



**UNIVERSITY of the  
WESTERN CAPE**

**Faculty of Law**

**The importance of Bilateral Investment Treaties in  
relation to the protection and promotion of  
investment in Africa**

**By**


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**A mini-thesis submitted in partial fulfilment of the  
requirements for the MPhil in International Trade,  
Investment and Business Law Degree**

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## Declaration

I, **Olagoke Akinfemi Ajayi** declare that **The Importance of BITs in relation to the Protection and Promotion of investment in Africa** is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed:   
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2019

Signed:   
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**Prof. Riekie Wandrag**

2019



## Dedication

I dedicate this thesis to my wife Fanelwa and children Funmi, Timi and Demi who have been my greatest inspiration and support throughout these challenging years.



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## **Acknowledgements**

To the Most Gracious and Most Merciful, I want to thank the almighty God for his infinite mercy upon my life all through these years. His guidance gave me the strength and patience to endure the rigour of studying over the last two years. I'm truly thankful.

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The opportunities the future holds are enormous. This is just the beginning of another chapter of my life. As a leader in my own right, what I choose to accomplish with this new knowledge proves the worth of my abilities. Like I promised a few, the billions are getting closer by the day. Where there are possibilities, there are opportunities. Nothing matters but your will to succeed. Watch the space.

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## List of Acronyms

ANC	AFRICAN NATIONAL CONGRESS
BIT	BILATERAL INVESTMENT TREATY
BBBEE	BROAD BASED BLACK ECONOMIC EMPOWERMENT
DS	DISPUTE SETTLEMENT
FCN	FRIENDSHIP COMMERCE & NAVIGATION
FDI	FOREIGN DIRECT INVESTMENT
FET	FAIR & EQUITABLE TREATMENT
FPS	FULL PROTECTION & SECURITY
FTA	FREE TRADE AGREEMENT
GATS	GENERAL AGREEMENT ON TRADE IN SERVICES
HDSA	HISTORICALLY DISADVANTAGED SOUTH AFRICAN
ICJ	INTERNATIONAL COURT OF JUSTICE
ICSID	INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
IIA	INTERNATIONAL INVESTMENT AGREEMENT
ISDS	INVESTOR STATE DISPUTE SETTLEMENT
IISD	INTERNATIONAL INSTITUTE ON SUSTAINABLE DEVELOPMENT
LDC	LEAST DEVELOPED COUNTRIES
MFN	MOST FAVORED NATION
MPRDA	MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT
NAFTA	NORTH AMERICAN FREE TRADE AGREEMENT
NDP	NON DISPUTING PARTY
NT	NATIONAL TREATMENT
POI	PROTECTION OF INVESTMENT
SA	SOUTH AFRICA
SSDS	STATE-STATE DISPUTE SETTLEMENT
TNI	TRANSNATIONAL INSTITUTE
UNCITRAL	UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
UNCTAD	UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
USA	UNITED STATES AMERICA

VCLT	VIENNA CONVENTION ON THE LAW OF TREATIES
WB	WORLD BANK
WTO	WORLD TRADE ORGANISATION
VAT	VALUE ADDED TAX



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## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background

There is a growing concern around new patterns of negotiating international investment agreements vis-a-vis the recent withdrawals from Bilateral Investment Treaties (BITs) by developing countries. In recent times, the decision by a number of countries withdrawing their BITs with their investment partners raises questions to whether this investment instrument remains relevant in international investment discourse,<sup>1</sup> or simply creates a gap to be exploited by larger entities or economies.

The emergence of BITs became increasingly important within the framework of International Investment Law when emerging nations acceded to be members of the international community after World War II.<sup>2</sup> Literature contends that emerging nations had little evidence to show that BITs have stimulated additional investments in developing countries, let alone revitalised domestic reforms during this era.<sup>3</sup> Seemingly, these conditions are not peculiar to certain countries but cut across geographical regions.

The call for Investment Treaties can be seen from two perspectives. One, is from the Investor's point of view to engage its home country in fostering a bilateral agreement with other countries and secondly from the host country seeking developments by means of capital investments from bigger economies. One can then suggest that the need for investment treaties is primarily driven by the host country, in this case a developing state, while on the other hand, these treaties facilitates the quest to meet the needs of developed states in fulfilling the new international economic order.<sup>4</sup> In view of these developments, it is imperative for developed nations to protect their

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<sup>1</sup> Cervantes-Knox K & Thomas E 'Ecuador terminates 12 BITs- growing trend of reconsideration of traditional investment treaties? (2017) *DLA PIPER* 1 available at <https://www.dlapiper.com/en/southafrica/insights/publications/2017/05/ecuador-terminates-12-bits-a-growing-trend/> accessed 16 June 2018).

<sup>2</sup> Salacuse J W *The Law of Investment Treaties* (2010) 75.

<sup>3</sup> Hallward-Driemeier M 'Do Bilateral Investment Treaties attract FDI? Only a bit...and they could bite' *World Bank* (2003) 22 available at <http://documents.worldbank.org/curated/en/113541468761706209/10550532220041117160010/additional/multi0page.pdf> (accessed 16 June 2018).

<sup>4</sup> Sornarajah M *The International Law on Foreign Investment* (2010) 173.

investments by initiating legal frameworks guided by Customary International Law as a pre-emptive measure to guard against political and other associated risk.<sup>5</sup>

For the purpose of this mini-thesis, this research aims to establish the importance of the current formulation of African BITs in relation to protecting and promoting investment for both investor and host country. These BITs will be compared to the South African Protection of Investment Act 22 of 2015,<sup>6</sup> to establish if they are designed conclusively for the purpose of investment protection and promotion while preserving the bilateral relationships. Recommendations will be suggested as to the best way forward for African countries with regards to developing sustainable bilateral agreements. The primary focus will be on protection and promotion clauses in the selected BITs while occasionally discussing provisions of dispute settlement as they arise within specific case studies. Dispute settlement mechanisms will remain part of the concluding arguments.

First, the notion of International Investment Agreements (IIAs) must be understood. The IIA is a product of international investment law, a legal framework that is continuously undergoing remarkable transformation over time.<sup>7</sup> More conspicuously, the IIA is a legal instrument designed to help policy makers, government officials and other stakeholders frame rules guiding international investments for the purpose of fostering sustainable developments and inclusive growth.<sup>8</sup>

The continuous use of IIAs to promote and protect investment among nations cannot be overemphasised. Nevertheless, deriving the appropriate methodology to measure the extent to which investments are protected might be difficult or almost impossible to achieve.<sup>9</sup> Common clauses used in safeguarding investments in BITs include the protection of private investments made by individuals/entities, protection against expropriation, fair and equitable treatment (FET), transfer of funds as well as other

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<sup>5</sup> Somarajah M (2010) 174.

<sup>6</sup> Act No 22 of 2015 Protection of Investment Act 2015 available at [https://www.thedti.gov.za/business\\_regulation/acts/Investment\\_Act\\_22of2015.pdf](https://www.thedti.gov.za/business_regulation/acts/Investment_Act_22of2015.pdf) (accessed 17 June 2018).

<sup>7</sup> Salacuse J W & Sullivan N P 'Do BITs really work? An evaluation of Bilateral Investment Treaties and their grand bargain' (2005) 46 *HILJ* 67.

<sup>8</sup> United Nations Conference on Trade and Development (UNCTAD) available at [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/International-Investment-Agreements-\(IIAs\).aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/International-Investment-Agreements-(IIAs).aspx) (accessed 17 June 2018).

<sup>9</sup> Salacuse J W (2010) 118.

obligations.<sup>10</sup> These instruments do not work in isolation, but with collaborative investors' commitments through Foreign Direct Investment (FDI).

Foreign Direct Investment growth from the perspective of developing nations builds the framework for expediting developments and economic opportunities.<sup>11</sup> A remarkable example is the investment in renewable energy by the South African Government which has yielded exponential benefits in skills development in technology to the economy.<sup>12</sup> It should be known that FDI is not the panacea for achieving all socio-economic developments but only a means to an end and not a goal in itself.<sup>13</sup>

Succinctly, in spite of these anticipated successes, there are always tendencies for dispute processes to be initiated. Providing an effective mechanism to handle such grievances remains the responsibility of the intended legal agreement. Such agreements must clearly state guidelines on the dispute settlement and compliance. Compliance to these sets of rules of conduct are high when mutual benefits are met, however, a denial of such benefits will attract sanctions which are enforced by the agreed dispute settlement mechanism (DSM).<sup>14</sup> In situations where targeted objectives don't meet desired goals of investors, investors are known to have instituted dispute settlement measures against host states. For instance, in the *SSP v EGYPT*<sup>15</sup> case, the tribunal concluded that the primacy of the foreign investment was paramount thus, the government was held liable for breaching the contract.<sup>16</sup>

Poulsen argues that countries sacrificed their sovereignty unknowingly in the quest for development only to realise the extent of damage when claims are brought against them by investors.<sup>17</sup> This leads to more questions as to why BITs were created. Were

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<sup>10</sup> Bilateral Investment Treaties (BITs) available at <http://guides.ll.georgetown.edu/c.php?g=371540&p=4187393> (accessed 17 June 2018).

<sup>11</sup> Carlos M C & Nagesh K *Protecting foreign investment* (2003) 13.

<sup>12</sup> Samuels C 'The dark side of foreign direct investment: A South African perspective' *SAIIA* (2013) 5 available at <http://www.saiia.org.za/occasional-papers/the-dark-side-of-foreign-direct-investment-a-south-african-perspective> (accessed 17 June 2018).

<sup>13</sup> Samuels C (2013) 18.

<sup>14</sup> Sornarajah M 'The clash of globalisations and the international law on foreign investment' (2003) 10:2 *Canadian foreign policy journal* 6.

<sup>15</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3.

<sup>16</sup> Sornarajah M (2003) 9.

<sup>17</sup> Poulsen L N S *Sacrificing sovereignty by chance: Investment treaties developing countries and bounded rationality* (PhD thesis, London School of Economics and Political Science, 2011) 3 available at [http://etheses.lse.ac.uk/141/1/Poulsen\\_Sacrificing\\_sovereignty\\_by\\_chance.pdf](http://etheses.lse.ac.uk/141/1/Poulsen_Sacrificing_sovereignty_by_chance.pdf) (accessed 18 August 2018).

they created as an alternative to diplomatic protection or were they established as international investment instruments of law to protect, promote and retain the sanctity existing investments? The answers to this hypothesis will probably be open ended, notably because there are no direct claims in literature to link FDI and BITs suggesting that without BITs developing countries will lose FDI.<sup>18</sup> It is a combination of various additional factors which needs to be tested to establish its exclusivity. This will be covered in chapter two.

Recent developments suggest that South Africa, Ecuador and Indonesia are recalling/withdrawing from their BITs for reconsideration and renegotiation.<sup>19</sup> Attesting to this are comments from the Secretary General of the Organisation for Economic Cooperation and Development (OECD) who suggested:

'Government and business leaders are also seeking to reform treaties so as to ensure that they help attract investment, not litigation. Some major countries such as South Africa, Indonesia and India are terminating, reconsidering or updating what they perceive to be outdated treaties that excessively curtail their "policy space" and entail unacceptable legal risk'.<sup>20</sup>

This assertion by the Secretary General strongly suggest that investment treaties are less attractive to developing states *inter alia* African states. South Africa is among the first in Africa to withdraw its BITs.<sup>21</sup> The introduction of the Protection of Investment Act 22 of 2015 as a replacement to BITs is a reflection of a sustainable option by the South African government however it is yet to be comprehensively examined for its effectiveness to investments.<sup>22</sup>

Establishment of protection of investment in Africa has prompted the expansion of BITs among sovereign states. The expansions are by and large as a result of multinational companies trying to secure their investment in developing countries through legal frameworks designed to facilitate and protect their investment.<sup>23</sup> By

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<sup>18</sup> Poulsen L N S (2011) 23.

<sup>19</sup> Angel Gurria Secretary General of OECD 'The growing pains of investment treaties' (2014) available at <http://oecdinsights.org/2014/10/13/the-growing-pains-of-investment-treaties/> (accessed 18 June 2018).

<sup>20</sup> Angel Gurria Secretary General of OECD (2014).

<sup>21</sup> Angel Gurria Secretary General of OECD (2014).

<sup>22</sup> Schlemmer E C 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) *ICSID Review* 185.

<sup>23</sup> Salacuse J W (2010) 95.

designing a robust and vibrant legal frameworks with clear and enforceable rules to govern foreign investments, the general assumption is that foreign investments are protected.<sup>24</sup> The same assumption further argues that while protected, risk are reduced and a reduction of risk promotes investments.<sup>25</sup>

As a prerequisite to developments, African countries are forced into signing agreements that include clauses that might be detrimental to their sovereignty as independent states.<sup>26</sup> However, there are no binding obligations to encourage or induce nationals to invest in territories of their BIT counterparts.<sup>27</sup> This research will also explore the provisions of recent African BITs by trying to unpack the interpretations of protection of investment clauses such as Fair and Equitable Treatment (FET), National Treatment (NT), Most Favoured Nation (MFN), Full Protection and Security (FPS), expropriation and compensation, transfer as well as dispute settlement mechanism while proposing viable alternatives to an efficient BIT framework.

## 1.2 Problem Statement

Generally, BITs to an extent highlight the window of opportunities to any given state at any given time by providing an insight into investment possibilities through its provisions. While it remains an exclusive document of bilateral commitments, it can be assumed that these legal instruments are inherently responsible for the control of people, actions and objects within its territory.<sup>28</sup> Having said that, with the constant change and continuous evolvement of society, it is necessary to evaluate how important this instrument is to the protection and promotion of investment in Africa.

The conditions under which most IIAs were established have changed over time hence the need for new approaches cannot be overemphasised. In achieving this arduous objective, this thesis will explore the provisions of selected African BITs to establish if they have experienced significant changes in their respective legislative framework or if new models have emerged to address the concerns of African States. The fact that Africa is mostly on the receiving end of financial investment suggest that before FDI

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<sup>24</sup> Salacuse J W & Sullivan N P (2005) 95.

<sup>25</sup> Salacuse J W & Sullivan N P (2005) 95.

<sup>26</sup> Schlemmer E C (2016) 168

<sup>27</sup> Salacuse J W & Sullivan N P (2005) 95.

<sup>28</sup> Somarajah M *The International Law on Foreign Investment* fourth edition (2017) 145.

are initiated, certain conditions must be met. Those conditions will be discussed to establish the importance of BITs as a tool for protection and promotion of investment in the new age. The new age represents an era of complex industrialisation often referred to as the fourth industrial revolution,<sup>29</sup> characterised by exponential changes designed to meet the challenges of the 21<sup>st</sup> century.<sup>30</sup> Are BITs actively designed to meet these challenges or are they merely tools with exploitative indicators for judicial recourse? Answers to these questions form the basis of the investigation.

### 1.3 Significance of Study

The decision on whether to withdraw or uphold the BIT agreements remains the prerogative of the sovereign states in question. The manner in which the state will design its agreements will depend on what benefit it seeks from the proposed relationship.

The significance of this study is to analyse the scope of the treaties and to assess if they fulfil the purpose for which they were established. In addition, this thesis will highlight the importance of the BITs in fostering international bilateral relationships. Are they truly a means to an end or an end in itself towards development in Africa? In order to establish this, questions as to whether BITs are merely tools used by investors to exploit host nations or if they are concluded to preserve the sanctity of the protected agreement are to be considered.

Furthermore, it is in the best interest of the host country to take into consideration the interest of the foreign investor as customary international law requires that these interests must be protected.<sup>31</sup> For that reason, it is incumbent on the BITs to strike an intrinsic balance between protecting investors' interest and that of the host state. This thesis seeks to investigate the primary function of BITs from the African perspective, with respect to protecting and promoting investment in selected African BITs. Selected provisions will be identified to give a better understanding on the technicalities of

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<sup>29</sup> Bloem J et al 'The Fourth Industrial Revolution: Things to tighten the link between IT and OT' available at <https://vint.sogeti.com/wp-content/uploads/2014/06/VINT-Sogeti-Internet-of-Things-Report-3.pdf> (accessed 28 March 2019). This concept aptly describes a rapid and fundamental change in industrial development, notably from being industrious to being industrial. I.e. the time line of industrialisation has moved from Mechanical Production- Mass Production-Electronic and IT- Cyber and Physical growth.

<sup>30</sup> See page 4 which describes the fourth industrial revolution as a paradigm shift in industry from real manufacturing to digital manufacturing.

<sup>31</sup> Somarajah M (2017) 146.

conceptualising the text of these clauses while suggesting ways of improving the agreements to be aligned with the interest of African States.

Salacuse & Sullivan questioned why developing countries enter into IIAs knowing the limitations it exerts on the sovereignty of the state?<sup>32</sup> They concluded by arguing that developing countries deem it necessary to promote the increase in capital inflow as well as technological knowhow in their territories.<sup>33</sup> If this assumption is correct, then BITs in its present approach should be an instrument for collective benefits between investor and host state and not a case of preferential benefits to protect the investors' interest mostly.

In view of the above proposition, African countries by and large should enjoy the benefits of these agreements without the fear of exploitations from their investors. The general idea is that the bilateral treaties aim at protecting and facilitating investment opportunities while reducing the risk of investors however questions as to whether it creates gaps that constrains the host country remains contentious in investment law.

The answers to this will suggest a framework for future approaches in formulating international investment agreements. The basis for these frameworks should be based on policies which seeks to further the commercial interest and national competitiveness of African countries.<sup>34</sup> In contextualising this agreement, this research will give clarity on more acceptable approaches in protecting investor – host country interest in a manner that is mutually beneficial.

#### **1.4 Research Question and Objectives**

The objective of this research is to determine the fundamental importance of BITs in relation to the protection and promotion of investment in Africa. Based on the problems articulated earlier, the thesis will put into consideration certain clauses in selected BITs and determining if they satisfy the adequacy need for both investor and host country or otherwise. The following questions to be answered are as follows;

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<sup>32</sup> Salacuse J W & Sullivan N P (2005) 77.

<sup>33</sup> Salacuse J W & Sullivan N P (2005) 77.

<sup>34</sup> Carlos M C & Nagesh K *Protecting foreign investment* (2003) 9.

- I. To what extent does the provisions on 'Protection and Promotion of Investment' clauses go to include a balance of interests between the investor and host state in selected African BITs?
- II. What has the South African Protection of Investment Act 22 of 2015 done differently to protect new investments in the country? Questions as to why this Act was promulgated and if its adoption is beneficial to the country in the long run will be addressed.
- III. After evaluation of the uniqueness of the selected African BITs and the South African Protection of Investment Act 22 of 2015, do the identified approaches seek to address the anticipated needs of both the Investor and host country considering their legislative formations? Are the dispute settlement clauses provided in both approaches appropriate to address the needs of both contracting parties?
- IV. To make recommendations based on the observations on the most effective ways of protecting and promoting investments in Africa. Is the present status quo worth retaining?

## 1.5 Methodology

This research will be a desktop study. All materials used will be sourced from the library as well as the internet. Primary sources will include literature from UNCTAD, UNCITRAL, ICSID, current BITs of various African countries, South Africa Protection of Investment Act 22 of 2015, as well as Section 25 of the constitution of South Africa which the parliament is currently reassessing for amendments. Although not the main purpose of this thesis, it is noteworthy to give an insight on recent deliberations with regards to 'expropriation of land' and its attendant effect on South African legislation.

The choice to analyse these BITs stems from the fact that they all adopt different approaches in defining 'Protection and Promotion of Investment' and are from three geo-political regions in Africa. The choice of vocabulary used and the applicability will depend on the interpretation from contracting parties. On the other hand, the SA Protection of Investment Act 22 of 2015 was designed in a specific manner to address protection and the expropriation clauses. This raises interesting questions as to the present clamour for amendments of Section 25 of the Constitution of South Africa.



Secondary sources will include books, journal articles, news opinions and other credible scholarly materials needed to achieve this goal.

## **1.6 Chapter Outline**

This research is divided into (5) chapters

### **Chapter 1**

This chapter introduces the mini thesis. It consists of the background to the research, research question and objectives, significance of the problem, methodology, key definitions and the chapter outline.

### **Chapter 2**

This chapter examines the ‘Protection and Promotion of Investment’ clauses as found in current African BITs namely Morocco – Nigeria (2016), Japan- Kenya (2016) and Canada – Senegal (2014).<sup>35</sup> It further scrutinises the provisions of the selected African BITs including the Dispute Settlement Mechanism (DSM) as enshrined in the BITs and seeks to establish if they serve the interest of both investor and host nation considering the African perspective.

### **Chapter 3**

Chapter three aims to establish if the SA Protection of Investment Act 22 of 2015 addresses the concerns of investors with regards to protecting Investments. The research will narrowly explore the provisions of Section 25 of the constitution of South Africa,<sup>36</sup> the provisions on dispute settlement and discuss not extensively the effect of expropriation of land which is subject to amendments by parliament and its attendant effect on investments.

### **Chapter 4**

The author performs a selected comparative study between the selected African BITs and the SA POI Act by comparing the provisions on protection and promotion of

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<sup>35</sup> International Investment Agreement Navigator available at <http://investmentpolicyhub.unctad.org/IIA/MostRecentTreaties#iialInnerMenu> (accessed 08 August 2018).

<sup>36</sup> Bill of Rights Section 25 of the Constitution of the Republic of South Africa 1996 available at <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf> (accessed 07 August 2018).

investments. The Dispute Settlement mechanisms adopted by both approaches are also discussed. The investigation discusses these approaches in line with the requirements of customary international law and closely considers if elements of both approaches suits the legislative framework of the African state.

## **Chapter 5**

This chapter further concludes the mini-thesis with suggested recommendations on most effective methods for promoting and protecting investments in Africa, taking into consideration the importance of BITs. Final remarks suggest strategies for future BITs.

### **1.7 Key Definitions**

This research focuses mainly on the promotion and protection of investment in Africa. Key definitions within this discourse includes:

**Foreign Direct Investments** as defined by Sornarajah 'Involves the transfer of tangible and intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the asset.'<sup>37</sup>

**Bilateral Investment Treaties** are treaties that 'Involve two states often a capital-exporting [developed] and a capital-importing [developing] state dealing exclusively with investment issues and providing substantive promises of favourable treatment.'<sup>38</sup> Vandeveldde further characterises BITs as 'Advertising themselves as instrument of liberalisation.'<sup>39</sup>

**International Investment Agreements** are legal instruments designed to help policy makers, government officials and other stakeholders frame rules guiding international investments for the purpose of fostering sustainable developments and inclusive

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<sup>37</sup> Sornarajah M (2010) 8.

<sup>38</sup> Yackee J W (2011) 402.

<sup>39</sup> Vandeveldde K J 'Investment Liberalisation and Economic Development: The role of Bilateral Investment Treaties' (1998) 36:501 *Columbia journal of transnational law* 503. The liberalisation theory is based on the premise that BITs are 'instrument for the facilitation and protection of international investment flow'. The efficiency of the free market is determined by the effective use of its resources and productive capacity.

growth.<sup>40</sup> E.g. Friendship, Commerce and Navigation (FCN), Bilateral Investment Treaty (BIT), North America Free Trade Agreement (NAFTA)<sup>41</sup> amongst others.

**South African Protection of Investment Act 22 of 2015** is a piece of legislation passed as an Act of Parliament on the 15 December 2015 to provide for the protection of investors and their investments in achieving a balance of rights and obligations that apply to all investors and to provide for matters connected therewith in the Act. The Act came into effect on the 13<sup>th</sup> July 2018.<sup>42</sup>



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<sup>40</sup> United Nations Conference on Trade and Development (UNCTAD) available at [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/International-Investment-Agreements-\(IIAs\).aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/International-Investment-Agreements-(IIAs).aspx) (accessed 17 June 2018).

<sup>41</sup> Vandeveldt K J 'A Brief History of International Investment Agreement' (2005) 12 *University of California Davies Journal of International Law and Policy* 181.

<sup>42</sup> South African Government Protection of Investment Act 22 of 2015 available at <https://www.gov.za/documents/protection-investment-act-22-2015-15-dec-2015-0000> (accessed 12 April 2019).

## CHAPTER TWO

### **AN ANALYSIS OF PROTECTION AND PROMOTION OF INVESTMENT CLAUSES IN SELECTED AFRICAN BILATERAL INVESTMENT TREATIES**

#### **2.1 Introduction**

This chapter examines the Promotion and Protection of Investment clauses as found in selected BITs. As such, the relevant characteristics of selected African BITs will be carefully evaluated. The treaties to be considered are those most recently signed between selected African countries with other developed nations in other continents. They include among others, BITs between Morocco – Nigeria (2016), Japan – Kenya (2016) and Canada – Senegal (2014).<sup>43</sup> The above mentioned BITs will be analysed on the basis of their individual legislative frameworks as defined by the agreements. The aim of this analysis is to establish the importance of protecting and promoting investments through the designated clauses in the selected BITs and to examine the importance of these treaties to investment developments in Africa.

#### **2.2 Importance of BITs**

Earlier in this research, Bilateral Investment Treaties (BITs) were described within the scope of protecting investment interests and achieving developmental goals.<sup>44</sup> It was further defined as a catalyst to investments bringing together shared interest of emerging states at a time when a transition of the international regulation of foreign investment were most needed.<sup>45</sup>

An interesting and more elaborate definition describes these treaties as instruments of foreign investments designed within the international legal framework to conduct the policy, actions and affairs of the nationals of one country in the territory of another.<sup>46</sup> These state actions and conduct are autonomously directed towards an

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<sup>43</sup> UNCTAD International Investment Agreement Navigator available at <http://investmentpolicyhub.unctad.org/IIA/MostRecentTreaties#iialInnerMenu> (accessed 08 August 2018).

<sup>44</sup> Sornarajah M (2017) 215.

<sup>45</sup> Guzman A T 'Why LDCs sign treaties that hurt them: Explaining the popularity of Bilateral Investment Treaties' (1998) 38:639 *Berkeley law scholarship repository* 641.

<sup>46</sup> Salacuse J W *The Law of Investment Treaties* (2010) 91.

anticipated quest for sustainable development. Commentators like Gazzini argue that while sustainable development remains a highly controversial paradigm, it serves to marry economic development and environmental protection.<sup>47</sup> In describing BITs as a contributing element to sustainable development, Gazzini echoed that for sustainable development to thrive, factors such as the efficient use of natural resources, the principle of equity and poverty eradication, principle of human rights and preservation of the ecosystem, principle of common but differentiated responsibilities, principle of good governance, public participation and access to information and justice, principle of integration and interrelationships must be upheld.<sup>48</sup>

A holistic view of the above mentioned factors suggest that BITs are progressive elements with specific functions of protecting and promoting investment in their respective clusters. Concluding BITs henceforth, will depend on how efficiently the parties in agreement synthesizes these factors into a unifying legislative framework for the overall benefit of all in their respective treaty.

Determining the impact of BIT at this stage seems premature however it is important to note that various factors not exclusive to BITs, contributes to stimulating economic developments. Gazzini argues that it will be a misconception to establish a single contributing factor for developments to BITs but to an array of other factors ranging from other legal instruments like contracts and legislation and other endogenous and exogenous factors<sup>49</sup> such as technological knowhow, Foreign Direct Investment (FDI), natural resources and political neutrality.

Wandrag opined that in the absence of global regulation, a sizeable number of FDI are regulated by BITs and International Investment Agreements (IIAs).<sup>50</sup> Thus monitoring, evaluation and assessment of FDI's are also performed by other international legal instruments. While the presence of these legal instruments contributes to the growth of FDI, the treatment standards enshrined in these documents provides for the foreign investors rights to be protected.<sup>51</sup>

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<sup>47</sup> Gazzini T 'Bilateral Investment Treaties and Sustainable Development' (2014) 15 *The Journal of World Investment and Trade* 932.

<sup>48</sup> Gazzini (2014) 931.

<sup>49</sup> Gazzini (2014) 934.

<sup>50</sup> Trade and Investment Policy Workshop (2015) available at <https://pmg.org.za/committee-meeting/21187/> (accessed 04 March 2019).

<sup>51</sup> See Wandrags comments on treatment standards for foreign investors in 'Trade and Investment Policy Workshop 2015.'

As presented by various scholars, it can be summarised that BITs serve three primary functions. First, they are legal instruments for 'protecting' investment interest in sovereign states including foreign investment.<sup>52</sup> Secondly, they are tools for 'promoting' shared interest of countries *inter alia* harmonising each other bilateral interest as the case may be,<sup>53</sup> and finally, they are 'legal documents' indicating the conduct of business, policies and actions of nationals or institutions in each other's territories respectively.<sup>54</sup> The emphasis on these descriptions therefore, reckons that BITs protect, promote and are legally cushioned in accordance with customary international law.

In addition to these anticipated functions BIT serves, it also provides a platform for arbitration where violations have taken place.<sup>55</sup> This is considered one of the most important functions of the treaty. Aggrieved investors can lodge claims directly against host authorities in an investor – state arbitration process where there are violations of the BITs.<sup>56</sup>

Over the years, in order for host countries to respect the standards of the treaty, the investor – state arbitration served as a watch dog towards malicious state behaviour against investors.<sup>57</sup> The establishment of the International Centre for Settlement of Investment Disputes (ICSID) in 1966 under the auspices of the World Bank (WB) guaranteed that enforcement of BITs provisions are adhered to.<sup>58</sup> The institution embarked on resolving disputes that arose between foreign investors and host governments because it was generally accepted that such issues derail the process of economic development in least developed countries (LDC's).<sup>59</sup>

Unlike the old customary international law which relied on the 'Hull rule'<sup>60</sup> in providing prompt, adequate and effective compensation, the investor –state arbitration accords investors a platform to negotiate superior protections against hostile states in a

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<sup>52</sup> Sornarajah M (2017) 215.

<sup>53</sup> Guzman A T (1998) 641.

<sup>54</sup> Salacuse J W (2010) 91.

<sup>55</sup> Salacuse J W (2010) 92.

<sup>56</sup> Salacuse J W (2010) 92.

<sup>57</sup> Salacuse J W (2010) 93.

<sup>58</sup> Salacuse J W (2010) 93.

<sup>59</sup> Salacuse J W (2010) 93.

<sup>60</sup> Sornarajah M (2017) 153. Hull rule also known as Hull Formula expresses compensation as a result of expropriation of private property to be prompt, adequate and effective in execution.

properly managed legal process.<sup>61</sup> Contrarily, alternative opinion suggest that what constitute an effective arbitration process will depend on the parameters prescribed in the treaty. For example, the South African Protection of Investment Act (SA POI) Section 13 (4) recommends exhaustion of local remedies through a competent legal institution in the Republic<sup>62</sup> before invoking arbitration between the home state of the investor and the host state.<sup>63</sup> An in-depth study on dispute settlement will highlight various strategies in the African BITs and the SA POI Act in the forthcoming chapters.

Following the above perspective given by various scholars on the importance of BITs, it is apparent that BITs still provide some form of guidance towards understanding a country's position to international investments and its future ambitions. The challenge however, is determining the content of the treaties, bearing in mind the contending issues of protection and promotion of investments in sovereign nations, the overwhelming interest of investors and their investment in finding solutions to the challenges of the fourth industrial revolution of recent times. In order to get a general understanding of these international legal instrument, investment will be defined in the context of each selected African BIT.

### **2.3. Investment defined in the context of selected BITs**

The term 'investment' as covered by most BITs is broadly defined along asset based definitions.<sup>64</sup> Before concluding on different approaches to the definitions of investment, it is important to distinguish between FDI and Portfolio investment.

Sornarajah defines FDI as the 'transfer of tangible or intangible assets from one country to another for purpose of their use in that country to generate wealth under total or partial control of investor.'<sup>65</sup> Interestingly, the qualifying word 'control' which is directly linked to BITs forms the basis of how much the investor or state can regulate. Portfolio investment involves a transactional movement of funds for the purpose of acquiring right of ownership by means of purchasing shares/security from a legal entity

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<sup>61</sup> Guzman A T 'Why LDCs sign treaties that hurt them: Explaining the popularity of Bilateral Investment Treaties' (1998) 38:639 *Berkeley law scholarship repository* 644.

<sup>62</sup> Section 13 (4) of Act No 22 of 2015.

<sup>63</sup> Section 13 (5) of Act No 22 of 2015.

<sup>64</sup> Sornarajah M (2017) 11.

<sup>65</sup> Sornarajah M (2017) 11.

(company) operating in a foreign country.<sup>66</sup> Sornarajah's definition is limited in scope by subjecting portfolio investment to buying of shares in a foreign country however, these shares can also be bought in a home country as an investment.

Al-Louzi articulated the same ideology by dissecting the definition from three different angles. First is the asset-based paradigm which defines investment in terms of the nature of assets that is tangible and intangible properties.<sup>67</sup> These will include property, intellectual property, contractual and administrative, direct and portfolio investment.<sup>68</sup> Secondly is the transaction-based narrative from the angle of transfer of cross border financial flow and thirdly the enterprise-based definition which seeks to focus on managerial control of enterprises from an investor point of view.<sup>69</sup>

This brings the argument to what the distinguishing factors are between FDI and Portfolio Investment in relation to customary international law. Customary International Law does not cover portfolio investment but classified it under ordinary commercial risk, a category attached to the risk profile of the investment during purchase.<sup>70</sup> Nevertheless, the distinguishing factors that separates both definitions are the duration of investment, physical presence of investment and the control or management of the investment. For the purpose of this thesis, the discussion will focus on FDI as a contributing factor to investment which is protected under customary international law.<sup>71</sup>

Recent developments have shown evidence of portfolio investment included in the scope of investments however the level of protection accorded will depend specifically on the inclusiveness of certain elements in the definition of investment in respective treaty.<sup>72</sup> Article 1 of the Japan-Kenya (2016) BIT defines investment as;

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<sup>66</sup> Sornarajah M (2017) 11.

<sup>67</sup> Al-Louzi R 'A Coherent Review of Investment Protection under Bilateral Investment Treaties and Free Trade Agreements' (2015) 12 *Manchester Journal of International Economic Law* 275.

<sup>68</sup> Al-Louzi R (2015) 275.

<sup>69</sup> Al-Louzi R (2015) 275.

<sup>70</sup> Sornarajah M (2017) 12.

<sup>71</sup> Sornarajah M (2017) 20.

<sup>72</sup> Sornarajah M (2017) 13.



'every kind of asset owned or controlled, directly or indirectly, by an investor and has characteristics of an investment such as commitment of capital or other resources, the expectation of gain or profit, or assumption of risk, including...'.<sup>73</sup>

As earlier indicated, the inclusion of Portfolio Investment have become a major characteristic of modern treaties in recent times.<sup>74</sup> Both treaties under scrutiny namely Canada-Senegal (2014), Morocco-Nigeria (2016) follows the same pattern by listing the different characteristics of investments as elements of investment covered in their respective treaty. While unpacking what constitutes investment, Sornarajah concluded that the task of defining the parameters of investments remains the duty of the host state in categorising what is tangible and intangible and the rights to its existence which is purely vested in the law of the state where the investment is incorporated.<sup>75</sup> For instance, the Canada-Senegal (2014) BIT classifies investments under its Article 1 as;

'an enterprise, a share, stock or other form of equity participation in an enterprise,...any other tangible or intangible, moveable or immovable, property and related property rights acquired in the expectation of or used for the purpose of economic benefit or other business purpose'.<sup>76</sup>

On the other hand, while the definition of investment is consistent with some elements of portfolio investment, the Morocco-Nigeria (2016) BIT excludes portfolio investment as investment however identified certain characteristics consistent with portfolio investment included in its treaty but offers no definition as to what constitutes 'portfolio investment'. Article 1 (3) (a) (a) (b) reads; 'for greater certainty, investment does not include portfolio investment'.<sup>77</sup> This exposes the treaty to potential litigation where terms are contradictory and not properly defined.

All definitions coherently describe investment in quite a comprehensive manner nevertheless the meaning of investment will depend on the context for which it is incorporated. Salacuse can be credited for a simplified definition describing investment

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<sup>73</sup>Article 1 of the Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment (2014).

<sup>74</sup> Sornarajah M (2017) 226.

<sup>75</sup> Sornarajah M (2017) 226.

<sup>76</sup> Article 1 of the Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments.

<sup>77</sup> Article 1 (3) (a) (a) (b) of the Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (2016).

as 'the commitment of resources by a physical or legal person to a specific purpose in order to earn a profit or to gain a return'.<sup>78</sup> Although commitments of resources constitute a major part of the definition, he came to the conclusion that most treaties if not all define investment within the scope of contractual rights and property, control attributes and enterprise form of investment.<sup>79</sup>

As seen above, the definition of investment indicated by all treaties consistently acknowledges the basic features posited by various scholars, but differ in the context for which they apply. It then follows that the incorporation of investment and the distinctive definitions suggested by individual treaty as to what constitute an investment, will be limited to the scope prescribed to investment by the state parties in relation to the treaty. Understanding the benefits of this provision, will require interpretations of treaties given by the Vienna Convention of the Law of Treaties (VCLT).

#### **2.4 Understanding the purpose of the treaty in selected African BITs**

The foundation of a treaty is the general rules guiding the interpretation of the treaty.<sup>80</sup> This rule states that a treaty should be defined ordinarily according to its object and purpose. Article 31 (1) of the (VCLT) states that;

'A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.<sup>81</sup>

The rules contained in the treaty are expressed in the context of its object and purpose, thus keeping the parties' agreement as the sole basis of the decision.<sup>82</sup> Based on observation, all treaties indicated in this thesis explicitly starts by explaining the purpose of the agreements as it were. The only difference appears in the manner in which the content was written. Each treaty highlights the importance of 'promoting and protecting' investment of investors of one party in the territory of the other party. Citing the introduction of the Canada-Senegal (2014) BIT, it states;

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<sup>78</sup> Salacuse J W *The Three Laws of International Investment* (2013) 3.

<sup>79</sup> Salacuse J W (2013) 4.

<sup>80</sup> Salacuse J W (2010) 140.

<sup>81</sup> Article 31 (1) of the Vienna Convention on the Law of Treaties.

<sup>82</sup> Schefer K N *International Investment Law Text Cases and Materials* (2016) 42.

'Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity...to the promotion of sustainable development.'<sup>83</sup>

This treaty specifically identifies the intentions of both parties to the agreement by upholding the need to promote and protect investments in territories of both parties in a coordinated manner that is beneficial to all meaning, 'favourable' conditions may be provided to enhance development and cooperation. The question therein is, who will be the biggest beneficiary of these conditions? Perhaps the term 'favourable' as opposed to 'conducive' can apply and the limits to which these conditions will be provided should be clearly expressed in the introduction. The Japan-Kenya (2016) BIT avoided the use of the word 'protection' but rather limit its scope of commitments to 'promotion' in its introduction;

'Desiring to further promote investment in order to strengthen the economic relationship between.....'<sup>84</sup>

The introductory note seems less appealing due to the fact that the term 'protection' was omitted from the clause which could raise investors' concern leading to inconsistencies in the provisions. However it places emphasis on 'promotion' and provides other conditions typical of a traditional BIT in fostering economic cooperation and development. The Morocco-Nigeria (2016) BIT expresses its agreement as 'reciprocal investment promotion and protection' but fails to highlight the need for 'protection' in its preamble nonetheless it mentions the need for promoting investment opportunities as well as cooperation in enhancing sustainable development. Paragraph three of the preamble states;

'Seeking to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the state parties.'<sup>85</sup>

Thus, it is important that these introductory notes are carefully scripted to accommodate the objectives set out in these treaties. Situations where they are clearly identified gives an indication of the overall purpose of the agreement which should be consistent throughout the treaty for the promotion and protection of investment. For instance the Canada-Senegal (2014) BIT consistently emphasised the need to

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<sup>83</sup> Introductory note on the Canada-Senegal (2014) BIT.

<sup>84</sup> Introductory note on the Japan-Kenya (2016) BIT.

<sup>85</sup> Paragraph 3 of the preamble of Morocco-Nigeria (2016) BIT

'promote and protect' investments in mutually beneficial business activity to the development of economic cooperation and development between nations.<sup>86</sup> Article 3 of the Canadian-Senegalese (2014) BIT further buttresses the need for promotion of investment by stating that;

'Each Party shall encourage the creation of favourable conditions for investment in its territory by investors of the other Party and shall admit those investments in accordance with the agreement.'<sup>87</sup>

These proclamations are aimed at strengthening relationships and cooperation between contracting parties. In further expressions, all three treaties codified each agreement by establishing the 'definition of terms' at the beginning and identifying each term with respect to the treaty. In spite of the content, each selected BIT was uniquely designed to serve the purpose of the agreement. The next section will be dedicated to discussions of selected clauses representing protection and promotion of investments in selected African BITs.

## **2.5 Legal interpretation of Protection and Promotion of investment clauses of Selected BITs**

This section focuses on the interpretation of the protection and promotion of investment clauses in BITs. Provisions to be discussed include minimum standard of treatment, most favoured nation, national treatment, expropriation as well as dispute settlement mechanisms. This thesis will examine the various clauses detailing the treatment standards listed above and how they relate to the protection and promotion of investments in Africa.

### **2.5.1 Minimum Standard of Treatment**

#### **I. Fair and Equitable Treatment (FET)**

The origin of the FET clause dates back to the era of the mid 1900's, a time the economic cooperation and developments were the primary focus of sovereign states. The aim was to protect investors against violations perpetrated by the host country as

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<sup>86</sup> Introductory note on the Canada-Senegal (2014) BIT.

<sup>87</sup> Article 3 of the Canada-Senegal (2014) BIT.

part of the conditions for international cooperation and agreements.<sup>88</sup> In acknowledging the importance of this standard in most treaties, the standard is widely viewed as one of the most important yet controversial provisions considered during investment disputes.<sup>89</sup> However, by virtue of its broadness and ambiguity, it is difficult to interpret its legal obligations and it must be considered on a case to case basis.<sup>90</sup> One such case is *Neer v Mexican United State*<sup>91</sup> decided in 1926 where the arbitral ruling was subject to different interpretations ranging from denial of justice, fair and equitable treatment to the minimum standard of treatment in customary international law.<sup>92</sup> Literature suggests that investment arbitration tribunals have struggled in unpacking and delivering a clear direction as to how this standard is to be applied.<sup>93</sup> The *Neer* case demonstrated the complexity of interpreting the treatment of foreign nationals and their property using the international minimum standard provisions.<sup>94</sup> This has caused much anxiety due to the content and vagueness in interpretation.<sup>95</sup> A popularly used mechanism of providing adequate remedy in categorising and unbundling this challenge is the introduction of the investor-state arbitration.

Present day experiences have revolutionised the arbitral discourse demonstrating the importance of the BITs by making provision for investor – state arbitration. Within the scope of this provision, the state recognises the treatment of foreigners and their investments as sacrosanct. This is carefully covered within the framework of the minimum standard of treatment in international investment law and termed ‘fair and equitable treatment’.<sup>96</sup> The North American Free Trade Agreement (NAFTA) cases

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<sup>88</sup> Leite K ‘The Fair and Equitable Treatment Standard: A search for a better balance in International Investment Agreements’ (2016) *American University Journal of International Law & Policy* 370.

<sup>89</sup> Leite K (2016) 371.

<sup>90</sup> Leite K (2016) 371.

<sup>91</sup> International Arbitration Case Law (IACL) available at [www.internationalarbitrationcaselaw.com/new-cases/neervmexicodecisiononthemeritsbymariakostytska](http://www.internationalarbitrationcaselaw.com/new-cases/neervmexicodecisiononthemeritsbymariakostytska) (accessed 14 September 2018). In this case, a U.S citizen Paul Neer and a few men were arrested but later released. The U.S brought a claim against Mexico in the U.S Mexico General Claims Commission for denial of justice but eventually the commission ruled in favour of Mexico pointing out errors in the manner in which the investigation was carried out.

<sup>92</sup> Leite K (2016) 373.

<sup>93</sup> Leite K (2016) 372.

<sup>94</sup> Leite K (2016) 374.

<sup>95</sup> Sornarajah (2017) 240.

<sup>96</sup> Leite K (2016) 374.

namely *S.D Myers v Canada*<sup>97</sup> and *Pope & Talbot, Inc. v Canada*<sup>98</sup> illustrate the approaches Canada has adopted as a reflection of the correction of the *Neer* case thus setting high standards for minimum treatments by arbitration tribunals.<sup>99</sup> *S.D Myers v. Canada*<sup>100</sup> demonstrated the different view the arbitral tribunal took in interpreting violations in national treatment (NT) and FET standard.<sup>101</sup> The tribunal concluded that indeed the NT and FET standard were violated, however the violations to FET situations in arbitrary treatments were unacceptable from an international point of view.<sup>102</sup> Sornarajah's opinion in his concluding remarks regarding this treatment, echoed that the tribunal consciously limited its scope of the interpretation of the violation of standard according to customary international law.<sup>103</sup>

The case of *Pope and Talbot Inc. v. Canada*<sup>104</sup> provided a different dimension to tribunal arbitral awards which changed the course of arbitral decisions unlike the *S.D Myers* case.<sup>105</sup> This case was also attributed to violations in treatment standards ranging from NT to FET standards. The complexity of the case resorted the tribunal to reaffirming its verification review by reconsidering the interpretation of FET standard and not relying on a static position reminiscent of the *Neer Claim*.<sup>106</sup> This tribunal thoroughly explored and gave more content to FET standard by broadening the scope of the standards beyond the basic requirements of international minimum standard in international law.<sup>107</sup> In broadening the content, the tribunal concluded by considering the severity of interference as substantial deprivations which should be compensable.<sup>108</sup> The effect of this decision will reflect in structural changes in future

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<sup>97</sup> *S.D. Myers Inc. v. Government of Canada*, UNCITRAL (NAFTA), First Partial Award, paras. 284-8 (Nov 13, 2000). It was a complex case on waste disposal. SD Myers, an American company operating in Canada is in the business of disposing hazardous waste. Canada on the other hand imposed ban on export of waste to the United States. The case involved violations in minimum standard of treatment however the tribunal concluded that action taken by closing the border thereby denying market access for 18 months does not amount to indirect expropriation.

<sup>98</sup> *Pope and Talbot Inc. v. The Government of Canada*, UNCTRAL (NAFTA) Interim Award, (June 26, 2000).

<sup>99</sup> Leite K (2016) 373.

<sup>100</sup> *S.D. Myers Inc. v. Government of Canada*, UNCITRAL (NAFTA), First Partial Award, (Nov 13, 2000).

<sup>101</sup> Schefer K N (2016) 239. Different interpretations were given by different tribunals. First denied claim based on regulation while the other was satisfied with claimants compliant premises on a year denial of investment opportunities.

<sup>102</sup> Sornarajah M (2017) 413.

<sup>103</sup> Sornarajah M (2017) 413.

<sup>104</sup> *Pope and Talbot Inc. v. The Government of Canada*, UNCTRAL (NAFTA) Interim Award, (June 26, 2000).

<sup>105</sup> Sornarajah M (2017) 413.

<sup>106</sup> Sornarajah M (2017) 415.

<sup>107</sup> Sornarajah M (2017) 415.

<sup>108</sup> Schefer K N (2016) 238.

treaties giving more meaning to standard treatments when concluding agreements. By so doing, clarity is provided with clauses that restricts interference to avoid compensations. All this was done in the effort to provide more answers to pertinent questions regarding the investors' protection against indiscriminate treatment. Be that as it may, considering the continuous development in investment law, Sornarajah warned that states will continue to challenge the creators of this standard due to 'constant threat of their regulatory structures being reviewed by international tribunals.'<sup>109</sup> Those structures in context are designed to safeguard the independence of these institutions tasked with protecting and promoting all investment established under the sovereign powers of the state.

As noted above, every sovereign state comes with its own challenges from socio-cultural beliefs to economic and political *modus operandi*. It comes as no surprise that different interpretation to this standard can be located in different international jurisprudence.<sup>110</sup> The FET standard can therefore be considered as problematic in application depending on the challenges posed before any arbitration tribunal. From this analysis, it is therefore accepted that given the responsibilities vested on this standard, it would be certain that it would place undue burden on any state, most especially developing and least-developed countries around the globe.<sup>111</sup> The challenge for sovereign states therefore is, how it plans to strike a balance between enacting policies that are friendly and not in conflict with customary international law and ensuring that the state remains committed to its treaty obligation of equitable treatment for all investments within its territory.

The conclusion of BITs ensures that host countries abide to the commitments made in their treaties as a matter of law and approval to the enforcement mechanism provided.<sup>112</sup> By so doing, promotion of foreign investments are viewed in light of mitigating political interference, encouraging inward and outward flow of investment between contracting states, preventing uncompensated expropriation and

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<sup>109</sup> Sornarajah M (2017) 415.

<sup>110</sup> "Fair and Equitable Treatment Standard in International Investment Law" OECD 2004 available at [http://www.oecd.org/daf/inv/investment-policy/WP-2004\\_3.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf) (accessed 03 March 2019).

<sup>111</sup> Petersen L E ' *Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration* ' ( 2009) 13

<sup>112</sup> Vandeveld K J 'The Economics of Bilateral Investment Treaties' (2000) 41 *Harvard International Law Journal* 488.

discriminatory treatments thereby reducing the risk to investors.<sup>113</sup> Protecting and promoting of investments in BITs then suggest that it remains a critical criteria to gaining investors' confidence in the long run. Without these minimum standards, it becomes elusive for host nations to guarantee full substantial benefits to its developing economy however, the restrictive nature of the protection clauses tend to insulate the host countries to the vulnerability of regulating the foreign investment and the adverse effects its generates.<sup>114</sup>

The FET discourse as indicated by all three selected African BITs, each agreement specifically highlighted this clause under the term 'Minimum Standard of Treatment' apart from the Japan – Kenya BIT (2016)<sup>115</sup> which codified its provision as 'General Treatment and Improvement of Investment Environment'. Article 6(1) & (2) of the Canada –Senegal (2014) BIT gives a short description of this provision as:

'Each Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of investment of aliens, including fair and equitable treatment and full protection and security'

And

'The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens'.<sup>116</sup>

The obligations enshrined in all three agreements stress the importance of the minimum standard of treatment in relation to customary international law. This standard ensures that favourable conditions for investment are established for either contracting party in the territory of the other party.<sup>117</sup> The term also used in the Japan-Kenya 2016 BIT i.e. 'General Treatment and Improvement of Investment Environment' gives an indication of promoting investment by both states by improving the conditions

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<sup>113</sup> Vandeveld K J (2000) 498.

<sup>114</sup> Vandeveld K J (2000) 499.

<sup>115</sup> Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment.

<sup>116</sup> Article 6 (1) (2) of the Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments.

<sup>117</sup> Salacuse J W (2013) 378.



for which businesses will thrive in both territories. The argument therefore will be, what has been improved over the years to support the premise of an enabling business environment? In order to determine this, a thorough analysis on the economic developments of both states in relation to legislations guiding the standard must be established. Consequently, this will resort to an inter-disciplinary approach. Unfortunately, that goes beyond the scope of this study, however the paper hopes to establish if actually this 'FET' standard propagate protection and promotion obligations but limits its research on the area of jurisprudence of the treaties.

Salacuse is of the opinion that customary international law requires that treaties accords to investors FET as ways to develop and intensify economic cooperation between the contracting states for the benefit of both.<sup>118</sup> This very important provision remains general and vague because it doesn't explain explicitly what constitutes FET. The difficulty in explaining what the FET clause entails brought about the suggestion by various scholars that it is an 'all-encompassing provision that embraces generality'.<sup>119</sup> Therefore, due to the nature by which the clause have been interpreted, it is further suggested that African BITs provides a *sui generis* explanation on what constitutes the FET provision.

Observing the common application of the FET and Full Protection and Security (FPS), Article 5 [3] of the Japan –Kenya (2016) BIT took a satisfactory approach by stating that the agreement shall take 'appropriate measures' to further improve the investment environment . The article provides as follows;

'Each Contracting Party shall take "appropriate measures" to further improve investment environment in its area for the benefit of investors of the other contracting party and their investments. In this regard, each Contracting Party shall endeavour to create and maintain favourable conditions for the investors of the other Contracting Party and their investments with respect to investment activities as well as the establishment, acquisition and expansion of investment'.<sup>120</sup>

An argument can suffice with the suggestion of another seemingly vague and ambiguous interpretation to the 'kind of measures' that may be put in place to promote

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<sup>118</sup> Salacuse J W (2013) 378.

<sup>119</sup> Wythes A 'Investor-State Arbitrations: Can the Fair and Equitable Treatment Clause Consider International Human Rights Obligations?' (2010) *Leiden Journal of International law* 245.

<sup>120</sup> Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment (2014).

investment. On one hand, such measures can improve the conditions under which investments will take place while on the other hand, it might hinder the ability to conduct such businesses where measures put in place goes against the tenets of human rights. It goes further to suggest that lack of clarity can lead to inconsistent decisions and inconsistency creates uncertainty which damages the legislative expectations of investors and states.<sup>121</sup>

The case of *Foresti v. South Africa*<sup>122</sup> illustrates a classical example of a compromise between international human right obligation and investor protection provided by the FET clause. The compromise in interpretation emanates from the submissions to arbitration by the Italian investor that the Black Economic Empowerment (BEE) policies adopted by South Africa violates the FET clause contained in South Africa-Italy BIT.<sup>123</sup> This policy required a system of renewed licencing before exploitation exercise<sup>124</sup> mandating investors to hire black managers as stated by the Minerals and Petroleum Resources Development Act (MPRDA) as a means of empowering historically disadvantaged persons.<sup>125</sup> This sparked international outcry with the investors challenging these policies claiming they violated South Africa international obligation under its BIT amounting to expropriation under international law.<sup>126</sup> Others who lay claims as non-disputing parties (NDP) alleged that the Act was discriminatory and went against public interest and human rights.<sup>127</sup> Although the case was settled outside the tribunal,<sup>128</sup> it gained recognition amongst experts as topical in the sense that it has raised international attention to issues of human rights and international investment law as well as finding answers to legal questions by tribunals on the governing principles on which *Foresti v. South Africa*<sup>129</sup> might be decided.<sup>130</sup> It also showed the difficulty in which arbitrators will extend international investment treaty obligations such as policies against expropriation and application of FET, to

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<sup>121</sup> Hanotiau B 'Are Bilateral Investment Treaties and Free Trade Agreement Drafted with Sufficient Clarity to give Guidance to Tribunals?' (2016) 5 *American University Business Law Review* 314

<sup>122</sup> *Piero Foresti, Laura De Carli and Others v. Republic of South Africa*, ICSID Case No, ARB(AF)/07/1.

<sup>123</sup> Wythes A (2010) 243.

<sup>124</sup> Friedman A 'Flexible Arbitration for the Developing World: Piero Foresti and the Future of Bilateral Investment Treaties in the Global South' (2010) 7 *International Law & Management Review* 38.

<sup>125</sup> Wythes A (2010) 244.

<sup>126</sup> Friedman A (2010) 38.

<sup>127</sup> Friedman A (2010) 43.

<sup>128</sup> Friedman A (2010) 37.

<sup>129</sup> *Piero Foresti, Laura De Carli and Others v. Republic of South Africa*, ICSID Case No, ARB(AF)/07/1.

<sup>130</sup> Wythes A (2010) 244.

accommodate human right policy objectives or interpreted within such framework.<sup>131</sup> This case set precedence as to how difficult it was in interpreting the FET clause while accommodating the state commitments to human rights obligations towards its people. Further insight suggest that the arbitration cannot be exclusively limited to FET standards but other perceived violations which conclusively remains topical in various tribunal deliberations.

Scholarly opinion shows more inconsistency in tribunal decisions between NT and FET. Those expressions suggest that the FET standards should be broadly interpreted to include several categories that gives more meaning to the standard. In the course of an extensive study carried out by United Nation Conference on Trade and Development (UNCTAD), it was suggested that the FET standard should include categories as denial of justice, arbitrariness, discrimination, abusive treatment and violation of legitimate expectation.<sup>132</sup> While Sornarajah concluded that the first four categories define the basis of international minimum standard, the last category of legitimate expectation remained new to minimum standard framework.<sup>133</sup> This broad open ended concept, tend to hinder government responsibility and creates undue burden on the state, which may indirectly infringe on the government's ability to regulate and conduct its business of protecting public interest.<sup>134</sup>

The tribunal in the case of *Tecmed v. Mexico*<sup>135</sup> case which set off the interpretation on legitimate expectation in the context of FET standard can be said to have opened a can of worms for a breach in FET standards, in conditions where promises have been made to investors in both contracts and non-contractual documents in the law of the host state.<sup>136</sup> In this case, Schefer argued that the tribunal considered what the

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<sup>131</sup> Petersen L E (2009) 40.

<sup>132</sup> Sornarajah M (2017) 417.

<sup>133</sup> Sornarajah M (2017) 418. The notion of legitimate expectation implies that the foreign investor expects that the host state acts in a consistent and transparent manner, free from ambiguity in divulging all information be it regulation, policies, administrative directives and practices regarding the governing of investments in its territory, so as to give the investor an opportunity to plan how it would conduct its commercial and business activities. The general idea is that an 'expectation created by administrative conduct should not be violated unless a hearing is given to the person who had that expectation'.

<sup>134</sup> Davitti D 'On the Meaning of International Investment Law and International Human Rights Law: The Alternative Narrative of Due Diligence' (2012) 12 *Human Rights Law Review* 434.

<sup>135</sup> *Tecmed v. Mexico*, ICSID Case No ARB (AF)/00/2 (29 May 2003).

<sup>136</sup> Schefer K N (2016) 244. Tecmed a company incorporated in Spain but runs operation in Mexico also in the business of disposal of hazardous industrial waste. Mexican government refused to renew Tecmed licence citing breaches in its operational aspects landfill.

investor expected and what the investor could legitimately have expected.<sup>137</sup> Balancing the rights of the state to regulate and the interest of the investor more often than not, suggest that arbitrators become less critical in determining legitimate expectation.<sup>138</sup>

What this discourse highlights is interpretation accorded to the FET standard by arbitrators. Research suggest that by expanding the very nature of this definition, tendencies of aggravating law suits against host states proves imminent.<sup>139</sup> This in return hinders the ability of the tribunal to act effectively in passing down decisions pertaining investment disputes. It can also be said that it can easily lead to arbitration crisis in investment treaties knowing that the review carried out by tribunals directly threatens state sovereignty.<sup>140</sup>

So many other cases have proved that the FET standard is problematic in its approach, application and interpretation. Despite the strong resistance from states to continuously request tribunals to expand the interpretation of FET standards,<sup>141</sup> states have opted to link its NT standard with the FET in its treaties. This brings some sort of relief to the state by giving more meaning to the FET standard. In order words, the state can regulate effectively while the rights of the investors are not violated. Future treaties can follow the same approach to mitigate litigations against the host state.

The conclusion of BITs will require more than just giving more content to the FET standard but also extending those privileges to include Full Protection and Security (FPS). Growing concerns on the nature of security provided will be discussed below.

## **ii. Full Protection and Security (FPS)**

History suggests that the FPS standard has existed to protect foreign interest as far back as the ancient Greece through the middle ages, and finally crystallised into contemporary FPS standards in the twenty first century.<sup>142</sup> These standards were not only limited to physical protection and security, but also extended to legal protection

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<sup>137</sup> Schefer K N (2016) 407

<sup>138</sup> Schefer K N (2016) 408.

<sup>139</sup> Somarajah M (2017) 418.

<sup>140</sup> Davitti D (2012) 436.

<sup>141</sup> Somarajah M (2017) 421.

<sup>142</sup> Junngam N 'The full Protection and Security Standard in International Investment Law: What and Who is Investment Fully Protected and Secured from?' (2018) 7 *American University Business Law Review* 8.

too.<sup>143</sup> It must be accepted that this standard is aptly recognised by customary international law stressing that the host state takes responsibility for protecting aliens threatened by violence within its territory.<sup>144</sup> In order for the standard to be vastly accepted, various scholars have suggested that due diligence must be exercised. Due diligence in context states that certain actions, conduct or behaviour must be followed by the State in order to effectively protect other states from harm through legislative and administrative actions.<sup>145</sup>

Chen echoes that by adopting an alternative model like improving domestic institutions of host states, investors as well as importing states benefit from increased FDI invariably translating to better opportunities for investments in host states.<sup>146</sup> His postulation can also be construed to mean strengthening domestic institutions to make it more attractive for investors to commit capital investments towards developing the host state. Achieving such status will involve defining the roles of each domestic institution clear of prejudice but secured with legislative oversight. While the customary interpretation of the FPS standard relates to the physical security of the investment only, more recent tribunals have expanded the standard to also include securing the legal and economic stability of the investment.<sup>147</sup> In the case of *Bewater Gauff Ltd v Republic of Tanzania*,<sup>148</sup> the tribunal stated that the FPS standard is afforded when a State guarantees a stable and secure physical, commercial, and legal environment. For instance, the tribunal considered that Tanzania violated its obligation to provide adequate physical security in actions that constitute seizure of City Waters offices and the deportation of its staff.<sup>149</sup>

Junngam opined that the responsibility to initiate due diligence rest within the confines of the host state.<sup>150</sup> His argument follows the reasoning that, the level of protection to be accorded will depend on the level of development of the host state.<sup>151</sup> Therefore FPS responsibilities in internalising 'due diligence' is a function of other variables that

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<sup>143</sup> Junngam N (2018) 99.

<sup>144</sup> Somarajah M (2017) 427.

<sup>145</sup> Davitti D (2012) 444.

<sup>146</sup> Chen M C 'Bilateral Investment Treaties and Domestic institutional Reforms' (2018) 55 *Columbia Journal of Transnational Law* 550.

<sup>147</sup> Somarajah M (2017) 427.

<sup>148</sup> *Bewater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22 (2007).

<sup>149</sup> Schill SW *International Investment Law and Comparative Public Law* (2010) 198.

<sup>150</sup> Junngam N (2018) 36.

<sup>151</sup> Junngam N (2018) 37.

are dependent on the overall development of the host state i.e. level of political and economic stability, availability of resources and capacity space.<sup>152</sup> The literature then suggests that international investments will not function efficiently if the FPS standard is absent or not uniquely defined to serve the interest of Contracting States.<sup>153</sup> While some investment treaties have omitted this standard altogether, it is advisable for countries to define the parameters to which this standard will apply in treaty negotiations. For example, Article 7 2(b) of the Morocco-Nigeria (2016).<sup>154</sup>

All selected BITs indicated that FPS shall be included as part of the minimum standard of treatment in international law however only the Morocco – Nigeria (2016) BIT explained briefly the need for police protection as required by customary international law.<sup>155</sup> Article 7 2(b) of this treaty states that ‘FPS requires each party to provide the “level of police protection” required under customary international law’.<sup>156</sup> Although most BITs do not go as far as interpreting the level of protection that should be accorded to investors as required by customary international law, it is important that treaties signed by African countries indicate the obligation of FPS the host country should accord to investors. The basic assumption will be based on the host state ability to accord protection against its availability to dispose resources.<sup>157</sup>

Whatever the case may be, the primary objective of the FPS is to protect the life line of the investment in both the short and long run. Part of this expansionist interpretation supports Salacuse’s position that this provision can be open to different interpretations and has led the International Court of Justice (ICJ) and other arbitration tribunals into problems of properly defining the scope of protection.<sup>158</sup> Be that as it may, commentators have suggested that the obligation by host countries in granting due diligence in protecting foreign investments is relative and has no absolute inclinations but rather reasonable protection and security as determined by customary international law.<sup>159</sup>

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<sup>152</sup> Junngam N (2018) 37.

<sup>153</sup> Junngam N (2018) 99.

<sup>154</sup> Article 7 2 (b) of the Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (2016).

<sup>155</sup> See Article 7 of Morocco-Nigeria (2016) BIT.

<sup>156</sup> Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (2016).

<sup>157</sup> Junngam N (2018) 100.

<sup>158</sup> Salacuse J W (2013) 388.

<sup>159</sup> Junngam N (2018) 36.

As a matter of principle, host government should uphold the responsibility of protecting investments in their territory. Unprecedented situation might find host governments in precarious positions if their attention to detail are left in doubt and unguarded. An example is the case of *Wena Hotels Ltd v Egypt*<sup>160</sup> where the government failed in its obligations to protect and secure a hotel from some disgruntled employees and were thus held liable and ordered to pay compensation to investors for damages. The tribunal had no doubt that Egypt had violated its FPS because it was aware of the intention to seize the hotels but took no appropriate action against the perpetrators.<sup>161</sup> It is therefore necessary for host states to take responsibility of providing a legal framework that ensures that no absolute liability is placed on any of the contracting parties. What different tribunals has held consistently is that, host states must accord due diligence at all time.<sup>162</sup>

Finally, it can be argued that customary international law sets the basis for which the FPS must be applied thus it is expected that the provision does not go below the anticipated set standard stated to be in accordance with customary international law. What customary international law requires is for the host state to accord a minimum standard of treatment which includes FET and FPS.<sup>163</sup> Therefore it will be of best interest of all parties to provide some level of protection while the treaties creates an autonomous provision for FPS as most have done but with additional clause compelling the host state to provide additional protection and security synonymous to the national treatment, expressing same treatment for all investments.

## **2.6 Most Favoured Nation (MFN) Standard in Relation to Selected African BITs**

One of the legal documents used for a legal recourse is the BIT. This instrument has protected FDI inflows in Africa within the scope of its investment rules in Regional Economic Agreements.<sup>164</sup> As a standard requirement for most BITs, the Most Favoured Nation (MFN) requirement remains critical in the overall framework of its legal text. This standard ensures that uniform standard of treatment are accorded to

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<sup>160</sup> *Wena Hotetels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4.

<sup>161</sup> Schreuer C 'Full Protection and Security' (2010) 1 *Journal of International Dispute settlement* 355.

<sup>162</sup> Schreuer C (2010) 369.

<sup>163</sup> Schreuer C (2010) 362.

<sup>164</sup> Kidane W 'Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code' (2018) 50 *The George Washington International Law Review* 540.

the contracting parties to a BIT and such treatment should also be extended to investments and investors of third parties.<sup>165</sup> Cole stated that one of the primary functions of the MFN clause is to 'ensure that whenever benefits are given to investors from one state, they must also be provided to investors from any other state with an applicable MFN clause, thereby ensuring equality of treatment.'<sup>166</sup> The manner in which this provision is included in the BIT will depend on the level of cooperation contracting parties intend to adopt. Kidane argues that in spite of the growing number of intra-Africa BIT agreements, not a single dispute has been recorded in the ICSID tribunals.<sup>167</sup> Thus, more bilateral agreements within the African continent should be embarked upon in order to facilitate more FDI inflows into the continent.

Considering the content of the African BITs under investigation, Ofidile opined that there are variations to how this standard is drafted.<sup>168</sup> Some are limited to certain minimum requirement standards i.e. guided by the FET principle, others stand independently of any sort of principles in the BIT while lastly, given the nature of the BIT, other MFN standards incorporate some level of exceptions which are tied to the conditions highlighted in the BITs.<sup>169</sup> These variations can be observed in the African BITs under investigation. Article 6 of the Morocco – Nigeria (2016)<sup>170</sup> BIT fused together the provision for MFN and NT, stressing the need for encouraging and creating favourable conditions for investors and their investment in territories of the contracting parties. It goes further in Art 6 (2) and (3) in stating the conditions for which each state will accord the 'like circumstances' to be no less favourable to investment than that accorded to its own investors in accordance with the laws and regulations of the state. There are exceptions to the like circumstances which are listed in Art 6 (3) which are in line with the general requirements as suggested by commentators in the very nature of the BIT. One discerning feature of this BIT is the manner in which it expresses its limitations with regards to present and future changes in national affairs and other anticipated future agreements. Art 6 (5) affirms;

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<sup>165</sup> Ofidile U E 'Africa-China Bilateral Investment Treaties: A Critique' (2013) 35 *Michigan Journal of International Law* 167.

<sup>166</sup> Cole T 'The boundaries of Most Favored Nation Treatment in International Investment Law' (2012) 33 *Michigan Journal of International Investment Law* 540.

<sup>167</sup> Kidane W (2018) 540.

<sup>168</sup> Ofidile U E (2013) 168.

<sup>169</sup> Ofidile U E (2013) 168.

<sup>170</sup> Article 6 of Morocco – Nigeria (2016) BIT



'The treatment granted under 1, 2, and 4 of this article shall not be "construed as to preclude" national security, public security or public order nor oblige one Party to extend to the investors of the other Party and their investment the benefit of any treatment, preference or privilege from...'.<sup>171</sup>

This BIT in its requisite nature made it explicitly clear that any measure adopted after this agreement comes into effect, must notify and justify the reasons for adopting such measure in its entirety as soon as 'practicable'. Art 6 (6) states;

'As soon as practicable after a Party adopts a measure under this Article that Party shall inform the other Party of the justification for the measures adopted, as well as the scope and relevance of such measures.'<sup>172</sup>

'The word 'Practicable' could be interpreted in so many ways because it does not give an exact time frame which may prove problematic in times of BIT violations by either Contracting Party. While some commentators have suggested that this very important clause run the risk of being over- interpreted,<sup>173</sup> it is imperative that in times of conflict resolution, arbitrators are encouraged in the best interest of justice to consider consulting other bilateral investment treaties to ensure consistency in procedure and application. Hence Whitsitt suggested that,

'Thus, if MFN clauses are viewed as having the primary objectives of promoting non-discrimination and harmonisation, then an adjudicator may consider that the very purpose of the clause is to permit, indeed encourage, a comparison to other BITs to ensure that the most favourable rights, including procedural rights, are available'.<sup>174</sup>

In so doing, clarity in the proper scope and applicability of MFN protection within the context of International Investment law will be easily articulated. In the case of *Occidental Exploration and Production company v Ecuador*,<sup>175</sup> the United States brought a claim against Ecuador for violating its BIT on the basis of imposing Value Added Tax (VAT) on Occidental Exploration an International U.S Oil and Gas

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<sup>171</sup> Art 6 (5) of the Morocco – Nigeria (2016) BIT.

<sup>172</sup> Art 6 (6) of the Morocco – Nigeria (2016) BIT.

<sup>173</sup> Cole T (2012) 540.

<sup>174</sup> Whitsitt E 'Application of Most-Favored-Nation Clauses to the Dispute Settlement Provisions of Bilateral Investment Treaties: an assessment of the Jurisprudence' (2009) 27 *Journal of Energy & Natural Resources Law* 530.

<sup>175</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11.

Company.<sup>176</sup> The Tribunal dismissed the claims on expropriation for reasons that it wasn't pertinent to the claims but pronounced that the provision on non-discriminatory treatment was evident and might have been violated.<sup>177</sup> The Tribunal further reiterated that the present dispute violated the MFN Treatment thus held the respondent liable for violating its commitments to the BIT.<sup>178</sup> This is one of many cases whereby understanding a particular clause in context might result in a different translation in arbitration deliberations.

Closely observing the selected BITs, the Canada – Senegal (2014) and Japan – Kenya (2016) BITs take a different approach with the MFN standard separately catered for. As Ofidile indicated, provisions for MFN standards in some BITs are independently highlighted and not tied to any set of principles<sup>179</sup> however the structure of the clauses could also incorporate some exceptions to the MFN standard.<sup>180</sup> This is not far-fetched with the aforementioned BITs. In the Canadian – Senegal (2014) BIT, the MFN Treatment is listed as part of the Substantive Obligations in Section B, which expresses the independence of the MFN clause in like circumstances. Article 5 (1) states;

'Each Party shall accord to an investor of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory'.<sup>181</sup>

The beauty of the Canadian – Senegal (2014) Treaty is its ability to articulate itself clearly with limited ambiguity. Paragraph 3 of Article 5 of its (MFN) Treatment illustrates the exceptions of the like circumstances to sub-national government which should extend to investments of investors and non-Party to the treaty. In other words, no less favourable treatment by other tiers of government should be accorded to signatories of this treaty and non-Parties. Inference could be drawn from Cole's argument that 'if more favourable treatment is provided to investors from a third state,

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<sup>176</sup>Schefer K N (2016) 339. Occidental Petroleum Corporation is an international oil and gas company established and owned by U.S Nationals. In 1999 it became a joint venture oil producer with Ecuador with the name Occidental Exploration and Production Company (OEPC).

<sup>177</sup> Schefer K N (2016) 339.

<sup>178</sup>Schefer K N (2016) 341.

<sup>179</sup> Ofidile U E (2013) 168.

<sup>180</sup> Ofidile U E (2013) 168.

<sup>181</sup> Article 5 (1) Canada – Senegal (2016) BIT.

an obligation arises to provide equivalent treatment to those investors benefiting from the MFN clause'.<sup>182</sup> Understanding the immediate effect of the MFN clause can be factored from two dimensions namely, 'Right to Claim' and 'Instantaneous Obligations'.<sup>183</sup>

The 'Right to Claim' argument from Cole's perspective states that there are no obligations to a treatment provided to a third party only if a party in agreement demands equivalent treatment, thus such treatment must be provided.<sup>184</sup> For example if Party A and B enters a Treaty Agreement and Party B accords a favourable treatment to a third party, according to this obligation, an equivalent treatment will be accorded to Party A only if Party A demands it. Alternatively 'Instantaneous Obligations' eliminates the need for beneficiaries to monitor the State on any MFN agreements it enters into.<sup>185</sup> In other words, the State is obligated without demand from Parties in Agreement to extend equivalent treatment no less favourable to contracting parties in question.

Citing the case of *Maffezini v Kingdom of Spain*<sup>186</sup> of 18 July 1997, Mr Maffezini an investor of Argentine origin commenced an arbitration against Spain with issues around treatment allegedly received to his investment in production and distribution of chemical products in a Spanish region of Galicia. Spain subsequently cited Mr Maffezini's failure to exhaust local remedies before approaching international arbitration, stating that the ICSID tribunal had no jurisdiction nor competence to oversee arbitration proceedings. Mr Maffezini further argued that the MFN clause in the Argentina – Spain BIT afforded him the opportunity to invoke dispute submissions to international arbitration without necessarily referring to domestic courts.<sup>187</sup> He contended that the Chile – Spain BIT does not require an investor to make prior dispute submissions to domestic courts before approaching arbitration tribunal, thereby according more favourable treatment to the Chilean investor than the Argentines, in so doing contravening the MFN clause on treatment.<sup>188</sup> In response Spain further

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<sup>182</sup> Cole T 'The Boundaries of Most Favored Nation Treatment in International Investment Law' (2012) 33 *Michigan Journal of International Law* 539.

<sup>183</sup> Cole T (2012) 569.

<sup>184</sup> Cole T (2012) 569.

<sup>185</sup> Cole T (2012) 570.

<sup>186</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7.

<sup>187</sup> Whitsitt E (2009) 534.

<sup>188</sup> Whitsitt E (2009) 534.

made arguments which will not be highlighted at this juncture. In conclusion, the tribunal determined that it was within Mr Maffezini right not to exhaust local remedies but to make claims directly to the arbitral tribunal.<sup>189</sup>

The *Maffezini case*<sup>190</sup> above illustrates the importance of the MFN clause in international investment law in addressing obligations which should be accorded to contracting parties in no less favourable treatment than it accords to third parties. Parker argued that the tribunal assessed the history of MFN treatment in trade treaties and concluded that in fact, the situation of protection of foreign investors are inextricably related therefore, a general obligation of MFN treatment ought to be extended.<sup>191</sup>

While the MFN provisions in certain BITs remain silent on its application to dispute settlement, both Canada – Senegal (2014) and Morocco –Nigeria (2016) BITs showed similar trend. This is a clear indication suggesting that the MFN provision may or may not be applicable to the dispute settlement, however it is noteworthy to mention that a few exceptions were mentioned in these BITs but nothing critical to the enforcement of dispute settlement to this clause. The Japan – Kenya (2016) BIT in its teleological narrative, is construed to have laid emphasis on the understanding that the ‘MFN Treatment’ is not included in the dispute settlement procedures. This is contained in Article 4 (6) where it is understood that with this exception, the agreement curtails the ability of any of the contracting parties to invoke other international agreement including other investment agreements with regards to the applicability of MFN treatment to dispute settlement. Citing Parker’s argument, there are different types of MFN clauses, one of which ‘expressively prohibits application to dispute settlement provisions’.<sup>192</sup> This however, does not mean it totally prohibits the application as such but in times of ambiguity i.e. when not clearly defined, such clauses should apply to dispute settlement provision.<sup>193</sup>

Unlike the *Maffezini case*<sup>194</sup> where the Chile-Spain BIT was invoked by Mr Maffezini to give clarity to the Argentina – Spain BIT on matters relating to MFN treatment, the

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<sup>189</sup> Whitsitt E (2009) 534.

<sup>190</sup> *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7.

<sup>191</sup> Parker S L ‘A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties’ (2012) 2 *Arbitration Brief* 37.

<sup>192</sup> Parker S L (2012) 35.

<sup>193</sup> Parker S L (2012) 35.

<sup>194</sup> *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7.

Japan – Kenya (2016) BIT totally avoids such procedure. This was observed in modern jurisprudence subsequent to the *Maffezini* case in recent time<sup>195</sup>

In 2003, the Tribunal in the case of *Tecmed v Mexico*<sup>196</sup> denied the claimant access to other treaties based on conditions precedent to the basic treaty agreements.<sup>197</sup> The tribunal held that the dispute settlement provision was specifically negotiated for in their treaty. It further concluded that had it not been negotiated, the parties wouldn't have entered into an agreement anyway.<sup>198</sup> Therefore the negotiation of BITs and its attendant provisions remains critical in addressing the scope and limitations of the agreements. Consequently, Parker concluded by arguing that no nation is immune to the invasion of the MFN clause and the threat of uncertainty, for the uncertainty lives within.<sup>199</sup> These are common challenges envisaged for future BITs in Africa hence it is suggested that a plausible remedy will be to maintain the status quo of excluding the MFN clause from not applying to dispute settlement provisions.<sup>200</sup>

The textual compilation of these treaties remains relevant in affording opportunities to expanding the protection of investors and investment in the continent. It is therefore suggested that the MFN clause be treated as a valuable tool that guarantees investors the highest level of treatment. This cannot be overemphasized.

In subsequent discussions, the dispute settlement procedure as part of the mechanism for the protection and promotion of investments in Africa will be discussed exhaustively.

## **2.7 National Treatment from the perspective of Selected African BITs**

The duty to treat foreign investors and their investment in a non-discriminatory manner remains one of the obligations found in IIAs.<sup>201</sup> This obligation is to accord treatment no less favourably than the host treats its national investors and their investments.<sup>202</sup>

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<sup>195</sup> Parker S L (2012) 37.

<sup>196</sup> *Tecnicas Medioambientales Tecmed SA v. The United Mexican states*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).

<sup>197</sup> Parker S L (2012) 37

<sup>198</sup> Parker S L (2012) 38

<sup>199</sup> Parker S L (2012) 57.

<sup>200</sup> Parker S L (2012) 58.

<sup>201</sup> Schefer K N (2016) 353.

<sup>202</sup> Schefer K N (2016) 353.

Article XVII (I) of the General Agreement of Trade in Services (GATS) of the World Trade Organisation (WTO) jurisprudence is centred on trade in services however it conspicuously prohibits less favourable treatment in relation to like services and service suppliers.<sup>203</sup> Likewise in investment treaties, this standard also extends to NT which prohibits discrimination against investors and investment in like circumstances.<sup>204</sup> Broadly speaking, in determining the nature and scope of 'likeness' within IIAs, the competitive relationship between the domestic and international investor vis-a-vis the business or economic sector within which these investments are made will have to be established to ascertain if these standard is indeed violated.<sup>205</sup> This goes with the fact that each scenario must be considered on a case to case basis to establish which legal regime or regulatory requirements will apply.<sup>206</sup>

The NT expresses itself in that tone within the regulatory requirements of the BITs under investigation. Article 4 of the Canada – Senegal (2014) BIT clearly states the conditions of likeness and the business/economic sectors where applicable. Article 4 (2) goes as far as identifying the scope of the 'covered agreement' for which it permits its applicability i.e. from date of which the agreement entered into force and the investment made or acquired thereafter. It further extends its protection to the sub national government in Art 4 (3) and the like circumstances it accords to investors and investments of investors. The Japan- Kenya (2016) BIT also followed a similar approach but listed an exception in Article 3 paragraph 3. It reads;

'Paragraph 1 shall not apply to measures adopted or maintained by Contracting Party with respect to incentives only for the purpose of promoting small and medium sized enterprises in its area, to the extent that such measures do not materially affect the investments or investment activities of the investors of the other Contracting Party'.<sup>207</sup>

This is quite important for this BIT because it gives room to government of developing economies in Africa to sustain their local investments which might be encroached by bigger multinational investments thus leaving the locals uncompetitive. As far as those

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<sup>203</sup> World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1994) 299.

<sup>204</sup> King A N 'National Treatment in International Economic Law: The Case for Consistent Interpretation in New Generation EU Free Trade Agreements' (2018) 49 *Georgetown Journal of International Law* 942.

<sup>205</sup> King A N (2018) 944.

<sup>206</sup> King A N (2018) 944.

<sup>207</sup> Article 3 (3) Japan – Kenya (2014) BIT.

incentives do not impair the rights of other Investments within the same space, it becomes imperative that they all stay afloat. The problem however is how to measure the kind of incentives that will be given which will not be destructive.

Paragraph 2 and 3 of the Morocco-Nigeria (2016) BIT tend to tilt towards the same reasoning but makes references to overall assessment of 'like circumstances' on a case to case basis of investments within the business/economic sector. This is in line with the general exception it provides in its NT and MFN clauses. In order to align the purpose for the protection of foreign investors, drafters will have to understand the determination of 'like circumstances' and a detailed understanding of its regulatory purposes.<sup>208</sup> Overall, the assessment of these provisions tend to be in line with the general requirements of NT in all BITs.

NT are clearly and well scripted in accordance with customary international law in the selected BITs. Recommending additional requirements will only put more strain on host countries. What is required though is clearly defined parameters of incentives for like circumstances to be considered by customary international law.

## 2.8 Expropriation and Standard of Compensation

A principal purpose of these investment treaties is to promote and protect investments from various governmental actions.<sup>209</sup> One such action is 'expropriation'.

Schefer describes the term expropriation to 'refer to a State's taking property, something of value, away from its owner'.<sup>210</sup> It could also mean an act that completely destroys the value of an investment or one that transfer ownership or possession of an investment to the state.<sup>211</sup> Whichever form it takes tends to accentuate the interpretative meaning of expropriation.

A myriad of commentators have argued how this action must be carried out by the state. One which most have agreed upon is that the state shall expropriate for public purposes, accord due process, *inter alia* offering a reasonable compensation without

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<sup>208</sup> Chauvel L M 'The Influence of General Exceptions on the Interpretation of National Treatment in International Investment Law' (2017) 14 *Brazilian Journal of International Law* 155.

<sup>209</sup> Salacuse J W 'Of Handcuffs and Signals: Investment Treaties and Capital flows to Developing Countries' (2017) 58 *Harvard International Law Journal* 130.

<sup>210</sup> Schefer K N (2016) 191.

<sup>211</sup> Hanotiau B 'Are Bilateral Investment Treaties and Free Trade Agreement Drafted with Sufficient Clarity to give Guidance to Tribunals?' (2016) 5 *American University Business Law Review* 330.

unreasonable delay.<sup>212</sup> In other words, it should be carried out in compliance with the due process of law in a non-discriminatory fashion.<sup>213</sup> Article 10 (1) of the Canada-Senegal (2014) BIT for instance reads;

'A party may not nationalise or expropriate a covered investment either directly or indirectly through measures having an effect equivalent to nationalisation or expropriation ("expropriation"), except for public purpose, in accordance with due process of the law, in a non-discriminatory manner and on payment of compensation...

<sup>214</sup>

The term 'expropriation' has been used interchangeably with 'nationalisation' in this BIT giving the scope a wider meaning in application. Not all authors differentiate between expropriation and nationalisation because all nationalisations are indeed expropriations.<sup>215</sup> Depending on the intent of the developing nation, most justify their government actions as 'nationalisation' referring to a measure for regulating their economy.<sup>216</sup>

The key to understanding the scope of liability of each potential BIT is the components of its substantive rights.<sup>217</sup> There are more similarities than discrepancies in the Japan-Kenya (2016) and Morocco-Nigeria (2014) BITs. Each BIT carefully explains the conditions under which expropriation may or may not occur however all highlight the need for a case by case and a fact based inquiry to be established to determine an equivalent to expropriation.

On provisions that include the form of expropriation i.e. direct or indirect expropriation, Article 8 (2) paragraph (a) and (b) of the Morocco-Nigerian (2016) BIT, generally mentions these terminologies but also subjected them to a series of conditions for which they will be determined. As is indicated in this provision, where there is evidence that expropriation took place either directly or indirectly, the legislation gives each party

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<sup>212</sup> Kidane W 'China's Bilateral Investment Treaties with African States in Comparative Context' (2016) 49 *Cornell International Law Journal* 148.

<sup>213</sup> Reinisch A 'The Rule of Law in International Investment Arbitration' in Pazartzis et al (eds) *Reconceptualising The Rule of law in Global Governance Resources, Investment and Trade* (2016) 293.

<sup>214</sup> Article 10(1) Canada-Senegal (2014) BIT.

<sup>215</sup> Schefer K N (2016) 191.

<sup>216</sup> Schefer K N (2016) 191.

<sup>217</sup> Giest A 'Interpreting Public Interest Provisions in International Investment Treaties' (2017) 18 *Chicago Journal of International Law* 326.



the right to recourse as agreed by the BIT. The Canada-Senegal (2014) BIT applies the same principles and these exceptions are provided for in section E annex B (10) under the final provisions. The Japan-Kenya (2016) BIT is silent on forms of expropriation which may present a potential legal problem as time lapses. It is important therefore that a comprehensive description of this highly sensitive clause be included to give clarity so a proper classification to this measure can be applied. For example an exception describing direct and indirect expropriation and its economic impact on investment which will guide the amount of compensation awarded.

It is generally accepted under customary international law that one of the requirements for expropriation is a prompt, effective and adequate compensation.<sup>218</sup> While this expropriation is permissible under certain conditions in customary international law, the legal rights to expropriate are not always absolute.<sup>219</sup> Dolzer argues that the right to expropriate must be tantamount to the market value, however in recent times, debates from investment tribunals contend that the treaty-based standard of compensation in accordance with a fair market value should be considered, which in real time is not easy to determine.<sup>220</sup> On that note, this thesis cannot agree less with Sornarajah position that;

'BITs are not made with the aim of subscribing to the formulations of a uniform standard of compensation, but are instead efforts by the parties to agree on the standard on which they compensate in the event of one of them nationalises the property of a national of the other'.<sup>221</sup>

## 2.9 Dispute Settlement

The emergence of investment arbitration sprung up in the mid-20 twentieth century and is often referred to as 'Dispute Settlement Mechanism' (DSM).<sup>222</sup> Its primary objective is to provide legal certainty as well as protecting foreign investors and their investments within the framework of their international investment agreements.<sup>223</sup> This protection has resulted in the proliferation of arbitration clauses in BITs and multilateral

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<sup>218</sup> Dolzer R & Schreuer C *Principles of International Investment Law* Second Edition (2012) 100.

<sup>219</sup> Schefer K N (2016) 192.

<sup>220</sup> Dolzer R & Schreuer C (2012) 100.

<sup>221</sup> Sornarajah M (2017) 246.

<sup>222</sup> Lopez-Rodriguez A M 'Investor-State Dispute Settlement in the EU: Certainties and Uncertainties' (2017) 40 *Houston Journal of International Law* 145.

<sup>223</sup> Lopez-Rodriguez A M (2017) 145.

investment treaties while also raising concerns about its neutrality among contracting parties.<sup>224</sup>

Amidst the growing concerns of developing countries intentions to redraft and reinterpret features of their BITs, it has become increasingly important as part of their restructuring strategy, to address definitions incorporated in their BITs.<sup>225</sup> They include investor and investment, protection provisions, obligation of investors towards home and host states, procedures regarding arbitrations as well as concerns of conflict of interest of arbitrators.<sup>226</sup>

Dispute settlement has become an integral part of investment treaties giving it the legitimacy to act as a mechanism to protecting and promoting investors and their investments.<sup>227</sup> There are however different forms of dispute settlement in international investment law, namely, through diplomatic protection,<sup>228</sup> state-to-state dispute resolution,<sup>229</sup> use of force,<sup>230</sup> and investor-state dispute settlement.<sup>231</sup> For the purpose of this research, the focus will be placed on understanding Investor-State Dispute Settlement (ISDS) mechanism and the International Centre for the Settlement of Investment Dispute (ICSID) under the auspices of the World Bank (WB).<sup>232</sup>

BITs have played a very important role in consolidating customary international law into the scope of international investment law.<sup>233</sup> They have achieved this by incorporating certain comprehensive rules in the quest to protect the interest of the foreign investor.<sup>234</sup>

While there are divergent opinions for and against the ISDS mechanism, commentators have expressed concerns over transparency and private incentives for

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<sup>224</sup> Lopez-Rodriguez A M (2017) 145.

<sup>225</sup> Rolland S E 'The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries' (2017) 49 *Loyola University Chicago Law Journal* 388.

<sup>226</sup> Rolland S E (2017) 388.

<sup>227</sup> Jennings M 'The International Investment Regime and Investor-State Dispute Settlement: States Bear the Primary Responsibility for Legitimacy' (2016) 17 *Business Law International* 127.

<sup>228</sup> Schefer K N (2016) 429.

<sup>229</sup> Schefer K N (2016) 430.

<sup>230</sup> Schefer K N (2016) 432.

<sup>231</sup> Schefer K N (2016) 433.

<sup>232</sup> Schefer K N (2016) 438 'The ICSID is an international institution established in Washington in 1966 with the purpose of settlement of investment dispute between States and Nationals of other Contracting States who are signatories to the provision of the convention.'

<sup>233</sup> Ghori U 'Investment Court System or Regional Dispute Settlement? The Uncertain Future of Investor-State Dispute Settlement' (2018) 30 *Bond Law Review* 84.

<sup>234</sup> Ghori U (2018) 85.

efficient dispute resolution.<sup>235</sup> They claim that the mechanism provides a platform in international law for private actors to file claims against the state to seek compensation for alleged violations or harmful conduct.<sup>236</sup> This is not to be misconstrued that investors go into dispute settlement for the sole benefit of reaping the state of financial rewards but rather of finding an amicable solution to violations suffered against their investment.

Reverting back to the BITs under investigation, the Canada-Senegal (2014) BIT makes provision for two dispute settlement mechanisms namely ISDS and the State to State Dispute Settlement (SSDS) mechanism. Article 20 right through to (37) provides a detailed procedural process by which an arbitration should be instituted. Like most dispute settlement processes, Article 22 (1) solemnly recommends that a consultation by disputing parties shall first convene to settle any claim if necessary before any submission is made to an arbitration. Unless otherwise agreed, the time frame for consultation shall be instituted within sixty days of submission of notice of intent to claim to arbitration. In other words it is advised that an amicable solution is sought within sixty days of the submission. If that fails, the investor is advised to follow the procedure lined up from paragraph two to four. Since both parties are signatories to the ICSID convention, it is pertinent that the ICSID remains the choice of arbitration for both parties. Where one party is a member, the treaty still maintains the ICSID Additional Facility Rules and the UNCITRAL Arbitration Rules.

The issue of transparency in modern BITs has made headlines in nascent discourse on transparency measures. Miles suggested provisions for open proceedings and the submission of *amicus curiae* briefs in new generation BITs.<sup>237</sup> A more transparent approach to the conduct of hearing has been adopted by the Canada-Senegal (2014) BIT making provision for public access to hearing and documentation. This is evident in Article 31 and 32 of the BIT. In addition, the treaty makes provision for non-disputing party access to the pleadings and the acceptance of non-disputing party submissions.

The Japan-Kenya (2016) and Morocco-Nigeria (2016) BITs carry almost the same pattern with few differences in procedure. One such discrepancy is that both BITs

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<sup>235</sup> Hafner-Burton E M, Puig S & Victor D G 'Against Secrecy: The Social Cost of International Dispute Settlement' (2017) 42 *The Yale Journal for International Law* 282.

<sup>236</sup> Hafner-Burton E M, Puig S & Victor D G (2017) 283.

<sup>237</sup> Miles K *The Origin of International Investment Law: Empire Environment and the Safeguarding Capital* (2013) 375.

make provision for a longer time for negotiation and consultation. Japan-Kenya extends its consultations for six months while Morocco-Nigeria recognises ninety days which can be extended by an additional sixty days if mutually agreed by disputing parties. This is a positive initiative because it gives room for due consultations and proper deliberations. Exhausting local remedies through a competent court of choice between parties is recommended.

Another difference is that they also do not make provision for a State to state dispute settlement but acknowledges the transparency clause by inclusion in the respective BITs. State to state dispute settlement promotes diplomatic relationships therefore by excluding them, the chances of a fair deliberation through the agreed method might be compromised because of the lack of trust in the institution.

With regards to transparency measures, it is suggested that access to public hearing be allowed because they innately involve matters of public interest.<sup>238</sup> If left out, it will suggest that transparency conditions in investor-state arbitration at their current description are opaque.<sup>239</sup> This is the position of the Japan-Kenya (2016) BIT, where the transparency clause excludes public hearing which is a major factor in promoting credibility in the dispute process. Absence of this access invokes limitation to public confidence when appraising future engagements. The suggested intervention when properly managed, have assisted in giving a higher level of predictability and reliability to dispute settlement and reduced the risk of short-term reversal to that policy path driven by vested interest.<sup>240</sup> In the interest of fairness and public disclosure, it is recommended that access to public hearing be incorporated in suggested future BIT.

## **2.10 Chapter Conclusion**

This chapter examined the importance of selected treatment standards to the protection and promotion of investments in various bilateral investment treaties in Africa. In the course of the investigations, it was apparent that most commentators resonate to the ideal that the Canadian/ United States Model BITs remained a reference point to what constitute a well scripted BIT.

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<sup>238</sup> Miles K (2013) 373.

<sup>239</sup> Miles K (2013) 375.

<sup>240</sup> Kurtz J *The WTO and International Investment Law: Converging Systems* (2016) 56.

The investigation first examined the purpose of each treaty and was quick to identify that each treaty followed the standard practice of defining the purpose of the agreements while highlighting the importance of promotion and protection of investments in the territory of the other party. Although, the textual content of the BITs under investigation were scripted differently, they all carried similar narratives in terms of the definition of purpose within their legislative framework. Further analysis revealed that the FET standard expressed seems ambiguous and vague in definition.

The importance of this standard was not comprehensively described however it is expected that they comply with the requirements of customary international law. The FPS standard of both Canada-Senegal (2014) and Japan-Kenya (2016) also seem vague and ambiguous. They could be subject to very broad interpretations which might lead to litigations. Both BITs do not describe the exact kind of protection that should be provided as opposed to that of Morocco-Nigeria (2016) BIT which mentioned 'level of police protection required'. The SDDS settlement and transparency provisions highlighted by the Canada-Senegal (2014) BIT gives room for alternative DS mechanism which could invoke more effectiveness and confidence between contracting parties. Japan-Kenya (2016) and Morocco-Nigeria (2016) only recognises the ISDS which limits its options to alternative dispute settlement resolution methods. Seemingly, the limitation in scope of the transparency clause in the Japan-Kenya (2016) BIT, raises red flags however if access to public hearing is included, might elevate the level of confidence of the host state and third parties total evaluation of the arbitration process.

Concluding comments suggest that African treaties adopt a consistent approach of identifying in text, the need for treaties to protect and promote investments in their regions. The Canadian-Senegal (2014) BIT have done that consistently, confirming their commitments to strengthening their international investment agreements which have been reviewed in their bilateral agreements. Overall, the treaties under investigation have laid out their obligation consistently by stating their commitments to the standards in accordance with customary international law however, the fundamental objective of determining whether these provisions have truly protected and promoted investments in Africa remains evasive due to the nature to which they were designed. These clauses in question are designed more to protect international investors and their investments. Promotion as a concept is hardly expressed in the

textual context of Japan-Kenya (2016) and Morocco-Nigeria (2016) BIT. It is the opinion of this thesis that 'promotion' can only be determined by meticulously screening the laws, legislation, tax break and other elements of ease of doing business in relation to its BIT before successfully arguing a case to that effect. That goes beyond the scope of the thesis nevertheless, more of the word 'promotion' needs to be seen in treaty text to eliminate investor's negative perception about investing in African economies.

The next chapter will explore the South African Protection of Investment Act 22 of 2015. The thesis will be assessing the protection and promotion of investment clauses in line with SA constitutional provision to its attractiveness to international investors. Suggested opinions to the attractiveness are speculative considering the nascent introduction of this Act. Highlights to factors that led to the promulgation of this legislation will be articulated appropriately. The Act came into effect in July 2018 therefore premature to wholly make assumptions on its effectiveness, hence this paper will acknowledge its benefit/challenges.



## CHAPTER THREE

### SOUTH AFRICA AND THE PROTECTION AND PROMOTION OF INVESTMENT

#### 3.1 Introduction

Critics suggest that negotiation of BITs and other investment treaties are procedurally unfair,<sup>241</sup> which led to various states reviewing their commitments to the process. One example is South Africa which began reviewing its BIT with several European countries in October 2012.<sup>242</sup> This chapter focuses on South Africa's Protection of Investment Act 22 Of 2015 in relation to the BITs signed before the Act was promulgated. It will discuss the BIT regime prior to the Act as well as the decision by the government to review its position with various countries with regards to its investment treaties and its relevance to the overall legislative framework of protection and promotion of investment in Africa.

#### 3.2 Brief historical background of the South African BIT regime

From 1994 till date, South Africa have signed forty nine BITs of which twelve are in force.<sup>243</sup> Within this space of time, the South African government has also cancelled some of its BITs. They realised amongst others that FDI does not always materialise or are projected to be in favour of developing countries.<sup>244</sup> The UNCTAD 2018 report suggests that for the first time, the number of effective treaty terminations outpaced the number of new IIAs. This is not to be construed as meaning that BITs are outdated, rather, countries have embarked on steps to formulate new generation of sustainable development orientated IIAs by reviewing their treaty network and revising their treaty models.<sup>245</sup>

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<sup>241</sup> Leibold A M 'The Friction between Investor Protection and Human Right: Lessons from Foresti v. South Africa' (2016) 38 *Houston Journal of International Law* 222.

<sup>242</sup> Kron J 'Bilateral Investment Treaties in South Africa' available at [www.nortonrosefulbright.com/knowledge/publications/118456/bilateral-investment-treaties-in-south-africa#section2](http://www.nortonrosefulbright.com/knowledge/publications/118456/bilateral-investment-treaties-in-south-africa#section2) (accessed 14 November 2018).

<sup>243</sup> UNCTAD 'South Africa Bilateral Investment Treaties' available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iialnnerMenu> (accessed 19 November 2018).

<sup>244</sup> Motala Z 'Free Trade the Washington Consensus and Bilateral Investment Treaties The South African Journey: A Rethink on the Rules on Foreign Investment by Developing Countries' (2016) 6 *American University Business Law Review* 48.

<sup>245</sup> UNCTAD World Investment Report (2018) XI available at [https://unctad.org/en/PublicationsLibrary/wir2018\\_overview\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2018_overview_en.pdf) (accessed 19 November 2018).

The report confirmed an increase in the number of new treaty based ISDS new cases.<sup>246</sup> This does not come as a big surprise as many countries continue to modernise their existing stock of old generation treaties.<sup>247</sup> Motala argued that by cancelling the BITs, the South African investment Act allowed for recalibration of rights and responsibilities of the investor and the state.<sup>248</sup> This action necessitated the government to review its commitments to the old treaties because it threatened its constitutional sovereignty thereby surrendering its state's law and policy to external challenges.

Other factors that led to the renegotiations of BITs was the unprecedented adoption of the UK draft Model BIT by SA as the basis to conclude other BITs with developed countries.<sup>249</sup> South Africa signed its first BIT with the United Kingdom in 1994 at 'a time when the country was on the precipice of emerging into a democratic society'.<sup>250</sup> The signing of this BIT prompted the country to engage in further negotiations with other European countries over the next four years.<sup>251</sup> The UK and European model BIT referred to by Coleman and William as the 'northern hemisphere model' was wholly unsuited for a country restructuring its economy in order to correct the economic and social skews of its difficult past, 'the apartheid era'.<sup>252</sup> The unanticipated problems with the adoption of the UK Model by SA were the incompatibility in the level of development of both economies at that point in time. SA needed funding to support its ambitious aspirations. As a nascent democracy and a developing nation, conditions around the features of the UK Model BIT were fundamentally not aligned to that of SA's developmental goals.<sup>253</sup> After the signing of other BITs, SA soon realised that much of the language used in the EU-SA BITs covertly undermined its position,

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<sup>246</sup> UNCTAD World Investment Report (2018) XI.

<sup>247</sup> UNCTAD World Investment Report (2018) XI.

<sup>248</sup> Motala Z (2016) 50.

<sup>249</sup>Williams R 'Nothing Sacred: Developing Countries and the future of International Investment Treaties' available at [http://www.iisd.org/pdf/2011/developing\\_countries\\_and\\_the\\_future\\_of\\_IAs.pdf](http://www.iisd.org/pdf/2011/developing_countries_and_the_future_of_IAs.pdf) (accessed 21 November 2018)

<sup>250</sup> George E & Thomas E 'Bringing Human Rights into Bilateral Investment Treaties: South Africa and a Different Approach to International Investment Dispute' (2018) 27 *Transnational Law and Contemporary Problems* 419.

<sup>251</sup>George E & Thomas E (2018) 420.

<sup>252</sup> Coleman M & William K 'South Africa's Bilateral Investment Treaties Black Economic Empowerment and Mining: a fragmented Meeting?' (2008) 9 *Business Law International* 59.

<sup>253</sup>Williams R 'Nothing Sacred: Developing Countries and the future of International Investment Treaties' available at [http://www.iisd.org/pdf/2011/developing\\_countries\\_and\\_the\\_future\\_of\\_IAs.pdf](http://www.iisd.org/pdf/2011/developing_countries_and_the_future_of_IAs.pdf) (accessed 21 November 2018).



subjecting South Africa to submitting its resources for exploitation.<sup>254</sup> The features of the proposed Organisation for Economic Cooperation and Development (OECD) based model included,

- ✓ fair and equitable treatment to be accorded to foreign investors and their investment at all time,
- ✓ there should be no discrimination and expropriation,
- ✓ contracts remained binding, facilitating movement of capital without restrictions,
- ✓ International arbitration to be adjudicated in investor-state dispute processes.<sup>255</sup>

A policy change from exploitative investment agreements to an inclusive humanistic approach became the order of the day.<sup>256</sup> The government of SA further concluded that BITs 'pose risks and limitations on the ability of the government to pursue its constitutional based transformation agenda'.<sup>257</sup>

### 3.3 South Africa BIT review process and factors that prompted the review

The period following the end of apartheid and the signing of new BITs with several European countries without fully evaluating the long term effect of the 'protection of investor' obligation triggered South Africa's attention to the complexity of BITs.<sup>258</sup> The ANC led government at the time was deeply conflicted about supporting its new development policies through BITs however it needed funding to support its goal.<sup>259</sup> It had to find a way of attracting FDI without necessarily compromising its sovereignty to the west. Prior to this time, the retrogressive impact of the international sanctions and tight capital control was taking a toll on South Africa.<sup>260</sup> Nevertheless, attracting foreign

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<sup>254</sup>George E & Thomas E (2018) 420.

<sup>255</sup> Mossallam M 'Process matters: South Africa's experience exiting its BITs' (2015) *Global Economic Governance working paper 2015/97 University of Oxford* 7.

<sup>256</sup> George E & Thomas E (2018) 421.

<sup>257</sup> Green A 'South Africa: BITs in pieces' available at <https://www.ft.com/content/b0eec497-5123-3939-92f7-a5fbc73dd33> (accessed 22 November 2018).

<sup>258</sup>Rolland S E 'The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries' (2017) 49 *Loyola University Chicago Law Journal* 393.

<sup>259</sup> George E & Thomas E (2018) 420

<sup>260</sup> Poulsen L N S *Sacrificing sovereignty by chance: Investment treaties developing countries and bounded rationality* (PhD thesis, London School of Economics and Political Science, 2011) 260 available at [http://etheses.lse.ac.uk/141/1/Poulsen\\_Sacrificing\\_sovereignty\\_by\\_chance.pdf](http://etheses.lse.ac.uk/141/1/Poulsen_Sacrificing_sovereignty_by_chance.pdf) (accessed 27 November 2018)

investments was an important component of ANC economic strategy.<sup>261</sup> In securing investors' confidence in 1994, Nelson Mandela stated;

'We are determined to create the necessary climate which the foreign investor will find attractive'.<sup>262</sup> He further narrated that 'in our economic policies...there is not a single reference to things like nationalisation, and this is not accidental. There is not a single slogan that will connect us with any Marxist ideology.'<sup>263</sup>

The address was well welcomed by the business leaders from various communities despite a looming fear by a few that the ANC economic policy might lurch in a radical direction.<sup>264</sup> Twenty four years down the line, the narrative is beginning to change with recent clamour for the expropriation of Land without compensation.

Prior 1994, SA had a long history of racial inequality and political unrest.<sup>265</sup> In resolving the damage done by the apartheid regime, the ANC led government embarked on signing a number of BITs with its European counterparts to stimulate the long awaited restructuring of its nascent democracy. Between 1994 and 1998, SA experienced a surge in BIT engagements with the republic signing fifteen (15) BITs most of which were with European countries.<sup>266</sup> The aftermath of that relationship led to the discovery that most of its BITs it had entered into hardly reckoned with its FDI policy or constitutional obligations of securing post-apartheid Black Economic Empowerment (BEE).<sup>267</sup>

The Broad-Based Black Economic Empowerment (BBBEE) Acts of parliament were enacted to reverse the anomalies and injustices that existed in South African society during the apartheid era.<sup>268</sup> A key element to this economic strategy is the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).<sup>269</sup> The MPRDA constitutes a system based on administrative law commonly known to be a system of

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<sup>261</sup>Poulsen L N S (2011) 260.

<sup>262</sup> Poulsen L N S (2011) 261.

<sup>263</sup> Marais H *South Africa Limits to Change: The political Economy of Transition* (2001) 122.

<sup>264</sup> Marais H (2001) 122.

<sup>265</sup> Poulsen L N S (2011) 260

<sup>266</sup> Lang J & Giffillan B 'Bilateral Investment Treaties- A Shield or a Sword? Available at [www.bowmanslaw.com/wp-content/uploads/2016/09/PPI-article\\_mailshot\\_08112013\\_1038389\\_1-1.pdf](http://www.bowmanslaw.com/wp-content/uploads/2016/09/PPI-article_mailshot_08112013_1038389_1-1.pdf) (accessed 06 December 2018).

<sup>267</sup> Rolland S E (2017) 393.

<sup>268</sup> Coleman M & William K (2008) 60.

<sup>269</sup> Coleman M & William K (2008) 57

licences.<sup>270</sup> The terms of references in the Act enables amongst others the mining companies to hold 'a limited real right in land' and gives them the prospect of mining minerals against payment of royalties to the state.<sup>271</sup> Kron reckons that the MPRDA objectives are to consolidate the mineral rights of South Africa to be in line with the provision of the constitution as well as to enable the state to fulfil its constitutional role as custodian of the nation's mineral wealth on behalf of the people of South Africa.<sup>272</sup>

The introduction of this Act became the centre of controversy in the *Foresti v Republic of South Africa*<sup>273</sup> case brought before the ICSID on the 8 January 2007. This case was registered by the Italian and Luxembourg investors alleging that South Africa had violated its obligations to the BITs it has with Italy 'The Italian BIT' and the Benelux States 'The Benelux BIT'.<sup>274</sup> The claims were premised on South Africa Minerals and Petroleum Recourses Development Act, a law that required holders of older rights to convert to the new mineral rights.<sup>275</sup> The claimants alleged that through this legislation, investors risk the chance of recouping the true economic value of their assets and may never recover their full mineral rights.<sup>276</sup> Part of the ANC BEE economic strategy requirements was for companies to transfer twenty six percent ownership sold at fair market value to historically disadvantaged South Africans by 2014 as a precursor to mining rights renewal.<sup>277</sup> The claimants argued that these requirements were not economically viable and therefore constituted an indirect expropriation, violation of the fair and equitable treatment as well as national treatment obligations of its BITs.<sup>278</sup> The uproar resulted in diplomatic intervention with the Italian Embassy in Pretoria submitting an 'Aide Memoire' to the Government of South Africa setting forth Italy's concerns on BEE legislation and its support for its investors.<sup>279</sup> It became apparent that the Italian investors would institute an arbitration claim against the government of

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<sup>270</sup> Coleman M & William K (2008) 66.

<sup>271</sup> Coleman M & William K (2008) 66.

<sup>272</sup> Kron J 'Bilateral Investment Treaties in South Africa' available at [www.nortonrosefulbright.com/knowledge/publications/118456/bilateral-investment-treaties-in-south-africa#section2](http://www.nortonrosefulbright.com/knowledge/publications/118456/bilateral-investment-treaties-in-south-africa#section2) (accessed 14 November 2018).

<sup>273</sup> *Piero Foresti, Laura De Carli and others v Republic of South Africa* ICSID Case No ARB (AF)/07/1.

<sup>274</sup> Coleman M & William K (2008) 57.

<sup>275</sup> Leibold A M (2016) 245

<sup>276</sup> Leibold A M (2016) 245

<sup>277</sup> Leibold A M (2016) 245

<sup>278</sup> Leibold A M (2016) 246

<sup>279</sup> Peterson L E & Garland R 'Bilateral Investment Treaties and Land Reform in Southern Africa' (2010) *Rights and Democracy International Centre for Human Rights and Democratic Development* 7.

South Africa because Italy viewed the mineral Act as a 'significant and deleterious effect on Italian investor's investments in Southern African Mining industry'.<sup>280</sup>The aftermath of this action resulted in arbitration claims against SA challenging certain aspects of its BEE policies.<sup>281</sup>

South Africa responded by arguing that the measures taken by the state were not expropriation because there was no total loss of rights over minerals consequently the actions taken by government represents a rational and proportional government regulation.<sup>282</sup>They further contended with concluding comments that the measures were lawful and for public purposes, that compensation accorded were fair and adequate, decisions were non-discriminatory and carried out under due process of the law following the MPRDA procedures.<sup>283</sup> Research done by TNI (The Transnational Institute) also suggest that the decision made by SA to cancel its BITs is based on the assessment done by the country affirming that BIT protection was incompatible with SA national development objectives.<sup>284</sup> Further claims reveal that the BIT/ISDS framework limits the state ability to protect the environment from mining companies or shield the economies from harmful financial flow.<sup>285</sup> More so the result suggest that there is not enough evidence to demonstrate that BITs lead to more investment in partner countries where treaties are in force.<sup>286</sup>

The *Foresti* case proved that in spite the benefits of BITs to FDI, it could also be used as a tool for costly litigation against the state. This prompted Poulsen to suggest that the SA position on fundamental policy issues had the potential to trigger similar legal claims questioning the re-distribution efforts of the post-apartheid government.<sup>287</sup> In

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<sup>280</sup> Peterson L E & Garland R (2010) 7.

<sup>281</sup> Peterson L E & Garland R (2010) 7.

<sup>282</sup> Leibold A M (2016) 246.

<sup>283</sup> Leibold A M (2016) 246.

<sup>284</sup> The Transnational Institute 'After South Africa Indonesia takes a brave decision to terminate its Bilateral Investment Treaty with the Netherlands' (2014) available at <https://www.tni.org/en/pressrelease/after-south-africa-indonesia-takes-brave-decision-terminate-its-bilateral-investment> (accessed 03 December 2018).

<sup>285</sup> The Transnational Institute 'After South Africa Indonesia takes a brave decision to terminate its Bilateral Investment Treaty with the Netherlands' (2014) available at <https://www.tni.org/en/pressrelease/after-south-africa-indonesia-takes-brave-decision-terminate-its-bilateral-investment> (accessed 03 December 2018).

<sup>286</sup> The Transnational Institute 'After South Africa Indonesia takes a brave decision to terminate its Bilateral Investment Treaty with the Netherlands' (2014) available at <https://www.tni.org/en/pressrelease/after-south-africa-indonesia-takes-brave-decision-terminate-its-bilateral-investment> (accessed 03 December 2018).

<sup>287</sup> Poulsen L N S (2011) 268.

summarising the concluding argument, the case was settled outside the arbitration tribunal following an agreement between parties.<sup>288</sup> The year 2010 marked a historical moment in international investment law in SA when the Italian investors eventually withdrew their case as they managed to negotiate other favourable terms with SA mining regulators.<sup>289</sup> These terms required SA to confer new mining rights to the investors while investors requested to discontinue arbitration proceedings against the state.<sup>290</sup>

The relevance of BITs and its overall challenges to the SA political and legislative arena can also be traced back to 2001.<sup>291</sup> Poulsen referred to this as the first known situation where investors invoked the BIT against the government of South Africa.<sup>292</sup> This era was characterised by the bill passed by the SA government through its parliamentary committee recommending that the government regulate five thousand odd companies in the security industry.<sup>293</sup> According to contemporaneous news report, the private security industry, one of the largest in the world, with its people, power and access to weapons posed a threat to the national security of the country.<sup>294</sup> A commentator from the economist further escalated the issue by narrating that 'foreign firms will be kicked out'.<sup>295</sup> This statement sparked international attention due to the earlier comments by an ANC stalwart saying;

'There will be no role for foreign companies. All security companies in South Africa must be owned and run and controlled by South Africans'.<sup>296</sup>

The proposed legislation encountered stiff opposition from the foreign investors in the aforementioned industry, most especially the British government.<sup>297</sup> Following a lengthy and vigorous negotiation between foreign investors and their home

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<sup>288</sup> Sheffer M W 'Bilateral Investment Treaties: A Friend or a Foe to Human Rights?'<sup>39</sup> *Denver Journal of International Law & Policy* 499.

<sup>289</sup> Poulsen L N S (2011) 269.

<sup>290</sup> Sheffer M W (2011) 499.

<sup>291</sup> Poulsen L N S (2011) 263.

<sup>292</sup> Poulsen L N S (2011) 263.

<sup>293</sup> The Economist 'South African Security companies: An Industry Hijacked' (2001) available at <https://www.economist.com/business/2001/10/04/an-industry-hijacked> (accessed 03 December 2018).

<sup>294</sup> Peterson L E 'South Africa's Bilateral Investment Treaties: Implications For Developments and Human Rights' (2006) 15

<sup>295</sup> The Economist 'South African Security companies: An Industry Hijacked' (2001) available at <https://www.economist.com/business/2001/10/04/an-industry-hijacked> (accessed 03 December 2018).

<sup>296</sup> The Economist 'South African Security companies: An Industry Hijacked' (2001) available at <https://www.economist.com/business/2001/10/04/an-industry-hijacked> (accessed 03 December 2018).

<sup>297</sup> Peterson L E (2006) 15.

government, the British government relentlessly raised fierce objections indicating that any such measures would breach the BIT between the two countries.<sup>298</sup> The arguments were eventually won by the foreign owned security companies hence the SA government summarily dismissed their position stating that the actions were ludicrous and would adversely affect the security industry which brings approximately two billion rand a year to the SA economy.<sup>299</sup> Though a BIT claim was not instituted, nevertheless the government felt it was the right thing to do.<sup>300</sup> As this unforeseen events unfolded, SA realised the need for government immediate intervention in understanding investment agreements and uses especially in the context of dispute settlement between investor and the state.

With reference to the above mentioned events on developments in international investment law, it became inextricable for the government of South Africa to re-evaluate its position to BITs with its treaty partners. Gordon's macro-analysis on 'drivers of countries re-evaluation of investment treaty law' suggested that countries taking up the responsibility of protecting investors and managing legal risk for treaty partners, will as a matter of importance consider the self-interest of the country's developmental stage on whether it's a 'capital exporting or capital importing or a bit of both'.<sup>301</sup> They also argued that experience from lessons learned from treaty based claims necessitated the need for government intervention in re-evaluation of certain treaty practices.<sup>302</sup> As such, the legal implications to experiences acquired as respondents in ISDS cases would warrant a total realignment of treaty commitments.<sup>303</sup> Be that as it may, 'empirical study of BIT negotiations shows that having been a respondent in a treaty-based claim is a strong, statistically significant predictor of countries' BIT renegotiation activity'.<sup>304</sup>

In the wake of the controversy engulfed around the first generation BITs, the Department of Trade and Industry (DTI) embarked on a mission to review South

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<sup>298</sup> Poulsen L N S (2011) 263.

<sup>299</sup> Poulsen L N S (2011) 264.

<sup>300</sup> Poulsen L N S (2011) 264.

<sup>301</sup> Gordon K & Pohl J 'Investment Treaties Over Time-Treaty Practice and Interpretation in a Changing World' (2015) *OECD Publishing* 9.

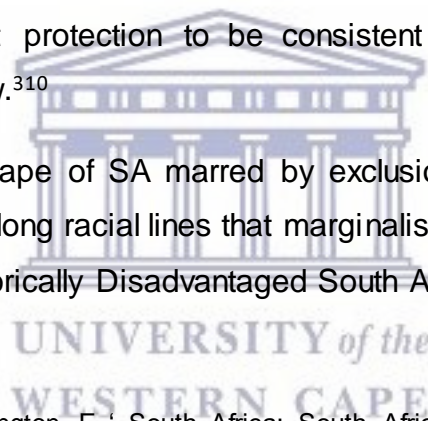
<sup>302</sup> Gordon & Pohl J (2015) 9.

<sup>303</sup> Gordon & Pohl J (2015) 10.

<sup>304</sup> Gordon & Pohl J (2015) 11.

Africa's BITs.<sup>305</sup> In June 2009, the DTI was of the opinion that the first generation BITs post 1994 were allegedly skewed to the investor.<sup>306</sup> The department therefore arrived at the following conclusions first, that the BITs invaded the policy space of the government's development plan, lacking necessary safeguards to preserve flexibility, secondly, as part of government's mandate to promote trade and investment, BITs sometimes allowed legal and business communities to challenge regulatory changes, which government consider to be in public interest.<sup>307</sup> In support of these conclusions, Carim argues that IIAs and the ISDS system are perceived as being biased towards the interest of investors as opposed to government and the overall concerns of the society.<sup>308</sup> Although included in BITs are sunset clauses spanning between ten to fifteen years, the government of SA undertook a policy to review all its first generation BITs that were approaching their expiring date.<sup>309</sup> Interestingly this measure offered the government an opportunity to address inconsistencies and overlaps and the ability to update their investment protection to be consistent with the global trend on international investment law.<sup>310</sup>

The pre 94 political landscape of SA marred by exclusionary policies experienced deeply rooted inequalities along racial lines that marginalised communities resulting in what is best known as Historically Disadvantaged South Africans (HDSA). The post –



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<sup>305</sup> Leon P, Veeran J & Warmington E ' South Africa: South Africa Declines To Renew Bilateral Investment Treaties With European Union Member States' available at [www.mondaq.com/southafrica/x/199586/international+trade+investment/South+Africa+Declines+To+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States](http://www.mondaq.com/southafrica/x/199586/international+trade+investment/South+Africa+Declines+To+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States) (accessed 07 December 2018).

<sup>306</sup> Leon P, Veeran J & Warmington E ' South Africa: South Africa Declines To Renew Bilateral Investment Treaties With European Union Member States' available at [www.mondaq.com/southafrica/x/199586/international+trade+investment/South+Africa+Declines+To+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States](http://www.mondaq.com/southafrica/x/199586/international+trade+investment/South+Africa+Declines+To+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States) (accessed 07 December 2018).

<sup>307</sup> Leon P, Veeran J & Warmington E ' South Africa: South Africa Declines To Renew Bilateral Investment Treaties With European Union Member States' available at [www.mondaq.com/southafrica/x/199586/international+trade+investment/South+Africa+Declines+To+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States](http://www.mondaq.com/southafrica/x/199586/international+trade+investment/South+Africa+Declines+To+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States) (accessed 07 December 2018).

<sup>308</sup> Carim X 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' in Singh K & Ilge B (ed) *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (2016) 56.

<sup>309</sup> Leon P, Veeran J & Warmington E ' South Africa: South Africa Declines To Renew Bilateral Investment Treaties With European Union Member States' available at [www.mondaq.com/southafrica/x/199586/international+trade+investment/South+Africa+Declines+To+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States](http://www.mondaq.com/southafrica/x/199586/international+trade+investment/South+Africa+Declines+To+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States) (accessed 07 December 2018).

<sup>310</sup> Carim X (2016) 59.

apartheid constitution thereafter is often commended as one of the best in the world for its strong assertion on human rights.<sup>311</sup> Inscribed in the constitution is the transformation agenda prescribed to address socio-economic inequalities among its citizens.<sup>312</sup> It also categorically addresses issues around non-discrimination between foreign and domestic investors taking into consideration that all investors operate within the context of the transformation agenda set forth by the constitution.<sup>313</sup> One of the main challenges invading the policy space was the risk associated with imprecise legal commitments, notably the shortcomings in international arbitration in investor-state dispute settlement which are subject to unpredictable international arbitration outcomes.<sup>314</sup> Extensive studies by various groups including the government came to the conclusion that there are several inconsistencies between BITs and the constitution of RSA,<sup>315</sup> which prompted the review process of BITs in 2008.<sup>316</sup> The achievements of this intervention precipitated a legal and policy framework that learns from lessons of the past in resolving the challenges of sustainable socio-economic growth.<sup>317</sup>

The process of terminating long standing European BITs signed before the new constitution in SA started in 2010.<sup>318</sup> The decision to review in view to terminate 'first generation' BITs was taken by the South African cabinet noting with concern that the investor state dispute settlement mechanism (ISDS) recommended might be a challenge.<sup>319</sup> The government through its spokesperson from the department of trade and industry said;

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<sup>311</sup>Carim X (2016) 60.

<sup>312</sup> Carim X (2016) 60.

<sup>313</sup> Carim X (2016) 60.

<sup>314</sup>Carim X (2016) 61.

<sup>315</sup> Carim X (2016) 60.

<sup>316</sup> Carim X (2016) 61.

<sup>317</sup> Carim X (2016) 64.

<sup>318</sup> Thomas E & George E (2018) 421.

<sup>319</sup> Freehills H S 'South Africa Terminates its Bilateral Investment Treaty with Spain: Second BIT Terminated as part of South Africa's planned review of its investment treaties' available at <https://www.lexology.com/library/detail.aspx?g=daf93855-71f9-425e-92d3-5368d104f8ff> (accessed 22 November 2018). 'First Generation BITs' refers to BITs concluded in the immediate post-apartheid period.



'The South African government recognises that it has an investment protection legal framework in place that matches world's standards and that the risk posed by BITs vastly outweigh their purported benefits'.<sup>320</sup>

An overhaul was inevitable and the government of SA took a bold step of restructuring its BITs in addressing its social, economic, environmental and developmental challenges by the proposing the Promotion and Protection of Investment Bill.

The focus of this thesis however should not be misconstrued as taking a position on whether the decision by South Africa is fundamentally right or wrong in its re-evaluation of its international investment law. It only tries to establish from its own perspective, the adverse effect of BITs vis a vis the argument to reconsider renegotiating the treaty obligations with other developed and developing countries.

### **3.4 Overview of the South Africa Protection of Investment Act 22 of 2015**

The first protection of investment Bill to be introduced for public comment in SA was in November 2013.<sup>321</sup> This was the first of its kinds to correct the inconsistencies the country experienced in the signing of its post 94 BITs. The interactions from various intra-governmental legal and policy organisations, departments and civil society led to the compilation of this Bill for public commentary.<sup>322</sup> The Bill was understood not to introduce any new restrictions nevertheless it clarifies the non-discriminatory protection offered to all foreign investors and their investments respectively.<sup>323</sup> The introduction of the Bill was prompted by the *Piero Foresti, Laura de Carli and Others v The Republic of South Africa* Case No. ARB (AF)/07/1<sup>324</sup> as a prelude to the government review of its investment laws and regulations.<sup>325</sup> Recapping on the case, the international investors raised concerns about SA BEE policy in the mining industry and its effect on foreign investment in the country, which sparked international criticism

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<sup>320</sup> Green A 'South Africa: BITs in pieces' available at <https://www.ft.com/content/b0eec497-5123-3939-92f7-a5fbc73dd33> (accessed 22 November 2018).

<sup>321</sup> Republic of South Africa Promotion and Protection of Investment Bill, 2013.

<sup>322</sup> Carim X (2016) 62

<sup>323</sup> Carim X (2016) 62

<sup>324</sup> *Piero Foresti, Laura De Carli and others v Republic of South Africa* ICSID Case No ARB (AF)/07/1.

<sup>325</sup> Farish A 'Protection of Investment Act- a Balancing Act between Policies and Investments' available at [www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/](http://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/) (accessed 12 December 2018).

thus leading to international arbitration<sup>326</sup> At the time the first Bill was introduced, SA had simultaneously embarked on terminating its BITs with various countries known to have previously controlled their investment regime.<sup>327</sup> These included BITs with Germany, Switzerland and the Netherlands which were duly served a notice to termination between 2011 and 2014 as part of the government's effort to re-calibrate its international policy space.<sup>328</sup> Following the decisions by the cabinet, these three treaties were given top priority because they were subject to automatic renewal clauses meaning if not terminated, would extend based on the agreed run-off periods.<sup>329</sup>

The draft bill known as the 'Promotion and Protection of Investment Bill (PPIB)' was designed to provide investors with more latitude in protecting their investment through domestic laws as opposed to the initial referral to international arbitration.<sup>330</sup> The main objective of the bill was to align its international investment agreements with South Africa's constitutional principles.<sup>331</sup> The preamble of the bill re-affirms South Africa's commitments to creating an enabling investment environment for foreign investors in an open and transparent manner that supports sustainable development and the right to international human right.<sup>332</sup> It further espouses the development of 'material economic investments' aimed at balancing the social inequalities within the legislative framework of the state as an 'enterprise-based' economy.<sup>333</sup> The national treatment standard ensures that all foreign investors are accorded the same protection in like circumstances as their local counterparts and mandates the government to exercise its powers in redressing inequalities and upholding the rights guaranteed in the

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<sup>326</sup>Farish A 'Protection of Investment Act- a Balancing Act between Policies and Investments' available at [www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/](http://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/) (accessed 12 December 2018).

<sup>327</sup>Farish A 'Protection of Investment Act- a Balancing Act between Policies and Investments' available at [www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/](http://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/) (accessed 12 December 2018).

<sup>328</sup> Mossallam M (2015) 12.

<sup>329</sup> Mossallam M (2015) 13.

<sup>330</sup> Mossallam M (2015) 13.

<sup>331</sup> Mossallam M (2015) 13.

<sup>332</sup> Carim X (2016) 63.

<sup>333</sup> Carim X (2016) 63.

constitution.<sup>334</sup> In so doing, the government tackles social and economic inequalities by enforcing its policy on BEE without contravening the national treatment standard.<sup>335</sup>

The provisions on expropriation and compensation are defined in line with section 25 of the constitution of South Africa.<sup>336</sup> Expropriation is deemed appropriate and applicable in situations where it is done for public purposes or for the interest of the public.<sup>337</sup> The bill clarifies that expropriation is subject to compensation and should be just and equitable.<sup>338</sup> On the other hand, it stresses that it is at the discretion of the court to determine a fair value for compensation after it has assessed each case in light of the legislative objective of public interest.<sup>339</sup> This means that market value will not be considered for compensation but an amount that is just and equitable which is in line with the tenets of the constitution.<sup>340</sup>

The draft bill triggered a political uproar from several stakeholders however promulgation of this bill after an arduous task of consultations and compilation was imminent.<sup>341</sup>

On the 22 July 2015, the bill was formally introduced to the national assembly titled 'Promotion and Protection of Investment Bill' however it was later promulgated in its final form on 15 December 2015 as an Act of parliament with a new title 'Protection of Investment Act 22 of 2015'.<sup>342</sup>

### **3.4.1 Interpretation of specific provisions of the Protection of Investment Act 22 of 2015**

The Act begins with an introductory note defining the purpose (therein Article IV a full description of the purpose of the Act) as well as a preamble describing the rights, responsibilities, obligations, regulations and commitments of the Government to the

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<sup>334</sup> Mossallam M (2015) 13.

<sup>335</sup> Mossallam M (2015) 13.

<sup>336</sup> Carim X (2016) 63.

<sup>337</sup> Carim X (2016) 63.

<sup>338</sup> Mossallam M (2015) 14.

<sup>339</sup> Mossallam M (2015) 14.

<sup>340</sup> Farish A 'Protection of Investment Act- a Balancing Act between Policies and Investments' available at [www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/](http://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/) (accessed 18 December 2018).

<sup>341</sup> Gazzini T 'Rethinking the Promotion and Protection of Foreign Investments: The 2015 South Africa's Protection of Investment Act' (2017) *Social Science Research Network* 4.

<sup>342</sup> Gazzini T (2017) 5.

Republic in protection of persons, categories of persons historically disadvantaged in the republic, human rights and the peoples resources. It also highlights however not exhaustively, the importance of the protection of foreign investor and their investments in the republic. The Act is primarily modelled like the traditional BITs both substantially and procedurally but differ in certain regards to its approach.<sup>343</sup> It comprises of sixteen (16) sections divided in structures with the last three on practical matters and transitional arrangements.<sup>344</sup>

## I. General provisions

The *Chapeau* of the POI Act provides a statement that embraces the objectives of the government in protecting and not discriminating between ‘local and foreign’ investors and their investments in achieving a balance of rights and obligations of all stakeholders,<sup>345</sup> in integrating its public policy objectives. The term stakeholders refer to investors, investments, government and civil society. It reads;

‘To provide for the protection of investors and their investments; to achieve a balance of rights and obligations that apply to all investors; and to provide for matters connected therewith.’<sup>346</sup>

The preamble aims to satisfy the requirement of the Department of Trade and Investment (DTI) BIT policy review to incorporate specific languages that emphasises its policy objectives of ‘inclusiveness’ rather than centralising definitions specifically around investment protection alone.<sup>347</sup>

The Act categorically defines Investment in three spheres, emphasising the nature by which it is constituted i.e. by enterprise, financial instruments of payments and acquisition and cooperation of interest held by the enterprise. Article 2(1) of the Act states that an investment is;

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<sup>343</sup> Gazzini T (2017) 5.

<sup>344</sup> Gazzini T (2017) 5.

<sup>345</sup> For the purpose of clarity, this thesis has used the word stakeholders interchangeably to refer to investors. As such stakeholders will include local and international investors, their investment, host and home government as well as civil society.

<sup>346</sup> See *Chapeau* of POI Act 22 of 2015.

<sup>347</sup> Boyce GM ‘An Examination of whether the Protection of Investment Act Represents a Successful Alternative to Bilateral Investment Treaties’ (2017) 31 available at [https://open.uct.ac.za/bitstream/handle/11427/25200/thesis\\_law\\_2017\\_boyce\\_gizelle\\_marie.pdf?sequence=1&isAllowed=y](https://open.uct.ac.za/bitstream/handle/11427/25200/thesis_law_2017_boyce_gizelle_marie.pdf?sequence=1&isAllowed=y) (accessed 18 June 2019).

- (a) Any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic, committing resources of economic value over a reasonable period of time, in anticipation of profit;
- (b) The holding or acquisition of shares, debentures or other ownership instruments of such an enterprise; or
- (c) The holding, acquisition or merger by such an enterprise with another enterprise outside the Republic to the extent that such holding, acquisition or merger with another enterprise outside the Republic, has an effect on an investment contemplated by paragraphs (a) and (b) in the Republic.<sup>348</sup>

Gazzini argues that the definition of investment makes no reference to contributing to the economic development of the host state, citing in retrospect that several arbitral tribunals have considered it instrumental as an additional requirement for the purpose of giving a clearer indication to the definition of investment as proposed.<sup>349</sup> As such, the definition of investment should incorporate the fundamental essence of developmental issues stressing the need for contributing towards sustainable development to the host state with the underlining characteristics common to investments as listed by the Act.

The Act provides a blanket definition of an investor in section 1 as 'an enterprise making an investment in the republic regardless of nationality'.<sup>350</sup> It disregards nationality as a determining factor of an investor in as much as these investments are incorporated in the RSA by nationals or legal persons,<sup>351</sup> making the Act non-discriminatory. For this reason, it can be concluded that the brief definition of an investor satisfies the purpose it represents in similar international investment treaties, however for the purpose of international arbitration, the nationality of foreign investor as defined by the treaty is of utmost importance.<sup>352</sup>

Section 3 of the Act deals with the interpretation of the Act which should be done in light of the constitution. It states that the Act shall be interpreted in three spheres

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<sup>348</sup> Article 2(1) of Act No 22 of 2015: Protection of Investment Act, 2015. Government Gazette Republic of South Africa (2015)606 No 39514.

<sup>349</sup> Gazzini T (2017) 6.

<sup>350</sup> Section 1 of Act No 22 of 2015.

<sup>351</sup> Gazzini T 'Travelling the National Route: South Africa's Protection of Investment Act 2015' 26 (2018) *African Journal of International and Comparative Law* 244.

<sup>352</sup> Gazzini T (2018) 244.

namely its purposes highlighted in section 4, the constitution with specific reference to the Bill of Rights and lastly any relevant convention or international agreement to which South Africa is a signatory.<sup>353</sup> In terms of the purpose in section 4, the Act protects investments by balancing public interest and the rights and obligations of investors in accordance with the constitution, secondly, it upholds the sovereign right of the republic to regulate investments in a manner that will protect public interest. Lastly, it ensures that all investors and investments in the republic are subject to the laws guided by the Bill of Rights which are applicable to all. All three spheres therewith are governed by section 39, 232 and 233 of the Constitution respectively.

Section 39 of the Constitution provides an overview of the duties of the court, tribunal or forum in interpreting the Bill of Rights. This includes promoting values that demonstrates transparency in a democratic society based on dignity, equality and freedom whilst considering international law and other foreign law.<sup>354</sup> Secondly in interpreting legislation, the above mentioned institutions must promote the spirit, purport and object of the Bill of Rights.<sup>355</sup> Section 232 expresses conditions under which customary international law will be applicable within the South African legal system. It thus states that for the law to be applicable, it must be consistent with the constitution of South Africa or the Act of parliament.<sup>356</sup> Unless consistent, such law will not be applicable in the South Africa.<sup>357</sup> It becomes more interesting in that the Act adopts certain elements of customary international law which are well embedded in the constitution and are thus permissible within South African legal system. Section 233 of the Constitution states;

'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'<sup>358</sup>

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<sup>353</sup> Section 3 of Act No 22 of 2015.

<sup>354</sup> Gazzini T (2018) 245.

<sup>355</sup> Gazzini T (2018) 245.

<sup>356</sup> Gazzini T (2018) 245.

<sup>357</sup> 'The Role of International Law in South African Health Law and Policy Making' available at <https://section27.org.za/wp-content/uploads/2010/04/Chapter5.pdf> (accessed 21 January 2019).

<sup>358</sup> Section 233 of the Constitution of the Republic of South Africa 1996 - Chapter 14: General Provisions.

Under this provision, the court will first take into consideration whether the international law is binding to South Africa. Where the international law is directly in conflict or inconsistent with the Bill of Right, the court will deny its application domestically.<sup>359</sup>

## II. Review of other Protection Clauses in SA POI Act

Section 6 of the POI Act ensures that the government operate within the ambit of the constitution to accord all investors the right to administrative treatment which is consistent with its obligations to provide administrative, legislative and judicial processes that do not operate arbitrarily or denies administrative and procedural justice to investors and their investments. This seems like a deliberate move to deviate from the traditional coding of the general treatment entrusted in traditional BITs but offers a similar treatment in like circumstances such as the right to administrative decision making as regards their investments, right to access of information in a timely manner, the right to dispute settlement and the application of law to be decided fairly in a public hearing before a court.

Note this provision somewhat replicates the procedural treatment in traditional BITs, nevertheless it is a bold attempt to interpret the FET prescribed by customary international law found in conventional BITs. The POI Act attempts to satisfy the requirements accorded by BITs but falls short in legal interpretation thus creating a vacuum for uncertainties. As such, the uncertainty envisaged could potentially be an avenue for investor exploitation therefore future recommendation will require more content to the FET standard in terms of equitable treatment to investor as guaranteed by customary international law.

Section 8 is a reflection of the measures put in place as a result of the *Foresti*<sup>360</sup> case. It expresses the importance of NT obligations to the protection of foreign investors and their investment by the SA authorities. It stresses the notion of 'like circumstances' and the conditions under which they must be accorded to foreign investments. Fortunately, the Act omits the MFN treatment totally. Such initiative is good and demonstrates the country's ability to prevent investors from invoking other treaties in

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<sup>359</sup> 'The Role of International Law in South African Health Law and Policy Making' available at <https://section27.org.za/wp-content/uploads/2010/04/Chapter5.pdf> (accessed 21 January 2019).

<sup>360</sup> *Piero Foresti, Laura De Carli and others v Republic of South Africa* ICSID Case No ARB (AF)/07/1.

dispute settlement. Despite the limitations and scope of NT standard in like circumstances and the exemption expressed by the Act to cater for South Africans, the provision of this section seems to be inspired by the requirements of the 'freedom charter' which states that;

'The natural wealth of our country, heritage of South Africans, shall be restored to the people.'<sup>361</sup>

From the analysis, it is of no doubt that this provision is consistent with the constitution of South Africa but inconsistent with the requirements of the conventional BITs which is good for sustaining the investor relationship with the republic.

Section 9 is no different from the model BIT as it accords protection of physical security of property to foreign investors and their investment as their local counterparts as obligated by the minimum standard of treatment of customary international law. However the Act goes a bit further taking into consideration conditions of availability and capacity as a prerequisite to the treatment. Section 10 enshrines the right to legal protection of property as guaranteed and safeguarded under section 25 of the constitution. It is in the interest of transparency and accountability that funds accumulated in a sovereign state are taxed accordingly. The Act ensures that funds accumulated can be repatriated accordingly as far as it subject to taxation and other applicable legislation.

Section 13 of the POI Act sets out processes and procedures for invoking dispute resolution by the foreign investor. Section 13 (1) of the Act permits investors to seek recourse upon request in response to any action taken by government which directly or indirectly affects the operations of the foreign investment, through the relevant department. Time frame for such request may be within six months of acknowledging a violation and a written submission may be made to the DTI. On request, the department will facilitate dispute settlement mechanisms through mediation by appointing a mediator. Section 13 (2) (a) empowers the department to collate a list of individuals with high moral standards and competence in law, commerce, industry or finance capable of exercising their discretion independently to oversee the mediation process.

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<sup>361</sup> Extracts from the African National Congress Freedom Charter adopted at the congress of the people, Kliptown, on 26 June 1955.



In agreement by both parties namely 'foreign investor and government', section 13(2) (b) authorises both parties to nominate a candidate listed by the department. Thereafter, the investor may approach any competent South African court, independent tribunal or statutory body to adjudicate dispute settlement. If no resolution is agreed upon by both parties, the Act allows the investor to seek recourse in international arbitration subject to exhaustion of all domestic remedies in the republic. This process may be concluded in international arbitration requiring the consent from the government of SA and the commitments from the home state of the investor.

Be that as it may, certain inconclusive arguments which remain vague may be raised with regards to this section. They include amongst others the question of time. It is known that adjudication takes time, therefore the time frame given for mediation might be too short and requires an extension to cater for proper consultations and plausible agreement.

### **3.5 Recapping on Section 25 of the Constitution of South Africa**

South African disadvantaged communities have suffered decades of oppression from oppressors prior to the attainment of independence in 1994. In recent time, due to the inequality and the economic slowdown, there has been a fresh attempt by government to redistribute land belonging to the elite minority at fair price that is just and equitable. In addressing these challenges, compulsory purchases of land to redress the recurring racial disparities in land ownership has warranted the government of South Africa to redistribute land.<sup>362</sup> In order to understand this redistributive process, it is paramount to highlight Section 25(1) (2) of the Constitution of South Africa. It reads;

'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

Subsection 2 which forms the focus of the discussion states that;

'Property may be expropriated only in terms of the law of general application

(a) For a public purpose or in the public interest; and

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<sup>362</sup> Solomon M 'Parliament approves Land Expropriation Bill' available at <https://mg.co.za/article/2016-05-26-parliament-approves-land-expropriation-bill> (accessed 29 January 2019).

- (b) Subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.<sup>363</sup>

The Constitution prohibits 'arbitrary deprivation of property' and categorically states that in subsection 2. Two main exceptions whereby property may be expropriated are for public purpose or public interest.<sup>364</sup> While the debate for expropriation has intensified in recent years, the government alleges that the redistribution exercise is based on the premise to rectify the past wrongs and to provide opportunities to the previously excluded.<sup>365</sup> A new narrative emerged calling for the 'expropriation of land without compensation' thereby sparking uproar within the international investors classifying these actions as violations of the South Africa international treaties. Commentators from the economics fraternity and farming groups have warned that the proposals malign investments and productions at a time when South Africa is emerging from a major drought, citing economic damages linked to farm seizures in neighbouring Zimbabwe and the resultant backlash from the west.<sup>366</sup> Amidst all this controversy, the SA ruling party African National Congress (ANC), on the back of the upcoming elections promised to accelerate the redistribution plans to accommodate a vast majority of the marginalised communities.<sup>367</sup> While the world watch in anticipation of this changes, South Africa still remains an investment hub for many within the international investment fraternity.

### **3.5.1 Birth of a new dawn (The Expropriation Bill of 2016)**

The much anticipated land Bill which has attracted so much criticism since its debut at the beginning of 2013,<sup>368</sup> referred to as 'Expropriation Bill' was finally approved by parliament on the 26 May 2016 and currently awaiting the president's signature.<sup>369</sup> The Bill which is intended 'to provide for the expropriation of property for a public

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<sup>363</sup> Section 25 (1) (2) of the Constitution of South Africa.

<sup>364</sup> It is not the intention of this discussion to analyse the provisions of this section of the constitution but to show the impact it reflects on foreign investments in a sovereign state.

<sup>365</sup> Solomon M 'Parliament approves Land Expropriation Bill' available at <https://mg.co.za/article/2016-05-26-parliament-approves-land-expropriation-bill> (accessed 29 January 2019).

<sup>366</sup> See editor's comments on 'Parliament approves Land Expropriation Bill'.

<sup>367</sup> See editor's comments on 'Parliament approves Land Expropriation Bill'.

<sup>368</sup> Marais EJ & Slade BV 'Expropriation Bill will Boost Land Reform' available at <https://mg.co.za/article/2016-05-20-expropriation-bill-will-boost-land-reform> (accessed 29 January 2019).

<sup>369</sup> Van Wyk J 'Compensation for Land Reform Expropriation' (2017) 1 *Journal of South Africa Law* 21

purpose or in the public interest and to provide for matters connected therewith'<sup>370</sup>set into motion a debate which will transform the landscape of land reforms within the South African legal system.

Law experts and commentators Marais and Slade argue that the approach taken by government follows a similar pattern of jurisdiction in countries like United States, Germany and Ireland, therefore unlikely to pose a threat to investors' confidence.<sup>371</sup> Further comments reveals that the Bill may not limit or take away property arbitrarily owning claim to section 25(2) which allows the state to expropriate property only for public purposes and public interest realising land and related reforms as permitted by section 25(4a).<sup>372</sup> These powers enable the government to initiate compulsory acquisition of property from affected owners without permission, hence the state must exercise its powers within the confines of the law.<sup>373</sup>

Van Zyk maintained that the proposed Bill provides for the expropriation of property of an owner and unregistered rights of the holder.<sup>374</sup> The author gives more meaning to the narrative by asserting that 'expropriation of property' referred to that contemplated in section 25 of the Constitution, the 'owner' as the person in whose name the property or right is registered and 'unregistered rights of holder' as an occupier of land which is recognised and protected by law but is neither registered nor required to be registered.<sup>375</sup> In proposing a full assessment of the Bill, Van Zyk argues that the overall purpose of the Bill, is to determine whether the Bill constitutes an amount that is 'just and equitable' in compensation and if it will be acquired in a timely manner.<sup>376</sup>

The expropriation Bill as proposed can be seen in three spheres namely investigation, service of notice of intention to expropriate and notice of expropriation. These

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<sup>370</sup> 'Draft Expropriation Bill, 2019' available at [https://www.gov.za/sites/default/files/gcis\\_document/201812/42127qon1409s.pdf](https://www.gov.za/sites/default/files/gcis_document/201812/42127qon1409s.pdf) (accessed 29 January 2019).

<sup>371</sup> Marais EJ & Slade BV 'Expropriation Bill will Boost Land Reform' available at <https://mg.co.za/article/2016-05-20-expropriation-bill-will-boost-land-reform> (accessed 29 January 2019).

<sup>372</sup> Marais EJ & Slade BV 'Expropriation Bill will Boost Land Reform' available at <https://mg.co.za/article/2016-05-20-expropriation-bill-will-boost-land-reform> (accessed 29 January 2019).

<sup>373</sup> Marais EJ & Slade BV 'Expropriation Bill will Boost Land Reform' available at <https://mg.co.za/article/2016-05-20-expropriation-bill-will-boost-land-reform> (accessed 29 January 2019).

<sup>374</sup> Van Wyk J 'Compensation for Land Reform Expropriation' (2017) 1 *Journal of South Africa Law* 30.

<sup>375</sup> Van Wyk J (2017) 30.

<sup>376</sup> Van Wyk J (2017) 31.

procedures will have to be strictly adhered to before expropriation is determined. Van Zyk concludes that land reforms remain a topical discourse the government have hardly succeeded in, nevertheless, reliance on new legislation to dislodge the 'willing buyer willing seller' will be an arduous task, requiring amendments in the expropriation Bill to accommodate these lapses.<sup>377</sup>

Slade's discussions on the impact of the expropriation Bill concluded on a similar note on the difficulty in applying the tenets of the Bill by the courts. The argument suggest that the basis to expropriate property in line with the proposed procedures may *inter alia* restrict the courts ability to award compensation in a potential expropriation dispute.<sup>378</sup> This could be as a result of legislative inadequacy authorising expropriation and a detachment from the expropriation procedures set out in the Bill which were not followed.<sup>379</sup>

The discussions above have highlighted the position of various scholars to the expropriation Bill. At the time of the writing of this thesis, the Bill is yet to be signed into law by the President of the RSA. It is however the position of many that the task ahead for amendments remains a difficult one, therefore the impact on foreign investment as a result of this Bill could be classified speculatively as retrogressive. This paper have discussed various dynamics but its major objective is to determine the impact of these factors not to question if the Bill is right or wrong. Further research will unveil the potential benefit or threats to international investment law.

### **3.6 Merits of the Protection of Investment Act and its attractiveness to FDI**

Protection of Investment in any given sovereignty remains the sole responsibility of the state to design sound legislative framework for the protection of all investments, be it foreign/domestic in pursuance of its constitutional obligation. This commitments are well enshrined in the section 12 of the Act, communicating the right to regulate in accordance with the constitution and applicable legislation.

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<sup>377</sup> Van Wyk J (2017) 35.

<sup>378</sup> Slade BV 'The Law of General Application Requirement in Expropriation Law and the Impact of the Expropriation Bill of 2015' (2017) 50 *De Jure* 361.

<sup>379</sup> Slade BV (2017) 361.

International law subscribes to two claims both of which are based on the state sovereignty, they include 'protection of persons and property of aliens'.<sup>380</sup> These rights are guaranteed in the SA POI Act and can be cited in section 9 and 10 respectively. Section 9 alludes to the type of physical security which must meet the minimum standard of customary international law depending on the availability of resources and capacity. In terms of the legal protection, section 10 aligns its obligation to section 25 of the Constitution which is subject to amendments and a threat to foreign investment in the country.

While the number of States revisiting their international treaties are on the increase, it is unbecoming for several others to conclude new BITs.<sup>381</sup> The UNCTAD 2018 report indicates that 2017 experienced the lowest IIAs concluded.<sup>382</sup> On the other hand, effective treaty terminations increased outpacing the newly concluded IIAs.<sup>383</sup> The report anticipates a positive investment outlook for Africa in 2018 with the interregional cooperation through the signing of the Africa Continental Free Trade Area (ACFTA)<sup>384</sup> agreement which could galvanise a stronger FDI inflow into Africa.<sup>385</sup>

Many have suggested that there is no clear evidence to show that investment treaties increase the inflow of foreign investment,<sup>386</sup> rather states are pushing for facilitation agreement which generally advocates for judicial and arbitral proceedings that supports the host state through exhaustion of domestic remedies as opposed to international arbitration in dispute settlement.<sup>387</sup> At this point, claims cannot be credited to the South Africa POI Act as attracting new investments however with the ongoing developments in the ACFTA and the proposed expropriation Bill, SA is yet to

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<sup>380</sup> Jungam N 'The full Protection and Security Standard in International Investment Law: What and Who is Investment Fully Protected and Secured from?' (2018) 7 *American University Business Law Review* 30

<sup>381</sup> Gazzini T (2018) 249.

<sup>382</sup> UNCTAD 'World Investment Report 2018 Investment and New Industrial Policies Key Messages and Overview' available at [https://unctad.org/en/PublicationsLibrary/wir2018\\_overview\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2018_overview_en.pdf) (accessed 14 February 2019).

<sup>383</sup> UNCTAD World Investment Report 2018.

<sup>384</sup> 'Africa Continental Free Trade Agreement (ACFTA) is an AU powered initiative aimed at accelerating intra-African trade and boosting African trading position in the global market' available at <https://au.int/en/cfta> (accessed 19 June 2019).

<sup>385</sup> UNCTAD World Investment Report 2018.

<sup>386</sup> Gazzini T (2018) 249

<sup>387</sup> Gazzini T (2018) 249.

experiencing more interesting time in future negotiations within the international investment landscape.

### 3.7 Risk inherent in the POI Act

Experts have expressed concerns over certain elements of the POI Act which may jeopardise the country's ability to attract foreign investors. Commentators from law firms expressed concerns reiterating that the Act limits the possibility of investors claiming compensation thereby subjecting every claim to a 'just and equitable compensation' rather than 'full market value'.<sup>388</sup> The Act unequivocally defends this expression in section 12 (1) by providing a list of measures which addresses the constitutional rights of the citizens of the republic and must be done in accordance with the constitution of South Africa. Subject to the just and equitable compensation and the argument that it may deter foreign investors, Williams Randall concurs that the most important determinant of FDI is the 'market size' of the proposed economy.<sup>389</sup> This amongst other factors is ranked first in hierarchy above 'legal certainty' which comes last in the value chain.<sup>390</sup> Be that as it may, investors will pay more attention on the fact that funds can be transferred freely without necessarily going through the difficulties of cumbersome legislative processes and tax barriers before repatriation takes effect. For most investment, ease in return of capital, tax breaks and a functional domestic institutions including the judicial institutions drives the desire to invest in any given state.

Another risk associated with the POI Act is the dispute resolution process recommended. The Act recognises the exhaustion of local remedies through domestic legislation but distances itself from international arbitration. Its position is anchored on the premise that domestic legislation is more appropriate than international legal instrument in regulating foreign investment.<sup>391</sup> The risk however lies in the

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<sup>388</sup> The South African 'South African's Protection of Investment Act may drive Foreign Investors away' available at <https://www.thesouthafrican.com/south-africas-protection-of-investment-act-may-drive-foreign-investors-away/> (accessed 05 February 2019)

<sup>389</sup> Williams R 'Nothing Sacred: Developing Countries and the future of International Investment Treaties' available at [http://www.iisd.org/pdf/2011/developing\\_countries\\_and\\_the\\_future\\_of\\_IAs.pdf](http://www.iisd.org/pdf/2011/developing_countries_and_the_future_of_IAs.pdf) (accessed 05 February 2019).

<sup>390</sup> Williams R 'Nothing Sacred: Developing Countries and the future of International Investment Treaties' available at [http://www.iisd.org/pdf/2011/developing\\_countries\\_and\\_the\\_future\\_of\\_IAs.pdf](http://www.iisd.org/pdf/2011/developing_countries_and_the_future_of_IAs.pdf) (accessed 05 February 2019).

<sup>391</sup> Gazzini T (2018) 249.

amendments of legal rules by the domestic legislator which might affect the foreign investor leading to costly litigation cases.<sup>392</sup> Treaties on the other hand requires the consent of the parties involved which in practical terms brings some kind of relief to the foreign investor.<sup>393</sup> The Act does not operate in isolation. It is rigidly anchored to the constitution which can be amended but only through very complex procedures.<sup>394</sup> For that reason, it mitigates exposures to uncertainty and instability while constitutionally providing legal backing to foreign investment.<sup>395</sup>

Omission of the Most Favoured Nation (MFN) clause limits the treatment accorded to foreign investment however shield the SA investment arena especially those investments established after the POI Act. The primary aim of the Act is to protect all investments and by incorporating the NT, investors are rest assured that all investments enjoy the same treatment in like circumstances. Some might argue that this position is short lived subsequently it may prompt new standards to be introduced as host nations rectifies their constitution.

### **3.8 Recent outlook on SA Investment Climate**

The South African investment climate in recent times is experiencing significant changes in capital injection. Results indicate that from 2003 till date, Chinese companies have made over sixty nine billion Rands of capital investment into various sectors of the economy.<sup>396</sup> These are the automotive, electronics, metals, building and construction as well as the financial sector.<sup>397</sup> Although the government's position on foreign investment suggest improvements, alternative research conducted by other companies articulate at a different conclusion.

The central question will then be has BITs or the SA POI generally demonstrated a change in dynamics of foreign investments in Africa? With the striking difference in elements from both approaches, is there a common ground for the future of

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<sup>392</sup> Gazzini T (2018) 250.

<sup>393</sup> Gazzini T (2018) 250.

<sup>394</sup> Gazzini T (2018) 250.

<sup>395</sup> Gazzini T (2018) 250.

<sup>396</sup> South African Government News Agency' SA Investment Climate is improving' available at <https://www.sanews.gov.za/south-africa/sa-investment-climate-improving> (accessed 13 February 2019).

<sup>397</sup> South African Government News Agency' SA Investment Climate is Improving' available at <https://www.sanews.gov.za/south-africa/sa-investment-climate-improving> (accessed 13 February 2019).

international investment agreements? The answers are not far-fetched in that these instruments have contributed to securing investors' confidence in various capital-importing countries in Africa. It is incumbent however, for both host and home countries to develop strategies that aligns to their developmental needs by creating investor friendly agreements that caters for all that operate within the given sovereignty. More to this will be discussed in the proceeding chapter.

### **3.8.1 Institutional reports on foreign investment in South Africa**

B & M analysts suggest that since 2014, local companies invested more outside the country than foreign companies did in SA.<sup>398</sup> According to the report, various factors could have contributed to this namely poverty, crime, infrastructure, workforce, natural security, political instability, regime uncertainty, taxes, and rule of law, property rights, government regulation, government transparency and accountability.<sup>399</sup>

The World Bank analysis on doing business in South Africa 2018 suggest positivity in institutional reforms however these conditions can be improved by national government.<sup>400</sup> In spite of the selective indicators used, the report claims significant improvement in services rendered, aided by working institutions. Legal services on the other hand remained unchanged at a record low since 2015 suggesting the need for an improvement in levels of efficiency as compared to other upper-middle income economies.<sup>401</sup>

Revisiting the UNCTAD report 2018 discussed earlier, FDI flows in Africa generally slumped by twenty one percent less than 2017.<sup>402</sup> Claims to this suggest weakness in oil prices and harmful macroeconomic effects from commodity sales.<sup>403</sup> SA was not spared within the global trend reporting negative growth in foreign investments citing

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<sup>398</sup> B&M Analyst 'The Investment Climate in South Africa' available at <https://bmanalysts.com/the-investment-climate-in-south-africa/> (accessed 13 February 2019).

<sup>399</sup> B&M Analyst 'The Investment Climate in South Africa' available at <https://bmanalysts.com/the-investment-climate-in-south-africa/> (accessed 13 February 2019).

<sup>400</sup> World Bank Group 'Doing Business in South Africa 2018' available at <http://www.doingbusiness.org/content/dam/doingBusiness/country/s/south-africa/ZAF-SA.pdf> (accessed 13 February 2019).

<sup>401</sup> World Bank Group 'Doing Business in South Africa 2018' available at <http://www.doingbusiness.org/content/dam/doingBusiness/country/s/south-africa/ZAF-SA.pdf> (accessed 13 February 2019).

<sup>402</sup> UNCTAD *World Investment Report 'Investment and New Industrial Policies'* (2018) Geneva: United Nations 40.

<sup>403</sup> UNCTAD *World Investment Report* (2018) 40.



underperforming commodity sector and political uncertainty,<sup>404</sup> which could also be attributed to the decline in investment in the republic.

The general overview has not been too pleasant. Attributing the challenges experienced by the country to a single paradigm will not constitute good judgement. Be that as it may, recent development suggest that the country is working on new strategies and commitments to revamp its institutions with the nascent call by the president for structural, legislative and policy reforms in government institutions.<sup>405</sup> This position is closely watched by the international community.

### **3.9 Chapter Conclusion**

After consulting different literature that focuses on the South African BIT regime and the review processes, it became apparent that an intervention would ensue. From the investigations presented, reviewing the BITs and the promulgation of the POI Act safeguards the Republic from costly litigation cases which might be prompted by various elements of the old BIT regimes. The POI Act addresses these challenges but falls short over concerns on the new Expropriation Bill which proposes expropriation without compensation. This is yet to be debated. Excluding the MFN clause from the POI Act brings some form of relief to the state in terms of parties invoking complimentary treaties in times of dispute settlement. In such situation, host states are able to protect themselves against costly litigation imposed by disgruntled investors.

The next chapter performs a comparative study on both approaches from the perspective of both the foreign investor and the host state to the protection and promotion of investment in Africa.

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<sup>404</sup> UNCTAD World Investment Report (2018) 42.

<sup>405</sup> Hermanus L & Godinho C 'Why South Africa's latest Plan for State-Owned Power Giant Could Work' available at <https://theconversation.com/why-south-africas-latest-plan-for-state-owned-power-giant-could-work-111480> (accessed 13 February 2019).

## CHAPTER FOUR

### **A COMPARATIVE STUDY OF SUGGESTED AFRICAN BITs AND THE SOUTH AFRICAN POI Act**

#### **4.1 Introduction**

This chapter highlights selected provisions on protection of investment in the BITs identified in contrast with the South African Protection of Investment (POI) Act. The Act specifically aims at protecting investment however is silent on promotion, nevertheless the overall purpose of this Act is to achieve a balance of rights and obligations to all investors in fostering economic growth and development within its territory.

Final analysis will discuss dispute settlement as an important component of investment treaties in providing recourse to disputes emanating from international agreements and the challenges of the twenty first century.

#### **4.2 Common trends in selected African BITs and the South African POI Act**

The respective BITs under review discussed in earlier chapters are scripted in similar trends incorporating the substantive obligations which culminates as the heart of protecting foreign investors. These rights and obligations define the scope of treatment contracting parties provide as a reflection of their commitments to protection of foreign investment. For instance, each suggested BITs promotes investments by creating favourable conditions for investments in its territory for all investors and shall carry out these obligations in accordance with the agreement. The idea of promoting favourable conditions are all embedded in treatment standard provided by each individual treaty. For this study, emphasis will be paid to NT, MFN, Expropriation and Compensation, Minimum Standard of Treatment as well as Transfer of Profits.

##### **4.2.1 National Treatment (NT) under suggested African BITs and SA POI Act**

As a measure of fairness and equity in international business law, the NT standard ensures that foreign controlled enterprises in like circumstances expect treatment no

less favourable than that received by their domestic counterparts.<sup>406</sup> Meaning equally competitive investment opportunities must be provided for both local and international companies operating within the same threshold by host nations. Special circumstances of each investor are taken into account when considering beneficiaries as most states may consider the economic condition of their nationals while extending such privileges to them.<sup>407</sup> Such privileges given by host states deserves equal rights of establishment to be extended to foreign investors. For instance, programmes designed to help promote small and medium scale businesses in a host country cannot be extended to multinational companies. This is well articulated in the African BITs under analysis highlighting the areas where it applies i.e. 'covered investment' and the conditions for which they may apply 'like circumstances'. Article 4 (2) Canada-Senegal (2014) BIT states;

'Each Party shall accord to a covered investment treatment no less favourable than that it accords, in like circumstances, to investment of its own investor...'<sup>408</sup>

This term 'like circumstances' is often used in trade related cases however the major challenge with the term is determining the limits for which it applies in NT.<sup>409</sup> Hence it is construed as meaning 'similar situations' giving a better understanding to situations of applicability. The SA POI Act 'national treatment' clause in addressing like circumstances takes into account to include affirmative measures to redress historical injustices faced by the black population.<sup>410</sup> In other words it gives local firms preferential treatment as indicated in section 8 (4) subsection (1) stating

'must not be interpreted in a manner that will require the Republic to extend to foreign investors and their investments the benefit of any treatment, preference or privilege resulting from...'<sup>411</sup>

Such measures were specifically designed to address the imbalances experienced in the past which at the time of the drafting of the constitution were of paramount

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<sup>406</sup> Geiger R 'Towards Multilateral Agreement on Investment' (1998) 31 *Cornell International Law Journal* 469.

<sup>407</sup> Somarajah M (2017) 238.

<sup>408</sup> Article 4(2) of the Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments (2014).

<sup>409</sup> Somarajah M (2017) 239.

<sup>410</sup> Mossallam M 'Process matters: South Africa's experience exiting its BITs' (2015) *Global Economic Governance working paper 2015/97 University of Oxford* 7.

<sup>411</sup> Section 8 (4) (1) of Act No 22 of 2015.

importance to the overall development of the country. South Africa has chosen to limit the right to NT to foreign investors operating in “like circumstances” to South African investors in their business operations. The outlook of this approach in its application is not problematic, but the description given to like circumstances by the Act in Section 8 (2) (a) to (g) may create problems.

Section 8 (2) does not define “like circumstances”, but calls for an overall, case by case examination on the merits of all the terms of the foreign investment which in general are wide and vague invoking different interpretations to different terms. The intention to protect the economy, local communities and the environment against the negative effect of investments is laudable, but the formulation of the criteria is not interpretable. As it stands, Section (2) would certainly create uncertainty amongst foreigner investors as to the standard of treatment they may expect and how this standard may differ between different sectors of the economy. Maintaining this standard in its interpretative form as stated in Article 4 (2) of the Canada-Senegal (2014) BIT requires simple applications to the listed categories.

#### **4.2.2 Observing the Most Favoured Nation (MFN) Treatment in Suggested African BIT and the SA POI Act approach**

The MFN treatment forms the heart of the substantial requirements for the selected African BITs alongside the minimum standards of treatment as required by customary international law. Earlier jurisprudence suggest that in interpreting the meaning and scope of the MFN clause, the International Court of Justice (ICJ) relied on party’s intent, forming the basis of discourse in various BITs.<sup>412</sup> Parker concurs in one of such cases with the *Anglo-Iranian Oil Co.*,<sup>413</sup> where the ICJ held that in as much as the basic treaty and third party treaties are valid and in force, the claimant could invoke privileges extended to third parties treaties in matter of consular jurisdiction.<sup>414</sup> As a prelude to most dispute settlement provisions, various arbitration clauses have internalised this clause and used it as part of the requirements in resolving disputes arising from breaches in bilateral investment treaties.<sup>415</sup> It is therefore no surprise that

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<sup>412</sup> Parker S L ‘A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties’ (2012) 2 *Arbitration Brief* 35.

<sup>413</sup> Parker S L (2012) 35.

<sup>414</sup> Parker S L (2012) 36.

<sup>415</sup> Parker S L (2012) 36.

in most bilateral investment treaties, the MFN clause is applied to dispute settlement provision.<sup>416</sup> This practice of invoking certain clauses from other treaties in dispute resolution more often than not lead to uncomfortable compromises in direction of the treaties sometimes prompting retaliatory economic measure from the other contracting party.<sup>417</sup> Treaty shopping is not totally a new concept, it has been used in different ICSID cases in overriding certain provisions in other for contracting states to accord to investors of the other contracting state treatment that is no less favourable than that accorded to the investors of the third state.<sup>418</sup> Such has been seen in the *Maffezini* case<sup>419</sup> discussed earlier highlighting the dangers of invoking treaties which could be disruptive to the policy objectives of the underlying specific treaty provision in the applicable BIT.<sup>420</sup>

On the other hand, the SA POI Act recognises the NT clause with emphasis on 'like circumstances' but rejects the adoption of the MFN treatment. The MFN treatment standard is not included in the SA POI Act. As indicated in the discussion on customary international law, this treatment standard is only relevant where treatment is awarded on the basis of nationality, and there is the possibility of differentiation between investors from different countries.<sup>421</sup> This is not relevant in the POI Act as investment is defined irrespective of nationality. This clause would be potentially relevant should any future BITs be concluded.<sup>422</sup>

The MFN clause clearly visible in suggested African BITs but omitted in SA POI Act, owes credence to a number of cases. Citing a few are the *Maffezini v. Kingdom of Spain*<sup>423</sup> and the *Piero Foresti v. Republic of South Africa*<sup>424</sup> discussed in chapter two and three respectively. It is without doubt that considering the issues around both

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<sup>416</sup> Parker S L (2012) 36.

<sup>417</sup> Greenberg A J 'Section 884 and Congressional Override of Tax Treaties: A Reply to Professor Doernberg' (1990) 10 *Virginia Tax Review* 439.

<sup>418</sup> Fietta S, Latham & Watkins 'Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point?' (2005) *International Arbitration Law Review* 131.

<sup>419</sup> *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/.

<sup>420</sup> Fietta S, Latham & Watkins (2005) 131.

<sup>421</sup> Trade and Investment Policy Workshop (2015) available at <https://pmg.org.za/committee-meeting/21187/> (accessed 26 March 2019). Prof Wandrag articulates the importance of NT standard and where MFN might be relevant in international investment agreements.

<sup>422</sup> Trade and Investment Policy Workshop (2015) available at <https://pmg.org.za/committee-meeting/21187/> (accessed 26 March 2019). Part of Prof Wandrag's recommendations to the committee on discussions on the PPI Bill 2015.

<sup>423</sup> *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/.

<sup>424</sup> *Piero Foresti, Laura De Carli and others v Republic of South Africa* ICSID Case No ARB (AF)/07/1.

cases whether from lessons learnt from invoking other treaties or abiding to the sovereign laws of the land, it appeared inevitable that the interest of the country must come first. As one commentator suggested, the threat of the BIT could potentially compromise SA position with an unquantifiable cost.<sup>425</sup> This is very true in areas of unlawful expropriation where the State directly or indirectly expropriate property of nationals or foreigners by nationalisation or enforcing other measures that constitute expropriation. It is of significant importance to note that the State is not totally prohibited from expropriating under customary international law, however it is established that the right of the State to expropriate is limited by certain conditions that must be satisfied.<sup>426</sup>

### 4.2.3 Expropriation and Compensation

Expropriation and compensation as indicated in BITs under analysis prohibits either party to nationalise or expropriate whether directly or indirectly in a manner that is close or equivalent to nationalisation or expropriation without compensating accordingly. Each BIT stresses conditions for which expropriation can take place i.e. for public purposes, non-discriminatory prompt payment and must be done in accordance with the due process of the law. Compensation therein must be equivalent to a fair market value and paid without delay in a fully realisable and freely transferable manner.

Contrary to this the SA POI Act makes reference to section 25 of the constitution, which highlights expropriation and compensation and conditions under which these measures apply. Section 25 (2) of the Bill of Rights states;

‘Property may be expropriated only in terms of the law of general application (a) for public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by the court.’<sup>427</sup>

The Constitution recognises the need to expropriate and as Sornarajah articulates, ‘provided certain conditions are satisfied’.<sup>428</sup> Those conditions include for public

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<sup>425</sup> Poulsen L N S (2011) 268.

<sup>426</sup> Sornarajah M (2017) 245.

<sup>427</sup> Section 25 (2) of the Constitution of the Republic of South Africa.

<sup>428</sup> Sornarajah M (2017) 245.

purposes or interest and subject to compensation in a timeous and prompt manner. Although one of the greatest threats to foreign investment is nationalisation,<sup>429</sup> it is still within the ambit of customary international law to define what constitute nationalisation which SA has identified in its Constitution before for such measures are implemented. Reinforcing this area of customary international law by South African legislation proves not only that the laws are consistent with international standards, but also affirms South Africa's commitments to protecting investments under international law.

BITs generally do not provide a clear distinction between expropriation and deprivation.<sup>430</sup> This may be construed as implying that expropriation is equivalent to deprivation thus compensation must apply.<sup>431</sup> The constitution forbids arbitrary deprivation of property however expropriation can occur in terms of the law for public purposes and public interest. The amount to be paid for compensation must reflect the relevant circumstances as indicated in the constitution and must be just and equitable as opposed to fair market value depicted by BITs. This pronouncement from the constitution reflects on reversing the damages experienced by historically disadvantaged South Africans and encourages reforms to bring about equitable access to all South Africa's natural resources.<sup>432</sup>

While acknowledging the position of both approaches, an alternative position is to suggest that compensation takes place within the availability of resources of the host state and a fair market value as prescribed by BITs be administered in line with the present value of the expropriated property. In other words, developing nations in Africa should consider the present economic conditions while articulating similar positions taken in like circumstances by other developing nations within the continent and applying within their respective jurisdiction. .

#### **4.2.4 Full Protection and Security/ Physical Security of Property**

In terms of full protection and security, contracting parties are required to provide FET in accordance to the principles of international law.<sup>433</sup> Defining the minimum standard

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<sup>429</sup> Somarajah M (2017) 244.

<sup>430</sup> Mossallam M (2015) 8.

<sup>431</sup> Mossallam M (2015) 8.

<sup>432</sup> Poulsen L N S (2011) 266.

<sup>433</sup> Akinkugbe O D 'Background Towards a Critical Assessment of Canadian-Nigerian Bilateral Relations' (2017) 4 *The Transnational Human Rights Review* 18.

of treatment will depend on the parties concluding the establishment of the treaty, hence agreeing on the terms of its existence in relation to customary international law.<sup>434</sup> Selected African BITs within the ambit of customary international law generally subscribes to this principle codifying it under minimum standard of treatment as FPS. The SA POI Act adopts a contrary approach to this. Section 9 refers to this treatment as 'physical security of property'.<sup>435</sup> It compels the Republic to accord investors and their investment such level of physical security as may be generally provided to domestic investors and subject to available resources and capacity. The Act drifts away from the traditional connotation as 'full protection and security' to a 'level of physical security subject to available resources and capacity'.<sup>436</sup> This provision makes it very clear that the government is retaining policy space to regulate in the public interest for purposes of equality and access to resources. These resources are limited and must be restricted to serve the needs of all investments. This is notably in accordance with customary international law and the stated objectives of the Act.

In view of the complexity of interpreting this standard, the state's ability to meet this standard is succinctly limited to the level of resources available. The more qualified level of protection provided for in Section 9 is therefore in line with recent international practice, and particularly the recommendations of the International Institute for Sustainable Development (IISD) that states must take control in relation to the FPS standard.<sup>437</sup> South Africa is no exception to this provision as it subject herself to a level of physical security which is open to different interpretation considering the resources of the state at any given time. Perhaps as newer treaties have suggested, investor protection should apply only against violence to investment.<sup>438</sup>

#### **4.2.5 Transfer/ Transfer of Funds**

Another momentous standard present in selected BITs and the SA POI Act is the 'Transfer' or 'Transfer of Funds' provisions which is very visible in both models. Apparently, no state operates in isolation therefore the need for foreign investment to

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<sup>434</sup> Somarajah M (2017) 405.

<sup>435</sup> Section 9 of Act No 22 of 2015.

<sup>436</sup> Section 9 of Act No 22 of 2015.

<sup>437</sup> Malik M 'Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?' (2011) *International Institute for Sustainable Development* 12.

<sup>438</sup> Somarajah M (2017) 242.



repatriate profits will depend on certain measures put in place by host States to facilitate the process of return.

Section 11 of the SA POI Act confirms the incorporation of the provision. The Act provides that a foreign investor may, in respect of any investment, transfer funds, subject to taxation and other applicable legislation. This clause is entirely in line with customary international law, however, attention must be paid to times of economic difficulties experienced at any given time. In situation where extreme balance of payments surfaces, the state could invoke measures to suspend the treaty obligation to permit repatriation until such time when the economy recovers.<sup>439</sup>

This stance is an ideal policy position adopted by most states however recommending a retaining profit policy will go a long way to guarantee confidence among foreign investors. This profits should be directed towards treaty policy objective of sustainable development in host countries.

#### **4.3 Dispute settlement approaches presented by both models**

Generally, the set of rules guiding international investments are enshrined in the arbitration rules of the United Nations Commission for International Trade law (UNCITRAL). These rules are mostly used in commercial arbitration in investor-state dispute settlement where documents submitted to arbitrators are confidential and closed to the public.<sup>440</sup>

It is often alleged that transparency and accountability are far-fetched in most ISDS processes because of its strict adherence to confidentiality and access to information to the public,<sup>441</sup> however in recent times, the UN pushed for more transparency through public hearing, access to documents submitted as well as ability for interested parties to make submissions to arbitration proceedings in investment dispute.<sup>442</sup> The

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<sup>439</sup> Sornarajah M (2017) 244.

<sup>440</sup> Tralac 'EU Backs New Transparency Standards for Investor-State Dispute Settlement' available at <https://www.tralac.org/news/article/685-eu-backs-new-transparency-standards-for-investor-state-dispute-settlement.html> (accessed 13 February 2019).

<sup>441</sup> Tralac 'EU Backs New Transparency Standards for Investor-State Dispute Settlement' available at <https://www.tralac.org/news/article/685-eu-backs-new-transparency-standards-for-investor-state-dispute-settlement.html> (accessed 13 February 2019).

<sup>442</sup> Tralac 'EU Backs New Transparency Standards for Investor-State Dispute Settlement' available at <https://www.tralac.org/news/article/685-eu-backs-new-transparency-standards-for-investor-state-dispute-settlement.html> (accessed 13 February 2019).

role of the ISDS is to provide the international investor an opportunity to sue a country for alleged breaches of agreement in investment made in a host state.<sup>443</sup> This may not be the case at all times for certain BITs tend to sway from this process to other forms of dispute settlement mechanisms.

#### 4.3.1 The selected African BIT approach

In most cases, resolving disputes requires the international investor to bypass national courts seeking judicial remedies before the ICSID. Considering similar circumstances, others have subscribed to resolving disputes through diplomatic channels between countries. BITs usually contain an arbitration clause submitting disputes unilaterally to a neutral arbitration tribunal before the ICSID using the UNCITRAL arbitration rules,<sup>444</sup> however mere references to ICSID in treaties did not give jurisdiction over individual disputes to ICSID.<sup>445</sup> In fact, with such jurisdiction in place will depend mainly on the precise textual reference incorporated in the treaty.<sup>446</sup> In further analysis, this paper will identify the dispute mechanisms the African BITs share and where they differ.

All selected African BIT states are signatories to the ICSID Convention and the UNCITRAL Arbitration rules however not all subscribe to the various forms of dispute settlement. The Morocco-Nigeria (2016) BIT recommends in Article 26 for disputing parties to seek negotiations and consultations before initiating any arbitration procedure.<sup>447</sup> If disputes cannot be resolved within six months from date of request for consultations, the investor may proceed to international arbitration after exhausting local remedies of the host state.<sup>448</sup> This further reveals the role of domestic courts as part of exhausting local remedies in dispute settlement. Articles 27 and 28 discuss the processes and procedures of the ISDS as a form of dispute settlement. It gives the investor the right to invoke international arbitration through the ICSID. The SSDS<sup>449</sup>

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<sup>443</sup> Tralac 'EU Backs New Transparency Standards for Investor-State Dispute Settlement' available at <https://www.tralac.org/news/article/685-eu-backs-new-transparency-standards-for-investor-state-dispute-settlement.html> (accessed 12 February 2019).

<sup>444</sup> Sprenger H & Boersma B 'The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Market' (2014) *Business Law Today* 2.

<sup>445</sup> Somarajah M (2017) 255.

<sup>446</sup> Somarajah M (2017) 256.

<sup>447</sup> Article 26 of the Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (2016).

<sup>448</sup> Article 26 (5) of 2016 Morocco-Nigeria BIT.

<sup>449</sup> The (SSDS) is a form of dispute settlement mechanism facilitated through diplomatic channels between home and host state as a means of finding an amicable solution to international investment disagreements.

mechanism is excluded in this agreement meaning contracting parties recognises resolving dispute only by consultation while exhausting local remedies and the ISDS mechanism.

The Japan-Kenya (2016) BIT narrative follows a similar approach seen earlier in the Morocco-Nigeria (2016) BIT. Article 15 recommends consultations between disputing parties while seeking judicial or administrative settlement within the area of investment.<sup>450</sup> In other words, it recommends exhaustion of local remedies 'at the choice of the disputing party' meaning judicial recourse may be sought within the investment area at a competent court or administrative tribunal of the disputing party. Alternatively an investor may proceed with international arbitration in accordance with the ICSID invoking the UNCITRAL rules in quest for an amicable settlement. No mention of SSSDS is recommended thus relying on the ISDS mechanism.

The Canada-Senegal (2014) BIT first recognises the adoption of both dispute settlement mechanisms namely ISDS and SSSDS. The incorporation of the State-to-State arbitration is not new to investment treaty for SSSDS predates Investor-State arbitration and commonly used in early investment treaties such as the friendship, commerce and navigation (FCN) treaties.<sup>451</sup> Article 20 states;

'without prejudice to the rights and obligations of the Parties under Section D (State-to-State Dispute Settlement Procedures), the Parties establish in this Section a mechanism for the settlement of investment disputes'.<sup>452</sup>

Consultations are recommended for an amicable settlement before an investor may submit claim for arbitration. Nowhere was it suggested that national courts be approached to address disputing parties' grievances however the treaty proposes consultations through diplomatic channels or ICSID. If all attempts fails, Article 22 outlines the procedures in invoking a claim to international arbitration. The option of the SSSDS in the treaty provides a diplomatic angle into resolving investment dispute between an investor and the host state. Experts argue that the approach offers possibilities for states to re-engage with the investment treaty system while contrary

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<sup>450</sup> Article 15 (2) of the Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment (2016).

<sup>451</sup> Bernasconi-Osterwalder N 'State-State Dispute Settlement In Investment Treaties' in Singh K & Ilge B (ed) *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (2016) 253.

<sup>452</sup> Article 20 of the Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments (2014).

opinion suggest that interstate arbitration may re-politicise investment dispute.<sup>453</sup> Whatever the case may be, it is in the interest of the parties to carefully reconsider all options by evaluating the risk and benefits of including both mechanisms<sup>454</sup> or subscribing to one as seen in earlier BITs discussed in this thesis.

### 4.3.2 The South African POI Approach

Despite the debate over the impact of investor protection regime on policy space, the settlement of dispute proposed by the SA POI Act appears to raise concerns over its effectiveness.<sup>455</sup> Literature suggest that most states in the world have signed and ratified at least one investment treaty.<sup>456</sup> SA is no exception to this for it introduced the POI Act in 2015 in response to various challenges amongst which is that BITs pose risk and limitations on the ability of government to pursue its constitutional-based transformation agenda.<sup>457</sup>

In terms of the POI Act, the rights to unilateral recourse to arbitration is preserved enabling SA to limit foreign investment dispute settlement to its domestic courts.<sup>458</sup> Section 13 of the Act highlights the processes and procedures for dispute settlement.<sup>459</sup> This provision starts by availing the investor an opportunity to approach the department within six months by which a notice of request must be filed. Upon initiating this request, the department appoints a mediator in agreement with the investor after exhausting all criteria listed thereafter in the Act. The challenge envisaged is the ability of the parties in conflict to commit themselves willingly to finding an amicable solution as opposed to subjecting the whole process to an independent external judicial body. *Prima facie* premonition suggest that such exercise may be marred by other exogenous factors which include finance, political interference and public pressure depending on the sensitivity of the sector involved.<sup>460</sup>

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<sup>453</sup> Bernasconi-Osterwalder N (2016) 255.

<sup>454</sup> Bernasconi-Osterwalder N (2016) 257.

<sup>455</sup> Gazzini T 'Rethinking the Promotion and Protection of Foreign Investments: The 2015 South Africa's Protection of Investment Act' (2017) *Social Science Research Network* 16.

<sup>456</sup> Williams Z P 'What When Where and Why? Patterns in Investor-State Arbitration' in Singh K & Ilge B (ed) *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (2016) 30.

<sup>457</sup> Lang J & Giffillan B 'Bilateral Investment Treaties- A Shield or a Sword? Available at [www.bowmanslaw.com/wp-content/uploads/2016/09/PPI-article\\_mailshot\\_08112013\\_1038389\\_1-1.pdf](http://www.bowmanslaw.com/wp-content/uploads/2016/09/PPI-article_mailshot_08112013_1038389_1-1.pdf) (accessed 25 February 2019).

<sup>458</sup> Somarajah M (2017) 276.

<sup>459</sup> Section 13 of Act No 22 of 2015.

<sup>460</sup> Gazzini T (2017) 17.

The Act also avails the foreign investor the opportunity to exhaust local remedies for recourse. When a resolution cannot be reached and all local remedies have been exhausted, the Act compels the investor to seek government consent before embarking on arbitration. Chen contends that the quality of the host state's judiciary is important to foreign investors<sup>461</sup> which can also translate to according judicial independence and legislative oversight on strengthening the quality of local courts.

Investor-State arbitration was deliberately set aside by the government because it believes in the independence and competence of its judicial mechanisms thus section 13 (4) encourages the use of various judicial institutions within the republic in finding recourse to investment disputes. This might turn unpopular among investors because investment arbitration over the years has experienced;

'Remarkable development bringing the dispute outside the reach of politics with a view of ensuring the equalities of the parties in efficient proceedings conducted by independent tribunals'.<sup>462</sup>

The views expressed by Gazzini further confirms the position of international investors. On the other hand proponents of BITs argue that the investor-state arbitration clause brings some kind of relief to the investor. Chen suggested that it attempts to remove obstacles by delivering via international agreements protection that domestic laws fail to adequately guarantee.<sup>463</sup> Though in his concluding remarks contended that redesigning the BITs to promote institutional reforms (i.e. improve competency in local courts) possess a better option for developing nations.<sup>464</sup>

It is noteworthy to be reminded that the POI Act wasn't designed in a mutually exclusive manner but in conjunction with section 6, which must be read with section 13 (4), which expresses the administrative treatment that must be followed.<sup>465</sup> Contrary to traditional BITs like the Canada- Senegal (2014) BIT which opts for either ISDS or SSDS, the SA POI recommends that upon the government consent to international arbitration, such processes will be guided by Section 6 only when all local remedies have been exhausted by the investor. It further states that international

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<sup>461</sup> Chen R C 'Bilateral Investment Treaties and Domestic Institutional Reforms' (2017) 55 *Columbia Journal of Transnational Law* 583.

<sup>462</sup> Gazzini T (2017) 17.

<sup>463</sup> Chen R C (2017) 554.

<sup>464</sup> Chen R C (2017) 591.

<sup>465</sup> Section 6 of Act No 22 of 2015.

arbitration conducted in accordance with the administrative procedures set out in Section 6 will be done between the host state and the home country of the investor recognising the State-to-State arbitration as a mechanism that can be explored. It barely gives investors room to challenge the sovereignty of domestic institutions but leverages through diplomatic channels in matters of international investment violations. The SA POI Act herein connotes a deliberate legislative action by the government to restructure its investment policy space<sup>466</sup> and promoting its constitutional-based transformation agenda for the overall benefit of the country. It should be mentioned at this point though that one major challenge with this process is getting two government to agree to arbitration. The manner by which this is to be achieved constitutes a topical issue for further research.

The concluding analysis shows evidence of similarities in treaty approach to dispute settlement by all three BITs subscribing to the ISDS mechanism and the ICSID as their choice for judicial recourse. The SSDS is clearly indicated as a choice of arbitration between states in the Canada-Senegal (2014) BIT but silent on other BITs under investigation. While the ISDS remains the primary mechanism to resolving investment dispute, the SA POI Act is resolute on relying on its constitutional provisions recommending exhaustion of local remedies within a competent court of jurisdiction. This thesis therefore aligns its support with the SA approach by soliciting for African States to exhaust local remedies within their host states while independently strengthening its judicial institutions to leverage its competences in handling complex international investment gridlocks.

#### **4.4 Chapter Conclusion**

Presenting an alternative model or adopting various strategies for resolving international investment dispute should be viewed within the framework of the constitutional prerogatives of the state. Following careful observations from the respective treaties above, it is clear that most African BITs still embrace the OECD standard which was designed to give greater protection to the international investor at the expense of the host state. South Africa on the other hand have not introduced any

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<sup>466</sup> Motale Z 'Free Trade: The Washington Consensus and Bilateral Investment Treaties The South African Journey: A Rethink on the Rules on Foreign Investment by Developing Countries' (2016) 6 *American University Business Law Review* 56.

new measures out of the ordinary but have relied more upon strengthening its judicial institutions by ratifying its constitution to accommodate elements of customary international law aimed at protecting the investor and their investments as well as the host state. Though certain provisions of the POI Act requires further clarity, the anticipated introduction of the new legislation 'Amendment of Section 25 to allow for expropriation without compensation' will shed more light on the strength of its legislative institutions in resolving investment challenges. The true test to this prognosis is yet to be determined as the country slowly navigates into the fourth industrial revolution.

The next and final chapter summarises the discourse to establish if indeed BITs enhances the protection and promotion of investment in Africa. Concluding comments with reference to BITs and other protection instruments will form the basis for future recommendations.



## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Introduction

This chapter highlights the authors overall findings regarding the primary question of this thesis notably 'The importance of BITs in relation to the protection and promotion of investment in Africa'. The main issues of each chapter will be summarised and recommendations suggested towards improving the present status quo of African BITs.

#### 5.2 Summary

The abridged thesis gives an overview of the importance of BITs with particular emphasis on the protection and promotion clauses of selected African BITs as well as the South African Protection of Investment Act as an alternative approach to international investment agreements.

The introductory chapter provided a general overview of the emergence of BITs and its importance to the development of States.<sup>467</sup> Chapter two went a bit further to unbundle the very essence of these BITs. In order to establish this, the author tries to investigate specific treatment standard alongside other required provisions in selected African BITs that are tasked in promoting and protecting investment in their respective treaties.<sup>468</sup> The approach culminated in investigating specific problematic clauses within their legislative formations, highlighting cases to show the mismatch in standard obligations. Further investigations surfaced suggesting if these clauses truly protect and promote investment considering the interest of the investor and that of the host state. In chapter three, the author took a holistic view on the SA POI Act and it's interlink with various provision of the Constitution of South Africa.<sup>469</sup> As the clamour for the amendment of Section 25 of the Constitution of South Africa intensified,<sup>470</sup> attention was drawn to the recently proposed Expropriation Bill and its anticipated

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<sup>467</sup> See introductory discussions on pg 1-5.

<sup>468</sup> See treatment standards discussions on pg 21-46.

<sup>469</sup> See pg 60-68.

<sup>470</sup> See pg 68.



merits and challenges.<sup>471</sup> While evaluating the effectiveness of this piece of legislation, it is noteworthy to mention that such an evaluation will be premature and amount to a breach in legislative assessment, hence this thesis only considered submissions from experts and scholars suggesting the pros and cons and its effect on the South African economic landscape.<sup>472</sup> Chapter four performed a comparative investigation of particular clauses of interest in selected Africa BITs and the SA POI Act in light of their individual legislative mandate.<sup>473</sup> It then went further to explain the flaws and merits of each provision with respect to its legislative framework towards the protection and promotion of investment. Dispute settlement mechanisms were discussed as a means of providing legitimate recourse to grievances for the overall functioning of the BITs.<sup>474</sup> This is evident in the treaties under investigation subscribing to the ICSID as their premier institution of investment arbitration<sup>475</sup> while the SA POI Act gave jurisdiction to any competent judicial institutions in the republic.<sup>476</sup> Chapter five provides a summary of the entire campaign on the importance of BIT to the protection and promotion of investment in African states and professes alternative methods to further improve the legitimacy of existing treaties in light of their sunset clauses.

### 5.3 Conclusions from Investigation

At the heart of the discourse on the importance of BITs with particular references to the promotion and protection of investment clauses in respective African BITs concluded with other developing and developed countries, the following conclusions highlighted below expresses the position of this thesis.

The investigations revealed that certain treatment standards remain problematic due to the scope of reference when interpreting its applicability in international investment law. For example, defining the terms of reference for the FET and FPS standards should be streamlined to provide a *sui generis* limits to the level of treatment and security to be accorded to treaty parties. It is known that arbitration tribunals struggle to give precise meaning to these standards thereby resorting to other legal instruments

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<sup>471</sup> See pg 70.

<sup>472</sup> See pg 72-74.

<sup>473</sup> See pg 78-85.

<sup>474</sup> See pg 86.

<sup>475</sup> Refer pg 87.

<sup>476</sup> Refer pg 89.

which invariably broaden the scope of the initial meaning. Treaties should however spell out what exactly constitute FET while the full protection should be limited to 'police protection' or 'private protection' provided, subject to the availability of resources available to the host state. The issue of transparency in recent times plays an important role in promoting investment. Recent research suggests that the transparency clause abounds the level of confidence in investors' attitude towards investing in any given state, provided the level of transparency espouses open public hearing and access to information. Therefore consistency in incorporating this substantial obligation in treaties improves the desirability of conducting business in the host state in accordance with the provisions of customary international law. It also provides the investor with some level of confidence and reliability in the judicial system of the host state.

The commitments to 'promoting investment' should also be conspicuously represented in future treaty textual formations. Investigations from treaties observed showed that the word 'promotion' was scarcely used as opposed to 'protection', which was widely used by most treaties. It gives an impression that treaties are primarily designed to safeguard the investor instead of finding a balance between the investor's interest and the host state aspirations. Consistent emphasis and representation of this word will consciously improve the viability of promoting treaty obligations in international investment agreements.

The approach adopted by the South African government to review its BITs and the introduction of the SA POI Act brought a new dimension to international investment protection and promotion. Research suggests that the dangers exhibited by the *Foresti* case prompted a drastic change in government attitude towards BITs because it encroached on government policy space and more importantly it exposes the government's inability to exercise its sovereign powers over the state. Although South Africa's experience is unique in the sense that it addresses the injustice of the past, it continuously takes into consideration the policy direction of the republic and the need to guard against any unlawful exploitative tendencies coming from foreign investor. The supremacy of the SA Constitution and its overwhelming support for the protection and promotion of investment requires treaties to be drafted maintaining an intrinsic balance between domestic legislation and customary international law. In so doing, the SA POI Act lays emphasis on the supremacy of its legislation beyond any other

external legislative instrument, subjecting every foreign investor and investment to be compliant with its domestic legislation. It is therefore the opinion of this thesis that African countries negotiating BITs should pay more attention to strengthening its institutions and focussing on investments that addresses its developmental challenges by identifying key elements in the treaties which protect the powers of the state and subsequently guard the sovereignty of the state against measures that threatens its existence. The interest of the investor must be equally protected with recommendations for new measures that seek recourse within the host state before concluding BITs with other developing or developed economies.

A careful examination of the selected African BITs and the SA POI Act suggest that both models are designed to promote and protect investments taking into consideration the various clauses incorporated in these treaties. The main differences are the treatment standards adopted by African BITs i.e. MFN and NT while the SA POI opted for only the NT standard. Dispute settlement, a mechanism adopted by all treaties, forms the crown for contemporary violations of treaty obligations by the investor or the host state. It was quick to identify that all treaty parties are signatories to the ICSID and the UNCITRAL Rules notably placing more responsibility to the state than the investor. The author therefore suggests that a total review of the dispute settlement process be carried out by African Countries in the wake of the challenges the ISDS poses to developing countries.

The option of exhausting local remedies entrenched in the SA POI Act before opting for the SSDS process gives both the State and the investor reasonable opportunity to resolve disputes domestically or bilaterally through diplomatic channels. Some may argue about the inefficiency of the domestic institutions however strengthening of these institutions through legislative reforms and capacity building will give more credit to these processes. Capacity building which entails providing training courses to re-skill professionals in matters relating to international investment law cannot be excluded. Overhauling the judicial system to be of international standards to be impartial and independent will go a long way in helping adjudicating the dispute processes.

Indeed the importance of BITs and the role it plays in international investment law cannot be down-played in international investment law discourse however overstating

their importance might be too ambitious owing to the fact that treaties are getting less attractive as states opt for new models with balanced rights between the host state and the impending interest of the investor.<sup>477</sup> Though other factors contribute to the development of the state i.e. the strength of the public institutions and the respect for the rule of law, the degree of social and political stability and the active role of government in promoting a vibrant economy,<sup>478</sup> plays a major role in promoting BITs. The role of BITs in identifying the investment potential in states is one of the first points of reference for most investors seeking safe investment destination. In other words, BITs are important however the most important aspect of this legal instrument are the provisions it incorporates to protect and promote investment. Africa, represented by its diversity and culture, people and other resources must take ownership of its identity by first designing its own international investment agreements within the legal frameworks of an institutionalised organ that best serve the interest of its people and the institutions of the continent as a whole.

#### 5.4 Recommendations

African states concluding BITs should take into consideration their unique circumstances before conceding to adopt BITs as a tool for attracting FDI. They can achieve this by adopting new models that permits more elasticity in regulatory space. South Africa laid the foundation for that, others should follow suit. BITs must be seen from a continental perspective and should be dealt with in that capacity.

Specific clauses like the MFN and FET standards must be limited in scope with clear indicators as to what applies in treaties. The FPS standard also inclusive, must be defined within the parameters of the available resources present at the disposal of the host state. While the state remains the legitimate provider of law enforcement, latitude should be given to the investor to provide additional security to their establishments. In essence the FPS in treaties can be phrased as;

‘Full Protection and Security requires each Party to provide a “level of private security to be determined by the state and a level of police protection” as required under customary international law.’

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<sup>477</sup> Somarajah M (2017) 213.

<sup>478</sup> Spears S ‘The Quest for Policy Space in a New Generation of International Investment Agreement’ (2010) 13 *Journal of International Economic Law* 1047.

The sunset clauses which determine the lifespan of the treaties should only be valid for the duration of the agreement and not extended beyond the specified timeframe.

Rather than relying on the ICSID for recourse, each individual African state should improve its legislative framework by strengthening its institutions to have the capacity to adjudicate on complex investment cases with limited interference from the WB. Attesting to this was research done in 2003 by Marry Hallward-Driemeir on FDI suggesting that BITs are more likely to be effective when the host state has better established legal institutions.<sup>479</sup>

Exhausting domestic remedies in terms of dispute settlement, is an ideal model to be replicated by African Nations but should be done only if their domestic judicial institutions are independently led and equipped with the right resources to match international standard. This will give more credibility to the operation, function and administration of the institution. After all, the pre-colonial Africa demonstrates a robust and vibrant framework for resolving continental dispute.<sup>480</sup>

## 5.5 Final Remarks

The supremacy of the law and the respect for the rule of law by the host state will deter home countries from relying on the ICSID for judicial recourse.<sup>481</sup> This is well articulated as a reference point in conversations that mitigates the threat of litigation from international investors. The sooner Africa develops a comprehensive framework that addresses the nascent challenges of its legal systems and respecting the provisions of the legal instruments as a whole, the better disposed African countries will be in concluding IIAs.

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<sup>479</sup> Vandeveldt K J 'A Brief History of International Investment Agreement' (2005) 12 *University of California Davies Journal of International Law and Policy* 185.

<sup>480</sup> Kufuor K O 'The African Continental Free Trade Agreement and the Importance of a Two-Level Approach to its Success' available at <http://www.afronomiclaw.org/2019/04/21/the-african-continental-free-trade-agreement-and-the-importance-of-a-two-level-approach-to-its-success/#> (accessed 23 April 2019).

<sup>481</sup> Allee T & Peinhardt C 'Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provision' (2010) 54 *International Studies Quarterly* 10.

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