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Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context

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ABSTRACT

International trade and investment have been around for a long time. The quest for resources has manifested itself through trade and, as time evolved, has been realised through wars of conquest, friendship, commerce and navigation treaties, colonialism, gunboat diplomacy and, lately, the evolution of an international investment regulatory framework. The regulation of foreign investment through bilateral investment treaties started in 1959 when Germany entered into such a treaty with Pakistan. This was generally in response to the decolonisation processes that were taking place in most of the developing world. Colonialism had been used to protect foreign investments, as the colonial powers' laws applied in the colonies. South Africa was a latecomer to the bilateral investment treaty regime due to its isolation during the apartheid era. The negotiations for a democratic South Africa led to a laudable constitution which, besides entrenching civil liberties, also encumbered the post-apartheid state with the duty to take measures to redress apartheid-induced inequalities. South Africa, however, did not reflect this mandate in the bilateral investment treaties it entered into with capital-exporting countries post-1994. The South African government has found bilateral investment treaties to be a stumbling block to its developmental ambitions and obligations to effect black economic empowerment policies. The country therefore decided to review its bilateral investment treaty framework and ultimately terminate it and replace it with domestic legislation in the form of the Promotion and Protection of Investment Bill of 2014.

South Africa's investment partners and foreign investors are alarmed by this decision because the change in policy is accompanied by a general shift in approach to proprietary rights, reflective of predatory state tendencies. South Africa could avoid this negative signalling by joining the international community in negotiating third-generation investment agreements wherein it can preserve its regulatory space. Any efforts to redress apartheid-induced legacies would have a sympathetic global audience, which could translate to diplomatic capital that South Africa could use to push for an international investment regulatory framework more sensitive to domestic regulatory imperatives. South Africa should not be seen to be taking a 'lone ranger' approach when there is a general movement in the international investment community towards collective reform of the system.

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ABBREVIATIONS AND ACRONYMS

BEE	black economic empowerment
BIT	bilateral investment treaties
CODESA	Convention for a Democratic South Africa
dti	Department of Trade and Industry
FDI	foreign direct investment
FTA	free trade agreement
ICSID	International Centre for the Settlement of Investment Disputes
IIA	international investment agreement
ISDS	investor–state dispute settlement
MFN	most favoured nation
MPRDA	Mineral and Petroleum Resources Development Act
NAFTA	North Atlantic Free Trade Agreement
NDP	National Development Plan
NP	National Party
OECD	Organization for Economic Cooperation and Development
PPIB	Promotion and Protection of Investment Bill
SADC	Southern African Development Community
TRIPS	Trade Related Aspects of Intellectual Property
TTIP	Trans-Atlantic Trade and Investment Partnership
UNCTAD	UN Conference on Trade and Development
UNSC	UN Security Council
WTO	World Trade Organization

INTRODUCTION

South Africa's foreign direct investment (FDI) regulatory environment has come under scrutiny in the past two years due to the country's decision to terminate its bilateral investment treaties (BITs) with capital-exporting countries, mostly in the EU. The termination has created anxiety within the foreign investment community, including the diplomatic corps of capital-exporting countries. South Africa has decided to replace the BITs in question with domestic legislation in the form of the Protection and Promotion of Investments Bill of 2013 (PPIB). Foreign investors' apprehension is based on the possibility that termination could lead to their investments' being vulnerable to outright expropriation or other regulatory takings.[1] These investors tend to assume that their investments can best be protected at the international level.

This paper seeks to locate South Africa's actions within an international context. It begins by tracing the evolution of international investment law in general. South Africa is then located within this global framework. The evolution of South Africa's own FDI regulatory regime is traced and analysed. In doing so, particular focus is placed on section 25 of the South African constitution of 1996; the black economic empowerment (BEE) programme; the entering into, and subsequent termination of, BITs; the enactment of the PPIB; and a raft of other regulatory measures that have a bearing on investment protection. In addition, the paper draws on the experiences of India and Indonesia, and provides direction on how South Africa could proceed with its FDI regulatory policy, especially within a global context. India and Indonesia are emerging economies, like South Africa, and have faced similar challenges in the foreign investment regulatory framework. The manner in which they have responded to and articulated their 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. The paper also draws lessons from India and Indonesia on how to deal with reform of the international investment legal framework. Finally, recommendations are made on how the South African government could best balance its own policy objectives and the need to protect foreign investors.

INVESTMENT LAW AND POLICY EVOLUTION

Apartheid era

Apartheid South Africa was an isolated state. It did not attract much foreign investment, and most investment came from local companies as the government was trying to develop a local industry through an import substitution policy. However, there were notable exceptions in industries such as the automotive and textile sectors. In addition, the global community's imposition of sanctions against the country inhibited the internationalisation of South African businesses and industries as firms were reluctant to be seen to be co-operating with a regime placed under sanction. The manufacturing and services sectors were mostly dominated by a few monopolies created by the apartheid regime as part of its import substitution policy. During the apartheid era much of the country's investment also came from government expenditure on, for example, roads, dams, railways, electronics and armaments. Since 1994, efforts have been made to break these monopolies through legislation and policies regulating competition, and to encourage joint ventures with local and foreign firms through mergers and acquisitions.

Black areas were generally excluded from mainstream public investment. They nevertheless attracted much FDI through the border zones policy, for example with Taiwanese industries in Newcastle in KwaZulu-Natal and Botshabelo in the Free State that bordered the homelands and neighbouring states, leading to booming textile manufacturing industries. Owing to the fact that most apartheid policies did not favour an inclusive approach to human capital development, there were few higher-value investments. Only a small part of the population had access to valuable skills that could be utilised for a more competitive economy. South Africa was divided into the Republic of South Africa, which was mostly white, and the so-called homelands, which were quasi-independent and predominantly inhabited by black South Africans. Investment in these 'homelands' came mainly from the firms based in the then-Republic. The South African legal system under apartheid generally favoured foreign investments, as these were no different from the property regimes of the metropolitan powers from where most of the foreign investments would have originated. However, it was underpinned by an import substitution policy, the regime and country being isolated through sanctions and disinvestment, and a consequent emphasis on building domestic 'strategic' industries in armaments, chemicals and energy. Some of the statutes that had a direct bearing on FDI under apartheid, from an investment regulatory perspective, were the Expropriation Act No. 63 of 1975[2] and the Arbitration Act No. 42 of 1965,[3] both of which are being reviewed as part of the new FDI regulatory framework. The Expropriation Act codified the general principle of international investment law that prohibits expropriation unless it is in the public interest; whereas the Arbitration Act codified the New York Convention on the Enforcement of Foreign Arbitral Awards.[4] The Arbitration Act therefore created a regime that allowed for the direct enforcement of arbitration awards, in the same way that judgements from local courts were enforced. It is important to note that BITs are effective due to their reliance on the New York Convention. The Expropriation Act had a compensation standard based on the market value of expropriated property, which is generally referred to as the Hull formula[5] owing to its American roots. It is expected that the envisaged amendment to the Expropriation Act will make it consistent with the constitution, as the latter has a different standard of compensation.

When the ANC came into power in 1994, the country was isolated and steps had to be taken to re-engage with the international community. It was also necessary to send a message of exceptionalism in a region that had hitherto been characterised by scant respect for property rights and weak institutions.

Pre-constitutional era (1993–1995)

South Africa emerged from a long and arduous negotiation process involving the ANC, the then National Party (NP), organised business and labour. The negotiations started informally in the mid-1980s, culminating in a negotiated settlement in 1993 that paved the way for all-inclusive democratic elections on 27 April 1994. These negotiations are captured in the South African Constitution Act No. 108 of 1996 (the constitution), which came into effect in 1996. The relevance of this period with regard to the evolution of international investment regulation in South Africa is two-fold: firstly, the period witnessed the negotiation of BEE laws with pressure from the ANC on the NP, which was then governing. These negotiations resulted in BEE policies being codified in the constitution. Secondly, and more importantly, this was the period when South Africa entered into a series of BITs with capital-exporting European countries.[6] These BITs did not take into account South Africa's BEE programme which, at that time, was being negotiated domestically. The wave of BIT negotiations went on until around 1998 when the then-president, Nelson Mandela, left government, after he had re-engaged South Africa with the international community, including through BITs. However, the BITs concluded at that particular time made no mention of the need to carve out space in order to accommodate the BEE policy. This policy had by then been included in the constitution as a burden for the state.[7]

OVERVIEW OF SOUTH AFRICA'S BIT HISTORY

In South Africa's BIT-signing frenzy between 1994 and 1998 – mostly with capital-exporting European countries – the main aim was to signal to the world that the country was prepared to engage with the international community, and that investments would be protected. By its nature, international investment law acts as the rule of law for signatory states.[8] It is meant to ensure the protection of foreign investments in the long term and avoid the vulnerability of foreign investments to changes in governments. Schneiderman put it succinctly when he stated: 'The legal regimes associated with economic globalisation are concerned with pinning states down … to the narrowest field of political possibilities. The political economy of certainty is being secured … via the establishment of a transnational regime for the protection and promotion of foreign investments.'[9] When the ANC came to power, it was conscious of the need to indicate to the international community that the country was a good investment destination. This was important, considering that most African post-colonial states had embarked on waves of economic nationalism with a view to redistributing economic wealth. It was against this background that the administration of the-then British prime minister, John Major, fearing that the ANC might expropriate British assets in South Africa, was the first to approach the government with a BIT template. The fact that South Africa's neighbourhood is characterised by instances of unbridled resource nationalism in countries such as Zambia, Mozambique, Angola and, since the early 2000s, Zimbabwe,[10] coupled with its own unique history, places an extra burden on it of having to signal to the international community and foreign investors that it will not take a similar route. It is important that this dynamic be borne in mind when assessing the current need for South Africa to not only be part of the international investment law regime but also to be seen to be part of it. Since attaining democratic rule, South Africa has been a multilateral player, be it in the World Trade Organization (WTO), the UN Security Council (UNSC), the Southern African Development Community (SADC), the Bretton Woods reforms or climate change talks, making its unilateral approach in the international investment regulatory reform agenda uncharacteristic. South Africa would generally be expected to be at the forefront of the third-generation international investment agreements and debates. This is because besides being a notable participant in multilateral debates, at a global level the reformation of the international investment legal system could benefit from the country's currency of a having unique history and its need to effect reforms aimed at creating a more equal society, in the form of BEE.

South Africa's BIT with the UK and the subsequent agreements that it entered form part of over 3 600 such treaties that have been concluded worldwide. By 2012 South Africa had concluded 48 foreign investment protection and promotion treaties.[11]

One of the other reasons South Africa entered into BITs soon after gaining democratic governance was related to international events at the time, notably the popularity of the 'Washington Consensus' macroeconomic model, which had been propagated by the World Bank and the International Monetary Fund. The Washington Consensus was based on overthrowing 'an intellectual apartheid'[12] by extending to developing countries the economic development principles that had hitherto been confined to developed countries. Developing countries were being encouraged to enter into BITs with capital-exporting countries as a way of locking some of these economic values into their regulatory systems through a transnational legal and policy regime, in the belief that these would yield results at a later stage. This was exacerbated by the euphoria accompanying the triumph of capitalism over communism at the end of the 1980s.

Another reason why post-apartheid South Africa entered into BITs was the fact that inherent in the Washington Consensus framework was a belief, which residues still linger, that BITs attract FDI. It is not surprising therefore that South Africa entered into so many BITs between 1994 and 1998, the same time that it started negotiations with the EU on a free trade agreement (FTA), namely the Trade and Development Co-operation Agreement. The idea was to enter into BITs and attract foreign investment, which would boost the country's manufacturing and export industry.[13]

In a nutshell, South Africa's BIT signings in the 1990s should be understood within the prevailing global context.

Another reason for entering BITs that is usually overlooked was the need on the part of the South African government to protect its investors abroad. This is because South African firms started investing especially in African countries after the demise of apartheid.

South Africa was also caught up in the BIT fever of the early 1990s, which began with about 250 BITs having been signed internationally and ended with over 2 000 BITs.

Two processes were simultaneously taking place in the mid- to late-1990s in South Africa. The first, and most important, were the Convention for a Democratic South Africa (CODESA) negotiations, which were aimed at ushering in a more inclusive democratic dispensation. Closely related to these negotiations was the constitutional negotiation process. An understanding of the current debates on South Africa's FDI regulatory policy is best underpinned by an appreciation of the substance of the BITs to which South Africa is a signatory.

Importantly, South Africa is still a party to those BITs it did not renew due to the survival clauses. It is necessary to internalise these basic tenets not only of BITs but also of the international investment regime in order to grasp the discontent that the current South African government has with the system. Understanding the transnational investment law regime is also pertinent in offering a critique of the path that South Africa has chosen in dealing with it. In addition, this will assist in appreciating the various alternative paths that South Africa could have followed in dealing with the dissonance between the regime and its own domestic circumstances.

Public policy/regulatory space

As indicated, South Africa's BITs displayed a disconnect between the country's domestic imperatives and what it committed itself to at the international level; in other words, South Africa did not provide for policy space within its BITs. The ambit of regulatory policy, space or public interest remains an interpretive hard hat in international investment regulatory law discussions. Each country has its own formulation and understanding of regulatory space or policy, depending on its unique circumstances. It is, however, generally agreed that states have to exercise regulatory autonomy owing to their being sovereign or eminent domains. What are contentious are the limits of these regulatory powers. In order to understand what constitutes public policy or interest in South Africa, one only has to look at the constitution, the PPIB and the preambles of almost all post-apartheid statutes. Section 25(4)(a) of the constitution describes what public interest (usually a pointer to what regulatory space might be needed for) entails. The section provides that 'public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'. Perhaps more poignant is section 25(4)(b), which points out that 'property is not limited to land'.

Almost every statute promulgated in post-apartheid South Africa states in the preamble that the state has a duty to take positive measures to redress the imbalances of the past.[14] This can effectively be referred to as South Africa's public interest, or the main aspect in which South Africa requires regulatory or policy space. The PPIB is no exception in this regard and even goes a step further by providing that investors will only be admitted if they further the nation's bid to narrow inequality and empower previously disadvantaged members of the community.[15]

MAIN PRINCIPLES OF BILATERAL INVESTMENT TREATIES

Fair and equitable treatment

This is one of the most common standards in BITs. It is also the most invoked in international disputes involving BITs.[16] Its interpretation has been contentious, ranging from the broad (that curtail the state's regulatory powers) to the more moderate ones that seek to balance the interests of investors against those of host states. Investor parties claimed a violation of this principle in the 'pesification' judgements, which emanated from the actions filed against the Argentinian government after its financial crisis in the early 2000s. Salacuse[17] has described this standard as the *grundnorm* or cornerstone of the international investment system. Understanding this standard within a South African context is very important, since some government actions might run counter to it in the BITs. The standard owes its origins to the need for maintaining a minimum standard of treatment of foreigners.[18] One of the most comprehensive meanings of the standard was offered by the UN Conference on Trade and Development (UNCTAD) after it had analysed various treaty interpretations by tribunals.

According to UNCTAD, the standard prohibits the following:[19]

- Manifest arbitrariness in decision-making i.e. measures taken purely on the basis of prejudice or bias without legitimate purpose or rational explanation;
- The denial of justice and disregard of the fundamental principles of due process;
- Targeted discrimination on manifestly wrongful grounds such as gender, race or religious belief.

The fair and equitable treatment standard in simple terms prohibits host states from treating foreign investors in a way that does not meet the international minimum standard of treatment that is accorded to all foreigners in host territories. It is an absolute standard in the sense that it is independent of the way in which a host state could be treating its own citizens. For instance, during the chaotic Zimbabwean land reform exercise, proper application of the standard would have required foreign landowners to be treated better than provided for in domestic laws, which allowed for the violent dispossession of private property.

Prohibition of unlawful expropriation

One of the main reasons why home states enter into investment agreements is to protect investors' properties or investments from being taken by host states. Expropriation in general occurs when a state permanently deprives investors of their property. The most common form of directly taking property is nationalisation or confiscation. The deprivation of property rights in this scenario is quite clear; what can become an issue is the compensation for and legality of such an exercise. Direct expropriation has become rare in contemporary society, save for isolated measures in, *inter alia*, Zimbabwe, Bolivia, Venezuela and Argentina. However, there has been an evolution in the way in which states interfere with property rights, from outright takings to indirect, or regulatory, takings.

According to Salacuse,[20] indirect expropriation has the effect of 'diminishing the nature of the investor's property rights over the investment'. Reinisch[21] defines indirect expropriation as

> the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of the investment. The legal title to the property remains vested in the foreign investor but the investors' rights of use of the property are diminished as a result of the interference by the state.

This decrease in terms of rights could be related to the investor's freedom to control, manage, and derive benefits from the investments. The commentary to the Organization for Economic Cooperation and Development (OECD) Draft Convention[22] describes indirect expropriation 'as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation'. In a nutshell, what matters in contemporary international expropriation law is not the express intention of the state to expropriate but the effect of the state's conduct. This (mis)conduct, according to Reisman and Sloane,[23] could be malfeasance, nonfeasance or misfeasance.

Indirect expropriation is conduct by the state or any of its organs, and has the effect of diminishing the value of investments. Examples include disproportionate tax increases, interference with contractual rights, unjustified interference with the management of the investment, and revocation or denial of government permits or licences.

It is interesting to note that South Africa's constitution provides for direct expropriation but is silent on indirect expropriation. The country's law regime has its origins in the Roman and Dutch legal systems, which have informed and shaped the South African legal system, generally known as the common law. South African common law places emphasis on tangible private property and, as a result, expropriation within such a regime can mainly be understood as a direct taking of such real property. While the idea of property and takings has expanded and been refined in other jurisdictions and in international investment law, South African domestic courts have been reluctant to pronounce on the regulatory takings doctrine.[24]

In this paper the term 'expropriation' is used to refer to all forms of regulatory taking, including direct expropriation. Most treaties, including those to which South Africa is a signatory, proscribe expropriation in all its manifestations. Usually in bilateral investment treaty law, the level of expropriation is determined by the definition of investment in an investment agreement.

National treatment

A national treatment obligation in international investment law prohibits a host country from treating foreign investors and their investments less favourably than domestic investors and their investments. This is a relative standard as it is measured against the treatment given to domestic investors and their investments. The main purpose of this standard is to ensure that foreign investors are not subjected to discrimination that is arbitrary, unfair or based on nationality. What amounts to just and fair discrimination is contentious, since it is usually informed by the developmental objectives of the host state. In this regard, South Africa's empowerment policy is tied to its developmental agenda, with the idea being that empowerment policies will ultimately lead people out of poverty. The empowerment legislation affects all facets of South Africa's economy, thus raising the potential to be inconsistent with national treatment obligations.

Investor–state dispute settlement

All BITs contain an investor–state dispute settlement (ISDS) mechanism. The importance of an ISDS mechanism is that if investors have a dispute with a host government, they can approach a tribunal that is usually located outside the host country. Foreign investors whose home states have a BIT with South Africa have to approach an arbitration tribunal such as the International Centre for the Settlement of Investment Disputes (ICSID) or the UN Centre for International Trade Law in case of a dispute. The use of international arbitration located outside home states is a unique feature of the international investment law regime. The rationale behind the evolution of this feature is the assumption that developing countries have less developed and impartial judicial systems, and cannot be entrusted with the adjudication of investment disputes. As a result, a system was devised in which private arbitrators chosen by both the state and investors preside over disputes arising out of BITs. This mostly resides within the World Bank's ICSID. However, the system has been mired in controversy, with allegations that arbitrators are biased in favour of corporate interests and do not take into account the domestic legal systems and unique circumstances in various host states. The controversy surrounding the ISDS system is serious and has threatened to derail the Transatlantic Trade and Investment Partnership (TTIP) negotiations. Australia has also insisted on its exclusion from the investment chapter of the FTA it entered with the US. South Africa's disenchantment with the whole transnational investment regulatory regime has its genesis in the realisation of the 'teeth' of BITs through the ISDS.

Customary international law

The foregoing treaty standards are generally found in all treaties as expressed terms of those agreements. However, any discussion of BIT standards would be incomplete without a reference to standards, which are read into all treaties and constitutions. These standards are commonly known as 'customary international law'. Customary international law operates above all laws and is derived from the practices of states. In international investment law principles such as national treatment, prohibition against expropriation, and payment of just, prompt and adequate compensation in cases of expropriation, having a general minimum standard of treatment of foreign investors has gained the status of customary international law. This means that domestic measures or statutes cannot be used to derogate from duties imposed by these standards. The standards of customary international investment law are generally read into BITs and domestic regulatory measures as implied terms. The PPIB has sought to redefine expropriation in a way that deviates from the customary international investment law understanding of the concept. This was done by distinguishing between deprivation and expropriation; a distinction of merely academic significance in customary international investment law.

These customary international law principles are the nucleus of investment treaty provisions and thus also became part of the BITs to which South Africa is a party. Consequently, the way South Africa has tried to evade these principles in its domestic legislation dealing with foreign investments is worrying. Initially, post-1994, South Africa adopted a UK–OECD prototype template for its BITs, which was expectedly characterised by a strict expression of these principles.[25] The reason South Africa adopted an OECD BIT template was because by then BITs were deemed to be of little consequence and attention was not really paid to the agreements' details. As all laws are informed by socio-economic and political history, the OECD template did not address South Africa's unique sociological, economic and political context. As stated previously, South Africa is tasked by its constitution with embarking on economic and social measures to redress socio-economic imbalances, but this obligation was not transposed to its international investment agreements. It is of vital importance to understand the genesis of this conflict between South Africa's BIT commitments and its own domestic constitutional framework and obligations.

A HISTORICAL SNAPSHOT OF CONSTITUTIONAL AND BILATERAL INVESTMENT TREATY LAWMAKING PROCESSES IN SOUTH AFRICA

In order to understand the events that are currently unfolding within South Africa's FDI regulatory space, it is important first to deal with the history of the regulatory environment. The current dissonance between the South African constitution and its BIT regime can be traced to the twin processes that took place in the early to mid-1990s. First, there were the CODESA deliberations, which began after Mandela's release from prison in 1990. Running parallel to these talks, which resulted in the constitution of 1996, was the signing of BITs by South Africa with capital-exporting countries, mostly in Western Europe. These talks had been preceded by informal talks ('talks about talks') in the mid- to late-1980s[26] between the capital-owning, mostly-Afrikaner status quo and the ANC. As these discussions took place between a capital-owning ruling class and an ostensibly socialist-inclined liberation movement, proprietary rights issues were bound to loom large.

Second, one of the most important documents to come out of these negotiations was the interim constitution of 1993. This constitution was meant to pave the way for an all-inclusive election process that would usher in a new government. Three provisions were particularly relevant, and formed the crux of what is currently understood as 'public interest' in FDI regulatory parlance in a South African context. Public interest in South Africa is thus the constitutional obligation on the majority-led government to perform redistributive functions with a view to reversing historically induced economic inequalities.[27]

The first provision in the interim constitution (which was also retained in the final constitution) was the preamble, which implied that the incoming administration had a duty to redistribute the country's wealth with a view to 'heal[ing] the divisions of the past'.[28] This can be construed as a duty to redistribute wealth with a view to achieving sustainable development.

The second provision was the equality clause, which dealt with matters of creating an egalitarian society.[29] Besides the formal equality pronunciations, this particular clause also contained an important proviso, namely that discrimination could be fair if it was meant to correct the historical injustices occurring in South African society. One pertinent section relating to FDI regulation outlined in the equality clause was that the state had to take positive measures to address historical imbalances.[30] The interim constitution also contained a clause that mandated the state to engage in preferential procurement in favour of previously disadvantaged communities.

Third, and perhaps the most important provision, was the so-called property clause. This was a compromise between the ANC and Afrikaner capitalists.[31] The property clause is important in that it enshrines the right to property. It also provides for the redistribution of property in the public interest. It sets a non-exhaustive constitutional definition of what constitutes public interest as including 'the nation's commitment to bring about equitable access to South Africa's natural resources'.[32] Further, the provision sets a compensation standard based on the Calvo doctrine.[33]

Another important provision in the South African constitution (both interim and current) is the one dealing with procurement. Section 217 of the South African constitution[34] sets out an elaborate preferential procurement regime in favour of historically disadvantaged South Africans.[35] Government procurement is one of the integral vehicles that can be used to bring about meaningful transformation, yet this particular provision was not added to the BITs. What is ironic is that the South African government resisted being party to the WTO's Agreement on Government Procurement in 1996 because it felt (legitimately so) that it might interfere with its preferential procurement imperatives.

The property clause in the interim constitution also stated, but did not elaborate on, the distinction between deprivation and expropriation. That was to be left to the courts to decide. The section 28 provisions have been subsumed into the current constitution under section 25, including those relating to the duty of the state to redistribute wealth in order to redress historical imbalances.

INTERFACE BETWEEN SOUTH AFRICA'S CONSTITUTIONAL OBLIGATIONS AND BITs

As indicated above, the interim constitution and the current constitution are not substantively different. One would have expected that the constitutional obligations, insofar as they relate to the need for the state to engage in BEE, would have been replicated in the BITs. This is one of the key reasons the South African government has engaged in a review of its BITs and subsequently terminated them. The government's reason for doing so, as is now well known, was that these agreements resulted in regulatory capture. This is a phenomenon in which a host state becomes reluctant to implement measures that it deems to further its developmental objectives for fear of violating its BIT commitments. Regulatory chill caused by the BITs, the South African government would argue, resulted in its not being able to pursue developmental policies mandated by the constitution, such as the BEE programme and related industrial policies such as beneficiation.

Various scholars have tried to explain why a country like South Africa, with its unique history and a mandate to pursue developmental policies to redress historically induced inequities, entered into boilerplate BITs ostensibly constraining its policy space.

Guzman has tried to explain, from a general perspective, why developing countries enter into investment agreements that seem to curtail their policy space.[36] Guzman's premise is that all nations have accepted that BITs have become the dominant vehicle through which foreign investment is regulated.[37] The first reason he offers for this is the principle of 'dynamic inconsistency'.[38] He describes this as a situation where 'a preferred course of action once undertaken cannot be adhered to without the establishment of some commitment mechanism'.[39] This means that if a country does not live up to its commitments to an international instrument, it might change the terms of its obligations at a later stage. This would not necessarily imply a *mala fides* approach to negotiations with an investor on the part of the host state. The host state at the time of entering into an agreement might not have foreseen that it will have to institute policies that may be detrimental to that investor. The principle of dynamic inconsistency therefore articulates that until a state binds itself to a BIT when it comes to investment protection, its commitments will not attain the highest possible credibility. The ability of a host state to change the rules after coming to an agreement with an investor lies in its being a sovereign state. South Africa, therefore, by entering into BITs of an OECD type, could have been informed by a need to render credibility to its commitment that it would respect proprietary rights in an OECD or Washington Consensus fashion. According to Elkins,[40] BITs create credible commitments in that they have what he terms 'ex post costs', which come in the form of diplomatic, sovereignty, arbitration and reputational costs, in both their observance and violation.

Sovereignty creates an asymmetric relationship between the host state and a foreign investor, so if an investor is to have confidence in the relationship it generally has to be underwritten by a BIT or any equivalent transnational agreement. This has become the norm, even for jurisdictions with the most advanced legal systems, as has been evidenced in the EU–US TTIP negotiations. The principle of dynamic inconsistency is even more applicable to a developing country, and thus the South African context. South Africa is a young democracy with robust institutions. The South African government might enter into an agreement with a foreign investor under the current climate of the National Development Plan (NDP), or a better climate when the NDP is fully implemented. However, South Africa, like other SADC states that are run by former liberation movements, has an unusual democratic system in which it is difficult for political parties without a liberation background to be elected to government. Were the governing ANC to lose popularity, it might decide to engage in populist policies, change the constitution, corrupt the judiciary and engage in massive expropriations. This is a possibility, as South African institutions are still young and have not yet been tested fully. While the comparison may not be fair, Zimbabwe until 2000 had a judiciary as credible and independent as that of contemporary South Africa. It did not take long for non-pliant judges to be dismissed constructively and replaced with judicial officers more sympathetic to the regime and its ideology of unbridled economic nationalism. The political economy of South Africa is such that the dynamic inconsistencies are still a major factor. A country like South Africa would therefore enter into BITs in order to add credibility to its domestic commitments, which are usually reflected in policies and legislation.

In addition to building credibility around domestic commitments, South Africa has the additional burden, as alluded to above, of using BITs to signal that it will not go down the same route as its northern neighbour. Perhaps Schneiderman[41] was hinting at this political economy when he stated that 'there is the shadow that Zimbabwe casts on events in South Africa and the largely unspoken possibility of other, more radical forms of redistribution such as expropriation and nationalisation'. The South African government seems to have been acutely aware of the need to send an assurance to the international community as late as the early 2000s. Brendan Vickers,[42] a senior official in South Africa's Department of Trade and Industry (dti), which is responsible for the review and termination of the country's international investment treaties, rightly observed: 'The risk factor generally associated with investment in emerging markets also applies to South Africa. Politically volatile events in the region have spawned concerns over property rights, rule of law and governance in South Africa'. BITs are therefore not substitutes for domestic legislation and policy but guarantors thereof. In trying to explain the role of BITs, Fatouros[43] noted that 'international rules and practices function in constant interaction with national ones, deferring to them, supplementing them or replacing them in a continuous dialectical relationship'. Related to the principle of dynamic inconsistency, and explaining why states enter into BITs, is the theory of 'obsolescing bargaining'.[44] The theory postulates that once an agreement has been entered into between the foreign investor and a host state, the former is at the mercy of the latter. This is because the latter can easily change policy, knowing that the foreign investor will find it costly to disinvest. It is a situation that arises mostly in cases where the investor has sunk substantial capital into infrastructure, etc. BITs assist in mitigating the 'obsolescence' of investments, as the host state is now governed by an international legal regime.

The second most important reason why countries should and do enter into BITs is to counteract reputational risk. According to Guzman,[45] a country's reputation has value and, if positive, can reap dividends from it. Within the context of BITs, a country that signs these agreements and abides by them is perceived as being co-operative. Being co-operative is an integral part of being a member of the community of nations, which South Africa fought hard to rejoin. It is paradoxical that a country that waited for so long to be readmitted into the international community, which it achieved and signalled through BITs, has decided within just two decades to seek the reformation of such a pertinent issue as the regulation of FDI through domestic and unilateral means. This paradox becomes clear in a comparative assessment with other countries such as Indonesia, which is mistakenly perceived also to be leaving the BIT system. The benefit of entering into BITs is that, with time, monitoring and verification by the international community becomes less important as a country builds capital by participating in and adhering to international agreements. Guzman warns that 'countries that decide against developing a strong reputation for compliance with international obligations choose short-term benefits over long-term gains'.[46]

South Africa, which is young and has not yet entrenched a reputation for participating in and complying with international investment law, has even more of a duty not only to be party to the BITs system but also to be seen to be participating in the regime. Entering into BITs increases credibility and reputational dividends. This point is pertinent when studying South Africa's decision to terminate its BITs and substitute them with a domestic regulatory framework. The country as a potentially influential middle power could miss an opportunity to influence the substance of third-generation BITs.

However, South Africa can still be an integral part of the process. Its participation is important considering that the country, besides being a middle power, does not generally make rules but rather follows those rules made by larger powers, hence its non-participation in the global reform debate on international investment agreements will not halt the process. South Africa could use its middle power status and soft power to rally a critical mass of like-minded countries in shaping the policy space needs of host states, using the capital gained from its apartheid history. This is because the need to accommodate a policy such as BEE in BITs would hit a nerve in international policymaking circles. In emphasising the reputational vitality of states as a motive for entering into BITs, Guzman used the example of the US in the North Atlantic Free Trade Agreement (NAFTA). He argues that if the US were to withdraw from NAFTA it would suffer reputational costs similar to those of violating a treaty. This is instructive when one analyses the South African decision to terminate BITs without replacing them with an equal international legal regime.

What South Africa has done by not renewing its BITs 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 BITs has cast doubt on the country's commitment to international law. It is this potential reputational cost that could bode ill for South Africa's continued ability to attract foreign investment.

UNCTAD has asserted that BITs by their very nature do limit states' policy spaces.[47] In narrowing the issue to South Africa, Poulsen[48] has used a cognitive heuristic theory to try to explain why South Africa entered into BITs that ostensibly did not align with its constitutional obligations. He argues that South Africa entered into those BITs because they were being promoted at the time. This explains why the BITs disregarded the developmental necessities of the constitution – South Africa had no rational or coherent policy on these instruments. It was against this background that the country was suspicious of the Canadian template, which ironically had carve-outs for a BEE-like programme. Worse, South Africa did not demand carve-outs for BEE even when Malaysia had exempted its Bhumiputra policy from the BIT's application.[49] Instead, South Africa stuck to its OECD BIT prototype, adopted from the UK. Demonstrating the lack of rationality in the process, Poulsen also refers to the fact that South Africa had to wait for the Foresti case before it acted.[50]

The debate in South Africa today is in harmony with the global debate on the matter. Fatouros[51] rightly noted long before South Africa reviewed its BITs that '[t]he debate has largely shifted to pragmatic, policy oriented considerations: not so much what is the law, not even which are the correct legal principles or rules, but what policies and measures are effective in promoting international flows of capital and technologies'. South Africa therefore is currently engaged in a debate that has, at a global scale, shifted focus to how current-generation BITs can be crafted in a way that can best accommodate states' policy spaces. The fact that South Africa is questioning the legitimacy of FDI regulations using international instruments in the company of Bolivia, Ecuador and Venezuela does not help in terms of reputation, as the last-mentioned countries have weak institutions as well as questionable policies and governance systems. The Indonesian case will be used to illustrate how a country similar to South Africa in terms of economic size, governance system, and middle power and anchor state status, has managed to evolve its international investment regulatory policy through an organic process in which the country has woven international investment principles into its own domestic regulatory framework.

This dissonance of the South African debate from the global debate on BITs could be exacerbated by the fact that those countries that had set the agenda on the protection of foreign investments are now shifting their agendas and norms in this regard. Hopefully, in addition to reforming its internal FDI policy South Africa is also carefully studying the changing attitudes to the issue at an international level, with a view to offering a meaningful contribution to the debate at a later stage.

The expectation from South Africa had been that investment would flow towards the country as soon as it entered into BITs.[52] Schneiderman[53] has weighed in on the discussion by analysing South Africa's transition and how the economic policy of Growth, Employment and Redistribution (GEAR), which was followed from 1996 to 2000 and adopted during the heyday of the Washington Consensus, led to South Africa's entering into BITs that proved antithetic to its constitutional obligations. Schneiderman[54] notes that South Africa faces the challenge of finding a balance between engaging in redistributive policies at a domestic level while promoting and participating in an international rules-based system that is apparently antithetical to its domestic agenda. Schneiderman, one of the most vocal and sympathetic advocates of host countries and particularly South Africa, does not envisage South Africa's getting out of the international investment regulatory system. Instead, he emphasises the need to keep regulation of FDI at an international (thus BIT) plane because 'FDI is risky … vulnerable to local instabilities, prejudices and vagaries of host state laws'.[55] The international investment regulatory regime is meant to entrench policy certainty by 'pinning states down to the narrowest field of political possibilities'.[56] South Africa is not an exception in this regard. This will become evident in the discussion on South Africa's most recent pieces of legislation that have a direct impact on FDI.[57] One of the main functions of BITs is to lock countries into predictable regulatory frameworks.[58] This is one of the many reasons why it is imperative for South Africa to locate its foreign investment regulatory agenda within the international arena.

Peterson,[59] in a comprehensive treatise on the issue, discusses some of the reasons that could have led to South Africa's entering into BITs that did not carve out policy space. One of the reasons he offers for South Africa's entering into BITs from the mid- to late-1990s was to reassure investors that it was a safe destination for investments. In addition to that, the proliferation of international investment treaties was a global phenomenon. This buttresses Guzman's assertion of the need to be part of the international community by engaging in what the community is doing as being one of the drivers for signing these agreements.

The government's overview of its BIT framework reveals another of the reasons for entering into such BITs. Interestingly, neither Schneiderman nor Klaaren[60] or the government itself is critical of entering into BITs. Instead, they object to being party to agreements that do not provide policy space. A study of the BITs of that era reveals that they are part of a generation of BITs with which leading countries such as the US, Canada, Indonesia and India are now expressing discomfort.[61] The difference is that South Africa seems to seek to locate the discussion outside the international investment regulatory system, and not to embark on new-generation BITs to which other leading countries are party. Before discussing the implications of South Africa's new policy on localising its foreign investment regulatory regime, it is imperative to assess the political economy of its domestic FDI regulatory framework, including recent legislation with a possible impact on FDI.

RATIONALISING SOUTH AFRICA'S DOMESTIC FDI REGULATORY FRAMEWORK

The foregoing analysis has sought to engage on some of the reasons why states resort to the transnational legal framework for the protection of foreign investment. The genesis of international investment regulation in friendship, commerce and navigation treaties, diplomatic protection, gunboat diplomacy and colonialism generally reveals a system that was based on a mistrust of domestic legal systems.[62] The divide was clearly between developed and developing countries. The duty to protect aliens therefore developed and was exported not only to the protection of natural persons but also to their property. The logical conclusion that can be drawn from this evolution therefore is that, should domestic legal systems be of a certain standard, there would be no need for a transnational regulatory framework. It is against this background that the South African government decided to localise its FDI regulatory framework.[63] One of the stated reasons for its decision to disengage from the BIT regime is that the South African legal and court system is of a world-class standard and can therefore handle investment disputes. The fact that Australia decided not to include an ISDS clause in its FTA with the US was used as an example of what should happen when the legal system is of such a high standard. However, the decision not to include an ISDS clause in the US–Australia FTA has since been shown to have been a partisan, ideological and populist one by the then Labour-led government. Australia has included an ISDS in its subsequent FTA with South Korea.[64] This shows that Australia is still committed to the regulation of FDI through the international investment law framework.

In order to understand the readiness or fragility of South Africa's domestic legal system, one has to look at the constitutional provisions on the protection of FDI and the plethora of regulations that could affect foreign investments, particularly Constitutional Court decisions.[65]

Constitutional provisions

Generally, the South African constitution was informed by the Canadian, German, US and Indian constitutions, and is regarded as one of the most progressive constitutions in the world.[66] As outlined above, the South African constitution mandates the government to take active measures to redress apartheid-induced economic inequalities.[67] Also significant in the South African constitution with regard to investment regulation are those provisions dealing with the status of international and foreign law. These are important provisions in that FDI regulation lies, *sui generis*, at public international law level. The status of international law within the constitution will point to the extent to which the domestic legal framework takes transnational law seriously. Section 232 of the constitution thus states: 'Customary international law is law in the Republic unless it is inconsistent with the constitution or an Act of Parliament.'[68] The wording of this provision, which subordinates customary international law to domestic law, is problematic. This is because customary international law originates from the practice of nations and, once established, should be read into all legal systems. An example of a customary international law principle would be the prohibition of unlawful expropriation. South African law therefore should not be used to redefine what constitutes expropriation, as has been done in the FDI Bill[69] and the AgriSA[70] decision, which will be discussed at length below. The fact that domestic laws in many countries might be redacted to suit domestic and national interests is why the regulation of FDI has been granted such a coveted status at an international level. However, the subsequent provision offers a glimmer of hope that international law will be taken seriously. Section 233 reads as follows: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.' This provision places international law above domestic law. However, it contradicts the preceding provision on customary international law. Customary international law is an integral part of international law and occupies an even more elevated status. This ambiguity manifests in the AgriSA case and the FDI Bill.

AgriSA v. Minister of Mining and Energy

The AgriSA case is a typical example of the apex court arriving at a decision that does not make sense from an international investment law perspective. As the appellants in the case were domestic investors, it did not raise much dust. However, if they had been foreign investors, it could have amounted to a denial of justice. This underlines the limitations of relying on a domestic system, no matter how good it might be.

The appellants were domestic investors challenging provisions of the Mineral and Petroleum Resources Development Act (MPRDA)[71] relating to the conversion of old-order mineral rights to new-order rights. Old-order rights were real (ownership) rights, while new-order rights are limited in scope. The Constitutional Court made a pronouncement on the principle of indirect expropriation, which is an international investment law principle that interprets the difference between deprivation and expropriation.

The principle of indirect expropriation provides that any act of the state that leads to the diminution of the value of a property is expropriation. The Constitutional Court seemed to fear that applying a more liberal interpretation of expropriation would lead to a situation in which the government becomes hamstrung when formulating policy out of fear of being found to be engaging in expropriation. A narrower interpretation would not interfere with the government's transformation agenda. In distinguishing between expropriation and deprivation, the court thus provided as follows: 'Deprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation.'[72]

Perhaps what is even more worrisome is the declaration by the court that '[t]here can be no expropriation in circumstances where deprivation does not result in property being acquired by the state'.[73] In international investment law, principles such as regulatory takings; indirect expropriation; creeping expropriation; virtual, constructive expropriation; and de facto, consequential, and measures tantamount to expropriation do not hinge on the state's benefiting directly or indirectly from the deprivation or expropriation. Recent trends in international investment law cases support this contention.[74] It must be conceded, however, that the international investment law scene is replete with inconsistent decisions. As a consequence, there are some decisions that are in line with the Constitutional Court's decision.[75]

The argument could be made that when the MPRDA changed old-order mineral rights from real rights into limited rights, it had the effect of reducing the value of private properties within which those minerals lay. For instance, a farmer who owned land with diamonds worth a trillion dollars underneath now found himself owning the land but not the mineral wealth. In international investment law the South African government does not need to have benefited directly or indirectly from the implementation of the MPRDA.[76] If investors have suffered a loss through the diminution of the value of their investments, a finding of expropriation would be made. In this case real rights are more valuable than limited rights.

Foreign investors

The question is whether or not foreign investors must be worried about the ruling. The answer is twofold. First, investors need not be worried for now. This is because disputes resulting from current international investment agreements will not have to be subjected to domestic courts. Second, the terminated agreements have survival clauses ranging between 10 and 15 years, meaning that they will still be in force for the next decade and a half. However, foreign investors should be very worried should the South African government proceed and remove investor dispute settlement from its future bilateral investment agreements.

The judgement of the Constitutional Court[77] in the AgriSA case shows how far the highest court in South Africa will go in accommodating transformative policies. While BEE in its various manifestations could be argued to result in indirect expropriation, it is lamentable that the court has made a finding to the effect that there is no such principle in South African law. Considering that the Constitutional Court is the apex court in South Africa, the appellants in this case have exhausted all the available local remedies.

The AgriSA case is testimony to the unpredictable application, and occasional lack of appreciation, of international law in domestic courts, which is why foreign investors are more comfortable with an international investment regulatory framework. What makes this case more interesting is that South Africa in its BITs does not distinguish between expropriation and deprivation. The decision of the Constitutional Court in this case, as in the Bengwenyama case, is a reflection of the lengths to which the court will go to protect the government's regulatory space. This is because the principle of separation of powers dictates that courts walk a tightrope when making judgements on issues that have a bearing on policy, as they are deemed to fall within the domain of the executive.

FDI-specific and related statutes in South Africa

South Africa's termination of its BITs and its apparently hostile attitude towards the transnational investment regulatory regime could not have come at a worse time in terms of domestic policymaking. This is because the general non-renewal of its BITs had critics arguing that it could encourage disrespect for property rights and open the way to interventionist industrial policy instruments. In conduct akin to a self-fulfilling prophecy, South Africa, in addition to the FDI-specific PPIB, is in the process of promulgating domestic laws that have an adverse bearing on proprietary rights.

FDI-specific statute

South Africa, unlike other countries that have misgivings about the international investment regulatory regime, did not opt to carve out its policy space within the transnational regime. Instead, it decided to replace the BIT system with a domestic statute. Ordinarily, replacing BITs with a domestic instrument would not be problematic, as long as the regulatory standards and principles in international investment law are maintained and accompanied by an ISDS system – the cornerstone of international investment regulation. However, an analysis of the FDI Bill reveals some worrying inconsistencies between the bill and customary international law principles. The bill has an expansive description of what might constitute public interest. In addition to that, it has a non-exhaustive list of what in customary international law would constitute regulatory takings but which it describes as acts that do not amount to expropriation. These are actions by the state that in BITs are described as being tantamount to expropriation, constructive takings and indirect expropriation, among others.

The FDI Bill also has an implied screening mechanism, which manifests in exceptions to national treatment, undergirded by the likeness test. This is a test that seeks to determine whether a foreign investor faces circumstances so similar to those of a domestic investor as to warrant similar or discriminatory treatment. It is a new concept in international investment regulation.[78] For instance, foreign investors might be found to be in similar circumstances to white-owned firms in South Africa. This would result in these foreign firms being subjected to the same fair discrimination directed at white-owned businesses in South Africa in a BEE context. In addition, the bill does not make reference to the fair and equitable treatment principle, which is a cardinal principle in a transnational investment regulatory regime. Furthermore, and most importantly, the bill does not provide for an ISDS system. At the very least, this could have been done through a 'fork in the road' provision embedded within the bill. At the time of writing, the final FDI Bill text had not yet been made public, but ministry officials had indicated that the expropriation provisions might be transferred to another statute that deals with expropriation.[79] In addition to the FDI-specific statute, other statutes also have an indirect bearing on FDI regulation.

FDI-related bills

One of the main differences between South African constitutional law and its commitments in BITs, and general customary international law is the amount of compensation that should be paid out in cases of expropriation. The South African constitution provides for a hybrid standard of compensation, while BITs and general customary international law stipulate a Hull compensatory standard. The former is expressed as 'fair and equitable', meaning that the state has to pay compensation that it can afford. The Hull standard of compensation, however, is based on market value determined by a willing buyer and willing seller. It is rare to find a hybrid standard of compensation and its applicability in practice is unclear. South Africa, in an attempt to give meaning to the compromise reflected in the hybrid standard, has promulgated the Valuation Bill. This bill seeks to establish the Office of the Valuator, whose main task would be to determine the value of property in cases of expropriation. There is concern that the Office of the Valuator might not solve the issue of compensation standards, as the office might not be institutionally and personally independent of government influence. The Valuation Bill also has a vague definition of market value.[80]

Another statute that has a bearing on FDI regulation that is currently being promulgated is the Private Security Industry Regulation Amendment Bill No. 27 of 2012. When the ANC came into power it tried to enact this statute, but decided against it after the UK government had threatened it with arbitration proceedings under the UK–South Africa BIT. The bill seeks to amend a statute that regulates the private security industry in South Africa. Its crux is that only South African nationals should hold controlling shares of private security firms. It clearly stipulates that private security firms that are currently majority-controlled by non-South Africans should cede 51% of their shareholding to South African nationals within a specific timeframe. The justification for the bill is national security considerations: apparently, if foreigners were to control the industry it would undermine the country's safety and security. This justification does not enjoy much traction among security experts, who point out that South Africans already dominate the industry as one cannot be a security guard if one is not a citizen or permanent resident.[81] Furthermore, the mandatory cession of a 51% shareholding to local persons creates two disturbing dynamics from an international investment law perspective. First, it amounts to expropriation, as it is a taking of property from the owner by the state to give to another person. Second, the fact that it is a mandatory sale will distort the market price, as there is no willing seller. The property owners will have to settle for less than market value in order to meet the statutory deadline.

The AgriSA case and the South African constitution make a distinction between deprivation and expropriation. According to the argument by the Constitutional Court in AgriSA, a situation in which the state mandates and facilitates the transfer of property without the ownership vesting in it does not constitute expropriation but deprivation. According to this doctrine, devised by the Constitutional Court, deprivation is not compensable as it falls within the state's police powers. However, in customary international law the distinction between expropriation and deprivation is only an academic one. Second, because this is a mandatory taking the shareowners cease to become willing sellers; something that has a direct and detrimental effect on the share price. Furthermore, the definition of 'security firm' is wide as it includes downstream and upstream industries relating to private security such as the manufacture and courier of security equipment, meaning the scope of expropriations could be broad. This bill would not have passed muster under a BIT, but it is now possible to enact it as South Africa has terminated its BITs with the EU, including the UK.

The MPRDA Amendment Bill is another instrument under consideration that has an indirect relationship with FDI regulation. This bill is aimed at finding industrial policy space for the government within the petroleum and mineral sectors. The South African government seeks to gain more control over the industry through ownership, enforced beneficiation of minerals, and export controls. One of the pertinent provisions of the MPRDA is that in all petroleum greenfield investments the state assumes a 20% free carried interest. Apparently, this free carried interest can be increased at the discretion of the state. What the bill envisages is a situation where there will be direct expropriation through free carried interest, and creeping expropriation through the incremental acquisition of remaining shares. Overall, the bill introduces various performance requirement obligations, which would generally be frowned upon, if not prohibited entirely, under BIT law.

Ultimately, South Africa is in the process of updating its expropriation regime. The Expropriation Bill No. 4 of 2015 seeks to modernise the current statute, which is over 50 years old. While the statute itself makes sense as it seeks to legitimately update a now archaic instrument, if, as indicated by dti officials, the flawed indirect expropriation provisions in the FDI Bill will now be transferred to the Expropriation Bill it could prove fatal to this piece of legislation. What is also unsettling is the move to modernise an expropriation regime shortly after exiting the international investment regulatory regime.

The foregoing regulatory measures, which are at various stages of drafting by the government, send a disturbing signal to the international investment community, particularly when analysed within a context in which South Africa has terminated its BITs with capital-exporting countries. However, what is clear from a reading of the various bills is the government's desire for more policy space, in order to effect an industrial policy suited to its developmental needs and its pursuit of BEE. It is undeniable that South Africa as a developing country with a unique history and peculiar challenges needs policy space. However, the platform and means it is using to express this cast an uneasy light on its true intentions, especially when coupled with the recent rhetoric within the governing ANC on nationalisation and the second phase of the so-called National Democratic Revolution.

COMPARATIVE EXPERIENCES

Other developing countries that face similar challenges and also need policy space have taken different paths to the same objective. Indonesia and India warrant comparative scrutiny in this regard. Indonesia was chosen because, like South Africa, it is an emerging economy and has considerable diplomatic weight within its region. In addition, it is also a member of the G-20. Most importantly, Indonesia has been trumpeted as following South Africa's path of rejecting the international investment law regime.[82] India's selection as a comparator is based on the fact that it also belongs to the BRICS grouping. India has also expressed disenchantment with the transnational FDI regulatory system after being subjected to a barrage of lawsuits from foreign investors, mostly in the telecommunications and coal sectors.[83] As these two countries, like South Africa, are leaders in their own regions in addition to being middle powers in a global context, their conduct in this sphere might be a pointer as to whether or not South Africa could be on the right path.

Before focusing on India and Indonesia, it is prudent to take a cursory glance at the BIT frameworks of other BRICS countries. Brazil is well known for not having any BITs in force. While it did sign 14 BITs between 1994 and 1999, the Brazilian Congress has not ratified any of these. However, the country continues to attract FDI. Brazil's case has been used to justify why countries, including South Africa, should not enter into BITs. What is overlooked in this discussion is that Brazil has a huge market and thus attracts market-seeking FDI. Market-seeking FDI is not easily subjected to, or affected by, the vagaries of local political economy dynamics, as no one can expropriate a market. Another fact that is overlooked in proclaiming Brazil's 'disregard' for the international investment framework is that Brazil is a massive diplomatic player that does not need to signal to the world that it has credible institutions. This is in addition to the fact that it has no troubled past or a 'dodgy' neighbourhood. South Africa's unique history and legacy of race-based inequalities places a burden on it to over-emphasise its commitment to the rule of law in the long run. Such a commitment becomes more credible if locked into a transnational regulatory framework. Russia has signed 71 BITs since the fall of communism in 1989. The fact that Russia, despite being a comparatively closed economy in an orthodox liberal sense, has entered into so many BITs and is not considering leaving the system is evidence of its awareness of the signalling power that these treaties possess. Russia has a historical duty to send such a signal, as it once expropriated many properties belonging to foreigners without compensation.[84] India had about 86 BITs by 2014. In addition, it has four FTAs with investment chapters and is negotiating with several other countries to conclude additional BITs. China is not to be outdone, with more than 120 BITs in force. It has the second-most BITs in the world after Germany. South Africa, as has already been indicated, has 48 BITs.

The overall picture from the BRICS is one of a stamp of approval of the international investment law framework, with South Africa and Brazil being exceptions. Within the

BRICS grouping there is not even a discussion on abandoning the transnational FDI regulatory system.[85] India and Indonesia might provide lessons for South Africa on how best to carve policy space out of the international investment regulatory regime.

India

While India has had no experience of apartheid (although it has a similar system in its centuries-old caste arrangement) it has interesting similarities with South Africa in its trade and economic history. Both countries are founding members of the General Agreement on Tariffs and Trade and ardent believers in multilateral institutions and the power of diplomacy, as envisaged by their participation in the Uruguay Round and the Trade and Related Intellectual Property (TRIPS) renegotiations. In addition, these countries had a BIT programme that was not informed by any coherent policy considerations, and used an OECD template for their BITs. Both India and South Africa have been subjected to international arbitration under a BIT.[86] What differs is how they have sought to deal with their dissatisfaction with the BIT system.

The Foresti case that challenged South Africa's BEE programme triggered the BIT review programme, which culminated in the decision to terminate treaties with most EU member states. An equivalent in the Indian context is the White Industries case,[87] an arbitration tribunal case under the Australia–India BIT.[88] The brief facts of the case are that in 2002 White Industry, an Australian investor in India, won a judgement against Coal India Limited over a breach of contract. However, it took the Indian courts over nine years to enforce the judgement award of about AUD[89] 4 million ($3.2 million). White Industries then unsuccessfully sued the Indian government under an India–Australia BIT, alleging denial of justice, expropriation and violation of the free transfer of funds and the most favoured nation (MFN) provision. The international tribunal dismissed all these claims, but found a violation of India's treaty obligation to enable an 'effective means of asserting claims and enforcing rights', which in itself was quite a stretch of legal creativity.[90] This reflects how the ineffectiveness of domestic institutions in implementing judicial decisions could be in violation of international investment law. Indian courts are well known for having a serious backlog and the wheels of justice turn slowly. If there had been no BIT, White Industries would have been at the mercy of the local Indian courts. South Africa also has issues with the expeditious conclusion of cases due to a huge backlog.

The arbitration tribunal in the White Industry case exercised judicial creativity and came up with a novel standard in this particular case and in the BIT. It is this creativity that has unsettled governments, as it encroaches on their policymaking space. One interesting aspect of this judgement is that this principle, which the tribunal found to have been violated, had actually been imported through an MFN provision from an India–Kuwait BIT. According to Nedumpara,[91] the decision shocked and dismayed the Indian establishment.

One would imagine that the ANC and the South African government had a similar response when the Foresti case challenged BEE policy; what Schneiderman[92] refers to as 'the ANC's most important vehicle for wealth distribution in post-apartheid South Africa'. It is, however, the reaction of these countries to these two almost similar cases that sets them apart. India has taken a decision to review all its BITs with a view to renegotiating them. It wants to reserve policy space for itself in future BITs. One would have expected

India to adopt a more radical stance such as South Africa's, considering its unpleasant encounters with foreign investors such as in the Bhopal disaster[93] and that it has been subjected to international arbitration more than 20 times, with nine claims currently pending (seven of which are in the telecommunications sector, and two in the coal and energy sectors). However, it seems India draws succour from its experience as a multilateral player. It has a history of negotiating policy space in the multilateral environment, especially in trade. This was evident in the Uruguay Round, when it managed to push for concessions in the subsidies agreement, in the TRIPS agreement on compulsory licensing, and when it recently torpedoed the adoption of the Trade Facilitation Agreement because it wants protection for small-scale farmers. India thus believes that space can still be reserved at an international level. To further demonstrate its faith in the system, India signed a BIT in December 2013 with the United Arab Emirates even though it did not carve out much policy space.[94] Maybe South Africa, as a member of BRICS and the G-20, could 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.

Indonesia

Indonesia's experience with the international investment regulatory system and how it is dealing with supposed regulatory chill also deserves attention, and could provide lessons for South Africa. Besides the political and economic similarities between South Africa and Indonesia, the Indonesian case is significant considering that it has been used to give credence to South Africa's decision to disengage from the transnational investment regulatory framework.

Media outlets have wrongly reported that Indonesia was also terminating its BITs and leaving the international investment regulatory system, like South Africa, Bolivia, Ecuador and Venezuela. Indonesia has indeed made it clear that it intends terminating 67 of its BITs when they expire.[95] Yet the drawing of parallels between South Africa and Indonesia without checking facts has given rise to what Trakman and Sharma[96] refer to as 'a premature view that Indonesia's actions indicate a wholesale rejection of ISDS'. The Indonesian ambassador to the EU is quoted as setting the record straight by affirming that Indonesia is only seeking to 'update, modernize and balance its BITs'.[97] Indonesia, like most countries that are part of the international investment regulatory system, is embarking on the modernisation of its BIT regime in line with international best practice. It seeks to accommodate its public interest obligations in health, the environment and industrial policy. Indonesia has been with the BIT system for decades, from the first-generation to the current third-generation agreements. It is not a stranger to arbitration under the ISDS system, having been dragged there many times by foreign investors. Berger and Knorich[98] have done extensive research on Indonesia's investment protection regime. One of the most important findings of their research is the intricate but invaluable way in which Indonesia has succeeded in engaging in what is termed 'localised globalism'. This is the weaving of international investment protection and promotion norms into a domestic regulatory instrument without upsetting the international regime while reserving regulatory space.[99] The Indonesians have achieved this by instituting a domestic investment regulatory statute encompassing international investment law principles from the beginning.

One of the interesting features of Indonesia's domestic legislation regulating foreign investment is that it contains a 'fork in the road' provision that allows for ISDS. A 'fork in the road' provision gives an investor the choice of using the domestic legal system or an external forum, mostly ISDS. This therefore allows investors to either pursue their claims under domestic law or resort to international tribunals that apply treaty law. This is quite important, as investors fearing a political backlash might decide to utilise domestic courts, which could help develop investment law and capacity in the country. Indonesia is a prime example of how a developing country with limited diplomatic clout can navigate a complex system dominated by rich capital-exporting countries and manage to carve out policy space for itself without suffering reputational risk. South Africa can learn from the Indonesian experience on how to deal with the international investment law regime.

Immediate challenges

Besides the long-term policy, regulatory and reputational hazards evident when one imagines South Africa's position in the international investment regulatory matrix, there are immediate issues that might need to be addressed in the short to medium term. Deliberations with the dti have revealed that while South Africa might not enter into any new BITs any time soon, it will negotiate and enter into investor–state contracts containing ISDS provisions with individual investors. However, as the concession agreements in the oil-producing states and the US–Iran Claims Tribunal have shown, these types of contracts are contentious as it is not clear whether public international law or contract law should apply. South Africa might therefore find itself having similar problems in investor–state contracts as those it tried to avoid in BITs. South Africa needs to proceed with caution on the issue of investor–state contracts, as they further muddy the waters when much of the international community is trying to create more transparency and coherence in the system. This makes a strong case for South Africa's continuing to negotiate its policy space in the international arena and enter into new-generation BITs.

Related to the issue of investor–state contracts is the assertion by South Africa that it will only enter into BITs when there are compelling political and economic considerations to do so. These compelling economic and political reasons led to the negotiation and signing of the BIT with Zimbabwe in 2009 – the only BIT entered into by South Africa after its decision not to continue with the BIT regime. The current approach, however, creates a situation that could give rise to forum shopping. Foreign investors could incorporate into countries such as Zimbabwe with which South Africa has BITs and then invoke such agreements in cases of perceived violations. This has been the case with the Netherlands, whose BIT regime attracted many shelf companies that then sued other countries using Amsterdam as the place of incorporation. Another challenge that the current South African approach brings is that of a fragmented foreign investment regulatory framework within its own jurisdiction. Various foreign investors in South Africa are now covered by different legal regimes. These regimes are the terminated BITs, existing BITs (depending on country of origin) and the envisaged PPIB. This fragmented system does not bode well for policy and regulatory certainty, predictability and transparency.

CONCLUSION

The debate about South Africa's review of its FDI regulatory framework and the attendant policy decisions has been topical, in South Africa and abroad. Discussions thus far have focused on the domestic implications of the decision by the South African government to terminate its BITs and replace them with a domestic statute. The general policy direction in South Africa, which is characterised by a more restrictive FDI regulatory policy in response to a more interventionist industrial policy, has also been subjected to debate. What has been missing in this discussion, and which this paper has tried to do, has been an attempt to locate South Africa's actions in a global context. South Africa is an active member of the international community, and its actions and policy choices ought to be informed by global developments. South Africa's termination of its BITs and their subsequent replacement with a domestic statute is usually referred to as being part of a global phenomenon. Countries such as Venezuela, Bolivia, Indonesia, Ecuador, India and Australia have been used as examples of those that are embarking on the same path as South Africa. This paper has shown that while the primary genesis of the review of BITs, which was precipitated by the need for policy space, is global, South Africa's decision to terminate and not renegotiate differs from the approach taken by its peers such as India and Indonesia.

This paper therefore argues that South Africa should remain within the international investment law and policy regulatory framework. While the need for regulatory space is legitimate, South Africa should seek to carve out that policy space within a transnational legal system, as India and Indonesia did. The paper emphasises signalling as one of the basic tenets of the BIT framework, in contrast with the hitherto emphasis on the link or lack thereof between BITs and FDI attraction. In addition to signalling, it also highlights the fact that BITs are not meant to undermine or substitute for domestic institutions, but rather act as guarantors of such. South Africa's own unique domestic challenges, characterised by great inequalities and unemployment, are also identified as necessitating an FDI policy underwritten by international undertakings. South Africa is therefore encouraged to remain within the international investment agreements regime. It should be an integral player in the negotiation and formulation of third-generation BITs. With 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 BIT negotiation table, which could shape the structure of third-generation agreements considerably. It could therefore turn what it currently perceives to be a disincentive to being part of the system into an important tool that it can use to influence the third-generation 'need for policy space' debate.

ENDNOTES

1 'Regulatory takings' refers to conduct of the state or its organs that has the effect of diminishing the value of investors' properties. Cases of outright takings in the form of confiscation have dropped significantly and have been replaced with expropriation through concerted state actions that have the same effect as expropriations.

2 The Expropriation Act is in the process of being modernised through the Expropriation Bill of 2014. The Expropriation Bill will, among other issues, redefine the meaning of expropriation in order to bring it into conformity with the constitution. See RSA (Republic of South Africa), Minister of Public Works, Expropriation Bill, Draft Expropriation Bill released for public comment, 15 March 2013, https://jutalaw.co.za/media/filestore/2013/03/Draft_Expropriation_Bill.pdf, accessed 22 October 2014.

3 This statute is now being considered for amendment by the South African government.

4 See UN (United Nations), The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, UN Conference on International Commercial Arbitration. New York: UN, 6 July 1958, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf, accessed 20 November 2014.

5 See Dumberry P, 'Are BITs Representing the New Customary International Law on International Investment Law', *28 Penn State International Law Review*, 675, 2009–2010, p. 677-679. The Hull formula provides that when there is expropriation, compensation must be 'prompt, adequate and effective'. It was named after American Secretary of State Cordell Hull, who formulated the standard in his diplomatic deliberations with his Mexican counterpart. The current South African constitution encapsulates a hybrid of the Hull and Calvo doctrine. The Calvo doctrine is the standard devised by the Argentinean jurist, Calvin Calvo, to counter what was perceived as an intrusive US approach in dealing with its citizens invested in Latin America.

6 They were with the UK (1994), Canada (1995), Cuba (1995), Germany (1995), France (1995), the Netherlands (1995) and Switzerland (1995). See also UN, United Nations Conference on Trade and Development Full list of Bilateral Investment Agreements concluded, 1 June 2013, http://unctad.org/Sections/dite_pcbb/docs/bits_south_africa.pdf, accessed 17 January 2015.

7 See South African Constitution of 1996, section 9 (dealing with fair discrimination) and section 217 (which provides for a preferential procurement regime).

8 Schneiderman D, 'Investment rules and the rule of law', *Constellations*, 8, 4, 2001, p. 522.

9 *Ibid*.

10 There are notable exceptions in the region such as Botswana, Namibia, Lesotho, Swaziland and Malawi.

11 See UNCTAD (UN Conference on Trade and Development) Investment Policy Hub, International Investment Agreements Navigator: South Africa, http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu, accessed 17 January 2015.

12 See Williamson J, 'Where have we come from? Reflecting on the Washington Consensus', paper presented at a conference in Singapore, 7–8 November 2005, p. 1, http://www.iie.com/content/?ID=1, accessed 5 January 2015.

13 See UNCTAD Investment Policy Hub, Preamble to the Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of South Africa and the Kingdom of the Netherlands of 1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2082, accessed 23 October 2014.

14 See the South African Competition Act No. 89 of 2008. The preamble of this statute, among other things, provides that the purpose of the act is to 'regulate the transfer of economic ownership in keeping with the public interest'.

15 The Promotion and Protection of Investments Bill of 2014 (PPIB) provides that one of the purposes of the bill is to 'promote and protect investment in a manner that is consistent with public interest'.

16 UNCTAD, 'Investor–State Dispute Settlement and Impact on Investment Rulemaking'. New York and Geneva: UNCTAD, 2007, http://unctad.org/en/docs/iteiia20073_en.pdf, accessed 12 September 2014.

17 Salacuse JW, *The Law of International Investment Treaties*. Oxford: Oxford University Press, 2009, p. 80.

18 See UN, Reports of International Arbitral Awards, *Neer LFH and Pauline Neer (USA) v. United Mexican States*, 15 October 1926, volume V, pp. 60–66, http://legal.un.org/riaa/cases/vol_IV/60-66.pdf, accessed 12 January 2015.

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20 Salacuse JW, *op. cit*.

21 Reinisch A, 'Expropriation', in Muchlinski P, Ortino F & C Schreur (eds), *The Oxford Handbook of International Law*. Oxford: Oxford University Press, 2008, p. 427.

22 OECD (Organization for Economic Cooperation and Development), 'Draft Convention on the Protection of Foreign Property', 1960, p. 41.

23 Reisman MW & RD Sloane, 'Indirect Expropriation & its Valuation in the BIT Generation', Faculty Scholarship Series, Paper 1002, 2004, p. 121.

24 See *Minister of Minerals Resources and Energy v. Agri South Africa* (CALS Amicus Curiae) (458/11) ZASCA 93 (31 May 2013).

25 See Poulsen LNS, 'Bounded rationality and the diffusion of modern investment treaties', *International Studies Quarterly*, 1–14, 2013, pp. 7–9.

26 Mark Gevisser, *Thabo Mbeki and the Dream Deferred.* Cape Town: Jonathan Ball Publishers, 2007.

27 See Schneiderman D, 'Investment rules and the new constitutionalism', *Law and Social Enquiry*, 25, 3, Summer 2000, pp. 757–787. See also Peterson LE, 'South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights', IISD (International Institute for Sustainable Development), Occasional Paper. Winnipeg: IISD, November 2006.

28 See Constitution of South Africa Act No. 108 of 1996, preamble (preceded by the interim constitution, which did not differ substantially from the final constitution of 1996).

29 *Ibid*., section 9.

30 *Ibid*.

31 Schneiderman D, 'Promoting equality, black economic empowerment and the future of investment rules', *South African Journal of Human Rights*, 25, 2, 2009, pp. 246–279.

32 See South African Constitution Act No. 108 of 1996, section 25.

33 *Ibid*.

34 Section 217 reads as follows:

(1) When an organ of State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive & cost effective.

(2) Subsection (1) does not prevent the organ of state or institution referred to in that subsection from implementing a procurement policy providing for:

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

35 See also the Preferential Procurement Policy Framework Act No. 5 of 2000, http://www.cogta.gpg.gov.za/Resource%20Centre%20Documents/Preferential%20Procurement%20Policy%20Framework%20Act%20No%205%20of%202000.pdf, accessed 27 February 2015. The Preferential Procurement Policy Framework Act sets out the preferential procurement regime in favour of previously disadvantaged service providers and contractors. It is important to note that the regime is applicable to both private and public entities.

36 See Guzman A, 'Why LDCs sign treaties that hurt them: Explaining the popularity of BITs', *Virginia Journal of International Law*, 38, 1997–1998, p. 640.

37 *Ibid*.

38 *Ibid*.

39 *Ibid*., p. 658.

40 Elkins Z, Guzman AT & BA Simmons, 'Competing for capital: The diffusion of bilateral investment treaties, 1960–2000', *International Organisation*, 60, 4, October 2006, pp. 830–840.

41 Schneiderman D, 2000, *op. cit*.

42 Vickers B, 'An Overview of South Africa's Investment Regime and Performance', presentation at an Institute for Global Dialogue Conference, 16 April 2002, Pretoria, p. 3.

43 Fatouros AA, 'Towards an International Investment Agreement on FDI', *ICSID Review FILJ*, 10, 1995, p. 181.

44 Guzman AT, 'A compliance based theory of international law', *California Law Review*, 90, 6, December 2002, pp. 1823–1887.

45 *Ibid*., p. 1849.

46 *Ibid*., p. 1850.

47 UNCTAD, *World Investment Report*. Geneva: UNCTAD, 2012.

48 Poulsen LNS, *op. cit*.

49 *Ibid*.

50 South Africa was in a rush to enter into BITs after the end of apartheid and it assumed that these agreements were not inimical. It had to be dragged before an international arbitration tribunal for it to embark on a path of reforming the system, as the Foresti case had challenged the country's BEE laws.

51 Fatouros AA, *op. cit*., p. 183.

52 *Ibid*., p. 11.

53 Schneiderman D, 2000, *op. cit*.

54 *Ibid*.

55 *Ibid*.

56 *Ibid*., p. 522.

57 See Minerals and Petroleum Resources Development Act Amendment Bill No. 15 of 2013, Property Valuation Bill No. 54 of 2013, Promotion and Protection of Investments Bill No. 1087 of 2013, Private Security Industry Regulation Act Amendment Bill No. 27 of 2012, and Expropriation Act Amendment Bill No. 4 of 2015, among others.

58 Guzman A, 1997–1998, *op. cit*.

59 Peterson LE, 'South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights', IISD, Occasional Paper. Winnipeg: IISD, November 2006, http://library.fes.de/pdf-files/iez/global/04137-20080708.pdf, accessed 23 September 2014.

60 See Schneiderman D & J Klaaren, 'Investor–State Arbitration and South Africa's Bilateral Investment Treaty Review Framework, comment submitted to the Department of Trade and Industry'. Johannesburg: Mandela Institute Law School, University of the Witwatersrand, 10

August 2009, http://www.wits.ac.za/files/res67d65f799c55477cacc6abf3c0e0bce5.pdf, accessed 30 January 2015.

61 South African Government, ‘ Bilateral Investment Treaty Policy Framework Review: Government Position Paper’, 25 July 2009, http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf, accessed 12 December 2014.

62 See Guzman AT, 2002, *op. cit*.

63 See Schneiderman D & J Klaaren, *op. cit*.

64 Australian Government, DFAT (Department of Foreign Affairs and Trade), Korea–Australia Free Trade Area of 2014. Canberra: DFAT, http://www.dfat.gov.au/trade/agreements/kafta/official-documents/Pages/default.aspx, accessed 17 December 2014.

65 See *Bengwenyama Minerals (Pty) Ltd and Others* (CCT39/10) [2010] ZACC 26.

66 Law D & M Versteeg, ‘The declining influence of the US constitution’, *NYU Law Review*, 2012, p. 89.

67 *Bengwenyama Minerals (Pty) Ltd and Others*, *op. cit*.

68 Section 232.

69 *Agri South Africa v Minister of Minerals and Energy* CCT 51/12 [2013] ZACC para 48–59.

70 *Ibid*.

71 The MPRDA is the overarching statute regulating the minerals and petroleum resources industry in South Africa. This statute encapsulates BEE requirements which, for instance, have set 26% equity requirements in favour of previously disadvantaged South Africans.

72 *Agri South Africa v Minister of Minerals and Energy*, *op. cit*., p. 22, para 48.

73 *Ibid*., p. 28, para 59.

74 See, for instance, *Waste Management v United Mexican States ICSID Case No. ARB (AF)/97/1; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICISD Case No. ARB/06/11, awarded on 5 October 2012, p. 7. The latter referred to these types of expropriation as ‘measures short of physical taking … that permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way’.

75 See *Metalclad v. United Mexican States*, ICSID Case. No. ARB(AF)/97/1, *S.D. Meyers Inc. v. Government of Canada*, 2001 FCT 317, *Pope & Talbot Inc. v. Government of Canada*, 41 ILM 1347 (2002).

76 See Reinisch A, ‘Expropriation’, in Muchlinski P, Ortino F & C Schreuer (eds), *The Oxford Handbook of International Law*. Oxford: Oxford University Press, 2008, p. 427.

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88 *White Industries Australia Limited v The Republic of India*, UNCITRAL (India–Australia BIT), Award, 30 November 2011.

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99 *Ibid*.

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