WHAT ARE THE IMPLICATIONS OF SOUTH AFRICA'S PROTECTION OF INVESTMENT ACT ON THE SADC REGIONS' AIMS TO HARMONISE INVESTMENT POLICY WITHIN THE REGION, AND HOW CAN POSSIBLE INCONSISTENCIES AND CHALLENGES BE OVERCOME?

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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.

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Abstract

Pre-Democratic South Africa was largely an isolated State. With the exceptions of the automotive and textile sectors, the country did not attract significant foreign investment due to the economic sanctions imposed by the international community in response to the crimes of apartheid.

Between 1993 and 1995, the newly elected democratic government of South Africa concluded its first bilateral investment agreements with European countries. These bilateral investment agreements were made the standard for future treaties. The newly elected government realised the importance of foreign direct investment for achieving its economic growth and development objectives. Moreover, the conclusion of several bilateral investment treaties was used to strengthen relations with other countries and a tool to promote investment.

However, by the late 1990s the South-African government found that these treaties were no longer appropriate. They often conflicted with the States socio-economic development policies and presented unequal protections for foreign investors and the States national policies. The Piero Foresti case, in which Italian investors brought an international arbitration claim against the South African government, galvanized the investment policy review process. The policy recommendation stemming from the review process included; that the South African cabinet refrain from entering into new bilateral investment treaties (BITs) - unless there were compelling political or economic reasons to do so, terminate existing BITs and replace them with domestic legislation.

This dissertation considers the impact of the change in South Africa's investment policy on the Southern African Development Community (SADC) regions' efforts to harmonise investment policy across member states. It is an empirical study which considers South Africa's policy shift within the international investment law global context. Given South Africa's powerful and

somewhat hegemonic position on the African continent and within the region, whatever changes take place internally, are bound to spill-over into the region and potentially across the continent.

The regional impact is analysed and described in detail. The research encompasses broader regional integration challenges, relations among member states and implications for dispute resolution.

The study concludes that South Africa's policy shift is in line with global developments. It is an attempt to find a balance between investor protection and the States' ability to regulate. However, the policy shift has created a measure uncertainty regarding the settlement investment disputes within South Africa and across the SADC region. Furthermore, the broader obstacles which inhibit regional integration across SADC need to be addressed in order to facilitate investment policy harmonisation.

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List of Acronyms

ACIA - The Comprehensive Investment Agreement of the Association of South-East Asian Nations
ANC - African National Congress
BEE - Black Economic Empowerment
BIT - Bilateral Investment Treaty
BRICS - Brazil, Russia, India, China and South Africa
CAJAC - China-Africa Joint Arbitration Centre
CFTA - Continental Free Trade Area
CODESA - Convention for a Democratic South Africa
COMESA – Common Market for Eastern and Southern Africa
COMESA CCIA - COMESA Common Investment Area
DTI - Department of Trade and Industry
EPA - Economic Partnership Agreements
EU - European Union
FDI - Foreign Direct Investment
FTA - Free Trade Agreements
GEAR - Growth Employment and Redistribution Programme
ICJ - International Court of Justice
ICSID - International Centre for Settlement of Investment Dispute
ISDS - International state dispute settlement
IIA - International investment agreement
MIAC - Mauritian Arbitration Centre International
MFN - Most favoured nation
MPRDA - Mineral and Petroleum Resources Development Act
NP - National Party
OECD - Organisation on Economic Cooperation and Development
PPIB - Promotion and Protection of Investment Bill
RISDP - Regional Indicative Strategic Development Plan
SACU - Southern African Customs Union
SARB - South African Reserve Bank
SADC - Southern Africa Development Community

SADCC - Southern African Development Coordination Conference

TFTA -Tripartite Free Trade Area

TTIP - Transatlantic Trade and Investment Partnership

UNCITRAL - United Nations Commission on International Trade Law

UNCTAD - United Nations Conference on Trade and Development

USA - United States of America

WTO - World Trade Organisation

Chapter 1- Introduction

Background to the study

International investment agreements (IIAs) are binding on investors and host-states. They were introduced to affirm international legal standards that regulate foreign investment flows. Prior to the Second World War, the protection of foreign direct investment (FDI) was not prioritized in international agreements. At the time, most international agreements concerned themselves with establishing trade relations and sometimes included provisions relating to the protection of foreign nationals' property rights[1].

Post-World War II and the Colonial Era, the newly independent states were very protective of their independence[2] and regarded foreign investments as a form of neo-colonialism as they involved foreign control over their means of production[3]. Many developing countries obstructed their economies from receiving new foreign investment and began to expropriate existing investments[4].

Developed countries responded to the threat of uncompensated expropriation by creating IIAs to reduce political risk. The most common forms of IIAs are Bilateral Investment Treaties (BITs) and Preferential Trade and Investment Agreements (PTIAs). The focus of this study is on BITs. By and large, BITs deal with the admission, treatment and protection of foreign investments.

When developing countries came to recognise that FDI could be used to advance their development objectives they concluded a considerable number of IIAs[5].

In the absence of a multilateral framework, BITs were seen by developing countries as a way to indicate that they were a safe destination for investment. However,

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[1] KJ. Vandevelde, *A Brief History of International Investment Agreements. U.C. Davis Journal of International Law & Policy*, Vol. 12, No. 1, p. 157, 2005; Thomas Jefferson School of Law Research Paper No. 1478757. Available at SSRN: https://ssrn.com/abstract=1478757,p. 2.

[2] Sornarajah M, The International Law on Foreign Investment, 12, 1994.

[3] Hanink D, *The International Economy A Geographic Perspective,* 234, 1994.

[4] For example: - These expropriations included notably the seizure of petroleum assets in Iran in 1951 and in Libya in 1955, and Fidel Castro's expropriation of the private sector starting in 1959.

[5] Kishoiyoan B, The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law, 14 Nw.J.Int'l. & Bus. 327 (1993-1994), p. 372.

quantitative and qualitative studies which have analysed the impact of the treaties on increasing FDI have been inconclusive[6].

Nevertheless, between 1980 and 2014, the number of bilateral investment treaties grew from 500 in 1980 to 2923 in 2014[7]. This is attributed to the 'race to the bottom', ie the competition between developing countries to attract FDI based on the belief that these investments would promote economic growth and development.

During the late 1990s and early 2000s, the treaties became more and more politically controversial as developed and developing countries alike became dissatisfied with the content and effects of traditional IIAs. This first generation of treaties has been criticised for creating unequal distribution of rights and obligations between investors and host-states. They constrain the host-states' governments' ability to pursue public policies, and through their dispute resolution clauses, put undue risk on host-states without requiring investors to contribute to development objectives of the state.

The Republic of South Africa, which is the case study of my dissertation, officially began signing BITs in the 1990s. During this time, the government failed to assess the implications of certain provisions of the treaties on the states' ability to pursue its public policy objectives. With the change in government in 1994, and the introduction of the constitution in 1996, more contradictions became apparent.

The BITs were inconsistent with the States' obligations to redress past injustices of apartheid, and to create a more equal society. For example, the BITs did not make a distinction between expropriation and deprivation, which implied that a deprivation was tantamount to expropriation, and as a result, would require compensation. The Constitution on the other hand clearly stipulated that deprivation would not require compensation if the measures were pursuant to law and not arbitrary[8].

The *Piero Foresti*[9] case has been branded as the case that incited South Africa's policy review. In this case, the conflict between the governments' Black Economic Empowerment (BEE) policy and its BIT obligations became clear.

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[6] Neumayer, Eric & Spess, Laura. (2005). Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries? World Development. 33. 1567-1585. 10.1016/j.worlddev.2005.07.001.

[7] https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx accessed 09/06/2018.

[8] The Constitution of the Republic of South Africa No. 108 of 1996, s 25.

[9] *Piero Foresti, Laura de Carli & Others v. The Republic of South* Africa (ICSID Case No. ARB (AF)/07/1).

The claimants argued that their old-order rights were expropriated when the Mineral and Petroleum Resources Development Act[10] (MPRDA) of 2004 took effect and claimed compensation. The case was ultimately settled on the merits in 2010.

While the Foresti case triggered the review, it is important to consider the wider international trend - where many countries are seeking to address flaws in the traditional 'first-generation' treaties and in ISDS[11].

The South African government began a methodical review of its investment policy in 2007, which was concluded in 2010. Among the Department of Trade and Industry's recommendations were that the government should restructure its policy framework to ensure that broader social and economic priorities are not undermined[12] . The South African Cabinet took up these recommendations and made a series of landmark decisions including to[13]:-

i) Develop investment legislation to codify BIT provisions into domestic law;
ii) Terminate first generation BITs after offering partner-nations the possibility to renegotiate;
iii) Develop a South African model BIT as the basis for any new agreement; and
iv) Establish an inter-ministerial committee to oversee the process.

It is in this context that the SADC Model BIT and the Protection of Investment Act of 2015 were developed.

Both instruments differ substantially from traditional BIT provisions, for example - they recommend state-to-state international investment dispute settlement instead of

[10] The MPRDA was enacted to facilitate equitable access to South Africa's mineral and petroleum resources, and to ensure the sustainable development thereof. In so doing, the Act provided a limited period of time to holders of old-order rights and mining rights to have these converted into new order rights under the Act.
[11] Remarks by Dr Rob Davies at the Centre for Conflict Studies Public Dialogue on "South Africa, Africa and International Investment Agreements" Cape Town, 17 February 2014 http://www.tralac.org/news/article/5481-south-africa-africa-and-international-investment-agreements.html.
[12]Lang, J. (2013). Bilateral Investment Treaties – a shield or a sword? [online] Bowman Gilfillan Africa Group. Available at: http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf.
[13]Republic of South Africa, Department of Trade and Industry, Update on the Review of Bilateral Investment Treaties in South Africa, (Pretoria: Report to Cabinet, 15 February 2013) online: South African Foreign Policy Initiative, <http://www.safpi.org /sites/ default/files/ publications/dti_review_of_bits_ppc_20130215.pdf>.

international investor-state dispute settlement and exclude most-favoured nation and fair and equitable treatment clauses.

However, these instruments have different applications. The SADC Model BIT template is non-binding soft-law and was intended to be used as a guideline by member states and other interested parties in their individual and collective negotiations of IIAs.

The Protection of Investment Act[14] on the other hand was enacted to: -

> 'Provide for the protection of investors and their investments; to achieve a balance of rights and obligations that apply to all investors; and to provide matters connected therewith [15].'.
>
> The Protection of Investment Act was heavily criticised by South Africa's main trading partners, including the European Union and the United States of America as well as the broader international community[16]. Conversely, notable legal and economic experts such as David Schneiderman and Joseph Stiglitz praised the government for its decision to review and exit BITs[17] .
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> During the public submissions in 2013, one of the key criticisms raised against the Act was its incompatibility with South Africa's international and regional obligations - with particular reference to the SADC Finance and Investment Protocol of 2006 (FIP)[18]. The SADC FIP had been enacted to foster the harmonisation of financial and investment policies of member states in line with the SADC's regional integration objectives. The FIP entered into force in 2010.
>
> Although South Africa had signed the protocol, it had not ratified it. In fact, many of the SADC member states had not implemented the FIP- as indicated in the 2012 Protocol on Finance and Investment Baseline Study, undertaken by the Finmark Trust[19]. Many of the member states found it problematic due to its content which was similar to

[14] Act 22 of 2015.
[15] *Ibid*, preamble.
[16] Steyn P, Investments in South Africa - Private Equity | Werksmans Attorneys. [online] Werksmans Attorneys. Available at: http://www.werksmans.com/legal-briefs-view/new-promotion-protection-investment-billassessment-implications-local-foreign-investors-south-africa/, (2014).
[17] T Steenkamp, South Africa's New Bilateral Investment Treaty Policy: A Reasonable Response to a Flawed Regime? Master of Laws. The University of British Columbia. https://circle.ubc.ca/handle/2429/49945, Stiglitz, J. (2013). South Africa Breaks Out. [online] Project Syndicate. Available at: (2014).
[18] https://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf accessed 7/6/2018.
[19] Protocol on Finance and Investment Baseline Study: Regional Report, Finmark Trust, (2012).

traditional BITs, furthermore, there were no guidelines to operationalise the implementation of its objectives.

Subsequently, the Annex 1 of the FIP was amended, and is now more in line with South Africa's Act.

South Africa's policy review decision and the subsequent policy which was pursued are particularly important in light of its position as the most economically developed and advanced state on the African continent and within the SADC region. Due to this powerful position, it could guide the direction of investment policy within the region, which would in turn have broader implications for current efforts to harmonise the international investment policy on a regional and continental level.

The asserted benefits of a harmonised investment policy on a regional level are that it would assist to simplify investment rules and regulations which would make them clearer and would in turn create an environment more conducive for investment[20].

At times, South Africa has been described as the regional hegemon. South Africa could use its political and economic power to assert its leadership status within the region and lead regional integration in SADC. On the other hand, South Africa is often perceived as a hegemonic bully and this has a negative impact on relations among SADC member states, coordination of policies and commitment to regional integration.

South Africa's' significance and influence within the region is highlighted throughout this study. This thesis submits that the policy shift and development of South Africa's Protection of Investment Act has had the following impact on the SADC regions' aims to harmonise investment policy within the region - it led to the development of a regional model bilateral investment treaty template which aims to balance host-states' and foreign investors rights and contributed significantly to the amendment of the SADC Finance and Investment Protocols' Annex 1. The policy changes regarding foreign direct investment have incited a lot of criticism concerning the procedures that were followed, the protection of investors' rights, investments and access to dispute settlement mechanisms.

[20] Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration, UNECA https://www.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf, p. 10.

It is hoped that this thesis has made an empirical contribution to the current discussions in this area of law and is intended for scholars, practitioners and policy-makers to reflect on the implications of the new Act on the regions' foreign direct investment policy vis-à-vis its sustainable development agenda.

Research problem

With South Africa having such a dominant role within the Southern-African region, particularly economically and politically, this paper examines how its recent investment policy shift could impact on other SADC member-states policies and the overall strategy to harmonise international investment policy within the region.

Research questions

i) What is the impact of South Africa's policy change domestically;
ii) What is the impact of South Africa's policy change in the SADC region;
iii) What are the other regional integration issues pertaining to the harmonisation of international investment law and how these can be overcome?

Thesis findings

South Africa's international investment policy review has had the following impact of the SADC regions efforts to harmonise the regional international investment policy: - it led to the development of the SADC Model BIT template and motivated the amendment of the Annex 1 of SADC FIP. The South African government took a lead amongst developing countries, particularly on the African continent to address dissatisfaction with the apparent imbalance between protection of investors and states right to regulate.

Significance of the study

From the time when the Protection of Investment Act (PIA)[21] was introduced, it elicited a lot of criticism. Many of South Africa's traditional trading partners argued that by terminating its BITs, South Africa took a step away from being an 'investor friendly' jurisdiction[22].

This paper examines the current issues in international investment law; including- the balance between investors and states' rights, the relationship between sustainable development and foreign direct investment and controversies surrounding investor-state dispute settlement within the SADC context.

This dissertation intends to highlight; similarities between South Africa's foreign investment policy and the current global trends and the challenges concerning regional integration within the SADC region which hinder efforts to harmonise the regions investment policy.

Methodology

The research is mainly based on desktop and library-based research which include the following sources: - books, journals, international organisation reports, websites and submissions made to parliament relating to the Protection of Investment Act.

Limitations to the study

Apart from statements made publicly by government officials, the study does not investigate the motives or rationale for the investment policy stance of the South African government with regard to changes domestically and on a regional level.

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[21] *Supra* note 14.
[22] *Supra* 17.

Outline of chapters

Chapter two sets out the context for the research question to be answered in this thesis. It provides a background of South Africa's history with bilateral investment treaties which informed key considerations during the review process.

The Protection of Investment Act was subjected to a lot criticism, particularly from European and American trading partners. In chapter three the thesis examines some of the key provisions of the Act, objections raised and reviews the domestic implications of the investment policy review within South Africa.

Chapter four analyses the 'spill-over' effects of South Africa's policy review into the SADC region. Due to South Africa's powerful and central position in the region - whatever policy decisions it embarks upon, are bound to have implications for the region and continent.

Chapter five examines the dispute settlement provisions of South Africa's Protection of Investment Act, SADC Model BIT and the amended Annex 1 of the SADC FIP. South Africa's legislation differs markedly from the recommendations of the SADC Model BIT. The Amended Annex 1 brings the SADC FIP in line with South Africa's domestic law and Constitution. However, it potentially leaves investors and investments which were covered under the original Annex 1 without protection.

Chapter six, summarises the findings of the thesis and argues that South Africa's decision to review its investment policy is broadly in line with recent global developments. However, in trying to find a balance between asserting states right to regulate and the protection of investors, the Protection of Investment Act provisions are quite restrictive and limit foreign investors access to international arbitration. The government of South Africa must ensure that there are alternative institutions available domestically, which can address international investment disputes effectively.

With reference to South Africa's dominant position, both in the region and on the continent, the government needs to reconsider its approach to SADC regional issues. On one hand, by South Africa taking the reins and leading the SADC region, member-states investment policies may be better coordinated, which could ensure a more harmonised system. On the other hand, SADC member-states are at different levels of development, and as a result, have different needs and priorities and realise unequal benefits from their membership in the regional bloc. At times it may seem as

though SADC needs South Africa more than South Africa needs SADC, however, from the point of view of potential investors, South Africa needs to be seen to be operating in a stable, secure and economically-viable environment.

Chapter 2- South Africa's Bilateral Investment Treaty History

2.1 Introduction - International Investment Law Background

International law advanced from functioning as a tool for mutual deterrence to an instrument promoting co-operation and coordination[23]. Over time this co-operation would take specific forms such as the United Nations (UN), and the European Coal and Steel Community (now the European Union). In the aftermath of World War II, a new dimension of financial mobility led to the growth in foreign investment[24] and customary international law rules to regulate it.

In the absence of international agreements governing foreign investment, the international investment legal framework evolved and acquired its own distinct features in response to global changes; including developing countries attaining independence in the 1960s, socialist and capitalist movements and the emergence of China as a 'super-power' at the turn of the 21st century.

2.2 The use of Bilateral Investment Treaties

Investors found that traditional customary law rules did not provide the kind of rules and standards of protection which they required[25]. For instance, foreigners and their properties were usually considered subject to different treatment standards compared to the nationals of host states[26]. Furthermore, investors were faced with potentially hostile exhaustion of local remedies' requirements before they could convince their home states to pursue the matter through diplomatic channels. In Latin America, most countries espoused the 'Calvo Doctrine', which meant that foreign investments were

[23] N Laos, Foundations *of Cultural Diplomacy*: Politics among cultures and the moral autonomy of man, (2011), p. 17.
[24] R Baldwin and PH Martin , *Two Waves of Globalisation: Superficial Similarities, Fundamental Differences, H Siebert (ed), Globalisation and Labour*, (1999), 3.
[25] J. Kenneth Vandevelde, *A Brief History of International Investment Agreements*, (2005), p.157.
[26] Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment,* (2009), p. 4.

subject to national control and disputes arising from them had to be settled by domestic courts in accordance with domestic law[27].

In most cases, domestic laws generally offered adequate protection and incentives to foreign investors. However, they were soon held to be unattractive because they were liable to change with a corresponding change in government.

The regulation of foreign investment through bilateral investment treaties officially began in 1959, when Germany entered such a treaty with Pakistan[28]. In the past, colonialism had been used to protect foreign investments but in light of the decolonisation processes that were taking place in most developing countries, investors became wary of privatisation and discriminatory practices of developing states.

Bilateral Investment Treaties cannot be changed unilaterally and were said to be preferable due to their long-term duration (usually 10-20 years) and continuing coverage through 'sunset clauses,' which usually last for twenty (20) years after termination[29].

Although the actual benefits and protections offered by bilateral investment treaties vary according to their terms, the basic core provisions are as follows: -

i) Protection from expropriation or nationalisation,
ii) Most-favored national treatment (treatment of foreign nationals which is no less favorable than that accorded to other foreign investors in like circumstances),
iii) National treatment (treatment no less favorable in similar circumstances, compared to treatment compared to nationals of the home state),
iv) Repatriation and investment of earnings,
v) Observation of contractual obligations, and
vi) Dispute resolution.

[27] The Calvo Clause binds foreign investors to waive appeal to diplomatic protection and permits them to seek redress only in the local courts and under the law of the host state. The principles emanating from the Calvo Clause were embodied in the constitutions and statues of Latin American countries and in treaties concluded among them. Calvo, Manuel de Droit International Public et Prive para 104, 134-37 (1884).
[28] Germany-Pakistan Treaty 1959.
[29] SP Subedi*, International Investment Law: Reconciling Policy and Principle*, (2008), p.82.

When the potential for foreign direct investment (FDI) to contribute towards economic growth and development was realised during the latter half of the 20th century, developing countries began to campaign to attract FDI from developed countries. Investors from developed countries used international investment agreements and bilateral investment agreements to avoid or reduce vulnerability of foreign investments to changes in government, and to ensure that their investments would be adequately protected in the long run.

Towards the middle of the 20th century, international investment agreements were thought to fill the legal gap left by the breakdown of colonial systems and provided additional protections in view of the expropriation policies adopted by many of the newly independent states. Furthermore, it was argued that these types of agreements would facilitate FDI and investment promotion by complementing domestic investment protection, accountability and fostering the rule of law[30].

Most international investment agreements contain investor-state-dispute-settlement (ISDS) clauses which guarantee neutrality in the settlement of disputes by affording investors an option for recourse to international arbitration against the host-states.

Alongside the proliferation of BITs came an increase in the number of ISDS cases initiated by investors against host states. The provisions in many of the treaties were couched in vague and open-ended terms, which resulted in inconsistent judgments by tribunals, questionable levels of transparency and the exposure of host states to exorbitant claims brought forward by foreign investors.

Consequently, many political actors took the view that the international investment agreements restricted the states' sovereign right to regulate and took steps to respond to these challenges.

Owing to their unique histories and experiences, states responded in different ways. Some countries, such as India, instituted reviews of their IIAs and developed a model BIT. While Ecuador denounced the International Convention on the Settlement of

[30] K Bosman , *South Africa: Trading international investment for policy space*, Stellenbosch Economic Working Papers: 04/16, 6.

Investment Disputes between States and Nationals of other States (ICSID Convention)[31].

In 2008, South Africa, which is the case study of this thesis, launched a review process with the aim of developing a policy framework which would inform the bilateral investment treaty negotiation process and would be more in line with its development needs[32]. In the following paragraphs, South Africa's previous history with bilateral investment treaties is briefly outlined and the governments' current foreign direct investment law policy is discussed.

2.3. Apartheid South Africa

The legal system under the apartheid regime generally favoured foreign investment. The domestic laws of South Africa were essentially no different from the property regimes of the western powers from where most of the foreign direct investment originated.

For example; The Expropriation Act No. 63 of 1975 codified the general principles of international investment law that prohibits expropriation except for when it is in the public interest. The Hull formula[33], which is the standard of compensation based on the market-value of the expropriated property was applied in this Act. This formula originates from the United States of America.

The Arbitration Act No 42 of 1965 codified the New York Convention on the Enforcement of Foreign Arbitral Awards[34]. Therefore, this created a regime that allowed for the direct enforcement of arbitration awards.

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[31] Ecuador exits ICSID, https://www.iisd.org/itn/2009/06/05/ecuador-continues-exit-from-icsid/ accessed 10/5/2017.

[32] Department of Trade and Industry Bilateral Investment Treaty Policy Framework Review (2009) 12.

[33] P Dumberry, *Are BITs Representing the New Customary International Law on International Investment Law,* 28 Penn State International Law Review, 675, 2009–2010, p. 677-679. The Hull formula provides that when there is expropriation, compensation must be 'prompt, adequate and effective'. It was named after American Secretary of State Cordell Hull, who formulated the standard in his diplomatic deliberations with his Mexican counterpart. The current South African constitution encapsulates a hybrid of the Hull and Calvo doctrine. The Calvo doctrine is the standard devised by the Argentinean jurist, Calvin Calvo, to counter what was perceived as an intrusive US approach in dealing with its citizens invested in Latin America.

[34] UN (United Nations), The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. See UN (United Nations), The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, UN Conference on International Commercial Arbitration.
New York: UN, 6 July 1958, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/ XXII_1_e.pdf, accessed 20 November 2014.

However, Apartheid South Africa was an isolated state. With the exceptions of the automotive and textile sectors, the country did not attract much foreign investment.

Most investment came from the governments' efforts to develop local industry through an import substitution policy[35]. At the time, the government's policies did not favour an inclusive approach to human capital development, and the black areas were generally excluded from mainstream public investment.

Moreover, the global communities' imposition of sanctions against the country inhibited the internationalisation of South African businesses and industries as firms were reluctant to be seen to be cooperating with a regime placed under sanction[36].

2.4. Pre-Constitutional Era (1993-1994)

During the last years of the apartheid regime, South Africa went through a long and strenuous negotiation process involving the ANC (African National Congress) and the NP (National Party). The first of these negotiations were CODESA (Convention for a Democratic South Africa) deliberations which began after Nelson Mandela was released from prison in 1990. CODESA aimed at a more inclusive democratic dispensation. During this period, Black Economic Empowerment (BEE) laws were also negotiated and were eventually codified in the final Constitution[37].

During the three and a half years of constitutional negotiations, the major actors understandably concentrated their efforts on devising a new political structure to give expression to black political aspirations and at the same time to incorporate a variety of power sharing devices into the Interim Constitution[38].

While this was taking place, the outgoing government was finalising the United Kingdom-South Africa Bilateral Investment Treaty which had been presented to it a year earlier. At the time, the United Kingdom's government was said to be wary of the new government of South Africa, fearing they would not protect existing investments

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[35] F. Maleka , *South Africa's industrialisation strategy and import substitution*, (2017), p. 15 WITS research report.

[36] A. Langalanga, *Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context,* https://www.saiia.org.za/occasional-papers/848-imagining-south-africa-s-foreign-investment-regulatory-regime-in-a-global-context/file accessed 7/6/2018, p 5.

[37] *Supra* note 8, s 9(2).

[38] PB. Rich, *Reaction and Renewal in South Africa*, (1996).

and would nationalise or expropriate the property of its investors[39]. The proposed text was based on a 'standard' OECD (Organisation for Economic Co-operation and Development) model[40], which stipulated fair and equitable treatment, no discrimination, no compensation, no capital restrictions, and disputes to be subjected to international investor-state-arbitration[41]. From 1993 onwards, South Africa concluded several BITs[42].

Considering the possibility of the supposedly socialist liberation movement party (the ANC) coming into power, it was to be expected that proprietary rights issues would be particularly contentious.

The CODESA negotiations concluded in a negotiated settlement in 1993 which was the Interim Constitution of 1993. Three provisions are particularly relevant and formed the crux of what is understood as 'public interest' in foreign investment regulatory talks in the South African context.

i) The preamble: which implied that the incoming administration had a duty to redistribute the country's wealth with a view to heal the divisions of the past[43];

ii) The equality clause: which dealt with matters of creating an egalitarian society[44]. It went further than most legal instruments and included not only formal equality pronouncements but was also substantive. It included an important proviso - that discrimination could be fair if it was meant to correct the historical injustices; furthermore, it obliged the state to take positive steps to address historical imbalances;

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[39] R. Williams, *The Third Annual Forum of Developing Country Investment Negotiators Nothing Sacred: Developing Countries and the Future of International Investment Treaties* [online] International Institute for Sustainable Development, (2009*).* Available at:http://www.iisd.org/pdf/2011/developing_countries_and_the_future_of_IIAs.pdf, p5.

[40] UNCTAD; International Investment Instruments: A Compendium, Vol. III (Geneva: UNCTAD, 1996).

[41] L. Poulsen, *Sacrificing sovereignty by chance: investment treaties, developing countries, and bounded rationality*. PhD Thesis, (2011), The London School of Economics and Political Science (LSE).

[42] They were with the UK (1994), Canada (1995), Cuba (1995), Germany (1995), France (1995), the Netherlands (1995) and Switzerland (1995). See also UN, United Nations Conference on Trade and Development Full list of Bilateral Investment Agreements concluded, 1 June 2013, http://unctad.org/Sections/dite_pcbb/docs/bits_south_africa.pdf, accessed 17 January 2015.

[43] S*upra* note 8, preamble.

[44] *Supra note 8,* s9.

iii) The property clause: which was a result of a compromise between the ANC and the NP[45]. It enshrines the right to property; provides for the redistribution of property in the public interest and sets a non-exhaustive constitutional definition of what constitutes public interest, including; 'the nation's commitment to bringing about equitable access to South Africa's natural resources[46].' Furthermore, the provision set a compensation standard based on the Calvo Doctrine. It is noted that the property clause in the Interim Constitution stated but did not elaborate on the distinction between deprivation and expropriation - this was left to the courts to decide.

The CODESA negotiations paved the way for the first democratic elections in 1994 and the adoption of the South African Constitution Act No. 108 of 1996.

2.5. Post -1994 South Africa

South Africa's constitution was informed by the Canadian, German, US and Indian constitutions, and is regarded as one of the most progressive constitutions in the world[47]. It mandates the government to take active measures to redress apartheid-induced inequalities[48] and asserts the status of international and foreign law[49].

During the new democratic era, South Africa's Foreign Direct Investment regulatory regime underwent significant transformation. Post 1994 - South Africa began to open up economically as sanctions were lifted and the country was re-admitted into respectable international society.

During the new democratic era, South Africa experienced an increase in foreign direct investment, from US$380 million inward FDI flows in 1994, to realising its highest flows between 2005 and 2013, which averaged around US$5154million[50]. More recently,

[45] Schneiderman D, *Promoting equality, black economic empowerment and the future of investment rules, South African Journal of Human Rights*, 25, 2, 2009, p 246-279.
[46] *Supra note 8*, s 25.
[47] D. Law & M Versteeg, *The declining influence of the US Constitution*, NYU Law Review, (2012), p. 89.
[48] *Bengwenyama Minerals (Pty) Ltd and Others* (CCT39/10) [2010] ZACC 26.
[49] Supra note 8, s 232 and s 233.
[50] http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx accessed 30/5/2018.

there has been a decrease in FDI; for example, in 2015 inward FDI came to a total of US$ 1729million, and US$ 2270 million in 2016.

From 1996 to 2000, the country's macro-economic policy was based on the Growth, Employment, and Redistribution (GEAR) Strategy, which was adopted during the 'heyday' of the Washington Consensus, which is conceived within, and oriented towards the competitive global economy[51].

This strategy rests on two pillars for economic growth - i) rapid expansion of non-traditional exports, ii) an increase in private-sector investment. According to Langalanga[52], this strategy led to South Africa concluding BITs that proved to be opposed to its constitutional obligations.

The UK-BIT was adopted by South Africa as a draft model[53] and used as the basis for concluding further BITs with capital-exporting European countries. The majority of these first-generation of BITs reflected texts developed to promote anti-communist, post-decolonization protection agendas of the 1960s[54]. The underlying objective of these BITs - for most of the non-African partners was to ensure that investments made in strategic sectors in their former colonies were protected and regulated to ensure continuity in already established commercial links for sourcing primary goods as inputs for their industries after independence[55].

During the period from the late 1950s to the late 1990s, many developing countries, signed these treaties in the hope of attracting more FDI. The overarching notion at the time was that BITs attract FDI. However, existing literature and empirical evidence has proven to be inconclusive on this theory[56]. Nevertheless, South Africa was caught up in the BIT trend and in the process concluded BITs which displayed a disconnect

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[51] http://www.igd.org.za/jdownloads/Global%20Insight/gi_16.pdf, Vickers B. An Overview of South Africa's Investment Regime and Performance, Issue No. 16, 2002. Accessed 02/08/2017.

[52] https://www.saiia.org.za/occasional-papers/848-imagining-south-africa-s-foreign-investment-regulatory-regime-in-a-global-context/file p 17, accessed 20/06/2017.

[53] R. Williams*, The Third Annual Forum of Developing Country Investment Negotiators Nothing Sacred: Developing Countries and the Future of International Investment Treaties* [online] International Institute for Sustainable Development. Available at:http://www.iisd.org/pdf/2011/developing_countries_and_the_future_of_IIAs.pdf.

[54] A. Green, *Bilateral investment treaties coming back to bite*, This is Africa Online, 2 March 2012, http://www.thisisafricaonline.com. 23/11/2017.

[55] Investment policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration, United Nations Economic Commission for Africa (UNECA), (2016), p. 21.

[56] M Hallward-Driemeier, Do Bilateral Investment Treaties attract foreign direct investment? Only a bit-and they could bite, (2003), Policy Research Working Paper.

between the country's domestic priorities and its commitments on an international level.

2.6. South African BITs and Policy Space at Odds

South Africa's early BITs did not address its unique sociological, economic and political context. This obligation was put upon the state in the national Constitution but was not transposed into its international investment agreements.

There has been much discussion among academics and professionals concerning the reasons why South Africa concluded BITs which conflicted with its Constitution.

At the time, such agreements were widely considered harmless, and many developing countries were concluding them[57].

Poulsen[58] used a 'cognitive heuristic' theory to try to explain why South Africa entered into BITs that did not align with its constitutional obligations:

i) Those were the BITs that were being promoted at the time, and

ii) South Africa did not have a coherent policy on those instruments at the time. Poulsen's further research indicates that there was a lack of expertise and coordination which led South Africa's officials to ignore the risks of the BITs and overestimate their benefits[59].

Brendan Vickers, a senior official in South Africa's Department of Trade and Industry (DTI) explained that South Africa's other possible goal in concluding the series of BITs was to indicate to the rest of the world that the country was prepared to participate in the international community and that investments would be protected[60]. Through the signing of BITs, South Africa assured the international community that their property

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[57] M Mossallam, *Process Matters: South Africa's experience exiting its BITs*, GEG Working Paper 2015/97, (2015), https://www.geg.ox.ac.uk/sites/geg/files/GEG%20WP_97%20Process%20matters%20-%20South%20Africas%20experience%20exiting%20its%20BITs%20Mohammad%20Mossallam.pdf accessed 10/01/2018.

[58] L. Poulsen, *Bounded rationally and the diffusion of modern investment treaties*, International Studies Quarterly, pp. 1-14, p7-9, (2013).

[59] L. Poulsen, *Sacrificing sovereignty by chance: investment treaties, developing countries, and bounded Rationality*, (2011) PhD Thesis. The London School of Economics and Political Science (LSE).

[60] B. Vickers , *An Overview of South Africa's Investment Regime and Performance', presentation at the Institute for Global Dialogue Conference*, 16 April 2002, Pretoria, p. 3.

rights would be protected and that the rule of law would be upheld. In this context, BITs were therefore seen as guarantors of the domestic legislative framework.

During the late 1990s the government became aware of the challenges posed by the international investment agreements into which they had concluded. This awareness came from observing the contentious debate in the OECD over a multilateral investment agreement[61], and the World Trade Organisation (WTO) discussions which sought to include investment as one of the Singapore issues in the Doha Round negotiations[62].

The sharp increase in international investment arbitration cases that were instituted following the financial crises of 2001 further sensitised government officials to the risks posed by BITs[63].

2.7. Piero Foresti and the Policy Review Process

The *Piero Foresti*[64] case spurred on the government of South Africa to take steps in international arbitration. In this matter, the foreign investors filed an expropriation claim against the government of South Africa for their mineral rights, which had been terminated by the entry into force of the Mineral and Petroleum Resources Development Act[65] and the Black Economic Empowerment (BEE) policy's compulsory equity divestiture requirements.

The case revealed the extent to which South Africa's domestic policies were exposed to challenges by an international tribunal, which left the South African government unsettled and prompted the review process to curb similar challenges in the future.

Although the matter was settled on merits, a review process was initiated in 2008 in order to curtail future challenges. The Department of Trade and Industry suspended further negotiation and conclusion of BITs pending the thorough review of the policy

[61] X. Carim, Speech at the WTO Public forum 2012 "Investment Provisions and Agreements: What is the Right 21st Century Approach?" Session.
[62] *Ibid.*
[63] *Ibid.*
[64] *Supra note 9.*
[65] Act 49 of 2008.

framework and used guidelines such as the SADC Model BIT for evaluating BITs which had already been concluded and for engaging with new BITs in the future[66].

According to the Department of Trade and Industry (DTI), the review was initiated when it became apparent that South Africa was facing serious challenges from developed countries seeking to rely on BIT provisions in order to claim compensation for alleged failure by the state to comply with its obligations under the various BITs[67] .

At the outset, during the review process, the content of the various BITs was compared with South African domestic law. It was held that the standards contained in the BITs, pertaining to expropriation differed from the standards held under South African law[68]. Furthermore, it was determined that the failure to distinguish between 'regulation' and 'expropriation' would mean that legitimate government directives could be deemed to constitute a form of 'indirect' expropriation or amount to regulatory expropriation.

Secondly, the policy review held that the current BITs extended far into the country's policy space by imposing damaging and binding investment rules with far-reaching consequences for development[69]. Without adequate regulatory space, the governments of developing countries were unable to make it mandatory for foreign companies to transfer technology, train local workers or source inputs locally. As a result, investment failed to encourage and enhance development[70].

The ambit of regulatory space is determined by each country with reference to its own unique circumstances. Every state is confronted with the challenge of addressing its changing domestic, political and economic position, while honouring the agreements it has entered into with outside investors. In the South African context, the constitutional principles set out the core values of the state and society. These are set out in section 1 of the constitution, and refer to human dignity, achievement of equality and advancement of human rights and freedoms.

These values impose a duty on the state to take positive measures to redress the imbalances of the past.

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[66] Department of Trade and Industry Bilateral Investment Policy Framework Review, (2009), 12.
[67] https://www.thedti.gov.za/parliament/2015/SA_Trade_Investment_Policy.pdf accessed 25/4/2018.
[68] *Ibid.*
[69] *Op cit.*
[70] *Op cit.*

2.8. Policy Review Recommendations

Recommendations by the DTI included that South Africa should review its practices with a view to developing a Model BIT which would be in line with its development needs and domestic legislative intervention to ensure that a proper balance be struck between the need for investor certainty and South Africa's own legitimate interests[71].

In July 2010, upon consideration of the findings of the review process, the South African Cabinet decided that it would refrain from entering into BITs unless there were compelling political or economic reasons to do so. Moreover, Cabinet would terminate existing BITs and offer partners the possibility of re-negotiation of BITs on the basis of a new model. In conclusion, the decision to develop new foreign investment legislation was taken. The statute would align with the constitution and clarify typical BIT provisions. Cabinet also elected to establish an Investment Inter-Ministerial Committee to oversee this process[72].

Subsequently, the government terminated its BITs with a number of European countries, including Germany, the United Kingdom, the Netherlands and France and began the overhaul of the country's investment-protection legislative framework. Interestingly, the government chose to retain its BITs with other emerging economies, such as China and Russia. Such steps are indicative of a foreign policy shift, from the more 'global actor' approach of President Nelson Mandela between 1994-1999, to a more South-South[73] alliance under President Zuma.

As part of the process, several new Acts were enacted, including the International Arbitration Bill of 2015 which would apply to international arbitrations; the Property Valuation Act which came into effect in August 2015 - 'to give effect to the provisions of the Constitution which provide for land reform and to facilitate land reform through the regulation of the valuation of property[74],' the Expropriation Bill of 2015 - which

[71] *Supra 38*, 56.
[72] X Carim, *Perspectives on topical foreign direct investment issues; Lessons from South Africa's BITs review*, Vale Columbia Centre on Sustainable International Investment, (2013), p. 109 .
[73] http://www.saiia.org.za/opinion-analysis/south-africa-s-foreign-policy-under-zuma-towards-greater-strategic-partnerships Mpungose Luanda, 2/6/2918.
[74] The Property Valuation Act 17 of 2014, preamble.

would repeal the Expropriation Act of 1975 which was drafted before the present constitution. The new Act aims to update the legislative framework for expropriation and to 'provide for the expropriation of property for a public purpose or in the public interest, subject to equitable compensation, and to provide for matters connected therewith[75].'

To further the reviews recommendations, the government introduced the Draft Promotion and Protection of Investment Bill[76] to provide a framework for the protection of both domestic and foreign investments in SA which is in line with the constitution.

2.9. Protection of Investment Act 2015

The initial draft of the Investment Bill was published in 2013 with the opportunity for public comment. A further revised version was published in July 2015 and in November 2015, a further revised version was passed by both Houses of Parliament. On 13 December 2015, the President assented to the Investment Bill. On 15 December 2015, the Bill was published in the Government Gazette as the Protection of Investment Act 22 of 2015 (hereafter referred to as the PIA). The PIA will come into operation on a date determined by the President by proclamation in the Government Gazette.

According to Xavier Carim[77], former Deputy Director General at the Department of Trade, 'the Act is informed by the DTI's vision of a legal and policy framework for investment that learns from the lessons of the past and is better attuned to the challenges of sustainable development and inclusive growth.'

The Protection of Investment Act has been heavily criticised by foreign investors. Their concerns include; the lack of communication from the government of South Africa during the review process, the level of protection for investors, the impact on FDI and economic growth, the impact on the SADC region and the well-being of the people of South Africa[78].

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[75] Expropriation Bill, B B4B-2015.

[76] Initially introduced as the Promotion and Protection of Investment Bill, later renamed to the Protection of Investment Bill, and now the Protection of Investment Act.

[77] *Supra 72*, p. 2.

[78] A Jeffery, *The Investment Bill and FDI, (2014), 14 Without Prejudice,* p.18.

2.10. Comparative Jurisdictions

In response to the challenges identified in the international investment law regime, individual countries have responded in different ways - with reference to their history, experiences and current circumstances. South Africa's decision to terminate a number of its BITs is not a strange phenomenon. Many developing countries are of the growing view that the traditional model for bilateral investment treaties needs review. For example, Indonesia has made it clear that it intends terminating 67 of its BITs when they expire[79], in order to update, modernise and renegotiate terms. The domestic investment regulatory statute, the Indonesia Law on Capital Investment[80], encompasses international investment law principles and contains a 'fork in the road' provision which gives the investor the choice of either using (ISDS) or the domestic legal system[81].

India, which shares interesting trade and economic history similarities with South Africa[82], also announced that it was seeking to terminate BITs whose initial duration has either expired or will soon expire with up to 57 countries, including the UK, Germany, France and Sweden[83]. India intends to replace the existing BITs with more modern treaties which strike a balance between investors' rights, regulatory space and investor responsibilities. This has been the outcome of India's Model BIT of 2015.

[79] LE Trakman & S Kunal, *Why is Indonesia terminating its bilateral investment treaties',* East Asia Forum, 20 September 2014, http://www.eastasiaforum.org/2014/09/20/why-is-indonesiaterminating-its-bilateral-investment-treaties/,accessed 3 April 2018.

[80] Indonesia law No. 25 of 2007 on Capital Investment.

[81] Indonesia law No. 25 of 2007 on Capital Investment. Article 32.

[82] Both countries are founding members of the General Agreement on Tariffs and Trade.

[83] https://www.lexology.com/library/detail.aspx?g=a493e664-6cd4-43d8-8f10-476d00207cdc accessed 23/9/2017.

Conclusion

In the absence of a multilateral framework, international investment agreements and bilateral investment agreements were introduced to establish the international legal standards that regulate foreign investments' flows and that host countries must abide by.

Many developing countries, including South Africa, signed the IIAs based on the popular belief that they would attract FDI. However, there has been a lack of persuasive evidence demonstrating a positive correlation between IIAs and FDI. On the contrary, many host states found that the IIAs restricted the government's ability to pursue public policies and the investor-state-dispute-settlement clauses made the countries more vulnerable to international arbitration proceedings.

In response to the sharp increase in ISDS cases, many countries across the world took various steps to combat the legitimacy crisis of the international investment regime. For example, some developing countries signed IIAs at a slower pace, renegotiated their terms or announced the non-renewal or termination of their IIAs.

Initially, South Africa's investment treaties were predominantly with European countries and based on the European model. It soon became evident that this model had numerous shortcomings and restricted the country's efforts to implement development-related policies. The South African government decided to address this problem by shifting the FDI strategy from the 'freedom of investment model' - to an 'investment for sustainable development model'[84]. The former assumes that all investment is good and promotes economic development, whereas the latter requires that regulations are implemented to balance the incentives used to attract FDI with the need to ensure that these investments positively contribute to South Africa's sustainable development objectives[85].

[84]UNCTAD, (2012). Shift African investment towards industry, South African Minister recommends. (online): http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=292&Sitemap_x0020_Taxonomy=UNCTAD20Home accessed 25/4/2018.

[85] *Ibid.*

At the core of this endeavour was the review process which brought about the restructuring of the investment policy framework and the development of the Protection of Investment Bill in 2013. In the following chapter, some of the key criticisms raised during the parliamentary process, the government's response to the criticism and the impact of the Protection of Investment Act within South Africa will be analysed.

Chapter 3- South Africa's Protection of Investment Act

3.1 Introduction

The South African government adopted the new investment policy framework in July 2010 and introduced the Promotion and Protection of Investment Bill in 2013 to provide a framework for the protection of both domestic and foreign investment in South Africa. The Draft was published, with an opportunity for public comment.

The stated purpose of the Act is-

> 'to provide for the protection of investors and their investments, to achieve a balance of rights and obligations that apply to all investors, and to provide for matters connected therein. The Preamble reaffirms that the importance of investment is recognized as it plays an important role in job creation, economic growth, sustainable development and the wellbeing of the people of South Africa.'

The interpretation clause of the Investment Act provides that it has to be interpreted with regard to the Constitution, including customary international law and international law as contemplated in the Constitution[86].

Key features

i) Investment definition: compared to the definition typically found in BITs, the Act has a narrower definition of investment, by requiring a material economic investment or a significant underlying presence[87]. BITs tend to have a broader definition;

ii) States right to regulate: The Act unequivocally reinforces the states right to regulate in the public interest, in order to redress inequalities, foster economic development and achieve the progressive realisation of socio-

[86] Protection of Investment Act 22 of 2015, preamble.

[87] Protection of Investment Bill 2013, Definition of investment clause 1.

economic rights, and therefore adopts an approach to expropriation that is less onerous on the state[88];

iii) Expropriation: The Act guarantees the security of investments and provides that an investment may not be expropriated except for public purpose or in the public interest, under due process of the law and against just and equitable compensation effected in a timely manner[89]. However, the property rights of investors and market value compensation are not fully guaranteed[90] and expropriation may be direct or indirect;

iv) Compensation: The Acts compensation model is more aligned with the National Constitution. In terms of the constitutional approach - one has to balance the public interest and the interests of those affected, considering the current use of the investment, the history of acquisition and use of the investment, the market value of the investment and the purpose of the expropriations[91];

v) Non-Discrimination: The Act recognises international investment obligations such as not treating foreign investors less favourably than domestic investors that operate in "like circumstances"[92] . However, other standards, such as the prohibition against unfair and inequitable treatment of investors, and the most-favoured nation standard are absent. The absence of these provisions implies that the South African government could offer advantages to investors from specific states without an obligation to extend the same benefit to all foreign investors, and accord different preferential treatment as the state deems fit to different foreign investors;

vi) International arbitration: recourse to international arbitration has been explicitly left out of the PIA[93]. The Act provides for mediation, arbitration in terms of domestic law, recourse to a competent court and international

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[88] *Supra note* 68 clause 10.
[89] *Supra note 68*, clause 8.
[90] *Supra note 68,* Clause 8. i.e. The Act carves out broad regulatory powers that will not constitute compensable indirect expropriation. It excludes measures taken by the government that have an incidental or indirect adverse impact on the economic value of an investment. These measures include those aimed at protecting or enhancing legitimate public welfare objectives, environmental protection or state security, or where there is deprivation of property without any concomitant acquisition of ownership by the state.
[91] *Supra note 14*, s 8(3).
[92] *Ibid s6 (4).*
[93] *Op Cit, s 13.*

arbitration subject to the exhaustion of remedies and on a state-to-state basis.

3.2 Criticism of the Act

When the Bill was introduced in Parliament, opposition parties stated that the Protection of Investment Act would 'choke-off' foreign investment at a time when the economy is already struggling[94]. Many also probed into whether South Africa's policy shift was substantively reasonable and proportional to the legitimacy crisis facing the international investment regime[95] .

Submissions made included the following: -

i) Investment definition: Compared to the definition typically found in BITs, the Act has a narrower definition of investment, by requiring a material economic investment or a significant underlying presence[96].

The definition of investment which was adopted in the initial version of the Bill was one of the models proposed in the SADC Model BIT which requires the establishment or acquisition of an enterprise. South Africa avoided stipulating an exhaustive list of assets under 'investment'. In the final draft of the Protection of Investment Act a non-exhaustive list of assets which may be possessed by an enterprise was inserted[97].

Traditionally, investments have been categorised as either direct or portfolio investments, hence a narrow approach was followed by earlier agreements[98].Today, a greater variety of assets are included in the definition of investment, and broad definitions appear in national investment codes and international instruments[99]. Most multilateral and bilateral treaties and trade agreements with investment chapters include a broad definition

[94] http://ewn.co.za/2016/01/20/Zuma-quietly-signs-investment-bill-signed-into-law 21/7/2017
[95] On the issue of achieving an equitable balance between according full investor protection and the right of the state to legislate in the public interest in order to meet its development goals and obligations.
[96] Summary of PPIB submissions 08092015, p 16.
[97] *Supra note 14*, s 2 (2) (a)-(h).
[98] International Investment law, Accessed at https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf on 09/06/2018.
[99] International Investment Law: Understanding Concepts and Tracking Innovations. Chp. 1,p. 47.

of investment. This has been the approach due to the recognition that forms of investment are constantly evolving;

ii) Application of the Act: parties sought clarity on the application of the Act to investments in the Republic of South Africa. The DTI confirmed that the Act would apply to investments made in the Republic which will be subject to other national legislation as well[100] . Furthermore, current investments would be protected by the inclusion of the transitional arrangements provision (section 15)[101]. Following the expiration of the BITs protection period, all investors would be on an equal footing in terms of investment protection.

Globally, there are instances of more far-reaching measures being taken; for example, the European Commission (EC) has taken steps to dismantle intra-EU BITs with immediate effect and without the 'sunset clauses'[102]. The EC alleged that they were incompatible with EU law. Furthermore, international arbitration recourse, which was provided for in all the intra-EU BITs will no longer be made available[103].

In the South African context, investors will still have protection in terms of the BITs provisions for at least 10 to 20years. Alternatively, the terms of the BITs may be renegotiated, or parties could opt-out of the 'sunset-clauses' by mutual agreement. As stated previously, when the 'sunset-clause' period has lapsed, investors will be on equal footing, which should go towards clarifying their position, which could enhance certainty and inspire confidence;

[100] *Supra note 14*, S2.
[101] *Supra note 14, s* 15.
[102] http://europa.eu/rapid/press-release_IP-15-5198_en.htm accessed 23/04/2018.
[103] http://arbitrationblog.kluwerarbitration.com/2018/01/21/future-intra-eu-bits/ accessed 20/04/2018. Micula v. Romania -the ICSID award was only partially enforced because the EC issued in 2014 a suspension injunction calling Romania to suspend the remaining payment due under the award.

iii) Regulatory Impact: The Western Cape Government interrogated whether a rigorous Regulatory Impact Assessment (RIA) had been undertaken and the impact on the economy considered.

In its response, the DTI submitted that a Regulatory Impact Assessment had been conducted on the Bill. The outcomes confirmed that the Bill would not create additional obstacles to foreign investors, would achieve a balance between the governments' right to regulate in the public interest and rights and obligations of investors[104].

iv) States' right to regulate: The right of states to regulate for public interest has been the focus of increased interest in recent years[105]. It has also found formal recognition in recent multiple international investment agreements[106], for example: - in the Australia-China Free Trade Agreement (FTA 2015), the reference to the states' right to regulate is explicit and direct – 'rights of the governments to regulate in order to meet national policy objectives and to preserve their flexibility to safeguard public welfare'[107]. Alternatively, it may be more implicit, for example, NAFTA's preamble refers to the right to preserve flexibility and to safeguard public welfare[108].

In the South African context, the Protection of Investment Bill confirmed the government's right to regulate in the public interest. This approach is in line with international investment law pronouncements, for example in *Saluka Investments BV v Czech Republic*[109], the Tribunal held that 'it is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their

[104] Summary of submissions for the Promotion and Protection of Investment Bill (PPIB), p4.
[105] C. Giannakopoulos , *The Right to Regulate in International Investment Law of State Responsibility: A Hohfeldian Approach, (2017*), p.1.
[106] It is not uncommon for the content and references to the right to regulate to vary in different IIA's
[107] http://dfat.gov.au/about-us/publications/Documents/guide-to-using-chafta-to-export-and-import-goods.pdf accessed 18/4/2018.
[108] https://www.italaw.com/sites/default/files/laws/italaw6187%2814%29.pdf accessed 18/4/2018.
[109]*Saluka Investments BV v Czech Republic IIC 210 (2006)* .

> regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed as the general welfare'[110].
>
> Similarly, the Tribunal in *Methanex Corporation v USA* held in its final award that, 'it is a principle of customary international law that, where economic injury results from bona fide regulation within the police powers of a State, compensation is not required'[111].
>
> These acknowledgments have largely been considered a positive development in terms of making IIAs more balanced with reference to investors and states' rights.
>
> The Protection of Investment Act unequivocally reinforces the States right to regulate in the public interest, in order to redress inequalities, foster economic development and achieve the progressive realisation of socio-economic rights, and therefore adopts an approach to expropriation that is less onerous on the state[112].

Expropriation and Security of Investment: Traditionally, the term 'expropriation' referred to outright takings of property - direct expropriation. However, in more recent times, it is more commonly the result of government measures that have the equal result of a formal taking of property (indirect expropriation).

> As the distinguished legal scholar and practitioner, Sir Ian Brownlie held;
>
> 'State measures, *prima facie* a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of

[110] *Saluka Investments BV (the Netherlands) v the Czech Republic* (A Partial Award) of March 2006; Permanent Court of Arbitration, https://www.pcacases.com/web/sendAttach/880 accessed 15/5/2018 para 276.
[111] *Methanex Corporation v United States of America* (Final award of the Tribunal on Jurisdiction and Merits of 3 August 2005), ICSID Case, part IV, para 410.
[112] *Supra note* 14, preamble.

devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation'[113].

Moreover, the right of a sovereign state to 'expropriate' property within its jurisdiction for the 'public good' or for the 'general welfare' is a well-established entitlement[114].

In the South African context, as part of the process of bringing international investment treaties in line with the national constitution, the new Act guarantees the investors right to property in terms of the section 25 of the Constitution[115]. Therefore, an investment may not be expropriated except for public purpose or in the public interest, under due process of the law, and against just and equitable compensation effected in a timely manner.

In the Agri South Africa v Minister for Minerals and Energy[116], the Constitutional Court considered the application of section 25 of the Constitution to the Mineral and Petroleum Resources Development Act[117]. In this matter, Agri SA - acting on behalf of the company, claimed that the companies old order rights had been expropriated when the company was liquidated before it could apply for its rights to be converted.

The court made a pronouncement on the principle of indirect expropriation by drawing a distinction between deprivation and expropriation. The court held that that a deprivation (and not an expropriation) of the company's old-order rights had taken place, and that this deprivation was not arbitrary and was carried out in terms of a law of general application[118].

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[113] Brownlie I., *Public International Law,* Oxford University Press, 6th Edition, (2003), p.509.
[114] *Norwegian Shipowners' Claims (Norway v USA*), Award of the Tribunal, 12 October 1922, 1 RIAA (1922) p. 307, p. 332 [emphasis added].
[115] *Supra note 14*, s 10.
[116] *Agri SA v Minister for Minerals and Energy 2013 (4) SA 1 (CC*).
[117] Mineral and Petroleum Resources Development Act 49 of 2008. The MPRDA was enacted to facilitate equitable access to South Africa's mineral and petroleum resources, and to ensure the sustainable development thereof. The Act provided a limited time to holders of old order prospecting rights and mining rights to have these converted into new order rights under the Act.
[118] *Supra 116,* paras 24 and 53.

Moreover, the court held that;

> ‘There can be no expropriation in circumstances where deprivation does not result in property being acquired by the state’ [119]. With reference to compensation, the court provided that ‘deprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation[120]’.

The Agri SA case illustrated the way the highest court in the country interprets and balances the states transformative polices with the rights and protection of investors. The court avoided a liberal interpretation of expropriation which would restrict government policy decisions which could be tantamount to expropriation. This approach demonstrates the attitude towards the separation of powers and appropriate judicial deference.

Critics of the Protection of Investment Bill argued that section 25 of the constitution was already problematic due to its vagueness and created a situation where investors could receive less than market value as compensation if any at all.

International investment agreements on the other hand, provided for minimum standards for lawful taking of foreign property, including that expropriation must be for a public purpose; applied in a non-discriminatory manner; carried out with due process of law and accompanied by payment of prompt, adequate and effective compensation[121]. These minimum standards developed from customary international law[122].

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[119] *Supra note* 116, p28.
[120] *Ibid*, para 48.
[121] The Hull formula of ‘prompt, adequate and effective compensation’. Supra note 5, p 356.
[122] OECD (2004), “"Indirect Expropriation" and the "Right to Regulate" in International Investment Law”, OECD Working Papers on International Investment, 2004/04, OECD Publishing. http://dx.doi.org/10.1787/780155872321

Nonetheless, the expropriation provisions in most IIAs were often viewed as guarantees put in place for the benefit of the investor[123].

Internationally, the principles concerning regulatory acquisitions, indirect expropriation, *de facto* and consequential measures tantamount to expropriation are satiated with inconsistent decisions by tribunals[124]. As a result, there are some decisions that are in line with the Constitutional Courts majority decision and others that are not.

From the point of view of investors, BITs provided a 'safety net' in that compensation had to be in terms of the Hull formula, the Protection of Investment Act omits this. However, as submitted by another South African scholar, Tania Steenkamp[125], it may be possible for a South African court to find that the compensation provisions of section 25 of the constitution are inconsistent with South Africa's international obligations as contained in the country's BITs. Where the BITs provide for 'prompt, adequate and effective' compensation, section 233 of the constitution would direct courts to prefer an interpretation that is consistent with international law to an interpretation that is inconsistent with international law[126] .

Overall, the issue of expropriation illustrates the difficulty in balancing between meeting national objectives - sovereignty over natural resources and ability to regulate in the public interest versus the need to attract foreign direct investment.

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[123] C. Giannakopoulos, *The Right to Regulate in International Investment Law and the Law of State Responsibility: A Hohfeldian Approach* (May 3, 2017). Available at SSRN: https://ssrn.com/abstract=2962686 or http://dx.doi.org/10.2139/ssrn.2962686 p12.

[124] *Metalclad v United Mexican States, ICSID case No. ARB(AF)/97/1, S.D. Meyers Inc v Government of Canada, 2001 FCT 317, Pope & Talbot Inc. v. Government of Canada, 41 ILM 1347(2002).*

[125] *Supra note 12,* p. 93.

[126] *Supra note 8,* s 233.

Coupled with the Expropriation Bill of 2015, which may also weaken investors' property rights, we have yet to see how these changes will impact on investment flows into the country.

v) Non-discrimination: The EU Chamber of Commerce submitted that although the Bill recognizes international investment obligations such as not treating foreign investors less favourably than domestic investors that operate in 'like circumstances'[127] , it has excluded other well-recognised standards such as the prohibition against unfair and inequitable treatment of investors, and the most-favoured nation standard [128] .

This party was concerned that in the absence of these provisions, the implication could be that the South African government could offer advantages to investors from specific states without an obligation to extend the same benefit to all foreign investors and accord different preferential treatment as the state deems fit.

The principle of non-discrimination is a core feature of IIAs, which typically provide for most-favoured nation treatment (MFN) and national treatment (NT). The former ensures that foreign investors covered by the bilateral investment treaties are not discriminated against relative to other investors, while the latter ensures that they are not discriminated against relative to domestic investors[129].

In international trade law, in essence the national treatment clause means that the host country is mandated to treat foreign products no less favourably than 'like' domestic products[130].The underlying purpose of this

[127] *Protection of Investment Bill section 8.*
[128] *Supra note 96,* p.31.
[129] SADC Model Bilateral Investment Treaty Template with Commentary, SADC, provide link. p.21.
[130] The presence of similar clauses has been seen in various parts of the WTO including the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS);
GATT art. 3 obliges the WTO members to provide national treatment to imports of foreign goods,
GATT art 3(4) has the textual structure which is closest to a typical national treatment clause in an investment treaty setting.

clause is to maintain a competitive environment between the domestic and the foreign investors 'in like circumstances'[131].

In the international investment law context, historically, nations (mostly developing countries) have been liberal with foreign entities, but instances of protectionist attitudes towards domestic producers soon became dominant[132]. National treatment clauses were inserted to guard against the practical risks of entering into unknown markets and exposure to pecuniary losses[133].

Historically, these clauses were drafted in accordance with the dominant party, that is, the developed country wanting to operate in a resource-rich developing country. This aggravated the disproportionate power division[134].

In response to the criticism raised, the DTI affirmed that it is typical for states to circumscribe the specific content of the national treatment standard, relative to treatment of nationals[135] . National treatment seeks to establish a degree of competitive equality among national and foreign investors. The 'like circumstances test' determines if foreign investors are not in like circumstances in respect of South African investors - if that is the case, then national treatment will not be granted.

In South Africa's experience, the national treatment provisions in BITs created uncertainty and posed a risk to BEE legislation, public health and environmental and economic development policies.

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[131] The term 'in like situation' has often been used in the national treatment clauses, See also North American Free Trade Agreement. US.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993). art 1102(1) 'Each party shall accord to investors of another Party treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments'

[132] S. Bhardwaj, *National Treatment Clause in an international investment agreement: determining the standard of enforcement*, (2014), http://www.spilmumbai.com/uploads/article/pdf/national-treatment-clause-in-an-international-investment-agreement-determining-t-32.pdf 20/4/2018., p. 146.

[133] N. Dimascio & J. Pauweyn, *Non-discrimination in Trade and Investment Treaties: Worlds Apart or two Sides of the same coin.* 102 A.J Int'L 48, 67 (2008).

[134] *Ibid*, p.147.

[135] *Supra note* 96, p 31.

Section 8(1) of the final draft of the PIA states that foreign investors will not be treated less favourably than South African investors in like circumstances[136]. This section is qualified by subsection (4), which stipulates that when interpreting section 1, one must not interpret in a manner that requires the Republic to extend to foreign investors and their investments the benefits resulting from a non-exhaustive list of treatment, preference or privilege[137].

Subsection (2) (a)-(g), of the same provision, sets out a requirement to assess the overall circumstances of the investment, including; the effect of the foreign investment on the Republic (and the cumulative effects of all investments), the sector that the foreign investments are in, the aim of any measure relating to foreign investments…'. The examination must not be limited or biased towards any one factor[138].

The PIAs national treatment provision is also in line with UNCTADs Investment Policy for Sustainable Development Policy options which stipulate a reservation list[139]. In the three years since it was launched, the UNCTAD Investment Policy Framework has served as a reference for many policymakers in formulating national investment policies and negotiating investment agreements[140].

On a regional level, the Drafting Committee of the SADC Model BIT recommended against the inclusion of an MFN provision. In the past, this clause had been broadly interpreted in arbitrations, which makes it very

[136] *Supra note 14*, s 8(1).
[137] *Supra note 14*, s 4(a)-(f).
[138] *Ibid,* s 8(3).
[139] United Nations Conference on Trade and Development (UNCTAD)- Investment Policy Framework for sustainable development, (2015), National treatment, p.95.
[140] http://investmentpolicyhub.unctad.org/ipfsd accessed 23/4/2018.

unpredictable in practice. It therefore posed an unnecessary and serious risk for states- especially developing countries[141].

In the event that member states choose to include a non-discrimination clause, the SADC Model BIT Drafting Committee recommended that member states qualify this provision by scheduling a list of present and future non-conforming measures, sectors and activities which would be excluded from the scope of the national treatment provision[142]. Moreover, a broad view to assess the proper basis for comparison of investors in 'like circumstances' is encouraged, for example, in the COMESA Investment Agreement (CCIA), the text ensures that the reasons for any given measures can be fully considered with reference to broad considerations[143].

vi) Fair and Equitable Treatment: is a central norm in international investment law. This norm is contained in the vast majority of international investment agreements as one of the main standards for the protection of foreign investors[144]. Historically, international investment agreements contained short and general clauses of fair and equitable treatment, which were formulated either as free-standing provisions with a reference to general international law, or to the international minimum standard of customary international law [145] .

In recent years, drafting approaches to fair and equitable treatment clauses became increasingly diverse and generated complex and elaborate clauses which sought to address the different elements of the norms that have

[141] SADC BITs template with commentary, Southern African Development Community, July 2012, p 22. Available at https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf accessed 09/11/2018.
[142] *Supra note 141,* p 22; … 'each State Party shall accord o investors and their investment treatment no less favourable than the treatment it accords, in like circumstances, to investors of any other State and their investment with respect to the management, operation and disposition of investments in its territory.'
[143] http://www.comesa.int/revised-comesa-common-investment-agreement-tabled-before-legal-affairs-committee/ accessed 25/4/2018.
[144] For example; Economic Agreement of Bogotá 1948 an agreement covering among other things, the provision of adequate safeguards for foreign investors, In 1959, the Draft Convention on Investments Abroad.
[145] http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0158.xml 20/04/2018.

developed over time. Nevertheless, the concepts of fairness and equity in this framework have remained vague and created difficulties when interpreted. Due to these issues and their general character, this clause became a prominent cause of action in investor-state arbitration proceedings with a considerable rate of success[146].

The increasing number of cases based on fair and equitable treatment also led to concerns and criticism that the far-reaching norm would threaten the host states' sovereignty and right to regulate[147].

The South African government, desirous of implementing its transformational based agenda, chose to exclude measures which might be inconsistent with non-discrimination obligations. This was a risk-mitigation effort on the South African governments part.

On a regional level, The Drafting Committee of the SADC Model BIT recommended against the inclusion of an FET provision in treaties due to their problematic nature[148]. Instead, it recommended the inclusion of a provision on fair administrative treatment. This standard avoids the most controversial aspects of FET, while addressing state actions toward investors that could create a liability[149]. This standard and approach was developed and proposed by the South African government in the PIA[150].

In his analysis of the SADC Model BIT, Sean Woolfrey stated that the standard in the PIA is narrower in scope than FET and sets a relatively high threshold for what can be considered arbitrary conduct that amounts to a

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[146] United Nations Conference on Trade and Development (UNCTAD), UNCTAD's Reform Package for the International Investment Regime, p. 31. Available at http://investmentpolicyhub.unctad.org/Upload/Documents/Reform_Package_web.pdf accessed 11/09/2018.

[147] UNCTAD (2007), p28. It is argued that under customary international law a violation of the minimum standard requires actions by a state amounting to gross misconduct, manifest injustice, au outrage, bad faith or wilful neglect of duty. As a result, a breach of this standard is likely to be harder to prove than if FET is associated with higher standards.

[148] *Supra note 141*, p. 22 article 5.

[149] *Ibid.*

[150] *Supra note* 14, s 6.

denial of procedural justice or due process[151]. In addition, the fair administrative treatment provision uses language of co-operative governance standards rather than investor rights in order to limit the interpretational approach of arbitral tribunals.

For member states wishing to include an FET provision in their domestic legislation or in their BITs, the Model BIT recommends that such a provision should use specific and precise language with regard to the standard to be applied so as to avoid expansive interpretations by arbitrators[152].

During the submissions, the PIAs incompatibility with the SADC FIPs fair and equitable treatment provision[153] was raised. The regional aspects and their compatibility are addressed more in the next chapter, however, at this stage, it is apposite to point out that 'fair and equitable' treatment clause in Article 6 of the SADC FIP has since been deleted and the provisions of the Article now align with the fair administrative treatment section of the PIA.

vii) International arbitration: the dispute settlement mechanisms of the international investment law regime have been at the core of the recent discussions and reforms in this area of law. The current challenges facing the international-investor-state dispute settlement system and South Africa's PIAs provisions are discussed in more depth in Chapter 4. At this juncture, some of the key challenges raised concerning these provisions in the PIA will be highlighted.

Parties expressed concern that recourse to international arbitration has been explicitly left out of the PIA[154]. The Act provides for mediation, arbitration in terms of domestic law, approaching any competent court, and

[151] Woolfrey S, *The SADC Model BIT Template; towards a new standard of investor protection in southern Africa, T*RALAC Trade Brief No. D14TB03/2014, p. 7.
[152] *Supra note 141*, p. 23, Art. 5, http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf accessed 20/05/2017.
[153] SADC Protocol on Finance and Investment, 2006, Article 6.
[154] *Supra note 14,s* 13.

international arbitration subject to the exhaustion of remedies, and on a state-to-state basis.

Agri SA submitted that, by excluding investor-state international arbitration, the Bill defeats the defining feature of international investment law[155] and is inconsistent with the SADC FIP, wherein 'a foreign investor may refer any investment dispute against…. if all available domestic remedies have first been exhausted'[156].

Furthermore, they submitted that it was concerning that state-to-state international arbitration has been made subject to the consent of the government of South Africa[157].

It is apparent from these provisions that the South African government now regards international arbitration as an exception to the rule, and not the preferred method of resolving such disputes[158]. At the outset, such conduct may appear to be a deterrent to foreign investment, but upon consideration of the international trends in this particular field, South Africa's decision to retain a certain level of control over the resolution of disputes which have the potential of having highly adverse consequences is in line with current global trends in this field.

viii) Regional Obligations: The regional integration aspects are considered fully in Chapter 3. Most of the submissions were based on the PIA's incompatibility with SADC FIPs Annex 1. Subsequently, SADC member states took steps to amend Annex 1[159], which has made it more consistent with the recommendations of the SADC Model BIT and South Africa's PIA.

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[155] *Supra note 96*, p.54

[156] SADC FIP Article 28(1) of Annex 1; 'Disputes between and investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wish's."

[157] *Supra* note 96, p 53.

[158] J. Ripley-Evans, *Dispute Resolution*, p. 486.

[159] At the 36th SADC Summit held in Swaziland from 30-31 August 2016.

ix) Anti-West stance: The American Chamber of Commerce (ACC) criticised the anti-West stance which the South African government had taken through the termination of its BITs. The ACC criticised the South African governments decision to terminate the European BITs but retain BITs with other BRICs countries, including Russia and China[160]. To be more precise, this decision was informed by South Africa's changing economic priorities and the differences in the type and nature of BITs concluded.

Although South Africa is still considered a small economy, the country is an active contributor in the world economy. It acts both as a capital exporting country (through South African companies investing in third countries) and capital importing country (by being the host country for investors)[161]. Furthermore, South Africa has targeted export-oriented investment as the key to the country's economic performance[162]. This approach has furthered South Africa's position as the gateway to the African market.

In contrast to the late 80s and early 1990s[163], the country is now more focused on securing legal protection for South African investors while at the same time reserving broad policy space to regulate foreign investors operating in South Africa.

Fundamentally, the BITs concluded with China, Russia, Iran, Ghana, and the Czech Republic contained important derogations from the national treatment principle. They provided for any laws enacted under section 9 of

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[160] http://www.politicsweb.co.za/documents/this-bill-adds-to-uncertainty-of-doing-business-in?utm_source=Politicsweb+Daily+Headlines&utm_campaign=c383b1bce0-DHN_Sept_17_2015&utm_medium=email&utm_term=0_a86f25db99-c383b1bce0-130082905 The American Chamber of Commerce in South Africa submission on the Promotion and Protection of Investment Bill, as presented to the Portfolio Committee on Trade & Industry, Parliament, 15 September 2015.

[161] Republic of South Africa, Department of Trade and Industry, Bilateral Investment Treaty Policy Framework Review, (Pretoria: Position Paper to Cabinet, 29 June 2009), online: Parliamentary Monitoring Group, <https://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/ytLj4qNhfQF68gWXv7JeHPOYolZS-Qi-wissKlQmACg/mtime:1381177270/files/docs/090626trade-bi-lateralpolicy.pdf> [Government Position Paper] at 10, at 7.

[162] *Ibid,* p. 20.

[163] When the country was facing economic sanctions and drastic shortage of savings and focused on making the country as attractive as possible to foreign investors.

the South African constitution, including Black Economic Empowerment provisions[164] to override the national treatment principle. None of the BITs concluded with European countries contained such provisions.

Therefore, it is more likely that the South African government found that these more recent BITs did not constrain its development-oriented policies, hence they were retained.

[164] TRALAC, Investment Project: South Africa Case Study, (2004), p 6. Accessed on 10/04/2018 http://www.iisd.org/pdf/2004/investment_country_report_south_africa.pdf.

Conclusion

The purpose of the Act is to 'promote and protect investment' in a way that 'balances the public interest and the rights and obligations of investors' while also affirming the Republics sovereign right to regulate investment'[165].

From the time the Bill was published, the response to the government's overhaul of the investment regime has had mixed responses. Some critics argue that by terminating its BITs, South Africa took a step away from being an 'investor friendly jurisdiction'[166] and has jeopardised its attractiveness as an investment destination.

Aside from the specific provisions at issue, trading partners were particularly dissatisfied with the manner in which the BITs had been terminated (without any negotiation or discussion).

Other political actors, academics and professionals notably praised the government for its decision to review its policies, and for taking the lead amongst the developing countries in seeking to rebalance the rights and responsibilities of states and investors[167].

The Department of Trade and Industry carried out extensive research while reviewing South Africa's investment policy regime before terminating any agreements. This denotes a high-level of engagement, consultation and planning[168].

However, the PIA does have several significant shortcomings which the South African government should look to mitigate to ensure that the Act achieves its objectives. The current 'investment' definition seems to exclude certain assets, including goodwill, intellectual property and other portfolio investments. Patents, intellectual property rights and portfolio investments often rank high among investors key assets and also

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[165] *Supra note 9, s4*.
[166] *Supra note 96*.
[167] J. Stiglitz, (2013). South Africa Breaks Out. [online] Project Syndicate. Available at: https://www.projectsyndicate.org/commentary/joseph-e--stiglitz-on-the-dangers-of-bilateral-investment-agreement accessed 23/4/2018.
[168] J. Klaaren, and D. Schneiderman, SA's *Bilateral Investment Treaty Policy Framework Review. Working Paper. Johannesburg: Wits Law School, Mandela Institute*, (2009), Accessed 23/4/2018.

require adequate protection in order to give foreign investors' confidence to invest in the country. Clarity on this section would be of great assistance.

The Expropriation provision has been highly criticised for weakening foreign investors' property rights. Even though the South African courts and the government have emphasised the intention to open up the South African economy to previously disadvantaged members of society[169], it might still be possible for a South African court to pronounce that the compensation provisions of section 25 of the constitution incompatible with South Africa's international obligations.

With regard to the dispute resolution provisions, due to the 'sunset clauses' contained therein, investors covered by these investments would still be able to challenge the government in international arbitration proceedings for at least 20 years to come. According to Gizelle Boyce[170], this could result in an untenable situation where investments could be covered by three different governing laws - investments made under BITs continue to be protected in terms of the BITs for the duration of the 'sunset clause'; all investments made after the termination of BITs but before promulgation of the PIA are governed by general South African law and all investments made after the promulgation of the PIA will be governed by the Act.

Given this unsustainable situation, it may have been better for the government of South Africa to renegotiate 'third-generation' treaties, wherein countries could still preserve their regulatory space.

We have yet to see whether the government has met its objectives in enacting the Protection of Investment Act and how the new policy will impact on investment flows.

Given the centrality of South Africa in the SADC region, and more broadly, on the continent, concerns have also been expressed that the new legislation would be inconsistent with South Africa's regional obligations. The next chapter will examine the Southern African Development Community, the impact that the changes in South Africa's investment policy have had on the region, the possible consequence and how they can be addressed.

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[169] *Supra note 116,* para 60.

[170] GM. Boyce , An Examination of whether the Protection of Investment Act represents a successful alternative to bilateral investment treaties, UCT faculty of law dissertation, 28 March 2017, p.40.

Chapter 4 - SADC Regional Considerations

4.1. Introduction

South Africa has the strongest economy in Southern Africa and on the African continent[171]. It has compelling influence over the success of SADC at both economic and political levels. Notwithstanding, each SADC member state operates its own regulatory framework with its own level of economic liberalisation[172].

A large body of literature exists on the economic influences of regional integration agreements on both member states and non-member countries. Some of the potential gains which have been highlighted include; the facilitation of intra-regional infrastructure and mitigation of the 'race to the bottom[173]' of investment incentives.

This chapter will assess regional integration in the SADC region, efforts to harmonise investment policy and the impact of the South African Protection of Investment Act. Furthermore, I will consider the challenges facing the region with regard to regional integration, economic development and establishing a harmonised investment regime.

4.2. Regional Integration in SADC

Regional integration is a multidimensional process by which neighbouring countries within a demarcated geographical space increase their level of interaction with regard to economic, security, political, social and cultural issues[174]. The degree of integration is hinged upon the inclination and commitment of the independent states to yield to a possible limitation on sovereignty.

The Southern African Development Community (SADC) was established in 1992 at a summit of its predecessor SADCC (Southern African Development Coordination Conference).

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[171] http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/710/index.html accessed 22/4/2018.
[172] http:// www.sadc.int/themes/economic development/investment/foreign-direct-investment/ accessed 28/5/2018.
[173] Where countries compete to offer the most attractive incentives to investors and as a result, end up undermining their own social, economic, development or environmental initiatives.
[174] B. Vickers, Handbook *on Regional integration in Africa: Towards Agenda 2063,* (2017) p. 1.

The SADC Treaty, also known as the 'Windhoek Treaty'[175] was signed on 17 August 1992 - at a Summit held in Windhoek, Namibia. It agrees on five (mainly political) principles which provide the framework for a long list of mostly economic and development-oriented objectives.

Article 4: Principles

> 'SADC and its member-states shall act in accordance with the following principles:
>
> a) Sovereign equality of all Member States;
>
> b) Solidarity, peace and security;
>
> c) Human rights, democracy, and the rule of law;
>
> d) Equity, balance and mutual benefit;
>
> e) Peaceful settlement of disputes.' [176]

Amongst its objectives, as set out in Article 5, SADC aims to 'achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration[177] , promote self-sustaining development based on collective self-reliance[178] and the interdependence of member states and to achieve complementarity between national and regional strategies and programs'[179].

The treaty also stipulated that the member states would sign various Protocols necessary for cooperation, which would spell out the objectives and scope and institutional mechanisms for cooperation and integration[180].

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[175] Southern African Development Community (SADC) Treaty 1992.
[176] C. Peters-Berries, Reginal Integration in Southern Africa, Internationale Weiterbildung und Entwicklung gGmbh- InWEnt, Germany, p. 72 available at http://iaj.org.za/wp-content/uploads/2017/06/sadc_-_guidebook_for_regional_integration11.pdf accessed 10/06/2018.
[177] *Supra note* 175, (a).
[178] I*bid,* (d).
[179] *Op cit*, (e).
[180] Consolidated Text of the Southern African Development Community, as amended. Article 22.

The Treaty was amended in 2001 at an extraordinary summit in Windhoek. The amendments reflected the agreed changes in the structure of the SADC regarding the new institutions, including the Organ for Politics, Defence and Security (OPDS), Integrated Council of Ministers, the SADC National Committees as well as the introduction of the Troika leadership model. Moreover, they included the adoption of the Common Agenda and the Regional Indicative Strategic Development Plan (RISDP).

4.2.1. SADC Structure

SADCs membership currently stands at 15 member states. As compared to its predecessor, SADC has a more centralised approach, which aims at trade-based integration[181].

The highest body of SADC is the Summit of Heads of States. It comes together at least once a year but can also be summoned more frequently in urgent cases. The Summit is the highest decision-making body - it adopts decisions regarding SADC, determines the organizational structure of SADC and any changes thereof.

The Summit follows the 'consensus principle[182]'— which at times makes it difficult to reach mutual decisions[183].

Other important institutions include, the SADC Tribunal, Council of Ministers, Standing Committee of Officials, SADC Secretariat and Executive Secretary of SADC.

4.2.2. SADC Sector Protocols

A protocol is a legal instrument of implementation of the SADC Treaty, which outlines a course of action aimed at achieving a specific goal of the institution[184]. Protocols are major integration instruments, which also determine implementation time frames. They require consensus of 75% of the member states present at a summit to change or amend a protocol.

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[181] *Supra note 176,* p.73.
[182] Decisions by the SADC Institutions are made by consensus-Consolidated Text of the Treaty of the SADC 2011, Article 19.
[183] *Supra note 176, 74.*
[184] *Ibid,*84.

With reference to regional investment policies, the SADC Finance and Investment Protocol was designed to foster regional development and integration in the area of finance and investment.

4.3. SADC Protocol on Finance and Investment 2006

The SADC FIP was signed in August 2006 by all SADC member states and was ratified by the required two-thirds majority of member states during 2010.

Accordingly, the FIP came into force on 16 April 2010.

The general objective of the Protocol is to ensure that 'state parties shall coordinate their investment regimes and cooperate to create a favourable investment climate within the region as set out in Annex 1'[185].

Annex 1 contains international protections for foreign investors in the region that resemble those typically contained in BITs[186]. By creating a set of investor rights that are fixed and enforceable at international level, the Protocol ensured that unilateral changes could not be made at the national level by a host state.

However, unlike most BITs or multilateral investment treaties, the Protocol did not contain precise definitions of investors with reference to their nationality or place of incorporation[187]. This has been particularly problematic and rendered the application of the Protocol unclear. Notwithstanding, the Protocol includes provisions relating to investor conduct. For example, Article 10 of the Annex imparts a 'Corporate Responsibility' obligation on foreign investors 'to abide by the laws, regulations, administrative guidelines and policies of the Host State.'

4.3.1. Challenges to the SADC FIP 2006

The SADC FIP's Annex 1 elicited a lot of criticism in the region among member states due to the perception that it failed to adequately balance investor protection and the

[185] SADC Finance and Investment Protocol (2006) Article 3.
[186] www.sadc.int/documents-publications /show/1009 accessed 12/05/2017.
[187] http://www.jonesday.com/files/Publication/bc9586ae-e80e-4326-9180-0d09bdb9f702/Presentation/PublicationAttachment/da80f0ea-6fcd-4722-963a-12a8cdebd0d7/Protecting%20Foreign%20Investments.pdf accessed 28/04/2017. Kotuby T C, Egerton-Vernon E., and Rooney C. Michael, Protecting Foreign Investments in Sub-Saharan Africa: The Development Community and its Protocol on Finance and Investment.

regulatory autonomy of host states[188]. Furthermore, member states were unclear about the commitments derived from the SADC FIP and their legal implications[189]. According to the SADC FIP Baseline Project Report prepared by the Finmark Trust, only 53.4% of the country-level commitments of the FIP had been implemented by 2011[190].

The FIP was based on first-generation BITs which have been denounced for their biased nature[191]. Consequently, this exposed the host states to large claims when they attempted to implement domestic measures which were in conflict with the biased provisions[192]. Furthermore, there was a lack of political will among member states to sacrifice some of their national interests in favour of regional integration.

Under mounting case law, member states took steps to develop the SADC Model BIT and to amend Annex 1 of the SADC FIP.

4.4. South Africa's role within the SADC Region

Shortly after joining SADC on 29 August 1994, South Africa was given a sector responsibility for finance, investment and health[193]. This decision was informed by South Africa's comparative advantage in these areas. On account of these factors, South Africa's influence on the direction of the regions investment policy would be probable.

Although the SADC Secretariats' functions and responsibilities are centralised in Gaborone, Botswana[194], it is common cause that the SADC Model BIT and the

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[188] https://www.tralac.org/discussions/article/11875-amendments-of-annex-1-to-the-sadc-finance-and-investment-protocol-are-they-in-force-yet.html accessed 25/07/2017. Talkmore C.

[189] SADC FIP before and After, https://journals.assaf.org.za/per/article/view/1676 accessed 27/05/2018, p 5.

[190] SADC FIP Baseline Study: Regional Summary Report, Finmark Trust, (2011). Note the disclaimer that this study is based on desktop research page 3, http://www.finmark.org.za/sadc-fip-baseline-study-regional-summary-report-final-5-august-2011/ .

[191] A. Grear LJ. and Kotzé, *Research Handbook on Human Rights and the Environment*, (2015), p. 493.

[192] Up to 2014, a total of 608 cases had been brought for investor-state dispute settlement (ISDS). Of these 43% were decided in favour of the host state, 31% in favour of the investor and 27% were settled. See EFILA 2015 http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf.

[193] http://www.dirco.gov.za/foreign/Multilateral/africa/sadc.htm accessed 25/4/2018

[194] L. Wentworth, Speaking Notes, *South African and the regional economic integration agenda; Priorities and Perspectives*, https://www.saiia.org.za/speeches-presentations-other-events-materials/604-saiia-80conf-pres-day-3-wentworth-regional-economic-integration/file accessed 25/6/2017.

amended Annex 1 of the SADC FIP were developed with significant input from South Africa.

4.4.1. SADC Model BIT

In 2012, SADC adopted a Model BIT directed at furthering the overall goal of the SADC FIP, which is to harmonise investment policies and laws at a regional level. The process involved various consultations with government representatives.

The model BIT is a non-binding instrument adopted to serve as a guide to member states in developing their own model investment treaty or in negotiating any investment treaty. It is also open for use by non-SADC countries. The model BIT adopts a more modern approach to investment protection and achieves a greater balance between investors and host states' rights and obligations.

In the 2014 article, titled 'Is an overhaul of the SADC FIP imminent' by Sean Woolfrey for the Trade and Law Centre (TRALAC) asserted that the 2006 SADC FIP was inconsistent with the more favourable SADC Model BIT[195]. Woolfrey asserts that The Model BIT includes more progressive provisions and recommends that member states negotiate investment treaties integrating several rights and obligations of investors and states in areas of corruption, provision of information, human rights, environment, and labour standards[196].

States are encouraged to adopt and negotiate treaties protecting investors and their investments, while at the same time preserving the host states right to regulate in the public interest.

The Model BIT encourages states to adopt fair administrative treatment instead of FET, provide fair and adequate compensation in cases of expropriation, and to provide investors with recourse to ISDS procedures subject to exhaustion of local remedies. The model provides for inter-state dispute settlement through consultation, mediation and arbitration under the international centre for settlement of investment disputes (ICSID) or United Nations Commission on International Trade Law (UNCITRAL) or a

[195] https://www.tralac.org/discussions/article/5358-is-an-overhaul-of-the-sadc-protocol-on-finance-and-investment-imminent.html accessed 10/06/2017. Is an overhaul of the SADC Protocol on Finance and Investment imminent, 13 March 2015.

[196] Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration, United Nations Economic Commission for South Africa (UNECA), (2016), p.30.

regional forum of one or both parties or any arbitration institution agreed upon by the parties[197].

Some states, including South Africa chose to apply the SADC Model BIT in developing their domestic laws[198]. To a large extent, the provisions of the PIA are consistent with the SADC Model BITs' recommendations. However, the dispute settlement provisions of the PIA[199] are more restrictive than what was recommended under the SADC Model BIT. This aspect and investor-state-dispute- settlement is discussed in more depth in the next chapter. Nevertheless, it suffices to state that UNCTADs policy options for state-to-state arbitration indicated that states could opt for the policy option which offers State-to-State dispute settlement, although the organisation cautioned that this route could lead to possible politicisation of investment disputes[200].

Despite the optimism surrounding the development and introduction of the Model BIT, in practice, BITs signed by SADC member states do not seem to follow the SADC Model BITs recommendations. The reluctance to implement the recommendations of the SADC Model BIT implies a lack of political will among member states to surrender some of their national interests in favour of regional integration.

4.4.2. The Protection of Investment Act's inconsistencies with the SADC Protocol on Finance and Investment 2006

The draft Agreement Amending Annex 1 to the SADC FIP (Amendment Agreement) was approved by regional leaders at the 36th SADC Summit, held in Swaziland from 30 to 31 August 2016. The Agreement amends most of the Annex's investment protection standards. For example, it limits the application of the Protocol by narrowing the definitions of investment and investors to include only those of a SADC member state investing in another member state[201]. The Draft Agreement Amending Annex 1 to the SADC FIP also borrows significantly from the Model BIT.

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[197] S. Woolfrey, *The SADC Model Bilateral Investment Treaty Template: Towards a new standard of investor protection in southern Africa*, TRALAC Trade Brief No. D14TB03/2014, (2014), pp. 4-14.
[198] Namibia and Angola have recently tabled new domestic investment frameworks. Namibia-Investment Promotion Bill 2015, and Angola- Private Investment Law 10/18.
[199] *Supra* 14, s13.
[200] UNCTAD (2015) Framework for International Investment Agreements, p. 105.
[201] http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150922summary.pdf accessed 21/07/2017.

Key features of the amended Annex 1 are as follows:

i) Compensation: The reference to 'prompt, adequate and effective' compensation is replaced with 'fair and adequate' compensation. Such compensation is assessed in relation to the 'fair market value' of the expropriated investment prior to expropriation. This is the same valuation method that was recommended in the SADC Model BIT. Moreover, it accommodates the use and or application of the standard of compensation contemplated in section 25 of the South African constitution and the Protection of Investment Act;

ii) Fair and Equitable Treatment: The sub-committee recommended that the FET provision be replaced with a more substantive provision which entrenches national treatment[202]. This is also consistent with the PIA[203];

iii) Right to regulate: The subcommittee recommended that Article 14, which provides for the rights of the State party to regulate in the public interest be redefined and better described. This would provide certainty, minimise disputes and litigation and guarantee the sovereign rights of the state party to regulate in the public interest, which is also consistent with South Africa's PIA[204];

iv) Dispute Settlement: based on recommendations from the subcommittee, Article 28 which deals with the settlement of investment disputes has been removed from the Annex[205]. The amended draft provides for settlement of investor-state disputes through domestic courts or tribunals of the host state. State-to-state investment disputes are to be settled in the manner set out in the SADC Tribunal Protocol. Moreover, in relation to any investment-related matter, Article 27 of the Annex makes it obligatory for member states to ensure that investors have the right of access to courts, judicial and administrative tribunals under the laws of the host state.

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[202] *Supra note 141.*

[203] Agreement amending Annex 1 (Co-operation on investment of the Protocol on Finance and Investment), (2016).

[204] I*bid.*

[205] *Ibid.*

SADC member States signed the Draft Agreement on 31 August 2016[206]. There was debate as to when the amended draft would come into force[207]. Subsequently, the document was released to the public on 16 May 2017[208].

As stated above, the SADC FIP's amended Annex 1 is now in line with the PIA and the South African constitution. Therefore, any previous inconsistencies have fallen away.

Another key issue which was not underscored during the parliament debate is that South Africa had not ratified the SADC FIP. Granted, as a member state it is obliged to create favourable conditions for investments through creating a predictable and harmonised investment climate[209]. The provisions of the FIP could not override an Act of parliament or the supreme constitution of the republic[210].

Although member states came together to amend the SADC FIP with the intention to create a better balance of rights and obligations between investors and host states and to align their FDI polices with the international trend towards 'sustainable' FDI, the regional investment policies still lack coordination.

According to Wentworth, SADC heads of state 'often pay lip service to the importance of deepening regional integration, there is an unwillingness to sacrifice national sovereignty to the regional body'[211].

The lack of a harmonised investment framework for the region diminishes the regions attractiveness as an FDI destination, for example, in 2015, the Organisation for Economic Co-operation and Development (OECD) published a policy brief addressing development challenges in Southern Africa. It specifically investigated the investment

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[206] The amendments required the adoption by three-quarters of the member states that are a party to the SADC FIP. Such adoption has taken place-SADC FIP before and After, Kondo T, p5- confirmed by email by Shubi Mukarasi and Thembi Langa from the SADC.

[207] https://www.tralac.org/discussions/article/11875-amendments-of-annex-1-to-the-sadc-finance-and-investment-protocol-are-they-in-force-yet.html accessed 10/09/2017.

[208] *Supra note 203.*

[209] www.sadc.int/opportunities/investement/.- for example, 'member states are encouraged to implement legislation that creates a favourable environment for investment, such as tax incentives that ease financial burdens for private firms seeking to invest in the region.'

[210] *Supra* note 8, , s 232 states that 'customary international law is law in the republic unless it is inconsistent with the constitution or an Act of Parliament. Section 233 states that '' when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

[211] L. Wentworth, Speaking *Notes-South Africa and the regional economic integration agenda: Priorities and Perspectives,* https://www.saiia.org.za/speeches-presentations-other-events-materials/604-saiia-80conf-pres-day-3-wentworth-regional-economic-integration/file accessed 11/06/2018.

policy framework for the SADC. SADC countries have experienced an increase in the stock of inward foreign direct investment (FDI) during the last decade[212]. The vitality of FDI flows reflect the regions improved overall economic performance and growing competitiveness.

However, the overall lack of consistency and coordination in the investment regime has hindered the achievement of economic and development goals[213].

4.5. Regional integration challenges facing the SADC

Attracting investment was placed at the core of the development integration agenda of the SADC in 2006 with the development of the SADC FIP. However, the region still faces crucial integration challenges including the following:

i) Resistance to ceding sovereignty: the unwillingness of member states to cede their sovereignty to regional institutions[214] has been an ongoing and paramount issue for the region. It stems from the historical remnants of colonialism and the struggle for national liberation;

ii) Different levels of development: as a result, they stand to gain unequal benefits from the integration agreements. This is evident from the apparent lack of commitment to implement the agreements which had been agreed upon;

iii) Overlapping membership: the multiple overlapping memberships of some states in more than one regional organisation creates a complicated tangle of political commitments and institutional obligations. For example, some SADC member states are also part of COMESA, EAC and SACU, and

iv) South Africa's hegemony: by virtue of being the 'powerhouse' on the continent, South Africa's post-1994 reforms improved the regions FDI

[212] OECD-SADC Policy Brief, 1. http://www.oecd.org/daf/inv/investment-policy/SADC-OECD-policy-brief-June-2015.pdf accessed 20/06/2017.

[213] I*bid*. According to the IMF, Sub-Saharan Africa is the second fastest growing region in the world. However, the high growth rates have failed to lead to significant advances in poverty reduction and human development. There is a need for a coherent policy and deeper regional integration in order to reap the benefits of having a significant market size, growing populations and natural resources.

[214] Unlike in the EU, African leaders are generally unwilling to surrender essential elements of their sovereignty to regional institutions. *Supra* note 211, p.79.

attractiveness as a whole[215]. However, South Africa also absorbs most FDI to the SADC region[216] and opinions differ with regard to its future role within the region[217]. This aspect is explored more in the following section.

4.5.1. South African's Hegemony

A number of academics have reviewed South Africa's role in regional integration in Southern Africa and have considered its role as a hegemon in SADC[218].

South Africa has been described as a 'hesitant hegemon' by Tjonneland[219]. Within discussions on regional integration, Tetenyi[220] described a hegemon as a country which demonstrates strong leadership and is more powerful, both economically and in terms of militarily, compared to other countries in the system[221]. The four criteria that are generally offered as characterising a state as a hegemon in a regional bloc are the following: claim to leadership, power resources, employment of foreign policy instruments and an acceptance of the leadership role[222].

Although South Africa is the dominant force within the SADC region, there is a debate as to whether South Africa fulfils these criteria. For instance; inconsistencies in its

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[215] Kubny J et al*, Regional Integration and FDI in emerging markets,* Kiel Institute for the World Economy No 1418, 2008, p. 20.

[216] Goldstein E A*., Regional integration, FDI and Competitiveness: The Case of SADC, Prepared for the Africa Investment Roundtable*, 19 November 2003, OECD, Paris.

[217] C. Jenkins and L.Thomas , *Foreign Direct Investment in Southern Africa: Determinants, Characteristics and Implications for Economic Growth and Poverty Alleviation,* CSAE and CREFSA, University of Oxford and London School of Economics, p 21, 2002. http://www.csae.ox.uk/reports/pdfs/rep2002-02.pdf.

[218] A. Adebajo,A. Adedeji, and C. Landsberg, C. (2007). South Africa in Africa. Scottsville, South Africa: University of KwaZulu-Natal Press. Alden, C. and Le Pere, G. (2009). South Africa in Africa: Bound To Lead?. Politikon, 36(1), pp.145-169. Alden, C. and Schoeman, M. (2015). South Africa's symbolic hegemony in Africa. Palgrave-journals, (52).

[219] EN. Tjønneland., Rising powers in Africa: what does this mean for the African peace and security agenda? Retrieved 01.05.2014, available at http://peacebuilding.no/Themes/Emerging-powers/Publications/Rising-powers-in-Africa-what-does-this-mean-for-the-African-peace-and-security-agenda/(language)/eng-US page 5.

[220] A.Tetenyi, (2014). South Africa vs. Nigeria: competing countries for leadership position in Sub-Saharan Africa. 1st ed. [ebook] Budapest, Hungary. Available at: http://web.isanet.org/Web/Conferences/FLACSO-ISA%20BuenosAires%202014/Archive/6086c7d5-abaf-460c-bd29-95c912752033.pdf [Accessed 18 September 2014].

[221] *Ibid p. 2.*

[222] D. Flemes, *Conceptualising Regional Power in International Relations: Lessons from the South African Case*. SSRN Journal, (2007).

foreign policy, and lack of representative staff in the SADC headquarters have been used to strengthen arguments of its inability to lead[223].

Moreover, some argue that South Africa cannot be a leader of regional integration in SADC because of its inability to effectively address domestic problems relating to crime, unemployment, inequality, corruption and poverty[224].

Furthermore, there is a sense of distrust among member states, which stems from the fact that South Africa is perceived as a hegemonic bully in the region[225], eg during the SADC Free-Trade Agreement negotiations at the turn of the new millennium, South Africa negotiated on behalf of Southern African Customs Union (SACU) members largely without any prior discussion with them[226]. This was said to be due to capacity constraints of the SACU members, but Saurombe submits that it was more likely because South Africa was primarily pursuing its own interests and the SADC FTA was in large part tailored to suit the perceived interests of its business community[227]. Such engagements indicate that at times, the more primary concern for South Africa has been to further integrate its economy into the world economy. Sometimes this can be at the expense of regional partners[228].

Researchers and professors who assert South Africa's hegemony often cite the following indicators: the fact that South Africa is the largest contributor and investor in SADC member states[229], it has a far stronger and well-diversified economy in comparison to the other member states of the SADC region, it has the most business

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[223] S. Gwala *, An analysis of South Africa's Role in Regional Integration in Southern African: Prospects and Challenges,* University of Kwa-Zulu Natal, (2015), p.18.

[224] *Supra note 218.*

[225] *Supra note 218.*

[226] MC. Lee, *The Political Economy of Regionalism in Southern Africa*, (2003), p.130.

[227] *Saurombe A, The role of South Africa in SADC reginal integration: The making or breaking of the organisation, Journal of International Commercial Law and Technology Vol. 5, Issue 3 (2010), p 1. https://www.researchgate.net/publication/44796864_The_role_of_South_Africa_in_SADC_regional_integration_The_making_or_braking_of_the_organization accessed 10/04/2018, p. 127.*

[228] *Ibid,p. 128*.

[229] T. Hartzenberg, (2015*), National policies and regional integration in the South African Development Community*, 1st ed. [ebook] wider.unu.edu. Available at: http://www.wider.unu.edu/publications/working-papers/2015/en_GB/wp2015-056/_files/94053610053173574/default/wp2015-056.pdf [Accessed 16 July 2014].

associations within industrialised states across the world[230] and has the strongest military capability.

Furthermore, as the most developed and economically advanced economy within the region and continent, 'South Africa has the capacity to make or break regional integration within the SADC and the continent[231].' Nevertheless, having a hegemon within a regional economic community is not necessarily a negative feature. The most qualified state to carry out this role and responsibility would be able to spear-head the integration process, eg RISDP was developed by the SADC Secretariat and adopted in 2003 with the aim of operationalising the SADC's Common Agenda over a period of 15 years[232]. South Africa's leadership and participation for such endeavours is crucial in order to reach the levels of intra-regional unrestricted flow of goods, services and investment envisaged.

4.5.2. South Africa - Domestic, Regional and Global Interests

South Africa's growing economic presence and strength across the region and continent has sparked debates as to its intentions[233]. South Africa is often confronted with a dilemma of trying to balance its domestic, regional and global interests. By virtue of being the only African state in the BRICS grouping and membership in the G8[234], there are great expectations and pressure applied by the international community on South Africa to lead the rest of the continent. Moreover, as one of Africa's biggest contributors to multilateral peacekeeping operations and putting SADC on the map,

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[230] P. Draper, D. Halleson & P. Alves, (2007). SACU, Regional Integration and the Overlap Issue in Southern Africa: From Spaghetti to Cannelloni? South African Institute of International Affairs, Trade Policy Report NO. 15. Johannesburg: South African Institute of International Affairs.

[231] *Supra note 227.*

[232] For instance, according to the 15-year plan, the key milestones are to reach a Free Trade area in 2008, Customs Union in 2010, Common Markey in 2015, Monetary Union in 2016 and regional currency in 2018. Subsequently, the RISDP was revised and approved in April 2015- http://www.sadc.int/files/5113/6785/2592/SADC_RISDP_Summary_en.pdf accessed 10/2/2018. Summary of the SADC Revised Regional Indicative strategic development plan 2015-2020. https://www.sadc.int/files/5415/2109/8240/SADC_Revised_RISDP_2015-2020.pdf accessed 27/05/2018.

[233] C. Alden and M. Soko, South *Africa's economic relations with Africa: hegemony and its discontents. The Journal of Modern African Studies,* (2005), pp.367-392.

[234] Reformatted as G7 from 2014 due to Russia's exclusion- inter-governmental political forum with the participation of the major industrialized countries in the world, that viewed themselves as democracies- France, Germany, Italy, Japan, the UK, the US, with the addition of Canada established in 1975. In 2005, the leading emerging markets- Brazil, China, India, Mexico and South Africa joined.

South Africa's position on the global front helps to magnify the regions potential in many respects[235].

This section has highlighted positive and negative aspects of South Africa's power and influence within the region. Without South Africa's commitment, it would be very difficult to achieve any significant regional integration progress. However, with member states such as the Democratic Republic of Congo (DRC) - which has the advantage of a large consumer base and Mozambique, Mauritius and Botswana who benefit from great resource wealth and interest from foreign investors, it would be essential for South Africa to foster better relations in order to encourage deeper regional integration.

Whilst the SADC is committed to following a linear economic integration model[236], it has consistently missed its convergence targets. The linear integration model is based on the European Union (EU) integration model. Although this model has been successful in the EU, the lack of regional integration progress within the SADC region had made the 'across-the-board' application of this model in Africa questionable. Nevertheless, perhaps tailoring some of the EU's international investment harmonisation policies to the SADC region could lead to achieving more progress.

4.6. European Union International Investment Harmonisation

The Lisbon Treaty of 2009 extended the EU's exclusive competence under the then Common Commercial Policy (CCP) to the regulation of foreign direct investment (FDI)[237]. Some member states opposed this extension of the CCP to FDI regulation and continued to conclude bilateral investment treaties with third parties despite being in breach of EU law[238].

The member states' opposition stood in contrast to their previous conduct in this policy domain. They (the member states) had temporarily empowered the EU to participate in international investment negotiations since the 1980s. For example, the European

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[235] *Supra note 227*, p 124.
[236] Moving from a free trade area to a customs union, and eventually culminating in a common market with a single currency.
[237] UNCTAD, Investment Instruments Online (2016), <http://www.unctadxi.org/templates/docsearch____779.aspx>.
[238] I*bid.*

Commission acted as the EU's collective voice or negotiated alongside the member states in investment-related negotiations in the GATT, WTO,OECD and on recent FTAs[239].

Because of its 'supra-national thinking' and approach, the EC has been described as a policy entrepreneur by writers such as Basebow and Woll who describe the manner in which it has pushed for integration for ideological, functional, and power considerations[240]. Furthermore, the EC uses various strategies, such as using its agenda-setting powers to advance its substantive and institutional policy agenda[241] to make the member states cooperate and delegate to it in new policy domains[242].

In this way, the EC can frame policy debates and to influence the formation of member state preferences in daily policy-making.

The SADC Secretariat is the closest comparable body to the EC. The SADC Secretariat has the function of a management unit and has increasingly become the implementing agency for SADC programmes[243]. However, the Secretariat lacks the legal backing afforded to the EC and as a result, it does not have the legal capacity to force countries to satisfy its obligations[244]. Such insufficient institutional arrangements make fostering regional integration and enforcing regional decisions unattainable[245].

[239] R. Basebow, (2016) The European Union's new international investment policy: product of Commission entrepreneurship or business lobbying? European Foreign Affairs Review, 21 (4). pp. 469-491. ISSN 1384-6299 page 2.
[240] C. Woll, The Road to External Representation: the Commission's Activism in International Air Transport, JEPP 13:1, 52-69 (2006); H. Kassim et al., The Commission in the of the 21st Century, (OUP 2008); M. Pollack, The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU (OUP, 2003)..
[241] *Supra note 239,* p 4.
[242] *Supra note 239.*
[243] *Supra note 176*, p.77.
[244] Alemayehu Geda & Haile Kibret, 2002. "Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA," Working Papers 125, Department of Economics, SOAS, University of London, UK. p. 14.
[245] *Supra note* 176, p. 169.

Conclusion

According to the International Monetary Fund (IMF), sub-Saharan Africa has become the second fastest growing region in the world after South Asia[246]. However, to sustain this growth and enhance the potential benefit to all from it, increased investment is needed[247]. In order to attract such good foreign direct investment, there is a need to be seen in an environment of peace and stability, not just in South Africa, but in the region as well. Therefore, a more stable, coordinated and mutually beneficial outcome would benefit all member states.

South Africa has taken a leading role in the region to address issues of closer collaboration and economic integration[248]. However, its perceived or real role as the regional hegemon, both in political and economic terms, further entrenches economic disparities in the region. On one hand positive results can be found when the hegemon expands its business to neighbouring countries; such as the increase in South African trade and investment in Mozambique[249] , but on the other hand, countries such as Lesotho experience both the benefits and challenges arising from close economic ties with South Africa[250].

With regard to the Protection of Investment Act, South Africa's sector responsibility for investment policy in the SADC region was bound to influence the direction which the policy would take. After the amendments to Annex 1 of the SADC FIP, the regional protocol was more in line with South Africa's law and inconsistencies identified between the SA law and the SADC FIP fell away.

When one reviews the provisions of the PIA and the amended Annex 1, it becomes clear that they reflect the same trend that many developing countries around the world

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[246] Regional Outlook; Sub-Saharan Africa Restarting the growth engine, April 2017, World Economic and Financial Surveys, International Monetary Fund (IMF), available at https://www.imf.org/en/Publications/REO/SSA/Issues/2017/05/03/sreo0517 accessed 06/03/2018.

[247] *Ibid.*

[248] These include the establishment of a free trade area in the region, the development of basic infrastructure, human resources, the urgent need for peace, democracy and good governance.

[249] C. Aldenand M. Soko, M. (2005). South Africa's economic relations with Africa: hegemony and its discontents. The Journal of Modern African Studies, 43(3), p. 376.

[250] The monetary union creates a stable interest rate and a credible monetary policy on the one hand, but also makes Lesotho subject to the currency volatility of the rest of the global economy- supra note 244, p. 31.

have taken, that is, to restrict foreign investors' recourse to international arbitrations and ensure a balance of rights and obligations between investors and host-states.

In terms of regional harmonisation, it was during South Africa's investment policy review that the SADC Model BIT was developed to harmonise member states' investment policies and laws. This template seeks to ensure a greater balance between the rights of investors and the objectives of host states in regulating in the public interest.

Due to the non-binding nature of the SADC Model BIT and in response to the challenges of the SADC FIP, SADC member states took steps to amend the latter. The 2016 SADC FIP annex 1 reduced the scope of the definitions of investor and investment, excludes the MFN and fair and equitable clause, introduces a substantive national treatment clause and expressly provides for the states' right to regulate.

Despite these efforts, the SADC region still faces several challenges with regard to harmonisation of investment policy, including the different stages of development among member states, the reluctance to cede sovereign powers to a supra-national body and multiple memberships in regional economic communities.

Such challenges result in fragmented markets, heterogeneous regulatory environments and harmful practices such as a 'race to the bottom'. These difficulties reduce the attractiveness of the region as an investment destination.

The cited challenges also call into question the investment measures of the TFTA[251] (Tripartite Free Trade Area) - a free trade agreement between COMESA, EAC and SADC launched in 2015, the establishment of a Continental Free Trade Area[252] and the eventual establishment of a Pan-African Investment Code.

Adopting a single investment regime at a continental level in Africa will be quite a challenge, as can be seen from the challenges that have arisen at a regional level. To ensure that steps taken towards a Pan-African Investment Code are coherent and

[251] The tripartite integration is to be based on a 'developmental regionalism 'approach, which is based on three pillars- market integration, infrastructural and industrial development.

[252] The CFTA is expected to include an investment chapter. The investment chapter is to be aligned with the overall objective of the CFTA – to create a single continental market for goods and services, with free movement of business persons and investments.

consistent, consolidation of the international investment treaties at this level is crucial. Therefore, policymakers need to contribute towards the harmonisation of the regime.

For completeness, the following chapter evaluates the issues surrounding investor-state dispute settlement within the international investment law framework. The current issues in the regime stem from the sharp increase in the number of disputes between investors and governments. In the South African context, the Protection of Investment Act adopted a more restrictive approach to investor-state dispute resolution, which leaves investors in a complex situation when attempting to assert their rights.

Chapter 5 - Dispute Resolution

5.1. Introduction

Under customary international law, a state can address injury caused to its national by the host state by exercising diplomatic protection. In addition, to avoid having to resort to coercive means, states often establish ad hoc commissions and arbitral tribunals to adjudicate claims involving the treatment of foreign nationals and their property by the host State, this is under 'state-to-state dispute-settlement'.

Under public international law, private parties virtually have no rights under state-to-state dispute settlement to bring a claim against a state through a dispute settlement mechanism administered by a third body. Therefore, investors had only two options:

i) They could assert their rights before the domestic courts of the host-state. This was often an unsatisfactory procedure as the host state could modify its investment laws or there could be a change in government which would lead to a change in foreign investment policy;
ii) Alternatively, aggrieved investors were restricted to exercising pressure within their own home states to force the state to start legal proceedings on their behalf before an international court.

In the 1960s, German investors sued several countries, including Ghana, the Philippines, and Ukraine at the World Bank's Centre in Washington DC. The World Bank took up this idea, stating that 'such a system could help the world's poorer countries to attract foreign capital' [253].

It was under this scope that investor-state dispute resolution developed.

5.2. Bilateral Investment Treaties and the increase is ISDS cases

A defining characteristic of the investment regime contained in most of the BITs is that investors have a private right to action when seeking redress under the ISDS mechanism[254] . Based on the belief that developing countries have less developed

[253] Reed, Lucy; Paulsson, Jan; Blackaby, Nigel, *Guide to ICSID Arbitration*, 2nd ed., (2010), p. 468.
[254] http://ccsi.columbia.edu/files/2015/08/KPS-E15-Overview-Paper-May-15-published.pdf accessed 31/07/2017,p. 3.

and impartial judicial systems, international arbitration located outside the home states of the host country has been the preferred method to resolve disputes

Furthermore, the original claim was that arbitral proceedings were neutral, could draw on experts, be expedited, were less costly and confidentiality could be ensured.

Since 1959, the number of BITs grew exponentially - with more than 3000 BITs being concluded globally[255]. This growth has been attributed mainly to the competition between developing countries for FDI, relating to the belief that BITs attract FDI, which in turn promotes economic development and growth.

As the number of BITs grew, so did the number of cases instituted against host states.

Globally, states began to criticise the BITs for creating unequal distribution of rights and obligations between developing countries and investors, and restricting host states' policy space. Thus, for many developing countries, the benefit of these treaties in attracting foreign direct investments does not seem to compensate for the litigation initiated against them. Furthermore, this has led to the perception that BITs have an increased risk of litigation, are unpredictable, are open to bias from the international tribunals, and have an overall negative net impact on the benefit of investment to recipient countries. Therefore, it is not surprising that BITs have become a more politically contentious issue.

5.3. South Africa's Approach.

The Protection of Investment Act illustrates the South African government's clear attempt to preserve policy space and avoid controversial obligations. For the most part, South Africa's PIA mirrors the Model BITs recommendations, although South Africa has chosen to apply a more restrictive standard by removing ISDS altogether and including additional barriers for investors to access international arbitration.

The dispute settlement provisions are found in section 13, which provides for mediation[256], court or independent tribunal or statutory body within the Republic[257], or

[255]UNCTAD IIA Databases http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx accessed 20/04/2017.
[256] *Supra 14, s (1).*
[257] *Ibid, s 13(4).*

state-to-state arbitration of foreign investment disputes after the parties have exhausted local remedies available in South African courts and with consent from the government[258] .

5.4. The SADC Model BITs' recommendation regarding Dispute Settlement

In the special note, the Drafting Committee indicated that several states were opting out or were looking to opt out of ISDS mechanisms, including Australia and South Africa[259]. The Committee recommended that SADC member states should not include such a provision[260].

Instead, it recommended the inclusion of a state-to-state[261] dispute settlement provision that would allow contracting parties to claim damages on behalf of an investor for an alleged breach of the treaty, but only if the investor had first exhausted local remedies or a contracting party can demonstrate that no appropriate domestic remedies are available.

If a state does decide to negotiate and include ISDS, the guidelines provided were primarily drawn from the United States' and Canadian Model BITs, recent treaties and existing arbitration rules[262].

The Model BIT also attended to concerns about the transparency of proceedings and recommended that 'all documents relating to the arbitration shall be available to the public, subject to the exclusion of confidential information'[263].

5.5. Protection of Investment Act-Dispute Settlement provisions

As discussed in previous chapters, parties expressed concern regarding the exclusion of investor-state arbitration, and the additional barriers to access international arbitration including: the exhaustion of domestic remedies[264], obtaining government consent, and state-to-state arbitration as an alternative.

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[258] *Op cit, s 13(5).*
[259] SADC Model Bilateral Investment Treaty Template, (2012) Art. 29.
[260] *Supra note 141,* p.55.
[261] *Supra* note 141, Art. 28.
[262] Supra note 141, p. 55.
[263] *Supra* note 141, p. 53.
[264] *Ibid 141,* p. 54.

In addressing the removal of ISDS, the DTI referred to the challenges that came with ISDS, particularly the restriction on policy space and the implementation of developmental polices[265]. It cited preference for state-to-state dispute settlement because of the different dynamics and the reduced likelihood to challenge certain types of regulatory measures or make certain types of legal arguments that could be brought against them in future[266] .

The customary international law rule of exhaustion of domestic remedies aims at safeguarding state sovereignty by requiring individuals to seek redress for any harm 'allegedly' caused by a state within its domestic legal system before pursuing international proceedings against the state[267]. To a large extent, this rule was dispensed with, as states concluded investment treaties which gave advance consent to arbitration to foreign investors. In recent years, this rule was reintroduced by states including Argentina, India and the United Arab Emirates as well as countries in the Southern African Development Community (SADC).

The more controversial limitation has been the requirement to obtain the South African government's consent to international arbitration[268]. The consideration of such a request will be done in terms of the fair administrative treatment section of the Act.

The language allows the South African government a wide discretion not to consent to this type of arbitration. Swart,[269] submits that it is highly questionable that the government would ever be inclined to allow for this type of arbitration as can be seen from the South African governments unwillingness to take one of the risks associated with international arbitration.

5.6. The impact of Protection of Investment Act nationally

In recent years there have been major developments in reforming South Africa's alternative dispute resolution legislation.

i) Mediation: The South African DTI published the draft rules for mediation in investor-state dispute resolution under the PIA on 30 December 2016, in

[265] *Op cit,* p. 53.
[266] N. Bernasconi-Osterwalder, *State-State dispute settlement in Investment Treaties*, (2014), Best Practices Series, International Institute for Sustainable Development (IISD).
[267] MD. Brauch, *Exhaustion of local remedies in international investment law*, IIS Best Practices Series, (2017),p.1.
[268] *Supra 14*, s 13(5).
[269] D. Swart, *Legal Protection of Foreign Investment in SA*, University of Pretoria LLM. Thesis, (2016), p. 38.

terms of the Protection of Investment Act 22 of 2015. The intended purpose of the Draft Regulations is to provide for rules to govern the mediation of any investor-state dispute between investors (foreign and domestic) in South Africa and the government of South Africa.

Globally, mediation is now being promulgated as a valid and viable alternative to international investment arbitration[270]. This option also channels such disputes into forums that encourage communication and the development of consensual solutions[271].

However, mediation has several shortcomings. It is often characterised as a preliminary step, with no binding effect and no enforceable final award. This could lead to a lack of finality. Furthermore, mediation proceedings are confidential - which contradicts the modern approach of resolving investor-state disputes in a transparent manner.

The Draft rules were open for public comment until 28 February 2017, and have been criticised for being highly unfavorable investors; for example – there is potential for conflict of interest with the DTI [272] and there is a lack of an overarching policy and legislation for Alternative Dispute Resolution (ADR) in South Africa;

ii) International arbitration: The International Arbitration Act 15 of 2017 entered into force on 20 December 2017. The long-awaited Act was specifically enacted to transform international arbitration practice in South Africa.

The former Arbitration Act 42 of 1965, was drafted with domestic arbitration in mind. In 1978, South Africa acceded to the Convention on the Recognition

[270] Investor-State Mediation, International Centre for Settlement of Investment Disputes, accessed at https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx on 23/04/2018.
[271] See Susan D. Franck, Integrating Investment Treaty Conflict and Dispute Systems Design, 92 MINN. L. REV. 161, n. 266 (2007) [hereinafter Integrating Investment Treaty]; see Jack J. Coe, Jr., Toward A Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch, 12 U.C. DAVIS J. INT'L L. & POL'Y 7, 8-9 (2005).
[272] *Supra note* 141, p 71.

and Enforcement of Foreign Arbitral Awards (New York Convention of 1958). The legislation drafted to give effect thereto - the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 was also flawed, eg the definition of 'foreign' arbitral award failed to include a provision relating to enforcement of arbitration agreements[273]. The International Arbitration Act has now been repealed.

One of the main shortcomings of this statute is that it did not include the United Nations Commission on International Trade Law Model Law (UNCITRAL Model Law). The new International Arbitration Act has adopted it.

This Model Law was specifically drafted for international commercial arbitration and also serves as a guidance tool for states reforming and modernising their arbitral laws. The Model Law also contributes towards the uniformity of the law of arbitral procedures. Furthermore, it provides the main features that should be part of the legislation, including; procedures, composition, jurisdiction and enforcement of arbitral awards.

It has been adopted in over 70 jurisdictions worldwide, including other Southern African Development Countries; Zimbabwe, Zambia, Mauritius, Madagascar, and now South Africa.

Mauritius, another SADC member state which is doing particularly well in terms of attracting investment also adopted the Model Law into its domestic arbitration law. The International Arbitration Act of 2008 established a separate legal regime for international arbitration (commercial and investment arbitration). The Mauritian government then went on to establish the Permanent Court of Arbitration at the Mauritius Chamber of Commerce and Industry in 2010 and the Mauritian International Arbitration Centre (MIAC) the following year. In light of the above developments, Mauritius is

[273] Miles J et al, *Arbitration in Africa: A review of key jurisdictions*, (2016), p.217.

ranked first on the African continent when it comes to the foreign investment climate[274].

More broadly, across the African continent, the number of Arbitral Centre's has been growing in line with economic growth. Although few matters are actually heard on African soil, Africa is gaining recognition in the international arbitration fraternity[275].

The new Arbitration Act is indicative of the Government's intention to transform and align its commercial arbitration practice with international standards in the resolution of international commercial disputes and increase trade and investment[276]. Such developments could enhance South Africa's desirability as a seat for arbitration, and lead to improvements in the country's ability and readiness to host international arbitration matters.

However, despite the progress made, South Africa's commercial arbitration framework would now be divided into domestic arbitration-which is governed by the previous Arbitration Act; international commercial arbitration - regulated by the International Arbitration Act, and investment arbitration - to be governed by the Protection of Investment Act once it comes into force.

This arbitration system appears to be quite fragmented, which may deter investors who typically consider the ability to resolve disputes through transparent and efficient means to be a crucial factor when deciding where to invest.

[274] Mauritius: The World Bank Doing Business Report 2018, http://www.doingbusiness.org/data/exploreeconomies/mauritius.
[275] Permanent Court of Arbitration, Mauritius, https://pca-cpa.org/en/about/structure/pca-mauritius-office/.
[276] TRALAC, South Africa's International Arbitration Act, 29 March 2017. T Chidede https://www.tralac.org/discussions/article/11475-south-africa-s-international-arbitration-bill-2016-stepping-stone-for-increasing-trade-and-investment.html accessed 18/05/2018.

Moreover, although arbitration as an alternative dispute method has been used widely in South Africa, for example, in areas of shipping, insurance, building and engineering contracts, employer-employee relations and international commercial disputes, it is still relatively new in the international investment dispute context. Furthermore, despite having a renowned judicial system and strong institutions, the SADC region and South Africa have traditionally been viewed as medium-risk investment destinations[277] and some investors may be deterred by the lack of adequate protection.

However, it is essential to distinguish between the investors as well. For example, drawing from the distinction made by Dunning[278], market-seeking investors, who want access to the growing populations within the Southern African region are less affected by the presence or absence of IIAs[279]; while resource seeking investors, who are prompted to invest to acquire and specific resources of a high quality and at a lower cost (such as unskilled labour) or which are not available in their home countries (natural resources or raw materials[280] may be more vulnerable to political changes[281].

On the other hand, in light of the global challenges facing ISDS, many investors have had to adapt to the current situation. They could resort to 'treaty shopping', by incorporating holding companies in countries that are afforded protection under BITs[282]. Alternatively, investors could direct their investments to projects with faster maturation periods. This would reduce their exposure to the risks associated with major political, institutional and economic shifts[283].

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[277] United Nations Economic and Social Council (UNESC), Investment Agreements Landscape in Africa, 2015, p.10.
[278] JH. Dunning, *Multinational Enterprises and the Global Economy*, (1993) and 'Location *and the multinational enterprise: A neglected factor?*' Journal of International Business Studies, (1998), pp. 45–66.
[279] Boulle L et al, *International Economic Law and African development,* (2014), p.176.
[280] C. Franco et al, *Why do firms invest abroad? An analysis of the motives underlying Foreign Direct Investments,* (2008), University of Bologna, Department of Economics, p.7.
[281] The other category is non-marketable asset seeking investors- also known as efficiency seeking, JH. Dunning, *Multinational Enterprises and the Global Economy*, (1993), Harlow: Addison-Wesley, p. 60.
[282] Some of the newer IIAs impose restrictions on nationality planning, eg US model Bilateral Investment Treaty process that the host states may deny the benefits arising from the treaty if the investor has no substantial business in the territory of the other party.
[283] *Supra 280,p. 179.*

iii) Domestic Courts and Polycentric Issues: During the submission of public comments for the Protection of Investment Bill, concerns were raised about the use of domestic courts and the doctrine of separation of powers which prohibits the courts from 'second-guessing' the substance of regulatory decisions[284]. The text of the South African Constitution does not refer to it explicitly, but its inception can be traced back to Constitutional Principle VI, which provides that - 'There shall be a separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'[285].

The doctrine has been interpreted in several Constitutional Court judgments, including Glenister v President of the Republic of South Africa[286], South African Association of Personal Injury Lawyers v Heath[287], and the De Lange v Smuts case[288].

It is now well established that - the main objectives of the doctrine of separation of powers is to prevent the abuse of power within different spheres of government. Furthermore, "[t]here is . . . no universal model of separation of powers. In democratic systems of government, in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute[289].

In the De Lange[290] case, J Ackerman held that:-

> 'The courts have a duty to develop a distinctively South African model of separation of powers, which fits this particular system of government provided for in the Constitution, and that reflects a delicate balancing,

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[284] *Supra 96,*p. 56.
[285] *In re: Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253 (CC). 2009 (1) SA 287 (CC) at p 298*.
[286] *2009 (1) SA 287 (CC) at p. 298.*
[287] *South African Association of Personal Injury Lawyers v Heath 8 2001 (1) BCLR 77 (CC) P86 at par 22, first certification judgment, Ex parte Chairperson of the Constitutional Assembly of the Republic of South Africa 1996 (4) SA 744 (CC) at p 810 para 108 .*
[288] *De Lange v Smuts No and Others 1998 (7) BCLR 779 (CC) at p 804 par 60*
[289] *Supra note 288.*
[290] *Ibid, par 60-61.*

informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.'

iv) Independent tribunals and statutory bodies: with the growing use of alternative dispute resolution (ADR), various forums for ADR have been established. Among them, the Association of Arbitrators and the Arbitration Foundation of South Africa promote arbitration and provide competent bodies to resolve disputes.

There are also specialised tribunals, including: The Copyright Tribunal, Competition Tribunal and the Companies Tribunal.

With regard to Asia-Africa disputes, the China-Africa Joint Arbitration Centre (CAJAC) was established in 2015 to address matters relating to Asia-Africa investment disputes and to train and develop African arbitrators. So far, the CAJAC centre has only administered one case.

v) State-to-State Arbitration: Many pre-1969 BITs provided for only state-to state arbitration, for example, the Germany-Liberia BIT (1961). This approach to dispute settlement predates investor-state arbitration, but in efforts to depoliticise disputes between investors and states, investor-state-dispute settlement emerged.

Due to the negative impacts of ISDS, many states are reverting to the state-to-state dispute settlement mechanism. Some of the recent investment chapters in comprehensive trade and investment treaties do not contain investor-state arbitration provisions, but rather have state-to-state dispute settlement clauses; for example, the Australia-Malaysia Free Trade Agreement (FTA) 2012, the Japan-Philippines Economic Partnership Agreement (EPA) (2006) and the Australia-United States FTA (2004).

In terms of process, the state-to-state investment arbitration procedure is similar to the investor state procedure, for instance both follow similar structured arbitration rules (often modelled on the United Nations Commission on International Trade Law (UNICITRAL). A state-to-state tribunal is usually composed of three arbitrators; each state appoints one, and the third arbitrator is jointly selected by the party-appointed arbitrators and must be a national of a third country[291].

Given the similarities, many of the issues that are raised in the context of investor-state arbitration are also relevant for state-to-state arbitration; including the issues of inconsistent decisions by tribunals, the overall predictability of the process and lack of an appeals system. Therefore, it is essential to design a state-to-state procedure that offsets these challenges. This can be done in various ways. For example, in the context of investment chapters, states have adopted more elaborate approaches to state-to-state arbitration. Chapter 20 of NAFTA[292] stipulates 'that a party could request a meeting of the NAFTA Free Trade Commission to resolve the dispute after the consultation fails, and if the Commission fails to resolve the dispute, a party may call for the establishment of an arbitral panel consisting of five panellists chosen from a roster.'

Similarly, the Investment Agreement for the COMESA Common Investment Area moves away from party-appointed panellists or arbitrators. Instead, it stipulates that all three members of the arbitral panel shall be appointed by the COMESA Secretary General[293].

Some investment treaties establish a quasi-judicial state-to-state dispute settlement system inspired by the World Trade Organisations dispute settlement panel and Appellate Body system, for example The

[291] Article 37 (State-State Dispute Settlement) of the 2012 U.S. Model BIT slightly differs from this model, e.g., the third arbitrator is appointed by the agreement of the Parties.
[292] North American Free Trade Agreement (1992).
[293] Investment Agreement for the COMESA Common Investment Area Annex A Article 6.

Comprehensive Investment Agreement (ACIA) of the Association of Southeast Asian Nations (ASEAN) signed in 2009.

At present, it is unclear how the South African government will approach state-to-state arbitration, but perhaps one could take cues from South Africa's participation and conduct in the multilateral relations both in the World Trade Organisation (WTO) and the International Criminal Court (ICC).

5.7 Regional Dispute Settlement Considerations

In the regional context, challenges concerning the Protection of Investment Acts inconsistency with the SADC FIP [294] have largely fallen away since Annex 1 was amended. However, neither Annex 1 nor the Amendment Agreement[295] clarify how investors or investments affected by amendments will be protected upon entry into force of the Amendment Agreement. As observed by Talkmore Chidede, the lack of a survival clause could result in investors within and outside the region who were previously protected under Annex 1 to be left without protection[296].

In such cases, investors could bring denial of justice claims against member states. In its broadest sense, this term (denial of justice) seems to embrace the whole field of state responsibility and has been applied to all types of wrongful conduct on the part of the state towards foreigners[297].

In its narrowest sense, it has been limited to refusal by a State to grant a foreigner (alien) access to its courts or a failure of a court to pronounce a judgment[298].

In the majority of cases, denial of justice claims are employed in connection with the improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures and unjust decisions[299].

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[294] SADC Protocol Annex 1, Article 28(1).
[295] The Agreement Amending Article 22 of the SADC Treaty 2007.
[296] https://www.tralac.org/discussions/article/11875-amendments-of-annex-1-to-the-sadc-finance-and-investment-protocol-are-they-in-force-yet.html accessed 10/12/2017.
[297] A. Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law,* Canadian Yearbook of International Law/Annuaire Canadien De Droit International, (1977), p 14, 73-95. doi:10.1017/S0069005800000904 C.
[298] *Ibid.*
[299] Freeman (n 1) 1; de Visscher (n 1) 390; Paulsson (n 2) 4; F Francioni, '*Access to Justice,*

The amendments to Annex 1 illustrate the difficulty in finding the proper balance between protecting investors and protecting the host states.

Denial of Justice and International Investment Law' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009).

Conclusion

International investment agreements were often cited as being imperative to promote the 'rule of law'. However, they also created a privileged legal system which was skewed in favour of foreign investors at the expense of developing countries.

The dispute resolution clauses in most BITs provided for investor-state-dispute settlement, which allow foreign investors to bring claims against host states before international arbitral tribunals, in cases of a breach of the agreement.

As the number of concluded BITs increased, so did the number of ISDS cases instituted against states. There has been growing criticism against this system because of its impact on the capacity of governments to pursue and implement reforms and development related policies.

In response to the problems facing ISDS, many developing countries, including South Africa reviewed their international investment policies and adjusted their approach when engaging in international investment agreements.

South Africa's Protection of Investment Acts dispute settlement provisions are quite restrictive. The government has taken a conscious decision to limit foreign investors' access to international forums. Soon after the PIA was introduced, Annex 1 of the SADC FIP was amended. The result being that it is now more consistent with South Africa's legislation.

These measures are consistent with current global trends in response to ISDS's legitimacy crisis. Furthermore, such measures are not restricted to developing countries. Both the United States' House of Representatives and European countries expressed opposition to the incorporation of ISDS in the proposed Transatlantic Trade and Investment Partnership (TTIP) [300]. Ironically, many of the concerns raised by South Africa during discussions with the EU prior to terminating the EU BITs were raised by some of the EU member states during the TTIP negotiations[301].

[300] Negotiations between the EU and the US have resulted in high level public debate about the merits and demerits of international investment agreements.
http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf accessed 25/4/2018.
[301] M. De Gama, Director of Legal, Trade and Investment in the Department of Trade and Industry. Republic of South Africa. Personal Interview, 24 July 2014.

While reforming their international investment policies, it is however crucial that host-states consider the legitimate protection concerns of investors and provide appropriate alternative options and independent and efficient procedures to resolve disputes.

Chapter 6 - Summary of findings

Soon after gaining democratic governance, South Africa concluded numerous bilateral investment treaties that did not provide for policy space. There are several reasons for this: - at the time, most countries, including South Africa did not pay much attention to the details of the agreements; there was a lack of appreciation of the possible implications and many of the IIAs were signed for diplomatic reasons. Additionally, the overriding belief at the time was that bilateral investment treaties would attract foreign direct investment.

In the late 1990s South African officials became aware of the challenges posed by the investment treaties, and how they hindered the black economic empowerment policy which was designed to redress inequalities in the political, social and economic spheres of South Africa.

Prompted by the Piero Foresti case, the South African government initiated a review of its policy regime. This change in investment regime was consistent with global trends and specifically mirrored the BIT revisions and modernising processes taking place in other countries, including the United States, Canada and Australia.

Given South Africa's prominent and powerful position on the continent and within the SADC region, the changes taking place domestically have had a 'spill-over' effect on the international investment policy within the region.

The SADC Finance and Investment Protocol had been enacted to ensure a level of cooperation and harmonisation which was necessary for regional financial integration. The FIP was signed in August 2006 by all SADC member states and came into force in 2010.

However, member states were slow to ratify and domesticate the Protocol due to a lack of implementation planning. Moreover, the SADC FIP provided more or less similar investment protection clauses as those typically found in 'first generation' BITs, hence member states soon found that their policy space was also restricted.

The South African government was instrumental in the development of the SADC Model BIT which was finalized in 2012. The Model BIT was developed in line with the overall goal of the SADC FIP - to promote harmonization of member states investment policies and law. However, it was intended to be used as a guideline for governments,

so they may consider it in any future negotiations they entered into relating to investment treaties and developing their national legislations.

The SADC Model BIT recommended several deviations from standard BIT provisions, including: recommendations regarding exceptions for measures relating to public morals and safety, omission of a most-favoured nation provision, a provision which confirms a host states right to regulate in the public interest and the omission of any provision providing foreign investors with recourse to international investor-state arbitration.

The South African Protection of investment Act was developed from the SADC Model BIT.

The Protection of Investment Bill was introduced in 2013, and was subject to much criticism, particularly from EU and US investors. They expressed concern regarding the expropriation clause, the exclusion of investor-state-dispute settlement, equal treatment of foreign investors and the timing of the BIT termination and the presentation of the Act.

One of the key claims against the PIA was that it was inconsistent with the SADC FIP Annex 1. In 2016 South Africa and other member states (including Botswana and Namibia) took steps to amend Annex 1, to align with South Africa's domestic legislation and the recommendations of the SADC Model BIT.

However, while seeking to protect states' right to regulate, both the South African government and the SADC member states have significantly limited the international dispute resolution options available to aggrieved foreign investors. On one hand, such policies reduce host states' exposure to legal and financial risks that are associated with ISDS, but on the other hand, they could make it more difficult for foreign investors to assert and defend their rights.

Recommendations

- SADC member states to adopt the Model BIT

  The Model BITs template can be adopted by member states as they develop their own domestic investment legislation, or when engaging in international investment treaty negotiations. The Model BIT encapsulates the modern

thinking and approach to investment governance by recommending an approach which deviates from the traditional BITs. Furthermore, in developing their own legal frameworks, they would do so within the guidelines suggested by the Model BIT, which could support efforts to harmonise investment policy in the region;

- Provide adequate protections for investors

  In light of the recent changes both domestically (within South Africa) and regionally - within the SADC region, investors may find themselves in a precarious position. The lack of a sunset clause or a transitional provision in the Amendment of Annex 1 could leave investors who had protection under the previous Annex 1 without protection. This could amount to denial of justice claims if alternative forums are not established or are not adequate. Having taken the lead in these matters, South Africa and the SADC Secretariat should clarify this position;

- Enhance level of integration within the SADC Region

  As pointed out by organisations such as the OECD, the SADC region needs to review its current approach to investment policy issues, which is still rather fragmented. For example, member states could coordinate incentives in the natural resource extraction sector. This would ensure that member states do not 'under-cut' each other, which often leads to a race to the bottom[302];

- South Africa's commitment to regional integration

  In order to successfully develop a more harmonised policy, the region would need South Africa's commitment. As the strongest and most developed member state, no other country plays a bigger role in shaping the continents and the region's economic future;

- EU secretariat-like powers

  SADC is committed to following a linear economic integration plan[303] based on the EU integration model. The success of the wholesale application of this model in the African context is debatable. However, South Africa is in a good position to adopt the European Commission's tactics which advance

[302] Regional extractives strategy suggested by Wentworth L, Schoeman M. and Langalanga A., Foreign Direct Investment and Inclusive Growth in Southern Africa, 4/10/2017.

[303] Moving from a free trade area to customs union, and ultimately culminating in a common market with a single currency.

integration. For example, the EC uses various strategies such as framing policy debates and influencing member states preferences regarding the integration of international investment policy.

Overall conclusion

South Africa's decision to review its investment policy has elicited a lot of criticism from both professionals, academics and traditional trading partners. However, the direction which the policy has taken is in line with many developments occurring around the world - in both developed and developing countries. With regard to South Africa's position within the SADC region - its policy review and subsequent approach to international investment agreements was likely to have a substantial impact on the SADC region.

Overall, the author is of the opinion that South Africa's impact on the SADC regions international investment policy has been positive. The 2016 SADC FIP did away with a lot of outdated provisions which exposed host states to onerous international arbitration claims. Moreover, the SADC Model BIT recommends an approach that aims to provide an appropriate balance between the interests of foreign investors and the host-states right to regulate in the public interest.

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