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Foreign investors' Rights and Obligations under the Protection of Investment Act 22 of 2015

Submitted to the Faculty of Law, Centre for Human Rights, University of Pretoria, in partial fulfilment of the requirements of the Master of Laws (LLM) degree in International Trade and Investment Law in Africa

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03 NOVEMBER 2021

DECLARATION

I, Kedibone Ntlapana Seloane, declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in International Trade and Investment Law in Africa (TILA)

Signed…………………………………………

Date……………………………………………

Supervisor: Dr Rimdolmsom Jonathan Kabre

Signature…..................................

Date……………………………………………

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DEDICATION

This work is dedicated to my mother and my late father for believing in from childhood; they believed that I am meant for greatness and for that, I am forever grateful.

LIST OF ACRONYMS

AU	AFRICAN UNION
BIT	BILATERAL INVESTMENT TREATY
CSR	CORPORATE SOCIAL RESPONSIBILITY
FDI	FOREIGN DIRECTT INVESTMENT
FET	FAIR AND EQUITABLE TREATMENT
ICSID	INTERNATIONAL CENTRE FOR SETTLEMEN OF INVESTMENT DISPUTES
LRA	LABOUR RELATIONS ACT 66 OF 1995
MPRDA	MINRAL AND PETROLIUM RESOURCES DEVELOPMENT ACT 28 OF 2008
PAIC	PAN AFRICAN INVESTMENT CODE 2016 DRAFT
PIC	PROTECTION OF INVESTMENT ACT 22 OF 2015
SADC	SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
UNCTAD	UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

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ABSTRACT

The South African Investment Climate has been developing since the dawn of democracy. The government of South Africa has entered into different BITs immediately after the end of the apartheid government. This was done as a way of attracting FDIs into the country to develop the economy and to also form relationships within the international community.

Since the first BIT which was entered into in the early 1990s the South African law governing FDIs has changed tremendously and this was seen by the termination of those BITs and the introduction of new legislation governing the FDIs. The termination of the BITs was done as a way of responding to the imbalance and unfairness that was found in such BITs towards the government of South Africa. The BITs were said to provide more rights and no obligations to foreign investors and as such, they were imbalanced.

This research work will therefore provide an analysis of the rights and obligations of foreign investors under the new legislation in South Africa, making reference and comparison to the previous BITs as well as looking at the regional and continental level to make comparison with the South African law so as to see if there can be a balance of rights and obligations in international investment law.

CHAPTER 1-INTRODUCTION

1.1 Background

This research will be dealing with Foreign Direct Investments[1]. It will analyse the balance of rights and obligations of foreign investors when doing business in South Africa. It will find out if there is a balance between the rights afforded to foreign investors and the obligations by which they should abide.

Foreign Direct Investment is an investment from a party in one country into a business or corporation in another country (i.e. the host state) with the intention to establish a lasting interest.[2] The investment may be made by way of obtaining a lasting interest or expanding one's business within the jurisdiction of the host state.

The Protection of Investment Act 22 of 2015 (hereinafter referred to as PIA) which is the main focus of this research, defines the term "investment" as a lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic of South Africa, committing resources of economic value over a reasonable period of time, in anticipation of profit.[3] As seen in its preamble, one of the objectives of the PIA is to secure a balance of rights and obligations of investors.

1.2 Problem statement

South Africa like many other African countries has had Bilateral Investment Treaties (hereinafter referred to as BITs) with the hope of attracting foreign investments.[4] However, most of those BITs were later found to be unfavourable to South Africa as it was evidently seen in the case of *Pierro Foresti v the Government of South Africa*[5] where foreign investors laid claims against the South African Government.

Post the *Pierro Foresti* case, the government of South Africa had to review its BITs and it was found that the BIT system gives leeway for a narrow commercial interest to subject matters of vital national interest to unpredictable international arbitration that may constitute direct challenges to legitimate constitutional and democratic policy-making. It was further found that the BITs do not compliment the provisions of the constitution and therefore some

[1] Hereinafter referred to as FDIs.
[2] https://corporatefinanceinstitute.com/resources/knowledge/economics/foreign-direct-investment-fdi/ .(accessed 10 June 202)
[3] Section 2(1) of the PIA
[4] https://www.tralac.org/news/article/9927-the-quest-for-a-pan-african-investment-code-to-promote-sustainable-development.html. (accessed 01 June 202)
[5] Piero Foresti, Laura de Carli and Others v Republic of South Africa ICSID Case No.ARB(AF)/07/1.

legitimate government regulations could be deemed to be unlawful under the BITs (as was the case in the *Pierro Foresti* case) while they are necessary for sustainable development of the country. It was therefore because of these findings that the government of South Africa had to enact a legislation that would govern investments in a manner better than the BITs.

South Africa has received criticisms for this approach of governing FDIs because it is believed that investments promote growth and development. However, the policy implications of this belief are that a government should attract FDIs by providing strong protection to foreign investors, liberalise investment regimes, reduce or limit regulations and conditions on investors and, in so doing, realise the benefits of FDIs.[6] This therefore results in an imbalance of rights and obligations of foreign investors with the South African Investment law fraternity. This imbalance of foreign investors' rights and obligations has been argued to have been influenced by South Africa's need to form international relations with other countries and the need to grow its economy through foreign direct investments (hereinafter referred to as FDIs) and such was done through the BITs.[7]

The imbalance of rights and obligations in the BITs has led to investors being afforded more rights than responsibilities to honour and abide by the laws of the Republic of South Africa, therefore when South Africa amended its laws as a way of advancing the historically disadvantaged people as it was the case in the *Pierro Foresti* case, the foreign investors did not see the obligation to honour the government's right to regulate.

Due to the investors concerns and dissatisfaction regarding the PIA, and the general comments regarding whether the PIA actually cause any significant difference to the investment climate of SA in terms of balancing the government's duties to protect foreign investments as well as its duty to develop policies necessary for the development of the country, this study will therefore analyse the balance of rights and obligations provided for in the PIA. It will specifically focus on finding out if the provisions of PIA are able to help achieve its objective of securing a balance and obligations of investors.

[6] Carim X. "International Investment Agreements and Africa's Transformation: A Perspective from South Africa" Investment Policy Brief 2015 available at https://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IIAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf. (accessed 01 July 2021)
[7]https://www.dlapiper.com/en/southafrica/insights/publications/2018/11/africa-connected-doing-business-in-africa/investment-projection-legislation-in-south-africa. (accessed 30 June 2021)

1.3 Research questions

In trying to address the above-discussed problem statement, the following key research questions will be answered in the course of this thesis:

1. What was the level of protection provided to foreign investors before the coming into operation of the PIA?

2. How does PIA achieve the balanced rights and obligations of foreign investors?

3. What lessons can the PIA learn from the PAIC regarding striking the balance between rights and obligations of foreign investors?

1.4 Research methodology

This research will be conducted on a qualitative analysis approach in that it will analyze different texts and documents that will be used in this study. This study will make use of desk-and-library based resources that will enable access to primary and secondary sources. This research will comprehensively use the internet sources and papers (including commentary papers) from different institutions and/or scholars.

In particular, the primary resources that will be used in this study include the Protection of Investment Act, case laws decided in South African courts, the South African constitution, BITs signed by South Africa, etc. The secondary sources that will be used in this study will include academic books, journals articles, newspaper articles, etc.

1.5 Objective of the research

This research is important as it will analyze the development of the South African Investment laws on whether the promulgation of the PIA can be said to be a progressive move from the previous BITs which South Africa had entered into, specifically regarding the balancing or foreign investors' rights and obligations.

The objective of this research will be to analyse whether the PIA through its provisions, secures the balance of investors' rights and obligations. Furthermore, this study will also find out whether PIA can borrow from the provisions of other laws governing foreign direct investments, such as the Pan African Investment Code (hereinafter referred to as PAIC) as far as the balancing of foreign investors' rights and obligations.[8] The PAIC, although it is not yet passed into a binding law and it is still a draft, it serves as a guiding principle on how its member states like South Africa, should conduct their investment relations with their

[8] PAIC 2016 Draft.

investors.[9] Therefore, it would be valuable for the PIA to look into PAIC for guidance on how to strike a balance between the rights and obligations of foreign investors so as to achieve its objective of securing such a balance and ultimately increasing investments in the Republic of South Africa.

1.6 Delineation of study

This research will only be limited to the PIA as far as the rights and obligations of foreign investors are concerned. This research will not compare the South African legal framework to any other country's legal framework in this subject.

1.7 The hypothesis (thesis)

- Whereas the Act seeks to secure a balance between the rights and obligations of investors so as to promote investments in South Africa, the absence of specific provisions regarding foreign investors' obligations may have an impact on securing such desired balance.
- Should the Act not be developed to in such a way that it specifically makes a balanced provision of foreign investors' rights and obligations, there might be a rise of disputes against South Africa by foreign investors as seen during the times of BITs.

1.8 Literature review

In 2015, the South Africa's minister of Trade and Industry stated that according to the OECD's Restrictiveness Index, South Africa ranked amongst the most open jurisdictions for FDI in the world and such openness was reflected in the growing inflow of FDIs into the country over since the beginning of democracy in 1994 in that the South Africa's stock of FDIs accounted for about 42% of the country's GDP.[10]

The South Africa's openness to FDIs was further seen by the release of the PIA for public comments by all interested and affected parties during its enactment so as to assess which provisions need improvement. Foreign investors raised issues that were of concern to them about the PIA, which included but not limited to issues such as the right to protection of property (expropriation), fair and equitable treatment provisions, national treatment and the dispute resolution mechanism which, amongst others, excluded investor-state arbitration.[11]

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[9] Article 2 of the Pan African Investment Code.

[10] Davies R, "South Africa, the most open country for Foreign Direct Investment in the World" SANews (01-19-2015) available at http://www.sanews.gov.za/south-africa/south-africa-most-open-country-foreign-direct-investment-world. (accessed 01 June 2021)

[11] https://oxfordbusinessgroup.com/overview/legislation-update-look-key-laws-and-recent-regulatory-amendments-affecting-investors. (accessed 15 June 2021)

As mentioned above, the PIA was enacted after South Africa terminated its BITs with the European countries following the *Pierro Foresti* case. Due to this fact, some scholars have argued that the PIA serves as a strong response to the inadequacy of investment treaties which had unbalanced characters such as undue restrictions on policy space and the shortcomings of the mechanisms for settlement of disputes.[12]

South Africa opted for the national legislation to govern investment agreements and this was based on the assumption that domestic legislation is more appropriate than international legal instruments to regulate foreign investments. This is because it is believed that the need to balance the rights and obligations in investment agreements will be realized when the state is afforded the policy space it needs to regulate and maintain the sustainable development.

A balance needs to be found between the government's sovereign right to implement domestic policies in order to achieve its socio-economic goals, its duty to protect foreign investments, and its overall objective of promoting sustainable economic growth.[13] This balance of rights and obligations is important because foreign investments are a crucial source of finance for development and can provide significant contributions to sustainable development across all sectors in a country, therefore, such development need not to be compromised due to lack of balance between rights and responsibilities.[14]

The PIA was enacted to provide a framework for the protection of investments in South Africa in line with the provisions of the constitution as the supreme law of the country. It provides effective protection while preserving the sovereign right of the government to pursue legitimate public policy objectives in line with the constitutional requirements. However, it has seen argued that its effectiveness remains to be seen as far as protection of investments is concerned.[15]

Whereas the PIA undeniably provides a framework for investments in South Africa, its depth cannot be equated to that of an international treaty due to the fact that domestic legislation such as PIA can be easily amended while an international treaty can only be amended on

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[12] Gazzini T. "Travelling the National Route:South Africa's Protection of Investment Act 2015" *Journal of International and Comparative Law*, 2018, Vol.26, P.1.

[13] Bosman K. "South Africa: Trading International Investment for Policy Space" *Stellenbosch Economic Working Papers 04/06* available at https://www.ekon.sun.ac.za/wpapers/2016/wp042016/wp-04-2016.pdf . (accessed 5 June 2021)

[14] Bosman K. "South Africa: Trading International Investment for Policy Space" *Stellenbosch Economic Working Papers 04/06* available at https://www.ekon.sun.ac.za/wpapers/2016/wp042016/wp-04-2016.pdf. (accessed 5 June 2021)

[15] Gazzini T. "Travelling the National Route:South Africa's Protection of Investment Act 2015" *Journal of International and Comparative Law*, 2018, Vol.26, P.1.

agreement by the parties involved. Furthermore, domestic legislation also gives room for introduction of other regulations/laws that should guide its implementation and such practice may give uncertainty to the investors.

1.9 Structure of the dissertation

Chapter 1 will cover the general introduction of the thesis.

Chapter 2 will deal with the history of the South African Investment law, discussing some of the BITs that South Africa had concluded prior to the coming into operation of the PIA.

Chapter 3 will discuss the PIA and its provisions regarding the rights and obligations of foreign investors.

Chapter 4 will discuss and analyze the PIA and the lessons it can draw from the PAIC as far as striking the balance between the rights and obligations of foreign investors.

Chapter 5 will discuss the concluding remarks on the topic as well as a summary of recommendations to the South African Policymakers and/or legislatures on how the PIA can be developed to satisfy its desired outcomes of protecting investors, promoting investments and attracting foreign investments.

CHAPTER 2-THE HISTORY OF THE SOUTH AFRICAN INVESTMENT LAW

2.1 Introduction

This chapter will discuss the history of the South African investment law so as to have an understanding of the current South African investment law. It must be borne in mind that the previous South African investment law was operating within the apartheid system and therefore such system needs to be unpacked in order to understand how the investment space of South was shaped over the years.

South Africa has been said to be "the most powerful economy" in the African continent[16] and therefore, as one of the leading countries in Foreign Direct Investments (FDI) within the continent,[17] it is important to understand how such was achieved.

This chapter will therefore also provide a detailed discussion of the investment agreements in South Africa prior the current governing law/legislation, therefore discussing some of the agreements which were entered into prior and/or post the apartheid regime in South Africa.

2.2 The apartheid system

The history of the South African investment law needs to be understood within the context of the apartheid regime as that was the governing regime since 1948 until the country attained democracy in 1994. The apartheid system was established by ruling party at the time, known as the National Party and the establishment of the this system particularly included the implementation of expanding legislative framework stipulating racial segregation and during these times the South African political and economical agenda comprised of an inward perspective manifested in the substitution of imports with locally manufactured products and capital control.[18] However, during the 1950s, the resistance by the black community against the racial discrimination massively increased resulting in greater scrutiny by the international community.

2.3 The South African investment law since the end of apartheid

The coming into an end of the apartheid government in South Africa meant that many laws, including the investment laws had to be changed in order to introduce the new government and align with the democratic South Africa.

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[16] Victor Mallet, Trade and Investment: An African Renaissance, FIN. TIMES SURVEY, March 24, 1998, IV.

[17] https://www.dlapiper.com/en/southafrica/insights/publications/2018/11/africa-connected-doing-business-in-africa/investment-projection-legislation-in-south-africa. (accessed 30 June 2021)

[18] Trade Law Centre (TRALAC) Investment Project: South African Case Study International Institute for Sustainable Development Report (2004) P.3.

South Africa's bilateral investment treaties

In the early 1960s the international business community began to exert a 'disinvestment movement' in order to protest against the Apartheid system and to effect social change in South Africa by imposing trade sanctions and investment boycotts. This was mainly because despite South Africa's reputation for a well-run economy under white rule, the policies of the National Party hampered growth severely. Apartheid brought about international isolation and economic sanctions, and the government's economic management was also poor.[19]

Subsequently, foreign state governments started to pass legislation restricting investments in South Africa - for instance most prominently the federal Comprehensive Anti-Apartheid Act of 1986 by the US, which banned US nationals from new investments and trade in South Africa. African institutions, namely the Organization of African Unity, also joined the disinvestment movement and greatly discouraged trade relations with South Africa. As a result, an estimated total of 350 (three hundred and fifty) trans-national companies decided to withdraw from business activities in South Africa, which resulted in an immense capital outflow of South Africa.[20] Moreover, South African businesses and industries were impeded to grow into internationally operating businesses as foreign firms were restraining from associating with South African companies due to the severe international pressure. Hence, South Africa was facing an economic stagnation and political instability due to increasingly violent resistance by the end of the 1980s. Eventually, the massive external pressure and the constantly increasing internal expenses resulting from the high maintaining costs of the implemented security system forced the government to rethink the concept of Apartheid.

Apartheid proved expensive and unsettling. For one thing, there was a high cost of maintaining the large security apparatus required to enforce apartheid. Also, investors grew nervous over brewing social unrest. As a result, the government in 1961 found itself faced with a sudden deterioration in its balance of payments. The government's response was to inhibit the flight of investment capital by imposing a "dual rand" currency and exchange rate system.[21] Within this system, there was the "financial rand" and the "commercial rand".

The "financial rand" was defined as "the local proceeds of South African assets owed by persons residing outside of the Republic of South Africa. In other words, the financial rand

[19] Hunter R. *Foreign Direct Investment In South Africa*, Denver Journal of International Law and Policy, Vol.27,1999, P.341.
[20] Trade Law Centre (TRALAC) Investment Project: South African Case Study International Institute for Sustainable Development Report (2004) P.3.
[21] Hunter R. *Foreign Direct Investment In South Africa*, Denver Journal of International Law and Policy, Vol.27,1999, P.342.

became the currency used by foreign investors in government approved ventures.[22] The "commercial rand," was made the domestic currency. The financial rand and the commercial rand were developed to block the easy repatriation of non-South African owned securities and prevent a run on foreign reserves.

2.4 History of foreign direct investment agreements in South Africa

During the apartheid era South Africa entered into very few Bilateral Investment Treaties (BITs). After 1994 the South African government entered into a flurry of BITs with developed countries, principally European countries that were keen to support the country's transition back into the community of nations, with a view to encouraging foreign investment in the new South Africa.[23]

BITs were introduced in 1959 between Germany and Pakistan and during this time, South Africa as mentioned above, was facing sanctions from the international community because of the apartheid system. South Africa signed its first BIT with the United Kingdom in August 1994.[24] Although not all of the BITs that were entered into are in effect, those that became operational played a huge role in bringing back South Africa into the international community from the sanctions that it faced during the apartheid system.

BITs are international agreements establishing the terms and conditions for private investment by nationals and companies of one state in another state.[25] They have also been described as agreements made between two countries containing reciprocal undertakings for the promotion and protection of private investments made by nationals of the signatories in each other's territories.[26] These agreements establish the terms and conditions under which nationals of one country invest in the other, including their rights and protections.

BITs make provisions for protection against illegal nationalisation and expropriation of foreign assets and other actions by a signatory of the BIT that may undermine the ownership or economic interest of a national of the other signatory. Since their establishment, BITs required the host state to treat foreign investments on the same level as investments from any other state, including in some instances treatment that was as favourable as the host nation treated its own investments.

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[22] Gary S. *The Policy and Law of Foreign Direct Investment in the New South Africa* Journal Of The World Trade, Vol.5 1994, P.16 .

[23] https://www.bowmanslaw.com/wp-content/uploads/2016/09/PPI-article_mailshot_08112013_1038389_1-1.pdf . (accessed 17 June 2021)

[24] Briefing by the Department of Trade and Industry on the impact of land expropriation without compensation on international law and treaties to which South Africa is a signatory, 2019, P.2.

[25] https://www.law.cornell.edu/wex/bilateral_investment_treaty. (accessed 08 July 2021)

[26] https://uk.practicallaw.thomsonreuters.com/2491?transitionType=Default&contextData=(sc.Default)&firstPage=true. (accessed 13 July 2021)

2.5 South Africa's bilateral investment treaties

According to the International Investment Navigator, South Africa has signed about 50 (fifty) BITs since its first BIT with the United Kingdom (UK) in 1994.[27] Out of the 50 BITs, 27 are signed but not yet in force, 11 are terminated and only 12 are in force. It is therefore important to discuss some of those BIT that South Africa has entered into.

2.5.1 South Africa-UK BIT

As mentioned above, this is the first BIT South Africa entered into post the apartheid era. It was entered into in 1994 and came into operation in 1998. In terms of this agreement, the word "investment" was defined as every kind of asset and in particular, movable and immovable property and any other property rights such as mortgages, liens or pledges; shares in and stock and debentures of a company and any other form of participation in a company; claims to money or to any performance under contract having a financial value; intellectual property rights, goodwill, technical processes and know-how; business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.[28]

It is important to note that according to the United Nations Conference On Trade And Development (UNCTAD), on their series on issues in International Investment Agreements, there are different types of definitions of the term "investment" in international law and the reason for that is mainly because there are different investment policies for each country, and depending on what a particular country wants out of the investment, then the definition will differ accordingly. Therefore, according to UNCTAD, many countries have used the asset-based approach to define this term.[29] The asset-based definition, as explained in this UNCTAD series, is based on the notion that investors' interests need to be protected at all costs as a way of promoting FDI.

Another type of definition of the term investment is known as the Enterprise-based definition which is based on including the establishment or acquisition of a business enterprise as well as shares in a business by a foreign investor, which such acquisition or establishment provides the investor wit control over the enterprise.[30] This type of definition was said to be useful in instances where the protection afforded to the foreign investor is afforded to them pre-entry, meaning at the commencement of making such an investment, as well as pot-

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[27] https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa. (accessed 10 July 2021)

[28] Article 1(a)(i-v) of the UK-South Africa BIT.

[29] UNCTAD/DIAE/IA/2010/2 P. 21 available at https://unctad.org/system/files/official-document/diaeia20102_en.pdf . (accessed 20 July 2021)

[30] UNCTAD/DIAE/IA/2010/2 P. 22 available at https://unctad.org/system/files/official-document/diaeia20102_en.pdf. (accessed 20 July 2021)

entry, meaning after the investment has been successfully made and the investor has settled in the host state.

Another type of definition as explained by the UNCTAD is the definition with reference to commercial presence. This type of definition limits the scope of the definition to only those that take the form of commercial presence such as the legal entities and branches established by the investors in the home state. However, this type of definition is said to usually be used in International Investment Agreements (IIAs) that have specific aim of liberalizing trade in services as it requires the investor to establish a commercial presence in the host state as a way of cross-border supply of a service or services.[31]

The last type of definition of investment is the broad-asset that is solely based on the idea that investment embraces everything of economic value. This type of definition usually incorporates the words “every kind of asset” in defining investment.[32]

From the above definition of investment in the South Africa-UK BIT, it is clear that the definition used in this treaty was the asset based definition as it incorporated the word “every kind of asset”. The impact of this type of definition is that because it incorporates everything of economic value, the list of assets that form part of that definition are never exhaustive, therefore, interpretation of each investment will be made in an arbitral decision if need be. However, the lack of preciseness in this definition can cause problems because the definition of investment is among the key elements of determining the scope of application of rights and obligations under International Investment law.[33]

The rise of investor-state claims has brought into focus the broad range of assets that qualify as investments under this definition. The investment treaty awards awarded to investors in arbitrations have proven that the broad definition of investment is problematic because host states have often found themselves amazed at the type of asset that is considered investment under the IIA. This means that this broad definition of investment extends it beyond what is considered foreign investment under many host states’ domestic laws and regulations in many cases. In fact, host states frequently challenge the jurisdiction of arbitral tribunals on the ground that the investor’s asset does not constitute an investment and as

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[31] UNCTAD/DIAE/IA/2010/2 P. 23 available at https://unctad.org/system/files/official-document/diaeia20102_en.pdf. (accessed 20 July 2021)
[32] UNCTAD/DIAE/IA/2010/2 P. 24 available at https://unctad.org/system/files/official-document/diaeia20102_en.pdf. (accessed 20 July 2021)
[33] INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS – ISBN 978-92-64-04202-5 – © OECD 2008 available athttps://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf. (accessed 18 July 2021)

such, states have reacted to this by drafting the definition of investment with greater detail and precision so as to avoid confusion and ambiguity. [34]

While the BIT is one of the 11 (eleven) that were terminated it is important to discuss it in detail since it is the first that was entered into BIT post the apartheid era. Some of the valuable provisions of this BIT include but are not limited to the following:

The national treatment and most-favoured nation treatment

Article 3 of this BIT provided that neither contracting party shall in its territory subject investments or returns of nationals or companies of the other contracting party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.[35] It went further to provide that neither contracting party shall in its territory subject nationals or companies of the other contracting party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.[36]

Compensation for Losses

Article 4 made a provision for compensation for losses and it provided that nationals or companies of one contracting party whose investments in the territory of the other contracting party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter contracting party shall be accorded by the latter contracting party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter contracting party accords to its own nationals or companies or to nationals or companies of any third state. Resulting payments shall be freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.[37]

Expropriation

In terms of the provisions of this BIT, Investments of nationals or companies of either contracting party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation in the territory of the other contracting party except for a public purpose related to the internal needs of that party on a non-discriminatory basis and against prompt, adequate and effective compensation. It went

[34] https://www.iisd.org/system/files/publications/best_practices_bulletin_1.pdf . (accessed 14 July 2021)
[35] Article 3(1) of the UK-South Africa BIT.
[36] Article 3(2) of the UK-South Africa BIT.
[37] Article 4(1) of the UK-South Africa BIT.

further to provide that such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.[38]

Repatriation of Investment and Returns

Article 6 of this BIT provided that each contracting party shall "in respect of investments" guarantee to nationals or companies of the other contracting party the unrestricted transfer of their investments and returns and such transfers be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the contracting party concerned and unless otherwise agreed by the investor transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force. [39]

Settlement of Disputes between an Investor and a Host State

Disputes between a national or company of one contracting party and the other contracting party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.[40] According to this BIT, the international arbitrations that could be used to refer such disputes were the Centre for the Settlement of Investment Disputes (CSID), the Court of Arbitration of the International Chamber of Commerce (CAICC); or an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.[41]

From the above brief discussions of the provisions of this BIT, it appears that there was no balance of rights and obligations to the investor. As already mentioned that the definition of investment in this BIT is asset-based in that it covers everything of economic value, it is clear

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[38] Article 5(1) of the UK-South Africa BIT.
[39] Article 6(1) of the UK-South Africa BIT.
[40] Article 8(1) of the UK-South Africa BIT.
[41] Article 8(2)(a-c) of the UK-South Africa BIT.

that in this BIT South Africa was protecting the interest of foreign investors as a way of probably attracting more FDIs as this was the first BIT after the apartheid system.

It is furthermore clear from the above discussion that investors were afforded more rights such as the rights to not have their properties in South Africa nationalised, the rights to be compensated for loss of their investments even if it was due to natural causes, the right to be treated on the same level as the nationals of South Arica, and they were given little to no responsibility at all. From this, it can be concluded that this imbalance of rights and obligations is one of the many reasons South Africa has promulgated legislation to proper govern and regulate FDIs better than what it was in this BITs.

2.6 The Southern African Development Community (SADC) protocol on Finance and Investment

South Africa being a member state of the SADC community, it is important to discuss in detail the nature of investment law at the regional level within which South Africa falls. The SADC Protocol on Finance and Investment is aimed at harmonising the financial and investment policies of its member states in an effort to build stronger regional integration and encourage economic development within the region by creating favourable investment climate that will promote and attract FDI into the region.[42]

It is important to discuss this protocol when discussing and analyzing the South Africa's investment climate as far as rights and obligations are concerned because the regional laws have an impact on the national laws of the member states and as such, a comparison needs to be made so as to assess whether South African law could have adopted some of the regional laws when entering into its BITs post apartheid.

In comparison to the definition of investment as provided by the above-discussed BIT, the protocol defines investment as the purchase, acquisition or establishment of productive and portfolio investment assets, and in particular, which includes but not limited to movable and immovable property and any other property rights such as mortgages, liens or pledges; shares, stocks and debentures of companies or interest in the property of such companies; claims to money or to any performance under contract having a financial value, and loans; copyrights, know-how (goodwill) and industrial property rights such as patents for inventions, trade-marks, industrial designs and trade names; rights conferred by law or under contract,

[42] Article 2 of the SADC Protocol, 2006.

including licences to search for, cultivate, extract or exploit natural resources.[43] From this definition, it seems that the protocol leaned towards the broader asset-based definition in that there is a non-exhaustive list of assets that are to be considered as investment.

Article 5 continues to deal with Investment Protection and it provides that investments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation.[44] This provision of expropriation is similar to the South Africa-UK BIT in that states are obligated not to nationalise and expropriate investors' investments except where there is a public purpose and such should be done on non-discriminatory basis.

Article 6 goes further to highlight national treatment by providing that investments and investors shall enjoy fair and equitable treatment in the territory of any state party.[45] However, what is more interesting about this protocol in comparison to the above BIT is that it provides exceptions in detail to the rights afforded to investors, which then may serve as responsibilities to the investors and provide the much-needed balance of rights and obligations in investment agreements.

Article specifically provides that notwithstanding the provisions of Article 6, state parties may in accordance with their respective domestic legislation grant preferential treatment to qualifying investments and investors in order to achieve national development objectives.[46] This means that investors have the obligation to abide by and not challenge the host state's legislative remedies of achieving national development objectives. Where the host state has developed legislation to achieve national development in accordance with its laws and regulations, the investor has the obligation to respect such laws and not challenge them as violation of its right to national treatment.

This is further affirmed by the provisions of Article 10 which provides that foreign investors shall abide by the laws, regulations, administrative guidelines and policies of the Host State.[47] Article 13 further provides that state parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures and agree not to waive or otherwise derogate from, international treaties they have ratified, or

[43] Article 1 of Annex 1 of the SADC Protocol, 2006.
[44] Article 5 of Annex 1 of the SADC Protocol, 2006.
[45] Article 6 of Annex 1 of the SADC Protocol, 2006.
[46] Article 7 of Annex 1 of the SADC Protocol, 2006.
[47] Article 10 of Annex 1 of the SADC Protocol, 2006.

offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment.

The above 2 provisions make it clear that investors do not only enjoy the rights in the host state but they also have obligations to abide by the rules and regulations of the host state. Regardless of the fact that investors have rights to establish investments within the host-state, such rights must not override the host state's need to establish its laws for the development of its nation and such laws need to be protected by the investors. It further makes it clear that none of the investors' rights must be exercised at the expense of health and environmental laws of the host state. This means that in conducting their investment within the host state, investors have the obligation to respect the health and environmental laws of the host state.

Furthermore, Article 14 provides that the host state must exercise its right to regulate in the public interest and to adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.[48]

The protocol, just like the BITs, also provides some obligations on the governments of the member states in order to strike the much needed balance between the rights and obligations and to ensure that the level of control and power provided to host states does not chase away the investors. One of such obligations is the governments' obligations to be transparent with the investors. To meet this requirement the government must publish its policies in places such as the Government Gazette so as to inform concerned parties of their rights and obligations. The rationale behind this obligation on the host states is that transparency is a crucial determinant of the political and economic risk foreign investors are faced with when making a foreign investment decision.

However, the difficulty with this approach is that it focuses on the state and its institutions but fails to demand the same amount of transparency from all actors, including foreign investors and their home states. In South Africa, it is common practice for the government to publicise information in the Government Gazette that affects all the people including investors.

From the above few provisions of the SADC Protocol, it is clear that the rights and obligations of foreign investors were more balanced than it was the case in the South Africa-UK BIT. This is so because in the BIT, there were only provisions about what host states must not do to investors, but never about what investors are obligated to do when operating

[48] Article 14 of Annex 1 of the SADC Protocol, 2006.

in the host state. Although the Protocol did not specifically separate investors' obligations from the protection of investment provision, such balance of rights and obligations can be seen from the provision on corporate responsibility and the genera exceptions.

2.7 The Mineral and Petroleum Resources Development Act (MPRDA) no.28 of 2002

It is important to discuss this piece of legislation as it has an impact on the investment climate in South Africa as well. This legislation was formed so as to make provisions for equitable access and sustainable development of the country's minerals and petroleum resources, to affirm the government's obligation as provided in the constitution to take legislative and other measures to redress the results of the past racial discrimination that took place during the apartheid era. The discussion of this legislation is further important because it will provide an analysis of how investments in the mining sector are impacted by the provisions of this legislation.

According to the MPRDA, the state is the custodian of all mineral resources in South Africa and it (state) has the discretion to either grant, refuse, administer, control or manage any mining right or permit in consultation with the minister and determine the fee or levy payable in terms of any relevant legislation.[49] This means that in redressing the past racial discrimination and achieving sustainable development, the government of South Africa has the right against any investor, to control, grant or refuse mining rights to such an investor, and the exercise of such right by the government needs to be adhered to by such an investor.

Furthermore, section 16 provides that any person, who wishes to apply for a prospecting, may apply to the Minister for a prospecting right and such an application must comply with stated requirements.[50] This implies that a foreign investor wishing to establish an investment within the mining sector must do so in terms of this section and meet all the requirements as per the provisions of this section in order for such an investment to be valid.

One of the highlights of the impacts of the coming into operation of the MPRDA was seen in the reported cases of *Agri South Africa v The Minister of Minerals and Energy*; and *Annis Möhr van Rooyen v The Minister of Minerals and Energy*,[51] where the plaintiffs were respectively holders of coal and clay rights before the MPRDA came into operation and upon

[49] Section 3(1)(a)(b) of the MPRDA.
[50] Section 16 of the MPRDA.
[51] Agri South Africa v The Minister of Minerals and Energy; and Annis Möhr van Rooyen v The Minister of Minerals and Energy 2010 (1) SA 104.

the coming into operation of the MPRDA, the plaintiffs lodged claims for compensation on the basis that their rights had been expropriated by the coming into force of the MPRDA. The court found that the MPRDA did not acknowledge any existing holding of mineral rights, and that insofar as they have not been exploited they 'simply disappear in thin air'; and that unused old order rights would simply have been extinguished without compensation, rendering the MPRDA contrary to section 25 of the Constitution and hence unconstitutional.

It has further been argued that the MPRDA did not bring about any expropriation of common law privately owned mineral rights as all it did was regulate the use of mineral rights which the Act placed under state custodianship in accordance with internationally recognised principles.[52] This means that according to the MPRDA, the custodianship of mineral rights by the state did not amount to expropriation and therefore the state is not obligated to pay compensation for acquiring such mineral rights. The court in *Agri SA* thus found that under the MPRDA, the holder of mineral rights no longer has an asset that can be sold, otherwise alienated, used as security or kept as an investment. The mineral right holder's contingent ownership in the minerals, once severed, has similarly disappeared. The right to grant, subject to statutory regulation, the right to others to prospect for and mine has disappeared. In sum the holders of mineral rights have, since the enactment of the MPRDA not one of the competencies that the law conferred upon them.[53]

The impact of the MPRDA in FDIs in South Africa is that because the majority of South Africa's BITs were being terminated by the South African government, investors now will undoubtedly have issues with entering into investment agreements with the country because of the provisions of this legislation and the amount of positive discrimination it subjects them to.

The Investment Bill seeks to achieve several balances between the rights and obligations of all investors in South Africa, the need to provide adequate and equal protection of foreign and domestic investors. The Investment Bill raises some concerns whether sufficient protection will be granted to foreign investors from a security of tenure perspective and specifically compensation in the event of expropriation of rights or interests in South Africa.

2.8 Piero Foresti, Laura de Carli, and others v. The Republic of South Africa (ICSID CASE NO. arb(af)/07/1)

Having discussed the MPRDA and its impacts above, it is further necessary to discuss one of the leading cases in international investment in South Africa because the claim which was

[52] Leon P "Agri SA v Minister of Mineral Resources: a judicial warning on nationalisation? May 2011.
[53] 2010 (1) SA 104.

laid in this case was given rise to by the provisions and the coming into operation of the MPRDA. Therefore, it is necessary to get a brief discussion of the case so as to understand clearly the impacts of the coming into operation of this legislation.

Summary of the facts

This case deals with claims arising out of the alleged extinction of certain old order mineral rights held by the claimants by the entry into force of the Mineral and Petroleum Resources Development Act, and the introduction of compulsory equity divestiture requirements with respect to the investors' shares in certain operating companies. It concerned a claim instituted against South Africa by a group of investors in the International Centre for the Settlement of Investment Disputes (ICSID).

The proceedings of this case were brought in terms of two BITs which were signed by South Africa with Italy[54] and the Belgo-Luxembourg Economic Union[55] in 1997 and 1998 respectively. The claimants alleged that South Africa was in breach of the BITs' prohibitions on expropriation in two respects: firstly, by putting into effect the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) on 1 May 2004, which extinguished certain putative old order mineral rights allegedly held by the claimants; and secondly, by the coming into effect of the MPRDA, when combined with the Mining Charter dated 13 August 2004, which introduced compulsory equity divestiture requirements with respect to the claimants' shares in their operating companies.

The claimants alleged that, by reason of the MPRDA's promulgation, the Respondent expropriated all of the Claimants' mineral rights, in their totality. This is so, the claimants argued, because upon its entry into force the MPRDA extinguished the claimants' mineral rights and, at the same time, granted them "a procedural right to apply for conversion of their 'old order mineral rights' into much-diminished 'new order mineral rights.' The claimants argued that the procedural right to apply for conversion is, if relevant at all, properly characterized as a form of procedural compensation for the expropriation.

More specifically, the claimants argued that their old order mineral rights were unlawfully expropriated in one of three ways, depending on the particular properties associated with the old order mineral rights. First, the Claimants alleged that the old order mining rights associated with forty-four properties affecting twenty-one quarries have been effectively, definitively, and directly or indirectly expropriated as of 1 May 2004 because, at the end of

[54] Agreement between the government of the Republic of South Africa and the government of the Italian Republic for the Promotion and Protection of Investments, signed in Rome on 9 June 1997.
[55] Agreement between the Republic of South Africa and the Belgo-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments, signed in Pretoria on 14 August 1998.

the conversion process, no new order right has been granted and, thus, no compensation has been granted. The Claimants noted that, with respect to the old order rights associated with some of these properties, the Claimants had not availed themselves of the conversion process because if they had done so they would have been required under the MPRDA to begin prospecting or mining operations within a period of time that was not economically feasible.[56]

Second, the Claimants alleged that the old order mining rights associated with five properties affecting four quarries have been directly expropriated as of 1 May 2004 against a measure of compensation that fails to satisfy the standards for compensation required under the BITs. The Claimants argued that these old order mining rights can be said to have been expropriated against an incorrect measure of compensation because, although the old order rights associated with these properties have been converted into new order rights, that measure of compensation (i.e., the value of the new order rights) is insufficient. The Claimants argued that if this second group of expropriations were not direct expropriations, then they were indirect and/or partial expropriations and/or 'equivalent measures', again, taken against inadequate compensation.[57]

Third, the claimants alleged that the old order mining rights associated with fifty properties affecting twenty-five quarries where a decision of the Respondent on conversion was still pending nevertheless have been directly expropriated against a measure of compensation that is still uncertain but that, at best, will not satisfy the standards for compensation required under the BITs. The claimants argued that if the cases in this third group of expropriations were not direct expropriations, then they were indirect and/or partial expropriations and/or 'equivalent measures', again, taken against inadequate compensation. The claimants argued that all of the above expropriations were unlawful, not only because there was insufficient compensation, but also because of a failure of due process.

In summary, therefore, the claimants complained that the effect of the MPRDA was to expropriate their existing mineral rights and replace them with less valuable rights; and to subject them to the Broad-Based Black Economic Empowerment (BEE) objectives of the Mining Charter. The claimants sought compensation in the amount of €266-million (approximately R3-billion) from South Africa.

[56] https://www.iareporter.com/arbitration-cases/foresti-carli-and-others-v-south-africa/. (accessed 01 November 2021)

[57] Piero Foresti, Laura de Carli, and others v. The Republic of South Africa (ICSID CASE NO. arb(af)/07/1, p.17

The Award

The claimants sought to discontinue with the claim upon agreement with South Africa that they shall be granted new mining rights and therefore, the tribunal directed the claimants to pay a contribution to the costs of the respondent (the Republic of South Africa) in the amount of €400,000 in respect of the fees and costs and the claimants' claims were dismissed with prejudice.

2.9 Termination of BITs in South Africa

Following the decision of the ISCID in the above case, the South African government saw it fit to review some of its BITs so as to align them with the policy space of the country. The value of the BITs for FDI flow to South Africa was reviewed and thereafter the government decided to terminate some of the BITs because of the risks that certain policy and domestic interventionist measures may be open to attack by foreign investors (including black economic empowerment and procurement policies).[58]

In 2012, the South African government decided to terminate unilaterally bilateral investment treaties (BITs) with certain European Union members – including a co-signed agreement with Belgium and Luxembourg and individual agreements with Spain and Germany – and stated that it was planning to cancel further treaties in the future. [59] The prospect of being hauled before the international court of arbitration over public policies (such as the Broad-Based Black Economic Empowerment and land redistribution policies) prompted the government to use domestic legislative instruments rooted in South Africa's Constitution.

The policy decision by South Africa to terminate its BITs constituted a challenge to the manner in which investment protection was traditionally guaranteed by host states. The intention of the South African government in terminating those BITs was that foreign investments will in future be protected through domestic legislation as it is today.

The decision was prompted by a policy review of the actual value of BITs for FDI flow to South Africa and also the risk that certain policy and domestic interventionist measures may be open to attack by foreign investors including black economic empowerment and procurement policies (BBEEE). One typical and clear example of such attacks was seen in the above-discussed case of *Piero Foresti* case following the enactment of the MPRDA, when foreign investors from Luxembourg and Italy came to regard the MPRDA and the black empowerment requirement for mining rights as a form of expropriation of their common law

[58] https://www.dlapiper.com/en/us/insights/publications/2014/12/international-arbitration-newsletter-q4-2014/challenging-the-status-quo. (accessed 11 August 2021)
[59] https://www.news24.com/fin24/opinion/sas-cancellation-of-bilateral-investment-treaties-strategic-or-hostile-20180928-3. (accessed 13 August 2021)

entitlement to exploit and mine minerals alleging that South Africa was in breach of article 5 of its BITs with Italy and Luxembourg, which prohibited expropriation.

Furthermore, other scholars have argued that the reason for terminating the BITs, although came immediately after the *Piero Foresti* case, it was long coming because as mentioned seen above, when South African officials began signing BITs in the early 1990s just at the beginning of democracy and after being removed from the ban of sanctions in the international community, the government failed to assess the implications of certain provisions of these treaties and was unaware of their potential impact on their future policies.[60] It has been further argued that the combination of overbearing conditions and lack of expertise and coordination led South African officials to ignore the risks of BITs and overestimate their benefits. BITs were signed simply because they were available and ready to adopt and the government of South Africa was trying to attract as much FDIs as it possibly could at the time. The government did not undertake a careful consideration of costs and benefits of the treaties compared to alternative investment promotion instruments and as a result, the implications of entering into these investment treaties were brushed aside and did not receive scrutiny until the South African government found itself on the receiving end of a first serious claim in this case.

As seen in section 5.1 above, South Africa's first BIT after democracy was with the UK and although the new post-Apartheid South African government signed it in 1994, the BIT was actually presented to the outgoing government a year earlier. The UK government at the time was said to be wary of the new government of South Africa, fearing they would not protect their existing investments and would nationalize or expropriate the property of its investors. Accordingly, they acted swiftly by presenting their draft model BIT to the outgoing government, which simply accepted the draft model BIT without any negotiation from when it was presented. The main features of the agreement was that it stipulated that foreign investors and their investments had to be treated fairly and equitably, there should be no discrimination or expropriation, contracts should be upheld, there should be no capital restrictions, and disputes could be adjudicated through international investor-state arbitration.

At the time, such agreements were widely considered harmless, and many developing countries entered into them. However as seen above, a close analysis of the terms of the UK-South Africa BIT and South Africa's constitution reveals substantial incompatibility and,

[60] Mossallam, Mohammad (2015) : Process matters: South Africa's experience exiting its BITs, GEG Working Paper, No. 2015/97, University of Oxford, Global Economic Governance Programme (GEG), Oxford.

in hindsight, it is quite striking that this was overlooked. One of incompatibility can be seen from the national treatment clause in the BIT which contained no explicit provision allowing the state a right to give local firms preferential treatment. This clause directly contradicted the new constitution, which was being developed when the BIT was signed, and, which included affirmative measures to redress the historical injustices faced by the black population. The coming into operation of the 1996 Constitution revealed the contradictions of this provision by proving that the BIT did not make a distinction between expropriation and deprivation, implying that deprivation was synonymous to expropriation and would result in compensation. In contrast, the constitution clearly stipulates that deprivation would not require compensation if the measures were pursuant to law and not arbitrary

Another aspect was the calculation of compensation in this BIT, which in the constitution included taking public interest into account and allowing for less than market compensations. This would be considered in cases where it was, for instance, proven that the land was acquired during the apartheid era. However, the relevant clause in the BITs would not allow any deviation from market value.

2.10. Conclusion

From the above discussion, it can be concluded that South Africa, as one of the leading states in FDI within the continent, has travelled a long road to where it is today in terms of its FDI. It is further concluded that the South Africa-UK BIT model has contributed to the development of the South African FDI flow as it was seen that the inflow of FDIs in South Africa has helped in bringing back South Africa to the international community from which it was banned/sanctioned due to the apartheid regime.

The distinctive feature of many BITs is that they allow for an alternative dispute resolution mechanism, whereby an investor whose rights under the BIT have been violated could have recourse to international arbitration, often under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), rather than suing the host State in its own courts.

Be that as it may, and not disputing the development that was brought about by the FDI inflows in South Africa, it is clear that poor leadership has contributed towards failure of FDIs in the country and as such, leading to disputes such as the *Pierro Foresti* one and ultimately, the promulgation of the PIA. The contradictions between the BITs and South Africa’s constitution were all overlooked, there was weak organization, uninformed and poorly coordinated workforce of government officials dealing with BITs and the lack of oversight

resulted in treaties being signed in many cases for diplomatic reasons, ignoring the real commitments they entailed.

CHAPTER 3-RIGHTS AND OBLIGATIONS OF FOREIGN INVESTORS UNDER THE PROTECTION OF INVESTMENT ACT 22 OF 2015

3.1 Introduction

Having discussed the South Africa's position regarding FDIs under the BITs in the previous chapter, it is therefore important to discuss the position under the new legal system: the PIA. Post the introduction of the PIA, investors' rights and obligations under investment law were amended from what they used to be in the BITs. The FDIs under the PIA are now dealt with differently from what they used to be in the BITs.

This chapter will therefore discuss the rights and obligations of investors under the PIA so as to assess the development, (if any), that was brought about by the PIA.

3.2 The investors' rights under the PIA

As a way of maintaining the FDI attraction into the country even without the BITs, the PIA has made provisions for investors' rights so as to maintain trust with the investors and ensure stability of the investments.

3.2.1 The right to fair administrative treatment

Section 6 of the PIA provides that "the government must ensure that administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural justice to investors in respect of their investments as provided for in the Constitution and applicable legislation".[61] This means that investors are afforded the right to fair and equitable administrative, procedural and judicial proceedings.

Section 4 of the PIA states that the purpose of the Act is to confirm the Bill of Rights in the Constitution therefore it is worth-noting that Section 33 of the South African Constitution[62]guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair. Therefore, section 6 of the PIA can be said to be upholding the values of the Constitution of South Africa. However, upholding the values of the Constitution is only one of the many purposes of the PIA; therefore, an analysis of all the provisions should be made so as to arrive at a decision regarding this legislation.

Although this right in terms of the PIA is termed as the right to fair and administrative action, it can be related to the right/principle of Fair and Equitable Treatment (hereinafter referred to as the FET) as widely known in the international investment law. This is so because the

[61] Section 6(1) of the PIA.

[62] Section 33(1)and(2) of the Constitution Act 108 of 1996.

principle of FET requires foreign investors to be treated equally within the realm of international law. The host state is required to afford foreign investors of the contracting states a fair and "equitable" treatment and therefore the level of fairness and non-discriminatory practice that is required under section 6 can be related to the level of fairness required under the FET principle. The general effect of this is that states cannot discriminate among investors on the basis of their nationality, with the exception of national treatment and most-favoured nation (hereinafter referred to as MFN) treatment standards. The FET principle brings in the elements of fairness and equity drawn from customary international law. However, even within the international law or international customary law, it is still not clear what constitutes the FET and the meaning of this principle is decided on a case-to-case basis. Therefore, the precise meaning of the terms 'fair and equitable' is a controversial one.

Arbitral tribunals identified a number of situations and instances in which the conduct of the host state amounts to a violation of the FET standard and in doing so, tribunals have balanced the investors' and the states' interests.[63] Tribunals identified lack of respect for the obligation of vigilance and protection, lack of judicial or procedural propriety as evidence of fair and equitable treatment violation; non-observance or frustration of investors' legitimate expectations, coercion and harassment by the organs of a host state; failure to offer a stable and predictable legal framework amongst other issues giving rise to the violation of FET standard.[64]

In the case of Asian *Agricultural Products Ltd v Republic of Sri Lanka*,[65] the connection of 'fair and equitable treatment' with 'full protection and security' was noted and each connotes the same level of treatment in that they both require that foreign investors to be treated equally within the realm of international law and that host states afford foreign investors of the contracting states a fair and equitable treatment. The general effect of this is that states cannot discriminate among investors on the basis of their nationality, with the exception of national treatment and most-favoured nation (MFN) treatment standards.[66]

This principle was confirmed in the case of (Oil Platforms) *Islamic Republic of Iran v united Stated of America*[67] wherein the Islamic Republic of Iran filed in the Registry of the Court an Application instituting proceedings against the United States of America with respect to the

[63]https://jusmundi.com/en/document/wiki/en-fair-and-equitable-treatment. (accessed 10 September 2021)
[64]https://jusmundi.com/en/document/wiki/en-fair-and-equitable-treatment. (accessed 10 September 2021)
[65] Asian Agricultural Products Ltd v Republic of Sri Lanka ICSID case No ARB/87/3 pages 580-655.
[66] Marriane W Chow 'Discriminatory equality v non-discriminatory inequality: The legitimacy of South Africa's affirmative action policies under international law' (The Connecticut Journal of International Law 2008-2009) 306.
[67] Oil Platforms (Islamic Republic of Iran v united Stated of America) ICJ Reports 2003 161.

destruction of Iranian oil platforms and alleged that the destruction caused by several warships of the United States Navy to 3 offshore oil production complexes, owned and operated for commercial purposes by the National Iranian oil company, constituted a fundamental breach of various provisions of the Treaty of Amity and of international law. Iran had contended that, in attacking on two occasions and destroying three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, the United States had violated freedom of commerce between the territories of the Parties as guaranteed by the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran and it sought reparation for the injury caused therein. The court in this case found that the principle of national treatment was not breached in this case.

The reason for relating the section 6 of the PIA to the FET principle is based on the fact that this relations is supported by many scholars who have argued that because of the ambiguity and broadness of this right, a number of investor-state arbitration decisions have shown that the FET standard is usually associated with the protection of an investor's legitimate expectation; the protection against the denial of justice; the protection of due process, transparency and consistency during the course of legislative or administrative proceedings; and host state to provide a stable and predictable legal and business environment for an investment amongst other things.[68]

Other scholars have also affirmed this relation of the two principles and referred to it as a combination of standards of treatment in international investment law whereby different standards of treatment are combined in one provision or may be interpreted as being related in instances where they provide the same level of protection and security to the foreign investor and a duty to the host state to refrain from arbitrary and discriminatory treatment towards the investors.[69]

However, the vague and broad wording of the obligation carries a risk of an overreach in its application because it raises the issue that the FET standard may be applied in investor-state arbitration to restrict host-country the necessary administrative and governmental action to a degree that threatens the policymaking autonomy of that country and/or the right to regulate, as termed in the PIA.[70] The reason for this is the uncertainty regarding the correct approach to interpretation and application of the FET standard because on one hand,

[68] https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Dispute/dispute-resolution-alert-28-november-Substantive-Rights-Fair-and-Equitable-Treatment-Standard-under-International-Investment-Agreements.html. (accessed 15 September 2021)

[69] Klger R. “Fair and Equitable Treatment in International Investment Law” 2011 P.16.

[70] UNCTAD Series on Issues in International Investment Agreements II UNCTAD/DIAE/IA/2011/5 p.1.

there is the issue of which sources of law should be used when determining the proper limits of the discretion to interpret the standard and on the other hand, there is the question of the actual substantive content of the standard.

Notwithstanding the above discussion of the FET, it appears that one of the most important elements that was omitted in the provisions of section 6 of the PIA when affording the foreign investors the FET, was the issue of due diligence on the part of the investor which must operate as a prerequisite for the violation of the FET. This is because some scholars have argued that the investor's due diligence has become a significant factor in determining whether the legitimate expectations of an investor give rise to protection under the FET standard especially where an investor's claim for the protection of its legitimate expectations is based on the stability of a regulatory framework.[71] The investor's due diligence in the context of the FET standard goes beyond the risk-based business due diligence performed by a foreign investor for its own benefit as it is said to have implications for the host state's right to regulate in the public interest and a broader notion of business responsibilities.

Thus foreign investors are urged in most cases, to conduct proper due diligence before investing in a host state by demonstrating their reasonable efforts to collect information about the rules and regulations that are applicable to their desired investment in the host state. In some cases, due diligence extends to an investor's duty to assess the possible risks related to the broader economic situation and socio-political background of a host state. However, the obligations of foreign investors towards the host state in South Africa will be discussed in detail hereunder so as to arrive to an informed decision on whether there was indeed an omission by the legislature in drafting this provision of the PIA.

3.2.2 The right to equality (i.e. national treatment)

Section 8 of the PIA provides that foreign investors and their investments must not be treated less favourably than South African investors.[72] This provision can also be seen to be furthering the values of the constitution, specifically the right to equality as enshrined in the Bill of Rights[73] and affirming that everyone should be treated equal before the law. The right to equality is at the cornerstone of the South African Constitution and as such, forms part of the founding values of such constitution.

The principle of national treatment has been defined as a principle whereby a host country extends to foreign investors treatment that is at least as favourable as the treatment that it

[71] Yulia L. "Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law" Netherlands International Law Review (2020) 67 p.233.
[72] Section 8(1) of the PIA.
[73] Section 9 of the Constitution Act 108 of 1996.

accords to national investors so as to ensure a degree of competitive equality between national and foreign investors.[74] This right has been said to be the “single most important” standard of treatment within the international investment law sphere and as difficult to achieve as it deal with economically and politically sensitive issues. For one to be afforded the national treatment, countries set qualifications to be adhered to.

This principle of national treatment was dealt with in the case of *Total SA v Argentina*,[75] where the tribunal stated that to prove breach of national treatment, the investor, amongst other things, has to identify the local subject for comparison; prove that the claimant investor is in like circumstances with the identified preferred national comparator(s); and further demonstrate that it received less favourable treatment in respect of its investment, as compared to the treatment granted to the specific local investor or the specific class of national comparators.

This principle has been criticized for not benefiting African states as it was argued to enhance foreign investors rather than developing the host states. The reason for this was, as per scholarly arguments, that for it to be effectively implemented, it requires the requires changes in existing laws and policies favouring domestic business entities or ‘discriminating’ against foreign investors, and prohibits prospective laws and policies that might be intended to address the specific situation of domestic businesses only.[76]

It has also been argued that the principle of national treatment, when assessed in relation to foreign investors’ right to repatriate their investments, it is clear that foreign investors will never be in the “like circumstances” as domestic investors because it is clear from the right to repatriate that foreign investors are still invested in contributing to the economy of their home-states rather than the host state.[77] In terms of the PIA, the phrase “like circumstances” has been said to mean that in order to assess whether the foreign investor and a domestic investor are in like circumstances, factors such as the effect of the foreign investment on the Republic, and the cumulative effects of all investments; the sector that the foreign investments are in; the aim of any measure relating to foreign investments; the factors relating to the foreign investor or the foreign investment in relation to the measure concerned; the effect on third persons and the local community; the effect on employment;

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[74]https://unctad.org/webflyer/national-treatment. (accessed 18 September 2021)
[75]Total SA v Argentina ICSID Case No ARB/04/1.
[76] Dagbanja DN, *The case against national treatment in Africa*, June 4 2020, P2. Available at https://www.afronomicslaw.org/2020/06/03/the-case-against-national-treatment-in-africa. (accessed 20 September 2021)
[77] Dagbanja DN, *The case against national treatment in Africa*, June 4 2020, P3. Available at https://www.afronomicslaw.org/2020/06/03/the-case-against-national-treatment-in-africa. (accessed 20 September 2021)

and the direct and indirect effect on the environment, etc, must be taken into consideration so as to afford the national treatment to the foreign investor.[78] Therefore, the relevance of national treatment within Africa has been questioned an suggestions have been made to treat investment laws on the same scale as national immigration and citizenship laws instead of giving foreign investors a *de facto* citizenship in Africa.[79]

3.2.3 The right to physical security of property

The PIA further provides that the Republic must accord foreign investors and their investments a level of physical security as may be generally provided to domestic investors in accordance with minimum standards of customary international law and subject to available resources and capacity. This means that foreign investors in South Africa have the right to enjoy physical security measured against standards of international law.

This provision is further affirmed by section 25 of the Constitution in the Bill of Rights which provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. The Constitution goes further to provide that the property may be expropriated only in terms of law of general application for a public purpose or in the public interest; and 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.[80]

However, this provision of the Act, progressive as it may appear, it has been criticised to say that it does not offer as much protection to foreign investors as it should as far as security of property is concerned. The protection offered by this provision is said to limited in the sense that it is conditional on the availability of resources and level of capacity. Furthermore, the security provided for in this provision only applies to physical security and not legal and commercial security and the level of protection need only meet the minimum standards of customary international law.[81]

This was dealt with in the case of *Biwater v Tanzania* where the tribunal mentioned that the implication of this provision is that the state must guarantee physical, commercial and legal stability in a secure environment for foreign investors.[82] The stability in this sense (legal and commercial), means that with regard to legal stability, foreign investors' focus is on the

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[78] Section 8(2)(a-g) of the PIA

[79] Dagbanja DN, *The case against national treatment in Africa*, June 4 2020, P2. Available at https://www.afronomicslaw.org/2020/06/03/the-case-against-national-treatment-in-africa. (accessed 20 September 2021)

[80] Section 25(1)(2)

[81] https://www.lexology.com/library/detail.aspx?g=f40f8ce0-af37-4778-a89b-a491d600c791. (accessed 29 October 2021)

[82] Biwater v Tanzania ICSID Case no.ARB/0/22 P.216, Para.729.

stability of both the underlying investment contract (contractual stability) and the applicable regulatory framework in the host country (regulatory stability).[83]

3.2.4 The right to transfer funds

Section 11 of the PIA further affords foreign investors the right to repatriate their investment funds subject to applicable tax laws and other relevant legislation. One of the most crucial matters for the investor when coming to the host-state is the ability to transfer profits of their investment out of the host-state during the course of the investment and the ability to repatriate same profits upon termination of the investment agreement.[84] This means that the foreign investor must be able to move the capital and funds made during their investment in South Africa to their home-state.

Although this provision of the PIA is clearly stated, there seems to be loopholes and ambiguity in terms of how its implementation will take place. This provision, although it has always been a part of the South African investment climate, lacks clarity on its implementation, leaving the courts to draw inferences. Perhaps the most important question that may arise out of this provision as far as implementation is concerned, is what happens when a South African company is owned by non-residents of the country, as well as instances where the company is partly owned by a South African citizen/resident and a non-resident.

It must be noted that clarity on this provision is crucial because as mentioned above, investors need assertion that, having invested in a foreign country, they will be entitled to repatriate the capital invested and the profit arising from that investment.[85] The profit/income is usually used to in BITs as "returns" and it is said to include interests, dividends, capital gains, fees and royalties.

The PIA does not do provide any differentiation between income/profits and capital in this provision; neither does it define the meaning of repatriation in the context of this right afforded to foreign investors. Whether the legislature intends to use the words synonymously for the purpose of this provision remains unknown and therefore needs to be clarified further so as to avoid confusion during the implementation of the law. In answering the above issues, the legislature will need to further clarify in this provision which other legislations will apply in implementing this provision without any ambiguities.

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[83] https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198842637.001.0001/oso-9780198842637-chapter-2. (accessed 29 October 2021)

[84] Coronna M.E *The right to repatriation of capital and transfer of capital for foreign investors in Yugoslav joint-ventures* Review of Socialists Law Vol.12 1986 P.139.

[85] Lang J. *Bilateral Investment Treaties-A shield or a sword?* Bowman Gilfillan Group, P.3 available at https://www.bowmanslaw.com/wp-content/uploads/2016/09/PPI-article_mailshot_08112013_1038389_1-1.pdf. (accessed 21 September 2021)

This lack of clarity in this provision, as mentioned, might later prove to be difficult because it is one thing to formulate well-thought laws, and it is another thing to put it practice and enforce the laws to achieve the desired outcomes. African countries tend to have laws on paper with little effect on the ground.[86]

Furthermore, it should be noted that section 7 of the PIA provides that none of the provisions of the Act create a right for a foreign investor to establish an investment in South Africa.[87] This means that for an investor to enjoy any of the rights provided for in the Act they must firstly establish an investment in South Africa and the validity of the establishment of the investment will depend on whether such an investor has followed the laws of the country regulating such an investment.[88] This therefore makes it clear that any prospective investor may not lodge a claim against South Africa in accordance with the PIA until such time that the investment has been established and they are considered an investor as per the definition in the PIA.

3.3 Investors' obligations under the PIA

It goes without saying as much as foreign investors are protected and enjoy rights under the PIA; such rights do not come bearing no responsibilities of obligations. In order to successfully analyze the PIA, the discussion of the investors' obligations towards the government of South Africa must also be discussed so as to find out whether the legislature has managed to successfully balance the need for economic growth through foreign investments as well as the investors protection within South Africa.

Investor-responsabilization is important to make sure that investors don't only enjoy the benefits of being in the host-state but they also respect the rules and regulations of the host state so as to safeguard public order and morals.

3.3.1 The obligation to abide by the laws of South Africa for establishment of investment.

Section 7 of the PIA provides that foreign investors must establish their investments within the Republic in accordance with the laws of the country.[89] It should be noted that this provision serves as the foremost obligation that foreign investors must abide by in order to successfully establish their investment in South Africa. This means that all processes such as laws regulating registration of a company in South Africa must be followed.

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[86] Laryea T.E Africanisation of international investment law for sustainable development: challenges Journal of International Trade Law Policy, Issue2, P.53.
[87] Section 7(2) of the PIA
[88] Section 7(1) of the PIA
[89] Section 7 of the PIA.

It must be noted that as far as investors' obligations are concerned, the PIA does not go beyond what is provisioned under section 7. This is therefore concerning considering the fact that the rights of investors and the obligations of the state (South Africa) are well provisioned in their separate sections so as to give clear meaning to each and every right of the investor. It is therefore alarming to see a legislation that is meant to regulate and improve the investment laws of the country is silent on how investors should conduct their investments when operating within its territory.

This obligation as discussed by some scholars, limits treaty protection to investments that have been made "in accordance with the laws and regulations" of the host state, thereby creating an implied obligation on investors to act in accordance with the applicable law of the host state in making an investment.[90] This has been said to include not only applying for and receiving the appropriate permits for the proposed investments, but also not breaching other laws such as anti-corruption laws in the process. This obligation was dealt with in the case of *Salini v. Morocco* where the International Centre for Settlement of Investment Disputes (ICSID) tribunal held that this principle focuses on the validity of the investment rather than the definition of same.[91] The court went further to explain that this obligation seeks to specifically prevent the BITs from protecting investments that should not be protected, particularly because they would be illegal.

The PIA according to its preamble, is supposed to be an improvement from the previous and terminated BITs which South Africa was a part of, however, it appears to have many omissions than what was in the BITs. Now this concern raises a question on whether the PIA was a progressive move from the BITs to what South Africa is currently at as far as international investment law is concerned.

The omission and silence of investors' obligations under the PIA can be seen on the fact each of the investors' rights as discussed above, serves as the host state's responsibility towards the investors and nothing is mentioned about how investors are supposed to exercise such rights responsibly, except for the brief provision that is contained in section 7.

Perhaps in showing such omission, it is important to highlight some of the investors' obligations that were also omitted in the terminated BITs in order to bring to light that the legislature was indeed not progressive in drafting the PIA as far as investor obligations are concerned. The importance of highlighting the omissions of investor obligations in the BITs in comparison to the provisions of the PIA is important because as the PIA is considered to

[90] Bernasconi-Osterwalder N. "Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements" IISD, 2018, p.6.
[91]Salini v. MoroccoICSID Case No. ARB/00/4.

be a reaction to the “not favourable” BITs, it is expected that its provisions be progressive and better than those that were contained in those BITs. The BIT that will be used in comparison with the provisions of the PIA in this case is the South Africa-UK BIT as already discussed above.

3.3.2 Obligation to respect the environmental and health laws of the host state

It is worth-noting that the South Africa-UK BIT did not make any provision for foreign investor to take responsibility in respecting the environmental and health laws of the country. Perhaps before embarking on the importance of clear and unambiguous provision of this obligation within the South African law, it is firstly important to take note of what scholars have said about the need for investor obligations in investment law.

It has been argued by scholars that we need investor obligations in order to influence investor behaviour and improve the quality of investment, promote sustainable development, the respect of human rights by investors and environmental protection, and to combat corruption, create a better balance of rights and obligations in investment treaties, complement or bolster domestic law in host and home states, address gaps and weaknesses in domestic and international law in order to hold transnational corporations accountable for their actions as well as improving governance amongst other things.[92]

The investors’ obligations to respect the environmental laws of the host state was dealt with in the case of *David Aven v Costa Rica*[93]wherein the claimants, who were the citizens of the United States of America brought claims against Costa Rica in which they alleged that they had obtained all municipal permits and approvals, including environmental viability and construction permits, required to commence the development however, because of the complaints by neighbours on the site, local authorities conducted inspections and identified alleged wetlands and forests within the project site. According to the claimants, the administrative and judicial actions that shut down the project to avoid further environmental harm which caused the destruction of the investment were in breach of Costa Rica's obligations as per their BIT. The claimants alleged that Costa Rica had failed to afford them fair and equitable treatment had treated them discriminatorily and had indirectly expropriated their right to the value of their investment without compensation.

In response, Costa Rica argued that the protection of the environment is a key governmental policy acknowledged under the BIT, that the rights of investment protection granted to investors under the treaty may be subordinated to the protection of the environment, and

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[92] Bernasconi-Osterwalder N. “Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements” IISD, 2018, p.6.
[93] *David Aven v Costa Rica*ICSID Case No. UNCT/15/3.

that it had acted in accordance with its environmental laws to prevent further environmental harm to its protected ecosystems and as such, a counter claim was made against the claimants for their breach of important environmental laws.

The Tribunal held that Costa Rica's actions were neither arbitrary nor in breach of the BIT because a wetland had been damaged by the Claimants' development activities and the state's measures to protect the wetland were taken in accordance with domestic laws and international law.

The above-discussed case law goes to show the importance of having a provision on the obligation of the investor to respect the environmental and health laws of the host state because in South Africa for example, in instances where are stopped from performing their investment activities which are found to be harmful to the environment, the government will have no clause or provision to rely on in the PIA. Notwithstanding argument that was made regarding the obligation to "abide by the rules of the host state" in that it is inclusive of all other laws and obligations, it is still thus important to have a separate provision regarding this obligation as same was done with the investors' rights.

3.3.3 Obligation to abide by the labour laws of the host state

Furthermore, this provision was never part of the South Africa-UK BIT and it is once again omitted in the PIA. The importance of this obligation on foreign investors is based on the fact that South Africa has laws regulating employer-and-employee relationships and as such, foreign investors need to be made aware of such laws so as to ensure that employees are not affected.

One of the examples of such laws is the Labour Relations Act No. 66 of 1995, (hereinafter referred to as the LRA) which amongst other things, regulates the nature of informal work in the South African labour market and regulates the use by employers of workers employed through a temporary employment service and fixed-term employees, who, together with part-time employees, are referred to as non-standard employees.[94]

It is therefore important for this obligation to form part of the PIA in order to make sure that investors familiarize themselves with the relevant employment laws of South Africa.

3.3.4 Obligation on corporate social responsibility (CSR)

This obligation was also not mentioned in the BIT and it is further ignored in the PIA. This omitted provision in the PIA is important as it relates to the responsibility of the investors

[94] Section 198 of the LRA.

towards the host state to ensure that they voluntarily limit the negative social, environmental and other externalities caused by their activities.[95] The importance of imposing corporate social responsibility of investors was highlighted in the case of *Urbaser v Argentina* where the tribunal indicated that it is no longer the case in international investment law that foreign investors are immune to the standards of international law and as such, they need to be held liable for breaking the internationally adhered standards of international law.[96]

This obligation in international investment law, can take a form of direct or indirect obligation on the investor. An example of an indirect obligation of corporate social responsibility can be found the Benin-Canada BIT which provides that contracting party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the contracting parties and such principles address issues such as labour, the environment, human rights, community relations and anti-corruption.[97]

This BIT imposes an obligation on the contracting states to promote responsible business conduct for companies operating within the territory or under the jurisdiction of one of the contracting states. This type of provision does not impose direct obligations on foreign investors, but rather indirect ones in that, the states, not investors, are the primary addressees of the obligations outlined in these types of corporate social responsibility provisions. The consequence of such CSR formulations is that such provisions leave the contracting states in charge of complying with CSR standards. Therefore, in order for this provision to be effective, the contracting states need to take the necessary action through their internal laws and policies in order to ensure that the companies comply with CSR standards. If the state does not promote and encourage businesses to comply with such standards, the effectiveness of this obligation will be limited. On the other hand, CSR provisions incorporating indirect investor obligations signal that contracting states are expected to ensure that the 'operations of investors abide by certain internationally recognized CSR standards. In turn, this may indicate that by operating abroad, companies cannot count on the lower environmental or human rights standards that may sometimes apply in host states.

The direct approach of incorporating CSR can be seen in BITs such as Argentina-Qatar BIT which states that of investors should 'make efforts to voluntarily incorporate internationally

[95]https://www.iisd.org/itn/en/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/. (accessed 30 September 2021).
[96] ICSID case No. ARB 07/26.
[97] Article 16 of the Benin-Canada BIT.

recognized standards of corporate social responsibility into their business policies and practices.[98] The language employed in this provision is broad and does not go further than encouraging investors to integrate CSR norms into their business. Article 12 of the Argentina-Qatar BIT does not specify the CSR standards, it merely sates that these standards should be 'internationally recognized.'

3.3.5 Obligation not to engage in corrupt activities in the host state

Corruption is one of the alarming issues in South Africa and the fact that it was previously never taken into consideration in the BIT and it is further ignored in the PIA is concerning. This obligation is widely known within the international investment law as the "anti-corruption" principle. Incorporating anti-corruption provisions into international investment agreements is a vital step for governments to address transnational corruption in international investment.[99]

For most people, the word "corruption" invokes the image of a public official secretly accepting a sum of money from a company in exchange for a public contract, or motorists paying off traffic police to avoid speeding tickets. Abuse of entrusted power for private gain is a definition popularised by Transparency International which is the leading global non-governmental anti-corruption movement. Corruption has been defined as the violation of norms of conduct or professional obligations explicit or implicit, arising from formal or other entrusted duties. The notion implies decision-making without due impartiality; counter to public policies; or more broadly against the public interest.[100]

Corruption arises when a person misuses the authority derived from all kinds of formal or professional roles, but also informal or traditional ones and the gain realised through corruption is private because it does not benefit the entity or the collective that the official is entrusted to represent or serve. Private gain expresses the opposite of public good.

The UN Convention against corruption states that each state party must adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in the convention and such liability must be without prejudice to the criminal liability of the natural persons who have committed the offences. It goes further to provide that each state party must ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

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[98]Article 12 of the Argentina-Qatar BIT 2016.
[99]https://academic.oup.com/jiel/article-abstract/23/4/989/6027731?redirectedFrom=fulltext. (accessed 03 October 2021)
[100]https://www.u4.no/topics/anti-corruption-basics/basics. (accessed 05 October 2021)

This goes to show that corruption is an alarming issue even in international law and the omission of this provision by the legislature in drafting the PIA appears to be backwards and not improving from the terminated BITs.

3.3.6 General exceptions to investors' rights

As already mentioned above, every right afforded to a person, comes bearing responsibilities with it. However, it appears that the PIA only focuses on the rights and never provides general exceptions to such rights as usually done in most laws where there are general rules such as non-discrimination, and it is important for investors to know that although they are generally not going to be discriminated against, there are instances where such discrimination will be considered "positive discrimination" as widely known within the South African law.

Although this provision is necessary in each and every right afforded to investors, the interpretation of general exceptions in international law raises many interpretative issues that have not been not been addressed in jurisprudence. The general approach in interpreting general exceptions would be that general exceptions are intended to provide greater regulatory flexibility to host states in pursuing the specific legitimate objectives established in the exceptions.

3.4 Conclusion

Although the PIA as adopted with the aim of reacting to the unfair BITs that were terminate after the *Pierro Foresti* case, it appears that it has not been able to develop the investment law in South Africa beyond what it used to be in the BITs. There is still undeniable and clear imbalance of rights and obligations afforded to foreign investors in South Africa and this therefore may lead to many disputes in the future.

The legislature's silence in many of the obligations that are ordinarily supposed to be given to foreign investors in international investment law is alarming and confusing. There is still a need to ensure that investors do not only enjoy their rights when investing in South Africa but they also bear responsibilities along with those rights. The main issue with the provisions of the PIA as far as investors' rights and obligations are concerned is not the imbalance itself but the audible silence specifically with the obligations.

This goes to show that South Africa is still under the belief that FDI must be attracted at all costs, even if it means at the cost of the nation itself, and such belief could not be further from the truth. The imbalance of rights and obligations under the PIA provisions furthermore sends a message that South Africa needs FDI more than the foreign investors need the mineral and other investment opportunities found within the country.

Furthermore, the PIA is supposed to showcase the difference and its contribution towards the investment climate in South Africa from what it used to be during the apartheid system as seen in chapter 2 above. However, from the provisions of the PIA it seems the legislature was not well informed about the needs of the country as far as FDI is concerned.

As seen in chapter 2 above, one of the reasons for the failure of BITs was that they were entered into immediately after apartheid system and therefore there were no proper personnel in the advisory team that was well informed about the international investment law and how to negotiate international investment agreements. Therefore, the loopholes found in the provisions of the PIA are questionable because it is expected that after learning the lessons from the terminated BITs, the legislature would have an advisory team that is well-informed about the current trends in international investment law and how different countries have been approaching the international investment laws in their respective countries so as to ensure that the much needed balance of rights and obligations is achieved.

Having said that, it must further be noted that South Africa is a member of the African Union which founded the Pan African Investment Code which is aimed at guiding the member states of the African Union on how they can conduct responsible and favourable international investment agreements with their investors.

Therefore, the next chapter will look at the code and assess the rights and obligations of investors so as to find out if South Africa can borrow from some of the craftsmanship of the code in developing the PIA to ensure that it is not only favourable to the investor but also to South Africa. The code is relevant in this research as it goes to prove the importance of having separate provision for the fundamental issues such as rights and obligations especially in international investment law because such issues are usually found to be the course of action in arbitrations when investors lodge claims against the host states.

CHAPTER 4-RIGHTS AND OBLIGATIONS OF OFREIGN INVESTORS UNDER THE PAN AFRICAN INVESTMENT CODE

4.1 Introduction

Having discussed the position of the South African investment law in the previous chapter, it is important to discuss the investment law of the continent as found in the Pan African Investment Code (PAIC) Draft of 2016 as it is considered to be the foundation upon which the continent's investment protection will be found.[101] The discussion of the PAIC is important in this paper because the purpose of the PAIC is to promote, facilitate and protect investments that foster the sustainable development of each its member states, and in particular, the member states where the investment is located.[102] South Africa is a member state to the African Union under which the PAIC was established and therefore, the relevance and analysis of the code alongside the South African investment law is important so as to see whether the South African investment law is founded upon the foundation which was laid by the PAIC.

It is important to note that unlike the South African PIA, the PAIC has a whole chapter dedicated to addressing the investors' obligations so as to balance the rights and responsibilities of the parties in an investment agreement.[103] The investors' obligations under the PAIC shall be discussed below in order to provide some clarity on how different the PAIC is from the South African investment law.

4.2 Investors' obligations under the PAIC

Having provided investors with rights, the PAIC also provides some obligations that investors need to adhere to in exercising such rights.

4.2.1 Corporate governance

The PAIC provides that investments must meet national and internationally accepted standards of corporate governance for the sector in which such investments are made, specifically, meeting the principles of transparency and accounting practices.[104] The PAIC goes further to explain the meaning of this provision by stating that Investors must, *inter alia*, ensure the equitable treatment of all shareholders, in accordance with national laws; encourage active co-operation between corporations and stakeholders in creating wealth,

[101] https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Dispute/Dispute-Resolution-Alert-9-February-2021-Investment-Protection-for-trade-related-infrastructure-to-realise-the-AfCFTAs-full-potential-.html. (accessed 08 October 2021)

[102] Article 1 of the PAIC.

[103] Chapter 4 of the PAIC.

[104] Article 19(1) of the PAIC.

jobs and the sustainability of financially sound enterprises; ensure that timely and accurate disclosure is made on all material matters regarding a corporation, including the financial situation, performance, ownership, and governance of the company, risks related to environmental liabilities, and any other matters in accordance with the relevant regulations and requirements; and provide information relating to human resource policies, such as programs for human resource development.[105] This provision, articulates in detail what investors must expect to do when they decide to invest in the member state of the African Union, unlike the PIA which only provides for the rights of investors without giving any obligations to the investors.

4.2.2 Socio-Political Obligations

Under the PAIC, investors are obligated to adhere to socio-political obligations including, but not limited, respect for national sovereignty and observance of domestic laws, regulations and administrative practices; respect for socio-cultural values; non-interference in internal political affairs; non-interference in intergovernmental relations; as well as respect for labour rights.[106] This means that when deciding to invest within the member state of the AU, foreign investors know that they ought not to interfere with the social and political space of the host-state.

The PAIC goes further to state that investors are obligated not to influence the appointment of persons to public office or finance political parties[107] and further not exercise restrictive practices and to achieve gains through unlawful means.[108] In a country such as South Africa, just like many countries in Africa, where corruption is an obstacle to the economic growth, specifically within the political space and the public offices, a provision such as this one is of paramount importance in addressing and governing the investments in the country.

However, as already seen from the previous chapter, the South Africa’s PIA has made little to no effort when it comes to clearly stating the obligations of foreign investors as it did the rights. From the previous chapter, it seems like the South African investment law is concerned with attracting investors more that it is concerned with balancing the attraction of investors and protecting the interests of the country. It should further be noted that as discussed in chapter 2 above, one of the driving forces behind the promulgation of the PIA and the termination of the BITs was because the government of South Africa had reason to believe that the BITs were not favourable to the country especially where the responsibilities of investors and the government’s sovereignty is concerned.

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[105] Article 19(3)(a-d) of the PAIC.
[106] Article 20(1)(a-e) of the PAIC.
[107] Article 20(2) of the PAIC.
[108] Article 20(3) of the PAIC.

Although the promulgation of the PIA and the reasoning behind such promulgation are convincing, it appears that the legislature did not take into account the fact that there needs to be clear understanding of not only the rights of foreign investors but their responsibilities in the country as well.

4.2.3 Bribery

Investors shall not offer, promise or give any unlawful or undue pecuniary or other advantage or present, whether directly or through intermediaries, to a public official of a Member State, or to a member of an official's family or business associate or other person in order that the official or other person act or refrain from acting in relation to the performance of official duties. Investors shall also not aid or abet a conspiracy to commit or authorize acts of bribery. It must be noted that bribery is a form of corruption and South Africa, like any other African country, must try by all means to fight corruption especially within the investment climate because it has been acknowledged in the PIA that investments do contribute to the growth and development of the economy.

Corruption is one of the pressing issues at the moment. Abuse of power and looting of resources has been disturbingly growing without anyone being held accountable for such conducts. The fight against corruption in South Africa perfectly coincides with the process of state formation and nation-building. The government of South Africa has put into place laws and institutions that will try and bring those who have been found guilty of corrupt conducts to book; however, the undermining of such laws and institutions by those that are in power has rendered such laws and institutions inadequate. [109]

Furthermore, corruption is a corrosive drain on public trust and on the legitimacy of public and private sector institutions. Its toll can be devastating to a national economy, particularly at a time when open global markets can rapidly reverse investment and capital flows if confidence and trust are compromised by revelations of systemic corruption. Corruption affects all types and sizes of business firms from global conglomerates to Small and Medium-Sized Enterprises (SMEs) and co-operatives each with varying degrees of resources and capabilities to deal with the consequences. It has the power to destroy firms and with them the livelihoods of stakeholders who depend on a company's success. This further dehumanizes and undermines the reputation of the private sector as a positive force for economic growth and development in poor countries.[110]

[109] Dr. R Mathekga, Effectiveness of Anti-Corruption Agencies in Southern Africa, A Review by Open Society Initiative for Southern Africa, 2017, P.221.

[110] https://www.ifc.org/wps/wcm/connect/fb7be001-8a70-4129-a7c1-151e89520f21/Focus7_AntiCorruption.pdf?MOD=AJPERES&CVID=jtCwtbR#:~:text=The%20bottom%20line%20

The calculation of corruption level is carried out by Transparency International,[111] which calculates the corruption perception index (hereinafter referred to as CPI), which is a combination of researches and assessments of corruption. The perceived level of corruption is shown by way of points received by a country, on a scale of 0 to 100 points, with 0 being the highest level and 100 being the lowest level of corruption.

According to the 2020 reports, the level of corruption in South Africa remains unchanged and at a high risk of 44 points, which was also the case for the year 2019.[112] These reports have shown that South Africa has, for the past 10 years, failed to move above the 50 point mark, and this is an indication of how damaging corruption has been to the country. Corruption has been considered by some scholars as an illegal tax forming a barrier for entering of new participants as well as undermining the legitimacy of the state and its ability to provide services that support proper functioning of the economy.[113]

The issue of bribery within the investment space in South Africa must be taken seriously because corruption within FDIs happens not only when the investment has been made, it can also happen at the beginning of investment during the negotiations stage, it can also happen at a late state when the investor seeks redress for their dispute, which is what happened in the case of *Piero Foresti* case whereby the counsel who was representing the South African government attempted to solicit bribe in the amount of R5 000 000.00 from the aggrieved investors for the settlement of the said dispute. Therefore, it is expected that having had this experience, the South African government, in promulgating the PIA, would make provisions for such instances.

Although the above-mentioned counsel has been removed from the roll of Advocates in South Africa, his conduct in the above investment case of *Piero Foresti*, has constituted a serious crime however, he surprisingly does not appear to have been charged of any criminal offence, no prosecution ensued. Furthermore, such counsel has been recently attempting to be readmitted and be allowed to practice again as an Advocate and after the High Court granted him an Order to be readmitted as an Advocate, the office of the state

is%20that,%2C%20regulators%2C%20media%2C%20etc.&text=The%20fight%20against%20corruption%20starts,social%2C%20political%20and%20economic%20institutions/. (accessed 13 October 2021)

[111]https://www.transparency.org. (accessed 20 October 2021)

[112]https://www.tradingeconomics.com/south-africa/corruption-index. (accessed 22 October 2021)

[113] Gasanova, A. Assessment of Corruption Impact on the Inflow of Foreign Direct Investment, AIP Conference Proceedings 1836 02001 (2017).

attorney, which is the office for legal representation of the government, immediately briefed him to represent the Minister of Home Affairs in another recent case.[114]

It should be borne in mind that the office of the state attorney that recently briefed the above counsel, who exercised corruption in the case of *Piero Foresti* case, is the same office that briefed him to represent the South African government at the international arbitration in the case of *Piero Foresti* case. This now begs the question of whether, in drafting the PIA, consideration was made to instances such as this one, where foreign investors experience corruption while seeking a redress for their grievances?

Although the Supreme Court of Appeal has granted an order against his readmission as an Advocate, the question still remains, how is the PIA, as the governing for investments in South Africa, intending to deal with cases such as these? Has the provisions been made for corruption arising out of FDIs? Notwithstanding the fact that the counsel in question might be prosecuted, it is still important for the legislature in the PIA to provide guidelines as to how cases such as this one will be dealt with because not only will that avoid confusions but it will restore investors' confidence in the South African legal system.

Jung-Yeop Woo[115] has affirmed the argument that corruption is a major obstacle to economic growth in many ways. He argues that corruption hinders economic development by discouraging foreign direct investment, which is considered an important factor for economic growth. Furthermore, Rahim Quazi and Vijay Vemuri have emphasized the importance of FDIs by contending that FDIs can fill the "investment gap" by providing capital for investment, the "foreign exchange gap" by providing foreign currency through investments as well as the "tax revenue gap" by generating revenue through economic activities.[116]

4.2.4 Corporate social responsibility (CSR)

The PAIC goes further to provide that investors shall abide by the laws, regulations, administrative guidelines and policies of the host state and in pursuit of their economic objectives, investors must ensure that they do not conflict with the social and economic development objectives of host States and shall be sensitive to such objectives.[117] Furthermore, the investors are required to contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host State.

[114] Johanesburg Society of Advocates and Another v Seth Azwihangwisi Nthai and Others (89/2020 and 880/2019)[2020] ZASCA 171.

[115] JY Woo "The Impact of Corruption on a country's FDI Attractiveness: A Panel Data Analysis, 1984-2004" (2010) *Journal of International And Area Studies* at 71.

[116] R Quazi et al "Impact of Corruption on Foreign Direct Investment in Africa" (2014) *International Business Research, Vol.7, No.4,* at 1.

[117] Article 22(1)-(3) of the PAIC.

Although this provision is somewhat a repetition of the last 2 provisions that were discussed above, it emphasizes the responsibilities of foreign investors in respecting the economic and social issues of the host-state and not to interfere with them. This makes things clear and leaves no ambiguity that foreign investors might claim in future when a dispute arises.

The principle of CSR will not be discussed in detail in this chapter as it was already done in the previous chapter. However, the discussion in this chapter as it relates to this principle will be focused on why the AU adopted this principle in the PAIC and its relevance in Africa currently and how it can help navigate the investment climate better than the previous BITs. It appears that the PAIC was prompted by the need to Africanize the investment laws amongst other things, so as to make them relevant to the current and developing needs of the continent.

4.2.5 Obligations as to the use of natural resources

Foreign investors are further obligated not to exploit or use local natural resources to the detriment of the rights and interests of the host state and to further respect rights of local populations, and avoid land grabbing practices or resettlement of the people.[118]

The issue of respecting the land rights of the people of South Africa is a concerning issue given the historical practices of the apartheid South Africa before democracy. In cases where foreign investors' interests in terms of making profit are prioritized more than the rights to land of the people of South Africa, then it can be concluded that the investment law of the country does not live up to its name of developing the economy for its people.

4.2.6 Business ethics and human rights

Foreign investors are further required to comply with by the business ethics and human rights by supporting and respecting the protection of internationally recognized human rights; ensuring that they are not complicit in human rights abuses; eliminating all forms of forced and compulsory labour, including the effective abolition of child labour; eliminating discrimination in respect of employment and occupation; and ensuring equitable sharing of wealth derived from investments. It is common knowledge that South Africa has one of the best constitutions in the world, so since the constitution of South Africa is considered to be the supreme law, it is no surprise that even the labour laws of South Africa, although not perfect, are the best.

This obligation on foreign investors is innovative and progressive because the relationship and the need to balance the business and human rights have been growing undeniably for the past years. This therefore means that international investment laws, in pursuing the need

[118] Article 23 of the PAIC.

to grow businesses and investments, must take into account the human rights elements that are related and may be affected by such investments.

Businesses must start focusing on the impact they have on individuals, communities and the environment. It is clear that one of the central measures of a company's social responsibility is its respect for human rights.

While most companies recognize the moral obligation to operate consistent with human rights principles, recognition is growing that respect for human rights also can be a tool for improving business performance. Some of the reasons why for human rights are important to business include the compliance with both Local and International laws in that human rights principles are contained in national and international law and therefore, ensuring that business operations are consistent with these legal principles helps companies avoid legal challenges to their global activities.

Different international courts and tribunal have had to adjudicate matters in which foreign investors are alleged to have sometimes through their business partners, contributed to human rights violations in their global operations. This therefore necessitates the need for this obligation especially in South Africa where the constitution is known worldwide to be respectful an upholding human rights. The legislature needs to revisit the provisions of the PIA and incorporate the provision that will highlight the importance of the relationship between human rights and investment law.

Another reason why it is important to ensure a balanced relationship between human rights and business is the issue of satisfying consumer concerns because the increased media attention to business' role in protecting human rights has led to increased consumer awareness of the treatment of workers producing goods for the global marketplace and demands for public accountability. Several companies have found themselves the targets of campaigns by human rights, labour rights, religious or consumer organizations highlighting allegations of human rights abuses.

Therefore, establishing and enforcing a meaningful approach to human rights can help to avoid such campaigns, limit their impact on the company if they occur as well as protect the overall image of the company.

Furthermore, this obligation on business and human rights is important for the purposes of promoting the rule of law in that many of the principles enunciated in the Universal Declaration of Human Rights involve the creation of a stable, rule-based society that is essential to the smooth functioning of business. Applying human rights principles thoroughly,

consistently and impartially in a company's global operations can contribute to the development of legal systems in which contracts are enforced fairly, bribery and corruption are less prevalent and all business entities have equal access to legal process and equal protection under law.

Notably, the importance of building community goodwill also plays an integral part on the relationship between business and human rights thus making this obligation on investors a necessity in that the foreign investor’s presence can be viewed locally as positive or negative. Therefore, avoiding human rights violations will help maintain positive community relations and contribute to a more stable and productive business environment.

Furthermore, the supply chain management is also important in maintaining a healthy relationship between business and human rights especially in investment law because any businesses' human rights policies are designed to promote their global business partners' compliance with human rights and labour rights standards. These policies can also serve as tools to help companies select business partners which are well-managed and reliable and which operate ethically.

The need to enhance risk management is also important in business and human rights in that the predictability is essential to stable and productive business operations. The denial of basic human rights often leads to social or political disruption. This in turn can cause labour strife, restricted access to goods and services, or delays in the movement of finished products. And avoiding public controversies reduces the direct costs of resolving high-profile disputes.

Keeping markets open is also important for the maintenance of business and human rights relationship as it was said that such will help ensure that markets remain open. The recent WTO Ministerial demonstrated how broad concerns about the intersection of business and human rights, amongst other issues, hinder the further development of global trade agreements. Protecting the human rights and labour rights of employees and business partners' employees leads to increased productivity, as workers who are treated fairly and with dignity and respect are more likely to be productive. Enterprises that avoid human rights and labour rights violations can also reduce employee turnover and achieve higher product quality. Furthermore, applying Corporate values that do not deny people their basic human rights in ways that hinder a company's ability to conduct its business consistent with its stated values can be of great value because if not, such can undermine the faith of employees and external stakeholders in company integrity.

It should be borne in mind that although the PAIC makes provisions for investors' obligations in its member states, such obligations operate as guidelines to the member states on how they can better improve their domestic laws for investments, and as such, member states may or may not adopt the guidelines provided by the PAIC.

4.3. Investors' rights under the PAIC

The discussion of the rights of investors under the PAIC is necessary as it will provide a clear assessment of some of the issues that were raised in the previous chapter regarding the provisions of the PIA. Furthermore, the PAIC as mentioned above as prompted amongst other things by the need to Africanize the investment laws within the continent and align them with the current and relevant needs of the continent. Therefore, there is a need to look at how the PAIC has managed to Africanise the provisions of the rights afforded to foreign investors in order to see how different it is from the provisions of the PIA.

4.3.1 Most-Favoured-Nation Treatment

The PAIC provides that each member state shall accord to investors of another member state treatment no less favourable than it accords, in like circumstances, to investors of any other member state or of a third country with respect to the management, conduct, operation, expansion, sale or other disposition of investment. It goes on further to provide that each member state shall accord to investments made by investors of another member state treatment no less favourable than it accords, in like circumstances, to investments made by investors of any other member state or of a third country with respect to the management, conduct, operation, expansion, sale or other disposition of investments.[119]

Although this provision refers to the treatment amongst member states of the AU, it is still relevant and applicable to foreign investors because it is clear that the use of the words "third party" may be used to refer to a foreign investor whose home state is not the member state to the AU.

According to the PAIC, the concept of "in like circumstances" requires an overall examination which should be done on a case by-case basis, of all the circumstances of an investment, including its effects on third persons and the local community; its effects on the local, regional or national environment, the health of the populations, or on the global commons; the sector in which the investor is active; d. the aim of the measure in question; the regulatory process generally applied in relation to a measure in question; company size; and

[119] Article 7(1)(2) of the PIAC.

g. other factors directly relating to the investment or investor in relation to the measure in question, amongst other things.[120]

One of the issues of concern in the previous chapter regarding the rights of foreign investors was the silence of the PIA regarding the exceptions to such rights. It is therefore interesting to note that the PAIC provides an exception to the above right of most favoured nation. Article 8 of the PAIC provides that member states may adopt measures that derogate from the Most-Favoured-Nation principle.[121] It provides further that any regulatory measure taken by a member state that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute a breach of the Most-Favoured-Nation principle [122]and that the measures taken by reason of national security, public interest, public health or public morals are not considered as a "less favourable treatment", in the meaning of Article 7.[123] Furthermore, the Most-Favoured-Nation principle is said to not apply to sectors excluded in a member state's list of scheduled investment sectors.[124] This exception goes on further to provide that The Most-Favoured-Nation principle does not oblige a member state to extend to the investors of another of a third country (i.e foreign investor) the benefit of any treatment, preference or privilege contained in the existing or future free trade area, customs union, common market agreement or any international arrangement to which the investor's home state is not a party, or any international agreement or domestic legislation relating wholly or mainly to taxation.[125]

This provision, unlike the PIA which only makes provision for foreign investors to be afforded equality and not be discriminated against, it is a progressive one because it makes it clear to foreign investors that although they are entitled in terms of the relevant law, to not be discriminated against, such entitlement may be limited where necessary and such limitation will not constitute any breach of any law and should be respected by the said investors.

4.3.2 National Treatment

The right of foreign investors to receive national treatment is also found in the PAIC wherein it is provided that a member state shall accord to investors of another member state treatment no less favourable than it accords, in like circumstances, to its own investors with

[120] Article 7(a)-(g) of the PAIC.
[121] Article 8(1) of the PAIC.
[122] Article 8(2) of the PAIC.
[123] Article 8(3) of the PAIC.
[124] Article 8(4) of the PAIC.
[125] Article 8(5)(a)(b) of the PAIC.

respect to the management, conduct, operation, and sale or other disposition of investments.[126]

Furthermore the PAIC in this right also provides an exception which states that member states may adopt measures that derogate from the National Treatment principle provided such measures are not arbitrary and that any regulatory measure taken by a Member State that is designed and applied to protect or enhance legitimate public welfare objectives, such as national interests, public health, safety and the environment, does not constitute a breach of the National Treatment principle.[127] The PAIC goes further to state that member states may in accordance with their respective domestic legislation, grant preferential treatment to qualifying investments and investors in order to achieve national development objectives.

Having discussed the MPRDA and its relevance to the South African investment law in the previous chapter, it is clear that the omission of this exception in the provisions of the investors' rights was uncalled for and as such should be revisited. This is so because the MPRDA clearly has an impact on how foreign investors will be treated less favourably from domestic investors in South Africa based on the need to redress the past racial discriminations that came about as a result of the apartheid system.

The PAIC affords its member states the right to deny an investor the benefits of this Code (which might also include some of the rights), and to grant special and differential treatment to any investor and investment in instances here for example, the investor does not have substantial business activities in the member state; or the investor is engaged in activities disadvantageous to the economic interest of member states.[128]

Furthermore, member states are allowed under the PAIC to deny national treatment if advantages available within the member state's economy are made for the exclusive benefit of its own nationals within the framework of its national development programs or its list of scheduled investment sectors where applicable. Another exception to the National Treatment principle is that it is said to not apply for example to subsidies or grants provided to a government or a state enterprise, including government-supported loans, guarantees and insurance; or to taxation measures aimed at ensuring the effective collection of taxes, except where this results in arbitrary discrimination.[129]

In accordance with national laws and regulations, member states may accord more favourable treatment to address the internal needs of designated disadvantaged persons,

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[126] Article 9(1) of the PAIC.
[127] Article 10(1)(2)of the PAIC.
[128] Article 10(1)(2)of the PAIC.
[129] Article 10(6)(a)(b) of the PAIC.

groups or regions. In chapter 2, it was mentioned that the South African Investment law should be understood within the context of the previous apartheid system. Having seen that the apartheid system has had an impact on other groups of people in South Africa, the need to attend to those injustices is inevitable and therefore, in doing, the government should not be subjected to international scrutiny on why foreign investors are being treated differently. The effectiveness of this can be ensured and realized through the incorporation of exceptions such as this one.

4.3.3 Expropriation and Compensation

Member states are directed not to nationalize, expropriate or subject to measures having effect equivalent to nationalization or expropriation, the investors' investments except where a public purpose related to the internal needs of that member state; on a non-discriminatory basis; against adequate compensation; and under due processes of law,[130] and the investor affected by such nationalization or expropriation as the case may be, is afforded the right under the laws of the member state expropriating, to prompt review by a judicial or other independent authority of that member state, of its case and of the valuation of its investment in accordance with the procedure established by the laws of the member state.[131]

4.3.4 Determination of the Value of Compensation

In compensating the foreign investor for any loss of their investment, the adequate compensation must be assessed in relation to the fair market value of the expropriated investment immediately before the date of expropriation and must not reflect any change in value occurring because the intended expropriation had become known earlier.[132] The calculation of compensation is important in providing the investors with the right to compensation for their losses because the relevant authority responsible for issuing such compensation needs guidelines on how such compensation, as claimed by the investor, must be calculated.

4.3.5 War and Civil Disturbance

Investors who suffer within the territory of a member state damage in relation to their investments owing to the outbreak of hostilities or a state of national emergency such as, revolt, insurrection or riot, shall be accorded treatment no less favourable than that accorded to investors of such a member state or to investors of any third country, as regards to any measure to be taken by the concerned member state including restitution, compensation or

[130] Article 11(1)(a)-(d) of the PAIC.
[131] Article 11(2) of the PAIC.
[132] Article 12(1) of the PAIC.

other valuable consideration. It is worth-noting that this provision, although not worded the same, is also available in the PIA wherein foreign investors are afforded the right to claim for compensation for the loss that came as a result of natural causes that are out of the control of the host state.

4.3.6 General Exceptions

The general exception to all of the rights discussed above is that the PAIC and all its provisions cannot prevent any member state from adopting or enforcing measures relating to the protection of human, animal or plant life or health, or to the maintenance of international peace and security, or to the protection of its national security interests, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investors in like circumstances or a disguised restriction on investment flows.[133]

Member states are not required to change nor relax their appropriate level of protection of human, animal or plant life or health in pursuit or attraction of investments. Any interested member state may request information on the reasons for the measures taken under Paragraph 1. The Member State taking such measures shall respond to the request for information within three months.

4.3.7 Transfer of Funds

Member States shall, subject to national laws, permit all transfers relating to an investment to be made freely and without delay and such transfers may include profits, capital gains, dividends, royalties, interests and other current income accruing from an investment; the proceeds of the total or partial liquidation of an investment; repayments made pursuant to a loan agreement in connection with an investment; license fees in relation to investment; payments in respect of technical assistance, technical service and management fees; payments in connection with contracting projects; earnings of nationals of a member state who work in connection with an investment in the territory of the other member state; and compensation, restitution, indemnification or other settlement pursuant to the investments. [134]

4.3.8 Exceptions to the Transfer of Funds

A Member State shall apply restrictions on international transfers of funds and payments for current transactions relating to investments made in its territory in accordance with its

[133] Article 14(1) of the PAIC.
[134] Article 15(a)-(g) of the PAIC.

taxation as well as financial laws and regulations. Exceptions to the transfer of funds are permitted under the following conditions: capital can only be transferred after a period of five years after full operation of the investment in a member state unless its national legislation provides for more favourable treatment; or proceeds of the investment can be transferred one year after the investment entered the territory of a Member State unless its national legislation provides for more favourable treatment.

A Member State may prevent a transfer in a non-discriminatory manner and in accordance with its laws relating to: bankruptcy, insolvency or other legal proceedings to protect the rights of creditors; criminal or administrative violations; or ensuring the satisfaction of judgments in adjudicatory proceedings. A Member State may adopt or maintain measures not conforming with its obligations relating to cross-border capital transactions: in the event of serious balance-of-payments and external financial difficulties or threat thereof; or in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies. Measures under paragraph 4 shall be made public, be temporary and be eliminated as soon as conditions permit. [135]

In summary, the PAIC is a classic example of the African perspective in using old tools in new ways to promote more economic nationalism and sustainable development in Africa while maintaining a balance between investors' protection and states' sovereign right to regulate.

4.4 Conclusion

South Africa adopted the large bulk of their bilateral investment treaties (BITs) in the early 1990s. Traditionally, BITs were concluded with capital exporting countries, mainly from Europe. South Africa, like many African states, hoped that the establishment of international rules to protect investment intended to ensure stability and predictability, would promote and attract foreign capital into their economies which has been proven to be both true and not.

The PAIC, which would be applicable to any investment made in AU member states, has the potential to solve the problems of legal uncertainty and fragmentation. The crucial provision on the relationship between the PAIC and other investment agreements in Africa, despite its soft language, highlights the significance of the PAIC, which would thus seek to ensure continent-wide coherence and legal certainty for the purpose of investment facilitation.

With a continent-wide instrument such as the PAIC, Africa provides its own investment rules. The PAIC contains several innovative feature in that it reformulates traditional investment

[135] Article 16 of the PAIC.

treaty language, introduces new provisions (such as unprecedented provisions on due diligence and obligations for investors in relation to human rights, corporate social responsibility, use of natural resources, and land-grabbing) and omits certain investment standards completely (for instance, there is no mention of the controversial fair and equitable treatment standard).

Although the legal nature of the PAIC is still uncertain, it might end up as a binding instrument applicable in all AU member states, as it might be adopted as a model treaty serving as a guide for individual member states' IIA negotiations. The pros and cons of these two options constitute a political question and AU member states need to decide upon the issue with their relevant stakeholders.[136]

[136] https://www.tralac.org/news/article/9927-the-quest-for-a-pan-african-investment-code-to-promote-sustainable-development.html. (accessed 28 October 2021)

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Concluding remarks

From the above discussion in the previous chapters, it is clear that the South Africa's PIA is not properly drafted and therefore, needs to be revisited so as to align with the needs of the country and to further avoid and mitigate risks that were experienced during the time of the BITs.

As a result of the conflict between the desire to attract investment and strong environmental protection, greater opening of markets to foreign direct investment "may lead to patterns of investment and production that are not desirable in that market conditions do not adequately allow for the internalization of social (including environmental) costs.

Although the PIA is not entirely faulty in its provision, it has been proven during the above discussions that it does need to be worked on extensively in order to ensure that South Africa not only protects itself from possible claims by foreign investors but to also make sure that the standard that is seen within the provisions of the PIA is in line with the standard as seen in the SADC protocol on finance and investment or that of the PAIC.

However it is important to highlight and briefly discuss some of the recommendations that the writer has found to be relevant and might be helpful in restructuring the PIA and the investment climate in South Africa.

5.2 Recommendations

5.2.1 Outlining and incorporating separate investors obligation provisions

One of the pressing issues within the provisions of the PIA was found to be the issue of having almost 1 investor obligation in the entire legislation. This can be seen from the provision on investors abiding by the host state laws in section 7. Other than this particular provision, there is no single provision that outlines the responsibility of investors towards the South African government when conducting their business within the territory of the country.

This is important because while the PIA specifically outlined the investors' rights separately and provided an in-depth meaning of each right, how it is to be implemented and effected, same was not done with the investors' obligations and this might be one of the many reasons that inform the imbalance of rights and obligations.

5.2.2 Incorporating an exception rule for each right afforded to the investor

as it was seen in the PAIC, most of the rights afforded to investors are accompanied by an exception which I believe, serves as an obligation on the investor in that whereas the

investor is aware of the rights afforded by the host state, certain instances will allow for that right to be ignored and such should not be challenged as a violation as it is justified under the law.

This recommendation is important because while the legislature might not be keen to adopt the above recommendation in 2.1, wherein each of the investor's rights are incorporated each one separately, perhaps making an exception for each of the rights that are already in the legislation would be feasible.

5.2.3 Provide a clear guideline for the calculation of compensation

The legislature highlighted in the provisions that investors are entitled to compensation for the expropriation of their property in section 10. However, the guidelines on how the relevant body must calculate such compensation is not provided and the PIA is supposed to work as a guiding principle for all matters relating to investments in South Africa, therefore it is necessary for the legislature to incorporate the guidelines on the calculations of such compensation in order to ensure effective implementation of the provision.

5.2.4 Implement the business and human rights obligation on investors

As discussed in the previous chapter, the need to ensure balance between business and human rights has been on the rise. This therefore means in order to align with the current international standards; South Africa must ensure that investors adhere to the international standard of respecting and upholding human rights when conducting their business.

5.2.5 Balance the rights and obligations of investors

In order to ensure that the legislation is as successful as it was intended to be, the legislature needs to realise that there is no need in affording investors the rights without any clear responsibility because that will be taking the country back to what it used to be in the BITs.

5.2.6 Involve the communities in the international investment negotiations

Too often, investors receive privileged treatment under international investment agreements, while people impacted by the investments suffer. The need to respect human rights as highlighted above is of paramount importance in international investment law and as such,

the people whose rights are going to be directly affected by the investments need to be consulted when decisions are being made about such investments.

The need for consulting and involving the affected communities was seen in Jamuna Project which was one of the biggest developmental projects in Bangaldesh. This project was jointly finance by the World Bank (WB), Asian Development Bank (ADB), Japan Bank for International Cooperation (JBIC) and the Government of Bangladesh (GoB), and it was considered as one of the biggest national experiences in terms of socioeconomic and environmental aspects.[137] The Jamuna River is one of the three largest rivers in Bangladesh, running from the north to the south through central Bangladesh, dividing the country into two halves: the east and the west.[138]

The Bridge was built with a view to providing the first road and rail link between the relatively less-developed Northwest region of the country and the more developed eastern part including the capital of Dhaka and the port of Chittagong. The total project cost of roughly US$960 000 000 (nine hundred and sixty million dollars).[139] The primary objective of the project was economic progress of Bangladesh.[140]

A local Non-Governmental Organisation (NGO) lodged a complaint on behalf of the people who were affected by this project. This NGO lodged a complaint on behalf of about 3000 (three thousand) people. The NGO requested an investigation of the harmful effects of the project on the livelihood and islands where its members, char dwellers, live. Some of the claims were that the char people were not included in the design and implementation of the project.[141] They claimed that the destruction of the char people was an indication that the project authority had not devised a comprehensive plan for the construction of the bridge.[142]

They further claimed that the bank had violated its own policies and procedures such as the Involuntary Resettlement Directives because the steps undertaken by the bank to ascertain the resettlement potentials only dealt with the people whose land had been acquired but did

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[137]Ghosh S and Rahman H “Revisiting Jamuna Bridge Resettlement Areas: Exploring Livelihood Status of the Affected People” BRAC Research Report,2010 P.7.
[138] Bayes A, “Impact Assessment Of Jamuna Multipurpose Bridge Project (JMBP) On Poverty Reduction” Japan Bank for International Corporation, 2007, P.6.
[139] Bayes A, “Impact Assessment Of Jamuna Multipurpose Bridge Project (JMBP) On Poverty Reduction” Japan Bank for International Corporation, 2007, P.6.
[140] Duttd B, “Social Impact Assessment On Social Change Progress: An Analysis Of The Case Of Jamuna Bridge In Bagladesh” *Bangladesh ResearchPublication Journal* (2014), Issue 3, Vol 10, P.264.
[141]https://www.inspectionpanel.org/news/world-bank-accepts-inspection-panel-recommendation-jamuna-bridge-project. (accessed 15 July 2021)
[142]https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/8-Request%20for%20Inspection%20%28English%29.pdf. (accessed 15 July 2021)

not consider the thousands of people who would be evicted from their land as a consequence of the construction of the bridge system and will be turned into environmental refugees.

Therefore, the NGO requested the Inspection Panel to undertake a thorough investigation into the matter and urged upon the inspection panel to look comprehensively into the resettlement issues of the char people.

Another example of the impacts of the non-involvement of the communities was seen in the Bujagali Hydropower Project (BHP) wherein a dam was built at the Bujagali Falls on the Nile River. The Director of the Compliance Review and Mediation Unit (BCRM) received a complaint relating to the Bujagali Projects (i.e. the BHP and BIP) by the National Association of Professional Environmentalists (NAPE). The NAPE is a Ugandan non-governmental organization (NGO). The NAPE represented also people affected by the project (PAPs) and requested a compliance review of the Bujagali Hydropower Project (BHP) and the Bujagali Interconnection Project (BIP) ("the Bujagali Projects").[143] The projects were intended to meet the energy needs of Uganda's population for social and economic development in an environmentally sustainable manner. Due to their potential negative environmental and social impacts, the projects were classified as high-risk.

The issues raised by this complaint included, *interalia*, inadequate Environmental and Social Impact Assessments (ESIAs), inadequate consultation with and compensation of the communities and people affected by the projects (PAPs), inadequate dam safety measures, and the loss of the Bujagali Falls as a spiritual and cultural heritage site.

In both these cases, it is clear that the people's consideration were not taken into account when making decisions that are going to have direct consequences on them. It is for this reason that i recommend to the legislature to make a provision in the PIA that will ensure that communities are consulted, either directly or through the NGOs.

In South Africa, the need to involve and consult with the affected communities was witnessed in the case of *Duduzile Baleni v Minister of Mineral Resources*[144] wherein the case was brought by members of the Umgungundlovu, who opposed proposed mining operations on their land and the court affirmed that the community does have the right to prohibit mining on their territory, as their customary rights to land were protected by the

[143]https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/IRM_Closure_Report_-Bujagali_Hydropower_Project_and_Bugali_Interconnection_Project-Uganda.pdf. (accessed July 5 2021)
141 Baleni and Others v Minister of Mineral Resources and Others 2019 (2) SA 453 (GP)

Interim Protection of Informal Rights to Law Act 1996 (ILIRLA). The court affirmed that when this legislation is read together with the MPRDA, and in light of the constitutional need for transformation, the law requires that the community consent before mining operations can commence on their land. Therefore, because FDIs can have an impact on some communities depending on which industry the investment is made, it would be advisable for the legislature to include a provision that highlights the importance of consulting with the communities for the purposes of investments made in terms of the PIA.

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