A Critical Analysis of the Protection of Investment Act 22 Of 2015

Lindelwa Mhlongo
https://orcid.org/0000-0002-6051-8480
LLD Candidate
Lecturer, Department of Public, Constitutional and International Law,
University of South Africa
mhlonlb@unisa.ac.za

Abstract

In 2010, South Africa reviewed its foreign investment legal framework and during this process, it terminated most of its bilateral investment treaties. For a period, there was no piece of legislation that dealt with the regulation of investment in South Africa and investors had to comply with commercial laws. To solve this problem, South Africa introduced the Investment Act in 2015 aimed at regulating both domestic and foreign investment within its territory. In light of the above, the questions central to the article are whether the Investment Act in its current form balances the rights and obligations of foreign investors and that of host states. If not, what can be added or deleted from the Investment Act in order to balance these two competing rights? The article first looks at why South Africa terminated the bilateral investment treaties. It then compares the Investment Act with the SADC FIP to ascertain if the Investment Act is aligned with the sub-regional standard of foreign investment protection. Finally, recommendations are made which include suggested amendments to improve the Investment Act.

Keywords: foreign direct investment; Investment Act; bilateral investment treaty; economic development; foreign investor

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL
Volume 34 | Number 1 | 2019 | #4190 | 22 pages

https://doi.org/10.25159/2522-6800/4190
ISSN 2219-6412 (Print) | 2522-6800 (Online)
© Unisa Press 2019

Introduction

Foreign Direct Investment (FDI), when properly regulated, can accelerate the economic growth and sustainable development of a country. However, it may also negatively affect the economy of a country. If FDI is not properly regulated, a foreign investor will be reluctant to invest in a country that does not promote and protect its interests. Therefore, FDI regulation should ideally take into account the best interests of both the host country and foreign investors. A country's national investment laws should thus be enacted in a way that protects the interests of international investors, and securing ecological sustainable development, while promoting justifiable economic and social development in the country.[1] However, striking this balance can be challenging for most host states taking into account their domestic political and economic situations while at the same time trying to fulfil their obligations to foreign investors.[2]

This article examines South Africa's Protection of Investment Act 22 of 2015[3] (the Investment Act) in relation to the regulation and protection of foreign investments within its jurisdiction. It will identify issues found in the Act which could be problematic. The article will then provide a brief overview of the regulation of FDI at the sub-regional and regional level. This overview is critical to appreciating the gaps in the Investment Act. The article then compares the Investment Act with Annex 1 of the SADC Protocol on Finance and Investment, 2006 (the SADC FIP)[4] before finally assessing the Act as a whole and making recommendations for improvement.

Contextual Framework

Bilateral Investment Treaties (BITs) play an important role in the protection of foreign investors' rights. The main purpose of BITs is to shield foreign investments from state interference and state regulation.[5] Conflicts can arise between foreign investors and the host state with regard to their respective rights and obligations. For example, economic conditions may change and alter both the feasibility and the content of existing laws and policies. Generally, investment agreements are premised on a reciprocal relationship between the contracting states, whereby they establish investments that create more favourable economic conditions in their respective countries.

The question that begs an answer is: how does one balance the scale between the rights of the host state and those of the foreign investor? Often, aligning the rights of foreign

---

1 See s 24(b) (iii) of the Constitution of the Republic of South Africa, 1996.

2 Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2012) 59.

3 The Investment Act came into operation on 13 July 2018. See Government Gazette Notice No 41766.

4 The SADC FIP was amended by the Agreement Amending Annex 1 of the Protocol on Finance and Investment in 2016.

5 Barnali Choudhury, 'Democratic Implications arising from the Intersection of Investment Arbitration and Human Rights' (2008) 46(4) The Alberta Law Review 985.

investors and those of the host state could prove to be difficult. When a developing country such as South Africa relies heavily on FDI for economic development, the rights of foreign investors cannot not be ignored. Host states allow foreign investments to improve economic development in their territory, while foreign investors invest in the host state to enhance their own competitiveness and market share. This may lead to investment disputes between the host state and the foreign investors, as seen in *Piero Foresti, Laura De Carli v Republic of South Africa*,[6] which came before the International Centre for the Settlement of Investment Disputes (ICSID)[7] in 2007. This case challenged certain provisions of the Mineral and Petroleum Resources Development Act (MPRDA).[8] The *Piero Foresti* case dealt with the mining interests owned by a group of European investors who had investments in South Africa. The proceedings were initiated under Article 8 of the Italy-South Africa BIT[9] and Article 10 of the Luxembourg-South Africa BIT, respectively.[10]

The ICSID panel could not finalise the case, because the claimants requested the respondent to consent to the discontinuation of the proceedings in accordance with Article 50 of the Additional Facility Rules.[11] The discontinuance of the case was granted. However, the case prompted South Africa to embark on an investment policy review process in 2010, with the purpose of correcting the ambiguity in the BITs. The country felt that the scope of its first-generation BITs was too wide, and that it could lead to many foreign investment disputes in future. It also realised that there was a need to limit the scope of the rights of foreign investors, while at the same time promoting foreign investments in South Africa. This was not going to be an easy task.

After the review process, South Africa made the decision to terminate the first-generation BITs with most European countries, which had previously governed their investment regimes. The first few BITs that South Africa terminated were with Germany, Switzerland, and the Netherlands. South Africa had concluded these BITs at the dawn of democracy in 1994. As at 28 March 2018, only fourteen BITs remained in force, out of the forty BITs that had been previously concluded.[12] In comparison, China, a developing country and a BRICS member with a higher Gross Domestic Product (GDP), has more than 108 BITs in place.[13] South Africa has only two BITs in place

---

6 Piero Foresti, Laura De Carli v Republic of South Africa (ICSID case No ARB (AF)/07/1).

7 The ICSID is an international institution that deals with the resolution of international investment disputes. <https://icsid.worldbank.org/apps/icsidweb/about/pages/default.aspx> accessed 23 April 2018.

8 The Mineral and Petroleum Resources Development Act 28 of 2002.

9 The Italy-South Africa Bilateral Investment Treaty, 1999.

10 The Luxembourg-South Africa Bilateral Investment Treaty, 1998.

11 Piero Foresti (n 6) 79.

12 UNCTAD, 'IIAs by Economy: South Africa' (Investment Policy Hub) <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu> accessed 28 March 2018.

13 ibid.

with the Southern African Development Community (SADC) region which has fifteen member states. It has, however, maintained the BITs with most of the BRICS countries, namely Russia, India and China; Brazil is not included.[14]

South Africa gave the following reasons for the termination of the BITs:

First, it is premised on the idea that the new investment policy framework will provide adequate protection to all investors, including foreign investors, and it will ensure that 'South Africa's constitutional obligations, like sustainable development, are upheld, while allowing government to retain the policy space to regulate in the public interest.'[15]

Second, there is no connection between the growth of the economy and the BITs, although some of these countries remain South Africa's largest trading partners.[16]

Third, these BITs were close to their termination dates and South Africa saw an opportunity to terminate them, as they would otherwise have been automatically extended in terms of their renewal clauses. For example, the South Africa-Germany BIT contains a twelve-months' notice period with a run-off protection for existing protected investments of twenty years,[17] while the South Africa-Netherlands BIT contained a six months' notice period with a ten-year automatic renewal period and a fifteen-year run-off period for investments made before the termination date.[18] The South Africa-United Kingdom Bilateral Investment Treaty (South Africa-United Kingdom BIT)[19] contained a twelve months' application period after the notice of termination and a twenty-year run-off protection period for existing investments.[20]

The supporters of the termination of the BITs were convinced that the new investment legal framework would have many positive effects. According to Carim, although BITs signalled South Africa's re-entry into the international community after years of isolation, other countries had also embarked on the investment policy review and terminated their BITs.[21] He further argued that the first-generation BITs concluded by

---

14 ibid.

15 SA Government News Agency, 'Bill to Help Modernise SA's Investment Regime: Davies' (SANews.gov.za, 4 November 2013) <http://www.sanews.gov.za/south-africa/bill-help-modernise-sas-investment-regime-davies> accessed 24 April 2017.

16 ibid.

17 Mohammed Mossallam, 'Process Matters: South Africa's Experience Exiting its BITs' (2015) The Global Economic Governance Working Paper 2015/97 13.

18 Articles 14(2) and 14(3) of the South Africa-Netherlands Bilateral Investment Treaty, 1995.

19 The South Africa-United Kingdom Bilateral Investment Treaty, 1994.

20 Article 14 of the South Africa-United Kingdom BIT.

21 Xavier Carim, 'International Investment Agreements and Africa's structural transformation: A perspective from South Africa' (South Centre, August 2015) <http://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IIAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf> accessed 6 July 2017.

South Africa were ambiguous, made for unpredictable interpretation and were inconsistent with the Constitution.[22] Another critic of the BITs opined that

> the system's unique use of private arbitration conflicts with cherished principles of judicial accountability and independence in democratic societies and this taints the integrity of the legal system by contracting out of the judicial function in public law.[23]

Mossallam stated that the bureaucrats who negotiated the first-generation BITs, were not lawyers and had little legal and technical expertise in international investment law.[24] However, the first ever BIT that South Africa concluded with Paraguay in 1974 is still in force.[25]

However, there are concerns and criticisms levelled against South Africa for terminating the majority of its BITs. First, scholars and economists are sceptical about South Africa's approach to the new investments regulation.[26] Second, foreign states and private entities are concerned that the cancellation of BITs will affect their legal rights as foreign investors, whose main concern is security of tenure for their investments. Foreign investors are usually vulnerable when governments promote policy changes that could potentially have an adverse effect on the investors' rights and legitimate expectations for their investments.[27] Although domestic laws may be amended or changed unilaterally by parliament, one party cannot change the provisions of BITs to the agreement. This is because the conclusion of BITs internationalises the legal association between the contracting states.[28]

Subedi argues that BITs ensure that regulation of investments in the host states are more transparent, stable, predictable, and secure. The European Union Chamber of Commerce (EU Chamber of Commerce) pointed out that new investment decisions to invest in South Africa were put on hold, while disinvestment decisions are next on the agenda.[29] The European Union Chamber of Commerce and Industry in South Africa stated that:

---

22 ibid.

23 Alexandra Diehl, *International Investment Law in Context* (Eleven International Publishing 2008) 9.

24 Mossallam (n 17) 8.

25 UNCTAD (n 12).

26 Peter Drape and Azwimpheleli Langalanga, 'Does the Draft Investment Bill Threaten Foreign Investors' Rights' (SAIIA, 2 April 2014) <http://www.saiia.org.za/opinion-analysis/draft-investment-bill-requires-amendment> accessed 05 July 2017.

27 ibid.

28 Hercules Booysen, *The Principles of International Trade Law as a Monistic System* (Interlegal 2003) 208.

29 EU Chamber of Commerce in South Africa, 'The Promotion and Protection of Investment Bill 2013: Submission by the EU Chamber of Commerce and Industry in Southern Africa' (Parliamentary Monitoring Group, August 2015) < http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150909EUChamber.pdf> accessed 13 July 2018.

> By limiting the rights and expectations of committed and long-term investors and the predictability of changes which may affect their investments, including expropriation, the current Bill could invariably attract short-term investors, who do not pay much attention to investment frameworks, either because of the short turnaround time of their investments, or because they enjoy other preferential arrangements.[30]

Brief Overview of the Regulation of Foreign Direct Investment at the Sub-Regional and Regional Level

South Africa does not only have to consider its national obligations; it also has commitments at sub-regional and regional level since it is part of the broader regional economic community. The question is then whether the regulation of foreign investment in South Africa aligns with the rules of regional investment laws.

In Southern Africa, the Southern African Development Community (SADC) is the most prominent regional organisation. This organisation was developed in terms of the Southern African Development Community Treaty (SADC Treaty),[31] with fifteen member states including South Africa. The purpose of the SADC Treaty is to inter alia promote the free flow of capital within the region through improving the investment climate and enhancing co-operation among contracting states.[32] This international organisation has rules by way of agreements on how the member states should act in their respective territories for the benefit of the African regional community. Article 5 of the SADC Treaty requires member states to promote and harmonise common political values, systems and other shared values for the benefit of the whole continent. When regulating in their respective territories, member states are required to take the regional agreements into account. Article 6(1) of the SADC Treaty further requires states to afford the treaty the force of national law. Article 21 of the SADC Treaty requires member states to co-operate in all areas necessary in order to foster regional development and integration on the basis of balance, equity and mutual benefit. Article 4 of the SADC Treaty requires its member states to be mindful of *inter alia* sovereign equality of all member states, human rights, democracy and the rule of law principle.

Foreign investment in the SADC region is regulated by the SADC FIP in general and the Annex 1 of the same Protocol in particular.[33] This legally binding and

---

30 ibid.

31 The Southern African Development Community Treaty <https://www.sadc.int/documents-publications/sadc-treaty/> accessed 08 February 2019.

32 The Preamble of the SADC Treaty, 1992.

33 The effect of this is that foreign investors in South Africa may invoke the SADC FIP, which allows them to have access to arbitration that it provides. This will mitigate the lack of access to arbitration in terms of the Investment Act.

internationally recognised document creates rights and obligations for all contracting states and foreign investors.[34] One of the objectives of the SADC FIP is to

> foster harmonisation of the financial and investment policies of the State Parties in order to make them consistent with objectives of SADC and ensure that any changes to financial and investment policies in one State Party do not necessitate undesirable adjustments in other State Parties.[35]

Article 2 (1) of the Annex 1 of SADC FIP requires the contracting states to promote investments in their respective territories and admit such investments in accordance with their domestic laws and regulations. Furthermore, Article 2 (2) of the Annex 1 of SADC FIP requires the host state to facilitate and create favourable conditions to attract investments in its territory through suitable administrative measures, in particular, in the matter of expeditious clearance of authorisations in accordance with its laws and regulations. [36] The expectation is that all SADC member states will eventually harmonise their structures and policies under the banner of the African Union (AU), and then achieve continental integration in Africa.[37]

One of the challenges facing the SADC region are institutional weaknesses such as lack of policy direction, duplication, poor policy coordination and different levels of judicial activism.[38]

The Common Market for Eastern and Southern Africa -East African Community-SADC Tripartite Agreement (COMESA-EAC-SADC Tripartite Agreement) also advocates for the harmonising of programmes and policies within and between the three Regional Economic Communities of COMESA, EAC and SADC, and to advance their establishment on interpretation and application.[39] The COMSA-EAC-SADC Tripartite Agreement also allows for an investment protocol in Article 36. Article 14 of the COMESA-EAC-SADC Tripartite Agreement requires member states to design and

---

34 Tinashe Kondo, 'A Comparison with Analysis of the SADC FIP Before and After its Amendment' (2017) Potchefstroom Electronic LJ 20.

35 Article 2 of the SADC Protocol on Finance and Investment.

36 Article 2 of the Agreement Amending Annex 1 of the Protocol on Finance and Investment.

37 Lawrence Ngobeni and Babatunde Fagbayibo, 'The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and Opportunities for Effective Harmonisation' (2015) 19 Law, Democracy and Development 186.

38 Zolomphi Nkowani, 'Making Haste Slow: Harmonization of Economic Laws in the SADC Region and the Impact of the Proposed Tripartite Free Trade Area (T-FTA) for SADC, COMESA and EAC' (Academia) <http://www.academia.edu/8059944/making_haste_slow_harmonization_of_economic_laws_in_the_sadc_region_and_the_impact_of_the_proposed_tripartite_free_trade_area_t-fta_for_sadc_comesa_and_eac> accessed date 11 July 2018.

39 Mark Pearson, 'Trade Facilitation in the COMESA-EAC-SADC Tripartite Free Trade Area' (TRALAC, 21 September 2011) <https://www.tralac.org/publications/article/4220-trade-facilitation-in-the-comesa-eac-sadc-tripartite-free-trade-area.html> accessed 11 July 2018.

standardise their trade and customs, documentation and information in accordance with internationally accepted standards.

The newly signed agreement establishing the African Continental Free Trade Area agreement[40] (AfCTA Agreement) is also aimed at creating 'a single continental market for goods and services, with free movement of business persons and investments, and thus paves the way for accelerating the establishment of the Customs Union'.[41]

The sub-regional and continental integration developments outlined above may in future impact on the regulation of investment at the domestic level. These investment agreements either contain protocols or intend to include protocols in future, which are likely apply at member state level, thereby replacing domestic law.

Comparing the Protection of Foreign Investment Act of 2015 and the Agreement Amending Annex 1 of the SADC Protocol on Finance and Investment, 2016

Definition of an Investment

The definition clause is an important clause in investment policies and agreements. The importance of the definition of an investment was alluded by the United Nations Conference on Trade and Development (UNCTAD). The UNCTAD stated that the definition of investment is aligned with the scope of application of rights and obligations of investment agreements, and with the establishment of the jurisdiction of investment treaty-based arbitral Tribunals.[42] Both the Annex 1 of SADC FIP and the Investment Act contain similar definitions of an investment, the only difference is that in terms of the Investment Act, the enterprise must be lawfully established, acquired or expanded in South Africa.[43] This restriction is important in a developing country context of the SADC, where the thrust should be towards sustainable development and investment.[44]

The Right to Regulate

The right of the host state to regulate FDI within its territory is both important and challenging. States generally have a sovereign right to regulate within their respective borders. However, with regard to foreign investments, there must be a balance between investor protection and the host state's right to regulate within its own territory. In the

---

40 The AfCTA agreement provides for an investment protocol, which will be finalised by 2020.

41 TRALAC, 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' (Trade Law Centre, May 2018) < https://www.tralac.org/resources/by-region/cfta.html> accessed 11 July 2018.

42 UN, 'Scope and Definition UNCTAD Series on Issues in International Investment Agreements II' <https://unctad.org/en/Docs/diaeia20102_en.pdf> accessed 8 February 2019.

43 See generally Article 1 of the Annex 1 of the SADC FIP and Section 1 of the Investment Act.

44 Kondo (n 35) 8.

ADC Affiliate Limited and ADMC Management Limited v Republic of Hungary[45] case, the court noted that states have an inherent right to regulate, subject to limitations.[46] The question then is: how can the host state balance these two competing interests? The SADC Model BIT Template provides that states can impose special exceptions, such as ensuring that foreign investments are legally constituted under domestic law.[47] Section 12 of the Investment Act grants the government or any organ of state certain powers, for example, the power to redress historical, social and economic inequalities and injustices;[48] to uphold the values, principles and rights contained in the Constitution;[49] and promote and preserve cultural heritage and practices, indigenous knowledge and applicable biological resources or national heritage.[50] Furthermore, the Investment Act grants South Africa powers to regulate in the public interest.[51]

The above provision is unclear and vague. The difficulty with the above is that the scope of public interest as a regulatory interest is not adequately captured. It is not enough to refer to the right to regulate in the public interest, as this does not narrow the possible meanings of public interest.[52] Host states can impose special exceptions, such as those ensuring that foreign investments are legally constituted under domestic law in order to balance these competing interests. Such provision balances investor protection and the right to regulate. Article 14 of the Annex 1 of SADC FIP affords member states the right to regulate in the public interest. However, Article 14 of Annex 1 of SADC FIP further qualifies this right by requiring the host state to adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activities are undertaken in a manner sensitive to health, safety, or environmental concerns.

Establishment of Investment

Subject to admission rules in international agreements and customary international law, host states have the right to control entry and establishment of foreign investment in their territories[53] as part of their sovereign prerogative.[54] However, states have moved towards unilateral liberalisation of the entry conditions for foreign investors, through international investment agreements. According to these agreements, host states are

45 *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary* (ICSID Case No ARB/03/16).
46 ibid.
47 Article 4(5) of the SADC Model BIT Template.
48 Section 12(1)(a) of the Investment Act.
49 Section 12(1)(b) of the Investment Act.
50 Section 12(1)(d) of the Investment Act.
51 The Preamble of the Investment Act.
52 Kondo (n 35) 21.
53 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2004) 233.
54 Sornarajah (n 54) 310.

bound to provide entry conditions that give foreign investors the predictability and security they seek.[55]

The establishment of investments is dealt with in section 7 of the Investment Act and provides that all investments must be established in compliance with the laws of South Africa. Section 7(2) further provides that the Investment Act does not create a right for a foreign investor or prospective foreign investor to establish an investment in South Africa. Therefore, South Africa has no obligation to establish investments for foreign investors or prospective foreign investors. This is a necessary restriction, because South Africa will have the ultimate control over the regulation of the investment environment.

Fair and Equitable Treatment (FET)

This principle requires foreign investors to be treated equally within the realm of international law.[56] The host state is required to treat foreign investors of the contracting states in a fair and equitable manner. The importance of the FET standard was reaffirmed in the case of *Oil Platforms (Islamic Republic of Iran v United Stated of America).*[57] The general effect of this principle is that states cannot discriminate against investors on the basis of their nationality, with the exception of national treatment and most-favoured nation (MFN) treatment standards.[58] The FET principle brings in the elements of fairness and equity drawn from customary international law.[59] It is, however, not clear what constitutes FET and appears that it would be dependent on the circumstances of each case.[60] Furthermore, the precise meaning of the terms 'fair and equitable' is controversial.[61] In the *Asian Agricultural Products Ltd v Republic of Sri Lanka*[62] case, the connection of 'fair and equitable treatment' with 'full protection and security' was noted and each connotes the same level of treatment. Both the Investment Act and the Annex 1 of SADC FIP provide for the national treatment standard but does not cover the MNF.[63]

While the Investment Act does not provide for the MNF, it does make reference to a similar principle, that of fair administrative treatment. The Investment Act reads:

> 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

---

55 ibid.

56 Marianne Chow, 'Discriminatory Equality v Nondiscriminatory Inequality: The Legitimacy of South Africa's Affirmative Action Policies under International Law' (2009) 24 The Connecticut Journal of International Law 306.

57 Oil Platforms (Islamic Republic of Iran v United States of America) ICJ Reports 2003 161.

58 ibid.

59 Subedi (n 2) 57.

60 Hennie Strydom (ed), *International Law* (OUP 2016) 485.

61 ibid.

62 *Asian Agricultural Products Ltd v Republic of Sri Lanka* (ICSID case No ARB/87/3).

63 National treatment is dealt with later in this article.

justice to investors in respect of their investments as provided for in the Constitution and applicable legislation.[64]

This provision is problematic for the following reasons:

1. Although it affords foreign investors administrative, legislative and judicial processes that are not detrimental to their investments, the protection is provided in accordance with the Constitution and domestic legislation. What happens when international investment law and customary international law afford foreign investors more protection than the domestic law? A more desirable position would be where foreign investors are afforded the discretion to choose the processes that will apply to them and their investments.

2. This principle may also have challenges with interpretation at regional tribunals. The challenges caused by the application of different laws at the domestic and regional level was highlighted by Ngobeni and Fagbayibo. In this regard, they argue that possible challenges are caused by the fact that some SADC states are also members of other regional economic bodies.[65] This may cause a conflict, if domestic law/policies differ from what is prescribed at regional level.[66]

Article 6 of the Annex 1 of SADC FIP provides that investments and investors 'shall enjoy fair and equitable treatment in the territory of any member state'. The Annex 1 of SADC FIP limits this right by allowing contracting states to grant preferential treatment to qualifying investments and investors, in order to achieve national development objectives. However, Annex 1 of SADC FIP also realises the need to eventually harmonise respective domestic policies and legislation with the spirit of non-discrimination.[67] Article 19 of the Annex 1 of SADC FIP requires member states to harmonise investment regimes including policies, laws, and practices, in accordance with the best practices within the overall strategy towards regional integration.

Legal Protection of Investment

While the Investment Act distinguishes between physical security and the legal protection of investment, this article addresses both of these terms under one heading. Foreign investment is generally protected after its establishment. Establishment of investment qualifies a foreign investor a right to be protected by allowing the

64 Section 6(1) of the Investment Act.
65 Ngobeni and Fagbayibo (n 38) 186.
66 ibid.
67 Article 7 of the Annex 1 of SADC FIP.

contracting parties to provide privileges. Foreign investments are protected by means of international investment agreements and customary international law.[68]

The Investment Act accords foreign investors protection in accordance with section 25 of the Constitution of the Republic of South Africa, 1996 (the Constitution).[69] Foreign investments are further afforded a level of physical security, as may be generally provided to domestic investors in accordance with the minimum standards of customary international law and subject to available resources and capacity.[70] This provision is vague, as the scope of the protection is not clearly defined, and there are many inconsistencies between the Investment Act and customary international law. Dugard argues that if a state arbitrarily confiscates the property of 'aliens' without paying them compensation, it is liable for the violation of the international minimum standard.[71] How can the physical security protection afforded to foreign investors be equal to domestic investors when the same Investment Act also allows for historically disadvantaged persons a higher level of protection? This is one of the areas where the Investment Act can provide equal protection to foreign investment without qualification. The Investment Act aims to provide a 'physical' protection but not necessarily a legal protection.

In the same breath, this provision may lead to conflicts between the domestic law and international investment law. South African law is generally subject to the Constitution.[72] The Constitution states that any law or conduct that is inconsistent with it, is invalid.[73] This means that the validity of international investment law is not measured against the rules of traditional customary law, but by the Constitution. Therefore, it will be difficult for foreign investors to invoke this provision for the protection of their investments in practice.

While the Investment Act does not include an expropriation clause, it allows the government to take any measures, in accordance with the Constitution and legislation, to redress historical inequalities, to uphold the values and principles of the Constitution, to promote cultural heritage, to foster economic development and to protect the environment. The right to expropriation is directly linked to the right to regulate. It is also important to note that the exercise of the right to regulate may result in direct or indirect expropriation. For instance, the Tribunal in *Desarrollo de Santa Elena S.A. v*

---

68 Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law: A Handbook* (CH Beck, Hart, Nomos, Baden-Baden, 2015) 65.

69 Please note that there is currently an ongoing debate regarding compensation for expropriation. This means that the Constitution may be amended, if it is concluded that expropriation should be without compensation. This topic is beyond the scope of this article.

70 Section 9 of the Investment Act.

71 John Dugard, *International law: A South African Perspective* (Juta 2011) 303.

72 Section 2 of the Constitution.

73 ibid.

The Republic of Costa Rica[74] had to make a determination on indirect expropriation and state regulation for the public purpose of protecting the environment. In reaching a decision, the Tribunal noted that despite the fact that the expropriation had been done for the legitimate purpose of regulating the protection of environment, this did not absolve the government from paying compensation.[75]

The Investment Act has also done away with the repatriation clause. This was done even though the SADC Model BIT Template provides for the repatriation of investments in Article 8,[76] and is also provided for in Article 9 of the Annex 1 of SADC FIP, which requires contracting states to 'ensure that investors are allowed facilities in relation to repatriation of investment and returns.' Article 5 of the same Annex prohibits states from nationalising or expropriating foreign investment in the territory of the contracting states 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.

National Treatment

The right to equality forms the basis of South Africa's Constitution. It also forms part of the founding values of the Constitution. Section 9 of the Constitution states that 'everyone' is equal before the law and has a right to enjoy full and equal protection of the law. The term 'everyone' includes all persons or entities. Furthermore, the equality clause attempts to undo the social structure that oppressed black Africans during the pre-democratic era, by precluding discrimination based on the grounds mentioned in section 9(3) of the Constitution.

The national treatment principle is one of the principles of international minimum standard of treatment and ensures that the playing field, among investors, is level. Similar to the equality clause found in South Africa's Constitution, it prohibits host states from treating a foreign investor less favourably than a domestic investor. The national treatment acts as a 'watch-dog' by preventing discrimination on the basis of nationality. This principle however, does not affect the internal economic policies of host states, for example, whether it liberalises or not certain economic sectors.[77]

The Investment Act includes a national treatment standard, although its scope is limited. In terms of section 8(1) foreign investors and their investments must not be treated less favourably than domestic investors in 'like circumstances'. In this instance, the principle of equality is recognised. This may include the treatment of a foreign investor with

---

74 *Compania del Desarrollo de Santa Elena S.A. v The Republic of Costa Rica* (ICSID Case No ARB/96/1).

75 ibid.

76 The SADC Model BIT Template was promulgated in 2012, meaning it was already in existence when the Investment Act was enacted.

77 Kondo (n 35) 12.

respect to establishment, management, acquisition, expansion, conduct and/or operation.[78]

BITs operate on the basis of an agreement that there will be equal treatment between the contracting states within the investment relationship. The wording 'not be treated less favourably than South African investors' is further qualified by the words in 'like circumstances'. This means that South Africa will take into account its circumstances, leaving little room for foreign investor interests. 'Like circumstances' means the requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment. It is clear from the above exceptions that they apply to foreign investors only, and that the right to a national treatment is not absolute. The Investment Act does not define the term 'like circumstances' except that each case should be judged by its own merits. Furthermore, even though in theory, it appears as if the 'like circumstances' is a good concept, it is problematic because practically speaking a foreign investor will never be in 'like circumstances' with domestic investors.

For example, a domestic investor and a foreign investor, who both invested in the same South African mining company, which in theory qualify as 'like circumstances' do not have equal rights, because the domestic investor has by virtue of nationality more rights. This is because there are certain benefits that are afforded only to domestic investors, by virtue of the fact that they form part of the categories of legal persons who are entitled to certain benefits. An example of such persons will be the historically disadvantaged persons in South Africa.

Even though the scope of the application of the national treatment is limited in terms of the Investment Act, it is wider than the protection provided for by the Annex 1 of SADC FIP. The Annex does not provide national treatment of foreign investors in the host state. In fact, it grants the member states powers to grant preferential treatment to qualifying investments and investors, in order to achieve national development objectives.[79]

Dispute Resolution

Section 13 of the Investment Act deals with dispute resolution. The Investment Act grants an aggrieved foreign investor a right to approach the DTI for the facilitation of a resolution by appointing a mediator. In this regard, any domestic competent court, independent Tribunal or statutory body has jurisdiction.[80] The foreign investor may utilise state-to-state international arbitration after the exhaustion of domestic remedies and only if the government consents to such arbitration.[81] In the *Mike Campbell (Pvt)*

78 Subedi (n 2) 98.
79 Article 7 of the SADC FIP.
80 Section 13(4) of the Investment Act.
81 Section 13(5) of the Investment Act.

Ltd v Republic of Zimbabwe[82] case, the court held that the exhaustion of local remedies will not be required if the municipal law does not offer any remedy or when the remedy offered is ineffective.[83]

The Investment Act only provides for the possibility of state-to-state arbitration, and not the traditional investor-state arbitration. Article 28 of the Annex 1 of SADC FIP makes provision for the investor-state dispute settlement after the local remedies have been exhausted, and the matter has not been resolved amicably. In such cases, the dispute may be resolved by the SADC Tribunal,[84] ICSID, or the United Nations Commission on International Trade Law (UNCITRAL), if one of the parties so elects.

Although, generally, international law does not preclude the exhaustion of internal remedies,[85] a dispute resolution process may be too expensive for foreign investors because they will have to seek domestic remedies first before they can take a dispute to international arbitration. Foreign investors generally favour investor-state dispute settlement panels that remove disputes from the host state's political and legal systems. This in turn offers the prospect of a neutral and impartial hearing. The Investment Act primarily emphasises municipal dispute resolution over international arbitration.[86]

Furthermore, the aggrieved foreign investor may only approach an international arbitration tribunal if the government consents to such arbitration. What happens if the government withholds its consent unreasonably? Furthermore, because of the nature of state-to-state arbitration, a foreign investor's government would also have to consent to take up the matter on behalf of the investor.

The lack of recourse in the case of investor-state dispute settlement in the form of international arbitration as a primary option is one of the main concerns for foreign investors. In order to increase the protection of foreign investment, domestic courts of contracting states 'should ideally be placed in such a position that those investors who cannot access international arbitration via BITS or investment agreements will have confidence in them.'[87] Rob Davies, the South African Minister of the Department of Trade and Industry (DTI), and a strong supporter of the Investment Act, states that doing away with international arbitration will increase the protection of investors and the

---

82 *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* [2008] SADCT 2 (28 November 2008).

83 ibid.

84 In March 2018, the High Court declared the president's participation in the suspension of the operation of the SADC Tribunal and the citizens' right to take the disputes to the Tribunal unlawful, irrational and unconstitutional.

85 This was part of customary international law prior to BITs taking over.

86 Section 13 (1)-(4) of the Investment Act.

87 Ngobeni and Fagbayibo (n 38).

economy.[88] Furthermore, he argues that it will be easier to predict the outcome of a dispute as South African courts will have, most likely, dealt with the same or very similar situations domestically and pronounced on such situations. This will lead to certainty within the dispute-resolution setting.[89] However, with so many factors detracting from investment in South Africa, the lack of international arbitration may add to these factors.[90]

The dispute resolution option in terms of international law depends on whether the matter is between foreign investors, or between the state and a private investor. If the matter is between private investors, they can either take the matter on review through international arbitration or diplomatic channels.[91] With regard to investor-state dispute settlement, the parties to the dispute can either take the matter to international arbitration, the ICSID, or the International Chamber of Commerce (ICC).[92]

The Investment Act generally limits the rights of foreign investors despite the fact that these rights are standard at international level in terms of BITs. An example of the limited rights available is the right of a foreign investor to choose the institution and the law that will be applicable in the case of a dispute. At international law level, the parties to a dispute have the autonomy to choose either the domestic laws of the host state or the law of another state or international law.

Foreign investors are vulnerable when governments promote policy changes that could potentially have an adverse effect on the rights and legitimate expectations they have with regard to their foreign investments.[93] South Africa has a constitutional obligation to promote sustainable economic development and promote Black Economic Empowerment.[94] Domestic laws may be amended or changed unilaterally by the parliament if it will be in the best interest of society to do so, which may in turn negatively impact foreign investors.

Conclusion and Recommendations

South Africa has come a long way since the birth of democracy in 1994. It has actively been developing its laws in many different areas. However, the country has not yet

88 Stephen Hurt, 'Why South Africa is Cancelling Foreign Investment Deals' (Economy Watch, 2 January 2014) <http://www.economywatch.com/features/south-africa-cancelling-foreign-investment.02-01.html> accessed 23 October 2015.

89 ibid.

90 Section 13 of the Investment Act.

91 See s 11 of the Investment Bill.

92 The ICC is an institution that promotes international trade and investment while helping business to meet the challenges of globalisation.

93 Lindelwa Mhlongo, 'The Effect and Impact of National Law and International Law on Foreign Investment in South Africa' (LLM Dissertation, University of South Africa 2017) 6.

94 Section 9(2) of the Constitution and the preamble of the Broad-Based Black Economic Empowerment Act 53 of 2003.

achieved economic freedom and stability, and a lot still needs to be done. At present, the country is experiencing low economic growth rates as compared to other emerging economies. Despite twenty-five years of democracy, South Africa it is still a developing nation and so are its laws. For this reason, it is imperative that South Africa increase its international relations with other countries in order to handle economic challenges better.

To some extent, South Africa has recognised this shortcoming and has attempted to remedy this through the enactment of the Investment Act which was aimed at regulating foreign investment in South Africa. However, there are many loopholes in the Investment Act that need to be addressed in order to make it attractive to foreign investors. The rationale for the Investment Act was a good one, namely, to provide a more sophisticated regime for investments, which would, in turn, attract more foreign investment. However, in its current form, the country may struggle to achieve these goals. The loopholes found in the Act as well as in other legislation and policies need to be addressed so that the country's stance on the treatment of foreign investors will align with international minimum standards.

The rights of foreign investors from start to end has to be clearly defined. At present, the South African government has introduced legislations such as the MPRDA,[95] the Labour Relations Act,[96] the BBBEEA and the land reform process, placing its domestic interests first to the detriment of foreign investors. The rationale behind these policies may be good in principle, but it is doubtful whether South Africa is in a strong enough bargaining position to be alienating foreign investors.[97]

Prior to the introduction of the Investment Act, South Africa did not have legislation that dealt with investment in general, and FDI in particular. Therefore, its promulgation was definitely a positive initiative for the regulation of investments. The new investment policy regimes have the potential to ensure that South Africa regains its status as an investment-friendly jurisdiction. It is currently too early to determine the long-term effects of the Act on investments because these effects are yet to be tested. However, it would seem that the Act in its current form does not offer foreign investors much protection. Therefore, the problem is no longer that FDI is not regulated nationally, but rather that the extent of the protections afforded by the Act is limited.

The Investment Act was promulgated without major amendments, even though it received a lot of negative feedback from the international investment community and many national stakeholders. The Act contains only two of the five common provisions

---

95 Section 6-8 of the MPRDA.

96 Labour Relations Act 66 of 1995.

97 Amy Farish, 'Protection of Investments Act – A Balancing Act Between Policies and Investments' (De Rebus 25 April 2016) <http://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/> accessed 11 July 2018.

of BITs, namely, the national treatment and dispute resolution. The Act seems to be more favourable to domestic investors, even though it references both domestic and foreign investors within its definition of an investment.

To improve application of the Investment Act and to bring it in line with other regional regulations which South Africa has signed, it is recommended that the following amendments be effected:

1. A repatriation clause be added to the Investment Act. In terms of this clause, foreign investors will have the right of transfer of and returns on their investments. This will provide clear assurance that capital relating to investments and returns can be repatriated, so that the investors do not lose their basic rights.
2. The term 'public interest' be defined. The definition should contain non-exhaustive factors to determine whether there is a genuine public interest. It should *inter alia* contain the nature and degree of the right affected, and the consequences of the infringement of the right. The court in *Ferreira v Levin*[98] held that the following factors may be used to determine the scope and application of the public interest principle: the range of persons or groups who may be directly or indirectly affected by the act or conduct.[99]

3. The Act should contain an investor-state dispute settlement mechanism, which can be used as a last resort after the exhaustion of domestic remedies. If this is done, access to justice will be improved significantly because it will enable foreign investors to enforce the host state's obligations directly against the state, in spite of the fact that there are no direct agreements between the host state and the investor.[100]

4. The Act should be amended to include a prescription clause for the completion of litigation/arbitration. At present, it only contains a prescription timeframe for the commencement of litigation. The amended prescription clause will provide clarity as to when matters may be taken to international arbitration.

5. The Investment Act should contain a publication clause in terms of which an intention to litigate will be published in some form of media. Such publication will alert the general public of the pending arbitration and will allow any person who has an interest in the matter to be part of the proceedings.

6. The Investment Act should be amended to include a liability clause for both the investor and the host state. A party who institutes an action against the other will

98 *Ferreira v Levin NO* 1996 (1) SA 984 (CC).

99 ibid.

100 Sarah McKenzie, 'Resolving the Conflict Between the Protection of International Investments and the State's Right and Responsibility to Regulate' (LLM Dissertation, University of the Witwatersrand 2017) 36–37.

first have to establish a '*prima facie* liability' of the other party. This would entail providing grounds in which the claim is based.

As Gray-Parker rightly said, 'While seemingly noble in the country's intent to improve economic development, like so many things, the devil is arguably in the detail.'[101]

[101] Jackie Gray-Parker, 'Why You Should be Concerned by the Expropriation Bill?' (Private Property, 25 May 2016) <http://www.privateproperty.co.za/advice/news/articles/why-you-should-be-concerned-by-the-expropriation-bill/4573 > accessed 12 December 2016.

References

Booysen H, *The Principles of International Trade Law as a Monistic System* (Interlegal 2003).

Bungenberg M, Griebel J, Hobe S and Reinisch A (eds), *International Investment Law: A Handbook* (CH Beck, Hart, Nomos, Baden-Baden, 2015). https://doi.org/10.5771/9783845258997

Carim X, 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' (South Centre, August 2015) <http://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IIAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf> accessed 6 July 2017.

Choudhury B, 'Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights' (2009) 46(4) Alberta Law Review 983–1008. https://doi.org/10.29173/alr213

Chow MW, 'Discriminatory Equality v Nondiscriminatory Inequality: The Legitimacy of South Africa's Affirmative Action Policies Under International Law' (2009) 24 The Connecticut Journal of International Law 292–379.

Diehl A, *International Investment Law in Context* (Eleven International Publishing 2008).

Drape P and Langalanga P, 'Does the Draft Investment Bill Threaten Foreign Investors' Rights' (SAIIA, 2 April 2014) <http://www.saiia.org.za/opinion-analysis/draft-investment-bill-requires-amendment> accessed 5 July 2017.

Dugard J, *International Law: A South African Perspective* (Juta 2011).

EU Chamber of Commerce in South Africa, 'The Promotion and Protection of Investment Bill 2013: Submission by the EU Chamber of Commerce and Industry in Southern Africa' (Parliamentary Monitoring Group, August 2015) <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150909EUChamber.pdf> accessed 13 July 2018.

Farish A, 'Protection of Investments Act – A Balancing Act Between Policies and Investments' (De Rebus, 25 April 2016) <http://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/> accessed 11 July 2018.

Gray-Parker J, 'Why You Should be Concerned by the Expropriation Bill?' (Private Property, 25 May 2016) <http://www.privateproperty.co.za/advice/news/articles/why-you-should-be-concerned-by-the-expropriation-bill/4573> accessed 12 December 2016.

Kondo T, 'A Comparison with Analysis of the SADC FIP Before and After its Amendment' (2017) 20 PELJ 1–47. https://doi.org/10.17159/1727-3781/2017/v20i0a1676

McKenzie S, ‘Resolving the Conflict Between the Protection of International Investments and the State’s Right and Responsibility to Regulate’ (LLM Thesis, University of the Witwatersrand Dissertation 2017).

Mossallam M, ‘Process Matters: South Africa’s Experience Exiting its BITs’ (2015) The Global Economic Governance Working Paper 2015/97. https://doi.org/10.2139/ssrn.2562417

Ngobeni L and Fagbayibo B, ‘The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and Opportunities for Effective Harmonisation’ (2015) 19 Law Democracy and Development 175–192. https://doi.org/10.4314/ldd.v19i1.9

Nkowani Z, ‘Making Haste Slow: Harmonization of Economic Laws in the SADC Region and the Impact of the Proposed Tripartite Free Trade Area (T-FTA) for SADC, COMESA and EAC’ (Academia) <http://www.academia.edu/8059944/> making_haste_slow_harmonization_of_economic_laws_in_the_sadc_region_and_the_impact_of_the_proposed_tripartite_free_trade_area_t-fta_for_sadc_comesa_and_eac > accessed 11 July 2018.

Pearson M, ‘Trade Facilitation in the COMESA-EAC-SADC Tripartite Free Trade Area’ (TRALAC, 21 September 2011) <https://www.tralac.org/publications/article/4220-trade-facilitation-in-the-comesa-eac-sadc-tripartite-free-trade-area.html> accessed 11 July 2018.

Strydom H (ed), *International Law* (Oxford University Press 2016).

Sornarajah M, *The International Law on Foreign Investment* (Cambridge University Press 2004). https://doi.org/10.1017/CBO9780511617027

Subedi S, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2012).

TRALAC, ‘African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents’(TRALAC) <https://www.tralac.org/resources/by-region/cfta.html> accessed 11 July 2018.

UNCTAD, ‘IIAs by Economy: South Africa’ (Investment Policy Hub) <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu> accessed 28 March 2018.

UN ‘Scope and definition UNCTAD Series on Issues in International Investment Agreements II’ <https://unctad.org/en/Docs/diaeia20102_en.pdf> accessed 8 February 2019.

Legislation

African Continental Free Trade Area Agreement, 2018.

Broad–Based Black Economic Empowerment Act 53 of 2003.

Common Market for Eastern and Southern Africa - East African Community - Southern African Development Community Tripartite Agreement, 2015.

Constitution of South Africa, 1996.

Italy-South Africa Bilateral Investment Treaty, 1999.

Labour Relations Act 66 of 1995.

Luxembourg- South Africa Bilateral Investment Treaty.

Mineral and Petroleum Resources Development Act 49 of 2002.

Promotion and Protection of Investment Bill, 2013.

Protection of Investment Act 22 of 2015.

South Africa-Netherlands Bilateral Investment Treaty, 1995.

South Africa-United Kingdom Bilateral Investment Treaty, 1994.

Southern African Development Community Bilateral Investment Treaty Model Template, 2015.

Southern African Development Community Protocol on Finance and Investment, 2016.

Southern African Development Community Treaty, 1992.

Cases

ADC Affiliate Limited and ADMC Management Limited v The Republic of Hungary (ICSID Case No ARB/03/16).

Asian Agricultural Products Ltd v Republic of Sri Lanka (ICSID case No ARB/87/3).

Compania del Desarrollo de Santa Elena S.A. v The Republic of Costa Rica (ICSID Case No ARB/96/1).

Ferreira v Levin NO 1996 (1) SA 984 (CC).

Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe [2008] SADCT 2 (28 November 2008)

Oil Platforms (Islamic Republic of Iran v United States of America) ICJ Reports 2003 161.
Piero Foresti, Laura De Carli v Republic of South Africa (ICSID case No ARB (AF)/07/1).