



**UNIVERSITY OF CAPE TOWN**  
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

**THE DEVELOPMENT OF SOUTH AFRICAN INVESTMENT PROTECTION LAW  
– LEGAL PROTECTION OF FOREIGN INVESTMENTS UNDER THE  
PROTECTION OF INVESTMENT ACT NO. 22 OF 2015 WITH SPECIAL  
REGARD TO INDIRECT EXPROPRIATION**

**Charlotte-Sophie Picker  
PCKCHA004**

**A Thesis Submitted in Partial Fulfilment of the Requirements for the Degree of  
Master of Laws (LL.M.) (Commercial Law)**

**Research dissertation/ research paper presented for the approval of Senate in fulfillment of part of the requirements for the Master of Laws (LL.M.) (Commercial Law) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.**

**I hereby declare that I have read and understood the regulations governing the submission of Master of Laws (LL.M.) (Commercial Law) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.**

*Charlotte-Sophie Picker*

**School of Advanced Legal Studies  
University of Cape Town**

**Supervisor: Silindile N Buthelezi**

**Words: 24993**

**15 September 2017**

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

## TABLE OF CONTENT

ABBREVIATIONS .....	IV
I. INTRODUCTION .....	1
II. INTERNATIONAL INVESTMENT PROTECTION LAW .....	5
1. The Terms ‘Investor’ and ‘Foreign Investment’ .....	5
2. Protection of Foreign Investment in International Investment Law .....	8
a. Origins of International Investment Law .....	8
b. Customary International Minimum Standard .....	10
c. Expropriation.....	11
i. The Legality of an Expropriation.....	11
ii. Direct and Indirect Expropriation .....	11
d. Fair and Equitable Treatment.....	13
e. Full Protection and Security .....	15
f. National Treatment .....	15
g. Most-Favoured-Nation Treatment .....	17
h. Investor-State Dispute Settlement.....	18
i. Compensation for Expropriation.....	19
j. Transfer of Funds .....	20
III. DEVELOPMENT OF INVESTMENT LAW IN SOUTH AFRICA .....	20
1. Apartheid Era .....	20
2. Developments in Post-Apartheid Era.....	22
a. Pre-Constitutional Era .....	22
b. Broad-Based Black Economic Empowerment Act and the Mineral and Petroleum Resources Development Act.....	22
c. Entry into and Termination of Bilateral Investment Treaties .....	26
IV. LEGAL PROTECTION OF FOREIGN INVESTMENT UNDER THE 2015 PROTECTION OF INVESTMENT ACT NO. 22 OF 2015 .....	28
1. Omitted Stipulations .....	29
2. Substantive Stipulations of the 2015 Protection of Investment Act No. 22 of 2015 .....	30
a. Right to Regulate.....	30
b. The Terms ‘Investor’ and ‘Investment’ .....	32
c. National Treatment.....	35
d. Physical Security of Property.....	38
e. Legal Protection of Property .....	39

i. Legality of Direct and Indirect Expropriation .....	40
ii. Manner of Calculation of Compensation.....	45
iii. Timing and Manner of Compensation Payment.....	47
f. Transfer of Funds.....	47
g. Dispute Resolution.....	48
i. Domestic Dispute Resolution .....	49
ii. International Arbitration .....	50
V. PROGNOSIS AND RECOMMENDATIONS .....	53
VI. CONCLUSION.....	56
BIBLIOGRAPHY .....	I

## ABBREVIATIONS

BEE	Black Economic Empowerment
BIT	Bilateral Investment Treaty
EC	European Community
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIP	Protocol on Finance and Investment
FPS	Full Protection and Security
FPI	Foreign Portfolio Investment
GDP	Gross Domestic Product
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
IMF	International Monetary Fund
MFN	Most-Favoured-Nation
MPRDA	Mineral and Petroleum Resources Development Act
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
SADC	Southern African Development Community
TRALAC	Trade Law Center
UNCTAD	United Nations Conference on Trade and Development
UN	United Nations
US	United States
WIR	World Investment Report

## I. INTRODUCTION

Subsequently to the G20 Summit in September 2016 in Hangzhou, China the G20 published the G20 Guiding Principles for Global Investment Policymaking. These principles state that investment constituted the ‘engine of economic growth in the global economy’.<sup>1</sup> The G20 advises governments to ‘avoid protectionism in relation to cross-border investment’.<sup>2</sup> Although these principles are non-binding and only aim to provide general guidance, they illustrate the importance of Foreign Direct Investment (FDI) on an international level. Also the 2016 A. T. Kearney Foreign Direct Investment Confidence Index states that the majority of the questioned executives believe that FDI will become increasingly important in regards to economic growth and competitiveness.<sup>3</sup> According to the 2016 World Investment Report by UNCTAD the global FDI inflow jumped by 38 per cent to US\$ 1.76 trillion in 2015.<sup>4</sup>

The law of international investment emerged from growing trade activities between European countries during the seventeenth to the twentieth century.<sup>5</sup> In the eighteenth and nineteenth century, investments were mostly made within the framework of colonialism related to the exploitation of natural resources, agriculture and cheap labour costs.<sup>6</sup> During these times there was no need for a special legal protection of those investments as the colonies’ legal systems were imposed by the colonial powers and, thus, provided sufficient protection.<sup>7</sup>

Investments in uncolonised areas were protected from adverse interventions by the exercise of diplomatic pressure as well as the threat of military force.<sup>8</sup> Moreover, foreign investors sought superior treatment by the host states claiming that the domestic law was not applicable to their investments but that they remained subject to their respective home jurisdictions.<sup>9</sup> Consequently, the early international investment law developed into a system of imposition of power, use of force and the creation of extra-territorial jurisdiction in order to obtain extended commercial benefits.<sup>10</sup> However, during the process of gaining independence, the colonized territories started questioning

---

<sup>1</sup> G20 Guiding Principles for Global Investment Policymaking, <http://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf>.

<sup>2</sup> Ibid.

<sup>3</sup> 2016 A. T. Kearney Foreign Direct Investment Confidence Index, <https://www.atkearney.com/documents/10192/8064626/2016+A.T.+Kearney+Foreign+Direct+Investment+Confidence+Index-FDI+on+the+Rebound.pdf/e61ec054-3923-4f96-b46c-d4b4227e7606>, 7-9.

<sup>4</sup> UNCTAD, *World Investment Report (WIR) 2016*, 2.

<sup>5</sup> Kate Miles ‘International Investment Law: Origins, Imperialism and Conceptualizing the Environment’ (2010) 21 *Colorado Journal of International Environmental Law and Policy* 1.

<sup>6</sup> Talkmore Chidede *Legal Protection of Foreign Investment* (2016) 19-20.

<sup>7</sup> M Sornarajah *The International Law on Foreign Investment*, (2004) 19.

<sup>8</sup> Ibid, 20.

<sup>9</sup> Surya P Subedi *International Investment Law: Reconciling Policy and Principle* (2012) 7.

<sup>10</sup> Miles ‘International Investment Law’ op cit note 5 at 9.

the concept of foreign investors and businesses residing within their territory whilst not submitting to the domestic law.<sup>11</sup> Subsequently, on the grounds of state sovereignty and rising economic nationalism, the former colonies began to assert their rights to expropriate and nationalise foreign assets arguing that foreign investors residing within the national territory were subject to domestic law.<sup>12</sup> Thus, the need for an international system balancing the investor's interests to minimise interference by the host state and the host state's interest to maintain sovereign control and autonomy with minimal external influence became increasingly apparent.<sup>13</sup>

The law of foreign investment is therefore a very old branch of international law, which underwent numerous changes and developments. However, the opposing interests essentially remained the same. Foreign investors still face a number of risks in relation to their investments abroad. Although direct expropriation or nationalisation became rather seldom<sup>14</sup>, the risks of indirect expropriation by virtue of political or legal changes are still topical.<sup>15</sup> Whereas in the event of a direct expropriation foreign owned property is taken by direct means under the transfer of all, or almost all, property rights, an indirect expropriation occurs by the host state's intervention in relation to the use of the property or the benefits thereof, even though the property rights may remain with the foreign investor.<sup>16</sup> Equally, host states wish to preserve room for sovereign policy and regulations of investments by means of domestic legislation taking into consideration the specific socio-economic conditions found in the host state.<sup>17</sup> Nowadays, these opposing interests are mainly balanced and regulated by customary international law, the domestic law of the host state and international investment agreements (IIAs), particularly Bilateral Investment Treaties (BITs). BITs have become the prevalent international instrument to regulate investments.<sup>18</sup> By the end of 2015 in total 2,946 concluded BITs existed globally.<sup>19</sup> BITs generally provide security of investments from expropriation without compensation, fair and equitable treatment, national treatment, most-favoured nation treatment, full protection and security and legal remedies in the event of any breaches of the stipulations of the BIT through international arbitration, not solely between host state and home state, but particularly between host state and investor.<sup>20</sup> BITs, therefore, render a high standard of foreign investment protection.

---

<sup>11</sup> Subedi op cit note 9 at 8.

<sup>12</sup> Simon Lester 'Reforming the International Investment Law System' (2015) 30 *Maryland Journal of International Law* (2015) 72.

<sup>13</sup> Sornarajah op cit note 7 at 12.

<sup>14</sup> Lester op cit note 12 at 74.

<sup>15</sup> Chidede op cit note 6 at 36-45.

<sup>16</sup> Subedi op cit note 9 at 74-5; Talkmore Chidede op cit note 6 at 37.

<sup>17</sup> Chidede op cit note 6 at 2.

<sup>18</sup> Andrew T. Guzman 'Why LCDs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1997-1998) 38 *Virginia Journal of International Law* 640.

<sup>19</sup> UNCTAD *WIR 2016*, 101.

<sup>20</sup> Subedi op cit note 9 at 82.

Although recent trends show that investors begin to turn to developed economies<sup>21</sup>, developing countries still constitute a large recipient of FDI.<sup>22</sup> FDI into developing economies are considered an important instrument to integrate those economies into the international globalised economic community and to facilitate capital inflow.<sup>23</sup> In 2015 the FDI flow into developing economies reached a new peak of US\$ 765 billion.<sup>24</sup> However, the FDI inflow to the African continent decreased by 7 per cent to US\$ 54 billion in 2015.<sup>25</sup> Particularly South Africa's FDI inflow dropped significantly by 69 per cent to the lowest level in 10 years.<sup>26</sup> Moreover, the 2016 OECD economy forecast projects an only moderate growth regarding investments in 2017 due to a lack of investor confidence.<sup>27</sup> Furthermore, South Africa dropped out of the A. T. Kearney Foreign Direct Investment Confidence Index in 2015 and did not manage to return to the index in 2016.<sup>28</sup>

During the apartheid era and especially during the 1980s disinvestment movement, South Africa did not attract much foreign investment due to its political and economic isolation. In the post-apartheid era, South Africa entered into several BITs, especially with capital-exporting European countries, which was seen as an important diplomatic signal towards the international community announcing South Africa's re-entry to the international community.<sup>29</sup> However, South Africa's foreign investment policy has changed severely over the past five years. As a result of a review of South African BITs performed in 2008, South Africa decided to terminate or to not renew several BITs, particularly with European countries, in 2012. The main arguments were that the provisions imposed by the concluded BITs failed to satisfy the specific socio-economic challenges and were inconsistent with the Constitution.<sup>30</sup> Furthermore, the investor-state dispute settlement provisions allowed mere commercial interests to influence crucial national concerns.<sup>31</sup> In order to replace the terminated BITs, South Africa promulgated the Protection of Investment Act No. 22 of 2015 (the Investment Act) in December 2015. This new Act's key features significantly differ from the provisions regularly entailed by BITs, as the Act does not differentiate between foreign and national

---

<sup>21</sup> UNCTAD *WIR 2016*, 4; A. T. Kearney, op cit note 3 at 1.

<sup>22</sup> In 2015 the FDI inflow to developing economies increased by 9 per cent compared to 2014, UNCTAD *WIR 2016*, 36.

<sup>23</sup> Chidede op cit note 6 at 1.

<sup>24</sup> UNCTAD *WIR 2016*, 36.

<sup>25</sup> Down to a global share of 3.1 per cent in 2015 (2014: 4.6 per cent), UNCTAD *WIR 2016*, 4.

<sup>26</sup> UNCTAD *WIR 2016*, 41.

<sup>27</sup> OECD Economic Outlook, Volume 2016, Issue 2, South Africa, <http://www.oecd.org/eco/outlook/economic-forecast-summary-south-africa-oecd-economic-outlook-november-2016.pdf>.

<sup>28</sup> 2016 A. T. Kearney op cit note 3 at 4.

<sup>29</sup> Azwimpheleli Langalanga, *Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context*, Occasional Paper 214, South African Institute for International Affairs, May 2015, 7.

<sup>30</sup> Xavier Carim, 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' in Kavalij Singh and Burghard Ilge (Eds), *Rethinking Bilateral Investment Treaties Critical Issues and Policy Choices*, 1 ed (2016), 60.

<sup>31</sup> Carim op cit note 30 at 61.

investors.<sup>32</sup> Moreover, the Act solely provides for state-state arbitration and only in the event that all domestic remedies have been exhausted first.<sup>33</sup> The reactions by the international community and especially European investors were by and large negative as they feared that the new Act did not provide sufficient substantive protection for foreign investors, particularly in relation to indirect expropriation and the settlement of disputes.<sup>34</sup>

The aim of the present dissertation is to assess and evaluate the South African Investment Act against the background of international investment law and Model BITs. The main focus will lie on the determination of gaps and inconsistencies in the Investment Act, especially regarding indirect expropriation and dispute resolution.

Therefore, following an introduction, the general principles of international investment law and the range of protection for foreign investors offered by customary international law and by the standards usually provided by BITs will be outlined.

Subsequently, the development of investment protection law in South Africa will be depicted against the background of the political and economic evolution from the Apartheid era to the post-Apartheid era leading to the termination of the BITs in 2012 and the publication of the Investment Act. The main goal of this chapter is to provide an overview regarding the respective motivations and the applicable legal framework.

In the following chapter, the Investment Act and its provisions will be assessed and evaluated. The objective is to determine to what extent the stipulations provided by the Act are sufficient with regard to the internationally recognised and acknowledged minimum standards in customary international law and the range of protection ordinarily provided by BITs. The goal is to determine whether or not the Act complies with these usually provided measurements of investor protection and whether the protection of foreign investments possibly decreased with particular regard to indirect actions and dispute resolution.

---

<sup>32</sup> Section 8 (1) of the Investment Act.

<sup>33</sup> Section 13 (5) of the Investment Act.

<sup>34</sup> Discussion Paper of the German-African Business Association (Afrika-Verein) and the EU Chamber of Commerce and Industry in Southern Africa, [https://static1.squarespace.com/static/55f93ec2e4b0d99faf1aef57/t/5640b423e4b031347f7a7120/1447080995959/Afrika-Verein\\_EU+Chamber\\_Discussion+Paper\\_\\_EN+final.pdf](https://static1.squarespace.com/static/55f93ec2e4b0d99faf1aef57/t/5640b423e4b031347f7a7120/1447080995959/Afrika-Verein_EU+Chamber_Discussion+Paper__EN+final.pdf); Comment by the European Chamber of Commerce and Industry in Southern Africa, <http://www.politicsweb.co.za/documents/this-bill-wont-protect-or-promote-investment--eu-c>.

## II. INTERNATIONAL INVESTMENT PROTECTION LAW

### 1. The Terms ‘Investor’ and ‘Foreign Investment’

The concept of foreign investment generally implies the transmission of tangible or intangible assets from one state into another in order to generate wealth whilst controlling the assets totally or partially.<sup>35</sup> The term ‘investor’ comprises of a state, state enterprise, a foreign national or a private enterprise of a foreign state that has made an investment in another country.<sup>36</sup> However, the initial purpose of international investment law implies the protection of private foreign investors, so that government-controlled entities are generally only protected in the event that their conduct can be qualified as commercially rather than governmentally.<sup>37</sup> For instance, the US Model BIT of 2012 defines an ‘investor of a party’ as

a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.<sup>38</sup>

According to this definition not only already established investments but also ‘attempts to make’ an investment shall be covered by the term ‘investor’ in order to ensure protection of pre-establishment rights of foreign investors.<sup>39</sup> The investor’s nationality is of particular importance as it determines the foreign nature of an investment. However, the origin of the investment, i.e. especially the question where the respective capital is coming from, is irrelevant for the purpose of defining the nationality.<sup>40</sup> The determination of an individual’s or natural person’s nationality does usually not pose many difficulties - apart from the issue of double-nationality. The nationality is predominantly determined by the national law of the country whose nationality is asserted.<sup>41</sup> A certificate of nationality issued by the competent authorities provides sufficient evidence in most cases.<sup>42</sup> However, states follow different approaches regarding the determination of a juridical person’s nationality, for instance a corporation’s nationality. Different legal systems developed different approaches to evaluate corporate nationality.<sup>43</sup> Civil law countries by and large follow the ‘*siège social*’, according to which the corporate nationality is determined by the location of the main seat

---

<sup>35</sup> Sornarajah op cit note 7 at 7.

<sup>36</sup> Subedi op cit note 9 at 58.

<sup>37</sup> Rudolf Dolzer & Christoph Schreuer *The Principles of International Investment Law* 2 ed (2012) 44.

<sup>38</sup> Article 1 of the US Model BIT of 2012.

<sup>39</sup> Subedi op cit note 9 at 58.

<sup>40</sup> Dolzer & Schreuer op cit note 37 at 44.

<sup>41</sup> Christoph H. Schreuer *The ICSID Convention: A Commentary* 2 ed (2009) 264.

<sup>42</sup> Sornarajah op cit note 7 at 306; Dolzer & Schreuer op cit note 37 at 45.

<sup>43</sup> Sornarajah op cit note 7 at 306.

or central administration of a corporation.<sup>44</sup> Common law countries rather follow the place of *incorporation* or place of registered office approach.<sup>45</sup>

Moreover, in the absence of an universally valid legal definition of the term ‘foreign direct investment’, one has to turn to various definitions provided by international organisations, utilised in IIAs and devised by jurisprudence.

According to UNCTAD a foreign direct investment consists in an

‘investment made by a resident of one economy in another economy, and it is of a long-term nature or of “lasting interest” resulting in “a significant degree of influence” on the management of the enterprise’.<sup>46</sup>

In order to enhance international uniformity, a general voting share or voting power of at least 10% is required in order to determine a sufficient degree of interest and influence by the investor.<sup>47</sup>

OECD defines a foreign direct investment as the

‘objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor’. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. The direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship.’<sup>48</sup>

The IMF states, that

‘direct investment is a category of cross-border investment associated with a resident in one economy having control or a significant degree of influence on the management of an enterprise that is resident in another economy.’<sup>49</sup>

The US Model BIT of 2012 defines an ‘investment’ as

‘every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.’<sup>50</sup>

---

<sup>44</sup> Dolzer & Schreuer op cit note 37 at 47.

<sup>45</sup> Sornarajah op cit note 7 at 306.

<sup>46</sup> UNCTAD, *Training Manual on Statistics for FDI and the Operations of TNCs*, Volume 1 (2009) 35.

<sup>47</sup> Ibid.

<sup>48</sup> OECD *Benchmark Definition of Foreign Direct Investment*, 4 ed (2008) 48.

<sup>49</sup> IMF, *Balance of Payment and International Investment Position Manual*, 6 ed (2010) 100.

<sup>50</sup> Article 1 of the US Model BIT of 2012.

The German Model BIT of 2008 is phrased even broader. According to this, an ‘investment’ implies

‘every kind of asset which is directly or indirectly invested by investors of one Contracting State in the territory of the other Contracting State.’<sup>51</sup>

In the following, both Model BITs provide a non-exhaustive list of forms an investment may take. However, the German Model BIT, other than the US Model BIT, states that indirect investments shall only be covered by the Model BIT in the event that the investor realizes them via a company situated in the territory of the other country.<sup>52</sup>

The ICSID Convention does not provide a definition, which has led to significant case law dealing with the interpretation and the scope of ‘foreign investment’. The first and most dominant<sup>53</sup> decision in this regard is *Salini Costruttori S.P.A. v Kingdom of Morocco*.<sup>54</sup> According to the *Salini* tribunal, an investment requires (1) contributions, (2) a certain duration of performance of the contract, (3) participation in the risks of the transaction and (4) a contribution to the economy of the host state. These criteria have been applied by tribunals in several cases, although it is not unambiguous whether they are regarded as essential requirements constituting an investment or simply as factors typically indicating the existence of an investment.<sup>55</sup>

Foreign direct investments need to be distinguished from foreign portfolio investments (FPI), which imply the movement of money in order to obtain shares in an enterprise founded or operating in another country.<sup>56</sup> FPI involves only a minority holding (less than 10 %) in the enterprise and does therefore not rise to the level of the investor having direct or indirect control over the enterprise.<sup>57</sup> Moreover, portfolio investors tend to accept higher risks over a shorter period of time, while direct investments pursue long-term gains with a lower level of risks.<sup>58</sup>

---

<sup>51</sup> Article 1 (1) of the German Model BIT of 2008.

<sup>52</sup> Article 1 (1) of the German Model BIT of 2008.

<sup>53</sup> Berk Demirkol ‘The Notion of Investment in International Investment Law’ (2015) 1 *The Turkish Commercial Law Review* 46; Alex Grabowski ‘The Definition of Investment under the ICSID Convention: A Defense of *Salini*’ (2014) 15 *Chicago Journal of International Law* 290.

<sup>54</sup> *Salini Costruttori S.P.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para 52.

<sup>55</sup> Schreuer op cit note 41 at 130.

<sup>56</sup> Sornarajah op cit note 7 at 7.

<sup>57</sup> Chidede op cit note 6 at 12.

<sup>58</sup> *Ibid*, 13.

## 2. Protection of Foreign Investment in International Investment Law

### a. Origins of International Investment Law

International investment law is based on several components, yet derives particularly from customary law, treaties, general principles of law and dispute settlement rules.<sup>59</sup> The origins of international investment law trace back to the seventeenth to early twentieth centuries, when European countries expanded their trade and investment and therefore occurred long before modern bilateral investment treaties were entrenched.<sup>60</sup> Consequently, investment protection used to be largely dependent on the domestic laws governing the protection of private property, which required foreign investors to carefully study the respective host state's national legislation prior to the establishment of an investment.<sup>61</sup> However, international investment law seeks to determine international standards of alien protection through customary international law, the notion of diplomatic protection, international human rights law and the international law of state responsibility.<sup>62</sup>

Still today there is no comprehensive multilateral agreement providing universally applicable rules governing the subject matter of international investments.<sup>63</sup> Consequently, investments are not subjected to universally valid standards of investment promotion and protection but imply several rules and norms, which may differ widely.<sup>64</sup> Although there were several attempts to establish multilateral investment agreements, this objective failed, largely due to the opposing positions of capital-exporting and capital-importing host states on the adequate standards of investor protection.<sup>65</sup> The rapid expansion of international investment law was particularly driven by the desire of capital-exporting states to broadly protect investments made by their nationals in foreign by and large developing and capital-importing economic territories.<sup>66</sup> The main focus of capital-exporting states comprised of the establishment of a high-standard protection, which led them to eventually turn to bilateral investment treaties as these offered the possibility of one-on-one negotiations.<sup>67</sup> After the conclusion of the first BIT in 1959<sup>68</sup>, a massive spreading of BITs occurred

---

<sup>59</sup> Chidede op cit note 6 at 50.

<sup>60</sup> Kate Miles *The Origins of International Investment Law* (2013) 2.

<sup>61</sup> Subedi op cit note 9 at 55.

<sup>62</sup> Ibid, 56.

<sup>63</sup> Chidede op cit note 6 at 48.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Bilateral Investment Treaty concluded between Germany and Pakistan signed 25 November 1959.

in the 1990s. By the end of the millennium, there were about 2000 treaties signed globally, especially between capital-exporting and developing states.<sup>69</sup>

One particular feature of a foreign investment comprises of its long-term commitment vis-à-vis the host state, which leaves the investor incapable of leaving the country as and when it wishes. Hence, from the investor's viewpoint a long-term protection is necessary, which is independent from changes in the domestic legislation of the host state.<sup>70</sup> Based on its territorial sovereignty the host state is entitled to change its national rules applicable to foreign investment at any time in the event that it considers the current stipulations not appropriate. Accordingly, as international investors were unable to faithfully rely on the host state's legislation, they sought investment protection by other means than national law. *Guzman* names this 'dynamic inconsistency problem' which describes the situation that the adherence to a certain conduct agreed upon can only be ensured via the establishment of a binding mechanism ensuring the continued commitment of both parties to the initial agreement despite potential changes in interests and objectives of each party, particularly on part of the host.<sup>71</sup> This special protection mechanism has recently been sought particularly under BITs as neither party to the agreement is capable of unilaterally changing the stipulations set out in the agreement.<sup>72</sup> Another particular feature of BITs is the fact that they are often agreed between a capital-exporting developed state and a less developed host state seeking to attract foreign capital inflow - thus, the capital flow usually only occurs one-way. However, the formulation of BITs ordinarily provides for a reciprocal capital flow, which is not consistent with the actual circumstances.<sup>73</sup> The developing country promises to protect the foreign investments made in its territory in exchange for the receipt of foreign capital inflow to its economy.<sup>74</sup> Due to the fact that the states parties to BITs are usually of different bargaining power the relationship hence qualifies as unequal.<sup>75</sup> In order to obtain the prospect of future investment inflows developing countries agree to a limitation of their regulation rights as those regulations potentially constitute a breach of the stipulations provided by the investment treaty.<sup>76</sup> Moreover, treaties do generally not contain a firm obligation of the capital-exporting vis-à-vis the capital-receiving state to actually effect investments, hence the host-states commit to surrender parts of their sovereignty rights merely based on the hope to receive capital inflow but in the absence of any assurance thereof.<sup>77</sup> Therefore, the underlying

---

<sup>69</sup> Sornarajah op cit note 7 at 204; Miles *The Origins of International Investment Law* op cit note 60 at 86.

<sup>70</sup> Subedi op cit note 9 at 81.

<sup>71</sup> Guzman op cit note 18 at 658-9.

<sup>72</sup> Subedi op cit note 9 at 82.

<sup>73</sup> Sornarajah op cit note 7 at 207.

<sup>74</sup> Alec R. Johnson 'Rethinking Bilateral Investment Treaties in Sub-Saharan Africa' (2010) *59 Emory Law Journal* 924.

<sup>75</sup> Sornarajah op cit note 7 at 207.

<sup>76</sup> Johnson op cit note 74 at 924.

<sup>77</sup> Ibid.

idea of international investment law is to balance the opposing interests of foreign investors and host states and the prevention of economic distortion by discrimination of aliens.<sup>78</sup>

#### b. Customary International Minimum Standard

The international minimum standard of treatment of foreign nationals constitutes the main principle in international investment law regarding investment protection.<sup>79</sup> The minimum standard emerged from the law on the diplomatic protection of aliens.<sup>80</sup> A breach of the diplomatic protection of aliens could trigger an intervention right of the home state entitling it to take actions on behalf of its aggrieved national.<sup>81</sup> However, the minimum standard was initially only concerned with the protection of the physical person of the alien while abroad; it was only in the second half of the twentieth century that tribunals began to extend the scope of protection to foreign investments under the assertion of having a creative function to perform.<sup>82</sup> The international law regarding the protection of alien property, however, was initially based on the idea that the alien submitted to the application of the local laws and jurisdiction by its decision to enter and carry on business in the host state's territory.<sup>83</sup> Nowadays the existence of an international minimum standard regarding the treatment of foreign investors is principally acknowledged; however, its scope and limits are rather unclear.<sup>84</sup> Three notions, which can be drawn from early case law on the matter of state responsibility, appear to shape the minimum standard: first, the requirement of a compensation for expropriation, secondly, the responsibility for destruction or violence by non-state actors and lastly, denial of justice.<sup>85</sup> In the course of establishing investment protection by BITs, the initial scope of the minimum standard was broadened. BITs commonly provide explicit protection regarding the first and second aspect. The first aspect displays the common main concern of investment treaties whereas the second aspect is usually taken into account in the shape of the requirement of 'full protection and security'.<sup>86</sup> Consequently, only denial of justice remains of independent significance.<sup>87</sup> In *Azinian v Mexico* the ICSID tribunal held that '[a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way.'<sup>88</sup> However, arbitral awards are only very

---

<sup>78</sup> Subedi op cit note 9 at 57.

<sup>79</sup> Ibid.

<sup>80</sup> Miles *The Origins of International Investment Law* op cit note 60 at 47.

<sup>81</sup> Ibid.

<sup>82</sup> Sornarajah op cit note 7 at 329.

<sup>83</sup> Miles *The Origins of International Investment Law* op cit note 60 at 48.

<sup>84</sup> Sornarajah op cit note 7 at 329.

<sup>85</sup> Ibid, 330.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> *Azinian, Davitian & Baca v United Mexican States* Award ICSID Case No. ARB(AF)/97/2, para 102.

seldomly based on the notion of denial of justice as tribunals refrain from stating misconduct by judicial organs of courts.<sup>89</sup>

### c. Expropriation

It is a fundamental and broadly accepted principle in international law that host states have the right to expropriate foreign assets as part of their territorial and economic sovereignty.<sup>90</sup> Therefore, most modern investment treaties respect the notion of state sovereignty and only engage with the conditions and consequences of an expropriation, however, leaving the principal right to expropriation untouched.<sup>91</sup> The expropriation of assets generally involves the transfer of property rights.<sup>92</sup>

#### i. The Legality of an Expropriation

Nowadays it is widely understood in international law that an expropriation can constitute a legally admissible action in the event that certain requirements are met. First, the measure of expropriation must serve a public purpose. Secondly, an expropriation must not be performed in an arbitrary or discriminatory fashion.<sup>93</sup> Moreover, the measure must be conducted in compliance with the applicable law and due process. Lastly, the expropriation must provide for compensation.<sup>94</sup> Put differently, any expropriation, which does not meet the requirements of serving a public purpose, non-discrimination, due process and compensation is illegal under international investment protection law.<sup>95</sup>

#### ii. Direct and Indirect Expropriation

Broadly, the subject matter of expropriation falls into two classifications: First, direct and expropriations and secondly, indirect expropriation.

Direct expropriation implies the actual taking of alien assets by the host government via direct means under deprivation of the legal title of the foreign investor's property.<sup>96</sup> Accordingly, a direct expropriation implies the loss of all, or almost all, meaningful control in relation to the foreign asset.<sup>97</sup> However, today direct expropriations occur rather seldom as states restrain from the overt taking from alien property rights as such a conduct is highly likely to attract negative publicity and

---

<sup>89</sup> Sornarajah op cit note 7 at 330.

<sup>90</sup> Chidede op cit note 6 at 37.

<sup>91</sup> Dolzer & Schreuer op cit note 37 at 98.

<sup>92</sup> Chidede op cit note 6 at 37.

<sup>93</sup> Subedi op cit note 9 at 73.

<sup>94</sup> Dolzer & Schreuer op cit note 37 at 99.

<sup>95</sup> Chidede op cit note 6 at 70.

<sup>96</sup> Peter D. Isakoff 'Defining the Scope of Indirect Expropriations for International Investments' (2013) 3 *Global Business Law Review* 192; Dolzer & Schreuer op cit note 37 at 101.

<sup>97</sup> Subedi op cit note 9 at 74.

to cause potential damage to the states' reputation regarding international investments.<sup>98</sup> Hence, nowadays the main concern comprises of indirect takings. An indirect taking implies a legal or administrative governmental action, which does not affect the foreign investor's legal title as such but leads to a deprivation of the property's substantial benefits or of the feasible usage of the respective asset.<sup>99</sup> The determination of an indirect expropriation entails more difficulties due to the fact that the opposing interests of the investor and the host state's sovereignty rights need to be balanced.<sup>100</sup> Furthermore, indirect expropriation may manifest in various forms. In the event that the host state's government takes a series of actions, which lead to a reduction of the investment's economic value, this conduct may constitute 'creeping expropriation'.<sup>101</sup> The cumulative impact of several measures by the host state could rise to the level of expropriation, even though the respective single action on its own was insufficient to constitute the allegation of expropriation.<sup>102</sup> The ICSID tribunal in *Generation Ukraine v Ukraine* defined 'creeping expropriation' as

'a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.'<sup>103</sup>

Another form indirect expropriation may take is 'regulatory expropriation', which may occur when the host state takes regulatory measures affecting the economic value of the foreign owned asset.<sup>104</sup> It will be decisive if the governmental action in question amounts to expropriation requiring compensation or if it merely displays the legitimate exert of the host state's regulatory discretion governing public welfare objectives.<sup>105</sup> The *Link Trading v Republic of Moldova* tribunal held that regulatory measures

'only become expropriatory when they are found to be an abusive taking. Abuse arises where it is demonstrated that the State has acted unfairly or inequitably towards the investment, where it has adopted measures that are arbitrary or discriminatory in character or in their manner of implementation, or where the measures taken violate an obligation undertaken by the State in regard to the investment.'<sup>106</sup>

---

<sup>98</sup> Dolzer & Schreuer op cit note 37 at 101.

<sup>99</sup> Subedi op cit note 9 at 75.

<sup>100</sup> Maurizio Brunetti 'Indirect Expropriation in International Law' (2003) 5 *International Law FORUM du droit international* 150.

<sup>101</sup> Subedi op cit note 9 at 76.

<sup>102</sup> Isakoff op cit note 96 at 195.

<sup>103</sup> *Generation Ukraine Inc. v Ukraine* Award ICSID Case No. ARB/00/9, para 20.22.

<sup>104</sup> Subedi op cit note 9 at 76.

<sup>105</sup> Dolzer & Schreuer op cit note 37 at 120.

<sup>106</sup> *Link Trading Joint Stack Company v Department for Customs Control of the Republic of Moldova* Final Award, 18 April 2002.

#### d. Fair and Equitable Treatment

BITs commonly provide for a ‘fair and equitable treatment’ (FET), which has to be granted to the parties to the treaty.<sup>107</sup> The notion of FET has given rise to various case law as the vast majority of successful cases were based on the alleged violation of this standard.<sup>108</sup> This development occurred due to its broadness and vagueness<sup>109</sup>, which, however, allows it to cover a wider range of potentially breaching measures.<sup>110</sup> The initial purpose of the FET was to achieve an objective which would be capable of filling potential gaps regarding the protection of foreign investments as not all administrative or legislative measures by the host state might be subsumable under one of the other protection measurements provided for in BITs.<sup>111</sup> Moreover, the FET is a ‘non-contingent’ standard and therefore provides for an absolute protection, which implies that the extent of protection is independent from the range of protection afforded to others.<sup>112</sup> Accordingly, host governments are unable to object to a claim solely based on the argument that the respective investor was treated in the same way as nationals or other foreign investors.<sup>113</sup> Most BITs stipulate that the contracting parties have to accord fair and equitable treatment to the covered investments of the respective other party without any explicit definition of the standard as such.<sup>114</sup> Due to the broadness and vagueness of the FET standard, several tribunals attempted to define and specify the meaning.<sup>115</sup> In 2012, the *Swisslion v Macedonia* tribunal expressed its view that the ‘[FET] standard basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors.’<sup>116</sup> In *Genin v Estonia* the tribunal defined a violation as ‘acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.’<sup>117</sup> The *Saluka v Czech Republic* tribunal stated that the FET standard involves certain requirements, which have to be adhered to by the host government:

---

<sup>107</sup> Sornarajah op cit note 7 at 235.

<sup>108</sup> Dolzer & Schreuer op cit note 37 at 130.

<sup>109</sup> Sornarajah op cit note 7 at 236.

<sup>110</sup> Rudolf Dolzer ‘Fair and Equitable Treatment: Today’s Contours’ (2013) 12 *Santa Clara Journal of International Law* 10.

<sup>111</sup> Dolzer & Schreuer op cit note 37 at 132.

<sup>112</sup> Campbell McLachlan & Laurence Shore & Matthew Weiniger *International Investment Arbitration: Substantive Principles* (2007) 11.

<sup>113</sup> UNCTAD *Fair and Equitable Treatment* UNCTAD Series on Issues in International Investment Agreements (2012) 6.

<sup>114</sup> Kenneth J. Vandeveld ‘A Unified Theory of Fair and Equitable Treatment’ (2010) 43 *N.Y.U. Journal of International Law and Politics* 46.

<sup>115</sup> Dolzer & Schreuer op cit note 37 at 142.

<sup>116</sup> *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, para 273.

<sup>117</sup> *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* ICSID Case No. ARB/99/2, para 367.

A foreign investor whose interests are protected under the Treaty is entitled to expect that the [host state] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some national policy, or discriminatory (i.e. based on unjustifiable distinctions)).<sup>118</sup>

Therefore, the FET standard in BITs provides that investments or investors are granted a treatment, which is reasonable, consistent, non-discriminatory, transparent and in accordance with due process.<sup>119</sup> The subject matter, which will be examined in order to determine the adherence to the FET standard is the treatment of the alien investor by the host state regardless of the importance of the measure or the respective economic sector to the host.<sup>120</sup> However, the foreign investor's legitimate expectations regarding its investment developed to be a crucial aspect based on the growing reference hereto by arbitral tribunals.<sup>121</sup> As this notion is not mentioned in actual FET provisions it constitutes an arbitral innovation.<sup>122</sup> In this regard, the *Tecmed* tribunal - one of the most cited cases<sup>123</sup> - stated the following:

‘The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. [...] The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State [...] not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle.’<sup>124</sup>

The legal framework at the time of the investment is decisive in order to determine the legitimate expectations of a foreign investor as this offers the investor the possibility to examine the legal

---

<sup>118</sup> *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para 309.

<sup>119</sup> Vandeveldelde op cit note 114 at 52-3.

<sup>120</sup> Dolzer ‘Fair and Equitable Treatment’ op cit note 110 at 11.

<sup>121</sup> UNCTAD *Fair and Equitable Treatment* op cit note 113 at 9.

<sup>122</sup> *Ibid.*

<sup>123</sup> Dolzer & Schreuer op cit note 37 at 142.

<sup>124</sup> *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para 154.

status in the host country while the host government is able to determine the legal stipulations which formed the basis for the investor's expectations.<sup>125</sup> Therefore, the investor is unable to call for changes in the domestic legislation but is entitled to a faithful application of the existing legislation as it is part of the host state's sovereignty rights to establish the legal framework applicable to foreign investments.<sup>126</sup>

e. Full Protection and Security

The entitlement to 'full protection and security' (FPS) is another crucial non-contingent standard usually provided for by BITs.<sup>127</sup> This standard generally implies that contracting parties shall grant FPS to investments and investors by the respective other contracting party within their respective territory<sup>128</sup> and derives from the international minimum standard, which required the state to take responsibility for destruction or violence of non-state actors.<sup>129</sup> However, there is a general consent that the standard of FPS does not offer absolute protection in relation to physical or legal infringements but that the host state is obliged to take such measures, which are necessary and reasonable in order to protect the foreign investment under the given circumstances.<sup>130</sup> Consequently, the host state is essentially required to exert 'due diligence' regarding the protection of alien property.<sup>131</sup> Moreover, the state cannot excuse itself based on the notion that reasonable measures could not be taken due to a lack of capacity or resources.<sup>132</sup> However, a violation of the standard cannot be constituted by reasonable regulation and legislation appropriate under the given circumstances.<sup>133</sup> In general, the standard of FPS is not designed to apply to a state's decision-making process but is deemed to govern the protection from civil strife and physical violence performed by state officials or others by the exercise of police power.<sup>134</sup> The standard, therefore, intends to render protection against the violation of the investor's property or interests by state forces or others, which could be reasonably anticipated and prevented.<sup>135</sup>

f. National Treatment

The national treatment (NT) standard stipulates that host states have to accord an extent of investment protection to foreign investors, which is at least as favourable as the extent of

---

<sup>125</sup> Dolzer & Schreuer op cit note 37 at 146.

<sup>126</sup> McLachlan & Shore & Weiniger op cit note 112 at 237.

<sup>127</sup> Ibid, 247.

<sup>128</sup> Ibid.

<sup>129</sup> Sornarajah op cit note 7 at 330.

<sup>130</sup> Dolzer & Schreuer op cit note 37 at 161.

<sup>131</sup> Subedi op cit note 9 at 67.

<sup>132</sup> Dolzer & Schreuer op cit note 37 at 162.

<sup>133</sup> Ibid.

<sup>134</sup> McLachlan & Shore & Weiniger op cit note 112 at 247.

<sup>135</sup> Sornarajah op cit note 7 at 237.

investment protection rendered to domestic investors in like circumstances.<sup>136</sup> The objective of the NT standard is to rule out discrimination based on the investor's nationality by means of a comparison with the treatment awarded to foreign and national investors under the provision of similar circumstances.<sup>137</sup> The main objective of the standard, as stated by UNCTAD, is to 'ensure a degree of competitive equality between national and foreign investors'.<sup>138</sup> Moreover, the standard 'raises difficult questions concerning the factual situations in which national treatment applies and the precise standard of comparison by which the treatment of national and foreign investors is to be compared'.<sup>139</sup> Moreover, it is questionable which factors determine 'like circumstances'. In *Pope & Talbot Inc v Canada* the tribunal held that - as a first step - the treatment of a foreign investment 'should be compared with that [treatment] accorded domestic investments in the same business or economic sector'.<sup>140</sup> Additionally, the tribunal held that different treatment of foreign and domestic investors will violate the NT standard 'unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of [the investment agreement]'.<sup>141</sup> This definition provides for some leeway for states as they may differentiate between foreign and domestic investments for national policy reasons but only to the extent that the policy measure itself is not discriminatory. Due to inequalities in economic power, technical capabilities and financial strength, different treatment of foreign and domestic investors may be reasonably necessary under certain circumstances for the purpose of creating a certain amount of operative equality.<sup>142</sup> Hence, treaties or related instruments often entail exceptions determining in which areas the NT standard is deemed to be not applicable.<sup>143</sup> However, it has to be stressed that mere economic reasons are not sufficient, as they do not constitute a rational government policy.<sup>144</sup> Thus, the obligation of NT is not unlimited and absolute but it ensures that host states do not attempt to achieve national law or policy goals by means of discriminating foreign investors, unless there is a reasonable exception.<sup>145</sup> Hence, UNCTAD stated that the determination of the scope of the standard is 'dependent on the treatment offered by a host country to domestic investors and not on some *a priori* absolute principles of treatment'.<sup>146</sup> However, the extent of differential treatment should be kept at the lowest possible level and not be greater than absolutely

---

<sup>136</sup> Chidede op cit note 6 at 80.

<sup>137</sup> Subedi op cit note 9 at 71.

<sup>138</sup> UNCTAD, *National Treatment*, UNCTAD Series on Issues on International Investment Agreements (1999) 1.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Pope & Talbot Inc v The Government of Canada* (Award on the Merits of Phase 2), 10 April 2001, para 78.

<sup>141</sup> *Ibid.*

<sup>142</sup> Subedi op cit note 9 at 71.

<sup>143</sup> Chidede op cit note 6 at 81.

<sup>144</sup> Sornarajah op cite note 7 at 235.

<sup>145</sup> Chidede op cit note 6 at 81.

<sup>146</sup> UNCTAD *National Treatment* op cit note 138 at 6.

necessary.<sup>147</sup> Moreover, the majority of BITs stipulate that the NT standard is only applicable to already established investments, however, some BITs also provide for application in the pre-establishment phase.<sup>148</sup>

g. Most-Favoured-Nation Treatment

Another standard commonly used in BITs is the most-favoured-nation (MFN) treatment. The objective of the standard of MFN is to ensure equal treatment and conditions between foreign investors from third countries.<sup>149</sup> Foreign investors aim to achieve a level of investment protection, which creates a ‘level playing ground’ in order to prevent economic disadvantages and discrimination, also, or particularly, in relation to foreign investors from other third countries.<sup>150</sup> Hence, the MFN treatment contributes to the establishment of competitive equality by eliminating the distortion of competition based on nationality considerations.<sup>151</sup> The Draft Articles on MFN Clauses provided by the ILC define the MFN treatment clause as ‘a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations’.<sup>152</sup> Hence, the MFN treatment standard is not an absolute but a relative standard in that its scope and extent hinges on the particular state’s conduct.<sup>153</sup> Thus, the MFN clause may not take any effect in the event that the state in question does not accord any relevant benefit to third states.<sup>154</sup> Moreover, the standard generally applies to all kind of activities related to an investment, such as the ‘establishment, acquisition, expansion, management, conduct, operation, sale or other disposition’.<sup>155</sup> However, parties may agree on exceptions regarding MFN, which permit differential treatment for foreign investors, e.g. based on attempts of regional integration, such as custom unions and free trade areas.<sup>156</sup> In *Maffezini v Spain*, the ICSID tribunal held that the relatively broad definition of MFN in the Spain – Argentina BIT would not only entail substantive but also procedural rights, i.e. dispute settlement provisions permitting the submission of the dispute to international arbitration.<sup>157</sup> However, in *Plama Consortium v Bulgaria*, the ICSID tribunal rejected the view of the *Maffezini* tribunal based on the notions that firstly, the possibility to

---

<sup>147</sup> Chidede op cit note 6 at 81.

<sup>148</sup> Ibid.

<sup>149</sup> UNCTAD *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II (2010) 14.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Art 4 of the Draft Articles on Most-Favoured-Nation Clauses with Commentaries adopted by the International Law Commission at its 30th session, 1978, and submitted to the General Assembly, *Yearbook of the International Law Commission* (1978) vol II, part two.

<sup>153</sup> Dolzer & Schreuer op cit note 37 at 206.

<sup>154</sup> Ibid.

<sup>155</sup> Subedi op cit note 9 at 68.

<sup>156</sup> Chidede op cit note 6 at 82.

<sup>157</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, para 56.

submit disputes to international arbitration needs to be expressly agreed between the parties and secondly, the general application of MFN to dispute settlement provisions would lead to a ‘chaotic situation’.<sup>158</sup> The decision in *Plama Consortium* is considered as preferable over the *Maffezini* reasoning, therefore, the MFN treatment is only deemed applicable to the subject matter of dispute resolution in the event that the parties expressly provided for its application.<sup>159</sup> Moreover, most BITs only provide for the application of the MFN treatment in the post-establishment phase, however there are some exceptional BITs, which determine application in the pre-establishment phase.<sup>160</sup>

#### h. Investor-State Dispute Settlement

Another provision commonly found in BITs relates to the dispute settlement. BITs commonly entail two different types of dispute settlement: First, clauses providing arbitration between the host state and the investor, and secondly, clauses providing arbitration between the state parties to the treaty.<sup>161</sup> Traditional international law stipulated that states could only be sued by other states, as individuals were not granted legal standing.<sup>162</sup> Hence, home states were obliged to litigate on their aggrieved national’s behalf in order to accord them diplomatic protection whereby it was uncertain if the investor would be awarded compensation.<sup>163</sup> However, nowadays BITs generally entail clauses providing accessibility of international arbitration tribunals, such as ICSID, for the investor in the event of disputes vis-à-vis the host state.<sup>164</sup> Accordingly, modern BITs allow home states to exempt themselves from the obligation to take actions on behalf of its nationals while maintaining and promoting the effectiveness of remedies for the investor, who is no longer forced to rely on diplomatic protection.<sup>165</sup> From the investor’s perspective this is particularly favourable against the background of potential uncertainty with regards to the national courts’ impartiality and independence.<sup>166</sup> The accessibility of international arbitration provides the investor with the prospect of a fair and impartial decision by an international legal forum extricated from political or economic motivations.<sup>167</sup>

---

<sup>158</sup> *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para 219.

<sup>159</sup> McLachlan & Shore & Weiniger op cit note 112 at 257.

<sup>160</sup> Chidede op cit note 6 at 82.

<sup>161</sup> Dolzer & Schreuer op cit note 37 at 234.

<sup>162</sup> Chidede op cit note 6 at 93.

<sup>163</sup> Ibid.

<sup>164</sup> Subedi op cit note 9 at 94.

<sup>165</sup> Ibid, 95.

<sup>166</sup> Dolzer & Schreuer op cit note 37 at 235.

<sup>167</sup> Chidede op cit note 6 at 88.

i. Compensation for Expropriation

The concept of compensation for expropriation is one of the main principles of international investment law. In the event that a state expropriates foreign assets within the scope of its sovereignty rights, it shall traditionally be liable to pay compensation to the foreign owner.<sup>168</sup> The vast majority of BITs provides for a ‘full’ compensation, whereby the term ‘full’ is defined as ‘prompt, adequate and effective’.<sup>169</sup> This term of ‘prompt, adequate and effective’ became known as the ‘Hull Rule’ or ‘Hull Formula’ as it derives from a statement made by the American Secretary of State, Cordell Hull.<sup>170</sup> The aspect of a ‘prompt’ compensation comprises that the respective investor should not have to wait for a longer time, i.e. possibly several years.<sup>171</sup> Compensation is ‘adequate’ when it reflects the appropriate value of the ceased property and displays the value of the invested assets and the expected profits.<sup>172</sup> Moreover, compensation is ‘effective’ when it is provided in a form, which is beneficiary for the former owner, thus paid in a convertible or transferable currency.<sup>173</sup> Although the vast majority of BITs adopted the Hull Rule, it does not constitute customary international law.<sup>174</sup> Capital-exporting states support the Hull Rule as the rapid payment of the full value of the property prevents the investor from suffering material damages and allows him to swiftly reinvest the capital, whereas in particular developing states largely criticise the Hull Rule and plead for a less stringent approach.<sup>175</sup> In 1974 the United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources provided a limiting approach in regards to compensation by stipulating that an ‘appropriate’ compensation needs to be paid.<sup>176</sup> The standard of ‘appropriate’ compensation is deemed to be more subjective than the concept of ‘adequate and effective’ compensation.<sup>177</sup> Regardless of which terms are used in the respective treaty, BITs commonly provide determination of compensation based on the ‘fair market value’ or ‘genuine value’ of the concerned asset.<sup>178</sup> This conduct is broadly acknowledged as it takes into account the value of the asset at the moment of the taking.<sup>179</sup>

---

<sup>168</sup> Ibid, 67.

<sup>169</sup> Subedi op cit note 9 at 79.

<sup>170</sup> Guzman op cit note 18 at 645.

<sup>171</sup> Chidede op cit note 6 at 68.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Sornarajah op cit note 7 at 437; Andrew T. Guzman op cit note 18 at 647.

<sup>176</sup> See Charter of Economic Rights and Duties of States, GA Resolution 3281(xxix).

<sup>177</sup> McLachlan & Shore & Weiniger op cit note 112 at 317.

<sup>178</sup> Ibid, 318.

<sup>179</sup> Chidede op cit note 6 at 69.

## j. Transfer of Funds

Another provision ordinarily found in BITs relates to the subject matter of transfer of funds, which constitutes the host country's undertaking to allow for the payment, conversion and repatriation of funds in connection with the foreign investment.<sup>180</sup> Most BITs provide for an absolute rather than a relative obligation, as the ability of repatriating profits to the home state is a main objective of foreign investments.<sup>181</sup> In contrast, multilateral agreements often provide for exceptions, which exempt the host state from the general obligation on the basis of the state's economic circumstances.<sup>182</sup> The inclusion of such derogations seems reasonable in the event that one contracting party experiences an economic crisis which causes the other contracting party losses, for instance due to exchange shortfalls.<sup>183</sup> During a financial or economic crisis, large surges of capital outflows might exacerbate the host state's situation and make it even more difficult for the country to implement appropriate adjustment policies.

### III. DEVELOPMENT OF INVESTMENT LAW IN SOUTH AFRICA

#### 1. Apartheid Era

The Apartheid system was formally institutionalised in South Africa in 1948 by the National Party (NP) and constituted the establishment of two distinct economies and societies within the territory of South Africa.<sup>184</sup> The establishment of the Apartheid system particularly included the implementation of expanding legislative framework stipulating racial segregation, for instance the Group Areas Act of 1950 - which divided the country in separate geographical areas, the Republic of South Africa and the so-called homelands - and the Separate Amenities Act of 1953 - which provided racial segregation with regards to public facilities and accommodations.<sup>185</sup> During these times the South African political and economical agenda comprised of an inward perspective manifested in the substitution of imports with locally manufactured products and 'capital control'.<sup>186</sup> However, during the 1950s, the resistance by the black community against the racial discrimination massively increased resulting in greater scrutiny by the international community.<sup>187</sup> In the 1960s the international business community began to exert a 'disinvestment movement' in

---

<sup>180</sup> UNCTAD *Transfer of Funds* UNCTAD Series on Issues in International Investment Agreements (2000) 5.

<sup>181</sup> Sornarajah op cit note 7 at 238.

<sup>182</sup> UNCTAD *Transfer of Funds* op cit note 180 at 7.

<sup>183</sup> Sornarajah op cit note 7 at 238.

<sup>184</sup> Hunter R. Clark & Amy Bogran 'Foreign Direct Investment in South Africa' (1999) 27 *Denver Journal of International Law and Policy* 341.

<sup>185</sup> Langalanga op cit note 29 at 6; Clark & Bogran op cit note 184 at 341-2.

<sup>186</sup> Trade Law Centre (TRALAC) *Investment Project: South African Case Study* International Institute for Sustainable Development Report (2004) 3.

<sup>187</sup> Chidede op cit note 6 at 103; Eric Taylor 'The History of Foreign Investment and Labor Law in South Africa and the Impact on Investment of the Labour Relations Act 66 of 1995' (1996) 9 *The Transnational Lawyer* 618.

order to protest against the Apartheid system and to effect social change in South Africa by imposing trade sanctions and investment boycotts.<sup>188</sup> Subsequently, foreign state governments<sup>189</sup> started to pass legislation restricting investments in South Africa - for instance most prominently the federal Comprehensive Anti-Apartheid Act of 1986 by the US, which banned US nationals from new investments and trade in South Africa.<sup>190</sup> African institutions, namely the Organization of African Unity, also joined the disinvestment movement and greatly discouraged trade relations with South Africa.<sup>191</sup> As a result, an estimated total of 350 trans-national companies decided to withdraw from business activities in South Africa, which resulted in an immense capital outflow of South Africa.<sup>192</sup> Moreover, South African businesses and industries were impeded to grow into internationally operating businesses as foreign firms were restraining from associating with South African companies due to the severe international pressure.<sup>193</sup> Hence, South Africa was facing an economic stagnation and political instability due to increasingly violent resistance by the end of the 1980s.<sup>194</sup> Eventually, the massive external pressure and the constantly increasing internal expenses resulting from the high maintaining costs of the implemented security system forced the government to rethink the concept of Apartheid.<sup>195</sup> On 2 February 1990 the South African President Frederik W. de Klerk officially announced the release of African National Congress (ANC) leader Nelson Mandela from prison and the lifting of bans of the ANC and other legal political groups.<sup>196</sup> Nelson Mandela was released from prison on 11 February 1990.<sup>197</sup> In the following, a series of tedious and difficult negotiations took place between the ANC, the then governing NP and representatives of organised business and labour associations with the purpose of working peacefully towards a legitimate and democratic multiracial government.<sup>198</sup>

---

<sup>188</sup> Clark & Bogran op cit note 184 at 344.

<sup>189</sup> Countries imposing economic and trade sanctions on South Africa include the UK, Australia, Hong Kong, France, Brazil, Norway, Sweden, Finland, Denmark, Iceland, Netherlands, Japan and others, Talkmore Chidede op cit note 6 at 103.

<sup>190</sup> Taylor op cit note 187 at 620-1.

<sup>191</sup> OECD 'Self-Assessment of South Africa's Investment Regime in Relation to the OECD Codes of Liberalisation and the Principle of National Treatment' *OECD-South Africa Investment Policy Dialogue* (2014) 15.

<sup>192</sup> Trade Law Centre (TRALAC) *Investment Project: South African Case Study* International Institute for Sustainable Development Report (2004) 3.

<sup>193</sup> Langalanga op cit note 29 at 5.

<sup>194</sup> Federal Research Division, Library of Congress *South Africa: A Country Study* 3 ed (1997) 73.

<sup>195</sup> Taylor op cit note 187 at 622-3.

<sup>196</sup> Federal Research Division op cit note 194 at 75.

<sup>197</sup> Taylor op cit note 187 at 626-7.

<sup>198</sup> Federal Research Division op cit note 194 at 75.

## 2. Developments in Post-Apartheid Era

### a. Pre-Constitutional Era

In the course of enduring negotiations, the main legislative pillars of Apartheid, such as the Group Areas Act of 1953 and the Population Registration Act of 1950<sup>199</sup> were abolished, which paved the way for formal negotiations regarding a future Constitution by the end of 1991.<sup>200</sup> Subsequently, most international trade sanctions and investment boycotts were lifted: The US repealed remaining sanctions under the Comprehensive Antiaparthoid Act in July 1992; the then European Community (EC) revoked most bans in 1992; the United Nations (UN) lifted respective sanctions in 1993.<sup>201</sup> Eventually the first multiracial democratic elections were held in April 1994 with a tremendous success for the ANC, which won the elections with a share of 62.6% of the votes.<sup>202</sup> The election of a new democratic government, under the guidance of State President Nelson Mandela, constituted a shift towards more open-looking and trade and investment orientated economic and social policies.<sup>203</sup> The results and achievements of this negotiation period are enshrined in the South African Constitution Act No. 108 of 1996 (the Constitution), which came into force in 1996.<sup>204</sup> Regarding the legal investment framework, two considerations, which evolved during the negotiation phase, are of particular relevance. Firstly, the Black Economic Empowerment (BEE) policy was formed and later codified in the Constitution.<sup>205</sup> Second, the negotiations constituted the beginning of a series of conclusion of BITs with developed countries with the purpose of generating capital inflow and mitigating poverty and unemployment.<sup>206</sup>

### b. Broad-Based Black Economic Empowerment Act and the Mineral and Petroleum Resources Development Act

The Black Economic Empowerment (BEE) policy evolved against the backdrop of the massive and enduring racial discrimination and the exclusion from economic opportunities and business ownership particularly suffered by the black population during the Apartheid era.<sup>207</sup> The BEE strategy is founded on section 9 (2) of the South African Constitution, which states that in order

---

<sup>199</sup> The Population Registration Act of 1950 provided compulsory registration of new born babies and immigrants by race, *ibid*, 79.

<sup>200</sup> *Ibid*, 77-80.

<sup>201</sup> *Ibid*, 80-1.

<sup>202</sup> *Ibid*, 84.

<sup>203</sup> OECD 'Self-Assessment of South Africa's Investment Regime in Relation to the OECD Codes of Liberalisation and the Principle of National Treatment' *OECD-South Africa Investment Policy Dialogue* (2014) 16.

<sup>204</sup> Langalanga *op cit* note 29 at 6-7.

<sup>205</sup> *Ibid*, 7.

<sup>206</sup> Jennifer Reed 'South African Revolutionizing Foreign Investment Protection System' (2014) 6 *Yearbook on Arbitration and Mediation* 296.

<sup>207</sup> Matthew Coleman & Kevin Williams 'South Africa's Bilateral Investment Treaties, Black Economic Empowerment and Mining: A Fragmented Meeting?' (2008) 9 *Business Law International* 60.

‘[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.’<sup>208</sup> The term ‘black’ is used generically and entails Africans, Coloureds and Indians.<sup>209</sup> The aim of the BEE policy is to enable the promotion and facilitation of black people in regard to the participation in the country’s economy by raising the share of black employment, management and control of businesses.<sup>210</sup> In 2003 the Broad-Based Black Empowerment Act No. 53 of 2003 (the B-BBEE Act) was enacted based on subsection 9 (2) of the Constitution with the objective of enhancing the hitherto insufficient achievements of the BEE policy.<sup>211</sup> Section 1 of the B-BBEE Act defines BEE as

‘the economic empowerment of all black people [...] through diverse but integrated socio-economic strategies that include, but are not limited to

- (a) increasing the number of black people that manage, own and control and enterprises assets;
- (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises
- [...]
- (f) investment in enterprises that are owned or managed by black people; [...].’

As part of the BBE-strategy, the Mineral and Petroleum Resources Development Act No. 28 of 2002 (MPRDA) was promulgated. The objectives thereof are according to section 2, *inter alia*, the augmentation of opportunities for historically disadvantaged persons<sup>212</sup>, the enhancement of their benefits from the exploitation of South Africa’s mineral and petroleum resources and the safeguarding of the sustainable development in relation thereto.<sup>213</sup> In order to achieve this goal the MPRDA creates a new mineral regulation framework, which varies widely from the previous mineral rights system.<sup>214</sup> The previous system was determined by South African common law, according to which the landowner is entitled to the whole of the land including the space above the surface and everything below it.<sup>215</sup> Thus, the landowner was also owner of the respective minerals

---

<sup>208</sup> See section 9 (2) of the Constitution.

<sup>209</sup> See section 1 of the B-BBEE Act.

<sup>210</sup> Chidede op cit note 6 at 116-7.

<sup>211</sup> Ibid, 118-9.

<sup>212</sup> Section (1) of the MRDPA defines the term ‘historically disadvantaged person’ as:

‘(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;

(b) any association, a majority of whose members are contemplated in paragraph (a);

(c) any juristic person other than an association, in which persons contemplated in paragraph (a) own and control a majority of the issued capital or members’ interest and are able to control a majority of the members’ votes.’

<sup>213</sup> See section 2 (d) and (e) of the MPRDA.

<sup>214</sup> Coleman & Williams op cit note 207 at 66.

<sup>215</sup> Ibid, 64.

and petroleum resources found on his land - though the mineral and petroleum rights were separable from the landownership and transferable.<sup>216</sup> However, the holder of the mineral rights had to obtain permissions by the government in order to undertake prospecting activities or conduct mining subject to the Minerals Act No. 50 of 1991.<sup>217</sup> These authorisations constituted regulatory licences premised on the underlying rights, which in themselves did however not confer any rights.<sup>218</sup> The introduction of the MPRDA annulled the 1991 Minerals Act and eliminated all old order mineral rights.<sup>219</sup> After the MPRDA came into effect in 2004, old order mineral rights were obliterated and ceased by the state, who became the ‘custodian’ thereof on behalf of all the people of South Africa.<sup>220</sup> Thus, private companies with previous mineral rights holdings were obliged to apply for new licences, which however do not provide the applicant with full rights but only with a ‘limited real right in respect of the mineral or petroleum and the land to which such rights relate’.<sup>221</sup> Moreover, the applicant is obliged to demonstrate the manner in which the granting of the requested rights would contribute to the expansion of opportunities for historically disadvantaged persons and the promotion of socio-economic welfare.<sup>222</sup> Particularly, applicants were obliged to undertake to divest 26% of their ownership stake within a period of ten years<sup>223</sup> to historically disadvantaged persons as stipulated by the Mining Charter.<sup>224</sup> However, the MPRDA provides for a conversion process, which allows for the transformation of old order (lost) rights into new order mining and prospecting rights under the MRDPA subject to approval by the Minister of Minerals and Energy.<sup>225</sup>

In *Piero Foresti et al. v Republic of South Africa*<sup>226</sup>, the claimants - a group of Italian nationals and a company based in Luxembourg - brought claims challenging the MPRDA based on the assertion that the extinction of previously held mineral rights as stipulated by the MPRDA and the requirement of mandatory divestment in favour of historically disadvantaged persons were in breach with the expropriation stipulations of the BIT concluded between South Africa and Italy and between South Africa and Belgium and Luxembourg.<sup>227</sup> Therefore, according to the claimants, the

---

<sup>216</sup> Ibid, 64.

<sup>217</sup> Ibid, 65.

<sup>218</sup> Ibid, 65.

<sup>219</sup> Annalisa M. Leibold ‘ The Friction Between Investor Protection and Human Rights: Lessons from Foresti v. South Africa (2016) 38 *Houston Journal of International Law* 245.

<sup>220</sup> See section 3 (1) of the MPRDA.

<sup>221</sup> See section 5 (1) of the MPRDA.

<sup>222</sup> See section 17 (4) of the MPRDA, read with section 2 (d) and section 23(1)(h).

<sup>223</sup> See paragraph 4.7 [Ownership and Joint Ventures] of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, General Notice 1639 of 2004, Government Gazette No. 26661.

<sup>224</sup> Andrew Friedman ‘Flexible Arbitration for the Developing World: Piero Foresti and the Future of Bilateral Investment Treaties in the Global South (2010) 7 *International Law and Management Review* 41.

<sup>225</sup> See Schedule II of the MPRDA.

<sup>226</sup> *Piero Foresti et al. v The Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award 4 August 2010.

<sup>227</sup> *Piero Foresti et al. v The Republic of South Africa* op cit note 226 at 14.

putting and coming into effect of the MPRDA constituted an expropriation of the previous mineral rights and the respective shares in the operating companies, and a violation of the FET and the NT standard entailed by the respective BITs.<sup>228</sup>

South Africa however claimed that the investments in question had not been expropriated, neither directly nor indirectly, and even if they were, the expropriation occurred in compliance with the expropriation stipulations provided by the respective BITs and was lawful as it was conducted for a public purpose, under the provision of immediate or prompt compensation that is full or adequate and effective, on a non-discriminatory basis and under due process of law.<sup>229</sup> As to the aspect of the public purpose of the alleged expropriations, South Africa argued that the promulgation of the MPRDA served the purpose of

- (i) ‘simplifying and modernizing an overly complex legal system;
- (ii) ameliorating the disenfranchisement of HDSAs and other negative social effects caused by apartheid in general and the 1991 Mineral Rights Act in particular;
- (iii) reducing the economically harmful concentration of mineral rights and promoting the optimal exploitation of mineral resources; and
- (iv) protecting the environment and the communities living in the vicinity of mining operations’.<sup>230</sup>

Even though the dispute was settled on the merits, it received enormous international attention.<sup>231</sup>

Another important decision challenging the MPRDA is the judgment by the South African Constitutional Court in the case *Agri SA v The Minister for Mineral and Energy*.<sup>232</sup> This judgement is particularly important as it depicts the interpretation of the right to property and the meaning of expropriation under section 25 of the South African Constitution. *Agri SA* instituted proceedings on behalf of a company, which had held old order rights but did not manage to apply for the conversion thereof due to liquidation of the company.<sup>233</sup> The Constitutional Court held that although the extinction of the previous mineral rights constituted a deprivation thereof, the deprivation was not arbitrary.<sup>234</sup> The court further held that the deprivation did not amount to expropriation, as the establishment of an expropriation compulsorily required the acquisition of the property rights in question by the state.<sup>235</sup> As the state only became ‘custodian’ of the mineral rights

---

<sup>228</sup> Ibid, 15-6; Jason Brickhill & Max du Plessis ‘Two’s Company, Three’s A Crowd: Public Interest Intervention in Investor-State Arbitration (Piero Foresti v South Africa)’ (2011) 27 *South African Journal of Human Rights* 155-6.

<sup>229</sup> *Piero Foresti et al. v The Republic of South Africa* op cit note 226 at 18-20.

<sup>230</sup> Ibid, 18.

<sup>231</sup> Friedman op cit note 224 at 37.

<sup>232</sup> 2013 (4) SA 1 CC.

<sup>233</sup> Karen Bosman ‘South Africa: Trading International Investment for Policy Space’, Stellenbosch Economic Working Papers 04/16, 16.

<sup>234</sup> 2013 (4) SA 1 CC para 53.

<sup>235</sup> Ibid, paras 58 and 68.

by virtue of the MPRDA, the state had not acquired ownership of the mineral rights.<sup>236</sup> The court held that section 25 of the Constitution interdicted an ‘over-emphasis [is] [on] private property rights at the expense of the state’s social responsibilities.’<sup>237</sup> These findings represent the majority decision, three of the judges however declared that they considered the rule that expropriation required the compulsory acquisition of rights in property by the state as too inflexible.<sup>238</sup>

### c. Entry into and Termination of Bilateral Investment Treaties

Following the democratic transformation, the South African government sought to attract FDI in order to mitigate the high employment and poverty rates and to increase capital flow into the country.<sup>239</sup> *Nelson Mandela* stressed the importance of FDI for the South African economy in an article published in 1993 dealing with the future foreign policies of South Africa:

‘It is obvious to me that the primary components of our international economic relations, which must feed our development strategy, are the strengthening of our trade performance and our capacity to attract foreign investment. [...] We do not expect foreign investment to solve our economic problems, but we understand that it can play a very valuable role in our economic development. [...]

The ANC believes the most important way to attract foreign investment is to create a stable and democratic political environment. Also important is the development of legitimate, transparent and consistent economic policies. [...] And while we do not plan to provide exclusive incentives for all foreign investors, we realize that it might be necessary to make special arrangements to attract the kind of investment that will make a real difference in South Africa.’<sup>240</sup>

Immediately following the election of Nelson Mandela as president, the new democratic government decided to conclude numerous BITs in order to send a diplomatic signal to the international community that South Africa desired to re-engage with foreign countries and that foreign investments would be protected and secured by means of international investment law.<sup>241</sup> Between 1994 and 1998, South Africa entered into around fifteen BITs, mostly with South Africa’s main traditional trading partners, i.e. capital-exporting Western European states.<sup>242</sup> These BITs were largely formulated following the OECD template regarding the format and objectives.<sup>243</sup> In this respect, however, it is important to stress that the Republic of South Africa had neither previous

---

<sup>236</sup> *Ibid*, para 71.

<sup>237</sup> *Ibid*, para 62.

<sup>238</sup> *Ibid*, paras 78, 80-1.

<sup>239</sup> *Reed op cit* note 206 at 296.

<sup>240</sup> Nelson Mandela ‘South Africa’s Foreign Future Policy’ (1993) 72 *Foreign Affairs* 95.

<sup>241</sup> Langalanga *op cit* note 29 at 7.

<sup>242</sup> Carim *op cit* note 30 at 61.

<sup>243</sup> Republic of South Africa, Department of Trade and Industry, *Bilateral Investment Treaty Policy Framework Review Government Position Paper* (2009) 19.

history nor expertise regarding the conclusion of BITs due to the historical background. Thus, the newly elected government, which aimed to demonstrate South Africa's new investment friendly climate, was not fully apprised of the risks and consequences, which may result from the conclusion of BITs.<sup>244</sup>

A turning point of South Africa's approach to and perception of BITs occurred following the above-mentioned case *Piero Foresti v Republic of South Africa*.<sup>245</sup> Even though the dispute was settled on the merits<sup>246</sup>, it induced the South Africa government, namely the Department of Trade and Industry (DTI), to undertake a comprehensive review and risk assessment of the existing BITs beginning in 2007.<sup>247</sup> In June 2009, the DTI published the 'Bilateral Investment Treaty Policy Framework Review Government Position Paper', which reflects the respective findings. One of the main findings was that there was no proven correlation between the conclusion of BITs and the actual flow of FDI into the South African economy.<sup>248</sup> South Africa received substantial FDI from countries with whom the country has not signed any investment agreements whereas the FDI inflow from many partner countries was much less significant or even non-existent.<sup>249</sup> Furthermore, South Africa's current BITs were too far-reaching and limited policy space in a manner, which led to the prevention of the country's sustainable development.<sup>250</sup> Moreover, the state-investor-arbitration provisions contained in BITs allowed for the assessment of vital national interests against the backdrop of mere commercial interests which might lead to unpredictable arbitration decisions contradictory to legitimate and constitutional policies.<sup>251</sup>

Thus, in July 2010 the South African Cabinet decided to undertake measures in order to modernise and enhance the investment protection framework.<sup>252</sup> In this respect, the Cabinet emphasised five core elements<sup>253</sup>:

---

<sup>244</sup> Ibid, 5.

<sup>245</sup> Fola Adeleke 'Benchmarking South Africa's Foreign Direct Investment Policy' Policy Insights 13, South African Institute for International Affairs, April 2015, 1.

<sup>246</sup> Tania Steenkamp *South Africa's New Bilateral Investment Treaty Policy: A Reasonable Response To a Flawed Regime?* (2014) 79.

<sup>247</sup> South Africa, Department of Trade and Industry, Update on the Review of Bilateral Investment Treaties in South Africa (Report to Cabinet, 15 February 2013), online available at: [http://osf.org.za/wp-content/uploads/2015/08/Department-of-Trade-and-Industry-dti-updates-on-South-Africas-trade-diplomacy-dti\\_review\\_of\\_bits\\_ppc\\_20130215.pdf](http://osf.org.za/wp-content/uploads/2015/08/Department-of-Trade-and-Industry-dti-updates-on-South-Africas-trade-diplomacy-dti_review_of_bits_ppc_20130215.pdf), last accessed 17 July 2017.

<sup>248</sup> Mohammad Mossallam 'Process Matters: South Africa's Experience Exiting its BITs' (2015) *SSRN Electronic Journal*, 12.

<sup>249</sup> Carim op cit note 30 at 60.

<sup>250</sup> Government Position Paper op cit note 243 at 19.

<sup>251</sup> Xavier Carim 'Lessons from South Africa's BITs Review' Columbia FDI Perspectives No. 109, 25 November 2013, 1.

<sup>252</sup> South Africa, Department of Trade and Industry, Update on the Review of Bilateral Investment Treaties in South Africa (Report to Cabinet, 15 February 2013), online available at: [http://osf.org.za/wp-content/uploads/2015/08/Department-of-Trade-and-Industry-dti-updates-on-South-Africas-trade-diplomacy-dti\\_review\\_of\\_bits\\_ppc\\_20130215.pdf](http://osf.org.za/wp-content/uploads/2015/08/Department-of-Trade-and-Industry-dti-updates-on-South-Africas-trade-diplomacy-dti_review_of_bits_ppc_20130215.pdf), last accessed 17 July 2017.

- 1) Development of a new Investment Act which codifies and clarifies provisions typically entailed by BITs into domestic law with focus on the enhancement of existing investor protection;
- 2) Termination of the first generation BITs, however under proposition of renegotiation;
- 3) Prevention of conclusion of future BITs, unless compelling economic and political reasons exist to do so;
- 4) Development of a new Model BIT for the purpose of negotiations or renegotiations of BITs;
- 5) Establishment of an Inter-Ministerial Committee comprised of representatives of various government departments to monitor the process.

As a result, the South African government decided to terminate numerous BITs particularly with European states<sup>254</sup> and began to rearrange the domestic investment protection framework focussing on the inclusion of policy space in relation to socio-economic needs.<sup>255</sup> In the following the government published the draft Promotion and Protection of Investment Bill (PPIB)<sup>256</sup> in November 2013, encouraging public comments relating thereto.<sup>257</sup> In July 2015 a first revised version was released, and in November 2015 a further revised version was passed by both Houses of Parliament.<sup>258</sup> South African President, Jacob G. Zuma gave his assent to the Investment Bill on 13 December 2015, which led to its publication in the Government Gazette on 15 December 2015, now named the Protection of Investment Act No. 22 of 2015.<sup>259</sup>

#### **IV. LEGAL PROTECTION OF FOREIGN INVESTMENT UNDER THE 2015 PROTECTION OF INVESTMENT ACT NO. 22 OF 2015**

The Protection of Investment Act of No. 22 of 2015 (the Investment Act) was promulgated in the Government Gazette on 15 December 2015. The date of commencement of the Investment Act is however still to be proclaimed, which means that it has not come into operation yet.

According to section 4 of the Investment Act, the main objective is to protect investments aligned with the South African Constitution whilst balancing public interest and rights and obligations of investors.<sup>260</sup> According to *Carim*, the government - as mentioned in the Preamble - considers the Investment Act to confirm South Africa's maintained openness to foreign investments and to render comprehensive and effective protection whilst allowing the government to pursue a policy regime

---

<sup>253</sup> Ibid.

<sup>254</sup> Bosman op cit note 233 at 14; including Germany, the United Kingdom, the Netherlands, France, Austria, Belgium-Luxembourg Economic Union, Denmark, Switzerland and Spain.

<sup>255</sup> Mossallam op cit note 248 at 4.

<sup>256</sup> Later renamed to Protection of Investment Bill.

<sup>257</sup> Bosman op cit note 233 at 14.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid.

<sup>260</sup> See subsection 4 (a) of the Investment Act.

appropriate to the specific socio-economic conditions and in compliance with the Constitution.<sup>261</sup> Foreign investors, in particular European investors, claimed that national legislation did not constitute a viable substitution for the terminated BITs, which would eventually result in a reduction of FDI flow into the South African economy.<sup>262</sup>

In fact, one of the major aspects of an investment framework enshrined in national legislation as opposed to investment protection through IIAs, e.g. BITs, comprises of the fact that domestic legislation can be amended and changed unilaterally to the discretion of the government of the host country by virtue of its territorial sovereignty, whereas under IIAs neither party is capable of unilaterally doing so.<sup>263</sup>

South Africa is not the only country, which conducted a BIT review aiming at the adoption of a narrower approach of investment protection.<sup>264</sup> However, the Republic has not terminated the entirety of its BITs but maintained agreements with about 14 countries.<sup>265</sup> Moreover, the terminated BITs provide for survival clauses, according to which runoff periods ensure on-going protection after termination of the BITs,<sup>266</sup> which range from 10 to 20 years.<sup>267</sup> In this regards, section 15 of the Investment Act provides for ‘transitional arrangements’ according to which ‘existing investments which were made under BITs will continue to be protected for the period and terms stipulated in the treaties’.<sup>268</sup> However, according to section 15 (2) of the Investment Act any investment made after the promulgation of the Investment Act shall be subject thereto.

### 1. Omitted Stipulations

The Investment Act does not entail stipulations dealing with FET and MFN standards. The DTI stated in this regard, that the decision to exclude FET and MFN provisions constituted a risk mitigation effort by the government.<sup>269</sup> Particularly the FET standard competed with the host state’s right to implement regulatory measures in the public interest and therefore limited the space for South Africa’s transformational policy agenda.<sup>270</sup> South African stakeholders stated that the FET

---

<sup>261</sup> Carim op cit note 30 at 61.

<sup>262</sup> Mossallam op cit note 248 at 15.

<sup>263</sup> Subedi op cit note 9 at 82.

<sup>264</sup> Jonathan Lang ‘Bilateral Investment Treaties - a shield or a sword?’ (2013) Bowman Gilfillan Africa Group Corporate Newsflash, online available at <http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf>.

<sup>265</sup> South Africa has still BITs in force with: Argentina, China, Cuba, Finland, Greece, Iran, Italy, Mauritius, Nigeria, Russia, Senegal, South Korea and Zimbabwe, see <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195>.

<sup>266</sup> Bosman op cit note 233 at 25.

<sup>267</sup> Mossallam op cit note 248 at 13.

<sup>268</sup> Section 15 (1) of the Investment Act.

<sup>269</sup> See Summary of Submissions for the Promotion and Protection of Investment Bill (PPIB) [B18-2015], Department of Trade and Industry, See DTI’s response to submissions in respect of ‘fair and equitable treatment’, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150916Summary.pdf>.

<sup>270</sup> Ibid.

standard needs to be included in order to bring the Investment Act in line with international practice; however a qualified FET standard, which allows for a greater right to regulate would be accepted.<sup>271</sup> The DTI responded to these suggestions by stating that even the qualification of the scope of FET provisions did not appear to preclude arbitrators from basing claims on the notion of FET.<sup>272</sup> Moreover, fair treatment was ensured by the rule of law and the Constitution.<sup>273</sup> In terms of MFN treatment, the DTI stated that the inclusion of a MFN clause was only useful within the framework of an international treaty but not within the scope of national legislation.<sup>274</sup> Besides, a MFN clause was superfluous as the Investment Act did not distinguish among investors based on their respective nationality but was applicable to every investor.<sup>275</sup> The lack of these two provisions has great impact on several aspects of the protection of investment under the 2015 Investment Act as illustrated where applicable in the following paragraphs.

## 2. Substantive Stipulations of the 2015 Protection of Investment Act No. 22 of 2015

### a. Right to Regulate

The 2015 Investment Act is an overall expression of the South African government's call for the preservation of greater policy space regarding the regulation of investments. Hence, this notion is expressly stipulated in section 12 of the Investment Act, which reads as follows:

- 1) Notwithstanding anything to the contrary in this Act, the government or any organ of state may, in accordance with the Constitution and applicable legislation, take measures, which may include
  - (a) redressing historical, social and economic inequalities and injustices;
  - (b) [...]
  - (c) upholding the rights guaranteed in the Constitution;
  - (d) [...]
  - (e) fostering economic development, industrialisation and beneficiation;
  - (f) achieving the progressive realisation of socio-economic rights; or
  - (g) protecting the environment and the conservation and sustainable use of natural resources.
- 1) The government or any organ of state may take measures that are necessary for the fulfilment of the Republic's obligations in regard to the maintenance, compliance or restoration of international peace and security, or the protection of the security interests, 20 including the financial stability of the Republic.

---

<sup>271</sup> See Summary of Submissions, op cit note 269 at 'fair and equitable treatment'

<sup>272</sup> See Summary of Submissions, op cit note 269 at DTI's response in respect of 'fair and equitable treatment'.

<sup>273</sup> Ibid.

<sup>274</sup> See Summary of Submissions, op cite note 269 at DTI's response in respect of 'national treatment'.

<sup>275</sup> Ibid.

According to the DTI this section reaffirmed the government's right to regulate investments in the public interest and is to be read together with the other stipulations of the Investment Act, particularly with the national treatment and the protection of property clauses.<sup>276</sup> The DTI is of the opinion that various BITs might challenge many affirmative actions, which the South African government did take and will take in the future, as internationally similar measures have been challenged already.<sup>277</sup> In this regard, *Gazzini* also states that current BITs by and large imposed obligations almost exclusively upon the host states while according numerous rights to foreign investors.<sup>278</sup> Multiple stakeholders however expressed concerns regarding this stipulation as it granted the government a virtually unlimited right to regulate in relation to an unlimited range of goals.<sup>279</sup> The wide range of actions and the lack of clear definitions thereof opened the possibility of abusive conduct, even more so as the wording 'any organ of state' also allowed for state-owned enterprises to take measures.<sup>280</sup>

Furthermore, the FET standard ordinarily provided by BITs protects the investor's legitimate expectations. This requires the host state to act in a manner, which allows the foreign investor to know beforehand which rules and regulations will govern the investment in order to enable the foreign investor to plan its investment and comply with the respective rules. The same applies to expectations regarding the maintenance of pre-existing decisions or permits issued. The decisive framework is the existing legal framework at the time of the investment. Section 12 of the Investment Act, however, allows the government to take a virtually unlimited range of measures so that the rules and regulations governing foreign investment are highly unpredictable. However, the lack of sufficient regulatory space for host states under IIAs has been one of the leading arguments against IIAs.<sup>281</sup> The limits placed on host states were too far-reaching and impeded the pursuit of public interests and inclusive growth and sustainable development policies.<sup>282</sup> The manner in which the opposing interests are balanced constituted a strategic choice based on the preferences by the host state.<sup>283</sup> Thus, section 12 of the Investment Act may be incompatible with the FET standard as commonly provided by BITs, it represents however a legitimate policy choice by the South African government. Nevertheless, section 12 of the Investment Act constitutes a deviation from the international practice of investment protection.

---

<sup>276</sup> See Summary of Submissions, op cit note 269 at DTI's response in respect of 'right to regulate'.

<sup>277</sup> *Ibid.*

<sup>278</sup> Tarcisio Gazzini 'Bilateral Investment Treaties and Sustainable Development' (2014) 15 *Journal of World Investment & Trade* 939.

<sup>279</sup> See Summary of Submissions, op cit note 269 at 'right to regulate'.

<sup>280</sup> *Ibid.*

<sup>281</sup> UNCTAD, *WIR 2015*, 130.

<sup>282</sup> *Ibid.*, 128.

<sup>283</sup> *Ibid.*, 131.

b. The Terms ‘Investor’ and ‘Investment’

According to section 1 of the Investment Act, the term ‘investor’ means

‘an enterprise making an investment in the Republic regardless of nationality’.

Hence, the Investment Act is equally applicable to investments by South African and foreign nationals. The Investment Act defines an investor as ‘an enterprise’, which is defined as ‘any natural person or juristic person, whether incorporated or unincorporated’.<sup>284</sup> It has been criticised that the definition of the term ‘enterprise’ rendered no guidance as to the aspects constituting an enterprise.<sup>285</sup> It was recommended to clarify the meaning of enterprise under the Investment Act, especially against the backdrop of different meanings within various South African legislation.<sup>286</sup> The DTI responded that it was willing to consider the inclusion of one particular definition<sup>287</sup>, however eventually refrained from doing so, which renders the scope and content unclear. The author therefore submits that in order to enhance clarification, the definition of an investor should differentiate between natural and juristic persons within the scope of the definition of an ‘investor’ and not within the scope of the definition of an ‘enterprise’. This would also be in line with the definition of an investor as ordinarily provided by BITs. Moreover, the scope of the term ‘making an investment’ is questionable. As mentioned above, BITs tend to extend the scope of protection to ‘attempts or seeks to make an investment’ in order to ensure the protection of pre-establishment rights as for instance provided by the 2012 Model BIT.<sup>288</sup> Section 2 of the Investment Act does not provide for pre-establishment protection; though it is not expressly excluded either. The Oxford English Dictionary defines ‘making’ as ‘the action of make in various senses: production, creation, construction, preparation; institution [...], also (occasionally): the process of being made’.<sup>289</sup> According to this definition, it could be argued that the term ‘making’ covers pre-established rights.

In terms of an ‘investment’ section 2 (1) of the Investment Act provides the following definition:

‘(a) any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic, committing resources of economic value over a reasonable period of time, in anticipation of profit;

(b) the holding or acquisition of shares, debentures or other ownership instruments of such an enterprise; or

---

<sup>284</sup> See section 1 of the Investment Act.

<sup>285</sup> See Summary of Submissions, op cite note 269 at ‘enterprise’.

<sup>286</sup> Ibid.

<sup>287</sup> See Summary of Submissions, op cit note 269 at DTI’s response in respect of ‘enterprise’.

<sup>288</sup> See Article 1 of the 2012 US Model BIT.

<sup>289</sup> See <http://www.oed.com/view/Entry/112669?rskey=ArZiVj&result=1#eid>, last accessed 18 July 2017.

(c) the holding, acquisition or merger by such an enterprise with another enterprise outside the Republic to the extent that such holding, acquisition or merger [...] has an effect on an investment contemplated by paragraphs (a) and (b) in the Republic;  
[...].

In the following section 2 (2) of the Investment Act provides a non-exhaustive list of assets, which an enterprise may possess in terms of an investment.

The present formulation follows the enterprise-based definition model, one of the options suggested by the 2012 SADC<sup>290</sup> Model BIT.<sup>291</sup> The enterprise-based approach requires the establishment or acquisition of an enterprise within the economic territory of the host state.<sup>292</sup> It is a narrower concept than the asset-based approach, which is used by the vast majority of BITs and ordinarily covers ‘every kind of asset’ which leads to a virtually unlimited inclusion of everything of economic value.<sup>293</sup> However, the asset-based approach has been subject to various international arbitration cases, which has given rise to concern regarding the scope of the definition.<sup>294</sup> UNCTAD recommends for developing countries to use the enterprise-based approach in order to achieve an investment policy framework, which is focused on the enhancement of sustainable development and inclusive growth.<sup>295</sup> According to UNCTAD, developing countries should adopt an investment framework, which ensures that protection is only rendered to investments which bring concrete benefits to the respective host economy.<sup>296</sup> The enterprise-based approach only covers enterprises owned or controlled by an investor and thereby excludes contributions, which do not entail the transfer of financial and managerial control over the investment. Only investments which comprise of such a contribution will be warranted protection based on the greater commitment of resources and implicated risks.<sup>297</sup> Moreover, the utilised definition provides for the exclusion of portfolio investments as those do not require an influence on the enterprise’s management.

Another problematic aspect in respect of the investment definition is that section 2 (1) (a) of the Investment Act stipulates that the investment has to be made ‘in anticipation of profit’ which suggests that non-profit investments are excluded from the protective scope. Even though this fact has been criticised by the Banking Association of South Africa (BASA), the DTI did not comment on the reasons for the exclusion of non-profit investments.<sup>298</sup> Similar stipulations in BITs ordinarily

---

<sup>290</sup> Southern African Development Community, formally established in 1992.

<sup>291</sup> Summary of Submissions, op cit note 269 at DTI’s response in respect of ‘investment’.

<sup>292</sup> UNCTAD *Scope and Definition* Series on Issues in International Investment Agreements II (2011) 22.

<sup>293</sup> Ibid, 24.

<sup>294</sup> Ibid, 5.

<sup>295</sup> UNCTAD *Investment Policy Framework for Sustainable Development* (2015) 93.

<sup>296</sup> Ibid.

<sup>297</sup> UNCTAD *Scope and Definition* op cit note 291 at 10.

<sup>298</sup> Summary of Submissions, op cit note 269 at ‘investment’.

include non-profit investments through formulations such as ‘in expectation of gains and profits’<sup>299</sup> or by keeping silent on this matter.<sup>300</sup> The 2012 SADC Model BIT which has been used as a template for the Investment Act, does not provide for a differentiation between profit and non-profit investments within the enterprise-based definition model.<sup>301</sup> Moreover, the 2016 Agreement on the Amendment of the 2006 SADC Protocol on Finance and Investment (FIP)<sup>302</sup> provides within the scope of the definition of ‘enterprise’ ‘whether or not for profit’<sup>303</sup>, stating that non-profit investments are protected. Although the 2016 SADC FIP Amendment Agreement is not in force yet<sup>304</sup>, it constitutes a noteworthy fact as South Africa will be bound by the amending stipulations once the Amendment Agreement comes into force<sup>305</sup> regardless of the actual adoption by South Africa.<sup>306</sup>

Moreover, the formulation of section 2 (1) of the Investment Act requires the commitment of resources of economic value ‘over a reasonable period of time’. According to the DTI, the term ‘reasonable period’ is meant to ensure that only investments, which contribute to the economic development objectives of the country are protected.<sup>307</sup> The exact meaning and temporal duration of ‘reasonable period’ depended on specific facts especially in relation to the respective economic sector.<sup>308</sup> Moreover, the stipulation aimed at the explicit exclusion of portfolio investments as those were ordinarily not aiming at the achievement of long-term goals.<sup>309</sup>

As a result, the definitions of ‘investor’ and ‘investment’ pursuant to the Investment Act differ in several aspects from the provisions ordinarily found in IIAs. This is likely to create ambiguity and uncertainty from a foreign investor’s perspective due to the limited scope of protection compared to previous BITs. Furthermore, the Investment Act is not entirely clear on the types of investments covered, which renders the security of foreign investments less predictable. However, some of the limitations appear necessary in order to create an investment climate aimed at the enhancement of

---

<sup>299</sup> See Article 1 of the 2012 US Model BIT.

<sup>300</sup> See Article 1 (1) of the 2008 German Model BIT.

<sup>301</sup> See Article 2 of the 2012 SADC Model BIT.

<sup>302</sup> The SADC signed the Protocol on Finance and Investment (FIP) in 2006, which came into force in 2010 and which South Africa is a party to. In 2016 an agreement on the amendment of the 2006 FIP was signed.

<sup>303</sup> See Article 1 (2) of the 2016 SADC FIP Amendment Agreement.

<sup>304</sup> The 2016 SADC FIP Amendment Agreement will come into effect following its adoption by three quarters of the state parties to the Protocol. As of July 2017, the Amendment Agreement has only been signed by 8 out of 15 member states, which means that three more member states are to adopt the Amendment Agreement in order for it to come into force, Talkmore Chidede ‘Amendments of Annex 1 to the SADC Finance and Investment Protocol: Are they in force yet?’, *tralac* discussions, 13 July 2017, online available at <https://www.tralac.org/discussions/article/11875-amendments-of-annex-1-to-the-sadc-finance-and-investment-protocol-are-they-in-force-yet.html>.

<sup>305</sup> The SADC Treaty stipulates that all Protocols under the treaty are binding upon member states who are party to the Protocol, see Article 22 (9) of the SADC Treaty.

<sup>306</sup> Chidede ‘Amendments of Annex 1 to the SADC Finance and Investment Protocol’ op cit note 303.

<sup>307</sup> Summary of Submissions, op cit note 269 at DTI’s response in respect of ‘investment’.

<sup>308</sup> *Ibid*.

<sup>309</sup> Summary of Submissions, op cit note 269 at DTI’s response in respect of ‘investment’.

sustainable development and inclusive growth. The prevention of infringements of potential future investment policies promulgated by SADC would be beneficial as those only enhance the overall uncertainty regarding the protection of foreign investments under the Investment Act. Moreover, the exclusion of non-profit investments appears not advisable against the backdrop of their by and large charitable and educational purposes, which may constitute desirable forms of investment.

### c. National Treatment

The Investment Act provides national treatment in section 8 (1) according to which

‘[f]oreign investors and their investments must not be treated less favourably than South African investors in like circumstances.’

In the following, section 8 (2) determines a non-exhaustive list of aspects which have to be taken into consideration in terms of the determination of ‘like circumstances’:

For the purposes of this section, ‘like circumstances’ means the requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment, including the

- (a) effect of the foreign investment on the Republic, and the cumulative effects of all investments;
- (b) sector that the foreign investments are in;
- (c) aim of any measure relating to foreign investments;
- (d) factors relating to the foreign investor or the foreign investment in relation to the measure concerned;
- (e) effect on third persons and the local community;
- (f) effect on employment; and
- (g) direct and indirect effect on the environment.

Section 8 (3) stipulates that ‘the examination referred to in subsection (2) must not be limited to or be biased towards any one factor’.

According to the Memorandum of Clarification issued by the South African government regarding the text of the Protection of Investment Bill as of 3 November 2015 [B18B-2015], the national treatment clause is closely aligned to the Constitution, which allows for the government to take measures in order to overcome past discrimination.<sup>310</sup> National treatment clauses entailed by BITs constituted unbearable risks in regards to the realization of national legislation objectives such as Black Economic Empowerment, public health, and environmental and economic development.<sup>311</sup> Moreover, it aimed at the enhancement of competitive equality between foreign and domestic

---

<sup>310</sup> Paragraph 2.5 of the Memorandum of Clarification issued regarding the Protection of Investment Bill [B18B-2015].

<sup>311</sup> Ibid.

investors by only granting national treatment to foreign investors in the event that they were in fact in ‘like circumstances’ compared to national investors.<sup>312</sup> The factors listed in section 8 (2) were suitable to assist in the determination thereof.<sup>313</sup>

However, several stakeholders issued critical submissions mainly concerned with the definition of the term ‘like circumstances’.<sup>314</sup> Even though section 8 (2) provided a list of factors which have to be taken into consideration in the course of the determination, uncertainties remained due to the broad and vague wording.<sup>315</sup> For instance, the meaning of the term ‘sector’ is not explicitly defined, so that the specific content thereof is unclear. Besides, though section 8 (3) stipulates that the determination should not be limited by or biased towards the specified factors, it does not provide a comprehensive understanding of the ratio between the factors and their individual significance.

Consequently, the manner of interpretation and application by the domestic courts remains uncertain due to the non-exhaustive character and broad wording of the provision.<sup>316</sup> Especially in the event that the national judiciary adopted a relatively narrow approach, foreign investors might be *de facto* excluded from the extension of national treatment.

Furthermore, section 8 (4) provides that

‘Subsection (1) must not be interpreted in a manner that will require the Republic to extend to foreign investors and their investments the benefit of any treatment, preference or privilege resulting from

- (a) taxation provisions in any international agreement or arrangement or any law of the Republic;
- (b) government procurement processes;
- (c) subsidies or grants provided by the government or any organ of state;
- (d) any law or other measure, the purpose of which is to promote the achievement of equality in South Africa or designed to protect or advance persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability in the Republic;
- (e) any law or other measure, the purpose of which is to promote and preserve cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage; or
- (f) any special advantages accorded in the Republic by development finance institutions established for the purpose of development assistance or the development of small and medium businesses or new industries.’

---

<sup>312</sup> Summary of Submissions, op cit note 269 at DTI’s response in respect of ‘national treatment’.

<sup>313</sup> Ibid.

<sup>314</sup> Summary of Submissions, op cit note 269 at ‘national treatment’.

<sup>315</sup> Ibid.

<sup>316</sup> Ibid.

Accordingly, foreign investors can be excluded from certain benefits accorded to domestic investors. The government admitted in this respect that the different treatment foreign and domestic investors might be ‘unavoidable’ in certain limited instances, which was however not contradictory to the principle of equal treatment but due to the government's right to implement legitimate policy measures in the public interest.<sup>317</sup> As mentioned above, section 12 (1) stipulates a virtually unlimited right for the South African government or any organ of state to take certain regulatory measures regarding investments in the public interest, which is to be read together with section 8 governing national treatment. Hence, the Investment Act stipulates that in the course of the determination of ‘like circumstances’ pursuant to section 8 (1), factors which enabled the government to conduct certain measures in accordance with section 12 (1) have to be taken into consideration. Therefore, measures which the government deems legitimate in respect of the public interest - subject to compliance with the Constitution and applicable legislation - ultimately constitute lawful reasons for the different treatment of foreign and domestic investors. As the government declared in the Memorandum of Clarification, this aims particularly at provisions in respect to BEE, public health, and environmental and economic development.<sup>318</sup>

The rationale of rendering national treatment subject to national legislation therefore comprises of the prevention of foreign investors enjoying greater rights while avoiding legislation and regulatory measures applicable to domestic investor. However, simultaneously, foreign investors are not protected from rigorous measures taken against national investors, which under BITs is ensured through other standards of treatment<sup>319</sup>, particularly by FET and MFN clauses, which are not included in the Investment Act. Yet, as held in *Pope & Talbot Inc v Canada*<sup>320</sup> the different treatment of national and foreign investors under national treatment clauses entailed by IIAs is lawful if a reasonable nexus to rational government policies is provided, which does not *de facto* distinguish between foreign and national companies. However, as stated above, the extent of differential treatment may not be greater than absolutely necessary. In this context it would moreover be beneficial if the Investment Act provided for a MFN clause ensuring the equal treatment of foreign investors, which are determined to be in ‘like circumstances’.

Another critical factor is whether the national treatment clause is applicable only to post-establishment rights or also to pre-establishment rights. As mentioned above, the majority of BITs stipulate that national treatment is only applicable to already established investments. The

---

<sup>317</sup> See paragraph 1.3 of the Memorandum of Clarification issued regarding the Protection of Investment Bill [B18B-2015].

<sup>318</sup> See paragraph 2.4 of the Memorandum of Clarification issued regarding the Protection of Investment Bill [B18B-2015].

<sup>319</sup> Sornarajah op cit note 7 at 235.

<sup>320</sup> *Pope & Talbot Inc v The Government of Canada* supra note 140, para 78.

Investment Act does not explicitly comment on this matter. However, when read together with section 7 (2) of the Investment Act, which states the Investment Act ‘does not create a right for a foreign investor or prospective foreign investor to establish an investment’, it becomes apparent that national treatment shall only apply to post-establishment rights.

As a result, the national treatment provision of the Investment Act is by and large compatible with the national treatment clauses ordinarily stipulated by BITs provided that the South African government limits the differentiation between foreign and national investors to a rational minimum.

#### d. Physical Security of Property

BITs normally provide for ‘full protection and security’ of alien investments in order to grant protection from physical violence performed by state officials or third parties in relation to violations, which could be reasonably anticipated and prevented. This standard derives from the international minimum standard which required states to take responsibility for destruction or violence by non-state actors.

The Investment Act deals with this matter in section 9, which reads as follows:

‘The Republic must accord foreign investors and their investments a level of physical security as may be generally provided to domestic investors in accordance with minimum standards of customary international law and subject to available resources and capacity.’

This provision is critical with regard to several aspects. The Investment Act however, stipulates that the physical security of investments is ‘subject to available resources and capacity’. The formulation is unclear in that it is not evident whether the general physical protection of investments is dependent on the availability of the relevant resources and capacity or if this limitation is only applicable regarding the protection of foreign investments. Furthermore, section 9 does not define the ‘level of protection’, which is to be granted to domestic investors, which consequently leaves foreign investors uncertain about the scope of physical protection accorded to them. Several stakeholders expressed their concerns about the wording of section 9 and submitted criticism to the DTI.<sup>321</sup> The DTI responded to these submissions and stated that the stipulation sought to clarify that South Africa does not bear any greater obligation to foreign investors than to national investors in relation to the physical protection of investors.<sup>322</sup> The physical protection of investments was conducted by the South African police and section 9 only sought to indicate that foreign nationals were entitled to the same level of protection.<sup>323</sup> In essence, section 9 therefore rather constitutes a national treatment clause than an actual standard of ‘full protection and security’

---

<sup>321</sup> Summary of Submissions, op cit note 269 at ‘security of investment’,

<sup>322</sup> See Summary of Submissions, op cit note 269 at DTI’s response in respect of ‘security of investment’.

<sup>323</sup> Ibid.

as ordinarily provided by the customary international law minimum standard and BITs. The stipulation does not provide virtual all-including physical protection of foreign investors from civil strife and violence by state and non-state actors but merely constitutes that foreign investors were entitled to the same scope of physical protection as domestic investors, which is further limited by the stipulation of an excuse on part of the state in the event of a lack of resources and capacity. The 2012 SADC Model BIT, for instance, does provide for physical protection of foreign investments which may not be ‘less favourable’ than the protection accorded to domestic investors and therefore also links the scope of protection to the treatment accorded to domestic investors; it does however not provide for an excuse on part of the state due to a lack of resources and capacity.<sup>324</sup> Also the 2015 UNCTAD *Investment Policy Framework for Sustainable Development* provides that developing countries should include a ‘full protection and security’ clause but qualify its scope by expressly linking it to the customary international law standard or by expressly stating that only physical protection was covered.<sup>325</sup>

Under customary international law the limitation of protection subject to available resources and capacity is generally not accepted. States cannot excuse themselves based on the assertion that the physical protection of the investment was not possible due to a lack of capacity or resources. The host state is in fact required to exercise due diligence in regard to the protection of alien property.

Moreover, the majority of IIAs provides for the payment of restitution or compensation in the event of losses due to the physical violation of the foreign investment owed to civil strife, armed conflicts or riots.<sup>326</sup> The 2013 PPIB stipulated such a payment of compensation, which is however not included in the 2015 Investment Act.

Consequently, the scope of physical protection accorded to foreign investments pursuant to section 9 of the Investment Act is unjustifiably lower than the ‘full protection and security’ standard provided by the customary international law minimum standard and respective clauses in BITs.

#### e. Legal Protection of Property

The section dealing with the matter of the legal protection of property and therefore ultimately with the question of expropriation under the Investment Act is section 10. This section states that

‘Investors have the right to property in terms of section 25 of the Constitution.’

Therefore, the question of a lawful expropriation is subject to section 25 of the South African Constitution, which reads as follows:

---

<sup>324</sup> See Article 9 of the 2012 SADC Model BIT.

<sup>325</sup> UNCTAD *Investment Policy Framework for Sustainable Development* op cit note 294 at 98.

<sup>326</sup> See, for instance, Article 9.2 of the 2012 SADC Model BIT; Article 5.5 of the 2012 US Model BIT, Article 8.11 of the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA).

‘(1) No one may be deprived of property except in terms of 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

(a) for a public purpose or in the public interest; and

(b) 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.

(3) 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, including

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section

(a) the 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; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

[...]

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section .

[...]

#### i. Legality of Direct and Indirect Expropriation

The DTI explained that the rationale for the formulation of section 10 comprised of the fact that section 25 of the Constitution contained sufficient details regarding the subject matter of expropriation.<sup>327</sup> However, the initial 2013 Promotion and Protection of Investment Bill (PPIB) contained a section named ‘Principles relating to expropriation of investment’ which gave more

---

<sup>327</sup> See Summary of Submissions, op cit note 269 at DTI’s response in respect of ‘protection of property’.

details on the new approach to expropriation of alien assets under domestic legislation. Though it was removed in both following draft Bills, scrutiny of this extinguished section is valuable with regard to a better understanding of the motives and considerations of the policy drafters.<sup>328</sup> Notably, the 2013 PPIB included a non-exhaustive list of measures which were considered not to amount to expropriation<sup>329</sup>, such as ‘measures and series of measures [...] that have an incidental or indirect adverse impact on the economic value of an investment’<sup>330</sup> and measures ‘aimed at protecting and enhancing legitimate public welfare objectives’<sup>331</sup>. This motivation is also depicted by the findings of the DTI in the BIT review process, which declare that the failure of BITs to effectively distinguish between regulation and expropriation would allow for legitimate government regulations to be classified as indirect expropriations.<sup>332</sup>

However, section 25 of the Constitution distinguishes between ‘deprivation’ (section 25 (1)) and ‘expropriation’ (section 25 (2)), but does not give a clear definition of the scope and content of these terms. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>333</sup> the Constitutional Court came to the conclusion that deprivation constituted a *genus*, while expropriation is a *species*, i.e. a subset thereof.<sup>334</sup> This interpretation by the Constitutional Court suggests that basically any kind of interference with the usage, the benefits or the exploitation of private property might potentially constitute a form of deprivation.<sup>335</sup> As mentioned above, in *Agri SA v The Minister for Minerals and Energy*<sup>336</sup> the Constitutional Court extended these findings by stating that other than deprivation, an expropriation compulsorily required the acquisition of the property or rights in relation thereto by the state.<sup>337</sup> Moreover, expropriation could only occur in the public interest and against payment of compensation; deprivation however already occurred in the event that property or rights therein were taken away or significantly interfered with and did not require compensation.<sup>338</sup> Therefore, certain additional requirements had to be met for deprivation to rise to the level of expropriation.<sup>339</sup>

---

<sup>328</sup> Bosman op cit note 233 at 18.

<sup>329</sup> See section 8 (2) of the 2013 PPIB.

<sup>330</sup> See section 8 (2) (a) of the 2013 PPIB.

<sup>331</sup> See section 8 (2) (b) of the 2013 PPIB.

<sup>332</sup> Government Position Paper op cit note 243 at 41.

<sup>333</sup> 2002 (4) SA 768 (CC).

<sup>334</sup> Ibid, para 57.

<sup>335</sup> Mostert & Lei, ‘The Dynamics of Property Clauses in the Developing World: China and South Africa’ (2010) 17 *Maastricht Journal of European & Comparative Law* 390.

<sup>336</sup> 2013 (4) SA 1 CC.

<sup>337</sup> Ibid, para 48.

<sup>338</sup> Ibid.

<sup>339</sup> Mostert & Lei ‘The Dynamics of Property Clauses in the Developing World: China and South Africa’ (2010) 17 *Maastricht Journal of European & Comparative Law* 390.

Consequently, section 25 (1) of the Constitution allows for a taking of or interference with property and rights in relation thereto which will not trigger recourse or compensation claims in favour of the affected person. Only in the event that the state itself directly ceases property or rights therein, section 25 (2) of the Constitution will be applicable. Expropriations therefore have to be in line with both requirements of section 25 (1) and section 25 (2).<sup>340</sup>

However, as mentioned above, direct expropriations nowadays constitute a rather seldom occurrence, which reinforces the importance of indirect expropriations. For instance, the cumulative effect of a series of measures taken by the host government leading to a reduction of the investment's economic value is acknowledged to potentially constitute indirect expropriation in the form of 'creeping expropriation' under international investment protection law.<sup>341</sup> Notably, this conduct has been one of the measures, which the South African government attempted to exclude from the scope of measures deemed to amount to the level of expropriation under the 2013 PPIB.<sup>342</sup> Moreover, international investment protection law recognises that 'regulatory expropriation' may constitute a form of indirect expropriation. A 'regulatory expropriation' is constituted in the event that the host state implements a regulatory measure which is arbitrary and discriminatory in regards to its character or manner of implementation or which is in violation of an obligation undertaken by the state.<sup>343</sup> Section 8 (2) (b) of the 2013 PPIB however provided that state measures, which aimed at the protection and enhancement of legitimate public welfare objectives, were not tantamount to expropriation without making reference to requirements such as non-discrimination and fairness. Therefore, the 2013 PPIB appears to aim at the preclusion of compensation claims in respect of legal or administrative governmental actions, which by and large constitute measures defined as indirect expropriation under international investment protection law. Even though these stipulations were removed in later draft Bills and are not part of the 2015 Investment Act, they are worth noting in regards of the overall objective of the new South African approach towards foreign investments.

As explained above, it is accepted under international law that states are generally entitled to expropriate alien assets due to their territorial and economic sovereignty. However, both direct and indirect expropriation can only be lawful in the event that the conduct serves a public purpose, is performed in a non-arbitrary and non-discriminatory manner, complies with applicable law and due process and is conducted against the payment of compensation. The South African Constitution provides that expropriation in terms of subsection 25 (2) of the Constitution was required to be

---

<sup>340</sup> Ibid, 393.

<sup>341</sup> Subedi op cit note 9 at 76.

<sup>342</sup> See section 8 (2) (a) of the 2013 PPIB.

<sup>343</sup> See *Link Trading Joint Stack Company v Department for Customs Control of the Republic of Moldova* supra note 106.

performed in terms of a law of general application, for a public purpose or in the public interest and against payment of compensation.<sup>344</sup> As mentioned above, according to the Constitutional Court in *Agri SA v The Minister for Minerals and Energy* only direct takings of foreign property and rights therein by the state would rise to the level of expropriation under subsection 25 (2) of the Constitution. Thus, under the South African Constitution only direct expropriations are subject to the requirements, which under international investment protection law are equally applicable to indirect expropriation. An action by the state, which would constitute indirect expropriation under international investment law, is merely subject to subsection 25 (1) of the Constitution and can therefore be readily performed in terms of a law of general application and under the provision of a non-arbitrary manner independent from a compulsory payment of compensation.

In essence, the Constitutional Court in *Agri SA v The Minister for Minerals and Energy* therefore precluded the acknowledgement of indirect expropriations as a trigger for recourse and compensation under the South African Constitution. The customary international minimum standard however determines as one of the criteria for a lawful expropriation, regarding both direct and indirect, that it can only be conducted legally against the payment of compensation.

Accordingly, every indirect expropriation performed in terms of subsection 25 (1) of the Constitution would be illegal under customary international law as it did not meet the requirements of the customary international minimum standard. However, section 232 of the Constitution provides that

‘[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Thus, the requirement of the international minimum standard of payment of compensation in respect of indirect expropriation does not rise to the level of law in South Africa as it is in conflict with subsection 25 (1) of the Constitution. This fact is particularly problematic as customary international law derives from the practice of nations and expresses an *opinio juris* within the international community that the respective principle requires obligatory acceptance.<sup>345</sup> Moreover, section 233 of the Constitution declares that

‘[w]hen 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.’

---

<sup>344</sup> See section 25 (2) of the Constitution.

<sup>345</sup> Sornarajah op cit note 7 at 89.

Section 233 hence elevates international law above domestic law whereas section 232 states that customary international law must be consistent with the constitution. This appears contradictory, especially due to the fact that customary international law forms a significant party of international law.<sup>346</sup> In fact, the non-compliance by a state with established international law principles can be challenged in international courts in respect of the denial of justice.<sup>347</sup> In this regard, the Permanent Court of International Justice concluded in the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* case, that

‘according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, [...] and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.’<sup>348</sup>

Thus, governmental measures, which would rise to a level tantamount to indirect expropriation under international law but not under the South African legal system could theoretically be challenged on an international level in regards to the non-payment of compensation.

Another critical factor in this regard comprises of the lacking FET standard. As stated by the *Tecmed* tribunal it is part of the investor's legitimate expectations covered by the FET standard that the host state will not deprive the investor of its investment without the required compensation. Thus, indirect expropriation without payment of compensation might potentially constitute a breach of the FET standard ordinarily stipulated by BITs. As stated above, the Investment Act does not provide for FET, which hence simultaneously lowers the level of protection regarding expropriation. The same applies to the MFN standard. As South Africa has still BITs in force, which provide for the payment of compensation<sup>349</sup>, foreign investors were normally entitled to base claims on the MFN standard under the assertion that foreign investors of third countries were treated more favourably. In order to prevent discrimination and to provide a ‘level playing ground’ the host country would be obliged to accord the same treatment to all foreign investors. The fact that the Investment Act does not provide MFN treatment therefore adds to the low level of protection against indirect expropriation.

---

<sup>346</sup> Langalanga op cit note 29 at 19.

<sup>347</sup> Bosman op cit note 233 at 18.

<sup>348</sup> *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Permanent Court of International Justice, Twenty-Third Session (4 February 1932), Advisory Opinion, para 62.

<sup>349</sup> See for instance Article 4 (1) of the South Africa-China BIT, which reads as follows:

‘(1) Investments of investors [...] shall not be nationalized expropriated, or subjected to measures having effects equivalent to nationalization or expropriation [...] except for public purposes, under domestic legal procedure, on a non-discriminatory basis and against compensation. Such compensation shall be at least equal to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge [...].’

## ii. Manner of Calculation of Compensation

Another critical issue is the manner in which the compensation is to be calculated. As seen above, section 10 of Investment Act merely refers to section 25 of the Constitution, which stipulates in subsection 25 (3) that the amount of the compensation as well as 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’.<sup>350</sup> In the following, subsection 25 (3) of the Constitution gives a non-exhaustive list of factors, which have to be taken into consideration in the course of determination. Notably, ‘the market value of the property’<sup>351</sup> is only one of a number of factors, which have to be taken into account amongst others such as the current and historical use of the property and the purpose of the expropriation.

However, as mentioned above, the vast majority of BITs provides for the calculation of the compensation based on ‘fair market value’ or ‘genuine value’ of the asset in question. Moreover, BITs ordinarily provide for the application of the Hull Formula, according to which the payable compensation has to be ‘prompt, adequate and effective’.

The formulation of section 25 (3) of the Constitution therefore allows for the South African government to provide less than full market value. Even though this does not necessarily mean that South Africa will always pay compensation below fair market value, it at least opens up the possibility to do so, which has been previously precluded by South Africa’s BITs, which provided compensation based on fair market value.<sup>352</sup> *Chidede* also states in this regard that the assurance of the payment of full market value was more beneficial from a foreign investor’s perspective as the determination of a just and equitable compensation was ‘less predictable and more open to political influence’.<sup>353</sup> It is to stress however that the method of calculation in relation to compensation, despite its vast usage in IIAs and BITs, does not rise to the level of customary international law.<sup>354</sup> For instance, UNCTAD recommends for developing countries to use terms such as ‘just’ or ‘fair’ and ‘based on equitable balance between public and private interests (where the fair market value of investment is only one of the factors to be taken into account)’ in order to enhance flexibility in terms of the calculation.<sup>355</sup> Accordingly, it is a legitimate policy choice for the South African government to determine a calculation method deviating from the manner of calculation provided

---

<sup>350</sup> See section 25 (3) of the Constitution.

<sup>351</sup> See section 25 (3) (c) of the Constitution.

<sup>352</sup> Sean Woolfrey ‘South Africa’s Promotion and Protection of Investment Bill’ (2013) Tralac Discussions, online available <https://www.tralac.org/discussions/article/5345-south-africa-s-promotion-and-protection-of-investment-bill.html>.

<sup>353</sup> *Chidede* op cit note 6 at 111.

<sup>354</sup> *Sornarajah* op cit note 7 at 89.

<sup>355</sup> UNCTAD *Investment Policy Framework for Sustainable Development* op cit note 294 at 99.

by the previous BITs, which does nonetheless increase uncertainty from a foreign investor's perspective.

However, the 2006 SADC FIP provides for 'prompt, adequate and effective compensation'.<sup>356</sup> The 2016 SADC Agreement Amending Annex 1 of the Protocol on Finance and Investment (Amendment Agreement) conversely, now provides for 'fair and adequate' compensation, which is to be assessed 'in relation to the fair market value of the expropriated investment immediately before the expropriation took place'.<sup>357</sup> It continues by stating that, 'where appropriate, the assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interests of those affected', which requires to take into account a number of factors which are listed in the following.<sup>358</sup> The factors entailed therein are by and large the same as those entailed in section 25 (3) of the South African Constitution. Nevertheless, the Amendment Agreement generally acknowledges that the compensation should be calculated by means of the fair market value. Accordingly, the stipulations by the Amendment Agreement are conflicting with the South African Constitution. As the Amendment Agreement will come into force regardless of the adoption by South Africa, provided that the required number of member states adopts the Amendment Agreement, it could qualify as 'an agreement which does not require either ratification or accession' in terms of section 231 (3) of the Constitution. Accordingly, the Amendment Agreement would potentially 'bind[s] the Republic without approval by the National Assembly and the National Council of Provinces [...]'.<sup>359</sup> According to section 231 (4)

'[a]ny 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.'

These two sections appear contradictory, as the Amendment Agreement would likely bind South Africa after its entry into force but it would only become law subject to section 231 (4) of the Constitution. It is therefore highly uncertain if and if so, in which manner South Africa will give effect to the provisions of the Amendment Agreement and in which ways this will influence the South African investment framework.

As a result, the legal protection of investment provision of the Investment Act and the scope of protection provided by section 25 of the Constitution fall short of the scope of protection provided for by customary international law and BITs. Although the reasons for the decision to overhaul the previous foreign investment approach on part of the South African government - redress regarding

---

<sup>356</sup> See Article 5 of the 2006 SADC FIP.

<sup>357</sup> See Article 5 (2) of the 2016 SADC FIP Amendment Agreement.

<sup>358</sup> Ibid.

<sup>359</sup> See section 231 (3) of the Constitution.

the enduring racial injustice and cruel suppression of black South Africans during Apartheid - are comprehensible and sensible, the provided mechanisms are in conflict with customary international law and potential regional agreements. Thus, there is a realistic chance that these provisions will be challenged on an international or subregional level. In any event, the legal framework regarding expropriation is highly uncertain and vague, particularly regarding indirect actions.

### iii. Timing and Manner of Compensation Payment

Another critical factor is the timing and manner of the compensation payment. Section 25 (3) of the Constitution provides that 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’ under reference to a non-exhaustive list of aspects which are to be taken into consideration. The vast majority of BITs utilises the Hull Formula which stipulates that compensation payment must be ‘prompt, adequate and effective’ in order to provide foreign investors with predictability and stability regarding the compensation payment. Section 25 (3) however entails much less predictability as the timing and manner is dependent on many factors, whilst the application thereof may be inconsistent and incoherent due to a lack of sufficient ascertainment. Furthermore, the specific weight of the factors in relation to each other is unclear, which leaves foreign investors incapable of determining the concrete conditions regarding timing and manner. However, as mentioned above, the Hull Formula does not rise to the level of customary international law. It therefore depicts a legitimate policy choice on part of the South African government to pursue a different approach, which nevertheless adds to the uncertainty and unpredictability of the Investment Act. In this respect again, a MFN clause would have been beneficial in order to ensure the equal treatment of foreign investors.

### f. Transfer of Funds

In terms of transfer of funds, section 11 of the Investment Act states

‘[a] foreign investor may, in respect of an investment, repatriate funds subject to taxation and other applicable legislation.’

According to the Memorandum of Clarification, section 11 of the Investment Act clarified that South Africa had a liberal transfer regime, which allowed for foreign investors to repatriate returns on their investments, subject to taxation and other applicable legislation.<sup>360</sup> Several stakeholders however argued that the formulation of section 11 was too broad and vague as no clear definition of the scope and content of the terms ‘funds’ and ‘other applicable legislation’ was given.<sup>361</sup> Furthermore, the stipulation’s formulation did not constitute an explicit right to transfer funds,

---

<sup>360</sup> Paragraph 2.8 of the Memorandum of Clarification issued regarding the PPIB [B18B-2015].

<sup>361</sup> Summary of Submissions, op cit note 269 at ‘transfer of funds.’

which can be asserted vis-à-vis South Africa.<sup>362</sup> This fact was likely to create a major obstacle to foreign investments in South Africa.<sup>363</sup> The DTI responded that the right to transfer funds was unequivocal.<sup>364</sup> This aspect does not become clear from the formulation of section 11. As stated above, the main disadvantage from a foreign investor's perspective of a national investment protection framework is that it allows for unilateral changes on part of the host state as an expression of its territorial sovereignty. Due to the fact that the transfer of funds is 'subject to taxation and other applicable legislation', it is to the discretion of the South African government to alter taxation and the respective domestic legislation, which leaves foreign investors with only limited predictability in regard thereto. It will therefore be decisive that the South African government limits changes regarding taxation and applicable legislation to rational and reasonable alterations. However, in the event that the government would fail to do so, foreign investors could potentially base claims on the national treatment clause of section 8 of the Investment Act.

#### g. Dispute Resolution

The scope and content of provisions regarding the subject matter of dispute resolution are another decisive factor, which foreign investors take into account in the course of determining a suitable investment venue.

The Investment Act deals with dispute resolution in section 13, which reads as follows:

(1) An investor that has a dispute in respect of action taken by the government, which action affected an investment of such foreign investor, may within six months of becoming aware of the dispute request the Department to facilitate the resolution of such dispute by appointing a mediator.

(2) (a) The Department must maintain a list of qualified mediators of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators.

(b) The mediator must be appointed by agreement between the government and the foreign investor (hereinafter referred to as the parties) from the list contemplated in paragraph (a), or, in the absence of a list, from individuals proposed by either party.

[...]

(d) Recourse to mediation must be governed by the prescribed rules and any prescribed time limit may be adjusted by agreement between the disputing parties.

[...]

---

<sup>362</sup> Ibid.

<sup>363</sup> Ibid.

<sup>364</sup> Summary of Submissions, op cit note 269 at DTI's response in respect of 'transfer of funds'.

(4) Subject to applicable legislation, an investor, upon becoming aware of a dispute as referred to in subsection (1), is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment.

(5) The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. The consideration of a request for international arbitration will be subject to the administrative processes set out in section 6. Such arbitration will be conducted between the Republic and the home state of the applicable investor.

#### i. Domestic Dispute Resolution

Accordingly, under the Investment Act the investor is provided with a choice to either request the South African government to facilitate the dispute resolution by means of mediation<sup>365</sup> or to bring the dispute to a competent court, independent tribunal or statutory body within South Africa.<sup>366</sup> The Investment Act does however not provide for international investor-state arbitration, which is ordinarily provided in BITs.

According to the DTI, there was no general conclusive reason, which would prohibit the review of a foreign investor's claim by the judiciary of the host state.<sup>367</sup> In fact, direct access to international arbitration illustrated a 'blatant disregard' for the South African legal system, which allowed South Africa to preserve its policy space.<sup>368</sup> However, several stakeholders submitted comments stating that the review of executive measures in relation to investments by the South African courts was inconsistent with the constitutional doctrine of separation of powers.<sup>369</sup> In *International Trade Administration Commission v Scaw South Africa (Pty) Ltd.*<sup>370</sup>, the Constitutional Court held that 'the power to formulate and implement domestic and international trade policy [...] resides in the heartland of national executive authority'.<sup>371</sup> The Constitutional Court further stated that

'[w]hen a court is invited to intrude into the terrain of the executive, [...] it must do so only in the clearest of cases and only when irreparable harm is likely to ensue if interdictory relief is not granted. This is particularly true when the decision entails multiple considerations of national policy choices and specialist knowledge, in regard to which courts are ill-suited to judge.<sup>372</sup> [...] Courts may not without justification trench upon the polycentric policy terrain of international trade and its concomitant foreign relations or diplomatic considerations reserved by the Constitution for the national executive.'<sup>373</sup>

---

<sup>365</sup> See section 13 (1) of the Investment Act.

<sup>366</sup> See section 13 (4) of the Investment Act.

<sup>367</sup> Government Position Paper op cit note 243 at 45.

<sup>368</sup> Summary of Submissions, op cit note 269 at DTI's response in respect of 'dispute resolution'.

<sup>369</sup> Summary of Submissions, op cit note 269 at 'dispute resolution'.

<sup>370</sup> 2012 (4) SA 618 CC.

<sup>371</sup> Ibid, para 44.

<sup>372</sup> Ibid, para 101.

<sup>373</sup> Ibid, para 104.

According to these statements by the Constitutional Court, the doctrine of separation of powers renders South African domestic courts incompetent to judge regulatory measures implemented by the executive. Hence, the determination of South African domestic courts judging disputes in relation to the implementation of regulatory measures in regard to investment is inconsistent with the doctrine of separation of powers and therefore, strictly speaking, incompatible with the South African Constitution.

Notwithstanding this unconstitutionality, section 13 (1) of the Investment Act moreover raises concerns regarding the lack of determined time limits governing the period in which the DTI has to initiate mediation proceedings following the request by the aggrieved investor.<sup>374</sup> Section 13 (1) merely stipulates a time limit in terms of the investor who is entitled to request dispute resolution vis-à-vis the DTI within six months following awareness of the dispute. Hence, it is entirely to the discretion of the government when it will respond to the request by the investor. Besides, section 13 (1) of the Investment Act does not stipulate a binding obligation by the DTI to take action following the request at all. Section 13 (4) stipulates that investors may approach courts, tribunals or statutory bodies at any time subject to applicable legislation and therefore guarantees access to justice for aggrieved investors as stipulated by section 34 of the Constitution provided that legal actions are admissible under applicable legislation. Nevertheless, gauging from its stipulation in subsection (1), mediation initiated by the DTI is supposed to constitute the primary dispute resolution mechanism. Against this backdrop it is to state that subsection (1) in itself is insufficient as it lacks guarantee of access to justice; even more so as the Investment Act does not provide for FET treatment. Generally, the provisions governing the domestic dispute resolution appear to aim at the prevention of precise recourse claims for investors due to a general lack of concrete determination thereof. Section 13 (1) by and large renders the question of recourse via mediation dependent on the government's discretion, while section 13 (4) subjects the access to courts, tribunals and statutory bodies to applicable legislation, which is not further defined or determined. As a result, the investor-state dispute resolution mechanisms provided for by the Investment Act fall short of the standard ordinarily provided for by BITs. The provisions significantly lack certainty and predictability.

## ii. International Arbitration

The Investment Act only allows for international arbitration between South Africa and the respective home state of the investor, and only in the event that the South African government expresses its consent therewith subject to prior exhaustion of domestic remedies.

---

<sup>374</sup> Summary of Submissions, op cit note 269 at 'dispute resolution'.

The DTI substantiated the new dispute resolution policy with the argument that the majority of investor-state arbitration outcomes were decided in favour of the investor and to the detriment of the host country.<sup>375</sup> Particularly developing countries suffered from investor-state dispute settlement (ISDS) due to the high number of arbitration claims brought against them and the investor-biased outcomes of international arbitration.<sup>376</sup>

These assertions by the DTI have been challenged by several stakeholders<sup>377</sup> - they are however not entirely false. According to the UNCTAD World Investment Report 2016 only 40% of the ISDS cases were brought against developed countries.<sup>378</sup> In terms of the results of concluded cases, total as of the end of 2015, 36% were decided in favour of the state and 27% in favour of the investor.<sup>379</sup> These numbers have been brought forward by several stakeholders in order to refute the DTI's assertions.<sup>380</sup> However, it is to stress that in regards to the total of cases, which have been decided on the merits, 60% were decided in favour of the investor. About half of the decisions made in favour of the state were dismissed due to a lack of jurisdiction.<sup>381</sup>

According to the DTI, the resolution of investment disputes on an investor-state basis allowed for the assessment of vital national regulatory measures on the basis of mere commercial interests inconsistent with constitutional provisions.<sup>382</sup> It thus put South Africa's policy space, especially in regard to developmental policies, 'at great risk' if the Investment Act provided ISDS.<sup>383</sup> State-state arbitration, on the contrary, was more beneficial in this regard as states were 'presumably less likely to challenge certain types of regulatory measures', particularly due to the fact that arguments made by states could be equally brought against them in the future.<sup>384</sup> Furthermore, the provision for state-state arbitration constituted a concrete application of customary international law according to which states had the right to bring claims on behalf of their nationals in the event of a breach of international law by another state.<sup>385</sup>

However, this fact renders the provision for state-state arbitration in domestic legislation essentially superfluous and meaningless as states do have the right to take actions on behalf of their nationals in any event as part of the doctrine of diplomatic protection. In fact, ISDS superseded state-state disputes due to the fact that it enables investors to have a legal standing vis-à-vis a state party,

---

<sup>375</sup> Summary of Submissions, op cit note 269 at DTI's response in respect of 'dispute resolution'.

<sup>376</sup> Government Position Paper op cit note 243 at 45.

<sup>377</sup> Summary of Submissions, op cit note 269 at 'dispute resolution'.

<sup>378</sup> UNCTAD *WIR 2016*, 105.

<sup>379</sup> *Ibid*, 107.

<sup>380</sup> Summary of Submissions, op cit note 269 at 'dispute resolution'.

<sup>381</sup> UNCTAD *WIR 2016*, 105.

<sup>382</sup> Carim op cit note 30 at 61.

<sup>383</sup> Summary of Submissions, op cit note 269 at DTI's response in respect of 'dispute resolution'.

<sup>384</sup> Summary of Submissions, op cit note 269 at DTI's response in respect of 'dispute resolution'.

<sup>385</sup> *Ibid*.

which was considered to ‘depoliticise’ the process.<sup>386</sup> By granting the investor legal standing, the dispute did not develop into a dispute between the host and home state, whose relationship was hence not affected in any way. Instead, the investor was granted access to a neutral and unbiased arbitration tribunal, which is independent from political or economic climate prevalent in the respective states.<sup>387</sup> In fact, under the Investment Act the investor is obliged to lobby its home government to institute proceedings in relation to the dispute; the investor is however not guaranteed that the home state would actually do so.<sup>388</sup> Diplomatic protection by the home state does not constitute an absolute right a citizen has but lies exclusively within the discretion of the home state.<sup>389</sup> The institution of proceedings against another state might contradict or complicate the home state’s foreign policies and hence prevent it from taking actions.<sup>390</sup> Thus, from the investor’s perspective, ISDS is much more beneficial as it provides greater certainty and predictability regarding the settlement of disputes.

Moreover, subsection 13 (5) of the Investment Act provides that the South African government ‘may consent’ to international arbitration. Against the backdrop of the findings of the DTI review, it does not appear very likely that South Africa will readily declare its consent thereto. Moreover, the fact that domestic remedies have to be exhausted first, leaves the investor with even greater uncertainty due to the long and unpredictable duration of this process. As the conduct of international arbitration is already subject to the consent of South Africa, the cumulation of both these limiting requirements are too restricted and unsatisfactory.

Even in the unlikely event that South Africa would declare its consent, it has to be stressed that only the violation of customary international law or stipulations of an international treaty can constitute the subject of international arbitration.<sup>391</sup> Claims could therefore be based on the assertion of a violation of the customary international minimum standard. However, South Africa has not terminated the entirety of its BITs, which may result in the different treatment of foreign investors depending on the maintenance of BITs, the run-off period pursuant to the terminated BITs and the provisions entailed by the respective treaty. However, the tribunal in *Plama Consortium*<sup>392</sup> held that the MFN standard was not applicable to procedural rights, i.e. despite settlement provisions, so that even in the event that the Investment Act included such a standard claims could not be based on it.

---

<sup>386</sup> Sornarajah op cit note 7 at 250.

<sup>387</sup> Vadi ‘When Cultures Collide: Foreign Investment, Natural Resources, and Indigenous Heritage In International Investment Law’ (2011) 42 *Columbia Human Rights Law Review* 825.

<sup>388</sup> Comment by the European Chamber of Commerce in Southern Africa op cit note 34.

<sup>389</sup> Schlemmer ‘Protection of Investors and Investments’ (2009) 21 *SA Merc LJ* 742.

<sup>390</sup> See Anglo-American South Africa Ltd. *Supplementary Written Submission to the Portfolio Committee on Trade and Industry on the Promotion and Protection of Investment Bill*, 23 September 2015, 13.

<sup>391</sup> Gerhard Erasmus ‘Investment Protection Agreements: The Implications of South African Policy and Legislative Changes’ tralac Working Papers No. S15WP18/2015 (2015) 11.

<sup>392</sup> *Plama Consortium Limited v Republic of Bulgaria*, op cit note 158.

As a result, section 13 (5) of the Investment Act leaves investors with uncertainty and unpredictability, even more so as the Investment Act does not determine applicable rules or arbitration centre. However, the system of ISDS is currently experiencing a legitimacy crisis including calls arguing in favour of a complete overhaul of the investment arbitration system.<sup>393</sup> The main concerns comprise of additional legal and financial risks, too far-reaching rights for foreign investors compared to domestic investors, unacceptable facts regarding the course of domestic policy development, inconsistent arbitral awards and a lack of transparency.<sup>394</sup> Against this backdrop, the decision by the South African government to primarily provide for domestic dispute resolution is understandable. However, it would have been preferable to keep the door open for investor-state arbitration due to the ‘politisation’ of investment disputes if resolved on a state-state basis. In any event, the provision regarding state-state arbitration is too limited and very unlikely to contribute to the subject matter of dispute resolution. Despite the comprehensible motives on part of South Africa, section 13 of the Investment Act therefore falls short of the standard normally provided by BIT.

## **V. PROGNOSIS AND RECOMMENDATIONS**

The promulgation of the Investment of Protection Act No. 22 of 2015 has brought many changes in regard to the investment policy framework in South Africa. It is questionable which implications these changes will have for the investor confidence regarding future investments in South Africa. As the previous findings show, the 2015 Investment Act creates uncertainty and unpredictability in many of the areas governed. However, it is important to note that South Africa’s foreign investment framework does not only comprise of the 2015 Investment Act but includes various other legislation - parts of which are also being reviewed, such as e.g. the Expropriation Bill [B 4-2015], the International Arbitration Bill [B 10-2017] - and particularly BEE-related legislation such as the MPRDA and the Mining Charter. The content and impact on foreign investment by this legislation is partially not yet clear, which impedes the assessment of the South African investment environment for foreign investors.

In 2017, South Africa was rated ‘junk’ status, which essentially means ‘non-investment grade’ or ‘speculative’ mainly based on the assertion of poor governance and weak economy.<sup>395</sup> Although South Africa offers attractive business opportunities, the increasing political risk regarding doing business in the country involves the threat of distressing policy and legislative alterations, which is

---

<sup>393</sup> Leibold op cit note 219 at 217.

<sup>394</sup> UNCTAD *WIR 2015*, 128.

<sup>395</sup> BBC News ‘South Africa’s credit rating has been cut to junk status’, 3 April 2017, online available at: <http://www.bbc.com/news/business-39476903>, last accessed 7 August 2017.

expected to continue at least until the elections in 2019.<sup>396</sup> Thus, foreign investors assessing the South African investment climate would have reason to have little confidence regarding the stability and security of investments. It is therefore questionable if the enhancement of doubts and uncertainty by the termination of BITs was advisable, particularly against the background that the subject matter of attracting investment is part of the Nine Point Plan to reignite economic growth as presented in the State of Nation Address 2017 by State President Jacob G. Zuma.<sup>397</sup> It is noteworthy however that South Africa managed to re-enter the 2017 A.T. Kearney Foreign Direct Investment Confidence Index for the first time since 2014.<sup>398</sup> The report states that the outlook for the attraction of foreign direct investments in South Africa was mixed as the country, on the one hand, faced struggles relating to good governance and a volatile exchange rate but, on the other hand, was expecting GDP growth and still remained the gateway to Sub-Saharan Africa.<sup>399</sup>

However, according to the UNCTAD *World Investment Report 2017*, South Africa was still underperforming regarding the inflow of foreign direct investment in 2016, which amounted to \$2.3 billion.<sup>400</sup> Even though this constitutes an augmentation of 31% from the 2015 record low, this result was still significantly lower than the past average.<sup>401</sup> UNCTAD stated that the main reason for the 2015 low was ‘lacklustre economic performance, lower commodity prices and higher electricity costs’.<sup>402</sup> The OECD states that the confidence in the South African economy is already low due to political uncertainty, which might inhibit private investments even further in 2017 and 2018.<sup>403</sup>

Moreover, it is important to state that in 2016 foreign direct investment flows into other Sub-Saharan African countries, especially Angola and Nigeria, significantly increased.<sup>404</sup> Particularly Angola received almost seven times as much FDIs as South Africa, whereas Nigeria received approximately twice the amount of South Africa.<sup>405</sup> Although South Africa is still considered to constitute the ‘gateway’ to Sub-Saharan Africa, the fact that its regional counterparts experience

---

<sup>396</sup> South African Monitor *Report 7 - Year-End 2016* (2016) 99.

<sup>397</sup> See: <http://www.sanews.gov.za/south-africa/state-nation-address-2017-full-speech>.

<sup>398</sup> Ranked 25th out of 25, A.T. Kearney Foreign Direct Investment Confidence Index *Glass Half Full* (2017), online available at <https://www.atkearney.com/documents/10192/12116059/2017+FDI+Confidence+Index+-+Glass+Half+Full.pdf/5dced533-c150-4984-acc9-da561b4d96b4>, 33.

<sup>399</sup> *Ibid.*

<sup>400</sup> UNCTAD *World Investment Report 2017* 47.

<sup>401</sup> *Ibid.*

<sup>402</sup> UNCTAD *World Investment Report 2016* 41.

<sup>403</sup> OECD Economic Outlook, Volume 2017 Issue 1, South Africa, online available at <http://www.oecd.org/eco/outlook/economic-forecast-summary-south-africa-oecd-economic-outlook-june-2017.pdf>.

<sup>404</sup> UNCTAD *World Investment Report 2017*, Country Fact Sheet: South Africa, online available at [http://unctad.org/sections/dite\\_dir/docs/wir2017/wir17\\_fs\\_za\\_en.pdf](http://unctad.org/sections/dite_dir/docs/wir2017/wir17_fs_za_en.pdf).

<sup>405</sup> *Ibid.*

economic strengthening and become noticeably more attractive as investment venues cannot be ignored.

According to Guzman, already the mere fact of the termination of international bilateral agreements in itself is likely to send a negative signal to the international community as government decisions which are non-compliant with international law are able to damage a country's reputation.<sup>406</sup> The mere decision to terminate BITs and the implementation of domestic legislation as such is not incompatible with international law. It might however be perceived as a positioning outside of the international business community. Thus, it might have been preferable for South Africa to renegotiate the content of the respective BITs in order to tailor treaties appropriate to the country's socio-economic needs instead of terminating them. *Gazzini* also states that BITs constituted a flexible framework, which would allow for renegotiations modifying the respective commitments according to changing conditions and needs, or alternatively, for the adoption of binding common interpretations of the content and application of certain provisions.<sup>407</sup> Additionally, South Africa's stay within the international regulatory framework would have allowed for the country to significantly contribute to and take a decisive role regarding the development of third generation BITs.<sup>408</sup> Furthermore, the renegotiating of the BITs would have enabled South African investors, who make investments in another treaty country, to equally benefit from the protection offered by the treaties due to the reciprocity thereof.<sup>409</sup> By terminating or not renewing BITs South Africa might protect some of its national interests vis-à-vis foreign investors, it does however equally weaken the range of protection rendered to investments by its own nationals in foreign countries.<sup>410</sup> Moreover, *Steenkamp* states that the South African government's decision to 'opt out' of international arbitration might simultaneously demolish the currently established separation of legal and political relations on an international level as South African investors were deprived of the possibility to enforce investment related claims in foreign countries independently from the South African government.<sup>411</sup>

From a foreign investor's perspective, the factors mentioned above are likely to trigger a decline in foreign investor confidence regarding the stability and security of the South African investment framework. Particularly the overall poor economic development displayed by declining GDP growth and deteriorating inflow of foreign investment over the past years paired with increasing political instability and growing government consumption are likely to negatively impact the

---

<sup>406</sup> Andrew T. Guzman 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1850.

<sup>407</sup> *Gazzini* op cit note 279 at 940.

<sup>408</sup> *Langalanga* op cit note 29 at 28.

<sup>409</sup> *Schlemmer* 'Protection of Investors and Investments' (2009) 21 *SA Merc LJ* 734-5.

<sup>410</sup> *Ibid.*

<sup>411</sup> *Steenkamp* op cit note 246 at 181.

foreign investors' sentiments.<sup>412</sup> Combined with the significantly lower scope of protection rendered by the 2015 Investment Act, there is large foundation for doubts and concerns on part of investors. Particularly investors from countries with whom South Africa previously had BITs will be adversely affected after the expiration of the survival clauses. In order to prevent disinvestment by those investors, the South African government will have to act prudently regarding the utilisation of the preserved policy space in order to enhance investor confidence and ensure on-going capital inflow to the economy. In general, the manner in which the South African government will apply the applicable legislation and harness the preserved policy space will be decisive regarding the maintenance of already established and the making of future investments. The government will be forced to carefully contemplate future policy and legislative actions in order to assure foreign investors that the preserved regulatory space will not be used in an arbitrary or discriminatory fashion, which might put foreign investments at risk.

## **VI. CONCLUSION**

The Protection of Investment Act No. 22 of 2015 is aiming to provide an investment framework which facilitates the redress of the historical racial and discriminatory injustices of the Apartheid era prior to 1994. In order to achieve this, the South African Constitution puts restraints on private property rights in some instances and the South African government has introduced various legislation and policy measures serving the purpose of BEE, the enhancement of equality of all South African citizen, and sustainable development and inclusive growth. In the government's view the previous BITs did not sufficiently allow for the facilitation of these vital domestic policy measures due to too limited policy space. On the contrary, by means of BITs, and particularly international investor-state arbitration, the exercise of crucial national legislative measures was inhibited and exposed to interests non-consistent with the domestic socio-economic needs. The Investment Act, however, was aligned with these findings and allowed for the necessary policy space on part of the government.

It is undisputed that the rectification of the wrongdoings during the Apartheid regime is essential and the decision to terminate BITs and to implement national investment protection legislation constitutes a legitimate and lawful policy choice. However, foreign direct investment still constitute a major catalyst for economic growth in developing countries due to the inflow of foreign capital. The Investment Act however provides a substantially lower scope of protection regarding foreign investments in comparison to the previous BITs in terms of crucial elements such as fair and equitable treatment, most-favoured nation treatment and investor-state dispute settlement.

---

<sup>412</sup> OECD Economic Outlook, Volume 2017 Issue 1, South Africa, online available at <http://www.oecd.org/eco/outlook/economic-forecast-summary-south-africa-oecd-economic-outlook-june-2017.pdf>.

Moreover, the Investment Act and the South African Constitution determine a significantly narrower concept of expropriation, whilst lacking provisions regarding compulsory payment of compensation in terms of indirect measures, and a limited concept of full protection and security. These stipulations are essentially incompatible with the respective requirements of the customary international minimum standard. Thus, South Africa's commitment to international law is likely to be interpreted as rather moderate, which might affect the country's reputation and perception within the international economic community. It is questionable if non-compliance with international state practice is advisable, particularly against the background that South Africa's GDP growth and the inflow of foreign investment have been deteriorating over the past years whereas political instability and government consumption is constantly increasing.

Therefore, the actual manner of utilisation of the preserved policy space and the application not only of the Investment Act but of the entirety of the foreign investment related legislation will be decisive in order to achieve a reasonable balance between the domestic public interest and policy space and foreign investors' needs of predictable and reliable investment protection.

It will be necessary for the government to show its dedication and commitment towards the establishment of a balanced regime, equally taking into account the respective needs and interests whilst preventing arbitrariness and discrimination, in order to maintain South Africa's status as a foreign investment-friendly venue and to convince foreign investors of the continued long-term protection of investments in South Africa.

## **BIBLIOGRAPHY**

### **LEGISLATION**

#### **South African Legislation**

Broad-Based Black Economic Empowerment Act No. 53 of 2003.

Constitution of the Republic of South Africa No. 108 of 1996.

General Notice 1087 of 2013: Invitation for the Public to Comment on the Promotion and Protection of Investment Bill, 2013, G Gazette No 36995, 1 November 2013, 3.

General Notice 1639 of 2004: Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry, Government Gazette No 26661, 13 August 2004, 3.

Minerals Act No. 50 of 1991.

Mineral and Petroleum Resources Development Act, No 28 of 2002.

Promotion and Protection of Investment Bill (B18-2015).

Protection of Investment Act No. 22 of 2015.

#### **International Legislation**

Charter of Economic Rights and Duties of States, GA Resolution 3281 (xxix).

SADC Treaty

### **GOVERNMENT DOCUMENTS**

#### **South Africa**

Republic of South Africa, Department of Trade and Industry, Bilateral Investment Treaty Policy Framework Review, Government Position Paper, Pretoria, June 2009, online available:

*Parliamentary Monitoring Group*, [http://pmg-assets.s3-website-eu-west-](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf)

[1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf), last accessed 11 August 2017.

Republic of South Africa, Department of Trade and Industry, Update on the Review of Bilateral Investment Treaties in South Africa (Report to Cabinet, 15 February 2013), online available at:

[http://osf.org.za/wp-content/uploads/2015/08/Department-of-Trade-and-Industry-dti-updates-on-South-Africas-trade-diplomacy-dti\\_review\\_of\\_bits\\_ppc\\_20130215.pdf](http://osf.org.za/wp-content/uploads/2015/08/Department-of-Trade-and-Industry-dti-updates-on-South-Africas-trade-diplomacy-dti_review_of_bits_ppc_20130215.pdf), last accessed 17 July 2017.

### **JURISPRUDENCE**

#### **South Africa**

Agri SA v Minister of Mining and Energy 2013 (4) SA 1 (CC).

*First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*, 2002 (4) SA 768 (CC).

*International Trade Administration Commission v Scaw South Africa (Pty) Ltd.*, 2012 (4) SA 618 CC.

## **International**

*Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Permanent Court of International Justice, Twenty-Third Session (4 February 1932), Advisory Opinion.

## **INTERNATIONAL ARBITRATION AWARDS**

*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* ICSID Case No. ARB/99/2, Award, 25 June 2001.

*Azinian, Davitian & Baca v United Mexican States* ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999.

*Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000.

*Generation Ukraine Inc. v Ukraine* ICSID Case No. ARB/00/9, Award, 16 September 2003.

*Link Trading Joint Stock Company v Department for Customs Control of the Republic of Moldova* UNCITRAL, Final Award, 18 April 2002.

*Piero Foresti et al. v The Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award, 4 August 2010.

*Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

*Pope & Talbot Inc v The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001.

*Salini Costruttori S.P.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

*Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006.

*Swisslion DOO Skopje v Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012.

*Tecnicas Medioambientales Tecmed S.A. v The United Mexican States* ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.

## **INTERNATIONAL MATERIALS**

Agreement between the Government of the People's Republic of China and the Government of the Republic of South Africa concerning the Reciprocal Promotion and Protection of Investments (1997), online available at: <http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/971>.

Draft Articles on Most-Favoured-Nation Clauses with Commentaries adopted by the International Law Commission at its 30th session, 1978, and submitted to the General Assembly, Yearbook of the International Law Commission (1978) vol II, part two.

G20 Guiding Principles for Global Investment Policymaking, online available at:

<http://investmentpolicyhub.unctad.org/Upload/Documents/Annex%20III%20G20%20Guiding%20Principles%20for%20Global%20Investment%20Policymaking.pdf>.

German Model BIT of 2008, online available at:

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2865>.

US Model BIT of 2012, online available at:

<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

## **SECONDARY MATERIALS**

### **Books**

Carim, Xavier 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' in Kavalijt Singh and Burghard Ilge (Eds), *Rethinking Bilateral Investment Treaties Critical Issues and Policy Choices*, 1 ed (2016), 61.

Chidede, Talkmore *Legal Protection of Foreign Investment* (2016) Anchor Academic Publishing: Hamburg.

Dolzer, Rudolf & Schreuer, Christoph *The Principles of International Investment Law* 2 ed (2012) Oxford University Press: Oxford.

McLachlan, Campbell & Shore, Laurence & Weiniger, Matthew *International Investment Arbitration: Substantive Principles* (2007) Oxford International Arbitration Series: Oxford.

Miles, Kate *The Origins of International Investment Law* (2013) Cambridge Studies in International and Comparative Law: Cambridge.

Schreuer, Christoph H. *The ICSID Convention: A Commentary* 2 ed (2009) Cambridge University Press: Cambridge

Sornarajah, M *The International Law on Foreign Investment* 2 ed (2004) Cambridge University Press: Cambridge.

Subedi, Surya P *International Investment Law: Reconciling Policy and Principle* 2 ed (2012) Oxford and Portland, Oregon.

### **Articles**

Brickhill, Jason & du Plessis, Max 'Two's Company, Three's A Crowd: Public Interest Intervention in Investor-State Arbitration (Piero Foresti v South Africa)' (2011) 27 *South African Journal of Human Rights* 152 - 166.

Brunetti, Maurizio 'Indirect Expropriation in International Law / L'expropriation indirecte en droit international' (2003) 5 *International Law FORUM du droit international* 150-154.

Clark, Hunter R. & Bogran, Amy 'Foreign Direct Investment in South Africa' (1999) 27 *Denver Journal of International Law & Policy* 337-358.

Coleman, Matthew & Williams, Kevin 'South Africa's Bilateral Investment Treaties, Black Economic Empowerment and Mining: A Fragmented Meeting?' (2008) 9 *Business Law International* 56 – 94.

Demirkol, Berk 'The Notion of Investment in International Investment Law' (2015) 1 *The Turkish Commercial Law Review* 41 – 50.

Dolzer, Rudolf 'Fair and Equitable Treatment: Today's Contours' (2013) 12 *Santa Clara Journal of International Law* 7 – 33.

Friedman, Andrew 'Flexible Arbitration for the Developing World: Piero Foresti and the Future of Bilateral Investment Treaties in the Global South' (2010) 7 *International Law and Management* 37 – 51.

Gazzini, Tarcisio 'Bilateral Investment Treaties and Sustainable Development' (2014) 15 *Journal of World Investment & Trade* 929 – 963.

Grabowski, Alex 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15 *Chicago Journal of International Law* 287 – 309.

Guzman, Andrew T. 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1823 – 1888.

Guzman, Andrew T. 'Why LCDs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 639 – 688.

- Isakoff, Peter D. 'Defining the Scope of Indirect Expropriations for International Investments' (2013) 3 *Global Business Law Review* 189 – 209.
- Johnson, Alec R. 'Rethinking Bilateral Investment Treaties in Sub-Saharan Africa' (2010) 59 *Emory Law Journal* 919 – 967.
- Leibold, Annalisa M. 'The Friction Between Investor Protection and Human Rights: Lessons From *Foresti v. South Africa*' (2016) 38 *Houston Journal of International Law* 215 - 267.
- Lester, Simon 'Reforming the International Investment Law System' (2015) 30 *Maryland Journal of International Law* 70 – 81.
- Mandela, Nelson 'South Africa's Future Foreign Policy' (1993) 73 *Foreign Affairs* 86 – 97.
- Miles, Kate 'International Investment Law: Origins, Imperialism and Conceptualizing the Environment' (2010) 21 *Colorado Journal of International Environmental Law and Policy*.
- Reed, Jennifer 'South African Revolutionizing Foreign Investment Protection System' (2014) 6 *Yearbook on Arbitration and Mediation* 295 - 304.
- Schlemmer, EC 'Protection of Investors and Investments' (2009) 21 *SA Merc LJ* 734–752
- Taylor, Eric 'The History of Foreign Investment and Labor Law in South Africa and the Impact of the Labour Relations Act 66 of 1995' (1996) 9 *The Transnational Lawyer* 611-649.
- Vadi, Valentina S. 'When Cultures Collide: Foreign Investment, Natural Resources, and Indigenous Heritage In International Investment Law' (2011) 42 *Columbia Human Rights Law Review* 797 - 890.
- Vandevelde, Kenneth J. 'A Unified Theory of Fair and Equitable Treatment' (2010) 43 *N.Y.U. Journal of International Law and Politics* 43 – 106.

## **Papers**

- Adeleke, Fola 'Benchmarking South Africa's Foreign Direct Investment Policy' Policy Insights 13, South African Institute for International Affairs, April 2015, online available at: <https://www.saiia.org.za/policy-insights/802-benchmarking-south-africa-s-foreign-direct-investment-policy/file>.
- Bosman, Karen 'South Africa: Trading International Investment for Policy Space' Stellenbosch Economic Working Papers 04/16, Department of Economics and the Bureau for Economic Research at the University of Stellenbosch, online available at: [www.ekon.sun.ac.za/wpapers/2016/wp042016/wp-04-2016.pdf](http://www.ekon.sun.ac.za/wpapers/2016/wp042016/wp-04-2016.pdf).

Carim, Xavier 'Lessons from South Africa's BITs Review' Columbia FDI Perspectives No. 109, 25 November 2013, Vale Columbia Center on Sustainable International Investment, online available at: [http://ccsi.columbia.edu/files/2013/10/No\\_109\\_-\\_Carim\\_-\\_FINAL.pdf](http://ccsi.columbia.edu/files/2013/10/No_109_-_Carim_-_FINAL.pdf).

Erasmus, Gerhard 'Investment Protection Agreements: The Implications of South African Policy and Legislative Changes' (2015) *tralac Working Papers No. S15WP18/2015*, online available at: <https://www.tralac.org/publications/article/8281-investment-protection-agreements-the-implications-of-south-african-policy-and-legislative-changes.html>.

Langalanga, Azwimpheleli 'Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context', Occasional Paper 214, South African Institute for International Affairs, May 2015, online available at: <https://www.saiia.org.za/occasional-papers/848-imagining-south-africa-s-foreign-investment-regulatory-regime-in-a-global-context/file>.

## Reports

Anglo-American South Africa Ltd. Supplementary Written *Submission to the Portfolio Committee on Trade and Industry on the Promotion and Protection of Investment Bill*, 23 September 2015, online available at: <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/151021angloamerican.pdf>.

A. T. Kearney, Foreign Direct Investment Confidence Index (2016), online available at: <https://www.atkearney.com/documents/10192/8064626/2016+A.T.+Kearney+Foreign+Direct+Investment+Confidence+Index-FDI+on+the+Rebound.pdf/e61ec054-3923-4f96-b46c-d4b4227e7606,7-9>.

A.T. Kearney, Foreign Direct Investment Confidence Index *Glass Half Full* (2017), online available at: <https://www.atkearney.com/documents/10192/12116059/2017+FDI+Confidence+Index+-+Glass+Half+Full.pdf/5dced533-c150-4984-acc9-da561b4d96b4,33>.

European Chamber of Commerce and Industry in Southern Africa *Submission on the Promotion and Protection of Investment Bill 2013* (2015), online available at: <http://www.politicsweb.co.za/documents/this-bill-wont-protect-or-promote-investment--eu-c>.

Federal Research Division, Library of Congress *South Africa: A Country Study* 3 ed (1997).

German-African Business Association (Afrika-Verein) and the EU Chamber of Commerce and Industry in Southern Africa *Discussion Paper on the occasion of the visit of the South African President Jacob Zuma to Germany, on 10 November, 2015*, online available at: [https://static1.squarespace.com/static/55f93ec2e4b0d99faf1aef57/t/5640b423e4b031347f7a7120/1447080995959/Afrika-Verein\\_EU+Chamber\\_Discussion+Paper\\_\\_EN+final.pdf](https://static1.squarespace.com/static/55f93ec2e4b0d99faf1aef57/t/5640b423e4b031347f7a7120/1447080995959/Afrika-Verein_EU+Chamber_Discussion+Paper__EN+final.pdf).

IMF *Balance of Payment and International Investment Position Manual* 6 ed (2009), online available at: <https://www.imf.org/external/pubs/ft/bop/2007/pdf/bpm6.pdf>.

OECD *Benchmark Definition of Foreign Direct Investment* 4 ed, 2008, online available at: <https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>.

OECD *Economic Outlook* Volume 2016, Issue 2, South Africa, online available at: <http://www.oecd.org/eco/outlook/economic-forecast-summary-south-africa-oecd-economic-outlook-november-2016.pdf>.

OECD *Economic Outlook* Volume 2017, Issue 1, South Africa, online available at <http://www.oecd.org/eco/outlook/economic-forecast-summary-south-africa-oecd-economic-outlook-june-2017.pdf>.

OECD ‘Self-Assessment of South Africa’s Investment Regime in Relation to the OECD Codes of Liberalisation and the Principle of National Treatment’ OECD-South Africa Investment Policy Dialogue (2014), online available at: <http://www.oecd.org/investment/south-africa-investment-regime.htm>.

South African Monitor Assessing and Promoting Civil and Minority Rights in South Africa, Report 7 - Year-End 2016 Political Turbulence and Business Risks in the ANC's Hybrid Regime, online available at: <http://sa-monitor.com/category/reports/latest-reports/>.

Trade Law Center (TRALAC) Investment Project: South African Case Study International Institute for Sustainable Development Report, May 2004, online available at: [http://www.iisd.org/pdf/2004/investment\\_country\\_report\\_south\\_africa.pdf](http://www.iisd.org/pdf/2004/investment_country_report_south_africa.pdf).

UNCTAD *Fair and Equitable Treatment* UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2012, online available at: [http://unctad.org/en/Docs/unctaddiaeia2011d5\\_en.pdf](http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf).

UNCTAD *International Investment Agreements: Key Issues Volume I*, New York and Geneva, 2004, online available at: [http://unctad.org/en/Docs/iteiit200410\\_en.pdf](http://unctad.org/en/Docs/iteiit200410_en.pdf).

UNCTAD *Investment Policy Framework for Sustainable Development*, 2015, online available at: [http://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf).

UNCTAD *Most-Favoured-Nation Treatment* UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2010, online available at: [http://unctad.org/en/Docs/diaeia20101\\_en.pdf](http://unctad.org/en/Docs/diaeia20101_en.pdf).

UNCTAD *National Treatment* UNCTAD Series on Issues on International Investment Agreements, New York and Geneva, 1999, online available at: <http://unctad.org/en/Docs/psiteiitd11v4.en.pdf>.

UNCTAD *Scope and Definition* UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2011, online available at: [http://unctad.org/en/Docs/diaeia20102\\_en.pdf](http://unctad.org/en/Docs/diaeia20102_en.pdf).

UNCTAD *Training Manual on Statistics for FDI and the Operations of TNCs* Volume 1, New York and Geneva, 2009, online available at: [http://unctad.org/en/Docs/diaeia20091\\_en.pdf](http://unctad.org/en/Docs/diaeia20091_en.pdf).

UNCTAD *World Investment Report 2015*, online available at: [http://unctad.org/en/PublicationsLibrary/wir2015\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf).

UNCTAD *World Investment Report 2016*, online available at: [http://unctad.org/en/PublicationsLibrary/wir2016\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf).

UNCTAD *World Investment Report 2017*, online available at: [http://unctad.org/en/PublicationsLibrary/wir2017\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf).

### **News Reports / Others**

BBC News 'South Africa's credit rating has been cut to junk status', 3 April 2017, online available at: <http://www.bbc.com/news/business-39476903>, last accessed 7 August 2017.

State of the Nation Address 2017 by Jacob G Zuma, President of the Republic of South Africa on the occasion of the Joint Sitting of Parliament Cape Town, Full Speech, online available at: <http://www.sanews.gov.za/south-africa/state-nation-address-2017-full-speech>.

### **Internet Sources**

Chidede, Talkmore 'Amendments of Annex 1 to the SADC Finance and Investment Protocol: Are they in force yet?', tralac discussions, 13 July 2017, online available at <https://www.tralac.org/discussions/article/11875-amendments-of-annex-1-to-the-sadc-finance-and-investment-protocol-are-they-in-force-yet.html>, last accessed 10 August 2017.

Lang, Jonathan 'Bilateral Investment Treaties - a shield or a sword?' (2013) Bowman Gilfillan Africa Group Corporate Newsflash, online available at: <http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf>, last accessed 25 July 2017

Mossallam, Mohammad 'Process Matters: South Africa's Experience Exiting its BITs' (January 2015) SSRN Electronic Journal The Global Economic Governance Programme University of Oxford, online available at: [https://www.geg.ox.ac.uk/sites/geg/files/GEG%20WP\\_97%20Process%20matters%20-%20South%20Africas%20experience%20exiting%20its%20BITs%20Mohammad%20Mossallam.p](https://www.geg.ox.ac.uk/sites/geg/files/GEG%20WP_97%20Process%20matters%20-%20South%20Africas%20experience%20exiting%20its%20BITs%20Mohammad%20Mossallam.pdf)df, last accessed 18 July 2017.

Woolfrey, Sean 'South Africa's Promotion and Protection of Investment Bill' (2013) Tralac Discussions, online available at: <https://www.tralac.org/discussions/article/5345-south-africa-s-promotion-and-protection-of-investment-bill.html>, last accessed 26 July 2017.

### **Theses and Dissertations**

Tania Steenkamp *South Africa's New Bilateral Investment Treaty Policy: A Reasonable Response To a Flawed Regime?* LL.M. thesis, (2014) The University of British Columbia (Vancouver).