Settlement of Investment Disputes under the New South African Protection of Investment Act, Act 22 of 2015

By

Cara Jacobé Maree

Student Number: 10027069

A research paper submitted in partial fulfilment of the requirements of the LLM Degree in International Trade and Investment Law in Africa, University of Pretoria, South Africa.

November 2017

Supervisor: Doctor Femi Oluyeju

University of Pretoria

Centre for Human Rights

DECLARATION OF ORIGINALITY

I, Cara Jacobé Maree, student number 10027069, declare that this mini-dissertation is my original work and all sources of information from other authors have been acknowledged. I also declare that this mini-dissertation has never been submitted to any other institution. I hereby present this work in partial fulfilment for the award of the LLM Degree in International Trade and Investment Law in Africa.

Full Names: Cara Jacobé Maree

Student Number: 10027069

November 2017

Pretoria

South Africa

ACKNOWLEDGMENTS

I would like to thank my friends and my parents, especially my father, who supported me throughout my studies and the completion of this mini-dissertation.

I would like to thank the National Research Foundation for the financial assistance towards my tuition.

I would also like to thank my supervisor Doctor Femi Oluyeju.

SUMMARY

Investment law is one of the controversial disciplines in law. Since arbitration became more popular the number of arbitral cases, in terms of Bilateral Investment Treaties (BITs), also increased. It was found that the inconsistencies in the language used in the treaties caused most conflict as each person interpreted the treaty differently.[1]

Precisely in 2013, the South African government introduced a new Bill, The Promotion and Protection of Investment Bill (the Bill). The Bill was initiated in response to the arbitral case of *Piero Foresti, Laura de Carli and Others vs The Republic of South Africa ICSDI, ARB(AF)/07/.* The South African government became concerned because foreign investors challenged Black Economic Empowerment (known as BEE) on an international level in an arbitral matter. The government was concerned that certain policies would not be protected internationally, specifically arbitration as a dispute settlement mechanism.[2]

Some of the BITs were terminated between South Africa and various countries, after the draft Bill was introduced on the 1st of November 2013. BITs were normally used to regulate the investment regimes. After the Bill was passed and the existing BITs were cancelled, a revised Bill was introduced on 22 July 2015.[3] The Act is now known as *The Protection of Investment Act, Act 22 of 2015* (the Act) and will come into effect on a date to be determined by the President of South Africa and as published in the Government Gazette.

After a careful study and analysis of the Act[4] the Department of Trade and Investment has acknowledged that the Act is not in line with the Southern African Development Community (SADC) Protocol and their defence is that the Protocol has been through a review process and that the changes made to the Protocol would be in line with the act. It is however uncertain whether the Protocol and the Act would be in line with each other. There are numerous questions regarding the fact that South Africa is bound by the SADC Protocol and if it would be possible to pass the Act with regards to South Africa's international obligations. Many of

[1] M Sornarajah *The International Law on Foreign Investments* (2010) 1

[2] A Farish Protection of Investment Act - A balancing Act between Policies and Investments (2016) *De Rebus* (25 April)

[3] Farish (n 2 as bove)

[4] The Protection of Foreign Investments Act, Act 22 of 2015

the BITs between South Africa and foreign investors have not yet been terminated and they are still protected under the BITs.[5]

Numerous people are of the opinion the Act should include the ISDS system or at least be more specific regarding the measures that should be taken before the parties can refer the dispute to arbitration. State-to-state arbitration is also a difficult route to follow because foreign investors would have to approach their government to get involved in the dispute. ISDS arbitration should be included in the South African Act, as it would restore the foreign investors trust in the system and might encourage more Foreign Direct Investments (FDIs). In a country where FDIs are important for economic growth, it is important to find a balance between (1) the government's sovereign right to implement domestic policies, (2) its duty to protect foreign investors and (3) its objective of promoting sustainable economic growth.[6]

The fact that South Africa drafted its own investment legislation is a step in the right direction. The law is evolving alongside the new trends of international law regarding FDI. It is however important that the Act should be reconstructed in terms of SADC's Protocols so that South Africa may meet its international obligations. Furthermore, the Act should contain the Investor- State Dispute Settlement (ISDS) system and be more specific regarding the procedures that should be taken before the parties are allowed to refer the matter to arbitration. To include the ISDS system and make the necessary changes with regards to SADC, would encourage FDIs and have a positive effect on the development and growth of South Africa.

[5] K Bosman *South Africa: Trading international investment for policy space* 24

[6] Bosman (n 5 as above) 39

TABLE OF CONTENTS

DECLORATION OF ORIGINALITY …………………………………………………… 2

ACKNOWLEDGEMENTS ……………………………………………………………. 3

SUMMARY ……………………………………………………………………………. 4

Chapter 1: General Introduction ………………………..…………………... 11

1.1 Introduction …………………………………………………………….………... 11

1.2 Research Problem ………………………………………………………….…. 12

1.3 Research Question ………………………………………………………....… 12

1.4 Thesis Statement ……………………………...……………………….....….... 13

1.5 Preliminary Literature Review ……………………………………….….…..... 13

1.6 Research Methodology ……………………………………………………..… 15

1.7 Limitations of the Study …………………………………………………..…... 15

1.8 Outline of the Chapters …………………………………………….…..…… 15

Chapter 2: History of Foreign Investments in South Africa …………….……. 17

2.1 Background Information …………………………………………………….….….. 17

2.2 Apartheid ……………………………………………………………………….…… 17

2.3 Apartheid and Business Support ……………………………………….…..... 18

2.4 International Sanctions ……………………………………………………….……18

2.5 The Unsustainability of the Economy due to Apartheid ……………………….…… 19

2.6 The effects of Post-Apartheid on Foreign Investments ………………………...… 19

2.7 Conclusion ………………………………………………………………………... 20

Chapter 3: Bilateral Investment Treaties and Dispute Settlement ……..…...… 21

3.1 Introduction ……………………………………………………………..……... 21

3.2 Foreign Direct Investments and Bilateral Treaties ……………………..……… 21

3.3 Dispute Settlement …………………………………………………….……….. 24

3.3.1 Protection of FDI's by means of Contracts ……………….....……..….. 25

3.3.2 The Essential Clauses ……………………………….…...…..…… 26

3.3.2.1 The Stabilisation Clause ……………………….……….…. 27

3.3.2.2 Choice of Law Clause …………………………...………... 29

3.3.2.3 Arbitration Clause …………………………...……………. 30

3.4 Conclusion …………………………………………………………….……….. 33

Chapter 4: Dispute Settlement Mechanisms: Adjudication ……….…....…… 34

4.1 Introduction …………………………………………………….…….………. 34

4.2 The Adjudication Procedures ……………………………………...………….. 34

4.2.1 History of Adjudication ……………...………………………..….…… 35

4.2.2 The Main Types of Adjudication ……..……………………..……….. 38

4.2.2.1 Litigation …………………………………………….……... 39

4.2.2.1.1 Types of International Litigation ……………….…….… 39

4.2.2.1.2 Law Governing International Litigation …………..…. 39

4.2.2.1.3 Advantages and Disadvantages of International Litigation …………………………………….….… 42

4.2.2.2 Arbitration ……………………………………………….……... 42

4.2.2.2.1 Types of Arbitration …………………………….……. 43

4.2.2.2.2 Law Governing International Arbitration 44

4.2.2.2.3 The Advantages and Disadvantages of Arbitration 45

4.3 Conclusion 45

Chapter 5: Dispute Settlement Mechanisms: Alternative Dispute Resolution 47

5.1 Introduction 47

5.2 Alternative Dispute Resolution 47

5.2.1 The History of Alternative Dispute Resolution 48

5.2.2 The Main Procedures in ADR 51

5.2.2.1 Negotiation 52

5.2.2.1.1 Types of Negotiation 52

5.2.2.1.2 Negotiation vs Litigation 53

5.2.2.1.3 Law Governing International Negotiation 55

5.2.2.1.4 Advantages and Disadvantages of Negotiation ... 56

5.2.2.2 Mediation 57

5.2.2.2.1 Types of Mediation 57

5.2.2.2.2 Law Governing International Mediation 59

5.2.2.2.3 Advantages and Disadvantages of Mediation 59

5.2.2.3 Conciliation 59

5.2.2.3.1 Types of Conciliation 60

5.2.2.3.2 Law Governing International Conciliation 60

5.2.2.3.3 Advantages and Disadvantages of Conciliation .. 61

5.3 Conclusion ………………………………………………………….……………... 61

Chapter 6: The South African Position on Foreign Direct Investments …. 63

6.1 Introduction ………………………………………………………….…….. 63

6.2 Important Provisions of The Protection of Investment Act ………………….. 64

6.3 Dispute Resolution, Section 13 of The Protection of Investment Act ....….... 65

6.3.1 Concerns Regarding Dispute Resolution …………………………... 66

6.3.2 Why is Investor-State Dispute Settlement Important ……….…… 68

6.3.3 The Concerns Regarding Proceedings …………………………... 70

6.3.4 Advantages and Disadvantages of Investors State Dispute Settlement System ……………………………………………. 73

6.3.4.1 Advantages ………………………………………… 73

6.3.4.2 Disadvantages ……………………………………. 73

6.4 Conclusion ……………………………………………………………… 74

Chapter 7: Conclusion …………………………………………….......... 76

7.1 Introduction ………………………………………………………….. 76

7.2 Summary of Findings ……………………………………………... 76

7.3 Conclusion ……………………………………………………...…… 78

7.1 Recommendations ……………………………………………….……... 79

Bibliography ………………………………………………………….…... 80

1 Text Books ………………………………………………….……...….. 80

2 Journal Articles ……………………………………………......….... 80

3 Theses and Dissertations ……………………………………………...…..... 80

4 Legislation …………………………………………………...………... 80

5 Case Law ………………………………………………………………… 80

5.1 International Court of Justice ……………………………………….. 80

5.2 ICSID ……………………………………………………………….. 81

5.3 England ……………………………………………………………... 81

5.4 United States of America …………………………………………… 81

6 Websites ………………………………………………………………. 81

7 Other ……………………………………………………………...……... 83

CHAPTER 1

GENERAL INTRODUCTION

1.1 Introduction

Investment law is one of the most controversial legal disciplines. Since arbitration became more popular, the number of arbitral cases, in terms of Bilateral Investment Treaties (BITs) had also increased. It was found that the inconsistencies in the language used in the treaties caused most conflicts as each person interpreted the treaty differently.[7]
Precisely, in 2013, the South African government introduced a new Bill, The Promotion and Protection of Investment Bill (the Bill). The Bill was initiated in response to the arbitral case of *Piero Foresti, Laura de Carli and Others vs The Republic of South Africa ICSDI, ARB(AF)/07/1*. The South African government became concerned because foreign investors challenged Black Economic Empowerment (known as BEE) on an international level in an arbitral matter. The government was concerned that certain policies would not be protected internationally, specifically arbitration as a dispute settlement mechanism.[8]

Some of the BITs were terminated between South Africa and various countries after the draft Bill, *The Protection and Promotion of Investment Act*, was introduced on the 1st of November 2013. BITs were normally used to regulate the investment regimes. After the Bill was passed and the BITs were cancelled, a Bill was introduced on 22 July 2015.[9] The Act is now known as *The Protection of Investment Act, Act 22 of 2015* and will come into effect on a date to be determined by the President of South Africa and as published in the Government Gazette.

[7] M Sornarajah *The International Law on Foreign Investments* (2010) 1
[8] A Farish Protection of Investment Act - A balancing Act between Policies and Investments (2016) *De Rebus* (25 April)
[9] Farish (n 8 as bove)

1.2 Research problem

The research problem in this study relates to dispute mechanisms under the new legislation, specifically the procedures that need to be followed in the settlement of foreign direct investment disputes. In addition, it is not clear whether these procedures would promote or deter foreign direct investments. According to Farish, there is an international opinion that South African courts don't always function as they should and that the investors would be treated less favourable than in international arbitration.[10]

It is against this backdrop that this study will seek to investigate how the perceived gaps in relation to dispute mechanisms framework under the new legislation can be closed to make the legislation more investor-friendly.

1.3 Research question (s)

The broad legal research question which this investigation will seek to answer is what are the perceived gaps in the procedures that need to be followed in the settlement of investment disputes under the new legislation and how can the gaps be closed to boost investors' confidence and attract more foreign investments into the country?

In answering the broad question, the following sub-questions will also be answered-

i. How has Foreign Direct Investment evolved in South Africa?
ii. What are Bilateral Investment Treaties (BITs)?
iii. Which dispute settlement mechanisms are available to the parties involved in an investment dispute?
iv. What are the alternative dispute resolution mechanisms available in South Africa?
v. How effective is settlement of disputes in terms of *Section 13* of the South African *Protection of Investment Act, Act 22 of 2015*?

[10] A Farish Protection of Investment Act - A balancing Act between Policies and Investments (2016) *De Rebus* (25 April)

1.4 Thesis statement

South Africa has great potential to attract FDIs. With strong FDIs, the current living standards in South Africa will improve. Therefore, this study will argue that there are gaps in the procedures that need to be followed in relation to settlement of investment disputes under the new legislation and closing the gaps will boost investors' confidence and attract more foreign investments into the country.

1.5 Preliminary literature review

There is a strong link between economic growth and foreign investments. The inflow of foreign investments is important for economic growth as it results in the escalation of a country's currency. This escalation leads to the expansion of the host-state's foreign exchange by which imports are funded. The stronger the currency of the host-state, the cheaper the import of products would be. In contrast, exporting will become more expensive and may result in unemployment.[11]

Though FDIs may lead to positive and negative results the total effect is more positive than negative. FDIs have become an important source of finances, as it mostly represents investments in the production facilities in developing countries.[12]

South Africa recently after frequent and major opposition, accepted a new act with regards to investments, *Act 22 of 2015: Protection of Investment Act,* (the Act). This Act was based on the Promotion and Protection of Investment Bill of 2013. South Africa decided to draft its own bill and did not re-enforce some of the Bilateral Investment Treaties, due to the fact that the Bilateral Treaties make provision for some form of a contract which cannot be amended by only one party.[13]

There are many opinions about the Act and the dispute settlement mechanisms. There could be however better ways to settle disputes that would not lead to the breakdown in the

[11] http://uir.unisa.ac.za/bitstream/handle/10500/1332/dissertation.pdf?sequence=1 accessed 26 July 2017
[12] http://uir.unisa.ac.za/bitstream/handle/10500/1332/dissertation.pdf?sequence=1 accessed 26 July 2017
[13] A Farish Protection of Investment Act - A balancing Act between Policies and Investments (2016) *De Rebus* (25 April)

relationship between the investor and the host-state. The aim is to determine which action will be the best and the best way to implement it in terms of the Act.[14]

After the Bill was introduced on the 1st of November 2013, the BITs) were terminated between South African and various countries, the aforementioned regulated the investment regimes. After the Bill was released and the cancellation of the BITs, the revised Bill was introduced on 22 July 2015.[15]

The first Bill didn't provide for arbitration as an option for dispute resolution. This lead to an international outcry by the foreign investors. The Act however, provided arbitration as an option, but the importance was downplayed and investors are only permitted to use international arbitration when all their domestic remedies have been exhausted as stated in Section 13(5). The security the foreign investors had was removed from the Act creating an uncertainty whether the Act will be efficient and whether the South African courts can function properly and have the necessary skill and expertise.[16]

Furthermore, the investors are concerned with the fact that the judges will be South African and that they will place the national interest above the interest of the foreign investors. Dr Rob Davis, Minister of Trade and Industry, is of the opinion that doing away with international arbitration will protect the national investors and the South African economy. The fact that the courts will attend to the dispute resolution will enable a party to predict the outcome and create certainty amongst investors.[17]

At this stage it is too early to determine the long-term effect the Act will have on foreign investors and investments. The European Union's Chamber of Commerce and Industry stated that foreign investors are cautious at this stage to invest in South Africa and will rather invest somewhere else in Africa or aboard.[18]

---

[14] A Farish Protection of Investment Act - A balancing Act between Policies and Investments (2016) *De Rebus* (25 April)

[15] Farish (n 14 as above)

[16] Farish (n 14 as above)

[17] Farish (n 14 as above)

[18] Farish (n 14 as above)

1.6 Research methodology

The research is desktop based complimented by different tools of inquiry that will include text books, journal articles, unpublished research reports and international treaties. Additionally, the research will use secondary sources like the internet and LinkedIn.

1.7 Limitation of the study

The Act is a relatively new and not yet implemented in South Africa. Therefore, there might be challenges with regards to finding information pertaining to the implementation of the act and the prescribed dispute settlement mechanisms. In addition, applicable cases in South Africa might be limited.

1.8 Outline of the chapters

Chapter 1: This chapter introduces the study and provides information on the background, the research question and thesis statement. In addition, a brief literature review, the research methodology and the limitations of the study are also provided.

Chapter 2: This chapter presents a brief history of FDIs in South African before and after apartheid and the pros and cons thereof.

Chapter 3: Chapter 3 describes BITs and FDIs and its development.

Chapter 4: This chapter contains the two different adjudication mechanisms, namely (1) litigation and (2) arbitration, the development of the adjudication mechanisms, the advantages and disadvantages of each of the procedures and the law governing the procedure.

Chapter 5: Chapter 5 focuses on the alternative dispute mechanisms, (1) negotiation, (2) mediation and (3) conciliation, the development of the alternative dispute

mechanisms, the advantages and disadvantages of each of the procedures and the law governing the procedure.

Chapter 6: Chapter 6 Presents the *Protection of Investment Act, Act 22 of 2015* of South Africa, *Section 13* and the importance of the Investor- State Dispute Settlement.

Chapter 7: Chapter 7 concludes the study.

CHAPTER 2

HISTORY OF FOREIGN INVESTMENTS IN SOUTH AFRICA

2.1 Background information

There is a strong link between the economic growth of a country and foreign investments. Thus, the inflow of foreign investments is important for economic growth. FDIs result in the escalation of a country's currency, which in turn results in the expansion of the host-state's foreign exchange by which imports are funded. The stronger the currency of the host-state the cheaper importing of products become, however exporting will become more expensive and may result in unemployment.[19]

Although FDIs may lead to positive and negative results, the total effect is more positive. FDIs have become an important source of finances, as it represents investments in production facilities and is of significance in developing countries; it further provides for more investable production facilities that provides more capital for the host-state.[20]

South Africa recently, after frequent and major opposition, accepted a new Act with regards to investments, *Act 22 of 2015: Promotion and Protection of Investment Act* (the Act). This Act was based on the Promotion and Protection of Investment Bill of 2013. South Africa decided to draft its own bill and did not re-enforce some of the BITs, due to the fact that the Bilateral Treaties make provision for some form of a contract which cannot be amended by only one party.

To understand the history of South Africa's foreign investments and the Act one has to have a brief look at the South African history from 1984.

2.2 Apartheid

The National Party was elected as the South African government in 1948, after which they enforced what was known as apartheid. Apartheid was the division of different racial groups with the aim of allowing the different ethnic groups to progress in their own separate ways in

[19] http://uir.unisa.ac.za/bitstream/handle/10500/1332/dissertation.pdf?sequence=1 accessed 6 March 2017
[20] http://uir.unisa.ac.za/bitstream/handle/10500/1332/dissertation.pdf?sequence=1 accessed 6 March 2017

different areas. Apartheid lead to white economic and political superiority, the other groups were maintained in a subservient position and their homelands soon turned into slums.[21]

After two decades of the National Party governing South Africa, the Whites dominated in all aspects and had the upper hand in the labour market.[22]

As noted by one historian, "Full employment, in combination with labour controls, limitations on the free movement and employment of Non-whites, and the use of colour barriers at company level, contributed to high levels of disposable income for the White population".[23]

Apartheid managed to create a system where some racial groups were unskilled, illiterate and developed low living standards, because their schooling was based on the idea they could not progress quickly enough, due to lower intellectual skills.[24]

2.3 Apartheid and Business Support

Mines and mining finance houses, largely controlled by the English-South Africans, flourished under apartheid due to foreign financial support. A market situation in which there is only one buyer,[25] known as a monopsony, was formed and the mining companies supported the reservation of jobs which lead to the prevention of different racial groups developing their skills. The mining companies introduced changes to lower their costs but the relationship with the government still continued. The first White trade unions were introduced to the system, but Black trade unions were only allowed in the 1970's.[26]

2.4 International Sanctions

International sanctions were enforced in protest to the apartheid government, which caused economic stress in the country and the apartheid system started to unravel. Even though the international community enforced oil sanctions, South Africa was still able to buy oil on the

---

[21] J Baten *A History of the Global Economy. From 1500 to the Present* (2016) 318-325

[22] Baten (n 21 as above) 318-325
[23] Baten (n 21 as above) 318-325
[24] Baten (n 21 as above) 318-325
[25] https://www.google.co.za/#q=monopsony+definition&* accessed 6 March 2017
[26] Baten (n 21 as above) 318-325

international market enabling them to develop technology which converted coal into fuel. Off the coast of Cape Town, a small gas field was also created.[27]

The most damaging to the South African economy at that stage was the denial of investment funds and the prohibition of South African investments mainly by United States universities and foundations. The main goal of the aforementioned sanctions was to stop South Africa gaining power, as South Africa's growth was immense and threatening to the United States.[28]

In the 1980s, gold reached an all-time high, which was ironic, and resulted in international tension, as it resulted in a huge profit for the mining companies. South Africa was still however unable to invest in some foreign countries due to currency restrictions, the banning of the sale of Krugerrands and the investment sanctions prohibiting South Africa to invest abroad. This led to the buying of any business, which had an active effect on the economy, with surplus funds. However, the financial benefit for the mining companies of continuing to support the system eroded as international capital stopped flowing into the country.[29]

2.5 The Unsustainability of the Economy due to Apartheid

The South African government realised in 1990 that the South African economy was unsustainable due to apartheid and Nelson Mandela, the leader of the African National Congress, was finally released.[30]

Despite the National Party's fears of the state becoming ungovernable, the first democratic election took place in 1994 with Nelson Mandela becoming the president.[31]

2.6 The effects of Post-Apartheid on Foreign Investments

After the first democratic election, during President Mandela's reign, South Africa experienced numerous FDIs, as international sanctions were lifted enabling foreigners and foreign businesses to invest in the country. This lead to a strong currency, construction and

[27] J Baten *A History of the Global Economy. From 1500 to the Present* (2016) 318-325
[28] Baten (n 27 as above) 318-325
[29] Baten (n 27 as above) 318-325
[30] Baten (n 27 as above) 318-325
[31] Baten (n 27 as above) 318-325

infrastructure development, which led to economic growth in terms of population and trade, and resulted in an increase in foreign trade. During President Mandela's presidency the South African economy grew, on average, by **2.5%** (quarter on quarter annualised data) and inflation averaged at **8%** per year.[32]

2.7 Conclusion

The South African economy was in dire straits during the period of international sanctions, limited FDIs, high inflation and growth deteriorated. The lifting of the international sanctions leads to increasing FDIs, the economy started growing and labour became more liberalised.

Foreign investments were governed by BITs which made provision for legal procedures regarding any dispute that might arise from such FDIs. During these years the country started to draft its own national legislation regarding FDIs to level the playing field. The effects of national legislation on FDIs are uncertain. There is no concrete evidence that it hampered FDIs or economic growth.

[32] read:http://www.southafricanmi.com/south-africas-economic-history.html accessed 6 March 2017

CHAPTER 3

BILATERAL INVESTMENT TREATIES AND DISPUTE SETTLEMENT

3.1 Introduction

Bilateral Investment Treaties (BITs) are known as the agreements between two states regarding the direct investment by a foreign country in a host-state. The BITs create a certain standard between the states, investor and host-state, and can be enforced outside of the national jurisdiction system of the host-state. Foreign investors are sceptical toward the quality of the host-state's national legislation and the enforcement thereof. The host-state, normally a developing country, is thus willing to restrict its sovereignty in the hope that the protection from political and other risks might increase FDIs.[33]

BITs are seen as the most important international legal mechanism to encourage and govern FDIs. It is clearly stated in the preamble, in most of the BITs, that the sole purpose of the BITs is to promote the flow of FDIs. Both states invest time to negotiate, conclude, sign and ratify a BIT, as it is the governing document of the FDI and stipulates dispute settlement, most favoured nation and other important clauses.[34]

3.2 Foreign Direct Investments and Bilateral Investment Treaties

FDIs have become a main source for the allocation of international funds and technology. World trade was the main event before the 1970's and grew at a rapid rate. After the 1970's however, FDIs appeared and since then have grown more than double the rate of world trade. FDIs became an important source of funds for developing countries over the years. It is known that in 2003 FDIs were the largest component of the net resource flows to developing countries and it will be the case for some time.[35] Even though developed countries remain the dominant

[33] E Neumayer & L Spess *Do bilateral investment treaties increase foreign direct investment to developing countries?* (2005) 33 (10) World Development 1567-1585
[34] Neumayer et al (n 33 as above)
[35] Neumayer et al (n 33 as above)

source and recipients of FDIs, their position has changed as more developing countries are receiving FDIs.[36]

At the end of the 1950's, BITs made their appearance. The basis of the BITs can be seen as the treaties of Friendship, Navigation and Commerce (FNC), as concluded between the United Sates and other states over centuries. The main goal of the FNCs were to improve the United States international relations with regard to international trade, with investment provisions added later. BITs focus more on the protection of FDIs than did FNCs. The first BIT was concluded between Germany and Pakistan in 1959, as Germany lost most of its foreign investments during the Second World War. After the aforementioned event, it took almost two decades for BIT's to gain momentum in the international sphere. BITs grew rapidly between the 1990's and 2000's and by the end of 2002 there were 2 181 BITs worldwide.[37]

The only protection for foreign investors, before BITs, was the customary international legal rule of minimum standards of treatment and the Hull rule.[38] The protection was minimal regarding the minimum standard rule and the Hull rule only dealt with expropriation and thus gave no general protection against any form of discrimination to the investors. The Hull rule came into being after a dispute between the United States and Mexico in 1930. The dispute arose from properties being expropriated by the government of Mexico. In the diplomatic notes between the Minister of Foreign Affairs and the United States Secretary of State, Cordell made the following statement:

> *"No government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment..."*[39]

The rule of prompt, adequate and effective compensation was established after this correspondence between the two men and the standard was named the Hull rule. The validity

[36] E Neumayer & L Spess *Do bilateral investment treaties increase foreign direct investment to developing countries?* (2005) 33 (10) World Development 1567-1585
[37] Neumayer et al (n 36 as above)
[38] Neumayer et al (n 36 as above)
[39] Neumayer et al (n 36 as above)

of the rule was however disputed by developing countries and whether it was customary international law was questioned and in 1970's the rule was terminated.[40]

In later years the Hall rule was adapted and incorporated into the BITs between parties. The reasons for the incorporation of the expropriation clause, was that the competition for FDIs became greater under developing countries as well as developed countries.[41] The countries would have been better off if they had refused to sign any BIT's and had kept as much control over their assets as possible. This would explain the strong feelings against the acceptance of the multilateral investment treaties, for example the United Nations Conference on Trade and Development (UNCTAD) where all interests can be collectively expressed. It is however known that a country gains a better competitive advantage, as an investment location by entering into a BIT.[42]

As previously mentioned, BITs guaranteed a certain standard regarding the treatment of foreign investors. In the BIT, the country agrees to treatment such as national treatment and most-favoured nation. Furthermore, they agree to fair and equitable treatment where the investor will be treated according to international standards after the investment is in force. Most important was the fact the BITs included a specific clause with regards to dispute settlement. The parties would normally agree to submit to binding dispute settlement, if any dispute may occur.[43]

BITs are thus an important way of protecting foreign investors, as there are not many legal alternatives available. There are only a few regional free trade agreements which specifically contain protection provisions for investments. Examples of the aforementioned are the North America Free Trade Agreement (NAFTA) and The World Trade Organization's (WTO) Agreement on Trade-Related Investment Measures; even though they contain such protection it falls short on the protection of the BIT's.[44]

It is important to note that not all BITs are the same, because the parties will normally negotiate the terms and the clauses that the BIT should contain. It is however an important

[40] E Neumayer & L Spess *Do bilateral investment treaties increase foreign direct investment to developing countries?* (2005) 33 (10) World Development 1567-1585
[41] Neumayer et al (n 40 as above)
[42] Neumayer et al (n 40 as above)
[43] Neumayer et al (n 40 as above)
[44] Neumayer et al (n 40 as above)

means of protecting the rights and interests of the foreign investor.[45] There are however some countries that drafted national legislation with regard to FDI's, thus eliminating the need for BITs between the parties. This national legislation with regards to FDIs will be discussed in Chapter 6.

3.3 Dispute Settlement

There have been a few methods of settling disputes between parties regarding FDIs. There were settling of disputes by means of diplomatic action and through the settlement clauses in treaties. There are some situations where diplomatic means may be used. These situations can be seen as a genesis of international customary law, or which some countries see as international customary law. Where the diplomatic means have failed the parties normally use litigation as a means of dispute settlement. However, there have been very few cases brought before the International Court of Justice or its predecessor.[46]

BITs have created their own way of settling disputes. The disputes can be settled between state and state, or state and investor. BITs will enable the foreign investor to invoke remedies, normally arbitration, in their own instance. The state consents to such dispute settlement or other dispute settlement mechanisms in the BIT.[47] There is therefore an attempt to protect foreign investors through the BITs and furthermore, through a network of investment treaties, a system was developed regarding the protection of the foreign investor by means of arbitration. The creation of the International Centre of the Settlement of Investment Disputes and the creation of other centres enhanced the system. The system that will be used between the parties will be agreed upon in the BIT.[48]

Prior to the abovementioned system, the dispute settlement mechanisms were normally determined on a contractual basis, negotiated between the parties at the time of the entry of the investment into the host-state. The intent of the contract was to protect the assets or any of the terms and conditions of the foreign investment. The contract between the parties agreed on another law, with the exemption of the national law of the host-state, which would be applicable

---

[45] E Neumayer & L Spess *Do bilateral investment treaties increase foreign direct investment to developing countries?* (2005) 33 (10) World Development 1567-1585
[46] M Sornarajah *The International Law on Foreign Investments* (2010) 276
[47] Sornarajah (n 46 as above) 276
[48] Sornarajah (n 46 as above) 276

to the contract. This agreement, with regards to the governing law of the contract, ensured the legality of the contract and the enforcement between the parties. The reason for the agreement on a law other than the host-states national law was because the national law could be changed at any time the host-state so wished. Over time there were great efforts to perfect the system by including arbitration.[49]

Arbitration, as means of dispute settlement, was a central feature with regards to the system. Arbitration still plays an important role in the settling of investment disputes today. There are thus two ways of using arbitration as a dispute settlement mechanism. It can either be enforced on the basis of a contract or under an investment treaty.[50]

3.3.1 Protection of FDI by means of Contracts

The contractual agreement between parties only came later. If an agreement was breached between the parties they would settle the matter with negotiations, persuasion, or if necessary by means of military force. This situation gave force to the idea that agreements must be honoured by all parties involved.[51]

In 1943, Hackworth stated the position of the United States.

> *"Generally speaking, the Department of State does not intervene in cases involving breaches of contract between foreign state and a national of the United States in the absence of showing a denial of justice… The practice of declining to intervene formally prior to a showing of denial of justice is based on the proposition that the Government of the United States is not a collective agency and cannot assume the role of endeavouring to enforce contractual undertakings freely entered into by nationals with foreign states."*[52]

During that time states were very careful to intervene with matters relating to breach of contract. The state would only intervene in cases where the result was a denial of justice in a host-state. After the Second World War there came a more prominent need for principles to

[49] M Sornarajah *The International Law on Foreign Investments* (2010) 277
[50] Sornarajah (n 49 as above) 277
[51] Sornarajah (n 49 as above) 279
[52] Sornarajah (n 49 as above) 279-280

ensure contractual claims could be enforced through supranational means. These principles were a creation of the foreign investors themselves and not created by states.[53]

The early protection of contractual rights regarding international investment was used in the oil industry. The agreement they used was a concession agreement which came close to the transfer of a state's sovereignty. The agreement gave the foreign investor complete control over the transaction. The reason for this development was the fact that the government of the host-state didn't possess the power to protest or object against the foreign investor. Concessions were normally granted to colonies or protectorates.[54]

After decolonisation, new techniques were necessary regarding FDIs and the agreements, as they had to reflect the interests of the host-state and involve an internal balance between the interest of the host-state and the interest of the foreign investor.[55] The protection of investments also required new attention as the situation changed and states would no longer hesitate to declare their displeasure.[56]

The contracts had a basic structure and before the changes took place, the elaborate theory was established. The contracts contained the clauses listed below;

3.3.2 The Essential Clauses

The concession agreements during the years had the same core features and the clauses were very similar. As these agreements were to be valid for a long time they had to be immune from interference by the host-state during the period of the FDI. The following clauses were included in the concession agreements: (1) a stabilisation clause, (2) choice of law clause, and (3) general principles of law clause or standards that prevail within the industry.[57] The reason for these clauses was to ensure the application of the system could not be unliterally altered. In return for the resources the investor extracted, the host-state received royalties calculated on the basis

[53] M Sornarajah *The International Law on Foreign Investments* (2010) 280
[54] Sornarajah (n 53 as above) 280
[55] Sornarajah (n 53 as above) 280
[56] Sornarajah (n 53 as above) 281
[57] Sornarajah (n 53 as above) 281

of the amount of resources extracted.[58] It is important to note there are agreements that do not contain all or some of the clauses.[59]

3.3.2.1 The Stabilisation Clause

The main goal of the stabilisation clause was to ensure that any changes in the host-state's legislation would not affect the basis of the agreement between the investors and the host-state. This clause was necessary to protect the foreign investor, as the investor would be at a disadvantage when entering an agreement, because the host-state has power over its own legislation. It was thus in the interest of the investor that this power could be neutralised. The stabilisation clause was introduced in the agreements with regard to FDI, any changes of law would not affect the original agreement, thus freezing the law applicable to the original contract.[60]

The stabilisation clause is important as it protects the foreign investors from matters such as taxation, environmental controls and other regulations that might be established. Furthermore, it protects the investor from early termination of the contract and allows the contract to conclude after the time period has lapsed, as agreed upon. There are a few different stabilisation clauses, but the main goal is the prevention of change of law being applied to the agreement.[61]

The validity of the stabilisation clause has been questioned and whether it actually can prevent the host-state from changing its laws. The stabilisation clause has an effect on the sovereignty of the host-state and the question is whether that state is bound by the stabilisation clause. According to constitutional theory the stabilisation clause cannot achieve its goal. It merely serves as a comforter to the foreign investor. For the stability clause to be effective, another theory was needed to ensure this clause achieved its main goal.[62]

The establishment of the internationalised contracts strived to fulfil the goal of the stabilisation clause. The inclusion of stabilisation clauses was seen as evidence of the intention of the host-state party not to be subjected to its domestic law, but to be subjected to a different

[58] M Sornarajah *The International Law on Foreign Investments* (2010) 281
[59] Sornarajah (n 58 as above) 281
[60] Sornarajah (n 58 as above) 281-282
[61] Sornarajah (n 58 as above) 282
[62] Sornarajah (n 58 as above) 282

external system, which would guarantee the validity of the stabilisation clause.[63] With the inclusion of the stabilisation clause and other clauses, it was safe to come to the conclusion that the investment agreement was not subjected to the host countries' national legislation.[64]

It is important to note that some of the stabilisation clauses are important and should be considered in the drafting of BITs. One of the examples can be seen in the *Texaco vs Libya* arbitration.[65] The agreement read:

> "*The government of Libya will take all steps necessary to ensure that the company enjoys all the rights conferred by the concession. The contractual rights expressly created by this concession shall not be altered except by the mutual consent of the parties.*"[66]

The abovementioned clause merely creates an obligation to secure consent of the foreign investor before any changes can be made by legislation and is not a direct stabilisation clause. Including negotiation or renegotiation into the clause creates an avenue for negotiation between the parties to establish new grounds for the agreement. In doing so, making an indirect stabilisation clause more acceptable than a direct stabilisation clause.[67]

The second example of a stabilisation clause, - a direct stabilisation clause, – was found in the arbitration between *Aminoil vs Kuwait.*[68] In the agreement between the two parties the stabilisation clause read;

> "*The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement expect as provided in Article 11. No alteration shall be made in terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interests of both parties to make certain alterations, delegations or additions to this Agreement.*"[69]

---

[63] M Sornarajah *The International Law on Foreign Investments* (2010) 282
[64] Sornarajah (n 63 as above) 282
[65] Texaco vs Libya (1977) 53 ILR 389
[66] Sornarajah (n 63 as above) 283
[67] Sornarajah (n 63 as above)) 283
[68] Aminoil vs Kuwait (1982) 21 ILM 976
[69] Sornarajah (n 63 as above) 283

The fact that the host-state agreed to the broad stabilisation clause indicated the host-state would not interfere with the workings of the foreign investor during the period agreed upon.[70]

When any dispute arises from the FDI agreement, the first question is whether the stabilisation clause is in fact binding. There are normally two questions regarding the stabilisation clause, (1) the *vires* of the person who entered into the agreement on behalf of the state and (2) the legislation powers of a state cannot be bound by an agreement.[71] There are however rules which are applicable to the two questions. Firstly, when the state concluded the agreement it is not allowed to use its own national legislation to challenge the validity of the agreement. As stated in the arbitration, *Sapphire vs NIOC,*[72] by judge Cavin, a foreigner cannot be expected to know all the laws of the host-state.[73] The second question is addressed by the theory that the agreement is like a treaty and thus can bind the state in the same way regarding local legislation.[74]

3.3.2.2 Choice of Law Clause

The choice of law clause in an investment agreement is to protect the investor from the host-state's national legislation, as the state can change the legislation at any time. The rule being applied is that parties have the authority to choose which legal system they would like to govern the agreement. It is possible for the parties to choose another state's national legislation, this however will not have the desired effect. The idea is to choose a system which is higher in hierarchy than the national legislation of the host-state. Hierarchy is important to address as it is a means of protecting the foreign investor. The parties may choose international law. This system has its own challenges, as there is no body of international law applicable to contracts. The strategy however is to choose a system of supranational principles or some nebulous system. This system is normally referred to as

[70] M Sornarajah *The International Law on Foreign Investments* (2010) 283
[71] Sornarajah (n 70 as above) 283
[72] Sapphire vs NIOC (1982) 21 ILM 976
[73] Sornarajah (n 70 as above) 284
[74] Sornarajah (n 70 as above) 285

"general principles of law" and it can provide the measure of protection that is needed, as the rule cannot be unilaterally changed.[75]

There are however statements that the national legislation of the host-state will be applicable to the investment agreement. There are mandatory provisions in law and it is accepted globally that mandatory laws cannot be evaded by merely choosing a different legal system to be applicable to the agreement. For example, in the natural resource sector there would be greater controls relating to pricing and taxation and the protection of the environment.[76]

The abovementioned is supported by other authoritative systems, in particular that the domestic law, especially the municipal system, will be applicable to the transaction between the host-state and the foreign investor. In the *Kahler vs Midland Bank,*[77] 1950, the following statement was made by Lord Radcliffe: *"In the case of a contract between a state and a foreign private party, the state's law not merely sustains but, because it sustains, may modify or dissolve the contractual bond."*[78] There were several statements made in arbitral awards in the 1950's that the host-state's law will apply to the agreement.[79]

If there was a change in law that permitted the choice of another system, it must be identified in some concrete fashion. If an international rule was established with regard to the matter to permit the choice of another system other than the one of the national legislation of the host-state, the evolution must be identified clearly. The source must be identified and must show the change with a sufficient degree of precision. This onus will be difficult to satisfy.[80]

3.3.2.3 Arbitration Clause

The third clause to be taken into account is the arbitration clause. It is said this clause gave rise to an inference that the foreign investment agreement had been subjected to an external system. Foreign investors have insufficient confidence in the national courts of the host-state or any national tribunals, to settle the dispute in an impartial and fair manner. The arbitration clause therefore provides for a neutral forum for the settlement of disputes which may arise from the

[75] M Sornarajah *The International Law on Foreign Investments* (2010) 285
[76] Sornarajah (n 75 as above) 285
[77] Kahler vs Midland Bank (1950) AC 24 at 56
[78] Sornarajah (n 75 as above) 286
[79] Sornarajah (n 75 as above) 286
[80] Sornarajah (n 75 as above) 286

investment agreement. The choice to refer the dispute matter to a national court of the host-state is not an appropriate choice, as there can be problems of sovereign immunity. The option of arbitration in a tribunal in another state is more appropriate and preferred by foreign investors. In the older agreements, they referred to *ad hoc* arbitral tribunals. These tribunals were tailor-made by the parties for the type of dispute that could arise from the agreement. At that stage, there were no tribunals with expertise in the settlement of disputes, until the Centre of the Settlement of Investment Disputes (ICSID) was established.[81]

When the arbitration clause referred to an *ad hoc* tribunal, the creation of said tribunal would be set out in the arbitration clause. The parties were given the option to appoint arbitrators and to select the place and procedure they would follow during the arbitration. It was possible to refer the matter to private institutions. However, they did not have the specialised knowledge necessary to settle the dispute where a state was involved. ICSID was established for the settlement of disputes where states were involved and where any dispute may arise from an investment agreement. ICSID was formed by means of a convention and distinguished from the private institutions, as it was created by sovereign will.[82]

In the arbitration clause the parties should state the extent and the nature of the jurisdiction of the tribunal. The award given during the arbitration process may be null and void if the tribunal exceeds the jurisdiction given to them and where they make any pronouncements outside of the scope. ICSID has its own rules and procedures regarding jurisdiction and the annulment of awards.[83]

When the agreement is terminated by either one of the parties it is normal practice that the arbitration clause will survive the termination. This is not the case when a state is a party to the agreement as the state will normally terminate the agreement unilaterally by legislation therefore the arbitration clause will not survive. Thus, the survival of an arbitral clause is mainly when the parties to the agreement are private parties.[84]

Where the parties agreed to refer any disputes to ICSID, the arbitral clause will survive, because the state's defence that the contract is effaced by legislation is unreasonable.[85] The ICSID Convention creates an obligation that all disputes must be submitted to ICSID for

---

[81] M Sornarajah *The International Law on Foreign Investments* (2010) 286
[82] Sornarajah (n 81 as above) 287
[83] Sornarajah (n 81 as above) 287
[84] Sornarajah (n 81 as above) 287
[85] Sornarajah (n 81 as above) 287

settlement. The fact that the agreement was terminated by national legislation would not affect the international obligation. The obligation ICSID created is protected by an international treaty, whereas the situation is different with *ad hoc* arbitration.[86]

Arbitrators do not accept the difference between an ICSID arbitration and *ad hoc* arbitration. They are of the opinion the arbitral clause will survive no matter what the process of the arbitration, whether it is an ICSID or an *ad hoc* arbitration. The arbitrators position was clearly illustrated in the *Liamco* arbitration,[87] where Arbitrator Mahmassani stated:

> *"It is widely accepted in international law and practice that an arbitration clause survives the unilateral termination by that state of the contract in which it is inserted and continues in force even after that termination. This is a logical consequence of the interpretation of the intention of the contracting parties, and appears to be one of the basic conditions for creating a favourable climate of foreign investment."*[88]

This statement has a valid point, especially when it comes to private international arbitration. It is however still not clear if this would be the position when an agreement located in a state, is absolutely extinguished by legislation. The termination differs in circumstances when a state is involved. Where the parties are private parties, the agreement will be terminated by choice of either of the parties involved in the agreement. In the case of a state being a party, the contract will be terminated by a public act of a sovereign state. It will be superficial to argue in these circumstances that the arbitral clause would survive the termination, unless it is protected by a treaty.[89] States are of the opinion that the arbitral clause would not survive and they seldom appear before arbitrators who want to establish jurisdiction. The only way the arbitration clause could still be in force is when the parties refer their dispute/s to ICSID, as the ICSID tribunal would be kept alive by a treaty. The same would apply to any international obligation under a treaty.[90]

Over time, investment agreements evolved. The agreements moved out of the national law sphere of the host-states onto a higher plane of supranational law, identified as transnational

[86] M Sornarajah *The International Law on Foreign Investments* (2010) 288
[87] Sornarajah (n 86 as above) 288
[88] Sornarajah (n 86 as above) 288
[89] Sornarajah (n 88 as above) 288
[90] Sornarajah (n 88 as above) 288

law, general principles of law and international law.[91] This was achieved *inter alia* by the inclusion of the stabilisation clause, the choice of law clause and the arbitration clause, to name a few of the important clauses. To ensure that international investment agreements (IIA) are protected the focus should be directed to the theory of Internationalisation of State Contracts.[92]

The ICSID Convention elevates a contract which contains an arbitral clause, when the dispute is referred to ICSID and thus to a higher level. Investment treaties provide the foreign investor with a variety of required dispute settlements, depending on the precise wording in the provisions of each treaty.[93]

3.4 Conclusion

Agreements regarding FDIs evolved over the years from BITs to IIAs to host-states developing their own national legislation. The goal of the development was to ensure that the agreements and necessary clauses keep up with the development in FDIs trends and that all the parties receive the necessary protection they expect.

The creation of international protection for investment agreements through private means was a huge success. It illustrates the power of multinational corporations to create law and the existence of avenues through which international law can be used as an instrument of private power opposing weak sources of law, such as the awards of bilateral tribunals and writing of highly qualified publicists.[94]

In the past, arbitration was based on the consent of both parties expressed in the arbitration clause in a foreign investment agreement. Thereafter, arbitration became treaty based. The investment treaties had a big role in promoting arbitration and increasing the number of arbitral cases in the foreign investment area, especially ICSID arbitration. Even though treaties provide a sounder base for the jurisdiction of arbitral tribunals, international law still applies. International law is still being represented by the principle of *pacta sunt servanda* in the international sphere.[95]

---

[91] M Sornarajah *The International Law on Foreign Investments* (2010288-289

[92] Sornarajah (n 91 as above) 289

[93] Sornarajah (n 91 as above) 289

[94] Sornarajah (n 91 as above) 305

[95] Sornarajah (n 91 as above) 305

CHAPTER 4

DISPUTE SETTLEMENT MECHANISMS: ADJUDICATION

4.1 Introduction

With the development and arrival of globalisation in the function of international law, international dispute mechanisms have developed and evolved to settle disputes in the most functional way.[96] Dispute mechanisms or resolution, as referred to in practice, can be categorised into two main groups. Namely, the adjudication procedures, (1) litigation and (2) arbitration, and the consensual procedures, (1) negotiation, (2) mediation and (3) conciliation.[97] It is important to note that the consensual procedures contain more than the three mentioned procedures, it is a function of what the parties agreed to in the treaties, or what is stated in the national legislation governing the FDIs.

4.2 The Adjudication Procedures

Adjudication is where a formal judgement is given on a dispute. There are normally three types of disputes that make use of the adjudication process: (1) disputes between private parties, (2) disputes between private parties and public officials, (3) disputes between public officials or public bodies.[98]As previously mentioned the adjudication procedure is divided in two components namely litigation and arbitration.

The adjudication process requires that all parties involved must receive notice as to the complaint and the reasons, thereafter all parties must be given a chance to state their case and present evidence relating thereto. There are formal rules applicable in the adjudication process and the main goal is to come to a conclusion or a reasonable settlement. The court reaches a decision based on passive fact finding and a judgment will be made, which the parties are bound by.[99]

---

[96] https://lawweb.colorado.edu/profiles/pubpdfs/spain/IntlDispRes-EraGlobalization.pdf accessed 11 August 2017

[97] https://www.fenwickelliott.com//sites/default/files/nick_gould_-_adjudication_and_adr_-_an_overview_matrics_paper.indd_.pdf accessed 26 September 2017

[98] http://legal-dictionary.thefreedictionary.com/adjudication accessed 11 August 2017

[99] http://legal-dictionary.thefreedictionary.com/adjudication accessed 11 August 2017

4.2.1 History of Adjudication

In the nineteenth century the legal community found international law to be a kind of primitive law. There have always been international courts and alternative dispute resolution to settle a matter, but what the court lacks is general, compulsory jurisdiction over states.[100]

The formal process of litigation and arbitration long pre-dated the rise of modern international law. David Bederman researched the functionality of the process regarding the settlement of disputes. He didn't believe the question "Why it arose" was that important. He found that in the early years, there was a strong link between the adjudication process and the religion of the communities. Even though religion played an important part in the settlement of disputes, the production of seasoned opinions was found to be the basis of the success of adjudication.[101]

As both faith and reason formed the basis of the success of adjudication in settling disputes, it was therefore advocated by priests as an alternative to war. In the 15th and 16th century, writings of priests were found in which they advocated the alternative stating that adjudication is the choice of the Pope.[102]

Hugo Grotius, the author of *On the Law of War and Peace,* was a devoted Christian and offered adjudication as an alternative. This alternative could provide for peaceful settlement and the exclusion of a political or religious leader. Grotius defended his case by referring to one of Christ's teachings and the fact that there should be respect for peace amongst the community. He agreed with Thucydides, a Greek historian, regarding the statement "It is not lawful to proceed against one who offers arbitration just as against a wrongdoer."[103] Grotius further used the Kings of Castile and Navarre treaty from the 12th century, where the parties agreed to submit all disputes to King Henry II of England for resolution, as a defence to his statements. Thereafter the German Cities of Hamburg and Lübeck agreed to settle their differences by means of arbitration. This process was later followed by a few other states.[104]

The ideas Grotius advocated were reflected in the Peace of Westphalia, which formally ended the 30 years' war in Europe. The Peace of Westphalia was established by means of

---

[100] C Romano, KJ Alter & Y Shany *The Oxford Handbook of International Adjudication* (2013) 40
[101] Romano et al (n 100 as above) 42
[102] Romano et al (n 100 as above) 42
[103] Romano et al (n 100 as above) 42-43
[104] Romano et al (n 100 as above) 43

negotiation and arbitration, and was concluded after three years. The parties adopted a treaty with basic principles of non-intervention, religious tolerance and peaceful settlement of disputes. The dispute settlement procedure should be an "amicable settlement or legal discussions." The Peace of Westphalia established the modern international system of sovereign, co-equal states and thus the basis of the modern system of international law.[105]

Emmerich de Vattel was considered the most important writer of international law after Hugo Grotius. Vattel served as a diplomat and was the author of *The Law of Nations.* The book contains his view of how the world works and the best system to implement international law. Vattel agreed with Grotius and stated that adjudication, more specific arbitration, is a good means of settling disputes between states in a way that is practical, ethical and rational. Vattel went further and suggested that the states involved should use a neutral third party to pay performance bonds to, or that the states should exchange hostages, which will be held captive until the arbitration was concluded.[106]

Vattel's advice regarding adjudication proved to be of great help to the founding members of the United States. After the War of Independence, they created an independent state. They believed it was important for the functionality of the state to implement international law and ways of settling disputes peacefully. In the Jay Treaty of 1794, the United States and Great Britain agreed to use arbitration as means of settling all disputes that may arise, with the main agreement of using arbitration to settle any dispute from the War of Independence. During the period 1794 to 1804 the Jay Treaty lead to 536 arbitration awards. The first award was known as the St. Croix River Arbitration, in 1798, between Canada and the United States.[107]

This all led to a change in the way states settled their disputes. In 1873, the Russian Tsar acted as sole arbitrator in the *Maria Luz* case, a dispute between Japan and Peru. The victory of Japan in the *Maria Luz* case, proved the universality of international law and the protection of human rights on an international level.[108]

The Italian Chamber of Deputies passed a resolution in favour of arbitration in 1873. The resolution read:

---

[105] C Romano, KJ Alter & Y Shany *The Oxford Handbook of International Adjudication* (2013) 43
[106] Romano (n 105 as above) 43
[107] Romano (n 105 as above) 44
[108] Romano (n 105 as above) 45

> *"An acceptable and frequent mode of solving, according to the dictates of equality, such international questions as may admit of that mode of arrangements, as well as to introduce opportunity into any treaty with those Powers a clause to the effect that any difference of opinion respecting the interpretation and execution of those treaties is to be referred to arbitration."*[109]

Another noteworthy event, in the development of adjudication, was the Universal Peace Congress of 1889. A trend developed where the resolution of disputes shifted from arbitration and the use of courts became more prominent. The movement advocated the use of courts as an alternative to settling disputes. The movement believed that the creation of permanent international courts would be a better means of resolving disputes. The reason for this was they felt international courts would be able to respond quicker to disputes and that the court would be a particularly effective mechanism. The creation of functioning international law became a common theme during this time. In *Le Tribunal International,* Kamarowsky, a legal scholar from Russia, proposed an international court of justice which would be available to all states and which would help with the codification and promulgation of international law.[110]

The movement was of the opinion that at the core of the court was the centrality of the law rather than the desire to achieve some agreed-upon solution acceptable to both sides.[111] The support for international courts came from the positive and negatives of arbitration as well as the limitations it had. There were however setbacks in the establishment of international courts.[112]

During the early 19th century, Ivan Bloch produced a multi-volume treaty calling for the establishment of an international court. Bloch was convinced that adjudication was the alternative to war and should be used. He argued that the effects of war and armed conflict were so horrifying and destructive that the states should use adjudication to settle dispute rather than using adjudication as an option.[113]

---

[109] C Romano, KJ Alter & Y Shany *The Oxford Handbook of International Adjudication* (2013) 45-46
[110] Romano et al (n 109 as above) 46
[111] Romano et al (n 109 as above) 46
[112] Romano et al (n 109 as above) 47
[113] Romano et al (n 109 as above) 47-78

It was at The Hague Conference in 1899 where the United States delegation proposed the establishment of an international court. Root, a lawyer from New York, supported Bloch's opinion than an international court should be established, he was further of the opinion that arbitration was not a suitable means of resolving disputes and therefore an international court was needed. Even though the delegates did not establish a permanent international court after The Hague Conference, they did however agree upon the Convention on the Pacific Settlement of International Disputes. In the Convention on the Pacific Settlement of International Disputes they agreed to establish the Permanent Court of Arbitration (PCA). At the PCA there would be a Permanent Administrative Council consisting of diplomats to represent the state parties and a list of arbitrators from which states could select an arbitrator, should they voluntary submit a dispute. After the establishment of the PCA, Britain and France concluded a general arbitration treaty that served as model for other states using the PCA as a dispute resolution mechanism.[114]

Later at the Second Hague Conference in 1907, various dispute mechanisms were established and had some success. The two most important cases of that time, with specific reference to the Pacific Settlement Convention, was the 1909 case of *Deserters of Casablanca* and the 1906 case of *Dogger Bank.*[115] At this Second Hague Conference, there was again a movement to establish an international court, but this was once again unsuccessful. [116]

It was only after World War I, which was formally ended by the Treaty of Versailles, that there was reference made to include a court. The plan was instituted by the League of Nations and thus established the Permanent Court of International Justice (PCIJ). In February1920 a counsel was appointed to draft the statute of the new court. In December 1920, the draft was accepted. After the statute was formally accepted in 1921, the court began work on their first case in 1922.[117]

4.2.2 The Main Types of Adjudication

There are two main types of adjudication one should be aware of. As aforementioned, adjudication is categorised under (1) litigation and (2) arbitration, both being formal procedures.

[114] C Romano, KJ Alter & Y Shany *The Oxford Handbook of International Adjudication* (2013) 49
[115] Romano et al (n 114 as above) 49-50
[116] Romano et al (n 114 as above) 50-51
[117] Romano et al (n 114 as above) 53

4.2.2.1 Litigation

International litigation is the procedure of litigation against a foreign party. It can be against individuals, businesses or states. To enable an international litigation matter, the plaintiff must first establish jurisdiction over a foreign defendant. The establishment of jurisdiction can be a difficult process. After a judgment is obtained the plaintiff must take steps to enforce the judgment. The options on dispute settlement is normally set out in the treaties between the parties and where applicable any national legislation.[118]

Litigation is one of the forms of adjudication that is available as a dispute mechanism to states in state-to-state disputes that may arise regarding FDIs. Litigation is known to be the process where legal action is taken against another party.[119] With regards to FDIs the litigation process will be determined by the BIT, whether the parties can go directly to the International Court of Justice (ICJ) or whether they should approach the domestic courts first.[120]

4.2.2.1.1 Types of International Litigation

International and national litigation are two different processes. International litigation can be between two or more states, between a state and an international organisation, between international inter-governmental organisations or between a state and some other entity.[121]

Whether the parties refer the matter to international litigation or national litigation, will be determined by the agreement between the parties and the interpretation of the dispute settlement clause.[122]

4.2.2.1.2 Law Governing International Litigation

It is important to note that international litigation can only take place when both parties give consent to such proceedings. It is not possible for a state to drag the other party to one of the

---

[118] http://www.charlescamplaw.com/international-dispute-resolution/international-civil-litigation/ accessed 23 August 2017
[119] www.dictionary.com accessed 11 August 2017
[120] N Bernasconi-Osterwalder *State – State Dispute Settlement in Investment Treaties* (2014) 5
[121] https://www.dur.ac.uk/ibru/publications/download/?id=125 *accessed 23 August 2017*
[122] https://www.dur.ac.uk/ibru/publications/download/?id=125 *accessed 23 August 2017*

international courts, for example the International Court of Justice (ICJ) or the International Tribunal. The respondent or defendant must have agreed to such action.[123]

There are a few forms in which consent can be given by states. States can give their permission in terms of an agreement to a defined dispute, the state can give their permission to litigation regarding a category of future disputes and permission can be given by ways of a treaty between two states. The permission to litigate under a treaty can be a bilateral or multi-lateral treaty.[124]

Most treaties are based on the Vienna Convention of the Law of Treaties. For FDIs, the states will conclude a Bilateral Investment Treaty that will include a dispute resolution clause stating the options regarding the procedures for any dispute resolution.[125]

In the dispute settlement clause there is normally an indication for state-to-state disputes and whether they should first make use of national courts or if they have the option to approach the ICJ directly.[126]

In early BITs, investment disputes were uniformly referred to the ICJ. Such referral of a dispute formed a formal document, known as a *compromise,* conferring jurisdiction on the ICJ over the investment dispute.[127]

Even though the ICJ is an option to the settlement of investment disputes, instead of solely referring the matter to the ICJ, some investment treaties include state-to-state dispute settlement clauses, which combine the option of judicial settlement and international arbitration. The state initiating the dispute has the option of deciding which of the two procedures it prefers. The 1959 Germany–Pakistan BIT is an example of such an option. Note that this BIT did not include an investor- state arbitration clause.

Article 11 of the Germany – Pakistan BIT reads:

"(1) In the event of disputes as to the interpretation or application of the present Treaty, the Parties shall enter into consultation for the purpose of finding a solution in a spirit of friendship.

[123] https://www.dur.ac.uk/ibru/publications/download/?id=125 *accessed 23 August 2017*
[124] https://www.dur.ac.uk/ibru/publications/download/?id=125 *accessed 23 August 2017*
[125] https://www.dur.ac.uk/ibru/publications/download/?id=125 *accessed 23 August 2017*
[126] https://www.dur.ac.uk/ibru/publications/download/?id=125 *accessed 23 August 2017*
[127] https://www.dur.ac.uk/ibru/publications/download/?id=125 *accessed 23 August 2017*

(2) If no such solution is forthcoming, the dispute shall be submitted

(a) to the International Court of Justice if both Parties so agree or

(b) if they do not so agree to an arbitration tribunal upon the request of either Party [...].”[128]

The 1959, the Germany–Pakistan BIT required a specific agreement by the parties, with regards to any disputes, to be submitted to the ICJ. The BIT did however allow for arbitration upon request of either of the parties.[129] The BIT between the parties thus governed the litigation process and the law that would be applicable.[130]

Some BITs require that the dispute must be submitted to regional courts. An example of this is the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area (2007). The agreement allows states to choose between an arbitral tribunal and the COMESA Court of Justice by providing the following in the dispute settlement clause:[131]

“*Article 27 Settlement of Disputes between Member States*

1. Any dispute between Member States as to the interpretation or application of this Agreement not satisfactorily settled through negotiation within 6 months, may be referred for decision to either:

(i) an arbitral tribunal constituted under the COMESA Court of Justice in accordance with Article 28(b) of the COMESA Treaty; or

(ii) an independent arbitral tribunal; or

(iii) the COMESA Court of Justice sitting as a court [...].”[132]

Most of the FDIs are governed by BITs, thus stating the options regarding litigation or any other dispute settlement mechanism. Where there isn’t a BIT between the parties, the host-state will have national legislation governing the matter.

[128] https://www.dur.ac.uk/ibru/publications/download/?id=125 *accessed 23 August 2017*
[129] https://www.dur.ac.uk/ibru/publications/download/?id=125 *accessed 23 August 2017*
[130] https://www.dur.ac.uk/ibru/publications/download/?id=125 *accessed 23 August 2017*
[131] https://www.dur.ac.uk/ibru/publications/download/?id=125 *accessed 23 August 2017*
[132] https://www.dur.ac.uk/ibru/publications/download/?id=125 *accessed 23 August 2017*

4.2.2.1.3 Advantages and Disadvantages of International Litigation

1. Advantages:
    a. It is a formal procedure.
    b. Litigation can be used to motivate the parties to settle the matter before approaching the court.
    c. The confirmation of the trial date can be seen as a warning that there is going to be a consequence if the parties do not attend the trial or try to avoid the situation, thus parties are compelled to attend.
    d. The final decision from the court is binding.
    e. A legal precedent may be established by the case.[133]

2. Disadvantages:
    a. Litigation is costly and there is an emotional discomfort with regard to the ongoing process.
    b. The time frame for the litigation process to run its course is uncertain and might take years to reach a conclusion.
    c. The parties can't control the outcome of the matter.
    d. The available remedies are limited.
    e. The matter will not be resolved in a private manner, this may cause harm to the parties' reputation and their business relationship.[134]

4.2.2.2 Arbitration

Arbitration can be defined as the legal process of the resolution of disputes or dispute settlement outside the courts. The parties appoint three people, known as the arbitrators, by whose decision they agreed to be bound. This process is used to try and avoid litigation where possible.[135]

According to *the Arbitration Act*, *Act 42 of 1965,* arbitration proceedings can be defined as the following:

---

[133] https://www.blaney.com/sites/default/files/other/adr_advantages.pdf accessed 11 August 2017
[134] https://www.blaney.com/sites/default/files/other/adr_advantages.pdf accessed 11 August 2017
[135] https://www.hg.org/arbitration-definition.html accessed 9 June 2017

> *"Arbitration proceedings means proceedings conducted by an arbitration tribunal for the settlement by arbitration of a dispute which has been referred to arbitration in terms of an arbitration agreement."*

International commercial arbitrations have become more popular in the past few years and may be due to the number of international disputes. To settle a matter, most parties prefer arbitration, instead of litigation. Parties prefer to submit the dispute to the tribunal, rather than a court, which is governed by a specific governmental structure of that particular state. Private parties prefer not to be tied to a national court, where their opponent is a foreign state. When the parties are state vs state, arbitration is preferred as they do not feel comfortable with the foreign state sitting in on the judgement. This all leads to the fact that the parties wish to settle disputes on neutral ground.[136]

Arbitration is very attractive as an alternative dispute resolution, because it is an effective way of settling disputes and its faster and inexpensive compared to national court proceedings. This makes it also easier for the parties to obtain legal assistance. The parties may use their own attorneys rather than an attorney familiar with the national courts. [137]

According to H Smit, in his article *The Future of International Commercial Arbitration: A Single Transnational Institution?* page 11 and 12, the following is important to the parties:

> *"(1) The opportunity to select decision-makers who have the appropriate degree of ability and expertise necessary to adjudicate the particular dispute, (2) the ability to adjust the procedure to meet the exigencies of the case presented, and (3) the efficiency and speed of the process."*

4.2.2.2.1 Types of Arbitration

There are currently two forms of arbitration namely, Voluntary and Mandatory Arbitration and/or Binding and Non-Binding Arbitration.[138]

Voluntary and Mandatory Arbitrations are used when parties agree to arbitration as a dispute resolution in an agreement, or where the agreement is regulated by specific legislation. There

[136] H Smit *The Future of International Commercial Arbitration: A Single Transnational Institution?* (1986) 25 *Columbia Journal of Transnational Law* 9 1986-1987

[137] Smit (n 136 as above)

[138] https://www.linkedin.com/pulse/different-types-arbitration-shane-coons accessed 9 June 2017

are a number of agreements which can include the aforementioned clause such as labour, business, or consumer agreements. The parties agree on the number of arbitrators usually three, and each party may choose an arbitrator and the third will be an independent person. The area where the arbitration will take place and the fees will also be agreed upon. The parties normally agree to use arbitration before a dispute arises, but they are entitled to refer any dispute to arbitration after it arises. If the parties question the validity of the arbitration clause the matter may be referred to court with jurisdiction by notice of motion. The court may then decide whether the decision of the arbitrators must be enforced.[139]

The court can decide to refer parties to arbitration whether or not the parties agreed on arbitration. This normally happens when the agreement is regulated by national legislation. It will depend on the matter and if the court finds it in the best interest of justice to order the parties to arbitrate.[140]

The second form of arbitration is Binding and Non-Binding Arbitration. When the arbitrator's decision is binding, the decision will be enforceable as a judgment of court. The decision is seen as final and the parties cannot appeal the matter. There are however certain instances where the parties can appeal, in the case of fraud or the misuse of power.[141]

In the case of a non-binding decision, the parties may at any point appeal the decision made by the arbitrator and the case will be referred for settlement in court. The parties will agree whether the decision will be binding or non-binding, either in the pre-dispute agreement or in the earlier stages of the proceedings.[142]

4.2.2.2.2 Law Governing International Arbitration

There is currently no existing international arbitration law that governs international arbitration. Arbitration is governed by national legislation or other international rules. An example of an international rule is the International Centre for Settlement of Investment

[139] https://www.linkedin.com/pulse/different-types-arbitration-shane-coons accessed 9 June 2017
[140] https://www.linkedin.com/pulse/different-types-arbitration-shane-coons accessed 9 June 2017
[141] https://www.linkedin.com/pulse/different-types-arbitration-shane-coons accessed 9 June 2017
[142] https://www.linkedin.com/pulse/different-types-arbitration-shane-coons accessed 9 June 2017

Disputes. The international rule that will apply will normally be defined in the BIT agreement entered into by the parties.[143]

4.2.2.2.3 The Advantages and Disadvantages of International Arbitration

1. Advantages:
    a. Parties create their own process.
    b. The arbitrators can be selected on the basis of substantive knowledge.
    c. It is a confidential procedure.
    d. The formalities compel proper behaviour between parties.
    e. The procedural rules can be changed.
    f. There are less backlogs than in the courts.
    g. The final decision is binding.
    h. The procedure is shorter, in most circumstances, than courts, thus lower costs are incurred.[144]

2. Disadvantages:
    a. The success is normally determined by the arbitrators.
    b. Time and costs can be affected by poor co-operation.
    c. The confidentiality is not always suitable.
    d. The outcome of the matter is uncertain and binding on parties.
    e. The options to appeal are limited.[145]

4.3 Conclusion

Adjudication transformed throughout the years to keep up with the changing legislation and globalisation of international affairs. Both litigation and arbitration have a place in the settlement of disputes between states. It seems however that most agreements prefer the parties to try and resolve the matter by using the arbitral procedure.

---

[143] JH Carter *The International Arbitration Review* (2016) 474
[144] https://www.blaney.com/sites/default/files/other/adr_advantages.pdf accessed 11 August 2017
[145] https://www.blaney.com/sites/default/files/other/adr_advantages.pdf accessed 11 August 2017

It seems that arbitration is the better way to settle disputes. It is normally a faster, less expensive way than litigation and due to that, it has already a major advantage. It is also a more private procedure than litigation and leads to less damage to the parties' reputation and relationship. The parties are further pro-actively involved in trying to settle the matter under supervision of the arbitrator/s and the outcome or decision is binding.

If the parties could however not resolve the dispute, they may approach the courts, national or international, and may be confronted by the associated disadvantages of an open court case.

CHAPTER 5

DISPUTE SETTLEMENT MECHANISMS: ALTERNATIVE DISPUTE RESOLUTION

5.1 Introduction

As mentioned in Chapter 4, dispute mechanisms or resolution as referred to in practice, can be categorised into two main groups (1) adjudication procedures, which include litigation and arbitration and the (2) consensual procedures, which include negotiation, mediation and conciliation.[146] It is important to note that the consensual procedures contain more than the three mentioned procedures, it depends on what parties agreed to in the treaties or what is stated in the national legislation governing the FDI.

This chapter contains more information regarding alternative dispute resolution (ADR), the history and development of ADR, the types of ADR available, the law governing the procedure and the advantages and disadvantages of each of the main ADR procedures.

5.2 Alternative Dispute Resolution

Alternative dispute resolution (ADR) consists of a few different aspects, each with a different procedure. The different types of dispute resolutions are permitted options to use instead of going straight to litigation.[147] ADR refers to a set of practices and techniques aimed at achieving a resolution to a legal dispute between parties.[148]

The most common form of ADR is negotiations. Negotiations keep all parties involved in the process of settling the dispute and providing a solution to the matter at hand.[149] Whenever the parties can't settle the dispute amongst themselves, they can cede some control to a third

[146] https://www.fenwickelliott.com//sites/default/files/nick_gould_-_adjudication_and_adr_-_an_overview_matrics_paper.indd_.pdf accessed 26 September 2017

[147] http://www.abyssinialaw.com/study-on-line/item/320-alternative-dispute-resolution-and-historical-development accessed 8 August 2017

[148] http://www.ilo.org/public/english/iira/documents/congresses/regional/lagos2011/1stparallel/session1c/adr-southafrica.pdf accessed 8 August 2017

[149] SB Goldberg, FEA Sanders & NH, Rogers In *Dispute Resolution, Negotiation, Mediation and Other Processes* (1992) 3-14

party. It is important to know what factor of control they ceded to the third party, whether it is over the procedure, the solution or both, or if the third party is only there to help the parties reach a solution. This process where a third person is involved is known as mediation.[150]

The three primary processes in ADR are (1) negotiation, (2) mediation and (3) conciliation. The development in the procedures lead to a few “hybrids” of the primary processes. Examples of “hybrids” are:

(1) Where the process consists of an adjudication-like presentation of evidence and arguments combined with negotiations where a mini-trial will take place;[151] (2) arbitration can be combined with court adjudication to form the “rent a judge” or “private judging” process;[152] (3) mediation and arbitration are combined to form med-arb.[153] (4) Another well-known process is the ombudsman, where there is a neutral expert, a neutral evaluation and a summary jury trial.[154]

It is important to be able to distinguish between the processes, as each ADR process consists of different procedures and rules which might seem simple to identify, but can cause some confusion.[155]

5.2.1 The History of Alternative Dispute Resolution

The development of the ADR is known as the alternative dispute resolution movement (the Movement). Prior to the Movement there were already other alternatives to settle disputes instead of using litigation. When the parties voiced their disputes, it was often resolved by involving the ward boss, the village priest or a family friend. It was discovered that even where the parties filed their complaint in court, the dispute was normally settled outside of court.[156]

As previously mentioned, negotiation is the most popular of the ADR processes and is used even after filing the complaint at the court. Statistics show that only a tenth of the civil cases

---

[150] SB Goldberg, FEA Sanders & NH, Rogers In *Dispute Resolution, Negotiation, Mediation and Other Processes* (1992) 3
[151] Goldberg et al (n 150 as above) 3
[152] Goldberg et al (n 150 as above) 3
[153] Goldberg et al (n 150 as above) 3
[154] Goldberg et al (n 150 as above) 3
[155] Goldberg et al (n 150 as above) 3
[156] Goldberg et al (n 150 as above) 6

filed in the United Sates courts are resolved by going to trial and another fifth are resolved by some process of ADR.[157]

Mediation is another ADR process which has been used for centuries worldwide to resolve matters outside of court. Furthermore, mediation was the process used in small-scale societies globally and common practice within cohesive immigrant or religious groups as early as colonial New England.[158] Mediators became important for collective bargaining disputes in the early century. In the 1940's, their role became more important and a few courts started to use this process or rather encourage the process to settle matters outside of court. They especially used this option for minor criminal offences or family disputes.[159]

In the 1970's, the need for ADR increased. The Movement was desperate for so-called "alternative" methods to settle disputes outside of court. The term however was vague and only focused on non-binding third party procedures. The Movement assisted in the termination of the civil rights conflict in the 1960's and 1970's. The Community Relations Service of Justice Department hired mediators in 1972 to assist with the resolving of civil rights disputes.[160]

During that time the courts also became involved. In 1976, at the Pound Conference, the jurists and lawyers voiced their concerns regarding the expenses and the delay caused by a crowded justice system. After the Pound Conference the jurists appointed a task team to try and implement the vision of Professor Frank Sanders, that a court should not just be a courthouse, but also a centre of dispute resolution. The clerk of the court should have the jurisdiction to evaluate a case and refer the case to a suitable alternative for settlement of the dispute.[161] With the recommendation of the task team and public funding towards mediation and arbitration, the American Bar Association encouraged the creation of the model "multidoor courthouses."[162]

While the juristic system focused on the development of ADR and other less expensive alternatives to litigation, some advocates saw that mediation could be used to serve different purposes. Commentators voiced their hope that the use of other methods might lead to

---

[157] SB Goldberg, FEA Sanders & NH, Rogers In *Dispute Resolution, Negotiation, Mediation and Other Processes* (1992) 6
[158] Goldberg et al (n 157 as above) 7
[159] Goldberg et al (n 157 as above) 7
[160] Goldberg et al (n 157 as above) 7
[161] Goldberg et al (n 157 as above) 7
[162] Goldberg et al (n 157 as above) 7

resolutions, which would be more suitable for the parties and that there would be relief for the parties, as well as non-parties, involved in the matter.[163]

After the abovmentioned events the San Francisco Community Boards (the Board) programme was established in 1976 to strengthen ties and help find more alternatives. The Board created their own mediation programme and were open to anyone willing to be part of the said programme. The Board however did not achieve success and only had about 100 cases per year that they attended to. In the late 1970's the first "neighbourhood justice centres" were created. The parties who used the option of mediation were satisfied with the outcome and satisfied that they had a less expensive option available. However, the community didn't take full advantage of this process and the court caseloads weren't affected.[164]

After realising it would be impossible to achieve everything the Board wanted to in one programme, priorities were established for dispute resolution. The priorities were as follows:[165]

- *"To lower the court caseloads and expenses,*
- *To reduce the parties' expenses and time,*
- *To provide speedy settlement of those disputes that were disruptive of the community or the lives of the parties' families,*
- *To improve the public's satisfaction with the justice system,*
- *To encourage resolutions that were suited to the parties' needs,*
- *To increase voluntary compliance with resolutions,*
- *To restore the influence of neighbourhood and community values and the cohesiveness of communities,*
- *To provide accessible forums to people with disputes, and*
- *To teach the public to try more effective processes than violence or litigation for settling disputes*."[166]

After the prioritisation of the goals for the ADR, changes were developed and implemented in the system. The funding for these types of programmes were used to fund private dispute resolution programmes instead of the court's programmes. Mediation was funded rather than

---

[163] SB Goldberg, FEA Sanders & NH, Rogers In *Dispute Resolution, Negotioation, Mediation and Other Processes* (1992) 7
[164] Goldberg et al (n 163 as above) 8
[165] Goldberg et al (n 163 as above) 8
[166] Goldberg et al (n 163 as above) 8

cases that resembled trials and free dispute resolution was favoured above services rendered for a fee.[167]

The 1980's lead to more experiments and the development of the Movement. Insurance companies started to fund their own experimental alternative dispute programmes to reduce legal costs. The corporate counsel started to support the non-profit Centre for Public Resources to use ADR amongst businesses and their lawyers. The option of ADR in the corporate world led to faster settlements of disputes, which was more economic and caused less disruption with regard to the relationship of the parties involved. This period produced numerous experiments of ADR in the corporate sector especially with regards to mediation.[168]

During the period of the 1980's, the legislators in favour of the Movement started to include provisions to ensure the fairness of the ADR procedures and the outcome of the matters. Guidelines were provided for matters that could be settled under ADR and exclusion of certain matters were also addressed. For example, any matters involving public policies were not included in the scope for the option of ADR.[169]

The 1990's lead to the ceasing of experimentation and the implementation of ADR. The Congress requested the implementation of ADR as an option to settle matters. Businesses and their clients, following the Movement, demanded greater use of ADR. Under pressure from courts, businesses and clients the legal system was forced to implement new tools of ADR that would better equip parties to settle matters in a faster more economical way, and which would not lead to the disintegration of business relationships.[170]

5.2.2 The Main Procedures in ADR

As previously mentioned there are three main procedures in ADR- negotiation, mediation and conciliation. These three main procedures can be used in any interstate dispute resolution, depending on what was agreed in the treaty or determined by the host-states' acts.

---

[167] SB Goldberg, FEA Sanders & NH, Rogers In *Dispute Resolution, Negotiation, Mediation and Other Processes* (1992) 8
[168] Goldberg et al (n 167 as above) 9
[169] Goldberg et al (n 167 as above) 9
[170] Goldberg et al (n 167 as above) 9

5.2.2.1 Negotiation

Professor Frank Stander, a professor at Harvard, defined negotiation as "Communication for the purpose of persuasion".[171] Negotiation is seen as an important procedure under ADR because both parties keep control over the proceedings and the solution. The main focus of negotiation is communication between the parties to find common ground and any compromises that may be acceptable to both parties. This is a matter of problem-solving between the two parties and to find a solution that both parties will be comfortable with.[172]

It was previously mentioned that the conditions of a country's business and investment environment are important factors in attracting FDI and for the development of small and medium enterprises. Transnational businesses will invest in countries where there are healthy business environments and where the costs, delays and risks are minimal.[173]

Law is the basis on which a sound dispute resolution process for businesses is build, thus the law-makers have the responsibility and important role to ensure timely, modern and efficient ways in resolving a dispute for the protection of businesses' interests.[174]

It is noted that South Africa's law-makers can be of help, in making timely business-related laws, as *Section 76* of the *Constitution of the Republic of South Africa*[175] being an example of best practice.[176]

5.2.2.1.1 Types of Negotiation

There are two types of interests during the negotiation process, one being compatible interests and the other incompatible interests. In daily life, one must however consider there is a mixture of the abovementioned interests. Negotiation thus contains a mixture of (1) integrative and (2) distributive elements. It is theoretically important to distinguish between the two.[177]

---

[171] SJ Ware *Principles of Alternative Dispute Resolution* (2001) 152
[172] K Aina *Dispute Resolution* (2012) 44
[173] Aina (n 172 as above) 161
[174] Aina (n 172 as above) 161
[175] The Constitution of the Republic of South African, Act 108 of 1996
[176] Aina (n 172 as above) 162
[177] Unpublished: A Maiwald *Power, Negotiation Type and Negotiation Tactics* Unpublished Master's thesis, University of Twente The Netherlands 2015 5

(1) Integrative negotiation: Interests are neither completely oppositional nor completely compatible.[178] This integrative potential allows for a mutual agreement. This agreement will be reached when both parties achieve a result higher than where both parties have to compromise equally.[179]

(2) Distributive negotiation: It is the opposite of integrative negotiation. The negotiator, in this matter, has to investigate the question at hand. There must be determined how to divide a fixed amount of resources between the parties. This is known as a zero-sum game; the one side is better off than the other side.[180]

5.2.2.1.2 Negotiation vs Litigation

It is important to know when a party must use negotiation as a settlement mechanism or when they must approach the court and start a litigation procedure against the other party. Litigation normally ends with a settlement agreement before the case goes to trial. A settlement agreement is reached when both parties are of the opinion that their independent interests are looked after. This normally happens in a negotiation process. It is therefore of importance in valuing the case for both parties.[181]

The following factors should be evaluated before a party decides whether to negotiate or litigate:

1. Valuing a case:
   Where the litigant and the attorney determine whether the matter is worth the costs linked to litigation.[182]

2. Factors the attorney and client should consider in valuing the case:
   As the outcome of the litigation procedure is difficult to predict, attorneys are normally more cautious when they have to determine whether to negotiate or litigate. Where the client is willing to settle or willing to accept an offer made by the other party,

---

[178] Unpublished: A Maiwald *Power, Negotiation Type and Negotiation Tactics* Unpublished Master's thesis, University of Twente The Netherlands 2015 5
[179] Maiwald (n 178 as above) 5
[180] Maiwald (n 178 as above) 6
[181] SJ Ware *Principles of Alternative Dispute Resolution* (2001) 157
[182] Ware (n 181 as above) 157

negotiation is a better option than litigation. However, pursuing litigation can bring some satisfaction to the client. The question whether to litigate or negotiate is thus a complex question to answer.[183]

3. Timing of the Dispute

Because negotiation can take place anytime during the litigation process, anytime from the moment the complaint is drafted till a satisfied judgement is reached, it is always an option. It is however important to note that only the plaintiff can end the litigation proceedings. The defendant can also put an end to the proceedings by making an acceptable offer to the plaintiff. Settlement options are ever-present. Therefore, it is important to know when to settle the matter or rather to continue with litigation. [184]

4. Risk Aversion and Diversification

Risk aversion and diversification are important elements that need to be determined after the case valuation. Risk aversion is the willingness to pay for increased certainty.[185] It is the choice between:

4.1 receiving one million dollars for example, or

4.2 flipping the coin and receiving two million dollars or losing and receiving nothing.[186]

Risk diversification can be used to limit the risk in a matter. When it comes to risk diversification one must look at the example of two litigants. The one litigant is frequently litigating and the other only litigated once in his life. With regard to this example, the litigant who only litigated once before will be more risk averse than the litigant with the experience. This is because of risk diversification.[187]

[183] SJ Ware *Principles of Alternative Dispute Resolution* (2001) 158
[184] Ware (n 183 as above) 159
[185] Ware (n 183 as above) 159
[186] Ware (n 183 as above) 159
[187] Ware (n 183 as above) 161

5. Expected Values, Best Alternative to a Negotiated Agreement (BATNA) and the Bottom Line

   In the decision-making process between negotiation and litigation one would weigh the options and assess the option with the highest benefits and value. One will thus determine what is the lowest they will accept in the case of a settlement and act accordingly.[188]

6. Psychological Barriers to Valuating the Case

   There are a number of psychological barriers that could influence the evaluating of the case that one could list. One may be the tendency to give more weight to cases covered by the media than others. Another the tendency towards being overoptimistic and third how one determines the values of similar cases, to name but a few. Caution must be taken with respect to these factors.[189]

5.2.2.1.3 Law Governing International Negotiation

Informal negotiation is normally the first obligated procedure to dispute settlements in an international treaty or agreement. The reason for this is because disputes are normally settled outside of court an effective way to settle without the disintegration of the relationships between the parties, if negotiations between the parties happen in good faith. It is also important to note that negotiation is not a legal procedure, therefore there is no legislation governing the procedure and the rules.[190]

The BITs, between states, normally specify that negotiation must first be used between the states to try and resolve the matter informally. This is normally contained in the dispute settlement clause. Where a host-state has legislation governing the dispute settlement procedures, such legislation will apply. An example, the case of South Africa's Investment Act, Section 13,[191] when instated.[192]

[188] SJ Ware *Principles of Alternative Dispute Resolution* (2001) 161-165
[189] Ware (n 188 as above) 167-168
[190] UNCTAD Series on issues in international investment agreements *Dispute Settlement: Investor – State* (2003) 23-24
[191] The Protection of Investment Act, Act 22 of 2015
[192] n 191 (as above)

To conclude, the procedure of negotiation shall thus be determined by the BIT agreement or the host-state's legislation (if applicable). The BITs or legislation normally determine that negotiation should take place before any other procedure. The parties will also determine their own rules and procedure as they find suitable because it is not a legal procedure.[193]

5.2.2.1.4 Advantages and Disadvantages of Negotiation

1. Advantages:
   a. Active participation is required by both parties.
   b. Both parties have to co-operate to find a solution.
   c. Negotiation is based on the interest of both parties and not law.
   d. Negotiation is flexible.
   e. The parties determine their own rules.
   f. Transaction costs are less than litigation.
   g. The process is private and confidential.
   h. There is no requirement that an agreement should be reached.
   i. The parties control the outcome and tempo of the negotiation.[194]

2. Disadvantages:
   a. Can be a stalling tactic.
   b. The parties are not compelled to negotiate.
   c. It's not a legal procedure.
   d. The parties may have limited authority to negotiate.
   e. A power imbalance is possible between the parties.
   f. The lack of a neutral party may reduce the chances of reaching an agreement.
   g. It may not provide the necessary protection with regards to the parties' rights.[195]

[193] https://www.lawteacher.net/free-law-essays/contract-law/advantages-and-disadvantages-of-mediation-adr-contract-law-essay.php accessed 11 August 2017
[194] https://www.lawteacher.net/free-law-essays/contract-law/advantages-and-disadvantages-of-mediation-adr-contract-law-essay.php accessed 11 August 2017
[195] https://www.blaney.com/sites/default/files/other/adr_advantages.pdf accessed 11 August 2017

5.2.2.2 Mediation

As previously mentioned, mediation is one of the main processes in ADR. Mediation is the involvement of a third neutral party, the mediator, to assist in resolving the matter.[196]

The strategy of mediators may vary and the focus point of each is different. Some may focus on the solution and the best possible way to resolve the matter so that both parties' interests are protected. Other mediators may only focus on the legal rights of the parties involved. There are also mediators who encourage the participation of the parties to solve the matter and others who would only involve the legal representatives or just the parties without their legal representative. It solely depends on the mediator involved.[197]

Even though mediators may have different approaches to the mediation process, the experienced mediators tend to employ similar processes. Common practice is to divide the mediation process in stages:[198]

1. The opening of the mediation.
2. The parties' opening presentation.
3. Mediated negotiations.
4. Reaching an agreement.[199]

It is said that mediation is a non-binding process, but the outcome of the mediation can have a legally-binding result. Mediation normally leads to an agreement between the parties and this agreement is legally-enforceable by any of the parties in terms of contract law, because settlement agreements are binding between the parties.[200]

5.2.2.2.1 Types of Mediation

Over the years, mediation evolved and three types of mediation that have been established: (1) facilitative mediation, (2) evaluative mediation and (3) transformative meditation.[201]

[196] https://www.hg.org/mediation-definition.html accessed 15 August 2017
[197] SB Goldberg, FEA Sanders & NH, Rogers In *Dispute Resolution, Negotiation, Mediation and Other Processes* (1992) 104
[198] Goldberg et al (n 197 as above) 104
[199] Goldberg et al (n 197 as above) 104
[200] SJ Ware *Principles of Alternative Dispute Resolution* (2001) 6 & 7
[201] www.mediate.com/articles/zumeta.cfm accessed 15 August 2017

(1) Facilitative mediation was applicable in the 1960's and the 1970's. It was the only form available at the time and the main goal was to structure the process in a manner that would help the parties reach a mutual solution. During this process the mediators asked questions and assisted the parties to find solutions and to analyse the said solutions. The mediator wasn't involved in making any recommendations, giving advice or predicting the outcome of the matter. The mediator was solely responsible for the process and the parties had their own responsibility regarding the outcome of the matter. The main goal of facilitative mediation was to reach a solution based on the information and understanding of the parties.[202]

(2) Evaluative mediation is based on the settlement conference held by judges. The mediator assists the parties in finding a solution to the matter by showing the parties the weaknesses in their cases. After the identification of the weaknesses, the mediator will then predict how a court will interpret the facts and decide the outcome. The mediator makes recommendations to the parties. The evaluative mediator's only concern would be the legal bases of the matter and he would normally have separate meetings with the parties and their legal representatives. The mediator will help the parties determine the legal position and their costs versus the benefits of continuing litigation rather than resolving the matter in the mediation process. The mediator will determine the process and have direct influence on the outcome of the matter.[203]

(3) Transformative mediation is the latest mediation process and is based on the values of "empowerment" of the parties. Another value is "recognition" of the parties' needs, interests, values and points of view. The main goal of this mediation is the possibility that the relationship between the parties may change during the mediation process. The parties will all attend the same meeting, not as in evaluative mediation, where the parties are separated. The main goal is to have the parties together, as only they can give "recognition" to each other.[204]

[202] www.mediate.com/articles/zumeta.cfm accessed 15 August 2017
[203] www.mediate.com/articles/zumeta.cfm accessed 15 August 2017
[204] www.mediate.com/articles/zumeta.cfm accessed 15 August 2017

5.2.2.2.2 Law Governing International Mediation

International mediation is understood to be a voluntary process of dispute settlement. This option can however be agreed upon in the BITs between parties before any litigation is allowed. This is normally defined in the dispute settlement clause of the BIT. Furthermore, where the host-state has specific legislation governing any dispute settlements, the parties will normally follow the procedure as set out in the legislation.[205]

The parties can however agree to approach any international organisation if the process fails on a national level. It depends on the agreement reached in the BITs between the parties and whether any national/local legislation will be applicable before the parties may approach any international organisation.[206]

5.2.2.2.3 Advantages and Disadvantages of Mediation

1. Advantages:
    a. The parties are empowered.
    b. The parties must take responsibility for their own dispute.
    c. If the parties reach an agreement it is legally enforceable.

2. Disadvantages:
    a. The process may take a while to complete.
    b. There is a possibility that the outcome is contrary to the standards of fairness.
    c. The parties may feel pressured to reach an agreement by the mediator.
    d. Mediators aren't able to protect the weaker party.
    e. The mediation might end without the parties reaching an agreement.

5.2.2.3 Conciliation

The third of the main procedures in ADR is conciliation, which is much like mediation, but there are a few important differences in the procedure. The procedure is known as a friendly way to settle disputes. The parties will nominate an independent neutral third person to be the conciliator. When the conciliator is nominated and appointed he will assist the parties to resolve

[205] http://theheartofeurope.ideasoneurope.eu/2014/10/15/mediation/ accessed 15 August 2017
[206] http://theheartofeurope.ideasoneurope.eu/2014/10/15/mediation/ accessed 15 August 2017

the matter by way of negotiation. This is a strictly confidential matter.[207] The conciliator is not like the arbitrator who solves the matter and makes decisions regarding an appropriate outcome, they merely help the parties to identify the issues, develop options, consider all the alternatives available to them and help the parties reach a resolution by means of an agreement.[208]

5.2.2.3.1 Types of Conciliation

The type of conciliation which will be applicable will be determined by the matter at hand or the parties themselves. There are two main types of conciliation, (1) informal conciliation and (2) formal conciliation.[209]

(1) Informal conciliation is where disputes are addressed between the parties' legal representatives, over informal means of communication, for example phone calls, letters, e-mails, etc.[210]

(2) Formal conciliation, also known as conciliation conference, is where a meeting is scheduled and the clients' legal representatives attempt to resolve the matter in the presence of the conciliator.[211]

5.2.2.3.2 Law Governing International Conciliation

Because conciliation is a voluntary process, the same as mediation, there is no specific laws governing the process. The parties can determine and agree on their own procedure and time and place they would like to conclude the proceedings.[212]

It is however possible that a BIT or national law can give the parties the option to use the conciliation procedure before they may approach the court with the matter.[213]

[207] www.sblaw.vn/what-is-the-difference-between-arbitration-and-conciliation accessed 22 August 2017
[208] https://www.monash.edu/workplace-policy/staff-wellbeing/.../conciliation-process accessed 22 August 2017
[209] https://www.lpcc.sa.gov.au/lawyers/conciliation/types-of-conciliation accessed 22 August 2017
[210] https://www.lpcc.sa.gov.au/lawyers/conciliation/types-of-conciliation accessed 22 August 2017
[211] https://www.lpcc.sa.gov.au/lawyers/conciliation/types-of-conciliation accessed 22 August 2017
[212] http://www.dispute-resolution-hamburg.com/conciliation/what-is-conciliation/ accessed 23 August 2017
[213] http://www.dispute-resolution-hamburg.com/conciliation/what-is-conciliation/ accessed 23 August 2017

5.2.2.3.3 Advantages and Disadvantages of Conciliation

1. Advantages:
   a. The conciliator is normally a legal expert.
   b. The process is private, thus there is no damage to the parties' reputation.
   c. The parties reserve the right to go to court if they are not satisfied with the outcome of the process.
   d. The time and date of the meeting is flexible and will be arranged at a time suitable for both parties.
   e. The procedure is cheaper than approaching the court.
   f. The procedure is informal, but still private.[214]

2. Disadvantages:
   a. The process is not legally binding on the parties.
   b. The decision at the end of the process can't be guaranteed.
   c. The parties might not take the matter seriously, as the process is informal.
   d. There are no appeals available.
   e. There is no legal aid.[215]

5.3 Conclusion

There are ADR procedures available to parties before referring the dispute to court and making use of litigation. The main goal of ADR is to provide parties with a different option to settle disputes on a national and international basis, rather than using litigation as their first option. Most of the ADR procedures are informal and less costly and they strive to settle the dispute in a civil manner that will not damage any of the parties' reputations. The parties are legally bound by the settlement agreement. If there is a breach, the parties can hold each other accountable on the basis of the settlement agreement.

Furthermore, the options that are available to the parties can be defined by BITs or national legislation. There are normally options in the dispute settlement clause of the BITs or the national legislation, depending on which are applicable, which are available to the parties or

[214] https://getrevising.co.uk/grids/advantages-and-disadvantages-of-conciliation accessed 22 August 2017
[215] https://getrevising.co.uk/grids/advantages-and-disadvantages-of-conciliation accessed 22 August 2017

which they can agree upon using before referring the matter to court. Normally the BIT or national legislation will determine that the parties try and resolve the matter outside of court by making use of ADR first. If they are not satisfied with the outcome they can refer the matter to court and make use of formal court proceedings.

ADR has numerous advantages and disadvantages. It is a function of how the matter is approached and which of the ADR procedures the parties will agree upon using to resolve the problem. The outcome of the matter cannot be guaranteed and in certain circumstances, the parties might not reach a settlement.

The main goal however is to try and settle the dispute without going to court and to resolve the problem in a manner that is fast, cost effective and not damaging to the parties' reputations or their business relationships.

CHAPTER 6

THE SOUTH AFRICAN POSITION ON FDI

6.1 Introduction

Investment law is one of the legal fields which creates a lot of controversy. Since arbitration became more popular the number of arbitral cases in terms of Bilateral Investment Treaties also increased. It was found that the inconsistencies in the language used in the treaties caused most conflict as each person interpreted the treaty differently.[216]

In 2013, the South African government introduced a new bill, The Promotion and Protection of Investment Bill (the Bill). The Bill was initiated in response to the *Piero Foresti, Laura de Carli and Others vs The Republic of South Africa ICSDI, ARB(AF)/07/1,* arbitral case. The South African government became concerned because foreign investors challenged Black Economic Empowerment (known as BEE) on an international level in an arbitral matter. The government was concerned that certain policies would not be protected internationally, specifically arbitration as a dispute settlement mechanism.[217]

Some of the Bilateral Investment Treaties (BITs) were terminated between South Africa and various countries after the draft bill, *The Protection and Promotion of Investment Act*, was introduced on the 1st of November 2013. BITs were normally used to regulate the investment regimes. After the Bill was released and the cancellation of the BITs took place, the revised Bill was introduced on 22 July 2015.[218] The Act is now known as *The Protection of Investment Act, Act 22 of 2015* and will come into practice on a date determined by the President of South Africa and as published in the Government Gazette.[219]

There are however a number of concerns regarding the Act. Especially the dispute settlement clause has gaps and may be confusing as to what the parties' options are. Arbitration is only available after certain measures are taken and only available as a state-to-state dispute settlement and not as a state to investor.

---

[216] M Sornarajah *The International Law on Foreign Investments* (2010) 1

[217] A Farish Protection of Investment Act - A balancing Act between Policies and Investments (2016) *De Rebus* (25 April)

[218] Farish (n 217 as bove)

[219] Farish (n 217 as bove)

6.2 Important Provisions of The Protection of Investments Act

The Act included a few key provisions namely, (1) interpretation, (2) equal treatment, (3) expropriation, (4) repatriation of funds and (5) dispute settlement.[220]

(1) Interpretation: The Act must be interpreted in line with any relevant convention or international agreement to which South Africa is or becomes a party to. BITs will be upheld by South Africa, irrespective of the commencement of the Act.[221]

(2) Equal Treatment: Foreign investors must be treated equally to national investors under the same circumstances. The equal treatment provision may not be interpreted in such a way that will require South Africa to extend to foreign investors the benefit of any treatment, preference or privilege resulting from government procurement processes, subsidies or grants provided by the government or any law or measure that is designed to protect or advance historically disadvantaged persons.[222]

(3) Expropriation: Foreign investors will have the right to property. This is provided for in the constitution[223] of South Africa. Foreign investors' property may only be expropriated in terms of a law of general application, and (i) for a public purpose or in the public interest and (ii) subject to compensation. Any expropriation must be in line with the Expropriation Act, 63 of 1975.[224]

(4) Repatriation: Foreign investors may repatriate funds subject to taxation and any other applicable legislation. The repatriation of funds will remain subject to South Africa's exchange control regulations.[225]

---

[220] https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/south-africas-protection-of-investment-act accessed 31 August 2017
[221] https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/south-africas-protection-of-investment-act accessed 31 August 2017
[222] https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/south-africas-protection-of-investment-act accessed 31 August 2017
[223] The Constitution of the Republic of South Africa, Act 108 of 1996
[224] https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/south-africas-protection-of-investment-act accessed 31 August 2017
[225] https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/south-africas-protection-of-investment-act accessed 31 August 2017

(5) Dispute Settlement: If any investor has a dispute regarding any action taken by the South African government, the investor may lodge a request within six months, at the Department of Trade and Industry (DTI), to facilitate the settlement of the dispute by appointing a mediator. The foreign investor is not limited to mediation. The foreign investor may approach any competent court, independent tribunal or statutory body within South Africa for the settlement of the dispute. If all domestic remedies have been exhausted, the South African government may consent to international arbitration. Such international arbitration shall be conducted between South Africa and the home country of the foreign investor. Arbitration is only available as a state-to-state dispute settlement mechanism.[226]

6.3 Dispute Resolution, Section 13 of The Protection of Investment Act

The dispute settlement clause reads as follows in the Act;

> *"(1) An investor that has a dispute in respect of action taken by the government, which action affected an investment of such foreign investor, may within six months of becoming aware of the dispute request the Department to facilitate the resolution of such dispute by appointing a mediator.*
>
> *(2) (a) The Department must maintain a list of qualified mediators of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators.*
>
> *(b) The mediator must be appointed by agreement between the government and the foreign investor (hereinafter referred to as the parties) from the list contemplated in paragraph (a), or, in the absence of a list, from individuals proposed by either party.*
>
> *(c) In the event of the Department being party to the dispute, the parties may jointly request the Judge President of one of the divisions of the High Court to appoint a mediator.*
>
> *(d) Recourse to mediation must be governed by the prescribed rules and any prescribed time limit may be adjusted by agreement between the disputing parties.*

[226] https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/south-africas-protection-of-investment-act accessed 31 August 2017

(3) In order to facilitate a resolution of a dispute contemplated in subsection (1), the following information and prescribed form must be submitted by the foreign investor:

(a) Contact details of the foreign investor, including a physical address in the Republic or territory where the investor is predominantly resident, or where it is incorporated, its email address, facsimile number and telephone number;

(b) a summary of the claim, including the measures giving rise to the investment dispute;

(c) the specific organ, agency, province or other subdivision of the Republic allegedly responsible for the measures which the foreign investor alleges constitute a breach of any of the investment protection contained in this Act;

(d) the provisions of this Act that the foreign investor alleges have been breached; and

(e) the relief sought.

(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."[227]

6.3.1 Concerns Regarding Dispute Resolution

One serious issue which brought about concern, was that the Act overlooked the effects it may have on legal obligations of South Africa, which agreed upon as a member of the Southern Africa Development Community (SADC). In 1994, after the first democratic elections, the SADC treaty was signed by the South African government.[228] All Protocols under the treaty are binding and should be domesticated in terms of national legislation. The aforementioned

[227] Section 13 of the Protection of Investments Act, Act 22 of 2015

[228] http://www.sadc.int/member-states/south-africa/ accessed 12 September 2017

principle that SADC Protocols are binding, was recently confirmed by the South African Constitutional Court which stated that it was binding both internationally and constitutionally.[229]

Annex 1 of the SADC Protocol on Finance and Investment, the Co-operation on Investments, provides the guidelines for Southern African countries regarding the promotion and protection of investments. The countries are required to harmonise all investment regimes according to the guidelines as set out in the SADC Protocol on Finance and Investment. The Protocol further includes, *inter alia,* "investments shall not be nationalised or expropriated…except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation; that investments and investors shall enjoy fair and equitable treatment in the territory of any member state,"[230] and that both parties may submit any dispute they have to international arbitration upon the exhaustion of domestic remedies.[231]

The Act has a few flaws. Firstly, it does not allow for "prompt, adequate and effective compensation."[232] Secondly it does not provide for "fair and equitable treatment."[233] and thirdly it does not allow a foreign investor to submit a dispute to international arbitration, because the Act states that "such arbitration will be conducted between the Republic and the home state of the applicable investor."[234] The Act only allows for state-to-state arbitration. All the above-mentioned flaws go against the requirements as set out in the SADC Protocol on Finance and Investment.[235]

The Act only provides for a state-to-state arbitration when all other local remedies have been exhausted. These remedies include mediation and litigation. There is however no clarity as to whether the parties must use all the remedies, e.g. mediation and litigation, before they are allowed to arbitrate, or whether they are allowed to arbitrate the matter after having used one of the dispute resolution mechanisms. The old rule of the "doctrine of diplomatic protection" is revised and the inclusion has little legal meaning, as the injured investor had the option of protection under diplomatic channels in terms of international law and through state-to-state

---

[229] K Bosman *South Africa: Trading international investment for policy space* 21
[230] Bosman (n 229 as above) 21
[231] Bosman (n 229 as above) 21
[232] Bosman (n 229 as above) 21
[233] Bosman (n 229 as above) 21
[234] Section 13(5) The Protection of Investment Act, Act 22 of 2015
[235] Bosman (n 229 as above) 22

arbitration. Diplomatic protection was replaced in the second century by Investor-State Dispute Settlement ISDS, due to the de-politicisation of international investment disputes.[236]

According to the South African Department of Trade and Industry (DTI) under ISDS, the investor would most likely be favoured above the host-state. This however is not the case and the opposite is applicable. Under ISDS, the host-state is normally favoured.[237] According to the United Nations Trade and Development 2015 Investment Report, 36% of disputes were decided in favour of the host-state and 27% in favour of the investor. The statistics are based on 405 concluded cases. The government however feels that ISDS will have a negative impact on the implementation of South Africa's development policies.[238]

The concerns regarding dispute settlement are not entirely invalid. It is however important to note that to date, only two cases were brought against the government on the grounds of ISDS.

In the *Foresti vs South Africa* case,[239] a claim arose, amongst others, from the extinction of old mineral rights. Such rights were held by the claimant in terms of the Mineral and Petroleum Resources Development Act. The claims included the alleged breach of the relevant international investment agreement, regarding indirect expropriation. The matter had however been settled before an appropriate decision was made.[240]

International investment agreements are still being drafted, even though there is a global feeling of unimportance towards such agreements. International investment agreements are drafted and designed in such ways that provide for certainty for the investors and for more space for host-states to pursue legitimate public policy goals.[241]

6.3.2 Why is Investor Sate Dispute Settlement Important?

It is known that when a dispute arises between the investor and the host-state, the dispute will normally be settled in the domestic courts of the host-state. The opinion of the investors is that this means of settling a dispute is disadvantageous to the investor, due to the fact that the

[236] K Bosman *South Africa: Trading international investment for policy space* 23
[237] Bosman (n 236 as above) 23
[238] Bosman (n 236 as above) 23
[239] Piero Foresti, Laura de Carli and others vs the Republic of South Africa (ICSID Case No. ARB(AF)/07/1)
[240] Bosman (n 236 as above) 23
[241] Bosman (n 236 as above) 24

domestic courts would not be impartial with regards to the matter. Domestic courts have to apply domestic legislation which does not necessarily protect the foreign investors' rights in dispute settlement. Furthermore, domestic courts lack the technical expertise to resolve international investment disputes therefore causing concern for the investors.[242]

The option that the dispute should be settled in another state's domestic court was not an acceptable way to resolve the matter either. In most instances the other state's courts will not have jurisdiction over the matter and any decision made by the court will be unenforceable. Even where the host-state agreed to the involvement of the third state, sovereign immunity or other contravening judicial doctrines would be applicable causing such proceedings to be moot.[243]

The case of direct arbitration between the investor and the host-state seems a better, more attractive alternative. Arbitration is known to be more cost effective and more efficient than continuing with litigation in the domestic courts. Arbitration allows the parties to choose their own arbitrators. The arbitrators would be more neutral and reliable and they would possess the necessary skills to resolve the matter.[244] The investor possesses an advantage as he has the option to an effective international forum, should a dispute arise.[245]

The option of using arbitration as a dispute settlement mechanism is important as it builds confidence in legal security, which is required for a sound investment decision. The advantages for the host-state are twofold. Firstly, as the investment environment improves the possibility of attracting more investments and funds are likely. Furthermore, the host-state protects itself, from international litigation by allowing investor-state arbitration. Secondly, the host-state shields itself from the problem regarding diplomatic protection that might be enforced by the investors home-state.[246]

The most important benefit of ISDS, which is mostly used in the USA, is the fact that it depoliticises investment disputes between the investor and the host-state. Equating the private investment interest with those of an entire nation could ultimately lead to tension that threatens

---

[242] WM Choi *The Present and Future of the Investor-State Dispute Settlement Paradigm* (2007) 10(3) Journal of International Economic Law 734-735
[243] Choi (n 242 as above) 735
[244] Choi (n 242 as above) 735
[245] Choi (n 242 as above) 735
[246] Choi (n 242 as above) 735

the peace in the modern world.[247] The implementation of ISDS helps to reduce the aforementioned threat by (1) substituting direct claims by individuals for the mechanism of diplomatic protection,[248] and (2) it reduces unnecessary diplomatic tension in the area of investment between the disputant countries, by broadening the legal context into the wider arena of global economic interest.[249]

When legal obligations exist but cannot be enforced, they take the form of a ghost. The rules are in the code of law, but they are vague and out of reach. Thus, for practical reasons, they have little power. It is important the rules of investment treaties do not fade into nothingness. If that is the case, the purpose would be lost and confidence would erode and reason for the entire system of negotiation of treaties would be lost. Functional investor-state dispute settlement mechanisms would promote foreign investments. Though the implementation of ISDS is important, there is however some concerns regarding the proceedings of the ISDS.

6.3.3 The Concerns Regarding Proceedings

Due to the complexity of claims by an investor against a host-state, the possibility of abuse of the system is of concern. There are a few procedural rules that prevent this abuse from taking place under ISDS.

Firstly, the parties must try and resolve the matter in an informal matter, through consultation or negotiation. It is normal practice in BITs and Free Trade Agreements (FTA) that a claim may only be made after six months, thus guaranteeing a period of six months for consultations or negotiations.[250]

Secondly, 90 days before a claim is submitted the investor must submit a written notice to inform the host-state of their intentions to submit a claim to arbitration.[251] The reason for the 90 days is to give the host-state time to prepare their defence.

---

[247] WM Choi *The Present and Future of the Investor-State Dispute Settlement Paradigm* (2007) 10(3) Journal of International Economic Law 736
[248] Choi (n 247 as above) 736
[249] Choi (n 247 as above) 736
[250] Choi (n 247 as above) 738
[251] Choi (n 247 as above) 738

Thirdly, there is a certain period of statute of limitation.[252] For example, in the North American Free Trade Agreement (NAFTA) an investor may not bring any investor-state dispute claim if three years have lapsed from the date of the alleged damage or breach by the host-state. This prevents any claims due to a grudge against the host-state. All claims should be brought in good faith and the transparency that the claims should be considered on the formal merits of the matter.[253]

Fourthly, any investor registered in the host-state may not make an investor-state dispute claim.[254]

Lastly, once the investor-state dispute claim has started all other remedies must be excluded. No forum shopping will be permitted between arbitration and the domestic courts, and arbitration must be permitted to the complaining investor.[255]

Under these procedural rules, investor-state dispute claims grew over the years. None of the cases were instituted by government. If settled or undisclosed cases and those where the parties had the intention of instituting a claim were included, the number of the investor-state dispute claims would be impossible to determine.[256]

There have been multiple claims lodged in certain circumstances with regards to one single investment or against one government. As an example, one such case was a beef case against the US. More than 100 individuals brought claims against the US based on the same set of facts.[257] These events lead to the inclusion of responses on the part of governments. After these events, the United States – Uruguay BIT had a special state-to-state binding arbitration available at an early stage of the dispute settlement. The goal of this state-to-state arbitration was to prevent frivolous claims or any interim injunctive relief. This treaty went even further and included a negotiation of the restructuring of debt instrument issued by Uruguay, and a condition that would not be subjected to ISDS.[258]

[252] WM Choi *The Present and Future of the Investor-State Dispute Settlement Paradigm* (2007) 10(3) Journal of International Economic Law 738
[253] Choi (n 252 as above) 739
[254] Choi (n 252 as above) 739
[255] Choi (n 252 as above) 739
[256] Choi (n 252 as above) 739
[257] Choi (n 252 as above) 740
[258] Choi (n 252 as above) 740

The exclusion of certain public policy from the ISDS became a new trend and it is possibly the answer to the frivolous claim problem. It would still serve the purpose of maintaining a balance between the protection of investments and preserving legitimate public policies.[259]

The public is of the opinion there is a lack of binding effects and enforcement is seen as a drawback. With regards to decisions made by the International Court of Justice (ISJ), the decisions would be binding on the parties involved in the dispute, but the enforcement of such decisions is not supported by adequate enforcement mechanisms. Due to that the judgements are only seen as symbolic.[260] Contrary, any decision made in investor-state disputes is fully binding on the parties. Any breach thereof would result in a breach of the International Centre for Settlement of Investment Disputes (ICSID) Convention. This breach would lead to a revision of the right of diplomatic protection by the investor's home-state. It is important to note that domestic courts cannot review any judgment made by the ICSID in terms of their enforcement. However, in the event of an award against a state, the normal rules of immunity would apply. In short, any award made against a state's assets would not be enforceable.[261]

There have been discussions regarding the possibility of an appeal system for investment disputes, in view of ISDS being final. This resulted in the parties considering the establishment of an appellate body. The aforementioned provision regarding an appellate body was recently included in an US FTA and the 2004 US Model BIT.[262] This provision is likely to appear more in the near future and would probably lead to the establishment of an *ad hoc* appeal tribunal in the ISDS mechanisms. The introduction of such *ad hoc* tribunal will lead to global support for the ISDS system and would increase the possibility of rectification of any legal errors.[263]

6.3.4 Advantages and Disadvantages of the Investor-State Dispute Settlement System

[259] WM Choi *The Present and Future of the Investor-State Dispute Settlement Paradigm* (2007) 10(3) Journal of International Economic Law 740
[260] Choi (n 259 as above) 740–741
[261] Choi (n 259 as above) 741
[262] Choi (n 259 as above) 741
[263] Choi (n 259 as above) 742

6.3.4.1 Advantages

- The host-state must provide investors with fair and equitable treatment and full legal protection and security, either as defined by the agreement or as required by the international minimum standard. (Minimum standard of treatment).[264]
- States must follow defined and legal processes. They may not invoke arbitrary measures in cases involving investors from another state. (Due process).[265]
- The protection for foreign investors must be the same as those for domestic investors. The most favoured nation standard, that host-states may not discriminate between foreign investors from different nations, is applicable. (Non- discrimination).[266]
- States cannot directly, indirectly, or "creepingly" render an investment valueless without compensating the investor. (Expropriation)[267]

6.3.4.2 Disadvantages

- ISDS is seen as an overkill. FDIs are usually risky. It does not require the establishment of institutions to protect companies. Multinational companies are very successful and sophisticated. They are capable of evaluating risk and determining whether the expected returns cover that risk. Companies usually cover their own risk by purchasing private insurance policies.[268]
- The ISDS socialises the risk of foreign direct investment.[269]

---

[264] http://www.heritage.org/trade/report/investor-state-dispute-settlement-isds-mechanisms-important-feature-high-quality-trade accessed 14 September 2017
[265] http://www.heritage.org/trade/report/investor-state-dispute-settlement-isds-mechanisms-important-feature-high-quality-trade accessed 14 September 2017
[266] http://www.heritage.org/trade/report/investor-state-dispute-settlement-isds-mechanisms-important-feature-high-quality-trade accessed 14 September 2017
[267] http://www.heritage.org/trade/report/investor-state-dispute-settlement-isds-mechanisms-important-feature-high-quality-trade accessed 14 September 2017
[268] https://www.forbes.com/sites/danikenson/2014/03/04/eight-reasons-to-purge-investor-state-dispute-settlement-from-trade-agreements/#317f2f0d1899 accessed 13 September 2017
[269] https://www.forbes.com/sites/danikenson/2014/03/04/eight-reasons-to-purge-investor-state-dispute-settlement-from-trade-agreements/#317f2f0d1899 accessed 13 September 2017

- The process encourages "discretionary" outsourcing**.** While one should not denigrate, punish, or tax foreign outsourcing, neither should one subsidise it. The ISDS however does exactly that, it subsidises "discretionary" outsourcing.[270]
- The process exceeds the "national treatment" obligations**,** in effect it extends special privileges to foreign corporations. An important concept of trade agreements is that they should be non-discriminatory. ISDS turns national treatment on its head, giving privileges to foreign companies that are not available to domestic companies.[271]
- ISDS can be exploited by creative lawyers. There is a lot of latitude for interpretation of what constitutes "fair and equitable" treatment of foreign investment, given the vagueness of the terms and the uneven jurisprudence.[272]
- ISDS reinforces the myth that trade primarily benefits large corporations.[273]

6.4 Conclusion

There are a number of opinions regarding the importance of the ISDS system. Some writers feel it should not be included in the investment agreements or legislation, whereas others feel it is important to be included. The reason for including the ISDS system is that the foreign investor would be more comfortable with the system because they don't always have confidence in the host-state's legal system and the courts.[274]

The evolution of the direct claim system in FDI would make up for all short-comings of the traditional diplomatic protection. Furthermore, diplomatic protection has the strong ability to screen out frivolous or dishonest claims by any individuals. It is however the perception that

[270] https://www.forbes.com/sites/danikenson/2014/03/04/eight-reasons-to-purge-investor-state-dispute-settlement-from-trade-agreements/#317f2f0d1899 accessed 13 September 2017
[271] https://www.forbes.com/sites/danikenson/2014/03/04/eight-reasons-to-purge-investor-state-dispute-settlement-from-trade-agreements/#317f2f0d1899 accessed 13 September 2017
[272] https://www.forbes.com/sites/danikenson/2014/03/04/eight-reasons-to-purge-investor-state-dispute-settlement-from-trade-agreements/#317f2f0d1899 accessed 13 September 2017
[273] https://www.forbes.com/sites/danikenson/2014/03/04/eight-reasons-to-purge-investor-state-dispute-settlement-from-trade-agreements/#317f2f0d1899 accessed 13 September 2017
[274] WM Choi *The Present and Future of the Investor-State Dispute Settlement Paradigm* (2007) 10(3) Journal of International Economic Law 746

direct claims through ISDS combined with the removal of exhaustion of domestic rule would restrict the state's sovereignty.[275]

There is no concrete evidence to support the belief that the ISDS may promote FDI. The fact that the ISDS restores some confidence in the investor is however a mutual global feeling.[276]

After further inspection of the Act[277] the DTI has acknowledged that the act is not in line with the SADC Protocol. Their defence being that the Protocol has been through a review process and that the changes made to the Protocol would be in line with the Act. It is however uncertain whether the Protocol and the Act would be in line with each other. There are numerous questions regarding the fact that South Africa is bound by the SADC Protocol and if it would be possible to pass this act with regards to South Africa's international obligations. Many of the BITs between South Africa and foreign investors have not yet been terminated and the investors are still protected under the BITs.[278]

Many are of the opinion that the Act should include the ISDS system or at least be more specific regarding the measures that should be taken before the parties can refer the matter to arbitration. State-to-state arbitration is also a difficult route to follow, as the foreign investor first has to approach his government to get involved in the dispute. If ISDS arbitration could be included it would restore the foreign investors trust in the system and might encourage more FDI's. In a country where FDI's are important for economic growth it is important to find a balance between the government's sovereign right to implement domestic policies, it's duty to protect foreign investors and its objective of promoting sustainable economic growth.[279]

---

[275] WM Choi *The Present and Future of the Investor-State Dispute Settlement Paradigm* (2007) 10(3) Journal of International Economic Law 746

[276] Choi (n 275 as above) 746

[277] The Protection of Foreign Investments Act, Act 22 of 2015

[278] K Bosman *South Africa: Trading international investment for policy space* 24

[279] Bosman (n 278 as above) 39

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

7.1 Introduction

The research problem which this study has sought to solve relates to dispute mechanisms under the new legislation, specifically the procedures that need to be followed in the settlement of foreign direct investment disputes. The issue is whether these procedures would promote or deter foreign direct investments. However, there is an international opinion that South African courts don't always function as they should and that the investors would be treated less favourable than in international arbitration. It is against this backdrop that this study has sought to investigate how the perceived gaps in relation to dispute mechanisms framework under the new legislation can be closed to make the legislation to be investor-friendly.

The broad legal research question which the research has sought to answer is what are the perceived gaps in the procedures that need to be followed in the settlement of foreign investment disputes under the new legislation and how can the gaps be closed to boost investors' confidence and attract more foreign investments into the country?

The core argument in this research is that South Africa has great potential to attract FDIs. With strong FDIs, the current living standards in South Africa could improve. Therefore, this study has argued that there are gaps in the procedures that need to be followed in relation to settlement of foreign investment disputes under the new legislation and closing the gaps will boost investors' confidence and attract more foreign investments into the country.

7.2 Summary of findings

In chapter 2, the strong link between the economic growth of a country and foreign investments has been established in the sense that the inflow of foreign investments is important for economic growth. Increase in the flow of FDIs has been proved to improve the currency of a host-state and this improvement has resulted in the expansion of the host-state's foreign exchange by which imports are funded. The stronger the currency of the host-state the cheaper importing of products become. However, exporting will become more expensive and may result in unemployment. As a whole FDIs have a positive effect on the economy of a country.

In chapter 3, the nature of BITs is discussed as the agreements between two states regarding the direct investment by a foreign country in a host-state. The BITs create a certain standard between the states, investor and host-state and can be enforced outside of the national jurisdiction system of the host-state. However, foreign investors are sceptical toward the quality of the host countries' national legislation and the enforcement thereof. One of the research findings in this chapter is that, in the past, arbitration was based on the consent of both parties expressed in the arbitration clause in a foreign investment agreement. Thereafter, arbitration became treaty based. The investment treaties had a big role in promoting arbitration and increasing the number of arbitral cases in the foreign investment area, especially ICSID arbitration. Even though treaties provide a sounder base for the jurisdiction of arbitral tribunals, international law still applies. International law is still being represented by the principle of *pacta sunt servanda* in the international sphere.

In chapter 4, it was found that with the development and arrival of globalisation in the function of international law, international dispute mechanisms have developed and evolved to settle disputes in the most functional way. Adjudication transformed over the years to keep up with the changing legislation and globalisation of international affairs. Both litigation and arbitration have a place in the settlement of disputes between states. It seems however that most agreements prefer the parties to try and resolve the matter by using the arbitral procedure.

In chapter 5, alternative dispute resolution (ADR), its history and development, the variants of ADR, the law governing the procedure and the advantages and disadvantages of each of the main ADR procedures are discussed. The main goal of ADR is to provide parties with a different option to settle disputes on a national and international basis, rather than using litigation as their first option. Most of the ADR procedures are informal and less costly and they strive to settle the dispute in a civil manner that will not damage any of the parties' reputation. The parties are legally bound by the settlement agreement. If there is a breach, the parties can hold each other accountable on the basis of the settlement agreement. The options that are available to the parties can be defined by BITs or national legislation. The main goal however is to try and settle the dispute without going to court and to resolve the matter in a manner that is fast, cost-effective and not damaging to the parties' reputations or their business relationships.

Lastly in chapter 6, the fact that investment law is one of the most controversial disciplines of law was discussed. Since arbitration became more popular, the number of arbitral cases in

terms of BITs also increased. It was found that the inconsistencies in the language used in the treaties caused most conflict as each person interpreted the treaty differently. In South Africa, some of the BITs were terminated between South Africa and various countries after the draft Bill had been promulgated. The Bill is known as *The Protection of Investment Act, Act 22 of 2015* and will come into effect on a date to be determined by the President of South Africa and as published in the Government Gazette. There are however a number of concerns regarding the Act, especially the dispute settlement clause which has gaps and may be confusing as to what the parties' options are. Arbitration is only available after certain measures have been taken and only as a state-to-state and not as an investor-to-state dispute settlement mechanism.

7.3 Conclusions

Over the years, the South African legal system has developed and multiple treaties were signed to regulate the agreements between South Africa and foreign investors. The protection of investors changed during this period. The results were that states would have to revise or update treaties or enforce new legislation. South Africa reacted to this change by accepting a new legislation[280] to try and improve the system in South Africa with regards to the protection of national and international investors. Some however feel that this is not the case and that the Act places national investors in a better position than the international investors, with specific reference to the settlement of disputes between foreign investors and the host-state.[281]

There are a few opinions regarding the importance of the ISDS system. Some writers feel that it should not be included in the investment agreements or legislation, where others feel that it is important to include. The reason for including the ISDS system is that the investors would be more comfortable with the system because they don't always have confidence in the host-state's legal system and the courts. The direct claim in terms of the ISDS system has however became a worldwide trend.[282] In the case of South Africa ISDS is excluded from the act. Recent events in South Africa also reduced confidence in the host-state's legal system and institutions.

[280] The Protection of Investments Act, Act 22 of 2015

[281] A Farish Protection of Investment Act - A balancing Act between Policies and Investments (2016) *De Rebus* (25 April)

[282] WM Choi *The Present and Future of the Investor-State Dispute Settlement Paradigm* (2007) 10(3) Journal of International Economic Law 746

In conclusion, this writer is of the view the Act should include the ISDS system or at least be more specific regarding the measures that should be taken before the parties can refer the dispute to arbitration. State-to-state arbitration is also a difficult route to follow because the foreign investors would have to approach their governments to get involved in the dispute. ISDS arbitration should be included in the South African Act because it would restore the foreign investors trust in the system and might encourage more FDIs. In a country where FDIs are important for economic growth it is important to find a balance between (1) the government's sovereign right to implement domestic policies, (2) its duty to protect foreign investors and (3) its objective of promoting sustainable economic growth.[283]

7.4 Recommendations

The fact that South Africa drafted its own investment legislation is a step in the right direction. The law is evolving alongside the new trends of international law regarding FDI. It is however important that the Act should be reconstructed in terms of SADC's Protocols in order for South Africa to meet its international obligations. Furthermore, the Act should contain the ISDS system and be more specific regarding the procedures that should be taken before the parties are allowed to refer the matter to arbitration. To include the ISDS system and make the necessary changes with regards to SADC, would encourage FDIs and have a positive effect on the development and growth of South Africa.

[283] K Bosman *South Africa: Trading international investment for policy space* 39

Bibliography

1. **Text Books**

1.1 Baten J, A History of the Global Economy. From 1500 to the Present (2016) 318-325

1.2 Goldberg SB, Sanders FEA & Rogers NH, *In Dispute Resolution, Negotioation, Mediation and Other Processes* (1992) 3-14

1.3 Romano C, Alter KJ & Shany Y, *The Oxford Handbook of International Adjudication* (2013) 40

1.4 Sornarajah M, *The International Law on Foreign Investments (*2010) 1

1.5 Ware SJ, *Principles of Alternative Dispute Resolution* (2001) 152

2. **Journal Articles**

2.1 Choi WM, *The Present and Future of the Investor-State Dispute Settlement Paradigm* (2007) 10(3) Journal of International Economic Law 734-735

2.2 Farish A, Protection of Investment Act - A balancing Act between Policies and Investments (2016) *De Rebus* (25 April)

2.3 Neumayer E & Spess L, *Do bilateral investment treaties increase foreign direct investment to developing countries?* (2005) 33 (10) World Development 1567-1585

2.4 Smit H, *The Future of International Commercial Arbitration: A Single Transnational Institution?* (1986) 25 *Columbia Journal of Transnational Law* 9 1986-1987

3. **Theses and Dissertations**

3.1 Unpublished: Maiwald A *Power, Negotiation Type and Negotiation Tactics* Unpublished Master's thesis, University of Twente The Netherlands 2015 5

4. **Legislation**

4.1 The Constitution of the Republic of South African, Act 108 of 1996

4.2 The South African Protection of Investment Act, Act 22 of 2015

5. **Case Law**

5.1 **International Court of Justice:**

5.1.1 Texaco vs Libya (1977) 53 ILR 389

5.2 **ICSID:**

5.2.1 Piero Foresti, Laura de Carli and others vs the Republic of South Africa (ICSID Case No. ARB(AF)/07/1)

5.3 **England:**

5.3.1 Kahler vs Midland Bank (1950) AC 24 at 56

5.4 **United States of America:**

5.4.1 Sapphire vs NIOC (1982) 21 ILM 976

5.4.2 Aminoil vs Kumait (1982) 21 ILM 976

6. Websites

6.1 https://www.thebalance.com/foreign-direct-investment-fdi-pros-cons-and-importance-3306283 accessed 26 July 2017

6.2 http://uir.unisa.ac.za/bitstream/handle/10500/1332/dissertation.pdf?sequence=1 accessed 26 July 2017

6.3 https://www.google.co.za/#q=monopsony+definition&* accessed 6 March 2017

6.4 read:http://www.southafricanmi.com/south-africas-economic-history.html accessed 6 March 2017

6.5 https://lawweb.colorado.edu/profiles/pubpdfs/spain/IntlDispRes-EraGlobalization.pdf accessed 11 August 2017

6.6 https://www.fenwickelliott.com//sites/default/files/nick_gould adjudication_and_adr_-_an_overview_matrics_paper.indd_.pdf accessed 26 September 2017

6.7 http://legal-dictionary.thefreedictionary.com/adjudication accessed 11 August 2017

6.8 www.dictionary.com accessed 11 August 2017

6.9 http://www.charlescamplaw.com/international-dispute-resolution/international-civil-litigation/ accessed 23 August 2017

6.10 https://www.dur.ac.uk/ibru/publications/download/?id=125 accessed 23 August 2017

6.11 https://www.blaney.com/sites/default/files/other/adr_advantages.pdf accessed 11 August 2017

6.12 https://www.hg.org/arbitration-definition.html accessed 9 June 2017

6.13 https://www.linkedin.com/pulse/different-types-arbitration-shane-coons accessed 9 June 2017

6.14 https://www.blaney.com/sites/default/files/other/adr_advantages.pdf accessed 11 August 2017

6.15 http://www.abyssinialaw.com/study-on-line/item/320-alternative-dispute-resolution-and-historical-development accessed 8 August 2017

6.16 http://www.ilo.org/public/english/iira/documents/congresses/regional/lagos2011/1stparallel/session1c/adr-southafrica.pdf accessed 8 August 2017

6.17 https://www.lawteacher.net/free-law-essays/contract-law/advantages-and-disadvantages-of-mediation-adr-contract-law-essay.php accessed 11 August 2017
6.18 https://www.blaney.com/sites/default/files/other/adr_advantages.pdf accessed 11 August 2017
6.19 https://www.hg.org/mediation-definition.html accessed 15 August 2017
6.20 www.mediate.com/articles/zumeta.cfm accessed 15 August 2017
6.21 http://theheartofeurope.ideasoneurope.eu/2014/10/15/mediation/ accessed 15 August 2017
6.22 www.sblaw.vn/what-is-the-difference-between-arbitration-and-conciliation accessed 22 August 2017
6.23 https://www.monash.edu/workplace-policy/staff-wellbeing/.../conciliation-process accessed 22 August 2017
6.24 https://www.lpcc.sa.gov.au/lawyers/conciliation/types-of-conciliation accessed 22 August 2017
6.25 http://www.dispute-resolution-hamburg.com/conciliation/what-is-conciliation/ accessed 23 August 2017
6.26 https://getrevising.co.uk/grids/advantages-and-disadvantages-of-conciliation accessed 22 August 2017
6.27 https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/south-africas-protection-of-investment-act accessed 31 August 2017
6.28 https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/south-africas-protection-of-investment-act accessed 31 August 2017
6.29 http://www.sadc.int/member-states/south-africa/ accessed 12 September 2017
6.30 https://www.lawteacher.net/free-law-essays/contract-law/advantages-and-disadvantages-of-mediation-adr-contract-law-essay.php accessed 11 August 2017
6.31 https://www.blaney.com/sites/default/files/other/adr_advantages.pdf accessed 11 August 2017
6.32 https://www.hg.org/mediation-definition.html accessed 15 August 2017
6.33 www.mediate.com/articles/zumeta.cfm accessed 15 August 2017
6.34 http://theheartofeurope.ideasoneurope.eu/2014/10/15/mediation/ accessed 15 August 2017
6.35 www.sblaw.vn/what-is-the-difference-between-arbitration-and-conciliation accessed 22 August 2017
6.36 https://www.monash.edu/workplace-policy/staff-wellbeing/.../conciliation-process accessed 22 August 2017
6.37 https://www.lpcc.sa.gov.au/lawyers/conciliation/types-of-conciliation accessed 22 August 2017
6.38 http://www.dispute-resolution-hamburg.com/conciliation/what-is-conciliation/ accessed 23 August 2017

6.39 https://getrevising.co.uk/grids/advantages-and-disadvantages-of-conciliation accessed 22 August 2017
6.40 https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/south-africas-protection-of-investment-act accessed 31 August 2017
6.41 https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/south-africas-protection-of-investment-act accessed 31 August 2017
6.42 http://www.sadc.int/member-states/south-africa/ accessed 12 September 2017
6.43 http://www.heritage.org/trade/report/investor-state-dispute-settlement-isds-mechanisms-important-feature-high-quality-trade accessed 14 September 2017
6.44 https://www.forbes.com/sites/danikenson/2014/03/04/eight-reasons-to-purge-investor-state-dispute-settlement-from-trade-agreements/#317f2f0d1899 accessed 13 September 2017

7. Other

7.1 Aina K, *Dispute Resolution* (2012) 44
7.2 Bernasconi-Osterwalder N, *State – State Dispute Settlement in Investment Treaties* (2014) 5
7.3 Bosman K, *South Africa: Trading international investment for policy space* 21
7.4 Carter JH, *The International Arbitration Review* (2016) 474
7.5 UNCTAD Series on issues in international investment agreements *Dispute Settlement: Investor – State* (2003) 23-24