REDRESSING THE ASYMMETRIES OF INTERNATIONAL INVESTMENT TREATY REGIME FROM A SOUTH AFRICAN PERSPECTIVE

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Declaration

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

Koena Herbert Mpshe

Certificate

I certify that my mini dissertation consist of 24 884 words

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List of Acronyms

ANC	African National Congress
AsgiSA	Accelerated Shared Growth Initiative South Africa
BEE	Black Economic Empowerment
BIT	Bilateral investment treaty
BRICS	Brazil, Russia, India, China and South Africa
DTI	Department of Trade and Industry
EU	European Union
FCN	Friendship, Commercial and Navigation
FDI	Foreign direct investment
FTAs	Free trade agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GEAR	Growth Employment and Redistribution Programme
HDSA	Historically Disadvantaged South Africans
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Dispute

ICTSD	International Centre for Trade and Sustainable development
IIAs	International investment agreements
IISD	International Institute for Sustainable Development
IMF	International Monetary Fund
ITO	International Trade Organisation
MFN	Most Favoured Nation
MIGA	Multilateral Investment Guarantee Agency
MPRDA	Mineral and Petroleum Resources Development Act
NGO	Non-governmental organizations
NIEO	New International Economic Order
OECD	Organisation on Economic Co-operation and Development
PPIB	Promotion and Protection of Investment Bill
RDP	Reconstruction and Development Programme
SADC	Southern Africa Development Community
TRIMs	Trade-related investment measures
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
WTO	World Trade Organisation

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2. *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe (*ICSID Case No ARB/05/6), Award, April 12, 2009, online: ICSID, www.icsidworldbank.org (International Centre of Investment Disputes).

3. *MTN (Dubai) Limited and MTN Yemen for Mobile Telephones v. Republic of Yemen*, ICSID Case No. ARB/09/7.

4. *Piero Foresti, Laura de Carli and others v Republic of South Africa* (ICSID Case No ARB(AF)/07/1) Award, 3 August 2010, online: ICSID, www.icsidworldbank.org (International Centre of Investment Disputes).

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2. Charter of Economic Rights and Duties of States, General Assembly res 3281 (XXIX), 29 General Assembly Official Records, Supp. No. 31, p 50, UN doc. A/9631 (1974). http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__journals__journal_of_international_law_and_politics/documents/documents/ecm_pro_064908.pdf

3. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

4. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 575 UNTS 159, article 48(5)

5. Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4 1986), online: UN http://www.un.org/documents/ga/res/41/a41r128.htm.

6. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A,

7. International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force on 3 January 1976)

8. North American Free Trade Agreement, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (1993) (entered into force 1 January 1994).

9. SADC Protocol on Finance and Investment, 18 August 2006, online: SADC http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf

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10. The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 UNTS 187, 33 I.L.M. 1153 (1994).

11. The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 1868 UNTS 186 (entered into force on 1 January 1995).

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6. Agreement between the Kingdom of Sweden and the Republic of South Africa on Promotion and Reciprocal Protection of Investments, South Africa and Sweden, 25 May 1998, online: UNCTAD http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu (entered into force on 1 January 1999).

Abstract

The recent investment policy shift, by the South African government, including, termination of bilateral investment treaties with some developed countries, is illustrative of the continued discontent by most developing countries with the *status quo* in the realm of international investments agreements (IIAs) regime.

Balancing governments' sovereign right to implement domestic policies, in order to achieve socio-economic goals, for overall sustainable development, and the corresponding duty to protect foreign investments within the host state seems perpetually elusive, within the current bilateral investment treaty (BIT) regime. The parallel rising of free trade agreements (FTAs) incorporating investment chapters to BITs and the withdrawal from international investment arbitration by some countries, is symptomatic of continued disgruntlement with the current investment regime. South Africa is amongst the front runners of this discontentment and has voiced its concerns with the system, by cancelling some of its BITs and substituting same with adopting a new domestic investment regime instead, the investment Act of 2015. This study analyses the government's policy shift, with a view to find the extent to which the current BIT regime constrained the government's policy space towards economic transformation. This is achieved by analysing the substance and objective of the policy reform as against the international standards. Consequently, after probing the global investment regime and more in particularly the country's economic and political architecture, the study found that although South Africa's investment policy shift was labelled 'drastic and regressive' by critics, the latter is rational when subjected to substantive approach to the rule of law. Author however, concludes that it is the implementation thereof that is disproportional, as the same objectives underpinning the policy reform can be achieved through a less contentious approach. Finally author suggests a renegotiation of a model BIT as a less onerous and proportionate tool, to achieve the balance sought, and recommends policy options for enhancing international investment regime to address the challenges identified.

Key terms

Arbitration, bilateral investment treaty, development, developing countries, host state, foreign direct investment, policy space, transformation, South Africa.

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CHAPTER 1

GENERAL INTRODUCTION

1.1 Background to the research

International law is at the highest echelons of modern global governing structures. The increasing prominence of international law in investor-state relations governance is unprecedented. Nowhere has such prominence been evident akin to international investment regime.[1] However, this area of law is at the moment knotted with challenges, faced with a fork in the road. It has abandoned relative stability, finds itself in murky waters. While facing consolidation and proliferation on the one hand, it also experiences mounting contestation or even outright rejection on the other.[2]

The proliferation of BITs over the last two decades is indicative of global economic liberalisation, characterised by a shift from reliance on customary international law to treaty based investment protection mechanism. The beginning of protection of foreign investment by way of BITs has been backed as one of the greatest highlights of international law.[3] Foreign direct investment (FDI) through BITs has arguably become critical puzzles in the international legal and economic maze. Approximately 2952 such treaties have been concluded since 1959, about 2318 of which are in force,[4] this number surpasses most other treaties, ever concluded.[5]

At the same time, the current BIT-based regime is fiercely contested, On the one hand some countries chose to maintain the *status quo* or, limit changes to minor reforms, while other countries such as South Africa, which is the case study of this investigation, did not renew their BITs and even went to the extent of terminating

[1] LNS Poulsen 'Sacrificing sovereignty by chance: investment treaties, developing countries, and bounded rationality' (2011) (Doctoral dissertation, The London School of Economics and Political Science (LSE)).
[2] S Hindelang & M Krajewski. *Towards a More Comprehensive Approach in International Investment Law. Shifting Paradigms in International Investment Law-More Balanced, Less Isolated, Increasingly Diversified* (2016) 1-18 http://www.academia.edu/20696680/Towards_a_More_Comprehensive_Approach_in_International_Investment_Law_in_Shifting_Paradigms_in_International_Investment_Law (accessed 16 May 2016).
[3] T Steenkamp '*South Africa's new bilateral investment treaty policy: a reasonable response to a flawed regime?* (Doctoral dissertation, University of British Columbia).2014 chp 1.
[4] http://investmentpolicyhub.unctad.org/IIA (accessed 24 April 2016).
[5] J W Salacuse 'Emerging Global Regime for Investment' (2010) *Harvard International investment law Journal* 51 427.

existing ones, while others, such as Ecuador, have withdrawn from the international centre for settlement of investment dispute (ICSID) based international arbitration.[6]

Nonetheless, BITs remain a sacrosanct instrument of protection to foreign investors, for which there is currently not much legal alternative,[7] save for customary international law principles, which are sometimes narrow in scope. The literature of the World Trade Organisation's (WTO)Agreement on trade-related investment measures (TRIMs), is also underwhelming in that it entail only basic disciplines on the regulation of foreign investment that are by far not as comprehensive, compared to most provisions contained in the BITs.

However, most developing countries over-estimated the advantages of BITs and ignored the risks attached thereto. Developing country governments often regarded these treaties as merely '*tokens of goodwill*' and thus inconsequential[8]. Most of them, sacrificed their sovereignty more by chance than by choice,[9] and therefore neglecting their national policy objectives and development agendas while competing for capital. It is only until they suffered the callousness of international arbitration themselves, when they realised that, those treaties were not merely mythical but realistic.[10] Only then did they start to question the legitimacy of the BIT-regime as to whether it speaks to their development objectives, and many embarked on exit strategies in an effort to redress the alleged legitimacy crisis of the BIT regime. South Africa opted for a policy overhaul, which is the focus of this thesis. This makes an interesting case study, since the exit strategy adopted by the latter, is unprecedented in the global investment regime. Analysing the country's policy option, in the quest for the elusive *policy space*, makes a critical case study not only for the developing countries but for the entire global investment community, because once tested, it will offer lessons and way forward in this fiercely contested sphere of international governance structure.

[6] S Clarkson & S Hindelang, 'How parallel Lines Intersect: Investor-State Dispute settlement Social Policy in AC Bianculli and A Ribeiro' Hoffman (eds).
[7] E Neumayer & L Spess 'Do bilateral investment treaties increase foreign direct investment to developing countries? 'World Development ,October 2005 33 10, 1567–1585. http://www.sciencedirect.com/science/article/pii/S0305750X05001233 (accessed 03 May 2016)
[8] Poulsen (n 1 above) 273-313.
[9] N 1 above, 273-313.
[10] N 1 above, 273.

The term *policy space* was coined by United Nations Conference on Trade and Development (UNCTAD) document in 2002.[11]It was officially used for the first time in the Sao Paulo Consensus of 2004 where it was defined as, 'the scope for domestic policies especially in the areas of trade, investment and industrial development, which might be framed by international disciplines, commitments and global market considerations.'[12]In context, the term *policy space* refers to: 'the room required for sovereigns to govern and regulate as they see fit, while at the same time observing their obligations under international and municipal laws'.[13]

Within the South Africa context, the balance sought is between foreign investors' protection, and the right of the state to legislate or take administrative actions,[14] which are meant to advance socio-economic transformation, from the ruins of the apartheid legacy. The bone of contention however, is whether the sudden policy shift brought about by the Protection of Investment ACT (the Act) will seamlessly succeed in striking such a balance in a manner that is not detrimental to foreign investor's interest and consequently not to the detriment of the country's development goals?

Pursuant to its BIT policy review in 2010, South Africa embarked on terminating several of its BITs, in favour of domestic investment legislation pursuant to its BIT policy review. The decision to terminate a number of BITs within a relatively short period of time, cannot escape criticism. Consequently, on the other hand the country's BIT termination exercise is reflective of the growing discontent amongst capital importing countries with international investment law in general and investor-State arbitration in particular, and reflecting the advice expressed in the *Osgoode* statement by concerned scholars regarding the current international investment regime.[15]

In the aforementioned statement, the scholars in question suggested that municipal law should be the primary legal framework for the regulation of investor-

[11] UNCTAD Trade and development report, 2002 online http://unctad.org/en/Docs/tdr2002_en.pdf (accessed 03 January 2016).
[12] I Grabel 'Not your grandfather's IMF: global crisis," productive incoherence "and developmental policy space' (2011) 35 *Cambridge Journal of Economics* 5.
[13] J Pfumorodze, 'rebalancing Foreign investor and host state interest under the new generation of South African Bilateral Investment treaties' unpublished PHD thesis, University of Pretoria 2015.
[14] Perronne NM, 'International Investment regime and foreign investor's right: Another view of a popular story http://etheses.lse.ac.uk/776/1/Perrone_International_Investment_Regime.pdf (2013) (accessed 03 Feb 2016).
[15] See the Osgoode statement by academics issued on 31 August 2010 online at http://www.osgoode.yorku.ca/public_statement/ (accessed 02 March 2016).

state relations,[16] in an effort to exterminate the legitimacy concerns levelled against the investment regime.[17] Despite the overhaul, South Africa has also kept the door open for possible future BITs, which implore the question; is it even possible to combine the protection of foreign investments through BITs with the State's right to regulate in the public interest and the State's right to development, in order to leave enough policy space for host States to regulate in accordance with its domestic priorities without breaching its obligations to foreign investors?,[18] Some international institutions such as; the International Institute for Sustainable Development (IISD), United Nations Conference on Trade and Development (UNCTAD), Commonwealth Secretariat (Commonwealth) and the South African Development Community (SADC) believe it is possible and have all published either Model BITs or guidelines for the drafting of BITs that incorporate principles that prioritize development in capital importing States. [19]

However, Implementation is a critical part of any policy, if a reasonable policy is well implemented, negative consequences can be mitigated.[20] When a substantively reasonable policy is not well implemented, it leaves the door open to detractors to communicate harmful and false messages that may harm a country's reputation among foreign investors.

1.2 Research problem

The challenge presented by South Africa's investment policy, is embedded in the mounting contestation around the issue of balance between foreign investor protection, and the right of the state to legislate,[21] or take administrative actions which are meant to advance socio-economic transformation of the country from the prejudice inflicted by colonialism and apartheid regimes. The transformative nature of the country's investment formulation, reflecting the government's constitutional mandate, is sending wrong signals to the global investment community about the country's hospitability towards foreign investors.

[16] See (N 15 above).
[17] Pfumorodze (n 13 above).
[18] Steenkamp (n 3 above). Chr 1 -3
[19] UNCTAD, 'Investment Policy Framework for Sustainable Development', (14 June 2012), online: UNCTAD http://unctad.org/fr/PublicationsLibrary/webdiaepcb2012d6_en.pdf.
[20] N 18 above.
[21] Perronne (n 14 above)

As highlighted by some commentators in the *Osgoode* statement;

> FDI should be a blessing to country's that accepts it. Developed countries seem to have profited from FDI to the extent of even rebuilding their economies from the remains of World war. But at the developing end of the spectrum, the record is not as impressive; the latter is still trailing in as far as development is concerned. [22]

The cry for development, by developing countries fell into deaf ears, when the development agenda was hijacked by the so called, *race to the bottom.*[23]When developing countries try to resuscitate this agenda, by legislating in the public interest to meet development targets as South Africa did with their policy reform, such measures are met with fierce opposition from the developed world and labelled and being contrary to the international best practices which results in the predicament that Africa in particular finds, herself in. Despite its natural resource endowment, Africa remains at the tail end of development presents a 'shocking, terrible paradox.'[24]Thus the tension over sovereignty of developing countries and the purported limitation thereof, is but a screaming *neon sign* indicating the turbulence facing the international investment law.

1.3 Research question(s)

This thesis does not per se argue that traditional international investment law does not adequately provide for sustainable development in general, and home State regulation in particular. Those arguments have already been made eloquently by many commentators. This thesis focuses on the case study of South Africa's recent investment policy shift from the traditional BIT regime to domesticated investment law regime.

Thus, the purpose of this thesis is to evaluate South Africa's new Investment policy to determine if it is a, substantively reasonable and proportional response to legitimacy crisis facing the international investment regime on the issue of achieving an equitable balance between according full investor protection as required by customary international law and cascaded in BITs and the right of the state to legislate in the public

[22] Osgoode statement (n 15 above).
[23] *The race to the bottom*: is a socio-economic phrase which is used to describe government deregulation of the business environment or taxes in order to attract or retain economic activity in their jurisdictions.
[24]D T Mailula *Protection of petroleum resources in Africa: a comparative analysis of oil and gas laws of selected African States* (Doctoral dissertation Unisa) (2013).

interest in order to meet its development agenda as envisaged in the UN, Declaration on the right to development?[25]The secondary questions are:

a) Since the international investment law is deeply entrenched as a sole governance structure of international investment across the globe and a conduit for FDI flow, is there any legitimacy to criticisms levelled against the system?
b) Is South Africa's policy shift a necessary response to the current international investment law system or was it exaggerated?
c) If the answer is in the affirmative, will the new policy approach achieve the balance sought between investor protection and state's right to regulate in its current form?

Unlike many other developing countries, South Africa has a dual status in global economy. It is both a capital importer and exporter and therefore not a net capital importer, and is arguably one of the major role player in the global South. The country's Multinational companies have a large footprint in Africa and therefore significant investors particularly in the African continent. It is thus critical for the new investment law that while seeking to preserve the policy space in the host economy; it should also offer adequate investment protection for South African Multinationals who invested abroad.

1.4 Thesis statement

The South African investment policy shift drew a lot of criticism as well as praise. Criticism was centred around the argument that by terminating its BITs, South Africa is but regressing from being an 'investor friendly' jurisdiction contrary to current international trends and thereby heading for inevitable economic meltdown.[26] This position is based solely on formalistic approach to the rule of law.[27] Through application of substantive approach to the rule of law, author, demonstrate the inaccuracy of the hypothesis.

[25] Article 1(1) of the Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128.

[26] 'SA is a reliable investment destination' city press 27 December 2015http://city-press.news24.com/Voices/sa-is-a-reliable investment-destination-20151226.

[27] DA Farber et al '*Law and public choice: a critical introduction*' 1991.

1.5 Significance of the study

Most scholars highlighted the deficiencies in international investment law. This thesis does not, however, focus on these alleged deficiencies, but rather on the response thereto in the form of a policy shift, by one particular developing country. South Africa's response is but one of the most encompassing responses by far. Although countries such as Ecuador and Venezuela have taken some steps to renounce investment dispute settlement,[28] South Africa's new investment policy is not only challenging international arbitration, but pre and post establishment of investments, in light of development concerns. This study provides information and guidance to other developing countries and Scholars about a practical example of a developing country that has taken a holistic approach to challenge an unequal international law system.

Unlike most third world scholars who have written extensively on this area of international investment law, the author is a South African, and provides a unique perspective on the problem. Author is thus well vested with the socio-economic architecture of the country and better positioned to evaluate the implications of the policy shift in question, therefore providing an in-depth understanding of the South African context.

1.6 Literature review

This section reviews the scholarly literature which discusses South African investment regime.

Yazbek study

Yazbek [29]examines whether South African BITS hinder or foster the achievement of the country's development objectives. This analysis was done using the broad-based black economic empowerment scheme as a case study. The author concluded that South African BITs do hinder the achievement of the country's development objectives. The Author recommended the use of special and differential treatment in BITs as well as clarity and less ambiguity in definition of key terms such as fair and equitable treatment and full protection and security. Whereas this author focused primarily on BEE

[28] A Claire Cutler, 'Human Rights Promotion through Transnational Investment Regimes: An International Political Economy Approach' (2013) 1:1 Politics and Governance 16 23.

[29] N Yazbek,'Bilateral Investment Treaties: the Foreclosure of domestic policy space'17(1) *South African Journal of International Affairs*,"(2010).103.

legislation, by contrast my thesis focuses on the entire change of hearts or policy shift by South African policy makers from BIT regime to locally legislated investment regime.

Schneiderman study

Schneiderman [30]discussed the tension between international investment law and the black economic empowerment scheme in South Africa. The author argued that developed countries are less likely to accommodate such schemes in their investment treaties with developing countries. The article focused narrowly on BEE, whilst this thesis has a wider scope which considers socio-economic transformation broadly.

Friedman study

There are other authors who specifically discussed the dispute settlement provision in BITs. Friedman [31] used the *PieroForesti* case,[32] to examine whether entering into a BIT precludes a country from passing legislation to correct past social injustices. The author argued that there is a need for flexible approach in investment arbitration in order to accommodate the developmental objectives of the developing countries.

Klaaren and Schneiderman discussed the dispute settlement mechanisms which are in South African BITs with specific reference to the investor-state dispute settlement.[33]

Steenkamp study

Steenkamp,[34] the author focused on whether South Africa's change of hearts in investment policy is justifiable and concluded that same is in light of the visible cracks in the investment regime, while I agree with the author on the reasonableness of the response, I am however of the view that given the economic climate and robustness of South Africa's legal system, although the Act will still undoubtedly achieve the desired

[30] D Schneiderman,'Promoting Equality, Black Economic Empowerment, and the Future of Investment Rules' 25 *South African Journal of Human Rights*,(2009).246.

[31] A Friedman, Flexible 'Arbitration for developing World: *Piero Foresti* and the future of Bilateral Investment Treaties in the Global South', *International law and management review* (2010) 37.

[32] *Piero Foresti, Laura de Carli and others v Republic of South Africa* (ICSID Case No ARB(AF)/07/1) Award, 3 August 2010, online: ICSID, <www.icsidworldbank.org> (International Centre of Investment Disputes).

[33] Klaaren J&Schneiderman D," Investor-state arbitration and SA's Bilateral investment treatypolicy framework review: comment submitted to the dti (Department of trade and Industry)10 August 2009. http://wiredspace.wits.ac.za/bitstream/handle/10539205/SABITPolicyReviewCommentsKlaarenandSchneiderman10Aug 2 pdf? Sequence" (accessed 22/12/2015).

[34] See Steenkamp (n 18 above).

results in the long run, the most proportionate of response to the flawed investment regime would be through renegotiations, as the latter is immediate and does not expose the country to the risk of arbitration that can still be raised on BITs that have already been cancelled through the survivor clause in those BITs.

Shifting Paradigms in International Investment Law, edited by Steffen Hindelang and Markus Krajewski, addresses these changes against the background of the UNCTAD framework to reform investment treaties. The book analyses how the investment treaty regime has changed and how it ought to be changing to reconcile private property interests and the state's duty to regulate in the public interest. In doing so, the volume tracks attempts in international investment law to recalibrate itself towards a more balanced, less isolated, and increasingly diversified regime.

Given the implications of the so called "*sunset clause*" or "*survivor clause*", in most of South African BITs, writer is of the view that it is premature for the detractors of the country's policy shift to proclaim imminent capital flight, particularly since most treaties have a built in immune system in the form of "sunset clauses" which will keep them alive for the next two decades or so. Again the BIT movement does not work in silos, but need to be accompanied by a fertile investment climate such as the one South African is providing, encompassing the robust legal system and the rule of law and economic activity.

Although the policy shift is a welcomed development in realising the country's development objectives, the forum in which such shift was exercised is in writer's view inappropriate and discriminatory since not all the BITs were cancelled but a select few which can be perceived as a protectionist measure against some European investors. The correct measure would have been to raise these concerns in renegotiated new BITs which make the investments conditional to addressing the country's socio economic objectives and offer easy exit strategy without a survivor clause, in the event either party is no longer wants to continue with the state-investor relationship.

1.7 Methodology

The study consists of historical analytical literature review, BITs, domestic case law and international arbitration award. These documents allow an understanding of the factors that informs governments' policy options and how these factors add to and become evident in the final policy framework that is adopted. Secondary materials, which include the study of scholarly books, articles and reports, assist in the analysis of these primary documents.

1.8 Limitations to the study

The study is a desktop research and analytical literature focusing on the South African context, therefore can only give an opinion on whether or not the investment policy dispensation is reasonable and or proportional within the South African context.

1.9 Outline of chapters

Chapter 2

Paints the framework for the thesis, first by explaining the origins of international investment law as a global governance system and the context of international investment agreements in this area of law and how it has evolved.

Chapter 3

A brief history of Bits, introduces the origins of bits in the South African context in chapter 3 by first discussing the collapse of the colonial order, failed attempts at multilateral agreements and how such gave rise to the formation and proliferation of BITs up until concerns against the system became pronounced where a number of countries embarked on different exit strategies from the international investment regime included repeated displeasure with international settlement of Disputes between states and investors of the other party (ISDS).

Chapter 4

The next chapter (Chapter 4) relies almost exclusively on South African primary materials, including government documents to explain South Africa's progression from

a State eagerly entering into BITs to a State that has now decided to terminate a number of its existing BITs and to regulate investors' rights mainly through domestic regulation. In explaining the shift in policy, Author also relies on the BITs concluded by South Africa's in the 1990s to demonstrate the country's BIT policy at the time, or the lack thereof. Author further relies on some South African case law to demonstrate the development of property rights in relation to expropriation in domestic South African law, which played an important role in the country's change of heart on the desirability of BIT. I also bring in the history of capital in order to highlight the country's economic architecture and the factors playing central roles in the countries transformational goals.

Chapter 5

Once South Africa's concerns have been contextualized and its policy choices have been explained, the country's new investment policy has to be evaluated to determine whether it is reasonable and appropriate and this is done in the context of the concluding chapter. Finally concludes with policy recommendations on international investment regime enhancement

CHAPTER 2

HISTORICAL EVOLUTION OF INVESTMENT LAW

2.1 Introduction

Before going aboard with our discussion, it is necessary to understand the historical context in which the investment treaties emerged. This chapter will offer a brief history of the international investment and the proliferation of bilateral investment treaties (BITs).

2.2 Genesis of Investment treaty regime

Prior to the 17th century, there was no singular governing structure in the international investment realm, save for customary international law, which was wide in scope.[35] Major European trading powers, indentified the gaps in the system, and agreed to protect foreign persons and their property according to certain minimum standards over and above the protection accorded by customary international law during this era. [36] These basic principles were acknowledged and guaranteed by most major European countries, as well as the United States.[37] They were subsequently incorporated in the precursors to BITs, Friendship, Commerce and Navigation treaties (FCN) treaties,[38] which mostly dealt with commercial and navigation matters but also obliged treaty-partners to uphold certain minimum standards with respect to the treatment of foreign investors.[39]Whereas this emerging doctrine of investment protection was agreed upon by relatively equal parties aiming to ensure reciprocal arrangements, subsequently extending its principles to territories outside of Europe or the United States, changed its political foundation.[40]

Through a combination of treaties, concessions, political pressure, military intervention, or outright colonial occupation, foreign investment law, as stated by Kate

[35] A Anghie *Imperialism, sovereignty and the making of international law (*2007) 37.
[36] J H Jackson *The world trading system: law and policy of international economic relations*. (1997)
[37] R La Porta, et al. Investor protection and corporate governance. (2000) 58 1 *Journal of financial economics* 3-27.
[38] H Walker Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice (1956). *The American Journal of Comparative Law* 229-247.
[39] J Salacuse 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries'(1990) 24 3 *International Lawyer* .
[40] C Lipson, Standing Guard: *Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (1985), 12. See also S Picciotto *Regulating global corporate capitalism (*2011).

Miles, 'moved from a base of reciprocity to one of imposition.'[41] Often, state's interests would be delegated to selected trading companies, which were granted sovereign powers to be applied on behalf of their home states, the latter thus became important players in imperial politics of their home states. [42]

Eventually, foreign investment protection became part of the 19th century legal doctrine on the diplomatic protection of aliens.[43]Companies abroad had to be treated and protected according to international minimum standards accorded to citizens such as the right to compensation for expropriation, failing which home state intervention may be sought. In their relationship with Latin American states in the 19th century, for instance, both the United States and European powers repeatedly imposed these legal principles through treaties and international arbitration[44] and applied the political and military tools in enforcing them.[45]

Disgruntled with the constant threat of foreign interventions triggered by trade or investment disputes, Latin American countries began in the mid-19th century to embrace a different set of international economic order ideology. Named after *Carlos Calvo*, the Argentinean legal scholar, the *Calvo* doctrine argued that the concept of state sovereignty made it illegal for foreign powers to intervene in the affairs of other sovereign states by diplomatic or more forceful means.[46] Also, instead of being accorded superior standards, aliens solely had a right to be treated as well or poor as citizens or companies of the host state. Apart from the substantive standards governing the affairs of foreign investors, this principle of national treatment entailed having investment disputes settled in the courts of host states rather than through international arbitration. This analysis was incorporated into laws, contracts, and even certain constitutions in Latin America, yet they faced fierce opposition by the United States and European countries. By the end of the 19th century, Western powers continued to

[41] K Miles 2013. *The origins of international investment law: empire, environment and the safeguarding of capital* (2013) 99.
[42] Poulsen, (n 1 above) 273-313.
[43] M Sornarajah *The international law on foreign investment* 2010.
[44] Sornarajah (n 43 above).
[45] CC Joyner *International law in the 21st century: rules for global governance* 2005.
[46] A.S Hershey 'The Calvo and Drago Doctrines'(1907) 1 *The American journal of international law* 26-45.

contest that the international law for foreign investors rested on the key principles of international minimum standards and diplomatic protection.[47]

2.3 The demise of colonial order

After the Second World War, Western states faced major difficulties in the developing world, when trying to enforce their views on the proper treatment of foreign investors.[48] After losing most of their investments during World War II, and in an effort to rebuild their economy, Western governments could no longer exercise a blanket imperial rule and therefore could not afford to ignore the views of their developing country counterparts and thus had to compromise on key investment protection standards in numerous major investment disputes involving the expropriation of Western assets.[49] An example of which, came in 1938 with the Mexican nationalisations of American investments in several industries.[50]

In the wake of these expropriations, US Secretary of State Cordell Hull replied to his Mexican counterpart that; 'the international minimum standards on expropriation required *prompt, adequate and effective compensation*.'[51]

The aforesaid standard of compensation later became known as the 'Hull-formula', and is by far forming the framework of the majority of BITs to date. Although the *Calvo* doctrine used the concept of national treatment to eradicate gun-boat diplomacy in favor of sovereign control, it never advocated the eradication of basic property rights, [52]and therefore it was lost in translation and ultimately distorted to support expropriation without compensation. Following Santiago Montt, the *Calvo* doctrine had in the early 20th century thereby begun to be '*transmuted into a new and opportunistic one: expropriation without compensation*.'[53]

[47] S.K.Asante, 1988. 'International law and foreign investment: a reappraisal'.(1998) 37 3 *International and Comparative Law Quarterly* 558-628.
[48] Lisbon (n 30 above) 66-70.
[49] W R Mead *Power, terror, peace, and war: America's grand strategy in a world at risk*.(2007).
[50] JS Migdal. *Strong societies and weak states: state-society relations and state capabilities in the Third World* (1988).
[51] K. Vandevelde 'Sustainable liberalism and the International Investment Regime' (1998) 373 *19 Michigan Journal of International Law* 380.
[52] Vandevelde (n 51 above) 57.
[53] (n 51 above) 57.

During the 20th century, there were divergent views from the developed and developing countries regarding the applicable doctrine, this divergence escalated to multilateral level and is arguable a major contributor towards the failed codification of customary international law, by League of Nations during the 1930 Hague Conference, such divergence included, the applicable law on the 'Responsibility of States for Damage Caused in their Territories to the Person and Property of Foreigners.'[54]Developing countries wanted application of the Calvo's doctrine, whereas developed ones advocated for Hull inspired minimum standard.

The United States proposed an International Trade Organisation (ITO), which would protect international minimum standard for foreign investors, encompassing the Hull formula.[55] Although such proposal appealed to capital-exporting countries, the contrary was true about many developing countries, mainly Latin American countries, which associated forced compensation and international arbitration of investment disputes with continued foreign domination and control over their natural resources.[56]

These resulted in a compromise on these issues which was eventually rejected by proponents of liberal international economic order.[57] The United States Congress refused to ratify the ITO, then the less ambitious General Agreement on Tariffs and Trade (GATT) was tasked with the responsibility of managing international trade. However, challenges with this task was that; issues pertaining to foreign investment were completely absent from GATT, and the ongoing conflict between developed and developing countries over which legal principles should determine the protection of foreign investors thus remained unsettled.

Western investors nevertheless pursued a different means to expand their activities substantially despite failed attempts at international trade organisation (ITO). Foreign direct investment (FDI) became a major conduit of international investment flows in the post-war period as multinationals increasingly set up wholly or majority

[54] GH Hackworth, 'Responsibility of States for Damages caused in their Territory to the Person or Property of Foreigners': The Hague Conference for the Codification of International Law. (1930)24 3 *The American Journal of International Law* 500-516.
[55] Note, that the initial US proposal did not include investment provisions, as the US favored bilateral commercial treaties with higher standards than a multilateral agreement based on the 'lowest common denominator'.
[56] Vandevelde (n 51 above), 16-7.
[57] C. Wilcox, 'A Charter for World Trade New York: Macmillan', (1949), 145 8.

owned subsidiaries in developing countries.[58] However in large parts of the developing world, the political environment towards foreign investors was more hostile than ever, rigid and autarchic industrial policies with discriminatory treatment of foreign investors became prevalent in the developing countries who were dissatisfied with the ability, and willingness of multinational companies, in contributing to national development. Foreign investments thereby often became subject to screening mechanisms, performance requirements, capital transfer restrictions, and so forth.[59]

In response, capital-exporting countries within the OECD initiated a new round of negotiations for an international investment treaty in 1962 after a series of failed attempts during the 1940s and 1950s respectively.[60] Post 1950s, the Abs-Shaw cross convention proposed a text based on the international minimum standard, including the Hull standard of compensation, and was renowned for allowing investors to submit disputes directly to arbitration against their host states.[61] The convention eventually failed when developing countries disagreed to its terms in late 1960's.

In the 1970s, developing countries proposed a New International Economic Order (NIEO), [62]allowing them 'Permanent Sovereignty over Natural Resources'.[63] The founding result of the NEIO was the 1974 'Charter of Economic Rights and Duties of States' (the UN Charter),[64] which not only challenged the Hull standard of compensation but more fundamentally questioned the very concept of an international minimum standard by proposing foreign investment disputes on domestic law to be settled in the courts of host states.[65] With repeated resolutions by the General Assembly

[58] D Hanink,' The International Economy: A Geographic Perspective' (1993) 223-4.

[59] F Bergsten, 'Coming Investment Wars,' Foreign Affairs, October, (1974); C. Murphy, Emergence of the NIEO ideology (Boulder, CO: Westview, 1984). Note that a parallel development took place even in selected developed countries at the time.

[60] Vandevelde (n 51 above), 20-21.

[61] A Fatouros, 'International Codes to Protect Private Investment: Proposals and Perspectives,' (1961)141 *The University of Toronto Law Journal* 86.

[62] N, General Assembly, 6th spec sess, Declaration on the Establishment of a New International Economic Order, Res 3201 (S-VI) (1st May 1974), Off Doc GA UN A/9559, supp. No. 1 (1974).

[63] UN, General Assembly, 17th sess, Permanent Sovereignty Over Natural Resources, Res 1803 (XVII) (14 December 1962), Off Doc GA UN A/5217, suppl no. 17 (1963).

[64] Salacuse (n 39 above) 11.

[65] UN, General Assembly, 29th sess, Charter of Economic Rights and Duties of States, Res 3281 (XXIX) (12 December 1974), Off Doc GA UN A/9631, suppl. No. 31 (1975). See also 'List of Areas of Concern Regarding the Operations and Activities of Transnational Corporations, Note Submitted by the Group of 77,' in: UNCTC, Report on the Second Session (New York: United Nations, 1976), annex I.

completely contradictory to Western perceptions of the international norm, the customary international law on foreign investment was clearly in disarray.[66]

2.4 The dawn of BITs

With hostility at the behest of developing countries at the general assembly, discontented capital-exporting countries went on a different expedition altogether, what they lost at the multilateral level; they tried instead to obtain through bilateral negotiations.[67]The United States (US) thus expanded its existing network of FCN treaties.[68] Whereas the treaties did not obtain a central role in the international regime for foreign investment as envisaged by US policy makers, they did however, provide important motivation for European States keen to obtain favourable and legally binding standards for their investors abroad.

Having lost almost all its investments after its defeat in the Second World War, West Germany had to rebuild its economy and thus entered into a BIT with Pakistan in 1959, which intended '*... to create favourable conditions for investments by nationals and companies of either state in the territory of the other State.*'[69] Distinct from FCN-treaties, the treaty was specific and dealt solely with investment; it was thus specifically customised to be negotiated between a developed and a developing country. This was thus a fountain of a great number of BITs signed during the 1960s.

The substantive provisions of BITs were directly inspired by the failed OECD convention and thus very much in the line with the Western investment standards developed from the 17th century and granted them far-reaching protections.[70] They thus set an independent standard on the treatment and protection of foreign investors by obliging the contracting parties to provide compensation for expropriation, whether measures in question, amounted to direct takings of assets or indirect takings 'tantamount to expropriation'. [71]Moreover ensured investors the repatriation of their profits, and generally incorporated further standards independent from domestic law,

[66] Salacuse (n 39 above).
[67] Pualson. (n 32 above) 'Significance of South-South BITs for the International Investment Regime': A Quantitative Analysis (2010) 30 *The .North western. Journal for International Investment law & Business.* 101.
[68] (n 57 above),101.
[69] G Nick. 'An umbrella just for two? BIT obligations observance clauses and the parties to a contract.'(2008) 24 1 *Arbitration International* 157-170.
[70] Poulsen,(n 1 above) 261-313.
[71] (n 70 above).

such as so called 'umbrella clauses' obliging the contracting parties to observe their contractual obligations vis-à-vis foreign investors, as well as clauses providing for 'fair and equitable treatment', 'full protection and security',[72] and damages owing to war or conflicts. Finally, many included non-discrimination standards, such as national- and most-favoured-nation treatment.[73]

2.5 The Institutionalisation of international arbitration

In the absence of contracts providing for international arbitration, foreign investors in the early post-colonial era thus still depended on their home state being willing to risk diplomatic good-will and foreign policy objectives to fight for their interests abroad.[74] From 1969, this slowly began to change, when Italy entered into its BIT with Chad allowing all investors covered by the treaty to submit disputes to international arbitration directly against its host state. In theory, at least, this allowed the capital-exporting state (Italy) to de-politicise future investment disputes, as it would not be directly involved in the adjudication.

The conclusion of the Italy-Chad BIT was pursuant to a recommendation made by the World Bank's International Centre for Settlement of Investment Disputes (ICSID).[75]Instead of incorporating substantive rules on the treatment and protection of foreign investors - which developing countries would eventually resist - the 'father' of the ICSID Convention, Aaron Broches, found that one pragmatic way to move foreign investment law forward, was to establish a set of impartial rules for the settlement of disputes.[76] The ICSID Convention was notable for allowing investors direct recourse to international arbitration against host states without, in principle, exhausting local remedies.[77] An equally notable feature of the Convention was its jurisdiction to 'any legal dispute that arose directly out of an investment',[78] thereby extending investment

[72] N 70.
[73] N 70, 101.
[74] *Barcelona Traction, Light and Power Company Limited* (Belgium v Spain) [1970] ICJ Rep. 3,9 ILM 227, par.79.
[75] http://investmentpolicyhub.unctad.org/IIA/country/39/treaty/826.
[76] Poulsen (n 1 above) 20.
[77] N 76 above, 21.
[78] ICSID Convention, art 25(1).

arbitration beyond mere commercial claims to a very wide range of public regulatory disputes.[79]

2.6 BITs and development

Given the opposition to BIT-like rules in the developing world, only few developing countries signed up to BITs in the early years of the BIT network, and in the year of the UN-charter the international BIT-network therefore largely remained a phenomenon between Europe and Africa in mid 70s to mid 80s.[80]

Whereas the early years of the BIT-movement were dominated almost entirely by Germany and Switzerland, this changed with the NIEO. Urged by domestic business communities, and the International Chamber of Commerce (ICC),[81] developing countries' collective action in the UN made a number of developed countries begin, or accelerate, their BIT programs in this period.[82] The United Kingdom, for instance, began its investment treaty program specifically to address the increasing investment protectionism in the developing world,[83] and the same was the case in the United States, which revived its investment protection program now in the shape of BITs rather than FCNs.[84]

2.7 Washington Consensus

The end of the Cold War concluded the change of perceptions from scepticism towards foreign investors to full-fledged embrace.[85] Foreign investment was no longer perceived as a threat to developing countries' sovereignty, but suddenly regarded as a prospect for economic growth and development.[86]Earlier doubters of international investment now saw multinationals as engines of growth which could facilitate economic development

[79] (n 77 above).
[80] N 77.
[81] ICC, *Bilateral Treaties for International Investment* (Paris: ICC, 1977).
[82] See also the collective response by OECD countries, *OECD Declaration on International Investment and Multinational Enterprises,21 june 1976*.
[83] E Denza and S Brooks, 'Investment Protection Treaties: The British Experience, (1987) 36 *The International and Comparative Law Quarterly* 4; Hansard, UK Parliamentary Debates,'OverseasAid , House of commons, 9 June 1971.Series 5 (818cc 1135-1198.
[84] D Harvey Neoliberalism as creative destruction(2007) 610 1 *The Annals of the American Academy of Political and Social Science* 21-44.
[85]Harvey (n 84 above).
[86] See generally; C. Gore, 'The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries,' 28 World Development 5 (2000).

in the 1990s.[87]John Williamson's 10-point list summarises the 'Washington Consensus' towards development policies;' a restrictive attitude towards FDI was now considered outright ''foolish.'' '[88]Scores of developing countries, agreed and began to relax their restrictions and attracted escalating amounts of FDI flows.

That's when the present regime for foreign investment was pronounced.[89]Although many developing countries started gradually in the 1980s, former Communist countries now signed BITs in substantial numbers, and most of Latin America and Asia joined the bandwagon of the BIT-regime rendering the latter, a global trend. This later encouraged strong participation by developing countries, who concluded BITs in 'assuring investors that they sought a liberal investment regime.'[90] Significantly, during the same period, BITs began to allow for direct investor-state arbitration as a general rule, and thus created an adjudicate regime for investment disputes with the scope for according utmost protection for foreign investors, since the height of the Imperial era.[91]

BITs reached their 'peak'[92] in the 1990s, despite developing countries' continual opposition of 'multilateralism,' BIT inspired rules whether under the auspices of the UN, the OECD, or the WTO became prevalent. To date, BITs remain by far the mainly prevalent and significant treaties to protect foreign investors.[93] Content wise, majority of them follow the original European models with few changes and many thus use remarkably similar terms with frequently alike provisions.[94] Often disregarding the equalizing effect of the MFN standard, developing countries have thus signed up to principles which often reflect the models developed by capitalist-exporting states,

[87] J. Williamson, 'What Washington Means with Policy Reform,' in: J. Williamson (ed.) Latin American Adjustment: How Much has Happened? (Washington DC: Institute for International Economics, (1990), ch. 2.
[88]Poulsen (n 1 above).
[89] J. Alvarez, 'The Once and Future Foreign Investment Regime,' in: M. Arsanjani, J. Cogan, R. Sloane, and S. Wiesner, Looking to the Future: Essays of International Law in Honor of W. Michael Reisman (The Hague: MartinusNijhoff, (2010), 617.
[90]Vandevelde (1998).
[91] T Wälde, 'The umbrella' clause in investment arbitration: a comment on original intentions and recent cases,' (2005)183 6 *Journal of World Investment & Trade* 194.
[92]Vandevelde (2009), 19.
[93] S Rose-Ackerman & J Tobin Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties. (2005) *Yale Law & Economics Research Paper* 293
[94] C. McLachlan et al International Investment Arbitration: Substantive Principles (2007), 5-6; R. Geiger, 'The Multifaceted Nature of International Investment Law,' in: K. Sauvant (ed.) Appeals Mechanisms in International Investment Law *New York: Oxford University Press,* (2008) 72

notwithstanding essentially having alternative models available with less inclusive protections.[95]

2.8 Conclusion

In this chapter, a discussion around several attempts at a multilateral agreement governing international investment was discussed. From the beginning in the 50s up until the 80s, the overall bone of contention that led to this failure was the clash of interests between capital exporting and capital importing countries. Whereas the capital exporting countries wanted much higher levels of protection for their investments and did not want their multinational corporations (MNC's) to be subjected to the control of the host states.[96] On the other hand the recipient countries wanted some flexibility and policy space.[97] They also wanted to subject multinational corporations to their control so that they would not interfere in the domestic affairs of the capital importing states and to be able to channel the FDI to further their development objectives.[98]The post-independence period in the 1970s is the era that witnessed an acceleration of clashes between the capital exporting and the capital importing countries as evidenced by numerous United Nations General Assembly Resolutions and some nationalisation of foreign investment during this era.

IT further illustrated a change in attitude from both developing and developed countries, the clash of interest was no longer based on the country's developmental status, but even developed countries became more concerned with preserving their own policy space, for example, France became vehemently opposed to the conclusion of the OECD MIA. Furthermore, some developed countries joined hands with developing countries in resisting the introduction of investment negotiations under the banner of the WTO during the ministerial conference in 1996.

It has also shown that BIT's mushroomed from 1959 as one of the best alternative to the botched multilateral investment system. During the 1990's the word progressed from a protectionist approach to a liberal approach to economy which saw exponential

[95] Poulsen, (n 1 above).
[96] Sornarajah (n 43 above)
[97] RH Wade What strategies are viable for developing countries today? The World Trade Organization and the shrinking of 'development space (2003)10 4 *Review of international political economy*, 621-644.
[98] EM Burt Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization (1997)12 1015.

growth in BITs while countries were in the race competing for capital. However, these BITs were lopsided, based on OECD models, favouring the foreign investor more, while the host state was relegated to the bottom of the equation, and thereby curtailing the policy space of the host state.

Thus these BITs did nothing to alleviate the tension between foreign investor and home states but in fact added to the anguish of the capital importing countries. However, the dawn of the millennium, witnessed a new era, from liberalism, to protectionism globally, the renegotiation and revision of many BITs ushered in the new generation of BITs which aspires to be more equitable. This new generation of BITs managed to lessen the tension between capital importing and capital exporting states by attempting to reconcile their divergent interest.

Overall, investment treaties reflect a legal standards promoted by Western states since the colonial era, who aspired for a system that offered considerable and enforceable protections to foreign investors independent of national legal regimes.[99] They emerged as a response to increasing hostility towards foreign investors in the developing world, and were therefore, not surprisingly, initially not pro development.[100]

[99] Boer, et al *The Mekong: A Socio-legal Approach to River Basin Development* (2015).
[100] Boer (n 99 above).

CHAPTER 3

SOUTH AFRICAN INVESTMENT LAW

3.1 Introduction

Whereas the preceding chapter has provided a generalised context of the investment regime and the source of bilateral investment regime in particular, this chapter discusses the context of current South African BITs in light of the new investment regime.

Unlike in international human rights law where there is a group of core treaties which constitute the corpus in that area of the law, there is no single global treaty on international investment law. Various attempts to codify the rules concerning international law have been without success. It is a patchwork of IIAs, BITs and some WTO agreements such as the General Agreement on Trade in Services (GATS) and the Agreement on Trade-related Investment Measures (TRIMS) that deal with investor state relations. This wider gap in the international investment law leads to countless international arbitrations against host governments on various alleged breaches of trade and investment law rules.[101]Consequently, some countries seek protection of their sovereignty outside the confines of the traditional international investment regime and therefore reverting back to internal protection such as the Investment protection Act by South Africa which predictably resuscitates the long forgotten Calvo's doctrine.

3.2 Historical architecture of South Africa's economy

In contextualising, the historical architecture of South Africa is critical for one to fully comprehend and understand the current impasse present in the country's economic inequalities. The country's history of inequality drawn along racial lines can be traced as further back as the 17th and 18th centuries.[102]

South Africa's entry into BITs-movement was during the 1990s when the country has just been released from the evil claws of the apartheid regime,[103] which arguably

[101] S P Subedi,. *International investment law: reconciling policy and principle*. Bloomsbury Publishing, (2016)13.
[102] S Terblanche, *A history of inequality in South Africa 1652-2002, Pietermarizburg, University of Durban Press* (2002) 153.
[103] K P Sauvant *AIM Investment Report: Trends and policy challenges* (2015) 89.

played a significant role in the countries continued exclusion from the rest of the global community. However, the country's decision to enter the BIT movement was largely in outright contradiction to politically sensitive elements of South Africa's newly enacted Constitution.[104]

3.2.1 The foundation of socio-economic inequality

During the era of slave trade, European sailors established routes around the coastal lines of South African in order to export slaves to America and the West Indies.[105] The aboriginal inhabitants of South Africa were the Khoisan.[106] These people became victims of slave trade during this period under 'the Dutch East India Company' which was instrumental in facilitating slave trade during that time, to an extent that it even established its port at Table Bay under the leadership of Jan van Riebeck.[107] After establishing the port along the coast, the company moved inland and waged war against the Natives, and that's where the first disposition came to life. The Khoisans were defeated by the Dutch, dispossessed of their land and enslaved as cheap labour.[108]

Between 1795 and 1910, the British took the reins from the Dutch; they took control of the cape colony and perpetuated the system of using natives as cheap labour.[109] During this era the British Parliament abolished the slave trade throughout the British Empire. At the same time, Christian missionaries were becoming prevalent and they campaigned against the poor working conditions in which the natives were subjected to. This paved a way for a series of laws which were meant to give more freedom to the natives; the first of such laws was the Hottentots Proclamation issued by the British Governor.[110] However the shortfalls of this proclamation was that in limited the native's freedom of movement, since approval of the masters was required for natives to move places.[111]

[104] J Markoff *Waves of democracy: Social movements and political change* (2015) 23.
[105] N Nunn *The long-term effects of Africa's slave trades* (2007) 46.
[106] Boer (n 99 above) 45.
[107] C Rassool & L Witz 'The 1952 Jan van Riebeeck tercentenary festival: constructing and contesting public national history in South Africa'. (1993) 34 3 *The Journal of African History* 447-468.online. http://www.sahistory.org.za/topic/arrival-jan-van-riebeeck-cape-6-april-1652 (accessed 04 May 2015).
[108] SBO Gutto, Equality and Non-discrimination in South Africa: The Political Economy of Law and Law making , *Cape Town, New African Books* (Pty)ltd (2001) 151-159.
[109] Gutto (no 108 above) 151-159.
[110] S Terblanche (n 102 above) 153.
[111] N 102 above, 153.

From 1833 onwards, several master and servant ordinances were passed the purpose of which was to perpetuate racial domination and racial capitalism.[112] The discovery of gold in South Africa at the end of the 19thcentury perpetuated further divisions along racial lines, the "slave-master" relationship took a different form, the mining industry was developed and the whites provided skilled labour while their counterparts were confined to unskilled labour. Racial discrimination spread across other industries including Agriculture where land was apportioned across racial lines in terms of the Natives Land Act, where blacks were dispossessed of the entire land but 13% which was marked as reserves, in which blacks could only be allowed ownership thereof. A decade later, the Natives Urban Areas Act of 1923 was passed.[113] The latter Act authorised cities to designate some areas for Africans and to regulate influx of blacks.

From 1950s onwards, the stage for Apartheid regime was set. Several pieces of legislations were passed whose effect was to further entrench racial discrimination. As a results of this oppressive laws there were internal protests caused by Black South Africans, who were classified as third grade citizens after the whites and coloureds in terms of the Population Registration Act. Blacks fought for political and economical emancipation. These protests generated criticism of South African government within the continent and internationally.[114]

The political landscape changed in South Africa when FW de Klerk was elected as president.[115] After lifting the ban on the African National Congress (ANC) which was imposed in the 1960s, he also repealed the apartheid laws and agreed to release Nelson Mandela in 1991.[116] This paved the way for South Africa's first democratic elections in 1994.The ANC's victory in 1994 under the leadership of Mandela, marked constitutional changes to suite new democratic paradigm.

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[112] See B M Magubane,"*Reflections on the Challenges Confronting Post-Apartheid South Africa*" management of social transformations, Discussion Paper Series –No.7 http://www.unesco.org/most/magu.htm accessed 13 march 2016.

[113]C Walker. *Landmarked: land claims and land restitution in South Africa* (2008).

[114]See C.Fenwick et al 'Labour Law: A South African Perspective', International Institute for Labour Studies, International Labour law Organisation (2007) online at http://www.ilo.org/wcmsp5/groups/public---dgreports/---inst/documents/publication/wcms_193513.pdf (accessed 13 March 2016).

[115]B Glad & R Blanton 1997. FW de Klerk and Nelson Mandela: A study in cooperative transformational leadership. (1997) 27 3 *Presidential Studies Quarterly*565-590.

[116] A Habib et al 1998. South Africa and the global order: the structural conditioning of a transition to democracy (1998) 16 1 *Journal of Contemporary African Studies* 95-115.

The Mandela administration, was a transformative government, transformation was at the heart of all the governmental policies.[117] Given that the apartheid government created an oppressive regime designed to systematically disenfranchise and disadvantage the black people in South Africa, instead of waging war against the white minority, the government opted for a more conservative approach which was focused on a more inclusive economic growth, it opted for reconciliation and focused on transforming the economy to achieve equitable distribution of the country's wealth which was and is still is in the hands of the white minority.

The government embarked on a series of programs and policies aimed and achieving socio-economic transformation, such as Reconstruction and Development Programme (RDP) in 1994, focusing on economic growth with the government being the driving force. This was then followed by the Growth Employment and Redistribution Programme (GEAR) in 1996, which was a private sector led macro-economic programme aimed at stabilising the country's economy.[118] The Gear was then replaced by the Accelerated Shared Growth Initiative South Africa (AsgiSA), aimed at facilitating the country's growth and wealth distribution through welfare.[119] In 2010 AsgiSA was replaced by the new Growth Path Network, aimed at addressing unemployment through creating new Jobs and many more policies in other sectors aimed at industrialising, export market orientated programs, promotion of labour absorbing industrialisation as well as increasing participation of historically disadvantaged people.[120]

In light of the above, post-apartheid South African government was on the transformation agenda from the first day in office, the target of which it has not as yet achieved due to resource constrains, therefore transformation is still very much part and parcel of the government policy to achieve socio-economic objectives. Such objectives can only be achieved if the country's investment regime caters for such, therefore the

[117] Glad (note 93 above) 1-28.

[118] J Michie & V Padayachee Three years after apartheid: growth, employment and redistribution? (1998) 22 5 *Cambridge Journal of Economics* 623-636.

[119] M Lundahl & L Petersson Post-apartheid South Africa: an economic success story? *Achieving Development Success:Strategies and Lessons from the Developing World* (2013) 232.

[120] See V Gumede for a discussion of this policies and programmes; "*Social and Economic Transformation in post Apartheid South Africa*,"policies,progress and proposals online http://www.vusigumede.com (accessed 03 Jan 2016).

BITs to which the country is party to, should be tailor-made to take into account the country's need to rebalance the inequities of both colonialism and apartheid.

3.2.2 The reception of the BIT-regime

The country's prolonged exclusion from the international community due to apartheid, inflicted severe damage to the country's economic makeup.[121] The economic growth was stagnant, regressing and or moving at a snail's pace if at all moving. Thus, attracting foreign investment became an important component of the ANCs' economic strategy from the onset. As a result of a combination of international sanctions and tight capital controls, South Africa received next to no FDI inflows during Apartheid, the country was in desperate need to reverse this. The then soon to be president leader of the ANC, Mr Nelson Mandela told an audience of American Business leaders in 1991 that: '*The rates of economic growth cannot be achieved without important inflows of foreign capital; we are determined to create the necessary climate, which the foreign investor will find attractive*.'[122]

The new ANC led government thus welcomed foreign investment in the 1994 whitepaper on the Reconstruction and Development Programme (RDP), and aimed to provide foreign investors, national treatment.[123] Nelson Mandela assured investors that '*not a single reference to things such as nationalisation'* was present in his government's economic policies and that his policy had been cleansed of '*any Marxist ideology*.'[124]

South Africa embarked on a liberal economy by liberalising its investment regime in virtually all sectors, allowing foreign investors 100 % ownership, dismantling earlier discriminatory taxes towards non-residents, loosening restrictions on capital repatriation, provided cash incentives to invest in manufacturing, avoiding performance requirements, signing double-taxation treaties, ratifying the MIGA Convention, establishing an investment promotion agency, and practically opening doors for

[121] A Klotz 1999. *Norms in international relations: The struggle against apartheid* (1999).
[122] Quoted in; H. Marais, 'South Africa: *Limits to Change'* (1998) London: Zed Press 123.
[123] Parliament of the Republic of South Africa, 'White Paper on Reconstruction and Development,' Government Gazette, 23 November (1994) 23.
[124] Note 112 above.

business in an effort to undo the legacy of apartheid.[125] In short, South Africa followed the international trend of the last couple of decades by replacing '*red tape with red carpet treatment of foreign investors*.'[126] However, with one of the highest unemployment rates in the world, the ANCs' economic reforms failed to live up to the economic success story envisaged and South Africa also failed to attract much FDI through the 1990.[127]

The low interest of foreign investors in the early years of the post-Apartheid regime has been attributed to a wide range of reasons,[128] but not due to a lack of investment protection treaties. South entered into almost 50 BITs from 1994 onwards,[129] although these BITs are unlikely to have helped South Africa to attract more FDI as mentioned above, the decision to develop a wide-ranging BIT network led to serious and far-reaching implications as discussed hereunder.

3.3 South Africa's BIT claims experience

Whereas there is only one documented South African investor using a BIT to claim damages against its host state,[130] foreign investors in South Africa have in recent years used BITs to question a wide range of regulatory actions, culminating in a compensation claim of more than quarter of a billion US dollars concerning South Africa's constitutionally enshrined post-Apartheid program to redistribute wealth to the black population.[131]

The first instance of investors reverting to BITs provisions to exercise the benefits of BIT to promote their interests against the South African government was in 2001. In the wake of the 9/11 attacks in New York, from the South African perspective, national security became a major concern which resulted in policy-makers proposing a ban on foreign ownership and forced divestment among the approximately 5000 private

[125] See; OECD, Regulatory Environment for Foreign Direct Investment, draft paper, 2005; O Akinboade *et al* 'Foreign Direct Investment in South Africa,'.

[126] K Sauvant, '*Driving and Countervailing Forces: A Rebalancing of National FDI Policies*,' in: K. Sauvant (ed.), Yearbook on International Investment Law and Policy (2009) 222.

[127] M Lundahl (note 111 above) UN-WIDER Research Paper No. 2009/56.

[128] A Arvanitis, 'Foreign Direct Investment in South Africa: Why Has It Been So Low?,' in: M. Nowak and L. Ricci (eds.), Post-Apartheid South Africa. The First Ten Years (Washington DC: IMF (2005).

[129] UNCTAD and South Africa's Department of Foreign Affair data South African BITs Sep 94 to Sep 99.

[130] In 2009 MTN, a subsidiary of a South African telecommunications company, used the UAE-Yemen BIT to file a claim, which was discontinued the year after; MTN (Dubai) Limited and MTN Yemen for Mobile Telephones v. Republic of Yemen, ICSID Case No. ARB/09/7.

[131] Poulsen (n 1 above).

security firms in the country, one of the largest security industries in the world in relation to the size of the country's economy.[132] The security firms fiercely objected to proposal and the British government let South Africa know that any such measure would breach the BIT between the two countries.[133] ultimately, the foreign-owned security companies won the argument since kicking out companies who brought in close to R2b rand a year proved to be an unfeasible endeavour, despite the absence of a BIT claim the government withdrew its proposal.

3.3.1 The first BIT claim encounter

The risk of a treaty-based investment dispute materialised the same year, but in an entirely different industry based on a 1997 BIT between South Africa and Switzerland. [134] Around 2001, a Swiss national owned farm in the northern parts of South Africa was being looted, vandalised, and later entirely destroyed. In 2001 the farm owner used the BIT to ask for compensation damages from South Africa.[135] As the claim was pursued under UNCITRAL rules, it was kept entirely under the radar until 2006, when Luke Peterson managed to uncover some of its details.[136] The Swiss investor made two arguments: first of all, the investment was subject to 'creeping' expropriation due to its destruction over time or, alternatively, due to the subsequent land-claims process by local black and other Historically-Disadvantaged South Africans (HDSA) seeking restitution for land takings under the Apartheid regime. This process was part of South Africa's Black Economic Empowerment (BEE) regime, which based on the 1996 Constitution mandates redistributive efforts to rectify the vast economic inequalities as a result of Apartheid. Yet these fundamental social policies of the South African state were now argued to conflict with its investment treaty obligations contained in the BIT with Switzerland. Secondly, the investor argued that a lack of effective policing of the investor's property or the lack of prosecution of apprehended looters was a breach of the BIT's provision on 'full protection and security.'

[132] '*An industry hijacked*,' The Economist, 6 October, 2001.

[133] L Peterson, South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights (Geneva: Friedrich Ebert Stiftung, (2006) 15-16.

[134] Poulsen The importance of BITs for foreign direct investment and political risk insurance: Revisiting the evidence.(2010).

[135] Trade Law Centre for Southern Africa, Investment Project: South African Case Study (2004)10 14.

[136] Peterson, 'Swiss investor prevailed in 2003 in confidential BIT arbitration over South Africa land dispute,' Investment Arbitration Reporter, 22 October 2008.

The expropriation claim was dismissed by the tribunal: the land-claims process was still ongoing and the outcome was uncertain at the time including the possibility of compensation under domestic South African law. [137] However, by not having effectively protected the Swiss-owned property, the tribunal found South Africa in breach of its obligation to provide full protection and security. During the proceedings, South Africa in their argument cited capacity constrain as part of the defence that the obligation should be seen in its proper context: as a third world country, it could not be expected to provide the same level of protection to the investor as he could obtain in developed countries. While the due diligence obligation may be a standard independent of national laws and regulations, it had to be modified to take into account the host state's level of economic development.[138]However, this argument was entirely rejected by the tribunal arguing that simply doing 'the best it could in the circumstances' based on the state's capacity to act was not enough according to the obligatory minimum standards under public international law, as that would allow developing countries to 'escape' their investment treaty obligations.[139] In 2004, the tribunal therefore awarded the investor almost R7m in compensation approximately US$1 million which South Africa paid.

3.3.2 The second BIT claim encounter

The second BIT bite was nearly felt again in 2004, where the Italian Embassy threatened the South African government with a second BIT claim.[140] This time it concerned the then recently enacted legislation for the mining industry in South Africa. The legislation had been many years in the making. Up through the 1990s and early 2000s, various sticks and carrots in the BEE program, mentioned above, required the multinational to comply with BEE requirement which led multinationals such as Deutche Bank, Merrill Lynch, and de Beers to sell off equity stakes to black-owned enterprises or black employees, appoint black managers, enter into joint ventures with black operators, etc.[141] So after a long consultative process,[142] the time had come to

[137] Walker (n 101 above).
[138] N Gallus, 'The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection,' (2005) 6 *Journal of World Investment and Trade* 5.
[139]Quoted in Peterson (n 125 above) 2008.
[140] L Peterson and R. Garland, 'Bilateral Investment Treaties and Land Reform in Southern Africa' Montreal: Rights and Democracy (2010) 7.
[141] D Schneiderman, *Constitutionalizing Economic Globalization Cambridge* (2008) 152-154.

extend the program to the mining industry which was arguably the largest in Africa, and one of the largest in the world. To rectify the unequal access to South Africa's natural resources as a result of the Apartheid regime, mining legislation was enacted in 2002 to replace the old Mining Act of 1991.[143]The new Mineral and Petroleum Resources Development Act (MPRDA)[144] along with the 'Mining Charter,'[145]vested all mineral rights with the South African state and only allowed holders of 'old order rights' to obtain new licenses ('new order rights') if they divested a considerable percentage of their shareholdings to HDSA. This gave effect to the South African Constitution, where Section 25(4)(a) encourages 'reforms to bring about equitable access to all South Africa's natural resources.'[146] The act moreover obliged companies to reach 40% HDSA participation in management by 2009.[147] Finally, 'new order rights' would be for a limited time period, they had to be exercised, and holders would be subject to thorough review of their social and environmental obligations.

Parallel to the case of security companies, again the fierce opposition from the mining industry led the South African government reduce the target HDSA ownership in the mining sector from 51% to 26% to be achieved by 2014.[148] Italian investors, in particular, continued to fiercely object to the commercial losses they were about to suffer, and tried to use their BIT to pursue the South African government to further water down the legislation. Given the political sensitivities of the affair the investors were backed up by their government, which in 2005 sent the letter to the South African Minister for Minerals and Energy.[149] Arguing that the BEE efforts in the mining sector

[142] P Leon, 'Creeping Expropriation of Mining Investments: An African Perspective,' (2009) 27 4 *Journal of Energy & Natural Resources Law* 599.
[143] See Kaplan & Dale, A Guide to the Minerals Act (Durban: Butterworths, 1991).
[144] GG 26264, GN 25 of 23 April 2004. See also; H. Berg, '*Ownership of minerals under the new legislative framework for mineral resources*,' 1 Stellenbosch Law Review 139 (2009); P. Leon '*A Fork in the Investor-State Road*: South Africa's New Mineral Regulatory Regime Four Years on,' (2008) 42 4 *Journal of World Trade* 4 (2008).
[145] The Chamber of Mines of South Africa, the Department of Minerals and Energy, the South African Mining Development Association and the National Union of Mineworkers, Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, 18 June 2002, available at: www.capegateway.gov.za/Text/2004/5/theminingcharter.pdf (accessed 11 January 2016).
[146] Sec 25(4) of Constitution of the Republic of South Africa, Act 108 of 1996.
[147] Leon (n 143 above) *27* 4, 597-644.
[148] P Leon (n 139 above) Whither the South African mining industry?.(2010) 30 1 *Journal of Energy & Natural Resources Law*, 5-27.
[149] Similarly, in 2004 British Foreign Minister, Jack Straw, was asked in the British Parliament about the 'expropriation of privately-owned common law mineral rights under the 2002 Act,' upon which he replied that: 'under the provisions of the UK/South Africa Investment Promotion and Protection Agreement any dispute between a UK investor and the South African Government may be submitted to international arbitration.' Yet British firms –

had gone too far, the Italian embassy's '*Aide Memoire'* noted that the MRPDA had '*a significant and deleterious effect on Italian investors*' investments in the South African mining industry ...' and by granting more favourable treatment to HDSAs, it essentially favoured 'South African investors as a group.'[150] As such, the 'social upliftment objectives' of the act 'might produce a breach' of the 1997 BIT between Italy and South Africa, which had no carve-out or provision for affirmative action measures in any of its substantive provisions.

If true, this was not to be taken lightly. Even if compensation was required for the mining act according to South African law – as a judge in an ongoing High Court case has alluded to[151] - the 1997 BIT with Italy gave the investors a right to 'immediate, full and effective compensation', rather than the 'less than market value' standard prescribed by South African law when compelling social objectives are involved.[152]

A year later, the threat materialised; The Italian miners initiated a BIT claim along with a group of Belgian investors arguing that the mining legislation was tantamount to discrimination and expropriation and therefore asked for US$350 million in compensation.[153] This was a significantly huge claim for the South African government: it translated into more than US$7 per capita and equated to 70% of its entire Strategic Health Programme for preventing and treating HIV/AIDS that year.[154] Most importantly, it touched upon fundamental issues of concern to the South African policy makers. If successful, it had potential to open the flood-gates for similar claims questioning the re-distributive efforts of the post-Apartheid regime,[155] which could

such as Anglo American – chose not to file a claim due to the political ramifications that would have for its future relationship with the South African government.

[150] Peterson & Garland (n 132 above) 28.

[151] *Agri South Africa and Annis Mohr Van Rooyen v The Minister of Minerals and* Energy (Case No 558896/2007), Judgment of March 6, 2009 in the High Court of South Africa (North and South Gauteng High Court, Pretoria).

[152] L Peterson, 'South African court rules that mineral rights holders can claim for expropriation following introduction of new minerals rights regime; meanwhile, government about to file its written defense in international arbitration challenging the same legislation,' Investment Arbitration Reporter, March 17 2009. See generally; section 25 of the South African Constitution.

[153] While arguments were not specified in the award, investors further argued that the act was a breach of provisions on 'fair and equitable treatment' as well as 'national treatment'; *PieroForesti, Laura de Carli and others v. the Republic of South Africa*, Award, ICSID Case No. ARB(AF)/07/1 (henceforth 'Foresti award'), par 78.

[154] www.treasury.gov.za/documents/national%20budget/2007/ene/15%20health.pdf (at 10) (last accessed 16 January 2016).

[155] Centre for Applied Legal Studies (CELS), Application to be Admitted as Amicus Curiae in the Matter Between Agri South Africa and the Minister of Minerals and Energy, and in the Matter Between Annis Mohr Van Rooyen and Minister of Minerals and Energy, High Court of South Africa, Pretoria, 30 June 2009, pars. 54.2.3-54.2.4.

result in 'a significant and potentially unquantifiable liability for the South African government,' as one South African lawyer put it.[156]

Unlike the Swiss investor a few years earlier who pursued their claim under UNCITRAL, *Foresti et al,* pursued their claim under ICSID's Additional Facility Rules, which meant that its existence if not actual proceedings had to be made public. The immediate result was predictable: after ICSID had approved the claim in 2007, non-governmental organisations (NGOs) in South Africa and abroad were quick to pick up on the politically charged case, and sought *amicus curia* status in the arbitration proceedings.[157] Apart from the question of compensation to the claimants in question, the NGOs argued that the case touched upon 'a wide range of issues of concern to the citizens of all countries.'[158] In 2010, however, the investors eventually withdrew the case as they managed to negotiate rather favourable terms with South African mining regulators: instead of having to sell more than a fourth of their investment to re-obtain their licenses, they were now allowed to sell only 5% - and that too as part of a share-ownership scheme to their own employees.[159] Ultimately, South Africa agreed to discontinue the proceedings as long as it was on a *res judicata* basis.

3.4 Conclusion

This chapter provided a detailed analysis of the decision-making processes surrounding a BIT-process in South Africa, indicative of developing countries with considerable public policy incentive to engage carefully with investment treaties. However, the government failed to carefully seek and process information about the implications of BITs until the country itself was hit by a major BIT claim.

New South Africa's mandate was dual, being readmission by the international community, and to redress the imbalances of the apartheid regime. Thus government was adamant on opening the country up to trade and foreign investments to help rebuild an

[156]B Ryan, 'Offshore investors may sue SA government,' 15 September 2005, available at: www.miningmx.com (accessed: 4 November 2015).

[157]CELS, the Centre for International Environmental Law, the International Centre for the Legal Protection of Human Rights, and the Legal Resources Centre, Petition for limited participation as non-disputing parties, in ICSID ARB(AF)/07/01.

[158] N 145 above.

[159]Foresti Award,(n 32 above) 21.

economy suffering from past repressive economic mismanagement.[160] As the Apartheid regime was crumbling and South Africa was about to end decades of isolation from the international community, the United Kingdom (UK) approached the South African government to enter into a BIT and the type of treaty the British had brought to their attention seemed a useful legal tool to assist in that process which was the first ever BIT that the country has entered into.[161]

Since the standard OECD model enshrined in the British BIT was used as a *de facto* model for future negotiations.[162] South Africa rushed to spread out a web of investment treaties using the UK-SA BIT as a model precedent and the following year no less than seven BITs were signed. Until the *Foresti*[163] claim, the government had hardly ever taken BITs seriously. As stated by one senior official: '*it was not until we got sued, we truly realized that we should have had red flags up when signing these treaties*.'[164] The BIT movement was thereby joined not after careful consideration of costs and benefits of the treaties compared to alternative investment promotion instruments, but simply because it was readily available to adopt after a capital-exporting country had made the government aware of the treaties' existence.[165] On this basis, the BIT program anchored almost entirely to the first treaty signed without taking into account the social and transformational needs peculiar to South Africa. Thus the time is ripe for the country's constitutional transformative mandate to form part and parcel of the new investment laws going forward and the policy reform should be viewed in that light

[160] N. Mandela, '*South Africa's Future Foreign Policy*,' (1993) 72 Foreign Affairs 86.
[161] According to UNCTAD's online database, the Apartheid regime entered into a BIT with Paraguay in 1974. See, 'Agreement Relating to Economic Co-Operation and Investment Between the Government of the Republic of South Africa and the Government of the Republic of Paraguay,' Pretoria, April 3, 1974. For press coverage at the time, see; 'SA, Paraguay sign 2 pacts,' Rand Daily Mail, April 4, 1974.
[162] Poulsen (n 134 above).
[163] Foresti, Piero (n 32 above).
[164] 'It was the *Foresti* claim that made Cabinet realise that they really had to review what these treaties were all about.'
[165] See n 174 above.

CHAPTER 4

POLICY SHIFT IN SOUTH AFRICA'S APPROACH TOWARDS INTERNATIONAL INVESTMENT LAW

4.1 Introduction

This chapter forms the nucleus of this study. The Author commenced the study by highlighting the historical aspect of the investment regime and contrasting same with South Africa's economic regime under both colonialism and apartheid, informing the policy reform. The challenges within the broader international investment regime necessitated the long overdue policy shift which South Africa has recently embarked on, in furthering economic transformation .This chapter analyses the political and economical rationale behind the policy option informing the government's approach towards international investment regime. This is done by scrutinizing some definitional aspects of the *first generation* bilateral investment treaties (BITs) entered into after the country's readmission into the international community. It further discusses South Africa's international arbitration experience, development concerns and a broad spectrum of the legislative framework underpinning the regime change in order to evaluate the legitimacy of the concerns voiced against the investment regime. Then concludes by commentary on whether the policy shift adopted by South Africa is a *reasonable* and *proportionate* response to challenges facing international investment regime.

4.2 South Africa's ascendance to the global economic stage

Whereas South Africa is considered a small economic player on the global stage, the country has in recent years announced its presence in the globe by, *inter alia*, being the first ever African country to successfully host the federation of international football association (FIFA) world Cup in 2010.[166] Recently the country also became the only African country to be part of the new BRICS countries (consisting of Brazil, Russia,

[166] S Cornelissen. Crafting legacies: the changing political economy of global sport and the 2010 FIFA World Cup™.(2007)34 3 *Politikon* 241-259.

India, China and South Africa) also in 2010.[167] The country's economy also does fare favourably in the areas of productivity, transparency and the ease of doing business.[168]

South Africa has, over the last two decades, been marred by huge foreign direct investment (FDI) inflows.[169] At the centre of underlying principles for the country's attraction as an investment destination is; exceptionally strong institutions and a vibrant, functioning democracy. The Minister of Trade and Industry stated in January 2015 that 'according to the OECD's Restrictiveness Index, South Africa ranks among the most open jurisdictions for FDI in the world'. He further stated that;

> "openness was reflected in the overall trend of growing FDI into South Africa over two decades since 1994, which South Africa's stock of FDI accounted for around 42 percent of GDP, and that over the previous five years, South Africa had accounted for the bulk of new investment projects in Africa.[170]"

While the country's new investment regime is at the centre of critics, constraining the investment climate, the country's central bank's FDI statistics indicate that foreign direct Investment in South Africa has increased by a record; one thousand nine hundred and forty two billion South African rands (1942 ZAR Billion) in the fourth quarter of 2015. And that the FDI in South Africa averaged 394.74 ZAR Billion from 1956 until 2015, reaching an all time high of 1942 ZAR Billion in the fourth quarter of 2015.[171] The latter, adds to the ongoing debate around the correlation between FDI flows and Bilateral Investment Treaties.

Under apartheid regime, which lasted until the late 1980s, South Africa was facing economic sanctions in the forms of international arms embargoes, oil embargoes, prohibition on IMF loans, denial of loans by most international banks, prohibition of loans by the United States Export-Import bank, and limitations on trade and

[167] P Gammeltoft Emerging multinationals: outward FDI from the BRICS countries (2008) 4 1 *International Journal of Technology and Globalisation* ,5-22.
[168] S D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2014) 50 *Harvard International Law Journal* 435 487
See also Steenkamp (note 24 above) 2014 81 https://open.library.ubc.ca/cIRcle/collections/24/items/1.0077780 (accessed 06 February 2015).
[169] The case for a better FDI data in South Africa 05 May 2015 ,online http://www.thetradebeat.com/opinion-analysis/the-case-for-better-fdi-data-in-south-africa (accessed 08 May 2016).
[170] R Davies' South Africa, the most open country for Foreign Direct Investment in the World' SANEWS,http://www.sanews.gov.za/south-africa-most-open-country-foreign-direct-investment-world.
[171]http://www.tradingeconomics.com/south-africa/foreign-direct-investment (accessed 03 May 2016).

investment.[172] The country faced a severe shortage of savings,[173] and in 1990 had a GDP of only US$40 billion.[174] With the end of apartheid, upon readmission ,South Africa had to cast its net too wide in the investment pool in the hope of catching as many investors as possible, and it was therefore only logical that Government would do all that it could to attract foreign investment and to stabilize the economy in the aftermath of apartheid system.

South Africa is currently, one of the few countries in the world that acts both as a capital exporting country and capital importing country at the same time[175]From a policy perspective, it has targeted export-oriented investment as the key to the country's economic performance,[176] which would support its position as a gateway to the African market. We should therefore, always keep in mind that South Africa's interest in international investment agreements(IIAs) are a twofold, in that the country should not only be viewed from capital importing perspective but also from a capital exporting perspective. Paradoxically, while developed countries and economies in transition saw a significant decrease in FDI, inflows to developing economies remained at historically high levels.[177]These indicate that developing countries like South Africa are still attractive investment destinations despite recent policy shift.

4.3 Some key provisions of South Africa's BITs

Engaging some of the key provisions of the "old generation" BITs in which South Africa is and was party to, provided clues which will be critical to test the reasonableness and understand the rationale behind the government's policy shift.

[172] HR Clark & A Bogran, 'Foreign Direct Investment in South Africa' (1998 - 1999) 27:3 *Denver Journal of International Law and Policy* 337 344.
[173] JT Gathii, 'War's Legacy in International Investment Law' (2009) 11:4 *International Community Law Review* 353 384.
[174] G S Eisenberg, 'The Policy and Law of Foreign Direct Investment in the New South Africa' (2009) 28:1 *Journal of World Trade* 5 5.
See also Steenkamp (n 24 above) 82.
[175] n 187 above, 82.
[176]Republic of South Africa, Department of Trade and Industry, Bilateral Investment Treaty Policy Framework Review, 20 (Pretoria: Position Paper to Cabinet, 29 June 2009), online: Parliamentary Monitoring Group, https://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/ytLj4qNhfQF68gWXv7JeHPOY_olZS-Qi-wissKlQmACg/mtime:1381177270/files/docs/090626trade-bi-lateralpolicy.pdf [Government Position Paper].
[177]UNCTAD World investment report 2015, Reforming international investment governance http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (accessed 25 may 2016).

4.3.1 Definition of 'investor'

One of the most important definitions in a BIT is that of the "investor". The parameters of the BIT and its scope are determined relative to the definition of investor in such a BIT. Different BITs define the term "investor" in different forms, the main criterion employed in most BITs, is that of the nationality of the investor. It is trite that BITs apply to investments made by investors of one contracting party in the territory of the other. The traditional definition covers both natural and legal persons and this are treated differently.[178]

In the case of *Nottebohm*,[179] the international Court of Justice (ICJ) confirmed the view that a state may decide in terms of its own laws whether to grant nationality to a specific person provided there is a real connection between providing the protection and the national in need of such protection. Thus there should be a clear and valid connection between the natural person in question and the protecting state.

Where ICSID is used as the forum of choice, a BIT should always be read with the ICSID Convention.[180] Under South African BITs, natural persons are defined in three categories, used as nationality test relating to natural persons; where a claimant must be a *national* of either contracting party, example of which can be illustrated by the Belgium-Luxembourg-SA BIT. In the context of investment law, a national of the host state may emigrate and get the dual citizenship and later decide to invest his capital back into the original country of origin (the host state) as illustrated in *Wena v Egypt*.[181] In the latter case, an Egyptian national who had dual citizenship successfully brought an international claim in the ICSID against the government of Egypt for violation of the Egypt UK BIT. In this case the investor managed to avoid the Egyptian courts and according to Maupin, this defeats the essence and justification of Bits.

[178] For a detailed discussion on nationality of investors, see Pannier M (2007) nationality of corporations under domestic law: A comparative perspective, F Ortino et al, (eds) Investment Treaty Law: Current issues II, *Nationalityof Investment Treaty claims, fair and equitable treatment in investment treaty law*. London, British Institute of International and comparative law (2007)11.

[179] H David. 'The Protection of Companies in International Law in the Light of the *Nottebohm* Case.'(1969) 18 2 *International and Comparative Law Quarterly* 275-317.

[180] Article 25(2)(a) provides that:" National of another Contracting Sate, means (a) any natural person who had the nationality of a contracting state, other than the state party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as the date on which the request was registered.

[181] *Wena Hotels ltd v Arab Republic of Egypt*, award 8, December 2000, 6 ICSID Reports 89.

The second category of BITs requires that, an investor who is a natural person be a national of the contracting party without being a national of the host state. Such provision can be found in the SA-Iran BIT.[182] This provision attempts to narrow the definition of investor and it also addresses the potential challenges brought about by dual citizenship , by disallowing a person who bears citizenship of both countries from benefiting from the BIT protection in the host state.

The third and last category requires a natural person investor to be a citizen or permanent resident of the contracting party but not being a citizen of the host state. The Canada-South African BIT illustrates this approach.[183] The most distinctive feature of this approach is that it does not require an investor to be a national to enjoy protection under such BIT, mere permanent residence suffices. This widens the net of those who are to be identified as covered investors. Secondly the permanent residence is also covered under investor. Importantly, these exclude a citizen of a contracting party in order to limit the problems of dual citizenship.[184]

Nationality of Investor who is a Juristic Person

The same inconstancies also present themselves when defining legal persons in the BITs similar to natural persons. The disparities are huge and each variation in definition bears significant legal meaning. Some definitions tend to be narrow while other tends to be wide and all encompassing. Various combinations have been used in BITs to define the nationality of a legal entity. These include the place of incorporation, the location of the companies' seat and the nationality of ownership and control.[185]

The first set of definitions requires that a legal person should be incorporated in accordance with the laws of the contracting party and should have a registered office in the contracting party. Once there is a registered office in the home state, the legal person qualified for the benefits and protection afforded by a BIT. It does not matter

[182] Article 1(2) (a) of the Iran-SA BIT Provides that Investors include "natural persons who, according to the laws either contracting party, are considered to be its nationals and do not have the nationality of the host contracting party.
[183] See Article 1(g) of SA-Canada BIT.
[184]Pfumorodze (n 13 above).
[185] See UNCTAD,"scope and Definition" UNCATD series in issues in international investment agreements, *New York and Geneva, United Nations* (1999).

whether such a registered office is the head quarter of the legal person or not. Furthermore whether or not there is economic activity being undertaken by the legal person in the home state is irrelevant. Thus this problem is reflected by the United Kingdom and Northern Ireland – SA BIT,[186] which in article 1(D) states that companies means:

a) In-respect of the republic of South Africa, companies, firms and associations incorporated or constituted under the law enforce in any part of the republic of South Africa.

The second set covers those entities which are recognised under the laws of the contracting party be it that they profit making or non profit making this is also very wide as it seeks to explicitly cover non profit organisation. An example of which is the Korean BIT.[187] This is in contrast with the first definition which does not explicitly mention non profit organisations. The term companies is defines widely to include "corporations, firms and associations incorporated or constituted under the law in force" in either party it can be argued that certain categories of non profit activity like certain development or charity activities which promote economic development in the whole state should enjoy protection under BIT's. This will contribute to making BITs as both instrument of investment protection as well for the promotion of sustainable development.

Paterson argued that non profit making organisation and their assets should be protected under BITs. The activities of non profit organisations contribute to the socio economic development of the host state in contracts to many profit making organisations.[188] If BITs are to balance investor protection and social economic development, protection of NGO would play a greater role in meeting the objective.

The third category requires that a legal person be in accordance with the laws of contracting party and that it should have its headquarters in the territory of the contracting party as indicated in the Turkey - SA BIT[189]. This tends to limit the scope of

[186]See art 1(d).
[187] Article 1, the term "investor" refers to any natural or juridical person who invests in the territory of the other contracting party.
[188] See G Berger 'NGOs and socially inclusive business; 'within the market, for the Mission' Revista (2006) *Harvard Law Review Latin America magazine* 47-48 qouted in Pfumorodze(n 174 above).
[189] Note 135 above 85.

definition of investor and tend to create certainty on whether the legal person is covered or not.

The widest legal definition of the legal person is found in the South African BITs with Netherlands and Sweden. In addition to the usual requirement that the legal person should be constituted under the laws of the contracting party, this definition cover even legal person not constituted under the laws of any contracting party but contracted directly or indirectly by natural or legal persons covered by the laws of the contracting party this is a very wide definition presents the problem of indirect shareholders. Foreign investors can incorporate a shell company in a country that maintains a particularly favourable BIT with South Africa and then make their investment through that company in order to get protection under that BIT, as illustrated in the case of *Aquas dell Tunari SA vs the Republic of Bolivia*[190]. Briefly the fats of the case we that *Aguas dell Tunari* (ADT) was incorporated in Bolivia. In September 1999 ADT received a concession for the right to provide water and sewerage to Kochambaa, city in Bolivia. From the onset there was public opposing to the concession on communal wells, due to massive public resistance the city revoked its concession and ADT brought an ICSID claim based on the Netherlands- Bolivia BIT. [191]

However prior to bringing its claim and as the public opposition was growing, the investor migrated corporate ownership of privatised assets from the Cayman Islands to the Netherlands in order to have access to the Netherlands - Bolivia BIT. This was done without permission of the Bolivian authorities which approved original privatisation. Bolivia argued that ADT was ineligible to sue under the Netherlands - Bolivia BIT claiming that ADT was controlled by a US based Bechtel which hold a majority stake in ADT. Whereas a majority of the tribunal allowed the claim to proceed, in spite of investor migration his investment to Netherlands in order to access arbitration under Bolivia-Netherlands BIT.[192] The Bolivian appointed arbitrator dissented on this view and concluded that the Bolivian Authorities should have been consulted first about the change in corporate ownership. The liberal approach taken by the majority in this case

[190] ICSID case NO.ARB/02/3.
[191] Dunbar and L.E Pieterson . '*Bolivia water dispute settled, Betchel forgoes compensation*,' Investment Treaty News (ITN), International Institute for Sustainable Development (20 January 2006) http://www.iisd.org/investment/itn accessed 16 April 2016.
[192] For commentary on this case, see G. Van Harten, *Aguas del Tunari v Bolivia* (Netherlands-Bolivia BIT) available on www.iiapp.org (accessed 17 may 2016).

opens an avenue of multiple claims against the host state from investors and thus legitimises concerns against international arbitration. This is so because the BIT defines investors very broadly to include corporations incorporated in Bolivia "controlled directly or indirectly by nationals of the Netherlands. Thus, there is a need to narrow the scope of the definition of investor to avoid this broad application.

4.4 Concerns about ISDS and subsequent termination of SA BITs

The discussion about dispute settlement as contained in the South Africa BITs is critical. It traces the roots of investment dispute settlement and provides a brief overview of institutions which are custodians of the international investment dispute resolution mechanism. This add to the question of whether South Africa should encompass the investor-state arbitration clauses in its new BITs as the government has indicated that it has not entirely abandoned the BIT regime and will enter in new ones *should exceptional circumstances prevail*.[193]

4.4.1 Historical context of investment dispute resolution

Investment dispute settlement is an age old phenomenon.[194] Since ancient Greece, the rules regarding the protection of foreigners have been a central feature of local laws. Foreigners would have to resort to local courts of administrative tribunals of the host in the event their properties has been interfered with or even expropriated. Reliance of domestic dispute settlement mechanisms proved not to be a success. The challenges associated with the latter included domestic sovereign immunity as well as the concerns around the independence of the judiciary, which were inclined to the influences of the host states politicians.[195]

Diplomatic Protection

During the late seventeenth century, some treaties were concluded between states to support the international movement of goods in order to contribute towards growing

[193]Vandevelde, Kenneth J. 'A brief history of international investment agreements.' *UC Davis Journal of International Law & Policy* 12.1 (2005): 157.
[194] For a detailed discussion on international investment dispute settlement seem M Moses, principles of practice of International Commercial Arbitration., Cambridge University Press (2008).
[195] K.N Schefer, International Investment Law: Text Cases and materials.,Cheltenham, UK, Edward Elgar Publishing Limited(2013); ;S.Singh and S.Sharma,"Investor state Dispute Mechanism:The Quest for a workable roadmap," (2013) 29 76 *Utrecht Journal of International Law* 88.

national economies. In terms of theses treaties, a shift from domestic investment settlement to international approach was pronounced. Within the confines of these treaties, the respective states would take its citizen's claim into an international dispute settlement arena. This is called espousal and its effect was to transform a private claim into a sovereign claim.[196]Once espoused, the investors claim became the claim for the State.[197] In the *Mavromatis* case, the permanent Court of International Justice noted that:

> "It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by any acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels.[198]"

The home state would decide on the best possible way to pursue the claim, and at international level such disputes were primarily solved diplomatically between the governments of the affected parties. Where an impasse has been reached, and the dispute could not be resolved through diplomatic channels, the home state concerned would either resort to the use of force or instituting proceedings against the host state at international institutions.

The approach had its own advantages and drawbacks. The main advantage being that at states level, the home state was more likely to be given attention to by the host state as opposed to the individual investor approaching the host state to raise his discontent. However the main pitfall of the diplomatic protection approach is that the state itself will decide whether the claim is worth pursuing or not and therefore the affected investor does not have the right of espousal. According to the International Court of Justice (ICJ), espousal lies within the discretion of the state the state itself is the sole judge of espousal request.[199] The state may turn down the request for espousal on several grounds including a fear of political implications. Lastly the government is under no obligation to reimburse the recovered damages to the investor who is the subject of espousal; the discretion still lies with the State to remit the compensation to the affected investor.

[196] For a detailed discussion on espousal in international law, see M.Koessler,"Governmental Espousal of private claims before international tribunals." 13(2)The University of Chicago Law Review(1946) 180.
[197] See international law Commission (ILC),"Draft Articles on Diplomatic Protection" (2004) UN Doc A/CN. 4/L 4/L.647.
[198]A Karl. *Letters on International Relations before and during the War of 1870*. Vol. 2. Tinsley brothers, 1871.
[199]See ICJ comments on the Barcelona Traction, Light and Power Co (Belgium v Spain).

Employment of the Use of Force

This approach was common during the eighteenth to twentieth century. Where diplomatic protection failed, the other traditional method employed to settle investment dispute between states was, the use of force. However in the Morden era, the employment of aggressive use of military force is illegal, unless authorised by the international community through the Security Council.[200] Latin America became the one of the first casualties of this approach on dispute settlement. They However challenged the legitimacy of home state involvement in investment disputes, led by the Argentinean Scholar, *Carlos Calvo,* who argued that investment disputes should be resolved domestically solely between the host state and the investor concerned within the host states courts. Recently some of the countries who have been on the receiving end of the international arbitration have raised legitimacy concerns around this institution as will be discussed below.

4.4.2 Investor –state dispute settlement (ISDS)

Many BITs include provision for settlement of disputes between a contracting party and an investor to an institution.[201] Majority of the times the International Centre for Settlement of Investment dispute (ICSID) is the most preferred candidate, followed by the United Nations Commission of International Trade Law (UNCITRAL).These provision within any BIT, creates certainty and comfort for investors.

Most countries started to include ISDS at the centre of their BITs between the late 1960's and early 1970's .By the 1990, this had almost crystallised as a standard treaty component. The main attraction to ISDS, was that it sought to create a neutral forum that would offer investors the opportunity of a fair hearing before a tribunal independent of domestic political considerations and able to focus only on the legal issues at hand.[202] It has also done away with the need to investor to beg their home state to espouse their claim where even recovery of damages in favour of the investor concerned was not guaranteed irrespective of the outcome of the diplomatic settlement.

[200]C, Antonio. "Terrorism is also disrupting some crucial legal categories of international law." (2001) 15 5 *European Journal of International Law* 993-1001.
[201] R Dolzer &C Schreuer, principles of International Investment Law, (2008) 211-285.
[202] N 187 above.

These need for a neutral arbitral avenue that will accord the investor the right to arbitration without dependence on diplomatic protection, culminated in the conclusion of the convention on the settlement of Investment disputes between states and nationals of the other state (ICSID Convention) in1965.

Although South Africa is not a member of the ICSID, it consents to the ICSID Additional Facility in most of its BITs. It also allows for *ad hoc* arbitration under UNCITRAL rules. These BITs also do not require the exhaustion of local remedies as is the case in the new investment regime.

4.4.3 Arbitration Panels as opposed to Domestic Courts

Although ISDS arbitration is considered the most preferred arbitration avenue by most capital exporting countries, it is however not without blemish. This type of settlement mechanism is being followed by criticism in recent times.[203] The arbitration system is riddled with major weaknesses not associated with normal courts, such as the *ad hoc* nature of the process, where the tribunal members are not sitting judges, but may be lawyers that also represent other investors in other cases.[204] The same panellists might be suing another state on other cases on behalf of another investor, and do not have obligations on disclosing conflict of interest.[205]Also lack transparency since the arbitrations are not held in the open and existence of the results are not officially made known. In a nutshell modern investor state dispute settlement practice faces massive public criticism: non transparency, unpredictability of the outcome due to no precedence, inappropriate inferences with democratic policy choices in host states and considerable financial risks.[206]

In addition to the tension between the South African constitutional standard for expropriation and the standard applied in international investment law, the Government Position Paper raised real concerns about the international arbitration process and

[203]For a detailed discussion on these criticism, see L.E. Trakman, 'Investor State Arbitration or local Courts: Will Australia Set a New Trend?'46(1) *Journal of Wolrd Trade* (2012),83.
[204]Mackenzie,et al. 'International courts and tribunals and the independence of the international judge.'(2003) 44 *Harard. International 'investment Law Journal* 271.
[205] n185 above ,271.
[206] n 185 above,217.

expressed a clear preference for dispute settlement to be done at a domestic level. The review held that:[207]

> "There is no compelling reason why review of an investor's claims against a state cannot be undertaken by the institutions of the state in question provided these are independent of the public authority that is in dispute and they discharge their duties in accordance with basic principles of good governance, including an independent judiciary."[208]

South Africa's main concern appears to be that dispute settlement institutions were not designed to address complex issues of public policy that are now often raised by Respondent States (such as the issues that were raised in the *Foresti* Arbitration).[209] Although some changes have been made to the dispute settlement regime, the Government Position Paper raises a number of issues that still need to change, including greater transparency, the establishment of a neutral manner of selecting arbitrators and proper deference to domestic dispute settlement procedures.[210]

4.4.4 Right to Regulate, BITs and Developmental concerns

One of the effects of the risk of adverse arbitration awards is that States can also no longer regulate in the public interest without considering whether there is a risk that an arbitral tribunal could find that the domestic regulation has a negative impact on foreign investment.[211] Limitations on how and what regulations a State may prescribe, impacts on the manner in which a State is able to develop. The State's choice about which public interest objectives to pursue and how to pursue them may be affected.

The right to development has long been recognised in international law. The United Nations General Assembly, in the Declaration on the Right to Development, defined it as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully

[207] Government Position Paper (n 166 above).
[208] KP Sauvant (ed) Yearbook on international investment law & policy 2010-2011 Oxford University Press.
[209] N 193 above 46.
[210] N 193 above 54.
[211] Ginsburg, Tom. "International substitutes for domestic institutions: Bilateral investment treaties and governance." *International Review of Law and Economics* 25.1 (2005): 107-123.

realized".[212] The right to development imposes, *inter alia*, the following duties on the State:

- to formulate national development policies aimed at "the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the resultant benefits ";[213]
- to create, as a primary responsibility resting on the State, favourable conditions for the realisation of the right to development;[214] and
- to undertake "all necessary measures for the realization of the right to development" at national level."[215]

It is generally accepted that the right to development, while recognised, is not absolute and therefore cannot be enforced against any state. There is increasingly serious concern on how to regulate FDI inflows and how best to make such inflows contribute towards realising the development aspirations of poor economies. The dimensions of the regulatory difficulties that developing countries face revolve around conflicts between investors and host countries.[216] Foreign investors are therefore usually keen to know what standards of "treatment" (such as 'fair and equitable treatment') they will be subjected to upon entry.[217]

There is currently no comprehensive multilateral instrument for the regulation of foreign investment. Foreign investment is therefore only subject to various BITs, regional investment treaties, and, at the multilateral level, the World Trade Organization's (WTO) limited-scope Agreement on Trade Related Investment Measures (TRIMs)[218] and the General Agreement on Trade in Services (GATS).[219]Regional

[212] Article 1(1) of the Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4 1986), online: UN http://www.un.org/documents/ga/res/41/a41r128.htm .
[213] N 160 above, Article 2(3).
[214] N 157 above, Article 3(1).
[215] N 161 above, Article 8(1).
[216] V Mosoti, 'Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between', (2005-2006) 95 26 *North-western Journal of International Law and Business* 97.
[217] JW Salacuse (n 39 above) 655-675.
[218] See Trade-Related Aspects of Investment Measures, The Legal Texts: The results of the Uruguay round of Multilateral Trade Negotiations 143-46 (1999).
[219] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IB, legal instruments - results of the Uruguay round, 33 International Legal Materials. 1125 (1994).

investment regulation frameworks are in their nascent stages in Africa. For instance, the Southern Africa Development Community (SADC),trade protocol provides rather vaguely that "Member States shall adopt policies and implement measures within the Community to promote an open cross border investment regime, thereby enhancing economic development, diversification and industrialization."[220]

For developing countries, trade and investment, in particular foreign direct investment, are undoubtedly significant for development. The creation of a favourable environment for the free flow of FDI is a development strategy that is increasingly central in government policies throughout the developing world. However, such development would not be sustainable if the model on which it is based is not balanced to take into account the interests of both the foreign investor and the host State.[221]

From a South African perspective, the government has taken the view that first generation BITs, such as the ones in which the country is party to, entered in the post apartheid era; do not necessarily address major issues of concern which are critical for development objectives of most developing countries.[222] And are therefore stifling sustainable developments in these developing countries.

4.5 Legislative framework on South Africa's investment Policy shift

4.5.1 The constitution

South Africa is prides itself in the robustness of its legal system. It is worth mention that the country's constitution is transformative in nature given the historical makeup of the country, and such transformational objectives have been entrenched in the constitution which is the supreme law of the republic, indicating the significance of achieving transformation the country economic architecture. The most important constitutional provision which is central to investment law in South Africa is the so called "property

[220] Declaration and Treaty of South African Development Community, Aug. 17, 1992, Protocol on Trade, art. 22, 32 International legal materials 116 (1993). See generally Rose Thomas, '*Why Increasing Investment into SADC is Critical for Improving the Region's Ability to Trade*,' Presentation at the NEPAD Opportunities for Africa's Business, Entrepreneurs and SME Communities (Apr. 22, 2002).

[221] Note 197 above 46.

[222] http://www.saiia.org.za/occasional-papers/848-imagining-south-africa-s-foreign-investment-regulatory-regime-in-a-global-context/file.

clause" which is briefly referenced in Section 25 of the Constitution,[223] "the property clause", deals with the issue of expropriation[224]: The clause reads as follows:

> ***"25. Property***
>
> *(1) No one may be deprived of property except in terms of law of general application, and no law may permit deprivation of property.*
>
> *(2) Property may be expropriated only in terms of law of general application-*
>
> *(a) for a public purpose or in the public interest; and*
>
> *(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*
>
> *(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances, including –*
>
> *(c) the market value of the property;*
>
> *(e) the purpose of the expropriation.*
>
> *(4) For the purpose of this section –*
>
> *(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources;*
>
> *(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination,*

[223] See (n 134 above).
[224] L Ntsebeza Land redistribution in South Africa: the property clause revisited. *The land question in South Africa: The challenge of transformation and redistribution* (2007) 107-131.

> *provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).”*

At this juncture, the international treaty obligations and the transformative nature of the country’s constitution which was still being negotiated when the first treaties were entered into were pronounced and it was clear that the interest were divergent. The Incompatibility of the BITs provisions with the constitutional mandate of transformation necessitated the reform in the investment regime in order to align the latter with the country’s constitutional objectives.

4.5.2 Investment Treaty Review Process

Following the readmission into the international community, post apartheid South Africa had their first democratic elections in 1994.[225] Before the advent of the Final Constitution, South Africa joined the race for competition of foreign direct investment in an effort to reconstruct the economic disaster left behind by the apartheid regime. While at it, the country opened itself to international investment and concluded a large number of bilateral investment treaties which included recourse to investor-state arbitration. Not too many years later however, the government began to find that its public policy goals were being restricted by these agreements. To remedy the situation, the Department of Trade and Industry (DTI) sought to suspend further negotiation and conclusion of BITs pending a comprehensive review of the policy framework informing the BIT process. As early as 2007,the review process commenced with the aim of developing a policy framework as well as guidelines for assessing BITs already concluded and for engaging with BITs in the future. [226]

The overall conclusion reached upon finalising the review process was that, the current system leaves the door open "for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration that may constitute direct challenges to legitimate, constitutional and democratic policy-making". [227]

During the review the content of various BITs was compared with domestic South African law and it was found that standards in the BITs with relation to expropriation differ from standards under domestic South African law.[228] It was argued that BITs do not make a distinction between 'deprivation' and 'expropriation,' that the concept of nationalization, as found in the BITS, is not used in the Constitution, and that terms such as 'measures having effect equivalent to expropriation' are not recognised in SA's constitutional parlance. It was further argued that failure to distinguish between 'regulation' and 'expropriation' would mean that legitimate government regulation

[225] G le Pere SOUTH AFRICA'S FOREIGN POLICY IN A GLOBALISING WORLD AN OVERVIEW: 1994-2002 (Institute for Global Dialogue) http://www.thepresidency.gov.za/docs/pcsa/irps/pere1.pdf (accessed 08 May 2016).

[226] Department of Trade and Industry *Bilateral Investment Treaty Policy Framework Review* (2009)12,also quoted by K Bosman,'South Africa: Trading international investment for policy space')" a working paper of the department of economics and the Bureau for economic research "University of Stellenbosch ,2016.

[227] X Carim"Lessons from South Africa's BITs review"(2013) 109 Vale *Columbia Centre on Sustainable development*, see also Davis (n 166 above) http://www.politicsweb.co.za/news-and-analysis/why-the-bits-had-to-bite-the-dust--rob-davies (accessed 02 February 2016).

[228] (n 227 above) 41.

could be deemed to constitute a form of 'indirect' expropriation, or regulatory expropriation.[229]The policy review held that;

adequate policy space is a key developmental tool for developing countries, but that the "current BITs extend far into developing countries policy space", imposing damaging binding investment rules with far-reaching consequences for development.[230]

It was further argued that "new investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally," and that under such conditions investment would fail to encourage or enhance development."[231] Recommendations included, among other things, that South Africa review it practices with a view to developing a model BIT which would be in line with its development needs that the need for investor certainty should not compromise the country's own legitimate interests; and that further domestic legislative intervention could be brought to ensure that a proper balance is achieved.[232] Taking the findings of the review into account, the South African Cabinet decided in July 2010 that South Africa would:

> "refrain from entering into BITs unless there are compelling political or economic reasons to do so; terminate existing BITs and offer partners the possibility to re-negotiate BITs on the basis of a new model; develop a new Foreign Investment Act that is aligned with the Constitution and clarifies typical BIT provisions under South African law; and establish an Investment Inter-Ministerial Committee to oversee this work."[233]

June 2010, marked a very significant milestone in the South African Investment regime which can be characterised as a turning point in the history of the country's international investment regime where Cabinet decided that work to modernise and strengthen South Africa's investment protection legal framework should be initiated.[234]

The South African Department of Trade and Industry's (DTI) Trade Policy and Strategy Framework which has been very instrumental in the policy change states that:

[229] Bosman (n 226 above) 13 par .
[230] N 226 above.
[231] Leading academics voice concerns over investment treaties September 2, 2010. http://justinvestment.org/2010/09/leading-academics-voice-concerns-over-investment-treaties/
[232] N 175 above, 13.
[233] Position paper (n 166 above). http://www.dti.gov.za/ads/bi-lateral_policy.doc
[234] Steenkamp (n 24 above).

"The government's broad developmental strategy aims to promote and accelerate economic growth along a path that generates sustainable, decent jobs in order to reduce poverty and extreme inequalities."[235]

The following forms the crux of the June 2010 Cabinet decision which has been cascaded into the DTI's Trade Policy and Strategy Framework:[236]

> "(1) Developing a South African Investment Act to codify and clarify typical BIT provisions into domestic law and strengthen existing investor protection.
>
> (2) Terminating first generation BITs and offering partners with whom BITs are terminated the possibility to renegotiate.
>
> (3) Refraining from entering into BITs in future, unless compelling economic and political reasons exist to do so.
>
> (4) Developing a Model South African BIT as a basis for negotiation or renegotiation of all BITs."

According to the Government Position Paper, a State's right to regulate in the public interest should be preserved.[237] This requires that BITs should leave a wider variety of disciplines affecting more areas of a State's activity open for regulation by that State without stifling developmental objectives. It could potentially be achieved through the incorporation of general exceptions into BITs, although such incorporation may lead to interpretational difficulties.

One area that a State would want to regulate is the promotion of human rights; for example, to protect citizens from having their rights interfered with by foreigners, policy measures designed to promote the right to food, the right to health or the right to water. In terms of standard BITs, foreign investors in international arbitration may challenge such measures. The 2010 Government Position Paper identified tensions between investment law standards and the provisions of the South African Constitution on expropriation. Domestically, Section 25 of the Constitution, "the property clause", deals with the issue of expropriation.

[235] Department of Trade and Industry A South African Trade Policy and Strategy Framework (2010) 10.
[236] n 217 above.
[237] n 219 above.

It is crucial to note that, BITs do not distinguish between deprivation (as set out in Section 25(1) of the Constitution) and expropriation (as set out in Section 25(2) of the Constitution) as already mentioned above. Conversely, the Constitution does not refer to either "nationalisation" or "measures having effect equivalent" to expropriation, both concepts that are commonly used in investment law.

The concept of expropriation in international law is therefore much wider and much less toned than in the Constitution, which leaves open the possibility that legitimate government regulation will be deemed to be a form of indirect expropriation

The nuanced approach of South African law to expropriation is demonstrated by the jurisprudence on Section 25 of the Constitution. In *Agri SA v Minister for Minerals and Energy*[238] the court considered the application of section 25 of the Constitution to the Mineral and Petroleum Resources Development Act ("MPRDA").[239] The MPRDA was enacted to facilitate equitable access to South Africa's mineral and petroleum resources, and to ensure the sustainable development thereof.

The Claimant brought the case to the courts as a test case to determine whether the commencement of the Act effectively expropriated the mineral rights conferred on holders by its predecessor, the Minerals Act. The Claimant brought the claim for compensation of a holder of so called "old order" mineral rights, *Sebenza* (Pty) Ltd ("Sebenza").[240] *Sebenza* became the holder of the mineral rights in question on 2 October 2001, when it bought the rights from the liquidators of a third company. On 1 May 2004, *Sebenza* became the owners of old-order mineral rights in terms the MPRDA, and had the exclusive right to apply for mining rights under the MPRDA within a year. Due to the dissolution of its shareholding, *Sebenza* was not in a position to apply for the necessary government authorisations to prospect for or mine the coal it had acquired the rights to, either in terms of the Minerals Act (predecessor to the Act) or the MPRDA itself.

[238] *Agri South Africa v Minister for Minerals and Energy*, [2013] ZACC 9, online: SAFLII http://www.saflii.org/za/cases/ZACC/2013/9.pdf .
[239] Mineral and Petroleum Resource Development Act 28 of 2002.
[240] P Badenhorst & N Olivier 2012. Expropriation of'Unused Old Order Rights' by the MPRDA: You Have Lost It! Agri SA v. Minister of Minerals and Energy (Centre for Applied Legal Studies as Amicus Curiae)(2011) 3 All SA 296 (GNP).(2012) 75 *Journal of Contemporary Roman-Dutch Law*,329-343.

In a nutshell, the claimants pursued the claim they purchased from *Sebenza*, alleging expropriation due to deprivation of rights by the MPRDA, the court held that the deprivation in question, did not raise to the level of expropriation since acquisition of the latter's rights by the State is a prerequisite for expropriation to take place and on this matter at hand the state did not take acquisition of such rights,[241] in which case the measure should be accompanied by compensation based on the "appropriate" value of the expropriated property. Therefore the claim for expropriation by the claimants was thus unsuccessful. For a deprivation to rise to the level of expropriation, the State must acquire the "substance or core content" of the property that the owner has been deprived of.[242]There must be "sufficient congruence or substantial similarity". This approach, although not in the context of the Act, was also taken by the Court in other cases dealing with section 25 of the Constitution.[243]

The default standard for expropriation under investment law is that of "prompt, adequate and effective" compensation, which is generally understood as the equivalent of market value of the expropriated investment.[244] The Government Position Paper argues that the "prompt, adequate and effective" standard is one proposed by developed nations, whereas developing nations prefer a standard of "appropriate" compensation[245], which implies a lower level of compensation than under the Hull standard of "prompt, adequate and effective" compensation. Since the standard of "appropriate" compensation leaves the determination of the amount of compensation up to domestic law, it would also be more in line with South Africa's domestic law. Some commentators argue the standard of compensation for expropriation provided for by Section 25 of the Constitution is contrary to international law.

In terms of Section 232 of the Constitution, customary international law would be law in South Africa unless it is contrary to the Constitution or an Act of Parliament.[246] Therefore Customary international law and the South African constitution already have divergent views on compensation; it would take a very brave domestic court to declare the compensation provisions of Section 25 of the Constitution contrary to customary

[241] Ntsebeza (n 214 above) 107-131.
[242] N 227 above.
[243] *Harksen v Lane NO* and others 1997 ZACC 12, http://www.saflii.org/ za/cases/ZACC/1997/12.pdf ;
[244] Dolzer&Schreuer, 'principles of international law 2ND (ed) 100.
[245] (n 219 above).
[246] Constitution (n 134 above) Sec 232.

international law. Despite its frequent application in investment arbitrations, claims that the "prompt, adequate and effective" standard of compensation has reached the status of customary international law are unsubstantiated and very weak.

It might be possible for a South African court to declare the compensation provisions of Section 25 of the Constitution contrary to South Africa's international obligations as contained in the country's BITs, where the BIT is still in force and specifies a "prompt, adequate and effective" standard of compensation. Considering that section 233 of the Constitution provides that, when interpreting any legislation, a court should prefer an interpretation that is consistent with international law to an interpretation that is inconsistent with international law, the outcome of such a claim would be much less certain than in the case of a claim that the compensation provisions of Section 25 of the Constitution are inconsistent with customary international law.

4.5.3 Land reform and investment policy

In order to align the country's investment framework with the constitution and to provide a clear and precise meaning of property rights, the government has embarked on reforming a series of legislation that have a direct impact on the investment framework such as, expropriation act, land reform legislation.

While the process of land restitution until now was often described in general terms as that of "willing buyer willing seller," the introduction of the Property Valuation Act, 2014, along with the Expropriation Bill, 2015, the Restitution of Land Rights Amendment Act, 2014, and the Investment Act, 2015, signifies a change in the policy- and legislative landscape

The Restitution of Land Rights Act of 1994 addresses the large-scale historical dispossession of land that took place throughout the history of colonial and Apartheid South Africa.[247] The Natives Land Act of 1913 dispossessed African people of all but 13 percent of land in South Africa, and numerous other Apartheid laws further weakened black peoples' rights to property. Surely this needs to be addressed; however such redress cannot take place within the BIT movement, without risking international arbitration.

[247] Ntsebeza (n 227 above),107-131.

In his 2015[248] State of the Nation Address the President announced that foreigners would no longer be entitled to own land in SA. This was later clarified to be applicable only to agricultural land. In an address to the National Assembly on 8 May 2015, the Minister of Rural Development and Land Reform said the "Regulation of Land Holdings Bill" would not only prevent foreigners from buying land, but would also include ceilings with regard to the amount of land that may be held by both natural and juristic persons. These ceilings are necessary "due to the historical need to address the legacy of colonialism and apartheid." For small-scale farms the proposed ceiling is 1000ha, for a medium-scale farm 2500ha, and for large-scale farms 5000ha.[249]These reforms are critical since land and property are the fountains of Capital which in turn is a source of Foreign Direct Investment, as intelligently alluded to by one Third World Scholar; *Fernando de Soto* in his book "the mystery of Capital"[250]In his book, de Soto argues that:

> *"Capital is central when dealing with property rights, how does one raise capital as a developing country? For an example a company from the developing country such as US, goes into developing country such as South Africa, and find mineral deposits, then they get concession from the South African government, hereafter then goes back to their country to ask their government to give them a property rights on such concession. They don't trust the government from whom they got concession; they go back to their home governments to ensure protection of their rights in a foreign country (mostly developing country) in the form of a Bilateral Investment treaty, where the rules of the game are now set, not to mention that such rules are lopsided. Because the property in question is government supported by the BIT, the Multinational Enterprise (MNE) ties the hands of the developing country in terms of the property rights involved, tax, and labour. Legislation can no longer change the basis of that treaty, they then take this over to their development promotion agencies such as the Overseas private investment corporation (OPIC) and the government of the US to confirm their property rights and assure investor protection in case host country government ever do something against their investment. Then with such property rights which they couldn't have gotten in the US or Canada basic labour and taxes tied up, they go to the capital market and produce the title then that's when the money comes in, there is no such thing as capital*

[248] State of the Nation Adress,2015.

[249] W Hartley "*Nkwinti promises to bring land ownership legislation to Parliament this year"* Business Day (8-04-2015) <http://www.bdlive.co.za/business/agriculture/2015/05/08/nkwinti-promises-to-bring-land-ownership-legislation-to-parliament-this-year%3E.

[250] W Christopher, and H de Soto. 'Review of de Soto's" The Mystery of Capital"' (2001): 1215-1223.

or money without property rights, then the MNE gets into the developing country and start to operate with the backing of a developed country's home government.[251]*"*

He further argues that;

"There is 2.7 billion hectors left in the world most of which is in Africa. Unless, indigenous African people are given property rights to land, in the near future it will be taken over not only by Chinese but by large corporations. Then we will start to understand why it is important to have property rights, they may not have capital for now, however if they have ownership, whoever wants to come in to invest although the land on its own will not yield to any produce, however, whoever want to come and invest in exchange of developing the land by improving the roads, irrigation systems etc, they will have to share ownership with the indigents maybe 50% each which is 50% of more than they have today and that's how capital begins . The issue of property rights affects everyone such as Aboriginals people of America, whose property rights are still frozen in the 1870 Indian Act and therefore they are still unable to trade with their property.[252]*"*

Brining de Soto's theory about Capital to the South African context. The Natives Land Act of 1913 dispossessed African people of all but 13 percent of land in South Africa, and numerous other Apartheid laws further weakened black peoples' rights to property. Such as the Group Areas Act,[253] by further partitioning the only 13% which was made available to the natives by the Colonial regime, the apartheid forced the natives out of the arable and economical land into the homelands creating massive economical inequalities. Hence the new investment framework regime is aimed and redressing this inequalities.

4.5.4 South African Investment treaty reform

[251] H De Soto "The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere *Else"New York, NY: Basic Books*, 2000. de Soto argues that capitalism's success in the West depends largely on a formal system of documented property—the key to unlocking capital.
-In other words, capital doesn't exist in things, it is the potential of things that we can see once they are described in a certain organized way.
What creates capital in the West, in other words, is an implicit process buried in the intricacies of its formal property systems. The formal property system is capital's hydroelectric plant. This is where capital is born (note 242 above) 46-47.
http://www.thepowerofthepoor.com/concepts/c4.php accessed 06 May 2016.
see also Fernando de Soto and Tambisa Moyo's "Dead Aid" Munk debate Canada 2009.

[252] de soto (n 201 above).

[253] Group Areas Act no 41 of 1950, This Act enforced the segregation of the different races to specific areas within the urban locale. It also restricted ownership and the occupation of land to a specific statutory group.

In implementing BIT review outcomes, the government terminated its BITs with a number of European states,[254] including Germany, the United Kingdom, the Netherlands and France, and introduced the Draft Promotion and Protection of Investment Bill[255] ("Investment Bill") to provide a framework for the protection of all investments in SA, both foreign and domestic, in line with the Constitution. An initial draft of the Investment Bill was published in 2013[256] with an opportunity for public comment; a significantly revised version was published in July 2015,[257] and in November 2015 a further revised version[258] was passed by both Houses of Parliament. On 13 December 2015 the President assented to the Investment Bill and on 15 December it was published in the Government Gazette as the Protection of Investment Act, no. 22 of 2015 ("the Act"). The Investment Act will come into operation on a date determined by the President by proclamation in the Government Gazette. Although the Presidency released media statements following the President's assent to three other acts on 13 December 2015, no statement was released announcing his assent to the Protection of Investment Act.

4.6 Concerns regarding the regime change

There is however, a real concern that the message sent by the passing of the Investment Act, in combination with the government's termination of various BITs, and a series of other recent legislative and policy measures, may be more likely to deter than promote investment in South Africa, and thereby have a negative impact on job creation, economic growth, sustainable development, and the well-being of the people of South Africa.[259]

South Africa's first generation BITs, signed shortly after the 1994 elections, reflect the general principles of international law, including that expropriation may be implemented only for a public purpose, under due process of law, and on a non-discriminatory basis (notably, while these obligations may be explicitly stated in BITs,

[254] South Africa has also terminated BIT with Austria, Belgium-Luxembourg Economic Union, Denmark, Switerzland and Spain.
[255] Initially introduced as the Promotion and Protection of Investment Bill, it was renamed the Protection of investment Bill, until it was signed into law as the Protection of Investment Act.
[256] Promotion and Protection of Investment Bill B-2013.
[257] Bill 18-2015.
[258] Bill B18B-15.
[259] Bosman (n 226 above).

these are also obligations that exist under customary international law). Under these treaties investors are generally guaranteed compensation that is "prompt, adequate, and effective" in the case of expropriation.[260]

In the *Agri SA* case a principle of international law (indirect expropriation) was essentially ruled not to be part of South African law by the Constitutional Court.[261]Section 232 of the Constitution states that: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.

However, disregard for international law principles can be challenged in international courts for denial of justice, and it has, for example, been held by the Permanent Court of International Justice in the Treatment of Polish Nationals Case,[262]that:

> "according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted…Conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations.[263]"

4.7 Conclusion

Some commentators even call investment law a field in which neoliberals (or the revival of market fundamentalism) flourishes through the assumption that foreign investment is so important to economic development that the flow of FDI should be facilitated by almost absolute protection, despite history showing that foreign investment has been used as a way to exploit host economies.[264]

The mere fact that a BIT is in place between two States would not necessarily lead to greater FDI inflows. What is of importance is the terms of the BIT, for example, the strength of the property rights enshrined therein. South Africa's own experience suggests that the signing of BITs does not necessarily lead to greater FDI inflows.[265]

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[260] N 226 above.

[261] South Africa Institute of International Affairs Submission on South Afria's Promotion and Protection of Investment Bill (1-11-2013) http://www.thetradebeat.com/book/saaia-submission-on-south -africa-s-drfat-promotion-and -protection-of-investment-bill.

[262] Treatment of Polish Nationals and other persons of Polish or Speech in the Danzing Territory Advisory Opinion (4-02-1932).

[263] MS McDougal Impact of International Law upon National Law: A Policy-Oriented Perspective, The. *SDL Rev* (1959) 425.

[264] Sornarajah, (n 43 above).

[265]Carim (no 227 above) 35.

This chapter also shows that there are legitimate concerns about investment law and arbitration that has arisen in recent times. Since the second half of 2012, South Africa has actively taken steps to implement a new investment policy in line with the Cabinet decision of June 2010. This concern could have been addressed had the DTI prepared and published the Bill and prepared a Model BIT before delivering the first BIT Termination Notice.

In trying to find whether South Africa's concerns regarding the international investment regime are well founded and whether the manner in which the country decided to react to these concerns were the most prudent steps that could have been taken, the study found that South Africa's response is substantively reasonable, as there is visible cracks in the system particularly with the ISDS, that, it fails to heed to the calls of development agenda for developing countries and that BITs in their current form are outdated does not see developing countries as equal economic partners but as high risk high return jurisdiction wherein ISDS is used a shield for developed countries . Although the policy choice is substantively reasonable in light of the country's economic history, it is the author's view that it lacks proportionality when it comes to implementation. Renegotiations would be the most proportional response in that the implications of the survivor clause will fall off and the renegotiated BITs will be effective immediately to address the transformation and development agendas sought by South Africa.

CHAPTER 5

FINAL CONCUSIONS

5.1 Summary of findings

The country's policy is made within its economic and political context.[266] The investment policy is thus no exception. There is therefore no one size fits all policy or singular 'correct' BIT policy that all countries, should pursue. South Africa itself acknowledges that its approach is but 'one route to address concerns with the aging system of BITs.'[267]

South challenge to South Africa's policy shift is not so much about the substance rather execution and implementation options of such policy by the government. It is trite that South Africa's economy is due for transformation as envisaged by the country's transformative constitution and such transformation will enhance the country's opportunity to meet its development agenda as outlined in the UN Declaration on the right to Development.[268]However although substantively rational, the implementation thereof is disproportional as the same objectives could have been achieved through a less onerous model BIT, incorporating the country's transformative agenda.

5.1.1 The state of international investment law and policy regime

In relation to the first research sub question (a) whether there is any legitimacy to criticisms levelled against the system?

International investment is arguably the most trusted vehicle for foreign direct investment flow across the globe.[269] It is a catalyst for global economic integration. It is a source of production networks often referred to as 'spaghetti bowl' in the trade realm,

[266] A J Frieden 1991. Invested interests: the politics of national economic policies in a world of global finance. (1991) 45 4 *International Organization* 425-451.
[267] Carim, (n 227 above) online http://www.vcc.columbia.edu . (Accessed 16 March 2016).
[268] (n 164 above) Article 1(1) of the Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128.
[269] JH Dunning & SM Lundan 2008. *Multinational enterprises and the global economy*.(2008).

and contribute immensely to trade to global trade, trough trade facilitation and global value chains.

The role of multinational enterprises (MNEs) across the globe contributes to a considerable share of international trade, thus fostering global economic integration,[270] tightly interlinking trade and investment. International Investments Agreements (IIAs), particularly bilateral investment treaties (BITs) have been a potent vector responsible for foreign direct investment (FDI) flows across the globe, prior to proliferation of free trade agreements (FTAs) most of which include investment chapters.

Although, the benefits of FDI are welcomed by the global investment community, the system is characterised by divergence of interests drawn along development status of the countries. Dissatisfied with the *status quo*, the developing side of the world who are most recipient of FDI, claims the system to be lopsided and outdated based on OECD model of economic reconstruction post world war II,[271] and therefore not speaking to development objectives of most investment destinations majority of which are developing and least developing countries. Hence a quest for policy space which is considered to be the only catalyst to give effect to national policies and legislations aimed at public interest to contribute towards development. In direct contrast, developed countries are increasingly voicing their concerns against too much policy space and views the latter as a platform afforded to developing countries to legitimise measures aimed at proscribing freedom of foreign investment,[272] thus leading to developing countries being let off the hook quite easy in relation to honouring their international commitments made under international agreements thereby providing incentive for unpopular policies aimed at nationalisation and expropriation of foreign owned assets in the host economies. This new reality makes it more imperative to re-examine the governance of international investment calls for urgent rebalancing of divergent interest as alluded to above.

[270] R Gilpin *Global political economy: Understanding the international economic order* (2011).
[271] B Martimort-Asso WTO's contribution to sustainable development governance: balancing opportunities and threats.
[272] I Taylor *Stuck in middle GEAR: South Africa's post-apartheid foreign relations* (2001).

The World Economic Forum, in partnership with International Centre for Trade and Sustainable development (ICTSD), joined forces as part of the E15 Initiative,[273] and convened a Task Force on Investment Policy to examine the state of the international investment law and policy regime and how its governance might be enhanced to encourage the flow of sustainable FDI for sustainable development in order to identify key policy options to help meet the challenge of enhancing the investment regime.

5.1.2 Africa's response to investment regime challenges

Is South Africa's policy shift a necessary response to the current international investment law system or was it exaggerated?

Throughout the thesis, we have already established that the international investment regime is riddled with challenges threatening to bring it down to its knees with some countries either on the developing or developed spectrum of global economies exploring alternative options such as partially withdrawing from the regime by denouncing the ICSID or considering intensifying the prospects of multilateral or plurilateral investment agreements over the traditional Bilateral investment agreements. Seeing that developing countries and developed countries have always had divergent views regarding the rationale of foreign direct investment (FDI), with the capital exporting countries looking for as much return to grow their home economies whereas the capital importing concerns are centred around development through transfer of skills and technology and to exercise sovereignty when dealing with issues of investment within their territory. This has been highlighted in chapters 2 where the Calvo's doctrine and Hull' formula were in perceptible contrast. Chapter 3 discussed the history of South Africa's economic architecture which was divided along racial lines as early as the 17th and 18th centuries as highlighted in chapter 3.

Post 1994, the country's transformative constitution aimed at rebalancing the inequalities that are already deeply entrenched in the country's economic architecture even today. However such corrective measures cannot be realised at international level due to their inconsistency with bilateral treaty obligations as highlighted in chapter 4.

[273] The E15 Initiative was established to convene world-class experts and institutions to generate strategic analysis and recommendations for government, business and civil society geared towards strengthening the global trade and investment system for sustainable development.

The country therefore viewed the international investment treaty regime as a stumbling block towards the country's transformation agenda as it is unable to exercise its *policy space* to give effect to economic transformation which will lead to development. Thus South Africa's response in the form of policy shift is substantively correct given the country's historical economic architecture characterised by inequality since the 17th centuries through Colonialism, Blacks were further economically marginalised through apartheid which denied them the opportunity to economically compete with their white counterparts. The author of apartheid Verwoerd was quoted as saying: '*Blacks should never be shown greener pastures, but remain removers of weed and drawers of water*.'

In light of the above, South Africa suffered a double blow as compared to other developing countries. In order to realise its development dream, it must first meet its economic transformation target without being subjected to international arbitration which will inevitably stifle economic transformation. Although a legitimate policy choice, author is of the view that the same objectives could still be achieved through renegotiating new BITs that are conditional on the country's transformation agenda.

5.2 Overall Conclusions

Author is of the view that South Africa's policy change is actually consistence with the ongoing trends in the current investment treaty regime. Over and above, BITs are slowly losing their battle against regional economic agreements which include investment chapters and that in the long run, the implications of globalisation indicate a paradigm shift in investment regime, that the future of BITs is on thin ice since the countries now prefer trading as regions to take advantage of regional trade preferences and that as developing countries gain more knowledge on the subject matter, most realise that signing BITs does not necessarily increase FDI and they are now changing internal regulations such as pre-establishment and redirecting the FDI to address their developmental concerns and to avoid being used as host states of convenience.

Finally, writer is of the view that although renegotiating a model BIT would have been the best method to address South Africa's discontentment with the investment regime in general and thus rendering cancellation of BITs a disproportionate implementation strategy of an otherwise substantive policy, however the policy shift itself is substantially reasonable. Therefore the spirit and purport of the Act should be

reflected in a model BIT. The new investment regime is not entirely flawed as affirmed by Joseph E Stiglitz, Nobel laureate in economics, when he described South Africa's actions as '*not anti-investment',* but *'pro-development*', the view which writer also assume.

Consequently, after engaging the country's historical economic and political architecture, the author found that although South Africa's investment policy shift was labelled '*drastic and regressive*' by critics, the study found the latter to be rational when subjected to substantive approach to the rule of law, given the country's economic architecture which is contrasting formalistic approach which is not concerned with the content of the policy concerned. Author however, concludes that it is the implementation thereof that is disproportional since the same objectives underpinning the policy shift could have been achieved through less contentious means, through renegotiation based on a new model BIT cantered around economic transformation of South Africa as a host country.

Author thus recommends a substantive application of the rule of law in formulating future investment treaties by paying due regard to the country's economic transformational agenda as opposed to the formalistic approach being advocated by critics of the recent policy shift.

5.3 Recommendations

5.3.1 Investment regime reform

Reforming the investment regime is an epic task, one which will require coordinated efforts and convergence of interests from both capital exporting and importing countries. Special efforts aimed at promoting sustainable FDI for sustainable development needs to be prioritised, particularly FDI directed to developing countries, within an encouraging and generally accepted international investment framework. The policy recommendations designed to enhance investment regime should now focus on the need to expand the regime's purpose beyond the protection of international investment in its current form to encompass also the promotion of sustainable development through allowing developing countries sufficient policy space to pursue legitimate public policy objectives and further to institutionalise the regime's dispute-

settlement mechanism, complemented by an Advisory Centre on International Investment Law. Negotiation of a multilateral investment agreement could provide an overall platform for international investment.

International investment regime is not only providing global economic value, but also serves as an overarching governing framework structure in this area of international law. It consists of over 3 000 international investment agreements (IIAs), the majority of which are bilateral investment treaties (BITs). It also increasingly provides the legal yardstick for national rule-making on investment related policies. The international and national investment frameworks should be aligned to regulate what international investors cannot regulate at national level and what national governments cannot regulate at international level. Thus the two should be complementary and interdependent for a common goal of enhancing the investment regime.

South Africa's policy shift although a substantively legitimate response to the challenges facing the investment regime, the former however adds to the growing tensions in the regime and therefore does not add to efforts aimed at harmonising the regime. Renegotiation could have employed by the country as the best possible option for incorporating the country's economic transformative agenda, since the latter has no implementation hurdles present in the current policy option of terminating drastically terminating BITs. The new policy could still be implemented by framing new renegotiated BITs to address the country's economic transformation in order to meet its development goals .Having a legitimate international investment framework in place is not an objective in itself, if implementation thereof will attract critics and therefore raising legitimacy concerns around an otherwise good policy, and possibly affecting investor confidence in the face of prospects that the world economy may face a decade or more of slow growth.

It is unfortunate that world FDI inflows declined substantially from their peak of US$2 trillion in 2007 as a result of the financial crisis. Flows need not only to recover, but surpass this earlier record. Contrary to prior global financial crisis, the issue is not only more about FDI flows, but more FDI that helps to put the world on a sustainable development path.

Achieving this objective requires not only that; the economic, regulatory, and investment-promotion determinants in individual countries be in place, But also the international framework dealing with international investors needs to be enabling as well: by providing clear rules of the road and a suitable mechanism for resolving disputes between these two actors, should disputes arise. An improved investment regime, with enhanced legitimacy, provides the enabling framework for increased flows of sustainable FDI for sustainable development.

5.3.2 Policy recommendations

Author recommends various policy options having systemic implications, towards suggesting ways of enhancing the international investment regime in general, and South Africa's investment regime in particular.

Revisiting the purpose of IIAs

A paradigm shift, beginning with the very purpose of international investment, need to be embarked upon on any efforts aimed at enhancing the regime. Given the origin of IIAs, it is not surprising that its principal purpose has been, and remains, to protect foreign investors, and to facilitate the operations of investors,[274] thus no transformation and or development agenda at heart. Thus lopsided in favour of developed countries. The regime's purpose needs to be reframed to include development objectives of most developing countries including, South Africa's transformation agenda given the economic history of the country.

Recognise the need for adequate policy space

[274] Word economic forum The Evolving International Investment Law and Policy Regime: Ways Forward Policy Options Paper http://www3.weforum.org/docs/E15/WEF_Investment_Law_Policy_regime_report_2015_1401.pdf (Accessed 13 June 2016).

Giving effect to expanding the purpose of the regime, entail that; governments preserve a certain amount of policy space that gives them the right to regulate in the interest of legitimate public policy objectives, a right that needs to be acknowledged in a dedicated article in IIAs.[275] The contents of IIAs need to reflect this broadened purpose.

Care needs to be taken that "*Policy space*" is not hijacked and politicised to be interpreted as a carte blanche for governments to disregard international commitments such as non-discrimination and therefore losing legitimacy, as occurred before with an otherwise brilliant Calvo's doctrine, which due to wrong interpretation was lost in translation and used to legitimise expropriation without compensation

Establishing ISDS appeals mechanisms

Given the centrality of the investor-state dispute settlement (ISDS) mechanism to the investment regime the latter has to be beyond reproach. The mechanism is at the centre of the very legitimacy concerns of the international investment regime. The mechanism can do with a lot of improvement, given its implications to the regime at large.

It is trite that the major challenge informing the exodus of most country's from ICSD based international arbitration, is the absence of appeals mechanism. Establishing appeals mechanisms for the current *ad hoc* tribunals, or as proposed by the European Commission recently, establishment of a world investment court, should form a central component of the reform process. The reform should emulate the move from the *ad hoc* dispute-settlement process under the GATT, to the much-strengthened Dispute Settlement Understanding of the WTO. This could, over time, enhance consistency, help make the dispute-settlement process more accountable, and develop a body of legally authoritative general principles and interpretations that would increase the coherence, predictability, and, ultimately, the legitimacy of the investment regime.

States have a fundamental right to regulate on behalf of the public welfare and this right must not be subordinated to the interests of investors where the right to regulate is exercised in good faith and for a legitimate purpose.[276]

[275] (n 261 above).

[276] See (n 13 above).
http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010 .

Author shares the view advanced to by a group of academics in the Osgoode statement,[277] where they pointed out that:

> "FDI can have adverse impact on society and it is the responsibility of any government to limit these adverse effects. They further note that investor protection is only a means to advance public welfare and not an end in itself, thus concluded that 'States have a fundamental right to regulate on behalf of the public welfare and this right must not be subordinated to the interests of investors where the right to regulate is exercised in good faith and for a legitimate purpose.'[278]"

In the South African context, the dream of economic inclusion, is swallowed by the reality of exclusion, hence the need for transformative reforms such as the one under review.

[277] N 263 above.
[278] N 263 above.

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