Legal Protection of Foreign Investment in South Africa

by

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Declaration

Except for references specifically indicated in the text, and such help as I have acknowledged, this thesis is wholly my own work and has not been submitted for degree purposes at any other University

Certification

I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

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List of Acronyms

ANC	African National Congress
BEE	Black Economic Empowerment
BIT	Bilateral Investment Treaty
DTI	Department of Trade and Industry
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
MFN	Most Favoured Nation
SADC	Southern African Development Community
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organisation

Abstract

Foreign Direct Investment (FDI) is regarded as a key contributor to economic growth and wealth creation in both developing and developed countries. It is for this reasons that countries compete on the international stage to attract the limited amount of FDI that is available internationally. Countries compete for this limited amount of investment by a number of means but one of the most important factors is the protection of investments.

Countries offer foreign investors certain protections to guarantee that they may safely and securely invest in that specific country. By establishing these protections countries hope that foreign investors will choose that country to invest in. The main instruments that have been used in recent years to offer this protection are treaties. These treaties are commonly known as bilateral investment treaties or BITs.

South Africa is no exception and the country has concluded BITs with a number of other nations to offer investors this protection. The main purpose of such BITs are to ensure the protection of investments and also to promote foreign investment. These BITs do however place significant obligations on its parties and they may not always be beneficial. As a result of the risks related to these treaties the South African government decided to terminate many of its BITs.

The cancellation of these BITs has however left a gap with regards to investment protection in South Africa. The South African government accordingly decided to fill this gap by way of domestic legislation. This legislation is the so-called Protection of Investment Act. It intends to protect investments in South Africa while at the same time achieving a balance between investor protection and public interest.

The history of South Africa's investment regime is largely similar to what was seen internationally at any given time. In recent years however the cancelation of BITs and the Protection of Investment Act has been a departure from the international norm.

A comparison of the Protection of Investment Act and some South African BITs reveal that there are some major differences between the two types of instruments. The Act clearly offers less robust protections when compared to South African BITs.

A closer analysis of the provisions of the Act also reveals that the Act in itself significantly departs from international standards relating to investor protection. It

further appears that the Act over-emphasises public interest at the expense of investor protection.

The cancellation of many BITs together with the enactment of the Protection of Investment Act has significantly altered South Africa's investment regime. Taking into account South African BITs and international standards it is clear that investor protection has been greatly weakened in the country. On the other hand, government now has far greater flexibility when it comes to regulation that may affect a foreign investor. This reduction in protection may however unfortunately lead to a decrease in investor confidence in South Africa.

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CHAPTER 1

INTRODUCTION

1.1.Background to the study

International investment is increasingly seen as a significant contributor to both economic growth and prosperity throughout the world.[1] As a result, most countries pursue foreign direct investment (FDI) in order to advance their national economic development.[2] This pursuit of FDI is particularly pronounced among developing countries that have an enormous amount to gain from such investments.[3] Such investment may provide a number of key benefits to countries from employment and skills development to the transfer of technology and development in general.[4] These potential benefits attached to FDI generates competition between states to attract the limited amount of investments available internationally to their own countries.[5]

It is however not only countries that may benefit from international investment. Companies from both developed and developing countries invest massive amounts of capital and other resources abroad each year.[6] They do so in order to reach new markets, increase production efficiencies and to take advantage of natural resources and knowledge.[7] Although pure economic considerations are major drivers of international investments, they are not the only factors that influence such investments.

Investors usually take great care to ensure that they can maximize their returns and minimize the risk associated with any investment.[8] As a result legal rules and institutions also affect international investment flows.[9] The legal investment framework of a specific country will for instance determine how an investment may be made, the nature of the rights of the investor and host state and the method for resolving investment disputes.[10] An investor will therefore closely

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[1] JW Salacuse *The Three Laws of International Investment* (2013) vii.
[2] As above.
[3] NR Nourbakhshian et al 'The Contribution of Foreign Direct Investment into Home Country's Development' (2012) 3 *International Journal of Business and Social Science* 276.
[4]Nourbakhshian (n 3 above) 277.
[5]G Anastassopoulos 'Countries' International Competitiveness and FDI: An Empirical Analysis Of Selected EU Member-Countries And Regions' (2007) 10 *Journal of Economics and Business* 36.
[6] JW Salacuse *The Three Laws of International Investment* (2013) vii.
[7] As above.
[8] As above.
[9] As above.
[10] As above.

consider how a country's legal framework affects a prospective investment before investing in that particular country.[11]

The importance of this legal consideration has had a significant effect on international investment law. The movement of capital across borders has driven the progress in international investment law and specifically the progress in bilateral investment treaties (BITs).[12] International investment law, and more specifically BITs, has in turn driven the volume of international investments.[13]

Investors anticipating that there would be profit to be made in foreign countries requested that their governments enter into agreements with other states.[14] These agreements, which are now known as BITs, are intended to facilitate and protect their investments in these foreign countries.[15] This development has also had the consequence of encouraging new flows of capital to the countries that had entered into these agreements.[16] These new investment flows were a result of the fact that these treaties reduced the risk associated with investing in a specific country. Countries that were eager to benefit from these enhanced flows of FDI started to promote investments into their country by concluding these BITs.[17]

Treaties of this nature could have many different purposes but their primary objectives are typically twofold. First, they aim to protect investments so that an investor can safely and securely invest in a particular country.[18] Second, they attempt to promote and encourage investment with the hope that increased FDI will lead to development and prosperity.[19] As a result, BITs were generally seen as a 'win-win' when concluded between a capital exporting developed country and a capital importing developing country.[20] On the one hand, the developed country received assurances that its investors would be protected in the host state,

[11] UNCTAD 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries' (2009) xii.

[12] JW Salacuse & NP Sullivan 'Do BITs Really Work? : An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 *Harvard International Law Journal* 71.

[13] As above.

[14] As above.

[15] As above.

[16] As above.

[17] Salacuse & Sullivan (n 4 above) 78.

[18] Salacuse (n 1 above) 355.

[19] Salacuse (n 1 above) 356.

[20] Salacuse & Sullivan (n 12 above) 77.

and on the other hand, the developing country had the prospect of a greater influx of FDI from a more developed state.[21]

As is the case with many developing countries, South Africa has also made use BIT's to protect foreign investors and more importantly, to attract FDI. To date, South Africa has concluded 49 individual agreements with different countries.[22] These treaties have been signed with a wide array of countries on both ends of the development spectrum. South Africa, for instance, has a BIT with Finland on the one end and a country like Guinea on the other.[23] The motivation for concluding agreements with these two seemingly contradictory countries is however different. The motivation for a BIT with developed countries like Finland is probably to protect and promote investments from those countries into South Africa. The motivation for entering into treaties with less developed countries like Guinea is probably to protect South African investments in those countries.[24]

1.2 Research problem

The South African government has however recently decided to terminate a number of these investment treaties specifically BITs signed with European countries.[25] BITs between South Africa and among others, the Netherlands, Spain, Luxembourg, Belgium and Germany have all been cancelled with more cancellations expected.[26] The main reason for these withdrawals, according to the Department of Trade and Industry (DTI), is that these treaties are unequal and exploitative and excessively constrains governmental policies needed to fight poverty.[27]

The termination of BITs has however created some lacunae with regards to investor protection in South Africa that had to be addressed. The South African government accordingly decided to protect foreign investments by way of municipal legislation and no longer by way of international treaty. The legislation intended to replace BITs and provide investor protection is

[21] As above.
[22] http://investmentpolicyhub.unctad.org/IIA/CountryBits/195 (accessed 05-12-15).
[23] As above.
[24] This is only generally true as there is also FDI from less developed countries into South Africa and investments from South Africa into more developed countries.
[25] A Jeffery 'The Investment Bill and FDI: promotion and protection of investment bill' (2014) 18 *Without Prejudice* 18.
[26] P Leon & B Winks 'A reversion to diplomatic protection? : Promotion and Protection of Investment Bill' (2014) 14 *Without Prejudice* 14.
[27] Jeffery (n 25 above). Other reasons are that the BITs do not conform to the Constitution and that they limit the policy space available to government. See J Lang, 'Bilateral Investment Treaties – a shield or a sword?'

the so-called "Protection of Investment Act"[28] (the Act).[29] The Act aims to, among other things, provide for the legislative protection of investors and to achieve a balance between the rights and obligations of investors and the state.[30] This Act appears to significantly alter the protections that were afforded to foreign investors under the terminated BITs (like the Germany-South Africa BIT for instance).[31] When compared to some of the cancelled BITs, the Act modifies or completely removes provisions relating to expropriation, compensation, fair and equitable treatment, national treatment, repatriation of funds, full protection and security and dispute resolution.[32]

As a result of the above, critics have voiced the opinion that the Act will bring about a decline in FDI into South Africa.[33] It has further been argued that the Act in combination with the termination of BITs will likely serve to repel investments rather than promoting it.[34] A possible reduction in FDI resulting from the termination of BITs and the Act may have serious impacts on South Africa. In a country that is facing major economic problems including high unemployment such a change may not be prudent. In the words of the EU ambassador to South Africa, Roeland van de Geer:

> '*With South Africa reportedly attracting less than half of the FDI of comparably sized economies, eroding the existing protections that foreign investors enjoy in the country should be carefully, and financially, assessed*.'[35]

1.3 Research questions

Does the Protection of Investments Act provide sufficient legal protection to foreign investors and their investments in South Africa?

1.3.1 Sub-questions

i. How has the legal protection of foreign investment in South Africa evolved?

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[28] Act 22 of 2015.
[29] The Act will be discussed below in both chapter three and four.
[30] Jeffery (n 25 above)
[31] Webb, M 'No more BITs and pieces' (2013) 10 *Without Prejudice* 10.
[32] Jeffery (n 25 above) 19.
[33] Webb (n 31 above)
[34] Jeffery (n 25 above)
[35] Jeffery (n 25 above) 20.

ii. What are the implications of the provisions contained in the Protection of Investment Act?

iii. How does the provisions of the Protection of Investments Act compare to the content of South Africa's cancelled BITs and BITs in general?

1.4 Thesis statement

In light of the above the author suggests that South Africa will not offer sufficient legal protection to foreign investments. This author further proposes that this lack of protection has been brought about by the termination of several BITs as well as the enactment of the Protection of Investment Act.

1.5 Scope of the research

In light of the above, the study will seek to investigate whether or not the new Act indeed provides sufficient protection to foreign investors and their investments. In order to come to a conclusion regarding the above, this study intends to investigate the history of investor protection in South Africa with a specific emphasis on its recent history. This study will also examine in detail the provisions of the Act in order to determine the level of protection offered to investors. It will further scrutinize whether the investors' protection offered in terms of the Act is balanced when compared to the public interest.

1.6 Limitations

It should be noted that this study does not attempt to investigate the economic impact of BITs or any other type of investor protection. It is merely a legal analysis of foreign investor protection in South Africa. This study further does not seek to investigate the motives or rational of any public interest or public policy position of the South African government.

1.7 Sources and approach

The bulk of the research for this study consisted of desktop and library based research. Some of the most important sources that have been relied upon is books by well-known authors, reports by international organisations and submissions relating to the Act made by interested parties.

1.8 Structure of dissertation

The mini-dissertation is structured as follows. Chapter two is a short history of investor protection in South Africa with an emphasis on its recent history. The focus is therefore on the conclusions and subsequent termination of South African BITs and the adoption of the Act.

The following chapter seeks examine the provisions of the Act. In this case, the Act is examined in relation to international standards of investor protection as well as common BIT provisions. This chapter further seeks to determine whether the Act fulfils its purposes with specific reference to the balance between investor protection and public interest.

Chapter four is an extension of the previous chapter and contains a comparative analysis of the Act on one hand and BITs on the other. This chapter seeks to compare the protections offered in terms of the Act with the investor protections offered in terms of two carefully chosen South African BITs. It seeks to determine which investment instrument offers the greatest protection to a foreign investor in South Africa.

Chapter five is the conclusion of the study. In it a summary of what has been learnt will be provided. It will further provide some recommendations for the way forward.

CHAPTER 2

EVOLUTION OF INVESTOR PROTECTION IN SOUTH AFRICA

2.1 Introduction

International investment protection law is one of the most dynamic areas of international law.[1] This branch of international law has an interesting history globally and also in relation to South Africa. This chapter seeks to investigate the evolution of investment protection law in South Africa with specific focus on its recent history.

2.2 Pre-1994 history

The history of investment protection in South Africa dates back to colonial times and had developed in the early days as part of a colonial system. In the eighteenth and nineteenth century foreign investments worldwide were mostly made in the context of colonial expansion.[2] Overseas investments of the time were protected in the colonies by the laws of the imperial powers in control at the time. The imperial laws in place during this period offered an adequate level of protection to foreign investors. This level of protection negated the necessity for an international law relating to the protection of foreign investments.[3] This state of affairs was also applicable in South Africa that had been an English and Dutch colony during this time. Foreign investors in the country could therefore rely on the colonialists to protect their investments in South Africa.

With the dissolution of the various colonies came the need for some sort of international system to protect foreign investors.[4] These investors could no longer rely upon the imperialists to protect their investments in previously colonised states. Accordingly, a system was developed over a period of time to offer this protection once again. In time international law principles like diplomatic protection and state responsibility were formed to provide protection for foreigners. These principles did however not guarantee the successful protection of an investment. The major issue was that these standards were unclear and that an investor's home state regularly had to get involved in disputes.[5] During the period when these rules were

[1] M Paparinskis *Basic Documents on International Investment Protection* (2012) 1.
[2]M Sornarajah *The International Law on Foreign Investment* 3rd Edition (2010) 19.
[3] As above.
[4]Sornarajah (n 2 above) 20.
[5] As above.

applicable internationally they would similarly have been relevant in South Africa. These principles however left much to be desired.

During the apartheid era the country was an isolated state. During this time South Africa did not attract a large amount of foreign investment with most major investments being made by local companies.[6] The South African laws applicable at the time had however favoured the limited amount of foreign investors that were present in the country. This was a result of the fact that the country's property regime was similar to the regimes of the home states of these investors.[7]

2.3 Post-1994 history

This post-colonial period of international investment protection in South Africa was followed by the modern era of international investment protection law. In modern times international investment agreements are concluded between states in order to protect the investors of the parties concerned in their respective territories. These agreements are often in the form of BITs, although there are some important multilateral instruments. These treaties have now become an exceptionally important instrument for the protection of foreign investors and investments[8].

The first modern BIT was entered into between the United Kingdom and Pakistan in 1959.[9] This treaty took a significant step in clarifying the rules applicable to international investment, especially the protection of investors.[10] Although these modern treaties had existed from 1959, the South African government, which at the time had been the Apartheid government, had not entered into any such treaties.[11] South Africa at this stage was therefore bound only to the rules of customary international law.

2.3.1 The South African bilateral investment treaty programme

The South African BIT programme started in the early 1990's when the Apartheid regime was collapsing.[12] The United Kingdom (UK) at the time was concerned that the incoming African

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[6]A Langalanga 'Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context' South African Institute of International Affairs (2015) 5.
[7] As above.
[8] UNCTAD *World Investment Report* (2012) 84.
[9] LE Peterson 'South Africa's Bilateral Investment Treaties Implications for Development and Human Rights' (2006) Dialogue on Globalisation, Occasional Papers 6.
[10] As above.
[11] As above.
[12]LNS Poulsen 'Bounded Rationality and the Diffusion of Modern Investment Treaties' (2014) 58 International Studies Quarterly 7.

National Congress (ANC) government would expropriate or nationalize British investments in the country.[13]The ANC at the time was also embarking on a campaign to liberalize the economy and attract foreign investment. The Thatcher government nevertheless thought it important to guarantee protection for the substantial amount of British investments in the country.[14] As a result, the UK approached the South African government to enter into a BIT to ensure the protection of their investments.

The two countries entered into negotiations and in 1994 the South African and UK governments concluded a BIT which was based on the standard European model BIT.[15] At the time of conclusion of the BIT such agreements were largely perceived to be harmless and many developing countries concluded them.[16] Closer analyses of these treaties however reveal that such agreements may potentially be quite harmful, especially to a developing country.

The South Africa-UK BIT[17] (UK-SA BIT) for instance contained provisions that were in all probability inconsistent with South Africa's broader economic objectives.[18] These provisions were not only inconsistent with economic policy but also with the country's newly drafted interim Constitution.[19] One of the most problematic provisions contained in this BIT was the national treatment clause. In terms of this clause there was no explicit exception that offered the state the right to give specific local firms preferences.[20] The Constitution on the other hand expressly encouraged affirmative action in order to advance historically oppressed persons and their participation in the economy.[21] The national treatment clause in the UK-SA BIT and affirmative action clause in the Constitution were therefore conflicting and incompatible.

National treatment and affirmative action is however not the only inconsistency between these two documents. The provisions relating to expropriation also differs in two essential ways. The Constitution provides that compensation must be paid in cases of expropriation but that such compensation could be less than market value when considering certain factors.[22] The BIT

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[13] M Mossallam 'Process Matters: South Africa's Experience Exiting its BITs' (2015) The Global Economic Governance Program (working paper) 7.
[14]Poulsen (n 12 above) 7.
[15] As above.
[16]Mossallam (n 13 above)7.
[17]Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa for the Promotion and Protection of Investments 1994. (UK-SA BIT). This BIT is discussed in Chapter four in more detail.
[18]Peterson (n 9 above) 20.
[19]Constitution of the Republic of South Africa Act 200 of 1993.
[20]Article 3. Mossallam (n 10 above)7.
[21] Section 8.
[22] This will be discussed in Chapter three in more detail.

however did not allow for any deviations from "prompt, adequate, and effective compensation" and such compensation further had to amount to the "genuine value of the investment".[23] Furthermore, the BIT did not draw a distinction between expropriation and deprivation. This suggests that deprivation and expropriation should be treated equally and that both should therefore be compensated.[24] The Constitution on the other hand made a clear distinction between the two, with no compensation payable for deprivation but payable in the case of expropriation.[25]

The UK-SA BIT brought this type of investment treaty to the attention of the South African Government who thought it to be a useful tool to attract foreign investment. As a result, between 1994 and 1998, South Africa entered into 15 further BITs with mostly European countries.[26] These treaties all employed the UK-SA BIT as a basis. This was as a consequence of the governmental decision to use this BIT as a model for future treaties.[27] This choice was however regrettably not based on a careful legal analysis of the document but rather on the fact that it was the first BIT they had come across.[28] This lack of clear consideration was a result of the perception that these agreements were a risk-free way of attracting foreign investments.[29]

After entering into numerous BITs between 1994 and 1998 South Africa continued to conclude BITs with many other countries. A number of these newer generation BITs did however move away from the UK model. Today South Africa is party to 49 of these treaties although some of them have never entered into force and some have been terminated.[30]

2.3.1 South African review of investment policy

The government policy to conclude a large number of BITs was however not destined to last forever. The transformation would occur in 2007, even though there had been some concerns about the policy in the latter parts of the 1990's and early 2000's.[31] The year 2007 would be a major turning point for the South African government's policy on BITs. As this would be the year that the risks associated with BITs would be appreciated by the South African

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[23] Article 5.
[24] Mossallam (n 13 above) 8.
[25] Section 8 (2) & (3).
[26] http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf (Accessed 20 March 2016).
[27] Mossallam (n 13 above) 9.
[28] Poulsen (n 12 above) 8.
[29] As above.
[30] http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu (Accessed 20 March 2016).
[31] Mossallam (n 13 above) 10.

Government. This realisation was as a result of South Africa being taken to international arbitration based on one of these treaties.

The 2007 arbitration case involved a claim by several Italian citizens and a Luxembourg corporation against South Africa. The claim was based on a BIT known as the Belgium-Luxembourg BIT. The main focus in this arbitral case, known as the Foresti Case,[32] was the conflict between BEE[33] and the provisions of the BIT.[34] The case was eventually settled on its merits but it forced Cabinet to appreciate the fact that these agreements were not risk-free, as had previously been assumed.[35] The realisation that these treaties threatened government's ability to regulate domestic policy prompted a review of the South African foreign investment regime.[36]

The review commenced in 2007 and it "entailed looking at both the macro and micro environment surrounding BITs".[37] This comprehensive review involving more than a hundred stakeholders was concluded in 2010.[38] The review drew some noteworthy conclusions. First it found that there was no correlation between the existence of a BIT with one country and the flow of FDI from that country.[39] Second it found that there was a need for adequate policy space, especially in a developing country. It further found that these investment treaties often substantially limited this space.[40] The review recommended that South Africa develop a new overarching policy relating to foreign investment.[41]

This recommendation was taken up by cabinet which made a series of conclusions based on the review. The most important decisions that were taken by cabinet were to:[42]

(i) develop domestic legislation to incorporate BIT provisions;
(ii) terminate first generation BIT's; and
(iii) develop a new South African Model BIT.

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[32] Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1).
[33] Black Economic Empowerment.
[34] Mossallam (n 13 above) 10.
[35] Poulsen (n 12 above) 11.
[36] Mossallam (n 13 above) 11.
[37] As above. Department of Trade and Industry (DTI) Bilateral Investment Treaty Policy Framework Review. Government Position Paper to Cabinet (2009) 5.
[38] As above.
[39] DTI (n 37 above) 22.
[40] DTI (n 37 above) 54.
[41] As above.
[42] DTI (n 37 above) 55

Based on these decisions the South African Government began terminating older BITs. Many BITs concluded with European countries have as a result been terminated to date, including the UK and Belgium-Luxembourg BITs.[43] Most of these treaties do however still offer protection to the relevant investors in the form of a sunset clause. This is evident in the Germany-SA BIT for example, where the run-off protection for existing protected investments lasts 20 years.[44]

At the same time, the South African Government also drafted the Promotion and Protection of Investment Bill (PPIB). This Bill intended to establish a domestic law to protect foreign investments and effectively replace BITs.[45] The Bill was passed in parliament, although with a slightly different name, and published in the Government Gazette of 15 December 2015. The Act is known as the Protection of Investment Act 22 of 2015 and it will be discussed in detail later on.

The development of a purely South African model BIT has as of yet not emerged. The Southern African Development Community (SADC), of which South Africa is a member, has however developed a model BIT.[46] The aim of which is to harmonize the investment policies and laws of member states.[47] This model may therefore be used by South Africa in future when concluding BITs.

2.4 Conclusion

The South African investment regime has for most of the country's existence been closely linked to the international standard prevalent at the time. This was especially true in colonial times and thereafter when diplomatic protection was the primary investor protection. South Africa also followed the international trend, albeit slightly later, by signing numerous BITs. These treaties unfortunately were not clearly thought out or considered and ultimately resulted in this latest development in the country's investor protection regime.

In recent times, South Africa has broken with the trend and done something that is not internationally prevalent today. They have terminated many BITs that limit policy space and have decided to enact domestic legislation to offer protection to foreign investors. The

[43] http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu (Accessed 20 March 2016).
[44] Germany- SA BIT article 13 (3).
[45] Mossallam (n 13 above) 13.
[46] SADC *Model Bilateral Investment Treaty Template* (2012).
[47] SADC (n 46 above) 3.

termination of BITs is however today a growing movement, although not yet a mainstream phenomenon. South Africa may consequently be at the forefront of a new trend in investor protection but only time will tell whether this direction will be successful or not.

CHAPTER 3

ANALYSIS OF THE PROTECTION OF INVESTMENT ACT

3.1 Introduction

As mentioned in chapter two the Protection of Investment Act[1] came about as a result of the South African government's decision to review the country's investment framework. The Act is intended to replace terminated first generation BITs and to become the basis of the country's investor protection regime. As a result, it deals with the rights and obligations of foreign and local investors as well as the rights and obligations of government.[2] In order to do this it includes provisions that are typically addressed in BITs such as national treatment, security of investment, expropriation and dispute settlement among others.[3]

The stated purpose of the Act according to section four is as follows:

> *"(a) protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors;*
>
> *(b) affirm the Republic's sovereign right to regulate investments in the public interest; and*
>
> *(c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic."*

The first specified purpose of the Act is similar to the primary purpose of all international investment treaties, to protect investments and investors.[4][5] The long and short titles of the Act as well as the preamble confirm that investor protection is in fact one of its primary objectives. This primary purpose is however limited by the need to balance investor protection with public interest. This balance between investors on the one hand and the public on the other is a reoccurring theme throughout the Act. The long title, the preamble as well as section four all mention this balancing of rights. Section four and the preamble both refer to the right of

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[1] Act 22 of 2015.

[2] S Woolfrey 'The Emergence of a New Approach to Investment Protection in South Africa' S Hindelang& M Krajewski (eds) *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016) 282.

[3] As above.

[4] JW Salacuse*The Three Laws of International Investment* (2013) 355.

[5] According to Salacuse the promotion of investment is another primary objective of investment protection treaties. The Act however does not include the promotion of foreign investment as one of its purposes.

government to regulate investments in the public interest. This regulation is the mechanism through which public purpose goals are to be achieved.

The two most important purposes of this Act are thus to protect investment and to ensure that such protection is balanced with public interest. This chapter consequently aims to examine the provisions of the Act in relation to its stated purposes.

It will therefore examine whether sufficient protection is offered to investors and their investments. Additionally, it will investigate whether or not the Act achieves a balance between the rights and obligations of investors and the public interest.

3.2 Provisions of the Protection of Investment Act

3.2.1 Definition of investment

The first provision that merits analysis when considering any international investment instrument is the definition of investment. This provision is essential as it delineates the scope of application of the Act. It is fundamentally necessary to initiate the protections and provisions found in the Act.[6]

The most commonly applied type of definition in this regard is the broad asset based approach as will be discussed with regards to the UK-SA and China-SA BIT in chapter four.[7] Definitions of this nature have however been criticized by some. This is due to the fact that they have often been very widely interpreted by arbitral bodies in the past.[8] This broad stance on interpretation has recently resulted in a trend towards narrowing the definition in newer investment instruments.[9]

The Act defines Investment not as one would expect under the definitions section[10] but rather includes a distinct section dealing only with this specific term. This highlights the importance of the term 'investment' in the context of this Act. The definition is dealt with in section two of the Act under the heading 'Investment 'and it reads as follows:

> **"***(1) For the purpose of this Act, an investment is—*

[6] EC Schelemmer 'Investment, Investor, Nationality and Shareholders' in P Muchlinski et al (eds) *The Oxford Handbook of International Investment Law* (2008) 50.
[7]Ranjan P 'Definition of Investment in Bilateral Investment Treaties of South Asian countries and Regulatory Discretion' (2009) 219 *Journal of International Arbitration*220.
[8] United Nations Conference on Trade and Development (UNCTAD) 'Scope and Definition' (2011) 5.
[9] As above.
[10] The Act (n 1 above) Section 1.

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

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

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

(2) For the purposes of the definition of ''investment'', an enterprise may possess assets such as, amongst others—

(a) shares as defined by the Companies Act, 2008 (Act No. 71 of 2008), stocks, debentures, securities as defined in the Financial Markets Act, 2012 (Act No. 19 of 2012), or other equity instruments of the enterprise or another enterprise;

(b) a debt security of another enterprise;

(c) loans to an enterprise;

(d) movable or immovable property or other property rights such as mortgages, liens or pledges;

(e) claims to money or to any performance under contract having a financial value;

(f) copyrights, know how, goodwill, or intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent that they are recognised under the law of South Africa;

(g) returns such as profits, dividends, royalties or income yielded by an investment; or

(h) rights or concessions conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources."

The first consideration to take into account when evaluating a definition of investment is to determine whether an asset or enterprise based approach is employed. In this case the Act follows an enterprise based approach to defining investment.[11] This is clear from the fact that the Act requires the establishment, acquisition or expansion of an *enterprise* or the holding or acquisition of shares in an *enterprise* for an investment to exist.[12]

The next important aspect of the definition of investment is the limiting factors that apply to it. These factors may be divided into two main categories: the legality of the investment and the nature of the investment.

With regard to the legality standard, the definition of investment states that the enterprise concerned must be lawful. It however goes further than just lawfulness of the enterprise. The definition requires that the establishment, acquisition or expansion of an enterprise must be in accordance with the laws of South Africa.

The addition of these legality provisions to the definition has the effect of excluding any unlawful enterprise as well as any unlawful investment into an enterprise from the definition.[13] This will result in any such unlawful enterprise or investment not enjoying the protections offered in terms of the Act.

The condition that investments must be made in terms of the laws of South Africa has two primary purposes. The first purpose is to affirm that both local and foreign investors have to comply with the laws of the country, thereby levelling the playing field between these investors.[14] The second and more significant motivation is to ensure that an investment will only be covered if it is consistent with the host country's development policy, which is expressed through its domestic legislation.[15] This consequently allows South Africa to only give protection to those investments which satisfy its domestic needs, as set out in municipal legislation.[16]

The concern is however that legislation affecting the legality of an investment may be changed at any time. An amendment of legislation will therefore affect the legality of investments made after such a change. The country therefore has a broad regulatory discretion in this regard. The fact that South Africa may alter its laws and regulations at any time may lead to uncertainty

[11] The definition in the Act closely resembles the enterprise based definition in the Southern African Development Community (SADC)'Model Bilateral Investment Treaty Template' (2012).
[12] This is similar to the definition employed in the Canada-United States Free Trade Agreement (1988).
[13] UNCTAD 'International Investment Agreements: Key Issues Volume I' (2004) 122.
[14] UNCTAD 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking' (2007) 9.
[15] As above.
[16] Ranjan (n 7 above) 235.

regarding which investments qualify for protection under the Act and which do not.[17] This aspect of the definition therefore tends to protect the state's right to regulate above the rights of investors.[18]

The second limiting factor relates to the nature of the investment covered. The Act requires that an investment be made by: "committing resources of economic value over a reasonable period of time, in anticipation of profit".[19] The primary purpose of this limitation is the exclusion of portfolio investments from the protection of the Act.[20] This exclusion will therefore ensure that investments that qualify under this Act will contribute to the economic development objectives of South Africa.[21]

The exact meaning of the phrases "economic value", "reasonable period of time" and "anticipation of profit" is at this stage unclear. The meaning of these phrases will however depend on both the specific facts of a particular case as well as the sector in which the investment is made.[22] The fact that the wording is not clearly defined at the moment may however result in ambiguity and uncertainty in the minds of investors. Their exact meanings will likely become evident when they are considered by a court or some other adjudicatory body.

The definition also allows other ways in which investments may be made. An investor may make an investment by way of the "holding or acquisition of shares, debentures or other ownership instruments of such an enterprise".[23] This is merely an extension of the previously discussed subsection and any such investment would similarly have to comply with the requirements as discussed above.

The last method of investment is by way of a holding, merger or acquisition of an enterprise with another enterprise outside the Republic.[24] These action will however only be considered an investment when they have the effect of an investment as contemplated in the two subsections discussed previously.

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[17]M Sornarajah *The International Law on Foreign Investment* 3rd Edition (2010) 227.
[18] As above.
[19] The Act (n 1 above) Section 2(1)(1)(a).
[20] UNCTAD (n 13 above) 123. Portfolio investments are instruments like shares that are ordinarily traded and freely circulated through stock exchanges or other markets.
[21]Department of Trade and Industry (DTI) 'Summary of Submissions for the Promotion and Protection of Investment Bill (PPIB)[B18-2015]' (2015) 22.
[22] As above.
[23] The Act (n 1 above) Section 2(1)(1)(b).
[24] The Act (n 1 above) Section 2(1)(1)(c).

In addition to the above methods of investments, the definition also includes a list of assets that an enterprise may possess. [25]This list is not a *numerus clausus* as is evident from the use of the words "amongst others". The list of assets is therefore merely included for illustrative purposes and may therefore be useful in the interpretation of this section.

The above shows that the definition of investment in the Act is relatively limited in its scope. The consequence is that fewer investments will be covered by the Act, and as a result, fewer foreign investors will be able to rely on its protections. The definition further leads to uncertainty with regards to which investments will be covered and which investments will not. This is of concern as an investor would want to be assured that it can rely on the provisions of the Act should it wish to invest in South Africa.

3.2.2 National treatment

The national treatment provision contained in the Act is the next provision of importance. National treatment similarly to MFN has its roots in international trade law and can be found in World Trade Organisation treaties.[26] This provision is present in most international investment instruments and is perhaps the most important provision to be found in these instruments.[27]

National treatment is what is known as a relative standard of treatment as opposed to an absolute standard.[28] The standard is relative since it invites a comparison between the treatment afforded to a domestic investor and the treatment afforded to a foreign investor.[29] The content of this standard is therefore based on the determination of the treatment of a local investor and does not offer any absolute protection. This measure will therefore not protect a foreign investor where harsh measures are taken against a host country's local investors.[30] As a result, absolute standards remain essential in any investor protection instrument.[31]

This type of clause is also one of the most problematic to be incorporated into investment instruments. This is due to the fact that the aim of the provision is to ensure non-discrimination

[25] The Act (n 1 above) Section 2(2).
[26] National treatment can be found in article 3 of the General Agreement on Tariffs and Trade (1947) for example.
[27]UNCTAD (n 13 above) 161.
[28] As above 162.
[29] UNCTAD 'National Treatment' (1999) 6.
[30]Sornarajah (n 17 above) 203.
[31] As above.

between local and foreign investors.[32] While this purpose in itself seems logical, it is one of the most challenging standards to achieve.[33] This is owing to the fact that national treatment prohibits a state from offering preferential commercial conditions to its own citizens.[34] A national treatment provision may therefore raise some economic and politically sensitive issues.[35] National treatment often means that a host state may not promote domestic industries in order to advance economic growth or promote equality.[36]

In recent times, it has been argued that developing countries should be able to discriminate between local and foreign investors and support its domestic industries.[37] The argument in this regard is that most developed countries applied discriminatory policies throughout their own development period, but now do not allow developing countries to do the same.[38] It is however not clear at this stage what effect such an exemption would have or whether it would be feasible. It is however a fact that developing countries have agreed to this standard and should therefore abide by its consequences.

When one considers the implications of a specific national treatment provision, there are a number of important aspects that require investigation. Some of the most important characteristics that have to be taken into account is the scope of coverage, the substantive content of the standard and the exceptions to the standard.[39] The author will discuss these as they relate to the Act below.

The National treatment provision of the Act is found in section eight. This section states:

> *"**8.** (1) Foreign investors and their investments must not be treated less favourably than South African investors in like circumstances.*
>
> *(2) For the purposes of this section, ''like circumstances'' means the requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment, including the—*

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[32] UNCTAD (n 13 above) 161.
[33] As above.
[34] K Nadakavukaren Schefer *International Investment Law* (2013) 303.
[35]UNCTAD (n 13 above) 161.
[36]UNCTAD (n 29 above) 3.
[37] Sornarajah (n 17 above) 203.
[38] As above.
[39]UNCTAD (n 29 above) 10.

(a) effect of the foreign investment on the Republic, and the cumulative effects of all investments;

(b) sector that the foreign investments are in;

(c) aim of any measure relating to foreign investments;

(d) factors relating to the foreign investor or the foreign investment in relation to the measure concerned;

(e) effect on third persons and the local community;

(f) effect on employment; and

(g) direct and indirect effect on the environment.

(3) The examination referred to in subsection (2) must not be limited to or be biased towards any one factor.

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

(a) taxation provisions in any international agreement or arrangement or any law of the Republic;

(b) government procurement processes;

(c) subsidies or grants provided by the government or any organ of state;

(d) any law or other measure, the purpose of which is to promote the achievement of equality in South Africa or designed to protect or advance persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability in the Republic;

(e) any law or other measure, the purpose of which is to promote and preserve cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage; or

(f) any special advantages accorded in the Republic by development finance institutions established for the purpose of development assistance or the development of small and medium businesses or new industries.''.

The first issue to deliberate on is the scope of the provision. In this regard, the question arises whether the national treatment standard applies to both the pre- and post-entry[40] stage or only to post-entry. This provision does not clearly state when national treatment is applicable. The section however determines that "Foreign investors and their investments"[41] are protected by this provision. The effect of this wording is that only investors and investments receive protection under this section. In order to be regarded as an investor or for there to be an investment present the "act" of investing must already have been concluded. The consequence is that only the post-entry period is secured under this section. This provision consequently does not confer any rights on a would-be investor prior to the establishment of an investment.[42]

The next issue of importance is the substantive provisions of the clause. This can be separated into two topics. First is the factual situation in which the national treatment applies, second is the content of the standard itself.

The factual situation in which the provision will apply relates to the circumstances under which an investor may rely on the standard. In the case of the Act, an investor may rely on this protection where it and a South African investor are in 'like circumstances'.[43] The question that now arises is: what is considered to be 'like circumstances'? The Act fortunately does provide a solution in this regard. In subsection two the Act offers an open list of factors to be taken into account when determining 'like circumstances'.

The Act states that in order to determine 'like circumstances' there has to be an overall examination taking into account all of the terms of the investment including the entire list. This wide test with regards to 'like circumstances' is employed in the Act to ensure that a broad view is taken when assessing the question of 'like circumstances'.[44] It was introduced to ensure that the narrow view that 'like circumstances' only entails that the investors must be in a related competitive sector is not taken.[45]

[40] Pre-entry would be the period before an investment is actually made in a particular host country. Pots-entry is the period after an investment has been made in a host country.
[41] The Act (n 1 above) Section 8(1).
[42] Section 7 of the Act also states that no right to establish is created in favour of a foreign investor. This further supports the argument that only post-entry protection is offered in terms of the Act.
[43] This term is used in most national treatment provisions.
[44] DTI (n 21 above) 33.
[45] As above.

The test is further described in subsection three which states that the enquiry into 'like circumstances' should not be biased towards any one factor. The effect that an investment has on the environment must not be considered above the effect on employment for instance.

Even though this list of factors is non-exhaustive and generally couched in wide language it may still serve to narrow the definition of 'like circumstances'.[46] This narrow definition of likeness may result in a foreign investor very seldom being in like circumstances compared to a local investor.[47] The consequence will be that many foreign investors are *de facto* excluded from the national treatment protection.[48] A further result of this list is that it may create uncertainty specifically because the language used is so wide and ambiguous.[49] The concern is that the wide language may be used to limit the scope of application of the national treatment provision.

The consequence of this 'like circumstances' test will be that a local and foreign investor will scarcely be judged to be in like circumstances as the test takes many wide factors into account.[50] Some commentators have even suggested that this could bar foreign investors from protection if they have not performed comparably with local investors on issues such as job creation, local procurement, BEE ownership transactions, and so on.[51] It is difficult to imagine a case where this test will result in a large multi-national corporation being adjudicated as being in 'like circumstances' to a local investor. This wide ranging test therefore severely limits the scope and effectiveness of this protection.

The next enquiry that arises in this regard is the actual content of the standard itself. In other words, how must a foreign investor be treated in relation to a local investor? The Act states that a foreign investor "must not be treated less favourably than a South African investor".[52] The Act therefore uses the "no less favourable" standard which is found in most international

[46]The EU Chamber of Commerce and Industry in Southern Africa 'Submission on the Promotion and Protection of Investment Bill 2013' (2015) 7.
[47] As above.
[48] As above.
[49] Vodacom 'Submission on the Draft Promotion and Protection of Investment Bill, 2013' (2014) 5.
[50] Mandela Institute 'Legal Analysis of the Suggested Amendments to the Promotion and Protection of Investment Bill' (2015) 13.
[51]A Jeffery 'The Investment Bill and FDI: promotion and protection of investment bill' (2014) 18 *Without Prejudice* 19.
[52] The Act (n 1 above) Section 8(1).

investment agreements.[53] The simple result of this language is that a foreign investor must receive treatment at least as favourable as the treatment received by South African investors.[54]

The last important aspect relating to any national treatment provision is the exceptions that apply to it. The exclusions in this regard is of great importance as both the number and scope of the exceptions will determine the practical effect of the national treatment protection.[55] The most common approach in BITs is the opt-out method in which the parties agree on situations in which the provision will not apply.

In this case the Act also applies the opt-out method and it is contained in subsection four. This subsection states that the protection as offered in subsection one will not apply in cases where a local investor obtains a benefit as a result of certain listed circumstances. In this case, the subsection lists six situations[56] which are excluded from the application of the national treatment provision.

The list includes an exception relating to any law with the purpose of achieving equality or that is designed to protect or advance previously disadvantaged people. This exception is clearly aimed at allowing South Africa the freedom to implement equality policies and legislation like BEE. It is very likely a direct result of the Foresti case brought against South Africa.[57]

The Act also excludes taxation provisions from the reach of national treatment. It however interestingly does not only exclude these provisions as they relate to international agreements but also provisions contained in any law of the Republic. The practical implication is that the South African government may discriminate between local and foreign investors by way of tax legislation.

The sensible use of qualifications and exceptions to national treatment can create a balance between public interest and the protection of investors. In particular, the development needs of a developing country may require such exceptions and flexibility in a provision.[58] Most international investment instruments do in fact contain some exceptions to the national treatment provision. The majority of these instruments however do not contain such a large

[53]UNCTAD (n 13 above) 174.
[54] Of course this remains subject to the 'like circumstances 'test as discussed above.
[55] UNCTAD (n 13 above) 177.
[56] The Act (n 1 above) Section 8(4) (a-f).
[57]Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1). The case is discussed in more detail in chapter two.
[58] UNCTAD (n 29 above) 5.

number or such a wide scope of exceptions. The practical effect of these exceptions is therefore that the national treatment provision is watered down and its application is limited.

Taking the national treatment provision as a whole it is clear that the protection established as well as the scope of application is restricted. The protection is limited by the fact that the standard only applies post-entry, although this is the case in most international investment agreements. The scope of application of this protection is perhaps the more significant issue. In terms of the Act the scope is severely limited by both a stringent test for like circumstances as well as a number of extensive exceptions. The cumulative effect of the above will be that the practical use of the national treatment provision will likely be exceptionally limited. The protection offered by this provision to a foreign investor will consequently be inadequate in most if not all cases.

3.2.3 Physical security of property

Section nine of the Act deals with the security that is to be afforded to a foreign investor and its investments. This provision is partially based on similar standards present in investment agreements that are known as protection and security clauses.[59] Provisions of this nature are referred to as absolute standards of treatment as they are typically non-contingent.[60] As a result, they usually define the treatment to be afforded to an investment without referring to the treatment provided to other investments or investors.[61] In this case the provision is however slightly different, it stipulates as follows:

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

What is immediately clear when reading this provision is the fact that this provision is a hybrid between an absolute and a relative standard. It is a relative standard in that the level of security to be provided is as "may be generally provided to domestic investors".[62] It however also provides that this level is "in accordance with minimum standards of customary international

[59] See chapter four for a discussion of this clause in the UK-SA as well as China-SA BIT.
[60] UNCTAD (n 14 above) 28.
[61] As Above.
[62] The Act (n 1 above) Sec 9.

law".[63] This provision may consequently lead to confusion as to what level protection it truly offers.

This standard also differs from most 'security and protection' provisions in that it only provides for physical security. It does not, as is often the case, provide for full protection and security.[64] The security of investment provision accordingly only covers security of a physical nature and not an overall protection. The wording of this section is intended to create clarity in that the security of investment does not extend to other protections such as legal protection.[65]

Clarity regarding the type of the protection offered was deemed necessary since there has been different approaches taken by arbitration tribunals. This difference of interpretation can be demonstrated by referring to the Saluka[66] and Azurix[67] cases. The tribunal in the Saluka case stated that:

> *"…the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."*

In the Azurix case, a tribunal however found differently and held that:

"…it is not only a matter of physical security; the stability afforded by a secure environment is as important from an investor's point of view."

In this case, the Act is very clear that only physical security, as provided by the police,[68] is covered and the protection is consequently in line with the approach taken in Saluka.

The security section goes on to state that the level of physical security is "subject to available resources and capacity".[69] The addition of this phrase places a caveat on the obligation of the Republic to provide physical security.[70] This phrase once again differentiates section nine from a standard 'protection and security' clause, as such a limitation is generally not incorporated.

The wording of the standard may however lead to uncertainty. It is unclear at this stage whether the phrasing allows government to provide a lower level of security to foreign investors in

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[63] As above.
[64] UNCTAD (n 14 above) 28.
[65] DTI (n 21 above) 40.
[66] Saluka Investments B.V. v. The Czech Republic, UNCITRAL.
[67] Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12.
[68] DTI (n 21 above) 40.
[69] The Act (n 1 above) Sec 9.
[70] The EU Chamber of Commerce and Industry in Southern Africa (n 46 above) 8.

some cases. The question is whether the government may provide less protection to a foreign investor compared to a domestic investor should there be a lack of resources and capacity?[71] Considering the normal meaning of the phrase 'subject to' it would appear that the protection offered in this case is dependent on the availability of resources. If this is the case, government may offer less security to a foreign investor than to a local should there be a lack of resources.

This phrase further implies that the South African government will not be liable for damages to an investor's property if sufficient resources are not available.[72] This has the effect that government will only be required to offer security at the *"minimum standard of customary international law"*[73]when there is sufficient resources and capacity available.

This clause accordingly deviates from similar provisions found in international investment agreements in three ways. First it only provides for physical security, second it does not guarantee an absolute right but rather a type of hybrid right and third it limits the obligation by way of capacity and resources. This section thus does not provide investors with a sufficiently robust right to security and this may have serious administrative and financial ramifications.[74]

3.2.4 Expropriation

Instruments relating to investment protection usually contain some sort of guarantee against expropriation of property without the payment of compensation.[75] These guarantees are of importance because the taking of property is regarded as one of the most significant risk that a foreign investor may face in a host country.[76] These instruments consequently seek to allay the fears that investors may have regarding the taking of their property or investments.

As will be discussed in chapter four the Act also contains such a guarantee. This guarantee is found in section 10 which specifically incorporates section 25 of the Constitution. Section 10 of the Act reads as follows:

"*10. Investors have the right to property in terms of section 25 of the Constitution.*"

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[71] Mandela Institute (n 50 above) 17.
[72] S Woolfrey 'The Emergence of a New Approach to Investment Protection in South Africa' in S Hindelang& M Krajewski (eds) (n 2 above) 279.
[73] The Act (n 1 Above) Sec 9.
[74]The EU Chamber of Commerce and Industry in Southern Africa (n 46 above) 8.
[75] Sornarajah (n 17 above) 99.
[76]UNCTAD (n 13 above) 236.

The fact that the section incorporates section 25 of the Constitution makes it necessary to quote that section here. The most important subsections stipulate the following:

> *"Property*
> *25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
> *(2) Property may be expropriated only in terms of law of general application—*
> *(a) for a public purpose or in the public interest; and*
> *(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*
>
> *(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—*
> *(a) the current use of the property;*
> *(b) the history of the acquisition and use of the property;*
> *(c) the market value of the property;*
> *(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
> *(e) the purpose of the expropriation.*
>
> *(4) For the purposes of this section—*
> *(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and*
> *(b) property is not limited to land.*
>
> *(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*
> *…"*

There are two main considerations to take into account when investigating an expropriation clause in any investment instruments. The first consideration would be to determine what constitutes expropriation. The second determination that has to be made is how an investor will be compensated when expropriation takes place.

The first issue of importance must be discussed in light of the Agri SA v Minister of Mining and Energy[77] case. This recent Constitutional Court case is of great importance to any discussion relating to expropriation in the South African context. The background to this case is briefly that the appellants were a group of South African investors challenging the Mineral and Petroleum Resources Development Act [78](MPRDA). This Act is intended to provide equitable access to the country's natural resources and to ensure that these resources are sustainably developed. In order to achieve this goal the Act required holders of old-order mining rights[79] to convert these rights to new-order mining rights.[80] Thus a claim was instituted by Agri SA on behalf of a company that could not apply for the new rights as it had been liquidated. The appellants claimed that the company's old-order rights had in fact been expropriated.

The Constitutional Court in this matter accordingly had to decide whether this state of affairs amounted to expropriation and more specifically indirect expropriation. Indirect expropriation occurs where an act of the state results in the diminution of the value of an investor's property.[81] Expropriation of this nature does not require the state to benefit from the deprivation or expropriation but merely a reduction in value of the property concerned.

The majority of the court held that a deprivation had taken place but that the deprivation was not arbitrary and it was done in terms of a law of general application.[82] This consequently meant that the deprivation was carried out in terms of s25 (1) of the Constitution and that this deprivation did not amount to expropriation. The majority held that expropriation could only occur where there had been a compulsory acquisition of rights in property by the state.[83] In this case the state did not acquire ownership of the rights, they were merely made the custodians of the mining rights. Expropriation had accordingly not occurred in this case.

[77]2013 (4) SA 1 (CC).
[78] Act 28 OF 2002.
[79] These rights were real (ownership) rights.
[80] These rights are more limited in scope when compared to old-order rights.
[81] A Langalanga 'Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context' South African Institute of International Affairs (2015) 20.
[82]Agri SA (n 77 above) Para 53.
[83]Agri SA (n 77 above) Para 68.

The effect of the judgment is that indirect expropriation is considered to be deprivation and it does not amount to expropriation as defined by section 25. The importance of this finding is that where there is a diminution in the value of property, caused by the state, an owner will have no recourse. The owner of property will only have recourse, and receive compensation, when direct expropriation has occurred. This case therefore ruled that the well-established international principle of indirect expropriation is not applicable in South Africa.[84]

The next matter of importance is the method of compensation in the case of expropriation. Section 25(3) deals with this aspect. Its states that the amount, manner and time of compensation must be equitable. This equity must be determined by way of balancing the public interest and the interest of those affected. This balance is achieved by taking into account all relevant circumstances including those contained in the list in section 25(3).[85] This list is not a *numerus clausus* and consists of five factors which include the market value of the property, the purpose of the expropriation and the use of the property.

The value of compensation is one of the major differences between section 25 of the Constitution and customary international law.[86] The difference occurs mainly in the determination of the amount of compensation payable to an investor. In terms of section 25, the market value is only one of the factors to be taken into account in this determination. Most international investment agreements, including the BITs that South Africa is party to, stipulate that the value is determined only by market value.[87] This valuation, is based on the Hull formula[88] which employs the willing buyer willing seller principle in order to calculate the fair market value of property.[89] On the subject of differing standards of compensation, Sean Woolfrey of the Trade Law Centre of Southern Africa states:

> "*From the point of view of foreign investors, a guarantee of full market value compensation is certainly more reassuring than a guarantee of 'just and equitable'*

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[84]K Bosman 'South Africa: Trading international investment for policy space' Stellenbosch Economic Working Paper (2016) 18.
[85] The Constitution of the Republic of South Africa Section 25(3) (a-e).
[86]Langalanga (n 81 above) 22.
[87]Bosman (n 84 above) 20.
[88] The formula states that compensation must be 'prompt, adequate and effective'". It was developed by American Secretary of State Cordell Hull.
[89]Langalanga (n 81 above) 22.

> *compensation, the exact determination of which is likely to be less predictable and more open to political influence."*[90]

In summary section 25 of the Constitution[91] and thus section 10 of the Act differs from the international standard of expropriation in two major ways. First, the Constitution, when read with the Agri SA case, does not recognise the principle of indirect expropriation. In other words, the deprivation of property must result in the acquisition of ownership by the state to be regarded as expropriation. Second, the Constitution does not apply the fair market value approach when it comes to determining the value of compensation. It rather uses a blended form which takes the market value into account in conjunction with other factors that are not related to the commercial value of the property.[92]

This section of the Constitution, as a result, does not align with international investment law standards, particularly in these two respects.[93] The protection offered to investors by this guarantee is accordingly not as comprehensive as in most other investment instruments and customary international law.[94] Investors' fears relating to expropriation may therefore not be completely dispelled by the Act and section 25 Constitution.

3.2.5 Transfer of funds[95]

Similar to most investment instruments, the Act also deals with the transfer of funds by a foreign investor from the host country to another country. Provisions of this nature are essential in international investment instruments.[96] These provisions are of importance because a foreign investor needs to be certain that the money invested as well as any profits can be repatriated to its home country. At the end of the day, these provisions are intended to ensure that the investor

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[90] L Ensor 'Bill to limit arbitration for foreign investors' (Business day 31 Oct 2013) http://www.bdlive.co.za/business/2013/10/31/bill-to-limit-arbitration-for-foreign-investors.

[91] The Constitution is however not the only piece of legislation that has an impact in this regard. Acts like the Restitution of Land Rights Amendment Act, and the Property Valuation Act as well as the Expropriation Bill will all have an effect on expropriation in South Africa.

[92] Bosman (n 84 above) 20.

[93] Bosman (n 84 above) 22.

[94] Woolfrey 'The Emergence of a New Approach to Investment Protection in South Africa' in S Hindelang& M Krajewski (eds) (n 2 above) 279.

[95] These provisions are also often referred to as repatriation of funds clauses.

[96] Sornarajah (n 17 above)206.

is able to enjoy the fruits of a successful investment.[97] If such a transfer is not possible, then there would be no reason for an investor to make an investment in a country in the first place. The Act's provision in this regard reads as follows:

"A foreign investor may, in respect of an investment, repatriate funds subject to taxation and other applicable legislation."[98]

The Act therefore gives an investor the right to repatriate funds but, as is common in the Act, limits this right. The right is limited by the addition of the phrase 'subject to taxation and other applicable legislation'. This places a very limited obligation on the state as it may alter taxation and other legislation so that such transfers are restricted or disallowed. The provision is therefore unlikely to give an investor the assurances that it needs when it comes to the repatriation of funds.[99]

It may be argued that an investor requires an absolute right to repatriate funds from a host country in order to feel protected. Sornarajah however argues that it is imperative not to have such an absolute right to repatriate profits.[100] An absolute right in this regard would be unrealistic as problems relating to foreign exchange shortfalls require some form of currency control.[101] In fact these types of exceptions to a repatriation of funds provision are quite common. The standard as provided for in the Act should therefore be sufficient to protect foreign investors. It is however important that the South African government not use other legislation to unreasonably limit the movement of funds.

3.2.6 Right to regulate

The Act places significant emphasis on the right of the South African government to regulate and as a result it includes a provision concerning this right.[102] Provisions of this nature are

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[97] UNCTAD (n 13 above) 257.
[98] The Act (n 1 above) Sec 11.
[99] The South African Institute for Race Relations 'Submission to the Portfolio Committee on Trade and Industry regarding the Promotion and Protection of Investment Bill of 2015 [B18 -2015]' (2015).
[100] Sornarajah (n 17 above) 206.
[101] Sornarajah (n 17 above) 207.
[102] Woolfrey 'The Emergence of a New Approach to Investment Protection in South Africa' in S Hindelang& M Krajewski (eds) (n 2 above) 282. Section 4 (b) states that one of the purposes of the Act is to affirm the sovereign right of the Republic to regulate investments in the public interest.

generally not provided for in investment treaties.[103] In fact all investment treaties by their very nature limit the sovereign right of a host state to regulate.[104] This section of the Act is specifically included to affirm that the Act does not alter or restrict the South African government's right to regulate.[105] The provision stipulates the following:

> *"12. (1) Notwithstanding anything to the contrary in this Act, the government or any organ of state may, in accordance with the Constitution and applicable legislation, take measures, which may include—*
>
> *(a) redressing historical, social and economic inequalities and injustices;*
>
> *(b) upholding the values and principles espoused in section 195 of the Constitution;*
>
> *(c) upholding the rights guaranteed in the Constitution;*
>
> *(d) promoting and preserving cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage;*
>
> *(e) fostering economic development, industrialisation and beneficiation;*
>
> *(f) achieving the progressive realisation of socio-economic rights; or*
>
> *(g) protecting the environment and the conservation and sustainable use of natural resources.*
>
> *(2) The government or any organ of state may take measures that are necessary for the fulfilment of the Republic's obligations in regard to the maintenance, compliance or restoration of international peace and security, or the protection of the security interests, including the financial stability of the Republic."*

This section stresses South Africa's sovereign right to regulate in the public interest.[106] This right to regulate is increasingly being seen as a critical element in international investment law.[107] The increased importance of the right to regulate is firstly caused by the view that states

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[103] H Mann 'The Right of States to Regulate and International Investment Law' 5. Available at: http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf .
[104] Sornarajah (n 17 above) 265.
[105] DTI (n 22 above) 52.
[106] P Leon & B Winks 'A reversion to diplomatic protection?: Promotion and Protection of Investment Bill' (2014) 14 Without Prejudice 15.
[107] H Mann 'The Right of States to Regulate and International Investment Law' 2. Available at: http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf .

are losing national sovereignty as a result of international obligations.[108] The second factor increasing its importance is the growing number of cases where public welfare legislation has been challenged on the basis of trade and investment laws.[109]

This particular provision affords the South African government and other organs of state a wide ranging exceptions concerning all the protections offered in terms of the Act. The use of the phrase "Notwithstanding anything to the contrary in this Act"[110] makes it clear that the right to regulate is elevated above the other provisions of the Act. In other words, where government acts in terms of this provision none of the protections offered in terms of the Act will be available to an investor to challenge such an action.

The measures[111] that government or any organ of state may take in terms of section 12(1) is almost limitless.[112] The subsection states that government or an organ of state may take measures provided that they are in compliance with the Constitution and other legislation. These measures may include a wide array of actions which are listed in the section. It is however important to note the use of the word 'including' before the list which indicates that the list does not limit the measures that may be taken in terms of this provision.

Subsection two allows government and any organ of state even further powers to regulate. This subsection is however slightly different than the previous subsection. It differs firstly because the provision does not state that measures in terms of the subsection have to be taken *"in accordance with the Constitution or applicable legislation*".[113] The second major difference between the subsections is that in subsection two the measures are limited to measures relating to international peace and security as well as the security interests of South Africa.

The two subsections discussed above are obviously intended to achieve the goal of the balancing investor protection with the government's right to regulate. The section however fails to achieve such a balance. In fact, this provision does not provide any balance what so ever as it elevates the right to regulate above all the other provisions of the Act. It also does not

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[108] As above.
[109] As above. The recent case brought by Philip Morris Asia against Australia in terms of a BIT is a recent example of such a challenge. In that case Philip Morris challenged Australia's legislation relating to plain packaging of tobacco products.
[110] The Act (n 1 above) Section 12(1).
[111] Measure is defined in section 1 as: "*refers to any binding governmental action directly affecting an investor or its investment, and includes laws, regulations and administrative action."*
[112] Business Unity South Africa 'Summary of Submissions for the Promotion and Protection of Investment Bill (PPIB)[B18-2015]' (2015) 52.
[113] The Act (n 1 above) Section 12(1).

limit or specify what measures may be taken by government thereby opening this section up to possible abuse.[114] The lack of precise wording and limitation to this right may render the protections offered to an investor in terms of the Act inadequate.[115] This is as a result of the fact that this very broad right of the government to make regulations may be applied to avoid protections offered under the Act.[116]

This section substantially limits the usefulness of the Act to any foreign investor. This is because one of the main objectives of any international investment treaty is precisely to limit the right to regulate of a host state.[117] This is done in order to reduce investor uncertainty and to counter the threat of adverse laws and regulations of a host state.[118] This section of the Act does the opposite in that it increases uncertainty and does not counter the threat of adverse laws and regulations to an investor.

While it is important to ensure that any government does have the right to regulate it must be achieved in a sensible and balanced manner. There is a fine line between the right of a state to regulate and the duty to protect foreign investors.[119] In this case, there is a lack of balance between these two competing principles. The seemingly unlimited right of the government to take measures shifts the balance too far in favour of the host state. This section as a result will only lead to doubt for a foreign investor in South Africa and will do nothing to promote their protection.

3.2.7 Dispute resolution

Most international investment agreements offer rules for the resolution of disputes arising out of those particular instruments. Most of these treaties specifically allow for the resolution of such disputes by way of arbitration in a neutral forum.[120] The vast majority of such instruments, especially BITs, provide further that such disputes may be pursued by private parties against host states.[121]

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[114] Centre for Constitutional Rights 'Concise Submission on the Promotion and Protection of Investment Bill [B18 -2015]' 4.
[115] The EU Chamber of Commerce and Industry in Southern Africa (n 46 above) 10.
[116] South African Chamber of Commerce and Industry 'Summary of Submissions for the Promotion and Protection of Investment Bill (PPIB)[B18-2015]' (2015) 52.
[117] Salacuse (n 4 above) 355.
[118] As above.
[119] Bosman (n 84 above) 6.
[120] Sornarajah (n 17 above) 216.
[121] UNCTAD (n 13 above) 384.

The importance of these provisions from the perspective of the investor is that they can be used to ensure that a host country meets its obligations in terms of an investment instrument.[122] From this viewpoint, it increases the level of certainty and predictability for investors.[123] These provisions may therefore be key to diminishing country risks associated with investment and as a result may encourage foreign investment.[124] Robust dispute resolution provisions are therefore essential to the functioning of any investment instrument and the Act is no exception.

The Act deals with dispute resolution in section 13. The most important subsections of this provision read as follows:

> *"13. (1) An investor that has a dispute in respect of action taken by the government,*
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> *which action affected an investment of such foreign investor, may within six months of becoming aware of the dispute request the Department to facilitate the resolution of such dispute by appointing a mediator.*
>
> …
>
> *(4) Subject to applicable legislation, an investor, upon becoming aware of a dispute as referred to in subsection (1), is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment.*
>
> *(5) The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. The consideration of a request for international arbitration will be subject to the administrative processes set out in section 6. Such arbitration will be conducted between the Republic and the home state of the applicable investor."*

As will be revealed in chapter four South Africa's BITs make provision for the resolution of disputes that arise out of the agreement. South Africa's BITs usually allow a foreign investor to approach an international tribunal in order to resolve a dispute.[125] The international nature

[122] UNCTAD (n 14 above) 28.
[123] As above.
[124] As above.
[125] See chapter four.

of this procedure ensures that arbitrators are not influenced by domestic political considerations.[126] The importance of international arbitration was confirmed in the case of Gas Natural SA v The Argentine Republic.[127] The court observed that independent international arbitration is overwhelmingly regarded as a "*crucial element*" which is "*essential*" to investment protection.[128]

Section 13 provides for dispute resolution but this provision is once again a departure from the norm. The section provides for three different types of dispute resolution mechanisms. First, it makes provision for mediation[129] second for other procedures such as litigation[130] and lastly for international arbitration.[131]

In terms of the mediation provision the investor may within six months after becoming aware of a dispute request the DTI to resolve the dispute by appointing a mediator. The following two subsections provide guidelines as to the appointment of such a mediator as well as what information is to be submitted.[132] These further arrangements are not of importance to the current discussion. What is however important is the word '*may*' in subsection one. This wording has the effect of allowing the investor to elect whether to use mediation or some other method of dispute resolution.

The investor's next option for resolving a dispute is found in subsection four. This subsection stipulates that an investor is not precluded from approaching a competent court, independent tribunal or statutory body inside the Republic. It is important to note that this procedure is subject to applicable legislation. The investor may therefore approach any legally recognised institution to resolve the dispute so long as the body is within South Africa. An aggrieved investor as a result cannot approach an international institution or body to resolve a dispute unless it is done in terms of subsection five.

The last possible mechanism for the resolution of a dispute is found in subsection five. This provision allows for the use of international arbitration but does have multiple restrictions and exceptions. The first of these limitations is that the procedure is subject to the exhaustion of

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[126] A Jeffery 'The Investment Bill and FDI: promotion and protection of investment bill' (2014) 18 *Without Prejudice* 19.
[127] ICSID Case No ARB/03/10.
[128] Leon & Winks (n 106 above)14.
[129] The Act (n 1 above) Section 13(1-3).
[130] The Act (n 1 above) Section 13(4).
[131] The Act (n 1 above) Section 13(5).
[132] The Act (n 1 above) Section 13(2 & 3).

local remedies. This requirement was historically a necessary phase before one could approach an international dispute resolution body.[133] In recent years however, this has not been a prerequisite in most investment instruments.[134] In practice, this requirement means that a foreign investor will have no choice but to approach a domestic court before arbitration may be considered.[135]

The second limitation is that the government 'may' consent to international arbitration. The consideration of such a request will be done in terms of the fair administrative treatment section of the Act.[136] The language of this provision allows the South African government a very wide discretion not to consent to this type of arbitration. This raises the question as to why the government would ever be inclined to allow this type of arbitration? The author submits that this consent will very rarely, if ever, be given to a foreign investor. The South African government will not be willing to take the risk associated with international arbitration.

The third limitation concerns the type of international arbitration that is allowed under the Act. The Act states that any international arbitration will be conducted between the home state of the investor and the Republic. The investor will therefore not be allowed to directly challenge the government. This provision places international dispute resolution in terms of the Act back in line with the antiquated system of diplomatic protection.[137]

The practicality of diplomatic protection as a dispute resolution mechanism however varies wildly. The success or failure of diplomatic protection often depends on the home state's power and policies vis-à-vis the host state.[138] The feelings of the host state towards a particular investor requesting such protection may further hinder the usefulness of this option.[139] The result will thus be that investors from different home states may not be on an equal footing when it comes to international arbitration.

While the first two dispute resolution procedures aren't without fault, it is the third method that is of greatest importance. The three limitations mentioned above are severely restrictive on a foreign investor. In practical terms, an investor will have to do the following in order to resolve a dispute by way of international arbitration:

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[133] UNCTAD (n 14 above) 108.
[134] As above.
[135]EC Schlemmer 'Protection of Investors and Investments' (2009) 21 *SA Mercantile Law Journal* 744.
[136] The Act (n 1above) Section 6.
[137]Leon &Winks (n 106 above) 14.
[138] As above.
[139] As above.

First the investor will have to request mediation or approach a court of tribunal in order to resolve a dispute. The investor will then have the duty to exhaust local remedies, which may take years, before being able to consider international arbitration. Government after the exhaustion of local remedies *may* then consent to international arbitration. Even in the instance, where government does choose to consent to such arbitration, an investor will have to persuade its home government to take up the case against South Africa.

This process is long and drawn out and does not guarantee that an investor will be heard before an international tribunal. This is as a result of two peculiarities found in the Act. First, the requirement of government's consent which will in all likelihood rarely be given. Second, the fact that an investor will have to persuade its home government to pursue such a matter against the government of South Africa.

The above illustrates the fact that the dispute resolution provisions of the Act are insufficient especially when compared to investor-state dispute settlement. The provision relating to dispute settlement are "out of kilter with developments in international investment law and essentially regressive".[140] The Act overlooks the fact that increased investor certainty and therefore investors' confidence can flow from the internationalisation of investment disputes.[141] In this case, the investor will not have the certainty that stems from such a mechanism, in fact this provision will lead to the opposite. Dispute resolution in terms of the Act will undoubtedly lead to a reduction of confidence as the provisions of the Act are of little value when they cannot be effectively enforced by an investor.

3.2.8 Other provisions

The provisions discussed above are only the most essential sections of the Act. There are however other sections of less importance that merit some discussion.

Section five stipulates circumstances under which the Act will be applicable. It states that the Act will apply to all investments in the Republic which are made in accordance with the requirements of section two.[142] It is noteworthy that this Act is not only applicable to foreign investments but that it is applicable to "all investments in the Republic". The result is that South African investors will also be able to rely on certain provisions of the Act.

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[140] As above.

[141]The South African Institute for Race Relations (n 99 above) 67.

[142] These requirements were discussed above under the definition of investment section.

The usefulness of this Act for a South African investor will however be very limited. These investors cannot rely on the provisions relating to national treatment,[143] security of property,[144] transfer of funds,[145] and international dispute resolution.[146] The provisions that domestic investors can rely on do not provide for any additional rights. The right to property and right to just administrative treatment for instance are already guaranteed by the Constitution. This Act accordingly does not provide a domestic investor with any additional protection. It is therefore unclear why local investors are even included in the application of the Act.

The Act further affords assurances relating to fair administrative treatment of investors. Section six of the Act places an obligation on the government to provide investors with fair administrative treatment. This section deals with administrative justice,[147] the right to reasons for a decision, the right of review[148] and the right to access of information.[149] These rights and obligations are however already provided for in other instruments.

Rights relating to just administrative treatment are already protected by way of the Constitution[150] and the Promotion of Administrative Justice Act.[151] Rights granted to investors relating to the access of information is similarly provided for in the Constitution[152] as well as in the Promotion of Access to Information Act.[153] This section of the Act accordingly does not offer an investor any significant rights, it merely confirms rights and obligations that are already in existence.

Some investment agreements provide for pre-entry rights to investors. Some even go as far as specifically granting a prospective investor the right of establishment. In the case of the Act, the opposite is true. Section seven states that investments must be made in terms of the laws of South Africa.[154] It further states that the Act does not create a right for a foreign investor to be

[143] The nature of the national treatment provision means that it cannot apply to a local investor.
[144] The security of investment section only applies to foreign investors.
[145] The transfer of funds provision logically only applies to foreign investors.
[146] The international dispute resolution mechanism in terms of this act is based on state-state arbitration. A local investor will therefore not have a home state that can act on its behalf against South Africa.
[147] The Act (n 1 above) Section 6(1).
[148] The Act (n 1 above) Section 6(2).
[149] The Act (n 1 above) Section 6(3).
[150] The Constitution (n 85 above) Section 33.
[151] Act 3 of 2000.
[152]The Constitution (n 85 above) Section 32.
[153] Act 2 of 2000.
[154] This is similar to the requirement found in the definition of investment.

established in South Africa. This provision merely affirms the position that the Act does not grant any pre-establishment privileges for a prospective investor.

Section 15 provides for the transitional arrangements. It states importantly that any investment made under a BIT will continue to be protected under that BIT for the period and on the terms stipulated in the specific treaty. It further specifies that any investment that was not made in terms of a BIT but was made before the promulgation of the Act will be governed by general South African law. The effect of this is that investments made prior to the promulgation of the Act will not receive the protections offered in terms of the Act.

3.3 Omitted provisions

For the purposes of the current discussion it is imperative to not only assess the provisions contained in the Act but also assess which provisions are not included at all. The Act does contain most provisions that one would find in any international investment instrument, albeit normally with some variations. The Act however does not contain certain provisions that are generally considered to be standard in these instruments and specifically in BITs. The two most important provisions that are not found in the Act is MFN and fair and equitable treatment (FET) provisions.

3.3.1 Most favoured nation

The MFN standard is one that is common in investment instruments including BITs.[155] The MFN provision is similar to the national treatment provision in that it is a relative standard and in that it is also found in international trade law. This standard generally provides that a host country may not treat investors from one country less favourably than it treats investors from any other foreign country.[156] Where a host state offers this standard to an investor it may latch on to any more favourable treatment offered to any other investor in the past or future by that host state.[157]

The Act does not contain such a provision and therefore does not offer investors the advantages associated with it. The DTI argues in its response to submissions that because the Act is not an international treaty, it would make no sense to include such a provision.[158] It further states that such a provision would be pointless as the Act does not differentiate between the nationalities

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[155] Sornarajah (n 17 above) 204.
[156] UNCTAD (n 13 above) 191.
[157] Sornarajah (n 17 above) 204.
[158] DTI (n 21 above) 36.

of investors.[159] The practical effect of such a provision would be that all investors in South Africa would be able to rely on the most favourable treatment that is offered to any investor. This would mean that where BITs are still in force like in the case of China -SA BIT, investors may rely on those provisions. Investors would also be able to rely on provisions of future BITs should any be concluded. The result of this would be that the provisions of the Act would be of no or very little significance. Including such a provision in the Act would make the Act itself pointless. The exclusion of this provision from the Act is therefore rational.

3.3.2Fair and equitable treatment

Most treaties refer to the FET of foreign investors.[160] This standard like the security and protection standard is also absolute in that it is non-contingent.[161]A FET provision is intended to provide a standard, which is detached from a host country's domestic law, against which the actions of such a country may be measured.[162] It essentially "*seeks to provide a means for resolving problems not only by reference to strict legal rules but on the basis of equity, taking into account the surrounding circumstances of each individual case."*[163]

This standard is however often vague and open to different and wide interpretations.[164] The vagueness and wide interpretation of this type of provision has become problematic in investment instruments.[165] The DTI argues that FET provisions also unduly constrains the policy space of a government and that transformational policy may fall foul of such a provision.[166] They contend that as a result of the above and the need to mitigate the risk associated with an FET provision, it has been left out of the Act.

The lack of such a standard may however prompt investor concerns about the nature of protection that is offered by a host-state and in this case, South Africa.[167] Most investment instruments that omit this type of provision do offer alternative protection in the form of national treatment and MFN.[168] These standards at least offer an investor some degree of

[159] As above.
[160]Sornarajah (n 17 above) 204.
[161] UNCTAD (n 14 above) 28.
[162] As above.
[163] UNCTAD (n 13 above) 92.
[164]Sornarajah (n 17 above) 204.
[165] DTI (n 21 above) 9.
[166] As above.
[167] UNCTAD (n 13 above) 92.
[168] As above.

protection.[169] As mentioned above the Act does not contain an MFN provision and the national treatment provision may not offer effective protection.

The omission of the provision from the Act does have some justification but it severely limits the protection that an investor would normally receive under a BIT for instance. In this case, the government's almost unrestricted right to regulate was considered to be more important than an FET provision. This may lead to some investor concerns regarding the standard of protection offered to foreign investors in South Africa.

The omission of these two provisions from the Act does diminish the protection that a foreign investor can expect in South Africa when compared to most BITs. The exclusion of a MFN principle in this case is however understandable. The FET provision on the other hand does drastically reduce the protection as compared to other international investment instruments. The explanation for such an omission may however be justifiable as most FET provisions are considered to be too vague. It may nevertheless be argued that the Act could have included a similar provision that was drafted in a way that excluded the imprecise wording associated with FET. Such a provision would arguably have been able to provide a balance between investor protection and governmental policy space.

3.4 Conclusion

The Protection of investment Act is an important piece of legislation that could have far reaching impacts on South Africa in future. It is vital that the Act offers sufficiently high levels of protection to guarantee that foreign investors continue investing safely and securely in South Africa. The Act is however also important to ensure that South Africa's public interest remains secure notwithstanding these investor protections. The balance between these two often competing ideals is thus essential. The purpose of the Act also makes clear that achieving a balance between these two ideals is one of its main purposes.

This balance is however not easily achieved as advancing one ideal will often lead to the diminution of the other. For instance, providing robust national treatment protection without any limitation will have the effect that government cannot discriminate between foreign and local investors. Such a provision will limit the policy space of government and may curtail certain measures that are intended to achieve a public interest goal. On the other hand, public interest may be protected and promoted at the expense of robust investor protection. A fine line

[169] As above.

therefore exists between providing strong investor protection as well as promoting the public interest goals of a country. This is particularly true in a country like South Africa with its complex history.

As mentioned above the Act does aim to achieve this fine balance between protecting investors and safeguarding policy space so government may act in the public's interest. The Act has however been widely condemned for not achieving this balance. Much of this criticism is based on the fact that the Act does not provide for the same standard of protection as was commonplace under previous BITs.[170] It has further been pointed out that the Act deviates from international customary law standards specifically on expropriation, security of investment and dispute resolution.[171] Many critics, accordingly, argue that the Act is excessively focused on the South African government's right to regulate at the expense of investor protection.[172]

This criticism that the Act does not provide the same level of protection as other investment treaties is accurate. The Act does not contain a provision relating to FET and MFN. The Act does however provide for protection normally found in investment treaties like national treatment, security of investment and transfer of funds. These protections are however not nearly as robust as they would be in the case of most BITs. First, the protection offered in terms of the Act is typically not as strong as one would expect in a treaty. Second, most of the protections provided for by the Act have very wide ranging exceptions that could allow government to side-step certain provisions. Third, the Act generally uses wide language that may lead to uncertainty for investors. The imprecise nature of the wording may also provide another avenue for government should they wish to side-step the protections offered in terms of the Act.

The criticism that certain provisions of the Act deviates from international law standards is also well founded. The provision relating to expropriation for example deviates from international standards on two fronts. First, indirect expropriation is not covered by the protection and as a result an investor will have no claim should such expropriation occur. Second, the level of compensation in the case of expropriation is considered to be lower than in international law.

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[170] S Woolfrey ' South Africa's Promotion and Protection of Investment Bill' (Accessed 24-11-15) http://www.tralac.org/discussions/article/5345-south-africa-s-promotion-and-protection-of-investment-bill.html.

[171] Woolfrey 'The Emergence of a New Approach to Investment Protection in South Africa' in S Hindelang& M Krajewski (eds) (n 2 above) 278.

[172] As above

The provisions relating to dispute resolution and security of investment also deviate from the international law standard.

The argument that public interest and the right to regulate has been overly protected at the expense of investor protection is in the author's view also correct. This is supported by the fact that certain protections have exceptions relating to public interest. The national treatment provision, for instance, contains six widely worded public interest exceptions. These exceptions allow the South African government to take a wide range of actions that may privilege local investors.

The strict stance relating to the protection of public interest and the right of government to regulate is nowhere clearer than in section 12. The appropriately named 'Right to Regulate' provision empathises that government may take public interest measures. As mentioned earlier, this right has been elevated above all other provisions of the Act and allows the South African government an almost limitless right to take measures. The result of this almost unrestricted exception is that the right to regulate and consequently public interest is elevated above all protections offered in terms of the Act.

The effect of the provision's specific exceptions as well as the general exception is that public interest and the right to regulate are raised above the protection of investors. These exceptions therefore reduce the protection offered in terms of the Act in order to promote the South African government's right to regulate.

The South African government has attempted to bring some balance to the country's investment regime by enacting the Protection of Investment Act. It is a fact that they have left a substantial amount of policy space for themselves to regulate in the public interest. In so doing they have however left investors with a significantly diminished level of protection than those found in customary international law as well as previous and current South African BITs.[173] The Act therefore does not find an equilibrium between investor protection on the one hand and public interest on the other. In an attempt to fix an investor protection regime that was skewed in favour of the investor, South Africa has gone too far in the opposite direction. This Act overwhelmingly favours government's right to regulate above robust investor protection and as a result has tilted the scales heavily in favour of public interest. The Act will

[173]Woolfrey 'The Emergence of a New Approach to Investment Protection in South Africa' in S Hindelang& M Krajewski (eds) (n 2 above) 282.

therefore not provide foreign investors with strong protections relating to their investments in South Africa.

CHAPTER 4

COMPARATIVE ANALYSIS OF THE PROTECTION OF INVESTMENT ACT AND SOUTH AFRICAN BIT'S

4.1 Introduction

The Protection of investment Act[174] is a statute that is intended to replace BITs as South Africa's principal foreign investment protection system.[175] The fact that this Act will replace many South African BITs makes it essential to compare its provisions with the provisions found in those treaties. This chapter will therefore compare the most significant provisions of the Act with the corresponding provisions of two South African BITs.

The first BIT that will form part of this comparative study is the UK-SA BIT,[176] which as mentioned earlier was the country's first BIT. It is also importantly a treaty that South Africa used as a model for many years when negotiating BITs with other countries. The UK- SA agreement came into force on the 27th of May 1998 and was terminated by unilateral denunciation on the 1st of September 2014.[177]

The second BIT of significance is the China- South Africa BIT (China- SA BIT)[178]. This agreement entered into force on the 1st of April 1998.[179] The treaty remains in force until today even though either party could have terminated the agreement after ten years of operation, that is, in 2008.[180] This BIT is of importance as South Africa and China have sought closer ties for many years now.[181]

4.2 Provisions

4.2.1 Definition of investment

The first provision that is of consequence is the definition of investment as found in the different instruments. The definition of an investment is crucial to any International investment instrument. It is vital as the protections offered by those instruments will only apply in cases

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[174]Act 22 of 2015.
[175] SAIIA *Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context* (2015) 5.
[176]Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa for the Promotion and Protection of Investments (1994).
[177]http://investmentpolicyhub.unctad.org/IIA/CountryBits/195 (Accessed 20-03-16).
[178]Agreement Between the Government of the People's Republic of China and the Government of the Republic of South Africa concerning the Reciprocal Promotion and Protection of Investments (1997).
[179] UNCTAD (n 4 above).
[180] Article 12.
[181]http://www.sanews.gov.za/south-africa/why-china-important-sa (Accessed 25 March 2016).

where the existence of an investment can first be established.[182] This definition is therefore the starting point of any investment instrument.

The term investment is defined in section two of the Act as follows:

"(1) For the purpose of this Act, an investment is—

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

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

(c) the holding, acquisition or merger by such an enterprise with another enterprise outside the Republic to the extent that such holding, acquisition or merger with another enterprise outside the Republic, has an effect on an investment contemplated by paragraphs (a) and (b) in the Republic;"[183]

The Act goes on to define the different types of assets that an enterprise may hold in subsection two. This list of assets is however not of importance for the current discussion.

The UK-SA BIT defines investment in article one of the agreement. The article reads as follows:

"(a) "investment" means every kind of asset and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

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[182] EC Schelemmer 'Investment, Investor, Nationality and Shareholders' in P Muchlinski et al (eds) The Oxford Handbook of International Investment Law (2008) 50.
[183] Section 2 (1).

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources."[184]

The China-SA BIT also defines the term investment in article one. The definition states the following:

"1. The term "investment" means every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the Latter, and in particularly, though not exclusively, includes:

(a) movable and immovable property as well as any property rights, such as mortgages, liens and pledges;

(b) shares, debentures, stock and any other kind of participation in companies;

(c) claims to money or to any other performance having an economic value;

(d) intellectual property rights, in particular copyrights, patents, utility-model patents, registered

designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how and good-will;

(e) concessions conferred by law, including concessions to search for, or exploit resources."

The Act differs from the BITs in that it employs an enterprise orientated approach to defining investment. The Act also offers, in subsection two, an open list of assets that may be possessed as an investment. This type of list is often suggestive of an asset based approach. In this case however the list is only employed for illustrative purposes and in addition to the enterprise based definition. This definition was discussed in detail in chapter three but some supplementary comments are of importance at this point.

The nature of the definition is not of great significance but rather how broad or narrow the definition truly is. The scope of such a definition can often be determined by the limitations that apply to it. In this case the Act contains certain limitations that are not found in the UK-SA BIT. For instance, the definition is limited in terms of the legality of both the enterprise and

[184] UK-SA BIT (n 3 above).

the actions of an investor. The enterprise and the "establishment, acquiring or expansion" of such an enterprise must be lawful in order for an investment to exist under the Act.

The Act further limits the scope of the definition by stipulating certain characteristic that an investment must comply with. The definition requires that an investor commit "resources of economic value over a reasonable amount of time, in anticipation of profit." This limitation is not found in either of the BITs currently under discussion.

The UK-SA BIT follows an asset based approach with an illustrative list. This list is not a *numerus clausus* and does therefore not limit the types of assets that are covered. It states that every kind of asset is covered including, but not limited to, the assets specifically mentioned in the list provided. The main reason for this type of definition is to cover as many forms of investment as possible.[185] This definition is without limitation and does not specify by what means the investment must be made. As a result, this definition is very broad and will include all forms of investment.

The China- SA BIT is comparable with the UK-SA BIT in that it similarly employs an asset based approach to defining investment. It also contains an open list of investments and this list is almost identical to the UK-SA agreement. Unlike the UK-SA BIT, this BIT does contain a limitation. The agreement stipulates that an asset must be invested in the host country "in accordance with the laws and regulations" of that host country. This limitation is similar to the one found in the Act but does not extend to the actions of the investor.

The UK-SA BIT consequently has a wide definition of investment in that it does not place any limitation on how an investment is to be made. The China-SA BIT is slightly more restrictive as the legality of the investment is a necessity. The Act employs the most restrictive definition in that it not only has a requirement relating to the legality of the investment but also places constraints upon the type of investment. The Act thus has the narrowest definition of investment out of the three instruments.

4.2.2 Protection and security

The next clause of importance is the so-called protection and security of investment provision. This type of provision is normally an absolute standard of treatment, meaning that it is non-

[185] UNCTAD 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking' (2007) 9.

contingent.[186] This class of protection determines the standard of treatment of an investor without reference to any other investor.[187]

The Act provides for the protection of an investment in section nine, which states that:

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

The UK-SA BIT also includes a provision relating to the protection and security of investments. Article 2(2) reads as follows:

> *"Investments of nationals or companies of each Contracting Party ... shall enjoy full protection and security in the territory of the other Contracting Party."*

Article three of the China-SA BIT touches on, among other things, the protection of investments. It states that:

> "*Investments and activities associated with investments of investors of either Contracting Party shall ... enjoy protection in the territory of the other Contracting Party."*

In this instance the UK-SA BIT provides extensive protection to an investor. It requires that the host state provide full protection and security. The result of such a provision may be, depending on the interpretation by a tribunal, that the protection extends beyond physical security.[188] The China-SA BIT also provides for the protection of investments. It does not however mention security and does not require *full* protection.

The Act provides for the security of an investment but does limit the extent of such security.[189] This provision is limited in a number of ways. First, the security to be provided is only physical security and therefore does not include legal and commercial security. Second, the level of protection that has to be accorded to a foreign investor is only as high as the level that may be

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[186] UNCTAD (n 12 above) 28.
[187] As above.
[188]The International Institute for Sustainable Development 'The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?' (2011) 5. Arbitral tribunals have been split regarding this issue. Some have found that only physical security is provided for while others have found that physical as well as commercial and legal security is protected.
[189] See Chapter three for a full discussion regarding this provision.

generally provided to a local investor in accordance with the minimum standard of customary international law. Third, the level of security is made conditional upon the availability of resources and the level of capacity.

With regard to protection and security the UK-SA BIT provides the widest ranging protection to an investor and may also provide legal and commercial security. The China-SA BIT also provides protection to foreign investors although the wording is subtler. The Act appears to impose a very watered down obligation on South Africa relating to security of investment as it is limited in a number of ways.

4.2.3 National treatment and most favoured nation treatment

The Act provides for national treatment in section eight. This provision of the Act is very comprehensive and is one of the most extensive parts of the Act. Some subsections of less importance have therefore been omitted. The provision reads:

> *"(1) Foreign investors and their investments must not be treated less favourably than South African investors in like circumstances.*
>
> *(2) For the purposes of this section, ''like circumstances'' means the requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment, including the—*
>
> *(a) effect of the foreign investment on the Republic, and the cumulative effects of all investments;*
>
> *(b) sector that the foreign investments are in;*
>
> *...*
>
> *(3) The examination referred to in subsection (2) must not be limited to or be biased towards any one factor.*
>
> *(4) Subsection (1) must not be interpreted in a manner that will require the Republic to extend to foreign investors and their investments the benefit of any treatment, preference or privilege resulting from—*
>
> *(a) taxation provisions in any international agreement or arrangement or any law of the Republic;*
>
> *(b) government procurement processes;*

(c) subsidies or grants provided by the government or any organ of state;

(d) any law or other measure, the purpose of which is to promote the achievement of equality in South Africa or designed to protect or advance persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability in the Republic;

...”

The provision relating to national treatment and most favoured nation in the UK-SA BIT can be found in article two and it stipulates as follows:

“(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.”

This treaty does provide for some exceptions to the national treatment provision in article seven. These exceptions relate to privileges that result from a customs union or taxation legislation.

The China-SA BIT provides for the following in article three:

“2. The treatment and protection ... shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State. Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favourable than that accorded to the investments and associated activities by its own investors.

3. The Republic of South Africa shall in its territory accord to investments and returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments and returns of its own investors with the exception of *any domestic legislation relating wholly or mainly to taxation or programmes and economic activities specifically aimed to promote, protect and advance persons and groups of persons that have been disadvantaged as a result of past discriminatory practices in the Republic of South Africa.*

4. the provisions of paragraph (1) and (2) shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:

(a) any customs union, free trade area, common market, any similar international agreement or any interim arrangement leading up to such customs union, free trade area, or common market to which either of the Contracting Parties is or may become a party.

(b) any international agreement or arrangement relating wholly or mainly to taxations, or;

(c) any special arrangement to facilitate frontier trade."

Although the three instruments all have clauses relating to national treatment the provisions are varied. It must also be noted that the UK-SA and China-SA BIT's have provisions relating to most favoured nation treatment (MFN) along with national treatment where the Act does not.

The national treatment provision of the Act[190] begins with a general rule that foreign investors must not be treated less favourably than South African investors in like circumstances. The Act then goes on to describe in subsection two how like circumstances should be determined. According to this subsection like circumstances must be determined by an overall examination of the merits of the case by taking the terms of the foreign investment into account. The Act then, by way of a non-exhaustive list, stipulates what factors should be taken into account when considering this question. Factors like the effect on employment and the sector of the investment are to be taken into account. This enquiry is however not limited to the list only and other factors may be taken into account.

[190]See Chapter three for a full discussion regarding this provision.

Subsection four has the effect of excluding certain treatment, preferences and privileges from the operation of the national treatment clause. Most importantly, the list includes measures that are intended to promote the achievement of equality and advance previously disadvantaged people. It also excludes, among other things, government procurement as well as subsidies or grants.

The UK-SA BIT includes a comprehensive provision with few exceptions. The treaty states that the "management, maintenance, use, enjoyment or disposal" of investments by a foreign investor must not be less favourable than that of a local. The national treatment provision of this treaty does allow for limited exceptions. In this case there are only two: one relating to customs unions and the other to taxation measures.

The China-SA BIT does, like the UK-SA BIT, contains a MFN provision together with the national treatment provision. The MFN provision is absolute whereas the national treatment provision is limited in its scope. National treatment is limited in the first instance by the words "without prejudice to its laws and regulations". The effect of this limitation is that the foreign investor must be treated no less favourably than local investors, but without prejudicing local laws and regulations. This has the effect of elevating local laws and regulations above the national treatment provision.

It is additionally limited by an exception that is only applicable to South Africa. This exception allows South Africa to deviate from this provision where domestic legislation relates to taxation or the promotion of previously disadvantaged persons.

Lastly, the national treatment as well as the MFN provision is limited in that benefits resulting from certain international agreements are excluded. This includes agreements relating to a customs union, free trade areas and taxation.

The abovementioned national treatment provisions differ noticeably between the three instruments. The UK-SA BIT creates robust provisions relating to MFN and national treatment with limited exceptions. The China-SA BIT on the other hand does allow for a number of exceptions as well as an exception specifically relating to South Africa. The Act does not contain an MFN provision and provides for national treatment but subject to many exceptions as well as rules of interpretation.

The above clearly illustrates that the UK-SA BIT has very stringent provisions in this regard while the China –SA BIT and the Act are less strict in this respect.

4.2.4 Expropriation

One of the most crucial provisions of any international investment instrument is the provision relating to expropriation. All of the instruments being discussed here have some sort of protection against expropriation.

The Act deals with expropriation in a single sentence. It reads as follows:

"Investors have the right to property in terms of section 25 of the Constitution."[191]

The UK-SA BIT contains a far longer provision relating to expropriation. Article 5(1) states:

> *"Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph."*

The China-SA BIT's provision relating to expropriation is almost word for word the same as the UK-SA BIT. Article 4 (1) and (2) of the agreement provides the following:

> *"1. Investments of investors of either Contracting Party shall not be nationalized expropriated, or subjected to measures having effects equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for public purposes, under domestic legal procedure, on a non-discriminatory basis and against compensation. Such compensation shall be at*

[191] Section 10.

> *least equal to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, and be effectively realizable.*
>
> *2. The investor affected by the expropriation shall have a right, under the laws and regulations of the Contracting Party making the expropriation, to promote review, by a court of law or other independent and impartial forum of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles referred to in Paragraph (1)."*

The UK and China BITs contain almost identical provisions relating to expropriation. The most important similarity between the two relates to the definition of expropriation. These treaties both define expropriation as "*the expropriation or nationalization of investments*". They however go further and stipulate that *"measures having effects equivalent to nationalization or expropriation"* are also deemed to be expropriation. This is what is known as indirect expropriation.[192] The effect of this inclusion is that the standards applicable to direct expropriation and nationalization also applies to indirect expropriation. Compensation is therefore payable in the event of any type expropriation whether it be direct or indirect.

The two BITs also have similar provisions relating to the amount of compensation payable should expropriation take place. The China-SA BIT requiring "market value" and the UK-SA BIT requiring the "genuine value" of an investment. The two treaties further allow the investor the right of review before an independent forum in the event of expropriation.

The Act differs substantially from the BITs in respect of expropriation. It does not contain a provision that is similar to those found in the BITs. The Act merely incorporates section 25 of the South African Constitution. The effect of this has been thoroughly discussed in chapter three. There are however certain points that are of significance for the current discussion.

It is important to point out that the rights as envisioned in section 25 of the Constitution do deviate from the provisions of the BITs in two important ways. First the Constitution defines

[192] UNCTAD (n 12 above) 44.

what expropriation is, and when it should be compensated in a different way.[193] Second the determination of the amount of compensation payable upon expropriation differs.[194]

When comparing the provisions of the two BITs with section 25 of the Constitution it is clear that an investor would be more protected in terms of the BITs. First, the definition of expropriation is wider in the BITs and includes indirect expropriation. Second, the compensation payable is at market or genuine value which is higher than what is provided for in section 25.

4.2.5 Dispute resolution

The dispute resolution provisions in these instruments is another essential aspect that has to be considered. These clauses are commonly found in BITs and they provide the investor with a procedure to enforce its rights.[195]

The Act is no different in that it also provides a dispute resolution procedure. This procedure can be found in section 13 and the most important sub-sections of this section are quoted below:

> *"(1) An investor that has a dispute in respect of action taken by the government, which action affected an investment of such foreign investor, may within six months of becoming aware of the dispute request the Department to facilitate the resolution of such dispute by appointing a mediator."*
>
> *"(4) Subject to applicable legislation, an investor, upon becoming aware of a dispute as referred to in subsection (1), is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment."*
>
> *"(5) The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. The consideration of a request for international arbitration will be subject to the administrative processes set out in section 6. Such arbitration will be conducted between the Republic and the home state of the applicable investor."*

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[193] Section 25 (1) & (2).
[194] Section 25 (3) & (4).
[195] UNCTAD (n 12 above) 100.

The UK-SA BIT dispute resolution clause contained in Article eight of the agreement reads as follows:

> *"(I) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes."*

The China-SA BIT's dispute resolution clause states the following:

> *"1. Any dispute between an investor of the other contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.*
>
> *2. If the dispute cannot the settled through negotiations within six months, either Party to the dispute shall be entitled to submit the dispute to an international arbitral tribunal provided that the Contracting Party involved in the dispute may require the investor to initiate administrative review procedures in accordance with its laws and regulations, and provided that the investor has not submitted the dispute to a domestic court of that Contracting Party."*[196]

The provisions in the Act are substantially different to the provisions of the two relevant BITs in this regard. The Act provides that an investor may approach the Department responsible for trade and industry to appoint a mediator to resolve the dispute within six months of becoming aware of the dispute. The Act goes on to provide the procedures in terms of which the mediator is chosen and how the mediation is to work.[197]

The investor may also, subject to applicable legislation, approach any competent court, independent tribunal or statutory body within the republic to resolve the dispute. It is important to note here that the subsection allows for an investor to approach a dispute resolution body within South Africa only.

The government may also consent to international arbitration in respect of an investment dispute. This arbitration will however be between the Republic and the home state of the

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[196] Article 9.

[197] Section 13 (2) & (3).

investor. Of importance here is the fact that government *may* consent and that the arbitration will be between the two states and not between South Africa and the investor.

In terms of the UK-SA BIT a dispute between a national or a company of the foreign state and the host state may be submitted to international arbitration. This will only be done where no settlement has been reached and where the national or company so wishes. The Investor may therefore take the host state to arbitration directly.

The China-SA BIT provides for a similar procedure. In this case, the investor and the host state must attempt to settle any dispute amicably. If the dispute cannot be resolved by negotiation, either the investor or the host state may submit the dispute to international arbitration. The host state could however require that the investor initiate administrative review procedures under its laws before submitting the dispute to arbitration.

Both the UK and China BITs allow for investor-state arbitration where a dispute cannot be settled by the parties. In terms of the Act a foreign investor does not have this option. A dispute may either be submitted to mediation or to a local dispute resolution body. The investor cannot on his own volition approach an international arbitral body. Although the Act does allow for international arbitration it is only permitted in circumstance where the government consents. International arbitration is further only permitted on a state-state basis. Investor-state arbitration does therefore not exist in terms of the Act.

The two treaties consequently offer far more generous options to a foreign investor seeking to enforce its rights against a host state. The Act does provide for the resolution of disputes but excludes the widely used mechanism of investor-state arbitration.[198]

4.2.6 Fair and equitable treatment

The final provision that is of importance is a provision known as fair and equitable treatment (FET). FET is similar to the protection and security standard in that it also guarantees an absolute standard.[199] This type of provision is widespread in BITs and it is found in both the China-SA[200] and UK-SA BIT.[201] The Act does not have an FET provision and therefore does not offer a foreign investor the protection afforded by such a standard. The two BITs as a result offer a higher level of protection to a foreign investor in relation to absolute standards.

[198] UNCTAD (n 12 above) 100.
[199] UNCTAD (n 12 above) 28.
[200] Article 3 (1).
[201] Article 2 (2).

4.3 Conclusion

This chapter compared some of the most important provisions of the three international investment instruments. If one were to rank the instruments in terms of the protections offered to foreign investors, the UK-SA BIT would surely rank first.

This is as a result of a number of factors including: the wide and unlimited definition of investment; the robust protection and security as well as FET clauses; the strong expropriation protection; MFN and national treatment clauses with limited exceptions and the inclusion investors-state arbitration.

The China-SA BIT would rank second in terms of investor protection. It is similar to the UK-SA BIT with regards to security and protection, FET, dispute resolution, MFN and expropriation. It differs slightly in terms of the definition of investment by providing for a narrower meaning. It also differs with regard to national treatment where it allows for more exceptions to the rule, especially for South Africa.

The Act would be rated the lowest out of the three for investor protection. First, the definition of investment is more limited than the ones found in the BITs. Second, most of the Act’s provisions permit wide ranging exceptions. Third, expropriation as well as dispute resolution in terms of the Act are severely limited. Lastly, the Act does not contain provisions relating to MFN and FET.

The Act clearly does not provide the same level of protection that is provided for by the BITs that it was designed to replace. In the case of UK investors, they will receive the protection in terms of their BIT until such time that the 20-year sunset clause expires.[202] Chinese investors on the other hand will be able to rely on the protections offered to them in terms of their BIT for as long as it stays in force.

The effect of this selective termination is that any new UK or other non-BIT protected investor will have to rely on the Act for the protection of their investments. Chinese or other BIT protected investors on the other hand will be sheltered by the superior provisions of their BITs. This effectively advantages some foreign investors over others when it comes to doing business in South Africa.

[202] Article 14.

This comparison shows that the Act is a major departure from a typical BIT. A foreign investor looking to invest in South Africa must therefore be mindful of what instrument will cover its investment, since the above illustrates that not all investor protection instruments are created equal.

CHAPTER 5

CONCLUSION

5.1 Introduction

In recent times there has been a major shift in the South African investor protection framework. This shift in focus was away from the traditionally used BIT towards domestic investor legislation. Although some BITs are still in force the South African government has decided to offer investor protection by way of the Protection of Investment Act. This Act was therefore the main focus of the current study.

The first part of the study considered the history of South African investor protection. In times gone by, the South African investor protection regime was very similar to what was prevalent elsewhere in the world. This included the use of customary international law, diplomatic protection and more recently BITs. Since 2010 this framework has however substantially changed and is now no longer comparable to most other nation's investor protection regime. This is as a result of the South African government's review of investor protection in general and more specifically the country's BIT regime. This review has resulted in South Africa terminating many of its BITs, especially those concluded with European partners. The governmental review has further led to the introduction of specialized domestic legislation aimed at replacing these terminated BITs.

The second substantive chapter analyses in depth the provisions that are contained in the Act. It considers the strength of the protection offered to foreign investors on the basis of the wording of the Act. In order to examine these protection, the provisions are considered in the light of generally accepted standards of treatment in both investment treaties generally and international investment law. Upon closer investigation it is clear that the Act substantially deviates from the international law standard in many instances.

This chapter also examined the Act in terms of two of its most important purposes which is to protect investment as well as balance this protection with the public interest. In this case it is apparent that government heavily emphasised public interest and its right to regulate. This prominence has led to a significant reduction in the level of investor protection. The public interest considerations contained in the Act has consequently been over-empathised at the expense of robust investor protection.

The final substantive chapter is aimed at comparing this newly adopted piece of investment legislation with South African BITs. The comparison comprises of two BITs one of which is a treaty that was signed with the UK that had been terminated in the aftermath of the 2010 review. The other is a BIT that was concluded between South Africa and China which has not been terminated and is still in force. This comparison reveals many similarities between the types of provisions contained in the BITs and the provisions contained in the Act.

The similarities are however much less apparent when the content and effect of the BIT provisions are compared to the content and effect of the Act's provisions. The discrepancy in this case is mainly due to the level of investor protection that each instrument offers. When comparing the UK and China BIT it is clear that the UK BIT offers a slightly higher level of protection than the Chinese treaty. In the case of the Act it seemingly provides a substantially lower level of protection to foreign investors than both of the BITs do.

The other major difference between the BITs and the Act relates to the nature of the instrument. The BITs are international treaties concluded between two nations. Provisions of such treaties can as a result not be unilaterally changed by either party after the agreement has been established. The Act on the other hand is a piece of national legislation and is therefore unilateral in nature. The effect is that the Act may be amended either by way of parliamentary process or by way of ministerial regulation. This possibility of unilateral alteration has the result that the circumstances under which investments are made may be changed at any time thereby reducing investor certainty. The BITs on the other hand do not present that risk as the parties would have to bilaterally agree to any change.

5.2 Practical implications of the Protection of Investment Act

The theoretical examination makes it clear that the Act together with the termination of some Bits has generally reduced the level investor protection in South Africa. The question that now arises is: What practical effect will these changes have on investors?

This question can only be answered by referring to four different categories of investors.[1] These types of investors are:

- Local investors;

[1] There is a fifth category of investor and that is a foreign investor without the protection of a BIT that invests before the Act is promulgated. In terms of Section 14 (b) of the Act such an investor will be governed by the general South African law.

- Foreign investors form home states with a South African BIT;
- Foreign investors from home states that previously had a South African BIT; and
- Foreign investors from home states that never had a South African BIT.

With regards to the first category, the local investor, the Act does not offer any substantial protection. As mentioned earlier most of the substantive provisions of the Act are only applicable to foreign investors. The few sections that do apply to South African investors do not offer any additional rights not contained in the Constitution and other legislation. South African investors will accordingly not be significantly impacted by the Act or the change to the investment framework.

Foreign investors who currently enjoy protection in terms of a BIT between their home state and South Africa are the second category of investors. These investors will continue to be protected in terms of section 14 of the Act. As mentioned earlier these investors will remain protected on the terms and for the period as stipulated in the relevant BIT.[2] This type of investor will as a result not be impacted by the Act for as long as their investment is protected by the treaty.

The third type of investor is a foreign investor whose home state at some stage had a BIT with South Africa. In this case the BIT would have been cancelled by the South African government as a result of the review of BITs.[3] There are two potential scenarios with regards to this type of investor.

The first is the scenario where this category of investor made an investment in terms of a terminated BIT while the BIT was still in force. In such a case the investor will still be protected on the terms and for the period stipulated in the BIT.[4] In other words this investor will be able to rely on the protection of the BIT until the expiry of the so-called sunset clause. The expiry of the sunset clause will however affect such investors. At the expiration date the investor will no longer be protected by the BIT and will then only be able to rely on the provisions of the Act. In such a case the investor will in all likelihood be prejudiced as the protection in terms of the BIT is substantially stronger than that of the Act. This type of investor will consequently be severely impacted by the cancellation of the specific BIT and the introduction of the Act.

[2] Act 22 of 2015 Section 14 (a).
[3] This is discussed in detail in chapter two.
[4] In terms of Section 14 (a).

The second possible situation is where this type of foreign investor invested in South Africa after the termination of the BIT and after the Act is promulgated. In such a case the foreign investor will not be able to rely on a BIT but will be afforded the protections in terms of the Act. This type of investor will also be impacted by the termination of BITs and the enactment of the Act. This is as a result of the fact that he will not be able to rely on the provisions of the specific terminated BIT.

These two categories of investor that previously could rely on a BIT will therefore be significantly affected by the change of investment regime. As discussed above and in chapter four the protection offered by the Act compared to other investment treaties is significantly less robust. A UK investor under the terminated BIT for instance could rely on FET, a stronger national treatment provision, stronger protection relating to expropriation and investor-state dispute settlement. Under the Act all of these provisions have either been omitted or significantly weakened when compared to the UK- SA BIT.

An investor in such circumstances has therefore unquestionably been adversely affected by South Africa's recent shift in investor policy. The dual actions by government of both terminating BITs and enacting arguably sub-standard investment protection legislation will not do very much to fill these investors with confidence.[5]

The last category of investor of importance to the current discussion is a foreign investor from a home state that has never had a BIT with South Africa. If such an investor is to invest in South Africa after the promulgation of the Act it will be able to rely on the protection offered in terms of the Act. The fact that these investors were never covered by a BIT and never had the option to be covered means that they would have only been protected by South African law. This has the effect that they could not rely on any specific investor protection instrument when it came to their investment. As things stand now however they will be covered by the Act.

In such a case one has to compare the protections offered in the Act with the protections offered in terms of general South African law. The Act when compared to the general law does offer improvements in some cases and merely confirms protections previously offered in others. The Act for instance regulates national treatment which should offer some additional protection to an investor however limited it may be. On the other hand, the section relating to expropriation

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[5] The EU Chamber of Commerce and Industry in Southern Africa 'Submission on the Promotion and Protection of Investment Bill 2013' (2015) 15.

incorporates section 25 of the Constitution and consequently does not offer the investor any additional protection. This is as a result of the fact that the Constitution would have applied to the investor regardless of the enactment of the Act.

This last category of investors will for the most part be positively impacted by the introduction of the Act. One positive impact that will result is that the Act clarifies that some protections do apply to foreign investors even though they were previously available. The positive impact on such an investor will however be restricted. This is as a result of the fact that protections offered by the Act are in most cases inadequate and do not provide significant advantages.

The practical effect of the new investor protection framework differs significantly depending on the situation that an investor finds itself in. In some cases, investor will be minimally impacted by these changes if at all. In other cases, investors will be negatively impacted and in yet other situations investors may be positively affected.

5.3 Recommendations

The change in investor protection has led to much criticism. Whilst it is important to ensure that public interest is protected it is also important to ensure that investors have enough confidence to invest in a particular country. In order to ensure that foreign investors keep seeing South Africa as a safe investment environment, government has to take certain steps.

The Act is now in place and the author will not recommend any amendments although they may be employed to better achieve some sort of balance. It is at this stage more important to achieve investor confidence by acting in a considered manner. In order to ensure that South Africa is seen as a safe investment destination government should carefully contemplate their actions relating to public policy measures as well as legislation.

The first recommendation in this regard is that government use the exceptions and the right to regulate as contained in the Act sparingly and judiciously. This will be extremely important to demonstrate to foreign investors that these exceptions won’t be used to undermine the protections offered in the Act. If government should go ahead and apply their right to regulate unfairly and unreasonably investors’ confidence will surely decline. If these measures are however carefully considered and applied in a fair and rational way foreign investors will remain confident in investing in South Africa. The use of these measures will create a reputation for South Africa and is important that this reputation is a positive one.

Government should further carefully consider future legislation that may affect foreign investors. Legislation like the Private Security amendment Bill[6] which aims to limit foreign ownership of security companies to 49% will reduce investor confidence. Legislation of this nature creates the impression that South Africa is becoming more inward looking and not open to foreign business. This type of legislation combined with the change in investment protection will only serve to scare potential foreign investors away.

5.4 Conclusion

South Africa is a developing country with a persistent current account deficit and as a result it requires foreign investment.[7] This investment is of great importance to stimulate growth and create employment and wealth. In order to ensure that investors are confident in investing in a country it is important to provide them with some form of protection. In South Africa's case this protection will in future be provided for in large part by the Act.

The Act as is apparent from the above chapters has significantly altered South Africa's investor protection regime. In many cases the Act along with the termination of BITs will mean that investors are less protected. It is however important for South Africa to show that even though there has been a reduction in investor protection the country is still open to international investment.

The South African government therefore has to ensure that it does not misuse its right to regulate in the public interest. Governmental action will be heavily scrutinized for some time to come by foreign investors as a result of these recent changes. Government will have to closely consider the possible effect of any further actions on foreign investor confidence in South Africa. This is important to ensure that the country remains one of the most attractive investment destinations on the continent.

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[6] 27 of 2012.

[7] S Woolfrey 'The Emergence of a New Approach to Investment Protection in South Africa' S Hindelang& M Krajewski (eds) Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified (2016) 288.

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