is to make the country a globally preferred investment destination. This development is not a surprise because the country's sound competition and trade policies, natural resource endowments, market size and regional influence; make it attractive to foreign business and FDI.¹

The country has experienced swings up and down in economic performance. For example, the International Monetary Fund (IMF) 2014 World Economic Outlook report stated that the South African economy was set to grow by below 2 per cent in 2014 and below 3% in 2015. This growth rate however, falls short of the minimum 5 per cent growth the National Planning Commission (NPC) stated in the National Development Plan (NDP) as the minimum required to make a sustained impact on poverty and unemployment. The World Economic Forum (WEF) 2014 Global Risk report stated that South Africa had the third-highest youth unemployment in the world, estimating that 50 per cent of young South Africans are unemployed.

The 2012 IMF Article IV Consultation on South Africa 12/247 concluded that if not addressed, the stubbornly high unemployment rate is likely to become politically and socially unsustainable. The 2012 IMF Article IV Consultation concluded by stating that job creation was an "urgent national priority". These socioeconomic challenges require clear policy goals that take into account the country's need to maintain an attractive investment climate for both local and foreign investors.

¹ Sibanda 2014(4) *BMR* 114

There is an urgent need for new capital inflows for Greenfield FDI projects that are labour-intensive to generate employment. Correspondingly, there is a dire need to achieve redistribution of wealth, land and other means of production to address the past racial inequalities and narrow the gap between the richest and poorest citizens. In this socioeconomic context, an *Update on the Review of Bilateral Investment Treaties in South Africa* was presented to the Parliamentary Portfolio Committee on Trade and Industry on 15 February 2013 by the Deputy Director-General for International Trade and Economic Development.² The presentation made some pointed references to the fact that from 1994 to 1998, the South African government concluded and ratified 15 BITs, mostly with European countries. Other BITs have been negotiated with various countries but were not ratified.

The BITs were concluded in an attempt to facilitate South Africa's re-entry into the global economic system following the 1994 election that marked the end of apartheid. The update to the Parliamentary Portfolio Committee on Trade and Industry points to five core elements of the BIT review that were approved by Cabinet.

These five core elements were as follows:

- 1) to develop a new Investment Act to codify and clarify typical BIT provisions into domestic law and strengthen investor protection;
- 2) to terminate first-generation BITs offering partners the possibility of renegotiation;

² DTI www.safpi.org/sites/default/files/publications/dti_review_of_bits_ppc_20130215.pdf (Date of use: 16 June 2014) points to the need to create legislation that balances effective protection of investments with measures that ensure that FDI supports national development, establishes beneficial linkages to national economy, augments domestic financial resources, fosters enterprise development and enhances the technology, skill and knowledge base of the economy. The presentation pointed out problems with definitions of investor and investment and the bypassing of domestic courts, and suggested that the first-generation BITs were ambiguous and subject to unpredictable interpretations by international arbitrators.

- 3) to refrain from entering into BITs in future unless for compelling economic and political reasons;
- 4) to develop a new model BIT as a basis for (re)negotiation, and
- 5) to establish an inter-ministerial committee (IMC) to oversee the process.

The policy choices of the first democratic government suggest that concluding BITs was considered a necessary process towards attracting FDI, particularly from developed European countries. The South African government now contends that there is no direct link between the levels of FDI from a particular country and whether or not South Africa has a BIT with that country. This view was outlined by the Minister of Trade and Industry, at the UN Conference on Trade and Development in Geneva in September 2012. The minister stated four main findings by the government from its BIT reviews:

- 1) There was no direct link between having a BIT and the level of FDI inflows.
- 2) BITs restrain the government from regulating in the public interest.
- 3) BITs are inconsistent with the South African Constitution.
- 4) South African courts are sufficiently independent to protect foreign investors.

Foreign investors are concerned that South Africa maintains intentions to create conditions favourable for the expropriation of the assets of foreign investors. They are concerned that replacing a treaty between nations with municipal law makes foreigners susceptible to host-nation politics. In this position of vulnerability, the host is more inclined to make unilateral changes to the law without negotiation.³

There is opposition by a number of European countries to the proposed Investments Bill, primarily those provisions emphasising municipal dispute resolution over international arbitration. The Bill provides that all investment

³ See Marais 2014-03-14 *Sunday Times* 2. The USA ambassador to South Africa, Patrick Gaspard, is quoted urging the South African government to be cautious. See also De Vos <http://reconciliationbarometer.org/volume-six-2008/the-independence-of-the-judiciary-in-south-africa/> (Date of use: 4 November 2014).

disputes are to be settled in South African courts or by other arbitral processes based on municipal law. The South African government argues that the legal systems as enshrined in the Constitution and the South African judiciary are robust, independent and fair, and that there is thus no need to settle disputes with foreigners via international forums. Further, that there are investors in South Africa from countries that do not have BITs with the country.⁴

The absence of a BIT is at present not seen by government as an impediment to investing, as the country has a well-developed legal system, stable democracy, and has a competitive and attractive investment climate. However, foreign investors are alert to the threats being made by the ANC Youth League, the Economic Freedom Fighters (EFF), the National Union of Metalworkers of South Africa (NUMSA) and other political formations with regard to policy changes that will allow for nationalisation. The EFF, in its 2014 Election Manifesto, called for the nationalisation of land, banks and other strategic industries without any compensation being paid.

South Africa has been sued at the ICSID by foreign investors utilising BIT provisions. One such case is the dispute in 2007 that involved Italian miners invested in South Africa, *Piero Foresti, Laura de Carli and Others v South Africa*.⁵ In that case it was argued amongst others that South African laws such as the Broad-Based Black Economic Empowerment (B-BBEE) Act 53 of 2003 as amended, the Minerals and Petroleum Resources Development Act 28 of 2002, the Mineral and Petroleum Resources Royalty Act 28 of 2008 and other legislation seeking to achieve racial redress as part of the legislative intent, are a form of regulatory expropriation and are discriminatory.

⁴ See Buthe and Milner in *Bilateral investment treaties* argue that BITs and their impact on FDI should not be construed on a narrow basis of the impact on the bilateral flows of investments. They argue that a BIT is a political tool that solves a political problem serving the purpose of signalling to a wider investor community the host state's broad commitment to liberal economic policies. BIT benefits should be measured based on the overall flow of FDI to the host nation and not merely at the bilateral levels.

⁵ *Piero Foresti, Laura de Carli and Others v. South Africa* (ICSID Case No. ARB(AF)/07/01) Award of 4 August 2010 herein after (*Foresti case*).

Furthermore, their investments in the South African mining sector have been impaired contrary to the terms of South African BITs with Italy, Belgium and Luxembourg.⁶ Foreign investors argued that these laws are in fact a breach of the fair and equitable treatment (FET) standard. This argument stems from the fact that the BITs concluded in the mid-1990s by the ANC government made no mention of the economic transformative agenda and social re-engineering policies of racial economic redistribution.⁷

These policies aim to redress high income and wealth inequality due to the fact that black South Africans were marginalised, excluded from meaningful economic participation, and denied education opportunities and the right to vote for a government of their choice. The government has subsequently enacted black economic empowerment (BEE) laws obligating companies to undertake BEE transactions.

For instance, affirmative action legislation requires companies to favour black entrepreneurs in the procurement process, to promote the advancement of blacks in the workplace and award financial assistance for study. In exchange, companies are awarded a BEE rating based on a scorecard. Only those entities that achieve a set number of points are permitted to enter into commerce with institutions of state. There are charters that have been agreed to by economic sectors that further drive the transformation plan, and companies, as part of their operating licences, are required to spend a percentage of profits made each year on corporate social responsibility (CSR) programmes.

This thesis does not attempt to provide a definitive answer for the contentious issue of whether FDI has been utilised as a political tool by capital-exporting nations.⁸

6 There may well be more cases, but information is limited due to the private nature of international arbitration hearings.

7 See Peterson 2006 (26) *Dialogue on Globalization* 8 and Pelsch 2004-08-24 *Financial Times* 6.

8 See Borensztein, De Gregorio and Lee "How does foreign direct investment affect economic growth?"

Equally, the determination of a direct link between FDI and BITs is beyond the scope of this study.⁹ The thesis focuses on the suitability of enacting the Investments Bill to regulate foreign investments in South Africa. It places this analysis in the context of the Constitution as well as the socioeconomic situation in the country, including the attainment of continental strategies. This is achieved by conducting research on various international efforts at regulation of foreign investments through BITs and other IIAs.

Customary international law and other voluntary corporate governance codes are taken into account. Regulatory attempts by multilateral institutions such as the United Nations (UN), (AU), Southern Africa Development Community (SADC), Common Market for Eastern and Southern Africa (COMESA), International Labour Organisation (ILO), World Trade Organisation (WTO), European Union (EU), Organisation for Economic Cooperation and Development (OECD) and other international organisations are also evaluated.

1.2 A global context for attempts to regulate foreign investments

The world is showing signs of recovery after seven years of a global financial crisis that began in 2008 and which had a devastating impact on major and developing economies. This global economic recovery is being spurred by economic improvements in high-income countries; however, this positive growth prospect is still sensitive to monetary policy changes, particularly the tapering of stimulus packages by the US Federal Reserve.¹⁰ Developing countries are set to grow by above 5 per cent on average, benefiting from improving global conditions in the next two to three years. To facilitate this growth, countries are attempting to lure the limited number of foreign investors in a global economic environment characterised by high competition for FDI funds.

⁹ See Helleiner *The international monetary and financial system*.

¹⁰ World Bank <http://worldbank.org/en/news/press-release/2014/06/10wb-lowers-projections-global-economic-outlook-developing-countries-domestic-reforms> (Date of use: 19 August 2014).

To date, available literature and various studies have proved inconclusive in establishing a direct correlation between having BITs in place and the level of FDI received by a particular country. More than fifty years have passed since Germany and Pakistan concluded the first bilateral investment treaty in the world, called the Encouragement and Reciprocal Protection of Investments. Several thousands of these treaties have been concluded since then. These BITs have been considered a part of the policy tools available to governments to attract foreign investors. Some governments believe BITs offer added guarantees and protections for foreign investments and act as an inducement to new investments.¹¹

Other governments, however, have considered BITs to be unnecessary, preferring instead the domestic regulation of foreign investment. Empirical studies of the impact of BITs on FDI have shown mixed results, with some studies demonstrating no link between the number of BITs concluded by a nation and FDI flows.¹² Since 1994 South Africa has concluded a total of 47 BITs, of which only 15 were in force prior to the treaty cancellation process the government embarked upon in October 2013.

In the absence of a global treaty on the regulation of foreign investments, BITs have been the most significant policy and legal instrument for regulating and protecting foreign investments. The primary reason for developed countries historically to have concluded BITs with developing countries has been that investments flowed from the developed countries to the developing world. Foreign investors judged the political and legal systems in least developed countries (LDCs) to be unstable and unpredictable.

The fear of nationalisation of investments by recently independent states caused many developed countries to require extended guarantees beyond those available under domestic legislation. BITs allow a private foreign investor to

11 Buthe and Milner *Bilateral investment treaties* 171-224.

12 Tobin and Rose-Ackerman *Foreign direct investments and the business environment in developing countries: The impact of bilateral investment treaties* 2. See also Neumayer and Spess 2005 *World Development* 1567-1585.

settle disputes with host governments without seeking their home state to be party to the dispute through political mechanisms such as diplomatic protection¹³ and state responsibility. Figure 1.1 and Figure 1.2 below show the growth of BITs globally and the participation levels of countries by decade from 1959 to 1999.

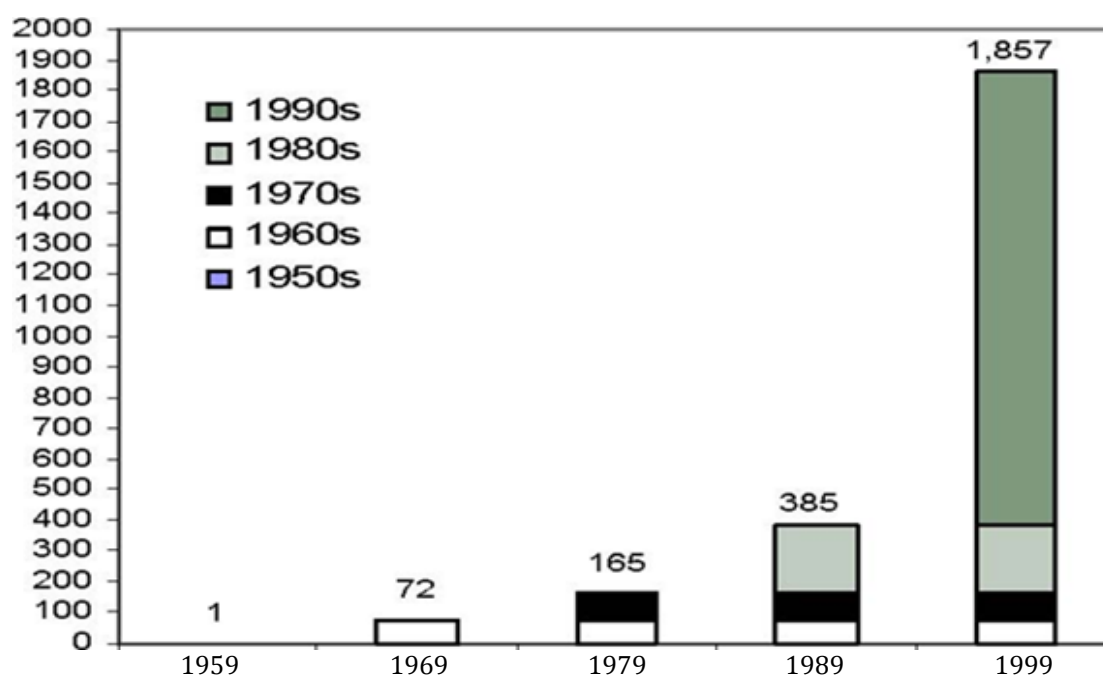


Figure 1.1: Growth in the number of BITs, 1959–1999

Source: UNCTAD database on BITs, 1999

¹³ *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at para 31, *Von Abo v President of South Africa* 2009(5) SA 345 (CC) also *Oliver* 2005 SAYIL 238-252.

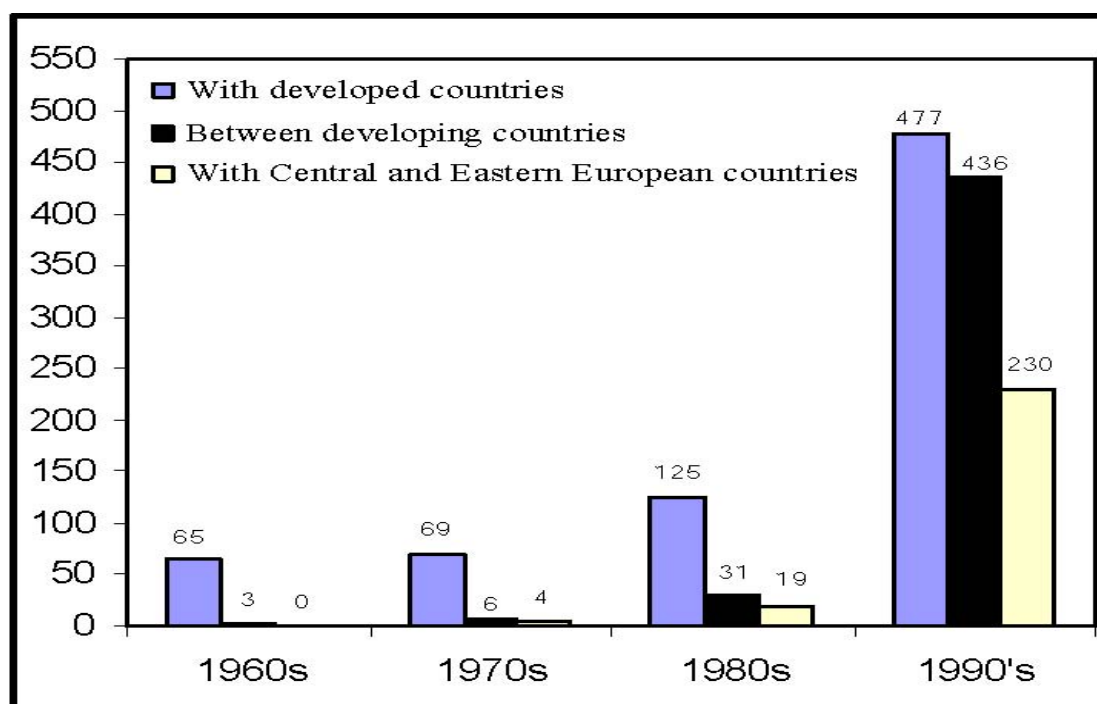


Figure 1.2: BITs concluded by developing countries, by decade, 1960-1999

Source: UNCTAD database on BITs, 1999

The number of BITs globally has risen from one in 1959, when the first BIT was concluded, to 1 857 by 1999, 2 500 by 2006 and 3 196 at the end of 2012, according to the UN Conference on Trade and Development (UNCTAD), World Investment Report of 2013.¹⁴ The report also indicated that countries are increasingly showing a greater preponderance for regional agreements rather than for simple bilateral agreements, and issues of social development and sustainability are becoming increasingly important. The report notes that a total of 1 300 BITs terminated in 2013, in line with treaty provisions globally. This has opened the way for renegotiations and cancellations of treaties that states believe are not in the best interests of the host.

¹⁴ UNCTAD <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=588> (Date of use: 10 February 2014)

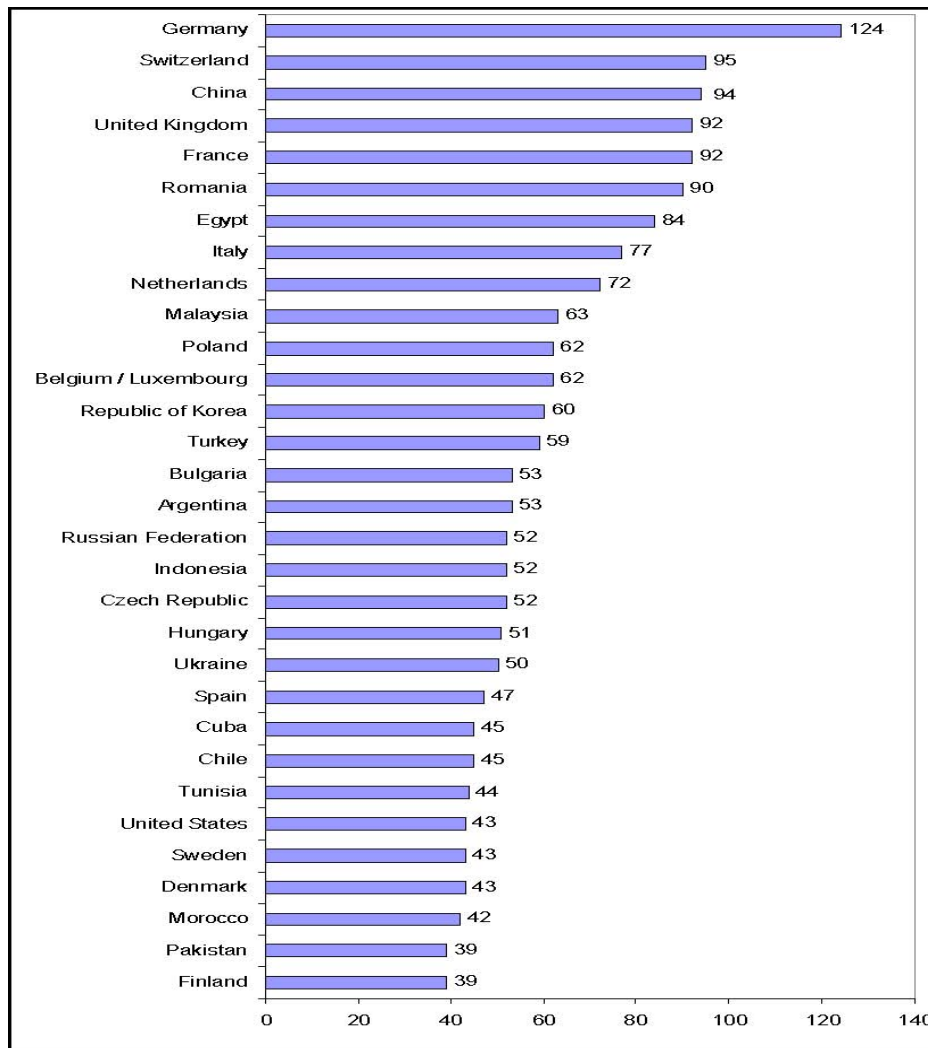


Figure 1. 3: Top 30 countries in the number of BITs concluded, 1 January 2000

Source: UNCTAD database on BITs, 1999

Developing countries hold concerns about the increasing power of some multinational corporations (MNCs). There are concerns about external influences and pressure being applied that has the intent of preventing the ability of developing nations to fully regulate their domestic affairs free from external interference, including from the foreign MNCs operating in these host countries.¹⁵

¹⁵ Lowenfeld *International economic law* 471-473. Carlos Calvo, an Argentine lawyer, argued against the imposition of international arbitration and market-related compensation for expropriated assets. The Calvo Doctrine demonstrates the contrast in ideological standpoints between the US and developing Latin American states regarding customary international law on foreign investments. Calvo articulated his doctrine in the following manner: “[T]he rule that in more than one case it has been attempted to

Figure 1.3 above shows the top 30 countries in the world that had concluded BITs by the year 2000. The list includes some of the largest economies in the world. Concluding BITs has become a necessary political tool for a developing country keen to attract foreign investments, particularly from developed countries. As illustrated in Figure 1.2, the 1990s were marked by significant shifts with an increasing quantum of BITs concluded between developing countries. To further facilitate the uptake of BITs, the World Bank played a central role in the conclusion of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) of 1965.¹⁶

The ICSID dispute settlement mechanisms became a spur for the conclusion of more BITs. The World Bank then went a step further with the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) of 1985.¹⁷ This created guarantees for investors through insurance cover for non-commercial risks such as nationalisation, or for destruction caused by acts such as riots and civil wars. The increase in BITs and ICSID arbitration processes have not been without controversy in recent times, as an increasing number of rulings in international arbitrations have gone against the host state governments.

The emerging view is one where the ICSID processes appear biased in favour of private foreign investors.¹⁸ A number of countries have recently withdrawn

impose on American States is that foreigners merit more regard and privileges more marked and extended than those accorded even to the nationals of the country where they reside. The principle is intrinsically contrary to the law of equality of nations." See also Shea *The Calvo Clause* 17-19.

¹⁶ See, the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965, ((1966) 575 UNTS 160); see also <http://www.icsid.worldbank.org>. Today, the ICSID is considered the leading international arbitration institution devoted to investor-state dispute settlement. There are 150 state parties to the ICSID Convention that have deposited instruments of ratification.

¹⁷ See, the Convention Establishing the Multilateral Investment Guarantee Agency of 1985 ((1988) 1508 UNTS 99). More on the work of MIGA can be accessed at <http://www.miga.org>. See also Salacuse *The three laws of international investment*.

¹⁸ Vis-Dunbar, Peterson and Diaz 2007-05-09 *Investment Treaty News*. The president of Bolivia, Evo Morales, called on all Latin American states to withdraw from the ICSID, saying: "We emphatically reject the legal, media and diplomatic pressure of some multinationals that ... resist the sovereign ruling of countries, making threats and initiating suits in international arbitration." The growing discontent with the ICSID

from the ICSID process. On 26 January 2012 Venezuela announced its withdrawal from the ICSID Convention. This did not, however, stop foreign investors filing claims at the ICSID against Venezuela.¹⁹ A total of six cases were filed by six international enterprises by July 2012, according to the report by El Universal.²⁰

At the time of its withdrawal from the ICSID, Venezuela had 26 active BITs that contained provisions allowing international dispute settlement through ICSID arbitration. The principal causes of disputes have been in the critical areas of nationalisation or expropriations, treatment by the host government, dispute resolution mechanisms and the safety and security of the investment. This study compares these provisions as contained in the Investments Bill to the Constitution of the Republic of South Africa, 1996²¹ (hereinafter the Constitution), international law (including other international investment agreements (IIAs)) and principles emanating from the African Union (AU), Southern African Development Community (SADC) and other continental bodies.²²

process stems from the alleged disillusionment that many countries, particularly in the developing world, have with the ICSID panels. The view is that the ICSID panels are investor-friendly and do not take the particular circumstances of each country sufficiently into account when adjudicating disputes. There is an overriding concern by some developing countries that due to the lack of a comprehensive international agreement on the law of foreign investments, the ICSID panels are creating and legitimising new principles of investment law that have by default become the customary international laws on foreign investments. See Subedi *International investment law: Reconciling policy and principle* 32.

¹⁹ See Osode 1997 *CILSA* 41. The author argues the declining value of sovereign immunity as a basis for frustrating the enforcement of international arbitration agreements.

²⁰ Tovar 2012-10-27 *El Universal*.

²¹ Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996)

²² South Africa is a member of the BRICS group, made up of Brazil, Russia, India, China and South Africa. The BRICS nations are leading developing countries with great potential to play a significant role in the global economy as economic influence is shifting more to developing countries from the developed world. The grouping was initially called BRIC, excluding South Africa, which became a member in 2010. See O'Neill 2008-09-23 *Financial Times* 7, where he argued against South Africa joining BRIC on the basis that the country had a low population and the economy was too small in comparison to the other nations in the grouping. South Africa is a member of the regional political group, SADC, established in August 1992. The stated aims of SADC are the achievement of development, peace and security, economic growth, poverty alleviation and the enhancement of the standard of living of the people in southern Africa, among others.

In the absence of a global agreement on regulating foreign investments, BITs remain a central feature in the definitions of investor and host-state relations. The growth in ICSID arbitrations suggests that investors value this ability to take disputes to international forums of adjudication when disputes arise with host states.

The BIT regime has occupied the vacuum created by the absence of a global legal instrument or treaty to regulate foreign investments in a similar manner as, for example, the well-developed area of international trade law.²³ International law on foreign investments has never been fully codified, nor has there been a universally concluded multilateral agreement. Multiple attempts have been made internationally within the UN, OECD, WTO, International Finance Corporation (IFC) and other multilateral forums between 1948 and the 2000s.²⁴ Some of the notable international attempts at concluding a multilateral treaty on the regulation of foreign investment will be discussed. The researcher has attempted to identify the rationale for the conclusion of each of the agreements below and why some were more successful than others.

1.2.1 The Havana Charter for an International Trade Organisation 1948

The Havana Charter for an International Trade Organisation 1948²⁵ hereinafter (Havana Charter) was the product of the UN Conference on Trade and Employment, held in Havana, Cuba from November 1947 to March 1948. This conference was a result of the ideology that had led to the creation of the UN and other global institutions like the IFC and International Monetary Fund (IMF). There was a desire at that point by world leaders to establish a global organisation that would regulate the flow of trade. As a consequence thereof, in 1946 the Economic and Social Council of the United Nations called an

²³ For a detailed study of the various attempts at the international level to conclude a multilateral agreement on foreign investments, see Subedi *International investment law: Reconciling policy and principle* 19-50.

²⁴ Subedi *International investment law: Reconciling policy and principle* 19.

²⁵ The Havana Charter for an International Trade Organisation 1948 (reprinted in US Dept of State Publication 3117 Com. Pol'y Series 113) hereinafter (Havana Charter).

International Conference on Trade and Employment for the purpose of promotion of trade.²⁶

The final charter adopted in Havana failed to include specific provisions on the regulation of foreign investment. This was as a result of opposition from some countries on concluding a multilateral treaty that would potentially weaken protections existing at the time that foreign investors, particularly Western investors, enjoyed in developing countries.²⁷ The US decided to abandon the charter in 1950 and the International Trade Organization (ITO) that was part of the charter resolutions never came to fruition. However, the Havana Charter served as a precursor to the eventual creation of the WTO nearly four decades later.

The General Agreement on Tariffs and Trade (GATT 1947)²⁸ which regulated world trade prior to the establishment of the WTO, also had its roots in the Havana conference. Limited attempts were made in Articles 11 and 12 of the Havana Charter to include rules relating to the regulation of foreign investment. In the end, however, the charter was abandoned. With the failures in Havana, other attempts were required to resolve global foreign investment regulation.

1.2.2 UN Declaration on the Permanent Sovereignty of States over their Natural Resources 1962

In December 1962, the UN General Assembly adopted resolution 1803 (XVII) on the Permanent Sovereignty over Natural Resources (PSNR). This resolution was adopted through the work of various UN committees and working groups, including the UN Economic and Social Council. This resolution came about as a result of an increasing number of former colonies becoming independent and joining the UN.²⁹ The newly independent states sought to assert their rights

²⁶ *Ibid* 12.

²⁷ See Wilcox *Charter for world trade* 145-146 on the motivation of some nations to prevent the conclusion of a multilateral treaty on foreign investments at the Havana Conference in Cuba. See also Toye 2003 (2) *The International History Review* 282-305.

²⁸ See General Agreement on Tariffs and Trade of 1947 ((1947) 55 UNTS 187).

²⁹ See Schrijver *Sovereignty over natural resources*; Anaya *Indigenous people*; Allen *The right to property*; and Coronel *The nationalisation of the Venezuelan oil industry*.

over their territories free from the control of the former colonisers. Having achieved political independence, economic independence became a major priority.

Supported by developments in international human rights laws, developing countries relied on a settled doctrine of international law that had formed the bedrock of the UN Charter: the sovereign equality of nations. Sovereignty became the underlying doctrine utilised by states that had recently achieved independence to argue for the adoption of the PSNR was just action towards the realisation of full sovereignty.³⁰

With regards to the regulation of foreign investments, the PSNR resolution was a major step forward in allowing developing states to exercise municipal judicial authority. A key provision in resolution 1803 on the PSNR³¹ that relates to the regulation of foreign investments is declaration 4 that states the following:

Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.

In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

The PSNR resolution was adopted by an overwhelming majority of states³² and has been cited in a number of judicial decisions by international courts and tribunals as customary international law on foreign investments. It achieved a balance between capital-importing and capital-exporting states' interests. This

³⁰ Sovereignty can be defined as conditions where a state or a government has power and authority to govern itself fully without interference from external sources. In political theory, sovereignty is attached to ruling over a political entity or polity. See Grewe and Byers *The epochs of international law*.

³¹ See UN General Assembly Resolution on PSNR.

³² Sornarajah 2006 (10) *SYBIL* 19-57.

is exemplified by the wording of declaration 4 above, which seeks to balance rights of investors and host nations on the contentious issues of the nationalisation, expropriation or requisitioning of property.

1.2.3 The Charter of Economic Rights and Duties of States of 1974

The Charter of Economic Rights and Duties of States (CERDS)³³ was adopted in 1974 after the precedent-setting PSNR (1803 (XVII)) resolution at the UN.

The charter attempted to codify rules of international law further following the gains made in 1962.³⁴ The CERDS did not achieve the same level of universal support in the UN, as it faced opposition from a number of developed Western capital-exporting countries. These countries held the view that some provisions like Article 2(a) were unreasonable and prejudicial to foreign investors in the event that their assets were seized by the host states.³⁵

The charter seemed to mirror the increasing influence of developing states in the UN as their numbers increased due to former colonies that had recently become independent joining the world body. The successful adoption of the PSNR resolution had emboldened developing countries to require more power to regulate foreign investments within their borders without external influences. There was a push for increasing economic sovereignty and for the realignment of the economic power that developing states felt was disproportionately wielded by industrialised states.

1.2.4 UN Commission on Transnational Corporations 1974

In the same year as CERDS was formulated the Economic and Social Council of the UN (ECOSOC) also established the Commission on Transnational Corporations (CTC). The mandate of the CTC was to consider a number of

³³ Charter of Economic Rights and Duties of States (G.A. Res A/RES/39/163)

³⁴ See Weston 1981 (75) *Am. J. Int'l L* 437.

³⁵ Leading capital-exporting countries such as Germany, the US, Belgium, Denmark, Luxembourg and the UK voted against the CERDS resolution while Canada, France, Israel, Italy, the Netherlands, Norway, Austria and Spain abstained from voting.

proposals for the formulation of rules to govern the conduct of transnational corporations (TNCs).³⁶ The establishment of the CTC was preceded by a number of scandals including those of US multinationals that had been implicated in attempts to bribe foreign governments; the most notable of these being the Lockheed Martin bribery scandals that occurred in the early 1970s.³⁷ The CTC produced a draft code of conduct for MNCs in 1988. Considerable discussion around making it a compulsory or voluntary code consumed the CTC as there was considerable disagreement among states. This eventually led to the disbandment of the CTC in 1993 without a global agreement on how to regulate MNCs.

1.2.5 World Bank efforts at creating regulation

The World Bank participated in two major attempts at developing standards for the regulation of foreign investments. Under the auspices of the bank, the ICSID was concluded in 1965.³⁸ The second legal instrument was the MIGA³⁹, adopted in 1985.

The ICSID was aimed at creating an international platform where private investors could refer disputes with host nations and have binding arbitration adjudicate on the matter. All parties are bound by the arbitration decisions, and the ICSID process has become a part of many BITs concluded internationally. The MIGA served as an enhancement to protect foreign investors from non-commercial risks faced abroad. The guarantees offered by the MIGA cover foreign investments made in developing countries.

³⁶ Refer to the UN ECOSOC Resolution 1908 (LVII) passed on 2 August 1974 and Resolution 1913 (LVII) of 5 December 1974.

³⁷ Refer to Kaplan 18-08-1975 *Time Magazine* 6. A US Senate subcommittee found that the Lockheed board had paid foreign government officials bribes to win military tenders. The scandal added impetus to the enactment of the US Foreign Corrupt Practices Act 1977, which made it a criminal offence for any US citizen to be party to any act aimed at bribing government officials overseas.

³⁸ Rowat 1992 (33) Harv. Int'l LJ 103. See also Parra *The History of ICSID* 11-24 and Screuer et al *The ICSID Convention: A commentary*.

³⁹ See, MIGA Convention 1985

1.2.6 WTO attempts at regulating foreign investment

The matter of regulating foreign investments utilising the WTO frameworks is explored in detail in Chapter 4.

During the WTO Uruguay round of multilateral trade negotiations of 1993, the idea of adding foreign investment regulation to the global trade agenda was considered.⁴⁰ Final rounds of negotiations concluded the Agreement on Trade-related Investment Measures (TRIMS)⁴¹. The TRIMS agreement aims to increase economic efficiency by prohibiting a WTO member state from applying any TRIM that is inconsistent with the principle of national treatment espoused in article III of the GATT.

Other measures aimed at regulating foreign investments concluded as part of the 1994 Marrakesh Agreement herein after (WTO Agreement)⁴² are the following: the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁴³ and the General Agreement on Trade in Services (GATS). These multilateral agreements are considered in Chapter 4, along with the WTO institutional arrangements. The WTO attempts at regulating foreign investments were eventually abandoned in 2004 after concerted opposition from developing countries who opposed adding FDI regulation under the WTO ambit.⁴⁴

⁴⁰ See WTO Press www.wto.org/english/news_e/pres96/pr042_e.htm (Date of use: 4 December 2014). The WTO Director-General at the time, Renato Ruggiero, is cited at the UNCTAD 1996 Seminar on Foreign Direct Investment and Multilateral Trading Systems as having said: "There can be no doubt that foreign direct investment has joined international trade as a primary motor of globalisation. It represents the most effective mechanism for the diffusion of productive know-how and capital around the world and the general creation of wealth." Also refer to Van den Berg 1996 11(4) *JEI* 510-538.

⁴¹ WTO: Trade Related Investment Measures (TRIMS) of 1994 (1869 UNTS 299)

⁴² Marrakesh Agreement Establishing the WTO 1994 (1869 UNTS 299 reprinted (1994) ILM 1197)

⁴³ WTO: Trade Related Aspects of Intellectual Property Rights of 1994 (1869 UNTS 299)

⁴⁴ See Report of the Working Group on the Relationship between Trade and Investment to the General Council of the WTO (WT/WGTI/6) submitted 9 December 2002.

1.2.7 The Multilateral Agreement on Investments

The OECD led an attempt at the conclusion of a multilateral agreement on the regulation of foreign investment in 1998.⁴⁵ The OECD had over a period of time attempted to mobilise international support for the conclusion of a global agreement that would create a stable regulatory environment to regulate MNCs and other aspects of international investment.

The overriding objective of the OECD in this regard was to enhance international economic cooperation in line with the mission of the organisation. The OECD member states were viewed by developing states as a “club of rich nations”, and the organisation’s motivation to conclude a Multilateral Agreement on Investments (MAI) was questioned.⁴⁶ According to the report by the OECD Committee on International Investment and Multinational Enterprises (CIME) in 1995, “[a] multilateral agreement on investment would provide a strong and comprehensive framework for international investment and would strengthen the multilateral trading regime”.

The disagreements between the developed and developing nations over the perceived protections provided to TNCs in the draft MAI, led to its abandonment by the OECD in 1998.⁴⁷ In 2000 the OECD produced a set of Guidelines for Multinational Enterprises following the collapse of the MAI. These guidelines contained provisions that covered aspects of human rights and the protection of the environment and were viewed as more balanced than

⁴⁵ See Witherell 1995 4(2) *Transnational Corporations* 1-14 and Rugman New rules for international investment 176.

⁴⁶ Subedi *International investment law: Reconciling policy and principle* 39-40. The OECD had made several attempts since the 1950s to conclude an international agreement on investments. The industrialised member states of the OECD were concerned by the agenda driven by recently independent states via the UN. They sought to conclude their own agreement and this resulted in the OECD Draft Convention on the Protection of Foreign Property (OECD Publication No. 23081 November 1967). The OECD made further attempts in 1976 with the Declaration on International Investment and Multinational Enterprises. These attempts were unsuccessful as they failed to appeal to a number of developing nations that viewed the OECD as protective of the interests of rich nations.

⁴⁷ See Daly 1997 (20) *World Economy* 787; Graham *Global corporations*; Lipson *Standing Guard*; Sergio 1997-11-10 *Montreal Gazette* B3; Wallace-Bruce 2001 (34) *CILSA* 210-241; and Staples 1999 (14) *Earth Island Journal* 36.

the MAI. However, they lacked the force of law the MAI would have possessed as they were voluntary guidelines that did not create binding international obligations.

1.2.8 Summary of other attempts in the 1990s and 2000s

A number of organisations have attempted to move forward the agenda of concluding an international agreement on foreign investments. The failure to conclude a binding treaty after numerous attempts in various international bodies highlighted the complexity of achieving international consensus on how to regulate TNCs. As highlighted above, the failure to conclude the MAI under the auspices of the OECD was due to philosophical divides between nations, with the more industrialised states pitted against the developing nations.

In the absence of a binding treaty, voluntary codes were developed as a means of providing a basis for further international discourse on regulation of TNCs. Some notable examples are:

1. International Labour Organization (ILO) Multinational Enterprises Declaration 2000 as amended
2. UN Global Compact 1998
3. Global Reporting Initiative 1997
4. Growing Sustainable Business of the UN Development Programme (UNDP)
5. The Equator Principles 2003
6. Amnesty International Human Rights Guidelines for Companies 1998

This list is not exhaustive but demonstrates the growth in various platforms of attempts at voluntary regulation through the development of best practice principles. The UN Global Compact 1998 principles have been included in some

municipal legal instruments for example in sections 72(4) and 72(5) of the South African Companies Act⁴⁸.

1.3 Objective and significance of study

The principal purpose of the Investments Bill is stated in the preamble as follows: “To provide for the legislative protection of investors and promotion of investment; to achieve a balance of rights and obligations that apply to ALL investors; and to provide for matters connected therewith.”⁴⁹ The Investments Bill, once passed into law, will coexist with a number of BITs that are still in force and the provisions of which the state is obligated to uphold. As recently as 2009, South Africa concluded the Bilateral Investment Promotion and Protection Agreement with Zimbabwe, which will be in force for ten years.

It was a highly controversial agreement that sparked legal challenges from the South African Commercial Farmers Union (SACFU), which alleged that the BIT was illegal as it ignored amongst others, the SADC Tribunal rulings of November 2008 that declared the land seizures in Zimbabwe illegal. Questions were raised regarding why the government would cancel BITs with some countries and not others.

Suffice it to say, South Africa maintains BITs with other African nations that are recipients of South African FDI. It is therefore important to develop a clear policy towards BITs as they serve a dual purpose for South Africa. A much broader, long-term strategy is required to influence the direction the country will take in the regulation of foreign investments.

The SACFU argued that the BIT with Zimbabwe prevented the South African government from exercising its constitutional duty of diplomatic protection of

⁴⁸ Companies Act 71 of 2008 (hereinafter the Companies Act); *Brassey Competition law*; *Gibson South African Mercantile and Company Law*; and *Du Toit South African Trust Law: Principles and Practice*.

⁴⁹ See preamble to the Promotion and Protection of Investment Bill 2013, *Government Gazette* 36995 of 1 November 2013.

South African citizens who suffered alleged human rights abuses at the hands of the Zimbabwean government. These abuses are alleged to have occurred during the land expropriations and allegedly involved state-sponsored torture and extrajudicial killing. The main source of dispute focuses on the provisions in the BIT that exclude BIT protection for expropriation that occurred prior to the agreement's conclusion. This provision in effect excludes coverage of losses that occurred during the Zimbabwean government's expropriation of property owned by South Africans in that country.⁵⁰

The objective of this study is to contrast the PPIB with the South African Constitution as well as with existing rules of customary international law on foreign investment to determine any areas of divergence and potential areas where foreign investors may decide to litigate against the state in domestic or international courts and arbitration forums. The study further compares the policy implication of the PPIB as it relates to the African economic integration plans including foreign investment regulation policies emanating from various Pan-African institutions.

The evaluation of the PPIB is critical in informing government policy directed at foreign investment regulation. The study concludes with policy recommendations to the DTI.⁵¹ These recommendations, it is believed, will play a role in influencing the department's foreign investment policy development paradigm in the future. For reasons elucidated in section 1.2 above, the

⁵⁰ See Sokwanele <http://www.sokwanele.com/thisiszimbabwe/archives/5253> (Date of use: 15 April 2014). The legal opinion by *Gauntlett JJ SC, ex parte: Commercial Farmers Union RSA* sought to answer the question of whether entering into a bilateral treaty which sought to exclude liability arising in terms of another multilateral treaty constituted a breach of South Africa's legal obligations. SACFU argued that the BIT with Zimbabwe sought to subvert the SADC Tribunal's final award of 28 November 2008. The North Gauteng High Court in Pretoria made an order that the South African Government must undertake to respect and honour the SADC Tribunal judgements in favour of Zimbabwean commercial farmers. This decision of the High Court was supported by the constitutional court

⁵¹ It is significant to take account of Minister Rob Davies' assertion at the UNCTAD in September 2012, as it reveals the policy dimensions of the South African Cabinet that took the decision in July 2010 for the cancellation of a number of BITs to be replaced by the PPIB.

investment climate in South Africa is a significant contributor to economic development.

In crystallising the DTI policy paradigm, the study will also provide commentary on the assertions made by the Minister of Trade and Industry that the BITs in place were problematic for the following reasons:

- 1) There is no direct link between having a BIT with a country and the level of FDI inflows from such a country.
- 2) BITs restrain the South African government from regulating in the public interest.
- 3) BITs are inconsistent with the South African Constitution.
- 4) The legal system in South Africa is sufficiently robust and independent to manage disputes with investors.

The above pronouncements by DTI Minister Dr Rob Davies are a manifestation of a review of BITs that was undertaken by the DTI from 2007 to 2010. This review coincided with a number of bilateral treaties that South Africa had concluded at the dawn of democracy, particularly with European states, reaching the end of their term. This presented South Africa with a window of opportunity to make changes to the treaties in 2013.

The outcomes of the BIT review by the DTI became Cabinet decisions in 2010, and they have formed the current policy direction of the country with respect to the future regulation of foreign investments.

1.4 Research Methodology

1.4.1 Qualitative data analysis

The research method used in this study is the qualitative analysis of texts and documents. Use was made of library sources, including library sources from other universities that enable access to primary and secondary sources. In particular, the primary sources that were examined include legal cases decided in South African courts, textbooks and law journals.

Interviews and the writings of legal scholars, South African and foreign government officials, diplomatic representatives of geopolitical organisations, legal practitioners, civil society formations, political parties and public international organisations. In some cases where the Internet was used, this was limited to the sourcing of vital research data. This study consists of four key elements:

1. A qualitative study is undertaken to determine what constitutes customary international law and treaty law on foreign investments. A comparative review of the PPIB will be undertaken. This review will focus on the following identified areas of the international law on foreign investments contained in BITs:

- the investment
- national treatment
- most-favoured nation treatment(MFN)
- FET
- Expropriation/nationalisation and compensation
- safety and security of the investment
- the settlement of disputes with foreign investors

This will be achieved by researching relevant decisions of international courts and tribunals, particularly the ICSID, UN Commission on International Trade Law (UNCITRAL),⁵² International Court of Justice (ICJ), Permanent Court of International Justice (PCIJ) and the London Chamber of Commerce. Further, treaties concluded and resolutions taken at the UN, WTO, EU, SADC, AU and other international economic and political forums will be studied.

⁵² UNCITRAL is the UN agency whose primary function is to modernise international trade law. See also Croft, Kee and Waincymer *UNCITRAL arbitration rules*; Binder *The Uncitral rules handbook*; Paulsson *The idea of arbitration*; Shaw *International law* also Fombad 1989 *African J. Int & Comp L* 707 on the role of negotiation and consultation in international dispute resolution.

World Bank reports, International Legal Material (ILM) Journal reports, OECD guiding principles and other international dispute settlement forums, including the European Court of Justice (ECJ) are examined. The rulings of the SADC Tribunal and other authoritative sources are also considered, including those of the African Commission on Human Rights (ACHR) and the African Court on Human and Peoples' Rights (ACHPR). The existence of an international minimum standard is explored, including the principles of state responsibility and the impact of international human rights law on foreign investments.⁵³

2. Research is conducted on relevant attempts at the AU and REC level to develop model IIAs for the regulation of foreign investments in Africa. Interviews with government officials, legislators, legal practitioners and scholars are undertaken. The objective is to focus on how, in the pursuit of African integration, the Investments Bill advances these strategic agendas. Uniform laws are being developed to simplify African regulatory regimes and create space for legitimate public policy objectives. Focus will be placed on how model IIAs developed by African states define the investment, treatment, expropriation, safety and dispute settlement processes with foreign investors.

3. WTO attempts at concluding an international agreement are studied. The matter of how the WTO structure may be expanded to accommodate investment issues reflects the desire to keep the issues of foreign investment regulation on the international agenda. The steps that South Africa takes to finalise municipal legislation on foreign investment, need

⁵³ See *Saluka Investments BV (the Netherlands) v the Czech Republic*, Partial Award, IIC 210 (2006) Permanent Court of Arbitration at para 292. See also International Law Commission draft articles on responsibility of states for internationally wrongful acts (Supplement No. 10 A/56/10 (2001)) and Roth *The minimum standard applied to aliens* also *Barcelona Traction, Light and Power Co Case (Belgium v Spain)* ICJ Reports 1970 (3) (hereinafter the *Barcelona Traction* case) at 33 states that "when a state admits into its territory foreign investments of foreign nationals, whether natural or juristic persons, it is bound to extend to them protection of the law and assumes obligations concerning the treatment to be afforded them".

to take into account obligations to the WTO, SADC, EU, UN, BRICS and other IIAs that bind the country.

4. A summary of key recommendations aimed at assisting in the development of foreign investment promotion and protection policy for South Africa will conclude the study. A constitutional analysis of the various PPIB provisions is also undertaken to improve the draft bill; the objective being to reduce the likelihood of the PPIB being challenged at the Constitutional Court should it be enacted. These recommendations will be based on identified key learnings drawn from the comparative analysis of the PPIB with municipal and international law on foreign investments, SADC and AU policy directions. The objective is to make a meaningful contribution to the policy formulation in the DTI and other pillars of government on this relevant topic of the regulation of foreign investments.

1.4.2 Validation of the research

There are several kinds of validity in respect of education research studies. These include content validity; construct validity, internal validity, external validity, concurrent validity, jury validity, predictive validity, consequential validity, systemic validity, descriptive validity, interpretive validity, theoretical validity and evaluative validity.⁵⁴ Validity in qualitative research refers to the question whether the findings accurately reflect the situation – that is, if the findings are *true* – and whether the findings are supported by evidence – that is, if the findings are *certain*.

There exist several methods to determine the validity of qualitative research, including but not limited to, data triangulation, peer debriefing and critical review. Under triangulation, different data from other sources are examined to build a coherent justification for research themes. In this study, peer debriefing and critical review was used. People or peers with the necessary knowledge

⁵⁴ Ayodele 2012 2 (20) *The JESR* 291 and Selinger and Shohamy *Second language research methods* 95.

and expertise in the area investigated were consulted, and their opinions or critical reviews were incorporated to ensure that the account in the study will resonate with people other than the researcher himself.

1.5 Limitations and delimitations

1.5.1 Limitations

In this study, limitations are potential matters, occurrences, weaknesses or factors that are out of the researcher's control that may influence the outcome of the study – particularly after concluding the study or at the time of examination. Limitations thus are disadvantages as “[t]hey limit the intensity to which a study can go”.⁵⁵ In this study, there are certain events and factors that are beyond the control of the researcher that may influence the outcome of the study, and the findings, submissions and recommendations by the researcher. These limitations are highlighted below:

1. The PPIB has not yet been passed into law in South Africa and may fail enactment or be enacted with significant amendments to the draft gazetted in November 2013.
2. South African courts have not had ample opportunity to pronounce on the constitutionality of certain provisions in the PPIB, and judicial precedent in the future may differ from some of the researcher's conclusions.
3. Section 2.6 below provides a juridical review of the status of international law in the South African courts and constitutional protections of property rights. The manner in which South African courts will interpret BIT provisions along with the PPIB and other binding IIAs is uncertain. The PPIB if enacted will take effect while terminated BITs still have legal effect

⁵⁵ Simon and Goes <http://www.dissertationrecipes.com/wp-content/uploads/2011/04/limitationscopedelimitation1.pdf> (Date of use: 12 December 2013).

as most BITs have a termination clause (so-called sunset clauses) that renders BIT protections valid for up to ten years post-termination.

4. The important matter of proving whether signing BITs with countries enhances the quantum of FDI flows from such countries in a directly correlated manner is beyond the scope of this research. However, the growth in BITs concluded globally can be explained on the premise that a significant number of host countries have found these treaties to be a useful part of the policy tools they have available to attract investments.
5. Developing states have made attempts to define the customary international law on foreign investment in their favour at international forums, including through UN resolutions such as the 1962 PSNR, Calvo doctrinal approaches and attempts at concluding a New International Economic Order (NIEO).⁵⁶

1.5.2 Delimitations

Delimitations are boundaries that are set by the researcher to control the range of a study. These are “conscious exclusionary and inclusionary decisions”⁵⁷ made before any investigations are carried out for numerous reasons, including limiting the amount of time and space allocated to certain aspects. In this study, the following are specific delimitations:

1. The researcher uses the international law of foreign investments as codified in BITs, international treaties and customary international law as a proxy for the minimum standards that foreign investors require from a host country. In essence, the customary international law on investments is assumed to be reflective of the minimum expectations of capital

⁵⁶ UN Declaration for the Establishment of a New International Economic Order 1974 (NIEO) (G.A Res. S-VI/3201); also, Sornarajah *The International law on foreign investment* 237

⁵⁷ Simon and Goes <http://www.dissertationrecipes.com/wp-content/uploads/2011/04/limitationscopedelimitation1.pdf> (Date of use: 12 December 2013).

exporting countries, which have mainly been developed countries. This allows the researcher to draw general principles from the expectations of the developed countries when concluding BITs with host countries.

2. The research also focuses on the evolving norms and practices of African and Latin American countries that seek different ways of regulating foreign investments. The objectives of the AU and other RECs on the African continent have an influence on South African policy development.

1.6 Outline and scope of study

This research focuses on the Investments Bill and its place in the South African foreign investment regulatory policy framework. The need to attract and retain FDI as a pillar for the desired economic growth required for the achievement of the targets set in the NDP is recognised. A sound and stable regulatory environment is considered to be one key variable that foreigners consider when making investments abroad. However, MNCs also factor in as part of the investment decision the inherent risk-return trade-offs that exist in international business transactions. FDI flows to Africa and South Africa in particular are low compared to those to other regions of the world. There is significant competition for the limited FDI and countries are prepared to make expansive guarantees to attract this FDI inflow.

A fundamental policy change, such as the one South Africa is embarking on by cancelling BITs and replacing them with municipal laws, requires close analysis. Chapter 1 covers the rationale for South Africa's concluded BITs and explores the underlying causative factors that have led to the subsequent policy changes by the government. Various international efforts at concluding a multilateral agreement on the regulation of foreign investments were explored, including the root causes of why these attempts to date have proved unsuccessful.

Chapter 2 focuses on the investment climate in South Africa, examining BITs and their effects on FDI in the country. Existing constitutional protections for foreign investors are detailed and the intersection of the Constitution with international legal principles is considered. The chapter concludes with an

evaluation of various international human rights principles that have a bearing on foreign investments.

Chapter 3 focuses in detail on the Investments Bill provisions, testing these against South African and other international legal principles. The Expropriation Act 63 of 1975, the Expropriation Bill of April 2013 and other national policy documents are discussed to present a full context. Chapter 4 focuses on international law principles on foreign investments regulation, including the WTO agreements. The WTO agreements that relate to foreign investments are studied including the dispute settlement understanding. Further attempts to expand the scope of regulation of foreign investments in the WTO agenda and their successes and failures are discussed.

Chapter 5 examines the evolving African approach based on overarching continental objectives. The challenge faced by African governments as a result of BITs limiting public policy space is explored. This includes crystallising the long-term objects of Africa and how FDI can be harnessed in a more balanced manner. The first-generation BITs have been broadly unfavourable to the African countries, creating conflict between the need to create secure and predictable environments for FDI and the need for states to regulate in the public interest.

Chapter 6 concludes the study and makes legal and policy recommendations to the DTI on the Investments Bill. The objective is to influence how the DTI develops policy in relation to the regulation of foreign investments.

It is critically important for the study to identify any key areas of strengths and weaknesses and to make recommendations that focus on improving the regulatory environment in order to make South Africa more attractive particularly to Greenfield FDIs. This must be done within a policy paradigm that recognises the broader African agenda to which South Africa has made significant contributions since the election of the first democratic government and adoption of the country's Constitution.

CHAPTER 2

A review of the South African investment outlook and existing framework for the protection of investment

2.1 Introduction

The principal reason South Africa concluded BITs after the democratic transition in 1994 related to the ANC government's desire to reintegrate the country into the global economic system after decades of isolation as a consequence of sanctions. The country adopted a new constitutional order in 1996 that entrenched democracy. This included a Bill of Rights that is a guarantee of fundamental human rights in line with international human rights laws and principles. This was a necessary condition after centuries of human rights abuses and segregation that attracted the attention of the world. There was a need to grow an inclusive, progressive economy and the attraction of foreign investment was considered key to this strategy.

The BITs were intended as guarantees to international investors that an ANC government would implement liberal economic policies that were conducive to business, and that human rights, peace and security would prevail after decades of conflict. International investors were desirous to re-enter the country after crippling international economic, social and political sanctions that saw more than 350 foreign corporations, primarily from the US, exiting South Africa during the 1980s.⁵⁸ Sanctions included a 1963 UN arms embargo, oil embargos by the Organization of the Petroleum Exporting Countries (OPEC) in 1973, suspension of IMF budget support, the US Comprehensive Anti-Apartheid Act of

⁵⁸ See Gelb http://r4d.dfid.gov.uk/PDF/Outputs/CNEM/drc08_south_africa.pdf (Date of use: 3 February 2015). Sanctions had a major impact on the country. These sanctions included sports bans, exclusion from international trade agreements, refusal of financing facilities and other targeted sanctions aimed at the leadership of the country.

1986 and the European Economic Commission (EEC) sanctions of 1986, to name a few.⁵⁹

The Organization of African Unity (OAU) and Iranian embargos also played a role in creating an international system targeting South Africa and isolating it with the objective of ending apartheid. The 20th-century South African economy was dominated by the mining sector, which contributed the largest share of gross domestic product (GDP), in particular through gold exports. The country produced almost fifty per cent of global gold bullion and was a significant producer in at least ten other mineral categories globally, including diamonds and particularly platinum. According to the *Mineral Handbook 2000–01: Statistics and Analyses of the World's Minerals Industry*⁶⁰, the country possesses the largest deposits of platinum group metals in the world. For the largest part of the 20th century gold dominated exports and rendered the national currency dependent on the international prices of the commodity.⁶¹ In the 1960s, the government took several measures to diversify the economy from mining to manufacturing and agriculture. This spurred significant industrialisation by the 1980s, which was race-based, aimed at creating largesse of white wealth providing goods and services needed by millions of blacks.

By the early 1990s, the South African economy had become significantly skewed by apartheid economic policies that aimed to benefit the small elite group of white South Africans while keeping the majority of blacks in subjugation. Legislation that had been adopted by the National Party (NP) government to enforce apartheid included the Group Areas Act 41 of 1950,

⁵⁹ See Mongabay <http://www.mongabay.com/reference/countrystudies/south-africa/economy.html> (Date of use: 16 April 2014).

⁶⁰ *US Geological Mineral Commodity Summaries 2000* <http://www.minerals.usgs.gov/minerals/pubs/mcs/2000/mcs2000.pdf> (Date of use: 16 April 2014)

⁶¹ See US Geological Survey *Mineral Commodity Summaries 2000*, which indicates that South Africa, although having dropped from its peak position, still remains among the top five gold-producing nations in the world. The country is the world's largest producer of chrome, manganese, platinum, vanadium and vermiculite. The report also indicates that South Africa is the second-largest producer in the world of limonite, palladium, zirconium and rutile. The country also produces large volumes of iron ore and coal for global exports.

Native Labour Regulation Act 15 of 1911 and Natives Land Act 27 of 1913, to name a few. Combined these laws created a government system of racial discrimination and exclusion that aimed to elevate the white minority and protect white economic, political and social interests.

The biological race of the individual became the primary classification system that determined all aspects of economic, social and political participation.⁶² Poverty among black South Africans was high during apartheid and has remained so to date. To keep mining and other sectors profitable, labour costs were kept low through a state system that ensured blacks were systematically prevented from acquiring skills. It is the researcher's untested contention that the violent "uprisings" experienced in the mining sector, particularly the Marikana massacre in 2012 as well as protracted strike actions by mine workers in 2012 and 2013 have their origins in the skills deficits wrought on blacks by apartheid.⁶³ The Bantu Education Act 67 of 1953 is an example of the kind of legal instrument the architects of apartheid utilised to prevent blacks from enrolling in higher education institutions for study programmes reserved exclusively for whites.

The imposition of severe international sanctions was a response to this unjust system that had inflicted untold human suffering on the black majority. To maintain control of the country, the white minority governments utilised state intelligence, policing and the military to achieve political objectives. This included political assassinations, imprisonments without trial, house arrest and other methods of torture aimed at preventing the aspirations of the black majority for political independence.

⁶² Under pressure from the international community, the NP government of PW Botha sought to institute some reforms, including the abolition of the pass laws and the ban on interracial sex and marriage. The reforms fell short of any substantive change, however, and by 1989 Botha was pressured to step aside in favour of FW de Klerk. De Klerk's government subsequently repealed the Population Registration Act, as well as most of the other legislation that formed the legal basis for apartheid. A new constitution, which enfranchised blacks and other racial groups, took effect in 1994, and elections that year led to a coalition government with a non-white majority, marking the official end of the apartheid system.

⁶³ See Alexander et al *Marikana: a view from the mountain* and Budeli *Freedom of association and trade unionism in South Africa: from apartheid to the democratic constitutional order* also, see Muswaka 2014 5 (2) *MJSS* 63-67.

The “one person one vote” principle was anathema to the apartheid government because its practical effect meant the election into power of a black government, as happened eventually in 1994.

To prevent such a fate, the minority government murdered, imprisoned and banished black people and drove millions to poverty and joblessness by enacting laws that kept blacks in relative disadvantage to whites.⁶⁴

These laws were enforced by a powerful police, state security and military machinery mandated with sweeping powers to suppress black ascent. Blacks were excluded from worldwide technological advancement. The technological sophistication of the mining industry, as well as the manufacturing, banking and services sectors, which had grown in terms of their contributions to GDP, required skills that most blacks did not possess. This created structural unemployment, a poverty spiral and increased discontent.

The international efforts to isolate South Africa continued to intensify and drove down economic growth causing declining living standards even among the privileged white population. After over forty years of entrenching apartheid, the NP government, faced with a declining economy and heightened social instability, took a decision to abandon its apartheid policies. Nelson Mandela was released from prison in February 1990 after spending 27 years in jail for his role in acts of terrorism undertaken by the ANC’s armed wing, Umkhonto we Sizwe (MK). Through a negotiated process that took place from 1990 till 1993, the NP government, led by former president FW de Klerk, unbanned political parties and set conditions for the election of a democratic government based on universal suffrage.⁶⁵

The constitution-making process started in 1992 after the release of Mandela from prison. By 1994, a number of countries that had maintained economic as

⁶⁴ See Alexander et al *Marikana: A view from the mountain and a case to answer*.

⁶⁵ See Deegan *The politics of the new South Africa* and Taylor 1993-12-23 *The Washington Post* 4.

well as a wide array of diplomatic sanctions against South Africa started to reconsider their policy positions.⁶⁶ This was in light of the perceived changing political dynamics that were occurring in the country. Foreign investors had new concerns, namely that the alliance partnership that made up the broad liberation movement led by the ANC, held ultra-left political ideologies of communism and nationalisation.

The Congress of South African Trade Unions (COSATU), the South African Communist Party (SACP) and the United Democratic Front (UDF), to name a few, were viewed with suspicion, particularly by European investors. Of equal concern to the international community was the capacity of the unity government to maintain peace and security in light of the high levels of tension existing in the country between blacks and whites and the threat of the outbreak of civil war. Against this historical background the new unity government found it necessary to enact policies that would reassure investors that their investments were safe in South Africa. There was a need to start reversing the damage caused by the prolonged period of sanctions and attract back into South Africa the several hundreds of companies that had disinvested at the height of apartheid.

The ANC government needed to develop a regulatory environment that was sensitive to the concerns of South Africa's largest investors, which were mainly European states and the US. The country had a negative international reputation that needed to be improved.⁶⁷ Unlocking international financing from public international organisations such as the IMF and World Bank was critical, as was enhancing trading relations and creating new lines of credit. The economy needed to grow to create employment for masses of unemployed blacks. Most significantly, the country needed to begin the processes of addressing the high levels of poverty and economic inequalities that were created by centuries of injustice. The policy choices facing the new government

⁶⁶ See Meldrum 2005-04-11 *The Guardian* (UK) 5.

⁶⁷ Loeb 1993-07-12 *Fortune Magazine* 11 and Loeb 1993-10-13 *The Times* (London).

were complex as hundreds of years of subjugation and oppression had created deep, lasting scars on the black majority.

Black people in the main lived and still continue to live in townships. Most of these living spaces lack the basic amenities necessary for decent living. Most South African townships in 1994 lacked safety and security, good schools, adequate medical facilities and clean parks and recreational areas. In the main, black people lived in squalor, lacking skills and without access to economic opportunities.

Decent housing was in short supply and large settlements of black communities did not have clean drinking water, electricity or public transport infrastructure. It was clear that significant social support systems were necessary to arrest this decline and restore human dignity.

2.2 Economic policy conundrum

Among other government measures to restore economic growth, the Reconstruction and Development Programme (RDP), adopted in 1994, was one of the ANC's policy responses to the abovementioned challenges.⁶⁸ The RDP was supplemented by the Growth, Employment and Redistribution Strategy (GEAR) in 1996.⁶⁹ GEAR placed significant weighting on the role of FDI in promoting and accelerating the country's economic growth and on the fact that economic development was the long-term sustainable solution to the critical task of creating employment.

The challenge was to manage the high expectations of rapid economic growth since sanctions had been lifted. In 1994, the country had emerged from a period

⁶⁸ The RDP was a socioeconomic policy designed by the ANC in consultation with its ruling political alliance partners of COSATU and the SACP. Wider consultation on the RDP was undertaken with other societal stakeholders including civil society formations, religious organisations and opposition parties. See Liebenberg and Steward *Participatory development* and Khosa *An RDP policy audit* for a detailed review of the RDP policy and its impact on South Africa also Moran *Foreign direct investment and development*

⁶⁹ See National Treasury <http://www.treasury.gov.za/publications/other/gear/chapters.pdf> (Date of use: 20 January 2013). See also Smit and Du Plessis *Economic growth in South Africa since 1994*.

of the lowest economic growth experienced since the Second World War. Yet the social challenges needed strong policy responses and there was an urgency to address them to maintain social stability. The choices that had to be made were not easy due to contrasting objectives, even within the ruling tripartite alliance of the ANC, COSATU and SACP. These contrasting objectives were achieving economic growth and employment on the one hand, and the redistribution of wealth and massive social expenditure on the other.⁷⁰

Figure 2.1 below demonstrates the economic growth trajectory of South Africa from 1994 to 2013 based on the GDP.⁷¹ Figures 2.2 and 2.3 below provide a comparative GDP analysis of sub-Saharan Africa and other regions of the world over the period 1994 to 2012. The GDP is an economic measure of the relative market value of all goods and services produced in a country annually. This GDP number is divided by the particular country's population to determine a prosperity or standard of living measurement, called GDP per capita.

⁷⁰ The policy differences in the alliance can be identified in the following policy statements released within a month of each other in May and June 2001. The then Minister of Trade and Industry, Alec Erwin, released the following statement in May 2001: "The need to create employment and a better life for our people is the central objective of the economic policy of this government. The Reconstruction and Development Program (RDP) remains the basic policy framework to achieve this objective. The Growth, Employment and Redistribution (GEAR) program is the associated macroeconomic strategy used. At the beginning of this year the President announced an Action Plan to Accelerate Growth. This action plan marked an increased emphasis on macroeconomic reform to further increase investment". The South African Congress of Trade Unions' Policy Statement issued in July 2001 stated that "[i]n contrast to this political progress, in socio-economic terms the legacy of apartheid remains entrenched and, with the massive loss of jobs in the past decade, even appears to be worsening. Wealth is still concentrated in the mining-finance complex, which continue to dominate the commanding heights of the South African economy. Serious inequalities persist, with signs of worsening particularly among the formerly oppressed. The number of people living in poverty is staggering. Almost half of the population lives in poverty, including many of the employed – the 'working poor'. Unemployment and underemployment are on the rise as more jobs are shed and people rely on survivalist activities to make ends meet. The complex nature of transition emerged in deeply contradictory government policies."

⁷¹ For an evaluation of the merits and demerits of GDP as an efficient economic measurement tool, see Stiglitz and Fitoussi *Mismeasuring our lives*.



Figure 2.1: South African GDP 1996–2012

Source: www.tradingeconomics.com; Statistics South Africa

South Africa's GDP grew by 1.9 per cent in 2013 and by 1.4 per cent in 2014. This stands in sharp contrast to the average growth rate of above 5 per cent achieved in sub-Saharan Africa in 2013 and the 6.5 per cent growth forecast for the next two years. The South African economy was heavily impacted by labour unrest in 2013/2014, particularly in the platinum mining sector.

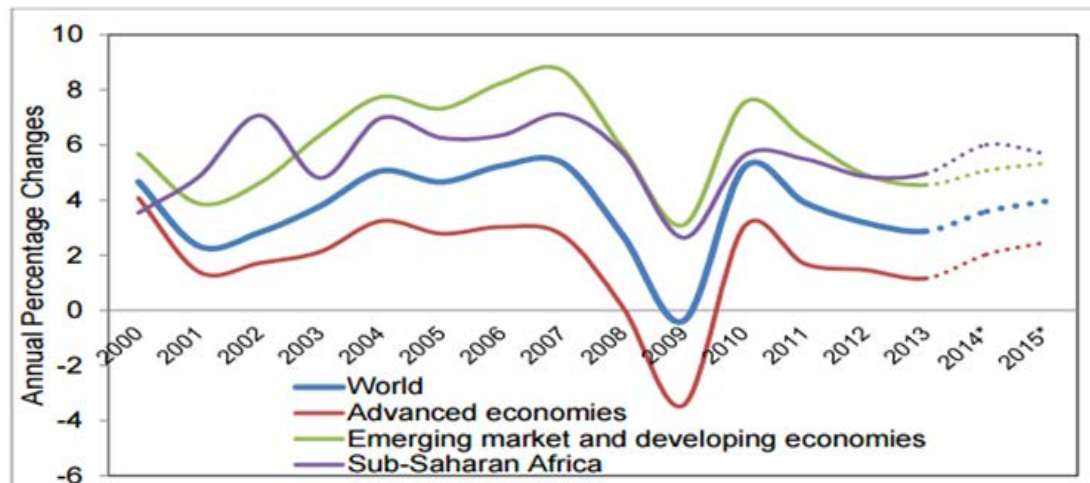


Figure 2.2: World real GDP growth rates 2000-2015

Source: IMF, WEO April 2014

Figure 2.2 above, from the IMF World Economic Outlook 2014, demonstrates a more positive economic growth trajectory for emerging and developing countries – more so for the sub-Saharan Africa region, which is set to grow at a faster rate than most other economies of the world.

Growth was steady in Sub-Saharan Africa in 2014.

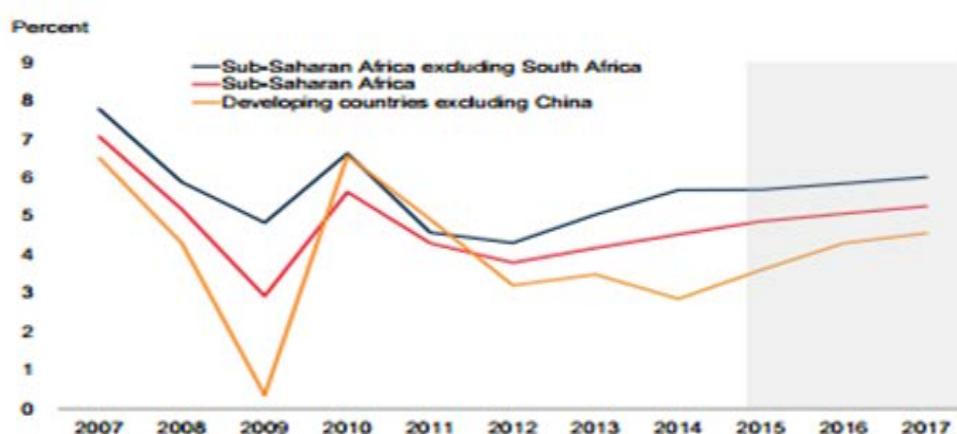


Figure 2.3: South Africa and sub-Saharan Africa GDP rates 2014

Source: World Bank

Figure 2.3 demonstrates that the economic growth rate of sub-Saharan Africa rises to above 6 per cent when South Africa is excluded. This is a worrying development for South Africa, as it demonstrates that the country is in fact pulling down the average sub-Saharan Africa growth trajectory.

Table 2.1 below compares the 2012 GDP to the 1994 GDP data sets, as provided by the South African Reserve Bank (SARB). The table demonstrates the proportionate share of each economic sector to the overall South African GDP.

Table 2.1: South Africa's 2012 GDP compared with 1994 GDP

ECONOMIC SECTOR	2012 GDP %	1994 GDP %	% CHANGE
Agriculture	2.2	4.6	(2.4)
Mining	10	7.3	2.7
Manufacturing	12.3	20.9	(8.6)
Electricity and water	2.6	3.6	(1)
Construction	3.9	3.1	0.8

Wholesale, retail and motor trade	16.2	14.2	2
Transport, storage and communication	9	8.7	0.3
Finance, real estate and business services	21.2	16	5.2
Government services	16.7	16.2	0.5
Personal services	5.9	5.3	0.6

Source: SARB, *Economic and Financial Data for SA*: www.resbank.co.za

Based on the above table, the finance, real estate and business services sector has grown more than any other sector. The mining sector has experienced marginal growth over the last 20 years. Manufacturing has collapsed, showing the largest decline. The areas of the economy that create large-scale employment for semiskilled and low-skilled workers have traditionally been the mining, agriculture and manufacturing sectors. These sectors' proportionate share of GDP has fallen, being replaced by sectors that require higher-skilled workers.

It is the researcher's view, therefore, that a triad of economic challenges arise out of this scenario:

- Structural unemployment has been created where there is a high number of job vacancies in the economy; however, the unemployed labour pool does not have the skills to occupy these positions – for example, in the financial services sectors. The impact of this structural misalignment in the labour market is mostly felt by the youth, who have no real skills due to their lack of exposure to the job market. Therefore, the proportionate share of youth in the unemployment pool will continue to grow in the short to medium term.
- Government services have maintained their proportionate share of the economy even though the economy has grown. This has been achieved

particularly by the large government infrastructure and energy generation expenditures. An increasing expenditure item relates to social grant payments to millions of South Africans. This is unsustainable in the long term as it does not add new money to the economic system and does not grow the tax base.

- With an economy that grew at just about 1.4 per cent in 2014 and is set to grow by about 2 per cent in 2015, the unemployment rate will continue to rise. These levels of economic growth are in fact indicative of decline, in a microeconomic environment characterised by inflationary rates averaging 4-6%. Growth rates below the 5% range are unlikely to make any real lasting impact on poverty and unemployment.

The above triad of challenges is therefore set to create spiralling poverty and unemployment and will prevent the state from achieving its social goals. With a high unemployment rate (officially pegged at 26 per cent but believed to be in the 40 per cent region), the country has a pressing challenge to create employment and reduce inequality, measured as being among the highest levels in the world by the Gini coefficient standard. It is submitted that failure to address this triad of challenges highlighted above, will lead to social unrest and potentially threaten the social stability of South Africa. Service delivery protests, university student protestations on unaffordability of fees and the recent tragic xenophobic attacks that led to loss of life and destruction of property are examples of some of the effects of poverty and unemployment.⁷²

A number of planning and policy documents have been released by the government since 1994, as highlighted above. Though the country enjoyed economic prosperity before the 2008 global economic crisis, this growth had been mainly “jobless” economic growth and the unemployment rates remained stubbornly high. Since then, the black middle class has grown significantly and a number of improvements in developing the social security system of the

⁷² See Chastain <http://www.breitbart.com/national-security/2015/04/16/malawi-repatriates-all-citizens-from-south-africa-over-xenophobic-violence/> (Date of use: 20 April 2015).

country have taken place. However, inequality seems to have worsened and poverty is on the rise. In response to all these challenges the government created a national planning commission to develop a plan for the country that would be an overarching plan to drive government programmes.

2.3 The National Development Plan

The NPC, whose responsibility was to develop a blueprint for the country until 2030, was chaired by a former Minister of Finance, Trevor Manuel. The NPC had to devise a plan of which the principal objectives were the reduction of inequality and the eradication of poverty. This would be achieved by creating employment through increasing economic growth, creating a better educated, innovative and skilled workforce with the state playing a transformative and developmental role.

The NDP was presented to Parliament in August 2012.⁷³ Some of the challenges leading to poverty and inequality the plan identified in its diagnostics of the country were the following:

- too few jobs
- crumbling infrastructure
- exclusive planning
- poor education system for blacks
- high disease burden
- public service uneven and poor quality

⁷³ NDP available online at www.npconline.co.za; see SONA 2013 www.southafrica.info/about/government/sona2013-jobs.htm#.VOYznoZXerU (Date of use: 10 February 2015). The president in his response to the Presidency budget vote in the South African Parliament on 13 June 2013 stated the following: "[T]he Plan was adopted by Cabinet; it enjoys the support of Parliament. It was also endorsed by the ruling party, the ANC, at its national conference in Mangaung in December. The NDP also enjoys the support of sectors of society. Very few policy documents have ever enjoyed such widespread support." The president came out strongly in support of the plan following media reports that suggested a rift between the tripartite ruling alliance partners over the plan. In the 2013 SONA, the president stated that 11 million jobs had to be created by 2030 and an economic growth rate of more than 5 per cent needed to be achieved. He indicated that South Africa was faced with a "[c]risis of youth unemployment".

- corruption
- continued divisions within the country
- resource-intensive economy

The NDP has been met with firm criticism by the ANC's alliance partners. In its February 2015 policy statement⁷⁴ issued by its Secretary-General, NUMSA, COSATU's largest affiliate union declared as follows:

NUMSA invites the entire South African working class and allies, to join us in rejecting the plan – NDP – which offers false hopes because it is not rooted in any efforts to root out the historic cause of our development and extreme human challenges: colonialism of a special type.

Many writers have argued that the success of the NDP depends on the support of all stakeholders in the country. The state cannot be the only stakeholder that actively promotes and implements the plan. Civil society, unions, business and an active citizenry is required to galvanise national action towards the plan's fulfilment. The country has a highly sophisticated financial services industry, large and diverse economic base and was rated at number 52 out of 144 countries in the WEF's 2013 Global Competitiveness Index.

A number of other political parties have voiced strong opposition to the NDP and have called for far more radical policies to address the country's economic and social challenges. The EFF, a splinter group lead by the former ruling party youth league leader, has taken a far more radical political stance towards government policies. The state president's February 2015 State of the Nation Address (SONA) was marked by violence as he was disrupted during his speech, a first in the history of the country, by EFF members of parliament. The parliamentary debates have become acrimonious with calls for the nationalisation of mines, banks, land and other sectors being echoed increasingly by a number of members of parliament and social participants.

⁷⁴ According to NUMSA, 15 million of the 50 million South Africans are living in poverty and ANC policies such as the NDP do not challenge the underlying problem, which is the domination of the South African economy by "[a] few companies, the majority of them multinationals or white-owned with a smattering of black faces".

The full impact of all of these rapid changes in South African politics have not yet been fully quantified in terms of how they will affect the realisation of the NDP or potentially damage the economic growth prospects and investor sentiments. What is clear is that at least a part of the country's desired economic growth will need foreign investments. The NDP realises this requirement and sets out to advocate government policy action to create an environment favourable to foreign investors. Section 2.4 below examines FDI to South Africa since 1994 in detail, as well as the role of BITs in the country's economic trajectory over the corresponding period. The focus will be on economic, social, political, legal and diplomatic policy considerations made by the state.

As a result of these changing policy dynamics, the South African government decided in 2010 to terminate some of its BITs. At the end of 2012, a total of 47 treaties had been concluded by South Africa since 1994; however, only 15 were ratified and binding. This raises the question of why the government concluded so many BIT agreements and why only about a third were ratified. In some instances, no treaties whatsoever were concluded with major trading partners such as the US and yet significant FDI flows have occurred from the US. Questions can therefore be raised on the policy coherence – or lack thereof – by the South African government in its approach to bilateral investment treaty-making, and an attempt will be made to provide such clarity in Chapter 6.

The following sections of this chapter will analyse FDI, the legal provisions that pertain to the protection of foreign investments under the South African Constitution and expand on the human rights factors that are increasingly influencing the debate regarding property rights.

2.4 Foreign direct investment in South Africa

Foreign direct investment (FDI) is defined by the World Bank as “the net inflows of investment to acquire a lasting management interest (10 per cent or more of voting stock) in an enterprise operating in an economy other than that

of the investor.⁷⁵ It is the sum of equity capital, reinvestment of earnings, other long-term capital, and short-term capital as shown in the balance of payments [of the recipient country].”

FDI can make a major contribution to a country’s economic growth by introducing foreign exchange and other economic growth opportunities by a foreign investor.

South Africa, however, attracts far less FDI than it is capable of when compared to other emerging economies at South Africa’s level of development and with South Africa’s credit standing. Foreigners who bring funds from outside the country can play a strategic role in spurring on investments and hence economic growth through FDI. The foreign capital that is transmitted into the country through foreign investments is utilised by the SARB to settle international debt obligations and to grow the bank’s foreign reserves holdings, called the Net Open Forward Position (NOFP).⁷⁶ The benefits of FDI are not limited to the flow of foreign exchange funds into South Africa. FDI can also take the form of technological transfers into the host country, including transfers of systems, processes, business management tools and norms.⁷⁷

Figure 2.4 below tracks the levels of FDI (in rand billions) made in South Africa from 1986 to 2012. In the period prior to 1994, the volume of FDI into the country was extremely low due to sanctions, which necessitated exchange control regulations that stifled the free flow of international capital in and out of the country. The total volume of FDI funds that the country received during the fourteen-year period till 1994 amounted to a low USD 300 million, according to the SARB.

⁷⁵ See, World Bank <http://data.worldbank.org/indicator/BM.KLT.DINV.GD.ZS> (Date of use: 2 April 2014); FDI is utilised globally as a proxy of a particular country’s ability to attract foreign investments in a defined period under measurement. For a study on the link between FDI and BITs, see Hallward-Driemeier *Do bilateral investment treaties attract FDI? Only a bit and they can bite*.

⁷⁶ NOFP represents all amounts to be received less all payments to be paid in future in a particular currency as a result of foreign exchange transactions which have already taken place.

⁷⁷ This refers to the World Bank’s expanded definition.

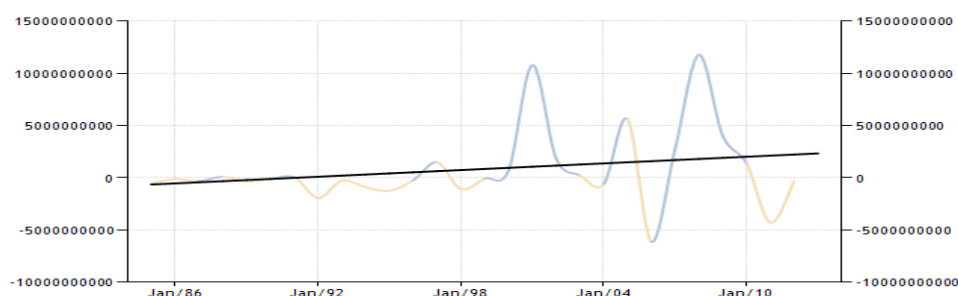


Figure 2.4: FDI to South Africa, 1986–2012

Source: South African Foreign Direct Investment <http://www.tradingeconomics.com/south-africa/foreign-direct-investment>

Between 1994 and 2013, the level of FDI in South Africa has remained fairly low as a percentage of GDP.⁷⁸ In quantitative terms, FDI has grown from its historic low base since 1994. The size of the economy has also grown; however, FDI has not increased its proportionate contribution relative to GDP over the same period.

The economic sectors that are recipients of FDI in South Africa are diverse. In spite of the dominance of natural resources deposits in the country, mining has on average attracted only a third of total cumulative FDI. The purchase in 2007 of a 20 per cent stake in Standard Bank of South Africa by the Industrial and Commercial Bank of China, at USD 5.6 billion, is the largest single FDI transaction since the inception of democratic rule in South Africa. The motivator for a significant quantum of FDI into the country seems to be the desire by foreign investors to position their operations to take advantage of the South African, SADC and the greater African markets. South African firms and foreign companies invested in South Africa are increasingly sources of significant FDI on the African continent.

⁷⁸ See Arvanitis <http://www.imf.org/external/pubs/nft/2006/soafrica/eng/pasoaf/sach5.pdf> (Date of use: 11 February 2014). The reduction of macroeconomic imbalances in the recent past years helped South Africa to attract some FDI flows to emerging markets. Notwithstanding recent trends, however, South Africa receives far less FDI than countries with broadly similar credit characteristics. As a percentage of GDP, South Africa receives about half of the flows of similar Asian or Latin American countries.

Hence, as much as South Africa is in search of increasing FDI inflows, the country plays a significant role in economic development on the continent as South African companies make substantial investments in Africa. The nature of FDI into South Africa consists predominantly of equity purchases on the Johannesburg Stock Exchange (JSE), mergers and acquisitions activity, and some Greenfield foreign investments in resources and the renewable energy sectors. The reasons that underlie the motivation of why firms engage in foreign investments have been considered in various studies.⁷⁹ These factors can be grouped into five main categories that will be discussed in the following sections.

2.4.1 Market size and demand

Market size and demand relates to the potential of the foreign investor to derive access to markets for products and services. The foreign investor attains new markets which may be untapped and where there are restricted or limited competitors. In some cases, the target market is that of the host country, and in some cases the target market is the sub region or even the whole continent. The access to new markets is crucial as it allows businesses to channel products, usually with minimal adaptation, from one market to another, exploiting competitive advantage factors.

Large markets with particular characteristics can be appealing to foreign investors, as has been seen in recent times by the massive flow of investments into China and India. Both countries have populations in excess of a billion people, as well as significantly growing middle classes and rising income levels. International telecommunications and cellular phone companies such as Apple (US) and Samsung (South Korea) are some examples of foreign firms that have made significant investments in China and India in search of market share and growth of earnings. Both Apple and Samsung have made foreign investments in

⁷⁹ See Graham *Global corporations* and Basu and Srinivasan *Foreign direct investment in Africa – some case studies* where five factors were identified as core to FDI decision-making: market size, infrastructure, cost-related factors, investment environment and country risk. See also Banik 2003 (27) *Savings and Development* 5.

South Africa and utilised the South African operations as feeders to exploit market opportunities in neighbouring countries of the SADC region.

In a similar vein, South African telecommunications companies Vodacom and MTN have made significant foreign investments in Africa and the Middle East in search of new markets since the home markets have become saturated and highly competitive. The strategy to invest outside of South Africa became necessary to protect future earnings growth and has proved successful, for instance in catapulting MTN to become one of the largest telecommunications firms in Africa.⁸⁰ Significant to market size, apart from population, is the growth in GDP and most importantly GDP per capita as a recognised measure of a nation's wealth. The GDP growth is attractive to foreign investors as it denotes economic vibrancy and an increasing GDP per capita indicates an increasingly more successful population where the middle-class numbers are growing in general.

This matters to different firms based on their products and market segmentation. As an example, Apple iPhones retail at high prices and are purchased predominantly by a middle class that can afford the average USD 800 to USD 1 500 price tag per handset. This excludes the costs of purchasing the Apple apps using credit cards from the iShop and other accessories like iTunes. A large proportion of a country with a shrinking GDP and declining living standards per capita may not be as attractive to Apple as a target market based on the fact that the majority of people living in such a country would not be able to afford the products.

⁸⁰ According to MTN Group 2012 financial statements, the company grew its South African market share to 37 per cent and the group grew total market share to service a total of 164 million subscribers. In this regard see Tech Central <http://www.techcentral.co.za/mtn-hikes-sa-market-share/38762/> (Date of use: 15 January 2015). The new Apple iPhone 6 sales allowed Apple Corporation to grow market share in the US, China, Japan, Australia, France, Italy, UK, Germany and Spain in the smartphone market.

2.4.2 Quality of infrastructure

The quality of infrastructure existing in a country is an important variable when firms decide to make foreign investments. Depending of the nature of the investments, the following are some of the infrastructure questions that may be considered by investors:

1. quality of roads and highways and extent of road network
2. quality of railways and stock and extent of coverage of the railway grid
3. quality of sea- and airports and extent of coverage
4. reliability of electricity supply including grid coverage
5. quality of water supply and extent of coverage
6. quality and sophistication of the industrial and manufacturing base
7. quality of hospitals and schools
8. quality of the public transportation system

This list is not exhaustive; however, it points to the significance of having well-developed and maintained national infrastructure. For example, the reliability of electricity supply is a critical factor that challenges many states, including South Africa.

Engineering and mining companies depend on reliable supplies and experience significant disruptions to operations and hence productivity when the supply of electricity is unreliable.⁸¹

⁸¹ See KPMG *Sub-Saharan Africa power outlook*. The report notes that sub-Saharan Africa, which consists of 49 countries and has a population of 800 million, has a generation capacity of 68 GW. This is equivalent to the generation capacity of Spain with a population of 41 million people. South Africa accounted for 40 GW of the sub-Saharan generation capacity in 2011. The report states that any further delays in creating additional generation capacity will result in economic losses far outweighing the cost of new generation. Every time there are power outages, expensive diesel-fired backup generators (if available) are used to reduce economic losses of industry. This, in turn, increases the costs of electricity generation. Clearly this is not a sustainable solution and totally impractical over the long term. There is a keen competition globally to attract investors in industry and infrastructure. Compared to regions such as China and India, Africa has been less successful in attracting industrial users, which can partly be attributed to the lack of overall infrastructure and especially the electricity shortages. The building of investor confidence in the security of electricity supply has become an issue common to all sub-Saharan countries and most governments are in the process of finalising measures to attract sustainable foreign investments.

2.4.3 Cost factors

Foreign investors also consider specific factors in a potential host country that have an impact on costs. Cost factors relate to, but not exclusively, the following considerations:

1. skills levels and quality of labour
2. financing costs, including interest rates
3. foreign exchange markets and stability
4. taxation policies
5. licensing costs
6. cost of corporate governance regulations
7. financial services access
8. rates of inflation

The cost factors indicate to potential investors, on a comparative basis, whether there will be economic advantage in making investments in a particular country. These cost factors, such as interest rates and inflation, are significant. They potentially have an impact on investment financial evaluation models, usually conducted prior to making the investments, such as discounted cash flow (DCF) modelling or internal rates of return (IRR), to name a few. Interest rates also point to the ease of accessing financing and cost of capital. Exchange rate volatility threatens the security of earnings by making it difficult to determine the costs required to set up and start operations, and the likely levels of dividend repatriation.

When evaluating a country with high exchange rate volatility, an investor may be concerned by the possible collapse of the host state's currency, which would erode the value of the investment. The levels of skills available in a country, the labour productivity rate and the unit costs of labour are important considerations as well. Companies, particularly those in high technological, medical and other specialist industries such as investment banking, require particular skills. The easy availability of these skills in the host country may have an impact on the attractiveness of the particular country.

2.4.4 Investment environment

The investment environment relates to the overall conditions that prevail in the microeconomic environment of the country in question that have an impact on investors and their investments. The investment environment refers to a number of variables in a country, usually beyond the control of the investor that may have an impact on the investment. They include but are not limited to the following factors, based on the researcher's assessment:

1. monetary policy systems
2. population demographics
3. climate and terrain
4. capital market regulation
5. intellectual property laws and available protections
6. labour rigidity and bargaining powers of organised labour
7. rule of law and judicial independence
8. regulatory certainty
9. transparency
10. ethical standards
11. human rights culture

These factors influence how foreign investors may or may not find it easy to exploit current and potential investment opportunities. There is a need to create conditions where investors have confidence in the stability and predictability of the environment in which they operate. Attracting foreign investors is a competitive activity, as many states vie for the limited investor funds, and deliberate steps need to be taken to make the host appealing to investors.

2.4.5 Country risk

A significant consideration to investment decisions relates to the host country risk. This in essence refers to the risk that the foreign investor will face as a consequence of making the investment decision in a particular country as compared to another country. It relates to all the country factors that may

expose the investment to both upside and downside risks. The upside risk factors may positively influence the decisions to make an investment and are taken into account when investors evaluate expected rate of returns and types of investment to make in a particular country.

Downside risk factors relate to the risks present in a country that have the potential to harm the investor's rights to their investments and to the full enjoyment and use of the investment. Country downside risks include:

1. exchange control regulations
2. currency instability/devaluations
3. violence caused by wars, coups, strikes or riots
4. legislative changes that may result in expropriations
5. weak public health infrastructure
6. poor policing, safety and security
7. extent of rule of law

A number of organisations produce country risk ratings and these ratings are then ranked and compared to those of other countries. These risk assessments also take into account the geopolitical factors at play that may have an impact on the particular country. In the case of South Africa, the SADC and broader sub-Saharan Africa risk profile will have a bearing on the country's ratings.⁸²

⁸² Refer to AMB <http://www3.ambest.com/ratings/cr/reports/SouthAfrica.pdf> (Date of use: 30 September 2014). The report notes that the sub-Saharan region as a whole is subject to high levels of crime, malnutrition, corruption, political unrest and low levels of education, with few of the countries enjoying economic prosperity. The recent exploration and production of natural resources in select countries has resulted in an inequitable wealth distribution. The report also notes that legal systems, on average, remain opaque and subject to selective enforcement. In South Africa, high crime rates, poor education, weak infrastructure, high poverty rates and the highest HIV and AIDS rates globally pose serious societal problems and have interfered with prospects for growth and investment. Unemployment remains stubbornly high at about 23 per cent and violent labour disputes have erupted over pay and working conditions, especially in the mining industry. See also Ensor 2015-03-06 *Business Day 1* where the first deputy Managing Director of the IMF, David Lipton, in a speech at the University of Cape Town, said: "No strong boost to the economy could be expected from the rest of the world ... SA's growth trajectory has not mirrored the rest of sub-Saharan Africa. The outlook for 2015 is for continued sluggish growth."

2.5 The rise and demise of investment promotion and protection through BITs in South Africa

In October 2013, the government of South Africa cancelled a number of BITs with major European countries. These countries – namely Belgium, Luxembourg, Spain, Switzerland, Germany and the Netherlands – complained of lack of consultation by the South African government. On 1 November 2013, the Minister of Trade and Industry published the PPIB in the *Government Gazette* 4 No 36995.

This created uncertainty among many investing nations concerned about the motivation for creating domestic legislation in place of bilateral investment treaties that had been part of the policy instruments on foreign investment protection. The government of South Africa has maintained that by replacing BITs with domestic legislation, it is not curtailing foreign investment protection. It argues that it is ensuring that the investor's rights are protected but that those rights are also balanced against the sovereign rights of the Republic of South Africa to regulate in the public interest. The state argues that the current first-generation BITs are drafted in favour of the foreign investors at the expense of the citizenry, and are unconstitutional.

The DTI, when concluding its review and in subsequent presentations to Parliament in 2013, argued that BITs allowed for legal challenges to be made against the country by foreign investors that put capital accumulation and profits against public interest, and that by allowing foreigners to litigate overseas against South African laws, the BITs made it possible for two foreign parties in the tripartite matter, the investor and arbitrator, to make decisions that did not sufficiently take into account the public policy interest of the South African people. According to the DTI, international arbitrations do not have sufficient context to adjudicate in disputes with investors, make arbitrary rules of procedure and tend to favour foreign investors in reaching decisions.

The government's policy positions on BITs were endorsed by Minister Davies, at a UNCTAD conference in 2012.⁸³ It is clear that the government has taken a decision to reshape the nature of foreign investment protection in South Africa and allow itself greater policy space. What needs clarity is the impact of these policy decisions on foreign investment regulation.

In the period from 1994 leading to 1998, South Africa concluded several BITs with a number of European nations. The treaties made guarantees that investors would be paid market rates in compensation in the event of expropriation, full protection and security, FET and MFN protections amongst others.

Unlike in the well-regulated area of trade law through the WTO, investments do not have an international framework that regulates BITs. Negotiating each treaty has traditionally been left to states at a bilateral level to agree the terms of the investment treaties. Investments in some instances are also covered in other political agreements, such as the SADC protocols. However, there is to date no universally agreed frame work for the conclusion of BITs. As a consequence, BITs concluded by various nations take different forms and contain varied provisions.

Various organisations, including the OECD and UNCTAD, produce best practice recommendations to states that are updating or concluding new BITs. In the main, BITs concluded by most states contain provisions that relate to the following core areas:

- definitions of the investor and investment

⁸³ Minister Davies said the following at the UNCTAD conference: "The recommendations emanating from the Review were largely endorsed by the South African Cabinet in April 2010. Cabinet understood that the relationship between BITs and FDI was ambiguous at best, and that BITs pose risks and limitations on the ability of the Government to pursue its Constitutional based transformation agenda. Cabinet concluded that South Africa should refrain from entering into BITs in future, except in cases of compelling economic and political circumstances. It instructed that all 'first generation' BITs which South Africa signed shortly after the democratic transition in 1994, many of which have now reached their termination date, should be reviewed with a view to termination, and possible renegotiation on the basis of a new Model BIT to be developed."

- procedures in case of expropriation
- Compensation principles
- treatment of the investment
- safety and security
- settlement of disputes

From 1959 to date, there can be little doubt that a significant number of BITs have been concluded internationally.⁸⁴ Investors have taken comfort in the security provided by BITs. A significant increase in the number of disputes filed at the ICSID has been the result of the increasing use of BITs worldwide. This trend has resulted in increasing discomfort by host governments as they are brought before international arbitral tribunals and required to justify domestic policy decisions. Many states have viewed this “intrusion” into areas of domestic policy as a breach of the internationally accepted principle of the sovereignty of states.⁸⁵

States have levelled a number of criticisms at the BIT system and its associated ICSID dispute resolution mechanisms, namely:

- The BITs are drafted in favour of the foreign investor nation and its nationals at the expense of host states that have traditionally been developing countries with limited bargaining power; this limit of bargaining power being at the international political and economic levels. States have raised the matter of diplomatic pressure being applied by developed countries to extract concessions for the foreign investments made by their nationals abroad.
- International arbitrations are perceived as biased in favour of foreign investors over host nations.⁸⁶ This is due to the fact that the tribunals are accused of lacking adequate local context, operate from a Western

⁸⁴ The trends in BITs concluded internationally are depicted in Figure 1.2 and detailed in section 1.1 above. See UNCTAD *The role of investment agreements*.

⁸⁵ Peterson 2006 (26) *Dialogue on Globalization* 6-11

⁸⁶ See, Harris 2008 5 (4) *TDM*. The matter of biased ICSID arbitrators has been raised by states as one of the weaknesses with this international arbitration forum.

paradigm and lack rigorous legal precedence. There are no clear mechanisms to appeal the rulings and states have been levied with significant awards against them in favour of foreign investors in some arbitral rulings.

- There are many states that argue that BITs and the international mechanisms of dispute resolution encroach on the domestic policy-making space of governments. These governments argue that they are prevented from regulating in the public interest by the continued threats of international litigation.
- Some BIT provisions are believed to be at odds with host state domestic legislation and infringe on human rights. Further, they prevent some legitimate public policy objectives of host governments to address inequalities and undertake racial redress or other redistribution processes.

As a result of the above factors and the changing global economic power dynamics moving more towards the developing east, a number of countries indicated a desire to cancel or renegotiate their BITs and opt out of the international dispute settlement mechanisms. In my view developing countries are more emboldened to renegotiate their economic relations with Western powers. There are an increasing number of states that are cancelling, reviewing or renegotiating BITs. Some countries have chosen to enact domestic legislation to regulate foreign investments, opting out of international legal agreements.

2.6 Investment protections: the constitutional context

The Constitution of the Republic of South Africa is the supreme law of the country. It is considered internationally as progressive and protective of human rights. In evaluating the PPIB, the constitutional rights enshrined in law that currently exist for foreigners and their investments need to be evaluated to determine their effectiveness. It is significant to determine the extent to which

South African courts enforce property rights when matters connected therein are referred to them.

Equally important is the extent to which international law influences jurisprudence in South Africa and the government's track record in observing international legal obligations. It is the researcher's assertions that these paradigms play a role in an overall evaluation of the existing legislative environment that a foreign investor would have to take into account when making an investment in the country.

In the absence of the proposed PPIB and if the cancellation of a number of BITs in 2013 had not occurred, a potential foreign investor to South Africa would have considered and been influenced by some of the following legal criteria:

- existence of a BIT with the home state of the investor
- South African laws applicable to foreigners and property rights
- judgments of South African courts
- respect of court decisions by the government (rule of law)
- international law influences on court decisions
- record of state observance of its international obligations
- evolving domestic political discourse and dynamics to foreign investments

The cancellation of BITs suggests that foreign investors will be concerned about what other legislative or policy changes the government is likely to implement in the short, medium to long term. Projecting a clear and coherent policy will be important in assuring investors of the long-term goals of the state.

2.6.1 International law and the South African Constitution

Under the apartheid government from 1948 until 1990, South African courts were cut off from the international legal order. The courts did not enforce international law, including human rights law or resolutions from the UN. The Apartheid state did not conclude BITs. It was only after 1994 that South Africa concluded bilateral Investment treaties. The actions of the government at that

time were, in fact, contrary to the principles espoused in notable international human rights agreements such as the International Covenant on Civil and Political Rights (1966),⁸⁷ the International Covenant on Economic, Social and Cultural Rights (1966),⁸⁸ African Charter on Human and Peoples Rights (1981) hereinafter (African Charter),⁸⁹ Convention on the Elimination of All forms of Discrimination Against Women (1979),⁹⁰ Convention on the Rights of the Child (1995)⁹¹ and the Charter of the UN.⁹²

Judges, legislators and lawyers did not consider international law, particularly in areas that were in conflict with government policy positions.⁹³ The 1993 Interim Constitution gave recognition to international law in South Africa under sections 82(1)(i) and 231(2).⁹⁴ This flowed through to the 1996 Constitution, which entrenched international law into the judicial system. Section 233 of the Constitution states that; customary international law is law in South Africa, unless it is contrary to the Constitution or to an act of parliament. The entrenchment of customary international law receives further emphasis in section 232 of the Constitution, which states that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.⁹⁵

⁸⁷ International Covenant on Civil and Political Rights 1966(G.A. Res. 2200A (XXI); 999 UNTS 171).

⁸⁸ International Covenant on Economic, Social and Cultural Rights 1966 (1967 (6) ILM 360; G.A. Res. 2200A (XXI); 993 UNTS 3)

⁸⁹ African Charter on Human and Peoples' Rights 1981 (OAU Doc. CAB/LEG/67/3 rev.5; 1982 (21) ILM 58)

⁹⁰ Convention on the Elimination of All Forms of Discrimination Against Women (G.A. Res. 34/180; 1249 UNTS 455)

⁹¹ Convention on the Rights of the Child 1989 (G.A. Res. A/ RES/44/25; 1577 UNTS 441)

⁹² Charter of the UN (I UNTS XVI)

⁹³ See Dugard *International law*. See also Chaskalson 1995 *SAJHR* 222.

⁹⁴ Interim Constitution of the Republic of South Africa 200 of 1993.

⁹⁵ See Dugard 1997 (36) *ILM* 744 and *Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC) at 21. The Court took *Oppenheim's International Law* into account which states that although the judicial determination of the existence of an international agreement may require the consideration of complex issues, the decisive factor is said to be whether the instrument is intended to create international legal rights and obligations between the parties.

International agreements and treaties to which South Africa is a party create binding legal obligations at an international level. South Africa is a signatory to a number of such international treaties in areas including trade, defence, taxation, customs unions and various other political agreements. The Constitution provides under section 231(1) to (5) that treaties signed by South Africa shall come into effect under the following circumstances:

1. The negotiating and signing of all international agreements is the responsibility of the national executive.
2. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection 231(3).
3. An international agreement of a technical, administrative or executive nature or an agreement which does not require either ratification or accession, entered into by the National Executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
4. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an act of parliament.
5. The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Section 231(3) of the Constitution creates a mechanism for treaties to have effect in the Republic without requiring ratification in Parliament insofar as a treaty is of a technical, administrative or executive nature. In my view this is a rather vague articulation and may create definitional issues. It may be argued

that a BIT could meet such a definition. The implication of this provision is that the executive must ensure that international treaties are specific about their intention. Section 232 has the effect of requiring courts to consider customary international law except in cases where such law is contrary to the Constitution or an Act of parliament.

Section 233 requires that when interpreting any legislation, courts should give preference to any reasonable international law interpretation of the legislation rather than to an interpretation of the law that will be contrary to international law. The full import of Sections 231, 232 and 233 of the Constitution imply that international law *must* be taken into account by all South African courts when making rulings and that international law is binding in the country.

2.6.2 Constitutional guarantees on foreign property rights

Section 25(1) and 25(2) of the Constitution provide as follows:

1. No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.
2. Property may be expropriated only in terms of law of general application:
 - (i) for a public purpose or in the public interest; and
 - (ii) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

Section 25(3) of the Constitution states that the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances. Section 25(4)(a) states that the public interest includes the nation's commitment to land reform, and that bringing about equitable access to all South Africa's natural resources and property is not limited to land. Section 33 of the Constitution states that everyone is entitled to just administrative action, and section 33(1) states that

everyone has the right to administrative action that is lawful, reasonable and procedurally fair. These provisions in the Constitution serve as a guarantee that foreign investors will not be subjected to arbitrary acts by the state aimed at depriving them of their investments. The actions of the South African government in relation to the property of foreign investors must therefore be just, lawful, reasonable and procedurally fair.⁹⁶

It is submitted that there is no clear definition in Section 25 of the Constitution as to what comprises “property”. Section 25 is broad, with a single proviso that when construing constitutionalism for the purposes of inferring rights and obligations, the definition of property must not be limited to land only.⁹⁷ This entails therefore that intellectual property also falls under the constitutional protections in section 25, not just physical property. It is pertinent, therefore, when determining the rights over property which a foreign investor must enjoy in South Africa, to determine what legal provisions are applicable.

The following sections of this chapter set out the legal processes governing property rights per the South African Constitution and determine whether these processes are unambiguous and backed by state practice.⁹⁸ Under the constitution the state may interfere with property rights based on two main legal principles; a deprivation as established in section 25(1) and an expropriation in section 25(2) of the constitution.

⁹⁶ See, Section 25(1) of the Constitution which states that “no law may permit arbitrary deprivation of property.” There must be an attempt by the legislation in question (for example, the Investments Bill of 2013) to strike a proportionate balance between the private and public purpose to escape an accusation of arbitrariness. The law that causes the expropriation needs to strike a balance between the interests of the investor who has been deprived of property against the desired end state that delivers the public purpose intended. There needs to be sufficient reason provided for the expropriation and procedural fairness should be followed when evaluating the public purpose against the private interest.

⁹⁷ Refer to Van der Walt *Constitutional property law* 20 where Van der Walt extends an interpretation to property as follows: “[T]hat moveable corporeal property, as well as intangibles such as commercial interests and intellectual property are included under the protection on section 25 as a motive cause.” If this is true, then protection in section 25 of the Constitution extends to include intellectual property.

⁹⁸ See Mostert 2003 4 (19) *SAJHR* 567 at 592; also refer to Du Bois 2012 (24) *SA Merc LJ* 177.

A deprivation in the main is an interference with property that derives from the exercise of regulatory or the policing powers of the state in the public interest. It entails limitations on the right to use, enjoyment or to exploit the property. It affects a large group in society in a broadly similar manner and does not normally require compensation.⁹⁹

An expropriation, generally is an application of sovereign authority by a state, where the state acquires property from one person or a small group of persons in the public interest or for a public purpose. Such state acquisition is subject to the payment of compensation under 25(2)(b). The challenge with the delineation espoused above, stems from state regulatory action or interference with property that may not necessarily result in state acquisition of the property rights.¹⁰⁰

The determination of the existence of a constitutional property dispute has for a period of time been based on the Constitutional Court ruling on the FNB case,¹⁰¹ as follows:

1. It must be determined whether the property interest in question qualifies as *property* for constitutional purposes.
2. It must be determined whether there was a *deprivation* of property.
3. If there has been a deprivation of property, was it *arbitrary* and therefore in conflict with section 25(1).

⁹⁹ See, Van der Walt *Constitutional property law* 195-197 also Marais 2015 (18) *PELJ* 2983

¹⁰⁰ See Marais 2015 (18) *PELJ* 2983 at 2985

¹⁰¹ In *First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) (hereinafter the FNB case), para 57, the Court held in effect that deprivation of the property (section 25(1)) is a *genus* of which expropriation (section 25(2)) is a *species*. In determining if a particular loss of property is as a result of expropriation, the court must apply the test laid out in section 25(1) with an expropriation most likely where a deprivation has occurred first. See also, IP Watch <http://www.ip-watch.org/2014/02/13/south-africa-promotion-and-protection-of-investment-bill-2013-a-review/> (Date of use: 10 January 2015) for a detailed review of the process to determine property disputes that meet section 30 constitutional protections and summarised by Dr Du Bois based on the judgment passed by the Constitutional Court in the FNB case.

4. If there was an arbitrary deprivation, the second step is to determine whether section 36(1) may *justify* such a deprivation. If not, the enquiry ends here, since the limitation is unconstitutional.
5. In the event that the deprivation conflicts with section 25(1) (it is arbitrary) and cannot be justified under section 36(1), it must be determined whether the deprivation is also an *expropriation*.
6. If it does amount to an expropriation, the deprivation must be tested against the requirements set out in section 25(2). Should these requirements be met, the expropriation is constitutional and the enquiry ends there.
7. However, if the requirements of section 25(2) are not met (and the expropriation in principle demands payment of compensation), the expropriation could still in principle be justified under section 36(1). If it may be justified, the expropriation is constitutional, but if section 36(1) cannot justify it, the expropriation is unconstitutional and invalid.¹⁰²

Should the deprivation of property fail to meet section 25(1) and be deemed arbitrary deprivation, then section 36 needs to be applied to determine whether it creates sufficient justification for the deprivation?¹⁰³ A distinction needs to be drawn between a deprivation and an expropriation when applying section 25. In principle, the *FNB* case established that a deprivation occurs first and that deprivation can then be judged as an expropriation based on its characteristics.¹⁰⁴

¹⁰² See, Du Bois 2012 (24) *SA Merc LJ* 177 at 187.

¹⁰³ See Mostert 2007 (72) *Amicus Curiae* 2-8. See also Lewis 1992 (8) *SAJHR* 389 and Chaskalson 1993 (9) *SAJHR* 388.

¹⁰⁴ See Marais 2015(18) *PELJ* 2983-2984 also *FNB* case para 57-62.

Section 1 of the Expropriation Bill of 2008 defined an Expropriating Authority as “any organ of state contemplated in section 239 of the constitution, authorised by this Act or any other law to acquire property through expropriation, and includes the Minister and any other person contemplated in section 2 of the Expropriation Act 39 of 1951”.¹⁰⁵

The acquisition of the property by the state as a necessary element to delineate a deprivation from an expropriation was ruled upon by the courts in landmark judgements involving Agri-South Africa (*Agri South Africa v Minister of Minerals and Energy*).¹⁰⁶ The Supreme Court of Appeal’s decision delivered in May 2012 was upheld by the Constitutional Court in 2013, which held the view that the determination of what is and is not an expropriation is rendered difficult to determine when the acquisition of such expropriated property does not vest in the state.¹⁰⁷ These principles of expropriation flowing from the *Agri SA* case are discussed in more detail below.

¹⁰⁵ See, Expropriation Bill, Government Gazette No. 30963 of 11 April 2008. The Bill proposed the following under section 2(1)(a): An expropriating authority may expropriate property for a public purpose or in the public interest subject to compensation contemplated in section 25 of the Constitution and section 2(1)(b): No property may be expropriated unless the procedures contained in this Act have been followed. Section 4(1) to section 4(4) proposed the following procedure for an expropriation of property on behalf of juristic persons: (a) The Minister must be satisfied that the said juristic person has a reasonable requirement of the property to undertake a public purpose or that it is in the public interest; (b) where the Minister undertakes such expropriation, the ownership of the property will be acquired by the juristic person; (c) fees, duties and other charges payable had the juristic person ordinarily purchased such property must be paid; and (d) all other costs incurred by the state to effect the expropriation are for the juristic persons account. According to section 1, a juristic person is defined as including non-profit organisations per the Non-Profit Organisations Act 71 of 1997. It is any institution established by law which accounts for the management of its finances in terms of the Public Finance Management Act 1 of 1999 or the Local Government: Municipal Finance Management Act 56 of 2003. Section 1 further defines a public purpose to include any purpose connected with the administration of the provisions of any law by an organ of state and public interest as the nation’s commitment to land reforms and to bring about equitable access to the countries natural resources. The Expropriation Bill 2008 was not passed into law and has been replaced by the Expropriation Bill of 2013.

¹⁰⁶ *Agri South Africa v Minister of Minerals and Energy* [2013] ZACC 9 (hereinafter the *Agri SA* case). See also *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA).

¹⁰⁷ See, *Agri SA case* paras 58-59

It is submitted that the principle set in the *Agri SA* case may pose a risk to property owners in that the state may enact laws that significantly regulate property to such an extent that the property owner is in effect, as a result of such regulation, rendered unable to enjoy the full benefit of ownership. Deprivation of property of this nature was addressed in the 1961 Draft Convention on the International Responsibility of States for Injury to Aliens (IRSIA) as a form of indirect or regulatory expropriation.¹⁰⁸

Mostert has described the principle of constructive expropriation as follows:

[A] legislative or administrative measure, which has the effect of removing and destroying all the rights of the particular property holder (whether or not a corresponding advantage is granted to the expropriator or another) without envisaging the payment of compensation, can generally be described as constructive expropriation. The intended effect of a specific imposition on an owner or property right holder should be the main consideration; even if nothing in the particular legislative or administrative measure is meant to be an expropriation, the effect of the measure may still factually result in expropriation.¹⁰⁹

The doctrine of constructive expropriation has a particular significance in South Africa. A number of legislative instruments have been proposed by the state that will have material effects on how property rights are applied. These laws aim to reverse property ownership patterns that were caused by apartheid.

The country has high levels of inequality in a number of areas, such as:

- land ownership

¹⁰⁸ See, Sohn and Baxter 1961 (55) *Am. J. Int'l L* 545 at 553. Article 10(3) of IRSIA established the following principles: (a) a taking of property includes not only an outright taking of property but also any such unreasonable interference, use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference. In subsection (b), a taking of the use of property includes not only an outright taking of property but also any unreasonable interference with the use or enjoyment of property for a limited period of time; see also *Germany v Poland*, PCIJ Rep, 1926, Series A, No. 7 and Christie 1962 (38) *BYIL* 310-311. Christie argues that “[a] state may expropriate property where it interferes with it, even though the state expressly disclaims any such intention, that even though a state may not purport to interfere with rights to property, it may, by its actions, render those useless that it will be deemed to have expropriated them.” See also *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) 64 (hereinafter the *Van Zyl* case)

¹⁰⁹ Mostert 2003 4 (19) *SAJHR* 567 at 592.

- mineral resources ownership
- black ownership of shares on the JSE
- black people in senior executive leadership in the private sector
- home ownership
- income disparities in the workforce
- access to quality education and healthcare

This is not an exhaustive list; however, after more than twenty years of ANC rule, questions arise about the ruling party's commitment to make fundamental changes to the inequality gaps that are still largely based on race.

Some of the policy responses from government have entailed the proposed enactment of the PPIB 2013 and the Expropriation Bill 2013, as well as amendments to the following Acts: the Labour Relations Act 66 of 1995, the Broad-Based Black Economic Empowerment Act 53 of 2003 (as amended), the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). The Draft National Policy on Intellectual Property, 2013 also forms part of these policy responses.

It is submitted that to hasten the redistribution agenda, government is presented with a significant inducement and pressure to enact laws that will enable transfer of property rights to blacks. The current economic challenges faced by the state render it unable in most instances to follow market procedures in acquiring property on a willing buyer, willing seller basis. Faced with these dynamics, enacting laws that achieve the redistribution objective without paying for the rights becomes a compelling policy alternative.¹¹⁰

¹¹⁰ See *GC Steinberg v South African Municipality* 2001 (4) SA 1243 (SCA) (hereinafter *GC Steinberg* case) where the Court affirmed a need for the development of constructive expropriation in the South African jurisprudence. The Court did not, however, pronounce on the circumstances that would qualify as constructive expropriation. The principle of constructive expropriation was also considered by the Constitutional Court in *Reflect-All 1025 CC and Others v MEC for Transport, Road and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) (hereinafter the *Reflect-All* case) and the Constitutional Court also did not pronounce on the matter.

The Department of Public Works, in its *Explanatory Memorandum on the Draft Expropriation Bill, 2013*¹¹¹ issued on 15 March 2013, set forth the following reasons to amend the laws that relate to expropriation:

1. To include the public interest provision as contained in the Constitution.
2. To create a system for just administrative action, where affected parties are notified and afforded an opportunity to raise objections. The expropriating authority would be required to take these submissions into consideration prior to making final decisions.
3. To create room for all urgent temporary expropriations in cases of disaster management or in compliance with a court order authorising the expropriation.
4. To expand the scope of protected rights to include registered and unregistered rights. The Expropriation Act 63 of 1975 refers only to registered rights whereas the Constitution does not make a distinction.
5. To align the determination of compensation in the event of an expropriation from the “market value approach” in the 1975 Act to the “just and equitable approach” as espoused in section 25 of the Constitution.

¹¹¹ It is of significance to note that in 2013, the Investments Bill and the Expropriation Bill were issued for public comment. In October of the same year the government of South Africa cancelled BITs with a number of trading partners, particularly in the EU. The 2008 Expropriation Bill was withdrawn after significant challenges from a number of organisations and international trading partners who expressed concerns about property rights protections. In 2013 the Expropriation Bill was reintroduced as a second attempt at concluding new expropriation legislation to replace the Expropriation Act of 1975. The state argued that the pre-1994 system of the apartheid government largely rested power on Parliament and this power was then transferred to ministers of state through legislation. This created a system where ministers wielded significant power and the Constitution did not have supremacy. The Expropriation Act 1975 is considered as giving too much power to a state department and the old Act does not therefore conform to the new Constitution particularly in respect of ss 9, 25, 33 and the constitutional requirement to include public interest as a legitimate basis for undertaking an expropriation.

6. To allow any such party to approach a court for a judicial decision on the value, timing and manner of payment of compensation in cases where a dispute arises about the expropriation value, and the parties are unable to reach an agreement.
7. To create a central register of expropriations within the Department of Public Works.
8. To enable the power of withdrawal of an expropriation if the expropriating authority is of the view that it is contrary to the public interest or that it is expedient to do so.
9. To ensure that all existing laws dealing with expropriations continue to apply to the extent that they are consistent with the Constitution and the Draft Bill and that all expropriations are to be conducted per the procedure set out in the Bill.
10. To repeal the Expropriation Act of 1975.

The explanatory memorandum from the Department of Public Works clearly establishes a number of reasons motivating the enactment of the Expropriation Bill and repeal of the Expropriation Act of 1975. The 2013 Expropriation Bill does not provide a clear definition of what constitutes property, opting to utilise the definition in section 25(4)(b) of the Constitution. The 2008 Expropriation Bill met with opposition from interest groups that accused the government of attempting to implement unconstitutional measures with regard to expropriation.¹¹²

¹¹² See Radebe 2013-04-18 *Business Day* 7.

Some notable changes in the 2013 Expropriation Bill compared to the 2008 Bill¹¹³ are:

1. Expansion of the power to expropriate to all organs of state and not just the Minister of public works
2. Allowing expropriating authorities to take the property without first making the compensation on the basis that payment will be agreed to with the state or determined by a court at a later stage.

The compensation provisions in section 13 of the Expropriation Bill of 2013 have been brought in line with the Constitution. These, however, fall short of the *prompt, adequate* and *effective* compensation principles contained in BITs to which South Africa is a party. A similar consideration applies to the Investments Bill and its principles for determining compensation that may be payable to foreign investors whose investments may be expropriated. In the *Agri SA* case, the applicants sought to challenge the MPRDA 28 of 2002 as amended. They argued that the MPRDA transferred all mineral rights in the country to the state and that this had the effect of expropriating private property rights that were held by private investors.

Prior to the passage of the MPRDA, minerals and all rights attached to the minerals vested in the hands of the owner of the land where these minerals were located. These landowners were mainly white farmers. The landownership in the country continues to be one of the most pressing matters for the ANC government to resolve. As part of its undertaking to the electorate, the ANC will attempt to reverse the current landownership pattern which is still biased towards white South Africans. Whites continue to own vast tracts of land in the country twenty years into the new democratic dispensation and the government has been unable to make meaningful changes to land ownership.¹¹⁴

¹¹³ See, Jeffery <http://news.acts.co.za/blog/2013/05/no-need-for-new-expropriation-bill> (Date of use: 3 May 2014)

¹¹⁴ The Land Act 27 of 1913 set aside 92 per cent of the country's land for whites and blacks, who comprised more than 62 per cent of the population, had only 8 per cent. Other

Prior to the MPRDA, the landowners by extension owned not only the land but also the mineral wealth of the nation. These rights to minerals were considered part of the estates of the landowner who held exclusive rights over the property and could bequeath, exploit or dispose of the mineral rights in their own right. The MPRDA effectively vested all ownership of the minerals in the country to the state. This in essence limited the landowner's rights and prevented the landowner from exercising full control over the mineral deposits.¹¹⁵

The Constitutional Court decision gave constitutional interpretations on expropriation that differed from the prevailing international law principles. This was so, when the court established delineation between outright expropriations, being where the state acquires the title in the property and where deprivation never rises to an expropriation if the state does not take ownership of the property. In my view this ruling could create an impression that our highest court buckled to political pressure and deviated from some established principles of international law on foreign investments, including customary international law, when it made its ruling.

The dispute over BEE provisions and the limitations on mineral rights have far-reaching consequences for property rights in South Africa:

- The *Agri SA* case created legal precedent for the delineation of expropriation from deprivation. In effect, the court's judgment rendered indirect expropriation to be an invalid principle under South African law by insisting on the rights in the said property passing to the state first before a deprivation could be judged an expropriation.

legislation, such as the Native Trust and Land Act 18 of 1936, the Group Areas Act 41 of 1950, Group Areas Development Act 69 of 1955, the Reservation of Separate Amenities Act 49 of 1953, the Bantu Homelands Citizenship Act 26 of 1970 and the Bantu Homelands Constitution Act 21 of 1971 are some of the legislative instruments utilised by the apartheid state to segregate blacks from whites thus depriving blacks of landownership.

¹¹⁵ The *Agri SA* case resulted in a landmark judgment in 2013 where the Constitutional Court struck down the concept of constructive expropriation and pronounced on the difference between expropriation and deprivation in an authoritative ruling delivered by the Chief Justice with the support of the majority of the Court.

- The MPRDA provisions were challenged by foreign investors utilising the ICSID additional facility.¹¹⁶ The fact that the South African government opted to settle the ICSID cases and was prepared to contest the *Agri SA* case in domestic courts, whereas the legal arguments of the applicants in my view are broadly similar may suggest double standards by the state. The accusation that can be levelled at the state is that it had an expectation of a more favourable outcome from domestic courts than that at the ICSID arbitration.
- The rationale of the South African government in cancelling BITs with foreign investors was covered in section 2.5 above and relates to what the state believes are infringements to its ability to regulate in the public interest. The *Agri SA* case and particularly the ICSID cases may serve to provide a basis for the reasons why the government has insisted on the exhaustion of local remedies in proposed legislation such as the PPIB and Expropriation Bill of 2013.

It is submitted that the Constitutional Court decision in the *Agri SA* case is a demonstration of the challenges that domestic courts face when confronted by matters of international law and politics. The principle of regulatory or indirect expropriation is well developed under international law. The principle that has developed over time, intended to prevent a foreign investor from suffering losses based on a host's regulatory changes, renders it a taking of property, when the regulatory actions of the host state result in a significant curtailment of use and enjoyment of the property, or if the state's actions cause value destruction of the property. The destruction of the economic value of the property need not be absolute or permanent.

¹¹⁶ See *Foresti case*, where the Italian investors challenged the MPRDA provision on the basis that they constituted a form of indirect expropriation and that the Act was contrary to the BIT protection between South Africa and Italy. The legal basis for the ICSID challenge related to facts similar to those raised in the *Agri SA case*. The South African government entered into a private settlement with the foreign investors and as by so doing denied an international tribunal the opportunity to pronounce on the international law merits of the MPRDA's BEE provisions.

The Constitutional Court provided an interpretation of section 25 of the Constitution that can be viewed as favourable to the state's transformative agenda, when it stated in paragraph 48 of the judgement that "[d]eprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation". These pronouncements in the judgment have profound implications for property owners who may find it difficult to prove that an expropriation has occurred where the state has not in fact acquired the rights.¹¹⁷

The Constitutional Court in the same judgment stated that "[t]here can be no expropriation in circumstances where deprivation does not result in property being acquired by the state". This in essence suggests that in South Africa, unless the rights attached to property pass to the state, an investor cannot claim that the property in question has been expropriated. The Constitutional Court's decision in the *Agri SA* case gave an interpretation of the Constitution that allows the state policy space to enact legislation that recognises and attempts to address the injustices of the past.

This concurrently needs to be balanced against the reality of a more integrated global system, where international law plays an increasing role.¹¹⁸ The interpretation of expropriation given by the Constitutional Court appears to be an attempt to balance the tension between the private property rights of investors as guaranteed under international norms and BITs with the legitimate public policy objectives of the government. The resulting judgment, however, renders the well-recognised international law principles of indirect

¹¹⁷ See, *Agri SA* case para 48; also *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (1) SA 530 (CC) paras 32-35.

¹¹⁸ In para 1 of the *Agri SA* case judgment, the Court stated that South Africa was a country rich in minerals but that the regrettable apartheid architecture placed 87 per cent of the land in the hands of 13 per cent of the population. "[c]onsequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining sector."

expropriation inapplicable under South African law. The approach adopted by the Constitutional court is unlikely to prevail at an international arbitration based on the BITs South Africa concluded. The principle also stands in contrast to other international agreements to which South Africa is party and that will be the subject of further study.¹¹⁹

The social imperative of redistribution through legislative measures in other economic sectors apart from mining is likely to follow, as there still remains significant inequality in the country. The state is not presented with many options in this regard and this may under lie the motivation behind the cancellation of BITs and the repudiations of the international dispute settlement procedures they entail in 2013. An outcome of the enactment of the MPRDA is that landowners or mineral rights owners (where these rights were severed) suffered deprivation of rights that they held prior to the passage of this Act.

As a result, the deprivation caused a decline in the value of these mineral rights or their complete extinguishment in cases where the rights' owners failed to reclaim the rights as prescribed by the MPRDA transitional arrangements. Both the applicant and respondent in the *Agri SA* case were in agreement that the adoption of the MPRDA resulted in a deprivation. What was in dispute was the contention by the applicant that the deprivation had in fact become an expropriation.¹²⁰ The Constitutional Court was unequivocal in its

¹¹⁹ The basis for the two known ICSID cases that were brought against the Republic of South Africa by foreign investors were pursuant to the Bilateral Investment Promotion and Protection Agreement with the Government of the Republic of Italy concluded in June 1997 and the Reciprocal Promotion and Protection of Investments Agreements, concluded with the Belgo-Luxembourg Economic Union in August 1998. Refer also *Metalclad v United Mexican States* (ICSID Case No. ARB(AF)/97/1), award of 30 August 2000 and *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador* (ICSID Case No. ARB/01/11), award of 5 October 2012.

¹²⁰ See *Agri SA* case where the applicants contended in para 54 of the judgment that the MPRDA—

(a) destroyed Sebenza's coal rights which encompassed the entitlement to enter the land with employees, prospect for or mine minerals and dispose of them as well as the competencies to keep, transfer, bequeath, encumber or lease rights;

(b) vested in the minister a public law power or competency to confer upon third parties, by means of a prospecting or mining right created by the MPRDA, the

pronouncements that under South African law, an expropriation has occurred *only* where deprivation results in the property interest in question being *acquired* by the state.

It is significant to analyse the SCA judgement in the *GC Steinberg* case¹²¹ where the SCA ruled that the distinction between a deprivation and expropriation was “[w]ell established under South African law”. The Court further pointed out that such provisions existed in the jurisprudence of a number of other countries of the world.¹²² The principle of constructive expropriation, which states that in certain circumstances a deprivation, will attract an obligation to pay compensation even though no rights vest in the body undertaking such a deprivation, would be problematic. The SCA’s view was that this created a blurring of deprivation with expropriation and made it problematic to determine under which circumstances deprivation or expropriation would be applied.

The Court suggested that there may in fact be room for the development of a doctrine akin to constructive expropriation in South Africa.¹²³ The Court based this on situations where public bodies may regulate over private rights to an extent where the said private rights are in effect transferred to the state. However, the Court indicated that such a doctrine may in fact prove to be undesirable as it may introduce confusion into the law and adversely affect the

entitlements tabulated in (a) above, subject to ministerial consent in terms of s 11 of the MPRDA; and

(c) imposed the obligation to compensate on the state, which is the expropriator.

In para 58, the Constitutional Court made the following determination: “To prove expropriation, a claimant must establish that the state has acquired the substance or core content of what it was deprived of. In other words, the rights acquired by the state do not have to be exactly the same as the rights that were lost. There would have to be sufficient congruence or substantial similarity between what was lost and what was acquired.” See *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) at para 16; *Badenhorst and Mostert* 2003 (3) *Stell LR* 377 at 384-385; and *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others* (1996) (4) SA 499 (A).

¹²¹ *Agri SA* case para 5-6.

¹²² Refer to *Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZS) at 502 where the Court points out that the distinction is contained in almost all the postcolonial constitutions granted by Britain in Africa. See also *Government of Malaysia and Another v Selangor Pilot Association (a Firm)* (1978) AC 377 (PC).

¹²³ *Steinberg* case at para 8.

reforms anticipated by section 25(4) to 25(9) of the Constitution. The points of law applied by the SCA to reach its judgment in the *GC Steinberg* case relate to those utilised by the Constitutional Court with respect to section 25 of the Constitution. The points of agreement reached by both the Constitutional Court and Supreme Court in the *GC Steinberg* and *Agri SA* cases are as follows:

1. There is a clear demarcation in law between deprivation and expropriation.
2. Deprivation per se does not generate a requirement to compensate.
3. A deprivation can only rise to an expropriation when the state acquires the rights.¹²⁴
4. The doctrine of constructive expropriation may have merits, particularly in those situations where an expropriating authority potentially overregulates rights. The end result may in fact have the cumulative effect of transferring said rights to the state. However this doctrine is not supported under South African law.
5. An interpretation of section 25 by courts that is narrow and extends the notion of expropriation to cover instances where an actual acquisition of rights has not passed to the state would limit the full application of section 25; in particular those provisions that aim to reverse the harmful effects of apartheid segregation, especially those concerning redistribution of land and other resources held disproportionately by whites as a result of past apartheid legislation.¹²⁵

¹²⁴ Refer to *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) at para 58, herein after (Arun case) where the court stated that “an expropriation occurs by state coercion and without the consent of the affected owner”.

¹²⁵ See Mostert 2002 (1) *TSAR* 160-167; Mostert 2002 (2) *SALJ* 400-428; and Mostert 2000 (60/2) *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 295-330. Also refer to Sabinet Law <http://www.sabinetlaw.co.za/land-reform/articles> (Date of use: 10 January 2015). The Director-General for Land Reform and Rural Development indicated to a parliamentary portfolio committee that the Expropriation Act of 1975 must be

6. There is a conflict between the manner in which compensation is to be determined by the Expropriation Act of 1975 and section 25(3) of the Constitution. The Expropriation Act of 1975, under section 12(1), requires compensation as close to market value as possible to make good on the property rights that has been expropriated. This is markedly different from the provisions of the Constitution that seek to discount the market value with a balance of other societal considerations. This is the subject of section 2.6.3 below on compensation principles.

The interpretation of section 25 given by the Constitutional Court in the *Agri SA* case is supported by the same court's interpretations of expropriation in the *Reflect-All* and *Harksen* cases.¹²⁶

The social justice and human rights considerations that flow from these Constitutional Court judgements and how they impact on foreign investors is the focus of section 2.7 below.

amended. He motivated the amendment on the basis that this would reign in land prices. In the same parliamentary committee, the chairman called for an amendment to the Constitution so that the right to land could be enshrined as a socioeconomic right. See also *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 46-53 where the Court held that s 12(1) of the Expropriation Act of 1975 "must be applied in conformity with the fundamental values of the Constitution whenever possible".

¹²⁶ See the *Reflect-All* case para 64. Nkabinde J passing judgment provided the following interpretation: "[T]he applicant argued that section 10(3) is inconsistent with the constitutional guarantee against uncompensated expropriation of property. I do not agree. Although it is trite that the constitution and its attendant reform legislation must be interpreted purposively, courts should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the state. It must be emphasised that section 10(3) does not transfer rights to the state ... As I have said, the state has not acquired the applicants' land as envisaged in section 25(2) and 25(3) of the Constitution. For that reason, no compensation need be paid." Also *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) paras 32-33 (hereinafter *Harksen case*), based on the Interim South African Constitution Act 200 of 1993. The Court interpreted s 28 of the Interim Constitution of 1993 which is equivalent to s 25 as follows: "[T]he word expropriate is generally used in our law to describe the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation ... The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our laws."

In Chapter 4 customary international law on foreign investments will be discussed as well as the doctrine of constructive (regulatory) expropriation that the Constitutional Court struck down.

Further in Chapter 4, the approach adopted by the courts with respect to the property clause in section 25 including the determination of compensation will be contrasted to current trends in public international law on foreign investments and international customary law. There are evolving principles of international law relating to regulatory expropriation, which will form part of the focus in Chapter 4. The genesis of these principles has in recent times been borne out by state practice.¹²⁷

It is of significance to note the judgments recorded in the *Agri SA* case by Cameron J and Froneman J, with Van der Westhuizen J concurring. All three justices of the Constitutional Court concurred with the main judgment delivered by Chief Justice Mogoeng. However, Cameron J and Froneman J both held reservations. Cameron J stated: “[I] share the caution Froneman J expresses regarding the main judgment’s finding that acquisition by the state is a necessary feature of expropriation under section 25 of the Constitution.”¹²⁸

Cameron J continued:

[a]cquisition by the state is, in my view, a general hallmark of expropriation. But not necessarily and inevitably so. Whether an expropriation contemplated by section 25 has occurred is – as the main judgement finds – a context-based enquiry, demanding a case by case approach. I therefore agree with Froneman J that it is inadvisable to extrapolate an inflexible general rule of state acquisition as a requirement for all cases.¹²⁹

127 See Barklem and Prieto-Rios <http://www.usergioarboleda.edu.co/civilizar/civilizar-21/the%20concept%20of%20indirect%20expropriation.pdf> (Date of use: 1 February 2015). In the article, the authors state that “[t]he protection of an alien’s property in a host country against direct expropriation has long existed in the international arena. Examples of direct expropriation include nationalisation, physical seizure of assets or legislated transfer of assets to the state. However, such physical takings are no longer common practice. Nowadays, expropriation comes mainly in the form of ‘indirect expropriation’: acts and steps taken by governments which interfere with the right to the property or diminish the value of the property.”

128 *Agri SA* case at para 77.

129 *Ibid* at para 78.

This view is expounded by Froneman J “[T]he judgment ultimately grounds its conclusion in the propositions that (1) state acquisition is an essential requirement for expropriation, and (2) in this case there was no state acquisition. I am unable to agree with either assertion.”¹³⁰ Froneman J concludes: “I acknowledge that there is no precedent for this approach. That is because this court is faced for the first time with legislation that seeks to effect an institutional change to the legal regime that applies to the exploitation of this country’s mineral and petroleum resources.”¹³¹

Froneman J continued: “[L]arge-scale transformation legislation of this nature presents challenges of a special kind. There is no binding precedent of this court that precludes a new and fresh approach to the issue.”¹³² He concludes as follows:¹³³

[a]pproaching the provisions of the MPRDA from this perspective also dispenses with the need to enter into a formal analysis of when a deprivation becomes expropriation. I consider that to be an advantage here. Before this court it was common cause that a non-arbitrary deprivation occurred. The first step of the FNB analysis thus needs no further attention.

In spite of these reservations from the justices, the underlying premise that an expropriation only occurs when the state acquires the rights in the said property was confirmed by the *Agri SA* judgment delivered by the Constitutional Court.

Another matter related to expropriation is how the investor, whose property has been expropriated, will be compensated. Furthermore, the courts need to provide clarity on what is and is not considered to be in the “public interest”.

It is submitted that this principle has no authoritative definition and as such is subject to expansive interpretations and may yield wide actions by the state under the public interest rationale.

¹³⁰ *Ibid* at para 79.

¹³¹ *Ibid* at para 91.

¹³² *Ibid*.

¹³³ *Ibid* at para 92.

2.6.3 Compensation principles

Once a deprivation has in fact been declared an expropriation as a result of the rights in the property interest passing to the state in line with section 25(2)(a), then section 25(2)(b) of the Constitution provides that compensation should be paid. The amount of compensation and the time and manner of payment should be agreed to by the parties affected or determined by a court. Hence, the following factors need clarity when a lawful expropriation has occurred.

2.6.3.1 *Is agreement among the affected parties on the compensation a condition precedent for an expropriation?*

This matter was the subject of the Constitutional Court case of *Haffejee NO and Others v eThekweni Municipality and Others*.¹³⁴ The court in essence reasoned that the “just and equitable” principle in the Constitution needed to be balanced against private interests. The risk of the state’s actions being unjust to the property owner in cases where compensation was not agreed upon prior to the expropriation was real, for example where individual homes were expropriated leaving the owners homeless as a result.

The public interest consideration it had to consider related to expropriations in the event of a state of emergency per section 37 of the Constitution, such as natural disasters or health emergencies. The Court held that requiring the affected parties to first reach agreement before the expropriation took effect, would impose a severe burden on the state. The court ruled in favour of a more

¹³⁴ 2011 (6) SA 134 (CC) (hereinafter *Haffejee* case). In this case, the Constitutional Court was requested to decide whether the quantum, timing and manner of the compensation should be decided upon by the affected parties before the expropriation occurred. The applicants in the case required a ruling that agreement on compensation as stipulated in s 25(2)(b) was a condition precedent in an expropriation. See para 143 of the main judgment, where the Court ruled that “[t]he determination of compensation is a condition, not a condition precedent for expropriation”. The Court in essence reasoned that the just and equitable principles in the Constitution required that a more flexible approach be adopted when balancing public interest and/or purpose against private property rights interests.

flexible interpretation, and stated that “[t]he protection of property as an individual right is not absolute but subject to societal considerations”.¹³⁵

In the *Haffejee* case, the Court indicated that in its quest to determine a way forward, foreign jurisdictions had been investigated. The Venice Commission had been consulted and this inquiry had proved inconclusive. The Constitutional Court is a member court of the Venice Commission, a body that comprises 46 Council of Europe states and 15 other states from Africa, Asia and America.

The Court also sought case studies from African states such as Nigeria, Ghana and Namibia. These states’ constitutions refer to “prompt” and “just” standards of compensation.

2.6.3.2 How is the quantum to be paid for expropriated property determined?

The constitutional property clause refers to “just and equitable” compensation, reflecting an equitable balance between public interests and the interests of those affected. Section 25(3) sets out all the factors that need to be considered by the parties when determining the amount, time and manner of the payment. These are the following:

1. the current use of the property;
2. the history of the acquisition and use of the property;
3. the market value of the property;
4. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
5. the purpose of the expropriation.

This stands in contrast to section 12(1)(a)(i) of the Expropriation Act of 1975, which requires that compensation be based on the amount which the property would have realised if sold on the date of notice in the open market by a willing

¹³⁵ The *Haffejee* case at para 16.

buyer; whereas to s 12(1)(a)(ii),¹³⁶ which refers to an amount to make good any actual financial loss caused by the expropriation. In essence, the fair market value principle is the standard set in the Expropriation Act and the Constitution sets a reduced standard that requires a set of factors to be applied that may have the effect of discounting the market value quantum.

Further, BIT provisions generally require market value or as close as possible to market value as the payment. The treaties also require that the state should make good on the quantum in as short a period of time as possible (prompt) and that the method of payment and the currency must be satisfactory to the investor (effective), restoring them to as close a condition they were in prior to the expropriation being made public.

This may therefore include a payment in foreign currency in the foreign investor's home country, or some exchange control facilitation so that the foreign investor may repatriate the compensation to the country of origin.¹³⁷

Chapter 3 will focus on the PPIB, and the provisions on compensation as proposed in the Investment Bill will be analysed in light of the discussion above. Chapter 4 will discuss international trade law and its intersection with

¹³⁶ See *Arun case* at para 73 where the Constitutional Court held that "[T]he parties to this appeal were agreed, correctly so, that section 28 (of Land Use and Planning Ordinance 15 of 1985) commands an obligatory passing of ownership to the local authority against compensation, section 26(1) of the Expropriation Act would be applicable. It follows that the assessment of any compensation due falls to be reckoned and paid in accordance with provisions of the Expropriation Act". In my view the critical element that establishes the basis for compensation in the *Arun case* is similar to that established in the *Agri SA case* and relates to the acquisition of the rights in the property by the state [City of Cape Town]. It is submitted that this judgement however reflects the challenge courts will continue to face in determining compensation for expropriation when the Expropriation Act and the Constitution set different compensation formulations. It is further submitted that the matter of applicable law in determining compensation has not been exhausted by the Constitutional Court ruling in the *Arun case*. This case traverses the critical line of when does a deprivation rise to an expropriation as a result of regulatory measures (constructive expropriation). It is submitted that the acquisition of the rights by the state remains the condition precedent for an expropriation.

¹³⁷ Refer to the *Du Toit case*, where the Court deferred ruling on the relationship between s 12 of the Expropriation Act of 1975 and s 25(3) of the Constitution. See also Boggenpoel 2012 *SALJ* 605. The Expropriation Bill of 2013 aims to repeal in full the Expropriation Act of 1975 and align the expropriation provisions with the property clauses in s 25 of the Constitution. The PPIB has similar wording as the Expropriation Bill of 2013 and the Constitution with regard to expropriation.

the regulation of foreign investments. The compensation principles that are being applied by ICSID and WTO tribunals and other international courts when determining compensation for expropriation will be explored. Just as the Constitutional Court sought international guidance in the *Haffeejee* case, the PPIB needs to be compared to international legal practices, as well as to best practice recommendations and protocols concluded at the SADC and the AU.

2.7 Human rights law and foreign investments

Acts of deprivation and expropriation have the impact of limiting rights held over property. These limitations of rights may partially, temporarily or permanently extinguish the rights held by a foreign investor. In the South African context the protection of rights is an important matter considering the country's history of racial segregation, inequality and human rights abuses. The Constitution of 1996 makes provision for a Bill of Rights of which the purpose is the safeguarding of human rights and the entrenchment of the Constitution as the supreme law of the country.

The South African courts are empowered to declare any law invalid on the basis that the law is inconsistent with the Constitution or the Bill of Rights.¹³⁸

In the Bill of Rights Handbook, Currie and De Waal identify constitutionalism as follows:

[T]he idea that government should derive its powers from a written constitution and that its powers should be limited to those set out in the constitution. The fundamental problem that is addressed by writing of a constitution is to establish a government with enough power to govern but, at the same time to structure and control that power so as to prevent it being used oppressively.

The Bill of Rights is one of the instruments in a constitutional democracy that is utilised to limit state power. This is done by preventing the state from infringing on listed fundamental rights and correspondingly being required to

¹³⁸ See Currie and De Waal *The Bill of Rights Handbook* 8; Ellmann *In a time of trouble*; s 38 of the Constitution; and *Pharmaceutical Manufacturers Association of SA v President of the Republic of South Africa* 2000 (2) SA 674 (CC).

utilise its powers to promote and protect the said rights. In protecting human rights, three fundamental pillars need to exist in a society, namely:

1. constitutional supremacy
2. judicial independence
3. wide entrenchment of human rights

Constitutional supremacy dictates that the constitution is the supreme law of the land that binds all branches of government and supersedes all rules made by that government or the courts. Therefore any laws or rules of procedure that do not meet the constitutional muster would be deemed invalid. In South Africa the supremacy of the Constitution is borne out in the preamble to the Constitution and in section 2.¹³⁹

Constitutional rights and freedoms guaranteed in the Constitution and Bill of Rights are not absolute but may be restricted by other national situations that are connected to safety and security, social justice, emergencies caused by natural disasters and war, as examples.

Section 36 of the Constitution of South Africa covers the limitation of rights providing the constitutional justifications that would permit the limitations as follows:

¹³⁹ The preamble to the Constitution states: “[W]e therefore, through our freely elected representatives, adopt this constitution as the supreme law of the Republic so as to—

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- Improve the quality of life of all citizens and free the potential of each person; and
- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”

Section 1(a) states that the Republic is founded on the values of “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms” and s 2 states that “[t]his constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”. Section 7(1) states that “[t]his Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all in our country and affirms the democratic values of human dignity, equality and freedom.” Section 7(2) states that “[T]he state must respect, promote and fulfil the rights in the Bill of Rights.” Section 7(3) provides as follows: “[T]he rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) The nature of the right;
 - (b) The importance of the purpose of the limitation;
 - (c) The nature of the extent of the limitation;
 - (d) The relation between the limitation and its purpose; and
 - (e) Less restrictive means to achieve the purpose
- (2) Except as provided in subsection (1) or in any other provision of the constitution, no law may limit any right entrenched in the Bill of Rights.

In the following subsection of this chapter it will be examined what the human rights implications are for foreign investors when states take measures that curtail or extinguish the property rights of investors. The degradation of human rights may be exacerbated by the failure of the state to observe the rule of law. The questions of what legal avenues are available when all local remedies are exhausted, in pursuit of the protection of rights will be explored further.

Suffice it to state that a number of international human rights courts have been established in recent times that adjudicate on rights violations.¹⁴⁰ These human rights courts have mechanisms that enable private citizens to launch judicial action against governments, including the home state, when the matter in question relates to violation(s) of human rights. There has been significant growth in international human rights law principles, as well as in arbitrations related to the protection of human rights. The laws that protect human rights

¹⁴⁰ See *Agri SA* case at para 96 and *Jahn v Germany*, *European Court of Human Rights* (2005) ECHR 444 (hereinafter the *Jahn* case). Froneman J highlights important human rights consideration that came to bear on the *Jahn* case. Section 2.7 of this study analyses the intersection of property rights with human rights. In the *Jahn* case, the European Court of Human Rights was requested to consider whether the failure to pay compensation to the applicants was a breach of article 1 of Protocol 1 to the European Convention for the protection of Human Rights and fundamental freedoms (CET no.194). The Protocol states: “[E]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

flow through international instruments such as UN covenants and declarations, regional political and trade agreements and the founding statutes of international courts such as the International Criminal Court (ICC) or the International Court of Justice (ICJ).

What has become increasingly clear is the growing intersection of the human rights of the investors and the human rights of those affected by the investments. Section 2.6 of this study covered the South African constitutional protections on the property rights of investors. However, some foreign investors in the country, particularly those from countries that have BITs with South Africa, enjoy more extensive legal protections than those available to locals. The protections arise out of South Africa's BIT obligations stemming from the treaties that the country has concluded with a number of states. These BITs have allowed foreign investors to lodge cases with the ICSID in cases where the foreign investors are of the view that BIT protections have been violated.

It is submitted that it had become possible for South Africans to lodge similar claims against their own government in cases where locals have incorporated legal entities in countries that have BITs with South Africa and then those entities have reinvested in the country. Those investments would be considered as falling under the ambit of BITs in some cases and would therefore be subject to treaty protections. Although South Africa has started a process to cancel BITs with a number of states since making this announcement in 2013, BITs usually have "sunset" clauses that run for up to 10 years from the date of cancellation.

Hence, regardless of the rulings of the highest courts in South Africa, foreign investors covered by BITs have the opportunity to bring claims against the country before international tribunals abroad. This section attempts to demonstrate the increasing conflict faced by international arbitrators when considering matters connected to human rights. An increasing number of governments and civil society formations are appealing to international arbitrators to consider broad human rights interests when determining cases brought by foreign investors against the host under BITs.

The rationale applied in an increasing number of cases by governments in their defence at the ICSID has been that overriding human rights considerations have compelled the host states to act or fail to act in particular ways. What is most concerning about this developing system of international jurisprudence relates to the competence of ICSID arbitrators to fully evaluate international human rights considerations. ICSID arbitrators are under no obligation to apply judicial precedent when making rulings, nor do they have the level of impartiality as judges of international courts.

The arbitrators are usually employed professionals, retired professors or advocates who may be swayed by the influential nature of some of the claimants that comprise global MNCs. The primary concern relates to the fact that human rights or the public interest is increasingly being cited as justification by governments for failing in their obligations under BITs.¹⁴¹

The risk exists that rulings of ICSID and other arbitral tribunals may be contrary to rulings delivered by human rights courts. Investors may have strong grounds for bringing cases to ICSID panels while affected citizens of the host states may also approach human rights courts on similar matters and the two systems may yield different outcomes.

It is also possible for a foreign investor to pursue a host government under a BIT and at the same time at human rights courts on similar alleged transgressions. A number of international courts and tribunals have been established in recent times to adjudicate over matters that relate to violations of human rights. These courts have either been created by regional political

¹⁴¹ See *Azurix Corp v Argentina* (ICSID Case no. ARB/01/12) Award of 14 July 2006 at 311-312; *Mondev International Ltd v USA* (ICSID Case no. ARB/(AF)/99/2) Award of 11 October 2002 at 144 also refers to Argentina's rationale for noncompliance with BIT provisions being based on "overriding human rights consideration" during the 2001 financial crisis. See also *CMS Gas Transmission Company v Argentina* (ICSID Case no. ARB/01/08) Award of 12 May 2005 and *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case no. ARB/05/22) Award of 24 July 2008. In *Sawhoyamaya Indigenous Community v Paraguay*, judgment of 29 May 2006 at para 140, the Inter-American Court of Human Rights noted that compliance with commercial treaties should always be compatible with the American Convention on Human Rights, "[w]hich is a multilateral treaty on human rights that stands in a class of its own and generates rights for individual human beings and does not depend entirely on reciprocity among states".

groupings such as the European Court of Human Rights or the Inter-American Court of Human Rights. These courts have jurisdiction over citizens of the states that belong to that regional political grouping and usually allow said citizens to approach the court for relief once all local remedies have been exhausted. Other courts have been established as a result of international treaties such as the Rome Statute of the International Criminal Court of 1998.¹⁴² These international human rights courts adjudicate over human rights matters across a number of geographical regions and their decisions are binding on all state parties to the convention or treaty.

Human rights considerations apply to foreign investments in three main areas. The first instance occurs where the best interests of citizens of a country are threatened by MNC interests, usually in collusion with corrupt public officials. There are numerous cases of corporations that have committed gross human rights violations, particularly in developing countries. These acts include but are not limited to the following:

- child workers
- hazardous work environments or causing pollution of the environment
- illicit trade in minerals or banned substances
- bribery of foreign government officials
- supporting coups and mercenary activity

In a number of instances, international corporations have been found to have transgressed transnational human rights principles in their conduct overseas.¹⁴³ In the second instance, human rights considerations apply where

¹⁴² Rome Statute of the International Criminal Court 1998 (2187 UNTS 3)

¹⁴³ Sornarajah *The international law on foreign investment* 27-28. See Principles 1 and 2 of the UN Global Compact. A developing trend in company law is the inclusion of human rights considerations in the duties of directors. The introduction of the Social and Ethics Committee in the South African Companies Act 2008 is an example. Litigants have also sued MNCs in their home countries for violations by their subsidiaries abroad – see *Lubbe v Cape Plc* (2000) 1 WLR 1545, where the UK House of Lords ruled that British MNCs could be held accountable for the injurious acts by their subsidiaries abroad. This case related to 3 000 South Africans who suffered from asbestosis from working for the defendant's South African subsidiary. See also Ratner 2001 111(3) *YLJ* 443-545, 478. See Gilmore <http://www.huffingtonpost.com/scott-gilmore/apartheid-lawsuits->

foreign investors using BIT provisions have brought cases against host governments at international arbitral forums.

The foreign investors have made various allegations against hosts for breaching protections espoused in BITs. The host states are usually alleged as examples to have:

- expropriated or indirectly caused an expropriation usually through some form of regulatory measures
- failed to provide FET to the investor
- failed to provide for full protection and security

Host governments contend that their actions are in pursuit of broad human rights objectives and are in line with the rights of sovereign states to regulate in the public interest. For example, the policies that host governments seek to implement may be aimed at redressing historic circumstances that have led to

gains_b_184944.html (Date of use: 2 February 2015). A US judge ruled against a motion to dismiss the claims brought against the defendants General Motors, Ford, Daimler and IBM. The lawsuits *Ntsebeza, et al v Daimler AG, et al* and *Khulumani, et al v Barclays National Bank Ltd, et al* were filed on behalf of classes of South Africans who allege that the defendant corporations aided and abetted South African forces in extrajudicial killings, torture, arbitrary denationalisation and the crime of apartheid. The lead attorney for the plaintiffs stated that: “[I]n this case, the expertise and products of General Motors, Ford, Daimler and IBM led to violations of human rights under apartheid in South Africa. These companies aided the apartheid regime by providing armoured military vehicles to violently suppress and terrorise South Africa’s black population and provided race-based identification documents that stripped black South Africans of nationality and citizenship.” See also Amnesty USA <http://www.amnestyusa.org/news-item/nigeria-long-awaited-victory-as-shell-finally-pays-out-%C2%A355-million-over-niger-delta-oil-spills> (Date of use: 10 January 2015). The *Shell* case was launched in the UK and six years after the oil spills that destroyed the livelihoods of thousands of people in the Bodo area, an out-of-court settlement was reached. Of this settlement an amount of GBP35 million is to be paid to 15 600 individuals and GBP20 million is for the community. Amnesty International has been critical of the delays that it has taken to reach this settlement. Audrey Gaughram, director of Global Issues, states in the article that “[i]n effect, Shell knew that Bodo was an accident waiting to happen. It took no effective action to stop it, then made false claims about the amount of oil that had been spilt. If Shell had not been forced to disclose this information as part of the UK legal action, the people of Bodo would have been completely swindled.” See the International Institute for Sustainable Development (IISD) *International human rights in bilateral investment treaties and in investment treaty arbitration* 2; Peterson and Beattie 2007-03-09 *Financial Times* 8; and Peterson 2006 (26) *Dialogue on Globalization*. See also Peterson <http://www.iareporter.com/articles/swiss-investor-prevailed-in-2003-in-confidential-bit-arbitration-over-south-africa-land-dispute.pdf> (Date of use: 4 June 2015) and *Bernadus Henricus Funnekotter and Others v Republic of Zimbabwe*, Request for Arbitration submitted at the ICSID on 30 May 2003.

the marginalisation of indigenous people or other societal groupings, or to discrimination based on segregation on the basis of race, sexuality, ethnicity, language, religion, political persuasion or other systems of beliefs and values.

These human rights policies of governments may include large-scale nationalisation of mineral, gas, oil or other deposits, land expropriations or economic empowerment legislation, such as B-BBEE legislation in South Africa. In a number of cases before the ICSID, the host states are sued by foreign investors for failing to compensate the investors per the BIT provisions; such compensation being based on applicable provisions in BITs that usually prescribe *prompt, adequate* and *effective* payment. Hence, by launching these cases using BITs, foreign investors can and have successfully challenged government policies. These cases are held in international arbitration forums, usually *in camera*, and are adjudicated outside of the host nation's judicial or constitutional systems and usually out of the scrutiny of the media and nongovernmental organisations and other interested parties.

The third instance of human rights violations can occur where arbitrary or politically motivated acts by the host government deprive foreign investors of property rights. This may occur without due process, in some cases violating even the constitution of the host nation or international human rights obligations. In some cases, the host state enacts hurried legislation to legitimise the expropriation or nationalisation programmes. The government may lack the administrative capacity or political will to follow due process of law when implementing these nationalisation programmes.¹⁴⁴ An example of such a violation is the matter of farm seizures in Zimbabwe.

¹⁴⁴ Currie and De Waal *Bill of Rights Handbook* 10 state that "[t]he rule of law was created to protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedure". See ruling of the Zimbabwean Supreme Court in *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement, Zimbabwe* 2001 (2) SA 925 (ZS). The Court was requested to consider the argument that the land redistribution issue and the rule of law need to be considered from a political stand point. The Court stated that "[o]f course, it is fundamentally true that the land issue is a political question. It is equally true that the political method of resolving that question is by enacting laws. The Government has done so. It has enacted and amended the Land

The Zimbabwean land expropriations rendered thousands of farm workers unemployed and destitute in once prosperous farming communities throughout the country. There are allegations of torture levelled against the so-called “war veterans” who undertook the land grabs that were reported at times to have turned violent. Some farm workers and landowners lost their lives, or sustained injury and destruction of their property. The US, EU, United Kingdom (UK) and other Western powers imposed targeted sanctions on the Harare leadership, including travel bans and asset freezes, alleging among others violations of human rights and breaching of BITs.¹⁴⁵

The dispute between the UK and Zimbabwe over land expropriations has been the subject of discussion at the UN, SADC, EU and AU, as a number of the foreign investors disposed of land were of British descent. In many African states, political arguments have been made to the effect that expropriations are being

Acquisition Act. It has then failed to obey its own law. That is the point at which, with respect, the Attorney-General and the Commissioner have gone astray. The courts are doing no more than to insist that the State complies with the law. The procedures under the Land Acquisition Act have been flouted. The Act was not made by the Courts. It was made by the State.”

¹⁴⁵ See *Mike Campbell (Pvt) Ltd and Another v The Republic of Zimbabwe*, SADC (T) 02/2007, brought before the SADC Tribunal. The applicants, who were white farmers, challenged a decision by the Republic of Zimbabwe for the unlawful acquisition of their agricultural land. The Zimbabwean government passed constitutional amendment 17 that allowed for the expropriation of privately owned agricultural land without compensation. The applicants also alleged racial discrimination against them. The Zimbabwean government raised a preliminary objection to the application on the basis that the tribunal lacked jurisdiction as the applicants had not exhausted local remedies and that the Tribunal had no mandate to entertain human rights matters in that SADC did not have a protocol on human rights. The Tribunal ruled that it had jurisdiction as the applicants had no remedies under municipal courts. In its decision, the Tribunal indicated that it did not need a protocol on human rights to entertain human rights matters as article 21(b) of the Protocol to the Tribunal requires that the tribunal must exercise its authority “[h]aving regard to applicable treaties, general principles and rules of public international law” as sources of law. On the allegation of racial discrimination by the applicants, the Tribunal found that the Zimbabwean government discriminated against the applicants. Though amendment 17 to the Respondents’ Constitution did not expressly mention race, the intention was to target white farmers, in violation of SADC Treaty article 6(2). The applicants were entitled to fair compensation and the respondent was ordered to pay such compensation. The Tribunal found the respondent had violated article 4(c) and 6(2) of the SADC Treaty and ordered that it take all reasonable steps to protect the possession, occupation and ownership of all other applicants. See *Mike Campbell (Pvt) Ltd and Another v The Republic of Zimbabwe* SADC (T) 03/2009. See also *Louis Karel Fick and Others v The Republic of Zimbabwe* SADC (T) 01/2010 where the applicants required a declaratory order of breach of the SADC Treaty, for failure to comply with the decision of the SADC Tribunal ruling on SADC (T) 2/2007 and 3/2009 and *Swissbourgh Diamond Mines and Others v The Kingdom of Lesotho* SADC (T) 04/2009.

done to reverse historical seizures of land by colonisers from the indigenous peoples. These land seizures were orchestrated by white minority colonialist governments utilising brute state force and various unjust legislations. Why therefore, should the postcolonial black governments be obligated to follow a human rights dictum to which previous white oppressive governments did not adhere?

When considering human rights principles that apply to foreign investors in South Africa, it is important to take account of the political, socioeconomic and human rights history of the country. South Africa remains a highly unequal society, as discussed in Chapter 1. It is faced with one of the highest Gini coefficient inequality in the world demonstrating a skewed wealth distribution, mainly along racial lines. In 1994 the country emerged from a violent past characterised by gross human rights abuses and economic exclusion perpetrated against black Africans. The colonisation of the country by Europeans and the successive white governments that ruled South Africa over hundreds of years caused untold human suffering, deaths and displacements to millions of people.

The constitution-making process in South Africa was a negotiated political process that involved all key political parties in crafting the Constitution, each representing particular stakeholder groups. At its core, it represented a political compromise between the white NP government under De Klerk and hitherto banned political parties, broadly represented by Mandela's ANC and other black parties.

It is submitted that a compromise had to be struck that would satisfy the aspirations of black people for political independence and economic inclusion. This had to be balanced against the fears of the white minority who were yet politically and economically powerful and who feared losing their property, accumulated wealth and social status.

Given such a historical background of human suffering, inequality and poverty, it is unsurprising that the Constitution attempts to create space for the

democratic government to undo the human rights effects and economic exclusionary policies of apartheid.

Provision is made for the state to redistribute land and other resources for a public purpose or in the public interest in Section 25(4) to 25(9) of the Constitution. The Constitution also attempts to protect investors from arbitrary processes that result in expropriation and makes provision for compensation when an expropriation has occurred. In keeping with the historical compromises, the levels of compensation in the Constitution are moderated by a number of factors that potentially reduce any compensation awards to below full market value.¹⁴⁶

2.8 Conclusion

Chapter 2 has focused on key themes that relate to foreign investments in South Africa. The chapter covered the economic, legal, social and human rights principles that shape the current debates regarding property rights. What is clear from the legal analysis is that significant gaps remain in the legislative net that covers expropriation in the country.

¹⁴⁶ See the *Agri SA* case at paras 97-99 and Zimmerman 2005 *SALJ* 378. See also Geffen 2015-02-15 *Sunday Times* 7. In the article, the president is said to have announced the most revolutionary changes to land ownership since the 1936 Native Trust and Land Act in his state of the nation address – and it has met strong resistance from organised agriculture and estate agents. He said the government would be tabling the Regulation of Land Holdings Bill, which will place a ceiling on land ownership by South Africans, and a new regulation that will prohibit foreigners from owning land in South Africa. Organised agriculture said this showed how little the government knew about farming. The proposed legislation will set a ceiling of 12 000 ha on land ownership – a move likely to be vigorously opposed in court by defenders of property rights. Leading estate agent Lew Geffen said: “[C]onsidering the fact that foreign land ownership stands at less than 5%, this should not even be on the government’s agenda at a time when we are facing far bigger problems such as the energy crisis. We can quite frankly, not afford to shake investor confidence in South Africa more than it has been already. While the percentage of foreign ownership is low, the calibre of ownership is exactly what we need in this country; captains of industry, multinational corporations and international social influencers of one type or another ... I cannot see the government stripping foreigners of assets without an international outcry.” In the SONA 2015, President Zuma indicated the government would explore further proposals to order farmers to share 50 per cent of their land ownership with farm workers. The president also indicated that the Office of the Valuer-General’s imminent establishment meant that the principle of willing buyer, willing seller would no longer apply when the state wanted to acquire land. See Maswanganyi 2015-02-23 *Business Day* 8.

This is made more complicated by the BITs that are still in force and how investors will respond to various legislative changes being proposed. The doctrine of constructive expropriation is contentious as the position that the Constitutional Court has taken on the matter is not consistent with BIT protections and international law. The principle of what constitutes an expropriation requiring compensation, distinct from a deprivation has generated debate among many sections of South African society. The principle that an expropriation only occurs when the rights in the expropriated property pass to the state, will likely attract possible challenge by foreign investors in international arbitration. What is clear is the desire by the state to achieve a significant realignment of property rights in the country. This is evidenced by the new bills covering land, minerals, expropriation, arbitration and foreign investment to name a few.

The cancellation of BITs in 2013 by the state and subsequent policy pronouncements made by various officials and cabinet ministers are indicative of underlying policy tension to reform property rights patterns. In his 2015 SONA, the South African state president emphasised the need to transform property ownership, which is skewed based on race, to a more equitable base reflective of the demographics of the country. Based on various press reports, it is clear that foreign investors are concerned about the legislative changes and how these will impact on their investments. The economic projections are troubling, as the economy is set to remain far below the NDP's desired growth levels, at about 2.0 per cent in 2015. Some economists have suggested that in fact the country may be in a recession.

The continued electricity supply crisis, low FDI and sluggish economic growth and recent increases in personal tax, announced by the Minister of Finance to Parliament on 24 February 2015, point to difficult economic conditions. The PPIB is one of the legislative tools being proposed by government to regulate investments. Chapter 3 of this study explores some of the key provisions in this Bill, and Chapter 6 will conclude this thesis with some policy recommendations on the implementation of this Bill in light of all the challenges that have been identified above.

CHAPTER 3

The Promotion and Protection of Investment Bill 2013: An analysis of key provisions

3.1 Introduction to the Investments Bill

The Promotion and Protection of Investment Bill is a proposed legislative instrument aimed at regulating foreign investments. The Bill was made available for public comments in October 2013 and may be presented for adoption by Parliament in 2015. A number of organisations made submissions to the DTI, and the final draft legislative instrument after the February 2014 closure of public comments is not yet available.¹⁴⁷ This chapter makes an analysis of the broad key provisions contained in the Bill. Assumptions are made that some provisions may be amended as the Bill proceeds through the National Assembly and the Council of Provinces, and finally is signed into law by the president of the Republic of South Africa.

As has been indicated in Chapter 2, the application of a number of legal principles remains unresolved. Based on submissions made by interest groups, it is possible that the Bill may be challenged in the Constitutional Court should it proceed in its current form, and hence the full timelines of its final implementation are still subject to debate. What is clear, however, is the government's intention to enact a legislative instrument that will regulate foreign investments in South Africa based on municipal legal principles that are espoused in the Constitution.

¹⁴⁷ South African Institute of Race Relations <http://www.sairr.org.za/services/submissions-on-proposed-legislation> (Date of use: 23 April 2014). See also Maswanganyi 2014-07-10 *Business Day* 1, where the Investec Bank SA's chief economist Annabel Bishop said the bank was in the process of revising growth forecasts down from 2,2 per cent to about 1,9 per cent. South Africa's growth would remain anaemic until private-sector investment and employment increased, which required the government to improve the ease of doing business. She said the Promotion and Protection of Investment Bill and the Expropriation Bill should be "cancelled" to instil confidence in the future of property rights.

The cancellation of BITs that commenced in 2013 was a clear signal that the state was on a firm path to change the legal regime and in all likelihood the DTI will press ahead with the implementation of the Investments Bill.

3.2 The purpose of the Bill

The Investments Bill's stated objective in its preamble is to "[p]rovide for the legislative protection of investors and the protection and promotion of investment; to achieve a balance of rights and obligations that apply to all investors; and to provide for matters connected therewith".¹⁴⁸ This proposed legislation has far-reaching consequences for investors in South Africa.

Section 3 of the Investments Bill states the purpose as follows:

- Section 3(a) promote and protects investment in a manner that is consistent with public interest and a balance between the rights and obligations of investors; and
- Section 3(b) ensure the equal treatment between foreign investors and citizens of the Republic, subject to applicable legislation.

In understanding the purpose of the Bill, the researcher has considered the potential degree of applicability of the legislation in the country to determine significance and extent of coverage. Taking the entire investor community in South Africa as representing the economy of the country, section 4(1) and 4(2) state that applicability is limited to the following segments of the investor population:¹⁴⁹

1. Only those investments that are made for *commercial purposes*. This provision in section 4(1) implies that the Act applies to *all* investments, except those investments that are made without the expectation of economic return. The notion of "commercial purpose" is not defined in the

¹⁴⁸ Refer to the Investments bill, preamble

¹⁴⁹ Refer to the Investments bill, section 4.

Bill and in my view this may create interpretational challenges that courts may be required to resolve.

2. The timeline of when the investment was made relative to the enactment of the proposed Act is not a factor, as it will apply to covered investments retrospectively. Subsection 4(1) has the effect of extending the Act's coverage to all investments that have been made in South Africa, irrespective of when in the history of the country such investments were made, and is thus an all-encompassing provision. This Bill therefore applies equally to investment made by nationals from states that have a BIT with South Africa or those from nations with which South Africa has concluded IIAs or other treaties.¹⁵⁰
3. The Bill relates to *all* commercial investments, regardless of whether the investor is an individual, private entity, governmental, public international or nongovernmental organisation (NGO). This covers all possible investor entity groups and is an all-encompassing provision.
4. The Bill applies to all commercial investments, irrespective of whether the investor is a South African or a foreign investor. In effect, the Bill applies to all persons who have made commercial investments in the country, regardless of the nationality of the investor.

The Bill will therefore have extensive coverage over investments and apply to all investors, both foreign and domestic.

¹⁵⁰ South Africa is a signatory to the SADC Protocol on Finance and Investment of 2006 that came into effect in April 2010. The Protocol has investor protection provisions similar to those found in a number of BITs that South Africa has cancelled. See Ngwenya *The United States* 264.

3.3 Definition of the investor and the investment

The Bill makes clear distinctions in defining the applicable investor and the investment itself. In section 1 under definitions, the “investor” refers to any person who holds an investment in the Republic and, in the case of a natural person, means a person who holds an investment in the Republic regardless of nationality. The definition of the investor under section 1 of the Bill raises a number of factors that need consideration:

1. Natural persons regardless of nationality are the investors covered per the provisions of the Bill. This further entrenches the principle raised in section 3.2 above, that this Bill will apply to all investors regardless of nationality and hence the applicability of this Act is not limited to just foreigners. This is distinctly different to BITs, of which the purpose is to regulate foreign investments in the host country through a bilateral treaty between nations.
2. Natural persons enjoy human rights protections per the Constitution and other legal protections. Apart from municipal legal systems, human rights are protected by international principles that enjoin all nations of the world. As discussed in section 2.7 above, the doctrine of “state responsibility” places a duty on the governments of most progressive nations of the world to provide diplomatic protection to their citizens abroad, particularly when they suffer human rights infringements or when their lives and property are threatened.¹⁵¹

When dealing with an investor, regardless of whether the investor is a foreigner or domestic person, the host government needs to consider human rights implications that may arise as a result of by how the investor and the investment are treated. Violent land seizures and other methods of expropriation that result in physical injury or death to foreigners or subject

¹⁵¹ Weston 1981 (75) *Am. J. Int’l L* 437.

foreigners to discrimination can expose the host state to liabilities at the international level.

The discrimination may be based on race, religion, nationality, ethnicity, language or other forms of segregation between people, which may result in human rights liabilities.

Section 1 of the PPIB defines the covered investment as including the following assets held by an investor in the Republic:¹⁵²

- (a) An entity;
- (b) Securities as defined in the Financial Markets Act, 2012 (Act 19 of 2012), and a share as defined by the Companies Act, 2008 (Act 71 of 2008);
- (c) Contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions or other similar contracts;
- (d) Moveable and immovable property, including commercial property, leases, mortgages, liens or pledges;
- (e) Intellectual property rights such as copyrights, patents, utility model patents, registered designs, trade-marks, trade-names, trade and business secrets and technical processes; and
- (f) Rights conferred by law to carry out economic and commercial activities, such as licences, authorisations and permits;

Provided that in the above –

- (i) The investment relates to a material economic investment or significant underlying physical presence in the Republic, such as operational facilities; and
- (ii) Commercial contracts for the sale of goods or services and the extension of credit in connection with such commercial contracts, including claims thereunder, do not qualify as investments under this Act.

A number of issues arise when the definition of investor and investment above are considered in light of international trends. Matters relating to the protection of pre-establishment rights of potential investors are increasingly included in a number of BITs but are excluded by the above definitions of what constitutes an investment per the above definition in the Bill.

¹⁵² Sections 1(e) and 8(2)(c) of the Investments Bill appear to be directed at intellectual property rights regulation and must be viewed in light of the release by the DTI of the Draft National Policy on Intellectual Property, 2013, General Notice No. 918 of September 2013. The implications of the Bill's provisions on intellectual property rights will be explored further in Chapter 4 in light of South Africa's WTO TRIPS commitments.

It is submitted that the inclusion of “material” and “significant” in the definition of investment in 1(f)(i) of the PPIB creates interpretation challenges that courts will be required to rule on, as various meanings may be attached in defining what constitutes a qualifying investment. This may have an impact on minority shareholders whose rights at times may need protection. It is further submitted that foreigners who have purchased holiday homes in South Africa will not be covered under the Bill, as these properties may not be considered as commercial investments nor would they in some cases be considered “material”.

3.4 Treatment of the investment

The manner in which investors and their investments are treated by the host governments has been one of the leading causes of disputes. It is submitted that two main principles are of significance in relation to host state treatment of foreign investors. The first is the sovereignty principle: a country has a right to regulate in its territory over all investments and investors in the public interest or for a public purpose. The second, competing principle relates to the desire of home governments to protect their citizen’s investments abroad, under a doctrine of state responsibility or diplomatic protection.¹⁵³ International law on foreign investments has been heavily influenced by former colonial powers as a result of the necessity to protect the investments of their citizens abroad. Initially, the domestic legal principles of the colonial power applied to its citizens and their investments in the colonies. As the colonies achieved independence and started the process of exerting sovereign power over foreign investors, tensions arose between the hosts and investor countries over the expected standards of treatment to be accorded foreigners compared to locals.¹⁵⁴ The BIT was a creation of former colonial powers to extend protections to their citizens making investments abroad. This was necessary

¹⁵³ Subedi *International investment law: Reconciling policy and principle* 12 also Sornarajah 2006 (10) *SYBIL* 19

¹⁵⁴ See Root 1910 (4) *Am. J. Int’l L* 517, 521-522; Schwarzenberger *International law* 248; and Subedi *International investment law: Reconciling policy and principle* 1-18 (on the Hull and Calvo doctrines).

after the failure of a number of attempts at concluding a binding international agreement on the regulation of foreign investments as discussed in chapter 1. It is submitted that this failure to achieve international agreement on a regulatory framework and the subsequent proliferation of BITs, has benefited developed nations at the expense of developing nations due to the latter's limited bargaining power.

South Africa is such an example of a state that concluded BITs with major European trading partners in the mid-1990s as a means of attracting FDI. The government is now attempting to repudiate these treaties alleging amongst others that the BITs limit the government's ability to regulate in the public interest. It is submitted that this is a demonstration of the significant bargaining power wielded by developed nations. The following subsections consider how the Bill proposes to treat foreign investors in South Africa utilising municipal laws. The treatment of investors under BITs has primarily been concerned with how foreigners and their investments are treated by the host. BITs have traditionally not placed significant emphasis on investor obligations to the host.

The Bill attempts to replace these BIT safeguards for foreigners with legislation that applies to all investors and not just foreign investors. In this study firstly an attempt will be made to clarify critical issues related to how the safeguards enjoyed by foreign investors according to the PPIB may differ from those contained in BITs and other IIAs. Secondly, if the Bill makes changes to these protections, whether these are enhancing or curtailing investor rights in line with currently accepted international norms. The latter will be considered in detail in Chapter 4. The broad provisions that relate to the treatment of foreign investments in the Bill are discussed in the following subsections.

3.4.1 National treatment

The objective of the national treatment principle in international law on foreign investments is to address disputes that may arise due to allegations by foreigners that the host state's actions discriminate against them when compared to citizens.

At its root, the principle attempts to address the notion that host governments have a natural preponderance to favour their citizens over noncitizens. The host government may be accused of creating conditions, enacting laws or causing trade distortions that favour locals.

Sections 6(1) to 6(5) of the Bill cover the national treatment principle as follows:

6(1) The Republic must give effect to national treatment and treat foreign investors, their investments and returns not less favourably than it treats South African investors in their business operations that are in like circumstances.

6(2) The national treatment referred to in subsection (1) only applies to foreign investors and foreign investments held in accordance with applicable legislation.

6(3) A foreign investor may conduct without restraint various activities of foreign investment in the Republic, subject to applicable legislation.

6(4) For the purpose of this section, “like circumstances” means the requirement for an overall examination on a case by case basis of all the terms of a foreign investment, including the following factors:

- (a) The effect of the foreign investment on the Republic, including the cumulative effects of all investments;
- (b) The sector that the foreign investment is in;
- (c) The aim of any measure relating to foreign investments; and
- (d) Other factors relating to the foreign investor or the foreign investment in relation to the measure concerned.

6(5) The examination referred to in subsection (3) shall not be limited to or biased towards any one factor.

Applicable legislation referred to in Section 6(3) of the Bill above would include affirmative action policies, the Expropriation Act, the MPRDA and other B-BBEE measures that aim to address racial inequalities created by apartheid legislation of the past. Section 6(4)(c) of the Bill also refers to measures that have an impact on foreign investments – including, for example, preferential procurement, land redistribution or sector charters, such as the mining sector charter. The sector charters also set targets for the inclusion of blacks in company management and ownership transactions of various industries across various national economic sectors through sector charters and BEE scorecards.

These measures clearly favour locals over foreigners – or, as is the case with ownership transactions, require foreigners to cede shares to locals. These types of measures can be construed by foreigners as breaches of the national treatment principles, save in circumstances where exclusions have been created and agreed upon prior to the investments being made in the host country.¹⁵⁵ National treatment is emphasised in s 3(b) of the Bill as constituting one of the purposes of the Bill.

A slightly different view is held by Sibanda in respect to the national treatment principle. Making reference to DiMascio and Pauwelyn,¹⁵⁶ Sibanda maintained that the “[p]roblem with the proponents of national treatment obligation in the investment context seems, in my view, to stem from the fact that they tend to treat the obligation as a discipline to facilitate competition and to protect foreigners against government abuse”.¹⁵⁷ He further contends that GATS articles XVI and XVII require countries only to provide market access and national treatment in service sectors that they have specifically listed in the schedules annexed to the Agreement, with the permissibility of allowing specific exceptions for FDI in these sectors.

An interesting question posed by Sibanda is: “[D]oes the national treatment claim relate to the harm to specific investments, and not just abstract competitive opportunities? If the answer is in the negative, such claim will be without merit”.¹⁵⁸

3.4.2 Most-favoured nation treatment

The most-favoured nation (MFN) principle in international law on foreign investments relates to actions by the host state that may favour one group of foreign investors over another, based on the nationality of the foreign investors. The inclusion of MFN in most BITs arose out of fear that the host, for any

¹⁵⁵ Refer to South African Institute of Race Relations <http://www.sairr.org.za/services/submissions-on-proposed-legislation> (Date of use: 23 April 2014).

¹⁵⁶ DiMascio and Pauwelyn 2008 (102) *Am. J. Int’ L* 48.

¹⁵⁷ Sibanda OS 2014 (4) 4 *BMR* 159.

¹⁵⁸ *Ibid*

number of reasons, may be prejudiced against one foreign investor group relative to another. It is submitted that such acts by the host may have an impact on the competitive landscape to the detriment of some foreign investors.¹⁵⁹

The MFN protections are included in the BIT protections South Africa has in the past afforded foreign investors. It is submitted that the MFN principles have been excluded from the Investments Bill. The researcher surmises that the reasons for such exclusion could be as follows:

- The Bill applies to all investors and as such has much wider applicability than BIT cover, which results from a bilateral negotiation.
- The nationality of an investor may be a mute issue for as long as national treatment is applied to all investors.
- The state may in future conclude ‘new generation BITs’ or conclude the tripartite FTA as examples. This allows South Africa to offer concessions to states covered by these international treaties that exclude other states.

If in the implementation of this Bill the host state achieves the above criteria in the treatment of all investors, then the MFN principle is rendered null and void and its exclusion would be justified. It is however possible that some foreign investors may view this exclusion of MFN as a reduction in protection. The BITs that are in force with some foreign governments include MFN cover, and this principle will therefore subsist in tandem with the provisions of the Bill if it is passed to law.

¹⁵⁹ *Ibid*

3.4.3 Fair and equitable treatment

The “fair and equitable treatment” (FET) principle in the international law on foreign investments is based on a fundamental customary international law concept of justice, equality and fairness. The breach of this principle is a cause of many disputes between host states and foreigners.¹⁶⁰ In *Noble Ventures v Romania* the ICSID arbitrator ruled that the fair and equitable principle was a “general standard which finds its specific application in *inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligation towards the investor”. The protection that the principle extends relates to host states respecting the terms of agreements in contracts with investors, and not arbitrarily changing the terms of contracts once the investments have been made. The principle may extend to just administrative action, presumption of innocence until proven guilty and may also include applicable human rights principles.

The PPIB does not make express mention of the principles of FET and the MFN. The FET principle is covered in most BITs concluded by South Africa as well as in WTO instruments and other IIAs. In the *Foresti case*, breaching the FET principle formed part of the alleged breaches by South Africa at the ICSID. Its exclusion may be aimed at reducing risk of litigation by investors. The FET principle is not fully codified in law and is subject to varying application in investor-host state relations. It becomes therefore contentious to prove its application or violation. For example, a host government may treat all investors, both local and foreign, in a similar manner; however, that treatment may be below an acceptable international minimum standard.

This may prove unacceptable to foreign investors who may object on the basis that they find the treatment below that which is accepted among “civilised nations” or that to which they are accustomed at home. This argument is

¹⁶⁰ See, *Noble Ventures v Romania* (ICSID ARB/01/11) Award of 12 October 2005 para 112.

central to the notion of the sovereign equality of states and the Calvo Doctrine.¹⁶¹

3.4.4 The taking of property

A fundamental concern that any foreign investor has when contemplating making an investment in another country is the possibility of future uncertainty regarding the investment once made.¹⁶² Conditions in the host country may change in undesirable ways that threaten the investor's ability to enjoy full use of the whole investment and enjoy the full benefits that accrue from owning the investment. The reasons for the taking/deprivation of the property may include the following:

- policies aimed at resource or land redistribution
- regulatory measures aimed at annexing property for a public purpose
- measures that aim to redress historical inequalities in economic ownership patterns or economic participation by indigenous people
- regulatory measures that increase the tax burden or other costs associated with owning and/or operating the investment
- regulatory changes that deprive the investor of licensing rights, renewals or result in outright cancellation of rights or commercial contracts
- seizures of property by armed forces or other organs of state using intimidation or other coercive measures.
- criminal activities that the host state fails to control whose cumulative effects result in deprivation
- general legislative measures that transfer ownership of property rights to the state, usually referred to as nationalisation decrees

¹⁶¹ See Subedi *International investment law: reconciling policy and principle* 63.

¹⁶² See, Christie 1962 (38) *BYIL* 310-311

- international agreements, sanctions, acts of war or other international political matters involving the host state that may lead to the physical or economic destruction of the value of the investment

The above factors are not exhaustive, but point to an array of events that may occur in the host country and that may have an immediate or cumulative negative effect on the investor and the investment. The concern of foreign investors losing their investments as a consequence of events in the host beyond the investor's control played a significant role in the push by investor states to conclude BITs.

3.4.5 Nationalisation

Nationalisation is a government-driven programme to acquire privately owned property on behalf of the state.¹⁶³ The mechanisms utilised to acquire the investments vary significantly, usually involving the passing of legislation of a general or specific nature by the host country to acquire the property. The investors are either compensated fully, partially or not at all. Some decrees target foreign-owned property for nationalisation and have been the cause of major diplomatic disputes with the investors' home states. Response from the investor nations usually entail putting international political and economic pressure on the host state as well as the imposition of sanctions, and may even escalate to physical conflict.¹⁶⁴

Nationalisation is viewed as large-scale measures where the primary recipient of the property seizure is the state. This is differentiated from expropriation, which is dealt with below. Nationalisation is not expressly provided for in the Bill. It is submitted however that the expansive exclusions as to what does and does not constitute an expropriation per section 8(2) of the PPIB may allow for government action akin to Nationalisation.

¹⁶³ See, Sornarajah *The international law on foreign investment* 365-401

¹⁶⁴ See Cable *Gunboat diplomacy*

3.4.6 Expropriation

In a similar vein as nationalisation, expropriation results in the investor being deprived of the full use and enjoyment of the investment. Customary International law on foreign investments creates a distinction between these two actions that impact on investor rights.¹⁶⁵ With nationalisation, the rights to the property are acquired by the state. In an expropriation, the rights to the property are not always acquired by the state. The constitutional provisions and case law that relate to the expropriation of property in South Africa was covered in detail in section 2.6.2 above.¹⁶⁶ The PPIB aims to align the expropriation provisions applicable to foreign investments with the property clause of the Constitution. Similar provisions have been included based on the *Agri SA* case principles, and the Expropriation Bill 2013 with regard to the process in South Africa.

The expropriation of the property of foreign investors is cited by the ICSID as one of the principal causes of investor-host state disputes. As a consequence, a number of ICSID panel rulings have had to consider the principles that relate to expropriations.¹⁶⁷ The ICJ has also been seized with the matter of expropriation.¹⁶⁸ The PPIB covers expropriation under the heading *Principles relating to expropriation of investment* under section 8, as follows:

8 (1) An investment may not be expropriated except in accordance with the Constitution and in terms of a law of general application for public purposes or in the public interest, under due process of law, against just and equitable compensation effected in a timely manner.

8 (2) The following acts, which are not limited, do not amount to acts of expropriation:

- (a) A measure or series of measures taken by the government of the Republic that have an incidental or indirect adverse impact on the economic value of an investment;

¹⁶⁵ See *Texaco v Libya* 1979 (53) *ILR* 389; also *SGS v Pakistan ICSID* (Case No ARB/01/13) Decision of 19 December 2002.

¹⁶⁶ Refer to the *FNB case* and the *Agri SA* case.

¹⁶⁷ *Guzman A* 1998(38) *Va. J. Int'l L* 639

¹⁶⁸ See the *United States v Italy*, ICJ Reports, 1989 at 119, also Reisman and Slaone *Indirect expropriation and its valuation in the BIT generation*.

- (b) a measure aimed at protecting or enhancing legitimate public welfare objectives, such as public health, safety, environmental protection or state security.
- (c) the issuance of a compulsory licence granted in relation to intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property; and
- (d) any measure which results in the deprivation of property but where the state does not acquire ownership of such property provided that–
 - (i) there is no permanent destruction of the economic value of the investment; or
 - (ii) the investor’s ability to manage, use or control his or her investment in a meaningful way is not unduly impeded.

8 (5) An investor affected by the expropriation has the right to a review by a competent court, including whether the valuation of his or her investment was done in accordance with the factors contemplated in subsection (2).

It is submitted that the Bill narrows the applicable situations that qualify as expropriation and removes the principles of constructive expropriation as a basis for an expropriation claim by a foreign investor. Section 8(2)(a) and 8(2)(d) has the effect of excluding indirect expropriation as being compensable in line with the judgement in the *Agri SA* decision. The expropriation provisions in section 8 of the PPIB are thus supported by various court decisions in South Africa.¹⁶⁹ These provisions are however inconsistent with BITs that South Africa concluded with foreign governments and the customary international law on foreign investment as discussed above. It is further submitted that this is an aspect in the provisions of the Bill that may cause disputes with investors.

3.5 Compensation

The principles that relate to compensation aim to address the manner in which a host state will make good on the injury suffered by investors who have been deprived in part or wholly of their property.

¹⁶⁹ Refer to the *Agri SA* case; *Steinberg case* and the *Reflect-All case*

The host government acknowledges responsibility for the deprivation and attempts to achieve redress. The matter of compensation to investors after their assets have been expropriated, nationalised or destroyed can generate controversy.

It is submitted that at the centre of these foreign investment regulatory challenges identified above, are political and ideological differences among countries regarding some of the following factors relating to compensation:

- sovereignty of states over their territories
- sovereign equality
- rights of states to regulate in the public interest
- factors that create the obligations to compensate
- the determinants of the manner, quantum and time of payment
- dispute resolution

The Hull formula and Calvo doctrine, discussed in Chapter 1, demonstrate the tension in the public international law on foreign investments with regard to compensation principles. This is clearly demonstrated in the ideological differences that exist between developed and developing nations, as exemplified by UN resolutions such as the PSNR and calls by some developing states for their withdrawal from ICSID dispute resolution mechanisms. The customary international law principles that relate to the compensation of foreign investors who have suffered losses as a result of internationally wrongful acts committed by host governments have been the subject of a number of arbitral and court rulings.¹⁷⁰

¹⁷⁰ See the *Factory at Chorzow (Germany v Poland)*, PCIJ (Permanent Court of International Justice) Rep (1928), Series A, No 13, 47. The PCIJ stated that the essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all consequences of an illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

Section 8(3) of the Bill reads as follows:

8 (3) The compensation contemplated in subsection (1) must reflect an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances including –

- (a) The current use of the investment
- (b) The history of the acquisition and use of the investment
- (c) The market value of the investment; and
- (d) The purpose of the expropriation.

8 (4) The value calculated in accordance with subsection (3) must be taken as the value of the investment immediately before the expropriation or before the impending expropriation became public knowledge, whichever is earlier, and must include interest based on the average deposit rate prevailing in the national banking system from the day of taking until the date of payment, and it must be without delay and effectively realisable.

The provisions relating to compensation in the Bill reflect the property clauses under section 25(3) of the Constitution. These provisions need to be read together with provisions contained in the Expropriation Act 63 of 1975 as amended.¹⁷¹ Section 8(4) gives effective guarantee that the investor will be compensated with interest and that payment should be without delay and realisable. This is in line with the *prompt* and *effective* provisions contained in BITs. The challenge is that 8(3) of the Bill as per 25(3) in the Constitution allows for consideration of a number of other variables than market value to arrive at the quantum payable. This in my view is to signal to investors that should an expropriation occur a reasonable expectation should be that the compensation may not be at full market value.

¹⁷¹ Section 10 of the Expropriation Act 63 of 1975 as amended has the following provisions: section 10(1) The Minister may in the notice of expropriation offer the owner concerned an amount of compensation for the property. Subsection (2) If no compensation was in the expropriation notice for the property in question and the owner concerned fails to furnish any relevant information in terms of s 9(1), the Minister shall within a reasonable period offer him an amount as compensation for such property. The determination of the compensation quantum is covered in s 12(1)(a) as follows; [i]n the case of any property other than a right, excepting a registered right to minerals, the aggregate of (i) the amount which the property would have realised if sold on the date of notice in the open market by a willing seller to a willing buyer; and (ii) an amount to make good any actual financial loss caused by the expropriation.

In the 2015 SONA,¹⁷² in relation to land redistribution, the State President confirmed that government would not accept the principle of paying market prices for land. The president announced that a Valuer-General would be appointed to make such determinations of price, based on constitutional principles. The Expropriation Bill of 2013, if passed into law, will repeal the Expropriation Act 63 of 1975. Like the PPIB, the Expropriation Bill attempts to align expropriations in South Africa with the provisions of the Constitution.¹⁷³ The value of compensation calculated taking account of section 8(3) of the Bill as stated above may yield a lower value than the full market value.

3.6 Full protection and security

The principles regulating full protection and security are entrenched in BITs concluded by a number of countries in the world. A number of South African BITs contain provisions that relate to the security of the investment in the Republic. The Security of investment provisions in BITs is considered part of the protection of investments that include national treatment, MFN and fair and equitable treatment.

The Republic of South Africa-Kingdom of Netherlands BIT, for example provides in Article 3 for all the standards of treatment mentioned above, and further adds the “[f]ull physical security and protection” provision.¹⁷⁴ This is a high standard for a host state to maintain, and implies that the state must ensure that foreign investors and their investments are protected from acts by locals that may cause physical harm or damage to the investor and/or

¹⁷² The 2015 SONA <http://www.gov.za/state-nation-address-2015> (Date of use: 17 May 2015)

¹⁷³ Section 13(1) of the Expropriation Bill, 2013 covers principles of compensation for expropriated property. The Bill in subsec (1) states that compensation should be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder. A range of criteria are laid out in s 13(1) and 13(2) for consideration when determining compensation. Market value is therefore not the only factor to be considered. The implication is therefore, a more reduced financial value standard which leaves the determination of compensation subjective and likely to be a cause of dispute.

¹⁷⁴ See, Peterson 2006 (26) *Dialogue on Globalization* at 9 and 33

investment, including acts by locals such as strikes, riots, criminality or invasions.

The matter of protection of the investor and their investments is considered under section 5 of the Bill in subsections 5(1) to 5(4) and again under section 7. The related provisions under section 5 are as follows:

- (1) The investment protection under this Act applies to investors and their investments where those investments have been –
 - (a) Made in accordance with applicable legislation;
 - (b) Acquired and used in the expectation, and for the purpose of economic activity or other business.
- (2) This Act must not be interpreted so as to create a right of establishment for foreign investors or potential foreign investors in the Republic.
- (3) The protection of foreign investment is subject to compliance with applicable domestic legislation and international agreements.
- (4) A change in the legal form in which assets are invested or reinvested does not affect their character as foreign investments under this Act, provided that the other criteria for foreign investments are met.

The Bill clearly applies to investors and their investments. It attempts in subsection 5(2) to limit the pre-establishment rights that investors may try to claim. The security of the investment is considered further under subsections 7(1) to (3) as follows:

- (1) The Republic must accord foreign investors and their investments and returns, equal level of security as may be generally provided to other investors and subject to available resources and capacity.
- (2) All investors that suffer losses or damage owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot must be accorded equal treatment and redress as regards any restitution, indemnification, compensation or other settlement, without any discrimination and subject to applicable domestic legislation, international law and international customary law.
- (3) An investor who suffers loss or damage resulting from–
 - (a) requisitioning of property by forces or the authorities of the Republic; or
 - (b) destruction of their property by the forces or authorities of the Republic, which was not caused in combat action or was not required by the necessity of the situation, must be accorded restitution or appropriate compensation.

The Bill extends similar cover to all investments in an equitable manner and does not create more protection for foreign investors than for local investors.

The security of the investment is a matter that concerns all investors, more so foreigners who may experience greater vulnerability when investing abroad.

What may be of concern to foreign investors is attempts to limit the level of security provided from the BIT standard that accords full protection and security to a qualified level of security by subsection 7(2) which will be determined by “available resources and capacity”. The latter may be interpreted as an attempt to minimise the state’s responsibility for the safety and security of the investor and the investment. Section 7(3)(b) may be of further concern as it refers to “restitution” and “appropriate compensation” in the event an investor suffers loss due to section 7(3)(a) or 7(3)(b). It is submitted that these provisions indicate that market values will not be offered as compensation should said losses occur.

Crime levels have risen in South Africa in recent times, including the incidence of xenophobic attacks, service delivery protests, labour unrest and property seizures by disaffected communities. Guaranteeing full protection and security would, under the circumstances, potentially expose the government to litigation by investors, should the state fail to provide that level of protection. This risk is also present under existing BIT provisions and the Bill therefore attempts, in section 7, to minimise the ability of investors to litigate under this right by limiting state accountability. Section 3.7 below highlights the proposed dispute resolutions processes contained in the PPIB.

3.7 Settlement of disputes

The settlement of disputes between host states and foreigners has been a major preoccupation of many international juridical and arbitral forums. Historical differences emerge between the perspectives of developed investment-exporting nations, and host states that comprise mostly developing nations. At the core of these differences is a desire by the investors’ home states to protect the investments of their citizens abroad.

Foreign Investors have concerns that host-state legal systems, particularly in developing countries, are less developed, lack independence and are less efficient when compared to those of the home states of the investors.¹⁷⁵ As a consequence, they have sought protection against unfair or inefficient dispute settlement proceedings in host states. They have achieved this by requiring that disputes with the host government be settled through private arbitral processes utilising international law abroad. The ICSID is a common platform for the settlement of disputes between states and private foreign investors, based on BIT provisions. The ICSID was discussed in detail in Chapter 1 of this study and has over a number of years provided arbitral services to state parties to the ICSID convention.

Using this facility, foreign investors have brought proceedings against host governments, in some instances bypassing the domestic judicial systems of the host state. Some BITs do refer to “exhaustion of local remedies” prior to the instituting of international arbitration. However, in general, investors have been able to bypass the municipal courts and institute proceedings against the host states abroad. Developing countries in the main have resisted the proliferation of international arbitrations. Foreign investors have raised arguments about the interference by such international arbitration rulings on the host state’s sovereign rights to regulate in the public interest. Some governments have challenged the lack of clear guidelines at these international arbitrations.¹⁷⁶

They claim the rules of procedure and applicable rules of international law are being “manufactured” to suit whatever case is being arbitrated, as no international agreement has been concluded on the regulation of foreign investments and there are no rules of precedence. Furthermore, there are no appeal procedures as in most cases the decisions resulting from the arbitrations

¹⁷⁵ See Oxfam International *Signing away the future: how trade and investment agreements between rich and poor countries undermine development* and Stiglitz 2013-11-07 *Business Day* 5.

¹⁷⁶ Vis-Dunbar, Peterson and Diaz 2007-05-09 *Investment Treaty News*

are final and binding.¹⁷⁷ Some states are suspicious of these proceedings, claiming arbitrators have stretched customary international law principles and created new rules without a clear international legal framework or system of appeal. In recent times, some states, such as Bolivia and Argentina, have revoked their membership of the ICSID and other international platforms. These states contend that a dispute with an investor is a domestic matter and that international arbitrations are an infringement of the host state's sovereignty.¹⁷⁸

South African BITs and other IIA's have provisions allowing for the referral of disputes with foreigners to international arbitration. South Africa is not a signatory of the ICSID convention but has participated in arbitral hearings brought against the country by foreign investors utilising the ICSID Additional facility. The PPIB deals with the matter of the settlement of disputes with investors in section 11(1) to 11(5) as follows:

- (1) A foreign investor that has a dispute in respect of action taken by the Government of the Republic or any organ of state, which action affected an investment of such foreign investor, may request the Department or any other competent authority to facilitate the resolution of such dispute by appointing a mediator or other competent body.
- (2) The Minister must make regulations on the processes and procedures relating to the settlement of disputes contemplated in subsection (1).
- (3) In order to facilitate a resolution of a dispute contemplated in subsection (1), the investor must provide the following information:
 - (a) contact details of the investor, including a physical address in the Territory, email address, facsimile number and telephone number;
 - (b) a summary of the claims, including the grounds giving rise to the dispute;
 - (c) the specific details of the party allegedly responsible for the grounds on which the investor alleges constitute a breach of any of the investment protection under this Act; and
 - (d) the relief sought.

¹⁷⁷ See, CCR South Africa, *Africa, and international investment agreements July 2014 Report*

¹⁷⁸ See UNCTAD *Recent development in investor-state dispute settlement: International investor agreements issue* also Osode 1997 CILSA 37

(4) Subsection (1) does not preclude an investor from approaching any court, competent, independent tribunal or statutory body for the resolution of a dispute relating to an investment.

(5) An investor may refer an investment dispute to arbitration in accordance with the Arbitration Act, 1965 (Act No. 45 of 1965).

The Bill clearly articulates the settlement of disputes under the auspices of municipal arbitration and judicial process or mediation by the DTI. The intent of this legislation appears to be that disputes with investors, both foreign and domestic, should be resolved using South African legal processes first. The Bill prioritises dispute resolution within the host country's national framework whereby disputants must refer their disputes to available arbitration/conciliation/mediation mechanisms, and national courts provided under the substantive and procedural law of South Africa.¹⁷⁹ The effect of such a development on investors is not fully known but is likely to be an area of significant concern. Former Justice and Constitutional Development Minister, Mr. Jeff Radebe, was quoted in the *New Age* newspaper on 29 November 2013 stating that the "Arbitration Act was being amended to synchronise it with the Investment Bill".

This will be cause of further uncertainty as the amended Arbitration Act may give the government further powers to influence the arbitration processes when disputes arise with investors. Foreign investors may be of the view that a significant safeguard has been removed, as they will be unable to take disputes to international arbitration as the legislation prefers exhaustion of local remedies.

On the other hand as discussed in chapter 1, the South African government argues that the legal processes in South Africa are robust, the Constitution is one of the most progressive in the world, and the courts are independent. An investor whose rights have been infringed will have local legal remedies available and thus there is no need to subject South African policies to external

¹⁷⁹ Sibanda 2014 *BMR* 159

arbitration because of the ad hoc nature of the proceedings and the infringement on the government's right to regulate.¹⁸⁰

3.8 Conclusion

This chapter has covered a number of fundamental principles that relate to the protection of foreign investments as proposed by the PPIB. These have been evaluated against prevailing general principles of international law on investments and South African government policy and judicial precedent enunciated by the courts.

Particular attention was paid to the identification of key provisions in the PPIB that extend investor protection and commentary made on the various provisions, taking into account the policy position of the South African government in implementing the Bill. Based on this research, it seems that the BIT as a means of regulating foreign investments in South Africa is in demise. The government appears intent on changing the BITs as the principal methods of regulating foreign investments in favour of the proposed Bill.

The provisions of the Bill, if passed into law, will apply equally to all investments, including those investments made prior to its enactment. These provisions appear to be in conflict with BIT protections and may be a source of conflict with foreign investors protected under the so-called "sunset clauses" of recently terminated BITs, WTO agreements and the SADC Protocol on Finance and Investments.

Sunset clauses are meant to cover foreign investors for periods of ten to fifteen years after the termination date of the BITs. This is meant to extend the protection long enough to allow those investors who desire to exit, sufficient

¹⁸⁰ See, CCR *South Africa, Africa, and international investment agreements July 2014 Report 10-12*. The report indicates that Australia, Canada, Brazil, India, Norway, South Africa, USA and the EU have over the past decade made reviews to investment treaties to resolve skewed provisions in these treaties. By 2013, almost 1300 treaties were estimated to have been terminated or renegotiated either consensually or unilaterally. At the same time, nearly 800 BITs had been concluded by African states representing 27 per cent of the global total.

time to disinvest under similar protections as those guaranteed at the time of investment. The DTI indicated that sunset clauses would be respected. This is in itself a matter of concern, as the wording of the PPIB does not create such exclusions or transitional arrangements and it will become challenging to regulate investments with a myriad of rules and regulations covering classes of investors.

This may lead to an appearance of policy uncertainty and “scare” potential investors away. The American Chamber of Business in South Africa, the US Ambassador, and representatives of the EU have voiced concern about these regulatory changes.

The Expropriation Bill was gazetted in 2013, amendments are being made to the Arbitration Act of 1965, the Draft National Policy on Intellectual Property was released in 2013 and in February 2015, during the SONA, the State President announced the creation of the position of a Valuer-General and indicated that the government was looking at passing laws to ban foreign land ownership and would abandon the “willing buyer, willing seller” principles. All these legal instruments plus pronouncement in Parliament in my view have an overarching objective of allowing for legislated redistribution of property rights.

It is submitted that there would be less controversy if these redistributions were based on the payment of compensation that is *prompt, adequate and effective*, i.e. the full market value of the property to the owners. This does not appear to be the intention of the proposed legislation. It is further submitted that the legislation aims to align the taking of property to the South African constitutional process in section 25, which seeks just and equitable compensation as opposed to market value compensation. Another important element relates to the extent of coverage of the Bill, as it may extend coverage to all investors in South Africa.

It is also significant to highlight that as tumultuous as these legislative processes may appear, in my view they form part of a larger shift in the global political alignments – away from the developed western powers.

This is being exemplified by leading developing countries such as Bolivia, Argentina and Venezuela, to name a few that have adopted policies increasingly at odds with the Bretton Woods institutional frameworks. They accuse the IMF, World Bank, ICSID and other institutions of being instrumentalities of Western interests and domination.

The emergence of the BRICS states as a significant economic and political bloc in recent times may have emboldened South Africa to consider measures that a decade or so ago would have been unlikely to be considered. There is a need to analyse the policy choices being made by the state in consideration of the end objectives. The NDP is intended to be the galvanising national action plan that will deliver a better South Africa for all. The NDP calls for economic growth on the one hand and redistribution on the other.

Economic growth of less than 5 per cent annually makes no significant impact on poverty, as indicated in Chapter 2. At the same time, a racially skewed economy and skewed wealth distribution is unsustainable and will lead to increased social instability. Can the two competing objectives of socialism (legislation-led social redistribution) and capitalism or free market economics (led by business) exist in one policy space? Does the introduction of legal instruments such as the PPIB, Expropriation Bill, MPRDA and others hinder the achievement of the economic growth agenda?

How have other countries, faced with similar socioeconomic challenges, resolved these policy tensions? Some states have in fact not concluded BITs with the home states of foreign investors opting for municipal regulation. South Africa equally has not concluded BITs with a number of other countries.

South Africa is not a contracting state to the ICSID convention.¹⁸¹ However, this has not repelled the nationals of those states that do not have BITs, making significant investments in South Africa. For example, South Africa has never concluded a BIT with the US and yet it is a recipient of FDI from this country. Brazil regulates its FDI utilising domestic laws and has refrained from concluding BITs. There have been a number of studies on the subject matter, but no study has proved conclusively that there exists a direct positive correlation between the number of BITs concluded and the levels of FDI received or economic growth in general.

It is because of these reasons in the South African context that Chapter 6 of this study will attempt to consolidate the findings of Chapter 1 to 5 to recommend specific policy positions. These policy positions will be limited to the PPIB and what its role may be in potentially unlocking investment and tackling the challenges and opportunities faced by the country in its attempts to regulate foreign investments.

¹⁸¹ South Africa is not a contracting state to the ICSID however the country is a contracting state to the New York Arbitration Convention of 1958 (330 UNTS) which it ratified on 3 May 1976. It is not a contracting state to the Convention on the Pacific Settlement of International Disputes of 1899 but is a contracting state to the 1907 Convention on the Pacific Settlement of International Disputes (UKTS 6 (1971) Cmnd.4575/1/Bevans 577). South Africa has not signed the Vienna Convention on the Law of Treaties of 1969 (Vienna Convention) (1155 UNT S331; 8 ILM 679). In this context it is important to note that Article 27, read with Article 46 of the Vienna Convention requires that a contracting party may not invoke municipal laws to avoid obligations arising from international treaties to which that state is party.

CHAPTER 4

International law principles on the regulation of foreign investments

4.1 Introduction

International law can broadly be defined as the global body of legal rules, principles and accepted practices by which states, enterprises, and humans interact worldwide. The need to have an acceptable standard of rules, regulations and concepts that guide how independent states conduct relations with other states has long been accepted. Coupled with international diplomacy, international law provides a set of rules and principles that regulate how foreign investors, international travellers and state emissaries are treated by host governments.

The rules governing the conclusion and observance of treaties has been in place for a significant period of time. According to the *World Encyclopaedia of Law*, modern international law emerged as a result of the universal acceptance of the concept of the sovereignty of states. Legal writers like the Dutch jurist Hugo Grotius, who in 1625 published a treatise on *The Laws of War and Peace*, made notable contributions to this body of law.¹⁸² Grotius' principles related to natural justice. He was of the view that the existing laws and principles that already existed and regulated how states interacted with each other were internationally binding unless they were against the laws of nature. The principal traditional sources of international law, apart from the writings of legal scholars like Grotius and others, are international treaties, multinational conventions, and international custom and generally accepted legal principles of law and natural justice.

The increasing numbers of international judicial and arbitral forums that have been established play a role in creating significant international judicial

¹⁸² Knight Grotius: *The law of war and peace*.

precedent.¹⁸³ In addition, the manner in which municipal courts have interpreted international rules in some influential countries of the world has also contributed to this body of law. International law has also been embedded by the resolutions, declarations and covenants adopted at international conferences and by political bodies such as the UN, AU, SADC, WTO and EU, to name a few. UN resolutions, particularly those supported by an overwhelming majority of member states, have played a significant role in codifying generally accepted norms and standards among nations. There are two broad branches of international law: *public international law* and *private international law*.¹⁸⁴

Public international law is concerned with relations among nations or between a nation and organisations or people from other countries. Private international law deals with disputes between citizens of different countries or businesses from different countries, especially when there is a question of which country's laws should apply or where the dispute should be resolved. Public international law on investments concerns the legal principles that govern the relationship between private investors and host states. This body of law thus fits into the public international law branch as defined above. The ability of individuals and companies internationally to litigate against foreign governments demonstrates the developments that have occurred in this body of law.¹⁸⁵

¹⁸³ Article 38(1) of the Statute of the ICJ provides that the ICJ must apply the following sources of international law: (a) international conventions, whether general or particular, establishing rules expressly recognised by consenting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations and subject to the provisions of article 59, (d) judicial decisions and teachings of the most highly qualified publicists of various nations, as subsidiary means for the determination of rules of law.

¹⁸⁴ See, Sornarajah *The international law on foreign investments* 19

¹⁸⁵ Cassese *International law* covers the concept of international legal personality. This principle refers to the entities or legal persons that are able to possess rights and obligations under international law. Individuals are generally not regarded as legal persons under international law. Their link to a state is through the concept of nationality which may or may not require citizenship. Companies, ships, aircraft and spacecraft are usually considered as having the nationality of the state in whose territory they are registered. Under the principle of nationality of claims, if a national of State A is injured by State B through an internationally unlawful conduct, state A may make a claim against state B on behalf of its injured national. This is known as the doctrine of diplomatic protection.

In the sphere of international human rights, the right of an individual to take a government to an international court has been further facilitated by the creation of specialised human rights courts. These courts allow people residing in a particular continent, subcontinent or a political or economic union to refer human rights infringements to international human rights courts. This right extends to nationals of a particular country referring a matter against their own home state on humanitarian grounds. Historically, it is only states and international organisations such as the UN that have been the principal parties recognised under international law.

This trend has changed in recent times, as private individuals and companies have been able to take foreign governments to international courts and tribunals to enforce rights accruing under various investment agreements or human rights principles. This chapter focuses on the recent international legal trends on the regulation of foreign investments. In particular, the chapter focuses on principles of international law and how those principles compare to the PPIB and other judgements of South African courts. The WTO and its attempts at regulation are explored in so far as South African obligations arise in relation to foreign investments under trade laws. The focus of this chapter is on those rules of law that are binding on South Africa, regardless of the municipal laws passed in state.

Breaching these rules would result in foreigners who suffer injury to property (or injury to person) being able to sue internationally under rules of international law. Another significant factor to consider is the international perceptions that are created when a state passes laws that are contrary to accepted norms of international law. Equally, reputations of countries are usually negatively affected by the publication of the country's involvement in disputes at ICSID or other international dispute resolution panels.

4.2 Customary international law

Distinct from the codified rules of law is an international body of law that is defined as *customary international law*. Customary international law is part of

the body of law that the Constitution of South Africa in section 232 requires the courts to take into account when reaching judicial decisions and this is done based on proof of law.¹⁸⁶ The South African legal system is based on a Roman-Dutch and English prescripts of common law. This is a direct result of the country's colonial history. It was considered over a significant period as norm that the laws of the home nations of early European explorers and traders applied to them when they travelled and settled in colonies.

The colonies' political and legal systems were considered less developed and therefore the municipal laws of the Europeans whose home states had more "sophisticated" laws were exported. It was thus customary that no host nation in the developing world could apply a domestic law to expropriate or nationalise assets owned by foreigners. National laws did not absolve a state from rights and obligations created by international law. Customary international law is understood to exist when there is a general acceptance of a particular legal practice or rule by states.¹⁸⁷ The customary rules of law should be in existence over a period of *time*, be applied *consistently* and considered *binding* by states.

The sense of obligation a state feels must derive from a legal commitment rather than from political strategy or ideology. There must be in existence a clear, uniform consensus among nations that the said rules of custom create international legal rights and duties. Custom is further entrenched when those states most affected by the particular rules apply the custom consistently and do not have internal legislated rules that contradict the claimed custom.

¹⁸⁶ Section 232 of the Constitution affirms that customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament. Section 233 also emphasises the needs for courts to factor the rules of international law when interpreting municipal law. Section 231(4) of the Interim Constitution of 1993 states that "[t]he rules of customary international law are binding on the Republic and shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic". See, *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) 238; *S v Mokwanyane* 1995 (3) SA 391 (CC) and also Keightley 1996 (12) SAJHR 405 at 408.

¹⁸⁷ Dugard 1997(36) ILM 744

4.2.1 Development of customary international law

States have been the principal participants in the creation and development of international law. As indicated in section 4.1 above, states were for a period of time the only participants that had legal personality at the international level. Therefore international rights and obligations could only accrue to state parties. The rules of customary international law on foreign investments have developed over time based on state practice.¹⁸⁸ These rules are proven as customary international law when:

- states practise the rule extensively
- states practise the rule uniformly
- states that practise the rule are a majority (not necessarily an absolute majority of all states)
- states understand the rule to create international legal obligations (*opinio juris sive necessitates*).

The above basis of defining the core principles that need satisfaction to prove existence of an international custom derives from the clear identification of what constitutes state practice. The American Law Institute, in the *Restatement of the Law, Third: Foreign Relations Law of the United States*, published in 1987, provided the following definition: “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁸⁹

State practice is considered as observable from the following actions by those states which affirm that a particular rule has in fact become customary international law:

- states make pronouncements about the rule at international conferences and other international platforms and are not challenged in any significant way by other states

¹⁸⁸ *Ibid*

¹⁸⁹ See Herdegan 1991 (39) *Amer J CL* 207.

- publications by the state on official websites
- diplomatic exchanges
- states include the rule in domestic legislation
- the judgments and opinions of international courts, tribunals and legal scholars
- the judgment and opinions of domestic courts and tribunals
- study of international agreements concluded by the state and the manner the rule is incorporated in such agreements

As a consequence of the absence of a binding comprehensive international agreement on the regulation of foreign investments, a significant number of BITs have been concluded by nations to fill this regulatory gap. The BITs, along with the FTA, RTA and other international investment treaties, have formed the codified rules on foreign investments in modern times. BITs cover a significant array of principles that regulate the international law on foreign investments.

Regardless of this significant proliferation of investment treaties, customary international law to date still plays a role in the protection of foreign investment. Gazzini, in his article “The role of customary international law in the field of foreign investments”,¹⁹⁰ argued that customary law, despite the significant number of BITs concluded, remains relevant because of the following reasons:

- BITs concluded cover less than 15 per cent of global bilateral relationships between states.
- There are virtually no BITs between developed countries, and countries that are significant exporters or recipients of FDI have only ratified a low numbers of BITs; for example, Japan and the US.

¹⁹⁰ See Gazzini 2007 (8) *JWIT* 691.

- Customary law forms the basis of investment claims and is utilised as applicable law before both international and municipal tribunals that consider claims that stem from other legal sources.
- Customary rules intersect with the bilateral and multilateral rules of international law and do not remain static.

Customary international law therefore plays a significant role in the regulation of foreign investments. To this end, decisions taken by international courts and tribunals may be considered as a significant source of proving the existence of customary rules of international law. The recent proliferation of tribunals adjudicating investment disputes centred on BITs has meant that a significant number of rulings have been made in recent times in the arena of foreign investments.

The critical elements of this proliferation is that in the absence of a global legal framework on regulating foreign investments nor an international court that sets judicial precedent, tribunals have been required to interpret customary rules of international law when making decisions. The arbitration rulings are in most cases binding on states, but the legal principles they apply could by themselves not represent the general practice of states. They have no appeal mechanisms nor can they be subjected to judicial reviews.

As indicated above, the creation or proof of the existence of customary law is based on a study of state practice. It is submitted that international courts and tribunals on their own may therefore not create new rules of customary international law as they are not states.

One of the central criticisms that have been levelled at ICSID panels is centred around what some states perceive as attempts by tribunals to make pronouncements on matters of custom that have not been settled as customary international rules on foreign investments by states. States have charged that ICSID and other international panels have usurped the role of states and have made rulings in favour of investors, claiming certain rules to be customary when in fact they are not.

The criticism has been so strong to warrant some states, such as Bolivia, Argentina and Venezuela, to withdraw from the ICSID dispute settlement mechanisms. The implication of this situation is that there may be codified rules of international law on foreign investment and precedents generated from the rulings of courts and tribunals that may differ from state practice. An example of this disjunction between codified rules and customary international law relates to the contentious matter of expropriation, nationalisation and compensation.

Many BIT provisions, rulings of tribunals and proven rules of customary international law on foreign investments support the principle that an investor whose property has been expropriated by the host state should be entitled to compensation. It is submitted therefore that the foreign investor, whose assets are expropriated, enjoys both codified and customary protections to be compensated for the loss.

What becomes clear, however, is that BITs and tribunal rulings place a different interpretation on what quantum of compensation the investor is entitled to. There exist differences as well in the manner in which such compensation should be satisfied. Many BITs require that the investor be compensated at full market price so that they are restored to the position they were in prior to the expropriation being made public. This principle is usually presented as the *prompt, adequate and effective* compensation principles covered in Chapters 2 and 3. A number of States have objected to this interpretation of the compensation principle as not representing customary international law.¹⁹¹ They argue that there is no proven practice supported by a majority of States on this matter nor are there uniform State applications of this principle.¹⁹²

Some states have indicated that compensation of the investor is not an absolute requirement and reserve the right not to compensate in some circumstances.¹⁹³

¹⁹¹ Lauterpacht 1990 (6) *JERL* 241.

¹⁹² Sornarajah *The international law on foreign investment* 210.

¹⁹³ Subedi *International law: Reconciling policy and principle* 217.

These States have also argued that compensation paid to the investor must be balanced against other variables such as availability of budgets to fund such compensation or other historical factors associated with the acquisition and use of said property.¹⁹⁴ Therefore, it is submitted that a clear delineation exists between:

- *provisions in BITs* and other investment treaties that cover elements regulating the relationship between the investor and the host state, and
- *customary international law on foreign investments* on similar matters covered by BITs as evidenced by state practice. In some instance, rulings have been made by arbitrators relaying on BIT provisions that may not necessarily conform to what the generality of nations understands to be international custom.

The fact that not all nations of the world have concluded BITs to similar extent, underscores the inherent risk associated with subscribing to new rules of customary international law that derive from international judicial or arbitral rulings divorced from state practice. The entrenchment by the international community of customary law is a slow process. State practice evolves slowly and more so when the matter in question generates significant debate and is opposed by significant segments of society.

The failure to consistently apply rules of custom, by international arbitrations is cited as part of the cause for a number of states including South Africa, to opt out of international arbitration. The principal sources of disputes with foreign investors as discussed in Chapter 2 relate to the following:¹⁹⁵

¹⁹⁴ *Ibid.*

¹⁹⁵ See Ripinsky <http://www.iisd.org/itn/2012/04/13venezuelas-withdrawal-from-icsd-what-it-does-and-does-not-achieve/> (Date of use: 23 June 2013) also Articles 4(c) and 6(2) of the SADC treaty that requires that members states must not deny justice nor discriminate on racial grounds.

- denial of fair and equitable treatment
- expropriation of property
- compensation disputes

In the context of the PPIB it is important to evaluate the above sources of conflict with foreign investors against customary and public international law on investments.

4.2.2 Fair and equitable treatment in customary law

The FET standard is included in a significant number of BITs, FTAs, RTAs and other IIA's. This standard of treatment was discussed above in section 3.4.3 as contained in the PPIB. It has its origins in the international minimum standards of protection for foreigners that developed under customary law. Many different interpretations have been given to this principle in arbitration proceedings on cases where foreign investors have claimed being denied this treatment by the host.

A number of arbitral awards in recent times have expanded the interpretation of the FET principle. Some BIT provisions have set the standard at a level considered above the international minimum standards of protection.¹⁹⁶ The concept of an "international minimum standard" of treatment was advocated by Elihu Root in 1910 as well as by other legal scholars. This standard was of such a nature that any state when dealing with aliens (foreigners) had to take it into account in municipal law. If the municipal law of a state did not take this "standard" into account, its nationals could live under the lower standard but no other nation was obliged to accept it as an acceptable way of treating its

¹⁹⁶ Sornarajah *The international law on foreign investment* 128-129, 349, 466-467. Subedi *International investment law: Reconciling policy and principle* 8-9 argues that foreign investment law has its origin in the international law concerning the protection of aliens – a legal regime based on both international human rights law and public international law principles of fairness, equity, justice and non-discrimination. See also Franck *Fairness in international law* 100-104.

nationals.¹⁹⁷ This principle in my view was colonial in construct and against the sovereign equality of nations.

The legal arguments of Root and other authors are further espoused in the Doctrine of State Responsibility as contained in the IRSIA 1961, which in essence states that a state is under no obligation to admit any aliens and/or their property into the territory of the said state. Should the state of its own accord extend entry to an alien, then that state becomes bound to accord decent treatment (minimum standard) to the visitor. The idea of an international minimum standard has its basis in Western liberal principles and was conceived for the protection of individuals. It was later extended to include property.¹⁹⁸ This expansion of western liberal ideology to Africa in my view underlies the desire by some African governments to opt out of the BIT system, perceiving it as an extension of western domination.

The international minimum standard therefore requires the extension of fair and equitable treatment, which in essence consists of fairness and good faith conduct when handling matters of foreigners. The above construct that presupposes a common standard of decency, fairness and equity has been the genesis of the FET principle in BITs. Subedi and others argue that customary international law on this principle is a reflection of the norms and customs of the investor's home state. The international minimum standard on the treatment of aliens has progressively been advanced by human rights advocates as a reflection of customary international human rights laws and principles.¹⁹⁹ This international minimum standard of treatment is founded on the principles of state responsibility. The principle has been extended to the FET principles applied under BITs.

¹⁹⁷ See Root 1910 (4) *Am. J. Int'l L* 517 and Schwarzenberger *International law* 220: "Even if the standard of national treatment is laid down in a treaty, the presumption is that it has been the intention of the parties to secure to their nationals in this manner additional advantages, but not to deprive them of such rights as, in any case, they would be entitled to enjoy under international customary law or the general principles of law recognised by civilised nations."

¹⁹⁸ Freeman *Denial of justice* 498-507.

¹⁹⁹ Adede *The minimum standards* 1001; *Mondev v United States* 120; and *ADF v United States* (ICSID Case No. ARB(AF)/00/01 (NAFTA) Award of 9 January 2003) 180.

However, what this principle comprises is not fully codified; Sornarajah offers three likely components of what may be comprised in the international minimum standard:²⁰⁰

1. **Compensation for expropriation** is covered explicitly in IIAs and many constitutions of the countries of the world. It is clearly articulated in the property clauses under section 25 of the South African Constitution and section 8 of the PPIB. Compensation matters are also clearly set out in the BIT treaties South Africa has concluded with a number of states and in regional protocols such as the Protocol on Finance and Investments (PFI).
2. **Protection from destruction and violence perpetrated by non-state parties**, as could occur during riots, labour unrest, xenophobic attacks and other terrorist militant attacks, for example. Apart from the international human rights laws that apply, these occurrences would fall under the full protection and security provisions contained in BITs concluded by South Africa and other IIAs to which the country is party.
3. **Denial of justice:** this component does not have a specific provision per se in BITs but relates to the actions of the organs of state, including the judiciary, to act in a manner that conspires to deny justice to the foreign investor. This may also entail failure to prosecute perpetrators of crimes who may be arrested but do not get sentenced by the courts as a result of poor policing, lack of political will or prosecutorial bungling.

International tribunals have rarely pronounced on denial of justice as a reason for awarding claims, as this would entail an evaluation of another sovereign state's justice system utilising criteria that are mostly subjective. The arena of judicial review of another state interacts with other pillars of law and politics

²⁰⁰ Sornarajah *The international law on foreign investments* 354-360.

and would invariably generate controversy. This would transform investment treaty arbitration into a judicial review of another sovereign state, thus trespassing into the realm of international diplomacy and justice. Based on this analysis, the application of denial of justice as a causative factor under the international minimum standard of customary international law has had limited application in BITs.²⁰¹

4.2.3 Expropriation of property under customary law

The expropriation of the assets of a foreign investor is a contentious matter in investor-state relationships. Most constitutions, BITs and trade agreements contain detailed legal processes and procedures setting out how an expropriation can be undertaken. These procedures are also set out in the municipal laws of each country and investors from a country without a BIT with the host state in question are expected to subject themselves and their investments to that law.

The law of the home state of the investor used to apply to the investment and no provision existed for a host government to take the property of the investor. In situations where an investment was expropriated, the home state could exercise diplomatic protection and “gun boat diplomacy”.²⁰² This was in essence a military solution to the taking of property by the host and the host’s subsequent failure to pay reparations.

²⁰¹ See the SADC Tribunal’s ruling in the *Campbell* case, where the Tribunal was of the view that the applicants could not receive justice from the Zimbabwean judiciary. In the *ADF ICSID* case at 182, the US argued that claimants must demonstrate when alleging violation of the international minimum standard which rules of customary international law contained in the standard have been violated. Denial of justice can also include failure to provide just administrative process as a result of opaque rules of procedure or the violation of the legitimate expectations of an investor. See also *Waste Management Inc v Mexico* (ICSID Case No. ARB/98/2) Award of 30 April 2004.

²⁰² This approach in relation to foreign investments objectives related to a display of military power aimed at pressuring the offending state from not taking property or paying reparations for seized property of the home state. See Cable *Gunboat diplomacy*. Britain, Germany and Italy in 1902 sent warships to the Venezuelan coast to demand reparation for the losses incurred by their nationals when Venezuela defaulted on its sovereign debt obligation.

The taking of property by the host state generated a requirement under the law of state responsibility for the provision of diplomatic protection by the home state. It is not the taking of property per se that abhorred the home state; it was the failure by the hosts to compensate the investors for the property taken. The customary international law principles that pertain to expropriation are closely aligned to those espoused by US Secretary of State, Hull, in his efforts to resolve the diplomatic standoff with Mexico that occurred in 1917.

A dispute arose between the two countries after Mexico expropriated agrarian land utilising a constitutional amendment.²⁰³ Since the matter sparked widespread condemnation, Secretary Hull wrote a letter on behalf of the US directed at the Mexican ambassador to the US. The contents of these diplomatic exchanges created the start of a customary law doctrine that became known as the Hull Formula.²⁰⁴ The political position taken by the US Secretary of State, Hull, formed the basis for the customary law principle of diplomatic protection and its complementary requirement for the payment of reparations in cases of expropriation.

Historically, reparation means making amends for a wrongdoing, restoration of a situation to what it was beforehand, or to make good. Customary international law, supported by the widely referred Hull Formula, supports the compensation of claims at full market value.²⁰⁵ This articulation of

²⁰³ 27 of 1917.

²⁰⁴ US Secretary Hull stated in his letter of 21 July 1938 that “[t]he taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an express intent to pay at some time in the future. If it were permissible for a government to take the private property of the citizens of other countries and pay for it as and when, in the judgement of that government, its economic circumstances and local legislation may permit, the safeguards which the constitutions of most countries and established international law have sought to provide would be illusory. Government would be free to take property far beyond their ability or willingness to pay and the owners thereof would be without recourse. We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law”.

²⁰⁵ See Sornarajah *The international law on foreign investments* 414 where the Foreign Minister of Mexico responded to Secretary Hull as follows: “My government maintains that there is no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even deferred

compensation principles by Hull made its way into a number of BITs and other international investment agreements. South African BITs contain similar standards of compensation in the event the state should expropriate foreign investments.

A number of states, particularly South American states, have objected to this articulation of compensation, disputing that this does not reflect international customary law. They have opted to champion the doctrine of Carlos Calvo which they believe is the real customary law standard. The so-called Calvo Doctrine is included in the constitutions of a number of South American states, including those of Mexico, Peru and Venezuela. These states in recent times have been the biggest critics of the ICSID arbitral procedures. They have been supported by a number of other developing countries, which have viewed Hull's articulation of the principles as attempts by developed nations to place barriers that prevent them as developing nations from exercising full sovereignty.

The South African Expropriation Act of 1975 in its compensation principles reflects the prompt, adequate and effective principle of full market price compensation. This is at odds with the Constitution of 1996, whose property clauses rather mirror the Calvo Doctrinal approach to property, by establishing "just" and "adequate" as the compensation standard required for state expropriation of foreign investments.²⁰⁶

It is submitted that at its core, the Calvo Doctrine articulates state supremacy and sovereignty over its territory. All land and resources in the territory belong to the state and no foreign entity can permanently own land or resources in another State. The foreign entity is under the sole and strict control of the host state's laws, principles and customs and may not claim for itself protection that is more extended than that available to citizens of that state.

compensation for expropriations of a general and impersonal character like those which Mexico has carried out for the redistribution of land." US Secretary Hull responded to state that "[u]nder every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision of prompt, adequate and effective compensation".

²⁰⁶ See Calvo doctrine.

4.3 Public international law on foreign investments

The international law of foreign investments has evolved over time, stemming from eight main sources:²⁰⁷

- customary international law principles that stem from state practice and other foreign policy instruments among states
- decisions of international courts and tribunals that are authoritative and have even been cited in the rulings of some municipal courts
- BITs, RTAs, IIAs and other trade agreements
- declarations, principles and other policies enunciated by the UN, IMF OECD, EU, AU, and other public international organisations
- international human rights and environmental laws
- political and military conflicts and ensuing principles
- authoritative rulings of the highest courts in influential countries of the world
- technological advancement and globalisation factors

As a result of the absence of a binding international agreement on foreign investments, in spite of numerous attempts at the international level to conclude one, there are no uniform, globally agreed rules on the regulation of foreign investments. The WTO attempted to bring the regulation of foreign investments under the WTO trade rules; however, this has not proved successful or all-encompassing as is required. The attempts by the WTO at the regulation of foreign investments utilising trade law platforms is considered in detail in section 4.4. BITs have filled the regulatory gap left open by the absence of a global treaty.

However, this has created a number of challenges, which are discussed in section 4.3.1 below. International trade law has made significant advances with respect to the international regulation of trade, along with its dispute

²⁰⁷ See Cassese *International law* and IISD <http://www.iisd.org/investment/law/> (Date of use: 1 February 2015).

settlement systems. This unfortunately has not been the case with regard to the regulation of foreign investments.

4.3.1 International investment law through BITs

The principles of public international law and the various attempts to conclude an international agreement on the regulation of foreign investments was discussed in detail in section 1.1.

Ideological differences among states have prevented the conclusion of an internationally binding agreement on investments which in its turn has resulted in a lack of uniform, universal rules on how host states may admit, regulate and allow for the exit of foreigners who make investments in their sovereign territories. To fill the regulatory void created by this lack of coherent rules on foreign investments, BITs have proliferated globally and so have the dispute resolution mechanisms comprising of arbitral tribunals to attend to the proliferation of investment disputes.

The challenges of managing disputes between the host state and an investor in this manner have been considered. However, BITs are still considered by some states, particularly capital-exporting states, as providing regulatory stability. These states believe that BITs ensure that avenues are left open for their nationals abroad should the investment be threatened or interfered with, and that international channels are available for “fair” and “speedy” arbitration.²⁰⁸

²⁰⁸ See CCR *South Africa, Africa, and international investment agreements July 2014 Report* 24. The report notes that mostly Western arbitrators and law firms control the investor state disputes settlement system of the ICSID. Litigating claims at these arbitral tribunals is now a part of international business models. A typical case at arbitration can cost USD8 million and can rise to USD30 million in legal fees. In 2009/2010 a total of 151 cases were arbitrated. In 2012, 75 per cent of the cases were awarded in favour of investors and in a single claim, Ecuador was ordered to pay USD1.7 billion, a record award. The number of cases had risen to 450 by 2012, with the vast majority of arbitrators being from the US, Canada and Europe. Few arbitrators are from Africa, Asia or Middle East and the small group of lawyers rotates from being arbitrators to representing claimants, a clear case of conflict of interest. This has created questions about the predictability and correctness of the judgments that are final, lack appeal process and have no judicial precedent. From its inception in 1966, the ICSID has presided over more than 280 disputes and has another 200 pending. In Africa, a quarter of all investment disputes relate to mining, oil and gas investments made by foreigners.

The significance of the BIT awards for investor-state dispute resolution mechanisms lies in the fact that a significant amount of commercial and state practice has been influenced by the rulings of these arbitral tribunals. In some instances these awards have served to stifle state powers to regulate in the public interest, and have made significant contributions to the body of public international law. However, the trends that are emerging point to increasing discontent with the manner these arbitral processes are being applied.²⁰⁹

To this end a number of states have indicated their intention to opt out of the international dispute settlement system opting for municipal regulation.²¹⁰ A number of policy-makers and studies have advocated the suspension of the ICSID and the UNCITRAL dispute settlement systems unless they are overhauled.²¹¹ There are lobby groups calling for states to suspend participation until some fundamental changes are implemented to enhance transparency and professionalism. Some of the advocated changes include:

- Increase the participation of judges and arbitrators from developing states based on clear mechanisms for appointment. Allow open calls for applications and transparent selection, appointment, tenure and remuneration criteria.
- Rules need to be developed and enforced to regulate the conduct of such arbitrations as well as a code of conduct for the arbitrators themselves.
- A system of precedent as well as rules of procedure need to be implemented to prevent the wide variability in the decisions of arbitration tribunals, so as to ensure more consistent rulings.

²⁰⁹ Bernasconi-Osterwalder and Rosert 2014 *IISD* 11-17.

²¹⁰ *Ibid* 10.

²¹¹ *Ibid* 20.

- States need to consider other dispute settlement mechanisms such as state-to-state dispute settlements or regional dispute settlement systems.
- Municipal arbitration may also be considered.

As discussed in Chapter 1, a significant number of BITs are coming to an end over the next few years. This presents an opportunity to reconsider the terms of these treaties should the states involved intend to renew them. A thorough review needs to be undertaken to determine the benefits of maintaining BITs with foreign investors. These benefits must be weighed against the risk of foreign investors limiting the policy space for the host governments.

As discussed previously, there are no conclusive studies that demonstrate that concluding an investment agreement yields inward FDI flows. In some cases studies have indicated that sudden growth in FDI in unregulated or underdeveloped regulatory systems in developing countries can have negative consequences for development. Some of the challenges that may arise from sudden FDI growth are:

- Destabilisation of the foreign exchange markets in the host states as a result of large inflows of foreign exchange.
- Sudden appreciation in the value of the currency of the host state as a result of changing supply and demand dynamics caused by sudden large exportation or importation of resources, goods and services.
- Rampant corruption may occur as MNCs bribe local officials to acquire rights, licences or access to other government services.
- Marginalisation of indigenous people as a result of the destabilisation of their traditional lands. In some cases human rights abuses have been recorded in attempts to forcibly relocate the indigenous population.

- Pollution and other environmental degradation as a result of MNCs' lax practices.
- The full spectrum of social ills such as trade in "blood diamonds" or child labour.
- Unclear BIT provisions that fail to place obligations on the MNCs to undertake meaningful, sustained technology transfers, integration into local supply chains, management skills transfer and commercial practices that foster social redistribution policies like B-BBEE in South Africa.
- Interference in the domestic political affairs of the host state by MNCs or their home governments to influence political events by subverting democratic processes; for example, backing dictators that oppress the democratic will of the population yet extend favourable terms to the MNCs.

This is not an exhaustive list of variables but reflects some of the factors that governments need to address when evaluating the decision to enter into, renegotiate or terminate the BIT agreements. A significant factor to consider is that a number of other states in the world have not concluded any investment agreements, and yet they receive a significant amount of FDI.

The South Africa government's reasoning in undertaking a BIT review in 2010 was discussed in chapter 1. The outcomes of that review was in fact a repudiation of BITs as a vehicle for attracting investments and a decision was taken to cancel them and renegotiate a new regulatory system that is in the main based on municipal regulation.

4.3.2 Fair and equitable treatment

The customary international law principles that relate to the FET provisions have been examined in section 4.2.2. This section explores what the current

trends are in so far as the FET standard of treatment is in BITs. What was established by an evaluation of customary international law principles is that the FET standard is a measure of fairness and justice, including predictability of the regulatory environment. The standard has increasingly been overlaid by international human rights principles, including the concept of an international minimum standard of treatment of foreigners once admitted into the host state.

The FET provision has been excluded from South Africa's PPIB. The Bill refers to national treatment principles mainly, yet the country has included the FET standard in its BITs and other IIAs such as the PFI. This contradictory approach to the treatment of investors could potentially create disputes with investors when the PPIB is enacted into law. In its submission to the DTI on the PPIB, the SAIRR argued that the FET provision was part of the South African BIT architecture. Its omission from the PPIB was an ominous sign that the state had no intention of honouring its obligation to foreign investors. The FET standard is about transparency and acting in an unambiguous way – it is about honouring the legitimate expectations held by foreign investors.²¹²

The requirement for transparency and predictability set by the FET standard has in fact created challenges for South Africa. Both of the two known cases brought against the country at the ICSID dispute panels related to the introduction of legislation that, in the opinion of the investors, changed the conditions of their investments. Investors held the view that these legislative changes negatively impacted on their investments, and thus generated a legal case for international arbitration. One of the critical functions of a BIT is to prevent the host from enacting, at leisure, legislation that may disenfranchise foreign investors utilising domestic procedures which usually do not need negotiation or consensus with foreigners.

²¹² Leon 2013-11-04 *Business Day* 4 wherein Leon argues that changing the regulatory environment prevailing at the time of an investment is breaching BIT protections and may generate a claim for compensation. See Fatouros *A government guarantees to foreign investors* 135-215; the Havana Charter at article 11(2); the UN Draft Code of Conduct for Transnational Corporations 1988 at article 48; the COMESA Treaty of 1994 at article 159; OECD Draft Convention on the Protection of Foreign Property 1967 (OECD Publication No. 23081 November 1967) and the North American Free Trade Agreement (NAFTA) 1994 at article 1105.

A detailed study of the ICSID case of *Micula and Others v Romania*²¹³ (hereinafter the *Micula* case) is significant because it touches on a number of relevant principles of international law on foreign investment as follows:

- The Tribunal in its ruling based its interpretation of the FET standard on Articles 2.4 and 3.2 of the BIT concluded between Sweden and Romania in 2003. The tribunal concluded the following principles as underpinning fair and equitable treatment:
 - An investor's legitimate expectations must be protected.
 - The state's conduct must be substantively proper (that is, not arbitrary or discriminatory).
 - The state's conduct must be procedurally proper (namely, in compliance with due process and fair administration).

Should a state at its own leisure amend domestic laws in a manner that fails to meet the above standards, then, while the legislation may be valid from a public policy perspective and amended correctly per municipal procedure, this does not necessarily absolve the state from international liability.²¹⁴ A second feature of the *Micula* case related to applicable law. It is submitted that this matter is of significance to South Africa, as a number of binding legal instruments, municipal and international, are likely to coexist in tandem should the PPIB be passed into law.

These binding legal instruments would be the BITs, PPIB, Expropriation Act, B-BBEE, SADC Protocols, the Constitution, other IIAs with trade partners and WTO trade agreements, to name a few. In the *Micula* case, Romania (with the EU as *amicus curiae*) argued that it was bound by EU law, and that EU law made it impossible to comply with BIT provisions. The EU Commission made submissions supporting this position. Romania submitted the following arguments:

²¹³ *Micula and Others v Romania* ICSID Case No. ARB/05/20, award of 11 December 2013.

²¹⁴ *Tecmed v Mexico* (ICSID Case No. (AF)/00/2); *CMS v Argentina*; *SGS v Pakistan*; and Garcia and Smith <http://www.hsfnotes.com/arbitration/2014/01/16/breach-of-fair-and-equitable-treatment-standard-icsid/> (Date of use: 1 February 2015).

- The tribunal should take into account the wider juridical context in which the BIT between Romania and Sweden had been negotiated and concluded. The conclusion of the BIT was a direct consequence of the European Union Association Agreement and within the context of Romania's accession to the EU. The European Union Association Agreement and the European Economic Community Treaty were relevant rules of international law that should be considered when construing the BIT under article 31(3)(c) of the Vienna Convention.²¹⁵
- The treatment of foreign investors under the BIT could not be divorced from Romania's obligations under the EU Association Agreement and the European Community Treaty.

This argument on applicable law was rejected by the tribunal in the *Micula* case. However, the debate about applicable law is likely to continue as a number of legal instruments may be applicable to an investor in a particular country. A fundamental principle that will be expanded upon in Chapter 6 relates to the implications of jurisprudence in South Africa for an investor that wants to claim violation of the fair and equitable standard. The foreign investors would not be able to sue under municipal law, since that standard of protection has been excluded in the PPIB. They may be forced therefore to revert to BITs (if they are in effect) or other IIAs for protection through international arbitration. The question is how this will intersect with South Africa's stated position on exhaustion of local remedies.²¹⁶

²¹⁵ See, Vienna Convention 1969.

²¹⁶ See Paparinskis *The international minimum standard*. Paparinskis argues that BITs and other IIAs generally contain the FET standard; this in spite of the ambiguous nature of this protection in these treaties and the unclear link to customary international law. The wide interpretation given of the rule and vague rules of custom and how tribunals and states have given varying interpretations has added to the complexity. The fact that this has been one of the leading causes of investor-state disputes with an increasing number of awards being made against host governments suggests that this is a highly controversial matter on the international regulation of foreign investments. See also Dolzer <http://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=513> (Date of use: 2 March 2015) see also *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The*

It has been argued and demonstrated by the rulings of a number of international arbitral tribunals that the FET standard is one of the most significant principles of foreign investment law. Violation of the FET standard is one of the leading reasons for disputes between hosts and foreign investors at the ICSID. This protection has its genesis in international customary law and is therefore a strong pillar for investors to lean on when launching arbitration against hosts governments. The challenge has been the wide interpretation given by tribunals to the meaning of this standard of treatment.

Many states view the fair and equitable standard of treatment as risky and in need of limitation, as the likely interpretations that may be given during an arbitration hearing are likely to yield varying outcomes. These states have attempted to link the standard more directly to customary international law. Under customary international law, a rule only qualifies if it is of a general nature across states, applied by states consistently and followed because states have a sense of legal obligation.

The US, EU, Canada, New Zealand and other countries are exploring the possibility of creating provisions that are explicit in defining the FET standard so as to prevent the wide interpretation contained in tribunal awards.²¹⁷ The rationale for this approach stems from the understanding that customary international law requires high proof of legal standards.

Applicants suing for a breach of the FET provisions need to demonstrate that the breach under such FET is one of the rules followed by a generality of states, according to custom, thus reducing ambiguity. It is submitted that this philosophy towards FET is going to be challenging to entrench in international arbitrations, as some recent awards have indicated reluctance by arbitrators for

Republic of Ecuador wherein the applicants raised the breach of the FET standard as a basis of the claim also *Foresti case*.

²¹⁷ See NAFTA Free Trade Commission
http://www.sice.oas.org/tpd/nafta/commission/CH11understanding_e.asp (Date of use: 1 March 2015)

this narrowing of the standard.²¹⁸ The SADC developed a Model BIT Template in 2012 that was drafted with the aim of assisting member states craft appropriate and common rules. This Model BIT aims to create a template for BIT negotiations in the member countries to achieve uniform laws across the SADC with respect to the regulation of foreign investors.²¹⁹

Challenges exist in this attempt as the SADC Protocol on Finance and Investment and the SADC Model BIT Template contain different standards of protection for foreign investors in the SADC region. This will be covered in detail in Chapter 5.

4.3.3 The taking of property in international law on foreign investments

This section is focused on the current trends in international law on the regulation of foreign investments, in so far as these laws seek to regulate the taking of property of foreign investors. As discussed in Chapter 1, the PSNR UN resolution 1803 of 1962 marked a significant change in global perspectives around the rights of the host states, particularly developing countries, to expropriate foreign owned property.

A number of former colonies, pushing the agenda of a NIEO, succeeded in its adoption when the UN passed resolution 3201 (S-VI), on the 31 May 1974 establishing the NIEO. The following declaration is made in the PSNR resolution of 1962:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their

²¹⁸ *Railroad Development Corporation v Republic of Guatemala* (ICSID Case No. ARB/07/23) Award 29 June 2012. See also UNCTAD <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf> (Date of use: 5 November 2014) at 139, where the report indicates that “[s]ome tribunals have read an extensive list of disciplines into the FET clause, which are taxing on any state but especially on developing and least developed countries; lack of clarity persists regarding the appropriate threshold of ability”.

²¹⁹ See, SADC Bilateral Investment Treaty Template, at IISD <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> (Date of use: 10 February 2015), wherein the Drafting Committee noted that the FET provision is highly controversial and recommended its exclusion from the SADC Model BIT template.

national development and of the well-being of the people of the State concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.

6. International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

The above declaration was unanimously adopted by a majority of UN member countries, and significant numbers of the PSNR principles have been implemented in a number of BITs and constitutions of countries around the world.

Of particular significance is that the resolution reflected a compromise position between the Calvo Doctrine and Hull formulation in so far as it dealt with the taking of property as espoused in point 4 of the declaration.

It is submitted that the principles of international law on foreign investments set forth in point 4 of the declaration raise a number of conditions precedent for a nationalisation of foreign property:

- A host may nationalise or take the property of a foreign investor.
- A host must demonstrate that the taking of property is for a *public purpose*, in the interest of *national security* or in the *public interest*.
- The state taking the property will be required to pay *appropriate* compensation based on municipal and international laws. (In my view this mixed provision in point 4 of the declaration is a demonstration of the compromise position between the Calvo and Hull doctrines which was required so as to get wide support for this resolution in the UN). The PSNR states that compensation must be paid, but does not dictate what level of compensation should be paid. It thus leaves the matter open for municipal courts to regulate over this area with a proviso that international laws, including customary international law, be taken into account when compensation is considered.
- Disputes arising over compensation should be resolved by the courts of the host country according to the principles of exhaustion of local remedies.

- By manner of free will, should a host and foreign investors agree on an international arbitration route, then, in the event of a dispute where local remedies fail to resolve the said dispute, international arbitration should be applied.

It is further submitted that the implications of point 4 of the PSNR declaration can be traced to a number of constitutional provisions, including in the South African Constitution, and IIAs that have been concluded around the world. The provisions for compensation are clearly relaxed from the “prompt”, “adequate” and “effective” standards that are understood to imply market values. However, where States have set a higher standard of compensation through the conclusion of IIAs which contain such higher standards, investors are entitled to hold the States to these agreements.

The right of a state to take the property of foreign investors is in my view a settled matter under public international law. This is in line with a state exercising its sovereign rights to regulate in the public interest or for a public purpose. The basic principles of international law are set out clearly above with regard to what is required for a state to nationalise, expropriate or requisition foreign-owned private property.

It is further submitted that, few foreign investors would lodge disputes with host governments in instances where property is taken and the investor is compensated at full market value of the asset. Such compensation being paid promptly and in a manner that allows the investors to dispose of the proceeds as they deem fit.

What causes disputes with investors, are cases where the host having followed due process to acquire the property of the foreign investors, then fails to agree on the quantum of compensation payable, delays payment or fails to pay altogether.

The complexity facing many nations, particularly developing nations, relates to the IIAs these states have subsequently concluded with capital-exporting nations. Some countries have made undertakings to offer investors far more protection than the standard agreed to at the UN and including guaranteeing market prices for expropriated property.

The justification for the extended protection provided to investors relates to the need to attract FDI to these countries.²²⁰ For a considerable period of time, the conventional wisdom has been for countries to conclude BITs as a means of signalling to a wider international community that the country was open for investment and that foreign investors should be at ease in exporting capital for FDI. In some cases, the countries have large endowments in resources and depend on the exploitation of those resources by foreigners as a means of creating economic growth.

During the first five years of democratic rule South Africa signed a number of BITs with various countries, particularly European states. The terms concluded by the ANC government with Europeans aimed to reassure nervous investors that South Africa was determined to join the family of nations and shed its pariah status. Of further concern to foreign investors was the ANC's communist ideology signified by the Freedom Charter²²¹ and the close political alignment with China and Russia during and after the liberation struggles. The ANC entered into a number of BITs that contained safeguards to foreign property, guaranteeing market prices for expropriations, full protection and security, and international arbitration.

It is submitted that South Africa's BITs contained provisions that were a departure from the principles and values of the liberation movement espoused

²²⁰ See Guzman 1998(38) *Va J. Int'l L* 639

²²¹ See ANC <http://www.anc.org.za/show.php?id=28> (Date of use: 9 March 2015). Of significance to investors are declarations in the Charter found in the sections that deals with the "Country's Wealth" wherein the Charter declares that "[t]he national wealth of our country, the heritage of South Africans, shall be restored to the people; The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole; All other industry and trade shall be controlled to assist the wellbeing of the people; All shall have right to occupy land wherever they choose."

in the Freedom Charter. They contained no provisions alerting foreigners to the social redistribution policies the ANC intended to implement in the country. This omission has prompted foreigners to litigate against South Africa at international tribunals as the country attempted to implement its B-BBEE legislation.²²² The belief that BITs can attract FDI was a strong motivator for the ANC in making international undertakings that also breached provisions of the new Constitution of South Africa, particularly the property clauses.

Disputes with foreigners therefore arise when the host, once the investment has been made, changes the conditions of the investment in a manner that in the opinion of the foreign investors is detrimental to the investment.

4.3.3.1 Direct expropriation

A lawful expropriation occurs when a host takes the private property of a foreign investor against their will or without the investor's agreement, against the payment of compensation according to the principles of international law on foreign investments. It is a direct expropriation because the host issues a notice or decree that notifies the foreign investor that the state will take the property in question. Subedi argues that direct expropriations have become rare as more countries of the world experience increased globalisation and the body of laws contained in IIAs make it challenging to expropriate foreign property.²²³ Coupled with the negative media coverage such expropriations attract and the fungible nature of capital, host governments are reluctant to damage their reputations by issuing expropriation decrees.

A direct expropriation occurs when the government or one of its agencies outright takes possession of the property of a foreign investor. Direct expropriation attracts the requirement to compensate the foreign investors, and there with the challenges of quantum and timing that were accepted above and which may cause complexity. More often than not the host is unable to compensate the investors at market valuations. In a direct expropriation, the

²²² See, Peterson 2006 (26) *Dialogue on Globalization* at 9 also *Foresti case*.

²²³ Subedi *International investment law: Reconciling policy and principle* 120

government or one of its agencies (expropriating authority) issues a notice of the intention to expropriate. According to prevailing international law principles, direct expropriation occurs in the following cases:

- When the state issues a decree to a foreign investor and the state or one of its agencies acquires ownership and control of the property.
- When the state issues a decree to a foreign investor instructing a compulsory transfer of the rights in the property to a third party that is not necessarily the state or one of its agencies.
- When the state enacts general legislation that aims to compulsorily transfer an entire industry or an entire class of property rights, for example the compulsory transfer of all mineral rights, oil, gas or land, to the ownership of the state (nationalisation).

The property that is expropriated may not always be acquired by the state itself but may be passed on to a third party by the state. The legality or illegality of an expropriation stems from whether due processes of law have been followed and whether the compensation is appropriate and fair.

4.3.3.2 Indirect expropriation

Apart from direct expropriation as set out above, an increasing number of expropriations do not involve government decrees and the direct taking of the investor's property. Indirect expropriation refers to cases where the state or an agency of the state acts in such a manner or takes such measures that these interfere with or prevent in an unreasonable way the investor's ability to use, enjoy and dispose of the property.

Indirect expropriation is deemed to have occurred regardless of a lack of acknowledgement by the state of the alleged expropriation or lack of transfer of legal title. Indirect expropriation of property is referred to in different terms in international law, namely:

- creeping expropriation
- deprivation
- constructive expropriation
- regulatory expropriation

A common theme in each case of indirect expropriation is a lack of outright acknowledgement by the host state or its agencies that it has acquired the rights or destroyed the investor's ability to freely enjoy the rights. This is usually achieved through a regulatory change or a combination of regulatory measures.

Usually, the indirect expropriation occurs through the enactment of legislation or other policy instruments which do not make an outright declaration of intent to expropriate; however, the legislation on its own or in tandem with other legislation may have the cumulative impact of causing an expropriation. This may occur gradually, thus disguising its true nature.²²⁴

The manner in which international tribunals have construed indirect expropriation has added controversy to the matter. In my view there is a blurred line between what investors perceive to be an infringement on their enjoyment of private property rights on the one hand and the regulatory powers of the state on the other hand.²²⁵ Tribunals are increasingly being required to rule on cases of allegations by investors that the host state has enacted some regulatory measure(s) whose cumulative or singular impact(s) has been to deprive the investors of their property rights. As such, the investors seek an order requiring the host to compensate for expropriation.

Host governments counter this argument by foreign investors on the basis that the measures are of a general nature and that the government has a sovereign

²²⁴ Small <http://dx.doi.org/10.1787/780155872321> (Date of use: 14 January 2015). The OECD raises the question of how governmental actions may affect the value of property by regulation, either general in nature or by specific actions in the context of general regulation, for a legitimate public purpose without effecting a "taking and having to compensate for this act".

²²⁵ See Osode 1997 *CILSA* 38 where the author states that a "tension" exists between the profit motive of the foreign investor and the developmental motive of the host.

right to regulate in the public interest.²²⁶ Governments argue that investment arbitrations lack sufficient understanding of the complexities of each country, for instance the social and public policy matters that governments are obliged to fulfil under a social contract. Host governments believe that foreign investors demand forms of protection that are more extensive than those available to local investors, and that by launching these cases at international arbitration forums, they prevent the hosts from fully exercising sovereign authority.

The level of discontent raised by governments with the interpretation of regulatory expropriation by some ICSID panels has caused some states to exit international arbitrations. South African courts and policy-makers have opted for two important policy positions on the matter of constructive expropriation:

1. The *Agri SA* Constitutional Court ruling limited the applicability of a regulatory or constructive expropriation.
2. An expropriation requiring compensation can only occur when the state acquires a direct legal title in the expropriated property.

At face value these principles contradict the generally accepted principles of international law on foreign investment which is based on a proposition that foreign investors may suffer indirect expropriation as a result of the exercise of a state's regulatory powers.²²⁷ The PPIB excludes regulatory actions by the state that may be construed under international law as regulatory taking.²²⁸

Whereas expropriation has a specific character related to measures that are motivated by overriding public purposes, South Africa has, through various pieces of legislation, transferred rights over large units of property, without the said rights passing to the state. The state acts as a "custodian" of the said rights

²²⁶ *Pennsylvania Coal Company v Mahon* (1922) 260 U.S. 393 (US Supreme Court) at para 16 and Todd *The law of expropriation and compensation in Canada* 35.

²²⁷ Article 10(3) of IRSIA also Stiglitz 2013-11-07 *Business Day* 1.

²²⁸ See, Investment Bill section 8(2).

and attempts to transmit them to a broad base of its citizens, particularly black people. The South African government rejects allegations of regulatory expropriation and argues that the state will not be under obligation to compensate any investors who have lost property where the rights have not been acquired by the state or its agencies.²²⁹

The concept of indirect expropriation has been well recognised by a number of legal judgments, arbitral rulings and scholars, as discussed. What is not clear, however, is at what point and at what level the regulatory powers of a state does the infringement become an expropriation. A state may levy taxes, effect devaluations and trade controls on sectors of the economy in line with the particular states policy objectives. The prevailing international law principle states that:

It is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulatory regulation within the police powers of the state, compensation is not required. A state measure will be discriminatory if it results in an actual injury to the alien ... with the intention to harm the aggrieved alien to favour national companies.²³⁰

A number of IIAs concluded around the world have increasingly addressed the matter of indirect expropriations. The *GC Steinberg* case was a landmark case in its pronouncements with regard to the doctrine of constructive expropriation under South African law. The Court concluded that constructive expropriation created a blurring of the distinction between a deprivation and an expropriation.²³¹

Section 8(2)(a) to (d) of the PPIB excludes a number of state measures from being construed as expropriation. Section 8(1) and 8(2), it is submitted indicate that South Africa may not accept claims under the PPIB for compensation as a result of constructive expropriation, and that the ruling in the *Agri SA* case has established precedent on the matter of the distinction between compensable

²²⁹ Mostert 2003 4 (19) *SAJHR* 567; Van der Schyff 2007 2 (40) *CILSA* 306-321; and Slade 2013 (2) *TSAR* 199-216.

²³⁰ See American Law Institute *Restatement of the Law* 712.

²³¹ *GC Steinberg* case at para 6.

and non-compensable expropriations. The state has utilised this principle in the PPIB and Expropriation Bill.

The implication for investment protection based on this application of the property clause in the Constitution translates to a reduction in the customary international law standard of protection for foreign investments. In my view the signal that this policy direction creates internationally is towards a reduction in the level of protection that is available to foreign investors under South African law.

4.4 The World Trade Organization: regulation of foreign investments through trade law

4.4.1 History of the World Trade Organization

The WTO is an organisation whose role is to establish rules, creating an enabling environment for trade expansion and resolving disputes between member states. The WTO is the result of agreements concluded under the Uruguay Round of Trade Negotiations that took place from 1986 to 1994.²³² The Uruguay Round occurred under the auspices of the GATT that was created under the Bretton Woods Agreement.²³³ The WTO Agreement prescribes and the institution claims the following responsibilities in the sphere of global trade and international cooperation:

- administration of WTO trade agreements
- trade negotiations

²³² The WTO was established on April 15, 1994 in Morocco by the Marrakech Agreement Establishing the World Trade Organization of 1994.

²³³ U.S Department of State <http://2001-2009.state.gov/r/pa/ho/time/wwii/98681.htm> (Date of use: 10 December 2014). The agreement created a landmark system for monetary and exchange rate management in 1944. The agreement was developed at the UN Monetary and Financial Conference held in Bretton Woods, New Hampshire in July 1944. The IMF, World Bank and a global exchange system pegged to Gold was part of the outcomes of the conference agreements. See also <http://www.wto.org> for details on the institutional arrangements of the WTO. See WTO *The legal texts* at (iv), for the Marrakesh Declaration. Article 6 of the Declaration states that ministers declare that their signature of the “[F]inal Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations” and their adoption of associated ministerial decisions initiates the transition from the GATT to the WTO.

- trade disputes
- monitoring of national trade policies
- technical assistance and training for developing countries
- cooperation with other international organisations

The WTO has a significant global presence and has in fact transitioned from the ITO envisaged by the Havana Charter discussed in section 1.1.1, through the General Agreement on Tariffs and Trade (GATT) and finally the WTO. The Bretton Woods system has endured for nearly 70 years, driven initially by the US and its victorious allies after the conclusion of the Second World War. Its membership has grown from eight in 1948 to 161 states as at April 2015, based on data available on the official internet site.²³⁴ The ITO Charter failed to obtain the approval of the US Congress and was eventually abandoned in 1950 by the US government.

Having failed at establishing an ITO with US support, the GATT was thus the only multilateral institution available to regulate trade. The GATT was also envisaged as a temporary arrangement while an international organisation was being established. The international system of trade regulation was thus without the supervision of a truly international organisation such as the IMF or World Bank.²³⁵ The GATT endured several rounds of negotiations, culminating in the Uruguay Round. As part of the Uruguay round of negotiations, the attending ministers acknowledged some notable achievements under the GATT system, summarised as:

- a strong and clear framework for the conduct of international trade
- reductions in global tariffs by 40 per cent
- establishment of a multilateral framework of disciplines for trade in services and for the protection of trade-related intellectual property rights
- established dispute settlement systems

²³⁴ WTO https://www.wto.org/english/thewto_e/whatis_e/tif_e/what_we_do_e.htm (Date of use: 20 May 2015).

²³⁵ See Lowenfeld *International economic law* 25-28.

International trade among nations now is well developed and the WTO has a long track record, as an international organisation that administers the trade agreements and has a significant membership. This is not to imply that the WTO system is perfect; however, the agreements concluded at the WTO have been negotiated at multilateral government level and therefore enjoy a higher status under public international law than the purely bilateral nature of investment treaties.²³⁶

4.4.2 Institutional arrangements of the WTO

The WTO is governed through a number of institutional arrangements, with the Ministerial Conference being the top-level decision-making body, the General Council, specialised councils, specialised committees, working groups and working parties. The powers and functions of the various institutional bodies of the WTO are covered under the WTO Agreement.

4.4.2.1 Ministerial Conference

The top decision-making body of the WTO is the Ministerial Conference, which convenes every two years. There have been nine conferences from 1996 to 2013, with the first conference taking place in Singapore. The 10th Ministerial Conference is expected to meet in December 2015. Article IV(1) of the WTO Agreement covers the functioning of the Ministerial Conference and other institutional arrangements of the WTO. The Conference is empowered to carry out the functions of the WTO and take all necessary actions to this effect. The Ministerial Conference is empowered at the request of a member to take decisions on all matters under any of the multilateral trade agreements (MTAs).

²³⁶ See Greenpeace <http://www.greenpeace.org/international/en/campaigns/trade-and-the-environment/why-is-the-wto-a-problem/> (Date of use: 1 February 2015). Greenpeace argues that the WTO is a tool of the rich and powerful. By placing trade above all other goals, it threatens our health and the environment. Its more powerful members use arm-twisting tactics to push developing countries into making bad deals.

4.4.2.2 *General Council*

The General Council is established under article IV(2) of the WTO Agreement and comprises of member state representatives. It meets when necessary and is empowered to undertake the functions performed by the Ministerial Conference between meetings. It establishes the rules of procedure of the General Council and of the Specialised Committees. Significantly, the General Council also has a role as the dispute settlement body as provided for in the Dispute Settlement Understanding (DSU), as per article IV(3) of the WTO Agreement. Further, the General Council fulfils the role of the Trade Policy Review Body under article IV(4). The General Council performs these functions as provided for in the Trade Policy Review Mechanism, as per Annex 3 to the WTO Agreement.

4.4.2.3 *Specialised councils*

The WTO has specialised councils, set out in article IV(5) of the WTO Agreement. There are three main councils that are subsidiary to the General Council:

- the Council for Trade in Goods
- the Council for Trade in Services
- the Council for Trade-related Aspects of Intellectual Property

These subsidiary councils are responsible for the WTO Agreements regulating their respective area of trade and all member states are represented in these councils, which report to the General Council. The General Council is also empowered under article V(1) of the WTO Agreement to make all necessary arrangements for cooperation with other intergovernmental organisations that have trade-related responsibilities. Further, article V(2) empowers the General Council to create a mechanism for cooperation with NGOs that deal with trade-related matters.

4.4.2.4 *Committees and working groups*

Certain standing committees are established by the Ministerial Conference under article IV(7), namely:

- the Trade and Development Committee
- the Balance of Payments Restrictions Committee
- the Budget, Finance and Administration Committee
- the Committee on Trade and the Environment
- the Committee on Regional Trade Agreements (RTAs).

The above committees work under assignment by the Ministerial Conference, as prescribed in the WTO Agreement and also as defined in other MTAs. The General Council can also assign functions to these committees or create other such committees as it deems appropriate to execute particular functions. An important function is assigned to the Trade and Development Committee: to review the MTAs in favour of the least developed nations and report back to the General Council for appropriate action.²³⁷

4.4.2.5 *Secretariat*

The Director-General (DG) of the WTO heads the secretariat as its principal officer. Per article VI(2) of the WTO Agreement, the DG is appointed by the Ministerial Conference, which determines his or her duties, powers and conditions of service. The DG then appoints the staff of the secretariat, per the conditions agreed to by the Ministerial Conference. The DG and staff of the WTO are international in character and are expected to be totally independent and not subject to any influence from any state.

4.4.2.6 *Status of the WTO*

The WTO, including its staff, is a public international organisation. Members of the WTO are required in Article VIII to accord privileges and immunities to the

²³⁷ See Sibanda *South African anti-dumping law and practice: a juridical and comparative analysis of procedural and substantive issues* 39-41 and WTO *The legal texts* 5-8.

WTO and its staff similar in character to those granted by the General Assembly under the UN Convention on the Privileges and Immunities of the United Nations and of the specialised agencies, 1947.²³⁸ The purpose of this requirement of member states is to enhance the international character of the WTO and afford protection for this international staff without fear or favour.

4.4.3 Regulation of investments under the WTO

In Chapter 1 the various attempts to conclude a multilateral agreement on the regulation of foreign investments was discussed, including attempts by the WTO. At its 1996 Ministerial Conference, the WTO included the regulation of foreign investments in its discussion agenda. The rationale by the WTO to bring the contentious matter of foreign investments into the ambit of global trade related to the fact that WTO members were happy to engage in the consensus-seeking negotiating processes in multilateral platforms when negotiating trade agreements.

Yet the same member countries seemed reluctant to conclude a global agreement similar to the WTO Agreement when it related to foreign investment regulations. Countries are instead willing to conclude bilateral treaties in this regard.²³⁹ According to the WTO, there are three main areas of engagement with regard to the regulation of foreign investments in 2015. These areas are the following:²⁴⁰

- a working group, established in 1996, which conducts analytical work on the relationship between trade and investment
- the TRIMS Agreement, which is a multilateral agreement on trade in goods that prohibits trade-related investment measures, such as local

²³⁸ UN Convention on the Privileges and Immunities of the United Nations and of the specialised agencies 1947 (G.A. Res 179 (II))

²³⁹ See WTO http://www.wto.org/english/news_e/pres96_e/pr057_e.htm (Date of use: 8 September 2014) and Subedi *International investment law: Reconciling Policy and Principle* 195-199.

²⁴⁰ WTO *The legal texts* 143-146.

content requirements, which are inconsistent with the basic provisions of GATT 1994²⁴¹

- the General Agreement on Trade in Services (GATS), which addresses foreign investment in services as one of four modes of the supply of services

4.4.3.1 *The TRIMS Agreement*

The TRIMS Agreement was concluded as part of the Uruguay Round of trade negotiations, forbidding any WTO members from implementing any TRIM that is not in line with the national treatment principle contained in GATT, Article III.²⁴² The TRIMS Agreement has provisions that apply to how a host treats foreign investors and attempts to prevent host states from enacting legislation that creates trade restrictions or barriers to foreign investments.²⁴³ This attempt at regulation was favoured by capital-exporting nations, but opposed by developing nations who insisted that the regulation of foreign investments should be a domestic law issue.

An argument can be made that the GATT and WTO system has endured due to the fact that the WTO refrains from the controversy that foreign investment regulation generates. Under GATT, few disputes were raised regarding the regulation of foreign investments. Under the WTO, trade-related investment measures are notifiable to the Council for Trade in Goods and should be

²⁴¹ General Agreement on Tariffs and Trade (GATT 1994) (1869 UNTS 187; 33 ILM 1153)

²⁴² *Ibid.* See also Lowenfeld *International economic law* 103.

²⁴³ TRIM Article 2(1) states that “[w]ithout prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994”; also the ANNEX to the TRIMS at 1 states that “TRIMS that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require: (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or (b) that an enterprise’s purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.”

eliminated depending on the level of development of the country in question and based on a time schedule.²⁴⁴

However, in spite of the WTO agreements, states still enact a number of measures that are contrary to BIT provisions and which breach international customary law on foreign investments. Should these infringements not be trade-related, then the TRIMS Agreement does not apply and the disputes cannot be resolved by the WTO. This narrow scope of TRIMS was the rationale behind the recommendation made in 1999 by the Council for Trade in Goods for a review of the agreement.

The main aim of TRIMS is to prohibit the use of performance requirements falling into the narrow scope of the limitation provided by the TRIMS/GATT provisions. The Ministerial Declaration at the Doha Conference of 2001, in support of the challenges raised by the Council for Trade in Goods, recommended a review of the relationship between investments and trade.²⁴⁵ It had become increasingly clear to the WTO that trade by MNCs regulated by a mash of BITs had grown to account for a third of global trade, and that it was in keeping with the mission of the WTO to explore ways of providing regulatory stability.²⁴⁶

²⁴⁴ See *US v Canada*, GATT BISD, 30th Supp. 140 (1984) where the USA brought a complaint against Canada under Article XXIII of GATT on the basis that a municipal law in Canada violated article III(4) and XI(1). See also *Certain Measures Affecting the Automobile Industry*, WT/DS44/R, Panel Report adopted by the DSB, 23 July 1998 and *Thai Tobacco Case* (1991) 37 GATT BISD 200.

²⁴⁵ See Doha WTO Ministerial Declaration adopted 14 November 2001 (WT/MIN (01)/DEC/1); Aitken and Harrison 1999 (3) *AER* 605; Ariff 1989 12 (3) *World Economy* 347-360; Baldwin *The effect of trade and foreign direct investment on employment and relative wages* 1-62; Blorensztein, De Gregorio and Lee *How does foreign direct investment affect economic growth?*; and Irwin *Multilateral and bilateral trade policies*.

²⁴⁶ See Sonarajah *The international law on foreign investment* 145 also WTO paper WT/WGTI/152 (2003) to the Working Group on Investment, where China, India, Kenya, Pakistan and Zimbabwe stated that “[m]ultinational Enterprises should strictly abide by all domestic laws and regulations in each and every aspect of the economic and social life of the host members in their investment and operational activities. Further, in order to ensure that the foreign investor meets its obligations to the host member, the cooperation of the home member’s government is often necessary, as the latter can and should impose the necessary disciplines on the investors. The home member’s government should therefore also undertake obligations, including to ensure that the investor’s behaviour and practices are in line with and contribute to the interests and development policies of the host member. It is important that the Working Group

The expansion of the TRIMS prohibiting performance requirements has proved challenging as many developing countries are at odds with this extension. With these varying views among states, the WTO has not made significant progress in incorporating foreign investments regulations by concluding a multilateral agreement on investments.²⁴⁷

4.4.3.2 *Trade-related Aspects of Intellectual Property Rights Agreement*

The GATT did not include many provisions related to the protection of intellectual property (IP) rights, focusing more on trade in goods. For a significant time pre the WTO Agreement, intellectual property rights relied on the following conventions:

- the Paris Convention of 1883 for the Protection of Industrial Property (Paris Convention) ²⁴⁸
- the Berne Convention of 1886 for the Protection of Literary and Artistic Works (Berne Convention)
- the Convention Establishing the World Intellectual Property Organization (WIPO) of 1967

Under these conventions, the national treatment standard is utilised to provide protection to IP. The implication of providing national treatment means states were required by these conventions to provide protection, on an equal basis as that which would be provided to host state nationals.

After several amendments, the convention establishing the WIPO was concluded in July 1967.²⁴⁹ None of the conventions mentioned above provide clear sanctions for offending state parties that fail to accord appropriate protection under national treatment provisions. As globalisation spread and

addresses the issue of the investors and home government obligations in a balanced manner.”

²⁴⁷ Subedi *International investment law: reconciling policy and principle* 195.

²⁴⁸ Paris Convention for the Protection of Industrial Property of 1883 (828 UNTS 108)

²⁴⁹ See Lowenfeld *International economic law* 107. WIPO facilitates debate, reviews and provides facilities for dispute resolution. See articles IX and XX of GATT that relate to intellectual property protection.

information technology (IT) made significant leaps and became central to the global conduct of commerce, pressure came to bear to strengthen the GATT/WTO system by bringing IP under tighter trade protection. Many governments, especially from developed countries, were anxious about piracy of technology and trademark and other intellectual property protection. There was a move to create clear sanctions for infringement and retaliatory measures on member states that did not comply with the obligations created.

As with most measures of such global significance, a number of countries were opposed to the extension of the WTO system to include rules regarding IP. Developing countries in particular strongly opposed these moves as an agenda by developed countries to extract taxes from the poor nations.

The arguments related equally to patents on pharmaceuticals, and this was viewed as contrary to human rights. Developing states were of the view that patents inflated the prices of medicines and made them unaffordable for millions of people in developing countries. A case in point is the supply of antiretroviral medicines (ARVs) to treat human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS). These ARVs were unavailable to a significant number of people in South Africa, causing millions of deaths from HIV-related complications.

Other countries were concerned about the sanctions that would befall them as a result of the activities of some industries in their countries that specialise in making fake designer goods. These included fakes of brands such as Gucci, Levi's, Versace and Rolex, for example.²⁵⁰

Annex 1C of the WTO Agreement contains the TRIPS Agreement. The TRIPS Agreement has the following key aspects that are significant for IP protection:

²⁵⁰ See WTO *The legal texts* 321-354; also King 1992-05-10 *NY Times* 7 and Hill *Foreign direct investment: the effects of rules of origin*.

- Each state party of the WTO Agreement is also required to be a party to the Berne and Paris Conventions and other conventions concluded under the WIPO, as set out in Article 2(2) of TRIPS.²⁵¹
- Each state party to the WTO Agreement is required to accord national treatment and MFN treatment to all member state nationals under Articles 3 and 4 when dealing with matters connected to IP.
- The TRIPS Agreement covers virtually all aspects of IP, imposing minimum standards of protection.
- Each state party of the WTO shall ensure that they provide under municipal laws enforcement procedures for the TRIPS Agreement under Article 41.

The TRIPS Agreement is a more comprehensive multilateral agreement and provides a stronger framework for the regulation of IP. The fact that WTO members are also required to conform to other conventions as part of the WTO Agreement mandate significantly broadens the scope of IP protections in the WTO system.²⁵²

4.4.3.3 *The General Agreement on Trade in Services*

The need for an agreement within the WTO that regulates trade in services arises from an understanding that the nature of world commerce and trade has changed over the years. The global economy is made up of more than just trade in manufactured goods and raw materials. A number of developed country economies have increasingly shown growth in the trade of specialised services.

²⁵¹ The conventions on intellectual property that the TRIPS Agreement covers are the Paris Convention, Berne Convention of 1886, Rome Convention of 1961 (496 UNTS 44) and the Washington Treaty on Intellectual Property in respect of Integrated Circuits of 1989.

²⁵² For a detailed review of the major discussions at the WTO on TRIPS, access World Trade Organization http://www.wto.org/english/tratop_e/trips_issues_e.htm (Date of use: 10 January 2015).

At the Uruguay Round of trade negotiations, services were included in the negotiations agenda. The result was the conclusion of the General Agreement on Trade in Services (GATS).²⁵³ Huge global demands are experienced in consultancy, engineering, insurance, accounting, banking, telecommunications, biotechnology and other. The GATS also provided for the conclusion of sector-focused agreements, such as the Telecommunications and Financial Services agreements. The GATS Agreement consists of three main parts:

1. Part 1 defines services in four main categories:
 - Model 1, from the territory of one member into the territory of any other member
 - Mode 2, in the territory of one member to the service consumer from another country
 - Mode 3, by a service supplier of one member, through commercial presence in the territory of any other member
 - Mode 4, by a service supplier of one member, through presence of natural persons of a member in the territory of any other member.

2. Part II focuses on the principles that bind members to GATS and how members are expected to accord protection and perform obligations under Article II to Article XV of the GATS Agreement.²⁵⁴ These include:
 - MFN treatment
 - transparency
 - avoidance of abuse of dominant position
 - increasing participation of developing countries

²⁵³ Lowenfeld *International economic law* 123 also WTO *The legal texts* 286-319 (Annex 1B of the WTO Agreement)

²⁵⁴ Other plurilateral agreements have been concluded at the WTO and are contained under Annex 4(a) to 4(c) of the WTO Agreements. These are the Agreements on Trade in Civil Aircraft 12 April 1979 (BISD 26S/162), Agreement on Government Procurement 15 April 1994, International Dairy Agreement 15 April 1994 and International Bovine Meat Agreement 15 April 1994. An Agreement on Agriculture was adopted by the General Council in August 2004. The General Council decision in August 2004 included an abandonment of pursuing a work programme on the relationship between trade and investments.

- economic integration
- labour market integration agreements

An important exclusion, however, are the national treatment principles which do form part of the TRIPS agreement.

3. Part III of GATS focuses on sector-specific agreements, and here national treatment does form part of the sectoral negotiations. The services sector classifications are included in the W/120 list, which shows all sectors that may be negotiated under GATS.

The GATS Agreement under Article XXIII provides for a dispute settlement and enforcement procedure. This provision therefore allows for disputes that arise under the GATS to be settled utilising the DSU of the WTO.

This format of dispute settlement has been criticised as creating a detour out of municipal legal procedures in favour of closed-door hearings. Detractors claim that this creates less room for a plurality of views on matters that are of significance to the citizens of the countries concerned.

4.4.4 Dispute Settlement Understanding

As part of the WTO Agreements, each member state is required to be party to the DSU contained in Annex 2 of the WTO Agreement. The DSU applies to most agreements concluded at the WTO and has been enhanced to that prevailing under the GATT system.

A member state can lodge an appellate review against the decisions of a panel by a standing appellate body. This includes a system to institute compensation or retaliation for failure to address noncompliance.²⁵⁵ The procedure for lodging a complaint to its conclusion as contained in the DSU is summarised as follows:

²⁵⁵ See WTO *The legal texts* 354-379 and Lowenfeld *International economic law* 162-164.

1. **Lodging of a complaint** – a member state that considers that the actions of another member state have infringed upon a WTO Agreement and that such an infringement has resulted in the member being deprived of a benefit accruing under a covered agreement, may call for a consultation with the other state party. The member state, per article 4(2) of the DSU, to whom the request for consultation is directed, must respond within ten days. Should 60 days lapse and the member has not responded to the request for consultation or entered into such consultations, then the member requesting a consultation can proceed to request the establishment of a panel in the absence of any other mutual agreement between the parties.
2. **Request for establishment of a panel** – In the event that a consultation fails to resolve the dispute 60 days after its initiation or as indicated above, where the consultation requested is not acted upon within 30 days, the complainant state may request that a panel be established. In pursuance of article 4(7) and 6(2), the request to establish a panel can be made jointly where the states in question do not see reasonable success of resolving the dispute through consultation. The request must be in writing, setting out the specific measures at issue and establishing the legal basis for the dispute.
3. **Establishing the panel** – According to article 6(1), a panel shall be established at the latest at the dispute settlement body (DSB) (comprising the whole WTO membership) meeting following that at which the request first appears as an item on the agenda, unless the DSB decides by consensus not to establish a panel.²⁵⁶
4. **Panel procedures** – A panel comprises of three persons nominated by the secretariat. Per article 7(3), the DSB may authorise the chairman to draw up the terms of reference of the panel in consultation with the

²⁵⁶ See WTO *The legal texts* 354-379 and Lowenfeld *International economic law* 162-164.

parties to the dispute, subject to provisions of paragraph 1. Articles 8 to 12 set out the powers, duties and procedures of the panel.

5. **The panel report** – The final report by the panel is first distributed to the parties involved in the dispute. Fourteen days thereafter, the report is circulated to the DSB. The DSU requires the DSB in a period not exceeding 60 days to adopt the panel reports. The DSB may by consensus adopt the panel report as presented.

6. **Appeals process** – A party to the dispute may give notice of an intention to appeal. The appeal must be submitted to the appellate body, a standing body that is established in terms of the DSU. The appeal must be based on points of law related to the panel report. The appellate body has authority to amend, confirm or overrule the panel report. This ability to create an appeals mechanism is a critical feature of the WTO dispute settlement system which renders it more robust than the ICSID and other investment arbitration panels where the arbitral decision is final. The appellate body report must be adopted by the DSB and all parties to the dispute, save if the DSB by consensus chooses not to adopt the report.

Table 4.1: The average duration of dispute settlement at the WTO²⁵⁷

Activity	Timeline
Consultation phase	2 months
Establishment of panel and appointment of panellists	1,5 months

²⁵⁷ Commercial Diplomacy
http://www.commercialdiplomacy.org/manuals/wto_dispute.htm (Date of use: 15 May 2015).

Provisional panel report	6 months
Final panel report	1 month
DSB adopts report (no appeal)	1,5 months
Estimated timeline	12 months
Preparation of appeal report	3 months
DSB approves appeal report	1 month
Total estimated timeline	16 months

Parties to a WTO dispute may reach agreement during the consultation and conciliation phases. That would bring a dispute to a conclusion, or the parties may negotiate differing timelines to those indicated above in pursuit of a resolution.

7. **Enforcement** – The country against which an adverse report has been issued has 30 days from the adoption of the report by the DSB to provide detail of how it will implement the ruling. If the state indicates that it is unable to at the given time address the implementation of the report, then a reasonable timeframe must be provided for such a state to implement the ruling. Failure to implement the ruling may lead to arbitration and possible retaliatory measures as defined in articles 21, 22 and 23 of the DSU.

4.4.5 Implications of WTO Agreements for the PPIB

South Africa is a member of the WTO and as such bound by the multilateral agreements including the DSU whose procedure was discussed in section 4.4.4 above. Although the primary focus of the WTO is on trade law, several attempts have been made to incorporate foreign direct investment into the ambit of the WTO framework as a consequence of the increasing global trade participation

of MNCs and the unregulated manner that BITs have been utilised to regulate FDI. Developing countries have expressed discontent with the manner in which investment arbitrations have made rulings that favour the interest of MNCs at the expense of legitimate host government public policy objectives.

This section explores the implications for South Africa should the PPIB be passed into law in light of the country's obligations under various multilateral agreements that aim to regulate investments. As indicated, the scope of coverage of the WTO agreements that relate to investments is much narrower than the scope of BITs and by 2004 the WTO had opted not to pursue negotiations for the conclusion of a multilateral agreement on investments. However, South Africa is still bound by agreements such as TRIPS and TRIMS, regardless of the enactment of municipal laws that may have a different import to international law.

4.4.5.1 *National treatment*

The WTO Agreement defines national treatment as according treatment to foreign investors similar or equal to that provided to nationals of the host. This principle is covered in a number of WTO multilateral agreements that relate to investments as follows:

- GATS articles XVII:1, XVII:2, XVII:3 and SG XVII
- TRIPS articles 3.1, 3.2 and 65.2
- Generally in GATT: articles III:1, III: 2, III:4, III:8

Section 6(1) to 6(5) and Section 3(a) of the PPIB covers national treatment protection to be provided to foreign investors in South Africa.

The emphasis of the national treatment protection is on investments that are made in "like circumstances".²⁵⁸ It is submitted that this meaning of national treatment differs from that included in WTO agreements and seems aimed at

²⁵⁸ See, Sibanda 2014 (4) 4 *BMR* 159.

limiting the cover of national treatment that is available to foreign investors. This may be motivated by the desire of the state to include sectoral performance criteria like the mining charter, financial services charters and other laws that are aimed at achieving social redistribution in targeted areas of the economy. Policies such as preferential procurement and BEE requirements create circumstances where the national treatment principle may be difficult to apply. South Africa has legislation that aims to promote the advancement of black people through economic policies that seek to increase their participation.

These laws seek to create advantage for companies that have particular levels of black ownership, black directors and managers, or procurement from black suppliers. There are also BEE and tax credits available to companies that undertake select socioeconomic development initiatives directed at the poor and needy.²⁵⁹ The laws that favour black businesses were enacted after South Africa obtained membership of the WTO. The country had also entered into a number of BITs which were not explicit on the BEE legislation planned.

4.4.5.2 *Most-favoured nation treatment*

The most-favoured nation (MFN) principle features in a number of WTO multilateral agreements. In Article 4 of TRIPS, MFN is defined as follows:

With regards to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

The MFN principle is included in the following multilateral agreements:

- GATT articles II:1, II:2, VI and V:5
- TRIPS articles 4 and 65.2

²⁵⁹ See Income Tax Act 58 of 1962. Part 1 and 11 of the ninth Schedule to the Act provides a list of Public Benefit Activities (PBAs). See also Broad-Based Black Economic Empowerment Act (BBBEEA) 53 of 2003 and the Amended Codes of Good Practice on Broad-Based Black Economic Empowerment 2012, *Government Gazette* 35423, 1 April 2012. See also Notice of clarification *Government Gazette* 38764, 5 May 2015.

- GATS articles II and XXI:2(b)

In the PPIB the MFN principle is not expressly provided. However, this will not preclude an investor suing under BIT provisions that do contain this principle, or under other IIAs such as the SADC Protocol on Finance and Investments, and under the WTO dispute settlement procedures.

4.4.5.3 *Intellectual property rights*

As a member of the WTO and thus party to the TRIPS multilateral agreement, South Africa is bound by international law principles with regard to the regulation of IP. The Designs Act 195 of 1993 and the Patents Act 57 of 1978 as amended provide the municipal legal framework for the regulation of IP in South Africa. The TRIPS Agreement provides for national and MFN treatment. Further protection is provided for owners of IP through access to courts for judicial review in situations where the IP is under threat.²⁶⁰ The provisions in the PPIB that relate to IP contained in section 8(2)(c) are contradictory as they attempt to exclude the issuance of compulsory licensing as an expropriation, while in the same section imposing a requirement for observance of international agreements on IP. Section 8(2)(d) of the PPIB excludes compensation for situations where the state does not acquire the IP rights. The implications of this provision are such that the state may issue licensing rights over IP to third parties and claim that the rights have not been expropriated. The TRIPS Agreement does make provision in Article 31 for compulsory licensing; however, the patent holder is still entitled to compensation and may still continue to produce.

The implications of the PPIB if passed into law mean an IP rights holder may have no municipal recourse under the Bill to lodge a claim for compensation as the state would argue that it has not acquired the rights, but allocated those rights to others, in the public interest or for a public purpose. The issue of compulsory licensing has been raised with respect to pharmaceutical products

²⁶⁰ See TRIPS articles 31-33.

prior to the PPIB, and has been a source of conflict with the industry.²⁶¹ Compulsory licensing is a form of regulatory expropriation, where the IP rights held by investors are waived by a government that allows another party to produce the patented product or process without the consent of the rights holder.

The intention in the TRIPS Agreement for the allowance of compulsory licensing relates to creating flexibility in the agreements based on the host government's determination of conditions that may justify such issuance of licensing rights. To avoid arbitrary government action on valuable IP rights, the TRIPS Agreement requires that judicial review of the decision be available in each country and that the IP holder has a right to appeal. Under section 8(5) of the PPIB, an investor may approach a court for review of the expropriation order including whether the valuation ascribed to the investment was done in line with section 8(2) of the Bill.

4.5 Conclusion

Chapter 4 has covered a number of international law principles that relate to foreign investments. International customary law, Public international law, rulings of international courts and tribunals coupled with state practice all play

²⁶¹ See CP Tech <http://www.cptech.org/ip/health/sa/SAsolidarity.html> (Date of use: 2 February 2015). In a letter to the South African ambassador to the United States, March 12, 2001, on behalf of ACT UP, the Gray Panthers, the Health GAP Coalition, Oxfam America and Doctors Without Borders, the letter states: "On April 18, hearings will resume in the case of 39 of the World's largest pharmaceutical companies against the people and the government of the new South Africa. The plaintiffs include GlaxoSmithKline, Hoffman la Roche, Merck, Boehringer-Ingelheim and Bristol-Myers Squibb. The companies are fighting a law, passed by the South African Parliament and approved by Nelson Mandela, which would increase access to life-saving medication for people with HIV and others in need of safe, effective medication ... Nearly five million South Africans are living with HIV. But few can afford the drugs that have enabled richer countries to transform the disease from a killer into a manageable illness ... We believe the Medicines Act does not violate any international agreements ... We note that 400 000 South Africans have lost their lives since the passage of the Medicines Act to the present day, while the pharmaceutical industry lawsuit has blocked implementation of these essential reforms ... We demand that nations have access to every tool to increase access to life-saving or extending medicines. This must include the introduction of local generic manufacturing and purchase and importation of medications at the best world price... We demand that the Bush Administration retain and expand policies that allow poor nations to use WTO-legal tools such as compulsory licensing and parallel importing to increase access to medicine."

a role in shaping the international regulation of foreign investments. Most significant was the analysis of the WTO system and its rules for regulating trade, including the DSU. Attempts were made to include investments into the WTO umbrella in Singapore in 1996, but after much negotiation, this was abandoned in 2004.

In Chapter 1, the global attempts at various forums to conclude a comprehensive multilateral treaty on investments were discussed. These failed in a similar way as the WTO attempts.

The WTO has a membership of 161 countries, and another 25 countries are in the process of applying for membership at the time of writing (2015). This indicates significant confidence by both developed and developing countries of the value that WTO membership and the WTO agreements add to global trade and national development. Why therefore does the regulation of FDI, a significant contributor to economic growth and development, cause such disputes among states that a multilateral agreement has proved impossible to attain after so many years?

At the WTO, UN, AU, EU, IMF and other public international bodies, a divide exists between developed and developing countries. At the core of many failed attempts at creating a global standard of treatment of foreign investments are the various interests that these nation groupings maintain. Be it the Calvo/Hull approaches, the PSNR resolutions, CERDS, NIEO or other global agreements, developing country and developed country interests seem continually at odds. The development of BITs was a developed-country creation to protect these nations and their investments abroad. Developing countries had to accept the conditions of these treaties as they desired to attract FDI.

The global economic power balances as discussed are shifting and some developing countries have started renegotiating the terms of their IIAs that they concluded in the past as a number of first-generation BITs with Western nations come to a conclusion. South Africa, like a number of its African counterparts, has begun a process to terminate or renegotiate its BITs concluded at the dawn of democracy.

The process in South Africa involves the replacement of BITs with municipal law and, in cases of necessity, a new model BIT is to be implemented. In Chapter 5, the efforts that are being made at the SADC, AU and other RECs to craft investment rules for the continent are considered. Chapter 5 concludes with an evaluation of the PPIB's key provisions contrasted against the emerging trends of FDI regulation in SADC.

CHAPTER 5

Economic growth, integration and regulation of foreign investments: An African perspective

5.1 Introduction

As discussed in Chapter 1, over the last decade a number of countries have made attempts at amending, cancelling or renegotiating their investment treaties. Some of the attempts in this regard have entailed redrafting, removing ambiguous terms, addition of terms that place particular emphasis on issues of significance to the host, or cancellation. Almost 30 per cent of all BITs concluded as at December 2013 were with African states, and nearly half of all disputes referred to the ICSID involve Africans.²⁶² Other IIAs, such as RTAs and preferential trade agreements, are concluded in Africa for a number of reasons; these agreements are not always in the best interests of the African states that conclude them.

Part of the reason for the poor balance between host states' obligations and those of investor states is historical in nature. The African continent has a record of conflict, violence and poor governance, partly caused by the damage exerted on the continent by colonialism and exploitation.²⁶³ Public institutions are usually strained by shortage of resources; high levels of corruption²⁶⁴ are prevalent in a number of countries, and the rule of law is often compromised. These countries need investment to grow their economies but lack the technological or global political power to influence world trade and economic power balances.

²⁶² See Leo <http://www.cgdev.org/content/publications/detail/1424333> (Date of use: 14 August 2014).

²⁶³ Hicks <http://www.csis.org/publication/bits-africa> (Date of use: 14 August 2014).

²⁶⁴ See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997 (2802 UNTS 1) at article 1 and the UN Convention against Corruption of 2003 (2349 UNTS 41).

African countries are therefore usually in a poor bargaining position relative to the developed capital-exporting nations when negotiating BITs. In certain cases African countries have been motivated to conclude BITs under pressure from some developed states or following recommendations made by peers or some multilateral institutions. Concluding a BIT has been seen as a necessary vehicle or condition preceding trade and investment. The treaties are usually written from the perspective of the advanced investor nations. They place significant obligations on developing countries and few reciprocating obligations on MNCs. By their very nature, extractive industries such as mining, oil and gas involve significant capital investments, which have long payback periods that stretch over many years or even decades. Foreign investors claim fears and concerns over political instability, unstable regulatory environments and poor governance as some of the reasons for requiring protection from the host states.²⁶⁵

In a bid to attract FDI in highly competitive environments, African states have traditionally supplied extended warranties to foreign investors. Some of these provisions in BITs are highly restrictive and of such a nature that they encroach on public policy spaces. The strength of the global forces that control the international trade, financial and investment systems, in some cases supported by home state political and military power, have in the past proved overwhelming for many countries – not only African states, but also for those in the Middle East, Asia and developing Latin American states. In the case of South Africa, the BITs concluded immediately following the ANC electoral victory in 1994 contained extended investor protection clauses.

²⁶⁵ See, Leo <http://www.cgdev.org/content/publications/detail/1424333> (Date of use: 14 August 2014) The cost of court action and time delays in Africa are higher than other parts of the world and so is the level of corruption estimated at 300 per cent more than the average of most countries that are members of the OECD and 200 per cent more than the average Asian countries.

The challenges that face South Africa and other African states are significant as they attempt to make changes to their foreign investment regulatory environment in pursuit of greater exercise of sovereignty.

5.2 Statement of challenges

It is submitted that the African growth story is a compelling one and as has been discussed in Chapter 1, the forecast for economic growth rates of a number of African countries is set to surpass that of a number of developed countries. Some of these developed countries are still struggling with the aftereffects of the 2008/2009 global recession and are overburdened by debt and fiscal drag. Though the growth trajectory for sub-Saharan Africa is positive and set to surpass that of many other regions, foreign investors still face challenges when making investments on the African continent, and some of these have been elaborated upon in Chapter 2.

A number of factors are creating challenges for African countries as they attempt to adjust the nature of the relationships they hold with MNCs and their home states. These challenges are broadly as follows:

- The regulatory powers of the host over MNCs should be increased so as to ensure that these investors are obliged to undertake meaningful transfers of skills, technology and processes to the locals of the host African nation. This includes creating citizens capacity for raw material beneficiation and other manufacturing from extracted resources. This will increase the revenues that the host can earn, unlike the current practice where resources are extracted, the raw materials exported to be beneficiated abroad and the finished products then resold to the African countries.

An example is the platinum mining industry in South Africa, which is dominated by MNCs. South Africa holds the largest known platinum deposits in the world. The minerals are mined and the platinum is exported abroad and sold to global markets. It is submitted that the

platinum is then utilised, for example, in the manufacture of catalytic convertors which are then sold back at several multiples of the original price to South Africans.

- Obligations should be created for MNCs to engage in equity transfer transactions that empower host communities by acquiring shares in the MNCs. The MNCs as indicated are concerned with extraction of resources for profit and when these resources are depleted and the operations become unprofitable, they exit the country and move to a different location. In my view, empowering hosts in this way allows for participation in dividend payments and voting rights at shareholder meetings, thus creating real leverage in the negotiations between the MNC and its host communities.
- Obligations should be created for MNCs to follow good governance practices, and observe human rights and best practice environmental protection principles. Host governments have in the past battled with MNCs that interfere with host state politics hoping to influence political outcomes that favour their business interests. Engaging in bribery, coups, mercenary activities and breaching UN sanctions and embargos are a few examples of such practices. Some MNCs have been accused of allowing child labour practices, poor employee safety protocols and other breaches of human rights including racism and discriminatory labour practices. Some MNCs undertake operations in host countries that cause severe damage to the environment, for example deforestation, pollution of water and air and other forms of environmental hazards.
- The host states require greater ability to adjust rates, taxes, terms and conditions of licences, royalties, permits and to take a host of other measures based on national priorities.

- Host states require greater flexibility to make changes to laws that help address social justice factors such as BEE, land redistribution, affirmative action and corporate social responsibility (CSR). The host states, driven by overriding public interests, may require fundamental policy changes to meet the needs of their citizens. This may prove challenging as it may conflict with forms of protection guaranteed to investors in BITs.

African countries require more freedom to regulate over MNCs in a manner that still allows the MNCs to derive the benefits of the investment. Correspondingly the hosts require more policy space to exercise authority over their territory for the benefit of the host communities. In my view the questions that remain are: How do the countries that have concluded BITs with stringent investor rights and protections and have allowed investors to make investments based on these BITs protection, now renegotiate the terms of BITs after the investments have been made?

Can a compromise be achieved that allows the home states to relax BIT protection as an outcome of the renegotiations, without damaging the reputations of the host states as safe and reliable investment destinations? Are there still any compelling reasons that render concluding BITs necessary for the home states of MNCs investing in Africa? In my view the home states of the MNCs still have an incentive to enter into BIT negotiations with African States to exploit the forecast growth. However Africa is still considered to be a high risk investment destination responsible for almost half of the ICSID disputes..

Can the resetting of the relationship between the hosts and foreign investors be done at regional or at a continent-wide basis so as to meet the higher policy objectives and strategic goals of African governments? The benefits of a continent-wide approach to the challenges of regulation of foreign investors are numerous and will be discussed further.

Uniformity of policy across the continent would ease the regulatory burdens and uncertainty currently experienced by foreign investors. Africans face common challenges and one of the most significant challenges relates to the bargaining power of African states. It is submitted that there is merit in engaging with the rest of the world as a unified block under the AU and negotiating terms that favour Africans.²⁶⁶

As discussed in earlier chapters, there is divergence of opinion on the benefits of FDI, and questions regarding whether the conclusion of BITs does indeed attract investment.²⁶⁷ Some studies have indicated positive spinoffs for countries that conclude BITs, while others indicate limited real benefits between concluding BITs and the levels of FDI inflows to countries.

5.3 African institutional arrangements

Over a significant period of time in the 20th century, an increasing number of countries on the African continent sought to better organise themselves. This was so they could better negotiate terms of engagement with former colonial states and for the advancement of independence goals, peace and security for Africans. This section gives an overview of the main African institutions with the objective of identifying what the key objectives of these institutions are and how they influence African continental investment policies. The focus is on analysing what the strategic goals of the continent are, how investment policy supports these goals and how the regional and country policies relate.

²⁶⁶ See Babatunde F 2012 (45) *CILSA* 64

²⁶⁷ See Masamba <http://www.consultancyafrica.com> (Date of use: 1 December 2014); Johnson 59 *Emory L.J.* 919-966; Cotula <http://www.iied.org/> tide-turning-for-africa-s-investment-treaties (Date of use: 1 December 2014); and Lang www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf (Date of use: 2 January 2015).

5.3.1 Organization of African Unity 1963

The Organization for African Unity (OAU) was established in 1963²⁶⁸ in Addis Ababa by 32 founding member states. The OAU had three key strategic goals espoused in the charter of the organisation:

1. to promote the unity and solidarity of the African states and act as a collective voice for the African continent. This was important to secure Africa's long term economic and political future;²⁶⁹
2. to defend the sovereignty, territorial integrity and independence of African states;
3. to eradicate all forms of colonialism and white minority rule, since several African states were under colonial white rule at the time of the establishment of the OAU.

Initially the organisation aimed to achieve its goals by defending the independence and sovereignty of the independent member states. The OAU would also remain neutral in world affairs in a bid to prevent the member states from being influenced and controlled by external powers. A liberation committee was established to advance these goals and mechanisms to resolve disputes were also established. The drive for a continent-wide organisation included a need to raise the living standards of Africans. Two main ideological standpoints competed for domination on the African continent in the pursuit of the achievement of these continental goals prior to the establishment of the OAU.²⁷⁰

²⁶⁸ See, Englebert and Dunn *Inside African politics*

²⁶⁹ See SA History <http://www.sahistory.org.za/topic/organisation-africa-unity-oau> (Date of use: 2 January 2015).

²⁷⁰ See Department of International Relations and Cooperation www.dfa.gov.za/foreign/Multilateral/africa/oau.htm (Date of use: 10 April 2015).

5.3.1.1 *The Casablanca Group*

The Casablanca Group was established in 1961 and was led by former Ghanaian president Kwame Nkrumah.²⁷¹ Its primary objectives included pushing for the creation of an African political federation.²⁷² Describing themselves as a group of “progressive states”, it comprised some influential countries of the continent, such as Libya, Mali, Morocco and Guinea.²⁷³

5.3.1.2 *The Monrovia Group*

The Monrovia Group was led by former Senegalese president Senghor and pushed for gradual achievement of a united Africa through economic cooperation. The Monrovia Group’s vision was for economic policies that would advance the African agenda through the economic substructure. In turn this would then influence the political substructure toward the realisation of a united Africa.

The various aims and approaches of these groupings were consolidated with the signing of the OAU Charter in Addis Ababa. Emperor Haile Selassie I oversaw the resolution of tensions between the groups and the creation of the OAU. From 32 nations in 1963 the OAU had grown to 53 countries in 2002, when it was disbanded and replaced by the AU.²⁷⁴

5.3.2 **African Union**

The vision of the African Union (AU) is “an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in global arena”.²⁷⁵ The AU was launched at the OAU Durban Summit of 2002 and

²⁷¹ Englebert and Dunn *Inside African politics* 320-321.

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ SA History <http://www.sahistory.org.za/topic/organisation-african-unity-oau> (Date of use: 20 May 2015). See also Ketema <http://africanunbound.org/index.php/aumagazine/issue-3/item/the-creation-of-the-oau.html> (Date of use: 20 May 2015).

²⁷⁵ AU <http://www.au.int/en/about/vision> (Date of use: 27 May 2015). For a detailed study of the institutional arrangements of the AU, see www.au.int/en/about/nutshell. In September 1999, the Heads of State and Governments of the OAU issued the Sirte Declaration calling for the establishment of an African Union. Critically to speed up

initiated the first Assembly of the Heads of States of the AU. Former South African state president Thabo Mbeki became the first chairperson of the AU. Some of the key objectives of the AU related to investments and economic matters are as follows:²⁷⁶

- to accelerate the political and socioeconomic integration of the continent
- to establish the necessary conditions which would enable the continent to play its meaningful role in the global economy and in international negotiations
- to promote sustainable development at the economic, social and cultural levels as well as the *integration of African economies*
- to coordinate and harmonise the policies between the *existing and future RECs* for gradual attainment of the objectives of the union

The AU has a number of other objectives in the areas of peace and security, health, and environmental affairs. The above list is focused on areas that involve trade and investments.

Within the AU Commission there is a Directorate of Trade and Industry.²⁷⁷ There is a division within this directorate focusing on industry, which has as one of its goals the provision of support to the overall AU mandate of boosting intra-Africa trade and the creation of a Continental Free Trade Area (CFTA). The second goal of this division per the AU website is to “coordinate and oversee the development, harmonisation and implementation of coherent and robust industrialisation policies, regulatory and legal frameworks and programmes based on value-chain approach at regional and national levels”.

integration on the continent so the continent can play its rightful role in the global economy while addressing multifaceted social, economic and political problems compounded as they are by certain negative aspects of globalisation.

²⁷⁶ Dyani-Mhango 2012 (38) *Brooklyn J. Int'l L* 1-4.

²⁷⁷ See Directorate of Trade and Industry <http://ti.au.int/en/divisions/industry> (Date of use: 18 April 2014).

5.3.3 Regional economic communities

The regional economic communities (RECs) are groups of African nations that are organised around geographical location. These are considered to be the major regional nations groupings that comprise the AU and have economic integration as a major strategic pillar. The AU is comprised of eight RECs, namely:

- the Arab Maghreb Union (UMA)
- the Common Market for Eastern and Southern Africa (COMESA)
- the Community of Sahel-Saharan States (CEN-SAD)
- the East African Community (EAC)
- the Economic Community of Central African States (ECCAS)
- the Economic Community of West African States (ECOWAS)
- the Intergovernmental Authority on Development (IGAD)
- the Southern African Development Community (SADC)²⁷⁸

These RECs have been established on the basis of the work done in the OAU, and are considered a prerequisite for the economic integration of Africa and a necessary condition for the achievement of economic development.

Under the auspices of the OAU the Treaty Establishing the African Economic Community (Abuja Treaty)²⁷⁹ was concluded in Nigeria in 1991. The Abuja treaty established the basis for the creation of an African Economic Community (AEC). The treaty, under article 88, envisages a gradual integration of the RECs and then full continental integration as the final objective towards which the activities of current and future RECs must be directed. The AU's Accra Summit of July 2007 adopted a Protocol on Relations between the AU and RECs which intends to ensure that the AU and the RECs work in a coordinated manner

²⁷⁸ For a list of AU RECs and their functions, see www.au.int/en/ (Date of use: 18 April 2014).

²⁷⁹ The Treaty Establishing the African Economic Community (Abuja Treaty) of 1991 (OAU CAB/LEG/28.1) called for the creation of an African single currency by 2023 and a Central Bank by the year 2028.

towards the realisation of the goals of the Abuja Treaty and those espoused in the Lagos Plan of Action 1981.²⁸⁰

The organisational and institutional structure of the OAU, AU and the RECs is geared towards the creation of an integrated Africa. At the time of writing 53 African states were members of the AU and subscribe to its charter. The current head of the AU Commission is a South African, Dr Dlamini-Zuma, a former Cabinet minister in South Africa. It is submitted that the country attaches importance to the AU and its objectives. The alignment of South African policies with those of the SADC on matters of investment and trade as well as the alignment of SADC to the AU agenda for an integrated AEC in line with the Abuja Treaty is in my view a critical step for the country. It is further submitted that, the long term overarching strategic objective of African states in the pursuit of economic growth and development depends on the success of the AEC.²⁸¹

The AEC is being established in six phases as per Articles 6 and 88 of the Abuja Treaty. Though the treaty was signed in June 1991 it only came into effect in May 1994 when the required number of states had submitted instruments of ratification. The treaty envisages a 34-year implementation period from 1994 and hence the full realisation of the AEC is planned for 2028. The critical stages of the AEC implementation are as follows:²⁸²

- a) Stage 1 (from 1994): Duration 5 years

Strengthening of RECs and creation of RECs in regions not covered

- b) Stage 2: Duration 8 years

²⁸⁰ The Lagos Plan of Action for the Economic Development of Africa 1981(1495 UNTS 247) was also developed under the auspices of the OAU in April 1980, Lagos, Nigeria; See also Muller 2007 1(1) *HJES* 16-34 and Muchie 2002 (407) *New Africa* 34.

²⁸¹ See Polity <http://www.polity.org.za/govdocs/pr1022a.html> (Date of use: 23 July 2014). The South African ambassador to the OAU signed the Treaty Establishing the African Economic Community (AEC), commonly known as the Abuja Treaty, on behalf of South African, see also Magombo <http://www.allafrica.com/stories/199907130008.html> (Date of use: 10 April 2015).

²⁸² See Abuja Treaty.

RECs are required to conclude a timeline for gradual liberalisation of intra-community trade, and to achieve sectoral integration in trade, agriculture, money, finance, transport, communications, industry and energy; the objective being to increase harmonisation and coordination among member states of the REC

c) Stage 3: Duration 10 years

Establishment of Free Trade Area and Customs Union in each REC

d) Stage 4: Duration 2 years

Coordination and the harmonisation of REC initiatives towards the creation of a Continental Customs Union

e) Stage 5: Duration 4 years

Creation of an African Common Market (ACM)

f) Stage 6: Duration 5 years (completion 2028)

Develop and strengthen the ACM, including free movement of people, factors of production, economic and monetary union, an African Central Bank and African currency, culminating in an African Parliament.

The AEC programme is currently in stage 3 wherein the RECs are required by 2018 to achieve the critical step of creating a customs union and a free trade area. These are significant African integration milestones that require countries to dismantle protectionist trade policies and harmonise customs policies and regulation.

5.3.4 Southern African Development Community

The SADC is a REC within the AU system of which South Africa is a member state. The SADC treaty was adopted in Namibia in August 1992 and is a binding international treaty. The SADC replaced the Southern African Development

Coordination Conference that had been established in 1980.²⁸³ The SADC region is made up of 15 southern African countries and has a secretariat based in Gaborone, Botswana. The SADC maintains the Regional Indicative Strategic Development Plan (RISDP)²⁸⁴ that was adopted in 2003 and has a number of priority intervention areas (PIAs). In 2007, the SADC Council adopted 12 priority sectors that must be implemented so that the overarching goal of regional integration could be achieved.

One of the twelve PIAs deals with trade/economic liberalisation and development. As part of the attempts to achieve regional integration, SADC has taken a number of steps to liberalise trade. The region currently has less than five years to reach the first important milestone of integration by 2020. Trade liberalisation involves the opening of markets to international trade by reducing trade restrictions. A SADC Protocol on Trade was concluded in 1996, followed by the Free Trade Area Agreement of 2008.²⁸⁵ Other important policy documents relating to the SADC's Economic and Investments policy are the SADC PFI of 2006 (which is the subject of section 5.3.4.1 below) and the Memorandum of Understanding on Macroeconomic Convergence of 2002, which was annexed to the PFI. The basis of macroeconomic convergence rests on an objective that requires all SADC member states to cooperate²⁸⁶ in the creation of economic policies that promote stability in deficit levels, inflation, current account balances and microeconomic fiscal responsibility.²⁸⁷

²⁸³ See SADC <http://www.sadc.int/about-sadc/overview/> (Date of use: 11 April 2015). The Regional Indicative Strategic Development Plan (RISDP) is a plan guiding SADC states towards integration by 2020. The countries that make up SADC are Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

²⁸⁴ *Ibid*

²⁸⁵ According to SADC, "[a] Protocol is a legally binding document committing Member States to the objectives and specific procedures stated in it. In order for a Protocol to enter into force, two thirds of the Member States need to ratify or sign the agreement, giving formal consent and making the document officially valid."

²⁸⁶ The SADC Treaty under article 6(1) and 6(4) require Member states to cooperate with and assist the institutions of SADC. Member states are obliged to refrain from taking measures likely to jeopardise the sustenance of SADC principles.

²⁸⁷ *Ibid*.

5.3.4.1 SADC Protocol on Finance and Investments 2006

The principal reasons provided by SADC member states for the conclusion of the PFI are the following:²⁸⁸

- to accelerate economic growth
- to accelerate investment and employment
- to increase cooperation in and coordination and management of macroeconomic, monetary and fiscal policies
- to establish and sustain macroeconomic stability as a precondition to sustainable economic growth and the creation of a monetary union in the region

The PFI was signed in Maseru, Lesotho in August 2006 and entered into force in April 2010. The Republic of South Africa ratified the PFI on 4 February 2008. The country is therefore bound by the provisions of the PFI and is expected to put in place municipal laws that ensure compliance with the provisions thereof. Article 2(1) of the PFI states the following:

This Protocol seeks to foster *harmonisation of the financial and investment policies of the State Parties* in order to make them consistent with objectives of SADC and ensure that any changes to financial and investment policies in one State Party do not necessitate undesirable adjustment in other State Parties. (Emphasis added)

Article 2(1) clearly sets the basis for the rationale that member states must ensure coordination of policies with SADC in the pursuit of the overarching goal of integration of the SADC by 2020.

5.3.4.1.1 Dispute settlement

Article 24(3) of the PFI covers disputes among state parties, encouraging dispute referral to the SADC Tribunal for adjudication.²⁸⁹ Article 25 requires

²⁸⁸ SADC [http://www.sadc.int/documents-publications/show/Protocol%20on%20Finance%20and%20Investment%20\(2006\)](http://www.sadc.int/documents-publications/show/Protocol%20on%20Finance%20and%20Investment%20(2006)) (Date of use: 8 December 2014). The nations of SADC “[a]cknowledge as their collective duty to achieve economic growth and balance intra-regional development, compatibility among national and regional strategies and programmes.”

state parties to take such measures as are necessary to ensure that obligations arising out of the PFI are fulfilled. Article 26(3) requires that any amendments to the PFI be approved by a supermajority of 75 per cent of the members. Hence, a high threshold is set for any amendments to the protocol and it will be a difficult hurdle for any one member state to achieve that level of support purely driven by domestic consideration.

The SADC Tribunal was controversially suspended by the SADC heads of State in 2011. This resulted in the Southern Africa Litigation Centre (SALC) and Pan African Lawyers Union (PALU) requesting an advisory opinion from the African Court on Human and People's Rights (ACHPR). This application was based on a requirement to determine whether:²⁹⁰

- the decision the SADC Heads of State and Government to suspend the SADC Tribunal and not to reappoint or replace members of the Tribunal whose terms had expired was consistent with the African Charter, the SADC Treaty, the SADC Tribunal Protocol²⁹¹ and general principles of the rule of law;

²⁸⁹ See SADC Tribunal <http://www.sadc-tribunal.org> (Date of use: 2 February 2015). The SADC Tribunal was established in 1992 by article 9 of the SADC Treaty as an institution of the REC based in Windhoek, Namibia. The Tribunal was suspended by the SADC Heads of State in May 2011. The SADC Tribunal, inaugurated in 2005, had made a number of decisions unfavourable to SADC governments, particularly Zimbabwe. Most of the judgments against Zimbabwe related to the nationalisation of land and the ensuing disputes with local and foreign investors. See James <http://www.southernafricanlitigationcentre.org> (Date of use: 2 February 2015). The Supreme Court of Appeal in South Africa held that the decisions of the SADC Tribunal are enforceable in South Africa. In the case of *Government of Zimbabwe v Fick and Others* [2012] ZASCA 122, the Supreme Court of Appeal held that the decisions of the SADC Tribunal are enforceable, and property belonging to the government of Zimbabwe could be sold in execution of the SADC Tribunal's costs order. This decision was upheld by the Constitutional Court decision on 27 June 2013, in *Government of Zimbabwe v Fick* [2013] ZACC 22. The farmers who were the applicants attempted to have the SADC Tribunal decisions that rendered the expropriations unlawful registered in Zimbabwe. The Zimbabwean High Court held that registering the SADC Tribunal rulings would be contrary to public policy, as it was contrary to the Constitution's land reform clauses. SALC and PALU filed a request to the ACHPR requesting the court to utilise its advisory powers to rule on the legality of the suspension of the Tribunal by the SADC leaders. Nicole Fritz, executive director of the SALC, stated: "Without the Tribunal, most of the region's inhabitants – who cannot access credible domestic courts – have no real prospect of securing justice and redress."

²⁹⁰ See ACHPR Request No. 002/2012 by PALU and SALC

²⁹¹ See SADC Protocol on Tribunal and Rules Thereof 2000.

- the decisions of the SADC Summit of August 2010 and May 2011 violated the institutional independence of the Tribunal and the personal independence of its judges as provided for in the African Charter and the UN Principles on the Independence of the Judiciary;
- SADC's 18 August 2012 decision violated the right of access to justice and effective remedies as guaranteed in the ACHPR, the SADC Tribunal Protocol and the UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law;
- the decision-making processes undertaken in the review of the SADC Tribunal were in compliance with the SADC Treaty.

The implication of this suspension is that substantive provisions that deal with the resolution of disputes between an investor and a state party as covered in Co-operation on Investment (Annex 1) article 28(1) to (4) of the PFI lack the judicial oversight of a regional judicial mechanism.²⁹²

The provisions on the resolution of disputes in Annex 1 of the PFI, when fully implemented, create significant latitude and options for an aggrieved foreign investor to seek remedies:

- Article 28(1) allows for investors who have “admitted investments” and where there exists a dispute with the state party, if either party so wishes to submit the dispute to international arbitration after exhausting local remedies.

²⁹² See PFI and Rickard 2015-04-22 *Rand Daily Mail* 8.

- International arbitration shall mean the SADC Tribunal, ICSID or other ad hoc international arbitration conducted under UNCITRAL arbitration rules.
- Should these processes fail after three months of written notification of the claim, then the parties will be bound to submit the dispute to arbitration under UNCITRAL. The parties having latitude to modify the UNICTRAL rule by written agreement between the parties.

These rules of dispute settlement in the PFI are in line with BIT and other IIA provisions and contain a robust dispute settlement process that allows investors to take the matter up with an international arbitral forum in the event that they are unable to reach settlement utilising local remedies. The definition of “admitted investment” is wide and therefore covers all investments made in the SADC region either by nationals of SADC member states or by foreign investors in the SADC region. The provisions in Annex 1 relating to dispute settlement therefore provide far more extended cover than that available under the PPIB and allows for international arbitration procedures that are not provided for in the PPIB.

The South African Arbitration Act 42 of 1965 recognises foreign arbitral awards in South Africa, and the country ratified the UN Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958. Therefore, a foreign investor may approach a South African court and have an international arbitral award against the government made an order of court.

This in essence means foreign investors may sue under the PFI dispute settlement procedure and have the dispute adjudicated at an international arbitration and then have the decision enforced in South Africa. In my view, the ability to detour out of the municipal courts in line with Article 28 of the SADC PFI is likely to be utilised increasingly as the country proceeds with the cancellation of BITs.

5.3.4.1.2 Expropriation provisions in the Protocol on Finance and Investments

Article 5 of the PFI relates to investment protection and has provisions that cover expropriations or nationalisations of the investment. Article 5 provisions are in line with international law principles espoused in a number of IIAs and BITs.

Article 5 offers the investors protection from arbitrary state action and requires that any expropriation be for a public purpose and subject to the due process of law. Most importantly, where a lawful expropriation has occurred, the investor must be paid prompt, adequate and effective compensation which in effect equals market value compensation. Article 5 of Annex 1 on Investment Protection, as related to compensation, represents a departure from section 8 in the PPIB as well as from section 25(3) of the Constitution which refers to “just and equitable” compensation. It is submitted that the PFI offers a compensation provision that is similar to the Expropriation Act of 1975 and is more in line with the BITs that South Africa is cancelling.

5.3.4.1.3 Fair and equitable treatment

The principles relating to FET in the PPIB were covered in section 3.4.3 above. Article 6(1) of Annex I to the PFI guarantees FET to investors in the SADC region. This is at odds with the PPIB, which does not expressly provide for the FET principles. This in my view leaves open the question of how investors can achieve redress in situations where FET is withheld. As indicated in Chapter 3, failure to provide FET to investors was central to two ICSID cases against the Republic of South Africa.

Its exclusion from the PPIB as argued earlier, seems to be aimed at preventing international claims by investors at some social policies government may implement which may have an impact on foreign investments. Like the other Annex I provisions, the exclusion of FET from the PPIB may result in investors deferring to the SADC PFI for relief should South Africa breach this provision.

5.3.4.1.4 Most-favoured nation treatment

Article 6(2)²⁹³ of the PFI extends MFN treatment to all admitted investments in the SADC region. MFN is discussed in section 3.4.2; it ensures that investors from one state are not treated more or less favourably than investors from other states. MFN is also not expressly provided for in the PPIB. Like the exclusion of FET, this provision creates a situation where an aggrieved investor may have no local remedies available in the event of breach by South Africa of MFN and FET principles.

The PFI has other important provisions such as Article 7 that allows state parties to implement legislation that is in line with the state's public policy objectives.

Article 10 places obligations on investors to undertake social responsibility programmes in the host state. Environmental issues are covered in Article 13, and Article 14 reserves the rights of all state parties to regulate in the public interest, and to this end adopt, maintain or enforce any measure that it considers appropriate.

5.3.4.2 SADC model BIT template

In July 2012, the SADC released a BIT template called the SADC Model Bilateral Investment Treaty Template with Commentary.²⁹⁴ This BIT is in essence the standard that SADC recommends member states to follow when negotiating BITs. There is no expectation that every state will adopt every provision as indicated in the template without exception.

However, there is an expectation that the principles in the template will create a basis for negotiations and that the final treaty which each member state concludes with foreign investors will substantively mirror the strategic goals of the SADC and AU. In the introductory section of the template, it is indicated that

²⁹³ See PFI

²⁹⁴ See SADC Model BIT Template.

the PFI has been the guiding principle in developing the Model BIT and that harmonisation of investment policies and laws of member states is the primary goal.²⁹⁵ It is important to note that the template is the work of the SADC secretariat as well as a drafting committee drawn from some member states.²⁹⁶

5.3.4.2.1 *Preamble*

The drafting committee highlights the significance of making the preamble of a BIT clear with regard to the broad intentions of the two governments in so far as investments protection and the right to regulate are concerned. As discussed in Chapter 3, failure to define the broad social objective of the host state can create difficulty when a dispute arises and an arbitrator is required to interpret the BIT in areas where the clauses are unclear. Making the preamble cover the key objectives of the parties allows the BIT to be more robust and supplies necessary guidance in the event of a dispute.

The SADC Model BIT Template makes provision for a member state's right to regulate in the public interest and refers to alignment issues that the drafters indicate have been drawn from the WTO GATS agreement and form part of the policy considerations that member states need to consider.²⁹⁷ The intention is to align the template's preamble with a GATS principle that has been agreed to under international law.

5.3.4.2.2 *Investment*

The definition of what constitutes an investment and what does not can be subject to controversy and a cause of disputes. Host states in the main are in search of FDI that involve Greenfield or expansion of current operations in the desire to attract foreign exchange, create jobs and other social development objectives. However, this is not the only way in which foreign investments may

²⁹⁵ *Ibid* 3.

²⁹⁶ *Ibid.* The drafting committee was made up of representatives from South Africa, Zimbabwe, Mauritius, Namibia and Malawi, with representatives from Botswana, Mozambique, Seychelles and Angola participating in the final drafting meeting in 2012. The Model BIT is therefore not a legally binding agreement, but a recommendation to member states.

²⁹⁷ See SADC Model BIT Template 5-6.

be made in a host state. In some cases the FDI may consist of a purchase of portfolios on a stock exchange, equity purchases in existing enterprises or other intangibles. The drafting committee made note of the fact that three broad approaches need consideration when defining the investment in a BIT.

These are in Article 2 of the SADC Model BIT template and are considered below:²⁹⁸

a) Article 2(I) Enterprise-based definition

[m]eans an enterprise within the territory of one State Party established, acquired or expanded by an investor of the other State Party, including through the constitution, maintenance or acquisition of a juridical person or acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise is established or acquired in accordance with the laws of the Host... in accordance with the legal requirements of the Host State...²⁹⁹

This definition is then followed by a list of assets that an enterprise may possess and a list of what is excluded from the investment definition, namely:

- portfolio investments
- government debt securities and loans to a government
- claims to money arising from commercial transactions

This definition of investment is about recognising those investments by foreign investors that entail establishing enterprises, or expanding existing enterprises.

²⁹⁸ *Ibid* Article 2.

²⁹⁹ The intention is to recognise only those investments that entail the establishment of business ventures or creation or expansion of new or existing business enterprises.

b) Article 2 (II) Asset-based Option 1: Closed-list, Exhaustive Test

This definition of investment is based on a Canadian model BIT and focuses on creation of a list of admitted assets or those that have been established based on the laws of the host nation.³⁰⁰

c) Article 2(III) Asset-based Option 2: Non-exhaustive Asset-based Test

This approach to the definition of investment is based on the US Model BIT.³⁰¹ The definition of what is or is not an investment is more widely defined and, according to the SADC drafting committee, the most preferred by investors. It is the definition that is contained in a number of SADC BITs. The drafting committee held the view that the host states should abandon this expansive definition of investment as it yields unpredictable interpretations when disputes arise with investors. The drafting committee held the view that the option in Article 2(I) was the most appropriate definitional approach of ‘investments’ for SADC countries. The overriding philosophical approach was the attraction of meaningful investment that would result in tangible economic and social benefits for the host.

5.3.4.2.3 *Non-discrimination*

Article 4 relates to non-discrimination or the national treatment clause. Article 4(1) states that in *like circumstances*, a host may not treat local investors and

³⁰⁰ See SADC Model BIT Template. The exclusions contained in the enterprise-based definition are added and a catch-all phrase is also included in article 2(II)(10) that an investment is a “substantial commitment of capital or other resources, the expectation of gain or profit, the assumption of risk and degree of significance for the Host States development”.

³⁰¹ See, SADC BIT Model BIT Article 3 which relates to the admission of investments and indicates that investments should be admitted in accordance with the Host States applicable laws applied in good faith. The drafting committee makes a number of recommendations on excluding explicit provisions in a treaty that relate to investment liberalisation. This aspect of the investor-host relationship should be subject to municipal laws to prevent, granting warranties about economic liberalisation that may later inhibit regulations that are designed to favour locals. The PFI does not contain such binding investment liberalisation provision despite pressure for its inclusion in treaties. Where a state has included a liberalising commitment, then the state should develop a detailed list of exclusions that are part of the treaty.

their investments more favourably than it treats the other state parties' investors and their investments. This is subject to limitations in Articles 4(3) to 4(5) and extends in essence the national treatment provisions discussed in Chapter 3 of this thesis. There is a deliberate exclusion in the template of the MFN treatment provisions often found in a number of BITs and IIAs.³⁰²

The rationale for the exclusion of the MFN principle in the template relates to the attempts to limit the coverage of BITs to the contracting state parties. The view was held that just extending what is essentially a bilateral agreement to other states that are not party to the negotiations through MFN may have unintended consequences. Thus it would be in the host state's best interests to limit the agreement to the bilateral relationship so as not to restrict opportunity to negotiate differing terms with other nations. This is compounded by varying application of the MFN in arbitral rulings, usually at the expense of the developing state respondents in the arbitration.

5.3.4.2.4 *Fair and equitable treatment*

Article 5 covers the FET provision, a common protection extended to foreign investors in a number of bilateral treaties, but a subject of great dispute. The challenges of the FET provisions in BITs and the risks they present to host states have been discussed in Chapters 2 and 3 of this thesis. The drafting committee recommended its exclusion in the SADC Model BIT template out of concern about the wide interpretations that various international tribunals ascribe to the FET principle when disputes arise.³⁰³

³⁰² *Ibid* 21. The drafting committee stated that "[i]t is critical to note that the scope of coverage for post-establishment non-discrimination is just as important to set out as the scope of any pre-establishment rights in a treaty ... This additional text, also seen in the Investment Agreement of COMESA of 2007 (CCIA), ensures the reason for any measure can be fully considered, and not just their financial impacts".

³⁰³ SADC Model BIT Template 23, in article 5(1), if the FET provision has to be included, then the provision must be limited to protection equivalent to the customary international law standard as it relates to the treatment of aliens. The drafting committee was of the view that being express about which customary international law standard applied to FET would limit a variety of interpretations and that in essence this was the original construct of the FET prior to the expansive interpretations that have since been applied by numerous tribunals. Further, as an alternative provision to the FET provisions is proposed in article 5(1) to 5(5) as the "fair administrative treatment provision". The Fair

5.3.4.2.5 *Expropriation*

The expropriation, seizure, taking or nationalisation of foreign property has been covered in the model BIT. It is one of the most controversial issues in the investor-host state relationship. Article 6 of the template covers the provisions that are recommended for SADC states. In article 6(1) of the template, an expropriation or nationalisation of an investment can only occur under the following conditions: it is in the public interest, according to due process of law and on payment of fair and adequate compensation within a reasonable time. This articulation of the expropriation compensation in 6.1(c) of the template differs from the provisions in most BITs, WTO agreements and more importantly represents a departure from the PFI. This creates a difference between the SADC protocol and the SADC Model BIT Template in respect of compensation calculation.

The compensation standard in the PFI is set as prompt, adequate and effective. The BIT template sets a fair and adequate standard. Article 6(2) of the BIT template, it is submitted, attempts to balance the public interest and the interests of other stakeholders who would be affected by the expropriation, taking into account all other relevant factors. These relevant factors are listed and serve as discounting parameters when calculating what constitutes fair and adequate compensation.

A second option provided in article 6(2) in the BIT template is linking the fair and adequate compensation to the market value of the expropriated property immediately prior to the expropriation being made public. However, the value derived must also factor in other relevant circumstances.

A third option takes the market value prior to the expropriation being made public. This option in essence requires that the investor is fully compensated at the market value. The BIT template excludes the concept of non-discrimination as being a condition for lawful expropriations as usually contained in a number

Administrative Treatment provision was recommended by South Africa to the drafting committee as an alternative.

of IIAs and BITs. This was done to allow for targeted expropriations which are not of a general nature to be deemed legal. For instance, it is possible that a state party intends to make changes to the platinum mining sector in a country without necessarily having an impact on all mining activities. The foreign investors in the platinum sector may then claim discrimination as governmental measures may have a detrimental impact only on this mineral sector to the exclusion of other mining sectors.

Another difference between the PFI and SADC BIT template relates to the timing of the compensation. The PFI refers to a “prompt” and “effective” time while the BIT template in Article 6(1) refers to “reasonable time”. These standards are significantly different, as “prompt” and “effective” suggest that payment for the expropriation should be done without any delay and in a manner that restores investors to the same condition they were in prior to the expropriation being undertaken. A “reasonable time” standard has the implication of leaving the determination of what is and what is not reasonable to the state that has undertaken the expropriation. A host may delay compensation and claim budget constraints. It is also possible that an investor may be compensated but fails to secure the authorisations to repatriate the funds.

Article 8 of the BIT Template covers the right of the investor to repatriate the funds. However, this right is not absolute, as provided for in Article 8(3) and 8(4) of the template.³⁰⁴ There are a variety of economic, social or crime-related factors that may trigger a decision by the host state party to delay payments to investors. Though provision is made for a consultation to occur with the affected investor under Article 8(4)(b), the investor negotiates from a point of weakness. The template is silent on the opportunity cost implications to the investor caused by these time delays. There is also no account of the time value

³⁰⁴ Article 28 of the SADC Model BIT Template states that a state party may prevent or delay a transfer through the non-discriminatory application of its law and regulations relating to, in 8(3)(a) bankruptcy, insolvency or the protection of the rights of creditors. Article 8(4)(a)(i) to (iii) allows a state party to delay payments were in the opinion of the state party, such payments may threaten or cause difficulties with balance of payments, external financial difficulties, macroeconomic factor including exchange rates.

of money losses that investors potentially suffer when payments are delayed by bureaucratic procedures.³⁰⁵

The BIT template also attempts to limit the treatment of certain state measures in respect of IP from classification as expropriations. The matter of compulsory licensing was covered in section 4.4.5.3 above, including its implications for developing countries, particularly with regard to access to more affordable medicine or generic equivalents. The right of state parties to regulate over IP in line with TRIPS and other international agreements is recognised in the PFI.³⁰⁶

5.3.4.2.6 *Safety and security of the investment*

Article 9(1) and 9(2) of the BIT template deals with the advised levels of protection that should be provided to foreign investments. The template further attempts to separate the protection investors must expect under the safety and security provisions in the BIT from the FET provisions. This is aimed at limiting the likelihood of a dispute concerning the FET standard being also applied to the safety and security provisions.

The approach that states are advised to take include delinking safety and security from FET and linking the protection to a MFN general provision. The host must therefore ensure conditions that create safety and security for all investors from all states invested in the host.

This eliminates a bilateral analysis of the safety and security provision, allowing host governments to treat the matter as general and applicable to all foreign investors and including local investors. This will prevent investors from other nations claiming more extensive protection than the levels of protection available to investors from other states. Should a breach of this standard occur then the host is better able to make compensation awards. The wording of the

³⁰⁵ *Ibid.* Article 6(8) creates rights for investors to seek a review by a judicial or other authority based on municipal laws, of the decisions taken by the host in relation to the expropriation of the investment.

³⁰⁶ *Ibid.* Article 6(5) removes the issuance of compulsory licences from being treated as an expropriation nor the revocation or creation of IP in so far as such measures are in line with international agreements on intellectual property.

“safety and security” provisions is general in nature, thus preventing the host state from being subjected to potential large awards against it at international arbitration hearings.³⁰⁷ This standard, as contained in the SADC template under Article 9, provides lower levels of guarantees of safety and security than the levels usually contained in BITs.

BITs usually contain the “full protection and security provision” which at times makes the host state liable for creating a safe and secure environment beyond such a state’s capability.³⁰⁸ The full protection and security standard has been expanded and given a more expansive meaning in BITs that may bind a host state to provide protection that exceeds that granted to domestic investors. The template therefore makes recommendations aimed at limiting the exposure of state parties to litigation due to breach of the standard and allows for a more general and equitable approach to be applied in instances where the host state has committed a breach.

5.4 Conclusion

In Chapter 5 an attempt was made to identify some key principles that drive the strategy processes of African countries, particularly those that relate to foreign investment regulation. The chapter has explored the underlying motivation of African states as they migrate from a precolonial to a postcolonial order. The African countries, as they seek to assert themselves in the exercise of sovereignty, have formulated continental strategies and ideological frames. The pursuit of these strategies led to the creation of the OAU in 1963 in Addis Ababa; the precursor to the AU established in 2004. The Lagos Plan of Action and the Abuja Treaty set the overarching strategy for a unified continent driven by the need to create a common market, currency and regulatory approach.

The RECs are aligned to the achievement of these objectives of the continent and through various protocols have set common agendas for the creation of a continental currency system by 2023. Within the SADC, various legal

³⁰⁷ Article 9(1) and (2) of the SADC Model BIT Template.

³⁰⁸ See Sornarajah *The international law on foreign investment* 205.

instruments have been adopted to ready state parties for the achievement of these African strategic plans. The SADC aims to deliver regional integration as a precursor to continent-wide integration.

South Africa is a key member state in the SADC and AU. The current AU chairperson of its secretariat is a former Cabinet minister in South Africa and the country has ratified SADC protocols that aim to achieve regional integration. In 1997 the country ratified the Abuja Treaty for a unified Africa, while former state president Thabo Mbeki was a founder member and first president of the AU. The country hosts the Pan-African Parliament and is one of the largest contributors to the budget of the AU, including its peace-keeping missions on the continent.³⁰⁹

Based on this analysis of the country and its African agenda, the PPIB needs to be analysed in terms of its congruence with the objectives of SADC and the AU. Due to the strategic nature that regulation of foreign investments plays in the developmental agenda of many African countries, RECs have developed model templates that guide how African states can better negotiate terms of entry, regulation and exit of foreign investments. The Model BITs attempt to guide state parties towards uniformity of rules to allow for better intra-and extra-African FDI flows.

RECs have also concluded protocols among state parties to facilitate regional economic cooperation, such as the SADC Protocol on Finance and Investments. As demonstrated in Chapter 4, a number of African countries are also members of global organisations such as the IMF and WTO. The countries are also bound

³⁰⁹ See Pan-African Parliament <http://www.pan-africanparliament.org> (Date of use: 4 February 2015). The Pan-African Parliament (PAP) was established in 2004 pursuant to Article 17 of the Constitutive Act of the AU, and is one of the nine organs provided for in the Abuja Treaty of 1992 that established the AEC. Based in Midrand, South Africa, the vision of the PAP is to evolve into a full legislative Parliament with members elected based on universal suffrage. Some of its key objectives include:

- a) Facilitating cooperation and development in Africa.
- b) Facilitating the effective implementation of the policies and objectives of the OAU/AEC and, ultimately, of the AU.
- c) Familiarising the peoples of Africa with the objectives and policies aimed at integrating the African continent within the framework of the establishment of the AU.

by IIAs and MTAs concluded at these platforms. It therefore creates a challenge for individual countries to navigate the plethora of these agreements to which they are party, overlaid with regional and domestic policy considerations. The policy formulation process becomes opaque and inconsistent. It is therefore a critical matter for countries to develop consistent, well-developed policies to guide government action.

Some inconsistencies also exist within RECs and the various protocols and policy documents produced. For example, the PFI and SADC Model BIT Template show fundamental differences with respect to how foreign investments are to be treated in the SADC region. The recommendations contained in the SADC Model BIT Template, if implemented by a state party, would be in breach of that state party's obligations under the PFI. A further complication arises when the legal position of a state's municipal laws are contrasted with regional or international positions.

In the case of South Africa, there appear to be contradictions between the Constitution of the Republic, the PFI, BITs, WTO agreements, SADC Model BIT templates and the provisions contained in the PPIB.

A similar challenge exists in other SADC countries such as Lesotho and Zimbabwe, where investors have sued these countries at the SADC Tribunal for breach of SADC agreements and national laws.

Recognising the conflicting nature of some of these obligations placed upon states and the legal risks they posed to states, it is my view that the heads of state of SADC countries decided to suspend the SADC Tribunal in 2011. The decision to suspend the Tribunal was controversial, and an application for an advisory opinion was lodged with the ACHPR.³¹⁰

³¹⁰ See Mackenzie *et al* *The manual on international courts and tribunals* 387. In terms of article 30 of the Charter, the purpose of the ACHPR is to ensure compliance with the African Charter on Human and People's Rights of 1981. The African Commission was established in 1987 and has supervisory powers over all 53 African state parties to the African Charter. In 1998 the OAU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples'

It is clear that achieving a unified African economic blueprint is one of the overarching objectives that AU member states have committed to. The full impact of this analysis is that South Africa is at a policy crossroads in terms of its commitment to the African integration agenda. The country is faced with a requirement to regulate in the public interest on the one hand, contrasted with its international obligations under BITs and other IIAs that are binding on the country.

The socioeconomic situation in South Africa is dire as the country faces increasing social pressures, low economic growth and a power supply crisis that may further retard the economy. While FDI is not the only determinant of economic growth, it does play a significant role in the South African economy, as discussed in Chapter 1. Recognising that attracting new FDI and growing the existing FDI levels is an important policy choice, the decision to terminate a number of BITs with European states in 2013 and the introduction of the PPIB were significant policy events for South Africa. The response by the EU and the US to the cancellation of BITs was one of displeasure. South Africa was warned that these cancellations may hinder future foreign investments.

Chapter 6 concludes this study by summarising the identified legal implications that pertain to the enactment of the PPIB in its current form. Further, the policy inconsistencies between what is proposed for the municipal regulation of foreign investment in South Africa and South Africa's obligations to the African integration agenda are crystallised. The chapter concludes with a clear set of recommendations that can be applied by the DTI to improve upon its policies on regulation of foreign investments.

Rights (OAU Doc. LEG/MIN/AFCHPR/PROT.1 rev.2) The AU decided in 2004 to merge the African Court of Human and Peoples' Rights with the African Court of Justice, which is contained in the AU constitutive documents and intended to be an AU judicial organ. This decision by the AU created the African Court of Justice and Human Rights (ACJHR).

CHAPTER 6

Conclusion and summary of recommendations

6.1 Introduction

The cancellations of old-order BITs and the proposed replacement of the regulation of foreign investments with municipal laws are being undertaken by the DTI as approved by the South African Cabinet in 2010. The PPIB is envisaged to be passed into law and become an Act of Parliament, and will be administered by the DTI.³¹¹ The DTI's vision is to create "a dynamic industrial, globally competitive South African economy" and in trying to achieve this, is guided by a set of strategic objectives. The DTI is therefore a significant department of state in the Republic of South Africa, tasked with creating an enabling environment for the promotion of economic growth through trade and investment, achieving economic transformation and B-BBEE participation.

In 2015 the DTI published its Strategic Plan (2015/2020) that sets a number of key objectives for the DTI in South Africa.³¹² In the DTI Strategic Plan, Minister Davies noted that the president of the Republic of South Africa has defined the requirement for the achievement of *radical socioeconomic transformation* as

transforming the structure of the economy through industrialisation, broad-based black economic empowerment, and through boosting and

³¹¹ See DTI http://www.thedti.gov.za/about_dti.jsp (Date of use: 3 March 2015). DTI's vision is to create "[a] dynamic industrial, globally competitive South African economy, characterised by inclusive growth and development, decent employment and equity, built on the full potential of all citizens". Some of the DTI's strategic objectives are:

- a) the transformation of the economy to promote industrial development
- b) Build mutually beneficial regional and global relationships to advance South Africa's trade, industrial policy and economic development objectives
- c) Facilitate broad-based economic participation through targeted interventions to achieve more inclusive growth
- d) Create a fair regulatory environment that enables investment, trade and enterprise development in an equitable and socially responsible manner
- e) Promote a professional, ethical, dynamic, competitive and customer-focused working environment that ensures effective and efficient service delivery.

³¹² DTI <http://www.dti.gov.za/DownloadFileAction?id=99> (Date of use: 3 March 2015).

expanding agriculture, manufacturing and beneficiating South Africa's mineral wealth.³¹³

The underlying motivation is to grow the economy and achieve the objectives set in the NDP. The DTI intends to pursue the goals of inclusive economic growth to achieve the 5 per cent growth level set in the NDP by utilising the following key policies:³¹⁴

- the Industrial Policy Action Plan (IPAP) will remain the central policy driver
- preferential procurement and supplier development of government expenditure ensuring at least 75 per cent local content
- creation of black industrialists through targeted supplier development initiatives, particularly with private sector participation
- advancing beneficiation and mineral value addition through the Mineral Beneficiation Action Plan (MBAP)
- further implementation of DTI investment and competitiveness incentives
- roll-out of special economic zones (SEZs)
- implementation of the B-BBEE Amendment Act 46 of 2013
- enhance South Africa's participation in the BRICS group so as to grow trade
- advancing trade and economic integration in Africa including work on a Tripartite FTA incorporating SADC, COMESA and EAC.

The plans set out by the DTI are not an exhaustive list of all areas of interventions by the government to stimulate the economy and achieve higher economic growth. They relate to areas that are under the management and control of the DTI minister, whose department must develop the necessary policy and legislative tools to advance trade and industry.

³¹³ *Ibid.*

³¹⁴ See DTI *Strategic Plan 2015/2020* 7-11.

Analysis of the Strategic Plan of the DTI reflected four main strategic themes that will drive it for the next five years:

- economic growth that creates jobs, reduces inequality and contributes to the eradication of poverty
- BEE, utilising B-BBEE legislation and the participation of the private sector in supplier development initiatives
- African economic integration and the New Partnership for Africa's Development (NEPAD) programme³¹⁵
- BRICS participation to enhance the trade development agenda

The objectives that drive FDI promotion and regulation relate to the desire to attract new FDI investment opportunities to South Africa. Foreign investors are required to advance industrialisation, mineral beneficiation and manufacturing as well as to boost agricultural output and exports. What is clear is that the state is unable to attract the required levels of investment that will promote economic growth without private sector participation. Proposed legislative instruments such as the PPIB, Expropriation Bill and others, as much as they are legal in nature, also serve as economic policy signals on the long-term intentions of the state.

The legislative environment is one of the variables that potential trade and investment partners take into account before making an investment, as discussed in sections 2.4.1 to 2.4.5. This study primarily focuses on the PPIB and its legal and policy implications for South Africa.

This study focused on the critical review of the PPIB as well as a comparative analysis of the Bill with international law, evolving African norms on foreign investment regulation and the Constitution of the Republic of South Africa, 1996. The results of this analysis have been used to crystallise succinct recommendations to the DTI, in respect of policy improvements that should be

³¹⁵ Nepad <http://www.nepad.org/about> (Date of use: 1 March 2015). NEPAD is an AU strategic framework for pan-African socio-economic development. Based in South Africa, NEPAD aims to galvanise African leaders so as to address poverty, development and the international marginalisation of the continent.

implemented to enable a more coherent and robust approach to foreign investments regulation by South Africa. This will assist in the finalisation of the draft PPIB should DTI recommend its enactment to Parliament. The recommendations contained in this thesis are also directed at the “new-generation” Model BIT template the DTI was instructed by Cabinet to develop in 2010.

This thesis focused on the five critical provisions in the PPIB that were considered general legal principles in respect of the regulation of foreign investments contained in most BITs worldwide:

1. definition of the investment;
2. treatment of the investment;
3. expropriation of the investment;
4. dispute resolution procedures; and
5. protection and security of the investment.

Though the PPIB is intended to be applicable to all investors in the country, focus has been limited to those areas that will impact on foreign investors. The PPIB is intended to apply equally to all investors; however, the way in which the bill is drafted shows a primary focus on regulation of foreign investments. The PPIB attempts to replace BIT provisions with similarly worded provisions, excluding others and introducing new concepts to foreign investment regulation in South Africa.

The thesis has critically evaluated a number of legal and socioeconomic factors that are relevant to South African and other African countries. The human rights and race relationship dynamics in South Africa were fleshed out in detail.

This was done because the country’s apartheid history of segregation, abuse and exclusion is still considered to date an important variable in the policy formulation of government.

As demonstrated in Chapter 1, black South Africans still experience economic marginalisation, 20 years into a post-apartheid, democratic ANC government.³¹⁶

This has created a situation where government policy-making in South Africa is, on the one hand, based on open-market reforms, and simultaneously redistributive in nature and highly regulated. Race-based divisions are still major drivers in the country and play a significant role in economic and other policy development debates. The DTI has been instrumental in the promulgation of B-BBEE legislation and has progressively developed capacity to enforce compliance with these empowerment laws. The revised BEE scorecard will come into effect for companies that will have BEE ratings from 1 May 2015. This revised score card is expected to be more stringent and many companies are expecting their BEE scores to decline. The DTI is setting up a commission with policing powers to monitor compliance with the new regulations.

Companies in South Africa that want state contracts and tenders are required to achieve particular BEE ratings, to achieve sector-specific transformation requirements, to maintain licences and to observe employment affirmative action targets. This plethora of laws and regulations is motivated by an ideology that requires the empowerment of blacks with a concomitant proportional reduction of white economic power and influence.

A final consideration in the South African socioeconomic policy analysis that was conducted in the study relates to the SADC and AU programmes in which South Africa, as discussed in Chapter 5, plays a key role. The country hosts a number of pan-African institutions and is party to the Macro-Economic Convergence policy and other SADC and AU principles aimed at African unification.

³¹⁶ See the media statement issued on 6 February 2014 by the National Empowerment Fund, noting an acknowledgement by the JSE, which supports pronouncements made by President Jacob Zuma, that only 3 per cent of direct shareholding in the JSE was in the hands of black South Africans.

This study made a fundamental assumption that the government of the Republic of South Africa is committed to achieving the objectives of the AU programmes and thus that the country will progressively develop policy that moves towards the full realisation of an African Economic Community (AEC) as espoused in the Abuja Treaty and other continental integration plans.

As indicated in Chapter 1, the Minister of Trade and Industry, Dr Rob Davies, dispelled the notion of any link between BITs and the levels of FDI inflows into South Africa. This view has been supported by other scholars and researchers who maintain that there is no direct correlation between concluding BITs and FDI.³¹⁷ Regardless, the PPIB has caused significant discussion and commentary in the country with both the US and EU ambassadors urging caution and indicating that the PPIB may cause investors to have concerns about the security of their investments.

This must also be viewed in light of the increasing calls from some sectors of the country for the nationalisation of strategic industries as part of the realisation of a National Democratic Revolution.³¹⁸ It is important to note that the revisions of its foreign investment regulations that South Africa is undertaking are not of a unique character, as a number of other nations have undertaken regulatory changes. The US, EU, Brazil, Canada, India and Australia are some of the nations that have recently made revisions to investment treaties. The AU Commission and the UN Commission on Africa have made recommendations for African states to undertake such revisions with a view of renegotiation or termination, particularly at this juncture when a number of first-generation BITs are reaching their expiry date.

Changes have entailed clarifying definitional issues; limitation of certain rights; modernisation of the BIT templates; incorporation of investor obligations and entrenching the state's rights to regulate. At this stage it is important to reflect on the underlying reasons advanced by the DTI to Cabinet and Parliament for

³¹⁷ See Mann 2013 (17) *LCLR* 521-544.

³¹⁸ See Nzimande <http://sacp.org.za/main.php?ID=1850> (Date of use: 15 April 2015).

regulatory change, covered in detail in section 1.2. The reasons were also explained by the DTI minister when making presentations at international conferences. After conducting a review between 2007 and 2010, the DTI came to the following conclusions supporting the need for a regulatory change to the prevailing BIT system:

- there is no proven direct link between concluding BITs and the level of FDI flow into a country;
- in their current construct, BITs inhibit the South African government's ability to regulate in the public interest;
- certain provisions are ambiguous and subject to multiple interpretations;
- certain provisions in the BITs are unconstitutional;
- international dispute resolution is skewed in favour of investors and lacks legal legitimacy;
- there is no need for international arbitration as South African courts are sufficiently independent to protect the rights of investors;
- BITs create forms of protection that are not available to local investors, creating an unfair situation.

For these reasons the Cabinet in 2010 deemed it necessary to require the cancellation of the current BITs and their replacement with municipal laws. The Cabinet further required the development of a modernised BIT template to be utilised in future. The DTI is required to develop this Model BIT. BITs will only be concluded in cases where there are compelling economic or political considerations.

6.2 Legal implications of the enactment of the Promotion and Protection of Investments Bill

The PPIB has a number of domestic legal implications should the Bill be passed into law in its current form. Section 2(a) to 2(d) of the Bill deals with the "Interpretation of Act", and states that the Act must be applied with regards to the "Constitution, International Law and Customary International Law

consistent with the Constitution and other conventions and agreements to which South Africa is or will become a party”.³¹⁹ The PPIB has a number of legal implications, which have been discussed in detail in this study and are summarised in the following section.

6.2.1 Definition of an investment

The PPIB takes an enterprise-based approach to the definition of investments. The Bill requires that the applicability of the PPIB be limited only to investments of a “material economic nature” and/or investments that are accompanied by a significant physical presence in South Africa, as per section 1(f)(i) of the Bill.³²⁰ The implication of this provision is that the Bill seems to recognise only commercial investments or large plant and equipment, manufacturing or other major operational facilities as being investments. Section 1(f)(ii) of the Bill excludes commercial contracts for the sale of goods and services and credit extension from being defined as investments in South Africa.

An investor is defined in section 1 as any person who holds an investment, regardless of nationality. The legal implication is that the Bill therefore applies equally to foreigners as it does to local investors. The definition of what constitutes a material economic investment or a significant physical presence in my view is vague such³²¹ that it will lead to varying interpretations and may possibly be challenged. The definition of investments in the Bill means that foreign-owned property held for private investments, not commercially traded, do not qualify as “investments” under the PPIB per sections 1(f) and 5(1)(b); for example, private holiday homes, farms, yachts and aircraft.

³¹⁹ See PPIB.

³²⁰ See SADC Model BIT Template 9. The definition of Investments in the PPIB seems to be closely aligned with the SADC BIT definition. See also the *Salini Principle* as defined in the *Salini Costruttori S.p.A and Italstrade S.p.A v Jordan* (ICSID Case No. ARB/02/13). The *Salini* arbitration at the ICSID was based on the BIT between Italy and Jordan.

³²¹ Section 1(f)(i) of the PPIB.

Foreigners that hold such qualifying property in South Africa would therefore be subject to protection as defined in the Constitution under section 25 and all other laws applicable to locals.

The PPIB does not address the matter of portfolio investments expressly, deferring to the Financial Markets Act No 19 of 2013 and as such creates room for dispute about what is and is not an investment with respect to portfolio investors. Section 5(1)(b) adds further complexity in the definition as it refers to “acquired and used”. Portfolio investors cannot be seen as “using” the investments in a similar manner to a manufacturing concern.³²² In the main, the enterprise-based definition of investments utilised in the PPIB under section 1 is progressive and aligned to some best practice recommendations emanating from the SADC BIT template, save for the identified drafting challenges above.

In Annex 1 of the PFI, at article 2, portfolio investments are included as constituting an investment. However, the rights of state parties to exclude speculative short-term portfolio investments are acknowledged, particularly when such investments are of a nature that would have a negative impact on the host’s economy. It is submitted that in its current form, the definition of investment in the PPIB may need redrafting to resolve the definitional issues identified should the bill be enacted.

6.2.2 Treatment of the investment

The PPIB extends only national treatment protections to foreign investors under section 6.

The MFN and FET principles that form part of a number of MTAs, IIAs and BITs that South Africa is party to, have not been expressly provided in the PPIB provisions. The national treatment protection in the Bill is limited by section

³²² See Sornarajah *The international law on foreign investment* 8-9 where the author argues that portfolio investments cannot be considered as FDI. The investors take the risk upon them to purchase these shares and cannot sue the exchange or public entity should the investor suffer loss. See also *Fedax v Venezuela* 37 ILM 1378 (1998) where it was found that portfolio investments are not covered by customary international law except where an investment treaty extends such protections.

6(4), which introduces the concept of “like circumstances”. This principle in my view is derived from the SADC Model BIT Template; that each case in respect of foreign investors, seeking national treatment should be considered on a “case-by-case” basis. The manner in which section 6 of the PPIB is drafted may lead to interpretational challenges and create an administrative burden of evaluating what constitutes a “like-for-like circumstance” while demonstrating just administrative action as required by the Constitution.

This may be overcome by developing clear criteria for the application of this provision to foreign investments so as to limit ambiguity. The exclusion of MFN is neither in line with the SADC Model BIT Template provisions nor the PFI, as both instruments contain expansive provisions providing for the extension of MFN protections to foreign investors. The exclusion of MFN is also contrary to the WTO provisions that South Africa is party to, as discussed in section 4.4.5.2. The exclusion of MFN appears also contrary to article 52 of the Trade Development and Cooperation Agreement of 1999 between South Africa and the EU. This creates legal challenges as investors may bypass the PPIB and lodge international disputes against South Africa for denial of MFN.

There needs to be clarity in terms of how these contradictions will be managed between the applicable municipal law and treaty obligations that are binding on the country. This matter forms part of the policy recommendations covered in section 6.3 below.

The FET standard of protection of foreign investments has been a source of significant controversy in investor-host state relations, as discussed in Chapters 3 and 4. Breaching of the FET protections by the host has been one of the leading reasons cited by investors in their applications for ICSID dispute resolution. However, the FET provisions, due to the expansive interpretations thereof given by international arbitrations, have the potential to cause extensive limitations to the host governments’ public policy space. The exclusion of the FET provision in the PPIB is in my view therefore appropriate.

This supports the government’s stated objective of requiring more space to regulate in the public interest. The FET provision as interpreted by some

international arbitration forums has been extended to the maintenance by the host of a stable regulatory environment. Regulatory changes that may create different conditions to those that existed when the investment was made by the foreign investor may be viewed as a breach of FET. This may restrict South Africa's ability to pass legislation that may be in the public interest but unfavourable to foreign investors.³²³

6.2.3 Expropriation of the investment

The detailed legal principles that pertain to expropriation in South Africa were considered in detail in section 2.6.2 above and are covered in section 8 of the PPIB. The Bill has been drafted in line with the legal principles established in the *Agri SA* case and attempts to align its provisions to the Constitution.³²⁴ In the main, the legal position of section 8 is accurate in light of the *Agri SA* Constitutional Court decision. In essence the Constitutional Court ruled that in South Africa, an expropriation that requires compensation by the state can only arise where the rights in the expropriated asset have been acquired by the state.³²⁵ The Court extinguished the principle of regulatory taking or constructive expropriation and reduced the concept of a regulatory taking to a deprivation or significant interference.

The Expropriation Bill of 2013 and the PPIB have been drafted in line with this principle set by the Constitutional Court. It is submitted that the approach being adopted by the state is to pass legislation, such as the MPRDA, that changes the property ownership by making the state the custodian or conduit and not the ultimate owner of property rights. The state can then argue that it has not in fact expropriated the property and is therefore at law not required to pay compensation. It merely acts as a custodian for onward passage to third parties. This ruling by the Constitutional Court in the *Agri SA* case, as demonstrated, established an expropriation process that is contrary to accepted rule of the international law on foreign investments. The policy implications for South

³²³ See the *Foresti* case and the Promotion of Administrative Justice Act 3 of 2000.

³²⁴ See the *Agri SA* case; the *FNB* case; and the *Haffejee* case.

³²⁵ *Agri SA* case 48.

Africa of pursuing this approach to expropriation are considered further in section 6.3.

The method of calculation of compensation for an expropriation based on the South African Constitution is in line with the SADC Model BIT Template but different from the PFI and BITs in force, as discussed above. There is a policy conflict between what section 25(3) of the South African Constitution prescribes as the compensation calculation principles and methodology on the one hand and what South Africa is bound to in IIAs on the other hand. Furthermore, the BITs that South Africa entered into in 1994 and that the state is in the process of cancelling contain compensation provisions that are contrary to the Constitution.

Section 8(2) of the PPIB contains provisions that seek to exclude certain actions by the state from classification as expropriations and therefore from requiring compensation. It is submitted that the implications of section 8 of the PPIB's definition of what is a compensable expropriation is much narrower than under customary international law. Section 8(2)(c) relates to compulsory licensing and the principles relating to IP and related international laws on IP that are binding on South Africa, such as the TRIPS Agreement. IP protection in South Africa is also covered in the Designs Act of 1993 and Patent Act of 1978 as amended. The manner, in which section 8 of the PPIB is drafted in my view, seems to attempt to exclude or insulate the state from paying compensation in cases where the state issues compulsory licensing. This will be contrary to the TRIPS Agreement covered in section 4.4.3.2 above, as well as to section 25(2) of the Constitution.

6.2.4 Dispute resolution

Section 11 of the PPIB covers the dispute resolution procedures that must be followed by a foreign investor in the event that a dispute should arise in respect of actions undertaken by the government of South Africa. The dispute resolution procedures in the PPIB were discussed in section 3.7 above. This represents a marked departure from the BITs to which South Africa is party, as well as from IIAs and the SADC Model BIT Template. The fundamental change

relates to emphasis on municipal regulation and making no express provision for foreign investors to sue the host at international arbitration forums should disputes arise over the investment in South Africa. The principle of exhaustion of local remedies is thus emphasised.

Disputes with South Africa are to be settled utilising municipal laws and the Minister of Trade and Industry is required per section 11(1) of the PPIB to produce regulations on the arbitral procedures to be followed. The PPIB envisages in sections 11(4) and 11(5) that investors who are dissatisfied with the dispute resolutions processes as set out in the Bill, may approach a court, tribunal or other statutory body for relief. The Bill empowers foreign investors to lodge a dispute with the state utilising the Arbitration Act 42 of 1965. However, this Act has significant weaknesses as it does not differentiate between municipal and international arbitrations and is not in line with UNCITRAL model law. Attempts are currently being made to effect amendments to the Arbitration Act.

The challenge with the provisions relating to dispute settlement is the policy conflict between what South Africa is bound to in a number of IIAs, such as the WTO, the DSU, PFI and BITs still in force, and what is proposed in the PPIB. This policy conflict is addressed in section 6.3 below. In consideration of all factors, it is my view that the termination of international arbitration in the PPIB is an appropriate step by the government with an added emphasis on local remedies. This is more so in consideration of the fact that there is misalignment between the PPIB and various IIAs that prescribe different dispute settlement processes.

An example of the misalignment in regulations is also demonstrated by provisions in the Private Security Industry Regulation Amendment Bill, which the South African Parliament adopted in 2014.³²⁶ This Bill attempts to prescribe

³²⁶ See Ensor 2014-05-14 *Business Day 4*, where the Trade Law Centre for Southern Africa argues that provisions in the Private Security Industry Amendment Bill that restrict foreign ownership of firms in this industry to 49 per cent are contrary to GATS, BITs and the SADC PFI. The government argues that the high foreign ownership patterns of an industry that has more private security officers than the South African police and military, poses a national security threat. In its current form, the Bill was likely to be

a ceiling for the foreign ownership of firms engaged in the security industry in South Africa, and has created cause for affected parties to sue the government at international arbitration forums.

6.2.5 Security of the investment

Section 7 of the PPIB relates to the security of foreign investments in South Africa. Section 7(1) adopts an MFN approach to the security of investments in South Africa, utilising provisions similar to those proposed in the SADC Model BIT Template discussed in section 5.3.4.2.6 above. This creates misalignment and potential interpretation challenges, as the MFN principle has been removed from the PPIB. The Bill does limit the state's responsibility to providing the level of security comparable to that provided to local investors. Other qualifications on the level of security to be provided in section 7(3) of the Bill are vague and will be subject to varying interpretations.

In a similar manner, the attempts to limit liability of the state for the provision of safety and security through municipal laws may be unsuccessful; particularly those provisions that attempt to limit the level of security to "available resources and capacity" in 7(1) of the Bill. The country is party to other international investment and trade agreements where higher levels of assurances over the security of investments have been granted to investors.

6.3 Policy recommendations to the Department of Trade and Industry

In section 6.2 above the legal implications that pertain to the enactment of the PPIB in its current form were reviewed. The Bill has some provisions that are inconsistent with the Constitution of the country as well as with international investment and trade agreements to which South Africa is party. As discussed, the Bill is also contrary to various customary international law principles. This

challenged at international arbitration by aggrieved investors or their home governments due to breach of international agreements binding on South Africa. See also *Lufuno Mphaphuli and Associates v Andrews and Another* 2009 (4) SA 529 (CC) and *Telecordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

creates a situation where the PPIB, if enacted, may face legal challenges in South African courts and at international dispute settlement forums such as the WTO, ICSID and others. However, while noting these identified legal weaknesses in the PPIB, a more critical challenge exists in the policy inconsistencies that have been identified in this study.

The state is faced with the following policy challenges in the attempt to regulate foreign investments because it:

- concluded IIAs that contain provisions that are contrary to the South African Constitution;
- failed to repeal some municipal laws that contain provisions contrary to the Constitution and IIAs;
- concluded IIAs that have contradictory provisions on related matters;
- concluded political agreements that have a bearing on investments and failed to align these with legislative developments;
- conversely, pursued economic policy objectives that are not supported by political strategic goals.

There is a need to define an overarching strategy for the country that guides all policies towards a unified national agenda. The cancellation by South Africa of the BITs with a number of states has implications for foreign investment regulation in the country. However, these cancellations also illustrate diplomatic policy considerations and thus have economic signalling implications to the international investment markets.

South Africa therefore needs to pursue a coherent strategy that meets the nation's desired objectives and should refrain from the current state of affairs where policies appear to be designed without coordination.³²⁷ South Africa is a developing country beset by a myriad of social and economic challenges. The economic analysis undertaken in Chapter 2 demonstrates a country growing at

³²⁷ See SAIIA http://www.saiia.org.za/doc_download/799-saiia-submission-investment-protection-and-promotion-bill. The SAIIA submission highlights increased diplomatic tensions between EU states, particularly Germany, and South Africa over the cancellation of the BITs in 2013.

a lower GDP growth rate than its African peers, attracting far less FDI than its true potential. The country is set to maintain this poor relative economic performance for the short to medium term.

The recommendations made below factor in this economic reality and seek to create policy coherence for the regulation of foreign investments. In section 6.3.1, a rationality frame for developing policy recommendations is offered. This rationality frame seeks to provide reasons why the ANC government may be experiencing challenges in creating policy coherence with regard to foreign investment regulation.

6.3.1 Rationalisation of underlying causes of policy incoherence on foreign investment regulation

It is submitted that the ANC, for as long as it maintains political power, will attempt to achieve the following economic policy objectives for South Africa:

- Transferring economic power to black people in line with the national democratic revolution, including nationalisation of key economic and resource sectors where necessary.
- Pursuing SADC macroeconomic convergence and other integration policies and working towards the implementation of the AEC.
- Seeking FDI growth progressively away from Western powers towards developing countries, including its BRICS counterparts.

The challenge which such a radical economic policy shift poses is conflict with the interests of current major foreign investors, who are predominantly from the EU and US. South Africa is in need of economic growth to achieve a number of objectives, including curbing unemployment, eradication of poverty, and delivery on social security obligations. In “A review framework for cross-border

direct investment in South Africa: Discussion Document”,³²⁸ the National Treasury indicates that FDI is a core element to a long-term, sustainable economic growth.

South Africa has a low domestic savings rate, with high domestic investment requirements. The country therefore requires foreign direct investment in order to support domestic financing needs. While FDI is important, concerns are expressed about the intentions of some foreign investors, for example that they may purchase controlling equity stakes in South African domicile businesses and then change the ownership structure of the firm, integrate it into the parent or re-domicile it. This has been the case with notable South Africa companies such as South African Breweries and Anglo American.

Regardless of these concerns, FDI remains an important contributor to growth, and market-friendly economic policies are considered part of the requirements to attract foreign investments. The challenge for South Africa is thus how to attract and retain investors, while maintaining regulatory space for the government to implement social redress policies and BEE.

6.3.2 Policy options on foreign investments regulation

The following changes are recommended to enable improvement in the overall policy that South Africa follows in the country’s regulation of foreign investment. These policies should inform municipal regulation and guide government’s approach to the conclusion of future IIAs.

This is important because FDI can make meaningful contributions to a nation’s economy and contribute to national development and sustainability. The manner that FDI is admitted and regulated is a significant policy matter that requires coherent government policy. Most significantly, the regulation of

³²⁸ The Review framework discussion document was released in February 2011. See Arezki and Funke 2007 (19) *J. Int. Dev* 275-294.

investments has international implications and requires a coordinated policy that involves many arms of the state.³²⁹

6.3.2.1 *Africa-wide regulation of foreign investments*

The stated goals of African states that are signatories to the Abuja Treaty and members of the AU is the progressive realisation of an AEC by 2028. This vision of Africa needs affirmation and alignment with the overall vision that the continent has for achieving economic unity. As discussed in section 5.4 above, South Africa has since 1994 played a key role in the creation of pan-African institutions, including being a host nation to the PAP and NEPAD, to name a few.

What is required is for South Africa to utilise its influence to promote a continental policy framework or treaty that regulates foreign investments for the African continent as a whole. The challenge facing many African states is the lack of coherent and, consistent application of rules that regulate investments across the continent. African governments, due to their lack of bargaining power, have in the past entered into BITs that offer protections to investors that are too expansive and have restricted the host's policy space.

African countries also compete among themselves for the limited FDI that is available and as a result, investors are able to manipulate the situation to their advantage. There are attempts to create unified law at the SADC level³³⁰ to regulate regional investments and create SADC-wide protocols towards regional integration.

The challenge is that SADC protocols do not align with municipal laws, as has been demonstrated above; there is conflict even between some of the SADC protocols and SADC's own policy documents. This creates a situation where the

³²⁹ Masamba <http://www.consultancyafrica.com> (Date of use: 1 December 2014); Salacuse and Sullivan 2005 46 (1) *Harv. Int'l LJ* 67-130; Globerman and Shapiro 30(3) *JIBS* 513-532; Gallagher and Birch 2006 7 (6) *JWIT* 961-974; Gastanaga, Nugent and Pashamova 1998 33 (10) *World Development* 1567-1585; and Poulsen 2013 *ISQ* 1 at 14.

³³⁰ Tralac *Monitoring Regional Integration in Southern Africa* Yearbook 2010, also Babatunde F 2009 (42) *CILSA* 309 for a study of attempts at harmonisation of investment laws in Africa.

investor is left in uncertainty about which legal principles are applicable in which situation. The cancellation of the SADC Tribunal and the failure of SADC states to observe the rulings of the Tribunal point to the need to create more binding rules that states can observe if the visions espoused in the AU Charter are to be realised.

It is therefore in the strategic interest of South Africa to pursue a SADC- and AU-based approach to the regulation of foreign investors.

6.3.2.2 Defining the relationship between FDI and the public-interest principle

An important consideration justifying the need to review BITs and which has led to the proposed PPIB is the claim that first-generation BITs restricted the government's policy space and limited its ability to regulate in the public interest.³³¹ Section 25(2)(a) of the Constitution states that property may only be expropriated in South Africa for a public purpose or in the *public interest*. Section 25(4)(a) of the Constitution further states: "[T]he public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources."

The PPIB contains numerous provisions that relate to the application of the public interest principle such as in the Preamble to the Bill, section 8(1) and section 10(1) relating to expropriation. The challenge is that there is no full definition at law of what is and is not *public interest*. As indicated above, the Constitution only adds components of what can be read into the public interest principle, but does not define the principle in full. This is in my view is an uncomfortable scenario for investors and may cause challenges should disputes arise and investors sue at international arbitration forums.³³²

³³¹ King and Chilton *Administration in the Public Interest*; and Donald and White *The State of Public Administration*.

³³² See *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC). The case depicts the gradual realisation of socio-economic rights. See also the Hoffman case; Aron *Liberty and justice for all*; Klare 1998 (14) *SAJHR* 165; and Marcus and Budlender *Public interest litigation in South Africa*.

A further aspect of the matter of public interest relates to its inclusion in the Competition Act 89 of 1998. The Competition Commission and Competition Tribunal are screening authorities for FDI and mergers and acquisitions in South Africa. The Competition Act places importance on the consideration of the public interest principles when decisions are being made by the Competition Commission and Competition Tribunal.³³³ The policy conflict between FDI and the public interest is best demonstrated by the Walmart 2012 acquisition of Massmart South Africa for USD 2.4 billion. This was significant FDI by a US-based, globally recognised MNC that signalled a positive investment development for South Africa.

The transaction, however, met significant resistance and was the subject of dispute with the government and labour formations in South Africa. The deal was alleged to be detrimental to job creation in South Africa. Walmart was accused of poor labour practices in some of its facilities around the world and it was alleged that the deal lacked sufficient BEE flow-through.

The Walmart deal was settled after months of disagreement, including court applications, with the company setting up a USD 13 million fund for the development of small, medium and micro enterprises (SMMEs) in South Africa. This was a difficult FDI transaction to conclude which demonstrates the need to clarify the public interest principles that apply to foreign investors to avoid confusion.

³³³ See, *Shell South Africa (Pty) Ltd merger with Tepco Petroleum (Pty) Ltd*, Case No. 66/LM/Oct01. The matter was referred to the Competition Tribunal by the Commission on the basis that the merger had public interest consideration. The Tribunal ruled that “the role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments ... The competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protect”. See also *Anglo American Holdings Ltd and Kumba Resources Ltd with the Industrial Development Corporation intervening*, Case No. 46/LM/Jun02; *Harmony Gold Mining Company Ltd and Goldfields Ltd*, Case No. 93/LM/Nov04; and Morphet www.modaq.com (Date of use: 3 April 2015).

6.3.2.3 *Reducing dependence on foreign direct investment by creating enabling legislation for increasing domestic savings rates*

A number of African countries as indicated above have a considerable dependency on FDI. As discussed, the benefits of FDI to hosts are in some cases doubtful and may result in economic challenges for the hosts when large foreign exchange inflows occur. South Africa has a similar dependency on FDI; since the country suffers from a low domestic savings rate.³³⁴ This view is supported by Osode as follows:

“[d]evelopment economists believe that many developing countries do not have, nor can they generate, enough savings to finance industrialisation. The direct result is their inability effectively to pursue their development aspirations without foreign investment”³³⁵

The ability to increase domestic savings creates domestic liquidity and allows the financial system of a country to function with less dependence on foreign cash flows.³³⁶ According to UNCTAD, sub-Saharan Africa has the lowest domestic savings rate among the developing regions of the world. The country needs to create policies that enhance domestic savings to counter the need to source funds from other countries, thus reducing dependency on FDI.

³³⁴ The former South Africa Minister of Finance, Pravin Gordhan, speaking at the SA Savings Institute in July 2011, indicated that low savings rates were holding the country back compared to its peers. South Africa's savings rates were 16 per cent of GDP compared to 52 per cent for China and 22 per cent for Russia as at 2009. Pre-1994 the domestic savings rate of South Africa was 30 per cent of GDP. In essence, South Africans had a consumerist approach and spent more than they earned, resulting in increasing debt levels. The minister indicated that if South Africans saved more, then the country would have to borrow less funds from other countries.

³³⁵ See, Osode 1997 *CILSA* 37

³³⁶ See UNCTAD *Economic development in Africa*. The report indicates that African countries' ability to finance a greater share of their development needs from domestic resources would give them much-needed flexibility in the formulation and implementation of policies.

6.3.2.4 *Fast-track implementation of the Tripartite Free Trade Area*

The COMESA-EAC-SADC Tripartite convened a Heads of State and Government Summit in Kampala, Uganda in 2008, which endorsed the Tripartite recommendations for the creation of an FTA. The purpose of the FTA when implemented will be the creation of a large market that will be attractive for investment and large-scale production. The trade among the 26 countries that comprise the FTA has increased since its endorsement. This FTA will create uniformity of trade and investment rules which should assist in stimulating intra-African trade and contribute towards programme convergence and harmonisation initiatives between the three RECs. This will be in line with the African strategy for the creation of an AEC.³³⁷

The three RECs have current regional FTAs and the intention is that there should be harmonisation of the three FTAs into a Tripartite FTA that covers all 26 countries, including South Africa. The DTI strategic plan includes a commitment to the successful implementation of the Tripartite FTA.³³⁸ Section 4(3)(d) of the PPIB, which deals with the application of the Bill, seems to be drafted for this eventuality.

The PPIB states that the government reserves the right to take part in any existing or future customs union or FTA, common market or any final or interim international agreement that may lead to the entry of South Africa into such an arrangement.

It is therefore imperative that South Africa utilises its influence for the speedy realisation of this Tripartite FTA as it will contribute to the realisation of the African agenda. The Tripartite FTA will present an opportunity to harmonise the regulatory environment. This will increase the bargaining power of the

³³⁷ See Sikuka <http://www.bilaterals.org/?tripartite-fta-soon-a-reality> (Date of use: 16 May 2014) for detailed programmes being implemented to create the Tripartite FTA. The FTA will have more than 520 million people, make up almost 60 per cent of the AU GDP and 57 per cent of the AU population. This makes the successful implementation of the Tripartite FTA crucial for the realisation of the AU economic integration agenda.

³³⁸ See Jensen and Sandrey *The Continental Free Trade Area*.

African countries and make them more attractive to foreign investors seeking to exploit the large common market. The critical policy decisions that will move South Africa towards the realisation of this vision need to be fast-tracked within government and the legislature.

6.3.2.5 *Modernise South African Arbitration legislation*

The Arbitration Act of 1965 needs to be replaced with legislation that is in line with international best practice and aligned to, for example, the UNCITRAL model law. The current Arbitration Act was enacted in 1965 and has weaknesses that have been highlighted. A modernised arbitration environment will offer investors alternative dispute resolution in South Africa and may dissuade them from resorting to international forums. Under the current regulatory environment, where foreign investors are unsettled by the cancellation of BITs, it becomes critical to demonstrate that the state is prepared to enact progressive legislation that allows private arbitration in South Africa as an alternative to courts.

Arbitrations are generally quicker, cost effective and allow for privacy. Once an arbitration order has been made an order of court, it is enforceable utilising the usual process for court judgments. The weaknesses apparent in international arbitration were comprehensively dealt with in this study. However, arbitration is an increasingly utilised method of expeditiously resolving disputes.

6.4 Concluding remarks

The current global BIT regulatory regime and its attendant Dispute Resolution Mechanisms (DRMs) as exemplified by the ICSID have been shown to possess considerable weaknesses. The bilateral agreements are the principal legislative instruments that form the basis for international arbitrations at the ICSID. These BITs lack adequate balance between the needs of the host states and those of the foreign investors.

The first-generation BIT templates that many African states concluded with developed capital-exporting nations were drafted to protect the foreign investment from the threats inherent to making investments in Africa; a continent traditionally associated with corruption, bad governance, civil wars and lack of observance of the rule of law.

Few BITs concluded by African governments placed obligations on the foreign investors to make meaningful contributions to the sustainable development of the host's nationals. As demonstrated, MNCs have in fact been party to various human rights abuses in the host states and have for a considerable period of time acted with impunity in the developing world, taking advantage of the weak governance regimes that exist in some of these developing countries to exploit resources and export capital abroad to the overall impoverishment of the host. When the resources are depleted, the MNCs exit, in some cases leaving a trail of environmental and social destruction. It is equally true that in some countries FDI has been an important source of foreign exchange, technology and development and has helped uplift host communities. When managed well, FDI can make an important contribution to sustainable development. The DTI's review of South Africa's FDI and BIT architecture was necessary as global economic balances have shifted and the outdated terms of a number of BITs are coming to a conclusion.

Some of these BITs were concluded before the enactment of the 1996 Constitution and as has been demonstrated, lack constitutional congruence in a number of key principles. The ICSID DRMs have been plagued with problems of consistency, lack of judicial review and apply customary international law principles that some states have repudiated. The system is in need of revision and South Africa should exit this arbitral forum due to the unpredictable nature of some of the rulings and the risks they pose to national sovereignty.

The country needs to enact modernised arbitration legislation and develop processes and procedures that will facilitate municipal investor-state dispute settlement. The South African courts are under a significant administrative burden and cases take a long time to resolve.

Against this backdrop and the trends in other jurisdictions to review or renegotiate BITs, South Africa opted for outright cancellation of its treaties. The PPIB was proposed as an alternative regulatory mechanism under municipal laws for foreign investments in South Africa. In its current form, the Bill is likely to face significant Constitutional Court challenges. Furthermore, how the Bill, if enacted into law, will function in tandem with IIAs and BITs still in force is a matter that is likely to create disputes with foreign investors and the country may be sued at international tribunals. The cancelled BITs are still active under their sunset clause mechanism, in some cases for the next 10 years.

South Africa is bound by other international agreements in the SADC and under WTO, FTAs and other investment and trade promotion agreements such as the African Growth and Opportunity Act (AGOA) with the US. There are inconsistencies that exist between the SADC Model BIT Template and the PFI that need to be resolved by SADC member states. The country's obligations under BITs and other IIAs such as the PFI are not aligned with the Constitution of the country. There is a need for regulatory alignment within South Africa as the country cannot continue concluding international agreements that are contrary to municipal laws and the Constitution. This exposes the country to the risk of international litigation.

The current policy choices are confusing and leave investors unsure of what the intention of the ANC government is towards foreign investors and their property rights. The successful implementation of a harmonised Tripartite FTA and regulation of foreign investment within a continental framework at the SADC and AU level in my view is the best policy choice for South Africa. The GDP of Africa is forecast to be about \$ 2.6 trillion by 2020, less than five years from now.

The continent has the fastest growing labour force in the world, which currently stands at 500 million and is set to reach 1.1 billion by 2040: larger than China and India.³³⁹ African countries have over the last decade made great strides in reforming their business environments and establishing investor-friendly policies. The momentum of economic growth driven by these improvements is starting to pay dividends as economic growth projections are above those of most regions of the world.

However, FDI flow to Africa is still low compared to other continents at less than 12 per cent globally, and intra-Africa trade is limited. It is submitted that in the current context, a focus on increasing intra-Africa trade and investments through policy and regulatory harmonisation is in the strategic interest of South Africa. In light of these findings, it is recommended that the DTI should withdraw the PPIB and seek a more holistic, continent-driven foreign investment regulatory framework.

³³⁹ See KPMG *Foreign Direct Investment in Africa*; Froot *Foreign Direct Investment*; Farole and Winkler *Making Foreign Direct Investment work*; Portnoy <http://dartmouthbusinessjournal.com/2012/05/foreign-direct-investment-in-nigeria/> (Date of use 12 September 2012); and Faulkner and Loewald *Policy Change and Economic Growth: A Case Study of South Africa*.

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UN Convention on the Elimination of All forms of Discrimination against Women of 18 December 1979 (G.A. Res. 34/180; 1249 UNTS 455)

UN Charter on the Economic Rights and Duties of States 1984 (G.A. Res. A/RES/39/163)

UN Convention on the Rights of the Child of 1989 (G.A. Res. A/RES/44/25; 1577 UNTS 441)

V

Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331; 8 ILM 679)

W

Washington Treaty on Intellectual Property in respect of Integrated Circuits 1989 (Not yet in force)

WTO Agreement on Government Procurement of 1994 (Annex 1B: Multilateral Agreements on Trade in Goods, GATT 1994)

WTO Agreement on Trade in Civil Aircraft of 1979 (Annex 1B: Multilateral Agreements on Trade in Goods, GATT 1994)

WTO International Dairy Agreement of 1994 (Annex 1B: Multilateral Agreements on Trade in Goods, GATT1994)

WTO International Bovine Meat Agreement of 1994 (Annex 1B: Multilateral Agreements on Trade in Goods, GATT1994)

WTO Doha Ministerial Declaration, WT/MIN (01)/DEC/1 (adopted 14 November 2001)

General Agreement on Tariffs and Trade of 1947 ((1947) 55 UNTS 187)

WTO General Agreement on Tariffs and Trade (GATT) 1994 (1869 UNTS 187; 33ILM 1153)

WTO Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPS) 1994 (1869 UNTS 299) reprinted (1994) ILM 1197

WTO General Agreement on Trade in Services (GATS) 1994

WTO Agreement on Trade-Related Investment Measures (TRIMS) 1994 (1869 UNTS 299), reprinted in (1994) ILM 1197