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UNIVERSITY OF THE WITWATERSRAND

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RESOLVING THE CONFLICT BETWEEN THE PROTECTION OF INTERNATIONAL INVESTMENTS AND THE STATE'S RIGHT AND RESPONSIBILITY TO REGULATE.

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ABSTRACT

This dissertation interrogates whether there is an irresoluble conflict between the traditional form of protection offered to foreign investments under bilateral and multilateral investment treaties and the right and responsibility of states to regulate in the public interest. It examines the criticisms against the traditional form of protection under such treaties, which have been voiced vociferously in the last few years, and contrasts these with the justifications for it. Ultimately, it appears that the protections and mechanisms for enforcement under investment treaties do act to curtail what would otherwise be legitimate exercises of sovereignty by host states and that this can have a significant chilling effect on a state's ability to implement important regulatory initiatives and policies. It also appears, however, that, although there is potential for tension between the protection of investments and the state's right and responsibility to regulate, this potential can be managed. This dissertation analyses the reaction of the South African government to the concerns it has with its investment treaties, which ultimately found expression in the arguably extreme decision to give notice of non-renewal of a number of its investment treaties and the adoption of domestic legislation which provides an undeniably diluted form of protection. This reaction leaves much to be desired and will ultimately have negative consequences of its own. It can be contrasted with that of other actors within the international arena who, whilst also harbouring concerns about the potential incursion of investment treaties into their regulatory mandate, have taken proactive and innovative steps to reform and craft their investment protection obligations to ensure that they retain sufficient regulatory space, without attracting the negative consequences of a complete rejection of the prevailing system. States should recognise their ability to tailor their commitments to their specific and evolving needs and take steps to craft legal frameworks that will provide sufficient investment protection without too great an incursion on their regulatory responsibilities.

DECLARATION

I, Sarah Jenelle McKenzie, declare that this dissertation is my own unaided work. It is submitted in fulfillment of the requirements of the degree of Masters of Laws (LLM) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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LIST OF ABBREVIATIONS AND DEFINED TERMS

The Bill	International Arbitration Bill, B10 of 2017
The Act	The Protection of Investment Act 22 of 2015
ADC Affiliate	*ADC Affiliate Limited and ADC & ADMC Management Limited v Hungary* ICSID Case No ARB/03/16, Award of October, 2 2006
Australia - US Free Trade Agreement	United States - Australia Free Trade Agreement, 2004
BEE	Black Economic Empowerment
The Commission	The North American Free Trade Agreement Free Trade Commission
The Constitution	The Constitution of the Republic of South Africa, 1996
The Convention	The Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Draft Amendment Agreement	Draft Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment, 2016
European Chamber submission	Submission by the European Union Chamber of Commerce and Industry in Southern Africa on the Promotion and Protection of Investment Bill, as presented to the Portfolio Committee on Trade & Industry, Parliament, September 15 2015
Foresti	*Piero Foresti, Laura de Carli and others v. Republic of South Africa*: ICSID Case No ARB(AF)/07/1
Glamis Gold	*Glamis Gold Ltd v United States of America,* NAFTA/UNCITRAL Award of June, 8 2009
ICSID	The International Centre for the Settlement of Investment Disputes
India Model Treaty	India Model Bilateral Investment Treaty (2015)
Methanex	*Methanex Corporation v United States of America*, NAFTA Award of August 3, 2005
MPRDA	The Minerals and Petroleum Resources Development Act, 2002
NAFTA	The North American Free Trade Agreement
Parkerings	*Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award of September 11, 2007

The Position Paper	Bilateral Investment Treaty Policy Framework Review: Government Position Paper June 2009
The Protocol	Southern African Development Community Protocol on Finance and Investment, 2006
SADC	The Southern African Development Community
SADC Model Treaty	Southern African Development Community Model Investment Treaty (2012)
Saluka	*Saluka Investments BV v Czech Republic*, Award of March 17, 2006
SD Myers	*SD Myers Inc. v Canada* UNCITRAL (NAFTA), First Partial Award of November 13, 2000
Southern Pacific	*Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt,* ICSID Case No ARB/84/3, Award of May 20, 1992
Tecmed	*Tecnias Medioambientales Tecmed SA v The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award of May 29, 2003
Transformative Industrial Policy	United Nations Economic Commission for Africa Transformative Industrial Policy for Africa, 2016
The US	The United States of America
US Model Treaty	United States Model Bilateral Investment Treaty (2012)

CHAPTER I - INTRODUCTION

It is clear that foreign investment, particularly in developing states, can be a significant factor in the development of those states.[1] Foreign investment is also a reality of increasing significance in the global market.[2] In an effort to encourage investment by creating certainty through the provision of various legal and binding assurances, states have begun to recognise the need for their actions to be curtailed (or at least remedied) by the bounds of international law and various international agreements and instruments.[3] This has led to a significant trend of concluding bilateral investment treaties which allow foreign private investors to challenge actions taken by states directly.[4]

It is clear, however, that there has recently been some political push-back on this trend globally, and in South Africa in particular. The contentious stance adopted by the South African government on bilateral investment treaties is a prime example of a potential claw-back of the desire to uphold state autonomy above all else.

This dissertation will explore the international economic and political context in which international investment law has developed and the current global trends in the resolution of international investment disputes, with a focus on the role and prominence of investment treaties and the position of South Africa.

Investor-state arbitration, its implications for states and the inevitable constraints that the

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[1] Rudolph Dolzer & Christoph Schreuer *Principles of International Investment Law* (2008) at 22 point out that the preambles to investment treaties invariably highlight 'the positive role of foreign investment in general and the nexus between an investment-friendly climate and the flow of foreign investment in particular.' See also Sachet Singh & Sooraj Sharma 'Investor-State dispute settlement mechanism: the quest for a workable roadmap' (2013) 29 *Merkourious: Utrecht Journal of International and European Law* 76 at 89, who state that '[f]oreign investment plays a key role in the progress and development of a country, in particular those which are less developed.'

[2] Charles N. Brower & Stephan W. Schill 'Is arbitration a threat or a boon to the legitimacy of international investment law?' (2008-2009) 9 *Chicago Journal of International Law* 471 at 472 - 473 state that the rise of international investment law and the dispute resolution mechanisms attached to it is:

> '[A] consequence of equally unprecedented increases in transborder investment flows, a necessary concomitant of the increasing globalization that has taken place since the end of the Cold War. It is this change in the world's social and economic environment that has created the need for legal institutions that structure and stabilize foreign investment activities and help regulate conflicts that unavoidably arise out of increases in investment cooperation.' (citations omitted.)

See also Jürgen Basedow *'Global life, local law? - About globalization of law and policy-making*' (2016) 1 Hamburg Law Review 7 at 7 - 9 and Stanimir Alexandrov 'The "baby boom" of treaty-based arbitrations and the jurisdiction of ICSID Tribunals: Shareholders as "investors" and jurisdiction *ratione temporis*" (2005) 4 *The Law & Practice of International Courts and Tribunals* 19 at 20.

[3] Singh & Sharma op cit note 1 at 89 state that in the absence of mechanisms to protect their foreign investments, investors 'are reluctant to employ resources in countries, especially those suffering from legal and political instability.'

[4] See Brower & Schill op cit note 2 at 471 -472 for a discussion on the increasing importance of international investment law as a field of international law and the increasing importance of investment disputes.

possibility of recourse to it places on democratically elected governments in making and implementing policy, have indeed become matters of some controversy. As I will detail later, while its supporters defend it ardently, various international commentators (and, more recently, some states) have argued forcefully that the current system of investment dispute settlement is simply not justifiable. The fault lines that have developed as a result of the debate raise questions about the very legitimacy of the prevailing system of international investment dispute settlement.

Whether the prevailing system is justifiable, and, if it is not, what should be done about this, must be assessed. This must be done bearing in mind the fact that investment treaty arbitration is a global reality of significant import. It cannot simply be wished away, and yet, because of its significance, its legitimacy should not simply be assumed.

As Van Harten has argued:

> 'Investment treaty arbitration is an important legal and institutional piece of the neoliberal puzzle because it imposes exceptionally powerful legal and economic constraints on governments and, by extension, on democratic choice, in order to protect from regulation the assets of multinational firms.'[5]

The scope of these constraints and their acceptability in the current global regime, and for individual States, should indeed be critically analysed and assessed.

Background

An increasingly globalised social and economic environment 'has created the need to structure and stabilize foreign investment activities and help to regulate conflicts that unavoidably arise out of increases in investment cooperation.'[6] This, along with the need to create certainty for foreign investors,[7] has led to a trend of concluding bilateral investment treaties which allow foreign private investors to challenge actions taken by states directly.[8]

Historically, the only possibility for protection of foreign investments was diplomatic

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[5] Gus Van Harten (2010) 'Five Justifications for Investment Treaties: A Critical Discussion' *Trade, Law & Development* (2010) 2 19 at 24.
[6] Brower and Schill op cit note 2 at 472 - 473.
[7] Tarcisio Gazzini 'Bilateral Investment Treaties' in T Gazzini & E De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (2012) at 113 sees bilateral investment treaties as playing 'a crucial role in the promotion of the rule of law and the development of a stable and predictable legal framework.'
[8] See Brower & Schill op cit note 2 at 471 -472.

intervention by the investor's home state and, possibly, state-state dispute settlement,[9] but a trend towards the conclusion of treaties (both bilateral and multilateral) between states, in which host states provide guarantees for the protection of investments in their territories and which can be enforced directly by foreign investors by way of binding international arbitration, has emerged.

The concept of arbitration is based, at its most basic level, on the agreement between parties to that method of resolving disputes between them. In principle, either party to the agreement can initiate claims against the other.[10] As Paulsson explains, however, the development of the current international investment law regime has seen an expansion on, and indeed a departure from, that premise:

> 'This new world of arbitration is one where the claimant need not have a contractual relationship with the defendant and where the tables could not be turned: the defendant could not have initiated the arbitration, nor is it certain of being able even to bring a counterclaim.'[11]

Paulsson terms the development 'a dramatic extension of arbitral jurisdiction in the international realm',[12] where the true complainant is able to face the true defendant.[13]

By concluding bilateral investment treaties, states effectively open themselves up to direct (and usually substantial) claims from an indefinite and (at the time) unidentifiable number of claimants.[14] This, of course, not only binds the ruling regime at the time of the conclusion of the treaty, but all successive governments as well.

As I have stated, it is clear, however, that there has recently been some political push-back on this trend. This has stemmed from a number of criticisms of the current international investment climate.[15] One of these is a 'perceived unevenness created by a regime that protects property, investment and foreign investors without sufficient regard to other non-investment-related interests of host states', which, the argument proceeds, creates an

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[9] Paulsson 'Arbitration without Privity' (1995) 10 *ICSID Review: Foreign Investment Law Journal* 232 at 255 to 256 explains why this system of indirect dispute resolution was effectively unworkable.
[10] Ibid at 232.
[11] Ibid at 232 - 233.
[12] Ibid at 233.
[13] Ibid at 256.
[14] Ibid at 233.
[15] There are a number of criticisms levelled against the current investment law trends, including that it is unpredictable and inconsistently applied and that it is an attempt by developed states to impose their power on weaker developing states. This dissertation will, however, focus on the principled concerns surrounding the encroachment on and handicapping of the role of the state.

'asymmetrical legal regime that is detrimental to state sovereignty'.[16]

The very serious questions raised by these issues have, in recent years, created a need for robust introspection by states and, in a number of instances, even a complete reconceptualisation of the kind of obligations that states should be willing to take on. Indeed, Brower and Schill record that the perceived shortcomings of investor-state dispute resolution mechanisms have led to 'calls for replacement or radical redesign' of those mechanisms.[17]

This has been particularly evident in the South African government's seemingly sudden abandonment of its commitment to investment protection through its cancellation of various bilateral investment treaties and its proposed course of action, as encapsulated in the Protection of Investment Act 22 of 2015 ('the Act') (which was signed into law at the end of 2015 and will come into operation on a date yet to be proclaimed).

South Africa is not the only state to have resiled from investment treaties, nor, indeed, was it the first, yet this move has been heavily criticised by the business and international communities. The contentious stance adopted by the South African government on bilateral investment treaties is a prime example of a potential revival of the desire to uphold state autonomy above all else. It has been strongly defended by the government, which has cited concerns relating to its ability to fulfill its mandate to govern the Republic and to do so within the bounds of the Constitution of the Republic of South Africa, 1996 ('the Constitution').

It thus becomes imperative to interrogate the question of whether the stance adopted by the South African government, and its non-renewal of various bilateral investment treaties and the Act, are justified and acceptable under international law when viewed against the state's right and responsibility to regulate.

Objectives

This dissertation investigates the potential implications of the tension between the rights of a state and the need for the protection of international investments through the application of international law and international legal instruments and, in particular, the tension between the democratic model and investor-state arbitration.

I examine the protection of international investments and the resolution of investment

[16] Brower and Schill op cit note 2 at 474.
[17] Ibid at 475.

disputes under international law, considered in light of the state's right and responsibility to regulate. The potential implications of the tension between the rights of a state and the need for the protection of foreign investments through the application of international law and international legal instruments and, in particular, the tension between the democratic model and investor-state arbitration, are important considerations in the current international economic climate, where states are coming under increasing pressure to ensure that they provide a stable and attractive investment environment to compete effectively in a globalising international market.

There is a vast amount of writing that has been done on the legitimacy of the current international investment law regime, on investment treaties and on investor-state dispute settlement, in particular. There is a clear divide between commentators who argue that the current system is unacceptable and those that seek to defend it. Among the latter group, there are also those that recognise various problems with the system, but believe that it can legitimately be retained if various solutions to those problems are adopted. This dissertation seeks to analyse the arguments put forward by each side of the debate.

This dissertation then applies the conclusions reached in this analysis to the South African government's recent policy shift and the steps that the government has taken stemming from it.

Outline

Chapter II

In order to contextualise my analysis, I begin by briefly introducing the concept of the modern state and the concept that one of the primary roles of a state is to regulate, organise and govern its territory and those that fall within its jurisdiction.[18] I then introduce investment law as an area of international law,[19] and describe the main instruments that govern investment law, including bilateral investment treaties and certain multilateral investment treaties.[20]

The rationale for the current situation in relation to investment law and historical

[18] See Gazzini op cit note 7 at 113, citing the tribunal in *ADC Affiliate Limited and ADC & ADMC Management Limited v Hungary* ICSID Case No ARB/03/16, Award of October, 2 2006 at para 423 ('*ADC Affiliate*').
[19] See Jean d'Aspremont 'International customary investment law: story of a paradox' in T Gazzini & E De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (2012) for an analysis of the historical development of international investment law. See also Gazzini op cit note 7 at 112.
[20] Gazzini op cit note 7 at 106.

developments in the field will then be introduced, with a focus on the internationalisation of commerce, the need to create certainty to encourage investments, and the necessity to ensure consistent and predictable treatment of investments globally.[21] In particular, it is clear that there is indeed a link between 'the general attractiveness of a particular host state to foreign investors' and the state's acceptance of the rule of law.[22] I then detail the development of the trend towards the conclusion of investment treaties.[23]

Chapter III

Next, I proceed to set out, in brief, the standard framework of bilateral investment treaties and the form of protection offered therein to investors. This includes that they generally provide extensive substantive protection against unlawful and insufficiently compensated expropriation, unfair and inequitable treatment, denial of justice, and failure to provide a standard of national treatment, a failure to ensure a standard of most favoured nation treatment and a failure to protect and secure investments fully.[24]

I drill down into some of the most important features of bilateral investment treaties relating to dispute settlement,[25] including that investors can enforce the host state's obligations directly against such state,[26] in spite of the fact that no direct agreements between the host

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[21] See Jack J. Coe, Jr 'Transparency in the Resolution of Investor-State Disputes - Adoption, Adaptation and NAFTA Leadership' (2006) 54 *Kansas Law Review* 1339 at 1343 - 1345. See also Campbell McLachlan QC, Laurence Shore & Matthew Weiniger *International Investment Arbitration* (2007) at 212 - 219.

[22] Coe op cit note 21 at 1358 suggests that '[t]he fact that a state has ratified a treaty that promises minimum levels of treatment and an arbitral remedy is noteworthy'.

[23] Stephan W. Schill 'Enhancing Investment Law's Legitimacy: Conceptual and Methodological Foundations of a new Public Law Approach' 52 *Virginia Journal of International Law* 57 at 63 states that '[i]nvestment treaty protection has become a truly global phenomenon that limits government conduct vis-à-vis foreign investors in industrialized and developing countries alike.' See also d'Aspremont op cit note 19 at 18 - 19. Patrick Dumberry 'The legal standing of shareholders before arbitral tribunals: has any rule of customary international law crystallised?' (2010) 3 *Michigan State Journal of International Law* 353 at 355 describes the level of substantive protection afforded to investors under bilateral investment treaties as 'unprecedented' and the procedural benefits to investors as 'groundbreaking'.

[24] Barnali Choudhury 'Democratic implications arising from the intersection of investment arbitration and human rights' (2009) *Alberta Law Review* 46 983 at 985 states that:

> '[D]espite the lack of harmonisation among investment treaties, the treaties generally all contain a number of standard features. In particular, the treaties contain substantive state obligations and a dispute resolution forum to determine whether the state has met its substantive obligations.'

See also Schill op cit note 23 at 62 and 94 - 95.

[25] Choudhury op cit note 24 at 986 states that because the interpretation of treaties determines their impact, the dispute resolution provisions of a treaty are 'likely its most important feature'.

[26] Schill op cit note 23 at 68 describes this as the most important right for investors under international investment treaties. Susan D Franck 'The ICSID Effect? Considering potential variations in arbitration awards' (2011) 51 *Virginia Journal of International Law* 825 at 833 notes that the ability of the investor to sue the state directly makes investment treaty arbitration 'a unique creature' because it is states, rather than private law actors that typically enjoy international law rights.

state and the investor may exist;[27] that they usually contain a general consent to jurisdiction clause in respect of any breaches of that treaty; and that they generally allow investors to pursue claims against the relevant state through binding international arbitration proceedings.[28] In doing so, I explore the imperatives and perceptions that led to the establishment of the current trends, including the desire of foreign investors to have disputes determined outside of the local courts of the host state and, rather, through what they perceive to be a 'neutral and reliable forum'.[29]

Effectively, this concludes in an analysis of the role that international investment treaties play in binding the state and the extent to which they do so. This is explored whilst highlighting the tension that exists between the binding nature of such treaties and the concept of sovereign authority.

As Toby Landau QC has stated:

> 'The investor-state relationship that is in question in an investment arbitration is not equal or horizontal, but rather vertical and regulatory in character. In fact it is a public law exercise, in which a tribunal can review every act of the state, be it an act of the Executive, Legislature or Judiciary. The tribunals may in fact discipline states and their decisions may have substantial influence on whole populations, because their decisions influence the allocation of public funds and similar matters. This widespread impact of investment arbitration causes a concern and a "legitimacy crisis".'[30]

This concern regarding a legitimacy crisis requires an analysis of the justification for disquiet with the concept of private dispute resolution having the ability to restrict the exercise of public power by the state. It also requires an analysis of the desirability of the material public implications that private adjudications can have under international investment law and the clash between such adjudications and the alternative form of resolution, being domestic

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[27] The general position under international law is that the relationship between states is what is regulated and individual actors are only affected indirectly. See Coe op cit note 21 at 1343 - 1347. Coe states that '[b]y processing its claim in the prescribed manner, the investor accepts what is functionally a treaty-based standing offer by the host state to arbitrate a particular class of claims with a defined class of persons'. Choudhury op cit note 24 at 989 states that because the general consent by states to arbitration in investment treaties' is provided *ex ante*, the opportunity to arbitrate is extended to a wide variety of potential claimants whose identity is unknown at the time consent is given, and for a broad range of potential disputes, the nature of which is also unknown at the time of consent.' See also Gazzini op cit note 7 at 108 - 112 and 125 and Ernst-Ulrich Petersmann 'International rule of law and constitutional justice in international investment law and arbitration' (2009) 16 *Indiana Journal of Global Legal Studies* 513 at 524.

[28] See Choudhury op cit note 24 at 987.

[29] Singh and Sharma op cit note 1 at 91.

[30] Toby Landau QC 'Saving Investment Arbitration from itself' Freshfields lecture 30 November 2011.

resolution of disputes. The question, which must ultimately be answered, is the balance to be struck between such disquiet and the desirability of binding states to respect the rule of law.

The supporters of investment treaties justify the prevailing regime through a number of considerations. Brower and Schill, for example, describe the ability of investors to sue host states directly as 'but a modest limitation on the host state's sovereignty' that is 'essential to creating a basis for effective and efficient foreign-investment activities.'[31] They clearly see the reality as a trade-off that is relatively minor from the state's perspective (liability is only triggered if the state unfairly interferes with the investor's investment or fails to fulfill a promise), and entirely necessary from the perspective of investors, which strikes the right balance between competing considerations. Gazzini is similarly of the view that these treaties 'strike a balance between the sovereign prerogatives of state parties and the need to protect the legitimate expectations that these treaties create for foreign investors.'[32]

Other justifications include the idea that, through investor-state dispute settlement provided in investment treaties, the problems arising from the possibility of courts in the host state being sensitive to the needs of that state (to the detriment of investors) can be avoided,[33] and that parties have control over the appointment of arbitrators and a chosen law, which excludes the automatic application of the domestic law of the host state in governing a dispute.[34]

I then deal with the increase in global criticism that the current global investor-state dispute settlement regime has been under, focusing on its legitimacy in light of numerous compelling concerns relating to, *inter alia*, both the processes that are followed and the outcomes in various disputes.[35]

Chapter IV

In the penultimate chapter of this dissertation, I set out a background to the current situation in South Africa in relation to investment treaties. This will cover the fact that the South African government concluded over 40 bilateral investment treaties, prior to 2008.[36] It is important to note that all bilateral investment treaties concluded by South Africa contain

[31] Brower & Schill op cit note 2 at 482.
[32] Gazzini op cit note 7 at 100.
[33] Dolzer & Schreuer op cit note 1 at 20, cite the depoliticisation of investment disputes as a 'major advantage'.
[34] See Singh and Sharma op cit note 1 at 95-96.
[35] See Schill op cit note 23 at 63.
[36] See Engela C. Schlemmer 'An overview of South Africa's bilateral investment treaties and investment policy' (2016) 31 *ICSID Review* 1 167 at 169 for a full analysis of the investment treaties concluded by the South African government since 1994.

dispute resolution provisions that allow for investor-state arbitration.[37]

In this chapter, I also traverse the only two instances where South Africa's investment treaties have, to date, been enforced. The first of these was in 2001, when a Swiss national initiated, and was successful in, arbitration proceedings under the UNCITRAL rules of arbitration, alleging breach of South Africa's bilateral investment treaty with Switzerland based on an allegation that the South African authorities had failed to provide adequate protection and security for an investment in a game farm and accompanying hotel and conference center. The second was in 2006/7, when the South African government faced a major international investment treaty arbitration in the case of *Foresti v Republic of South Africa*.[38] The case was ultimately settled with the South African government paying a significant settlement figure to the investors.[39]

In 2009, the government commissioned a review of its investment policies, including those relating to bilateral investment treaties.[40] This dissertation will summarise and analyse the outcome of this review, which concluded that a change was needed. In this context, I will explore the justification cited for the change, including:

1) a concern that bilateral investment treaties conflicted with the South African Constitution;[41]

2) that the proliferation of bilateral investment treaties endangered the South African government's ability to implement important policies;[42]

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[37] Ibid at 183.

[38] *Piero Foresti, Laura de Carli and others v. Republic of South Africa*: ICSID Case No ARB(AF)/07/1 (*'Foresti'*). Dennis Davis & Hugh Corder 'Globalization, national democratic institutions and the impact of global regulatory governance on developing countries' (2009) *Acta Juridica* 68 at 83 describe the *Foresti* case as providing 'a graphic illustration of a direct clash between internationally-recognized financial interests on the one hand and democratically required developmental initiatives at a domestic level on the other.' The *Foresti* case is also discussed by Choudhury op cit note 24 at 990 and Andrew Friedman 'Flexible arbitration for the developing world: Piero Foresti and the future of bilateral investment treaties in the global South' (2010) 7 *Brigham Young University International Law & Management Review* 37.

[39] These cases are summarised in Schlemmer op cit note 36 at 179 - 180 and 187.

[40] Ibid at 185.

[41] I note that the reason cited for Venezuela's withdrawal from the ICSID regime is the inconsistency between the arbitration of oil and gas disputes with the Venezuelan constitution. See Singh and Sharma op cit note 1 at 93. Schlemmer op cit note 36 at 180 - 181 sets out the possible gap between the standard offered under South Africa's investment treaties and that under South Africa's Constitution, concluding that the majority of South Africa's bilateral investment treaties do not allow for the full implementation of policies such as those implemented through the Broad Based Black Economic Empowerment Act 53 of 2003 and the Preferential Procurement Policy Framework Act 5 of 2000 and that they generally provide a much higher standard for compensation for expropriation than that guaranteed under the Constitution.

[42] Schlemmer op cit note 36 at 173 deals with the issue that South Africa did not negotiate preambles to its international investment treaties to set out the government's goals, aims and values to ensure that these are taken

3) a conclusion that bilateral investment treaties have no material bearing on the flow of foreign direct investment into South Africa;[43]

4) a concern that international tribunals tend to expand their jurisdiction under the bilateral investment treaties, are too independent and are inconsistent;[44] and

5) a perception that bilateral investment treaties place untenable obligations on host states.[45]

I then turn to consider the actions that the South African government has taken in deciding not to renew various bilateral investment treaties and the implications of this for future investments.[46]

In this chapter I focus on the Act. The Act is undeniably a substantial departure from the investment treaty regime and international law standards and includes various features that clearly move away from the foundations on which the current investment law regime is grounded.[47] For instance, the Act contemplates the vesting of power to decide all disputes in domestic courts, it curtails the possibility of claiming compensation significantly and alters the standard of compensation to be what is just and equitable, rather than full market value compensation, and it does away with fair and equitable treatment protection and does not guarantee repatriation of returns and investments. Moreover, the Act, being domestic legislation, can always be repealed without further ado.[48]

Here I focus on the dispute resolution mechanisms contemplated in the Act and how these are significantly different from the standard previously applied under South Africa's various bilateral investment treaties. I also consider the fact that South Africa ultimately has

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into account by Tribunals assessing the actions of the South African government.

[43] This is an issue of some debate. See, for example, David D. Caron 'Investment disputes and the public interest': conference paper prepared for the International Council for Commercial Arbitration Congress held in Miami in 2014, published in ICCA Congress Series No 18 at 776 at 779 and Gazzini op cit note 7 at 103.

[44] Jonathan Klaaren and David Schneiderman, 'Investor State Arbitration and SA's Bilateral Investment Treaty Policy Framework Review' comment submitted to the DTI, 10 August 2009 at 4 - 5. The inconsistency of arbitral tribunals is also a matter of debate. See Gazzini op cit note 7 at 103.

[45] See Fola Adeleke 'Benchmarking South Africa's foreign direct investment policy' (April 2015) *SAIIA Policy Insights* 13 at 1-2 for a summary of the justifications put forward by the South African government.

[46] See Schlemmer op cit note 36 at 176.

[47] Ibid at 193. Schlemmer states that it is clear that the South African government is 'doing away with investor-State arbitration in its entirety.'

[48] See Makane Moïse Mbengue 'National legislation and unilateral acts of states' in T Gazzini & E De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (2012) for a discussion of whether domestic investment protection legislation can found enforceable obligations under international law.

developed parallel systems in relation to the settlement of investment disputes.[49]

Whether the provisions of the Act in fact address the very real concerns that the current protection of investment regime raises and whether they are indeed likely to bring about what the South African government has stated its motivation to be in its 2009 review and in the Act is certainly questionable. I consider this and address a concern that has been mooted that the Act will not provide sufficient protection for investment to encourage such investment at appropriate levels.[50]

I also consider the question marks surrounding whether the government's decision to terminate investment treaties, seemingly without considering the option of seeking to renegotiate terms, or indeed to reach agreement on interpretive notes which could ensure that South Africa's investment treaties are not interpreted in a way that South Africa finds untenable,[51] does serious damage to South Africa's reputation at an international level as a trading partner that can be relied on.[52]

Chapter V

This dissertation then turns to consider how various other states or institutions have reacted to and implemented the developments and changes that have taken place in international investment law.

It is important to explore the various strategies for regime reform that have been adopted globally, including the adoption of new model bilateral investment treaties,[53] the introduction of interpretive statements or amendments to existing bilateral investment treaties, bilateral investment treaty terminations (which South Africa has opted for), the replacement of older bilateral investment treaties with newer regional treaties and the promotion of various

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[49] See Schlemmer op cit note 36 at 192, where she states that 'there is currently more than one system of protection in place, with a new system under construction.' See also Adeleke op cit note 45 at 4 where he states that the Bill, and this is equally true of the Act, has created 'regulatory uncertainty'.

[50] Schlemmer op cit note 36 at 192 suggests that the steps taken by the South African government do not 'bode well for attracting future investments.'

[51] Brower & Schill op cit note 2 deal with the possibility of agreeing to binding interpretations at 494, citing the exchange between Panama and the Argentine Republic of diplomatic notes with an 'interpretive declaration' of the most favoured nation clause in their 1996 investment treaty after a decision of an arbitral tribunal in 2006.

[52] There is precedent for the issuance of interpretive notes by states after the relevant treaty has come into force. Coe op cit note 21 at 1369, for example, discussed notes issued by the NAFTA contracting parties relating to the confidentiality of proceedings. Adeleke op cit note 45 at 7 opines that the stance adopted by the South African government 'will likely have significant adverse implications… at least as far as confidence in investing in such a volatile situation is concerned'.

[53] See McLachlan et al op cit note 21 at 27 - 29.

institutional reforms (such as transparency of proceedings,[54] arbitrator qualifications and ethics, and amicus participation[55]).

In this context, I explore the steps taken by the United States and how it has sought to carve out policy space through, *inter alia*, its model investment treaty,[56] and how it has ensured both transparency of proceedings in investor-state disputes and the ability of third parties to participate in those proceedings,[57] and, as a comparator, the approach adopted by other developing actors, and, in particular, India. I then consider the Southern African Development Community's ('SADC') approach. I will also consider how South Africa, as a member of SADC, has adopted a different stance in the Act and the possible implications of this incongruence.[58] This again ties into the discussion about inconsistent regimes that now apply to international investments in South Africa.[59]

Finally, I consider whether the South African government could have adopted a better course of action in the circumstances.

Conclusion to be reached

This dissertation is aimed at reaching a finding on whether the stance adopted by the South African government, its termination of various of its bilateral investment treaties and its proposed course of action, as encapsulated in the Act, with a particular focus on the scope for the settlement of its investment disputes, is justified and acceptable under international law when viewed against the state's right and responsibility to regulate.

Schill has defined the 'heart' of the critique of international investment law as residing in 'the observation that investment treaty arbitration restricts governmental action, and therefore concerns questions of public law, without relying on a dispute settlement mechanism that conforms to core public law values, including democracy, equal treatment, separation of powers, legal certainty and predictability, or in other words, the rule of law'.[60] As I will note

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[54] Ibid at 57, where the authors state that in investment disputes, the involvement of states and the implication of issues of public character 'mean that transparency and accountability are beginning to outweigh privacy and confidentiality in importance.'
[55] Ibid at 57 - 58.
[56] Ibid at 209 - 210. The authors cite, for example, the US model investment treaty as referring in its preamble to the objective of improving living standards and a desire to achieve its objectives 'in a manner consistent with the protection of health, safety and the environment, and the promotion of internationally recognized labor rights'.
[57] Ibid at 59.
[58] Adeleke op cit note 45 discusses this issue in detail.
[59] Ibid at 4 - 5. The author suggests that South Africa is 'exposed to too many simultaneous platforms of dispute settlement.'
[60] Schill op cit note 23 at 67.

later in this dissertation, although acknowledging its cogency, he ultimately suggests that the public nature of investment disputes does not mean that the entire investment treaty system should be dismantled or overhauled, but rather that public law concepts should be applied to the system (comparative public law can be analysed to see how public law systems deal with comparable situations relating to the power of states to act in relation to private parties)[61] to develop it in a more legitimate way.

Similarly, other commentators have suggested that the principle of the rule of law and the protection of human rights are both linked to justice and note that the protection of human rights is dependent on the rule of law.[62] These concepts are thus interrelated and should not be seen as competing ideals. Petersmann states that '[h]uman rights and investment law are both aimed at legal protection of rights by means of legal and judicial restraints on government powers…'.[63]

Indeed, as I argue, constraints on state power are not new to South Africa. Our very constitutional order is premised on the notion that the government is bound to act within particular and defined parameters and private actors are able to enforce those parameters. The notion that South Africa's domestic public law principles could inform its international investment policies (rather than de-legitimising them entirely) is appealing. This could include amendments, for example, to ensure transparency in proceedings and the ability of third parties to make representations to tribunals.

It has also been posited that 'the flexibility of the bilateral framework permits states to tailor their commitments to their specific [and evolving] needs'.[64] There are a number of ways in which this can be done. Importantly, these needs can be worked into the wording of the treaty itself, contracting parties can modify their obligations through protocols, amendments or subsequent practice, as may be necessary and, finally, parties can adopt binding common interpretations.[65] On the substantive front, this can include confirmation of the right of the state parties to regulate in specific domains, even if this would otherwise be a breach of its international obligations.[66]

Perhaps the Great Divide that seems to separate the two sides in what has been reduced into a

[61] Ibid at 88.
[62] Petersmann op cit note 27 at 521.
[63] Ibid at 523 -524.
[64] Gazzini op cit note 7 at 105.
[65] Ibid at 105 - 106.
[66] Ibid at 114 - 115.

largely binary debate can be bridged. Perhaps the question should not be whether investor-state dispute settlement in its present guise is legitimate or not. Perhaps the question should be how it can be made more legitimate.

Fully appreciating that this may be a challenging path to try to navigate, I ultimately argue that the benefits and merits of investor-state dispute settlement should not be discarded purely because it can also be faulted. More analysis of whether the general concerns surrounding it can be addressed, or whether they are inherent aspects of the system and inseparable from it, is needed. The international community should at least attempt to find a middle ground.

With this as its springboard, this dissertation examines the concepts of the legitimacy of the current international investment law regime, and, indeed, the role of investment arbitration and its interaction with the right and responsibility of the state to regulate through the lens of the very recent and significant steps taken by the South African government. Although there is clearly a need for reform of some sort, I will seek to establish that the stance adopted by the South African government leaves much to be desired.

CHAPTER II - INTRODUCING THE CONCEPTS

In order to set the scene for the remainder of my research, in this chapter I will introduce some of the key concepts that this dissertation will be centrally concerned with. This will be done at a high level and these concepts will be more fully developed, to the extent necessary, in the chapters that follow.

The concepts of (i) the state and its rights and responsibilities; (ii) international investment law, as a field of international law, albeit with a set of its own peculiar attributes; and (iii) the way in which investment law has been developed and is implemented, are important background topics that need to be touched on up front. This is done with the express rider that I do not purport to address the nuances and complexities of each of these concepts and with the full acknowledgement that the summaries below are a fairly high level and macro exposition.

The concept of the modern state

In order to analyse the potential effects of a treaty on the obligations of a state, it is important to understand the role that states play in the international community. In order to understand that, one must begin by appreciating what a state is. Of course this enquiry has been written on extensively and yields no simple answers. For the purposes of this dissertation I intend to contextualise my analysis through a broad overview of what a state is in its most simple terms.

One fairly rudimentary definition is that 'a state is a territorial body controlled by a government and inhabited by a population.'[67] For the purposes of this dissertation, the central control of the territory is what I will focus my attention on. Indeed, one of the primary roles of a state is to regulate, organize and govern its territory and those that fall within its jurisdiction and a state is generally isolated from interference by other states or actors as a matter of course.[68] This concept was traditionally enforced through the idea of sovereignty - the concept that each state will determine its own system of governance and will refrain from

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[67] Joshua S. Goldstein *International Relations* 5 ed (2004) at 10. Basedow op cit note 2 at 11 states that '[t]he world is divided into territorial units housing permanent populations each of which is subject to the exclusive and comprehensive rule of an apparatus consisting of various agencies - including those responsible for legislation, adjudication and administration - which is called a sovereign state'.

[68] See Gazzini op cit note 7 at 113, citing the tribunal in *ADC Affiliate* supra note 18 at para423. See also Eric Allen Engle 'The transformation of the international legal system: the post-Westphalian legal order' (2004) *QLR* 23 at 25.

interfering in the internal affairs of other states.[69]

While this concept is certainly no longer absolute,[70] it is accepted that '[t]he right of States to adopt measures to preserve their existence has long been established as a fundamental principle of international law.'[71] And 'the right to maintain "internal peace and social order" has … been described as the fundamental purpose of every State'.[72] Indeed, Bottini posits that a country cannot forego its right to 'adopt measures necessary to maintain public order'.[73]

States are thus inherently entitled, and indeed obliged, to govern and control their territories and must retain (and be afforded) the space and ability to do so despite an increasingly interconnected international community and an increasingly intertwined international market where foreign investment plays an important role in the economic independence of states and in the interconnectedness of states to a global community. Domestic law cannot solely govern this relationship and international law, particularly, international investment law, has a central role to play.

International Law

States exist and interact with one another in the international realm, which is (at least to some extent) governed by international law concepts. It thus becomes important to understand the nature of international law. Dugard defines international law as 'a body of rules and principles which are binding upon states in their relations with one another.'[74] It is clear from this basic definition that states are the primary subjects of international law.[75] Forsyth too describes international law as 'essentially a supra-national legal order regulating the legal relations between states'.[76] Menon states that the principal purpose of international law was originally 'to keep states peacefully apart', or to facilitate their coexistence.[77]

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[69] Engle op cit note 68 at 24.
[70] Ibid at 43.
[71] Bottini, G 'Protection of Essential Interests in the BIT Era' in TJ Grierson Weiler (ed) *Investment Treaty Arbitration and International Law* (2008) at 145.
[72] Ibid at 145.
[73] Ibid at 146.
[74] John Dugard *International Law: A South African Perspective* 3 ed (2005) at 1.
[75] Benedict Kingsbury, Nico Krisch, & Richard B. Stewart 'The emergence of global administrative law' (2005) *Law & Contemporary Problems* 15 at 23. See also Dugard op cit note 74 at 1 and Dr P.K. Menon 'The international personality of individuals in international law: a broadening of the traditional doctrine' (1992) *Journal of Transnational Law & Policy* 151 at 151 -153.
[76] CF Forsyth *Private International Law* (2012) at 5. See also Menon op cit note 75 at 151.
[77] Menon op cit note 75 at 151. The author states that '[r]elationships with other [s]tates were mostly bilateral in nature and involved only limited aspects of international law such as peace, alliance, navigation, and national boundaries.' See also Coe op cit note 21 at 1343.

Dugard, however, goes on to confirm that international law no longer concerns itself with states only but that there are other actors on the international stage.[78] Indeed, 'profound changes' can be seen in the scope and content of international law, particularly in the fact that international organizations and individuals are 'increasingly becoming capable of asserting their rights before international tribunals'.[79]

Dugard confirms that the signing of treaties has extended the protection of international law to individuals and that the relationship between states, on the one hand, and both individuals and multinational corporations, on the other, can be governed by international law.[80] Indeed, Engle confirms that multinational corporations are 'increasingly influential on the world stage'.[81]

It is also clear that the principle of sovereignty is no longer absolute.[82] Engle states that 'though it is premature to speak of the death of sovereignty, we can speak of an erosion and transformation of the sovereign power from a unitary hierarchy to multiple poles of competing influence…'[83]

In line with an expanded concept of international law, Allott proposes that:

> 'The social function of international law is the same as that of other forms of law. It is a mode of the self-constituting of a society, namely the international society of the whole human race, the society of all societies. Law is a system of legal relations which condition social action to serve the common interest. Law is a product of social processes which determine society's common interest and which organize the making and application of law. The international legal system integrates all subordinate legal systems … and regulates the international public realm and the interaction of subordinate public realms …'.[84]

International investment law

International investment law is a species of international law[85] that fully exposes these developments in the international law concept.[86] It deals with the consequences and obligations arising from investments by entities or individuals of one state in the territory of

[78] Dugard op cit note 74 at 1.
[79] Menon op cit note 75 at 151 - 154 and 156.
[80] Dugard op cit note 74 at 1 - 2.
[81] Engle op cit note 68 at 38.
[82] Ibid at 43.
[83] Ibid at 43.
[84] Philip Allott 'The concept of international law' (1999) *European Journal of International Law* 31 at 31.
[85] See Schill op cit note 23 at 58.
[86] See Gazzini op cit note 7 at 109.

another state. Sourgens states that '[m]odern Investment Law is private in substance. It regulates inherently commercial transactions. Yet, it has developed as an offshoot of public international law.'[87]

States have concluded treaties of commerce among themselves for centuries[88] and the protection of aliens and foreign property has always been a consideration of public international law.[89] But the niche field of international investment law has emerged as a result of a need for the legal consequences of international investments to be defined more precisely.[90] Otherwise put, '[t]he public function of international investment law consists of establishing principles of investment protection under international law that provide for the protection of property and endorse rule of law standards for the treatment of foreign investors by states.'[91]

For the purposes of this dissertation, the focal point of investment law is to be found at the intersection between a state's control over its internal affairs, and the ability of individual, non-state, actors to enforce international law rights. Although the host state's right to regulate its internal affairs in the public interest has been acknowledged in the investment law context,[92] there is clearly a possibility that the rights of investors may have an impact on what would otherwise be an impenetrable regulatory space.

How the current investment law regime has developed

Globalisation has been defined as 'the process of increasing interconnectedness between societies… A globalised world is one in which political, economic, cultural, and social events become more and more interconnected…'[93] Globalisation has meant the expansion of markets and the international mobility of goods and services.[94] This has invariably meant an increasing level of investment in foreign states and, as Basedow points out, the gain in mobility is undeniably irreversible.[95] Many multinational corporations have developed to the

[87] Frederic Gilles Sourgens 'ICSID Arbitration and the Importance of Public Accountability of a Private Judicature - A Roman Law Perspective' (2007) *International Community Law Review* 59 at 63.
[88] McLachlan et al op cit note 21 at 4.
[89] See Singh & Sharma op cit note 1 at 89 and Coe op cit note 21 at 1343.
[90] Coe op cit note 21 at 1350 states that 'many segments of international law doctrine relevant to investor protection are fragmentary, highly fact-dependent, and arguably, indeterminate'. See also Gazzini op cit note 7 at 131.
[91] Schill op cit note 23 at 59.
[92] Bottini op cit note 71 at 145.
[93] Basedow op cit note 2 at 8
[94] Ibid at 8 - 9.
[95] Ibid at 10.

point where they have larger turnovers than many states.[96] The accumulation of capital in particular states in excess of the investment opportunities in those states has led to an increase in international investment.[97]

From the perspective of the investment-receiving states, it is clear that foreign investment and the injection of capital and opportunities for growth and development that it brings are highly desirable.[98] Dumberry states that with the era of globalisation, 'private foreign investments were (almost) universally deemed by States as an essential tool for their economic development',[99] and Singh and Sharma state that '[f]oreign investment plays a key role in the progress and development of a country, in particular those which are less developed'.[100]

As Brower and Schill state, 'both capital-importing and capital-exporting countries derive benefits from increased flows of foreign investments.'[101] And so there is a general desire in the globalised international community that the conditions necessary to facilitate international investment should be fostered.

With the increased ability to invest in foreign states, both financially, and logistically, and an increased desire for incoming foreign investment on the part of most states, and developing states in particular, has come a need for those investments to be regulated and protected.[102] The need to create certainty to encourage investments and the necessity to ensure consistent and predictable treatment of investments globally[103] cannot be gainsaid.[104] Tobin and Rose-Ackerman state that:

> 'Investors always face risks because changes in market prices and opportunities cannot be perfectly predicted ex ante. However, in many developing countries the risk goes beyond ordinary market risk. Investors may have little trust in the reliability and fairness of property rights and government enforcement, and, conversely, local businesses, citizens, and politicians may have little confidence in the motives and staying power of international

[96] Engle op cit note 68 at 28.
[97] McLachlan et al op cite note 21 at 3.
[98] See Sourgens op cit note 87 at 61.
[99] Patrick Dumberry 'Are BITs Representing the "New" Customary International Law in International Investment Law?' (2010) *Penn State International Law Review* 675 at 678.
[100] Singh & Sharma op cit note 1 at 89.
[101] Brower & Schill op cit note 2 at 496.
[102] See Sourgens op cit note 87 at 69 - 70.
[103] See Coe op cit note 21 at 1343 - 1345. See also McLachlan et al op cit note 21 at 212 - 219. Dumberry op cit note 99 at 676 states that 'the question of the existence of legal protection for foreign investors under customary international law … has always been controversial.'
[104] See also Singh & Sharma op cit note 1 at 89, who suggest that 'in the absence of mechanisms to protect such investments, foreign investors are reluctant to employ resources in countries…'

> business. Investors complain that the rules are unclear and variable over time. Critics in the host country worry that international investors will reap most of the gains and will flee at the first sign of trouble. In the extreme, the distrust on both sides can be so large that little or no investment takes place, even when this investment would be beneficial to both parties.'[105]

Coe asserts that:

> 'The general attractiveness of a particular host state to foreign investors is a function of numerous criteria that include that state's acceptance of the rule of law. The fact that a state has ratified a treaty that promises minimum levels of treatment and an arbitral remedy is noteworthy; as telling, however, is how that state honors its promise to arbitrate, and the official positions it takes with respect to important protections and doctrines.'[106]

The need for visible investment protection is possibly even more important for developing countries. Schlemmer states that 'unless there are adequate treaties establishing the necessary safeguards for potential foreign investors, the latter will likely not be enticed to wager an investment in a developing country with an uncertain or uninspiring record…'.[107]

The desirability of clear legal rules to govern international investments is palpable. Although there is some debate around this topic, it also seems relatively easy to argue that there is a link between 'the general attractiveness of a particular host state to foreign investors' and that state's acceptance of the rule of law.[108]

The bodies, instruments and structures that have been established to implement investment law

Although there is no clear and overarching customary international law that is applicable to all international investments,[109] international investment law may be enforced through a number of mechanisms. Maupin posits that it 'encompasses a vast number of interwoven

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[105] Jennifer Tobin and Susan Rose-Ackerman 'Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties' (2003) *William Davidson Institute Working Paper Number* 587 at 2.
[106] Coe op cit note 21 at 1358 - 1359. See also Caron op cit note 43 at 779.
[107] EC Schlemmer 'Protection of Investors and Investments' (2009) *SA Merc LJ* 734 at 734. Although this appears to be a widely held view, it has not been without critique and the various factors motivating or impeding investment in a foreign state will be examined in more detail later in this dissertation.
[108] Coe op cit note 21 at 1358 suggests that '[t]he fact that a state has ratified a treaty that promises minimum levels of treatment and an arbitral remedy is noteworthy'. See also Gazzini op cit note 7 at 103 and 107.
[109] See Dumberry op cit note 99 at 677 - 678 for an analysis and historical explanation of this. See also Stephan W. Schill 'General Principles of Law and International Investment Law' in T Gazzini & E De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (2012) at 134.

legal instruments protecting foreign investors and their investments.'[110] The basic types of instruments utilised in investment law are treaties, investor-state contracts, and domestic investment legislation.[111]

Investor-state contracts, however, have their limitations, since it is only those investors with a significant amount of bargaining power that could rely on a negotiation process with a state yielding any real form of protection.[112] Domestic legislation, similarly, has significant limitations since it is in the sole control of the host state,[113] may be withdrawn summarily and is enforced through the local courts of a host state.[114] I will expand on, and interrogate, these perceived deficiencies later but it is effectively because of these potential shortcomings that reciprocal[115] investment treaties have become the predominant means of enforcing obligations under international investment law.

The rationale behind investment treaties has been described by Maupin as follows:

> 'The idea was that by providing privately actionable protections to foreign investors, backed by a neutral international dispute settlement system, states could encourage the private sector to invest…'.[116]

Otherwise put, '[i]n an investment treaty, the host state deliberately renounces an element of its sovereignty in return for a certain new opportunity: the chance to better attract new foreign investments…'.[117]

The commencement of '[t]he era of modern investment treaties' is generally accepted as the adoption of a bilateral agreement between Germany and Pakistan in 1959'.[118] The robust development of the trend towards the conclusion of treaties that govern investments[119] (in the form of multilateral and bilateral investment treaties, various Free Trade Agreements and a

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[110] Julie A. Maupin 'Public and Private in International Investment Law: An Integrated Systems Approach' (2014) *Virginia Journal of International Law* 367 at 379 - 380.
[111] Ibid at 380.
[112] See Brower & Schill op cite note 2 at 481 - 482.
[113] See Mbengue 48 at 183.
[114] Brower & Schill op cite note 2 at 479 discuss the concerns surrounding this.
[115] Schlemmer op cit note 107 at 734 confirms that 'the nationals of the home country who would invest in the other country that is party to a particular agreement will also be entitled to the same protection afforded to the foreign investors of the other country.'
[116] Maupin op cit note 110 at 375.
[117] Dolzer & Scheuer op cit note 1 at 23.
[118] Ibid at 18.
[119] See d'Aspremont op cit note 19 at 18 - 19. Dumberry op cit note 23 at 355 describes the level of substantive protection afforded to investors under bilateral investment treaties as 'unprecedented' and the procedural benefits to investors as 'groundbreaking'.

number of regional trade agreements[120]), since then, has been fuelled by this incentive and has been fortified by the fact that they have appeared to be the most effective means of establishing rules that will govern international investment,[121] albeit on a somewhat piecemeal basis, and of ensuring investment protection.[122]

Investor-state dispute settlement under investment treaties

Arguably the most powerful feature of investment treaties is that they generally include a pre-emptive and general consent[123] (which cannot unilaterally be revoked)[124] by the host state to referral of all investment disputes arising in respect of investors from the home state to binding dispute resolution.[125] They also, provide a method of direct recourse for investors against the host state, and remove disputes from the ambit of the local courts of the host state. I note that in the absence of this, aggrieved investors are obliged to rely on the intervention of their home state, which is certainly far from guaranteed, being within the complete discretion of that state, on an international level,[126] or on proceedings in the host state's courts, which, in at least some instances, may be a viable avenue only in theory.[127] As Coe ventures, these options would 'not offer much comfort to prospective investors'.[128]

[120] Robin F. Hansen 'Parallel proceedings in investor-state treaty arbitration: Responses for treaty drafters, arbitrators and parties' (2010) *The Modern Law Review* 523 at 525 - 526.
[121] Gazzini op cit note 7 at 99 states that bilateral investment treaties 'play a prominent role with regard to both the creation of a stable and predictable normative framework…'.
[122] See Hansen op cit note120 at 526 - 527 for a discussion on whether the network of investment treaties operates as a system in which general principles are being applied and developed.
[123] Coe op cit note 21 at 1347 terms this a 'treaty-based standing offer by the host state to arbitrate a particular class of claims with a defined class of persons'.
[124] Singh & Sharma op cit note 1 at 94 deal with the consequences of the customary rules of international law, as codified in the Vienna Convention on the Law of Treaties of 22 May, 1969 and the Vienna Convention on the Law of Treaties between States and International Organisations of 21 March 1986, which provide that a state has a right to withdraw from a treaty in accordance with the terms of that treaty, or by consent of all parties to the treaty. In the absence of any specific provision, a state party may not denounce or withdraw from a treaty, unless (i) 'it is established that the parties intended to admit the possibility of denunciation or withdrawal'; or (ii) 'a right of renunciation or withdrawal may be implied by the nature of the treaty'. See also Dolzer & Schreuer op cit note 1 at 23.
[125] McLachlan et al op cit note 21 at 5. See also Schlemmer op cit note 107 at 745 - 746. Note that the investor's consent is only registered when a dispute is referred and it is thus not competent for the state to launch proceedings against the investor. See Hansen op cit note 120 at 527 - 528.
[126] See Schlemmer op cit note 107 at 741 - 742. See also Coe op cit note 21 at 1344 - 1345 and Brower & Schill op cit note 2 at 480.
[127] Coe op cit note 21 at 1344.
[128] Ibid at 1345.

One of the most remarkable features of the development of the trend towards the conclusion of investment treaties is that state conduct can be, and is, scrutinised by arbitrators.[129] Van Harten states that:

> 'The treaty-based investment regime incorporates one of the most powerful systems of international adjudication in modern history. This system re-allocates powers from states to multinational companies and from domestic courts to a private arbitration industry based in Washington, New York, London, Paris, The Hague, and Stockholm.'[130]

Thousands of multilateral and bilateral investment treaties (the latter category far outweighing the former)[131] have been concluded between states in the last few decades.[132] McLachlan et al have described the result as a 'patchwork quilt of interlocking but separate … treaties'[133] and Schill states that '[i]nvestment treaty protection has become a truly global phenomenon that limits government conduct vis-à-vis foreign investors in industrialised and developing countries alike.'[134]

In 1965, a dedicated framework for the arbitration of investor-state disputes, in the form of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('the Convention'), was established.[135] The Convention was formulated by the Executive Directors of the World Bank and entered into force on 14 October 1966.[136] The development of the Convention was:

> '[P]rompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.'[137]

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[129] See Hansen op cit note 120 at 527. Hansen expands on this notion at 528 by stating that 'investment arbitration is primarily aimed at reviewing state conduct for its compliance with state obligations'.
[130] Van Harten op cit note 5 at 20.
[131] This is because multilateral attempts to negotiate treaties have largely been unsuccessful. See Dumberry op cit note 99 at 678; Gazzini op cit note 7 at 100; and d'Aspremont op cit note 19 at 18.
[132] McLachlan et al op cit note 21 at 5. See also Dumberry op cit note 99 at 676.
[133] McLachlan et al op cit note 21 at 5. Sourgens op cit note 87 at 61 describes investment law as deriving 'from a web of treaties'.
[134] Schill op cit note 23 at 63.
[135] McLachlan et al op cit note 21 at 4. The authors state that the Convention 'undoubtedly marks a considerable improvement in the procedures available for the settlement of such disputes'.
[136] Text of the ICSID Convention Regulations and Rules (April 2006), Introduction, at 5, last accessed from *https://icsid.worldbank.org* on 26 May 2016.
[137] See the text of the 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' at 40, last accessed from *https://icsid.worldbank.org* on

The Convention established the International Centre for the Settlement of Investment Disputes ('ICSID'), 'the world's leading institution devoted to international investment dispute settlement', which has administered the majority of all international investment cases.[138] Menon asserts that ICSID was established as a result of a recognition of the 'need for granting the private foreign investor jurisdictional capacity in international law'.[139]

In accordance with the provisions of the Convention, ICSID provides facilities for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states.[140] It claims to be 'an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and States helps to promote international investment by providing confidence in the dispute resolution process'.[141]

There were 52 cases registered with ICSID during the 2015 calendar year and, as of 31 December 2015, ICSID had registered 549 cases.[142] Coe describes ICSID as providing 'an autonomous arbitration system accepted by over 140 state parties'.[143] ICSID tribunal decisions are binding and enforceable against states,[144] but it must be noted that only states that have consented to its jurisdiction can be brought before ICSID.[145] The Convention is also deliberately silent on any substantive norms.[146]

The early ICSID caseload was largely made up of disputes arising from claims under contracts between investors and states in which ICSID had been nominated as the body to settle disputes between the parties.[147] But the emergence of the 'widespread provision within investment treaties for the direct invocation of arbitration claims by investors themselves against host states' has shifted the legal landscape.[148]

The most common fora selected for the resolution of disputes under investment treaties have

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26 May 2016. There was, as Singh & Sharma op cit note 1 at 92 state, indeed, a perception that being a party to the Convention was 'a method of increasing mutual confidence, which in turn increased the inflow of capital…'.
[138] ICSID website, last accessed from *https://icsid.worldbank.org/apps/icsidweb/about/pages/default.aspx* on 3 June 2016.
[139] Menon op cit note 75 at 163.
[140] Text of the ICSID Convention Regulations and Rules supra note 136.
[141] ICSID website supra note 138.
[142] 'The ICSID Caseload – Statistics' (Issue 2016-1) at 7, last accessed from https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx on 3 June 2016.
[143] Coe op cit note 21 at 1346.
[144] See Singh & Sharma op cit note 1 at 94, who confirm that '[a]n ICSID award is equivalent to "a final judgment of a court" in all ICSID contracting states, and therefore directly executable'.
[145] Ibid at 94. See also McLachlan et al op cit note 21 at 4 and Menon op cit note 75 at 163.
[146] McLachlan et al op cit note 21 at 4.
[147] Ibid at 5.
[148] Ibid at 5.

indeed proven to be ICSID arbitration and ad hoc UNCITRAL arbitration, and of these two, ICSID is 'by far more important in the development of the law'.[149] Investment treaty based investor-state-arbitration, while a relatively recent phenomenon, has gained significant 'momentum' in the last few decades.[150] Singh and Sharma state that the use of investor-state arbitration in the last decade has indeed been 'unprecedented'.[151]

Application of these concepts

It is against the backdrop of these central concepts that this dissertation will proceed to drill down into investment treaties, with a particular focus on bilateral investment treaties, given their prominence and importance in the international investment law realm.

[149] Sourgens op cit note 87 at 71.
[150] Hansen op cit note 120 at 525.
[151] Singh & Sharma op cit note 1 at 88.

CHAPTER III - A CLOSER LOOK AT INVESTMENT TREATIES AND THEIR IMPACT

The standard framework of bilateral investment treaties

Although each investment treaty is, by its nature, separately negotiated, they generally follow a similar pattern.[152] Indeed, there is effectively a standard set of protections included in each treaty, usually subject only to slight adjustments.[153]

Schill posits that one of the most important features of the system of fairly standardised international investment treaties that has developed is that:

> '[I]nternational investment treaties build on treaty-overarching principles concerning the treatment of foreign investors and thereby establish a largely uniform system of international investment protection.'[154]

Each bilateral investment treaty contains reciprocal undertakings given by each contracting party thereto.[155] And each bilateral investment treaty affords investors various substantive rights, as well as an ability to enforce these rights against the host state.[156]

Each treaty also has a preamble which states the aims of the treaty, generally being to protect and promote foreign investments.[157] The preamble is often used for interpreting the substantive provisions of the treaty[158] and the stated purpose is thus of some import. Preambles generally highlight the link between investment-friendly conditions and the flow of foreign investment, as well as the desirability of foreign investments to the contracting parties.[159]

Bilateral investment treaties are binding on states,[160] and generally provide for a fixed term of operation (usually at least ten years), after which they usually continue in force until express

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[152] See Schill op cit note 23 at 62 and 94, who confirms that '[d]espite some differences between the various international investment treaties, they follow rather uniform principles with regard to their structure, content and mechanism of dispute settlement.' McLachlan et al op cit note 21 at 5 state that the 'patchwork quilt of interlocking but separate bilateral investment treaties - each the product of its own negotiation - in fact betrays a surprising pattern of common features'.
[153] Schill op cit note 23 at 94 - 95.
[154] Ibid at 62.
[155] McLachlan et al op cit note 21 at 25.
[156] Schill op cit note 23 at 62.
[157] McLachlan et al op cit note 21 at 28.
[158] Ibid at 28.
[159] See Dolzer & Schreuer op cit note 1 at 22.
[160] See Fola Adeleke 'Human rights and international investment arbitration' (2016) *South African Journal on Human Rights* 48 at 50, who notes that this is usually after the state parties have notified one another that their internal constitutional requirements for entry into force have been met.

notice is given by either party for their termination.[161] If such notice is given, there is also usually a fixed period for which protection of investments already made prior to the termination is retained.[162]

Gazzini notes, however, that the 'flexibility' of bilateral investment treaties allows states to cater for their specific needs and there is a variety of provisions that may be included relating to, for example, the definition of investment, or the nationality of the investor.[163] Indeed, this flexibility even allows for the protections contained in investment treaties not to be applied symmetrically to the two contracting states.[164]

Since investment treaties are treaties, their interpretation is governed by international law and, in particular, by the Vienna Convention on the Law of Treaties.[165] It is interesting to observe that many states have developed and adopted a model bilateral investment treaty for use as a 'starting point' in treaty negotiations.[166]

The form of protection offered to investors

'The ultimate purpose of [bilateral investment treaties] is precisely to define how the host State must treat foreign investors'.[167] Investment treaties generally provide extensive substantive protection to investors.[168] The types of protections included frequently cover unlawful and insufficiently compensated expropriation, unfair and inequitable treatment, denial of justice, and failure to provide a standard of national treatment, and most favoured nation treatment standard.[169] Investment treaties generally also include guarantees of 'full protection and security' and the right to transfer profits and capital out of the host state.[170]

It is important to extrapolate on a few of these concepts in order to understand the ambit and effect of investment treaties.

The guarantee of fair and equitable treatment is usually encapsulated in a fairly Spartan

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[161] See McLachlan et al op cit note 21 at 33 - 34.
[162] Ibid at 34. See also Gazzini op cit note 7 at 119.
[163] Gazzini op cit note 7 at 105.
[164] Ibid at 105.
[165] Ibid at 106 and McLachlan et al op cit note 21 at 66.
[166] See McLachlan et al op cit note 21 at 27.
[167] See Gazzini op cit note 7 at 113.
[168] Ibid at 107. The author notes that 'virtually all substantive rules contained in these treaties are meant to protect foreign investors who, although not formally party to the treaty, are clearly its main beneficiaries.'
[169] McLachlan et al op cit note 21 at 30 list the substantive rights clauses frequently included in investment treaties. See also Schlemmer op cit note 107 at 743 and Adeleke op cit note 160 at 50.
[170] Schlemmer op cit note 107 at 743.

clause in investment treaties: investments shall 'at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the host state'.[171]

McLachlan et al posit that 'the beguiling simplicity' of the standard provision no doubt 'secured its easy passage into treaty practice.[172] In spite of its abstract and broadly formulated construction and the obvious difficulty that the determination of its content presents,[173] the fair and equitable treatment standard has been considered by a multitude of tribunals and has indeed frequently been the 'outcome-decisive right' in a number of disputes.[174] It has been described as 'a potent tool in the assessment of the adequacy of the judicial and administrative systems of host States'[175] and it has seen almost universal inclusion in investment treaties.[176] Indeed, Schill describes it as 'the most powerful standard of investment protection'.[177]

There is consensus that the fair and equitable treatment standard is to be determined independently from the host state's legal standards and that it does not require bad faith on the part of the host state to be invoked.[178] Schill, however, argues that the standard against which it is to be measured is not clear and '[i]t could equally refer to notions of equality or substantive justice, or to less grand notions of procedural due process'.[179] He argues that because of the interpretive difficulties that the standard presents, investment tribunals have not followed a uniform approach.[180]

Brower and Schill have argued that the fair and equitable treatment standard could be understood as:

> '[G]overnment according to the rule of law that establishes basic substantive and procedural rights concerning the stability and predictability of the legal framework; consistency of the host state's decision making; the protection of investor confidence or "legitimate expectations"; procedural due process and the prohibition of denial-of-justice; protection against discrimination and arbitrariness; and the requirement of transparency.'[181]

The most-favoured nation treatment standard, included in almost every investment treaty,

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[171] See McLachlan et al op cit note 21 at 200.
[172] Ibid at 200.
[173] Schill op cit note 109 at 143 describes these provisions as 'notorious and vaguely crafted'.
[174] See McLachlan et al op cit note 21 at 201.
[175] Ibid at 201.
[176] Ibid at 219 - 220. See also Schill op cit note 109 at 138.
[177] Schill op cit note 109 at 138.
[178] Ibid at 158.
[179] Ibid at 158.
[180] Ibid at 159.
[181] Brower & Schill op cit note 2 at 487.

'enables foreign investors to invoke the better treatment accorded by the host State to investors of any third State, provided that there is correspondence as to the subject matter between the two treaties'.[182] It requires the host state to treat investors no less favourably than investors from a third party state.[183]

Similarly, the national treatment standard obliges the host state to treat foreign investors no less favourably than domestic investors.[184]

Investment treaties almost invariably provide that a host state may not expropriate a foreign investment in its territory unless various conditions are met. These are that 'the taking must be for a public purpose, as provided by law, conducted in a non-discriminatory manner and with compensation in return'.[185] Both direct and indirect expropriation are covered by investment treaties.[186]

What is clear is that the substantive protections afforded by the standard investment treaty are extensive and afford extremely valuable rights to investors.

Dispute settlement under investment treaties

Professor Brigitte Stern remarked in 2000 that 'we are walking with giant steps towards a general system of compulsory arbitration against States for all matters relating to international investments, at the initiative of the private actors of international economic relations.'[187] Since then, this position has, if anything, been fortified.

One of the most important (and controversial) aspects of investment treaties is the dispute resolution provisions they contain to enforce the substantive protections they offer.[188] The provision for direct investor-state dispute resolution in investment treaties is common.[189] Such clauses enable investors to enforce the host state's obligations directly against such state,[190] in spite of the fact that no direct agreements between the host state and the investor

[182] See Gazzini op cit note 7 at 104 and Choudhury op cit note 24 at 986.
[183] See Choudhury op cit note 24 at 986.
[184] Ibid at 986.
[185] Dumberry op cit note 23 at 362. See also Choudhury op cit note 24 at 986.
[186] Adeleke op cit note 160 at 57.
[187] Professor Stern was quoted in CH Schreuer *The ICSID Convention: A Commentary* (2001) xii as cited in McLachlan et al op cit note 21 at 54.
[188] Schill op cit note 23 at 68 describes the right to initiate arbitration directly against states as 'the most important right' granted to investors under investment treaties and Dumberry op cit note 23 at 354 describes this as a 'groundbreaking' procedural benefit.
[189] See McLachlan et al op cit note 21 at 5, who describe the inclusion of such provisions as 'widespread'.
[190] Schill op cit note 23 at 68 describes this as the most important right for investors under international investment treaties. See also Schlemmer op cit note 107 at 743.

may exist.[191]

McLachlan et al go so far as to assert that '[t]he protection offered to investors by the dispute resolution provisions of treaties is sufficiently important to rise to the level of a substantive principle in its own right.'[192] Gazzini asserts that the provision for the investor to enforce the host state's obligations directly makes investment treaties 'truly remarkable'.[193] He also highlights the suggestion that has been made that this ability marks another step in the transition of individuals (in the form of investors) from objects to subjects at international law.[194]

The general position under international law is that the relationship between states is what is regulated and individual actors are only affected indirectly. Investors are not generally afforded standing to initiate disputes in international courts and tribunals.[195] Franck states that the ability of the investor to sue the state directly makes investment treaty arbitration 'a unique creature' because it is states, rather than private law actors, that typically enjoy international law rights.[196] Coe similarly states that '[b]y processing its claim in the prescribed manner, the investor accepts what is functionally a treaty-based standing offer by the host state to arbitrate a particular class of claims with a defined class of persons'.[197]

Indeed, these arbitration clauses usually contain a general consent to jurisdiction in respect of any breaches of that treaty.[198] Choudhury states that because the general consent by states to arbitration in investment treaties 'is provided *ex ante*, the opportunity to arbitrate is extended to a wide variety of potential claimants whose identity is unknown at the time consent is given, and for a broad range of potential disputes, the nature of which is also unknown at the time of consent.'[199] The most commonly included fora are ICSID (with a firm majority), ad

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[191] See McLachlan et al op cit note 21 at 5. See also Gazzini op cit note 7 at 108 - 112 and 125 and Petersmann op cit note 27 at 524.
[192] McLachlan et al op cit note 21 at 45.
[193] Gazzini op cit note 7 at 108.
[194] Ibid at 108. Although I note that Gazzini would himself prefer this to be seen as investors becoming 'participants in international law, thus overcoming the sterile dichotomy between subjects and objects'. See page 109.
[195] Brower & Schill op cit note 2 at 480.
[196] Franck op cit note 26 at 833.
[197] Coe op cit note 21 at 1343 - 1347.
[198] See McLachlan et al op cit note 21 at 52. Indeed, the notion of consent is a critical aspect of the system. Singh and Sharma op cit note 1 at 94 state that consent 'generally is a cornerstone of international dispute settlement involving states'. See also Gazzini op cit note 7 at 125.
[199] Choudhury op cit note 24 at 989.

hoc arbitration and the International Chamber of Commerce.[200]

McLachlan et al observe that most bilateral investment treaties do not contain specific provisions that set out the precise nature of disputes between investors and states that will be arbitrable.[201] They, however, generally prescribe a period (which varies from treaty to treaty) during which claims cannot be brought and settlement attempts should be made - a 'cooling off period'.[202]

What these arbitration clauses achieve is that investors are able to pursue claims against the relevant state through binding international arbitration proceedings,[203] and Professor Stern's observation is, given the sweeping extent of the investment treaty network and the significant effect of these clauses, apt.

There is no binding system of precedent in treaty arbitration but it is certainly the case that tribunals generally consider earlier decisions fairly carefully.[204] Schill confirms that 'a strong, albeit persuasive rather than binding, system of precedent' has developed, and which creates normative expectations for both states and investors.[205]

Why investor-state dispute settlement is such an attractive option to investors

Foreign investors understandably prefer to have disputes determined outside of the local courts of the host state and, rather, through what they perceive to be a 'neutral and reliable forum'.[206] Brower and Schill state that '[t]he problem with most state courts is that they are not - or at least they are not perceived to be - sufficiently neutral in resolving disputes between foreign investors and host states'.[207]

Of course, if the investor feels confident in the domestic legal system of the host state, this may be a less costly option than international arbitration.[208] It is clear, however, that legal

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[200] See McLachlan et al op cit note 21 at 52.
[201] Ibid at 46.
[202] Ibid at 50 - 51.
[203] See Choudhury op cit note 24 at 987.
[204] McLachlan et al op cit note 21 at 71 and 74.
[205] See Schill op cit note 23 at 80. See also d'Aspremont op cit note 19 at 43.
[206] Singh and Sharma op cit note 1 at 91. See also Daniel Barstow Magraw Jr and Niranjali Manel Amerisinghe 'Transparency and public participation in investor-state arbitration' (2009) 15 *ILSA Journal of International & Comparative Law* 337 at 338 - 339.
[207] Brower & Schill op cit note 2 at 479. The authors conclude that 'neither the courts of the host states nor the courts of any other state are well-positioned to enforce the state's promises vis-à-vis foreign investors'. Gazzini op cit note 7 at 124 also argues that 'domestic tribunals do not always deliver their decisions effectively or independently'.
[208] See Schlemmer op cit note 107 at 743.

systems change over time and that the face of the judiciary in any state may become more partisan during the life of an investment. On the other hand, investment treaties, while they may be formally amended by the contracting parties in theory, are far more certain and stable instruments to place reliance in, given the fact that such amendments are less easy to procure.[209]

Reliance on the substantive protections offered in national investment legislation is (although such legislation does create obligations for the host state),[210] for similar reasons, seen as an inferior source of investment protection. Such laws function as 'unilateral acts' of states[211] and, as such, can also be unilaterally amended or even revoked.

The guarantee of another neutral option is thus highly valuable for investors, even in the most stable of host states. It is even more important in host states where the domestic legal system simply cannot be trusted to enforce an investor's rights against it.

As I have already touched on earlier in this dissertation, there are also significant shortcomings in relying on home-state intervention. Singh and Sharma note that 'in most cases, home representation was difficult to secure as host states were only receptive to political symbolic or economically important disputes'.[212] It is trite that under international law individuals do not have a right to diplomatic protection[213] and states have no duty to grant it.[214] Even if the home state does intervene, it retains control over the process and is entitled to settle or waive the rights of its nationals during the course of its intervention.[215]

There are of course insurance options that investors can attempt to make use of to protect themselves against the effects of host state action. There is, however, no guarantee that insurance will be secured for any given investment as the insurer in question (whether a private insurer, or a domestic insurance scheme or international guarantee agency) will assess whether the risk is acceptable to it.[216] Insurance obtained is often only in respect of limited

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[209] Brower & Schill op cit note 2 at 495 state that 'such changes require the consent of all contracting parties, which is often quite difficult to achieve because, once an investment treaty is in force, the parties may have different incentives compared with the situation that existed when they entered into the treaty.'
[210] Mbengue op cit note 48 at 200.
[211] Ibid at 183.
[212] Singh and Sharma op cit note 1 at 91. See also Gazzini op cit note 7 at 124.
[213] Schlemmer op cit note 107 at 741.
[214] See Brower & Schill op cit note 2 at 480.
[215] Ibid at 480.
[216] See Schlemmer op cit note 107 at 737 - 741 for an analysis of the different insurance options that investors may explore.

events and is usually not for the full value of the investment.[217] It is also, generally, fairly costly.

In the result, the ability of investors to enforce their rights directly against the host state, without having to utilise the host state's court system is a critical ability for most investors. Brower and Schill propose that:

> 'Recourse to a dispute settlement and enforcement mechanism empowers the investor to effectively hold states liable for breaches of their promises in investment treaties to not expropriate foreign investors without compensation, to treat them fairly and equitably, to provide full protection and security, and so on. Conversely, from the host state's perspective, the investor's right to initiate arbitration enables the host state to make credible the commitments it made under its investment treaties. This, in turn, reduces the political risk of foreign investment, lowers the risk premium connected to it, and therefore makes investment projects more cost-efficient.'[218]

Indeed, having this ability, while valuable in its own right, even increases the insurability of the investment.

Gazzini argues strongly in summation that direct access to international investment tribunals 'ensures foreign investors of an unprecedented level of legal protection and overcomes the risks and hazards which are often associated with domestic remedies and diplomatic protection'.[219] This cannot be gainsaid and the prevailing investor-state dispute settlement regime is thus of critical importance to the international investment system as a whole.

The role that investment treaties play in binding the state

While their significance cannot be undermined, there is a clear tension that exists between the binding nature of investment treaties and the concepts of sovereign authority and sovereign immunity. The rules that have developed to govern the treatment of international investments by states act to curtail 'previously legitimate exercises of sovereignty'.[220] Indeed, compliance with domestic law is not a defense under international law and, even though the respondent government may have 'acted with no illicit animus and pursuant to a constitutionality

[217] Ibid at 737 - 741.
[218] Brower & Schill op cit note 2 at 477.
[219] Gazzini op cit note 7 at 131.
[220] Sourgens op cit note 87 at 61. Schill op cit note 23 at 63 suggests that '[i]nvestment treaty protection has become a truly global phenomenon that limits government conduct vis-à-vis foreign investors.'

recognised mandate', this principle holds true.[221]

As Adeleke notes:

> 'Under the guise of dealing with the protection of foreign investment, investors are increasingly challenging the validity of domestic government regulatory measures such as tax, limitation of powers in states of emergency, affirmative action policies, regulation of tariffs, healthy regulation, cultural rights, water regulation and human rights'.[222]

Examples abound. For instance, in the *Methanex*[223] case, a Canadian investor in the US argued that a ban on a particular gasoline additive (due to concerns relating to health risk to residents) violated the obligations under the North American Free Trade Agreement ('NAFTA').[224] In the *Tecmed*[225] case, the dispute involved a permit for the operation of a hazardous waste landfill site.[226] In *Parkerings-Compagniet AS v Republic of Lithuania*,[227] at issue were the cultural concerns that Lithuania had with the construction of a car park on a UNESCO World Heritage Site.[228] And in *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*,[229] the dispute concerned that respondent's entitlement to cancel a tourist development project situated on its own territory for the purpose of protecting antiquities.[230]

The public interest is clearly affected by the outcome of any such disputes.[231] Adeleke states that:

> 'At the centre of investor-state arbitrations are disputes about state natural resources, infrastructure development and delivery of social services, limitation of state actions in meeting constitutional obligations and in some cases human rights violations. All these penetrate into the domestic prerogative of a government and there is obvious public interest in

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[221] See Coe op cit note 21 at 1349 - 1350.
[222] Adeleke op cit note 160 at 51.
[223] *Methanex Corporation v United States of America*, NAFTA Award of August 3, 2005 (*'Methanex'*).
[224] See Choudhury op cit note 24 at 992 - 993 for a summary of the issues in that case. See also the NAFTA treaty last accessed from *https://www.nafta-sec-alena.org/Home/Legal-Texts* on 13 May 2017.
[225] *Tecnias Medioambientales Tecmed SA v The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award of May 29, 2003 (*'Tecmed'*).
[226] See Choudhury op cit note 24 at 993 for a summary of the issues in that case.
[227] ICSID Case No ARB/05/8, Award of September 11, 2007 (*'Parkerings-Compagniet'*).
[228] See paras 392 - 396 in particular. See also Choudhury op cit note 24 at 994.
[229] ICSID Case No ARB/84/3, Award of May 20, 1992 *('Southern Pacific')*.
[230] See para 158. As discussed by Choudhury op cit note 24 at 994, it, however, found that 'the right to cancel the project triggered a duty of compensation'.
[231] See Adeleke op cit note 160 at 56.

> ensuring the integrity and effectiveness of the system to address such disputes'.[232]

It is clear that investment treaty disputes, almost as a rule, involve 'intricate questions that can go to the heart of a state's public policymaking'.[233] Brower and Schill confirm that '[i]nvestment treaties can affect the way host states govern, legislate, and adjudicate and can have a profound impact on local populations.'[234] As Magraw and Amerasinghe note, investor-state arbitrations often involve 'challenges to regulatory or other decisions that penetrate deeply into domestic sovereign prerogatives…'[235]

The situation is accordingly that arbitral tribunals convened under investor-state dispute resolution clauses contained in investment treaties are, with regularity, making determinations which bind states in disputes concerning matters of clear public interest.

As I will later detail, what is perhaps most controversial about this is that the rules that have developed to govern the treatment of international investments by states have largely been developed by private decision-makers in the form of arbitral tribunals.[236] This has raised a serious concern that the concept of private dispute resolution having the ability to restrict the exercise of public power by the state is simply not legitimate. Indeed, Schill describes a major criticism of investment arbitration as being 'the threat that investment protection is accorded preference over competing policy concerns'.[237]

Schill sums up the unease with investment arbitration as follows:

> 'Host states are particularly concerned about a shrinking of domestic policy space occasioned by vague standards of investment protection, which are interpreted, partly in inconsistent ways, by international arbitrators who exercise significant interpretive powers over the content of investment treaty obligations, and who are de facto even able to restrict policy choices made by democratically-elected legislators, without themselves enjoying a robust democratic mandate'.[238]

Schill, writing in 2011, reiterates the 'public function' of international investment law, stating that it 'consists of establishing principles of investment protection under international law that provide for the protection of property and endorse rule of law standards for the treatment of

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[232] Ibid at 56.
[233] Brower & Schill op cit note 2 at 497.
[234] Ibid at 497.
[235] Magraw & Amerisinghe op cit note 206 at 339.
[236] Sourgens op cit note 87 at 70 suggests that 'the state finally ceded to private jurists the fate of the law'.
[237] Schill op cit note 23 at 66.
[238] Ibid at 66.

foreign investors by states'.[239] There should indeed be questions asked about the desirability of the material public implications that private adjudications can have under international investment law and the balance to be struck between such disquiet and the desirability of binding states to respect the rule of law.

It is clear from an analysis of the relevant decisions of arbitral tribunals that there has been a fairly broad range of decisions showing varying degrees of deference to the regulatory space of the states involved.

Brower and Schill posit that arbitral tribunals:

> '[H]ave recognized that, despite the lack of express textual support in most investment treaties, states continue to dispose of their core regulatory powers and are not required to compensate foreign investors for the effects of bona fide, general regulations that further a legitimate purpose in a nondiscriminatory and proportionate way'.[240]

In certain instances, however, arbitral tribunals have been relatively robust in taking decisions that have a significant impact on this space. For example, in *Tecmed*,[241] the Tribunal held at para 121 of the award that it found:

> '[N]o principle stating that regulatory administrative actions are per se excluded from the scope of the Agreement, even if they are beneficial to society as a whole —such as environmental protection—, particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever'.

Similarly, in *Compania del Desarrollo de Santa Elena S.A. v The Republic of Costa Rica,*[242] the tribunal held that the environmental purpose for the expropriation in question did not affect the legal nature of that expropriation or its consequences in relation to compensation payable.

On the other hand, several tribunals have been particularly sensitive not to tread too heavily in this sphere. For example, in *Methanex*,[243] the tribunal found that a lawfully enacted

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[239] Ibid at 59. At 100 - 101, Schill states that 'the possibility to have recourse to international arbitration represents a mechanism that allows foreign investors to make host states comply with the public law standards contained in investment treaty obligations.'
[240] Brower & Schill op cit note 2 at 484.
[241] Supra note 225.
[242] ICSID Case No ARB/96/1, Award of February 17, 2000.
[243] Supra note 223.

regulation enacted for a public purpose, which is non-discriminatory can affect a foreign investment without this amounting to expropriation.

In *Southern Pacific*,[244] the tribunal recognised that:

> '[A]s a matter of international law, the Respondent was entitled to cancel a tourist development project situated on its own territory for the purpose of protecting antiquities. This prerogative is an unquestionable attribute of sovereignty'.[245]

In *Parkerings-Compagniet*,[246] the tribunal took into account the cultural concerns that Lithuania had with the construction of a car park on a UNESCO World Heritage Site and found that the distinction it drew between an investment that would not impede on the culturally sensitive area and one that would, did not give rise to a breach of its investment treaty obligations.[247] It also found that:

> 'It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a *stabilisation* clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power'.[248]

The tribunal in *Lemire v Ukraine*[249] held that:

> 'Economic development is an objective that must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the object and purpose of the Treaty is not to protect foreign investments *per se*, but as an aid to the development of the domestic economy. And local development requires the preferential treatment of foreigners be balanced against the legitimate right of the Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest'.[250]

The existence of various types of decisions clearly demonstrates that the concern that

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[244] Supra note 229.
[245] At para 158. As discussed by Choudhury op cit note 24 at 994, it, however, found that 'the right to cancel the project triggered a duty of compensation'.
[246] Supra note 227.
[247] See paras 392 to 396 in particular.
[248] At para 332.
[249] *Joseph Charles Lemire v Ukraine* ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability of January 14, 2010.
[250] At para 273.

domestic policy space will be affected by international investment arbitration is not an unwarranted one. At the same time, however, it is clear that tribunals can, and indeed often do, respect the need for states to be able to regulate without undue interference.

The question of the legitimacy of investor-state dispute settlement in investment treaties

There is a vast amount of writing that has been done on the legitimacy of the current international investment law regime, on investment treaties and on investor-state dispute settlement, in particular. I have already outlined the significance that the regime has in the current global climate, but, as Schill points out, '[t]he very use of the concept of "legitimacy" in the analysis of international arbitration indicates an emerging awareness for the exercise of power in and through international arbitration'.[251]

There seems to be a clear divide between commentators who argue that the current system is unacceptable and those that seek to defend it. Among the latter group, there are also those that recognise various problems with the system, but believe that it can legitimately be retained if various solutions to those problems are adopted. I will discuss some of the arguments put forward by each of these groups in what follows.

Arguments against the current system

In recent years, the legitimacy of the current investor-state dispute settlement regime contained in investment treaties has come into serious question in light of numerous compelling concerns relating to, *inter alia*, both the processes that are followed and the outcomes in various disputes.[252]

Indeed, the dissatisfaction of certain states has been clear, for example, in the withdrawal from the Convention of the Republic of Bolivia (in 2007), Ecuador (in 2009) and Venezuela's 'irreversible denunciation' of ICSID in 2012, Venezuela's communication to the Netherlands of its intention to terminate the Dutch-Venezuelan Bilateral Investment Treaty in 2008,[253] as well as Ecuador's termination of its various bilateral investment treaties in 2008. India has also sought various treaty reversions,[254] and the Australian government at one point

[251] Stephan W. Schill 'Developing a framework for the legitimacy of international arbitration' conference paper prepared for the International Council for Commercial Arbitration Congress held in Miami in 2014, published in ICCA Congress Series No 18 789 at 790.
[252] See Schill op cit note 23 at 63.
[253] Discussed in Brower & Schill op cit note 2 at 475.
[254] Singh and Sharma op cit note 1 at 92 - 93. The authors state that '[t]hese recent practices indicate an increasing trend among developing countries to tighten or narrow ICSID jurisdiction or take conservative

announced a policy not to include arbitration provisions in future bilateral and regional trade agreements.[255]

The criticisms encompass both procedural and substantive concerns and cover a broad range of issues. The significance of the concerns is borne out by fact that the awards handed down by tribunals are often significant.[256] They thus have an unavoidably significant impact on the host state and its population. The breadth of the rights afforded to investors by arbitral tribunals and a number of heavy awards against states have led to serious criticism.[257]

On the procedural front, the ad hoc nature of arbitral tribunals who determine disputes and the absence of an appeal mechanism have led to concerns that there will be a lack of consistency in outcome.[258] This concern is heightened by the fact that there is no binding system of precedent in investment arbitrations.[259] Schill describes 'the fragmentation of international investment law into a cacophony of arbitral decisions' and the consequent 'lack of stability and predictability' for both investors and states.[260]

There is also a concern that there is a lack of democratic control over investment arbitrations.[261] 'Tribunals who derive their mandate from the consent of the two disputing parties exercise regulatory powers that go much beyond resolving an individual dispute'.[262] There is also a concern about those making the decisions. Arbitrators are not responsible to the public and are not appointed through any objective process.[263] Moreover, they do not have security of tenure (there are no permanent appointments of arbitrators)[264] and the usual democratic safeguards to prevent partiality are thus not in place.[265] The argument proceeds

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positions towards [investor-state dispute settlement mechanisms]'.

[255] Kyla Tienhaara & Patricia Ranald 'Australia's rejection of Investor-State Dispute Settlement: Four potential contributing factors' 12 July 2011, last accessed from *http://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/* on 16 June 2016. See also Franck op cit note 26 at 847. I note, however, that various commentators have downplayed or de-emphasised these developments. Brower & Schill op cit note 2 at 496, for example, posit that '[t]he more drastic reactions of states, such as terminating investment treaties or withdrawing from the Convention, by contrast, are a phenomenon that seems to be limited to a minority of states and can often be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy of international investment law and arbitration'.

[256] See Adeleke op cit note 160 at 52.

[257] Schill op cit note 23 at 63.

[258] Singh & Sharma op cit note 1 at 96. The authors argue that an appellate mechanism would bring about consistency in arbitral awards and thus be beneficial (at 99 - 101).

[259] Ibid at 97.

[260] Schill op cit note 23 at 67.

[261] Ibid at 66.

[262] Ibid at 79. See also Adeleke op cit note 160 at 52 - 53.

[263] Adeleke op cit note 160 at 52.

[264] See Brower & Schill op cit note 2 at 490, who describe this as a 'serious criticism'.

[265] Adeleke op cit note 160 at 52.

that since arbitrators have an interest in being appointed in future cases, this may affect their decisions.[266]

Another is that the details of the dispute are not necessarily transparent or in the public domain.[267] Brower and Schill, in detailing the effect that investment law disputes can have on the public interest, state that 'those affected by the outcome of such disputes have an interest in being informed about or even participating in investment treaty arbitrations'.[268] Indeed, Magraw and Amerasinghe note that the public generally has no way of knowing, *inter alia*, that the arbitration even exists, what the allegations of wrongdoing are, who the arbitrators are or what the outcome of the proceedings is.[269] Access to information is indeed one of the key elements of democratic governance.[270] It speaks to the ability of a citizenry to hold its elected officials accountable. The authors assert that 'there has been a decrease in holding states accountable to the public in the investment context.'[271]

A further and related criticism is that even though the nature of investment disputes has important public implications, the ability of parties who are not the investor or the state to participate are limited.[272] Magraw and Amerasinghe note a shift in power arising from investor-state arbitrations as there has been a decrease in the ability of citizens to hold their states accountable.[273] This they attribute to both a lack of transparency in the process and a lack of public participation.[274]

Indeed, one of the criticisms that is often levelled at investment treaties is their 'failure to take the wider interests of civil society into account'.[275] Schill describes the criticism as a perception 'of a built-in bias favouring foreign investors and foreign investments over

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[266] Brower & Schill op cit note 2 at 490.
[267] Singh & Sharma op cit note 1 at 97 and Schill op cit note 23 at 67.
[268] Brower & Schill op cit note 2 at 497. The authors believe that this concern could and should be accommodated in the current system but that it does not require a 'fundamental redesign' of the system. See also Magraw & Amerisinghe op cit note 206 at 339 - 340. Andrea J Menakar 'Benefiting from experience: developments in the United States' most recent investment agreements' (2005) *U.C. Davis Journal of International Law & Policy* 121 at 124 states that:

> 'Investor-State tribunals lack authority to order States to change their laws, and their decisions have no precedential value. Nevertheless, because investor-State disputes often involve issues of public concern and any award in favour of an investor will be paid out of the public fisc, the public has shown an increasing interest in monitoring and participating in these arbitrations.'

[269] Magraw & Amerisinghe op cit note 206 at 342 - 343.
[270] Ibid at 349.
[271] Ibid at 351.
[272] See Schill op cit note 23 at 66.
[273] Magraw & Amerisinghe op cit note 206 at 338.
[274] Ibid at 338.
[275] See McLachlan et al op cit note 21 at 28 who call this a 'recurring theme of recent criticisms'. See also Schill op cit note 23 at 66.

legitimate noninvestment policy choices, such as the protection of public health, cultural heritage, labor standards, or the environment.'[276]

Indeed, the asymmetrical nature of investment treaties (the investor is the only party acquiring rights, while the host state is the only party acquiring obligations) is also often the subject of criticism.[277] There have also often been criticisms that investment treaties give greater rights to foreign investors than to nationals of the host state.[278] This type of argument accords with the Calvo doctrine (generally adopted by capital-importing states) - which holds central the notion that no state should offer more protection to foreign investors than it does to its own nationals.[279] But many states feel that the level of treatment afforded to the nationals of the host state is indeed insufficient protection.[280] The divergence of views has, at least in part, contributed to the failure to multilateralise investment protections standards.[281]

Of critical importance to this dissertation is the charge levelled against investment treaties that they may act to discourage host states from enacting otherwise legitimate laws or that the effect of investment treaties and the enforcement mechanisms they contain may create a regulatory chill for fear of liability.[282] Klaaren and Schneiderman go so far as to suggest that investors can use bilateral investment treaty provisions to 'meddle significantly in the regulatory system of host states'.[283]As previously cited, Schill, collating and amalgamating the breadth of the criticisms of investment law and arbitration, describes the 'heart' of the criticism of international investment law as lying in the observation:

> '[T]hat investment treaty arbitration restricts governmental action, and therefore concerns questions of public law, without relying on a dispute settlement mechanism that conforms to core public law values, including democracy, equal treatment, separation of powers, legal certainty and predictability, or in other words, the rule of law'.[284]

This, of course, raises an interesting juxtaposition with the idea that binding investment arbitration in fact forces states to adhere to their obligations and thus enhances the rule of

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[276] Schill op cit note 23 at 67.
[277] See Gazzini op cit note 7 at 107.
[278] See Singh & Sharma op cit note 1 at 96 for a discussion on this criticism in respect of NAFTA.
[279] See d'Aspremont op cit note 19 at 11.
[280] Ibid at 11.
[281] Ibid at 11 - 18.
[282] See Singh and Sharma op cit note 1 at 96.
[283] Klaaren & Schneiderman op cit note 44 at 1.
[284] Schill op cit note 23 at 67.

law.[285]

Schill goes on to say that:

> 'While arbitration may be acceptable in a commercial context, where deficits in the governing law or in the mechanism of dispute settlement only affect the parties to the dispute, it is not acceptable, in the view of the critics, in the public law context, where the legality of a state's exercise of public power is reviewed under standards crafted by international arbitrators who are appointed by the disputing parties and have no genuine democratic legitimacy'.[286]

He concludes his summation of the argument by stating that investment law 'in this perspective, becomes a threat to state sovereignty, to the integrity of domestic public law and its values, and ultimately to national self-determination'.[287]

Choudhury sets out an argument that is premised on the assertion that there is indeed a conflict between states' obligations under investment treaties and their human rights obligations. She states that decisions taken in investor-state arbitration that have implicated human rights have had the effect of curtailing states' 'democratic expression by countering [their] sovereign decision-making authority'.[288]

Some of these concerns are certainly legitimate. The system does indeed suffer from anomalies that affect its ability to fulfil the role that it has grown to fill. The immense public interest at stake in investment arbitrations and the impact that they have on states should not be ignored and require that certain democratic safeguards are put in place.

It seems to me, however, that surely it is simplistic solely to blame investment treaties for any 'curtailment' in the state's sovereign powers. Much like in contract law, where the right to dignity is indeed given expression by respecting the fact that parties have bound themselves to a particular agreement and that that agreement should be enforced, the conclusion of an investment treaty, and the taking of a decision to be bound by particular standards of conduct is a sovereign decision taken by states. It is, in some respects, the opposite of an erosion of sovereignty because it embodies the state making certain binding decisions about the way it wishes to conduct itself.

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[285] See Adeleke op cit note 160 at 54 - 55.
[286] Schill op cit note 23 at 67.
[287] Ibid at 67.
[288] Choudhury op cit note 24 at 984.

In any event, states do not necessarily contract out of the ability to regulate, they are only obliged to do so in a way that also takes into account the rights of foreign investors and, if they fail to strike the appropriate balance, to compensate those investors fairly. This is in line with statement made by the *Parkerings* tribunal at para 332 that:

> 'It is each State's undeniable right and privilege to exercise its sovereign legislative power.... What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.'[289]

Arguments in support of the current system

In 2009, Brower and Schill, addressed and responded to a number of the criticisms related to legitimacy that affects decision-makers in the international investment law sphere. Relevant for present purposes is their analysis of the criticism that investment treaties elevate the interests of investors over those of the host state, 'thus establishing an asymmetrical legal regime that is detrimental to state sovereignty.'[290] They argue that:

> 'Much more than buttressing singular capital interests, investment treaties and arbitration aim at anchoring good governance standards that lock states into a policymaking framework that is open towards the functioning of markets in a global economic system, without losing sight of the state's legitimate regulatory interests'.[291]

They describe the ability of investors to sue host states directly as 'but a modest limitation on the host state's sovereignty' that is 'essential to creating a basis for effective and efficient foreign-investment activities.'[292] They also see investment arbitration as an 'efficient and effective' form of dispute settlement which has, in practice, fostered 'international rule of law and an investment friendly environment'.[293]

They argue that it is:

> '[T]rue that investment jurisprudence leaves states the necessary leeway to implement their policy choices and to legislate in a self-determined and sovereign manner. If one prefers, by contrast, a world in which property interests must yield to any other public interest, where the state's contractual promises have no real value in the fact of changed political preferences and where good governance standards cannot be enforced, one can do away with international

[289] Supra note 227 at para 332.
[290] Brower & Schill op cit note 2 at 474.
[291] Ibid at 476.
[292] Ibid at 482.
[293] Ibid at 497.

> investment treaties and investment-treaty arbitration. This, however, would hardly lead to more legitimacy in international investment relations, but rather to a chill in the global economy that is not in the interest of host states or their populations. In general, investment treaties and investor-state arbitration therefore constitute a legitimate mechanism for structuring and stabilizing international investment relations without institutionalizing a pro-investor bias or disregarding the host state's legitimate power to regulate in the public interest'.[294]

They thus clearly see the reality as a trade-off that is relatively minor from the state's perspective (liability is only triggered if the state unfairly interferes with the investor's investment or fails to fulfill a promise), and entirely necessary from the perspective of investors, which strikes the right balance between competing considerations. They ultimately conclude that 'investment treaties and investor-state arbitration constitute a legitimate vehicle for structuring and stabilizing foreign investment activities'.[295]

While these arguments are compelling, the authors do not adequately address the concerns relating to the private adjudication of what are essentially public disputes. They simply state that the argument that public disputes are being subjected to privatised dispute settlement can be countered by the fact that consent to arbitration is itself a sovereign act on the part of the host state and thus that the authority of arbitrators is founded in public office.[296] This may be so but it does not address whether the sovereign act of consent is legitimate or appropriate in the first place.

In discussing the various substantive and procedural concerns that have been leveled against investment treaty dispute mechanisms (including that they create a 'loss of risk-free exercise of domestic "policy space", the purported failure to support development objectives, or the incorporation of norms related to corporate social responsibility, the environment or human rights'), Franck asserts that 'these issues… arise from the state's original delegation in the treaty of unilateral rights for foreign investors, the acceptance of responsibility for state conduct, and the failure to include defenses or exclusions within the scope of treaty obligations.'[297]

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[294] Ibid at 497 - 498.
[295] Ibid at 477.
[296] Ibid at 490.
[297] Franck op cit note 26 at 843 - 844.

Gazzini sets out an overview of the principal features of bilateral investment treaties and their importance in international investment law. He is of the view that these treaties 'strike a balance between the sovereign prerogatives of state parties and the need to protect the legitimate expectations that these treaties create for foreign investors.'[298] Citing the tribunal in *ADC Affiliate*[299] with approval, Gazzini states that 'while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. … [T]he rule of law, which includes treaty obligations, provides such boundaries.'[300] He ultimately concludes that:

> '[B]y concluding [bilateral investment treaties] States certainly do not relinquish their regulatory powers; they merely agree to respect some further limits to their exercise in dealing with foreign investors of the other party'.[301]

He sees bilateral investment treaties as playing 'a crucial role in the promotion of the rule of law and the development of a stable and predictable legal framework.'[302] This type of argument can be taken one step further in that the threat of potential arbitration may well serve the purpose of disciplining states to comply with the obligations they have undertaken in investment treaties.

Gazzini also points out that 'the flexibility of the bilateral framework permits States to tailor their commitments to their specific [and evolving] needs'.[303] These needs can clearly be worked into the wording of the treaty itself, that contracting parties can modify their obligations through protocols, amendments or subsequent practice, as may be necessary and, finally, that parties can adopt binding common interpretations.[304]

Gazzini cites the bilateral investment treaty between Argentina and the US, by way of example, which provides that 'each party is entitled to maintain or make exceptions to the national treatment obligation in the sectors indicated by each of them in the protocol', and the Netherlands-China investment treaty, which states that China may require investors to

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[298] Gazzini op cit note 7 at 100.
[299] Supra note 18 at para 423.
[300] Gazzini op cit note 7 at 113.
[301] Ibid at 131.
[302] Ibid at 131.
[303] Ibid at 105.
[304] Ibid at 105 - 106.

'exhaust domestic administrative review procedure before submitting the dispute to an international investment tribunal'.[305]

On the substantive front, this can include confirmation of the right of the state parties to regulate in specific domains, even if this would otherwise be a breach of its international obligations. Here Gazzini cites the treaty between Belgium-Luxembourg and Colombia, which includes such a clause relating to environmental protection, and the treaty between the Russian Federation and Hungary, which carves out regulatory space in relation to 'measures necessary for the maintenance of defence, national security and public order, protection of the environment, morality and public health'.[306]

Dolzer and Schreuer note that:

> 'Notions of mutuality and reciprocity are not absent from the regime of an investment treaty, but they do not operate in the same manner as a classical agreement. Instead, they are focused on the mutual benefit of the host state and investor and on the complementarity of interest flowing from the long-term commitment of resources by the foreign investor under the territorial sovereignty of the host state'.

They go on to examine the relationship between investment treaties and the sovereignty of the host state, stating that:

> 'As with every treaty, the acceptance of an investment treaty by a state and the determination of the desirable type and extent of obligations contained in it represents an exercise of the sovereign power to be made freely in light of its circumstances and preferences'.[307]

Other justifications include the idea that the problems arising from the possibility of courts in the host state being sensitive to the needs of that state (to the detriment of investors) can be avoided,[308] and that parties have control over the appointment of arbitrators and a chosen law, which excludes the automatic application of the domestic law of the host state in governing a dispute.[309]

Finally, states have far more power than investors and investment treaties aim to correct this

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[305] Ibid at 105.
[306] Ibid at 114 - 115.
[307] Dolzer & Schreuer op cit note 1 at 23.
[308] Ibid at 20, citing the depoliticisation of investment disputes as a 'major advantage'.
[309] Singh and Sharma op cit note 1 at 95 -96.

imbalance and thus purposefully aim to constrain states.[310]

While some of these arguments in favour of the current system cannot be gainsaid, they do seem to brush-over or overlook some of the democratic concerns that can be raised in respect of investor-state arbitration arising from investment treaties, perhaps in an effort to defend the current international reality. I submit that it is not helpful to ignore the rising concerns with the current system for the sake of retaining it, and that these simply must be addressed if it is to retain legitimacy.

Arguments for modifications to the current system

Schill states that, as an alternative to a radical exit response, 'suggestions for institutional reform abound' in respect of the current investment law regime.[311] He goes on to say that these suggestions include the incorporation of an appeals body, a return to state-state dispute settlement and establishing a permanent court to deal with investment disputes.[312]

Singh and Sharma explore and evaluate investor-state dispute settlement mechanisms that have been employed. They also look at the causes of the current trend of 'reversion' by nations from 'highly protective investor-State dispute settlement mechanisms to the Calvo doctrine' and the resolution of investment disputes by reference to the local laws of the host state, and look at the consequences of the denunciation of bilateral investment treaties and ICSID. The authors ultimately argue for the need for designing an appellate mechanism, which they posit will 'improve the efficiency and transparency of investment dispute mechanisms'.[313]

Coe analyses the formation of transparency policies that have been necessitated by the rise of investor-state disputes and, in particular, those under NAFTA. He considers the different imperatives in relation to commercial international arbitration, as opposed to investment arbitration, and highlights the fact that investment arbitration inherently involves an adjudication of governmental acts and has material public implications. He posits that

[310] Adeleke op cit note 160 at 53.
[311] Schill op cit note 23 at 68.
[312] Ibid at 68. Schill, however, in discussing the appeal of each of these suggestions, also recognises significant drawbacks to each of them. He also acknowledges that these reforms have not secured sufficient political support and that they are unlikely to be implemented in the foreseeable future. See pages 68 - 69 in particular.
[313] Singh & Sharma op cit note 1 at 100.

transparency is a key consideration in investor-state arbitration as a result of 'its function as a mechanism for determining state responsibility'.[314]

Coe recognises that transparency would come at a price in that 'each participant must accept new risks and more complicated tasks in an already complex system of investor-state arbitration'.[315] He states that '[w]hether the price is worth paying is inescapably a question of priorities; competing policies, interests and expectations abound.'[316] He itemises the benefits of disclosure of arbitration awards in detail, setting out, for example, that they can be used as educational instruments, that they expose the host-state to post-event accountability, that this can serve the important goal of promoting jurisprudential development and consistency.[317] He also highlights the increasing shift towards transparency in investment arbitrations.[318] Coe also lends his weight to the argument that an appellate body would be a positive development in the investment arbitration sphere.[319]

Although she seems to perceive the entire investment treaty system as problematic, Choudhury suggests that in order to 'reflect the public nature of the human rights issues implicated in investment arbitration, a greater need for democratic principles infused into the process is warranted.'[320] She seems to envisage, in effect, a curtailment in the scope of investment arbitration, the institutionalisation of investment dispute resolution and, more plausibly I would argue, an increase in public participation in the process.[321]

Schill, reacting to the mounting challenges to the legitimacy of international investment law, and moving from the premise that it is akin to a public law discipline, also advocates for a method of comparative public law to be applied to it. He states that:

> 'The public function of international investment law consists of establishing principles of investment protection under international law that provide for the protection of property and endorse rule of law standards for the treatment of foreign investors by states. These principles have the purpose of reducing the so-called "political risk" inherent in any foreign investment situation. In that sense, the substantive principles of international investment law, therefore, assume a function that is much closer to that of domestic constitutional and administrative law

[314] Coe op cit note 21 at 1343.
[315] Ibid at 1353.
[316] Ibid at 1353.
[317] Ibid at 1356.
[318] Ibid, particularly at 1379 - 1380.
[319] Ibid at 1382.
[320] Choudhury op cit note 24 at 1003.
[321] Ibid at 1003 - 1005.

> than to private law and commercial contracts negotiated between equals; investment treaty arbitration, in turn, can be understood as more akin to administrative or constitutional judicial review than to commercial arbitration, even though international investment law makes use of the arbitral process to settle disputes between states and foreign investors'.[322] (Citations omitted.)

Although acknowledging the cogency of the critique that 'investment treaty arbitration … concerns questions of public law, without relying on a dispute settlement mechanism that conforms to core public law values…',[323] he ultimately suggests that the public nature of investment disputes does not mean that the entire investment treaty system should be dismantled or overhauled, but rather that public law concepts should be applied to the system to develop it in a more legitimate way.[324]

Petersmann argues that constitutional justice is an 'appropriate paradigm for commercial investor-state arbitration', and that the rule of law requires 'multilevel judicial cooperation and more comprehensive judicial balancing of private rights and corresponding constitutional obligations of governments' in the international investment law space.[325]

He sees the principle of the rule of law and the protection of human rights as both being linked to justice and notes that the protection of human rights is dependent on the rule of law.[326] These concepts are thus interrelated and should not be seen as competing ideals. He states that '[h]uman rights and investment law are both aimed at legal protection of rights by means of legal and judicial restraints on government powers…'.[327]

He argues that it is imperative for arbitral tribunals in investor-state disputes to take the broader interests of states into account when rendering awards to retain legitimacy and that state liability for 'public interest regulation' must remain limited.[328]

Friedman identifies a critical issue facing international investment law today: 'whether entering into a [bilateral investment treaty] precludes a country from passing legislation to correct past social injustices'.[329] He addresses this through an examination of the *Foresti* case, the historical South African context, the legislative measures in issue and the types of issues

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[322] Schill op cit note 23 at 59.
[323] Ibid at 67.
[324] Ibid at 88.
[325] Petersmann, op cit note 27 at 514.
[326] Ibid at 521.
[327] Ibid at 523 -524.
[328] Ibid at 531.
[329] Friedman op cit note 38.

thrown up by the arbitration and notes that the issue is of particular concern for developing states.[330]

He suggests the adoption of a new test for international investment disputes regarding claims of expropriation, which would include an analysis of:

> '(i) whether there is an internationally recognized policy goal for the legislation in question, (ii) whether the goal can be accomplished in a less discriminatory way, and (iii) whether the goal can be accomplished while minimizing the effects on aggrieved parties and investors'.[331]

He also suggests that the involvement of civil society organizations could assist tribunals in understanding the technical and contextual issues in each matter which involves policy decisions taken by a state.[332]

Bottini explores the inclusion by certain states of non-precluded measures in their bilateral investment treaties.[333] He posits that even in the absence of such inclusions, it is doubtful that states 'intended to renounce their firmly established right under international law to protect essential State interests'.[334] He concludes, nonetheless that their inclusion is desirable. This argument is particularly interesting since, if Bottini is correct, states have not contracted out of their ability to regulate in the public interest through concluding bilateral investment treaties. This would, of course only be so provided the regulatory measure is sufficiently closely aligned with protecting the state's fundamental interests, which could be argued to include the social upliftment of various sectors of the population.

What is clear is that suggestions for the reform of investor-state dispute settlement under investment treaties abound. It is not clear whether or how quickly any of these measures will be adopted and, indeed, any reform is likely to be fairly slow in implementation given the number of interested parties and the divergence of interests at stake. Many of these reforms would, however, fail to address the more fundamental question of whether the intrinsic curtailment of a state's right to regulate in the public interest contained in investment treaties and enforced by investor-state dispute settlement is legitimate. It is this question that this dissertation seeks to address.

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[330] Ibid at 47.
[331] Ibid at 45.
[332] Ibid at 45.
[333] Bottini op cit note 71.
[334] Ibid at 147.

The balance to be struck

Whatever the criticisms of investment treaties are, I do not think that it can be argued that a balance should not be struck between the disquiet relating to their complete legitimacy and the desirability of binding states to respect the rule of law. As was held by the Tribunal in *ADC Affiliate*:

> '[W]hile a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries'.[335]

As Gazzini argues, 'a delicate balance [also] needs to be struck between the regulatory powers of the host State and the need legally to protect the interests of foreign investors'.[336]

How such balance is to be struck is, of course, the burning question. Many argue that it has already been found. As Brower and Schill point out, for liability under an investment treaty to arise, the host state must first interfere with the investor's investment in a manner that is contrary to the obligations that it has undertaken under that treaty.[337] Gazzini similarly points out that as long as the boundaries set in investment treaties are not affronted, no duty to compensate the investor arises.[338] It is also important to reiterate that such obligations are voluntarily undertaken in a decision to enter into the relevant treaty - itself an exercise of sovereign power.

Moreover, in order for compensation to be payable, the impact of the regulatory measure on the investment cannot be insignificant.[339] Brower and Schill observe that tribunals 'rather unanimously require the passing of a high threshold' in this respect and that the impact must indeed be substantial.[340]

They also point out that investment treaties:

> '[D]o not abolish the host state's regulatory powers. Instead, as arbitral jurisprudence illustrates, neither the standard of fair and equitable treatment nor the concept of indirect expropriation establishes absolute rights for foreign investors. Rather, they require that the host state, in taking measures that affect foreign investors, give due consideration to the

[335] Supra note 18 at para 423.
[336] Gazzini op cit note 7 at 113.
[337] See Brower & Schill op cit note 2 at 483.
[338] Gazzini op cit note 7 at 113.
[339] See Brower & Schill op cit note 2 at 486.
[340] Ibid at 486.

> importance of the protection of foreign investments by balancing the rights of foreign investors with conflicting private and public interests.'[341]

While these arguments are, in my view, cogent, I do not believe that they fully exculpate the investment arbitration system from the criticisms levelled against it. Indeed, even if in binding itself to an investment treaty a state was exercising a conscious and sovereign choice, such state may be doing so illegitimately. What guarantees that the far-reaching effects of such a choice, whether contemplated by the state or not will be tolerable? And what is there to protect the public interest in such choice? Indeed, what protects the public interest where the state has acted in a manner in which compensation must arise?

In finding the correct balance, there are certainly several areas of reform that I believe would go a long way towards ensuring the legitimacy of the process of investor-state arbitration. Among these are that, given the significant public interest in such arbitrations, they simply must be made more transparent and the ability for participation of parties other than the disputing parties must be enhanced.

Some steps towards these types of reform have already been taken. In respect of *amicus curiae* participation in proceedings, it seems clear that this may allow issues of public concern to be raised before the arbitral tribunal. Dumberry analyses the *Methanex*[342] case under NAFTA and the participation of various NGOs in that claim against the US government.[343] The US government argued that the tribunal should be able to accept *amicus* submissions if appropriate, arguing, as paraphrased by the author, that the case 'was not a typical commercial arbitration dispute: it involves a State as a respondent, it has to be decided on the basis of public international law, and the decision will have a significant effect extending beyond the two Disputing Parties'.[344] This position was upheld by the tribunal.[345]

Again, the new ICSID rules have made provision for the tribunal to allow non-disputing parties to file written submissions after consultation with the parties, but even without their consent.[346] Although Magraw and Amerasinghe argue that none of the current institutions or rules that govern investor-state arbitrations has adequate means for facilitating transparency

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[341] Ibid at 484.
[342] Supra note 223.
[343] See Patrick Dumberry 'The admissibility of *amicus curiae* briefs by NGOs in investors-States arbitration: The precedent set by the *Methanex* case in the context of NAFTA Chapter 11 proceedings' (2001) 1 *Kluwer Law International* 201 at 205 - 213.
[344] Ibid at 207.
[345] Ibid at 211 - 212.
[346] See McLachlan et al op cit note 21 at 57.

and public participation in proceedings that affect the public so deeply,[347] in 2013 UNCITRAL adopted a set of transparency rules, which, although limited in application and allowing various exceptions,[348] evidence that moves are being made in the right direction.

In April 2017, Switzerland ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, which aims to provide an efficient mechanism that extends the scope of the UNCITRAL Rules on Transparency in treaty-based investor-state arbitration to investment treaties concluded before these Rules entered into force on 1 April 2014.[349] The effect of this is that the Convention will enter into force in six months from the date of Switzerland's ratification thereof.[350]

A trend towards allowing participation may go some way towards addressing the criticism that has been levelled by, *inter alios*, Choudhury that 'investment arbitration has become involved in the adjudication of society's core values without the input from the affected society'.[351]

In respect of transparency, I note that in the case of ICSID arbitrations, at least the basic details (the fact of the arbitration, the parties, the identity of members of the tribunal and the nature of the dispute) are published.[352] The parties are also encouraged to consent to the publication of the award and, under the new ICSID rules, at least portions of the legal reasoning are published regardless of whether the parties consent to this.[353] Similarly, the US has displayed a pro-transparency stance both in its implementation of NAFTA and in its model bilateral investment treaty.[354]

But at a more fundamental level, the legitimacy concerns may perhaps be answered by a two-pronged approach. First, states must take responsibility for the extent to which they bind themselves and ensure that sufficient regulatory breathing-room is carved out of any treaty. This is primarily a matter of negotiation but it is a crucial step towards ensuring that states are not unduly constrained and may indeed fulfil their proper purpose. Second, the manner in which investment disputes are adjudicated must be shifted towards an ethos that, as a rule,

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[347] Magraw and Amerisinghe op cit note 206 at 341.
[348] Adeleke op cit note 160 at 53 - 54.
[349] See the United Nations Information Service Press Release dated 19 April 2017, last accessed from *http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl244.html* on 28 April 2017.
[350] Ibid.
[351] Choudhury op cit note 24 at 984.
[352] McLachlan et al op cit note 21 at 57.
[353] Ibid at 57.
[354] See Coe op cit note 21 at 1378.

takes into account the broader interests of states and their populations. I will expand on each of these ideas in what follows.

In respect of the steps that states may take, Gazzini highlights the fact that the bilateral nature of bilateral investment treaties enables state parties to amend their obligations in order to meet their changing needs or to react to what they perceive as incorrect interpretations by tribunals.[355] Such modification may be through protocols, amendments or subsequent practice.[356] Indeed, parties may at any time adopt binding common interpretations to clarify the scope and extent of their treaty obligations.[357]

Gazzini also points out that there is nothing preventing contracting states from inserting provisions imposing obligations on foreign investors to, for example, respect the environment, particular labour standards or human rights,[358] or indeed from inserting provisions ring-fencing the right of the host state to regulate in particular respects.[359] An example of the latter (cited by Gazzini) can be found in the bilateral investment treaty signed in 2009 between the Belgium-Luxembourg Economic Union and Colombia, which contains the following provision:

> 'Nothing in this Agreement shall be construed as to prevent a Contracting Party from adopting, maintaining, or enforcing any measures that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with environmental law of the Party'.[360]

It is also permissible for states to include provisions in investment treaties which preserve their right to adopt measures that are in fact contrary to their international obligations in certain circumstances.[361] Finally, it is even permissible for states to adopt clauses that expressly allow for specified measures that would be contrary to the treaty obligations of the

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[355] Gazzini op cit note 7 at 105 and 118.
[356] Ibid at 105. See Anthea Roberts 'Power and persuasion in investment treaty arbitration: The dual role of states' (2010) 104 *The American Journal of International Law* 179 for a full discussion on the role of subsequent practice in the interpretation of treaties.
[357] Gazzini op cit note 7 at 106. He cites the example of the 1996 exchange of diplomatic notes between Argentina and Panama with an interpretive declaration of the most favoured nation clause in the bilateral investment treaty between these two states.
[358] Ibid at 107 - 108.
[359] Ibid at 114.
[360] Article VII (4).
[361] Gazzini op cit note 7 at 115. Here he cites the treaty between the Russian Federation and Hungary, which provides at article 2(3) as follows:

> 'This Agreement shall not preclude the application of either Contracting Party of measures, necessary for the maintenance of defence, national security and public order, protection of the environment, morality and public health'.

host state, as long as they are non-discriminatory.[362]

Adeleke also notes the possibility of states including provisions in investment treaties that ensure that their domestic laws are considered in the interpretation exercise, particularly regarding the substantive contents of a right.[363] Such provisions can be broadly framed, ensuring that all host state laws are taken into account, which, he argues forces tribunals to apply applicable human rights and other laws that would ordinarily not come into the reckoning.[364]

In certain of its free trade agreements, the US has specified that non-discriminatory measures which further legitimate public welfare objectives do not constitute expropriations.[365] The Canadian model investment treaty also exempts, *inter alia*, regulations which protect human, animal or plant life from the obligations of each treaty.[366] Such provisions are not unique to developed nations. Indeed, the People's Republic of the Congo has entered into treaties that exempt investments relating to drinking water supply and the Kingdom of Morocco has entered into treaties which exempt 'government aid used for national development programmes and activities'.[367]

Gazzini reaches the conclusion that by concluding bilateral investment treaties states 'certainly do not relinquish their regulatory powers; they merely agree to respect some further limits to their exercise in dealings with foreign investors of the other party'.[368] Much like the entering into of any contractual arrangement, a state is entitled to bind itself in certain respects.

In respect of the adjudicative reform, I have already noted above that many tribunals are fairly deferential towards the regulatory role of respondent states in their reasoning. It must also be noted that arbitral tribunals are, of course, already constrained by the wording of the investment treaty through which they have been mandated.[369] As Gazzini points out, the role

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[362] Ibid at 115. Here Gazzini refers to article 7(2) of the bilateral investment treaty between Canada and Peru, which reads:

> 'A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 3 [national treatment] and 4 [most-favoured-nation treatment] apply to the measure'.

[363] Adeleke op cit note 160 at 60.
[364] Ibid at 62.
[365] See Choudhury op cit note 24 at 1003.
[366] As summarised by Choudhury ibid at 1003.
[367] Ibid at 1003. I also note that the treaties cited by the author are, in each instance (the US in the case of the Congo and the UK in the case of Morocco) with developed states.
[368] Gazzini op cit note 7 at 131.
[369] See Dumberry op cit note 23 at 365.

of investment tribunals is not to assess the exercise of the state's regulatory powers, but, rather, strictly to determine whether there has been a violation of the treaty in question.[370] As the tribunal in *SD Myers Inc. v Canada* pointed out, tribunals do not:

> '[H]ave an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections'.[371]

Brower and Schill argue that the employment by arbitral tribunals of 'proportionality reasoning' assists in achieving a balance between the rights on investors and the public interest that is sought to be advanced by the measure in question.[372] They cite the *Tecmed* decision by way of example, where the tribunal 'looked at the legitimate expectations of the investor, the importance of the regulatory interest pursued by the host state, and the weight and the effect of the restriction'.[373] They also rely on the decision in *Saluka Investments BV v Czech Republic*[374] in which the tribunal held that determinations under the fair and equitable treatment standard require 'a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other.'[375]

They posit that in order for a regulatory measure to be proportionate, it must not 'specifically target or unequally affect one investor' and that regulations should give rise to compensation if they 'restrict a property disproportionately or lead to a "special burden" on some investors'.[376]

It bears mentioning that the striking of the appropriate balance is also something that tribunals are generally acutely aware of.[377] The tribunal in the *El Paso Energy v Argentina* case emphasised that:

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[370] Gazzini op cit note 7 at 114.
[371] UNCITRAL (NAFTA), First Partial Award of November 13, 2000 at para 261 (*'SD Myers'*).
[372] Brower & Schill op cit note 2 at 486.
[373] Ibid at 486.
[374] Award of March 17, 2006 (*'Saluka'*).
[375] Brower & Schill op cit note 2 at 488, citing in particular the *Saluka* decision at 306.
[376] Ibid at 486.
[377] See Gazzini op cit note 7 at 120.

> '[A] balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow'.[378]

Adeleke posits that, in order to address the legitimacy concerns surrounding investor-state dispute settlement, a hybrid approach involving a consideration of both domestic law and international law should be utilised, taking administrative justice principles into account.[379] The aim of this approach would be to protect the sovereign rights of states to regulate in the public interest, while resolving some of the serious criticisms levelled against the current system.[380] He argues forcefully that an interpretive approach that favours public interest considerations should be adopted in investor-state dispute settlement,[381] and that the principle of deference inherent in global administrative law should be adopted through 'a recognition of the right of states to regulate certain policy matters'.[382]

Adeleke ultimately suggests the following approach:

> '[T]ransparency within the arbitrations system, public participation of all relevant stakeholders, and an interpretive approach that includes the hybrid application of international and domestic rules in resolving investment disputes that take into account broader interests beyond those of investors'.[383]

I submit that Adeleke's approach is eminently sensible. Effective reform will not be achieved by minor and single-minded incursions into the current system. A multi-faceted and nuanced approach must be adopted if a meaningful balance is to be achieved. I would add to Adeleke's proposal that states cannot be allowed to remain helpless victims of any legitimacy concerns. They must be expected to carve out sufficient regulatory space in any investment treaty (whether this is done at conclusion or addressed thereafter if need be) and must, in doing so, have regard to the unique needs of their territories and populations. This is indeed their mandate.

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[378] ICSID Case No ARB/03/15, Award on Jurisdiction of April 27, 2006 at para 70.
[379] Adeleke op cit note 160 at 50.
[380] Ibid at 50.
[381] Ibid at 54.
[382] Ibid at 63.
[383] Ibid at 65.

CHAPTER IV - SOUTH AFRICA, ITS INVESTMENT TREATIES AND THE COURSE OF ACTION IT HAS ADOPTED

Background to the current situation in South Africa

Now that I have detailed what investment treaties generally provide for, as well as some of the serious criticisms and countervailing defenses of them, I turn to analyse these treaties in the context of the Republic of South Africa and its recent decision to terminate some of its bilateral investment treaties and to enact domestic investment protection legislation to cater for the protection of investments made in the country.

It is critical to understand the historical context of South Africa's current political exigencies in order to appreciate the probable reasons behind, and full implications of, this decision. For more than half a century, through the system of apartheid, black South Africans were systematically and brutally disadvantaged in South Africa.[384] Among other atrocities, black South Africans were denied the possibility of self-employment and skills development by the South African government and were confined to particular (impoverished) areas of the country.[385] There are a number of serious and lasting effects of this which still plague South African society today.[386] The post-apartheid South African government has rightly sought to implement policies to redress the past injustices that were suffered and to 'alleviate the societal devastation' that has flowed from the apartheid system.[387]

The Constitution accordingly embraces a substantive, rather than a formal, notion of equality, and permits (and indeed requires) the taking of positive steps towards the realization of the Constitution's remedial and restitutionary aims.[388] Chow articulates the well-accepted principle underlying the notion of equality that is understood in South Africa as being that '[t]o truly bring all South Africans to a level playing field, measures must be aimed at promoting the advancement of [historically disadvantaged South Africans] and other

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[384] Friedman op cit note 38 at 39.
[385] Ibid at 39.
[386] Ibid at 39 and 40. Friedman, for example, notes that 'a large disparity in income between black and white South Africans' remains.
[387] Ibid at 39.
[388] Section 9(2) of the Constitution expressly provides that 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'. See Marianne W. Chow 'Discriminatory equality v. nondiscriminatory inequality: the legitimacy of South Africa's affirmative action policies under international law' (2009) 24 *Connecticut Journal of International Law* 291 at 302 to 303 for an analysis of this.

categories of persons who are in disadvantaged positions due to past discrimination'.[389] One of the policies that has been implemented is that of Black Economic Empowerment ('BEE') and the South African government has been afforded broad powers to legislate and regulate to achieve the objectives underlying BEE.[390]

During the apartheid period, the South African government did not enter into any bilateral investment treaties.[391] During this time, South Africa was effectively treated as a pariah state and many other states disinvested from it economically, with an international sanctions regime ultimately being applied.[392]

After the end of the apartheid regime, however, the newly elected South African government, as 'an important element of a wider policy of opening the country to greater foreign investment', concluded over 40 bilateral investment treaties, between 1994 and 2008.[393] Friedman describes this as 'a move toward economic security and development'[394] and Schlemmer asserts that 'the signing of investment promotion and protection agreements showed a measure of good faith on the side of the government'.[395] The conclusion of these investment treaties was effectively seen as a strategic step towards creating the economic climate in which development could occur.

The first of the treaties concluded included investment treaties with the United Kingdom (signed in 1994) and with Canada, Cuba, France, Germany, Korea, the Netherlands and Switzerland (signed in 1995).[396] South Africa has, to date, concluded investment treaties with both developed and developing states, including a number of African states.[397]

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[389] Chow op cit note 388 at 313.
[390] Friedman op cit note 38 at 40. Friedman cites the objectives of such policies as including'(1) increasing black South African ownership interest in enterprises in both standard and priority sectors of the economy, (2) increasing the number of new black South African enterprises, and (3) increasing the number of black South Africans in executive management positions.' See also Matthew Coleman & Kevin Williams 'South Africa's bilateral investment treaties, black economic empowerment and mining: a fragmented meeting?' (2008) *Business Law International* 56 at 60 to 62.
[391] Luke Eric Peterson 'South Africa's Bilateral Investment Treaties: implications for development of human rights' (November 2006) 26 *SAIIA IISD Dialogue on Globalization Occasional Papers* at 1. See also Azwmpheleli Langalanga 'Imagining South Africa's foreign investment regulatory regime in a global context' (May 2015) *SAIIA Economic Diplomacy Programme Occasional Paper 214* at 5 - 6.
[392] Schlemmer op cit note 36 at 167 to 168.
[393] Peterson op cit note 391 at 1 states that the new government embarked on 'an ambitious round of treaty-making'. See also Schlemmer op cit note 36 at 169 for a full analysis of the investment treaties concluded by the South African government since 1994. See also Langalanga op cit note 391 at 7 - 8.
[394] Friedman op cit note 38 at 39.
[395] Schlemmer op cit note 36 at 168.
[396] Peterson op cit note 391 at 1.
[397] See ibid at 2 for a list of South Africa's bilateral investment treaties as of June 2006. See also Schlemmer op cit note 36 at 169.

Approximately 25 of the treaties signed by South Africa ultimately entered into force.[398]

South Africa's investment treaties

South Africa's bilateral investment treaties are not exceptions to the archetypal investment treaties described in this dissertation. They typically define both investments and investors broadly.[399] They also generally offer substantial protections to investors, including, rights to repatriate profits and other returns and guarantees of compensation in cases of expropriation, they incorporate the fair and equitable treatment standard, the national treatment standard and the most favoured nation treatment standard.[400]

It is important to note that all bilateral investment treaties concluded by South Africa contain dispute resolution provisions that allow for investor-state arbitration.[401] Although South Africa is not a signatory to the Convention and investors cannot proceed against the South African government through ICSID arbitration, such disputes can be referred to the ICSID Additional Facility or arbitration under, for example, the UNCITRAL rules.[402]

Schlemmer recognises the potentially problematic reality that in respect of investment treaty arbitrations involving South Africa, the taxpayer effectively has to bear the brunt of any adverse awards, without even necessarily being aware of the dispute and without the government being held to account.[403] Schlemmer thus introduces the extremely important issue of accountability into the debate about the appropriateness of the current investor-state arbitration regime in South Africa. The fact that South Africa's investment treaties do not specify that investor-state arbitral proceedings under such treaties should be transparent raises serious concerns. As I have noted previously, there is an accountability gap in the fact that arbitral tribunals convened under investor-state dispute resolution clauses contained in investment treaties are, with regularity, making determinations which bind states in disputes concerning matters of clear public interest, without the public necessarily even being aware that such arbitral proceedings are taking place. Serious questions are being raised globally

[398] See the United Nations UNCTAD Investment Policy website, last accessed from *http://investmentpolicyhub.unctad.org/IIA/CountryBits/195* on 26 March 2017. South Africa has also concluded various other treaties that contain investment protection provisions. See the UNCTAD website, last accessed from *http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/195#iiaInnerMenu* on 26 March 2017.
[399] Peterson op cit note 391 at 4.
[400] Ibid at 4. See also Schlemmer op cit note 36 at 178.
[401] Schlemmer op cit note 36 at 183.
[402] Ibid at 183. See also Schlemmer op cit note 107 at 752.
[403] Schlemmer op cit note 36 at 187.

about whether the concept of private dispute resolution having the ability to restrict the exercise of public power by the state is legitimate.

It is also notable that South Africa's investment treaties, subject to a few exceptions, do not contain any development goal or regulatory carve outs.[404] They, moreover, do not contain preamble provisions which highlight South Africa's particular social or development goals.[405] Indeed, Peterson notes that, in spite of the contemporaneity of many of these treaties with the conclusion of the Constitution, they do not reference the 'soaring aspirations' which were written into the Constitution's preamble.[406] The majority of South Africa's investment treaties, even those concluded after the adoption of BEE policies and legislation implementing them, do not contain any carve-out provisions which allow for the implementation of BEE policies.[407]

Because the goals, aims and values encapsulated in the Constitution are not reflected in the preambles of South Africa's bilateral investment treaties, these would not be taken into account by arbitral tribunals interpreting the conduct of the South African government.[408] As Schlemmer points out:

> 'This can have no other result than giving an interpretation that is more investor-friendly than what could have been the position had the government's intentions to redress the wrongs of the past been included in the preamble to the [bilateral investment treaty]'.[409]

Peterson describes South Africa's investment treaties as 'a double-edged sword, providing certainty to foreign investors, and security to outward-bound SA investors, at the same time as the application of these treaties may constrain government policy-making'.[410] He also posits that South Africa's bilateral investment treaties are generally most favourable to investors without sufficient consideration having been given to the need for investments to be regulated.[411] He states that what is most remarkable is that many of South Africa's earlier

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[404] Peterson op cit note 391 at 5. See also Emad Khalil 'A selection of views on the expropriation of interests in the mineral and petroleum extraction industries' (2008) *International Energy Law Review* 79 at 88, who states that South Africa's earlier investment treaties 'make no attempt to immunize the [g]overnment's sweeping social reform programmes, particularly those relating to BEE, from extensive treaty protection.' See also Langalanga op cit note 391 at 9, who states that South Africa's investment treaties 'displayed a disconnect between the country's domestic imperatives and what it committed itself to at the international level'.
[405] Peterson op cit note 391 at 5.
[406] Ibid at 5.
[407] Schlemmer op cit note 36 at 173.
[408] Ibid at 173.
[409] Ibid at 174.
[410] Peterson op cit note 391 at 3.
[411] Ibid at 6.

investment treaties 'do not contain a provision which expressly shelters those government measures which are designed to promote the achievement of equality or to advance the interests of the previously disadvantaged'.[412]

I note that some of South Africa's investment treaties do, however, contain such a clause. Article 3 of the investment treaty between the Czech Republic and South Africa, concluded in 1998,[413] for instance, carves out benefits extended by virtue of 'any law or other measure the purpose of which is to promote the achievement of equality…, or designed to protect or advance persons, or categories of persons, previously disadvantaged by unfair discrimination' from its national treatment and most favoured nation treatment provisions.[414] It is clear that the South African government was not entirely unaware of the possibilities of carving out such space, even as far back as 1998. Why it chose not to do so for the bulk of its investment treaties is not apparent.[415]

Schlemmer performs a very useful analysis of the terms of the various South African bilateral investment treaties, ultimately concluding that the South African government did not change its stance in negotiating these treaties over the years.[416] She asserts that the trend shows that the South African government did not ensure that its own domestic needs and policies, at a time when it was under significant transformation pressure, were taken into account when negotiating its investment treaties.[417] She also raises the issue that South Africa did not negotiate preambles to its international investment treaties to set out the government's goals, aims and values to ensure that these are taken into account by Tribunals assessing the actions of the South African government.[418]

Schlemmer suggests that the failure on the part of the South African government to ensure that its legitimate social upliftment policies and goals, as set out in the Constitution, were catered for in negotiating its investment treaties is significant.[419] It is of significance, as she notes, that South Africa did include exceptions to the standards of protection offered in its

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[412] Ibid at 6.
[413] Agreement between the Czech Republic and the Republic of South Africa for the Promotion and Reciprocal Protection of Investments, 1998.
[414] See Article 3.3(c) of such treaty and Peterson op cit note 391 at 6.
[415] See Chow op cit note 388 at 328 where she states that some of South Africa's bilateral investment treaties 'have contained language that is favourable to South Africa's domestic policies and development goals… Yet … these favourable provisions were not consistently applied…'.
[416] Schlemmer op cit note 36 at 172 - 185.
[417] Ibid at 172 - 185.
[418] Ibid at 173.
[419] Ibid at 174.

investment treaties to cater for laws or measures applied for the purpose of promoting the achievement of equality in some of its investment treaties.[420] It is clear then, as Schlemmer indicates, that the South African government was aware of the possibility (and desirability) of doing so, yet failed to do so in the majority of treaties to which it agreed. She states that the South African government was 'in a perfect situation to take its own domestic needs and policies into account' when negotiating its bilateral investment treaties.

Moreover, there is at least one example of South Africa having successfully negotiated an addendum or protocol to an existing bilateral investment treaty. In respect of the Iran - South Africa bilateral investment treaty, the parties have agreed to exclude '[a]ny law or other measure taken, pursuant to Article (9) of the [Constitution] the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination' from the ambit of the most favoured nation and national treatment provisions in the treaty.[421]

As Adeleke notes, the United Nations Guiding Principles on Business and Human Rights has recognised that 'states should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other states or business enterprises, for instance through investment treaties or contracts'.[422] Surely it is a trite principle that:

> '[O]wing to the binding character of express promises and agreements, a wise and prudent Nation will carefully examine and maturely consider a treaty of commerce before concluding it, and will take care not to bind itself to anything contrary to its duties to itself and others.'[423]

The failure to negotiate investment treaties that would allow South Africa sufficient regulatory space to effect the transformative and developmental policies that it has already adopted should, I submit, be seen as a failure on its part. It was aware of the possibility of doing so, yet agreed to be bound to treaties that arguably left it unable to implement important national policies without putting itself at risk of significant claims being lodged against it by investors.

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[420] Ibid at 178.
[421] See Chow op cit note 388 at 324 to 325.
[422] Adeleke op cit note 160 at 60, citing article 9 of the Guiding Principles.
[423] McLachlan et al op cit note 21 at 3, citing M de Vattel *Le Droit des Gens ou Principes de la Loi Naturelle* (1758) Book II Chapter VIII para 28 trans C Fenwick (1916) Vol III at 122.

Investment treaty disputes involving South Africa

To date, there have only been two known instances where South Africa's investment treaties have been enforced. The first of these was in April of 2001, when a Swiss national initiated, and was successful in arbitration proceedings under the UNCITRAL rules of arbitration, alleging breach of South Africa's bilateral investment treaty with Switzerland based on an allegation that the South African authorities had failed to provide adequate protection and security for an investment in a game farm and accompanying hotel and conference center.[424] The investor had made improvements to the property but, the investor claimed, the property had been plagued by vandalism, theft and poaching and was totally destroyed in the late 1990s.[425] This dispute was arbitrated without any publicity and led to a binding award against the South African government in 2003.[426] The arbitral tribunal determining the dispute found that the South African government had breached its obligation to provide protection and security to the claimant's investment.[427]

The second known instance of a claim being brought under South Africa's investment treaties commenced in 2006/7, when the South African government faced a major international investment treaty arbitration under the auspices of ICSID in the *Foresti* case.[428] The claimants were several Italian citizens and Luxembourg-based entities who had invested in a mining operation in South Africa.[429] The claim concerned the BEE provisions contained in South Africa's Minerals and Petroleum Resources Development Act, 2002 ('the MPRDA').[430]

Through the MPRDA, the South African government took ownership and control over all natural resources within its territory and, through a licensing system, determined who could have rights therein.[431] Entities that had, until this point, owned various mineral rights (through ownership of land on which such minerals were found) were consequently compelled to apply for licenses to continue to exploit these rights.[432] Moreover, a particular percentage of black South African ownership of such mineral rights was envisaged.[433] In

[424] Peterson op cit note 391 at 30.
[425] Ibid at 30.
[426] Ibid at 14 and 30.
[427] Ibid at 30. See also Schlemmer op cit note 36 at 186.
[428] The *Foresti* case supra note 38. Note that since South Africa is not a signatory to the Convention, the arbitration was initiated under the ICSID Additional Facility capacity. See Chow op cit note 388 at 333.
[429] See Friedman op cit note 38 at 37.
[430] Ibid at 38. See also Chow op cit note 388 at334 - 336.
[431] Friedman op cit note 38 at 38 and Coleman & Williams op cit note 390 at 67.
[432] Friedman op cit note 38 at 38 and 41.
[433] Ibid at 41. See also Kahlil op cit note 404 at 87, who states that:

> 'A… key regulatory aspect of the MPRDA is its specific reference to social transformation and the

effect, mining companies were expected to hire, and to sell 26 percent of their shareholdings to, historically disadvantaged South Africans.[434]

The claimants in *Foresti* challenged this regime, *inter alia*, on the basis that the 'forced divestiture' of shareholding it mandated amounted to an expropriation under international law and a breach of South Africa's obligations under its bilateral investment treaties.[435] They also argued that the South African government was in breach of its fair and equitable treatment and national treatment obligations.[436] The claim was for €260 million.[437]

The South African government argued that its obligations under the relevant investment treaties had been met in that South African law provides an adequate mechanism for determining compensation in cases of expropriation and that all investors were being treated equally under the legislation in question.[438] It argued that, even if this was not so, 'the difference in treatment would fall within the State's margin of appreciation for determining which measures were reasonable and justifiable in advancing critical public interests'.[439] Kelsey notes that notes that:

> 'South Africa's defence cited several public purposes, including (i) ameliorating the disenfranchisement of disadvantaged South Africans and other negative social effects caused by apartheid in general and the 1991 Mineral Rights Act in particular; (ii) reducing the economically harmful concentration of mineral rights and promoting the optimal exploitation of mineral resources; and (iii) protecting the environment and the communities living in the

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> need to redress the wrongs of South Africa's apartheid past through an explicit policy of [BEE]. Again, the objects clause of the [MPRDA] records the need "to substantially and meaningfully expand opportunities for historically disadvantaged persons […] to enter the mineral and petroleum industries". The [MPRDA] then links this BEE objective to its most important licensing provisions, providing, in effect, that no mining right or conversion of such right can be granted without BEE compliance. This, in turn, reflects South Africa's Constitutional principle of positive discrimination, to redress past inequality which prevailed in apartheid South Africa'. (Citations omitted.)

[434] Choudhury op cit note 24 at 990. See also Davis & Corder op cit note 38 at 82 and Coleman & Williams op cit note 390 at 73 - 74I note that in *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC), the Constitutional Court of South Africa found that the deprivation of rights in the Mineral and Petroleum Resources Development Amendment Act, 49 of 2008 was not arbitrary, as a result of its objectives including the facilitation of equitable access to the Republic's mineral resources. See Adeleke op cit note 160 at 59.

[435] Friedman op cit note 38 at 38. See also Choudhury op cit note 24 at 990, Annalisa M. Leibold 'The friction between investor protection and human rights: Lessons from Foresti v. South Africa' *Houston Journal of International Law* (2016) 215 at 244 to 247, who states at 244 that this case 'stirred up considerable international controversy because it involved a challenge to South Africa's Black Economic Empowerment (BEE) policies, which were designed as remedial measures to alleviate the effects of racial discrimination from the apartheid era', and Jason Brickhill & Max Du Plessis 'Two's company, three's a crowd: public interest intervention in investor-state arbitration (*Piero Foresti v South Africa*)' (2011) *South African Journal of Human Rights* 152 at 156. See also Coleman & Williams op cit note 390 at 76.

[436] Choudhury op cit note 24 at 990. See also Coleman & Williams op cit note 390 at 76.

[437] Schlemmer op cit note 36 at 186.

[438] Adeleke op cit note 160 at 58.

[439] Ibid at 58.

vicinity of mining'.[440]

The government also argued that the measures in question were enacted to give effect to the values enshrined in the Constitution.[441]

Various non-governmental organisations sought, and were permitted, to intervene in the case and some presented arguments that the tribunal appointed to determine the matter 'should take into account the "on the ground reality" in South Africa that vast inequalities exist' and the purpose behind the policy measure in issue and employ an adapted expropriation analysis on this basis.[442]

The case was ultimately settled with the South African government paying a significant settlement figure to the investors.[443]

Friedman posits that the issue arising from the *Foresti* case was 'the scope of the post-apartheid South African government's ability, under domestic and international law, to implement legislative and policy decisions designed to redress the devastating socio-economic legacy left by apartheid.'[444] Vidal-León similarly states that the case 'encroached upon one of the most sensitive aspects of the country's policy objectives, namely social transformation and uplifting of historically disadvantaged individuals.'[445] Davis and Corder describe the *Foresti* case as providing 'a graphic illustration of a direct clash between internationally-recognised financial interests on the one hand and democratically required developmental initiatives at a domestic level on the other.'[446]

Indeed, it is difficult to imagine a case that could have had more potential to undermine South

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[440] Jane Kelsey 'Towards a new international investment paradigm? Taking the BRICs seriously' (2015) *New Zealand Business Law Quarterly* 328 at 340.

[441] Christian Vidal-León 'A new Approach to the Law of Foreign Investments: the South African Case' *Yearbook on International Investment Law & Policy 2014-2015* (2016) Chapter 11 (uncorrected proof) at 297.

[442] Friedman op cit note 38 at 44. See also Brickhill & Du Plessis op cit note 435 at 153 and 157 - 158. At 163 the authors state that the intervening parties:

> '[S]ought to place the relevant constitutional and international human rights law before the Tribunal to ensure that its decision on the international legality of the MPRDA was not taken in a social and economic vacuum by applying investment law blindly without consideration of the transformative duties upon and objectives of the South African government.'

[443] These cases are summarised in Schlemmer op cit note 36 at 179 - 180 and 187. See also Friedman op cit note 38 at 37.

[444] Friedman op cit note 38 at 38, quoting from the submissions made by non-disputing parties in the *Foresti* case.

[445] Vidal-León op cit note 441 at 297 - 298.

[446] Davis and Corder op cit note 38 at 83. See also Annika Wythes 'Investor-state arbitrations: can the "fair and equitable treatment" clause consider international human rights obligations?' (2010) *Leiden Journal of International Law* 241 at 241, where the author states that the case dealt with the extent to which international human rights obligations might be compromised by investor protections'.

Africa's ability to pursue the domestic transformation goals that lay at the very heart of its newly established democracy. The country's mineral resources are critical to its economic prosperity and control over such resources must, of necessity, be a critical aspect of any transformatory agenda.

Neither of the above two investment arbitrations was fully public and, as Schlemmer points out, in both instances, the taxpayer had to bear the brunt of significant awards and costs without the citizenry fully being aware of the cause and without the South African government ever being properly accountable.[447]

The review of South Africa's investment treaties

In 2008 and 2009, the South African government commissioned and undertook a review of its investment policies, including those relating to its bilateral investment treaties.[448] Schlemmer credits South Africa's exposure to international investment arbitration for this reassessment.[449] Indeed, the government Position Paper produced in June 2009 as a consequence of the review ('the Position Paper') recognises that the review was 'partly necessitated by various arbitral proceedings initiated against the Republic of South Africa'.[450]

Several concerns were raised in the review. These, to some extent, echoed the general concerns with investment treaties and investor-state dispute settlement discussed in chapter three of this dissertation. These included a concern that the proliferation of bilateral investment treaties endangered the South African government's ability to implement important policies. The Position Paper states that:

> 'Prior to 1994, [South Africa] had no history of negotiating [bilateral investment treaties] and the risks posed by such treaties were not fully appreciated at the time. The Executive had not been fully apprised of all possible consequences of [bilateral investment treaties]. While it was understood that the democratically elected government of the time had to demonstrate that [South Africa] was an investment friendly destination, the impact of [bilateral investment treaties] on future policies were not critically evaluated. As a result, the Executive entered into agreements that were heavily stacked in favour of investors without the necessary

[447] Schlemmer op cit note 36 at 187.
[448] Ibid at 185. See also Vidal-León op cit note 441 at 298.
[449] Schlemmer op cit note 36 at 169. See also Vidal-León op cit note 441 at 296, where the author states that the *Foresti* case 'sufficed to awake an aversion to the rules and procedures of foreign investments'.
[450] 'Bilateral Investment Treaty Policy Framework Review: Government Position Paper' June 2009 at 5 and 12.

safeguards to preserve flexibility in a number of critical policy areas'.[451]

Another major concern raised was that dispute settlement mechanisms under investment treaties 'were not designed to address complex issues of public policy that now routinely come into play in investor-state disputes'.[452] Other concerns included the inconclusiveness of the correlation between bilateral investment treaties and the flow of foreign direct investment into South Africa;[453] an impression that international investment arbitration allows investors to 'leapfrog' domestic legal systems and the safeguards those systems have in place to protect public goods;[454] an apprehension that significant issues of concern for developing countries are not being addressed in the negotiating process surrounding bilateral investment treaties;[455] a concern that international tribunals tend to expand their jurisdiction under the bilateral investment treaties, are too independent and are inconsistent;[456] and a perception that bilateral investment treaties place untenable obligations on host states.[457]

Some of the concerns were also specific to the South African context. In particular, a concern was raised that bilateral investment treaties conflicted with the Constitution.[458] Schlemmer sets out the possible gap between the standard offered under South Africa's investment treaties and that under the Constitution, concluding that the majority of South Africa's bilateral investment treaties do not allow for the full implementation of policies such as those implemented through the Broad Based Black Economic Empowerment Act 53 of 2003 and the Preferential Procurement Policy Framework Act 5 of 2000 and that they generally provide a much higher standard for compensation for expropriation than that guaranteed under the Constitution.[459]

South Africa's investment treaties conform to the international standard of requiring 'prompt, adequate and effective' compensation, which is extrapolated to mean, in effect, compensation

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[451] Position Paper supra note 450 at 5.
[452] Ibid at 45.
[453] Ibid at 11 and 22. I note that that Position Paper at 22 did recognise that foreign direct investment 'has many determinants and [bilateral investment treaties] may account for at least one of them, namely legal certainty'. As previously discussed, this is an issue of some debate. See, for example, Caron op cit note 43 at 779 and Gazzini op cit note 7 at 103.
[454] Position Paper supra note 450 at 10.
[455] Ibid at 11 and 46.
[456] Klaaren & Schneiderman op cit note 44 at 4 - 5. The inconsistency of arbitral tribunals is, as I have previously discussed, also a matter of debate. See Gazzini op cit note 7 at 103.
[457] See Adeleke op cit note 45 at 1-2 for a summary of the justifications put forward by the South African government.
[458] Position Paper supra note 450 at 40 - 41. Klaaren & Schneiderman op cit note 44 at 2 state that the Constitution 'provides sufficient guarantees, and thereby mitigates risks, to foreign investors'.
[459] Schlemmer op cit note 36 at 31 and 180.

amounting to the market value of the investment.[460] In contrast, under section 25 of the Constitution, compensation must merely be:

> '[J]ust and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all the relevant circumstances, including:
>
> a. the current use of the property;
> b. the history of the acquisition and use of the property;
> c. the market value of the property;
> d. the extent of the direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> e. the purpose of the expropriation'.[461]

It is clear from the wording of the Constitution that a number of potentially competing factors must be weighed when assessing the amount of compensation to be provided in cases of expropriation, and that the market value of the property expropriated is only one of these factors. Peterson states that 'by invoking their rights to international arbitration found in [South Africa's bilateral investment treaties], foreign shareholders or foreign owners of South African mining interests could circumvent the South African courts, and seek to avoid the compensation standards prescribed under' South African law.[462] Indeed, Klaaren and Schneiderman conclude that the 'constraints concerning expropriation and nationalisation in [bilateral investment treaties] are more onerous than those found in the text of the South African Constitution'.[463] They also argue that the Constitutional property rights regime 'is substantially coherent and guarantees considerable protection and property interests.'[464]

The Position Paper also includes sentiment stemming from the Calvo doctrine in stating that treatment of foreign investors should not be greater than that afforded to South African citizens.[465]

The review concluded that a change was needed. The ultimate finding of the review has been summarised as being that 'the current system leaves the door open "for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration

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[460] Peterson op cit note 391 at 20.
[461] Section 25(3) of the Constitution. See also Adeleke op cit note 45 at 3 and Karen Bosman 'South Africa: Trading international investment for policy space' (2016) *Stellenbosch Economic Working Papers*: *04/16* at 22.
[462] Peterson op cit note 391 at 21.
[463] Klaaren & Schneiderman op cit note 44 at 3.
[464] Ibid at 3. See also Vidal-León op cit note 441 at 298 - 299 for a summary of the concerns raised.
[465] See Vidal-León op cit note 441 at 299.

that may constitute direct challenges to legitimate, constitutional and democratic policy-making"'.[466] It included suggestions that investment treaties approaching the end of their terms should be 'revisited with a view to ensuring that they incorporate measures which ensure that national development objectives may be pursued',[467] and that more specific language catering for the promotion of sustainable development and ensuring that investment protection will not trump key public values should be included.[468] The bottom line proposed was that South Africa:

> '[S]hould review its [bilateral investment treaty] practices, with a view to developing a model [treaty] which is in line with its development needs, balancing the need for investor certainty on the one hand, but also ensuring that its own legitimate interests are not compromised'.[469]

The stance taken by the South African government

Vidal-León highlights the Position Paper's consideration by the South African Cabinet in 2010.[470] He confirms that Cabinet endorsed the following five actions that the government should take:

1) refrain from entering into further investment treaties, 'save for compelling economic and political circumstances';

2) review and renegotiate 'all "first generation" investment treaties entered into after the democratic transition';

3) implement domestic legislation to cater for protection of investments;

4) develop a model investment treaty to be used in future renegotiations; and

5) elevate all decision-making in respect of investment treaties to an Inter-Ministerial Committee.[471]

The South African government, however, ultimately took the more extreme policy decision not to renew, or to terminate, certain of its existing bilateral investment treaties.[472] It decided,

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[466] See Bosman op cit note 461 at 12 (citations omitted).
[467] Position Paper supra note 450 at 19. At page 33 the Position Paper suggests that the South African government should be requesting renegotiation of investment treaties nearing the end of their term.
[468] Ibid at 28.
[469] Ibid at 56.
[470] Vidal-León op cit note 441 at 299.
[471] Ibid at 299 - 300.
[472] Schlemmer op cit note 36 at 189. See also Adeleke op cit note 160 at 48 - 49 and Kathryn Gordon & Joachim Pohl (2015) 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World' *OECD*

instead, to focus solely on developing domestic legislation to govern the protection of foreign investments.[473] A number of South Africa's investment treaty counterparts were accordingly notified that their bilateral investment treaties were being unilaterally terminated.[474]

Termination, or notification of termination, of the investment treaties with the United Kingdom, the Netherlands, Switzerland, Germany, France, Cuba, Denmark, Austria, Italy, Sweden, Argentina, Belgo-Luxembourg Economic Union, Finland, Spain and Greece has been effected.[475] South Korea, China, Mauritius, Senegal, Russia, Nigeria and Zimbabwe did not receive similar notifications.[476]

The decision by the South African government has been aggressively criticised,[477] and has evoked strong negative reactions from foreign countries.[478] In 2015, the European Union Chamber of Commerce and Industry in Southern Africa recorded that 'the recent withdrawal of South Africa's Bilateral Investment Treaties (with EU member states) sent a negative message to the EU business community regarding the long-term standard of protection of investments in South Africa.'[479]

It is without question that the South African government has taken a fairly robust stance in response to its concerns about the investment treaties that it is party to and it is inevitable that this will have implications for future investments in the Republic.[480]

Working Papers on International Investment 2015/02 at 7. These authors also confirm that globally treaty termination has been an extremely rare event at 18. See also Vidal-León op cit note 441 at 300.

[473] Schlemmer op cit note 36 at 189 and Adeleke op cit note 160 at 49.

[474] Schlemmer op cit note 36 at 189.

[475] Ibid at 189.

[476] Ibid at 189.

[477] Vidal-León op cit note 441 at 295 and Gerhard Erasmus 'Investment protection agreements: The implications of South African policy and legislative changes' (2015) *Tralac Working Paper* at 1. See also Mohammad Mossallam 'Process matters: South Africa's experience exiting its BITs' *Global Economic Governance Programme Working Paper* 2015/97 at 5 and 15, who records that criticism came from local and foreign business groups, and foreign governments.

[478] Vidal-León op cit note 441 at 301. See also Langalanga op cit note 391 at 5 and the United Nations Economic Commission for Africa 'Transformative Industrial Policy for Africa' (2016) ('Transformative Industrial Policy'), last accessed from *www.uneca.org/sites/default/files/PublicationFiles/tipa-full_report_en_web.pdf,* on 30 April 2017 at 141.

[479] Text of the submission by the European Union Chamber of Commerce and Industry in Southern Africa on the Promotion and Protection of Investment Bill, as presented to the Portfolio Committee on Trade & Industry, Parliament, September 15 2015 ('European Chamber submission') last accessed from *http://www.euchamber.co.za/parliamentary-submissions/2015/9/21/submission-to-the-portfolio-committee-ito-the-promotion-and-protection-of-the-investment-bill-2013* on 14 April 2017. The submission also states that '[i]n addition to creating a negative signalling effect, the changes have also increased the cost of doing business in South Africa for investments from member state investors where an increased (risk insurance) premium is associated with investing in countries with which there are no [bilateral investment treaties] in place.'

[480] See Schlemmer op cit note 36 at 176.

The Protection of Investment Act

As I have mentioned, the South African government took the decision that the protection of foreign investments in South Africa should be governed by domestic legislation. The Act was thus conceptualised, drafted and passed.

The purpose of the Act, as stated in section 4, is to:

> '(a) protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors;
>
> (b) affirm the Republic's sovereign right to regulate investments in the public interest; and
>
> (c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.'

Although the Act sets out a national treatment standard,[481] a physical security of property standard, and a right to transfer funds,[482] the Act is undeniably a substantial departure from the investment treaty tradition and generally accepted international law standards and includes various features that clearly move away from the foundations on which the current investment law regime is grounded.[483] Moreover, the Act, being domestic legislation, can always be amended or repealed without further ado.[484] As I have stated previously, reliance on the substantive protections offered in national investment legislation (although such legislation does create obligations for the host state) is thus seen as an inferior source of investment protection.

Adeleke, writing in 2015 prior to the passing of the Act, examines what was then South Africa's proposed law and highlights the discrepancies between such proposed law and the protection offered under South Africa's bilateral investment treaties.[485] In doing so, he is mindful of South Africa's 'competing interests of national development objectives and its obligations under international law'.[486] In 2015, the European Union Chamber of Commerce

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[481] This is set out in section 8 of the Act. I note that there are significant provisos to this protection which are dealt with later in this Chapter.
[482] Sections 8, 9, and 11 of the Act.
[483] Bosman op cit note 461 at 25 states that the Act 'significantly weakens' the protection of foreign investments in South Africa in relation to protection that has traditionally been offered under bilateral investment treaties.
[484] See Mbengue op cit note 48 for a discussion of whether domestic investment protection legislation can found enforceable obligations under international law. See also Bosman op cit note 461 at 24.
[485] Adeleke op cit note 45.
[486] Ibid at 1.

and Industry in Southern Africa stated that '[i]n general, the Bill does not appear to EU investors to provide sufficient substantive protection'.[487]

Notable exclusions from the Act include that the Act does not contain a most favoured nation treatment standard, and a fair and equitable treatment standard.[488] The Act also curtails the possibility of claiming compensation significantly and alters the standard of compensation to be what is just and equitable (to conform to the constitutional standard described above), rather than full market value compensation.[489]

Importantly, the Act also explicitly grants South Africa the right to take regulatory measures in order, among other things, to redress historical, social and economic inequalities and injustices, uphold the rights, values and principles contained in the Constitution, promote and preserve cultural heritage, foster economic development, protect the environment and achieve the progressive realization of socio-economic rights.[490] This express inclusion is clearly an attempt to ensure that the rights of foreign investors cannot be interpreted in a way that would infringe on the South African government's right to implement regulatory measures that it sees as being in the public interest.

The Act also introduces exceptions in the required state conduct that carve out 'broad regulatory powers'.[491] For instance, section 8(1) of the Act prescribes that '[f]oreign investors and their investments must not be treated less favourably than South African investors in like circumstances'. Section 8(4) of the Act goes on to provide that the standard set out in section 8(1) '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

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[487] European Chamber submission supra note 479. See also Kelsey op cit note 440 at 342, who records that during the consultation phase before the Act was passed, '[b]oth the European Regional Chamber of Commerce and Industry and the American Chamber of Commerce in Africa told public hearings that foreign investors could be deterred.'

[488] I note, however, that Vidal-León op cit note 441 at 305 conceptualises the 'fair administrative action' provisions in section 6 of the Act as encapsulating the substance of such a provision. The relevant clauses afford investors substantive and procedural due process rights, including, *inter alia*, the right to be given written reasons, the right of access to information and the right to have disputes determined in a fair hearing. But these provisions do not necessarily capture the breadth of the fair and equitable treatment standard and, given their specificity, as was perhaps the intention behind them, cannot be given contextual meaning by bodies determining disputes between investors and the South African government. In my view, they do little more than reiterate standards that are already found in the Constitution and various domestic pieces of legislation (including the Promotion of Administrative Justice Act, 2000 and the Promotion of Access to Information Act, 2000) and take these standards no further.

[489] The rights under section 25 of the Constitution are effectively incorporated. See the discussion by Vidal-León op cit note 441 at 306 - 307.

[490] See section 12 of the Act and Adeleke op cit note 45 at 3.

[491] Adeleke op cit note 45 at 3.

from', among other things, laws or measures intended to promote the achievement of equality in South Africa and laws or measures intended to promote and reserve cultural heritage.

These provisions have clearly been included to cater for the government's concerns surrounding the limitations international investment agreements place on regulatory flexibility and curtailment of policy space.[492] Indeed, as noted above, one of the stated purposes of the Act is to 'affirm the Republic's sovereign right to regulate investments in the public interest'.[493] Vidal-León states that:

> '[T]he public policy exceptions in [the Act] seek to fill what is perceived as a gap that the recently terminated [bilateral investment treaties] had failed to address. For South Africa, these exceptions are fundamental in order to advance a wide range of restitutionary measures, many of which address the legacy of apartheid'.[494]

Another discrepancy of significance is that recourse to international arbitration has been explicitly removed.[495] Investors with grievances will now have to request the South African Department of Trade and Industry to appoint a mediator, and must do so within six months of the dispute arising.[496] Alternatively, they may approach a competent court, independent tribunal or statutory body within South Africa.[497]

There are a number of concerns with either option. In respect of mediation, it is clear that the South African government will have significant control over the process. The relevant mediator will be appointed by a South African Government Department,[498] and the mediator must be appointed from a list of mediators maintained by that same Department.[499] It is only in the absence of such a list that mediators 'proposed by either party' could be considered.[500] The government will thus be acting both as a party to a dispute with an investor and, thus, as a potential party to mediation proceedings, and in an administrative capacity for the very same mediation proceedings. The distinct possibility that a conflict of interest could arise

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[492] Vidal-León op cit note 441 at 308.
[493] Section 4(b) of the Act.
[494] Vidal-León op cit note 441 at 310.
[495] Adeleke op cit note 45 at 4. Vidal-León op cit note 441 at 311 - 312 explains the South African government's concerns with investor-state dispute settlement and states that one of the concerns in the South African context is that:

> '[A]rbitrators unfamiliar with the social and economic intricacies of the country may apply the standards of investment protection without weighing up the constitutional imperatives of economic transformation, redistribution of resources, and mitigation of historical inequalities.'

[496] See section 13 of the Act. See also Adeleke op cit note 45 at 4.
[497] Section 13 of the Act. See also Adeleke op cit note 45 at 4.
[498] Section 13(1) of the Act.
[499] Section 13(2) of the Act.
[500] Ibid.

where the Department is fulfilling its role as administrator in respect of the mediation of a dispute to which it is a party is inescapable. This is hardly a solution that will placate investors.

Mediation is also, of course, of limited use if the parties are unable to reach agreement. I would suggest that it is likely, in fact, that no binding outcome will be achieved in a significant number of disputes. Moreover, as Coe states, '[i]t is legitimate to ask whether mediation holds too great a potential to cloak activities that deeply implicate the public interest.[501]

In December 2016, the government's Regulations on Mediation Rules under the Act were published for public comment.[502] The Regulations make it clear that the South African government will not only be maintaining the list of possible mediators, but will also be responsible for compiling the list.[503] The impartiality of mediators may thus be difficult to maintain since all mediators will be dependent on the government to make it onto the list of eligible mediators in the first place. A perception may also arise that the government will inevitably select mediators for the list who are sympathetic to its policies.

The Regulations also provide that the government will play an important role in resolving a dispute between a party to the mediation and the mediator in respect of the recusal of that mediator.[504] This, again, is likely to create the perception that the dispute resolution mechanisms that will replace investor-state dispute settlement in South Africa are stacked heavily in favour of the government.

In respect of the ability to approach competent courts, tribunals or statutory bodies within South Africa, I have stated previously that the concern surrounding most state courts is that they are not perceived to be (and sometimes are not in fact) sufficiently neutral in resolving disputes between foreign investors and host states.[505]

The Act does provide that the South African government 'may consent to international arbitration in respect of investments covered by [the] Act', but this is only 'subject to the

[501] Coe op cit note 21 at 1382. The author further states that mediation 'depends heavily on confidentiality to promote candor.'
[502] GN 958 GG 40526 of 30 December 2016.
[503] Regulation 7(4).
[504] Regulation 13.
[505] Brower & Schill op cit note 2 at 479. The authors conclude that 'neither the courts of the host states nor the courts of any other state are well-positioned to enforce the state's promises vis-à-vis foreign investors'. Gazzini op cit note 7 at 124 also argues that 'domestic tribunals do not always deliver their decisions effectively or independently'.

exhaustion of domestic remedies'.[506] The permissive language used makes it clear that there will be no obligation on the government to do so. Moreover, the Act states that such international arbitration will be conducted between the Republic of South Africa and the home state of the investor.[507] Bosman states that '[t]his is a reversion to the antiquated doctrine of diplomatic protection, and its insertion carries very little legal meaning as an injured investor in any event has the option of protection through diplomatic channels under customary international law, including through state-state arbitration.'[508] Effectively, the remedies that the investor will be able to enforce directly are thus limited to state-administered mediation and approaching domestic courts.

Of course, this means that all of the concerns relating to the use of host-state courts are now inescapable for investors in South Africa. For this reason, it seems that it is highly likely that investors will see the limitation of their potential recourse to South African courts as adding significant risk to their investments. As Adeleke appropriately points out, 'how the courts in South Africa will balance the right of the state to regulate and the applicable public exceptions, while ensuring that the South African regulatory regime does not prejudice foreign investors' remains to be seen.[509]

It bears mentioning that in 2016, the International Arbitration Bill was introduced to Parliament for deliberation and consideration.[510] The objects of this Bill include being to 'facilitate the use of arbitration as a method of resolving international commercial disputes', and to adopt the UNCITRAL Model Law for use in international commercial disputes'.[511] The Bill (progressively) envisages that international arbitrations involving state bodies will be open to the public.[512] It also emphasises that the mere fact that a court is empowered in legislation to determine a particular dispute does not mean that such dispute is not capable of resolution by arbitration.[513]

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[506] Section 13(5) of the Act.
[507] Ibid.
[508] Bosman op cit note 461 at 23.
[509] Adeleke op cit note 45 at 3. Vidal-León op cit note 441 at 311 similarly states that:
> '[T]here must be a delicate weighing and balancing between the rights of investors and the legitimate public policies the South African government seeks to advance; otherwise, legal uncertainty may undermine the country's ability to attract foreign investments'.

[510] International Arbitration Bill, B10 of 2017 ('the Bill').
[511] Section 3 of the Bill.
[512] Section 11(1) of the Bill.
[513] See section 7(2) of the Bill.

The Bill thus recognises arbitration as an important method for resolving international disputes, including those concerning public bodies (and, implicitly, the public interest inherent in any such disputes). The Bill, however, makes it clear that it does not apply to investments covered by the Act, or affect the provisions of the Act.[514] A dichotomy has thus been created where international investment disputes will be treated completely differently to other international disputes involving state bodies, even though the public interest in both types of disputes is indisputable and acknowledged.

On 21 April 2017, a new version of this Bill was tabled in Parliament. The only change that is of significance to the above observations is that the 2017 Bill makes its provisions subject to the dispute resolution provisions in section 13 of the Protection of Investment Act (rather than section 12, which deals with the right to regulate). This seems, largely, to be the correction of an error.

It seems clear that the Act's divergence from the standard investment treaty type protection is significant and that this will have implications for attracting foreign investment into South Africa.[515]

Will this address the concerns with investment treaties and does it raise new concerns?

The question arises whether the provisions of the Act in fact address the very real concerns that the current protection of investment regime raises, and whether they are indeed likely to bring about what the South African government has stated its motivation to be in its 2009 review and in the Act.

There is, for instance, a concern that has been mooted that the Act will not provide sufficient protection for investment to encourage such investment at appropriate levels.[516] Bosman states that there is 'a real concern that the message sent by the passing of the [Act], in combination with the government's termination of various [bilateral investment treaties], and a series of other recent legislative and policy measures, may be more likely to deter than promote investment in South Africa, and thereby have a negative impact on job creation, economic growth, sustainable development, and the well-being of the people of South

[514] Section 5(1) of the Bill provides that the Bill, 'subject to the provisions of section 12 of [the Act], binds public bodies and applies to any arbitration in terms of an arbitration agreement to which a public body is a party'.
[515] Adeleke op cit note 45 at 3.
[516] Schlemmer op cit note 36 at 192 suggests that the steps taken by the South African government do not 'bode well for attracting future investments.'

Africa'.[517]

Indeed, Schlemmer, discussing the Act while it was still a Bill before Parliament, states that 'for South Africa to provide for State-State arbitration in an act that is supposedly aimed at investor protection,… does not help the foreign investor one bit.'[518]

There is also a concern that the provisions of the Act that digress from standard investment treaty protections will have a negative impact on the willingness of foreign investors to invest in South Africa.[519]

Adeleke opines that the stance adopted by the South African government 'will likely have significant adverse implications… at least as far as confidence in investing in such a volatile situation is concerned'.[520] There is also a concern that the government's decision to terminate investment treaties, seemingly without even considering the option of seeking to renegotiate terms, or indeed to reach agreement on interpretive notes which could ensure that South Africa's investment treaties are not interpreted in a way that South Africa finds untenable, does serious damage to South Africa's reputation at an international level as a trading partner that can be relied on.

Of course, the decision of the South African government to terminate its treaty obligations

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[517] Bosman op cit note 461 at 17. See also Erasmus op cit note 477 at 13, who states that:

> 'The need for sustained investment makes investor confidence a very relevant concern. In Africa in particular, with its many infrastructural and development needs, investment is vital for economic growth and development'.

[518] Schlemmer op cit note 36 at 192. See also the European Chamber submission supra note 479, which states that the Chamber had a particular concern regarding the exclusion of international investor-state dispute settlement from the Bill. It stated that '[i]n itself, this has generated a negative signal to some from within the EU investor community'.

[519] See, by way of example, the European Chamber submission supra note 479, which states that '[w]hile general and subject exceptions are a natural upshot of the stated public interest balance, as well as the stated right to regulate, it is our general assessment that the manner in which they have been crafted does not provide for sufficient clarity.' This is a major concern for South Africa since, as Bosman op cit note 461 at 35 records:

> 'There are 2000 EU companies invested in South Africa, accounting for 77 percent of total FDI stock. These companies have created over 300 000 direct and approximately 150 000 indirect jobs… EU investment contributes significantly to the government's policy goals'.

See also the submission by the American Chamber of Commerce in South Africa on the Promotion and Protection of Investment Bill, as presented to the Portfolio Committee on Trade & Industry, Parliament, September 15 2015 last accessed from *http://www.politicsweb.co.za/documents/this-bill-adds-to-uncertainty-of-doing-business-in?utm_source=Politicsweb+Daily+Headlines&utm_campaign=c383b1bce0-DHN_Sept_17_2015&utm_medium=email&utm_term=0_a86f25db99-c383b1bce0-130082905* on 14 April 2017, which states that '[w]e submit respectfully that the Bill adds to the uncertainty of doing business in South Africa. This uncertainty is one of the compelling reasons why the private sector has put additional investment in South Africa on hold'.

[520] Adeleke op cit note 45 at 7. See also Langalanga op cit note 391 at 16 - 17, who states that:

> 'What South Africa has done by not renewing its [bilateral investment treaties] as they expired thus has reputational costs akin to the cancellation or violation of international agreements, especially for a country that is young and vulnerable. The non-renewal of these [bilateral investment treaties] has cast doubt on the country's commitment to international law'.

also leaves outward-bound South African investments without protection.[521] As the Position Paper acknowledged, South Africa is both a capital importing and a capital exporting country and its nationals are investing in other African countries and even developed countries, and bilateral investment treaties are used 'to protect such investments'.[522] Indeed, bilateral investment treaties are reciprocal in nature and their termination will leave South African nationals without protection that they previously enjoyed for their investments abroad. Schlemmer states that:

> 'By deciding - or considering - not to conclude any further bilateral investment or similar treaties, the relevant governments might be 'protecting' (some of) their own interests, but they certainly will not be improving their own nationals' positions as investors in other countries.'[523]

Indeed, Schlemmer argues that South African outward investors are unlikely to receive assistance from the South African government if their investments abroad are interfered with.[524] She cites various examples, including the facts underlying the decisions of the South African Courts in certain cases.[525] The first is that of *Von Abo v Government of the Republic of South Africa and others*,[526] where Mr Von Abo, a South African citizen and businessman who held various properties and farming interests in Zimbabwe, complained that the government of South Africa had failed to afford him diplomatic protection against his proprietary interests being 'violated' by the government of Zimbabwe. The second is that of *Van Zyl and Others v Government of Republic of South Africa and Others*,[527] where the appellants had requested the government of South Africa to provide them with diplomatic protection against the government of Lesotho in respect of the cancellation and revocation of five mineral leases. This request had been refused since the 'Government was under no obligation to afford diplomatic protection to the appellants; that any decision to intervene would involve a policy and not a legal decision; that the decision is the sole prerogative of the Government; that the disputes between the appellants and the Government of Lesotho had been decided by the Lesotho courts; that mediation or intervention by the Government would

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[521] See the discussion in Peterson op cit note 391 at 34 and 36.
[522] Position Paper supra note 450 at 16 - 19.
[523] Schlemmer op cit note 107 at 735. See also Kelsey op cit note 440 at 344, who states that 'South Africa's approach directly challenges the international investment regime in both form and content. It suggests that social and political imperatives are stronger than either the interests of South African capital offshore, and the perceived impact on its ability to attract new capital.'
[524] Schlemmer op cit note 107 at 742.
[525] Ibid at 742.
[526] 2009 (2) SA 526 (T).
[527] 2008 (3) SA 294 (SCA).

imply a lack of faith in the judicial system of a sovereign state; and that diplomatic intervention would set an unhealthy precedent'.[528]

Of note is the fact that most of South Africa's bilateral investment treaties contain a provision that where such treaties are terminated, they will remain applicable to investments made prior to such termination for an additional period of 10 to 20 years (depending on the investment treaty in question) thereafter.[529] This means that the concerns surrounding investment treaties will remain applicable for a significant period in spite of their termination. Had the government sought to renegotiate investment treaties to cater for these concerns, it may have been able to alleviate them in a much shorter time-frame. Its actions may have had the effect of locking in the very issues that the government sought to resolve.

There is also a serious concern that different and contradictory protection of investment regimes have now been adopted by the government of South Africa. First, South Africa has only chosen to terminate some of its investment treaties. As such, the Act will be the only thing governing some investments (i.e. those with no international investment treaty cover - whether because no investment treaty exists, or because the investment treaty in question has been terminated and the extension of its protections has expired), while others will be governed by investment treaty protections and the Act, to the extent that these do not conflict. Moreover, it seems that the Act is not in line with the SADC stance on investment protection.[530]

I will deal with the SADC regime in more detail in chapter five of this dissertation, but for present purposes I note that the SADC Protocol on Finance and Investment (which was signed on 18 August 2006, and came into effect on 16 April 2010) ('the Protocol') contains provisions that afford foreign investors in SADC states investment treaty-like protection, which differ from that under the Act.[531] For example, the Protocol recognises the possibility of investor-state dispute settlement, subject to the investor having exhausted local

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[528] See the judgment at [2] and [3] for a summary of these facts.

[529] See Schlemmer op cit note 36 at 176. See also Bosman op cit note 461 at 25 and Ben Winks 'The dti's embarrassing blunder on bilateral investment treaties' (2015) *Without Prejudice* 6 at 6 - 7, who states that '[t]he ironic result is that the very [bilateral investment treaties] targeted by the [Department of Trade and Industry] will continue to constrain the government's regulatory licence and to expose it to international arbitration for many more years than they otherwise would have.'

[530] See Adeleke op cit note 45 at 4 - 5. See also Bosman op cit note 461 at 21 and Erasmus op cit note 477 at 2.

[531] The Protocol is available at *www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf*, last accessed on 1 May 2017. See Lawrence Ngobeni and Babatunde Fagbayibo 'The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and opportunities for effective harmonisation' (2015) *Law Democracy and Development* 175 at 176. See also Adeleke op cit note 45 at 4.

remedies.[532] The SADC Model Bilateral Investment Treaty also provides for this option, subject to the same proviso.[533] I note that at the time of writing, various amendments to the relevant portions of the Protocol have been tabled, which will, if adopted, have a significant impact on the dispute settlement provisions of the Protocol.[534]

The Position Paper acknowledged that the prescripts of the Protocol had not been followed in South Africa's investment treaty practice and that treaty provisions differ substantially from what is set out in the Protocol.[535] Thus, it appears that neither South Africa's previous policy, as encapsulated in its various investment treaties, nor its current policy, as encapsulated in the Act, are in accord with its obligations at a regional level.

Adeleke describes the approach adopted by the South African government as 'fragmented' and posits that it has created 'regulatory uncertainty'.[536] He states that:

> 'A common regional policy approach that adequately balances the legitimate public interest regulatory objectives of a state with globally recognized international protection standards offered to foreign investors is key to ensuring that South Africa and SADC remain globally competitive for [foreign investment]'.[537]

It seems South Africa ultimately has developed parallel systems in relation to the settlement of investment disputes.[538]

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[532] See Article 28 of Annex 1 to the Protocol supra note 531. See also Schlemmer op cit note 107 at 750 and Bosman op cit note 461 at 21 - 22. See, however, Vidal-León op cit note 441 at 313, who discusses the 2014 SADC Protocol on the SADC Tribunal, which limits the scope of operation of the SADC Tribunal to state-state disputes.

[533] Adeleke op cit note 45 at 5 notes, however, that the drafting committee included a note stating that its preferred option is to exclude international arbitration.

[534] This is in the form of the Draft Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment, 2016 ('Draft Amendment Agreement'). Bosman op cit note 461 at 24 records that:

> 'The [Department of Trade and Industry] has acknowledged that the [Act] does not comply with the SADC Protocol, however argues that the SADC Protocol has been through a review process and is to be amended to align with the [Act]. It is however unclear when this will be completed and whether the Protocol will indeed align with the [Act] once it has been amended. South Africa is bound by the obligations of the Protocol, and it is questionable how the [Act] can pass constitutional muster if it contradicts South Africa's international obligations'. (Citations omitted.)

[535] See page 17 of the Position Paper supra note 450.

[536] Adeleke op cit note 45 at 4. See also Langalanga op cit note 391 at 27, who states that 'various foreign investors in South Africa are now covered by different legal regimes… This fragmented system does not bode well for policy and regulatory certainty, predictability and transparency'.

[537] Adeleke op cit note 45 at 8 - 9. He also, however, highlights key similarities, including the fact that the South African and SADC approaches are aligned in relation to recognising the right of the state to regulate at 7.

[538] See Schlemmer op cit note 36 at 192, where she states that 'there is currently more than one system of protection in place, with a new system under construction.' Adeleke op cit note 45 at 4 states that the Bill, and this is equally true of the Act, has created 'regulatory uncertainty'.

Could the government's concerns have been addressed in a better way?

Adeleke notes that the stance adopted by South Africa 'must be understood in the context of the objective of redressing some of the legacies of apartheid', which, he states, 'is not entirely at odds with emerging global practices', citing, for example, the approach of the Canadian and Australian governments.[539]

Chow, similarly, highlights the historical context within which South Africa's concept of substantive equality has developed and contrasts this to the more formal notion of equality that underpins international law concepts, particularly those that have found their way into investment treaties, such as national treatment standards and most favoured nation treatment standards.[540] She concludes that there are 'several major "clashes" in the conceptual framework of equality between South African and international law'.[541]

It is clear that South Africa's historical context requires its government to give very careful consideration to the obligations that it takes on at an international level. It cannot be faulted for seeking to ensure that the special political and social context of the country is prioritised.

It seems, however, that the South African government did not give adequate consideration to options short of termination that were discussed in chapter three of this dissertation. No clarificatory language or interpretive notes have been negotiated[542] and there does not seem to be any evidence of the government having approached its counterparts to explore these options.

Commenting on the Act, Bosman states that:

> 'The guarantee of 'fair and equitable treatment' or FET, is a central feature of international investment law and is recognized by the United Nations Conference on Trade and Development (UNCTAD) as one of the 'key components of investment protection.' FET has been subject to international controversy due to the fact that the host state's obligations can be widely interpreted, and the DTI has expressed similar concerns regarding the FET clause in the SADC Protocol. However, these concerns could have been easily mitigated through the inclusion of interpretive guidance in the [Act]; a common drafting practice in recent [bilateral

[539] Adeleke op cit note 45 at 3
[540] Chow op cit note 388 at 302 - 315.
[541] Ibid at 315.
[542] Peterson op cit note 391 at 18.

investment treaties]'.[543]

Another, very serious concern is that South Africa has not been consistent in its termination of investment treaties. Indeed, the notices that it has given in this regard seem to be somewhat targeted. As I have already mentioned, termination or notification of termination of the investment treaties with the United Kingdom, the Netherlands, Switzerland, Germany, France, Cuba, Denmark, Austria, Italy, Sweden, Argentina, Belgo-Luxembourg Economic Union, Finland, Spain and Greece has been effected.[544] South Korea, China, Mauritius, Senegal, Russia, Nigeria and Zimbabwe did not receive similar notifications.[545]

It seems then that the general concerns raised, such as infringement on policy space and divergence from constitutional standards and, which would surely affect all bilateral investment treaties, were only considered sufficiently serious to warrant action in the case of treaties with European (and some South American) countries. This inconsistency aggravates the sense of discomfort, from a perception level, with the decision of the government.

In their comments submitted to the Department of Trade and Industry very shortly after the South African government's review of South Africa's bilateral investment treaty policy framework was published, Klaaren and Schneiderman unequivocally supported the move away from investor-state dispute resolution contemplated and submitted that only state-state

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[543] Bosman op cit note 461 at 22. See also Erasmus op cit note 477 at 2, who states that the result of the omission of fair and equitable treatment provisions is that '[t]he signal to foreign investors is that they will in future enjoy less protection'.

[544] Schlemmer op cit note 36 at 189.

[545] Ibid at 189. See also Bosman op cit note 461 at 25 and Erasmus op cit note 477 at 11. I note that there seems to be no definite temporal distinction between the two lists in terms of signature dates and entry into force. By way of selective example, the Agreement between the Kingdom of Sweden and the Republic of South Africa on the Promotion and Reciprocal Protection of Investments was signed in May 1998. It entered into force in January 1999. The Agreement between the Government of the Republic of Mauritius and the Government of the Republic of South Africa for the Promotion and Reciprocal Protection of Investments was signed in February 1998. It entered into force in October 1998. There is also no clear temporal distinction between the two lists in respect of the potential for termination. Again, by way of selective example, the Agreement Between the Government of the People's Republic of China and the Government of the Republic of South Africa concerning the Reciprocal Promotion and Protection of Investments entered into force in 1998 and endured for a ten year period and was to 'continue in force if either Contracting Party fails to give a written notice to the other Contracting Party to terminate this Agreement one year before the expiration of' such ten year period (see article 12 of the treaty). Article 12(3) of this treaty provides that '[a]fter the expiration of initial ten years period, either Contracting Party may at any time thereafter terminate this Agreement by giving at least one year's written notice to the other Contracting Party'. It is thus clear that the investment treaty with China could have been terminated at any stage after 2008 by the provision of one years' notice, and has not been terminated. The Treaty between the Federal Republic of Germany and the Republic of South Africa concerning the Reciprocal Encouragement and Protection of Investments, which has been terminated, entered into force in the same year as the treaty with China, endured for the same initial ten year period and has similar provisions in respect of termination after that period (see article 13(2) of the treaty). See the United Nations UNCTAD Investment Policy website supra note 398. See also Winks op cit note 529 at 6 - 7, who states that '*exclusively* European states have had their [bilateral investment teaties] terminated, despite those with other states (including China and Russia) being equally restrictive of South Africa's regulatory freedom and equally ripe for termination'.

dispute resolution should be countenanced.[546] They state that 'it has become increasingly clear that investors can use [bilateral investment treaty] entitlements to meddle significantly in the regulatory systems of host states'.[547]

They also cite five reasons for their position. Firstly, that the Constitution provides sufficient guarantees to foreign investors. Second, South Africa should be seeking to reclaim policy space lost to bilateral investment treaty practice. In relation to this second point, and perhaps in anticipation of the counter-argument that policy space can be carved into the wording of investment treaties, as I have argued, the authors state that:

> 'Model [bilateral investment treaties] are only as developmentally friendly as states anticipate they are required to be. [Bilateral investment treaty] policy is reliant on ex ante predictions about how state policy will develop going forward. It thereby places an unfair burden on states that may choose to experiment with social and economic policy - particularly where the national constitution mandates the development of public policy - in ways that foreign investors may find disagreeable'.[548]

Third, there is little assurance that treaties will be interpreted in predictable ways, and, in particular, that they will be interpreted in ways that are 'constrained, respectful of state party intentions, and mindful of other commitments such as constitutional ones.'[549] This may be so, but this is equally true of a court interpreting any treaty guarantees, unless one makes the unattractive concession that local courts will inherently be more state-friendly (or biased) than independent arbitral tribunals would be. This might be so for legitimate reasons, such as accountability of the judiciary and a better understanding of national imperatives but it is, of course, precisely why investors wish for their disputes to be adjudicated outside of this realm. It seems clear that interpretive notes or treaty provisions specifying the intentions of the state and its constitutional commitments could go a long way to resolving this concern.

The fourth reason cited is that treaties including investor-state dispute resolution have not had much effect on the flow of foreign direct investment into South Africa. Yet, even if this is so, the conclusion that a communication of a decision to move away from the protection offered by bilateral investment treaties will have no effect on investment does not follow. Indeed, it is in fact likely to create a perception that the South African government does not wish to be

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[546] Klaaren & Schneiderman op cit note 44 at 1.
[547] Ibid at 1.
[548] Ibid at 4.
[549] Ibid at 4.

held to as high a standard as it previously was in respect of its actions in either failing adequately to protect, or in actively eroding, foreign investments. This perception of a diluted willingness to be held accountable alone would be problematic and is not addressed by the authors.

Of course the question then becomes whether the previous high standard of investor protection was reasonably justifiable in the unique context of South Africa. The South African government did not think so and was, apparently, willing to shoulder the negative consequences of terminating investment treaties in order to rectify what it saw as being bound to unacceptable standards. It is beyond question that South Africa's transformative and developmental goals should be prioritised by the government. The simple point made in this dissertation is that there may have been a more palatable way of reaching the same end-goal (or at least an acceptable version of that end-goal) in at least attempting to renegotiate the egregious terms of those treaties in one or other way.[550]

In a best case scenario, this would have reaffirmed the government's commitment to the values and goals enshrined in the Constitution and, at the same time, led to treaties that are sufficiently flexible to allow South Africa the regulatory space it needs (and to have done so immediately, rather than in ten or twenty years' time). Even if such attempts had not been successful, had they been made in an open and public way, highlighting the laudable goals behind the desire to renegotiate,[551] South Africa's termination of investment treaties would likely have been seen in a much less negative light by its trading partners and by investors.[552]

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[550] Mossallam op cit note 477 at 15 states that:

> 'Interestingly, the EU and European investors did not question the decision of the government to embark on a review of its investment policies. However, serious concerns were raised about how the review had been undertaken and many investors challenged the contents of the draft [Act]. According to Axel de La Maisonneuve, the Head of Economic, Trade section of the EU Delegation in South Africa: 'this was the sovereign right of the government to take policy steps of this nature.... South Africa is entitled to believe at a certain stage that [bilateral investment treaties] have done their time and that they need to modernize the framework. For us that is not the problem, it's not a matter of content or substance, it is a matter of how it was handled and how it should be handled in the future to ensure investors remain confident that they can invest in South Africa safely.'

[551] As Langalanga op cit note 391 at 28 states, '[w]ith its history of overcoming apartheid and its need for policy space in order to right the wrongs of the past, South Africa brings immense policy capital to the third-generation [bilateral investment treaty] negotiation table'. Indeed, there seems to be no reason to assume that these laudable policy goals would not be taken extremely seriously by South Africa's trading partners.

[552] Mossallam op cit note 477 at 15 states that one of the main concerns raised with the process adopted by the South African government was 'the lack of communication/consultation and simply notifying the parties before terminating the treaties.' This issue could surely have been avoided. I note that at 27 - 28 Mossallam, however, recognises that, at least in respect of the review, 'South Africa adopted a transparent and interactive strategy throughout the review process engaging the international community and not only the local public', but that, in respect of the termination process, the South African government could have performed better in respect of its communication of the termination of bilateral investment treaties.

The government could have, for example, made public entreaties to its negotiating partners for the necessary amendments, expressly citing its concerns.

Lastly, the authors posit that development of internal legal institutions can be enhanced by excluding investor-state arbitration. It is not clear to me that this is so (only a very specialised and limited set of disputes is removed from the remit of local institutions and courts and the local courts will always have jurisdiction over a significant number of disputes), or that, even if it is, it should trump the developmental benefits of protecting the interests of South Africa's investors abroad or in South Africa having a good reputation as an investment destination and trading partner. In any event, as I have previously discussed, there are serious concerns surrounding the submission of such disputes to local courts and other institutions.

In spite of their concerns, Klaaren and Schneiderman note that South Africa's treaty practice had 'appropriately been moving in the direction of reclaiming policy space'.[553] They also concede that South Africa had been 'provoked to modify its [bilateral investment treaty] text to exclude from the scope of the rule of national treatment equality promoting measures'.[554] They do not, however, address why this positive evolution was not sufficient or would not be sufficient, if continued or expanded, to address the concerns with investor-state dispute settlement. Although the comment piece raises serious and legitimate concerns with South Africa's current international investment regime, it does not seem to address the concerns that can be raised relating to their proposed course of action, which ultimately became a reality in the dramatic turn-around that South Africa has made. It seems clear to me that a more moderate policy adjustment could have been made to address these concerns in a less damaging way and that this should have been considered.

The Position Paper itself recognised that solutions to the concerns surrounding investor-state dispute settlement were possible, including increased transparency, neutral selection of arbitrators, and the introduction of an appellate process.[555] It also recognised that most of these changes 'appear inescapable'.[556] It is unclear then why the very drastic decision to terminate certain of South Africa's bilateral investment treaties was ultimately taken without, it seems, any consideration of potential reform and renegotiation.

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[553] Klaaren & Schneiderman op cit note 44 at 2.
[554] Ibid at 3.
[555] Position Paper supra note 450 at 10.
[556] Ibid at 11.

If the rule of law requires, and it must require, that states be held to standards of conduct to which they knowingly and willingly agree to be bound, a decision thereafter not to renew or to terminate such obligations cannot avoid being seen as a step towards backing out of being held to a particular standard of conduct in relation to foreign investors and does not bode well for the perception of South Africa's willingness to ensure that investors are treated fairly.

It must surely be correct that, as discussed above, South Africa's initial negotiation of its investment treaties did indeed leave much to be desired. It should have ensured that its legitimate policy imperatives were catered for in the text of each treaty. Moreover, given the need for the value of accountable and transparent governance to be upheld, South Africa should have ensured that its investment treaty arbitrations are not private. These corrections would have done much to allay the concerns that the South African government has with the current investor-state dispute settlement model and it is not clear that they would not have been achievable at initial negotiation or that South Africa's investment treaty counter-parties would not have been willing to agree to interpretive instruments or amendments even at this stage.

Without in any way impugning the need for the South African government to ensure that it has sufficient breathing-room at a policy level to address the significant restitutionary and developmental imperatives that it faces, it seems clear that the actions taken by the South African government, in not renewing or terminating certain of its bilateral investment treaties without even attempting to renegotiate them, and in enacting the Act, which contains an extremely diluted form of investment protection, leave much to be desired.

CHAPTER V - AN ANALYSIS OF HOW OTHER ACTORS HAVE RESPONDED

The steps taken by the South African government in response to the concerns surrounding the current manifestation of international investment law are unarguably extreme. Various other states or institutions have also reacted to these concerns. But, as I will examine in this chapter, they have done so in a variety of different ways which have generally been less sweeping and less controversial.

Some of the strategies for regime reform that have been adopted globally include the adoption of new model bilateral investment treaties,[557] the introduction of interpretive statements or amendments to existing bilateral investment treaties, the replacement of older bilateral investment treaties with newer regional treaties, the promotion of various institutional reforms (such as ensuring greater transparency of proceedings,[558] arbitrator qualifications and ethics, and amicus participation[559]), and, at the end of the spectrum, bilateral investment treaty terminations (which South Africa has opted for).

I have chosen first to examine the position that the US has adopted. The US provides a helpful example of how a state may take positive and proactive steps in reaction to its experiences as a respondent in investor-state disputes to protect its regulatory space in its investment treaties, without removing itself from the system altogether. It has done so in a number of ways, which I discuss in what follows.

Next, I have explored the position adopted by other actors in the developing world, namely, India, which, although recognising serious concerns with its previous investment treaty regime, has also not sought to remove itself from the system entirely and has, instead, enacted a model treaty that includes a number of progressive provisions to guard against regulatory curtailment; and SADC, of which South Africa is a member and which, of course, has significant regional implications for South Africa. The position adopted by SADC highlights a lack of coherence in the domestic and regional position adopted by South Africa that, I argue, is significant.

In chapters three and four of this dissertation, I discussed the concerns with the prevailing investment treaty regime raised by the global community and by the South African government in its review of its investment treaties. To recap, these include a concern that

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[557] See McLachlan et al op cit note 21 at 27 - 29.
[558] Ibid at 57.
[559] Ibid at 57 - 58.

bilateral investment treaties endanger the ability of governments to implement important policies and that dispute settlement mechanisms under investment treaties are not designed to address complex issues of public policy. This latter concern has often found a specific voice in issues surrounding a lack of transparency of proceedings and lack of ability of third parties to participate in proceedings.

In light of these concerns, I have, in respect of each of these jurisdictions, focused on whether it has retained investor-state arbitration as a method for resolving investment disputes, how it has taken steps to ensure that investment treaties do not tread too heavily on regulatory scope and agility and how it has addressed the important issues of transparency of, and participation in, proceedings.

The US and the steps it has taken to carve out policy space

The US, which has significant interests, both as a capital importer and a capital exporter,[560] is no stranger to the kind of claims that sparked the concerns with investor state dispute settlement that ultimately led to South Africa's very extreme policy about-turn.[561] Indeed, the US has faced a significant number of investment treaty claims that arguably encroach upon its legitimately adopted policies. The US has concluded some 50 bilateral investment treaties, which include investor-state dispute settlement provisions.[562]

One of the most significant investment protection instruments that the US has concluded is the NAFTA treaty. NAFTA is a multilateral trade and investment treaty among the US, Mexico and Canada, which entered into force in 1994.[563] One of its central tenets is the liberalisation of cross-border investments and it thus contains numerous provisions designed to protect such investments.[564] Chapter 11 of NAFTA contains investor-state dispute resolution provisions, which have facilitated the initiation of a substantial number of

[560] Roberts op cit note 356 at 196 - 197.
[561] See William L. Owens & Andrew Fitzpatrick 'Investment arbitration under NAFTA Chapter 11: a threat to sovereignty of member states?' (2015) *Canada-United States Law Journal* 55 at 57.
[562] Ibid at 57.
[563] See McLachlan et al op cit note 21 at 34. See also Singh & Sharma op cit note 1 at 95. It should be noted that the future of NAFTA is currently somewhat uncertain given the heavily critical campaign rhetoric of the newly elected US President, who has stated categorically that he will either seek a full repeal of the agreement or will seek to renegotiate it. See Gregory Husisian 'The Future of NAFTA in the Trump Administration' (2017) *International Trade Law and Regulation* 29 at 29 - 30.
[564] Owens & Fitzpatrick op cit note 561 at 55, 56 and 60. See, for instance, articles 1102 (national treatment), 1103 (most favoured nation treatment), 1105 (minimum standard of treatment), and 1101 (expropriation and compensation) of NAFTA.

claims.[565]

Dumberry states that:

> 'The investment dispute settlement mechanism included in Chapter 11 of NAFTA has been described by some as an innovative and progressive treaty providing maximum protection for investors abroad. Others have described it as a new instrument in the hands of multinational corporations that will have the effect of further undermining the regulatory powers of States and diminishing their influence in this age of globalization. If there is disagreement on the effect of Chapter 11 provisions, all agree however that it is the most extensive combination of rights and remedies ever provided to foreign investors in an international agreement'.[566]

Singh and Sharma similarly record that Chapter 11 has 'been the subject of controversy'.[567] Peterson cites the concern that 'it could be dangerous to leave it to arbitrators to draw the line between legitimate government regulation and (compensable) expropriations' for the decision by the [US government] to take steps to 'minimize the risk of tribunals rendering overly broad readings of expropriation clauses'.[568] And Owens and Fitzpatrick state that:

> 'Critics of Chapter 11 are primarily concerned with the use of this power by corporate entities and its potential to effectively overturn or significantly weaken NAFTA states' ability to legislate or regulate in the public interest, according to their respective constitutional powers and responsibilities'.[569]

The US has found itself in the respondent's corner in many claims arising from Chapter 11 of NAFTA, many of which had serious policy implications.[570] For example, in 2003, a Canadian mining company launched an investment arbitration under the NAFTA treaty against it due to its efforts to preserve Native American sacred lands.[571] And in *Methanex*, a Canadian

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[565] Articles 1117 to 1138 of NAFTA supra note 224. See McLachlan et al op cit note 21 at 34, who state that more claims have arisen under the NAFTA treaty than under any other modern investment treaty. See also Dumberry op cit note 343 at 202.

[566] Dumberry op cit note 343 at 204.

[567] Singh & Sharma op cit note 1 at 95. Here the authors describe that:

> 'Opponents of NAFTA allege that the provisions of Chapter 11 create new rights for corporations and investors, which has the effect of allowing them to dodge the rule of law, thereby compromising public interest'.

See also Owens & Fitzpatrick op cit note 561 at 55.

[568] Peterson op cit note 391 at 18.

[569] Owens & Fitzpatrick op cit note 561 at 56.

[570] Indeed, José E Alvarez 'Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?' (2016) *Victoria University of Wellington Law Review* 503 at 518 records that the US is the NAFTA treaty's leading respondent, with some 18 claims against it having been lodged.

[571] *Glamis Gold Ltd v United States of America*, NAFTA/UNCITRAL Award of June, 8 2009 ('*Glamis Gold*'). See also Choudhury op cit note 24 at 990 - 991 and Todd Weiler 'NAFTA: dispute settlement - significant awards and a new US dispute' (2003) *International Trade Law & Regulation* 63.

investor argued that a Californian ban on a particular gas additive due to concerns arising from the leakage of that additive into the water system, thus posing a serious health risk, was a breach of NAFTA.[572]

McLachlan et al record that the US has revised its model investment treaty 'to take direct notice of tribunal rulings' such as those under the NAFTA claims I have mentioned.[573] They go on to state, writing about the 2004 US model bilateral investment treaty, that the unusual provisions contained in such treaty 'represent a deliberate attempt by the US to provide drafting solutions to difficulties perceived in treaty arbitration practice.'[574] Some of these 'innovations' include the incorporation of a three year limitation on claims,[575] the ability for tribunals to dismiss claims without 'legal merit' at a preliminary stage of proceedings[576] and a limitation on the kind of interim measures that may be awarded.[577] Brower and Schill also highlight the US Model Treaty's language which 'concretizes' the fair and equitable treatment standard and the concept of indirect expropriation.[578]

Dispute resolution

Unlike South Africa, the US has elected to retain investor-state dispute resolution in its investment treaties, as can be seen from the US Model Treaty, which provides for investor-state dispute settlement.[579]

The US Model Treaty does, however, build in some limitations on this. For instance, it sets out a prescription period for claims in that article 26 states that no claim may be brought under the treaty if more than three years have elapsed since the date on which the claimant first acquired, or the date on which the claimant should have first acquired, knowledge of the breach relied upon.[580] Article 23 of the treaty also provides that '[i]n the event of an

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[572] *Methanex* supra note 223. See Choudhury op cit note 24 at 992 - 993. See the discussion in Dumberry op cit note 343 at 205 - 214 and Owens & Fitzpatrick op cit note 561 at 62.
[573] McLachlan et al op cit note 21 at 27. See also Brower & Schill op cit note 2 at 495.
[574] McLachlan et al op cit note 21 at 50. Roberts op cit note 356 at 222 similarly states that the US modifies its model treaty 'to confirm or reject specific jurisprudence, which helps to crystallize certain de facto precedents and stall or prevent the formation of others'. See also Andrew Newcombe 'General exceptions in international investment agreements' Draft Discussion Paper Prepared for BIICL Eighth Annual WTO Conference 13th and 14th May 2008, London, last accessed from *https://www.biicl.org/files/3866_andrew_newcombe.pdf* on 29 April 2017 at 2.
[575] See article 26(1) of the 2012 US Model Bilateral Investment Treaty, last accessed from *https://www.state.gov/documents/organization/188371.pdf* on 14 April 2017 ('US Model Treaty').
[576] See article 28(4) of the US Model Treaty supra note 575.
[577] McLachlan et al op cit note 21 at 50.
[578] Brower & Schill op cit note 2 at 495.
[579] Article 24 of the US Model Treaty supra note 575.
[580] Ibid at article 26(1).

investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation'. Article 34 of the US Model Treaty, moreover, makes it clear that tribunals will not be empowered to award punitive damages.[581] That article also provides that '[a]n award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case'.[582]

I note, however, that the US - Australia free trade agreement did not include explicit investor-state dispute settlement provisions at the insistence of the Australian government (although the treaty does contemplate that in cases of changes in the economic or legal circumstances of the state parties, they could consider a discrete procedure for the bringing of claims directly by investors),[583] and instead, formulates its own intra-state dispute resolution mechanism.[584] This approach has not been echoed in later investment treaties signed by the US.[585]

Protection of regulatory space

As I have discussed in chapter three, the fair and equitable treatment standard that is incorporated into almost all investment treaties is a fairly nebulous concept that has the potential to have a decisive influence over the outcome of investment claims. This potential has been the source of serious concern, both from the South African government, and the global community of states.

South Africa has elected to exclude the standard entirely from its new Act. The US, on the other hand, has retained it but ensured that its model investment treaty incorporates fairly restrictive language to limit the scope of the application of the standard, which, McLachlan et al posit:

> '[M]ay be understood as a response to a perception by the US that a definition of "fair and equitable treatment" unbounded by custom had left the door open to adventurist arbitrators to

[581] Ibid at article 34(3).
[582] Ibid at article 34(4).
[583] See Singh & Sharma op cit note 1 at 97 - 98. The authors note that the Australian Department of Foreign Affairs has 'justified' this exclusion as follows: 'it is an acknowledgement of the well-developed legal systems of both nations, which provide adequate protection to private investors against the host government'. See also Klaaren & Schneiderman op cit note 44 at 2.
[584] See Choudhury op cit note 24 at 1004. See Chapter 21 of the Treaty, last accessed from *https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text* on 9 April 2017 ('Australia-US Free Trade Agreement'). Langalanga op cit note 391 at 19 states that the decision not to include investor-state arbitration in this treaty 'has since been shown to have been a partisan, ideological and populist one by the then Labour-led government' and notes that Australia has subsequently included investor-state dispute resolution in more recent treaties.
[585] Klaaren & Schneiderman op cit note 44 at 2.

> exercise an unfettered discretion as to the appropriateness of State policy'.[586]

On a more specific substantive front, the US Model Treaty expressly limits the scope of the treaty to ensure that it will not interfere with important policy objectives. For example, the treaty provides, in respect of environmental matters, that '[t]he Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws'[587] and that:

> 'The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities...'.[588]

Moreover, article 12(5) provides that:

> 'Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns'.[589]

Another example can be found in the US Model Treaty's treatment of labour regulations. Article 13 of the US Model Treaty specifically records that:

> 'The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws...'[590]

The US has, in effect, sought to carve out policy space through the express provisions of its model investment treaty.[591] It has also sought to do so through the incorporation of

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[586] McLachlan et al op cit note 21 at 210, citing, for example, article 5 of the US Model Treaty, which provides that:

> '1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.'

[587] Article 12(2) of the US Model Treaty, supra note 575.
[588] Ibid at article 12(3).
[589] Ibid at article 12(5).
[590] Ibid at article 13(2).
[591] McLachlan et al op cit note 21 at 27 - 29 and 209 - 210. They cite, for example, the US Model Treaty as

clarificatory language into any new treaties.[592]

Bottini states that 'a well-known feature' of bilateral investment treaties concluded by the US is that they include non-precluded measures which reserve the right to adopt 'measures to protect certain essential interests'.[593] He cites the example of the US - Argentina bilateral investment treaty,[594] which provides, in article XI, that:

> 'This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests'.[595]

Bottini records that the US government has (somewhat contentiously) affirmed that it views the non-precluded measures set out in its investment treaties as 'self-judging', i.e. that only the party whose measures are questioned is competent to determine what is in its own essential security interests.[596]

The US has also specified in its more recent free trade agreements that non-discriminatory measures that protect legitimate public welfare interests will not be expropriations.[597] For example, the US - Australia free trade agreement, which entered into force in 2005, provides that:

> 'Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of

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referring in its preamble to the objective of improving living standards and a desire to achieve its objectives 'in a manner consistent with the protection of health, safety and the environment, and the promotion of internationally recognized labor rights'.

[592] Peterson op cit note 391 at 18.

[593] Bottini op cit note 71at 146. Bottini at 149 - 151 also discusses the fact that the International Court of Justice has upheld the effect of such provisions as being to limit the scope of the treaty, particularly in the case of the US - Iran Friendship, Commerce and Navigation Treaty.

[594] Treaty between the United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investment signed on 14 November 1991.

[595] See the discussion at Bottini op cit note 71 at 146. See also Roberto Aguirre Luzi 'BITs & Economic crises: Do States have *carte blanche*?' in TJ Grierson Weiler (ed) *Investment Treaty Arbitration and International Law* (2008) at 183, where the author states that the US first started including this clause in order to 'provide an "escape clause" for the exercise of domestic police power, the implementation of United Nations Security Council Resolutions, and the imposition of extraordinary measures taken in times of "national emergency", war, etc'.

[596] Bottini op cit note 71 at 162. See also Luzi op cit note 595 at 185.

[597] See Choudhury op cit note 24 at 1003. She cites, for example, the free trade agreements with Australia, Chile, the Dominican Republic and Central America, and Morocco. See the discussion in Alvarez op cit note 570 on the Trans-Pacific Partnership among Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US (until recently) and Vietnam.

public health, safety, and the environment, do not constitute indirect expropriations'.[598]

Moreover, while NAFTA may provide extensive investor protection, it is also true that it has been crafted to ensure that its member states are not hamstrung in developing and implementing their own domestic policies. For instance, the NAFTA treaty expressly ensures that 'a number of notable regulatory areas were both broadly and specifically exempted from the Chapter 11 claims of foreign investors including national security, healthcare and social welfare, among many others.'[599] Owens and Fitzpatrick state that '[t]he creation of these exemptions demonstrates the negotiator's original awareness of the risks for sovereignty and public regulation of an unchecked investor-state dispute resolution mechanism.'

The NAFTA parties also established a Free Trade Commission ('the Commission'), whose role it is to issue interpretations of the NAFTA Treaty and 'thereby steer investment tribunals into directions that are in tune with the state parties' intentions'.[600] The Commission, which is made up of cabinet-level representatives of the parties, has the power to bind tribunals convened under Chapter 11.[601]

Petersmann also highlights the 'successive agreements among NAFTA member states to limit the NAFTA jurisprudence regarding the NAFTA minimum standard of treatment and expropriation standard', which 'illustrate that, in constitutional democracies, … state liability for public interest regulation of the economy must remain limited'.[602]

Transparency

The US has also responded to the concerns surrounding a lack of transparency in investor state disputes by ensuring that advancements relating to the transparency of proceedings in investor-state disputes have been included in its investment protection instruments.

In respect of NAFTA, Coe notes that the US has confirmed (as has Canada) that when it is a party to an investment dispute, the award may be published.[603] The Commission has also

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[598] Annex 11-B article 4(b) of the Australia-US Free Trade Agreement supra note 584. See the discussion of the Free Trade Agreement at Singh & Sharma op cit note 1 at 97 - 99.
[599] See article 1101(4) of NAFTA supra note 224. See also Owens & Fitzpatrick op cit note 561 at 65.
[600] Article 2001 of NAFTA supra note 224. Brower & Schill op cit note 2 at 494 - 495. See also Coe op cit note 21 at 1366.
[601] Articles 1131(2) and 2001 of NAFTA supra note 224. Coe op cit note 21 at 1366. See also Roberts op cit note 356 at 180.
[602] Petersmann op cit note 27 at 531. See also the discussion in Alvarez op cit note 570 at 524.
[603] See Annex 1137 of NAFTA supra note 224. See also Coe op cit note 21 at 1355.

issued notes relating to the confidentiality of proceedings.[604]

Coe states that the pro-transparency policies promoted by the US under NAFTA are reflected in its 2004 revision of its model bilateral investment treaty.[605] The US Model Treaty expressly provides for documentation to be made public and for hearings to be open to the public.[606]

Menakar states that '[c]entral among the procedural innovations in the [US's] post-NAFTA agreements are changes to maximize the transparency of the proceedings.'[607] She goes on to describe the main areas of change in this regard as relating to public access to documents, the participation by non-parties in proceedings, and public access to hearings, and confirms that all of the recent US investment treaties provide for disclosure of arbitral documents, subject to limited exceptions to protect confidentiality and privilege.[608] Coe confirms that 'within [US] practice, the commitment to openness now extends well beyond its North American undertakings, as reflected in a number of recent [US] trade agreements…'[609]

Participation

On a similar note, the US has adopted a clear policy of ensuring that the concerns surrounding the inability of third parties to participate in disputes that have strong public implications are addressed.

An example of where a tribunal expressly accepted that it had the power to accept amicus briefs under NAFTA can be found in the *Methanex* case.[610] It is important to note that in the *Methanex* case, the US argued that the tribunal was indeed authorized to accept such

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[604] Coe op cit note 21 at 1369. The NAFTA Free Trade Commission, Notes on Interpretation of Certain Chapter 11 Provisions (2001) last accessed from *https://www.state.gov/s/l/c3439.htm* on 27 April 2017, state as follows:

> 'Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration and … nothing in the NAFTA precludes the Parties from providing access to documents submitted to, or issued by, a Chapter Eleven tribunal.'

[605] Coe op cit note 21 at 1378.

[606] Article 29 of the US Model Treaty supra note 575. See also McLachlan et al op cit note 21 at 59. Here the authors note that the model treaty 'goes further than the new ICSID rules', which I have discussed previously in this dissertation. See also Leibold op cit note 435 at 250, who states that '[i]n 2004, the [US], at the forefront of the transparency movement, altered its model [bilateral investment treaty] to allow for amicus participation and open hearings'. See also Coe op cit note 21 at 1378.

[607] Menakar op cit note 268 at 124.

[608] Ibid at 125.

[609] Coe op cit note 21 at 1385.

[610] See Dumberry op cit note 343 at 201. See also Dimitrij Euler 'UNCITRAL Working Group II Standards in Treaty Based Investor-State Arbitration: How Do They Relate to Existing International Investment Treaties?' (2012) *Asper Review of International Business and Trade Law* 139 at 142.

submissions.[611] It argued that the case was

> '[N]ot a typical commercial arbitration dispute: it [involved] a State as a respondent, it [had] to be decided on the basis of public international law, and the decision [would] have a significant effect extending beyond the two Disputing Parties'.[612]

Amicus submissions were also accepted in the *Glamis Gold* case,[613] and various other disputes involving the US as the respondent.[614]

The Commission has also issued notes relating to the participation of amici in proceedings.[615] In 2003, the Commission confirmed that amici curiae could apply for leave to make written submissions in NAFTA proceedings and set various guidelines for this.[616] Bastin confirms that NAFTA tribunals have since followed these guidelines closely.[617]

The US Model Treaty has also been drafted to ensure the ability of third parties to participate in those proceedings. Article 28(3) expressly states that '[t]he tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party'.[618]

Menakar also confirms that the treaties recently concluded by the US 'expressly provide that the tribunal has the authority to accept non-party, or *amicus*, submissions.'[619] The Iran-US

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[611] Dumberry op cit note 343 at 207. See also Lucas Bastin 'The amicus curiae in investor-state arbitration' (2012) *Cambridge Journal of International and Comparative Law* 208 at 219.

[612] As summarised by Dumberry op cit note 343 at 207. I note that (as Dumberry records here) Canada agreed with the US's stance but that Mexico expressed the view that amicus briefs should not be allowed. See also Coe op cit note 21 at 1372 - 1374.

[613] Supra note 571. See Bastin op cit note 611 at 220.

[614] Bastin op cit note 611 at 220 - 221.

[615] Coe op cit note 21 at 1366 and 1378 - 1379. The NAFTA Free Trade Commission Statement of the Free Trade Commission on non-disputing party participation (2004) last accessed from *https://www.state.gov/s/l/c3439.htm* on 27 April 2017, states as follows:

> 'No provision of the [NAFTA] limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party.'

See also Bastin op cit note 611 at 213.

[616] Bastin op cit note 611 at 220 elaborates on these guidelines, stating that:

> 'Key guidelines were that tribunals, when deciding whether to grant leave to file a submission, should consider whether: (i) the submission would assist it in determining a factual or legal issue by bringing a perspective, particular knowledge or insight different from the parties; (ii) the submission would address matters within the scope of the dispute; (iii) the would-be *amicus curiae* has a significant interest in the arbitration; and (iv) there is a public interest in the subject-matter of the arbitration. The [Commission] Statement also requires the tribunal to ensure that the submission will not disrupt the arbitration, and that neither party is unduly burdened or unfairly prejudiced by the submission.'

[617] Ibid at 220.

[618] US Model Treaty supra note 575. See also McLachlan et al op cit note 21 at 59, Coe op cit note 21 at 1378 and Bastin op cit note 611 at 232.

[619] Menakar op cit note 268 at 125. See also Bastin op cit note 611 at 232, who cites, for example the bilateral investment treaties between the US and Uruguay and Rwanda, respectively, and the free trade agreements

Claims Tribunal has also admitted third-party memorials.[620]

Conclusion

The approach adopted by the US could be said to be one of ensuring that sufficiently clear and narrowly tailored, or constrained, treaty provisions govern its obligations. Roberts states that the US 'has been particularly influential because of steps it has taken to engage with the developing case law, such as by providing a detailed and updated model [bilateral investment treaty] and intervening in cases'.[621]

Alvarez summarizes the US approach as having moved:

> '[F]rom the exceptionally strong investor rights of the [US] Model [bilateral investment treaties] of 1984 and 1987 to the more complex regional package deals struck by the three NAFTA parties to the more "sovereign-sensitive" provisions of the [US Model Treaty] and contemporary [US] [free trade agreements]'.[622]

Of course it must be recognised that the US has a significant amount of bargaining power and that it is not clear that states with less economic clout would be in a position to achieve the same kind of cordoning-off for their policy space.

The approach of other developing countries

It is clear, however, that other developing states have also adopted very different stances to that of South Africa.[623] I will now turn to consider the approach adopted by the Indian government and the SADC approach to investment treaties.

India

India is, like South Africa, a capital exporting country.[624] Like South Africa, it is an emerging economy and has 'faced similar challenges in the investment regulatory framework'.[625] It also

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between the US and Chile, Morocco, and Peru, respectively.

[620] See Coe op cit note 21 at 1375.

[621] Roberts op cit note 356 at 224. See also Alvarez op cit note 570 at 515, who states that the US has reacted 'by striving to reform existing model texts for [bilateral investment treaties / free trade agreements] and [investor state dispute settlement] rather than exiting both'.

[622] Alvarez op cit note 570 at 519.

[623] See Langalanga op cit note 391 at 24, who states that '[o]ther developing countries that face similar challenges and also need policy space have taken different paths to the same objective'.

[624] Kelsey op cit note 440 at 329.

[625] Langalanga op cit note 391 at 5 states that the manner in which it 'has responded to and articulated [its] dissatisfaction with the system could inform South Africa on how it should or could have approached and navigated its own misgivings over the current international investment regulatory regime'.

has 'domestic imperatives to address poverty and environmental degradation and to develop [a] "sustainable" [economy]'.[626]

India has signed over 80 international investment agreements, the large majority of which are in force.[627] It has also concluded a number of free trade agreements with investment chapters.[628] India has, like South Africa, expressed concerns surrounding the prevailing international investment law regime.[629] In spite of the growing number of controversial investment disputes that India has faced, and although India has elected to terminate a number of its existing treaties, it has not rejected the investment treaty law regime entirely.[630]

India has, instead, decided to put on hold all existing bilateral investment treaty negotiations and review all of its bilateral investment treaties with a view to renegotiating them.[631] It is also planning to ensure that it will reserve policy space in future investment treaties.[632]

As a consequence of its review, India has developed a new model bilateral investment treaty, 'that rewrote almost all the traditional rules'.[633] The model treaty's purpose is to serve as a base for negotiations of new bilateral investment treaties, as well as for renegotiations of existing treaties.[634]

The India Model Treaty contains 'many procedural innovations that will enhance the state's jurisdiction and regulatory sovereignty'.[635] Among these are that the initial term of the treaty's operation is 10 years, after which it lapses unless explicitly renewed.[636] Moreover, there are tight time constraints for raising disputes.[637]

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[626] Kelsey op cit note 440 at 329.
[627] Ibid at 344 and Langalanga op cit note 391 at 24. See also Shruti Iyer 'Redefining investment regime in India: Post *White Industries*' (2013) *The Journal of World Investment and Trade* 595 at 601 and Manu Thadikkaran 'Model text for the Indian bilateral investment treaty: An analysis' (2015) *NUJS Law Review* 31 at 31.
[628] Langalanga op cit note 391 at 24.
[629] Ibid at 24 and 25.
[630] Kelsey op cit note 440 at 344. Langalanga op cit note 391 at 24 - 25, confirms that India has faced over 20 investment claims. See also Iyer op cit note 627 at 598 and Saravanan A & Dr S. R. Subramanian 'Role of domestic courts in the investor-state dispute settlement process: the case of South Asian BITs' (2017) *International Arbitration Law Review* 42 at 53.
[631] Langalanga op cit note 391 at 25. See also Saravanan & Subramanian op cit note 630 at 53.
[632] Langalanga op cit note 391 at 25.
[633] Kelsey op cit note 440 at 336 and 344 and Saravanan & Subramanian op cit note 630 at 53. The model treaty, released on 28 December 2015 can be accessed at finmin.nic.in/reports/ModelTextIndia_BIT.pdf, last accessed on 29 April 2017 ('India Model Treaty'). See also Thadikkaran op cit note 627 at 31.
[634] Thadikkaran op cit note 627 at 32.
[635] Kelsey op cit note 440 at 344.
[636] Article 38(2) of the India Model Treaty supra note 633. See also Kelsey op cit note 440 at 345.
[637] Article 15 of the India Model Treaty supra note 633. Kelsey op cit note 440 at 345 and 348 and Saravanan & Subramanian op cit note 630 at 53.

Dispute resolution

As I have stated, India has, importantly, not taken the stance taken by the South African government to turn its back on investor-state dispute settlement and the India Model Treaty provides for investor-state dispute settlement under the UNCITRAL rules and ICSID.[638]

This is, however, subject to the investor having 'exhausted all judicial and administrative remedies' or being able to show that there is no available local remedy reasonably capable of providing relief.[639] It is also subject to the express limitation that arbitral tribunals cannot review the merits of a decision made by a judicial authority of the host state.[640]

Protection of regulatory space

Kelsey states that the India Model Treaty 'strongly asserts the national interest through … the government's right to modify and revoke law in good faith and exercise discretion.'[641]

The treaty also expressly provides that tribunals must interpret the treaty 'in the context of the high level of deference that international law accords to States with regard to their development and implementation of domestic policies'.[642] The India Model Treaty also takes the relatively progressive step of including a set of general exceptions, which ensure that the host state can take actions without the risk of committing a breach of the treaty.[643] Article 32(1) of the India Model Treaty, a general exception clause, states that nothing in the treaty:

> 'shall be construed to prevent the adoption or enforcement by a Party of measures of general applicability applied on a non-discriminatory basis that are necessary to:
>
> (i) protect public morals or maintaining public order;
>
> (ii) protect human, animal or plant life or health;
>
> (iii) ensure compliance with law and regulations that are not inconsistent with the

[638] Articles 13 and 16(1) of the India Model Treaty, supra note 633. This is discussed by Kelsey op cit note 440 at 348.
[639] Article 15 of the India Model Treaty, supra note 633. Kelsey op cit note 440 at 348 and Saravanan & Subramanian op cit note 630 at 53.
[640] Article 13.5(i) of the India Model Treaty, supra note 633, as discussed by Thadikkaran op cit note 627 at 38, who states that '[t]his provision has the potential of allowing the Host State to remove any dispute from the purview of arbitration'.
[641] Kelsey op cit note 440 at 345.
[642] Ibid at 345. Article 23(1) of the India Model Treaty, supra note 633.
[643] Article 32 of the India Model Treaty, supra note 633, as discussed by Thadikkaran op cit note 627 at 39 - 40, who states that '[t]hese exceptions aim at providing a higher regulatory space for the Host States in taking certain actions necessary for the economy, environment or security of the State.'

provisions of this Agreement;

(iv) protect and conserve the environment, including all living and non-living natural resources;

(v) protect national treasures or monuments of artistic, cultural, historic or archaeological value'.

Article 24(1) of the India Model Treaty explicitly provides that:

> 'Interpretations of specific provisions and decisions on application of this Treaty issued subsequently by the Parties in accordance with this Treaty shall be binding on tribunals established under this Article upon issuance of such interpretations or decisions'.

The treaty also expressly recognises that amendments to the treaty may be made at any time on request of either party.[644]

Standard investor protections have also been narrowed in the India Model Treaty,[645] and, although both direct and indirect expropriation are covered, '[n]on-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives' are explicitly excluded.[646] There is, significantly, no fair and equitable treatment standard.[647]

These innovations are clearly aimed at ensuring that the regulatory space of contracting states is not stifled and that states retain a measure of control over the interpretation of their obligations. Singh and Sharma note that 'India, after being rattled by threats from foreign investors, has sought treaty reversions…'.[648]

Bottini records that India, like the US, has concluded bilateral investment treaties that include

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[644] Article 37(1) of the India Model Treaty, supra note 633.

[645] Kelsey op cit note 440 at 346. Here the author cites, for example, that the treaty, rather than incorporating minimum treatment standards or fair and equitable treatment, 'protects against a violation of customary international law, defined as resulting only from a general and consistent practice of states.' See article 3(1) of the India Model Treaty, supra note 633. Moreover, the model treaty clarifies in the context of national treatment, and an examination of 'like circumstances' that 'diverse circumstances must be considered, including whether different treatment was for "legitimate regulatory objectives"'. See article 4(1) of the India Model Treaty, supra note 633. There is also no express most favoured nation provision.

[646] Article 5(1), 5(3) and 5(5) of the India Model Treaty, supra note 633. See also Kelsey op cit note 440 at 346 and Thadikkaran op cit note 627 at 38.

[647] See Thadikkaran op cit note 627 at 36 and 37, who states that

> 'Article 3.1 of the [India Model Treaty] sets out the standard of treatment for foreign investments. The form in which this provision is found in the [India Model Treaty], however, is unique, as it is different from the traditional standards of treatment under international investment law.'

[648] Singh & Sharma op cit note 1 at 93.

non-precluded measures.[649] Newcombe notes that the India-Singapore Comprehensive Economic Co-operation Trade Agreement, for example, expressly provides that 'the security exception is non-justiciable, thereby avoiding uncertainties as to the interpretation of self-judging language'.[650]

Transparency

The India Model Treaty, moreover, makes various strides in relation to the transparency of arbitration proceedings. It provides that documents relating to the dispute will be made public and that hearings will be open to the public.[651]

Participation

The India Model Treaty also introduces various reforms relating to the accessibility of arbitration proceedings. It provides, for instance, that non-disputing parties may make oral and written submissions to the tribunal regarding the interpretation of the treaty.[652]

Conclusion

India has clearly taken a number of steps to address its concerns surrounding the sweeping and invasive nature of the prevailing investment protection regime. It has done this through ensuring that treaties it enters into in future do not provide investors with untenably strong protections and that its obligations thereunder are sufficiently specified and truncated to ensure that its regulatory agility is retained.

Langalanga states that India might provide a good example for South Africa 'on how to best carve policy space out of the international investment regulatory regime',[653] and goes on to state that South Africa should 'take its cue from the Indian experience and desist from being a reluctant multilateral player, instead carving out policy space within the international investment regulatory regime'.[654]

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[649] Bottini op cit note 71 at 146.
[650] Newcombe op cit note 574 at 2.
[651] Article 22(1) and 22(2) of the India Model Treaty, supra note 633. See also Saravanan & Subramanian op cit note 630 at 53.
[652] Article 22(3) of the India Model Treaty, supra note 633.
[653] Langalanga op cit note 391 at 25.
[654] Ibid at 26.

The approach of SADC

Protocol on Finance and Investment

As discussed in chapter four of this dissertation, the Protocol (which was signed on 18 August 2006, and came into effect on 16 April 2010) contains provisions that afford foreign investors in SADC states investment treaty-like protection.[655] The preamble to the Protocol recognises the:

> '[I]ncreasing importance of the development and strengthening of financial and capital markets, and the role played by investment and the private sector in productive capacity and increased economic growth and sustainable development'.[656]

It also expressly recognises:

> '[T]he importance of the link between investment and trade, and the need for greater regional cooperation to enhance the attractiveness of the Region as an investment destination'.[657]

The Protocol requires member states to 'harmonise their investment policies, laws and practices, with the objective of creating a SADC investment zone'.[658] Member states are also required to 'create a favourable investment climate within SADC with the aim of promoting and attracting investment in the region.'[659]

Model bilateral investment treaty

The SADC Model Bilateral Investment Treaty ('SADC Model Treaty'), published in 2012 with 'significant input' from South Africa, 'with a view to further harmonization of investment law and practice', incorporates standard provisions relating to non-discrimination and protections in respect of expropriations.[660] It, however, suggests that states include a 'fair administrative treatment' provision in place of a fair and equitable treatment provision.[661]

I note, however, that there are some concerns surrounding whether the Protocol and the

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[655] See Ngobeni and Fagbayibo op cit note 531 at 176 and Adeleke op cit note 45 at 4.
[656] See the preamble to the Protocol, supra note 531.
[657] Ibid.
[658] Article 19 of Annex 1 to the Protocol supra note 531. See also article 2 of the Protocol; Ngobeni & Fagbayibo op cit note 531 at 176; and Lonias Ndlovu 'Following the NAFTA star: SADC land reform and investment protection after the *Campbell* litigation' (2011) *Law, Democracy and Development* at 15.
[659] See article 3, and article 2 of Annex 1 to, the Protocol supra note 531and Ndlovu op cit note 658 at 15.
[660] Bosman op cit note 461 at 24, Ngobeni and Fagbayibo op cit note 531 at 176 and Adeleke op cit note 45 at 5. The text of the model treaty, last accessed from *http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf* on 1 May 2017. See articles 4 and 6 of the SADC Model Treaty.
[661] Adeleke op cit note 45 at 5. See article 5 of the SADC Model Treaty supra note 660.

SADC Model Treaty are completely aligned.[662]

Dispute resolution

Again, unlike the stance adopted by the South African government domestically, the Protocol recognises the possibility of investor-state dispute settlement, subject to the investor having exhausted local remedies.[663] The investor is entitled to refer disputes to the SADC Tribunal, ICSID, or to an international arbitrator or ad hoc tribunal appointed under the UNCITRAL rules.[664] I note, however, that in 2014, a SADC Protocol on the SADC Tribunal, was published, which limits the scope of operation of the SADC Tribunal to state-state disputes.[665]

The SADC Model Treaty also provides for the option of investor-state dispute settlement, this option is again subject to the investor having exhausted local remedies.[666] The SADC Model Treaty also puts in place similar restrictions to those found in the US Model Treaty.[667]

Protection of regulatory space

The Protocol includes fair and equitable treatment and most favoured nation treatment provisions and provides protection against expropriation (which must be subject to the payment of prompt, adequate and effective compensation).[668] This is, however, subject to the carve-out that states may 'grant preferential treatment to "qualifying investments and investors in order to achieve national development objectives while safeguarding the principle of non-discrimination"'.[669] The Protocol also recognises the right of member states to regulate in the public interest.[670]

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[662] Ngobeni and Fagbayibo op cit note 531 at176 and 179 - 183. The authors, for example, note that 'unlike the [Protocol], the [SADC Model Treaty] does not make investor-state arbitration a mandatory provision in an [investment treaty]'. There is also a discrepancy relating to transparency of proceedings.

[663] See Article 28 of Annex 1 to the Protocol supra note 531. See also Schlemmer op cit note 107 at 750, Bosman op cit note 461 at 21 - 22, Ngobeni and Fagbayibo op cit note 531 at 176 and Adeleke op cit note 45 at 5.

[664] See Schlemmer op cit note 107 at 750 and Ngobeni and Fagbayibo op cit note 531 at 178.

[665] Vidal-León op cit note 441 at 313. See also Adeleke op cit note 45 at 5.

[666] Article 29 of the SADC Model Treaty supra note 660. Adeleke op cit note 45 at 5 notes, however, that the drafting committee included a note stating that its preferred option is to exclude international arbitration. See also Vidal-León op cit note 441 at 314 and Ngobeni and Fagbayibo op cit note 531 at 179.

[667] See, for instance, articles 29.1 (relating to the amiable settlement of disputes), 29.4 (relating to the conditions for and prescription of disputes) and 29.29 (relating to arbitral awards).

[668] See articles 5 and 6 of Annex 1 to the Protocol supra note 531and Adeleke op cit note 45 at 4. See also Bosman op cit note 461 at 21.

[669] Adeleke op cit note 45 at 4. See also article 6 of Annex 1 to the Protocol supra note 531.

[670] Article 14 of Annex 1 to the Protocol supra note 531 provides that:

> 'Nothing in this Annex shall be construed as preventing a State Party from exercising its right to

The SADC Model Treaty, importantly, recognises the right of the parties to regulate in the public interest[671] and states explicitly that nothing in the remainder of the treaty will revoke a state's right to:

> '[G]rant preferential treatment in accordance with [its] domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals',[672]

or to:

> '[T]ake measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement'.[673]

Following the example set by the US Model Treaty and NAFTA, article 29.20 also states that:

> 'A joint decision of the State Parties, each acting through its representative designated for purposes of this Article, declaring their joint interpretation of a provision of this Agreement, shall be binding on any tribunal, and any decision or award issued by a tribunal must apply and be consistent with that joint decision.'

Transparency

The SADC Model Treaty makes clear provision for the transparency of various aspects of investor-state arbitrations. Article 29.17 sets out that the respondent state must make various documents public,[674] and mandates that hearings must be open to the public.[675] The Protocol does not contain similar provisions.

> regulate in the public interest and to adopt, maintain or enforce any measures that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.'

See also Adeleke op cit note 45 at 4 and Bosman op cit note 461 at 24, who states that the Protocol 'is explicitly designed to safeguard the policy space needed by developing countries to pursue sustainable development goals'.

[671] See article 20 of the SADC Model Treaty supra note 660, which provides that:

> 'In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.'

See also Adeleke op cit note 45 at 7.

[672] See article 21.1 of the SADC Model Treaty supra note 660.

[673] Ibid at article 21.3.

[674] Ibid at article 29.17(a).

[675] Ibid at article 29.17(b).

Participation

Article 29.15 of the SADC Model Treaty also provides that the arbitral tribunal appointed to adjudicate an investor-state dispute 'shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party'. The Protocol again does not contain similar provisions.

Divergence

South Africa, as a member of SADC, has adopted a different stance in the Act and in its actions in terminating investment treaties.[676] Its current policy, as encapsulated in the Act, is not in accord with its obligations at a regional level.[677] Bosman summarises the most significant discrepancies as follows:

> 'In the first instance, the [Act] does not allow for "prompt, adequate and effective compensation" as is required by the Protocol; secondly, the Act does not provide for "fair and equitable treatment"…, as required by the Protocol; and thirdly, the Act does not allow a foreign investor to submit a dispute to international arbitration but rather provides that "such arbitration will be conducted between the Republic and the home state of the applicable investor"'.[678]

As is evident from the discussions in the remainder of this dissertation, these discrepancies are extremely significant from an international investment law standpoint.

The possible implications of this incongruence are significant.[679] Adeleke notes that South Africa can withdraw from the Protocol by giving notice[680] but ventures that 'for regional integration reasons it may choose not to do so'.[681] This leaves outbound South African investors into other SADC states with protection that will not be reciprocated for SADC investors into South Africa (except those from states with which South Africa still has

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[676] Bosman op cit note 461 at 24 notes that the SADC Model Treaty 'was intended as a template to guide treaty negotiators as well as a tool for regional harmonisation. Two months after the [SADC Model Treaty] was completed, South Africa began to terminate its own [bilateral investment treaties].'
[677] Ibid at 21, where Bosman confirms that all Protocols under the SADC Treaty are binding on member states and 'must be domesticated through national legislation'. Bosman also notes that the binding nature of these instruments has been confirmed by the South African Constitutional Court.
[678] Ibid at 21 - 22.
[679] Adeleke op cit note 45 discusses this issue in detail. He also points out a number of similarities in the approach which are significant, for example, at 5 he deals with the fact that the South African and SADC approaches are aligned in relation to recognising the right of the state to regulate.
[680] See article 31 of the Protocol supra note 531.
[681] Adeleke op cit note 45 at 5.

bilateral investment treaties in place).[682] This again ties into the discussion about inconsistent regimes that now apply to international investments in South Africa.[683]

In April 2015, Adeleke posited that South Africa:

> '[E]ither needs to review its domestic policy approach (given its misalignment with the regional position) and assume a policy more favourable to the integration and harmonisation of SADC states, or should advocate for a reform of SADC policies to make those consistent with the South African approach.'[684]

I note that various amendments to the relevant portions of the Protocol have been tabled in late 2016 which will, if adopted, have a significant impact on the provisions of the Protocol and draw these more into line with the South African position.[685] The Draft Agreement, for example, contains provisions which will dilute the compensation available on expropriation,[686] and the fair and equitable treatment provisions and most favoured nation provisions appear to have been removed. Moreover, the provisions relating to investor-state arbitration have been removed.

Bosman records that:

> 'The [Department of Trade and Industry] has acknowledged that the [Act] does not comply with the SADC Protocol, however argues that the SADC Protocol has been through a review process and is to be amended to align with the [Act]. It is however unclear when this will be completed and whether the Protocol will indeed align with the [Act] once it has been amended. South Africa is bound by the obligations of the Protocol, and it is questionable how the [Act] can pass constitutional muster if it contradicts South Africa's international obligations'. (Citations omitted.)[687]

Could the South African government have adopted a better course of action in the circumstances?

It is so that South Africa is not the only country to view exit from the system as the best option available to it. As far back as 2008, Newcombe recognised that certain Latin American states had 'dramatically' indicated that they would be withdrawing from the Convention, or

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[682] Ibid at 5.
[683] Ibid at 4 - 5. Adeleke suggests that South Africa is 'exposed to too many simultaneous platforms of dispute settlement.'
[684] Ibid at 5.
[685] This is in the form of the Draft Amendment Agreement supra note 534.
[686] Ibid at article 5.
[687] Bosman op cit note 461 at 24.

specific investment agreements 'due to alleged abuses by foreign investors of their rights under these treaties.[688] The examples he cites are Bolivia submitting a notice of denunciation of the Convention and Venezuela announcing its withdrawal from the Netherlands-Venezuela bilateral investment treaty.[689]

In 2008, Ecuador began terminating its investment treaties with other Latin American states and withdrew from the Convention in 2009.[690] Venezuela withdrew from the Convention in 2012 and Argentina has announced similar plans.[691] Indonesia began terminating bilateral investment treaties in 2014.[692] Its treaty with Argentina was terminated by consent, which avoided some of the concerns relating to survival clauses.[693] Both India and Indonesia have conducted reviews of their investment treaties,[694] and in February 2016, Poland began reviewing its investment treaties.[695] Australia has also refused to include investor-state dispute settlement in a number of its treaties,[696] as have Bolivia, Ecuador and Venezuela.[697] In March 2017, Romania enacted a law approving the termination of its bilateral investment treaties with other European Union member states.[698] And yet, South Africa's bold move is seen in some circles as having 'led the way' in this regard.[699]

Brower and Schill posit that the system of international investment law should be viewed as dynamic and that states can and generally do react to correct perceived failings or developments that they do not agree with.[700] They state that:

> 'The more drastic reactions of states, such a terminating investment treaties or withdrawing from the ICSID Convention, by contrast, are a phenomenon that seems to be limited to a minority of states and can often be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy of international investment law

[688] Newcombe op cit note 574 at 2.
[689] Ibid at 2. See also Kelsey op cit note 440 at 334.
[690] Kelsey op cit note 440 at 334.
[691] Ibid at 334.
[692] Ibid at 334.
[693] Ibid at 334.
[694] Transformative Industrial Policy supra note 478 at 141.
[695] Kelsey op cit note 440 at 334. See also Marcin Orecki 'Bye-bye BITs? Poland reviews its investment policy' (31 January 2017) *Kluwer Arbitration Blog,* last accessed from *http://kluwerarbitrationblog.com/2017/01/31/bye-bye-bits-poland-reviews-investment-policy/* on 14 June 2017.
[696] Kelsey op cit note 440 at 333.
[697] Transformative Industrial Policy supra note 478 at 141.
[698] Dr Cosmin Vasile & Violeta Saranciuc 'Eyes on Romania as it enacts a law approving the termination of all EU bilateral investment treaties' (April 2017) *Young ICCA Blog,* last accessed from *http://www.youngicca-blog.com/eyes-on-romania-as-it-enacts-a-law-approving-the-termination-of-all-intra-eu-bilateral-investment-treaties/* on 14 June 2017.
[699] Transformative Industrial Policy supra note 478 at 141.
[700] Brower & Schill op cit note 2 at 496.

> and arbitration'.[701]

It is clear from the analysis of the reactions of other actors that a number of possibilities, short of attempting (rather clumsily) to remove itself from the investment treaty space, were open to the South African government once a concern about incursion into its policy space had been identified.

The first opportunity presents itself at the conclusion of new treaties. A number of commentators have observed that international investment agreements are increasingly being drafted to ensure that states are given sufficient policy space.[702]

This is certainly true of the approach of both the US and India described above, and, indeed, SADC in its Protocol and its Model Treaty.[703] In the context of the discrepancy between the Protocol and the Act in the Act's failure to include a fair and equitable treatment standard of investor protection, Bosman states that the concerns surrounding the possible broad interpretation of this standard 'could have been easily mitigated through the inclusion of interpretive guidance in the [Act]; a common drafting practice in recent [bilateral investment treaties].'[704]

It is unclear why South Africa was not more careful when negotiating its existing investment treaties to ensure that areas of particular regulatory concern were not better shielded. But that, as is clear from the strategies adopted by both the US and India, need not be the end of the story. There are a number of approaches that may be adopted post-treaty conclusion that can assist in ensuring that states' regulatory ability is better retained. Indeed, Owen and Fitzpatrick suggest that 'treaty parties must continue to evaluate the treatment of certain sensitive industries and economic sectors, ensuring that investor protections are appropriately balanced against legitimate public interest regulation'.[705]

Roberts, discussing the possibility of states taking an ongoing role in the interpretation of their existing treaty obligations, and the possibility of states amending or replacing their existing treaties states that:

> 'Treaty parties have used this option to reduce future tribunal discretion by such means as increasing the precision of treaty commitments, adding interpretive mechanisms like the

[701] Ibid at 496.
[702] See, for example, Bosman op cit note 461 at 24.
[703] Ibid at 24.
[704] Ibid at 22.
[705] Owen & Fitzpatrick op cit note 561 at 66.

[Commission], and clarifying their acceptance or rejection of certain interpretations'.[706]

As the author states, '[i]nvestor rights are granted within the treaty's general regulatory framework, which includes the right of treaty parties to interpret, amend, and revoke those rights.'[707]

Some states have cooperated in issuing joint interpretive statements to clarify the scope of their international treaty obligations.[708] Others have sought to clarify their obligations through the development of comprehensive model investment treaties.[709] Again, this conduct is clearly evident in the approach of both India and the US.

Conclusion

It is clear that a number of options, short of termination and exit, are available to states that are concerned about the incursion of investment treaties on their legitimately exercised regulatory and policy space. Indeed, several states and other actors have been taking extremely innovative steps towards ensuring that the investment protections they offer are appropriately tailored and regulated.

The US and India (both of which recognise a need for regime reform) are prime examples of this and it is clear that the South African government should not have been short of inspiration for responsible methods of reform.

Stemming from the analysis in this chapter, I would posit that instead of the unilateral and seemingly summary cancellation of treaties, with previous protections clearly intended to be replaced solely by watered-down protections in domestic legislation, South Africa should have taken less drastic steps to correct the failings it perceives in the system.

In respect of existing treaty obligations, South Africa could have investigated options such as renegotiation of obligations, or, at least the issuing of joint interpretive statements, thereby ensuring that its obligations will not be interpreted as permitting unacceptable constraints on its regulatory goals.

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[706] Roberts op cit note 356 at 192.
[707] Ibid at 211.
[708] Newcombe op cit note 574 at 2. Brower & Schill op cit note 2 at 494 deal with the possibility of agreeing to binding interpretations, citing the exchange between Panama and the Argentine Republic of diplomatic notes with an 'interpretive declaration' of the most favoured nation clause in their 1996 investment treaty after a decision of an arbitral tribunal in 2006.
[709] Newcombe op cit note 574 at 2.

In respect of any future treaties, South Africa could, of course, have considered adopting a model investment treaty, with sufficient safeguards in place, to guide its negotiation of investment treaties. It could also have considered the incorporation of an interpretive mechanism to ensure that its obligations are adjudicated bearing in mind its particular circumstances and imperatives.

To some extent, the damage flowing from the stance taken by South Africa's has already been done. There is, however, no reason why it could not at least adopt a more moderate and considered stance going forward. This should, I would suggest, include a combination of strategies. First, South Africa should review the Act to interrogate whether it truly encapsulates an adequate and appropriate investment protection regime that sufficiently advances South Africa's interests. I would argue that it does not, as appears from the discussion in chapter four, and that significant revisions should be made. Second, South Africa should explore the willingness of its existing treaty counterparts to renegotiate or interpret those treaties to include carve outs in respect of, at least, South Africa's ability to adopt regulatory measures to redress its past and address its urgent developmental imperatives. Finally, the adoption of a model treaty to ensure appropriate negotiation of future treaties should be considered.

This course of action would be in accordance with what was suggested (although, as we know, not ultimately followed) in the Position Paper that was crafted as a result of the South African government's review of its investment treaty obligations, as discussed in chapter four of this dissertation. It would also, while ensuring that South Africa does not continue to give away too much of its regulatory breathing-room, ensure that South Africa ceases to give off the impression that it is uninterested in respecting and protecting foreign investments made in its territory.

CHAPTER VI - CONCLUSION

In this dissertation, I have explored whether there is a conflict between the protection of international investments and the state's right and responsibility to regulate. I suggest that there is in the traditional form of investment protection, at the very least, a perceived conflict and that, in particular circumstances, a clear tension may arise.

Kelsey observes that, flowing from this potential tension, '[t]he contemporary model of international investment agreements…, enforced through investor-state arbitration, is in turmoil, if not in crisis'.[710] In recent years, the perceived conflict has, along with other perceived failings in the system, become the subject of escalating international controversy, which has led to the polemic debate that I foreshadowed in chapter one of this dissertation, or the 'crisis' surrounding the legitimacy of international investment treaties that Kelsey references.

The significant protections offered to investors through investment treaties, including the possibility of recourse to investor-state arbitration, their implications for states and the constrictions that are placed on democratically elected governments in making and implementing policy as a result, have become matters of serious concern for a significant number of states. Indeed, as I have mentioned, many states have begun to question the very legitimacy of the prevailing system of international investment protection and several have reacted to what they perceive as an intolerable constraint on their mandate.

These reactions have been varied, to say the least. Some states have proactively sought to implement reforms to the system and ensure that their own obligations are palatable in order to protect their ability to regulate, ensuring that they have sufficient scope to implement policies in the public interest. Others have sought to insulate themselves from the prevailing system, and some have even sought to withdraw from it altogether. In analysing these reactions, it is imperative that the especial duties and roles of states are borne firmly in mind. As I highlighted in chapter two of this dissertation, states are inherently entitled, and indeed obliged, to govern and control their territories and must retain (and be afforded) the space and ability to do so.

At the same time, states must, I argue, be willing to be bound by reasonable limitations on their power. They simply cannot expect to be able to operate in a way that can have

[710] Kelsey op cit note 440 at 328.

disastrous effects on foreign investors (who have taken the risk of investing, almost invariably to the benefit of the local economy and the host state), with no inhibitions whatsoever.[711]

It would be misguided in the extreme to argue that the rule of law is not strengthened by states being held accountable to adhering to reasonable restrictions on their power. Indeed, in the investment law realm, they are effectively being asked simply to adhere to constraints which they have agreed (ironically, through an exercise of their sovereign power) will be placed on them.[712] As McLachlan et al have stated:

> '[B]y agreeing to extend such treatment to nationals of a reciprocating country, States have accepted that there is an objective standard of treatment by which their own legal and administrative system may be judged. The standard thus encapsulates the minimum requirements of the rule of law'.[713]

And as Weiler has posited, '[t]he rule of law in international economic affairs has been increasingly strengthened by the direct access to dispute settlement offered by investment protection treaties.'[714]

That being said, states must also temper the constraints they place upon themselves to ensure that they retain sufficient scope for legitimate and necessary regulatory expression. The restrictions they place on their power must ultimately be reasonable and a balancing act must thus surely be performed. As Gazzini states, 'a delicate balance needs to be struck between the regulatory powers of the host [s]tate and the need legally to protect the interests of foreign investors'.[715]

I submit that the prevailing investment protection regime probably does not give sufficient weight to the deference to be afforded to states' regulatory responsibilities or to other democratic concerns in this balancing act.[716] At the same time, the importance and benefits for states of being party to reciprocal investment protection treaties cannot simply be

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[711] Indeed, in international investment law territory, the impediments extend only to financial repercussions. States are not interdicted from implementing policies of their choice. See, for example, the discussion in Owens & Fitzpatrick op cit note 561 at 60.
[712] Gazzini op cit note 7 at 113 states that '[b]y concluding [bilateral investment treaties] the contracting parties *accept* some obligations… in relation to their dealings with foreign investors'. (Emphasis added.)
[713] McLachlan et al op cit note 21 at 205. Schill op cit note 23 at 59.
[714] Weiler op cit note 571.
[715] Gazzini op cit note 7 at 113.
[716] As Choudhury op cit note 24 at 984 states, the effect of decisions made in investor-state dispute settlement claims under investment treaties 'has been to curtail a state's democratic expression by countering its sovereign decision-making authority'.

disregarded. The benefits and merits of investor-state dispute settlement should not be discarded purely because it can also be faulted.

The potential tension between the protection of international investments and the state's right and responsibility to regulate is, in my view, not irresoluble and can be managed. States should ultimately recognise their ability to tailor their commitments to their specific and evolving needs. As I have explored, there are a number of ways in which this can be done.

Given this, the question really should be what protections can be afforded without too great an incursion on states' regulatory responsibilities, rather than whether such protections should be extended at all. Or, as I posited in my introduction to this dissertation, perhaps the question should not be whether investor-state dispute settlement in its present guise is legitimate or not. Perhaps the question should be how it can be made more legitimate.

As I have detailed, one of the most extreme reactions to the concerns surrounding the prevailing system has been that of the South African government. I have also aimed to analyse whether the stance adopted by the South African government, its termination of various of its bilateral investment treaties and its proposed course of action, as encapsulated in the Act, is either justified and acceptable or unjustified and unacceptable under international law when viewed against the state's right and responsibility to regulate.

As Peterson suggests, South Africa's investment treaties may be 'a double-edged sword, providing certainty to foreign investors, and security to outward-bound [South African] investors, at the same time as the application of these treaties may constrain government policy-making'.[717] Although there is clearly a need for reform, the stance adopted by the South African government leaves much to be desired and the Act is indeed a highly problematic attempt to address legitimate and pressing concerns.

Constraints on state power are a fundamental tenet of South African law and our very constitutional order is premised on the notion that the government is bound to act within particular and defined parameters and the notion that private actors are able to enforce those parameters. It is certainly not clear that South Africa needed to reject the traditional international investment protection regime, along with the ability for investors to enforce such protections directly, almost wholesale. It could have accepted certain constraints and found creative ways (as states such as the US and India have done) of ensuring that those

[717] Peterson op cit note 391 at 3.

constraints were acceptable. It could have at least attempted to renegotiate existing investment treaties to ensure that sufficient policy space was retained in order for it to introduce legitimate regulations aimed at addressing, among other things, the country's important developmental needs and its need for redress. It also could have ensured that any future investment treaties include clear provisions to ensure that space. Moreover, the South African government could be seeking to ensure that its key domestic public law principles inform its international investment policies. This could include amendments, for example, to ensure transparency in proceedings and the ability of third parties to make representations to tribunals.

In examining the concepts of the legitimacy of the current international investment law regime, and, indeed, the role of investment arbitration and its interaction with the right and responsibility of the state to regulate through the lens of the very recent and significant steps taken by the South African government, I have concluded that there were certainly less extreme steps that South Africa could have taken to protect its regulatory mandate and that these steps would have been preferable to what it in fact did. While South Africa's position has certainly already had some irreversible effects, there is no reason why a more thoughtful and nuanced approach cannot be adopted going forward.

Gaining inspiration from the innovative options short of termination and exit that other international actors expressing concerns about the prevailing system have taken, it is clear that states can take steps towards ensuring that the investment protections they offer are appropriately tailored and regulated.

In South Africa's case, and as I have suggested in chapter five of this dissertation, this should include a combination of strategies. First, South Africa should review the Act to interrogate whether it truly encapsulates an adequate and appropriate investment protection regime that sufficiently advances South Africa's interests. I submit that it does not, as appears from the discussion in chapter four, and that significant revisions should be made.

Second, South Africa should at least explore the willingness of its existing treaty counterparts to renegotiate or interpret those treaties to include carve outs in respect of, as a minimum, South Africa's ability to adopt regulatory measures to redress its past and address its urgent developmental imperatives.

Finally, the adoption of a model treaty with sufficient safeguards in place to ensure

appropriate negotiation of future treaties should be considered. This model treaty could also potentially incorporate an interpretive mechanism to ensure that the South African government's obligations are adjudicated with its particular circumstances and imperatives in mind.

This proposed course of action would, while ensuring that South Africa does not continue to restrict too much of its regulatory breathing-room, ensure that South Africa ceases to give off the impression that it is uninterested in respecting and protecting foreign investments made in its territory and allow South Africa and its outward bound investors to retain the benefits of South Africa being a party to reciprocal investment protection treaties.

As Peterson suggests, the 'challenge for governments is to forge a sword which is sharp enough to provide some baseline protection for foreign investment, while ensuring that the instrument is delicate enough so as not to impact negatively upon important government prerogatives…'[718] In my view, the South African government has missed the mark in this regard. The edge of the sword it has forged to ensure that its regulatory mandate is not interfered with is unnecessarily sharp, and is so at the expense of its reputation as a trading partner that can be relied upon and as a safe destination for much-needed foreign investment. At the same time, the edge of the sword it has forged to protect foreign investments and its investors abroad is hopelessly blunt.

Ultimately, it seems clear that there is no irreconcilable conflict between the protection of international investments and the state's right and responsibility to regulate and that states can craft their international obligations in such a way as to ensure that their regulatory responsibilities more comfortably co-exist with the guarantee of sufficient investment protections. The fault lines that have been exposed as a result of the debate surrounding the legitimacy of the prevailing system of international investment protection can be mended and states need not turn their backs on the system entirely. I conclude that the focus should more properly be on ensuring that the system is effectively reformed to ensure that states are not irreparably hamstrung in exercising their sovereign mandates. The traditional form of international investment protection should be restructured and upgraded, rather than rejected.

[718] Ibid at 36.

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