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Stellenbosch Economic Working Papers: 04/16

KEYWORDS: SOUTH AFRICA, FOREIGN INVESTMENT PROTECTION, EXPROPRIATION, POLICY SPACE, BILATERAL INVESTMENT TREATIES, PROTECTION OF INVESTMENT ACT, CONSTITUTION
JEL: K10, K11, K33, F21

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A WORKING PAPER OF THE DEPARTMENT OF ECONOMICS AND THE
BUREAU FOR ECONOMIC RESEARCH AT THE UNIVERSITY OF STELLENBOSCH

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ABSTRACT

The overall trend since 1994 of growing foreign direct investment into South Africa has been a reflection of the country's openness to investment as well as significant international trust in its institutions. Recent policy and legislative developments, including the termination of South Africa's bilateral investment treaties with EU trading partners and the introduction of the Protection of Investment Act, are however raising concern among international investors and bringing into question the attractiveness and reliability of South Africa as a destination for foreign investment. These concerns have been compounded by increasing regulatory restrictions upon foreign investors, including stricter visa requirements, and the introduction of various other pieces of legislation that have implications upon the level of protection of property rights in South Africa. A policy shift, reflected in legislation such as the Protection of Investment Act, the Private Security Industry Regulation Amendment Bill and the Expropriation Bill, indicates an enhanced focus on the public interest aspect of the constitutional right to property in accordance with the government's constitutionally mandated transformative agenda. A balance needs to be found between the government's sovereign right to implement domestic policies in order to achieve its socio-economic goals, its duty to protect foreign investments, and its overall objective of promoting sustainable economic growth.

Keywords: South Africa, foreign investment protection, expropriation, policy space, bilateral investment treaties, Protection of Investment Act, Constitution
JEL codes: K10, K11, K33, F21

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"I would not look to the U.S. Constitution, if I were drafting a constitution in the year 2012. I might look at the constitution of South Africa. That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights, had an independent judiciary. It really is, I think, a great piece of work that was done."

- Justice Ruth Bader Ginsburg, Supreme Court of the United States

1. Introduction

The South African Department of Trade and Industry's Trade Policy and Strategy Framework states: "The government's broad developmental strategy aims to promote and accelerate economic growth along a path that generates sustainable, decent jobs in order to reduce poverty and extreme inequalities."[2]

This paper will investigate South Africa's recent policy shift in its approach toward international investment and analyze this with regard to the government's economic and social development goals. The fist part will include a general introduction to foreign investment and development, as well as current issues that are emerging in the field of international investment law. The next part constitutes the central focus of the paper and will discuss the property clause in the South African Constitution against the backdrop of Apartheid and in the context of a number of new laws and their effect on the treatment of foreign investment in South Africa. Lastly the paper will look at the potential impact of the policy shift on the decisions of foreign investors. The paper concludes by questioning whether the approach chosen is the correct approach for the achievement of the government's stated goals.

[2] Department of Trade and Industry *A South African Trade Policy and Strategy Framework* (2010) 10.

2. Economic Development, FDI, Institutions, and Current Trends

2.1. Private Property and Economic Development

While there is some debate regarding the specific institutions that matter most for economic development, there is a high level of agreement that the protection of private property is a necessity for sustained, long-term economic growth.

Private property rights that are secure promote the efficient use of economic resources by enabling actors to make rational economic decisions without having to account for the risk of expropriation; well-defined and secure property rights allow the market to convey reliable information through market prices and enable actors to engage in profit and loss accounting. In a market with secure property rights the market process directs resources away from unprofitable activities and into more profitable and hence productive ventures. Insecure property rights can discourage more productive long-term investments because a higher risk of expropriation reduces expected returns, and as a consequence shorter-term investments appear more attractive. Thus, it is argued, insecure property rights lead to less productive employment of resources, less innovation, and ultimately less economic development.[3]

2.2. Foreign Direct Investment and Economic Development

Foreign Direct Investment (FDI) is a crucial source of finance for development, and can provide significant contributions to sustainable development across all sectors. The goal in itself is not to attract FDI, the goal is to reap the benefits of sustainable development that FDI brings. FDI has been described as a package of resources, such as capital, technology, knowledge, and skills that foreign investors can harness and transfer to a host state, generating employment and increasing fiscal revenues. Stimulating domestic

[3] Bennett, DL et al "Evaluating Alternative Measures of Institutional Protection of Private Property and Their Relative Ability to Predict Economic Development" (2015) *Social Science Research Network* 1 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2451143>.

demand in this way not only encourages entrepreneurship and local enterprise development, but also builds domestic productive capacities and generates further demand, thereby supporting sustainable economic growth.[4]

Yet the development benefits of FDI are often brought into question. What is notable in the discussion about FDI's benefits is that many commentators ignore the fact that FDI comes in various different forms that each pose distinct policy challenges. In each case these challenges need to be addressed in order to best harness the benefits and avoid any harmful side effects of FDI. These include FDI in the extractive sector, FDI in infrastructure, FDI in manufacturing and assembly (low-skilled manufacturing and assembly and higher-skilled), and FDI in services. Aggregating these forms of FDI can lead to conclusions of questionable accuracy and reliability for policymaking purposes.[5]

2.3. South Africa, FDI, and Institutions

South Africa has, in recent decades, been an attractive destination for FDI, has exceedingly strong institutions and a vibrant, functioning democracy. The Minister of Trade and Industry stated in January 2015 that according to the OECD's Restrictiveness Index, South Africa ranks among the most open jurisdictions for FDI in the world. He further stated that openness was reflected in the overall trend of growing FDI into South Africa over the 22 years since 1994, that South Africa's stock of FDI accounted for around 42 percent of GDP, and that over the previous five years, South Africa had accounted for the bulk of new investment projects in Africa.[6] In 2013 South Africa rose two places to become the 13th-most attractive FDI destination globally, attracting $10 billion in FDI in 2013.[7] In 2015, however, FDI inflows fell to $1.5 billion.[8]

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[4] R Echandi and P Sauve *Prospects in International Investment Law and Policy* 1 ed (2013) 15-16.
[5] R Echandi and P Sauve *Prospects in International Investment Law and Policy* 1 ed (2013) 30.
[6] R Davies "South Africa, the most open country for Foreign Direct Investment in the World" *SANews* (01-19-2015). <http://www.sanews.gov.za/south-africa/south-africa-most-open-country-foreign-direct-investment-world>.
[7] Oxford Business Group "South Africa's increasing FDI appeal" (03-11-2014) <http://www.oxfordbusinessgroup.com/news/south-africa's-increasing-fdi-appeal>.

South Africa ranks highly for various institutions important for attracting FDI as evidenced by the 2015 - 2016 World Economic Forum's Global Competitiveness Report which ranks South Africa 38th out of 140 countries for the strength of its institutions, including 24th for property rights and intellectual property rights.[9] For judicial independence the country is also rated 24th, topping countries like the United States and Austria. South Africa is ranked 14th for efficiency of the legal framework in settling disputes, and 17th for efficiency of the legal framework in challenging regulations; these too rate above developed countries such as the United States, Denmark, and Australia. For accountability South Africa is rated 2nd, for strength of auditing and reporting standards 1st, for protection of minority shareholders 3rd and for strength of investor protection 14th (down from 10th in the 2014-2015 report). South Africa is rated 11th for trustworthiness and confidence in its financial markets, and 2nd in the regulation of securities exchanges.[10]

2.4. Current Trends in International Investment Protection

Part of attracting and maintaining FDI flows into a host country is providing a guarantee to foreign investors that their investments are sufficiently protected. There is however increasing international controversy regarding the balance between a state's duty to protect foreign investments and its sovereign right to regulate, and while developing states have been raising this issue for a number of years, it is now also at the forefront of controversy in current negotiations such as the Transatlantic Trade and Investment Partnership between developed nations such as the United States and those of the European Union. At the very center of this debate is the mechanism of investor-state

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[8] United Nations Conference on Trade and Development *Global Investment Trends Monitor* (20-01-2016) 5.

[9] In the 2014-2015 Report, South Africa ranked 36th for strength of institutions, 20th for property rights, and 22nd for intellectual property rights.

[10] In the 2014-2015 Report, South Africa ranked 15th for efficiency of the legal framework in settling disputes, and 9th for efficiency of the legal framework in challenging regulations, 2nd for protection of minority shareholders, and 10th for strength of investor protection, 6th for trustworthiness and confidence in its financial markets, and 1st in the regulation of securities exchanges.

dispute settlement (ISDS), whereby individual foreign investors are entitled, usually by virtue of an international investment agreement (IIA), to institute international arbitration proceedings against a host state for violation of its duties to protect foreign investments.

All states enjoy the sovereign right to regulate in the pursuit of public policy goals; there is however a fine balance between a state's right to regulate and its duty to protect international investment, and the line between justified and unjustified regulatory restrictions on foreign investment is not always a clear one. Various motivations exist for restrictions on foreign investment, including sovereignty or national security concerns, strategic considerations, socio-cultural reasons, prudential policies in financial industries, or infant industry protection. Although there are certain standards in international law, different states may have different perceptions in each case of whether and under what conditions restrictions on foreign investments are legitimate.[11]

IIAs, including bilateral investment treaties (BITs), have become a common way in which states agree, usually bilaterally, upon various aspects regarding the protection of investments of each other's nationals. IIAs are designed to protect foreign investors against expropriation by host states and usually include provisions regarding measures that constitute expropriation, compensation for expropriation, and mechanisms for dispute settlement. It is argued that these types of international agreements facilitate FDI and investment promotion by complementing domestic investment protection policies, ensuring a stable, predictable, and transparent investment climate, providing accountability, and fostering the rule of law. The ISDS mechanism included in the majority of IIAs guarantees neutrality in the settlement of disputes by providing the investor with an option for recourse to international arbitration proceedings directly against the host state. These agreements are regarded as serving a unique function internationally in the protection of international investments, promotion of rule of law,

[11] R Echandi and P Sauve *Prospects in International Investment Law and Policy* 1 ed (2013) 21.

and removal of governments from their diplomatic role of espousal[12] (and thus the facilitation of the de-politicization of international investment disputes).[13]

There is however a growing sentiment among various political actors, due in part to a few recent ISDS decisions,[14] that IIAs restrict states' sovereign right to regulate and expose host states to risks of exorbitant claims by investors by being vague and excessively broad in their scope. States have started to respond to these challenges in a number of ways. Some have instituted reviews of their IIAs or taken steps to develop a model BIT. As a result of reviews that are taking place, more recent treaty models contain increasingly sophisticated and precise treaty language, mitigating risks and carving out more policy space for host states.[15] South Africa and Indonesia, on the other hand, have launched a process of terminating certain of their investment agreements, either unilaterally or by mutual agreement.[16]

Over all governments have become much more cautious in formulating obligations and pay greater attention to clearly defining the states' right to regulate in the public interest. The scope of treaties is being more precisely formulated, with certain areas of regulation, such as taxation, financial services, and government procurement often being explicitly excluded. General exceptions are also being included that allow more room for regulation in the areas of protecting human, animal or plant life or health, or national security. Another broad development includes the clarification of specific

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[12] Prior to IIAs containing Investor-State Dispute Settlement investors had to rely on dispute resolution through diplomatic channels.

[13] J Salacuse and N Sullivan "Do BITS Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" (2005) 46 *Harv. Int'l L.J.* 67.

[14] For example *Vattenfall AB, Vattenfall Europe AG, Vattenfell Europe General AG v. Federal Republic of Germany* (International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/09/6).

[15] R Echandi and P Sauve *Prospects in International Investment Law and Policy* 1 ed (2013) 21.

[16] L Peterson "Indonesia ramps up termination of BITs – and kills survival clause in one such treaty – but faces new $600 mil. Claim from Indian mining investor" *Investment Arbitration Reporter* (20-11-2015).

obligations, such as fair and equitable treatment clauses, or the precise meaning of indirect expropriation.[17]

The next section will discuss South Africa's changing policy approach to the protection of foreign investment, particularly with regard to the property clause in the Constitution.

3. South Africa, The Constitution, and The New Legislative Landscape

3.1. The Constitution of South Africa

The property clause in the South African Constitution needs to be understood within the historical context of the country's racially discriminatory history in which many were systematically dispossessed of their rights, including their land rights. The Apartheid system in South Africa officially came to an end through a series of negotiations that took place between 1990 and 1993 and the first democratic elections were held on 27 April 1994. Between 1993 and 1996 South Africa operated under an Interim Constitution, which served as a roadmap for transition and for the drafting of the Final Constitution, completed in 1996.

The 1996 Constitution protects the right to property, but it also contains a carve-out for certain measures aimed at redressing results of past racial discriminatory laws and practices; and it has thus been held by the Constitutional Court that: "(t)he purpose of section 25 has to be seen both as protecting existing property rights as well as serving

[17] R Echandi and P Sauve *Prospects in International Investment Law and Policy* 1 ed (2013) 21.

the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions."[18]

The Property clause reads as follows:

> *25. Property*
>
> *(1) No one may be deprived of property except in terms of law of general application, and no law may permit deprivation of property.*
>
> *(2) Property may be expropriated only in terms of law of general application-*
>
> *(a) for a public purpose or in the public interest; and*
>
> *(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*
>
> *(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances, including –*
>
> *(a) the current use of the property;*
>
> *(b) the history of the acquisition and use of the property;*
>
> *(c) the market value of the property;*
>
> *(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
>
> *(e) the purpose of the expropriation.*

[18] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another, First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 50.

(4) For the purpose of this section –

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

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

…

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

Certain aspects of the wording need to be highlighted, including the distinction made between the terms "deprivation" and "expropriation" in subsections (1) and (2).[19] To this extent, "deprivation" has been described by courts as "the extinguishing of a right" in property, while "expropriation" has been interpreted as a more specific type of deprivation (discussed in more detail in 3.3.2).[20]

According to section 25(2)(a) expropriation may be carried out for a public purpose or in the public interest; with subsection (4)(a) partially defining "public interest" to include

[19] O Dean & M Kleyn "Promotion and Protection of Investment Bill, 2013 – a Review" (6-02-2014) <http://blogs.sun.ac.za/iplaw/2014/02/06/promotion-and-protection-of-investment-bill-2013-a-review/>.

[20] *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 48.

the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.

Subsection (4)(b) provides that property is not limited to land; this gives no clear indication as to what types of property are subject to constitutional protection, but does mean that property could also include, for example, intellectual property rights, or mining rights. Indeed the Constitutional Court has stated that there is "no comprehensive definition of constitutional property in South Africa,"[21] and that "(a)t this stage of our constitutional jurisprudence it is….practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25."[22]

Subsection (3) sets out factors that need to be considered when determining "just and equitable" compensation. Notably, market value of the property is only one of the factors to be considered in trying to find an equitable balance between the public interest and the interests of the expropriated party.[23]

Subsection (8) essentially allows for the limitation of the right to property where measures are taken "to achieve land, water and related reform in order to redress the results of past racial discrimination." The right to property may however be limited "only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity,

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[21] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others* 2015 (6) SA 125 (CC) para 104.
[22] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another, First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.
[23] O Dean & M Kleyn "Promotion and Protection of Investment Bill, 2013 – a Review" (6-02-2014) <http://blogs.sun.ac.za/iplaw/2014/02/06/promotion-and-protection-of-investment-bill-2013-a-review/>.

equality and freedom, taking into account all relevant factors" as listed in section 36 of the Constitution. [24]

3.2. Review and Termination of Bilateral Investment Treaties

After the first democratic elections in 1994, and before the advent of the Final Constitution, South Africa opened itself to international investment and concluded a large number of bilateral investment treaties which included recourse to investor-state arbitration. Not too many years later however, the government began to find that its public policy goals were being restricted by these agreements. The Department of Trade and Industry (DTI) sought to suspend further negotiation and conclusion of BITs pending a comprehensive review of the policy framework informing the BIT process. The review commenced in 2008 with the aim of developing a policy framework as well as guidelines for assessing BITs already concluded and for engaging with BITs in the future. [25]

The overall conclusion reached was that the current system leaves the door open "for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration that may constitute direct challenges to legitimate, constitutional and democratic policy-making". [26] According to the DTI the review was initiated when it became apparent that SA was facing serious challenges from developed nations seeking to rely on BIT provisions in order to claim compensation for alleged failure by the state to comply with its obligations under BITs with various countries.

During the review the content of various BITs was compared with domestic South African law and it was found that standards in the BITs with relation to expropriation

[24] Constitution of the Republic of South Africa, 1996 section 36.
[25] Department of Trade and Industry *Bilateral Investment Treaty Policy Framework Review* (2009) 12.
[26] X Carim "Lessons from South Africa's BITs review" (2013) 109 *Vale Columbia Center on Sustainable International Investment*

differ from standards under domestic South African law.[27] It was argued that BITs do not make a distinction between "deprivation", and "expropriation;" that the concept of nationalization, as found in the BITS, is not used in the Constitution, and that terms such as "measures having effect equivalent to expropriation" are not recognized in SA's constitutional parlance. It was further argued that failure to distinguish between "regulation" and "expropriation" would mean that legitimate government regulation could be deemed to constitute a form of "indirect" expropriation, or regulatory expropriation.

The policy review held that "adequate policy space is a key developmental tool for developing countries", but that the "current BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for development." It was further argued that "(n)ew investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally," and that under such conditions investment would fail to encourage or enhance development."[28]

Recommendations included, among other things, that SA review it practices with a view to developing a model BIT which would be in line with its development needs, that the need for investor certainty should not compromise SA's own legitimate interests; and that further domestic legislative intervention could be brought to ensure that a proper balance is achieved.[29]

Taking the findings of the review into account, the South African Cabinet decided in July 2010 that South Africa would: "refrain from entering into BITs unless there are compelling political or economic reasons to do so; terminate existing BITs and offer

[27] Department of Trade and Industry *Bilateral Investment Treaty Policy Framework Review* (2009) 41.
[28] Department of Trade and Industry *Bilateral Investment Treaty Policy Framework Review* (2009) 54.
[29] Department of Trade and Industry *Bilateral Investment Treaty Policy Framework Review* (2009) 56.

partners the possibility to re-negotiate BITs on the basis of a new model; develop a new Foreign Investment Act that is aligned with the Constitution and clarifies typical BIT provisions under South African law; and establish an Investment Inter-Ministerial Committee to oversee this work (see discussion at 4.2).[30]"

3.3. Protection of Investment Act

3.3.1. An Investment Act

In furtherance of the decisions taken after the BIT review, the government terminated its BITs with a number of European states,[31] including Germany, the United Kingdom, the Netherlands and France, and introduced the Draft Promotion and Protection of Investment Bill[32] ("Investment Bill") to provide a framework for the protection of all investments in SA, both foreign and domestic, in line with the Constitution. An initial draft of the Investment Bill was published in 2013[33] with an opportunity for public comment; a significantly revised version was published in July 2015,[34] and in November 2015 a further revised version[35] was passed by both Houses of Parliament. On 13 December 2015 the President assented to the Investment Bill and on 15 December it was published in the Government Gazette as the Protection of Investment Act, no. 22 of 2015 ("Investment Act"). The Investment Act will come into operation on a date determined by the President by proclamation in the Government Gazette. Although the Presidency released media statements following the President's assent to three other acts on 13 December 2015, no statement was released announcing his assent to the Protection of Investment Act.

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[30] X Carim "Perspectives on topical foreign direct investment issues: Lessons from South Africa's BITs review" *Vale Columbia Center on Sustainable International Investment* 109 (25-11-2013)

[31] South Africa has also terminated its BITs with Austria, Belgium-Luxembourg Economic Union, Denmark, Switzerland and Spain.

[32] Initially introduced as the Promotion and Protection of Investment Bill, it was renamed the Protection of Investment Bill, and is now the Protection of Investment Act.

[33] Promotion and Protection of Investment Bill B-2013

[34] Promotion and Protection of Investment Bill B18-2015

[35] Protection of Investment Bill B18B-15

The DTI believes the Act provides confirmation that South Africa remains open to FDI and provides effective protection while preserving the sovereign right of the government to pursue legitimate public policy objectives in line with constitutional requirements. The Act is informed by the DTI's vision of a "legal and policy framework for investment that learns from the lessons of the past and is better attuned to the challenges of sustainable development and inclusive growth."[36]

The government's assertion, however, that this approach is "better attuned to the challenges of sustainable development and inclusive growth" is not an opinion shared by many.

3.3.2. Agri SA v The Minister for Minerals and Energy

Before proceeding to a deeper analysis of the Investment Bill, it is necessary to briefly discuss the findings of a recent Constitutional Court judgment regarding the meaning of expropriation within the context of the section 25 of the Constitution.[37] This judgment influences the way in which the constitutional right to property is interpreted, and a brief summary thereof will allow for a more comprehensive illustration of the repercussions of the various pieces of legislation discussed below.

In Agri SA v Minister for Minerals and Energy[38] the court considered the application of section 25 of the Constitution to the Mineral and Petroleum Resources Development Act ("MPRDA"). The MPRDA was enacted to facilitate equitable access to South Africa's mineral and petroleum resources, and to ensure the sustainable development thereof. In doing so the MPRDA had provided a limited period of time to holders of old order

[36] X Carim "Perspectives on topical foreign direct investment issues: Lessons from South Africa's BITs review" *Vale Columbia Center on Sustainable International Investment* 109 (25-11-2013) 2.
[37] David W Butler *Changing South African perceptions regarding BITs, Investment Arbitration and ICSID* (2015) paper presented at the Annual IBA ICSID Arbitration Day (27-02-2015) 5.
[38] 2013 (4) SA 1 (CC).

prospecting rights and mining rights to have these converted into new order rights under the act. Agri SA instituted proceedings, acting on behalf of a company that had held old order rights but had been placed in liquidation before it could apply for the rights to be converted. Upon the claim that the company's old order rights had been expropriated when the MPRDA took effect the majority of the court held that a deprivation of the company's old order rights had taken place, but that this deprivation was not arbitrary, and was carried out in terms of a law of general application.[39] The majority further found that deprivation did not amount to expropriation until there was a compulsory acquisition of rights in property by the state; and while the MPRDA made the state the custodian of mineral resources (on behalf of the people of South Africa), the state did not acquire ownership of the resources, and therefore there was no expropriation.[40] It was also held that courts are enjoined to have regard for "the public interest and constitutional imperative to transform and facilitate equitable access to our mineral and natural resources…when construing section 25."

Despite the majority decision, three of the judges made it clear that they were against accepting as an inflexible general rule that acquisition by the state is an essential requirement for expropriation in all cases.[41]

3.3.3. Concerns Regarding the Protection of Investment Act

Returning now to the Investment Act, this section will look at a number of reasons why the Act has raised concern, both domestically and abroad.

The Investment Act states in its preamble that it recognizes "the importance that investment plays in job creation, economic growth, sustainable development, and the well-being of the people of South Africa."

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[39] Paras 24 and 53.
[40] Paras 68 and 69.
[41] Paras 78, 80-81.

There is however a real concern that the message sent by the passing of the Investment Act, in combination with the government's termination of various BITs, and a series of other recent legislative and policy measures, may be more likely to deter than promote investment in South Africa, and thereby have a negative impact on job creation, economic growth, sustainable development, and the well-being of the people of South Africa. [42]

South Africa's first generation BITs, signed shortly after the 1994 elections, reflect the general principles of international law, including that expropriation may be implemented only for a public purpose, under due process of law, and on a non-discriminatory basis (notably, while these obligations may be explicitly stated in BITs, these are also obligations that exist under customary international law). Under these treaties investors are generally guaranteed compensation that is "prompt, adequate, and effective" in the case of expropriation.[43] In its BITs with both the United Kingdom and the Netherlands for example, SA agrees to pay compensation that amounts to the "genuine value" of the investment expropriated,[44] and in its BIT with Germany the agreed compensation is "equivalent to the value of the expropriated investment…"[45] In addition, the decision regarding the amount of compensation rests with an international arbitral tribunal rather than domestic courts, providing a vital guarantee of independence in the adjudication of claims. These treaties were described by the DTI in its review as "unequal and exploitative agreements which prohibited the very policies…needed to fight poverty."

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[42] A Jeffery "The Investment Bill and FDI" (2014) 14 *Without Prejudice* 18.

[43] A Jeffrey "The Investment Bill and FDI" (2014) 14 *Without Prejudice* 18.

[44] *Agreement between the Government of the Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa for the Promotion and Protection of Investments* 1994, and *Agreement on encouragement and reciprocal protection of investments between the Republic of South Africa and the Kingdom of the Netherlands* 1995.

[45] *Treaty between the Federal Republic of Germany and the Republic of South Africa concerning the Reciprocal Encouragement and Protection of Investments* 1995.

The interpretation clause of the Investment Act provides that it has to be interpreted with regard to the Constitution, including customary international law and international law as contemplated in the Constitution. In the Agri SA case a principle of international law (indirect expropriation) was essentially ruled not to be part of South African law by the Constitutional Court.[46] Section 232 of the Constitution states that "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." However, disregard for international law principles can be challenged in international courts for denial of justice,[47] and it has, for example, been held by the Permanent Court of International Justice in the *Treatment of Polish Nationals* Case[48] that -

> *"according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted…[C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.*[49]

In previous drafts of the Investment Bill section 8 had dealt with "Principles relating to expropriation of investment." While this section was removed in a later version, it is nonetheless worth discussing as it offers valuable insight into the policy considerations of the drafters, and because much of what was removed is still reflected in other legislation such as the Expropriation Bill of 2015, discussed below, and in case law. This section has now been replaced by section 10, which merely states, "Investors have the right to property in terms of section 25 of the Constitution." Section 10 brings the level

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[46] South African Institute of International Affairs *Submission on South Africa's Promotion and Protection of Investment Bill* (1-11-2013) 6. <http://www.thetradebeat.com/book/saiia-submission-on-south-africa-s-draft-promotion-and-protection-of-investment-bill>.

[47] South African Institute of International Affairs *Submission on South Africa's Promotion and Protection of Investment Bill* (1-11-2013) 6.

[48] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* Advisory Opinion (4-02-1932).

[49] D Bishop, J Crawford and M Reisman *Foreign Investment Dispute* 2 ed (2014) 543.

of protection offered to foreign investments in line with the level of protection offered to domestic property under the Constitution. While South African jurisprudence on the matter is well developed, the fact also remains (as discussed above) that "there is no comprehensive definition of constitutional property in South Africa." This may add uncertainty with regard to certain types of property (discussed in more detail below in 3.3.4).

The previous section 8 had sought to explicitly narrow the meaning of expropriation by stating that various listed actions would not amount to expropriation, including measures that, at international law, would constitute indirect expropriation.[50] Naturally, where no act of expropriation takes place, there can be no claim for compensation.

This list included, *inter alia,* "a measure which results in the deprivation of property but where the state does not acquire ownership of such property provided that, (i) there is no permanent destruction of the economic value of the investment, or (ii) the investor's ability to manage, use or control his or her investment in a meaningful way is not unduly impeded." This measure echoes the finding of the Agri SA case, provides ample scope for uncertainty, and runs contrary to internationally recognized concepts of expropriation.

The previous section 8(2)(c) also excluded from the definition of expropriation "the issuance of compulsory licenses granted in relation to intellectual property rights, or the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property." This provision appeared to relate to parts of the DTI's Draft National Intellectual Property Policy, published in 2013, which specifically addresses the introduction of compulsory licensing in the interest of public health.[51]

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[50] P Leon and B Winks "A Reversion to Diplomatic Protection?" (2014) 14 *Without Prejudice* 14.

[51] M Kleyn and O Dean "The South African Promotion and Protection of Investment Bill 2013: A Review" (2014) 36 *European Intellectual Property Review* 477.

Compulsory licensing is where the government, or other jurisdictional body, forces the holder of a patent, copyright, or other exclusive right to grant use to the state or others. The holder of the right usually receives some royalties, either set by law or determined through arbitration. This area of law is governed internationally by the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to which South Africa is a signatory, and any measures taken in this regard in the future will have to not only comply with domestic South African intellectual property laws, but also with requirements set by the TRIPS.[52]

The previous section 8 also dealt with compensation in the event of expropriation. It reflected section 25 of the Constitution, providing that in contemplating the amount of compensation regard must be had for "all relevant circumstances including - (a) the current use of the investment, (b) the history of the acquisition and use of the investment, (c) the market value of the investment, and (d) the purpose of the expropriation." While the Constitution mandates these considerations, the notion that market price is not to be the only factor when contemplating compensation for expropriation adds uncertainty and again goes against an internationally recognized investment law concept, and in many cases against South Africa's BIT undertakings.

Section 9 seeks to codify the international law requirement that states provide security to investors' property. It provides that the "Republic must accord foreign investors and their investments a level of physical security as may be generally provided to domestic investors in accordance with minimum standards of customary international law" but then continues "subject to available resources and capacity." This again adds uncertainty and falls short of recognized international standards and of the Full Security and Protection clause in most BITs.

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[52] M Kleyn and O Dean "The South African Promotion and Protection of Investment Bill 2013: A Review" (2014) 36 *European Intellectual Property Review* 477.

3.3.4. International Law, SADC Protocol, and Dispute Resolution

Another issue of somewhat serious concern is the fact that the Investment Act disregards a number of South Africa's legal obligations as a member of the Southern African Development Community (SADC). The SADC Treaty, acceded to in 1994, and all Protocols under the Treaty are binding upon member states, and must be domesticated through national legislation. The Constitutional Court[53] has also recently affirmed the binding nature of SADC Protocols in South Africa, both internationally and constitutionally.[54]

The SADC Protocol on Finance and Investment (the Protocol), and in particular Annex 1: Co-operation on Investment, provides a framework for the promotion and protection of investment in Southern Africa and binds members to harmonise their investment regimes in accordance with the Protocol. The Protocol includes, *inter alia,* that "investments shall not be nationalized or expropriated…except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation;[55] that investments and investors shall enjoy fair and equitable treatment in the territory of any member state,"[56] and that either party may submit a dispute to international arbitration upon the exhaustion of domestic remedies.[57]

In the first instance, the Investment Act does not allow for "prompt, adequate, and effective compensation" as is required by the Protocol; secondly, the Act does not provide for "fair and equitable treatment" (discussed below), as required by the Protocol; and thirdly, the Act does not allow a foreign investor to submit a dispute to

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53 In *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC).
54 Anglo American South Africa Ltd. *Supplementary Written Submission to the Portfolio Committee on Trade and Industry on the Promotion and Protection of Investment Bill* (23-09-2015) 4.
55 Annex 1, Article 5.
56 Annex 1, Article 6(1).
57 Annex 1, Article 28.

international arbitration but rather provides that "such arbitration will be conducted between the Republic and the home state of the applicable investor."

The standard of protection against expropriation set by the Investment Act is that which is provided in section 25 of the Constitution. A large degree of complexity lies in the fact that, while the property clause has a significant role in the context and history of South African domestic affairs, section 25 does not align with international investment law standards, particularly in three key respects.[58] Firstly, as recently confirmed by the Constitutional Court and as discussed above, "expropriation" does not extend to indirect expropriation (i.e. where there is a deprivation but the state does not acquire ownership); secondly, section 25 only protects "property," which has been interpreted by the Constitutional Court[59] to be a more narrow concept than the definition of "investment" as found in the SADC Protocol and other international treaties. Lastly, as discussed above, section 25 of the Constitution does not require market value compensation for expropriation.[60]

The guarantee of "fair and equitable treatment" or FET, is a central feature of international investment law and is recognized by the United Nations Conference on Trade and Development (UNCTAD) as one of the "key components of investment protection." FET has been subject to international controversy due to the fact that the host state's obligations can be widely interpreted, and the DTI has expressed similar concerns regarding the FET clause in the SADC Protocol. However, these concerns could have been easily mitigated through the inclusion of interpretive guidance in the Investment Act; a common drafting practice in recent BITs.[61]

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[58] Anglo American South Africa Ltd. *Supplementary Written Submission to the Portfolio Committee on Trade and Industry on the Promotion and Protection of Investment Bill* (23-09-2015) 11.
[59] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23.
[60] Anglo American South Africa Ltd. *Supplementary Written Submission to the Portfolio Committee on Trade and Industry on the Promotion and Protection of Investment Bill* (23-09-2015) 11.
[61] Anglo American South Africa Ltd. *Supplementary Written Submission to the Portfolio Committee on Trade and Industry on the Promotion and Protection of Investment Bill* (23-09-2015) 9.

The Investment Act provides an option for "state-state" international arbitration upon exhaustion of local remedies (including mediation and domestic courts).[62] This is a reversion to the antiquated doctrine of diplomatic protection, and its insertion carries very little legal meaning as an injured investor in any event has the option of protection through diplomatic channels under customary international law, including through state-state arbitration. Diplomatic protection as a means of safeguarding international investment was replaced by ISDS in the second half of the last century, largely because it de-politicises international investment disputes and is seen to be better suited to the modern international investment environment. [63]

The DTI argues that in most cases ISDS favours the investor over the host state, but the opposite is in fact true. UNCTAD's World Investment Report 2015 shows that out of 405 concluded cases, 36 percent were decided in favour of the host state and 27 percent in favour of the investor. There is a belief, however, that the implementation of South Africa's developmental policies will be put at risk if ISDS is allowed.[64]

While these concerns are not entirely unfounded, only two ISDS cases have been brought against the government to date. In one of the cases, Foresti v. South Africa, the claim arose, *inter alia,* from the alleged extinction of certain old order mineral rights held by the claimants by entry into force of the Mineral and Petroleum Resources Development Act. Claims included the alleged breach of the relevant IIA based on indirect expropriation. (The matter settled before a decision was reached.)[65]

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[62] The option for state-state arbitration appeared in a later redraft of the Bill.

[63] Anglo American South Africa Ltd. *Supplementary Written Submission to the Portfolio Committee on Trade and Industry on the Promotion and Protection of Investment Bill* (23-09-2015) 13.

[64] Anglo American South Africa Ltd. *Supplementary Written Submission to the Portfolio Committee on Trade and Industry on the Promotion and Protection of Investment Bill* (23-09-2015) 14.

[65] *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No. ARB(AF)/07/1).

Yet rather than being disregarded internationally, IIAs are increasingly being drafted and designed in a way that provides more space for host states to pursue legitimate public policy goals (as mentioned above), while still maintaining certainty for investors. The SADC Protocol, for example, is explicitly designed to safeguard the policy space needed by developing countries to pursue sustainable development goals.[66]

The DTI has acknowledged that the Investment Act does not comply with the SADC Protocol, however argues that the SADC Protocol has been through a review process and is to be amended to align with the Investment Act.[67] It is however unclear when this will be completed and whether the Protocol will indeed align with the Investment Act once it has been amended. South Africa is bound by the obligations of the Protocol,[68] and it is questionable how the Investment Act can pass constitutional muster if it contradicts South Africa's international obligations.

The SADC also published a model BIT in July 2012, with significant input from South Africa. The model BIT was intended as a template to guide treaty negotiators as well as a tool for regional harmonization. Two months after the model BIT was completed, South Africa began to terminate its own BITs.

While the introduction of the Investment Act does provide a legislative framework for the protection of all investment in SA, it cannot be equated to an international treaty; domestic legislation can be domestically amended, whereas treaties can only be amended by agreement. Domestic legislation also allows for the promulgation of regulations to guide implementation, adding another dimension of uncertainty. For these reason and others already discussed, the Investment Act, although aligning with

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[66] Anglo American South Africa Ltd. *Supplementary Written Submission to the Portfolio Committee on Trade and Industry on the Promotion and Protection of Investment Bill* (23-09-2015) 5.
[67] R Davies *Speech during National Assembly debate on the Protection of Investment Bill* (17-11-2015).
[68] Anglo American South Africa Ltd. *Supplementary Written Submission to the Portfolio Committee on Trade and Industry on the Promotion and Protection of Investment Bill* (23-09-2015) 6-7.

the Constitution, overall significantly weakens the protection of foreign investments in South Africa in relation to protection that has traditionally been offered under BITs.

Many of South Africa's BITs have however not been terminated, and the protections offered under these remain in force. South Africa's BIT with China[69] for example has not been terminated, and offers compensation "at least equal to market value of the investment." Even protections under the BITs that have been terminated will in most cases remain in force for a number of years due to "sunset" provisions.

3.4. Land Reform Legislation

While the process of land restitution until now was often described in general terms as that of "willing buyer willing seller," the introduction of the Property Valuation Act, 2014, along with the Expropriation Bill, 2015, the Restitution of Land Rights Amendment Act, 2014, and the Investment Act, 2015, signifies a change in the policy- and legislative landscape. The shift will profoundly impact certainty in land ownership.

3.4.1. Restitution of Land Rights Amendment Act

The Restitution of Land Rights Act of 1994 was an undisputable necessity in the South African historical context, but it is the cumulative effect of the passing of the Restitution of Land Rights Amendment Act of 2014, along with other legislation, that gives rise to emerging uncertainty with regard to property rights, and this act therefore needs to be mentioned.

The Restitution of Land Rights Act of 1994 addresses the large-scale historical dispossession of land that took place throughout the history of colonial and Apartheid South Africa. The Natives Land Act of 1913 dispossessed African people of all but 13

[69] *Agreement Between the Government of the People's Republic of China and the Government of the Republic of South Africa concerning the Reciprocal Promotion and Protection of Investments* 1997.

percent of land in South Africa, and numerous other Apartheid laws further weakened black peoples' rights to property.

The Restitution of Land Rights Act established the Land Claims Commission and the Land Claims Court to investigate and adjudicate claims of individuals and communities dispossessed on or after June 1913. The Act gives the court the authority to instruct the government to buy or expropriate land and return it to successful claimants in a just and equitable manner.

Under the 1994 Act individuals and communities that were dispossessed of their land by racially discriminatory laws were allowed to lodge land claims, but it included the cut-off date of 31 December 1998. Due however to the large volume of claims that were lodged, misinformation about the claims process, and administrative challenges, many people that were entitled to land claims missed their opportunity. The Amendment Act of 2014 thus reopened the opportunity for land claims, with a new cut-off date of 30 June 2019. Approximately 120 000 new claims had been lodged at the end of 2015.[70]

3.4.2. Property Valuation Act

The objects of the Property Valuation Act, which came into effect in August 2015, include to "give effect to the provisions of the Constitution which provide for land reform and to facilitate land reform through the regulation of the valuation of property." In its preamble the Act references the property clause in the Constitution, and in particular section 25(8) which provides that "no provision of section 25 may impede the State from taking legislative and other measures to achieve land, water and related reform in order to redress the results of past discrimination."

The Property Valuation Act creates the Office of the Valuer General (OVG) and provides that where a property has been identified for purposes of land reform such property

[70] State of the Nation Address 2016, South Africa.

must be valued by the OVG according to prescribed criteria. In addition, where property has been identified for acquisition or disposal for any reason other than land reform, the OVG may determine the market value of the property if so requested.[71]

The "value" which must be determined by the OVG for purposes of land reform is defined in the Property Valuation Act as follows: "must reflect an equitable balance between the public interest and the interests of those affected by the acquisition, having regard to all the relevant circumstances, including…" the factors set out in section 25(3) of the Constitution.

Before the Property Valuation Act was passed the Banking Association of South Africa commented on the draft bill, highlighting the fact that the regulations to the Banks Act, which are based on a global regulatory framework, require the security value of loans to be derived from the market value of the property. If the value determined by the Valuer-General becomes the value of compensation for expropriation (agreed or decided by a court), and is less than market value, banks would be forced to adopt much more conservative approaches to lending. The net effect of the ensuing uncertainty would be that the cost of production, particularly of agricultural products, could become much higher, with a potentially enormous impact on South Africa's food security.[72] (The Expropriation Bill has since included provisions regarding mortgages, however some uncertainty remains.)

While the OVG must value the land, the Constitution still mandates that the amount of compensation, and the time and manner of payment thereof, must either have been agreed to by those affected or decided and approved by a competent court. If the property owner does not agree to the value proposed by the OVG, the government will

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[71] Property Valuation Act, 2014 section 12.

[72] The Banking Association of South Africa *Draft Property Valuation Bill: Comments submitted by the Banking Association of South Africa* (13-02-2014) 2.

institute expropriation proceedings and the expropriated owner will have to dispute the compensation amount either through mediation or in court (discussed below at 3.5).

3.4.3. Banning of foreign land ownership

In his 2015[73] State of the Nation Address the President announced that foreigners would no longer be entitled to own land in SA. This was later clarified to be applicable only to agricultural land. In an address to the National Assembly on 8 May 2015, the Minister of Rural Development and Land Reform said the "Regulation of Land Holdings Bill" would not only prevent foreigners from buying land, but would also include ceilings with regard to the amount of land that may be held by both natural and juristic persons. These ceilings are necessary "due to the historical need to address the legacy of colonialism and apartheid." For small-scale farms the proposed ceiling is 1000ha, for a medium-scale farm 2500ha, and for large-scale farms 5000ha.[74]

When President Zuma made the announcement there was much concern that the new policy would have a negative effect on investor sentiment. The Presidency responded, saying that it would not harm foreign investors, as they would be entitled to long-term leases, as is the practice in other parts of the world. The government also stated that limiting foreign ownership of land "is not unusual, and that many countries do not allow foreign ownership of land, including developed countries." Local analysts have however argued that there are no parallels between these "other countries" and SA. "Every country," they argue, comes with a "package of advantages and disadvantages, and every country's package differs," for instance, countries like Brazil and Argentina are situated close to the biggest economy in the world and Switzerland is surrounded by the

[73] Reiterated in 2016 State of the Nation Address.

[74] W Hartley "Nkwinti promises to bring land ownership legislation to Parliament this year" *Business Day* (8-04-2015) <http://www.bdlive.co.za/business/agriculture/2015/05/08/nkwinti-promises-to-bring-land-ownership-legislation-to-parliament-this-year>.

European market. South Africa, in contrast, "is one of the most isolated economies on the planet in terms of its proximity to major markets."[75]

Moreover, the World Bank's Investing Across Borders report[76] has shown that while it takes, for example, two months to lease land from the government in Mali, it takes on average ten months to lease land from the government in South Africa.

3.4.4. Preservation and Development of Agricultural Land Framework Bill

The Draft Preservation and Development of Agricultural Land Framework Bill[77] was published for comment in early 2015. This bill pertains only to agricultural land, and provides that "agricultural land is the common heritage of all the people of South Africa" and that the Department of Agriculture, Forestry, and Fisheries is "the custodian thereof for the benefit of all South Africans." The Bill further provides that as the custodian of the nation's agricultural land, the Department "may approve, reject, control, administer and manage any rezoning or subdivision of agricultural land."[78] Read in conjunction with Agri SA v Minister for Minerals and Energy[79] (see 3.3.2) this draft bill may have far reaching implications for investment in agricultural land.

3.5. Expropriation Bill

Currently the legislative framework for expropriation in South Africa is the Expropriation Act of 1975, but the 2015 Expropriation Bill[80] is at an advanced stage of the parliamentary process in the National Assembly. The 1975 Act was drafted before the advent of the Constitution and the wording refers only to expropriation for a public

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[75] T Holmes "Foreign land bill a 'setback' for economy" *Mail and Guardian* (06-03-2015). <http://mg.co.za/article/2015-03-05-foreign-land-bill-a-setback-for-economy>.
[76] 2010.
[77] Published in Government Gazette 38545, No 210 of 13 March 2015.
[78] Section 3.
[79] 2013 (4) SA 1 (CC).
[80] Bill B4B-2015.

purpose. The new Expropriation Bill aims to update the legislative framework for expropriation, and to "provide for the expropriation of property for a public purpose or in the public interest, subject to just and equitable compensation; and to provide for matters connected therewith."[81] The definition for "public interest" in the Expropriation Bill largely echoes the partial explanation found in section 25(4) of the Constitution, stating that it "includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources in order to redress the results of past racial discriminatory laws or practices." The definition for "public purpose" remains the same as in the 1975 Expropriation Act.[82]

In the most recent version of the Expropriation Bill,[83] "property" is defined to mean, "property contemplated in section 25 of the Constitution." As mentioned above, no comprehensive definition of constitutional property exists in South Africa, and the right to constitutional protection will be evaluated on a case-by-case basis. In addition, the most recent version of the bill defines "expropriation" to mean "the compulsory acquisition of property by an expropriating authority or an organ of state upon request to an expropriating authority." Expropriation (and thus the right to compensation) would thus be limited to a situation where the state acquires the expropriated property.

The Expropriation Bill provides that the amount of compensation to be paid for expropriated property "must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including…" the factors listed in section 25(3) of the Constitution.[84]

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[81] Expropriation Bill, B4B-2015.
[82] "Includes any purposes connected with the administration of the provisions of any law."
[83] B4B-2015.
[84] Section 12(1).

The Bill also allows for a scenario in which, once the expropriating authority has made an offer and it has been refused by the owner, and the requisite amount of days have passed, the authority could serve an expropriation notice on for example 1 January, which states that the date of expropriation will be 2 January, and that the right to possess the property would pass to the authority on 3 January.[85]

If no agreement is reached regarding the compensation amount, either party may submit the dispute to mediation. If no agreement is reached through mediation, or if the expropriated owner does not want to mediate, the expropriating authority must refer the matter to a court "to decide or approve just and equitable compensation."[86] "Court" is defined as either a High Court or Magistrates' Court in whose area of jurisdiction the property is situated, or, in the case of intangible property, the court where the owner is resident or has its principle place of business.[87]

3.6. Minerals and Petroleum Resources Development Amendment Bill

Proposed amendments to the Mineral and Petroleum Resources Development Act have also raised serious concerns among foreign investors.

One of the areas of concern is that the bill in effect gives the State the right to take over an existing petroleum operation. Moreover, where the state was previously obligated to pay "fair market value" for any participation interest that it acquired, it now only needs to pay "an agreed price". The state will also be able to determine and enforce the volume and the price at which "strategic minerals" have to be sold domestically, to encourage local beneficiation.[88]

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[85] A Jeffery "Expropriation Bill: How you could lose your land" *Politicsweb* (05-05-2015).
[86] Expropriation Bill, 2015 section 21.
[87] Expropriation Bill, 2015 section 1.
[88] L Kolver "Controversial MPRDA Amendment approved by NCOP, awaiting Zuma's signature" *Mining Weekly* (28-03-2014) <http://www.miningweekly.com/article/controversial-mprda-amendment-approved-by-ncop-awaiting-zumas-signature-2014-03-28>.

The Bill was passed by Parliament in 2014, but has been sent back to the legislature by the President because it does not pass constitutional muster.

A further development in this area includes the introduction in January 2016 of the Draft African Exploration Mining and Finance Corporation Bill, which provides "for the establishment of the African Exploration Mining and Finance Corporation to acquire and develop permits, rights (prospecting and/ mining) and any other interest granted to the Corporation in terms of the MPRDA on behalf of the State." The preamble to the bill acknowledges that South Africa's mineral resources belong to the nation and that the State is the custodian thereof. The State will be the sole shareholder of the Corporation.[89]

3.7. Private Security Industry Regulation Amendment Bill

The Private Security Industry Regulation Amendment Bill is another recent legislative development that has also caused enormous consternation among foreign investors. The bill was passed by Parliament in March 2014 but has not yet been signed into law by the President. It imposes a requirement for 51 percent local ownership of all security companies and manufacturers, importers and distributors of security equipment. The Bill however violates certain of South Africa's commitments under the WTO General Agreement on Trade in Services (GATS), and the government has undertaken to renegotiate its commitments in this regard.[90]

3.8. Immigration Regulations

New regulations to the Immigration Act, 2002, came into force on May 26, 2014 (with delays to certain sections) and have caused great upheaval and further agitation to foreign investors due to the vast regulatory burdens they impose. The new rules

[89] Draft African Exploration Mining and Finance Corporation Bill, 2015.
[90] K Kugler "SA in for a bumpy ride over changes at the WTO" *Business Day* (25-03-2015) <http://www.bdlive.co.za/opinion/2015/03/26/sa-in-for-a-bumpy-ride-over-changes-at-wto?service=print>.

included requirements that visas to SA need to be applied for in person, that applications for status or condition changes need to be made outside the country, that parents traveling with children under the age of 18 need to be in possession of an unabridged birth certificate, and that at least 60 percent of the workforce of a business needs to be local. The new rules also included significant increases in penalties for overstaying a visa.

According to the Director-General of Home Affairs, business visas are to be issued for businesses showing potential to advance national interest, after an assessment by relevant Departments, including Trade and Industry and Labour, of the feasibility of a prospective business venture, including compliance with labour laws and the benefits they would have for the SA economy. Additionally, at least 60 percent of the total staff complement have to be SA citizens or permanent residents, in order to facilitate job creation and skills transfer.

The investment amount for a business visa has been revised from R2.5 million to R5 million, with the Department stating "this amendment caters for South Africans to participate in the economy by giving them an opportunity to open businesses as well."[91]

The amendments were implemented "to better manage immigration in a way that balances SA's openness to travelers as well as developmental and security imperatives."[92]

Compounding the impact of these regulations are the administrative challenges that the Department of Home Affairs has faced in the implementation of these new regulations.

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[91] Speech by Home Affairs Director-General Mkuseli Apleni "Overview of the new immigration laws and regulations and their implications" (23-04-2015) <http://www.home-affairs.gov.za/index.php/statements-speeches/600-overview-of-the-new-immigration-laws-and-regulations-and-their-implications-by-home-affairs-director-general-mkuseli-apleni>.

[92] Speech by Home Affairs Director-General Mkuseli Apleni "Overview of the new immigration laws and regulations and their implications" (23-04-2015)

Much opposition to the new regulations has come from the tourism industry, which contributes significantly to foreign exchange earnings and job creation. In October 2015 the CEO of the Southern African Tourism Services Association announced that South Africa would lose R7.5 billion a year due to the new visa regulations. The regulations will also have a negative effect on the film industry in Cape Town, which is an important source of income.

In addition, the regulations are likely to impact negatively upon businesses looking for workers with skills they cannot acquire locally, such as engineering and medicine. The government requires businesses to search for suitably qualified South Africans, hoping to develop local skills,[93] this is however not always possible, and is compounded by the fact that SA was ranked last out of 140 countries for quality of its mathematics and science education by the World Economic Forum in 2015.[94]

Due to the enormous upheaval caused by the Immigration Regulations an Inter-Ministerial Committee was established by the President in August 2015 to "look at the unintended consequences and mitigating factors relating to the implementation of the Immigration Amendment Acts (2007 and 2011) and the Immigration Regulations, 2014."

In October 2015 the Department of Home Affairs issued a statement advising that certain aspects regarding the implementation of the Act and Regulations would be adjusted. Accordingly, in countries where there are no SA missions, the requirement for travellers to apply for visas in person are to be relaxed and biometric data is to be captured upon arrival at ports of entry instead (but only in certain instances). Outbound children under 18 will still be required to have an unabridged birth certificate (or "birth certificate containing parental details") and parental consent affidavits; however, details

[93] J Hamill "Closing the door: South Africa's Draconian Immigration Reforms" *World Politics Review* (27-10-2014).
[94] *Global Competitiveness Report* 2015-2016.

of parents will be printed in passports; mitigating the need to carry a birth certificate in future. In the case of inbound travel where visas are required, children under 18 will still be required to have an original birth certificate or a certified copy, but only for the visa application process.[95]

4. Potential Impact of the New Regime

4.1. Reputational Damage

There are 2000 EU companies invested in South Africa, accounting for 77 percent of total FDI stock. These companies have created over 300 000 direct and approximately 150 000 indirect jobs; often provide vocational and educational training, upskilling, and management development; and with many high-tech, high skill companies located in South Africa, EU investors have played a notable part in technology transfer. EU investment contributes significantly to the government's policy goals.[96] In November 2013 the EU's commissioner for trade, Karel de Gucht, said South Africa's decision to terminate the treaties was not the right one and would have an impact on EU investments. The EU ambassador to South Africa added that "(w)ith South Africa reportedly attracting less than half of the FDI of comparably sized economies, eroding the existing protections that foreign investors enjoy in the country should be carefully, and financially assessed."[97]

Carol O'Brien, the executive director of the American Chamber of Commerce in South Africa, has also raised concerns, saying "(w)e encourage the government to reconsider certain policies proposed recently, including the Promotion and Protection of Investment Bill, the Expropriation Bill, and the Mineral and Petroleum Resources

[95] Department of Home Affairs "Statement on Cabinet decision on the immigration amendment acts and regulations" (23-10-2015).
[96] EU Chamber of Commerce and Industry in Southern Africa *Presentation: Promotion and Protection of Investment Bill Comments* (15-09-2015).
[97] R van de Geer "EU wary of South Africa missing out on FDI" *Business Day* (18-11-2013).

Development Act. These policies make investors jittery and create the perception that South Africa is closing its doors to foreign direct investment."[98]

Over 600 United States (US) companies are invested in South Africa; and a 2014 survey of 89 of them showed that US companies contributed a combined total of R278 billion to the local economy, employing 221 400 South Africans. They spent R500 million on corporate social investment and invested R400 million in skills development and another R144 million in training.[99] O'Brien mentions that there are costs involved in passing legislation such as the Private Security Industry Regulation Bill, and specifically mentions the possible implications for South Africa's eligibility for the US general system of preferences, the platform for the African Growth and Opportunity Act (AGOA). AGOA gives South African exporters (and exporters from various other African countries) access to the US market, enabling 98 percent of South African exports to enter the US duty free. "International firms have often chosen South Africa as investment destination precisely for this preferential access." The US in 2013 was the largest destination for South African exports after China, and was by far the largest destination for the vehicle sector. In 2013 the US was the leading destination for South Africa's key industrial exports – vehicles, machinery and chemicals.[100]

The Africa Growth and Opportunity Act requires any country that uses the law to have a "market-based economy that protects private property rights." The US Trade Act also provides that a country would not qualify as a beneficiary developing country if it has "nationalized, expropriated or otherwise seized ownership or control or property, including patents, trademarks or copyrights, owned by a US citizen or…corporation, partnership or association which is 50 percent or more beneficially owned by US

[98] Carol O'Brien "SA laws will unnerve investors, block FDI" *Business Report* (10-06-2014).
[99] The American Chamber of Commerce in South Africa *Presentation: Public Hearings on the Promotion and Protection of Investment Bill* (15-09-2015).
[100] Carol O'Brien "SA laws will unnerve investors, block FDI" *Business Report* (10-06-2014).

citizens."[101] The American Chamber of Commerce has warned that the new legislative landscape puts South Africa at risk of becoming ineligible for AGOA preferences. Indeed South Africa came very near to being excluded from the benefits of AGOA at the end of 2015, and while antidumping duties imposed by South Africa on US poultry were cited as the main reason it is clear that some of SA's crucial trading partners are beginning to raise a red flag.

In their presentation at public hearings on the Protection of Investment Act the American Chamber of Commerce stated: "Confidence in South Africa is at its lowest ever: The first expropriation will result in a flight of investment out of SA."[102]

4.2. Investor Attractiveness

The World Bank's Investing Across Borders Report identifies the main factors which multinationals look for when making decisions regarding investment destinations.[103] The indicators measure FDI regulation in 4 specific policy areas. One of the first determinants of location is whether the company is allowed to enter and operate in a specific market. Even where a market is "open," onerous start-up procedures, excessive licensing and permit requirements are among the factors that can make an economy less attractive to foreign investors. The ability to access land or buildings with secure ownership rights, at transparent prices, and with limited restrictions can be critical to a foreign investor's decision on whether to invest in a new market. A stable and predictable arbitration regime, as part of the broader legal framework, is another factor that can affect conditions for FDI.

All of these factors are touched in one way or another by the roll-out of these various new pieces of legislation by the SA government and there is a real danger that the

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[101] Carol O'Brien "SA laws will unnerve investors, block FDI" *Business Report* (10-06-2014).
[102] The American Chamber of Commerce in South Africa *Presentation: Public Hearings on the Promotion and Protection of Investment Bill* (15-09-2015).
[103] The World Bank Group *Investing Across Borders* (2010) 2-3.

cumulative impact of the new regime on the decisions that foreign investors make when considering SA as an investment destination will be negative. Indeed in 2015 foreign direct investment into South Africa fell by 74 percent to $1.5 billion.[104] While this drop can be attributed to the decrease in demand for commodities and seen as reflective of a global trend,[105] the drop in investment flows into the rest of Africa, at 31.4 percent, and the drop in FDI flows to Brazil, at 23 percent (and Latin America at 11 percent), is significantly less dramatic than the 74 percent fall in FDI flows to South Africa.

A potentially positive development however, is the announcement by DTI in January 2016 that the President had established an Inter-Ministerial Committee on Investment Promotion, and that an InvestSA service and a One Stop Shop to simplify regulatory requirements for investors would be launched later in 2016. The Inter-Ministerial Committee will focus on SA's investment climate across all areas of government in a coordinated and cohesive manner.[106]

5. Conclusion

This paper concludes by looking once more at the some of the government's policy aims: "*The government's broad developmental strategy aims to promote and accelerate economic growth along a path that generates sustainable, decent jobs in order to reduce poverty and extreme inequalities."*

It is inescapable that there are severe historic wrongs that need to be addressed in South Africa. And it is so that the Constitution mandates the limitation of the right to property in certain instances. There are however also certain realities that exist in the

[104] UNCTAD *Global Investment Trends Monitor* (20-01-2016) 5.
[105] Department of Trade and Industry Media Statement: "The Protection of Investment Act 2015" (23-01-2016).
[106] Department of Trade and Industry Media Statement "Inter-Ministerial Committee on Investment Promotion Appointed" (19-01-2016).

international investment regime. An unavoidable trade-off exists between a certain level of sovereign regulation and foreign investment protection, and in this case that trade-off lies squarely in the way of South Africa's transformative and developmental agenda. The question thus arises whether there is not perhaps a way for South Africa to achieve its goal by harmonizing these two forces rather than squaring them off against each other. In a country where FDI accounts for roughly 42 percent of GDP, and in a global economy where FDI inflows are based on economic decisions of investors, and the level of private property protection is by and large one of the most important factors, it is the conclusion of this study that a calculated balance needs to be sought between the government's sovereign right to implement domestic policies, its duty to protect foreign investments, and its overall objective of promoting sustainable economic growth.