SOUTH AFRICA’S NEW BILATERAL INVESTMENT TREATY POLICY: A REASONABLE RESPONSE TO A FLAWED REGIME?

by

Tania Steenkamp

B.Com (Law) (cum laude), North West University (South Africa), 2001
LLB (cum laude), North West University (South Africa), 2003
LLM, North West University (South Africa), 2007

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Abstract

In 2010 South Africa officially adopted a new Bilateral Investment Treaty Policy. The new policy brought to an end a policy review process that was initiated following an investor-State arbitration concerning legislation introduced in the South African mining sector, aimed at promoting equality in South African society, which allegedly breached South Africa’s international obligations in terms of the country’s Bilateral Investment Treaties with Italy and the Belgo-Luxemburg Economic Union respectively.

South Africa’s new policy was introduced in the wake of various concerns that have been raised against the investment law regime, specifically with regard to the way in which earlier Bilateral Investment Treaties limited a State’s right to regulate, which could, in turn, negatively impact on a State’s right to development. One of the main limitations on a State’s right to regulate is the overly expansive application of the provision prohibiting expropriation of investments of foreign investors. If applied to any form of taking, including takings resulting from proportional and non-discriminatory regulatory measures that are in the public interest, States face the risk of their actions being challenged in investor-State arbitration. If such an arbitration tribunal finds the disputed regulatory measures to violate a State’s international obligations, States who have not drafted their Bilateral Investment Treaties carefully, will be forced to pay compensation to the investor based solely on the market value of the investment in terms of the standard of paying prompt, adequate and effective compensation.

This thesis considers South Africa’s new policy against the background of these concerns. It focuses specifically on the standard for expropriation, the standard of
compensation for expropriation and the role of investor-State arbitration in investment law. South Africa’s policy is placed in context through consideration of the Bilateral Investment Treaty policies of Canada and Brazil. Finally, through a study of various treaty models, the thesis considers ways in which these potentially problematic provisions could be drafted to address the concerns raised by South Africa. The thesis concludes that, despite legitimate concerns about the implementation of South Africa’s new policy, the policy itself is reasonable and appropriate in light of the country’s domestic priorities.
Preface

This thesis is the original, unpublished and independent work of Tania Steenkamp.

During the preparation of this thesis, the author was on sabbatical from her position with the South African Department of International Relations and Cooperation. The views expressed in this thesis are the author’s own and do not necessarily reflect the views of the South African government.

The documents relied on for the thesis are all publicly available. The author did not draw from any confidential sources or information regarding the position or decisions of the South African government.
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I am thankful to colleagues and friends who have been generous with their time and advice on my research. Specifically Prof Erika de Wet, who took the time to read and comment on my research proposal and Adv Andre Stemmet who willingly read and commented on early drafts of some of the chapters.

To my supervisor, Prof Ljiljana Biukovic, and my second reader, Prof Karin Mickelson, thank you for always making time to consider my work despite your busy schedules, and thank you for pushing me to continuously improve on my work.

Finally, a special thanks to the Law Foundation of British Columbia, the Law Faculty and the Faculty of Graduate Studies of the University of British Columbia, without whose financial support it would have been much more complicated to complete my studies.
Dedication

To my husband.
Chapter 1: Introduction

1.1 Overview

The protection of foreign investment by way of Bilateral Investment Treaties ("BITs") has been described as one of the great international legal success stories.¹ The first modern BIT was entered into between Germany and Pakistan in 1959.² Since then, the number of BITS in force globally has proliferated and currently exceeds 2700 in total.³ But as BITs proliferated, certain areas of concern with BITs themselves, as well as with the investment law and investment dispute resolution system that BITs established, became apparent.

From the point of view of developing or capital importing States, BITs are concluded for two main objectives, namely to promote and to protect foreign direct investment ("FDI").⁴ But some States have started to question whether BITs actually achieve these objectives. States have started to identify issues in the investment law regime and in BITs that needed to be addressed. The issues are wide-ranging in scope, including normative matters, concerns about the legitimacy of the regime, and concerns about transparency of the arbitral

³ ibid.
process. Some specific concerns that are frequently voiced are that BITs follow an outdated model that may not actually promote sustainable development in countries seeking investors, that BITs limit a State’s ability to regulate in the best interest of its citizens, that there is no clear link between BITs and increased FDI, that BIT language are interpreted expansively to prioritize the economic interest of transnational organizations over the interest of States, that different arbitral tribunals may apply the same investment law standards in very different ways due to the lack of a precedent system in international arbitration, that arbitrators may not always be neutral as a result of their appointment by the

5 These concerns are considered in Chapter 3.
6 As further explained in Chapter 5, the term “sustainable development” is used in this thesis to mean “the need to promote investment not only for economic growth as such, but for growth that benefits all, including the poorest”.
10 van Harten et al, supra note 8.
parties to the dispute,\textsuperscript{12} and that there is no meaningful way in which arbitration awards may be appealed.\textsuperscript{13}

South Africa’s experience with BITs and investment arbitration serves to illustrate the tensions in this field of law. South Africa re-entered the international community following the unbanning of the African National Congress (“ANC”) and the release of Nelson Mandela from prison in 1990 and, following its suspension from the United Nations as a result of its discriminatory domestic policies, was re-admitted to the organization on 24 September 1993.\textsuperscript{14} South Africa entered into its first BIT, with the United Kingdom, on 20 September 1994, less than 6 months after the country’s first democratic elections on 27 April 1994. In the period from 1994 until the change of the millennium, South Africa signed another 23 BITs.\textsuperscript{15}

To date, South Africa has been involved in two BIT arbitrations. The second of these had the potential to seriously impact South Africa’s Black Economic Empowerment (“BEE”) policy. In light of the country’s history of racial discrimination, the BEE policy was designed to redress inequalities in the


political, social and economic spheres of South Africa.\textsuperscript{16} The arbitration concerned BEE measures in the mining industry, which (in short) required mining companies to transfer 26\% of their shares to previously disadvantaged South Africans. An Italian foreign investor in South Africa claimed the measures were expropriatory and contrary to certain obligations undertaken by South Africa in its BITs.\textsuperscript{17} South Africa claimed that it is obliged, both under international human rights law and the South African Constitution, to promote equality and that the mining policy was aimed at realizing its human rights obligations.

The case was ultimately settled on the merits, with the tribunal only required to make an award on costs.\textsuperscript{18} However, it did raise questions concerning the ability of a State to regulate successfully in terms of its domestic public policy objectives, in light of its BIT obligations in general and international investment arbitration in particular.

In the wake of the settlement, South Africa initiated a review of its BIT policy, which concluded with a Cabinet Decision in 2010 that determined a new BIT policy for South Africa.\textsuperscript{19} In short, the Cabinet Decision provided that South Africa would terminate a number of its earlier BITs, would develop a domestic law to deal with investor rights that provides for dispute resolution in the South

\textsuperscript{16} Department of Trade and Industry, online: DTI <https://www.thedti.gov.za/economic_empowerment/bee.jsp>

\textsuperscript{17} Piero Foresti, Laura de Carli and others v Republic of South Africa (ICSID Case No ARB(AF)/07/1) Award, 3 August 2010, online: ICSID, <www.icsidworldbank.org> [Foresti et al v South Africa].


\textsuperscript{19} Update on BIT Review, supra note 11.
African courts and that the country would only in exceptional cases enter into further BITs. The European Commissioner for Trade, Mr Karel de Gucht, criticized the move as a “bad policy” and a unilateral move that would create investor uncertainty. South Africa’s apparent retreat from investor-State arbitration as dispute resolution mechanism under BITs have been described as a “retrogressive step” that is out of line with international best practices. But are these criticisms justified?

This thesis argues that while it is undeniable that investment, both domestic and foreign, is central to a State’s ability to develop, it is rightly being questioned whether the current investment law system leaves adequate room for such development to take place. BITs were created as a protectionist measure for foreign investors, but have turned into a weapon with which investors can attack host States, with a State’s public interest regulations attracting the biggest risk of attack. Investment law, for all its potential positive effects, also has the potential to harm public welfare, especially through its hampering of governments’ ability to regulate in the best interest of their citizens.

The thesis focuses primarily on two aspects of BITs. The first is the right to

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20 ibid.
25 van Harten et al, supra note 8.
regulate, as articulated through the provisions on expropriation (encompassing both direct and indirect expropriation) and the standard of compensation for expropriation. These provisions can limit the types of actions that would be considered as “expropriation” in terms of the treaty. The second is the provisions on investor-State dispute resolution. Investor-State dispute resolution is the mechanism through which the State’s BIT obligations are enforced. As a consequence of the fear of being subjected to investor-State arbitration and a possible negative pronouncement on regulatory measures coupled with a damages award against the State, States may refrain from enacting regulations.\textsuperscript{26}

The current most prevalent model for BITs, and consequently the model that formed the basis of many (if not most) BITs that were concluded in the heyday of the conclusion of new BITs in the 1990s, was developed in the political context of the 1950s and 1960s, when the fear of the spread of communism and concern for the impacts of decolonization on business interests in newly independent developing countries lead to the focus of these agreements on the protection of foreign capital and investments, possibly at the expense of other interests.\textsuperscript{27} In light of the “visible cracks” that have started to show in the investment law regime,\textsuperscript{28} it could be argued (as this thesis does) that States should, at least, review their current BITs and the models on which it is based, to ensure that it

\textsuperscript{27} Mann et al, supra note 20 at V.
\textsuperscript{28} Simma, supra note 1 at 575.
addresses all relevant concerns and that the model on which BIT negotiations are based truly serves the State’s interests.

Such an approach is appropriate for future BITs, but what of the BITs that are already in force? What is a host State is to do if it is not satisfied with its existing BIT regime? It has one of two choices. It could either amend or terminate its existing BITs and possibly renegotiate them, or it could attempt to defend its actions on the basis of its human rights obligations if ever arbitration is initiated against it.\(^ {29}\)

Following its BIT policy review, South Africa has chosen to terminate a number of its BITs, indicating that it is in the process of drafting domestic legislation to protect the rights of foreign investors.\(^ {30}\) Although a legally valid choice, the decision to terminate a number of BITs within a relatively short period of time, cannot but be considered drastic. The country’s decision could be seen as a reflection of the growing discontent amongst capital importing States with investment law and investor-State arbitration. It also reflects the advice of a large group of international scholars who expressed their concerns with regard to the international investment regime in 2010.\(^ {31}\) These scholars go so far as to


\(^{30}\) Update on BIT Review, supra note 11.

\(^{31}\) van Harten et al, supra note 8.
opine that domestic law should be the primary legal framework for the regulation of investor-state relations.\textsuperscript{32}

But South Africa has also kept open the possibility of entering into further BITs in future, which begs the question: is it even possible to combine the protection of foreign investments through BITs with the State’s right to regulate in the public interest and the State’s right to development, in order to leave enough policy space for host States to regulate in accordance with its domestic priorities without breaching its obligations to foreign investors? A number of international entities believe that it is possible. The International Institute for Sustainable Development (“IISD”), United Nations Conference on Trade and Development (“UNCTAD”), Commonwealth Secretariat (“Commonwealth”) and the South African Development Community (“SADC”) have all published either Model BITs or guidelines for the drafting of BITs that incorporate principles that prioritize development in capital importing States.\textsuperscript{33}

The reasonableness of a policy is, however, only part of the package. The policy should be implemented in a transparent and predictable manner, especially since one of the topics it deals with is investor confidence, which is very important for a capital importing country. If a reasonable policy is well implemented, the negative consequences predicted by naysayers can be managed and minimized. When a reasonable policy is not well implemented, it leaves the door open to detractors

\textsuperscript{32} \textit{Ibid} at 3.
\textsuperscript{33} Discussed in Chapter 5.
of the policy to communicate harmful and false messages that may harm a country’s reputation among foreign investors.

1.2 Research Question

This thesis does not *per se* argue that traditional international investment law does not adequately provide for sustainable development in general and home State regulation in particular. Those arguments already have been made and continue to be made eloquently by many commentators. This thesis focuses on the case study of South Africa’s recent policy decision, in the context of these arguments.

Therefore, the purpose of this thesis is to evaluate South Africa’s new BIT policy to determine if it is a considerate, reasonable and appropriate response to legitimate concerns levied against the investment law regime, or if it is a defensive action taken in the wake of the threat of having an important governmental policy declared incompatible with the country’s BIT obligations by an investment arbitration tribunal.

In order to answer this question, this thesis will first seek to answer 2 more specific questions. First, it should be determined whether the concerns raised against the international investment regime by South Africa are legitimate. If the concerns are legitimate, South Africa would have been justified to review its BIT policy and adjust the policy to better respond to the country’s concerns. The next question is whether South Africa’s new BIT policy is appropriate to address the concerns that have been raised. Since the policy is newly adopted, and have not yet been
extensively implemented, the validity of the policy has to be measured by comparing it to existing policies as well as the likelihood that sustainable development principles can successfully be incorporated into BITs.

Throughout this thesis it should be kept in mind that a country’s policy choices are just that – choices. Policy choices are made based on domestic priorities. Investment policy is made within an economic and political context.\(^{34}\) There is therefore no singular “correct” BIT policy that all countries, or even all countries with comparable domestic circumstances, should pursue. South Africa itself acknowledges that its approach is but “one route to address concerns with outdated BITs”.\(^{35}\) This thesis can therefore only give an opinion on whether or not the new policy is reasonable within the South African context.

### 1.3 Theoretical Framework

The thesis does not adopt a single theoretical framework, but is influenced by various schools of thought. However, while the theoretical underpinning of this study is interdisciplinary, it draws inspiration primarily from Third World Approaches to International Law (“TWAIL”). TWAIL is discussed in the first subsection. The thesis is further influenced by contract theory, which attempt to explain why developing States would enter into BITs in light of its alleged bias in favor of developed nations. These theories are discussed in the second

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subsection. As can be seen from the next two sections, none of the theories that are discussed individually provide completely satisfactory answers for the purposes of this thesis, but each theory does provide a piece to the puzzle to explain why, despite the many issues involved with the investment law regime, there could still be good reasons for developing States to continue to enter into new BITs.

1.3.1 TWAIL

TWAIL is “a critical internationalist movement that trains its lenses squarely on the experiences of third world peoples”. Its origins can be traced back to academic writings of the 1960s and 1970s, and finds its roots in the decolonization movement that followed the Second World War.

TWAIL has been described in different ways: as a “framework” or an “approach”, a “methodology” and a “theory”. Among these options, there does not appear to be consensus on what TWAIL exactly is. It has been argued that TWAIL meets the requirements of both a theory and a methodology. As a theory, i.e. a “system of ideas explaining something”, TWAIL draws from the empirical history of international law’s engagement with the third world to imagine and predict the

39 The Oxford English Dictionary, 2d ed, sub verbo “theory”.

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way in which international law will engage with the third world in future.\textsuperscript{40} As a methodology, i.e. a “science of method” or a “body of methods used in an activity”\textsuperscript{41}, TWAIL insists on global (rather than only West-centric) historicisation in order to more effectively write the third world into international legal history and analysis.\textsuperscript{42}

Since TWAIL encompasses both theory and methodology, it has been argued that it should rather be thought of as an approach to international law.\textsuperscript{43} But not everyone agrees with this argument. Anthony Anghie, a leading TWAIL scholar, expressly resists the contention that TWAIL is a methodology, preferring to refer to it as a “political project” that was founded on the common question how international law could be used to further the interests of the peoples of the Third World.\textsuperscript{44} Anghie also protests the idea that TWAIL is a methodology, describing it rather as an “analytical tool”.\textsuperscript{45} Other commentators see TWAIL as having both a political and scholarly aspect.\textsuperscript{46}

What is clear from all these attempts at describing TWAIL, is that it is broad,\textsuperscript{47} not fixed and established,\textsuperscript{48} and an emerging discipline.\textsuperscript{49} Even the 1997 document

\begin{thebibliography}{99}
\bibitem{40} Obiora Okafor, “Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?” 10 International Community Law Review 371.
\bibitem{41} The Oxford English Dictionary, 2d ed, \textit{sub verbo} “methodology”.
\bibitem{42} Okafor, supra note 36 at 373.
\bibitem{43} \textit{ibid} at 377.
\bibitem{45} \textit{ibid}.
\bibitem{46} Mickelson, supra note 37 at 360; Mutua, \textit{supra} note 38 at 38.
\bibitem{47} Okafor, \textit{supra} note 36 at 378.
\bibitem{48} Anghie, \textit{supra} note 44 at 480.
\bibitem{49} Mutua, \textit{supra} note 38 at 32.
\end{thebibliography}
entitled “Third World Association of International Law: A Vision Statement” ("TWAIL Vision Statement") acknowledges that scholars may not necessarily all agree on the content, direction and strategies of TWAIL.\(^\text{50}\) Perhaps, therefore, in trying to understand TWAIL, the answer lies not in a precise definition, but rather in what TWAIL scholars have in common.

The fundamental focus of TWAIL is on Third World peoples\(^\text{51}\) and the core idea has been described as “a shared ethical commitment to the intellectual and practical struggle to expose, reform or even retrench those features of the intellectual legal system that help create or maintain the generally unequal, unfair or unjust global order”.\(^\text{52}\) Supplemental to this core idea are the three objectives of TWAIL scholarship, namely, first, to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetration of a racialized hierarchy of international norms and institutions that sub-ordinate non-Europeans to Europeans, second, to construct and present an alternative normative legal edifice for international governance and, third, to eradicate the conditions of underdevelopment in the Third World through scholarship, policy and politics.\(^\text{53}\)

The idea of resistance against international law as a tool to perpetuate inequality between the West and the Third World is central to TWAIL scholarship. “Third

\(^{50}\) Mickelson, supra note 37 at 357.


\(^{52}\) Okafor, supra note 40 at 376.

\(^{53}\) Mutua, supra note 38 at 31.
World” in this context does not suggest a pre-modern-modern, child-adult, barbarian-civilized and inferior-superior civilizational ladder, a linear, unidirectional progression of history led by the West.\textsuperscript{54} It also does not deny the diversity between various non-Western nations.\textsuperscript{55} Rather, in the context of TWAIL, “Third World” should be seen as a direct attack on the Western hegemony of the globe.\textsuperscript{56}

This Western hegemony refers to the West’s use of international law to perpetuate its historical superior position vis-à-vis the Third World. TWAIL scholars base their work on the ideas that International law is premised on Europe as the center, Christianity as the basis of civilization, capitalism as innate in humans and imperialism as necessary\textsuperscript{57} and that International law is playing a crucial role in helping legitimize and sustain the unequal structures and processes that manifest themselves in the growing north-south divide.\textsuperscript{58}

While it is difficult to find a generally acceptable definition of what TWAIL scholarship is, it is possible to identify certain common characteristics of TWAIL. First and foremost, TWAIL adopts a critical view of international law and views international law from the point of view of Third World peoples.\textsuperscript{59} This critical approach is clear from the TWAIL vision statement, which provides for the “need

\textsuperscript{54} ibid at 36.  
\textsuperscript{55} ibid at 31.  
\textsuperscript{56} ibid.  
\textsuperscript{57} ibid at 33.  
\textsuperscript{59} Parmar, supra note 51 at 365; Mickelson, supra note 37 at 358.
to formulate a substantive critique of the politics and scholarship of mainstream international law to the extent that it has helped reproduce structures that marginalize and dominate third world peoples”. The sense of criticism and resistance is apparent from the other TWAIL characteristics, namely that TWAIL is anti-hierarchical, in that TWAIL scholarship refuses to merely accept the imposition of Western or Eurocentric international law principles as superior, but demands that universally acceptable norms should be found through cross-cultural dialogue; that TWAIL is counterhegemonic and seeks to advance the representation of all peoples, especially the non-State, nongovernmental, rural and urban poor in the international legal and economic order; and that TWAIL is suspicious of so-called universal creeds or truths, where such creeds or truths finds its origins in Western society, as opposed to being truly universal.

How then would TWAIL manifest in investment law? How do TWAIL scholars view investment law and how does investment law perpetuates inequality between the West and the Third World? As a starting point, TWAIL scholars view international investment law as a continuity of a structure of rules that support of the rights of Western investors over the rights of Third World peoples in host countries, as a system carried from the colonial past to the postcolonial

60 Mickelson, supra note 37 at 358.
61 Mutua, supra note 38 at 36. The commitment to cross-cultural dialogue is also emphasized by the TWAIL vision statement, see Mickelson, supra note 37 at 359.
62 Mutua, supra note 38 at 37.
63 ibid.
The history of international economic law generally, and international investment law in particular, can be traced back to the post-colonial period. The rules and institutions of international trade and investment which became binding colonial States on their independence, provided Western States with an alternative way to facilitate access to the resources in these former colonies needed by Western multinational firms, under the guise of promoting foreign investment in these States in order to facilitate development. As former colonial States became independent and were recognized as sovereign nations, international law developed to disallow the use of force (specifically with regard to the enforcement of the payment of sovereign debt) and towards the settlement of disputes through arbitration.

But TWAIL argues that arbitration proceedings are biased towards Western States and their investors, both regarding substantive rules and procedure. The rules of international investment law and arbitration are supposedly neutral, but the neutrality of the rules disregards the inequalities in bargaining power between indebted former colonial States and financially sophisticated multinationals, or the developed States from which they hail. With the end of colonization, poor

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65 ibid at 354.
66 ibid at 358.
67 ibid.
68 ibid at 360.
countries obtained the autonomy to freely enter into commercial contracts and international investment agreements, but concerns lingered about the underlying fairness of these deals.\textsuperscript{69}

Furthermore, international investment law has a troubled relationship with regulatory measures in general, and more specifically, regulatory measures adopted in response to domestic pressure,\textsuperscript{70} representing the voices of the Third World peoples that TWAIL seeks to promote. In fact, public demand seems to be at the bottom of the ladder of acceptable rationales for the adoption of regulatory measures.\textsuperscript{71}

The effect of these developments was to limit the sovereignty and sovereign immunity of newly independent States in much the same way as it was limited by colonization. While international law of the nineteenth century created consent for non-sovereign colonial States to enable them to enter into international agreements disposing of their territory with no rights attached, modern international investment law has created rules allowing capital-importing States (Third World States or former colonies) to participate in market transactions and to be taken to arbitration by private entities without distinguishing between actions of a commercial nature and regulatory measures taken by the State.\textsuperscript{72}

\textsuperscript{69} \textit{Ibid.}
\textsuperscript{71} \textit{Ibid.}
\textsuperscript{72} Gathii, \textit{supra} note 64 at 384.
Third World States have attempted to challenge these rules, but without success. For example, Third World States have resisted the contention that there exists an "international standard of justice" for foreign investors and attempted to argue that the nationals of a host State and foreign investors are entitled to exactly the same protection and remedies,\(^\text{73}\) and that the standard of compensation for expropriation promoted by Western States was unjust.\(^\text{74}\) The positions of Third World States on these issues have been opposed and defeated by Western States, despite the fact that some Western States have themselves adopted the lower standards proposed by Third World States. The United States, for example, while strenuously opposing the equal treatment of foreign investors and nationals of host States, advocating for an international standard of protection for foreigners at an international law level, have enacted the No Greater Rights principle in domestic law, which provides for this equal treatment of foreign investors in the United States.\(^\text{75}\)

TWAIL scholars are further critical of international investment law and arbitration based on the exclusionary procedures of investment arbitration. They challenge the image of investment arbitration as an institutionalized, depoliticized system that is the exclusive domain of States and foreign investors and, occasionally, NGOs as *amicus curiae*.\(^\text{76}\) The resistance is based primarily on the participants in investment arbitration, and the fact that Third World peoples do not, as a matter

\(^{73}\) *ibid* at 362. For a discussion of the Calvo clause, see section 4.3.  
\(^{74}\) For a discussion on the international law standard of compensation for expropriation, see section 2.2.  
\(^{75}\) Gathii, *supra* note 64 at 369.  
\(^{76}\) Odumosu, *supra* note 70 at 428.
of course, have access to these proceedings, and arbitrators will not hear domestic groups or activists. It is these domestic groups and activists that are most affected by investment activity and their participation in the formation of investment law, if not specifically in the arbitration process, should be encouraged.\(^\text{77}\)

It is therefore reasonable to conclude from a TWAIL perspective that international economic law, and specifically international investment law, may be regarded as a set of assumptions and limitations that determine how powerful and less powerful countries interact with one another, and that interaction is still based on the assumption that Western States are superior to Third World States,\(^\text{78}\) and it is this assumption of superiority-inferiority in investment law and arbitration that TWAIL resists.

This thesis is informed by TWAIL to the extent that the new South African BIT policy purports to be a reaction to the concerns identified by TWAIL scholars as contributing to the inequality of international economic law and international investment law. In arguing that the new BIT policy is indeed reasonable, the thesis supports the TWAIL objective of contributing to more equal economic relations at an international level.

It should be kept in mind that it is not the purpose of this thesis to prove the inequality between States that are inherent to international investment law and

\(^{77}\) ibid at 444.
\(^{78}\) Gathii, supra note 64 at 384.
specifically in the negotiation of BITs. For the purposes of this thesis, the fact that inequality exists, and that it affects developing Third World States like South Africa, is assumed. What this thesis does explore is whether, in light of that inequality, South Africa’s actions in amending its BIT policy is reasonable or excessive.

While TWAIL is unquestioningly the primary theoretical framework relied on in this thesis, there are also other approaches that contribute, although to a much lesser extent. The next section gives a brief overview of these other theoretical approaches.

1.3.2 Other Theoretical Frameworks

If TWAIL is the theoretical framework on which this thesis relies in order to conclude that South Africa’s concerns about the international investment regime are legitimate, one would expect that the a further conclusion of this thesis would be that South Africa should refrain from entering into BITs at all in order to avoid this inequality. But it isn’t. This thesis actually encourages South Africa to follow through on its decision to draft a Model BIT and to continue to enter into BITs, arguing that if a BIT is properly negotiated, it can still provide contracting Parties with significant benefits, such as depoliticizing dispute resolution by removing the need for diplomatic protection and contributing a country’s reputation as being investor friendly by proving the country’s commitment to the rule of law and investment protection.
This argument finds it theoretical framework in various economic and contract theories. Although all of the theories presented in this section have limitations to adequately explain every aspect of why States enter into BITs, each explains part of the phenomenon.

Contract theory is an analytical approach to explain why parties enter into the contracts they do enter into. In contract law terms, BITs are contracts between States in favor of a third party (the investor). In general, States will only enter into BITs if the expected cost of limiting its regulatory sovereignty does not exceed the expected net benefit, or, in contract theory terms, the “participation constraints of States must be met”.

In terms of contract theory, as applied to BITs, countries enter into BITs in an attempt to make their promises to respect property rights of investors more credible. BITs are therefore an instrument to attract scare resources by reducing the risk of the host State ex post reneging on its investment protection promises. A large part of this promise is the sanctions that are attached to the State’s failure to comply with its obligations in the form of investment arbitration that does not require the exhaustion of local remedies.

But contract theory does not fully explain why States enter into BITs for three

80 ibid.
81 ibid.
82 ibid at 521.
83 ibid.
reasons. First, new studies show that the mere existence of a BIT between an investor’s home State and the State where the investor intends to invest, is not as important to foreign investors as factors such as, for example liberal admission requirements.\textsuperscript{84} South Africa, for example, strongly questions the value of BITs in attracting foreign investment.\textsuperscript{85} Second, BITs tend to favor the capital exporting States and its investors, and do not protect all parties equally, wherefore the benefit for capital importing States to enter into BITs is still not adequately explained.\textsuperscript{86} Third, and complementary to the second reason, BITs with overly strict home State obligations that do not leave enough regulatory flexibility for home States, as this thesis argues is the case with earlier BIT texts, could actually endanger the system as a whole and lead to State’s exiting the system altogether, which could lead to less investor protection at an international law level.\textsuperscript{87} This appears to be exactly what has happened in the case of South Africa. Faced with BITs that are overly burdensome and that do not allow regulatory flexibility, South Africa has started to terminate some of its BITs without any signs so far that it would renegotiate those BITs, even though the new BIT policy allows for it.

A better explanation for why capital importing States continue to enter into BITs

\textsuperscript{84} For a more detailed discussion on what BITs can and cannot achieve and what foreign investors look for in a BIT, see section 2.2 below.
\textsuperscript{87} van Aaken, supra note 79 at 509.
could perhaps be found in the limited contract theory, which explains the reasoning behind entering incomplete contracts, i.e. a long-term contract that does not precisely specify each party’s obligations,\textsuperscript{88} by analyzing the power structures of contractual relationships.\textsuperscript{89} BITs as incomplete contracts are desirable for States as they do not fully apportion sovereignty, but make the distribution and allocation of sovereign rights a matter of ongoing negotiation between the Contracting Parties and a third party, in the case of BITs, the investor.\textsuperscript{90}

With investments, the power relationship between the investor and the host State shifts as time passes. Whereas at first the investor has a lot of bargaining power as the capital importing State would like to attract the investor’s capital, the power shifts to the State as soon as the investment is made as the investor cannot easily recoup its expended costs for establishing the investment and has to incur further costs to move the investment.\textsuperscript{91} For this reason, limited contract theory argues, BITs often include renegotiation or amendment clauses, as well as stabilization clauses – to provide for the changing power relationship between the parties.\textsuperscript{92}

A fundamental problem for limited contract theory in the context of BITs, though, is the fact that in practice, BITs, like all international agreements are not often

\textsuperscript{88} Cutler, \textit{supra} note 86 at 23.
\textsuperscript{89} \textit{ibid}.
\textsuperscript{90} \textit{ibid} at 24.
\textsuperscript{91} \textit{ibid}.
\textsuperscript{92} \textit{ibid} at 25.
renegotiated or amended, primarily because of the high transactional costs attached thereto. South Africa’s decision to terminate its BITs with the possibility to renegotiate is an exception, not the rule. Therefore, while limited contract theory does explain some of the reasons why capital importing States enter into BITs and explains the power relationship underlying BITs, it too falls short in fully explaining the phenomenon.

A further theoretical framework that informs the thesis’ argument is liberal foundations in rational choice theory, which argues that by entering into BITs, governments reduce the relative cost of investment, which is to everyone’s benefit.\textsuperscript{93} For capital exporting States, costs are reduced through the reduction in the risk of default and in enforcement costs, whereas for capital importing countries, the BIT reduces the perceived risk of default and enhances a State’s competitive edge when compared to other capital importing countries.\textsuperscript{94} In terms of this theory, BITs insulate the market from politics and encourages investment in the host State, and in return, the host State undertakes to limit its role in private property rights.\textsuperscript{95}

Of course, it is this limitation of the State’s role in private property rights and the insulation of the market from politics that TWAIL criticizes. This thesis, however, accepts that in entering a BIT, a capital importing State will accept some limitations on its sovereignty, and should get the benefit of increased investment,

\textsuperscript{93} ibid at 23.  
\textsuperscript{94} ibid.  
\textsuperscript{95} ibid.
or at least a reputational benefit as an investor-friendly jurisdiction, from the exchange. It is the extent of the limitation of a State’s sovereignty which is concerning, not the mere fact that there is a limitation. A State should at all times be fully aware of how much sovereignty it is willing to give up in this bargain, and should not give up so much sovereignty that it is prevented from regulating for the public benefit.

Contract theories work on the assumption that the existence of a BIT is an important factor for foreign investors when deciding on where they want to invest. The connection between BITs and increased FDI is being called into question, and is not necessarily supported by the data that is available. But to the extent that there is some benefit to the capital-importing State in entering into a BIT, even if not in increased investment per se, they do still offer valid insights into the reasons why it could be beneficial for capital importing States to conclude BITs.

1.4 Methodology and Outline

The methodology of this thesis is analytical literature review of primary and secondary materials. The primary materials used are largely official government documentation, together with BITs and some domestic case law. These documents enable an understanding of the factors that motivate governments’ policy decisions and how these factors contribute to and manifest in the final policy framework that is adopted. Secondary materials, which include the study of scholarly books, articles and reports, assist in the analysis of these primary documents.
Chapter 2 paints the framework for the thesis, first by explaining the origins and purpose of BITs and then by considering the normative criticisms, legitimacy concerns and transparency issues raised against the investment law regime as it has developed. This chapter relies exclusively on secondary materials to point out and describe the concerns, and to evaluate their legitimacy.

Within the framework of this bigger picture, the next chapter (Chapter 3), relies almost exclusively on South African primary materials, including government documents to explain South Africa’s progression from a State eagerly entering into BITs to a State that has now decided to terminate a number of its existing BITs and to regulate investors’ rights mainly through domestic regulation. In explaining the shift in policy, I also rely on the BITs concluded by South Africa’s in the 1990s to demonstrate the country’s BIT policy at the time, or the lack thereof. I also rely on some South African case law to demonstrate the development of property rights in relation to expropriation in domestic South African law, which played an important role in the country’s change of heart on the desirability of BITs. Where appropriate, the South African position is contrasted or compared with international law.

Once South Africa’s concerns have been contextualized and its policy choices have been explained, the country’s new BIT policy has to be evaluated to determine whether it is reasonable and appropriate. This analysis is done in Chapters 4 and 5.

Chapter 4 analyses the BIT and foreign investment policies of Canada and Brazil,
based primarily on secondary sources as well as some primary Canadian sources, in order to determine what insights the policies of these two countries can offer regarding the appropriateness of South Africa’s new policy. While Chapter 4 relies to an extent on a comparative methodology, the purpose of the Chapter is not primarily to conduct a strict comparative study between South Africa’s BIT policy and that of Canada and Brazil respectively, but more to see how the latter two countries have responded to concerns that in many respects are similar to the concerns raised by South Africa. Canada and Brazil’s policy choices regarding BITs, provide guidance on what types of BIT policies are already in place. Based on this, one can determine whether South Africa’s new BIT policy is completely novel, or whether it shows some similarities to other countries’ policy choices, and what, if anything, South Africa can learn from these two countries’ experiences.

Chapter 5 more carefully considers the one aspect of the South African policy that has not yet been clarified by the government – a proposed model BIT. In terms of the country’s policy decision, new BITs will only be concluded if there are convincing reasons to do so. This Chapter explores ways in which South Africa’s primary concerns about the investment law regime, namely the ability of home States to regulate and compensation for regulatory expropriation, as well as investment dispute resolution processes, could be addressed in a model BIT. This is done through an analytical review of proposals made on these issues by the International Institute for Sustainable Development (“IISD”), United Nations Conference on Trade and Development (“UNCTAD”), Commonwealth Secretariat
(“Commonwealth”) and the South African Development Community (“SADC”). By determining whether it is possible to draft BITs in a way that addresses South Africa’s concerns, Chapter 5 contributes to determining the practicability of the new policy. If there are practical ways in which South Africa’s concerns could be addressed in a model BIT, it could allay many of the country’s reservations about concluding further BITs and could allow the country to conclude BITs on its own terms, contributing to establishing a more equal investment law regime.

1.5 Originality of the Thesis

Much has been written about the deficiencies in international investment law. This thesis does not, however, focus on these alleged deficiencies, but rather on the response thereto by one particular Third World State. South Africa’s response is one of the most encompassing responses so far. Even though countries like Ecuador and Venezuela have taken some steps to renounce investment dispute settlement, South Africa’s new BIT policy does not only focus on investment arbitration. This thesis provides information and guidance to other Third World States and Scholars about a practical example of a Third World State that has taken steps to challenge an unequal international law system.

As this thesis is written by a scholar from the Third World, it provides a unique perspective on the problem. As a general rule, TWAIL scholarship and scholarship concerning investment law is produced by scholars from the

96 ibid at 22.
developed world. These scholars analyze the policies of Third World States from the perspective of an “outsider”, a commentator on the policies and actions of another. Conversely, this thesis is written by a South African trained legal scholar, providing an in-depth understanding of the South African context.

1.6 Expected Findings of the Study

The South African Cabinet Decision drew a lot of criticism as well as praise. Criticism was centered on the argument that by terminating its BITs, South Africa is taking a step away from being an “investor friendly” jurisdiction. Praise centers on the arguments that that BITs do not sufficiently promote sustainable development and in fact impairs States’ ability to regulate in the public interest.

It is expected that this thesis will find that South Africa’s new BIT policy is an appropriate and reasonable response to legitimate concerns about the international investment law regime. However, a policy, no matter how considered, needs to be implemented appropriately in accordance with its terms and intention. Failing proper implementation, even the best policies are ineffective. It is expected that the study will show if there are implementation concerns about South Africa’s new BIT policy and that, should such concerns be discovered, that recommendations will be made on how to proceed.
Chapter 2: The Bigger BIT Picture

2.1 Introduction

Before South Africa’s history with BITs and its new BIT policy, it is necessary to consider the bigger picture surrounding investment law and arbitration. This chapter considers this bigger picture, first by discussing the history and rise of BITs (2.2) followed by a discussion of the concerns that have been raised about the investment law regime in recent times as well as some of the proposed responses to these concerns (2.3).

This Chapter sets the tone for the chapters that follow. Against the background of this Chapter, the next Chapter discusses South Africa’s history with BITs and recent policy changes that have been taken. It is this new South African policy that forms the focus of the study.

2.2 International Investment Law and the Rise of BITs

While BITs are a relatively recent phenomenon in international law, provisions relating to the protection of property abroad dates back to international agreements concluded in the late 18th century.97 With the exception of Friendship, Commerce and Navigation agreements, such as the ones negotiated by the United States, foreign investors had to rely on customary international law for protection.98

98 ibid at 159.
In customary international law, the leading principle on investment protection was the Hull principle, which held that “no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefore”. Before BITs, the rule has always been difficult to enforce, as individuals and corporations do not have standing in international law generally, but have to rely on their State of nationality to resolve any disputes diplomatically.

The first modern BIT was entered into between Germany and Pakistan in 1959. It started a proliferation of BITs that resulted in more than 2700 being in force by 2011. The rate at which new BITs were entered into shows an interesting trend. From 1959 until the late 1980s, the number of new BITs rarely exceeded 20 per year. During the 1990s over 100 signing ceremonies for new BITs were held annually. However, with the turn of the millennium, the number of new BITs showed a marked decline.

Initially, BITs were seen by as a way to credibly commit host governments to protecting the property rights of foreign investors. BITs enabled private investors to challenge their treatment in a third State at an international level, without having

100 Vandevelde, supra note 97 at 159.
101 Jandhyala, Henisz & Mansfield, supra note 2 at 1048.
102 ibid.
103 ibid.
104 ibid at 1050.
105 ibid.
106 ibid.
to exhaust their local remedies in the domestic courts of the State concerned, and without having to rely on their State of nationality to bring international proceedings on their behalf.\textsuperscript{107} BITs were primarily concluded between developed and developing countries, with the developed country frequently offering a draft agreement to the developing country with few amendments made during negotiations between the parties, the underlying assumption being that it would serve to protect the investments of the developed country’s nationals in the developing State.\textsuperscript{108} In fact, while the obligations in BITs are reciprocal in nature, the perception was that they are non-reciprocal, as the obligations fell primarily on the developing State Party.\textsuperscript{109} The inequality was so apparent that the trend in the conclusion of BITs up to 1999 has been described as “wealthy countries picking off potentially lucrative but risky venues one at a time”.\textsuperscript{110}

Developing States entered into these treaties in the hope of attracting foreign direct investment (“FDI”), in order to obtain the capital they required to develop. During the 1990s, the proliferation of BITs was driven by two main objectives, namely to promote and to protect FDI.\textsuperscript{111} While at the time Developing States could only predict the importance of FDI to their economies as it was a relatively “new” source of capital, its importance has since been proven by the fact that the value of FDI flows now by far exceed the value of the transnational sale of goods

\textsuperscript{107} Choudhury, \textit{supra} note 24 at 781.
\textsuperscript{108} Vandevenlede, \textit{supra} note 97 at 170.
\textsuperscript{109} \textit{Ibid} at 171.
\textsuperscript{110} Elkins, Guzman & Simmons, \textit{supra} note 99 at 181.
\textsuperscript{111} Joubin-Bret, Rey & Weber, \textit{supra} note 4 at 16.
and most commentators would agree that FDI flows remain the principal vehicle for generating growth in less developed countries.\textsuperscript{112}

By 1980, private lending accounted for half of all capital flows to developing countries, but this source of funding dried up during the debt crisis of the 1980s.\textsuperscript{113} In addition, extensive borrowing by United States during this time coupled with a cut in development assistance prompted developing States to search for alternative sources of capital and opening up to foreign investment in order to attract FDI.\textsuperscript{114} Offering investors guarantees by concluding BITs indicated a desire on the part of the developing State to provide a more secure environment for their investments.\textsuperscript{115}

Concurrent with the proliferation of BITs, FDI to developing countries increased exponentially, causing some to argue that FDI to developing countries increased as a result of these countries entering into BITs with developed countries.\textsuperscript{116} By 2000, half of all FDI flows from OECD countries (all countries with developed economies) to developing countries were covered by a BIT.\textsuperscript{117} In the context of Least Developed Countries, the argument is that the conclusion of BITs leads to greater FDI inflows as it provides transparency about the consequences of expropriation and it indicates the host State’s willingness to avoid expropriating

\begin{thebibliography}{99}
\bibitem{113} Vandevelde, \textit{supra} note 97 at 178.
\bibitem{114} ibid.
\bibitem{115} ibid at 179.
\bibitem{116} Jandhyala, Henisz & Mansfield, \textit{supra} note 2 at1048.
\bibitem{117} Hallward-Driemeier, \textit{supra} note 9 at 9.
\end{thebibliography}
foreign investments.\textsuperscript{118}

But other authors argue that this correlation is not necessarily as straightforward as its proponents would argue. Specific examples of this is the case of Brazil, one of the top receivers of foreign FDI, that has no BITs in force, and Sub-Saharan Africa that, despite entering into many BITs, have struggled to attract FDI.\textsuperscript{119} South Africa's own experience suggests that the signing of BITs does not necessarily lead to greater FDI inflows.\textsuperscript{120}

The mere fact that a BIT is in place between two States would not necessarily lead to greater FDI inflows. What are of importance are the terms of the BIT, for example, the strength of the property rights enshrined therein.\textsuperscript{121} It has been posited that countries on the cusp of establishing strong investment climates may benefit from entering into comprehensive BITs, whereas countries that are already unattractive destinations for foreign investors are unlikely to become more attractive simply by entering into BITs.\textsuperscript{122} Recent studies have shown that strong national treatment provisions that ensure liberal admission rules (i.e. provisions in the BIT that ensures non-discriminatory admission requirements), do promote FDI,\textsuperscript{123} whereas the inclusion of an investor-state dispute settlement clause in a

\begin{flushleft}
\textsuperscript{119} Hallward-Driemeier, \textit{supra} note 9 at 9.
\textsuperscript{120} Carim, \textit{supra} note 35.
\textsuperscript{121} Hallward-Driemeier, \textit{supra} note 9 at 3.
\textsuperscript{122} Clint Peinhardt & Todd Allee, “Different investment treaties, different effects”, (14 February 2012), online: \textit{Columbia FDI Perspectives} <http://www.vcc.columbia.edu/content/fdi-perspectives> at 3.
\textsuperscript{123} Axel Berger et al, “Do trade and investment agreements lead to more FDI? Accounting for key provisions inside the black box” (2012) 10:2 Int Econ Econ Policy 247 at 268.
\end{flushleft}
BIT does not lead to greater FDI inflow to a State.\textsuperscript{124}

The fact that FDI inflows are not necessarily a consequence of entering into BITs probably played a role in countries’ policy decision to enter into fewer BITs after the turn of the millennium. Another possible reason for the decline in new BITs entered into by States after the turn of the millennium is that States have started to identify the risks associated with the investment law regime.

The proliferation in BITs has gone hand in hand with the proliferation of investment arbitrations. Statistics of the International Centre for the Settlement of Investment Disputes (“ICSID”), a World Bank affiliated body that deals with the majority of investment law claims, show a rise in investment disputes registered with the institution from 26 over the period from 1972 to 1990, to 128 over the period from January 2010 to June 30, 2013.\textsuperscript{125} The nature of the claims has also changed, with investors increasingly challenging host countries’ regulatory activities, rather than claims of direct expropriation of property.\textsuperscript{126}

These investment arbitrations have highlighted unexpected and often unintended consequences of BITs. Arbitration awards have raised concerns concerning the cost of BITs – both financial and in limiting the choices available to policymakers – and if there is little apparent financial benefit in entering into new BITs when

weighed against the potential costs thereof, the conclusion of new BITs becomes harder to justify.\textsuperscript{127}

2.3 Concerns about the Investment Law Regime

Since the effects of BITs have started to become clearer through the proliferation of international investment arbitrations and investment arbitration awards, Sates and commentators have started expressing concerns about BITs and investment law in general. While BITs were created as a protectionist measure for foreign investors, some fear that it has since turned into a weapon with which investors can attack host States, with a State’s public interest regulations attracting the biggest risk.\textsuperscript{128} Some commentators even call investment law a field in which neo-liberalism (or the revival of market fundamentalism) flourishes through the assumption that foreign investment is so important to economic development that the flow of FDI should be facilitated by almost absolute protection, despite history showing that foreign investment has been used as a way to exploit host economies.\textsuperscript{129} In August 2010, a group of 30 prominent academics from a wide array of jurisdictions published a public statement proclaiming concern for the harm done by the international investment regime to public welfare, especially through its hampering of governments’ ability to act in the best interest of their

\textsuperscript{127} Hallward-Driemeier, \textit{supra} note 9 at 22.
\textsuperscript{128} Choudhury, \textit{supra} note 24 at 782.
\textsuperscript{129} Muthucumaraswamy Somarajah, “Mutations of Neo-Liberalism in International Investment Law” (2014) 3:1 Trade, Law and Development 203 at 204. The author considers neo-liberalism in investment law to currently be declining, but anticipates that it will return when circumstances allow therefor.
citizens (the “Osgoode Statement”).\textsuperscript{130}

The Osgoode Statement highlights the pro-investor interpretation of investment treaties, problems associated with using international law instead of domestic law as chosen law to settle disputes, and systemic problems with the arbitration system.\textsuperscript{131} The authors advise States, \textit{inter alia}, to review their BITs with a view to withdrawing from and renegotiating them in light of the issues that have been brought to light.\textsuperscript{132}

The concerns about investment law can be divided into normative issues (3.3.1), issues concerning legitimacy (3.3.2) and issues concerning transparency (3.3.3.). Each of these three topics will be discussed, but each individual concern about investment law and investment arbitration will not be considered in detail, as this section merely aims to demonstrate that valid concerns have been raised that need to be considered by investment law stakeholders.

\subsection*{2.3.1 Normative Issues}

By entering into a BIT a State agrees to treat a foreign investor in accordance with the standards set out in the agreement. A failure by the State to comply with the standards set in the BIT could lead to it incurring international responsibility \textit{vis-à-vis} the foreign investor in terms of the provisions of the BIT. The State’s liability will be determined not by the State or its courts, but by an international

\textsuperscript{130} van Harten \textit{et al}, \textit{supra} note 8.
\textsuperscript{131} \textit{Ibid.}
\textsuperscript{132} \textit{Ibid.}
tribunal of arbitrators which is not in any way accountable to the State’s citizens and, with a few limited exceptions noted later on in this Chapter, without those citizens having any voice in the proceedings. Arbitrators are often required to decide on domestic public interest issues,¹³³ not in order to determine if the government took a reasonable and / or correct decision for the greatest number of people in the circumstances, but in order to determine if the government’s actions negatively impacted a specific foreign investment and violated a specific international treaty.¹³⁴ In case of an adverse finding, government could be compelled to make changes to domestic regulations in order to avoid similar adverse findings in future. As a result of this risk, BITs might impact on a State’s right to regulate and a State’s right to development.

2.3.1.1 Right to Regulate

One of the effects of the risk of adverse arbitration awards is that States can also no longer regulate in the public interest without considering whether there is a risk that an arbitral tribunal could find that the domestic regulation has a negative impact on foreign investment.¹³⁵ Limitations on how and what regulations a State may prescribe, impacts on the manner in which a State is able to develop. The State’s choice about which public interest objectives to pursue and how to pursue them may be affected.

¹³³ Choudhury, supra note 24 at 778. Public interest can either be defined as that which is in the interest of the State and its citizens or as that which is in the common interest of mankind. For the purpose of this work, either definition can apply.
¹³⁴ Alvarez, supra note 112 at 73.
¹³⁵ Choudhury, supra note 24 at 778.
The two investment law standards that are most likely to limit a State’s ability to regulate are the standards of expropriation and fair and equitable treatment. These are also the two obligations that foreign investors usually invoke in disputes concerning human rights regulation by the State. The reason why these two standards have such strength is due to the way they have been applied by arbitration tribunals.

Expropriation under investment law can be either direct or indirect, with indirect expropriation taking various forms, such as a regulatory taking or creeping expropriation. International law does not determine whether an expropriation took place based on the type of taking – all of the mentioned forms of takings are “expropriations” under international law. The standard of compensation for any type of expropriation has been the subject of debate between developed and developing States since the 1970s. Developing States are proponents of the “appropriate” standard of compensation contained in the 1974 Charter of Economic Rights and Duties of States that leaves the determination of compensation up to domestic law. This standard stands in contrast to the “prompt, adequate and effective” standard of compensation, supported by developed States, which translates to full market value of the taken property. This standard was contentious up to approximately 1990,

\[136\text{ Choudhury, supra note 26 at 995.}\]
\[137\text{ Ibid.}\]
\[139\text{ See also section 3.4.2.2 in this regard.}\]
but some commentators argue that it has now been accepted in international law.\(^\text{140}\)

Arguably, the contrasting interests of the States involved may explain the different approaches to the standard of compensation for expropriation, especially during the 1970s when this debate started in earnest. Nationals from developed States were mostly the foreign investors who invested in developing States. To best protect these investors, it would be in the interests of developed States to achieve the highest possible return for their nationals in the case of their investments being expropriated. The risk of a large damages award against the State would also go a long way towards securing the rights of investors from developed States in developing States and may also, indirectly, contribute to cementing the influence of the developed State in the developing State. Conversely, even if it is undoubtedly in the interests of developing States to attract foreign investors, the rights of foreign investors must be balanced with the rights of their own nationals and the State’s right and obligation to promote development in its territory in order to erase the legacy of colonialism.

The effect of the influence of developed States in the debate is that many now argue that the prompt, adequate and effective standard of compensation has now become the customary international law standard and that now, as a

general rule, even if most BITs do not expressly provide what standard of compensation will be due to a foreign investor who has suffered loss or damage due to a violation of a BIT, arbitrators have tended to award full market value of the loss that has been suffered to the claimant.¹⁴¹

The lack of distinction between types of expropriation when it comes to the determination of the standard of compensation means that a State may be liable to compensate a foreign investor where the investor has suffered a reduction in the value of his investment due to a change in regulations of the host State, further protecting the rights of foreign investors from developed States over the interests of developing States. With compensation for such loss running into millions of dollars, the effect is that States may think twice before implementing measures that might be construed as affecting the value of foreign investments.¹⁴²

The fair and equitable treatment standard has been similarly problematic. The main difficulty concerning the fair and equitable standard is its scope. It is the standard that is most often invoked in investment disputes and has the most practical relevance for investors – the majority of successful claims pursued in international arbitration are based on a violation of this standard¹⁴³ - and has been applied to a wide variety of issues, including the non-respect of

¹⁴¹ Alvarez, supra note 103 at 73.
¹⁴² Argentina, for example, is faced with arbitration awards of approximately US$40 billion against it following the measures it took in 2000 in response to its economic crises.
¹⁴³ Dolzer & Schreuer, supra note 140 at 130.
obligations of vigilance and protection, the denial of due process and/or procedural fairness and the non-observance of the investor’s legitimate expectations.\textsuperscript{144} This standard is used as a “catch all” or “stop gap” provision where other treaty standards are too specific and it may in practice be used where the facts of the case do not support a claim for expropriation.\textsuperscript{145} It has been stated that it would be impossible to anticipate in the abstract the range of possible types of infringements upon the investor’s legal position and that the fair and equitable treatment principle allows for an independent and objective third party determination of this behavior on the basis of a flexible standard.\textsuperscript{146}

Due to the strength of these two obligations under investment law, they have been described as having a “chilling effect” on government regulatory capacity.\textsuperscript{147} It has been noted that, even if a host State should prevail in an investment dispute relating to domestic regulatory measures, the duration and expense involved in the dispute might still cause a ‘regulatory chill’, as States self-censor their regulations in an attempt to avoid future investment arbitrations.\textsuperscript{148} States may refrain from enacting regulations that enforce human rights obligations against foreign investors, in fear of being subjected to


\textsuperscript{145} Dolzer & Schreuer, \textit{supra} note 129.

\textsuperscript{146} \textit{Ibid} at 132.

\textsuperscript{147} Choudhury, \textit{supra} note 26 at 995.

\textsuperscript{148} Simma, \textit{supra} note 1 at 580.
international arbitration and a consequent exorbitant damage award.\textsuperscript{149}

Regulation in favor of States’ human rights obligations poses one of the most difficult challenges vis-à-vis investment law standards. At first glance, human rights law and investment law appear to be completely different fields of international law that have no relation to one another. The two fields have been described as “oil and water”,\textsuperscript{150} raising concerns over if it is even possible to give expression to human rights norms within the investment law regime. Is this assessment correct? It has been pointed out that both human right and investment law are concerned with protecting the individual against the power of the State.\textsuperscript{151} Why then is there a perception that investment arbitration impacts negatively on a State’s human rights obligations?\textsuperscript{152}

Due to the importance of human rights globally, a responsible host State cannot but prioritize human rights compliance in its public policy agenda, which will affect the regulatory spaces of the host State vis-à-vis foreign investors and other host States.\textsuperscript{153} States who are parties to international human rights treaties such as the International Covenant on Economic, Social and Cultural rights, face the challenge to progressively realize these human rights within their territory, thus creating a “moving target” not only for the State

\textsuperscript{149} Choudhury, \textit{supra} note 26 at 987.
\textsuperscript{150} Simma, \textit{supra} note 1 at 573.
\textsuperscript{151} \textit{Ibid} at 576.
\textsuperscript{153} Simma, \textit{supra} note 1 at 578.
who has to continuously take steps to progressively realize such rights,\textsuperscript{154} but also to the foreign investor, who might be required to adapt to a changing regulatory environment.\textsuperscript{155} In a way one could argue that international human rights law continuously requires governments to improve the lives and living conditions of the people living in a State through more protective regulation, causing a continuously changing regulatory environment, whereas international investment law attempts to maintain the regulatory environment as it was at the date the investment was made in order to make the regulatory environment more predictable and consistent for foreign investors. Foreign investment has the potential to act as a catalyst for the enjoyment of individual human rights,\textsuperscript{156} but gaps in the BIT regime have limited host States’ ability to protect the human rights of its nationals.\textsuperscript{157}

Ultimately, regardless of whether States want to regulate in order to comply with its human rights obligations or whether it wants to regulate in favor of another goal that is in the public interest, the bottom line remains the same – unless BITs are carefully drafted to make provision for this right, a State might be held liable for all losses suffered by foreign investors as a result of changing regulations.

\textsuperscript{154} See, for example, article 2(1) of the \textit{International Covenant on Economic, Social and Cultural Rights}, 16 December 1966, 993 UNTS 3 (entered into force on 3 January 1976).
\textsuperscript{155} Simma, \textit{supra} note 1 at 579.
\textsuperscript{156} Jernej Letnar Cernic, “Corporate human rights obligations and international investment law” (2011) 3 Anuario colombiano de derecho internacional 243 at 246.
2.3.1.2 Right to Development

The right to development has long been recognized in international law. The United Nations General Assembly, in the Declaration on the Right to Development, defined it as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”. The right to development imposes, *inter alia*, the following duties on the State:

• to formulate national development policies aimed at “the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom”,

• to create, as a primary responsibility resting on the State, favorable conditions for the realization of the right to development; and

• to undertake “all necessary measures for the realization of the right to development” at national level.

It is generally accepted that the right to development, while recognized, is not

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159 *Ibid*, at Article 2(3).
160 *Ibid*, at Article 3(1).
161 *Ibid*, at Article 8(1).
“hard law”. Neither is it a justiciable right. But that does not mean that it is a right without any meaning. At minimum, it should indicate that the State has a duty under international law to prioritize the development of its nationals. It is problematic that BITs have the potential to hinder the implementation of this duty.

As a result, it can be argued that the investment law regime also poses a threat to State sovereignty and domestic governance. Investment law, through BITs, has the ability to curtail the State’s sovereign right to determine how best to pursue the development of its citizens in order to fully realize their human rights. The threat to a State’s sovereignty has been raised as a major normative concern against investment law. The Osgoode Statement notes that States’ fundamental right to regulate on behalf of the public, if exercised in good faith and for a legitimate purpose, should not be subordinated to the interests of investors.

It has been argued that allegations that BITs limits a State's sovereignty may very well be a “red herring”. The State’s decision to enter into the BIT is of itself an exercise of sovereign power. It is the arbitrator’s task to interpret and apply the treaty that was agreed to by the State, and if the State is no

163 ibid at 317.
164 Choudhury, supra note 24 at 778 - 9.
165 van Harten et al, supra note 8.
166 Alvarez, supra note 112 at 368.
167 Alvarez, supra note 112 at 368; Choudhury, supra note 26 at 777.
longer satisfied with the terms of the treaty, it is its sovereign right to terminate
the treaty in accordance with its terms.\textsuperscript{168}

A further factor to consider is that the concern about State sovereignty is of a
political nature, rather than of a legal nature.\textsuperscript{169} The decision to enter into a BIT
is itself political to a large extent – States enter into BITs in pursuance of a
specific policy objective. But the mere fact that the concern is not of a legal
nature does not diminish its validity. Ultimately it concerns the trust that parties
have in the system as a whole, and it is in the best interest of the BIT regime
to ensure that its stakeholders have confidence therein. Without confidence in
the system, more and more States who have legitimate concerns about the
investment law system may decide to abandon it all together. This does not
suggest that the investment law regime should bend over backwards in an
attempt to appease stakeholders with normative concerns about the system,
but it should take these concerns seriously in an attempt to continuously
improve the system.

\textbf{2.3.1.3 What Could States Do?}

The answer seems to be that States should be clear on their objectives for
entering into BITs and draft their BITs in a way to allow them regulatory
leeway. States have, in fact, started to address a broader range of issues in
their new BITs by including specific language on the protection of health,

\textsuperscript{168} Alvarez, \textit{supra} note 112 at 368.
\textsuperscript{169} \textit{Ibid.}
safety, cultural identity, the environment and the promotion of internationally
recognized labor standards.\textsuperscript{170} The ideal solution would be to find a balance
between providing potential investors the necessary guarantees and enabling
states to pursue the public interest objectives of its choosing in order to
develop in a way that is most appropriate for its circumstances.

Drafting a BIT in this way would not be contrary to international law.
International law recognizes a host State’s right to regulate or to take
measures that may affect foreign investors’ property interests without payment
of compensation, if the measures pursue a legitimate purpose, is aimed at the
general welfare of the State’s citizens, are non-discriminatory and fall within
the ambit of the State’s general regulatory powers.\textsuperscript{171} International law refers
to such regulatory measures taken by a state to promote the general welfare
of the public as “police powers”, being the source of the State’s right to
regulate.\textsuperscript{172}

Although this principle is part of customary international law, states such as
the USA and Canada have included a “police powers” provision in their most
recent Model BITs, which expressly provides that non-discriminatory

regulatory action in the interest of the public will not constitute indirect expropriation. The most reasonable explanation for this development in treaty drafting is that States are doing all that they can to protect their regulatory powers and to ensure that arbitral tribunals respect States’ right to regulate.

States have started to be much more precise and detailed in their drafting of BITs. A 2007 UNCTAD study showed a new trend in drafting of BITs, with States:

- being more specific about the types of investments that will be covered by the BIT;
- linking the standards of investment protection to their standing in customary international law in order to be more specific about the scope of the rights;
- imposing transparency obligations not only on an inter-State basis, but also between the State and the investor, which imposed transparency obligations on the investor and requires transparent rule making on the part of the State.


174 Krommendijk & Morijn, supra note 172 at 434.

175 UNCTAD, supra note 170 at 71.
• clarifying which forms of indirect expropriation will be covered will be covered by the BIT; and
• addressing a wider range of issues (such as health, safety, labor and environmental rights) in the BIT in order to ensure that the protection and liberalization of investment should not be pursued at the expense of other important policy objectives.

The UNCTAD report notes that States include a wider scope of issues either through positive language that reinforces the parties’ commitment to certain values, through exception clauses that preserve a wide range of public policy objective, or through a combination of exception clauses and positive language.176

2.3.2 Legitimacy

The legitimacy of the international arbitration system can be measured by its determinacy and coherence, its predictability and reliability.177 Legitimacy is very closely related to the concepts of justice, fairness, accountability, representation, due process and opportunities for review.178 Without legitimacy, stakeholders in a system such as the international investment arbitration regime do not have any

176 Krommendijk & Morijn, supra note 172 at 435.
178 ibid.
legal certainty - they cannot accurately predict what the outcome of a specific dispute will be.\textsuperscript{179}

The legitimacy of the international arbitration regime has mainly been questioned as a result of inconsistent arbitral awards.\textsuperscript{180} An often-used example of the investment’s regime’s potential for inconsistent decisions is the situation of Argentina. In response to an economic crisis of 1999 – 2002, the Argentinian government took a variety of measures to stabilize the economy, including devaluing the local currency, the Peso, which up to that point was pegged at 1 Peso to 1 US Dollar.\textsuperscript{181} As a result of the devaluation of the Peso, the value of all property in Argentina, including foreign investments in the country, decreased dramatically in a very short period of time. Subsequently, as many as 50 investment arbitration claims were brought against Argentina by aggrieved foreign investors, most in terms of the Argentina-USA BIT.\textsuperscript{182} In defense of its actions, Argentina invoked the public international law defense of necessity, arguing it acted to maintain public order and protect its essential security interests.\textsuperscript{183} Based on similar factual circumstances, in terms of the same BIT and in relation to the same defense (necessity), different arbitration tribunals came to different conclusions. Of the arbitrations that have so far been concluded, 5 found that Argentina could not rely on the defense of necessity

\textsuperscript{179} ibid.
\textsuperscript{180} ibid at 1582.
\textsuperscript{181} Alvarez, supra note 112 at 150.
\textsuperscript{182} Simma, supra note 1 at 575.
\textsuperscript{183} Choudhury, supra note 24 at 805.
whereas 2 found the defense of necessity to be applicable in the circumstances. 184 It is not the purpose of this thesis to consider the awards in detail, as the point is merely to point out that inconsistent decisions exist that leads to questions about the legitimacy of the international arbitration regime.

It has been argued that the inconsistencies in the investment arbitration regime could lead to a backlash that will result in the rejection of investment arbitrations as a form of dispute resolution provided for in BITs and the return to a public forum such as State courts for dispute resolution. 185 The other side of the argument is that such inconsistencies are a result of the difference in language between different BITs and that each arbitration award is so case specific that it is sometimes appears as though a rule is being applied inconsistently, while it is merely a situation where the facts not allow for the application of the rule in a consistent manner. 186 A third argument is that it is too early to determine whether there truly are inconsistencies in the application of investment law, considering that investment arbitration is a relatively “young” system and that any perceived inconsistencies will be dealt with through a gradual process that will bring more coherence. 187 This third argument is a difficult argument to use to convince States with concerns over inconsistent arbitration awards to persist with

185 Franck, supra note 177 at 1590.
the system, however, as it means that they would be exposed to the risk of inconsistent awards while the system is standardizing.

While States have little control over the manner in which arbitrators will ultimately interpret BITs, the language used in drafting the BIT might appear to be wholly within the control of the negotiating States. But such an understanding is too simplistic. It ignores the power dynamics involved in treaty negotiations. The power of developed States, at least during the 1980 – 2000 period when States were rapidly entering into new BITs, is reflected by the typical negotiation process described above,\(^{188}\) which was also reflective of South Africa’s experience post 1994.\(^{189}\)

It should be kept in mind that many of the BITs that are currently the subject of investment arbitrations, were negotiated in the heyday of new BITs during the 1990s, before many of the risks associated with what was then accepted as standard treaty language became apparent. The negotiating contexts and power imbalances still persists today, but many developing States have realized that promises of FDI inflows associated with early BITs might have been overstated and the risks associated with the treaties underestimated.

So what is the answer? How can the legitimacy of the investment arbitration system be put beyond doubt? Two proposals have been put forward to improve the consistency of investment arbitration awards. The first concerns a possible

\(^{188}\) See section 2.2 above.

\(^{189}\) South Africa’s experience is discussed in more detail in Chapter 3, below.
precedent system for investment arbitration and the second concerns the establishment of an appellate review body.

2.3.2.1 Precedent in Investment Arbitration

With a few exceptions,\textsuperscript{190} international law does not provide for a precedent system, although previous decisions are taken into consideration.\textsuperscript{191} While not everyone agrees on this,\textsuperscript{192} the lack of a clear precedent system in investment arbitration has been raised as a concern and it can be argued that that this in itself gives an opportunity for inconsistent case law or the perception thereof to flourish.\textsuperscript{193} International investment arbitration differs from international commercial arbitration in the publicity of the process,\textsuperscript{194} and with disclosure comes public scrutiny of the awards.\textsuperscript{195}

The concept of precedent is a common law concept, in which judicial decisions becomes law and becomes binding on lower courts, differs from the civil law concept of \textit{jurisprudence constante}, which does not create new law, but aims

\begin{itemize}
  \item \textsuperscript{190} Gilbert Guillaume, “The Use of Precedent by International Judges and Arbitrators” (2011) 2:1 Journal of International Dispute Settlement 5 at 12. The author points to the International Criminal Tribunals for Rwanda and Yugoslavia as examples where lower courts (the trial chambers of each of these two tribunals) are bound by the decisions of each tribunal’s appeal chamber.
  \item \textsuperscript{191} ibid.
  \item \textsuperscript{192} Irene M Ten Cate, “The Costs of Consistency: Precedent in Investment Treaty Arbitration” (2013) 51 Columbia Journal of Transnational Law 418 at 420.
  \item \textsuperscript{194} Guillaume, supra note 190 at 15.
\end{itemize}
to establish a sufficient degree of clarity, continuity and permanence of jurisprudence.\textsuperscript{196}

The demand for consistency in investment arbitration is greater than in other forms of international dispute settlement, arguably as a result of the public interest aspect of the disputes, and investment arbitration panels do rely on previous awards more than ever before.\textsuperscript{197} But despite this, consistency on some issues remains elusive. It especially causes concern when different tribunals decide identical issues raised against the same Respondent State differently.\textsuperscript{198}

The question whether investment arbitration should clearly provide for a precedent system requires a careful balancing act. Precedent acts as a guarantor of certainty and equality of treatment to the parties.\textsuperscript{199} A system functioning on a precedent basis promotes equality amongst litigants, unpredictable decisions, increases the legitimacy of the whole system and creates some degree of legal certainty about the scope and content of legal rules.\textsuperscript{200} Inconsistency creates uncertainty and damages the legitimate expectations of both investors and States.\textsuperscript{201} But there are some risks. Precedent could also create a freezing effect on the law, preventing it from

\textsuperscript{196} Guillaume, supra note 190 at 15.
\textsuperscript{197} Ibid at 17.
\textsuperscript{198} Ibid. The author points out the case of Argentina, which is the subject of numerous arbitration proceedings flowing from its financial crisis in 2000. The principle of necessity has been raised as a defense by Argentina. The defense has succeeded in some cases, but failed in others.
\textsuperscript{199} Ibid at 6.
\textsuperscript{200} Cate, supra note 192 at 420.
\textsuperscript{201} Franck, supra note 177 at 1558.
progressing according to the new demands of society.\textsuperscript{202} It could also lead to a decrease in accuracy, sincerity and transparency if it is applied in a manner that requires adjudicators to apply previous decisions even though they might have been incorrectly decided – simply for the sake of applying precedent.\textsuperscript{203}

It has been argued that there are three functions that a precedent system fulfills, namely development, control and recognition.\textsuperscript{204} The development function requires some flexibility in order for the legal order to adjust to the requirements of the community.\textsuperscript{205} The control function should prevent wild deviations in the law to ensure legal certainty and the recognition function provides the community with tests to determine if each award complied with the accepted methods for reasoning.\textsuperscript{206}

While certainty and equality of litigants is definitely something worth striving for in international arbitration, one must be careful not to disregard the differences in relevant text and applicable law.\textsuperscript{207} Each arbitration should remain informed by the specific treaty on which it is based, which makes a precedent system in the common law \textit{stare decisis} sense difficult to achieve. Rather than promoting a precedent system for investment arbitration, which is an extraordinary step in

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{202} Guillaume, \textit{supra} note 190 at 6.
\item \textsuperscript{203} Cate, \textit{supra} note 192 at 421.
\item \textsuperscript{204} Cheng, \textit{supra} note 195 at 1019.
\item \textsuperscript{205} \textit{ibid}.
\item \textsuperscript{206} \textit{ibid}.
\item \textsuperscript{207} Guillaume, \textit{supra} note 190 at 23.
\end{enumerate}
\end{footnotesize}
international law, this author would propose that what investment arbitration should strive for is more a civil law concept of *jurisprudence constante*.

2.3.2.2 Appellate Review in Investment Arbitration

As already mentioned, arguing that the investment arbitration regime is still in its infancy and that the concerns that are currently raised against the system will normalize in time, asks States, and more often developing States, to carry the risk of possible adverse arbitration awards until such time as the system has become more consistent and predictable. This risk might be easier for States to accept if there was a way in which inconsistent awards could be harmonized or errors of law could be corrected. A proposal that has garnered a lot of discussion is that of an appeals tribunal for arbitration awards, with the purpose to create a public forum for the review of public disputes in order to create a coherent *jurisprudence*.

Currently, there is only limited control over the quality and integrity of investment arbitration awards, with national courts having limited power to refuse to enforce awards and annulment committees such as the ICSID annulment committees having limited jurisdiction to review awards for procedural errors or manifest excess of powers. However, these

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208 See paragraph 2.3.2.1 above.
209 Franck, *supra* note 177 at 1607.
210 Cheng, *supra* note 195 at 1024.
The lack of proper review powers in international investment arbitration can be seen as problematic. What are often being adjudicated upon in investment arbitration are the actions taken by the legitimate and often democratically elected governments of host countries. Investment tribunals may declare the actions of these legitimate governments to be illegal, which could have serious repercussions within the host state. As such, any decision of such an arbitral tribunal should be convincing enough to overcome the suspicion that investment arbitration is nothing but a ploy to derail the political will of a legitimate government, or, conversely, should not create the impression it is too timid to confront a host country in order to address the wrong done to an investor. An appellate mechanism, it is argued, will contribute to the legitimacy and acceptability of the investment arbitration system, much in the same way as the WTO Appellate Body contributed credibility and acceptability to the decisions made under the General Agreement on Tariffs and Trade ("GATT").

211 ibid.
212 Werner, supra note 13 at 116.
213 ibid.
214 ibid.
216 Werner, supra note 13 at 116.
It is not clear what form such an appellate body should take or what its exact mandate should be, with suggestions ranging from *ad hoc* appellate bodies to appointing the ICJ or similar body as appellate body for investment arbitrations.\(^\text{217}\) But, regardless of the form that such an appellate body takes, it is an idea that merits further consideration, as it could potentially resolve many of the critiques against the investment arbitration system discussed in this section.

### 2.3.3 Transparency

In international economic law generally, transparency is understood “as a concept denoting the openness of institutions and procedures of international law, especially vis-à-vis international civil society”.\(^\text{218}\) Specifically in the context of international investment law as a system, the requirement for transparency manifests itself, *inter alia*, in the disclosure of pleadings and awards to the public, in the choice of arbitrators and the participation of civil society in the arbitration process. This section briefly considers the alleged lack of transparency in the international investment law system accordingly.

#### 2.3.3.1 Transparency in Choice of Arbitrators

Investment arbitrations are generally presided over by three arbitrators, with each party nominating an arbitrator and the third arbitrator, the president of the

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\(^{217}\) Franck, *supra* note 177 at 1608 - 9.

tribunal, being appointed in one of a variety of ways, be it by consensus between the parties, by the institution administering the arbitration or by an independent body. The ability to choose one’s arbitrator is one of the most prominent features of international arbitration and reflects the consensual nature of this form of dispute settlement, which also allows parties to determine aspects such as the language and seat of arbitration and applicable law.\textsuperscript{219} International investment arbitration rules require arbitrators to be impartial. It does not allow for the appointment of a non-neutral arbitrator who acts as its appointing party’s advocate on the panel, as is the case in some domestic jurisdictions.\textsuperscript{220}

However, there is a perception amongst some commentators that party appointed arbitrators, rather than acting as independent and impartial judges of the dispute, advance the position of the party that appointed them before the tribunal. Investment arbitration has no system of security of tenure or financial security for adjudicators as domestic jurisdictions have for judges.\textsuperscript{221} Arbitrators often act as both arbitrator and counsel at the same time in different disputes.\textsuperscript{222} It has been argued that a lawyer’s (and client’s) incentive in appointing an arbitrator is to appoint someone who will win the case for them,

\begin{itemize}
\item \textsuperscript{219} Giorgiu Sacerdoti, "Is the party-appointed arbitrator a ‘pernicious institution’? A reply to Professor Hans Smit", (3 February 2012), online: Columbia FDI Perspectives \textless http://www.vcc.columbia.edu/content/fdi-perspectives\textgreater.
\item \textsuperscript{220} In the USA, for example, domestic arbitration rules allow for a party-appointed arbitrator to be an advocate on the panel for the party that appointed him or her. See Hans Smit, “The pernicious institution of the party-appointed arbitrator”, (14 December 2010), online: Columbia FDI Perspectives \textless http://www.vcc.columbia.edu/content/fdi-perspectives\textgreater.
\item \textsuperscript{221} Choudhury, supra note 24 at 787.
\item \textsuperscript{222} ibid.
\end{itemize}
while the arbitrator’s incentive, once appointed, is to secure future appointments by providing the party that appointed him or her with a favorable outcome.223 Studies have shown that dissenting arbitrators most often are those who have been appointed by the losing party, and while there might be a rational explanation for it, these types of statistics do little to instill mutual confidence in investment arbitration proceedings.224

In a study that was designed to examine arbitrators’ potential bias by drawing on literature on judicial behavior and on empirical studies, in order to focus on whether there is evidence that the resolution of contested issues of jurisdiction and admissibility in investment arbitrations were influenced by apparent financial or career interests of arbitrators or by the wider economic aims of the arbitration industry, some evidence was found of systemic bias in favor of investors (Claimants) in the case-by-case resolution of disputed jurisdiction and admissibility-related issues.225 In an impartial and independent adjudicative process, one would expect to find a degree of evenness between claimants and respondent States on such contested issues arising from ambiguous treaty texts that does not vary significantly based on the claimant’s nationality.226 However, the study found that arbitrators tended to favor

223 Smit, supra note 199.
224 Jan Paulsson, Moral Hazard in International Dispute Resolution (Inaugural Lecture, University of Miami School of Law, 29 April 2010), online: arbitration-icca <http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf> at 9.
226 ibid at 216.
claimants in general and Western capital exporting States in particular, at least in the initial jurisdictional phase of investment arbitrations. However, the study does not provide empirical evidence of actual bias and that even on a systemic level there may be explanations for the results, but it does indicate a trend that is difficult to explain.\textsuperscript{227}

This argument has, of course, not gone unchallenged. It has been argued that the arbitration system itself has sufficient built-in guarantees through arbitration rules and codes of ethics to ensure that arbitrators act independently and impartially, and that to suggest otherwise would be to question the professionalism of the vast majority of arbitrators.\textsuperscript{228} Additionally, one could argue that it would be incredibly shortsighted for an arbitrator to systemically favor claimants from developed States, as it would surely lead to a decrease in appointments and/or increase in challenges to the arbitrator's appointments if such a bias could be established.

A study that focused on the outcomes of investment arbitrations, rather than decisions at the jurisdictional phase, found that the outcome of investment arbitrations could not be reliably associated with the development status of the Respondent State or with the development status of the presiding arbitrator

\textsuperscript{227} \textit{Ibid} at 215.
\textsuperscript{228} Sacerdoti, \textit{supra} note 219. Even those who argue that the arbitration system is not transparent and independent are careful to note the respect top arbitrators command for their knowledge of the field. See, for example Choudhoury, \textit{supra} note 24 at 787.
(i.e. whether the arbitrator is from a developing or developed State).\textsuperscript{229} Even if the concerns regarding a pro-investor and pro Western bias at the jurisdictional phase of the proceedings are correct, this bias does not appear to translate to the merits phase of the disputes.

One possible solution that has been advanced to ensure that arbitrators truly are neutral in investment disputes is that all arbitrators must be appointed jointly or selected by a neutral body.\textsuperscript{230} Even some who have challenged the argument about arbitrator bias, acknowledge that in investment arbitration, due to its public nature and effects, the argument that truly neutral institutions should select arbitrators carries some weight.\textsuperscript{231}

\subsection*{2.3.3.2 Disclosure of Awards to the Public}

The level of publicity of the proceedings depends largely on the Parties. Neither the UNCITRAL Arbitration Rules nor the International Centre for the Settlement of Investment Disputes ("ICSID") Convention allow for the publication of the arbitration award without the consent of the Parties.\textsuperscript{232} All proceedings under the investment provisions of the North American Free

\begin{flushleft}
\textsuperscript{230} Paulsson, \textit{supra} note 224 at 10.
\textsuperscript{231} Sacerdoti, \textit{supra} note 219.
\end{flushleft}
Trade Agreement ("NAFTA")\textsuperscript{233} are public by agreement of the State Parties.\textsuperscript{234} States such as the USA and Canada are also starting to include provisions requiring transparency of the proceedings in their model BITs.\textsuperscript{235}

In practice, many, if not most, ICSID awards are published and are available on the ICSID website. Other websites such as Investment Treaty Arbitration\textsuperscript{236} also publish many, if not most, investment arbitration awards, as well as other documents relied on in the proceedings such as experts' opinions and pleadings and a number of publications, both web-based and paper-based, exists to report investment arbitration news and to provide analysis.\textsuperscript{237}

Based on the sheer volume of information that can be found on investment arbitration, it would appear that confidentiality of arbitration pleadings and awards are, in practice, less and less of a meaningful barrier to access to information. A bigger transparency concern is the participation of stakeholders, other than the parties to the dispute, in the proceedings.

\textbf{2.3.3.3 Public Participation}

One of the major differences between international commercial arbitration and international investment arbitration lies in the nature of the dispute. Whereas

\textsuperscript{234} Andrea K Bjorklund, "The Emerging Civilization of Investment Arbitration" (2014) 113 Penn State Law Review 1269 at 1288.
\textsuperscript{235} ibid.
\textsuperscript{237} See, for example, Investment Arbitration Reporter, online: IARreporter, <http://www.iareporter.com/>.
international commercial arbitration concerns disputes between private entities of a commercial nature, investment arbitration concern disputes about regulatory matters that could have serious consequences for host States within the domestic sphere. It is precisely for this reason that a wide array of parties other than the actual parties to the dispute, ranging from civil society to journalists to academic commentators and policy advisers, advocate for a transparent system that gives interested parties an opportunity to be heard.

Public participation can take place in one of two ways, namely through publicity of the proceedings or through participation in the proceedings in the capacity of amicus curiae.

Arbitral proceedings are increasingly becoming more public as a matter of course. Despite the ICSID Convention not allowing for the publication of the arbitration award without the consent of the Parties, many, if not most, ICSID awards are made available on the ICSID website. As already mentioned, NAFTA provides for all proceedings to be public. Increased transparency requirement has recently also started to show up in model BITs of States such as the USA and Canada. The 2004 Canadian Model Bilateral Investment Treaty (“Canadian Model”), for example, provides that arbitral

\[239\] See article 48(5) of the ICSID Convention.
\[240\] Bjorklund, supra note 234 at 1288.
\[241\] ibid at 1289.
\[242\] Canadian Model, supra note 173.
hearings shall, as a matter of course, be open to the public, except where there is a need to protect confidential information.\textsuperscript{243} Furthermore, all documents in the arbitration shall be publicly available, although the Canadian Model does provide the possibility for the parties to the dispute to agree otherwise and provides for the possibility of deleting confidential information from the documents that are made public.\textsuperscript{244}

While the concept of allowing interested parties to act as \textit{amicus curiae} in investment arbitration is still in its infancy, it is being accepted more and more by States and arbitrators as an important aspect for the legitimacy of the investment arbitration regime.\textsuperscript{245} Arbitral tribunals acting under both the UNCITRAL Arbitration Rules and the ICSID Arbitration Rules have admitted \textit{amici curiae} to participate in proceedings and in 2006 the ICSID Convention was amended to expressly provide for the participation of \textit{amici} in the proceedings.\textsuperscript{246}

Interestingly, UNCITRAL recently published new procedural rules to enhance the transparency of treaty-based arbitrations (investor-State dispute resolution).\textsuperscript{247} These new rules came into effect on 1 April 2014.\textsuperscript{248} It applies to

\begin{itemize}
\item \textsuperscript{243} Article 38(1) of the Canadian Model.
\item \textsuperscript{244} Article 38(3) of the Canadian Model.
\item \textsuperscript{246} Bjorklund, supra note 234 at 1291.
\end{itemize}
treaties concluded before 1 April 2014 where the Parties agree thereto and would applies to treaties concluded on or after 1 April 2014, unless the Parties agree otherwise.\textsuperscript{249} The new UNCITRAL Rules on Transparency in Treaty Based Investor State Arbitration (“UNCITRAL Transparency Rules”) create a Repository that will be responsible to publish the information about the proceedings that is to be made public.\textsuperscript{250} The information to be made public includes written submissions in the proceedings (excluding exhibits unless decided otherwise by the tribunal),\textsuperscript{251} witness statements and expert reports (excluding exhibits unless decided otherwise by the tribunal),\textsuperscript{252} except where the rules themselves create an exception to their publication.\textsuperscript{253} The UNCITRAL Transparency Rules further provide for matters such as that the arbitral hearings shall be public\textsuperscript{254} and submissions by third parties to the dispute.\textsuperscript{255}

Public involvement is still the exception rather than the norm,\textsuperscript{256} and where it is allowed it is limited to written briefs.\textsuperscript{257} However, investment arbitration, which is already a more open and public form of dispute settlement than international

\begin{footnotes}
\item[249] Ibid. (UNCITRAL)
\item[250] Article 8 of the UNCITRAL Transparency Rules.
\item[251] Article 3(1) of the UNCITRAL Transparency Rules.
\item[252] Article 3(2) of the UNCITRAL Transparency Rules.
\item[253] Article 7 of the UNCITRAL Transparency Rules.
\item[254] Article 6(1) of the UNCITRAL Transparency Rules.
\item[255] Article 4 of the UNCITRAL Transparency Rules.
\item[256] Choudhury, supra note 24 at 787.
\item[257] Patrick Wieland, “Why the Amicus Curia Institution is Ill-Suited to Address Indigenous Peoples’ Rights before Investor-State Tribunals: Glamis Gold and the Right of Intervention” (2014) 3:2 Trade, Law and Development 334 at 335.
\end{footnotes}
commercial arbitration, is becoming more and more accepting to the idea of public participation. While there is still some way to go, the regime is moving in the right direction to provide more information to the public. This is appropriate considering the potential impact investment arbitration can have on a State's policies.

2.4 Conclusion

This Chapter shows that there are legitimate concerns about investment law and arbitration that has arisen in recent times. But, more importantly, on every issue that critics raise there is a possible answer within the arbitration system or within international law itself. Some concerns, such as transparency, are already being addressed. This confirms that States are not merely observers in the investment law process, but have the power to bring about change with regard to the issues that do not adequately cater to State’s requirements.

There are two questions that arise from the critiques against the investment law system. The first is what steps States, and specifically developing or capital importing States who are hosts to foreign investors, will take with regard to both already existing and newly negotiated BITs to ensure that their rights are protected. The second is whether the investment law is capable and willing to take the various criticisms on board and to improve the legitimacy of the system as a whole.

It is this author’s opinion that through careful drafting of BITs, States can eliminate
most, if not all, of the critiques raised against the investment law regime in order to preserve the benefits of the regime (such as legal certainty to investors and a dispute settlement system that does not rely on political relations between States) without exposing host States to unnecessary risks. The next Chapter will consider some concrete examples of how States could respond to these critiques.
Chapter 3: The South African Position on BITs

3.1 Introduction

The Republic of South Africa’s experience with international investment law can be described as turbulent. Within a period of approximately 15 years, the country concluded a number of Bilateral Investment Treaties, was involved in 2 investment arbitrations and decided to terminate most, if not all, of its BITs. Against the background set by the previous Chapter, this Chapter considers South Africa’s experience with investment law.

The South African Constitution (“Constitution”)\textsuperscript{258} provides that South Africa has a “co-operative government”,\textsuperscript{259} made up of a national government, provincial governments and local governments, all of which are “distinctive, interdependent and interrelated.” The system has features of both a federal and unitary State. While the South African provinces have some competencies, as set out in Schedules 4 and 5 to the Constitution, the country effectively functions as a unitary State. National policy is the responsibility of the Executive Authority, made up of the President and Cabinet,\textsuperscript{260} and the national government has exclusive competence to negotiate and enter into international agreements,\textsuperscript{261} which the subject of this thesis forms part of.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{258} Constitution of the Republic of South Africa, 1996, No 108 of 1996 [Constitution].
\item \textsuperscript{259} Ibid at Section 40.
\item \textsuperscript{260} Ibid at Section 85.
\item \textsuperscript{261} Ibid at Section 231.
\end{itemize}
\end{footnotesize}
The first part of this chapter considers the history that led up to the decision to enter into a number of BITs post-1994. The second part considers South Africa’s experiences in international arbitration. The third part considers the 2010 Cabinet decision to terminate South Africa’s first generation BITs. Finally, part four considers the way forward with regard to foreign investment in South Africa.

3.2 South Africa’s Introduction to Investment Law

South Africa re-entered the international community in 1990, following the unbanning of the African National Congress and the release of its leader, Nelson Mandela, from prison. Following its suspension from the United Nations due to its discriminatory policies, South Africa was re-admitted to the organization on 24 September 1993. During the first part of the 1990s, the country was going through a profound political change from a discriminatory, minority rule government to a democratic, inclusive government. While not yet elected, it was clear that the ANC would receive the most support in the country’s first democratic elections and would become the major political player in South Africa.

The change in government necessarily meant a change in government policies. Since South Africa was at the time also in the process of drafting a new Constitution, which would be enforced by a newly established Constitutional Court, it is understandable that the international community was eagerly awaiting

262 Eisenberg, supra note 14 at 5.
indications of what South Africa’s new policies would hold, including in the field of foreign investment.

This is not to say that foreign investors were left without any guidance on what direction South Africa would take with its economic policy regarding foreign investments after the 1994 elections. Prior to the first democratic elections on 27 April 1994, the National Economic Forum (“NEF”) took charge of the reformulation of economic policy in South Africa.263 The NEF brought together some of the major players in the South African economy – government, the formal business sector and organized labor.264 The ANC was not formally represented on the NEF, but enjoyed observer status.265 Simultaneously, an Economic Technical Committee, made up of the major political parties (including the ANC) met to resolve issues of national economic importance.266

The ANC, in anticipation of winning the 1994 elections, published a document in 1992 setting out its policy positions.267 With regard to foreign investment, as a subsection to its economic policy, the document stated the following:

“In a democratic South Africa the ANC will welcome foreign investment, in accordance with our objectives for growth and development, and will adopt an open approach to the entry of foreign investment. The most important way to

263 ibid at 6.
264 ibid.
265 ibid.
266 ibid.
promote foreign investment is to establish a climate of political stability, economic growth, and transparent, consistent economic policies.

The principle of national treatment will apply to foreign investors. They would enjoy the same treatment as domestic investors, and would be obliged to abide by South African laws.

Departures from national treatment may include limitations on domestic borrowing or on foreign ownership in strategic areas such as land and natural resources. Foreign investments that meet defined national growth and development objectives may enjoy specific contractual arrangements.”

This statement has been described as setting “the tone for the building of a liberal investment climate for South Africa”.268

Following the 27 April 1994 elections, the new government wasted no time concluding new BITs. South Africa’s first BIT was signed with the UK on 20 September 1994,269 less than 6 months after South Africa’s new Government of National Unity took office. By the end of the 20th century, South Africa signed another 25 BITs270 and had 13 BITs that had already entered into force271. The

268 Eisenberg, supra note 14 at 7.
269 DIRCO, supra note 15.
270 ibid. South Africa signed BITs with the United Kingdom, the Netherlands, the Swiss Confederation, the Republic of Korea, Germany, France, Canada, Cuba, Denmark, Austria, Mozambique, Italy, Iran, the People’s Republic of China, Mauritius, Sweden, Senegal, Ghana, Argentina, Finland, Spain, Egypt, Chile, Greece, the Russian Federation and the Czech Republic.
271 ibid. South African BITs in force by the end of the 20th century were with the United Kingdom, the Netherlands, the Swiss Federation, the Republic of Korea, Germany, France, Cuba, Denmark, Austria, Italy, the People’s Republic of China, Mauritius and Spain.
BITs concluded shortly after 1994 largely followed the format of the Organization for Economic Cooperation and Development (“OECD”) Model and most are fairly similar in substance, format and intention.\textsuperscript{272}

While the proliferation of BITs in the world started in earnest in the 1980s and the rate of new BITs signed by States increased exponentially in the 1990s,\textsuperscript{273} South Africa had no history of negotiating BITs before the mid-1990s and their risks were not fully appreciated.\textsuperscript{274} The new South African government aimed to demonstrate that the country was an investment friendly destination, without critically evaluating the impact of BITs on future policies.\textsuperscript{275} Very few records exist to explain why South Africa took the approach it did towards entering into BITs in the 1990s, but a draft Cabinet Memorandum from 1994, which appears to contain no legal or economic analysis of the risks associated with BITs, indicates that:\textsuperscript{276}

\begin{itemize}
  \item 16 countries had requested the conclusion of BITs with South Africa;
  \item the Department of Trade and Industry (“DTI”) was convinced that such agreements would create an investor friendly environment;
  \item the aspects covered by BITs can be viewed as “basic investor rights” and that the same rights and privileges would also be extended to South African investors.
\end{itemize}

\textsuperscript{272} Government Position Paper, supra note 12 at 19. See also section 3.5 below regarding the clauses included in these BITs.
\textsuperscript{273} Jandhyala, Henisz & Mansfield, supra note 2 at 1048. The authors point out that during the 1990s, approximately 100 BIT signing ceremonies took place annually.
\textsuperscript{274} Government Position Paper, supra note 12 at 5.
\textsuperscript{275} ibid.
\textsuperscript{276} ibid at 14.
The records that are available do not shed any light on whether there was any organized opposition to South Africa’s quick entry into the world of BITs. There are no records available to show whether anyone outside the ruling party (such as opposition parties or labor unions) was consulted before the BITs were concluded. However, considering that the ANC got more than 60% of the votes in the 1994 elections and that the official opposition party barely got more than 20% of the votes, even if the opposition were opposed to the conclusion of BITs, their opposition would not have made a difference. Furthermore, the main South African labor union, COSATU, forms part of the ANC’s tri-partite alliance (together with the South African Communist Party), so it is likely that any opposition they might have had would have been raised behind closed doors and would not have been made public. Until today, the South African public knows very little about the country’s BITs or the reasons why they were concluded.

What would become apparent with time is that the inexperience of negotiators, apparent lack of a clear policy with regard to the conclusion of BITs,\textsuperscript{277} and the South African government’s lack of knowledge about investment law in general, coupled with the haste with which new agreements were signed, resulted in South Africa signing very generic BITs that were not amended to balance South Africa’s policy objectives with the interests of foreign investors.\textsuperscript{278}

\begin{footnotes}
\item[277] \textit{Ibid} at 5.
\item[278] \textit{Ibid} at 22.
\end{footnotes}
3.3 South Africa’s Experiences with International Arbitration

To date, South Africa has had limited experience as a party to investment arbitration, with only two BIT arbitrations having been initiated against the country. Very little is known about the first arbitration, initiated by a Swiss investor under the BIT between South Africa and the Swiss Federation. Reports indicate that the arbitration concerned a claim for damages based on the South African government’s failure to provide the investor’s investment (a game lodge in the northern parts of the country) with full security and protection.\footnote{Marie-Andree Somers, “Swiss Investor prevailed in 2003 in confidential BIT arbitration over South Africa land dispute”, (22 October 2008), online: Investment Arbitration Reporter <http://www.iareporter.com>.

}\footnote{Peterson, supra note 18.}

The second arbitration initiated against South Africa garnered much more attention. While none of the pleadings in the arbitration are publicly available, the final award is. However, the final award primarily deals with the question of costs, as the Parties had reached a settlement on the merits.\footnote{Foresti et al v Republic of South Africa, supra note 17.}

The arbitration, initiated in terms of the BIT between South Africa and Italy,\footnote{Peterson, supra note 18.} Piero Foresti, Laure de Carli and others v Republic of South Africa (the “Foresti case”),\footnote{Foresti et al v South Africa, supra note 17.} challenged South Africa’s right to regulate ownership of mining ventures in the country through its policy of Black Economic Empowerment (“BEE”). The Claimants, Italian nationals, owned three privately held companies in South Africa, Marlin Holdings, Marlin
Corp and RED Graniti SA\(^ {282} \), that were (at the time) to be subjected to a new South African policy in the mining sector.

In 2002, the South African government became the custodian of all mineral rights in the country through Section 3 of the Minerals and Petroleum Resources Development Act, 2002 (the “MPRDA”).\(^ {283} \) In order to engage in mining activities, mining companies had to apply for so-called “new-order” mining licenses in terms of the MPRDA. For an applicant to qualify to apply for a new order mining license, it had to submit a plan, which had to show, inter alia, how the applicant would divest 26% of its ownership within a period of 10 years to Historically Disadvantaged South Africans\(^ {284} \), as required by the Mining Charter\(^ {285} \).

The claimants brought two claims regarding this legislation. The first claim alleged that the coming into effect of the MPRDA on 1 May 2004 breached the BITs provision on expropriation, as it (a) extinguished certain old order mining rights held by the claimants and, (b), read with the Mining Charter, introduced compulsory equity divestiture requirements with regard to the Claimants’ shares in


\(^{283}\) Mineral and Petroleum Resources Development Act, (S Afr), No 28 of 2002 [MPRDA].

\(^{284}\) Historically Disadvantaged South Africans are defined by Section 1 of the MPRDA to mean:

- \(a\) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;
- \(b\) any association, a majority of whose members are persons contemplated in paragraph (a);
- \(c\) any juristic person other than an association, in which persons contemplated in paragraph (a) own and control a majority of the issued capital or members’ interest and are able to control a majority of the members’ votes.”

\(^{285}\) General Notice 1639 of 2004: Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry, (S Afr), G Gazette No 26661, 13 August 2004, 3 [Mining Charter].
companies in South Africa. The second claim alleged that South Africa, through enacting the MPRDA and the Mining Charter, breached the obligation to provide the Claimant fair and equitable treatment and national treatment in terms of the BIT.

South Africa responded to the Claimants’ claims by denying that the investments in question had been expropriated, but, even if they were, that such expropriation was lawful in terms of the BIT. South Africa claimed that if any expropriation occurred, it was done in terms of the prescripts of the BIT, which requires that:

(i) the expropriation must be for a public purpose;
(ii) immediate or prompt compensation that is full or adequate and effective must be provided;
(iii) the expropriation must be on a non-discriminatory basis; and
(iv) the expropriation must be effected under due process of law.

For the purposes of this thesis, the reasons advanced by the South African government as to why the alleged expropriation was done for a public purpose are instructive. The government posited that the reforms brought about by the MPRDA and the Mining Charter were required to:

(i) simplify and modernize an overly complex legal system;

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286 Foresti et al v South Africa, supra note 17 at 14.
287 Ibid.
288 Ibid at 18.
289 Ibid.
(ii) ameliorate the disenfranchisement of HDSAs and other negative social effects caused by apartheid in general and the 1991 Mineral Rights Act (which was repealed by the Act and, according to the government, entrenched white privilege in the mining sector which could not be justified in a democratic South Africa) in particular;

(iii) reduce the economically harmful concentration of mineral rights and promoting the optimal exploitation of mineral resources; and

(iv) protect the environment and the communities living in the vicinity of mining operations.

Despite settling the dispute on the merits, the Foresti arbitration forced the South African government to engage in a wide-scale review of its foreign investment policies.

### 3.4 Policy Changes

Shortly after settling the Foresti arbitration, the DTI undertook a comprehensive review of South Africa’s BIT policy. While the DTI has not specified exactly which stakeholders were involved in the review process, it is known that interviews were held at managerial level with sector desks at the International Trade and Economic Development division (ITED) of the DTI and other relevant stakeholders. Some public meetings were also held, one of which invited inputs from the South African legal sector that the author attended in Pretoria in 2009.

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291 *ibid* at 6.
The review was initiated in 2007 and culminated in a Government Position Paper entitled “Bilateral Investment Treaty Policy Framework Review” (“Government Position Paper”) in June 2009. Position Papers are ordinarily prepared by the Government Department that is responsible for that specific policy issue and would ordinarily form the basis of presentations to Cabinet on any issue. In June 2010, the South African Cabinet decided that work to modernize and strengthen South Africa’s investment protection legal framework should be initiated.

The core elements of the June 2010 Cabinet decision were to:

(1) Develop a South African Investment Act to codify and clarify typical BIT provisions into domestic law and strengthen existing investor protection.

(2) Terminate first generation BITs and offer partners with whom BITs are terminated the possibility to renegotiate.

(3) Refrain from entering into BITs in future, unless compelling economic and political reasons exist to do so.

(4) Develop a Model South African BIT as a basis for negotiation or renegotiation of all BITs.

(5) Establish an Inter-Ministerial Committee with representatives from various government departments to oversee the process.

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292 *ibid.*
293 *Update on BIT Review, supra note 11.*
294 *ibid.*
295 See Section 3.5 below on which South African BITs could possibly be considered as “first generation” BITs.
But, other than the Foresti arbitration, what led the South African government to this decision? To answer this question, two factors are important. The first is the progression of South Africa from new democracy in 1994 to its current position, and the second is the growing debate surrounding BITs and whether they actually are as beneficial to developing countries as initially foreseen. This section will only briefly consider the second point, as it was the subject of extensive consideration in Chapter 2 of this thesis.

3.4.1 South Africa’s Changing Priorities

Internationally, South Africa is considered to be a small economy with a GDP in 2011 of US$ 402.2 billion, up from US$143.7 billion in 1996.\(^{296}\) It became part of the BRICS countries (also consisting of Brazil, Russia, India and China) in 2010, upon the invitation of China, who was the chair of the then BRIC countries.\(^{297}\) Many were surprised by the inclusion of South Africa in the BRICS, expecting Nigeria to receive the nod ahead of South Africa.\(^{298}\) While the South African economy is relatively small compared to its BRICS counterparts, it does compare favorably in the areas of productivity, transparency and ease of doing business.\(^{299}\)


\(^{297}\) Tom Nevin, "South Africa vaults into elite BRIC club" (2011) 372 African Business 56 at 56.

\(^{298}\) *ibid*.

\(^{299}\) *ibid* at 57.
South Africa’s economic position and objectives have changed greatly in the period since its re-entry into the international community. In the late 1980s, South Africa was facing economic sanctions in the forms of international arms embargoes, oil embargoes, prohibition on IMF loans, denial of loans by most international banks, prohibition of loans by the United States Export-Import bank, and limitations on trade and investment. The country faced a drastic shortage of savings, and in 1990 had a GDP of only US$40 billion. With the end of apartheid, and re-entry into the international community, it was only logical that South Africa would do all that it could to attract foreign investment and to stabilize the economy.

Currently, although still considered a small economy, the country is an active participant in the world economy and is one of the few countries in the world that acts both as a capital exporting country (in other words, South African companies invest in third countries) and capital importing country (in other words, being a host country for investors). According to the latest UNCTAD information, South Africa receives most of its foreign direct investment (77%) from the European Union and specifically the United Kingdom and the Netherlands. Also during 2010, South African companies invested ZAR593 million abroad, with

301 Ibid at footnote 78.
302 Eisenberg, supra note 14 at 5.
45% of that amount being invested in the EU and 21% in Africa.\textsuperscript{305} From a policy perspective, South Africa has targeted export-oriented investment as the key to the country’s economic performance,\textsuperscript{306} which would support South Africa’s position as a gateway to the African market.

It should be expected, therefore, that when South Africa now negotiates investment protection treaties, it is no longer only focused on making the country as attractive as possible to foreign investors without proper regard to the effect of such measures on domestic policy, but that it would want to secure as much legal protection as it can for South African investors, while at the same time wanting to reserve as much policy space as possible to regulate vis-à-vis foreign investors in South Africa. At the time of the conclusion of the country’s policy review in 2010, it is interesting to note that there existed no direct policy statement that informs a South African investment policy speaking to both inward and outward FDI.\textsuperscript{307}

3.4.2 Does the BIT Regime Serve South African Interests?

In light of South Africa’s position as a developing State that is both a capital importing and a capital exporting State, is the BIT regime as it is currently applied adaptable enough to serve a country like South Africa’s interests as well as that

\textsuperscript{305}ibid.
\textsuperscript{306}Government Position Paper, supra note 12 at 20.
\textsuperscript{307}ibid.
of investors, or does the BIT regime favor foreign investors at the expense of developing countries like South Africa?

The Government Position Paper identified a number of developmental issues that needed to be considered in order to answer this question. It also pointed to the discrepancy between the definition of expropriation under international law and South African law, and the need to reconsider whether an investment arbitration panel is better suited than domestic courts in adjudicating over disputes between investors and host States. It is these last two issues, and its interplay with the right to development and a State’s right to regulate, that form the core of this thesis.

3.4.2.1 Developmental Issues

It is undisputed that trade and investment, and specifically foreign investment, are essential for development. However, such development would not be sustainable if the model on which it is based is not balanced to take into account the interests of both the foreign investor and the host State. The South African government has taken the view that first generation BITs, such as the ones entered into by South Africa in the period following the end of

\[\textit{ibid at 25.}\]
\[\textit{ibid at 46.}\]
apartheid, do not address major issues of concern for developing countries that are vital from the perspective of sustainable development.\textsuperscript{310}

The most important developmental issue for South Africa, which can also be seen as an umbrella issue encompassing many others, is the need to create more \underline{equitable relations} between foreign investors and host States.\textsuperscript{311} This issue would encompass sub-issues such as obligations that may be imposed on the investor (for example the obligation to comply with the legislation of the host State),\textsuperscript{312} or even on the investor’s host state (for example the obligation to provide certain information, the obligation to assist in combatting corruption, or measures to ensure that investors do not use a State as a “home State of convenience” without having any substantial activity in that State).\textsuperscript{313} A State may also wish to hold multinational corporations investing in that State to social corporate responsibility standards or responsible business conduct standards, neither of which encompasses international law obligations.\textsuperscript{314}

An example of a type of obligation that could be imposed on an investor is performance requirements in the form of, \textit{inter alia}, joint venture and equity ownership requirements, research and development requirements, technology transfer requirements, employment and training requirements or local content

\begin{footnotesize}
\textsuperscript{310} \textit{Ibid.} Also see section 3.5 below on which South African BITs are considered as “first generation” BITs.
\textsuperscript{311} \textit{Ibid} at 49-50.
\textsuperscript{312} \textit{Ibid} at 48-9.
\textsuperscript{313} \textit{Ibid} at 49.
\textsuperscript{314} \textit{Ibid} at 48.
\end{footnotesize}
requirements.\textsuperscript{315} South Africa is, however, a party to the \textit{Agreement on Trade Related Investment Measures} ("TRIMS").\textsuperscript{316} The country would therefore only be able to implement performance requirements that conform to the TRIMS Agreement and has not implemented any performance requirements to date.\textsuperscript{317}

According to the Government Position Paper, a State’s \textit{right to regulate} in the public interest should be preserved. This requires that BITs should leave a wider variety of disciplines affecting more areas of a State’s activity open for regulation by that State. It could potentially be achieved through the incorporation of general exceptions into BITs, although such incorporation may lead to interpretational difficulties.\textsuperscript{318}

One area that a State would want to regulate is the promotion of human rights, for example, to protect citizens from having their rights interfered with by foreigners, policy measures designed to promote the right to food, the right to health or the right to water.\textsuperscript{319} In terms of standard BITs, foreign investors in international arbitration may challenge such measures.\textsuperscript{320} South Africa has

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\textsuperscript{315} \textit{Ibid.}
\textsuperscript{316} \textit{Agreement on Trade-Related Investment Measures}, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 1868 UNTS 186 (entered into force on 1 January 1995).
\textsuperscript{317} \textit{Government Position Paper, supra} note 12 at 48.
\textsuperscript{318} \textit{Ibid} at 38.
\textsuperscript{319} \textit{Ibid} at 49. This issue is discussed in more detail in Chapter 5 below.
\textsuperscript{320} \textit{Ibid.}
\end{flushleft}
started to include exceptions for human rights regulation in its more recent BITs, but so far very few of the country’s BITs contain such provisions.\textsuperscript{321}

\textbf{3.4.2.2 Definition of Expropriation}

On a substantive level, the Government Position Paper identified tensions between investment law standards and the provisions of the Constitution on expropriation. Domestically, Section 25 of the Constitution, which reads as follows, deals with the issue:

\textit{“25. Property}

1. \textit{No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.}

2. \textit{Property may be expropriated only in terms of law of general application}
   \begin{enumerate}
   \item \textit{for a public purpose or in the public interest; and}
   \item \textit{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.}
   \end{enumerate}

3. \textit{The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including}
   \begin{enumerate}
   \item \textit{the current use of the property;}
   \item \textit{the history of the acquisition and use of the property;}
   \end{enumerate}

\textsuperscript{321} \textit{ibid} at 49. See further section 5.2 below, \textit{inter alia}, pointing to the exception clause relating to equality and affirmative action that South Africa has started to include more recently.
c. the market value of the property;

d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

e. the purpose of the expropriation.

4. For the purposes of this section

a. the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and

b. property is not limited to land.”

According to the Government Position Paper, BITs do not distinguish between deprivation (as set out in Section 25(1) of the Constitution) and expropriation (as set out in Section 25(2) of the Constitution). Conversely, the Constitution does not refer to either “nationalization” or “measures having effect equivalent” to expropriation, both concepts that are commonly used in investment law. The concept of expropriation in international law is therefore much wider and much less nuanced than in the Constitution, which leaves open the possibility that legitimate government regulation will be deemed to be a form of indirect expropriation.  

The nuanced approach of South African law to expropriation is demonstrated by the jurisprudence on Section 25 of the Constitution. Under South African law, it is possible that less than market value may be awarded to claimants in expropriation cases, especially where compelling public interest purposes lie

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ibid at 41.
behind the expropriation of the property.\textsuperscript{323} An illustration of this can be found in the case of \textit{Agri SA v Minister of Minerals and Energy}.\textsuperscript{324} In a decision handed down in April 2013, the South African Constitutional Court (the highest court in the land regarding Constitutional matters) was faced with the question whether certain coal mining rights had been expropriated by the commencement of the MPRDA.

The Claimant brought the case to the courts as a test case to determine whether the commencement of the Act effectively expropriated the mineral rights conferred on holders by its predecessor, the Minerals Act. For this purpose, the Claimant bought the claim for compensation of a holder of so-called “old order” mineral rights, Sebenza (Pty) Ltd (“Sebenza”). Sebenza became the holder of the mineral rights in question on 2 October 2001, when it bought the rights from the liquidators of a third company.\textsuperscript{325} With the commencement of the Act on 1 May 2004, Sebenza became the owners of old-order mineral rights in terms the MPRDA, and had the exclusive right to apply for a prospecting or mining right under the MPRDA within a year.\textsuperscript{326} Due to the dissolution of its shareholding, Sebenza was not in a position to apply for the necessary government authorizations to prospect for or mine the coal it had acquired the rights to, either in terms of the Minerals Act (predecessor to

\begin{itemize}
\item \textsuperscript{323} \textit{ibid}.
\item \textsuperscript{324} \textit{Agri South Africa v Minister for Minerals and Energy}, [2013] ZACC 9, online: SAFLII <http://www.saflii.org/za/cases/ZACC/2013/9.pdf>.
\item \textsuperscript{325} \textit{ibid} at para 13.
\item \textsuperscript{326} \textit{ibid} at para 14.
\end{itemize}
the Act) or the MPRDA itself. It's only option was to liquidate, which it did. Sebenza’s liquidators attempted to sell its old order rights, but did not succeed as interested buyers were advised that the rights had ceased to exist under the Act. Sebenza then lodged a claim for compensation with the State in terms of the Act, on the grounds that its mineral rights had been expropriated. It is this claim of Sebenza that was purchased and taken up by the Claimants. Upon rejection of the claim by the State, the Claimants approached the courts to clarify the legal position.

The Constitutional Court held that while Sebenza was deprived of property by the commencement of the Act, this deprivation did not rise to the level of expropriation, and therefore no compensation was payable. The Claimants argued that extinguishing the rights of a property holder in any way equates to an expropriation, regardless of whether other rights that are not necessarily identical to the original rights replaced the original rights. The court did not agree that this deprivation rose to the level of an expropriation and explained the difference between deprivation and expropriation as follows:

"Deprivation within the context of section 25 includes extinguishing a right previously enjoyed, and expropriation is a subset thereof. Whereas deprivation always takes place when property or rights therein are either taken away or

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327 Ibid at para 15.
328 Ibid.
329 Ibid at para 16.
330 Ibid at para 56.
331 Ibid at para 48.
significantly interfered with, the same is not necessarily true of expropriation. Deprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation. There is therefore more required to establish expropriation [...] additional requirements must be met for deprivation to rise to the level of expropriation.”

For a deprivation to rise to the level of expropriation, the State must acquire the “substance or core content” of the property that the owner has been deprived of.\textsuperscript{332} While it is not necessary that there be an exact corollary between that which has been lost and that which has been acquired by the State, there must be “sufficient congruence or substantial similarity”.\textsuperscript{333} This approach, although not in the context of the Act, was also taken by the Court in other cases dealing with section 25 of the Constitution.\textsuperscript{334}

In the Court’s view, the distinction between deprivation of property and expropriation in terms of Section 25 is deliberate. The intention of the section is to facilitate South Africa’s nation building and reconciliation obligations, and

\begin{itemize}
\item \textsuperscript{332} \textit{ibid} at para 58.
\item \textsuperscript{333} \textit{ibid}.
\end{itemize}
the need to open up the South African economy to previously disadvantaged members of society. 335

This distinction between deprivation and expropriation under South African law arguably leads to the conclusion that a lower standard of protection is applied to foreign investors’ property in terms of South African law when compared to international investment law, which does not distinguish between deprivations of property and expropriation. As discussed in Chapter 2, the default standard for expropriation under investment law is that of “prompt, adequate and effective” compensation, which is generally understood as the equivalent of market value of the expropriated investment. 336 The Government Position Paper argues that the “prompt, adequate and effective” standard is one proposed by developed nations, whereas developing nations prefer a standard of “appropriate” compensation 337, which implies a lower level of compensation than under the Hull standard of “prompt, adequate and effective” compensation. 338 Since the standard of “appropriate” compensation leaves the determination of the amount of compensation up to domestic law, it would also be more in line with South Africa’s domestic law.

Could it be argued that the standard of compensation for expropriation provided for by Section 25 of the Constitution is contrary to international law?

335 Agri South Africa v Minister for Minerals and Energy, supra note 324 at 60.
336 Dolzer & Schreuer, supra note 140 at 100.
338 For a more detailed discussion on this point, see section 2.3.1
In terms of Section 232 of the Constitution, customary international law would be law in South Africa unless it is contrary to the Constitution or an Act of Parliament. In the author’s opinion, it would take a very brave domestic court to declare the compensation provisions of Section 25 of the Constitution contrary to customary international law. Despite its frequent application in investment arbitrations, claims that the “prompt, adequate and effective” standard of compensation has reached the status of customary international law are, in the author’s opinion, tenuous.

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

In this regard, South Africa should take note of the fact that the “prompt, adequate and effective” standard of compensation does not only appear in

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339 Constitution, supra note 259 at Section 232.
340 Ibid at Section 233.
South Africa’s older BITs, but is also the standard of compensation provided for by Article 5 of Annex 1 (Co-operation on Investment) to the SADC Protocol on Finance and Investment,\textsuperscript{341} ratified by South Africa on 19 June 2008 and entered into force on 16 April 2010.\textsuperscript{342} The same Annex 1 makes provision for investor-State dispute resolution before the SADC Tribunal, ICSID arbitration or \textit{ad hoc} arbitration.\textsuperscript{343} Even though the SADC Tribunal is currently suspended\textsuperscript{344} and South Africa is not a party to the ICSID Convention, the potential of \textit{ad hoc} arbitration remains. One aspect of the SADC Protocol that does conform to South Africa’s new policy, is the provision for the State’s right to regulate, although this right is limited to the areas of health, safety and environmental concerns.\textsuperscript{345}

The sweeping understanding of expropriation and the general application of the “prompt, adequate and effective” standard of compensation in investment law are clearly at odds with South African domestic law. But South Africa would have to look wider than only its BITs to ensure that its international obligations and domestic obligations align.

\textsuperscript{342} DIRCO, \textit{supra} note 15.
\textsuperscript{343} Article 28 of Annex 1 to the SADC Protocol.
\textsuperscript{344} Website of the SADC Tribunal, online: SADC, <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>.
\textsuperscript{345} Article 15 of Annex 1 to the SADC Protocol.
3.4.2.3 Adjudication by Arbitration Panels rather than Domestic Courts

In addition to the tension between the South African constitutional standard for expropriation and the standard applied in international investment law, the Government Position Paper raised real concerns about the international arbitration process and expressed a clear preference for dispute settlement to be done at a domestic level. The review held that:\textsuperscript{346}

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

South Africa’s main concern appears to be that dispute settlement institutions were not designed to address complex issues of public policy that are now often raised by Respondent States (such as the issues that were raised in the Foresti Arbitration).\textsuperscript{347} Although some changes have been made to the dispute settlement regime, the Government Position Paper raises a number of issues that still need to change, including greater transparency, the

\textsuperscript{346} Government Position Paper, supra note 12 at 40.
\textsuperscript{347} ibid at 45.
establishment of a neutral manner of selecting arbitrators and proper
deerence to domestic dispute settlement procedures.\textsuperscript{348}

3.4.3 Policy Recommendations of the Policy Review

In conclusion, the Government Position Paper points out that adequate policy
space is a key developmental tool for developing countries, and that BITs, as
they are currently being drafted, extend too far into this policy space.\textsuperscript{349} Without
the possibility to require foreign companies to transfer technology, train local
workers or source inputs locally, it argues, investment fails to encourage or
enhance development.\textsuperscript{350}

In light of the review’s findings, the Government Position Paper recommended
that:\textsuperscript{351}

- South Africa should reassess the form and content of its BITs that were to
  expire shortly following the conclusion of the review; and
- South Africa should develop a Model BIT that is in line with its development
  needs to minimize its liabilities arising from BITs that will be negotiated
  following the review;

\textsuperscript{348} \textit{ibid} at 46. \\
\textsuperscript{349} \textit{ibid}. \\
\textsuperscript{350} \textit{ibid} at 54. \\
\textsuperscript{351} \textit{ibid}.
These conclusions, together with the decisions to terminate South Africa’s first generation BITs and to develop an Investment Law for the country were adopted by Cabinet in 2010 as already discussed.

3.5 **New Foreign Investment Policy**

South Africa started to implement the 2010 Cabinet decision late in 2012. The first Termination Notice to terminate the BIT with the Benelux countries (Belgium and Luxemburg) was delivered late in 2012.\(^{352}\) Subsequently, South Africa delivered Termination Notices to Spain early in 2013, and Germany and Switzerland during October 2013.\(^{353}\) South Africa has not publicly stated which of its BITs are “first generation” BITs that will be terminated in terms of the new policy. This in itself raises concerns about the transparency of the policy, as well as about the transparency of the implementation of the policy. Without a clear statement on which BITs the government consider to be first generation treaties and why, the government’s actions could potentially be seen as arbitrary and could create uncertainty with all of South Africa’s BIT partners. Based on the BITs that have been terminated thus far, this thesis will attempt to predict which of South Africa’s remaining BITs might be classified as “first generation”.

\(^{352}\) Ensor, *supra* note 21.

The BITs with the Benelux States,\textsuperscript{354} Spain,\textsuperscript{355} Germany and\textsuperscript{356} Switzerland\textsuperscript{357} were all signed in the late 1990s and entered into force around the turn of the millennium. But the time period of treaties is not the only characteristic that they have in common. All four of these BITs are relatively short, each just 11 or 12 articles long and cover in the most general of terms the bare minimum that one would expect in a BIT. The following table sets out the provisions of these four terminated BITs:

<table>
<thead>
<tr>
<th>Definitions (very basic, includes definitions such as investor, investment, returns, territory)</th>
<th>BENELUX</th>
<th>SPAIN</th>
<th>GERMANY</th>
<th>SWITZERLAND</th>
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\textsuperscript{355} Agreement on the promotion and reciprocal protection of investments between the Kingdom of Spain and the Republic of South Africa, South Africa and Spain, 30 September 1998, 2098 UNTS 203 (entered into force on 21 December 1999) [South Africa – Spain BIT].


\textsuperscript{357} Agreement between the Government of the Republic of South Africa and the Swiss Federal Council on the promotion and reciprocal protection of investments, South Africa and Switzerland, 27 June 1995, 2548 UNTS 103 (entered into force on 29 November 1997).
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<thead>
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Table 3.1  South Africa’s BITs with the Benelux States, Spain, Germany and Switzerland

The provisions themselves are vague and very investor-friendly, leaving no regulatory space for the home State. For example Article 5(1) of the South Africa – Switzerland BIT, dealing with expropriation, provides in relevant part that:

“Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization...
or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the real value of the investment expropriated immediately before the expropriation or 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 freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.”

The articles dealing with expropriation of the other 3 terminated BITs provides for similar investment protection.

When applying the same criteria to South Africa’s remaining BITs, namely an agreement that came into force between the late 1990s and early 2000s, primarily with developed Western States as counterparty, and with wide, general and investor-friendly provisions leaving little or no regulatory space to the home State, there are a number of BITs that could fit the bill. It is possible that the other BITs that would qualify as “first generation” are South Africa’s BITs with
France,\textsuperscript{358} Italy,\textsuperscript{359} Greece,\textsuperscript{360} the Netherlands,\textsuperscript{361} the United Kingdom,\textsuperscript{362} Denmark,\textsuperscript{363} Austria,\textsuperscript{364} Sweden\textsuperscript{365} and Finland.\textsuperscript{366}

The move to terminate first generation BITs gave rise to concerns from the States involved, rating agencies, as well as from the South African private sector.\textsuperscript{367} One of the reasons for these parties’ concerns probably is that, despite the decision in 2010 to draft a Model BIT for South Africa as well as a new Investment Law, these documents had not yet been made public at the time of


\textsuperscript{361} Agreement on Encouragement and reciprocal protection of investments between the Republic of South Africa and the Kingdom of the Netherlands, 9 May 1995, 2066 UNTS 413 (entered into force on 1 May 1999).


\textsuperscript{363} Agreement between the Republic of South Africa and the Kingdom of Denmark concerning the promotion and reciprocal protection of investments, South Africa and Denmark, 22 February 1996, 2547 UNTS 39 (entered into force on 23 April 1997).


\textsuperscript{367} Ensor, supra note 21; Paton, supra note 353.
the first terminations. The lack of clear guidance on what South Africa would want to include in future BITs also contributes to transparency concerns about the whole process. It is impossible for foreign investors and States to predict the South African investment environment without at least a statement from the government confirming the rights that investors may expect to find in future BITs. It is perhaps, then, not completely unforeseen that investors would react by fearing the worst.

Interestingly, South Africa did conclude another BIT following the start of the policy review. In November 2009 South Africa concluded a BIT with neighboring Zimbabwe, which entered into force on 15 September 2010. It is possible that the South African government considered it prudent to conclude the BIT with Zimbabwe in light of the effects that country’s land redistribution project had on South African nationals. The South African government also faced pressure from South Africans with investments in Zimbabwe in the form of domestic legal action for their failure to provide diplomatic protection to South African farmers in Zimbabwe, who lost their farms as a result of the Zimbabwean government’s policy to expropriate white-owned farms without payment of compensation. In 2008 the South African High Court gave a baffling order against the Government

\[368\] Ensor, supra note 21.
\[369\] Paton, supra note 353.
in relation to a claim from a South African farmer who lost his farms in Zimbabwe as part of the land redistribution process, declaring that the Claimant has a right to diplomatic protection in terms of South African law and ordering the Government to provide the Claimant with diplomatic protection and to take all necessary steps, within 60 days of the order, to have the violation of the Claimant’s rights in Zimbabwe remedied.\textsuperscript{371} The High Court’s order was baffling for a few reasons, including the fact that South African courts had previously held that there is no right to diplomatic protection under South African law (as is the position in international law),\textsuperscript{372} and that, even if the South African government were to provide the Claimant with diplomatic protection, there would still be no guarantee that that the expropriation of the Claimant’s assets in Zimbabwe would be remedied as no Government has the power to ensure the remedy of a violation of rights that occurred in another country. The order was overturned on appeal in the Supreme Court of Appeal in 2011.\textsuperscript{373} The South African BIT with Zimbabwe was hailed as providing South African investors in Zimbabwe with the “best protection yet”.\textsuperscript{374} Of course, it could not address any of the expropriations without compensation that had occurred prior to the entry into force of the BIT, but from that point onwards, South African investors in Zimbabwe that were subjected to similar treatment would have some recourse against the

\textsuperscript{372} Kaunda and Others v President of the Republic of South Africa [2004] ZACC 5.
Zimbabwean government at an international level. The BIT with Zimbabwe might be an example of what is meant by “compelling economic and political circumstances” which would lead to South Africa concluding BITs in future.

Despite being concluded more than 10 years after South Africa first started to conclude BITs and after the start of the Foresti arbitration, the content of the South Africa – Zimbabwe BIT does not differ much from the first generation BITs identified above. It follows much the same pattern (including providing for prompt, adequate and effective compensation to be paid in cases of expropriation), except that it provides for a new exception to the fair and equitable treatment and national treatment provisions contained in Article 3. Article 3(4)(c) of the South Africa-Zimbabwe BIT now provides that these two standards shall not require a Party to extend a benefit to a foreign investor resulting from:

“any domestic law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.”

The inclusion of this new provision was likely a direct response to the Foresti arbitration. However it is surprising that the remainder of the BIT does not

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375 Interestingly, a number of Dutch farmers successfully brought an ICSID claim against Zimbabwe for the loss of their farms in that country: see Bernardus Henricus Funnekotter and others v Republic of Zimbabwe (ICSID Case No ARB/05/6), Award dated April 12, 2009.

376 South Africa – Zimbabwe BIT, supra note 370 at Article 3(4)(c).
substantially deviate from the first generation BIT model. It might be that because of the legal action taken against the South African government in relation to the treatment of South African investors in Zimbabwe, the government did not have sufficient time to develop a new model. But the South Africa – Zimbabwe BIT was concluded at a time when South Africa was already busy with its BIT review. Considering the amount of work that had gone into reviewing South Africa’s BIT practice up to that point and identifying various problems with that practice, one would expect that some of the less controversial issues that could already have been clear at that point (such as the prompt, adequate and effective standard of compensation), would have been addressed in this BIT. The negotiation of the South Africa – Zimbabwe BIT could have been used to at least start to develop a new model BIT for South Africa.

Similar to the situation regarding the absence of a South African Model BIT at the time of the Cabinet Decision in 2010, the legislation referred to in the Cabinet Decision was not ready at the date of the of the decision, or even when the implementation of the decision started in 2012. The Promotion and Protection of Investment Bill (the “Bill”) was only published for public comment on 1 November 2013. The Bill aims to put foreign investors and South African investors on level playing field, and addresses, among other things, the two main South

377 General Notice 1087 of 2013: Invitation for the Public to Comment on the Promotion and Protection of Investment Bill, 2013 (S Afr), G Gazette No 36995, 1 November 2013, 3 [Investment Bill].
African concerns – a host country’s right to regulate and an investor’s recourse to international arbitration.

Section 3 of the Bill sets out the purposes of the Act as to:

“(a) promote and protect investment in a manner that is consistent with public interest and a balance between the rights and obligations of investors; and

(b) ensure the equal treatment between foreign investors an citizens of the Republic [of South Africa], subject to applicable legislation.”

The Bill guarantees foreign investors national treatment (section 6), security of investment (section 7) and free transfer of funds subject to applicable legislation and tax obligations (section 8).

It also specifically preserves the government’s right to regulate in the public interest in order to, inter alia, redress historical, social and economic inequalities and to foster development industrialization and beneficiation (section 10).

The Bill’s provisions on expropriation and dispute settlement deserve further scrutiny.

3.5.1 Expropriation

Section 8 of the Bill provides that expropriation may only take place if it is done in accordance with the Constitution and in accordance with a law of general application for the public interest or public purposes and in line with due process
requirements. Just and equitable compensation for expropriated property should be effected in a timely manner.

The “just and equitable” standard mirrors the text of section 25 of the Constitution, and should therefore be interpreted as more flexible than the traditional Hull standard of “prompt, adequate and effective” compensation. According to section 8(3) of the Bill, compensation payable must “reflect an equitable balance between the public interest and the interests of those affected”, which must be determined having regard to all the relevant circumstances. Such circumstances would include having regard to the use of the investment, the history of the acquisition of the investment, the market value of the investment and the purpose of the expropriation.\textsuperscript{379}

The value of the expropriated investment should be determined based on the value immediately before the expropriation or before it became public knowledge and should include interest calculated on the average deposit rate prevailing on the date of the taking until the date of payment.\textsuperscript{380} It remains to be seen how the courts will interpret the term “immediately before the expropriation or before it became public knowledge”. It is foreseeable that investors could argue that the mere rumor that an investment may be expropriated could affect the market value of that investment, although the expropriation may not yet be public knowledge.

\textsuperscript{379} \textit{Investment Bill, supra note 377 at 15, section 8(3).}
\textsuperscript{380} \textit{Ibid at 15, section 8(4).}
This standard would allow for the specific circumstances of each case to be taken into consideration, which would, in light of the interpretation of section 25 of the Constitution by the South African courts, allow greater regulatory freedom for the South African government.

Some forms of regulation are explicitly stated as not amounting to expropriation, namely:\textsuperscript{381}

“\textit{(a) A measure or series of measures taken by the government of the Republic that have an incidental or indirect adverse impact on the economic value of an investment;}

\textit{(b) a measure aimed at protecting or enhancing legitimate public welfare objectives, such as public health or safety, environmental protection or state security;}

\textit{(c) the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property; and}

\textit{(d) any measure which results in the deprivation of property but where the State does not acquire ownership of such property provided that-}\textsuperscript{381}

\textit{\textsuperscript{ibid} at 14, section 8(2)(f).}
(i) there is no permanent destruction of the economic value of the investment; or

(ii) the investor’s ability to manage, use or control his or her investment in a meaningful way is not unduly impeded.”

Specifically section 8(2)(d) above would seemingly exclude the possibility of claiming compensation for the type of taking that occurred in terms of the Act, and which was the subject of the Foresti arbitration.

3.5.2 Dispute Resolution

In terms of section 11 of the Bill, a foreign investor who has a dispute regarding his investment has one of three options on how to settle the dispute. He may approach the DTI to find a negotiated settlement, he may approach a court, or he may initiate arbitration in terms of the South African Arbitration Act, 42 of 1965. Section 8(5) also provides for an investor who has been subjected to expropriation to have his case heard before a competent court, which may include a challenge to the validity of the valuation of the investment in terms of section 8(3).

The option of international arbitration would, of course, remain available to investors whose home countries have BITs in force with South Africa that provide for such arbitration, or who still benefit from the protection of a terminated BIT
through the operation of a so-called “grandfather clause”.\textsuperscript{382} For as long as South Africa is a party to the SADC Protocol on finance and Investment, arbitration would also be an option made available in that treaty. But the intention of the government to move away from international arbitration as the default dispute resolution mechanism has been clearly conveyed in the Bill.

Comments on the Bill were due by 1 February 2014. The Bill is unlikely to be enacted until late 2014 at the earliest.\textsuperscript{383}

\subsection{3.6 Conclusion}

South Africa has gone through a drastic change in policy with regard to BITs in a period of less than 20 years. This can, in part, be attributed to South Africa’s experience with international arbitration, but also to the change of South Africa’s position from a small economic player in the world to an important player in Africa and a member of BRICS.

Since the second half of 2012, South Africa has actively taken steps to implement a new investment policy in line with the Cabinet decision of June 2010. Despite the decision having been in the public domain and the terminations being effected in line with the relevant treaty provisions, the actual steps taken to terminate existing BITs took many by surprise and led to concern about the intention behind the termination. This concern could probably in large part have been addressed

\textsuperscript{382} Paton, \textit{supra} note 353.
\textsuperscript{383} \textit{ibid.}
had the DTI prepared and published the Bill and prepared a Model BIT before delivering the first BIT Termination Notice.

It remains to be seen what effect this changing policy will have on South Africa’s economic growth and foreign investors’ confidence in the country. This thesis examines whether South Africa’s concerns regarding the international investment regime are well founded and whether the manner in which the country decided to react to these concerns were the most prudent steps that could have been taken.
Chapter 4: Country Comparisons

4.1 Introduction

Despite the concerns raised in Chapter 2, some States, and especially developing States, continue to enter into BITs and to sign on to the investment arbitration process. One example is the case of South Sudan. An oil rich country that gained independence from Sudan on 9 July 2011, South Sudan ratified the ICSID Convention\textsuperscript{384} on 18 April 2012. Considering the country’s tumultuous civil war history, one has to wonder whether the government of South Sudan was fully apprised of all the risks as well as the potential benefits of ratifying this treaty.

China provides another example of a developing country that has bought into the investment law regime.\textsuperscript{385} As of 1 June 2013, China had 103 BITs in force, although only 8 of these BITs in force are with African States.\textsuperscript{386}

However, many countries are making dramatic adjustments to their policies regarding BITs and investment arbitration. While South Africa’s decision to terminate a large number of BITs in a relatively short period of time is one of the most extreme policy changes witnessed so far, it follows decisions of other developing countries to withdraw their consent to investment arbitration or

\begin{footnotesize}
\begin{enumerate}
\item ICSID Convention, supra note 232.
\item China’s position is, of course, very different from that of South Sudan. China is one of the world’s leading emerging economies and in many ways its behavior on the international stage has started to emulate that of developed States. This may also partially explain why China, as it became economically more powerful, adopted a more open approach to concluding BITs.
\item “Full List of Bilateral Investment Agreements Concluded, 1 June 2013”, online: UNCTAD <http://unctad.org/Sections/dite_pcbb/docs/bits_china.pdf>. Interestingly, it can be seen from the list how China increasingly relied on BITs as its economic stature continued to grow. The more China became a capital exporting country, the more BITs it concluded.
\end{enumerate}
\end{footnotesize}
drastically reduce the types of disputes that could be referred to investment arbitration.\textsuperscript{387} Latin American States specifically have been taking steps to distance itself from investment arbitration, either through finding ways to deny enforcement of the award, such as Venezuelan courts that resist enforcing ICSID awards, or through denouncing the ICSID Convention such as Bolivia, Venezuela and Nicaragua, or through termination of their BITs, such as Venezuela and Ecuador.\textsuperscript{388}

The following two chapters will consider practical examples of reactions to the crystallization of the risks involved in BITs and investment arbitration. This Chapter will focus on two country examples, namely Canada and Brazil. The next Chapter will consider specific model BIT clauses that have been put forward by the IISD, UNCTAD, Commonwealth and SADC to incorporate principles into BITs that address the concerns raised in Chapter 2.

The reason this chapter focuses on Canada and Brazil is because of the commonalities shared by these two countries and South Africa, but also because of the differences between the countries and between their BIT policies.

Canada, Brazil and South Africa have a wealth of natural resources in common. Very often, it is these natural resources that attract foreign investors. Trends in the natural resources or mining sector in these States could therefore be a primary


\textsuperscript{388} ibid at 227.
driver for investment policy reforms. All three States are former colonies with diverse populations, and, in the case of South Africa and Brazil, high levels of inequality and poverty. It is therefore appropriate to consider the similarities between these three countries from the perspective of capital importing countries for the purposes of the exploitation of natural resources.

But there are also differences between the three countries. While Canada has a developed economy, Brazil and South Africa are both developing economies and part of the BRICS emerging economies of States. Canada is in the process of liberalizing its rules on admitting foreign investors, but have concerns about foreign State Owned Enterprises (“SOEs”) investing in Canada and subject these SOEs to careful scrutiny before allowing such investments. At the same time, Canada enters into BITs to protect the rights of Canadian investors investing abroad. Brazil does not have any BITs in force, and have shown no indication that it intends to change this position. Brazil’s policy to attract FDI is not based on BITs and to date, this decision does not appear to have negatively impacted on Brazil’s ability to attract foreign investors.

The policy choices of Canada and Brazil could be instructive for South Africa. At the very least, it would be possible to determine if South Africa’s new BIT policy is completely novel, or whether similar steps have been taken by other countries. South Africa’s Cabinet decision indicates that it would prefer to regulate foreign investors and foreign investments primarily through domestic legislation and would
only enter into BITs in exceptional circumstances.\textsuperscript{389} The examples of Canada and Brazil indicate the benefits and drawbacks of regulating foreign investment through domestic legislation only as is the case for Brazil, or through a policy that encompasses both domestic legislation and BITs as is the case for Canada. South Africa’s new policy could easily follow either the path of Brazil or Canada, depending on how the government chooses to apply the new policy.

Since this thesis is not primarily a comparative exercise, it is not the purpose of this chapter to extensively analyze the foreign investment protection policies of the two countries under review, but merely to give a high level overview of the route each country has decided to take.

4.2 Canada

Canada started to enter into BITs right as the proliferation of BITs started in the early 1990s. Canada’s first BIT was concluded with the United States in 1989, followed by Poland in 1990.\textsuperscript{390} Currently, Canada has 26 BITs (Canada uses the term “Foreign Investment Protection Agreement” or “FIPA” in this regard) in force.\textsuperscript{391}

\textsuperscript{389} Update on BIT Review, supra note 11.
\textsuperscript{391} Information available on the website of the Canadian Department of Foreign Affairs, Trade and Development, online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng. This number does not include investment protection chapters included in Free Trade Agreements such as the North American Free Trade Agreement (“NAFTA”).
Canada, primarily a capital exporting country, enters into Bilateral Investment Treaties (“BITs”) for the purpose of enhancing the legal protection of Canadian business people and corporations investing abroad. Canada selects the countries with whom it enters into BITs on the basis of economic factors, prioritizing countries where Canadian investors would benefit most from investment protection. BITs are seen as “an instrument of protection for Canadian investors”, and the Canadian government uses BITs as a way to promote a “fair, open and secure environment”.

Canada’s BITs are negotiated on the basis of a Model Agreement (“Canadian Model”), the most recent version of which dates from 2004 and was developed based on Chapter 11 of the NAFTA informed by Canada’s experiences with investment arbitration under NAFTA. The Canadian Model follows a standard investment treaty model, but introduces some novel provisions, which are

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395 Ibid.
396 Canadian Model, supra note 173.
399 Ibid at 4. Bilateral investment treaties normally consist of three parts, the first part defining who may benefit from the treaty (usually through the definitions of investment and investor), the second part setting out the substantive protections provided by the treaty and the third part setting out the dispute resolution provisions of the treaty.
examined below.

Article 5 of the Canadian Model sets out the standard of protection that foreign investors can rely on. The standard relates to the provisions on fair and equitable treatment and full protection and equality, and stipulates that States will not be required to provide foreign investors with any more protection than what is required in terms of the customary international law minimum standard of protection for aliens. While the customary international law minimum standard remains an evolutionary standard,\(^{400}\) the provision does make the standard more predictable, and places an “upper limit” on the level of protection that the State Parties to the BIT can be expected to provide foreign investors. Canada’s approach in this regard was arguably informed by its NAFTA experience, where the States Parties to NAFTA \textit{ex post facto} had to restrict the meaning of fair and equitable treatment in terms of NAFTA Chapter 11 through an interpretative note.\(^{401}\)

The National Treatment (Article 3) and Most Favored Nation (Article 4) clauses in the Canadian Model are limited, first, in an attempt to stop “investment treaty shopping”,\(^{402}\) by Annex III to the Model that provides that the MFN clause shall only provide prospectively and, second, by Article 10 of the Model, a GATT-like

\(^{400}\) \textit{ibid.}


\(^{402}\) Newcombe, \textit{supra} note 389 at 4.
exception clause\textsuperscript{403} aimed at the protection of human, animal or plant life or health, as well as compliance with domestic law and conservation purposes.\textsuperscript{404} It has been argued that the inclusion of the exception clause gives rise to interpretive issues, most notably about what the effect of the inclusion of the clause will be on the interpretation of earlier treaties that do not have such a clause.\textsuperscript{405} In response, Canada would probably argue that the exception clause does not amend Canadian treaty practice but merely clarifies it, and that the same standards would apply regardless of whether the exceptions are explicitly stated or not.

In addition to the general exception clause (Article 10), the Canadian Model limits the definition of indirect expropriation through Annex B.13(1) by stating that a non-discriminatory measure aimed at protecting legitimate public welfare objectives, for example relating to health, safety and the environment, will only constitute indirect expropriation in exceptional circumstances,\textsuperscript{406} with the result that investment arbitration tribunals will no longer be able to find that an indirect expropriation has occurred merely based on the impact of a government measure on an investment.\textsuperscript{407} Annex B.13(1) further provides various factors that will have to be considered in order to determine whether an indirect expropriation in fact occurred, including the “character” of the measure, its “economic impact” on the

\textsuperscript{403} ibid.
\textsuperscript{404} ibid.
\textsuperscript{405} ibid at 5.
\textsuperscript{406} Canadian Model, supra note 173 at Annex B.13(1)(c).
investment, and whether the measure impacts on “distinct, reasonable, investment-backed expectations”.

Finally, the Canadian Model contains provisions relating to enhanced publicity of proceedings, through the publication of documents and access to the proceedings, as well as relating to the participation of amici curiae.

The Canadian Model was one of the first model BITs to incorporate sustainable development principles, as can be seen from the similarities between the Model and the IISD’s 2005 “Model International Agreement on Investment for Sustainable Development” and the reliance placed on the IISD Model by SADC in drafting its “Model Bilateral Treaty Template”. The inclusion of sustainable development principles is interesting in light of Canada’s stated approach of entering into BITs to assist Canadian investors abroad. These principles generally impose more obligations on and limit the rights of foreign investors. However, Canada itself has been subject to a number of investment arbitration proceedings in the context of NAFTA Chapter 11, and in a changing international landscape where developed States like Canada are faced with foreign investment from not only other

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408 Canadian Model, supra note 173 at Annex B.13(1)(b).
409 Ibid at Article 38.
410 Ibid at Article 39.
412 SADC, “SADC Model Bilateral Investment Treaty Template ”, (19 July 2012), online: IISD <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>. The SADC template expressly draws inspiration from the Canadian Model with regard to, inter alia, the definition of investment (at 9), the structure of the expropriation provision (at 25), the provision on repatriation of assets (at 28), the transparency provision relating to investor-State arbitration (at 54).
developed States but also from developing States, it is possible that the decision to include sustainable development principles was motivated by the need to protect Canadian interests in the event that the country finds itself subject to investment arbitration proceedings in the context of any of its BITs.

Recently, Canada has experienced a public outcry following the signing of a BIT with China. After concluding negotiations on a BIT with China in February 2012, the agreement between the two countries was signed on 9 September 2012. The Canada – China BIT is said to be significant due to China’s interest in investing in Canada’s natural resources, which is anticipated to lead to meaningful increases in Chinese foreign investment in Canada.413 The signing of the BIT resulted in judicial review proceedings being launched in the Canadian Courts by the Hupacasath First Nation, claiming that the Canadian Government should have consulted them, as the agreement could affect their rights and title,414 but the case was dismissed as the Hupacasath First Nation could not show how the Canada-China BIT would result in real damages to aboriginal rights.415

The Canada – China BIT has not yet entered into force. The reasons for the delay are not clear, but it is likely that the public outcry and legal proceedings have

415 Hupacasath First Nation v Canada (Minister of Foreign Affairs), 2013 FC 900.
played a role. Another possible reason for the delay is the impact of the acquisition of Canadian oil and gas company Nexen Inc ("Nexen"), whose assets include oil sands assets in Alberta, by Chinese SOE China National Offshore Oil Corporation ("CNOOC") for Cdn$15.1 billion.\footnote{Navin Joneja, \textit{Regulation of Foreign Investment In Canada: The Investment Canada Act - Law, Policy and Practice}, 2013 ed (Toronto: Carswell) at 69.} The CNOOC/Nexen deal faced strong opposition by the public, with polls showing that as many as 8 out of 10 Canadians were against it,\footnote{Daniel Tencer, "Nexen CNOOC Deal: Poll Finds 8 in 10 Don't Want Foreign Governments Owning Canadian Resources", \textit{Huffington Post} (16 October 2012), online: <http://www.huffingtonpost.ca/2012/10/16/nexen-cnooc-deal-poll_n_1971189.html>.} and its approval, approximately 6 months after the deal was first announced, drew strong criticism from opposition parties and civil society concerned about foreign control over Canada's natural resources.\footnote{"Opposition, civil society groups condemn government approval of CNOOC Nexen takeover", \textit{Rabble} (7 December 2012), online: <http://rabble.ca/news/2012/12/opposition-parties-civil-society-groups-condemn-government-approval-cnooc-nexen-takeover>.
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On the same date as the government approved the Nexen / CNOOC transaction, Canada published new regulations to its Investment Canada Act ("ICA").\footnote{\textit{Investment Canada Act}, R.S.C., 1985, c. 28 (1st Supp.) [ICA].} But before considering the regulations specifically, it is necessary to understand when the ICA will be triggered and what its purpose is. The ICA represents a step towards greater liberalization in Canada’s trade and investment policy.\footnote{Joneja, \textit{supra} note 327 at iv.} Its purpose, as set out in section 2 thereof, is to “provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be
While compared to its predecessors, the ICA significantly liberalizes and deregulates foreign investment in Canada,\textsuperscript{422} a strict review process remains in place before certain types of foreign investment will be allowed. The ICA will be triggered if a non-Canadian acquires control (or is deemed to acquire control) over a Canadian business,\textsuperscript{423} and the acquisition will be reviewable (as opposed to only requiring notification to the government) in the following circumstances:\textsuperscript{424}

- Where the investor is not a State-Owned Enterprise (“SOE”), is from a WTO member country, and no Canadian Cultural Business is being acquired directly, the transaction is reviewable if the book value of the assets used in carrying on business exceeds CA$344 million.\textsuperscript{425} It has recently been announced that this threshold will increase progressively over the next 5 years to CA$1 billion.\textsuperscript{426}
- The monetary threshold for SOEs\textsuperscript{427} will remain at CA$344 million, and the Minister of Industry (“Minister”) has the power to decide that a SOE has acquired \textit{de facto} control of a Canadian business, which will trigger the

\textsuperscript{421} ICA, supra note 419 at section 2.
\textsuperscript{422} Joneja, supra note 416 at iv.
\textsuperscript{423} \textit{ibid} at 47. While various exceptions apply at different stages of the enquiry, it is outside the scope of this Chapter to consider each possible exception in detail.
\textsuperscript{424} ICA, supra note 419 at section 14.
\textsuperscript{425} Joneja, supra note 416 at 48.
\textsuperscript{426} \textit{ibid}.
\textsuperscript{427} Which will, according to section 3 of the ICA, include (a) a foreign federal, state or local government or agency of such a government, (b) an entity controlled or influenced, directly or indirectly, by a government or agency referred to in (a), (c) an individual acting under the direction of a foreign government or agency or under the influence, directly or indirectly of a foreign government or agency.
applicability of the ICA, even where, on the face of the transaction, there is no *de jure* acquisition of control.\(^{428}\)

- Where the Canadian business being acquired is engaged in a Cultural Business,\(^{429}\) the thresholds are much lower, having been set at a book value of the assets used in carrying on business of CA$5 million for direct acquisitions and a book value of the assets used in carrying on business of CA$50 million for an indirect acquisition.\(^{430}\)

- In cases where neither the purchaser nor the vendor is from a WTO Member State, the same monetary thresholds will apply as where Canadian Cultural Businesses are involved.\(^{431}\)

- Any acquisition that presents reasonable grounds to believe that it could be injurious to Canadian national security, may be reviewed by the Minister.\(^{432}\)

There is no monetary threshold for a review on national security grounds, and the Minister has very wide powers to review a wide variety of investments.\(^{433}\)

The only requirements for the initiation of a review is that the entity being acquired (a) has a place of operations in Canada, (b) employs an individual in Canada in connection with the entity’s operations, or (c) has assets in Canada

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\(^{428}\) Joneja, *supra* note 416 at 71.

\(^{429}\) A Canadian Cultural Business is defined by section 14.1 of the ICA. In short, it is an entity that carries on business in the fields of printing, distributing an publishing of books (a), the production, distribution, sale or exhibition of film or video recordings (b), the production, distribution sale or exhibition of audio or video music recordings (c), the publication, distribution or sale of music in print or machine readable form (d), or radio communication in which the transmissions are intended for direct reception by the general public, any radio, television broadcasting undertakings and any satellite programming and broadcast network services.

\(^{430}\) Joneja, *supra* note 416 at 49.

\(^{431}\) *Ibid*.

\(^{432}\) ICA, *supra* note 419 at Part IV.1.

\(^{433}\) Joneja, *supra* note 416 at 94.
used to carry on the entity’s operations.\textsuperscript{434}

A reviewable investment will only be approved if the Minister considers it to be to the “net benefit” of Canada.\textsuperscript{435} The ICA sets out a number of aspects to be considered, and if the aggregate “net benefit” is positive after consideration of these factors, the investment is considered to be in to the “net benefit” of Canada, regardless of the extent of that benefit.\textsuperscript{436}

The new regulations have been introduced in the form of \textit{Guidelines on State Owned Enterprises} (“Guidelines”) that will apply to SOEs.\textsuperscript{437} The Guidelines were issued in conjunction with a \textit{Statement Regarding Investment by Foreign State Owned Enterprises} (“Statement”).\textsuperscript{438} Principles from both these documents were contained in proposed amendments to the Investment Canada Act, put forward as Bill C-60, which has been in force since July 2013.\textsuperscript{439} The new Guidelines give a much broader discretion to the executive to approve or deny proposed investments by foreign SOEs. For example, whereas with non-SOE investors there is a bright line test to determine whether or not control of a Canadian

\begin{quote}
\textsuperscript{434} ICA, supra note 419 at section 28 (4.1).
\textsuperscript{436} Joneja, supra note 416 at 58.
\textsuperscript{439} Joneja, supra note 416 at 70.
\end{quote}
company is being acquired, the Minister has the power to determine that an SOE has acquired \textit{de facto} control of an entity, which would trigger a review of the investment. SOEs will face greater scrutiny, but, as long as they pass the net benefit test, will be allowed in Canada, as long as the investment is not in the Canadian oil-sands business. If the proposed investment is in the Canadian oil-sands business, the starting point for the review will be that the investment will not be allowed, unless there are exceptional circumstances. Neither “exceptional circumstances” nor “Canadian oil-sands business” are defined in the ICA.

The Guidelines have acted as a counterbalance to the ICA’s steps towards greater liberalization and was introduced in response to a perception that the ICA was not tough enough when it counted, as a form of “risk management tool”.

The primary Canadian concern in relation to SOEs is that these entities will not operate on a commercial basis, but that decisions will rather be based on the interests of the SOE’s home government, which may be contrary to the interests of the Canadian government. Canada’s concern therefore does not lie with SOEs as such, in fact Canada itself has a number of SOEs (so-called “Crown Corporations”), but rather that these SOEs are “foreign” and that they might want

\begin{footnotes}
\item[440] \textit{Ibid.} The author refers to the example of deeming rules that provide that the acquisition of less than one third of the voting shares of a corporation, or less than a majority of voting interests of a non-corporate entity would not be considered as acquiring control.
\item[441] ICA Guidelines, \textit{supra} note 437.
\item[442] Joneja, \textit{supra} note 416 at 5.
\item[443] \textit{Ibid.}
\item[445] Henderson, \textit{supra} note 435 at 7.
\end{footnotes}
to invest in Canada for reasons that are not commercial in nature. These suspicions may be fueled by the perceived secrecy and lack of transparency of Chinese companies in general (and with the involvement of the Chinese government in SOEs in particular) and differences in governance between Western companies and Chinese companies.\textsuperscript{446} However, suspicions about foreign SOEs, and specifically Chinese SOEs, might well be a result of Western unease at China’s rising global influence.\textsuperscript{447} Given Canada’s already suspicious attitude towards foreign investment, these added risks have prompted further scrutiny of proposed investments by foreign SOEs.

The Guidelines have effectively introduced a three-tier system of foreign investments, with private foreign investments being the prized, top-tier investments that face the least amount of regulatory scrutiny, foreign SOE investments in non-oil-sands industries at the second level facing scrutiny at a much lower financial value threshold than private foreign investors, and foreign SOEs wanting to invest in Canada’s oil-sands business facing the fact that their investments will not be considered to the net benefit of Canada except in exceptional circumstances.\textsuperscript{448} What this high level review of Canada’s foreign investment policy shows, is that Canada has a very different approach towards outward investments as compared to inward investments. The differences between these two policies could possibly be attributed to Canada’s suspicious attitude towards foreign investors, especially

\textsuperscript{446} \textit{ibid} at 8.  
\textsuperscript{447} \textit{ibid} at 9.  
\textsuperscript{448} \textit{ibid}.  

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investors from corporate cultures that differ extensively from Canada’s.\textsuperscript{449} As far as outward investments go, Canada enters into BITs with countries where Canadian business could benefit most, based on a liberal Model. With regards to inward investments, Canada is very selective about which investors it allows within its borders. Only these select few investors who comply with the Canadian “net benefit” test will be able to benefit from the reciprocal rights provided for by Canada’s liberal BITs.

4.3 Brazil

In 2012 Brazil was the 7\textsuperscript{th} wealthiest economy in the world. In 2010, it was one of the three major destinations for FDI amongst emerging economies.\textsuperscript{450} Brazil achieved this economic growth despite having chosen a very different investment policy from that of Canada, and in fact, from that of most other Latin American countries.\textsuperscript{451} Brazil signed 14 BITs\textsuperscript{452} during the 1990s, but none of these were ever ratified.

A look into Brazil’s history gives some context to the country’s reluctance towards entering into BITs. From the time that Brazil became independent in 1822 until the 1930s, the country was very open to foreign investment and encouraged foreign

\textsuperscript{449} Henderson, \textit{supra} note 435 at 4.
\textsuperscript{452} BITs were signed with Portugal, Chile, the UK and Ireland, Switzerland, Denmark, Finland, France, Germany, Italy, Venezuela, Cuba, the Netherlands and Belgium between 1994 and 1999. See Wei, \textit{supra} note 450 at 668.
investment specifically to build the country’s infrastructure, often through offering various types of incentives to foreign investors.\textsuperscript{453} British foreign investors were the main source of FDI for Brazil before the 1930s, first in the export of goods industry (primarily coffee), followed by the railroad industry in the second half of the 19\textsuperscript{th} century and then in the public utilities sector.\textsuperscript{454}

During the 1930s, however, the Brazilian government’s attitude towards foreign investment changed to become much more restrictive,\textsuperscript{455} resulting in the reduction of foreign activities.\textsuperscript{456} The cause of Brazil’s more restrictive approach was a balance of payment crisis that resulted from a decline in the level of economic activity in the country.\textsuperscript{457} Tariffs were more tightly controlled and were not readjusted to the satisfaction of foreign investors.\textsuperscript{458} During the period from the end of the Second World War until the 1990s, most public utilities and entities involved in the exploitation of natural resources were taken over by the Brazilian government (either federal or state) as a result of government regulations that made investing in these industries unattractive, and fear by foreign investors of nationalist reactions to the foreign control of strategic sectors.\textsuperscript{459} During this time,

\textsuperscript{453} Werner Baer & Rahul A Sirohi, “The Role of Foreign Direct Investments in the Development of Brazil and India: A Comparative Analysis” (2013) 66:1 KYKLOS 46 at 48. The authors point to the example of the railroad industry, where foreign investors were offered guaranteed rates of returns on their investments as incentive to invest in Brazil.
\textsuperscript{455} Baer & Sirohi, \textit{supra} note 453 at 48.
\textsuperscript{456} Xu, \textit{supra} note 454 at 36.
\textsuperscript{458} Baer & Sirohi, \textit{supra} note 453 at 48.
\textsuperscript{459} \textit{ibid} at 48, 50.
Brazil protected its economy from foreign competition through high tariffs, non-tariff protections and control of foreign currency - Brazil applied forty-two special import regimes to allow for the exemption or partial reduction of fee payments.\textsuperscript{460}

Throughout this period Brazil, like the rest of Latin America, was heavily influenced by the so-called Calvo doctrine, which was developed by Argentinian lawyer and diplomat Carlos Calvo.\textsuperscript{461} The doctrine invokes the exclusive jurisdiction of States to try and judge the conduct of foreigners within their own borders.\textsuperscript{462} Calvo developed the doctrine in response to the diplomatic protection practice developed by European State’s, which was used to justify their intervention in the internal affairs of States that they considered as “non-civilized” on the basis that an injury to a citizen of the State is an injury to the State itself.\textsuperscript{463} Calvo argued that Latin American countries could also apply this doctrine in their relations with European States.\textsuperscript{464} The doctrine was first adopted and systematically applied the Calvo doctrine, but it rapidly spread throughout the region and was incorporated into the Constitutions and laws of almost every country in the region.\textsuperscript{465} Due to the treatment of Latin American States in international dispute resolution during the time, their negative attitude towards the abuse of diplomatic protection also

\textsuperscript{462} ibid.
\textsuperscript{463} ibid.
\textsuperscript{464} ibid.
\textsuperscript{465} ibid.
extended to international arbitration.\textsuperscript{466} The Calvo doctrine was routinely rejected by Western nations,\textsuperscript{467} but the negative perceptions of Latin American countries towards international arbitration and foreign investors only started to change from around 1958 with the accession of a number of Latin American States (not including Brazil) to the New York Convention\textsuperscript{468} and subsequent developments.\textsuperscript{469}

Most of Latin America gradually started to liberalize and open up to commercial arbitration during the 1960s and 1970s,\textsuperscript{470} started to enter into BITs from the mid 1980s onwards in order to stimulate growth through FDI,\textsuperscript{471} and ratified the ICSID Convention by the end of the 1990s.\textsuperscript{472} However, Brazil only slowly started to come around on issues of trade liberalization from the late 1980s onwards. Following the adoption of the 1988 Constitution, Brazil started a process of trade liberalization to improve efficiency of capital allocation through foreign trade competition.\textsuperscript{473} Brazil went through three rounds of tariff reductions, the second

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{466} \textit{ibid} at 67. As an example, the author refers to the 1899 arbitration award regarding the Venezuela Boundary Dispute between Venezuela and Great Britain that was resolved through international arbitration. The award, which was unanimous but provided no reasons, greatly favored Great Britain and that still remains disputed in Venezuela.
\item \textsuperscript{467} \textit{ibid} at 68.
\item \textsuperscript{468} \textit{Convention on the Recognition and Enforcement of Foreign Arbitral Awards}, 10 June 1958, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).
\item \textsuperscript{469} Biggs, \textit{supra} note 461 at 68.
\item \textsuperscript{470} The start of Latin America’s more open attitude towards international commercial arbitration is evident from the number of States who signed on to the New York Convention, or at least started the process, during the 1950s and 1960s. Argentina signed the New York Convention on 26 August 1958, El Salvador on 10 June 1958, Ecuador on 17 December 1958 (ratified on 3 January 1962) and Mexico on 31 December 1958. Chile ratified the New York Convention on 4 September 1975. See “Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)”, online: UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.
\item \textsuperscript{471} Gomez, \textit{supra} note 387 at 196.
\item \textsuperscript{473} de Moura Borges, Valadao & Sa, \textit{supra} note 460 at 343.
\end{enumerate}
\end{footnotesize}
one of which, that took place from 1991 – 1993, had the biggest impact on the Brazilian economy and contributed to making Brazil an attractive destination for foreign investment.\textsuperscript{474} The Brazilian government faced pressure from foreign governments, multinational companies and the Brazilian press to liberalize in order to attract foreign investors, with the press urging Brazil to move fast to attract foreign investors and reporting extensively on the Argentinian privatization process as justification for Brazil to adopt market friendly policies in order to attract foreign investment.\textsuperscript{475}

It is during this time that Brazil negotiated and signed 14 BITs. Brazil’s government at that time, a reformist government of social democrats,\textsuperscript{476} declared that its purpose to signal a receptive attitude towards foreign investment to the international financial community and saw BITs as a relevant factor to attract foreign investment.\textsuperscript{477} However, these treaties never made it through the required parliamentary process in order to be ratified.

Brazilian law provides that, once the President has signed an international treaty, it must be sent to the National Congress for appreciation and approval, through the passing of a legislative ordinance by simple majority, before it can be ratified.\textsuperscript{478} Once ratified, the President decrees a Presidential Ordinance, which makes the

\textsuperscript{474} ibid.
\textsuperscript{475} Lemos & Campello, supra note 472 at 8.
\textsuperscript{476} Wei, supra note 450 at 671.
\textsuperscript{477} Lemos & Campello, supra note 472 at 8.
\textsuperscript{478} Wei, supra note 450 at 669.
treaty valid in terms of Brazilian law.\textsuperscript{479}

Between 1996 and 1999 the BITs signed with Portugal, Chile, Switzerland, the UK and Ireland, France and Germany were sent to Congress.\textsuperscript{480} The BITs went through various processes within Congress, but were not approved. The 6 BITs were withdrawn from Congress in 2002, and the remaining eight signed BITs were never submitted to Congress.\textsuperscript{481} Five reasons have been put forward why the Brazilian Congress did not approve the BITs.

The first reason concerns the sovereignty and equality of nations in the new economic world order.\textsuperscript{482} Brazil saw BITs as a byproduct of the Washington Consensus acting on neo-liberal influences and the OECD’s recommendations.\textsuperscript{483} Parliamentarians were of the opinion that BITs are usually entered into between unequal parties, and that the obligations flowing from the treaty may be reciprocal in nature, but that it is formal reciprocity only, not reflecting the reality.\textsuperscript{484}

Secondly, Congress considered that there is no clear link between BITs and increased FDI.\textsuperscript{485} The signed BITs did not make any difference to incoming FDI into Brazil, and Brazil managed to successfully attract FDI without having any BITs

\textsuperscript{479} ibid.
\textsuperscript{480} Lemos & Campello, supra note 472 at 18, 20.
\textsuperscript{481} ibid at 22.
\textsuperscript{482} Wei, supra note 450 at 670.
\textsuperscript{483} ibid.
\textsuperscript{484} ibid.
\textsuperscript{485} ibid at 672.
in force.\textsuperscript{486}

Thirdly, there were discrepancies between provisions in the BITs and Brazilian domestic law.\textsuperscript{487} BIT provisions on indirect expropriation, the free transfer of funds and dispute resolution contradict the standard treaty provisions on these topics, which caused concerns for Brazilian parliamentarians.\textsuperscript{488} Specifically with regard to dispute resolution, concerns existed that foreign investors were being given preferential treatment by allowing them to proceed directly to international arbitration without being required to have recourse to Brazilian courts.\textsuperscript{489}

Fourthly it has been pointed out that when the treaties were submitted to Congress, they were met by a small, but well organized and cohesive opposition, who couched their opposition to the treaties in legal terms, rather than political terms, making it harder to argue against.\textsuperscript{490}

Fifth, it has been argued that the Brazilian executive, usually the driving force behind the conclusion of international agreements in Brazil, prioritized other policies to attract foreign investment over BITs, and lacked the conviction to push the process in Congress to obtain necessary approval to ratify the BITs.\textsuperscript{491}

With hindsight, the first and second reasons put forward for the failure of Congress to approve the BITs were completely legitimate and showed an understanding of

\textsuperscript{486}ibid.
\textsuperscript{487}ibid.
\textsuperscript{488}ibid.
\textsuperscript{489}ibid.
\textsuperscript{490}Lemos & Campello, supra note 472 at 23.
\textsuperscript{491}ibid at 24.
BITs by the Brazilian legislature that many other Third World States did not have at the time. These two issues (inequality between the parties and the lack of a clear link between BITs and FDI) have since been identified as concerns about the investment law regime and have contributed to changes in the way BITs are viewed and drafted by many countries.

Of course, Brazil's decision not to enter into any BITs has received criticism, primarily from abroad. Some commentators argue that in any developing country, foreign investors require basic standards of protection and a clear exit route if the investment turns sour. The lack of BITs in Brazil questions whether these required standards exist in Brazil, due to its attitude towards arbitration. Brazil only ratified the New York Convention in 2002, has no BITs and has not ratified the ICSID Convention. It adopted a new arbitration law in 1996, but the law faced constitutional challenges and was only declared constitutional by the Brazilian Supreme Court in 2001. It has been questioned how long Brazil will be able to maintain an “outlier” with regard to the global trend to enter into BITs and more specifically with regard to allowing foreign investors access to investment arbitration.

But is this criticism valid, or are these arguments merely a knee-jerk reaction from

493 ibid.
495 Blackaby, supra note 492 at 129.
496 Kalicki & Medeiros, supra note 451 at 445.
commentators and investors in First World States who doubt the standards of protection in Third World States primarily because they are Third World States? Just because Brazil does not have any BITs, does not necessarily mean that foreign investors are unprotected in Brazil. In fact, during the 1990s and 2000s, Brazil acceded to many rights based demands made by foreign investors through other channels, especially through Constitutional reform.\footnote{Lemos & Campello, supra note 472 at 26.} Article 5 of the Brazilian Constitution provides that there shall be no discrimination against foreign investors in Brazil.\footnote{Wei, supra note 450 at 670.} Brazil has taken steps outside of entering into BITs to address foreign investors’ concerns and ensure a safe legal environment. The national treatment of multinational corporations and free cross-border transfers has been addressed through central bank regulations.\footnote{Lemos & Campello, supra note 472 at 28.} By early 1995, the end of state monopolies on mineral resources, energy exploitation, telecommunications and oil and gas was proposed, and article 171 of the Brazilian Constitution, which provided special treatment to national companies, was revoked.\footnote{ibid at 26.}

It would seem that the one issue that Brazil is not willing to compromise on is international arbitration. While Brazil has steadfastly avoided investment arbitration, it has taken steps to open up regarding commercial arbitration, and has made it less complicated to enforce foreign arbitration awards in Brazil as the provisions of the new Arbitration Act almost exactly follow the text of Article V of

\footnote{Lemos & Campello, supra note 472 at 26.}
the New York Convention.\textsuperscript{501} The new Brazilian Arbitration Act has changed the view of arbitration in Brazil, and, together with legislation that now requires arbitration as form of dispute resolution in specific instances, has promoted the view that Brazil now recognizes that having an enforceable arbitration system is relevant to economic development.\textsuperscript{502}

The consequence is that foreign investors in Brazil would have recourse to courts, or international commercial arbitration for contractual claims against the Brazilian government. But there would be no international recourse for foreign investors seeking to challenge policy decisions of the State, effectively making policy decisions by the State only challengeable to the extent that Brazilian law allows for it to be challenged.

Would Brazil’s investment policy regarding dispute resolution be detrimental to their economic growth potential in the long run? Only time will tell, but Brazil’s position as one of the richest countries in the world shows that it hasn’t yet and considering the growing opposition to investment arbitration in Latin America and elsewhere, Brazil may not be considered as an “outlier” for much longer.

4.4 Conclusion

While Canada, Brazil and South Africa have a wealth of natural resources in common, these three countries have decided on widely divergent policies

\textsuperscript{501} Blackaby, supra note 492 at 138.
\textsuperscript{502} Pucci, supra note 494 at 87.
regarding how to promote FDI. But there are some similarities as well. After this high level overview of Canada and Brazil’s foreign investment regimes, it is clear that South Africa’s new approach is not completely novel.

South Africa’s recent policy decision to terminate its first generation BITs and to only enter into BITs in future if it is in the country’s interest to do so (presumably meaning that it will secure rights for South African abroad) show parallels with Canada’s policy to only enter into BITs where it is in the country’s interest to do so. South Africa therefore has apparently decided, like Canada, to have 2 different policies regarding inward FDI and outward FDI. It remains to be seen if the policy will be applied in this manner, though, as it appears that South Africa will be very selective about which countries it will enter into BITs with, if it enters into any further BITs at all.

In practice, it may be that South Africa’s policy more closely resembles that of Brazil, who has shown that it is possible to successfully attract FDI without having any BITs in place. Brazil’s example will also give South Africa confidence as it executes its decision to terminate first generation BITs. Brazil, like South Africa, asserts that they have all the necessary legal protections for foreign investors in their domestic legislation and both countries now seem to pursue a policy that the risks of investment arbitration outweighs the benefits.

While South Africa can learn much from Canada and Brazil’s foreign investment policies, a question that remains is how South Africa could ensure that it protects its right to regulate in those cases where it decides to enter into BITs. The
following chapter will consider some examples of model BITs and how South Africa could draft its model BIT to take account of its concerns about the international investment regime.
Chapter 5: Model Clauses

5.1 Introduction

Chapter 4 showed that South Africa’s new investment policy is not novel or unique. The new South African policy has some characteristics in common with the policies of Canada and of Brazil respectively. However, there are also distinct differences between the three States’ policies that can be explained by each State’s specific objectives and concerns. While the underlying principle that investors are attracted by good governance on the part of the host State appears undisputed, there does not appear to be a single “recipe for success” when it comes to the decision on whether or not to negotiate BITs and what such BITs should look like.

The question that remains is what will South Africa do now? If the allegation that BITs limit State’s regulatory powers is indeed a “red herring” and if States should simply terminate treaties if it is no longer satisfied with its terms, what should the steps be that follow such termination? Should dissatisfied States like South Africa follow the example of Brazil and give up on the investment law regime altogether, or is it possible to renegotiate BITs in a way that would address the concerns that have been expressed?

This thesis argues that dissatisfied States should not turn their backs on BITs without careful consideration. If it is possible to address the concerns raised

503 See section 2.3.1.1 above.
against the investment law regime through more careful drafting of BIT provisions, it should be possible to minimize the unreasonable risks involved with BITs, without having to give up benefits such as confirming the State’s reputation as an investor friendly destination and having a largely depoliticized dispute resolution system that does not require States to extend diplomatic protection to citizens whose investments have been harmed by the actions of another State.

South Africa, specifically, has indicated that it will develop a Model BIT, which will be used as the basis for negotiating BITs in future, where such BITs are in South Africa’s interest. But how could such a Model BIT look? If the BITs that States have been entering into over the last 30-odd years are not suitable for promoting a comprehensive conception of development, what should South Africa do to ensure that its Model BIT addresses these issues sufficiently?

This chapter focuses on drafting proposals by the IISD, UNCTAD, Commonwealth and SADC, with specific focus on the proposed clauses on home State regulation and expropriation, as well as dispute settlement. As it is impossible to consider each clause that could form part of a South African Model BIT in the scope of this thesis, these two clauses have been chosen due to their particular importance for the State’s right to regulate and the right to development. The clause(s) on regulation and expropriation act as a form of safeguard against a too broad

504 See section 3.4 above.
application of the BIT and attempts to rebalance the BIT to establish a more equitable distribution of power between the investor and home State. A well drafted dispute resolution clause could similarly ensure a better balance between the rights of the State and the investor by ensuring that disputes are settled at an appropriate level (domestic or international) and in an appropriate manner.

The Model BITs that are used as a basis for comparison in this chapter frequently rely on and promote sustainable development as the basis for their provisions. For example, according to UNCTAD, investment for sustainable development is the overarching objective that policymakers should consider when shaping investment policy.\textsuperscript{506} As a core principle of investment policy, sustainable development can be defined as "the need to promote investment not only for economic growth as such, but for growth that benefits all, including the poorest".\textsuperscript{507} It is in this context only that sustainable development is referred to in this Chapter. The need for development to be sustainable is similarly recognized in the South African Government Position Paper.\textsuperscript{508}

Commentators have suggested two main ways in which States could make BITs compatible with the principles of sustainable development: first, to negotiate "development friendly" versions of standard BIT clauses that will integrate sustainable development objectives into the BIT or, second, to include new

\textsuperscript{506} UNCTAD, \textit{supra} note 34 at 11.
\textsuperscript{507} \textit{Ibid}.
\textsuperscript{508} See section 3.4.2.1 above.
principles and guidelines to protect the environment, human rights, labor rights, or indigenous rights in BITs.\textsuperscript{509}

Independent of and in addition to ensuring that the substantive provisions of a BIT are compatible with sustainable development principles, States should also ensure that the preamble of any BIT reflect the promotion of sustainable development as a goal of the agreement, in order to frame the interpretation of the agreement in a manner that would take this principle into account.\textsuperscript{510} The preamble of the IISD Model International Agreement on Investment for Sustainable Development (“IISD Model”) does just this, by stating that it “\textit{seek[s] to promote sustainable development at the national, regional and global levels} and then by providing a definition of sustainable development, namely “\textit{development that meets the needs of the present without compromising the ability of future generations to meet their own needs}”.\textsuperscript{511}

Similarly, sustainable development features prominently in the preamble of the SADC Model Investment Treaty Template (“SADC Model”), which was drafted by a drafting committee made up of representatives of SADC Member States, with the technical support of the IISD.\textsuperscript{512}

\footnotesize
\begin{itemize}
  \item \textsuperscript{509} John Gaffney & Janani Sarvanantham, “Achieving sustainable development objectives in international investment: Could future IIAs impose sustainable development-related obligations on investors?”, (11 November 2013), online: Columbia FDI Perspectives <http://www.vcc.columbia.edu>; Mayeda, supra note 405.
  \item \textsuperscript{510} Mayeda, supra note 505 at 545.
  \item \textsuperscript{511} Mann et al, supra note 411 at 1.
  \item \textsuperscript{512} SADC, supra note 412 at 3.
\end{itemize}
None of South Africa’s first generation BITs make any reference to the State’s right to development or to sustainable development. The preamble of the BIT between South African and Spain, for example, simply provides as follows:\textsuperscript{513}

“Desiring to intensify their economic cooperation for the mutual benefit of both countries;

Intending to create favourable conditions for investments made by investors of each Contracting Party in the territory of the other Contracting Party;

and

Recognizing that the promotion and reciprocal protection of investments under this Agreement will stimulate initiatives in this field.”

In broad terms the South African BIT with Zimbabwe, the most recent South African BIT to enter into force, sticks to the same formula, but it does add that the protection of investments will be conducive to the stimulation of individual businesses and will increase prosperity in the territories of both States.\textsuperscript{514} Arguably, the goal of increasing prosperity in the territory of the two Contracting Parties could be interpreted as promoting development, although in the author’s opinion this is still too vague to confidently state that an arbitral tribunal will interpret the BIT in a way that would promote sustainable development.

\textsuperscript{513} South Africa – Spain BIT, supra note 355 at the Preamble.
\textsuperscript{514} South Africa - Zimbabwe BIT, supra note 370 at the Preamble.
A Model South African BIT should, therefore, clearly identify the rights and values that it intends to promote and should explicitly state such in the preamble in order to properly frame the substantive provisions of the BIT. These rights and values should, at a minimum, include the promotion of sustainable development.

It is within this context that this Chapter considers proposals for provisions dealing with home state regulation and expropriation (5.2) and dispute resolution (5.3). Each section discusses the possible ways in which each of these concerns could be addressed. It is not the purpose of this Chapter to judge the validity of concerns such as the ones expressed by South Africa, but only to determine whether ways exist in which the concerns can be efficiently addressed in BITs.

5.2 Home State Regulation and Expropriation (“Safeguard clauses”)

The right to regulate is an expression of a State’s sovereignty. More than being a right, regulation is necessary to establish the type of environment that would be clear, stable and predictable – the type of environment that would attract foreign investment. UNCTAD identifies a State’s right to regulate as a core principle of an investment policy framework aimed at sustainable development.

The South African Government Position Paper identifies regulation as both a right and a duty of States that must be exercised to regulate economic activity and

\[^{515}\text{UNCTAD, supra note 34 at 13.}\]
\[^{516}\text{ibid.}\]
\[^{517}\text{ibid. “Regulation” in this context does not only refer to the general legal and administrative framework of a State or to sector- or industry specific rules, but also to the effective implementation of rules including the enforcement of rights.}\]
economic actors in the public interest.\textsuperscript{518} In order to preserve the State’s right to regulate in the public interest, BITs must leave a wider variety of disciplines that affects more areas of a State’s activity open for regulation.\textsuperscript{519} But in developing a foreign investment policy or negotiating a BIT, States must also find the right balance between protecting foreign investment and maintaining policy space for domestic regulation. The flexibility mechanisms provided for by a State’s development strategy must not have the effect of eroding one of the main purposes of entering into BITs, namely its potential investment enhancing effect.\textsuperscript{520}

The right to regulate relates to the right to development in that regulation should be done in a way that promotes development. Article 25 of the IISD Model provides that the State’s right to regulate in favor of development should be taken into account in any balancing of rights.\textsuperscript{521} Article 20 of the SADC Model provides for the State’s customary international law right to pursue development in its territory that is consistent with the principles of sustainable development and other legitimate social and economic policy objectives.\textsuperscript{522} The purpose of these articles is to find a balance between the rights of investors and of the State and to reverse the appearance that some arbitrators to interpret BITs based on the single objective of protecting investors and investment rights.\textsuperscript{523}

\begin{thebibliography}{9}
\bibitem{518} Government Position Paper, \textit{supra} note 12 at 47.
\bibitem{519} \textit{ibid.}
\bibitem{520} UNCTAD, \textit{supra} note 34 at 40.
\bibitem{521} Mann et al, \textit{supra} note 411 at 33.
\bibitem{522} SADC, \textit{supra} note 412 at 39.
\bibitem{523} Mann et al, \textit{supra} note 23 at 33.
\end{thebibliography}
The right to regulate further relates to provisions on expropriation in a BIT. As discussed in Chapter 2, States often choose not to regulate or not to regulate to the extent necessary to achieve their sustainable development goals in fear of being faced with a claim by a foreign investor because the regulation in question impacted negatively on the foreign investor’s investment – a phenomenon known as “regulatory chill”. Regulatory chill may be caused by claims by foreign investors and / or arbitration awards that are unfavorable to States, but its risk can managed through the proper drafting of safeguard clauses of BITs such as the clauses on expropriation and compensation – to make sure that foreign investors can only bring claims against the State in predictable and appropriate circumstances. It is therefore necessary to consider the expression of a State’s right to regulate together with the expropriation provisions of a BIT.

Regulatory chill manifests most prominently with regard to indirect expropriations which, depending on how the expropriation provision in the BIT is interpreted by an arbitral tribunal, could effectively require tax payers to pay investors compensation for enacting regulations forcing such investors to change or stop behavior that is contrary to the public interest. Arbitral case law indicates that arbitrators may choose to adopt one of three approaches to determine whether or not an indirect expropriation occurred. The

524 See section 2.3.1.1 above.
526 ibid.
first approach is to apply the “sole effects” doctrine, which considers the purpose of a measure to be irrelevant and defines an indirect expropriation solely with reference to the loss caused to the investor by the measure.\(^{527}\) The second approach applied by arbitral tribunals is the proportionality approach, where the public purpose of the measure is balanced against the burden placed on the investor.\(^{528}\) The third approach often employed is the “police powers” carve-out approach, which provides that non-discriminatory regulations taken in good faith for public welfare reasons are deemed to be non-expropriatory, regardless of the impact on the investor.\(^{529}\)

The uncertainty about which approach will be applied by an arbitral tribunal leaves host States uncertain about whether a new regulatory measures will lead to costly and potentially embarrassing litigation and compensation awards.\(^{530}\) A natural response to such a situation would be to limit the risk involved by implementing less stringent regulation or no regulation at all.\(^{531}\) But this does not resolve the problem in the long run. States need to evaluate their investment policies and need to negotiate more effective BITs paying specific attention to the scope and content of the rights granted to foreign investors in order to avoid these risks.

\(^{527}\) ibid at 16. This approach was applied in the case of Metalclad Corporation v. United Mexican States (2000), 40 ILM 36 (International Centre for Settlement of Investment Disputes).

\(^{528}\) ibid. An example of this approach can be found in Tecnicas Medioambientales Tecmed S.A. v. United Mexican States (2003), 43 ILM 133 (International Centre for Settlement of Investment Disputes).

\(^{529}\) ibid. An example of this approach can be found in Methanex Corporation v. United States (2005), 44 ILM 1345 (UNCITRAL) [Methanex].

\(^{530}\) Bernasconi-Osterwalder, supra note 525 at 18.

\(^{531}\) ibid at 18.
The first step in this process would be to draft BITs in a way that arbitrators would have to adopt the second or third approaches described above when faced with a claim for indirect expropriation as a result of government regulation. It should be clear from the language of the BIT that the State has the power to regulate and that regulatory measures that have a negative impact on the value of a foreign investor’s investment should not automatically be considered as a form of indirect expropriation. Of course, regulation in this context must be qualified, or States will be able to avoid responsibility for violations of a BIT by simply claiming that the action was regulatory in nature. “Regulation” in this context refers to regulatory measures taken in good faith for a public purpose, in a non-discriminatory manner and implemented in accordance with due process.\footnote{J Anthony Van Duzer, Penelope Simons & Graham Mayeda, \textit{Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries Prepared for the Commonwealth Secretariat}, ed (Commonwealth Secretariat, 2013), online: IISD <http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf> at 164 [Commonwealth Guide].} The term “measures” is often used in BITs, rather than regulation. It can be defined as including “any legal, administrative, judicial or policy decision that is taken by the host State, directly relating to and affecting an investment in the territory of the host State, but does not include measures in draft form.”\footnote{Mann et al, supra note 23 at 3.} Regulations or measures that fit this description have passed muster with arbitral tribunals if it is found to be necessary, proportional\footnote{\textit{Azurix Corp v The Argentine Republic} (2006) 14 ICSID Rep 374 (International Centre for the Settlement of Investment Disputes).} and non-discriminatory.\footnote{Methanex, supra note 529.
Therefore, the expropriation provision of the BIT should not create a presumption that expropriation is wrongful in the absence of compensation where the expropriation aims at achieving an important goal of sustainable development.\textsuperscript{536} Tribunals should be required to balance the public interest pursued by the host State against the investor’s rights, and if the measure taken by the State is found to be in the public interest, the failure to pay compensation to the investor should not necessarily result in a breach of the expropriation provisions of the BIT.\textsuperscript{537}

Another aspect of the expropriation provision that States should consider is the level of harm that an investor has to experience before compensation will be owed. States should negotiate the expropriation clause of a BIT in a way that a simple decline in value or a situation where the investor’s expectations were not met, would not be compensable.\textsuperscript{538}

Practically speaking then, how could a State achieve its sustainable development objectives when negotiating the terms of a BIT regarding regulation and expropriation?

As a preliminary step, before getting to the clause on expropriation, States may wish to emphasize the importance of the right to regulate in the preamble of the

\textsuperscript{536} Mayeda, \textit{supra} note 505 at 549.
\textsuperscript{537} \textit{ibid}.
\textsuperscript{538} \textit{ibid} at 550.
BIT. The SADC Model takes this approach by providing as follows in its Preamble:\(^539\)

“Reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and — taking into account any asymmetries with respect to the measures in place — the particular need of developing countries to exercise this right.”

This text from the SADC Model was adjusted from that of the General Agreement on Tariffs and Trade (“GATS”).\(^540\) The drafters’ rationale for using this text was that, since all the developed States of the world are States Parties to the GATS, the text should be more acceptable to developed States in BIT negotiations involving a State from the global north and a State from the global south.\(^541\)

While including principles about sustainable development and the State’s right to regulate in the preamble of a BIT is definitely helpful to set an appropriate framework, the core issue relates to how the clause on expropriation should be

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\(^{539}\) SADC, supra note 412 at 5.

\(^{540}\) General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), at the Preamble. The text, adjusted for investment reads as follows: Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;  

\(^{541}\) SADC, supra note 412 at 6.
drafted, and if it should be coupled with exclusionary provisions or other forms of limitations.

The 2004 United States Model Bilateral Investment Treaty ("US Model"),\textsuperscript{542} may serve as an example on how to negotiate a clause on expropriation. Annex B of the US Model deals specifically with what will and will not constitute indirect expropriation, and includes the stipulation that regulatory measures that are designed and applied to protect legitimate public welfare objectives will only constitute indirect expropriation in exceptional circumstances.\textsuperscript{543} The IISD Model (article 8)\textsuperscript{544} and SADC Model (article 6)\textsuperscript{545} contain similar provisions, but the IISD Model adds that the measures must be bona fide in nature.\textsuperscript{546} The addition of the "bona fide" test is novel to BITs and intends to convey the intention that the measures not be deceitful or for an ulterior motive.\textsuperscript{547} This approach avoids placing undue constraints on the State’s prerogative to regulate in the public interest and while it does not exclude liability risks altogether, it does allow for a better balancing of investor and State rights.\textsuperscript{548}

Another suggested approach is adding specific exceptions that carve out measures in particular policy areas from the scope of the treaty,\textsuperscript{549} such as for

\textsuperscript{542} US Model, supra note 173 at 41.
\textsuperscript{543} ibid.
\textsuperscript{544} Mann et al, supra note 23 at 7.
\textsuperscript{545} SADC, supra note 412 at 25.
\textsuperscript{546} Mann et al, supra note 23 at 7.
\textsuperscript{547} ibid.
\textsuperscript{548} UNCTAD, supra note 34 at 52.
\textsuperscript{549} Commonwealth Guide, supra note 525 at 223; UNCTAD, supra note 34 at 56.
regulation that promote economic security where there are concerns about the promotion of economic stability and poverty alleviation.⁵⁵⁰

The difference between the first and second approaches is that the first approach creates a “carve-out” from the expropriation provision that places the burden of proof on the investor to show that the measure is not bona fide or otherwise does not comply with the carve-out provision, whereas an exception clause places the burden of proof on the State to prove that the measure falls within the scope of the exception clause.⁵⁵¹ Carve-out and exception clauses are currently so common in new BITs that it can be argued that the failure to include such a provision could be interpreted to mean that regulatory measures are not excluded from the scope of the expropriation provision of the BIT.⁵⁵²

A third approach is to be very specific about the type of compensation that will be payable in cases of expropriation and how it will be calculated, to serve as guidance to arbitrators.⁵⁵³ Firstly, while the “prompt, adequate and effective” standard of compensation is often accepted to be the standard for compensation in investment law,⁵⁵⁴ States may choose to specify that compensation for expropriation in terms of a BIT will be “fair and adequate”.⁵⁵⁵ The SADC Model identifies three options in this regard, all three of which is based on the fair market

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⁵⁵⁰ Mayeda, supra note 505 at 549.
⁵⁵¹ Mann et al, supra note 23 at 18.
⁵⁵² SADC, supra note 412 at 26.
⁵⁵³ UNCTAD, supra note 33 at 52.
⁵⁵⁴ This was discussed in more detail in section 2.3.1 above.
⁵⁵⁵ See, for example, SADC, supra note 412 at 25.
value of the investment, but differing on the role the fair market value of the investment plays in determining the compensation payable. As a first option, the fair market value of the investment can be considered as one of many factors that have to be considered on equal basis in determining the compensation payable and there is no presumption that the fair market value of the investment will prevail. The second option is more balanced, and presumes that the fair market value of the investment will be used, but the State could rebut this presumption on the basis of one or more equitable considerations. The third option is the most favorable to the investor and uses the fair market value of the investment as the basis for the determination of compensation payable.

Secondly, the compensation payable to an investor as a result of an expropriation could be limited in various ways, such as based on the direct loss of the investor. The compensation payable may exclude future profit, and could prohibit the calculation of lost profit based on the discounted value of future profits at the date of expropriation. Compensation payable can also be limited by allowing arbitral tribunals to award less than the market value of the investment if the investor did not mitigate his damages or if other equitable considerations are present, by prohibiting the award of moral or punitive damages, by requiring the State and investor to negotiate damages after an award on the merits have been made.

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556 SADC, supra note 412 at 25.
557 Ibid.
558 Ibid.
559 Commonwealth Guide, supra note 532 at 165.
560 Ibid at 166.
handed down but before an award on damages is made, or by providing for delayed payment of compensation in certain circumstances.\textsuperscript{561}

Including provisions limiting the compensation that may be awarded has the benefit that they will have to be considered by the tribunal and that damages awards may be smaller than they currently are, but has the risk that of changing the perception of the investor of the likely benefits of investment arbitration.\textsuperscript{562}

However, considering the doubtful link between the inflow of FDI into a State and the BITs entered by a State discussed in Chapter 2,\textsuperscript{563} the benefit of including such provisions are likely to outweigh the potential risk.

South Africa’s current BITs does not explicitly provide for the State’s right to regulate (except for the narrow exception relating to the promotion of equality through BEE as discussed below) and neither does it provide for compensation to be calculated in any way other than prompt, adequate and effective. Considering the practice in investment arbitration to apply a standard of prompt, adequate and effective compensation even when the standard is not specified, South Africa should ensure that its Model BIT specifically provides that the compensation payable will “fair and equitable” or “appropriate” and the basis on which it is to be calculated. The first option suggested by the SADC Model, namely that the market value of the investment is but one of the factors used to determine the compensation that will be payable to an investor is the option that is closest

\textsuperscript{561} ibid.
\textsuperscript{562} ibid at 434.
\textsuperscript{563} See section 2.2 above.
aligned to Section 25 of the Constitution. South Africa should also be mindful of the risk posed by the SADC Protocol on Finance and Investment in this regard. It is possible that a foreign investor might choose to invest in South Africa through a subsidiary based in one of the SADC countries, which would allow it to have recourse to the SADC Protocol. The SADC Protocol on Finance and Investment not only allows for investor-State arbitration, but also provides that expropriation should be compensated in a prompt, adequate and effective manner – contrary to South Africa's stated policy concerns.

Finally, while States would understandably use as broad language as possible when carving out policy space for themselves within which their actions will not be considered as expropriatory, there are some policy issues that are important enough for States to state explicitly that they reserve the right to regulate in favor of such issue. One such issue is measures to redress historical imbalances or to promote equality. Both the IISD Model (article 51) and SADC Model (article 21) make provision for a clause with general reservations and exceptions and both Models explicitly exclude procedurally fair measures that promote equality or to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement from the scope of the BIT.564 This issue is identified by the IISD as an important issue for both developed and developing

564 Mann et al, supra note 23 at 27; SADC, supra note 412 at 41.
countries and the SADC Model indicates that this provision draws on more recent South African BIT practice and has been included specifically to cater for measures such as South Africa’s BEE type measures.

The reference to South Africa’s more recent BIT practice refers to South Africa’s BITs with the Russian Federation, Ghana, Nigeria, the Czech Republic, Mauritius, Tanzania and Zimbabwe. While these BITs largely follow the same model as South Africa’s first generation BITs, it prescribes a limited number of exceptions to the Most Favoured Nation and National Treatment provision included in Article 3 of the BIT. After carving out exceptions for customs unions

565 Mann et al, supra note 23 at 27.
566 SADC, supra note 412 at 41.
573 South Africa - Zimbabwe BIT, supra note 370, discussed in detail in section 3.5 above.
and obligations incurred in terms of international agreements relating to taxation Article 3(4)(c), provides:\textsuperscript{574}

“[The MFN and National Treatment provisions] shall not be construed so as to oblige one Party to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from … any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.”

While this clause is undeniably a step in the right direction for South Africa’s BIT practice, it raises more questions than what it answers. Does this mean that these three exceptions are the only areas relating to which the Parties have reserved regulatory space for themselves? And why do the exceptions only apply to the MFN and National Treatment provisions? Why not to the expropriation provision of the BIT? Does the inclusion of these exceptions mean that prior South African BITs that do not expressly include similar exceptions should be interpreted to mean that earlier BITs do not provide for any exceptions to the MFN and National Treatment provisions of the treaty?

A better approach would probably be to list the specific, important policy areas that South Africa wants to carve out from the investor protection provisions of the BIT, but to also state that the list is not exhaustive. In order to ensure that the scope of

\textsuperscript{574} South Africa – Tanzania BIT, supra note 574 at Article 3(4)(c).
the regulation that is exempted is not too wide, the regulatory measures that would be accepted could be defined in relation to its purpose, for example to promote development or equality in the host country or to ensure compliance with the host country’s other international law obligations.

There is no reason why these exceptions should only apply to certain investor protection provisions and not to all. Both the US and Canadian Model BITs include independent provisions regarding reservations and exceptions to the substantive protections of the treaty.575 The SADC Model similarly provides for the State’s right to regulate and the right to pursue development goals in separate articles,576 as opposed to having it as a sub-article as part of specific substantive provisions as the South Africa-Tanazina BIT does. Having the exceptions in a separate provision also aids interpretation through clear drafting. South Africa can build on these examples to draft a purpose orientated exception provision that specifies important policy objectives as exclusions to the investor protection provisions of the Model BIT.

5.3 Dispute Resolution

The effect of including investor-state arbitration provisions in BITs has been to allow foreign investors to avoid domestic dispute resolution mechanisms through the creation of an international legal framework to resolve disputes between host

575 Canadian Model, supra note 173 at Article 9; US Model, supra note 173 at Article 14.
576 SADC, supra note 412 at 40 – 1.
States and investors.\textsuperscript{577} This international legal framework applies only to foreign investors and not to domestic investors and creates a mechanism for foreign investors to seek compensation for the detrimental effects of domestic measures on their investments that is not available to domestic investors relying on domestic law.\textsuperscript{578}

Widespread dissatisfaction with investor-state arbitration has resulted in States, including South Africa, threatening to withdraw, or actually withdrawing from, investor-state arbitration. Investor-State arbitration was originally intended to be a cheap, fast and flexible form dispute resolution meant to provide final and enforceable awards in depoliticized disputes. Instead it has given rise to allegations of inconsistent awards and unintended interpretation of BIT clauses, unanticipated uses of the system by investors, challenges against policy measures taken in the public interest, costly and lengthy procedures and limited transparency.\textsuperscript{579}

It has been noted that it is now very possible to exclude investor-state arbitration altogether from BITs, or for States to consent to arbitration on an \textit{ad hoc} basis only.\textsuperscript{580} The effect of this would be, however, that investors will be limited to domestic courts or, if a contract with the State exists, international commercial arbitration. If investor-State arbitration was taken off the bargaining table, foreign

\textsuperscript{577} Mayeda, \textit{supra} note 505 at 541.
\textsuperscript{578} Commonwealth Guide, \textit{supra} note 532 at 26.
\textsuperscript{579} These issues are discussed in detail in section 2.3.
\textsuperscript{580} Commonwealth Guide, \textit{supra} note 532 at 437.
investors who do not have adequate domestic remedies in the host State, would have to revert back to seeking diplomatic protection from their State of nationality. However, diplomatic protection is not a right in international law, leaving the investor at the mercy of its home State to determine if it is in the State’s interests to grant the investor diplomatic protection. This decision is necessarily fraught with political and diplomatic considerations and the investor’s loss is only one of the factors that are considered. If a State does decide to take up a national’s claim against the State that caused the harm, similar issues are at play in State-State dispute resolution. Add to this the political power inequality between economically developed States (usually the State of nationality of the investor) and economically developing States (usually the host State) and the investor seems destined to lose out. South Africa, as a capital exporter on the African continent and elsewhere should seriously consider the potential fate of South African nationals investing abroad who could be left without an effective remedy if the value of their investments are negatively impacted by a violation of a BIT by the State where they are investing.

Another risk of taking investment-State arbitration off the bargaining table when negotiating BITs is the possible reduction in the investment enhancing effect of BITs. This claim is controversial, especially in light of recent studies suggesting

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581 This principle was recognized, inter alia, by the South African courts, most recently in *Government of the Republic of South Africa and Others v Von Abo* [2011] ZASCA 65, which concerned the failure of the South African government to provide diplomatic protection to a South African farmer who invested in Zimbabwe and lost all his Zimbabwean assets as part of that country’s land redistribution program.

that BITs and investment arbitration provisions do not actually attract more FDI.  

But even if this risk was indisputable, there seems to be no compelling reason why an investor’s claims cannot be reviewed by the institutions of the host State, provided they are independent institutions and that they discharge their duties in accordance with the basic principles of good governance. There is no single definition of good governance that has been accepted in international law, but some commonly agreed elements of the concept is clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combatting corruption.

It could be argued that if the underlying motivation for the need for investment arbitration is to avoid a situation where foreign investors only have recourse the domestic courts of States that do not comply with the principles of good governance, States that do comply with the principles of good governance should not have to provide foreign investors the option of international arbitration in order to enhance the country’s desirability as a destination for foreign capital.

South Africa is a good example for this argument. South Africa has a young, but stable democracy and a highly sophisticated Constitution that inter alia,

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583 Berger et al, supra note 124. See also section 2.2 above.
585 Dolzer & Schreuer, supra note 140 at 188.
guarantees judicial independence\textsuperscript{586} and creates other independent institutions that support the South African Constitutional Democracy such as the Office of the Public Protector that has the authority to investigate any alleged improper actions of public authorities.\textsuperscript{587} The argument that was raised in the early 1990s that South Africa entered into BITs to prove that the country was an investor friendly destination\textsuperscript{588} no longer carries weight. Ongoing domestic discussions about transformation of the judiciary and the exact role and powers of the courts in South African society have to date not given any reason to doubt the independence of the South African judiciary or the quality of the judgments coming from the courts. One cannot help but wonder if the criticism that followed South Africa’s decision to terminate its first generation BITs might have less to do with the actual level of investment protection enjoyed by foreign investors in South Africa, and more to do with and entrenched distrust of the levels of investment protection available to nationals of capital-exporting States (traditionally developed, Western nations) in capital-importing States (traditionally developing, Third World States).

But does a State have to either adopt a policy that embraces investor-State arbitration and accept the risks involved with that, or a policy completely distancing itself from the investor-State arbitration process? Is it not possible to find middle ground where investor-State arbitration remains a possibility, giving confidence to investors who are not familiar with the host State’s domestic law and dispute

\textsuperscript{586} Constitution, \textit{supra} note 259 at Section 165.
\textsuperscript{587} \textit{Ibid} at Sections 181 and 182.
\textsuperscript{588} Government Position Paper, \textit{supra} note 12 at 5.
settlement procedures, while providing the host State the necessary assurances that investor-State arbitration serves the purposes that it was intended to?

The approaches of the two Model BITs prepared by the IISD and SADC respectively are direct opposites of each other in this regard. The IISD Model concludes that completely excluding the possibility of investor-State arbitration would be too harsh\(^{589}\) and that it would be preferable to take measures to improve both domestic remedies and international remedies.\(^{590}\) The SADC Model indicates that the preferred option of the Drafting Committee, and specifically of South Africa, is to exclude investor-State dispute resolution completely from the text of the agreement, but it provides guidance should any State decide to include it.\(^{591}\)

This section will not consider all the proposals that have been made to overhaul the investor-state arbitration system such as the introduction of an appellate system or the establishment of a more permanent panel of arbitrators, but will focus solely on the proposals to find a balance between resolving investment disputes before domestic institutions and resolving investment disputes before international institutions. The reason for this limited discussion is two-fold. First, the focus, scope and length of this thesis does not allow for an exhaustive discussion on the changes that are needed to improve the investor-State dispute resolution system in order to gain back or at least solidify confidence in the system. Second, in light of the focus of the Government Policy Paper and

\(^{589}\) Mann et al, supra note 23 at 29.  
\(^{590}\) ibid at 62.  
\(^{591}\) SADC, supra note 412 at 55.
indications that South Africa is seriously considering not including investor-State
dispute resolution clauses in its future BITs, this section sets out to determine if it
would be possible to draft such a dispute resolution clause that would address the
concerns of a country like South Africa. If it is not possible to address States’
concerns about the investment arbitration system through more accurate drafting,
then it might well be that it is in States’ interest to withdraw from the system all
together and possibly to seek an improved form of dispute resolution outside the
current system.

Another reason to determine whether it is possible to address State’s concerns
about investor-State arbitration through better drafting of BIT provisions is that,
despite the legitimate concerns that have been raised about the system, the author
still believes that investor-State dispute resolution fulfills an important purpose, if
the risks associated with the system can be managed. First, having the option of
investor-State arbitration available removes the political risk involved with a State
extending diplomatic protection to a national and claiming on his behalf against
another State that might be economically or politically much more powerful.
Second, while it is understandable that States would want disputes to be settled in
domestic courts, at least as a first stop before international dispute resolution, it is
also understandable that in some circumstances, foreign investors would want to
have the option to challenge States’ actions before a tribunal that is removed from
the domestic courts of a State. Conversely, in some circumstances it is in a
State’s interests to provide its nationals who invest in third States, where there
might be doubts about the standard of governance of those third States, with a form of international dispute resolution that is removed from the domestic courts of those third States and that arguably provides better protection to its own nationals than the domestic laws and courts of the third States would.

There is more than one way in which States can limit the scope of an investor-State dispute resolution clause in order to manage the risk involved in investment arbitration. First, States may exclude certain sensitive policy areas, such as state security, from its consent to arbitration.592 States need not agree on a definition of what disputes would fall exactly within the scope of such an exclusion, but may include a provision requiring the State Parties to agree whether the exclusion is applicable or not.593

Second, States could include a provision requiring investors to exhaust local remedies, or to diligently pursue local remedies, before a claim can be submitted to investor-state arbitration.594 Such remedies need not refer only to remedies in local courts, but could also refer to administrative review procedures.595

Because earlier BITs did not require the exhaustion of local remedies, investors were able to internationalize all disputes with the host state, including disputes that were essentially domestic in nature.596 The IISD Model (article 45), seeks to

592 Commonwealth Guide, supra note 532 at 410.
593 ibid.
594 ibid at 412.
595 ibid.
596 Mann et al, supra note 23 at 61.
reverse this trend by requiring that all domestic remedies be exhausted in relation to the underlying claim before investment arbitration may be initiated. The aim of article 45 of the IISD Model is to only allow the investor to move directly to investor-state arbitration if no remedies are available in the domestic sphere, making it clear that contract claims that can be resolved at a domestic level should be resolved in that way.

The IISD argues that since many arbitral tribunals have to date shown greater deference where local courts have adjudicated in a bona fide and procedurally fair manner on the underlying issues of the dispute than where the dispute was only adjudicated on before an administrative or regulatory body, a provision requiring the exhaustion of local remedies will not result in arbitral tribunals acting as an “appellate body” over local courts and tribunals, but it will rather lead to fewer claims being internationalized than is currently the case.

An example of such a provision can be found in the Canada – China BIT. Annex C.21 (Conditions Precedent to Submission of a Claim to Arbitration: Party-Specific Requirements) China requires a Canadian investor to first make use of the domestic administrative reconsideration procedure before proceeding to arbitration. This provision is interesting not only because of the requirement that an investor must first exhaust a specific domestic remedy before proceeding to international arbitration, but also because the requirement is non-reciprocal.

\[597\] Mann et al, supra note 411 at 24.
\[598\] Mann et al, supra note 23 at 61.
\[599\] Ibid at 62.
Canada does not have a similar requirement as a condition precedent before a Chinese investor may proceed to international arbitration against Canada.\textsuperscript{600} It shows just how much flexibility there actually is for a State to carve out a procedure that it is comfortable with in relation to investor-State dispute resolution which should give South Africa more confidence to include dispute resolution provisions in its Model BIT.

Third, States may require investors to waive all other proceedings in relation to the measure complained of upon initiation of investor-State arbitration.\textsuperscript{601} This option would manage the risk that investors may pursue multiple litigation strategies in different venues with regard to a single host state action.\textsuperscript{602} Both the USA and Canadian Model BITs include clauses that requires a claimant waive any other remedy it may have, whether in the domestic courts or administrative tribunals of the host State or any other dispute settlement procedures.\textsuperscript{603}

Fourth, States could impose obligations on investors in the BIT and allow for counterclaims by host States against investors for breaches of such obligations,\textsuperscript{604} alternatively States may disallow or limit investor-State arbitration initiated by the investor if the investor breaches any of the investor obligations provided for by the BIT. While the former approach was thought by the IISD to foster too much

\textsuperscript{600} Canada – China BIT, supra note 413 at Annex C.21.
\textsuperscript{601} Commonwealth Guide, supra note 532 at 414.
\textsuperscript{602} Ibid.
\textsuperscript{603} US Model, supra note 173 at Article 26(2); Canadian Model, supra note 173 at Article 26(1)(e).
\textsuperscript{604} Commonwealth Guide, supra note 532 at 444.
reliance on international mechanisms, the latter option has been included in both the IISD Model and the SADC Model.

Of course, States are not limited to applying only one of the possible solutions in their BITs. The SADC Model (article 29.4), for example, applies a combination of approaches in its dispute resolution clauses. It provides, inter alia, that an investor must have, before initiating investor-State arbitration, submitted a claim to a court in the home State for the purpose of pursuing local remedies after all administrative remedies in the host State have been exhausted and the investor may only proceed directly to investor-State arbitration if no effective legal remedies are available in the host State. The SADC Model further require investors to waive all other possible remedies in relation to the same underlying facts and introduces a 3 years “statute of limitations” for the initiation of investor-State arbitration.

Politically, it is impossible for any country to only negotiate investor-State arbitration clauses with States where investors may not have access to fair legal processes. Investor-State arbitration should therefore be included in South Africa’s Model BIT, regardless of whether it ends up in the finally agreed text of the agreement or not. The SADC Model seems like a sensible template for South

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605 Mann et al, supra note 23 at 29.
606 Mann et al, supra note 411 at 11.
607 SADC, supra note 324 at 56.
608 ibid.
609 ibid.
610 ibid.
Africa to build on. South Africa could require investors to first exhaust local remedies before proceeding to investor-State arbitration. As seen from the China–Canada BIT, such a provision need not be reciprocal, so a Counterparty that prefers to give direct access to investor-State arbitration to disgruntled investors, can do so. There is another reason why it is not advisable for South Africa to completely excludes recourse to investor-State arbitration in its Model BIT. While foreign investors in South Africa may not have legitimate concerns about the South African legal system and process, the same may not be said of South African investors investing elsewhere. Properly drafted investor-State provisions will simultaneously protect South Africa against inappropriate claims by investors and South African investors investing in third States.

5.4 Conclusion

This Chapter shows the need for States to carefully consider the way in which they draft BITs in order to provide for issues such as home State regulation, limitation of compensation and exact provisions regarding investor-State dispute resolution. While only focusing on two areas that were chosen based on the criticism leveled against it by the South African policy review, the study of these two provisions show that, from a legal point of view, there are options available for States to successfully incorporate sustainable development principles into BITs and to also address some of the main concerns raised against the international investment law regime (at least regarding the two issues addressed in this chapter).
Ultimately, whether a State will avail themselves of these options, will depend on the State’s foreign investment policy. And, as shown in the previous Chapter when the widely divergent investment policies of Canada and Brazil were considered, there does not appear to be a singular successful investment policy formulation that will guarantee increased inflow of FDI into a State.

The IISD suggests that there would be little chance of a new approach to investor-State dispute resolution if all recourse to investment arbitration would be removed, and that the answer would rather be for States to participate in and strengthen investment arbitration as a system. This argument has merit, and the same argument can be applied to BITs as a whole.

While at first glance this appears to be a pure policy argument, there are legal considerations as well. If States simply withdraw from the investment law regime while the majority of States continue to participate, there is a risk that, in time, customary international law may form around some investment law standards without the participation of these States, who have presumably withdrawn from the system because it disagrees with certain aspects of the system or the system as a whole.

At the moment, however, there is nothing to suggest that South Africa will no longer participate in the international investment law regime and since it has not yet released a Model BIT, there are no firm indications that it will not provide for

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611 Mann et al, supra note 23 at 61.
investor-state arbitration in such a Model BIT when it is released. The SADC Model indicates that the Drafting Committee, which included South African representatives, preferred not to include investor-State arbitration in the model agreement and that South Africa was looking at getting out of investor-State arbitration all together.612 Considering the original purpose and benefits of investor-State arbitration, there certainly are very good reasons to continue to agree to this form of dispute resolution, within very clearly defined parameters, in limited circumstances where an investor would have no other recourse available to it and with greater certainty as to scope of the standards that should be applied by the tribunal.

612 SADC, supra note 412 at 55.
Chapter 6: Conclusion

6.1 Introduction

This thesis set out to evaluate South Africa’s newly adopted BIT policy framework. First and foremost, we should remind ourselves of what was stated at the outset - a State’s policy is always a choice, that choice is the State’s prerogative and should be based on the State’s domestic priorities. Therefore, in order to evaluate South Africa’s policy choice with regard to BITs, the question is not whether South Africa has the “right” policy, because no single “right” BIT policy exists, but the question is rather whether South Africa’s policy effectively addresses the State’s concerns and priorities.

This chapter will seek to answer the questions identified in Chapter 1 in order to finally reach a conclusion on the effectiveness and appropriateness of South Africa’s new policy. The questions that are addressed are whether South Africa has legitimate concerns about the investment law regime, whether South Africa’s response to these concerns are reasonable, how South Africa could protect its interests in future BITs and whether there are any concerns about the country’s new BIT policy.

6.2 Does South Africa have Legitimate Concerns about the Investment Law Regime?

The primary concerns identified by the Government Position Paper, regarding the State’s right to regulate and the effect of a limitation of a right to regulate on the
payment of compensation, as well as concerns about investment arbitration, have been subject to careful scrutiny by various States, NGOs and international organizations.

Clumsily drafted clauses relating to the State’s right to regulate, or, in some cases, the complete absence of such provisions, have led to a situation where States could be exposed to claims concerning the State’s legitimate exercise of its right to regulate in the public interest. Expropriation clauses that cover any form of taking or reduction in value of an investment including reasonable, proportionate, non-discriminatory regulatory takings, coupled with provisions on compensation that effectively requires arbitral tribunals to potentially award disproportionately high amounts of compensation through the application of the “prompt, adequate and effective” standard of compensation do not leave sufficient regulatory space for States to balance the rights of foreign investors with the rights and requirements of the State’s citizens. The effect of the broadly drafted provisions on expropriation and compensation for expropriation that are included in many if not most BITs is known as “regulatory chill”- a phenomenon whereby a State fails to implement necessary regulatory measures out of fear of being faced with investment arbitration proceedings initiated by foreign investors.

Additionally, a number of concerns have been identified in relation to the arbitration process itself. Inconsistent interpretations of standard BIT provisions, perceptions about the potential bias of arbitrators and the lack of an appellate body to ensure the quality of arbitration awards have been identified as primary
concerns. While there are arguments in favor of and against each of these concerns, the fact remains that there are concerns about the legitimacy of the investor-State arbitration system. Considering the popular maxim that “justice should not only be done but should be seen to be done”, it is important for the investor-State arbitration system to have the confidence of all its stakeholders, something it does not have at the moment considering the number of States that have withdrawn either completely or partially from the system.

These concerns are not merely raised by disgruntled States who consider themselves to have been on the receiving end of an unfair and unequal system. Most commentators agree that these concerns are legitimate, even though there are differences of opinion on the best way to address them. At the Second Columbia Investment Conference, held 30 – 31 October 2007, for example, even conference participants who did not believe that there was a crisis in investment arbitration and that issues of concern are merely “growing pains” for the system, held the opinion that improvements to the regime are warranted and should be welcomed.613 Numerous academic commentators from both developed and developing countries have also highlighted the concerns raised by South Africa. The Osgoode Statement, signed by more than 50 senior academics emphasizes the State’s right to regulate on behalf of public welfare and identify various concerns about the investment arbitration regime.614 The Osgoode Statement goes so far as to recommend that States should withdraw from, or seriously curtail

613 Bjorklund, supra note 187 at 215.
614 van Harten et al, supra note 8.
access to investment arbitration by foreign investors precisely because of these concerns.615

One of South Africa’s domestic priorities is to rectify the inequalities created by the Apartheid regime prior to 1994. In order to do this, the country has been implementing various legislative measures, such as the measures that led the initiation of the Forresti arbitration. It is precisely because South Africa’s first generation BITs were drafted in a way that did not allow room for domestic regulation that enabled the foreign investors in the Forresti case to claim violations of the relevant BIT. There can be very little doubt that the goal of promoting equality to rectify the wrongs of a previous regime is reasonable and legitimate. This is precisely the type of measures that should be excluded from the scope of application of a BIT, in order to allow State’s the right to regulate in the public interest. South Africa’s experience with the Forresti arbitration and specifically the political risk of having an arbitral award declare a domestic policy as sensitive and important as the promotion of equality incompatible with the country’s international obligations under a BIT is in itself proof of the legitimacy of the concerns raised in the Government Position Paper.

In light of South Africa’s experience and the widespread acceptance of the concerns raised by South Africa, one cannot but conclude that South Africa has raised legitimate concerns about the investment law regime in the course of its policy review. But the mere fact that the concerns were legitimate, does not

615 ibid.
necessarily lead to a conclusion that the new policy is reasonable. To be able to draw such a conclusion, one has to start by considering South Africa’s response, which is to be found in the Cabinet Decision.

6.3 Is South Africa’s Response to these Concerns Reasonable?

On the face of it, the Cabinet Decision is very measured and reasonable. It covers all bases by from dealing with existing BITs to setting the standards for future BITs. It provides that South Africa’s first generation BITs will be terminated, rather than all South Africa’s BITs. Even after the treaties identified in Chapter 2 have been terminated, 10 of South Africa’s BITs are likely to remain in force, with 28 more signed, but not yet in force.616

While the government has taken the position that South African law already adequately provides the necessary legal framework to protect the rights of foreign investors, the policy provides for a new Investment Act to be drafted to specifically address the rights of foreign investors, which makes it easier for potential investors to determine exactly what they will be entitled to if they decide to invest in the country. The policy also provides that in future, BITs will only be concluded if there are compelling economic or political reasons to do so, and that a Model BIT should be drafted on which future BIT negotiations should be based.

616 Treaties that are likely to remain in force are the BITs with The Republic of Korea, Cuba, Senegal, Mozambique, People’s Republic of China, Mauritius, Argentina, Cote d’Ivoire, Nigeria and Zimbabwe. A list of all South Africa’s BITs can be found at <http://196.14.41.167/dbtw-wpd/textbase/searchhome.html>.
It is not yet clear how South Africa will apply its new policy. It does not appear that South Africa wants to follow the example of Brazil and completely exit the BIT stage, although the decision to only enter into BITs if there are “compelling reasons” to do so, does leave South Africa the policy space to refuse to enter into any further BITs. The conclusion of the BIT with Zimbabwe in 2010 seems to support this conclusion. South Africa’s willingness to enter into the BIT suggests that the “compelling reasons” required for the country to conclude BITs may focus primarily on the protection of South African investors abroad. The conclusion of the BIT with Zimbabwe follows that country’s dramatic land reform program in 2000 - 2002, which saw agricultural land identified in the Government Gazette confiscated by the State without compensation other than for improvements on the land and without recourse to Zimbabwean courts. This move was followed by an “indigenization” law that required all foreign owned mining companies to transfer 51% of their shares to Zimbabweans. Many South African farmers owned farms in Zimbabwe and were affected by the land reform program, and South African mining firms are active investors in Zimbabwe.

These early signs appear to indicate that South Africa’s approach to BITs should closely follow the model of Canada, with the decision on whether or not to enter into a BIT based on the needs of Canadian investors abroad, rather than to assure foreign investors in Canada. This conclusion is supported by the South African decision to draft an Investment Act, which will be applicable to foreign investors in Zimbabwe.

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617 “Zimbabwe law on firm’s ownership comes into effect”, BBC News (1 March 2010), online: <http://news.bbc.co.uk/2/hi/business/8542966.stm>.
South Africa but will be of no value to South African investors abroad, similar to the Canadian model. Different from the Canadian model, however, is the lack of establishment requirements for incoming foreign investments in the South African Investment Act. The Act contains no equivalent to the Canadian “net benefit” test and in its current form does not make provision for any discretion for the South African government to deny foreign investors access to certain South African industries or to review proposed investments that meet certain thresholds. It is possible that such requirements may in future be included in regulations to the Act but so far there have not been any indications that this will happen.

The new policy also gives some insight into how South Africa sees itself after 20 years of democracy. Whereas in 1994 South Africa was concluding BITs as part of a concerted effort to win the confidence of the international community in the wake of a major regime change, the country is now confident enough about its own position in the world economy to assert that foreign investors should be satisfied with the same assurances as offered to South African businesses in domestic law and to use BITs to protect South African investors investing in other African States and elsewhere in the world. South Africa, as its BRICS partners, has become a capital exporting country as much as it is a capital importing country, which has changed its perspective on BITs.618 But South Africa is not a developed economy like Canada and therefore cannot afford to be as selective about which foreign investors it will allow to invest in South Africa. It is likely that

618 Joubin-Bret, Rey & Weber, supra note 4 at 18.
this is the reason why South Africa does not impose any strict pre-establishment requirements in the way Canada does for new investments.

But if South Africa will then still enter into BITs where the circumstances call for it, what steps should South Africa take to protect its interests, given the reciprocal nature of BITs? It is, after all, South Africa’s responsibility to draft a treaty that accurately reflect its intentions, as one cannot expect investment arbitration tribunals to do anything other than to interpret the BIT before it in accordance with the normal rules of treaty interpretation.619

6.4 How could South Africa Protect its Interests Where It Does Enter Into BITs?

The examples discussed in Chapter 5 of this thesis to incorporate sustainable development principles into BITs should serve as a guide for South Africa as it prepares its own Model BIT. South Africa has already started to leave more regulatory space for itself in its newer BITs and there are now sufficient guidelines available for the country to craft language that could address the concerns raised in the policy review. For example, BITs concluded with the Russian Federation, Ghana, Nigeria, the Czech Republic, Tanzania, Zimbabwe and Mauritius provide exceptions in relation to National Treatment and MFN where preference are granted for purposes of promoting equality or to protect or advance natural or legal persons, or categories thereof, disadvantaged by unfair discrimination.620

619 Alvarez, supra note 112 at 369.
620 Government Position Paper, supra note 12 at 37. See further section 5.2 in this regard.
However, as acknowledged in the Government Position Paper,\(^{621}\) the exceptions currently included in South Africa’s newer BITs may not go far enough and, in the author’s view, does not address the concerns identified in the policy review regarding government regulation, expropriation and investment arbitration. South Africa would do well to draw from the IISD Model and SADC Model in drafting its own BIT, as well as from the Canadian experience, as articulated in its Model. Even with this new exception included in its newer BITs, South Africa’s BITs are rather short (generally 9 pages in length) and addresses the treatment of investors in a single article (generally Article 3) in the very broad and vague terms.

What is of further concern is the comment in the SADC Model that South Africa is looking to opt-out of investor-State arbitration in its BITs.\(^{622}\) The Government Position Paper acknowledged “solutions to the issues of dispute settlement are available”.\(^{623}\) However, the policy review predates the publication of the SADC Model and it may be possible that the South African government has adopted a decision not to incorporate investment arbitration into its model BIT.

In the opinion of this author, such a position would be counter-productive. While South Africa’s concerns are understandable, there are still benefits to opting into the investment arbitration regime. By excluding the possibility of investment arbitration, South Africa will also be denying its investors who are investing abroad the opportunity to enforce its rights at an international law level. There are also

\(^{621}\) Government Position Paper, supra note 12 at 38.
\(^{622}\) SADC, supra note 412 at 55.
\(^{623}\) Government Position Paper, supra note 12 at 46.
definite political advantages to having a process whereby South African investors abroad can enforce their rights against third States independent from the South African government. The process would allow the South African government the opportunity to separate legal process from political relations.

Therefore, a better option would be for South Africa to continue to include investment arbitration in its model BIT, but to ensure that it is clear on the circumstances when an investor may have recourse to this remedy, specifically by negotiating the substantive provisions of the treaty in a way that would allow South Africa the necessary leeway to regulate in accordance with its domestic priorities without the threat of being taken to international arbitration if such regulation should negatively impact a foreign investor.

This option would also allow South Africa to stay involved in the investment arbitration regime and to contribute to the revision of the system rather than being on the outside, looking in. It has been observed that while it is possible for States to amend BITs (as other treaties), the high transaction costs of treaty negotiations makes it impractical for States to constantly renegotiate and amend its treaties. Independent from the other reasons put forward in favor of continued participation in the investment treaty regime, if South Africa foresees that it might, in future, want to avail itself of the option of investment arbitration given that the system has addressed the issues of concern for South Africa, it will probably be impractical and costly for South Africa to renegotiate all its BITs to make provision for

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624 Cheng, supra note 195 at 1022.
investment arbitration. From this point of view as well it would be better if South Africa could now already determine the circumstances under which it would be willing to give investors recourse to investment arbitration and to already make provision therefore in its model BIT.

6.5 What Concerns, If Any, Remain about the New Policy?

Given its concerns, South Africa’s decision to terminate first generation BITs was reasonable, and, probably the responsible step to take. The new policy adopted as a whole is similarly reasonable, comprehensive and measured. However, one point of criticism relates to the manner in which the policy has been executed to date. While the review was completed in 2009 already, and the cabinet decision taken in 2010, South Africa only started terminating first generation BITs in 2012. At that time, no text was available of the Investment Act that South Africa indicated it would prepare, and no text was available of South Africa’s model BIT. The first text of the Investment Act was only published for comment during November 2013, after termination notices had already been served for a number of first generation BITs.

To date, no text for a model South African BIT has been made public by the government. The process thus far has not been dealt with in a predictable, transparent manner, perhaps partially explaining the dismay and dissatisfaction of South Africa’s treaty partners. It would be in South Africa’s interest to take its treaty partners into its confidence and to ensure that everyone is on the same
page as this process moves forward. Transparency will only contribute to investor confidence in South Africa.

6.6 Conclusion

In congratulating South Africa for its new BIT policy and expressing the hope that other countries will follow the country’s example, Joseph E Stiglitz, Nobel laureate in economics, has described South Africa’s actions as “not anti-investment”, but “pro-development”.

The policy is reasonable and appropriate in light of the domestic priorities of promoting development and equality, as identified by South Africa. There is still very little clarity on how the new policy will be implemented, and it is only in the implementation of the policy that one will be able to draw definitive conclusions as to South Africa’s intentions regarding BITs and its approach to the investment law regime in general. After all, as the saying goes, actions speak louder than words.

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